

# **The Rome Statute's withdrawal power: an unintentional avenue for ICC member states to circumvent accountability for crimes against humanity.**

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## **I. Introduction**

What is most intriguing about the International Criminal Court (ICC) is its youth. It stands proudly as a culmination of international law preceding the atrocities of WWII, and rightly vitiated the need for the rise and fall of ad hoc tribunals. We have, however, only seen two decades of this institution functioning. Powers and privileges that likely made sense while constructing the Rome Statute in 1998<sup>1</sup> may prove at odds the principles of justice in practice today. In particular, this essay will demonstrate how Article 127<sup>2</sup> of the Rome Statute, the withdrawal power, is a minor but impactful deficiency in the ICC's practical function. This analysis will first explain the function and brief overview of the ICC. Then, it will consider the recent criminal investigations into ex-ICC member states Burundi and Philippines to establish how their use of the withdrawal power both demonstrates this deficiency and sets an unjust precedent for other member states. Finally, it will assert a conditional withdrawal power as a potential remedy to help develop the ICC into a stronger, more effective judicial body.

## **II. The ICC was established to seek and maintain justice in the realm of international criminal law.**

The ICC is the world's first permanent international criminal court. It investigates and tries individuals charged with the gravest crimes of concern to the international community:

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<sup>1</sup> See generally Rome Statute of the ICC, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>, [accessed 19 Feb. 2023] ("The text of the Rome Statute reproduced herein was originally circulated as document A/CONF.183/9 of 17 July 1998").

<sup>2</sup> A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date. See Rome Statute art. 127(a).

genocide, war crimes, crimes against humanity and the crime of aggression.<sup>3</sup> Currently, there are 123 state parties to the Rome statute.<sup>4</sup> Momentum for the court came from the ad hoc international tribunals set up in the 1990s to address atrocious crimes committed in the former Yugoslavia and Rwanda.<sup>5</sup> The court's founding treaty, the Rome Statute, was adopted in July 1998 and the court officially opened its doors on July 1, 2002.<sup>6</sup> The Court exercises jurisdiction only situations where genocide, crimes against humanity, war crimes, or the crime of aggression<sup>7</sup> was committed on or after 1 July 2002.<sup>8</sup> Further, the crimes must be committed:

- a) by a State Party national, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court; or
- b) the crimes were referred to the ICC Prosecutor by the United Nations Security Council (UNSC) pursuant to a resolution adopted under chapter VII<sup>9</sup> of the UN charter.<sup>10</sup>

Lastly, the ICC operates under the concept of complementarity, heeding that ICC may intervene in state sovereignty and seek to prosecute only when “states do not are unwilling or unable to do

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<sup>3</sup> See International Criminal Court, *About the Court*, <https://www.icc-cpi.int/about/the-court> [accessed 19 Feb. 2023].

<sup>4</sup> See International Criminal Court, *The States Parties to the Rome Statute*, <https://asp.icc-cpi.int/states-parties> [accessed 19 Feb. 2023].

<sup>5</sup> See Human Rights Watch, *International Criminal Court*, <https://www.hrw.org/topic/international-justice/international-criminal-court> [accessed 19 Feb. 2023]; see also UN, *Legacy website of the International Criminal Tribunal for Rwanda*, <https://unictr.irmct.org/en/tribunal> [accessed 19 Feb. 2023]; see also UN, *International Criminal Tribunal for the former Yugoslavia*, <https://www.icty.org/> [accessed 19 Feb. 2023] (Prior to the ICC, the UN established ad hoc international criminal tribunals in Yugoslavia and Rwanda to prosecute those responsible serious humanitarian violations in those particular conflicts. There was no universal setting for such tribunals, and after the prosecution was over the courts would close).

<sup>6</sup> See *supra* note i.

<sup>7</sup> Rome Statute art. 5.

<sup>8</sup> See International Criminal Court, *How the Court Works*, <https://www.icc-cpi.int/about/how-the-court-works> [accessed 19 Feb. 2023].

<sup>9</sup> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. UN Charter, art. 39.

<sup>10</sup> See *supra* note viii.

so genuinely.”<sup>11</sup> As a court of last resort, the ICC seeks to complement, not replace, national courts.<sup>12</sup>

**A. The legal process evaluates if the ICC’s intervention is necessary or if domestic authorities are handling allegations sufficiently.**

The procedural process through the ICC is similar to that of the American Judicial system. First, there is a Preliminary Investigation.<sup>13</sup> Here, The Office of the Prosecutor determines whether or not there is enough evidence of crimes of sufficient gravity falling within the ICC’s jurisdiction, whether or not are genuine national proceedings, and whether or not opening an investigation would serve the interests of justice and of the victims.<sup>14</sup> Next, an investigation works to gather evidence and identify a suspect.<sup>15</sup> The Prosecution will then ask ICC judges to issue an arrest warrant or a summons to appear where suspects appear voluntarily.<sup>16</sup> The ICC relies on countries to make arrests and transfer suspects to the ICC. If a country fails to make an arrest itself, the ICC may issue an arrest warrant.<sup>17</sup> Next, at the Pre-trial stage, judges will decide (usually within 60 days) if there is enough evidence for the case to go to trial after hearing the Prosecution, the Defense, and the Legal representative of victims.<sup>18</sup> At the trial stage, the Prosecution must prove beyond reasonable doubt the guilt of the accused before three trial judges.<sup>19</sup> Finally, there may be an appeals stage as enforcement of a sentence.<sup>20</sup> Through ICC, the Court aims to hold those responsible accountable for their crimes, to help prevent these crimes from happening again, and to participate in the global fight to end impunity.

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<sup>11</sup> See Rome Statute art. 1; *see also* Rome statute preamble, *see also id.*

<sup>12</sup> Supra note viii (section header “Complementarity”).

<sup>13</sup> Rome Statute art. 15; *see also* supra note viii (section header “Example investigation and case from start to finish”).

<sup>14</sup> *See id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

### **III. The relevant facts regarding the situations in both the Philippines and Burundi allege serious allegations of crimes against humanity at the hands of the government, government actors, or government sanctioned actors.**

#### **A. The Situation in the Republic of the Philippines**

On September 15th 2021, the Pre-Trial Chamber I authorized the Prosecutor to commence an investigation of crimes within the jurisdiction of the Court.<sup>21</sup> The crimes were allegedly committed on the territory of the Philippines between November 2011 and March 2019, in the context of the so-called 'war on drugs' campaign (WoD).<sup>22</sup> This authorization followed the Prosecutor's request to open an investigation, initially submitted in May 2021.<sup>23</sup> In sum, the prosecution alleges that state actors, primarily members of the Philippine security forces, killed thousands of suspected drug users and other civilians during official law enforcement operations.<sup>24</sup> Markedly similar crimes were committed outside official police operations, reportedly by "vigilantes", although information suggests that some vigilantes were in fact police officers, while others were private citizens recruited, coordinated, and paid by police to kill civilians.<sup>25</sup> They allege the total number of civilians killed between July 2016 and March 2019 in connection with the WoD to be between 12,000 and 30,000.<sup>26</sup> Most importantly, they allege that the extrajudicial killings appear to have been committed pursuant to an official State policy of the Philippine government.<sup>27</sup> Specifically, that police and other government officials planned, ordered, and sometimes directly perpetrated extrajudicial killings.<sup>28</sup> Allegations

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<sup>21</sup> See International Criminal Court, *Situation of the Republic of the Philippines*, <https://www.icc-cpi.int/philippines/> [accessed 19 Feb. 2023].

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> Office of the Prosecutor, *Request for authorisation of an investigation pursuant to article 15(3)*, ICC-01/21 (I)(2), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021\\_05381.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_05381.PDF) [accessed 19 Feb. 2023].

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> See *id.* at (I)(3).

<sup>28</sup> See *id.*

of financial rewards for police officers and vigilantes to execute these killings, as well as powerful State officials speaking publicly in support of extrajudicial killings, was included in the evidence that led the Chambers authorization of an investigation into the Philippines.<sup>29</sup>

## **B. The Situation in Burundi**

The facts put forth by the Prosecution allege that since at least April 2015, the Burundi civilian population has been subject to attack by members of different Burundian State institutions.<sup>30</sup> These include as well as members of the youth wing of the ruling party known as the Imbonerakure.<sup>31</sup> The violence was largely propagated by Pierre Nkurunziza's ("President Nkurunziza") nomination as a candidate for the 2015 presidential elections, as his eligibility was contested as being unconstitutional.<sup>32</sup> As a result, violent protests spread quickly around the country<sup>33</sup> According to the material submitted, from the commencement of the protests, police shot at civilians who were demonstrating, causing many deaths.<sup>34</sup> Though the protests were not entirely peaceful, it is reported that the police used live ammunition in response to demonstrators who were throwing stones at them, and shot at unarmed civilians who were running from the police or otherwise not posing a threat.<sup>35</sup>

The violence was exacerbated in May 2015 when some of the security forces launched a *coup d'état*.<sup>36</sup> The coup was a quick failure, but in response, security forces supported by members of the Imbonerakure conducted cordon and search operations in Bujumbura

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<sup>29</sup> *See id.*

<sup>30</sup> Pre-trial Chamber III, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, ICC-01/17-X (IV)(A)(1)(b)(i)(33) [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017\\_06720.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_06720.PDF) [accessed 19 Feb. 2023].

<sup>31</sup> Pre-trial Chamber Decision at (IV)(A)(1)(b)(i)(34).

<sup>32</sup> *See id.*

<sup>33</sup> *See id.* at (IV)(A)(1)(b)(i)(35).

<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

<sup>36</sup> *See id.* at (IV)(A)(1)(b)(i)(36).

neighborhoods. They targeted areas where attacks had occurred or places considered to be associated with the opposition, and summarily executed dozens of civilians suspected of having demonstrated against President Nkurunziza's third term.<sup>37</sup> The victims were often demonstrators against President Nkurunziza's third term in office, suspected demonstrators, members of the opposition political parties, members of the civil society, journalists, members and sympathizers of armed opposition groups or persons suspected of having joined such groups.<sup>38</sup> The killings followed a pattern: the security forces made residents come out of their houses, forced some of them to kneel or lie down in the street, and executed them with bullets to the head or abdomen.<sup>39</sup> Mass arrests were also carried out in the context of these operations, which were accompanied or followed by torture and rape.<sup>40</sup> It is further alleged that the aforementioned acts of killing, assassinations, illegal detention, torture, and rape were carried out against civilians who opposed or were perceived to oppose the ruling party.<sup>41</sup>

#### **IV. A concerning precedent is set by Burundi and the Philippines exercising withdrawal power during active investigations on their state governments.**

Burundi and the Philippines are the only two member states who have officially exercised their withdrawal power.<sup>42</sup> In February 2018, the Office of the Prosecutor announced the preliminary examination into the Philippines.<sup>43</sup> In March 2018, the Philippines deposited a written notification of withdrawal.<sup>44</sup> Similarly, the preliminary examination of the situation in the Republic of Burundi ("Burundi") was announced in April 2016, the Presidency assigned the

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<sup>37</sup> *See id.* at (IV)(A)(1)(b)(i)(37).

<sup>38</sup> *See id.* at (IV)(A)(1)(b)(i)(39).

<sup>39</sup> *See id.* at (IV)(A)(1)(b)(i)(37).

<sup>40</sup> *See id.* at (IV)(A)(1)(b)(i)(37).

<sup>41</sup> *See id.* at (IV)(A)(1)(b)(ii)(40).

<sup>42</sup> *See supra* note xxi; *see also* International Criminal Court, *Situation in Burundi*, <https://www.icc-cpi.int/burundi> [accessed 19 Feb. 2023]; *see also* BBC News, *Burundi leaves International Criminal Court amid row*, 27 Oct. 2017 <https://www.bbc.com/news/world-africa-41775951>.

<sup>43</sup> *See supra* note xxi.

<sup>44</sup> *See id.*

situation to Pre-Trial Chamber III in August 2017, and Burundi exercised its withdrawal power in October 2017.<sup>45</sup> Both states are still responsible for any alleged criminal activity before their withdrawals took effect.<sup>46</sup> However, the appropriate concern arises in the lack of accountability for crimes succeeding the withdrawals, including but not limited to, “the relevant crimes” that “appear[ed] to have continued after this date.”<sup>47</sup>

In both Burundi and the Philippines, the relevant international crimes are alleged to have been committed by State agents, officials, and other state-sanctioned groups implementing State policies.<sup>48</sup> Additionally, the court has yet to find that either state has shown sufficient evidence demonstrating state authorities’ satisfactory investigation or prosecution of potential cases arising out of either situation.<sup>49</sup> Evading the ICC’s jurisdiction by simply wielding complete withdrawal sets a dangerous pattern. This precedent implies that member states may agree to the boundaries and standards set forth under humanitarian principles, enjoy ICC membership, but withdraw if at any point they are subject to investigation and likely face no repercussions for related perpetrated after the arbitrary withdrawal date.

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<sup>45</sup> See *Situation in Burundi supra* note xlii.

<sup>46</sup> A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective. Rome Statute Art.127(2).

<sup>47</sup> See *supra* note xxi (section header “information for victims”).

<sup>48</sup> See International Criminal Court, *ICC Statement on The Philippines’ notice of withdrawal: State participation in Rome Statute system essential to international rule of law*, Press Release, 20 March 2018 <https://www.icc-cpi.int/news/icc-statement-philippines-notice-withdrawal-state-participation-rome-statute-system-essential> [accessed 19 Feb. 2023]; see also International Criminal Court, *ICC judges authorize opening of an investigation regarding Burundi situation*, Press Release, 9 Nov. 2019, <https://www.icc-cpi.int/news/icc-judges-authorise-opening-investigation-regarding-burundi-situation> [accessed 19 Feb. 2023].

<sup>49</sup> See *id.* (Press release regarding Burundi, “according to available information, the Burundian authorities have remained inactive in relation to potential cases arising out of the situation in Burundi”); see also Office of the Prosecutor, *Prosecution’s Response to the Philippine Government’s Observations on the Prosecution’s Request to Resume Investigations*, ICC-01/21 I(5), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022\\_06308.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_06308.PDF) [accessed 10 Feb. 2023] (“the Philippine government has not demonstrated – even with its additional submissions – that it has conducted or is conducting national investigations or prosecutions that sufficiently mirror the investigation authorized by the Chamber”).

**A. Withdrawal during an active investigation against member states government actors is particularly at odds with justice.**

The criminal implication of a state's government also necessitates a unique analysis of complementarity, as exercising withdrawal power during an active ICC investigation may inherently trigger proper complementarity. As ICC is limited to prosecuting crimes where the court determines that a state is unable or unwilling to<sup>50</sup>, nothing suggests that it will become able or willing after withdrawing. In fact, as in the situation of the Philippines in Burundi, it seems clear that the prosecution's investigation initiatives into the lack of domestic accountability prompted such withdrawal. As a result of the withdrawal, related crimes now beyond the ICC's jurisdictional reach are set forth by an arbitrary date, one year after the notice of withdrawal, and entirely unrelated to the criminal behavior itself. Even in the light of separation of powers, if a state government meant to be investigating and prosecuting certain criminal acts are allegedly the same entities perpetrating them, there exists an inherent bias. Thus, the international community is left with internationally charged crimes unable to be considered by the ICC, probably not going to be considered at a national level, and in the situation of Burundi and the Philippines, potentially even continuing now.<sup>51</sup> Accordingly, the Philippines and Burundi's exercise of their withdrawal power jointly illustrates how this privilege undermines the court's authority, misaligns with justice, assists government officials in circumventing accountability, and disincentivizes other member states genuine compliance with the courts mission to "hold those responsible accountable for their crimes and help prevent these crimes from happening again."<sup>52</sup>

**V. An amended withdrawal power may be a potential remedy for this deficiency.**

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<sup>50</sup> See *supra* note xi.

<sup>51</sup> See *supra* note vlvii ("the relevant crimes appear to have continued after this date").

<sup>52</sup> *Supra* note iii.



A general withdrawal power is necessary and eliminates members' fear of feeling inescapably bonded to the institution. However, the power as it stands is too absolute. To minimize future abuse of this privilege, it should be amended and qualified. Once the Office of the Prosecutor announces a preliminary examination into any member state, a state should then only be able to “conditionally withdraw.” A conditional withdrawal would only cut off ICC jurisdiction over crimes completely unrelated to the relevant investigation. It would not bar prosecution into crimes which would have been of interest to the investigation, had the state not withdrawn. For example, in Burundi, any criminal activity sufficiently related to the “widespread and systematic attack against the Burundian civilian population”<sup>53</sup> would rest safely within the ICC’s jurisdiction even after the withdrawal took effect. The prosecution would, however, have to prove that the crime(s) they seek to prosecute, occurring after the withdrawal date, are in fact related to the initial subject matter.

## **VI. Conclusion**

Implementing this change would likely deter future states from withdrawing from the Rome Statute during an investigation, bolster the ICC’s authority, and improve the institution overall. In the interest of justice, this change could return a voice to survivors of international violence regardless of when the crime took place.

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<sup>53</sup> See International Criminal Court, *Situation in the Republic of Burundi* <https://www.icc-cpi.int/burundi> [accessed 19 Feb. 2023] (section header “context and alleged crimes”).