

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR TIMOSHINE**

**AT BRIHANE, TIMOSHINE**

**IN THE APPEALS CHAMBER**

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Criminal Appeal No. \_\_\_\_\_/2010

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

*Alijahan*

... Appellant

v.

*Prosecutor*

... Respondent

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Written Submissions on Behalf of the Respondent

Counsel for the Respondent

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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 1<sup>ST</sup> 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

Revate, a state within the Union of Timoshine has a population of Tilen's and Cotene's, two groups. The state occasionally witnessed religious conflicts between these two groups. In another incident of religious tension between Tilen's and Cotene's during 15<sup>th</sup> to 18<sup>th</sup> 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 14<sup>th</sup> August 2005. The Centre Government had to use military force to restore peace in the state.

As a result of the large scale massacres, Alijahan, the Chief Minister of Revate was widely criticized by the media and local and global NGOs and held responsible for the same. The matter was widely debated with the consequence of it being 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 20<sup>th</sup> 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 was alleged to have comprised 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 15<sup>th</sup> 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 15<sup>th</sup> 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 16<sup>th</sup> 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 31<sup>st</sup> 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 to support the fact that killings that took place subsequently were a reaction to it. The Defence sought permission to produce 30 witnesses in connection with the murder. Permission was denied by the Trial Chamber. The Trial Chamber issued its judgement on 10<sup>th</sup> found 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. JURISDICTIONAL CHALLENGES CANNOT BE BROUGHT BEFORE THE APPEALS CHAMBER OF THE TRIBUNAL.**

Jurisdictional challenges regarding the legality of the establishment of the Tribunal cannot be brought before the Appeals Chamber since it is not a permitted preliminary motion of jurisdiction under Rule 72 (D) of the Rules of Procedure and Evidence of the ICTR. Also, SC Resolution establishing the Tribunal is immune from judicial review since the UN Charter does not specify a court or any other judicial body which can exercise such powers of judicial review. The doctrine of *kompetenz-kompetenz* though it allows the Tribunal to examine its own jurisdiction does not give it the power to examine the competence and legality of the SC Resolution to establish such Tribunals. The establishment of the Tribunal by the SC Resolution No. 101/06 was lawful as the SC has the powers to establish judicial tribunals under Chapter VII of the UN Charter, specifically Art.41.

### **2. THE TRIAL CHAMBER PROCEEDINGS DID NOT VIOLATE THE RIGHTS OF THE ACCUSED**

The Trial Chamber proceedings did not violate fair trial requirements under Art. 19(1) and Art. 20(2) of the ICTR Statute since there has been equality in the treatment of the parties. As regards the denial of permission to the Defence to produce witnesses in connection with Bebe Remedeev's murder, the Trial Chamber ruling was correct since the evidence would not absolve the Appellant of his responsibility for the genocide; hence, the evidence lacks probative value and denial of permission is not violative of Art. 20(4)(e) of the Statute. The denial of certificate of appeal against the Trial Chamber decision is also not violative of fair trial requirements since the appeal did not meet the standards for certification of appeal given in Rule 73(B) of the Rules of Procedure and Evidence of the ICTR.

### **3. EVENTS ANTEDATING THE TEMPORAL JURISDICTION CAN BE ADMITTED AS EVIDENCE**

Although a charge cannot be based on crimes that occurred before the temporal jurisdiction of the Tribunal, such events can be admitted as probative evidence under Rule 89(C) of the Rules of Procedure and Evidence. The Security Council debate on the extension of temporal jurisdiction was only limited to the charging of crimes and not the evidence that can be produced.

### **4. ALIJAHAN IS GUILTY OF GENOCIDE**

Genocide has taken place. The Cotene's form a religious group or at the very least a stable and permanent group in the eyes of the accused. Acts under A. 2(2)(a), and A. 2(2)(b) of the Statute were committed against them with the specific intention to destroy the group. The killing at Village Zenotia and Housing Colony MRF in City Diew are specific examples of the genocide that occurred with Alijahan consent and killing in Town Rodin is an example negative violence which led to genocide. Hence Alijahan is guilty of genocide.

### **5. ALIJAHAN IS GUILTY OF DIRECT AND PUBLIC INCITEMENT TO GENOCIDE.**

Incitement is punishable *per se*, even where it is unsuccessful. No specific causation requirement exists. Alijahan's speech and other relevant statements were 'public'. It was

direct since the audience grasped the implication of the message i.e. killing of Cotene's. His statements indicate that *mens rea* can be imputed to him. No imminence requirement exists in the Statute, which Alijahan in any event satisfied. Hence, Alijahan is guilty of direct and public incitement to genocide.

#### **6. ALIJAHAN IS GUILTY OF CONSPIRACY TO COMMIT GENOCIDE.**

Conspiracy to commit genocide like Incitement is punishable *per se*. All that needs to be established is that there existed a common plan to commit genocide which can be inferred from the several meetings which occurred and the theme it revolved around. From the meetings that were held between Alijahan, Yashode, Dolme and Melena, it can be inferred that Alijahan had the special intent to cause genocide and in any case, mere knowledge of a common plan is enough to punish for conspiracy to commit genocide.

#### **7. ALIJAHAN IS GUILTY UNDER THE JOINT CRIMINAL ENTERPRISE DOCTRINE**

Alijahan was a part of a joint criminal enterprise comprising of Yashode, Dolme and Melena. From the meetings held between them, it can be inferred that they had a common purpose of destroying the Cotene religious group and they sought to execute their plan upon the murder of Bebe Remedeev. Alijahan participated in this joint criminal enterprise through inciting the public to take revenge and resort to violence. Hence, Alijahan is guilty for genocide under the joint criminal enterprise doctrine. Furthermore, the direct and foreseeable consequence of their common plan was incitement, given the scale of the crime and the prevailing situations in Revate. Hence, Alijahan is guilty for direct and public incitement under the third form of joint criminal enterprise.

#### **8. ALIJAHAN IS INDIVIDUALLY RESPONSIBLE UNDER ART. 6(1) OF THE STATUTE**

Alijahan is responsible for planning, instigating, ordering, and aiding and abetting crimes. The *mens rea* requirement for all these modes of responsibility is awareness of the substantial likelihood that the crimes will be committed. Alijahan participated in the meetings between Yashode, Dolme and Melena and instigated the masses at Bebe Remedeev's funeral. He asked his party's youth wing members to spread the idea of self-defence and organised a rally for the same. He implicitly ordered Melena to commit genocide. When two policemen were interrogating and assaulting the Cotene's, he did not interrupt and hence, abetted the crime of genocide.

#### **9. ALIJAHAN IS RESPONSIBLE UNDER ART. 6(3) OF THE STATUTE**

Alijahan had *de facto* authority over Dolme, Melena and the policemen and *de jure* authority over the party's youth wings' heads. Furthermore, he had enough information available with him which would have required him to enquire further into the conduct of his subordinates. He *consciously* ignored the assault of Cotene's by the two policemen. He was in a position to punish them, or at least, report the matter to the authorities. In the event that Alijahan did neither, he is responsible for the acts of his subordinates.

## **PLEADINGS**

### **1. THE TRIBUNAL HAS JURISDICTION TO HEAR THE MATTER**

#### **1.1. Jurisdictional challenges cannot be brought in the instant case**

##### **1.1.1 No provision for such a challenge under the Rules of Procedure and Evidence**

Rule 72(D) of the Rules of Procedure and Evidence (hereinafter “RPE”) of the International Criminal Tribunal for Rwanda (hereinafter “ICTR”) allows challenges to jurisdiction of the ICTR only on the ground that it does not refer to persons, territories, the period or any of the violations indicated in Art. 1 to Art. 9 of the ICTR Statute (hereinafter “the Statute”). There is no provision allowing for jurisdictional challenge regarding the competence of the Tribunal to prosecute persons accused of genocide. The Tribunal being governed by the RPE, such jurisdictional challenges are barred and cannot be brought up before the Appeals Chamber of the Tribunal.

##### **1.1.2. The Tribunal has no power to review the SC Resolution No.101/06 establishing it.**

1.1.2.1. There is no provision in the UN Charter (hereinafter “the Charter”) which provides for the setting up of a court or a judicial body to review the Resolutions passed by the SC.<sup>1</sup> Powers of judicial review or appeal over the decision taken by an organ of the UN are not given to any other UN organ, including the International Court of Justice (hereinafter “ICJ”).<sup>2</sup>

1.1.2.2. The doctrine of *kompetenz-kompetenz* can be used by the Tribunal to review the legality of the establishment of the Tribunal. However, the doctrine allows the Tribunal only to examine and determine its own jurisdiction; the ambit of the powers given to the Tribunal under the doctrine cannot be stretched so far as to include the power to examine the competence and legality of the Resolution of the SC to establish such judicial tribunals.<sup>3</sup> No power to review the legality of the Tribunal has been conferred to it under the Statute.<sup>4</sup> Hence, the Tribunal clearly lacks power to review the SC Resolution establishing it.

#### **1.2. The establishment of the Tribunal by SC Resolution No. 101/06 is lawful.**

##### **1.2.1. SC has powers to establish judicial tribunals under Chapter VII of the Charter.**

The power given to the SC under Chapter VII of the UN Charter includes the power to establish judicial tribunals also. Such power can be found in Art. 41 of the Charter which allows the SC to employ measures not involving the use of armed forces for the purposes of

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<sup>1</sup> The Charter of the United Nations, 1945.

<sup>2</sup> 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.

<sup>3</sup> Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal of Jurisdiction, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A (ICTY Appeals Chamber, October 2, 2005).

<sup>4</sup> Art. 1, Statute of the International Criminal Tribunal for Rwanda (“ICTR”), 1994.

maintenance of international peace and security.<sup>5</sup> The SC enjoys very wide discretionary powers in the matter of choice of means for such a purpose.<sup>6</sup> According to Art. 29 of the Charter, the SC also has the power to establish subsidiary organs including tribunals for carrying out its functions. Such a measure by a UN organ has been accepted by the ICJ.<sup>7</sup> Therefore, the SC can validly establish judicial tribunals under Chapter VII of the Charter.

## **2. THE TRIAL CHAMBER PROCEEDINGS DID NOT VIOLATE THE RIGHTS OF THE ACCUSED TO A FAIR TRIAL AND ARE VALID**

### **2.1 The Trial Chamber made a correct assessment of all relevant evidence**

In *Kordić and Čerkez*, the Appeals Chamber held that a fair trial should in the least give the accused sufficient time and facilities for his defence under conditions which do not disadvantage him.<sup>8</sup> Art. 20(4)(e) of the Statute gives the accused the right to have all witnesses on his/her behalf examined. The Trial Chamber (hereinafter “TC”) heard all matters incidental to genocide and took judicial notice of Bebe Remedeev’s (hereinafter “BR”) murder. Its decision that the murder need not be considered further in the proceedings is correct as it would not in any way deny the Appellant’s hand in the genocide that occurred, as will be proved subsequently. It would at the most be another event which took place along with the genocide but would not absolve the Appellant of his responsibility. Hence, the evidence regarding the murder is of no probative value and denial of permission to produce witnesses does not violate Rule 89(C) of the RPE or Art. 20(4)(e) of the Statute.

### **2.2 The denial of certificate of appeal to the accused does not vitiate the trial proceedings**

Interlocutory appeals on such decisions of the TC on motions filed by parties under Rule 73(A) of the RPE are generally not permitted unless the TC certifies that the consideration of the matter might significantly affect the fair and speedy conduct of proceedings or have a bearing on the outcome of the trial.<sup>9</sup> It has been proved above that the murder of BR was not relevant to the conduct of the proceedings; neither would it affect the trial’s outcome. Since BR’s murder is not relevant to the conduct of the proceedings, a denial of permission to appeal would not violate the right to appeal since the motion of appeal did not meet the standards for certification.<sup>10</sup>

Hence, it is submitted that there has been no violation of the right of the fair trial guaranteed to the accused and that the Trial Chamber proceedings are valid.

## **3. EVENTS ANTEDATING THE TRIBUNAL’S TEMPORAL JURISDICTION CAN BE ADMITTED AS EVIDENCE**

<sup>5</sup> *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*”); *Prosecutor v. Joseph Kanyabashi*, Decision on the Defence Motion on Jurisdiction, Case No. ICTR-95-15-T (ICTR Trial Chamber-2, June 18, 1997).

<sup>6</sup> *Tadić Jurisdiction*.

<sup>7</sup> Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, [1954] I.C.J Reports 47.

<sup>8</sup> *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A (ICTY Appeals Chamber, December 17, 2004) (“*Kordić and Čerkez*”).

<sup>9</sup> Rule 73(B), Rules of Procedure and Evidence of the ICTR.

<sup>10</sup> *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A (ICTY Appeals Chamber, March 24, 2000).

Under Rule 89C of the Rules of procedure and Evidence, the Tribunal can admit *any* evidence that is of probative value. It is submitted events that occurred prior to 1<sup>st</sup> January 2005 can also be taken into cognizance as there is a distinction between the elements of a crime and the evidence of their existence<sup>11</sup> and it is the former that should fall within the prescribed temporal jurisdiction. The SC debate on extending the jurisdiction was only regarding the *charging* of a crime and not the evidence that can be admitted to prove that crime.<sup>12</sup> Evidence that clarifies a given context and establishes the elements of a crime can be admitted.<sup>13</sup>

Hence, the 13 meetings that occurred before 2005 can be taken into consideration to prove the existence of the agreement that was made in the 2 meetings in 2005 (Allegations H to L). The agreement of dealing strongly with the Cotene's that was reached at the meeting in Allegation G can only be said to have concluded in 2005.

#### **4. ALJAHAN IS GUILTY OF GENOCIDE**

##### **4.1. The clashes that occurred in Revate constitute as Genocide**

It is submitted that genocide did occur in Revate as the Cotene's are a protected religious group under the Art. 2(2) of the Statute (**4.1.1**), the acts enumerated in Art. 2(2) of the Statute were committed (**4.1.2**) with the intent to destroy the group as such (**4.1.3**).

###### **4.1.1 Cotene's are a protected group under the Statute.**

A religious group is defined as a group of people who share the same religious beliefs and practices.<sup>14</sup> Art. 2 of the Statute clearly provides protection to a religious group.<sup>15</sup> In the present case, the Cotene's and Tilen's had a history of religious tension and media reports indicated that the said clashes were a result of the killing of a Tilen religious leader.<sup>16</sup> Some of the clashes, as has been proved in the TC to be acts of genocide, took place around the Cotene Prayer hall (Factsheet: Allegation B) (hereinafter "Allegation B"). All this clearly indicates that the Cotene's shared religious belief and practice. Hence, Cotene's constitute a religious group.

*Arguendo* the Cotene's do not constitute a religious group, it is submitted that they form a stable and permanent group. In *Akayesu*, the ICTR had difficulty classifying the Tutsis and therefore held that the Genocide Convention, on which the Statute is based, intended to protect all 'stable and permanent groups'.<sup>17</sup> The ICTR reasoned that the *travaux* indicated

<sup>11</sup> Separate Opinion of Judge Shahabuddeen on the Decision on Interlocutory Appeal, *Nahimana et al. v. Prosecutor*, Case No. ICTR 97-27-AR72 (ICTR Appeals Chamber, September 2, 2000).

<sup>12</sup> *Id.*

<sup>13</sup> *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, November 3, 2009); *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A (ICTR Appeals Chamber, November 28, 2007) ("*Nahimana Appeal*").

<sup>14</sup> WILLIAM SCHABAS, *Genocide in International Law: The Crime of Crimes* 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*"); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (ICTR Trial Chamber I, September 2, 1998) ("*Akayesu*").

<sup>15</sup> Art.2, Statute of the ICTR, 1994.

<sup>16</sup> Fact sheet.

<sup>17</sup> *Akayesu*.

that political groups were excluded as they were not stable.<sup>18</sup> Thus, acts enumerated in Art. 2 of the Statute, intended to destroy a group of people not expressly mentioned in the definition, but which is ‘institutional’, would constitute genocide.<sup>19</sup> The Cotene’s constitute a group which is ‘institutional’ and not unstable; conform to this definition as membership is permanent and involuntary.

*Arguendo* the group is not an *objectively* stable and permanent group, it is submitted that a subjective standard must be applied and concepts of race, etc. must be looked at in the prevalent political, social and cultural context.<sup>20</sup> The group must be perceived as a protected group by its members themselves or by the accused.<sup>21</sup> In the instant case, it is clear that there exists a divide in population on the basis of this identity with Revate having a majority of Tilen population and there being clashes between the two groups because of religious tension,<sup>22</sup> in various speeches the Cotene group has been recognized as a stable and permanent group (Allegations A, E, G, and H to L), there being attacks in and around the Cotene Prayer Hall (Allegation B), and the people identifying themselves as Cotene’s in front of the police (Allegation C). It can therefore, be reasonably inferred that the group was perceived as a protected group by both its members and the accused, which they wanted to destroy. Thus, Cotene’s are clearly a protected group under the Statute.

#### 4.1.2 Acts listed in Art. 2 of the Statute were committed against the Cotene’s

The physical acts which constitute genocide include, *inter alia*, killing members of the group (Art. 2(2)(a)) and causing serious bodily or mental harm to the members (Art. 2(2)(b)). In the killings that took place in Revate, 90% of the people killed were Cotene’s,<sup>23</sup> around 500 of which were killed near the Cotene Prayer Hall (Allegation B). The assault by the policemen on Cotene’s (Allegation C) comes within Art. 2(2)(b) as it has been held that illegal assault by the police which leads to death constitutes serious bodily harm. Thus, it is submitted that acts of genocide took place in Revate.

#### 4.1.3 There was intention to destroy the group, as such

The meaning of the phrase “as such” is the requirement that intent must be directed *against* the group.<sup>24</sup> The motive behind such intent is irrelevant,<sup>25</sup> as is also indicated by the *travaux*

<sup>18</sup> SCHABAS 2000, *supra* note 14, AT 131.

<sup>19</sup> Van der Vyver, “Prosecution and Punishment of the Crime of Genocide”, 23 *FORDHAM INT’L L.J.* 286.

<sup>20</sup> *Kayishema and Ruzidana; Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-T (ICTR Trial Chamber, December 6, 1999) (“*Rutaganda*”).

<sup>21</sup> CASSESE, *International Criminal Law* 277 (New York: Oxford University Press, 2003); *Jelisić; Prosecutor v. Krstić*, Case No. IT-98-33-T (ICTY Trial Chamber, August 2, 2001) (“*Krstić*”); *Prosecutor v. Musema*, Case No. ICTR-96-13-T (ICTR Trial Chamber, January 27, 2000) (“*Musema*”).

<sup>22</sup> Fact sheet.

<sup>23</sup> Fact sheet.

<sup>24</sup> *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A (ICTR Appeals Chamber, 9 July 2004) (“*Niyitegeka Appeal*”); See also Advisory Opinion on the Legality and Threat or Use of Nuclear Weapons, 1996 I.C.J. Reports 226; I.L.C. Draft Article, at 88.

<sup>25</sup> STEVEN RATNER & JASON ABRAMS, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 36 (1997); PIETER DROST, *Genocide: United Nations Legislation on International Criminal Law* 84 (1959); M. CHERIF BASSIOUNI AND PETER MANIKAS, *The Law of International Criminal Tribunal for the Former Yugoslavia* 258 (1995).

of the Genocide Convention.<sup>26</sup> In the instant case, the specific intent to commit genocide can be inferred from the fact that the Cotene Prayer Hall was targeted (Allegation B), people belonging to the Cotene group were tortured by the police (Allegation C) and Cotene's were identified as 'enemies of state' and were being targeted (Allegation F).

*Arguendo* if the words 'as such' are taken to imply a motive requirement, it is submitted that this requirement is satisfied in the present case. The ICTR held that if intent is to destroy the group on the grounds of their identity and the *actus reus* of genocide is completed, then genocide can be said to have taken place.<sup>27</sup> The killings in Village Zenotia on 15<sup>th</sup> August, 2005 were an act of genocide (Allegation B). There could have been no other reason to kill children. When the police assaulted the fifteen Cotene's, no reason was given to them which indicates motive to cause harm to the people because of their identity (Allegation C). Same holds true for the incident which occurred on the night of 16<sup>th</sup> August, 2005 at Housing Colony MRF in City Diew as there could have been no other reason to attack the servant of Mr. Vas Deferentiale (Allegation F). All of this conclusively proves that there was motive and specific intent to cause genocide.

One further requirement to prove the *mens rea* for Genocide is that the intent must be to destroy the group as a whole, or at least a substantial part.<sup>28</sup> The actual number of people killed is irrelevant except insofar as determining the intention, as it is widely accepted that the killing of a single person can constitute genocide in the event that intent can be demonstrated.<sup>29</sup> Since all the requirements under Art. 2 of the Statute are satisfied, it can be said that genocide did occur in Revate.

#### **4.2. Alijahan caused the genocide**

Art. 3 of the Genocide Convention deals with criminal participation and provides for liability of individual. The said criminal acts or the *actus reus* can be established by either an act of commission or an act of omission.<sup>30</sup> This principle applies to all the acts of genocide enumerated in the Art. 2 of the Statute. The 'act of omission' has been referred to as 'Negative Violence'.<sup>31</sup> When a person of authority did not take steps to protect children who had survived the massacre at a hospital, which resulted in death of the children, the incident was held to be an act of 'negative violence'.<sup>32</sup> In the instant case, the fact that Alijahan did not interfere when the two policemen were assaulting the Cotene's (Allegation C) clearly shows negative violence on Alijahan's part. Also inciting people to cause genocide, which was practiced by Alijahan, qualifies as *actus reus*.<sup>33</sup> In the rally (Allegation A), both Alijahan and Yashode used strong words inciting people to harm the Cotene's, subsequent to which

<sup>26</sup> UN Doc. E/AC.25/SR.11; UN Doc. E/AC.25/SR.12.

<sup>27</sup> *Akayesu*.

<sup>28</sup> SCHABAS 2000, *supra* note 14, at 231; *See also, 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); *Prosecutor v. Nolic*, Case No. IT-94-2A, (ICTY Appeals Chamber, February 4, 2005).

<sup>29</sup> SCHABAS 2000, *supra* note, at 158.

<sup>30</sup> *Yugoslavia v. Belgium*, [1999] I.C.J Reports 124.

<sup>31</sup> MANFRED LACHS, *War Crimes: An Attempt to Define the Issues* 21 (London: Steven & Sons, 1945).

<sup>32</sup> *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S (ICTR Trial Chamber, September 4, 1998).

<sup>33</sup> *Prosecutor v. Sikirica*, Case No. IT-95-8-T (Trial Chamber, September 3, 2001).

the killings in Zenotia took place. Alijahan then encouraged violence and asked the youth wings' heads to spread the idea of self defence. Melena then effected the events under Allegation F. In the backdrop of events in Revate, it is safe to assume that the 10 Cotene's were taken away by RM were physically harmed or possibly killed. Both Art, 2(2)(a) and Art. 2(2)(b) of the Statute apply. Thus, it is submitted that Alijahan is guilty of genocide.

## **5. ALIJAHAN IS GUILTY OF DIRECT AND PUBLIC INCITEMENT TO GENOCIDE**

### **5.1. Direct and public incitement can be caused even without occurrence of genocide**

The Statute has defined direct and public incitement to genocide as an *inchoate* offence which can be punished without the actual occurrence of genocide,<sup>34</sup> when successful attempt of incitement is proved.<sup>35</sup> In *Streicher*, the *potential* to cause genocide there was held to be punishable.<sup>36</sup> Hence, a '*possible causal link*' between the expression and the offence is sufficient.<sup>37</sup> Here, Alijahan clearly was successful at his attempt to incite.

### **5.2. The ingredients of direct and public incitement are satisfied in the present case**

#### **5.2.1 The incitement was direct and public**

Law in the matter of direct and public incitement to cause genocide has mainly been borrowed from Civil law which regards words as being public when they are spoken aloud in a place that is public by definition.<sup>38</sup> Since, Statute does not define 'public', incitement to even one person may qualify as 'public'.<sup>39</sup> Hence, Alijahan's address to the public (Allegation A), his meeting with the youth wings' heads (Allegation D) and the meetings held at his house (Allegations G and H to L) would all qualify as 'public'.

Incitement must assume a direct form and specifically provoke another to engage in a criminal act, and must be more than a '*mere vague or indirect suggestion*'.<sup>40</sup> This element should be viewed in light of the prevailing cultural and linguistic context.<sup>41</sup> In *Akayesu*, the speaker urged his audience to cause harm to a specifically identified group, as did Alijahan to the Cotene's, specifically provoking another to engage in a criminal act.<sup>42</sup> In *Nahimana*,

<sup>34</sup> *Akayesu*; SCHABAS 2000, *supra* note 14, at 158; *Genocide in International Law: The Crime of Crimes* 96 (Cambridge:Cambridge University Press, 2000); William Schabas, "Hate Speech in Rwanda: The Road to Genocide", 46 *McGill L.J.* 141 (2000); MICHAEL AKEHURST, *A Modern Introduction to International Law* 46 (2nd edn., London: George Allen & Unwin, 1970).

<sup>35</sup> William Schabas, "National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes'", 1 *J. Int'l Crim. Just.* 39 (2003); Diane Orentlicher, "Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana", 21 *Am. U. Int'l L. Rev.* 557 (2006). See also ANTHONY D'AMATO, *The Concept of Custom in International Law* (London: Cornell University Press, 1971); *Asylum Case (Colombia v. Peru)*, 1950 I.C.J. Reports 266; Michael Akehurst, "Custom as a Source of International Law", 47 *Brit. Y.B. Int'l L.* 1 (1974-75).

<sup>36</sup> *Streicher*, IMT Judgment, 22 *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany* (1946).

<sup>37</sup> *Prosecutor v. Nahimana et al.*, Case No. ICTR 99-52-T (ICTR Trial Chamber I, December 3, 2003) ("*Nahimana*").

<sup>38</sup> *Akayesu*; French Court of Cassation, Criminal Tribunal, (February 2, 1950, Bull, Crim. No. 38).

<sup>39</sup> Art. 2(3)(f), 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).

<sup>40</sup> *Akayesu*.

<sup>41</sup> 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).

<sup>42</sup> Joseph Rikhof, "Hate Speech and International Criminal Law", 3 *J. Int'l Crim. Just.* 1121 (2005).



*Barayagwiza and Ngeze*, the accused made a similar speech and was convicted for direct and public incitement.<sup>43</sup> It was held that even if there is no explicit call for the death of the group, the test should be: whether the audience ‘grasped the implication of the message’.<sup>44</sup> In *Nahimana, Barayagwiza and Ngeze*, the accused used the phrase: “let’s exterminate them like rats”, and it was held that even though there was no direct reference to the targeted group, the audience did in fact grasp the implication of the message. In the funeral for Bebe Remdeev, Alijahan asked the audience to react to the killing “like a man” with later statement he made to his wife, which was over heard by members of audience where he said “sometimes the only solution is to exterminate them like rats” (Allegation A). Alijahan asked the 5 heads of his political party youth wing “to deal strongly” with the “anti-social members” who he said were attacking the “right minded people” one of whom was Bebe Remdeev (Allegation D). Given the religious and political context, it is inconceivable that the largely the audience could have failed to grasp the fact that quite simply, this was a religion-specific speech, with derogatory references to Cotene’s. Though the effect of incitement was felt in this case as ‘thousands became victims’ after Alijahan’s speech, the Prosecution is not required to show such a causal link, but merely to show that the communication had the potential of driving people to commit genocide. The standard of proof in such cases is that the speech be *likely* to incite violence which has already been established.<sup>45</sup> Thus, even though only knowledge or act of recklessness is enough to prove the element of ‘directness’ of incitement, which in this case has been established, the above arguments clearly show that Alijahan actually intended to incite the audience to cause genocide.

### 5.2.2 Alijahan had the requisite *mens rea* to commit incitement.

As argued above, Alijahan had the special intent as required under Art. 2 of the Statute. *Arguendo* it is sufficient to show that the accused was reckless as to the consequences of his actions.<sup>46</sup> Assuming unrealistically that Alijahan had no *mens rea*, he knew that his speech would activate genocidal intent, given the context in which the speech was made. It would amount to gross recklessness on his part as to consequences, constituting the required knowledge for *mens rea*. In *Furundzija*, the ICTY held that it is not necessary for an accomplice to possess the same *mens rea* as, or identify with the will and purpose of, the other offender.<sup>47</sup> Although these observations were made in the context of complicity, every successful incitement amounts to complicity and is punishable. The intent required of an inciter cannot be different depending on whether the incitement is successful or not.<sup>48</sup> In fact, *Akayesu* held that an accomplice need not possess the *dolus specialis* of genocide. In the present case, it has already been established that Alijahan clearly had the knowledge that his statements would encourage the audience to harm the Cotene’s on religious ground,

<sup>43</sup> *Nahimana*.

<sup>44</sup> *Nahimana*.

<sup>45</sup> 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).

<sup>46</sup> *Prosecutor v. Zejnir Delalic et al.*, Case No. IT-96-21-T (ICTY Trial Chamber, November 16, 1998) (“*Celebici Case*”); SCHABAS, *supra* note 14, at 211.

<sup>47</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T (ICTY Trial Chamber, December 10, 1998).

<sup>48</sup> Wallenstein, Punishing words: An Analysis of the Necessity of the Element of Causation in Prosecutions for incitement to genocide, 54 *Stan. L. Rev.* 351.

especially after the death of Bebe Remede. Thus, Alijahan is guilty of direct and public incitement.

## **6. ALIJAHAN IS GUILTY OF CONSPIRACY TO COMMIT GENOCIDE**

### **6.1 There exists an agreement upon a common plan, between Alijahan and others, to commit genocide.**

Art. 3(b) of the Genocide Convention declares conspiracy to commit genocide as a crime. The Trial Chamber in *Musema* however, defined conspiracy as an agreement between two or more persons to commit the crime of genocide and the existence of the agreement is said to be the defining element of the crime of conspiracy.<sup>49</sup> Even though an agreement needs to be established,<sup>50</sup> no preparatory act<sup>51</sup> or formal or express agreement<sup>52</sup> needs to be established to convict a person for conspiracy to commit genocide.<sup>53</sup> Furthermore, conspiracy has been proved to be an inchoate offence.

In the present case, there seems to be a clear semblance of existence of plan to commit genocide. Alijahan and other accused in the matter had been party to several meetings before and during 2005, the theme of which was to convert Revate into a Tilen State (Allegations H to L). All the members in the meeting agreed upon the theme and also agreed upon the fact that “strong actions” were needed to make it happen (Allegation H to L). Clearly there was an existence of agreement on a common plan as circumstantial evidence of a common plan or conspiracy is sufficient in such cases.<sup>54</sup> Allegation G clearly shows that there was an agreement to deal strongly with the Cotene’s.

### **6.2 The existence of *dolus specialis* of genocide has already been established.**

As argued earlier, Alijahan had the *dolus specialis* to commit genocide. *Arguendo* mere knowledge of a common plan is enough to punish for conspiracy to commit genocide.<sup>55</sup> In *Nahimana, Barayagwiza and Ngeze*, it was held that, “*Conspiracy to commit genocide can be comprised of individuals acting in an institutional capacity as well as or even independently of their personal links with each other. Institutional coordination can form the basis of a conspiracy among those individuals who control the institutions that are engaged in coordinated action.*”<sup>56</sup> The Trial Chamber came to this conclusion on the fact that 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

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<sup>49</sup> *Musema*; See also *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-T and ICTR-96-17-T (ICTR Trial Chamber, February 21, 2003) (“*Ntakirutimana*”); *Prosecutor v. Niyitegeka*, Case No. ICTR-99-46-A (ICTR Appeals Chamber, July 7, 2006); *Nahimana Appeal*.

<sup>50</sup> *Prosecutor v. Kajelijei*, Case No. ICTR-98-44A-T (ICTR Trial Chamber, December 1, 2003).

<sup>51</sup> *Ntakirutimana*.

<sup>52</sup> *Nahimana Appeal*.

<sup>53</sup> UN Doc. E/447, at 31.

<sup>54</sup> *Prosecutor v. Bikindi*, Case no. ICTR-2001-72-T (ICTR Trial Chamber, June 26, 2007); *Prosecutor v. Bagosora et al.*, Decision on Motions for Judgment of Acquittal, Case No. ICTR-98-1-T (ICTR Trial Chamber, February 2, 2005).

<sup>55</sup> *Nahimana Appeal*.

<sup>56</sup> *Nahimana Appeal*.

their common goal.<sup>57</sup> This is similar to the present case. First, Alijahan was present in the meeting of 31<sup>st</sup> December 2004, where Mr. Ricardo Melena claimed that strict measures were needed to be adopted to deal with Cotene's and he later on committed genocide against the Cotene's. Thus clearly Alijahan had knowledge of the common plan. Secondly, the frequency of the meetings indicates establishment of an institution with a shared purpose to realize the common goal of committing genocide. Thus, Alijahan can be held liable for conspiracy to commit genocide.

## **7. ALIJAHAN WAS PART OF A JOINT CRIMINAL ENTERPRISE**

It is submitted that the requisite *actus reus* (7.1) and *mens rea* (7.2) for JCE for genocide are fulfilled here and Alijahan is guilty under the JCE doctrine. Furthermore, Alijahan is also responsible for direct and public incitement to commit genocide under the JCE doctrine (7.3).

### **7.1 Alijahan participated in furtherance of the common purpose of the JCE.**

It is established that the *actus reus* of JCE comprises of plurality of persons, the existence of a common design or purpose and participation in the common design "*involving the perpetration of one of the crimes provided for in the Statute*".<sup>58</sup> The persons need not be organised in a military, political or administrative structure.<sup>59</sup> An express agreement is not required and may be inferred.<sup>60</sup> Participation is broadly defined, may be direct or indirect<sup>61</sup> and it is sufficient that the defendant assisted in the crime and not necessary that he himself perpetrated the killing.<sup>62</sup> The level of participation need not be substantial.<sup>63</sup> It is not necessary to show that the offense would have occurred but for the accused's participation, but it must form a link in the chain of causation.<sup>64</sup>

The agenda of meetings held between Alijahan, Yashode, Dolme and Melena (Allegation G) was to deal strictly with the Cotene's. Upon the death of BR, they sought to achieve their goal and called for action against the Cotene's (Allegations A, D and E). The only reasonable inference that can be drawn from these facts is that they had the common purpose of destroying the Cotene religious group.

Addressing a rally on 15<sup>th</sup> August, 2005, Alijahan said that BR's death should be "*dealt with sternly*" (Allegation A). Immediately following this speech, where he was heard telling Yashode that sometimes the only solution is to "*exterminate them like rats*", Dolme led an armed group to Village Zenotia where around 500 Cotene's were killed. Furthermore, Alijahan by not interrupting when 15 Cotene's were being assaulted by policemen, helped in furtherance of the common purpose. Thus, Alijahan played a substantial role in the killings and was an important part of the chain of causation.

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<sup>57</sup> *Nahimana Appeal*.

<sup>58</sup> *Prosecutor v. Krnojelac*, Case No. IT-97-25-A (ICTY Appeals Chamber, September 17, 2003) ("*Krnojelac*").

<sup>59</sup> *Prosecutor v. Vasiljević*, Case No. IT-98-32-A (ICTY Appeals Chamber, February 25, 2004) ("*Vasiljević*").

<sup>60</sup> *Vasiljević*.

<sup>61</sup> *Prosecutor v. Brdjanin*, Case No. IT-99-36-T (ICTY Trial Chamber, September 1, 2004) ("*Brdjanin*").

<sup>62</sup> *Prosecutor v. Babić*, Case No. IT-03-72-A (ICTY Appeals Chamber, July 18, 2005).

<sup>63</sup> *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A (ICTY Appeals Chamber, February 28, 2005) ("*Kvočka Appeal*").

<sup>64</sup> *Kvočka Appeal*.

## **7.2 Alijahan possessed the requisite *mens rea***

To be held guilty under the first form of JCE, the accused must have the shared intent<sup>65</sup> and where the crime requires special intent, the accused must also have that special intent.<sup>66</sup> As argued above, Alijahan did not intervene when his wife was making the speech calling for action against Cotene's. Furthermore, he asked the youth wings' heads to spread the idea of self-defence and organised a meeting where he asked Melena to be present. This intention can also be inferred by the fact that Alijahan did not interfere in the interrogation and assault that two policemen were carrying out on a group of Cotene's. Thus, it is submitted that Alijahan had the requisite special intention for genocide and participated in furtherance of the common purpose of destroying the Cotene religious group.

## **7.3 Alijahan is guilty for direct and public incitement to commit genocide under the JCE doctrine**

Although it has been held that the form of JCE should be expressly pleaded in the indictment, it is *preferable* and *not mandatory*.<sup>67</sup> In any case, this was the *obiter dictum* and not material to the decision.

It is submitted that Alijahan is guilty for Yashode's act of incitement. It was reasonably foreseeable that in the execution of the common purpose of genocide, one of the members of the JCE could resort to incitement, given the scale of the crime of genocide, the superior position that the members enjoyed and the state of affairs in Revate. Yashode's speech immediately followed Alijahan's speech and identified the Cotene's as creating trouble in the state. The subsequent commotion in the masses clearly shows incitement and Alijahan is guilty for the same.

## **8. IN ANY CASE, ALIJAHAN IS INDIVIDUALLY RESPONSIBLE UNDER ART. 6(1)**

It is submitted that Alijahan is responsible under Art. 6(1) for planning (8.1), instigating (8.2), ordering (8.3) and aiding and abetting (8.4) the crimes pleaded in the indictment. It is established that the presence of these forms of responsibility may be proved through circumstantial evidence and direct evidence is not required.<sup>68</sup>

### **8.1 Alijahan is responsible for planning the genocide that occurred in Revate**

Planning requires a substantial participation of the accused in designing the criminal conduct constituting one or more crimes that are perpetrated<sup>69</sup> (*actus reus*) and awareness of the substantial likelihood that crime may be committed<sup>70</sup> (*mens rea*).

It has been held that *endorsing* a plan is also a mode of participation.<sup>71</sup> As argued above, Alijahan, Yashode, Melena and Dolme decided to deal sternly with the Cotene's and make Revate a Tilen state. The opportunity to give effect to this plan was realized when BR was

<sup>65</sup> *Vasiljević*.

<sup>66</sup> *Kvočka Appeal*.

<sup>67</sup> *Krnjelac*.

<sup>68</sup> *Prosecutor v. Blaškić*, Case No. IT-95-14-T (ICTY Trial Chamber, March 3, 2000) ("*Blaškić*").

<sup>69</sup> *Kordić and Čerkez*.

<sup>70</sup> *Kordić and Čerkez*.

<sup>71</sup> *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T (ICTR Trial Chamber, June 7, 2001) ("*Bagilishema*").

murdered. In light of the fact that five clashes had already occurred between the two religious groups in Revate in the past, it can be said beyond reasonable doubt that Alijahan was aware of the likelihood of the crime of genocide being committed as a consequence of the plan that they had formulated.

## **8.2 Alijahan instigated the people to commit genocide**

The *actus reus* for instigation is prompting another person to commit an offence that is actually committed.<sup>72</sup> Although the instigating act need not be a *sine qua non* for the crime to occur, a causal relation needs to be shown between the instigation and the physical perpetration of the act.<sup>73</sup> 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.<sup>74</sup> However, instigation need not be direct and public.<sup>75</sup>

In the immediate aftermath of BR's brutal murder, Alijahan's statements in his public address- "*How do we react...Do we simply stand and watch?...What would a man do?...Do I need to tell you?*"<sup>76</sup>- contributed substantially to the genocide that occurred. The causal relation can be ascertained from the fact that the killings took place immediately after his speech. Given the circumstances in which he made the statements, knowledge can be attributed to his instigating act.

## **8.3 Alijahan is responsible for ordering the crimes**

'Ordering' requires a person in position of authority instructing another to commit an offence.<sup>77</sup> It does not require a formal superior-subordinate relationship as long as the accused possess *de jure* or *de facto* authority to order.<sup>78</sup> Such authority may arise from social, *political* or administrative understanding.<sup>79</sup> 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.<sup>80</sup> The *mens rea* requirement is lower than direct intent and it is sufficient that the accused had knowledge that crime will be committed with substantial likelihood.<sup>81</sup>

Alijahan exercised authority over the youth wing heads of his political party YLS. He communicated to them the idea of self-defence and that "*there were no friends*". In *Blaskic*, it was held that an order may be implicit or explicit and that it need not be directly given to the person executing it.<sup>82</sup> It is submitted that Alijahan explicitly ordered the youth wing heads to

<sup>72</sup> *Prosecutor v. Galić*, Case No. IT-98-29-T (ICTY Trial Chamber, December 5, 2003).

<sup>73</sup> *Bagilishema; Brdjanin*.

<sup>74</sup> *Kordić and Čerkez; Prosecutor v. Limaj et al.*, Case No. IT-03-66-T (ICTY Trial Chamber, November 30, 2005) ("*Limaj et al*"); *Brdjanin*.

<sup>75</sup> *Prosecutor v. Akayesu*, ICTR-96-4- A (ICTR Appeals Chamber, June 1, 2001).

<sup>76</sup> Fact sheet.

<sup>77</sup> *Kordić and Čerkez; Prosecutor v. Stakić*, Case No. IT-97-24-T (ICTY Trial Chamber-II, July 31, 2003).

<sup>78</sup> *Kordić and Čerkez; Prosecutor v. Strugar*, Case No. IT- 01-42-T (ICTY Trial Chamber-II, January 31, 2005) ("*Strugar*").

<sup>79</sup> *Prosecutor v. Gacumbitsi*, Case No. ICTR-01-64-A (ICTR Appeals Chamber, July 7, 2006).

<sup>80</sup> *Strugar*.

<sup>81</sup> *Kordić and Čerkez; Limaj et al; Brdjanin*.

<sup>82</sup> *Prosecutor v. Blaškić*, Case No. IT- 95-14-A (ICTY Appeals Chamber, July 29, 2004) ("*Blaškić Appeal*").

commit incite people to genocide (Art. 2(3)(c)) when he asked them to spread the message and implicitly ordered Melena to commit genocide (Art. 2(3)(b)) as he specifically asked him to be present at the rally at Yuvkone cricket stadium. The fact that the youth wing heads organised the meeting to ‘spread the message’ and that Melena led a group of 30 youth wing members to give effect to the genocide that happened shows that there *was* a causal relation between Alijahan’s orders and the subsequent crime.

Alijahan knew that BR had been killed in an area that was home to a large Cotene community and he cited his killing as an example of an attack that was underway against the “right minded people”. Hence, it can be inferred that he was aware that ‘enemies’ would in all probability be construed as ‘Cotene’s’ and his party’s youth wing heads would comply with his order. It is, therefore, submitted that Alijahan is responsible for ordering the crimes.

#### **8.4 Alijahan is responsible for aiding and abetting genocide**

It is established that either aiding *or* abetting suffices to prove responsibility under Art. 6(1) and that it is not necessary to prove both.<sup>83</sup> The *actus reus* of aiding and abetting may be perpetrated through an omission, if that omission coupled with the requisite *mens rea* had a decisive effect on the commission of the crime.<sup>84</sup> An approving spectator may be liable if he is held in such respect by the perpetrators that his presence encourages them in their conduct.<sup>85</sup> The *mens rea* for aiding and abetting genocide is not special intent of the abettor but knowledge of the intent of the perpetrator of the crime.<sup>86</sup>

It is submitted that Alijahan, through an omission by not interfering in the interrogation and assault of 15 Cotene’s by the policemen (Allegation C) aided and abetted genocide. Although the policemen had started the assault before they realized that Alijahan was present at the scene, it is established that a causal link is not required and that substantial effect is sufficient to prove guilt.<sup>87</sup> In *Aleksovski*, it was held that the absence of any objection by the accused when he was present at the site of mistreatment of detainees would be construed as a sign of support and encouragement.<sup>88</sup> It can be reasonably inferred that by not interfering, Alijahan provided moral support and thereby, tacit approval to the two policemen, which has been held to be aiding and abetting the crime.<sup>89</sup> Given that the policemen stopped their acts upon seeing Alijahan at the scene of crime indicates that by not interfering, he contributed *substantially* to the commission of the crime.

### **9. ALIJAHAN IS RESPONSIBLE FOR THE CRIMES UNDER ART. 6(3) UNDER THE DOCTRINE OF COMMAND RESPONSIBILITY**

In order for a person to be held criminally responsible under Art. 6(3) of the Statute, the following elements must be established:<sup>90</sup> that there existed a superior-subordinate

<sup>83</sup> *Semanza; Limaj et al.*

<sup>84</sup> *Blaškić Appeal.*

<sup>85</sup> *Kayishema and Ruzindana.*

<sup>86</sup> *Prosecutor v. Krstić*, Case No. IT-98-33-A (ICTY Appeals Chamber, April 19, 2004); *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T (ICTY Trial Chamber-I, January 17, 2005) (“*Blagojević & Jokić*”).

<sup>87</sup> *Blagojević & Jokić; Blaškić Appeal.*

<sup>88</sup> *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T (ICTY Trial Chamber, June 25, 1999).

<sup>89</sup> *Prosecutor v. Simić et al.*, Case No. IT-95-9-T (ICTY Trial Chamber-II, October 17, 2003).

<sup>90</sup> Art. 6(3), Statute of the ICTR, 1994.

relationship in the nature of civilian command (9.1); that the superior knew, or had reason to know, that his subordinates were committing, or were about to commit crimes (9.2); and that the superior failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to punish the perpetrators of the crime (9.3).

### **9.1 There existed a superior-subordinate relationship between Alijahan and Dolme, Melena and other policemen**

Although in *Akayesu*, the ICTR Trial Chamber said that the applicability of the command responsibility (hereinafter “CR”) doctrine in the case of civilian leaders remains contentious,<sup>91</sup> the ICTY Appeals Chamber in *Celebici* held that the doctrine undoubtedly extends to both civilian and military commanders<sup>92</sup> and the current best evidence of customary international law on CR is the *Celebici* case.<sup>93</sup>

It is well established that the test used for determining superior-subordinate relationships is the effective control, or the *material ability* of the superior to prevent or punish the crimes being committed by his subordinates.<sup>94</sup> In this regard, the superior need not have *de jure* authority with an organized structure, or at the head of a formal chain of command,<sup>95</sup> what is required is a *de facto*<sup>96</sup> formal or informal hierarchical structure,<sup>97</sup> direct or indirect,<sup>98</sup> with the superior possessing effective control over his subordinates. It is not necessary that the *de facto* status must be the same as the *de jure* status.<sup>99</sup> Although a subordinate unit of the superior is a *sine qua non* for superior responsibility, it is *relatively unimportant* where the superior is charged with maintaining peace and order and punishing crime and protecting lives and property.<sup>100</sup>

In the instant case, Alijahan being the Chief Minister of the State of Revate exercised *de facto* authority over Dolme and Melena and *de jure* authority over YLS’s youth wings heads. Dolma and Melena were a part of meetings between Alijahan and Yashode from 1996 to 2005. Following Alijahan’s rally after BR’s killing, the armed group which effected to the killing of Cotene’s in Village Zenotia was led by Dolme (Allegation B). Melena also led a group of 30 people after the meeting in City Diew (Allegation E) to another place where they identified the enemies of the state (Allegation F). That the policemen halted their actions upon seeing Alijahan when they were interrogating the Cotene’s but resumed when Alijahan did not interrupt (Allegation C) clearly shows that Alijahan had effective control over the

<sup>91</sup> *Akayesu*.

<sup>92</sup> *Prosecutor v. Zejnil Delalić et al*, Case No. IT-96-21-A (ICTY Appeals Chamber, February 20, 2001) (“*Celebici Appeal*”).

<sup>93</sup> Greg R. Vetter, “Command Responsibility of Non-Military Superiors in the International Criminal Court”, 25 *Yale J. Int’l L.* 89 (2000).

<sup>94</sup> GERHARD WERLE, *Principles of International Criminal Law* 131 (Netherlands: T.M.C. Asser Press, 2005); *Nahimana*; *Blaškić Appeal*; *Celebici Appeal*.

<sup>95</sup> *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T (ICTR Appeals Chamber, December 1, 2003); *See also*, *Celebici Appeal*.

<sup>96</sup> *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A (ICTR Appeals Chamber, June 1, 2001); *See also*, *Nahimana*.

<sup>97</sup> *Prosecutor v. Bagambiki*, Case No. ICTR-99-46-T (ICTR Trial Chamber-III, February 25, 2004) (“*Bagambiki*”); *See also*, *Celebici Appeal*.

<sup>98</sup> *Celebici Appeal*.

<sup>99</sup> *Celebici Appeal*.

<sup>100</sup> *Celebici Appeal*.

policemen.

## **9.2. Alijahan knew or had reason to know that his subordinates were committing the crimes**

The *Celebici* TC held that the superior cannot remain wilfully blind to the acts of his subordinates. The superior will be held responsible if he had some actual information which informed of the crime.<sup>101</sup> In the instant case, Alijahan had a prominent status as the Chief Minister of Revate, itself a relevant factor in determining whether or not he should have known about the crimes of his subordinates.<sup>102</sup>

Even if it is conceded that to establish CR, the doctrine does not require a commander to actively seek out information about the activities of his subordinates, what it does require is that in the event that there is information available to the commander that would put him on notice about the crimes committed by his subordinates,<sup>103</sup> and if he fails to take action, criminal liability would be attracted. It is important to note that such information *need not* provide *specific* information about the offences that may be committed.<sup>104</sup> Alijahan was seen as moving away from Village Zenotia, where the killings took place (Allegation B) and when Cotene's were being assaulted by the policemen while interrogation, he *consciously* ignored their acts and continued to observe.

The meeting at the Yuvkone Cricket Stadium in City Diew and the talk to action being taken against the 'enemy' was information good enough for Alijahan to infer that an attack was being planned and that Dolme, Melena and the policemen were about to commit crimes or had committed crimes.

## **9.3. Alijahan failed to take all necessary measures to prevent the commission of crime by his subordinates**

Under Art. 6(3) of the Statute, if the superior is aware of the impending or on-going commission of a crime, necessary and reasonable measures must be taken to stop or prevent it. The Trial Chamber in *Kvočka* held that the superior does not have to be the one who dispenses the punishment but must take important disciplinary steps<sup>105</sup> and where the person is not in a position to prosecute, he may refer it to the competent authority.<sup>106</sup>

It is submitted that Alijahan in this case did absolutely nothing to prevent the crime or to punish the perpetrators of the crime. When he saw the policemen assaulting the Cotene's, he kept observing them without taking any steps to prevent it. It is well-established that the superior's *ability* to prevent the crime becomes irrelevant if he makes absolutely no *attempt* to do so.<sup>107</sup> Alijahan did not try to prevent Melena from effecting violence upon the Cotene's (Allegation F) and neither did he punish Dolme, Melena or any policeman subsequently.

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<sup>101</sup> *Celebici*.

<sup>102</sup> *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T (ICTR Trial Chamber-II, January 22, 2004).

<sup>103</sup> *Celebici Appeal*; *See also, Blaškić; Krnojelac*.

<sup>104</sup> *Celebici Appeal*.

<sup>105</sup> *Kvočka Appeal*.

<sup>106</sup> James D. Levine, "The Doctrine of Command responsibility and its Application to Superior Civilian Relationship: Does the International Criminal Court Have the Correct Standard?", 193 *Mil. L. Rev.* 52 (2007).

<sup>107</sup> *Prosecutor v. Halilović*, Case No. IT-01-48-T (ICTY Trial Chamber-I, Section A, November 16, 2005).



Hence, it is submitted that Alijahan is responsible for the crimes committed by his subordinates under the Art. 6(3) of the Statute.

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**PRAYER**

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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 has the jurisdiction to hear this matter.
- Declare that the accused's right to fair trial has not been violated.
- Declare that evidence that antedates the temporal jurisdiction of the tribunal can be admitted
- Declare that the accused is guilty of genocide, direct and public incitement to genocide and conspiracy to commit genocide.
- Declare that the accused is responsible under the JCE doctrine and that in the alternative, he is individually responsible for planning, instigating, ordering and aiding and abetting genocide.
- Declare that the accused is guilty under the CR doctrine.

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 Respondent.