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COURT COMPETITION -2018**

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*Case Concerning Border Skirmish*

**THE STATE OF MARSHAL  
APPLICANT**

**v.**

**THE STATE OF ARYAN  
RESPONDENT**

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**On Submission to the International Court of Justice  
The Peace Palace, The Hague, The Netherlands**

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**MEMORIAL FOR THE RESPONDENT**

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## LIST OF ABBREVIATIONS

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&	And
¶	Paragraph
Art.	Article
CTS	Consolidated Treaty Series
Doc.	Document
ed.	Edition
GA	General Assembly
GAOR	General Assembly Official Records
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
LOC	Line of Control
p.	Page
POW(s)	Prisoner(s) of War
Rep.	Report
Res.	Resolution
RIAA	Reports of International Arbitral Awards
ser.	Series
Sess.	Session
Supp.	Supplement
T.S	Treaty Series
UN	United Nations
UDHR	Universal Declaration of Human Rights
U.N.T.S	United Nations Treaty Series
USA	United States of America
v.	versus
VCCR	Vienna Convention on Consular Relations
VCLT	Vienna Convention on Law of Treaties

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## QUESTIONS PRESENTED

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- I. Whether the application filed before the International Court of Justice is maintainable?
- II. Whether the acts of State of Marshal are in violation of International Humanitarian Law?
- III. Whether the State of Marshal is bound to provide Consular Access to Mr Alex?
- IV. Whether the State of Marshal is liable to pay damages?

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## STATEMENT OF FACTS

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### BACKGROUND

Aryan is a country in the African continent bordered by Marshal on one side. Marshal is a despotic country ruled by a dictator named General Vadim. General Vadim assumed power in 1975 after Marshal gained independence from British rule in 1972 by quashing the newly formulated Constitution of independent Marshal. Aryan, on the other hand, is an Islamic State with democratic government that has never experienced a military coup. Marshal is a Christian dominated State and has had four wars with its neighbours, primarily on the basis of religion.

### LOC AND THE PATROLLING OPERATIONS

Marshal has even gone ahead to annex certain parts of Aryan's territory into its own. These acts culminated in the Bortex Agreement of 1998 which demarcated a new border line between the State of Marshal and State of Aryan known as the Line of Control (LOC). It also made it mandatory to make LOC a demilitarized zone. Recently, on 15<sup>th</sup> October 2017, when the Aryan army was conducting patrolling operations on the LOC, Major Dmitri Godman who was manning one of the Marshal military outposts came, along with five other soldiers, with arms and ammunition to ward the Aryan army off. He along with the five soldiers was captured as a result of being overpowered.

### THE MARSHAL-ARYAN BORDER SKIRMISH

The State of Marshal in response to the six soldiers captured, conducted large scale military operations in the LOC resulting in a full-fledged war which lasted from 20<sup>th</sup> October 2017 to 25<sup>th</sup> December 2017. At the end of the war, Marshal emerged victorious. The war saw Marshal annexing the LOC as part of its territory, capturing approximately 47,000 Prisoners of War, 100 Civilians and lastly, the Aryan government was deposed and martial law was imposed with the army taking over the reins of the Government.



## **PRISONERS OF WAR AND ALEX**

The State of Aryan requested the State of Marshal to return the POWs and civilians, in exchange of the six soldiers, the only POWs captured by the State of Aryan. The request to return the POWs was refused by stating that they would be kept in permanent captivity as a punishment. All they agreed for was to return 99 of the 100 civilians. They however, detained one civilian named Alex whom they claimed was being detained on charges of espionage as he was a part of Aryan Secret Services. Even the repeated requests from Aryan to Marshal to have consular access to Mr Alex were denied by the State of Marshal contending that consular access was a threat to the security of the State. General Vadim even threatened the State of Aryan in the 73<sup>rd</sup> Session of UN General Assembly stating that,

**“Every time, we have to tolerate their rubbish. This time we will make them pay for their sins...”**

## **PARCEL SENT TO MARSHAL OUTPOST**

The threats made by General Vadim, the permanent captivity of POWs and ignorance of repeated requests for consular access to Alex compelled the State of Aryan to resort to harsh measures. On 2<sup>nd</sup> of February 2018, the Marshal border outpost received a sealed from the Aryan army. The parcel contained mutilated body parts of the 6 soldiers captured with the nametag of Major Godman on top of it. The parcel also had a message reading, **‘Be prepared, we are going to hit you soon’**. Within Aryan, largely, fingers were pointed towards General Vadim and the insensitive remarks he has made. After all this General Vadim tried to salvage the situation by stating that he was right in doing what he did.

## **APPLICATION TO ICJ**

General Vadim then invoked Art 4 of the Bortex Agreement which has now become invalid to establish Court’s jurisdiction under Art 36(1) of ICJ Statute. Both the states are parties to the following conventions; UDHR, ICCPR, ICESCR, all the Geneva Conventions, the UN Charter, Vienna Convention on the Law of Treaties and the ICJ Statute.

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## SUMMARY OF ARGUMENTS

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### **I. WHETHER THE APPLICATION FILED BEFORE THE INTERNATIONAL COURT OF JUSTICE IS MAINTAINABLE?**

The application filed before the International Court of Justice is not maintainable because the most primary basis of jurisdiction that is consent is not there. Further, the Bortex agreement is no longer in force as the Line of Control does not exist anymore and as a result of supervening impossibility of performance the treaty is invalid. Also, the matter under which application has been filed is beyond the jurisdiction of the International Court of Justice.

### **II. WHETHER THE STATE OF MARSHAL HAS VIOLATED INTERNATIONAL HUMANITARIAN LAW BY THE PERMANENT CAPTURE OF THE PRISONERS OF WAR?**

It is contended that State of Marshal has violated the international humanitarian law by breaking the code of conduct of the armed conflict thus breaching the Geneva conventions and its Additional Protocol. The treaties signed by Marshal which form a part of International Customary Law were violated by the permanent capture of the POWs held during the conflict. On the request of Aryan to return the POWs, the State of Marshal issued a statement that they would keep the POWs in permanent captivity. This is against the accepted norms of International Humanitarian law which makes Aryan liable for all such breach of laws of war. Therefore, ICJ should compensate Aryan for all such losses.

### **III. WHETHER THE STATE OF MARSHAL IS BOUND TO PROVIDE CONSULAR ACCESS TO MR. ALEX?**

It is humbly submitted that the State of Marshal has an obligation to provide for the consular access to Mr. Alex since he has been detained on the false charges of espionage and alleged to be a member of Aryan Secret Services although Marshal has no evidence to prove its stance. Since he is a civilian, thus he is bound to get the consular access under customary international law. The onus to prove that Mr. Alex is a spy also lies on the State of Marshal and they have no evidence to prove any such thing. The Geneva Conventions, Additional

Protocol I, the Vienna Convention on Consular Relations, all agree that every civilian must be provided the consular access. Thus as part of customary law, Mr. Alex is entitled to be provided with the consular access.

#### **IV. WHETHER THE STATE OF MARSHAL IS LIABLE TO PAY DAMAGES?**

The State of Marshal has been involved in acts of violation of International Humanitarian Law. The announcement of keeping POWs in permanent captivity as punishment makes it obligatory for the State of Aryan to pay damages because Art 12 of ILC Articles on State Responsibility for Wrongful Acts, 2001 makes State obligatory to pay damages for Executive's wrongful act. The State of Marshal is under an obligation to make restitution to the State of Aryan and return POWs. The State is also liable to pay compensation for the moral damages to the POWs. The amount of compensation to be given is to be decided by the Court keeping in mind that even moral damages should be compensated.

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## ARGUMENTS ADVANCED

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### I. THAT THE APPLICATION FILED BEFORE INTERNATIONAL COURT OF JUSTICE IS NOT MAINTAINABLE.

1. The court has jurisdiction under **Art 36(1) of its statute** in all cases referred to it by parties, and regarding all matters specially provided for in UN charter or in treaties or conventions in force.<sup>1</sup> These kinds of cases come before the Court by notification to the Registry of an agreement known as a special agreement (compromis) and concluded by the parties especially for this purpose.<sup>2</sup> Or matters specially provided for in treaties and conventions in force.
2. Also, becoming a party to the Statute of the Court doesn't mean that the state accepts the jurisdiction of the Court. It is one of the two prerequisites to become a party before the Court. The other is the consent of the states to the jurisdiction of the Court. If states have not given their consent, the Court will not exercise its jurisdiction.<sup>3</sup> In the **Application for the Interpretation and Revision of the Judgement in the Tunisia/ Libya Case**<sup>4</sup> the Court noted that jurisdiction of the court is founded upon the consent of the parties.<sup>5</sup>
3. The agent humbly submits that firstly, Consent forms the primary basis of ICJ jurisdiction [A]. Secondly, the Bortex Agreement is no longer in force since the LOC does not exist [B], and hence, ICJ jurisdiction cannot arise.

#### [A] THAT CONSENT FORMS THE PRIMARY BASIS FOR JURISDICTION.

4. It is a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent. According to Sir Fitzmaurice, "As to the application in contentious cases of the principle

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<sup>1</sup> Statute of the International Court of Justice art. 36(1), June 26, 1945, 33 UNTS 993(hereinafter ICJ Statute).

<sup>2</sup> *Basis of Court's Jurisdiction*, INTERNATIONAL COURT OF JUSTICE (2018) <http://www.icj-cij.org/en/basis-of-jurisdiction>.

<sup>3</sup> Cesare P. R. Romano, *International Justice and Developing Countries: A Qualitative Analysis*, 1 The Law and Practice of International Courts and Tribunals 542 (2002).

<sup>4</sup> Application for the Interpretation and Revision of the Judgement in the Tunisia/ Libya Case, 1985 ICJ Rep 192.

<sup>5</sup> *id* at 216.

of the consent of the parties as the basis of jurisdiction, there is no room for doubt”<sup>6</sup>. This fundamental concept correlates with the principle of state sovereignty, therefore, the decision to confer jurisdiction to the court is necessarily a deliberate political decision.<sup>7</sup>

5. The Permanent Court of Justice in the **Monetary Gold Case**<sup>8</sup> held that,

*“it cannot decide a dispute without the consent of Albania. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent”*<sup>9</sup>.

6. Consent has to be clearly present, if sometimes inferred, and not merely a technical creation.<sup>10</sup> The court has emphasised that such consent has to be ‘voluntary and indisputable’ as elucidated in the **Corfu Channel Case**.<sup>11</sup>
7. In the **Anglo-Iranian Oil Cases**<sup>12</sup> the Court referred to: “...the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties. Unless the parties have conferred jurisdiction on the Court in accordance with Article 36 [sc. of the Statute], the Court lacks jurisdiction”<sup>13</sup>.
8. In the **Ambatielos Case**<sup>14</sup> the Court said, “the function it was carrying out in that case did not involve departing from ...the principle, which is well established in international law, and accepted by its own jurisprudence as well as that of the Permanent Court of International Justice, that a State may not be compelled to submit its disputes to arbitration without its consent”<sup>15</sup>.
9. Also, the notice having being primarily sent for the treatment meted out to Major Dmitri Godman is beyond the scope of ICJ’s jurisdiction as it does not come within the ambit of ICJ.

<sup>6</sup> 11 SIR GERALD FITZMAURICE, THE LAW AND PROCEDURE OF INTERNATIONAL COURT OF JUSTICE, 493-4, (1st ed., 1986).

<sup>7</sup> SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 65 (3rd ed., 1975).

<sup>8</sup> Case of monetary gold removed from Rome in 1943, Order of November 3<sup>rd</sup>, 1953, 1953 ICJ Rep 44.

<sup>9</sup> *id* at 31.

<sup>10</sup> Monetary Gold Case, *supra* note 7 at 31.

<sup>11</sup> The Corfu Channel Case, Judgment on Preliminary Objection (United Kingdom v. Albania), 1948 ICJ Rep 15, 27.

<sup>12</sup> Anglo-Iranian Oil Co. Case (jurisdiction), Judgment of July 22<sup>nd</sup>, 1952, 1952 ICJ Rep 93.

<sup>13</sup> *id* at 109.

<sup>14</sup> Ambatielos Case (jurisdiction), Judgment of July 1<sup>st</sup> 1952, 1952 ICJ Rep 28.

<sup>15</sup> *id* at 44.

10. The State of Aryan as a sovereign has the right to decide in the matter of consent and as a requisite the consent has to be voluntary and undisputable. The objection to the application filed by the State of Aryan clearly shows that there is no consent to the jurisdiction of International Court of Justice.

**[B] THAT THE BORTEX AGREEMENT IS NO LONGER VALID.**

**[B.1] THAT THE LOC DOES NOT EXIST.**

11. There are a wide range of acts that may constitute manifestations of the exercise of State Sovereignty. It may be exercise of legislative, executive, judicial powers or the most Subjective Element that is the intent to act as a Sovereign.<sup>16</sup>
12. The Bortex Agreement of 1998 demarcated a new border line between the State of Marshal and Aryan. The agreement was concluded as a result of misconducts by the State of Marshal, which had gone ahead to annex certain territories of the State of Aryan.<sup>17</sup>
13. One of the major results of the Border-Skirmish was annexation of LOC as part of the territory of Marshal. The designation and recognition accorded to the LOC, as being part of the territory of Marshal clearly indicates the intent of the State of Marshal to act as Sovereign. Therefore, according the LOC to be part of Marshal's territory itself means that no borderline exists thereafter.
14. Further, State conduct comprises both effectivités for a State, and the reaction to them by another State. State conduct can itself create an estoppel. State conduct in relation to a territorial dispute may also entail a renunciation of a right. This may occur when a State decides not to claim its sovereign rights.
15. Therefore, the LOC does not exist anymore and is part of the Marshal's territory.

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<sup>16</sup> Marcelo G Kohen & Mamadou Hébié, *Territory, Acquisition*, 9 The Max Planck Encyclopaedia of Public International Law 887-900.

<sup>17</sup> See Moot Proposition, ¶ 6.

**[B.2] THAT THE STATE OF MARSHAL HAS ITSELF DEPRIVED THE TREATY OF ITS OBJECT AND PURPOSE.**

16. **Art. 60 of the Vienna convention on Law of Treaties**<sup>18</sup> states that, “A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty”.
17. Also, if the breach of the treaty is of such nature as to render the treaty of no further value to the other party or suppose that the offending party violates the treaty provisions again and again despite the protests of the other party. In such cases it would be unjust, to compel the other party to continue to be bound by the treaty with respect to the offending State.<sup>19</sup>
18. In organized communities it is settled by municipal law whether a contract which has been broken shall be enforced or annulled; but inter-nationally, as no superior coercive power exists, and as enforcement is not always convenient or practicable to the injured party, the individual State must be allowed in all cases to enforce or annul for itself as it may choose. The general rule then is clear that a treaty which has been broken by one of the parties to it is not binding upon the other, through the fact itself of the breach, and without reference to any kind of tribunal.<sup>20</sup>
19. Sir Gerald Fitzmaurice drew attention to the rule “a party to a treaty cannot claim rights under it or rights which can only exist on the basis of the treaty or be derived from it, without at the same time being willing to discharge the corresponding obligations”<sup>21</sup>.
20. Also, in the context of the Mandate for Southwest Africa, the court in its 1971 Advisory opinion in **Namibia Case**<sup>22</sup> stated “*one of the fundamental principles governing the international relationship thus established is that a party which does not fulfil its own*

<sup>18</sup> Vienna Convention on Law of Treaties art. 60, May 23, 1969, 1155 U.N.T.S. 331 (hereinafter VCLT).

<sup>19</sup> Supplement: Research in International Law, 29 AJIL 1077-1096 (1935).

<sup>20</sup> HALL, INTERNATIONAL LAW 343 (6<sup>th</sup> ed., 1909).

<sup>21</sup> 1 HUGH THIRLWAY, THE LAW AND PROCEDURE OF INTERNATIONAL COURT OF JUSTICE, 356 (1<sup>st</sup> ed., 2013).

<sup>22</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), advisory opinion, 1971 ICJ Rep. 46.

*obligation cannot be recognized as retaining the rights which it claims to derive from the relationship*”<sup>23</sup>.

21. The Bortex Agreement of 1998 stated that the agreement shall govern all actions, activities and disputes which arise between Marshal and Aryan in relation to the LOC.<sup>24</sup> It was result of breach by the State of Marshal that the object indispensable for the execution of the treaty i.e. the LOC does not exist. As the LOC is now part of Marshal’s territory. The State of Marshal by taking advantage of the Border-Skirmish has itself deprived the treaty of its object and purpose. Therefore, as a result of supervening impossibility of performance, the treaty is no longer in force.
22. Further, previously no attempts at peaceful negotiation have been made by the State of Marshal as specified in the **Art. 2 of the Bortex Agreement**.<sup>25</sup> It has time and again taken undue advantage of the circumstances; firstly, before the conclusion of the Bortex agreement;<sup>26</sup> secondly, after the Border skirmish by annexing the LOC as part of its territory, by keeping the 47,000 POWs in permanent captivity which is against the norms of International Humanitarian law and by not providing consular access to Mr Alex even after repeated requests made by the State of Aryan.<sup>27</sup>
23. Also, as further elucidated in the **Naulilaa dispute**<sup>28</sup> which states that reprisals had to be preceded by an unsatisfied demand for reparation and accompanied by a sense of proportion between the offence and the reprisal.<sup>29</sup> All the conducts clearly depict the acts of reprisal adopted by the State of Marshal in retaliation of a mere patrolling operation. The State of Marshal has opted an unjust route and way of reprisal to come back at the State of Aryan.
24. The absence of consent and the Bortex agreement being no longer in force clearly indicate that the State of Aryan is not obligated and cannot be coerced in the jurisdiction of International Court of Justice.

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<sup>23</sup> *id* at ¶ 91.

<sup>24</sup> See Moot Proposition, Annexure-1.

<sup>25</sup> See Moot Proposition, Annexure-1.

<sup>26</sup> See Moot Proposition, ¶ 6.

<sup>27</sup> See Moot Proposition, ¶ 12.

<sup>28</sup> Portuguese Colonies Case (Naulilaa incident), 2 UNRIAA 1011 (1928).

<sup>29</sup> M. N. SHAW, INTERNATIONAL LAW 1129 (6<sup>th</sup> ed., 2008).



## II. THAT NOT WITHSTANDING THE PREVIOUS ARGUMENT THE STATE OF MARSHAL HAS VIOLATED THE INTERNATIONAL HUMANITARIAN LAW WITH RESPECT TO THE PRISONERS OF WAR.

25. International Humanitarian Law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached as explained in **Prosecutor v. Tadic case**<sup>30</sup>. Geneva Convention is a part of the international humanitarian law. The Geneva Conventions and the Additional Protocols were made to protect people during international armed conflicts or non-international armed conflicts. The **Additional Protocol I** is specifically applicable during the times of international armed conflict and since the conflict is that of an international nature,<sup>31</sup> thus this provision is applicable here. **Art 2 of the Third Geneva Convention**<sup>32</sup> provides with the application of the convention during international armed conflict. Whenever the armed forces of two states that are party to the Geneva conventions of 1949 are entangled in hostilities the provisions of the conventions and those of AP I will apply. Since this armed conflict took place between two sovereign nations; State of Aryan and State of Marshal, thus it is an international armed conflict.
26. **Art 118 of the Third Geneva Convention**<sup>33</sup> states that the POWs shall be released and repatriated without delay after the cessation of active hostilities. This means that as soon as the conditions of active hostilities end, it is required by the capturing party to return back the POWs.
27. The important point here is that the term “active hostilities” is quite vaguely defined. It is important to understand the definite meaning of the term. The meaning of “active hostilities” should be informed with reference to the nature of “armed conflict.” Article 118 uses the term “active hostilities” rather than “armed conflict” not to suggest that prisoners could be held even *after* the conclusion of full-fledged armed conflict, as long as any low level of hostilities exists. Rather, that article makes the continuation of “active

<sup>30</sup> Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72 (ICTY, 1999).

<sup>31</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1(3), June 8, 1977, 1125 U.N.T.S. 3 (hereinafter Additional Protocol I).

<sup>32</sup> Geneva Convention Relative to Treatment of Prisoners of War art. 2, Aug. 12, 1949, 35 U.N.T.S. 135 (hereinafter Third Geneva Convention).

<sup>33</sup> *id* at Art. 118.

hostilities” the condition for continued detention for the opposite reason – that is, to facilitate the release of prisoners as soon as conditions make it possible, whether or not the parties have succeeded in agreeing to a formal end to armed conflict.

28. Active hostilities between the State of Aryan and State of Marshal ended as it has been clearly mentioned that the armed conflict ended with the defeat of the State of Aryan. Since active hostilities have ended, the 47000 POWs have to be returned back to the State of Aryan. If not, it is considered to be violation of the Geneva Conventions. An “unjustifiable delay in the repatriation of prisoners of war or civilians” constitutes a grave breach of **Additional Protocol I under Art. 85(4)(b)**<sup>34</sup>. Marshal declared that it is going to keep all the POWs in permanent captivity which is quite unreasonable and is considered a grave breach of the Geneva Convention.
29. **Art. 9 of ICCPR**<sup>35</sup> provides for right to liberty and security of person. Further, **Art. 3 of UDHR**<sup>36</sup> also provides for right of life, liberty and security of person. Keeping POWs in permanent captivity is thus infringement of rights provided in the Bill of Human Rights. The act of reprisal of keeping them in permanent captivity, is conducting breach of international obligations imposed on them as according to **Art 13 of the Third Geneva Convention** which prohibits measures of reprisal against POWs.<sup>37</sup>
30. In the **Tehran Hostages Case**<sup>38</sup> the Court stated, “*Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights*”<sup>39</sup>.
31. The provisions of the Hague Regulations have become part of customary law<sup>40</sup> and hence can be used even when both the states are not parties to it. **Art. 20 of The Hague**

<sup>34</sup> Additional Protocol I, *supra* note 31, Art. 85(4)(b).

<sup>35</sup> International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966), 999 U.N.T.S. 171 (hereinafter ICCPR).

<sup>36</sup> Universal Declaration of Human Rights art. 3, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (hereinafter UDHR).

<sup>37</sup> Geneva Convention III, *supra* note 32, Art 13.

<sup>38</sup> United States Diplomatic and Consular Staff in Tehran (USA v. Iran), 1980 I.C.J. Rep. 3.

<sup>39</sup> *id* at ¶ 91.

<sup>40</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J Rep. 136, 172.

**Convention, 1907**<sup>41</sup> provides for the obligation to repatriate prisoners of war as soon as possible after the conclusion of peace. 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-taking.

32. It can be concluded that the permanent captivity of POWs for an arbitrary reason like punishment is in clear violation of International Humanitarian Law. The POWs are supposed to be released as soon as the active hostilities end and since in this case the hostilities have ended; it becomes obligatory for the State of Marshal to return the POWs.

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<sup>41</sup> Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land art. 20, Oct 18, 1907, 187 CTS 227 (hereinafter Hague Convention).

### III. THAT THE STATE OF MARSHAL IS BOUND TO PROVIDE CONSULAR ACCESS TO MR ALEX.

33. The counsel humbly submits that the State of Marshal is obliged to provide consular access to Mr Alex because *first*, Mr Alex is not a member of the Aryan Secret Agency [A] and *second*, the State of Marshal is bound to provide consular access to him under customary international law [B].

#### [A] THAT MR. ALEX IS NOT A SPY.

34. The term espionage means a clandestine activity carried out by an individual or individuals working under secret identity to gather classified information on behalf of another entity or nation. Espionage is "an unfriendly act," it does not violate international law.<sup>42</sup> "Espionage is not prohibited by international law as a fundamentally wrongful activity. It does not violate a principle of *jus cogens*."<sup>43</sup> To give espionage some legal support, it is tied to the "right of anticipatory or preemptory" self-defence under the UN Charter and international law.<sup>44</sup> State practice throughout history also supports the legitimacy of spying.<sup>45</sup> Nowhere in international law is peaceful espionage prohibited. Domestic law punishes captured spies not because they violate some universal norm against espionage, but because they have engaged in intelligence operations against national interests.<sup>46</sup>
35. Since espionage has not been mentioned anywhere in the international law, so it is not considered a part of the customary international law. A person accordingly will be considered a spy when he is caught on definite proof that he was engaged in acts comprising espionage.<sup>47</sup> Spies, and other clandestine agents, are secret agents of a state sent abroad for the purpose of obtaining clandestinely information in regard to military, political or industrial value to the state, or for other clandestine purposes.<sup>48</sup> Mere suspicion of a person being a spy cannot evict the entitlements of right of protection

<sup>42</sup> Lt. Col. Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT'L L. & POL'Y 347 (1996).

<sup>43</sup> Cmdr. Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 AF. L. REV. 217, 218 (1999).

<sup>44</sup> *id* at 224.

<sup>45</sup> *supra* note 42.

<sup>46</sup> W. Hays Parks, *The International Law of Intelligence Collection*, National Security Law 433-34.

<sup>47</sup> Ashley S. Deeks, *Confronting and Adapting: Intelligence Agencies and International Law*, 102 Va. L. Rev. 599, 601 (2016).

<sup>48</sup> 1 OPPENHEIM, INTERNATIONAL LAW, 1176 (9<sup>th</sup> ed., 2008).

under the international law. Mr Alex was detained on the charges of espionage but the State of Marshal has no clear proof about this and are merely suspicious. Thus they don't have the right to do this.

36. **Article 46 of the Additional Protocol I**<sup>49</sup> defines spies as any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy. Mr Alex was captured as a civilian and then detained on the charges of espionage. He was not a member of the Aryan army.<sup>50</sup>
37. **Article 29 of the Hague Convention (IV) on Respecting the Laws and Customs of War on Land**<sup>51</sup> clearly mention that a person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Mr Alex was not captured while engaging in espionage; he was caught as a civilian without acting in any clandestine manner. Instead the State of Marshal captured Mr Alex on the false pretext that he is a member of the Aryan Secret Services and was engaged in the acts of espionage. State of Marshal '*claimed*' that Alex belonged to Aryan Secret Services.<sup>52</sup> They do not have an alleged evidence to prove their stance while capturing a civilian and detaining him on false pretexts. The onus to prove that Mr. Alex was a spy or that he belonged to the Secret Services lies on the State of Marshal. Without any evidence, they cannot detain Alex on the charges of espionage.

**[B] THAT STATE OF MARSHAL IS BOUND TO PROVIDE CONSULAR ACCESS TO MR. ALEX UNDER INTERNATIONAL LAW.**

38. **Art 4 of the Fourth Geneva Convention**<sup>53</sup> says that persons protected by the Convention are those who at a given moment and in any manner whatsoever find themselves, in case of a conflict or occupation, in the hands of persons a Party to the conflict or Occupying Power of which they are not nationals. All these people would be entitled protection under this convention until their full release and repatriation. Mr Alex

<sup>49</sup> Additional Protocol I, *supra* note 31, Art 46.

<sup>50</sup> See Moot Proposition, ¶ 12.

<sup>51</sup> Hague Convention, 1907, *supra* note 41, art. 29.

<sup>52</sup> See Moot Proposition, ¶ 12.

<sup>53</sup> Geneva Convention Relative to the Protection of Civil Persons in Time of War art. 4, Aug. 12, 1949, 75 U.N.T.S 287 (hereinafter Geneva Convention IV).

was captured as a civilian and so he was entitled the protection under the fourth Geneva Convention. Since **Art 50 of the Additional Protocol I**<sup>54</sup> defines who all would come under the ambit of civilians and civilian population and **Art 51 of the Protocol I**<sup>55</sup> states that all people coming under the purview of civilians under this protocol would be treated humanely and no torture would be accepted on them. Under these provisions, Alex was entitled to be protected under these provisions.

39. Diplomatic Protection has been recognised as a concept of Customary International Law. A State has right to take action in an effort to protect its citizens whose rights have been injured abroad. The rights include assistance when a citizen has been detained by a foreign Government. The global community as a whole has accepted diplomatic protection by the codifying it into **Art 36(1) of VCCR**<sup>56</sup>. In the case of **Nicaragua v. USA**<sup>57</sup>, the ICJ held that even if the principles of Customary International Law have been codified into treaties, they continue to exist simultaneously with the treaties. Therefore, even if the State of Marshal and State of Aryan are not parties to VCCR, still the identical customary provisions on consular access and diplomatic protection continue to apply between them.
40. **Article 36(1) of the VCCR**<sup>58</sup>, among other things, provides that when a national of a foreign country is arrested or detained, the detainee must be advised of the right to have the detainee's consulate notified and that the detainee has the right to regular consultation with consular officials during detention and any trial. The VCCR does not make any exception for people suspected of committing espionage or terrorism-related offences and the ICJ has in the past also not interpreted the treaty to exclude offences such as espionage or terrorism. Making the rights pertaining to consular access under the VCCR contingent upon the offence foreign nationals are charged with would undermine the purpose of the treaty. It would allow States to deny consular access to foreign nationals merely through a particular characterization of their acts. Indeed, it is precisely for charges of the most serious nature that consular access will be most compelling, both for the State and the individual seeking such access. Since the right to consular access is

<sup>54</sup> Additional Protocol I, *supra* note 31, Art 50.

<sup>55</sup> Additional Protocol I, *supra* note 31, Art 51.

<sup>56</sup> Vienna Convention on Consular Relations art. 36(1), Apr. 24, 1963, 596 UNTS 261 (hereinafter VCCR).

<sup>57</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), Merits, Judgment, 1986 I.C.J Rep 14.

<sup>58</sup> VCCR, *supra* note 56.

applicable from the time of arrest or detention, denial of consular access based on charges would also fly in the face of the principle of presumption of innocence.<sup>59</sup>

41. In the **LaGrand case**<sup>60</sup>, the ICJ determined that *Art 36(1) creates individual rights for the detained person in addition to the rights accorded the sending State, and that consequently the reference to the rights accorded the sending State, and that consequently the reference to "rights" in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individuals the rights*<sup>61</sup>.
42. On similar grounds, in the **Avena case**<sup>62</sup>, USA captured Mexican nationals, who lived in USA but weren't US citizens, for some offence and all those people were denied consular access. Out of all those people, some were even scheduled to be executed. It was found that since it was never claimed by those that they were US citizens so they had the right to be provided with the consular access. Breach of this right made US liable in the ICJ.
43. Also in the case of **Leal Garcia v. Texas**<sup>63</sup>, the Supreme Court of the United States decided that since there is no domestic law on consular access so they were not liable in denying the same to the applicant. It was considered one of the worst decisions of the court since it had been ruled in the Avena case that it was mandatory for every country to follow the Vienna Convention on Consular Relations.
44. Mr Alex was a civilian and was captured during the armed conflict between the two countries. He was detained on the charges of committing espionage and that he belonged to the Aryan Secret Services. Even after requesting the State of Marshal to have consular access to Alex, it was denied to the State of Aryan. It is an accepted norm that every person is innocent in the eyes of law before he is convicted for his crimes. This presumption applies on Alex too and the state of Marshal should also have allowed the consular access to him. The Vienna convention too allows for this access disregarding the degree of the crime committed. Thus, Marshal is liable for denying this right to Mr Alex.

<sup>59</sup> Draft Articles on Consular Relations, 2 Y.B Int'l L. Comm'n 56, U.N Doc. A/CN.4/SER.A/1961/Add.1.

<sup>60</sup> LaGrand (Germany v. USA), Judgment, 2001 I.C.J Rep 466.

<sup>61</sup> *id* at 497.

<sup>62</sup> Avena and Other Mexican Nationals (Mexico v. USA), Judgment, 2004 I.C.J Rep 12.

<sup>63</sup> Leal Garcia v. Texas, 564 U.S. 940 (2011).

#### IV. THAT THE STATE OF MARSHAL IS LIABLE TO PAY DAMAGES.

40. The Counsel contends that the State of Marshal is liable to pay damages to the State of Aryan because *first*, the State of Marshal is responsible for Internationally Wrongful Act by its organs [A], *second*, that the State of Marshal is liable to make reparations [B].

##### [A] THAT THE STATE OF MARSHAL IS RESPONSIBLE FOR INTERNATIONALLY WRONGFUL ACT BY ITS ORGANS.

41. Internationally wrongful acts are those which are attributable to state and constitute a breach of an international obligation.<sup>64</sup> An action or inaction is attributable to the State if it is done by an organ of the State exercising legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.<sup>65</sup> The decision to keep 47, 000 POWs as permanent captives was made by the executive<sup>66</sup> thus making the State responsible.

42. There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.<sup>67</sup> The State of Aryan requested the State of Marshal to return the 47, 000 POWs captured during the war.<sup>68</sup> The State of Marshal did not consider the request and announced that the POWs will be kept in permanent captivity as punishment which is in violation of **Art 118 of Third Geneva Convention**<sup>69</sup>. There is thus a violation of International obligation by the State of Marshal. It thus becomes clear that the State of Marshal has conducted an internationally wrongful act.

43. **Art 1 of ILC Articles on State Responsibility**<sup>70</sup> makes it clear that every internationally wrongful act of a State entails international responsibility of that State. The principle of objective responsibility maintains that the liability is strict.<sup>71</sup> Thus the internationally

<sup>64</sup> Draft Articles on State Responsibility on the Responsibility of State Responsibility for Internationally Wrongful Act art. 2, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10(2001) (hereinafter ILC Articles on State Responsibility).

<sup>65</sup> *id.*, Art 4(1).

<sup>66</sup> See Moot Proposition, ¶ 12.

<sup>67</sup> ILC Articles on State Responsibility, *supra* note 64, Art. 12.

<sup>68</sup> See Moot Proposition, ¶ 11.

<sup>69</sup> Third Geneva Convention, *supra* note 32 at Art. 118.

<sup>70</sup> ILC Articles on State Responsibility, *supra* note 64, Art. 1.

<sup>71</sup> SHAW, *supra* note 29, 783.



wrongful act by the State of Marshal of keeping the POWs in permanent captivity makes the State responsible under International Law.

44. The Court in advisory opinion of **Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights**<sup>72</sup> stated that, *‘According to a well-established rule of International law, the conduct of any organ of a State must be regarded as an act of the State’*.
45. **Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)**<sup>73</sup> case the arbitral tribunal stated that, *on the international plane, acts of “competent authorities” are considered to be attributable to the State as long as such authorities fall within the notion of state organs or entities that are empowered to exercise elements of the government authority.*<sup>74</sup>
46. The International Court of Justice stated in the **LaGrand case**, *“the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be”*<sup>75</sup>.
47. The Permanent Court of Justice in **Certain German Interests in Polish Upper Silesia (Merits)**<sup>76</sup> case said that *from the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.*<sup>77</sup>
48. In the **Salvador Commercial Company case**<sup>78</sup>, ICTY said that: *a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.*<sup>79</sup>
49. In **Prosecutor v. Dusko Tadic**<sup>80</sup>, the ICTY in accordance with Nicaragua Case stated that, *“It would ... seem that in Nicaragua the Court distinguished between three*

<sup>72</sup> Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J Reports 62, 87.

<sup>73</sup> Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom), Final Award, 23 R.I.A.A 59 (2003).

<sup>74</sup> *id* at 101, ¶ 145.

<sup>75</sup> LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, 1999 I.C.J Rep 9, 16, ¶ 28.

<sup>76</sup> Certain German Interests in Polish Upper Silesia, Merits, 1926 P.C.I.J., (ser. A) No. 7.

<sup>77</sup> *id* at 19.

<sup>78</sup> Claims of the Salvador Commercial Company, 15 R.I.A.A. 467 (1917).

<sup>79</sup> *id* at 477.

<sup>80</sup> Tadic Case, *supra* note 30.

*categories of individuals. The first comprised those who did have the status of officials: members of the Government administration or armed forces of the United States. With regard to these individuals, the Court clearly started from a basic assumption, which the same Court recently defined as ‘a well-established rule of international law’, that a State incurs responsibility for acts in breach of international obligations committed by individuals who enjoy the status of organs under the national law of that State or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority”<sup>81</sup>.*

**[B] THAT THE STATE OF MARSHAL IS LIABLE TO MAKE FULL REPARATION.**

50. The responsible State is under an obligation to make full reparation for the injury caused by its internationally wrongful act.<sup>82</sup> Reparation is to be made for both material and moral damages.<sup>83</sup> **Art 34 of ILC Articles**<sup>84</sup> provides that reparation shall take form of restitution, compensation and satisfaction, either singly or in combination. Also **Art 2(3) of ICCPR**<sup>85</sup> provides that States have duty to provide effective remedy in case of violation of human rights protected by the Covenant.
51. With every right comes an obligation. A State has right to capture POWs but is bound to return the POWs as soon as the hostilities end<sup>86</sup>. In this case, the war has ended and thus the active hostility. The State of Marshal has thus violated International Humanitarian Law by keeping 47, 000 POWs as permanent captives<sup>87</sup>. Violation of international obligation imposes the duty to make reparation for injury due to such breach.
52. The PCIJ in **Chorzow Factory Case**<sup>88</sup> gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach. In the second instance, it dealt with that aspect of reparation encompassed by “compensation” for an unlawful act—that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

<sup>81</sup> Tadic Case, *supra* note 30 at 43-4.

<sup>82</sup> ILC Articles on State Responsibility, *supra* note 64, Art. 31(1).

<sup>83</sup> ILC Articles on State Responsibility, *supra* note 64, Art. 31(2).

<sup>84</sup> ILC Articles on State Responsibility, *supra* note 64, Art. 34.

<sup>85</sup> ICCPR, *supra* note 35, Art 2(3).

<sup>86</sup> Third Geneva Convention, *supra* note 32, Art 118.

<sup>87</sup> Additional Protocol I, *supra* note 31, Art 85 (4) (b).

<sup>88</sup> Factory at Chorzów, (Germany v. Poland), PCIJ, Series A, No. 17 (1928).

53. In **M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)**<sup>89</sup>, the International Tribunal for the Law of the Sea held that “*Reparation may be in the form of “restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination” (article 42, paragraph 1, of the draft articles of the International Law Commission on State responsibility). Reparation may take the form of monetary compensation for economically quantifiable damage as well as for non-material damage, depending on the circumstances of the case. The circumstances include such factors as the conduct of the State which committed the wrongful act and the manner in which the violation occurred. Reparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right*”<sup>90</sup>.
54. In **Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)**<sup>91</sup> the Court stated that *the principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the Factory at Chorzów case: that ‘reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’*<sup>92</sup>.
55. In **Spanish Zone of Morocco (Great Britain v. Spain) claims**,<sup>93</sup> Judge Huber stated that “*responsibility is the necessary corollary of a right. All rights of an International character involve International responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met*”<sup>94</sup>.

<sup>89</sup> The M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea), judgment, 120 I.L.R. 143 (ITLOS, 1999).

<sup>90</sup> *id* at ¶ 144.

<sup>91</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. Rep 43.

<sup>92</sup> *id* at 232, ¶ 460.

<sup>93</sup> Spanish Zone of Morocco (Great Britain v. Spain) claims, 2 RIAA 641(1924).

<sup>94</sup> *id* at 658.

**[B.1] THAT THE STATE OF MARSHAL IS LIABLE TO MAKE RESTITUTION.**

**Art 35 of ILC Articles on State Responsibility**<sup>95</sup> states that,

*A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:*

*(a) Is not materially impossible;*

*(b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.*

56. The State of Marshal by keeping the POWs in permanent captivity has not only violated Art 118 of Third Geneva Convention but also Art 9 of UDHR which guarantees Right to Liberty. The purpose of restitution is to re-establish the situation that would have existed if the internationally wrongful act had not been committed. In the given case, it is materially possible to return the POWs kept in permanent captivity thus restoring the situation that existed before the war.

57. The PCIJ in **Chorzow Factory Case**<sup>96</sup> held that *there was a duty on the wrongdoing state in the case at hand to “restore the undertaking and, if this be not possible, to pay its value at the time of its indemnification, which value is designed to take the place of restitution which has become impossible”*<sup>97</sup>.

57. In its 2006 award, the arbitral tribunal constituted to hear the **ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary case**<sup>98</sup>, in determining the “customary international law standard” for damages assessment applicable in the case, noted that article 35 finally adopted by the International Law Commission in 2001 provided that *“restitution in kind is the preferred remedy for an internationally wrongful act”*.

<sup>95</sup> ILC Articles, *supra* note 64, Art 35.

<sup>96</sup> Chorzow Factory Case, *supra* note 88.

<sup>97</sup> Chorzow Factory, *supra* note 88 at 29.

<sup>98</sup> ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, award, Case No. ARB/03/16 (ICSID, 2006), ¶ 495 & 496.

**[B.2] THAT THE STATE OF MARSHSAL IS LIABLE TO PAY COMPENSATION.**

58. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.<sup>99</sup> The inhuman treatment to the POWs leads to moral damages which cannot be restored by restitution. **Art 91 of Additional Protocol I**<sup>100</sup> provides for compensation in case of breach of obligation imposed by the Protocol or Geneva Conventions. The non-material injuries are very real and the mere fact that the calculation is tough doesn't mean that that the injured person cannot be compensated.<sup>101</sup> Inhuman treatment is a clear breach of Art 13 of Third Geneva Convention and since both the States are parties to the Additional Protocol I, hence State of Marshal is liable to pay compensation for the moral damages to the POWs.

59. In the **Gabčíkovo-Nagymaros Project case**<sup>102</sup>, ICJ declared: *"It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it."*<sup>103</sup>

60. In **Ahmadou Sadio Diallo Case (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment**<sup>104</sup>, the Court allowing compensation for "moral" damage decided that *"the Democratic Republic of the Congo is under obligation to make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injurious consequences of the violations of International obligations"*<sup>105</sup>.

<sup>99</sup> ILC Articles, *supra* note 64, Art. 36.

<sup>100</sup> Additional Protocol I, *supra* note 31, Art 91.

<sup>101</sup> Opinion in Luitsania Cases, 7 R.I.A.A. 32 (1923).

<sup>102</sup> Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment 1997 I. C. J. Rep. 7.

<sup>103</sup> *id* at 81, ¶ 152.

<sup>104</sup> Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, 2010 ICJ Rep 639.

<sup>105</sup> *id* at 693.

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## FINAL SUBMISSION TO THE TRIBUNAL

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

- Declare that the application for jurisdiction of International Court of Justice is not maintainable.
- Declare that notwithstanding the previous argument, the acts of State of Marshal are in violation of International Humanitarian Law and it is bound to return the POWs.
- Declare that the State of Marshal is bound to provide consular access to Mr Alex.
- Declare that the State of Marshal is liable to pay damages to the State of Aryan.

*Any other order as it deems fit in the light of justice, equity and good conscience.*

*For this kindness the respondent shall be duty bound forever.*

**Respectfully submitted,  
Agent on behalf of the Respondent**