What Does the Future Hold for the International Criminal Court?

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For a certain kind of liberal internationalist, the International Criminal Court (ICC) is one of the world’s more noble innovations. Created by 1998 Rome Statute of the International Criminal Court and situated in The Hague, the ICC is charged with prosecuting war crimes, genocide, crimes against humanity, and aggression. Fourteen years after formally opening for business in 2002, the Court is facing challenges that threaten its future.

For the first time this week, an ICC member state—Burundi--decided to [withdraw](http://abcnews.go.com/International/wireStory/burundi-lawmakers-vote-withdraw-icc-1st-42746663) from the Rome Statute. Burundi’s decision was soon echoed by another, much bigger and more influential country, South Africa. These decisions could foreshadow a broader exit movement among African countries.

What’s going on? Burundi’s decision was precipitated by the announcement of a [preliminary examination](https://www.icc-cpi.int/burundi) by the Court into alleged crimes against humanity in the country. There is substantial evidence that the Burundian government is complicit in many abuses and the decision to withdraw from the ICC is, no doubt, based on self-interest rather than principle.

According to [U.S. State Department](https://foreignpolicy.com/2016/10/12/washington-is-unhappy-that-burundi-is-very-happy-to-be-leaving-the-icc/amp/) spokesman John Kirby, withdrawing from the ICC would “isolate Burundi from its neighbors and the international community at a time when accountability, transparency and engaged dialogue are most needed.”

Transparency, accountability, and dialogue are always welcome, but will this decision isolate Burundi from its neighbors? Unlikely. The violence perpetrated by the Burundian government has angered and disappointed its neighbors, but hostility toward the ICC is hardly rare on the continent.

The negative attitudes are based on the perception that the ICC is disproportionately focused on Africa and ignores equally horrific situations in other parts of the world. Some African governments dismiss the ICC to a [neo-colonial tool](http://www.csmonitor.com/World/Africa/Africa-Monitor/2013/1015/Is-the-International-Criminal-Court-a-tool-of-Western-imperialism-No) of Western governments.

This characterization is exaggerated and ignores the fact that many ICC cases were referred to the Court by African governments themselves. But the fact remains that of 10 [situations under investigation](https://foreignpolicy.com/2016/10/12/washington-is-unhappy-that-burundi-is-very-happy-to-be-leaving-the-icc/amp/) at the ICC, 9 are in African nations. All of the cases before the Court involve African defendants and all of those indicted are tied to African investigations.

By contrast, some of the worst crimes in the world, such as the atrocities in Syria, are not being addressed by the Court. There are reasons, of course. The ICC lacks jurisdiction in Syria and Iraq, for example, because neither country is a party to the Rome Statute, and Russia and China have vetoed Security Council resolutions referring situations in those countries to the Court.

This helps explain why the African Union supported a [call](https://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court) from Kenya earlier this year urging African member states to withdraw from the Rome Statute. Kenyan leaders have been the subject of ICC investigations, and the [Kenyan parliament](http://www.bbc.com/news/world-africa-23969316) voted to withdraw from the ICC in 2013. But to date, Kenya has not formally carried out that action.

[South Africa](http://www.aljazeera.com/news/2016/10/south-africa-formally-applies-quit-icc-media-161021044116029.html)’s shocking announcement this week that it intends to withdraw could lead Kenya to act. It also highlights that dissatisfaction with the ICC among African countries is not solely driven by a desire to avoid ICC prosecution, but also by the political complexities of being a State Party to the statute.

South Africa was roundly criticized for failing to arrest Sudanese President Omar Al Bashir, who is subject to an ICC warrant for alleged genocidal crimes in Darfur, when he visited the South Africa. These diplomatic complications were cited by South Africa as a key reason for its withdrawal decision.

If influential African nations like Kenya and South Africa withdraw from the Rome Statute, it could open the flood gates. Such a move would be crippling for the ICC – 34 of the 124 [ICC states parties](https://foreignpolicy.com/2016/10/12/washington-is-unhappy-that-burundi-is-very-happy-to-be-leaving-the-icc/amp/) are African.

The Court is already hampered by the fact that major and rising powers have refused to join the ICC, including China, India, Russia and the U.S. None of them is likely to leap into the breach to save the Court, at least by joining themselves.

Although he signed the Rome Statute in 2000, President Bill Clinton recommended that President George W. Bush not submit the Statute to the Senate for advice and consent necessary for U.S. ratification.

For its part, the U.S. has [concluded](http://www.heritage.org/research/reports/2009/08/the-us-should-not-join-the-international-criminal-court) that the ICC is a flawed institution that lacks prudent safeguards against politicization, is insufficiently accountable to the U.N. Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of non-party states in some circumstances.

The U.S. has selectively backed the ICC, including supporting Security Council referrals of situations in Sudan and Libya to the Court. But even under President Obama the U.S. has not ratified the Rome Statute. Moreover, over 90 bilateral [agreements](http://guides.ll.georgetown.edu/c.php?g=363527&p=2456099) prevent countries from turning over U.S. citizens to the Court without U.S. permission.

Beyond the political concerns, there are practical problems with the ICC. Put simply, the ICC is expensive, slow, and entirely reliant on the cooperation of governments.

The [ICC](https://www.icc-cpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf) has 800 staff and a 2016 budget of over $150 million, but since 2002, the Court has launched only 23 cases and managed to arrive at 4 convictions. It has issued 29 arrest warrants, but 13 suspects remain at large either due to an inability to locate them or deliberate decisions not to arrest them by governments.

There are also questions as to whether the ICC can be an even handed institution of justice. How can the ICC, for example, effectively pursue and prosecute high-ranking government officials when it depends on cooperation by their governments to arrest them and provide evidence? Unsurprisingly, witness intimidation and deliberate obstruction have hindered the ICC in cases involving government officials, and the Court’s successful prosecutions have mainly involved political opposition figures or fugitives.

The ICC was established for a noble purpose. Who can oppose the desire to hold people to account for horrible crimes?

As it turns out, lots of people. The ICC has always been an effort to elevate principle over *Realpolitik*. Events indicate that effort is failing.