
XIV K.K. LUTHRA MEMORIAL MOOT COURT, 2018

Before
THE FEDERAL COURT OF HALLBACH

JUPITER HESTIA.....APPELLANT

v.

THE STATE OF HALLBACH.....RESPONDENT

&

MILITIA MEMBERS.....APPELLANT

v.

THE STATE OF HALLBACH.....RESPONDENT

&

THE STATE OF HALLBACH.....APPELLANT

v.

DR. ARES.....RESPONDENT

[MEMORIAL ON BEHALF OF THE RESPONDENT]

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STATEMENT OF FACTS

BACKGROUND

Hallbach is a Federal Republic sharing its western territorial border with Hoko. Both the countries have long standing dispute over two of the cities situated in Hallbach i.e. **X & Y**. During the ‘Weer War’, the Hoko King was killed, and his son Nicholas VI was crowned, on his anointment, he ‘gifted’ the famous emerald “Covfefe” to the Hallbach crown. However, Hoko has maintained a historical claim over the emerald.

Since 1975, Hoko had a succession of military dictators. In 1999, after constitutional changes and internationally overseen elections, the former dictator, General Rouge was democratically elected as the President of Hoko.

ROLE OF DR. ARES

Dr. Ares was the curator of the state museum at X was a decorated Hallbachian Special Forces officer and now a renowned scholar. He too believed that though Hallbach now legitimately held Covfefe, Hoko also had a legitimate historical claim.

ROLE OF JUPITER HESTIA

One, Jupiter Hestia, who had the following of almost 68% of the Hokian Population, on 15th March 2010, remarked on her podcast ‘*My people-pulse tells me that we need a distraction. Something, anything. Come on Hoko, lets do something else for a change. There are issues more important than bread*’ further changed her social handle to @getmecovfefe, and sent a tweet saying ‘Been there too long #getmecovfefe. The tweet went viral.

RESOLUTION FOR COVFEFE

On 25 March 2010, General Rogue wanted to send a personal message to his son, but accidentally sent it as a tweet instead; the message read ‘Son, still at the national sec. meeting, looks like #getmecovfefe’. The Senate Assembly (Legislature) of Hoko passed a binding resolution, authorizing its military to take all necessary steps to protect the Hoko people and its culture. The spokesperson of the Defence Minister, while decrying the leaking of government documents, denied the official order and also famously remarked, ‘Controlling the imagination of the media is an impossible mission!’.

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CLASHES IN X AND Y

A high intensity campaign began at the border, both countries broke ceasefire accords Hoko claimed that X and Y were under the control of a local militia that had been raised by Hallbachian government to suppress local dissent in X and Y. Further, Hoko promised to cooperate with Hallbach and reduce border tensions. A ceasefire agreement was entered into between the two countries on 05 May 2010, which was honoured by both countries.

POST THE CLASHES

The Hallbachian forces had arrested a number of militia members, The Hoko government disavowed these individuals. On 29 May 2010, Jupiter Hestia was reported missing in London; It was suspected that persons of Hallbachian origin, with possible links to the Hallbachian Army, had abducted her. Hoko had lodged official protests with both the United Kingdom and Hallbach. On 04 June 2010, the Hallbachian Central Police announced that a mysterious donor had given them someone who appeared to be one Jupiter Hestia. The authorities were verifying her credentials and if found to be in order, would ensure that she reaches her rightful historical home. On 01 August 2010, the Hallbach Federal Court passed an order in ‘Re: X and Y,’ directing that a Special Court be set up for the trial of all matters pertaining to the events in X and Y.

FINDINGS OF THE COURT

On 01 August 2010, the Hallbach Federal Court passed an order in ‘Re: X and Y,’ directing that a Special Court be set up for the trial of all matters pertaining to the events in X and Y. The investigation and trial before the Special Court was concluded within 23 months, the special court convicted Seventeen militia members, for murder, waging war against Halbach, Theft, Violation of the Foreigners Act and miscellaneous offences to property. Jupiter Hestia was convicted of incitement and conspiracy to commit murder, Waging War against Hallbach; Dr. Ares was acquitted for theft. The Hallbachian Government and the convicted militia both preferred appeals before the Federal Court of Hallbach. Jupiter Hestia filed a separate appeal challenging her conviction which was clubbed with these appeals.

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ISSUE RAISED

I.

WHETHER THE FEDERAL COURT IS PERMITTED TO EXERCISE JURISDICTION OVER THE LOCAL MILITIA FOR THE OFFENCES COMMITTED IN THE CITIES OF X AND Y

II.

WHETHER THE INVESTIGATION AND TRIAL PURSUANT TO ORDERS PASSED BY THE HALLBACH FEDERAL COURT WAS CONTRARY TO LAW AND THE CONVICTIONS MUST BE SET ASIDE.

III.

WHETHER THE ARREST AND SUBSEQUENT PROSECUTION OF JUPITER HESTIA WAS CONTRARY TO THE PROCESS OF LAW

IV.

WHETHER THE ACQUITTAL OF DR. ARES AND JUPITER HESTIA FOR ALLEGATIONS OF THEFT WAS CONTRARY TO LAW AND FACT.

SUMMARY OF ARGUMENTS

[1]. THE FEDERAL COURT IS PERMITTED TO EXERCISE JURISDICTION OVER THE MATTER

The Hallbach Federal Court possesses jurisdiction to try the offences committed by the local militia in the cities of X and Y on the basis of the International principles of jurisdiction i.e. the Passive Personality Principle and the Protective Principle. Furthermore, common law treats international law as a part of municipal law as long as there is no inconsistency between them and there exists a void in the domestic law. Lastly, the Hallbach Federal Court is permitted to exercise jurisdiction by virtue of the rights and obligations arising out of Article 33 and Article 52 of the United Nations Charter, 1945, of which, both Hoko and Hallbach, are signatories.

[2]. THE INVESTIGATION AND TRIAL PURSUANT TO ORDERS OF FEDERAL COURT WAS NOT CONTRARY TO LAW

The investigation and trial pursuant to orders passed by the Hallbach Federal Court in *Re X and Y* was not contrary to law and thus, the convictions must be set aside. A Special Court may be set up to try a certain case or a certain class of cases based on the '*Test of Reasonable Classification*' and this does not infringe on the right to equality of the accused. Furthermore,

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the Federal Court may direct the setting up of a Special Court in certain circumstances by virtue of the implied power under Section 156 of the Code of Criminal Procedure. Additionally, by virtue of the right to speedy and expeditious trial envisaged under the umbrella of the right to a fair trial, the Federal Court may direct the Special Court to pass a judgment within 24 months and this, is not contrary to law. Lastly, the Federal Court is permitted to appoint a Special Public Prosecutor in cases of exceptional nature and according to the '*Rule against bias*'.

[3]. THE EXERCISE OF JURISDICTION OVER JUPITER HESTIA WAS NOT CONTRARY TO LAW

It is submitted that the arrest and prosecution of Jupiter Hestia, leading to her conviction was not contrary to the due process of law, the Principle *Male Captus Bene Detentus* meaning wrongly capture, but properly detained as a practice has been upheld in Various Common Law Countries, moreover the when the accused commits extraordinary crimes such as crimes against humanity, improperly capturing the accused does not server as a bar to exercise jurisdiction by the courts. Moreover, the principle of Universal Jurisdiction guides the Special Court to exercise jurisdiction over the instant matter. Further in light of the offences that accused was suspected to have committed and the lack of attribution of the suspected individuals who kidnapped the accused to the respondent state, the Territorial Sovereignty of the offended state and Basic Human rights cannot be said to be violated.

[4]. WHETHER THE ACQUITTAL OF DR. ARES AND JUPITER HESTIA FOR ALLEGATIONS OF THEFT WAS CONTRARY TO LAW AND FACT.

It is submitted that the offence of theft is not made out against the accused Dr.Ares and Jupiter Hestia as the ingredients of the offence i.e. intention to dishonestly appropriate property belonging to another with the intention of permanently depriving the other of it is not fulfilled. Further there lacks requisite Mens Rea to cull out the offence, Furthermore, the threefold test to prove Jupiter Hestia dishonestly received stolen property does not stand, Moreover the chain of circumstantial evidence, against both Dr. Ares and Jupiter Hestia is not collusive in nature, the evidence in the instant matter cannot be considered as material circumstantial evidence.

WRITTEN PLEADINGS

ISSUE 1: WHETHER THE HALLBACH FEDERAL COURT IS PERMITTED TO EXERCISE JURISDICTION OVER THE OFFENCES COMMITTED BY THE LOCAL MILITIA IN THE CITIES OF X AND Y.

1. It is humbly contended that the principles of International Law guides Hallbach Federal Court to exercise jurisdiction over the offences committed by the local militia in the cities of X &Y and these local militia cannot be tried by Court Martial considering their nationality.

[1.1] THE HALLBACH COURT HAS JURISDICTION UNDER INTERNATIONAL LAW

2. The Hallbach Federal Court has jurisdiction to initiate investigation and trial proceedings against the local militia by virtue of the established Principle of Passive Personality and the Protective Principle under International law.Criminal jurisdiction under the passive personality principle is exercised by the State of the nationality of the victim where the offence took place outside its territory.¹ This principle has been upheld by the Court of Appeals in the case of *USA v. Yunis*². The only nexus between the offence of hijacking in the case and the United States of America was the presence of U.S. nationals on board the hijacked plane³. Furthermore, the International Court of Justice (ICJ) noted that there is no ‘*general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory*’⁴
3. The Protective Principle rests on the premise that a country may assert jurisdiction to prosecute aliens for acts committed outside its territory if the acts are directed against the security, or the political or territorial integrity of the nation even if no criminal effect actually occurs in the State.⁵

¹GR Watson, ‘*The Passive Personality Principle*’, 28 Texas ILJ (1993), I.

² *USA v. Yunis*, (1991) 88 ILR 176.

³ *USA v. Yunis*, 681 F. Supp. at 899, *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984), cert. denied, 471 U.S. 1137 (1985).

⁴ *S.S. Lotus (France. v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

⁵ *United States v. Pizzarusso*, 388 F.2d 8, 10-11 (2d Cir. 1968); *United States v. Rodriguez*, 182 F. Supp. 479; *Joyce v. Director of Public Prosecutions*, [1946] AC 347; *R v. Sansom*, (1991) 2 All ER 145.

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4. In the case of *AG of the Government of Israel v. Eichmann*⁶, the principle of protective jurisdiction was upheld by the Israeli Supreme Court⁷ and held that a country whose ‘vital interests’ and ultimately its existence are threatened, has a right to assume jurisdiction to try the offenders. Furthermore, the Court in the case of *United States v. Rodriguez*⁸ stated that the United States can widen the scope of its criminal jurisdiction by means of the principles of international jurisdiction, including *inter alia*, the Protective principle.
5. In the instant matter, the offences committed by the local militia, in the cities of X and Y, were against the citizens of the Hallbach.⁹ Furthermore, Hallbach was not in the control of the cities X and Y, at the time of the commission of the offences.¹⁰ The elements to exercise passive personality jurisdiction are satisfied. Further, with respect to the jurisdiction under Protective Principle, it may be expounded that the loss of control of Hallbachian cities, X and Y and, the loss of citizens and infrastructure are evidence to the fact that there existed an imminent threat to the security and integrity of Hallbach along with a threat to its vital interests. Thereby, enabling Hallbach Federal Court to exercise jurisdiction.

[1.1.A] COMMON LAW TREATS INTERNATIONAL LAW AS PART OF MUNICIPAL LAWS.

6. Hallbach being a common law nation, the international principles of jurisdiction are applicable as a part of its Municipal law. **Arguendo**, Hallbach belongs to the dualistic school of thought, it may be stated that the International principles of jurisdiction are applicable. Reliance has been placed on the case of *People’s Union for Civil Liberties v. Union of India*¹¹, where it has been held by the Supreme Court that it is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law.

[1.1.B] RIGHTS AND OBLIGATIONS BY VIRTUE OF THE UN CHARTER

⁶ *AG of the Government of Israel v. Eichmann*, (1961) 36 ILR 5.

⁷ *AG of the Govt. of Israel v. Eichmann*, (1962) 36 ILR 277.

⁸ *United States v. Rodriguez*, 182 F. Supp. 479, 489 (S.D. Cal. 1960); *Re Van den Plas*, 22 ILR 205.

⁹ ¶ 19, Page 5, STATEMENT OF FACTS, K.K. Luthra Memorial Moot Court, 2018.

¹⁰ ¶ 15, Page 4, STATEMENT OF FACTS, K.K. Luthra Memorial Moot Court, 2018.

¹¹ *People’s Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301; *Vellore Citizens Welfare Forum v. Union of India and Others*, [1996] 5 SCC 647; *Vishaka v. State of Rajasthan*, (1997) 3 LRC 361; *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438

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7. Hoko and Hallbach are signatories to the UN Charter and by virtue of which, are obligated to act in a manner which does not defeat the objective and purpose sought by the Charter.¹² Now, Article 33(1)¹³ and Article 52(1)¹⁴ of the UN Charter recognize and promote regional mechanisms to tackle international disputes by peaceful means. Thus, the Federal Court of Hallbach by exercising jurisdiction on the subject matter of the events in the cities of X and Y is simply discharging its obligation by preventing the threat to international peace and security by way of peaceful means. This is in consonance with the Purpose and Principles of the United Nations Charter and hence, must be permitted. The Hallbach Federal Court is thus permitted to assert jurisdiction to initiate investigation and trial proceedings against the local militia. This is not contrary to law and therefore, must be upheld.

[1.2] LOCAL MILITIA NOT TO BE TRIED BY THE COURT MARTIAL.

8. The question whether the Court Martial has the jurisdiction to try a person who commits an offence has to be adjudged from the provision of the armed forces itself and not with reference to the Criminal Procedure Code. It is contended that the local militants in the instant matter, are not subject to the provisos of The Act as the arrested militia members were found to be members of the Hoko Special Forces. Further, all the militia members were nationals of Hoko, thereby expressly invalidating the applicability of The Act, to the militia members. Sec 2 of the Act expressly within its ambit enables the person enrolled under this Act and to any such other person who may be attached to the Armed Forces. And even in case the military authority either decide not to try such a person by the court martial or fail to exercise their option when approached by the criminal courts, the accused may be tried by the ordinary criminal court.

¹²Article 18(a), Vienna Convention on The Law of Treaties, 1969: A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.

¹³ Article 33(1), UN Charter, 1945: The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

¹⁴Article 52(1), UN Charter, 1945: Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

**ISSUE 2: WHETHER THE INVESTIGATION AND TRIAL PURSUANT TO ORDERS
PASSED BY THE HALLBACH FEDERAL COURT IN RE X AND Y WAS CONTRARY TO
LAW**

9. It is humbly submitted that the entire investigation and trial pursuant to orders passed by the Hallbach Federal Court in *Re X and Y* was not contrary to the process of law and thus, the convictions must not be set aside. The counsel relies on the following sub-issues to prove this submission [2.1] The constitution of the Special Court is valid and the Special Court may ‘oversee’ investigation [2.2] The Federal Court is permitted to direct the Special Court to pass a final judgment within 24 months [2.3] The Federal Court may appoint a Special Public Prosecutor to direct investigations on the basis of the rule against bias.

***[2.1] THE CONSTITUTION OF THE SPECIAL COURT IS VALID AND IT CAN
OVERSEE INVESTIGATION.***

10. A Special Court may be set up upon a notification by the Senate¹⁵. However, this does not impose a restriction on the Federal Court to *direct* the constitution of such a Court. In the case of *Manohar Lal Sharma v. The Principal Secretary*,¹⁶ the Supreme Court of India ordered the setting up of a Special Court to try all matters pertaining to the infamous Coal Scam.
11. The constitution of a Special Court to try a certain case or certain class of cases, does not infringe upon the right to equality as envisaged under Article 7 of the Universal Declaration of Human Rights¹⁷ and provided for as a fundamental right to every person under the common law systems of various States.¹⁸ Same was affirmed in the case of *Re Special Courts Bill, 1978*¹⁹ which examined the validity of establishment of Special Courts in light of the fundamental rights (including Article 14) guaranteed

¹⁵ ¶ Section 10, Special Courts Act, 2010, Page 11, STATEMENT OF FACTS, K.K. Luthra Memorial Moot Court, 2018.

¹⁶ *Manohar Lal Sharma v. The Principal Secretary*, Order dated 18th July 2014, Writ petition (CrI) No 120/2012; *J. Sunanda Bhandare Foundation v. Union of India*, Order dated 25th April, 2017, Writ petition (Civil) No. 116/1998.

¹⁷ Article 7, UDHR: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

¹⁸ Article 14, CONSTITUTION OF INDIA, 1950; Section 1, Fourteenth Amendment, CONSTITUTION OF THE UNITED STATES OF AMERICA; Section 15, CANADIAN CHARTER OF RIGHTS AND FREEDOMS.

¹⁹ *Re Special Courts Bill, 1978*, (1979) 1 SCC 380.

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under the Indian Constitution. Further, strict separation of powers is a theoretical absurdity and practical impossibility.²⁰

12. Further, it is contended that on the basis of this doctrine, the Court cannot interfere in the investigation process. However, under Section 156 of the Code of Criminal Procedure the Magistrate possesses certain implied powers.²¹ In the case of *Lalita Kumari v. Govt. of Uttar Pradesh*²², the apex court held that it can be inferred that there is no express power to the magistrate regarding the monitoring of the investigation but under Section 156 of the Code that implied power is there and magistrate is having whole sole authority to monitor the investigation and in case the investigation is not going on in a fair and proper manner, in that case the magistrate is even having the authority to interfere in the investigation.²³
13. Furthermore, under the Special Courts Act, 1979 of India, by virtue of Section 9(1)²⁴ the procedure to try any case before a Special Court is analogous to the procedure prescribed under the Code for a warrant case triable by a Magistrate. Thus, the provisions of the Code and specifically of Section 156 of the Code are applicable to the case at hand. The Special Court is thus merely exercising oversight into the investigation conducted by the Special Investigation Team. Thus implying that the Special Court is simply ‘monitoring’ the investigation and not interfering with it and thus, by virtue of the doctrine of implied powers under Section 156 of the Code, the Special Court possesses the authority to do so.²⁵

[2.2] FEDERAL COURT CAN DIRECT TO PASS JUDGMENT WITHIN 24 MONTHS

14. The right to a fair trial enshrines within its ambit the significant principle of the right to an expeditious or speedy trial. This right is guaranteed under the 6th Amendment of the Constitution of the United States of America. The right to a speedy trial has also been incorporated under Article 21 of the Indian Constitution.²⁶ Furthermore, Section

²⁰ Kesavananda Bharti v. State of Kerala, 1973 4 SCC 225.; Friedmann, Law in a Changing Society (1996).

²¹ Lalita Kumari v. Govt. of U.P. (2014) 2 SCC 1.

²² *Ibid.*

²³ Sakiri Vasu v. State of U.P. (2008) 2 SCC 409.

²⁴ Section 9, Special Courts Act, 1979: A Special Court shall in the trial of such cases follow the procedure prescribed by the Code, for the trial of warrant cases before a magistrate.

²⁵ Test of Reasonable Classification under Article 14, CONSTITUTION OF INDIA, 1950.

²⁶ Hussainara Khatoon v. State, 1979 AIR 1369.

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309 of the Hallbach Code of Criminal procedure explicitly provides for the case to be heard on a day-to-day basis²⁷ thus, essentially ensuring the right to fair trial.²⁸

15. In *Strunk v. United States*²⁹, the Supreme Court ruled that if the reviewing court finds that a defendant's right to a speedy trial was violated, then the indictment must be dismissed and/or the conviction overturned. In a Canadian case of *R v. Jordon*³⁰, a new framework was proposed based on a ceiling limit beyond which delay is presumptively unreasonable. In the case of *Sheela Barse v. Union of India*³¹, the Division Bench directed a maximum permissible time limit for investigation and trial for a child, accused of an offence punishable with imprisonment for less than 7 years. It may also be pertinent to note that in the case of *State of Bihar v. RamdarasAhir*³² and *State v. Maksudan Singh*³³, it has been held that the right to fair trial embodies in its purview the stage of investigation and not merely, the trial stage.

16. Recently, in the cases of *Hussain and Anr. v. Union of India*³⁴ and *Aasuv. State of Rajasthan*³⁵, the Supreme Courtsuggested, that the magisterial trial must be concluded within six months and sessions trials must be concluded within two years. Thus, the directions of the Federal to pass a final order within a period of 24 months, in fact guarantees the right of the accused to a fair and speedy trial

[2.3] APPOINTMENT OF SPECIAL PUBLIC PROSECUTOR IS ON THE BASIS OF THE RULE AGAINST BIAS.

17. The 197th Law Commission Report on Appointment of Public Prosecutors states that the public prosecutors must act independently of the executive branch.³⁶ Lord Hewart's stated that "*justice should not only be done, but seen to be done.*"³⁷ This rule mainly provides for impartiality in the judicial system.³⁸ Some judges have suggested

²⁷ ¶ Section 309, Hallbach Criminal Procedure Code, Page 9, STATEMENT OF FACTS, K.K. Luthra Memorial Moot Court, 2018.

²⁸ Abdul Rehman Antulay v. R.S. Nayak, (1992) 1 SCC 225.

²⁹ Strunk v. United States, 412 U.S. 434 (1973).

³⁰ R v. Jordon, 1 S.C.R. 631 (SCC 2016).

³¹ Sheela Barse v. Union of India, [1986] 3SCR 562.

³² State of Bihar v. RamdarasAhir, 1985 Cri LJ 584.

³³ State v. Maksudan Singh, AIR 1986 Pat38.

³⁴ Hussain and Anr. v. Union of India, Criminal Appeal No.509/2017.

³⁵ Aasu v. State of Rajasthan, Criminal Appeal No.511/2017.

³⁶ ¶ Page 14, 197th Law Commission Report at <http://lawcommissionofindia.nic.in/reports/rep197.pdf>.

³⁷ R v Sussex, Justices Ex p McCarthy [1924] 1 KB 256.

³⁸ Gillies v Secretary of State for Work and Pensions, [2006] EWCA Civ 392.

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that judicial independence and impartiality are sufficiently interwoven that both should be regarded as constitutional requirements.³⁹

18. Although, section 24⁴⁰ of the Code of Criminal Procedure provides for the appointment of the Public Prosecutor and Special Public Prosecutor by the Central and State Governments, as the case may be, the Court may interfere in such appointment when there exists a genuine and reasonable apprehension with respect to the independence of the Prosecutor.⁴¹ Additionally, it has also been held that the rule against bias looks at the risk of bias rather than the bias in fact.⁴² Furthermore, the appointment of a Special Public Prosecutor by the Supreme Court has been permitted and upheld on the basis of impartiality and independence⁴³. In the instant matter, the Hallbach Government may possess a vested interest in the matter since the matter is pertaining to the offences committed in territories of the cities X and Y, of which Hallbach lost control and the theft of *Covfefe*, a symbol of Hallbach's pride.

**ISSUE 3: THE ARREST AND PROSECUTION OF THE JUPITER HESTIA IS NOT
CONTRARY TO THE PROCESS OF LAW**

19. It is humbly contended before this Hon'ble Federal Court that the conviction based on arrest and subsequent prosecution of the Hokian Officer Jupiter Hestia should be upheld as [3.1] the principle of *male captus bene detentus* is applicable and prevailing in various common law countries. [3.2] Further, the Appellant was charged for offence of waging war against the respondent state. [3.3] Special Court has lawful Jurisdiction in the instant matter. [3.4] **Arguendo**, Principles of International Law are not violated.

[3.1] MALE CAPTUS BENE DETENTUS IS APPLICABLE

³⁹ Ebner v Official Trustee, [2000] HCA 63.

⁴⁰Section 24(8) - The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

⁴¹*Supra* note 41.

⁴²Ratan Lal Sharma v. Managing Committee, Dr. Hariram (Co-education) Higher Secondary School, 1993 AIR 2155.

⁴³Manohar Lal Sharma v. The Principal Secretary and Ors, Writ petition (CrI.) No. 120/2012 order dated 25th July, 2014.; State of Karnataka v. Selvi J. Jayalalitha and Ors, Writ Petition (CrI) No. 154/2013

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20. It is contended that the principle of *male captus bene detentus* (improperly captured, properly detained) was first upheld in the case of *Ker v. Illinois*⁴⁴, where it was alleged that the court lacked jurisdiction on the grounds that the accused had been kidnapped and forcibly brought to the United States. The Supreme Court of the U.S while rejecting the appeal held that mere irregularities in the manner in which the accused was brought into the custody of law, did not entitle him to escape prosecution.⁴⁵ Further, the court stated that it is not divested of jurisdiction over the accused as the appropriate remedy lied at the diplomatic level, and that physical presence of the accused before the court sufficed in the initiation of proceedings, regardless of the manner in which the accused was brought before the court.⁴⁶
21. Again in *United States v. Alvarez Machain*⁴⁷, it was held that the abduction did not violate the extradition treaty and, further, that although the abduction may have been a violation of international law, however a US court could still exercise jurisdiction over the matter.⁴⁸ Furthermore, in the case of *Re Argoud*⁴⁹ it was held that, where jurisdiction was exercised over a defendant by the French courts as the accused was abducted by private individuals.⁵⁰ It was ruled by the court that illegality of abduction did not rob it off its jurisdiction.
22. In the instant matter, the persons who had abducted the Appellant were only suspected to be from Halbachain origin, with possible links with the Halbachain army,⁵¹ and that such persons cannot be assumed to be exercising police powers of functions of law enforcement agencies.⁵²

[3.2] ACCUSED IS CHARGED WITH WAGING WAR AGAINST HALLBACH

23. It is contended that in the case of *Eichman*, where Israel had exercised jurisdiction over against the Nazi war criminal Adolf Eichmann, it was held that the defendant cannot dispute the jurisdiction of a court, simply because of forcible abduction. That aforementioned case highlighted the extraordinary crimes of Adolf Eichmann, and

⁴⁴ *Ker v. Illinois* 119 US 436 (1886).

⁴⁵ 119 US 436 (1886) Pg 440.

⁴⁶ *Ibid.*

⁴⁷ *United States v. Alvarez Machain* 504 US 655 (1992).

⁴⁸ *Ibid.*

⁴⁹ *Re Argoud* (1965) 45 ILR 90 (French Court of Cassation).

⁵⁰ Wilske, Stephan and Schiller, Teresa "*Jurisdiction over Persons Abducted in Violation of International Law in the Aftermath of United States v. Alvarez-Machain*," *The University of Chicago Law School Roundtable*: Vol. 5: Iss. 1, Article 8. (1998)

⁵¹ ¶ 22, Page 5, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2018.

⁵² *Eichman Case* 36 ILR 18 (Dist Ct Jerusalem 1961); 36 ILR 277 (Sup Ct 1962).

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that such case has served as an exception for defendants who have been involved heinous crimes like those of Eichmann.⁵³

24. In the instant matter, the Appellant in the instant matter has been charged with offences relating to waging war against Halbach, and that for such offences, the manner in which a person is brought before the court should not be a bar in exercising jurisdiction by the courts. Further, even strong critics of jurisdiction over abducted persons have allowed for an exception in such cases.⁵⁴

[3.3] SPECIAL COURT HAS UNIVERSAL JURISDICTION TO TRY JUPITER

25. Art 7 of the Rome Statute⁵⁵ defines ‘crimes against humanity’ as any of the acts⁵⁶ when committed as a part of widespread or systematic attack directed against any civilian population, with knowledge of the attack. Further Attack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack⁵⁷. Furthermore, Article 7(2)(a) of the Rome Statute determines that crimes against humanity must be committed in furtherance of a State or organizational policy to commit an attack. The plan or policy does not need to be explicitly stipulated or formally adopted and can, therefore, be inferred from the totality of the circumstances.⁵⁸
26. By virtue, of the official order dated 26 March 2010, issued by the defence minister to the Hoko Army, were to reclaim the Historic lands and end the long suffering of the People of Hoko.⁵⁹ Further, however the existence of any such orders were denied, in light of the afore-mentioned contention, the plan or policy need not be explicitly stipulated or formally adopted, and that existence of such policy may be inferred from the totality of circumstances where subsequent attacks were meted out on the lands of X and Y over which both the countries.⁶⁰

⁵³ Andreas F. Lowenfeld, U.S. Law Enforcement Abroad: The Constitution and International Law, Continued, 84 Am J Intl L 444, 490 (1990)

⁵⁴ *Ibid*

⁵⁵ Art 7, Rome Statute of the International Criminal Court, (Adopted on July 17, 1988)

⁵⁶ Art 7, ¶ 1 Rome Statute of the International Criminal Court. (Adopted on July 17, 1988)

⁵⁷ Art 7, ¶ 2 Rome Statute of the International Criminal Court. (Adopted on July 17, 1988)

⁵⁸ United Nations office on Genocide Prevention and the responsibility to protect available at <http://www.un.org/en/genocideprevention/crimes-against-humanity.html>

⁵⁹ ¶ 14, Page 4, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2018.

⁶⁰ ¶ 2, Page 1, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2018.

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27. It is further contended that war crimes and crimes against humanity are subject to Universal Jurisdiction, i.e. although the crimes weren't committed within the territory of the forum state, the principle of Universal Jurisdiction can be invoked by the courts as the controlling test of subject matter jurisdiction.⁶¹ Thus the federal court in the instant matter has jurisdiction over the instant matter, and that the conviction is not liable to be vitiated.

[3.3.A] SEC 5 HPC GRANTS JURISDICTION TO SPECIAL COURT

28. Sec 5 of the Halbach Penal Code⁶² guides that Any person liable, by any Halbach Law to be tried for an offence committed beyond Halbach shall be dealt with according to the provisions of this Act for any offence committed beyond Halbach in the same manner as if such act had been committed within Halbach. By virtue of the aforesaid provision, the federal court of Halbach confers upon itself the power to exercise jurisdiction in the instant matter, that the offences committed by the appellant were committed when, the appellant was in the territory of Hoko, that by virtue of the aforesaid provision, the appellant is liable to be tried for the offences charged as if such offences were committed within the territory of the Respondent State.

[3.4] PRINCIPLES OF INTERNATIONAL LAW ARE NOT VIOLATED

[3.4.A] PRINCIPLES OF TERRITORIAL SOVEREIGNTY IS NOT VIOLATED

29. It is contended that any exercise of law enforcement or police power, by one state, without the permission on the territory of another is a violation of latter's sovereignty.⁶³ The concept of "territorial sovereignty of states" is a long standing and well established rule as has been affirmed in Art 2(4) of the Charter of the United Nations⁶⁴ Furthermore, when a British minesweeping operation was done in the Albanian Territory, without their permission, the International Court of Justice held that such operation was in violation with the Albanian Sovereignty.⁶⁵

⁶¹ Filartiga v. Pena-Irala. 630 F.2d 876 (2d Cir. 1980)

⁶² Sec 5, Halbach Penal Code

⁶³ Mann, FA, *Future Studies in International Law*, 1990 at p 339.

⁶⁴ Art.2(4) United Nations Charter; *A state may not in any form exercise its powers in the territory of another state* Lotus Case, (1927) PCIL Series A, No 10.

⁶⁵ The Corfu Channel case (1949) ICJ Rep 4.

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30. In *S.S. Lotus Case*⁶⁶, where the world court declared that the first and foremost restriction imposed by International law upon a State is that it may not exercise its power in any form in the territory of another State. In the instant matter, the persons who abducted the appellant, were only suspected to have Halbachain Origin, having possible links with the army,⁶⁷ and such persons cannot be said to be exercising law enforcement or police powers. In *Re Argoud*⁶⁸ it was held that, where jurisdiction was exercised over a defendant by the French courts as the accused was abducted by private individuals⁶⁹, the illegality of abduction did not rob it off its jurisdiction.⁷⁰ Furthermore, in the case at hand the persons who abducted the appellant cannot be said to be exercising police powers, or law enforcement powers, which is a necessary requisite in the commission of the offence of violating the Territorial sovereignty, and thereby not resulting in the commission of the said offence.

[3.4.B] HUMANS RIGHTS OF APPELLANT ARE NOT VIOLATED

31. As has already been established above the Appellant was charged for commission of exceptional offence, as already mentioned above the commission of such offences serve as an exception to the class of cases where jurisdiction has been opposed on the grounds of abduction.⁷¹ Thus cannot be said to violate Human Rights of the Appellant Thereby validating the previous conviction of the Appellant by the Special Court.⁷²

ISSUE IV. WHETHER THE ACQUITTAL OF DR ARES AND JUPITER HESTIA FOR ALLEGATIONS OF THEFT WAS CONTRARY TO LAW AND FACT.

32. It is submitted that, from the argument advanced in support of the charges in the instant case, the offence of theft is not proved because, [4.1] firstly, the ingredients of theft are not fulfilled, [4.2] secondly it lacks the requisite Mens Rea. [4.3] *lastly*, there is

⁶⁶ The Lotus Case (1927)PCIJ Series A, No 10.

⁶⁷ ¶ 22, Page 5, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2018.

⁶⁸ *Re Argoud* (1965) 45 ILR 90 (French Court of Cassation).

⁶⁹ Wilske, Stephan and Schiller, Teresa "*Jurisdiction over Persons Abducted in Violation of International Law in the Aftermath of United States v. Alvarez-Machain*," The University of Chicago Law School Roundtable: Vol. 5: Iss. 1, Article 8 (1998). Available at: <http://chicagounbound.uchicago.edu/roundtable/vol5/iss1/8>

⁷⁰ In case of Adolf Eichmann 36 ILR 18 (Dist Ct Jerusalem 1961); 36 ILR 277 (Sup Ct 1962).

⁷¹ *Supra* Note 87

⁷² ¶ 25, Page 6, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2018.

a missing link in the chain of circumstantial evidence. Hence, the order of federal court should not be reversed.

[4.1.] INGREDIENTS OF THEFT ARE NOT FULFILLED.

33. The basic definition of “theft” in the Hallbach Penal Code, however, is *parimateriawith* the definition given in Theft Act, 1968 of UK⁷³. A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it'. Unlike India, theft in England consists of four ingredients, viz., dishonestly; appropriation; of property which is capable of being stolen, belonging to another; with intention to deprive permanently⁷⁴,
34. Additionally, the Indian Penal Code defines dishonestly as something done with the intention of causing “...*wrongful gain...or wrongful loss...*”⁷⁵ In the instant case, the petitioners had no dishonest intention. Intention is the gist of the offence. The taking will not amount to theft unless the intention with which it is taken is dishonest. The question of whether the accused had a dishonest intention is one of fact⁷⁶ and the same is not proved in the instant matter.

[4.2.] ABSENCE OF REQUISITE OF MENS REA

35. Evidence must be tested for its inherent consistency and inherent probability of the story⁷⁷. In the instant case, the entire prosecution story is unreliable. It is a well settled principle in common law that an offence is constituted by the presence of the *actus reus* as well as *mens rea*⁷⁸. The requirement of *mens rea* can be dispensed with only if the statute excludes *mens rea* explicitly or by necessary implication⁷⁹. It imposes a burden on the State to prove that the defendant “*performed the relevant actus reus with the requisite mens rea in the crime charged*”⁸⁰. The offences of theft which the petitioners have been charged with, is explicit in its requirement for *mens*

⁷³ Section 1, Theft Act, 1968.

⁷⁴ Harris's Criminal 22nd Edn., reprint 2000, pp. 489450

⁷⁵ Section 24, The Indian Penal Code, 1860.

⁷⁶ K.N. Mehra v. state of Rajasthan, AIR 1957 SC 369; A.N. Parhi Emperor, AIR 1920 Pat 582. In England Theft Act, 1968 punishes theft, robbery and burglary,

⁷⁷ C. Magesh v. State of Karnataka, AIR 2010 SC 2768, ¶ 49; Suraj Singh v. State of Uttar Pradesh, 2008 (11) SCR 286.

⁷⁸ R v. Tolson, (1889) 23 QBD 168

⁷⁹ Brend v. Wood, (1946) 62 TLR 462; Nathulal v. State of Madhya Pradesh, AIR 1966 SC 43.

⁸⁰ Woolmington v. D.P.P., 1935 AC 462; *Smith and Hogan's Criminal Law* 29 (David Ormerod ed., 13th edn., 2011).

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*rea*⁸¹. Hence, the prosecution needs to prove that a *prima facie* case exists with regard to the *mens rea* as well. There is nothing in the facts to give a slight hint that Dr. Ares had any intention to steal the emerald and that Jupiter Hestia received it dishonestly.

[4.3.] JUPITER HESTIA RECEIVED COVFEFE IS BONA FIDE

36. A threefold test needs to be satisfied to prove that the offence of dishonestly receiving stolen property was committed⁸². *First*, that the stolen property was in the possession of the accused. *Secondly*, that some person other than the accused had possession of the property before the accused got possession of it. And *thirdly*, that the accused had knowledge that the property was stolen property. It is contended that since there was no dishonest intention, the test is not met.
37. It has already been submitted that the use of the term “dishonestly” has two implications for criminal offences. *First*, it is a clear expression of the requirement of *mens rea*. *Secondly*, the IPC specifically defines “dishonestly” as pertaining to an act done with the intention of causing “...*wrongful gain...or wrongful loss...*”⁸³. It is submitted that *mens rea*, and by extension dishonest intention, are not present in the instant case. The petitioners genuinely received the emerald from a *bona fide* mysterious person. Hence, no case is made out as to dishonestly receiving stolen property.

[4.4] THE CHAIN OF CIRCUMSTANTIAL EVIDENCES IS INCONCLUSIVE

38. The Circumstantial evidences available against Dr Ares and Jupiter Hestia do not make a case where they can be impleaded as an accused. There is any missing link in the chain of events to prove the circumstances relating to the commission of an offence, then such evidences cannot be considered as material circumstantial evidence⁸⁴. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability that such person was involved in the commission of offence⁸⁵⁸⁶.

⁸¹ R v. Prince, L.R. 2 C.C.R. 154 (1875); *Smith and Hogan's Criminal Law* 167 (David Ormerod ed., 13th edn., 2011).

⁸² *Trimbak v. State of Madhya Pradesh*, AIR 1954 SC 39.

⁸³ Section 24, The Indian Penal Code, 1860.

⁸⁴ *State of Manipur v. Okram Jitan Singh*, 2005 CrLJ 1646.

⁸⁵ *Padala Veera reddy v. State of A.P.*, AIR 1990 SC 79.

⁸⁶ JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW*, 400-01 (3d ed. 1940); See also *Padala Veera reddy v. State of A.P.*, AIR 1990 SC 79.

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39. In the instant case, the available evidences are independent and not complete. In the present case it is clearly mention that when Dr. Ares escaped the museum with truck load of artefact, emerald was not there⁸⁷. Given the turmoil prevalent in X and Y it could have been anyone who stole the emerald. The very link breaks when it is not clear who exactly stole it. Hence all these situations do no connect or form a chain which can make a *prima facie* case against Dr. Ares and Jupiter Hestia.
40. As Jaffee says “*Propositions are true or false; they are not "probable"*”⁸⁸. In court as elsewhere, the data cannot 'speak for itself'. In the present case, the plausibility of the hypothesis put forward by the Prosecution is inconclusive in nature. The circumstances encompassing situation at hand fail to prove the *factum probandum*⁸⁹. The rules as laid down by Wills on Circumstantial Evidence, is firstly that The circumstances alleged as the basis of any legal inference must be strictly and indubitably connected with the *factum probandum*. Secondly, the *onus probandi* is on the party who asserts the existence of any fact which infers legal accountability⁹⁰.
41. When dealing with the serious question of the guilt or innocence of persons charged with crime, the following general rule⁹¹ is in matters of doubt it is safer to acquit than to condemn; for it is better that several guilty persons should escape than that one innocent person suffer⁹². In a criminal case, if there can be two possible views on the evidence adduced by the prosecution, the accused is entitled to acquittal on the benefit of doubt⁹³.
42. In the instant matter, the Special Court acquitted Dr. Ares and Jupiter Hestia of the offences of Theft and Conspiracy to commit theft⁹⁴. The offences, if committed at all, have been committed by anyone else. It is submitted that none of the existing circumstances are concrete enough to prove the *factum probandum*. Where the case of circumstantial evidence is primarily dependent upon the prosecution story each circumstance must be proved like any other fact which will, upon their composite

⁸⁷ 17, Page 5, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2018

⁸⁸ Leonard Jaffee 'Of Probativity and Probability' (1985) 46 University of Pittsburgh Law Review 924, 934.

⁸⁹ The fact in issue

⁹⁰ J. F. B., *The American Law Register (1852-1891)*, Vol. 16, No. 12, New Series Volume 7 (Oct. - Nov., 1868), pp. 705-713

⁹¹ ss. 101-104 “Criminal cases”];

⁹² Nema v. S, A 1965 C 89

⁹³ Abdul Sufan v. State of Tripura, 2010 CrLJ 805 (813) (Gauh-DB); Harendra Narain Singh v. state of Bihar, A 1991 SC 1842; Abdul Sayeed vs. State of A. P., CrLJ 1890 (1893) (AP-DB).

⁹⁴ Brajendra Singh v. State of Madhya Pradesh, AIR 2012 SC 1552 (1557); Jagroop Singh v. State of Punjab, AIR 2012 SC 2600.

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reading, completely demonstrate how and by whom the offence had been committed.⁹⁵ The fact that the accused was going in the direction of the sugarcane field from where the bodies were recovered is hardly a circumstance which would ever establish the crime attributed to the accused⁹⁶.

43. It is well settled that when a case rests on circumstantial evidence, such evidence must satisfy three tests⁹⁷: firstly the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established⁹⁸; secondly, those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused⁹⁹; thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else¹⁰⁰. Suspicion, however strong, cannot be allowed to take place of proof and therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof.¹⁰¹ While appreciating the evidence in appeal against acquittal the Court shall bear in mind that presumption of innocence is further reinforced by acquittal of the accused by the trial court¹⁰². If two views are possible, it is trite, the appellate Court shall not interfere¹⁰³.

⁹⁵ Munna Kumar Upadhyaya v. state of Andhra Pradesh, AIR 2012 SC 2470 (2476).

⁹⁶ State of Harayana v. Ved Prakash, (2008) 13 SCC 268 (270)

⁹⁷ Prakash v. State of Rajasthan. AIR 2013 SC 1474.

⁹⁸ Rivera v. United States, 57 F.2d 816 (1st Cir. 1932); Commonwealth v. Shea, 324 Mass. 710, 88 N.E.2d 645 (1949); Baines v. State, 218 Miss. 240, 67 So.2d 300 (1953)

⁹⁹ Christen v. State, 228 Ind. 30, 89 N.E.2d 445 (1950); Commonwealth v. Shea, 324 Mass. 710, 88 N.E.2d 645 (1949); People v. Asta, 337 Mich. 590, 60 N.W.2d 472 (1953); Thomas v. State, 148 Tex. Crim. 526, 189 S.W.2d 621 (1945); State v. Bradley, 267 Wis. 871 64 N.W.2d 187 (1954). People v. Foley, 307 N.Y. 490, 121 N.E.2d 516 (1954);

¹⁰⁰ S D Soni v. State of Gujarat, A 1991 SC 917; Padala Veera Reddy v. state of A P, A 1990 SC 79; Chandmal v. S, A 1976 SC 917; Charan Singh v, S, A 1967 SC 520; Hanumant v. S, 1952 SCR 1091 A 1952 SC 343; Govinda Reddy v. S, A 1960 SC 29

¹⁰¹ Vijay Kumar Arora v. State (NCT of Delhi), (2010) 2 SCC 353 (357); Dilip v. State of M.P (2007) I SCC 4

¹⁰² Rukia Begum v. State Karnataka, AIR 2011 SC 1585.

¹⁰³ Union of India v. Bal Mukund, .12 SCC 161 (175); Mahendra Pratap Singh v. state of UP, (2009) 11 SCC 334

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PRAYER

WHEREFORE IN THE LIGHT OF THE ISSUES RAISED, ARGUMENTS ADVANCED AND AUTHORITIES CITED, IT IS HUMBLY PRAYED THAT THIS HON'BLE COURT

1. **To Declare**, the orders passed by the Federal Court not contrary to the process of law, and must not be struck down.
2. **To Declare**, conviction of Jupiter Hestia not contrary to the process of law and must not be set aside.
3. **To hold**, acquittal of Dr Ares and Jupiter Hestia not contrary to law.
4. **To Declare**, that the Members of the Local Militia are subjected to the Jurisdiction of the Special Court.

AND PASS ANY OTHER ORDER, DIRECTION, OR RELIEF THAT THIS HON'BLE COURT MAY DEEM FIT IN THE INTERESTS OF JUSTICE, EQUITY AND GOOD CONSCIENCE.

All of which is humbly prayed,

URN-1461

Counsels for the Respondents