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 Respondent

Counsel for Respondent

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

3. Karin N. Calvo Goller *The Trial Proceedings of the International Criminal Court* (Martinues Nijhoff Publishers, 2006).

4. Kriangsak Kittichaisaree *International criminal Law* (Oxford University Press, 2001).

5. Leila Nadya Sadat, *The International Criminal Court and The Transformation of International Law: Justice for the New Millennium, (*Transnational Publishers Inc., 2002).

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

7. Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to*

International Criminal Law and Procedure, (Cambridge: Cambridge University press (2007).

8. Vladimir Tochilovsky, *Jurisprudence of the International Criminal Court: Procedure and Evidence* (Wolf Legal Publishers, 2006).
9. William Park "The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz--Kompetenz- Has Crossed the Atlantic?," Arbitration Intl, vol. 12 (1996).
10. William Schabas, *Genocide in International Law: The crime of Crimes* 128 (Cambridge: Cambridge University Press, 200).

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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 Pink Tribe and the Red Tribe are two ethnic groups living within Akpaf, a country 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 coupled 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 deaths of the thousands people and destruction of the country. Coffee production started anew and funded the inflow of arms into the country. The two ethnic tribes continued to fight going through more than 26 changes in government and 13 bloody coups. In 1986, at the peak of the fighting the Red Tribe led by Commander A leveled the Akpaf Senate in an effort to rid Akpaf of the scourge of the Pink Tribe. Commander A stated that he was proud to be a part of cleansing Akpafian society. The Pink Tribe responded in kind and killed one hundred Red Tribe members at the site of the old Parliament. 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 as its governing law.

The chaos continued in Akpaf and resulted in economic opportunity. Both the Pink and Red Tribes took advantage of the second hand small arms sold in Akpaf, which were partly financed by the sale of illegal coffee beans. Despite the United Nations Security Council ban on Akpafian coffee trade and the Akpafian laws, sales flourished. Red and Pink Tribe members sold much 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. Arban Srinivas demonstrated his distance from the Akpafian conflict when he served on the Supreme Court of Industan in 1996 and divorced his wife, who was also an employee of the corporation. Further, he publicly stated that he believed in the rule of law.

After Arban Srinivas's appointment to the Supreme Court, an investigative journalist released emails from what appears to be Arban Srinivas's account at AS Enterprises. These emails were written to political leaders in Industan and discussed business opportunities following the Akpafian conflict. They also stated that AS Enterprises had armed the Red Tribe and predicted an end to the conflict.

As a result of this exposure, Industan maintains a case open against Revati Srinivas who fled Industan to Akpaf. However, there is no indication that Arban Srinivas was ever under investigation. Arban Srinivas was appointed as one of the Judges of the ICTA because of his experience on the bench on the Supreme Court of Industan. In the first case to come before the ICTA, against the leader of the Pink Tribe, Arban Srinivas recused himself for the case. In the second case before the ICTA, Arban Srinivas didn't recuse himself and Commander A was tried and convicted of genocide. Commander A has appealed this decision before the Appeals Chamber of the Tribunal.

SUMMARY OF PLEADINGS

1. **COMMANDER A PROCEDURALLY DEFAULTED BY WAITING TO ADDRESS JUDGE RECUSAL ON APPEAL.**

   Commander A cannot address recusal on appeal because the rules of the ICTA require that issues be raised before the trial court as soon as they develop. Additionally, Commander A could have filed an interlocutory appeal if his trial motion had been denied, but waiting to initiate such an issue on appeal is an improper attempt to receive a trial *de novo*. Even if Commander A sought a review of judgment, it would not be granted because there is no information available after trial that was not present at the time of trial. Commander A may introduce new evidence on appeal, but he may not introduce new arguments.

2. **JUDGE ARBAN SRINIVAS IS UNBIASED AND NEED NOT BE RECUSED.**

   Judge Srinivas had prior employment that has extensive connections to the subject matter at hand. The connection, however, is far too attenuated to meet the extremely high threshold for a motion for recusal.

3. **JUDGE ARBAN SRINIVAS IS QUALIFIED TO SIT ON THE ICTA.**

   Judge Srinivas has extensive experience in international and criminal law. Hence, he meets the standard set by the Rome Statute and was justifiably selected to serve on the ICTA bench.

4. **THE SECURITY COUNCIL RIGHTFULLY CREATED THE ICTA.**

   Jurisdictional challenges cannot be brought in the instant case on the establishment of the court. Further, the Security Council rightfully created the ICTA for the safety and security of international relations.

5. COMMANDER A IS GUILTY OF GENOCIDE.

Genocide has taken place. Acts under Article 6 (b) of the International Criminal Court (ICC) statute were committed against the Pink tribe with the specific intent to destroy the group.

PLEADINGS

1. The Tribunal Has Jurisdiction to Hear the Matter.

1.1. Commander A waived his right to introduce recusal on appeal because he did not raise it at trial.

Commander A should have raised the issue of recusal at the trial level, and because he did not, he waived his right to do so. Parties have a duty to be reasonably diligent and raise issues before the Trial Chamber. The Human Rights Committee, established through the International Covenant on Civil and Political Rights, states that a party may not raise a new issue on appeal in the absence of special circumstances.[1] The ICTY and ICTR both prohibit a party from raising issues on appeal that were not previously addressed during the trial, unless a special circumstance exists. "The party cannot remain silent on the matter only to return on appeal to seek a trial *de novo*."[2] Further, an appeal is not an opportunity to remedy shortcomings of trial advocacy.[3] In *Kambanda*, the ICTR's Appeals Chamber ruled that because the defendant made no objection to his counsel's competence before the Trial Chamber, the defendant waived the right to bring the issue to the Appeals Chamber.[4]

In *Furundizija*, the accused took issue with Judge Mumba's previous work related to a legal issue in the case.[5] The ICTY ruled that because the information was available during the trial period, the accused waived his right to bring the issue to the Appeals Chamber.[6] The accused claimed that he first learned of Judge Mumba's work only after the trial, but the ICTY was quick

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1 *See Albert Berry v. Jamaica,* Comm. No. 330/1998, 26 April 1994; UN doc. CCPR/C/50/D/330/1998, para. 11.6. *See also Glenford Campbell v. Jamaica,* Comm. No. 248/1997, 30 March 1992.
2 *See Prosecutor v. Tadic,* Case No. IT-94-1-A (ICTY 15 July 1999) at para55. *See also Prosecutor v. Milan,* Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998; *Prosecutor v Kovačević,* Case No. IT-97-24-AR73, (ICTY July 1998) at para. 33.
3 *See Prosecutor v. Nahima et al,* Case No. ICTR-99-52-A (ICTY Dec. 8 2006) at para 4.
4 *See Prosecutor v. Kambanda,* Case No. ICTR 97-23-A (ICTR Appeals Chamber, Oct 2000) at para 25–29.
5 *See Prosecutor v. Furundzija,* Case No. IT-95-17/1-A (July 2000) at §173–74.

to point out that the information was public and well within due diligence.[7]

In the instant case, Commander A neglected to raise the issue of recusal at the trial level. Accordingly, he cannot now bring the issue at the Appeals Chamber, hoping to receive a trial *de novo*. This tactic is an abuse of the ICTA, a waste of time and money, and disrespectful to the Trial Chamber. Commander A cannot now use the Appeals Chamber to remedy his failings at the trial level. This attempt is not an appropriate use of the Appeals Chamber.[8]

1.2 Commander A should have filed a motion for recusal as soon as the issue arose.

Commander A needed to have filed a motion for recusal at the trial or even pretrial stage. ICC Rule 34 mandates that "a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based." Additionally, the ICTY obliges the complaining party to address difficulties in the Trial Chamber immediately.[9] Most defendants address judge recusal through motions at the trial or pretrial level and if necessary file an interlocutory appeal. For example, although Eduoard Karemera's case is ongoing in the ICTR at present, he filed a motion for disqualification of trial judges in May 2004 when he perceived glaring irregularities in their orders.[10] Karemera did not wait until the end of his trial to address these issues.[11]

According to ICC rules, Commander A must have brought the concern of Judge Srinivas's partiality as soon as it arose. Commander A has no excuse in waiting to raise recusal on appeal because the information regarding Judge Srinivas's business endeavors and the emails from his

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6 See id.
7 See id.
8 *See* Vladimir Tochilovsky, Jurisprudence of the International Criminal Court: Procedure and Evidence (Wolf Legal Publishers, 2006) at 377.
9 *See Prosecutor v. Tadic,* Case No. IT-94-1-A (ICTY 15 July 1999) at para55. *See also Prosecutor v. Milan,* Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998; *Prosecutor v Kovačević,* Case No. IT-97-24-AR73, (ICTY July 1998) at para. 33.
10 *See Prosecutor v. Karemera et al,* Case No. ICTR-98-44-T (Decision On Motion By Karemera For Disqualification Of Trial Judges 17 May 2004) (exemplifying expeditious filing).

AS Enterprises account were made public in 2001 when Judge Srinivas was confirmed a member of the ICTA. It is unfair and improper for Commander A to wait until after the trial proceedings to raise this issue. Therefore, Commander A procedurally defaulted; he cannot now raise this issue before the trial chamber.

1.3 Commander A could have filed an interlocutory appeal if his motion had been denied.

Article 82 regulates interlocutory appeals and permits such appeals for preliminary decisions and anything that would affect fair and expeditious conduct of the proceedings or the outcome of the trial.[12] Interlocutory appeals are not abundantly common but defendants have successfully filed appeals under Article 82.[13] Commander A should have filed an interlocutory appeal if his motion for recusal was denied.[14] Because Commander A had the opportunity to file a request recusal first by motion and second by interlocutory appeal, the Appeals Chamber cannot address the issue now.[15]

1.4. Judge Srinivas' position on the court did not materially affect the trial's outcome, which means that Commander A does not meet the legal standard for appeal.

Even if Commander A is permitted to appeal based on Article 81, Article 83(2) further qualifies

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11 *See* Antonio Cassese, International Criminal Law Second Edition, (Oxford: Oxford University Press, 2008) at 380 (explaining that *Delalic* and others similarly accused filed motions with respect to judge recusal).
12 Rome Statute of The International Criminal Court (1998); Maruo Politi and Giuseppe Nesi, *The Rome Statute of The International Criminal Court: A Challenge to Impunity*, (Ashgate Dartmouth, 2001) at 229; Antonio Cassese, International Criminal Law Second Edition, (Oxford: Oxford University Press, 2008) at 425–426 (stating that the ICC may deliver decisions on interlocutory appeals); *See* Rome Statute, Art 82; Leila Nadya Sadat, *The International Criminal Court and The Transformation of International Law: Justice for the New Millennium,* (Transnational Publishers Inc., 2002) at 244; Carsten Stahn and Goran Sluiter, *The Emerging Practice of The International Criminal Court*, (Martinus Nijhoff Publishers, 2009) at 556.
13 Carsten Stahn and Goran Sluiter, *The Emerging Practice of The International Criminal Court*, (Martinus Nijhoff Publishers, 2009) at 559.
14 See *Prosecutor v. Delalic,* Case No. IT 96 21 AR 73.2 (ICTY Appeals Chamber, Decision on application of D Zejnil Delaclic For Leave To Appeal Against The Decision of The Trial Chamber of 19 Jan 1998 for the Admissibility of Evidence, March 4 1998); *Prosecutor v. Delalic* Case No. IT 96 21 T (ICTY, Decision on Prosecution's Application for Leave to Appeal Pursuant to Rule 73 Dec 1997).
15 *See* Antonio Cassese, International Criminal Law Second Edition, (Oxford: Oxford University Press, 2008) at 426–427.

the appeals standard by requiring the unfairness of the proceedings to affect the outcome in the Trial Chamber.[16] Here, Commander A must also show that Judge Srinivas's position on the bench materially affected Trial Chamber's decision. It seems unlikely that Judge Srinivas's participation altered the trial's outcome because he is only connected to the Akpaf conflict through a company that he left in 1990. Judge Srinivas's current and tenuous connection to the Akpafian politics is too complicated for this appeals court to digress and distill how Judge Srinivas would have ruled if he did have substantial involvement. However, it appears form the facts at hand that his previous and currently severed connection would have caused him to lean towards acquitting Commander A.

1.5. Commander A will not receive a review of judgment.

Arguendo Commander A sought a review of judgment, he would not receive a favorable response. Review of judgment is a rarely successful remedy that permits the accused to seek revision after the time for appeal has elapsed based on new evidence available after the trial that would have altered the disposition of the trial.[17] One such example is serious misconduct by a judge or breach of duty.[18] The moving party is obliged to show that the evidence was unavailable due to something out of the party's control.[19] However, this procedure would not be available to Commander A because all of the information regarding Judge Srinivas's alleged role in the Akpaf conflict was available years before trial.

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16 *See* Rome Statute. Art.83(2); Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, (Cambridge: Cambridge University press (2007) at 389.

17 *See* Rome Art. 84.

18 See Leila Nadya Sadat, The International Criminal Court and The Transformation of International Law: Justice for the New Millennium, (Transnational Publishers Inc., 2002) at 244–247.

19 *See* Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, (Cambridge: Cambridge University press (2007) at 391.

1.6. While the Rome Statute permits new evidence it does not permit new arguments on appeal.

New evidence is permitted upon appeal where the party presents a reasonable explanation for why the evidence was not presented at trial, but this opportunity is distinguished from presenting new arguments on appeal.[20] It is clear that additional evidence is different from presenting new arguments in the case of *Tadic* where the accused introduced new witnesses on appeal because they addressed issues in the trial record.[21] An appeals chamber will also require the moving party to show reasonable diligence in employing the mechanisms of the Trial Chamber to bring evidence. [22] Commander A will not be permitted to present neither new evidence nor new arguments on appeal because all the most damaging information regarding Judge Srinivas's potential bias was made available to the public by InYerFace News in 2001. Commander A's appeal will be fruitless because he did not diligently utilize the available redress in the trial court.

2. Commander A received a fair trial because Judge Srinivas was unbiased.

2.1 Judge Srinivas's background enables him to make fair, unbiased decisions.

Judge Srinivas need not be recused because judges may have personal convictions and the connection between Judge Srivinas and Commander A is tenuous.[23]

The Assembly of State Parties and nominating member states have already vetted judges who sit on international tribunals.[24] Having a parliamentary body elect judges is the best way to avoid

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20 See Kriangsak Kittichaisaree, International Criminal Law (Oxford University Press, 2001) at 306; Vladimir Tochilovsky, Jurisprudence of the International Criminal Court: Procedure and Evidence (Wolf Legal Publishers, 2006) at 377; Prosecutor v. Mejakjic, Case No. IT 02 65 AR11 (ICTY, Nov. 2005) at para 8.
21 Karim Kahn and Rodney Dixon, Archibold International Criminal Courts Practice, Procedure, and Evidence (Thomson Reuters (legal), 2009) at 1458–60.
22 *See Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, (ICTR, 10 December 2004") at para. 9.

23 *See* Rome Statute, Art 67.
24 *See* Rome Statute, Art 36 (explaining qualifications and election of judges).

judicial bias.[25]

In addition to the stringent nomination process, Judges are bound to remain impartial.[26] Upon assuming office judges take an oath in which they swear to administer justice independently and impartially.[27] Due to these measures, a presumption exists that judges are unbiased.[28] The moving party must overcome this presumption.[29] "It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions."[30] The standard for recusal establishes a very high threshold.[31] As of 2008, motions for recusal had never been granted, showing a high bar and the seriousness of the accusation.[32]

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.[33] 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 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 the judge should be

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25 Antonio Cassese, International Criminal Law Second Edition, (Oxford: Oxford University Press, 2008) at 379.
26 *See* id.; Rome Statute, Art 40(1).
27 *See Prosecutor v. Furundzija,* Case No. IT-95-17/1-A (ICTY, July 2000) at §196; Rome Statute, Art. 45 (affirming judges' solemn undertaking).
28 *See Prosecutor v. Furundzija,* Case No. IT-95-17/1-A (ICTY, July 2000) at §196; *Prosecutor v. Niyitegeka,* Case No. ICTR-96-14-T (ICTR Appeal Chamber, July 2004).
29 *See Prosecutor v. Karemera et al,* Case No. ICTR-98-44-T, Decision On Motion By Karemera For Disqualification Of Trial Judges (ICTR, 17 May 2004).
30 *See Prosecutor v. Furundzija,* Case No. IT-95-17/1-A (ICTY, July 2000) at §196.
31 *See id.*; *See Prosecutor v. Karemera et al,* Case No. ICTR-98-44-T, (ICTR, May 2004).
32 *See* Antonio Cassese, International Criminal Law Second Edition, (Oxford: Oxford University Press, 2008) at 379.
33 Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure,* (Cambridge: Cambridge University press (2007) at 355.

recused.[34]

Of course, judges have personal convictions "absolute neutrality on the part of a judicial officer can hardly if ever be achieved."[35] A judge may have political sympathies without being biased. Parties cannot expect judges to be void of personal opinions.

Due to the high threshold, few cases have had success in disqualifying judges. For example, judges have been permitted to remain on the bench where they have also been the president of the tribunal, visited the territory of the conflict, previously served on a United Nations committee that made determinations relevant to the tribunal, elected to be vice president of her home country, received ex-parte communications without disclosing them, decided similar issues in other cases while on the tribunal, opined on the issue previously, interviewed a witness years before trial, and seemed adversarial in their orders against the accused.[36]

In *Furundzija*, the defendant filed a motion to recuse Judge Mumba because she previously sat on the UN Commission on the Status of Women on behalf of her country. During that time, the commission discussed the definition of rape, which became an issue in the defendant's case. Judge Mumba had also met authors of amicus briefs and one of the prosecutors prior to the

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34 *See Prosecutor v. Furundzija,* Case No. IT-95-17/1-A (ICTY, July 2000) at §189; Robert Cryer, Hakau Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure,* (Cambridge: Cambridge University press (2007) at 355.

35 *See Prosecutor v. Furundzija,* Case No. IT-95-17/1-A (ICTY, July 2000) at §203.

36 *See Prosecutor v. Karemera et al,* Case No. ICTR-98-44-T, Decision On Joseph Nzirorera's Motion For Disqualification Of Judge Byron And Stay Of Proceedings, (ICTR, 7 March 2008) (declining to recuse Judge Byron because he was also the president of the tribunal and stated to the United Nations General Assembly that judicial decision would be made in the next several months); *See Prosecutor v. Karemera,* Case No. ICTR-98-44-T, *Decision On Motion By Karemera For Disqualification Of Trial Judges* (finding no bias based on the judges' decisions themselves); *Prosecutor v. Delalic,* Case No. IT 96 21, Decisions of the Bureau of 4 September 1998 and 1 Oct 1999 and 25 October 1999, (Bureau Decision 25 Oct. 1999); Antonio Cassese, International Criminal Law Second Edition, (Oxford: Oxford University Press, 2008) at 380; *Prosecutor v. Brdanin and Talic* Case No. IT 99 36/1, Decision On Application By Momir Talic For The Disqualification And Withdrawal Of A Judge, (ICTY, 18 May 2000) (finding that Judge Mumba's previous decision in *Tadic* did not inhibit her ability to fairly decide the instant case); *Cockayne, Special Court for Sierra Leone,* 2 J. Int'l Crim. Just. 1154 (2004); *President v. S?es?elj,* Case No. IT-03-67-T, Order on the Prosecution Motion for the Disqualification of Judge Frederik Harhoff (14 January 2008).

commencement of the defendant's trial. The link was still determined to be tenuous.[37] The court emphasized that a position prior to judicial appointment, although thematically related, did not create any bias.[38]

The holding in Furundzija can be applied to the instant case. Like, Judge Mumba, Judge Srinivas did have prior employment that was related to the subject matter dealt with in the court. However, Judge Srinivas was merely a merchant in a conflict zone whereas Judge Mumba actually participated in constructing a legal definition to be used by the court. Thus, Judge Srinivas's connection to the matters at hand is more distant than Judge Mumba. Therefore, Judge Srinivas's involvement does not require recusal.

Judges have been recused in cases where the judge was an actual party to the case. For example, a judge in the case against former Chilean head of state Augusto Pinochet was recused where he served as an unpaid director of Amnesty International who became party to the suit.[39] In another case, a judge recused herself where she had previously cohabitated with the prosecution.[40]

In the instant case, Judge Srinivas was not party to the suit in any way, and his connection to the case is much more distant than the facts in Pinochet because the relationship between Commander A and Judge Srinivas is not speculative. The emails allegedly from Judge Srinivas' account do not directly connect him to Commander A. The emails do not manifest an action committed by Judge Srinivas, more than anything else; they state an opinion on the events taking place in Akpaf. While the emails stated that AS Enterprises armed the Red Tribe, there is no indication that Judge Srinivas was involved in that act or even knew of it at the time it took

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37 *See Prosecutor v. Furundzija,* Case No. IT-95-17/1-A (ICTY, July 2000) at §194.
38 *See Prosecutor v. Furundzija,* Case No. IT-95-17/1-A (ICTY, July 2000) at §§195–215) (finding no prejudice).
39 R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2) [1999] 1 All ER 577 ("Pinochet")
40 *See Prosecutor v. Karemara,* Case No. ICTR-98-44-AR15 (ICTR Appeals Chamber, October 2004).

place. Furthermore, it must be remembered that Judge Srinivas left AS Enterprises twenty years ago. Judge Srinivas cannot be held responsible for AS enterprises' involvement after 1990. While there was an investigation of AS Enterprises, there has been no investigation of Judge Srinivas, evincing his distance from the corporation. Additionally, Judge Srinivas divorced his wife in 1997 and cannot be connected to her misdeeds. Therefore, there is no reason for Judge Srinivas to recuse himself or be recused.

2.2 Commander A avers that Judge Srinivas is partial based on speculation.

Commander A's argument is based on mere speculation. "A mere feeling or suspicion of bias by the Accused is insufficient" to warrant judge recusal.[41] The facts do not place Judge Srivinas directly in conflict between the Red and Pink Tribes and do not show that he ever knew or met Commander A. Judge Srinivas must not be recused based on speculation.

2.3 Judge Srinivas is permitted to serve on the ICTA.

Judge Srinivas may serve as one of the ICTA judges given his background. Judges may serve on a court where they have opined on the subject, written about the subject, visited the territory in issue or had a similar personal connection to the conflict. The facts offer no special connection between Judge Srinivas and Commander A. Appellant's argument would forbid Judge Srinivas from serving on the court in any capacity because Appellant effectively avers that Judge Srinivas cannot adjudicate any case with a Pink or Red Tribe member. However, this logic is flawed because Judge Srinivas's involvement in the conflict was known at his appointment. Furthermore, the supposed detrimental emails came to light within months of Judge Srinivas' appointment in 2001. Commander A's case took place in 2009 - eight years after the emails

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41 *See Prosecutor v. Karemera et al,* Case No. ICTR-98-44-T Decision On Motion By Karemera For Disqualification Of Trial Judges (ICTR, 17 May 2004)

were published. In the past eight years, the Assembly of State Parties never thought to replace Judge Srinivas, demonstrating his fitness.

2.4 Judge Srinivas did not engage in serious misconduct.

Judge Srinivas did not commit an act of serious misconduct during his appointment on the court. A Judge may be removed for serious misconduct or breach of her duties.[42] Rule 24 provides three examples of such misconduct: revealing information acquired through the tribunal, concealing information, abusing judicial office to receive special treatment.[43] Another form of serious misconduct may occur outside of judicial duties so long as it is likely to cause serious harm to the standing of the court.[44]

Any allegations against Judge Srinivas relate to acts before Judge Srinivas was appointed to the ICTA. Accordingly, Judge Srinivas could only be held accountable for misconduct outside his duty that meets the standard of seriously harming the court. This standard is so high that "[i]t might be impossible for anyone not part of the court to prove that the misconduct had a direct effect on the judgment of the sentence."[45] Judge Srinivas may remain on the court because his behavior has been appropriate.

3. Judge Srinivas is qualified to sit on the ICTA.

Judge Srinivas should remain on the ICTA because he has extensive legal experience. Article 36 of the Rome statute explains judges' qualifications and insists that judges have experience in criminal law and criminal procedure and international law.[46] Judge Srinivas was undoubtedly exposed to international law and criminal law while serving on the Industan Supreme Court and

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42 *See* Rome Statute, Article 46.
43 *See* Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda (2010), at Rule 24.
44 See id.
45 *See* Karin N. Calvo Goller *The Trial Proceedings of the International Criminal Court* (Martinues Nijhoff Publishers, 2006).

as a Senior Advocate. The Assembly of State parties reviewed Judge Srinivas' qualifications and personal history and voted him into office.

4. Jurisdiction challenges on the merits of the court cannot be brought in the instant case.

4.1. No provision for such a challenge found in the ICC Statute.

Article 81 of the ICC statute allows challenges to jurisdiction of the respective court in the trial court or even in the preliminary trial procedures. However, there is no provision allowing for jurisdictional challenge regarding the competence of the court in the appeals chamber. Further, article 81 states that "the Court shall satisfy itself that it has jurisdiction in any case brought before it. The court may, on its own motion, determine the admissibility of a case."[47]

4.1.2. The Court has no power to review the SC Resolution No. 54/01.

4.1.2.1. There is no provision in the UN Charter which provides for the setting up of a court or a judicial body to review the Resolutions passed by the Security Council (SC).[48] Powers of judicial review or appeal over the decisions taken by an organ of the United Nations (UN) are not give to any other UN organ, not the ICC, and not the International Court of Justice.[49]

4.1.2.2. The doctrine of competence-competence, which is used by ad hoc tribunals to look into their own jurisdiction without having to go to the expense of going to a court, is available in this case as the statute dictates.[50] However, this power cannot be stretched so far as to include the

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46 *See* Rome Statute, Art. 36.
[47] Rome Statute, Art. 81.
[48] The Charter of the United Nations, 1945.
[49] Legal Consequences for States of the Continued Presence of South Africa Namibia (South –West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion of 25 June 1971, 1971 I.C.J. Reports 16.
[50] *See* Park, William "The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-- Kompetenz-Has Crossed the Atlantic?," Arbitration Intl, vol. 12 (1996), pp. 137, 149.

power to examine the competence and legality of the Resolution of the SC to establish such judicial tribunals as this one.[51] Here, there is no indication of any special article of jurisdictional review of the tribunal and furthermore, the ICC statute includes no clause for the establishment of an appeals tribunal.[52] Therefore, the Tribunal clearly lacks power to review the SC resolution establishing it.

4.2 The establishment of the Tribunal by the SC Resolution 54/01 is lawful.

4.2.1. SC has the power 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. 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 maintenance of international peace and security.[53] Here, the influence of foreign powers into the violence of the country reaches the threshold of the SC discretion to implement measures to maintain international security. This situation is similar to that in Yugoslavia where the SC enjoyed wide discretionary powers in the matter of choice of means for such a purpose.[54] According to Art. 29 of the Charter, the SC also has the power to establish subsidiary organs including tribunals for carrying out its functions – a measure that has been accepted by the ICJ.[55] Therefore, the SC can validly establish judicial tribunals under Chapter VII of the Charter.

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[51] *See generally,* Separate Opinion of Judge Li on the Defense Motion for Interlocutory Appeal of Jurisdiction, *Prosecutor v. Dusko Tadic,* Case No. IT-94-1-A (ICTY Appeals Chamber, October 2, (2005) (discussing the challenge to jurisdiction of the ICTY).

[52] *See* Rome Statute.

[53] *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); *Prosecutor v. Joseph Kanyabashi,* Decision on the Defense Motion on Jurisdiction, Case No. ICTR-95-15-T (ICTR Trial Chamber-2, June 18, 1997).

[54] *Tadic Jurisdiction,* Case No. IT-94-1-T.

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

5. Commander A is Guilty of Genocide

5.1. The actions that took place at the Akpaf Senate Building constitute Genocide.

Under the ICC Statute genocide is, with the intent to destroy, in whole or in part, a national, ethical, racial or religious group, an act that occurs *inter alia* causing serious mental harm to members of the group.[56] The destruction of the Akpafian Senate building and the subsequent announcement by Commander A satisfies the elements of the ICC statute to constitute genocide.

5.1.1. Commander A had the requisite Mens Rea.

To prove the mens rea for genocide, intent must be present to destroy the group as a whole, or at least a substantial part. The actual number of people killed [or affected] 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. Here in, first, we infer the intent from the fact that the Red Tribe leveled the Akpafian Senate building, a building built and designed by prominent Pink Tribesman. Furthermore, intent can be directly proved by the comments to the Commander A of the Red tribe who stated that the destruction of the senate building was to "bereft [the country] of the scourge of Pink Tribesmen." He went on to say that he was proud to be a part of the events that "aided in cleansing the Akpafian Society." Therefore, the requisite mens rea element of intent is established to convict Commander A of genocide.

5.1.2. Commander A had the intent to destroy in whole or in part the Red Tribe.

Commander A's comments following the destruction of the Senate building indicate his intent to destroy the entire Red Tribe. While the Red and Pink tribe had historic riffs up to that point,

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[56] Rome ICC Statute, Article 6(b).

Commander A announced after the Senate attack that the action was with the specific motive to "scourge" the land of the Pink tribe.

5.1.3. The Pink Tribe is a protected group under the ICC Statute.

An ethnic group is a group whose members share a common language or culture.[57] Article 6 of the Statute clearly provides protection to an ethnic group.[58] In the present case, the Red and Pink tribe have historically been the two prominent ethnic tribes in Akpaf.[59] It may be argued that the Pink tribe is not a protected group because they speak the same language and have a similar culture to the Red tribe; however, this is not a strong argument. In *Prosecutor v. Akayesu*, an ICTR case, the tribunal held that the Tutsi group is a stable and permanent group and should be protected regardless of the fact that they shared a common religion, national, cultural and linguistic background with the opposing group, the Hutu. The determination that the Tutsi were a stable and permanent group was based largely on the fact that the members were born into the group and they were a stable and permanent group (unlike a political group).[60] We can easily assume the same here.[61] Therefore, The Pink Tribe herein is not only described as ethnic but they are also a stable and permanent group and as such protected under the Statute and previous Tribunal precedent. Finally, this argument has been recognized and supported in the Darfur Commission of Inquiry that stated that the ICTR *conceptualization* [of group membership for the crime of genocide] has become part and parcel of international law.[62] As such, the ethnic group

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[57] William Schabas, *Genocide in International Law: The crime of Crimes* 128 (Cambridge: Cambridge University Press, 200).
[58] Rome ICC Statute, Article 6(b).
[59] Fact Sheet.
[60] Schabas.
[61] Fact Sheet first para. "Akpaf is a country that has a *history* of ethnic strife between its two primary tribes."
[62] Darfur Commission of Inquiry (2004).

of the Pink Tribe is a protected group under the ICC, and thus, Commander A's conviction for genocide should stand.

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 has the jurisdiction to hear this matter.
- Declare that the appellant did not properly raise the pertinent issues at trial.
- Declare that Arban Srinivas is qualified and properly served on this honorable tribunal.
- Declare that the accused is guilty of genocide.
- Declare that the accused is guilty under the ICC statute and this honorable tribunal.

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 Respondent.