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INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING THE BORDER SKIRMISH BETWEEN MARSHAL AND
ARYAN**

MARSHAL *v.* ARYAN

COUNTER MEMORIAL ON BEHALF OF THE RESPONDENT

THE RESPONDENT

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LIST OF ABBREVIATIONS

1. A.B.A.J- American Bar Association Journal
2. AJIL. – American Journal of International Law
3. Art. – Article
4. CJIL- Chinese Journal of International law
5. Comp.- Comparative
6. Ed. – edition
7. G.A Res.- General Assembly Resolution
8. I.C.J – International Court of Justice
9. ICCPR- International Covenant on Civil and Political Rights
10. ICESCR- International Covenant on Economic, Social and Cultural Rights
11. ICTY- The International Criminal Tribunal for the Former Yugoslavia
12. IHL- International Humanitarian Laws
13. ILSA- International Law Student Association
14. Int. – International
15. IRRC- International Review of the Red Cross
16. J.- Journal
17. L. – Law
18. L.J- Law Journal
19. No. – Number
20. para.- Paragraph
21. PCIJ- Permanent Court of International Justice
22. Pg. –page
23. POW- Prisoners of War
24. Rep. – Report
25. Rev.- Review

- 26. U. Chi.L.Rev. – University of Chicago Law Review
- 27. U. Pitt. L. Rev.- University of Pittsburg Law Review
- 28. UDHR- Universal Declaration of Human Rights
- 29. UN Doc.- United Nations Document
- 30. UN- United Nations
- 31. Va. L. Rev. – Virginia Law Review
- 32. VCCR- Vienna Convention on Consular Relations
- 33. VCLT- Vienna Convention on the Law of treatise.
- 34. Vol. –Volume

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STATEMENT OF JURISDICTION

It is hereinafter most respectfully submitted that the Respondent has contested the jurisdiction of the International Court of Justice in the present matter.

QUESTIONS PRESENTED

I- WHETHER ICJ HAS JURISDICTION IN THE PRESENT MATTER .

II- WHETHER THE TREATMENT METED OUT TO MAJOR DMITRI GODMAN IS BEYOND THE SCOPE OF ICJ JURISDICTION THEREBY MAKING ARYAN NOT OBLIGATED TO ANSWER QUESTIONS RELATED TO BILATERAL ISSUES WHICH CAN BE SOLVED BILATERALLY.

III- WHETHER THE SIZABLE NUMBER OF PRISONERS OF WAR CAPTURED AS A RESULT OF THE INFILTRATION WAR REQUIRED TO BE RETURNED BACK TO ARYAN.

IV- WHETHER ARYAN IS ENTITLED TO APPROPRIATE DAMAGES WHICH ARE TO BE CALCUTED BASED ON SETTLED CONVENTIONS UNDER INTERNATIONAL LAW.

V- WHETHER ARYAN WAS ENTITLED UNDER THE PRINCIPLES OF INTERNATIONAL LAWS TO HAVE CONSULAR ACCESS TO MR. ALEX.

FACT HIGHLIGHTS

- Geographical Background

Marshal is a landlocked country located in the African continent ruled by a dictator, General Vadim. Marshal is bordered by Aryan, Castle and Lager. Assura is the capital of Marshal.

- Prevailing Circumstances

As a country, Marshal has been perceived as a despotic state by its neighboring states. General Vadim assumed power in 1975, after Marshal became independent from British rule in 1972. After suspending the newly formulated constitution of independent Marshal, General Vadim had succeeded to become the dictator of Marshal. Aryan, Castle and Lager have democratically elected governments and have never seen or witnessed a military coup. Since independence, Marshal has fought four wars with its neighboring countries, primarily on the basis of religion as Marshal is a Christian dominated country whereas its three neighbours are all Islamic countries. In its confrontations with the neighboring countries Marshal has always employed military tactics and expertise, and sought support from the Republic of Dominia, which happens to be another Christian majority superpower located in the African continent.

- The BORTEX Agreement, 1998

Marshal has even gone ahead to annex certain territories of Aryan, which culminated in the Bortex Agreement of 1998 demarcating a new border line between Aryan and Marshal known as the Line of Control (LOC). Additionally, this Agreement also made it mandatory to make the LOC a demilitarized zone.

- Incidences that led to war

Recently, on the 15th of October 2017, the Aryan army started conducting patrolling operations in the LOC. The operations were discovered by Major Dmitri Godman who was in charge of the Alpha unit manning one of the Marshal border outposts. Major Godman went on to ward off the infiltration attempt by the Aryan army along with five other soldiers, and all of them were eventually caught as a result of being overpowered by the Aryan army after they ran out of ammunition. Following this, the Marshal army conducted large scale military operations in the LOC resulting in a full-fledged war within the territory known as the

Marshal- Aryan border skirmish which lasted from 20th October 2017 to 25th December 2017. Marshal emerged victorious in this war by brutally crushing the Aryan aggression.

- Consequences of war

The result of the war was that first, Marshal annexed the LOC as part of its territory; second, Marshal captured close to 47000 Prisoners of War (POW) as well close to 100 civilians and lastly, as a result of the humiliating defeat in the war, the Aryan government was sacked along with an imposition of martial law with the army taking over the reins of the government. The Aryan government requested Marshal to hand over the Prisoners of War (POW) as well as the civilians captured by them, in exchange for Major Godman, along with his five soldiers, who happened to be the only POW captured by Aryan. The offer was refused by Marshal by stating that these soldiers would be kept in permanent captivity as a punishment for Aryan's constant indulgence in unnecessary war and aggression, and also since the recent unprovoked war on the LOC meant that Aryan needs to be given a constant reminder for its wrongdoings. Even the repeated requests from Aryan to Marshal to have consular access to Mr. Alex were denied stating that Mr. Alex was a threat to the country of Marshal and permitting consular access would only further endanger their nation.

On the 02nd of February 2018, the Marshal border outpost received a sealed parcel from the Aryan army with an enclosed letter. The parcel contained mutilated body parts of all the soldiers captured by Aryan, with Major Godman's name tag appearing on top of all the chopped-up body pieces. In a speech to justify his actions, General Vadim tried to salvage the situation by stating that he was right in doing what he did. He committed to bringing Aryan to book, and consequently made a declaration to invoke Article 4 of the Bortex Agreement which gives rise to jurisdiction of the ICJ (International Court of Justice) for acts committed during war time. A notice was accordingly sent to Aryan for the brutalities committed on Major Dmitri Godman, for bringing ICJ jurisdiction into the foray. Aryan has filed its objection to the application with a singular ground that it does not consent to the ICJ's jurisdiction and has stated that it would appear in court to reiterate the same.

Hence the instant matter is presented before the International Court of Justice.

SUMMARY OF ARGUMENTS

I- THAT ICJ HAS NO JURISDICTION IN THE PRESENT MATTER.

It is humbly submitted that ICJ does not have jurisdiction over the present matter as consent is the cardinal principle for ICJ jurisdiction exercised under Art. 36(1) of the ICJ statute. The State of Aryan has not given consent to ICJ jurisdiction. The Bortex agreement, 1998 by virtue of which the State of Marshal is invoking the jurisdiction stands culminated and therefore the jurisdiction of ICJ cannot arise under the shadow of the agreement either.

II- THAT THE TREATMENT METED OUT TO MAJOR DMITRI GODMAN IS BEYOND THE SCOPE OF THIS COURTS JURISDICTION.

It is humbly submitted before this Hon'ble court that the treatment meted out to a combatant (i.e Major Dmitri Godman) is outside the scope of this court's jurisdiction in the present matter. The State of Aryan had submitted to ICJ jurisdiction merely with respect to territorial issues and not the issues relating to the combatants of war and their treatment as such. It being so, the State of Aryan has the right not to be involuntarily involved into litigation.

III- THAT THE INFILTRATION WAR HAS RESULTED IN THE CAPTURE OF SIZABLE NUMBER OF PRISONERS OF WAR AND THEY NEED TO BE SUITABLY RETURNED BACK TO ARYAN SINCE THEIR CAPTURE AND CONSEQUENTIAL INHUMAN TREATMENT IS CONTARY TO THE PRINCIPLES OF INTERNATIONAL LAW AND THE TREATIES AND CONVENTIONS THAT BOTH STATES ARE PARTY TO.

It is humbly submitted before the Hon'ble court that the sizable number of prisoners captured as result of the Infiltration war required to be returned back to the State of Aryan as the hostilities have ceased. If the State of Marshal would not return the POW and subject them to permanent captivity , it will contravene the dignity of human person and violate the provisions of all international laws and the treatise to which both the states are a party to.

IV- THAT ARYAN IS ENTITLED TO APPROPRIATE DAMAGES WHICH ARE TO BE CALCUTED BASED ON SETTLED CONVENTIONS UNDER INTERNATIONAL LAW.

It is humbly submitted before this Hon'ble Court that the acts of the State of Aryan have caused irreparable loss and injury to the State of Marshal. Reparation would be an indispensable step forward in the direction of protecting the victim state of Aryan , so that

they do not continue to suffer at the hands of the abusive government of Marshal. In order to eliminate the consequences of the illegal acts and violations committed by the State of Aryan and to restore the situation that would have existed if state of Marshal had not committed the enumerated violations, the State of Aryan will be entitled to damages.

V- THAT ARYAN WAS ENTITLED AS PER THE PRINCIPLE OF INTERNATIONAL LAW TO HAVE CONSULAR ACCESS TO MR. ALEX.

It is the deferential submission of the State of Aryan that it has an incontestable right to have consular access to Mr. Alex under the principles of International law and also as per the treatise and conventions to which both states are a member of. The State of Marshal has violated the provisions of VCCR, UDHR, ICCPR, ICESR and IV Geneva Conventions by denying the State of Aryan consular access to Mr. Alex.

ARGUMENTS ADVANCED

I- THAT ICJ HAS NO JURISDICTION IN THE PRESENT MATTER.

It is humbly submitted before this Hon'ble Court that ICJ does not have jurisdiction in the present matter. It stands undisputed in the eyes of law and international practice that in the absence of consent of the State party, ICJ cannot in any circumstance have jurisdiction over it.

1.1 That there is no consent to the ICJ jurisdiction.

The State of Marshal has invoked the jurisdiction of this Hon'ble Court by virtue of Art. 4 of The Bortex Agreement of 1998¹ in the light of Art.36(1) of the ICJ statute. The jurisdiction of the Court in contentious proceedings is based on the consent of the States to which it is open. No State can be compelled without its consent to submit a dispute with another State to international adjudication.² In the present case, State of Aryan does not accept the jurisdiction of the Court and therefore the Court cannot allow an application for the same.³ In the words of the International Court of Justice, the principle that "the Court can only exercise jurisdiction over a State with its consent" is "a well established principle of international law embodied in the Court's Statute".⁴ Time and again the ICJ has reaffirmed this principle and denied to the hilt to exercise its jurisdiction in any dispute where the state party do not consent to its jurisdiction.⁵

In the present case, "the vital issue to be settled concerns the international responsibility of the State of Marshal, the Court cannot, without the consent of that State, give a decision on that issue. The Court cannot exercise jurisdiction since Marshal's legal interests would be affected by any such decision of ICJ."⁶

¹ Annexure-1- The Bortex Agreement of 1998, Moot proposition

² Stanimir A. Alexandrov, *Compulsory jurisdiction of the International Court of Justice: How compulsory is it?*, 5 *Chin.J.Int.Law*, 29, 29 (2006).

³ United States of America v. Hungary, ICGJ 181 (ICJ 1954); United States of America v. USSR, ICGJ 181 (ICJ 1954); United States of America v. Czechoslovakia, [1997] ICJ Rep 7; United Kingdom v. Argentina, ICGJ 178 (ICJ 1956); United Kingdom v. Chile, ICGJ 178 (ICJ 1956).

⁴ Italy v. France, United Kingdom and United States, 1954 I.C.J. 19 (Jun. 15).

⁵ Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, 1989 ICJ Rep. 162; Nauru v. Australia, [1992] ICJ Rep 240, Portugal v. Australia, [1995] ICJ Rep 90.

⁶ Italy v France, ICGJ 183 (ICJ 1954).

1.2 ICJ jurisdiction cannot arise as the Bortex agreement by virtue of which the State of Marshal has invoked the jurisdiction, itself does not exist .

The Bortex agreement of 1998 which was entered into by both state parties was with respect to the disputes that arise in relation to the LOC.⁷ *Clausula rebus sic stantibus* is an established principle of International laws which holds that “treaties are binding so long as things stand as they are”⁸. Vienna Convention on law of Treaties⁹ also reaffirms this principle which enumerates that in case there is change of circumstances , the existence of which had constituted an essential basis of consent of parties then that can be invoked as a ground for terminating /withdrawing from such a treaty. The material breach of the bilateral agreement between the Marshals and Aryans , which ensued from the annexure of LOC by Marshals as a part of their own territory¹⁰ entitles Aryans to invoke the breach as a ground for terminating the treaty.¹¹ “International law admits that a fundamental change in circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty.”¹² The ICJ has explicitly accepted doctrine of fundamental change in circumstances as a reason for suspension of treaties.¹³ Even if it is considered that there is existence of any substantive right which their procedural right would have protected , it disappeared with the termination of the agreement with respect to the Marshals .¹⁴

There is no speck of doubt that with the annexure of LOC by the Marshal’s within their own territory , the entire agreement stands culminated. Therefore , unquestionably the jurisdiction of ICJ cannot arise.

⁷ Moot proposition, Annexure 1.

⁸ J.L BRIERLY, THE LAW OF NATIONS 260 (5th ed. 1955).

⁹ Vienna Convention of Law of Treaty, Art.62(1).

¹⁰ Moot Proposition, para10.

¹¹ Vienna Convention on Laws of Treaty, Art. 60.

¹² UK v. Iceland, 1974 I.C.J 3 (Jul.25); FR of Germany v. Iceland, [1973] ICJ Rep 313.

¹³ 206 E. LAUTERPACHT et. al. , INTERNATIONAL LAW REPORT , 206-207 (2nd ed., 1997).

¹⁴ Cameroon v United Kingdom (Northern Cameroons Preliminary) [1963] ICJ Rep 15.

II- THAT THE TREATMENT METED OUT TO MAJOR DMITRI GODMAN IS BEYOND THE SCOPE OF THIS COURTS JURISDICTION.

It is humbly submitted that the treatment meted out to Major Dmitri Godman , a combatant of the state of Marshal is beyond the scope of the ICJ jurisdiction and the issues raised by the applicant are not those for which the State of Aryan has provided ICJ with the jurisdiction.

2.1 That the treatment meted out to a combatant is beyond the scope of ICJ jurisdiction.

The applicant has invoked the jurisdiction of ICJ under Art.36(1)¹⁵ for which consent is an indispensable element. The compromissory clause¹⁶ of the Bortex agreement had conferred ICJ with the jurisdiction over territorial disputes only in relation to the LOC, and therefore ICJ cannot deal with the present matter.¹⁷ The treatment meted out to a combatant , clearly falls outside the scope of the compromissory clause of the Bortex agreement and in such a case jurisdiction of ICJ cannot arise.¹⁸

2.2 That the breach of IHL or Geneva convention is not to be a subject of ICJ jurisdiction

In the instant matter , that whether there is a breach of Geneva Convention or violation of IHL , is undisputedly an issue which the ICJ has no jurisdiction over. It being so, as there is absence of consent of the State of Aryan or any compromissory clause in the Geneva Convention. Moreover both Marshals and Aryans are not a member of IHL.¹⁹ Unless the parties themselves agree to refer disputes relating to the violation of Geneva Conventions to the International Court of Justice , it cannot be determined by the ICJ.²⁰ Therefore , the ICJ statute and international instruments to which the both states are a member of leave no room of doubt that without an express consent for a specific dispute , jurisdiction of ICJ cannot and will not arise.²¹

¹⁵ ICJ Statute.

¹⁶ I.C.J Statute, Art.4.

¹⁷ Greece v UK, [1953] ICJ Rep 10

¹⁸ Cameroon v United Kingdom (Northern Cameroons Preliminary), [1963] ICJ Rep 15.

¹⁹ Moot preposition, para 2.

²⁰ Resolution 1, Resolutions of the Diplomatic Conference of Geneva ,1949.

²¹ Aerial Incident of March 10th 1953, U.S. v. Czechoslovakia, Order, 1956 I.C.J. 6 (Mar. 14) ; United States of America v USSR, [1954] ICJ Rep 103.

2.3 That Aryan has the international law right not to be involuntarily involved in litigation.

The demand that a state appear before an International Tribunal to defend its actions or to argue questions of jurisdictions represents an intrusion into the state's international law right not to be involuntarily involved in litigation.²² State of Aryan cannot be impelled without its consent to submit a dispute with another State to international adjudication.²³

III- THAT THE INFILTRATION WAR HAS RESULTED IN A SIZABLE NUMBER OF PRISONER OF WARS BEING CAPTURED.THEY NEED TO BE SUITABLY RETURNED BACK TO ARYAN SINCE THEIR CAPTURE AND CONSEQUENTIAL INHUMAN TREATMENT IS CONTARY TO THE PRINCIPLES OF INTERNATIONAL LAW AND THE TREATIES AND CONVENTIONS THAT BOTH STATES ARE PARTY TO.

It is humbly submitted before this Hon'ble court that the infiltration war conducted by the State of Marshal resulted into the capture of a sizable number of prisoners of war and the treatment meted out to them violates downright all principles of International law , Humanitarian laws and the treatise and conventions to which both states are a member of. After having captured close to 47,000 prisoners and also 100 civilians, Marshal have had no qualms in making open declaration that they would make the State of Aryan pay for their sins and keep the POW's in permanent captivity²⁴ and irrefutably in pursuance of the same violations of International Humanitarian laws, Geneva Convention and its Additional Protocols , UDHR and ICCPR has followed.

3.1 That there was infiltration attempt.

Marshals have many times made attempts to annex certain territories of Aryans²⁵ and in the present situation, under the shadow of the act of warding off they have tried to infiltrate²⁶ into the territory of the Aryans. Major Dimitri Godman along with five armed soldiers

²² Jonathan I. Charney , *Compromissory clauses and The jurisdiction of ICJ*, 84 Am.J.Int'l L.855,863(1987).

²³ Stanimir A Alexendrov , *Compulsory Jurisdiction of the International Court of Justice : How compulsory is it?*, 5 CJIL 29,29(2006).

²⁴ Moot proposition, para. 12.

²⁵ Moot proposition, para. 6.

²⁶ Cameroon v Nigeria [1998] ICJ Rep 275; Christian Grey, *The use and abuse of International Court of Justice: Case concerning the use of force after Nicaragua*, 14 E.J.I.L. 867 , 882 (2003).

conducted this military operation.²⁷ The permissible use of force by State is limited to acts of self-defense, which can be permitted only in response to an armed attack.²⁸ Large scale Military operation conducted by the Marshals in the LOC resulted into full fledged war in the territory.²⁹ It is serious violation of the Charter itself to encourage armed bands³⁰. It is a duty owed to world peace and international legal order³¹.

3.2 That there should be repatriation of prisoners of war since there is violation of International laws.

Marshals have captured close to 47,000 POW as well as 100 civilians. Marshals have refused to release the soldiers stating that they would be kept in permanent captivity as punishment for Aryan's constant indulgence in unnecessary war and aggression.³² The soldiers of the State of Aryan are not criminals serving well deserved punishment, but persons who fought on behalf of their country.³³ The very fact of prolonged and indefinite captivity of POW of Aryan is inhuman and futile.³⁴ Prolonged detention shall contravene the inherent dignity of human person.³⁵ Article 13 of the Geneva Convention states that Prisoners of War must be humanly treated.³⁶ Inhuman treatment is contrary to the principles of Customary International

²⁷ Moot Proposition, para 8

²⁸ Mohammed Saif-Alden Wattad, *RESURRECTING "ROMANTICS AT WAR": INTERNATIONAL SELF-DEFENSE IN THE SHADOW OF THE LAW OF WAR WHERE ARE THE BORDERS?*, 13 ILSA J.Int and Comp. Law 205,206(2006).

²⁹ Moot proposition, para. 9.

³⁰ 2625 (XXV), Declaration on principles of International Law concerning friendly relations and co-operation among states in accordance with the charter of the united nations, Schacher, *In defense of use of force in International law*, 53 U.Chi.L.Rev 113,136(1986).

³¹ Levenfeld, *Israel's Counter-Fedayeen Tactics in Lebanon: Self defense and reprisal under Modern International Law*, 21 Colum J. Transnat'l L. 1,11(1982).

³² Moot proposition, para. 12.

³³ 24 YORAM DENTEN & MALA TABORY, ISRAEL YEARBOOK ON HUMAN RIGHTS,128, 129(1st ed.,1994).

³⁴ UN Security Council, *Prisoners of war in Iran and Iraq : the report of a mission dispatched by the Secretary-General, January 1985*, 22 February 1985, S/16962, 24 YORAM DENTEN & MALA TABORY, ISRAEL YEARBOOK ON HUMAN RIGHTS,128, 129(1st ed.,1994).

³⁵ International Covenant on Civil and Political Rights, Art. 10, UN Security Council, *Prisoners of war in Iran and Iraq : the report of a mission dispatched by the Secretary-General, January 1985*, 22 February 1985, S/16962.

³⁶ Third Geneva convention, Art.13.

Humanitarian law and condemned at international platform.³⁷ Prohibition of inhuman treatment is to be found in general human rights treaties³⁸ which includes ICCPR³⁹ to which the State of Marshal is a member of. Also, the jurisprudence of International courts and tribunals have considered a much wider scope of inhuman treatment and defined it as that which “causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity”.⁴⁰ Disciplinary punishment shall not be inhuman⁴¹ at any cost. Refusal to release detainees when the reason for their detention has ceased to exist would violate the prohibition of arbitrary deprivation of liberty and may also constitute hostage-taking⁴² which is prohibited under all International laws.⁴³

Prisoners of war shall have unrestricted opportunity to be released and repatriated without delay after the cessation of active hostilities.⁴⁴ Parties to the conflict are bound to send back the prisoners of war to the country whose national they are.⁴⁵ The UN General Assembly adopted a resolution which affirmed that release and repatriation of prisoners of war shall be effected in accordance with the Geneva Convention.⁴⁶ In parallel to the inalienable right the Prisoner of war to be repatriated⁴⁷ there is an inescapable obligation for the detaining power.⁴⁸ Taking into account of the experience of the second world war, the 1999 Diplomatic

³⁷David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 LAW & INEQ. 343,343,347348(2011); Jean-Marie Henckaerts, *Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict*, 87 IRRC 175,184(2005).

³⁸ European Convention on Human Rights, Art. 3.

³⁹ International Covenant on Civil and Political Rights, Art. 7.

⁴⁰ The Prosecutor v Blaskic, IT-95-14 The Prosecutor v Celebici, IT-96-21-A.

⁴¹ Third, Geneva Convention, Art. 89(3).

⁴² ICRC, *Rule 129 Summary*, Customary International Humanitarian Law, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule128.

⁴³ Geneva Convention, Common Art.3 ; Fourth Geneva Convention, Art. 34; Additional Protocol I to the Geneva Convention, Art.75(2)(c); Additional Protocol II to the Geneva Convention, Art.4(2)(c).

⁴⁴ Geneva Convention, Art. 118&119.

⁴⁵ Geneva Convention, Art. 109.

⁴⁶ Resolution 610(VII) , Adopted by United Nation General, December 3, 1952, *American Foreign Policy, 1950–1955: Basic Documents*, vol. II, pp. 2651–2654.

⁴⁷ Ibid, Charmatz, Jan P & Harold M. Witt, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 Yale L.J. 391, 395(1953).

⁴⁸ III JEAN S. PICTET, GENEVA CONVENTION OF 1 AUGUST, 1949 COMMENTARY, 547(1st ed., 1960).

Conference recognized that captivity is painful situation⁴⁹ which must be ended as soon as possible and was anxious that repatriation should take place rapidly and that prisoners of war should not be retained in captivity on various pretends.⁵⁰ The text that has been finally adopted by the states is that the repatriation must take place “without delay after the cessation of active hostilities”.⁵¹ Detaining power is responsible for the treatment given to them.⁵²

IV- THAT ARYAN IS ENTITLED TO APPROPRIATE DAMAGES WHICH ARE TO BE CALCUTED BASED ON SETTLED CONVENTIONS UNDER INTERNATIONAL LAW.

The fourth submission requests the Court to award to Aryan a sum which constitutes the minimum valuation of the direct damages caused by the State of Marshal. The Applicant has, by its activities in relation to the Respondent, violated a number of principles of customary international law and the treatise and convention to which both the states are a party to. Reparations which in its variable forms have featured in the *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation*.⁵³ holds significance in the practice of International courts.⁵⁴

4.1 That the State of Marshal has responsibility towards State of Aryan for breach of International conventions.

State responsibility⁵⁵ is an old aged principle of international law that was developed to protect the rights of aliens.⁵⁶ "Every internationally wrongful act of a State entails the

⁴⁹ ICRC, *Convention(III) Article 118 Commentary of 1960*, Customary International Humanitarian Law, <https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=ACBCD2830E088D59C12563CD00428F5E>.

⁵⁰ III JEAN S.PICTET, GENEVA CONVENTION OF 1 AUGUST, 1949 COMMENTARY, 547(1st ed., 1960); DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, 735(3rd ed., 2009).

⁵¹ III JEAN S.PICTET, GENEVA CONVENTION OF 1 AUGUST, 1949 COMMENTARY, 547(1st ed., 1960).

⁵² Third Geneva Convention, Art. 12.

⁵³ General assembly resolution 60/147(basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law) UN Doc. A/RES/60/147.

⁵⁴ United Kingdom v. Albania, 15 XII 49 ICJ Report 1949 ; Portugal v. Australia, [1995] ICJ Rep 90; Democratic Republic of the Congo v. Uganda, [2005] ICJ Rep 168.

⁵⁵ International Humanitarian Law, Rule 150.

⁵⁶ Guy S. Goodwin-Gill, *Systems of the Law of Nations: State Responsibility, Part 1*. By Ian Brownlie, 79 AMJIL 471, 472-473(1985).

international responsibility of that State."⁵⁷ A State Party to the conflict which violates the provisions of the Conventions shall be responsible for all acts committed by persons forming part of its armed forces.⁵⁸ In the instant matter the doctrine of state responsibility will plunge into action as the State of Marshal has committed international wrongs against State of Aryan. There is an internationally wrongful act of State of Marshal as their conduct, consisting of the Infiltration war in the demilitarized zone, the capture and detention of civilians and prisoners of war and inhuman treatment meted out to them and denial of consular access :

(a) Is attributable to the State of Marshal under international law; and

(b) Constitutes a breach of an international obligation of the State of Marshal.⁵⁹

The Geneva Convention⁶⁰ and IHL⁶¹ clearly hold that prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. Also, VCCR to which both states are a member of have been violated by Marshal by denying consular access to Mr. Alex. However, violating these principles of international law and treaty the Marshals have held the prisoners of war in permanent captivity.⁶²

4.2 That the State of Marshal is liable to pay damages under the doctrine of State responsibility.

"The fundamental concept of 'damages' is satisfaction, reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole."⁶³ A state is responsible, when it has a duty to make reparation to another state for the injury sustained by the latter state as a

⁵⁷ International law Commission Report on the work of 53rd session adopted by General Assembly, Art. 1., UN Doc. A/56/10 August 2001.

⁵⁸ Additional Protocol I to the Geneva Convention, Art.91.

⁵⁹ International law Commission Report on the work of 53rd session adopted by General Assembly, Art. 2, UN Doc. A/56/10 August 2001.

⁶⁰ Third Geneva Convention, Art.118.

⁶¹ Customary International Humanitarian Law, Rule 128.

⁶² Moot preposition, para 12.

⁶³ BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 234(3rd ed., 2006). DAVID D. CARON et.al, PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION, 634(1st ed., 2015).

consequence of an injury to its national.⁶⁴ In *Chorzów Factory (Germany v Poland)*⁶⁵ the Permanent Court of International Justice defined it not only as a principle of international law but also as ‘a greater conception of law’ involving an obligation to make reparation for any breach of an engagement.⁶⁶ Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.⁶⁷ An interpretation that would confine the Court to simply recording that the Convention had been correctly applied or that it had not been applied, without being able to lay down the conditions for re-establishment of Treaty rights affected, what would be contrary to would have been prima-facie the natural object of the clause ; for a jurisdiction of this kind ,instead of settling the dispute once and for all., would leave open the possibility for further disputes. Between States the principle that every violation of international obligations gives rise to a duty to make reparation is well established in law⁶⁸ and functions reasonably well in practice.⁶⁹

Thus, State of Marshal shall not be allowed to absolve itself of any liability incurred by it in respect of grave breaches of these Conventions.⁷⁰

V. THAT ARYAN WAS ENTITLED AS PER THE PRINCIPLE OF INTERNATIONAL LAW TO HAVE CONSULAR ACCESS TO MR. ALEX

It is humbly submitted before this Hon’ble Court that the State of Aryan was entitled to have consular access to Mr. Alex in accordance with the principles of Customary International law⁷¹ and as per the provisions of the Vienna Convention On Consular Relations, 1963⁷². The right to consular access had been widely accepted as a part of the customary international

⁶⁴ F. V. Garcia Amador , *International responsibility*. Second report, Art 1., DOCUMENT A/CN.4/106.

⁶⁵ *Germany v Poland*, [1928] PCIJ Series A, No 17.

⁶⁶ *United Kingdom v Albania*), [1949] ICJ Rep 4.

⁶⁷ *Germany V Poland* [1928] PCIJ Series A, No 17.

⁶⁸ First Geneva Convention, Art.51, Second Geneva Convention ,Art 52, Third Geneva Convention Art 131& Fourth Geneva Convention, Art.148.

⁶⁹ Emanuela Chiara Gillard, *Reparation for violations of international humanitarian law*, 85 IRRC,529,530(2003).

⁷⁰ Riccardo Pisillo Mazzeschi , *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview* , 1JICJ 339,341(2003).

⁷¹ Christopher Lau , *Diplomatic & Consular Law: Research Guide*, Berkeley Law Scholarship Repository Legal Research4,7(2015)

⁷² Vienna Convention on Consular Relations,Art. 36.

law has been incorporated in VCCR.⁷³ The UN General Assembly has also affirmed the right to consular access.⁷⁴ Denial of consular access to Mr. Alex would be contrary to various conventions⁷⁵ of the international law.

5.1 That Mr. Alex is not a secret service agent.

It is humbly submitted that Mr. Alex is not a secret service agent. There exists nothing more than a foundationless claim of Marshal that holds Mr. Alex to be a secret service agent who committed espionage.⁷⁶ An allegation of such seriousness would warrant a very high degree of certainty.⁷⁷ The rule on the allocation of the burden of proof that is applied in international courts and tribunals is in accordance with ‘onus probandi incumbit actori’ which holds that the party making an assertion must prove that assertion.⁷⁸ The Permanent Court of International Justice (PCIJ) did expressly apply the rule that a party asserting a fact bore the burden of proving it.⁷⁹

Any judgment on the merits in the present case will be limited to upholding such submissions of State of Marshal as have been supported by sufficient proof of relevant facts.⁸⁰ There is complete absence of any proof either direct or circumstantial that would establish that Mr. Alex is a secret service agent and therefore the conviction cannot sustain.⁸¹

5.2 That the State Of Marshal had violated Article 36 of the VCCR, 1963 by not providing consular access.

It is humbly submitted that both the States are parties to the Vienna Convention on Consular Relations, 1963. Article 36 of the convention⁸² governs the communication and contact

⁷³ Christopher Lau, Diplomatic & Consular Law: Research Guide, Berkeley Law Scholarship Repository Legal Research 48 (2015).

⁷⁴ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16, U.N. General Assembly Resolution 43/173 (1988).

⁷⁵ International Covenant on Civil and Political Rights, Fourth Geneva Convention.

⁷⁶ Moot proposition, para.12.

⁷⁷ U.K. v Albania, [1949] ICJ Rep 4,

⁷⁸ Argentina v Uruguay, [2006] ICJ Rep 113 :R S J Martha, *Presumptions and Burden of Proof in World Trade Law* 14 JIntl Arb 67, 98 (1997).

⁷⁹ The Mavrommatis Jerusalem Concessions [1925] PCIJ (ser A) No 5; Legal Status of Eastern Greenland [1933] PCIJ (ser A/B) No 53, 49.

⁸⁰ Nicaragua v United States of America, ICJ 112 (ICJ 1986).

⁸¹ Prosecutor v Aleksovski, Case No. IT -95-14/1-A.

⁸² Vienna Convention on Consular Relation.

between a consul and nationals of his country.⁸³ Article 36 contains both national's and the consular officer's right to communicate.⁸⁴ The right to consular communication works two ways: it recognizes the state's right to help its nationals abroad through consular officers and the national's right to obtain this assistance.⁸⁵ Providing consular assistance would be the only crucial link between Mr. Alex and State of Aryan.⁸⁶ Also, this Court has provisionally accepted in *Breard v. Greene* that the VCCR confers on a foreign national a right to consular assistance.⁸⁷ ICJ gave its interpretation that Art. 36⁸⁸ paragraph 1 establishes interrelated regime designed to facilitate the implementation of the system of consular protection. The right to communication and access depends on consular notification but also the measure available to consular officers to render consular assistance as per Article 36(1)(c).⁸⁹ The implementation of a rule in national legislation which prevents an accurate solution and reparation for violations of the rights in article 36 is not allowed.⁹⁰

The repeated requests by the State of Aryan to have consular access to Mr. Alex were denied.⁹¹ The State of Marshall has acted in contravention of Article 36(1)(a)⁹² and Article 36(1)(c)⁹³, in particular as the consular officers of the State of Aryan are free to communicate with and have access to Mr. Alex who is detained or arrested. The text of Article 36 does not indicate any exception on the grounds of national security (espionage or terrorism) and the protection under this Article extends to a national detained in any other manner.⁹⁴ The ICJ regards Article 36 as a right granted to all detainees, including those charged with espionage

⁸³ Diplomatic Conference, The United Nations Conference on Consular Relations, Codification Division Publications, 1963.

⁸⁴ *Breard v. Greene*, 523 U.S. 371 (1998) ; A.N. Bishop, '*The unenforceable rights to consular notification and access in The United States: what's changed since the LaGrand's case?*', 25 *HousJIntIL* 29,30(2002).

⁸⁵ IACHR, The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law. Advisory Opinion (1999).

⁸⁶ J. Quigley, '*Vienna Convention on Consular Relations: in retrospect and into the future*', 38 *S. Ill. U. L.J.* 1,5, (2013).

⁸⁷ *Breard v. Greene*, 523 U.S. 371, 376 (1998).

⁸⁸ Vienna Convention on Consular Relation.

⁸⁹ *Mexico v United States of America*, [2004] ICJ Rep 12

⁹⁰ *Ibid.*

⁹¹ Moot Proposition, para13.

⁹² Vienna Convention on Consular Relation, Article 36(1)(a).

⁹³ Vienna Convention on Consular Relation, Article 36(1)(c).

⁹⁴ David W. Williams, *Consular Access to Detained Person*, 29 *ICLQ* 238,239(1980).

and other similar crimes.⁹⁵ Furthermore, the burden of proof⁹⁶ lies completely on the Prosecution. The Prosecution does not have sufficient evidentiary basis to prove their claims and allegations against Mr. Alex. The state of Marshal is therefore, responsible for denying consular access under Article 36(1)(a) to Aryan.⁹⁷

All notions of human rights now considered by the global community as basic to behavior in civilized nations, have been thrown to the winds, by denying the consular access.

5.3 That the denial of consular access has violated various conventions that states are parties to.

Mr. Alex has been held incommunicado and has been denied any legal representation. A growing part of the international community considers the rights under article 36 to be human rights.⁹⁸ Protection of human rights is an international concern that does not lie exclusively within the scope of a State's internal affairs.⁹⁹ Denial of consular access to Mr. Alex is not a matter of internal affair. All notions of human rights now considered by the global community as basic to behavior in civilized nations, have been thrown to the winds, by denying the consular access.

Turning down all requests of the State of Aryan for consular access to Mr. Alex has resulted in violation of provisions of UDHR, ICCPR, ICESR, IV Geneva Conventions. International law recognizes the sanctity of human life. "Everyone is entitled in full equality to a fair trial¹⁰⁰ or fair and public hearing¹⁰¹ by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. As per Article 5 Fourth Geneva Convention, Mr. Alex (i.e a protected person) though detained as a spy shall nevertheless be treated with humanity and in case of trial, shall not be deprived of rights of fair and regular trial. Where a person is arrested in a foreign country, the right to consular access, and to seek the assistance of his home country in his defense is what fulfills the

⁹⁵U.S. v. Iran, [1980] ICJ Rep 3.

⁹⁶ Prosecutor v. Laurent Gbagbo, ICC-02/11-01/11

⁹⁷ Mexico v United States of America, ICGJ 8 (ICJ 2004)

⁹⁸ J. Quigley, 'Vienna Convention in Consular Relations: in Retrospect and into the Future', 38 S. Ill. U. L.J. 1,14-17, (2013).

⁹⁹ SIR IVOR ROBERTS, SATOW'S DIPLOMATIC PRACTICE, 358 (6th ed., 2009).

¹⁰⁰ International Covenant on Civil and Political Rights, Art. 14(1).

¹⁰¹ Universal Declaration of Human Rights, Article 10.

aspiration of a fair trial in a foreign state¹⁰², but that has been abnegated in the present case by the State of Marshal.

Hence denial of consular access is completely against the norms of international law and is a great injustice on international platform.

¹⁰²India vs. Pakista, ICGJ 515 (ICJ 2017).

FINAL SUBMISSIONS TO THE COURT

It is prayed that court may adjudge State of Marshal is guilty for:

- a) Violation of the Bortex Agreement
- b) Violation of the UN Charter, Geneva Conventions and the International instruments to which it is a member of.
- c) Violation of International Humanitarian Laws

And therefore liable to pay damages to the State of Aryan.

-Respectfully Submitted

The Respondent.

(Agent for the State of Aryan)