

NUREMBERG MOOT COURT 2019

Team: N48

Prosecution

TABLE OF CONTENTS

I.	The Case against Mr. Vega Falls within the Jurisdiction of the Court Pursuant to Art. 19(1) of the Rome Statute	2
	I.A The Court Has Temporal and Territorial Jurisdiction	2
	I.B The Court Has Subject-Matter Jurisdiction	3
	I.B.1 The Contextual Elements of Crimes against Humanity are Met	4
	I.B.2 The Specific Elements of Enforced Disappearances are Met	6
II.	The Case against Mr. Vega is Admissible Pursuant to Art. 17(1)(a)-(c) and Art. 17(1) (d) of the Statute	8
	II.A The Court is Acting in Accordance with the Principle of Complementarity	8
	II.B The Case is Sufficiently Grave to Justify Further Action by the Court	9
	II.B.1 Quantitative Factors	9
	II.B.2 Qualitative Factors	11
III.	There are Reasonable Grounds to Believe Mr. Vega is Criminally Responsible under Art. 25(3)(b) of the Statute	12
IV.	Submissions	14

ARGUMENTS

I. The Case against Mr. Vega Falls within the Jurisdiction of the Court Pursuant to Art. 19(1) of the Rome Statute:

Pursuant to Art. 19(1) of the Rome Statute, the ICC holds power in the determination of its jurisdiction of a case and on its own motion.¹ This has been echoed through previous jurisprudence as is held in the *Situation in Uganda*, “It is a well-known and fundamental principle that any judicial body, including any international tribunal, retains the power and the duty to determine the boundaries of its own jurisdiction and competence.”²

The Court may exercise jurisdiction in areas where it fulfills the jurisdictional requirements declared by the Statute. Accordingly, the OTP submits that the case against Mr. Vega falls within the jurisdiction of this Court as it fulfills the requirements of the temporal, territorial or personal jurisdiction, and subject-matter jurisdiction.

I.A The Court Has Temporal and Territorial Jurisdiction;

First, it has been stipulated by Art. 11(2), the Court may exercise its jurisdiction over States that have become parties to the Statute after its entry into force.³ As so, the Schwarzwald State has been a State Party to the Statute since 2002 and any commission of acts stipulated under Art. 5 of the Statute shall render the crime to fall within the jurisdiction of the Court. The acts committed by Mr. Vega took place on 17 September 2018 and following. Thus, the case against Mr. Vega shall fall within the jurisdiction of the Court.

Second, the Court shall also exercise its jurisdiction in the event that Art. 12(2)(a) or (b) is applied. That is, should the act be committed on the land of a State Party or by a national of that State Party the case is rendered to fall within the jurisdiction of the Court. Based on the fact that Mr. Vega carried out his acts on the territory of the State of Schwarzwald and that Schwarzwald is a State Party to the Statute, the case shall fall within the territorial jurisdiction of the Court.

I.B The Court Has Subject-Matter Jurisdiction;

The Court mainly focuses on whether there are reasonable grounds to believe that crimes falling under the jurisdiction of the Court have been committed.⁴ Accordingly, the Court takes into account the *cha-*

¹ Rome Statute of the International Criminal Court, Art. 19(1).

² ICC, *Situation in Uganda*, ICC-02/04-01/05, Decision on the Prosecutor's Application that the PTC Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, 9 March 2006, para. 22.

³ *Ibid.*, Art. 11(2).

⁴ ICC, *Situation in the Republic of Cote D'Ivoire*, ICC-02/11, Corrigendum to “Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire”, 15 November 2011, para. 26.

peau of Art. 7 of the Statute which reads that, a crime against humanity means any of the underlying acts when committed as part of widespread or systematic attack directed against any civilian population, with knowledge of the attack.⁵ In the case at hand, Mr. Vega committed the crime of enforced disappearances constituting a crime against humanity pursuant to Art. 7(1)(i) of the Statute. Henceforth, the OTP submits that the contextual and specified elements of the crimes against humanity are fulfilled.

I.B.1 The Contextual Elements of Crimes against Humanity are Met;

Any of the underlying acts enumerated under article 7(1) of the Statute constitute a crime against humanity if committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.⁶ It is important to note that, a single act can be considered to satisfy the criteria of an attack, where underlying acts occurred and where all other contextual legal requirements are met.⁷

The attack was “systematic” and “widespread”:

The ICTY in *Kordić* case stated that the term “systematic” reflects the “patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are common expressions of such systematic occurrence”.⁸ The degree and form of organization of the NIO signals the scale of effort brought into work in order to carry out the commission of its acts and agenda, rendering its acts systematic in essence and far from non-random or unorganized. Mr. Vega’s instructions before implementing the plan and the formulation of a five-stage plan emphasizes the degree of organization invested behind the attack.

The OTP further submits that the political objectives which led Mr. Vega to commit the attack of enforced disappearances indicate the systemic nature of such an attack.⁹ Such objectives could be inferred through acts “to destroy, persecute or weaken a community, [...] and the implication of high-level political authorities in the establishment of the methodical plan”.¹⁰ Mr. Vega, head of a high-level governmental authority (the NIO),¹¹ targeted an organized group made up of 40 activists (the NF); including several mid-level members from the police and government. Therefore, it could be inferred that the

⁵ Rome Statute, Art. 7(1).

⁶ ICC, *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008, para. 391.

⁷ ICC, *Prosecutor v. Gbagbo*, *Amicus Curiae Observations of Professors Robinson, deGuzman, Jalloh and Cryer*, ICC-02/11-01/11-534, 9 October 2013, para. 12; Simon Chesterman, “An Altogether Different Order: Defining the Elements of Crimes against Humanity”, in *Duke Journal of Comparative and International Law*, 10 (2000), p. 316; Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, para. 891.

⁸ ICTY, *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-A, Judgement, 17 December 2004, para. 94.

⁹ ICTY, *Prosecutor v. Kordić et al.*, ICTR IT-95-14/2-T, Judgment, 26 February 2001, para. 179.

¹⁰ *Ibid.*

¹¹ Case Facts, para. 1.

enforced disappearances carried out to destroy the NF was meant for political reasons; that being to prevent high risk of radicalization of Schwarzwald.¹² This demonstrates the systematic character in which the crime of enforced disappearances was committed in a well-organized and planned fashion.

In regards to the widespread nature of the attack, “widespread” refers to the number of victims.¹³ It shall be noted that Mr. Vega had targeted the NF body in its whole and did not exclude a single member. The disappearance of 40 members out of 40 illustrates this widespread nature.

The attack was against a civilian population:

The civilians are persons who are not members of the armed forces.¹⁴ In *Kayishema* and *Ruzindana* case, the Court proceeds to include the police in the civilian term and in so the NF, being formulated of several members of the police and government, qualifies as civilian.¹⁵ In the case at hand, there are no facts that show any existence of armed forces amongst the victims.

There is a nexus between Mr. Vega’s acts and the attack:

Taking the Situation in the *Islamic Republic of Afghanistan* by example, the PTC held that the nexus can present itself through the common features such as aims and targets of the acts.¹⁶ A nexus can be drawn between the instructions of Mr. Vega and the five-stage plan of Ms. Jorg. Furthermore, Mr. Vega had instructed to target all members of the NF and disruptive refugees.¹⁷ Similarly, Ms. Jorg’s plan had targeted these same individuals.¹⁸ With regards to aim, Mr. Vega intended for measures to be taken in order to prevent further instability in Schwarzwald all while Ms. Jorg conducted her plan for the purpose of charging them of endangering national security.¹⁹

The state policy element is achieved:

According to Art. 7(2)(a) of the Statute, the attack must be committed ‘pursuant to or in furtherance of a State or organizational policy to commit such attack’.²⁰ Moreover, the Elements of Crime provide that a “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population.²¹

¹² *Ibid.*, para. 12(a)

¹³ ICTY, *Prosecutor v. Tadić*, IT- 49-1-I, (Amendment), 1 September 1995, para. 648.

¹⁴ Customary International Humanitarian Law, Rule 5.

¹⁵ ICTR, *Prosecutor v. Ćlement Kayishema and Obed Ruzindana*, ICTR-9S-1-T, Judgement, 1 May 1999, para. 127.

¹⁶ ICC, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17, Request for Authorisation of an Investigation Pursuant to Art. 15, 20 November 2017, para. 122.

¹⁷ Case Facts, para. 13.

¹⁸ *Ibid.*, para. 14.

¹⁹ ICTY, *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljik, Milivoj Petković, Valentin Ćorić, Berislav Pušić*, IT-04-74-T, Judgment, 29 May 2013, paras. 43-44; Case Facts, paras. 13 and 14(d).

²⁰ Rome Statute, Art. 7(2)(a).

²¹ Elements of Crimes, Art. 7, introductory para. 3, footnote 6.

Mr. Vega as head of the NIO and Ms. Jorg as head of a division of the NIO and the task force, are all subordinates to the Ministry of the Interior of the Schwarzwald government and carried out the plan premeditated by Mr. Vega.²² Moreover, the lack of intervention displayed by the state has been established in the Report of the Preparatory Commission for the ICC as it outlines that, “Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack”.²³ Regarding the acts carried out by these bodies, complaints were lodged to the government of Schwarzwald and no action was taken towards the situation, ultimately leaving the IHRO communicating the situation to the OTP of the Court.

Although the two concepts of ‘policy’ and ‘systematic’ serve different purposes and imply different requirements under Art. 7(1) and (2)(a) of the Statute; the evidence of planning, organization or direction by a State or organization may prove both the policy and the systematic character of the attack as they both refer to a certain level of planning and organizing of the attack.²⁴ Furthermore, the OTP submits that the state policy requirement is achieved due to the high level of planning and organizing for the enforced disappearances crime.

I.B.2 The Specific Elements of Enforced Disappearances are Met;

Pursuant to Art. 7(2)(i) of the Statute, the enforced disappearance of persons means “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”.²⁵

The crime of enforced disappearances consists of two material elements: the deprivation of liberty; and the refusal to acknowledge that deprivation or to give information on the fate and whereabouts of the person.²⁶ On 17 September 2018, the NIO task force arrested 40 members of the NF and 30 Odenwald refugees.²⁷ On 30 September 2018, all arrested individuals were secretly, separately and summarily tried and sentenced for “endangering national security” and then jailed.²⁸ Should the Court find this arresting as lawful; the OTP submits that deprivation of liberty does not necessarily need to be unlaw-

²² Case Facts, paras. 1, 13,

²³ ICC, *Report of the Preparatory Commission for the International Criminal Court. Addendum. Part II, Finalized draft text of the Elements of Crimes*, 2 November 2000, PCNICC/2000/1/Add.2, footnote 6.

²⁴ ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges against Laurent Gbagbo, June 2014, para. 216

²⁵ Rome Statute, Art. 7 (2)(i).

²⁶ ICC, *Elements of Crimes*, 7(1)(i), Elements 1 and 2.

²⁷ Case Facts, para. 15.

²⁸ *Ibid.*,16.

ful,²⁹ as the IACtHR held that the deprivation of liberty cannot be conditioned to its unlawful character. This would exclude legitimate forms of deprivation under which enforced disappearances can also take place.³⁰

Both the deprivation of liberty and the refusal to give information must have been committed with the authorization, support or acquiescence of a State or a political organization.³¹ The OTP submits that the crime of enforced disappearances was committed by Mr. Vega, head of the NIO- the official state security agency of the Ministry of the Interior, meaning that both the deprivation of liberty and the refusal to give information have been committed with the authorization of the State.

The OTP further submits that Mr. Vega refused to acknowledge that deprivation and also refused to give information on the fate and whereabouts of the arrested victims.³² Ms. Jorg's five-stage plan explicitly consisted of 'imprisoning the individuals without providing any information as to their whereabouts or length of detention to either the public or to their family.'³³ Moreover, Mr. Vega denied any knowledge or connection to the disappeared persons and no information as to the judicial process, including the sentences imposed or where the sentences were to be served, was made public or given to relatives.³⁴

In the *Situation in the Republic of Burundi*, the Court held that the refusal or denial of information includes "outright denial or the giving of false information about the fate or whereabouts of the victim."³⁵ According to Ms. Jorg's five-stage plan, the NIO assumed some of the victims' accounts in order to de-radicalize the followers,³⁶ thus creating false information which was leaked to the public, taking advantage of the social media's role in disseminating information publicly.

Mr. Vega possessed the general mens rea of crimes against humanity: The OTP submits that Mr. Vega was aware and intended for his actions to be conducted as part of the attack,³⁷ as his instructions to Ms. Jorg constituted the building block for the crime of enforced disappearances. Moreover, as a result of the enforced disappearance, the victim is removed from the protection of the law the victims no

²⁹ Elements of Crimes, footnote 26 in Art. 7(1)(i).

³⁰ IACtHR, *Heliodoro Portugal v Panamá*, C No.186 , Preliminary Objections, Merits, Reparations, and Costs, 12 August 2008, para.192.

³¹ Elements of Crimes, 7 (1)(i), Elements 4 and 5.

³² Case Facts, para. 15.

³³ Case Facts, para. 14(e).

³⁴ Case Facts, para. 18.

³⁵ ICC, *Situation in the Republic of Burundi*, ICC-01/17-X-9-US ,Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi 25 October 2017, para. 118.

³⁶ Case Facts, para. 14.

³⁷ ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3343, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 167.

longer have access to judicial assistance and legal procedures”.³⁸ In effect, the intention of removing the victims from the protection of the law for a prolonged period of time could be inferred from the five-stage plan demanded by Mr. Vega, as it explicitly meant to arrest the victims and initiate secret trials for them outside main cities on the charge of “endangering national security”,³⁹ and when the plan was executed; all arrested victims were secretly tried and sentenced, and then jailed;⁴⁰ and the victims are still missing today.⁴¹

For all previous arguments, and whereas the contextual elements and the special elements of the crime in question are met, and therefore constituting enforced disappearance as a crime against humanity falling under the subject-matter jurisdiction of the Court. Thus, the OTP submits that the case of Mr. Vega falls within the jurisdiction of the Court pursuant to Art. 19 (1) of the Statute.

II. The Case against Mr. Vega is Admissible Pursuant to Art. 17(1)(a)-(c) and Art. 17(1) (d) of the Statute:

II.A. The Court is Acting in Accordance with the Principle of Complementarity;

On 25 December 2018, the President of Schwarzwald publicly expressed her willingness to cooperate fully with the Court and stressed that the government was prepared to let the Court investigate the case in order to avoid any further political tensions among the population.⁴² This indicates that the government of Schwarzwald has not resisted the Court’s intervention. Thus, the OTP submits that the Court is acting in accordance with the principle of complementarity and did not encroach over Schwarzwald’s national jurisdiction.

In any case, the “same-conduct test” is not satisfied

With regards to the government of Schwarzwald’s establishment of an independent body to investigate the allegations of kidnapping by NIO;⁴³ the OTP submits that Schwarzwald’s national proceedings against Mr. Vega do not encompass the conduct that constitutes the basis of the OTP’s Application.⁴⁴

In *Lubanga*, the DRC authorities had arrested Lubanga on charges of crimes against humanity, genocide, murder, illegal detention and torture.⁴⁵ Although Lubanga was under national investigations for

³⁸ ICC, *Situation in the Republic of Burundi*, ICC-01/17-X-9-US, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi 25 October 2017, para. 120.

³⁹ Case Facts, para. 14.

⁴⁰ Case Facts, para. 16.

⁴¹ Clarifications, para. 16.

⁴² Case Facts, para. 21.

⁴³ Case Facts, para. 23.

⁴⁴ Case Facts, para. 25.

serious crimes, the case was still deemed to be admissible before the Court as they were not investigated domestically for the same conducts that were being investigated by the Prosecutor.⁴⁶

In the case at hand, the OTP submits that the case against Mr. Vega is admissible as the national proceedings by Schwarzwald had made no mention to ‘enforced disappearances’, meaning that the national proceedings against Mr. Vega do not encompass the conduct subject of the case before the Court, which constitute the basis of the Prosecution’s Application.⁴⁷ Accordingly, no state with jurisdiction over the case against Mr. Vega is acting, or has acted, in relation to such case. As such, and in the absence of any acting state, the PTC need not make any analysis of unwillingness or inability.⁴⁸ For all previous reasons, the Court would be acting in accordance with the principle of complementarity.

Nonetheless, the OTP submits that the burden of proof falls on the State to “provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates”⁴⁹ that it has indeed investigated the case against Mr. Vega genuinely.

II.B The Case is Sufficiently Grave to Justify Further Action by the Court;

In order to meet the gravity threshold, the conduct which is the object of a case must be of serious concern to the international community,⁵⁰ it must also be systematic or large-scale; and the suspect’s position or rank falls within the category of most senior leaders being most responsible for the alleged crime.⁵¹

II.B.1 Quantitative Circumstances:

*The Acts Committed by Mr. Vega were of a “Systematic Nature”*⁵² Mr. Vega’s instructions before the formulation and implementation of the five-stage plan emphasizes the degree of organization invested behind the attack, which may be *indicia* of the grave quality of Mr. Vega’s acts.

⁴⁵ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-8, Decision on the Prosecutor’s Application for a Warrant of Arrest, 9 February 2006, para. 33; ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-4, "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga", 6 July 2007, para. 20.

⁴⁶ Sarah M.H Nouwen, *Complementarity in the Line of Fire: The Catalyzing Effect of The International Criminal Court in Uganda and Sudan* (2013), p. 52

⁴⁷ Case Facts, para. 23.

⁴⁸ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-8, Decision on the Prosecutor’s Application for a Warrant of Arrest, 9 February 2006, para. 40.

⁴⁹ ICC, *Prosecutor v. Gaddafi and Al-Senussi*, PTCI, ICC-01/11-01/11-344-Red, 31 May 2013, para. 52.

⁵⁰ Rome Statute, preamble.

⁵¹ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-8, Decision on the Prosecutor’s Application for a Warrant of Arrest, 9 February 2006, para. 60.

⁵² ICC, *Situation in the Democratic Republic of Congo*, Decision on the Prosecutor’s Application for Warrants of Arrest, Art. 58, ICC-01/04-02/06-20-Anx2, 10 February 2006, para. 47.

The Case against Mr. Vega did Cause Social Alarm to the International Community;

Should the Court estimate the crime not to be of sufficient gravity due to the low number of disappeared persons including only 30 targeted refugees; the status of a number of the disappeared persons being refugees, sets off a signal of social alarm affecting the international community as a whole.⁵³

The jurisprudence in the case of *Lubanga* referred to the criteria of social alarm as *indicia* of the gravity of a crime.⁵⁴ According to the Convention relating to the Status of Refugees, Schwarzwald has been bestowed the duty of protecting any refugee seeking to enter its land. The refugees were provided with no protection from their own State or the State of Schwarzwald whatsoever. What is more, the refugees had been deprived a fundamental right to liberation through detention and withholding of their whereabouts and Mr. Vega neither secured protection for this right nor did the State provide the refugees with assistance or secure legal status.⁵⁵

In addition, the refugees had been implicitly deprived of their fundamental right to litigation. Pursuant to Art. 16(2) of the Convention relating to the Status of Refugees; refugees shall enjoy the same treatment as a national in access to the courts.⁵⁶ However, in our case, it can be understood that through toleration of the State by persistently maintaining silence on the NIO attack and in being the constant target of the majority of the Schwarzwald population's anger in real life and online, the refugees could not have perceived pursuance by the national court to be impartial and fair. The refugees had no authority to resort to rendering them ultimately isolated and deprived of their right to litigation. This signifies the weight pertaining to the case against Mr. Vega, the urgency of the refugee status and the need for international action as the State did not fulfill its obligation to protect these refugees justifying the social alarm criterion.

II.B.2 Qualitative Circumstances:

The Case is of Serious Concern due to Mr. Vega Being the Most Responsible for the Crimes Committed; Although the *Lubanga* case did not perceive the “most serious crimes” to portray the role of the perpetrator as being “the most responsible for international crimes”,⁵⁷ the OTP's policy paper expresses that the Prosecutor focuses on those that bear the greatest responsibility in the commission of alleged

⁵³ ICC, *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Confirmation of charges, 8 February 2010, paras. 30-34.

⁵⁴ ICC, *Situation in the Democratic Republic of Congo*, Decision on the Prosecutor's Application for Warrants of Arrest, Art. 58, ICC-01/04-02/06-20-Anx2, 10 February 2006, paras. 47 and 64.

⁵⁵ UNHCR, *The State of The World's Refugees 2006: Human Displacement in the New Millennium* (1st ed., 2006), p. 66.

⁵⁶ Convention relating to the Status of Refugees, Art. 16(2).

⁵⁷ ICC, *Situation in the Democratic Republic of Congo*, Decision on the Designation of a Single Judge, ICC-01/04, 13 July 2006, para. 79.

crimes.⁵⁸ The reasoning behind this being that seriousness can pertain to the role of the perpetrator. If the perpetrator enjoys full powers to direct whether a crime should be committed, this can be deemed serious.⁵⁹

In the case at hand, Mr. Vega was not only a member of the NIO- a body that had been entrusted by the State to be its official agent to maintain security- he was also the head of this comprehensive body. Mr. Vega enjoyed complete power over this body and in turn should be held completely responsible. As such, it would fall upon Mr. Vega to attempt to prevent or stop the commission of acts. However, Mr. Vega did not attempt this but gave out instructions to commit the crime.⁶⁰ The seriousness evermore emanates as Mr. Vega, as head of the NIO, was entrusted with such great powers to maintain security and in betraying this trust had rendered the case to be of a serious quality.

Alternatively, the ‘Senior-Leader’ Test is Met; The PTC applied the ‘senior-leader’ test to *Lubanga* case according to a teleological interpretation of Art. 17(1)(d).⁶¹ By this application, it found the case against Lubanga of a sufficient gravity to justify further action by the Court, on the grounds that he held the highest position (Former President) of the Forces Patriotiques pour la liberation du Congo (FPLC) movement, and he was the main individual responsible for the alleged policy of enlisting and conscripting into the FPLC. The PTC concluded that Lubanga falls within the category of most senior leaders suspected by being the most responsible for the crimes allegedly committed.⁶²

In the case at hand, Mr. Vega is the Head of the NIO of Schwarzwald and therefore, is considered as a senior leader who must bear the greatest responsibility for the enforced disappearances. As it falls upon Mr. Vega as a holder of such a serious position to ensure stability and provide protection, one would consider the conduct of Mr. Vega in the case at hand to be grievous and out of line.

⁵⁸ OTP, Paper on Some Policy Issues Before the Office of the Prosecutor, p. 7.

⁵⁹ Otto Triffterer, *The Rome Statute and the International Criminal Court* (3rd ed., 2016), p. 814.

⁶⁰ *Ibid.*, p. 812.; ICC, Situation in the Democratic Republic of Congo, Decision on the Prosecutor's Application for Warrants of Arrest, Art. 58, ICC-01/04-02/06-20-Anx2, 10 February 2006, para. 87.

⁶¹ ICC, *Situation in the Democratic Republic of Congo*, ICC-01/04-01/07, Decision on the Prosecutor's Application for warrants of Arrest, Article 58, 10 February 2006, para. 48.

⁶² *Ibid.*, para. 74.

III. There are Reasonable Grounds to Believe Mr. Vega is Criminally Responsible under Art. 25(3)(b) of the Statute

A person who orders the commission of a crime that falls within the jurisdiction of the Court, is criminally responsible and liable for punishment.⁶³ The ICC case law requires a position of authority from which the person responsible has to 'instruct' another person to commit a crime.⁶⁴ In *Akayesu*, the ICTR held that, "ordering implies a superior-subordinate relationship", where the person in a position of authority uses it to convince or coerce the subordinate to commit a crime.⁶⁵ Moreover, the superior must have *de jure* or *de facto* authority enabling him to control his subordinates.⁶⁶

Mr. Vega, head of the NIO and Ms. Jorg, head of the Division of National Security in the NIO,⁶⁷ have a superior-subordinate relationship due to the hierarchical nature of their positions, giving Mr. Vega's *de jure* powers over Mr. Jorg and the NIO.⁶⁸ Subsequently, it is not necessary to demonstrate the existence of a formal superior-subordinate relationship, as long as Mr. Vega was vested with the authority to give orders.⁶⁹ Mr. Vega gave an explicit order to Ms. Jorg to take all necessary measures against all members of the NF and disruptive refugees.⁷⁰ Meaning that, the crime of enforced disappearances was committed in execution of the order issued by Mr. Vega.

As indicated in the Statute, Mr. Vega would still be responsible if he knew that a consequence or a crime will occur in the ordinary course of events.⁷¹ Even if Mr. Vega was unaware or uninformed of the details of the attack, or does not approve of the purpose of the attack,⁷² he should have known of the five-stage plan set by Ms. Jorg as her superior. Mr. Vega neither took action to prevent the commission of the crimes nor held Ms. Jorg accountable. Furthermore, he disregarded the IHRO report and other human rights organizations complaints, and neglected the concerns of the relatives of the disappeared persons.⁷³ Additionally, Mr. Vega ordered Ms. Jorg to take necessary measures without attract-

⁶³ Rome Statute, Art. 25(3)(b).

⁶⁴ ICC, *Prosecutor v. Mudacumura*, ICC-01/04-01/12-1Red, Decision on the Prosecutor's Application under Art. 58, PTC II, 13 July 2012, paras. 63–65; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-309, Decision on the Confirmation of Charges, PTC II, 9 June 2014, para. 145.

⁶⁵ ICTR, *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, 2 September 1998, para. 483; ICTY, *Krstić Trial Judgment* 2 IT-98-33, August 2001, para. 601; ICC, *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-656-Red, Decision on the Confirmation of charges, 12 June 2014, paras. 242-243.

⁶⁶ Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Art. by Art. München: Beck, 2008, P. 1102, para. 124.

⁶⁷ Case Facts, paras. 1 and 13.

⁶⁸ ICTR, *Ferdinand Nahimana et. Al. v. Prosecutor*, ICTR-99-52-A, Judgment, 28 November 2007, para. 787.

⁶⁹ ICTY, *Prosecutor v. Jadranko Prlić*, IT-04-74-T, Judgment (TC), 29 May 2013, para. 231.

⁷⁰ Case Facts, para. 13.

⁷¹ Rome Statute, Art. 30(2)

⁷² ICTY, *Prosecutor v. Jadranko Prlić*, IT-04-74-T, Judgment (TC), 29 May 2013, para. 45

⁷³ Case Facts, paras. 17 and 19.

ing public attention.⁷⁴ The order gave no limitation or restriction to the sort of conduct that must be taken.

Pursuant to Art. 28, a crime may be committed by a civilian superior who knew or should have known that subordinates were committing or about to commit such crimes.⁷⁵ A superior shall be criminally responsible for crimes committed by subordinates under their effective authority and control as a result of their failure to exercise control properly.⁷⁶ The superior can be a member of the government, where they are incurred to criminal responsibility similar to that of military commanders, providing they give an explicit or implicit order to commit a crime.⁷⁷ In *Akayesu* case, the ICTR confirmed the applicability of the doctrine of command responsibility to civilians holding a position of authority.⁷⁸ Therefore, although Mr. Vega was not a military commander, he is still responsible under Art. 28(b) of the Statute, which is applicable when a hierarchy of a military or quasi-military nature cannot be established.⁷⁹

Furthermore, the scope of Art. 28 is determined in the article itself, where it explicitly mentions that the responsibility resulting from the superior-subordinate relationship should be ‘in addition to other grounds of criminal responsibility under this Statute’.⁸⁰ Under these supplements, an additional form of participation is provided to that specified in Art. 25(3)(b).⁸¹

In addition, the perpetrator must have intended to engage in the conduct.⁸² A superior must also know with substantial likelihood that his order will result in the commission of a crime.⁸³ Moreover, the superior’s knowledge can be established by circumstantial evidence stated in *Nyiramasuhuko* case, such as the type of illegal acts, and the time during which the illegal acts occurred.⁸⁴ Mr. Vega gave the order in an unstable situation and under the possibility of a civil war, where reasonable grounds stand for the high risk of the commission of crimes.

⁷⁴ Case Facts, para. 13.

⁷⁵ Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article. by Article*, München: Beck, 2008, Individual responsibility and participation, para 32, p. 141.

⁷⁶ Rome Statute, Art. 28 (b).

⁷⁷ ICC, *Situation in the Republic of Côte d'Ivoire in the case of the Prosecutor v. Laurent Gbango*, ICC-02/11-01/11-642-Red, Public redacted version of Prosecution’s Final Written Submissions on the Confirmation of Charges Proceedings, 1 May 2014, para. 26; Bemba (PTC II Decision), note 99, para. 838.

⁷⁸ ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, Trial Chamber, 2 Sep. 1998, para. 492.

⁷⁹ Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article. by Article*, München: Beck, 2008, p. 1102, para. 124.

⁸⁰ Rome Statute, Art. 28 (b).

⁸¹ Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article. by Article*, München: Beck, 2008, Individual responsibility and participation, pp. 179 and 186.

⁸² Rome Statute, Art. 30(2)(b).

⁸³ ICTY, *Prosecutor v. Milomir Stakić*, IT-97-24-A, Trial Judgement, 31 July 2003, para. 445.

⁸⁴ ICTY, *Mucićet al. ("Čelebići")*, ICTR-98-42-A, Trial Judgment 16 November 1998, para. 386.

According to Art. 28(b)(i), the superior must know, or otherwise consciously disregard information which indicates that the subordinates were committing or about to commit crimes.⁸⁵ Additionally, the IMTFE stated that if the commander was in a position that requires them to have had such knowledge, they are under responsibility to take any action to prevent such crimes.⁸⁶ Mr. Vega overlooked the situation reflected in the government's memorandum to the NIO to monitor and assess the situation. For all previous reasons, the OTP submits that Mr. Vega is criminally responsible under Art. 25(3)(b) for ordering the commission of the crime against humanity of enforced disappearances and is also criminally responsible as a commander under Art. 28(b)(i) of the Statute.

IV. SUBMISSIONS

Wherefore in light of the questions presented, arguments advanced and authorities cited, the OTP respectfully requests this Court to:

- A. Confirm the Court's jurisdiction with regards to case against Mr. Vega pursuant to Art. 19(1) of the Statute;
- B. Determine the case against Mr. Vega admissible before the Court pursuant to Art. 17 (1)(a)-(c) and 17 (1)(c) of the Statute;
- C. Find that there are reasonable basis to believe that Mr. Vega is criminally responsible for ordering the crime of enforced disappearances under Art. 25(3)(b) of the Statute.

Respectfully Submitted,
Counsel for the Prosecution

⁸⁵ Rome Statute, Art. 28(b)(i).

⁸⁶ Tokyo Trial, *Official Transcript*, 4 November 1948, pp. 48 and 445.