

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

BEFORE



-IN THE CASE OF-

The Prosecutor

V.

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

-The Office of The Defence-

***“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-

➤ ¶	-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-
➤ 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-
➤ 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 for Sierra Leone-
➤ Somland	-The Kingdom and Commonwealth of Somland-
➤ S.T.L.	-Special Tribunal for Lebanon-

- **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-

The Office of The Defence 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”.

-STATEMENT OF FACTS-

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 Zulfedich Zignoria Haslaf, 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

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

- I. THE CASE CONCERNING THE RED BROADCASTS IS NOT ADMISSIBLE BEFORE THE ICC.**
 - II. THE KING AND TRAPTA WOULD NOT BE ACCOUNTABLE FOR THE ACTS OF THE CORPORATIONS.**
 - III. TRANSAL IS NOT LIABLE FOR THE CRIMES MENTIONED UNDER ARTICLE 5 OF THE ROME STATUTE.**
 - IV. TRANSALS PROSECUTION IS UNNECESSARY AND OVERLY INTRUSIVE.**
-

SUMMARY OF ARGUMENTS

1. CASE CONCERNING THE RED BROADCASTS IS NOT ADMISSIBLE BEFORE THE ICC.

In light of the principle of complementarity, the present case is not admissible before the ICC. The Courts of Somland must have the first chance to prosecute the three individual's viz. the King, Trapta & Transal.

2. THE KING AND TRAPTA WOULD NOT BE ACCOUNTABLE FOR THE ACTS OF THE CORPORATIONS.

Art. 25(3)(a) does not provide for corporate criminal liability.

The King and Trapta had no '*Mens Rea*' to commit crimes. Their sole aim was to maximize profits and their actions do not invoke the threshold of intent or knowledge provided under Article 30 of the Statute. Both the individuals are not co-perpetrators to the crime. There was no evidence to show that there exists a common plan or agreement between the parties. Further, the actions of the King and Trapta do not qualify as a co-ordinated essential contribution to the crimes.

DCC is a separate legal entity and their actions are responsibility of their own. Criminal liability if any should accrue to DCC and not to the parent corporation i.e. SCC. Even if the corporate veil is pierced, the heads of DCC should be held liable and not the heads of SCC.

Lastly, the King of Somland can claim immunity under the national laws of Somland.

3. TRANSAL IS NOT LIABLE FOR THE CRIMES MENTIONED UNDER ARTICLE 5 OF THE ROME STATUTE.

Transal is not liable as a civilian superior. He did not have effective responsibility and control over the rebels. Mere fact that the official is a influential person does not suffice. There is no evidence to establish that he had the reason to know that the acts were being perpetrated.

Transal cannot be held liable for Genocide as he did not have the specific intent for the act. He did not target the officials because of their ethnicity. He cannot be held liable for Crimes against Humanity as the group that allegedly committed the acts does not fulfil the requirements of an ‘organization’ as used in the Rome Statute. The attacks were neither widespread nor systematic and were committed without any discriminatory intent. Also, he cannot be held liable for War Crimes as there did not exist any armed conflict, international or non-international, during the time in which the crimes have allegedly been committed.

4. Transal’s prosecution is unnecessary and overtly intrusive.

Transal’s speech qualifies for a protected speech as it was a political speech and, as such, it was highly protected. It allows a degree of provocation. The speech was in public concern. He cannot be held liable for Article 5 crimes merely on the basis of his speeches. Under the general practice, a person cannot be held liable for such crimes on the basis of speech as these crimes require a high degree of threshold.

ARGUMENTS ADVANCED

1. THE CASE CONCERNING THE RED BROADCASTS IS NOT ADMISSIBLE BEFORE THE ICC.

The Defence submits that the three individuals in the custody of the International Criminal Court (“ICC” or the “Court”), namely; the King, Trapta & Transal should be released from the custody of the ICC because the Situation is not admissible before the ICC.

The present Situation does not attract the merits of Article 17 of the Rome Statute (“Statute”) in light of the principle of complementarity. Additionally, the admissibility procedure applies to all cases that come before the Court, even those resulting from referral by the Security Council.¹ There are three components to the admissibility determination – Complementarity, Gravity and *non bis in idem*.

It is contended that in the present case the principle of complementarity was not adequately fulfilled. The national justice system of Somland was not given any kind of opportunity to prosecute the three individual’s *viz.* the King, Trapta & Transal.

Paragraph 10 of the Preamble to the Statute r/w Article 1 of the Statute emphasise that ‘the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions’.² The drafters of the Rome Statute sought to limit the ability of the Court to try cases over which it has, at least in theory, jurisdiction. Consequently, they have required that the State’s own courts get the first bite at the apple.³ Logically also, the States should be discouraged to defer situations to the ICC rather than assuming their own responsibilities. The ICC was intended to be a ‘Court of last resort’.⁴

In *Lubanga Arrest Warrant Decision*,⁵ the Court held that it may only take action with respect to a case where States with jurisdiction have remained inactive, or a decision not to

¹ SCHABAS, W., AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, p. 189, (Cambridge University Press, 3rd Ed. 2007). [SCHABAS]

² Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force 1 July 2002, art. 1. [Rome Statute]

³ Mohamed El Zeidy, ‘*The Principle of Complementarity: A New Machinery to Implement International Criminal Law*’, 23 *Michigan Journal of International Law* ¶ 869 (2002).

⁴ SCHABAS, p. 187.

⁵ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-8-US-Corr, Decision on the Prosecutor’s Application for a Warrant of Arrest, ¶ 29 (10 Feb. 2006).

prosecute has been resulted from the unwillingness or inability to genuinely prosecute within the meaning of Art. 17.⁶

Paragraph 6 of the Preamble to the Rome Statute⁷ declares that ‘*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.*’ In his September 2006 ‘*Prosecutorial Strategy*’, he stated: “With regard to ‘*complementarity*’, the Office emphasizes that according to the Statute national states have the primary responsibility for preventing and punishing atrocities in their own territories ...The Office has adopted a ‘*positive approach*’ to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.”⁸

Article 13(b) of the Statute,⁹ governs the Security Council referral which is one of means of triggering the exercise of jurisdiction by the Court. If it triggers the Court, the Council should be prepared to live within the parameters of the Statute with respect to such matters as jurisdiction.¹⁰

In the present case, the UNSC with its resolution “*Red Resolved*” referred the matter to the ICC¹¹ While the ICC may have adequate jurisdiction to try the three individuals, however, in light of the aforementioned, the Situation should be construed as inadmissible.

2. THE KING AND TRAPTA WOULD NOT BE ACCOUNTABLE FOR THE ACTS OF THE CORPORATIONS.

The Defence submits that Art. 25 of the Rome Statute does not provide for corporate criminality. [2.1] The King who was the primary stakeholder and Mr. Trapta, CEO of the news corporation, had no *Mens Rea* to commit any crimes. [2.2] Further, they do not qualify as co-perpetrators to the crimes committed. [2.3] *In arguendo*, DCC is a separate legal entity [2.4]. The King of Somland can claim immunity under national laws of Somland [2.5].

⁶ Rome Statute, art. 7.

⁷ Rome Statute, Preamble.

⁸ ‘Report on Prosecutorial Strategy’, 14 September 2006 (emphasis in the original).

⁹ Rome Statute, Art.13(b).

¹⁰ SCHABAS p.169; Ruth B. Philips, ‘*The International Criminal Court Statute: Jurisdiction and Admissibility*’, 10 *Criminal LawForum* 61, p.73, (1999); Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, art. 17.

¹¹ Moot Proposition, ¶ 47.

2.1 Art. 25(3)(a) does not provide for corporate criminal liability.

The subject of Art. 25(3)(a) is a ‘*person*’ who is involved in a criminal enterprise.¹² Such a person as interpreted by Art. 25(1) is only a natural person.¹³ This has its basis in the doctrine of ‘*societas delinquere non potest*’ which posits that legal persons cannot be held criminally responsible.¹⁴ Rather, they are used as instruments for the commission of crimes.¹⁵ This was reflected in French proposal which did not isolate the liability of the corporation from the person behind it.¹⁶

Moreover, deeming an entity criminal would ‘*ipso facto*’ attribute liability to those associated with it. This would result in a collective attribution of guilt that endangers the codified intent of prosecuting individuals at the helm.¹⁷

Hence, Art. 25 of the Statute does not allow for an organization to be treated as a co-perpetrator.

2.2 There was no *mens rea* to commit the crimes.

The King and Trapta did not have any ‘*dolus specialis*’ to commit the crimes.

The ‘*Mens Rea*’ required is that the accused acted with the requisite intent for the crime under customary international law.¹⁸

The cumulative reference to “intent” and “knowledge” requires the existence of a volitional element on the part of an individual.¹⁹ This volitional element encompasses, those situations in which the suspect:

- (i) “*Knows that his or her actions or omissions will bring about the objective elements of the crime;*

¹² Rome Statute, art. 25(3).

¹³ Prosecutor v. Al Jadeed, Case No. STL-14-05/T/CJ, Judgement, ¶ 19, (18 Sept. 2015).

¹⁴ Joanna Kyriakakis, ‘*Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge*’, 56 (3) NETHERLANDS INTERNATIONAL LAW REVIEW, 333 (2009).

¹⁵ US v. Krauch et al., Case No. Vol. VIII, 1081-1210, Judgement, ¶ 52 (I.M.T. 29 July 1948).

¹⁶ AMBOS K., TREATISE ON INTERNATIONAL CRIMINAL LAW, p. 144, (Oxford University Press, 2013).

¹⁷ Payam Akhavan, ‘*Justice in the Hague, Peace in the Former Yugoslavia?*’ 20 HUM. RTS., p. 742, (1998).

¹⁸ Prosecutor v. Dario Kordić & Mario Čerkez, Case No. IT-95-14/2-A, A.C. Judgement, ¶ 363 (I.C.T.Y. 17 Dec. 2004).

¹⁹ CASSESSE, A., GAETA, P. & JONES, J. (ED.), THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, pp. 899-900, (Oxford, Oxford University Press 2002).

- (ii) Undertakes such actions or omissions with the express intent to bring about the objective elements of the crime (*dolus directus* of the first degree);²⁰
- (iii) Aware that it (the consequence) will occur in the ordinary course of events (*dolus directus* of the second degree).²¹

[EMPHASIS SUPPLIED]

The present factual matrix does not entail that the King and Trapta ‘knew’ or had ‘specific intent’ to commit the crimes. Just like any other corporation, their sole aim was to earn revenue and maximize profit. Only because SCC clocked the maximum revenue did they broadcast the show across the world.²² The news corporation even conducted an in-house enquiry and found no reference to violence or incitement *per se*.²³

Hence, the two heads of the corporation will not attract criminal liability in light of **Art. 30 of the Statute**.

2.3 The King and Trapta are not co-perpetrators to the crime.

There was no common plan between heads of SCC and Transal to commit the crimes. **[2.3.1]** Additionally, there was no essential contribution made by the King and Trapta. **[2.3.2]**

2.3.1 No common plan or agreement between the parties

The *Lubanga* decision referred joint commission as “co-perpetration”,²⁴ and approved the German doctrine of ‘functional control over the act’ (*funktionelle Tatherrschaft*).²⁵ It is contended that the King and Trapta cannot be considered as principals to the crimes committed.

²⁰ Rome Statute, art. 30; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgement, ¶¶ 315,352, (14 Mar. 2012).

²¹ Rome Statute, art. 30(2)(b).

²² Moot Proposition, ¶ 26.

²³ *Id.*, ¶ 38.

²⁴ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803-tEN, P.T.C. I, Decision on the Confirmation of Charges, ¶¶ 343-347, (29 Jan. 2007); OTTO TRIFFTERER, KAI AMBOS, THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: A COMMENTARY, p. 479, (Beck Hart, 3rd ed. 2016).

²⁵ Prosecutor v. Blé Goudé, Case No. ICC-02/11-02/11-186, P.T.C. Decision on the Confirmation of Charges, ¶ 135, (11 Dec. 2014); Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, A.C. Judgement, Separate Opinion of Judge Schomburg, ¶ 17, (7 July 2006); Prosecutor v. Ngudjolo Chui, Case No. ICC-01/04-02/12-4, T.C. Judgement, Concurring Opinion of Judge van den Wyngaert, ¶¶ 5-6,17,67, (18 Dec. 2012).

Participation in the crimes committed by an individual without the coordination with one's co-perpetrators falls outside the scope of co-perpetration within the meaning of Art. 25(3)(a).²⁶ The common plan must include the commission of a crime.²⁷ The *Bemba Confirmation Decision*²⁸ followed this approach, whereas *Lubanga* AC held that the common plan must involve "a critical element of criminality."²⁹ The agreement need *not be explicit*, and that its existence can be inferred from the subsequent concerted action of the co-perpetrators.³⁰

The King and Trapta had no association with Transal. Transal was an independent user who on his own volition uploaded the video-logs to the portal.³¹ The news corporation believed in the doctrine of '*laissez-faire*' and hence seldom intervened in the video-logs.³² The King and Trapta had no functional control over the acts of Transal and therefore, cannot be questioned to have jointly committed the crimes.

2.3.2 No co-ordinated essential contribution made by the King and Trapta

The co-perpetrators who if they do not perform their tasks could frustrate the commission of crimes are said to have joint control over the crime.³³ The essential character of the task is to be identified to assess whether someone is a co-perpetrator or not.³⁴

In the present case, the platform "Your news, your views" was just a portal where any user could upload video-blogs.³⁵ Allowing Transal to upload his videos is in consonance with Somland's least interventionist policies. Also, the censor board of Dragoonia only raised

²⁶ Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, P.T.C. I Decision on the Confirmation of Charges, ¶ 322, (30 Sept. 2008).

²⁷ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803-tEN, P.T.C. I Decision on the Confirmation of Charges, ¶ 344, (29 Jan. 2007).

²⁸ Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08-424, P.T.C. II Decision on the Confirmation of Charges, ¶¶ 348-351, (15 June 2009).

²⁹ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-3121-Red, A.C. Judgement, ¶ 446, (1 Dec. 2014).

³⁰ *Id.*, ¶ 345.

³¹ Moot Proposition, ¶ 25.

³² *Id.*, ¶ 20.

³³ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803-tEN, P.T.C. I Decision on the Confirmation of Charges, ¶¶ 346-348, (29 Jan. 2007).

³⁴ Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, T.C. Judgement, ¶ 495, (I.C.T.Y. 31 July 2003).

³⁵ Moot Proposition, ¶ 20.

concerns with respect to the show, namely “*The Pride of the Masons*”, and not the platform. This in itself is not an essential contribution by the King and Trapta.

Hence, the King and Trapta do not satisfy the merits of Art. 25(3).

2.4 In arguendo, DCC is a separate legal entity.

Even though a subsidiary might be wholly-owned, the subsidiary is a separate and distinct legal entity from the parent company. It is contended that liability, if any, should accrue to the heads of DCC and not SCC.

The autonomy of the corporate personality, the idea that the corporate veil is to be pierced only in the exceptional case of wrongdoing,³⁶ is a doctrine that has become established throughout the world.³⁷ This doctrine, which allows parent companies to maintain legal separation between themselves and their subsidiaries, has enabled legal invisibility.³⁸

DCC was a 100% owned subsidiary of the SCC.³⁹ SCC appointed an independent team under the leadership of Haslaf, a national of Dragoonia. The DCC should have exercised adequate checks and balances so as to ensure that the crimes committed in Dragoonia could be avoided. Even if the portal was supervised by SCC, it is the responsibility of the subsidiary for which it is created to oversee the implications in Dragoonia.

Hence, Haslaf can be liable for the crimes.

2.5 The King of Somland can claim immunity under national laws of Somland.

The ICC cannot try the King as a UNSC referral does not waive off the immunity available to the heads of States. [2.5.1] In arguendo, the due process of law was not followed for the arrest of the King of Somland and Mr. Trapta. [2.5.2] Sovereign immunity available under Customary International Law should also be available in International Courts. [2.5.3]

2.5.1 The UNSC Referral does not waive off the immunity available to the King of Somland

³⁶ PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY*, p. 96, (Oxford University Press, 1993).

³⁷ Dalia Palombo, *Chandler v. Cape*, ‘*An Alternative to Piercing the Corporate Veil Beyond Kiobel v. Royal Dutch Shell*’, 4 BRIT. J. AM. LEGAL STUD. 453, p. 453 (2015).

³⁸ Vivian Grosswald Curran, ‘*Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations*’, Vol. 17 No. 2, CHI. J. INT’ L., (12 Jan. 2016), p. 408.

³⁹ Moot Proposition, ¶ 17.

The UNSC Referral respects the distinction between States and non-State Parties as it should be in accordance with the cardinal rule of international law that ‘a treaty does not create obligations or rights for a third State without its consent’.⁴⁰ A UNSC referral is simply a mechanism to trigger the jurisdiction; it does not turn a non-State party into a party to the Statute.⁴¹ Presence of jurisdiction does not imply that immunity is removed as if a non-State Party is analogous to a State Party to the Statute.⁴² Once the jurisdiction has been established, it needs to be established if any immunities bar the exercise of Court’s jurisdiction.

Thus, the mere fact that the Court may exercise jurisdiction on the basis of a referral of UNSC does not mean that Article 27 of the Statute is applicable to Somland as if Somland were analogous to a State Party.

2.5.2 In arguendo, due process of law was not followed for the arrest of the King of Somland

Article 98(1) of the Statute states that the ICC may not move with requests of arrest for surrender that would require the requested state to act inconsistently with its obligations under international law with respect to immunity of a person unless ICC obtains cooperation of that third state for waiver of immunity. The Statute also states that no person shall be subjected to arbitrary arrest.⁴³

In the present situation, Dragoonian overran Somland and captured the King and Mr Trapta. With the fear of the death of his father, the crown prince was made to accede to a treaty which expressed an agreement to hand over the King, Mr Trapta and Mr. Transal to an international and neutral body. Having no option left, the prince had to accept that.

Dragoonia did not respect its obligations of respecting the sovereign immunity of the King and Mr. Trapta. The ICC also did not obtain any waiver of immunity from Somland. Thus, King was deprived of his liberty with this arrest and the arrest was arbitrary.

Hence, due process of law was not followed in the arrest of the King and Mr Trapta.

⁴⁰ Vienna Convention on the Law of Treaties, 1155 UNTS 331, entered into force on 23 May 1969, art. 34.

⁴¹ Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. 02/05-01/09, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, ¶ 55, (I.C.C. 4 Mar. 2009).

⁴² Id., ¶ 56.

⁴³ Rome Statute, art. 55(d).

2.5.3. Sovereign Immunity available under Customary International Law is available in International Courts

Immunity shall be available to the King of Somland as per the Customary International Law [‘CIL’].

In CIL, heads of state enjoy ‘*rationae personae*’ immunity i.e. absolute personal immunity for every action taken while in office. In *Blaškić*, the ICTY held that ‘*although sovereign immunity was meant to apply to relation between states inter se, it must and has been respected by international organizations and international courts.*’⁴⁴

The King of Somland enjoyed sovereign immunity under domestic laws. As held by the ICTY, this immunity shall be respected by all international courts. ICC being one such international court should not try the King.

Hence, immunity will be available to the King of Somland and he cannot be tried by the ICC.

3. TRANSAL IS NOT LIABLE FOR THE CRIMES MENTIONED UNDER ARTICLE 5 OF THE ROME STATUTE.

The Prosecution submits that Transal is not a civilian superior [3.1] and cannot be made liable for Genocide [3.2], Crimes against Humanity [3.3] and War Crimes [3.4].

3.1 Transal is not liable as a Civilian Superior.

Superior Responsibility is proven by, inter alia, superiors effective control⁴⁵ [3.1.1] and knowledge that his subordinates were about to commit a crime. [3.1.1]

3.1.1 Transal does not have effective responsibility and control over the rebels.

Transal did not exercise effective responsibility and control over the rebels.

In *Bemba Case*⁴⁶, it was held that, “effective control” is an element of responsibility and must be obtained by modality, manner or nature by a commander over his forces or subordinates.⁴⁷ In *Hadzihasanovic*⁴⁸, simply exercising influence is insufficient. Furthermore, effective control must have existed when the crime was committed.⁴⁹

⁴⁴ Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, T.C. Judgement, ¶ 206, (I.C.T.Y. 3 Mar. 2000).

⁴⁵ Id.

⁴⁶ Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, T.C. Judgement, ¶¶ 410-411, (21 Mar. 2016).

⁴⁷ Id. ¶ 441.

According to the *Čelebići Appeal Judgement*, a superior has effective control over the subordinate if he has “the material ability to prevent and punish criminal conduct.”⁵⁰ But as there was no hierarchy the dereliction for duty to prevent the crime does not exist.⁵¹ Authority is reflected in a hierarchical relationship, “which distinguishes superiors from mere rabble-rousers or other persons of influence.”⁵²

Only those superiors, either ‘*de jure or de facto*’, military or civilian, who are clearly part of a chain of command, either directly or indirectly, with the actual power to control or punish the acts of subordinates may incur criminal responsibility.”⁵³ A showing that the official merely was generally an influential person will not be sufficient.⁵⁴

Dario Kordic was a civilian leading militia forces in the Bosnian–Croat community in *Bosnia- Herzegovina*.⁵⁵ He was acquitted of responsibility with respect to crimes committed by the militias because he did not possess the authority to prevent the crimes or punish the perpetrators.⁵⁶

Transal was neither a leader nor the founder of the KLA which spares him of both direct and indirect superior subordinate responsibility.⁵⁷ He neither ordered nor participated⁵⁸ in those attacks which are a general practice for making a person liable under this. He merely welcomed the assistance of people to overthrow the tyrannous rule of Dragoonia.⁵⁹ KLA was formed based on the inspiration by Transal. But the moot proposition is silent as to whether

⁴⁸ Prosecutor v. Hadzihasanovic, Case No. IT-01-47-A, A.C. Judgment, (I.C.T.Y. 22 Apr. 2008).

⁴⁹ Prosecutor v. Sefer Halilovic, Case No. IT-01-48-T, T.C. Judgment, ¶ 59, (I.C.T.Y. 16 Nov. 2005); Prosecutor v. Théoneste Bagosora Anatole Nsengiyumva, Case No. ICTR-98-41-A, A.C. Judgment, ¶ 2012, (14 Dec. 2011).

⁵⁰ Prosecutor v. Halilovic, Case No. IT-01-48-A, A.C. Judgment, ¶ 59 (I.C.T.Y. 16 Oct. 2007); Prosecutor v. Kajelijeli, Case No. ICTR-98-4A-A, A.C. Judgment, ¶¶ 85–86 (23 May 2005).

⁵¹ Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, A.C. Judgment, ¶ 66 (I.C.T.Y. 29 July 2004).

⁵² Prosecutor v. Bagilishema, Case No. ICTR-95-01A-T, T.C. Judgment, ¶¶ 40–43 (7 June 2002).

⁵³ Prosecutor v. Kordic, Case No. IT-95-14/2-T, T.C. Judgment, ¶ 416, (I.C.T.Y. 26 Feb. 2001).

⁵⁴ *Id.*, ¶¶ 415–416.

⁵⁵ *Id.*, ¶ 5.

⁵⁶ *Id.* ¶¶ 839–41.

⁵⁷ Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, A.C. Judgment, ¶ 2, (23 May 2005).

⁵⁸ Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A, A.C. Judgment, ¶ 5, (1 June 2001).

⁵⁹ Moot Proposition, ¶ 8.

Transal was leader of this group or not. A chain of command is essential for the circulation of orders which was missing here which further secures Transal from the guilt.⁶⁰

Hence, an obligation which is not related to the position of superiority should not trigger the application of the superior responsibility doctrine.⁶¹

3.1.2 Transal did not possess the knowledge of the rebels resorting to such deeds.

Transal was not aware of the acts that were being committed by the rebels.

Liability for superior responsibility only arises where the superior knew about the commission of a crime.⁶² The more remote a Superior is from the commission of the crime, the more indicia of evidence is required to establish knowledge.⁶³ In *Akayesu*, the ICTR found evidence must show how and in what capacity the accused supported the act.⁶⁴ This capacity must be proved by solid evidence.⁶⁵

Transal was not involved in planning of any attack, nor was he a part of KLA. Therefore, there was no information available to put him on notice.⁶⁶ Since, KLA members were spread across Dragonia and grew in size,⁶⁷ it is reasonable to infer that this information were not available to Transal. Thus, it would be inappropriate to hold him accountable for the acts of KIA

Although Transal called for standing against Government of Dragonia but no evidence shows how and in what capacity he supported the actions of KLA. There is nothing to establish that he knew or had reason to know⁶⁸ which does not prove these indictments beyond reasonable doubts.

Thus, Transal was unaware of the deeds of the KLA and, as such, cannot be a superior to them.

⁶⁰ Prosecutor v. Delalić et al., Case No. IT-96-21-T, T.C. Judgement, (I.C.T.Y. 16 Nov. 1998).

⁶¹ METTRAUX, G., INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS, p. 52 (Oxford University Press, 2005); Prosecutor v. Kalimanzira, Case No. ICTR-05-88-T, T.C. Judgment, ¶ 18, (22 June 2009).

⁶² Rome Statute, art. 32(1).

⁶³ Prosecutor v. Naletilic, Case No. IT-98-34-T, T.C. Judgment, ¶ 72, (I.C.T.Y. 31 Mar. 2003).

⁶⁴ Prosecutor v. Akayesu, Case No. ICTR-96-4-A, A.C. Judgement, ¶ 642 (1 June 2001).

⁶⁵ Prosecutor v. Dario Kordic & Mario Erkez, Case No. IT-95-14/2-T, T.C. Judgement, ¶ 427 (I.C.T.Y. 26 Feb. 2001).

⁶⁶ Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, T.C. Confirmation Decision, ¶ 434, (21 Mar. 2016).

⁶⁷ Moot Proposition, ¶ 8.

⁶⁸ Prosecutor v. Bagilishema, Case No. ICTR-95-01A-A, A.C. Judgment, ¶ 4 (July 3, 2002).

3.2 Transal is not liable for “Genocide”.

Transal lacked the specific intent for the act [3.2.1]. The attacks did not target the officials because of their ethnicity [3.2.2]. The officials assassinated do not fall under the category of ‘in part’ [3.2.3].

3.2.1 Transal lacked the specific intent for the act.

Transal lacked the specific intent for genocide. He never targeted the Tamaris specifically.

Any genocidal act must be carried out with the “intent to destroy in whole or in part, the targeted group”.⁶⁹ Mental element of a person is defined under **Article 30 of Rome Statute**.⁷⁰ A person needs to have knowledge and intent in order to be liable.⁷¹ The intent is proven when a person means to engage in the conduct of genocide.⁷² The person also needs to be aware that the genocide will occur in the normal course of action.⁷³

The court, in the *Al Bashir*⁷⁴ case, stated that if several reasonable conclusions with regards to Genocidal intent can be deduced, the prosecution application in relation of Genocide must be rejected.⁷⁵ Thus, the intent has to be conclusive and unambiguous.⁷⁶

In his speeches, Transal did not refer to the Tamarians. His acts of forming the “Government of Keljukistan in exile” and airing spiteful videos against the government do not show any intent to destroy the Tamarians. He was merely expressing dissent.⁷⁷ It is also not sure whether the assassinations of the officials were done by Keljuks or not. Speculation cannot, by itself, form the basis of a conviction of genocide.⁷⁸

⁶⁹ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, P.T.C. Decision on the Prosecution’s Application for Warrant of Arrest, ¶ 139, (4 Mar. 2009).

⁷⁰ Rome Statute, art. 30.

⁷¹ Id.

⁷² Rome Statute, art. 30(2)(a).

⁷³ Rome Statute, art. 30(2)(b).

⁷⁴ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, P.T.C. Decision on the Prosecution’s Application for Warrant of Arrest, ¶ 159, (4 Mar. 2009).

⁷⁵ Id.

⁷⁶ Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, T.C. Judgement, ¶ 134, (I.C.T.Y. 2 Aug. 2001).

⁷⁷ Moot Proposition, ¶ 27.

⁷⁸ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, P.T.C. Decision on the Prosecution’s Application for Warrant of Arrest, ¶ 139, (4 Mar. 2009).

Thus, there is a lack of specific intent and hence, Transal cannot be held liable for genocide.

3.2.2 The officials killed do not fall under any of the protected groups under Art. 6 of the Statute.

Art. 6 of the Statute have enumerated four protected groups against which genocide can be committed.⁷⁹ These are ‘national’, ‘ethnic’, ‘religious’ and ‘racial’ groups. **The Trial Chamber in Akayesu case** has objectively defined the protected groups under the crime of genocide⁸⁰ to include ‘national’ groups as those that possess a common citizenship; ‘religious’ groups as those that profess a particular religion and ‘Racial’ groups as those that share distinct geographical characteristics.⁸¹

The officials do not comprise a ‘national’, ‘religious’ or ‘racial’ group. To assess whether a particular group falls within the protection, it has to be done independently, by way of a mixed approach.⁸² This means that the group has to ‘objectively and subjectively’ satisfy the test of protection.⁸³

The government officials who were assassinated were not entirely Tamaris, which fulfils the objective criterion. The subjective element mandates that the perpetrators should perceive the victims as belonging to the enumerated groups, and then carry out the attack based on the same.⁸⁴ There should exist a nexus between their status as an ‘ethnic group’ and the perpetrator’s motive to carry out the killings.⁸⁵ In the present case, the killings were not concentrated based on ethnicity. They were targeted because they were a part of the government machinery.

⁷⁹ Rome Statute, art. 6.

⁸⁰ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, T.C. Judgement, ¶¶ 512-515, (2 Sept. 1998).

⁸¹ Id., ¶¶ 513-515.

⁸² Prosecutor v. Rutaganda, Case No. ICTR-96-3, T.C. Judgement, ¶¶ 56-57, (6 Dec. 1999); Prosecutor v. Kamuhanda, Case No. ICTR-95-54A, T.C. Judgement, ¶ 630, (22 Jan. 2004); Prosecutor v. Semanza, Case No. ICTR-97-20-T, T.C. Judgement, ¶ 317, (15 May 2003).

⁸³ Id.

⁸⁴ Prosecutor v. Bagilishema, Case No. ICTR-95-1A, T.C. Judgement, ¶¶ 61-65, (7 June 2001); Prosecutor v. Emmanuel Nindabahizi, Case No. ICTR-01-71, T.C. Judgement, ¶ 466-469, (15 July 2004); Prosecutor v. Kajelijeli, Case No. ICTR-98-44A, T.C. Judgement, ¶ 813, (1 Dec. 2003).

⁸⁵ WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, p. 125 (Cambridge University Press, 2nd ed. 2000).

Therefore, the officials do not fall under any of the protected groups mentioned in the Rome Statute.

3.2.3 The officials assassinated did not constitute 'in whole' or 'in part' of the group.

The officials killed do not satisfy the definition of 'in part' as used in the Rome Statute.⁸⁶

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 portion within the group can be a useful consideration.⁸⁷In the *Sikirica case*, the Tribunal stated that for Genocide to occur the death of the people killed should imperil the survival of the community as whole.⁸⁸

Several government officials, primarily of Tamaris ethnicity, were assassinated.⁸⁹ The government officials cannot be considered a 'significant' part of the Tamaris ethnic community so as to imperil the survival of the Tamaris community.

Thus, the people killed do not satisfy the definition of 'in part' of a group.

3.3 Transal cannot be held liable for "Crimes against Humanity"

The attacks were not pursuant to or in furtherance of an organizational policy [3.3.1.] and were not widespread or systematic in nature [3.3.2.]. There was no discriminatory intent [3.3.3.].

3.3.1 The attack was not committed pursuant to or in furtherance of a state or organisational policy

In order to be able to commit Crimes against Humanity, the organization must have state-like characteristics [3.3.1.1]. In arguendo, the organization that has allegedly committed the crime does not qualify as an organization [3.3.2.2].

3.3.1.1 The organisation must have state-like characteristics that are not there in the present case

⁸⁶ Rome Statute, art. 6.

⁸⁷ Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, T.C. Judgement, ¶ 12, (I.C.T.Y. 2 Aug. 2001).

⁸⁸ Prosecutor v. Sikirica et al., Case No. IT-95-8-T, T.C. Judgement, ¶ 80, (I.C.T.Y. 3 Sept. 2001).

⁸⁹ Moot Proposition, ¶ 41.

The attacks were not committed in furtherance of any state or organizational policy.

The policy requirement under the Rome Statute is restricted to state or state-like organizations.⁹⁰ Judge Hans-Kaul in his dissenting opinion in the *Kenya case* restrictively interpreted the term ‘organization’ to encompass only organizations that “*partake the characteristics of a state*”.⁹¹ Further, the ‘policy’ element under *Article 7* presupposes the existence of a state-like entity,⁹² which alone is competent to implement such policy.⁹³ The authoritative opinion of **C. Bassouni⁹⁴ and Schabas⁹⁵** on the matter reaffirms the interpretation of ‘organization’ to be limited to de-facto agents of state or those acting on behalf of it.⁹⁶

The relevant elements of a state-like organization could include, “(i) *a hierarchical structure or existence of responsible command, or as a minimum some level of policy; (ii) the ability to impose policy on members and to sanction them*”.⁹⁷

There is no evidence of any hierarchy or command structure in any of the terrorist organisations involved in violence. None of those organisations had any territory under control. Thus, these organisations fail to fulfil the requirement of the term ‘organisation’ as mentioned in **Article 7(2)(a) of the Rome Statute**.⁹⁸

Thus, the attacks were not in furtherance of a state or organisational policy as the organisation, here, is neither state nor a state-like organisation.

3.3.1.1 The organisation that has allegedly committed the crime does not qualify as ‘an organisation capable of implementing a policy’

⁹⁰ Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07 OA 8, P.T.C. Judgement, ¶ 1093, (18 Sept. 2009).

⁹¹ Prosecutor v. William Samoei Ruto, Case No. ICC-01/09-01/11, Separate and Partly Dissenting Opinion of Judge Kaul, ¶ 12, (15 Mar. 2011).

⁹² Id.

⁹³ Id.

⁹⁴ M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW, p. 462 (2nd ed. 2003). [BASSIOUNI].

⁹⁵ SCHABAS, W., AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, p. 273, (Cambridge University Press, 3rd Ed. 2007).

⁹⁶ BASSIOUNI, p. 23.

⁹⁷ Prosecutor v. William Samoei Ruto, Case No. ICC-01/09-01/11, Separate and Partly Dissenting Opinion of Judge Kaul, ¶ 12, (15 Mar. 2011).

⁹⁸ Rome Statute, art. 7(2)(a).

The group does not fulfil the requirements of an organisation as used in the Rome Statute.⁹⁹ The concept of organization is based on the group's capability to perform acts which infringe on basic human rights.¹⁰⁰ Organization must have the requisite means, mutual agreement and coordination to carry out such an attack.¹⁰¹

KLA was formed by a small group of students.¹⁰² It was unheard of until Operation Ragnarok took place. There is no evidence of their access to any weaponry. Even this is not conclusive whether they assassinated the officials or not. Thus, no evidence is present that can establish that they had the means or coordination to affect such an attack.

Hence, the requirements of an 'organization' have not been fulfilled here.

3.3.2. The attacks were neither 'widespread nor systematic'.

The attacks that took place do not meet the threshold of 'widespread' as used in Article 6 of the Rome Statute.¹⁰³ These attacks were also not systematic.

The concept of 'widespread' may be defined as '*massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims*'.¹⁰⁴ Ad hoc tribunals have defined widespread as referring either 'only to a large number of victims'¹⁰⁵, or to the commission of the acts '*on a large scale*'¹⁰⁶ or both. ICC Pre-Trial Chamber in the *Kenyatta* case held that '*the widespread element should not be assessed strictly quantitatively or geographically but on the basis of individual facts*'.¹⁰⁷

The concept of 'systematic' may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.¹⁰⁸

⁹⁹ Rome Statute, art. 7(2)(a).

¹⁰⁰ Prosecutor v. Francis Kirimi Muthaura, Case No. ICC-01/09-19, P.T.C. Decision on the Authorisation of Investigation, ¶ 90, (31 Mar. 2010).

¹⁰¹ Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07-717, P.T.C. Confirmation Decision, ¶ 1120, (7 Mar. 2014).

¹⁰² Moot Proposition, ¶ 32.

¹⁰³ Rome Statute, art. 7(1).

¹⁰⁴ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, T.C. Judgement, ¶ 580, (2 Sept. 1998).

¹⁰⁵ Prosecutor v. Tadić, Case No. IT-94-1-T, T.C. Judgement, ¶ 648, (I.C.T.Y. 7 May 1997).

¹⁰⁶ Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, T.C. Judgement, ¶ 206 (I.C.T.Y. 3 Mar. 2000).

¹⁰⁷ Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, P.T.C. Judgment, ¶ 95, (13 Mar. 2015).

¹⁰⁸ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, T.C. Judgement, ¶ 580, (2 Sept. 1998).

In the *Akayesu Case*¹⁰⁹, the Chamber held that the systematic nature was evidenced by the unusually large shipments of machetes into the country, shortly before the attacks, the structure in which the attacks took place, the fact that teachers and intellectuals were targeted first, and the fact that through the media and other propaganda, Hutu were encouraged systematically to attack Tutsi.¹¹⁰

However, in the present case the number of casualties was not large enough to qualify for this element. Even the assassinations did not take place at a large scale. It has been held time and again that in order for crimes against humanity to take place, the attacks must take place on a large scale and the target must be a significant number of civilian populations.¹¹¹

The element of systematicity was also missing in these attacks. The casualties in the demonstrations show no evidence of any systematicity as there is no evidence of any planning behind them. There is a lack of evidence which can show any organized activity. There is no evidence of any use of public or private resource by the KLA. These attacks seem to be random and isolated, inspired by patriotic sentiments. Further, it is still at sea whether the assassinations were carried out by the Keljukians or not.

Thus, these attacks fail to fulfill the criterion of widespread or systematic. Hence, Transal cannot be held guilty for Crimes against Humanity of Murder and Prosecution.

3.3.3 There was no discriminatory intent.

There was no discriminatory intent and, as such, Transal cannot be held liable for the Crime against Humanity of Persecution.

Transal never targeted any ethnicity *per se*. All he did was to urge the people to overthrow the tyrannous rule of Dragoonia.¹¹² In the violence that took place, Masons and Keljuks constituted most of the casualties. The officials assassinated were also not entirely Tamaris. He urged people to be against imperialism and the government machinery, that he considered tyrannical.

¹⁰⁹ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, T.C. Judgement, (2 Sept. 1998).

¹¹⁰ Id.

¹¹¹ Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, T.C. Judgment, ¶ 206 (I.C.T.Y. 3 Mar. 2000).

¹¹² Moot Preposition, ¶ 8.

Thus, there was no discriminatory intent and, as such, Transal cannot be held liable for the Crime against Humanity of Persecution

3.4 Transal is not Liable for the War Crime of Attacking Civilians as stated under S. 8(2)(e)(i).

The crime requires five elements¹¹³, two of which are unsatisfied. There did not exist any armed conflict [3.4.1]. Transal did not intend the civilian population to be the object of the attacks [3.4.2].

3.4.1. There existed no armed conflict.

In the time during which the attacks took place, there did not exist any non- international armed conflict [3.4.1.1.] or any international armed conflict [3.4.1.2.]

3.4.1.1. No non-international armed conflict existed during the time at which the crimes have allegedly been committed.

An armed conflict has to be differentiated from lesser forms of collective violence such as riots, civil unrest or isolated acts of terrorism.¹¹⁴ There is a difference between ‘attack on civilians’ and ‘armed conflict’.¹¹⁵ There are two criteria for the classification of a situation as an armed conflict.¹¹⁶ First, the hostilities should reach a minimum level of intensity. For example, the government must be obliged to use military force, or when the hostilities are of a collective nature.¹¹⁷ Second, the non-governmental groups involved must be ‘parties to the conflict’, meaning they should possess organized armed forces. For example, they must be under a certain command structure and have the capacity to sustain military

¹¹³ 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>.

¹¹⁴ KATHLEEN LAW AND, WHAT IS A NON-INTERNATIONAL ARMED CONFLICT? <https://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.html>.

¹¹⁵ Prosecutor v. Dusko Tadić, Case No. IT-94-I-A, A.C. Judgement, ¶ 251, (I.C.T.Y. 15 July 1999).

¹¹⁶ Prosecutor v. Dusko Tadić, Case No. IT-94-1-T, T.C. Judgement, ¶¶ 561-568, (I.C.T.Y. 11 Nov. 1997); Prosecutor v. Fatmir Limaj, Case No. IT-03-66-T, T.C. Judgement, ¶ 84, (I.C.T.Y. 30 Nov. 2005).

¹¹⁷ Id., ¶¶135-170.

operations.¹¹⁸ Formation of a group of rebels, based on pure motivation, is not a relevant factor to qualify for a command structure.¹¹⁹

The KLA and other rebels committed various acts because of which the Dragoonian Army had to launch the '*Operation Ragnarok*' in order to crackdown on KLF cardholder.¹²⁰

The hostilities did not reach the threshold required for an armed conflict. The violent demonstrations and the assassinations that took place can be classified as riots at most. There is no evidence of the types of weapons used and there has been no direct fight between the Dragoonian army and the KLF. Thus, the situation has not aggravated to an extent so as to qualify for a non-international or international armed conflict. Furthermore, Transal was not a part of the organization suspected of the assassinations.

There is no evidence of any command structure in the KLA. Thus, these groups do not qualify as a 'party to the conflict' and Transal cannot be held liable.

Thus, there was no armed conflict of a non-international nature during the time in which the crimes have been alleged.

3.4.1.2. No international armed conflict existed during the time at which the crimes have allegedly been committed.

Laws pertaining to international armed conflict apply in all cases of declared war or any other armed conflict which may arise between two or more of the *High Contracting Parties*(countries that have ratified the Geneva convention), even if the state of war is not recognized by one of them.¹²¹

In the present case, there was no declared war between any high contracting parties during the time in which assassinations took place. A state of war erupted between Somland and Dragoonia post Operation Ragnarok but no war crime has been alleged to have taken place at

¹¹⁸ D. Schindler, '*The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*', 163 RCADI, 147(1979); Prosecutor v. Fatmir Limaj, Case No. IT-03-66-T, T.C. Judgement, ¶¶ 94-134, (I.C.T.Y. 30 Nov. 2005).

¹¹⁹ Kathleen Lawand, What is a non-international armed conflict? , <https://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.html>.

¹²⁰ Moot Proposition, ¶ 42.

¹²¹ ICRC, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, <https://ihl-databases.icrc.org/ihl/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5>

that time. Thus, there was no international armed conflict when the alleged act of war crime was committed.

3.4.2. Transal did not intend the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attacks

Transal did not intend any civilian not taking part in the hostilities to be the object of the attack. Transal aired a series of videos in which he talked about breaking the Dragoonian Empire and forming new nations.¹²² His speeches, in no way, urge anyone to attack civilians. By his speeches he motivated his fellow Keljukians to unite and come up against the Monarch. His speeches aimed at attaining self-rule, but he never spoke anything to incite the rebels against the civilians of a nation.

Thus, Transal did not intend the civilian population or individuals not taking part in direct hostilities to be the object of the attacks.

4. TRANSALS PROSECUTION IS UNNECESSARY AND OVERLY INTRUSIVE.

The speeches of Transal are protected speeches, [4.1] and he cannot be held liable for Article 5 crimes merely on the basis of speeches. [4.2]

4.1. Transals speech qualifies for protected speech.

The speech made in political context about public officials is political speech and is highly protected. It allows a degree of provocation and hence, allegations on matters of public concern, albeit based on rumors, are not considered violations. Further, states have a narrow MoA in curtailing information of serious public concern.

Transal's speech is in public interest as it exposes the level of captivity in which the minority Keljucians has been living in. The keljucians are 1% of the population in Somland and 10% of the population in Dragonia. It was the first time that the Keljucian sentiment received an identity.

There was a call for a Keljuck unity from the side of Transal. He was a simple Kejuckian who raised the voice and provoked his people against the Monarch. The allegations made by him against the Dragon were based on the fear that Dragonia or Somland for the matter would not pay any heed to the interest of the Keljucians.

¹²² Moot Proposition, ¶ 25.

Thus, Transals speech constitutes political speech, therefore, should be afforded the highest level of protection.

There is no discernible nexus between Transals' post and the unrest.

4.2 Transal cannot be liable for Art. 5 crimes merely based on a speech.

The liability of Transal is based solely on the basis of the speeches given by him. However, merely on the basis of the speech Transal cannot be made liable for such grievous crimes like Genocide, Crimes against Humanity and War Crimes.

Under the CIL¹²³ and the general practice of the ICC¹²⁴ a person cannot be made guilty of the article 5 crimes merely on the basis of the Hate Speech. *Prosecutor V. Nahimana* is the only case before an International Forum where a person was held liable for the "Incitement to Genocide" and "Crimes against Humanity" for persecution.¹²⁵ The law is still not developed and there is still no jurisprudence on the idea of invoking the liability merely on the basis of speech, due to the level of threshold that needs to be met.¹²⁶

The ICTY, in the *Kordić* judgment¹²⁷, found that '*hate speech not directly calling for violence did not constitute persecution because it failed to rise to the same level of gravity as the other enumerated crimes against humanity acts (such as imprisonment or deportation, for example).*'

However, even if we allow the expansion of the liability, merely on the speech, still Transal would not be liable as it has already been proved by the council that the contextual elements of all the article 5 crimes are not fulfilled to meet the liability. The speeches given by Transal would also not qualify for Hate Speech, as proved above [4.1], which being the first requirement for making a person liable under the **ICC for the article 5 crimes**.

¹²³ Gregory S. Gordon, *Music and Genocide: Harmonizing Coherence, Freedom and Nonviolence in Incitement Law*, 50 Santa Clara L. Rev. 607, 637 (2010).

¹²⁴ Id.

¹²⁵ Prosecutor v. Nahimana, Case No. ICTR 99-52-T, T.C. Judgment, (28 Nov. 2007).

¹²⁶ Marchuk, I., '*The Fundamental Concept of Crime under International Criminal Law: A Comparative Law Analysis*', Springer Science and Business Media, (2003).

¹²⁷ Prosecutor v. Kordić, Case No. IT-95-14/2-T, T.C. Judgment, ¶ 209 (I.C.T.Y. 26 Dec. 2001).

PRAYER

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. THE CASE CONCERNING THE RED BROADCASTS IS NOT ADMISSIBLE BEFORE THE ICC.**
- II. THE KING AND TRAPTA WOULD NOT BE ACCOUNTABLE FOR THE ACTS OF THE CORPORATIONS.**
- III. TRANSAL IS NOT LIABLE FOR THE CRIMES MENTIONED UNDER ARTICLE 5 OF THE ROME STATUTE.**
- IV. TRANSALS PROSECUTION IS UNNECESSARY AND OVERLY INTRUSIVE.**

All of which is respectfully submitted.

On Behalf of the Office of the Prosecutor

Counsel for the Prosecution.