**MEMORIAL OF THE**

**DEFENSE COUNSEL**

**PRESENTED TO THE**

**INTERNATIONAL CRIMINAL COURT**

# INTERNATIONAL CRIMINAL MOOT COURT NUREMBERG

## TEAM NR. 4

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SITUATION IN THE REPUBLIC OF FLANIA

IN THE CASE OF THE PROSECUTOR v. FLANELI

2014

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## QUESTIONS PRESENTED

The Defense Counsel respectfully asks the Honorable Court to adjudge and declare that:

1. The jurisdiction of the International Criminal Court is limited because of Article 17 (1) lit. a) of the Rome Statute.

2. Defendant is not criminally liable for genocide and crimes against humanity under the Rome Statute.

# SUMMARY OF FACTS

The case at hand refers to a situation in the Republic of Flania. Flania's population consists of the Flanian minority and the Benian indigenous minority. Flania is not a member of the Rome Statute.

From May 2011 to July 2013 a civil war took place in Flania and claimed the lives of 75,000 people. The conflict emerged in the aftermath of the elections in April 2011, when the Benians started protesting against the election's results and the general oppression of their rights. President K subsequently authorized military force against the protests.

The United Nations High Commissioner for Human Rights determined that the government under President K adopted an 'extermination and resettlement plan' with the object of exterminating the Benian minority in Flania.

At this time, Defendant, who is Flanian and member of K's political party, became Information Minister. Defendant initially started his career as journalist and blogger and earned a solid reputation within Flanian society. In February 2011, he became director of the state-controlled TV-station FSR. In this function he had the complete control of all creative and administrative policies and decisions of the station. He was responsible for programs in which the Benian population was accused of being 'uncultured and inferior'. In his own show, where Defendant functioned as moderator, he invited speakers who portrayed the Benian minority as a threat, supported by invented statistics and reports. Defendant often emphasized the controversial opinions of his guests. Defendant himself expressed the wish that the whole Benian population should vanish.

On Twitter and Facebook, where Defendant reached over 1.5 Mio. 'followers', he spread false accusation and racist statements. Various reports determined that ethnical tensions were increased and certain specific attacks on the Benians prompted by these inflammatory TV shows and social media posts. In that context a massacre occurred in Bua, which is also Defendant's home town, and 25,000 Benians were killed. Before the massacre, there was a controversial discussion on Defendant's Facebook page, which was not deleted by him or his personal social media assistant. Defendant furthermore posted '#fightthenemey' on Twitter.

In Resolution 9876 the Security Council of the United Nations recognized that genocide was taking place in Flania and referred the situation since April 2011 to the International Criminal Court. In January 2014 an arrest warrant was issued against Defendant. In February 2014 Defendant was prosecuted and convicted in a national proceeding for 'violations of public order'.

# SUMMARY OF PLEADINGS

**Claim 1**

A) According to the general principle of complementarity granted under article 17 (1) lit. a) the ICC has no jurisdiction over Mr. Flaneli. The Republic of Flania, which is a non-member State of the Rome Statute, is still protected by this main and high accepted principle of international criminal law.

B) Even if it exists exceptions to this principle of complementarity granted by the Statute and developed through the jurisprudence of the ICC, the prerequisites are not met in this case preventing the ICC from using it in order to make the arrest warrant effective. The prerequisites are namely the unwillingness, the inability or the non-genuineness of the state action which do not characterize the action of the Republic of Flania.

C) The fact that Flania have obligations under the Rome Statute even if it has not ratified it raises the problem of the controversial principle of universal jurisdiction and its breaches against States sovereignty

**Claim 2**

A) Inducement to crimes against humanity (Article 25 (3) lit. b), 7 Rome Statute). The Defendant is not liable. His twitter post "#letsfighttheenemy" has to be interpreted as an appeal to stand together against anarchy and the civil war. There is no commission by omission for not having deleted Facebook comments and tweets. Even if there was such one, the defendant is not liable for those comments and tweets, but the users, Facebook/Twitter and Mr. Oballo. "It would be best for the Flanian population if every single Benian would disappear and the whole population would vanish" is only a hypothetical scenario and no realistic outlook. There was no systematic attack, when the accused actions took place, so Article 7 Rome Statue is not even applicable.

B) Incitement to genocide (Article 25 (3) lit. e), 6 Rome Statute). The Defendant is not liable. There was no direct incitement to genocide (adequate interpretations see above), neither is there a proable *mens rea*.

# PLEADINGS

## Claim 1

The jurisdiction of the ICC is limited due to the principe of complementarity under Article 17 (1) lit. a) of the Statute of the International Criminal Court (Rome Statute).

### A) The Republic of Flania has jurisdiction over Mr. Flaneli puruant to the principle of complementarity under Article 17 (1) lit. a) of the Rome Statute

#### *I. The principle of complementarity pursuant to Article 17 of the Rome Statute is also applicable for non-member States*

According to the principle of complementarity under Article 17 of the Rome Statute, Flania has full jurisdiction over Mr. Flaneli. The fact that Flania is not a member of the Statute does not limit the protection granted by this principle. Although this is not explicitly stated in Article 17 (1) lit. a), it follows from the wording of the paragraph. It refers to 'a State which has jurisdiction over' a case and does not require that the State is a member of the Rome Statute. It can be drawn from the overall structure of the Statute, that in cases where membership of a State to the Statute is required, it expressely mentions it.

#### *II. The complementarity is the most important principle of the Rome Statute*

Complementarity is one of the fundamental principles of the Rome Statute. The International Criminal Court (ICC) is a court of 'last resort'. It has only jurisdiction where the national judiciary has failed to address crimes of international relevance. This principle is stated in paragraph 10 of the Preamble and Article 1 of the Statute of the ICC (the Rome Statute).
In the *Katanga and Chui* case[1], admissibility was challenged by the defense counsel.
Thereupon, the Trial Chamber noted that « [t]he provisions of Article 17 of the Statute must be read in light of paragraph 10 of the Preamble and Article 1 of the Statute ». Read together, they establish

[1] *Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case*, 16 June 2009.

one of the most fundamental principles of the Statute, namely the complementarity of the International Criminal Tribunal to national criminal courts.

The Flanian national courts were therefore entitled to try Mr. Flaneli.

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## B) <u>The two prerequisites of article 17 (1) lit a) are not met. Thus, jurisdiction of the ICC cannot be established as an exception to the principle of complementarity.</u>

According to the Rome Statute and the Court's complementarity jurisprudence, the principle of complementarity does not apply when the State is either unwilling or unable to carry out investigation or prosecution pursuant to Article 17 (1) lit a). Indeed, not all domestic proceedings constitute state action sufficient to render a case inadmissible. Whether or not the respective state action is sufficient within the meaning of Article 17 (1) lit. a) will be decided based on its genuineness[2]. However, Flania is neither unwilling nor unable to carry out the investigation or prosecution.

### *I. Flania is not unable to carry out investigations or prosecution*

One important exception to the principle of complementarity under Article 17 is the inability of a State to conduct investigations or prosecution. It concerns situation where due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to hold the accused liable or to obtain necessary evidence and testimonies or is otherwise unable to conduct proceedings. This applies for example to the situation in Somalia or in Rwanda after genocide had been taken place.
In the *Bemba* case [3], the Trial Chamber determimed 'that the Central African Republic's national judicial system is unable to investigate effectively or try the accused leads inevitably to the conclusion that for the purposes of Article 17(3) of the Statute, the national judicial system of the CAR is "unavailable", because it does not have the capacity to handle these proceedings'.

Based on the evidence in this case, similar circumstances which would establish 'unavailiability' of

[2] *Situation in the Republic of Kenya, Case No. ICC-01/09, Decision pursuant to article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, Mar. 31 2010 [hereinafter *Kenya Authorization Decision]*.
[3] *Decision on the Admissibility and Abuse of Process Challenges*, 24 June 2010, para. 246.

the national judicial system in Flania cannot be reached.

An exception to complementarity based on 'unavailability' within the meaning of Article 17 (1) lit. a) cannot be established.

## *II. Flania is not unwilling to conduct the investigation or prosecution*

Flania decided in February 2014 to open investigations in the case of Mr. Flaneli. He was indicted for ' violation of public order ', which is a crime punishable under the Flanian Penal Code. This demonstrates the willingness of Flania to end the conflict in Flania and hold perpetrators judically accountable. Consequently, the ICC is not entitled to exercised jurisdiction in Mr. Flaneli's case.

### *1. The body of evidence under article 17 (2) of the Rome Statute*

Article 17 (2) lit. a), b) and c) give some guidance to determine the willingness of a State. None of these scenarios apply to the proceedings initiated in Mr. Flaneli's case.

First, the proceedings were not undertaken in order to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the Court. Doubts concerning legitimacy can for example be established based on the fact that there was an obvious departure from regualr proceedings.[4] In Mr. Flaneli's case, investigations were opened by the Flanian national prosecution service. There were no irregularities. Moreover, 'violation of public order' is an effective crime. It is defined as 'crime which involves acts that interfere with the operations of society and the ability of people to function efficiently'[5], i.e., it criminalizes behaviour based on the fact that it runs counter to shared norms, social values, and customs. This crime is punishable under the criminal law of several national legal system such as the English Penal Code[6] and also the Flanian Penal Code. The indictment of Mr. Flaneli for this crime cannot be interpreted as a way to shield him from criminal responsibility.

Secondly, there has been no unjustified delay in the proceedings.

Thirdly, there is no evidence that the proceedings where not conducted independently or impartially.

[4] John T. Holmes pp. 675-676 in Antonio Cassese/Paola Gaeta/John R.W.D. Jones.

[5] Siegel, Larry J. (2006). *Criminology: Theories, Patterns, & Typologies*, 9th edition. Belmont, CA: Wadsworth Publishing.

[6] Public order act 1986.

Therefore, no exception to complementarity based on 'unwillingness' can be established.

*2. The criteria of the genuine state action in the Court's complementarity jurisprudence*

In its jurisprudence, the ICC determined criteria to examine the admissibility of a case and in particular whether state action can be considered to be genuine. The action of a state has to be genuine for the principle of complementarity to be effective.
In its decision authorizing investigations into the situation in Kenya, the Pre-Trial Chamber found for instance that proceedings can be insufficient under Article 17, although they consituted domestic investigations, when the proceedings did not reach out for high-level perpetrators.[7]
In Flania, investigations were specifically directed against Mr. Flaneli indicting him for a crime punishable under the Flanian Penal Code. They must therefore be considered genuine.

It follows that Flania has full jurisdiction over Mr. Flaneli. According to the principle of complementarity, the provisions of the Rome Statute and international criminal law, Flania has no obligation to execute the arrest warrant and has exclusive jurisdiction over Mr. Flaneli.

## C) <u>The fact that Flania has obligations under the Rome Statute even if it has not ratified it raises the problem of universal jurisdiction which is a breach of the State's sovereinty.</u>

### *I. The principle of universal jurisdiction allows the ICC to exercise jurisdiction over Mr. Flaneli byreference of the Security Councel of the United Nation*

Universal jurisdiction allows states or international organizations to exercise criminal jurisdiction over an accused person regardless of where the alleged crime has been committed, and regardless of the accused's nationality, country of residence, or any other matter relevant for prosecution.
Universal jurisdiction can be exercised by the ICC when the proceedings is triggered by the Security Councel through its reference to the Prosecutor[8] under Chapter VII of the UN Charter. This

[7] *Kenya Authorization Decision.*
[8] Article 13 (b) Rome Statute.

mechanism was used in Sudan against President Al Bashir[9].

### *II. The universal jurisdiction is the least accepted source of jurisdiction in international criminal law as it breaches the fundamental principle of State sovereingty.*

Indeed, while nationality and territoriality are widely accepted sources of jurisdiction, universal jurisdiction is more problematic. The Defense Counsel therefore points out the considerable lack of legitimacy of this principle.

Opponents, such as Henry Kissinger, argue that universal jurisdiction is a breach on every state's sovereignty: all states being equal in sovereignty, as affirmed by the United Nations Charter.[10] "Widespread agreement that human rights violations and crimes against humanity must be prosecuted has hindered active consideration of the proper role of international courts."[11] According to Kissinger, as a practical matter, since any number of states could set up such *universal jurisdiction* tribunals, the process could quickly degenerate into politically driven show trials to attempt to place a quasi-judicial stamp on a state's enemies or opponents.

## Claim 2

Mr. Flaneli is not guilty of the accused crimes. He neither inducted crimes against humanity (Article 25 (3) lit. b) and Article 7 of the Rome Statute) nor incited anyone to commit genocide (Article 25 (3) lit. e) and Article 6 of the Rome Statute).

### A) <u>Inducement to crimes against humanity (Article 25 (3) lit. b), 7 Rome Statute)</u>

#### *I. Offence*

##### *1. Actus Reus*

Mr. Flaneli neither ordered nor solicited nor inducted to crimes against humanity. As him not being

[9]SC Res. 1593 (2005).
[10]Article 2 of the United Nations Charter.
[11] Kissinger, Henry "The Pitfalls of Universal Jurisdiction".

a member of the military forces he was not able to order anything to the soldiers. His tweets and his Facebook posts were sent to an uncountable number of followers. So they went out to an indeterminate circle of people, which is not covered by Article 25 (3) lit b) Rome Statute.[12] Since on Facebook fan pages as well as on big Twitter accounts every post and commentary respectively tweet is published for everybody to see, those words are spread so far, that every of the 7 billion of people in the world could be able to see them. The same argument is possible for his TV show, which – thanks to YouTube or similar video portals – could possibly also be seen by anyone and not only by a determinate group. Furthermore, it's doubtful that Facebook commentaries or tweets lead to people committing crimes against humanity. There are so many commentaries on Facebook and tweets on Twitter, which are not followed by anyone.

One also has to point out that Mr. Flaneli is not liable for Facebook commentaries and answering tweets. Other people post them. The first one to be liable are the individuals who post them. The second ones to be liable are Facebook and Twitter, who provide the space for those commentaries. Both pages provide a "report"-function. If a post, a commentary or a tweet is reported, Facebook respectively Twitter decide whether it is deleted or not. It's not Mr. Flaneli's duty to delete commentaries beyond his posts. Since such a duty is necessary,[13] Mr. Flaneli cannot be guilty referring the discussions on Facebook and Twitter. The evoking Tweet "#letsfighttheenemy" is no evocation to kill the Benians. It has to be interpreted as an appeal to stand together against the anarchy, which is the "enemy" for the Flanian country. The third one to be liable is Mr. Oballo. As Mr. Flaneli's social media assistant, he is the person, who runs Mr. Flaneli's social media profiles. However, there even is no commission by omission in the Rome Statute except for Article 28 Rome Statute. Article 28 Rome Statute is not applicable here as Mr. Flaneli is none of the possible offenders. In the Draft Statute and the Draft Final Act, omission was included.[14] Nevertheless, a commission by omission still was not taken into the Rome Statute. This has to be interpreted in that way, that there is no commission by omission except for Article 28 Rome Statute.[15] So Mr. Flaneli is not liable for not deleting posts on his Facebook page.

Regarding his TV show, it is clear, that Mr. Flaneli has the duty to show up as many opinions as possible. This includes radical and racist points of view, too. He mainly acted as a moderator, so he mostly didn't vent his own opinion. In the few cases, in which he did, this is covered by the freedom of speech. The freedom of speech is a very high good. It is part of the first amendment to the constitution of the United States and is also codified in Article 19 of the Universal Declaration of Human Rights. As it is also almost equally worded codified in Article 19 (2) ICCPR, which is

[12] *Ambos*, Internationales Strafrecht, p. 173, § 7, note 46.
[13] *Werle*, Völkerstrafrecht, p. 600, note 599; *ICTY*, Limaj et. al., TC), para 513.
[14] Cassese/Gaeta/Jones – *Eser*, The Rome Statute of the International Criminal Court: A commentary, p. 819.
[15] *Eser* (supra 14), p. 819; *Ambos* (supra 12), p. 144, § 7, note 3.

ratified by 168 states and signed by seven further states,[16] it can be seen as customary international law and as *ius cogens*.

In addition to that, Article 7 (1) Rome Statute is not applicable here. Article 7 (1) Rome Statute requires a "widespread or systematic attack directed against any civilian population". When Mr. Flaneli acted in the accused way, there was no such attack against the civilian population. There only was a civil war. The alleged attack took place on August 7-9, 2012, the Facebook discussion and the tweets were made before the massacre in Bua. It's also doubtful, whether the victims really were civilians or parts of the civil war. So there was no "widespread or systematic attack directed against any civilian population". So Article 7 (1) Rome Statute is not applicable here. Since there were no crimes against humanity, Mr. Flaneli could also not have ordered, solicited or induced such crimes.

*2. Mens rea*

Mr. Flaneli also did not fulfil the mens rea requirements.

On the one hand, there were no crimes at that time (see above). Article 7 (1) Rome Statute requires aside from the "widespread or systematic attack" also knowledge of the attack. With no attack existing, Mr. Flaneli could also not be in knowledge of the (at that time not yet existing) attack.

On the other hand, Mr. Flaneli also did not want such horrible things to happen. The consideration "It would be the best for the Flanian population if every single Benian would disappear and the whole population would vanish" is too see as a hypothetical scenario, but not as a realistic outlook.

### *II. Defence*

Mr. Flaneli did not fulfil the *actus reus* nor the *mens rea*. So there is no need for any further defences.

## B) Incitement to genocide (Article 25 (3) lit. e), 6 Rome Statute)

### *I. Offence*

[16] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (24/07/14).

1. *Actus reus*

Mr. Flaneli did not incite anyone to commit genocide. Article 25 (3) lit. e) Rome Statute requires a direct and public incitement.

First, there must be an incitement "directed at the commission of genocide"[17]. This doesn't include merely provocative statements.[18] The accused statements are no incitements to genocide.

"It would be best for the Flanian population if every single Benian would disappear and the whole population would vanish" was only a hypothetical scenario, neither a realistic outlook nor the appeal for someone to make the scenario happen. As the evaluation of a hypothetical scenario, it's covered by the freedoms of speech and of opinion, which – as previously shown – are customary international law and *ius cogens* and as such binding human rights. Once again, one has to point out the importance of those human rights as main parts of democratic systems: In the French Declaration of the Rights of the Man and of the Citizen (1789), Article 11 calls the free communication of ideas and opinions "one of the most precious of the rights of man"[19]. Later on, the first Amendment to the United States Constitution forbids the congress to pass any law abridging the freedom of speech. So one can register that the freedom of speech is one of the most fundamental and important human rights, maybe even the most important one, especially considering that it is the cornerstone of every democratic system. So that statement, that hypothetical scenario is protected by the freedom of speech and nor incitement to genocide.

"#letsfighttheenemy" neither is an incitement to genocide. In fact, it has to be interpreted as an appeal for the whole population to stand together against the anarchy and the civil war, which is "the enemy" to fight. It is not Mr. Flaneli's fault, if some "ill-intentioned"[20] hardliners misinterpret that statement on purpose, just to get a justification for their plans to genocide.

Regarding his TV show, Mr. Flaneli's acts are protected by the freedom of information, which is the flipside of the freedom of opinion. Without the freedom of information, freedom of opinion doesn't make any sense since there is no possibility to form any opinion without being provided with information. There, Mr. Flaneli and his TV show played an important role for the population to live its freedom of opinion. In that show there never was any incitement to genocide, but expressions of opinions, which are protected by the freedom of opinion.

Mr. Flaneli was not involved in the discussion on his Facebook page. As previously shown, he is not liable for the comments other users post there. The first to be liable are the users themselves, the second is Facebook and the third is Mr. Oballo, who was in duty of the page. As previously shown,

[17] *Eser* (supra 14), p. 805.
[18] *Werle* (supra 13), note 602.
[19] http://avalon.law.yale.edu/18th_century/rightsof.asp (25/07/14).
[20] *Eser* (supra 14), p. 805.

there also is no commission by omission, so Mr. Flaneli cannot be held liable for not deleting any posts.

In addition, none of those acts is a direct incitement. Direct means "specifically urging another individual to take immediate criminal action rather than making a vague or indirect suggestion"[21]. Mr. Flaneli did not urge anybody to commit genocide. There are no statements of him, which are direct enough to be seen as urging. Even "#letsfighttheenemy" cannot be seen as more than a vague suggestion, in fact it even has no connection with the Benians, as previously shown.

*2. Mens rea*

The mens rea is furthermore not fulfilled. A double intent is necessary for Article 25 (3) lit. e) Rome Statute, by knowing of the public action and the direct inciting effect on the one hand and by "knowing and desiring that the persons to be incited by him would (…) act with the intent 'to destroy (…) a (…) group as required by Article 6 of the ICC Statute on genocide'"[22].

Of course, Mr. Flaneli knew, he was acting publicly, as he posted on Facebook and Twitter respectively broadcasted his TV show. However, there is no evidence for him knowing of the alleged direct inciting effect – which, as previously shown, in fact didn't exist – or for him knowing and desiring of the people acting with a genocidal intent. The only possible statement, "#letsfighttheenemy" has to be interpreted in another way, as previously shown, and there is no evidence for Mr. Flaneli knowing and desiring it to be misinterpreted.

***II. Defence***

Neither the actus reus, nor the mens rea are fulfilled. There is no need for any further defences.

**C) <u>Conclusion</u>**

Mr. Flaneli neither induced to crimes against humanity, since there was no definite group of people addressing his statements, nor incited anybody to commit genocide, since there was no direct incitement and no provable *mens rea*. All his statements are protected by the freedoms of speech, opinion and information. Therefore he is not guilty of the accused crimes.

[21] ILC, Report of the International Law Commission on the Work of its 48th Session (6 May – 26 July 1996), UN Doc A/51/10.
[22] *Eser* (supra 14), p. 806.

# CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated above, the Defense Counsel requests this Court to

DECIDE that,

1. The jurisdiction of the International Criminal Court is limited because of Article 17 (1) lit.a) of the Rome

2. Defendant is not criminally liable for genocide and crimes against humanity under the Rome Statute.