THE INTERNATIONAL CRIMINAL TRIBUNAL FOR AKPAF

AT THE HAGUE

IN THE APPEALS CHAMBER

Criminal Appeal No._____ /2011

(Under Art. 81 of the Statute of the International Criminal Court)

Commander A ...Appellant

v.

Prosecutor ...Respondent

Written Submissions on Behalf of Appellant

Counsel for Appellant

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STATEMENT OF JURISDICTION

Appellant approaches this Honorable Court under Article 81 of the Rome Statute of the International Criminal Court. Respondent humbly submits to the jurisdiction of this Honorable Court.

STATEMENT OF ISSUES

1. WHETHER COMMANDER A PROCEDURALLY DEFAULTED IN FAILING TO RAISE THE ISSUE OF JUDGE RECUSAL AT TRIAL?
2. WHETHER JUDGE ARBAN SRINIVAS IMPROPERLY SEVED AS AN ADJUDICATOR ON THE TRIAL COURT BENCH?
3. WHETHER JUDGE ARBAN SRINIVAS IS QUALIFIED TO SERVE ON THE ICTA?
4. WHETHER THIS HONORABLE COURT HAS PROPER JURISDICTION TO HEAR THE MATTER?
5. WHETHER COMMANDER A COMMITTED AN ACT OF GENOCIDE?

STATEMENT OF FACTS

The Red Tribe and the pink Tribe are two groups within Akpaf a state that gained its independence from colonial rule in the early 1950's. Akpaf is home to rich soil that is conducive to growing fine coffee that sells at a high value on the world market. Because the coffee trade would often lead to violence, the Akpaf Senate passed a national ban on coffee with a punishment of death, which was couple by a United Nations Security Council ban.

In the late 1970's, differences between the Red and Pink tribes came to a head and a civil war broke out, which resulted in thousands dead and the destruction of the country. Each tribe had political and military wings, which constituted opposing sides and were described as criminal organizations. Coffee production started anew and funded the inflow of arms into the country. The two sides continued to fight going through more than 26 changes in government and 13 bloody coups. In 1986, in an effort to symbolically start anew, the Red Tribe destroyed the Akpaf Senate building, which was a physical representation of the Pink Tribe's power. The Red Tribe's Commander A stated that he was pleased to have participated in such a symbolically powerful event. The Pink Tribe responded to the destruction of the Senate with violence and killed one hundred Red Tribe members where the building once stood.

Akpaf's dire state of affairs caused millions to starve to death and many to seek refuge in neighboring countries. In 2001, the Security Council passed a resolution to establish the International Criminal Tribunal for Akpaf (ICTA) to prosecute persons responsible for the tragedies happening in Akpaf. The Tribunal adopted the International Criminal Court Statute. Akpaf did not consent to the jurisdiction of the ICC nor did they sign a waiver or present a statement in regards to the establishment of the ICTA or to the jurisdiction of the ICC.

While the tribunal was being established, both the Pink and Red Tribes took advantage of the

new coffee sales and second hand small arms sales. Despite the Akpaf ban and the United Nations ban against the sale of coffee, sales of coffee flourished. Red and Pink Tribe members sold a good portion of the illegal coffee to AS Enterprises, a multinational corporation that specialized in coffee, exotic spices, goods, and small arms. Arban Srinivas founded AS Enterprises in 1977 and served as its director until 1990 when he left with a hefty golden parachute. Arban Srinivas and AS Enterprises have received great success in their illegal sales of coffee and their sales of small arms to countries like Akpaf. Undoubtedly, Arban Srinivas was intimately involved with the conflict between the Red and Pink tribes by way of his sale of arms to the tribes. Furthermore, Arban Srinivas' wife (now ex-wife), Revati Srinivas, heavily lobbied the Industan government to accept the Red Tribe's legitimacy, which is additional evidence of their involvement in the politics of Akpaf.

Arban Srinivas tried to distance himself from the Akpafian conflict when he served on the Supreme Court of Industan in 1996 by divorcing his wife and publicly stating that he believed in the rule of law. However, Arban Srinivas true involvement in the Akpafian conflict became clear shortly after his appointment to the court. In 2001, an investigative journalist uncovered emails from Arban Srinivas to Industan's political leaders speaking of the many opportunities in Akpaf. The emails spoke of removing the elite, maintaining order amongst savages, arming the red tribe, and taming the Akpafian population. As a result of this exposure, Industan maintains a case open against Revati Srinivas who fled Industan to Akpaf. During the investigation, Arban Srinivas remained silent.

In the first ICTA case, ICTA linked Arban Srinivas former company, AS Enterprises to war crimes committed during the conflict. Judge Srivinas was appointed to serve on the panel of judges for the ICTA, however, he recused himself for the first trial. Judge Srivinas' career has

been far from criminal and international law. From 1977 to 1990, Judge Srivinas was outside of Industan, where he was barred. He joined the Industan Supreme Court in 1996 after serving as a Senior Advocate and practicing extensively in international commercial law. Despite this extensive involvement in the conflict and lack of experience, Arban Srinivas remained on the trial bench for Commander A's case the second ICTA case. Commander A was tried before the Trial Chamber after which the tribunal found him guilty of genocide. Commander A has appealed the decision before the Appeals Chamber of the Tribunal.

SUMMARY OF PLEADINGS

1. **COMMANDER A FOLLOWED PROPER COURT PROCEDURES IN FILING HIS APPEAL.**

   Commander A has the right to appeal the Trial Chamber's decision and may introduce issues not addressed at the trial level. Alternatively, Commander A may seek a review of judgment. It is unreasonable to expect Commander A to have made an interlocutory appeal on a trial motion because they are highly discouraged. Therefore, the Appeals Chamber should hear Commander A's appeal based on the requested recusal of Judge Srinivas.

2. **JUDGE ARBAN SRINIVAS SHOULD HAVE BEEN RECUSED FROM THE TRIAL COURT PROCEEDINGS BECAUSE OF HIS EXTENSIVE, PERSONAL INVOLVEMENT IN THE AKPAFIAN CONFLICT.**

   Because of Judge Srinivas's personal and professional involvement in Akpafian politics and the allegations of involvement in arms dealing with the Red Tribe, he should have been recused from Commander A's trial. Judge Srinivas' act of not recusing himself is material misconduct.

3. **JUDGE SRINIVAS IS NOT QUALIFIED TO SIT ON THE ICTA.**

   Judge Srinivas fails to meet the requirements under Article 36 of the Rome Statute.

4. **THE TRIAL COURT PROCEEDINGS ARE INVALID BECAUSE THE ICTA DOES NOT HAVE JURISDICTION OVER COMMANDER A.**

   The establishment of the Tribunal by the Security Council Resolution no. 54/01 is unlawful since the Security Council does not have the power to establish judicial tribunals in the current circumstances under Chapter VII of the UN Charter. Furthermore, the Security Council resolution is null and void since it violates the

sovereignty of Akpaf and conflicts with its local laws.

5. **COMMANDER A DID NOT COMMIT AN ACT OF GENOCIDE.**

Genocide did not occur. The acts that did occur at the site of the senate building do not reach the uniquely high threshold for the crime of genocide. Furthermore, it is not established that the Red tribe constitutes a group that would be protected under the ICC statute. Finally, there was no intention and no element of mens rea to convict Commander A of genocide.

PLEADINGS

1. COMMANDER A'S APPEAL IS RIPE, PROPER AND SHOULD BE HEARD.

1.1 Commander A may appeal the Trial Chamber's decision.

Commander A clearly has grounds to appeal. The ICC, ICTY, ICTR, ICCPR, and Draft Rome Statute from the ILC all protect the right to appeal.[1] Article 81 provides for appeal "[o]n any other ground that affects the fairness or reliability of the proceedings or decision."[2]

Judge Srinivas's close relationship with the Red and Pink Tribes as well as the great profit he gained from the Akpafian conflict establish an unfair bias against Commander A. As a result Commander A, may appeal on the grounds of fairness.

1.2 Commander A may introduce new issues on appeal.

Commander A may introduce the issue of recusal even though he did not address the issue at trial. Article 81(2)(b) intimates that issues may be introduced on appeal: the court "may invite the Prosecutor and the convicted person to submit grounds under article 81."[3] The draft provisions by the Preparatory Committee originally prohibited the introduction of new arguments on the appellate level under Article 82, but the Committee deleted this provision because many worried that it would, in fact, prohibit new evidence as well.[4] The ICC statute clearly provides an avenue for litigants to bring new evidence on appeal, which suggests that new arguments may be brought at well.[5] Jurisprudence of the ICTY and ICTR prohibit the

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1 *See* Karin N. Calvo Goller *The Trial Proceedings of the International Criminal Court* (Martinues Nijhoff Publishers, 2006); Antonio Cassese, *International Criminal Law Second Edition*, (Oxford: Oxford University Press, 2008) 424.

2 *See* Rome Statute of The International Criminal Court, Article 81 (1998); Antonio Cassese, *International Criminal Law Second Edition*, (Oxford: Oxford University Press, 2008) 428.

3 *See* Rome Statute of The International Criminal Court, Article 81(2)(b) (1998); Maruo Politi and Giuseppe Nesi, *The Rome Statute of The International Criminal Court: A Challenge to Impunity*, (Ashgate Dartmouth, 2001) 229.

4 See Maruo Politi and Giuseppe Nesi, The Rome Statute of The International Criminal Court: A Challenge to Impunity, (Ashgate Dartmouth, 2001) 229.

introduction of new arguments on appeal, but similar case law has not been found for the ICC.[6] This drafting history evinces and the nature of Article 81(2)(b) that Commander A is permitted to raise defenses on appeal that he did not raise in the Trial Chamber.[7]

1.3 If Commander A may not appeal the Trial Chamber's judgment, then he may seek a review of judgment.

Even if Commander A could not appeal the Trial Chamber's decision, Commander A could likely still seek a review of judgment. Review of judgment is a legal mechanism permitting the accused to seek revision after the time for appeal has run. This review is based on new evidence that becomes available after the trial that would have altered the disposition of the trial had it been available.[8] Serious misconduct by a judge or breach of duty gives rise to a review of judgment.[9] The moving party is obliged to show that the evidence was unavailable due to something out of the party's control.[10]

Here, Judge Srinivas breached a duty to the court by not recusing himself, which allows Commander A to seek review of the judgment if necessary. Commander A may seek review of judgment by showing that this act occurred during the course of trial and therefore could not be argued until the behavior was complete.

1.4 Commander A could not have filed an interlocutory appeal because they are rarely granted.

It would have been impractical and improbable for Commander A to file an interlocutory appeal

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6 *See* Kriangsak Kittichaisaree, *International Criminal Law* (Oxford University Press, 2001) 304.
7 See Maruo Politi and Giuseppe Nesi, The Rome Statute of The International Criminal Court: A Challenge to Impunity, (Ashgate Dartmouth, 2001) 229.
8 *See* Rome Statute of The International Criminal Court, Article 84 (1998).
9 See Leila Nadya Sadat, The International Criminal Court and The Transformation of International Law: Justice for the New Millennium, (Transnational Publishers Inc., 2002) 244–247.
10 *See* Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, (Cambridge University Press, 2007) 391.

regarding this issue because interlocutory appeals are an exception in international courts and generally avoided.[11] Drafters intended interlocutory appeals to be very limited.[12] Therefore, Commander A's interlocutory appeal would have been fruitless and only harmed his case.

2. COMMANDER A DID NOT RECEIVE A FAIR TRAIL BECAUSE JUDGE SRINIVAS SHOULD HAVE BEEN RECUSED.

2.1 Judge Srinivas' partiality tainted Commander A's case, accordingly, Judge Srinivas should be recused.

Commander A did not receive a fair trial because Judge Srinivas's close connection to the Akpafian conflict created unacceptable bias. International human rights and the Rome Statute of the ICC mandate that an accused receive a fair trial by impartial, independent judges of moral integrity.[13] Article 41(2)(a) of the Rome statute states, "A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground."[14] Rule 34(c) further explains that this would include activities prior to taking office in which the judge "could be expected to have formed an opinion on the case in question, the parties, or on their legal representatives that, objectively, could adversely affect the required impartiality of the person

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11 *See* Carsten Stahn and Goran Sluiter, *The Emerging Practice of The International Criminal Court*, (Martinus Nijhoff Publishers, 2009) 559.

12 See Karim Kahn and Rodney Dixon, Archibold International Criminal Courts Practice, Procedure, and Evidence (Thomson Reuters (legal), 2009) 1443.

13 *See* Antonio Cassese, *International Criminal Law Second Edition*, (Oxford: Oxford University Press, 2008) 379; Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda, Rule 15(A) (2010); The International Covenant on Civil and Political Rights, Article 14(1) (1996) (granting "a fair and public hearing by a competent, independent and impartial tribunal"); Rome Statute of The International Criminal Court, Article 4 (1998) (stating "Judges shall be impartial and ensure the appearance of impartiality"); Rome Statute of The International Criminal Court, Article 67(1) (1998) (providing "In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to thefollowing minimum guarantees, in full equality"); European Convention on Human Rights, Article 6 (1953); Rome Statute of The International Criminal Court, Article 40 (1998) (underscoring the need for independent judges).

14 *See* Rome Statute of The International Criminal Court, Art.41 (1998).

concerned."[15]

A presumption of judicial impartiality exists but may be overcome.[16] The test for judge impartiality is clearly explained in *Furundzija* where the Appeals Chamber found that a judge must be both subjectively and objectively unbiased.[17] To determine impartiality, the Appeals Chamber in *Furundzija* considered several factors of a two pronged test: (1) A Judge is partial if it is shown that actual bias exists; (2) There is an unacceptable appearance of bias and the judge should be recused if a judge is one of the parties, or has a financial interest in the case's disposition, or if the case's outcome will promote a cause in which she is involved with one of the parties, or if a properly informed reasonable observer would detect bias.[18] The concept of the reasonable observer employed in this context is supported in both civil and common law jurisdictions as well as the European Court of Human Rights.[19] The maxim "justice should not only be done but be seen to be done" explains the high standard applied to judges.[20]

In the instant case, there is no question that a reasonable observer would rationally believe Judge Srinivas to have bias against Commander A given his financial gain from the Akpafian conflict, the emails he wrote regarding taming the Akpafian people and arming the Red Tribe, as well as

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15 *See* Rules of Procedure and Evidence of the International Criminal Court, Rule 34(c) (2002).
16 *See Prosecutor v. Furundzija,* Case No. IT-95-17/1-A (ICTY Appeals Chamber July 2000) §196.
17 *See* Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, (Cambridge: Cambridge University press (2007) 355.
18 *See Prosecutor v. Furundzija,* Case No. IT-95-17/1-A (July 2000) §189; Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction To International Criminal Law and Procedure*, (Cambridge: Cambridge University Press, 2007) 355.
19 *See* German Code of Criminal Procedure, Arts. 22-24 (Strafprozeßordnung); The French Code de Procédure Pénale Art 668; Italian Codice de Procedura Penale Arts. 34-36; The Dutch Code of Criminal Procedure Arts. 512-519 (Wetboek van Strafvordering); Swedish Code of Judicial Procedure, Sections 13 and 14 (1998); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988) (stating that even the appearance of impartiality should be avoided); *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others, Judgement on Recusal Application*, 1999 (7) BCLR 725 (CC), 3 June 1999; *Piersac v Belgium*, ECHR, judgment of 1 Oct 1982, Series A No 53, par 30; *Hauschildt v Denmark*, (1990) 12 EHRR 266, par 48; *Bulut v Austria*, ECHR, judgment of 22 Feb 1996, Reports of Judgments and Decisions 1996-II 347, at 356 (pars 31-33).

his ex-wife's involvement in both the business and political sectors. The ICTA was established through a United Nations resolution, and Judge Srinivas explicitly contravened the United Nations ban on Akpafian coffee. This dubious involvement would cause a reasonable observer to find that Judge Srinivas could not impartially sit on the ICTA.

In the English case of former Chilean head of state, Augusto Pinochet, the court determined that the judge who had been an unpaid director of one of the parties involved could not serve on the court. [21] Here, Judge Srinivas financed the Red Tribe and directed its actions "to maintain order amongst the savages of Akpaf." This shows a direct link between Judge Srinivas and the accused. This relationship is stronger than an unpaid head of state because Judge Srinivas profited greatly from the illegal arms and coffee trade in Akpaf.

The Appeals Chamber of the Special Court For Sierra Leone recused Judge Robertson because, prior to his appointment to the bench, he wrote a book entitled *Crimes Against Humanity* about the conflict in which he stated that Revolutionary United Front rebels of the conflict in Sierra Leone committed acts such as torture and rape.[22] Judge Robertson was eventually removed from the Special Court entirely.[23] It did not matter that Judge Robertson's book was already available at the time of his appointment and that knowing his opinions he was appointed and sworn into office. Judge Robertson should have foreseen the recusal issues and declined to serve on the Special Court.[24] Comparing the instant case, it is evident that Judge Srinivas should have recused himself and because he did not, he should now be recused because past acts expressing

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20 R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2) [1999] 1 All ER 577 ("Pinochet") (finding a judge to be too intimately involved with one of the parties to be unbiased); R v Sussex Justices, Ex parte McCarthy All ER 233 (1923).
21 R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2) [1999] 1 All ER 577 ("Pinochet").
22 See Cockayne, Special Court for Sierra Leone, 2 J. Int'l Crim. Just. 1154 (2004).
23 See id.
24 See id.

partiality (such as writing a book or sponsoring a conflict through trade) are enough for a reasonable observer to apprehend bias.

In cases where recusal has been denied, the relationship between the judge and parties and issues of the case has been much weaker than in the instant case. Here, Judge Srinivas sponsored the Akpafian conflict by supplying arms and ensured the Red Tribe's military victory. Further, it could be argued that Judge Srinivas is responsible for the alleged act of genocide. Judge Srinivas used the Red Tribe and Commander A as a tool to gain economic power in Akpaf and construct a market favorable to his financial pursuits. Judge Srinivas discussed exploiting the commercial potential of Akpafian coffee in his emails. Specifically, the standard set out in *Furudizija* states financial incentive as a reason to find the judge unfit to adjudicate the case. These facts demonstrate that Judge Srinivas was so closely tied to Commander A and the conflict that he could potentially be charged with conspiracy, aiding and abetting, or joint criminal enterprise, placing him much closer to the defendant and the legal issues than in cases where recusal has been denied.

Judge Srinivas had a duty to recuse himself as he did in the case against the former Pink Tribe leader.[25] Commander A did not receive a fair trial because Judge Srinivas remained on the bench; therefore, Commander A should be granted a new trial.

2.2 Judge Srinivas engaged in serious misconduct under Rule 24(1)(b).

Judge Srinivas' acts constitute serious misconduct under ICC Rule 24(1)(b) because his act of fueling the conflict was so grave in nature that it will likely cause serious harm to the standing of the court.[26] A Judge may be removed for serious misconduct or breach of her duties.[27]

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25 *See* Rules of Procedure and Evidence for the International Criminal Court, Rule 35 (2002).
26 *See* Rules of Procedure and Evidence for the International Criminal Court, Rule 24(1)(b) (2002).
27 *See* Rome Statute of The International Criminal Court, Article 46 (1998).

Furthermore, Judge Srinivas participated in the illegal coffee trade that violated domestic law and the Security Council ban on coffee sales. Therefore, his conduct requires his recusal.

3. JUDGE SRINIVAS IS UNQUALIFIED TO SIT ON THE ICTA.

Judge Srinivas should be removed from the ICTA entirely because he does not have the required experience. Article 36 of the Rome statute explains the qualifications of judges and insists that judges have experience in criminal law and criminal procedure. Additionally judges must have "established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court."[28]

Here, Judge Srinivas does not meet this requirement because he only has experience in international commercial law. From 1977 to 1990, Judge Srinivas was outside of Industan (the jurisdiction in which he is barred) and lead his corporation, AS Enterprises. It is unlikely that Judge Srinivas even practiced law during this time. His service on the Industan Supreme Court surely exposed him to the laws of Industan but not to international law, especially international human rights law. Judge Srinivas does not have the legal knowledge or experience to sit on the ICTA.

4. THE TRIAL COURT PROCEEDINGS ARE INVALID BECAUSE THE ICTA DOES NOT HAVE PROPER JURISDICTION.

4.1 The establishment of the ICTA by Security Council resolution No. 54/01 is unlawful.

4.1.1. The Tribunal has the jurisdiction to review the Security Council Resolution No. 54/01.

Judicial review of the Security Council (SC) Resolution is permitted because of the direct consequences that occur following the Security Council's exercise of power.[29] In cases that

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28 *See* Rome Statute of The International Criminal Court, Article 36 (1998).

29 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.

occurred in similar tribunals, the Security Council's actions were reviewable. For example, in *Tadic*, 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.[30] Furthermore, in another tribunal case *Kadi,* it was held that the review of the SC Resolutions is permitted for questions regarding violations of jus Cogens.[31] Because genocide is clearly a violation of jus Cogens, and because of the similarity in the ICTA establishment and that of the ICTY, this tribunal has jurisdiction to review the SC resolution establishing it.

4.1.2. The Security Council does not have the power to establish the ICTA.

4.1.2.1. 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 Article 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 that 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. However, the measures in Article 41 are not exhaustive. Applying the principle of ejusdem generis – a recognized means of treaty interpretation under Article 32 of the Vienna Convention on Law of Treaties[32] to article 41 of the UN Charter – the SC can only take political measures, and as such they should not have established the tribunal.

Reports 16; Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, [1954] I.C.J. Reports 47.

[30] *Prosecutor v. Dusko Tadic,* Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-T (ICTY Appeals Chamber, October 2, 2005). (While the cited case dealt with an interlocutory appeal, it is submitted that the appeals chamber herein should allow the review as if it were an interlocutory appeal, because of the infrequency and lack of encouragement to submit an interlocutory appeal under the ICC see section 1.4.)

[31] *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).

[32] Aust, *Modern Treaty Law and Practice* 200 (Cambridge: Cambridge University Press, 2000).

4.1.2.2. *Arguendo* that the SC does have the power to establish ad hoc tribunals, the power only comes from circumstances that threaten the maintenance of international peace and security.[33] The situation in Akpaf and the facts that are given do not indicate that an international peace and security crisis are present. Indeed, the first tribunal holding found only that "there appeared to be conduct of foreign nationals"[34] involved. As such, there is no international threat to the peace and security and the SC had no power or right to establish the ICTA.

4.2 The Security Council Resolution 54/01 establishing ICTA is null and void.

4.2.1 Akpaf is not a signatory of the ICC.

It is a jus Cogens norm that the establishment of the Tribunal should not violate the sovereignty of a State[35], in this case Akpaf. In this case, Akpaf is not a signatory to the International Criminal Court.[36] Furthermore, it cannot be deduced from the fact statement that Akpaf has submitted to the jurisdiction of the ICC. Therefore, Akpaf's sovereignty is being impinged by the act of the SC forcing the jurisdiction of the ICC on the people of Akpaf and in particular Commander A without any waiver or self submission.[37]

4.2.2. Akpaf has not implemented the Convention on Prevention and Punishment of the Crime of Genocide.

Akpaf is a signatory to the Convention on Prevention and Punishment of the Crime of Genocide of 1948, however, a treaty cannot become law of the land and cannot be brought into force unless the Parliament passes legislation under Article 253 of the Constitution of India enforcing

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[33] Rome Statute of The International Criminal Court (1998).
[34] Fact sheet.
[35] M. Cherif Bassiouni, "International Crimes: "Jus Cogens" and "Obligatio Erga Omnes," 59(4) *Law and Contemporary Problems* 63 (1996) at 74.
[36] India is not a signatory to the ICC and the law of India is *pari material* with the laws of Akpaf.
[37] *See Generally,* Rome Statute for the ICC Article 12-13.

the same,[38] which is in *pari material* with the Constitution of Akpaf. Article 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 Akpaf as the Genocide Convention Act, 1960 although enacted, has not be notified in the Official Gazette. Since there is no law in the absence of notification, Akpaf has no legal obligations arising from the Genocide convention and genocide is not recognized as a crime under its domestic law. Therefore, along with the lack of consent by the Akpafian people to the ICTA jurisdiction, any action by the SC is invalid because it is inconsistent with the provisions of Article 20(1) of the Constitution, which grants protections against ex-post facto laws. Article 46 of the Vienna convention on the Law of Treaties 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.[39] This provision applies to the UN Charter as well since the ICJ has held that the provision of the Vienna Convention can be considered as a codification of already existing customary law.[40] Thus, the SC resolution establishing the tribunal without the consent of the Akpafian society (and even if they did consent to it) is vitiated by virtue of it being inconsistent with the Constitution of Akpaf, which is its "internal law of fundamental importance." In conclusion, the SC actions are a violation of Akpafian sovereignty.

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[38] *State of West Bengal v. Kesoram Industries,* (2004) 10 SCC 201; *Maganbhai Ishwarbhai Patel v. Union of India,* AIR 1969 SC 783; Constitution of India, 1950.

[39] Vienna Convention on the Law of Treaties (Entry into force, 27 Jan 1980) Article 46 "Provisions of internal law regarding competence to conclude treaties."

[40] Bruno Simma, *The Charter of the United Nations:* A Commentary 30 (New York: Oxford University Press, 1994).

5. GENERAL A IS NOT GUILTY OF GENOCIDE.

5.1 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[41], and no derogation on the point is permitted.[42] Tribunals established by the Security Council in similar situations have described genocide as the "most inhumane crime."[43] Other tribunals have called it the "crime of crimes."[44] Rafael Limkin first coined the term, genocide, when he was describing the horrors of the Second World War.[45] Under international law, the crime of genocide involves the denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations.[46] Thus, only exceptional cases where extreme and the most inhuman form of persecution has occurred can qualify as genocide. Here, the destruction of the Senate building does not come close to the gravity threshold that genocide.

5.2 *Arguendo* Commander A did not commit genocide.

To convict Commander A of genocide, the prosecution has to prove that Commander A committed at least one of the acts listed in Article 6 of the Statute. He did not commit one of them. From the fact statement, nobody was killed and even if there was some form of mental distress from the leveling of the Senate building, nothing in the fact statement indicates that the

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[41] Akhavan, *Enforcement of the Genocide Convention; A Challenge to Civilization,"* 8 Harvard Human Rights Journal 29 (1995).

[42] *See generally, Oppenhaim's International Law* (9th edition, R. Jennings & A. Watts editors, volume I, London: Peace, 1993); Ian Brownlie, *Principles of Public International Law* (6th editions, Oxford: Oxford University Press, 2003).

[43] *See Prosecutor v. Kupreskic et al*, Case No. IT-95-16-T (ICTY Trial Chamber, January 14, 2000).

[44] *See Prosecutor v. Akayesu,* Case No. ICTR-96-4-T (ICTR Trial Chamber I, September 2, 1998); *Prosecutor v. Serushago,* Case No. ICTR 98-39-S, Sentence 5 (February 1999), para. 15

[45] William Schabas, *Genocide in International Law,* Cambridge university Press 92000), p. 25 (referring to Limkin's renowned book *Axis Rule in Occupied Europe, Law of Occupation, Analysis of Government, Proposals of Redress,* Washington: Carnegie Endowment for World Peace (1944).

[46] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), 1951 ICJ Reports 15, p. 23.

stress was to the level that is required by the statute and similar case law. In similar ICTY cases, the tribunal held that while the result of genocide need not be permanent or irremediable, it must result in a "grave and long-term disadvantage to a person's ability to lead a normal and constructive life."[47] Furthermore, the phrase "mental harm" was inserted in order to prohibit acts of genocide committed primarily committed through narcotics.[48] Therefore, the acts committed at the Senate Building site do not constitute genocide.

5.3 The Red Tribe is not a protected group under the Statute.

For genocide to occur a national, religious, ethnical or racial group must exist.[49] The red tribe is not a protected group under the Statute. The red tribe is not a national, racial or religious group. In order to be considered an ethnic group, they must share the same language and culture,[50] which cannot be inferred from the facts, where we are only told, without support or evidence, that they constitute an ethnic tribe. Next, in the ICTR case *Akayesu* a concept of a "stable and permanent group" emerged as a protected group.[51] This faulty reasoning came from the *travaux* of the genocide convention. 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.[52] Moreover, the preparatory works of a document are to be used to interpret it only when there is some level of ambiguity in the text, not to rewrite unambiguous statutes.[53] Expanding the definition of the groups that fall under the genocide statutes and

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[47] *Prosecutor v. Radislav Kristic,* Case No. IT-98-33-T, Judgment, para. 513, 2 August 2001; *See also Prosecutor v. Vidoje Blagojevi and Dragan Joki,* Case No. IT-02-60-T para. 645 Judgement, 17 Jan 2005.

[48] Mathew Lippman, "The convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later," *Arizona Journal of International and Comparative Law,* 15 Ariz. J. Int'l & Comp. Law 415, 453 (1998) *citing* 3 U.N. GAOR C. 6, 81st mtg. at 175, U.N. Doc. A/C.6/SR.81 (1948) (Mr. Ti-Tsun Li, P.R.C.).

[49] Rome Statute of The International Criminal Court (1998) Article 6.

[50] *Prosecutor v. Akayesu,* Case No. ICTR-96-4-T (ICTR Trial Chamber I, September 2, 1998) (citing the Rwanda tribunal is indicative herein because they are interpreting the same genocide statute provisions).

[51] *Id.*

[52] Schabas 2000, at 132.

[53] Article 32, Vienna Convention on Law of Treaties, 1969.

conventions is beyond the intent of the framers to hold the crime of genocide for only the most serious and unique offenses. Furthermore, this tribunal should not uphold the argument that a group exists in the eyes of the perpetrators of the crime and therefore their acts can be punished as genocide, as was seen in the ICTR[54], as this is unsustainable. This interpretation would be to submit and criminalize the mental status of the defendants before the crime is committed, which was not the intention behind the convention or the aim of the drafters.[55] The intention of the Rome genocide statute was to protect specified minority groups;[56] therefore, allowing subjective groups to be enough to constitute genocide is wrong.

5.4 The leveling of the Senate building was not a deliberate act designed to destroy the Red Tribe.

In order to prove genocide, the mens rea element of intent must be shown. The "intent to destroy in whole or in part" is the "special intention" that separates genocide from other crimes against humanity.[57] It is accepted that the words "in part" mean at the very least a substantial part of the group.[58] Here, it cannot be deduced from the facts that Commander A intended to destroy *any* part of the Red Tribe. General A's statement indicated that he was encouraged to help rid the Senate "look" of the Pink Tribesmen but not to rid the entire Pink tribe.[59] Indeed, 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

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[54] *Prosecutor v. Kayishema and Ruzindana* Case No. ICTR-95-1-T (ICTR Trial Chamber, May 21, 1999).
[55] Schabas 2000, at 110.
[56] Mathew Lippman, "The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later," Arizona Journal of International and comparative Law, 15 Ariz. J. Int'l & Comp. Law 415, 422 (1998).
[57] *Akayesu,* Case No. ICTR-96-4-T.
[58] Schabas 2000, at 1010; *See also, Prosecutor v. Semanza,* Case No. ICTR-97-20-T (ICTR Trial Chamber, May 15, 2003); *Prosecutor v. Goran Jelisic,* Case No. IT-95-10-T (ICTY Trial Chamber I, December 14, 1999); *Prosecutor v. Nicolic,* Case No. IT-94-2A, (ICTY Appeals Chamber February 4, 2005).
[59] Fact Sheet.

genocide.[60] Similar incidents, which occurred in Gujarat in 2002, were not declared to be genocide another similar case was of the NATO bombings where it was held that there was not element of intention directed against a group.[61] The case at hand does not have the requisite intent for genocide; therefore, General A cannot be convicted for genocide.

PRAYER

Wherefore in light of the issues raised, arguments advanced and authorities cited, it is humbly prayed that this honorable court may:

- Declare that it does not have the jurisdiction to hear this matter.
- Declare that the accused has been prejudiced by Judge Arban Srinivas placement on the tribunal.
- Declare that Judge Srinivas is not qualified to sit on the Tribunal and as such the accused should be acquitted.
- Declare that the accused is innocent of the charge of genocide.
- Acquit the accused of all charges in the indictment.

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

All of which is humbly prayed,

Counsel for the Appellant.

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[60] Report on 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).

[61] *See* Guglielmo Verdirame, "The Genocide Definition in the Jurisprudence of the ad hoc tribunals," 49 (3) *The International and Comparative Law Quarterly* 578 (2000).