

**6th RMLNLU – SCC ONLINE® INTERNATIONAL MEDIA LAW MOOT COURT  
COMPETITION, 2018**

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**BEFORE**



**Cour  
Pénale  
Internationale**

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**International  
Criminal  
Court**

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**-IN THE CASE OF-**

**The Prosecutor**

**V.**

**The King of Somland, Mr. Felocious von Trapta & Mr. Valfus von Transal.**

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*-The Office of the Prosecutor-*

*“Case Concerning the Red Broadcast” pursuant to Article 13(b) of the Rome Statute in  
light of the UNSC resolution “Red Resolved”.*

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**-LIST OF ABBREVIATIONS-**


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➤ ¶	-Paragraph-
➤ ¶¶	-Paragraphs-
➤ A.C.	-Appeals Chamber-
➤ art.	-Article-
➤ Doc.	-Document-
➤ Dragoonia	-The Empire of Dragoonia-
➤ D.C.C.	-Dragoonian Casting Corporation-
➤ ECtHR	-European Convention of Human Rights-
➤ ed.	-edition-
➤ EoC	-Elements of Crime-
➤ G.A.	-General Assembly-
➤ H.R.C.	-Human Rights Commision-
➤ I.C.C.	-International Criminal Court-
➤ I.C.C.P.R.	-International Covenant on Civil and Political Rights-
➤ I.C.J.	-International Court of Justice-
➤ I.C.T.R.	-International Criminal Tribunal for Rwanda-
➤ IMT	- International Military Tribunals-
➤ JCE	- Joint Criminal Enterprise-
➤ KLA	-Keljuk Liberation Army-
➤ No.	-number-
➤ O.T.P.	-Office of the Prosecutor-
➤ P.T.C.	-Pre-Trial Chamber-
➤ Rep.	-Report-
➤ Res.	-Resolution-
➤ R.P.E.	-Rules of Procedure and Evidence-
➤ S.C.C.	-Somian Casting Corporation-
➤ S.C.S.L.	-Special Court of Sierra Leone-
➤ S.P.S.C.	-Special Panel for Serious Crimes-
➤ Somland	-The Kingdom and Commonwealth of Somland-
➤ S.T.L.	-Special Tribunal for Lebanon-

- **T.C.** -Trial Chamber-
- **U.D.H.R.** -Universal Declaration of Human Rights-
- **UK** -United Kingdom-
- **U.K.H.L.** -United Kingdom House of Lords-
- **U.N.** -United Nation-
- **U.N.G.A.** -United Nations General Assembly-
- **U.N.T.S.** -United Nations Treaty Series-
- **U.S.A.** -United States of America-
- **v.** -Versus-
- **Vol.** -Volume-

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**-STATEMENT OF JURISDICTION-**

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*The Office of The Prosecutor submits the “Case Concerning the Red Broadcast” to the International Criminal Court pursuant to Article 13(b) of the Rome Statute in light of the UNSC resolution “Red Resolved”.*

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**-STATEMENT OF FACTS-**

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**I.**

Somland is a developed country with the king as its titular head. The King, though apolitical, exercised great influence in decision making exercises great respect. He also influences decision making when the country faces critical issues. All State Corporations are headed by him and a marginal share of the profit is directed towards his personal purse. As per the laws of Somland, no forum can compel the King to appear in any court of law, nor shall any criminal prosecution or civil cause of action survive ipso facto being against the royal personage.

**II.**

Somian Casting Corporation (SCC) is the state-run news corporation. Most of the decisions related to its functioning and administration of are taken independently. However, certain guidelines empower the King and his Council to regulate the content in national interest, public good and in maintaining friendly relations between Somland and other countries.

**III.**

Dragoonia, of whose Somland was once a principality is a rapidly modernizing country. The ethnic compositions are culturally the first point of loyalty for each of these communities irrespective of the religious and cultural beliefs which they follow.

**IV.**

Felocious von Trapta, the principal force behind the operations of the SCC decided to advise investment in Dragoonias hoping to establish and exploit the market by establishing Dragoonias's first international media house. This decision was appreciated by both the nations. DCC, or Dragoonias Casting Corporation, was established in Dragoonias.

**V.**

An independent team was organized under ZulfedichZignoriaHaslaf, a national of Dragoonias. Mr. Trapta continued to be the Chief General Editor of the entire content. One of the shows which were produced was, "The Pride of the Masons". The show showed the cultural and linguistic history of the Masons and highlighted the creation of Sømland.

**VII.**

Due to the popularity of the show, the company launched a web broadcasting channel. One could also upload video blogs on the channel. In accordance with Somland's policy of *laissez faire*, the editorial board seldom intervened in the video-blogs.

**VIII.**

The censor board of Dragoonia issued a warning to review the content of the show. In the "Your news, your views" part of the show, Transal aired his first video urging the Keljukians to break the empire into pieces. He kept airing videos of similar nature after which a lot of violence erupted in Dragoonia.

**IX.**

Later on, Transal set up the "Government of Keljukistan in Exile" and named himself its Caretaker. Several political outfits began to be formed at different levels, one of which was KLA. Later, it was declared to be a terrorist organization. KLA claimed Transal as its chief inspiration and their object was to be free of the Emperor and attain self-rule.

**X.**

Mr. Haslaf was issued a show cause notice both for both les majaste laws and Sediton. A similar notice was also sent to Mr. Trapta and the SCC, and the DCC was declared an anti-national organization with its broadcasting license suspended. SCC, however, continued without disruption.

**XI.**

Transal later gave a speech urging the people to be ready to bleed as well as exact red. This was ensued by assassinations of several government officials, primarily of Tamaris ethnicity. What followed was "Operation Ragnarok" which led to a war-like situation. Dragoonia overran Somland and captured the King and MrTrapta. The crown prince was made to sign a treaty for the handing over of the King.

**XII.**

UNSC vide its resolution "Red Resolved", referred the matter to the ICC. Therefore, the office of prosecution sues King, Transal and Trapp for different crimes under Article 5 of the Rome statute.

**STATEMENT OF ISSUES**

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*The following questions are presented before the Hon'ble International Court of Justice for its consideration:*

- 1. Whether King and Trapta would be accountable for the actions of the corporation.**
  
  - 2. Whether Transal is liable for crimes committed under article 5 of the Rome Statute for his hate speeches.**
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**SUMMARY OF ARGUMENTS**

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**I. THE KING AND TRAPTA WOULD BE ACCOUNTABLE FOR THE ACTS OF THE CORPORATIONS.**

In light of the principle of corporate criminality, the corporate actors viz the people who control the corporation are liable for the acts of the corporation. In the present case, the King and Trapta were the corporate actors. Since the corporate veil is pierced, they attract individual criminal responsibility in light of Article 25 of the Rome Statute.

The SCC and DCC provided the platform for Transal to express his views. They did so without keeping a check on the content of the broadcasts. This led to the commission of crimes enshrined under **Article 5 of the Rome Statute**. Both of them facilitated the commission of the crimes which satisfies the aid and abet threshold. Further, even if it was an omission on their part the same would satisfy the merits specified under **Article 25(3)(c)**.

The King of Somland will not be able to shield himself by impunity of his royal office, thus under no circumstance, the king can escape the liability before the ICC.

**II. TRANSAL IS LIABLE FOR THE CRIMES COMMITTED UNDER ARTICLE 5 OF THE ROME STATUTE DUE TO HIS ‘HATE SPEECHES’.**

The speeches given by Transal amounted to “hate speech” which prosecutes him in response to a pressing social need. Transal was the mind behind the incitement to violence. However, the Mens Rea was converted to the Actus Reus by the insurgents, which establishes a Superior-Subordinate relationship between Transal and the rebellious Keljucians. Transal had the relevant effective control over these Keljucians which implies that he possessed the knowledge of the acts committed by the KLA, which should have had been prevented by Transal.

Transal needs to be made liable for genocide, crimes against humanity and War Crime as his acts fulfilled all the contextual elements of the abovementioned crimes established under **Article 5 of the Rome Statute, 2002**. In case, Transal escapes the liability for Genocide still in that case he would be liable for Incitement to genocide. The underlined act of Murder specified under every Article 5 crime was also committed over here. Thus, under no circumstance Transal could escape the liability before the ICC.

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**ARGUMENTS ADVANCED**


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**1. THE KING AND TRAPTA WOULD BE ACCOUNTABLE FOR THE ACTS OF THE CORPORATIONS.**

The liability of corporate actors is invoked. [1.1] Further, SCC and DCC aided and abetted Transal for the crimes committed. [1.2] The King of Somland cannot claim defence of sovereign immunity. [1.3]

**1.1. The corporate actors responsible for the deeds of the company.**

The King and Trapta will be held as criminals. [1.1.1] Further, requirements of corporate criminality are being fulfilled. [1.1.2]

*1.1.1. Corporate criminality will entail the King and Trapta as criminals.*

The ICC recognizes the liability of natural persons [1.1.1.1] and the threshold to pierce the corporate veil is established. [1.1.1.2]

## 1.1.1.1. Article 25 contemplates liability of natural persons.

Individuals operating as a criminal enterprise, as an entity can be held liable for crimes committed by the group.<sup>1</sup> Thus, individuals operating as a group should be held liable if they commit crimes while commencing their work as an organization.<sup>2</sup>

**Article 25 of the Rome Statute** states individual criminal responsibility and entails that natural persons will be held criminally responsible.<sup>3</sup>

Natural persons are considered as organs of the corporate body in the sense that they are the limbs and brains of the company.<sup>4</sup> The theory of '*alter ego*' gives the corporation all the physiognomies of a physical individual, which fulfils the criterion for vicarious

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<sup>1</sup> Armina Tanja Savanovic, '*Corporate Criminal Liability in International Criminal Law: ex nihilo nihil fit*', p. 13, <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOid=8908793&fileOid=8922573>.

<sup>2</sup> Andrew Clapham, '*Human Rights Obligation of Non-State Actors*', 88 INTERNATIONAL REVIEW OF THE RED CROSS, p. 61, (Oxford University Press, Oxford, 2006).

<sup>3</sup> Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force 1 July 2002, art. 25, [Rome Statute].

<sup>4</sup> DUBBER, M. & HÖRNLE, T., CRIMINAL LAW, A COMPARATIVE APPROACH, p. 334 (Oxford, Oxford University Press, 2014).

liability.<sup>5</sup> Also, there is growing consensus among scholars that corporate officials can also be prosecuted as indirect perpetrators under **Article 25(3)(a)**.<sup>6</sup>

The King and Trapta were the two individuals who exercised functional control over SCC and therefore, both of them will attract individual criminal responsibility.

1.1.1.2. Piercing of corporate veil is necessary.

It is imperative to identify the brains behind a corporation and pierce the corporate veil to hold them criminally responsible. To investigate the brains behind the operation, the Court penetrates the organizational veil employed.<sup>7</sup> In fact, ICL has previously upheld corporate criminal liability where corporations were a front for the commission of crimes.<sup>8</sup>

In pursuit of identifying corporate intent, US Courts have interpreted Article 25(3) of the Rome Statute. It was held that the '*Mens Rea*' for complicity is satisfied when it can be shown that a group of persons acted with a common purpose to facilitate commencement of a crime by another person(s).<sup>9</sup> The test is to check whether or not the directing mind was acting within his or her official capacity.<sup>10</sup>

Contrastingly, ICC's first Chief-Prosecutor held that corporations should be subjected to prosecution internationally;<sup>11</sup> captivantly, the preparatory works stated that prosecution of

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<sup>5</sup> Armina Tanja Savanovic, '*Corporate Criminal Liability in International Criminal Law: ex nihilo nihil fit*', p. 37, <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=8908793&fileId=8922573>.

<sup>6</sup> Joanna Kyriakakis, '*Developments in international criminal law and the case of business involvement in international crimes*', INTERNATIONAL REVIEW OF THE RED CROSS 994, p. 94 (2012); Peter Muchlinski, '*Limited liability and multinational enterprises: a case for reform?*', 34 CAMBRIDGE JOURNAL OF ECONOMICS, p. 5-928 (2010).

<sup>7</sup> Andrew Clapham, '*The complexity of international criminal law: looking beyond individual responsibility to the responsibility of organizations, corporations and states*', in RAMESH CHANDRA THAKUR AND PETER MALCONTENT, SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES, p. 239 (United Nations University Press, 2004).

<sup>8</sup> US v. Krauch et al., No. 10, Vol. VIII, 1081-1210 (1952), Judgement in Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law (29 July 1948); US v. Alfred Krupp et al., No. 10, Vol. IX, 1327-1452 (1950), Judgement in Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law (31 July 1948).

<sup>9</sup> Khulumani v. Barclay National Bank Ltd., 02-MDL-1499, (S.D.N.Y. 2007); Ntsebeza v. Daimler Chrysler Corporation, 05-2326-cv pp. 46-47 (US Court of Appeals for the Second Circuit 2007).

<sup>10</sup> HORDER, J., ASHWORTH'S PRINCIPLES OF CRIMINAL LAW, pp.168-169, (8<sup>th</sup> ed., Oxford: Clarendon Press 2016); Legislating the Criminal Code, Involuntary Manslaughter: item 11 of the Sixth Programme of Law Reform: Criminal Law, LawCom (Series) no. 237, p. 78 (London: Her Majesty's Stationery Office, 1996).

<sup>11</sup> Podgers, J., '*Corporations in the Line of Fire*', A.B.A. Journal (2004).

legal entities should be enabled.<sup>12</sup> Ideally, “if corporations are ‘persons’ under the law, then they should be more fully so”;<sup>13</sup> because with rights come responsibility. Relaxing the threshold, it can be held that the corporate accomplice does not need to be based where the crimes are committed, nor does it have to share the particular intent of the directing mind but should at least be aware of their contribution and what it is resulting in.<sup>14</sup>

The ‘Red Broadcasts’ were fully supported by the King and Trapta. They acted within their official capacity and did not act responsibly as they were in a position to control and restrict these crimes, but they chose not to.<sup>15</sup> Mere revenue earnings are not enough of a justification to balance the crimes committed by Transal.<sup>16</sup> It is, therefore, necessary that these two persons be held liable for the crimes committed by Transal.

### 1.1.2. Contours of corporate criminality are satisfied in the present Situation

In the case of *Al Akhbar*,<sup>17</sup> the Special Tribunal for Lebanon held that in order to impute corporate criminal liability on a corporation, three requirements attributed to the *corporation’s principals, employees, and/or affiliates* must be satisfied;

The identified person(s) must have “(1) acted within the scope of their employment; (2) had authority on behalf of the corporation; and (3) acted on behalf of the corporation.”

The Court further observed that these elements are envisaged in international law through the applicable Rule 60 *bis* of the Tribunal’s Rules of Procedure and Evidence.<sup>18</sup> It is emphasized

<sup>12</sup> Andrew Clapham, ‘Human Rights Obligation of Non-State Actors’, 88 INTERNATIONAL REVIEW OF THE RED CROSS, p. 30 (Oxford University Press, Oxford, 2006).

<sup>13</sup> Kelly, M.J., ‘The Status of Corporations in the TravauxPréparatoires of the Genocide Convention: The Search for Personhood’, 43 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW, p. 240 (2010).

<sup>14</sup> Werle, G., ‘Individual Criminal Responsibility in Article 25 ICC Statute’, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE, p. 970 (2007); Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro), ICJ 91, ¶ 421 (Feb. 26 2006).

<sup>15</sup> Moot Proposition, ¶ 48.

<sup>16</sup> Moot Proposition, ¶ 26.

<sup>17</sup> Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, Case No. STL-14-06/T/CJ, T.C. Judgement, ¶ 45 (15 July 2016).

<sup>18</sup> Al Jadeed [CO.] S.A.L./NEW T.V. S.A.L. (N.T.V.) & Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/T/CJ, T.C. Judgement, ¶ 60 (18 Sept. 2015); Special Tribunal for Lebanon, Rules of Procedure and Evidence, STL-BD-2009-01-Rev.6-Corr.1, (20 Mar. 2009).



that corporate responsibility should not exclude individual responsibility and vice-versa.<sup>19</sup> All the three conditions are satisfied by the King and Trapta.

Hence, in light of the aforesaid, the King and Trapta attract criminal liability.

### 1.2. The SCC and DCC aided and abetted Transal in committing these crimes.

The King and Trapta, heads of the corporations, attract the merits of Art. 25(3)(c) of the Rome Statute [1.1.1] and their omission satisfies the threshold under Art. 25(3)(c) [1.1.2].

#### 1.2.1. *The King and Trapta facilitated the commission of crimes in light of Art. 25(3)(c).*

It is contended that the King and Trapta, aided and abetted the commission of crimes.

**Article 25(3) of the Rome Statute** can be distinguished as: 1) aiding and abetting or otherwise assisting<sup>20</sup> and 2) contribution to the commission of an illicit act of a group.<sup>21</sup> To aid, abet or otherwise assist are three separate concepts. The third concept is open-ended, thus, making the list of assisting acts non-exhaustive.<sup>22</sup>

The ICTR defined aiding in *Akayesu* as ‘giving assistance to someone’ and abetting as ‘facilitating the commission of an act by being sympathetic thereto’.<sup>23</sup> The contribution to the crime need neither ‘always’ be tangible<sup>24</sup> nor need it be indispensable.<sup>25</sup> Further, in the *Tadić* case, the ICTY held that the act in question must constitute a “direct and substantial” contribution to the commission of the crime.<sup>26</sup> This position was confirmed by a TC in ‘*Celebici*’<sup>27</sup> and, more recently, in ‘*Naletilić*’ and ‘*Martinović*’.<sup>28</sup>

<sup>19</sup> Fauchlad & Stigen, ‘Corporate Responsibility Before International Institutions’, p. 1044, <https://www.jus.uio.no/ior/personer/vit/olefa/dokumenter/corporate-resp.pdf>.

<sup>20</sup> Rome Statute, art. 25(3)(c).

<sup>21</sup> Id., art. 25(3)(d).

<sup>22</sup> Armina Tanja Savanovic, ‘Corporate Criminal Liability in International Criminal Law: ex nihilo nihil fit’, p. 31, <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOid=8908793&fileOid=8922573>.

<sup>23</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, T.C. Judgement, ¶ 484, (2 Sept. 1998).

<sup>24</sup> Prosecutor v. Kayishema & Ruzindana, No. ICTR 95-1-T, T.C. Judgement, ¶ 200, (21 May 1995).

<sup>25</sup> Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, T.C. Judgement, ¶ 33, (7 June 2001); Prosecutor v. Bisengimana, Case No. ICTR-00-60-T, T.C. Judgement & Sentence, ¶ 34, (13 Apr. 2006).

<sup>26</sup> Prosecutor v. Tadić, Case No. IT-94-1-T, T.C. Judgement, ¶¶ 674, 688-92, (I.C.T.Y. 7 May 1997).

<sup>27</sup> Prosecutor v. Delalić et al., Case No. IT-96-21-T, T.C. Judgement, ¶¶ 325-9 (I.C.T.Y. 16 Nov. 1998).

<sup>28</sup> Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T, T.C. Judgement, ¶ 726, (I.C.T.Y. 31 Mar. 2003); Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, T.C. Judgement, ¶ 726, (I.C.T.Y. 17 Jan. 2005).

In sum, aiding and abetting requires ‘practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.’<sup>29</sup> The news corporation allowed twenty-four episodes of the show to be broadcasted despite warnings from the censor board of Dragoonia.<sup>30</sup> The King, principal shareholder in SCC and his Council had a duty to censure and regulate content in ‘*maintaining good and peaceful relationships...*’ which he failed to exercise.<sup>31</sup> The Corporation allowed sensitive messages by Transal to be aired ‘without any checks and balances.’<sup>32</sup> By doing so, the King and Trapta superintend ethnic tensions to materialize into violence. The platform “*Your news, your views*” allowed the *Red Broadcasts*, thus, assisting Transal in commission of the crimes.

Hence, the King and Trapta aided, abetted & assisted the commission of crimes by Transal.

### 1.2.2. Omission by the King and Trapta satisfies the aid and abet threshold.

It is contended that the omission by the King and Trapta does not absolve them from the criminal liability.

Aiding and abetting includes an ‘omission’.<sup>33</sup> In cases of omission, it is interpreted as ‘moral support’ by encouraging.<sup>34</sup> The ‘*Bemba*’ case recognized that omission creates and substantially increases the risk of violation of fundamental legal interests.<sup>35</sup> A ‘*direct link*’ needs to be identified in order to fulfill the threshold enshrined in Art. 25(3)(c).<sup>36</sup>

The King and Trapta were in a position to stop and control the potentially sensitive content from being broadcasted. But they omitted to do so with clear knowledge that in the ordinary

<sup>29</sup> Prosecutor v. Furundzija, Case No. IT-95-17/1-T, T.C. Judgement, ¶¶ 235, 249, (I.C.T.Y. 10 Dec. 1998).

<sup>30</sup> Moot Proposition, ¶¶ 22, 24.

<sup>31</sup> *Id.*, ¶ 5.

<sup>32</sup> *Id.*, ¶¶ 20, 26.

<sup>33</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, T.C. Judgement, ¶ 548, (2 Sept. 1998); Prosecutor v. Nahimana, Case No. ICTR-01-68-A, A.C. Judgement, ¶ 147 (16 Dec. 2013); Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, T.C. Judgement & Sentence, ¶ 470 (12 Sept. 2006); Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, T.C. Judgement, ¶ 597, (22 Jan. 2004).

<sup>34</sup> Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, T.C. Judgement, ¶ 200, (21 May 1995); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, T.C. Judgement, ¶¶ 235, 249, (I.C.T.Y. 10 Dec. 1998).

<sup>35</sup> Prosecutor v. Bemba Gombo, Case No. ICC 01/05-01/08-424, Decision on the Confirmation of Charges PTC II, ¶ 425, (15 June 2009); Kai Ambos, “*Critical Issues in the ‘Bemba’ Confirmation Decision*”, 22 LEIDEN JIL 715, 721-2.

<sup>36</sup> Prosecutor v. Perisic, Case No. IT-04-81-A, A.C. Judgement, ¶ 44 (I.C.T.Y. 28 Feb. 2013); CARSTEN STAHN, THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT, 604 (2015).

course of events it would lead to violence. This also implies that they had the requisite mental element to commit the crimes.<sup>37</sup>

The show challenged the ‘*les majaste*’ laws of Dragoonia. It spurred hatred on ethnic grounds which culminated into several casualties including 128 civilians and 25 police personnel.<sup>38</sup> A direct link between the actions of the King and Trapta and the crimes committed by Transal can be clearly established, in the form of *Red Broadcasts*.

Hence, the omission on the part of the King and Trapta tantamount to ‘commission by omission’ and therefore in light of the aid and abet principle, they attract criminal liability.

### **1.3. The King of Somland cannot claim immunity under national laws of Somland.**

**Article 27 of the Rome Statute** expressly lays down the irrelevance of immunity provided to a head of State under the national or international law.<sup>39</sup> In that regard, it is contended that the immunity enshrined by the domestic laws of Somland to the Sovereign<sup>40</sup> will *ipso facto* be null and void.

In the ‘*Arrest Warrant*’ case, the ICJ held that ‘*Rationae Personae*’ immunity shall not be available when the official is subject to proceedings before ‘certain international courts, where they have jurisdiction’.<sup>41</sup> And similarly, immunity has been held to be unavailable in several ICC cases.<sup>42</sup>

Hence, no immunity will be available to the King of Somland and he can be tried by the ICC.

## **2. TRANSAL IS LIABLE FOR THE CRIMES COMMITTED UNDER ARTICLE 5 OF THE ROME STATUTE DUE TO HIS ‘HATE SPEECHES’.**

The Prosecution submits that Transal gave hate speeches [2.1] which made his subordinates [2.2] commit Genocide [2.3], Crimes against Humanity [2.4] and War Crimes [2.5].

### **2.1. Transals’ speech amounts to “hate speech” which prosecutes him in response to a pressing social need.**

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<sup>37</sup> Rome Statute, art. 30.

<sup>38</sup> Moot Proposition, ¶ 30.

<sup>39</sup> Rome Statute, art. 27.

<sup>40</sup> Moot Proposition, ¶ 4.

<sup>41</sup> Arrest Warrant (Democratic Republic of the Congo v. Belgium), ICJ Rep 3, p. 61 (14 Feb. 2002).

<sup>42</sup> Prosecutor v. Saif Al-Islam Gaddafi, ICC-01/11-01/11, P.T. The Warrant of Arrest (27 June 2011); Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. 02/05-01/09, Judgment, (I.C.C. 4 Mar. 2009).

In the digital age, it is easier than ever to publish any information, which is quickly shared and taken to be true and widely accepted.<sup>43</sup> Public communication loses its discursive vitality as a result.<sup>44</sup> This ‘implies the existence of a pressing social need’.<sup>45</sup>

This information may incite violence, discrimination or hostility against identifiable groups in society.<sup>46</sup> Indeed, incitement to hatred does not necessarily entail a call for violence.<sup>47</sup> For instance, the **ECHR**<sup>48</sup> held that an individual’s portrayal of persons belonging to a particular group as a ‘source of evil’ constituted incitement to racial hatred. Online hate speech is itinerant, and the longer it stays available, the more damage it can inflict.<sup>49</sup>

Transal’s post is hate speech, it incites ethnicity hatred expressed by aggressive communal tensions towards Dragoonia.<sup>50</sup> Accordingly, it fulfils all the elements of Hate speech.<sup>51</sup>

**(i)Context:** Hate speech does not arise in a vacuum.<sup>52</sup> In recent years, Dragoonia has been marred by tensions between Dragoonian Power and insurgents from Keljuck

<sup>43</sup> Katherine Viner, ‘How Technology disrupted the Truth’, The Guardian, (12 July 2016), <https://www.theguardian.com/media/2016/jul/12/how-technology-disrupted-the-truth>.

<sup>44</sup> Jürgen Habermas, ‘How to save the quality press?’, Sign and Sight, (21 May 2007), <http://www.signandsight.com/features/1349.html>.

<sup>45</sup> UNHRC ‘General Comment No 34, Article 19, Freedoms of Opinion and Expression’, (12 Sept. 2011) UN Doc CCPR/C/GC/34 [33]; Zana v. Turkey, App No. 18954/91, [51] (ECtHR, 25 Nov. 1997); Sürek v. Turkey (No. 4), App No. 24762/94, [33] (ECtHR, 8 July 1999).

<sup>46</sup> David Kaye, ‘Freedom of Expression Monitors Issue Joint Declaration on ‘Fake News’, Disinformation and Propaganda’, (3 Mar. 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287&LangID=E>.

<sup>47</sup> Article 19, ‘Prohibiting incitement to discrimination, hostility or violence, Policy Brief’, (10 Dec. 2012), <https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf>; Féret v. Belgium, App No. 15615/07, (ECtHR, 16 July 2009); Faurisson v. France, Comm No. 550/1993 UN Doc CCPR/C/58/D/550/1993, (UNHRC, 1996).

<sup>48</sup> Pavel Ivanov v. Russia, App No. 35222/04, (ECtHR, 20 Feb. 2007).

<sup>49</sup> Iginio Gagliardone & others, ‘Countering Online Hate Speech’, 13 (UNESCO 2015), <http://unesdoc.unesco.org/images/0023/002332/233231e.pdf>.

<sup>50</sup> Council of Europe, ‘Recommendation No. R (97) 20 of the Council of Europe Committee of Ministers on Hate Speech’, (30 Oct. 1997), <https://rm.coe.int/1680505d5b>; Gündüz v. Turkey, App No. 35071/97, pp. 22-43, (ECtHR, 4 Dec. 2003).

<sup>51</sup> UNHRC, ‘Report of the Special Rapporteur on Minority Issues’, UN Doc A/HRC/28/64 [52], (5 Jan. 2015); Article 19, ‘Prohibiting Incitement to Discrimination, Hostility or Violence’, pp. 29-30, (21 Dec. 2012), <https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf>; UNHRC, ‘Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence’, (17 Sept. 2012), [http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf).

<sup>52</sup> UNHRC, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’ UN Doc A/HRC/14/23 p. 79; Malcolm Ross v. Canada, Case No. 736/1997 UN Doc CCPR/C/70/D/736/1997, (UNHRC, 2000).

community.<sup>53</sup> The rise of a violent extremist organization (KLA) in Somland and Dragoonia has further aggravated the feelings of fear and distrust towards Keljucks.<sup>54</sup> No one but, Transal is responsible for this particular situation.

**(ii) Content:** Transal's speech has a high degree of severity<sup>55</sup> as it contains direct allegations of fact against the Dragoonian empire and the Crown.<sup>56</sup> He gave several speeches which promoted the collapse of the Dragoonian Empire and incited the Kejucks to revolt for a cession.<sup>57</sup> His post led to several casualties<sup>58</sup> which has immense shock value<sup>59</sup> and exacerbates the harms caused.

**(iii) Position of the speaker in society:** Transal is the founder of a terrorist organization named "Government of Keljukistan in Exile". He is also the main inspiration for the establishment of another terrorist organisation KLA<sup>60</sup> which opposes Dragoonian rule and promotes rebellion. He is looked up to as a leader by the Keljukians and every post by him on the internet is deemed to be an order for the rebellious Keljukians. As a result, there have been multiple instances of abuse, harassment and assault on other people by members of the speaker's organization.<sup>61</sup>

**(iv) Intent:** Discriminatory speech by perceived reliable sources legitimizes intolerance in society.<sup>62</sup> His intent can be derived by the lurid speeches he gave. Though peaceful

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<sup>53</sup> Moot Proposition, ¶ 29.

<sup>54</sup> Id., ¶ 30.

<sup>55</sup> Article 19, '*Prohibiting Incitement to Discrimination, Hostility or Violence*', pp. 27-40 (2012), <https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf>; UNHRC, '*Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*', UN Doc A/67/357, p. 41 (2012); *Otto-Preminger-Institut v. Austria*, App No. 13470/87, (ECtHR, 20 Sept. 1994); *Wingrove v. The United Kingdom*, App No. 17419/90, (ECtHR, 25 Nov. 1996); *Gundez v. Turkey*, App No. 35071/97, (ECtHR, 14 July 2004); *Kokkinakis v. Greece*, App No 14307/88 (ECtHR, 25 May 1993); *Larissis v. Greece*, App No. 140/1996/759958/960, (ECtHR, 24 Feb. 1994); *Murphy v. Ireland*, App No. 44179/98, (ECtHR, 3 Dec. 2003); *Gay News Ltd & Lemon v. United Kingdom*, App No. 8710/79, (ECtHR, 7 May 1982).

<sup>56</sup> Moot Proposition, ¶ 25.

<sup>57</sup> Id.

<sup>58</sup> Id., ¶ 30.

<sup>59</sup> Jennifer E. Brown, '*News Photographs and the Pornography of Grief*' 2 J. Mass Media Ethics 75 (1987); Clay Calvert, '*Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction*' 24 Fordham Intell. Prop. Media & Ent. L.J., p. 673 (2015).

<sup>60</sup> Moot Proposition, ¶ 32.

<sup>61</sup> Id., ¶ 31.

<sup>62</sup> UNHRC, '*Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*', UN Doc A/67/357, p. 24 (7 Sept. 2012); *Erbakan v Turkey*, App No. 59405/00, p. 64, (ECtHR, 6 July 2006).

demonstrations are accepted in a society, but he made the Keljukians to resort to arms and blood which expounds on his *mens rea* to commit crimes.<sup>63</sup>

(v) **Extent:** Transal deliberately made his assertions on the most popular social networking platform (SCC) in his country.<sup>64</sup> The speech went viral on the internet and had a wide reach.<sup>65</sup>

(vi) **Likelihood of harm materializing:** There is a direct nexus between Transal's assertions and the harm materializing. This is evinced by the brutal killings of Tamaris civilians and the 25 police personnels by the insurgents.<sup>66</sup> Thus their objective of attaining self rule by the means as 'Red' was completely materialized.

Thus, there existed a pressing social need to prosecute Transal for hate speech.

## **2.2. There exists a 'Superior-Subordinate relationship' between Transal and the rebellious Keljukians.**

Transal should be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates based on the knowledge [2.2.1], effective responsibility and control [2.2.2] and the failure to prevent and punish the rebels [2.2.3].

### *2.2.1. Transal possessed the knowledge about the future conduct of the Keljukians.*

A superior subordinate relationship existed between Transal and his rebellious followers.

Superior-subordinate relationship makes the superior responsible for the omission in connection with the crimes committed by subordinates, which makes the acts of subordinates to be attributable to the superior.<sup>67</sup> This principle has been enshrined and expounded in the Rome Statute.<sup>68</sup>

**Article 28(b)(i)** of the statute states that, "*The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes*".

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<sup>63</sup> Moot Proposition, ¶ 33.

<sup>64</sup> Id., ¶ 25.

<sup>65</sup> Id., ¶ 19.

<sup>66</sup> Id., ¶ 30.

<sup>67</sup> Prosecutor v. Sefer Halilovic, Case No. IT-01-48-T, T.C. Judgement, ¶ 54 (I.C.T.Y. 16 Nov. 2005).

<sup>68</sup> Rome Statute, art. 28.

The **Trial Chamber of the ICTR** in the ‘*Akayesu*’<sup>69</sup> case confirmed the applicability of the doctrine of superior-subordinate relationship to non-international armed conflicts and its extension to civilians holding ‘*de facto*’<sup>70</sup> positions of authority. The **ICTY**<sup>71</sup>, **ICTR**<sup>72</sup> and the **Additional Protocol to the Geneva Convention**<sup>73</sup> also have provisions on the superior-subordinate relationship similar to that of the Rome Statute.

“*Consciously disregarded*” may go much further and perhaps represent the “*willful blindness*” that the ‘*Celebici*’ court said was actionable.<sup>74</sup> The word “*consciously*” means being “well aware of some object, impression, or truth.”<sup>75</sup>

Even if Transal says that he did not have actual knowledge<sup>76</sup>, still based on circumstantial knowledge<sup>77</sup> that a patently potential crime is to be perpetrated by his subordinates, he can be made liable. He “*had reason to know*”<sup>78</sup> or “*should have known*”<sup>79</sup> because he was the one who incited the Keljukians.<sup>80</sup> A superior’s knowledge is often presumed either from the official position in the state hierarchy or from the notorious and widespread character of the crimes committed by subordinates.<sup>81</sup>

Thus, Transal possessed the knowledge of the acts committed under his influence which fulfils the first element under Article 28(b) of the Statute.

### 2.2.2. The acts were within the effective responsibility and control of the superior.

<sup>69</sup> Prosecutor v. Akayesu, ICTR-96-4-T, T.C. Judgement, ¶ 492 (I.C.T.R. 2 Sept. 1998).

<sup>70</sup> BLACK’S LAW DICTIONARY, p. 631 (9th ed. 2009).

<sup>71</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, SC Res. 827, entered into force on 11 Feb. 1994, art. 7(3).

<sup>72</sup> Statute of the International Criminal Tribunal of Rwanda, SC Res. 955, entered into force on 29 June 1995, art. 6(3).

<sup>73</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, art.7.

<sup>74</sup> Prosecutor v. Mucić, IT-96-21-A, A.C. Judgement, ¶ 387, (8 Apr. 2003).

<sup>75</sup> BLACK’S LAW DICTIONARY, p. 730 (9th ed. 2009).

<sup>76</sup> A.P.V. Rogers, ‘*Command Responsibility under the Law of War*’, Lauterpacht Centre for International Law, (1999).

<sup>77</sup> Prosecutor v. Delalić et al., Case No.IT-96-21-T, T.C. Judgement, ¶ 386, (I.C.T.Y. 16 Nov. 1998).

<sup>78</sup> Prosecutor v. Nahimana, Case No. ICTR-99-52-A, A.C. Judgment, ¶¶ 1044-52, (28 Nov. 2007).

<sup>79</sup> Prosecutor v. Bemba Gombo, Case No. ICC 01/05-01/08-424, Decision on the Confirmation of Charges PTC II, ¶¶ 432-433, (15 June 2009).

<sup>80</sup> Id., ¶ 232.

<sup>81</sup> B.I. Bonafé, ‘*Finding a Proper Role for Command Responsibility*’, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE, p. 606 (2007).

All the crimes committed were under the responsibility and control of Transal which makes him liable and establishes a relationship.

It is an established principle of CIL that the superior-subordinate relationship applies to civilian superiors also<sup>82</sup>. “*Ordering*”, “*Soliciting*” and “*Inducing*” refer to a conduct by which a person is influenced by the superior to commit a crime.<sup>83</sup> This imposes individual criminal liability under **Article 25(3)(b) of the Statute** upon him.<sup>84</sup>

Transal through his speeches instigated and motivated the Keljukians to revolt against the Dragoonian Empire and “let the Red flow”. The Tamaris were stripped red after being murdered, implying that the ‘*Mens Rea*’ of Transal was converted into ‘*Actus Reus*’ by the insurgents.<sup>85</sup> Transal was invited to head the KLA and lead them for independence.<sup>86</sup>

Transal became a superior because he had the power to compel action<sup>87</sup>. If these commands wouldn’t have been abided by, then a relationship would not have been established. But as here the ‘*causalities*’<sup>88</sup> did occur this establishes a relationship, as the orders were obeyed.<sup>89</sup>

Even in the absence of formal rules or a formal structure, a superior can have actual and effective control<sup>90</sup> where the superior subordinate relationship need not be direct or immediate.<sup>91</sup> Thus Transal directly never spoke of committing crimes under **Article 5 of the Statute** but the words used in his speeches express that he knew that his commands would be

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<sup>82</sup> Prosecutor v. Kayishema, Case No. ICTR-95-1-T, T.C. Judgement, ¶¶ 213-15, (21 May 1999); Prosecutor v. Zejnil Delalić, Case No. IT-96-21-T, T.C. Judgement, ¶¶ 355-363, (I.C.T.Y. 16 Nov. 1998); Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, A.C. Judgement, ¶ 52, (3 July 2002).

<sup>83</sup> Prosecutor v. Gbagbo, Case No. ICC-02/11-01/15, Judgement, (28 Jan. 2016).

<sup>84</sup> Rome Statute, art. 25(3)(b).

<sup>85</sup> Prosecutor v. Musema, Case No. ICTR-96-13-A, A.C. Judgement, (16 Nov. 2001).

<sup>86</sup> Moot Proposition, ¶ 32.

<sup>87</sup> Ilias Bantekas, ‘*The Contemporary Law of Superior Responsibility*’, 93 AM. J. INT’L L., 573-595 (1999).

<sup>88</sup> Moot Proposition, ¶ 30.

<sup>89</sup> Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, A.C. Judgement, ¶¶ 69, 399, (I.C.T.Y. 3 Mar. 2000).

<sup>90</sup> Id.

<sup>91</sup> Prosecutor v. Halilovic, Case No. IT-01-48-T, T.C. Judgement, (I.C.T.Y. 16 Nov. 2005); Prosecutor v. Mucić, IT-96-21-A, A.C. Judgement, ¶¶ 193-195, (I.C.T.Y. 8 Apr. 2003).



executed.<sup>92</sup> However, it is widely accepted that the commander does not need to know all the details of the crimes committed.<sup>93</sup>

This image of Transal which made him look as a ‘leader’ proves the existence of a superior-subordinate relationship making him liable for the ‘greatest responsibility’.<sup>94</sup>

### 2.2.3. Failure on Transal’s part to prevent the commission of the crime.

**Article 28(b)(iii) of the Rome Statute**<sup>95</sup> enunciates the third element for establishing superior-subordinate relationship. This element imposes a duty on the perpetrator to prevent, repress the commission of the crime or to provide it to the relevant authorities.

A) **Prevention of crime** – Despite having the knowledge of such commission, nothing was done to fulfill him to prevent the commission of crimes.<sup>96</sup> Transal never would have had prevented Keljukians from committing these crimes due to his inherent mensrea.<sup>97</sup>

B) **Submit the matter to the competent authorities for investigation and prosecution** – The “ethnic composition is culturally the first point of loyalty for each person”<sup>98</sup> in the state of Somland. Under no circumstances, Transal would have had brought the actual perpetrators before the competent authorities.

## 2.3. Invocation of liability under “Genocide”.

The alleged conduct fulfils the required elements of Genocide as stated in Article 6 of the Rome Statute [2.3.1]. Alternatively, his acts amount to incitement of Genocide. [2.3.2]

### 2.3.1. The alleged conduct fulfils the contextual elements of Article 6 of the Rome Statute.

Transal had the specific intent [2.3.1.1] to kill the civilians [2.3.1.2] and he intended to destroy ‘in whole’ or ‘in part’, [2.3.1.3] through the underlying act of killings [2.3.1.4].

<sup>92</sup> Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Judgement, ¶¶ 1044–52, (28 Nov. 2007).

<sup>93</sup> Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement, ¶ 700, (I.C.T.Y. 30 Nov. 2006); Prosecutor v. Bemba Gombo, Case No. ICC 01/05-01/08-424, Decision on the Confirmation of Charges PTC II, ¶ 194, (15 June 2009).

<sup>94</sup> Prosecution v. Norman, SCSL-2004-14-PT-026, T.C. Judgement, ¶ 40 (28 May 2008).

<sup>95</sup> Rome Statute, art. 28(b)(iii).

<sup>96</sup> Id.

<sup>97</sup> Id., art. 30.

<sup>98</sup> Moot Proposition, ¶ 30.

2.3.1.1. There was a presence of specific intent.

Transal possessed the specific intent (*dolus specialis*) for the commission of genocide.

A person needs to have knowledge and intent in order to be liable.<sup>99</sup> Intent is proven through the act of a person for which he needs to be aware of the consequences in the ordinary course.

In the case of '*Krstic*', the court stated that convictions for Genocide can be entered only where that intent has been unequivocally established.<sup>100</sup> Specific intent can be inferred from the perpetrators statement in a general campaign against any group or targets of a group.<sup>101</sup>

Transal had the knowledge of the violent situation that existed in Dragoonia. He formed the "*Government of Keljukistan in Exile*" and aired videos that incited violence.<sup>102</sup> His very aim of starting the revolution for attaining the self rule depicts his Specific Intent. He was reasonably aware that genocide will occur in the ordinary course of events.

The knowledge of the act, intent and engaging in the conduct by giving hate speeches shows that there was a presence of specific intent.

2.3.1.2. The persons who were killed belonged to a particular national, ethnic, racial or religious group.

Genocide means any of the acts mentioned in **Article 6 of the Rome Statute**, committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.<sup>103</sup>

The Tamaris were the majority ethnic community in Dragoonia. The officials assassinated were primarily of Tamaris ethnicity. Thus, people killed belonged to an ethnic group.

2.3.1.3. Transal intended to destroy '*in whole*' or '*in part*', the people of the ethnic group, as such.

There was an intention to destroy in part, members of Tamaris ethnicity.

If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding, that the part qualifies as substantial prominence of the targeted

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<sup>99</sup> Rome Statute, art. 30.

<sup>100</sup> Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, T.C. Judgment, ¶ 134, (I.C.T.Y. 2 Aug. 2001).

<sup>101</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. 02/05-01/09, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, ¶ 19, (I.C.C. 4 Mar. 2009).

<sup>102</sup> Moot Proposition, ¶ 27.

<sup>103</sup> Rome Statute, art. 6.

portion within the group can be a useful consideration.<sup>104</sup> Genocidal intent can be inferred from the ‘*desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such*’.<sup>105</sup>

In the case of ‘*Tolimir*’<sup>106</sup>, the Trial Chamber concluded that if the people killed is *qualitatively* satisfying the definition of ‘*in part*’ then also there can be a conviction for genocide.<sup>107</sup> The term ‘*as such*’ has the effect of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. Thus, “as such” clarifies the intent requirement.<sup>108</sup>

Transal’s last video was followed by assassinations of government officials, primarily those of Tamaris ethnicity. Dragoonia was a Tamaris majority country.<sup>109</sup> The assassinations of Tamaris government officials were meant to warn Dragoonian administration that the aim was to wipe off the important members of the majority community. Thus the goal of independence was to be achieved by destruction of the ruling majority. Hence, the target was the ethnic group, as such.

Thus, there was an intention of destroying a significant part of the Tamaris ethnicity, as such.

#### 2.3.1.4. An act of killing occurred.

Tamaris officials were killed by the Keljuks. The term ‘*killed*’ is interchangeable with the term ‘*caused death*’.<sup>110</sup> The murder should be intentional, not necessarily premeditated murder to fulfill the meaning of the word ‘*meurte*’.<sup>111</sup>

Transal caused the killings as it was essential to for him achieve the desired goal of self rule.

#### 2.3.2. *In arguendo, Transal is liable for “incitement to genocide”.*

In Arguendo, Transal is liable for “incitement to genocide”.

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<sup>104</sup> Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, T.C. Judgement, ¶ 12, (I.C.T.Y. 2 Aug. 2001).

<sup>105</sup> Prosecutor v. Jelusic, Case No. IT-95-10-A, A.C. Judgement, ¶ 82, (I.C.T.Y. 5 July 2001).

<sup>106</sup> Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Judgement, ¶ 782, (I.C.T.Y. 12 Dec. 2012).

<sup>107</sup> Id.

<sup>108</sup> Prosecutor v. Niyitegaka, Case No. ICTR-96-14-A, A.C. Judgement, ¶ 53, (9 July 2004).

<sup>109</sup> Moot Proposition, ¶ 9.

<sup>110</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, T.C. Judgement, (2 Sept. 1998).

<sup>111</sup> Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, T.C. Judgement, ¶ 151, (21 May 1995).

Crime of incitement requires direct and public incitement to commit Genocide as a material element and the intent to incite others to commit genocide (itself implying a genocidal intent) as a mental element.<sup>112</sup> **Article 25(3)(e) of the Rome Statute** in conjunction with Article 6 defines the actions of Transal as Genocide. It is “public” under international law if it is communicated to a number of individuals in a public place or to members of a population at large by such means as the mass media.<sup>113</sup>

Transal, in his videos, gave speeches which incited violence.<sup>114</sup> After those videos were aired, several causalities took place which was primarily against Tamaris ethnicity. In the similar factual matrix of ‘*Rwanda*’<sup>115</sup> the Court held that public statements by Hutu political leaders and RTLM radio broadcasts constituted direct and public incitement to commit genocide against ethnic Tutsis for which there is no need of any weaponry.<sup>116</sup>

Also in the case of ‘*Popovi’c*’, speeches and propagandistic broadcasts were cited as evidence of defendant’s participation.<sup>117</sup> The ICTR in ‘*Rwanda*’ invoked the liability, as the ‘*superior had the reason know that his subordinates at RTLM were going to engage in incitement to genocide*’.<sup>118</sup> In the present case, Transal’s speech in itself can be considered genocidal.

Hence, Transal can in no way escape the liability for incitement to genocide.

#### **2.4. Transal is Liable for ‘Crimes Against Humanity’ for the underlying act of Murder.**

The attacks took place in furtherance of an organizational policy [2.4.1] against the civilian population [2.4.2]. These attacks were widespread and systematic [2.4.3]. The underlying act of ‘murder’ was committed [2.4.4].

##### *2.4.1. There existed an attack in furtherance of an organisational policy*

Transal led to an attack, executed in furtherance of a ‘*State or Organizational policy*’.<sup>119</sup>

<sup>112</sup> Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Judgement, ¶ 1034, (28 Nov. 2007).

<sup>113</sup> Id., ¶ 692.

<sup>114</sup> Moot Proposition, ¶¶ 25-33.

<sup>115</sup> Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Judgment, (28 Nov. 2007).

<sup>116</sup> Id.

<sup>117</sup> Prosecutor v. Popovi’c et al., Case No. IT-05-88-T, Judgment, ¶¶ 1812-1821, (I.C.T.Y. 10 June 2010).

<sup>118</sup> Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Judgment, ¶ 791, (28 Nov. 2007).

<sup>119</sup> Rome Statute, art. 7(2)(a).

The term ‘*organization*’ is not defined in the Statute.<sup>120</sup> The use of the conjunction ‘or’ indicates that the concepts of ‘*State*’ and ‘*Organization*’ are distinct.<sup>121</sup> The concept of organization is based on the group’s capability to perform acts which infringe on basic human rights and not the formal nature of a group and the level of its organization.<sup>122</sup> Therefore, organization includes even a non-state entity which has the requisite means, mutual agreement and coordination to carry out such an attack.<sup>123</sup>

The word ‘*policy*’ denotes that the entity meant to execute a “*planned, directed and organised attack*” instead of random acts of violence against the civilian population.<sup>124</sup> The policy need not be declared expressly an implicit or de facto policy is enough.<sup>125</sup>

As aforementioned in issue [2.2], Transal and his supporters were in a superior-subordinate relationship. This formed an organization. The way violence ensued, every speech of Transal shows that he had the requisite means and mutual coordination with his supporters which fulfill the requirements of the word ‘*organizational*’. Also, the systematized nature of assassinations shows the presence of an implicit policy which made the ‘Red flow’.

Thus, these attacks took place pursuant to an organizational policy of Transal.

#### 2.4.2. The attacks were directed against civilian population.

Transal led to attacks which were directed against the non-combatant, civilian population.

‘Civilian Population’ excludes “*members of the armed forces and other legitimate combatants.*”<sup>126</sup> Everyone except an active combatant of a hostile armed force is in a ‘*specific situation*’ requiring protection.<sup>127</sup>

<sup>120</sup> Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, T.C. Judgement, ¶ 1117, (7 Mar. 2004).

<sup>121</sup> Id.

<sup>122</sup> Prosecutor v. Francis Kirimi Muthaura, Case No. ICC-01/09-19, P.T.C. Decision on the Authorization of Investigation, ¶ 90, (31 Mar. 2010).

<sup>123</sup> Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07-717, P.T.C. Confirmation Decision, ¶ 1120, (7 Mar. 2014).

<sup>124</sup> Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, P.T.C Judgement, ¶ 218, (12 June 2014).

<sup>125</sup> Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07-717, P.T.C. Confirmation Decision, ¶ 396, (30 Sept. 2008).

<sup>126</sup> Prosecutor v. Bemba Gombo, Case No. ICC 01/05-01/08-424, Decision on the Confirmation of Charges PTC II, ¶ 78, (15 June 2009).

<sup>127</sup> OTTO TRIFFTERER, KAI AMBOS, THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: A COMMENTARY, p. 174 (Beck Hart, 3rd ed. 2016) [TRIFFTERER].

Transal caused the assassination of several government officials primarily of Tamaris ethnicity. There is no evidence that these government officials were active combatants in any hostile situation. Thus, they are to be considered as civilians. Therefore, these attacks were directed against a civilian population.

2.4.3. It fulfils the criterion of widespread or systematic attack.

Once the conduct qualifies as an attack, it has to be characterized as ‘widespread’ or in the alternative ‘systematic’ in nature.<sup>128</sup> In the present case, the attacks were both widespread and systematic.

Widespread refers either to the multiplicity of victims<sup>129</sup> or to the commission of acts on a large scale.<sup>130</sup> Additionally, the term ‘systematic’ represents the organized nature of the attack and “*the improbability of their random occurrence*”.<sup>131</sup> The organized nature of the attack is related to a similarity of conduct done in a non-accidental manner.<sup>132</sup>

Transal, through his speeches, caused violent demonstrations throughout the country. In a clash between Keljuks and policemen more than 150 people died.<sup>133</sup> These deaths and assassinations clearly constitute multiplicity of victims, thus making the attacks widespread.

Alternatively, even if the attacks are not considered to be widespread, they were systematic. In the week following Transal’s last speech, several government officials were killed, ‘*stripped naked and painted red*’.<sup>134</sup> These incidents cannot be said to be isolated random incidents. They manifest a systematic pattern. Thus, these attacks fulfill the criterion of widespread or systematic nature of attack.

2.4.4. The underlying act of murder was committed.

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<sup>128</sup> KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: FOUNDATIONS AND GENERAL, pp. 284-285, (Oxford University Press 2013).

<sup>129</sup> Prosecutor v. Kayishema&Ruzindana, Case No. ICTR-95-1-T, T.C. Judgement, ¶ 123, (21 May 1995).

<sup>130</sup> Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, T.C. Judgement, ¶ 206 (I.C.T.Y. 3 Mar. 2000).

<sup>131</sup> Prosecutor v. Al Bashir, ICC-02/05-01/08, P.T.C. Decision on the Prosecution’s Application for Warrant of Arrest, ¶ 81-82, (15 June 2009).

<sup>132</sup> Prosecutor v. Germain Katanga& Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07 OA 8 P.T.C. Judgement, ¶¶ 397-398, (18 Sept. 2009).

<sup>133</sup> Moot Proposition, ¶ 30.

<sup>134</sup> Moot Proposition, ¶ 41.

The underlying act of murder has been committed which amounts to crime against humanity. 'Actus Reus' for murder requires that 'the victim is dead' and that 'the act resulted from an unlawful act or omission of the accused or his subordinate'.<sup>135</sup>

Transal has committed the underlying act of murder. For attaining this, many Tamaris and police personals had to give their lives.<sup>136</sup> Transal had the requisite knowledge of these killings and it was an unlawful omission on his part as proved in issue [2.2].

Hence, Transal has perpetrated acts of murder and is liable for crimes against humanity.

#### 2.4.5. The underlying act of Persecution was committed.

A single act can be used to sue for both killing and persecution.<sup>137</sup> Thus, murder can be charged as persecution if discriminatory intent is shown.<sup>138</sup>

There was discriminatory intent, as his very aim of starting the revolution was getting a separate country on the basis of ethnicity. He, by his statement, wanted to target the majority ethnicity of Dragoonia that was Tamaris. That is why, primarily, officials of Tamaris ethnicity were killed in a very inhumane manner,<sup>139</sup> as they were murdered, stripped naked and painted red.<sup>140</sup> Thus, the murders constituted grave violations of their fundamental rights, as their right to live with dignity under the right to life is violated.<sup>141</sup>

### **2.5. Transal is Liable for the War Crime of Attacking Civilians as stated under S.**

#### **8(2)(e)(i)**

There existed a Non-International Armed Conflict [2.5.1] as Transal directed an attack [2.5.2] against civilians [2.5.3] which being the objects of the attack [2.5.4] Also, Transal was aware of factual circumstances that established the existence of an armed conflict [2.5.5].

<sup>135</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, T.C. Judgement, ¶ 589, (2 Sept. 1998).

<sup>136</sup> Moot Proposition, ¶ 30.

<sup>137</sup> METTRAUX, G., INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS, (Oxford University Press, 2005).

<sup>138</sup> The Elements of Crimes, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, part II.B*, <https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf>.

<sup>139</sup> SCHABAS, W., AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, (3rd Edition Cambridge University Press, 2007).

<sup>140</sup> Moot Proposition, ¶ 41.

<sup>141</sup> Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, T.C. Judgment and Sentence, ¶ 21 (1 June 2000).

2.5.1. The conduct took place in the context of and was associated with an armed conflict not of an international character.

For a non-international armed conflict, the hostilities must reach a minimum level of hostilities and the non-governmental groups involved must be considered “*parties to a conflict*”.<sup>142</sup> Minimum level of hostility is said to be in existence when the government is obliged to use military force instead of police.<sup>143</sup> The term “*parties to a conflict*” means that the forces have to be under a certain command structure and have the capacity to sustain military operations.<sup>144</sup>

The series of events including the inciteful speeches of Transal, formation of terrorist organizations in Zapahara, violent demonstrations and assassinations led to a situation where use of military force became inevitable. Thus, the Dragoonian Government launched a military crackdown, Operation Ragnarok.<sup>145</sup> Thus, the first requirement of ‘a minimum level of hostility’ is fulfilled. KLA was declared to be a military organization.<sup>146</sup> They also claimed that they would attain independence not only by voice but also with hands.<sup>147</sup> There was also a command structure as proved in [2.2]. Thus, they had the ability to sustain military attacks.

Hence, there was a protracted armed conflict of non-international nature.

2.5.2. Transal directed an attack.

Transal caused the perpetration of violence against the Tamaris several times.

Transal was the chief inspiration for the KLA.<sup>148</sup> Other Keljuks also followed him so taking advantage of this he made the Keljuks rebel. This was followed by assassinations of government officials, primarily of Tamaris ethnicity. Hence, Transal directed an attack against civilian population.

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<sup>142</sup> International Committee of the Red Cross (ICRC), “*How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?*”, (Mar. 2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

<sup>143</sup> Prosecutor v. FatmirLimaj, Case No. IT-03- 66-T, Judgement, ¶¶ 135-170, (I.C.T.Y. 30 Nov. 2005).

<sup>144</sup> Id., ¶¶ 94-134.

<sup>145</sup> Moot Proposition, ¶ 42.

<sup>146</sup> Moot Proposition, ¶ 28.

<sup>147</sup> Moot Proposition, ¶ 33.

<sup>148</sup> Moot Proposition, ¶ 32.



2.5.3. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities

Everyone except an active combatant of a hostile armed force is in a 'specific situation' of requiring protection.<sup>149</sup>

There is no evidence to show that the Tamaris officials, engaged in hostilities. Thus, they are to be considered as civilians. The objects of these attacks, therefore, were individual civilians not taking direct part in hostilities.

2.5.4. The 'object of the attack' was Tamaris civilians satisfying the specific intent.

Transal intended to attack the Tamaris who did not take part in the hostilities.

A person needs to have knowledge and intent in order to be liable.<sup>150</sup> The 'dolus specialis' of Transal has already been proved in [2.3.1.1]. He, by his statement, wanted to target the majority of the Dragoonians that consisted of Tamaris ethnicity.

The knowledge of the act, intent and engaging in the conduct by giving hate speeches shows that there was a presence of specific intent which fulfils the object of the act.

2.5.5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Transal's speeches gave impetus to the Keljuk sentiment. Several political outfits were formed and violent demonstrations erupted throughout Dragoonians which resulted in casualties.<sup>151</sup> In one such demonstration, more than 150 people died. After his second speech, the KLA was formed which advocated independence by use of hands and not just voice. By his third speech, several assassinations of Keljuk officials took place.<sup>152</sup>

Almost every video of Transal was ensued by violence still he kept airing videos like 'enough is enough and the only way to move forward is to let the Red flow'<sup>153</sup> as this was heard.

Thus, Transal was aware of factual circumstance establishing the armed conflict.

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<sup>149</sup> TRIFFTERER, P. 155.

<sup>150</sup> Rome Statute, art. 30.

<sup>151</sup> Moot Proposition, ¶¶ 27, 29.

<sup>152</sup> Moot Proposition, ¶ 41.

<sup>153</sup> Id.

**PRAYER**

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Wherefore in light of the issues presented, arguments advanced and authorities cited, the Prosecution respectfully requests this Trial Chamber to adjudge and declare that:

- I. King and Trapta would be accountable for the actions of the corporation.*
  
- II. Transal is liable due to his hate speeches, for crimes of Genocide, Crimes against Humanity and War Crime established under Article 5 of the Rome Statute.*

*All of which is respectfully submitted.*

On Behalf of the Office of the Prosecutor

Counsel for the Prosecution.