

# COMMISSION OF INQUIRY ON BURUNDI

## Terms of Reference

### I. JUDICIAL AUTHORITY

The Commission of Inquiry on Burundi was created Resolution A/HRC/RES/33.24 of the Human Rights Council on 5 October 2016.<sup>1</sup>

### II. MANDATE

Paragraph 23 of Resolution 33/24 states that the Human Rights Council “decides to create for a period of one year a commission of inquiry:

(a) To conduct a thorough investigation into human rights violations and abuses in Burundi since April 2015, including on their extent and whether they may constitute international crimes, with a view to contributing to the fight against impunity;

(b) To identify alleged perpetrators of human rights violations and abuses in Burundi with a view to ensuring full accountability;

(c) To formulate recommendations on steps to be taken with a view to guaranteeing that the authors of these violations and abuses, regardless of their affiliation, are held accountable for their acts;

(d) To engage with the Burundian authorities and all other stakeholders, in particular United Nations agencies, civil society, refugees, the field presence of the Office of the High Commissioner in Burundi, authorities of the African Union, and the African Commission on Human and Peoples’ Rights, in order to provide the support and expertise for the immediate improvement of the situation of human rights and the fight against impunity [...]

After consultations, and taking into account comparable past experiences, the members of the Commission have interpreted the application of their mandate as follows.

#### i. Subject-matter jurisdiction (*ratione materiae*)

Paragraph 23 a) of Resolution 33/24 states that the Commission will conduct “a thorough investigation into human rights violations and abuses in Burundi [...], including on their extent and whether they may constitute international crimes”.

By “human rights violations”, according to the common definition, the resolution refers to all human rights violations by state agents or entities covered by national and international law. By “abuses”, the resolution refers to actions committed by non-state entities or their members.

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<sup>1</sup> See <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/Pages/ListReports.aspx>

With respect to human rights violations and abuses committed in Burundi since April 2015, paragraph 2 of Resolution 33/24 refers in particular to mass arbitrary arrests and detentions, including cases involving children, cases of torture and other cruel, inhuman and/or degrading treatment, extrajudicial killings, enforced disappearances, sexual and gender-based violence, persecution of and threats against members of civil society, journalists, members of the opposition and demonstrators, including young demonstrators, and restrictions on freedoms of expression, peaceful assembly and association. The resolution also mentions the existence of “unacknowledged places of detention”<sup>2</sup> and the worrying situation of human rights defenders, “many of whom are forced into exile.”<sup>3</sup>

In light of the breadth of its mandate and the relatively short time for its implementation, the Commission will concentrate first and foremost on the most serious human rights violations and abuses, in particular those which might constitute international crimes. Indeed the Human Rights Council has asked the Commission to assess the extent of human rights violations and abuses committed in Burundi and to determine “whether they may constitute international crimes”.<sup>4</sup> The Commission will interpret the expression “international crimes” as “the most serious crimes of concern to the international community as a whole”, as defined in the Rome Statute.<sup>5</sup> The Commission’s final report will highlight certain emblematic cases and events.

## **ii. Personal jurisdiction (*ratione personae*)**

Paragraph 23 b) of Resolution 33/24 tasks the Commission with identifying “alleged perpetrators of human rights violations and abuses in Burundi with a view to ensuring full accountability.”

In particular, the Human Rights Council “expresses grave concern about the reports that most of the violations and abuses are being committed by the Burundian security forces and the Imbonerakure in a climate of impunity”.<sup>6</sup> Nevertheless, the Commission will examine allegations of human rights violations and abuses committed by all parties, including the Burundian defence forces (the army) and other state security forces (police, intelligence services) as well as armed groups, or their members, in Burundi.<sup>7</sup>

The Commission will establish, to the extent possible, individual responsibility for human rights violations and abuses. More generally, it will attempt to identify the entities responsible and chains of command. In this respect, the Rome Statute provides for the responsibility of military commanders or hierarchical superiors in certain situations.<sup>8</sup>

## **iii. Territorial jurisdiction (*ratione loci*)**

Paragraphs 23 a) and b) of Resolution 33/24 limit the geographical scope of the Commission of Inquiry to human rights violations and abuses “in Burundi”, that is, committed on the

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<sup>2</sup> Paragraph 4 of Resolution 33/24.

<sup>3</sup> Paragraph 8 of Resolution 33/24.

<sup>4</sup> Paragraph 23 a) of Resolution 33/24.

<sup>5</sup> Article 5/1 of the Rome Statute.

<sup>6</sup> Paragraph 5 of Resolution 33/24.

<sup>7</sup> Armed groups referred to in paragraph 7 of Resolution 33/24.

<sup>8</sup> Article 8 of the Rome Statute.

territory of Burundi, which includes an examination of abuses committed in Burundi by non-state entities, or their members, based abroad.

Furthermore, paragraph 22 of Resolution 33/24 refers to “the difficult situation of the more than 295,000 Burundians who have fled to neighbouring countries”, whereas paragraph 23 invites the Commission to engage with refugees, among others. A combined reading of these two points has led the Commission to include in the scope of its mandate, to the extent possible, an examination of the human rights situation relating to refugees in order to formulate recommendations to improve the situation.

#### **iv. Temporal jurisdiction (*ratione temporis*)**

Paragraph 23 of Resolution 33/24 specifies that the Commission will “conduct a thorough investigation into human rights violations and abuses in Burundi since April 2015 [...]”. The resolution therefore clearly specifies the start date of the Commission’s mandate which coincides with the first demonstrations against Pierre Nkurunziza’s third presidential term. The Commission will only be able to conduct investigations until the end of June 2017 because of editorial constraints requiring the report to be finalised in July. Subsequent events in Burundi can be covered during the Commission’s oral briefing to the Human Rights Council in September 2017, on the occasion of the presentation of its final report.

Members of the Commission are aware that there have been already been initiatives to observe and investigate human rights violations in Burundi since April 2015 by the Office of the High Commissioner for Human Rights in the country and by the mission of Independent Experts established by Human Rights Council resolution A/HRC/S-24/1. In its own investigations, the Commission will therefore take into account the conclusions of the High Commissioner of Human Rights presented in his report to the thirty-second session of the Human Rights Council<sup>9</sup> and by the Independent Experts in their report presented at the thirty-third session of the Human Rights Council.<sup>10</sup> However, as an independent body, the Commission will carry out its own investigations on some of the cases and events mentioned in these reports.

### **III. APPLICABLE LAW**

#### **i. International law**

With respect to the mandate entrusted to the Commission by the Human Rights Council, described above, international human rights law and international criminal law will constitute the law applicable to the Commission’s mandate.

Regarding international human rights law, Burundi is party to most relevant instruments, including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child and its two optional protocols; and the Convention on the Rights of Persons with

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<sup>9</sup> A/HRC/32/30

<sup>10</sup> A/HRC/33/37

Disabilities. Burundi is also party to the Convention relating to the Status of Refugees and its Optional Protocol.

In terms of international criminal law, Burundi is party to the Convention on the Prevention and Punishment of the Crime of Genocide. It is also party to the Rome Statute of the International Criminal Court. However, on 27 October 2016, Burundi notified the Secretary General of the United Nations, depositary of the Rome Statute, that it intended to withdraw from this treaty. This will not affect the Commission's mandate, since under article 127 of the Rome Statute, a state's withdrawal does not free it from its obligations while it was party to the Statute. Since the withdrawal does not come into effect until one year after its notification, in the case of Burundi it will not take place before 26 October 2017. As the Commission is due to submit its report in September 2017, it can therefore base its work on the Rome Statute which will remain in force throughout its mandate.

In terms of international humanitarian law, Burundi is party to the Geneva Conventions and their additional protocols. If the Commission were to reach the conclusion that aspects of the situation in Burundi fell under these conventions, they would also become part of the body of applicable law.

#### **ii. Regional law**

On the regional level, Burundi is party to the African Charter on Human and Peoples' Rights and to the Protocol to the African Charter on the Establishment of the African Court of Human and Peoples' Rights, as well as the African Charter on the Rights and Welfare of the Child and the African Union Convention Governing Specific Aspects of Refugee Problems in Africa.

#### **iii. Sub-regional law**

Burundi is party to the Pact on Security, Stability and Development in the Great Lakes Region which includes ten legally binding protocols, including the Protocol on Democracy and Good Governance, the Protocol on the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, the Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children and the Protocol on the Protection and Assistance to Internally Displaced Persons.

### **IV. Standard of proof**

In the course of its work, the Commission has decided to adopt the same standard of proof as the majority of international commissions of inquiry on human rights, that is "reasonable grounds to believe". This means that in order to reach conclusions, the Commission will ensure it has gathered a body of reliable and consistent information, on the basis of which a reasonable and normally cautious person would have grounds to believe that an incident or systematic behaviour had taken place.

This standard of proof is lower than that used by courts to determine a person's guilt, which is "beyond reasonable doubt". However, it is the same standard of proof which enables the

Preliminary Chamber of the International Criminal Court, for example, to issue an arrest warrant or a summons to appear, on application of the Prosecutor.<sup>11</sup>

In this context, the Commission will pay particular attention to corroborating any information it receives or has collected. It will do so by verifying every piece of information by obtaining consistent information from at least two other independent and reliable sources. However, this process may not always be necessary or possible. Information provided by one primary reliable source may only require corroboration by one additional independent and reliable source, which may include the investigator's own observations. For example, if an interviewee makes an allegation of torture, the investigator's assessment of the reliability of the source, as well as the sight and observation of scars and injuries corresponding to the account, could be sufficient for the process of corroboration. In other cases, for example acts of sexual violence, it can be very difficult to obtain corroboration of a victim's account from another independent source, especially if the victim did not obtain medical assistance or was not in a position to report the acts to the authorities. In such cases, the account can be corroborated by assessing the details of the victim's account, trying to determine if they correspond to information available in the public domain and establishing whether the acts point to a pattern consistent with other similar cases.<sup>12</sup>

## **V. COMPOSITION**

### **i. Members of the Commission**

On 22 November 2016, the President of the Human Rights Council announced the appointment of Mr Fatsah Ouguergouz (Algeria), Ms Reine Alapini Gansou (Benin) and Ms Françoise Hampson (United Kingdom) as members of the Commission of Inquiry on Burundi. The President of the Council indicated that Mr Ouguergouz would serve as President of the Commission.<sup>13</sup>

The members of the Commission will enjoy the privileges and immunities granted to experts on mission, according to article VI of the Convention on the Privileges and Immunities of the United Nations.

### **ii. The Secretariat**

Paragraph 25 of Resolution 33/24 of the Human Rights Council requests that "the Office of the High Commissioner be provided with all the resources necessary [...] to fulfil [its] mandate". The Office of the United Nations High Commissioner for Human Rights has therefore put at the disposal of the Commission a secretariat with specialised skills as well as the administrative, technical and logistical assistance needed for the implementation of its mandate.

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<sup>11</sup> Article 58/1 of the Rome Statute.

<sup>12</sup> Office of the United Nations High Commissioner for Human Rights, Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law, 2015, pages 62-63.

<sup>13</sup> <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20910&LangID=E>

## **VI. OBLIGATIONS OF THE STATE CONCERNED**

In paragraph 24 of Resolution 33/24, the Human Rights Council “urges the Government of Burundi to cooperate fully with the commission of inquiry, to authorize it to conduct visits to the country and to provide it with all the information necessary to fulfil its mandate.”

In light of this provision and on the basis of similar experiences,<sup>14</sup> the Commission should benefit from:

- a) freedom of movement throughout the territory of Burundi. If the Government of Burundi refuses to grant the Commission access to its territory, the Commission should try to visit countries in the region and any other country it believes would be useful for the successful conduct of its investigations;
- b) unhindered access to all places and establishments, and freedom to meet and interview representatives of national, local and military authorities, community leaders, nongovernmental organisations and other institutions, and any person whose testimony is considered necessary for the fulfilment of its mandate;
- c) unhindered access for individuals and organisations wishing to meet the Commission;
- d) free access to all sources of information, including documentary material and physical evidence;
- e) appropriate security arrangements for the Commission's members, staff and documents;
- f) protection of victims and witnesses and all those who come into contact with the Commission, and an undertaking that no such person shall, as a result of such contact, suffer harassment, threats, acts of intimidation, ill-treatment or reprisals.

In its oral briefings and its final written report, the Commission will be able to report on the level of cooperation by the Government of Burundi and any other State it approaches.

## **VII. THE COMMISSION'S REPORT**

Paragraphs 23 e) and f) of Resolution 33/24 of the Human Rights Council provide for the Commission of Inquiry: “e) To present an oral briefing to the Human Rights Council at its thirty-fourth and thirty-fifth sessions, and a final report during an interactive dialogue at its thirty-sixth session; f) To present its report to the General Assembly and other relevant international bodies.”

In light of these provisions, the Commission will present an oral briefing on the progress of its work at the March and June 2017 sessions of the Human Rights Council. It will present its final report at the September 2017 session. This will be a written report which will include a set of recommendations “on steps to be taken with a view to guaranteeing that the authors of these violations and abuses, regardless of their affiliation, are held accountable for their acts”, in accordance with paragraph 23 c) of Resolution 33/24. The report will be published on the website of the Office of the High Commissioner for Human Rights after being communicated in advance to the Government of Burundi.

Paragraph 23 f) of the resolution mentions the presentation of the report to the United Nations General Assembly without mentioning to which session of the General Assembly the

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<sup>14</sup> Office of the United Nations High Commissioner for Human Rights, Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law, 2015, pages 67-68.

Commission should make this presentation. However, as the presentation of the Commission's final report is scheduled for the Human Rights Council session of September 2017, the Commission can be expected to present its report to the General Assembly during its 72nd ordinary session, scheduled to take place from September to December 2017.

Paragraph 23 f) of the resolution also provides for the Commission to present its final report “to other relevant international bodies”. This opens the possibility for the Commission to present its report to bodies other than the Human Rights Council and the United Nations General Assembly, including the United Nations Security Council<sup>15</sup> and the African Union Peace and Security Council.

## **VIII. COOPERATION**

In the implementation of its mandate, the Commission of Inquiry on Burundi should enjoy the full cooperation of all United Nations Member States, departments and bodies, and of all other relevant international institutions and actors.

In particular, the Commission will try to ensure the cooperation of the Office of the United Nations High Commissioner of Human Rights which has an office in Burundi. However, as an independent body, the Commission will conduct its own investigations independently and separately from the Office of the United Nations High Commissioner of Human Rights in Burundi.

In countries where the Office of the United Nations High Commissioner of Human Rights does not have a field presence, the support of other United Nations agencies in the country will be necessary to organise meetings with the main actors, establish dialogue with stakeholders and ensure follow up activities, including the protection of victims, witnesses and other sources.

Geneva, 27 February 2017

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<sup>15</sup> In the past, several commissions of inquiry set up by the Human Rights Council have included in their recommendations a request for the Security Council to take their conclusions into consideration. This was the case, for example, with the Commission of Inquiry on the human rights situation in North Korea in 2014 and the Commission of Inquiry on human rights in Eritrea in 2016.