



ADF INTERNATIONAL

The Situation in Burundi

PRELIMINARY REPORT

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Executive Summary

Despite the fact that the Civil War ended almost 11 years ago, Burundi is still struggling with the consequences of the 12 year conflict (1993-2005). The civil war was a violent conflict between Tutsi and Hutu, mirroring the situation in Rwanda. As it is known now, the atrocities committed in Rwanda amounted to genocide on ethnic grounds. The Tutsi population was being exterminated with the specific intent to destroy the group in whole or in part. It is estimated that the Rwandan genocide claimed the lives of around 1 million Tutsi people. The civil war in Burundi did not reach the same level of atrocities as in Rwanda but nonetheless caused the deaths of over 300,000 people. After the civil war the situation remained bad and the conflict and its destructive effect were also used for political means.

Over the last few years, it was the government that was sparking civil unrest. Similarly, the 2015 election caused violent clashes. The president was elected for the third time despite clear objections by civil society which argued that running for a third term was unconstitutional. It has been reported that the Burundian government has been using excessive force, torture and extrajudicial killings against protesters including peaceful demonstrators.

This memorandum collates information about the situation in Burundi. It scrutinises the international obligations of Burundi and analyses whether the crimes committed in Burundi amount to genocide, crimes against humanity (and/or war crimes). Lastly, the memorandum considers the actions taken by the International Criminal Court and the United Nations.

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(a) Situation in Burundi

1. The situation in Burundi deteriorated around April 2015 after President Nkurunziza announced that he would be running in the elections for a third term. This announcement was met with strong opposition from civil society which turned into a 'Stop the third term' campaign. The supporters of the campaign became victims of intimidation and harassment. The government response included the excessive use of force. Many human rights defenders had to flee the country and, in November 2015, a number of NGOs were suspended.
2. An Amnesty International report on the human rights situation in Burundi in 2015/2016 documented that the police was using excessive and lethal force during protests and demonstrations. This response to demonstrations was deemed to be in breach of international law.¹
3. The Burundian forces have also been accused of extrajudicial killings. These have not been investigated and/or prosecuted adequately or at all.² A unit belonging to the presidential guard, the Appui pour la Protection des Institutions (API), has been accused of committing human rights violations including extrajudicial killings.³ It was reported that API was responsible for the killing of Zedi Feruzi on 23 May 2015. Zedi Feruzi was president of Union for Peace and Democracy - Zigamibang, the opposition party.⁴ A number of members of the opposition party were targeted and attacked.⁵ API was also associated with the killings of Vénérant Kayoya, Léonidas Nibitanga, Faustin Ndabitezimana.⁶
4. API was also heavily involved in systematic attacks on civilians in response to the 11 December 2015 attack on military installations. The API attacks left many civilians dead. Some reports of mass graves appeared in the media.⁷
5. The Burundian forces were using and continue to use torture and other ill-treatment against protesters and against the opponents of President Nkurunziza. The use of torturous methods was reported to be present in official and unofficial detention centres/sites. Some of the reported techniques included: 'beating detainees with

¹ Amnesty International, Report 2015/2016, The State of the World's Human Right, 101.

² *Ibid*, 102.

³ *Ibid*, 102.

⁴ *Ibid*, 102.

⁵ *Ibid*, 102.

⁶ *Ibid*, 102.

⁷ *Ibid*, 102.

metal bars, wooden sticks and military belts. Some victims were submerged in dirty water and others put in rooms covered with glass shards or forced to sit in acid.⁸

6. It was reported by the Office of the United Nations High Commissioner for Human Rights that between April and mid December 2015, over 400 people were killed.⁹ However, the exact numbers of victims are not known.
7. On 22 March 2016, Ivan Šimonović, Assistant UN Secretary-General for Human Rights, made some comments on the situation in Burundi and confirmed that since April 2015, over 474 people have been killed and at least 36 cases of enforced disappearances have been reported. It was further reported that over 4951 persons have been detained in connection with the political crisis.¹⁰ 1834 of the detainees were later released. The UN has received information of over 496 cases of torture and other ill-treatment.¹¹ After the intervention of the United Nations, 41 political detainees were released by the Burundian government.¹² The Burundian government was required by the United Nations to release the remaining political detainees.¹³
8. In response to the ongoing situation, the Burundian Ministry of Justice established a commission of inquiry to investigate the incidents of violence.¹⁴ However, this did not cause the situation to improve and has been accused of bias.
9. **Nyakabiga and Musaga killings in December 2015:** On 17 December 2015, Valentin Bagorikunda, the Prosecutor General, set up an inquiry into the events from 11 December 2015. The findings of the inquiry were released on 20 March 2016, and indicated that the atrocities were committed by individuals that did not belong to the security forces. The report did not mention any atrocities committed by the security forces.¹⁵ The inquiry report suggested that 79 combatants, 4 police officers, and 4 soldiers were killed on 11 December 2015. There have been reports that many people were buried in mass graves without being identified. The inquiry found that seven of the combatant died in unclear circumstances.¹⁶
10. However, interviews conducted by Human Rights Watch, suggested that the security forces were killing local residents, and not combatants.¹⁷ Human Rights Watch confirmed that they have seen photographs of 16 people killed that day who were

⁸ *Ibid*, 102.

⁹ *Ibid*, 102.

¹⁰ Remarks by Ivan Šimonović, Assistant Secretary-General for Human Rights, at the Human Rights Council interactive dialogue on Burundi, Geneva, 22 March 2016

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18526&LangID=E>

¹¹ *Ibid*.

¹² *Ibid*.

¹³ *Ibid*.

¹⁴ Human Right Watch, Burundi: Government Investigations Ignore State Abuses, available at:

<https://www.hrw.org/news/2016/04/13/burundi-government-investigations-ignore-state-abuses>

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

wearing civilian clothes. Many of them were not wearing any shoes. It is reported that it is a common practice of the security forces to remove the shoes of detainees to make it more difficult for them to flee.¹⁸

11. **Ngagara Killings in October 2015:** On 13 October 2015, three police officers were attacked by unknown individuals. One of the police officers was killed, one was injured. The police responded with brutal and disproportionate attacks on people in Ngagara, torturing and killing at least nine people.¹⁹ On 17 October 2015 an inquiry was opened into the events. The inquiry report focused predominantly on the attack on the three policemen without taking into account the atrocities unleashed by the local police force.²⁰
12. **Anti-Third-Term Demonstrations from April 2015:** On 29 April 2015, an inquiry was opened into the incidents of violence that followed the decision of the president to run in elections for a third term. The inquiry called the protests an 'insurrectional movement'.²¹ The atrocities committed by the security forces did not find an adequate recognition.²²
13. **Cibitoke Province Killings from December 2014 - January 2015:** It was reported that between 30 December 2014 and 3 January 2015, over 47 people died as a result of extrajudicial killings by the military and police.²³ The inquiry set up to investigate the events failed to fully investigate the killings.²⁴
14. **Politically motivated killings between 2010 and 2012:** On 18 September 2011, 37 people were killed in Gatumba. A commission set up to investigate the killings indicated that the killings did not constitute extrajudicial killings.²⁵
15. The events outlined above suggest that, despite the attempt to establish a commission of inquiry, Burundi is unable and unwilling to conduct genuine investigations and persecutions.²⁶ As a result, the situation in Burundi requires intervention by an independent actor, namely, the International Criminal Court (ICC).

(b) Burundi's International Obligations

16. Burundi ratified or accessed to various international treaties, including the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights. Burundi acceded to the Convention on the Prevention and Punishment of the Crime of

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

Genocide (Convention on Genocide) on 6 June 1997 and ratified the Rome Statute on 21 September 2004.

The Rome Statute

17. The Rome Statute defines the jurisdiction of the ICC. The Court was specifically created to investigate and prosecute the most heinous international crimes.²⁷

i. Jurisdiction

18. Article 5(1) of the Rome Statute indicates that the ICC has jurisdiction over:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

19. As specified in Article 13 of the Rome Statute, there are three scenarios in which the ICC may exercise its jurisdiction over the crimes listed in Article 5(1):

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

20. Furthermore, as clarified in Article 12 of the Rome Statute, there are certain preconditions for the ICC to exercise its jurisdiction. The preconditions are as follows:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

²⁷ International Criminal Court, Press Release, Burundi ratified the Rome Statute, available at: https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/burundi%20ratified%20the%20rome%20statute.aspx.

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

ii. Prosecution

21. The ICC Prosecutor has the power to initiate investigations of crimes within the Court's jurisdiction, in accordance with Article 15 of the Rome Statute which states:

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

22. The ICC Prosecutor may conduct investigations of crimes under the Court's jurisdiction on his/her own initiative (*proprio motu*) without any external referral. Such investigation refers to preliminary examinations of crimes within the jurisdiction of

the Court. However, any investigation that crosses the threshold of preliminary examination would need to be authorized by the Pre-Trial Chamber in accordance with Article 15(3)–(5).

23. Considering the evidence in the public domain, the Burundian government's forces may have committed crimes against humanity, including murder, imprisonment, torture, persecution, enforced disappearance, and other inhumane acts.

Convention on Genocide

24. Article II of the Convention on Genocide defines the crime of genocide as:

(...) any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

25. The definition of genocide from the Convention on Genocide was mirrored in Article 6 of the Rome Statute and in the statutes for the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

i. The Elements of the Crime

a) Mens Rea

26. "Genocide is an organised and not a spontaneous crime."²⁸ The organizational aspects of the crime of genocide imply a degree of preparation and planning of the underlying acts, and of the end result. The crime of genocide requires *dolus specialis*, that is, intent to conduct the underlying act (as listed in Article II of the Convention on Genocide) and intent in relation to bringing about the ultimate aim, this is, the destruction of the group, 'in whole or in part'.²⁹ This ulterior intent, the 'intent to destroy', distinguishes genocide from other crimes (crimes against humanity

²⁸ William Schabas, *Genocide in International Law* (Cambridge University Press, Cambridge 2000) 208.

²⁹ Kai Ambos, 'What Does 'Intent to Destroy' in Genocide Mean?' (2009) 91 *International Review of the Red Cross* 834.

or war crimes).³⁰ As noted by the Trial Chamber in *Prosecutor v. Jean-Paul Akayesu*³¹:

Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”

b) Actus Reus

27. **Protected groups:** Article II of the Convention on Genocide protects national, ethnical, racial and religious groups. However, it does not incorporate cultural, political, social and economic groups.³² UN General Assembly Resolution 96(I) proposed a broader approach to recognising genocide, when “racial, religious, political, and other groups have been destroyed, entirely or in part.”³³ However, this wording was not adopted; therefore the groups protected under Article II of the Convention on Genocide continue to be limited to four groups without any reference to “other groups.” In practice, the limitation of genocide to the defined groups can cause difficulty when attempting to establish whether a persecuted group falls under one of the four protected groups. As a result, the test to be applied is a subjective one, namely, whether the perpetrator perceived the victims as belonging to “a national, ethnical, racial and or religious group.” The subjective test approach was adopted by the ICTR in the case of *Prosecutor v. Kayishema and Ruzindana*³⁴ where the Tribunal established that it was enough that “a group [was] identified as such by others, including perpetrators of the crimes.”³⁵ The ICTR has found that the determinative factor is the subjective knowledge or belief of the perpetrators as to the group identity of the victims.
28. **Destruction and intent to destroy:** The crime of genocide is committed when the specific acts, as listed in Article II(a)-(e) of the Convention on Genocide, are committed with the intent to destroy the group. General Assembly Resolution 96(I) indicated that genocide is “a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings.” However, the “destruction” does not have to materialize and the “the denial of the right if existence” may take various forms:³⁶

The physical destruction of a group is the most obvious method, but one may also conceive of destroying a group through

³⁰ *Ibid.*, 836.

³¹ *Prosecutor v. Akayesu* (Judgement) ICTR-96-4 (2 September 1998), 498.

³² Kurt Jonassohn, ‘What is Genocide?’ in Helen Fein (ed.), *Genocide Watch* (Yale University Press, New Haven 1992) 17.

³³ General Assembly Resolution 96(I), 11 December 1946.

³⁴ *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999.

³⁵ *Ibid.*, 98.

³⁶ Larissa van den Herik, ‘The Meaning of the Word ‘Destroy’ and the Implications for the Wider Understanding of the Concept of Genocide’ in J. Ten Cate and H. van der Wilt et al. (ed.), *60 Years Genocide Convention*, available at SSRN: <http://ssrn.com/abstract=1989848>

purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community.³⁷

29. The acts which qualify as “destruction” thus constituting genocide or genocidal acts may include:

murder; summary executions; torture; rape; mayhem; so called 'ethnic cleansing'; the wanton devastation of villages, towns, districts and cities; the siege of villages, towns, districts and cities; the starvation of the civilian population; the interruption of, interference with, and harassment of humanitarian relief supplies to the civilian population by the international community; the bombardment of civilian population centres; and the detention of civilians in concentration camps or elsewhere.³⁸

(c) Genocide v. Crimes against Humanity and War Crimes

30. Despite the fact that the crime of genocide, crimes against humanity and war crimes are often discussed together, there are numerous differences that should not be overlooked. There is a general misconception about the threshold of genocide in relation to how many people have to die before genocide may be officially recognised. Furthermore, there is often political reluctance to recognise genocide because of the associated duty to act/prevent that follows such recognition. However, because of the magnitude of the crime of genocide, it is crucial to distinguish it from other crimes, recognise it and act accordingly in order to keep the promise of “never again.”

Crimes against Humanity

31. The wording used in Article 6 of the Rome Statute mirrors the wording used in Article II of the Convention on Genocide. However, while the Convention on Genocide does not mention crimes against humanity or war crimes, the Rome Statute incorporates both clearly specifying their elements.
32. It is accepted that the *actus reus* in Article 7 of the Rome Statute is to a certain degree incorporated in the *actus reus* of Article II of the Convention on Genocide. Article 7 of the Rome Statute contains a more precise list of acts qualifiable as crimes against humanity. The acts listed in Article 7 of the Rome Statute are required to be committed as a “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” This means that single acts of violence would not suffice to meet the threshold of crimes against humanity. However, the *mens rea* threshold for crimes against humanity is much lower as there is no requirement of specific intent as in case of genocide in Article II of the Convention on Genocide. Furthermore, Article 7 of the Rome Statute does not contain reference to specifically protected groups as in Article II of Convention on Genocide) but its protection covers all civilians.

³⁷ *Prosecutor v. Akayesu* (Judgement) ICTR-96-4 (2 September 1998), 574.

³⁸ *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* 1993 I.C.J. 1 (8 April 1993).

33. The wording used in both provisions means that despite the fact that the same acts can constitute either genocide or crimes against humanity, the crucial distinction will be whether the atrocities were intended to destroy a specifically protected group, in whole or in part. Such specific intent is often very difficult to establish and therefore many genocide acts will fall short of the recognition of genocide. The distinction in practice often comes down to the question of whether there is enough evidence to establish that the perpetrators intended to destroy the protected group in whole or in part, or whether the specific intent can be implied based on the pattern of the atrocities committed.

War Crimes

War crimes are defined in Article 8. The elements of *actus reus* do not differ significantly from the acts which qualify as genocide or crimes against humanity. Article 8 of the Rome Statute is intentionally very detailed in order to include numerous scenarios that are otherwise not covered by any other provisions. However, the war crimes as listed in Article 8 of the Rome Statute do not refer to crimes committed at the same level as in case of genocide or crimes against humanity. In any event, particular attention is given to crimes committed in accordance to a plan or a policy. Furthermore, as in case of other crimes against humanity, there is no requirement of a 'specific intent' for the atrocities to be classified as war crimes.

34. The example of definitions of genocide, other crimes against humanity and war crimes as per the Rome Statute shows that while the *actus reus* of all three crimes may be very similar, it is the degree of the crimes, i.e., their systematic occurrence and the specific intent, that are decisive in distinguishing the various atrocities from having reached the threshold of genocide. These differences should not be overshadowed by political considerations and fear of identifying atrocities in the appropriate manner.
35. The example of the three crimes further shows that genocide does not just happen overnight. Under certain circumstances, genocide can develop from war crimes and crimes against humanity. However, this progression takes time and often happens with an attendant ignorance by the international community which gives the perpetrators *carte blanche* to continue and escalate their crimes. A failure by the international community to act promptly will often lead to atrocities escalating until they reach the threshold of genocide.

(d) Is Genocide Being Perpetrated in Burundi?

36. It is clear that the reported atrocities committed by the Burundian government's forces fall within the scope of crimes against humanity under the Rome Statute. However, the question of whether or not genocide being perpetrated is a more complex one.
37. The targeted group is broadly defined as the political opposition, protestors and human rights defenders. It is difficult to demonstrate to the requisite standard at this stage that the targeted population falls within one of the four protected groups under Article II of the Convention on Genocide, namely, national, ethnical, racial or religious group. As argued at the ICTR, a national group was a 'collection of people

who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.³⁹

38. Some commentators have highlighted this difficulty, acknowledging that those protesting are often Tutsi: “Was he targeted because he joined a couple of protests? Or was it because he was a Tutsi?”⁴⁰ Others have reaffirmed the principally political foundations of the ongoing violence including Lionelle Kingsley Bio, vice-president of the UK Burundian Diaspora: “This [is] not an ethnic problem, it is a political problem. People who opposed the third term included Tutsi, Hutu and Twa, but the history of ethnic cleansing in Burundi is an open wound and, when something goes wrong, there is a chance that the conflict between Hutu and Tutsi can erupt at any moment.”⁴¹
39. Even if the targeted population could have been perceived as a ‘national’ or ‘ethnic’ group for the purposes of Article II of the Convention on Genocide, the next question would be whether the atrocities committed by the government (clearly able to fall within the genocidal methods listed in Article II of the Convention on Genocide) were perpetrated with an intent to destroy the group in whole or in part. Such intent has not been expressed and therefore it would have to be inferred from the nature of the crimes committed. At this stage it is difficult to establish such specific intent. This will necessitate an ongoing assessment and in no way absolves the international community of its obligation to “prevent” genocide. Given that the crimes amount to crimes against humanity and or/war crimes, they should be treated as such, namely, triggering international cooperation to stop the perpetrators, investigate, and prosecute.

(e) The Response of the International Community

The Prosecutor of the ICC

40. On 25 April 2016, the Chief Prosecutor of the ICC opened the preliminary examination into the situation in Burundi since April 2015.⁴² The Prosecutor noted that

in the course of the on-going crisis, more than 430 persons were reportedly killed, at least 3,400 people have been arrested and over 230,000 Burundians forced to seek refuge in neighbouring countries. My Office has reviewed a number of communications and reports detailing acts of killing, imprisonment, torture, rape and other forms of sexual violence, as well as cases of enforced

³⁹ Prosecutor v. Akayesu (Case No. ICTR±96±4±T), Judgment, 2 September 1998, 511.

⁴⁰ Jeffrey Gnettleman, “Burundi Crackdown Puts Hutus and Tutsis, and the West, on Edge” *New York Times*, 28 December 2015.

⁴¹ Quoted in: Ludovica Laccino, “Burundi hears echoes of anti-Tutsi hate speech that sparked Rwanda genocide” *International Business Times*, 9 November 2015.

⁴² Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi, 25 April 2016, available at: https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-25-04-2016.aspx

disappearances. All these acts appear to fall within the jurisdiction of the ICC.⁴³

41. The preliminary examination, an examination that can be initiated by the Prosecutor, is governed by Article 53(1)(a)-(c) of the Rome Statute establishing the legal framework for this examination. At the preliminary examination stage, the OTP is required to consider the jurisdiction and the interests of justice. The standard of proof applicable at the preliminary examination stage is that of 'reasonable basis'. The preliminary examination consists of four phases (stages). Phase one is an initial assessment of all communications received by the OTP. The aim of this consideration is to assess the seriousness of information received and 'filter out information on crimes that are outside the jurisdiction of the Court and identify those that appear to fall within the jurisdiction of the Court.' As it is clear from the ICC issued Policy Paper on preliminary examination, the assessment should indicate whether the crimes are within or outside the Court's jurisdiction.
42. Phase two of the preliminary examination considers the preconditions to the exercise of jurisdiction under Article 12 of the Rome Statute and whether 'there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court.' This is also when the information received is assessed. Phase three focuses on the admissibility assessment and Phase four evaluates the propriety of next steps in light of the interests of justice.
43. Article 53(1)(b) requires the OTP to assess the admissibility of the cases under Article 17(1) of the Rome Statute. Article 17(1) sets out the admissibility test that involves an assessment of complementarity and gravity. While at the preliminary examination stage there are no cases yet that could be assessed, the assessment at the preliminary stage refers to "an identified set of incidents, suspects, and conduct." The admissibility assessment under preliminary examination considers the complementarity and gravity in the potential cases that can be identified.
44. The complementarity assessment considers whether genuine investigations and prosecutions have been conducted or are being conducted on the domestic level in respect of the potential cases identified by the OTP. Each potential case has to be considered separately. This means that it is not enough to show that a State is conducting some investigations or prosecutions in relation to the potential cases or in relation to the potential defendant. The investigations and prosecutions would have to refer to the potential cases and be directed against the potential defendant.
45. As confirmed by the Appeals Chamber in *Prosecutor v. Germain Katanga*, the initial questions to be considered are:
 - (1) whether there are ongoing investigations or prosecutions, or
 - (2) whether there have been investigations in the past, and the

⁴³ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi, 25 April 2016, available at: https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-25-04-2016.aspx

State having jurisdiction has decided not to prosecute the person concerned.

It is only when the answers to these questions are in the affirmative that one has to look to the second halves of subparagraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse.

46. The gravity assessment refers to qualitative and quantitative considerations. Regulation 29(2) of the Regulations of the Office of the Prosecutor clarifies that, in order to assess the gravity of the crimes allegedly committed in the situation the Office shall consider various factors including their scale, nature, manner of commission, and impact. The scale may be assessed based on the number of victims (both direct and indirect), the extent of the damage caused, the geographical and temporal spread of the crimes. The manner is assessed based on the execution of the crimes including the involvement (the degree of participation) and intent of the perpetrator. It is also considered whether the crimes were systematically perpetrated, whether there were elements of particular cruelty, the degree of vulnerability of the victims etc. The impact is to be assessed based on:

the sufferings endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.

47. Finally, phase four of the preliminary examination, is engaged with assessing the interests of justice. At this state, the OTP would proceed ‘unless there are specific circumstances which provide substantial reasons to believe that the interests of justice are not served by an investigation at that time.’
48. If all requirements of the preliminary examination are fulfilled, the Prosecutor would have to refer the case to the Pre-Trial Chamber to request an authorization for an investigation under Article 15(3) of the Rome Statute.
49. Once the preliminary examination is concluded, and if all requirements are met, formal investigations will be initiated, ultimately leading to prosecutions of the perpetrators.

The United Nations

50. The Special Rapporteur on the situation of human rights defenders on his mission to Burundi confirmed that since April 2015, Burundi has been struggling with a political crisis and violent disturbances since the decision of the President to seek a third term.⁴⁴ Despite the fact that the situation in Burundi has been bad since the end of

⁴⁴ Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders on his mission to Burundi, 30 December 2015, A/HRC/31/55/Add.2, 57.

the Civil War, the events of April 2015 amount to a considerable (and ongoing) deterioration.⁴⁵

51. As a result of the growing concerns in relation to the situation in Burundi, the Special Rapporteur made a number of recommendations to Burundi's government. These included:

Carefully consider allegations and reports of violence, intimidation, harassment and surveillance on human rights defenders, conduct prompt and impartial investigations accordingly and hold perpetrators accountable, including for acts committed during the pre- and post-election periods in 2015;

Promptly investigate all allegations of human rights violations and hold the perpetrators accountable, including in connection with the protests that began on 26 April 2015;

Ensure that the Independent National Human Rights Commission is fully independent and effective, in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles), including by amending the existing provisions to allow public participation in the process to nominate and appoint commissioners. In addition, the Commission must be consulted in processes undertaken to establish human rights protection mechanisms, in particular in the implementation of a programme to protect human rights defenders;

Ensure that the functioning of the office of the Independent National Human Rights Commission is reviewed in order to strengthen the institution, including by increasing its capacity to process cases and to monitor independently compliance with the recommendations of international and regional human rights mechanisms;

Provide adequate resources to the Independent National Human Rights Commission. The State party should take the necessary measures to ensure the genuine, full independence of the Commission and to provide it with sufficient resources to enable it fully to carry out its mandate in accordance with the Paris Principles.⁴⁶

52. On 17 December 2015, The UN Independent Investigation on Burundi (UNIIB) was established by virtue of resolution A/HRC/S-24, to:

(a) To undertake swiftly an investigation into violations and abuses of human rights with a view to preventing further deterioration of the human rights situation;

⁴⁵ Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders on his mission to Burundi, 30 December 2015, A/HRC/31/55/Add.2

⁴⁶ *Ibid.*, 105.

(b) To make recommendations on the improvement of the human rights situation and on technical assistance to support reconciliation and the implementation of the Arusha Agreement;

(c) To engage with the Burundian authorities and all other relevant stakeholders, including United Nations agencies, civil society, refugees, the field presence of the Office of the High Commissioner in Burundi, authorities of the African Union, and the African Commission on Human and Peoples' Rights, in particular with a view to help the State to fulfil its human rights obligations, to ensure accountability for human rights violations and abuses, including by identifying alleged perpetrators, to adopt appropriate transitional justice measures and to maintain the spirit of the Arusha Agreement;

(d) To ensure the complementarity and coordination of this effort with other efforts of the United Nations, the African Union and other appropriate regional and international entities, drawing on the expertise of the African Union and the African Commission on Human and Peoples' Rights to the extent practicable;

(e) To have a representative of the experts issue an oral update and participate in an enhanced interactive dialogue on the human rights situation in Burundi at the thirty-first session of the Human Rights Council, and to issue a final report and participate in an enhanced interactive dialogue on the human rights situation in Burundi at the thirty-third session.⁴⁷

53. The UNIIB was required to update the United Nations on the situation in Burundi during the 31st session of the Human Rights Council in March 2016 and to provide the final report for the 33rd session in September 2016.⁴⁸

54. In March 2016, Christof Heyns, UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, visited Burundi.

55. The Special Rapporteur, while praising the Burundian Ministry of Justice for establishing the commission of inquiry, emphasized that the commission focused on violence perpetrated by the protesters and no adequate consideration has been paid to the acts of violence perpetrated by the police force against the protesters. The Special Rapporteur further noted that the word "insurgents" was used indiscriminately to all protesters, even those engaged in peaceful protests.⁴⁹ The commission has targeted many human rights defenders, including 'Pacifique Nininahazwe, the President of Forum pour la conscience et le développement, Vital Nshimirima, the President of Forum pour le renforcement de la société civile au

⁴⁷ UN General Assembly, Resolution adopted by the Human Rights Council on 17 December 2015, A/HRC/RES/S-24/1, 17.

⁴⁸ *Ibid.*

⁴⁹ Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders on his mission to Burundi, 30 December 2015, A/HRC/31/55/Add.2, 58.

Burundi, and Armel Niyongere, the President of Action chrétienne pour l'abolition de la torture.⁵⁰ The Special Rapporteur further indicated that the police force and the National Intelligence Services may be responsible for torture, inhuman, and degrading treatment of journalists, human rights defenders, and the protesters.⁵¹

56. The UN Security Council is closely following the situation in Burundi. On 1 April 2016, the UN Security Council adopted Resolution 2279 that requests the Secretary-General to consider and provide options to augment the UN presence in Burundi.

57. In its preambular paragraphs, the resolution condemns:

...all violations and abuses of human rights in Burundi, whoever perpetrates them, including those involving extra-judicial killings, sexual violence in the context of the political crisis, acts of torture and other cruel, inhuman and/or degrading treatment, arbitrary arrests and detentions, harassment and intimidation of civil society organizations and journalists, and restriction of fundamental freedoms, as well as indiscriminate use of grenade attacks, especially against civilians.⁵²

58. The resolution urges Burundi to ensure and protect the human rights of all in accordance with Burundi's international obligations and to adhere to the rule of law. The resolution further requests Burundi to bring to justice all violating or abusing human rights.⁵³

59. The Secretary-General confirmed the existence of evidence suggesting that various crimes have been committed by military and police forces, intelligence services, Imbonerakure and other military groups.⁵⁴ The Secretary-General notes that:

While extrajudicial killings have declined in the past two months, reports indicate a rising trend in enforced disappearances, arbitrary arrests, illegal detention and ill-treatment and torture. A sharp deterioration in the security situation, with serious implications for the human rights situation, intercommunal cohesion and regional stability, remains a persistent risk. Reports of human rights violations and abuses, including those committed during security and cordon and search operations and in the wake of incidents of public disorder, have increasingly undermined public confidence in the role of the national police in maintaining the rule of law and prompted allegations by some of an ongoing politicization of policing.⁵⁵

⁵⁰ *Ibid.*, 60.

⁵¹ *Ibid.*, 61.

⁵² UN Security Council Resolution S/RES/2279 (2016) 1 April 2016, http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2279.pdf

⁵³ *Ibid.*

⁵⁴ UN Security Council, Letter dated 15 April 2016 from the Secretary-General addressed to the President of the Security Council, S/2016/352, 8, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2016_352.pdf.

⁵⁵ *Ibid.*, 9.0.

60. The Secretary-General expressed his concerns that the weak domestic accountability mechanisms in Burundi cause problems with identification and sanctioning of misconduct, and ultimately, lead to impunity.⁵⁶
61. On 7 April 2016, The Burundian government indicated their reservations in relation to the presence of armed UN police in Burundi.⁵⁷ Later on 13 April 2016, the Burundian government agreed to receive around 20 unarmed police experts to assist the Burundian police. Burundi also agreed to the UN assistance with logistics and capacity-building activities.⁵⁸
62. The Secretary-General submitted his recommendations⁵⁹ on 15 April 2016. The recommendations were discussed by the UN Security Council on 27 April 2016.
63. In May 2016, the UN Security Council will consider the deteriorating situation in Burundi.

(f) Conclusion

64. The situation in Burundi remains critical. The atrocities committed by the government or on behalf of the government, especially against the opposition, protesters, and human rights defenders constitute serious breaches of international law. The crimes are likely to have reached the threshold of crimes against humanity (and/or war crimes). There is a growing body of evidence which could suggest that the Burundian government is approaching the threshold for committing genocide.

⁵⁶ *Ibid.*, 10.0.

⁵⁷ *Ibid.*, 11.

⁵⁸ *Ibid.*, 11.

⁵⁹ S/2016/352