

NUREMBERG MOOT COURT 2019

Team: 2019-81

Defense

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I. THE COURT DOES NOT HAVE JURISDICTION.

Art. 19(1) of the Rome Statute requires the ICC ('the Court') to 'satisfy itself that it has jurisdiction in any case brought before it'. Three conditions must be met for the Court to have jurisdiction to prosecute Mr. Vega for committing crimes against humanity under Art. 5 and Art. 7(1)(i): (1) *jurisdiction ratione temporis*;¹ (2) either *jurisdiction ratione loci* or *jurisdiction ratione personae*;² and (3) *jurisdiction ratione materiae*.³ *Jurisdiction ratione materiae*, which requires the crime be one of the crimes enumerated in Art. 5,⁴ is the contentious element in this case. Art. 5 limits the jurisdiction of the Court to 'the most serious crimes of concern to the international community', such as crimes against humanity,⁵ including the enforced disappearance of persons under Art. 7(1)(i). The Court must first consider the contextual elements in the chapeau of Art. 7(1) and in 7(2)(a),⁶ before considering the specific elements relevant to the crime of enforced disappearance of persons under Art. 7(1)(i) and 7(2)(i).⁷ At this stage of pre-trial proceedings the Court must be satisfied that there are 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court'.⁸ The Court shall firstly apply: the Rome Statute, the Elements of Crimes, and the Rules of Procedure and Evidence.⁹

I.A. There are no reasonable grounds to believe that the contextual elements are present.

For an act to constitute a crime against humanity, it must be committed by a person 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.¹⁰ An 'attack' means 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or

¹ Rome Statute, Art. 11.

² Rome Statute, Art. 12.

³ ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-55, Decision on the evidence and information provided by the prosecution for the issuance of a warrant of arrest for Germain Katanga, 5 November 2007, para. 11; Otto Triffterer and Kai Ambos (ed.), *Rome Statute of the International Criminal Court: A Commentary* (3rd ed., 2016), p. 855 ("Otto Triffterer and Kai Ambos (ed.), 2016").

⁴ ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-55, Decision on the evidence and information provided by the prosecution for the issuance of a warrant of arrest for Germain Katanga, 5 November 2007, para. 11.

⁵ Rome Statute, Art. 5(b).

⁶ ICC, *Prosecutor v. Ruto*, ICC-01/09-01/11-373, Decision on the confirmation of charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 161.

⁷ ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-55, Decision on the evidence and information provided by the prosecution for the issuance of a warrant of arrest for Germain Katanga, 5 November 2007, para. 26; ICC, *Prosecutor v. Harun*, ICC-02/05-01/07-01, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, para. 29.

⁸ ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, 31 March 2010, para. 28.

⁹ Rome Statute, Art. 21(1)(a); ICC, *Prosecutor v. Harun*, ICC-02/05-01/07-01, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, para. 29; ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-55, Decision on the evidence and information provided by the prosecution for the issuance of a warrant of arrest for Germain Katanga, 5 November 2007, para. 26.

¹⁰ Rome Statute, Art. 7(1).

organizational policy to commit such attack'.¹¹ Here there are no reasonable grounds to believe that there was: (1) a widespread or systematic attack directed against a civilian population, and (2) a State or organizational policy to commit such attack.¹² It is not contentious that the alleged attack in this case was directed against a civilian population.¹³

I.A.1. There are no reasonable grounds to believe that there has been a widespread or systematic attack directed against a civilian population.

The alleged attack need only be widespread *or* systematic;¹⁴ there is no requirement to meet both criteria.¹⁵ 'Widespread' refers both to the scale of the attack and the number of victims.¹⁶ Unlike the cases this Court heard relating to the situation in Kenya in which thousands of people were killed over several months,¹⁷ here only 70 people in total were arrested by the NIO and only on the one day.¹⁸ It is the first known instance of such arrests in Schwarzwald, and there have been no further arrests by the NIO since. Accordingly, the alleged attack is not widespread as there are relatively few victims and the arrests do not constitute 'massive, frequent, large scale action'.¹⁹ Nor is the alleged attack systematic, as it is not 'thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources'.²⁰ Even if the arrest of 70 people involved substantial resources, the requirement of a pattern of crime 'in the sense of nonaccidental repetition of similar criminal conduct on a regular basis' is not met.²¹ This requirement exists to exclude 'isolated acts of violence from the notion of crimes against humanity'.²² Although organised, the arrests occurred only on a single day.²³ The regular pattern of acts required for the alleged attack to be systematic is not established, and thus there are no

¹¹ Rome Statute, Art. 7(2)(a).

¹² ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-55, Decision on the evidence and information provided by the prosecution for the issuance of a warrant of arrest for Germain Katanga, 5 November 2007, paras 27-35.

¹³ ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, 31 March 2010, para. 82.

¹⁴ ICTY, *Prosecutor v. Tadić*, IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 646; ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, 31 March 2010, para. 94.

¹⁵ ICC, *Situation in the Republic of Kenya*, ICC-01/09, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, 31 March 2010, para. 94.

¹⁶ ICTY, *Prosecutor v. Tadić*, IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 648; ICTY, *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Judgement, 17 December 2004, para. 94; ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, 31 March 2010, para. 95.

¹⁷ ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, 31 March 2010, para. 145.

¹⁸ Case Facts, paras 14-15.

¹⁹ ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, para. 580.

²⁰ *Ibid.*

²¹ ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, 31 March 2010, para. 96.

²² ICC, *Prosecutor v. Harun*, ICC-02/05-01/07-01, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, para. 62.

²³ Case Facts, paras 14-15.

reasonable grounds to believe that a widespread or systematic attack has occurred. This alone is sufficient to exclude Mr. Vega's case from the jurisdiction of the Court.

I.A.2. There are no reasonable grounds to believe that there is a State or organizational policy pursuant to which an attack was committed.

The requirement of a policy 'implies that the attack follows a regular pattern' and it has been held that 'an attack which is planned, directed or organized - as opposed to spontaneous or isolated acts of violence - will satisfy this criterion'.²⁴ However, the Court has also emphasised that the 'policy must be directed to commit "such attack"'.²⁵ In *Ruto*, the Prosecutor alleged that the policy at issue had two limbs: (1) 'to punish and expel from the Rift valley those perceived to support PNU, namely, Kikuyu, Kamba and Kisii civilians', and (2) 'to gain power and create a uniform ODM voting block'.²⁶ The Court held that the second limb was 'merely political in nature' and, unlike the first limb, not a policy directed to committing an attack against civilians.²⁷

Mr. Vega's instructions to Ms. Jorg were to 'take all necessary measures to prevent further instability in the country by taking action against all the members of the National Front and disruptive refugees without attracting public attention'.²⁸ In *Ruto*, the perpetrators were directly involved in determining 'several issues which were crucial for the implementation of the policy' such as recruitment, map preparation, target identification, weapon supply and logistics, and establishing a reward system to motivate perpetrators.²⁹ Mr. Vega has not been involved in any operational planning, and it is also unclear whether he was even aware of Ms. Jorg's plan.³⁰ His policy is directed at preventing instability in Schwarzwald. While this may 'be considered to be the motive or the purpose of a potential policy to commit [an] attack', this alone is insufficient to consider an otherwise merely political policy to be one directed to committing an attack.³¹ There are no reasonable grounds to believe that Mr. Vega's instruction was directed to committing an attack and consequently it is not a policy for the purposes of Art. 7(2)(a).

²⁴ ICC, Situation in the Republic of Kenya, ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, 31 March 2010, para. 84-85; ICC, *Prosecutor v. Ruto*, ICC-01/09-01/11-373, Decision on the confirmation of charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 210.

²⁵ ICC, *Prosecutor v. Ruto*, ICC-01/09-01/11-373, Decision on the confirmation of charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 211.

²⁶ *Ibid.*, para. 212.

²⁷ *Ibid.*, para. 213.

²⁸ Case Facts, para. 13.

²⁹ ICC, *Prosecutor v. Ruto*, ICC-01/09-01/11-373, Decision on the confirmation of charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 219.

³⁰ Case Facts, paras 14-16.

³¹ ICC, *Prosecutor v. Ruto*, ICC-01/09-01/11-373, Decision on the confirmation of charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 213.

I.B. There are no reasonable grounds to believe that the specific elements are present.

Even if the contextual elements are satisfied, to establish jurisdiction the Court must also find that there are reasonable grounds to believe that Mr. Vega's actions meet the specific elements of the Art. 7(1)(i) crime. Art. 7(2)(i) specifies that 'the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time' constitutes the crime of enforced disappearance of persons.

It is not contentious that: (i) the arrests occurred, (ii) they were carried out by the NIO as the official State security agency of Schwarzwald's Ministry of the Interior,³² and (iii) Mr. Vega subsequently denied any knowledge of these arrests while acting as head of the NIO.³³ The objective elements of the crime are therefore not in dispute.³⁴ Nevertheless, the Court must also be satisfied that there are reasonable grounds to believe that the subjective elements of the crime are present. Firstly, element 3(b) is not present as Mr. Vega was not aware that his refusal was preceded by the arrests. Secondly, elements 6 and 8 are not present as Mr. Vega did not intend to remove the arrested persons from the protection of the law for a prolonged period of time, and did not know or intend his conduct to be part of a widespread or systematic attack directed against the civilian population.

I.B.1. Mr. Vega was not aware that his refusal was preceded by a deprivation of freedom.

Mr. Vega must be shown to have made his refusal to acknowledge the arrests and deprivation of freedom with intent, in the knowledge that it would form part of a widespread or systematic attack against a civilian population.³⁵ A person has 'knowledge' when they are aware that a circumstance exists or a consequence will occur in the ordinary course of events.³⁶ Nothing on the facts indicates that Mr. Vega was aware of Ms. Jorg's plan before its execution, or that he was aware of the arrests. At best, Mr. Vega was put on notice that something was amiss on 5 October 2018 when relatives of the arrested individuals accused him of being responsible for the disappearances.³⁷ Accordingly, Mr. Vega was not aware at the time of his refusal that the arrests had occurred,³⁸ and thus did not know that his conduct may have been part of an attack against the civilian population.

³² Case Facts, para. 15; Case Clarifications, para. 1.

³³ Case Facts, paras 15, 18.

³⁴ Elements of Crimes, Art 7(1)(i), Element 1, 2, 4, 5.

³⁵ Rome Statute, Art. 7(1); ICTY, *Prosecutor v. Tadić*, IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 656; Elements of Crimes, Art. 7(1)(i), Element 8.

³⁶ Rome Statute, Art. 30(3).

³⁷ Case Facts, para. 17.

³⁸ Case Facts, para. 18.

I.B.2. Mr. Vega did not know or intend his conduct to be part of an attack, and did not intend to remove persons from the protection of the law for a prolonged period of time.

A person acts with ‘intent’ in relation to a consequence where that person means to cause that consequence or is aware that it will occur in the ordinary course of events.³⁹ Mr Vega’s instruction to Ms. Jorg was that she ‘take all necessary measures to prevent further instability in the country by taking action against all the members of the National Front and disruptive refugees without attracting public attention’.⁴⁰ Without further information, this alone does not provide reasonable grounds to believe that Mr. Vega meant to cause Ms. Jorg to conduct arrests in the manner she did, as Mr. Vega may not have believed all measures taken by Ms. Jorg were *necessary* measures.

At best, Mr. Vega may have been aware that Ms. Jorg’s actions would occur in the ordinary course of events. However, Mr. Vega’s intent must be considered in light of the 20 August 2018 expert report which preceded his instructions to Ms. Jorg. That report expressed concerns as to the open arrest of National Front members.⁴¹ Thus, there are reasonable grounds to believe that Mr. Vega was aware that his instructions would result, in the ordinary course of events, in Ms. Jorg carrying out the arrests in secret. However, this alone does not provide reasonable grounds to believe he was aware his instructions to conduct the arrests secretly would result, in the ordinary course of events, in the other steps taken by Ms. Jorg, i.e. the trials being conducted in secret and no information being provided to relatives. Therefore, there are no reasonable grounds to believe that Mr. Vega intended his conduct to form part of an attack of enforced disappearance of persons, as when Mr. Vega instructed Ms. Jorg he did not intend to remove the arrested persons from the law. Mr. Vega’s subsequent refusal to publicly acknowledge the arrests does not support a conclusion that he did intend to remove the persons from the law, as he may have believed trials were being properly conducted and made his refusal to the journalist to prevent the media inflaming public outrage. In conclusion, Mr. Vega’s case is not within the jurisdiction of the Court as there are no reasonable grounds to believe that the requisite contextual and specific elements of the crime are satisfied here.

II. THE CASE IS INADMISSIBLE.

There are two limbs to admissibility: complementarity under Art. 17(1)(a)-(c) and gravity under Art. 17(1)(d).⁴² As the national investigations are currently ongoing, the relevant component of the complementarity principle is Art. 17(1)(a), i.e. a case is inadmissible where it ‘is being investigated

³⁹ Rome Statute, Art. 30(2)(b).

⁴⁰ Case Facts, para. 13.

⁴¹ Case Facts, para. 12.

⁴² ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 52.

or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution'.⁴³ For the case to be inadmissible, the national investigation must 'cover the same individual and substantially the same conduct as alleged in the proceedings before the Court'.⁴⁴ The case must also be of sufficient gravity pursuant to Art. 17(1)(d). The Defense bears the burden of proof in demonstrating admissibility.⁴⁵ Although the Rome Statute does not provide guidance as to the standard of proof, the Court has indicated that the relevant standard is on the balance of probabilities.⁴⁶

II.A. The prosecution of the case is inconsistent with the principle of complementarity.

For the principle of complementarity to render this case inadmissible, it must be shown that: (1) there is an ongoing national investigation which meets the requirement under Art. 17(1)(a); and (2) Schwarzwald is not unwilling genuinely to carry out that investigation. It is not contentious that Schwarzwald is not 'unable genuinely to carry out that investigation',⁴⁷ as there has not been 'a total or substantial collapse or unavailability of its national judicial system'.⁴⁸

II.A.1. The national investigation covers substantially the same conduct and the same individual as the case before the Court.

On the facts, it is clear that Schwarzwald has established an investigative body tasked with conducting an independent assessment of the alleged crimes.⁴⁹ The exercise of ICC jurisdiction is 'not the rule, but rather the exception' to national proceedings.⁵⁰ Accordingly, the case will be inadmissible if the national investigation covers substantially the same conduct and the same individual as that specified in the warrant of arrest.⁵¹ Here the 'contours' of the case are clear:⁵² the investigative body is tasked with independently investigating the NIO for alleged kidnappings under Art. 308 of the Schwarzwald Criminal Code.⁵³ It is not necessary that the investigation consider

⁴³ Rome Statute, Art. 17(1)(a).

⁴⁴ ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11-274, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, para. 39.

⁴⁵ ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11-274, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, para. 61.

⁴⁶ ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, para. 203; Otto Triffterer and Kai Ambos (ed.), 2016, p. 863.

⁴⁷ Rome Statute, Art. 17(1)(a).

⁴⁸ Rome Statute, Art. 17(3).

⁴⁹ Case Facts, para. 23; Case Clarifications, para. 5.

⁵⁰ Otto Triffterer and Kai Ambos (ed.), 2016, p. 793.

⁵¹ ICC, *Prosecutor v. Gaddafi*, ICC-01/11-01/11-344-Red, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013, para. 83.

⁵² ICC, *Prosecutor v. Gaddafi*, ICC-01/11-01/11-547-Red, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", 21 May 2014, para. 83.

⁵³ Case Clarifications, para. 5.

international crimes specifically, provided the ‘ordinary crime’ covers substantially the same conduct as that specified in the warrant.⁵⁴ The case against Mr. Vega in the warrant of arrest is that he is responsible under Art. 25(3)(b) for ordering, inducing or soliciting the criminal conduct. Therefore, the conduct that defines this case is ‘both that of the suspect, [Mr. Vega], and that described in the incidents under investigation’ which he is alleged to have ordered, solicited, or induced.⁵⁵ Consequently, the conduct of the NIO forms a part of the case against Mr. Vega as Head of the NIO.⁵⁶ Kidnappings ordinarily involve depriving persons of their freedom and concealing their whereabouts. Accordingly, there is a ‘large overlap’ between the national and international investigation, as the incidents being investigated domestically ‘form the crux of the Prosecutor’s case’ and represent its ‘most serious aspects’.⁵⁷ Although the investigation is directed towards the NIO,⁵⁸ this necessarily involves making inquiries into Mr. Vega’s responsibility for the criminal conduct given his involvement and position in the NIO. Furthermore, the suspension, arrest, and detention of Mr. Vega by domestic authorities indicates that they consider him to be a potential wrongdoer.⁵⁹ Therefore, as the national investigation covers both the same individual and substantially the same conduct as in the warrant of arrest, the case is inadmissible.⁶⁰

II.A.1.a. *Schwarzwald is taking concrete and progressive steps towards ascertaining the specific responsibility of Mr. Vega.*

As a warrant of arrest has been issued,⁶¹ the national investigation is required to take concrete and progressive steps ‘directed at ascertaining whether *those suspects* are responsible for that conduct’.⁶² The Court has indicated that this may include the collection of forensic samples, witness testimonies or documentary evidence.⁶³ As a matter of fact the investigative body started its activities on 4 February 2019 with a deadline to conclude investigations by September 2019.⁶⁴ At

⁵⁴ ICC, *Prosecutor v. Gaddafi*, ICC-01/11-01/11-344-Red, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013, para. 108.

⁵⁵ ICC, *Prosecutor v. Gaddafi*, ICC-01/11-01/11-547-Red, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, 21 May 2014, para. 62.

⁵⁶ Case Facts, paras 1, 15.

⁵⁷ ICC, *Prosecutor v. Gaddafi*, ICC-01/11-01/11-547-Red, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, 21 May 2014, para. 72.

⁵⁸ Case Facts, para. 25.

⁵⁹ Case Facts, paras 21-22.

⁶⁰ ICC, *Prosecutor v. Gaddafi*, ICC-01/11-01/11-547-Red, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, 21 May 2014, para. 73.

⁶¹ Case Facts, para. 24.

⁶² ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11-274, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, para. 40.

⁶³ *Ibid.*

⁶⁴ Case Facts, para. 23; Case Clarifications, para. 5.

this early stage, it is presumably still in the process of collecting such evidence. The suspension, arrest and pre-trial detention of Mr. Vega are further evidence of concrete and progressive steps being taken by Schwarzwald to ascertain Mr. Vega's criminal liability.⁶⁵

II.A.2. Schwarzwald is not unwilling genuinely to investigate the case.

As the ongoing national investigation accords with Art. 17(1)(a), the case remains inadmissible as Schwarzwald is not unwilling genuinely to carry out the investigation or prosecution as:⁶⁶ (a) the proceedings were not undertaken to shield Mr. Vega from criminal responsibility;⁶⁷ (b) there has not been an unjustified delay in the proceedings inconsistent with an intent to bring him to justice.⁶⁸ It is not contentious that the proceedings are being conducted independently, in a manner which is consistent with an intent to bring Mr. Vega to justice.⁶⁹ This is clear, as the investigative body is comprised of experts independent from the NIO and the government, and there is no evidence to suggest that the independence of the panel has been tainted in any way.

II.A.2.a. *The proceedings were not initiated to shield Mr. Vega pursuant to Art. 17(2)(a).*

The 'more thorough and serious the domestic investigation is, the more difficult it will be to find proof of an "intent to shield"'.⁷⁰ The fact that the investigation was launched only after domestic outcry is not enough to render it a sham, and the establishment of an independent body suggests the matter is being considered with sufficient seriousness.⁷¹ Mr. Vega's suspension, arrest and pre-trial detention occurred prior to the ICC's warrant of arrest being issued,⁷² but these actions are consistent with Schwarzwald's intention to cooperate with the ICC.⁷³ This undermines the suggestion that domestic authorities were merely protecting him from ICC charges. Unlike *Katanga*,⁷⁴ investigations have not been closed in the face of Mr. Vega being surrendered to the Court. In fact, they are continuing with the same level of inquiry and findings are to be presented in September.⁷⁵ Therefore, the facts do not reveal an intent by Schwarzwald to shield Mr. Vega from justice.

⁶⁵ Case Facts, paras 21-22.

⁶⁶ Rome Statute, Art. 17(1)(a).

⁶⁷ Rome Statute, Art. 17(2)(a).

⁶⁸ Rome Statute, Art. 17(2)(b).

⁶⁹ Rome Statute, Art. 17(2)(c).

⁷⁰ Otto Triffterer and Kai Ambos (ed.), 2016, p. 819.

⁷¹ Case Clarifications, para. 5.

⁷² Case Facts, paras 21-22.

⁷³ Case Facts, para. 21.

⁷⁴ ICC, *Prosecutor v. Katanga*, ICC-01/04-07/07-1497, Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 80.

⁷⁵ Case Facts, para. 23.

II.A.2.b. *There was not an unjustified delay in proceedings inconsistent with an intent to bring Mr. Vega to justice pursuant to Art. 17(2)(b).*

On 6 October 2018 Mr. Vega stated that the police would investigate the alleged disappearances.⁷⁶ Approximately three months elapsed between this statement and the establishment of the investigative body.⁷⁷ However, this delay is explicable as Schwarzwald indicated they were prepared to let the ICC investigate the case, and only decided to conduct their own investigation following a public outcry on the lack of a domestic response.⁷⁸ Accordingly, this delay is not unjustified. Even if it was, it is not inconsistent with an intent to bring Mr. Vega to justice as during this time Schwarzwald had cooperated with the ICC.⁷⁹ Mr. Vega's suspension, arrest and detention was consistent Schwarzwald's intent to cooperate with the ICC. Even after the national investigation started Mr. Vega was promptly handed over to the ICC upon request.⁸⁰ These facts do not suggest that any delay was inconsistent with an intent to bring Mr. Vega to justice.

II.B. The case does not meet the gravity threshold under Art. 17(1)(d) of the Statute.

Should the Court be satisfied that no investigation or prosecution is being conducted by Schwarzwald pursuant to Art. 17(1)(a), the case would nonetheless be inadmissible under Art. 17(1)(d) due to insufficient gravity. Gravity is to be assessed against the case defined in Mr. Vega's warrant of arrest,⁸¹ and includes quantitative and qualitative considerations, such as: the nature, scale, manner of commission of the crime, and both its direct and broader impacts.⁸² The mere fact that the case falls within the Court's jurisdiction is not sufficient to establish gravity;⁸³ the relevant conduct must have features which render it 'especially grave'.⁸⁴ It follows that the features forming the elements of the crime are not relevant for an assessment of gravity, as they are not 'particular features' of the crime, but just its basic components.⁸⁵

⁷⁶ Case Facts, para. 18.

⁷⁷ Case Facts, para. 23.

⁷⁸ Case Facts, paras 21, 23.

⁷⁹ Case Facts, paras 21-22.

⁸⁰ Case Facts, paras 25-26.

⁸¹ Case Facts, para. 24.

⁸² ICC, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13-34, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, 16 July 2015, para. 21.

⁸³ ICC, *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the confirmation of charges, 8 February 2010, para. 30.

⁸⁴ ICC, *Situation in the Democratic Republic of Congo*, ICC-01/04-520-Anx2, Decision on the Prosecutor's Application for warrants of arrest, Article 58, 10 February 2006, para. 46.

⁸⁵ Marco Longobardo, "Factors relevant for the assessment of sufficient gravity in the ICC. Proceedings and the elements of international crimes", *Questions of International Law Zoom-In*, 33 (2016), p. 30.

The alleged crime does not possess any particular features which render it ‘especially grave’.⁸⁶ The arrest, secret trial and detention of the 70 persons was a single isolated incident not on a scale comparable to that of other situations investigated by the Office of the Prosecution (‘OTP’),⁸⁷ such as the situation in the Republic of Kenya which involved over 1,000 killings.⁸⁸ There is nothing on the facts to suggest that the alleged crime was conducted in an aggravating manner. It did not, for example, involve excessive force or unnecessarily cruel treatment. Although the arrested persons were secretly, separately and summarily tried, sentenced and jailed,⁸⁹ it cannot be inferred from this alone that they were denied access to justice.

Insofar as the leaked photographs only show four of the disappeared persons, they do not suggest that the conditions of their detention aggravate the impact of the alleged crime as they appear to be in good health.⁹⁰ Further, the case against Mr. Vega can distinguished from that in *Abu Garda* which involved only ‘a single attack [against] a relatively low number of victims’. The nature and impact of the alleged crime in this case is not comparable to that of an attack against peacekeeping personnel in *Abu Garda* as it is not ‘directed against the international community’ nor does it ‘strike at the very heart of the international legal system’.⁹¹ Therefore, the alleged crime does not satisfy the gravity threshold in Art. 17(1)(d).

III. MR. VEGA IS NOT CRIMINALLY RESPONSIBLE.

There are no reasonable grounds to believe that Mr. Vega is liable under Art. 25(3)(b) of the Rome Statute for ordering the commission of a crime against humanity, namely enforced disappearances.⁹² Mr. Vega’s instruction to Ms. Jorg on 1 September 2018 to ‘take all necessary measures to prevent instability in the country by taking action against all the members of the National Front and disruptive refugees without attracting public attention’ is the order in question.⁹³ There are 4 elements that are required for Art. 25(3)(b) liability: (1) a position of authority, (2) an

⁸⁶ ICC, *Situation in the Democratic Republic of Congo*, ICC-01/04-520-Anx2, Decision on the Prosecutor's application for warrants of arrest, Article 58, 10 February 2006, para. 46; ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, 31 March 2010, para. 62.

⁸⁷ Case Facts, para. 12; See Office of the Prosecutor of the International Criminal Court: *Paper on Preliminary Examinations* (2016), paras 216, 218; Office of the Prosecutor’s response to communications received concerning Iraq, 10 February 2006, where 4 to 12 victims of willful killing and a limited number of victims of inhumane treatment “was not sufficient to instigate an investigation”.

⁸⁸ ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the Situation in the Republic of Kenya, 31 March 2010, paras 145-150.

⁸⁹ Case Facts, para. 16.

⁹⁰ Case Facts, para. 17.

⁹¹ ICC, *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the confirmation of charges, 8 February 2010, para. 145.

⁹² Elements of Crimes, Art. 7(1)(i).

⁹³ Case Facts, para. 13.

instruction, (3) the order's direct effect upon the commission of the crime, and (4) the requisite mental element.⁹⁴ It is conceded that Mr. Vega was in a position of authority in relation to Ms. Jorg when he gave her the order.⁹⁵ The PTC has held the legal requirements of 'ordering' are equally applicable to 'soliciting' or 'inducing' with the only difference being the need to establish a position of authority for 'ordering'.⁹⁶ Therefore, as the position of authority is established it is unnecessary to consider inducing or soliciting. It is also conceded that Mr. Vega instructed Ms. Jorg to perform an act.⁹⁷

III.A. Mr. Vega's order did not have a direct effect on the commission of the crime.

In *Mudacumura* the ICC established the direct effect of the order on the commission of the crime by reasoning that Mr. Mudacumura's 'proven authority over the direct perpetrators supports the conclusion that his orders had a direct effect on the commission of the crimes'.⁹⁸ If that reasoning is followed in the present case, it is clear that Mr. Vega is not liable. While Mr. Vega had authority over Ms. Jorg – he did not have 'direct authority'⁹⁹ over the NIO task force that she used to carry out her five-stage plan.¹⁰⁰ Likewise, Mr. Vega did not have the same explicit requirement of obedience for his orders on the pain of death that was found to satisfy element (3) of Art. 25(3)(b) in *Bosco Ntaganda*.¹⁰¹ Mr. Vega's instructions were very general and on the facts he did not closely monitor their implementation. Unlike Charles Blé Goudé in Côte d'Ivoire, Mr. Vega did not engage in any kind of 'sustained effort' to mobilize the NIO task force to commit specific crimes.¹⁰²

III.B. Mr. Vega did not have the necessary mental state when he gave the order.

There are no reasonable grounds to argue that Mr. Vega was 'at least aware that the crime will be committed in the ordinary course of events as a consequence of the execution of his order'.¹⁰³ At no point did he specifically order Ms. Jorg to have the National Front or refugee persons abducted, a

⁹⁴ ICC, *Prosecutor v. Mudacumura*, ICC-01/04-01/12-1-Red, Decision on the Prosecutor's application under Article 58, PTC II, 13 July 2012, para. 63; ICC, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-309, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda, PTC II, 9 June 2014, para. 145.

⁹⁵ ICC, *Prosecutor v. Mudacumura*, ICC-01/04-01/12-1-Red, Decision on the Prosecutor's application under Article 58, PTC II, 13 July 2012, para. 63.

⁹⁶ ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-656-Red, Decision on the confirmation of charges against Laurent Gbagbo, PTC I, 12 June 2014, para. 243.

⁹⁷ ICC, *Prosecutor v. Mudacumura*, ICC-01/04-01/12-1-Red, Decision on the Prosecutor's application under Article 58, PTC II, 13 July 2012, para. 65.

⁹⁸ *Ibid.*, para. 63.

⁹⁹ *Ibid.*, para. 63.

¹⁰⁰ Case Facts, para. 15.

¹⁰¹ ICC, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-309, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda, PTC II, 9 June 2014, para. 149.

¹⁰² ICC, *Prosecutor v. Blé Goudé*, ICC-02/11-02/11-186, Decision on the confirmation of charges against Charles Blé Goudé, PTC I, 11 December 2014, para. 162.

¹⁰³ ICC, *Prosecutor v. Mudacumura*, ICC-01/04-01/12-1-Red, Decision on the Prosecutor's application under Article 58, PTC II, 13 July 2012, para. 63.

necessary element of enforced disappearances.¹⁰⁴ His instruction was simply ‘to take all necessary measures’.¹⁰⁵ Although Mr. Vega’s orders were vague, there are hundreds of actions that could fall within that instruction. This is in stark contrast to the defendant in *Bosco Ntaganda* who ‘repeatedly and unequivocally stated that the objective of his orders was the commission of the crimes’ that were executed on his orders.¹⁰⁶ Likewise, in *Mudacamura* the defendant received regular updates on the commission of the crime that he ordered.¹⁰⁷ While Mr. Vega would have been aware of the crime’s likelihood if Ms. Jorg proposed her five-stage plan to him, he certainly did not have the necessary mental state when he gave the order on 1 September 2018.¹⁰⁸

PRAYER FOR RELIEF

Accordingly, the Defense requests the Court to declare that Mr. Vega’s case is not within the jurisdiction of the Court and is inadmissible, and that there are no reasonable grounds to believe that he is criminally responsible under Art. 25(3)(b) of the Rome Statute.

¹⁰⁴ Elements of Crimes, Art. 7(1)(i), Element (1)(a).

¹⁰⁵ Case Facts, para. 13.

¹⁰⁶ ICC, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-309, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda, PTC II, 9 June 2014, para. 150.

¹⁰⁷ ICC, *Prosecutor v. Mudacamura*, ICC-01/04-01/12-1-Red, Decision on the Prosecutor’s application under Article 58, PTC II, 13 July 2012, para. 67.

¹⁰⁸ Case Facts, paras 13, 14.