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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 Public redacted Annexes 1 and 8**  
**and Under Seal, EX PARTE, only available to the Prosecution Annexes 2-7**

**Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 6 September 2017, ICC-01/17-5-US-Exp**

**Source:** Office of the Prosecutor

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

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## I. Introduction

1. The Prosecution hereby requests authorisation from Pre-Trial Chamber III (“Chamber”) to proceed with an investigation into the situation in the Republic of Burundi (“Burundi”) from 26 April 2015 onwards, pursuant to article 15(3) of the Rome Statute (“Request”).
2. Having analysed the information available, the Prosecutor has determined that there is a reasonable basis to believe that members of the Burundian Government, members of the military, namely the *Force de Défense Nationale* (“FDN”), the police, namely the *Police Nationale du Burundi* (“PNB”) and the intelligence service, the *Service National de Renseignement* (“SNR”) (together, the “security forces”), as well as members of the *Imbonerakure*, the youth wing of the ruling party, carried out a deliberate attack against the civilian population, entailing the multiple commission of acts of murder, imprisonment, torture, rape, enforced disappearance and persecution, constituting crimes against humanity.
3. The attack targeted specific categories of civilians, namely: actual or suspected protesters opposing President Pierre Nkurunziza’s (“President Nkurunziza”) third presidential term; actual or perceived members of the political opposition or opposition sympathisers, including journalists, members of civil society organisations and residents of neighbourhoods associated with the opposition.
4. This attack was carried out pursuant to a State policy to keep President Nkurunziza in power by all means, including by repressing protests, quelling dissenting views, and punishing persons based on their actual or perceived affiliation with the political opposition.

5. The large-scale commission of the crimes, the number of victims, and the organised and coordinated nature of the acts of violence establish a reasonable basis to believe that the attack was both widespread *and* systematic. Although the violence subsided in December 2015, related alleged acts of violence continue to be committed.
6. There is evidence of some armed confrontation as the violence progressed between the Burundian security forces and armed anti-government entities, namely the *Forces Républicaines du Burundi* ("FOREBU") and the *Résistance pour un Etat de Droit au Burundi* ("RED-TABARA"). In this context, a number of acts of violence, including acts of murder, have allegedly been committed by such armed anti-government entities and other unidentified perpetrators. Nonetheless, at this stage such underlying acts cannot be linked to the contextual elements of crimes within the jurisdiction of the Court. This is because the degree of intensity of the armed confrontation and the level of organisation of these armed anti-government entities are insufficient to characterise the situation as a non-international armed conflict. Nor are these underlying acts constitutive of crimes against humanity. If and when an investigation is authorised by the Chamber, the Prosecution will, in the context of such investigation, keep these allegations under review.
7. Although the Burundian authorities have initiated a limited number of domestic inquiries with respect to violent acts, the information available suggests that such inquiries have not sought to examine the conduct of those who appear to be most responsible for the alleged crimes against humanity identified in this Request. Instead, these inquiries appear to have largely focussed on the responsibility of opposition members for the violence and have characterised the actions of the security forces as legitimate counter-insurgency operations. The potential case identified in

this Request is also sufficiently grave to warrant further action by the Court and there are no substantial reasons to believe that the opening of an investigation into the situation would not serve the interests of justice.

8. According to article 127(2), Burundi's withdrawal from the Rome Statute, scheduled to come into effect on 27 October 2017, shall not affect its 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*" (emphasis added). As such, Burundi will continue to bear cooperation obligations towards the Court should the Prosecutor commence criminal investigations upon authorisation before 27 October 2017. In any event, since this Request also triggers the commencement of 'proceedings',<sup>1</sup> Burundi would also continue to bear cooperation obligations to the Court were the Chamber to grant this Request after Burundi's withdrawal comes into effect. Finally, it should be recalled that the Court will indefinitely retain jurisdiction with respect to alleged crimes occurring on the territory of Burundi during the time period when it was a State Party to the Statute, irrespective of whether Burundi continues to bear any cooperation obligations.

## II. Level of Confidentiality and Requested Procedure

9. The Prosecution submits this filing as under seal pursuant to regulation 23*bis* of the Regulations of the Court ("Regulations"). This 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, [REDACTED]. The

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<sup>1</sup> *Situation in the Democratic Republic of Congo ("DRC Situation")*, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings, ICC-01/04-556 OA4 OA5 OA6, 19 December 2008, para. 45 (the Appeals Chamber held, in a different context, that the term 'proceedings' denotes "a judicial cause pending before a Chamber").

Prosecution does recognise that confidentiality *per se* will not neutralise those risks; however, it will allow the Prosecution additional time to complete [REDACTED] comprehensive protection strategies, which may in turn at least attenuate the risks identified thus far.

10. The Prosecution's assessment of the current situation, as reflected in the annexed report from the Office of the Prosecutor's ("Office") Protection Strategies Unit,<sup>2</sup> as well as in a number of factual findings included in this application,<sup>3</sup> is 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 the Office. The information gathered so far indicates that there is widespread fear of retaliation and an extended perception that government-related agencies are actively seeking to detect any instances of cooperation with ongoing inquiries into human rights abuses and/or international crimes.<sup>4</sup> [REDACTED]. [REDACTED]. There is also a concern that government agencies have infiltrated refugee camps in those states in an effort to gather information as to the activities of those who have sought refuge. [REDACTED]. The Prosecution's assessment is that the concrete possibility of the ICC opening an investigation into the Burundi situation, which could eventually lead to the prosecution of people located at the top echelons of the groups involved in the crimes, can increase the existing risks to those victims and witnesses.
11. The dangers posed to the integrity of the investigation, if authorised by the Chamber, are exacerbated by the fact that neither the Prosecution nor

<sup>2</sup> Annex 2, Protection Strategies Unit of the Office of the Prosecutor, [REDACTED].

<sup>3</sup> See *e.g.* paras. 59-61 and 71.

<sup>4</sup> A recent report of the United Nations ("UN") Commission of Inquiry on Burundi ("UNCOI") further described the "climate of fear" among persons interviewed: UNCOI, Rapport de la Commission d'enquête sur le Burundi, A/HRC/36/54, 11 August 2017, ("UNCOI Report"), [BDI-OTP-0005-0003](#) at 0007, para. 15 and 0019, para. 83. [REDACTED].

the Court as a whole are able to undertake any meaningful protective action under article 68 until an investigation is authorised. This means that the Prosecution may only at this stage design, but not implement, any protection strategies while the Chamber considers the merits of this Request. [REDACTED]. [REDACTED]. [REDACTED].

12. In these circumstances, the Prosecution considers that the proper course of action in view of its mandate to effectively and objectively investigate crimes under the jurisdiction of the Court (article 54), as well as the Court's protective duties under the Statute, is to file this Request under seal. The Court's legal framework expressly allows for this: 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 when so doing "would pose a danger to the integrity of the investigation or the life or well-being of victims and witnesses" (rule 50(1)). Both risks apply to the instant situation, as already advanced, and therefore the exception provided for in rule 50(1) is fully engaged. It is worthy of note that in a comparable situation, the Appeals Chamber accepted "under seal *ex parte*" submissions in the context of an admissibility appeal, despite the right of victims to submit observations to the Court under article 19(3), due to the risks to the life and well-being of victims and witnesses and the integrity and efficiency of ongoing investigative efforts that any public dissemination of the

matters being litigated (including whether a warrant of arrest against a certain suspect should be issued) would entail.<sup>5</sup>

13. While the Chamber considers this Request, the Prosecution will continue its security assessment and develop protection strategies and contingency plans and, as already advanced, will also [REDACTED]. [REDACTED]. As to the process to be followed once the Chamber is ready to issue its decision, the Prosecution proposes the following steps: (a) first, that any decision issued by the Chamber, be it favourable or not to the Prosecution, be issued with the same security classification as this Request; (b) that, if and when the Chamber authorises the commencement of an investigation, the Prosecution will, within a period of ten working days, proceed to complete its planning [REDACTED] prior to providing notice under article 18 to all State Parties and other States with jurisdiction, including Burundi. Since the threats to the investigation and the well-being of victims and witnesses emanate from groups that either belong to the Government of Burundi or are otherwise associated with it, the Prosecution is of the view that notifying States on a confidential basis, as allowed by article 18(1), will not provide any meaningful protection. Accordingly, once the letters are sent the Prosecution will notify the Chamber and propose the necessary redactions, both to the Prosecution's Request and, if necessary, to the Chamber's decision, with a view to the unsealing of both documents. The Prosecution will also inform the Chamber which annexes to the present Request should, in its view, remain under seal.

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<sup>5</sup> See, *DRC Situation*, Appeals Chamber, Judgment on Article 58 Appeal, ICC-01/04-169-US-Exp, 13 July 2006, subsequently reclassified as public decision ICC-01/04-169 23-09-2008 1/49 CB PT OA, 23 September 2008, paras. 19-31.

### III. Procedural history

14. By letter, dated 17 August 2017, the Prosecutor notified the President of the Court, in accordance with regulation 45 of the Regulations, of her intention to submit a request for authorisation of an investigation into the situation in Burundi, pursuant to article 15(3) of the Statute.
15. On 23 August 2017, the Presidency of the Court assigned the situation in Burundi to Pre-Trial Chamber III.
16. On 24 August 2017, the Prosecutor submitted a request for an extension of the page limit applicable under regulation 38 of the Regulations.
17. The Chamber granted the request on 31 August 2017.

### IV. Background

#### A. Past conflicts and the Arusha Agreement

18. Burundi has a population of approximately 11.5 million.<sup>6</sup> The majority of the population belong to the Hutu ethnic group (80.9%) while the minority are Tutsi (15.64%) and Twa (1%).<sup>7</sup> Burundi's history, both before and after independence in 1962, has been marked by repeated cycles of violence, including between ethnic communities.<sup>8</sup> Starting in 1993, a long and violent ethnic conflict that lasted over a decade reportedly cost the lives of more than 300,000 Burundians,<sup>9</sup> and left hundreds of thousands displaced.<sup>10</sup> The civil war, sparked by the assassination of the country's

<sup>6</sup> UN Department of Economic and Social Affairs, World Statistics Pocketbook 2016 edition, Series V, No. 40, [BDI-OTP-0003-4907](#) at 4920.

<sup>7</sup> Encyclopaedia Britannica online, "Burundi - People", accessed on 17 July 2017, [BDI-OTP-0003-4921](#) at 4921.

<sup>8</sup> Report of the United Nations Independent Investigation on Burundi ("UNIIB") established pursuant to Human Rights Council resolution S-24/1, A/HRC/33/37, 20 September 2016, ("UNIIB Report"), [BDI-OTP-0003-4258](#) at 4262, para. 18.

<sup>9</sup> BBC News, "Heavy Shelling in Burundi capital", 18 April 2008, [BDI-OTP-0003-2592](#) at 2592.

<sup>10</sup> UN Office of the High Commissioner for Human Rights ("OHCHR"), OHCHR in Burundi 2010-2011 - Human rights context, accessed 5 April 2017, [BDI-OTP-0003-4639](#) at 4639.

first Hutu President, Melchior Ndadaye, in October 1993, pitted a variety of mostly Hutu rebel movements against Burundi's Tutsi-dominated armed forces, the *Forces Armées Burundaises* ("FAB").<sup>11</sup> The *Conseil National pour la Défense de la Démocratie-Forces de Défense de la Démocratie* ("CNDD-FDD"), a politico-military movement, was the main Hutu rebel group during this war.<sup>12</sup>

19. In August 2000, the Arusha Peace and Reconciliation Agreement for Burundi ("Arusha peace agreement") set up a power-sharing system between the Hutu and the Tutsi which led to the creation of a transitional government on 1 November 2001.<sup>13</sup>
20. Transformed into a political party, the CNDD-FDD participated in the general elections of 2005, which marked the end of the transition period.<sup>14</sup> It won a majority in the National Assembly in July 2005 and on 19 August 2005, CNDD-FDD leader Pierre Nkurunziza was elected President by a Joint Parliamentary Congress comprising members of the National Assembly and the Senate.<sup>15</sup>
21. President Nkurunziza was re-elected for a further term in the 2010 presidential election, which was boycotted by the opposition.<sup>16</sup> As the term progressed, a core of the CNDD-FDD argued that, notwithstanding the constitutional two-term limit on the presidential office, President Nkurunziza could run again because his first election did not count given

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<sup>11</sup> International Crisis Group ("ICG"), From Electoral Boycott to Political Impasse, 7 February 2011, ("ICG, Electoral Boycott to Political Impasse"), [BDI-OTP-0003-4932](#) at 4936; Nindorera, W., "The CNDD-FDD in Burundi – the path from armed to political struggle", Berghof Transitions Series No. 10, 2012, ("Nindorera, The CNDD-FDD in Burundi"), [BDI-OTP-0003-0350](#) at 0358.

<sup>12</sup> Nindorera, The CNDD-FDD in Burundi, [BDI-OTP-0003-0350](#) at 0358.

<sup>13</sup> ICG, Electoral Boycott to Political Impasse, [BDI-OTP-0003-4932](#) at 4936.

<sup>14</sup> Nindorera, The CNDD-FDD in Burundi, [BDI-OTP-0003-0350](#) at 0375-0376.

<sup>15</sup> UN Security Council ("UNSC"), Special report of the Secretary-General on the United Nations Operation in Burundi, S/2005/586, 14 September 2005, [BDI-OTP-0003-4530](#) at 4531, paras. 6 and 8.

<sup>16</sup> UNSC, Seventh report of the Secretary-General on the United Nations Integrated Office in Burundi, S/2010/608, 30 November 2010, [BDI-OTP-0003-4541](#) at 4543, para. 11.

that it did not result from a direct election as contemplated by the constitution.<sup>17</sup> Towards the end of President Nkurunziza's new term, the CNDD-FDD reportedly radicalised, marginalising moderate CNDD-FDD members opposing an additional term of President Nkurunziza.<sup>18</sup> Opponents of the so-called third term were excluded from the party or fled the country following threats.<sup>19</sup> By early 2015 the CNDD-FDD was *de facto* reduced to its original core – the former guerrillas (the ex-FDD fighters and their military commanders).<sup>20</sup>

## **B. Burundi's crisis since April 2015**

22. The political and security situation in Burundi since April 2015 evolved along three phases:
- (i) In the first phase, the announcement on 25 April 2015 by Burundi's ruling CNDD-FDD party, that President Nkurunziza would run for a further term, sparked several public protests, claiming that this was barred by the Arusha peace agreement and by the Constitution. By contrast, as set out in paragraph 21 above, supporters of the President argued that the first term did not count. Less than three weeks later, on 13 May 2015, while the President was abroad on an official visit to Tanzania, a group of senior military and police officers led by former head of the SNR, Major

<sup>17</sup> Africa Union, Report of the Delegation of the African Commission on Human and Peoples' Rights ("ACHPR") on its Fact-Finding Mission to Burundi, 7-13 December 2015, ("ACHPR Mission Report"), [BDI-OTP-0003-1211](#) at 1225-1226, paras. 34-35. The Prosecution takes no position on this issue, given that the focus of this Request is on alleged crimes within the jurisdiction of the Court which followed such protests, not the legality of the electoral process itself.

<sup>18</sup> International Federation for Human Rights ("FIDH"), Repression and genocidal dynamics in Burundi, November 2016, ("FIDH, Repression and genocidal dynamics"), [BDI-OTP-0003-1932](#) at 1965-1966; ICG, Burundi: A Dangerous Third Term, 20 May 2016, ("ICG, Burundi: A Dangerous Third Term"), [BDI-OTP-0003-1753](#) at 1760 and 1761.

<sup>19</sup> See e.g. Armed Conflict Location & Event Dataset, Country Report: Burundi Crisis Year One, May 2016, ("ACLED Burundi Country Report"), [BDI-OTP-0003-1734](#) at 1740; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1965-1966.

<sup>20</sup> ICG, Burundi: A Dangerous Third Term, [BDI-OTP-0003-1753](#) at 1760 and fn. 3.

General Godefroid Niyombare,<sup>21</sup> announced a *coup d'état* on private radio stations and stated that the President had been dismissed.<sup>22</sup> After two days of fighting in the capital, Bujumbura, the coup eventually failed<sup>23</sup> and some senior leaders of the coup attempt were arrested, while others, including Major General Godefroid Niyombare, went into hiding.<sup>24</sup>

- (ii) In the second phase, the presidential elections on 21 July 2015, which had been twice postponed, were followed by a number of targeted attacks and search operations by the security forces in neighbourhoods perceived as 'anti-government' or where attacks on the security forces had taken place.<sup>25</sup> Following the elections, the Government reportedly further targeted non-state media stations and independent journalists as well as human rights defenders and other members of civil society.<sup>26</sup>
- (iii) In the third phase, attacks by armed men against four military bases in and around Bujumbura on 11 December 2015 led to

<sup>21</sup> Major General Niyombare, a member of the CNDD-FDD was dismissed as Director General of the SNR on 18 February 2015, after he had allegedly submitted a report to President Nkurunziza advising him not to run for a third term for several political and security reasons: UNSC, Report of the Secretary General on the United Nations Electoral Observation Mission in Burundi, S/2015/510, 7 July 2015, ("SG's July 2015 Report on the UN Electoral Observation Mission in Burundi"), [BDI-OTP-0003-4331](#) at 4332, para. 5.

<sup>22</sup> SG's July 2015 Report on the UN Electoral Observation Mission in Burundi, [BDI-OTP-0003-4331](#) at 4333, para. 8; ACHPR mission report, [BDI-OTP-0003-1211](#) at 1233, para. 59.

<sup>23</sup> SG's July 2015 Report on the UN Electoral Observation Mission in Burundi, [BDI-OTP-0003-4331](#) at 4333, para. 8; ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1234, para. 60.

<sup>24</sup> Human Rights Watch ("HRW"), Burundi's Human Rights Crisis - Materials Published by Human Rights Watch April 2015 to July 2016, July 2016, ("HRW, Burundi's Human Rights Crisis"), [BDI-OTP-0003-1793](#) at 1915; ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1234, para. 60.

<sup>25</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1976; OHCHR, Rapport du Haut-Commissaire des Nations Unies aux droits de l'homme sur la situation des droits de l'homme au Burundi, A/HRC/32/30, 17 June 2016, ("OHCHR, Rapport sur la situation au Burundi"), [BDI-OTP-0003-4119](#) at 4122, paras. 6-7; UNSC, Report of the Secretary-General on the United Nations Electoral Observation Mission in Burundi, S/2015/985, 16 December 2015, ("SG's December 2015 Report on the UN Electoral Observation in Burundi"), [BDI-OTP-0003-4574](#) at 4576, para. 9.

<sup>26</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1958-1959 and 2046-2056; SG's July 2015 Report on the UN Electoral Observation Mission in Burundi, [BDI-OTP-0003-4331](#) at 4334, para. 15; SG's December 2015 Report on the UN Electoral Observation in Burundi, [BDI-OTP-0003-4574](#) at 4578-4579, para. 23 and 4589, para. 79.

counter-insurgency operations by the security forces, including house-to-house searches in neighbourhoods associated with the opposition. This reportedly resulted in the killing of a number of civilians, including by summary and extrajudicial executions.<sup>27</sup> These events were allegedly followed by a wave of repression by the security forces, supported by members of the *Imbonerakure*, against perceived and actual opponents of the Government, marking a peak in the violence.<sup>28</sup> This third phase has continued at varying levels of intensity, coupled allegedly with more covert strategies involving abductions, enforced disappearances, and unexplained deaths.<sup>29</sup> In this context, the Government also took measures to suspend or restrict the activities of several civil society organisations;<sup>30</sup> declared the three independent experts of the United Nations Independent Investigation in Burundi (“UNIIB”) *personae non gratae*;<sup>31</sup> suspended all cooperation with the Burundi Office of the Office of the United Nations High Commissioner for Human Rights (“OHCHR”);<sup>32</sup> announced its refusal to cooperate

<sup>27</sup> See, OHCHR, Alarming new patterns of violations emerging in Burundi - Zeid, 15 January 2016, (“OHCHR, Statement on Burundi, 15 January 2016”), [BDI-OTP-0003-4317](#) at 4317; Amnesty International (“AI”), Burundi: Suspected Mass Graves of Victims of 11 December Violence, 29 January 2016, (“AI, Burundi: Suspected Mass Graves of Victims of 11 December Violence”), [BDI-OTP-0003-1748](#) at 1748-1749.

<sup>28</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4122, para. 7.

<sup>29</sup> See, HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1802. See also, FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1976.

<sup>30</sup> UNSC, Report of the Secretary-General on Burundi, S/2017/165, 23 February 2017, (“UNSC, SG’s Report on Burundi, 23 February 2017”), [BDI-OTP-0003-4558](#) at 4564-4565, paras. 34-35.

<sup>31</sup> Government of Burundi (“GoBUR”), Déclaration du Gouvernement Burundais sur la collaboration et la coopération avec l’Office du Haut-Commissariat des droits de l’homme au Burundi, 11 October 2011, (“GoBUR, Déclaration du Gouvernement Burundais, 11 October 2011”), [BDI-OTP-0003-1576](#) at 1578.

<sup>32</sup> GoBUR, Déclaration du Gouvernement Burundais, 11 October 2011, [BDI-OTP-0003-1576](#) at 1577-1578.

with a commission of inquiry set up by the UN Human Rights Council;<sup>33</sup> and lodged its withdrawal from the Rome Statute.<sup>34</sup>

### C. Activities of the Office of the Prosecutor

23. Since 26 April 2015, the Prosecution has received [REDACTED] communications pursuant to article 15 of relevance to this situation, some of which contain multiple reports and documents. It has registered and reviewed over 500 reports, academic articles, legal submissions and documents, press releases and public statements by intergovernmental, governmental and non-governmental organisations, academic institutions and media agencies.
24. On 8 May 2015, the Prosecutor issued a statement expressing concern that violence ahead of the legislative and presidential elections in Burundi may escalate, which could lead to the commission of crimes within the jurisdiction of the Court.<sup>35</sup> The Prosecutor's second statement of 6 November 2015 noted the increasing risk of violence and the reported use of inflammatory language by political leaders and other actors in Burundi, while reiterating the jurisdictional competence of the ICC.<sup>36</sup> On 25 April 2016, following the review of communications and reports, the Prosecutor opened a preliminary examination into the situation.<sup>37</sup>
25. During the course of its preliminary examination, the Prosecution has been in contact with relevant actors, including the Government of

<sup>33</sup> UN General Assembly, Human rights situation in Burundi, A/HRC/33/L.31, 27 September 2016, [BDI-OTP-0004-0209](#) at 0212-0213, paras. 23-25; UNSC, SG's Report on Burundi, 23 February 2017, [BDI-OTP-0003-4558](#) at 4565-4566, paras. 38 and 42.

<sup>34</sup> GoBUR, Burundi ICC Withdrawal Notification, [BDI-OTP-0003-1444](#).

<sup>35</sup> Office of the Prosecutor, "[Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the recent pre-election violence in Burundi](#)", 8 May 2015.

<sup>36</sup> Office of the Prosecutor, "[Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening situation in Burundi](#)", 6 November 2015.

<sup>37</sup> 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.

Burundi, in order to gather and verify information on alleged crimes committed and the existence and genuineness of relevant national proceedings. Despite a pending request to the Burundian authorities to visit Burundi, the Prosecution was unable to conduct any on site missions and instead interacted with relevant stakeholders in other locations, including at the seat of the Court.

## V. Examination of the information available

26. The Prosecution has evaluated sources and their information following a consistent methodology based on criteria such as relevance (usefulness of the information to determine the commission of crimes within the jurisdiction of the Court), reliability (trustworthiness of the provider of the information as such), credibility (quality of the information in itself, to be evaluated by criteria of immediacy, detail, internal consistency and external verification), and completeness (the extent of the source's knowledge or coverage vis-à-vis the whole scope of relevant facts). Furthermore, it has endeavoured to corroborate the information provided with information available from reliable open and other sources. Full references of the sources used are provided in Annex 8.
27. The Prosecution faced several challenges during its evaluation of the information available. These include: the fact that most of the reporting was focused on the Bujumbura area, representing the highest concentration of alleged crimes; the lack of information on armed anti-government entities allegedly involved in the attacks against the members of the PNB, FDN, CNDD-FDD and *Imbonerakure*;<sup>38</sup> the very limited cooperation of the Government of Burundi; the deliberate

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<sup>38</sup> The information available rarely provides attribution to any individual or group and at best refers to “*hommes armés, pour la plupart non identifiés*” (Unofficial English translation: “armed men, mostly unidentified”), see e.g. OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4123, para. 10. See also, HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1881.

targeting and resultant exodus of human rights observers in Burundi which reduced the level and quality of in-country monitoring and reporting; and the risk of circular information, [REDACTED].

28. To the extent possible, the Prosecution has relied on reports published by organisations which were able to diversify their sources and base their findings on primary witness accounts. It also undertook a thorough evaluation of each relevant source and sought to verify the seriousness of information in its possession through corroboration.
29. Overall, the information available is sufficient in volume and quality to enable a determination on the reasonable basis standard. In so doing, the Prosecution has borne in mind the nature of the proceedings under article 15, the low threshold applicable, as well as the object and purpose of the authorisation procedure.<sup>39</sup> In particular, the case law before this Court provides that the information available at such an early stage is “neither expected to be ‘comprehensive’ nor ‘conclusive’”<sup>40</sup> and need not necessarily “point towards only one conclusion”.<sup>41</sup>
30. Accordingly, and bearing in mind the above, the crimes identified in this Request as meeting the reasonable basis standard should be considered as examples of relevant criminality within the situation,<sup>42</sup> in the light of the threshold requirement of determining whether one or more crimes within the jurisdiction of the Court have been committed. Once that threshold has been

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<sup>39</sup> See e.g. *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute, ICC-01/09-19-Corr, 31 March 2010 (“*Kenya Article 15 Decision*”), paras. 73-75; *Situation in the Republic of Côte d’Ivoire*, Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute, ICC-02/11-14-Corr, 15 November 2011 (“*Côte d’Ivoire Article 15 Decision*”), paras. 24-25.

<sup>40</sup> *Kenya Article 15 Decision*, ICC-01/09-19-Corr, paras. 27-35; *Côte d’Ivoire Article 15 Decision*, ICC-02/11-14-Corr para. 24. See also, at a more advanced stage in the proceedings, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Appeals Chamber, Judgment on Prosecutor’s appeal against the Decision on the Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-73, 3 February 2010, para. 33.

<sup>41</sup> *Kenya Article 15 Decision*, ICC-01/09-19-Corr, para. 34.

<sup>42</sup> *Situation in Georgia*, Pre-Trial Chamber I, Decision on the Prosecutor’s request for authorization of an investigation, ICC-01/15-12, 27 January 2016 (“*Georgia Article 15 Decision*”), para. 63.

met, the Chamber should authorise an investigation into the situation as a whole, and not just with regard to the particular acts or incidents brought forward to substantiate that threshold.<sup>43</sup> To do otherwise would be to pre-determine the direction and scope of a future investigation based on the limited information available at the preliminary examination stage, and would convert the facts provisionally identified as meeting this threshold into binding parameters to regulate the scope of future case-specific investigative inquiries.

31. In the event that an investigation is authorised, the Prosecution should be permitted to expand or modify its investigation with respect to these or other alleged acts or incidents and, as necessary, adopt different legal qualifications, provided that the cases brought forward for prosecution are sufficiently linked to the authorised situation.<sup>44</sup>

## VI. Jurisdiction

32. Pursuant to regulation 49 of the Regulations, the Prosecution provides the following information setting out a reference to the crimes believed to have been committed and a statement of the facts being alleged to provide the reasonable basis to believe that those crimes have been committed, and a declaration with reasons that the listed crimes fall within the jurisdiction of the Court.
33. The Prosecution also appends to the request (a) a chronology of relevant events (Annex 5); (b) maps showing relevant information, including the

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<sup>43</sup> *Kenya* Article 15 Decision, ICC-01/09-19-Corr, paras. 74-75; *Georgia* Article 15 Decision, ICC-01/15-12, paras. 63-64.

<sup>44</sup> *Kenya* Article 15 Decision, ICC-01/09-19-Corr, paras. 74-75; *Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, Decision on the Defence Challenge to the Jurisdiction of the Court, ICC-01/04-01/10-451, 26 October 2011 (“*Mbarushimana* Decision”), paras. 21 and 27; *Georgia* Article 15 Decision, ICC-01/15-12, para. 64.

location of the alleged crimes (Annex 6); and (c) an explanatory glossary of relevant names of persons, locations and institutions (Annex 7).

**A. Alleged crimes within the jurisdiction of the Court**

34. On the basis of the available information, and without prejudice to other possible crimes within the jurisdiction of the Court which may be identified during the course of an investigation, the Prosecutor has determined that there is a reasonable basis to believe that in the context of the situation, from 26 April 2015 onwards, at a minimum the following acts constituting crimes against humanity have been committed: murder under article 7(1)(a); imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law under article 7(1)(e); torture under article 7(1)(f); rape and other forms of sexual violence of comparable gravity under article 7(1)(g); enforced disappearance under article 7(1)(i); and persecution against any identifiable group or collectivity on political grounds under article 7(1)(h).
35. Despite evidence of some armed confrontation as the violence progressed 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). The information available also does not provide a reasonable basis to believe that acts of murder allegedly committed by such armed anti-government entities against members of the Burundian Government, the security forces and the *Imbonerakure* constitute crimes against humanity.

## 1. *Places of alleged commission of the crimes*

36. The large majority of crimes identified in this Request are alleged to have been committed in the province of *Bujumbura Mairie*,<sup>45</sup> with a particular focus within Bujumbura on the neighbourhoods of Cibitoke, Ngagara, Musaga, Mutakura, Nyakabiga.<sup>46</sup> A map locating the main incidents is provided in Annex 6.
37. In particular, the above listed locations in Bujumbura were the sites of protests in the weeks prior to the July 2015 elections and were reportedly perceived as ‘anti-government’.<sup>47</sup> After the attempted *coup d’état* of 13 May 2015, the information available indicates that the violence spread to the other 17 provinces of Burundi.<sup>48</sup>

## 2. *Time period of alleged commission of the crimes*

38. The above alleged crimes fall within the Court’s jurisdiction *ratione temporis*, since Burundi deposited its instrument of ratification of the Rome Statute on 21 September 2004 and the Statute entered into force for Burundi on 1 December 2004 in accordance with article 126(1) of the Statute.

<sup>45</sup> Burundi is divided into 18 provinces, which are subdivided into *communes* with further subdivisions into *collines* or *zones*. The *zones* that exist in urban centres comprise several *quartiers*: Loi No. 1/33 du 28 novembre 2014 portant révision de la loi No. 1/02 du 25 janvier 2010 portant organisation de l’administration communale, [BDI-OTP-0003-2619](#) at 2620, Articles 1-4. This Request uses the term ‘neighbourhood’ to refer to areas called ‘zones’ or ‘quartiers’ in French and the term “Bujumbura” when referring to the province of Bujumbura Mairie, the capital of Burundi.

<sup>46</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1956 and 2001; OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4122, para. 7, 4123-4124, paras. 11 and 13, and 4130, para. 46; AI, “My Children Are Scared”, Burundi’s Deepening Human Rights Crisis, 22 December 2015, (“AI, My Children are Scared”), [BDI-OTP-0003-1717](#) at 1717; GoBUR, 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, March 2016, made publicly available by Forum Burundi, (“GoBUR, Report of the Commission on the 11 December 2015 Events”), [BDI-OTP-0003-4815](#) at 4817 ([REDACTED]).

<sup>47</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4121-4122, paras. 4-5; GoBUR, Report of the Commission on the 11 December 2015 Events, [BDI-OTP-0003-4815](#) at 4817 (rather than calling these neighbourhoods ‘anti-government’, the Government of Burundi generally refers to these areas as “*prétendument affiliés à l’opposition*” (allegedly affiliated to the opposition)).

<sup>48</sup> Bujumbura Rural, Bubanza, Rumonge, Cibitoke, Muramvya, Makamba, Muyinga, Ngozi, Kayanza, Cankuzo, Gitega, Kirundo, Ruyigi, Rutana, Mwaro, Karuzi and Bururi.

39. In terms of the outer temporal scope of the situation, the information available provides a reasonable basis to believe that the conduct alleged has continued on an ongoing basis since 26 April 2015, with varying degrees of intensity. Should the withdrawal of Burundi from the Statute come into effect on 27 October 2017, as presently envisaged, the Court will no longer have jurisdiction on the basis of article 12(2)(a) of the Statute over article 5 crimes occurring on the territory of Burundi from that date forwards, meaning that the end date of the situation would be 26 October 2017.

### 3. *Persons or groups involved*

40. The information available indicates that the crimes alleged in this Request were committed by members of the Government, members of its security forces - the *Force de Défense Nationale* (FDN), the police (*Police Nationale du Burundi*, or PNB) and the intelligence service (*Service National de Renseignement*, or SNR) - and members of the *Imbonerakure*.

41. In particular, the information available suggests that the entities principally involved in the alleged crimes include the PNB, including special police units such as: the *Brigade Anti-Emeute* ("BAE"), an anti-riot unit created in September 2015 to deal with crowd control and prevent acts of terrorism;<sup>49</sup> the *Appui pour la Protection des Institutions* ("API"), the police unit in charge of the protection of the President, the presidential palace, high ranking officials of the ruling party and their homes and all

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<sup>49</sup> Ordonnance No 215/1182 du 7 septembre 2015 portant création, organisation, composition, missions et fonctionnement de la Brigade Anti-Emeute, [BDI-OTP-0003-2749](#) at 2751, Articles 1 and 10; AI, My Children are Scared, [BDI-OTP-0003-1717](#) at 1723; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2065 (states that the BAE is reportedly composed of approximately 300 hand-picked police officers, of predominantly Hutu ethnicity); AI, Burundi: Submission to the United Nations Committee Against Torture, Special Report, 25 July – 12 August 2016, [BDI-OTP-0003-4170](#) at 4177; UNCOI Report, [BDI-OTP-0005-0003](#) at 0008, para. 19.

State institutions;<sup>50</sup> and the *Groupement Mobile d'Intervention Rapide* (“GMIR”), a specialised reserve force charged with responding rapidly to emergencies throughout the country;<sup>51</sup> as well as the national intelligence service or SNR.<sup>52</sup>

42. Several military units have also been identified as having played a key role in the alleged commission of crimes, including the *Bataillon Génie des Combats* (“BGC”), based in Muzinda military camp, situated in the Bubanza province north of Bujumbura,<sup>53</sup> and the *Brigade Spéciale de Protection des Institutions* (“BSPI”), the special military unit in charge of the protection of the President, the presidential palace, high ranking officials of the ruling party and their homes, as well as all State institutions,<sup>54</sup> and the *221ème bataillon de Ruyigi*, a military battalion reportedly involved in operations in Bururi province in southern Burundi.<sup>55</sup>
43. Members of the *Imbonerakure*, the youth wing of Burundi’s ruling party, the CNDD-FDD, are alleged to have conducted joint operations with the police and the intelligence service which resulted in the alleged

<sup>50</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1987 and 2068; AI, Braving Bullets, Excessive Force in Policing Demonstrations in Burundi, July 2015, (“AI, Braving Bullets”), [BDI-OTP-0003-1661](#) at 1676; UNCOI Report, [BDI-OTP-0005-0003](#) at 0008, para. 19.

<sup>51</sup> HRW, “Every Morning They Beat Me” – Police Abuses in Burundi, April 2008, [BDI-OTP-0003-2212](#) at 2233; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2066-2067.

<sup>52</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2073. *See also*, ICG, Burundi: A Dangerous Third Term, [BDI-OTP-0003-1753](#) at 1761; HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1826-1839; UNCOI Report, [BDI-OTP-0005-0003](#) at 0008, para. 18.

<sup>53</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2069-2070; ICG, Burundi: A Dangerous Third Term, [BDI-OTP-0003-1753](#) at 1762; UNCOI Report, [BDI-OTP-0005-0003](#) at 0008, para. 20.

<sup>54</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2070; ICG, Burundi: A Dangerous Third Term, [BDI-OTP-0003-1753](#) at 1762; UNCOI Report, [BDI-OTP-0005-0003](#) at 0008, para. 20.

<sup>55</sup> *See e.g.* FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2071 (the 221<sup>st</sup> battalion at Ruyigi is reportedly commanded by Maj. Marius Gahomera aka “Gakoryo”); GoBUR, Report of the Commission on the 11 December 2015 Events, [BDI-OTP-0003-4815](#) at 4831-4832 (states that according to the Burundian Attorney-General’s investigation report of the alleged December 2015 killings in Bujumbura, Maj. Gahomera is subject to proceedings for having participated in the killings of seven alleged rebels).

commission of killings, arbitrary detentions, ill-treatment and torture.<sup>56</sup> The Burundian military reportedly maintained a military presence in Kiliba, a village in the east of the Democratic Republic of Congo (“DRC”) at the border with Burundi, for at least three years which it used to train members of the *Imbonerakure*.<sup>57</sup> The command and control of members of the *Imbonerakure* allegedly involved in the commission of crimes during the period set out in the Request reportedly fell to a member of the security forces within the President’s inner circle.<sup>58</sup>

44. Further information on the persons or groups of persons allegedly involved is provided in confidential Annex 4.
45. Although, on the basis of the information available to the Office to date, the Prosecution has not found a reasonable basis to believe that other persons or groups of persons committed crimes within the jurisdiction of the Court, it also sets out in this section a brief overview of the two main armed anti-government entities that are referred to elsewhere in this Request.

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<sup>56</sup> AI, My Children Are Scared, [BDI-OTP-0003-1717](#) at 1718; AI, “Just Tell Me What to Confess to”, Torture and Other Ill-Treatment by Burundi’s Police and Intelligence Service since April 2015, 24 August 2015, (“AI, Just Tell Me What to Confess to”), [BDI-OTP-0003-1582](#) at 1586-1587. *See also*, ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1260, para. 147; OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4121, fn. 1; FIDH, Burundi: Eviter l’embrasement, May 2015, [BDI-OTP-0003-1613](#) at 1634-1637; OHCHR, Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein on Burundi via videolink to the Security Council, 9 November 2015, (“OHCHR, Statement on Burundi, 9 November 2015”), [BDI-OTP-0003-4624](#) at 4624. *See also*, UNCOI Report, [BDI-OTP-0005-0003](#) at 0009, paras. 25-27 and 0010, para. 34.

<sup>57</sup> RFI, “L’armée burundaise se retire de l’est de la RDC”, 7 October 2014, [BDI-OTP-0003-2547](#) at 2548; UNSC, Final Report of the Group of Experts on the DRC, S/2015/19\*, 12 January 2015, (“UNSC, Final Report of the DRC Group of Experts”), [BDI-OTP-0003-4348](#) at 4366-4368, paras. 83-89.

<sup>58</sup> *See*, US Department of the Treasury (“US DoT”), Press Center - Treasury Sanctions Three Individuals for Contributing to the Ongoing Violence in Burundi, 2 June 2016, (“US DoT Press Release on Burundi Sanctions”), [BDI-OTP-0003-4004](#) (on 2 June 2016, the US added to their sanctions list Ignace Sibomana, a “Burundian security force member linked to President Nkurunziza’s inner circle” for being part of a group charged with the command and control of the *Imbonerakure* militia). *See also*, US DoT, Burundi Sanctions Designations, 2 June 2016, (“US DoT Burundi Sanctions Designations”), [BDI-OTP-0003-4006](#).

46. There is no homogenous opposition, but rather various opposition groups, including political and armed entities, with existing rivalries.<sup>59</sup> Despite the common opposition to President Nkurunziza, the opposition remains divided and its unification has been described as “illusory”.<sup>60</sup>
47. On 23 December 2015, former Burundian Lieutenant Colonel Edouard Nshimirimana announced the creation of FOREBU, claiming to represent former soldiers and police officers who had recently defected from the Burundian security forces.<sup>61</sup> It is likely that FOREBU constituted itself from the group of officers responsible for the attempted *coup d'état* in May 2015. In June 2016, FOREBU announced its transformation into a politico-military movement with the creation of a political wing under the overall coordination of Major General Godefroid Niyombare.<sup>62</sup> FOREBU reportedly operated principally in the provinces of *Bujumbura Rural* and *Bujumbura Mairie*.<sup>63</sup>
48. In January 2016, a second rebel movement known as RED-TABARA emerged.<sup>64</sup> Despite the lack of information on any activity prior to January 2016, the group claimed the date of its creation to be 24 April 2011.<sup>65</sup> On 13 February 2016, RED-TABARA reportedly appointed Hutu Major General Melchiade Biremba as its chief of staff. RED-TABARA

<sup>59</sup> ICG, Burundi: A Dangerous Third Term, [BDI-OTP-0003-1753](#) at 1777.

<sup>60</sup> ICG, Burundi: A Dangerous Third Term, [BDI-OTP-0003-1753](#) at 1777.

<sup>61</sup> Centre d'étude de la région des grands lacs d'Afrique, L'Afrique des Grands Lacs / Annuaire 2015-2016, [BDI-OTP-0003-0845](#) at 0904; Al Jazeera, “Burundi: New rebel group formed to oust president”, 23 December 2015, [BDI-OTP-0003-2579](#) at 2579; RFI, “Burundi: le Forebu n'inquiète pas la présidence”, 25 December 2015, [BDI-OTP-0003-2581](#) at 2581-2582.

<sup>62</sup> FOREBU, Forces Républicaines du Burundi « FOREBU », June 2016 (estimated), [BDI-OTP-0003-4103](#) at 4108.

<sup>63</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2079.

<sup>64</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4122, para. 8.

<sup>65</sup> RED-TABARA, Historique et identité de RED-TABARA, 22 January 2016, [BDI-OTP-0003-4110](#) at 4110.

announced in a statement that it reserved its 'right' to remove President Nkurunziza by force.<sup>66</sup>

49. It appears that several anti-government entities are active and determined to engage Burundian security forces both from inside and outside the country. Notably, however, none of these groups appear to have demonstrated a sufficient military or organisational capacity to be invited to the political dialogue initiated by the international mediation.<sup>67</sup> Likewise, the United Nations Commission of Inquiry on Burundi, ("UNCOI") could not find any information on attacks against civilians by organised armed groups with a known structure.<sup>68</sup>

**B. Legal characterisation and reasons that the listed crimes fall within the jurisdiction of the Court**

Acts allegedly committed by members of the Government, the security forces and the *Imbonerakure*

50. The contextual elements of crimes against humanity require: (i) an attack directed against any civilian population; (ii) a State or organisational policy; (iii) an attack of a widespread or systematic nature; (iv) a nexus between the individual act and the attack; and (v) knowledge of the attack.<sup>69</sup> In light of the nature of the current stage of the proceedings, and bearing in mind that there is presently no suspect before the Court, the last requirement cannot be adequately addressed at this stage, as knowledge is an aspect of the mental element under article 30(3) of the

<sup>66</sup> RED-TABARA, Communiqué de Presse au sujet de l'appel du CNARED-GIRITEKA, 13 May 2016, [BDI-OTP-0003-4117](#); RED-TABARA, Communiqué de Presse : Le Faux Départ Des Négociations D'Arusha, 23 May 2016, [BDI-OTP-0003-4118](#).

<sup>67</sup> See, Centre d'étude de la région des grands lacs d'Afrique, L'Afrique des Grands Lacs / Annuaire 2015-2016, [BDI-OTP-0003-0845](#) at 0903-0906.

<sup>68</sup> UNCOI Report, [BDI-OTP-0005-0003](#) at 0009, para. 28.

<sup>69</sup> Côte d'Ivoire Article 15 Decision, ICC-02/11-14-Corr, para. 29.

Statute.<sup>70</sup> Thus, the analysis under this section focuses on the first four elements.

### ***1. Contextual elements of crimes against humanity***

#### ***(i) Attack directed against any civilian population***

51. The information available provides a reasonable basis to believe that from 26 April 2015 onwards, members of the Burundian security forces and the *Imbonerakure* carried out an attack against the civilian population in the province of *Bujumbura Mairie* in particular. The attack targeted specific categories of civilians based on their actual or perceived political affiliation. This included protesters opposing President Nkurunziza's third presidential term, suspected protesters, members of the political opposition, and persons perceived as opposition members or sympathisers, including journalists, members of civil society organisations as well as residents of neighbourhoods associated with the opposition.<sup>71</sup>
52. The information available provides a reasonable basis to believe that the alleged crimes were committed as a "course of conduct" constituting a campaign or operation against the civilian population, rather than an aggregate of mere random acts. As set out more fully in section VI.B.2 (Underlying acts constituting crimes against humanity), the Prosecution has identified a consistent pattern of prohibited acts inflicted on actual or perceived opponents of the Government throughout all three phases of violence.

<sup>70</sup> Côte d'Ivoire Article 15 Decision, ICC-02/11-14-Corr, para. 29; Kenya Article 15 Decision, ICC-01/09-19-Corr, para. 79.

<sup>71</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4121-4122, paras. 4-7, 4123-4124, paras. 10-11, 4125, paras. 17-20, 4126, para. 24, 4127-4128, paras. 27 and 30, 4129, paras. 37-39, and 4130, paras. 45-46; UNIIB Report, [BDI-OTP-0003-4258](#) at 4262-4263, paras. 24 and 26, 4264, para. 39 and 4270, para. 78; ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1229, para. 45 and 1231, para. 52. See also, UNCOI Report, [BDI-OTP-0005-0003](#) at 0007, para. 14.

53. The fact that some targeted individuals engaged in violent acts against the security forces and/or persons associated with the Government does not alter their status as civilians,<sup>72</sup> nor would in any event the presence of certain non-civilians deprive a population of its civilian character.<sup>73</sup> This assessment is not altered by the Burundian Government's blanket characterisation of the political opposition and most civil society organisations as 'insurgents'.<sup>74</sup>

(ii) State or organisational policy

54. The information available indicates that since 26 April 2015, the Burundian Government has sought to keep President Nkurunziza in power by all means, including by repressing protests, quelling dissenting views, and punishing persons based on their actual or perceived affiliation with the political opposition.

55. The State policy to commit the attack set out in this Request is evidenced by a variety of indicators. These include: (i) criminalisation of demonstrations and protesters as a justification for the violent crackdowns; (ii) the targeting of the media, civil society organisations and human rights defenders to suppress dissent; (iii) the advance training and arming of members of the *Imbonerakure*, indicating advance planning and

<sup>72</sup> It should be noted that the information available does not support a finding on the existence of an armed conflict. A civilian in peacetime situations remains a civilian even if that person engages in violence or otherwise poses a threat to public security, law and order - *see e.g.* Melzer, N., [Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law](#) (Geneva: ICRC, 2009), pp. 24, 76; ICRC Expert Meeting, [The Use of Force in Armed Conflicts – Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms](#) (Geneva: ICRC, 2013), pp. 24-25. *See also*, ICRC, [Fifth Expert Meeting on the Notion of Direct Participation in Hostilities](#) (Geneva: ICRC, 2008), p. 44 (“recalling that the phrase ‘direct participation in hostilities’ was based on the concept of ‘hostilities’, which did not include all organised forms of violence, but referred exclusively to the use of means and methods of warfare between parties to an armed conflict”).

<sup>73</sup> *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436, Judgment pursuant to article 74 of the Statute, para. 1105; *Prosecutor v. Tadić*, IT-94-1-T, Judgment, 7 May 1997, para. 638.

<sup>74</sup> *See*, GoBUR, Commission d'enquête chargée de faire la lumière sur le mouvement insurrectionnel déclenché le 26 avril 2015, August 2015, made publicly available by FIDH, (“GoBUR, Report of the Commission on the 26 April 2015 Insurrectional Movement”), [BDI-OTP-0003-4783](#) at 4796-4814 ([REDACTED]); GoBUR, Comments on the UNIIB Report, 29 September 2016, (“GoBUR Comments on the UNIIB Report”), [BDI-OTP-0003-1362](#) at 1372, para. 35.

preparation; and (iv) the official denial and concealing of crimes, coupled with the failure to hold perpetrators to account, which appears to have encouraged the ongoing commission of crimes. The nature and extent of these actions, the time period over which they were committed, and their underlying motivation, indicate that there was a significant degree of coordination and planning involved by organs and agents of the State.

*a. Criminalisation of demonstrators*

56. The Burundian authorities have characterised the members of the opposition as ‘enemies’, ‘insurgents’, ‘rebels’, ‘armed criminals’, and ‘terrorists’.<sup>75</sup> They have also referred to protesters as ‘insurgents’;<sup>76</sup> alleged that they were armed and/or drugged;<sup>77</sup> and stated “[...] *les manifestants seront traités comme des complices des putschistes car ils font obstruction aux enquêtes sur la tentative de putsch et perturbent délibérément l’ordre public.*”<sup>78</sup>
57. A September 2015 report by an investigation commission launched by Burundi’s Prosecutor General alleged that the 25 civil society organisations constituting the “*Halte au 3sième mandate*” movement, as well as six opposition parties and other individuals, took part in the organisation of an insurrection.<sup>79</sup>
58. In addition, senior Government officials have made statements calling for violence against anyone opposing the Government. For example, during a

<sup>75</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2035. *See also*, GoBUR, Report of the Commission on the 26 April 2015 Insurrectional Movement, [BDI-OTP-0003-4783](#) at 4809-4812.

<sup>76</sup> *See*, GoBUR, Report of the Commission on the 26 April 2015 Insurrectional Movement, [BDI-OTP-0003-4783](#) at 4796-4797 and 4809-4812. *See similarly*, GoBUR comments on the UNIIB report, [BDI-OTP-0003-1362](#) at 1376, para. 46: “the insurgents that some do not hesitate to call peaceful protesters”.

<sup>77</sup> GoBUR, Report of the Commission on the 26 April 2015 Insurrectional Movement, [BDI-OTP-0003-4783](#) at 4797. *See also*, GoBUR Comments on the UNIIB Report, [BDI-OTP-0003-1362](#) at 1370, para. 30.

<sup>78</sup> GoBUR, Communiqué De Presse Sur Les Menaces à la Paix au Burundi, 18 May 2015, [BDI-OTP-0004-0403](#) at 0404.

<sup>79</sup> GoBUR, Report of the Commission on the 26 April 2015 Insurrectional Movement, [BDI-OTP-0003-4783](#) at 4809-4810.

speech made on 1 November 2015, President of the Senate, Révérien Ndikuriyo, reportedly said: “*Vous devez pulvériser, vous devez exterminer ces gens qui ne sont bons qu’à mourir. Je vous donne cet ordre, allez-y*”.<sup>80</sup> These statements have often been charged with ethnically divisive language, reportedly in an effort to exploit historical ethnic divisions within Burundian society and thus exert influence over members of the security forces.<sup>81</sup>

*b. Suppressing dissent*

59. Burundian journalists and media outlets have been subjected to restrictions and often accused of colluding with the opposition, instigating civil unrest and armed rebellion, and fuelling tensions through their broadcasts.<sup>82</sup> On 26 April 2015, the Burundian Government banned *Radio Publique Africaine*, *Bonesha FM* and *Radio Isanganiro* from broadcasting, alleging that they were supporting insurrection and riots.<sup>83</sup> According to the United Nations Committee Against Torture (“UN CAT”), journalists are targeted “inasmuch as they report on events that

<sup>80</sup> OkayAfrica, “Crisis in Burundi: The Activist Family Targeted for Assassination”, 19 November 2015, [BDI-OTP-0003-2508](#) at 2509 (Unofficial English translation: “You tell those who want to execute the mission: on this issue, you have to pulverize, you have to exterminate – these people are only good for dying. I give you this order, go!”). See also, US Embassy in Rwanda, Statement by Ambassador Samantha Power, US Permanent Representative to the United Nations, on Violence and Disturbing Rhetoric in Burundi, 5 November 2015, [BDI-OTP-0003-4016](#); Le Monde, “Craincte de violences au Burundi après le discours du président”, 6 November 2015, [BDI-OTP-0003-2563](#) at 2564; UNSC, SG’s Report on Burundi, 23 February 2017, [BDI-OTP-0003-4558](#) at 4559, para. 7.

<sup>81</sup> ICG, Burundi: A Dangerous Third Term, [BDI-OTP-0003-1753](#) at 1765.

<sup>82</sup> SG’s July 2015 Report on the UN Electoral Observation Mission in Burundi, [BDI-OTP-0003-4331](#) at 4343, para. 47; UNIIB Report, [BDI-OTP-0003-4258](#) at 4270, para. 78; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2053; ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1231, para. 51 and 1235-1236, para. 67; Reporters Sans Frontières (“RSF”), “Offensive renforcée du gouvernement contre la liberté de l’information au Burundi”, 11 September 2015, (“RSF, Report on Burundi”), [BDI-OTP-0003-2313](#).

<sup>83</sup> AI, Braving Bullets, [BDI-OTP-0003-1661](#) at 1680; ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1231, para. 51; SG’s July 2015 Report on the UN Electoral Observation Mission in Burundi, [BDI-OTP-0003-4331](#) at 4332, para. 6. See also, UNCOI Report, [BDI-OTP-0005-0003](#) at 0013, para. 52.

show State institutions in an unfavourable light and broadcast live scenes of repression of protesters.”<sup>84</sup>

60. The armed forces reportedly launched grenades and mortar attacks on radio and television stations that had covered the attempted *coup d'état*.<sup>85</sup> By contrast, the national radio and television broadcaster *Radio Television Nationale du Burundi* (“RTNB”) appears to have given generous airtime to prominent CNDD-FDD leaders and supporters to criticise opposition parties and coalitions.<sup>86</sup> The CNDD-FDD has also repeatedly harassed and attacked journalists in its official communiqués, accusing them, *inter alia*, of demonising the country and its institutions, and colluding with the opposition.<sup>87</sup> Journalists have reportedly been subjected to harassment, death threats, arrests, torture, and the closure of their offices and/or destruction of their equipment.<sup>88</sup>
61. Most civil society organisations have been suspended, with several having their accounts frozen for “leading and organizing protests and riots, and collaborating with the plotters of 13 May attempted coup.”<sup>89</sup> Human

<sup>84</sup> UN, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture (“UN CAT”), Concluding Observations, CAT/C/BDI/CO/2/Add.1, 9 September 2016, (“UN CAT, Concluding Observations on Burundi”), [BDI-OTP-0003-4293](#) at 4300, para. 24. *See also*, AI, Braving Bullets, [BDI-OTP-0003-1661](#) at 1680; ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1231, para. 51.

<sup>85</sup> ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1235-1236, para. 67.

<sup>86</sup> SG’s July 2015 Report on the UN Electoral Observation Mission in Burundi, [BDI-OTP-0003-4331](#) at 4344, para. 50.

<sup>87</sup> CNDD-FDD, Communiqué No. 0045/2015 of the CNDD-FDD party dated December 23<sup>rd</sup>, 2015, 23 December 2015, [BDI-OTP-0003-1512](#) at 1512, para. 3; CNDD-FDD, Communiqué No. 006/2016 du parti CNDD-FDD du 26 mars 2016, 29 March 2016, [BDI-OTP-0003-1315](#) at 1315, para. 4.

<sup>88</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4271, paras. 81 and 84. *See also*, SG’s July 2015 Report on the UN Electoral Observation Mission in Burundi, [BDI-OTP-0003-4331](#) at 4343, para. 47; ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1231, para. 51 and 1235-1236, para. 67; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1958-1959, 2027-2028, 2048-2049 and 2053-2054; UN CAT, Concluding Observations on Burundi, [BDI-OTP-0003-4293](#) at 4300-4301, para. 24; ACHPR, Resolution ACHPR/Res. 357 (LIX) 2016, 4 November 2016, [BDI-OTP-0003-1269](#); AI, Braving Bullets, [BDI-OTP-0003-1661](#) at 1681; HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1914.

<sup>89</sup> ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1244-1245, para. 97. *See also*, UNIIB Report, [BDI-OTP-0003-4258](#) at 4270, para. 79; ICG, Burundi: A Dangerous Third Term, [BDI-OTP-0003-1753](#) at 1768-1769; FIDH, Burundi: Temporary suspension of the activities of 10 Human Rights NGOs, 25 November 2015, [BDI-OTP-0003-2335](#) at 2335; FIDH, Freezing of assets of three new human rights organizations, 11 December 2015, [BDI-OTP-0003-2339](#) at 2339; United Nations High Commissioner for

rights activists have also formed the target of threats and attacks.<sup>90</sup> The information available indicates an estimated 80 percent of leaders of human rights organisations have fled the country,<sup>91</sup> while over 100 media professionals reportedly are in exile or otherwise in hiding within the country.<sup>92</sup>

*c. Training and arming of the Imbonerakure*

62. Members of the *Imbonerakure* reportedly received training and weapons under the supervision of Burundian military generals and senior SNR officials in 2014, in eastern DRC.<sup>93</sup> These *Imbonerakure* reportedly wore Burundian army uniforms during the training.<sup>94</sup> Specifically, the SNR is alleged to have coordinated, armed, trained and indoctrinated members of the *Imbonerakure*.<sup>95</sup> The command and control of members of the *Imbonerakure* allegedly involved in the commission of crimes in the course

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Refugees (“UNHCR”), Burundi Regional Update no. 32, December 2016, [BDI-OTP-0003-4322](#) at 4323. *See also*, UNCOI Report, [BDI-OTP-0005-0003](#) at 0014, para. 55.

<sup>90</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2027-2028. *See also*, UN CAT, Concluding Observations on Burundi, [BDI-OTP-0003-4293](#) at 4300-4301, para. 24; UNIIB Report, [BDI-OTP-0003-4258](#) at 4270-4271, paras. 78-81; ACHPR, Resolution ACHPR/Res. 357 (LIX) 2016, 4 November 2016, [BDI-OTP-0003-1269](#).

<sup>91</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1958. *See also*, regarding the repression of civil society: UN CAT, Concluding Observations on Burundi, [BDI-OTP-0003-4293](#) at 4300-4301, para. 24; OHCHR, Comment by UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein on Burundi killing, 6 November 2015, [BDI-OTP-0003-4642](#); UNSC Resolution 2248 (2015), S/RES/2248 (2015), 12 November 2015, [BDI-OTP-0003-4600](#) at 4600; ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1235-1236, para. 67.

<sup>92</sup> ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1236, para. 68. *See also*, regarding the repression of journalists: SG’s July 2015 Report on the UN Electoral Observation Mission in Burundi, [BDI-OTP-0003-4331](#) at 4343, para. 47; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2053-2056; RSF, Report on Burundi, [BDI-OTP-0003-2313](#); International Refugee Rights Initiative, Burundi: a country on the edge, April 2016, [BDI-OTP-0003-2142](#) at 2151.

<sup>93</sup> UNSC, Final Report of the DRC Group of Experts, [BDI-OTP-0003-4348](#) at 4367-4368, paras. 88-89.

<sup>94</sup> UNSC, Final Report of the DRC Group of Experts, [BDI-OTP-0003-4348](#) at 4367, para. 89.

<sup>95</sup> OHCHR, Increased militia violence “could tip Burundi over the edge” - Zeid, 9 June 2015, (“OHCHR, Statement on Burundi, 9 June 2015”), [BDI-OTP-0003-4622](#) at 4622-4623; OHCHR, Statement on Burundi, 9 November 2015, [BDI-OTP-0003-4624](#) at 4625; UNSC, Final Report of the DRC Group of Experts, [BDI-OTP-0003-4348](#) at 4366-4368, paras. 83-89. *See*, US DoT, Treasury Sanctions Four Burundian Individuals, 18 December 2015, [BDI-OTP-0003-4002](#) at 4002 (on 18 December 2015, the US Department of the Treasury sanctioned SNR agent Joseph Mathias Niyonzima alias “Kazungu” for, among other things, his role in supervising and supporting the *Imbonerakure*); Association Burundaise pour la Protection des Droits Humains et des Personnes Détenues (“APRODH”), Enquête de l’APRODH sur la composition et le fonctionnement du SNR (Services Secrets du Burundi), 25 August 2016, [BDI-OTP-0003-2474](#) at 2475.

of the period under review has also been linked to a Burundian security force member in the President's inner circle.<sup>96</sup>

*d. Concealing crimes and culture of impunity*

63. The information available indicates that the bodies of individuals killed following the 11 December 2015 attacks on military bases in Bujumbura have been buried in mass graves, rendering it difficult to identify the victims.<sup>97</sup> In another instance, members of the *Imbonerakure* reportedly transported bodies to the DRC for burial.<sup>98</sup> According to the UNIIB, members of the *Imbonerakure* and the SNR have allegedly intimidated persons in possession of information about the existence of mass graves.<sup>99</sup> It has also been reported that “tortured detainees have been hidden during prison visits of the International Committee of the Red Cross (ICRC) and the OHCHR.”<sup>100</sup>
64. As described in more detail in section VII (Admissibility), the information available also indicates that the Burundian authorities have failed to take meaningful action to bring members of the security forces and the *Imbonerakure* allegedly responsible for violent conduct to justice and to prevent or deter the repetition of violent acts.<sup>101</sup>
65. The lack of accountability of those within the Burundian security forces and the *Imbonerakure* alleged to be most responsible for the conduct

<sup>96</sup> See, US DoT Press Release on Burundi Sanctions, [BDI-OTP-0003-4004](#) (on 2 June 2016, the US added Ignace Sibomana to their sanctions list, a “Burundian security force member linked to President Nkurunziza’s inner circle” for being part of a group charged with the command and control of the *Imbonerakure* militia); US DoT Burundi Sanctions Designations, [BDI-OTP-0003-4006](#).

<sup>97</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4265, para. 44; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2016; AI, Burundi: Satellite evidence supports witness accounts of mass graves, 28 January 2016, [BDI-OTP-0003-2136](#); OHCHR, Statement on Burundi, 15 January 2016, [BDI-OTP-0003-4317](#) at 4317. See also, HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1852.

<sup>98</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4265, para. 42.

<sup>99</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4265, para. 44.

<sup>100</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2027.

<sup>101</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4276, para. 127; ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1239, para. 79.

identified herein, as well as the absence of measures to prevent the further commission of abuses, appear to have contributed to the persistence of such practices. Thus, the report of the African Union's Delegation of the African Commission on Human and Peoples' Rights concluded that "the emergence of an atmosphere of illegality that the absence of investigation and prosecution created is to blame for the security forces['] repeated recourse to summary executions and extra-judicial killings with impunity."<sup>102</sup> Similarly, the UNIIB has concluded that "[a]ny semblance of opposition to the Government is dealt with ruthlessly and seemingly without fear of accountability."<sup>103</sup>

(iii) Widespread or systematic nature of the attack

66. The information available provides a reasonable basis to believe that the attack directed against the civilian population as described above was both widespread *and* systematic.

*a. Widespread*

67. From 26 April 2015 onwards, members of the Burundian security forces and the *Imbonerakure* engaged in a wide range of violent acts directed against civilians, namely: actual or suspected protesters opposing President Nkurunziza's third presidential term; actual or perceived members of the political opposition or opposition sympathisers, including journalists, members of civil society organisations and residents of neighbourhoods associated with the opposition.

68. As UNIIB observed: "No one can quantify exactly all the violations that have taken place and that continue to take place in a situation as closed

<sup>102</sup> ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1254, para. 123. *See also*, UNCOI Report, [BDI-OTP-0005-0003](#) at 0015, paras. 61-64 and 0018-0019, para. 80.

<sup>103</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4276, para. 127.

and repressive as Burundi”.<sup>104</sup> It noted that according to some estimates more than one thousand people have been killed as part of the crisis;<sup>105</sup> while according to another source thousands have reportedly been tortured, hundreds of people have disappeared, thousands illegally detained and an unknown number of women are victims of various forms of sexual crimes.<sup>106</sup> In June 2017, the International Federation for Human Rights (FIDH), Ligue ITEKA, and a number of other local organisations, estimated that “in two years, at least 1,200 people have been killed. There have been 400 to 900 victims of forced disappearances. Several hundreds or even thousands of individuals have been tortured. And more than 10,000 are still victims of arbitrary detention [...]. The majority of the human rights violations have been committed by the Burundian security forces and militias that operate under their control, and affect the civilians first and foremost.”<sup>107</sup>

69. As set out more fully in section VI.B.2 (Underlying acts constituting crimes against humanity), the available information provides a reasonable basis to believe that members of the Burundian security forces and the *Imbonerakure* are responsible, at a minimum, for 593 killings, 651 cases of torture, 3,477 arbitrary arrests or detentions, and 36 enforced disappearances, and widespread rape and sexual violence.<sup>108</sup>
70. The information available indicates that, at a minimum, these acts took place in a large geographic area within the province of *Bujumbura*

<sup>104</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4264, para. 34.

<sup>105</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4264, para. 35, citing ‘FIDH, Burundi: a bloody first year of challenged presidency for Pierre Nkurunziza, 28 July 2016’.

<sup>106</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4264, para. 35, citing HRW’s compilation of reports: HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1856.

<sup>107</sup> FIDH *et al*, Burundi on the brink: looking back on two years of terror, June 2017, (“FIDH, Burundi on the brink”), [BDI-OTP-0004-0235](#) at 0239.

<sup>108</sup> *See above*, paras. 80-139.

*Mairie*.<sup>109</sup> They followed a consistent pattern and were repeated over a significant time period from 26 April 2015 onwards.<sup>110</sup>

71. The number of people who have fled the country is also indicative of the widespread nature and impact of the attack.<sup>111</sup> According to the UNHCR 413,490 people had sought refuge in neighbouring countries between April 2015 and 31 May 2017.<sup>112</sup> Reported reasons for leaving Burundi include the general climate of insecurity as well as threats and/or fear of violence or reprisals for having participated in demonstrations or for materially or financially supporting protesters, for refusing to join the *Imbonerakure*, for defecting to the opposition, for having divergent opinions from the ruling party or for being related to people who had been arrested.<sup>113</sup>

*b. Systematic*

72. The information available provides a reasonable basis to believe that the attack was committed on a systematic basis. The organised nature of the attack is evidenced by the reported involvement of designated units to carry out the suppression activities, the apparent coordination amongst them and the repetition of acts.
73. Multiple sources have excluded the possibility that the violent acts inflicted on actual or perceived opponents of the Burundian Government occurred randomly. In its September 2016 report, for example, the UNIIB concluded that “the numbers, modes of operation, alleged perpetrators,

<sup>109</sup> See above, paras. 36-37.

<sup>110</sup> See, section VI.B.2 (Underlying acts constituting crimes against humanity).

<sup>111</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4264, para. 36.

<sup>112</sup> UNHCR, Regional Update, Burundi Situation, May 2017, [BDI-OTP-0004-0394](#) at 0394 and 0402. According to the Burundian authorities, 156,000 refugees returned to their homes in Burundi as of 20 June 2017: UNSC, “Briefing by ASG Political Affairs on Burundi”, S/PV.7978, 20 June 2017, [BDI-OTP-0004-0406](#) at 0413-0414.

<sup>113</sup> SG’s July 2015 Report on the UN Electoral Observation Mission in Burundi, [BDI-OTP-0003-4331](#) at 4335, para. 16; UNIIB Report, [BDI-OTP-0003-4258](#) at 4272-4273, para. 98.

the apparent identity of victims, the apparent motivation of the violations, and the lack of either remedial or preventive action on the part of State authorities, show that they are not simply the result of ‘chance,’ ‘bad apples,’ provocation, or other type of ‘necessity’”, but instead suggested “widespread and systemic patterns of violations.”<sup>114</sup> Similarly, the African Commission observed that the abuses allegedly committed by “[g]overnment security personnel and affiliated groups” were not only perpetrated “repeatedly”, but over time became “part and parcel of the response of security forces to the violent expressions of opposition to the Government”, resulting in abuses it called “pervasive and systematic.”<sup>115</sup>

74. The information available shows that a multiplicity of military and police units were involved in the alleged commission of crimes committed against individuals opposing or perceived to be opposing the regime.<sup>116</sup> Some of these units were created during the course of the events, such as the special police unit BAE, while others were deployed outside their usual mandate to participate in alleged operations, such as the special police unit GMIR, or the military unit BGC. The command positions of the individual units as well as the positions of the persons who *de facto* control them are all reportedly selected for their loyalty to the President.
75. Moreover, SNR agents are alleged to have supported and coordinated part of the *Imbonerakure* prior to the 2015 elections.<sup>117</sup> During the subsequent violence, members of the *Imbonerakure* are alleged to have

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<sup>114</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4277, para. 132.

<sup>115</sup> ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1249, para. 110.

<sup>116</sup> *See above*, paras. 40-44.

<sup>117</sup> *See*, Annex 4, Preliminary list of persons or groups that appear to be the most responsible for the most serious crimes, paras. 6 and 12.

operated under instructions from the ruling party and with the support of the PNB and the SNR.<sup>118</sup>

76. The information available also indicates a high level of collaboration between the PNB, the SNR, and members of the *Imbonerakure*, in the arrest and transfer of detainees from the custody of one to the other.<sup>119</sup>
77. Examples of common patterns of operation include incidents of mass arrests, mainly in the context of search operations, followed by alleged torture of detainees.<sup>120</sup> Other victims were reportedly identified from video recordings and photographs taken during demonstrations, as well as through information coercively obtained during interrogations.<sup>121</sup> According to the UNIIB, a former senior officer of the FDN confirmed the existence of several lists of people, including civilians and military, to be eliminated by the security forces.<sup>122</sup>

*c. Nexus between individual acts and the attack*

78. The information available indicates that there is a reasonable basis to believe that the underlying acts committed by members of the Burundian security forces and the *Imbonerakure* from 26 April 2015 onwards were not

<sup>118</sup> OHCHR, Statement on Burundi, 9 June 2015, [BDI-OTP-0003-4622](#) at 4622-4623; OHCHR, Statement on Burundi, 9 November 2015, [BDI-OTP-0003-4624](#) at 4625; OHCHR, Opening Statement by Zeid Ra'ad Al Hussein United Nations High Commissioner for Human Rights at the Human Rights Council 24th Special Session, 17 December 2015, [BDI-OTP-0003-4627](#) at 4628.

<sup>119</sup> HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1897; OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4125, para. 18; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2008; APRODH, Enquête de l'APRODH sur la composition, les abus, les responsabilités, impunité au service national de renseignement du Burundi / organe cite dans les violations des droits humains, 25 August 2016, ("APRODH, Report on the SNR"), [BDI-OTP-0001-0402](#) at 0414-0416; FIDH, Burundi on the brink, [BDI-OTP-0004-0235](#) at 0254; UNSC, SG's Report on Burundi, 23 February 2017, [BDI-OTP-0003-4558](#) at 4563, para. 27.

<sup>120</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4122, paras. 6-7, 4125, paras. 18-20, and 4127, para. 27.

<sup>121</sup> AI, Just Tell Me What to Confess to, [BDI-OTP-0003-1582](#) at 1586; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1999; HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1856.

<sup>122</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4265, para. 46.

isolated acts, but formed part of an attack, thus constituting crimes against humanity.

79. For the purpose of the present proceedings, a nexus can be established between the acts allegedly committed and the attack against a civilian population from the common features of the acts committed, in terms of their characteristics, nature, aims, targets, alleged perpetrators, and times and locations.<sup>123</sup> For the reasons set out above, this is evident from the geographical and temporal spread of the alleged acts; the multiple and recurrent occurrence of the prohibited acts over a protracted period of time, displaying a consistent pattern of conduct, and the categories of civilian victims, corresponding to a State policy to commit the attack.

## *2. Underlying acts constituting crimes against humanity*

### (i) Murder

80. On the basis of the information available, there is a reasonable basis to believe that from 26 April 2015 to at least 31 December 2016 members of the Burundian security forces and the *Imbonerakure* deliberately killed civilians who opposed, or were perceived to oppose, the Government, within the meaning of article 7(1)(a) of the Rome Statute.
81. According to some estimates, the total number of persons killed from April 2015 onwards exceeds one thousand.<sup>124</sup> The OHCHR documented 593 violations of the right to life, ascribable to the Burundian security forces and members of the *Imbonerakure*.<sup>125</sup> Official Burundian sources

<sup>123</sup> *Prosecutor v. Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, ICC-02/11-01/11-656-Red, 12 June 2014, para. 212.

<sup>124</sup> See, FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1940 (states that these killings (and other abuses documented), were committed “mainly by Burundian security forces”); FIDH, Burundi on the brink, [BDI-OTP-0004-0235](#) at 0239.

<sup>125</sup> UNSC, SG’s Report on Burundi, 23 February 2017, [BDI-OTP-0003-4558](#) at 4559, para. 4. The figure of 593 relates to violations of the right to life documented by OHCHR from April 2015 to 31 December

indicate that, as of March 2016, the “insurgency” had caused the deaths of 374 civilians and 77 police officers, and the wounding of another 367 police officers.<sup>126</sup>

82. There is a reasonable basis to believe that the majority of killings in Burundi since the beginning of the crisis were committed by members of the Burundian security forces, mainly by police units, including in particular the API and BAE special police units, and members of the SNR, with a smaller number attributed to members of the *Imbonerakure*.<sup>127</sup> Certain units of the FDN, including the BGC, were also allegedly responsible for killings.<sup>128</sup>
83. Both open sources and the analysis of these incidents indicate that the majority of victims of these killings were actual or perceived opponents of the Government.<sup>129</sup>
84. Three patterns of killings attributed to security forces and members of the *Imbonerakure* are discernible: (a) deliberate killings during or in the immediate aftermath of demonstrations; (b) killings during police operations, principally ‘cordon and search operations’, in neighbourhoods perceived to be anti-government or where attacks on

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2016. The SG’s Report on Burundi does not specify the perpetrator group but the qualification of these acts as violations of the right to life indicates, by its nature, attribution invoking State responsibility. Moreover, in its earlier report of June 2016, the OHCHR had documented 348 cases of extrajudicial killings between April 2015 and April 2016 of which the main perpetrators were members of the police, the intelligence service and from October 2015 the Anti-Riot Brigade. *See*, OHCHR, Rapport sur la situation au Burundi 2016, [BDI-OTP-0003-4119](#) at 4123, para. 10.

<sup>126</sup> GoBUR, Ministère De La Sécurité Publique, Revue Annuelle No. 8, December 2016, (“GoBUR, Annual Review, December 2016”), [BDI-OTP-0003-1517](#) at 1521.

<sup>127</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4121, para. 2, 4122, paras. 5-7, and 4123, para. 10. UNIIB Report, [BDI-OTP-0003-4258](#) at 4264-4265, paras. 40-42 (including, at para. 42, an alleged confession to the UNIIB by an *Imbonerakure* member who claimed to have been involved in 20 killings); HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1822 and 1846 (regarding killings attributed to the API special police unit).

<sup>128</sup> *See e.g.* FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2069-2070.

<sup>129</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4121-4122, paras. 4-7 and 4123-4124, paras. 10-11.

security forces had occurred; and (c) targeted killings of persons based on their actual or perceived association with the political opposition.

*a. Killings in the context of demonstrations*

85. Estimates of the number of killings in the context of protests range from 27 to 80 persons, the majority of whom were allegedly shot by police.<sup>130</sup> The vast majority of killings reported during this period occurred in the capital, Bujumbura, where the protests were concentrated.
86. The police shot protesters at close range in the head, neck or chest and others in the back as they fled.<sup>131</sup> Eight children were reportedly killed and “many more” injured during the demonstrations held between 26 April and July 2015,<sup>132</sup> although the Government has blamed protesters for bringing children to the protests.<sup>133</sup>
87. The civilians killed were protesters opposing President Nkurunziza’s third term, persons suspected of having participated in demonstrations, bystanders and residents of ‘anti-government’ neighbourhoods.<sup>134</sup>
88. While it appears that protests were largely conducted in a peaceful manner, the information available indicates that civilians and demonstrators were responsible for some cases of killing and injuries

<sup>130</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1958; *See also*, HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1914 (HRW provide the figure of 27 killed at, or as a consequence of injuries sustained during demonstrations and state that others were killed in separate incidents. These figures do not appear to include members of the security forces).

<sup>131</sup> HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1847, p. 46. *See also*, Daily Mail, “Terrifying moment female police officer shoots unarmed protesters point blank range with a Kalashnikov” (video), 13 May 2015, [BDI-OTP-0003-0202](#).

<sup>132</sup> AI, Braving Bullets, [BDI-OTP-0003-1661](#) at 1665 (citing the UN Children’s Fund, UNICEF).

<sup>133</sup> AI, Braving Bullets, [BDI-OTP-0003-1661](#) at 1679 (Willy Nyamitwe, Communications advisor to President Nkurunziza, told AI on 11 July 2015 that “in our communiqués, we said that children should go to school, and not be on the street, while demonstrators told parents that children shouldn’t go to school”. He added “when the police saw children, they would tell them to go back home”. He also stated that “children were given drugs to be on the street, they brought children into an insurrectional movement; children have nothing to do with this constitutional issue”).

<sup>134</sup> AI, Braving Bullets, [BDI-OTP-0003-1661](#) at 1676-1679 and 1686-1690; UNIIB Report, [BDI-OTP-0003-4258](#) at 4265, para. 41; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1940; HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1917-1919.

sustained by the police, civilians and persons perceived to be members of the *Imbonerakure*, as well as for the destruction of some public and private property.<sup>135</sup> In some instances, protesters reportedly threw Molotov cocktails and grenades at the security forces.<sup>136</sup>

89. According to the Burundian Government, 77 police officers were killed during the demonstrations,<sup>137</sup> although these figures are not corroborated by other sources.<sup>138</sup>
90. Notwithstanding the violent and chaotic circumstances of some of the protests, the information available indicates that the use of lethal force by the police directly against demonstrators appears on its face to have been unwarranted and excessive.<sup>139</sup> Video footage and witness testimony further supports allegations that police fired directly at people either in the context or in the vicinity of demonstrations, at least in some instances.<sup>140</sup> Although the information available indicates that at least some members of the police handled demonstrators peacefully, others appear to have been specifically instructed to shoot at protesters.<sup>141</sup>

<sup>135</sup> SG's July 2015 Report on the Electoral Observation Mission in Burundi, [BDI-OTP-0003-4331](#) at 4334, para. 13

<sup>136</sup> ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1231, para. 53; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1956-1957; HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1916.

<sup>137</sup> GoBUR, Annual Review, December 2016, [BDI-OTP-0003-1517](#) at 1521.

<sup>138</sup> See, SG's July 2015 Report on the UN Electoral Observation Mission in Burundi, [BDI-OTP-0003-4331](#) at 4334, para. 13. See also, FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1958.

<sup>139</sup> See, AI, Braving Bullets, [BDI-OTP-0003-1661](#) at 1686, 1687, 1694 and 1695.

<sup>140</sup> HRW, Police abuses exposed during Burundi protests (video), uploaded 16 June 2015, [BDI-OTP-0002-0045](#). See also, HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1930 (HRW cited several local sources reporting that on 27 April 2015 at least two people had been shot dead and others injured in clashes between police and demonstrators, who allegedly threw stones at police in Bujumbura); UNIIB Report, [BDI-OTP-0003-4258](#) at 4265, para. 41 and 4268, para. 62; ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1229-1230, para. 47 and 1235, para. 64; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1956; UN CAT, Concluding Observations on Burundi, [BDI-OTP-0003-4293](#) at 4299, para. 20; SG's July 2015 Report on the UN Electoral Observation Mission in Burundi, [BDI-OTP-0003-4331](#) at 4332-4333, para. 6.

<sup>141</sup> AI, Braving Bullets, [BDI-OTP-0003-1661](#) at 1686-1687.

91. One witness, who reports having seen that the police were handling demonstrations in a peaceful manner, observed: “[b]ut then three pickups arrive, drop some policemen who just start shooting before leaving again.” The same witness reported having heard a policeman say that those men “receive bonuses”. AI also reported having interviewed one police officer who complained about the behaviour of his colleagues and said: “After the coup, we were told to shoot demonstrators, because they are putschists; we were not given helmets, shields from then on, only weapons.”<sup>142</sup>
92. Reports also corroborate allegations that members of the police involved in the repression of protests used live ammunition against stone-throwing protesters and fleeing demonstrators, in spite of having less lethal means to control the crowds.<sup>143</sup>
93. Examples of deliberate killings committed during demonstrations illustrate the non-incidental commission of the conduct. For instance, on 26 April 2015, the first day of public protests, police allegedly shot dead a 16-year-old boy who encountered a demonstration as he was returning home from church. According to the UNIIB, a police commissioner ordered one of his officers to kill the boy as the police dispersed protesters who were chanting slogans and throwing stones. The victim reportedly begged for his life, saying, “I could be your child. I beg you.

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<sup>142</sup> AI, *Braving Bullets*, [BDI-OTP-0003-1661](#) at 1695.

<sup>143</sup> *See e.g.* HRW, *Burundi’s Human Rights Crisis*, [BDI-OTP-0003-1793](#) at 1930 (HRW cited several local sources reporting that on 27 April 2015 at least two people had been shot dead and others injured in clashes between police and demonstrators, who allegedly threw stones at police in Bujumbura). *See also*, UNIIB Report, [BDI-OTP-0003-4258](#) at 4265, para. 41 and 4268, paras. 62-63; ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1229-1230, para. 47 and 1235, para. 64; FIDH, *Repression and genocidal dynamics*, [BDI-OTP-0003-1932](#) at 1956; UN CAT, *Concluding Observations on Burundi*, [BDI-OTP-0003-4293](#) at 4299, para. 20; SG’s July 2015 Report on the UN Electoral Observation Mission in Burundi, [BDI-OTP-0003-4331](#) at 4332-4333, para. 6; AI, *Braving Bullets*, [BDI-OTP-0003-1661](#) at 1682-1683 and 1686-1687.

Save me.” After hesitation on the part of the officer, the commissioner allegedly shot the boy twice in the head.<sup>144</sup>

94. On 4 May 2015, members of the police reportedly shot a protester who was participating in a demonstration that took place at the intersection of Avenue *L’Imprimerie* near Ntakangwa Bridge and *Boulevard du 28 Novembre* in Bujumbura. Based on video footage and witness interviews, AI reported that during the demonstration, a policeman fired his Kalashnikov rifle at the feet of an opposition leader who was speaking into a loudspeaker. Demonstrators reportedly ran away, but then the policeman ran after them firing more shots, along with other policemen. Later, demonstrators tried to block the Boulevard with branches and stones. Policemen threw tear gas and then reportedly switched to firing AK-47s. AI further reported that “policemen ran after demonstrators, trying to catch them on the river embankment. In one scene [of video footage], the police shot at three demonstrators who had reached the river and were running away.” According to a witness account, “there were some dead and injured.” The Deputy Director General of the Police was reportedly present during the event.<sup>145</sup>
95. Killings also allegedly occurred in the hours following demonstrations, during police operations in the neighbourhoods where protests had occurred, or which were otherwise perceived as ‘anti-government’ neighbourhoods. The police reportedly targeted persons who were either suspected of involvement in the protests or simply present in those neighbourhoods. Several such killings were reportedly carried out by members of the API special police unit.<sup>146</sup> The information available does not indicate the victims were armed or resisting arrest.

<sup>144</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4265, para. 41.

<sup>145</sup> AI, Braving Bullets, [BDI-OTP-0003-1661](#) at 1688-1689.

<sup>146</sup> AI, Braving Bullets, [BDI-OTP-0003-1661](#) at 1676-1677.

*b. Killings during cordon and search operations*

96. According to several sources, from May 2015 onwards the security forces carried out deliberate reprisal killings of civilians in response to attacks against the security forces.<sup>147</sup> The killings allegedly targeted actual or perceived opponents of the Government as well as residents of neighbourhoods in which attacks against security forces had occurred.<sup>148</sup> The police were alleged to be responsible for several such incidents.<sup>149</sup>
97. The information available suggests that in many instances the victims were residents of the neighbourhoods in which the operations were conducted, were not armed, and/or were already under the control of the security forces and/or members of the *Imbonerakure* when they were killed.<sup>150</sup> Several sources also indicated that victims were shot in the head.<sup>151</sup>
98. On 3 October 2015, between 8 and 15 civilians were allegedly killed in the adjacent neighbourhoods of Cibitoke and Mutakura, in Bujumbura, following a grenade attack against police by unidentified persons in Mutakura earlier in the day.<sup>152</sup> According to witnesses, police accompanied by youths in civilian clothes, alleged to be *Imbonerakure* members,<sup>153</sup> were engaged in clashes with unidentified individuals.<sup>154</sup>

<sup>147</sup> HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1882-1887; UNIIB Report, [BDI-OTP-0003-4258](#) at 4262, para. 24.

<sup>148</sup> See e.g., AI, Braving Bullets, [BDI-OTP-0003-1661](#) at 1676-1678; HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1882-1887; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1988.

<sup>149</sup> See, FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1977-1979; RFI, "Burundi: 6 morts dans des combats avec la police", 1 July 2015, [BDI-OTP-0003-2554](#) at 2554-2555.

<sup>150</sup> See e.g. HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1883-1885.

<sup>151</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4124, paras. 12-13; HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1874. See e.g. FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1978; RFI, "Burundi: 6 morts dans des combats avec la police", 1 July 2015, [BDI-OTP-0003-2554](#) at 2555.

<sup>152</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1978. See also, HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1883-1885.

<sup>153</sup> HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1883-1885.

Police also reportedly fired into homes, forced residents to come outside and shot unarmed residents dead in the street.<sup>155</sup> One of those allegedly killed by police was a disabled resident of the neighbourhood. Witnesses in Cibitoke also alleged that during the incident one of the youths in civilian clothes was heard reporting on the telephone that there was an operation in Cibitoke and they were “in control of the sector”, and that the day following the incident, 7 to 10 *Imbonerakure* members assisted police in loading “at least 10” bodies into the back of a police pick-up truck.<sup>156</sup>

99. On 13 October 2015, one API police officer was reportedly killed, and another injured, in a grenade attack in Ngagara, Bujumbura.<sup>157</sup> According to witnesses, API police officers responding to the incident shot, beat and kicked residents of the area in which it had occurred. Notably, they went to the house of a cameraman for the state broadcaster, RTNB. It is alleged that the cameraman was first ordered out of his house, slapped, and then shot twice, fatally. His wife, son, nephew, and daughter were allegedly made to lie down in the street and then each shot in the head. Several other persons in the neighbourhood were also reportedly killed in the same way, including a guard from a nearby residence.<sup>158</sup> Witnesses to the incident reported that API officers killed nine people in total, including three children, and injured two.<sup>159</sup>

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<sup>154</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1978-1979; HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1883-1885. Sources differed on whether police responsible were from the API special police unit (cited in HRW report) or the BAE (mentioned in the FIDH report).

<sup>155</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1978-1979; HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1883-1885.

<sup>156</sup> HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1884.

<sup>157</sup> HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1885.

<sup>158</sup> HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1886.

<sup>159</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4124, para. 12 and 4132, para. 55.

100. During the operations by security forces that followed the 11 December 2015 attacks on military bases in Bujumbura, NGOs reported that at least 150 people were killed.<sup>160</sup> It is unclear how many of these deaths occurred in the context of exchange of fire between security forces and armed anti-government entities. According to the Burundian authorities, 79 “*combattants*”, four soldiers and four police officers died in the context of the fighting surrounding the events of 11 December 2015.<sup>161</sup> However, on the basis of witness accounts, OHCHR reported that the security forces entered homes and summarily executed several young men by shooting them at close range and/or in the head.<sup>162</sup> At least one child, a 15-year-old boy, appears to have been among those killed in the operation.<sup>163</sup> The bodies of some victims reportedly had their arms tied behind their backs.<sup>164</sup>

*c. Targeted killings*

101. The information available indicates a number of targeted killings of persons who opposed, or were perceived to oppose, the Government, including the targeting of perceived opposition sympathisers within the police and FDN.<sup>165</sup> The OHCHR noted “persistent reports of arrest, detention, torture, ill-treatment, enforced disappearances and assassination of certain members of the police and military by other

<sup>160</sup> FIDH, *Repression and genocidal dynamics*, [BDI-OTP-0003-1932](#) at 1941 and 1979-1980; UNIIB Report, [BDI-OTP-0003-4258](#) at 4265, para. 43 (UNIIB reported having received testimonies confirming the commission of extra-judicial executions, and indicating that the official number of 87 killed during this incident is very conservative).

<sup>161</sup> GoBUR, *Report of the Commission on the 11 December 2015 Events*, [BDI-OTP-0003-4815](#) at 4842.

<sup>162</sup> OHCHR, *Rapport sur la situation au Burundi*, [BDI-OTP-0003-4119](#) at 4124, para. 13. *See also*, AI, *Burundi: Suspected Mass Graves of Victims of 11 December Violence*, [BDI-OTP-0003-1748](#) at 1748 (AI also interviewed witnesses who corroborated these allegations).

<sup>163</sup> AI, *My Children Are Scared*, [BDI-OTP-0003-1717](#) at 1721.

<sup>164</sup> HRW, *Burundi’s Human Rights Crisis*, [BDI-OTP-0003-1793](#) at 1874 and 1860 (photograph and caption).

<sup>165</sup> OHCHR, *Rapport sur la situation au Burundi*, [BDI-OTP-0003-4119](#) at 4122, paras. 5-7 and 4123-4124, paras. 11-14. *See also*, FIDH, *Burundi on the brink*, [BDI-OTP-0004-0235](#) at 0245-0246; OHCHR, *Torture and illegal detention on the rise in Burundi – Zeid*, 18 April 2016, (“OHCHR, *Torture and illegal detention on the rise in Burundi*”), [BDI-OTP-0003-4329](#) at 4330.

government forces,” adding “[m]embers and officers of the former Burundian Armed Forces – known as ex-FAB and which was predominantly Tutsi – appear to have been particularly targeted, including some retired soldiers.”<sup>166</sup>

102. For example, on 15 May 2015, in Buterere, Bujumbura, men in “spotted blue uniforms” allegedly shot and killed a nurse who was an active member of the opposition movement Front for Democracy in Burundi – *Front pour la démocratie au Burundi* (“FRODEBU”) – in the neighbourhood and had participated in organising the protests.<sup>167</sup> A relative stated the victim had received threatening phone calls and text messages in the days immediately preceding the incident.<sup>168</sup>

103. On 23 May 2015, Zedi Feruzi, president of the opposition party *Union pour la paix et la démocratie – Zigabimanga* (“UPD”), and one of his bodyguards, were shot dead allegedly by men wearing the uniforms of the API special police unit.<sup>169</sup> An eye witness reportedly recognised one of the policemen.<sup>170</sup>

(ii) Imprisonment or other severe deprivation of physical liberty

104. The information available provides a reasonable basis to believe that from 26 April 2015 onwards members of the Burundian security forces and the *Imbonerakure* committed acts of imprisonment or other severe deprivation

<sup>166</sup> OHCHR, Torture and illegal detention on the rise in Burundi, [BDI-OTP-0003-4329](#) at 4330. *See also*, ICG, Burundi: The Army in Crisis, 5 April 2017, [BDI-OTP-0004-0275](#) at 0281 and 0285-0286; FIDH, Burundi on the brink, [BDI-OTP-0004-0235](#) at 0245-0246 (FIDH reported that between November 2016 and June 2017 its organisations collected more than 120 cases of arrests and arbitrary detentions, torture, disappearance and assassination attempts against ex-FAB. FIDH noted that SNR was particularly active in targeting many ex-FAB, “often disappearing and killing them”).

<sup>167</sup> May refer to a blue camouflage-patterned uniform, which is worn by officers of the API special unit: *see, e.g.* AI, Braving Bullets, [BDI-OTP-0003-1661](#) at 1676-1677.

<sup>168</sup> *Ibid.*, at 1677.

<sup>169</sup> *Ibid.*, at 1677; HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1887; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1987.

<sup>170</sup> AI, Braving Bullets, [BDI-OTP-0003-1661](#) at 1677.

of physical liberty in violation of fundamental rules of international law against actual or perceived opponents of the Government, within the meaning of article 7(1)(e) of the Rome Statute.

105. The information available indicates that the Burundian security forces systematically arrested and detained thousands of civilians who opposed or were perceived to oppose the Government, and people associated with them.<sup>171</sup> The security forces reportedly engaged in arrests and detentions regularly,<sup>172</sup> with increases in the number of incidents, including mass round-ups in neighbourhoods perceived to be ‘anti-government’, corresponding to periods of intensified repression. Mass arrests reportedly primarily targeted young adults accused or suspected by the authorities of intending to join rebel groups.<sup>173</sup>
106. The arrests and detentions appear to have been in violation of fundamental rules of international law, even if it is plausible that some of them were carried out initially on lawful grounds (such as against protesters or individuals who reportedly engaged in violent acts). While the exact circumstances of all arrests and detentions allegedly committed in the context of the crisis are not available from open sources, there is a reasonable basis to believe that members of the security forces, in coordination with *Imbonerakure* at times, carried out thousands of arbitrary arrests and detentions. Further, there is a reasonable basis to believe that imprisonments that may have been initially lawful became subsequently unlawful, due to breaches of detainees’ procedural rights

<sup>171</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4264, para. 35; OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4121-4122, paras. 5-7 and 4125-4126, paras. 18-20.

<sup>172</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4269, para. 68; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2001.

<sup>173</sup> OHCHR, Zeid alarmed by recent upsurge in arrests, detention and killings in Burundi, 28 September 2015, (“OHCHR, Zeid alarmed by recent upsurge in arrests, detention and killings in Burundi”), [BDI-OTP-0003-4319](#) at 4319.

and/or infliction of acts of ill-treatment and torture against them while in custody.

107. From April 2015 to the end of April 2016, the OHCHR recorded some 5,881 arrests and detentions in the course of its monitoring, including 351 children and 138 women.<sup>174</sup> The OHCHR assessed that at least 3,477 of these arrests and detentions were arbitrary or illegal.<sup>175</sup> In reaching this conclusion, the OHCHR considered factors such as detentions carried out by persons without legal authority to arrest; whether the accusations against the individual constituted illegal acts under Burundian law; whether arrest or detention procedures were observed; and detention in illegal facilities.<sup>176</sup>
108. Arrests and detentions were conducted principally by police or agents of the SNR<sup>177</sup>, although collaboration between the police, SNR and members of the *Imbonerakure*, and transfer from the custody of one to the other – usually from the *Imbonerakure* to the SNR - has also been mentioned as a common feature of detentions, ill-treatment and torture.<sup>178</sup> HRW reported that a high-ranking Burundian justice official, who spoke anonymously for fear of reprisals, stated that “the *Imbonerakure* arrest people and take them to the police after beating them and injuring them seriously. Instead

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<sup>174</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4125, para. 18. *See also*, FIDH, Burundi on the brink [BDI-OTP-0004-0235](#) at 0239 (In June 2017, FIDH estimated that more than 10,000 persons were still victims of arbitrary detentions).

<sup>175</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4125, para. 18.

<sup>176</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4125, para. 18, fn. 9.

<sup>177</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4125, paras. 18-19. *See also*, UNCOI Report, [BDI-OTP-0005-0003](#) at 0012, para. 43.

<sup>178</sup> Transfers from SNR to the judicial police have also been reported, *see e.g.* HRW, Burundi: Spate of Arbitrary Arrests, Torture, 6 August 2015, (“HRW, Burundi: Spate of Arbitrary Arrests, Torture”), [BDI-OTP-0003-1596](#) at 1598; OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4125, para. 18 and 4127, para. 28. *See also*, UNCOI Report, [BDI-OTP-0005-0003](#) at 0009, para. 27.

of taking them to the hospital, the police imprison them because of political pressure.”<sup>179</sup>

109. According to the OHCHR, FIDH, UNIIB, the UNCOI and the UN CAT, the Burundian security forces established irregular places of detention in different locations in Bujumbura and Ngozi where acts of torture were allegedly committed.<sup>180</sup> Detainees were deprived of medical care and had no access to lawyers.<sup>181</sup> Testimony reportedly received by the UNIIB indicates that “the security forces would typically bring arrested persons to temporary detention sites before sorting them according to their presumed collaboration with armed opposition groups or involvement in the movement against the third term.”<sup>182</sup>
110. Places of detention in Bujumbura reportedly included: uninhabited houses; private homes; the bar “Iwabo w’Abantu” in Kamenge, which belonged to the late General Adolphe Nshimirimana; the basement of the headquarters of the CNDD-FDD in Ngagara; the basement of the residences of General Guillaume Bunyoni, Minister of Public Security, in Kinanira and Gasekebuye; the BAE’s headquarters, known as “*Chez Ndadaye*”; the water supply distribution company building (REGIDESO) in Ngagara, near King Khaled Hospital, and the containers serving as military positions next to REGIDESO, in Kigobe.<sup>183</sup> Reported places of

<sup>179</sup> HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1823.

<sup>180</sup> See e.g. OHCHR, Torture and illegal detention on the rise in Burundi, [BDI-OTP-0003-4329](#) at 4329-4330 (the OHCHR reported that the use of torture and ill-treatment was also widespread in the countryside); FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2010-2014; UNIIB Report, [BDI-OTP-0003-4258](#) at 4269-4270, paras. 71-72; UNCOI Report, [BDI-OTP-0005-0003](#) at 0012, para. 43; UN CAT, Concluding Observations on Burundi, [BDI-OTP-0003-4293](#) at 4296-4297, para. 12.

<sup>181</sup> AI, Just Tell Me What to Confess to, [BDI-OTP-0003-1582](#) at 1584-1585; OHCHR, Torture and illegal detention on the rise in Burundi, [BDI-OTP-0003-4329](#) at 4329. See also, Loi No. 1/10 du 3 avril 2013 portant révision du code de procédure pénale, [BDI-OTP-0003-2854](#) at 2856-2857 and 2877, Articles 10 and 95 (The Burundian Code of Criminal Procedure makes provision for a detainee to remain silent if his lawyer is not present and for a detainee to communicate freely with his lawyer).

<sup>182</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4268, para. 66.

<sup>183</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2010-2014; UNIIB Report, [BDI-OTP-0003-4258](#) at 4269, para. 72. See also, UNCOI Report, [BDI-OTP-0005-0003](#) at 0012, para. 45.

detention in Ngozi include the Bar “*Chez Nyamugaruka*” at Vyegwa; the houses of President Nkurunziza in Mwumba commune and “the basement of the SNR”.<sup>184</sup>

111. Arrests and detentions often followed incidents of attacks on security forces, but appeared to frequently be conducted indiscriminately and in several instances included the detention of children.<sup>185</sup> For instance, on 10 and 11 July 2015, following an attack by an unidentified armed anti-government entity in the provinces of Cibitoke and Kayanza, at least 220 people, including a number of children, were arrested by the FDN and transferred to the Rumonge prison.<sup>186</sup> The children were reportedly charged with “involvement in armed groups”; by 5 August 2015, one had been released on probation, 17 had been sentenced and 34 remained in preventative detention.<sup>187</sup> Following the intervention of the OHCHR and the United Nations Children’s Fund (UNICEF), the minors were released on 30 November 2015.<sup>188</sup> According to UNICEF, they were being held in the adult prison in Rumonge in “very poor conditions”, including “limited sanitation facilities and no access to basic services (one shower and one toilet for all those incarcerated)”.<sup>189</sup> Most of the adults held were reportedly still in detention as of 30 April 2016.<sup>190</sup>

112. In another instance, on 18 January 2016, members of the police and the FDN reportedly arrested three girls aged between 14 and 16 years.<sup>191</sup> After

<sup>184</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4269-4270, para. 72.

<sup>185</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4125-4126, paras. 18-23.

<sup>186</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4126, para. 21.

<sup>187</sup> UNICEF, Burundi Humanitarian Situation Report, 12 August 2015, [BDI-OTP-0003-4509](#) at 4510-4511. The Prosecution notes some discrepancy between the figures provided by UNICEF (51-52 children arrested), and those provided by the OHCHR (53 children arrested) above at fn. 184.

<sup>188</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4126, para. 21 and 4133, para. 61.

<sup>189</sup> UNICEF, Burundi Humanitarian Situation Report, 12 August 2015, [BDI-OTP-0003-4509](#) at 4510-4511.

<sup>190</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4126, para. 21.

<sup>191</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4126, para. 23.

the arrest, they were transferred to a military position at Gatoke (Bujumbura) and then to the SNR. The girls were allegedly threatened with death by police officers, SNR agents and members of the FDN to reportedly force them to confess to being adult members of an armed group. After eight days, on 26 January 2016, they were released following the intervention of the OHCHR and UNICEF.<sup>192</sup>

113. Although there is limited detailed information on the length and conditions of all arrests and detentions, there is a reasonable basis to believe that, at least in some instances, individuals remained in detention for longer periods than allowed by law and, in many cases, were subjected to acts of ill-treatment and torture of such gravity as to amount to a violation of fundamental rules of international law.<sup>193</sup> According to some sources, hundreds of victims have allegedly been subjected to ill-treatment and torture while in custody.<sup>194</sup> They were reportedly mistreated for the purpose of punishing them, or to obtain information or confessions, including joining an armed rebellion.<sup>195</sup>
114. During a visit to SNR facilities in Bujumbura in April 2016, OHCHR officers found that 30 of the 67 detainees present bore physical signs of torture. Some were being held for offences including “undermining state

<sup>192</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4126, para. 23.

<sup>193</sup> See, e.g. UNIIB Report, [BDI-OTP-0003-4258](#) at 4264, para. 35. See also, OHCHR, Zeid alarmed by recent upsurge in arrests, detention and killings in Burundi, [BDI-OTP-0003-4319](#) at 4319-4320; OHCHR, Opening Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, at the Human Rights Council 24<sup>th</sup> Special Session, 17 December 2015, [BDI-OTP-0003-4504](#) at 4505. See also, ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1239, para. 78.

<sup>194</sup> See, FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2008 (citing “a UN source” and “an international observer”). See also, APRODH, Report on the SNR, [BDI-OTP-0001-0402](#) at 0414, para. 11; HRW, Burundi: Spate of Arbitrary Arrests, Torture, [BDI-OTP-0003-1596](#) at 1596 (HRW documented more than 148 cases of arbitrary arrests between April and July 2015, noting that many of those arrested were beaten, tortured or otherwise ill-treated).

<sup>195</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4127, paras. 28-29; HRW, Burundi: Spate of Arbitrary Arrests, Torture, [BDI-OTP-0003-1596](#) at 1604-1605; HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1818-1820, 1835.

security, illegal possession of arms and espionage".<sup>196</sup> In July 2015, the UN Secretary General reported that most of 307 people arrested since 26 April to 29 June 2015, had been subjected to "torture and cruel, inhumane and degrading treatment by security officers (mainly police and intelligence agents)".<sup>197</sup>

(iii) Torture

115. The information available provides a reasonable basis to believe that the Burundian security forces, in particular the police and the SNR, committed torture against actual or perceived opponents of the Government from 26 April 2015 onwards, within the meaning of article 7(1)(f) of the Statute.
116. Torture appears to have been a prominent feature of the conduct of the security forces in Burundi. According to OHCHR, 651 cases of torture and ill-treatment were recorded between April 2015 and the end of April 2016.<sup>198</sup> Reported instances of torture peaked between April and July 2015, in October 2015, and between December 2015 and April 2016,<sup>199</sup> which corresponds to periods of intensified repression by the security forces. After the 11 December 2015 attacks on military camps in Bujumbura, the number of incidents implicating the police and the SNR reportedly almost tripled within a month, with 29 cases of torture and 42 cases of ill-treatment documented in December 2015.<sup>200</sup> Referring to cases of torture and ill-treatment recorded by OHCHR between January and April 2016, the United Nations High Commissioner for Human Rights referred to

<sup>196</sup> OHCHR, Torture and illegal detention on the rise in Burundi, [BDI-OTP-0003-4329](#) at 4329.

<sup>197</sup> SG's July 2015 Report on the UN Electoral Observation Mission in Burundi, [BDI-OTP-0003-4331](#) at 4334, para. 13.

<sup>198</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4127, para. 27. *See also*, FIDH, Burundi on the brink, [BDI-OTP-0004-0235](#) at 0239 (FIDH estimated that in the past two years, "several hundreds or even thousands of individuals have been tortured").

<sup>199</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4127, para. 27.

<sup>200</sup> OHCHR, Statement on Burundi, 15 January 2016, [BDI-OTP-0003-4317](#) at 4318.

these figures as “a clear indicator of the widespread and growing use of torture and ill-treatment by government security forces.”<sup>201</sup> The rise in instances of alleged torture also appears to correspond to the increased use of detention, including mass round-ups in neighbourhoods perceived to be ‘anti-government’.

117. To the extent that their profile could be identified, victims were reportedly either members of the opposition or civil society organisations, or persons suspected of joining armed anti-government entities.<sup>202</sup>
118. The SNR and police were allegedly responsible for most instances of torture.<sup>203</sup> Some sources documented cases of torture and ill-treatment by the police, including the API, and the SNR, with assistance from members of the *Imbonerakure* in identifying who should be arrested.<sup>204</sup> According to other sources *Imbonerakure* members had participated in beatings of detainees, either at the time of arrest or at SNR headquarters.<sup>205</sup> In several cases individuals or groups were detained by the police and then transferred to the custody of the SNR where they were tortured or ill-treated.<sup>206</sup>
119. Torture appears to have been committed in SNR premises in central Bujumbura and in Ngagara; police stations in Nyakabiga, Cibitoke, Mutakura and Musaga; the headquarters of the *Bureau Spécial de Recherche*

<sup>201</sup> OHCHR, Torture and illegal detention on the rise in Burundi, [BDI-OTP-0003-4329](#) at 4329.

<sup>202</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4127, paras. 27-28.

<sup>203</sup> OHCHR, Torture and illegal detention on the rise in Burundi, [BDI-OTP-0003-4329](#) at 4329; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2006 (the report identifies the responsibility, to a lesser extent, of the FDN for some cases of alleged torture).

<sup>204</sup> AI, Just Tell Me What to Confess to, [BDI-OTP-0003-1582](#) at 1586.

<sup>205</sup> See e.g. HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1832; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2006.

<sup>206</sup> AI, Just Tell Me What to Confess to, [BDI-OTP-0003-1582](#) at 1588 and 1589. See also FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2008 (citing “a UN source” and “an international observer”); APRODH, Report on the SNR, [BDI-OTP-0001-0402](#) at 0414, para. 11; HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1818-1821.

(“BSR”), in Buyenzi; and, the judicial police premises in Jabe/Bwiza neighbourhood,<sup>207</sup> as well as in other irregular detention locations.<sup>208</sup>

120. A wide variety of methods are cited by several sources, including tying of arms and legs behind the back for several days; electrocution; beating with iron bars, boots and rifle butts, including to break bones and teeth; threats of summary execution; poking of eyes; tying of weights to genitals; crushing of fingers and toes with pliers; being tied by the feet upside down (known as “*Amagurizege*” in Kirundi); knife and machete stabs; being forced to sit on acid, broken glass or nails; burning with a blow torch, gas cylinder or acid; and being forced to look directly into the sun for several hours.<sup>209</sup>
121. The victims of torture appear to have been targeted because they were actual or suspected opponents of the Government.<sup>210</sup> In the majority of cases, torture was used to punish the victim, to obtain a confession and/or to try to obtain information on hidden weapons from the victim.<sup>211</sup>
122. In the context of alleged acts of imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law identified above, there is also a reasonable basis to believe that in some cases

<sup>207</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2006.

<sup>208</sup> See above, para. 110. See e.g. OHCHR, Torture and illegal detention on the rise in Burundi, [BDI-OTP-0003-4329](#) at 4329-4330 (the OHCHR reported that the use of torture and ill-treatment was also widespread in the countryside); FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2010-2014; UNIIB Report, [BDI-OTP-0003-4258](#) at 4269-4270, paras. 71-72; UN CAT, Concluding Observations on Burundi, 12 August 2016, [BDI-OTP-0003-4293](#) at 4296-4297, para. 12.

<sup>209</sup> See e.g. OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4127, paras. 28-29; UNIIB Report, [BDI-OTP-0003-4258](#) at 4266-4267, para. 54; HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1819-1820 and 1826-1838; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2006 and 2008; UNCOI Report, [BDI-OTP-0005-0003](#) at 0012, para. 46.

<sup>210</sup> HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1818 and 1820.

<sup>211</sup> OHCHR, Rapport sur la situation au Burundi 2016, [BDI-OTP-0003-4119](#) at 4127, para. 28; HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1818-1820 and 1834. See also, AI, Just Tell Me What to Confess to, [BDI-OTP-0003-1582](#) at 1584-1592.

detainees were subjected to severe physical or mental pain that could also amount to torture under article 7(1)(f) of the Statute.<sup>212</sup>

(iv) Rape and other forms of sexual violence

123. The information available provides a reasonable basis to believe that members of the Burundian security forces and the *Imbonerakure* committed the crime of rape against women and girls perceived to be associated with, or sympathisers of, the opposition, within the meaning of article 7(1)(g) of the Statute. There is also a reasonable basis to believe that sexual assaults against men in detention constitute other forms of sexual violence of comparable gravity to those acts listed in article 7(1)(g).
124. The UNIIB has identified sexual and gender-based violence as one of the patterns of victimisation in Burundi. In particular, the UNIIB noted that “many women who fled the country were subject to sexual violence during their flight by members of the *Imbonerakure*, unidentified armed men, and border guards, including as a punishment for leaving the country ‘while there was no war’”. It further noted “credible information indicating that many Burundian women and girls related to males who opposed the third term, or were perceived as political dissidents, became the targets of physical and sexual violence by elements of the security forces.” Moreover, UNIIB noted first and second-hand allegations of sexual violence against men, particularly in detention.<sup>213</sup>
125. Between June and October 2015, the UNHCR recorded 193 instances of rapes, allegedly committed by the security forces - including the PNB,

<sup>212</sup> ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1239, para. 78; SG’s July 2015 Report on UN Electoral Observation Mission in Burundi, [BDI-OTP-0003-4331](#) at 4336, para. 21; OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4127, paras. 28-29. *See also*, HRW, Burundi: Spate of Arbitrary Arrests, Torture, [BDI-OTP-0003-1596](#) at 1596 (HRW documented more than 148 cases of arbitrary arrests between April and July 2015, noting that many of those arrested were beaten, tortured or otherwise ill-treated).

<sup>213</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4267-4268, paras. 56-61.

SNR and FDN - or members of the *Imbonerakure*, from victims who reported the incidents after they had fled the country. Sixteen cases were reportedly perpetrated by the police and 177 by other members of the security forces or the *Imbonerakure*.<sup>214</sup> The OHCHR specifically documented the cases of 19 victims of sexual violence believed to be linked to the crisis between April 2015 and the end of April 2016.<sup>215</sup> The UNCOI conducted interviews with 45 rape victims, aged between 8 and 71 years.<sup>216</sup> There have also been reports of several cases of alleged gang-rape.<sup>217</sup>

126. There is a reasonable basis to believe that numerous cases of rape were committed against women and girls based on their actual or perceived political affiliation or association with the opposition,<sup>218</sup> or that of their relatives, or as punishment because they were seeking to flee Burundi during the crisis.<sup>219</sup> Rapes were reportedly committed by force or threat of force by members of the security forces, taking advantage of the coercive environments of search operations and detentions by the security forces or while under the control of the *Imbonerakure*.<sup>220</sup>

<sup>214</sup> HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1806 (citing information that HRW obtained from UNHCHR).

<sup>215</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4127-4128, para. 30.

<sup>216</sup> UNCOI Report, [BDI-OTP-0005-0003](#) at 0012, para. 48.

<sup>217</sup> HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1804-1805, 1808-1809 and 1811-1812; UNIIB Report, [BDI-OTP-0003-4258](#) at 4267-4277, paras. 56-61; OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4127-4128, paras. 31-32; UNSC, Report of the Secretary-General on conflict-related sexual violence, S/2016/361/Rev.1, 22 June 2016, ("SG's Report on conflict-related sexual violence"), [BDI-OTP-0003-4136](#) at 4162, para. 84. *See also*, UNCOI Report, [BDI-OTP-0005-0003](#) at 0013, paras. 49-50.

<sup>218</sup> SG's Report on conflict-related sexual violence, [BDI-OTP-0003-4136](#) at 4139-4140, para. 10 (noting reports of sexual assaults based on perceived political affiliation) and 4141, para. 13 (noting that women associated with the political opposition had been depicted in media cartoons as prostitutes). *See also*, UNCOI Report, [BDI-OTP-0005-0003](#) at 0013, para. 49.

<sup>219</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4267, paras. 57-58.

<sup>220</sup> *See e.g.* HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1804, 1809 and 1811; SG's Report on conflict-related sexual violence, [BDI-OTP-0003-4136](#) at 4162, para. 84. *See also*, UNCOI, Oral Briefing by Fatsah Ouguergouz, 14 June 2017, [BDI-OTP-0004-0380](#) at 0381-0382; UNCOI Report, [BDI-OTP-0005-0003](#) at 0013, para. 50.

127. In some cases, the victims were accused of supporting an opposition party or being married to an opposition supporter.<sup>221</sup> Reportedly in 14 cases the victims (all women) alleged they had recognised at least one of the attackers as a member of the *Imbonerakure* and some reportedly said their attackers wore police uniforms.<sup>222</sup>
128. The highest number of cases of rape reportedly occurred in December 2015.<sup>223</sup> In the context of the security operations following the attacks on military camps in Bujumbura on 11 December 2015, at least 13 sexual assaults were allegedly committed by members of the API special police unit, military police officers, other soldiers and members of the *Imbonerakure*. Security forces reportedly entered homes, forced male residents to leave and then raped or gang raped women and girls in their homes. Some victims of these attacks reported they had also been insulted by the attackers on the basis of their actual or perceived political or ethnic affiliation.<sup>224</sup>
129. In addition to allegations of rape, the information available indicates that men in the detention of the Burundian security forces or under the control of *Imbonerakure* members were subjected to violent acts of a sexual nature.<sup>225</sup> These acts targeted the sexuality of the victims, including forced nudity, tying of cords to detainees' genitals, beating, cutting and burning of genitals, and hanging heavy objects from genitals.<sup>226</sup>

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<sup>221</sup> HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1808-1809.

<sup>222</sup> HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1804.

<sup>223</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4127-4128, para. 30.

<sup>224</sup> SG's Report on conflict-related sexual violence, [BDI-OTP-0003-4136](#) at 4162, para. 84.

<sup>225</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4268, para. 61.

<sup>226</sup> HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1819 and 1821; UNIIB Report 2016, [BDI-OTP-0003-4258](#) at 4268, para. 61; AI, Just Tell Me What to Confess to, [BDI-OTP-0003-1582](#) at 1588.

(v) Enforced disappearance

130. There is a reasonable basis to believe that the Burundian security forces have committed the crime of enforced disappearance of persons from 26 April 2015 onwards, within the meaning of article 7(1)(i) of the Statute.<sup>227</sup>
131. Several sources have reported that opposition supporters, civil society members and protesters have disappeared since April 2015, often following arbitrary arrests by the security forces, notably by the police and the SNR.<sup>228</sup> UNIIB reported having met with relatives of persons arrested by members of the security forces, who were unable to obtain any information from the authorities regarding the fate or whereabouts of the person concerned.<sup>229</sup> The OHCHR reported 36 cases of enforced disappearance between 26 April 2015 and the end of April 2016.<sup>230</sup> In February 2017, a group of UN human rights experts also highlighted allegations of a significant increase in enforced disappearances, with unconfirmed reports of over 60 cases during the last two months of 2016.<sup>231</sup>
132. A widely-reported case is that of journalist, Jean Bigirimana, on 22 July 2016, who disappeared after leaving his home in Bujumbura to travel to

<sup>227</sup> Alleged cases of arrests, detentions or abductions by members of the security forces may otherwise qualify as acts of imprisonment or severe deprivation of physical liberty committed under article 7(1)(e) of the Statute, when the conditions of detentions were of such severity as to amount to a crime under the Rome Statute. They may amount to murder under article 7(1)(a) when the victims were killed after apprehension. Where the alleged conduct included acts of torture or ill-treatment prior to the killing of the victims, the crime may also qualify as torture under articles 7(1)(f).

<sup>228</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4266, para. 50; OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4124-4125, paras. 16-17; UN CAT, Concluding Observations on Burundi, [BDI-OTP-0003-4293](#) at 4296, para. 10. *See also*, OHCHR, Burundi: UN experts raise alarm at growing repression of NGOs and human rights defenders, 6 February 2017, (“OHCHR, Burundi: UN experts raise alarm at growing repression of NGOs”), [BDI-OTP-0004-0375](#) at 0375. *See also*, FIDH, Burundi on the brink, [BDI-OTP-0004-0235](#) at 0239 (In June 2017, FIDH estimated between 400 and 900 victims of forced disappearances in the last two years); UNCOI Report, [BDI-OTP-0005-0003](#) at 0011, paras. 37-38.

<sup>229</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4266, para. 50.

<sup>230</sup> OHCHR, Rapport sur la situation au Burundi 2016, [BDI-OTP-0003-4119](#) at 4125, para. 17.

<sup>231</sup> *See*, OHCHR, Burundi: UN experts raise alarm at growing repression of NGOs, [BDI-OTP-0004-0375](#) at 0375.

Muramvya province.<sup>232</sup> Some sources alleged he was bundled into a vehicle belonging to the SNR.<sup>233</sup> The police publicly denied that they had arrested him and asked his family to assist their investigations.<sup>234</sup>

133. The Prosecution notes in that regard that while multiple instances of possible disappearances have been reported, given the concealed nature of the crime, detailed information on specific incidents is often lacking, including information documenting the authorities' denial of arrest, detention or abduction, or refusal to provide information about the whereabouts of the alleged victims.<sup>235</sup> Nonetheless, there is a reasonable basis to believe that this crime occurred taking into account the overall context of other crimes within which this conduct allegedly took place, the multiple allegations of disappearances attributed to the Burundian security forces, as well as the possibility of underreporting due to the repressive environment and the fear of reprisals for seeking information on the whereabouts of missing persons.

(vi) Persecution

134. On the basis of the information available, there is a reasonable basis to believe that the Burundian security forces and members of the *Imbonerakure* committed the crime against humanity of persecution based on political grounds, within the meaning of article 7(1)(h) of the Statute.

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<sup>232</sup> HRW, Where is Burundian Journalist Jean Bigirimana?, 22 August 2016, (“HRW, Where is Jean Bigirimana?”), [BDI-OTP-0003-1790](#).

<sup>233</sup> FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2053.

<sup>234</sup> HRW, Where is Jean Bigirimana?, [BDI-OTP-0003-1790](#) at 1790; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2053.

<sup>235</sup> See e.g. FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2003 and 2070; HRW, Burundi: Abductions, Killings, Spread Fear, 25 February 2016, [BDI-OTP-0003-4884](#) at 4885; SOS-Torture/Burundi, Rapport No. 23 de la campagne SOS-Torture/Burundi publié le 21 mai 2016, 21 May 2016, [BDI-OTP-0003-4924](#) at 4926-4927; OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4124-4125, paras. 16-17 and 4132, paras. 53-54. See also, UNCOI Report, [BDI-OTP-0005-0003](#) at 0017-0018, para. 74.

135. Persecution appears to have been committed by means including killings, abductions, detentions and arrests, torture, rape and other forms of sexual violence. Moreover, as set out in paragraphs 59-61 described earlier, the authorities implemented several measures to repress and punish the expression of dissenting views, including by banning and violently repressing demonstrations, closing media stations accused of instigating civil unrest and armed rebellion through their broadcasts and suspending the activities of human rights organisations.
136. Members of the Burundian security forces and the *Imbonerakure* targeted the victims of these acts by reason of their actual or perceived political affiliation with the opposition.<sup>236</sup> This appears to have been based on civilians' participation in demonstrations, their activities in documenting and reporting the repression, their membership of opposition political parties, their family ties and their residence in neighbourhoods perceived as supporting the opposition.<sup>237</sup>
137. Moreover, as noted earlier, the authorities have equated protesters, journalists, human rights activists and members of the opposition with 'terrorists' and 'insurgents'.<sup>238</sup>
138. Several sources also refer to the emergence of an ethnic dimension to the situation in Burundi.<sup>239</sup> In particular, international organisations and experts have expressed concern at the ethnically divisive language used

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<sup>236</sup> "Political grounds" are not limited to membership of a particular political party or adherence to a particular ideology and may include a difference in opinion concerning public affairs issues as a reason for persecuting an identifiable group or collectivity; C. Hall and C. Stahn, 'Article 7', in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court*, Third Edition (2016), p. 223.

<sup>237</sup> See above, para. 51. While not exclusively so, the inhabitants of perceived pro-opposition areas are mainly from Tutsi ethnicity. See e.g. AI, *My Children are Scared*, [BDI-OTP-0003-1717](#) at 1717.

<sup>238</sup> FIDH, *Repression and genocidal dynamics*, [BDI-OTP-0003-1932](#) at 1956 and 2035. See also, GoBUR, *Report of the Commission on the 26 April 2015 Insurrectional Movement*, [BDI-OTP-0003-4783](#) at 4809-4812; AI, *Braving Bullets*, [BDI-OTP-0003-1661](#) at 1674.

<sup>239</sup> UNIIB Report, [BDI-OTP-0003-4258](#) at 4270, paras. 73-77; ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1232, para. 55; FIDH, *Repression and genocidal dynamics*, [BDI-OTP-0003-1932](#) at 2035-2038.

by members of the Government or CNDD-FDD party, alluding to the Tutsi ethnicity of persons perceived as opposed to the third presidential mandate.<sup>240</sup> Some CNDD-FDD officials also appear to have linked the so-called ‘acts of insurrection’ to an alleged plot or subversive plan by persons of Tutsi ethnicity to re-establish power.<sup>241</sup> Ethnically charged rhetoric has reportedly been used in an apparent effort to influence members of the security forces.<sup>242</sup> Reportedly some members of the security forces used ethnic slurs against their victims when committing alleged crimes.<sup>243</sup>

139. Nonetheless, a clear pattern of discrimination based on ethnicity cannot be established at this stage. Instead, the information available indicates that the crimes allegedly committed by members of the security forces and the *Imbonerakure* in Burundi were committed with a discriminatory intent based on political grounds, focussed on the actual or perceived political affiliation of persons with the opposition.<sup>244</sup> This is supported by the fact opponents of President Nkurunziza’s third term were drawn from individuals across society with both Hutu and Tutsi ethnicity and persons of both ethnicities were attacked.<sup>245</sup> In some instances persons of

<sup>240</sup> See e.g. UN CAT, Concluding Observations on Burundi, 12 August 2016, [BDI-OTP-0003-4293](#) at 4299, para. 18; UNIIB Report, [BDI-OTP-0003-4258](#) at 4270, para. 75; UN Press Release, Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide on the situation in Burundi, 24 August 2016, [BDI-OTP-0004-0393](#); UNCOI Report, [BDI-OTP-0005-0003](#) at 0013, para. 53.

<sup>241</sup> ICG, Burundi: A Dangerous Third Term, [BDI-OTP-0003-1753](#) at 1763-1765; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1956 and 2035-2036.

<sup>242</sup> ICG, Burundi: A Dangerous Third Term, [BDI-OTP-0003-1753](#) at 1765. See e.g. CNDD-FDD, Communiqué No. 003/2016 of the CNDD-FDD party of February 17<sup>th</sup>, 2016, 17 February 2016, [BDI-OTP-0003-1501](#) at 1501-1502; CNDD-FDD, Communiqué No. 005/2016 of the CNDD-FDD party of March 10<sup>th</sup>, 2016, 10 March 2016 [BDI-OTP-0003-1506](#) at 1506-1507.

<sup>243</sup> See e.g. UNIIB Report, [BDI-OTP-0003-4258](#) at 4270, para. 77; OHCHR, Statement on Burundi, 15 January 2016, [BDI-OTP-0003-4317](#) at 4318; HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1830.

<sup>244</sup> International Refugee Rights Initiative, “I know the consequences of war”: Understanding the dynamics of displacement in Burundi, 7 December 2016, [BDI-OTP-0003-2165](#) at 2198; ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1232, para. 55 and 1248-1249, para. 107. See also, FIDH, Burundi on the brink, [BDI-OTP-0004-0235](#) at 0240 (observing “Even some members of the party [CNDD-FDD] and the youth-league of the party, the *Imbonerakure* [...] are increasingly being targeted because they are suspected of not abiding by the authoritarian political line of the [CNDD-FDD]”).

<sup>245</sup> ACHPR Mission Report, [BDI-OTP-0003-1211](#) at 1248-1249, para. 107.

Tutsi ethnicity were reportedly attacked because their ethnicity was perceived as an indicator of likely association with the political opposition. For example, areas targeted in operations by the security forces were neighbourhoods historically associated with the opposition, and were also reportedly inhabited by a large number of persons of Tutsi ethnicity.<sup>246</sup>

Acts allegedly committed by members of armed anti-government entities

140. A number of acts of violence, including murder, are alleged to have been committed by armed anti-government entities and other unidentified perpetrators. Most of these allegations, however, cannot be attributed to specific persons or groups to the requisite standard. For example, the OHCHR reported that between 26 April 2015 and the end of April 2016 “*hommes armés, pour la plupart non identifiés*” carried out some 134 killings in attacks targeting police officers, *Imbonerakure*, members of the CNDD-FDD party and military personnel, but also killing some civilians.<sup>247</sup> However, these allegations occur during a time period largely before FOREBU and RED-TABARA emerged, in December 2015 and January 2016 respectively.<sup>248</sup> Moreover, information indicates that some protesters engaged in violent acts against the security forces, including by throwing grenades and Molotov cocktails.<sup>249</sup> Likewise, the UNCOI was not able to identify the perpetrators of, or attribute responsibility for, a number of individual killings.<sup>250</sup>

141. In relation to those incidents for which the information available provides a reasonable basis for attribution, FOREBU is reported to have killed four

<sup>246</sup> See, e.g. AI, My Children Are Scared, [BDI-OTP-0003-1717](#) at 1717.

<sup>247</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4123, para. 10 (Unofficial English translation: “armed men, mostly unidentified”).

<sup>248</sup> See above, paras. 47-48.

<sup>249</sup> See above, para. 88.

<sup>250</sup> UNCOI Report, [BDI-OTP-0005-0003](#) at 0011, para. 36.

members of the *Imbonerakure* during an assault against a police station in Cibitoke on 5 February 2016.<sup>251</sup> FOREBU has also reportedly claimed responsibility for the assassination of Lieutenant Colonel Darius Ikurakure, commander of the BGC, a special unit of the FDN on 22 March 2016.<sup>252</sup> RED-TABARA is alleged to be responsible for four incidents targeting members of the Burundian security forces in January 2016 in which eight members of the security forces or civil servants were killed.<sup>253</sup> Nonetheless, at this stage such underlying acts cannot be linked to the contextual elements of crimes within the jurisdiction of the Court. This is because the degree of intensity of the armed confrontation<sup>254</sup> and the level of organisation of these armed anti-government entities<sup>255</sup> is insufficient to characterise the situation as a non-international armed conflict.<sup>256</sup> Nor are these underlying acts constitutive of crimes against humanity.<sup>257</sup> If and when an investigation is authorised by the Pre-Trial Chamber, the

<sup>251</sup> ACLED Burundi Country Report, [BDI-OTP-0003-1734](#) at 1747.

<sup>252</sup> HRW, Burundi's Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1845; FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 1994 and 2069. The UNCOI was unable to attribute responsibility for the killing of Darius Ikurakure: UNCOI Report, [BDI-OTP-0005-0003](#) at 0011, para. 36.

<sup>253</sup> SOS-Torture/Burundi, Rapport numéro 6 de la campagne SOS-Torture Burundi publié le 23 janvier 2016, 23 January 2016, [BDI-OTP-0003-2380](#) at 2382-2384; RED-TABARA, Communiqué de Presse Contre La Supercherie Du FOREBU, 6 February 2016, [BDI-OTP-0003-4109](#).

<sup>254</sup> In its 2015 Annual Report, the ICRC used the terms “outbreak of violence”, “tensions” and “unrest” when describing the situation in Burundi: ICRC, 2015 Annual Report, [BDI-OTP-0003-2344](#) at 2345. Similarly, ICRC articles issued in 2016 refer to a “wave of violence”, “unrest” and “crisis”: ICRC, Three young Burundian refugees reunited with their families in Rwanda, 20 May 2016, [BDI-OTP-0003-2351](#) at 2351-2352; and ICRC, Burundian refugees restore contact with their families, 28 July 2016, [BDI-OTP-0003-2349](#) at 2349. Likewise, the UNSC used the words “escalation of insecurity”, “rise in violence” or “persistence of violence” and “political impasse” when addressing the situation in the three resolutions adopted during the period under review: UNSC Resolution 2248 (2015), S/RES/2248 (2015), 12 November 2015, [BDI-OTP-0003-4600](#) at 4600; UNSC Resolution 2279 (2016), S/RES/2279 (2016), 1 April 2016, [BDI-OTP-0003-4603](#) at 4603; and UNSC Resolution 2303 (2016), S/RES/2303 (2016), 29 July 2016, [BDI-OTP-0003-4607](#) at 4607.

<sup>255</sup> Neither entity appears to be under a well-structured and responsible command or a cohesive internal hierarchy, despite their inclusion of several experienced individuals formerly from the security forces: *see e.g.* FIDH, Repression and genocidal dynamics, [BDI-OTP-0003-1932](#) at 2079.

<sup>256</sup> Similarly, the UNCOI came to the conclusion that the situation in Burundi does not qualify as a non-international armed conflict: “*La Commission a considéré que le droit international humanitaire ne s'appliquait pas dans le cadre de son mandat, le caractère sporadique des attaques menées ou revendiquées par des groupes armés depuis avril 2015 au Burundi ne permettant pas de conclure à l'existence d'un conflit armé non international*”: UNCOI Report, [BDI-OTP-0005-0003](#) at 0006, para. 11.

<sup>257</sup> *See also*, UNCOI Report, [BDI-OTP-0005-0003](#) at 0009, para. 28.

Prosecution will, in the context of such investigation, keep these allegations under review.

## VII. Admissibility

142. The factor set out in article 53(1)(b), applied via rule 48, provides that in determining whether there is a reasonable basis to proceed, the Prosecutor shall consider whether “the case is or would be admissible under Article 17”.
143. Previous decisions on article 15 applications have held that admissibility at the article 15 stage should be assessed against certain criteria defining a ‘potential case’ such as: (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); and (ii) 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).<sup>258</sup>
144. In relation to the level of specificity and detail required, the Prosecution has borne in mind the nature of the present proceedings, the low threshold, as well as its object and purpose. Such identification “at this stage is preliminary, and as such, this may change as a result of the investigation”.<sup>259</sup> Moreover, the assessment of the groups of persons allegedly involved “involves a generic assessment (general in nature and compatible with the fact that an investigation is yet to be opened)”.<sup>260</sup> The Appeals Chamber has similarly observed that “the contours of the likely cases will often be relatively vague ... Often, no individual suspects will

<sup>258</sup> *Kenya* Article 15 Decision, ICC-01/09-19-Corr, para. 59 ; *Côte d’Ivoire* Article 15 Decision, ICC-02/11-14, paras. 190-191.

<sup>259</sup> *Georgia* Article 15 Decision, ICC-01/15-12, para. 37. *See also*, *Kenya* Article 15 Decision, ICC-01/09-19-Corr, para. 50.

<sup>260</sup> *Georgia* Article 15 Decision, ICC-01/15-12, para. 51. *See also*, *Kenya* Article 15 Decision, ICC-01/09-19-Corr, para. 60.

have been identified at this stage, nor will the exact conduct nor its legal classification be clear.”<sup>261</sup>

145. Accordingly, the Prosecution has attached to this Request two confidential, *ex-parte*, annexes. Annex 3 presents an indicative list of crimes within the jurisdiction of the Court allegedly committed during the most serious incidents within the situation based on the available information. Annex 4 presents a preliminary list of persons or groups that appear to be the most responsible for the most serious crimes, with an indication of their specific role.
146. In the event that an investigation is authorised, the Prosecution should be permitted to expand or modify its investigation with respect to these or other alleged acts, incidents, groups or persons, provided that the cases brought forward for prosecution are sufficiently linked to the authorised situation.<sup>262</sup>

#### **A. Complementarity**

147. In light of the information available, [REDACTED], the potential case that would likely arise from an investigation of the situation, related to those who appear most responsible for the most serious crimes, would be admissible pursuant to article 17(1)(a)-(b).
148. The Burundian authorities have established three commissions of inquiry in response to the violent events since April 2015. However, their findings have examined only a limited number of incidents and focussed on the criminal responsibility of actual or perceived members of the opposition as ‘insurgents’ for the violence. They have also generally discounted the

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<sup>261</sup> *Prosecutor v. Ruto et al*, Appeals Chamber, 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), ICC-01/09-01/11-307, 30 August 2011, (“*Ruto Article 19 Decision*”), para. 39.

<sup>262</sup> *Kenya Article 15 Decision*, ICC-01/09-19-Corr, paras. 74-75; *Mbarushimana Decision*, ICC-01/04-01/10-451, paras. 21 and 27.

alleged responsibility of members of the Government, the security forces or the *Imbonerakure* for the commission of crimes. The limited number of cases that the authorities have initiated into the death or abduction of civilians appears to have focussed on isolated acts and generally lack specificity. As such, the Prosecution has been unable to identify at this stage the actual contours of the relevant person(s) or conduct under investigation.

149. More specifically, none of the domestic proceedings examined by the Prosecution reveal any past or ongoing criminal process that seeks to establish the criminal responsibility of members of the Burundian authorities, the security forces and/or the *Imbonerakure* who appear to bear the greatest responsibility for the alleged crimes set out in this Request. No leaders of the units identified in this Request and the accompanying annexes, nor other relevant members of the political, defence and security leadership have been investigated or prosecuted for the crimes alleged in this Request.
150. As such, the information available indicates inactivity by the Burundian authorities in relation to the potential cases identified in this Request and the accompanying annexes.<sup>263</sup> Additionally, to the extent that the Burundian authorities have cleared members of the security forces as alleged physical perpetrators of any wrongdoing, for the reasons set out below the Prosecution believes that the inquiries conducted into these allegations were not conducted genuinely, but were undertaken for the purpose of shielding the persons concerned from criminal responsibility.

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<sup>263</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, 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, ICC-01/04-01/07-1497 (“*Katanga and Ngudjolo Decision*”), para. 78.

## 1. National proceedings in Burundi

151. Between April and December 2016, the Prosecutor General of Bujumbura (*Procureur Général de la République*) established three national inquiries to investigate specific incidents: (a) the commission of inquiry into the 26 April 2015 insurrectional movement; (b) the commission of inquiry into the alleged incidents of 13 October 2015; and (c) the commission of inquiry into alleged extrajudicial executions following the attacks of 11 December 2015.<sup>264</sup>
152. All three commissions were set up to identify alleged perpetrators for the purpose of criminal proceedings and thus had the capacity to result in criminal investigations and prosecutions. Except for one case relating to the alleged extrajudicial execution of seven detainees which was committed for further investigation, none of the inquiries identified any case against security forces for conduct that may fall under the ICC jurisdiction. Responsibility for alleged wrongdoings is generally attributed to individuals not associated with the security forces.<sup>265</sup>
153. The Prosecution recalls that the admissibility provisions of the Statute are founded on the complementary relationship between the ICC and “national criminal jurisdictions”.<sup>266</sup> As such, in principle, it is only national criminal investigations and/or prosecutions of a State that can trigger the application of article 17(1)(a)-(c). The Prosecution observes that the three national commissions of inquiry do not appear to have had

<sup>264</sup> GoBUR, Report of the Commission on the 11 December 2015 Events, [BDI-OTP-0003-4815](#).

<sup>265</sup> See, in particular, GoBUR, Report of the Commission on the 26 April 2015 Insurrectional Movement [BDI-OTP-0003-4783](#) at 4813-4814; GoBUR, 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 Ntahangwa, December 2015, made publicly available by Forum Burundi, (“GoBUR, Report of the Commission on the 13 October 2015 Events”), [BDI-OTP-0003-4844](#) at 4851-4852 and 4854 [REDACTED]; GoBUR, Report of the Commission on the 11 December 2015 Events, [BDI-OTP-0003-4815](#) at 4840-4841; OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4132, paras. 53-56.

<sup>266</sup> Article 1 of the Statute.

full investigatory powers or conducted full criminal inquiries. Nonetheless, each commission was established by the Prosecutor General, comprised of either magistrates or judicial police officers from the Public Prosecutor's Office, and had some judicial and investigative powers as well as the authority to identify cases for further criminal investigation.<sup>267</sup> Out of an abundance of caution, and to ensure completeness of its analysis, the Prosecution has considered their findings within the remit of article 17(1)(a)-(b) as national criminal investigations, even if on their face these initiatives would appear to fall outside the technical scope of the term.

(i) Commission d'Enquête chargée de faire la lumière sur le mouvement insurrectionnel déclenché le 26 avril 2015

154. The objective of the inquiry into the "*mouvement insurrectionnel*" was to investigate the 'insurrectional movement', identify the perpetrators and their responsibility, in order to bring them to justice.<sup>268</sup> It thus excluded the investigation of conduct by the security forces, the *Imbonerakure* or the political, defence and security leadership. The commission ascribed to the 'insurgents' various punishable acts (including assaults and battery, killings, illegal possession of firearms, ransacking and destruction of private and public property).<sup>269</sup>

155. Specifically, the commission found that the organisers of the demonstrations did not follow the proper legal procedure to announce a

<sup>267</sup> GoBUR, Report of the Commission on the 26 April 2015 Insurrectional Movement, [BDI-OTP-0003-4783](#) at 4786; GoBUR, Rapport spécial – Examen du Burundi par le Comité de l'ONU contre la torture, 29 June 2016, ("GoBUR, Special Report on UN CAT"), [BDI-OTP-0003-4180](#) at 4180-4183; GoBUR, Report of the Commission on the 11 December 2015 Events, [BDI-OTP-0003-4815](#) at 4818; GoBUR, Report of the Commission on the 13 October 2015 Events, [BDI-OTP-0003-4844](#) at 4846.

<sup>268</sup> GoBUR, Report of the Commission on the 26 April 2015 Insurrectional Movement, [BDI-OTP-0003-4783](#) at 4786.

<sup>269</sup> GoBUR, Report of the Commission on the 26 April 2015 Insurrectional Movement, [BDI-OTP-0003-4783](#) at 4811-4812.

demonstration.<sup>270</sup> It concluded that the ‘insurrection’ was primarily financed by civil society organisations and opposition political parties, and found a direct link between the organisers of the demonstrations and persons involved in the 13 May 2015 *coup d’état*.<sup>271</sup> It stated that certain weapons were found among the ‘insurgents’, including pistols, machetes and Molotov cocktails.<sup>272</sup>

156. The inquiry attributed to ‘insurgents’ various crimes under domestic law, including assaults and battery, killings, illegal possession of firearms, ransacking and destruction of private and public property.<sup>273</sup> These included: the alleged killing of a member of the *Imbonerakure* who was reportedly burnt alive on 7 May 2015 in the Nyakabiga neighbourhood of Bujumbura; a grenade attack on police officers on 1 May 2015 in the Kamenge neighbourhood; and an attack on a female police officer on 12 May 2015 in Buterere *commune*. The commission further indicated that many civilians were victims of violence by the insurgents, referring to one incident where a dozen persons were allegedly beaten to death in the Kanyosha *commune*. Without referring to specific incidents, the commission also attributed kidnappings and grenade attacks to the ‘insurgents’.<sup>274</sup>

157. The commission identified politicians from opposition parties, leaders of certain civil society organisations, members of the military and the police as well as some businessmen and businesswomen as taking actively part in the ‘insurrectional movement’. In this respect, the report specifically named 25 civil society organisations, affiliated to the “*Halte au 3ème*

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<sup>270</sup> *Ibid*, at 4789.

<sup>271</sup> *Ibid*, at 4792-4795.

<sup>272</sup> *Ibid*, at 4797.

<sup>273</sup> *Ibid*, at 4811-4813.

<sup>274</sup> *Ibid*, at 4799-4801.

*mandate*” campaign, and six political parties, as well as 38 individuals, the majority of whom are presented as representatives of the listed formations. The report further indicates that 17 persons were arrested in the context of the inquiry. A file under record number RMPG 696/MA was opened to apprehend and bring to justice the remaining offenders.<sup>275</sup>

158. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].<sup>276</sup>
159. According to the Government’s report to the UN CAT in June 2016, 54 persons were subsequently prosecuted in relation to the “*mouvement insurrectionnel*” under case file RMP 151775/RP 24775. A judgment was passed on 13 June 2016 in which 26 defendants were acquitted, 16 persons convicted and sentenced to one year and six months’ imprisonment and 12 persons convicted and sentenced to three years’ imprisonment.<sup>277</sup>
160. The information available indicates that the Commission has not investigated persons and conduct which are the focus of the potential cases that are likely to arise from an investigation of the situation.
- (ii) 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 Ntahangwa
161. The inquiry into the events of 13 October 2015 found an anti-government youth group responsible for some crimes, but dismissed allegations concerning the killing of nine persons by the API special police unit as not backed by the evidence.

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<sup>275</sup> *Ibid*, at 4809-4813.

<sup>276</sup> [REDACTED].

<sup>277</sup> GoBUR, Special Report on UN CAT, [BDI-OTP-0003-4180](#) at 4194.

162. According to the commission's account of the 13 October 2015 events, a group of "*jeunes gens*" from the Ngagara neighbourhood of Bujumbura arbitrarily detained and ill-treated three policemen in civilian clothes from the API special police unit. Reportedly, one identified attacker<sup>278</sup> shot two of the prisoners, killing one, whilst the third policeman managed to flee and call for support. The ensuing intervention by police reinforcements and military forces of the GMIR led to a heavy exchange of fire between the API and unidentified assailants, resulting in civilian casualties. It also found that, later that night, individuals previously involved in clashes with the security forces surrounded and attacked at least two police stations in the Ngagara neighbourhood, resulting in an exchange of fire lasting more than 30 minutes.<sup>279</sup>
163. In total, the inquiry identified 10 persons killed, including a policeman, two civil servants, and a journalist of RTNB, Christophe Nikezabahizi who was allegedly targeted by the "*jeunes*" to prevent him from broadcasting the attack on the three police officers. It named three injured persons (two surviving policemen and one civil servant), and reported some material damage (notably to civilian cars).<sup>280</sup>
164. The commission found no evidence to support the alleged killing of civilians by police from the API unit. Rather, the inquiry concluded that the alleged crimes "*étaient bien préparés d'avance par les jeunes en provenance de différentes Zones de la Capitale de Bujumbura, soutenus par quelques adultes*",<sup>281</sup> and identified six of these youths as being involved in different

<sup>278</sup> Also referred to as "Hayidite", "Ayidite" or "Harakaharaka" in the report: *see*, GoBUR, Report of the Commission on the 13 October 2015 Events, [BDI-OTP-0003-4844](#) at 4847 and 4854.

<sup>279</sup> *Ibid*, at 4849-4857.

<sup>280</sup> *Ibid*, at 4857-4858.

<sup>281</sup> *Ibid*, at 4861 (Unofficial English translation: "were well-prepared in advance by young people coming from different areas of the capital of Bujumbura, supported by a few adults").

capacities in the incidents.<sup>282</sup> It reported that casefile 152961/NT.T was opened into the attacks and an arrest warrant issued for one of the alleged attackers.<sup>283</sup>

165. While the identity of the alleged perpetrators could not be fully established, the commission attributed the killings of civilians to “*jeunes gens*”,<sup>284</sup> “*ces jeunes*”,<sup>285</sup> “*assaillants*”,<sup>286</sup> “*malfaiteurs*”,<sup>287</sup> and various individuals identified by nicknames.<sup>288</sup> In particular, this group was said to be responsible for the killing of a police officer, journalist Christophe Nkezabahizi, and members of his family.<sup>289</sup>
166. In relation to reports of the summary execution of a RTNB journalist and members of his family, including three children, in front of their house, the commission concluded that it found no evidence supporting such allegations concerning police from the API unit. Instead, it emphasised the responsibility of “*jeunes gens*” for the ambush incident and ensuing alleged killings.<sup>290</sup>
167. The information available indicates that the commission has not investigated persons and conduct that are the focus of the potential cases that are likely to arise from an investigation of the situation.
168. Alternatively, to the extent to which the commission can be said to have investigated allegations against members of the security forces or the *Imbonerakure* and determined no basis to proceed, within the meaning of article 17(1)(a) or (b), the Prosecution considers that such a decision

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<sup>282</sup> *Ibid*, at 4860.

<sup>283</sup> *Ibid*, at 4859-4860.

<sup>284</sup> *Ibid*, at 4847, 4854 and 4859-4860.

<sup>285</sup> *Ibid*, at 4847, 4850, 4852-4853, 4855-4856 and 4859-4861.

<sup>286</sup> *Ibid*, at 4855-4856.

<sup>287</sup> *Ibid*, at 4847, 4854, 4856 and 4860-4862.

<sup>288</sup> *Ibid*, at 4860.

<sup>289</sup> *Ibid*, at 4852, 4854, 4857 and 4861-4862.

<sup>290</sup> *Ibid*, at 4854-4862.

resulted from the unwillingness of the Burundian authorities to carry out the investigation genuinely. In particular, as set out in paragraphs 56-58 and 64-65 above, multiple sources suggest that the authorities have attempted to justify their actions against civilians by classifying them as ‘insurgents’ or ‘assailants’, blaming them for the violence, attempting to conceal the commission of crimes, and by otherwise failing to bring alleged perpetrators to account. In the circumstances, the information available indicates that the competent authorities were not able to conduct the necessary investigations independently or impartially and in a manner consistent with an intent to bring the persons concerned to justice.

(iii) 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

169. The inquiry into the 11 December 2015 events examined attacks against the military camps of the Higher Institute of Military Cadre (“ISCAM”), the logistic base of FDN, and the military camps Ngagara and Mujejuru. The commission attributed the attacks to an unidentified armed group, but shed no light on the alleged mass killings committed subsequently by the security forces. Although other sources had reported that the security forces, accompanied by members of the *Imbonerakure*, entered homes and summarily executed several young men by shooting them at close range and/or in the head and that many detainees were tortured,<sup>291</sup> the commission concluded that - with the exception of seven ‘combatants’ who died in custody - all other killings occurred in action on the

<sup>291</sup> OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4124, para. 13 and 4127, paras. 27-28; OHCHR, Statement on Burundi, 15 January 2016, [BDI-OTP-0003-4317](#) at 4317; AI, Burundi: Suspected Mass Graves of Victims of 11 December Violence, [BDI-OTP-0003-1748](#) at 1748 (AI also interviewed witnesses who corroborated these allegations).

battleground. It held that there were no civilian casualties, since all the persons found dead in the neighbourhoods of Musaga, Ngagara and Nyakabia were ‘assailants’ who had attacked the military camps, except for one mentally disabled person killed by stray bullets.<sup>292</sup> It also found no cases of torture against detainees and nothing to support the existence of mass graves.<sup>293</sup>

170. The commission emphasised that, despite the calls by the authorities, “no family had approached it to file complaints and provide a different version of the events so that justice can prosecute the murders of the missing persons”.<sup>294</sup>
171. The commission reported that 87 individuals, arrested in relation to the attack on the military camps, were held in prison as of March 2016. They were charged with participation in an armed gang under articles 593 and 594 of the Penal Code. Four different casefiles were opened with respect to these 87 individuals: 47 defendants have been prosecuted under file RMP 153418/NIS; 19 soldiers under file RPC 19 (before the Court of Appeal of Bujumbura); 11 other individuals under file RMP 153421/HF; and 10 defendants are detained in Muramvya and Rumonge prisons. They are the subject of file RMP 153417/MB.B.<sup>295</sup>
172. In its submission to the Prosecution, the Government of Burundi again stated that [REDACTED]. [REDACTED].<sup>296</sup>
173. With regard to the alleged killings of seven detained attackers, the commission identified one case against an army Major and the chief of the

<sup>292</sup> GoBUR, Report of the Commission on the 11 December 2015 Events, [BDI-OTP-0003-4815](#) at 4828-4830, 4836 and 4842.

<sup>293</sup> GoBUR, Report of the Commission on the 11 December 2015 Events, [BDI-OTP-0003-4815](#) at 4835 and 4842-4843; OHCHR, Rapport sur la situation au Burundi, [BDI-OTP-0003-4119](#) at 4132, para. 56.

<sup>294</sup> *Ibid*, at 1339.

<sup>295</sup> *Ibid*, at 1335-1338 and 1345.

<sup>296</sup> [REDACTED].

Rwibaga police station.<sup>297</sup> The commission underlined it could not elucidate the exact circumstances of the deaths and that it had committed the alleged killings to further investigations under the file RM PG 713/BJB as a suspected murder case under articles 210 to 218 of the Burundian penal code.<sup>298</sup>

174. The scope of this case appears highly limited, focussed solely on the alleged criminal responsibility of two local commanders for the death in custody of seven individuals. This is particularly so when set against the scope of the allegations concerning incidents of killings which reportedly occurred in the aftermath of the attacks against the military bases, as set out in paragraph 100 of this Request. As such, the Prosecution has determined that the case does not correspond to the persons and conduct which form the focus of the potential case identified in this Request and the accompanying annexes.
175. Alternatively, to the extent to which the commission can be said to have investigated allegations against members of the security forces or the *Imbonerakure* and determined no basis to proceed, within the meaning of article 17(1)(a) or (b), the Prosecution considers that such a decision resulted from the unwillingness of the Burundian authorities to carry out the investigation genuinely. In particular, as set out in paragraphs 56-58 and 64-65 above, multiple sources suggest that the authorities have attempted to justify their actions against civilians by classifying them as ‘insurgents’ or ‘assailants’, blaming them for the violence, attempting to conceal the commission of crimes, and by otherwise failing to bring alleged perpetrators to account. In the circumstances, the information

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<sup>297</sup> GoBUR, Report of the Commission on the 11 December 2015 Events, [BDI-OTP-0003-4815](#) at 4831-4842.

<sup>298</sup> GoBUR, Report of the Commission on the 11 December 2015 Events, [BDI-OTP-0003-4815](#) at 4835.

available indicates that the competent authorities were not able to conduct the necessary investigations independently or impartially and in a manner consistent with an intent to bring the persons concerned to justice.

(iv) Other national proceedings

176. In its comments on the UNIIB report, its submission to the UN CAT and in its response to the Prosecution's request for information, the Government referred to five cases that appear to be potentially relevant to the potential case identified in the Request and are therefore set out in more detail below. In addition to these five cases, the Burundian authorities provided information [REDACTED],<sup>299</sup> [REDACTED].<sup>300</sup>
177. Below a summary is provided of the information available on the five cases that are potentially relevant for the admissibility assessment to the extent that they purport to examine the criminal responsibility of members of the security forces for alleged crimes committed within the context of the situation, as set out in this Request.
178. [REDACTED] an investigation into the alleged attempted murder of Pierre Claver Mbonimpa.<sup>301</sup> The Government reported to UN CAT challenges to the investigation due to the lack of cooperation by the representatives of the victims or their relatives.<sup>302</sup> In its submission to the Prosecution, the Government indicated that [REDACTED].<sup>303</sup>
179. [REDACTED].<sup>304</sup>

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<sup>299</sup> [REDACTED].

<sup>300</sup> [REDACTED].

<sup>301</sup> [REDACTED].

<sup>302</sup> [REDACTED].

<sup>303</sup> [REDACTED].

<sup>304</sup> [REDACTED].

180. [REDACTED],<sup>305</sup> [REDACTED].<sup>306</sup>
181. [REDACTED]. [REDACTED].<sup>307</sup> In its submissions to the Prosecution, the Government indicated that [REDACTED].<sup>308</sup>
182. [REDACTED].<sup>309</sup> The Government's submission to the Prosecution indicated that [REDACTED].<sup>310</sup>
183. The information submitted by the Burundian authorities indicates that the Prosecutor General has initiated a limited number of inquiries in relation to certain crimes against civilians allegedly carried out by members of the Burundian security forces and the *Imbonerakure*. Beyond asserting that investigations are ongoing and providing respective case numbers, the Prosecution has however not received information on any concrete or progressive investigative steps taken in relation to these cases in response to its requests for information to the authorities.<sup>311</sup> The limited specificity and substantiation of domestic proceedings, combined with their apparent limited and fragmentary scope within the context of the overall allegations set out in the Request, suggest that, according to the information available at this stage, the potential case identified in this Request and the accompanying annexes would remain admissible.<sup>312</sup>

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<sup>305</sup> [REDACTED].

<sup>306</sup> [REDACTED].

<sup>307</sup> [REDACTED].

<sup>308</sup> [REDACTED].

<sup>309</sup> [REDACTED].

<sup>310</sup> [REDACTED].

<sup>311</sup> *Ruto* Article 19 Decision, ICC-01/09-01/11-307, para. 62; *Prosecutor v. Muthaura et al*, Appeals Chamber, 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)', ICC-01/09-02/11-274, 30 August 2011, para. 61; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber I, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, paras. 54-55 and 116.

<sup>312</sup> *Katanga and Ngudjolo* Decision, ICC-01/04-01/07-1497, para. 78.

184. Should the Chamber authorise the investigation, the Prosecution will continue to assess the existence of national proceedings for as long as the situation remains under investigation, including in relation to any additional information that may be provided by Burundi or other relevant States with jurisdiction at the article 18 stage.

## ***2. National proceedings in third States***

185. The available information does not indicate any relevant national proceedings in any other States with jurisdiction in relation to potential case identified in this Request and the accompanying annexes.

### **B. Gravity**

186. The potential case identified in this Request and the accompanying annexes are sufficiently grave to justify further action by the Court, pursuant to article 17(1)(d) of the Statute.

187. The gravity assessment under article 17(1)(d) has been conducted in relation to the potential case likely to arise from an investigation, taking into consideration a generic examination of: (i) whether the persons or groups of persons that are likely to be the object of an investigation include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes allegedly committed during the incidents, which are likely to be the object of an investigation.<sup>313</sup> In relation to the latter, the Prosecution has examined the scale, nature, manner of commission, impact of crimes committed on victims and considered both quantitative and qualitative factors.<sup>314</sup>

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<sup>313</sup> *Kenya* Article 15 Decision, ICC-01/09-19-Corr, para. 188; *Côte d'Ivoire* Article 15 Decision, ICC-02/11-14-Corr, paras. 203-205; *Georgia* Article 15 Decision, ICC-01/15-12, para. 51.

<sup>314</sup> *Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, para. 31; *Kenya* Article 15 Decision, ICC-01/09-

188. As set out earlier, the Prosecution has attached to this Request two confidential, *ex-parte*, annexes presenting an indicative list of crimes within the jurisdiction of the Court allegedly committed during the most serious incidents within the situation based on the available information (Annex 3) and a preliminary list of persons or groups that appear to be the most responsible for the most serious crimes, with an indication of their specific role (Annex 4).
189. Based on the information available, the groups of persons that are likely to be the object of an investigation includes those who appear to be most responsible for the most serious crimes. Specifically, the potential case identified by the Prosecution relates to the conduct of the Burundian authorities and security forces, including individuals at senior levels of the Government and security apparatus, and members of the *Imbonerakure* in ordering, inducing or otherwise encouraging the commission of the alleged crimes.
190. The alleged crimes falling within the potential case were committed on a large scale, with an estimated 593 killings, 651 cases of torture, 3,477 arbitrary arrests or detentions, and 36 enforced disappearances, and widespread rape and sexual violence. The actual scale of these crimes may exceed these allegations since it is reasonable to assume that the repressive environment in Burundi and consequent fears of reprisals may have led to the under-reporting of alleged crimes. In particular, as noted earlier, reports indicate that in the third phase of violence (from December 2015) the manner of commission of crimes has become more covert, with increased instances of abductions, enforced disappearances

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19-Corr, para. 188; *Côte d'Ivoire* Article 15 Decision, ICC-02/11-14, paras. 203-204. *See also*, Regulation 29(2) of the Regulations of the Office of the Prosecutor.

and unattributed killings. Alleged perpetrators also reportedly took steps to cover up crimes.

191. Moreover, the information set out above indicates the alleged conduct was committed with discriminatory intent, based on actual or perceived political affiliation, and, in the case of torture, rape and sexual violence, with particular cruelty.
192. The alleged crimes committed have had a particularly severe impact on children and victims of sexual and gender-based crimes. Victims of rape in particular experienced long-lasting physical and psychological consequences.<sup>315</sup> Eight children were reportedly killed and others exposed to violence during protests.<sup>316</sup> Children victims of detentions were held in adult prisons with “very poor conditions” including “limited sanitation facilities and no access to basic services”<sup>317</sup>, hindering their access to education and ability to reach their full potential.
193. The identified crimes had a severe impact not only on direct victims—who lost their lives, suffered severe physical and psychological injuries but also on indirect victims. In general, there is a reasonable basis to believe that the alleged crimes aimed to deprive individuals of their basic human rights to life, to liberty and security, and of the right not to be subjected to torture, in order to deter them and the wider civilian population from exercising their rights to free expression, political participation and association. The situation has also given rise to soaring unemployment rates impeding economic and social development.<sup>318</sup> Furthermore, the deterioration of the human rights situation in Burundi

<sup>315</sup> HRW, Burundi’s Human Rights Crisis, [BDI-OTP-0003-1793](#) at 1816; UNCOI Report, [BDI-OTP-0005-0003](#) at 0013, para. 51.

<sup>316</sup> AI, Braving Bullets, [BDI-OTP-0003-1661](#) at 1678-1679.

<sup>317</sup> UNICEF, Burundi Humanitarian Situation Report, 12 August 2015, [BDI-OTP-0003-4509](#) at 4510-4511.

<sup>318</sup> UNSC, SG’s Report on Burundi, 23 February 2017, [BDI-OTP-0003-4558](#) at 4566, para. 46.

has caused donors to suspend all financial support to the Burundian administration, including budget support, further impacting on the functioning of the Government and state institutions with a related negative impact on the population.<sup>319</sup>

194. Attacks against members of the opposition, journalists and human rights activists, together with measures to repress and punish dissenting views, have also resulted in a large number of media professionals and civil society leaders going into hiding or fleeing the country. As a result, Burundian society has been left largely without the benefit of Burundian institutions established to monitor and report on the human rights situation in the country and thus contribute to good-governance, development and the proper functioning of state institutions.
195. According to the UNHCR 413,490 people had sought refuge in neighbouring countries between April 2015 and 31 May 2017.<sup>320</sup> This had a severe impact in particular on child refugees, who constitute a significant part of the total refugee population.<sup>321</sup> The situation has also had a negative impact on the socio-economic and humanitarian needs within Burundi, with a dramatic increase in the number of people needing humanitarian assistance from 1.1 million to at least 3 million in 2016 (26 percent of the total population of Burundi).<sup>322</sup>

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<sup>319</sup> Council of the EU, Burundi: EU closes consultations under Article 96 of the Cotonou agreement, 14 March 2016, [BDI-OTP-0004-0384](#).

<sup>320</sup> UNHCR, Regional Update, Burundi Situation, May 2017, [BDI-OTP-0004-0394](#) at 0394 and 0402.

<sup>321</sup> In Tanzania for example 55% of the Burundian refugees are minors: *Ibid*, at 0394. Out of a total of 11,095 children screened by the UNHCR for malnutrition in a refugee camp in Uganda 111 were identified as severely malnourished and 317 moderately malnourished: *Ibid*, at 0398-0399.

<sup>322</sup> UNSC, SG's Report on Burundi, 23 February 2017, [BDI-OTP-0003-4558](#) at 4566, para. 46 and 4567, para. 48.

### VIII. Interests of Justice

196. The Prosecution has identified no substantial reasons to believe that the opening of an investigation into the situation would not serve the interests of justice.
197. The seriousness and extent of the alleged crimes against humanity committed in Burundi, highlighted by the period of time over which crimes have been and continue to be committed, the identification of the perpetrators as part of Burundi's security and political apparatus, the recurring patterns of criminality, and the limited prospects at the national level for accountability of the persons allegedly most responsible, all weigh heavily in favour of an investigation.
198. Victims of alleged crimes within the context of the situation in Burundi have manifested their interest in seeing justice done in various ways. The Prosecution 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.
199. 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 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. The Prosecution also received [REDACTED] victims of torture, extrajudicial executions,

and kidnappings and/or disappearances who consider the ICC their last resort to obtain justice.

### **IX. Relief requested**

200. For the reasons set out in this Request and the supporting material, the Prosecution requests the Pre-Trial Chamber to authorise the commencement of an investigation into crimes within the jurisdiction of the Court allegedly committed in Burundi from 26 April 2015 onwards.



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**Fatou Bensouda**  
**Prosecutor**

Dated this 15<sup>th</sup> day of November 2017

At The Hague, The Netherlands