

ICC MOOT COURT COMPETITION IN THE ENGLISH LANGUAGE

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Case before the International Criminal Court:

Prosecutor v. Cersei Bannister of Valaria

**The Office of the Prosecutor'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	7
STATEMENT OF FACTS	11
ISSUES RAISED.....	14
SUMMARY OF THE ARGUMENTS	15
WRITTEN ARGUMENTS	17
A) THE POSTS PUBLISHED BY THE DRAGOS ON STATUSPHERE CONSTITUTE INCITEMENT OF GENOCIDE	17
I) An assessment on the legislation concerning the crime of incitement to genocide.....	17
II) The objective element.....	18
a) Dragos’ posts constitute direct incitement to commit genocide	18
b) Dragos’ posts constitute public incitement to commit genocide	21
III) The subjective element	23
a) Dragos display the intent to incite to genocide	24
b) Dragos display the intent to destroy the Starek ethnic group	25
B) CERSEI BANNISTER IS CRIMINALLY RESPONSIBLE FOR PROVIDING THE MEANS TO INCITE TO GENOCIDE AND FOR INCITING TO GENOCIDE.....	27
I) Bannister is responsible for aiding and abetting the crime of incitement to genocide by omission	27
a) A legal assessment on criminal liability arising from inaction.....	27
b) The objective element of aiding and abetting by omission.....	28
c) The subjective element.....	31
II) Bannister is responsible for inciting to genocide by omission	33
a) The objective element of inciting to genocide by omission.....	33
b) The subjective element.....	34
C) ICC HAS JURISDICTION TO PROSECUTE CERSEI BANNISTER	36
I) ICC has jurisdiction over Bannister’s conducts due to the objective territoriality principle.....	36
a) Interpretation of Article 12(2)(a)	37
b) Objective territoriality principle applies to Bannister’s conducts.....	38

II) ICC has jurisdiction over Bannister’s conducts due to the effects-based doctrine..... 39

 a) Effects doctrine applies to Bannister’s conducts40

SUBMISSIONS41

LIST OF ABBREVIATIONS

AC	Appeals Chamber
CDR	Coalition for the Defence of the Republic
CEO	Chief Executive Officer
CJEU	Court of Justice of the European Union
CoD	Council of Defence
ECtHR	European Court of Human Rights
EU	European Union
GGE	Group of Governmental Experts
ICC	International Criminal Court
ICCMCC	International Criminal Court Moot Court Competition
ICCPR	International Covenant on Civil and Political Rights
ICCSt.	International Criminal Court Statute
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission

IMT	International Military Tribunal
OEWG	Open-Ended Working Group
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
RTL	Radio-Télévision Libre des Mille Collines
UN	United Nations
US	United States
VCLT	Vienna Convention on the Law of the Treaties

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STATEMENT OF FACTS

I. Background of the Situation

1. This situation pertains to the potential commission of the crime to incite genocide by the Dragos of Nothroki ethnicity against the Stareks in Solantis, through the publishing of posts in the social network Statusphere. It also involves the country of Valaria, who's national is Cersei Bannister, Executive Officer of Statusphere and charged with the crimes to incite genocide and provide the means to incite genocide. Contrary to Valaria, the State of Solantis is a party to the Rome Treaty; while, both countries are members of the UN and parties to the ICCPR and the Genocide Convention.

II. Ethnic Groups in the Concerned States

2. Both States speak the same language, Valarian, but their dialects may differ. The population of Valaria is exclusively composed of Nothrokis as during the 19th century the Stareks were expelled; whereas, Solantis is made up of Nothrokis as major ethnic group and of Stareks, who represent 3% of the entire population.
3. Significant violence and discrimination, perpetrated by the Nothroki ethnic group, have been registered against the Stareks first in Valaria, prior to their expulsion, and then in Solantis to the present day.

III. Economic and Technological Conditions

4. Valaria displays a highly technological advancement with a GDP of \$25 billion and it hosts different large tech companies. On the contrary, the State of Solantis does not indicate such level of progress, as it is a developing country with a much more limited GDP.
5. Among the companies based in Valaria there is Statusphere, a social networking platform similar to Facebook, established by Cersei Bannister. Its slogan is “a social network for Nothroki people”, and it has become a well-known source to gather information, as shown by the fact it has seven million users in Valaria and three million in Solantis.

IV. Solantis' Ethnic Issue

6. In 2017, a Nothroki extremist group called "Dragos" was established with the aim to achieve ethnic purity in Solantis. They started to assault the Starek people and those attacks led to twenty-three Starek deaths.
7. By January 2018, Dragos had set up a Statusphere affinity group ("Dragos Initiative"), followed by subsequent ones which by today have reached four-thousand members. Violent episodes directed against the Stareks followed the publication of each post.

V. Statusphere Involvement in the Attacks on the Stareks

8. On 26 May 2019 the President of Solantis asked Bannister to remove Dragos posts on Statusphere, due to the UN High Commissioner for Human Rights' findings according to which the growing violence toward the Stareks was linked to the posts published on the social network. Bannister closed down Dragos Initiative group according to the Community Standards Policy.
9. Subsequently, a new group was established on Statusphere ("Dragos Ambition") but Bannister declined to follow Solantis President's request to remove the group's e-bulletin board. Only in the aftermath of the dramatic event that took place on 16 June 2019, Statusphere removed the group from its site, claiming it did not do it previously as its content monitors could not detect the dialect used for the messages.
10. A new Dragos group was established ("Dragos Aspiration") characterized once again by statements directed to Starek people. Even though the content monitors had brought the post to the attention of Bannister, the group was removed from the platform merely after a shooting organized by Dragos members which killed four-hundred Stareks.
11. Dragos launched subsequent groups on the social network. As in the previous cases, the posts were followed by severe attacks, but Statusphere claimed monitors' inability to recognize them as a call to violence; thus, it closed the groups only after each rough episode.

12. By 1 January 2020, one-thousand-five-hundred Stareks died and more than fifty-thousand demanded refugee status to neighbouring States. Additionally, in Solantis several members of the Dragos group have been arrested and investigations are ongoing.

VI. ICC's Proceedings

13. The PTC decided, by majority, to admit the case against Cersei Bannister before the Court. This is her appeal to the confirmation of charges.

ISSUES RAISED

-A-

Whether the posts published by the Dragos on Statusphere, between January 2018 and January 2020, display the direct-public element and the genocidal intent necessary for charging incitement to genocide under Article 25(3)(e) of the ICCSt.

-B-

Whether Cersei Bannister by way of enabling Stareks to publish posts, that may constitute incitement to genocide, and failing to undertake proper action, can be held criminally liable for inciting genocide under Article 25(3)(e) and providing the means to incite genocide under Article 25(3)(c) of the ICCSt.

-C-

Whether ICC has jurisdiction to prosecute Cersei Bannister under Article 12 of the ICCSt.

SUMMARY OF THE ARGUMENTS

-A-

1. PTC VI's determination that the publishing of the posts on Statusphere make Dragos criminally responsible for the crime of incitement to genocide under Article 25(3)(e) of the ICCSt. should be upheld.
2. Firstly, the analysis of the cultural and linguistic context, the community affiliation of the authors, their audience and how the message was understood by the intended audience demonstrate the directness of the incitement. Secondly, the act of incitement results public due to the features of Statusphere programming and also because the network represents a technological means of mass communication.
3. Thirdly, the required mental elements are fulfilled as the principal displayed intention to commit the act and to destroy wholly or partially the Starek ethnic group.

-B-

1. PTC VI was correct in treating Cersei Bannister criminally liable for providing the means to incite to genocide under Article 25(3)(c) and for inciting to genocide under Article 25(3)(e) of the ICC St.
2. On one side the accused had a legal duty she failed to discharge, with the intent to contribute to the commission of the crime perpetrated by the principal and despite being aware of the essential elements of the crime of incitement to genocide ultimately perpetrated by the Dragos.
3. On the other side, by way of intentionally omitting to take the required action and together with the genocidal intent, the accused allowed the principal to make use of the platform and to publish the posts aimed at inciting to genocide.

-C-

1. PTC VI correctly held that the Court boasts of jurisdiction over the accused under Article 12 of the ICCSt.
2. Prosecution argues the Court has the right to exercise jurisdiction over the accused as a result of a cyberspace connection between Valaria and Solantis.
3. First, according to the objective territoriality principle, parts of the crimes committed by Bannister took place in Solantis.
4. Second, pursuant to the effects-based doctrine, the crimes perpetrated by Bannister had substantial effects in Solantis.

WRITTEN ARGUMENTS

A) THE POSTS PUBLISHED BY THE DRAGOS ON STATUSPHERE CONSTITUTE INCITEMENT OF GENOCIDE

1. The statements published by the Dragos on Statusphere, between January 2018 and January 2020, constitute incitement of genocide under Article 25(3)(e) of the ICCSt., as the objective and subjective elements are fulfilled.

I) An assessment on the legislation concerning the crime of incitement to genocide

2. Incitement to commit genocide was already prohibited by the Genocide Convention¹ under Article 3(c) and most countries are party to this treaty which reflects customary international law.² The provision was adopted into the ICCSt. word for word as Article 25(3)(e).³
3. As the elements of crimes of the Rome Statute do not provide detailed elements of the crime of incitement to genocide, and there is no relevant ICC case law; international jurisprudence, namely the case law of the ICTY and ICTR,⁴ will be exploited with a view to demonstrating that Dragos' posts account for incitement to genocide. It has been recalled that the crime of incitement requires, on one side, direct and public incitement to commit genocide as a material element and, on the other side, the intent to incite others to commit genocide (itself implying a genocidal intent) as a mental element.⁵

¹ Genocide Convention, 09.12.1948.

² L. Arbour, "The responsibility to protect as a duty of care in international law and practice", 34 *Review of International Studies* (2008), at 450.

³ G. W. F. Jessberger, "Genocide", in Oxford University Press, *Principles of International Criminal Law* (2014), at 321.

⁴ The AC in ICC-01/04-02/06 (18.12.2015) also referred to international criminal tribunals.

⁵ Judgment, *Nahimana* (ICTR-99-52-A), Appeals Chamber, 28.11.2007, §1034; Judgment, *Akayesu* (ICTR-96-4-T), Chamber I, 02.09.1998, §556 – 557, 560; Judgment, *Nzabonimana Callixte* (ICTR-98-44D-A), Appeals Chamber, 29.09.2014, §121; Judgment, *Mugenzi et. Mugiraneza* (ICTR-99-50-A), Appeals Chamber, 04.02.2013, §135; Judgment, *Bikindi* (ICTR-01-72-A), Appeals Chamber, 18.03.2010, §135; Judgment, *Ngirabatware Augustin* (MICT-12-29-A), Appeals Chamber, 18.12.2014, §52; Judgment, *Kalimanzira Callixte* (ICTR-05-88-A), Appeals Chamber, 20.10.2010, §155.

II) The objective element

4. In order to be considered direct and public incitement to commit genocide, a speech must be a public and direct appeal to commit such specific act.⁶ To determine whether Dragos' posts rise to such level, context is the principal consideration, particularly: the cultural and linguistic context, the political and community affiliation of the author, its audience, and how the message was understood by its intended audience.⁷

a) Dragos' posts constitute direct incitement to commit genocide

5. In *Akayesu* case the ICTR deemed that to incite "directly" means that another person is concretely urged or provoked to take immediate criminal action (to commit genocide), as a vague suggestion is not sufficient.⁸ While dealing with the interpretation of ambiguous language, the ICTR stated that the direct element is meant to be "viewed in the light of its cultural and linguistic context"⁹.

6. In fact, during the Rwandan genocide, the president of the interim government exhorted to "get to work", and Rwandans took it as an invitation to kill Tutsis.¹⁰ The ICTR assumed to assess on a case-by-case basis,¹¹ by considering "whether the persons for whom the message was intended immediately grasped the implication thereof."¹²

7. Turning to the instant case concerning Dragos' posts, there are some relevant observations to make regarding the cultural context within which the publishing of the statements took place.

8. The ethnic group of Starek is a minority in Solantis and they have repeatedly been targeted by the Nothroki people for being considered responsible for the high rates of crime.¹³ For long time the Stareks have been subject to significant discrimination and violence by the Nothroki ethnic group,

⁶ A. Cassese et al., "Incitement to Commit Genocide", in Oxford University Press, *International Criminal Law, Cases and Commentary* (2011), at 413.

⁷ *Ibid.*

⁸ (ICTR-96-4-T), *op. cit.*; §557.

⁹ *Ibid.*

¹⁰ W. A. Schabas, *Genocide in International Law* (2000), at 277.

¹¹ *Ibid.*; at 278.

¹² (ICTR-96-4-T), *op. cit.*; §557.

¹³ 2020 ICCMCC Problem, §4.

in Valaria before their expulsion in the 19th century, and in Solantis continuing to this day.¹⁴ Such targeting reached the peak once in 2017 a Nothroki extremist group (Dragos) was established, officially aimed at achieving ethnic purity of Solantis;¹⁵ and by knowing that the State of Solantis displays solely of two ethnic groups, it is clear enough that their objective consisted in eliminating the opponent minority group, namely the Stareks. Moreover, as soon as the group was set up, its members commenced to direct attacks against the Starek people, causing the death of twenty-three Stareks;¹⁶ and at the beginning of 2018 Dragos' Statusphere affinity group called "Dragos Initiative" was created,¹⁷ together with the subsequent ones with the intent to carry out their plan of ethnic purity. This aim is deductible from the statement posted on the social platform that defined the 16 June attack against the Stareks "a good first step toward achieving the Dragos objective of ethnic purity in Solantis."¹⁸

9. Considering the cultural and social context described, the linguistic tone employed by Dragos appear much clearer.
10. Each name given to Dragos groups is characterized by the term "Dragos", the official name of the extremist group, followed by words (Initiative; Ambition; Aspiration; Mission; Yearning; Dream; Desire) that denote the determination to achieve something, notably to accomplish the objective of ethnic purity. In this way, they attract the attention of those sympathising for and sharing their purpose who are given the opportunity to join the group. The word "widget", read in the context, appears to be a disparaging and offensive term referred to the Stareks, as they have been discriminated and blamed in the past years by the Nothrokis, and they clearly represent an enemy in Solantis. Similarly, "enemy" was one of the terms frequently used during the Rwandan genocide to indicate Tutsis.¹⁹ Most of the times, "widget" is accompanied by verbs or terms that imply disintegration and elimination.
11. In particular, "to break down the widgets", "to clean up the widgets", "to pound the widgets", "to put the widgets in cold storage", "a widget roast", "to cleanse the widgets", and claiming "an end to the widgets", express orders to take action to achieve the ethnic purity. Perpetrators frequently use euphemistic, metaphorical, or otherwise coded language that is nevertheless perfectly clear to

¹⁴ *Ibid.*

¹⁵ *Ibid.*; §7.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*; §13.

¹⁹ Judgment, *Nahimana* (ICTR-99-52-T), Trial Chamber, 03.12.2003.

their audience.²⁰ In fact, during the 16 June attack Dragos members addressed Starek worshipers by yelling “burn, widgets, burn”.²¹

12. Relevant information about Stareks’ social places were shared; and some wordings express the determination in pursuing the goal, such as claiming the 16 June attack “a good first step toward achieving the Dragos objective of ethnic purity in Solantis.”²² By explicitly considering that event a “first step”, they declare their ambition to further the plan. In a similar way, the wording: “do what must be done to prevent the widgets from gaining power”²³ is meant to be understood in connection with the ongoing circumstances. In fact, the statement was written after a Solantis politician campaigned for the Parliament supporting the taking of measures to prosecute those responsible for inciting violence against the Stareks through internet.²⁴ Therefore, by publishing that post the Nothrokis were trying to impede actions that would have prevented Dragos from achieving their purpose. Moreover, the declaration to “do what must be done” provides room for being interpreted in the same way CDR party’s will to defend Hutu interests from Tutsi violence “by any means” was understood; as to “do what must be done” implicates to make use of any means necessary to achieve the objective. In *Nahimana* case, the Chamber considers the meaning of the words “by any means” in that context and assumes it referred to violence and constituted a threat to violence.²⁵
13. Against this backdrop, calls to the public to take up violent action against the “widgets” were interpreted as calls to perpetrate violence against Stareks. In *Akayesu* case, the ICTR considered that “there was a causal relationship between the Defendant’s speech to the crowd and the ensuing widespread massacres of Tutsis in the community”²⁶; even though such link is not requisite for a finding of incitement. Dragos’ audience understood the posts in the terms analysed above, since each post was followed by severe and dramatic events targeted towards the Starek ethnic group.

²⁰ G. W. F. Jessberger, *op. cit.*; at 323.

²¹ ICCMCC Problem, *op. cit.*; §11.

²² *Ibid.*; §13.

²³ *Ibid.*; §15.

²⁴ *Ibid.*; §14.

²⁵ (ICTR-99-52-T), *op. cit.*; §299.

²⁶ *Ibid.*; §1015.

b) Dragos' posts constitute public incitement to commit genocide

14. In *Akayesu* case the ICTR argued that public incitement is qualified “by a call for criminal action to a number of individuals in a public space or to members of the general public at large by such means as the mass media, for example, radio or television”²⁷; which reflects the position taken by the ILC.²⁸
15. In the concerned case, the posts were shared through a Statusphere affinity group, and a user must specifically sign up for the group to view its posts. Nevertheless, posts can be viewed by individuals who are firstly registered on the social platform and the last one can represent a public space. The latter is commonly regarded as “generally an indoor or outdoor area, whether privately or publicly owned, to which the public have access by right or by invitation”.²⁹
16. The affinity group is private as non-members cannot view posts, but the group is within a public space, as inhabitants of Valaria and Solantis have the right to freely join Statusphere.³⁰ It is remarkable that the users of the platform can become members of Dragos' groups in a very easy and straightforward way. Firstly, because the joining process is elementary since, as claimed by the owner of the platform in one interview³¹, to join a group a click is needed on the icon for groups and then just one more click on the name of the group to join. Secondly, due to the presence of pop-up ads on Statusphere that advertise new groups.³²
17. As a result, the appeal is aimed at a non-individualizable audience, as who's not a member cannot know the audience and the joining member provides a fictional name; and thus, enhances the danger of uncontrolled commission of the crime, as any (new) member can see the posts and participate in Dragos' mission. In *Kalimanzira Callixte* case, the supervision of a specific group of individuals manning a roadblock was determined not to constitute the public element for incitement to genocide, from the moment that “only the individuals manning the roadblocks would have been the recipients of the message and not the general public.”³³ Whereas, the posts published on Statusphere groups display the capability to reach all users of the platform for the reasons previously discussed, rather than solely a limited group of individuals. It follows that the

²⁷ (ICTR-96-4-T), *op. cit.*; §556.

²⁸ *Ibid.*

²⁹ US Legal, *Public Place Law and Legal Definition* (2019), available at: <https://definitions.uslegal.com/p/public-place/>.

³⁰ ICCMCC Problem, *op. cit.*; Appendix 1.

³¹ *Ibid.*

³² *Ibid.*

³³ (ICTR-05-88-A), *op. cit.*; §155.

place where the concerned incitement occurred is neither selective nor limited, from the moment that anybody had the right to accede to the groups, as their sign-up does not result based on any kind of limitation.

18. Particularly relevant, proves to be a study³⁴ by the University of Western Ontario. The project takes a user-centric approach to the question of whether online social spaces are public venues, focusing on how users treat their own information.³⁵ The results reveal that online social spaces are loci of public display as they are structured with a view that everyone can see them, even if the explicitly intended audience is more limited.³⁶ Similarly, anyone who is a Statusphere user can become a member of Dragos' groups, becoming able to view the posts shared in such groups.
19. In *Eva Glawischnig-Piesczek v Facebook Ireland* case, the CJEU alleged that that EU law does not preclude a host provider, such as Facebook, from being ordered to remove identical and equivalent comments previously declared as illegal.³⁷ It can be inferred that the Court consider online spaces like Facebook public, from the moment it was ruled the social media company can be ordered by member States to remove defamatory material worldwide and therefore enabling a court in one EU member State to issue an order that could be used to remove posts by users around the world.³⁸
20. Referring to the events in Rwanda, the ILC deemed that incitement could occur in a public place or by technological means of mass communication, such as radio or television.³⁹
21. The use of radios and televisions is not different from the social networking platform under discussion, as in both circumstances they represent technological communication tools. In fact, in order to get in touch with a particular information what is needed is either to join a group on the social platform (Statusphere), or to select a radio-television channel; therefore, a selection and action is always implied from the user to reach the interested message.
22. In *Ngirabatware Augustin* case it was held that “the number of persons and the medium through which the message is conveyed may be relevant in assessing whether the attendance was selected or limited, thereby determining whether or not the recipient of the message was the general public.”⁴⁰ This was stressed as well by the AC by recalling that “the dissemination of inciting

³⁴ J. Burkell, A. Fortier, L. Y. C. Wong, J. L. Simpson, “Facebook: public space, or private space?”, 8 *Information, Communication & Society* (2014).

³⁵ *Ibid.*; at 974.

³⁶ *Ibid.*

³⁷ CJEU, Press Release No. 128-19, at 1.

³⁸ *Ibid.*

³⁹ W. A. Schabas, *op. cit.*; at 276.

⁴⁰ (MICT-12-29-A), *op. cit.*; §52.

messages via the media may establish the public element of incitement”⁴¹. Dragos’ posts have been published on a social platform, and this has become a popular source of information in both Valaria and Solantis, with seven million users in the first country, and three million in the second one.⁴²

23. It is visible that, even though the statements have been written on a private group, the potential addressee of the messages was the general public of Statusphere due to the easy access to affinity groups and the pop-up ads method already outlined. This gets clear once the growing number of the members of Dragos’ groups is considered: when the first group was established (January 2018) there were one-thousand members, by December 2018 the size doubled and by today (2020) the group counts four-thousand members.⁴³ Based on those precedents, the group has the potential to increase each year by one-thousand members.
24. As proved and established along paragraphs 5-23, the objective element to incite to genocide is satisfied. It is direct incitement as the publishing of the posts was specifically aimed at provoking others to commit genocide; and it is public as the incitement was qualified by a call for criminal action to individuals in a public space and, at the same time by means of mass media.

III) The subjective element

25. The mental requirement for the crime of genocide is provided for in Article II (1) of the Genocide Convention. This intent amounts to *dolus specialis*; that is, to an aggravated criminal intention, required in addition to the criminal intent accompanying the underlying offence.⁴⁴ Article III of the Convention on responsibility for forms of participation in the crime other than perpetration (such as incitement) have not been taken up in the Statute’s provision on genocide.⁴⁵ For this reason, the Prosecution resorts to international jurisprudence that confirms that the *mens rea* of incitement to genocide is double: the act of incitement must be intentional and the inciter must have genocidal intent (*dolus specialis*).⁴⁶

⁴¹ Judgment, *Karemera* (ICTR-98-44-A), Appeals Chamber, 29.09.2014, §499.

⁴² ICCMCC Problem, *op. cit.*; §6.

⁴³ *Ibid.*; §7.

⁴⁴ A. Cassese, *International Criminal Law* (2008), at 137.

⁴⁵ *Ibid.*; at 146.

⁴⁶ (ICTR-99-52-A), *op. cit.*; §677.

a) Dragos display the intent to incite to genocide

26. First of all, the incitement must be accompanied by the intention “to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging.”⁴⁷ The content of the statement is used to deduce the perpetrator’s intent to incite genocide, together with the potential of the communication, the tone of the statement and the context where it is made.⁴⁸
27. Considering the content of Dragos’ posts, they embody nouns and verbs that evoke the idea of destruction and elimination, such as “clean up”, “pound”, “break down”, “roast”, “end”, “cleanse”. Those terms, once interpreted in the context of Dragos’ mission and objective as analysed under the objective element, are meant to call to action to achieve the ethnic purity of Solantis. As the ICTR has stated in *Akayesu* case : “the content in which these terms are used is critical to an understanding of their meaning”.⁴⁹ When Dragos called on the people to take the action against the “widgets”, the members of their groups understood it as a call to eliminate the Stareks. In this way, through synonyms or words advocating for ethnic purity Dragos aim to incite their supporters.
28. The wordings consist of short but precise sentences, they hold an imperative tone and therefore, are to be considered as orders or tasks directed to the followers.
29. The term “widget” is used up in most of the posts, and from the moment it works as a synonym to “Stareks” and as due to the meaning of the term itself it may be aimed at annihilating the Stareks, it also serves to provoke the followers. Moreover, in several posts clear information has been provided regarding the method to be used by the supporters to carry out the plan. For instance, posts claiming to “break down” and to “pound the widgets” had been followed by attacks where Stareks were beaten with the use of metal pipes and bats;⁵⁰ or when a post announced the “time for a widget roast”, it resulted that two-hundred Stareks died literally in fire by hand of the group’s members.⁵¹ In one case it was published to “do what must be done”, and the following

⁴⁷ (ICTR-96-4-T), *op. cit.*; §560.

⁴⁸ (ICTR-99-52-T), *op. cit.*; §1015-1022.

⁴⁹ (ICTR-96-4-T), *op. cit.*; §153.

⁵⁰ ICCMCC Problem, *op. cit.*; §8.

⁵¹ *Ibid.*; §11.

day some of the members shot in a voting centre and, as the best was required to be done to “prevent the widgets from gaining power”, the shooting was carried out indiscriminately.⁵²

30. Additionally, and this concerns also the communicational aspect employed, the time and place where the Stareks were known to be gathering were also listed. In this way, it is visible the intent to provide the members with all relevant information to carry out the task and therefore to prompt them to take the action concretely. This stresses that the purpose of the communications they channelled was not of a *bona fide* nature, *ergo* to share innocent information, but rather to engage the members in the plan. Similarly, in *Nahimana* case, the ICTR recognized the sharing of some information in Kangura magazine relevant for the occurrence of the incitement. Specifically, names of people were published in Kangura and “the editor would focus on someone for a period of time, saying that the person was against Habyarimana or against the Hutu, that he was against their political line, and then after a while, that person would be killed.”⁵³
31. The choice of the means of communication turns to be relevant as well. Dragos decided to publish the posts on a social platform active in Valaria and Solantis and hence, they could guarantee mounting supporters for their objective, as Nothrokis share deep discontent in regard to Stareks.

b) Dragos display the intent to destroy the Starek ethnic group

32. The ICTR Chamber found *dolus specialis* can be inferred either from words or deeds, together with evidence such as the physical targeting of the group or their property, and the use of derogatory language toward members of the targeted group.⁵⁴
33. Firstly, it is essential to acknowledge the subject against whom the actions are expressed: the widgets. As already demonstrated, it is an offensive term used to refer to Stareks to dehumanise them, so that hardly anyone was likely to feel guilt over the killing of something so worthless. It resembles the term “cockroaches” employed to deny the humanity of Tutsis.⁵⁵ Therefore, all the statements contained in the post are targeted against the Starek ethnic group. The genocidal intent is not expressed through explicit phrases, such as the one urged in Rwandan genocide “let’s exterminate them”⁵⁶, but this does not lead to a lack of specific intent. Rather, it emerges from

⁵² *Ibid.*; §15.

⁵³ (ICTR-99-52-T), *op. cit.*; §238.

⁵⁴ Judgment, *Kayishema and Ruzindana* (ICTR-95-I-T), Trial Chamber II, 21.05.1999, §93.

⁵⁵ The New Times, *Dehumanisation* (2014), available at: <https://www.newtimes.co.rw/section/read/73836>.

⁵⁶ (ICTR-99-52-T), *op. cit.*; §964.

different statements, as they have unambiguously stated that the mission of the group is the elimination of the Stareks. From these circumstances, it becomes evident that their intent was to eliminate such ethnic group.

34. The intent gets more apparent once the attention is paid to the method exploited, in particular Stareks are physically targeted by way of affecting their own places of gathering including concerts, fairs, celebrations, parks and events. According to the ICTR, in *Kayishema and Ruzindana* case, “the relative proportionate scale of the actual or attempted destruction of a group [...] is strong evidence to prove the necessary intent to destroy a group in whole or in part.”⁵⁷
35. Every time that information about their gathering centers have been added to the posts, attacks followed. Consequently, the Stareks represent the focus of each attack and the whole ethnic group is the potential target as their social places are mostly limited to Stareks and the posts aim to incite violence against any “widgets”.
36. In fact, the perpetrator must intend to destroy a group in whole or in part,⁵⁸ and this is visible by the choice to target places where Stareks would likely meet as it shows the intent to eliminate the minor ethnic group as such. This is particularly attested by the attack organized outside the Starek worship center that caused two-hundred deaths; and by the shooting got in four major voting centers which caused the death of four-hundreds of them.⁵⁹ Consequently, every attack was characterized by a growing number of deaths, and ultimately one-thousand-five-hundred Stareks died.⁶⁰
37. Additionally, to satisfy the specific intent criteria, “the victim of an act of genocide must have been targeted by reason of the fact that he or she belonged to a protected group.”⁶¹ Starek people have been targeted by the reason to be an ethnic group, that is a group that shares a language and cultural traditions. In fact, they have their own language, are concentrated in Starek community trailer parks and celebrate their own ethnic holidays.⁶² The target on ethnic basis is clearly evident as Dragos are willing to achieve ethnic purity in Solantis.
38. As established along paragraphs 25-37, the subjective element of the crime of incitement to genocide is satisfied. The act of incitement results to be intentional and the inciters displayed genocidal intent.

⁵⁷ (ICTR-95-I-T), *op. cit.*; §93.

⁵⁸ *Ibid.*; §95.

⁵⁹ ICCMCC Problem, *op. cit.*; §11, 15.

⁶⁰ *Ibid.*; §18.

⁶¹ (ICTR-99-52-A), *op. cit.*; §496.

⁶² ICCMCC Problem, *op. cit.*; §4.

B) CERSEI BANNISTER IS CRIMINALLY RESPONSIBLE FOR PROVIDING THE MEANS TO INCITE TO GENOCIDE AND FOR INCITING TO GENOCIDE

1. Cersei Bannister is criminally liable under Article 25(3)(c) and Article 25(3)(e) of the ICCSt.

I) Bannister is responsible for aiding and abetting the crime of incitement to genocide by omission

a) A legal assessment on criminal liability arising from inaction

2. ICC Statute does not contain a provision which *expressis verbis* imposes liability for omission other than superior responsibility. Whereas, under the case law of ad-hoc Tribunals, even crimes that require active conduct may be committed by omission.⁶³ The issue came to a head when the AC in *Mrkšić* case explicitly stated that aiding and abetting by omission is a recognized mode of liability under the Tribunals' jurisdiction.⁶⁴ The ad-hoc Tribunals have established a systematic approach: there has to be a legal duty to act, the accused must have had the opportunity to take the required action and the omission led to the commission of the crime.⁶⁵
3. The lack of a provision in the ICC Statute on omission does not entail the conclusion according to which the parties wished to rule out criminal liability in such instance.⁶⁶ ICC PTC II alleged, in *Muthaura* case, that “there is nothing in the Statute that can be interpreted to exclude acts by omission from the purview of the Court, and it would be contrary to its object and purpose to interpret article 17(1)(d) of the Statute in a way which would reduce, as a matter of law, the subject-matter jurisdiction of the Court.”⁶⁷ An aspect visible in the Statute is the consistently used terminology of “conduct”, generally accepted to indicate a criminal act or omission, and employed throughout the elements of crimes.⁶⁸ Similarly, the 1999 Commentary to ICCSt. alleges that

⁶³ G. W. F. Jessberger, “General Principles”, in Oxford University Press, *Principles of International Criminal Law* (2014), at 267.

⁶⁴ Judgment, *Mrkšić et al.* (IT-95-13/1-A), Appeals Chamber, 05.05.2009, §135.

⁶⁵ G. W. F. Jessberger, *op. cit.*; at 268.

⁶⁶ *Ibid.*; at 269.

⁶⁷ Decision on the confirmation of charges, *Muthaura et al.* (ICC-01/09-02/11), Pre-Trial Chamber II, 23.01.2012, § 46.

⁶⁸ M. Duttwiler, “Liability for Omission in International Criminal Law”, 6 *International Criminal Law Review* (2006), at 58.

conduct “may possibly also include an intentional omission”⁶⁹, leaving the door open to prosecute for omission.

4. Moreover, the ICC accommodates the concept of commission by omission from the moment that liability for omission appears to be a general principle of law.⁷⁰
5. Hereby, Prosecution will demonstrate that Bannister is criminally liable under Article 25(3)(c) of the ICCSt. by way of omitting to take action despite a duty to do so.

b) The objective element of aiding and abetting by omission

6. The *actus reus* of aiding and abetting by omission is fulfilled “when it is established that the failure to discharge a legal duty assisted, encouraged or lent moral support to the perpetration of the crime and had a substantial effect on the realization of the crime.”⁷¹ The conduct need not serve as a *conditio sine qua non* to the commission of the crime.⁷²
7. Prosecution will prove that Bannister had a legal obligation according to which she should have acted; that she had the possibility to fulfil the obligation, but the accused did not and this encouraged principal’s crime.
8. ICTR judges have declared that “the power of the media to create and destroy fundamental human values comes with great responsibility. Those who control the media are accountable for its consequences.”⁷³ Bannister is completely engaged in the management of the network and boasts of supervisory role, as she is the controlling owner and chief executive officer of Statusphere.⁷⁴ This makes her responsible for the posts published on the network and for the provision of the platform itself.
9. A review of international law on incitement to discrimination and violence is helpful as a guide to the assessment of Bannister’s criminal accountability. Particularly, the ICCPR⁷⁵ provides in Article 19(2) that “everyone shall have the right to freedom of expression”, while noting in Article 19(3) that the exercise of this right “carries with it, special duties and responsibilities”. Certain

⁶⁹ O. Triffterer, *The Rome Statute of the International Criminal Court: A Commentary* (1999), at 532.

⁷⁰ M. Duttwiler, *op. cit.*

⁷¹ Judgment, *Orić* (IT-03-68-A), Appeals Chamber, 03.07.2008, §43; Judgment, *Milutinović et al.* (IT-05-87-T), Trial Chamber, 26.02.2009, §90; (IT-95-13/1-A), *op. cit.*; §49.

⁷² J. Ingle, “Aiding and Abetting by Omission before the International Criminal Tribunals”, 14 *Journal of International Criminal Justice* (2016), at 765.

⁷³ (ICTR-99-52-T), *op. cit.*; §945.

⁷⁴ ICCMCC Problem, *op. cit.*; §6.

⁷⁵ ICCPR, 16.12.1966.

speech not only may but in fact must be restricted: Article 20(2) provides that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Therefore, from international law a legal responsibility derives on the behalf of Statusphere users. It follows that, in case of non-compliance with the provision, the CEO as highest-ranking individual in Statusphere is accountable and in fact, has the legal duty to take the action according to the Community Standards Policy, under which “the company will remove content and shut down groups in case of a genuine risk of physical harm or direct threats to public security.”⁷⁶

10. The concerned Policy reflects the 2000 EU e-Commerce Directive requiring social media platforms to remove access to prohibited speech once they are aware of illegal activities; and in China and Thailand platforms that fail to remove such content face fines or criminal liability.⁷⁷ US does not hold social media platforms liable in case of blocking offensive content ineffectively,⁷⁸ but Bannister did not act inefficaciously; she lacked of (preventive) action.
11. Similarly, Facebook Community Standards Policy connote what is and is not allowed on the platform,⁷⁹ and legitimately CEO Zuckerberg, in April 2018, was quizzed by the US Congress over Facebook’s failure to halt hate speech on its platform in Myanmar,⁸⁰ evidencing the Policy entails a legal responsibility.
12. ICTR has recognized that “to the extent that they acknowledged there was a problem and tried to address it, they demonstrated their own sense of responsibility for RTLM programming.”⁸¹ When Bannister received the email from the President of Solantis, asking to remove the posts, she acknowledged the company’s Community Standards Policy.⁸² This, together with the shutting down of the group, determines her responsibility in supervising the network, and the fact she recognized there was a problem and addressed it by cancelling the group, shows a sense of duty towards Statusphere programming. It is furtherly confirmed by her statement deeming that “in

⁷⁶ ICCMCC Problem, *op. cit.*; §9.

⁷⁷ Z. E. Chow, “Evaluating the Approaches to Social Media Responsibility for Prohibited Speech”, 51 *International Law and Politics* (2019), at 1303-1306.

⁷⁸ *Ibid.*; at 1301.

⁷⁹ Business for Social Responsibility, *Human Rights Impact Assessment: Facebook in Myanmar* (2018), at 21.

⁸⁰ S. Stecklow, *Why Facebook is losing the war on hate speech in Myanmar* (2018), available at: <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/> .

⁸¹ (ICTR-99-52-T), *op. cit.*; §971.

⁸² ICCMCC Problem, *op. cit.*; §9.

light of their violent actions, I have instructed my staff to remove the Dragos Aspiration group from Statusphere.”⁸³

13. In *Delfi AS v. Estonia* case, the ECtHR made remarkable pronouncements concerning the applicant company, held liable for degrading third-party comments posted on its internet news portal. In particular, the company is a professional publisher in Estonia, it published news in Estonian and Russian and operates also in Latvia and Lithuania. The Chamber, having regard to this background, considered “that the applicant company had been in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail.”⁸⁴ Statusphere background is similar, as it has become a popular and notorious source of a wide range of information and it operates in Solantis and Valaria. Thence, due to the Standards Policy and Bannister’s role in the management and supervision of Statusphere, she had been able to exercise a substantial degree of control over users’ posts and she had been in a position to predict the nature of the posts a particular Statusphere affinity group was liable to prompt and to take measures to prevent violent statements from being public.
14. Simultaneously, she would have had the possibility to act due to the huge strides in creating algorithms with unprecedented abilities at a variety of language tasks.⁸⁵
15. BERT is the algorithm behind the improved Google search, released by Google Brain in 2018. Google not only published its research, but also open-sourced the algorithm, allowing anyone to download it and then fine-tune it for their own specific purposes.⁸⁶ For instance, Microsoft and LinkedIn by using BERT changed the way they operate.⁸⁷ Facebook’s engineers modified BERT and the result is a model called RoBERTa.⁸⁸ In 2018, Facebook was forced to admit its social network had been used to incite ethnic violence against Rohingya Muslims in Myanmar. Part of the problem was that the company didn’t have enough people who spoke Burmese to screen the volume of the content.⁸⁹ RoBERTa offered a solution: Facebook tried having the algorithm learn the statistical map of multiple languages simultaneously.⁹⁰ By doing this, the algorithm builds up

⁸³ *Ibid.*; Appendix 2.

⁸⁴ ECtHR, *Delfi AS v. Estonia*, Appl. No. 64569/09, 10.10.2013, §62.

⁸⁵ Fortune, *A.I. breakthroughs in natural-language processing are big for business* (2020), available at: <https://fortune.com/2020/01/20/natural-language-processing-business/>.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

a statistical image of what “hate speech” or “bullying” looks like in any language. That means Facebook can now use automatic content monitoring tools for a number of languages, including relatively low resources ones, and the company says that thanks to such technologies it was able to increase by 70% the amount of harmful content it automatically blocked from being posted.⁹¹

16. Facebook experience clearly shows that Bannister, holding a prestigious PhD in Computer Science and being the CEO of Statusphere whose servers are located in a technologically advanced country,⁹² had the opportunity to easily resort to the algorithm to detect Valarian dialect and consequently halt the damaging posts.
17. Her contribution, namely the failure to block in a preventive, timely and decisive manner the posts, has proved to have facilitated the commission of the crime in a significant and substantial way; as if she had taken the required measures, most likely Dragos would not have had the opportunity to incite to genocide. Whereas, the posts published have been viewed and understood by the intended audience and the incitement to genocide against the Stareks occurred.

c) The subjective element

18. Based on the case law of the ICTY, the required *mens rea* for aiding and abetting by omission is that “the aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator and must be aware of the essential elements of the crime which was ultimately committed by the principal”⁹³.
19. On the basis of the interviews Bannister gave, it is noticeable that she was aware of the violent acts committed by Dragos and the posts advocating for them. This is proved by the fact she claimed in the interview the following: “we realized that the posts may have been an instigation to violence”⁹⁴ and, “in light of their violent actions”⁹⁵. By saying that, she acknowledged that the social platform may have been exploited to incite to violence. Thanks to the report issued by the UN High Commissioner for Human Rights she became conscious about the potential connection between the publication of the posts and the advocacy for violence against the Stareks, and the report determined that the posts were made by members of Dragos extremist group.⁹⁶

⁹¹ *Ibid.*

⁹² ICCMCC Problem, *op. cit.*; §5-6.

⁹³ (IT-03-68-A), *op. cit.*; §43; (IT-95-13/1-A), *op. cit.*; §49.

⁹⁴ ICCMCC Problem, *op. cit.*; Appendix 1.

⁹⁵ *Ibid.*; Appendix 2.

⁹⁶ *Ibid.*; §8.

20. In the wake of this relevant background information, it can be inferred that she was mindful of the feasible occurrence of a crime perpetrated by Dragos, and this is furtherly emphasized by the fact that each Dragos post was followed by an attack perpetrated by them. Nevertheless, the groups' establishment has never been challenged, prior to the happening of the violent and bloody episodes, with a view to immediately removing the concerned posts.
21. As claimed by the ICTY in *Mrkšić* case, it is not necessary that the aider knows the precise crime that was intended and was in fact committed,⁹⁷ but “if he is aware that one of a number of crimes will probably be committed, and one of those crimes is committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abetter.”⁹⁸ Even though Bannister has no awareness about the exact crime planned by Dragos, she displays the knowledge of a crime likely to be perpetrated, due to what has been already exhibited and given that Dragos openly defined an attack a “good first step toward achieving the Dragos objective of ethnic purity in Solantis”⁹⁹. Thus, it can be deduced Dragos intent to eliminate Starek ethnic group, and eventually they committed incitement to genocide.
22. It is then essential to demonstrate that Bannister knew her omission was going to assist in the commission of the crime perpetrated by Dragos. It is visible her support for Nothroki over the Starek ethnic group as Statusphere tag line is “a social network for the Nothroki people”¹⁰⁰; and the logo of the platform is a galloping horse,¹⁰¹ the same symbol worn by Dragos. Moreover, in one interview she implicitly sympathized for their goal, as she recalled Valarian history of ethnic purity against the Stareks and thanks to which, according to her, now Valaria is peaceful and assumed Solantis should get rid of them as well.¹⁰²
23. While in another interview, she deemed the “real tragedy” the winning of a parliamentary seat by a candidate in favour of Stareks protection,¹⁰³ therefore clearly manifesting her deep disagreement with the enactment of laws aimed at protecting the Stareks. This explains why she intentionally did not interpret the post published prior to the attack on 6 November 2019 as a call to violence but rather a call to vote, despite the fact the content monitors had brought the post to her attention.¹⁰⁴ It is revealed her intent to omit from taking the appropriate measures and addressing

⁹⁷ (IT-95-13/1-A), *op. cit.*; §159.

⁹⁸ *Ibid.*

⁹⁹ ICCMCC Problem, *op. cit.*; §13.

¹⁰⁰ *Ibid.*; §6.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*; Appendix 1.

¹⁰³ *Ibid.*; Appendix 2.

¹⁰⁴ *Ibid.*

the previous violent episodes which followed each post. Since, by knowing the events that took place previously, their gravity and the cultural context of discrimination she's aware of, it is predictable what is the message behind the post itself.

24. After the attack on 16 June 2019, she justified the inactivity by assuming that monitors did not interpret properly the dialect used in the post.¹⁰⁵ It may be that monitors only detect Valarian language (as she said it is only a small company and with few content monitors)¹⁰⁶, but she is responsible for the consequences that derive and, as previously demonstrated, she had the opportunity to deal with the linguistic issue. From the relevant factsheets there is no information that shows she and her staff attempted to call for help to understand the different language after having denoted that Dragos' posts may be violent.
25. Bannister proves to have the intent to omit from undertaking the required action, and she also has the knowledge of the elements of the crime eventually committed.

II) Bannister is responsible for inciting to genocide by omission

26. Additionally, Bannister is criminally liable for inciting genocide under Article 25(3)(e) of the ICCSt., as by omitting from taking the required action she let publishing the posts which constitute incitement to genocide.

a) The objective element of inciting to genocide by omission

27. An omission is criminal if the person in question had a legal duty to prevent harm from occurring.¹⁰⁷
28. Prosecution will demonstrate that Bannister is charged of such crime because her failure to promptly halt and block Dragos posts led to the publishing of the inciting statements.
29. Similarly, Julius Streicher, tried by the IMT at Nuremberg for inciting hate, founded in 1923 "Der Stuermer" ("The Attacker"), a Nazi's antisemitic, weekly newspaper that helped Adolf Hitler sway the German public's opinion against the Jewish people.¹⁰⁸ Even though Streicher knew about

¹⁰⁵ *Ibid.*; §12.

¹⁰⁶ *Ibid.*; Appendix 1.

¹⁰⁷ M. Duttwiler, *op. cit.*; at 5.

¹⁰⁸ ThoughtCo, *Der Stuermer* (2020), available at: <https://www.thoughtco.com/der-stuermer-newspaper-1779279> .

the writing of editorials and articles calling for violence against the Jews, he condoned such actions and let them publish.¹⁰⁹

30. The 2003 Media case, concerning the individual criminal responsibility of Nahimana and Barayagwiza for RTLM broadcasts, offers significant insights to deal with the concerned charge.
31. Similarly to the Rwandans accused¹¹⁰, even though she did not make decisions in the first instance with regard to the publication of Dragos' posts, these decisions reflected a Community Policy for which she was responsible. The statements collectively conveyed messages of ethnic hatred and a call for violence against the Stareks. Nahimana and Barayagwiza due to their role, board members responsible for RTLM, were deemed responsible for the messages and knew those were causing concern;¹¹¹ as well as being responsible for Statusphere, including its programming, Bannister is accountable for the posts. It is clear that she knew what was happening on Statusphere and failed to exercise the authority vested in her to prevent the genocidal incitement caused by Statusphere programming. Like the two accused had *de facto* authority to prevent the harm, attested by a successful intervention;¹¹² Bannister's is evidenced by the Standards Policy.
32. Bannister can be regarded as "number one" in Statusphere management, and therefore she should have been the first and last person to take the action to prevent Dragos from publishing the posts; instead, she allowed their mission to be supported by Statusphere.

b) The subjective element

33. As already established, the crime of incitement to genocide requires to be intentional and to be accompanied by the *dolus specialis*.
34. As Bannister is charged of the concerned crime by omission, she displays the intent to omit to take the action in order to enable Dragos to publish the statements. When the journalist asked Bannister what may prevent the Dragos from establishing a new group, she answered that "they are welcome to express them [their opinions] on our social networking platform"¹¹³, therefore revealing her willingness to continue affording them the opportunity to post the concerned statements, despite being aware of the violence advocated for. In fact, no post has ever been challenged prior to be correctly understood by the intended audience, even though the accused

¹⁰⁹ *Ibid.*

¹¹⁰ (ICTR-99-52-T), *op. cit.*; §970.

¹¹¹ *Ibid.*; §971.

¹¹² *Ibid.*; §972.

¹¹³ ICCMCC Problem, *op. cit.*; Appendix 1.

knew about the essential elements of the crime eventually perpetrated by Dragos (as proved under paragraph 19).

35. The *dolus specialis* of the accused is visible from certain circumstances. When she alleged that Solantis should take a leaf out of Valarian past history of ethnic purity against the Stareks due to the resulting benefits.¹¹⁴ By claiming so, she recognized the need to eliminate the Stareks in Solantis as well and this proves the intent to destroy the ethnic group in whole or in part.
36. By explicitly defining a “real tragedy” the winning of a parliamentary seat by a Solantis politician who was determined to guarantee the safety of the Stareks,¹¹⁵ Bannister announced to be against the (physical) protection of the ethnic group. The fact she did not address the 6 November post is supportive of such genocidal intent as she knew it represented a call to violence because Bannister was conscious of the elements of Dragos’ crime.
37. For her active engagement in Statusphere, and the intentional omission (implying the genocidal intent) to prevent Dragos’ severe statements, Prosecution find the accused guilty of incitement to genocide by omission.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*; Appendix 2.

C) ICC HAS JURISDICTION TO PROSECUTE CERSEI BANNISTER

1. The ICC has jurisdiction to prosecute Bannister under Article 12 of the Statute.
2. OTP is firmly on the position that this Court does enjoy, in addition to material jurisdiction, territorial jurisdiction over the alleged crimes.

I) ICC has jurisdiction over Bannister's conducts due to the objective territoriality principle

3. Article 12(2)(a)¹¹⁶ does not provide answers to the question of how little an international crime needs to take place within a Party territory for the Court to have jurisdiction;¹¹⁷ and as elements of crimes are not supportive in the interpretation of the Article, Prosecution will resort to applicable treaties, as a form of applicable law, recognized by the Court under Article 21(1)(b) of the Statute.
4. The rules of interpretation provided under Article 31 of the Vienna Convention¹¹⁸, prove essential to derive the objective territoriality principle and to demonstrate that it can be exploited to claim jurisdiction over the accused, due to a cyberspace connection¹¹⁹ between the two States. Moreover, international law does apply to cyberspace.¹²⁰
5. It is noteworthy that the ICJ stated that “Articles 31 and 32 of the Vienna Convention on the Law of Treaties [...] may in many respects be considered as a codification of existing customary international law”¹²¹.

¹¹⁶ ICCSt., 17.07.1998.

¹¹⁷ M. Vagias, “The Territorial Jurisdiction of the International Criminal Court – A Jurisdictional Rule of Reason for the ICC?”, 43 *Netherlands International Law Review* (2012), at 46.

¹¹⁸ VCLT, 22.05.1969.

¹¹⁹ Statusphere servers are in Valaria but the platform is active in Solantis as well.

¹²⁰ Digital Watch Observatory, *UN GGE and OEWG* (2019), available at: <https://dig.watch/processes/un-gge>.

¹²¹ Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, 12.11.1991, *I.C.J. Reports* (1991), §48.

a) Interpretation of Article 12(2)(a)

6. Article 31(1) of VCLT arranges a reading of the Statute's provisions in its context and in the light of its object and purpose.
7. First of all, "conduct" in Article 12(2)(a) has to be interpreted within the context of jurisdiction. The latter in criminal law is based on the interests of the States, and "interest justifying prescriptive territorial criminal jurisdiction can be invoked by different connections to a State, including by acts, omissions, or consequences occurring on its territory."¹²²
8. In the context of an international criminal tribunal created by treaty, States delegate their jurisdiction on agreed grounds, but it should include those restrictive doctrines that form the basis of domestic jurisdiction under international law.¹²³ The delegated-jurisdiction theory supports ICC's jurisdiction over nationals of non-party States, which can occur in cases of objective territoriality.¹²⁴ Article 31(3)(c) of VCLT allows recourse to "any relevant rules of international law applicable in the relations between the parties" to complement the contextual reading, and it implies a reference "to all recognized sources of international law" which include customary international law.
9. The State practice and the *opinio juris* elements¹²⁵ of the objective territoriality establish it as a norm of customary international law, and additionally States incorporate the principle into suppression treaties to facilitate the exercise of jurisdiction.¹²⁶ Such a notion has also been set forth in plural international instruments, including the European Convention on Extradition, Criminal Law Convention on Corruption and the AU Convention on Preventing and Combating Corruption.¹²⁷
10. Current ICJ has found that "the territoriality of criminal law [...] by no means coincides with territorial sovereignty".¹²⁸

¹²² Observations Pursuant to Rule 103(1) of the Rules of Procedure and Evidence (ICC-RoC46(3)-01/18-25), Pre-trial Chamber I, 19.06.2018, §20.

¹²³ *Ibid.*; §21.

¹²⁴ *Ibid.*; §22.

¹²⁵ Some of the States that have adopted legislation on the basis of this concept: Argentina, Australia, China, Czech Republic, Egypt, Estonia, Georgia, Germany, New Zealand, Switzerland, Afghanistan, Tanzania.

¹²⁶ (ICC-RoC46(3)-01/18-25), *op. cit.*; §26.

¹²⁷ Request Under Regulation 46(3) of the Regulations of the Court (ICC-RoC46(3)-01/18), Pre-Trial Chamber I, 06.09.2018, §66.

¹²⁸ The Case of the S.S. Lotus (France v. Turkey), Judgment, 07.09.1927, Permanent Court of International Justice, at 20.

11. Based on the above, Prosecution is of the view that Article 12(2)(a) cannot be interpreted as excluding objective territoriality. Such interpretation finds support in the object and purpose of the Statute.
12. Article 12(2)(a) results from a compromise between States to enable the Court to assert “jurisdiction over the most serious crimes of concern to the international community as a whole” in the wake of approaches to criminal jurisdiction that derive from international law and domestic legal systems.¹²⁹ The drafters meant to allow the Court to exercise jurisdiction in the same circumstances in which Parties would do over such crimes under their legal systems.¹³⁰ Therefore, denying the jurisdiction because a part of a crime within the Court’s jurisdiction was committed on the territory of a State non Party would not be in line with the object and purpose of the Statute.¹³¹
13. The Chamber dealing with Myanmar case, deemed that “if it were established that at least an element of another crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party, the Court might assert jurisdiction pursuant to article 12(2)(a) of the Statute.”¹³²
14. If the crime is consummated either in whole or in part within the territory, there is territorial jurisdiction.¹³³

b) Objective territoriality principle applies to Bannister’s conducts

15. As previously assessed, Bannister is criminally responsible for providing the means to incite to genocide by omission. According to its *actus reus*, the failure to discharge the legal duty “assists, encourages or lends moral support to the perpetration of a crime and has a substantial effect on the commission of that crime.”¹³⁴ It follows that eventually a crime has to be committed, and Prosecution already exhibited how the accused inaction encouraged the commission of the crime perpetrated by the principal, and demonstrated that Dragos’ statements amount to direct and public incitement to genocide. The latter crime took place in Solantis, since Dragos members

¹²⁹ O. Triffterer, *op. cit.*; at 339.

¹³⁰ (ICC-RoC46(3)-01/18), *op. cit.*; §70.

¹³¹ *Ibid.*

¹³² *Ibid.*; §74.

¹³³ A. Cassese et al., *The Rome Statute of the ICC: A Commentary* (2002), at 567.

¹³⁴ Judgment, *Šainović et al.* (IT-05-87-A), Appeals Chamber, 23.01.2014, §1677.

published the posts, directed against the Stareks on the territory of Solantis, with the objective to achieve ethnic purity.

16. It results that part of the crime Bannister is charged of took place in Solantis, as ultimately the crime the accused had encouraged occurred in a State Party to the Statute.
17. Moreover, Bannister is criminally liable for inciting to genocide by omission, with regard to intentionally allowing Dragos to publish statements inciting to genocide.
18. Consequently, part of the crime happened in Solantis, as Dragos posts proved to have incited to genocide against the Stareks and Bannister is responsible due to her *de facto* authority to act.

II) ICC has jurisdiction over Bannister's conducts due to the effects-based doctrine

19. The case-law of several States¹³⁵ shows that they have developed different concepts of territoriality principles according to which they are able to assert criminal jurisdiction over conducts that have happened outside their territory.¹³⁶ One of these principles is the effects doctrine, according to which the State may assert territorial jurisdiction if the crime, taking place outside the State territory, produces effects within the territory of the State.¹³⁷
20. The nation seeking jurisdiction must demonstrate that the crime's consequences were detrimental and occurred within its territory.¹³⁸ In the wake of the teleological interpretation of Article 12(2)(a), it would be in contrast with the Statute's object to deny ICC jurisdiction from the moment Bannister's crimes held effects in Solantis.
21. Due to the novelty of the current situation concerning the commission of crimes on cyberspace, it is also valid to take into account existing developments, such as Tallinn Manual¹³⁹ which acknowledges the doctrine. It is a manual on international criminal law, created by independent groups of experts at the invitation of the Tallinn-based NATO Cooperative Cyber Defence Centre of Excellence. Its aim is that to analyse how existing international law norms apply to cyber operations during peacetime and how to interpret international law in cyber context.

¹³⁵ Australia, Bahrain, Bangladesh, Belgium, Brazil, Colombia, India, Hong Kong, New Zealand.

¹³⁶ Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (ICC-01/19), Pre-Trial Chamber III, 14.11.2019, §56.

¹³⁷ *Ibid.*

¹³⁸ P. N. Stockton, M. Golabeck-Goldman, "Prosecuting Cyberterrorists: Applying Traditional Jurisdictional Frameworks to a Modern Threat", 25 *Stanford Law and Policy Review* (2014), at 236.

¹³⁹ International Groups of Experts, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2017).

22. Rule 9(c)¹⁴⁰ specifies that a State may exercise territorial jurisdiction over cyber activities having a substantial effect in its territory.

a) Effects doctrine applies to Bannister's conducts

23. Even though Bannister was in Valaria at the moment of commission of the crimes she is charged of, the effects of her conducts resulted in Solantis as the platform is active there as well. By omitting to discharge her legal duty and by way of granting Dragos the opportunity to publish the damaging posts, deleterious effects emerged in Solantis: the posts have not been removed in time and Dragos were instead given *carte blanche* in the publication of the statements. Therefore, they have been viewed and successfully understood by the intended audience resulting in the incitement to genocide directed against the Stareks.

24. The substantial effects led to the commission of part of Bannister's crimes on the territory of Solantis, as without such effects most likely Dragos' crime of incitement to genocide would not have occurred.

25. It follows ICC enjoys jurisdiction to prosecute Bannister primarily because of a cyber connection between Bannister's conducts and their effects in Solantis.

¹⁴⁰ *Ibid.*; at 55.

SUBMISSIONS

Having presented all arguments, the Prosecution respectfully requests the Chamber to:

- a) Maintain the PTC understanding that the statements by Dragos groups published on Statusphere, between January 2018 and January 2020, constitute direct and public incitement to genocide;
- b) Reaffirm that, Bannister's failure to discharge her legal duty to remove the statements inciting violence against the Stareks and, the fact she condoned the publishing of the concerned posts render her criminally responsible for providing the means for incitement and inciting to genocide;
- c) Confirm the ICC jurisdiction over the case, due to a cyberspace connection between Bannister's conducts and the effects in Solantis.

