

TEAM 2022-121

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1. THE CASE AGAINST MR. GRAVUS CONCERNING GENOCIDE IS INADMISSIBLE PURSUANT TO ART. 17 OF THE ROME STATUTE

Jurisdiction of the court is complementary¹ to the purpose of Art. 17 of the Rome Statute (hereinafter: “**Statute**”) together with para. 1 of the Preamble and Art. 1 of the Statute to ensure that State Parties enjoy a level of confidence in their sovereign right to try crimes committed on their territory. The principle of complementarity provides protection, ensuring the Court does not encroach upon this right. According to Art. 17(1)(a), the Court shall determine that a case is inadmissible where a case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is found unwilling or unable to genuinely carry out an investigation or prosecute the crimes. The Defense hereby submits that the test of admissibility has not been satisfied in the case against Mr. Gravus.

To determine admissibility of the case, two criteria must be met. Primarily, it must be established whether the case at hand has been or is being genuinely investigated or prosecuted by a state’s national judicial system. Next, the gravity threshold must be analyzed in order to determine if the case is of sufficient gravity to justify further action by the Court. The Defense emphasizes that both criterias must be fulfilled in order to conduct further actions before the Court.

a. The case is inadmissible pursuant to Art. 17(1)(a) of the Rome Statute, as an investigation is taking place

The question of admissibility must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge.² On 10 December 2021, a military court was established to investigate the crimes committed in the conflict regions as of 3 November 2015, including Castiria. The military court will complete its investigation in August 2022.³ As of 16 June, the investigation conducted by the military court is still in progress. The ongoing investigation of the crimes committed in the conflict region fulfills the premise in Art. 17 (1)(a). Furthermore, the investigation of the military court covers the time period of crimes committed between March 2019 and September 2021.⁴

i. There are no grounds to state unwillingness on the basis of Art. 17(2)(a)

There is no reason to believe the established military court is unwilling to examine the case of Mr. Gravus. Pursuant to Art. 17(2)(a), there was no intent nor activity that took place resulting in shielding Mr. Gravus from the jurisdiction of the Court regarding the alleged crime of Genocide. Mr. Gravus remained imprisoned until his transfer to the Court and there are no signs of the possible release of

¹ Klamberg (2017), p. 206, para. 215.

² ICC, Prosecutor v. Germain Katanga, ICC-01/04-01/07, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 56.

³ Case Facts, para. 18.

⁴ Case Facts, para. 18.

Mr. Gravus.⁵ Mr. Gravus' imprisonment indicates no intent of Hanatun authorities to release or shield him, especially when taking into consideration the fact that General Hitch, his opponent, took control of the state.⁶

ii. There are no grounds to state unwillingness on the basis of Art. 17(2)(b)

There are no grounds to believe that there has been an unjustified delay in the proceedings, which in the circumstances, is inconsistent with an intent to bring Mr. Gravus to justice. Determination of unjustified delay must be made on the basis of not an abstract ideal of justice, but rather, on the specific circumstances surrounding the investigation concerned.⁷ In the present case, the government and regime of Mr. Gravus had been toppled on 13 September 2021, and the military court was established on 10 December 2021 shortly after.⁸ The investigation concerning crimes committed in conflict regions including Castiria from 3 November 2015 is expected to be completed in August 2022.⁹ Seven months of investigation in a politically unstable country after a counter-terrorist campaign and bloodshed among the citizens of Hanatun should not be considered in the given circumstances as protracted or inconsistent with an intent to bring Mr. Gravus to justice.

iii. There are no grounds to state unwillingness on the basis of Art. 17(2)(c)

There is no sufficient evidence to believe that, according to Art. 17(2)(c), "the proceedings are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice." The established military court has been created under the pressure of national and international human rights organizations, which presumably are still putting pressure on the military court during the investigation.¹⁰ The Military Court is not related to the person of Mr. Gravus, which has been established during his imprisonment.

iv. There are no grounds to state inability on the basis of Art. 17(3)

There are no grounds to assume that due to the total or substantial collapse or unavailability of its national judicial system, the State is unable to carry out the investigation. Stating substantial difficulties faced by the national authorities in exercising judicial powers "across the entire territory"¹¹ would be nothing else than speculation, specifically in the context of the ongoing

⁵ Case Facts, para. 17.

⁶ Case Facts, para. 17.

⁷ ICC, *Prosecutor vs. Saif Al-Islam Gaddafi*, ICC-01/11-01/11-239, Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, 7 December 2012, para. 233.

⁸ Case Facts, para. 17.

⁹ Case Facts, para. 18.

¹⁰ Case Facts, para. 18.

¹¹ ICC, *Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11, Decision on the admissibility of the case against *Saif Al-Islam Gaddafi*, 31 May 2013, para. 20.

investigation performed by the military court and the imprisonment of Mr. Gravus until being transferred to the Court.

b. Pursuant Art. 17(1)(d), the case is not of sufficient gravity to justify further action by the court.

To determine the sufficient gravity of the case, two factors must be considered. First, the conduct which is the subject of a case must be either systematic (pattern of incidents) or large scale. Second, the assessment of gravity must give due consideration to the social alarm such conduct may have caused in the international community.¹² The Defense submits that the subject of the case is not systematic nor large scale. The special counter-terrorist campaign in place was introduced as a response to the ambush of a military convoy of 16 March 2019 performed by the Castirian National Front.¹³

The Defense also submits the elimination of 200 Castirian men on 15 July 2019 was the result of resisting arrest, which could take many forms, including active defense with the use of firearms.¹⁴ The intention of this acts was to arrest Castirians for affiliations with the military organization responsible for the ambush of a military convoy, not to kill them.¹⁵ The deaths of those men were incidental, as the actions of special forces were calculated to arrest them.

Furthermore, the events that took place between July 2019 and October 2019, including the deaths of 86 men, were also incidental and were the result of attempts to cross the border of the province, which has been closed due to the danger of Castirian National Front attacks.¹⁶ An approach to the border checkpoint could be interpreted as a substantial danger, especially in the context of an intense situation in the province. The case is therefore of insufficient gravity to warrant further action by the Court.

2. THERE ARE NO REASONABLE GROUNDS TO BELIEVE THE CASE AGAINST MR. GRAVUS CONCERNING GENOCIDE FALLS WITHIN THE JURISDICTION OF THE COURT PURSUANT TO ART. 19 OF THE ROME STATUTE

Art. 19(1) of the Statute introduces the principle of *la compétence de la compétence*, or the Court's competence to examine and determine the extent of its jurisdiction,, and this principle has been repeatedly affirmed by the Court in its jurisprudence.¹⁷ In order to demonstrate that the Court indeed

¹² ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-8, Decision concerning Pretrial 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, annex 1, para. 46

¹³ Case Facts, para. 9, para. 11.

¹⁴ Case Facts, para. 12.

¹⁵ Case Fact, para. 12.

¹⁶ Case Facts, para. 15.

¹⁷ ICC PTC I, ICC-RoC46(3)-01/18, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Art. 19(3) of the Statute", 6 September 2018, para. 30-32. The view was also expressed in ICC, *Situation in Uganda* (ICC-02/04), ICC-02/04-01/05, Decision on the Prosecutor's Application that the PTC Disregard as Irrelevant the Submission Filed by

has jurisdiction over the discussed crimes, it is necessary to establish *ratione temporis* jurisdiction, *ratione loci/personae* jurisdiction, and *ratione materiae* jurisdiction. Moreover, it is also necessary to prove one of the conditions enumerated in Art. 13 of the Statute is present. The Defense submits it reserves the right to challenge the jurisdiction of the Court in the case of Mr. Gravus.

a. The Court has no *ratione temporis* jurisdiction and *ratione loci/ratione personae* jurisdiction over the alleged crime of Genocide

According to Art. 11(1) of the Statute, the crime of Genocide under the jurisdiction of the ICC has to take place after the entry into force of the Statute for the Republic of Hantun to be able to apply its provisions. Therefore, it can be concluded that the Court does not have jurisdiction in the territorial aspect of the current case, because the Republic of Hantun is not a State Party to the ICC,¹⁸ so none of the situations that are the subject of a UN SC resolution can fall under its jurisdiction. Also, no situation described in Art. 12(3) of the Statute occurred, according to which a State that is not a party to the Statute may, by declaration delivered to the Secretary, accept the jurisdiction of the ICC with respect to a particular crime. As for the UN SC's powers under Art. 13(b) of the Statute itself, it should be noted that such an expansion of powers is not reconcilable with the provisions of the UN Charter.¹⁹

The ICC has jurisdiction over crimes committed in the territory of a State Party to the Statute. As already mentioned above, the Republic of Hantun is not a State Party to the Statute,²⁰ which leads to the conclusion that the ICC does not have jurisdiction over it also in the territorial aspect. Such a limitation is also a natural consequence of the principle of international law, according to which international legal obligations can produce consequences only for those States that have assumed certain obligations.²¹ The jurisdiction of the ICC may be extended by declaration of a state that is not a party, but such an extension did not occur in the case of the Republic of Hantun.

On the personal aspect of jurisdiction, it is worth mentioning that the ICC has jurisdiction only over crimes committed by nationals of States Parties to the Statute, regardless of whether the crimes were committed on the territory of a State party or a non-signatory State. Mr. Gravus is a citizen of the

the Registry on 5 December 2005, 9 March 2006, para. 22, as well as in ICC PTC II, ICC-01/05-01/08-424, *Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08), Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 23; PTC II, ICC-01/09-01/11-373, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (ICC-01/09-01/11), Decision on the Confirmation of Charges Pursuant to Art. 61(7)(a) and (b) of the Rome Statute (“Ruto et al. Confirmation of Charges Decision”), 23 January 2012, para. 24.

¹⁸ Case Facts, para. 1

¹⁹ F. Hoffmeister, S. Knoke, *Das Vorermittlungsverfahren vor dem Internationalen Strafgerichtshof – Prüfstein für die Effektivität der neuen Gerichtsbarkeit im Völkerstrafrecht*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1999, s. 789.

²⁰ *Ibidem*, para. 1

²¹ Vienna Convention on the Law of Treaties from 1969, article 34.

Republic of Hantun, which is not a party to the Statute, so the Court cannot have jurisdiction over him. Conversely, under Art. 24(1) of the Statute, no one may be held criminally responsible for an act committed before the entry into force of the Statute, which is further confirmation of the ICC's inability to punish Mr. Gravus.

b. The Court has no *ratione materiae* jurisdiction over the alleged crime of Genocide

There are three elements (of contextual and specific nature) which have to be fulfilled for the exercise of jurisdiction over the alleged crime of Genocide under the Statute: (i) the victims must belong to the targeted group, (ii) the crimes must take place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction and (iii) the perpetrator must act with the intent to destroy in whole or in part the targeted group.²² The Defense submits that neither the contextual element nor the specific elements of Genocide are satisfied in the present case pursuant to Art. 19 of the Statute.

i. The contextual element of the alleged crime of Genocide is not satisfied in the present case

The Defense submits there are no reasonable grounds to believe the contextual element of the alleged crime of Genocide is fulfilled in the present case. According to the contextual element provided in Elements of Crimes, the conduct for which a perpetrator is allegedly responsible must have taken place in the context of a manifest pattern of similar conduct against the targeted group or must have had such a nature so as to itself effect, the total or partial destruction of the targeted group.²³ This means the crime of Genocide is only completed when relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof.²⁴ The protection under Art. 6 of the Statute is only triggered when the threat against the existence of the targeted group, or part thereof, becomes concrete and real as opposed to just being latent or hypothetical.²⁵ In *Al-Bashir*, the Court held that the contextual element of genocide can be demonstrated by the “magnitude, consistency and planned nature of crimes.”²⁶

²² ICC, Prosecutor v. Omar Al Bashir, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2000, para. 113.

²³ ICC, *Prosecutor v. Omar Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2000, para.123.

²⁴ Ibidem, para. 124.

²⁵ Ibidem, para. 124.

²⁶ ICC, Prosecutor v. Omar Al-Bashir, ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010, para. 14.

In the present case, neither the elimination of 200 Castirian men nor the shooting of another 86 Castirian men meets the requirement of being systemic or on a large scale.²⁷ Their deaths were incidental, as the plan was to arrest, not kill them. Moreover, they were being arrested for affiliations with the CNF, and not for membership to a certain group. There was no pattern of extermination of Castirians as a specific group. The NDS and SPG were only preventing potential threats to the security of the Hanatun Republic.²⁸ Furthermore, the blockade of all the routes to Castiria was based on the danger of CNF attacks.²⁹ As there has already been an attack on a military aircraft of the Hanatun Republic,³⁰ there were reasonable grounds to believe they would strike another time. Also, other ethnic groups such as Hanu also lived in Castiria, not just Castirians.³¹ This leads to the conclusion that the blockade aimed to ensure the State's security, and was not a part of a bigger plan to take the life of Castirians as a special, protected group.

The counter-terrorism campaign was clearly based on the argument that the reason for actions of SPG and NDS is to restore national security and public order in Hanatun.³² Hence, the campaign has the legitimate aim of rectifying the social and security situations, and does not have any goal of persecuting ethnic minorities. Although the actions of the Republic of Hanatun might be seen as discriminatory, this can in no way be seen as a stated support of Genocide. A government must have a right to bring stability and peace in the state for the sake of all citizens. In addition, the actions taken by Mr. Gravus cannot constitute the alleged crime of Genocide because there was no real threat against the existence of the Castirians as a protected group.³³ Shooting over 200 men does not meet the requirement of a threat concrete enough for the existence of this minority nor does the blockade of all routes leading to Castiria. The blockade was aimed to hit the region of Castiria, and not Castirians as a protected group, therefore there are no reasonable grounds to believe that the action taken have or could have been a threat to this ethnic minority. Therefore, the contextual element has not been met in the present case.

ii. The specific elements of the alleged crime of Genocide are not satisfied in the present case

Should the Court find the establishment of the contextual element, the Court must also find there are reasonable grounds to believe Mr. Gravus has acted in fulfillment of the specific elements of the

²⁷ Case Facts, para. 12, 14.

²⁸ Case Facts, para. 12.

²⁹ Case Facts, para. 15.

³⁰ Case Facts, para. 9.

³¹ Case Facts, para. 12.

³² Case Facts, para. 11.

³³ ICC, *Prosecutor v. Omar Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2000, para.124.

alleged crime of Genocide to establish *ratione materiae* jurisdiction. Besides the aforementioned contextual element, Elements of Crimes provides for the following two specific elements: (i) the victims must belong to a particular national, ethnic, racial or religious group and (ii) the perpetrator must act with the intent to destroy in whole or in part that particular group.³⁴ In *Karadžić*, it was established that such part must be a substantial part of the group and be significant enough to have impact on the group as a whole.³⁵ In *Krstić*, it was found that the victims of the Genocide must be targeted by reason of their membership in a group.³⁶

In the present case, the Defense does not dispute that Castirians constitute an ethnic group as they speak a distinct language, Otati, and worship the god Otsari.³⁷ The Defense also does not dispute that some of the killed individuals belong to this ethnic minority. In *Jelisić*, the ICTY stated that the application of the Convention is limited to protecting “stable” groups objectively defined and to which individuals belong regardless of their own desires.³⁸ The evidence does not constitute proof that the ethnic Castirians were being specifically targeted. All individuals afflicted with the counter-terrorism campaign were not targeted as an ethnic minority, but as a political group whose actions threatened the security of Hanatun Republic. Furthermore, as for the conditions calculated to bring about the physical destruction to be met, the conditions must be inflicted on the group deliberately,³⁹ whereas the blockade in the present case was aimed to hit the region of Castiria, and not Castirians as a protected group. There is not enough evidence to prove an intent to destroy a group as such, because the region was inhabited by other ethnic groups. This means that the requirement that the victims must be perceived by the perpetrators to be members of the ethnic minority is not met.⁴⁰

Finally, Mr. Gravus has not in his conduct shown any intent to destroy the ethnic minority of Castirians in whole or in part. The campaign did not target the ethnic minority, as its aim was to reestablish peace in the Hanatun Republic. Mr. Gravus was clearly focussed on bringing security and stability to the country, and not on destroying Castirians as a protected group.⁴¹ In addition, there is no evidence suggesting that Mr. Gravus was aware that the killings or the physical destruction of the group, in whole or in part, would occur in the ordinary course of events⁴² and that the victims were

³⁴ *Ibidem*, para. 134.

³⁵ ICTY, *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Public red. version of Judgment, 24 march 2016, para. 555.

³⁶ ICTY, *Prosecutor v. Radislav Krstić*, IT-98-33-T, Judgment, 2 august 2001, para. 561.

³⁷ Case Facts, para. 4.

³⁸ ICTY, *Prosecutor v. Jelisić*, IT-95-10-T, Judgment, 14 december 1999, para. 69.

³⁹ ICTY, *Prosecutor v. Radoslav Brdanin*, IT-99-36-T, Judgment (TC), 1 september 2004, para. 692.

⁴⁰ ICTR, *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgment (TC), 2 september 1998, para. 712.

⁴¹ Case, Facts, exhibit I.

⁴² *Ibidem*.

targeted only because of their membership in the Castirian ethnic group. The Defense therefore submits there are no reasonable grounds to believe that the ICC's jurisdiction is established in the present case.

3. THERE ARE NO REASONABLE GROUNDS TO BELIEVE THAT MR. GRAVUS IS CRIMINALLY RESPONSIBLE FOR GENOCIDE UNDER ART. 28(A)(B) OF THE ROME STATUTE

a. Mr. Gravus cannot be held criminally responsible for the alleged crime of Genocide as a military commander under Art. 28(a) of the Rome Statute

Bemba provided the conditions that must be fulfilled for an individual to be found responsible for committing the crime of Genocide under Art. 28 of the Statute. Those conditions are: (i) crimes within the jurisdiction of the Court must have been committed by forces; (ii) the accused must have been either a military commander or a person effectively acting as a military commander; (iii) the accused must have had effective command and control, or effective authority and control, over the forces that committed the crimes; (iv) the accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; (v) the accused must have failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution; and (vi) the crimes committed by the forces must have been a result of the failure of the accused to exercise control properly over them.⁴³ The Defense submits that conditions (iii), (iv), (v), and (vi) are not fulfilled in the case against Mr. Gravus for the alleged crime of Genocide.

Mr. Gravus cannot be criminally responsible for committing the crime described in Art. 28(a)(i) based on the evidence, specifically, the text messages he sent to Ms. Jolie, the head of NDS. In these texts, it is clear that he was not aware of the fact that civilians were being treated in the way they were.⁴⁴ Mr. Gravus was misled by his subordinate. He even deliberately inquired about the state of affairs with civilians, however, he was ensured that civilians were safe and that soldiers do not cause any harm to them. He made the effort to contact Ms. Jolie directly, and asked her about specific aspects of the situation. Such behavior fulfills his duty to try to find out about the events, which excludes his liability, specifically his liability as military commander in the present case. Mr. Gravus therefore cannot be held criminally responsible for the alleged crime of Genocide under Art. 28(a) of the Statute.

⁴³ ICC, Prosecutor v. Bemba, ICC-01/05-01/08-3343, Judgment pursuant to Article 74 of the Statute, 21. March 2016, para. 170

⁴⁴ Case Facts, Exhibit I

b. Mr. Gravus cannot be held criminally responsible for the alleged crime of Genocide under Art. 28(b) of the Rome Statute

Pursuant to Art. 28(b) of the Statute, three aspects must be fulfilled to establish that Mr. Gravus is criminally responsible for crime of genocide: (a) he knew, or consciously disregarded information which clearly indicated that the subordinates were committing crimes of genocide; (b) the crimes concerned activities that were within the effective control of Mr. Gravus; and (c) he failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. The Defense submits that none of the above aspects are met in the case against Mr. Gravus.

Mr. Gravus could not exercise effective control over his subordinates. This element is not satisfied only by “a showing of general influence on the part of the accused.”⁴⁵ In fact, there is no evidence of Mr. Gravus giving any direct orders to the military, except for asking Ms. Jolie about the “situation in Castria.”⁴⁶ He left actual command to his subordinates. Even though he only gave the order to “prevent potential threats to the security of the Hanu people and the Hanatun Republic,”⁴⁷ the Defense submits his words were interpreted in that way by the military to effect imprisonment of and death upon Castirian people.

As stated above, Mr. Gravus possessed no information concerning the alleged crimes being committed, even though he made the effort to find out, and was misled. “Actual knowledge” of such crimes is therefore not established.⁴⁸ Moreover, the Defense submits that there are no reasonable grounds to believe in Mr. Gravus’ deliberate ignorance. Specifically with regard to his interview,⁴⁹ Mr. Gravus was sure that the chaos and economic problems of the country connected to Castrians were caused only by politicians.

To summarize, Mr. Gravus did everything possible, within his knowledge and power to combat the alleged genocidal conduct, and given that, Mr. Gravus is not criminally responsible for the alleged crime of Genocide under Art. 28(b) of the Statute.

4. PRAYER FOR RELIEF

⁴⁵ ICTR, Prosecutor v. Ndindiliyimana, Judgment, ICTR-00-56-T, 17 May 2011, para. 1917

⁴⁶ Case Facts, Exhibit I

⁴⁷ Case Facts, para. 12

⁴⁸ ICTR, The Prosecutor v. Lgnace Bagilishema, ICTR-95-1A, Judgment, 7 June 2001, para. 46

⁴⁹ Case Facts, para. 16

Based on the evidence provided, the Defense requests the Court find: the case is inadmissible, the case does not fall within its jurisdiction, and that there are no reasonable grounds to believe that Mr. Gravus is criminally responsible for genocide under Art. 28(a)(b) of the Statute.