THE INTERNATIONAL CRIMINAL TRIBUNAL FOR TIMOSHINE

AT BRIHANE, TIMOSHINE

IN THE APPEALS CHAMBER

Criminal Appeal No._____/2010

(Under Art. 24 of the Statute of the International Criminal Tribunal for Rwanda)

Alijahan ... Appellant

v.

Prosecutor ...Respondent

Written Submissions on Behalf of the Appellant

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STATEMENT OF JURISDICTION

The Appellant has approached this Hon'ble Court under Art. 24 of the Statute of the International Criminal Tribunal of Rwanda. The Respondent humbly submits to the jurisdiction of this Hon'ble Court.

STATEMENT OF ISSUES

1. WHETHER THE TRIBUNAL HAS JURISDICTION TO HEAR THE MATTER?
2. WHETHER ALIJAHAN'S RIGHT TO FAIR TRIAL HAS BEEN VIOLATED?
3. WHETHER THE EVENTS BEFORE 1ST JANUARY 2005 CAN BE ADMITTED AS EVIDENCE?
4. WHETHER ALIJAHAN IS GUILTY FOR GENOCIDE?
5. WHETHER ALIJAHAN IS GUILTY FOR DIRECT AND PUBLIC INCITEMENT TO GENOCIDE?
6. WHETHER ALIJAHAN IS GUILTY FOR CONSPIRACY TO COMMIT GENOCIDE?
7. WHETHER ALIJAHAN IS GUILTY UNDER THE JOINT CRIMINAL ENTERPRISE DOCTRINE?

8. Whether Alijahan is individually responsible under article 6(1) of the statute?

9. Whether Alijahan is guilty under the command responsible doctrine under article 6(3) of the statute?

STATEMENT OF FACTS

Tilen's and Cotene's are two groups within Revate, a state in the Union of Timoshine. There had been occasional instances of religious tension between the two groups. In another incident of such a nature that took place on and between 15th to 18th August 2005, thousands of persons were killed. The matter was reported to have been a result of the killing of Bebe Remedeev, a Tilen religious leader allegedly by Cotene's on 14th August 2005. The Centre Government had to use military force to restore peace in the state.

The accused, Alijahan, the Chief Minister of Revate was widely criticized by the media and local and global NGOs. He was held responsible for the large scale massacres that took place. The matter became subject to much public discussion that the matter was referred to the United Nations Security Council (hereinafter "SC"). The SC passed a Resolution No. 101/06 setting up a Tribunal for prosecution of persons responsible for the events.

On 20th September 2007, the Prosecution filed an indictment charging Alijahan with (i) *Genocide under Art. 2(3) (a) of the Statute of the International Criminal Tribunal for Rwanda(hereinafter "Statute")* (ii) *Conspiracy to commit Genocide under Art. 2(3)(b) of the Statute* (iii) *Direct and Public Incitement to commit Genocide under Art.2(3)(c) of the Statute* (iv) *Joint Criminal Enterprise under Art. 6(1) of the Statute or in the alternative for planning, aiding, abetting, instigating and ordering the crimes* (v) *superior responsibility under Art.6(3) of the Statute*. The Joint Criminal Enterprise allegedly was composed of Alijahan, his wife Yashode, businessman K.R. Dolme, the area Superintendent of Police Mr. Ricardo Melena and Xen, a leader.

The allegations levelled against Alijahan included (A) *making inciting speeches at a public rally on 15th August 2005 instigating Tilen's against Cotene's* (B) *participation with Dolme in the large scale killings of Cotene's in Village Zenotia* (C) *participation in the killings of Cotene's in Town Rodin on 15th August 2005 by the policemen* (D) *discussions on the situation with Political Party YLS's Youth Wings which had a strong Tilen affiliation and organising a meeting at the Yuvkone cricket stadium for the purpose of protecting the "right minded people" in the state from anti-social elements* (E) *participation in the meeting with Melena at the stadium in which allusions to the need for protecting Tilen's from Cotene's were made* (F) *killing of Cotene's at Housing Colony MRF on 16th August 2005 by a group led by Mr. Melena* (G) *discussions at his house between Melena, Dolme, Yashode and himself regarding the need to take stern action against Cotene's on the night of 31st December 2004* (H-L) *participation in meetings with Melena, Dolme, and Yashode which centred on the need to make Revate a completely Tilen-populated state*.

At the Defence opening statement, extensive reference was made to the murder of Bebe Remedeev and that the killings that took place subsequently were a reaction to it. The Defence sought permission to produce 30 witnesses in connection with the murder. The Trial Chamber denied permission. The Trial Chamber issued its judgement on 10th December, 2008 finding Alijahan guilty of all charges and sentenced him to life imprisonment. Alijahan has appealed against this decision before the Appeals Chamber of the Tribunal.

SUMMARY OF PLEADINGS

1. THE TRIAL CHAMBER PROCEEDINGS ARE INVALID SINCE THE TRIBUNAL DOES NOT HAVE THE JURISDICTION TO TRY THE APPELLANT.

The establishment of the Tribunal by the Security Council (hereinafter "SC") Resolution No. 101/06 is unlawful since the SC does not have powers to establish judicial tribunals under Chapter VII of the UN Charter. The SC Resolution is null and void since it affects Timoshine's sovereignty as it conflicts with Timoshine's Constitution. Since genocide is not recognized as a crime in Timoshine, consent to adhere by the SC decision is vitiated due to conflict with the Timoshine Constitution which prevents retrospective legislation.

2. THE TRIAL CHAMBER PROCEEDINGS ARE ILLEGAL AND VOID SINCE THEY VIOLATED THE FAIR TRIAL PROVISIONS IN THE ICTR STATUTE.

The denial of permission by the Trial Chamber to the defence to produce evidence in connection with Bebe Remedeev's murder, which was crucial to their case, and the denial of certificate of appeal against the decision of the Trial Chamber was a violation of the principle of 'equality of arms'. Hence, Alijahan's right to fair trial under Article 20(2) of the ICTR Statute were violated.

3. ALIJAHAN IS NOT GUILTY OF GENOCIDE.

Genocide did not occur. In any case, Genocide is impossible as the Cotene's do not form a religious or ethnic group. Stable and permanent groups and subjective groups are not protected by the statute. Intention for genocide requires motive and this was missing. Further, *dolus specialis* is also missing. There was no intention to destroy a substantial part of the group. Alijahan did not commit any act listed in Art. 2(2).

4. ALIJAHAN IS NOT GUILTY OF DIRECT AND PUBLIC INCITEMENT TO GENOCIDE.

A conviction for any incitement offence is sustainable only if the parent offence was legally possible. Since the Cotene's were not a protected group, a conviction for genocide for destroying them is a legal impossibility. Further, incitement cannot be prosecuted unless there is resultant genocide, which has not been established in the instant case. Since the record does not establish that Alijahan intended to destroy the Cotene's as such, or that he even intended to destroy them in the first place, *mens rea* cannot be imputed to Alijahan. Finally, the threat in Alijahan's statements was neither imminent, nor direct and was at worst, an act of hate speech or ethnic cleansing which not punishable under the Statute.

5. ALIJAHAN IS NOT GUILTY OF CONSPIRACY TO COMMIT GENOCIDE.

An objection is raised regarding the admissibility of evidence that antedates the temporal jurisdiction of the Tribunal. A charge cannot be based on such events. Furthermore, they cannot be admitted as evidence as is evident from the SC debate while extending the temporal jurisdiction of the Tribunal.

In order to prove conspiracy, it has to be established that there was an agreement between the parties. No agreement to *destroy* the Cotene's can be shown in the instant case as Alijahan merely decided to make Revate a Tilen state along with the others.

6. ALIJAHAN IS NOT A PART OF JOINT CRIMINAL ENTERPRISE

For a conviction under the joint criminal doctrine (hereinafter "JCE") there needs to be a common purpose. It cannot be inferred beyond reasonable doubt that there was a common purpose to destroy the Cotene religious group. Alijahan's participation in the alleged JCE does not establish a link in the chain of causation. Furthermore, Alijahan did not have the required intent to destroy the Cotene's in particular and he was against enemies in general. Thus, he is not responsible under the first form of JCE for genocide. Alijahan cannot be held guilty for Direct and public to commit genocide under the third form of JCE because the definition of common purpose should be strict and that the accused cannot be held guilty under the third form of JCE unless specifically pleaded in the indictment.

7. ALIJAHAN IS NOT RESPONSIBLE FOR PLANNING, INSTIGATING, ORDERING OR AIDING AND ABETTING GENOCIDE

Alijahan's substantial participation in designing the criminal conduct of genocide cannot be proved from the facts. There is no nexus between his speech and the genocide that took place. He did not order any of the crimes and he was merely against those whom he considered the enemies of the state. Furthermore, for aiding and abetting, both need to be proven simultaneously which has not been satisfied here. In any case, Alijahan did not possess the requisite *mens rea* for abetting genocide. He is not individually responsible under Art. 6(1).

8. ALIJAHAN IS NOT RESPONSIBLE UNDER THE ART. 6(3)

Alijahan did not exercise any authority, *de jure* or *de facto*, over Dolme, Melena, the youth wings' heads or the policemen. There is no chain of command present and Alijahan is not personally responsible for their acts. Substantial influence is not sufficient to prove superior-subordinate relationship. The *mens rea* requirement for civilian superiors is higher than that for military commanders. Although Alijahan addressed a rally after Bebe Remedeev's death which was also attended by Dolme, it is information not sufficient for him to conclude that Dolme would have committed the crime. Furthermore, he merely asked the youth wings' heads to spread the message of 'self-defence' and had asked Melena to be present at the stadium to provide cover. Hence, Alijahan cannot be held responsible under Art. 6(3).

PLEADINGS

1. THE TRIBUNAL DOES NOT HAVE THE JURISDICTION TO HEAR THE PRESENT MATTER.

1.1. The Appeals Chamber has the jurisdiction to hear a challenge to jurisdiction of the Tribunal.

According to Rule 72(B) of the Rules of Procedure and Evidence of the ICTR (hereinafter "RPE), all preliminary motions including motions on jurisdiction should be presented in the Trial Chamber (hereinafter "TC") stage. However, interlocutory appeals from the Trial Chamber decision, which also include the legality of establishment of the Tribunal (a question of jurisdiction), can be presented before the Appeals Chamber.[1]

1.2. The establishment of the Tribunal by Security Council Resolution No. 101/06 is unlawful.

1.2.1. The Tribunal has the jurisdiction to review the Security Council Resolution No. 101/06.

It is submitted that the judicial review of Security Council (hereinafter "SC") Resolutions is permitted indirectly for the determination of legal consequences arising as a result of exercise of such power by the SC.[2] In *Tadić*, the Appeals Chamber held that the ICTY has the jurisdiction to examine the question of challenge to its jurisdiction based on the invalidity of its establishment through a SC Resolution.[3] Also in *Kadi*, it was held that review of SC Resolutions is permitted in questions regarding violations of *jus cogens*.[4] Hence, the tribunal can review the SC Resolution establishing it.

The legality of the establishment of the Tribunal is challenged on two grounds stated below.

1.2.2. The Security Council does not have the powers to establish judicial tribunals.

1.2.2.1. The power given to the SC under Chapter VII of the UN Charter for maintenance of international peace and security does not explicitly or implicitly envisage the formation of judicial tribunals. What is envisaged in Art. 41, from which the SC purports to derive the power for establishing the present Tribunal, is economic and political measures and not judicial measures. The measures which can be used by the SC are limited to such categories and cannot be stretched so far as to give the SC wide discretionary powers.

1.2.2.2. *Arguendo* the measures mentioned in Art. 41 are not exhaustive, applying the principle of *ejusdem* generis - a recognized means of treaty interpretation under Art. 32 of the Vienna Convention on Law of Treaties (hereinafter "VCLT")[5] to Art. 41 of the UN Charter -–

[1] *Prosecutor* v. *Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-T (ICTY Appeals Chamber, October 2, 2005) ("*Tadić Jurisdiction*").
[2] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 25 June 1971, 1971 I.C.J. Reports 16; Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, [1954] I.C.J Reports 47.
[3] *Tadić Jurisdiction*.
[4] *Yassin Abdullah Kadi* v. *Council of the European Union and Commission of the European Communities*, Case T-305/01 (European Court of First Instance, September 21, 2005) ("*Kadi*").
[5] AUST, *Modern Treaty Law and Practice* 200 (Cambridge: Cambridge University Press, 2000).

the SC can only take political measures, political measures being the common genus here.

1.2.3. The SC Resolution No. 101/06 establishing the Tribunal is null and void.

It is submitted that it is *jus cogence* norm that sovereignty of a State, [6] in this case Timoshine, should not be violated by the establishment of the Tribunal, and giving the Tribunal the power to review this resolution.[7] In the present case, Timoshine is a signatory to the Convention on Prevention and Punishment of the Crime of Genocide (hereinafter "the Genocide Convention") of 1948. However, a treaty cannot become law of the land and cannot be brought into force unless the Parliament passes legislation under Art. 253 of the Constitution of India enforcing the same,[8] which is in *pari materia* with the Constitution of Timoshine. Art. V of the Genocide Convention requires the parties to enact legislation in accordance with their respective Constitutions for giving effect to the Genocide Convention in their domestic legal systems. There is no statute giving effect to the Genocide Convention in Timoshine as the Genocide Convention Act, 1960 although enacted, has not been notified in the Official Gazette. Since there is no law in the absence of notification, Timoshine has no legal obligations arising from the Genocide Convention and genocide is not recognized as a crime under its domestic law. Thus, it is submitted that any consent given by the Timoshine government to the Security Council to take action is invalid as it is inconsistent with the provisions of Article 20 (1) of the Constitution which grants protection against ex-post facto laws.

Art. 46 of the VCLT, 1969 states that the consent of a state to be bound by a treaty can be invalidated if adherence to the treaty resulted in the violation of its 'internal law of fundamental importance.' This provision applies to the UN Charter as well since the ICJ has held that the provisions of the Vienna Convention can be considered as a codification of already existing customary law.[9] Therefore, the consent of Timoshine to be bound by the SC Resolution No. 101/06 is vitiated by virtue of it being inconsistent with the Constitution of Timoshine which is its 'internal law of fundamental importance'. Hence, the action taken by the Security Council in establishing the Tribunal is to be regarded as a violation of Timoshine's fundamental law and hence of its sovereignty.

In the light of the above mentioned two grounds, it is submitted that the establishment of the Tribunal was unlawful and that it lacks jurisdiction to try the Appellant.

2. THE TRIAL CHAMBER PROCEEDINGS ARE ILLEGAL AND VOID SINCE THEY VIOLATED THE FAIR TRIAL PROVISIONS IN THE ICTR STATUTE.

[6] M. Cherif Bassiouni, "International Crimes: "Jus Cogens" and "Obligatio Erga Omnes", 59(4) *Law and Contemporary Problems* 63 (1996) at 74.
[7] *Kadi*.
[8] *State of West Bengal* v. *Kesoram Industries*, (2004) 10 SCC 201; *Maganbhai Ishwarbhai Patel* v. *Union of India*, AIR 1969 SC 783.
[9] BRUNO SIMMA, *The Charter of the United Nations: A Commentary* 30 (New York: Oxford University Press, 1994).

2.1. There was a violation of principle of 'equality of arms' thus resulting in a violation of the Appellant's right to a fair trial.

The principle of 'equality of arms' between the prosecutor and accused is an essential element of the fair trial guarantee given to the accused.[10] In *Delcourt* v. *Belgium*, it was held that the conditions of a trial should not put the accused unfairly at a disadvantage. [11] 'Equality of arms' requires that there is parity in treatment of both the parties in the trial.[12] It is submitted that there was a violation of this principle, thereby the right to fair trial under Art. 19(1) and Art. 20(2) of the Statute, on two grounds.

2.1.1 The Appellant was not permitted to present relevant and admissible evidence

It is submitted that the TC's decision as of 3rd June 2008 was in violation of Rule 89(B) and 89(C) of the RPE, which permit presentation of all probative evidence in order to ensure a fair determination of the matter, and Art. 20(4)(e) of the Statute, which gives the accused the right to get all witnesses on his/her behalf examined.. The Appellant's case rested on the fact that the murder of Bebe Remedeev (hereinafter "BR") by the Cotene's had resulted in reactions in the form of large scale killings of Cotene's and that it was not a systematically killing of a religious group. Hence, the production of the 30 witnesses in connection with BR's murder was of sufficient probative value to the Appellant's case and in the absence of express prohibitions against presentation of certain evidence, the TC cannot without cause deny the accused his right to present evidence in his defence.[13] Thus, and Art. 20(4)(e) of the Statute.

2.1.2. The Appellant was not granted a certificate of appeal against the TC decision

According to Rule 73(B) of the RPE, the Appellant has a right to an interlocutory appeal on an issue which would significantly affect the fair and speedy conduct of proceedings or the outcome of the trial. The right to appeal is also a constituent of the fair trial guarantee given to the accused.[14] The decision of the Trial Chamber to deny the motion for certificate of appeal was erroneous as the production of evidence in this case was pertinent to the Appellant's case and could have a significant bearing on the outcome of the trial.

3. ALIJAHAN IS NOT GUILTY OF GENOCIDE.

3.1. Genocide is an extreme crime committed to destroy a group or part of it.

History of the crime indicates that genocide is the ultimate crime,[15] and no derogation on the point is permitted.[16] The ICTY in *Kupreskic* described genocide as "*most inhuman crime*".[17]

[10] *Prosecutor* v. *Duško Tadić*, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999) ("*Tadić Appeal*").
[11] *Delcourt* v. *Belgium*, Series A, No. 11 (European Court of Human Rights, January 17, 1970).
[12] *Tadić Appeal*.
[13] *See generally* Section 3, Chapter VI, Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.
[14] *Prosecutor* v. *Zlatko Aleksovski*, Case No. IT-95-14/1-A (ICTY Appeals Chamber, March 24, 2000).
[15] Akhavan, 'Enforcement of the Genocide Convention: A Challenge to Civilization', 8 *Harvard Human Rights Journal* 29 (1995).
[16] *See generally*, *Oppenheim's International Law* (9th edn, R. Jennings & A. Watts eds, volume I, London: Peace, 1993); Ian Brownlie, *Principles of Public International Law* (6th edn., Oxford: Oxford University Press, 2003).
[17] *Prosecutor* v. *Kupreškić et al* , Case No. IT-95-16-T (ICTY Trial Chamber, January 14, 2000).

Clearly, the crime is intentionally directed to be unique, thereby making it the most serious and reprehensible of them all, thus, being called the "crime of crimes".[18] Thus, only exceptional cases where extreme and most inhuman form of persecution has occurred can qualify as genocide. Respondents have not shown that the clashes amount to be of the most serious nature. It is submitted that the attack on Cotene's was an instinctive reaction which in the given circumstances does not make it an extreme crime.

3.2. Cotene's are not a protected group under the Statue.

As stated earlier, for genocide to be constituted, a national, religious, ethnical or racial group must exist.[19] It is submitted that Cotene's are not a protected group under the Statute. The Cotene's are not a national or racial group. In order to be considered an ethnic group, they must share the same language and culture[20] which cannot be inferred from the facts. As regards religious group, it is submitted that the account of religious tension between Tilen's and Cotene's refers to religion in a broad sense. Given that there is no common understanding of the term 'religion', it must be strictly construed and therefore should only include traditional religions or religions and beliefs with analogous institutional characteristics as has been defined in the past.[21] It is submitted that there is nothing to indicate that the Cotene's meet this standard of the term religion. It is also submitted that there can be groups within the same religion and there have been various instances of clashes between two groups of same religion in the past.[22] Such groups which are part of the same religion in general cannot be classified as protected group under the Statute. Therefore Cotene's cannot be assumed to be a religious group.

Secondly, the concept of 'stable and permanent group' which emerged in *Akayesu*, to hold such a group to be a protected group allegedly on the basis of the *travaux* of the Genocide Convention is wrong. It is submitted that this is an incorrect understanding of the *travaux* as the authors of the Convention excluded political groups as a practical compromise and not because they are not stable and permanent.[23] Further, the preparatory works of a document are to be used to interpret it only when there is some level of ambiguity in the text,[24] not to rewrite unambiguous statutes.[25] It is submitted that saying that the Statute protects all stable and permanent groups expands the definition of crimes by analogy and therefore such a construction cannot be upheld. It is further submitted that the argument that a group exists in the eyes of the perpetrators of the crime and therefore their acts can be punished as genocide[26] is untenable. Such an interpretation criminalizes an impossible act on the basis of the mental make-up of the defendants, which was not and could not have been the intention

[18] *Prosecutor* v. *Akayesu*, Case No. ICTR-96-4-T (ICTR Trial Chamber I, September 2, 1998) ("*Akayesu*").
[19] Article 2, Statute of the ICTR, 1994.
[20] *Akayesu*.
[21] SCHABAS, *Genocide in International Law*, 128 (Cambridge : Cambridge University Press, 2000). ("SCHABAS 2000"); *Prosecutor v. Kayishema and Ruzindana* Case No. ICTR-95-1-T (ICTR Trial Chamber, May 21, 1999). ("*Kayishema and Ruzindana*"); *Akayesu*.
[22] Shimon L. Khayyat, "Relations between Muslims, Jews and Christians as Reflected in Arabic Proverbs" , 96(2) *Folklore* 190 (1985).
[23] SCHABAS 2000, *supra* note 21, at 130.
[24] Art. 32, ViennaCovention on Law of Treaties, 1969.
[25] SCHABAS 2000, *supra* note 21, at 132.
[26] *Kayishema and Ruzindana*.

behind the convention.[27] By allowing subjective groups to be enough to constitute genocide, the ICTR expanded the area of application of the provision and a strict interpretation of the Statute was not followed, and thus was wrongly decided.[28]

It is further submitted that the argument that a group exists in the eyes of the perpetrators of the crime and therefore their acts can be punished as genocide[29] is untenable. Such an interpretation criminalizes an impossible act on the basis of the mental make-up of the defendants, which was not and could not have been the intention behind the convention.[30]

3.3. The clashes were not deliberate acts designed to destroy Cotene group.

As argued above, the attack on Cotene's was an instinctive reaction. Since genocide is such a serious crime, "special intention" is required to be established for the crime of genocide.[31] In the present case, the same cannot be found. In its official report, the UN has clarified that when genocidal intent is missing, acts such as "*attacks on villages*, *killing of civilians*, *rape*, *pillaging and forced displacement*" would not be classified as genocide.[32] In Sudan where similar violence was recorded, the United Nation by its report declared it to not be an incident of genocide.[33] Similar incidents which occurred in Gujarat in 2002 were not declared to be genocide and similar was the situation in case of NATO bombings where it was held that there was no element of intention directed against a group.[34] Since there is nothing to indicate that the clashes in the case at hand were any different, the said incident cannot qualify as genocide. Thus, Alijahan cannot be convicted of genocide.

3.4. The clashes were not intended to destroy the group wholly or in parts.

In order to prove the mental element of Genocide, it must not only be shown that there was intent against the protected group as such, but also that the intent was to destroy that group, wholly or in part. It is accepted that the words "in part" mean at the very least a substantial part of the group.[35] In the instant case, it is submitted that no such intent can be made out. The clashes only occurred between certain Tilen and Cotene groups living in Revate, which is a State within the Union of Timoshine. It's only a reasonable assumption, there were people belonging to the Cotene group living in the rest of Timoshine. There is nothing to indicate some intention whatsoever against any of them. It is submitted that intention against a small, localized percentage of a group cannot be equated with an intention to destroy the group in substantial part.

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[27] SCHABAS 2000, *supra* note 21, at 110.
[28] Mathew Lippman, "The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later", *Arizone Journal of International and Comparative Law*, 15 Ariz. J. Int'l & Comp. Law 415, 453 (1998).
[29] *Kayishema and Ruzindana*.
[30] SCHABAS 2000, *supra* note 21, at 110.
[31] *Akayesu*.
[32] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General: Pursuant to Security Council Resolution 1564 of 18 September 2004 (Geneva, 25 January 2005).
[33] *Id*.
[34] Guglielmo Verdirame, "The Genocide Definition in the Jurisprudence of the ad hoc tribunals", 49 (3) *The International and Comparative Law Quarterly* 578 (2000) at 584.
[35] SCHABAS 2000, *supra* note 21, 110; *Akayesu; See also*, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T (ICTR Trial Chamber, May 15, 2003) ("*Semanza*"); *Prosecutor* v. *Goran Jelisić*, Case No. IT-95-10-T (ICTY Trial Chamber I, December 14, 1999) ("*Jelisić")*; *Prosecutor* v. *Nicolic*, Case No. IT-94-2A, (ICTY Appeals Chamber, February 4, 2005).

3.5. *Arguendo* Alijahan did not commit the genocide.

To convict Alijahan for genocide, the prosecution has to prove that Alijahan committed at least one of the acts listed in Art. 2(2) of the Statute. It is submitted that he committed none of them. When people were attacked in Village Zenotia (Allegation B), Alijahan was moving away from the scene of crime. There is nothing to indicate that he caused the killing at the said place. When the police were interrogating 15 people in the presence of Alijahan (Allegation C), there is nothing to indicate that the act was committed because the people were part of a group, which is a necessary ingredient to prove genocide under Art. 2 of the Statute. Finally, on the night of 16th August 2005, there is nothing to indicate that any of 5 acts mentioned in Art. 2 of the Statute were committed against any person belonging to the Cotene's.

4. ALIJAHAN IS NOT GUILTY OF DIRECT AND PUBLIC INCITEMENT TO GENOCIDE.

4.1. Incitement cannot be prosecuted unless it is resulting in genocide as the drafters intended to punish only successful Incitement.

Although it has been held that incitement is an inchoate offence,[36] it is humbly submitted that this conclusion is wrong in light of the *travaux* and custom. In the absence of a definition of incitement in the Statute, the Genocide Convention should be used, from where the definition has been borrowed. The draft Article of the Genocide Convention punished, "*Direct and public incitement to any act of genocide*, *whether the incitement be successful or not*." Belgium proposed deletion of the phrase, 'whether the incitement be successful or not',[37] which was opposed by other delegations, who wanted to also punish unsuccessful incitement.[38] The Belgium amendment was however accepted,[39] clearly indicating that drafters intended to punish *only successful incitement*. The International Law Commission also provided for incitement to apply, only to a crime that '*in fact occurs*'.[40] In the present matter, it has already been argued that there was no genocide that occurred in Revate. Unless it is successfully proved that genocide occurred in Revate and was caused by Alijahan, the accused cannot be convicted of the same.

4.2. In any event, a charge of direct and public incitement cannot be sustained.

4.2.1 The appropriate standard of imminence has not been satisfied.

The correct test has been elucidated in *Akayesu*, which is a carbon copy of the Hand test of imminence.[41] The Proxmire Act, applying this test, defines incitement as urging another to engage *imminently in conduct* in circumstances under which there is a *substantial likelihood*

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[36] *Akayesu*; Gregory Gordon, "'A War of Media, Words, Newspapers, and Radio Stations': The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech", 45 *Va. J. Int'l L.* 139 (2004).
[37] UN Doc. A/C.6/217; UN Doc. A/C.6/SR.84 (Kaeckenbeeck, Belgium).
[38] UN Doc. A/C.6/SR.84 (Abdoh, Iran); UN Doc, A/C.6/SR.85 (Manini y Rios, Uruguay).
[39] UN Doc. A/C.6/SR.85 (19 in favour, 12 against, with 14 abstentions).
[40] Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its Forty-Eighth Session, 1996, U.N. Doc. A/51/10 (1996) ("*Draft Code*").
[41] *Masses Publishing Co*. v. *Patten*, 244 F. 535(S.D.N.Y. 1917) ("*Patten*"); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969); Ameer Gopalani, "The International Standard of Direct and Public incitement to Commit genocide: An Obstacle to U.S. Ratification of the International Criminal Court Statute", 32 *Cal. W. Int'l L.J.* 87 (2001).

of *imminently causing such conduct*. Both *Akayesu* and *Ruggiu*[42] noted a direct link between the speech and the resulting genocide. There must be proof of a *possible* causal link, irrespective of whether the Incitement is successful or not.[43] The standard is that the speech must "*imminently threaten interference with the lawful and pressing purposes of the law*."[44] In *Hess* v. *Indiana*,[45] '*We'll take the street later*' was held to be protected. The Court stated, "*at worst [the statement] amount [ed] to nothing more than advocacy of illegal action at some indefinite future time*." Alijahan did not make any statement to anyone which could be used to show that he urged them to immediately, *imminently* start killing people from the Cotene group. On the contrary, Alijahan condemned violence and was positively disturbed when someone suggested it (Allegation A). His statement to the youth wings' heads (Allegation D) only indicates that he was concerned about the attack on people from 'anti-social' members in the State. As regards Allegation G, the message passed on the group collected outside the accused's house does not cause imminent danger to the Cotene group.

4.2.2 The appropriate standard of directness has not been satisfied.

The Appeals Chamber in *Nahimana* held that, the incitement has to be direct in nature and speech that creates a climate conducive to its commission cannot be considered incitement.[46] It could not be a vague or indirect suggestion, and any ambiguity would be resolved in favour of the accused.[47] In the *Fritzsche* case, the accused was acquitted of incitement because there was no 'explicit call' for the extermination of Jews.[48] It is submitted that in the instant case, there is no direct appeal or 'explicit call' to commit genocide anywhere in Alijahan's statements. At most, the messages passed on to YLS party workers can be said to be inciting ethnic hatred to make Revate a Tilen state however this cannot be equated to incitement to Genocide.[49] The meeting which occurred between Alijahan and other accused also revolved around the theme of making Revate a Tilen State and that some Cotene's were involved in wrong acts, and *not* around directing people to cause genocide. Hence, the requirement to establish direct and public incitement has clearly not been met with.

4.2.3 Alijahan's statements were a legitimate exercise of free speech.

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[42] *Prosecutor* v. *Ruggiu*, Case No. ICTR-97-32-T (ICTR Trial Chamber-I, June 1, 2001) ("Ruggiu").
[43] *Akayesu*.
[44] DAVID RABBAN, *Free Speech In Its Forgotten Years* 132-46 (New York: Cambridge University Press, 1997).
[45] *Hess* v. *Indiana*, 414 U.S. 105 (1973).
[46] U.N. GAOR, 3rd Sess., 6th Comm., 87th mtg., U.N. Doc. A/87/PV.
[47] *Prosecutor* v. *Nahimana*, *et al*, Case No. ICTR-99-52-T (ICTR Trial Chamber, December 3, 2003) ("*Nahimana")*; *See also*, *Ruggiu*,; U.N. GAOR, 3d Sess., 6th Comm., 87th mtg., U.N. Doc. A/87/PV; Jamie Metzl, "Rwandan Genocide and the International Law of Radio Jamming", 91 *Am. J. Int'l L*. 628 (1997).
[48] *Streicher*, IMT Judgment, 22 *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany* (1946); Jamie Metzl, "Rwandan Genocide and the International Law of Radio Jamming", 91 *Am. J. Int'l L*. 628 (1997).
[49] *Nahimana*; *See also*, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A (ICTY Appeals Chamber, December 17, 2004) ("*Kordić and Čerkez*"); Basic Principles of a Convention on Genocide, UN Doc. E/AC.25/7; Secretariat Draft Convention on the Crime of Genocide, U.N. Doc. E/447; Diane Orentlicher, "Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana", 21 *Am. U. Int'l L. Rev*. 557 (2006); Harvard Law Review Association, "International Law--Genocide--U.N. Tribunal Finds That Mass Media Hate Speech Constitutes Genocide, Incitement to Genocide, and Crimes Against Humanity -- *Prosecutor* v. *Nahimana*, *Barayagwiza*, *and Ngeze* (the Media Case), Case No. ICTR-99-52-T (Int'l Criminal. Trib. For Rwanda Trial Chamber I, Dec. 3, 2003)", 117 *Harv. L. Rev*. 2769 (2004).

A general international presumption supporting the free flow of ideas and information exists.[50] In the U.S, Neo-Nazi militiamen are allowed to parade through Jewish neighbourhoods.[51] In Denmark, racist groups are allowed radio time.[52] The Head of the Nazi Propaganda Ministry's Radio Division was acquitted.[53] Alijahan's statements were aimed at condemning violence in general and killing of BR in particular. They did not counsel violence, armed resistance or uprising, and hence did not transgress the limits of free speech.[54] This is thus clearly a legitimate exercise of free speech.

4.3. *Arguendo* Alijahan's statements amounted to incitement, it incited ethnic cleansing

The Genocide Convention does not criminalise ethnic cleansing, which allows using force to remove persons of given groups from the area.[55] The ICTY recognized this by not even indicting the accused for genocide, when it was established that he had engaged in ethnic cleansing.[56] The rationale is that displacing a population in order to change the ethnic composition of a territory is clearly different from destroying the group.[57] Eichmann was thus acquitted of genocide in the aftermath of World War II.[58] Alijahan's acts in Allegations G and H to L only indicate his desire to make Revate a Tilen State. This can qualify as an act of ethnic cleansing but not genocide. Hence the question of his having incited genocide does not arise. For all these reasons, Alijahan cannot be convicted of direct and public incitement to genocide.

5. ALIJAHAN IS NOT GUILTY OF CONSPIRACY TO COMMIT GENOCIDE.

5.1 There did not exist a common plan or agreement to commit genocide.

In order to prove conspiracy, it is necessary to prove that there existed an agreement between the conspirators.[59] Although it does not require the existence of a formal or express agreement,[60] there must be some semblance of understanding between the conspirators to commit a criminal act.

In the present case, there is nothing to indicate any sort of agreement between Alijahan and any other person to commit a criminal act. On the contrary, Yashode, made contrary statement in the public meeting of August 15 2005 which only shows that there was no agreement between the two. Whereas from the statements made in the said public meeting, it

[50] Alexander Dale, "Countering Hate Messages that Lead to Violence: The United Nations' Authority to Use Radio Jamming to Halt Incendiary Broadcasts", 11 *Duke J. Comp. & Int'l L.* 109 (2001).
[51] *Smith* v. *Collin*, 436 U.S. 953 (1978); *National Socialist Party* v. *Skokie*, 432 U.S. 43 (1977); Joshua Wallenstein, "Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide", 54 *Stan. L. Rev*. 351 (2001).
[52] *Jersild* v. *Denmark*, 19 E.C.H.R. 1 (1995).
[53] *Fritzsche*, IMT Judgment, 22 *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany* (1946).
[54] *Nahimana*.
[55] Interim Report of the Commission of Experts Established Pursuant To Security Council Resolution 780 (1992), UN Doc. S/35374; Kingsley Moghalu, "International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda", 14 *Pace Int'l L. Rev*. 273 (2002).
[56] *Prosecutor* v. *Duško Tadić*, Case No. IT-94-1-T (ICTY Trial Chamber, May 7, 1997).
[57] SCHABAS 2000, *supra* note 21, at 199.
[58] *Government of Israel* v. *Adolf Eichmann*, 36 I.L.R. 5 (D.C. (Jm.) 1961).
[59] *Prosecutor* v. *Kajelijei*, Case No. ICTR-98-44A-T (ICTR Trial Chamber, December 1, 2003).
[60] *Nahimana Appeal*.

can be argued that Mrs. Yashode was trying to incite the public against the Cotene's which could have resulted in violence, Alijahan was condemning violence (Allegation A). It is clear that Alijahan and Mrs. Yashode were not in agreement and the prosecution needs to establish the existence of a *common* plan to prove guilt for conspiracy.[61] Thus, Alijahan cannot be said to have agreed upon a common plan with the rest of the accused to commit genocide.

5.1.1 Conviction cannot be based on events that antedate the Tribunal's temporal jurisdiction

It is established that the all the elements of the crime for which conviction is sought, irrespective of whether it is a continuing crime or not, ought to have occurred during the temporal jurisdiction of the Tribunal.[62] Hence, a conviction cannot be based on the meetings that occurred prior to 1st January 2005.

5.1.2 The events cannot be admitted as evidence

Given that the Statute does not explicitly mention about the admissibility of evidence prior to its temporal jurisdiction period, the intention of the SC has to be taken into consideration. The SC while deciding the temporal jurisdiction of the ICTR deliberately extended it to 1st January 1994 despite the fact that the genocide occurred in April 1994. The objective was to "*capture the planning stage of crimes*".[63] Thus, since the SC has already extended the temporal jurisdiction, it cannot be extended further to take into the events that occurred before 1st January 2005.

In any case, there is nothing to indicate that Alijahan was party to any such conspiracy even if he was party to the meetings. They only indicate that there was an agreement upon the fact that there was irresponsible behaviour on the part of Cotene's and the fact that Revate should be made a Tilen state. An agreement to destroy the Cotene religious group cannot be inferred from these facts.

5.2 The *dolus specialis* for genocide is not established.

The *mens rea* requirement for conspiracy is that the accused intended to destroy, in whole or in part, a protected group as such.[64] As argued earlier, the question of *dolus specialis* should not and cannot be inferred from knowledge of an information or likelihood of an incident. The Trial Chamber in *Nahimana*, *Barayagwiza and Ngeze* observed that conspiracy can be inferred from knowledge. However, the Trial Chamber came to this conclusion only because the accused in the said case consciously interacted with each other, using the institutions they controlled to promote a joint agenda, which was the targeting of the Tutsi population for destruction. There was public presentation of this shared purpose and coordination of efforts to realize their common goal[65] which is absent in the present case.

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[61] *Musema; Ntakirutimana*; *Niyitegeka*; *Nahimana Appeal*.
[62] *Nahimana et al* v. *Prosecutor*, Decision on the Interlocutory Appeal, Case No. ICTR 97-27-AR72 (ICTR Appeals Chamber, 5 September, 2000) (Joint Separate Opinion of Judge lal Chand Vohrah and Judge Rafael Nieto-Navia) ("*Nahimana Interlocutory Appeal*"); *Nahimana Appeal*; *Prosecutor* v. *Gatete*, Decision on Defence Motion On Admissibility of Allegations Outside the Temporal Jurisdiction of the Tribunal, Case No. ICTR-2000-61-T, (ICTR Trial Chamber, 3rd November, 2009) ("*Gatete*")
[63] *Nahimana Interlocutory Appeal*.
[64] *Nahimana Appeal*; *Musema; Prosecutor* v. *Seromba*, Case No. ICTR-2001-66-I (ICTR Trial Chamber-I, December 13, 2006); *Niyitegeka*.
[65] *Nahimana Appeal*.

6. ALIJAHAN WAS NOT A PART OF JCE

The *actus reus* of JCE comprises of plurality of persons, common purpose and participation in furtherance of that common purpose. It is submitted that there is no common purpose (**6.1**) and in any case, Alijahan did not participate in furtherance of that common purpose (**6.2**). The *mens rea* (**6.3**) for JCE is also not fulfilled here. Therefore, Alijahan is not guilty for genocide under the JCE. In any case, he cannot be held guilty under the third form of JCE for direct and public incitement to commit genocide (**6.4**).

6.1 The common purpose of destroying the Cotene religious group cannot be inferred

The common agreement need not be express but it must be the only reasonable inference that can be made from the facts.[66] In the instant case, in the meetings that were held between Alijahan, Yashode, Dolme and Melena (Allegations G and H to L), it was decided that the Cotene's had to be dealt with sternly and that strong action would be needed to make Revate a Tilen state. However, this does not lead to the *only* reasonable conclusion that they planned to *destroy* the Cotene religious group as such.

6.2 In any case, Alijahan did not participate in furtherance of the common purpose

Mere membership of the enterprise is not enough and participation needs to be proved. Otherwise it would be a violation of the principle of *nullum crimen sine lege*.[67] Although it is not necessary to show that the offense would have occurred but for the accused's participation, it must form a link in the chain of causation.[68] In his speech after BR's murder, Alijahan never referred to the Cotene's explicitly and a reasonable inference cannot be drawn that it was his speech that aroused the masses and led to the subsequent killing of the people. In spite of his thirty-minute speech, the commotion in the audience was created only after Yashode finished with her speech wherein she called for action against the Cotene's. His non-action when Cotene's were being assaulted by the policemen cannot be said to be a link in the chain of causation of genocide. Furthermore, in his address to the heads of YLS's youth wings, he merely called for self-defence and asked them to *spread the message*. This does not in any way indicate that he participated in the JCE.

6.3 Alijahan did not possess the requisite *mens rea*

To be held guilty under the first form of JCE, the accused must have the shared intent[69] and where the crime requires special intent, the accused must also have that special intent.[70] In the instant case, Alijahan never identified Cotene's as enemies and wanted to take action against the *enemies of the state*. This is clarified from his statement at the end of his meeting with the youth wings' heads wherein he said that "*there were no friends*" in this war. Thus, he did not target any religious group in particular and was against enemies in general.

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[66] *Prosecutor* v. *Brdjanin*, Case No. IT-99-36-T (ICTY Trial Chamber, September 1, 2004) ("*Brdjanin*").
[67] *Brdjanin*.
[68] *Prosecutor* v. *Kvočka et al*, Case No. IT-98-30/1-A (ICTY Appeals Chamber, February 28, 2005) ("*Kvočka Appeal*"); *Prosecutor* v. *Blagojević & Jokić*, Case No. IT-02-60-T (ICTY Trial Chamber-I, January 17, 2005) ("*Blagojević & Jokić*").
[69] *Prosecutor* v. *Vasiljević*,Case No. IT-98-32-A (ICTY Appeals Chamber, February 25, 2004).
[70] *Kvočka Appeal*.

Although substantial participation is not necessary, it is important in inferring intent of the accused.[71] Assuming but not accepting that Alijahan's speech on 15th August aroused the masses, this act was not a substantial contribution to the killings that took place subsequently as BR's murder had already led to anguish amongst the masses.

6.4 *Arguendo* Alijahan is held guilty for genocide under the JCE doctrine, he is not responsible for direct and public incitement to commit genocide

While using the JCE doctrine, the definition of common purpose should be strict, irrespective of the category of JCE alleged.[72] From the definition of common purpose as pleaded in the indictment, it is clear that the crime intended was that of genocide and guilt is sought to be proved under the first form of JCE.

It has been held that the form of JCE under which the accused is charged has to be expressly mentioned in the indictment and that an accused cannot be held responsible under the third form of JCE with respect to any of the crimes alleged in the indictment.[73] The common purpose stated here is the destruction of the Cotene religious group and not incitement to commit genocide. Hence, Alijahan cannot be held guilty of the latter under the JCE doctrine.

7. ALIJAHAN IS NOT INDIVIDUALLY RESPONSIBLE UNDER ARTICLE 6(1)

7.1 Alijahan is not responsible for planning genocide

Planning requires a substantial participation of the accused in designing the criminal conduct constituting one or more crimes that are perpetrated[74] (*actus reus*) and awareness of the substantial likelihood that crime may be committed[75] (*mens rea*). Planning envisions the formulation of a method of design, arrangement or procedure for the accomplishment of a particular crime.[76]

It is submitted that meetings held between Alijahan, Yashode, Dolme and Melena, where they decided to take strong action against the Cotene's do not indicate that they planned to commit genocide. In any case, Alijahan's knowledge to *commit genocide* is not the only reasonable inference that can be made from the facts. Although circumstantial evidence may be used to prove *mens rea*, it should be the only possible inference.[77] Furthermore, planning implies designing the commission of a crime at *both* its preparatory and execution phases.[78] Alijahan's participation at the stage of execution cannot be said to be substantial, as the circumstances then and Yashode's speech identifying the Cotene's as creating trouble, led to the genocide.

7.2 Alijahan cannot be held responsible for instigation under Article 6(1)

The *actus reus* for instigation is prompting another person to commit an offence that is

[71] *Kvočka Appeal*.
[72] *Prosecutor* v. *Krnojelac*, Case No. IT-97-25-A (ICTY Appeals Chamber, September 17, 2003) ("*Krnojelac*").
[73] *Krnojelac*.
[74] *Prosecutor* v. *Kordić and Čerkez*, Case No. IT-95-14/2-A (ICTY Appeals Chamber, December 17, 2004). ("*Kordić and Čerkez*"); *Semanza*.
[75] *Kordić and Čerkez*.
[76] *Semanza*.
[77] *Prosecutor* v. *Strugar*, Case No. IT- 01-42-T (ICTY Trial Chamber-II, January 31, 2005) ("*Strugar*").
[78] *Prosecutor* v. *Georges Rutaganda*, Case No. ICTR-96-3-T (ICTR Trial Chamber, December 6, 1999).

actually committed.[79] Although the instigating act need not be a *sina qua non* for the crime to occur, a causal relation needs to be shown between the instigation and the physical perpetration of the act.[80] The accused must substantially contribute to the commission of the crime through the instigating act and must be aware of the likelihood that crime may be committed in perpetration of that instigation.[81]

It is submitted that Alijahan's speech cannot be said to have substantially contributed to the genocide that occurred and there is no causal nexus between the speech and the crime. As already argued above, the brutal murder of BR would have created resentment amongst the masses as he was their spiritual leader and healer. Moreover, after Alijahan, his wife had also addressed the rally and she particularly identified the Cotene's and said that they needed to be taught a lesson. It was only after her speech that there was a commotion in the audience and the killings cannot be said to have been substantially effected through Alijahan's speech.

7.3 Alijahan is not responsible for ordering crimes

'Ordering' requires a person in position of authority instructing another to commit an offence.[82] It does not require a formal superior-subordinate relationship as long as the accused possess *de jure* or *de facto* authority to order.[83] A causal link *must* be established between the order and the crime perpetrated and it is not necessary to prove that the crime would not have occurred in the absence of the order.[84] In order to prove *mens rea* it is sufficient that the accused had knowledge that crime will be committed with substantial likelihood.[85] *Mens rea* may be inferred from the facts but it must be the *only* reasonable inference.[86]

It is submitted that Alijahan did not order any of the crimes charged in the indictment. His instruction to the heads of YLS's youth wings was merely to spread the idea of self-defence and guard against the 'enemies of the state'. His statement at the end of the meeting (Allegation D) clearly indicates that he did not identify the Cotene's as the enemies of the state. Hence, it cannot be reasonably inferred that Alijahan ordered the youth wings' heads to incite people to genocide or to commit genocide.

7.4 Alijahan cannot be held responsible for aiding and abetting genocide.

In *Akayesu*, it was held that responsibility under Article 6(1) arises for either aiding *or* abetting genocide and it is not necessary that both should occur in order to hold the accused guilty. However, it is humbly submitted that the Trial Chamber in that case did not read the Statute strictly. The fact that penal statutes must be strictly construed has stood the test of time.[87] If an individual does not fall within the express language of the statutory provision,

[79] *Prosecutor* v. *Galić*, Case No. IT-98-29-T (ICTY Trial Chamber, December 5, 2003).
[80] *Prosecutor* v. *Bagilishema*, Case No. ICTR-95-1A-T (ICTR Trial Chamber, June 7, 2001); *Brdjanin*.
[81] *Kordić and Čerkez*; *Prosecutor* v. *Limaj et al*., Case No. IT-03-66-T (ICTY Trial Chamber, November 30, 2005) ("*Limaj*"); *Brdjanin*.
[82] *Kordić and Čerkez*; *Prosecutor* v. *Stakić*, Case No. IT-97-24-T (ICTY Trial Chamber-II, July 31, 2003).
[83] *Kordić and Čerkez*; *Strugar*.
[84] *Strugar*.
[85] *Kordić and Čerkez*; *Limaj*; *Brdjanin*.
[86] *Strugar*.

the interpreter is not competent to extend it and bring the individual within that provision.[88]

A logical interpretation of Article 6(1) of the Statute would indicate that an accused cannot be held guilty unless he both aids *and* abets the planning, preparation or execution of a crime. In the instant case, assuming but not conceding that Alijahan abetted genocide (Allegation C), there is nothing to prove that he *aided* genocide.

Arguendo, it is submitted that Alijahan did not assist or facilitate the genocide in any manner. It has been held that the individual aiding and abetting genocide should have the special intention required for genocide.[89] In any case, he should be aware of the special intent of the principal perpetrators whose acts he is aiding and abetting.[90]

In the event that Bebe Remedeev had been brutally murdered and that Alijahan was present in Town Costin to discuss the security situation of the State of Revate, it cannot be said that the only reasonable inference is that Alijahan possessed the requisite special intent to commit genocide of the Cotene's or that he knew of the special intent of the two policemen who were interrogating the Cotene's.

8. ALIJAHAN IS NOT RESPONSIBLE FOR THE CRIMES UNDER ARTICLE 6(3) UNDER THE DOCTRINE OF COMMAND RESPONSIBILITY

Command responsibility (hereinafter "CR") is a doctrine according to which a superior can be held responsible for crimes committed by his subordinates.[91] In order to prove CR, three elements must be satisfied:[92] it must be shown that there existed a superior-subordinate relationship (**8.1**); that the superior knew, or had reason to know that his forces were committing, or were about to commit crimes (**8.2**); and that the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission (**8.3**).

8.1. A superior-subordinate relationship did not exist in the instant case.

In order to determine the existence of a superior-subordinate relationship, the test used is one of effective control. This means that the superior must possess the *material ability* to prevent or punish the actions of his subordinates.[93]

In the instant case, it cannot be inferred from the facts that Alijahan exercised effective control over Dolme, Melena or the members of YLS's youth wing. There is no *de jure* authority that Alijahan has over them and the mere fact that they were a part of the meetings is not conclusive proof that he had *de facto* control over them.

It has also been held that a *chain of command* is a *sina qua non* for the superior responsibility and that 'superior' in Article 87 of Additional Protocol I is intended to cover only the

[87] *Prosecutor* v. *Zejnil Delalić et al*, Case No. IT-96-21-T (ICTY Trial Chamber, November 16, 1998) ("*Celebici*").
[88] *Celebici*.
[89] *Akayesu*.
[90] *Prosecutor* v. *Krstić*, Case No. IT-98-33-A (ICTY Appeals Chamber, April 19, 2004); *Blagojević & Jokić*.
[91] SCHABAS 2000, *supra* note 21, at 191.
[92] Art. 28, Statute of the ICTR, 1994.
[93] *Nahimana*; Prosecutor v. *Blaškić*, Case No. IT-95-14-A (ICTY Appeals Chamber, July 29, 2004) ("*Blaskic Appeal*"); *See also*, *Celebici*.

superior is *personally responsible* for the perpetrators of the act.[94] Alijahan cannot be said to be personally responsible for the acts of the policemen who were assaulting the Cotene's (Allegation C).

What *may* be said is that Alijahan had *substantial influence* over the perpetrators. It is submitted, however that, as held in the case of *Prosecutor* v. *Halilovic*,[95] it is not enough, under customary international law, to prove substantial influence; any degree of control which falls below the threshold of effective control is insufficient to attach liability under the doctrine of command responsibility. It is submitted, in the instant case, that the required threshold has not been satisfied; and, given the facts of the case, is impossible to satisfy. Therefore, a superior-subordinate relationship has not been made out in the instant case.

8.2. Alijahan did not know or had reason to know that crimes had been committed or were about to be committed by his subordinates

The doctrine of CR attaches criminal liability for an *omission* on the part of the superior: that is, knowing, or when ought to have known that certain crimes were about to be committed, he did not act to prevent their commission. Given that an omission, as opposed to an act, is being punished, it is well accepted that the omission must be extremely grave or culpable in nature.[96] In fact, the *mens rea* required must be "*so serious that it is tantamount to malicious intent*, *apart from any link between the conduct in question and the damage that took place*."[97] Moreover, the standard of proof is higher for civilian leaders holding *de facto* positions of authority.[98] It has to be shown that he *consciously* disregarded information which clearly indicated or put him on the notice that crimes were being committed or were about to be committed.[99]

Therefore, the standard of "knew, or ought to have known" does not impose a duty upon the superior to actively seek information about the actions of his subordinates.[100] The standard is limited to actual information being available to the superior, on the basis of which he could have reasonably foreseen that his subordinates were committing, or were about to commit crimes.[101] The presence of such information cannot be presumed merely from status.[102]

It is submitted that on the information available to Alijahan was not alarming[103] enough to put

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[94] *Celebici*.
[95] *Prosecutor* v. *Halilovic*, Case No. IT-01-48-T (ICTY Trial Chamber-I, Section A, November 16, 2005); *See also*, *Prosecutor* v. *Bagambiki*, Case No. ICTR-99-46-T (ICTR Trial Chamber-III, February 25, 2004); *Celebici*.
[96] *Musema*. *See also*, *Prosecutor* v. *Kamuhanda*, Case No. ICTR-95-54A-T (ICTR Trial Chamber-II, January 22, 2004) ("*Kamuhanda*"); *Trial of William Von Leeb & Thirteen Others*, U.N. War Crimes Commission, 12 Law Reports of Trials of War Criminals 1 (1948) ("*High Command Case"*); *U.S.* v. *Wilhelm list*, *et al*., 11 Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10, 754 (1946 -1949).
[97] Commentaries on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949.
[98] *Kordić and Čerkez*; GIDEON BOAS AND WILLIAM SCHABAS, *International Criminal Law Developments in the Case Law of the ICTY* 257(Leiden: Martinus Njoff Publishers, 2003).
[99] *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A *(*ICTR Appeals Chamber, June 1, 2001).
[100] *Musema*.
[101] *Blaškić*; *See also*, *Celebici*; *Krnojelac*.
[102] *Semanza*; *See also*, *Kamuhanda*.
[103] *Celebici*.

him on his guard for crimes being committed. He did not any have actual information that crimes were being or had been committed by his subordinates. It is conceded that Alijahan addressed a rally which was also attended by Dolme. However, merely because he talked about dealing sternly with the death of Bebe Remedeev in front of 5000 people would not make him reasonably foresee that Dolme would lead an armed group and commit such crimes. Furthermore, Alijahan had asked the members of YLS's youth wing to spread the message of self-defence and had asked Melena to be present at the Yuvkone cricket stadium *to provide cover* does not enable him to conclude killing would be the next logical step. At this point, it may be noted that a superior's knowledge can only be presumed from *recurrent criminal acts*; a single criminal act, committed by a single group of identifiable subordinates, has been held to be inadequate information for him to know that there is a general likelihood of his subordinates committing crimes.[104] In the instant case, there have been no such recurring acts by different subordinates and, therefore, liability cannot be attached.

8.3 Alijahan took all reasonable and necessary measures within his power to prevent the commission of crimes by his subordinates

If a commander takes all reasonable and necessary measures that are within his power to prevent the commission of crimes by his subordinates, criminal liability cannot then be attached to him.[105] The reasonableness of the commander's actions depend upon the degree of effective control that he possesses over his subordinates.[106] In *Aleksovski* the Trial Chamber held that the power of a civilian superior to punish or prevent a crime was more limited than that of a military commander.

The degree of control that Alijahan exercised over Dolme, Melena and others is not clear. It is only evident that they attended meetings with Alijahan and it wasn't within his material ability to punish them for their acts. In fact, Alijahan said that "*violence is a terrible thing*" which indicates that he did all he could to deter them from committing any crime.

PRAYER

Wherefore in light of the issues raised, arguments advanced and authorities cited, it is humbly prayed that this Hon'ble Court may:

- Declare that it does not have the jurisdiction to hear this matter.
- Declare that the accused's right to fair trial has been violated.
- Acquit the accused of all charges in the indictment.

And pass any other order that this Hon'ble Court may deem fit in the interests of justice.

All of which is humbly prayed,

Counsel for the Appellant.

[104] *Prosecutor* v. *Hadzihasanovic*, Case No. IT-01-47-T (ICTY Trial Chamber, March 15, 2006).
[105] *Blaškić*; *See also*, *Semanza*.
[106] *Celebici*.