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**SITUATION IN FLANIA
IN THE CASE OF
*THE PROSECUTOR v. HAIL FLANELI***

Prosecutor's Memorial

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LIST OF ABBREVIATIONS

art.	Article (unless otherwise noted, Art. designates articles of the Rome Statute)
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY	International Criminal Tribunal for the former Yugoslavia
No.	Number
Rome Statute, Statute	Text of the Rome Statute of the International Criminal Court
UN	United Nations

TABLE OF AUTHORITIES

Cases

<i>Prosecutor v. Kayishema et al.</i> , Judgement, Case No. ICTR-95-1-T, 21 May 1991	21
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<i>Prosecutor v. Tadic</i> , Judgement, Case No. IT-94-1-T, 7 May 1997	47,50

Other Authorities

Triffterer/ Author (=Otto Triffterer, ed., Commentary on the Rome Statute of the International Criminal Court, 2nd edition, 2008).....	39,43,44,49,50,51
United Nations War Crimes Commission, <i>History of the UNWCC and the Development of the Laws of War</i> (1948).....	36

JURISDICTION

1. Since the situation of Flania has been referred by the UN Security Council *via* Resolution 9876 under Chapter VII UN Charter, the Court exercises its jurisdiction pursuant to art. 13(b).
2. The Court's jurisdiction derives from the authority to exert power by the Security Council: Pursuant to art. 25 and 103 UN Charter, every member of the UN agreed to accept and to carry out the Security Council's decisions. Following its competence to approve resolutions under Chapter VII, every member state is required to abide to these measures. Thus, adherence to this referral is obligatory.
3. As consequence of art. 13(b) which is not mentioned in art. 12(2), the Court's ordinary jurisdiction is superimposed and widened. For this reason the Court exercises personal jurisdiction over Flaneli, regardless his citizenship. His position as Information Minister neither creates an obstacle.¹
4. The Court also exercises *temporary jurisdiction* pursuant to art. 11(1). The Flanian civil war started in 2011 and hence after the entry in force of the Statute on 1 July 2002.
5. Furthermore, the case falls within the Court's range of authority by *material jurisdiction* pursuant to art. 5 enumerating genocide and crimes against humanity.
6. Thus the Court has jurisdiction.

¹*Al Bashir*, ICC-02/05-01/09, para 38.

ADMISSIBILITY

Applicability

7. When the Security Council refers a situation to the ICC, there is no obligation to meet the admissibility criteria. This is the consequence of art. 18(1) prescribing the necessary steps concerning admissibility questions and thereby only contemplating admissibility based challenges in case of either a State Party referral or *proprio motu* investigations by the Prosecutor.

8. However, even if the chamber finds that admissibility needs to be determined, the Prosecutor confirms the admissibility of the case on the following grounds:

Complementarity

9. According to the case law of the Court, the complementarity test in art. 17 sec. 1 lit. a) is a two-fold test, determining firstly “inactivity” and secondly “unwillingness”.

a. Inactivity

10. First, in order for national proceedings to be deemed as active the investigations must cover the same conduct and the same person.

11. Investigations were conducted only in view of “violations of public order”.

12. The Chamber should consider "whether the conduct that forms the basis of the crimes for which the Court seeks the person's surrender is reflected in the crimes for which the suspect stands accused at the national level"². "Substantially the same conduct"³ cannot be interpreted in a manner that would allow variation in the underlying facts and incidents, as such a flexible interpretation would undermine the very purpose of complementarity.

13. A punishment by a fine or imprisonment of a maximum period of six months clearly shows that the conduct investigated is not substantially the same as it would be with murder, inflicting serious bodily harm.

² *Gaddafi and Al-Senussi*, ICC-01/11-01/11, para 49.

³ *Muthaura and Kenyatta*, ICC-01/09-02/11-274, para 1.

14. No documents and further information about the investigations were submitted even though the state has a burden of proof.⁴ According to the Prosecutor, the allocation of the burden of proof to the State is warranted because the State has superior and often exclusive access to the relevant information and is also consistent with the *raison d'être* of the complementarity principle: to prove that a case is inadmissible, the State must establish that it is conducting a meaningful investigation that genuinely seeks to ascertain the criminal responsibility of the suspect. This is not the case with Flania.

15. The domestic investigations do not cover substantially the same conduct and cannot be seen as active.

16. Even if the chamber agreed on the substantial same conduct test, it should find that the State is clearly unwilling pursuant to art. 17(1)(a).

b. Unwilling and unable

17. Investigations were undertaken for the purpose of shielding *Flaneli* from criminal responsibility, art. 17(2)(a). There is a clear and substantial discrepancy between crime and punishment. A maximum of six months imprisonment proves the unwillingness of the State to prosecute acts, which could constitute the most serious crimes of concern to the international community. Indicting a person for “violation of public order” and by that escaping criminal responsibility for Genocide or Crimes against Humanity would be inconsistent with the purpose of positive complementation.

18. The incitement of genocide during the civil war, which cost the lives of 75,000 people, is of sufficient gravity. The “shocked” reaction of the international community also shows that the Court is dealing with a “most serious crime of international concern”.

GENOCIDE

19. With respect to the charge of genocide, Flaneli is criminally liable under art. 25(3)(e) and art. 6 by directly and publicly inciting others to commit genocide.

⁴ *Muthaura and Kenyatta*, ICC-01/09-02/11, findings by the Appeals Chamber.

Protected Group

20. The ethnic Benians constitute a protected group under art. 6. The joint demonstrations of the indigenous minorities from the regions Flania and Malania against the suppression of their rights and for equal treatment and representation, reveal a common self-identification. Furthermore, the different treatment of Benians as well as the clear distinction during official and private media statements, illustrate a dissociation and identification as another group by the majority before and during the conflict. Such self-identification or identification by others is sufficient for the existence of an ethnic group.⁵

Incitement

21. Flaneli's acts constitute public and direct incitement. As he had complete control over the creative and administrative policies and decisions of the TV-station, he is responsible for the program and therefore for all statements made by guests. By using statements in furtherance of his media policy he alienated the Benians with the help of the impact of supposed social and cultural scholars by stigmatizing the group as "uncultured and inferior".

22. He specifically and deliberately invited guests who propagated a non-existing danger of the Benians by accusing them as terrorists who "aimed to burn down the Republic of Flania" and who posed a dangerous threat to the "civilized values and way of life of the Fenian population". Such a process of alienating and a rising atmosphere of fear led to increased resentments against the targeted group and lowered people's inhibition threshold to commit genocide. Moreover, Flaneli as Information Minister represented the government. He even is responsible for invented statistics and fabricated reports which were publicized in times and in context of one-sided reports of other state owned channels.

23. Alongside, Flaneli operated online accounts where he wrote inflammatory and racist posts which are eminently suitable to further hatred. Due to the high number of posts he even had a personal media assistant who acted pursuant to Flanelis directions wherefore all uploads are accountable to him. Furthermore Flaneli's *prima facie* liability arises from the frequency of updates.

⁵ Kayishema et al., ICTR-95-1-T, para 98.

24. Clear evidence of direct and public incitement is the discussion about “starting some action soon to them disappear forever”. The wording “disappear forever” leaves no doubt that the destruction of a group is intended. Flaneli as the owner of the “facebook” page had the duty to delete these posts especially as a civil war already raged for one year. But Flaneli used the phrases in his show to which he invited some of the most radical FPP members who were active in the civil war and presumably active in the military. It must be concluded that Flaneli actively used the social media discussion to incite the public and members of the military.

25. Such uploads and updates were used to change the spotlight of conversations towards hate contents. This created more inflammatory impact as animosity and hatred were not only imposed by authorities but also internalised and intensified by ordinary people *via* discussions.

26. Such a combination of state furthered, internalised resentments and lowered inhibition threshold leads to a high danger for the protected group. Flaneli’s statement expressing it would be the best if every Benian disappeared and the whole population vanished as well as his latest Twitter post, “#letsfighttheenemy”, has to be seen in this light. Such expressions do not only create hate or fear but constitute a direct call to commit concrete acts. Thus Flaneli incited others to commit genocide.

Publicly and directly

27. Flaneli incited publicly as statements and posts were given *via* TV and internet which are public media. As an all-known media figure all statements and posts received a large number of viewers and followers which demonstrate the public impact of the inciting.

28. In order to determine directness it is sufficient to analyze the incitement in its context by taking into account the audience of the message.⁶ In context with previous programme, online content and statements like it “would be best for the Flanian population if every single Benian would disappear and the whole population would vanish” his last post can only be understood as a call to fight the Benians as enemies. In times of ethnic tensions and later during a civil war was the main audience, it is inconceivable that audience did not understand all meanings and implications.

⁶ Bikindi, ICTR-01-72-T, para 423.

29. The wording of art. 6 does not implicate any requirement of a contextual element as described in the Elements of Crime regarding genocide which, according to art. 9(1), shall assist the Court in the interpretation and application. However, the element is fulfilled.

30. The conduct took place during a civil war which already had cost lives of members of the Benians as a manifest pattern of similar conduct directed against the Benians. Additionally, the conduct took place as part of an anti-Benian state policy against and as part of an “extermination and resettlement plan” with the objective of exterminating the indigenous minority. Moreover, the context includes initial acts in an emerging pattern pursuant to art. 6(a) of the Elements of Crime which is fulfilled insofar as the massacre in Bua caused more than one third of the deaths of the civil war and Flaneli’s inciting constitutes an initial act to that emerging pattern. The context of similar conduct was a manifest pattern as even the UN Security Council recognized the said events as genocide.

Individual criminal responsibility

31. Due to the abandoning of the accessory principle in art. 25(3)(e) there is no necessity to prove that in fact genocide occurred or was attempted.⁷

32. Flaneli fulfilled the material elements with intent and knowledge as described in art. 30(2),(3) and therefore pursuant to art.30(1). Due to his control and influence, he was aware of all content and meant to engage in the conduct as required in art. 30 (2)(a).As Information Minister Flaneli must have been aware of the state’s policy as well as of the ethnic tensions and the impact of his inciting. By his continuous commitment he accepted the massacre in Bua as an outcome by reconciling himself with it and consenting to it which is enough to fulfill art. 30(2)(b).⁸

33. The *dolus specialis*, the intention to destroy, can be inferred from a certain number of presumptions of fact.⁹ Flaneli, as a member of government, has been aware of the “extermination and resettlement plan” with the objective of exterminating the Benian minority which corresponds with his media policy wherefore he used the ethnic tensions leading to certain specific attacks on Benians. The

⁷ Akayesu, ICTR-94-4-T, para 561 f.

⁸ Lubanga, Decision of 29 January 2007, ICC-01/04-01/06, para 352.

⁹ Akayesu, ICTR-94-4-T, para 523.

commitment of acts in furtherance of such a state policy of destruction constitutes an indication of an existing *dolus specialis*.¹⁰

34. Personal statements with racist and group-destruction-calling content show his intention to destroy the group. Due to the including of “every single Benian” and “the whole population” in his statements he intended to destroy the ethnic group of Benians as such in whole.

CRIMES AGAINST HUMANITY

35. The mass killings of August 7-9, 2012 constituted crimes against humanity pursuant to art. 7(1)(a),(b),(h) for which Flaneli must be held criminally responsible according to art. 25(3)(b).

Specific Elements

36. Crimes against humanity consist of underlying offences, the “specific elements”, and contextual element. During the massacre murder, extermination and persecution were committed as underlying offences.

Murder, Art. 7(1) (a)

37. Employing the case law’s self-evident requirement of one or more victims’ death caused “by an act or omission” of the perpetrator(s),¹¹ the Bua massacre with its 25,000 killed victims can easily be subsumed here. In any event, it does not need to be discussed whether the perpetrators must have premeditated the death and whether recklessness suffices, as such mass killing is unconceivable without at least some of the perpetrators having premeditated and intended the death of victims. This also holds true for the two other offences.

Extermination, Art. 7(1) (b)

38. Extermination pursuant to art. 7(1)(b) means group-focussed “murder on a large scale”.¹² In light of the inapprehensible high number of people killed, exclusively members of the group of the Benians, it remains undoubted that these events also constituted extermination.

¹⁰ Kristic, IT-98-33-A, para 223.

¹¹ Krnojelac, IT-97-25, para. 324.

¹² Triffterer/Hall, art. 7, para. 25, 94.

Persecution, Art. 7(1)(h)

39. The massacre formed persecution according to art. 7(1)(h). The Elements of Crime define persecution as severe deprivation of persons' fundamental rights by targeting these persons due to the identity of a group by targeting the group as such. To snuff out a person's life is the gravest deprivation of basic human rights and it seems most likely that in the course of this shoreless massacre even more fundamental rights of many victims were infringed. Observing the perpetrators targeting the Benians as the ethnically defined enemy of the Flanian society, this persecution was apparently carried out on political, racial and ethnic grounds as required by the Statute. The persecution was also linked to another acts enumerated in art. 7(1), namely murder and extermination.

Contextual Elements

Attack directed against a civilian population

40. The aforementioned acts were committed as part of a both widespread and systematic attack directed against a civilian population pursuant to the *chapeau* of art. 7(1) of the Statute.

Civilian Population as Target

41. A civilian population means any distinguishable group of people – whereby as its distinctive feature the one marking these people as the attack's targets suffices.¹³ Target of both the entire civil war and the concrete atrocities in Bua was the Benian population as such. Consequently, target of the attack at hand was a civilian population within the meaning of the *chapeau* of art.7(1).

Course of Conduct, Art. 7(1), Art. 7(2)(b)

42. First, the civil war as such, costing more than 75,000 people their lives, constituted an attack within the meaning of art. 7(2)(b). Second, also the specific offences can “constitute the attack itself” as “[t]here is no requirement that a separate attack against the same civilians, within which the murders were committed, should be proven.”¹⁴ As the killings in Bua also presupposed the multiple commission of the mentioned acts, the massacre itself constitutes an attack according to the Statute as well.

Nexus

¹³ Cf. Werle, *Völkerstrafrecht*, para. 862.

¹⁴Triffterer/Ambos, art. 7, para. 7 based on *Akayesu*, ICTR-96-4-T, para. 581.

43. In order to establish the sufficient nexus between the underlying offences and the attack pursuant to the *chapeau* of art. 7(1), indicia such as “the nature of the events and circumstances surrounding the acts; the temporal and geographical proximity of the accuseds acts with the attack” must be employed.¹⁵ Thereby, “of particular significance will be the manner in which the acts are associated with, or further the policy underlying the attack.”¹⁶

44. It cannot be disputed that this massacre in the course of civil war completely fitted into the characteristics and goals of this war as a whole and fell into its geographical and temporal scope. Above all, the most important criterion, the close relationship between the underlying offences and the “policy underlying the [entire] attack”, is absolutely met as the policy consisted of or was most significantly expressed by the Flanian military’s anti-Benian “‘extermination and resettlement plan’, with the objective of exterminating the [...] Benian minority”.

45. Apparently, the military forces in Bua complied with their leaders’ plan as they killed “more than 25,000 Benian people” there. These events are the clearest outcome of the implementation of the “extermination plan” executed by soldiers in furthering a state’s policy associating the perpetrators.

46. Even if there were any doubts concerning the “extermination and resettlement plan”, this would in no way mean that the anti-Bentian policy did not exist. In any event, a policy can be inferred from the appearance and context of the acts and does not “need to be formalized”.¹⁷ The overall circumstances in Flania in the years 2011-2013 clearly reveal the presence of the policy even without relying on the mentioned military plan.

47. From the beginning, the Benians had cause to complain about the permanent violation of their rights by the government. Flaneli himself, concentrating the complete power about the formation of public opinion in Flania in his person by his positions granting him control over the information policy and the national television and making him “one of the most influential members” of the society, thereby always also representing the government, inflamed the anti-Benian atmosphere and misused its authority to fantasise publicly about the disappearance of the Benians. Each of these findings clearly show the existence of a policy underlying the civil war as well. And as after Flanelis calling to fight the

¹⁵Triffterer/Ambos, art. 7, para. 10.

¹⁶*Ibid.*

¹⁷Tadic, IT-94-1-T, para. 653; Akayesu, ICTR-96-4-T, para. 580.

“enemy” on Twitter his inhuman fantasies became reality, there can be no doubt that the acts in Bua expressed this policy and were part of the overall attack.

Furtherance of state or organizational policy

48. The “policy element” of art. 7(2)(b) as an additional separate requirement remains, which is apparent in the light of the aforesaid, “superfluous”:¹⁸ That the attack took place pursuant and in furtherance of such policy to commit such attack has already been shown.

Widespread and systematic character

49. It suffices for the attack to be either widespread *or* systematic. Both alternatives are fulfilled. How these thresholds have to be applied concretely is well-established by case law: E.g. in *Tadic*, the Court found that an attack can be both widespread and systematic even where it consisted of offences against the population of only one municipality.¹⁹ As to the “widespread” prerequisite regularly the number of victims will be decisive so that even an attack on a single building might constitute a widespread attack when it causes thousands of deaths.²⁰ Compared with the results of the Bua massacre, and the entire civil war, it follows that the attack was both widespread and systematic.

Individual Criminal Responsibility

50. Concerning the established crimes against humanity Flaneli is criminally responsible as he induced their commitment pursuant to art. 25(3)(b) where all mentioned forms of criminal participation are to be understood as modes of “prompting another to commit a crime”²¹, “instigating” him or her, or, broader speaking, influencing a person to commit a crime.²² On this basis inducing regularly is established where a person influences another in a psychologically persuasive way.²³

51. As inducing constitutes a form of accessory liability, it must be noted first that crimes must have been committed by “direct” perpetrators. As figured out, the killings during the massacre must be described as crimes against humanity according to the Statute.

¹⁸ Triffterer/Ambos, art. 7, para. 12.

¹⁹ *Tadic*, IT-94-1-T, paras. 660, 714-718.

²⁰ Triffterer/Ambos, art. 7, para. 12.

²¹ Cassese, p. 197.

²² *Gbagbo*, Decision 12 June 2014, ICC-PTC I, para. 243.

²³ Triffterer/Ambos, art. 25, para. 15.

52. As to the psychologically persuasive prompting, Flaneli's activities are characterised best as "poison" according the ICTR case law which confirmed the long-standing *Streicher* judicature.²⁴ The psychologically persuasive notion also reveals that in the fact that Flaneli was not officially a member of the military forces no obstacle for establishing his persuasive influence can be seen as persuasiveness does not hinge on questions of official competency.

53. According to his authority as paramount opinion leader with both an official and journalistic nimbus many people orientated themselves according to the attitudes, slogans and emotions transported by him and his public forums.

54. The persistent allegations and statements against Benians infected others minds to follow the government's lead. It appears particularly perfidious that Flaneli did everything to push hate propaganda by using manipulative methods.²⁵ By misusing media Flaneli succeeded not only in reaching the biggest audience possible, but also in letting his vision of anti-Benian mass murder become reality. To find Flaneli guilty of inducing by psychological persuasion via mass media it is no harm that he was assisted by his personal media assistant Oballo who acted solely on his demand.²⁶

55. All events and activities mentioned establish the exercising of psychological influence to commit crimes. As to the question of causation of this influencing and the actual occurrence of crimes it is sufficient to note that the massacre happened in Flaneli's hometown and that it appears that the massacre took place immediately after the "disappear forever" discussion on Flaneli's "facebook" page and his "#letsfighttheenemy" post, especially since the shortness of time between the persuading acts and the commission of the crimes is found to be the decisive point in determining the existence of the causal nexus.²⁷

Mental Elements

²⁴*Nahimana et al.*, ICTR-99-52-T; para.981.;*Streicher*, p. 302.

²⁵See paras. 22, 26.

²⁶Cf. para. 23.

²⁷Cf. Cassese, p. 197 relying on ICTR case law.

56. To hold an instigator criminally liable it suffices to “act [...] with advertent recklessness, in the sense of an awareness of the substantial likelihood that a crime will be committed an acceptance of that risk”²⁸.

57. Given the fact that Flaneli must have known about his influence and the special circumstances in the heated atmosphere of Flanian public it remains without any question that Flaneli at least was aware of the substantial likelihood that a massacre like that in Bua will be committed and accepted that risk.

58. Hence, the Prosecutor submits that the Court ought to confirm the charges in case of Flaneli for genocide as defined in art. 6 (a) and crimes against humanity as defined in Art 7 (1). (a)(b)(h) ICCSt, to put an end to his impunity.

²⁸Cassese, p. 197, paraphrasing Kordić and Cerkez, AC, § 112.

