

# Recent developments in the jurisprudence of the International Criminal Court – Part 3\*

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## IV. Situation in Mali (Pre-Trial Chamber I)<sup>1</sup>

No proceedings at the situation level took place during the review period. To date, only one case emanated from this situation.

### 1. *Prosecutor v. Ahmad Al Faqi Al Mahdi (Trial Chamber VIII)*<sup>2</sup>

- Warrant of arrest: 18 September 2015
- First appearance: 30 September 2015
- Confirmation of Charges: 24 March 2016
- Trial: 22-24 August 2016
- Judgment and Sentencing: 27 September 2016
- Victims participating: 8 (trial)/139 (reparations)<sup>3</sup>
- Current status: Implementation of reparations

Following an admission of guilt, Al Mahdi was convicted for the count of intentionally directing attacks against ten buildings dedicated to religion and historic monuments, pursuant to article 8 (2) (e) (iv).<sup>4</sup> He was sentenced to 9 years imprisonment.<sup>5</sup>

#### a) *Reparations Order*

Upon receiving the reparations applications, expert reports and submissions of the parties and participants, the Trust Fund for victims and amici curiae,<sup>6</sup> namely the United Nations Educational, Scientific and Cultural Organization (“UNESCO”), Queen’s University Belfast Human Rights Centre and the Redress Trust, the Fédération internationale des ligues des droits de l’Homme (“FIDH”) and the Associa-

tion malienne des droits de l’Homme (“AMDH”), the Chamber rendered on 17 August 2017 the Reparations Order.<sup>7</sup>

At the outset of its Reparations Order, the Chamber highlighted the significance of international cultural heritage.<sup>8</sup> The Judges made clear that this order was made against Al Mahdi bearing in mind that his liability for reparations must be proportionate to the harm caused and, “inter alia, to his [...] participation in the commission of the crimes for which he [...] was found guilty”.<sup>9</sup> As regards the principles to be applied, the Chamber saw no reason to deviate from and applied the reparation principles formulated by the Appeals Chamber in the Lubanga case.<sup>10</sup>

In relation to the rule 85 criteria to be met for natural persons and organisations<sup>11</sup> in order to be recognised as victims, the Chamber adopted in essence the same understanding as in trial for participation purposes.<sup>12</sup> The Chamber followed the definition of “harm” established by the Appeals Chamber in the Lubanga case, holding that the harm suffered may not be direct but personal to the victim,<sup>13</sup> and clarified that for the purpose of determining the harm suffered by victims it is “not limited to admissible evidence for this purpose, nor need it limit itself to the kinds of harm identified in the Judgment”.<sup>14</sup> As regards the causality for establishing the link between the crime and the harm, the Chamber specified that the crime committed by Al Mahdi must be “actual (‘but/for’) and ‘proximate’ cause of the harm for which reparation is sought” that would be assessed against the requisite threshold of a

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<sup>1</sup> The record carries the situation number ICC-01/12.

<sup>2</sup> The record carries the case number ICC-01/12-01/15.

<sup>3</sup> Of the 139 victims requesting reparations, 137 are natural persons and two organisations. Of the 137 individual applicants, 46 (33 %) are male and 91 (66 %) are female.

<sup>4</sup> All articles mentioned in this paper without reference to the legal instrument are those of the Rome Statute (UN [ed.], Treaty Series, vol. 2187, p. 3).

<sup>5</sup> For a summary of the developments in this case, see Chaitidou, ZIS 2016, 813 (835-838).

<sup>6</sup> ICC, Decision of 31.10.2016 – ICC-01/12-01/15-180 (Decision on Application by the United Nations Educational, Scientific and Cultural Organization [“UNESCO”] to Submit Amicus Curiae Observations); Decision of 25.10.2016 – ICC-01/12-01/15-178 (Decision on Application by Queen’s University Belfast Human Rights Centre, the Redress Trust, the FIDH and AMDH to submit amicus curiae observations [ICC-01/12-01/15-175 and ICC-01/12-01/15-176]).

<sup>7</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Reparations Order [“Al Mahdi Reparations Order”]).

<sup>8</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), paras 13-22.

<sup>9</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 50.

<sup>10</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), paras 26-38; ICC, Judgment of 3.3.2015 – ICC-01/04-01/06-3129-AnxA (Order for Reparations [amended]); for a summary of the Lubanga Appeals Chamber judgment, see Chaitidou, ZIS 2016, 813 (815-816).

<sup>11</sup> This includes, for example, non-governmental, charitable and non-profit organisations statutory bodies including government departments, public schools, hospitals, private education institutes, companies, telecommunications firms, institutions that benefit members of the community and other partnership, ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 41.

<sup>12</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), paras 39-44.

<sup>13</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 43.

<sup>14</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 42.

“balance of probabilities”.<sup>15</sup> When assessing the harm suffered, the Chamber considered freely all submissions, applications, supporting material, expert reports, and other relevant information.<sup>16</sup>

As regards the types of reparations, the Chamber accepted individual and collective reparations that may take various forms, including symbolic reparations.<sup>17</sup> “Compensation” was defined as “something, typically money, awarded to one or more victims”,<sup>18</sup> “rehabilitation” was defined as aiming “at restoring the victims and their communities to their former condition”, through means “such as economic development or social, medical or legal services”.<sup>19</sup>

The Chamber had only received victims’ applications pertaining to the Timbuktu community; UNESCO, which had spent EUR 2.53 million in rebuilding Timbuktu’s mausoleums and rehabilitating the mosques and libraries of manuscripts from the time of the attack until 2015, had not submitted any application for reparations.<sup>20</sup> While acknowledging the suffering endured by the Malian population and the international community as a whole, the Chamber limited its assessment of the various kinds of harm, in principle, to that suffered by or within the Timbuktu community. In addressing the harm suffered by the community of Timbuktu the Chamber considered to effectively address the broader harm suffered by the Malian population and the international community.<sup>21</sup> The harm and personal liability of Al Mahdi was determined by the Judges as follows:

*aa) Damage of Protected Buildings*

Collective reparations in the form of measures for their protection and maintenance were awarded.<sup>22</sup> In addition, the Chamber ordered that a video excerpt of Al Mahdi’s apology at trial be made available on the Court’s website or, if requested, to the victims.<sup>23</sup> The fact that the protected buildings had been restored in the meantime by UNESCO was consid-

ered irrelevant.<sup>24</sup> Al Mahdi’s liability for this harm was set at EUR 97.000.<sup>25</sup>

*bb) Consequential economic loss*

Individual reparations were awarded to those “whose livelihoods exclusively depended upon the Protected Buildings”, including certain “business owners whose only purpose was to sell sand perceived as holy from the sites of the Protected Buildings”,<sup>26</sup> collective reparations were awarded for the community of Timbuktu as a whole in order to rehabilitate the community, such as educational and awareness raising programs to promote Timbuktu’s cultural heritage, return/resettlement programs, microcredit system or other cash assistance programs.<sup>27</sup> Al Mahdi’s liability for this harm was set at EUR 2.12 million.<sup>28</sup>

*cc) Moral harm*

Individual reparations for mental pain and anguish were awarded to those whose ancestor’s burial sites were damaged in the attack; collective reparations through measures of rehabilitation, including symbolic measures like a memorial, commemoration or forgiveness ceremonies, were awarded to the Timbuktu community as a whole.<sup>29</sup> Al Mahdi’s liability for this harm was set at EUR 483.000.<sup>30</sup>

*dd) Other harm*

Reparations for the death or bodily harm of persons or damages to property other than the Protected Buildings were rejected on account of the insufficiency of information.<sup>31</sup>

A few last points are worth noting: the Chamber rejected the approach of assessing reparations only on the basis of individual victim applications but, in reference to the Regulations of the Trust Fund for Victims,<sup>32</sup> determined that it may award individual reparations in cases where the Court does not identify individual beneficiaries. Equally, in the context of collective reparations, the Chamber declared not to be

<sup>15</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 44.

<sup>16</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 57.

<sup>17</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), paras 45 and 49.

<sup>18</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 47.

<sup>19</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 48.

<sup>20</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), paras 52 and 116.

<sup>21</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), paras 53-56.

<sup>22</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 67.

<sup>23</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 71.

<sup>24</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 65.

<sup>25</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), paras 116-118.

<sup>26</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 81.

<sup>27</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 83.

<sup>28</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), paras 119-128.

<sup>29</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 90.

<sup>30</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), paras 129-133.

<sup>31</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), paras 93-103.

<sup>32</sup> Regulations 60-65 of the Regulations of the Trust Fund for Victims.

limited to the number of reparation applicants.<sup>33</sup> Furthermore, even though the Chamber had promised to limit its assessment of harm to the Timbuktu community, it nevertheless awarded EUR 1 to the Malian State and UNESCO, respectively, as part of the reparations award.<sup>34</sup> While UNESCO may qualify as an “organisation” within the meaning of rule 85 of the Rules of Procedure and Evidence, it is unclear on what basis the Chamber awarded nominal damages to the Malian State.

As regards the implementation of the reparations order, the Chamber, like other chambers before, drew upon the services of the Trust Fund for Victims. The Trust Fund for Victims was requested to propose a draft implementation plan reflecting the parameters of the Reparations Order, “including objectives, outcomes and necessary activities” and to submit it for the Chamber’s approval by 16 February 2018.<sup>35</sup> Guiding the Trust Fund for Victims in devising its implementation plan, the Chamber (i) encouraged the Trust Fund for Victims “to complement the individual and collective awards to the extent possible”;<sup>36</sup> (ii) clarified that the Trust Fund for Victims is not limited to the Chamber’s intermediate liability calculations, only the final determination on Al Mahdi’s total liability of EUR 2.7 million;<sup>37</sup> (iii) advised the Trust Fund for Victims to reflect in its implementation plan the prioritisation of the individual reparations;<sup>38</sup> and, lastly, (iv) ordered the Trust Fund for Victims to conduct an administrative screening of potential victims for individual reparations.<sup>39</sup> In relation to the last instruction, it is apparent that the Chamber actually “outsourced” the review of applications and identification of beneficiaries to the Trust Fund for Victims. In this respect, the approach differs from that taken in the Katanga case in which the applications were assessed individually and judicially by the Chamber. One may agree perhaps with Trial Chamber VIII’s approach in this particular instance considering that the security situation on the ground is difficult and may have prevented victims from submitting an application in time. In a follow-up decision, the Chamber will decide, having heard the participants involved, on the implementation plan proposed by the Trust Fund for Victims.

<sup>33</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 59.

<sup>34</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), paras 106-107.

<sup>35</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 136 and operative part of the decision. An extension of time was granted until 6 April 2018, ICC Decision of 12.2.2018 – ICC-01/12-01/15-257 (Decision on Trust Fund for Victims’ Request for Extension of Time).

<sup>36</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 138.

<sup>37</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 139.

<sup>38</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), para. 140.

<sup>39</sup> ICC, Decision of 17.8.2017 – ICC-01/12-01/15-236 (Al Mahdi Reparations Order), paras 141-146.

#### *b) Appellate Proceedings*

The legal representative of victims appealed Trial Chamber VIII’s Reparations Order “in part and limited”.<sup>40</sup> He recalled that individual reparations for economic loss have been awarded to victims whose livelihood exclusively depended upon the Protected Buildings. He indicated to appeal Trial Chamber VIII’s finding relating to the fact that this criterion would be assessed by the Trust Fund for Victims in the course of the administrative screening “without giving it a definition”.<sup>41</sup> He also requested that the Appeals Chamber does not grant any suspensive effect to the appeal “so that the reparations envisaged together with the Trust Fund can take their normal course”.<sup>42</sup> On 7 November 2017, the Appeals Chamber issued a decision on the conduct of proceedings for this appeal.<sup>43</sup> A decision is pending.

#### **V. Situation in Darfur/Sudan (Pre-Trial Chamber II)<sup>44</sup>**

No proceedings at the situation level took place during the review period. To date, five cases emanated from this situation. The warrants of arrest against the suspects Al Kushayb and Harun, Bashir, Banda and Hussein have not been executed yet and the persons are at large. Developments can be reported only in relation to the Bashir case as will be discussed below.

##### *1. Prosecutor v. Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber II)<sup>45</sup>*

- First warrant of arrest: 4 March 2009
- Second warrant of arrest: 12 July 2010
- Victims participating: 12
- Current status: suspect at large

In 2017, the Chamber finally addressed the question whether South Africa, by not arresting and surrendering President Bashir in 2015, had not complied with its obligations under

<sup>40</sup> ICC, Filing of 20.10.2017 – ICC-01/12-01/15-242-Corr-Red-tENG (Public redacted version of the corrected NOTICE OF APPEAL “In part and limited” against the Reparations Order of 17.8.2017 (paragraphs 81, 83 and 146) pursuant to Appeals Chamber Order ICC-01/12-01/15-240-Conf, paragraphs, with Redacted Annexes 1-5, of 6.10.2017, ICC-01/12-01/15-242-Conf-Exp-Corr [“Al Mahdi Victims’ Notice of Appeal”]); Filing of 17.10.2017 – ICC-01/12-01/15-244-tENG (Brief in support of the Appeal [in part and limited] ICC-01/12-01/15-242-Conf-Exp-Corr filed against the Reparations Order of 17.8.2017 [ICC-01/12-01/15-236] issued by Trial Chamber VIII).

<sup>41</sup> ICC-01/12-01/15-242-Corr-Red-tENG (Al Mahdi Victims’ Notice of Appeal), paras 11-13.

<sup>42</sup> ICC-01/12-01/15-242- Corr-Red-tENG (Al Mahdi Victims’ Notice of Appeal), para. 16.

<sup>43</sup> ICC, Decision of 7.11.2017 – ICC-01/12-01/15-246 (Directions on the conduct of the appeals proceedings).

<sup>44</sup> The record carries the situation number ICC-02/05.

<sup>45</sup> The record carries the case number ICC-02/05-01/09.

the Rome Statute. Before summarising the relevant findings of the Chamber, it is pertinent to quickly set out the facts against which the decision was rendered.<sup>46</sup>

*a) Events Leading to the Decision*

In May 2015, it became known that President Bashir would travel to South Africa to attend a summit of the African Union (“AU”) in Johannesburg from 7-15 June 2015. On 28 May 2015, the Court notified the competent authorities of South Africa of the cooperation request asking South Africa to arrest and surrender Bashir, should he enter South African territory; and to consult the Court without delay in case of problems impeding the execution of the request. On 11 June 2015, the Embassy of South Africa in The Netherlands requested an urgent meeting between the Registrar and the Chief State Law Adviser to the Government of South Africa and a delegation from the Embassy for the following day with a view to conducting consultations within the meaning of article 97. The meeting took place the next day in the presence of the Presiding Judge of the Chamber, Judge Tarfusser, representatives of the Office of the Prosecutor, the Registry and the representatives of South Africa. During the meeting, Judge Tarfusser pointed out that “(i) all of the issues tabled by South Africa had already been decided upon by the Court; and (ii) the consultations had no suspensive effect on South Africa’s outstanding obligations under the Statute”.<sup>47</sup> The following day, on 13 June 2015, President Bashir entered the territory of South Africa. In the course of the same day, the Chief State Law Adviser of South Africa met, separately, with representatives of the Registry and the Office of the Prosecutor. In the evening, the Chamber received an urgent request by the Prosecutor to clarify the obligations of South Africa under the Statute. This request was rejected the same evening by Judge Tarfusser observing that the position of the Court had already been made clear to South Africa and that no further reminder or clarification was needed.<sup>48</sup> President Bashir left South African territory in the morning of 15 June 2015. South Africa had not arrested and surrendered him to the Court.

Procedurally, the Chamber triggered the article 87(7) proceedings on 4 September 2015 by requesting South Africa to submit their views in accordance with regulation 109 of the Regulations of the Court.<sup>49</sup> Mindful of the situation before

domestic courts, the Chamber granted an extension of time “until such time as the currently ongoing relevant judicial proceedings before the courts of South Africa are finalised”.<sup>50</sup>

On 30 November 2016, a note verbale of South Africa addressed to the Secretariat of the Assembly of States Parties was filed into the record of the case stating that South Africa would submit its views and observations. On 8 December 2016, the Chamber decided to convene a hearing in the presence of representatives of South Africa, the Prosecutor, and representatives of the UN<sup>51</sup> for the purpose of receiving submissions on two questions: (i) “whether South Africa failed to comply with its obligations under the Statute by not arresting and surrendering Omar Al-Bashir to the Court while he was on South African territory despite having received a request from the Court under articles 87 and 89 of the Statute for the arrest and surrender of Omar Al-Bashir; and, if so (ii) whether circumstances are such that a formal finding of non-compliance by South Africa in this respect and referral of the matter to the Assembly of States Parties to the Rome Statute and/or the Security Council of the United Nations within the meaning of article 87 (7) of the Statute are warranted”.<sup>52</sup>

Prior to the hearing, the Chamber received submissions of South Africa, the Prosecutor, as well as amicus curiae submissions from Belgium and the Southern Africa Litigation Centre. Conversely, any written or oral submissions of victims accepted to participate in the Bashir case were rejected on the basis that article 68 (3) does not provide victims the right to present view and concerns in any proceedings leading to an article 87 (7) determination.<sup>53</sup> The hearing took place on 7 April 2017.<sup>54</sup>

*b) The Decision and Minority Opinion*

On 6 July 2017, the Chamber issued its decision making a finding of non-cooperation but, having exercised its discretion,<sup>55</sup> declined to refer the matter to the Assembly of States

<sup>46</sup> See also the summary in *Chaitidou*, ZIS 2016, 813 (821).

<sup>47</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al Bashir [“Bashir Immunity Decision”]), para. 10.

<sup>48</sup> ICC, Decision of 13.6.2015 – ICC-02/05-01/09-242 (Decision following the Prosecutor’s request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir).

<sup>49</sup> ICC, Order of 4.9.2015 – ICC-02/05-01/09-247 (Order requesting submissions from the Republic of South Africa for the purposes of proceedings under article 87 [7] of the Rome Statute).

<sup>50</sup> ICC, Decision of 15.10.2015 – ICC-02/05-01/09-249, (Decision on the request of the Republic of South Africa for an extension of the time limit for submitting their views for the purposes of proceedings under article 87 [7] of the Rome Statute), p. 6.

<sup>51</sup> The United Nations declined to take any position on the matter and neither transmitted any submissions in writing nor attended the hearing.

<sup>52</sup> ICC, Decision of 8.12.2016 - ICC-02/05-01/09-274 (Decision convening a public hearing for the purposes of a determination under article 87 [7] of the Statute with respect to the Republic of South Africa), para. 15.

<sup>53</sup> ICC, Decision of 9.3.2017 – ICC-02/05-01/09-286 (Decision on the “Request to present views and concerns in 7.4.2017 public hearing for the purposes of a determination under article 87 [7] of the Statute with respect to the Republic of South Africa”).

<sup>54</sup> ICC, Transcript of Hearing, 7.4.2017, ICC-02/05-01/09-T-2-ENG.

<sup>55</sup> ICC, Judgment of 19.8.2015 – ICC-01/09-02/11-1032 (Judgment on the Prosecutor’s appeal against Trial Chamber

Parties (“ASP”) or the Security Council since, in its view, a referral would not be warranted in order to achieve cooperation from South Africa. The pre-trial judges addressed (i) whether Bashir enjoyed immunity at the relevant time and how this circumstance affected the cooperation obligation of South Africa vis-à-vis the Court; (ii) whether South Africa had an obligation to comply with the request for arrest and surrender; (iii) whether South Africa’s interactions with the Court in June 2015 entitled South Africa not to comply with its obligations under the Statute; and (iv) whether the Chamber should refer the matter to the ASP or the Security Council.

This résumé will present the Chamber’s main findings on the first two issues. While the Chamber determined, as other Judges in the Chamber before, that President Bashir did not enjoy any immunity at the relevant time, it followed a slightly new argumentation. After the decisions concerning Malawi (2011)<sup>56</sup> and the DRC (2014),<sup>57</sup> this would be the third attempt of the Court to tackle the issue of the States’ Parties obligations towards the Court in the light of Bashir’s immunities.

*aa) Decision: Bashir’s Immunity*

South Africa had advanced two different legal bases for President Bashir’s immunity: (i) article VII(1) of the host agreement concluded between South Africa and the AU for the purpose of the AU summit;<sup>58</sup> and (ii) customary international

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V [B]’s “Decision on Prosecution’s application for a finding of non-compliance under Article 87 [7] of the Statute”), para. 43.

<sup>56</sup> ICC, Decision of 13.12.2011 – ICC-02/05-01/09-139-Corr (Corrigendum to the Decision Pursuant to Article 87 [7] of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir).

<sup>57</sup> ICC, Decision of 9.4.2014 – ICC-02/05-01/09-195 (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court). It is noted that this approach was followed subsequently in 2016 by the same Chamber in relation to the Republic of Uganda and the Republic of Djibouti, see ICC, Decision of 11.7.2015 – ICC-02/05-01/09-266 (Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute); ICC, Decision of 11.7.2015 – ICC-2/05-01/09-267 (Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute).

<sup>58</sup> That provision reads: “The Government shall accord the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organizations attending the Meetings the privileges and immunities

law. As regards the first basis, the Chamber clarified that the relevant provision of the agreement was inapplicable vis-à-vis Bashir as he did not qualify as any of the persons listed in said provision that were granted immunities. As regards the second basis, the Chamber determined categorically, and in glaring contrast to the Malawi decision, that it is “unable to identify a rule in customary international law that would exclude immunity for Heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court”.<sup>59</sup> Without more, the Chamber continued and emphasised that the matter under consideration did not concern the exercise of jurisdiction of the Court but, rather, South Africa’s cooperation obligations under Part 9 of the Statute.<sup>60</sup> The ensuing discussion on immunities would therefore unfold from this vantage point.

*bb) Decision: South Africa’s Obligation to Cooperate*

While accepting that heads of States enjoy immunities under customary international law, the Chamber enquired whether there existed any derogation of the rule in case the Court sought the arrest and surrender of such a person enjoying immunity as head of State.<sup>61</sup> The Judges explored the effects of article 27 (2) on Part 9 and found that article 27 (2) excludes the immunity of heads of States comprehensively, including from arrest.<sup>62</sup> In the opinion of the judges, allowing States to rely on immunities or procedural rules to refuse cooperation with the Court would create an “insurmountable obstacle to the Court’s ability to exercise its jurisdiction”.<sup>63</sup> This effect of article 27 (2) was considered to pertain both to the vertical relationship between a State Party and the Court and the horizontal inter-State relationship between States Parties.<sup>64</sup> The Chamber concluded that since there is no immunity from arrest and surrender involved, no waiver of immunity is required under article 98 (1).<sup>65</sup>

By the same token, the Chamber confirmed that States not parties to the Statute are under no obligation to cooperate with the Court and the irrelevance of immunities, as set forth in article 27 (2), has no effect on their rights. In relation to non-States Parties, article 98 (1) remains the applicable re-

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set forth in Sections C and D, Articles V and VI of the General Convention on the Privileges and immunities of the OAU”.

<sup>59</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), para. 68.

<sup>60</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), paras 69-70.

<sup>61</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), para. 71.

<sup>62</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), para. 74.

<sup>63</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), para. 75.

<sup>64</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), paras 76-79.

<sup>65</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), para. 81.

gime.<sup>66</sup> The legal regime pertaining to States Parties and non-States Parties is, however, further complemented by a third “*sui generis* regime” whereby obligations under the Statute arise for a State as a result of the UN Charter.<sup>67</sup> In this regard, the Chamber concluded that in case of a Security Council resolution referral, the legal framework of the Statute applies “in its entirety”, including its cooperation regime.<sup>68</sup> In other words, in the view of the Chamber, Sudan has, “for the limited purpose of the situation in Darfur, Sudan, [...] rights and duties *analogous to those of States Parties* to the Statute”.<sup>69</sup> As a consequence of the aforementioned, the Chamber held that article 27 (2) applies equally to Sudan, “rendering inapplicable any immunity on the ground of official capacity belonging to Sudan that would otherwise exist under international law”.<sup>70</sup> This means that not only Sudan has the obligation to arrest and surrender Bashir but, by virtue of the horizontal effect of article 27 (2), States Parties to the Statute are equally duty-bound to execute a cooperation request for arrest and surrender since his immunities do not apply. In the words of the Chamber, “article 98 (1) is not applicable to the arrest of Omar Al-Bahir and his surrender to the Court: no immunity needs to be waived and States Parties can execute the Court’s request for arrest and surrender of Omar Al-Bashir without violating Sudan’s rights under international law”.<sup>71</sup> Of significance is in this respect the Chamber’s indirect response to the previous decision in relation to the DRC holding that it was unnecessary to determine whether the Security Council resolution had “waived” explicitly or implicitly the immunity of Bashir.<sup>72</sup> Indeed, following the Chamber’s argumentation, the absence of any immunities entailed that there was nothing to be waived. In conclusion, the Chamber held that in the absence of any immunity preventing arrest and surrender, South Africa was duty-bound to execute the Court’s cooperation request.

*cc) Decision: Other Findings*

Other important legal findings set forth in this decision concern the Chamber’s determination that article 98 (1) does not provide any right on States Parties to unilaterally refuse or

<sup>66</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), para. 82.

<sup>67</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), para. 83.

<sup>68</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), paras 85-86.

<sup>69</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), para. 88 (emphasis added). That said, the Chamber was eager to clarify that these obligations did not encompass voting rights in the ASP or contributions to the Court’s budget, ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), para. 90.

<sup>70</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), para. 91.

<sup>71</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), para. 93.

<sup>72</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), paras 95-96.

suspend compliance with the Court’s cooperation requests;<sup>73</sup> and the object and purpose of “consultations” with the Court within the meaning of article 97 highlighting that consultations equally do not suspend or otherwise affect the validity of the Court’s cooperation requests.<sup>74</sup> When deciding not to refer the matter to the ASP or the Security Council, the Chamber took into account various factors, such as South Africa’s request for consultation under article 97, its presentation of extensive legal arguments, both in writing and orally, the complex legal problems revolving around the present questions and the Court’s unclear case-law. Notwithstanding South Africa’s non-compliance, the Chamber held that referring the matter would not be warranted as a way to obtain cooperation.

*dd) The Minority Opinion*

Judge Perrin de Brichambaut appended a “minority opinion” to the decision. While he agreed with the general outcome of the Chamber’s decision, he disagreed with regard to the legal basis for the removal of Bashir’s immunity. In his view, Bashir did not enjoy immunity from arrest and surrender because Sudan had relinquished the immunities of its head of State when acceding to 1948 Genocide Convention. Hence no impediments existed at the horizontal level between Sudan and South Africa regarding the execution of the request for arrest and surrender. In addition to setting out his interpretation of the effects of the 1949 Genocide Convention he also laid down a series of discrete legal questions, albeit without taking a position: (i) the effects of the Security Council referral on Sudan’s status vis-à-vis the Statute holding that given the current state of law, it cannot be determined exclusively on the basis of the legal effects of Security Council resolution 1593 whether either article 27 (2) or 98 (1) apply between the Court, Sudan and South Africa; (ii) whether the Security Council referral had removed Bashir’s immunities, arguing that the current state of the law does not allow a definite answer; and, finally, (iii) whether the involvement of international courts affected the application of the rules of customary international law regarding the personal immunity of heads of States arguing that due to conflicting positions of States and varying approaches of international courts, this question equally remained undecided.<sup>75</sup>

*c) Events After the Decision*

On 29 March 2017, Bashir was present on Jordan’s territory attending the 28<sup>th</sup> Arab League Summit in Amman. The Jordanian authorities did not arrest and surrender Bashir to the Court claiming that Bashir, as sitting head of State, enjoyed immunity from the criminal jurisdiction of Jordan under the rules of customary international law. Upon receipt of Jor-

<sup>73</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), paras 99-106.

<sup>74</sup> ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Bashir Immunity Decision), paras 112-121.

<sup>75</sup> ICC, Opinion of 6.7.2017 - ICC-02/05-01/09-302-Anx (Minority Opinion of Judge Marc Perrin de Brichambaut).

dan's submissions under regulation 109 (3) of the Regulations of the Court, the Chamber found that Jordan had not complied with its obligations under the Rome Statute and referred the matter to the ASP and the Security Council.<sup>76</sup> Jordan appealed directly, or in the alternative sought leave to appeal, this decision.<sup>77</sup> At the time of writing, the matter is still pending. Moreover, Uganda and Chad were requested to provide submissions concerning their failure to arrest Omar Al-Bashir and surrender him to the Court pursuant to regulation 109 (3) of the Regulations of the Court.

## VI. Situation in Libya (Pre-Trial Chamber I)<sup>78</sup>

No proceedings at the situation level took place during the review period. To date, three cases emanated from this situation. The warrants of arrest against the suspects Gaddafi, Khaled and Al Werfalli have not been executed yet and the persons are at large.

### 1. *Prosecutor v. Saif Al-Islam Gaddafi (Pre-Trial Chamber I)*<sup>79</sup>

- Warrant of arrest: 27 June 2011
- Victims participating: -
- Current status: Suspect at large

According to media reports, Saif Al-Islam Gaddafi remains in the custody of the militia controlling Zintan, Libya. In an attempt to push things forward, and considering the volatile and complex political situation on the ground, in particular Libya's inability to secure Gaddafi's transfer from his place of detention in Zintan into State custody, the Prosecutor requested on 26 April 2016 that the Chamber order the Registrar to transmit the warrant of arrest and corresponding cooperation request to "Mr al-Ajami AL-ATIRI, commander of the Abu Bakr Al-Siddiq Battalion based in Zintan".<sup>80</sup>

As a result, the Chamber ordered first the Registrar to communicate with the Libyan authorities enquiring whether there is any liaison between them and the militia in Zintan; and whether the Libyan authorities would agree that the re-

quest for arrest and surrender be addressed to the Zintan militia, and if so, whether the Libyan authorities would facilitate the transmission of the documents to, or agree that the Court directly transmit those documents to the Zintan militia.<sup>81</sup>

Upon receiving information from the representative of Libya, who declared to represent lawfully both the Government of National Accord and the Libyan House of Representatives, the Chamber rendered its decision on 21 November 2016 rejecting the Prosecutor's request.<sup>82</sup> Reiterating Libya's obligations to cooperate with the Court, the Chamber stressed that any communication between the Court and the State must be transmitted through the diplomatic channel or any other appropriate channel as designated by the State, as foreseen in article 87 (1) (a). With regard to the case at hand the Chamber determined that, in the absence of any other channel clearly designated, such official channel of communication remained that between the Court and the "Government of National Accord, which is recognised by the international community to represent the State". Accordingly, the Judges decided that the Court "cannot but deal with the de jure government and cannot direct its cooperation requests to any other non-State entity claiming to represent the State".<sup>83</sup>

### 2. *Prosecutor v. Al Tuhamy Mohamed Khaled (Pre-Trial Chamber I)*<sup>84</sup>

- Warrant of arrest: 18 April 2013 (public on 24.4.2017)
- Victims participating: -
- Current status: Suspect at large

On 18 April 2013, Pre-Trial Chamber I had issued a warrant of arrest against Al-Tuhamy Mohamed Khaled, alleged former Lieutenant General of the Libyan army and former head of the Libyan Internal Security Agency, for the commission of crimes against humanity and war crimes allegedly committed in various locations in Libya, in the context of a widespread and systematic attack against the civilian population, from 15 February 2011 to 24 August.<sup>85</sup> Khaled is believed to bear criminal responsibility for the crimes of imprisonment, torture, other inhumane acts and persecution as crimes

<sup>76</sup> ICC, Decision of 11.12.2017 – ICC-02/05-01/09-309 (Decision under article 87 [7] of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir).

<sup>77</sup> ICC, Filing of 18.12.2017 – ICC-02/05-01/09-312 (The Hashemite Kingdom of Jordan's Notice of Appeal of the Decision under Article 87 [7] of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir; or, in the Alternative, Leave to Seek Such an Appeal).

<sup>78</sup> The record carries the situation number ICC-01/11.

<sup>79</sup> The record carries the case number ICC-01/11-01/11.

<sup>80</sup> ICC, Filing of 26.4.2016 – ICC-01/11-01/11-624 (Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr. al-"Ajami AL-"ATIRI, Commander of the Abu-Bakr al-Siddiq Battalion in Zintan, Libya).

<sup>81</sup> ICC, Decision of 2.6.2016 – ICC-01/11-01/11-627 (Order to the Registrar with respect to the "Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr. al-"Ajami AL-"ATIRI, Commander of the Abu-bakr al-Siddiq Battalion in Zintan, Libya").

<sup>82</sup> ICC, Decision of 21.11.2016 – ICC-01/11-01/11-634-Red (Decision on the Prosecutor's "Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr. al-"Ajami AL-"ATIRI, Commander of the Abu-Bakr Al Siddiq Battalion in Zintan, Libya" ["Gaddafi Transmission Decision"]).

<sup>83</sup> ICC, Decision of 21.11.2016 – ICC-01/11-01/11-634-Red (Gaddafi Transmission Decision), para. 15.

<sup>84</sup> The record carries the case number ICC-01/11-01/13.

<sup>85</sup> ICC, Warrant of 18.4.2013 – ICC-01/11-01/13-1 (Warrant of Arrest for Al-Tuhamy Mohamed Khaled).

against humanity, and torture, cruel treatment and outrages upon personal dignity as war crimes. The warrant of arrest was made public 4 years later with decision dated 24 April 2017.<sup>86</sup>

3. *Prosecutor v. Mahmoud Mustafa Busayf Al Werfalli (Pre-Trial Chamber I)*<sup>87</sup>

- Warrant of arrest: 15 August 2017
- Victims participating: -
- Current status: Suspect at large

On 15 August 2017, Pre-Trial Chamber I issued a warrant of arrest against Mahmoud Mustafa Busayf Al-Werfalli, a commander in the Al-Saiqa Brigade that has been involved in the armed conflict ever since the days of the revolution against the Gaddafi regime and since May 2014.<sup>88</sup> Al-Werfalli is alleged to have directly committed and to have ordered the commission of murder in the context of 7 incidents, involving 33 civilians, which took place from on or before 3 June 2016 until on or about 17 July 2017 in Benghazi or surrounding areas, in Libya. The events underlying the warrant of arrest occurred only recently and hence the linkage between these crimes and the Security Council referral was specifically discussed in the decision. The Chamber accepted the link between the case and the situation referred to the Court on account of the same armed group ever since the days of the “revolution” underlying the Security Council referral.<sup>89</sup>

**VII. Situation in the Republic of Burundi (Pre-Trial Chamber III)**<sup>90</sup>

On 5 September 2017, the Prosecutor submitted an under seal request for an authorisation of the commencement of the investigation into the situation in Burundi<sup>91</sup> pursuant to article 15 to Pre-Trial Chamber III.<sup>92</sup> For the first time, article 15 proceedings were to be conducted under seal and with the participation of the Prosecutor only. On 15 September 2017,

the Chamber requested additional information on, inter alia, her classification request and the reasons that set this situation “apart from previous requests under article 15”.<sup>93</sup>

On 25 October 2017, Pre-Trial Chamber III authorised the commencement of the investigation regarding crimes within the jurisdiction of the Court allegedly committed in Burundi or by nationals of Burundi outside Burundi since 26 April 2015 until 26 October 2017.<sup>94</sup>

*a) Classification and Delayed Notification*

In its decision, issued first under seal ex parte, the Chamber first set forth the reasons for accepting the classification proposed by the Prosecutor. In brief, the Judges accepted the classification on an exceptional basis because the “past and present circumstances in Burundi and neighbouring countries indeed establish that there is a danger to the life and well-being of victims and potential witnesses”.<sup>95</sup> It is also worth noting that the Judges noted that during the authorisation process States, which would normally exercise jurisdiction over the alleged crimes, do not enjoy any participatory rights, while victims enjoy a “direct avenue to make representations before a Pre-Trial Chamber” that can only be curtailed upon judicial scrutiny.<sup>96</sup>

In addition, mindful of the continued risks facing the victims and potential witnesses in Burundi and neighbouring States as well as the lack of international cooperation on the part of the Burundian authorities, the Prosecutor was exceptionally granted a limited delay of 10 working days to notify the commencement of the investigation to States under article 18 in order to prepare and implement protective measures for victims and potential witnesses to mitigate the potential risks.<sup>97</sup> Hence, the decision was rendered public on 9 November 2017.

<sup>86</sup> ICC, Decision of 24.4.2017 - ICC-01/11-01/13-18 (Decision on Reclassification of the Warrant of Arrest).

<sup>87</sup> The record carries the case number ICC-01/11-01/17.

<sup>88</sup> ICC, Warrant of 15.8.2017 – ICC-01/11-01/17-2 (Warrant of Arrest).

<sup>89</sup> ICC, Warrant of 15.8.2017 – ICC-01/11-01/17-2 (Warrant of Arrest), para. 23.

<sup>90</sup> The record carries the situation number ICC-01/17.

<sup>91</sup> ICC, Filing of 15.11.2017 – ICC-01/17-5-Red (Public Redacted version of “Request for authorisation of an investigation pursuant to article 15”, 6.9.2017, ICC-01/17-5-US-Exp); at the time, the filing was classified under seal ex parte Prosecutor only. The filing was rendered public, with redactions, on 15.11.2017 (notified on 16.11.2017).

<sup>92</sup> ICC, Decision of 23.8.2017 – ICC-01/17-1 (Decision on the constitution of Pre-Trial Chamber III and on the assignment of the situation in the Republic of Burundi [“Additional Information Decision”]).

<sup>93</sup> ICC, Decision of 25.9.2017 – ICC-01/17-6-Red (Public Redacted Version of “Order to the Prosecutor to Provide Additional Information”, ICC-01/17-X-6-US-Exp, 15.9.2017), para. 8. At the time, the decision was classified under seal, ex parte. The decision was rendered public, with redactions, on 9.11.2017.

<sup>94</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”, ICC-01/17-X-9-US-Exp, 25.10.2017 [“Burundi Decision”]). The decision was issued on 25.10.2017 under seal, ex parte Prosecutor only. It was made public, in redacted form, on 9.11.2017. Due to the initial classification of the request, the following interim situation number was assigned: “ICC-01/17-X”. After making the decision public, the situation number was amended to “ICC-01/17”.

<sup>95</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 14.

<sup>96</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), paras 8-10.

<sup>97</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 19.

*b) Effects of Withdrawal*

With Burundi having withdrawn from the Statute (effective 27 October 2017), it was necessary for the Chamber to elaborate on the effects of such withdrawal. It found, first, that the Court had jurisdiction while Burundi was a State Party to the Statute, namely from the moment the Statute entered into effect for Burundi (1 December 2004) until the end of the one-year period since the notification of Burundi's withdrawal (26 October 2017).<sup>98</sup> In the view of the Chamber, this means that the Court retains jurisdiction over any crime within its jurisdiction up to and including 26 October 2017, regardless of Burundi's withdrawal.

As regards the exercise of jurisdiction, the Judges held that the Court may conduct its investigation and prosecution even after the withdrawal became effective for Burundi as long as the Court's activities relate to the crimes allegedly committed during the time Burundi was a State Party to the Rome Statute. In other words, there is no time limit for the exercise of jurisdiction by the Court.<sup>99</sup>

As regards Burundi's obligations to cooperate, the Chamber held that Burundi has a duty to cooperate since the investigation was authorised on 25 October 2017, two days prior to the date on which the withdrawal became effective for Burundi (article 127 [2]). The Judges were of the view that this obligation remained in effect for as long as the investigation lasts and encompasses any proceedings resulting from the investigation.<sup>100</sup>

*c) Facts of the Situation*

As regards the test to be applied under article 15 (4), the Chamber stayed in line with previous decisions: its assessment of the Prosecutor's request was based on the criteria enumerated in article 53 (1) (a)-(c) and the material was reviewed against the evidentiary standard "reasonable basis to proceed" that entailed "a sensible or reasonable justification" without the need of pointing towards one conclusion or being conclusive.<sup>101</sup> Following this standard, the Chamber agreed with the Prosecutor and confirmed that the Burundian State agents (such as the Burundian army, national police and the national intelligence service), together with the youth wing of the ruling party (known as the "Imbonerakure"), conducted a widespread and systematic attack against the Burundian civilian population since at least 26 April 2017. Crimes were allegedly committed against those against or perceived to be against the ruling party and who demonstrated against President Nkurunziza's third term. According to estimates, at least 1.200 persons were allegedly killed, thousands illegally detained, thousands reportedly tortured, and hundreds disap-

peared. The alleged acts of violence reportedly resulted in the displacement of 413.490 persons between April 2015 and May 2017.

*d) The Crimes*

The Judges found a reasonable basis to believe that the crimes of murder and attempted murder, torture, rape, imprisonment and severe deprivation of liberty, enforced disappearance and persecution had been committed. This decision offers for the first time further clarifications on the specific legal requirements of in particular three crimes: imprisonment or severe deprivation of liberty, enforced disappearance and persecution. They shall be briefly discussed.

As regards the crime of imprisonment or severe deprivation of liberty within the meaning of article 7 (1) (e), the Chamber clarified that imprisonment encompasses "unlawful captivity of a person in an enclosed environment, such as a prison or psychiatric institution"; severe deprivation of physical liberty was defined as the "unlawful restriction of the person's movements to a specific area, such as a ghetto, camp or a house".<sup>102</sup> The Chamber added that such conduct must have been in violation of fundamental rules of international law, if, for example, the person was detained without any legal basis or the person is denied any procedural rights.<sup>103</sup> Lastly, the Chamber pointed out that the crime "does not require the imprisonment or the deprivation of liberty to be for a prolonged period of time, contrary to what is provided for in article 7 (2) (i) of the Statute for the crime of enforced disappearance".<sup>104</sup>

As regards the crime of enforced disappearance within the meaning of article 7 (1) (i), it is worth noting that the Chamber evidently interpreted the crime in the light of related international instruments, the work of the Human Rights Committee, and the case-law of the Inter-American Court of Human Rights and the European Court of Human Rights. The Chamber understood the crime to be composed of "two inseparably interrelated components: (i) the victim's deprivation of liberty; and (ii) the ensuing denial or suppression of information".<sup>105</sup> With regard to the first component, the Chamber clarified that it understood the requirement of deprivation of liberty comprehensively, including "the scenario in which a victim, initially arrested and detained lawfully, may be 'disappeared' in custody".<sup>106</sup> With regard to the second component, the Chamber held that the "refusal to acknowledge or give information encompasses outright denial or the giving of false information about the fate or wherea-

<sup>98</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 24.

<sup>99</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 24.

<sup>100</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 26.

<sup>101</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 30.

<sup>102</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 68.

<sup>103</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 68.

<sup>104</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 68.

<sup>105</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 118.

<sup>106</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 118.

bouts of the victim”.<sup>107</sup> In line with international case-law, the Chamber emphasised that the lodging of a complaint by the victim’s family was not a pre-requisite but that it was incumbent on the State to commence an impartial and thorough investigation *ex officio* without delay into the disappearance of the victim.<sup>108</sup> Further, the Chamber held that as a result of the disappearance the victim must have been removed from the protection of the law, “i.e. the victim no longer has access to judicial assistance and legal procedures”.<sup>109</sup> The Judges explained that they would infer the intention to remove the victims from the protection of the law from the manner in which the person was deprived of his or her liberty, such as “the lack of a court order for the detention; abduction in cars without licence plates and with tinted windows, detention in secret, unofficial prisons; non-registration of names of the detainees in official records; or capture in desolate areas”.<sup>110</sup> Lastly, the Judges stressed that the crime of enforced disappearance is continuous in nature “as long as the perpetrators continue to conceal the fate and whereabouts of the person or persons who have disappeared and these facts remain unclarified”.<sup>111</sup>

As regards the crime of persecution within the meaning of article 7 (1) (h), the Chamber highlighted that the “conduct constituting persecution must have been committed in connection with any other crime within the jurisdiction of the Court (connection requirement), thus filtering out discriminatory measures that would not fall within the Court’s jurisdiction if committed without such connection”.<sup>112</sup> The Chamber then accepted that persecutory acts could take many forms, adding that only severe deprivation of fundamental rights contrary to international law, whether derogable or not (such as the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment, freedom of expression, freedom of assembly and association, and the right to private property), would be relevant.<sup>113</sup> Lastly, it was said that the persecutory conduct must have been directed against a group or collectivity based on the grounds enumerated in article 7 (1) (h) or any other ground recognised as impermissible under international law, as identified by the perpetrator.<sup>114</sup> Against the backdrop of the case, the Judges defined “political grounds” as not pertaining “only to the victim’s

membership of a political party or adherence to a particular ideology but also to differences of opinion over public affairs, or (actual or presumed) political affiliations”.<sup>115</sup>

In her request, the Prosecutor had declined to confirm the existence of war crimes alleging that the alleged degree of intensity of the armed confrontation and the level of organisation of the armed entities did not allow her to conclude that a non-international armed conflict existed at the time. Recalling the Comoros and Georgia standard that allowed the Prosecutor to draw conclusions on the information received, provided those conclusions did not appear manifestly unreasonable,<sup>116</sup> the Judges remarked that the material did suggest, at the requisite standard applicable at this early phase, the existence of a non-international armed conflict. They opined that the Prosecutor had assessed the evidence too restrictively having “imposed requirements on the material that cannot reasonably be met in the absence of an investigation” and encouraged her to extend her investigation to this crime as well.<sup>117</sup>

#### *e) Admissibility*

With regard to the admissibility of potential cases, the Chamber assessed the activities and outcome of three commissions of enquiry, which had been established to examine three discrete events in 2015, as well as national proceedings. Before embarking on an assessment of the commissions’ work, the Chamber stressed that “national investigations that are not designed to result in criminal prosecutions do not meet the admissibility requirements under article 17 (1)”.<sup>118</sup> It then looked briefly into the establishment, composition and powers of those commissions and accepted their findings for the purposes of the complementarity determination at this stage.<sup>119</sup>

In the view of the Chamber, the Burundian authorities had remained inactive in relation to potential cases either because (i) the domestic proceedings did not concern the same persons that are likely to be the focus of an ICC investigation into the situation in Burundi or they did not concern the same crimes as identified by the Chamber; or (ii) national investigations were deficient. In particular, the Chamber criticised that the commissions did not take tangible, concrete and progressive investigative steps, such as approach witnesses who could provide information, provide protective measures for the witnesses to safely testify, or conduct forensic examinations. As a result, the Chamber saw no conflict of jurisdic-

<sup>107</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 118.

<sup>108</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 118.

<sup>109</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 120.

<sup>110</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 120.

<sup>111</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 121.

<sup>112</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 131.

<sup>113</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 132.

<sup>114</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 133.

<sup>115</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 133.

<sup>116</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 138.

<sup>117</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 141.

<sup>118</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 152.

<sup>119</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 153.

tion between the Court and Burundi.<sup>120</sup> The Chamber also noted that the potential cases are of sufficient gravity.<sup>121</sup>

*f) Parameters of the Investigation*

Finally, when setting out the parameters of the authorised investigation, the Chamber clarified that the Prosecutor is not restricted to the incidents and crimes described in the decision but may, on the basis of the evidence, extend her investigation to other crimes against humanity or other crimes within the jurisdiction of the Court (i.e. genocide and war crimes), as long as she remains within the parameters of the authorised investigation.<sup>122</sup> In this regard, the Chamber deviated from Kenya which had restricted the Prosecutor to crimes against humanity only. Moreover, as regards the temporal scope of the investigation, the Chamber authorised the Prosecutor to go, in certain circumstances, beyond the time frame of 26 April 2015 and 26 October 2017. She was authorised to extend her investigation over crimes that had been committed before 26 April 2015 if the legal requirements of the contextual elements are fulfilled. In the light of the continuous nature of certain crimes, the Prosecutor was also authorised to extend her investigation to crimes even if they continue after 26 October 2017.<sup>123</sup> Lastly, as regards the geographical scope of the authorised investigation, the Prosecutor was authorised to extend her investigation to all crimes committed on the territory of Burundi (article 12 [2] [a]) or committed outside Burundi by nationals of Burundi (article 12 [2] [b]) if the legal requirements of the contextual elements of crimes against humanity are fulfilled.<sup>124</sup> For the first time, a situation before the Court is not only territorially defined.

**VIII. Situation in the Islamic Republic of Afghanistan (Pre-Trial Chamber III)**<sup>125</sup>

Having concluded her preliminary examination, the Prosecutor informed the Presidency on 30 October 2017 of her intention to submit a request under article 15 (3). The Presidency assigned the situation to Pre-Trial Chamber III.<sup>126</sup> On 9 November 2017, the Judges of the Chamber decided that

for this situation Judge Antoine Kesia-Mbe Mindua will act as the Presiding Judge.<sup>127</sup>

On the same day, the Chamber granted an extension of the page limit for the Prosecutor's impending article 15 (3) request and organised the process of receiving victims' representations.<sup>128</sup> In that decision, the Chamber extended the time limit within which victims may submit representations to Wednesday, 31 January 2018.<sup>129</sup> The Prosecutor was ordered to indicate in her public notice to the victims<sup>130</sup> the deadline as established by the Chamber. Standard representation forms, prepared by the Victims Participation and Reparation Section ("VPRS") in English, Pashto and Dari, were also approved by the Chamber. Moreover, the VPRS was instructed to conduct a preliminary assessment of all representations received and transmit them to the Chamber on a rolling basis. Of interest is the Chamber's encouragement that the VPRS "identify community leaders of the affected groups" and gather collective representations.<sup>131</sup>

The Prosecutor submitted her request for authorisation on 20 November 2017.<sup>132</sup> At the time of writing, a decision on the request is pending.

<sup>120</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), paras 142-182.

<sup>121</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), paras 183-189.

<sup>122</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 193.

<sup>123</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 192.

<sup>124</sup> ICC, Decision of 25.10.2017 – ICC-01/17-9-Red (Burundi Decision), para. 194.

<sup>125</sup> The record carries the situation number ICC-02/17.

<sup>126</sup> ICC, Decision of 3.11.2017 – ICC-02/17-1 (Decision assigning the situation in the Islamic Republic of Afghanistan), with one annex.

<sup>127</sup> ICC, Decision of 9.11.2017 – ICC-02/17-4 (Decision on the Election of the Presiding Judge). For the first time, a Pre-Trial Chamber has two presiding judges. With regard to the situation in Burundi, Judge Chang-ho Chung is the Presiding Judge. In the Court's practice, the Pre-Trial Chambers are presided by one judge only, irrespective of the number of situations assigned to it.

<sup>128</sup> ICC, Order of 9.11.2017 – ICC-02/17-6 (Order to the Victims Participation and Reparation Section Concerning Victims' Representations ["Afghanistan Victims' Decision"]).

<sup>129</sup> According to rule 50 (1) of the Rules of Procedure and Evidence the Prosecutor must to inform victims known to her, inter alia, via public notice by general means. Following this provision of information by the Prosecutor, the victims may make representations in writing to the Chamber within 30 days, as foreseen in regulation 50 (1) of the Regulations of the Court.

<sup>130</sup> Rule 50 (1) of the Rules of Procedure and Evidence.

<sup>131</sup> ICC, Order of 9.11.2017 – ICC-02/17-6 (Afghanistan Victims' Decision), para. 15.

<sup>132</sup> ICC, Filing of 20.11.2017 – ICC-02/17-7-Red (Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp).