Team N23

Defence

Nuremberg Moot Court

2017

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1. The Defence hereby challenges the admissibility of the case against Mr. Naberrie on the basis of Art. 17 ICC Statute (ICC St.), and considers the related arrest warrant to be unlawful. Should the Pre-Trial Chamber (PTC) find the case to be admissible, the Defence submits that the evidence upon which the charge of enforced disappearance is based is inadmissible, because it was obtained through torture. In any case, the requirements of the crime against humanity and war crimes allegedly committed have not been met, nor have the elements constituting the proposed modes of liability. Hence, the Defence submits that the Office of the Prosecutor (OTP) has failed to adduce sufficient evidence to establish substantial grounds to believe that Mr. Naberrie committed any of the crimes he is being charged with, as requested by Article 61(5) ICC St.

I. Challenge to admissibility pursuant to Arts. 17, 19(2)(a) and 19(4) ICC St.

2. The Defence submits the case to be inadmissible pursuant to Art. 19(2)(a), (4) ICC St., as there

are ongoing investigations in the sense of Art. 17(1)(a) ICC St. taking place in the FRN against Mr. Naberrie. The phrase 'the case is being investigated' signifies the taking of possible relevant investigative steps, including 'the interviewing of victims and suspects [and] collecting documentary evidence'.[1] What matters is that these steps are 'directed at ascertaining whether *those suspects* are responsible for that conduct'.[2] The FRN has taken investigative steps to ascertain the responsibility of Mr. Naberrie, the very suspect under scrutiny by the OTP. A commission of inquiry investigated the issuance of orders leading to the commission of the acts in question. Mr. Naberrie's responsibility was identified, and he was removed from office.

3. In addition, the Defence submits that the OTP, by proceeding to the issuance of an arrest warrant whilst the same matter is being investigated by FRN, acted contrary to the spirit of the Statute and notably its underlying principle of complementarity, which requires the OTP to encourage states to conduct investigations themselves.[3] In particular, by issuing said arrest warrant, the Prosecutor also disregards the practice she herself has established over the years. Notably, she treats this situation markedly different from that in Colombia, where she deferred from initiating an investigation into crimes within the jurisdiction of the Court due to domestic investigations being conducted by the government of Colombia.[4]
4. The Defence further submits that if no further prosecution is conducted by the FRN, the case is still inadmissible under Art. 17(1)(b) ICC St. Having genuinely considered Mr Naberrie's involvement in the conduct in question through the commission of inquiry and decided that the adequate response to his actions is dismissal from his position and not criminal prosecution, the case is inadmissible under Art. 17(1)(b) ICC St.
5. Even if this was not accepted by the Chamber, the case would be inadmissible under Art. 17(1)(d) due to the lack of gravity. Gravity is determined by the systematic or widespread nature of the relevant conduct and by the 'social alarm' it may cause, especially at the international level.[5] The scale of the conduct here concerned is not comparable to that of other situations considered by the OTP.[6] Nor was social alarm being caused by Mr. Naberrie's conduct. Some reactions came from non-governmental organizations, yet they do not represent society at large.

[1] ICC, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 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, paras 1, 40

[2] Ibid.; Mohamed Abdou, 'Article 17, Issues of Admissibility' in Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, p. 207.

[3] ICC OTP, *Policy Paper on Preliminary Examinations*, November 2013, para. 100f. See also Art. 18(1)-(2) ICC St.

[4] ICC OTP, *Situation in Colombia*, Interim Report, November 2012.

[5] ICC, *Prosecutor v Lubanga*, ICC-01/04-01/06, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 February 2006, para. 46.

[6] ICC OTP, *Report on Preliminary Examinations in 2016*,14 November 2016, paras 216, 218.

Indeed, compared to actions considered to cause social alarm, such as the crime of enlisting children,[7] the fight against drug cartels is one generally approved of by society. The case therefore is not of sufficient gravity to be admissible, Art. 17(1)(d) ICC St.

II. Charges brought against Mr. Naberrie

A. Count 1: Crimes against Humanity, punishable under Arts. 7(1)(i) and 25(3)(b) ICC St.

6. There are allegations that agents of Panth-Era kidnapped drug barons, following which their whereabouts were kept secret. However, the Defence strongly contests the charge against Mr. Naberrie of crime against humanity of enforced disappearance. First, there was no widespread or systematic attack directed against any civilian population. Second, the contested acts do not constitute enforced disappearance and cannot be connected to the Defendant.

1. Preliminary issue: Inadmissibility of the evidence obtained through torture

7. The evidence on which the OTP relies to establish any nexus between Mr. Naberrie and the Panth-Era group was obtained by torturing Mr. Bandosa, 'in violation of internationally recognized human rights',[8] and is therefore inadmissible under Art. 69(7) ICC St.
8. In this light, it is submitted that the definition of torture in the ICC St. is not limited to torture inflicted by state officials or acquiesced in by the latter, as may be the case under the UN Convention Against Torture (UNCAT).[9] Rather, it covers the 'intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused'.[10] Accordingly, the infliction of beatings and parrillas upon Mr. Bandosa by unknown individuals amounted to torture, and thus a violation of human rights, within the purview of the ICC St., and more particularly Art. 69(7) thereof.
9. The Chamber should determine such evidence to be inadmissible, because admitting it would be 'antithetical to and would seriously damage the integrity of the proceedings'.[11] It is well-established in customary international law (for the UNCAT reflected in Art. 15 thereof) that 'any statement made as a result of torture shall not be invoked as evidence in any proceedings' (the 'exclusionary rule').[12] Here, said rule necessarily attaches to the (broader) definition of torture as laid down in the ICC St. Thus, admitting the evidence at issue would violate that rule and amount to a denial of the right to a fair trial.[13]

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[7] ICC, *Lubanga*, see *supra* note 5, para. 66.
[8] Art. 69(7) ICC St.
[9] Art. 1 Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment (1984).
[10] Art. 7 (2)(e) ICC St.
[11] Art. 69(7)(a) ICC St.
[12] Association for the Prevention of Torture, *The Exclusionary Rule: International Law Prohibits the Use of Evidence Obtained Through Torture*, APT Background Bulletin, 27 July 2012, p. 1. Available at: <http://www.apt.ch/content/files/region/unlegal/Use_of_Evidence_0812.pdf>.
[13] IACtHR, *Cabrera Garcia and Montiel Flores v. Mexico*, Case No. 12.449, 26 November 2010, para. 167.

10. Moreover, the fact that such evidence was obtained through torture 'casts substantial doubt on the reliability of the evidence'.[14] The veracity of any utterances made under duress and coercion is highly questionable, as evidence obtained through torture is necessarily tainted.
11. Lastly, the video footage is uncorroborated by any other evidence, which casts substantial doubt on the authenticity of the video footage, of which the source is unknown.[15] The video was uploaded on YouTube, a digital media platform[16] with a standardised uploading process, during which embedded metadata[17] is often corrupted or deleted from the original file with the impossibility to be restored.[18] Necessarily, for this information to be admissible, a process of verification should establish the authenticity of the documentation. This requires a direct testimony of the person who created the video, which in this case is impossible, as it was uploaded by an unknown source. In addition, the e-protocol of the court clearly states that information in its digital format must comply with the system's standards, i.e. relevant metadata should be provided, such as the identity of the author, the date and the persons from whom the document emanated.[19]
12. Accordingly, admitting said evidence would be a flagrant violation of Art. 69(7) of ICC St.

2. There was no widespread or systematic attack directed against a civilian population

a) There was no 'attack' in the sense of Art. 7(2)(a) ICC St.

13. For crimes against humanity, an attack must be widespread or systematic. It requires a course of conduct involving the multiple commission of acts listed in Art. 7(1) ICC St., pursuant to or in furtherance of a state or organisational policy.[20] That an attack be widespread refers to 'the large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims',[21] usually referring to 'an attack carried out over a large geographical area'.[22] Here, the operations took place only in certain areas of the FRN, were not frequent (they only lasted several days) and targeted a carefully selected number of drug cartels; certainly, they were not 'massive'. That an attack be

[14] Art. 69(7)(a) ICC St.
[15] ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on Prosecutor's Bar Table Motions, 17 December 2010, para. 13.
[16] Federica D'Alessandra et al. (eds.), *Handbook on Civil Society Documentation of Serious Human Rights Violations: Principles and Best Practices*, Public International Law and Policy Group, 2016, p. 70.
[17] I.e. information of information, such as the date, time and location of creation that can be instrumental to establish the reliability and authenticity of the digital information provided.
[18] Federica D'Alessandra et al. (eds.), *Handbook*, see *supra* note 16, p. 70.
[19] ICC, E-Protocol, ICC-01/09-01/11-438-Anx 1, pp. 7-12.
[20] Art. 7(3) ICC Elements of Crimes, as read with Art 7(1) ICC St.
[21] ICC, *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 83; citing ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 580.
[22] ICC, *Bemba*, Confirmation of Charges, see *supra* note 21, para. 83; ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 395.

'systematic' refers to 'the organised nature of the acts of violence and the improbability of their random occurrence'.[23] Here, the operations appear to have been improvised in a rather short term, involving a significant part of uncontrolled acts on the part of Panth-Era members.

b) There was no attack 'against any civilian population'

14. Should the Chamber find that the FRN government's security operations amounted to an attack and that there were any civilian casualties, it is submitted that the primary object of the attack was not the civilian population, but the armed drug cartels.[24]

15. The drug cartels cannot satisfactorily be termed a 'civilian population'. First, because they are not a 'group distinguishable by nationality, ethnicity or other distinguishing features.'[25] Second, because they were heavily armed and actively involved in hostilities with the FRN government.[26] Indeed, according to an April 2014 report produced by the State Agency of Alcohol, Tobacco and Firearms in cooperation with independent researchers, more than 10,000 unregistered firearm units and 25 self-made armed vehicles were imported into the FRN by the drug cartels. In actual fact, the drug cartels cannot even be referred to as a 'population' as they are no more than a limited group of individuals.[27]

2. The state or organisational policy required by Art. 7(2)(a) ICC St. is lacking

16. The FRN new national security strategy of 22 May 2015 was clearly aimed at promoting law and order in the FRN by targeting drug cartels. There is no proof that the same policy or any other state policy in the FRN promoted or encouraged an attack against civilians.

17. Should the Chamber find that there was in fact an attack against the civilian population (a finding which the Defence strongly opposes) and that the FRN government failed to stop this attack, it should be stated that the mere failure of the state to act is not evidence of the FRN government's acquiescence in the attack or of the existence of a state policy promoting or encouraging an attack against the civilian population.[28]

3. No acts of enforced disappearance occurred

18. In the first place, the very existence of the organisation referred to by the OTP as Panth-Era is doubtful, let alone that the alleged acts of enforced disappearance are substantiated and

[23] ICC, *Katanga and Ngudjolo Chui*, Confirmation of Charges, *supra* note 22, para. 394; citing ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeal Judgment, 17 December 2004, para. 94, which is in turn citing ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23& IT-96-23/1-A, Appeal Judgment, 12 June 2002, para. 94; ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11, Decision on the Confirmation of Charges against Laurent Gbagbo, 12 June 2014, para. 223.

[24] For the principle that, 'the civilian population must be the primary object of the attack and not just an incidental victim of the attack', see ICC *Bemba*, Confirmation of Charges, see *supra* note 21, para. 76, citing ICTY case law, in particular ICTY, *Kunarac et al.*, see *supra* note 23, paras 91–92.

[25] ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC- 01/09-19-Corr, para. 81; ICC, *Bemba*, Confirmation of Charges, see *supra* note 21, para. 76; ICC, *Katanga and Ngudjolo Chui*, Confirmation of Charges, see *supra* note 22, para. 399.

[26] ICC, *Bemba*, Confirmation of Charges, see *supra* note 21, para. 78.

[27] Ibid, at para. 77.

[28] Art. 7(3), footnote 6 ICC Elements of Crimes.

corroborated with any actual documentation.

19. Even if any such acts occurred, they were not carried out with the support or acquiescence of the state.[29] There is no evidence establishing any factual and causal link between Mr. Naberrie, his actions and the alleged kidnapping of the cartel barons by Panth-Era as well as with any alleged subsequent refusal by the latter to acknowledge such deprivation of liberty and disclose the drug barons' whereabouts.
20. Even if any enforced disappearances could be said to have been carried out with the support or acquiescence of the state, they were not carried out to remove the drug barons from the protection of the law.[30] They intended to prevent the opportunity for corruption and information leaks, as well as to destabilise the cartels' networking.

4. Mr. Naberrie did not order/solicit the crime of enforced disappearance

21. First, the Defence submits that there is no evidence of any link – be it concerning a position of authority or the issuing of instructions – between Mr. Naberrie and the members of Panth-Era. The only evidence which the OTP is relying on was obtained through torture, and is inadmissible, for the reasons stated above (Part II.A.1.). Even if the available evidence is considered to be admissible, it does not prove that Mr. Naberrie was in any position of authority as to the members of Panth-Era,[31] as there is no evidence of any hierarchical structure within the Panth-Era. The fact that Mr. Naberrie was not present at the crime scene makes it even more unlikely that he exercised any authority or control over the group.[32]
22. Second, even if the Court finds that Mr. Naberrie created the Panth-Era group and 'tasked' them with the 'execution of secret missions', there is no evidence that he actually ordered them to 'arrest, detain or abduct'[33] the drug barons. Likewise, even if this Court arrives to the conclusion that Mr. Naberrie 'instructed' adjutant Bandosa to destroy all evidence related to Panth-Era, its mission and his connection to the group, there is still no proof that he ordered that the whereabouts of the kidnapped drug barons be kept secret.[34]
23. Additionally, the Defence reminds that, following established case law of the *ad hoc* Tribunals, the order must have had a '*direct and substantial* effect' on the perpetration of the crime.[35] But

[29] Art. 7(5)-(6) ICC Elements of Crimes.
[30] Art. 7(1)(i)(6) ICC Elements of Crimes,
[31] ICC, *Prosecutor v. Mudacumura*, ICC-01/04-01/12, Decision on the Prosecutor's Application under Article 58, 13 July 2012, para. 63; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, para. 145.
[32] '[T]he accused's presence at crime scenes is not necessary to prove the accused's control or authority over physical perpetrators, although it may be considered as a factor to support proof of such control or authority'; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-A, Appeal Judgment, 19 May 2010, fn. 442.
[33] See Art. 7(2)(i) ICC St.; Art. 7(1)(i), Element 1(a) Elements of Crimes.
[34] ICC, *Mudacumura*, see *supra* note 31, para. 63; ICC, *Ntaganda*, see *supra* note 31, para. 145.
[35] See amongst others ICTR, *Kamuhanda v. The Prosecutor*, ICTR-99-54A-A, Appeal Judgment, 19 September 2005, para. 75; ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Appeal Judgment (Reasons), 1 June 2001,

even if the Chamber would be satisfied with a mere 'direct effect',[36] the Defence submits that any order Mr. Naberrie may have given did not have such direct, let alone substantial, effect on the commission of any crime. This conclusion is supported by the observation that any authority of Mr. Naberrie remains unproven.[37] Even if Mr. Naberrie and members of Panth-Era ever were in contact, a highly trained group like Panth-Era was very likely to act on its own initiative, without necessarily following orders from above.

24. Lastly, it cannot be said that Mr. Naberrie was 'virtually certain' that, in the ordinary course of events, the crime against humanity of enforced disappearances would be committed as a consequence of any order.[38] Indeed, and if there already was any contact between Mr. Naberrie and the members of Panth-Era, it is highly likely that the latter, and possibly adjutant Bandosa, acted on their own initiative, if not, went beyond what Mr. Naberrie tasked them with.

25. Relevant here is the *mens rea* of the person issuing the order, not of those executing it.[39] The said *mens rea* on the part of Mr. Naberrie must be the only reasonable inference from the evidence.[40] Considering also that Mr. Naberrie was not present at the crime scene,[41] the Defence respectfully submits that no such conclusion can be reached.

26. If the Court accepts the Defence's argument that Mr. Naberrie was not in a position of authority, the Defence submits that, everything else being held equal,[42] he cannot be held liable for soliciting or inducing the alleged crime either. Mr. Naberrie, a recently appointed government official, who was not present at the crime scene, was not able to exercise psychological, let alone physical, influence[43] with the force of persuasion[44] over seasoned ex-police officers and national security guards. Nor did he use 'different forms of persuasion such as threats,

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para. 186; ICTR, *Prosecutor v. Munyakazi*, ICTR-97-36A-T, Trial Judgment, 5 July 2010, para. 432; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Judgment, 10 June 2010, Vol. I, para. 1013 (emphasis added).

[36] ICC, *Mudacumura*, see *supra* note 31, para. 63; ICC, *Ntaganda*, see *supra* note 31, para. 145.

[37] ICC, *Mudacumura*, see *supra* note 31, para. 66 (*a contrario*).

[38] Ibid., para. 63; ICC, *Ntaganda*, see *supra* note 31, para. 145; As first held in ICC, *Bemba*, Confirmation of Charges, see *supra* note 21, para. 362; and confirmed in ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06 A 5, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his Conviction, 1 December 2014, paras 447 and 451; and more recently in ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, Judgment pursuant to Article 74 of the Statute, 19 October 2016, paras 29 and 67.

[39] ICTY, *Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgment, 3 March 2000, para. 282; ICTY, *Kordić and Čerkez*, IT-95-14/2-T, Trial Judgment, 26 February 2001, para. 388.

[40] ICTY, *Prosecutor v. Vasiljević*, IT-98-32-A, Appeal Judgment, 25 February 2004, para. 120 (generally); ICTY, *Prosecutor v. Strugar*, IT-01-42-T, Trial Judgment, 31 January 2005, para. 333 (as to ordering specifically).

[41] '[T]he accused's presence at the crime scene is not a requisite element of planning, instigating and ordering, although it can be one of the factors to be considered in determining the *mens rea* of the planner, instigator or orderer'; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-A, Appeal Judgment, 19 May 2010, para. 132 (footnotes omitted).

[42] ICC, *Gbagbo*, Confirmation of Charges, see *supra* note 23, para. 243; see also recently ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Judgment, 24 March 2016, para. 572 *v.* 573.

[43] ICC, *Ntaganda*, see *supra* note 31, para. 153.

[44] Kai Ambos, *Article 25: Individual Criminal Responsibility* in Otto Triffterer and Kai Ambos (eds.), The Rome Statute of the International Criminal Court: A Commentary (3rd ed., 2016), p. 1003.

enticement or promises to the physical perpetrators of the crimes'.[45]

27. For the reasons above, the Pre-Trial Chamber should not confirm the charge of enforced disappearance proposed by the OTP.

B. Count 2: War Crimes, punishable under Arts. 8(2)(e)(i) and 25(3)(b) ICC St.

28. In the context of his national security strategy, Mr Naberrie faced the necessity of organising military operations against the bases of the drug cartels. Those operations led to heavy fighting with the paramilitary units of the cartels. However, the Defence submits that these operations did not constitute an attack against the civilian population as such or against individual civilians not taking direct part in hostilities under Art. 8(2)(e)(i) ICC St.

1. There was no armed conflict in the FRN

29. As it is well known, war crimes can only be committed in the context of an armed conflict. The Defence submits that the situation in the FRN did not constitute an armed conflict not of an international character (NIAC) as is required by the ICC St. to sustain the charges of war crimes under Art. 8(2)(e)(i) and 8(2)(c)(ii) ICC St. levelled against Mr. Naberrie.

30. The legal framework governing NIACs is Art. 3 common to the Geneva Conventions (GCs), Additional Protocol II to the GCs and, for the purposes of war crimes under the ICC Statute, Arts. 8(2)(d) and (f). The two basic requirements for the existence of a NIAC are sufficient organisation of the non-state armed group and intensity of violence.[46]

31. The Defence notes, first, that the drug cartels in the FRN were not sufficiently organised to qualify as an organized armed group that could be a party to a NIAC as established by law.[47] The drug cartels in the FRN were not hierarchically organised and did not have military armed forces, distinguishable by uniforms or coordinated at a central level from any headquarters.[48] The fact that they possessed weapons and were in control of part of the territory is connected to their criminal activities but does not imply that they had the ability, or the intention, to conduct concerted military operations.

32. Second, the fighting between the governmental forces and the cartels was based on law enforcement operations limited to some regions of the FRN, aimed at the arrest of criminals. Hence, it did not reach the threshold of intensity required to qualify it as a NIAC rather than

[45] ICTR, *Prosecutor v. Šešelj*, IT-03-67-T, Trial Judgment, Vol. I, para. 295.
[46] ICRC, *Commentary on the First Geneva Convention* (2016), Comment on Article 3, paras 421-437.
[47] ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 537; ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, 7 March 2014, para.1186; ICC, *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, paras 134–136. See also ICTY, *Prosecutor v. Haradinaj et al*., IT-04-84-T, Trial Judgment, 3 April 2008, paras 49 and 90–99; ICTY, *Prosecutor v. Limaj et al*., IT-03-66-T, Trial Judgment, 30 November 2005, paras 90 and 135–170.
[48] ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011, para. 104; ICTY, *Limaj et al*., see *supra* note 47, paras 90, 95, 119.

mere riots or other internal tensions.[49] Additionally, for war crimes committed under Art. 8(2)(e) ICC St., the armed conflict needs to be 'protracted'.[50] In the case of the FRN, where fighting only lasted some days, it cannot be considered to have reached this threshold.

33. Third, NIACs are generally characterised by the political motive for which non-state armed groups fight, usually the motive of substituting themselves to the government of the country, carrying out a secession, or creating an independent state.[51] From the factual evidence available, it appears that the cartels' only intention was to continue carrying on their criminal business. They did not have any political agenda to usurp the role of the FRN government[52] or to assume any political status,[53] neither in common nor individually.

34. In view of the above, the Defence submits that there was no armed conflict in the FRN, and that Mr. Naberrie was just implementing a national security strategy against organised crime.

2. No attack was intentionally directed against the civilian population

35. Even if the Court finds that a NIAC existed (a finding which the Defence strongly opposes), the other required elements for the charges against Mr. Naberrie are not met. The military operations did not constitute an attack against the civilian population as such or against individual civilians not taking direct part in hostilities under Art. 8(2)(e)(i) ICC St.

36. The concept of 'attack' refers to 'acts of violence against the adversary, whether in offence or defence'[54] with 'a sufficiently close link' to the conduct of the hostilities.[55] In the operation launched by the Defendant, such a link is not present. Indeed, there is no factual evidence suggesting that the operation was part of the conduct of hostilities. It was not an attack, but rather a law enforcement operation that unfortunately caused some casualties.

37. When there is no armed conflict, the categories of 'civilians' and 'combatants' do not have any meaning, and therefore there cannot be any war crime of attacking civilians. However, would the Chamber consider that there was a NIAC in the FRN, and that the operation launched by the Defendant constituted an attack in the sense of Art. 8(2)(e)(i) ICC St., such an attack would have been lawful because it was aimed at those members of the cartels that had a continuous combat function (CCF), i.e. they directly participated in hostilities in a continuous manner,

[49] ICC, *Lubanga,* Trial Judgment, see *supra* note 47, para. 538.
[50] ICC Statute, art. 8(2)(f); William A. Schabas, *An Introduction to the International Criminal Court* (4th ed., 2011) p. 125; Marco Sassoli, Antoine Bouvier, Anne Quintin, *How Does Law Protect in War?* (Vol. 1, 3rd ed., 2011), p. 23; ICC, *Lubanga,* Trial Judgment, see *supra* note 47, paras 536-538; ICC, *Katanga,* see *supra* note 47, paras 1185-1187.
[51] ICRC, *Commentary on the Additional Protocols* (1987), General introduction to the Commentary on Protocol II, para. 4341.
[52] Ibid.
[53] ICTY, *Limaj et al*., see *supra* note 47, paras 90, 95 and 119.
[54] *Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Additional Protocol I). Geneva, 8 June 1977, art. 49; ICC, *Prosecutor v. Abu Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, 8 February 2010, para. 65; ICC, *Katanga,* see *supra* note 47, paras 797-798; ICC, *Ntaganda*, see *supra* note 31, 9 June 2014, para. 45.
[55] ICC, *Ntaganda*, see *supra* note 31, para. 45; ICC, *Abu Garda*, see *supra* note 54, para. 66.

acting as if they were the group's armed forces.[56] It is clearly established that such persons can be targeted at all times because of their function.[57] The fact that they did not wear uniforms was not a legal impediment.[58] This is valid for all the members of the armed group, even for those who had not yet directly participated in hostilities, since what is required is that the individuals are integrated into the armed group by being recruited, trained and equipped.[59]

38. In case the Chamber does not accept the concept of CCF, it can still be maintained that the persons attacked were directly participating in hostilities. This concept encompasses a broad range of activities, which just need to be, by their nature or purpose, intended to cause harm to the enemy.[60] Even civilians who were forced by the cartels to perform some activities must be considered as directly participating in hostilities.[61] These persons were aware that they were contributing to the military advantage of the drug cartels, since they performed also military functions. Manufacturing drugs in itself can constitute direct participating in hostilities as it finances the cartels' military effort.[62]
39. In light of the above, the targeted persons were not civilians. Even if they were considered by the Court to be civilians, they were not the object of the attack, which was aimed at the bases of the cartels. The bases of the enemy, in a NIAC, are military objectives by their use, and their destruction was expected to create a definite military advantage. If there were some civilian casualties, those were unfortunate collateral damage.[63] Accordingly, the material elements of the crime under Art. 8(2)(e)(i) are not established.
40. With regard to the mental element, Art. 8(2)(e)(i) ICC St. provides that the attack against the civilian population or civilians who are not directly participating in hostilities must be launched 'intentionally'. This requires that the perpetrator had the intent to launch an attack and to direct it precisely against the civilian population as such or individual civilians not taking direct part in hostilities.[64] There is a reasonable basis to believe that the FRN armed forces did not possess the intent of attacking civilians as such. The fact that Mr. Naberrie publicly declared that everybody connected to the cartels was an enemy does not mean that the military intended to attack civilians. The objective of the operation was to defeat the enemy by neutralising its armed

[56] ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, p. 33.
[57] Ibid.
[58] Ibid.
[59] Ibid, p. 34.
[60] ICTY, *Prosecutor v. Strugar*, IT-01-42-A, Appeal Judgement, 17 July 2008, para. 178, and cited in ICC, *Abu Garda*, see *supra* note 54; ICRC, *Interpretative Guidance*, see *supra* note 56, p. 47.
[61] ICRC, *Interpretative Guidance* see *supra* note 56, p. 60.
[62] U.S. Navy, U.S. Marine Corps & U.S. Coast Guard, *The Commander's Handbook on the Law of Naval Operations*, October 1995, cited in Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: the Constitutive Elements*, International Law and Politics, Vol. 42:697 (2010), p. 697.
[63] Art. 51(5)(b) Additional Protocol I.
[64] Art 30(2)(a) ICC St.

branch, arresting the criminals and seizing weapons and drugs.

3. Mr. Naberrie did not order an attack against the civilian population as such

41. Even if the Chamber finds substantial grounds to believe that the war crime in question has been committed, the Defence submits that Mr. Naberrie himself did not order its commission. First, he only directed the military units to attack the bases of the drug cartels, a legitimate target, given that the drug barons should not be considered as civilians. Relatedly, even if any civilians were attacked, said instructions cannot be said to have had a direct and substantial effect on any such crime eventually committed,[65] as they concerned a different matter: a legitimate attack on the drug cartels.

42. Third, to the extent that Mr. Naberrie ordered to attack the bases of the drug cartels, he cannot be said to have been aware 'with virtual certainty'[66] that, in the ordinary course of events, the war crime of a direct attack against civilians would have been committed. Again, it cannot be concluded as the only reasonable inference from the evidence that Mr. Naberrie (rather than the soldiers), who was not present at the crime scene, possessed the required *mens rea*.

C. Count 3: War Crimes, punishable under Arts. 8(2)(c)(ii) and 25(3)(a) ICC St.

43. After the military operation against the drug cartels, pictures were posted online of FRN soldiers posing with the bodies of dead cartel members. Mr. Naberrie is accused of perpetrating the war crime of committing outrages upon personal dignity under Art. 8(2)(c)(ii) ICC St. for having shared these pictures on social media. The Defence submits that his conduct does not satisfy the legal requirements for the proposed charge.

1. No outrages upon personal dignity have been committed

44. The conduct underlying the crime in question has never been strictly defined.[67] However, it is uncontroversial that the violation of personal dignity must not only be perceived as such by the victim, but must also be objectively serious.[68] Although the ICC Elements of Crimes (EoC) specify in a footnote that dead persons can also be victims of this crime,[69] Art. 8(2)(c)(ii) does not mention this, nor does common Art. 3 to the GCs, to which the ICC provision refers.

45. The act of sharing pictures online cannot be considered to be a war crime of outrages upon personal dignity. The fact that a list of acts constituting such crime has never been defined was meant to leave open the possibility of including outrageous treatments that go beyond what the

[65] See *supra* note 35.
[66] See *supra* note 38.
[67] ICRC, *Commentary on the First Geneva Convention*, see *supra* note 43, paras 554, 664.
[68] ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-T, Trial Judgment, 25 June 1999, para. 56; ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23-T& IT-96-23/1-T, Trial Judgment, 22 February 2001, para. 504, and Appeal Judgment, see *supra* note 21, paras 162–163; ICRC, *Commentary on the First Geneva Convention*, see supra *note* 43, para. 664.
[69] Art. 8(2)(c)(ii), Element 1, footnote 57 ICC Elements of Crimes.

legislator could think of, but not to include acts that do not satisfy the required degree of seriousness to be 'most serious crimes of concern to the international community as a whole'.[70] It is questionable whether the requirement of an objective consideration of the act as outrageous is met here. Moreover, since the pictures portrayed dead bodies, it is hard to see how the victims can be considered to have suffered from any harm. The examples in case law of outrages upon personal dignity involve an incomparable physical and psychological suffering for the victims, who will have to live forever with the humiliation.[71]

46. Even if sharing a picture of a dead body could be considered as disrespectful, the difference in the suffering caused is self-evident. The footnote mentioning dead persons in the EoC is most probably aimed at avoiding that mutilation of dead bodies would go unpunished, since these are considered a violation of common Art. 3 to the GCs.[72] An example of mutilation involved beheading a body, boiling it, removing the skin and the flesh and keeping it as an ornament.[73] Sharing pictures of dead bodies is not comparable to mutilating them, since the extent of outrage that originates from the two conducts is completely different. Considering the above, the material element of the crime is not fulfilled.

2. Mr. Naberrie did not commit outrages upon personal dignity

47. Even admitting that taking pictures of dead bodies and uploading them on social media is an outrage to personal dignity and that the relevant crime was committed, Mr. Naberrie cannot be deemed to be responsible for it. The pictures were already online and public, since someone else had uploaded them. The high number of Mr. Naberrie's followers does not imply that more people saw the pictures: once a picture is online it can be found and seen by everyone.

48. First, the Defence submits that Mr. Naberrie cannot be held liable as a *direct perpetrator*, as he has not physically carried out all the material elements of the offence.[74] He was not present at the crime scene,[75] he has not taken the pictures himself and has not physically 'humiliated, degraded or otherwise violated the dignity of one or more persons'.[76]

49. Second, Mr. Naberrie did not commit the crime 'through another person' and cannot be considered to be an *indirect perpetrator*.[77] There is not the least evidence that he exerted control

[70] Preambular para. 4 ICC Statute.
[71] ICC, *Katanga and Ngudjolo Chui*, Confirmation of Charges, *supra* note 20, paras 370-371.
[72] ICRC, *Commentary on the First Geneva Convention*, see *supra* note 46, para. 661.
[73] United States General Military Government Court, *Trial of Max Schmid*, Dachau Germany, 19 May 1947, UNWCC, Law Reports of Trials of War Criminals, Vol. XIII, pp.151-152 (in ICC Case Matrix, online at www.cmn.cx).
[74] ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, para. 332; ICC, *Katanga and Ngudjolo Chui*, Confirmation of Charges, see *supra* note 22, para. 488; ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeal Judgment, 15 July 1999, para. 188.
[75] ICC, *Lubanga*, Confirmation of Charges, see *supra* note 74, para. 330 (*a contrario*).
[76] Art. 8(2)(c)(ii), Element 1 Elements of Crimes.
[77] ICC, *Lubanga*, Confirmation of Charges, see *supra* note 74, para. 332; see also ICC, *Katanga and Ngudjolo Chui*, Confirmation of Charges, see *supra* note 22, para. 488.

over the will of the will of the physical perpetrators, who were in no sense 'mere tool[s] or instrument[s] for the commission of the crime'.[78] Rather, the soldiers acted on their own initiative and bear their own (criminal) responsibility. In the same line, there is no evidence that Mr. Naberrie was in charge of any 'organised and hierarchical apparatus of power', propelled by functional automatism, in the frame of which the crimes would have been committed.[79]

50. Third, the Defence submits that Mr. Naberrie cannot be considered responsible as a *co-perpetrator*. There is no evidence of an agreement or common plan[80] between Mr. Naberrie and the soldiers. There was no concerted action[81], as both acted on their own. Moreover, the *Lubanga* Appeals Chamber rejected the Trial Chamber's standard that a common plan should involve 'a *sufficient risk* that, if events follow the ordinary course, *a crime* will be committed'.[82] In this light, even if there was a common plan, it did not involve a 'critical element of criminality' in the execution of which it was '*virtually certain*' that *the war crime of outrages upon personal dignity* would be committed.[83]

51. Even if the war crime of outrages upon personal dignity has been committed, any contribution by Mr. Naberrie was not essential. The crime contained in Article 8(2)(c)(ii) ICC St. had then already fully been completed by the soldiers, who took the pictures and put them on social media. Mr. Naberrie was in no position to frustrate the execution of such crime.[84]

III. Relief Sought

52. In view of all the above-stated arguments, it is submitted that the case against Mr. Naberrie is inadmissible, that his arrest warrant is unlawful and that the OTP has not presented sufficient evidence to establish substantial grounds to believe that the Defendant is responsible for any of the proposed charges. The Defence, therefore, respectfully requests the Pre-Trial Chamber – in accordance with Article 61(7)(b) ICC St. – to decline to confirm the charges brought against Mr. Naberrie and to order his immediate and unconditional release.

[78] ICC, *Katanga*, see *supra* note 47, 7 March 2014, para. 1402.
[79] Ibid., paras. 1405 and 1408.
[80] ICC, *Lubanga*, Confirmation of Charges, see *supra* note 74, para. 343; ICC, *Bemba*, Confirmation of Charges, see *supra* note 21, para. 350.
[81] ICC, *Lubanga*, Confirmation of Charges, see *supra* note 74, paras 345; ICC, *Katanga and Ngudjolo Chui*, Confirmation of Charges, see *supra* note 22, para. 523.
[82] ICC, *Lubanga*, Trial Judgment, see *supra* note 47, para. 984 (emphasis added).
[83] ICC, *Lubanga*, Appeal Judgment, see *supra* note 38, para. 451 (emphasis added). See also ICC, *Bemba*, Confirmation of Charges, see *supra* note 21, para. 362.
[84] ICC, *Lubanga*, Confirmation of Charges, see *supra* note 74, para. 347; ICC, *Lubanga*, Appeal Judgment, see *supra* note 38, para. 469.