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THE APPEALS CHAMBER

Case before the International Criminal Court:

Prosecutor v. Cersei Bannister of Valaria

The Defence 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

AC	Appeals Chamber
Elements	Elements of Crimes
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
NMT	Nuremberg Military Tribunal
OTP	Office of the Prosecutor
PCIJ	Permanent Court of International Justice
PTC	Pre-Trial Chamber
Res	Resolution
Statute	Rome Statute of the International Criminal Court
TC	Trial Chamber
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
US	United States of America
VCLT	Vienna Convention on the Law of Treaties

INDEX OF AUTHORITIES

Treaties

Preparatory Works

Cases - International Criminal Court

Cases - International Criminal Tribunal for the former Yugoslavia

Cases - International Criminal Tribunal for Rawanda

Cases - International Military Tribunal

Cases - Other Courts

United Nations Documents

Books

Articles

Joel Simon, ‘Of Hate and Genocide: In Africa, Exploiting the Past’ (2006) 9 Columbia Journalism Review **[Simon (2006)]**.....33

M. Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’, 42 Va J Intl L 81 (2001) **[Bassiouni (2001)]**.....28

Stewart Manley, ‘Referencing Patterns at the International Criminal Court’ (2016) 27 EJIL 191-214 [**Manley (2016)**].....28

Thomas Davis, ‘How the Rome Statute Weakens the International Prohibition on Incitement to Genocide’ (2009) 22 HarvHumRtsJ [**Davis (2009)**].....31, 32

Commentaries

Antonio Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP, 2002) **[Cassese Commentary (2002)]**.....21, 22

Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd edn, Munich: Beck-Hart-Nomos, 2008) [**Triffterer Commentary (2008)**].....21, 22

Miscellaneous

Council of Europe, Chart of Signature and Ratifications of Treaty 185 (Treaty Office, 15 February 2013), <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures> accessed 10 March 2020 **[COE Chart of Signatures and Ratifications of Treaty 185]**.....29

Council of Europe, Economic Crime Division Directorate General of Human Rights and Legal Affairs, Discussion paper (draft): Cybercrime and Internet Jurisdiction, 5 March 2009 [40] <https://rm.coe.int/16803042b7> accessed 9 January 2020 **[COE Cybercrime and Internet Jurisdiction draft]**.....29

Geoff Curfman, ‘ICC Jurisdiction and the Rohingya crisis in Myanmar’ (9 January 2018) available at <https://www.justsecurity.org/50793/icc-jurisdiction-rohingya-crisis-myanmar/> accessed on 15 December 2019 [**Curfman (2018)**].....20

STATEMENT OF FACTS

1. Valaria and Solantis are neighbouring States. The population of Valaria is composed of Nothroki whilst the population of Solantis is composed of 97% Nothroki and 3% Stareks. Both States share the common language of Valarian but have different dialects, each with particular grammar, idioms and vocabulary.

2. The Defendant is a national of Valaria where she has lived her whole life. After graduating from the Valaria Institute of Technology, she founded the social network, Statusphere. The company's headquarters and servers are located in Valaria. Both Solantis and Valaria have active users on the network, with 70% from Valaria. Thanks to Statusphere, citizens from both countries can obtain news, weather forecasts and government information.

3. Statusphere also allows users to create private closed groups. To view its content, a user must specifically search for the group and sign up. Posts cannot be viewed by the general public.

4. In 2018, Dragos, a Nothroki extremist group based in Solantis, created the private group 'Dragos Initiative' on which some Dragos members anonymously posted coded calls to violence against the Stareks. On 25 May 2019, the UNHCHR issued a report concluding that the term 'widget' represented an ethnic slur and was potentially linked to violence against Stareks. Upon reading the report, the President of Solantis asked the Defendant to remove the offending posts. Immediately after, the Defendant closed down the Dragos Initiative group in accordance with the platform's community standards policy. After this closure, Dragos members created a new group page called 'Dragos Ambition'.

5. On 16 June 2019, Dragos members perpetrated an attack against Stareks. That morning, an anonymous statement was posted on 'Dragos Ambition' stating "it is time for a widget roast". The meaning of this post could not be understood by the Statusphere content monitors because of the differences in dialects. After the attack, the Defendant removed Dragos Ambition from Statusphere.

6. On 7 November, election day, Dragos individuals indiscriminately attacked voters at election centres. The day before, an anonymous statement was posted on a new Dragos private group, calling Dragos members to go to four voting centres and "do what must be done to prevent the widgets from gaining power". Taking precautions, the Defendant's staff brought this statement to her attention. As it was posted on election day, she interpreted it as a call to campaign and vote. Following the attack, the Defendant removed the offending group from Statusphere.

7. The election resulted in the victory of Ayra Gendry, a Solantis politician of Nothroki ethnicity who spoke out against the increasing violence. Solantis then enacted a new law enabling the prosecution of those who incite violence against minorities using the internet. They have already arrested over a dozen Dragos members and are still investigating others.

8. Valaria is not a State Party to the Rome Statute. Solantis has ratified the Rome Statute. Both States are parties to the ICCPR and the Genocide Convention.

9. Solantis referred the matter of the Defendant to the Court for prosecution. The PTC found that she can be held criminally responsible for inciting genocide under Article 25(3)(e) and providing the means to incite genocide under Article 25(3)(c) of the Rome Statute. Leave for Appeal has been granted to the Defendant and the matter is now pending before the AC. The AC has sought submissions on the following issues.

ISSUES

1. Whether the Court may exercise jurisdiction under Article 12, considering that the Defendant's criminal conduct occurred in Valaria, a non-State Party to the Rome Statute.

2. Whether the coded posts by Dragos members on Statusphere, between January 2018 and January 2020, constitute direct and public incitement of genocide under Article 25(3)(e) of the Statute.

3. Whether the Defendant can be held criminally responsible for inciting genocide under Article 25(3)(e) and providing the means to incite genocide under Article 25(3)(c) of the Statute for her alleged failure to remove the coded posts and prevent the reposting of similar statements on private Dragos groups.

SUMMARY OF ARGUMENTS

1. *First*, the finding of the PTC that the Court may exercise jurisdiction is materially affected by an error of law. Under Article 12, the Court may only exercise jurisdiction when the act(s) underlying the crime occurred on the territory of a State Party to the Statute. The Defendant's acts occurred on the territory of Valaria, a non-State Party.

2. *Second*, the finding of the PTC that the posts made on the Dragos private groups constituted direct and public incitement to genocide under Article 25(3)(e) is materially affected by an error of law. The posts did not specifically provoke others to commit genocide, were not made to the general public and were not issued with genocidal intent.

3. *Third*, the finding of the PTC that the Defendant can be held criminally responsible for direct and public incitement to genocide under Article 25(3)(e) is materially affected by an error of law. She did not post any offensive statements, publicly call for criminal action and did not possess genocidal intent. The finding of the PTC that the Defendant can be held criminally providing the means to incite genocide under Article 25(3)(c) is materially affected by an error of law. She was not bound by a legal duty to act, did not substantially contribute to the incitement and did not aim to facilitate the crime.

WRITTEN ARGUMENTS

Standard of Review

1. The standard to be applied by the AC when reviewing decisions of the PTC is whether they are materially affected by errors of fact or law.[1]

2. The PTC can confirm charges only when there is sufficient evidence to establish substantial grounds of the Defendant's criminal responsibility for the crime charged.[2] The burden of proof rests with the Prosecution to establish compelling charges beyond mere suspicions.[3]

3. In the present case, the Prosecution failed to meet its burden of proof in demonstrating the substantial grounds to confirm the Defendant's criminal responsibility. The PTC committed a material error of law in confirming the charges against the Defendant.

ARGUMENTS

I. THE COURT MAY NOT EXERCISE JURISDICTION UNDER ARTICLE 12(2)(A) OF THE ROME STATUTE

4. The finding of the PTC that the Court may exercise jurisdiction in the present case is materially affected by an error of law. The legal requirements of Article 12(2)(a) of the Statute have been subject to speculation. For this reason, the exact scope of the provision shall *first* be addressed by establishing that Article 12(2)(a) requires the acts underlying the crime to have occurred on the territory of a State Party. The Rome Statute, the Elements of Crimes and the drafting history of the Statute establish a clear distinction between 'conduct' and 'crime' **[A]**. *Second*, this is applied in the present case by demonstrating that the Court may not exercise jurisdiction because the conduct of the Defendant occurred in Valaria, a non-State Party to the Statute **[B]**.

A. Article 12(2)(a) requires the acts underlying the crime to have occurred on the territory of a State Party

[1] Article 83(2) Rome Statute.

[2] Article 61(5) and Article 61(7)(a) Rome Statute.

[3] Article 66(2) and Article 67(1)(i) Rome Statute; *Lubanga* confirmation [37].

5. Article 12(2)(a) provides that the Court may only exercise jurisdiction if the conduct in question occurred on the territory of a State Party. This 'conduct' requirement means that the Court will have jurisdiction only if the acts underlying the crime occurred on the territory of a State Party, and does not include the consequences of such acts.[4] This is for two reasons. *First*, the Statute and the Elements of Crimes draw a distinction between the crime and its components – the conduct and its consequences – such that reference to 'conduct' refers to a certain behaviour alone and excludes the consequences of such behaviour **[i]**. *Second*, the drafting history of the Rome Statute indicates that 'conduct' refers to the act(s) underlying the crime **[ii].** *Third*, the *Myanmar* decisions do not apply as the facts and charges are distinguishable from the present case **[iii]**.

    i. The Rome Statute and Elements of Crimes distinguish between the crime and its components such that reference to conduct refers to a particular behaviour alone, to the exclusion of its consequences

6. Article 12(2)(a) must be interpreted in light of the text of the Statute and the Elements of Crimes.[5] The Statute **[a]** and the Elements of Crimes **[b]** indicate that each crime within the jurisdiction of the Court is comprised of two distinct components, the conduct and the consequences. Therefore, when the Statute uses the term 'conduct', it does not refer to the crime in all its components. Rather, it refers to conduct in its ordinary meaning alone,[6] a certain behaviour,[7] and excludes the consequences of such behaviour.

    a. The Rome Statute distinguishes between the crime and its components, such that reference to conduct does not include the consequences of such conduct

7. Three provisions of the Statute when read together lead to the conclusion that each crime is composed of the conduct and the consequences of such conduct, and that

[4] Curfman (2018).

[5] Article 31(2) VCLT. The interpretation of the Rome Statute is governed by the VCLT: *Lubanga* confirmation [277-285].

[6] Article 31 VCLT.

[7] OLD, 'conduct'.

every use of the term ‘conduct’ refers to the conduct alone – a certain behaviour – to the exclusion of its consequences.

8. First, Article 30(2) states that “[f]or the purpose of this article, a person has intent where: (a) [i]n relation to conduct, that person means to engage in the conduct; (b) [i]n relation to a consequence, that person means to cause that consequence”. This wording makes it clear that each crime within the jurisdiction of the Court is comprised of two distinct components, the conduct and the consequence, and that the perpetrator must intend both.[8]

9. Second, Article 31 focuses on the ‘conduct’ of a person in relation to the grounds for excluding criminal responsibility. This indicates that “the critical time for assessing the existence of a ground precluding responsibility is the time of criminal conduct, not the time of manifestation of the criminal result”[9], and as such evidences the distinction between a criminal conduct and its consequences.

10. Third, Article 20(1) prohibits trying a person with respect to a “conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court”. This provision means that the same actions can form the basis of different crimes, and that a person acquitted or convicted by the Court could be tried for the same conduct or action on account of other criminal charges at the national level.[10] As Article 20(1) implies that the same actions could lead to multiple crimes, it demonstrates that ‘conduct’ is not synonymous to ‘crime’.

11. A systematic reading of these sections indicates that in the Statute, the term ‘crime’ subsumes the ‘conduct’ and its ‘consequences’. When a section of the Statute relies on the ‘conduct’, it intends to refer to one of the elements of the crime alone, but not to the crime in all its components.

    b. The Elements of Crimes support the conclusion that the term ‘conduct’ does not take into account the consequences of such conduct

[8] Vagias (2014) 91-92.

[9] Triffterer Commentary (2008) 872 ; Cassese Commentary (2002) 1028-1029.

[10] Triffterer Commentary (2008) 686-687; Cassese Commentary (2002) 723-724.

12. The Elements also make it clear that 'conduct' and 'consequence' are subcomponents of the overarching notion of 'crime'. According to the General Introduction, the Elements are meant to address the "conduct, consequences and circumstances associated with each crime".[11] It further states that "a particular conduct may constitute one or more crimes".[12]

13. A reading of Article 12(2)(a) in light of the distinction drawn in the Statute and in the Elements between the crime and its components, the conduct and the consequences, leads to the conclusion that 'conduct' has a meaning differing from 'crime' in that it refers to a particular behaviour alone, to the exclusion of the consequences of such behaviour.

ii. The drafting history of the Rome Statute indicates that 'conduct' refers to the act(s) underlying the crime

14. The preparatory work of the Statute[13] indicates that the Parties intended the term 'conduct' in Article 12(2)(a) to refer to the act(s) underlying the crime.

15. The Statute in its current version was borne out of multiple negotiations that started in the 1994 Draft Statute. In that first version, draft Article 21(1)(b)(ii), for the purpose of territorial jurisdiction, referred to the "State on the territory of which the act or omission in question occurred" and not to the State on the territory of which the crime was committed.[14] The 1995 Alternative Draft also established jurisdiction on basis of the occurrence of 'the act or omission' on a State Party's territory.[15] Throughout the preparatory documents from 1997 to 1998, the same language is used in the draft provisions relating to the territorial jurisdiction of the Court: it is triggered when the 'act or omission' occurred on a State Party's territory.[16] Not a single one of these

[11] Elements of crimes, General introduction [7].

[12] Ibid [9].

[13] Article 32 VCLT.

[14] Article 21(1)(b)(ii) ILC Draft 1994 ; Maillart (2014).

[15] Article 21 Alternative to the ILC Draft (1995).

[16] Preparatory Committee on the Establishment of an ICC (14 August 1997) Draft Article 21 and Draft Article 25; Preparatory Committee on the Establishment of an ICC (14 April 1998) 23, Draft Article 7 (option 2) and 26, further options for Articles 6, 7, 10 and 11, Draft Article 7; Bureau proposal (10 July 1998) Draft Article 7.

documents mention the possibility of referring to the location of the 'commission of the crime' in the future Article 12(2)(a). In the final adopted version of the Statute, the term 'conduct' replaced the expression 'act or omission'. The only reason for this last minute change lies in the fact that the parties could not come to an agreement on the role of 'omissions' in the material elements of crimes.[17]

16. It is also relevant to examine the evolution of the mental element provision. The 1997 and 1998 draft provisions link 'conduct' to 'act or omission' for the purpose of the intent requirement: "in relation to *conduct*, that person means to engage in the act or omission".[18] The use of both expressions in the same sentence implies that they have the same legal meaning for the purpose of the intent requirement.

17. All these elements point to the fact that the drafters intended to give the same meaning to 'conduct' as that of, to the very least, 'act'. The change from 'act or omission' to 'conduct' is only due to an absence of consensus around the implications of 'omission'. The possibility of establishing the territorial jurisdiction of the Court by reference to the place of the commission of the crime was never raised.

18. For these reasons, the term 'conduct' in Article 12(2)(a) must be understood by this Court as referring to the physical acts underlying the alleged crime. In the present case, that would be the Defendant allowing users to post statements on private groups, and not immediately removing and blocking such statements while in the territory of Valaria, a non-State Party.

19. In light of the foregoing, this Court must find that the term 'conduct' in Article 12(2)(a) must be defined narrowly to include only the underlying acts taken to effectuate the crime, to the exclusion of the consequences of such act(s). This is the only correct interpretation of the provision in light of the distinction drawn by the Statute and the Elements between a crime, a conduct and its consequences, and in light of the drafting history of the Rome Statute. Accordingly, this Court must

[17] Vagias (2014) 92; Maillart (2014); Saland (1999) 205.

[18] Preparatory Committee on the Establishment of an ICC (20 February 1997) Chairman's Text, Draft Article H; Preparatory Committee on the Establishment of an ICC (4 February 1998) Draft Article 23(H), 59; Preparatory Committee on the Establishment of an ICC (1 April 1998) Draft Article 23(H), 9.

conclude that Article 12(2)(a) requires that the acts underlying the crime occurred on the territory of a State Party in order to trigger the jurisdiction of the Court.

iii. The Myanmar decisions do not apply as the facts and charges are distinguishable from the present case

20. In the *Myanmar* decisions, the Court ruled that 'conduct' and 'crime' had the same significance in Article 12(2)(a),[19] and that it sufficed that part of the crime occurred on the territory of a State Party to establish the jurisdiction of the Court.[20]

21. These decisions are distinguishable from the present case. The conclusion reached by the two PTC was specifically tailored to the crime against humanity of deportation,[21] which differs from incitement to genocide. As endorsed by the first *Myanmar* decision[22] and by other authorities[23] including the ICTY,[24] the key element of the crime against humanity of deportation is the crossing of an international border.[25] The PTC emphasised that "the inherently transboundary nature of the crime of deportation" confirmed its interpretation of 'conduct' in Article 12(2)(a) as equating to 'crime'.[26]

22. Moreover, the PTC in the first decision applied this interpretation of Article 12(2)(a) to other crimes against humanity also constituted through the crossing of the international border between Myanmar and Bangladesh. Since the crime of 'persecution' "must be committed in connection with any other crime within the jurisdiction of the Court, which includes deportation",[27] the Court concluded that the

[19] *Myanmar* decision on jurisdiction [64]; *Myanmar* authorisation decision [43], [48-49] .

[20] *Myanmar* decision on jurisdiction [64]; *Myanmar* authorisation decision [62].

[21] Article 7(1)(d) Rome Statute.

[22] *Myanmar* decision on jurisdiction [55].

[23] ILC Report (1996) 49.

[24] *Stakic* appeal [300].

[25] *Myanmar* decision on jurisdiction [57].

[26] ibid [71].

[27] Article 7(1)(h) Rome Statute.

cross-border transfer was the constitutive element of the persecution.[28] With regards to the crime of 'other inhumane acts',[29] the Court noted that the impediment on the Rohingya's return to Myanmar "following their deportation" would fall under Article 7(1)(k) of the Statute.[30]

23. In the second decision, the reasoning of the Chamber was governed by the fact that they were dealing with a transboundary crime by definition, that is, where the crossing of an international border is a legal element of the crime. The Chamber concluded that it was not "necessary to formulate abstract conditions for the Court's exercise of territorial jurisdiction for all potentially transboundary crimes contained in the Statute",[31] thereby implying that its analysis of Article 12(2)(a) relates to transboundary crimes only.

24. Incitement to genocide is not an inherent transboundary crime as it does not require a transboundary element to be established. Therefore, the reasoning of the PTCs with regards to Article 12(2)(a) must not be followed in the present case, where deportation and related crimes are not at hand.

25. Applying the conclusion reached in *Myanmar* that 'conduct' means 'crime' for the purpose of Article 12(2)(a) beyond inherent transboundary crimes would lead to problematic results. It would grant jurisdiction to the Court over any situation that has some ramification on the territory of a State Party, regardless of whether or not the principal actions that effectuated the alleged crime took place on a State Party's territory. This risks awarding universal jurisdiction to the Court, which the States Parties rejected during the negotiations of the Statute.[32]

26. Should the Court decide that the facts of the present case are similar to *Myanmar*, it may nevertheless depart from its prior decisions because it is not bound to them.

[28] *Myanmar* decision on jurisdiction [75-76].

[29] Article 7(1)(k) Rome Statute.

[30] *Myanmar* decision on jurisdiction [77].

[31] *Myanmar* authorisation decision [62].

[32] Vagias (2012) 59; Bassiouni (2001) 106; Bassiouni (2012) 659.

According to the hierarchy established in Article 21 of the Statute, precedent of the Court has no compulsory effect.[33] Accordingly, case law only intervenes as a subsidiary means of interpretation,[34] when the Statute and the Elements do not provide satisfactory guidance. As demonstrated above, the interpretation of 'conduct' as 'act(s) underlying the crime' directly flows from the contextual interpretation of the Statute and from its drafting history. Such interpretation takes precedence in this case over conclusions reached by this Court in another case, facing different facts and law.

27. This Chamber is not bound by the *Myanmar* decisions and must not follow their interpretation, since the crimes dealt with by this Chamber differ in nature from the crime against humanity of deportation. The Court must keep to the meaning of 'conduct' stemming from the contextual interpretation of Article 12(2)(a) and give consideration only to the acts underlying the alleged crime of incitement to genocide and aiding and abetting incitement to genocide, to the exclusion of the consequences of such acts.

B. The conduct of the Defendant occurred in Valaria, a non-State Party to the Statute

28. The Defendant's alleged actions are allowing users to post statements on Statusphere private groups, and not removing such posts and preventing their reposting. These are the actions taken to effectuate the alleged crime and correspond to the 'conduct in question' in Article 12(2)(a) of the Statute. These actions occurred on the territory of Valaria.

29. Crimes committed through the use of the internet do not change the application of Article 12(2)(a). Although the internet is not a tangible zone, there is always a connecting link to a State's territory, such as the territory where the network's are located.[35] As emphasised by the drafting committee of the Council of Europe Cybercrime Convention, there is always a person of "flesh and blood who at a determined moment of time and at some specific physical location initiates their

[33] Manley (2016) 196; Bitti (2009) 292; Cassese Commentary (2002) 1062.

[34] Cassese Commentary (2002) 1062.

[35] Chaumette (2014) 4-5.

criminal scheme".[36] This Convention is the only existing international instrument addressing crimes committed through cyberspace and has been widely ratified, including by States who are not parties to the Council of Europe. [37]

30. In the present case, notwithstanding the fact that her conduct was related to statements communicated through a social network, it is the actions she took as a natural person on how to deal with Dragos private groups and the statements posted on those groups that are incriminated. She took those decisions at a specific physical location.

31. The Defendant has lived in Valaria her whole life. The headquarters and the servers of Statusphere are located in Valaria.[38] There are therefore substantial grounds to believe that the Defendant was physically present in Valaria when the statements on Dragos escape her and Statusphere's vigilance on 16 June, and when she decided not to remove the statements that she and her content monitors could not understand on 6 November. There is no evidence that her actions would have taken place anywhere else than in Valaria.

32. In light of these elements, this Court must conclude that the conduct of the Defendant occurred on the territory of Valaria. The conditions of Article 12(2)(a) are not met, because Valaria is not a State Party to the Statute. Therefore, the PTC materially erred in finding that this Court may exercise jurisdiction in the present case.

C. Conclusion

33. For these reasons, the Court may not exercise jurisdiction in the present case. Under Article 12(2)(a), the Court may only exercise jurisdiction when the act(s) underlying the crime occurred on the territory of a State Party. The conclusion reached in *Myanmar* cannot be applied in the present case. The actions of the Defendant taken to effectuate the crime occurred on the territory of Valaria, a non-State Party. Therefore, the Court must reverse the finding of the PTC that the Court may exercise jurisdiction as it is materially affected by an error of law.

[36] COE Cybercrime and Internet Jurisdiction draft [40].

[37] COE Chart of Signatures and Ratifications of Treaty 185.

[38] Case [6].

II. THE CODED STATEMENTS POSTED ON THE DRAGOS PRIVATE GROUPS DO NOT CONSTITUTE DIRECT AND PUBLIC INCITEMENT TO GENOCIDE

34. In order to find the Defendant responsible for allegedly providing the means to incite genocide, it must first be established that there are substantial grounds to believe that the posts themselves constituted direct and public incitement. Therefore, if there are no substantial grounds to believe that the posts rise to this level of criminality, then the Defendant cannot be held criminally responsible.

35. The finding of the PTC that the posts constitute direct and public incitement is materially affected by an error of law. This is for two reasons. *First,* direct and public incitement is a mode of liability under the Statute requiring the commission of genocide which has not occurred **[A]**. *Second,* the posts do not constitute direct and public incitement to genocide as they were not direct, not public and not issued with genocidal intent **[B]**.

A. Direct and public incitement is a mode of liability under the Statute requiring the commission of genocide, which has not occurred

36. The coded statements posted on the Dragos private groups do not constitute direct and public incitement to genocide. This crime is a mode of liability under the Statute and must be strictly interpreted as such **[i].** Direct and public incitement to genocide, as a mode of liability, requires the commission of genocide which has not occurred **[ii]**.

i. Direct and public incitement is a mode of liability under the Statute

37. First, direct and public incitement to genocide is not listed as a distinct crime under Article 5 of the Statute which governs crimes within the jurisdiction of the Court. Therefore, direct and public incitement is not a standalone crime. Instead, the Statute treats incitement as a form of individual criminal responsibility for the underlying crime of genocide under Article 25(3)(e).[39] Thus, under the Statute, convicting a person of incitement to genocide means holding them responsible for the genocide itself.[40]

[39] Davis (2009) 245, 261.

[40] Davis (2009), 261. citing Schabas (2000), 258.

38. Second, this is supported by the drafting history of the Statute which indicates that direct and public incitement was deliberately placed under Article 25. In the 1996 Preparatory Documents, incitement was listed as a mode of "participation or complicity in crimes".[41] To hold someone responsible for incitement, the draft provision required that the person who was incited committed genocide.[42] Throughout the entire drafting process, incitement remained under the provisions governing the modes of participation in crimes. This was accepted in the final version of the Statute.[43]

39. Further, the 1996 ILC Draft Code, which formed an influential basis for the Statute,[44] stipulates that direct and public incitement is limited to situations in which the incited individual actually commits the crime.[45]

40. It should be noted that direct and public incitement is constructed differently under the ICTR and ICTY Statutes. Direct and public incitement is listed as a distinct, punishable crime within both instruments.[46] This is not the case with the Rome Statute and therefore direct and public incitement cannot be interpreted in a similar way before the Court.

41. Third, under Article 21(3) of the Statute, the Court must ensure that the interpretation and application of the Statute is consistent with internationally recognised human rights. Article 19(2) ICCPR enshrines the right to freedom of expression. This right includes the freedom to seek, receive, and impart information and ideas of all kinds

[41] Article 5(d) Preparatory Documents 1996, 70.

[42] Ibid.

[43] Preparatory Committee on the Establishment of an ICC (1997), 348; Preparatory Committee on the Establishment of an ICC (1998), 68.

[44] Davis (2009) 245, 268; Cryer (2007) 121; Saland (1999) 198.

[45] ILC Report (1996) 22.

[46] Article 2(3) ICTR Statute; Article 4(3) ICTY Statute.

through any media of the individual's choice.[47] This right is essential for any democratic society.[48]

42. Therefore, the right to freedom of expression must be interpreted broadly. The ECtHR determined that the principle of freedom of expression is also applicable to information and ideas that "offend, shock or disturb the State or any sector of the population."[49] Therefore, interpreting direct and public incitement as an inchoate offence would infringe upon this right. Censoring or prosecuting offensive speech which has not in fact resulted in the commission of a criminal action would amount to an arbitrary interference with the right to freedom of expression. The practice of casting the suppression of critical media as a legitimate effort to fight incitement is now distressingly common, so much so that it has become a major impediment to independent journalism in many countries.[50] This danger to freedom of expression was at the heart of the US' objection to the criminalisation of incitement during discussions surrounding the Genocide Convention.[51] Thus, interpreting incitement to genocide as a mode of liability which requires the occurrence of genocide mitigates this risk and protects freedom of expression.

43. For these reasons, direct and public incitement is not a distinct crime under the Statute but rather as a mode of individual criminal responsibility for the underlying crime of genocide. Therefore, in order to convict an individual for incitement to genocide, genocide must have occurred.

ii. Direct and public incitement requires the commission of genocide which has not occurred

44. Three elements alongside the criminal act must be satisfied to find substantial grounds that genocide has occurred. First, the victim belonged to a protected group. Second, the perpetrator intended to destroy, in whole or in part, that group. Third, the conduct

[47] Article 19(2) ICCPR.

[48] HRC General Comment 34 [2].

[49] *Handeyside* merits [49]

[50] Simon (2006) 2.

[51] UN Doc. A/C.6/SR.84 (United States); UN Doc. A/C.6/SR.85 (United States).

occurred in the context of a manifest pattern of similar conduct directed against the group. Whilst it is established that the Stareks represent an ethnic or religious group, there is no context of a manifest pattern of similar conduct and, as will be discussed below, the necessary mental element is not present.

45. The ICTY in *Tolimir*, when discussing the genocidal context, analysed the fact that the killings followed a pattern. It specifically noted that the vast majority of the killings occurred in an efficient and orderly manner with the involvement of several layers of leadership.[52] The Court endorsed this policy requirement in *Al-Bashir*.[53] The pattern must not be one of a few isolated crimes occurring over a period of years but must be clear, rendering the threat against the existence of the targeted group as concrete and real.[54] Further, the Court found the existence of serious war crimes and crimes against humanity that were carried out in a widespread and systematic manner does not automatically lead to the conclusion that there exist reasonable grounds to believe the perpetrators possessed genocidal intent.[55]

46. The Court clarified that this requirement of the contextual element is consistent with the traditional understanding of genocide as the "crime of crimes".[56] Under Article 21(1)(a), the Court must apply the Statute and Elements first, giving effect to the contextual element in the present case.

47. This policy requirement cannot be seen in the present case. The attacks against the Stareks were sporadic: there was no implemented plan or policy and instead consists of varying groups of individuals perpetrating random acts of violence. The attack of 16 June was carried out by only several dozen individuals with no evidence of a coordinated plan or leadership provided.[57]

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[52] *Tolimir* trial [770].

[53] *Bashir* warrant of arrest [4].

[54] Ibid [124].

[55] Ibid [193].

[56] Ibid [133]

[57] Case [11].

48. Therefore, there are no substantial grounds to believe that genocide has occurred as it cannot be shown that Dragos wished to destroy the Stareks or possessed a genocidal policy.

49. Direct and public incitement constitutes a mode of liability under the Statute and can only be prosecuted if genocide has occurred. In any event, the Court must reverse the decision of the PTC as the posts made between January 2018 and January 2020 do not fulfil the requirements of direct and public incitement.

B. The posts do not constitute direct and public incitement to genocide as they were not direct, not public and not issued with genocidal intent

50. There are no substantial grounds to believe that the coded statements posted on the Dragos private groups constitute direct and public incitement to genocide. This is for three reasons. *First*, the posts did not directly incite genocide as they did not specifically provoke individuals to commit genocide **[i]**. *Second*, the posts did not publicly incite genocide as they were not made in a public place nor before the general public at lard **[ii]**. *Three*, the posts were not issued with genocidal intent **[iii]**.

i. The posts did not directly incite genocide as they did not specifically provoke individuals to commit genocide

51. The ICTR in *Akayesu* defined the direct element as implying that the incitement assume a direct form and specifically provoke another to engage in a criminal act.[58] It must be more than a mere vague or indirect suggestion goes to constitute direct incitement.[59]

52. However, in analysing this requirement, the AC in *Nahimana* found that direct incitement to genocide assumes that the speech is a direct appeal to commit an act referred to in Article 2(2) of the ICTR Statute.[60] This article contains the definition

[58] *Akayesu* trial [557].

[59] Ibid.

[60] *Nahimana* appeal [692].

and acts which constitute genocide.[61] Thus, the accused can only be held accountable for speech which directly calls for the commission of genocide.[62]

53. The critical question is whether the meaning was immediately appreciated by its intended audience. In the *Streicher* case, the Court focused on Streicher's ability through his messages to create a certain mind-set in the population which rendered mass crimes thinkable.[63] In determining whether communications satisfy this criterion, the ICTR considered it significant that genocide occurred. [64] That the media intended to provoke others to commit genocide effect is evidenced in part by the fact that genocide did occur.[65] Further, the fact that the communications did have such effect can be an indication that the receivers of the message understood them as direct incitement to commit genocide.[66]

54. As established, no genocide has occurred in this case. Thus, the posts were not understood by the audience as a call to commit genocide. Whilst violent acts may have been committed against members of the Stareks, these do not equate to the commission of genocide. The absence of genocidal attacks and the victory of Ayra Gendry[67] evidence that the general public did not share Dragos' views nor possessed the thinking that genocide was possible. Further, a new law has been enacted in Solantis which does not label the actions genocide but rather "incite violence against minority groups".[68]

55. The PTC erred in finding there are substantial grounds to believe that the posts by Dragos members constitute direct incitement. Direct incitement requires an individual

[61] Article 2(2) ICTR Statute

[62] *Nahimana* appeal [693].

[63] Nuremberg Judgement [120].

[64] *Akayesu* trial [673].

[65] *Nahimana* trial [1029]

[66] *Nahimana* appeal [1674].

[67] Case [15].

[68] Case [17].

to be specifically provoked to commit genocide which has not occurred in the present case.

ii. The posts did not publicly incite genocide as they were not made in a public place nor before the general public at large

56. The ILC defined 'public incitement' as "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."[69] The ICTR in *Akayesu* found that the public element of incitement to commit genocide may be better appreciated in light of two factors: the place where the incitement occurred and whether or not the audience was selected or limited in attendance.[70]

57. The ACs in both *Kalimanzira* and *Nahimana* analysed these criteria and overturned convictions for incitement on the basis that the public element was not satisfied. In *Nahimana,* comments made to individuals at roadblocks were found to be more in line with a "conversation", "since only the individuals manning the roadblocks would have been the recipients of the message and not the general public".[71] In *Kalimanzira,* the Chamber found that the defendant's actions did not involve any form of mass communications such as public speech.[72] Instead, they were directed at a small and selected group of individuals.[73]

58. Similarly, in the present case the public element is not satisfied. To join the private Statusphere groups, users have to explicitly seek out the specific group of which they want to be a member.[74] The group is completely private and its posts cannot be viewed by the general public.[75] A user cannot view any of the postings unless they

[69] *Akayesu* trial [556]; ILC Report (1996) 22.

[70] *Akayesu* trial [556].

[71] *Nahimana* appeal [862].

[72] *Kalimanzira* appeal [159].

[73] Ibid [161].

[74] Case [Appendix 1].

[75] Case [7].

have specifically chosen to join the group. The display of advertisements for various groups on the sites does not negate this fact. Therefore, membership of the group was limited to those individuals who had specifically sought out the group and decided to join. Further, the statements were intended only for the members of the group and not the general public. Those who posted the statements could have done so through their personal accounts which would then have been shared on the general site.[76] However, these individuals deliberately chose to upload these statements on the e-bulletin board of the private group which can only be read by other members of the group.[77]

59. Therefore, the PTC erred in finding that there are substantial grounds to believe that Dragos members publicly incite genocide. The private Dragos groups do not constitute a public platform and the general public were not intended to be the audience of the posts. Rather, the statements were posted in a private group to users who had explicitly decided to join and be the recipients of such posts. These statements were only intended for those members of the group.

iii. The posts were not issued with genocidal intent

60. For direct and public incitement, the perpetrator must desire to create by their actions a particular state of mind necessary to commit such a crime in the minds of the person they are so engaging.[78] The perpetrator must also possess the specific intent required by genocide: the intent to destroy the group, as such.[79]

61. As stated in the *Bosnian Genocide* case, neither the intent to render an area 'ethnically homogeneous' nor the operation that may be carried out to implement such a policy, amount to genocidal intent.[80] It is not enough that the members of the group are targeted because they belong to that group. That is discriminatory intent; something

[76] Case [Appendix 1].

[77] Ibid.

[78] *Akayesu* trial [560].

[79] Article 6 Rome Statute.

[80] *Bosnia and Herzegovina v Serbia and Montenegro* [190].

more is required.[81] The ICTR in *Nahimana* found that the intention to promote unfounded resentment and inflame ethnic tensions does not amount to genocidal intent.[82] It is also important to note that the fact that genocide occurred was analysed as indicative of intent.[83]

62. Therefore, discriminatory intent cannot be equated to genocidal intent. Dragos members have a right to freedom of expression under Article 19(2) of the ICCPR. This right can be subject to restrictions.[84] However, as seen in the case of *Ross v Canada*, restrictions can only apply if it can be reasonably discerned that a causal link exists between the expression of the author and the poisoned atmosphere.[85] In this case, the author of the comments was a teacher who shared his opinions with a group of impressionable students, to which he represented a reliable source of learning and authority.

63. Although Dragos is committed to the ethnic purity of Solantis,[86] this cannot be equated to genocidal intent. The use of derogatory terms like 'widgets' is only evidence of discriminatory disdain towards the Stareks. Further, as private Dragos groups were not a source of reliable information and learning, their members did not contribute to the creation of a poisoned atmosphere. Therefore, the PTC erred in finding that there are substantial grounds to believe that authors of the statements possessed genocidal intent.

C. Conclusion

64. For these reasons, there are no substantial grounds to believe that the posts on the Dragos private groups constitute direct and public incitement. They did not specifically provoke others to commit genocide, were not made to the general public

[81] Ibid [187].

[82] *Nahimana* trial [1021].

[83] Ibid [1029].

[84] Article 20(2) ICCPR.

[85] *Malcolm Ross v Canada* [11.5.]

[86] Case [7].

and were not issued with genocidal intent. Therefore, the Court must reverse this finding of the PTC as it is materially affected by an error of law.

III. THE DEFENDANT CANNOT BE HELD CRIMINALLY RESPONSIBLE FOR INCITEMENT TO GENOCIDE OR PROVIDING THE MEANS TO INCITE GENOCIDE

65. The finding of the PTC that the Defendant can be held criminally responsible for incitement to genocide under Article 25(3)(e) is materially affected by an error of law **[A].** The finding of the PTC that the Defendant can be held criminally responsible for providing the means to incite genocide under Article 25(3)(c) is materially affected by an error of law **[B].**

A. The Defendant cannot be held criminally responsible for incitement to genocide under Article 25(3)(e)

66. The finding of the PTC that the Defendant can be held criminally responsible for incitement to genocide is materially affected by an error of law. This is for three reasons. *First,* the Defendant did not directly incite genocide as she did not post any statements on Statusphere and as the case of *Nahimana* can be distinguished **[i]**. *Second*, the Defendant did not publicly incite genocide as she did not issue any call to criminal action in a public place or to the general public **[ii]**. *Third*, the Defendant did not possess the required genocidal intent as her actions were undertaken to uphold the freedom of expression of Statusphere users and her statements only demonstrate discriminatory intent **[iii]**.

i. The Defendant did not directly incite genocide as she did not post any statements on Statusphere and the case of Nahimana can be distinguished

67. In *Akayesu*, the ICTR held that the 'direct' element of incitement to genocide implies that an individual "specifically provokes another to engage in a criminal act".[87] The incitement has to be a direct appeal to commit one of the acts enumerated in Article 2(2) of the ICTR Statute.[88]

[87] *Akayesu* trial [557]; ILC Report (1996) 22

[88] *Nahimana* appeal [692].

68. In many of the incitement cases before the ICTR, the direct element was fulfilled as a result of the accused holding speeches in which the commission of genocide was encouraged. Akayesu was found guilty of direct and public incitement for his call to the population to unite in order to eliminate "the sole enemy", which the population understood as urging them to kill the Tutsi.[89] Kajelijeli was found criminally responsible for direct incitement as he instructed the crowd to "exterminate the Tutsis".[90] The Tribunal found that Bikindi's exhortation on "the majority" not to "spare anybody" constituted a direct call to destroy the Tutsi ethnic group.[91] Finally, Ngirabatware telling the crowd to "kill Tutsis" led the Court to convict him of direct incitement to commit genocide.[92]

69. In the present case, there is no evidence that the Defendant posted on Statusphere or held a speech conveying a violent message that she delivered. She did not explicitly provoke another to engage in a criminal act. Instead, the Defendant is alleged to have directly incited genocide because of her failure to immediately remove the Dragos statements and prevent their reposting.

70. Only in the *Nahimana* and *Kambanda* cases did the ICTR find that the 'direct' criterion was met by a failure to act on the part of the accused.

71. In *Nahimana*, Ngeze, founder and owner of a newspaper, was found guilty of direct and public incitement to genocide for failing to prevent the publishing of articles that incited genocide.[93] Ngeze had direct control over the articles published in Kangura that were considered to constitute direct and public incitement to genocide and he acknowledged responsibility for the content of the publication.[94] Ngeze also wrote many inciting articles, ordering attacks against Tutsis and driving around with a megaphone calling on the population to spread the message that the Tutsis should be

[89] *Akayesu* trial [673-674].

[90] *Kajelijeli* trial [856]; *Kajelijeli* appeal [105].

[91] *Bikindi* trial [266], [422], [426].

[92] *Ngirabatware* trial [1366], [1368], [1369].

[93] *Nahimana* trial [1038].

[94] Ibid; *Nahimana* appeal [886].

exterminated.[95] As seen from these elements, the fact that, in addition to his failure to act, Ngeze also committed substantial acts of incitement to genocide, weighed significantly in his conviction.

72. *Nahimana* can be distinguished from the present case in three ways. First, contrary to a newspaper editor who is in the position to scrutinise the content *before* it is broadcast, the Defendant, as the CEO of a social network, has no control over posts written by Statusphere users prior to their publication. Statusphere's content monitors can only review the substance of the posts *after* their publication. Second, as opposed to Ngeze, the Defendant did take action in relation to the statements posted on Statusphere. When she became aware of the alleged correlation between coded posts on Dragos groups and attacks against Stareks, the Defendant consistently closed down the offending groups.[96] Third, as opposed to Ngeze, the Defendant herself did not write any violent statements on Statusphere, nor did she voice calls for violence against the Stareks.

73. Another case where failure to act was viewed as fulfilling the direct criterion is in *Kambanda.* In that case, the ICTR convicted the Defendant for incitement to genocide because, as Prime Minister of Rwanda at the time, he knew or should have known that his subordinates had or were about to commit crimes, and had failed to prevent or punish them.[97] However, this case has limited value as the conviction of Kambanda was not issued through an authoritative verdict, but was the result of a guilty plea procedure.[98]

74. For these reasons, there are no substantial grounds to believe that the Defendant can be held criminally responsible for direct incitement to genocide.

ii. The Defendant did not publicly incite genocide as she did not issue any call to criminal action in a public place or to the general public

[95] *Nahimana* trial [968], [1039]; Ibid [886].

[96] Case [17].

[97] *Kambanda* indictment [3.19].

[98] *Kambanda* trial [5-7].

75. The ‘public’ element of incitement requires the call for criminal action to be communicated to a number of individuals in a public place or to members of the general public at large.[99] This definition was repeatedly applied before the ICTR where individuals who gave speeches at public meetings to crowds were found guilty of public incitement to genocide.[100]

76. In the present case, the facts do not mention any statements that the Defendant posted on her platform or any speech that she made calling for criminal action. Therefore, the Defendant did not convey any violent message, let alone call for criminal action.

77. The PTC determined that it was the Defendant’s alleged failure to remove and block the Dragos posts on Statusphere that can render her criminally responsible for direct and public incitement to genocide.[101] This amounts to considering an alleged omission as sufficient to fulfil the public requirement. However, by applying the definition of omission, this cannot be the case. An omission is described as “not doing something”.[102] Therefore, this definition contradicts the public criterion which requires the performance of a criminal call made publicly by an individual. Article 25(3)(e) does not explicitly provide for liability by omission and the Court has never interpreted it in that sense. Should the Court rely on the jurisprudence on aiding/abetting by omission, it would have to determine the existence of a legal duty to act.[103] There was no legal duty to act binding on the Defendant in the present case.

78. Therefore, in the absence of any criminal call from the Defendant and the sole reliance on an alleged omission on her part, there are no substantial grounds to believe that the Defendant can be held responsible for public incitement to genocide.

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[99] *Akayesu* trial [556].

[100] *Akayesu* trial [672-674], *Niyitegeka* trial [431-436]; *Kajelijeli* trial [851], [856-860]; *Kalimanzira* appeal [44]; *Ngirabatware* trial [1355].

[101] Case [21].

[102] OLD, ‘omission’.

[103] *Brdanin* appeal [274]; *Oric* appeal [43] ; *Mrksic* appeal [146] ; *Sainovic* appeal [1677]; *Ntagerura* appeal [334].

iii. The Defendant did not possess the required genocidal intent as her actions were undertaken to uphold the freedom of expression of Statusphere users and as her statements only demonstrate discriminatory intent

79. To be convicted for direct and public incitement to genocide, the perpetrator must possess genocidal intent, namely, the intention to destroy, in whole or in part, a protected group, as such.[104]

80. In *Stakic*, the ICTY stressed that evidence demonstrating ethnic bias, however reprehensible, suggests discriminatory intent but does not necessarily prove genocidal intent.[105] Additionally, in *Brđanin*, the TC found that "the Accused openly derided and denigrated Bosnian Muslims and Bosnian Croats. Whilst these utterances strongly suggest the Accused's discriminatory intent, they do not allow for the conclusion that the Accused harboured the intent to destroy the [group]".[106] The ICJ has further ruled that discriminatory intent is not sufficient to amount to genocidal intent.[107]

81. In the present case, the Defendant did not possess genocidal intent when she decided not to immediately remove the Dragos statements and prevent their reposting. This is for four reasons.

82. First, the Defendant's efforts to regulate the content of Dragos posts of 16 June and 6 November through Statusphere's content monitors were hampered by the differences in dialects. She could not promptly remove these statements because the content monitors were unable to interpret the differences in the grammar, idioms and vocabulary. This cannot be found to be an indication of genocidal intent.

83. Second, the Defendant acted with caution in order not to arbitrarily suppress Statusphere users' right to freedom of expression when examining coded posts. She gave this right special weight in sensitive pre-election times where the right to freedom of expression is of critical importance in democratic societies.[108] The

[104] *Akayesu* trial [560]; *Nahimana* appeal [677].

[105] *Stakic* appeal [52]; *Brdanin* trial [986-987].

[106] *Brdanin* trial [986 - 987].

[107] *Bosnian Genocide* case [187].

[108] HRC General Comment 34 [2].

Defendant's alleged failure to immediately remove the statements was driven by motivations other than the intention to destroy the Stareks.

84. Third, whenever the Defendant became aware of a possible link between posts on Statusphere and the attacks perpetrated against Stareks, she shut down the groups in their entirety. By doing so, she acted beyond Statusphere's policy which only required her to remove any posts advocating violence. [109] This response is irreconcilable with genocidal intent.

85. Fourth, the statements made by the Defendant in her interviews on 17 June and 8 November demonstrate, at most, discriminatory intent. The Defendant expressed her views on the Stareks only on two occasions and in telephone conversations.[110] Her comments on the attacks were ethnically biased and reflected her disdain for the Stareks, as well as her lack of political support for Ayra Gendry.[111] However, she never expressed the desire to destroy the Stareks as such. These discriminatory comments are insufficient to amount to genocidal intent.

86. For these reasons, the Defendant's conduct and statements do not amount to the intent to destroy the Stareks, as such. Therefore, there are no substantial grounds to believe that the Defendant possessed genocidal intent.

B. The Defendant cannot be held criminally responsible for providing the means to incite genocide under Article 25(3)(c) of the Rome Statute

87. The PTC's finding that the Defendant can be held criminally responsible for providing the means to incite genocide is materially affected by an error of law. This is for two reasons. *First,* the Defendant did not provide the means to incite genocide as her alleged failure to act did not substantially affect the commission of the crime **[i]**. *Second,* the Defendant did not know that her conduct would assist the incitement and did not aim to facilitate it as she removed the posts when she became aware of their offensive nature **[ii]**.

[109] Case [Appendix 1].

[110] Case [Appendix 1], [Appendix 2].

[111] Case [Appendix 2].

i. The Defendant did not provide the means to incite genocide as her alleged failure to act did not substantially affect the commission of the crime

88. Under Article 25(3)(c), an individual can be held criminally responsible if that person aids, abets or otherwise assists in the commission or attempted commission of the crime, including providing the means for its commission. In the present case, the PTC based its finding under Article 25(3) on two facts: first, the Defendant allowing posts by Dragos members and second, her alleged failure to prevent Dragos members from reposting.

89. First, the finding of the PTC that the Defendant actively allowed Dragos members to post inciting statements is materially affected by an error of fact. An error of fact arises when a decision is exercised on a patently incorrect conclusion of fact.[112] Instead of actively allowing inciting statements to be posted, the Defendant implemented Statusphere's community standards policy. This policy establishes that posts are removed when there is a risk of physical harm or direct threat to public safety.[113] Whenever the Defendant became aware of an offensive post, she closed down the corresponding group. Therefore, the Defendant did not purposefully allow the offensive posts but on the contrary, willingly took reasonable precautions against them.

90. Second, the Defendant cannot be held responsible for providing the means to incite genocide by allegedly failing to prevent the reposting of similar statements. Failing to act is by definition an omission. A person can only be held criminally responsible for aiding and abetting by omission if the person has a legal duty to act in the circumstances.[114] As the owner of a private company, the Defendant does not have a legal obligation to act under international law. She cannot be held criminally responsible for an omission.

91. Further, the Defendant's alleged omission does to reach the required threshold of substantial effect. The ad hoc tribunals have found that an act of assistance must

[112] *Kony* appeal admissibility [80].

[113] Case [9].

[114] *Brdanin* appeal [274]; *Orić* appeal [43]; *Mrkšić* appeal [82], [154]; *Mladić* trial [3567].

constitute a direct and substantial contribution to the commission of the crime.[115] The ICTY found that there was substantial contribution when "the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed."[116] In *Bemba et al.,* the Court found that Article 25(3)(c) did not require the meeting of any specific threshold. Rather, it was sufficient that the contribution had a mere causal effect on the commission of the crime.[117]

92. This is contrary to what the Court has ruled in previous decisions[118] and such interpretation is inappropriate. As the Court held in *Mbarushimana*, "without some threshold level of assistance, every landlord, every grocer, every power utility provider, every secretary, every janitor or even every taxpayer who does anything which contributes to a group committing international crimes could satisfy the elements of liability for the infinitesimal contribution to the crimes committed".[119] Therefore, substantial contribution must remain the required test.

93. In the present case, the only association between the Defendant and the alleged crime is by virtue of the fact that she is the owner of the foreign private company, Statusphere. The Defendant's alleged failure to remove the posts and block the groups did not substantially contribute to the direct and public incitement as the alleged crime most likely would have occurred regardless of her role. Her behaviour is too remote from the alleged acts of Dragos. The PTC based their finding primarily on two offensive posts within a sea of 10 million Statusphere users. Thus, this connection does not reach the substantial effect threshold and does not give rise to the individual criminal responsibility of the Defendant.

94. Therefore, the Defendant took the reasonable measures to mitigate the risk of any harm, even though she did not have a legal duty to act. For these reasons, the PTC

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[115] *Tadic* trial [674], [688-692] ; *Nahimana* appeal [482]; *Blagojević* appeal [127] ; *Ndindabahizi* appeal [117]; *Ntagerura* appeal [370]; *Blaškic* appeal [45-48] ; *Vasiljevic* appeal [102].

[116] *Tadic* trial [688].

[117] *Bemba et al.* trial [93-94].

[118] Ibid [279]; *Lubanga* trial [997]; *Ruto* confirmation [354].

[119] *Mbarushimana* confirmation [277].

erred in finding that the Defendant can be prosecuted for providing the means to incite genocide.

ii. The Defendant did not know that her conduct would assist the incitement and did not aim to facilitate it as she removed the posts when she became aware of their offensive nature

95. Under Article 25(3)(c) a person can be held responsible for aiding and abetting if they act "for the purposes of facilitating the commission". In *Bemba et al.*, the Court clarified that this specific purpose requirement means that the accessory must have lent their assistance with the aim of facilitating the offence.[120] Therefore, the intention required for aiding and abetting is twofold: first, the aider and abettor must have known that their conduct would assist perpetration of the crime and second, they aimed to facilitate the crime. It is not sufficient that the accessory merely knows that their conduct will assist the principal perpetrator in the commission of the offence.[121]

96. In the present case, there are no substantial grounds to believe that the Defendant possesses this twofold intent. First, the Defendant did not know that certain posts could have amounted to incitement to violence because the Statusphere content monitors had difficulties interpreting the statements as they were written in a different dialect.[122] Second, there are no substantial grounds to believe that the Defendant intended to facilitate the alleged crime committed by Dragos. The Defendant created Statusphere to provide a free platform on which people could obtain information, upload photographs and join groups to share hobbies and interests.[123] Dragos attempted to abuse this purpose, yet, whenever an offensive statement was posted, it was removed in line with Statusphere's community standards policy.[124] In doing so, the Defendant had to balance this action alongside the right to freedom of expression.[125] To pre-emptively block Dragos groups before they had violated the

[120] *Bemba et al.* trial [97].

[121] Ibid.

[122] Case [17].

[123] Case [6] and Case [Appendix 1]

[124] Case [9].

[125] Article 19 ICCPR.

community standards policy would have had a serious impact upon the right to freedom of expression. However, once the Defendant became aware of the offensive nature of posts, she removed them.

97. Therefore, the Defendant did not know that her conduct would assist the perpetration of incitement and did not aim to facilitate the crime. For these reasons, the PTC materially erred in finding that the Defendant possessed the required intent for providing the means to incitement to genocide under Article 25(3)(c).

C. Conclusion

98. For these reasons, there are no substantial grounds to believe that the Defendant directly and publicly incited genocide. She did not post any offensive statements or publicly call for criminal action, did not possess genocidal intent and *Nahimana* can be distinguished.

99. For these reasons, there are no substantial grounds to believe that the Defendant provided the means to incite genocide. She was not bound by a legal duty to act and did not substantially contribute to the commission of the alleged crime. She did not know that her conduct would assist the incitement and did not aim to facilitate it as, when the meaning of the posts was discerned, she immediately removed and blocked the groups.

100. Therefore, the Court must reverse the findings of the PTC as they are materially affected by errors of law.

SUBMISSIONS

Wherefore in light of the issues raised, arguments advanced, and authorities cited, the Defence counsel respectfully requests this Court to reverse the impugned decision of the PTC and adjudge and declare that:

I. The Court may not exercise jurisdiction under Article 12(2)(a) of the Rome Statute.

II. The Dragos posts do not constitute direct and public incitement under Article 25(3)(e) of the Rome Statute.

III. The Defendant cannot be held criminally responsible for inciting genocide under Article 25(3)(e) and for providing the means to incite genocide under Article 25(3)(c) of the Rome Statute.

On behalf of the Defence

COUNSEL FOR THE DEFENCE