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No. ICC-01/17-X

Date: 15 September 2017

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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 "Order to the Prosecutor to Provide Additional Information", ICC-01/17-X-6-US-Exp, 15 September 2017

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

James Stewart, Deputy Prosecutor

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

Registrar

Herman von Hebel, Registrar

Defence Support Section

Victims and Witnesses Unit

Nigel Verrill, Chief

Detention Section

**Victims Participation and Reparations
Section**

Philipp Ambach, Chief

Other

PRE-TRIAL CHAMBER III (the “Chamber”) of the International Criminal Court (the “Court”) issues this Order to the Prosecutor to Provide Additional Information.

1. On 23 August 2017, the Presidency of the Court assigned the situation in the Republic of Burundi (“Burundi”) to the Chamber.¹
2. On 31 August 2017, the Judges of the Chamber elected Judge Chang-ho Chung as Presiding Judge of the Chamber.²
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 of her request for authorization to initiate an investigation in the situation in Burundi.³
4. On 5 September 2017, the Prosecutor submitted her “Request for authorisation of an investigation pursuant to article 15” (the “Request”) together with eight annexes.⁴
5. The Prosecutor filed her Request under seal, pursuant to regulation 23*bis* of the Regulations of the Court.⁵ In this regard, the Prosecutor proposes that any decision issued by the Chamber pursuant to article 15(4) of the Rome Statute (the “Statute”) be issued with the same level of classification as her Request.⁶ She further proposes that, in case the Chamber would decide to authorize the commencement of an investigation, notice under article 18 of

¹ ICC-01/17-X-1-US-Exp.

² ICC-01/17-X-3-US-Exp.

³ ICC-01/17-X-4-US-Exp.

⁴ ICC-01/17-X-5-US-Exp.

⁵ ICC-01/17-X-5-US-Exp, para. 9.

⁶ ICC-01/17-X-5-US-Exp, para. 13.

the Statute be provided to all States Parties and other States with jurisdiction, including Burundi, within ten working days.⁷

6. The Prosecutor bases the level of classification of her Request on an assessment that “there is a current and tangible threat to victims and witnesses posed by the groups involved in the crimes identified in the course of the preliminary examination undertaken by [...] [her] Office”.⁸ She submits that there is “an extended perception that government-related agencies are seeking to detect any instances of cooperation with ongoing inquiries into human rights abuses and/or international crimes”, [REDACTED] and that there is widespread fear of retaliation, based on previous alleged acts of retaliation both in Burundi and in neighbouring States.⁹ The Prosecutor therefore considers that knowledge of the fact that she is seeking authorization to commence an investigation may increase the existing risks to victims and witnesses and that there is a tangible risk that potential witnesses could be targeted in order to adversely affect any future investigative activities.¹⁰

7. The Chamber notes rule 50(4) of the Rules of Procedure and Evidence, which stipulates in the relevant part that “[t]he Pre-Trial Chamber, in deciding on the procedure to be followed, may request additional information from the Prosecutor [...]”. The Chamber considers that, for the following reasons, additional information from the Prosecutor is warranted in the circumstances at hand.

8. At the outset, the Chamber notes that this marks the first time that the Prosecutor presents a request pursuant to article 15(3) of the Statute under

⁷ ICC-01/17-X-5-US-Exp, para. 13.

⁸ ICC-01/17-X-5-US-Exp, para. 10. *See also* ICC-01/17-X-5-US-Exp-Anx2.

⁹ ICC-01/17-X-5-US-Exp, para. 10.

¹⁰ ICC-01/17-X-5-US-Exp, para. 10.

seal and *ex parte*. However, the Request does not elaborate on this matter. Accordingly, the Chamber orders the Prosecutor to provide additional information on the specific features of the request under article 15 of the Statute in relation to the situation in Burundi that set it apart from previous requests under article 15 of the Statute so as to warrant an under seal and *ex parte* classification.

9. According to the Prosecutor, conducting the article 15 proceedings under seal and *ex parte* would allow her “additional time to complete [REDACTED] comprehensive protection strategies, which may in turn at least attenuate the risks identified thus far”.¹¹

10. The Chamber takes note of the fact that the Request omits to specify: (i) the concrete steps the Prosecutor is currently taking to develop protection strategies and contingency plans; (ii) the specific measures that she would be able to implement should the Request be granted; and (iii) how such measures would reduce the risks to the victims and witnesses in the assessment of the Prosecutor. [REDACTED].¹²

11. Accordingly, the Chamber orders the Prosecutor to provide additional information on the aforementioned aspects omitted from the Request. In addition, the Chamber orders the Prosecutor to explain how maintaining the level of classification of her Request would allow her to develop protection strategies and contingency plans [REDACTED].

12. The Prosecutor further submits that, in the event the Chamber would grant the Request, a delay of ten working days in notifying such a decision to

¹¹ ICC-01/17-X-5-US-Exp, para. 9.

¹² ICC-01/17-X-5-US-Exp, para. 11.

the relevant States, including Burundi, would permit her to complete [REDACTED].¹³

13. The Chamber notes that the Prosecutor also does not explain how she would complete [REDACTED] within ten working days in the event that the Request would be granted. The Chamber therefore orders the Prosecutor to provide additional information on these matters and, in particular, to specify how she expects to implement these steps within such a limited period of time [REDACTED].

14. Moreover, in the Request, it is recalled that, “[o]n 25 April 2016, following the review of communications and reports, the Prosecutor opened a preliminary examination into the situation” in Burundi,¹⁴ which was communicated to the public.¹⁵ The Request further recognises that the withdrawal of Burundi from the Statute is scheduled to come into effect on 27 October 2017.¹⁶ Considering that the Prosecutor’s initial activities in respect of the situation in Burundi are already of a public nature and Burundi’s notification of withdrawal will come into effect in the near future, the Chamber orders the Prosecutor to provide additional information on the impact that the level of classification of her Request will have on attenuating the existing risks to victims and witnesses.

15. Finally, the Chamber notes the following statement by the Prosecutor:

“Neither in communications from victims, nor in any of the consultations with organisations representing victims or knowledgeable of the interests of victims, has the Prosecution received views that the interests of justice would not be served by an investigation into the

¹³ ICC-01/17-X-5-US-Exp, para. 13.

¹⁴ ICC-01/17-X-5-US-Exp, para. 24.

¹⁵ Office of the Prosecutor, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi”, 25 April 2016.

¹⁶ ICC-01/17-X-5-US-Exp, para. 8.

situation in Burundi. Instead, since 2015, the Prosecution has received multiple letters from Burundian civil society organisations on the incapacity of the judicial system in Burundi to investigate and prosecute international crimes and its lack of independence from the executive, requesting the Prosecutor to open an investigation into crimes committed in Burundi. [REDACTED]”.¹⁷

16. Accordingly, the Chamber further orders the Prosecutor to submit the documents and information referred to in this statement, so that the Chamber may assess the views expressed by the victims itself.

FOR THESE REASONS, THE CHAMBER HEREBY

ORDERS the Prosecutor to provide the additional information specified in paragraphs 8 to 16 of the present Order on Monday, 25 September 2017 at the latest.

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

¹⁷ ICC-01/17-X-5-US-Exp, para. 199.