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**PRE-TRIAL CHAMBER III**

**Before:**

**Judge Chang-ho Chung, Presiding Judge  
Judge Antoine Kesia-Mbe Mindua  
Judge Raul C. Pangalangan**

**SITUATION IN THE REPUBLIC OF BURUNDI**

**Public**

Public Redacted Version of "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-9-US-Exp, 25 October 2017

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**PRE-TRIAL CHAMBER III** of the International Criminal Court (“Court”) issues this decision pursuant to article 15 of the Rome Statute (“Statute”) on the authorization of an investigation into the situation in the Republic of Burundi (“Burundi”).

## I. PROCEDURAL HISTORY

1. On 23 August 2017, the Presidency of the Court constituted Pre-Trial Chamber III (“Chamber”) and assigned the situation in Burundi to it.<sup>1</sup>
2. On 31 August 2017, the Judges of the Chamber elected Judge Chang-ho Chung as Presiding Judge of the Chamber.<sup>2</sup>
3. On 31 August 2017, the Chamber issued the “Decision on the Prosecutor’s Request for Extension of the Page Limit”, granting the Prosecutor’s request for an extension of the page limit for her request for authorization of an investigation into the situation in Burundi.<sup>3</sup>
4. On 5 September 2017, the Prosecutor submitted her “Request for authorisation of an investigation pursuant to article 15” (“Request”), together with eight annexes.<sup>4</sup> The Prosecutor filed her Request under seal and *ex parte*, only available to the Prosecutor, pursuant to regulation 23bis of the Regulations of the Court (“Regulations”).<sup>5</sup>
5. On 15 September 2017, the Chamber issued the “Order to the Prosecutor to Provide Additional Information” (“15 September 2017 Order”), ordering the Prosecutor to provide the Chamber with additional information regarding the level

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<sup>1</sup> Presidency, Decision on the constitution of Pre-Trial Chamber III and on the assignment of the situation in the Republic of Burundi, ICC-01/17-X-1-US-Exp, with one under seal *ex parte* annex.

<sup>2</sup> Pre-Trial Chamber III, Decision on the Election of Presiding Judge, ICC-01/17-X-3-US-Exp.

<sup>3</sup> Pre-Trial Chamber III, ICC-01/17-X-4-US-Exp.

<sup>4</sup> ICC-01/17-X-5-US-Exp.

<sup>5</sup> Request, para. 9.

of classification of her Request and the communications she had received from victims or organizations representing victims.<sup>6</sup>

6. On 25 September 2017, the Prosecutor provided the additional information requested (“Prosecutor’s Additional Information”).<sup>7</sup>

## II. PRELIMINARY MATTERS

### A. Classification of the Request

7. Pursuant to the classification of the Request as under seal and *ex parte*, only available to the Prosecutor, the Prosecutor requests that the Chamber issue its decision under article 15(4) of the Statute with the same classification. She submits that “article 15 is essentially an *ex parte* procedure and the situation state is not afforded any participatory rights at this stage; victims may make representations under article 15(3), but this right is subject to the procedural framework provided for in rule 50, which expressly relieves the Prosecution of its duty to provide notice to victims [...]”.<sup>8</sup>

8. The Chamber agrees that article 15(3) of the Statute does not confer any rights of participation on the State(s) which would normally exercise jurisdiction over the alleged crimes. Pursuant to article 18 of the Statute, such a State acquires rights of participation only once the Prosecutor initiates an investigation following authorization by a Pre-Trial Chamber.

9. However, in the view of the Chamber, the Prosecutor’s interpretation of the relationship between article 15(3) of the Statute and rule 50(1) of the Rules of Procedure and Evidence (“Rules”) is legally untenable. Article 15(3) of the Statute grants victims an independent, direct avenue to make representations before a Pre-

<sup>6</sup> Pre-Trial Chamber III, ICC-01/17-X-6-US-Exp.

<sup>7</sup> ICC-01/17-X-7-US-Exp, with one under seal *ex parte* annex; *see also* ICC-01/17-X-8-US-Exp with one under seal *ex parte* annex.

<sup>8</sup> Request, para. 12.

Trial Chamber seized of a request for authorization of an investigation. The words “in accordance with the Rules of Procedure and Evidence” contained in this article, which recur repeatedly in other provisions of the Statute, simply mean that the Rules establish the process for implementing the corresponding article of the Statute. Contrary to the Prosecutor’s submission, such a process does not detract from the rights afforded to victims as such. In this regard, the Chamber recalls that the Rules are an instrument for the application of the Statute to which they are subordinate in all cases<sup>9</sup> and, pursuant to article 51(5) of the Statute, the Statute shall prevail over the Rules. It has, furthermore, been established that a provision of the Rules cannot be interpreted in a manner as to narrow the scope of an article of the Statute.<sup>10</sup> Thus, the Prosecutor’s interpretation that rule 50(1) of the Rules makes the victims’ rights set forth in article 15(3) of the Statute subject to the Prosecutor’s decision on giving notice must be rejected.

10. Having said that, the Chamber considers that the Prosecutor is not barred from making a determination that giving notice would pose a danger to the life or well-being of the victims and witnesses or to the integrity of the investigation pursuant to rule 50(1) of the Rules. However, this rule should be interpreted to mean that such a determination by the Prosecutor is not definitive with regard to the right of victims to make representations to the Pre-Trial Chamber. It is rather subject to a decision of the Pre-Trial Chamber on this matter. The reason is that a decision not to give notice would adversely affect the victims’ right to make representations to the Pre-Trial Chamber and must, therefore, undergo judicial scrutiny by that Chamber. This interpretation finds further support in rule 50(4) of the Rules, which provides that it falls upon the Pre-Trial Chamber to decide on the procedure to be followed. The

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<sup>9</sup> Explanatory note to the Rules adopted by the Assembly of States Parties at its first session, 3-10 September 2002, ICC-ASP/1/3.

<sup>10</sup> Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, [Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS5 and VPRS 6](#), 17 January 2006, ICC-01/04-101-tEN-Corr, para. 47.

Chamber also recalls its duty to protect the safety and well-being of victims and witnesses in accordance with article 68(1) of the Statute. It follows that, once an initial determination has been made by the Prosecutor on the basis of rule 50(1) of the Rules, the Pre-Trial Chamber may restrict victims' right of participation in certain situations in accordance with article 68(1) of the Statute.

11. In sum, the Chamber finds that, on the basis of a combined reading of articles 15(3), 18 and 68(1) of the Statute and rule 50(1) of the Rules, a procedure pertaining to a request for authorization of an investigation may, under certain circumstances, be conducted under seal, *ex parte*, with the Prosecutor only. The enquiry to be made is whether, following an initial determination by the Prosecutor, the Chamber considers that notifying victims would pose a danger to the integrity of the investigation or the life or well-being of victims and witnesses. The Chamber, therefore, turns to the Prosecutor's submissions regarding the level of classification of the Request.

12. The Prosecutor submits that the level of classification is based on "the existence of potential risks to the success and integrity of a future investigation, as well as on considerations concerning the safety and security of witnesses and victims of the alleged crimes".<sup>11</sup> In the Prosecutor's Additional Information, the Prosecutor adds that the Government of Burundi has not merely been uncooperative but has actively sought to target, both in Burundi and abroad, persons who it perceives could implicate it in the crimes alleged, as established by additional sources.<sup>12</sup> In this regard, the Prosecutor further indicates that, although the existence of the preliminary examination into the situation in Burundi is public, her assessment is that the concrete possibility of an investigation is likely to affect the calculations of those implicated by the crimes.<sup>13</sup> The Prosecutor also avers that the level of

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<sup>11</sup> Request, para. 9.

<sup>12</sup> Prosecutor's Additional Information, paras 7-20.

<sup>13</sup> Prosecutor's Additional Information, para. 40.

confidentiality is warranted by lessons learned from experience in previous investigations.<sup>14</sup> With regard to the steps being undertaken, the Prosecutor submits that the Prosecution's Protection Strategies Unit has begun the process of developing a Witness Security Strategy and a Concept of Operations which involves a review, assessment, and identification of particular measures.<sup>15</sup> The Prosecutor expressly acknowledges the limited measures she and the Victims and Witnesses Unit ("VWU") more generally can take, but maintains that the classification level is based on a reasonable request for preventative measures to safeguard the integrity of the proceedings and the life and well-being of victims and witnesses.<sup>16</sup>

13. The Chamber considers that multiple sources indicate that the Government of Burundi has interfered with, intimidated, or harmed victims and witnesses.<sup>17</sup> [REDACTED].<sup>18</sup> [REDACTED]<sup>19</sup> [REDACTED].<sup>20</sup> In addition, the Government of Burundi is suspending international cooperation in connection with the alleged crimes. Most notably, it has denied access to the members of the United Nations Independent Investigation in Burundi ("UNIIB") and has withdrawn from the Statute.<sup>21</sup>

14. The Chamber considers that, on the basis of the available documentation, the past and present circumstances in Burundi and neighbouring countries indeed establish that there is a danger to the life or well-being of victims and potential witnesses. This further entails that the integrity of the Prosecutor's investigation into the situation in Burundi, if authorized, may be compromised. In this regard, it is particularly worrying that [REDACTED]. In these circumstances, the Chamber finds

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<sup>14</sup> Prosecutor's Additional Information, paras 21-27.

<sup>15</sup> Prosecutor's Additional Information, paras 29-32.

<sup>16</sup> Prosecutor's Additional Information, paras 37, 41.

<sup>17</sup> Request, paras 59-61, 71.

<sup>18</sup> [REDACTED].

<sup>19</sup> [REDACTED].

<sup>20</sup> [REDACTED].

<sup>21</sup> Request, para. 22.



that such risks may be attenuated by conducting the present article 15 procedure under seal and *ex parte*, only available to the Prosecutor, and issuing its decision with the same level of classification. Therefore, the request concerning the level of classification is granted.

15. Nevertheless, the Chamber finds it imperative to clarify that, contrary to the Prosecutor's argument,<sup>22</sup> meaningful steps to protect victims and (potential) witnesses may already be undertaken under article 68(1) of the Statute prior to the authorization of an investigation by a Pre-Trial Chamber pursuant to article 15 of the Statute. Article 68(1) of the Statute provides in the relevant part that the Prosecutor "shall take such measures particularly during the investigation and prosecution" of crimes within the jurisdiction of the Court. The use of "particularly" indicates that such measures are not confined to the investigation and prosecution stages and may, therefore, also be applied at the preliminary examination stage. Indeed, pursuant to article 15(2) of the Statute, the Prosecutor may receive written or oral testimony at the seat of the Court at this stage and may even, under rule 47 of the Rules, request the Pre-Trial Chamber to take measures as may be necessary to ensure the efficiency and integrity of the proceedings. In such circumstances, the Prosecutor, or the Pre-Trial Chamber acting under rule 47 of the Rules and article 57(3)(c) of the Statute, would be required to take measures to protect the safety and well-being of those witnesses. Further, the fact that States Parties are not obliged to cooperate with the Court prior to the initiation of an investigation does not prevent the Prosecutor from seeking their voluntary cooperation in the implementation of protective measures. The same would apply to States not Parties to the Statute and non-state entities. Therefore, measures such as those envisaged in the Prosecutor's Additional Information<sup>23</sup> could be implemented *before* a Pre-Trial Chamber decides on an article 15 request. Nevertheless, the steps that the Prosecutor can take are subject to

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<sup>22</sup> Request, para. 11.

<sup>23</sup> Prosecutor's Additional Information, para. 31.

consultation with and the cooperation of the VWU, taking into consideration its unique mandate pursuant to article 43(6) of the Statute and rules 17 to 19 of the Rules.<sup>24</sup>

## **B. Delayed Notification under Article 18 of the Statute**

16. In addition to the level of classification of her Request and the issuance of the present decision with the corresponding level of classification, the Prosecutor requests that, should the Chamber authorize the commencement of an investigation, she be allowed ten working days to complete her planning before providing notice under article 18 of the Statute to all States Parties and other States which would normally exercise jurisdiction, including Burundi.<sup>25</sup> [REDACTED].<sup>26</sup>

17. The Chamber notes that article 18(1) of the Statute provides in the relevant part that, “[w]hen [...] the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned”. The words “shall notify” signify the Prosecutor’s duty to proceed with such a notification. The only limitation envisaged is the possibility to limit the scope of the information “where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons”. Accordingly, the Chamber considers that article 18(1) of the Statute, read in conjunction with article 15(1), (3) and (4) of the Statute, establishes in principle that, as soon as a Pre-Trial Chamber has authorized the commencement of an investigation, the Prosecutor must notify States and especially the State which would

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<sup>24</sup> Appeals Chamber, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, [Judgment on the appeal of the Prosecutor against the “Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67\(2\) of the Statute and Rule 77 of the Rules” of Pre-Trial Chamber I](#), 26 November 2008, ICC-01/04-01/07-776, para. 101.

<sup>25</sup> Request, para. 13.

<sup>26</sup> Prosecutor’s Additional Information, paras 33-36.

normally exercise jurisdiction, in order to enable it to assert its primary jurisdiction under article 18(2) of the Statute.

18. Nevertheless, the Chamber is also mindful of article 68(1) of the Statute, which provides in the relevant part that “[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”. As discussed, this duty applies at the preliminary examination stage as well. Accordingly, when deciding on the Prosecutor’s request, the Chamber is required to balance the Prosecutor’s duty to inform States as soon as a Pre-Trial Chamber has authorized the commencement of an investigation with the duty, incumbent upon the Court as a whole, to protect victims and witnesses.

19. While the Prosecutor could have undertaken more meaningful action in the preliminary examination phase under article 68(1) of the Statute, the Chamber finds that delayed notification is warranted in the exceptional circumstances of this situation. In view of the continued risks facing the victims and potential witnesses [REDACTED] as well as the complete lack of international cooperation on the part of the Burundian authorities, the Chamber considers that the Prosecutor must be allowed a limited period of time for the sole purpose of preparing and implementing protective measures for victims and (potential) witnesses, if authorization to commence an investigation is granted. Accordingly, a fair balance between articles 18(1) and 68(1) of the Statute requires that, for the purposes of the particular situation in Burundi, the Prosecutor’s request for a delay of ten working days in notifying a potential decision authorizing an investigation to the States concerned be granted. However, the Chamber underlines the fact that this exceptional and limited delay in the notification to be provided under article 18(1) of the Statute does not in any way diminish the rights accorded to States under article 18(1) and (2) of the Statute and rules 52 to 54 of the Rules to ensure that their primary jurisdiction is respected, which is the main purpose of article 18 of the Statute.

### C. Victims

20. The Prosecutor indicates that she “has sought to ascertain the interests of victims through direct consultations with human rights organisations representing victims [REDACTED] as well as through an examination of communications received and publicly available information”.<sup>27</sup> In more specific terms, the Prosecutor states that “[a] total of [REDACTED] different civil society organisations have submitted information under article 15”<sup>28</sup> and that she has received a significant number of [REDACTED] of victims of alleged crimes of relevance to the Request.<sup>29</sup>

21. The Chamber requested additional information under rule 50(4) of the Rules to assess the views of the victims and deems it appropriate to consider such information for the purposes of its article 15(4) decision. Accordingly, even though this procedure is exceptionally classified as under seal, *ex parte*, only available to the Prosecutor, the Chamber is additionally guided by the views expressed by the victims in the aforementioned documents. However, this exceptional procedure is not to be seen as replacing the procedural right accorded to victims under article 15(3) of the Statute.

### D. Article 127 of the Statute

22. As indicated, Burundi withdrew from the Statute by written notification addressed to the Secretary-General of the United Nations on 27 October 2016.<sup>30</sup> This withdrawal shall take effect on 27 October 2017.

23. Accordingly, the Chamber has to define the legal consequences of Burundi’s withdrawal on the Request and Burundi’s obligations in relation to an investigation,

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<sup>27</sup> Request, para. 198.

<sup>28</sup> Prosecutor’s Additional Information, para. 45.

<sup>29</sup> Prosecutor’s Additional Information, paras 49-50.

<sup>30</sup> Depositary Notification C.N.805.2016.TREATIES-XVIII.10.

if authorized.<sup>31</sup> In this regard, the Chamber considers that a distinction must be made between, on the one hand, the Court's jurisdiction prior to the entry into effect of the withdrawal and, on the other hand, Burundi's obligations arising from the Statute subsequent to the entry into effect of the withdrawal.

24. The Chamber finds that the jurisdiction of the Court prior to the entry into effect of a withdrawal must be determined in light of article 127(1), second sentence, of the Statute. This provision stipulates that a withdrawal takes "effect one year after the date of receipt of the notification". On this basis, a withdrawing State remains, for all intents and purposes, a State Party in the period between the communication of the notification of withdrawal and the end of the ensuing one-year interval. Therefore, by ratifying the Statute, a State Party accepts, in accordance with article 12(1) and (2) of the Statute, the jurisdiction of the Court over all article 5 crimes committed either by its nationals or on its territory for a period starting at the moment of the entry into force of the Statute for that State and running up to at least one year after a possible withdrawal, in accordance with article 127(1) of the Statute.<sup>32</sup> This acceptance of the *jurisdiction* of the Court remains unaffected by a withdrawal of the State Party from the Statute. Therefore, the Court retains jurisdiction over any crimes falling within its jurisdiction that may have been committed in Burundi or by nationals of Burundi up to and including 26 October 2017. As a consequence, the *exercise* of the Court's jurisdiction, *i.e.* the investigation and prosecution of crimes committed up to and including 26 October 2017, is, as such, not subject to any time limit.<sup>33</sup> The Court will further address the matter of the temporal parameters of the investigation arising from the Request below.

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<sup>31</sup> Request, para. 8.

<sup>32</sup> Burundi deposited its instrument of ratification on 21 September 2004, see C.N.936.2004.TREATIES-26. The Statute entered into force for Burundi on 1 December 2004.

<sup>33</sup> It is also to be underlined that, in accordance with article 29 of the Statute, the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

25. The obligations of a withdrawing State Party, after the withdrawal takes effect, are specifically governed by article 127(2) of the Statute. The first sentence of this provision sets forth, in general, that “[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”. The second sentence of article 127(2) of the Statute stipulates, more specifically, that “[i]ts 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, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective”. On the whole, article 127(2) of the Statute gives effect to the principle contained in article 70(1)(b) of the Vienna Convention on the Law of Treaties,<sup>34</sup> which provides that the termination of a treaty “[d]oes not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination”.

26. The Chamber notes that the relationship between the first and second sentences of article 127(2) of the Statute may be construed in different ways. However, the Chamber considers that it need not resolve this matter in relation to this Request. In the view of the Chamber, any obligations on the part of Burundi arising out of the Chamber’s article 15(4) decision would survive Burundi’s withdrawal. The reason is that the present decision is delivered prior to the entry into effect of Burundi’s withdrawal on 27 October 2017. Accordingly, it cannot be disputed that, if authorized, an investigation into the situation in Burundi would commence prior to the date on which the withdrawal became effective. Therefore, subsequent to the entry into force of its withdrawal, Burundi’s obligation to cooperate with the Court

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<sup>34</sup> UNTS, vol. 1155, p. 331 (23 May 1969).

in relation to such an investigation, if authorized, remains in effect for as long as the investigation lasts and encompasses any proceedings resulting from the investigation.

### III. ARTICLE 15 OF THE STATUTE

27. Article 15(3) of the Statute provides that, “[i]f the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected”. Pursuant to rule 48 of the Rules, the Prosecutor’s determination as to a reasonable basis to proceed with an investigation is guided by the factors set out in article 53(1)(a)-(c) of the Statute.

28. Under article 15(4) of the Statute, “[i]f the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case”. The purpose of this provision is to curb abuse of power on the part of the Prosecutor by subjecting the exercise of his or her *proprio motu* powers to initiate an investigation to judicial scrutiny.<sup>35</sup> Furthermore, like the Prosecutor’s article 15(3) determination, the article 15(4) decision of the Pre-Trial Chamber is based on the criteria enumerated in article 53(1)(a)-(c) of the Statute.<sup>36</sup>

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<sup>35</sup> Pre-Trial Chamber II, *Situation in the Republic of Kenya*, [Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya](#) (“Kenya Article 15 Decision”), 31 March 2010, ICC-01/09-19-Corr, paras 17-18; Pre-Trial Chamber III, *Situation in the Republic of Côte d’Ivoire*, [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire](#) (“Côte d’Ivoire Article 15 Decision”), 15 November 2011, ICC-02/11-14-Corr, para. 21; Pre-Trial Chamber I, *Situation in Georgia*, [Decision on the Prosecutor’s Request for Authorization of an Investigation](#) (“Georgia Article 15 Decision”), 27 January 2016, ICC-01/15-12, para. 3.

<sup>36</sup> [Kenya Article 15 Decision](#), paras 20-25; [Côte d’Ivoire Article 15 Decision](#), para. 21; [Georgia Article 15 Decision](#), para. 4.

#### IV. JURISDICTION

29. On the basis of article 53(1)(a), the first criterion to be examined is whether the information available “provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed”.

30. This threshold is considered to be the lowest evidentiary standard provided for in the Statute.<sup>37</sup> Accordingly, when reviewed against this standard, the relevant material is required neither to point towards one conclusion<sup>38</sup> nor to be conclusive.<sup>39</sup> Rather, a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed must be established.<sup>40</sup> In this regard, the Chamber considers that it does not follow that an investigation should not be opened where facts or accounts are difficult to establish, unclear, or conflicting. Such circumstances in fact call for an investigation to be opened, provided that the relevant requirements have been met.<sup>41</sup>

31. The Chamber further recalls that, for a crime to fall within the jurisdiction of the Court, all jurisdictional prerequisites must be satisfied. Thus, the crime must: (i) fall within the category of crimes set out in article 5 and defined in articles 6 to 8 of the Statute (jurisdiction *ratione materiae*); (ii) fulfil the temporal conditions specified in article 11 of the Statute (jurisdiction *ratione temporis*); and (iii) meet one of the two requirements contained in article 12(2) of the Statute (jurisdiction *ratione loci* or *ratione personae*).<sup>42</sup>

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<sup>37</sup> [Kenya Article 15 Decision](#), paras 33-34; [Côte d’Ivoire Article 15 Decision](#), para. 24.

<sup>38</sup> [Kenya Article 15 Decision](#), para. 34; [Georgia Article 15 Decision](#), para. 25.

<sup>39</sup> [Côte d’Ivoire Article 15 Decision](#), para. 24; [Georgia Article 15 Decision](#), para. 25.

<sup>40</sup> [Kenya Article 15 Decision](#), para. 35; [Côte d’Ivoire Article 15 Decision](#), para. 24; [Georgia Article 15 Decision](#), para. 25.

<sup>41</sup> Pre-Trial Chamber I, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, [Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation](#) (“Comoros Article 53 Decision”), 16 July 2015, ICC-01/13-34, para. 13.

<sup>42</sup> [Kenya Article 15 Decision](#), para. 39.



## A. Crimes Against Humanity

### 1. Contextual Elements

#### a) The Law

32. The chapeau of Article 7 of the Statute sets out the contextual elements of crimes against humanity as “a widespread or systematic attack directed against any civilian population”.<sup>43</sup> Article 7(2)(a) of the Statute further defines an “attack directed against any civilian population” as a “course of conduct involving the multiple commission of acts referred to in [article 7(1) of the Statute] pursuant to or in furtherance of a State or organizational policy to commit such attack”.<sup>44</sup> As regards the elements “attack”,<sup>45</sup> “civilian population”,<sup>46</sup> “policy”<sup>47</sup> and “widespread or systematic”,<sup>48</sup> the Chamber relies on the established case-law of the Court. Lastly, any of the underlying crimes must have been committed as part of the attack.

#### b) The Facts

##### (i) *The Attack*

33. The information available indicates that since at least 26 April 2015 the civilian population in Burundi has been subject to an attack by members of different

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<sup>43</sup> The Chamber considers that the requirement that the perpetrator had knowledge of the attack cannot be adequately addressed at the current stage of the proceedings as there is no suspect before the Court at this point; see [Kenya Article 15 Decision](#), para. 79.

<sup>44</sup> See also second and third paragraphs of the Introduction to article 7 in the Elements of Crimes.

<sup>45</sup> Paragraph 3 of the Introduction to article 7 in the Elements of Crimes; Trial Chamber III, *Prosecutor v Jean-Pierre Bemba Gombo*, [Judgment pursuant to Article 74 of the Statute](#) (“Bemba Judgment”), 21 March 2016, ICC-01/05-01/08-3343, paras 149-151; Trial Chamber II, *Prosecutor v Germain Katanga*, [Judgment pursuant to article 74 of the Statute](#), 7 March 2014 (“Katanga Judgment”), ICC-01/04-01/07-3436-tENG, para. 1101.

<sup>46</sup> Article 50 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (“Additional Protocol I”), adopted on 8 June 1977, UNTS vol. 1125, p. 3; [Bemba Judgment](#), paras 152-156; [Katanga Judgment](#), paras 1102-1105; Pre-Trial Chamber II, *Prosecutor v Jean-Pierre Bemba Gombo*, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo](#) (“Bemba Confirmation Decision”), 15 June 2009, ICC-01/05-01/08-424, paras 76-78.

<sup>47</sup> Paragraph 3 of the Introduction to article 7 and footnote 6 of the Elements of Crimes; [Bemba Judgment](#), paras 159-161; [Katanga Judgment](#), paras 1106-1109.

<sup>48</sup> [Bemba Judgment](#), paras 162-163; [Katanga Judgment](#), para. 1123.

Burundian State institutions as well as members of the youth wing of the ruling party, known as the *Imbonerakure*.

34. On 25 April 2015 the ruling party of Burundi, the *Conseil National pour la Défense de la Démocratie – Forces de Défense de la Démocratie* (“CNDD-FDD”), nominated President Pierre Nkurunziza (“President Nkurunziza”) as its candidate in the 2015 presidential elections, running for a third term in office.<sup>49</sup> His eligibility was contested as being unconstitutional,<sup>50</sup> and civilians started demonstrating against his candidacy on 26 April 2015, in particular in the capital, Bujumbura, but also in other locations across the country.<sup>51</sup>

35. The situation started to take a violent course soon after the start of the protests. According to the material submitted, from the first day of the protests, members of the police shot at civilians who were demonstrating, causing the death of a number of them.<sup>52</sup> While the protests were not entirely peaceful,<sup>53</sup> 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 were otherwise not posing a threat.<sup>54</sup> Also, whereas some members of the police appear to

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<sup>49</sup> Report of the Secretary-General on the United Nations Electoral Observation Mission in Burundi, 7 July 2015, UN Doc. S/2015/510, BDI-OTP-0003-4331, at 4332, para. 6 (“BDI-OTP-0003-4331”); Report of the Delegation of the African Commission on Human and People’s Rights on its Fact-Finding Mission to Burundi, 7-13 December 2015, BDI-OTP-0003-1211, at 1224-1225, para. 33 (“BDI-OTP-0003-1211”).

<sup>50</sup> BDI-OTP-0003-4331, at 4332, para. 5; BDI-OTP-0003-1211, at 1224-1225, paras 30-34.

<sup>51</sup> BDI-OTP-0003-4331, at 4332, para. 6; BDI-OTP-0003-1211, at 1225, para. 34; Report of the United Nations Independent Investigation on Burundi (UNIIB) established pursuant to Human Rights Council resolution S-24/1, 20 September 2016, UN Doc. A/HRC/33/37, BDI-OTP-0003-4258, at 4262, para. 23 (“BDI-OTP-0003-4258”).

<sup>52</sup> BDI-OTP-0003-1211, at 1229-1230, paras 47-50; BDI-OTP-0003-4331, at 4332, para. 6.

<sup>53</sup> République du Burundi, Ministère de la Justice, Commission d’Enquête chargée de faire la lumière sur le mouvement insurrectionnel déclenché le 26 avril 2015, Rapport, August 2015, BDI-OTP-0003-4783, at 4796-4801 (“BDI-OTP-0003-4783”); Rapport de la Commission d’enquête sur le Burundi, 11 August 2017, UN Doc. A/HRC/36/54, BDI-OTP-0005-0003, at 0010, para. 29 (“BDI-OTP-0005-0003”); BDI-OTP-0003-1211, at 1231-1232, paras 53-54.

<sup>54</sup> Amnesty International, *Braving Bullets: Excessive Force in Policing Demonstrations in Burundi*, 2015, BDI-OTP-0003-1661, at 1682 (“BDI-OTP-0003-1661”); BDI-OTP-0003-4258, at 4265, para. 41, at 4268, para. 62; Committee against Torture Concluding observations of the Committee on the special report of Burundi requested under article 19(1) in fine of the Convention, 9 September 2016, UN Doc. CAT/C/BDI/CO/2/Add.1, BDI-OTP-0003-4293, at 4299, para. 20 (“BDI-OTP-0003-4293”); BDI-OTP-0003-1211, at 1230, para. 47, at

have handled demonstrators peacefully, the available information shows that policemen were reportedly told “to shoot demonstrators, because they are putschists; [they] were not given helmets, shields [...], only weapons”.<sup>55</sup> It is also reported that pick-up trucks arrived at the site of demonstrations on several occasions dropped off some policemen who just started shooting and left.<sup>56</sup>

36. The security forces also carried out arrests of civilians who were participating or were suspected of participating in the protests which the Government had declared illegal.<sup>57</sup> In addition, human rights activists and members of civil society, members of opposition parties, and journalists were also targeted, in particular through (attempted) assassinations and arbitrary arrests.<sup>58</sup> According to the material submitted, most of those arrested were afterwards subjected to torture while they were being detained in official or unofficial places of detention.<sup>59</sup>

37. The violence was exacerbated when on 13 May 2015 elements of the security forces launched a *coup d'état*.<sup>60</sup> The *coup* was foiled after two days, but in the aftermath grenade attacks continued to be carried out by unidentified men against the police and soldiers in Bujumbura.<sup>61</sup> In response to these events, the security forces, supported by members of the *Imbonerakure*, conducted cordon and search operations in neighbourhoods of Bujumbura where attacks on the security forces

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1237, para. 72; Human Rights Watch, Police abuses exposed during Burundi protests (video), uploaded 16 June 2015, BDI-OTP-0002-0045.

<sup>55</sup> BDI-OTP-0003-1661, at 1695.

<sup>56</sup> BDI-OTP-0003-1661, at 1695.

<sup>57</sup> BDI-OTP-0003-1211, at 1231, para. 52, at 1235, para. 65. It is reported that the protests subsided around June 2015, BDI-OTP-0003-1211, at 1237, para. 72; BDI-OTP-0005-0003, at 0010, para. 29.

<sup>58</sup> BDI-OTP-0003-1211, at 1231, para. 52, at 1237, para. 71; BDI-OTP-0003-4331, at 4342, para. 44; Rapport du Haut-Commissaire des Nations Unies aux droits de l'homme sur la situation des droits de l'homme au Burundi, 17 June 2016, UN Doc. A/HRC/32/30, BDI-OTP-0003-4119, at 4125, para. 18 (“BDI-OTP-0003-4119”); BDI-OTP-0005-0003, at 0011, para. 35, at 0014, para. 57; International Federation for Human Rights, Repression and genocidal dynamics in Burundi, November 2016, BDI-OTP-0003-1932, at 1958, at 1986-1988 (“BDI-OTP-0003-1932”).

<sup>59</sup> BDI-OTP-0003-4331, at 4334, para. 13; BDI-OTP-0003-1932, at 2006-2013.

<sup>60</sup> BDI-OTP-0003-1211, at 1233-1234, paras 59 and 60.

<sup>61</sup> BDI-OTP-0003-1211, at 1237-1239, paras 73, 76-77, at 1243, para. 91.

had occurred or which were considered to be associated with the opposition.<sup>62</sup> The available information shows that, in the course of these operations, the security forces and members of the *Imbonerakure* summarily executed dozens of civilians suspected of having attacked the security forces or of having demonstrated against President Nkurunziza's third term.<sup>63</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>64</sup> Mass arrests were also carried out in the context of these operations, which were accompanied or followed by torture and rape.<sup>65</sup>

38. A high point in the escalating pattern of crimes was marked by an attack by unidentified armed men on four military positions in and around Bujumbura on 11 December 2015.<sup>66</sup> In response to these attacks, the security forces conducted cordon and search operations in neighbourhoods of Bujumbura considered to be associated with the opposition. The material submitted reveals that in the course of these operations, members of the security forces and the *Imbonerakure* killed dozens or possibly hundreds of civilians,<sup>67</sup> arrested around 300 young men from their homes,<sup>68</sup> committed acts of torture<sup>69</sup> and raped or gang-raped women and girls in their homes.<sup>70</sup>

39. After 11 December 2015, the number of killings in the context of cordon and search operations declined. It is reported that, instead, executions continued to be

<sup>62</sup> Human Rights Watch, *Burundi's Human Rights Crisis*, 2016, BDI-OTP-0003-1793, at 1883-1886 ("BDI-OTP-0003-1793"); BDI-OTP-0003-4258, at 4262, paras 24-25.

<sup>63</sup> BDI-OTP-0003-1932, at 1977-1981.

<sup>64</sup> BDI-OTP-0003-1932, at 1961 and at 1977-1981; BDI-OTP-0003-1793, at 1883-1886.

<sup>65</sup> BDI-OTP-0003-4119, at 4122, para. 7, at 4125, para. 19, at 4127, para. 30, *see also* at 4125, para. 21; BDI-OTP-0005-0003, at 0011-0013, paras 40, 43 and 50; BDI-OTP-0003-4258, at 4269, para. 68.

<sup>66</sup> BDI-OTP-0003-1211, at 1245, para. 99; BDI-OTP-0003-4119, at 4122, para. 7.

<sup>67</sup> BDI-OTP-0003-4293, at 4295, para. 8; BDI-OTP-0003-1932, at 1963; BDI-OTP-0003-4119, at 4124, para. 13; Amnesty International, "My Children Are Scared": Burundi's Deepening Human Rights Crisis, 22 December 2015, BDI-OTP-0003-1717, at 1717-1722 ("BDI-OTP-0003-1717").

<sup>68</sup> Reportedly, at least 154 of them were later found dead on the streets of Bujumbura on 11 and 12 December 2015; BDI-OTP-0003-1932, at 1963.

<sup>69</sup> BDI-OTP-0006-0002, at 0192.

<sup>70</sup> BDI-OTP-0003-1932, at 2019; BDI-OTP-0003-4119, at 4127, para. 30.

conducted in a more covert manner, with persons being forced to board pick-up trucks and taken to secret isolated locations, often blindfolded.<sup>71</sup> Arbitrary arrests and acts of torture also continued to be committed in 2016 and 2017.<sup>72</sup> Cases of disappearance of political opponents, members of civil society and members of the former *Forces Armées Burundaises* (“ex-FAB”),<sup>73</sup> who were considered disloyal and likely to turn against President Nkurunziza, were also recorded.<sup>74</sup> It is reported that in fact, the number of cases of persons who went missing after being arrested by the security forces increased since the beginning of 2016.<sup>75</sup>

(ii) *State Policy*

40. The available information shows that the above mentioned acts of killing, assassinations and attempted assassinations, illegal detention, torture, rape, and cases of disappearance formed part of a campaign carried out against civilians who opposed or were perceived to oppose the ruling party: demonstrators against President Nkurunziza’s third term in office and suspected demonstrators, members of the opposition political parties, members of the civil society, journalists, members and sympathisers of armed opposition groups or persons suspected of having joined such groups, and ex-FAB members.<sup>76</sup>

41. The supporting material points to the involvement of several State institutions: (i) the “*Police Nationale du Burundi*” (“PNB”), the Burundian National Police, with two of its units being particularly implicated: (1) the *Brigade Anti-Émeute* (“BAE”), an anti-riot brigade; and (2) the *Appui pour la Protection des Institutions* (“API”), a unit

<sup>71</sup> BDI-OTP-0003-1932, at 1982-1986. *See also* BDI-OTP-0005-0003, at 0010, para. 31.

<sup>72</sup> BDI-OTP-0003-4293, at 4296, para. 12; Report of the Secretary-General on Burundi, 23 February 2017, UN Doc. S/2017/165, BDI-OTP-0003-4558, at 4564, paras 29 and 33 (“BDI-OTP-0003-4558”).

<sup>73</sup> The *Forces Armées Burundaises* referred to here denote the former armed forces of Burundi in existence before the 2000 Arusha Peace and Reconciliation Agreement for Burundi; BDI-OTP-0003-1932, at 1966.

<sup>74</sup> BDI-OTP-0005-0003, at 0011, paras 37-38; BDI-OTP-0003-1932, at 1990-1992.

<sup>75</sup> BDI-OTP-0003-1932, at 2002.

<sup>76</sup> BDI-OTP-0005-0003, at 0007, para. 14; BDI-OTP-0003-4258, at 4264-4265, paras 39 and 42; BDI-OTP-0003-1211, at 1231, para. 52, at 1235, para. 65, at 1237, para. 71, at 1239, para. 78.

mandated to guard institutions, senior officials and politicians;<sup>77</sup> (ii) the *Service National de Renseignement* (“SNR”), Burundi’s national intelligence service;<sup>78</sup> and (iii) units of the *Force de Défense Nationale* (“FDN”), the Burundian army, in particular the *Bataillon Génie des Combats* (“BGC”) and the *Brigade Spéciale de Protection des Institutions* (“BSPI”), a specialized army unit in charge of the protection of State institutions.<sup>79</sup>

42. According to the available information, the above State institutions operated largely through parallel chains of command.<sup>80</sup> Several of the units involved were reported to be *de facto* headed by persons loyal to the regime.<sup>81</sup> For example, the director of the police, an ex-FAB, was excluded from the decision-making process and his deputy received orders directly from the Minister of Public Security and the Office of the President.<sup>82</sup> Similarly, the BGC received orders directly from the chief of the General Staff and President Nkurunziza, circumventing the chain of command and ex-FAB officers.<sup>83</sup>

43. Those who opposed or were thought to oppose the regime and President Nkurunziza’s third term were dismissed, transferred or assassinated. Notably, the head of the SNR, Major General Godefroid Niyombaré, was replaced in February 2015<sup>84</sup> after writing to the President advising him not to seek a third term.<sup>85</sup> Members of the military, predominantly ex-FAB, were retired, replaced, transferred from Bujumbura to provincial locations, arrested or assassinated.<sup>86</sup> Conversely, those “willing to kill” were recruited into units such as the BAE. It is reported that

<sup>77</sup> BDI-OTP-0005-0003, at 0008, para. 19; BDI-OTP-0003-1932, at 2064-2069; BDI-OTP-0003-1661, at 1676.

<sup>78</sup> BDI-OTP-0005-0003, at 0008, para. 18; BDI-OTP-0003-1932, at 2073; BDI-OTP-0003-1211, at 1263, para. 158.

<sup>79</sup> BDI-OTP-0003-1932, at 2069-2072; BDI-OTP-0005-0003, at 0008, para. 20.

<sup>80</sup> BDI-OTP-0005-0003, at 0008, para. 22; BDI-OTP-0003-1661, at 1694.

<sup>81</sup> BDI-OTP-0003-1932, at 2064.

<sup>82</sup> BDI-OTP-0003-1932, at 2068-2069.

<sup>83</sup> BDI-OTP-0003-1932, at 2070.

<sup>84</sup> République du Burundi, Cabinet du Président, Décret No. 100/30 du 18 février 2015 portant destitution de l’Administrateur général du Service National de Renseignement, BDI-OTP-0003-2937.

<sup>85</sup> BDI-OTP-0003-1932, at 1964-1965.

<sup>86</sup> BDI-OTP-0003-1932, at 1967 and at 2069.

according to an inside police source, when the BAE was created in September 2015,<sup>87</sup> approximately 300 police officers, essentially snipers, were “chosen from within the different sections of the police – those who are ‘strong,’ i.e. willing to kill”.<sup>88</sup>

44. The supporting material also points to the heavy involvement of members of the *Imbonerakure*. They were purportedly trained in 2014 in the Democratic Republic of the Congo (“DRC”) under the coordination of SNR officials.<sup>89</sup> It is also reported that they received weapons, vehicles and uniforms from the police and the SNR.<sup>90</sup> The command and control of members of the *Imbonerakure* have been linked to members of the security forces associated with President Nkurunziza’s inner circle.<sup>91</sup>

45. During the relevant time, members of the *Imbonerakure* conducted joint operations with the security forces resulting in killings, beatings and arbitrary arrests, sometimes in the presence of intelligence officers.<sup>92</sup> It is also alleged that they handed over individuals directly to SNR officers or the police and were seen alongside police and SNR officers in detention centres.<sup>93</sup>

(iii) *Widespread and Systematic*

46. The attack against the civilian population still ongoing in 2017 targeted a large number of civilian victims. Estimates put the number of victims at no less than 1,200 persons killed, thousands illegally detained, thousands reportedly tortured, and

<sup>87</sup> République du Burundi, Cabinet du Ministre de la Sécurité Publique, Ordonnance No 215/1182 du 07/09/2015 portant création, organisation, composition, missions et fonctionnement de la Brigade Anti-Émeute, BDI-OTP-0003-2749.

<sup>88</sup> BDI-OTP-0003-1932, at 2065.

<sup>89</sup> Final report of the Group of Experts on the Democratic Republic of the Congo, UN Doc. S/2015/19, 12 January 2015, BDI-OTP-0003-4348, at 4367-4368, paras 88-89.

<sup>90</sup> Office of the United Nations High Commissioner for Human Rights, Media Centre, “Increased militia violence ‘could tip Burundi over the edge’”, 9 June 2015, BDI-OTP-0003-4622, at 4623; *see also* BDI-OTP-0003-1793, at 1822, at 1858.

<sup>91</sup> US Department of the Treasury Press Centre, Treasury Sanctions Three Individuals for Contributing to the Ongoing Violence in Burundi, 2 June 2016, BDI-OTP-0003-4004.

<sup>92</sup> BDI-OTP-0003-4293, at 4297, para. 14; BDI-OTP-0005-0003, at 0010, para. 34; BDI-OTP-0003-1717, at 1718; BDI-OTP-0003-1793, at 1883-1884 and at 1897; BDI-OTP-0003-1932, at 1968.

<sup>93</sup> BDI-OTP-0005-0003, at 0009, paras 26-27; BDI-OTP-0003-1793, at 1897.

hundreds disappeared.<sup>94</sup> The alleged acts of violence reportedly resulted in the displacement of 413,490 persons between April 2015 and May 2017.<sup>95</sup>

47. The material submitted also reveals that the acts of violence did not occur randomly, but were rather planned and organized following a pattern of violence against civilians. Notably, it is reported that, starting in April 2015, the SNR and the *Imbonerakure* compiled lists of persons considered to be opposed to the ruling party based on (i) videos and photographs taken during demonstrations; (ii) photo albums confiscated during search operations; and (iii) interrogations conducted by the SNR. The security forces reportedly relied on these lists and photographs to identify individuals to be arrested, imprisoned and sometimes executed.<sup>96</sup> Further, as highlighted above, different State institutions and units of the police and the army were involved in the alleged commission of crimes, with some of the units, such as the BAE, having been created during the course of the events. The units were reportedly commanded by persons selected for their loyalty to the President.<sup>97</sup> The material submitted also indicates a high level of collaboration between the police, the SNR, and members of the *Imbonerakure*, in particular in the arrest and transfer of detainees.<sup>98</sup>

#### c) Conclusion

48. Based on the above, the Chamber finds a reasonable basis to believe that since at least 26 April 2015 an attack against the Burundian civilian population has been carried out pursuant to a State policy to suppress dissenting views and opposition to President Nkurunziza's third term in office. The Chamber acknowledges that some of the demonstrators as well as unidentified armed men were involved in acts of

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<sup>94</sup> International Federation for Human Rights, *Burundi on the brink: looking back on two years of terror*, June 2017, BDI-OTP-0004-0235, at 0239; BDI-OTP-0003-4258, at 4264, para. 35.

<sup>95</sup> United Nations High Commissioner for Refugees, *Burundi Situation*, May 2017, BDI-OTP-0004-0394, at 0394.

<sup>96</sup> BDI-OTP-0003-1932, at 1999.

<sup>97</sup> *See above* paras 41-43.

<sup>98</sup> *See above* para. 45.



violence, which sometimes led to death, and that the security forces acted at times in response to such events.<sup>99</sup> However, considering the methods used by the security forces and the type of resistance they had encountered, the discriminatory nature of the crimes committed and the number of victims, the Chamber is satisfied that the attack was directed against the civilian population. The Chamber is further satisfied to the requisite threshold that the attack was both widespread and systematic.

## 2. The Crimes

### a) Murder and Attempted Murder

#### (i) *The Law*

49. The crime of murder, within the meaning of article 7(1)(a) of the Statute, is committed when a person is killed<sup>100</sup> as a result of the perpetrator's act or omission.<sup>101</sup> In the case of attempted murder, substantial steps have been taken to execute the crime, but it does not occur because of circumstances independent of the perpetrator's intentions.<sup>102</sup>

#### (ii) *The Facts*

50. The supporting material indicates that since at least 26 April 2015 members of the Burundian security forces and the *Imbonerakure* have killed or attempted to kill persons who opposed, or were perceived to oppose the ruling party and/or President Nkurunziza's third term. Estimates of the number of deaths vary from at

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<sup>99</sup> BDI-OTP-0003-4783, at 4796-4801; BDI-OTP-0005-0003, at 0010, para. 29; BDI-OTP-0003-1211, at 1231-1232, para. 53-54, at 1237-1239, paras 73 and 77, at 1240, para. 82, at 1242, para. 88, at 1243, paras 91-92, at 1245, para. 99; BDI-OTP-0003-1793, at 1883.

<sup>100</sup> Footnote 7 in the Elements of Crimes specifies that '[t]he term "killed" is interchangeable with the term "caused death"'.

<sup>101</sup> See also [Bemba Judgment](#), paras 87-88; 91-94; [Katanga Judgment](#), paras 767-769 and 783-791; [Bemba Confirmation Decision](#), paras 131-134 and 273-274.

<sup>102</sup> Article 25(3)(f) of the Statute.

least 348, for the period between 26 April 2015 and the end of April 2016,<sup>103</sup> to more than 1,200, for the period between April 2015 and June 2017.<sup>104</sup> The main perpetrators of these killings are reported to be the Burundian security forces.<sup>105</sup>

51. The above information is further supported by a number of communications submitted by or on behalf of victims relating dozens of cases of murder or attempted murder between May 2015 and March 2017 attributable to the Burundian security forces and/or the *Imbonerakure*.<sup>106</sup> Those (attempted) murders were allegedly committed in Burundi, mostly in Bujumbura, but also in other provinces, such as Ryansoro<sup>107</sup> or Kirundo,<sup>108</sup> and even outside Burundi, for example in Uganda.<sup>109</sup> Victims are often in a position to indicate the names of the alleged perpetrators and their affiliation, *i.e.* whether they belong to the SNR, the PNB, the *Imbonerakure* or the FDN.<sup>110</sup> Very often those who survived attempted murders or the families of those killed went into exile.<sup>111</sup>

52. Four general patterns of killings can be discerned from the available information: (i) killings during or in the immediate aftermath of demonstrations; (ii) killings during police operations, principally cordon and search operations, in neighbourhoods associated with the political opposition or where attacks on security forces had occurred; (iii) killings conducted in secret; and (iv) targeted killings of civilians based on their actual or perceived association with the opposition.

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<sup>103</sup> BDI-OTP-0003-4119, at 4123, para. 10; *see also* République du Burundi, Ministère de la Sécurité Publique, Revue Annuelle No. 8, Décembre 2016, BDI-OTP-0003-1517, at 1521, reporting the death of 374 civilians, “victimes de l’insurrection” as of March 2016.

<sup>104</sup> BDI-OTP-0004-0235, at 0239; *see also* BDI-OTP-0003-1932, at 1952.

<sup>105</sup> BDI-OTP-0003-4119, at 4123, para. 10; BDI-OTP-0003-1932, at 1952.

<sup>106</sup> BDI-OTP-0003-4724; BDI-OTP-0005-0042; BDI-OTP-BDI-OTP-0001-0302; BDI-OTP-0004-0047; BDI-OTP-0001-0002.

<sup>107</sup> BDI-OTP-0006-0002, at 0094.

<sup>108</sup> BDI-OTP-0004-0448, at 0924.

<sup>109</sup> BDI-OTP-0006-0002, at 0066, reporting an attempted murder by persons speaking in Kirundi.

<sup>110</sup> [REDACTED].

<sup>111</sup> BDI-OTP-0004-0448, at 0608; BDI-OTP-0004-0448, at 0615; and BDI-OTP-0006-0002, at 0487.

53. **Killings in the context of demonstrations.** According to the supporting material, it is estimated that between 27 and 80 persons were killed during demonstrations, between 26 April and July 2015,<sup>112</sup> including eight children.<sup>113</sup> Most of them were shot by the police.<sup>114</sup> The first incidents of killing were already reported on the first day of protests, with at least three persons killed in Bujumbura; within a week, the number of victims had risen to at least seven.<sup>115</sup>

54. In particular, on 26 April 2015, the police shot a 15-year-old boy in the head, after he fell down while running away to hide.<sup>116</sup> In the evening, a man in police uniform reportedly opened fire on a group of people who were sitting outside a house, in Bujumbura, killing at least two men in their mid-60s with shots to the back and the head.<sup>117</sup> On 4 May 2015, policemen fired shots at a crowd of demonstrators who were running away from them. It appears that they killed at least two persons by shooting them in the back.<sup>118</sup> Similar events took place on 10 May 2015, when the police fired bullets at demonstrators who were running away after teargas had been used against them. The bullets hit at least one man who later died from the wounds.<sup>119</sup> It is also reported that on 13 May, and on 5 June 2015, the police shot at protesters who were throwing stones at them, causing the death of one man on each occasion.<sup>120</sup>

55. While some demonstrators were involved in acts of violence,<sup>121</sup> it appears that the police used unwarranted and excessive force against protesters. The Chamber notes that the police used live ammunition in response to demonstrators who were

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<sup>112</sup> BDI-OTP-0003-1793, at 1914; BDI-OTP-0003-1932, at 1958.

<sup>113</sup> BDI-OTP-0003-1661, at 1678.

<sup>114</sup> BDI-OTP-0003-1932, at 1958.

<sup>115</sup> BDI-OTP-0003-1211, at 1229-1230, paras 47-48.

<sup>116</sup> BDI-OTP-0003-1661, at 1679; BDI-OTP-0003-1211, at 1230, para. 47.

<sup>117</sup> BDI-OTP-0003-1661, at 1676-1677.

<sup>118</sup> BDI-OTP-0003-1661, at 1688-1689.

<sup>119</sup> BDI-OTP-0003-1793, at 1918.

<sup>120</sup> BDI-OTP-0003-1661, at 1686 and 1690; BDI-OTP-0003-1211, at 1237, para. 72.

<sup>121</sup> BDI-OTP-0003-4783, at 4798-4801; BDI-OTP-0005-0003, at 0010, para. 29; BDI-OTP-0003-1211, at 1231-1232, paras 53-54.

throwing stones at them and shot at persons who were running from the police or were otherwise not posing a threat.<sup>122</sup>

56. **Killings during cordon and search operations.** The supporting material reveals that the security forces carried out dozens of summary executions in the context of cordon and search operations conducted in response to attacks on the security forces.<sup>123</sup>

57. For example, on 1 July 2015, the police reportedly conducted a cordon and search operation in the Mutakura neighbourhood of Bujumbura after having been attacked with grenades by a group of armed men. In the course of the operation, they forced one family to leave their home and shot them in the street with bullets to the head and abdomen. Another man was executed while kneeling down with his arms in the air. In total, six persons were reportedly killed during the operation.<sup>124</sup> In another incident, on 5 August 2015, in Cibitoke, Bujumbura, members of the *Imbonerakure*, accompanied by police officers, allegedly executed two men after ordering them to kneel with their hands in the air.<sup>125</sup>

58. During the months of September, October, November and December 2015, bodies were found on an almost daily basis in the streets of Bujumbura, often following police operations in neighbourhoods seen as opposing President Nkurunziza's third term in office.<sup>126</sup> Bodies were regularly found also in several provinces, often with their arms tied behind their backs. In some cases, the victims were identified as persons who opposed President Nkurunziza's new term in office or as members of the opposition parties.<sup>127</sup>

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<sup>122</sup> BDI-OTP-0003-1793, at 1847 and at 1914; BDI-OTP-0003-1661, at 1682; BDI-OTP-0003-1932, at 1956; BDI-OTP-0003-4258, at 4268, para. 62; BDI-OTP-0003-4293, at 4299, para. 20.

<sup>123</sup> BDI-OTP-0003-1932, at 1977; BDI-OTP-0003-4258, at 4262, paras 24-25, at 4265, para. 43.

<sup>124</sup> BDI-OTP-0003-1932, at 1977-1978.

<sup>125</sup> BDI-OTP-0005-0003, at 0010, para. 34.

<sup>126</sup> BDI-OTP-0003-1932, at 1979.

<sup>127</sup> BDI-OTP-0005-0003, at 0010, para. 33.

59. Nearly 55 cases of summary executions were reported during the month of October 2015 alone.<sup>128</sup> In particular, on 3 October 2015, between eight and 15 persons, including disabled persons, were reportedly killed in the neighbourhoods of Cibitoke and Mutakura, in Bujumbura.<sup>129</sup> In response to grenade attacks, the police shot into houses to make residents come out, forced them to lie face-down in the street,<sup>130</sup> made others kneel at the roadside, and summarily executed them.<sup>131</sup>

60. On 13 October 2015, nine persons, including three children and one woman, were allegedly killed in Ngagara, Bujumbura, in the course of a search operation for persons who had previously thrown grenades at policemen.<sup>132</sup> Members of the API arrived in the neighbourhood, started shooting at houses and ordered people to come out. When a 58-year-old cameraman for the State broadcaster *Radio Télévision Nationale du Burundi* opened his gate, an API policeman slapped him and shot him twice, killing him.<sup>133</sup> When his wife, two children and nephew also came out of the house, they made them lie down in the street and killed them with shots to the head.<sup>134</sup> Several other persons in the neighbourhood were also shot in the head during this operation.<sup>135</sup>

61. It is reported that summary executions took place also on 31 October 2015 in Buringa, Bubanza Province,<sup>136</sup> and on 7 November in a bar in Kanyosha, where nine civilians were killed.<sup>137</sup> On 5 December 2015, the police killed a nine-year-old boy in Cibitoke, Bujumbura, when shooting indiscriminately after someone threw a grenade. On 9 December 2015, in the same neighbourhood, the police allegedly shot

<sup>128</sup> BDI-OTP-0003-1211, at 1243, para. 90.

<sup>129</sup> BDI-OTP-0003-1932, at 1978-1979; BDI-OTP-0003-1211, at 1242, para. 89.

<sup>130</sup> BDI-OTP-0003-1793, at 1883-1885.

<sup>131</sup> BDI-OTP-0003-1932, at 1978.

<sup>132</sup> BDI-OTP-0003-4119, at 4123-4124, para. 12.

<sup>133</sup> BDI-OTP-0003-1793, at 1886.

<sup>134</sup> See also BDI-OTP-0003-1211, at 1243, para. 91 (stating however that the events took place on 14 October 2015).

<sup>135</sup> BDI-OTP-0003-1793, at 1886-1887.

<sup>136</sup> BDI-OTP-0005-0003, at 0010, para. 29.

<sup>137</sup> BDI-OTP-0003-1932, at 1961, fn. 37.

five men at close range after breaking into their house and forcing them out into the street.<sup>138</sup>

62. One of the operations with the highest number of victims since 26 April 2015 was carried out on 11 December 2015, in Bujumbura, in response to the attack on four military positions in and around Bujumbura by groups of armed men earlier that day. Between 150 and 200 deaths were reported for the day.<sup>139</sup> Although it is not clear how many of these deaths occurred in the context of exchanges of fire between the security forces and armed men,<sup>140</sup> at least some of them occurred after the armed clashes.<sup>141</sup> It is reported that the security forces cordoned off neighbourhoods of Bujumbura that were considered to be associated with the opposition (Nyakabiga, Musaga, Mutakura, Ngagara, Cibitoke and Jabe) in order to search for weapons and rebels.<sup>142</sup> Members of the army and the police (including the BSPI, the BAE and the API), the SNR and the *Imbonerakure* forced people to leave their houses, threw them on the ground and fired at them.<sup>143</sup> It is alleged that, as they did so, they made remarks such as: “You demonstrate and you’re going to regret it to the very end”; “Our president is going to lead you by force whether you like it or not”.<sup>144</sup> When the residents did not open their doors, the security forces fired bullets at the doors.<sup>145</sup> Most victims were shot in the head and some of the bodies were found with their hands tied behind their backs.<sup>146</sup> A physically handicapped man and at least one child, a 15-year-old boy, appear to have been among those killed in the operation.<sup>147</sup> The Chamber has also been provided with one communication presented on behalf

<sup>138</sup> BDI-OTP-0003-1211, at 1244, paras 94-95.

<sup>139</sup> BDI-OTP-0003-4293, at 4295, para. 8; BDI-OTP-0003-1932, at 1963.

<sup>140</sup> See République du Burundi, Ministère de la Justice, Parquet Général de la République, Commission chargée de faire la lumière sur les allégations «d’exécutions extra judiciaires» lors de combats qui ont suivi l’attaque contre quatre camps militaires le 11 décembre 2015, Rapport, March 2016, BDI-OTP-0003-1318, at 1345 (“BDI-OTP-0003-1318”).

<sup>141</sup> BDI-OTP-0003-1793, at 1860.

<sup>142</sup> BDI-OTP-0003-1932, at 1962; BDI-OTP-0003-1211, at 1245-1246, paras 99-101.

<sup>143</sup> BDI-OTP-0003-1793, at 1860.

<sup>144</sup> BDI-OTP-0003-1932, at 1980.

<sup>145</sup> BDI-OTP-0003-1932, at 1979-1982.

<sup>146</sup> BDI-OTP-0003-1932, at 1963.

<sup>147</sup> BDI-OTP-0003-1717, at 1717, 1720-1721.

of a victim that reports an attempted murder in the aftermath of the 11 December 2015 attacks on military camps.<sup>148</sup>

63. According to the material submitted, the bodies of those executed were buried in mass graves in Bujumbura and surrounding areas.<sup>149</sup> The existence of at least nine mass graves has been reported.<sup>150</sup>

64. **Killings conducted in secret.** According to the material submitted, while the number of executions in the streets declined after the events of 11 December 2015, from the beginning of 2016 the security forces committed extrajudicial, often collective, executions in secret. Individuals were allegedly arrested, forced to board pick-up trucks, sometimes with tinted windows, driven to secret isolated locations, often blindfolded, and summarily executed.<sup>151</sup> Some of the killings appear to have taken place on plains and in forests.<sup>152</sup> For example, on the morning of 16 April 2016, a military truck full of individuals allegedly entered the forest of Kibira National Park and came back out empty later that morning.<sup>153</sup> Reports also indicate that persons died while in the custody of the security forces following acts of torture.<sup>154</sup> This is also supported by a communication presented on behalf of victims.<sup>155</sup> Notably, small common graves containing up to five bodies have become more common, instead of mass graves, which can be identified through satellite imagery.<sup>156</sup>

65. **Targeted killings.** The available information reveals that assassinations and attempted assassinations were carried out against members of opposition parties,

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<sup>148</sup> BDI-OTP-0006-0002 at 0487.

<sup>149</sup> BDI-OTP-0003-1211, at 1247, para. 103; BDI-OTP-0003-4258, at 4265, para. 44; BDI-OTP-0003-1932, at 1963, at 2016; BDI-OTP-0003-1793, at 1863-1865.

<sup>150</sup> BDI-OTP-0003-4293, at 4295, para. 8.

<sup>151</sup> BDI-OTP-0003-1932, at 1982-1986.

<sup>152</sup> BDI-OTP-0005-0003, at 0010, para. 33; BDI-OTP-0003-1932, at 1984.

<sup>153</sup> BDI-OTP-0003-1932, at 1984.

<sup>154</sup> BDI-OTP-0003-1932, at 2006; *see also* BDI-OTP-0005-0003, at 0010, para. 32.

<sup>155</sup> BDI-OTP-0004-0448 at 0689, mentioning deaths in detention after torture [REDACTED].

<sup>156</sup> BDI-OTP-0003-1932, at 1984.

human rights activists and their relatives, and ex-FAB soldiers, as early as the end of April 2015. Persons were targeted on the territory of Burundi as well as in other countries where they had sought refuge, such as Rwanda, Tanzania, the DRC, Uganda, Kenya, Sudan and South Sudan.<sup>157</sup> The acts appear to have been carried out by police officers, SNR agents, *Imbonerakure* members, or unidentified armed men.<sup>158</sup> Several communications presented on behalf of victims also confirm the targeted killings of political opponents, whether from the “Movement for Solidarity and Development” (“MSD”) or the “*Union pour la paix et la démocratie*”-Zigamibanga (“UPD-Zigamibanga”).<sup>159</sup>

66. More specifically, the Chamber notes that: (i) in late April 2015, in Bujumbura, a member of an opposition party was fired at by a police officer;<sup>160</sup> (ii) on 15 May 2015, in Bujumbura, armed men wearing spotted blue uniforms allegedly shot and killed a nurse who was an active member of the opposition party “Front for Democracy in Burundi” (“FRODEBU”). One of the victim’s relatives indicated that he had received threatening phone calls and text messages in the days prior to the incident;<sup>161</sup> (iii) on 23 May 2015, Zedi Feruzi, the president of the opposition party UPD-Zigamibanga, and one of his bodyguards were allegedly shot dead by men wearing API uniforms, in Bujumbura. On 7 September 2015, the UPD spokesperson was gunned down in Bujumbura, after having received threats;<sup>162</sup> (iv) on 3 August 2015, Pierre Claver Mbonimpa, president of the Burundian human rights organization “*Association pour la protection des droits humains et des personnes détenues*” (“APRODH”) was shot and wounded in the face and neck by a man allegedly working with the intelligence services while on his way home from work, in Bujumbura. On 9 October 2015, his son-in-law, Pascal Nshimirimana, also a member

<sup>157</sup> BDI-OTP-0003-1932, at 1988-1990.

<sup>158</sup> BDI-OTP-0003-1932, at 1990; BDI-OTP-0005-0003, at 0011, para. 35.

<sup>159</sup> BDI-OTP-0004-0448 at 0460 and BDI-OTP-0004-0448 at 0986.

<sup>160</sup> BDI-OTP-0003-1932, at 1988.

<sup>161</sup> BDI-OTP-0003-1661, at 1677.

<sup>162</sup> BDI-OTP-0003-1661, at 1677; BDI-OTP-0003-1932, at 1988.



of APRODH, was killed in the street in Bujumbura by unidentified persons, and on 6 November 2015, one of his sons, Welly Fleury Nzitonda, was shot and killed by a policeman after having shown his identity card during a check;<sup>163</sup> (v) three members of the opposition party MSD were allegedly killed, one on 30 September 2015 (the president of the party), another on 16 or 17 October 2015 (after having been abducted by men suspected of belonging to the SNR), and the third on 1 January 2016 (in Nairobi, Kenya, by a man suspected of being an *Imbonerakure*);<sup>164</sup> (vi) in March 2016, a Burundian refugee in Uganda was stabbed in the head in an assassination attempt;<sup>165</sup> and (vii) on 10 April 2016, the body of an ex-FAB soldier, who had been arrested the previous day by the police, was found in Gesenyi, near Citiboke.<sup>166</sup>

(iii) *Conclusion*

67. The Chamber finds a reasonable basis to believe that the crime of murder and attempted murder as a crime against humanity, pursuant to articles 7(1)(a) and 25(3)(f) of the Statute, was committed by the Burundian security forces and members of the *Imbonerakure* against civilians who opposed or were perceived to oppose the ruling party as part of a widespread and systematic attack against the Burundian civilian population.

b) Imprisonment or Severe Deprivation of Liberty

(i) *The Law*

68. The crime of imprisonment or other severe deprivation of physical liberty, within the meaning of article 7(1)(e) of the Statute, is committed when: (i) the

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<sup>163</sup> BDI-OTP-0003-4119, at 4129, para. 40; BDI-OTP-0003-4258, at 4266, para. 49; BDI-OTP-0003-1793, at 1910.

<sup>164</sup> BDI-OTP-0003-1932, at 1988 and 1990.

<sup>165</sup> BDI-OTP-0003-1932, at 1989-1990.

<sup>166</sup> Office of the United Nations High Commissioner for Human Rights, Media Centre, “Torture and illegal detention on the rise in Burundi”, 18 April 2016, BDI-OTP-0003-4329, at 4330 (“BDI-OTP-0003-4329”); *see also* BDI-OTP-0003-1932, at 1967, according to which news of assassinations, forced disappearances, torture and/or arbitrary arrests of ex-FAB members continued to appear on a regular basis in 2016.

perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty; and (ii) the gravity of the conduct was such that it was in violation of fundamental rules of international law.<sup>167</sup> The Chamber understands “imprisonment” to encompass unlawful captivity of a person in an enclosed environment, such as a prison or psychiatric institution; “other severe deprivation of physical liberty” denotes the unlawful restriction of the person’s movements to a specific area, such as a ghetto, camp or a house. Importantly, it is required that such deprivation of physical liberty is in violation of fundamental rules of international law, *i.e.* the person must have been deprived of his or her physical liberty without due process of law.<sup>168</sup> The conduct is in violation of fundamental rules of international law<sup>169</sup> if, for example, there is no legal basis to detain a person or the person is denied any procedural rights. The brevity of detention alone cannot be brought forward as an argument to deny the severity of the deprivation of physical liberty.<sup>170</sup> In this regard, the Chamber notes that article 7(1)(e) of the Statute does not require the imprisonment or the deprivation of liberty to be for a prolonged

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<sup>167</sup> See first and second paragraphs of the Elements of Crimes of article 7(1)(e) of the Statute.

<sup>168</sup> *In the same vein*, International Criminal Tribunal for the former Yugoslavia (“ICTY”), *Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-T, [Judgement](#), 26 February 2001, para. 302; *Prosecutor v Krnojelac*, Case No. IT-97-25-T, [Judgement](#), 15 March 2002, para. 113; International Criminal Tribunal for Rwanda (“ICTR”), *Prosecutor v Ntagerura et al.*, Case No. ICTR-99-46-T, 25 February 2004, [Judgement and Sentence](#), para. 702; Extraordinary Chambers in the Courts of Cambodia (“ECCC”), *Prosecutor v KAING Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007/ECCC/TC, [Judgement](#) (“Duch Judgment”), 26 July 2010, para. 347.

<sup>169</sup> Articles 9-11 of the [Universal Declaration of Human Rights](#) (GA/RES/217 A(III) of 10 December 1948); articles 9-11, 14 and 15 of the [International Covenant on Civil and Political Rights](#) (UNTS, vol. 999, p. 171); article 37 of the [Convention on the Rights of the Child](#) (UNTS, vol. 1577, p. 44) articles 6-7 of the [African Charter on Human and Peoples’ Rights](#) (UNTS, vol. 1520, p. 217); articles 7-9 of the [American Convention on Human Rights](#) (UNTS, vol. 1144, p. 143); articles 5-7 of the (European) [Convention for the Protection of Human Rights and Fundamental Freedoms](#) (UNTS vol. 213, p. 221); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Res. 43/173 of 9 December 1988.

<sup>170</sup> The Chamber, interpreting and applying the Rome Statute in conformity with internationally recognized human rights pursuant to article 21(3) of the Statute, pays heed to the case-law under international human rights instruments determining a violation of liberty when the persons were detained for a relatively short time, *see* Human Rights Committee, *Isidore Kanana Tshionga a Minanga v. Zaire*, 8 November 1993, Communication No. 366/1989 (detention of less than 12 hours); *Portorreal v Dominican Republic*, 5 November 1987, Communication No. 188/1984 (detention of about 50 hours); *Spakmo v Norway*, 5 November 1999, Communication No. 631/1995 (detention of eight hours); European Court of Human Rights (“ECtHR”), *Case of Quinn v France*, Application no. 18580/91, Judgment of 22 March 1995, paras 39-43 (detention of 11 hours); *Case of Ruslan Yakovenko v Ukraine*, Application No. 5425/11, Judgment of 4 June 2015, paras 67-70 (detention of two days); *Case of Gębura v Poland*, Application No. 63131/00, Judgment of 6 March 2007, para. 35 (detention of two days).

period of time, contrary to what is provided for in article 7(2)(i) of the Statute for the crime of enforced disappearance.

(ii) *The Facts*

69. The supporting material indicates that since at least 25 April 2015 members of the Burundian security forces and the *Imbonerakure* have arbitrarily arrested and detained persons who opposed, or were perceived to oppose the ruling party and/or President Nkurunziza's third term. It is estimated that, in the period between April 2015 and April 2016, between 5,881 and 8,000 arrests and detentions were carried out by police and intelligence officers, often assisted by members of the *Imbonerakure*, as well as by the FDN.<sup>171</sup>

70. The arrests and detentions followed three main trends. At first, persons who participated in or were suspected of having participated in the protests were targeted.<sup>172</sup> It is reported that 800 persons were arrested between April and July 2015.<sup>173</sup> Among those arrested were also members and candidates of the opposition parties and their supporters, human rights activists and members of the civil society, as well as journalists.<sup>174</sup> Between 25 April and 8 May 2015, 16 members of the MSD and supporters of the *Forces nationales de liberation* ("FNL") were reportedly arrested and detained for insurrection.<sup>175</sup>

71. Second, after the attempted *coup* of 13 May 2015, mass arrests were carried out in the course of cordon and search operations in neighbourhoods of Bujumbura considered to be associated with the opposition.<sup>176</sup> It is reported that 828 arrests were

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<sup>171</sup> BDI-OTP-0003-4119, at 4125, paras 18-19; BDI-OTP-0003-1932, at 1960-1961; BDI-OTP-0003-1793, at 1897; BDI-OTP-0003-4258, at 4268, para. 65.

<sup>172</sup> BDI-OTP-0003-4258, at 4268, para. 65; BDI-OTP-0003-1211, at 1231, para. 52 and at 1255, para. 127.

<sup>173</sup> BDI-OTP-0003-1932, at 1958 and 1960; *see also* BDI-OTP-0003-1211, at 1235, para. 65 according to which "some 470 people were in detention in relation to the protests and riots of April and May 2015".

<sup>174</sup> BDI-OTP-0003-1211, at 1231, para. 52 and at 1237, para. 71; BDI-OTP-0003-4119, at 4125, paras 18-19.

<sup>175</sup> BDI-OTP-0003-4331, at 4342, para. 44.

<sup>176</sup> BDI-OTP-0003-4258, at 4268-4269, paras 65 and 68.

carried out in September 2015 alone.<sup>177</sup> Individuals were arrested on suspicion of having engaged in acts supporting the attempted *coup*, having joined rebel movements, or being part of groups that attacked the security forces.<sup>178</sup>

72. Third, after September 2015, the number of arrests decreased to an average of 200 to 400 arrests a month, but continued into 2016 and 2017.<sup>179</sup> By February 2016 arbitrary arrests had allegedly become a daily occurrence, with 100 to 150 persons being arrested every week.<sup>180</sup> It appears that the arrests were, at least in part, conducted in the course of search operations and were prompted by grenade attacks.<sup>181</sup> It is estimated that in March 2016, around 70 people were arbitrarily arrested each week in Bujumbura. Some were freed on the same day or a few days later, often after the payment of a ransom. On 21 April 2016, approximately 120 people were allegedly arrested on that day alone in Bujumbura.<sup>182</sup> Members of opposition parties, perceived opponents and journalists working for private and independent media continued to be subject to arbitrary arrests, detention and ill-treatment in 2017. In January 2017, at least 35 members of opposition parties were arrested.<sup>183</sup> Ex-FAB members were also regularly targeted in 2016 and 2017, including through arbitrary arrests.<sup>184</sup>

73. Throughout the period under review, arrests and detentions were carried out mainly in the capital, but also in Bujumbura Rural and in other provinces, in particular Bururi, Cibitoke, Gitega, Makamba, Mwaro, and Rutana.<sup>185</sup> It is reported that arrests were also common at the boarder of Burundi.<sup>186</sup>

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<sup>177</sup> BDI-OTP-0003-4119, at 4125, paras 18-19.

<sup>178</sup> BDI-OTP-0003-1211, at 1239, para. 78, at 1255, para. 127; BDI-OTP-0003-1932, at 1960.

<sup>179</sup> BDI-OTP-0003-4119, at 4125-4126, paras 19-20 and 23.

<sup>180</sup> BDI-OTP-0003-1932, at 2001.

<sup>181</sup> BDI-OTP-0003-1932, at 2011.

<sup>182</sup> BDI-OTP-0003-1932, at 2001.

<sup>183</sup> BDI-OTP-0003-4558, at 4564, paras 29 and 33.

<sup>184</sup> BDI-OTP-0003-1932, at 1967; BDI-OTP-0003-4558, at 4564, para. 29.

<sup>185</sup> BDI-OTP-0003-1932, at 1996; BDI-OTP-0003-1211, at 1235, para. 65.

<sup>186</sup> BDI-OTP-0003-4258, at 4269, para. 68; BDI-OTP-0003-1932, at 1962.

74. The supporting material shows that arrested persons were kept in detention centres run by the police and the SNR, as well as in unofficial places of detention, in Bujumbura and in other provinces.<sup>187</sup> Places of detention in Bujumbura reportedly included: the headquarters of the SNR, located near Bujumbura Cathedral; a police detention centre known as “Chez Ndadaye”, reportedly used mainly in 2015 by the BAE; the basement of the headquarters of the CNDD-FDD in Ngagara; a bar called “Twabo w’Abantu” in Kamenge, which belonged to the late General Adolphe Nshimirimana; private homes, such as the basement of the residences of General Guillaume Bunyoni, Minister of Public Security, in Kinanira and Gasekebuye, and a house in Kigobe allegedly belonging to members of the API; the building of the water supply distribution company (“REGIDESO”) in Ngagara, near King Khaled Hospital; containers serving as military positions next to the REGIDESO building in Kigobe; and uninhabited houses. Reported places of detention in Ngozi include: the basement of the SNR; the houses of President Nkurunziza in Mwumba commune; and a bar called “Chez Nyamugaruka”, in Vyegwa.<sup>188</sup>

75. According to the supporting material, many of the arrests, notably those made in homes, were carried out without arrest warrants.<sup>189</sup> Additionally, the persons detained were often not notified of the charges brought against them, were not informed of their rights and were not brought promptly before a court of law.<sup>190</sup> For example, several detainees of the Mpimba prison in Bujumbura, who had reportedly been arrested during the demonstrations in the first half of 2015, had not been put on trial for any offence by March 2016.<sup>191</sup> It is reported that, according to a senior justice official, in some cases ruling party members controlled the fate of detainees and gave orders to the police to fabricate accusations against certain people. Some prosecutors

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<sup>187</sup> BDI-OTP-0005-0003, at 0012, para. 45.

<sup>188</sup> BDI-OTP-0003-4258, at 4269-4270, paras 71-72; BDI-OTP-0003-1932, at 2006-2013.

<sup>189</sup> BDI-OTP-0003-1211, at 1255, para. 128; BDI-OTP-0003-1793, at 1834.

<sup>190</sup> BDI-OTP-0003-1211, at 1239-1240, paras 78 and 81; BDI-OTP-0005-0003, at 0011-0012, para. 41.

<sup>191</sup> BDI-OTP-0003-4258, at 4269, para. 70, at 4260, para. 5.

allegedly collaborated with SNR agents to determine what charges to file against individuals arrested by the SNR or by the *Imbonerakure* and whether to keep them in detention.<sup>192</sup>

76. The available information reveals that, at times, the arrests were carried out by members of the *Imbonerakure*, who then transferred the arrested persons into the custody of the SNR or the police.<sup>193</sup> A high-ranking justice official reportedly stated that: “The *Imbonerakure* arrest people and take them to the police after beating them and injuring them seriously. Instead of taking them to the hospital, the police imprison them because of political pressure”.<sup>194</sup>

77. It is further reported that most of the prisoners were not allowed to contact a lawyer or petition a court to rule on the legality of their detention, were held beyond the legally allowed time limits, were not allowed to contact their families or receive visits, and in some instances, were refused medical care or were not fed for several days.<sup>195</sup> It is alleged that the SNR prevented lawyers from entering their headquarters.<sup>196</sup>

78. More specifically, at the end of May 2015, a man who had participated in the protests was allegedly arrested and taken to the SNR compound near the Bujumbura Cathedral. He was kept there for three days. During his time in detention he was held in very small rooms. It is alleged that one of them was so small that he had no space to lie down and had to sleep sitting. Another room had small rocks embedded in the floor. He was also subjected to physical abuse while in detention. Before being released he was asked to write a list of every person he knew and to sign a

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<sup>192</sup> BDI-OTP-0003-1793, at 1898.

<sup>193</sup> BDI-OTP-0005-0003, at 0009, para. 27; BDI-OTP-0003-1793, at 1901.

<sup>194</sup> BDI-OTP-0003-1793, at 1905.

<sup>195</sup> BDI-OTP-0003-4293, at 4300, para. 22; Amnesty International, “Just Tell Me What to Confess To”: Torture and Ill-Treatment by Burundi’s Police and Intelligence Service Since April 2015, 24 August 2015, BDI-OTP-0003-1582, at 1584, at 1592 (“BDI-OTP-0003-1582”); BDI-OTP-0003-4119, at 4126, para. 25; BDI-OTP-0005-0003, at 0012, para. 44.

<sup>196</sup> BDI-OTP-0003-1793, at 1833.

document promising not to take part in any more protests.<sup>197</sup> Another demonstrator, who was allegedly arrested between 15 and 16 May 2015, was detained for three days at “Chez Ndadaye”. While in detention, he was subjected to physical abuse and was kept in a container, with no beds and no blankets. It is alleged that at times there were as many as 20 persons in the container. He did not receive any visits while in detention.<sup>198</sup>

79. Another alleged victim who was detained at the same SNR compound near the cathedral in late June 2015 reportedly stated that many members of the MSD and the FNL were detained by the SNR and that people were beaten badly.<sup>199</sup> The leader of an opposition party was allegedly held in an SNR jail for a month, sometime in 2015, before being transferred to a prison. There, he was repeatedly subjected to physical abuse, but never received any treatment for the injuries suffered.<sup>200</sup>

80. Further, on 26 June 2015, a group of *Imbonerakure* arrested five young men who were attempting to cross into Rwanda. The leader of the *Imbonerakure* is reported to have said at the time: “We need to call the intelligence police because they [those they had captured] are numerous”. After he called the SNR, intelligence officers came to pick them up and handcuffed them. They spent two days in the custody of the SNR, after which they were transferred to the judicial police. While at the SNR, they were allegedly accused of being rebels, physically abused, and asked to collaborate with the SNR in order to be freed. They were released from the judicial police on 10 July 2015.<sup>201</sup>

81. The supporting material further shows that during the cordon and search operation that took place on 11 December 2015 in Bujumbura, about 300 young men

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<sup>197</sup> BDI-OTP-0003-1582, at 1587.

<sup>198</sup> BDI-OTP-0003-1582, at 1591.

<sup>199</sup> BDI-OTP-0003-1582, at 1588-1589.

<sup>200</sup> BDI-OTP-0003-1932, at 2009.

<sup>201</sup> BDI-OTP-0003-1793, at 1901.

were arrested in their homes.<sup>202</sup> A 39-year-old man who was among those arrested reportedly stated that he was taken from his home by men from the API, the BAE and soldiers, who beat him. He was taken to a detention centre known as *Bureau spécial de recherche*, where he was beaten again by the police. The Bujumbura prosecutor accused him of being an opposition fighter and denied him medical treatment. He was released after four days.<sup>203</sup>

82. In February 2016, a 34-year-old man, who was arrested on the street in Bujumbura by men in police uniforms, was allegedly detained for ten days in a toilet room at the SNR headquarters, after having been beaten with a steel rod. On the tenth day he was brought to the judicial police and ordered to tell them that he had just been arrested.<sup>204</sup>

83. On 18 April 2016, a student in a northern province was taken by members of the *Imbonerakure* in a truck belonging to the local government and brought to a house where he was kept for four days in a cellar. He was tied up throughout that whole time and was beaten twice every day: once around 6 in the morning, and again at around 8 in the evening.<sup>205</sup>

84. It is further alleged that, in many cases, large amounts of money have been demanded by members of the SNR, the police, the judiciary or the *Imbonerakure* for the release of detainees or their transfer to prisons.<sup>206</sup>

85. The detention of children has also been reported. The material submitted reveals that children are rarely separated from adults. In addition, in several cases, their ages were raised when they were registered so that they could be regarded as

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<sup>202</sup> Reportedly, at least 154 of them were later found dead on the streets of Bujumbura on 11 and 12 December 2015; BDI-OTP-0003-1932, at 1963.

<sup>203</sup> BDI-OTP-0003-1793, at 1862-1863.

<sup>204</sup> BDI-OTP-0003-1793, at 1833.

<sup>205</sup> BDI-OTP-0003-1793, at 1837-1838.

<sup>206</sup> BDI-OTP-0005-0003, at 0012, para. 44; BDI-OTP-0003-4258, at 4269, para. 67; BDI-OTP-0003-1793, at 1836.



adults during the investigation.<sup>207</sup> For instance, on 10 and 11 July 2015, following an attack on the armed forces in the provinces of Cibitoke and Kayanza, at least 220 people, including over 50 children, were reportedly arrested by the FDN.<sup>208</sup> They were held in the prison in Rumonge, an adult prison, in reportedly poor conditions with limited sanitation facilities. The children were charged with “involvement in armed groups”. By 5 August 2015, one had been released on probation, 17 had been sentenced and 34 remained in preventive detention. All children were released on 30 November 2015 following the intervention of the Office of the High Commissioner for Human Rights (“OHCHR”) and the United Nations Children’s Fund (“UNICEF”).<sup>209</sup> Most of the adults held were reportedly still in detention on 30 April 2016.<sup>210</sup>

86. In another instance, on 18 January 2016, members of the police and the FDN reportedly arrested three girls aged between 14 and 16 years in Bujumbura. After the arrest, they were transferred to a military post in Gatoke and then to the SNR. Police officers, SNR agents and members of the FDN reportedly threatened them with death to confess to being members of an armed group. They also forced them to state that they were adults. The girls were released after eight days, following the intervention of the OHCHR, UNICEF and the Independent National Human Rights Commission (“INCHR”), as they could not be charged.<sup>211</sup>

87. The above is further supported by numerous communications submitted by or on behalf of victims relating incidents of arbitrary arrest and detention between May 2015 and March 2017. Most of the time the arrests were carried out very brutally, no judicial warrant was shown to the person arrested and no legal reason was given to

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<sup>207</sup> BDI-OTP-0003-4119, at 4126, para. 25.

<sup>208</sup> BDI-OTP-0003-4119, at 4125, para. 21.

<sup>209</sup> UNICEF, Burundi Humanitarian Situation Report, 12 August 2015, BDI-OTP-0003-4509, at 4510-4511.

<sup>210</sup> BDI-OTP-0003-4119, at 4125, para. 21.

<sup>211</sup> BDI-OTP-0003-4119, at 4126, para. 23.

justify the arrest and detention.<sup>212</sup> [REDACTED].<sup>213</sup> Victims also complain that their detention was not registered anywhere.<sup>214</sup> They also indicate that they did not have access to a lawyer<sup>215</sup> or were not presented to a judge,<sup>216</sup> sometimes for several months. Victims are often able to identify the alleged perpetrators and to explain how they were released from detention, such as when a policeman had known the victim for a long time and intervened in his or her favour.<sup>217</sup> Detentions are very often linked to acts of torture.

(iii) *Conclusion*

88. The Chamber recalls that in the context of the demonstrations, some of the protesters engaged in violent acts, that grenade attacks against the Burundian security forces occurred regularly, in particular after the attempted *coup*, and that clashes between the security forces and anti-government entities were also recorded.<sup>218</sup> The Chamber accepts as plausible that some of the arrests and detentions were initially carried out on lawful grounds in response to such acts of violence.

89. However, for the purposes of these article 15 proceedings, the Chamber finds the supporting material sufficient to reasonably conclude that the Burundian security forces systematically arrested and detained civilians in violation of fundamental rules of international law. The Chamber has taken into account that: (i) individuals were detained without any legal basis, with many of the arrests being carried out without an arrest warrant; (ii) arrests were at times carried out by persons who did not have the legal authority to arrest (*i.e.* members of the

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<sup>212</sup> See, for example, BDI-OTP-0004-0448 at 0599; BDI-OTP-0006-0002 at 0409.

<sup>213</sup> [REDACTED].

<sup>214</sup> BDI-OTP-0004-0448 at 0510 (detention by the SNR).

<sup>215</sup> BDI-OTP-0004-0448 at 0842 and BDI-OTP-0006-0002 at 0361.

<sup>216</sup> BDI-OTP-0006-0002 at 0478 and BDI-OTP-0006-0002 at 0447.

<sup>217</sup> BDI-OTP-0004-0448, at 0700.

<sup>218</sup> See above paras 35, 37-38; see also below para. 139.

*Imbonerakure*); (iii) some of those arrested were seemingly held in pre-trial detention beyond the legally allowed time limits; and (iv) they were denied any procedural rights, such as the right to counsel, the right to have the lawfulness of their detention promptly determined, the right to be informed of the charges against them and to appear before a judge, and the right to have access to family and to medical care. The Chamber also notes that detainees were sometimes kept in unofficial places of detention, at times in very small cells or in containers.

90. In light of the above, the Chamber finds a reasonable basis to believe that the crime of imprisonment or other severe deprivation of physical liberty as a crime against humanity, pursuant to article 7(1)(e) of the Statute, was committed by the Burundian security forces and members of the *Imbonerakure* against civilians who opposed or were perceived to oppose the ruling party, as part of a widespread and systematic attack against the Burundian civilian population.

c) Torture

(i) *The Law*

91. The crime of torture, within the meaning of article 7(1)(f) and (2)(e) of the Statute, is committed, either by act or omission, when the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons in his or her custody or under his or her control.<sup>219</sup> Article 7(2)(e) of the Statute further clarifies that the intentional infliction of severe pain or suffering, “shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.<sup>220</sup>

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<sup>219</sup> See first and second paragraphs of the Elements of Crimes of article 7(1)(f) of the Statute. As to the severity threshold, see [Bemba Confirmation Decision](#), para. 193; similarly also ECCC, [Duch Judgment](#), para. 355; ECtHR, *Case of El Masri v The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgment, 13 December 2012, para. 197; *Case of Gäfgen v Germany*, Application No. 22978/05, Judgment, 3 June 2010, para. 90.

<sup>220</sup> See third paragraph of the Elements of Crimes of article 7(1)(f) of the Statute. The Chamber also pays heed to footnote 14 of the Elements of Crimes which stipulates: “It is understood that no specific purpose need be proved for this crime”.

(ii) *The Facts*

92. The supporting material indicates that since at least 26 April 2015 members of the Burundian security forces and the *Imbonerakure* have engaged in acts of torture of persons who opposed, or were perceived to oppose the ruling party. With regard to the starting date, the Chamber notes that it has received several victims' communications relating to acts of torture committed several days or even weeks before 26 April 2015.<sup>221</sup> The Chamber will take this into account when deciding on the temporal scope of the investigation.

93. The material reveals that in the period between April 2015 and April 2016, between 595 and 651 cases of torture were documented.<sup>222</sup> More than half – specifically 345 – are reported to have occurred between January and April 2016.<sup>223</sup> Acts of torture appear to have continued also into 2017.<sup>224</sup> For example, following an attack on a military camp in Mukoni, Muyinga province, on 23 January 2017, 18 people were arrested and sentenced to 30 years of imprisonment. It is alleged that eight of them were severely tortured.<sup>225</sup> In January 2017, at least 35 members of opposition parties were arrested, of whom at least ten were reportedly ill-treated or tortured.<sup>226</sup>

94. The victims appear to be mainly members of the opposition, members of civil society and persons suspected of belonging to rebel movements, but also more broadly persons suspected of being against the CNDD-FDD, including individuals

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<sup>221</sup> BDI-OTP-0004-0047 and BDI-OTP-0006-0002 at 0213-0214.

<sup>222</sup> BDI-OTP-0003-4329, at 4329; BDI-OTP-0003-4119, at 4127, para. 27.

<sup>223</sup> BDI-OTP-0003-4329, at 4329.

<sup>224</sup> BDI-OTP-0003-4558, at 4564, para. 29.

<sup>225</sup> BDI-OTP-0003-4558, at 4562, para. 23.

<sup>226</sup> BDI-OTP-0003-4558, at 4564, para. 29.

who participated in or were believed to have participated in demonstrations, and journalists.<sup>227</sup>

95. Numerous sources report a variety of forms and methods of ill-treatment including: beating (on the back, legs, ankles, genitalia) with pieces of rebar, batons, electric cables, rifle butts, wooden sticks, branches, or military belts; stabbing with bayonets or knives; tying weights to a person's testicles; pulling a cord attached to the testicles; burning with battery acid; electrocution; dunking in water; walking or jumping on the person; being forced to look into the sun; making the person think that he is going to be killed; tightly tying the arms behind the back for several days; poking fingers in the eyes; crushing fingers and toes with pliers; tying the person upside down by the feet (known as "*amagurizege*" in Kirundi) or, as reported in a victim's communication, tying the person up like an aeroplane or like a chicken to be roasted ("*manière dont on ligote un poulet que l'on veut rôtir*", known as "*uwindege*" in Kirundi);<sup>228</sup> or progressively burning the body with a blowtorch or gas cylinder.<sup>229</sup> In the majority of cases, torture and ill-treatment was inflicted to punish the victims or to obtain confessions or information, for example on hidden weapons and the whereabouts of other persons.<sup>230</sup>

96. Acts of torture and ill-treatment against detainees were reported to have taken place in particular in the detention centres of the SNR, the police, and unofficial places of detention (in particular, the headquarters of the SNR, the police detention centre known as "*Chez Ndadaye*", and the "*Iwabo w'Abantu*" bar).<sup>231</sup> For example, it is reported that of the 67 detainees observed between 11 and 15 April 2016 at SNR

<sup>227</sup> BDI-OTP-0003-4119, at 4127, paras 27-29; BDI-OTP-0003-1211, at 1239, para. 78; BDI-OTP-0003-1932, at 1961; BDI-OTP-0003-1582, at 1589-1592.

<sup>228</sup> BDI-OTP-0004-0448 at 0787.

<sup>229</sup> BDI-OTP-0003-4258, at 4266-4267, para. 54; BDI-OTP-0005-0003, at 0012, para. 46; BDI-OTP-0003-4119, at 4127, para. 28; BDI-OTP-0003-1793, at 1829-1838; BDI-OTP-0003-1582, at 1585-1592; BDI-OTP-0003-1932, at 2009.

<sup>230</sup> BDI-OTP-0003-4119, at 4127, para. 28; BDI-OTP-0003-4258, at 4266, para. 53; *see also below* paras 97, 101, 103-106.

<sup>231</sup> BDI-OTP-0003-1211, at 1239-1240, para. 80; BDI-OTP-0003-4293, at 4296, para. 12; BDI-OTP-0005-0003, at 0012, para. 45.

facilities in Bujumbura, 30 showed physical signs of torture.<sup>232</sup> The information available shows that torture and ill-treatment often also took place at the time of arrest,<sup>233</sup> and that members of the *Imbonerakure* engaged in acts of torture as well.<sup>234</sup> According to the supporting material, SNR officers prevented some detainees who bore physical signs of torture from being taken to the prosecutor's office. Instead, magistrates from the public prosecutor's office who are known to be loyal to the ruling party questioned tortured detainees at the SNR's premises in Bujumbura.<sup>235</sup>

97. The material submitted contains copious reports of torture, of which the Chamber highlights the following examples. A demonstrator who was allegedly arrested between 15 and 16 May 2015 was detained for three days at "Chez Ndadaye". While in detention, policemen beat him and other detainees on a daily basis, whipped them with small electric cables or with their batons, and walked on them in shoes. It is alleged that while doing so they made remarks such as: "dogs of demonstrators [...] we will beat you up until you no longer have the appetite to go in the street". At night the detainees were kept in a container, with no beds and no blankets.<sup>236</sup>

98. In mid-May 2015, a man was allegedly arrested in Bujumbura and taken to an SNR facility. There, a tyre was put around his neck and he was given three minutes to pray as a policeman went to look for fuel. He was then beaten with a metal bar and a man started jumping up and down on him.<sup>237</sup>

99. In late May 2015, a man who had taken part in the protests was allegedly beaten on a daily basis for three days while in detention in the SNR compound near the Bujumbura Cathedral. He and other detainees were beaten with pieces of rebar,

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<sup>232</sup> BDI-OTP-0003-4329, at 4329.

<sup>233</sup> BDI-OTP-0003-4329, at 4329.

<sup>234</sup> BDI-OTP-0003-4258, at 4266, para. 53; BDI-OTP-0003-1932, at 1961; BDI-OTP-0003-1793, at 1838.

<sup>235</sup> BDI-OTP-0003-1793, at 1832.

<sup>236</sup> BDI-OTP-0003-1582, at 1591.

<sup>237</sup> BDI-OTP-0003-1582, at 1586.

wooden sticks and military belts by individuals in civilian clothing. He was also dunked in water so he could not breathe. He was kept in small rooms where he had to sleep sitting or on small rocks.<sup>238</sup> In the same month, a man who was detained for 18 days by the SNR was reportedly forced to spread his legs and severely beaten on his genitals, causing permanent erectile dysfunction.<sup>239</sup>

100. In early June 2015, a man who had previously demonstrated was reportedly arrested by the police at his home. He was handcuffed and taken to “Chez Ndadaye”. There he was told to lie down on his stomach and policemen started beating him with batons and branches on his back and legs. He was beaten for about an hour. He was then told to look at the sun for 5-10 minutes, after which he was put in a very hot metal trolley. He was released after his family bribed the police.<sup>240</sup>

101. In June 2015, a young man was arrested and taken to the SNR compound near the Bujumbura Cathedral. When he got there, he was questioned about persons who had fired shots at night in the neighbourhood, and asked who had weapons and who the leaders of the demonstrations were. When he did not offer the information, he was beaten with a metal bar, and electric current was applied to his hands on different occasions.<sup>241</sup>

102. In late June 2015, a man who was arrested in the Kamenge area in Bujumbura was brought to the SNR compound near the cathedral and was reportedly held there for nearly a week. He was accused of organizing night watches and providing weaponry training to local youth. While in detention, he was hit with iron bars, made to sit in battery acid, and a five-litre container full of sand was tied to his testicles and left there for more than an hour.<sup>242</sup> The material submitted reveals that

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<sup>238</sup> BDI-OTP-0003-1582, at 1587.

<sup>239</sup> BDI-OTP-0003-4258, at 4268, para. 61.

<sup>240</sup> BDI-OTP-0003-1582, at 1591-1592.

<sup>241</sup> BDI-OTP-0003-1582, at 1588.

<sup>242</sup> BDI-OTP-0003-1582, at 1588; *see also* BDI-OTP-0003-4119, at 4127, para. 29.

according to another person who was held for a couple of days at the same SNR compound, during the same period, only three or four of the 15 persons in his cell were not tortured.<sup>243</sup>

103. The supporting material suggests that after the events of 11 December 2015, incidents of torture increased sharply. It is reported that the number of torture cases almost tripled in the space of a month, with 29 cases of torture and 42 cases of ill-treatment documented in December 2015.<sup>244</sup> In one instance, a 32-year-old teacher and his younger brother were stopped on the street by a group of police and *Imbonerakure* as they were heading home on the evening of 11 December 2015. They were tied with their arms behind their backs, their T-shirts were stripped off, their shoes removed and they were beaten at gunpoint with sticks, belts and barrels of rifles, including on their feet. They were questioned about their political affiliation and whether they were rebels. The beating and questioning allegedly went on until dawn on 12 December 2015.<sup>245</sup> The material also indicates that bodies found on the streets of Bujumbura on 12 December 2015 showed signs that their arms and legs had been tied behind their backs. It is reported that the “*uwindege*” technique (meaning “tied up like an aeroplane”) is frequently used by the Burundian security services.<sup>246</sup> Likewise, the Chamber received several communications from victims relating to severe acts of torture committed by SNR<sup>247</sup> or API<sup>248</sup> members in the aftermath of the 11 December 2015 events, sometimes with long lasting effects on victims,<sup>249</sup> and sometimes even committed against children.<sup>250</sup>

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<sup>243</sup> BDI-OTP-0003-1582, at 1588.

<sup>244</sup> Office of the United Nations High Commissioner for Human Rights, Media Centre, “Alarming new patterns of violations emerging in Burundi”, 15 January 2016, BDI-OTP-0003-4317, at 4317-4318.

<sup>245</sup> BDI-OTP-0003-1932, at 2008.

<sup>246</sup> BDI-OTP-0003-1932, at 2008.

<sup>247</sup> BDI-OTP-0006-0002, at 0192.

<sup>248</sup> BDI-OTP-0006-0002 at 0227.

<sup>249</sup> BDI-OTP-0006-0002 at 0196.

<sup>250</sup> BDI-OTP-0006-0002 at 0208.



104. Further, on 18 February 2016, a 22-year-old student was reportedly arrested in Bujumbura by men believed to be intelligence officers. He was put in a truck. In the back of the truck, the men started stomping on his chest and asking him about the location of hidden weapons and the whereabouts of others in the neighbourhood. He was brought to a house where the men took his clothes off and started beating him with an electric cable on his back and legs. While doing so, the men were allegedly saying: “When we hit you enough times, you will end up talking”. Later, they burnt him with a hot knife, cut him on his chest and pushed a sharpened steel bar into his leg until he lost consciousness.<sup>251</sup>

105. Also in February 2016, a 27-year-old man was arrested and taken to an SNR facility in Bujumbura. There, an electric cable was wrapped around his leg and plugged in and out of a socket as he was asked questions about the location of weapons. A cord was also wrapped around his genitals and pulled while he was questioned.<sup>252</sup>

106. Another man arrested by the police in Bujumbura in February 2016, was immediately beaten with truncheons and gun butts and asked to admit that he had collaborated with opposition leaders. He was then taken to the SNR headquarters where he was handcuffed to a chair that had iron sticking out of it and was beaten with a cable. He was kept for seven days, handcuffed, in a small room with no windows.<sup>253</sup> Another detainee who was also allegedly interrogated by an SNR agent about an opposition leader, in February 2016, had melting plastic dripped on him during the interrogation by an *Imbonerakure* member. His genitals were also cut with pliers while he was questioned.<sup>254</sup>

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<sup>251</sup> BDI-OTP-0003-1793, at 1830.

<sup>252</sup> BDI-OTP-0003-1793, at 1831.

<sup>253</sup> BDI-OTP-0003-1793, at 1832.

<sup>254</sup> BDI-OTP-0003-1793, at 1821.

107. In March 2016, a man in his early 30s was taken from his home at gunpoint in a pickup truck and driven to a military position in Bujumbura. There, his hands were tied behind his back with rope and his legs were then tied to his hands. He was suspended in this manner from a nail in the wall for three hours. He was also beaten for several hours and stabbed in his head and arm with a bayonet to make him reveal the location of hidden weapons. From the military position he was taken to an SNR facility in Bujumbura. There, he was beaten again and burning liquid was poured on him. It is reported that he was in so much pain that he asked to be killed on several occasions.<sup>255</sup>

108. All of the above is further supported by numerous communications from victims who provided extensive details as regards the methods used and the places where they were allegedly detained and tortured, at times in large groups of up to 70 persons<sup>256</sup> for periods up to several weeks.<sup>257</sup> Interestingly, victims are very often able to identify the alleged perpetrators and their affiliation, mostly the SNR but also the BAE, the PNB and the *Imbonerakure* (sometimes several forces acting in concert or successively), their respective ranks, but also their actual names<sup>258</sup> or nicknames.<sup>259</sup> Those tortures were allegedly committed from March 2015 until March 2017 on a regular basis mainly in Bujumbura, but also in other provinces such as Muramvya,<sup>260</sup> Kayanza,<sup>261</sup> Kirundo,<sup>262</sup> Karusi,<sup>263</sup> Rumonge<sup>264</sup> and Makamba.<sup>265</sup> Victims also describe how they were able to be released, very often after the payment of a ransom<sup>266</sup> or

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<sup>255</sup> BDI-OTP-0003-1793, at 1831.

<sup>256</sup> BDI-OTP-0004-0448, at 0642.

<sup>257</sup> BDI-OTP-0004-0448, at 0663; OTP-BDP-0004-0448, at 0674; BDI-OTP-0006-0002, at 0454 and BDI-OTP-0004-0047.

<sup>258</sup> BDI-OTP-0006-0002, at 0036; BDI-OTP-0006-0002, at 0101; BDI-OTP-0004-0448, at 0490; BDI-OTP-0004-0448, at 0524; BDI-OTP-0004-0448, at 0553 and BDI-OTP-0004-0448, at 0998.

<sup>259</sup> BDI-OTP-0004-0448, at 0566; BDI-OTP-0004-0448, at 0689 and BDI-OTP-0004-0448, at 0820.

<sup>260</sup> BDI-OTP-0006-0002, at 0202; BDI-OTP-0006-0002, at 0466.

<sup>261</sup> BDI-OTP-0006-0002, at 0155; BDI-OTP-0004-0448, at 0663.

<sup>262</sup> BDI-OTP-0004-0448, at 0454.

<sup>263</sup> BDI-OTP-0004-0448, at 0524.

<sup>264</sup> BDI-OTP-0004-0448, at 0813.

<sup>265</sup> BDI-OTP-0006-0002, at 0194.

<sup>266</sup> BDI-OTP-0004-0448, at 0689; BDI-OTP-0006-0002 at 0257; BDI-OTP-0006-0002 at 0169.

after the intervention of a State agent who did not want to participate in the torture. The victims' communications also indicate that those intervening in their favour were sometimes also subject to torture.<sup>267</sup> Finally, the victims describe the dire consequences of those acts of torture on them, such as long stays in hospital and even permanent disability.<sup>268</sup> Some victims have submitted medical certificates together with their communications.<sup>269</sup> Many of the victims explain in their communications that after the torture they sustained, they decided to leave the country.<sup>270</sup>

(iii) *Conclusion*

109. The Chamber is satisfied, against the required threshold, that members of the Burundian security forces and the *Imbonerakure* inflicted severe physical or mental pain or suffering upon persons in their custody or under their control. Such pain or suffering did not arise from and was not inherent in or incidental to lawful sanctions. The Chamber therefore finds a reasonable basis to believe that the crime of torture as a crime against humanity, pursuant to article 7(1)(f) and (2)(e) of the Statute, was committed by the Burundian security forces and members of the *Imbonerakure* against civilians who opposed or were perceived to oppose the ruling party, as part of a widespread and systematic attack against the Burundian civilian population.

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<sup>267</sup> BDI-OTP-0004-0448, at 0651; BDI-OTP-0004-0448, at 0998.

<sup>268</sup> BDI-OTP-0004-0448, at 0998.

<sup>269</sup> BDI-OTP-0004-0448, at 0566 and BDI-OTP-0004-0448, at 0674.

<sup>270</sup> BDI-OTP-0004-0448 at 0587.

d) Rape

(i) *The Law*

110. The crime of rape, within the meaning of article 7(1)(g) of the Statute, is committed when:<sup>271</sup>

1. The perpetrator invaded<sup>272</sup> the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>273</sup>

(ii) *The Facts*

111. Dozens of cases of sexual violence committed by police officers, military personnel and members of the *Imbonerakure* have been documented since April 2015.<sup>274</sup> Some of the victims are reported to be as young as eight years old.<sup>275</sup> According to the material submitted, women who fled the country in particular were subjected to sexual violence near the border by members of the *Imbonerakure*, unidentified armed men and border guards as a punishment for leaving the country.<sup>276</sup> Further, women who were related to males who opposed President Nkurunziza's third term in office or who were perceived as political dissidents were also the targets of sexual violence.<sup>277</sup> Such acts reportedly occurred during search operations in neighbourhoods of Bujumbura considered to be associated with the

<sup>271</sup> See first and second paragraphs of the Elements of Crimes of article 7(1)(g) of the Statute.

<sup>272</sup> Footnote 15 of the Elements of Crimes specifies: "The concept of "invasion" is intended to be broad enough to be gender-neutral".

<sup>273</sup> Footnote 16 of the Elements of Crimes specifies: "It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity"; see also [Bemba Judgment](#), paras 99-109; [Katanga Judgment](#), paras 963-966.

<sup>274</sup> BDI-OTP-0003-4119, at 4127, para. 30; BDI-OTP-0005-0003, at 0012, para. 48.

<sup>275</sup> BDI-OTP-0005-0003, at 0012, para. 48; BDI-OTP-0003-1793, at 1809.

<sup>276</sup> BDI-OTP-0005-0003, at 0013, para. 49; BDI-OTP-0003-4258, at 4267, para. 57; BDI-OTP-0003-1793, at 1812.

<sup>277</sup> BDI-OTP-0003-4258, at 4267, para. 58; BDI-OTP-0005-0003, at 0013, para. 49.

opposition, or while police officers or members of the *Imbonerakure* were in the process of arresting the victim's spouse or a male relative accused of belonging to an opposition party, of taking part in demonstrations or of refusing to join the CNDD-FDD.<sup>278</sup> The available information suggests that a number of acts of sexual violence were also committed during the demonstrations.<sup>279</sup> The most recent of the documented cases of sexual violence reportedly took place in 2017.<sup>280</sup> The communications sent on behalf of victims report the dire consequences of those rapes for the victims, not only from a medical but also from a social point of view, as women who have been raped tend to be abandoned by their husbands when the latter learn of the rape.<sup>281</sup>

112. More specifically, it is reported that in April 2015, the body of a woman was found in her house in Cibitoke, with a piece of wood inserted into her vagina, after armed men dressed in military uniform had been in her house.<sup>282</sup> In August 2015, a woman living in Cibitoke was sexually assaulted by members of *Imbonerakure* who came looking for her husband. When they did not find him, they allegedly tied her hands behind her back, hit her, and put their hands inside her vagina until her uterus came out. She was left bleeding.<sup>283</sup> In the same month, four *Imbonerakure* members, dressed in ruling party T-shirts, dragged the 17-year-old daughter of an MSD member to a banana grove near her house in Bujumbura, where they allegedly raped her. Her father was taken away that day and reportedly killed.<sup>284</sup> In October 2015, a 36-year-old woman was raped in the Mutakura neighbourhood of Bujumbura by three *Imbonerakure* members. They held her by the arms and legs and reportedly said "Let's kill her, she is an [...] FNL wife" as they raped her. Her

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<sup>278</sup> BDI-OTP-0003-4119, at 4127, para. 30; BDI-OTP-0005-0003, at 0013, para. 49.

<sup>279</sup> BDI-OTP-0003-4293, at 4298, para. 16; BDI-OTP-0003-4119, at 4127, para. 30.

<sup>280</sup> BDI-OTP-0005-0003, at 0012, para. 48.

<sup>281</sup> BDI-OTP-0006-0002, at 0316.

<sup>282</sup> BDI-OTP-0003-4258, at 4268, para. 60.

<sup>283</sup> BDI-OTP-0003-4258, at 4267, para. 59.

<sup>284</sup> BDI-OTP-0003-1793, at 1809.

husband was taken away and found dead in a nearby ditch the following day.<sup>285</sup> It is also reported in a communication sent on behalf of a victim that a 17-year-old girl, [REDACTED] was gang-raped in [REDACTED] 2015 and as a result was left pregnant.<sup>286</sup> In another communication, it is reported that a woman was gang-raped due to her being a member of [REDACTED].<sup>287</sup> Other communications sent on behalf of victims report that very often rapes occurred in front of family members.<sup>288</sup>

113. A high number of cases of rape reportedly occurred on the day of or in the days following the 11 December 2015 attacks on the military camps in Bujumbura, in the context of the security operations.<sup>289</sup> Members of the API, military police officers, other soldiers and members of the *Imbonerakure* reportedly entered homes, forced male residents to leave and then raped or gang-raped women and girls in their homes. Some of the victims reported they had also been insulted by the attackers on the basis of their actual or perceived political or ethnic affiliation.<sup>290</sup> It is alleged that *Imbonerakure* members were encouraged to rape Tutsi women to “give birth to little *Imbonerakure* Tutsi” and that these remarks were made on 11 and 12 December 2015 by members of the security forces and the *Imbonerakure*.<sup>291</sup> Victims in at least one communication submitted to the Chamber indicate that the CNDD-FDD acknowledged in April 2017 that this was indeed a slogan used by the *Imbonerakure*, although the CNDD-FDD stated that this should stop.<sup>292</sup>

114. In one instance, on 11 December 2015, API policemen reportedly entered a house in Mutakura, ordered the father to leave and forced his three daughters to “undress”, reportedly a euphemism used to refer to rape. The attackers allegedly

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<sup>285</sup> BDI-OTP-0003-1793, at 1804.

<sup>286</sup> BDI-OTP-0006-0002, at 0046.

<sup>287</sup> BDI-OTP-0006-0002, at 0370-0371.

<sup>288</sup> BDI-OTP-0004-0448 at 0684 and BDI-OTP-0004-0448 at 0721.

<sup>289</sup> BDI-OTP-0003-1932, at 2019.

<sup>290</sup> Report of the Secretary-General on conflict-related sexual violence, on conflict-related sexual violence, 22 June 2016, UN Doc. S/2016/361/Rev.1, BDI-OTP-0003-4136, at 4162, para. 84 (“BDI-OTP-0003-4136”).

<sup>291</sup> BDI-OTP-0003-1932, at 2022.

<sup>292</sup> BDI-OTP-0006-0002, at 0368.

returned on 14 December 2015 and raped the girls again.<sup>293</sup> In another incident, on 13 December 2015, a group of *Imbonerakure* forced their way into the home of a 22-year-old woman, beat her with sticks, and two of them raped her. It is alleged that the men had repeatedly forced their way into her home in the three months prior to the attack looking for her husband, verbally abusing her and accusing her of hiding him.<sup>294</sup>

115. Other reports include information about women who were raped in detention. In late February 2016, a 26-year-old local leader of an opposition party was raped by a senior policeman while she was detained overnight in a police station after she was accused of holding political meetings and of refusing to join the CNDD-FDD.<sup>295</sup> Another woman was reportedly raped (including gang-raped) over a period of four days in an SNR cell, including by police officers.<sup>296</sup> Rapes occurring in detention, committed by *Imbonerakure* and members of the police, are also reported by communications presented by victims, [REDACTED].<sup>297</sup>

(iii) *Conclusion*

116. The Chamber finds a reasonable basis to believe that the crime of rape as a crime against humanity, pursuant to article 7(1)(g) of the Statute, was committed by the Burundian security forces and members of the *Imbonerakure* against women and girls perceived to be associated with or to sympathize with the opposition against the ruling party, as part of a widespread and systematic attack against the Burundian civilian population.

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<sup>293</sup> BDI-OTP-0003-4136 at 4162, para. 84.

<sup>294</sup> BDI-OTP-0003-1793, at 1809.

<sup>295</sup> BDI-OTP-0003-1793, at 1811.

<sup>296</sup> BDI-OTP-0005-0003, at 0013, para. 50.

<sup>297</sup> [REDACTED].

e) Enforced Disappearance

(i) *The Law*

117. The crime of enforced disappearance, within the meaning of article 7(1)(i) and (2)(i) of the Statute,<sup>298</sup> “means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time”. Therefore, it is committed when:

1. The perpetrator:
  - a. Arrested, detained<sup>299</sup> or abducted one or more persons; or
  - b. Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.
2.
  - a. Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
  - b. Such refusal was preceded or accompanied by that deprivation of freedom.
3. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.
4. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
5. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.<sup>300</sup>

118. The crime consists of two inseparably interrelated components: (i) the victim’s deprivation of liberty; and (ii) the ensuing denial or suppression of information.

With regard to the first component, the Chamber understands the terms “arrest,

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<sup>298</sup> Footnotes 23 and 24 of the Elements of Crimes specify: “Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose” and “This crime falls under the jurisdiction of the Court only if the attack referred to in elements 7 and 8 occurs [*i.e. the contextual elements of crimes against humanity*] after the entry into force of the Statute”.

<sup>299</sup> Footnotes 25 and 26 of the Elements of Crimes specify: “The word ‘detained’ would include a perpetrator who maintained an existing detention” and “It is understood that under certain circumstances an arrest or detention may have been lawful”.

<sup>300</sup> See first, second, fourth, fifth and sixth paragraphs of the Elements of Crimes of article 7(1)(i) of the Statute.



detention or abduction” to cover comprehensively any form of deprivation of liberty of a person against his or her will. The crime also includes the scenario in which a victim, initially arrested and detained lawfully, may be “disappeared” in custody.<sup>301</sup> With regard to the second component, the Chamber holds that the refusal to acknowledge or give information encompasses outright denial or the giving of false information about the fate or whereabouts of the victim. Whether or not the victim’s family lodges a formal complaint,<sup>302</sup> the State authorities are duty-bound to commence an impartial and thorough investigation *ex officio* without delay into the disappearance of the victim.<sup>303</sup>

119. The crime is perpetrated by the State or by a political organization through authorization, support or acquiescence. Of relevance to this judgment is the conduct of State agents, such as the police, the intelligence service and the army, including groups that are implementing State policies. Internal political instability or any other public emergency may not be invoked to justify the conduct of State agents.<sup>304</sup>

120. As a result of the enforced disappearance, the victim is removed from the protection of the law, *i.e.* the victim no longer has access to judicial assistance and

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<sup>301</sup> See footnote 26 of the Elements of Crimes.

<sup>302</sup> See article 13(1), second sentence, of the [Declaration on the Protection of all Persons from Enforced Disappearance](#) (“1992 Declaration on Enforced Disappearance”), GA Res. 47/133 of 18 December 1992 (“Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint”); similarly article 12(2) of the [2006 International Convention for the Protection of All Persons from Enforced Disappearance](#) (“2006 Convention on Enforced Disappearance”), UNTS vol. 2716, p. 3.

<sup>303</sup> Human Rights Committee, *Sarma v Sri Lanka*, Communication No. 950/2000, 16 July 2003, para. 11; *Quinteros v Uruguay*, Communication No. 107/1981, 21 July 1983, para. 15; *Celis Laureano v Peru*, Communication No. 540/1993, 25 March 1996, para. 10; Inter-American Court of Human Rights (“IACtHR”), *Case of García and Family Members v Guatemala*, Judgment of 29 November 2012, para. 138; *Case of Heliodoro Portugal v Panama*, Judgment of 12 August 2008, para. 144; criticizing inadequate investigative activities into the disappearance of the victim, ECtHR, *Case of Timurtaş v Turkey*, Application No. 23531/94, Judgment, 13 June 2000, paras 89-90 and 104-105; *Case of Bazorkina v Russia*, Application No. 69481/01, Judgment, 27 July 2006, paras 118-125, 148.

<sup>304</sup> See also article 7 of the [1992 Declaration on Enforced Disappearance](#); article 1(2) of the [2006 Convention on Enforced Disappearance](#); article X of the [Inter-American Convention on Forced Disappearance of Persons](#) (Inter-American Convention on Forced Disappearance”), OAS Treaty Series No. 68, p. 33 [ILM 1429 (1994)].

legal procedures.<sup>305</sup> In this respect, oftentimes the manner in which the person is deprived of his or her liberty allows the Chamber to infer the intention to remove the victim from the protection of the law, such as the lack of a court order for the detention;<sup>306</sup> abduction in cars without licence plates and with tinted windows;<sup>307</sup> detention in secret, unofficial prisons;<sup>308</sup> non-registration of names of the detainees in official records;<sup>309</sup> or capture in desolate areas.<sup>310</sup> Lastly, the intended removal must be for a prolonged period of time. A period of several months or years certainly fulfils that requirement.

121. The crime of enforced disappearance is considered a continuous crime as long as the perpetrators continue to conceal the fate and whereabouts of the person or persons who have disappeared and these facts remain unclarified.<sup>311</sup>

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<sup>305</sup> See article 17 of the [2006 Convention on Enforced Disappearance](#); article XI of the [Inter-American Convention on Forced Disappearance](#); articles 6-7 of the [African Charter on Human and Peoples' Rights](#); article 9 of the [1966 International Covenant on Civil and Political Rights](#); article 7 of the [American Convention on Human Rights](#); article 5 of the (European) [Convention for the Protection of Human Rights and Fundamental Freedoms](#).

<sup>306</sup> Human Rights Committee, *Sarma v Sri Lanka*, Communication No. 950/2000, 16 July 2003, para. 9.4; *Celis Laureano v Peru*, Communication No. 540/1993, 25 March 1996, para. 8.6; ECtHR, *Case of El-Masri v The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgment, 13 December 2012, para. 236.

<sup>307</sup> IACtHR, *Case of Velásquez-Rodríguez v Honduras*, Judgment of 29 July 1988, paras 99-100; *Case of Godínez-Cruz v Honduras*, Judgment of 20 January 1989, paras 106, 110.

<sup>308</sup> IACtHR, *Case of Godínez-Cruz v Honduras*, Judgment of 20 January 1989, para. 153(d)(iii); *Case of Heliodoro Portugal v Panama*, Judgment of 12 August 2008, para. 89; ECtHR, *Case of El-Masri v The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgment, 13 December 2012, paras 236, 239.

<sup>309</sup> IACtHR, *Case of Goiburú et al. v Peru*, Judgment of 22 September 2006, para. 61(13)(b); similarly ECtHR, *Case of Kurt v Turkey*, Application No. 15/1997/799/1002, Judgment, 25 May 1998, para. 125; *Case of Çakıcı v Turkey*, Application No. 23657/94, Judgment, 8 July 1999, para. 105; *Case of Bazorkina v Russia*, Application No. 69481/01, Judgment, 27 July 2006, para. 147.

<sup>310</sup> IACtHR, *Case of Godínez-Cruz v Honduras*, Judgment of 20 January 1989, para. 154(b)(iii).

<sup>311</sup> See also article 17(1) of the [1992 Declaration on Enforced Disappearance](#); article 8(1)(b) of the [2006 Convention on Enforced Disappearance](#); article III(1) of the [Inter-American Convention on Forced Disappearance](#); Human Rights Committee, *Quinteros v Uruguay*, Communication No. 107/1981, 21 July 1983, para. 14; IACtHR, *Case of Velásquez-Rodríguez v Honduras*, Judgment of 29 July 1988, paras 155 and 181; *Case of Goiburú et al. v Peru*, Judgment of 22 September 2006, para. 81; *Case of Heliodoro Portugal v Panama*, Judgment of 12 August 2008, paras 34-35, 106-107; ECtHR, *Case of El-Masri v The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgment, 13 December 2012, para. 240; *Case of Varnava and Others v Turkey*, Application No. 16064/90, 16065/90, 16066/90, 16068/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment 18 September 2009, para. 148.

(ii) *The Facts*

122. The supporting material indicates that since at least 17 April 2015 members of the opposition, members of the civil society, ex-FAB, and young men suspected of having participated in demonstrations or of belonging to a rebel movement have disappeared, often following arbitrary arrest by the security forces, in particular the police and the SNR.<sup>312</sup>

123. More specifically, on 17 April 2015, two men were kidnapped by police and men in military uniforms from their home in the town of Mugamba, Bururi Province, in a vehicle bearing no registration number. Their relatives were still without news of their fate in November 2016.<sup>313</sup> On 16 September 2015, a 23-year-old man was reportedly taken from a police detention centre in Muramvya, put into a police vehicle and driven to an unknown destination. No information had yet been obtained about his fate in November 2016.<sup>314</sup>

124. On 10 December 2015, unidentified men in a vehicle believed to belong to the intelligence services picked up Marie-Claudette Kwizera, the treasurer of “Ligue Iteka”, a Burundian human rights organization, in Bujumbura. It is reported that she was arrested without a warrant. Her family allegedly paid a member of the intelligence services more than USD 2,000 to find her and a search was reportedly conducted by SNR agents. However, her fate was still unknown in November 2016. Several appeals have been made to the authorities to open an independent and impartial investigation to locate her.<sup>315</sup>

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<sup>312</sup> BDI-OTP-0003-4258, at 4266, para. 50; BDI-OTP-0005-0003, at 0011, paras 37-38; BDI-OTP-0003-4119, at 4124, para. 17; BDI-OTP-0003-1932, at 2003; BDI-OTP-0003-4329, at 4330.

<sup>313</sup> BDI-OTP-0003-1932, at 2005.

<sup>314</sup> BDI-OTP-0003-1932, at 2002.

<sup>315</sup> BDI-OTP-0003-1932, at 2003; BDI-OTP-0003-1793, at 1867; BDI-OTP-0003-4119, at 4124, para. 17.

125. It is reported that in 2016 the number of cases of persons who went missing after being arrested by the security forces increased.<sup>316</sup> On 19 January 2016, an influential member of the MSD in Bujumbura was allegedly arrested by the police in a bar in Kigobe. The following day his family searched for him in various prisons in Bujumbura but failed to locate him. On the third day, his wife received a phone call from a police officer indicating that he was being held at the “Iwabo w’Abantu” bar, an unofficial place of detention. The officer requested a ransom of 150,000 Burundian francs, for his release which the family agreed to pay. He was, however, still missing in November 2016, although his father had reported his disappearance to the INCHR.<sup>317</sup>

126. Another notable case is that of journalist Jean Bigirimana who disappeared after leaving his home in Bujumbura to travel to Muramvya province on 22 July 2016. He was allegedly taken into a vehicle identified as belonging to the SNR. The police spokesman claimed in a tweet on 25 July 2016 that the journalist had not been arrested by the police and asked his family to assist with their investigations. The INCHR also claimed that it was making enquiries. He was still missing in November 2016.<sup>318</sup>

127. The available information shows that cases of disappearance continued to occur into 2017. For instance, members of the SNR or the police were alleged to be involved in the disappearance of a former senator on 21 April 2017.<sup>319</sup> The Chamber also notes that many families were purportedly afraid to report their relatives as missing, in case they were suspected of having left to join the armed rebellion.<sup>320</sup>

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<sup>316</sup> BDI-OTP-0003-1932, at 2002.

<sup>317</sup> BDI-OTP-0003-1932, at 2004-2005.

<sup>318</sup> BDI-OTP-0003-1932, at 2053.

<sup>319</sup> BDI-OTP-0005-0003, at 0011, para. 38.

<sup>320</sup> BDI-OTP-0003-1717, at 1723.

128. The above is further supported by numerous communications submitted by or on behalf of victims reporting cases of enforced disappearance between May 2015 and February 2017, committed either by the security forces or by members of the *Imbonerakure*. Most of the time the families of the victims visited places of detention or hospital morgues in order to find the disappeared person or his or her body.<sup>321</sup> In one victim communication, the family went to the nearby police station where the authorities denied knowing the whereabouts of the missing person.<sup>322</sup> [REDACTED].<sup>323</sup> At times, the families are able to identify the operating forces and even the names of the alleged perpetrators.<sup>324</sup>

(iii) *Conclusion*

129. The Chamber notes the multiple instances of persons being abducted, arrested and detained by members of the security forces and whose whereabouts remained unknown for months, and sometimes years, afterwards. The Chamber notes that detailed information on the authorities' refusal to acknowledge the deprivation of freedom or to give information on the fate of the persons is not always available. However, the manner in which the persons were deprived of their liberty allows the Chamber to infer the intention to remove the victims from the protection of the law, such as arrest without a judicial warrant, abduction in vehicles with no registration numbers and detention in unofficial prisons. Considering the nature of the present proceedings and the requisite evidentiary threshold against which the information is assessed, the Chamber finds a reasonable basis to believe that the crime of enforced disappearance, pursuant to article 7(1)(i) and 2(i) of the Statute, was committed by the Burundian security forces and members of the *Imbonerakure* against civilians who opposed or were perceived to oppose the ruling party, as part of a widespread and systematic attack against the Burundian civilian population.

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<sup>321</sup> BDI-OTP-0004-0448, at 0762; BDI-OTP-0004-0448, at 0771.

<sup>322</sup> BDI-OTP-0004-0448, at 0768.

<sup>323</sup> [REDACTED].

<sup>324</sup> BDI-OTP-0006-0002, at 0355.

f) Persecution

(i) *The Law*

130. The crime of persecution, within the meaning of article 7(1)(h) and (2)(g)<sup>325</sup> of the Statute, is committed, either through a single act or a series of acts,<sup>326</sup> when:

1. The perpetrator severely deprived, contrary to international law,<sup>327</sup> one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any of the act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.<sup>328</sup>

131. The conduct constituting persecution must have been committed in connection with any other crime within the jurisdiction of the Court (connection requirement),<sup>329</sup> thus filtering out discriminatory measures that would not fall within the Court's jurisdiction if committed without such connection.

132. Persecutory acts can take many forms. Not every infringement of human rights is relevant but only a "severe deprivation" of a person's "*fundamental* rights contrary to international law" (emphasis added). This may include a variety of rights,

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<sup>325</sup> Article 7(2)(g) of the Statute stipulates: "Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity". Moreover, the Chamber applies the Elements of Crimes of Article 7(1)(h) of the Statute.

<sup>326</sup> Similarly, ECCC, *Prosecutor v KAING Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007-ECCC/SC, [Appeal Judgement](#) ("Duch Appeals Judgment"), 3 February 2012, para. 258; ICTY, *Prosecutor v Kupreškić et al*, Case No. IT-95-16-A, [Judgement](#), 23 October 2001, para. 97.

<sup>327</sup> Footnote 21 of the Elements of Crimes stipulates: 'This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes'. Paragraph 6 of the General Introduction reads: 'The requirement of "unlawfulness" found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes'.

<sup>328</sup> Footnote 22 of the Elements of Crimes stipulates: "It is understood that no additional mental element is necessary for this element other than that inherent in element 6".

<sup>329</sup> This requirement originates in the connection requirement set out in article 6(c) of the Charter of the International Military Tribunal, annexed to London Agreement of 8 August 1945 (UNTS vol. 82, p. 279).

whether derogable or not,<sup>330</sup> such as the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment, freedom of expression, freedom of assembly and association, and the right to private property.<sup>331</sup>

133. According to article 7(1)(h) of the Statute, the persecutory conduct must be directed “against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in [Article 7(3) of the Statute],<sup>332</sup> or other grounds that are universally recognized as impermissible under international law”. The collectivity or group must be identifiable by any of the characteristics mentioned in article 7(2)(g) of the Statute, as defined by the *perpetrator*.<sup>333</sup> Of import to this judgment are “political” grounds that do not pertain only to the victim’s membership of a political party or adherence to a particular ideology but also to differences of opinion over public affairs, or (actual or presumed) political affiliations.<sup>334</sup>

(ii) *The Facts*

134. The Chamber recalls its findings in relation to the crimes of murder and attempted murder, imprisonment and other severe deprivation of physical liberty, torture, rape, and enforced disappearance. The Chamber notes that these crimes targeted persons who opposed or were perceived to oppose the ruling party and/or President Nkurunziza’s third term in office, such as demonstrators, members of

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<sup>330</sup> Similarly, ECCC, [Duch Appeals Judgement](#), para. 254; ICTY, *Prosecutor v Stakić*, Case No. IT-97-24-T, [Judgement](#), 31 July 2003, para. 773.

<sup>331</sup> The Chamber will have recourse to, for example, [1948 Universal Declaration of Human Rights](#); [1966 International Covenant on Civil and Political Rights](#); [1966 International Covenant of Economic, Social and Cultural Rights](#) (UNTS, vol. 993, p. 3); [African Charter on Human and Peoples’ Rights](#); [American Convention on Human Rights](#); (European) [Convention for the Protection of Human Rights and Fundamental Freedoms](#); see also Pre-Trial Chamber II, *Prosecutor v Bosco Ntaganda*, [Decision Pursuant to Article 61\(7\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda](#), 9 June 2014, ICC-01/04-02/06-309, para. 58.

<sup>332</sup> Article 7(3) of the Statute stipulates: ‘For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above’.

<sup>333</sup> Similarly, ECCC, [Duch Appeal Judgement](#), para. 272; ICTY, *Prosecutor v Blagojević and Jokić*, Case No. IT-02-60-T, [Judgement](#), 17 January 2005, para. 583.

<sup>334</sup> Similarly, ECCC, [Duch Appeal Judgement](#), para. 272.

opposition parties, members of civil society, journalists, ex-FAB members, persons suspected of supporting or participating in the attempted *coup*, and members or sympathizers of armed opposition groups.

135. Additionally, the material submitted reveals that members of the Government and the security forces have also engaged in other acts targeting persons who opposed the ruling party and/or President Nkurunziza's third term. The Chamber notes in particular the following: (i) on 24 April 2015, the Minister of Public Security banned demonstrations,<sup>335</sup> and by 2 May 2015, the police and the SNR had reportedly arrested hundreds of people for participating in the protests that the Government had declared illegal;<sup>336</sup> (ii) independent journalists were subjected to harassment and death threats, their offices were closed, their equipment destroyed, and international arrest warrants were issued against some of them; many journalists remained in exile in 2017; further, the Government closed or suspended private radio stations;<sup>337</sup> (iii) the Government suspended or revoked the licenses of dozens of civil society organizations; a number of them had their bank accounts and the bank accounts of their executives frozen, and international arrest warrants were issued against their leaders;<sup>338</sup> (iv) members of opposition parties were reportedly under constant pressure to join the CNDD-FDD and could not meet freely or carry out their activities;<sup>339</sup> notably, members of the CNDD-FDD who petitioned President Nkurunziza not to run for a third term, received death threats afterwards, allegedly from soldiers close to President Nkurunziza.<sup>340</sup>

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<sup>335</sup> BDI-OTP-0003-1211, at 1229, para. 46.

<sup>336</sup> BDI-OTP-0003-1211, at 1231, para. 52.

<sup>337</sup> BDI-OTP-0005-0003, at 0013, para. 52; BDI-OTP-0003-4258, at 4271, para. 81; BDI-OTP-0003-1211, at 1236, para. 68.

<sup>338</sup> BDI-OTP-0005-0003, at 0014, para. 55; BDI-OTP-0003-4258, at 4270-4271, paras 79-80.

<sup>339</sup> BDI-OTP-0005-0003, at 0014, para. 57.

<sup>340</sup> BDI-OTP-0003-1932, at 1965.



(iii) *Conclusion*

136. The Chamber finds that the crimes of murder and attempted murder, imprisonment and other severe deprivation of physical liberty, torture, rape, and enforced disappearance mentioned above, as well as the acts described in paragraph 135 above, constitute severe deprivations of fundamental rights, contrary to international law, such as the right to life; the right to be free from arbitrary arrest and detention; the right not to be subjected to torture or to cruel, inhuman or degrading treatment; freedom of expression; freedom of association; and freedom of assembly. The Chamber is further satisfied that this persecutory conduct was directed specifically against an identifiable group or collectivity based on political grounds. Therefore, the Chamber finds a reasonable basis to believe that the crime of persecution as a crime against humanity, pursuant to article 7(1)(h) and (2)(g) of the Statute, was committed by members of the Government, the security forces and the *Imbonerakure* against civilians who opposed or were perceived to oppose the ruling party as part of a widespread and systematic attack against the Burundian civilian population.

**B. War Crimes**

137. With regard to the contextual elements of war crimes, the Chamber notes the Prosecutor's submission that "[d]espite evidence of some armed confrontation [...] between the Burundian security forces and armed anti-government entities, there is no reasonable basis to believe that the degree of intensity of the armed confrontation or the level of organisation of these armed entities is sufficient to characterise the situation as a non-international armed conflict within the meaning of article 8(2)(c)

and (e)” of the Statute.<sup>341</sup> She further states that, if an investigation is authorized by the Chamber, she will keep these allegations under review.<sup>342</sup>

138. The Chamber recalls that at the preliminary examination stage, the presence of several plausible explanations for the available information does not entail that an investigation should not be opened into the crimes concerned, but rather calls for the opening of such an investigation in order to properly assess the relevant facts.<sup>343</sup> At the preliminary examination stage, the Prosecutor is allowed to draw conclusions on the basis of the information received, provided those conclusions do not appear manifestly unreasonable.

139. Based on the material submitted, the Chamber notes with regard to the degree of intensity of the armed confrontation<sup>344</sup> that the attempted *coup d'état* of 13 May 2015 led to two days of fighting, involving exchanges of gun-fire between the security forces and the military and police officers who staged the *coup*.<sup>345</sup> Four radio and television stations were attacked with grenades and mortars, as well as police stations and a prison.<sup>346</sup> Between July and December 2015, attacks on army posts and clashes with the Burundian army were reported every month, in particular in Bujumbura, but also in the provinces of Kayanza and Cibitoke. The attacks involved the use of heavy weapons, such as machine guns and mortars, as well as rocket-propelled grenades.<sup>347</sup> In particular, on 11 December 2015, four military positions in and around Bujumbura were attacked by groups of armed men, which led to heavy

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<sup>341</sup> Request, para. 35.

<sup>342</sup> Request, para. 6.

<sup>343</sup> [Comoros Article 53 Decision](#), para. 13; [Georgia Article 15 Decision](#), paras 25 and 35.

<sup>344</sup> Article 8(2)(d) and (f) of the Statute; Trial Chamber I, *Prosecutor v. Thomas Lubanga Lyilo*, [Judgment pursuant to Article 74 of the Statute](#) (“Lubanga Judgment”), 14 March 2012, ICC-01/04-01/06-2842, paras 534-538; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, [Judgment](#) (“Boškoski and Tarčulovski Judgment”), 10 July 2008, para. 177 *et seq.*

<sup>345</sup> BDI-OTP-0003-1211, at 1233-1234, paras 59-62.

<sup>346</sup> BDI-OTP-0003-1211, at 1236, para. 67; BDI-OTP-0003-4783, at 4795-4795.

<sup>347</sup> BDI-OTP-0003-1211, at 1240, para. 82, at 1242, para. 88, at 1243, para. 92; BDI-OTP-0003-4119, at 4122, para. 7.

fighting involving gun-fire exchanges and explosions.<sup>348</sup> It is further reported that from the beginning of 2016, grenade and other armed attacks became more common.<sup>349</sup>

140. With regard to the level of organisation of the anti-government entities,<sup>350</sup> the material submitted reveals that the attempted *coup* was led by Major General Godefroid Niyombaré, the former head of the SNR, and a group of senior military and police officers.<sup>351</sup> The persons involved in the attacks that followed the foiled *coup* appear to remain unidentified, according to the available information. However, the Chamber notes that they had the ability to attack defended targets such as military camps,<sup>352</sup> and were able to carry out assassinations of high-level former or incumbent political or military officials.<sup>353</sup> In particular, the attacks on the four military positions in and around Bujumbura which took place on 11 December 2015 appear to have been coordinated. The attacks were planned, with the aim of seizing weapons and occupying the military camps, and were coordinated with military men from inside the units.<sup>354</sup> The material also points to the emergence of two armed groups in December 2015 and January 2016, the “*Forces républicaines du Burundi*” (“FOREBU”) and the “*Résistance pour un État de Droit*” (“RED-Tabara”) respectively.<sup>355</sup> RED-Tabara designated its Chief of Staff, a member of an opposition party, on 13 February 2016.<sup>356</sup> FOREBU is reported to be mainly composed of ex-army personnel and police deserters.<sup>357</sup> Around June 2016, it announced its transformation into a politico-military movement with the creation of a political

<sup>348</sup> BDI-OTP-0003-1211, at 1245, para. 99; BDI-OTP-0003-1318, at 1320-1327, in particular at 1325-1326.

<sup>349</sup> BDI-OTP-0003-4119, at 4122, para. 8.

<sup>350</sup> Article 8(2)(d) and (f) of the Statute; [Lubanga Judgment](#), paras 534-538; ICTY, [Boškoski and Tarčulovski Judgment](#), para. 199.

<sup>351</sup> BDI-OTP-0003-4331, at 4333, para. 8.

<sup>352</sup> BDI-OTP-0003-1318, at 1325-1326.

<sup>353</sup> BDI-OTP-0003-1211, at 1241, para. 85.

<sup>354</sup> BDI-OTP-0003-1318, at 1322.

<sup>355</sup> BDI-OTP-0003-4119, at 4122, para. 8.

<sup>356</sup> BDI-OTP-0003-1932, at 2079.

<sup>357</sup> BDI-OTP-0003-1932, at 2079.

wing under the overall coordination of Major General Godefroid Niyombaré.<sup>358</sup> Both groups appear to have the ability to communicate their aims, among which is ousting President Nkurunziza from power, including by force.<sup>359</sup> However, the supporting material also indicates that a disconnect existed between the leadership of these groups, some of whom were in exile, and the operational units.<sup>360</sup>

141. In the light of the above, it appears to the Chamber that the Prosecutor has acted too restrictively and has imposed requirements on the material that cannot reasonably be met in the absence of an investigation. The available information with regard to the degree of intensity of the armed confrontation may not be univocal and the level of organization of the armed entities may be unclear, but it is precisely the purpose of an investigation to provide such clarity and overcome doubts. In light of this, the Chamber is of the view that the Prosecutor will have to enquire during her investigation whether a non-international armed conflict existed in Burundi during the relevant period and whether war crimes were committed.

## V. ADMISSIBILITY

142. In accordance with article 53(1)(b) of the Statute, the second criterion to be examined by the Chamber is whether “[t]he case is or would be admissible under article 17” of the Statute. This determination “mainly concerns the scenarios or conditions on the basis of which the Court shall refrain from exercising its recognized jurisdiction over a given situation or case”.<sup>361</sup>

143. A contextual interpretation of article 53(1)(b) of the Statute leads to the conclusion that an admissibility assessment in the context of article 15 of the Statute

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<sup>358</sup> FOREBU, “Forces républicaines du Burundi «FOREBU»”, BDI-OTP-0003-4103, at 4108 (“BDI-OTP-0003-4103”).

<sup>359</sup> BDI-OTP-0003-4103, at 4105; Al Jazeera, Burundi: New rebel group formed to oust president, 23 December 2015, BDI-OTP-0003-2579; Résistance pour un État de Droit, “Historique et identité de RED-Tabara”, BDI-OTP-0003-4110.

<sup>360</sup> BDI-OTP-0003-1932, at 2079.

<sup>361</sup> [Kenya Article 15 Decision](#), para. 40.

pertains to potential cases arising out of a situation.<sup>362</sup> The criteria defining such potential cases include (i) the (groups of) persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s) before the Court; and (ii) the crimes falling within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).<sup>363</sup> The Chamber recalls that the Prosecutor's evaluation of these criteria is preliminary in nature and may change as a result of an investigation.<sup>364</sup>

144. The Chamber will conduct its admissibility assessment according to the relevant facts described above (see Part IV) concerning the crimes allegedly committed in the situation in Burundi and the (groups of) persons that appear to be the most responsible for the most serious crimes. In this regard, the Chamber will be guided by the "Indicative list of crimes allegedly committed during the most serious incidents within the situation in Burundi"<sup>365</sup> and the "Preliminary list of persons or groups that appear to be the most responsible for the most serious crimes"<sup>366</sup> submitted by the Prosecutor. This assessment will be based on a comparison between potential cases arising out of the situation in Burundi as identified by the Court and the cases allegedly investigated by national authorities in Burundi. Unless there is a jurisdictional conflict between the Court and the Burundian authorities, such a case is admissible.<sup>367</sup> The Chamber, accordingly, turns to the two prongs of the admissibility test, namely complementarity and gravity.

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<sup>362</sup> [Kenya Article 15 Decision](#), paras 45, 48; [Côte d'Ivoire Article 15 Decision](#), para. 190; [Georgia Article 15 Decision](#), para. 36.

<sup>363</sup> [Kenya Article 15 Decision](#), para. 50; [Côte d'Ivoire Article 15 Decision](#), para. 191; [Georgia Article 15 Decision](#), para. 37.

<sup>364</sup> [Kenya Article 15 Decision](#), para. 50; [Georgia Article 15 Decision](#), para. 37.

<sup>365</sup> Request, ICC-01/17-X-5-US-Exp-Anx3.

<sup>366</sup> Request, ICC-01/17-X-5-US-Exp-Anx4.

<sup>367</sup> Appeals Chamber, *The Prosecutor v Francis Kirimi Muthaura et al*, [Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute"](#) ("Muthaura Appeal Judgment"), 30 August 2011, ICC-01/09-02/11-274, para. 43; Appeals Chamber, *The*

## A. Complementarity

### 1. The Law

145. Article 17(1)(a)-(b) of the Statute provides, in the relevant part, that “[...] the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute”.

146. The Appeals Chamber has explained that article 17(1)(a)-(b) of the Statute involves the following test:

[i]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.<sup>368</sup>

147. The Appeals Chamber has further affirmed that “the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court” for a case to be inadmissible.<sup>369</sup> In relation to whether “substantially the same conduct” is being investigated, the Appeals Chamber has

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*Prosecutor v William Samoei Ruto et al*, [Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute”](#) (“Ruto Appeal Judgment”), 30 August 2011, ICC-01/09-01/11-307, para. 44.

<sup>368</sup> Appeals Chamber, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, [Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case](#), 25 September 2009, ICC-01/04-01/07-1497, para. 78.

<sup>369</sup> [Muthaura Appeal Judgment](#), para. 39; [Ruto Appeal Judgment](#), para. 40.

stated that “[w]hat is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating”.<sup>370</sup> To carry out this assessment “the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents” must be compared.<sup>371</sup> Accordingly, “if it has only been established that ‘discrete aspects’ of the case before the Court are being investigated domestically, it will most likely not be possible for a Chamber to conclude that the same case is under investigation”.<sup>372</sup>

148. Furthermore, the Appeals Chamber has also determined that the meaning of the words “case is being investigated” in article 17(1)(a) of the Statute “signify the taking of steps directed at ascertaining whether *those suspects* are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”.<sup>373</sup> It must, thus, “be established that tangible, concrete and progressive investigative steps are being undertaken”.<sup>374</sup>

## 2. The Facts

149. While the Prosecutor asserts that “[t]he available information does not indicate any relevant national proceedings in any other States with jurisdiction in relation to potential case [sic] identified in this Request and the accompanying annexes”,<sup>375</sup> she

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<sup>370</sup> Appeals Chamber, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”](#) (“Gaddafi Appeal Judgement”), 21 May 2014, ICC-01/11-01/11-547-Red, para. 73.

<sup>371</sup> [Gaddafi Appeal Judgment](#), para. 73.

<sup>372</sup> [Gaddafi Appeal Judgment](#), para. 77.

<sup>373</sup> [Muthaura Appeal Judgment](#), para. 40 (emphasis in original); [Ruto Appeal Judgment](#), para. 41 (emphasis in original).

<sup>374</sup> Pre-Trial Chamber I, *Prosecutor v Simone Gbagbo*, [Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo](#), 11 December 2014, ICC-02/11-01/12-47-Red, para. 65; Appeals Chamber, *Prosecutor v Simone Gbagbo*, [Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”](#), 27 May 2015, ICC-02/11-01/12-75-Red, para. 122.

<sup>375</sup> Request, para. 185.

refers to the establishment of three national inquiries into specific events by the Prosecutor General of Bujumbura<sup>376</sup> and five proceedings before the domestic courts of Burundi to be of possible relevance to the potential case(s) identified in the Request.<sup>377</sup>

150. It is the submission of the Prosecutor that “the information available indicates inactivity by the Burundian authorities in relation to the potential cases identified” in her Request and the accompanying annexes.<sup>378</sup> The Prosecutor further avers that “to the extent that the Burundian authorities have cleared members of the security forces as alleged physical perpetrators of any wrongdoing, [...] the inquiries conducted into these allegations were not conducted genuinely, but were undertaken for the purpose of shielding the persons concerned from criminal responsibility”.<sup>379</sup>

151. Before turning to its assessment of the relevant activities on the part of the Burundian authorities, the Chamber notes the Prosecutor’s observation that the aforementioned three Commissions of Inquiry have been considered to be national criminal investigations within the meaning of article 17(1)(a)-(b) of the Statute, “even if on their face these initiatives would appear to fall outside the technical scope of the term”.<sup>380</sup>

152. In this regard, the Chamber considers that a national investigation merely aimed at the gathering of evidence does not lead, in principle, to the inadmissibility of any cases before the Court, considering that, for the purposes of complementarity, an investigation must be carried out with a view to conducting criminal prosecutions. According to article 1 of the Statute, the fundamental purpose of the

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<sup>376</sup> Request, para. 151.

<sup>377</sup> Request, para. 176.

<sup>378</sup> Request, para. 150; *see also* Request, ICC-01/17-X-5-US-Exp-Anx3; Request, ICC-01/17-X-5-US-Exp-Anx4.

<sup>379</sup> Request, para. 150.

<sup>380</sup> Request, para. 153.



Court is to prosecute those responsible for the most serious crimes of international concern in a manner complementary “to national criminal jurisdictions”. Therefore, on the basis of this wording, national investigations that are not designed to result in criminal prosecutions do not meet the admissibility requirements under article 17(1) of the Statute.

153. The Chamber notes that the Commissions were established by the Prosecutor General,<sup>381</sup> and consisted either of policemen or members of the Public Prosecutor’s Office,<sup>382</sup> who were therefore all apparently subordinate to the Prosecutor General. It is not clear to the Chamber why those Commissions were established instead of following the normal process in accordance with Burundian criminal procedural law. However, the Chamber also notes that those Commissions had certain judicial and investigative powers<sup>383</sup> and that at least two such Commissions were explicitly authorized to refer persons to the competent authorities.<sup>384</sup> In fact, it appears, on the basis of the available material, that arrests have been made and/or charges have been brought against certain persons in connection with the inquiries conducted by two Commissions.<sup>385</sup> The Chamber considers that, in these circumstances, these Commissions’ findings need to be assessed for the purposes of the complementarity determination at this stage of the proceedings, without prejudice to any future determination on this matter, according to the information available to the Chamber.

a) Commission on the Events of 26 April 2015

154. The “*Commission d’enquête chargée de faire la lumière sur le mouvement insurrectionnel déclenché le 26 avril 2015*” [Translation: “Commission of inquiry entrusted with shedding light on the insurgency that began on 26 April 2015”]

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<sup>381</sup> BDI-OTP-0003-4783, at 4786; BDI-OTP-0003-4844, at 4846; BDI-OTP-0003-4815, at 4818.

<sup>382</sup> BDI-OTP-0003-4783, at 4786; BDI-OTP-0003-4844, at 4846; BDI-OTP-0003-4815, at 4818.

<sup>383</sup> BDI-OTP-0003-4783, at 4786, 4809, 4811; BDI-OTP-0003-4844, at 4846; BDI-OTP-0003-4815, at 4818, 4835.

<sup>384</sup> BDI-OTP-0003-4783, at 4786; BDI-OTP-0003-4844, at 4846.

<sup>385</sup> BDI-OTP-0003-4783, at 4811; BDI-OTP-0003-4844, at 4860.

(hereinafter referred to as “*Commission sur le mouvement insurrectionnel*”) was established to inquire into the protests sparked by the announcement that President Nkurunziza would run for a third term in office.<sup>386</sup> This Commission was mandated to conduct a judicial investigation into the “insurrectional” movement so as to identify the perpetrators and to establish the responsibility of all those involved in order to refer them to the competent authorities.<sup>387</sup>

155. In the relevant part, the report of the “*Commission sur le mouvement insurrectionnel*” details punishable acts arising out of these protests. In more specific terms, it concluded, *inter alia*, that the protestors had (i) incorporated children into their ranks;<sup>388</sup> (ii) created a situation preventing other citizens from enjoying their fundamental rights, such as the right to healthcare and education;<sup>389</sup> (iii) injured and committed killings against civilians, police officers, and soldiers (including the burning alive of a person suspected of belonging to the *Imbonerakure* on 7 May 2015 in Nyakabi, a grenade attack killing several police officers on 1 May 2015 in Kamenge and Bujumbura city centre, a physical and moral assault on a female police officer on 12 May 2015 in Buterere, the beating to death of approximately ten civilians at the Kiriri Campus in Bugazi, and the severe injuring of a Burundian with French nationality suspected of belonging to the *Interahamwe* on 13 May 2015 in Musaga);<sup>390</sup> (iv) kidnapped many persons accused of belonging to the *Imbonerakure* or *Interahamwe* who were subsequently found dead in neighbourhoods affected by the protests;<sup>391</sup> and (v) launched grenade attacks, including an attack against female fruit vendors in the city centre of Bujumbura and attacks on public-transport buses.<sup>392</sup>

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<sup>386</sup> BDI-OTP-0003-4783, at 4788.

<sup>387</sup> BDI-OTP-0003-4783, at 4786.

<sup>388</sup> BDI-OTP-0003-4783, at 4798-4799.

<sup>389</sup> BDI-OTP-0003-4783, at 4799.

<sup>390</sup> BDI-OTP-0003-4783, at 4799-4801.

<sup>391</sup> BDI-OTP-0003-4783, at 4801.

<sup>392</sup> BDI-OTP-0003-4783, at 4801.

156. The “*Commission sur le mouvement insurrectionnel*” indicated that a case file had been opened to bring to justice those responsible for the infractions it had established.<sup>393</sup> It went on to identify persons from civil society and political parties involved in the protests and added that these persons were closely affiliated with those behind the *coup d’état*.<sup>394</sup> Moreover, the Commission named 17 persons arrested in the framework of its inquiry but also noted that, in addition to these persons, many others had been apprehended in connection with the protests.<sup>395</sup> It finally concluded that those arrested, as well as others who were still being pursued, were criminally and civilly responsible for multiple violations of Burundian law, including assault, battery and killing.<sup>396</sup>

157. In the view of the Chamber, the report of the “*Commission sur le mouvement insurrectionnel*” does not establish that the Burundian authorities are investigating or have investigated potential cases arising out of the situation in Burundi as identified by the Court. This Commission was established with the purpose of inquiring into the acts of the political opposition and those critical of the political establishment. On this basis, the acts of those who, according to the Court’s Prosecutor, appear to be the most responsible for the most serious crimes, namely members of the Burundian government, the police, the intelligence service, the military, and the *Imbonerakure*,<sup>397</sup> appear to fall outside the Commission’s mandate. Therefore, the Chamber finds that the report of this Commission does not lead to the inadmissibility of potential cases arising out of the situation in Burundi before the Court.

b) Commission on the Events of 13 October 2015

158. A group of armed men allegedly killed one police officer and injured two other police officers on 13 October 2015 in the Ngagara zone of Bujumbura, which

<sup>393</sup> BDI-OTP-0003-4783, at 4809.

<sup>394</sup> BDI-OTP-0003-4783, at 4810-4811.

<sup>395</sup> BDI-OTP-0003-4783, at 4811.

<sup>396</sup> BDI-OTP-0003-4783, at 4811-4812.

<sup>397</sup> Request, ICC-01/17-X-5-US-Exp-Anx4.

subsequently led to a confrontation with the Burundian security forces.<sup>398</sup> In the ensuing events, a number of crimes were committed against residents of the Ngagara zone.<sup>399</sup> These events led the Prosecutor General to set up the “*Commission chargée d’enquêter sur les différents actes répréhensibles par la loi pénale commis en date du 13 octobre 2015 dans la zone Ngagara en commune Ntakangwa*” [Translation: “Commission entrusted with investigating the various offences punishable under criminal law committed in the Ngagara area, Ntakangwa commune, on 13 October 2015”] (hereinafter referred to as “*Commission sur les différents actes répréhensibles*”).<sup>400</sup> The mandate of this Commission was defined as conducting an investigation into all instances of killing and other crimes in the Ngagara zone of Bujumbura on 13 October 2015, identifying the perpetrators, establishing the responsibility of those involved, qualifying the facts, and referring the perpetrators to the competent authorities.<sup>401</sup>

159. The Commission heard several witnesses. The witnesses mentioned in its report are two of the police officers who were allegedly injured by the group of armed men,<sup>402</sup> two other police officers,<sup>403</sup> a member of the military forces,<sup>404</sup> the “chef” and the former “chef” of the neighbourhood in question,<sup>405</sup> a number of residents of the neighbourhood in question (although the Commission named only one such resident),<sup>406</sup> and two of the members of the group of armed men.<sup>407</sup> However, the Commission also noted that many residents of the neighbourhood concerned were not willing to testify as they were afraid of reprisals and mistrusted

<sup>398</sup> BDI-OTP-0003-4844, at 4846-4847; BDI-OTP-0003-1793, at 1885; BDI-OTP-0003-4119, at 4124.

<sup>399</sup> BDI-OTP-0003-4844, at 4846-4847; BDI-OTP-0003-1793, at 1886; BDI-OTP-0003-4119, at 4124.

<sup>400</sup> BDI-OTP-0003-4844, at 4846; BDI-OTP-0003-1793, at 1887; BDI-OTP-0003-4119, at 4132.

<sup>401</sup> BDI-OTP-0003-4844, at 4846.

<sup>402</sup> BDI-OTP-0003-4844, at 4847, 4848.

<sup>403</sup> BDI-OTP-0003-4844, at 4855, 4856.

<sup>404</sup> BDI-OTP-0003-4844, at 4854.

<sup>405</sup> BDI-OTP-0003-4844, at 4848, 4852.

<sup>406</sup> BDI-OTP-0003-4844, at 4850.

<sup>407</sup> BDI-OTP-0003-4844, at 4850, 4860.

the authorities.<sup>408</sup> Furthermore, the Commission did not manage to speak to injured residents of this neighbourhood who were treated in a hospital administered by “*Médecins Sans Frontières*”. The persons in charge of the hospital did not grant access to the Commission so as not to endanger the functioning of the hospital.<sup>409</sup>

160. The “*Commission sur les différents actes répréhensibles*” specifically concluded that in the Ngagara zone of Bujumbura on 13 October 2015 a group of young persons deprived three police officers of their liberty and eventually killed one of them, severely injured another, while the third one escaped.<sup>410</sup> It further found that the subsequent arrival of police and military reinforcements led to heavy fighting with this group of young persons.<sup>411</sup> In addition, it stated that police stations were attacked by some of the young persons on the evening of 13 October 2015.<sup>412</sup> In total, excluding the three police officers, nine persons were killed and one person was injured in these events.<sup>413</sup> The Commission specifically noted that a cameraman for the State broadcaster and his family were among the nine persons killed.<sup>414</sup>

161. The Commission observed that members of the API police force had been accused of perpetrating or inflicting the aforementioned killings and injuries.<sup>415</sup> However, it concluded that, in fact, the group of young persons was responsible for the crimes against the police officers and the residents of the Ngagara zone of Bujumbura.<sup>416</sup> In this regard, it named six persons involved in these events, but noted that the witness in question was not willing to reveal their real names.<sup>417</sup> It further noted that some persons had been arrested in connection with these events

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<sup>408</sup> BDI-OTP-0003-4844, at 4848-4849, 4859.

<sup>409</sup> BDI-OTP-0003-4844, at 4858-4859.

<sup>410</sup> BDI-OTP-0003-4844, at 4847-4854.

<sup>411</sup> BDI-OTP-0003-4844, at 4854-4856.

<sup>412</sup> BDI-OTP-0003-4844, at 4856-4857.

<sup>413</sup> BDI-OTP-0003-4844, at 4857.

<sup>414</sup> BDI-OTP-0003-4844, at 4856, 4861-4862.

<sup>415</sup> BDI-OTP-0003-4844, at 4861.

<sup>416</sup> BDI-OTP-0003-4844, at 4859, 4861; BDI-OTP-0003-4119, at 4132.

<sup>417</sup> BDI-OTP-0003-4844, at 4860.

and subsequently released during the course of its investigation.<sup>418</sup> Nonetheless, a warrant of arrest was issued against one person for his participation in the murder and injuring of the three police officers.<sup>419</sup> The Commission finally concluded that it wished that investigations be continued to bring the troublemakers to justice.<sup>420</sup>

162. The Chamber finds that the report of the “*Commission sur les différents actes répréhensibles*” does not result in the inadmissibility of potential cases arising out of the situation in Burundi before the Court pursuant to the principle of complementarity. The Chamber recalls that it has found that there is a reasonable basis to proceed with an investigation concerning the killing of nine persons in the Ngagara zone of Bujumbura on 13 October 2015, including the killing of a cameraman for the State broadcaster and his family.<sup>421</sup> The Chamber notes that the Commission also concluded that an identical number of persons were killed in these events, including a substantially similar assessment of the killing of the cameraman and his family. The Chamber further observes that the Commission stated its intention to investigate whether API police officers bore any responsibility for these crimes. However, in the view of the Chamber, this does not, as such, render inadmissible before the Court the potential cases arising out of the situation in Burundi. The Chamber recalls that it must be demonstrated, *inter alia*, that tangible, concrete, and progressive investigative steps have been adopted. On the basis of the available information, the Chamber finds that it cannot be said that the Commission complied with these requirements.

163. In this regard, the Chamber takes note of the fact that the available documentation reveals that the investigation of the Commission did not entail a detailed examination into the deaths of the residents of the Ngagara zone of

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<sup>418</sup> BDI-OTP-0003-4844, at 4860.

<sup>419</sup> BDI-OTP-0003-4844, at 4860.

<sup>420</sup> BDI-OTP-0003-4844, at 4862.

<sup>421</sup> *See above* para. 60.

Bujumbura on 13 October 2015. The report of the Commission is primarily devoted to the alleged killing and injuring of the three police officers. It did not address the specific circumstances surrounding the other crimes at issue. In fact, the Commission expressly acknowledged that the witnesses it had heard did not reveal who had killed the cameraman or the other victims.<sup>422</sup> Furthermore, whereas the Commission declared that it would address the allegations levelled against API police officers, it did not do so in a convincing and thorough manner. It made a general finding that the armed men were responsible for the crimes committed in the Ngagara zone of Bujumbura on 13 October 2015, but the Commission did not consider whether specific members or units of the Burundian security forces bore any responsibility, let alone whether any of their superiors should be called to account.

164. The Chamber further observes on the basis of the available information, that the investigation carried out by the Commission was incomplete. The Commission itself acknowledged that the witnesses it had heard provided information on specific aspects of the events in question and that the majority of the residents of the neighbourhood concerned declined to offer any information.<sup>423</sup> Therefore, it seems that the Commission did not seek access to a pool of witnesses who knew a lot about what really happened (*“connaissent beaucoup de choses sur ce qui s’est réellement passé”*)<sup>424</sup> and that it therefore did not obtain the necessary information. In another part of its report, the Commission seems to regret that victims did not bring their complaints to it.<sup>425</sup> However, the Commission did not attempt to remedy this matter to ensure a more comprehensive investigation. It neither exercised any of its own powers nor seized other authorities with such powers to compel persons who may have been in possession of relevant information to appear before it, while providing

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<sup>422</sup> BDI-OTP-0003-4844, at 4859.

<sup>423</sup> BDI-OTP-0003-4844, at 4848-4849, 4858-4859.

<sup>424</sup> BDI-OTP-0003-4844, at 4858.

<sup>425</sup> BDI-OTP-0003-4844, at 4861.

such persons with the necessary protective measures.<sup>426</sup> Indeed, it was incumbent on the Commission to investigate, using all the means at its disposal, not to wait for others, such as the victims, to bring the necessary information to it. Moreover, the Chamber is concerned by the fact that no forensic examination of the bodies found was conducted. In the view of the Chamber, however, such examination would have been a crucial investigative step in a proper assessment of the circumstances of the death of the persons killed on 13 October 2015.

165. Finally, on the basis of the available documentation, the Chamber considers that the Commission's investigation did not result in further investigative steps of relevance to potential cases arising out of the situation in Burundi. While the Commission expressed its desire to see the continuation of investigations to bring the perpetrators to justice,<sup>427</sup> no information detailing further investigative steps has been provided to the Chamber. In view of its finding that the armed men were responsible for the events under consideration, the Commission did not appear to contemplate the possibility of further investigations into the possible responsibility of the Burundian security forces or any of their superiors for the crimes in question.

c) Commission on the Events of 11 December 2015

166. Noting the allegations of two NGOs regarding killings and torture committed by the Burundian security forces following attacks by assailants on the four military bases on 11 December 2015, the *“Commission chargée de faire la lumière sur les allégations ‘d’exécutions extrajudiciaires’ lors de combats qui ont suivi l’attaque contre quatre camps militaires le 11 décembre 2015”* [Translation: “Commission entrusted with shedding light on allegations of ‘extrajudicial executions’ during the fighting that

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<sup>426</sup> Pre-Trial Chamber I, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi](#) (“Gaddafi Admissibility Decision”), 31 May 2013, ICC-01/11-01/11-344-Red, paras 209-211; Pre-Trial Chamber I, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Decision on the Admissibility of the Case against Abdullah Al-Senussi](#) (“Al-Senussi Admissibility Decision”), 11 October 2013, ICC-01/11-01/11-466-Red, para. 283.

<sup>427</sup> BDI-OTP-0003-4844, at 4862.



followed the attack on four military camps on 11 December 2015”] (hereinafter referred to as “*Commission sur les allégations d’exécutions extrajudiciaires*”) was established to shed light on these events.<sup>428</sup> The mandate of this Commission was to conduct a judicial investigation into the factual and legal circumstances surrounding the deaths of a number of persons following the attacks, to identify those in charge of the attacks, and to establish who was responsible.<sup>429</sup>

167. The “*Commission sur les allégations d’exécutions extrajudiciaires*” found that four military bases were attacked on 11 December 2015 by multiple assailants.<sup>430</sup> In addition to eight members of the Burundian security forces, the Commission concluded that 79 other persons were killed in these attacks and the subsequent events.<sup>431</sup> Based on the facts that their bodies were found in areas in which fighting had occurred and that some victims wore police or military uniforms and had weapons, the Commission concluded that the 79 casualties were “combatants”, with the exception of a disabled man killed by a stray bullet.<sup>432</sup> Nevertheless, in respect of a group of seven “combatants”, who were captured and subsequently found dead, the Commission expressed doubt about the circumstances surrounding their deaths.<sup>433</sup> It also stated that 87 persons suspected of involvement in the attacks on the military bases were detained and that not a single instance of torture had been recorded.<sup>434</sup>

168. The “*Commission sur les allégations d’exécutions extrajudiciaires*” further clarified that four criminal files had been opened against the 87 persons suspected of having participated in the attacks against the military bases.<sup>435</sup> With regard to the group of

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<sup>428</sup> BDI-OTP-0003-4815, at 4817-4818.

<sup>429</sup> BDI-OTP-0003-4815, at 4818.

<sup>430</sup> BDI-OTP-0003-4815, at 4819-4824.

<sup>431</sup> BDI-OTP-0003-4815, at 4824-4827, 4836.

<sup>432</sup> BDI-OTP-0003-4815, at 4827-4831.

<sup>433</sup> BDI-OTP-0003-4815, at 4831.

<sup>434</sup> BDI-OTP-0003-4815, at 4835.

<sup>435</sup> BDI-OTP-0003-4815, at 4832-4835.

seven “combatants” arrested and found dead, the Commission stated that further criminal investigations should be carried out *vis-à-vis* a police officer and a military officer on the basis of the criminal file opened to this effect.<sup>436</sup> However, the Commission also averred that: the security forces had generally complied with international humanitarian law during and after the attacks on the military bases;<sup>437</sup> no civilians had been killed with the exception of the aforementioned disabled man;<sup>438</sup> no families of victims had come forward to relate a different version of the events;<sup>439</sup> and no mass graves had been found.<sup>440</sup> [REDACTED].<sup>441</sup>

169. In the view of the Chamber, the report of the “*Commission sur les allégations d’exécutions extrajudiciaires*” does not entail the inadmissibility of potential cases arising out of the situation in Burundi before the Court on the basis of the principle of complementarity.

170. First, the Chamber recalls that it has found that there is a reasonable basis to proceed with an investigation regarding various instances of (i) imprisonment or other severe deprivation of physical liberty following arrests carried out on 11 December 2015,<sup>442</sup> and (ii) rape, allegedly committed by members of the Burundian security forces and the *Imbonerakure* in the aftermath of the attacks on the four military bases.<sup>443</sup> Such crimes did not fall within the mandate vested in the Commission, considering that it was exclusively established to examine allegations of extra-judicial killings.<sup>444</sup> Therefore, the Chamber finds that, in this respect, it cannot be concluded that potential cases arising out of the situation in Burundi as

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<sup>436</sup> BDI-OTP-0003-4815, at 4835.

<sup>437</sup> BDI-OTP-0003-4815, at 4835.

<sup>438</sup> BDI-OTP-0003-4815, at 4836.

<sup>439</sup> BDI-OTP-0003-4815, at 4836.

<sup>440</sup> BDI-OTP-0003-4815, at 4837-4841, 4843.

<sup>441</sup> [REDACTED].

<sup>442</sup> *See above* para. 81.

<sup>443</sup> *See above* paras 113-114.

<sup>444</sup> There is only one sentence, repeated twice, in the report on the issue of torture, see BDI-OTP-0003-4815, at 4835 and 4842.

identified by the Court are being or have been investigated by this Commission for the purposes of article 17(1)(a)-(b) of the Statute.

171. Second, the Chamber recalls that it has found that there is a reasonable basis to proceed with an investigation regarding the summary execution of several young men and instances of torture perpetrated by members of the Burundian security forces and the *Imbonerakure*.<sup>445</sup> The Commission concluded that the persons found dead were “combatants” and that no acts of torture had been carried out. Nevertheless, the Chamber finds that it cannot be said that potential cases arising out of the situation in Burundi as identified by the Court are being or have been investigated by this Commission within the meaning of article 17(1)(a)-(b) of the Statute. On the basis of the available documentation, the Chamber considers that the Commission did not undertake tangible, concrete, and progressive investigative steps.

172. The Chamber notes that the Commission’s conclusion that the victims were combatants and that, with the exception of one case, no civilians had been killed, was reached without a sufficiently detailed examination. The Commission merely referred to the location where the victims were found and the fact that “some” victims wore uniforms and had weapons.<sup>446</sup> These criteria do not exclude the possibility that the deaths of some victims contravened relevant rules of national and international law. Moreover, the Commission omitted to assess the responsibility of specific members of the security forces or any of their superiors, apart from one case. It merely stated that the conduct of the security forces was generally in keeping with international humanitarian law without further analysis. In this regard, further investigations would have been necessary in order to properly analyse the alleged

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<sup>445</sup> See above paras 62-63 and 103.

<sup>446</sup> BDI-OTP-0003-4815, at 4827-4831.

crime scene *before* it was altered and the bodies<sup>447</sup> apparently rapidly disposed of by the security forces and the *Imbonerakure*.<sup>448</sup> In the same vein, further questioning would have been needed to ascertain the circumstances of the death of those persons, whereas the Commission apparently limited its questioning to the issue of where the bodies were found (*“ont été interrogés pour savoir les endroits exacts dans lesquels les cadavres ont été récupérés”*).<sup>449</sup> This was even more necessary as, according to the Commission’s own conclusions, only *some* of the bodies found wore uniforms or had weapons.

173. Furthermore, it seems that this Commission, just like the Commission into the events of 13 October 2015, did not seek access to many witnesses who were residents of the areas where the bodies were found as, apparently, those residents were not willing to testify before the Commission.<sup>450</sup> However, the Commission did not attempt to remedy this matter to ensure a more comprehensive investigation. It neither exercised any of its own powers nor seized other authorities with such powers to compel persons who may have been in possession of relevant information to appear before it, while providing such persons with the necessary protective measures.<sup>451</sup> In the same vein, in another part of its report, the Commission underlined the fact that no families came forward to present another version of the events (*“aucune famille n’a approché la commission pour porter plainte et ainsi relater une version différente des faits”*).<sup>452</sup> It was, however, not up to the families to bring “another version of the events” but incumbent on the Commission to investigate, using all the means at its disposal, and therefore to give proper consideration to all hypotheses.

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<sup>447</sup> See *above* para. 103, where the Chamber notes that the material also indicates that bodies found on the streets of Bujumbura on 12 December 2015 showed signs of their arms and legs having been tied behind their backs.

<sup>448</sup> BDI-OTP-0003-1932, at 1963.

<sup>449</sup> BDI-OTP-0003-4815, at 4828.

<sup>450</sup> BDI-OTP-0003-4815, at 4825.

<sup>451</sup> [Gaddafi Admissibility Decision](#), paras 209-211; [Al-Senussi Admissibility Decision](#), para. 283.

<sup>452</sup> BDI-OTP-0003-4815, at 4836.

174. Finally, the Chamber is concerned by the fact that no forensic examination was even envisaged by the Commission in order to analyse the circumstances of death. However, in the view of the Chamber, such examination is a crucial investigative step in a proper assessment of such circumstances. In addition, the Chamber underlines the fact that assistance for a proper forensic examination was offered to the Burundian authorities but that those authorities did not follow up on such offer of assistance.<sup>453</sup>

175. Moreover, the Commission's conclusion with regard to allegations of torture is entirely devoid of detail. Apart from stating that it had not recorded a single instance of torture, it did not explain what it had investigated or the manner in which it had arrived at this conclusion. This stands in sharp contrast with the detailed information submitted to the Chamber, and further supported by many communications submitted on behalf of victims, which indicate that acts of torture were committed on and after 11 December 2015 by the security forces and members of the *Imbonerakure* and that many of the bodies found on the streets of Bujumbura on 12 December 2015 showed signs of torture.<sup>454</sup>

176. Third, with regard to the deaths of seven individuals arrested in relation to their role in the attacks on the military bases, the Chamber notes that the Commission identified a police officer and a military officer as the perpetrators and recommended further criminal investigation.<sup>455</sup> The information available to the Chamber does not reveal whether such investigations have been carried out. In any event, the Chamber observes that this case is of limited scope, involving allegations of one particular incident against two relatively low-ranking perpetrators. The names of these persons do not appear in the "Preliminary list of persons or groups

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<sup>453</sup> BDI-OTP-0003-4258, at 4265.

<sup>454</sup> See *above* para. 103.

<sup>455</sup> BDI-OTP-0003-4815, at 4835.

that appear to be the most responsible for the most serious crimes”<sup>456</sup> and they do not otherwise appear to fall into this category. Therefore, this matter falls outside the scope of potential cases arising out of the situation in Burundi.

d) Other National Proceedings

177. In their response to the Prosecutor’s request for information, the Burundian authorities detailed a number of ongoing proceedings before the domestic judicial authorities. The Burundian authorities also provided information on such proceedings in their comments on the report of the UNIIB.

178. In the submission of the Prosecutor, five such proceedings are of relevance to the potential case(s) arising out of her Request.<sup>457</sup> These concern the alleged attempted murder of Pierre Claver Mbonimpa,<sup>458</sup> [REDACTED]<sup>459</sup> [REDACTED].<sup>460</sup> The Chamber recalls that it has found that there is a reasonable basis to proceed with an investigation into crimes involving these persons.<sup>461</sup>

179. The Chamber observes that, in relation to the alleged attempted murder of Pierre Claver Mbonimpa, [REDACTED]<sup>462</sup> [REDACTED].<sup>463</sup> Accordingly, on the basis of the existing circumstances, it cannot be concluded that these proceedings were conducted in relation to those who, according to the Prosecutor, appear to be the most responsible for the most serious crimes.<sup>464</sup> Moreover, the Chamber has not been provided with more specific information regarding the specific steps that are being or have been undertaken in relation to these proceedings. Therefore, on the basis of the available information, these proceedings before the domestic courts of Burundi

<sup>456</sup> Request, ICC-01/17-X-5-US-EXP-Anx4.

<sup>457</sup> Request, ICC-01/17-X-5-US-Exp, para. 176. [REDACTED].

<sup>458</sup> [REDACTED].

<sup>459</sup> [REDACTED].

<sup>460</sup> [REDACTED].

<sup>461</sup> See above paras 66 and 126.

<sup>462</sup> [REDACTED].

<sup>463</sup> [REDACTED].

<sup>464</sup> Request, ICC-01/17-X-5-US-EXP-Anx4.

fall outside the scope of potential cases arising from the situation in Burundi as identified by the Court. It will be for the Prosecutor to keep under review the progress of national proceedings in relation to those cases for the purposes of complementarity.

180. [REDACTED].<sup>465</sup> However, the Chamber notes that the person concerned does not appear in the Prosecutor's "Preliminary List of Persons or Groups that Appear to be the Most Responsible for the Most Serious Crimes".<sup>466</sup> In addition, no further information on the person concerned has been provided, such as his position (if any) or his particular role [REDACTED]. Therefore, the Chamber considers that these domestic proceedings also fall outside the scope of potential cases arising out of the situation in Burundi as identified by the Court.

### **3. Conclusion**

181. The Chamber observes that, in spite of the establishment of the aforementioned Commissions and the proceedings before domestic courts, the Burundian authorities have remained inactive in relation to potential cases arising out of the situation in Burundi. The reason is that the documentation made available to the Chamber reveals that these Commissions and proceedings do not concern the same (groups of) persons that are likely to be the focus of an investigation into the situation in Burundi or that the Commissions have not undertaken tangible, concrete and progressive investigative steps. Accordingly, in these instances, there is no conflict of jurisdiction between Burundi and the Court.

182. Furthermore, the Chamber notes that it has found that there is a reasonable basis to proceed with an investigation into crimes arising out of the situation in Burundi beyond the scope of the findings of the aforementioned Commissions and

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<sup>465</sup> [REDACTED].

<sup>466</sup> Request, ICC-01/17-X-5-US-Exp-Anx4.

domestic proceedings. The Chamber has found, against the requisite threshold, that crimes of murder and attempted murder were committed by the security forces and members of the *Imbonerakure* on a continuous basis: (i) from 26 April until at least June 2015, in the context of the demonstrations; (ii) from May 2015 until at least December 2015, on an almost daily basis during cordon and search operations; (iii) after December 2015, in particular in the form of secret, extrajudicial killings; and (iv) starting from the end of April 2015 and throughout 2016, in the form of targeted assassinations, in and outside of Burundi. The Chamber has also found that numerous crimes of imprisonment or severe deprivation of physical liberty, torture and rape were committed by members of the security forces and the *Imbonerakure* starting on at least 25 April 2015 and continuing throughout 2016 and into 2017. Further, the Chamber has found that the crime of enforced disappearance was committed from at least 17 April 2015 and throughout the period under review, as well as the crime of persecution. The available information does not indicate that, with the exception of the limited proceedings mentioned above, any investigations or prosecutions have been undertaken by Burundi or by any other State which has jurisdiction with regard to these crimes. In view of such inactivity, the Chamber finds that there is no conflict of jurisdiction between Burundi and the Court in this regard either.

## **B. Gravity**

### **1. The Law**

183. The second prong of the admissibility test is set forth in article 17(1)(d) of the Statute, which declares that a case may be inadmissible if it “is not of sufficient gravity to justify further action by the Court”.



184. As with complementarity, gravity must “be examined against the backdrop of the likely set of cases or ‘potential case(s)’ that would arise from investigating the situation”.<sup>467</sup> This means that, with respect to the element of the persons or groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s), a generic assessment needs to be made as to whether “those who may bear the greatest responsibility for the alleged crimes committed” are encompassed.<sup>468</sup> Such an assessment must take into account that, at this stage, an investigation still needs to commence.<sup>469</sup> As for the second element, namely the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s), “the gravity of the crimes committed within the incidents” is mainly at stake.<sup>470</sup> It has been further clarified that “gravity may be examined following a quantitative as well as a qualitative approach”.<sup>471</sup> In this regard, the Chamber notes that cases encompassing a limited number of casualties<sup>472</sup> or even those dealing exclusively with the destruction of buildings dedicated to religion<sup>473</sup> have been considered to be sufficiently grave not only to justify an investigation but even actual prosecutions.

## 2. The Facts

185. The Prosecutor submits that potential cases arising from the situation in Burundi relate “to the conduct of the Burundian authorities and security forces,

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<sup>467</sup> [Kenya Article 15 Decision](#), para. 58; *see also* [Côte d’Ivoire Article 15 Decision](#), para. 202; [Georgia Article 15 Decision](#), para. 51.

<sup>468</sup> [Kenya Article 15 Decision](#), para. 60; *see also* [Côte d’Ivoire Article 15 Decision](#), para. 204; [Georgia Article 15 Decision](#), para. 51.

<sup>469</sup> [Kenya Article 15 Decision](#), para. 60; *see also* [Côte d’Ivoire Article 15 Decision](#), para. 203; [Georgia Article 15 Decision](#), para. 51.

<sup>470</sup> [Kenya Article 15 Decision](#), para. 61; *see also* [Côte d’Ivoire Article 15 Decision](#), para. 204; [Georgia Article 15 Decision](#), para. 51.

<sup>471</sup> [Kenya Article 15 Decision](#), para. 62; *see also* [Côte d’Ivoire Article 15 Decision](#), para. 203; [Georgia Article 15 Decision](#), para. 51.

<sup>472</sup> Pre-Trial Chamber I, *Prosecutor v Abdallah Banda Abakaer Nourain*, [Corrigendum of the “Decision on the Confirmation of Charges”](#), 7 March 2011, ICC-02/05-03/09-121-Corr-Red, paras 48-123.

<sup>473</sup> Trial Chamber VIII, *Prosecutor v Ahmad Al Faqi Al Mahdi*, [Judgment and Sentence](#), 27 September 2016, ICC-01/12-01/15-171, paras 34-37.

including individuals at senior levels of the Government and security apparatus, and members of the *Imbonerakure*".<sup>474</sup> Furthermore, the Prosecutor refers to the scale of the alleged crimes,<sup>475</sup> the fact that the alleged conduct was carried out with discriminatory intent and with particular cruelty in relation to torture, rape and sexual violence,<sup>476</sup> the particularly severe impact on children and victims of sexual and gender-based crimes,<sup>477</sup> and the deterioration of the human rights and economic situation.<sup>478</sup>

186. The Chamber considers that the potential cases arising out of the Request are of sufficient gravity to justify further action by the Court.

187. In view of the Prosecutor's assertion that high-ranking officials of the Burundian government, the police, the intelligence service and the military services, but also the *Imbonerakure*, appear to be the most responsible for the most serious crimes,<sup>479</sup> the Chamber accepts that the persons likely to be the focus of an investigation for the purpose of shaping a future case or cases are those who may bear the greatest responsibility for the alleged crimes.

188. In addition, the Chamber finds that it has been established that the crimes committed within the incidents are of sufficient gravity. In this regard, the Chamber recalls that it has found that there is a reasonable basis to believe that a wide array of crimes within the jurisdiction of the Court has been committed pursuant to a State policy involving many thousands of victims from at least 26 April 2015 in Burundi. This entails that the crimes have been committed on a large scale. Communications submitted by victims to the Prosecutor confirm the large-scale commission of

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<sup>474</sup> Request, para. 189.

<sup>475</sup> Request, para. 190.

<sup>476</sup> Request, para. 191.

<sup>477</sup> Request, paras 192, 195.

<sup>478</sup> Request, paras 193-195.

<sup>479</sup> Request, ICC-01/17-X-5-US-Exp-Anx4.

crimes.<sup>480</sup> It is further recalled that there is a reasonable basis to believe that some of these crimes were committed against children (such as murder, rape, and imprisonment)<sup>481</sup> and that some crimes have been executed in a particularly cruel manner (such as torture by means of electrocution and tying of weights to genitals, as well as gang rapes).<sup>482</sup> It has therefore been established that some crimes included elements of brutality. Such elements are also brought up in communications submitted by victims to the Prosecutor.<sup>483</sup>

### 3. Conclusion

189. For the foregoing reasons, the Chamber is of the view that potential cases arising out of the situation in Burundi satisfy the threshold of gravity pursuant to both a quantitative and a qualitative assessment.

## VI. THE INTERESTS OF JUSTICE

190. Finally, in accordance with article 53(1)(c) of the Statute, the third criterion to be examined by the Chamber is whether “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”.<sup>484</sup> Contrary to sub-paragraphs (a) and (b), which require a positive finding, sub-paragraph (c) does not require the Prosecutor to demonstrate that initiating an investigation *is* in the interests of justice. Since the Prosecutor has not determined that initiating an investigation in the Burundi situation “would not serve the interests of justice” and, importantly, taking into account the views of the victims which overwhelmingly speak in favour of commencing an investigation, the Chamber considers that there

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<sup>480</sup> BDI-OTP-0005-0080, at 0083; BDI-OTP-0003-4672, at 4683-4684, 4685-4686; BDI-OTP-0001-0314, at 0314.

<sup>481</sup> *See above* paras 53, 54, 57, 60, 61, 62, 85, 86, 112.

<sup>482</sup> *See above* the Chamber’s findings on the crimes of rape and torture.

<sup>483</sup> BDI-OTP-0005-0080, at 0081.

<sup>484</sup> [Kenya Article 15 Decision](#), para. 63; [Côte d’Ivoire Article 15 Decision](#), para. 207; [Georgia Article 15 Decision](#), para. 58.

are indeed no substantial reasons to believe that an investigation would not serve the interests of justice.

## VII. THE SCOPE OF THE AUTHORIZED INVESTIGATION

191. The Chamber finds it appropriate to set out the parameters of the authorized investigation. The Prosecutor requests the commencement of the “investigation into the crimes within the jurisdiction of the Court allegedly committed in Burundi from 26 April 2015”.<sup>485</sup> With regard to events subsequent to Burundi’s withdrawal from the Statute, the Prosecutor states that “the end date of the situation would be 26 October 2017”.<sup>486</sup>

192. With regard to the temporal scope of the authorized investigation, the Chamber underscores that some crimes, as exemplified in this decision, were committed before 26 April 2015. As a result, the Prosecutor is authorized to extend her investigation over those crimes if the legal requirements of the contextual elements are fulfilled. Moreover, in the light of the continuous nature of certain crimes, the Prosecutor may also extend her investigation to crimes even if they continue after 26 October 2017.

193. With regard to the material scope of the authorized investigation, the Chamber authorizes the commencement of an investigation of *any crime* within the jurisdiction of the Court committed between 26 April 2015 and 26 October 2017, subject to what is said in the previous paragraph on the temporal scope of the authorized investigation. Therefore, the Prosecutor is not restricted to the incidents and crimes set out in the present decision but may, on the basis of the evidence, extend her investigation to other crimes against humanity or other article 5 crimes, *i.e.* war crimes and genocide, as long as they remain within the parameters of the authorized

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<sup>485</sup> Request, para. 200.

<sup>486</sup> Request, para. 39.

investigation. This complies with the Prosecutor's duty to investigate objectively, in order to establish the truth, pursuant to article 54(1)(a) of the Statute.

194. Lastly, with regard to the geographical scope of the authorized investigation, the Chamber underscores the fact that some crimes, as exemplified in this decision, were allegedly committed outside of Burundi by Burundian nationals pursuant to or in furtherance of the State policy described in Part IV of the present decision. Therefore, the Prosecutor may extend her investigation to all crimes within the jurisdiction of the Court committed on the territory of Burundi (article 12(2)(a) of the Statute) or committed outside Burundi by nationals of Burundi (article 12(2)(b) of the Statute) if the legal requirements of the contextual elements of crimes against humanity are fulfilled.

## VIII. OPERATIVE PART

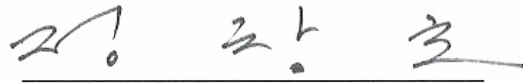
195. For these reasons, the Chamber hereby

- a) **AUTHORIZES** the commencement of an investigation into the situation in Burundi as defined in paragraphs 192 to 194 of the present decision;
- b) **GRANTS** the Prosecutor's request for delayed notification under article 18 of the Statute as held in paragraph 19;
- c) **ORDERS** the Prosecutor to submit within ten days of notification of the present decision proposals for redactions, if any, to the present decision and to the 15 September 2017 Order (ICC-01/17-X-6-US-Exp);
- d) **ORDERS** the Registry to reclassify as public the decisions issued by the Chamber on 31 August 2017 (ICC-01/17-X-3-US-Exp and ICC-01/17-X-4-US-Exp), as soon as the present decision is made public;
- e) **ORDERS** the Prosecutor to file, if necessary in a redacted form, public versions of her Request for extension of the page limit (ICC-01/17-X-2-US-

Exp), of the Request (ICC-01/17-X-5-US-Exp) and the Prosecutor's Additional Information (ICC-01/17-X-7-US-Exp and ICC-01/17-X-8-US-Exp), as soon as the present decision is made public;

- f) **ORDERS** the Victims Participation and Reparations Section in the Registry to notify the present decision, once it has been made public, to the victims, or to associations representing victims, who have communicated with the Registry or the Office of the Prosecutor in relation to the situation in Burundi.

Done in both English and French, the English version being authoritative.



**Judge Chang-ho Chung**  
**Presiding Judge**



**Judge Antoine Kesia-Mbe Mindua**



**Judge Raul C. Pangalangan**

Dated this Thursday, 9 November 2017

At The Hague, The Netherlands