

ICC MOOT COURT COMPETITION IN THE ENGLISH LANGUAGE

COUNSEL FOR THE DEFENSE

Team Number: 38

Year: 2020

Total Word Count: 9,903



Original: **English**

Date: 15 March 2020

**THE APPEALS CHAMBER**

**Case before the International Criminal Court:  
Prosecutor v. Cersei Bannister of Valaria**

**The Defense Counsel's Submission in the Appeal from the Pre-Trial  
Chamber's Decision on Confirmation of Charges against  
Defendant Cersei Bannister of Valaria**

**TABLE OF CONTENTS**

---

**List of Abbreviations** ..... 5

**Index of Authorities** ..... 6

**Statement of Facts** ..... 13

**Issues** ..... 14

**Summary of Arguments** ..... 15

**Written Arguments** ..... 17

A. The PTC erred in finding sufficient grounds to believe that one or more of the posts the Dragos group made on Statusphere constituted direct and public incitement of genocide under Article 25(3)(e) of the Statute ..... 17

    I. There are insufficient grounds to believe that the posts directly encourage others to commit genocide ..... 17

        (a) The burden is on the Prosecution to identify clearly which of the ten posts specifically provoke others to engage in genocide ..... 17

        (b) Encouraging ethnic cleansing is not direct incitement to genocide ..... 19

        (c) Encouraging ethnic purity is not direct incitement to genocide ..... 20

        (d) Encouraging violence towards Stareks is not direct incitement to genocide ..... 21

    II. There are insufficient grounds to believe that the authors of the posts intended to incite genocide ..... 23

    III. The posts did not constitute public incitement ..... 24

B. The PTC erred in finding substantial grounds to believe that the Defendant should be held responsible for inciting, or providing the means to incite, genocide under Article 25(3)(e) and 25(3)(c) of the Statute ..... 28

    I. The Defendant bears no responsibility under Article 25(3)(e) of the Statute ..... 28

        (a) The Defendant did not exert editorial control over the content ..... 29

        (b) The Defendant exhibited critical distance from all the alleged posts ..... 30

        (c) The Defendant lacked the intent to incite and commit genocide ..... 30

MEMORIAL *for* DEFENCE

II. The Defendant bears no responsibility under Article 25(3)(c) of the Statute ..... 31

    (a) The Defendant had no duty to take measures to remove posts on Statusphere until she acquires actual knowledge of the nature of the posts ..... 31

    (b) The Defendant took reasonable steps to identify offending posts and to remove them ..... 33

C. The PTC erred in finding jurisdiction under Article 12(2)(a) to prosecute the Defendant as the “conduct in question” did not occur in Solantis ..... 37

    I. Article 12(2)(a) requires specifically the “conduct in question” to occur in the territory of a State party ..... 37

    II. Conduct under Article 25(3)(e) attributed to the Defendant did not occur in Solantis ..... 40

    III. Conduct under Article 25(3)(c) attributed to the Defendant did not occur in Solantis; nor can a sufficient link be established to effects felt in Solantis ..... 41

**Submissions ..... 44**

**LIST OF ABBREVIATIONS**

---

CEO	Chief Executive Officer
Court / ICC	International Criminal Court
ECtHR	European Court of Human Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
Problem	2020 International Criminal Court Moot Court Competition Problem
PTC	Pre-Trial Chamber
UNHCHR	The United Nations High Commissioner for Human Rights

## INDEX OF AUTHORITIES

ICC Documents

1. Amendments on the crime of aggression to the Rome Statute of the International Criminal Court (adopted 11 June 2010) 2922 UNTS [**Amendments on the Crime of Aggression**] ..... 38
2. “Discussion Paper on the Crime of Aggression Proposed by the Chairman (revision January 2009)” 7<sup>th</sup> Session of the Assembly of the State Parties (Second Resumption) (9-13 February 2008) ICC-ASP/7/SWGCA/INF.1 ..... 38
3. Elements of Crimes (2 November 2000) PCNICC/2000/1/Add.2 [**Elements of Crimes**] ..... 38
4. “Report of the Special Working Group on the Crime of Aggression” 7th Session of the Assembly of States Parties (14-22 November 2008) ICC-ASP/7/20 ..... 38
5. “Report of the Special Working Group on the Crime of Aggression” 7th Session of the Assembly of States Parties (Second Resumption) (9-13 February 2009) ICC-ASP/7/SWGCA/2 ..... 38
6. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 [**Statute**] ..... 19, 20, 25, 26, 28, 32, 38

Treaties and Conventions

1. Convention on Cybercrime (adopted 23 November 2001, entered into force 1 July 2004) ETS No 185 [**Convention on Cybercrime**] ..... 29
2. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [**ICCPR**] ..... 24
3. Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 [**VCLT**] ..... 37

Cases**International Criminal Court**

1. *Prosecutor v Al Bashir* (Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02-/05-01/09-3, PTC-I (4 March 2009) [**Al Bashir Warrant Decision**] ..... 19, 22, 39
2. *Prosecutor v Bemba* (Judgment on the Appeal) ICC-01/05-01/08 A, AC (8 June 2018) [**Bemba Appeal Judgment**] ..... 33, 34

## MEMORIAL for DEFENCE

3. *Prosecutor v Bemba et al* (Judgment on the Appeals) ICC-01/05-01/13 A A2 A3 A4 A5, AC (8 March 2018) [**Bemba Public-Redacted Appeal Judgment**] ..... 41
4. *Prosecutor v Blé Goudé* (Decision on the Confirmation of Charges) ICC-02/11-02/1, PTC-I (11 December 2014) [**Blé Goudé Confirmation of Charges**] ..... 32
5. *Prosecutor v Mbarushimana* (Decision on the Defence Challenge to the Jurisdiction of the Court) ICC-01/04-01/10-451, PTC-I (26 October 2011) [**Mbarushimana Jurisdiction Decision**] ..... 39, 40
6. *Prosecutor v Ruto et al* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-01/11-373, PTC-II (23 January 2012) [**Ruto Confirmation of Charges**] ..... 39
7. *Situation in the People’s Republic of Bangladesh / Republic of the Union of Myanmar* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh / Republic of the Union of Myanmar) ICC-01/19-27, PTC-III (14 November 2019) [**Bangladesh/Myanmar Investigation Decision**] ..... 39
8. *Situation in the People’s Republic of Bangladesh / Republic of the Union of Myanmar* (Decision on the Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute) ICC-RoC46(3)-01/18-37, PTC-I (6 September 2018) [**Bangladesh/Myanmar Jurisdiction Ruling**] ..... 39

### International Criminal Tribunal for the former Yugoslavia

1. *Prosecutor v Brđanin* (Judgment) IT-99-36-A (3 April 2007) [**Brđanin Appeal Judgment**] ... 42
2. *Prosecutor v Krstić* (Judgment) IT-98-33-A (19 April 2004) [**Krstić Appeal Judgment**] .. 19, 22
3. *Prosecutor v Sikirica* (Judgment on Defence Motions to Acquit) IT-95-8-T (3 September 2001) [**Sikirica Motions to Acquit**] ..... 22
4. *Prosecutor v Stakić* (Judgment) IT-97-24-T (31 July 2003) [**Stakić Trial Judgment**] ..... 19
5. *Prosecutor v Tadić* (Judgment) IT-94-1-A (15 July 1999) [**Tadić Appeal Judgment**] ..... 34, 42

### International Criminal Tribunal for Rwanda

1. *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) [**Akayesu Trial Judgment**] ..... 17, 20, 23, 25, 27, 31

## MEMORIAL *for* DEFENCE

2. *Prosecutor v Kalimanzira* (Judgment) ICTR-05-88-T (22 June 2009) [***Kalimanzira Trial Judgment***] ..... 20, 25, 26
3. *Prosecutor v Karemera et al* (Judgment) ICTR-98-44-A (29 September 2014) [***Karemera Appeal Judgment***] ..... 20
4. *Prosecutor v Kupreškić* (Judgment) IT-95-16-T (14 January 2000) [***Kupreškić Trial Judgment***] ..... 22
5. *Prosecutor v Nahimana et al* (Judgment) ICTR-99-52-T (3 December 2003) [***Nahimana Trial Judgment***] ..... 28
6. *Prosecutor v Nahimana et al* (Judgment) ICTR-99-52-A (28 November 2007) [***Nahimana Appeal Judgment***] ..... 17, 18, 20, 21, 22, 24, 26, 28, 41
7. *Prosecutor v Ngirabtaware* (Judgment) MICT-12-29-A (18 December 2014) [***Ngirabtaware Appeal Judgment***] ..... 25
8. *Prosecutor v Nzabonimana* (Judgment and Sentence) ICTR-98-44D-T (31 May 2012) [***Nzabonimana Trial Judgment***] ..... 22
9. *Prosecutor v Nzabonimana* (Judgment) ICTR-98-44D-A (29 September 2014) [***Nzabonimana Appeal Judgment***] ..... 18, 25, 26
10. *Prosecutor v Ruggiu* (Judgment) ICTR-97-32-I (1 June 2000) [***Ruggiu Trial Judgment***] ..... 23

### **International Military Tribunal**

1. “Fritzsche” (1946) 22 *Trial of German Major War Criminals* 525 [***Fritzsche Judgment***] ... 24

### **International Court of Justice**

1. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43 [***Genocide Case***] ..... 19
2. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep 3 [***Croatia v Serbia***] ..... 19, 22



**Permanent Court of International Justice**

1. *The Case of the SS Lotus (France v Turkey)*, 1927 PCIJ Rep Series A No 10 [**Lotus Case**] ..... 39

**European Court of Human Rights**

1. *Yildirim v Turkey* [2012] ECHR 3003 [**Yildirim v Turkey**] ..... 34
2. *Delfi AS v Estonia* (2016) 62 EHRR 6 [**Delfi v Estonia**] ..... 28, 33, 34
3. *Jorgic v Germany* (2008) 47 EHRR 6 [**Jorgic v Germany**] ..... 19
4. *Sürek et al v Turkey*, 7 BHRC 339 [**Sürek v Turkey**] ..... 30

**Other Courts and Tribunals**

1. *Cass crim 27 mai 1999: Bull n° 112* (quoted in Nathalie Mallet-Poujol, *La notion de publication sur l'internet et son incidence concernant la prescription des délits en ligne*, LÉGICOM 2006/1 (N° 35), 56) [**Cass crim 27 mai 1999: Bull n° 112**] ..... 26
2. Case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, [2011] E.C.R. I-11959 [**Scarlet v SABAM**] ..... 33, 34
3. *Force v Facebook, Inc*, No 18-397 (2d Cir 2019) [**Force v Facebook**] ..... 29
4. *Fraser v County Court of Victoria* [2017] VSC 83 [**Fraser v County Court of Victoria**] ..... 25
5. *HKSAR v Chan Yau Hei* [2014] HKCFA 18 [**HKSAR v Chan Yau Hei**] ..... 25
6. *Jane Doe No 1 v Backpage.com, LLC*, 817 F.3d 12 (1st Cir 2016) [**Jane Doe v Backpage.com**] ..... 29
7. *Marshall's Locksmith Serv Inc v Google, LLC*, 925 F.3d 1263 (DC Cir 2019) [**Marshall v Google**] ..... 29

**UN Documents**

1. "Bureau Discussion Paper Regarding Part 2" (6 July 1998) UN Doc A/CONF.183/C.1/L.53 ... 37
2. "Bureau Proposal: Regarding Part 2" (10 July 1998) UN Doc A/CONF.183/C.1/L.59 ..... 37
3. "Bureau Proposal of the Committee of the Whole: Part 2. Jurisdiction, Admissibility and Applicable Law" UN Diplomatic Conference of Plenipotentiaries on the Establishment of an

## MEMORIAL *for* DEFENCE

	International Criminal Court (Rome 15 June – 17 July 1998) (10 July 1988) UN Doc A/CONF.183/C.1/L.59 .....	40
4.	ILC, “Report of the International Law Commission on the Work of its 48th Session” (6 May – 26 July 1996) UN Doc A/51/10 .....	25
5.	Kaye, “Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression” (1 January 2017) OHCHR OL DEU 1/2017 [ <b>Kaye</b> ] ...	34, 35
6.	UNGA Res 47/121 (18 December 1992) UN Doc A/47/PV.91 .....	19
7.	UNHCR, “Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression” (16 May 2011) UN Doc A/HRC/17/27 [ <b>UNHCR Report on Freedom of Expression</b> ] .....	29, 33
8.	UNSC Res 955 (8 November 1994) UN Doc S/RES/995 [ <b>ICTR Statute</b> ] .....	30

### Articles

1.	Jack M Balkin, “Media Access: A Question of Design” (2008) 76 <i>George Washington Law Review</i> 933 [ <b>Balkin</b> ] .....	29
2.	Susan W Brenner and Bert-Jaap Koops, “Approaches to Cybercrime Jurisdiction” (2004) 4 <i>Journal of Law and Technology</i> 1 [ <b>Brenner and Koops</b> ] .....	41
3.	Roger S Clark, “The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences” (2001) 12 <i>Criminal Law Forum</i> 291 [ <b>Clark</b> ] .....	37
4.	Caleb H Wheeler, “Human Rights Enforcement at the Borders: International Criminal Court Jurisdiction over the Rohingya Situation” (2019) 17 <i>Journal of International Criminal Justice</i> 609 [ <b>Wheeler</b> ] .....	39

### Treatises

1.	Antonio Cassese, Paola Gaeta and John Jones (eds), <i>The Rome Statute of the International Criminal Court: A Commentary</i> , vol 1 (Oxford University Press 2002) [ <b>Cassese</b> ] .....	37, 38
2.	Jonathan Clough, <i>Principles of Cybercrime</i> (Cambridge University Press 2010) [ <b>Clough</b> ] .....	41
3.	Michael Hirst, <i>Jurisdiction and the Ambit of the Criminal Law</i> (Oxford University Press 2003) [ <b>Hirst</b> ] .....	41

MEMORIAL *for* DEFENCE

4. Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge University Press 2014) [**Vagias**] ..... 39
5. Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol 3 (North-Holland 1997) [**Bernhardt**] ..... 40
6. Uta Kohl, *Jurisdiction and the Internet* (Cambridge University Press 2007) [**Kohl**] ..... 41

**Others**

1. Civil Rights Framework for the Internet (Brazil), LAW No 12.965 (23 April 2014) [**Civil Rights Framework for the Internet (Brazil)**] ..... 29, 30, 32
2. Communications Decency Act 1996 (US), USC 47 [**Communications Decency Act (US)**] ... 29
3. Council Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services, In Particular Electronic Commerce, in the Internal Market (“Directive on Electronic Commerce”) [2000] OJ L178/1 [**Directive on Electronic Commerce (EU)**] ..... 29, 32
4. Digital Millennium Copyright Act of 1998 (US), 17 USC 101 [**Digital Millennium Copyright Act (US)**] ..... 32
5. Ley No 20435 (Chile), Modifica La Ley No 17.336 Sobre Propiedad Intelectual [**Ley No 20435 (Chile)**] ..... 30, 32
6. Netzwerkdurchsetzungsgesetz (“Network Enforcement Act”) 2017 (Germany) [**Network Enforcement Act (Germany)**] ..... 35
7. Organization for Security and Co-operation in Europe, “Declaration on Freedom of Communication on the Internet” (28 May 2003) [**OSCE Declaration on Freedom of Communication on the Internet**] ..... 29
8. The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, “Joint Declaration on Freedom of Expression and the Internet” (1 June 2011) [**Joint Declaration on Freedom of Expression and the Internet**] ..... 33
9. The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the

MEMORIAL *for* DEFENCE

Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, “Joint Declaration on Freedom of Expression and Responses to Conflict Situations” (4 May 2015) [**Joint Declaration on Freedom of Expression and Responses to Conflict Situations**] ..... 34

## STATEMENT OF FACTS

---

### **I. Background**

1. Valaria and Solantis are neighbouring States. Solantis is a party to the Statute; Valaria is not. Solantis comprises two ethnic groups: a Nothroki majority and a Starek minority. Valaria is composed entirely of Nothroki.
2. Dr Cersei Bannister is a Valarian resident. She is the controlling owner and CEO of Statusphere, a free social network platform headquartered in Valaria that is widely used in Solantis and Valaria. Its users can join “affinity groups” to post and read anonymous messages.

### **II. Dragos**

3. In 2017, “Dragos”, a Nothroki group committed to the ethnic purity of Solantis, was established. Dragos members allegedly attacked Stareks, sometimes killing them. In January 2017, Dragos had 1,000 members. Today, it has 4,000 members.

### **III. Statusphere’s response**

4. On 25 May 2019, the UNHCHR issued a report that linked the increasing violence to calls for violence made in posts by Dragos members in a Statusphere affinity group. In response, Statusphere removed the Dragos affinity group.
5. Whenever Statusphere removed a Dragos affinity group, a new group was created which allegedly attracted the same type of anti-Starek posts, each time followed by violent attacks. The Defendant closed down each new group after the violent attacks occurred.

### **IV. The deaths and exodus**

6. By January 2020, up to 1,500 Stareks had died and more than 50,000 Stareks had fled to neighbouring States as a result of the violence.

### **V. Proceedings before the ICC**

7. The PTC confirmed the charges against the Defendant. This is her appeal from that decision.

**ISSUES**

---

**-A-**

Whether there are substantial grounds to believe one or more of the posts by the Dragos group made on the social networking platform, Statusphere, between January 2018 and January 2020 constituted direct and public incitement of genocide under Article 25(3)(e) of the Statute?

**-B-**

Whether Cersei Bannister, owner and CEO of the social networking company Statusphere can be held criminally responsible for inciting genocide under Article 25(3)(e) of the Statute and/or providing the means to incite genocide under Article 25(3)(c) of the Statute by allowing users to post statements that may constitute incitement to genocide and failing to take the appropriate action to immediately remove and block such posts on the social networking platform that she controls?

**-C-**

Whether the ICC has jurisdiction to prosecute Cersei Bannister under Article 12 of the Statute, considering that all of her actions related to the charges of incitement and providing the means to incite genocide occurred in her State of nationality, Valaria, which is not a party to the Statute?

SUMMARY OF ARGUMENTS

---

- A. The PTC erred in finding sufficient grounds to believe that one or more of the posts by the Dragos group made on Statusphere constituted direct and public incitement of genocide under Article 25(3)(e) of the Statute**
1. None of the posts made by the Dragos group on Statusphere “directly” encouraged the crime of genocide. Each of the posts is ambiguous as to whether its purpose is to encourage genocide, as opposed to murder, ethnic cleansing or a generic goal of ethnic purity in Solantis. A minority of the posts advocated murder in Solantis, but this is consistent with the purpose of causing the Stareks to flee Solantis out of fear of violence and need not entail the intended physical destruction of the Starek population in substantial part.
  2. Similarly, the Prosecution is unable to establish from the wording of the posts that their authors subjectively intended to encourage genocide. Since the posts are anonymous, there is no contextual evidence from which their intention can be inferred.
  3. The posts were not made “publicly”, being made on the e-bulletin boards of private affinity groups which were not seen by the general public. The audience of the posts were members of Dragos, a sectarian political group; they were not the general public.
- B. The PTC erred in finding sufficient grounds to believe that the Defendant is liable for inciting genocide under Article 25(3)(e) of the Statute and/or providing the means to incite genocide under Article 25(3)(c) of the Statute.**
4. To hold a publisher criminally responsible they must exercise editorial control over the impugned content in their publication. The Defendant exercised no editorial control over posts made on Dragos affinity groups. The Dragos posts were completely user driven. Unlike traditional media, posts published on an online intermediary such as Statusphere is not premised on receiving the publisher’s prior consent. States have not generally sought to impose legal obligations on publishers to screen all posts on online social media platforms prior to publication; nor should this Court. The Defendant cannot therefore be taken to assume the content of third-party users as her own. Further, the Defendant lacked the “intent to directly prompt or provoke another to commit genocide” and “the specific intent to commit genocide”. There is no evidence that the Defendant possessed the requisite *mens rea*.

## MEMORIAL *for* DEFENCE

5. The Defendant had no duty to take down the Dragos posts until she became aware that they were of a nature that would incite genocide. The Defendant was unaware this was the case, particularly given the ambiguity of the language used and the fact they were in a local dialect giving rise to difficulties in translation. Even if the Defendant was aware that the posts were capable of inciting genocide, she took reasonable measures. Contrary to the PTC's finding that the Defendant was required to remove the impugned posts "immediately", the Defendant is only required to do what is reasonable. The Defendant took reasonable measures to evaluate and remove all offending e-bulletin boards according to a "community standards policy".
- C. The PTC erred in finding jurisdiction under Article 12(2)(a) of the Statute to prosecute the Defendant as the "conduct in question" did not occur in Solantis.**
10. "Conduct in question" under Article 12(2)(a) of the Statute refers to an act or omission; jurisdiction cannot be established on consequences or any other element. Article 12(2)(a) is a jurisdictional regime specific to this Court; it is therefore unwarranted to broaden the scope of this provision with reference to the putative "effects" doctrine in customary international law. Even if the "conduct in question" is interpreted to permit "effects", there must be a sufficient link between the accused person and the effects, which is substantial, direct, and foreseeable.
  11. The Court does not have jurisdiction over the Defendant under Article 25(3)(e) because her alleged endorsement or failure to establish critical distance could only have occurred in Valaria. Furthermore, the effects are irrelevant to the crime because incitement to genocide is an inchoate offence.
  12. The Court does not have jurisdiction over the Defendant under Article 25(3)(c) because her alleged omission to prevent offending posts from being published on Statusphere could only have occurred in Valaria. The effects felt in Solantis are also not sufficiently linked to the Defendant's conduct.



WRITTEN ARGUMENTS

---

**A. THE PTC ERRED IN FINDING SUFFICIENT GROUNDS TO BELIEVE THAT ONE OR MORE OF THE POSTS THE DRAGOS GROUP MADE ON STATUSPHERE CONSTITUTED DIRECT AND PUBLIC INCITEMENT OF GENOCIDE UNDER ARTICLE 25(3)(E) OF THE STATUTE**

1. The Defence submits that the elements of direct and public incitement of genocide under Article 25(3)(e) of the Statute are not satisfied since [**I.**] the posts made by the Dragos group do not directly encourage others to commit genocide; [**II.**] even if they can be read as encouraging others to commit genocide, there are insufficient grounds to believe that the authors of the posts intended them to have such an effect; and [**III.**] in any event, the posts were not made publicly.

**I. There are insufficient grounds to believe that the posts directly encourage others to commit genocide**

**a) The burden is on the Prosecution to identify clearly which of the ten posts specifically provoke others to engage in genocide**

2. Given that the Court has not yet considered the elements of direct and public incitement to genocide, Article 21(1)(b) of the Statute requires the Court to look to other relevant international law. The ICTR Trial Chamber in *Akayesu* (affirmed in subsequent ICTR jurisprudence) construed “direct” to mean that the words said to constitute incitement must “specifically provoke” another to engage in genocide.<sup>1</sup> Hate speech or inciting violence does not constitute direct incitement to genocide unless there is a specific call to engage in the act of genocide.<sup>2</sup> Care should be taken to avoid criminalising incitement to acts that do not amount to genocide, since the Statute does not criminalise incitement to any other crime; such restrictiveness is reinforced by the inchoate nature of the crime of incitement.<sup>3</sup>

---

<sup>1</sup> *Akayesu* Trial Judgment [557]; *Nahimana* Appeal Judgment [692].

<sup>2</sup> *Nahimana* Appeal Judgment [692].

<sup>3</sup> *Akayesu* Trial Judgment [562].

## MEMORIAL *for* DEFENCE

3. The burden is on the Prosecution to identify clearly the individual posts that constitute specific encouragement to engage in genocide. The Court looks at each statement individually, not based on a general impression.<sup>4</sup> There are ten posts or phrases from posts mentioned in the Problem:
- (1) “break down those widgets”;<sup>5</sup>
  - (2) “pound the widgets”;<sup>6</sup>
  - (3) “clean up the widgets”;<sup>7</sup>
  - (4) “put the widgets in cold storage”;<sup>8</sup>
  - (5) “it’s time for a widget roast. Tonight – 7:00 PM, 12 Liberty Blvd”;<sup>9</sup>
  - (6) (the 16 June 2019 attack was) “a good step toward achieving the Dragos objective of ethnic purity in Solantis”;<sup>10</sup>
  - (7) “go to the voting sites near the Starek trailer park communities and do what must be done to prevent the widgets from gaining power”;<sup>11</sup>
  - (8) “an end to the widgets”;<sup>12</sup>
  - (9) “driving out the widgets”;<sup>13</sup>
  - (10) “cleansing the widgets”.<sup>14</sup>
4. None of these posts constitute direct incitement to genocide. The Defence considers them in three groups: first, post (9), which calls for the expulsion of the Stareks from Solantis; secondly, those that call for the ethnic purity of Solantis but are ambiguous as to how this is achieved (3, 4, 6, 8, 10); thirdly, those that (the Prosecution may argue) call for physical violence towards or killing

---

<sup>4</sup> *Nahimana* Appeal Judgment [726]-[727]; see also *Nzabonimana* Appeal Judgment [34] (on the crime of instigation).

<sup>5</sup> Problem [8].

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

<sup>8</sup> *ibid.*

<sup>9</sup> Problem [11].

<sup>10</sup> Problem [13].

<sup>11</sup> Problem [15].

<sup>12</sup> Problem [17].

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

of Stareks (1, 2, 5, 7). In what follows, the Defence submits that none of these posts specifically provoke others to commit genocide.

**b) Encouraging ethnic cleansing is not direct incitement to genocide**

5. The post that advocates “driving out the widgets”<sup>15</sup> can be interpreted as calling for the expulsion of the Stareks, but this does not constitute direct incitement to genocide. Expulsion of an ethnic group does not amount to genocide because “genocide” requires an intent to destroy – “physical or biological destruction”<sup>16</sup> – in whole or in part, a national, ethnical, racial or religious group, as such.<sup>17</sup> This view has much support from the case law. The ICTY Trial Chamber in *Stakić* held that the “expulsion of a group” does not in itself suffice for genocide.<sup>18</sup> This was followed by the ICJ in the *Genocide Case*, in which the court held that that “ethnic cleansing” – i.e. “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area” – does not, without more, constitute genocide.<sup>19</sup> This has since been reaffirmed by the ICJ in *Croatia v Serbia*<sup>20</sup> and by the ICC PTC in *Al Bashir*.<sup>21</sup>
6. The Prosecutor may rely on *Jorgic v Germany*, in which the ECtHR held that the German courts’ inclusion of ethnic cleansing in their definition of genocide “could reasonably be regarded as consistent with the essence of that offence”.<sup>22</sup> However, the threshold applied (“could reasonably be regarded as”) was a low one: the ECtHR did not define genocide, but merely considered that Germany’s definition was not unreasonable.<sup>23</sup> The Prosecutor might also draw from a resolution of the United Nations General Assembly that equated “ethnic cleansing” with genocide.<sup>24</sup> However, this resolution is not representative of custom given that it had a large number of abstentions (57) and any *opinio juris* that might have existed does not have any correspondence

---

<sup>15</sup> Problem [17].

<sup>16</sup> *Krstić* Appeal Judgment [25].

<sup>17</sup> Statute, Article 6.

<sup>18</sup> *Stakić* Trial Judgment [519].

<sup>19</sup> *Genocide Case* [190].

<sup>20</sup> *Croatia v Serbia* [163].

<sup>21</sup> *Al Bashir* Warrant Decision [143].

<sup>22</sup> *Jorgic v Germany* [114].

<sup>23</sup> *ibid* [105], [114].

<sup>24</sup> UNGA Res 47/121 (18 December 1992) UN Doc A/47/PV.91.

in practice given the contrary jurisprudence in the ICTY, ICJ and ICC (above). In any event, applying *nullum crimen sine lege*,<sup>25</sup> any ambiguity should be resolved in favour of the Defendant, so the narrower definition of “genocide” as requiring an intent to physically destroy a group should prevail.

**c) Encouraging ethnic purity is not direct incitement to genocide**

7. The posts that advocate “cleaning up the widgets”,<sup>26</sup> “putting the widgets in cold storage”,<sup>27</sup> “ethnic purity in Solantis”,<sup>28</sup> “an end to the widgets”,<sup>29</sup> and “cleansing the widgets”<sup>30</sup> are all calls for ethnic purity in Solantis, i.e. for Stareks to disappear from Solantis. However, none of them constitutes direct incitement to genocide because they are all ambiguous as to whether this is to be achieved by ethnic cleansing or by genocide.
8. To constitute direct incitement to genocide, the persons for whom the message was intended must have “immediately grasped”<sup>31</sup> that the purpose of the speech was to encourage genocide. This purpose must be evidenced objectively; it is not enough that the author subjectively intended the words to have that effect,<sup>32</sup> nor is it sufficient that the words in fact led to the commission of genocide.<sup>33</sup> Direct incitement to genocide needs to be “the only reasonable interpretation” of the words.<sup>34</sup> Coded language can be incitement if its meaning is clear from the context; but if the words, interpreted in context, remain ambiguous, they cannot constitute direct incitement to genocide.<sup>35</sup>

---

<sup>25</sup> Statute, Article 22(2).

<sup>26</sup> Problem [8].

<sup>27</sup> *ibid.*

<sup>28</sup> Problem [13].

<sup>29</sup> Problem [17].

<sup>30</sup> *ibid.*

<sup>31</sup> *Akayesu* Trial Judgment [558].

<sup>32</sup> *Nahimana* Appeal Judgment [706].

<sup>33</sup> *ibid* [709].

<sup>34</sup> *ibid* [746].

<sup>35</sup> *ibid* [701]; *Kalimanzira* Trial Judgment [716]; *Karemera* Appeal Judgment [483].

## MEMORIAL *for* DEFENCE

9. The posts calling for ethnic purity are ambiguous because ethnic purity can be achieved by expelling the Stareks and not necessarily by genocide; this ambiguity is compounded by the large and diverse membership of the Dragos group. The only unifying factor within Dragos is the general goal of “the ethnic purity of Solantis”,<sup>36</sup> and at least some Dragos members advocate ethnic cleansing (as seen from the calls to “drive out” the Stareks discussed previously). This diversity of opinion within the intended audience (i.e. the members of the Dragos affinity groups) means that there is no reason why they would necessarily interpret calls for ethnic purity as calls for genocide.
10. Context about the author, such as the author’s political and community affiliation, may assist interpretation of the author’s words.<sup>37</sup> Conversely, because of the anonymity of the posts, neither the intended audience nor the Court have any context about a particular author (other than that the author is likely sympathetic to Dragos’s goal of ethnic purity) that would help to disambiguate the message. Even if the author of a particular post subjectively intended the words to encourage the commission of genocide, its audience may not be able to immediately grasp that this was unambiguously the purpose of the post, in the absence of knowledge of the author’s background.
11. Therefore, the “ethnic purity” posts do not constitute direct incitement to genocide.

### **d) Encouraging violence towards Stareks is not direct incitement to genocide**

12. The posts that call for others to “break down the widgets” or “pound the widgets” can be interpreted as a call to violence towards Stareks. Likewise, the post “it’s time for a widget roast. Tonight – 7:00 PM, 12 Liberty Blvd” is plausibly a call to kill Stareks. In contrast, the call to “go to the voting sites near the Starek trailer park communities and do what must be done to prevent the widgets from gaining power” is ambiguous, since Stareks may have been prevented from voting by ways (e.g. intimidation or blocking their way) that do not necessarily require bodily harm.
13. However, *even if* it is assumed in the Prosecution’s favour that all of these posts are calls to kill Stareks, this does not amount to direct incitement to genocide, because genocide requires not just

---

<sup>36</sup> Problem [7].

<sup>37</sup> *Nahimana* Appeal Judgment [713].

## MEMORIAL *for* DEFENCE

an intent to kill individual Stareks, but rather an intent to destroy a “substantial” part of the Starek population.<sup>38</sup> This requirement of substantiality has been applied in subsequent jurisprudence:

- (1) In *Sikirica*, the killing of 1000-1400 Muslims out of a total population of 49,351 (i.e. 2-2.8%) was held not to amount to destruction of a substantial part of the group;<sup>39</sup> although this did not necessarily mean that there was no intent to destroy the group, the ICTY Trial Chamber used this as evidence against such an intent.<sup>40</sup>
- (2) In *Croatia v Serbia*, the ICJ held that the killing of 12,500 Croats did not constitute genocide in light of (*inter alia*) the fact that a much greater number – 80,000-100,000 – of them fled.<sup>41</sup>
- (3) In *Al Bashir*, the ICC PTC held that the “murder” of “thousands of civilians” belonging to the Fur, Masalit and Zaghawa groups did not amount to genocide in light of (*inter alia*) the fact that the large majority of the inhabitants were neither killed nor injured.<sup>42</sup>

14. There are insufficient grounds to believe that the posts inciting the killing of Stareks were immediately understood by the intended audience to encourage the widespread killing of Stareks to an extent sufficient to satisfy the substantiality threshold. It is relevant to look at the consequences of the posts as evidence of how they were understood by the intended audience (although consequences are not an element of the inchoate crime of incitement).<sup>43</sup> As of January 2020, out of 150,000 Stareks in Solantis, 1,500 have died and 50,000 have fled.<sup>44</sup> Comparing with the above cases, the consequences indicate ethnic cleansing, not genocide.
15. Similarly, there are insufficient grounds to believe that the incited killings are “primarily aimed” at destroying the group physically, as opposed to (e.g.) using intimidation to expel them from the community.<sup>45</sup> The post which encourages others to “do what must be done to prevent the widgets

---

<sup>38</sup> *Krstić* Appeal Judgment [12].

<sup>39</sup> *Sikirica* Motions to Acquit [72].

<sup>40</sup> *ibid* [75].

<sup>41</sup> *Croatia v Serbia* [437].

<sup>42</sup> *Al Bashir* Warrant Decision [192], [196], [205].

<sup>43</sup> *Nahimana* Appeal Judgment [709]; *Nzabonimana* Trial Judgment [1752].

<sup>44</sup> Problem [17].

<sup>45</sup> *Kupreškić* Trial Judgment [751].

## MEMORIAL *for* DEFENCE

from gaining power” is primarily aimed at preventing the Stareks from “gaining power” through the election of the pro-Starek politician Ayra Gendry,<sup>46</sup> herself of Nothroki ethnicity.<sup>47</sup> The post which encourages “breaking down” the Stareks can reasonably be interpreted as aimed at breaking down the Stareks as a political force, as opposed to the physical destruction of the Starek population. The post which calls others to “pound” the Stareks and the post which called for the “widget roast” might be primarily aimed at violence against Stareks just for the sake of it, or to intimidate them into leaving Solantis (as indeed happened); but neither of these aims necessarily amounts to (and may even be inconsistent with) the words being primarily aimed at the destruction of a substantial part of the group.

16. As submitted in paragraphs 9-10 above, the ambiguity of the posts is increased by the fact that they are written by many different anonymous individuals about which nothing is known (except for their loose Dragos affiliation), so that there is no contextual evidence about them from which it can be inferred that a particular post should be read as direct incitement to commit genocide.
17. For these reasons, there are insufficient grounds to believe that any specific post constituted direct incitement to commit genocide.

### **II. There are insufficient grounds to believe that the authors of the posts intended to incite genocide**

18. As held by the ICTR Trial Chamber in *Akayesu* and reaffirmed in subsequent ICTR jurisprudence, direct and public incitement to commit genocide requires a specific intent to directly prompt or provoke another to commit genocide.<sup>48</sup> The author must intend to create in the minds of their audience the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The author must also share the specific intent to commit genocide.<sup>49</sup>
19. For the same reasons discussed above, there are insufficient grounds to believe that the authors of the posts had the specific intent to destroy the Starek population physically, as opposed to a

---

<sup>46</sup> Problem [14].

<sup>47</sup> *ibid.*

<sup>48</sup> *Akayesu* Trial Judgment [560]; *Ruggiu* Trial Judgment [40].

<sup>49</sup> *ibid.*

## MEMORIAL *for* DEFENCE

generic intent to encourage ethnic purity in Solantis, or to intimidate the Stareks into fleeing Solantis. Likewise, there are insufficient grounds to believe that they intended to create an intent in the minds of their audience to destroy the Starek population physically.

20. Although incitement is an inchoate offence, the actual effect of incitement can be relevant evidence of the effect it was intended to have.<sup>50</sup> As submitted in paragraph 14 above, the actual consequences of the incitement reflect ethnic cleansing rather than genocide. Therefore, at its highest, the posts were intended to incite ethnic cleansing, not genocide.
21. The fact that the authors of the posts were anonymous significantly limits the evidence from which inferences about *mens rea* can be drawn. Given that *mens rea* is a subjective state of mind, contextual information about the author is highly relevant; for example, in the trial of Hans Fritzsche by the International Military Tribunal at Nuremberg for encouraging the commission of war crimes, it was relevant that Fritzsche was not aware of the extermination of the Jews in the East.<sup>51</sup> Yet there is no contextual evidence in relation to the authors of the posts on Statusphere.
22. If this matter were to proceed to trial, to draw inferences about the *mens rea* of the anonymous authors without an opportunity for the Defence to cross-examine them would prejudice the defendant's right to a fair trial under Article 64(2) of the Statute and under Article 14 of the ICCPR<sup>52</sup> (applicable via Article 21(3) of the Statute). It would be unprecedented in international trials to try a person on the basis of anonymous posts. That neither the Prosecution nor the Defence is able to call the authors as witnesses underscores the insufficiency of evidence in relation to their *mens rea*.
23. Therefore, there are insufficient grounds to believe that the authors of the posts had the specific intent required for direct and public incitement to genocide.

### **III. The posts did not constitute public incitement**

24. Given that the ICC has not considered the elements of direct and public incitement to genocide, it is again instructive to draw from ICTR jurisprudence on the equivalent provision in Article

---

<sup>50</sup> *Nahimana* Appeal Judgment [709].

<sup>51</sup> *Fritzsche* Judgment, 526.

<sup>52</sup> ICCPR, Article 14.



## MEMORIAL *for* DEFENCE

25(3)(c) of the ICTR Statute. According to the ICTR Trial Chamber in *Akayesu* (reaffirmed in subsequent ICTR jurisprudence), “public” incitement is characterized by a call for criminal action to a number of individuals in a *public place* or to members of the *general public at large* by such means as the mass media, for example, radio or television.<sup>53</sup> Only “unequivocally public” forms of incitement should be punished, reflecting the exceptionality of this inchoate crime.<sup>54</sup> If the incitement is made in private, it can only be criminalized under ordering, soliciting, and inducing,<sup>55</sup> which is not an inchoate crime.<sup>56</sup>

25. In the present case, the posts were not made in a “public place”. The ordinary meaning of “public place” refers to physical locations and does not include the Internet, as supported by the International Law Commission (and cited with approval in *Akayesu*) and domestic jurisprudence.<sup>57</sup> On this basis, the posts were not made in a public place because they were made in a “private” affinity group on Statusphere.<sup>58</sup>
26. In determining whether the posts were made to the “general public at large”, it is necessary to consider whether the audience was selective or limited.<sup>59</sup> This distinction is justified by the “special dangerousness associated with inciting an unspecified and indeterminate group of people to commit a crime so heinous as genocide, which risks creating an overall atmosphere conducive to violence and criminal activity capable of reaching uncontrollable proportions”.<sup>60</sup> The size of the audience is not determinative.<sup>61</sup> Although the ICTR has never defined the term “selective or limited”, it has been held that incitement was public in cases where it was made to “an

---

<sup>53</sup> *Akayesu* Trial Judgment [556]; *Nzabonimana* Appeal Judgment [126].

<sup>54</sup> *Kalimanzira* Trial Judgment [513], [515].

<sup>55</sup> Statute, Article 25(3)(b).

<sup>56</sup> *Kalimanzira* Trial Judgment [513] (on the analogous crime of instigation).

<sup>57</sup> ILC, “Report of the International Law Commission on the Work of its 48th Session” (6 May – 26 July 1996) UN Doc A/51/10, 22; *Akayesu* Trial Judgment [556]; *HKSAR v Chan Yau Hei* [37], [50]; *Fraser v County Court of Victoria* [105].

<sup>58</sup> Problem [1].

<sup>59</sup> *Akayesu* Trial Judgment [556]; *Ngirabtaware* Appeal Judgment [52].

<sup>60</sup> *Kalimanzira* Trial Judgment [746].

<sup>61</sup> *Nzabonimana* Appeal Judgment [128].

## MEMORIAL *for* DEFENCE

indeterminate group of persons”,<sup>62</sup> “anyone [...] watching or listening”,<sup>63</sup> or anyone “who happened to be present at the area”.<sup>64</sup>

27. Applying this test, the posts in the Dragos affinity groups could not constitute “public” incitement because the posts could “not be viewed by the general public”.<sup>65</sup> The groups were advertised as “Dragos” affinity groups. It was public knowledge that the aim of the Dragos group was the ethnic purity of Solantis. The audience was therefore self-selected. Those who joined the Dragos affinity groups were all Dragos members who were already sympathetic to Dragos’ aim of achieving the ethnic purity of Solantis. To borrow from relevant French jurisprudence,<sup>66</sup> the existence of a political link between the audience constitutes a “community of interests” (*communauté d’intérêts*) which negates the “public” element.<sup>67</sup>
28. The negation of the “public” element by the existence of a political link between the audience is supported by *Nahimana*, in which the ICTR Appeals Chamber held that inciting individuals manning the roadblocks of a Hutu political party could not constitute public incitement because such individuals were not the general public.<sup>68</sup> Similarly, in *Nzabonimana*, the ICTR Appeals Chamber held that incitement of a group of public officials – as opposed to “a gathering of random members of the population” – could not constitute public incitement because public officials were not the general public.<sup>69</sup> By contrast, another instance of incitement to kill Tutsis was held to be public in *Nzabonimana* partly because it was heard by Tutsis (i.e. across the political spectrum).<sup>70</sup>
29. The point that the audience of the posts were Dragos members as opposed to the general public is reinforced by the fact that the posts referred to Stareks as “widgets”, a phrase only used by members of Dragos.<sup>71</sup> While the Defence accepts that coded language can be direct and public

---

<sup>62</sup> *Kalimanzira* Trial Judgment [561] (reversed on the facts on appeal).

<sup>63</sup> *ibid* [589].

<sup>64</sup> *Nzabonimana* Appeal Judgment [232].

<sup>65</sup> Problem [7].

<sup>66</sup> Pursuant to Statute, Article 21(1)(c).

<sup>67</sup> *Cass crim 27 mai 1999: Bull n° 112*.

<sup>68</sup> *Nahimana* Appeal Judgment [862].

<sup>69</sup> *Nzabonimana* Appeal Judgment [385], [386].

<sup>70</sup> *ibid* [232].

<sup>71</sup> Problem [8].

MEMORIAL *for* DEFENCE

incitement to genocide if its meaning is clear to a public audience, it is indicative to a greater extent of “private” incitement if it can only be understood by a selective and limited audience. Although the UNHCHR after a formal investigation eventually came to the conclusion that the word “widgets” was an ethnic slur used by members of Dragos to refer to the Starek people,<sup>72</sup> there are insufficient grounds to believe that this would have been understood by an ordinary member of the general public.

30. For similar reasons, the Defence submits that the posts did not constitute incitement. “Incitement” must encourage or persuade another to commit an offence.<sup>73</sup> Given that members of the Dragos affinity groups are already sympathetic to Dragos’ goal of ethnic purity, the posts made by the Dragos group are at best aimed at coordinating the offences, rather than encouraging their commission. This is at most instigation or aiding and abetting, not incitement.
31. Therefore, the posts on Statusphere did not satisfy the elements of “direct” and “public” incitement of genocide under Article 25(3)(e) of the Statute.

---

<sup>72</sup> *ibid.*

<sup>73</sup> *Akayesu* Trial Judgment [555].

**B. THE PTC ERRED IN FINDING SUBSTANTIAL GROUNDS TO BELIEVE THAT THE DEFENDANT SHOULD BE HELD RESPONSIBLE FOR INCITING, OR PROVIDING THE MEANS TO INCITE, GENOCIDE UNDER ARTICLE 25(3)(E) AND 25(3)(C) OF THE STATUTE**

32. It is submitted that, [I.] under Article 25(3)(e) of the Statute, the Defendant had no editorial control over the impugned posts and the Defendant lacked the requisite *mens rea* to incite and commit genocide. [II.] For the charges under Article 25(3)(c), the Defendant had no duty to remove the impugned posts until she acquired actual knowledge as to the nature of the posts, contrary to the PTC’s determination that she bears responsibility for failing to “immediately” remove them; and, in any event, the Defendant took reasonable steps to remove the impugned posts.

**I. The Defendant bears no responsibility under Article 25(3)(e) of the Statute**

33. Given that the Court has yet to construe Article 25(3)(e) in determining the responsibility of persons for third-party content on media platforms, it is instructive to draw from analogous *ad hoc* jurisprudence.<sup>74</sup> In *Nahimana*, both the ICTR Trial Chamber<sup>75</sup> and Appeals Chamber<sup>76</sup> affirmed that media who published third-party content bear responsibility only if they “exercise control over the media” (by, for example, shaping “editorial directions”) and fail to exhibit “critical distance” between them and the actual author.<sup>77</sup> Furthermore, in *Delfi v Estonia*, the ECtHR Grand Chamber distinguished “professionally managed Internet news portals” from “other fora on the Internet where third-party comments can be disseminated, for example an Internet discussion forum or a bulletin board”, to exhibit varying degrees of control over online media.<sup>78</sup>

34. Accordingly, it is submitted that responsibility for the content of online media posts turns upon whether the Defendant (a) exerted editorial control over the content; and (b) exhibited critical distance.

---

<sup>74</sup> Statute, Article 21.

<sup>75</sup> *Nahimana* Trial Judgment [1001], [1003].

<sup>76</sup> *Nahimana* Appeal Judgment [692].

<sup>77</sup> *Nahimana* Trial Judgment [993]; *Jersild v Denmark* [34].

<sup>78</sup> *Delfi v Estonia* [115]-[116].

**a) The Defendant did not exert editorial control over the content**

35. The Defendant exercised no editorial control over posts on Statusphere’s e-bulletin board. The position of Statusphere can be contrasted with that of traditional printed media, as in *Nahimana* (above), in which third-party content would not be published without the authorisation and input of the publisher. In contrast with traditional media, online social media is user-driven, with posts being published instantaneously.<sup>79</sup> Statusphere has been described as a “social network platform somewhat similar to Facebook”.<sup>80</sup> The Dragos affinity groups have been described as an “e-bulletin board”.<sup>81</sup> The Defendant, given the nature of the media under her control, therefore did not exercise any control over the impugned posts.
36. The Prosecution might submit that the Defendant *ought* to have actively controlled the posting of statements *prior* to their publication on the e-bulletin boards, or that any post should be automatically attributed to her based upon some theory of general control. However, to safely conclude this, the Court must be satisfied that there exists an international legal requirement on providers of online social media platforms to exercise pre-publication control together with a sanction in failing to do so. Customary international law, to which this Court should have regard under Article 21(1)(c) of the Statute, does not reflect the bold proposition that criminal responsibility ensues for online social media providers for posts that were uploaded onto their platforms by third parties. Rather, the preponderance of international declarations and national law exempt providers from liability, or create a broad presumption of immunity, when their involvement in the publication of the content in question is passive.<sup>82</sup> Such social media providers, being a mere “conduit” for information exchange, are not to be treated as the “speaker” of the impugned words and should bear no responsibility for “content on the internet of which they are not the author”.<sup>83</sup> Liability only arises for the lack of action, if any, taken by the provider

---

<sup>79</sup> Balkin, 936-939.

<sup>80</sup> Problem [6].

<sup>81</sup> Problem [8].

<sup>82</sup> OSCE Declaration on Freedom of Communication on the Internet, Principle 6; UNHCR Report on Freedom of Expression [43]; Convention on Cybercrime, Articles 2, 3; Communications Decency Act (US), s.230(c)(1); Directive on Electronic Commerce (EU), Article 12; *Force v Facebook*, 27; *Marshall v Google*, 1267; *Jane Doe v Backpage.com*, 18; Civil Rights Framework for the Internet (Brazil).

<sup>83</sup> Directive on Electronic Commerce (EU), Article 12; Communications Decency Act (US), s.230(c)(1); UNHCR Report on Freedom of Expression [43].

*post-publication*.<sup>84</sup> Therefore, the Defendant did not exercise any control over the posts such that they were tantamount to her own words.

**b) The Defendant exhibited critical distance from all the alleged posts**

37. The Defendant maintained critical distance from the alleged posts. She made a public statement concerning Statusphere’s policy against any advocacy of violence and the closing down of group sites, including “Dragos Ambition” and “Dragos Initiative”.<sup>85</sup> The Prosecution might argue that the Defendant showed, in her interview with the Solantis Gazette, sympathy to the cause of ethnic homogeneity in Solantis, thereby failing to exhibit critical distance from the alleged posts.<sup>86</sup> However, the views of the Defendant were qualified by her as rooted in the “history of Valaria”.<sup>87</sup> In *Sürek v Turkey*, the ECtHR Grand Chamber upheld the right of a journalist to interview the leader of the PKK who advocated that “the war will go on until there is only one single individual left on our side”.<sup>88</sup> The Grand Chamber emphasised the need for the public via the media to have an “insight into the psychology” behind the violent conflict, distinguishing it from adopting or embracing what was said by the interviewee.<sup>89</sup> By explicitly qualifying her comment to be an explanation of history, read together with her condemnation of violence, a critical distance was maintained between the Defendant and the alleged posts.

**c) The Defendant lacked the intent to incite and commit genocide**

38. The PTC erred in failing to apply the appropriate *mens rea* requirement. Article 25(3)(e) of the Statute does not specify the *mens rea* requirement for the offence. However, applying a textually identical provision,<sup>90</sup> both the ICTR Trial Chamber and Appeals Chamber affirmed a twofold requirement: (i) the “intent to directly prompt or provoke another to commit genocide” and (ii)

---

<sup>84</sup> Civil Rights Framework for the Internet (Brazil), Article 19; Ley No 20435 (Chile).

<sup>85</sup> Problem, Appendix 1.

<sup>86</sup> *ibid*.

<sup>87</sup> *ibid*.

<sup>88</sup> *Sürek v Turkey* [10].

<sup>89</sup> *ibid* [61].

<sup>90</sup> ICTR Statute, Article 3(c).

## MEMORIAL *for* DEFENCE

the “specific intent to commit genocide”.<sup>91</sup> Further, given that Article 25(3)(c) is an inchoate offence, the *mens rea* requirement must be construed strictly and unequivocally established.<sup>92</sup>

39. The Defendant had neither the intent to directly prompt or provoke another to commit genocide, nor the intent to commit genocide:

- (1) The Defendant has expressed views about Stareks.<sup>93</sup> However, these political views, in the context of an upcoming election, fell substantially short of an intention to provoke others to commit genocide or to commit genocide herself against the Stareks. They must also be read alongside the Defendant’s denunciation of violence, meaning such views expressed against the Stareks were purely exhortatory.<sup>94</sup>
- (2) Concerning the Defendant’s failure to “immediately remove” the posts alleged to constitute public and direct incitement to genocide, the Defendant had explained the delay in removing the posts as due to translation difficulties and the possibility of an alternative interpretation of the metaphoric statements.<sup>95</sup> The non-removal was motivated by upholding free expression,<sup>96</sup> a reasonable consideration that an international provider of social media should have regard to given the importance of such media for information exchange, and did not evince an unequivocally genocidal *mens rea*. Moreover, the Defendant did remove posts that violated its community standards policy.<sup>97</sup> Without evidence demonstrating the failure to “immediately remove”<sup>98</sup> the posts was intended to provoke others to commit genocide, the *mens rea* requirement was not satisfied.

## **II. The Defendant bears no responsibility under Article 25(3)(c) of the Statute**

- a) The Defendant had no duty to take measures to remove posts on Statusphere until she acquires actual knowledge of the nature of the posts**

---

<sup>91</sup> *Akayesu* Trial Judgment [560]; *Ngirabatware* Appeal Judgment [59]

<sup>92</sup> *Akayesu* Trial Judgment [562].

<sup>93</sup> Problem, Appendix 1.

<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.*

<sup>96</sup> *ibid.*

<sup>97</sup> Problem [9].

<sup>98</sup> Problem [21].

## MEMORIAL *for* DEFENCE

40. The PTC held that the Defendant can be responsible for failing to “immediately remove” the impugned posts.<sup>99</sup> It is submitted that the imposition of responsibility on this basis has no support in the text of the Statute or in general international law. Rather, it is submitted that questions of responsibility arise only *after* the Defendant acquires knowledge that the posts were capable of inciting genocide, for three reasons.
41. First, to establish *mens rea* under Article 25(3)(c), the Defendant must possess the “intention to facilitate the commission of the alleged crime”.<sup>100</sup> The Defendant therefore has to be aware of the inciteful nature of the posts. To establish intention in relation to a consequence (the consequence being the facilitation of the commission of inciting genocide in the present case), Article 30(2)(b) of the Statute provides that the Defendant must “mean to cause that consequence or [be] aware that it will occur in the ordinary course of events”. Therefore, the Defendant’s duty to take action to remove the posts arises only when she becomes “aware” that direct and public incitement of genocide “will occur in the ordinary course of events” if the posts were not removed.
42. Second, this requirement of awareness, or actual knowledge, is rooted in customary international law, relevant to the Court in the construction of Article 25(3)(c).<sup>101</sup> An actual knowledge requirement, or a duty to act in response to a specific post upon receiving “notification”, is stipulated in the EU’s Directive of Electronic Commerce,<sup>102</sup> the US Digital Millennium Copyright Act,<sup>103</sup> and Brazil’s *Civil Rights Framework for the Internet*.<sup>104</sup> These instruments are generally representative of the actual knowledge requirement for imputing responsibility to online media providers in customary international law.
43. Third, a requirement of awareness is further compelled by the right to freedom of expression, with which judicial interpretations of the Statute must be compatible.<sup>105</sup> The requirement that providers only remove offensive posts when they are “aware” of their offensive nature has been

---

<sup>99</sup> *ibid.*

<sup>100</sup> *Blé Goudé* Confirmation of Charges [167].

<sup>101</sup> Statute, Article 21(1)(b).

<sup>102</sup> Directive on Electronic Commerce (EU), Article 14.

<sup>103</sup> Digital Millennium Copyright Act (US), s.512(c)(1)(A)(iii).

<sup>104</sup> Civil Rights Framework for the Internet (Brazil), Article 19. See also Ley No 20435 (Chile).

<sup>105</sup> Statute, Article 21(3).



## MEMORIAL *for* DEFENCE

observed by many different international juridical bodies as respecting freedom of expression by ensuring that action is not taken pre-emptively and without full appraisal as to the nature of any post.<sup>106</sup>

44. Having established actual knowledge as the threshold for triggering the duty on the Defendant to take action, it is submitted that the Defendant did not “immediately”<sup>107</sup> know that the posts were of a manner to incite genocide. The Court can infer the Defendant’s awareness based on all the evidence available. However, such inference must be based on unequivocal evidence so as not to lower the *mens rea* threshold of the offence.<sup>108</sup> The Defendant lacked such awareness:

- (1) It was reasonable for the Defendant to have read about the alleged post without associating them with a call for genocide. A day after the 16 June 2019 attack on the Starek worship centre, the Defendant noted that her content monitoring team had trouble properly understanding the dialect in which the post was written.<sup>109</sup> For the Dragos posts on 6 November 2019, the Defendant explained the reason for the delay in removal to be that she and her staff misinterpreted the message conveyed by a post to be a political statement instead of a call to violence.<sup>110</sup>
- (2) The Prosecution might submit that the Defendant did not do enough to ascertain the dialectal differences, ought to have grasped a “hidden meaning”, or otherwise should have presumed that they were of a character to incite genocide. However, the Prosecution must show that the failure on the Defendant’s part is “intentional” and is “for the purpose of facilitating” the incitement of genocide, which is absent from the facts. In any event, the language of the posts was ambiguous, as submitted in Part A(I) above.

**b) The Defendant took reasonable steps to identify offending posts and to remove them**

---

<sup>106</sup> Joint Declaration on Freedom of Expression and the Internet, Article 2(b); UNHCR Report on Freedom of Expression [76]; *Delfi v Estonia* [OIII-1]; *Scarlet v SABAM* [48].

<sup>107</sup> Problem [21].

<sup>108</sup> *Bemba* Appeal Judgment [145].

<sup>109</sup> Problem, Appendix 1.

<sup>110</sup> Problem, Appendix 2.

## MEMORIAL *for* DEFENCE

45. Furthermore, it is submitted that the Defendant took reasonable steps to identify offending posts and to remove them. Article 25(3)(c) of the Statute is silent on whether the offence can be committed by omission. However, the ICTY Appeals Chamber in *Tadić* affirmed that omission might be equated with aiding and abetting where there is a duty and ability to intervene.<sup>111</sup> The PTC in the present case characterised this duty as requiring the “immediate” removal of the impugned post. The Defendant strongly disputes this characterisation as both lacking any legal foundation and being tantamount to strict liability, for three reasons.
46. First, drawing reference from Article 28 of the Statute, albeit in a different content, a commander has to do what is “necessary and reasonable” to prevent a crime within the Statute from being committed by their subordinate. The ICC Appeals Chamber in *Bemba* held that “necessary and reasonable” does not require the person to do “the impossible”.<sup>112</sup> A margin of appreciation is to be accorded to the Defendant in determining what is necessary and reasonable; the existence of a better alternative does not mean the Defendant breached their duty.<sup>113</sup> It is submitted that these principles are equally material in determining what duties a social media provider owes to remove inciteful posts.
47. Second, the “immediate removal” of an offensive post would require, in practice, a blanket filter or a ban, both of which have been held by international jurists to be inconsistent with the right to freedom of expression.<sup>114</sup> The appropriateness of the content is often highly dependent on context, which social media providers are unequipped to assess.<sup>115</sup> If the Court rules that social media providers bear strict liability in failing to prevent their Internet platform from being used to facilitate crimes, this would lead to over-censuring and a deleterious effect on the right to freedom of expression.<sup>116</sup> If the “immediate removal” requirement is upheld on appeal, the Court would be acting inconsistent with an internationally recognised human right under Article 21(3) of the Statute.

---

<sup>111</sup> *Tadić* Appeal Judgment [192].

<sup>112</sup> *Bemba* Appeal Judgment [167].

<sup>113</sup> *ibid* [170].

<sup>114</sup> Joint Declaration on Freedom of Expression and Responses to Conflict Situations [4c]; *Scarlet v SABAM* [48]; *Yildirim v Turkey* [54]-[56].

<sup>115</sup> Kaye, 4.

<sup>116</sup> *Delfi v Estonia* [OIII-1].

## MEMORIAL *for* DEFENCE

48. Third, there is no evidence in customary international law that can be taken to support the PTC’s bold proposition that the posts had to be “immediately removed” upon posting. For example, in Germany an Internet service provider is given 24 hours or 7 days to remove content that is “manifestly unlawful” or otherwise “unlawful” respectively.<sup>117</sup> Even this period was criticised as too strict by international jurists because it would not allow for a considered proportionality assessment.<sup>118</sup> If anything, therefore, customary international law is accepting of a more generous timescale in which to evaluate allegedly offending posts.
49. In any event, the Defendant did take reasonable measures:
- (1) The Defendant established a community policy aimed at preventing posts inciting violence.<sup>119</sup> If such a post is made, Statusphere emails the user to inform them and removes the post within 24 hours.<sup>120</sup> If violent posts are systematic, Statusphere will close down the group site where they are posted.<sup>121</sup> The Defendant also set up content monitors to provide expedited notice of any suspicious posts.<sup>122</sup>
  - (2) Following the UNHCHR report, the Defendant promptly closed down the “Dragos Initiative” group.<sup>123</sup>
  - (3) It was not within the Defendant’s power to make the decision to remove the post on 16 June 2019 because she was not aware of its existence.<sup>124</sup> Regarding the attack on 16 June 2019, the content monitoring team experienced a problem of translation due to the difference in dialect between Valaria and Solantis, therefore the post was not promptly brought to the attention of the Defendant.<sup>125</sup> However, in realising this mistake, the

---

<sup>117</sup> Network Enforcement Act (Germany), s.3(2).

<sup>118</sup> Kaye, 4.

<sup>119</sup> Problem, Appendix 1.

<sup>120</sup> *ibid.*

<sup>121</sup> *ibid.*

<sup>122</sup> Problem, Appendix 2.

<sup>123</sup> Problem [10].

<sup>124</sup> Problem [12].

<sup>125</sup> *ibid.*

MEMORIAL *for* DEFENCE

Defendant shut down the whole “Dragos Ambition” group the next day.<sup>126</sup>

- (4) The Defendant fixed the translation problem encountered by the content monitors because she understood that the post on 6 November 2019 stated, “go to the voting sites near the Starek trailer park communities and do what must be done to prevent the widgets from gaining power”.<sup>127</sup>
- (5) There is no evidence that posts inciting violence were made in the newest “Dragos Aspiration” group. It is submitted that “Dragos Aspiration” by itself does not raise sufficient alarm to justify the closure of the group, unlike one such as “Nazi Aspiration” which would clearly denote an extremist cause. There were no posts calling for action until 6 November 2019, in which that post only encouraged others to “do what must be done”.<sup>128</sup> There was no reason for the Defendant to remove posts or to close the group.
- (6) Furthermore, the post on 6 November 2019 had a different tone compared to previous Dragos posts, which more unambiguously refer to violent actions, such as “break”,<sup>129</sup> “pound”,<sup>130</sup> and “roast”.<sup>131</sup> Particularly in light of the political election, the Defendant was careful not to suppress freedom of expression and interpreted it as a call to vote. After being aware of the violent attacks, despite the post being the first one to call for violence, the Defendant removed the whole “Dragos Aspiration” group.<sup>132</sup>

50. Therefore, the Defendant bears no responsibility under Article 25(3)(e) or 25(3)(c) of the Statute.

---

<sup>126</sup> Problem [13].

<sup>127</sup> Problem [16].

<sup>128</sup> Problem [15].

<sup>129</sup> Problem [8].

<sup>130</sup> *ibid.*

<sup>131</sup> Problem [11].

<sup>132</sup> Problem [13].

**C. THE PTC ERRED IN FINDING JURISDICTION UNDER ARTICLE 12(2)(A) TO PROSECUTE THE DEFENDANT AS THE “CONDUCT IN QUESTION” DID NOT OCCUR IN SOLANTIS**

51. The Defence submits that [I.] the Court has jurisdiction under Article 12(2)(a) only when the “conduct in question” occurred in the territory of a State party. The PTC erred in determining that the preconditions in Article 12 were met since [II.] under Article 25(3)(e), the Defendant’s alleged endorsement or failure to establish critical distance from posts by Dragos members did not occur in Solantis; [III.] under Article 25(3)(c), the Defendant’s alleged omission to prevent posts by Dragos members also did not occur in Solantis, nor can a link be established between such conduct and any putative effects in Solantis.

**I. Article 12(2)(a) requires specifically the “conduct in question” to occur in the territory of a State party**

52. Article 12(2)(a) of the Statute establishes that the Court may exercise its jurisdiction only when the “conduct in question” occurred on the territory of a State party.

53. The term “conduct in question” was selected by the drafters of the Statute to have specific legal implications. Pursuant to Article 32 of the VCLT<sup>133</sup>, the text should be interpreted based on its ordinary meaning in context (including relevant extrinsic materials) and in light of its object and purpose. It is submitted that the “conduct in question” refers to the *act or omission* of a crime and therefore cannot encompass the consequence or any other element of crime.

(1) The ordinary meaning of “conduct”, from common law uses of this term, denotes an “act or omission”.<sup>134</sup>

(2) According to the last official documents of the Rome negotiations, the phrase “act or omission in question” was used in Draft Article 7 – which later became Article 12 of the Statute.<sup>135</sup>

---

<sup>133</sup> VCLT, Article 32.

<sup>134</sup> Clark, 306; Cassese, 911.

<sup>135</sup> “Bureau Discussion Paper Regarding Part 2” (6 July 1998) UN Doc A/CONF.183/C.1/L.53, 208-209; “Bureau Proposal: Regarding Part 2” (10 July 1998) UN Doc A/CONF.183/C.1/L.59, 212.

## MEMORIAL *for* DEFENCE

- (3) There are many other instances where “conduct” is used instead of “crime” in the Statute.<sup>136</sup> For example, Article 31 states that “a person shall not be criminally responsible, if, at the time of the person’s conduct [they have one of the enumerated defences]”. This indicates that the Court must assess the asserted defence at the time of criminal conduct, not at the time of the criminal consequence.<sup>137</sup> The drafters therefore knew how to employ specific terms as distinct from others, as with “conduct”.
- (4) “Conduct” is one element of a crime. Article 20(1) of the Statute provides that “no person shall be tried before the Court with respect to *conduct which formed the basis of crimes* for which the person has been convicted or acquitted by the Court”. Article 30(2)(a) and 30(2)(b) also distinguishes “conduct” from “consequences”. This is corroborated by the Elements of Crimes, which indicated that crimes are composed of the elements: conduct, consequence, circumstance, and the *mens rea*.<sup>138</sup> Indeed, there are conduct-only crimes, such as the employment of poison without necessarily injuring a person.<sup>139</sup>
- (5) State parties have acknowledged subsequently that conduct is distinct from consequences. Some delegates in the Working Group on the Crime of Aggression sought to define conduct to include both conduct and consequence,<sup>140</sup> especially in light of the “territoriality principle”.<sup>141</sup> However, the draft<sup>142</sup> and actual<sup>143</sup> amendments to the Statute did not include any modification to Article 12(2)(a). Therefore, the drafters were aware of the “effects” doctrine and believed that the Statute did not support it.

54. Therefore, “conduct” denotes a specific meaning within the Statute, being the *act or omission* that comprises the crime. The Prosecution might seek to broaden Article 12(2)(a) through a liberal

---

<sup>136</sup> Statute, Articles 17, 22, 24, 31, 32, 78, 90, 93, 101.

<sup>137</sup> Cassese, 1028-1029.

<sup>138</sup> Elements of Crimes, General Introduction.

<sup>139</sup> Statute, Article 8(b)(xvii).

<sup>140</sup> “Report of the Special Working Group on the Crime of Aggression” 7<sup>th</sup> Session of the Assembly of States Parties (14-22 November 2008) ICC-ASP/7/20 [28].

<sup>141</sup> “Report of the Special Working Group on the Crime of Aggression” 7<sup>th</sup> Session of the Assembly of States Parties (Second Resumption) (9-13 February 2009) ICC-ASP/7/SWGCA/2 [38], [39].

<sup>142</sup> “Discussion Paper on the Crime of Aggression Proposed by the Chairman (revision January 2009)” 7<sup>th</sup> Session of the Assembly of the State Parties (Second Resumption) (9-13 February 2008) ICC-ASP/7/SWGCA/INF.1, 2-3.

<sup>143</sup> Amendments on the Crime of Aggression.

## MEMORIAL *for* DEFENCE

use of the “effects” doctrine in customary international law.<sup>144</sup> However, customary international law is applied “in the second place” under Article 21 of the Statute, only where (i) there is a lacuna in the ICC’s internal law, and (ii) the lacuna cannot be filled by the VCLT and “internationally recognised human rights” under Article 21(3) of the Statute.<sup>145</sup> Therefore, customary international law, given the clear answer provided in Article 12(2)(a), is immaterial.

55. The Prosecution might rely on the PTC’s findings in the *Bangladesh/Myanmar* Jurisdiction Ruling and Investigation Decision, where jurisdiction was found over alleged deportation against the Rohingya people in Myanmar (a non-State party), because it had effects in Bangladesh (a State party).<sup>146</sup> However, the Appeals Chamber is evidently not bound by this decision and should engage in its own evaluation of Article 12(2)(a) from first principles. Nor are these decisions persuasive. The PTC referred to customary international law without proper analysis of the Court’s internal laws and the textual constraints imposed on its jurisdiction.<sup>147</sup> Furthermore, most of the national laws reviewed explicitly state that the country will have jurisdiction over a crime if any element (i.e. act or omission, consequence or effect) or part/significant portion of the crime occurs on their territory.<sup>148</sup> These statutory formulations differ markedly from the one which the Court is required to interpret, pertaining to “conduct in question”.
56. In the event that the Court finds the putative “effects” doctrine to be applicable in Article 12(2)(a), the Defence submits that the correct application of the doctrine requires the effects to be substantial, direct, and foreseeable.<sup>149</sup> This is supported in a multitude of national laws with a minimum requirement that the criminal activity has a real and substantial link to its respective State, and that the effects were direct and foreseeable to an objective third party.<sup>150</sup> It is also reinforced in another context by this Court in *Mbarushimana*.<sup>151</sup> In addressing questions on temporal and territorial jurisdiction, the Court stated that crimes fell within its jurisdiction insofar

---

<sup>144</sup> *Lotus Case*.

<sup>145</sup> *Al Bashir* Warrant Decision [44]; *Ruto* Confirmation of Charges [289].

<sup>146</sup> *Bangladesh/Myanmar* Investigation Decision [104], [124].

<sup>147</sup> *Bangladesh/Myanmar* Jurisdiction Ruling [65].

<sup>148</sup> Wheeler, 626.

<sup>149</sup> Vagias, 106, 195.

<sup>150</sup> *ibid.*

<sup>151</sup> *Mbarushimana* Jurisdiction Decision.

as they were “sufficiently linked to the situation of crisis [State party territory]”.<sup>152</sup> Lacking substantiality, the effects doctrine would be a disguise for universal jurisdiction, thereby running contrary to the intention of the Statute negotiators where such a model was emphatically rejected.<sup>153</sup>

57. Therefore, to find the jurisdiction over the Defendant, it is necessary to establish that her “conduct in question” took place in Solantis (a State party) or, in the alternative, that the Defendant’s conduct had effects in Solantis that were substantial, direct, and foreseeable.

## **II. Conduct under Article 25(3)(e) attributed to the Defendant did not occur in Solantis**

58. In light of the submissions in paragraphs 52-57 above, the Court is unable to exercise jurisdiction over the Defendant in relation to the charge under Article 25(3)(e).

59. The alleged “conduct in question” of the Defendant, in inciting genocide (which is denied), did not take place in Solantis. The Prosecution might submit that the offending posts were written in Solantis, with the conduct in question therefore taking place in the territory of a State party. However, the relevant question under Article 25(3)(e) is whether the alleged conduct of the Defendant, which may associate her to these statements, occurred in Solantis. The Prosecution may further rely on the Defendant’s statements in the interview with Jonah Mormant as evidence of endorsement.<sup>154</sup> The Defendant’s alleged conduct in either endorsing or failing to exhibit critical distance (all denied), if anywhere, occurred in Valaria. She is located in Valaria and has resided there “all her life”, all such statements were made when she was physically present in Valaria.<sup>155</sup> Even if considering the conduct of the Dragos members, there is no evidence suggesting where the authors of the posts were located, given their anonymity.

60. The Prosecution might submit that “conduct” includes acts in cyberspace. So far the Court has not adjudicated on cybercrimes, although from national law, case-law and treaties, classic

---

<sup>152</sup> *ibid* [5], [6].

<sup>153</sup> Bernhardt, 55 and 58; “Bureau Proposal of the Committee of the Whole: Part 2. Jurisdiction, Admissibility and Applicable Law” UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June – 17 July 1998) (10 July 1988) UN Doc A/CONF.183/C.1/L.59, 212.

<sup>154</sup> Problem, Appendix 1 & 2.

<sup>155</sup> Problem [6].



## MEMORIAL *for* DEFENCE

interpretations of territorial jurisdiction were used.<sup>156</sup> Furthermore, national courts have refused to apply jurisdictional principles from civil cybercrime disputes to criminal cases.<sup>157</sup> The use of the Internet does not change that the “conduct in question” must physically occur in the territory of a State party for the Court to exercise jurisdiction.

61. In the alternative, it is submitted that the “effects” doctrine would not provide the Court with jurisdiction over the Defendant under Article 25(3)(e). It is firmly established that incitement to genocide is an inchoate offence.<sup>158</sup> The offence therefore does not include “consequences”. Even if the effects doctrine in this context is construed more broadly to include consequences, it is submitted that the Defendant’s conduct was not substantially linked to the effects occurring in Solantis. Given the Defendant’s celebrity, it would have been thought that the impact of Defendant’s putative endorsement or failure to show critical distance would be acknowledged, such as by the Dragos members seeking to advance their cause. The Prosecution have adduced no such evidence.
62. Therefore, the Court has no jurisdiction over crimes allegedly committed by the Defendant under Article 25(3)(e).

### **III. Conduct under Article 25(3)(c) attributed to the Defendant did not occur in Solantis; nor can a sufficient link be established to effects felt in Solantis**

63. In light of the submissions in paragraphs 52-57 above, the Court is also unable to exercise jurisdiction over the Defendant in relation to the charge under Article 25(3)(c). To the extent that the Defendant “provided the means” (which is denied), she did so through the provision of an online social network situated in Valaria, a non-State party.<sup>159</sup> The Prosecution may submit that the conduct of the principal occurred in Solantis, but the essential question is whether the Defendant’s conduct contributed substantially to the commission of the crime.<sup>160</sup> Evidence showing collaboration or awareness of existence between principal and accessory is

---

<sup>156</sup> Brenner and Koops, 6; Hirst, 187.

<sup>157</sup> Kohl, 96; Clough, 411–412.

<sup>158</sup> *Nahimana* Appeal Judgment [723].

<sup>159</sup> Problem [6].

<sup>160</sup> *Bemba* Public-Redacted Appeal Judgment [19].

## MEMORIAL *for* DEFENCE

unnecessary.<sup>161</sup> All executive decisions would be made by the Defendant, who has resided in Valaria all her life.<sup>162</sup> Furthermore, algorithms to filter coded words made by Dragos members or to remove Dragos groups would have been implemented through servers situated at the headquarters of Statusphere in Valaria.<sup>163</sup>

64. The application of the “effects” doctrine would also not suffice to confer jurisdiction on the Court in relation to Article 25(3)(c). The Defendant’s actions and the effects felt in Solantis are divisible. As submitted in paragraphs 40-44 above, the Defendant was unable to remove the posts until she was aware of their inciteful content, having a reasonable period of time in which to evaluate the allegedly offensive nature of a given post. The Defendant should not therefore be held responsible for the effects which the posts might have immediately had in Solantis: “it is time for widget roast” was posted in the morning and took effect that same evening;<sup>164</sup> “do what must be done to prevent widgets from gaining power” was posted the day before and took effect on the morning of the election.<sup>165</sup> If the Court were to hold the Defendant responsible for these effects, it would be reinforcing the legally misconceived requirement that the Defendant had to “immediately” remove posts without first properly evaluating their allegedly offensive content.
65. Further, recalling the requirement of a sufficient link, the effects of the posts in Solantis would not be foreseeable to a reasonable person placed in the same position as the Defendant. On the 16 June 2019 attack, the Defendant was unable to understand the true meaning of the Dragos posts due to the dialect difference of Valarian in Solantis and Valaria.<sup>166</sup> For the posts on 6 November 2019, the Defendant and her staff interpreted the message to be a call to campaign and vote.<sup>167</sup> A reasonable person in the position of the Defendant would not foresee the mistranslated message “it is time for those of the faith to see the light”<sup>168</sup> to produce the effects that they did.

---

<sup>161</sup> *Tadić* Appeal Judgment [229(ii)]; *Brđanin* Appeal Judgment [349].

<sup>162</sup> Problem [6].

<sup>163</sup> *ibid.*

<sup>164</sup> Problem [11].

<sup>165</sup> Problem [15].

<sup>166</sup> Problem [12].

<sup>167</sup> Problem [16].

<sup>168</sup> Problem, Appendix 1.

MEMORIAL *for* DEFENCE

Nor would a reasonable person be able to interpret the message “do what must be done” as incitement to genocide, thus justifying removal to prevent foreseeable effects.

66. Therefore, the Court has no jurisdiction over crimes allegedly committed by the Defendant under Article 25(3)(c).

**SUBMISSIONS**

---

The Defence therefore requests this Court to reverse the decision of the PTC and to declare that:

- a) There are no substantial grounds to believe one or more of the posts by the Dragos group made on Statusphere between January 2018 and January 2020 constituted direct and public incitement of genocide under Article 25(3)(e) of the Statute;
- b) The Defendant cannot be held responsible for inciting genocide under Article 25(3)(e) or providing the means to incite genocide under Article 25(3)(c) of the Statute;
- c) This Court does not have jurisdiction to prosecute the Defendant pursuant to Article 12 of the Statute.

*COUNSEL FOR THE DEFENCE*

