NUREMBERG MOOT COURT 2017

Team: N45

Prosecution

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The Prosecutor hereby charges Naberrie with war crimes and crimes against humanity, and requests the court, pursuant to Art. 61(7) of the Rome Statute,[1] to find that there is sufficient evidence to establish substantial grounds to believe that Naberrie committed these crimes, and confirm the charges.

I.THE COURT HAS JURISDICTION

After intensive and successful efforts triggered *ex officio* - investigating *propriu motu* under Art. 13(c) (cf. Art. 15) - the Office of the Prosecutor[2] is convinced that there is substantiated information on crimes committed in the FRN from June 2015 onwards, indicating cases falling within the jurisdiction of the Court.

I.A. THE CASE IS OF SUFFICIENT GRAVITY, ART. 17(d)

As it can be outlined by the *Lubanga* PTC consideration, the gravity concept constitutes an additional threshold which differs from complementarity *strictu sensu.*[3] The Court should consider various factors when determining the gravity of a crime such as scale, nature, manner of commission and impact of the crime.[4]

During the non-international armed conflict heavy attacks were perpetrated by military forces against 20 drug cartels resulting in the death of 4760 people within a mere period of six months. Already the high number of victims points out the high intensity of the crimes. The conduct took place in all parts of the country in which the control of the state had decreased.

Moreover, it is acknowledged that, assessing the scale of the conduct, the Court shall consider the psychological harm caused to the victims and their families.[5]

After the first attacks against the drug cartels, soldiers of the regular FRN army frequently posted photos in social networks, posing with the bodies of alleged cartel members killed in the military clashes. In this context these pictures were shared on social networks by Naberrie on his personal account, distributing them to his 50.000 followers. One does not need to be overly empathetic to imagine the harm, caused by the backdrop of these postings to countless families.

Thus, the large scale nature of the context within which the crimes have been committed cannot be denied.

[1] Hereinafter, all statutory references shall be to the Rome Statute, unless otherwise provided.
[2] Hereinafter, the Office of the Prosecutor will be referred to as the OTP.
[3] ICC, *Prosecutor v. Ntaganda*, Situation in the DRC, ICC-01/04-02/06-20-Anx2, 5 August 2015. para. 29.
[4] Kai Ambos. *Treatise on International Criminal Law. Volume III: International Criminal Procedure*, p. 285.; See in concurrence Prosecutor v. Abu Garda, Decision on the Confirmation of Charges, ICC-02/05-02/09- 243-Red, 8 February 2010, paras. 31.
[5] ICC, Situation in the Republic of Kenya, PTC II, ICC-01/09-19-Corr, Corrigendum of the Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 198f.

Adding to the gravity of the case is the manner of the commission, more specifically the means employed to execute the crime, the degree of participation and intent of the perpetrator.[6]

Naberrie, at the time acting as deputy minister of defense of the FRN deliberately made use of existing police and military structures within the FRN, in order to carry out extrajudicial killings and abductions, indifferently turning against the civilian population, all while publicly disgracing the dignity of victims.

It cannot be dismissed, that amongst the victims, a number was identified by their pitiful relatives to be civilians that had been forced to work for the cartels but had never been members. In this light, it becomes clear, that by sharing these photos Naberrie is sending a clear message to his allies to discredit the existence of the rule of law and even to abandon rudimentary human respect for the enemy, to reify even the most vulnerable, those protected under the renowned status *hors de combat*.[7] Moreover, as a part of these governmental policies, even a top-secret task force, Panth-Era, was set up exclusively to execute kidnappings. According to his status, all military forces were under the command of Naberrie, which clearly indicates that he is the person bearing the greatest responsibility for the committed crimes. Naberrie's rank and exposed position, him being most aware of the armed conflict and the circumstances, and the popularity stemming from this rank as a representative figure of the government has been misused undermining fundamental international law's achievements at the cost of humaneness. Concluding, the case is of sufficient gravity to justify further action by the Court.

I.B. THE COURT IS ACTING IN ACCORDANCE WITH THE PRINCIPLE OF COMPLEMENTARITY, ART. 17(1)(a) and (b)

Due to inaction of the FRN, the OTP finds the Court to have uncontested admissibility. Flowing both from general international law and the Statute, states are obliged to investigate, prosecute and punish international core crimes.[8]

A State remains inactive when failing to comply to this duty.[9] In this case admissibility is given. While FRN set up a Commission of Inquiry, the OTP is unable to recognize the genuineness of this supposed investigation.

[6] Ambos, *Treatise III*, p. 286; ICC-OTP, Policy Paper Preliminary Examinations, 2013, para. 62.
[7] Cf. Lars Berster, *Entscheidungsbesprechung*, BGH, Beschl.v. 08.09.2016, StB 27/16, ZIS 5/17, pp. 264(269).
[8] Ambos, *Treatise III*, p. 296.

At no point during or after the end of the situation the FRN has conducted a genuine investigation or prosecution. 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"[10] that it has indeed investigated the case genuinely.

On the contrary, in compliance to recent case law, the OTP finds the Commission of Inquiry as insufficient to the threshold proposed by Art. 17 concerning the genuineness of investigations. According to the "specificity test",[11] as established in *Prosecutor vs. Lubanga*, national investigations must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court for a case to be inadmissible under Art. 17(1)(a).[12]

In the case at hand the Commission of Inquiry was explicitly set up to „investigate into the issuance of excessive orders allowing extrajudicial killings, the enforced disappearance of the members of the drug cartels and civilians".[13] However, the conduct revoking the outrage upon personal dignity was clearly neglected by the Commission of Inquiry. Accordingly, the Commission of Inquiry's efforts lack a conduct substantial to the charges arising from the proceedings by the OTP. Thus, the threshold is not met, therefore making the investigations unable to classify as actions qualified to deem the case inadmissible before the court.

As a result, in concurrence to the ruling of the *Prosecutor vs. Lubanga* PTC,[14] no state with jurisdiction of the case is acting, or has acted, in relation to such case. Accordingly, in the absence of any acting state – hence no collision of jurisdiction – any analysis of unwillingness or inability is warranted.[15]

The PTC II in *Prosecutor v. Lubanga* generally argued that, while assessing the genuineness of national investigations, it should be borne in mind that the core rationale underlying the concept of

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[9] ICC, *Prosecutor vs. Lubanga*, PTC I, ICC-01/04-01/06-8-Corr, 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, 27 February 2006, para. 29; *Prosecutor vs. Lubanga*, PTC I, ICC-01/04-01/06-37, 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, 27 February 2006, para. 40.

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

[11] 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. 37.

[12] ICC, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, PTC II, ICC-01/09-02/11, 20 May 2011, paras. 48, 51. (referring to the "specificity test: developed in ICC case law in Lubanga, Ntaganda, Chui, Harun and Kushayb, etc.)

[13] Case Facts, para. 9.

[14] Cf. ICC, *Prosecutor v. Lubanga*, PTC I, ICC-01/04-01/06, Decision concerning PTC 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 006, paras. 30 ff.

[15] Ambos, *Treatise III*, p. 299.

complementarity aims at "striking a balance between safeguarding the primacy of domestic proceedings vis-à-vis the [...] Court on the one hand, and the goal of the Rome Statute to 'put an end to impunity' on the other hand. If States do not [...] investigate [...], the [...] Court must be able to step in."[16]

The primacy of domestic procedures must not be misused by states to shield their officials, effectively granting them impunity. Having said this, one needs to take a more detailed look into the intentions of the FRN supposedly exercising their primacy *via* the Commission of Inquiry, as revealed by the case facts. First of all, the Commission is not a judicial body of the state. In fact, it only provided non-binding, but nonetheless substantiated recommendations to the state, concluding that Naberrie "was liable for allowing the unlawful use of force in the fight against perceived criminals".[17]

Nevertheless, the FRN has, up to now, refrained from taking any further actions: no criminal proceedings were initiated, no alternative measures, e.g. seeking truth or reconciliation, were set up; thus, no process of coming to terms with the past had begun within six months after the incident. Furthermore the sole impact of the Commission lies within the scope of civil law – the removal from office of Naberrie on 14 January 2016 – which can *per se* not collide with the jurisdiction of this Court. All the more, this collides with putting an end to impunity. The fact that Naberrie was arrested during his vacation in the Republic of Alcanzas points to the conclusion that the FRN did not have the intention to seek justice in the first place.

The inaction of the FRN is contradictory to the interests of the international community defined in the Preamble of the Statue. Therefore, it is in the interests of justice to admit the case before the ICC. The OTP conclusively finds the case to be admissible.

II. THE VIDEOTAPED TESTIMONY OF ADJUTANT BANDOSA IS ADMISSIBLE EVIDENCE

Art. 69(7) does not apply, as the testimony was not obtained by means of a violation of the Statute or internationally recognized human rights: Before Bandosa admitted that he was instructed to destroy all evidence about Panth-Era, he was beaten and harmed by parrillas. Defense Counsel therefore argues that the evidence was obtained through torture and, hence, not admissible. For the term of torture, the case-law refers to the wording of the definition established in the *UN Convention against Torture*

[16] ICC, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, PTC II, ICC-01/09-02/11, 20 May 2011, para. 40.
[17] Case Facts, para. 9.

(CAT).[18] Accordingly, torture must have been 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.[19] The ICTY emphasized in the *Furundzija* case that at least one of the persons involved in the torture process must be a public official.[20] Also other practices against the bodily integrity, such as inhuman, cruel or degrading treatment or punishment, are proscribed by international human rights standards only when they are attributable to public officials.[21] In the present case, the source of the video and the perpetrators are unknown. But all factors speak for a perpetration by relatives or other cartel members who wanted to find out the whereabouts of the drug barons. Bandosa, as an adjutant, was linked to the state. It is highly unlikely that the state harmed its own ally. Hence, without the involvement of the state, the harming of Bandosa was neither torture nor inhuman, cruel or degrading treatment. Thus, Art. 69(7) does not apply.

When the Court comes to a different result, the testimony is reliable and the admission of the video would not damage the integrity of the proceedings: Bandosa was only asked to reveal the locations of the kidnapped drug barons. Without being asked about it, he admitted that he was instructed to destroy all evidence about Panth-Era. There is no correlation recognisable between question and answer. In that situation, Bandosa had no incentive to reveal something about Panth-Era and least of all to lie. It must therefore be concluded that this statement was true. It shall be the core duty of the Court to determine the truth.[22] Consequently, evidence shall be admissible when it seems conducive to ascertaining the truth.[23]

Concerning the integrity, the assessment has to be made on a case-by-case basis, taking into account the characteristic of the relevant item of evidence and the countervailing interests.[24] The integrity of the proceedings is preserved for the following two reasons.

First, the testimony was obtained by a third party, not linked to the Prosecution. In the *Barayagwiza* case, the ICTR denied a remedy for a violation of the accused's rights because it was – exactly as in the present case – the main responsibility of third parties.[25] The ICTY further stated that 'the function of this Tribunal is not to deter and punish illegal conduct by domestic law enforcement authorities by

[18] ICTY, Prosecutor v. Delalić et al., IT-96-21-T, Judgment, para. 474; ICTY, Prosecutor v. Tadić, IT-94-1-I, Indictment (Amended), 1 September 1995, para. 3.6.; ICTY, Prosecutor v. Kovacević, IT-97-24-I, Amanded Indictment, 28 January 1998, para. 22; ICTY, Prosecutor v. Sicirica et al., IT-95-8-PT, 21 July 1998, para. 7; ICTR, Prosecutor v. Akayesu, ICTR-96-4-T, para. 593

[19] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

[20] ICTY, Prosecutor v. Furundzija, IT-95-17/1-T, 10 December 1998, para. 162.

[21] Art. 16(1) CAT.

[22] Andreas Mosbacher, *Das Ideal richterlicher Wahrheitsfindung und die Betrübnisse des wirklichen Lebens*, Forensische Psychiatrie, Psychologie, Kriminologie, May 2015, Vol. 9, Issue 2, p. 82.

[23] Cf. Rule 87(4) Internal Rules of the ECCC.

[24] Ambos, *Treatise III*, p. 520.

[25] ICTR, Prosecutor v. Barayagwiza, ICTR-97-19-AR72, Decision, 31 March 2000, para. 71.

excluding illegally obtained evidence'.[26] The harming of Bandosa was not even perpetrated by domestic law enforcement authorities but by independent civilians.

Second, the gravity of the charges against Naberrie prevails the harming of a single person. The ICTY in the Brđanin case came to the same conclusion. It claimed that, given the gravity of the charges, it would be utterly inappropriate to exclude relevant evidence due to procedural considerations.[27] Naberrie committed gravest international war crimes and crimes against humanity. He attacked large sections of the civil population and is responsible for the killing of more than 4,700 people. In contrast, the harming of a single person appears virtually negligible. Furthermore, it would be absolutely intolerable if the exclusion of the video would lead to an exemption of punishment of Naberrie. It has been claimed that 'flexible evidentiary rules' for International Criminal Courts do apply due to their usual lack of evidence.[28] This principle of flexibility shall be applied in the present case, which entails such a disproportionate constellation. In conclusion, the testimony of Bandosa is reliable and not of any harm to the integrity of the proceedings. Therefore, the OTP claims the videotape to be admissible.

III. NABERRIE IS INDIVIDUALLY CRIMINALLY RESPONSIBLE FOR CRIMES AGAINST HUMANITY AND WAR CRIMES

III.A. NABERRIE IS INDIVIDUALLY CRIMINALLY RESPONSIBLE FOR COMMITTING THE CRIME AGAINST HUMANITY OF ENFORCED DISSAPPEARANCE UNDER ARTICLE 7(1)(i)

Actus reus: Firstly, the perpetrator must have arrested, detained or abducted one or more persons.[29] The drug barons of the cartels were kidnapped by the agents of Panth-Era.[30] Kidnapping is a violent form of abduction. Secondly, there has to be a refusal to give information on the whereabouts of such persons.[31] A refusal to give information presupposes that an interested person has asked about or inquired the victim's whereabouts.[32] Adjutant Bandosa was asked to reveal the locations of the kidnapped drug barons.[33] Since he was punished by several beatings and parrillas subsequently, it must be concluded that he initially had refused to give an answer.

[26] ICTY, Prosecutor v. Brđanin, IT-99-36-T, Decision on the Defence Objection to Intercept Evidence, 1 March 2004, para. 63 (no. 9).
[27] ICTY, Prosecutor v. Brđanin, IT-99-36-T, Decision on the Defence Objection to Intercept Evidence, 1 March 2004, para. 63 (no. 7, no. 8); referring to ICTY, Prosecutor v. Delalić et al., IT- 96-21-T, Decision on the Tendering of Prosecution Exhibits 104-108, 9 February 1998, paras 18-20.
[28] Richard May and Marieke Wierda, *International Criminal Evidence*, 2002, at 95, 98.
[29] ICC, Elements of Crimes, 7(1)(i), Element 1.
[30] Case Facts, para. 5.
[31] ICC, Elements of Crimes, 7(1)(i), Element 2.
[32] Werle, *Völkerstrafrecht* (2nd ed., 2012), paras 987-8.
[33] Case Facts, para. 8.

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.[34] The drug barons were kidnapped by agents of Panth-Era. Though the government did not know about the existence of the group, Naberrie was granted freedom of action by virtue of a decree. A total freedom of action includes the establishing of a secret group. Hence, the existence and missions of Panth-Era were authorized by the government of FRN.

The refusal to give information was carried out by adjutant Bandosa. As an officer of a higher rank, he was linked to the FRN. Moreover, he was instructed by Naberrie to destroy all evidence about Panth-Era to keep. This must logically include the order to no reveal any information about the missions of Panth-Era. Thus, by refusing to reveal the locations, Bandosa acted on order of Naberrie, the deputy minister of defense, and part of the government.

Mens rea: The perpetrator must have been aware that the deprivation of liberty would be followed in the ordinary course of events by a refusal to give information on the whereabouts of the arrested persons.[35] The whereabouts of the kidnapped persons were kept secret in order to prevent the opportunity for corruption and information leaks.[36] Thus, it was expected that there shall be attemps in order to find out the locations and to ransom or liberate the kidnapped. Since Naberrie created Panth-Era and tasked it with secret military missions against the drug barons, it must be concluded that this order also came from him.

Furthermore, as argued above, it was part of his instruction to Bandosa to not reveal the locations of the kidnapped persons. Following these two points, in any case, Naberrie had to be aware of the refusal to give information.

Moreover, he must have intended to remove such persons from the protection of the law for a prolonged period of time.[37] It must be concluded that the kidnapped persons had no access to the administration of justice. Otherwise, they could not have been effectively shielded from the public.The right of a free access to justice is an absolute requirement to assert one's rights.[38] When this is refused, the victims are factually removed from the protection of law.

Additionally, the drug barons were kidnapped at the beginning of June 2015,[39] while the video, capturing the interrogation of Bandosa, was published on 15 December 2015. Hence, the detainment and secrecy have been kept up for at least six months fulfilling the requirement of a prolonged removal.

[34] ICC, Elements of Crimes, 7(1)(i), Elements 4 and 5.
[35] ICC, Elements of Crimes, 7(1)(i), Element 3.
[36] Case Facts, para. 5.
[37] ICC, Elements of Crimes, 7(1)(i), Element 6.
[38] See Art. 13 ECHR; Art. 47(3) Charter of Fundamental Rights of the European Union; Art. 7(1) ACHPR; Art. 9(4) International Covenant on Civil and Political Rights.
[39] Case Facts, para. 5.

III.A.1. THE COMMON CONTEXTUAL AND MENS REA ARE FULFILLED

The conduct must have been part of a widespread or systematic attack directed against a civilian population.[40]

The attack was widespread and systematic: While "widespread" refers to the number of victims,[41] "systematic" entails that the acts are of an organized nature, i.e. non-random.[42] Naberrie directed military units to attack the bases of the drug cartels, which led to heavy fighting with the paramilitary units of the different drug cartels. The number of more than 4,700 victims certainly constitutes a widespread attack, going distinctly beyond what one considers a few victims. Naberrie planned the attacks as part of a new national security strategy, utilizing army resources implementing the strategy approved by virtue of a decree of the government.

The forced collaborators were civilians: A civilian is everyone, who is not a member of the armed forces.[43] Civilians enjoy the protection of the international humanitarian law (IHL), unless they take direct part in the hostilities.[44] Naberrie directed military units to attack the bases of the drug cartels. The majority of the civil population was forced to work for the drug cartels.[45] Those necessarily need to be considered as civilians. It would be intolerable to dispossess those, who are already in a personal dilemma, from the protection of the IHL. Furthermore, there can be found no indication that those were involved in the fighting, thus, they did in any case not take direct part in the hostilities.

The attack was directed against the civilian population: In his TV interview on 12 December 2015, Naberrie stated that every person who collaborates or was even forced to collaborate would be their enemy.[46] That shows that in his understanding of the fight against the cartels, he made no distinction between actual members of the cartels and forced collaborators. Furthermore, even if he had tried to, he would not have been able to distinguish sufficiently, since the actual members did not wear uniforms and dressed as civilians.[47]

As pointed out above, the forced persons still were civilians under the protection of IHL. By still letting attack the bases of the cartels without distinction and even without the possibility of distinction between forced collaborators and actual members, Naberrie made the civilian population to the object of the attack.

Naberrie was aware that the conduct was part of and intended the conduct to be part of the attack: Naberrie created Panth-Era as one part of his strategy to fight against the cartels. Alongside the attacks

[40] ICC, Elements of Crimes, 7(1)(i), Element 7.
[41] ICTY, Prosecutor v. Tadić, No. IT-94-1-T, para. 648.
[42] ICTY, Prosecutor v. Blaškić, IT-95-14-T, Judgement, 3 March 2000, para. 203.
[43] Cf. Prosecutor v Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08-424, para. 78; Art. 50(1) Additional Protocol I to the Geneva Conventions (AP I).
[44] Art. 51(3) AP I; Art. 13(3) Additional Protocol II to the Geneva Conventions (AP II).
[45] Case Facts, para. 3.
[46] Case Facts, para. 7.
[47] Case Facts, para. 3.

against the bases of the cartels, Panth-Era should execute secret military missions against the drug barons. The conduct of kidnapping them, must be considered as one of those missions provided by Naberrie.

III.A.2. NABERRIE IS CRIMINALLY RESPONSIBLE FOR ORDERING THE COMMISSION OF THE CRIME IN THE SENSE OF ARTICLE (25)(3)(b)

To be liable under Article 25(3)(b) the individual must use his authority to prompt another person to commit the crime,[48] and he must also intend or know with substantial likelihood that his order will result in a commission of the crime.[49] Mr. Naberrie was in a position of authority as the deputy minister of defense and in control of the group of Panth-Era. Moreover, he had the executive responsibility for the new national security strategy.[50] Thus, it must be concluded that the kidnapping of the drug barons could only have been done following the explicit orders of Naberrie.

IV.B. NABERRIE IS INDIVIDUALLY CRIMINALLY RESPONSIBLE FOR THE WAR CRIMES OF ATTACKING A CIVILIAN POPULATION UNDER ARTICLE 8(2)(e)(i)

Actus reus: For the act to constitute a crime, the perpetrator must direct an attack on the civilian population as such or individual civilians not taking direct part in the hostilities.[51] As outlined above in III.A.1., the attacks must be considered as those directed against the civilian population and fulfil therefore the *actus reus* of this crime.

Mens rea: The attacks on the civilian population must be intentional.[52] That does not mean that the civilian population has to be the sole and exclusive target of the attack.[53]As argued above, the TV interview of Naberrie shows that he did not distinguish between actual members of the cartels and forced collaborators, which were still protected by IHL. Hence, his intend encompassed the civilian population as such.

III.B.1. NABERRIE IS CRIMINALLY RESPONSIBLE FOR ORDERING THE COMMISSION OF THE CRIME UNDER ARTICLE 25(3)(b)

In accordance with the conditions established in section III.A.2., Naberrie ordered the attacks with the intention to target the civilian population. He gave the order in a position of authority as the deputy minister of defense and assigned person responsible for the fight against the drug cartels.

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[48] ICC, The Prosecutor v. Laurent Gbagbo, ICC-02/11-01/11-656-Red, Decision on the confirmation of charges, 12 June 2014, paras 242-243 .
[49] ICTY, Prosecutor v. Milomir Stakić, IT-97-24-A, Trial Judgement, 31 July 2003, para. 445.
[50] Case Facts, para. 4.
[51] ICC, Elements of Crimes Art. 8 (2) (e) (i), Elements 1 and 2.
[52] ICC, Elements of Crimes Art. 8 (e) (i), Element 3.
[53] ICC, *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the confirmation of charges, 16 December 2011, para. 142.

III.C. NABERRIE IS CRIMINALLY RESPONSIBLE FOR THE WAR CRIME OF OUTRAGES UPON PERSONAL DIGNITY UNDER ARTICLE 8(2)(c)(ii)

Actus reus: The perpetrator has violated the dignity of dead persons by sharing previously posted photos on his personal account in social networks with an audience of at least 50.000 followers. The photos show FRN army soldiers posing with the bodies of the ostensive cartel members killed in the clashes.[54]

Derived from the wording of a footnote to Art. 8(2)(c)(ii) Elements of Crime which reads „For this crime, ‚persons' can include dead persons",[55] the prosecution makes the case, that the rights protecting personal dignity outlive the subject of these rights. The footnote must be interpreted as proof of the member states consenting *opinio iuris* upon postmortem personal rights. Also, in recent years the ICTY and ICTR adopted the idea into their rulings.[56] This was backed by customary international humanitarian law, as manifested in Rule 113 of the Customary IHL-Rules, according to which all parties to the conflict are obliged to "take all measures to ensure the dead from being despoiled". Therefore, dead persons are also protected by Art. 8(2)(c)(ii).

Posing with the bodies of the enemy - like a trophy hunter does with his prey after a kill - is an act illustrating victory and superiority, *vice versa* defeat and inferiority, shamelessly making use of the most vulnerable participants in battle serving the purpose of glorifying one and degrading the other party, thus reifying them. Let alone the gravity of these acts themselves, this purpose could only have been served if publicised to an audience, leading the soldiers to post the photos in social networks. Significantly adding to this, Naberrie not only expressed his approval, but deliberately multiplied the scope of the degradation by sharing the photos on his personal social network account to his 50.000 followers. To put it in a nutshell, Naberrie took the soldiers' ill intent and, by the degrading action to approvingly share the content, made it his own by furthering it.

Aggravated by the public element, this amounts to an outrage upon personal dignity. In the word of the ICTY, the degradation must be of such intensity that any reasonable person would be outraged.[57] Keeping in mind modern social networks potential to spread contents uncontrollably and inflationary even if shared 'exclusively' and the internet being the biggest and most long lived database existing,[58] also the fact that this was not a singular act,[59] plays a factor. Adding up, the severity of this degrading act is of such a degree, that a reasonable person cannot be but outraged.

[54] Case Facts, para. 5.
[55] ICC, Elements of Crimes, Article 8 (2)(c)(ii), fn. 57.
[56] ICTY, *Prosecutor v. Brdanin*, Trial Chamber II, Judgement, IT-99-36-T, 1 September 2004; ICTR, *Prosecutor v. Bagasora*, Trial Chamber I, ICTR-98-41-T, Decision on disclosure of closed session Testimony of BDR-1 and LK-2, 29 August 2006.
[57] ICTY, Kunarac et al. (Trial Chamber Judgment), IT-96-23 & 23/1, 22 February 2002, see note 1003, paras. 504–506.
[58] Sven Weisenhaus, Das Internet vergisst nie: Chancen und Risiken im Umgang mit persönlichen Daten im Internet, 2010.
[59] Case facts, para. 5.

Mens rea: The act depicts Naberrie's blunt ignorance of the important distinction between combatants and non-combatants: The victims were obviously dead persons - ostensible civilians and cartel members. No one can be more *hors de combat* than the persons killed in combat.

III.C.1. NABERRIE IS INDIVIDUALLY CRIMINALLY RESPONSIBLE UNDER ARTICLE 25(3)(a)

In accordance with Article 25, a person committing a crime individually shall be criminally responsible and liable for punishment. It is highly likely that Mr. Naberrie shared the photos himeself. Even if he shared the content to support his policies the effect of the conduct remains and he did so on his own accord.

III.D. THE ACTS TOOK PLACE IN THE CONTEXT OF AND WERE ASSOCIATED WITH AN NON-INTERNATIONAL ARMED CONFLICT

An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[60]The present conflict existed between the FRN, represented by the military units, and the drug cartels. A third state was not involved. Beyond, it is generally established that for a non-international armed conflict, two objective requirements must be met.

Firstly, the hostilities must have reached a certain level of intensity.[61] The required intensity may be derived from factual indicators such as the scale, seriousness and increase of the attacks.[62] In the present case, heavy fighting took place between military units and paramilitary units of the drug cartels.[63] Over a period of at least six months, a total of 4,760 members of the drug cartels lost their lives, fulfilling the required level of intensity.

Secondly, the non-governmental armed group(s) involved in the conflict must have possessed a sufficient degree of organization.[64] That requires a minimum degree of collectivity and central organization,[65] being organized in a hierarchic manner,[66] and - pursuant to Art. 1(1) AP II - having the capacity 'to carry out sustained and concerted military operations'. The cartels were based in certain territories of which they took over the *de facto* control. There, specific bases existed, which were later

[60] ICTY, Prosecutor v. Tadić, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.
[61] See only ICC, Prosecutor v. Bemba, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 225.
[62] ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 538.
[63] Case Facts, para. 5.
[64] See ICC, Prosecutor v. Bemba, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, 15 June 2009, para. 234.
[65] Rudolf and Schaller, *SWP-Studien*, S1 (2012), p. 16.
[66] See Wieczorek, *Unrechtmäßige Kombattanten* (2005), pp. 75 ff.

attacked by the military units.[67] They were furthermore led by so-called 'drug barons'. From this, the required central and hierarchic organization can be deduced. Besides, it must be concluded that the drug cartels were collectively in possession of at least 10,000 unregistered firearm units and 25 self-made armed vehicles.[68] Due to this heavy armament, combined with the at least partial territorial control, the necessary military capacity is also given. The present cartels fulfil the status of organized armed groups.

Naberrie was aware of this armed conflict.[69] He, as the assigned deputy minister of defense, and the military units under his direction, that committed the attacks against the drug cartels, had to be aware of the factual circumstances establishing the armed conflict as required.[70]

Finally, the case law requires that there must be an 'evident nexus' between the context element and the individual crimes.[71] The attacks against the civilians were part of the new national security strategy, which was followed in the armed conflict with the drug cartels.

IV. PRAYER FOR RELIEF

On the basis of the evidence provided, the Prosecution respectfully asks the Court to find that is has jurisdiction in this case, to admit the video into evidence and to confirm the charges of crimes against humanity and war crimes.

Respectfully submitted,
Counsel for the Prosecution

[67] Case Facts, para. 5.
[68] Case Facts, para. 3.
[69] See ICC, Elements of Crimes, Article 8, the last Element of each war crime
[70] ICC Elements of Crimes, Article 8(Introduction)(C).
[71] Prosecutor v. Blaškić, *supra* note 42 , para. 69; Prosecutor v. Limaj et al., No. IT-03-66-T, Judgment, 30 November 2005, para. 83.