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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 BURUNDI

Public
with Under Seal, *EX PARTE*, only available to the Prosecution
Annex 1

Public redacted version of "Prosecution's urgent provision of further information pursuant to the 'Order to the Prosecutor to Provide Additional Information'", 25 September 2017, ICC-01/17-7-US-Exp

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

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I. Introduction

1. On 15 September 2017, following the Prosecution's Request for authorisation of an investigation pursuant to article 15 of the Rome Statute¹ ("Request"), Pre-Trial Chamber III ("Chamber") made an Order to Provide Additional Information ("Order").²
2. The Prosecution hereby provides the additional information requested in the Chamber's Order.³ This information provides additional support for the Prosecution's request that any decision issued by the Chamber on the Request be issued with the same classification. The information further provides relevant documentation and information provided by victims to the Prosecution expressing their views on the opening of an investigation.

II. Level of Confidentiality

3. Pursuant to regulation 23bis(2) of the Regulations of the Court ("Regulations"), the Prosecution submits this filing as under seal, *ex parte* only available to the Prosecution, which is the same classification as the Request and the Order, to which this filing relates.

III. Submissions

4. The Prosecution sets out below the additional information required by the Chamber in paragraphs 8 to 16 of its Order.

¹ *Situation in Burundi*, Pre-Trial Chamber III, Request for authorisation of an investigation pursuant to article 15, ICC-01/17-X-5-US-Exp, 5 September 2017.

² *Situation in Burundi*, Pre-Trial Chamber III, Order to the Prosecutor to Provide Additional Information, ICC-01/17-X-6-US-Exp, 15 September 2017.

³ Full references of the sources referred to herein are provided in Annex 1.

A. The specific features of the situation in Burundi set it apart from previous article 15 requests and so warrant an under seal and *ex parte* classification

5. This under seal *ex parte* classification is based on both the specific features of the situation in Burundi as well as lessons learnt from previous situations, on the adoption of measures to mitigate risks to victims, witnesses and the Prosecution's investigation.

1. *The protection risks arising from the situation in Burundi are unprecedented*

6. The Prosecution acknowledges that each situation presents security and protection related challenges that routinely require the adoption of measures to mitigate their effects. Physical evidence and witnesses may be located in fragile governance zones or in the midst of ongoing hostilities; States where the crimes occurred may be uncooperative and deny access to its territory; witnesses may be afraid of retaliation; and efforts may be undertaken to identify potential witnesses and/or undermine the integrity of investigation through the destruction of and tampering with evidence. Nonetheless, never before has the Court faced the combination of factors that are present in this situation.

7. Specifically, the Government of Burundi has not merely been uncooperative with accountability efforts undertaken to date by external actors: it has actively sought to target, both in Burundi and abroad, persons who it perceives could implicate it in the crimes alleged, including by means of suppression, intimidation, infiltration, arrest and detention, torture, and death. The resultant intense climate of fear among victims is not just a perception of retaliation, but based on concrete [REDACTED].

8. In addition to the information set out in paragraphs 9-13, 59-61 and 71 of the Request, the Prosecution provides below the following additional information from: (a) the recently published detailed report of the United Nations Commission of Inquiry on Burundi (“UNCOI”); (b) [REDACTED]; and (c) [REDACTED] provided pursuant to article 15 of the Statute.

(a) UNCOI Final Report

9. The Final Report⁴ of the UNCOI (“Final Report”) was issued on 18 September 2017, following a summary report published on 4 September 2017 and referenced in the Request.⁵ It corroborates and provides added insights into the high climate of fear and attendant security risks.

10. The UNCOI conducted over 500 interviews with victims, witnesses and other sources,⁶ based in Burundi and abroad. The Final Report indicated that when possible, interviews were conducted in person, and alternatively, due to lack of access to Burundi or security concerns, interviews were conducted from a distance.⁷ The great majority of persons interviewed did so on the condition of confidentiality, mainly motivated by the fear of retaliation and a more general climate of fear in Burundi.⁸ The UNCOI paid particular attention to witness and source protection issues due to allegations of retaliation and threats against Burundians who have in the past collaborated with human rights

⁴ UNCOI, Rapport final détaillé de la Commission d’enquête sur le Burundi, A/HRC/36/CRP.1, 18 September 2017, (“UNCOI Final Report”), [BDI-OTP-0005-0468](#).

⁵ UNCOI, Rapport de la Commission d’enquête sur le Burundi, A/HRC/36/54, 11 August 2017, [BDI-OTP-0005-0003](#). See, Request, at fn. 4.

⁶ UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0479, para. 26.

⁷ UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0478, para. 22.

⁸ UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0480, para. 26.

mechanisms, or who have provided information to representatives of the UN, non-governmental organisations (“NGOs”) or journalists.⁹

11. In particular, UNCOI interviews with victims and witnesses revealed a profound and widespread climate of fear to provide testimony based on the fear of retaliation and persecution, including among those located abroad.¹⁰ Numerous refugees interviewed stated their fear of being killed or attacked in the countries they sought refuge, or the risk of being forcibly repatriated to Burundi.¹¹ Specifically, several victims in exile confirmed having recognised agents of the Burundian intelligence service (*Service National de Renseignement*, or “SNR”) or members of the *Imbonerakure* in the Republic of Kenya (“Kenya”), the Republic of Uganda (“Uganda”), Democratic Republic of the Congo (“DRC”) and the United Republic of Tanzania (“Tanzania”).¹² Other refugees claimed to have received threatening anonymous phone calls or written messages and/or to have been physically attacked.¹³
12. The Final Report also confirms previous reports detailing the killing of civilians in Burundi after their having received threats from members of the *Force de Défense Nationale* (FDN), the police (*Police Nationale du Burundi*, or “PNB”), the SNR (together, the “Security Forces”) or the *Imbonerakure*.¹⁴ This includes assassinations and assassination attempts targeting members of the opposition, civil society or persons perceived to be opposing the Government;¹⁵ as well as cases of civilian deaths in detention following arrest by members of the Security Forces.¹⁶ Numerous

⁹ UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0528, para. 31.

¹⁰ UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0528, para. 197.

¹¹ UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0528, para. 197.

¹² UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0528, para. 197.

¹³ UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0528, para. 197.

¹⁴ UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0539, para. 243.

¹⁵ UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0545, para. 265.

¹⁶ UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0547, para. 271.

human rights defenders were also forced to leave Burundi following repeated threats against themselves or their family members or due to a general climate of insecurity often caused by the specific surveillance of their activities by agents of the SNR or the PNB.¹⁷ In this context, the UNCOI reported that the authorities have targeted persons who have shared information with domestic or international civil society organisations or the UN.¹⁸

13. The Final Report also includes information on persons who were threatened, arrested or tortured after having assisted others to seek refuge outside Burundi;¹⁹ family members of persons who managed to leave the country who were subjected to threats, arbitrary detention and/or disappearance;²⁰ and persons who returned to Burundi who were accused of collaborating with armed opposition groups abroad and subjected to arbitrary detention and torture.²¹
14. The Prosecution further notes reports of a attack on 13 September 2017 by six armed men on the office of the United Nations High Commissioner for Human Rights in Burundi.²² The Government of Burundi has reportedly dismissed this alleged attack as an attempt to smear it.²³

(b) [REDACTED]

¹⁷ UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0628, para. 584.

¹⁸ UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0628, para. 585.

¹⁹ UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0633, para. 607.

²⁰ UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0633, para. 608.

²¹ UNCOI Final Report, [BDI-OTP-0005-0468](#) at 0633, para. 609.

²² IWACU English News, “Armed Group attacked UNHCHR office in Bujumbura”, 14 September 2017, [BDI-OTP-0005-0436](#).

²³ Reuters, “Burundi says U.N. office break-in may have been fabrication”, 15 September 2017, [BDI-OTP-0005-0435](#).

15. [REDACTED]. [REDACTED].²⁴ The two main reasons given by the refugees for leaving Burundi were threats and abuses by the *Imbonerakure* and killings and enforced disappearances of family members.²⁵
16. [REDACTED]. [REDACTED].²⁶ [REDACTED].²⁷
17. [REDACTED].²⁸ [REDACTED],²⁹ [REDACTED].
18. [REDACTED].³⁰ [REDACTED]. [REDACTED].³¹

(c) [REDACTED]

19. [REDACTED]. [REDACTED].³² [REDACTED]. [REDACTED].
[REDACTED].³³
20. [REDACTED].

2. *Lessons learned from previous situations*

21. The level of confidentiality is also warranted by lessons learned from experience gained from the Prosecution's previous investigations, which have shown that in situations where vulnerable witnesses and potential pools of evidence are at heightened risk, the adoption of early preventative measures are far more likely to be effective than post-hoc remedial efforts in addressing those risks, once interference has occurred or persons have been placed at risk. Almost all of the cases brought by the Prosecution have been or are currently being confronted with incidents of

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

obstruction of justice — in particular witness tampering. While no single situation is directly comparable to the level of hostility, infiltration efforts and violence that members of the Burundian authorities have adopted towards perceived opponents, including persons who may implicate them in the crimes alleged in the Request, a number of examples illustrate existing risks.

22. In Kenya, there were repeated attempts, including during the article 15 stage, to identify persons who cooperated with the national commission of inquiry (Commission of Inquiry into Post-Election Violence or “CIPEV”), including to undermine future ICC investigations.³⁴ These attempts included alleged meetings held in the period between the Prosecution’s article 15 application³⁵ and the Pre-Trial Chamber’s decision thereon.³⁶ These meetings were reported in the media shortly after they allegedly took place.³⁷
23. [REDACTED]. [REDACTED].³⁸
24. The Prosecution has learnt from its experience in the Kenya situation that the time-lapse of the article 15 procedure, in contexts of heightened protection risks, may create a protection gap for persons perceived to be potential ICC witnesses as well as for the integrity of its future investigations, at a time when the Court has a limited mandate or ability to implement the measures required by articles 54(1)(b) and 68.

³⁴ See e.g. Daily Nation, “Witnesses at risk, warns lobby”, 11 January 2010, [BDI-OTP-0005-0427](#); Time, “Kenya’s Whistleblowers Face Growing Intimidation”, 30 January 2010, [BDI-OTP-0005-0424](#); allAfrica.com, Nairobi Star, “Kenya: Rift Leaders Behind Witness Attacks – NSIS”, 18 January 2010, [BDI-OTP-0005-0413](#).

³⁵ *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Request for authorisation of an investigation pursuant to article 15, ICC-01/09-3, 26 November 2009.

³⁶ *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010.

³⁷ See e.g. allAfrica.com, Nairobi Star, “Kenya: Rift Leaders Behind Witness Attacks - NSIS”, 18 January 2010, [BDI-OTP-0005-0413](#).

³⁸ [REDACTED].

25. The risks to potential witnesses and the integrity of investigations were also pronounced in the situation in Darfur, where the Government of Sudan was opposed to the referral and government officials had been implicated in the alleged crimes. Although the situation in Darfur was not triggered by an article 15 procedure, arguably a broadly comparable time period can be identified between the referral of the situation to the Prosecutor by the UN Security Council on 31 March 2005 until the Prosecutor announced the opening of an investigation on 1 June 2005.
26. Ultimately, because of the difference in triggering procedures, the issue did not arise in the same manner. Despite some similarity, during the above time period the Prosecutor had yet to make a determination to open investigations. The Prosecution also benefitted from a certain level of cooperation from the Government of Sudan at the time and the immediate period thereafter, including the provision of information, the facilitating of five missions to Khartoum, and the interview under caution of a senior official.³⁹ The prevalence of ongoing crimes and the ongoing insecurity in the region did mean that the Prosecution had to adopt other measures, including [REDACTED].⁴⁰ [REDACTED].
27. More generally, the Court's experience has shown that the early identification of risks and the taking of appropriate remedial measures can help to ensure the integrity of proceedings. This has included measures to mitigate the risks [REDACTED],⁴¹ [REDACTED].⁴²

³⁹ *Situation in Darfur*, Pre-Trial Chamber I, Prosecutor's Application under Article 58(7), ICC-02/05-56 27-02-2007, 27 February 2007, para.274.

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

B. Steps being taken to develop and implement protection strategies and contingency plans

28. Pursuant to paragraphs 10 to 14 of the Order, the Prosecution provides the following additional information on: (i) the concrete steps currently being taken to develop protection strategies and contingency plans; (ii) the specific measures that would be implemented by the Prosecution should the Request be granted; and (iii) how such measures will reduce the risks to victims and witnesses.

1. Concrete steps currently being taken to develop protection strategies and contingency plans

29. Under article 68(1) of the Statute, the protection of victims, witnesses and any other persons at risk on account of the activities of the Court⁴³ is a responsibility of the Court as a whole.⁴⁴ Within this context, the Statute sets out an independent duty and power of the Prosecution to protect all persons at risk on account of their interaction with the Prosecution.⁴⁵ In carrying out these functions, the Appeals Chamber has mandated the Prosecution and the Victims and Witnesses Section (“VWS”) to cooperate closely.⁴⁶ [REDACTED]. The Prosecution’s Protection Strategies Unit (“PSU”) has developed expertise in assessing security risks for persons interacting with the Prosecution and in taking measures to preventing and mitigating these risks.

⁴³ *Prosecutor v. Katanga*, Judgment on Prosecution’s Appeal against the First Redaction Decision”, ICC-01/04-01/07-475 OA, 13 May 2008, para. 1.

⁴⁴ *Prosecutor v. Katanga & Ngudjolo*, Appeals Chamber, Judgment on Preventive Relocation, ICC-01/04-01/07-776 OA7, 26 November 2008, para. 101.

⁴⁵ Articles 54(3)(f) and 68(1) of the Statute; *see also*, *Prosecutor v. Katanga & Ngudjolo*, Appeals Chamber, Judgment on Preventive Relocation, ICC-01/04-01/07-776 OA7, 26 November 2008, para. 98.

⁴⁶ *Prosecutor v. Katanga & Ngudjolo*, Appeals Chamber, Judgment on Preventive Relocation, ICC-01/04-01/07-776 OA7, 26 November 2008, paras. 92, 98, 101; *see also* article 43(6) of the Statute.

30. PSU has already begun the process of developing a Witness Security Strategy and a Concept of Operations which will be implemented in the event that the Chamber authorises an investigation to safeguard the security and protection of those persons with whom the Prosecution interacts during the course of its investigations. [REDACTED].

31. [REDACTED]. [REDACTED]. [REDACTED].

32. [REDACTED].

2. Specific measures to be implemented should the Request be granted

33. None of the measures foreseen in the Security Strategy and the Concept of Operations, which provide for the necessary advance planning and preparation, can be implemented until such time as the Chamber authorises an investigation into the Burundi situation.

34. In this regard, the Prosecution recalls that its primary request is that the stage during which the Chamber is considering the Request be kept under seal. The 10 working day period is envisaged as a window of advance time to allow the Prosecution to prepare for the public announcement of the investigation's opening. Only limited steps can be implemented by the Prosecution during the proposed 10 day time period. Nonetheless, these measures will allow it to respond more rapidly and efficiently to the security challenges that will arise once any decision on the opening of investigations is made public.

35. Specifically, if and when the Chamber does authorise such an investigation, then in the 10 working day period requested, the Prosecution [REDACTED].

36. Once any decision becomes public, other measures the Prosecution can take include [REDACTED].

3. How such measures will reduce the risks to victims and witnesses

37. As set out in the Request, the Prosecution's submission that the Request should remain under seal is not based on the assumption that it will be able to protect all witnesses at risk once an investigation is opened. The Prosecution expressly acknowledges the limited measures it and VWS more generally can take to mitigate the risks to which victims and witnesses may be exposed. At the same time, the Prosecution is mandated by article 54(1)(b) of the Statute to take appropriate measures to ensure the effectiveness of investigations and prosecutions, and in so doing, respect the interests and personal circumstances of victims and witnesses; while both it and the Court as a whole must take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses pursuant to article 68 of the Statute.

38. As set out in Section A, the information available clearly indicates that agents of the Burundian authorities have in the past, and are currently, taking active efforts to infiltrate and intimidate victims and witnesses and so undermine the integrity of any accountability process into the crimes allegedly committed by its agents. It remains reasonable to assess that any public announcement of an investigation by the ICC into those alleged crimes will aggravate the existing protection risks.⁴⁷

39. [REDACTED].

40. As set out in the Request, although the existence of the preliminary examination is public, the Prosecution's assessment is that the concrete

⁴⁷ Request, para.10.

possibility of the ICC investigation, as created by the Request, which could eventually lead to the prosecution of persons located at the top echelons of the groups involved in the crimes, is likely to affect the calculations of those implicated by the crimes. This is particularly so in circumstances where the Government of Burundi may well believe that the coming into effect of its withdrawal from the Statute would permanently deprive the Court of the possibility to investigate.

41. The classification level is thus based on a reasonable request for the taking of preventative measures to prevent posing a danger to the integrity of investigations and the life and well-being of victims and witnesses, weighed against the general principle of the publicity of the proceedings, as well as the specific prejudice that may be caused by not providing those same victims public notice of the application so that they may make representations to the Chamber.
42. If the Prosecution could, it would request that the entire investigation, if authorised, including the fact of its opening, be kept confidential given the specific circumstances. However, given that it must notify all States Parties, including Burundi, pursuant to article 18, it considers that the minimum necessary and proportionate measures should be adopted.
43. The Prosecution does not undertake this assessment lightly, nor underestimate the importance of the general principle concerning the publicity of proceedings nor the specific standing granted to victims to provide representations to the Court. It considers that the appropriate and necessary balance, foreseen in rule 50(1), is struck with the proposed course of action.

C. Documents and information received from victims supporting the opening of an investigation

44. Pursuant to paragraphs 15 and 16 of the Order, the Prosecution provides documents and information received from victims.
45. [REDACTED] human rights organisations representing victims have through article 15 repeatedly stressed the desire of surviving victims of crimes in Burundi for justice.⁴⁸ A total of [REDACTED] different civil society organisations have submitted information under article 15. [REDACTED].
46. [REDACTED],⁴⁹ [REDACTED].⁵⁰
47. [REDACTED],⁵¹ [REDACTED].⁵²
48. [REDACTED].⁵³ [REDACTED].⁵⁴ [REDACTED].⁵⁵
49. [REDACTED].⁵⁶ [REDACTED].⁵⁷ [REDACTED].⁵⁸
50. [REDACTED]⁵⁹ [REDACTED].⁶⁰ [REDACTED].⁶¹ [REDACTED].⁶²

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

IV. Conclusion

51. The Prosecution stands ready to provide any further additional information that the Chamber should deem necessary pursuant to rule 50(4) of the Rules of Procedure and Evidence.



Fatou Bensouda
Prosecutor

Dated this 10th day of November 2017

At The Hague, The Netherlands