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PART I—FACTS

1. The applicants apply to this honourable Court of Shakespeare to grant a writ of *mandamus* that would require the Attorney General of Canada to bring proceedings against Karl Heinrich, the respondent.
2. Karl Heinrich was born in Germany in 1920. During the Second World War, Heinrich became an Oberleutnant and, after occupying various positions, acted as a senior guard both the Sobibor and Chelmno camps. At Sobibor and Chelmno, Heinrich supervised the extermination of Jewish people, though he never actively caused any deaths.
3. Heinrich moved to Canada, and in 1951 he became a Canadian citizen. In Canada, Heinrich has been a model citizen who has raised his family and participated in the local community.
4. In 1990, however, Heinrich's quiet Canadian life has been disturbed by accusations regarding his conduct that occurred over forty years ago during WWII.
5. Heinrich was extradited to Israel, where he was acquitted due to inconclusive evidence regarding his identity as "Ivan the Terrible." The Israel Supreme Court declined to pursue further charges against Heinrich, and he was thus returned to Canada in 2000.
6. Heinrich, in a letter for the Attorney General of Canada, admitted that he worked at Sobibor and Chelmno during the last two years of the war. In his defense, Heinrich quoted Adolf Eichmann who said that he had obeyed orders, and had not persecuted "Jews with avidity and passion."

7. The Attorney General reviewed Heinrich's medical report, which highlighted that Heinrich, who is presently 82 years old, has recently suffered from two strokes and brain damage. He experiences periodic symptoms of Parkinson's disease and loss of memory, which results in a difficulty with comprehension.
8. The Attorney General has declined to press further charges, stating that a trial would not be in the interest of justice.

PART II—ISSUES

9. Should this Honourable Court of Shakespeare decline jurisdiction to grant the *mandamus* that would force the prosecution of Karl Heinrich's offense?
10. Did Karl Heinrich, by supervising the activities at the Sobibor and Chelmno camps, violate Shakespearian laws?
11. Should morality be infused into laws that contain no explicit morality?
12. Was Karl Heinrich, given the circumstances in which he worked, under a legal obligation to disobey governmental authority?
13. Should this Honourable Court of Shakespeare show mercy to the ill and aged Karl Heinrich?

PART III—ARGUMENTS

A. THIS COURT SHOULD DECLINE JURISDICTION OVER KARL HEINRICH BECAUSE IN SHAKESPEAREAN LAW, IT IS DIVINE WILL, AND NOT TRIALS, THAT DISTRIBUTE JUSTICE

14. In *Richard III*, Clarence's murderers are not guilty in the eyes of the law because they have a warrant from the head of state. They must perform their duty to the head, despite pangs of moral consciousness. The guilt they bear in their heart and divine judgment is their punishment, but these two murderers are never brought to trial or punished by the law.

1.4.104-184

15. In *A Winter's Tale*, Leontes ignores the oracle of Apollo's decree that Herminone is innocent, and proceeds with a trial against her. Immediately thereafter, Leontes' son dies and Leontes realizes that he should not have imposed his human will in a matter where Divine Will ruled: "Apollo's angry, and the Heavens themselves/ Do strike at my injustice."

3. 2. 147-8.

16. Similarly, when Antigonus follows Leontes' order to abandon his baby in the wilderness, Divine Will intervenes by causing Antigonus to be eaten by a bear; he is not punished by man or through a trial.

3. 3.

17. Furthermore, in the tragedies a trial is never the final arbiter of justice. Instead, there is a sense that divine justice ensures that the wrong-doer, such as Macbeth, Claudius in *Hamlet*, King Richard III, and Brutus in *Julius Caesar*, is punished

18. Regardless of Heinrich's legal guilt in this matter, Divine Will has already punished Heinrich for his moral culpability since he has been accursed with a terrible illness in his brain that permeates throughout his body.

19. This Honourable Court need not exercise jurisdiction in a matter where its connection is tenuous, and where another judiciary—Divine Will—is already acting.

B. KARL HEINRICH DID NOT VIOLATE ANY LAW OF SHAKESPEARE

1. THE LAW OF SHAKESPEARE DOES NOT AFFORD PROTECTION TO CIVILIANS DURING TIMES OF WAR

20. This Court is not free to apply conceptions of International Humanitarian Law to Heinrich's case, but instead must apply only the laws of Shakespeare. Thus, the Geneva Convention that protects civilians in war situations is irrelevant; this Court must look only to Shakespeare's war plays in order to determine whether Heinrich's military service violated the law.

i. According to the law of Shakespeare, actions during war are treated differently than actions during times of peace

a. *In Henry V, acts of war are not considered crimes*

21. According to *Henry V*, acts of war are necessarily to the survival and advancement of the nation, and are regarded as heroic.

22. In the context of war, because he defines himself as a soldier, Henry promises no mercy to the ordinary citizens of Harfleur when he threatens to kill all the town's virgins and infants. As an acceptable tactic of war, he vows to order his soldiers to rape all their maidens, to dash the heads of the old men against the wall, and to run through infants on pikes. The French take this threat seriously and surrender, which illustrates that Henry did indeed have the power and the right to carry out these actions.

3.3.1-43.

23. Both the French and the English commit violent acts of war that are legally legitimate tactics of war. The French kill the boys and the luggage carriers, ordinary citizens who are not soldiers in the English army, and the English retaliate by brutally slitting the

throats of all their prisoners of war. For giving this order, Henry is praised by his soldiers as a great leader.

Theodor Meron, "Crimes and Accountability in Shakespeare" (1998) 92 *A.J.I.L.* 1 at 24.
4.7.1-11

24. Heinrich, therefore, could not have committed a crime during his supervision of the camps since he was carrying out military orders that were considered essential to the war effort.

b. *All persons deemed a threat to the well-being or the advancement of the state are considered by the state to be guilty of treason and therefore must be eliminated by the state*

25. Under Shakespearean law, all persons deemed by the head of state to be a threat to the nation are automatically considered to be traitors, and traitors must be eliminated both in time of war and in time of peace because of the potential threat of rebellion they pose.

26. In WWII, all persons deemed by Hitler to be subversive or contrary to the state's agenda were eliminated based on the same principle. These persons, not only Jews but also homosexuals, gypsies, the mentally handicapped, and Catholics, would have been deemed traitorous threats to the state under Shakespearean law, just as in Renaissance England Catholics or Protestants were variously deemed as such depending on which ruler was in power.

27. Since Hitler had deemed those peoples at Sobibor and Chelmno a threat to the state, Heinrich did not violate Shakespearean law by supervising their deaths.

Steinhardt Botwinick, Rita, *A History of the Holocaust: From Ideology to Annihilation*, 2nd ed. (Upper Saddle River: Prentice Hall, 2001) at 25, 65.

ii. Germany was involved in World War II during Heinrich's service

28. In *Mein Kampf*, Hitler outlined the principles of the Nazi platform, which were "land, race, blood, anti-semitism, anti-Bolshevism and the expansion of the German territory to

the east.” The death camps, therefore, were a part of Hitler’s overall strategy of Aryan supremacy and border expansion.

Mathew Lippman, “The White Rose: Judges and Justice in the Third Reich” 15 Conn. J. Int’l L. 95 at 102 [“Lippman”].

29. Heinrich did not join the SS until WWII, at which point he attained the rank of Oberlieutenant. He supervised the Sobibor and Chelmno camps during WWII, and therefore his actions occurred during war-time.

30. Heinrich did not violate any Shakespearian laws since it has been established that the killing of civilians was an acceptable practice during a period of war. The laws of Shakespeare are compatible with Thomas Hobbes’ statement that “[t]o this warre of everyman against every man, this is also consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place.”

Thomas Hobbes, *Leviathon* in David Dyzenhaus & Arthur Ripstein, eds., *Law and Morality: Readings in Legal Philosophy* (Toronto: University of Toronto Press, 1996) 6 at 11.

2. CURRENT CONCEPTIONS OF MORALITY SHOULD NOT BE INFUSED INTO THE LAW

31. Since Shakespeare’s plays did not preserve civilian lives during times of war, this Court cannot infuse a modern conception of the worth of civilians into the laws of Shakespeare. The law should not be imbued with morality unless it is done so explicitly.

32. Though this Court is bound only by the laws of Shakespeare, legal theory may influence this Court’s interpretation of Shakespearian law.

33. Legal theorists such as H.L.A. Hart and Hans Kelsen agree that law is not necessarily moral. Kelsen stated that legal norms “are not valid by virtue of their content. Any content whatsoever can be legal.” This Court should look only at what the law was at the time, regardless of whether it agrees or disagrees with the law’s content.

Hans Kelsen, “The Pure Theory of Law” (1934-5) 50 & 51 Law Quarterly Review 291 at 295.

34. Hart, too, emphasized that law is not what ought to be, but rather what is. Thus, law is not concerned with the moral 'ought,' but with the ought that predicts how a person will act given the state of the law.

H.L.A. Hart, "Separation of Law and Morals" (1958) 71 Harvard Law Review 593 at 612-3.

35. This Court, therefore, should be concerned with how Heinrich 'ought' to have acted in order to comply with the law, not with how Heinrich 'ought' to have acted given a conception of a higher, moral or natural law.

3. KARL HEINRICH WAS UNDER NO OBLIGATION TO DISOBEY GOVERNMENTAL AUTHORITY

i. In war-time, the law of Shakespeare punishes disobedience with death

a. *Under Shakespearean law, any disobedience of the orders of the head of state during war, or under the rule of a tyrant, is punishable by violent death*

36. The obedience of subordinates is enforced through coercion that circumscribes their free will. If the subject is not with the ruler, then he is against him and is punished as an enemy of the state.

37. Shakespearean law establishes a hierarchy of offenses, the most heinous being high treason, that is rebellion against the head of state, followed by treason and then petty treason. Killing civilians is a much lesser sin than disobedience because rebellious high treason directly challenges the divine right of kings, that is, the social structure and hierarchy that forbids challenging rulers of nations.

38. It would have been a graver offense for Heinrich to disobey Hitler, which would constitute high treason, than for Heinrich to supervise the activities at Sobibor and Chelmno.

b. *In Coriolanus, to rebel against the head of state or the leader of the army results in death*

39. Mennenius Agrippa explains through parable the Renaissance paradigm of the body politic that renders disobedience against the head of state impossible. The state is a like a human body. In Renaissance terms, the ruler is the head; in Mennenius's example the ruler is the belly. In either case, the subjects are the body's members, and they cannot rebel against the core of their own body.

1.1.96ff.

40. As he is leading his soldiers into war, Caius Marcius warns, "Come on, my fellows: / He that retires, I'll take him for a Volsce, / And he shall feel mine edge"

1.4.27-29.

41. Heinrich could not rebel against Hitler without rebelling against himself. This point is substantiated by the manner by which Hitler punctiliously demanded obedience. Hitler allowed neither words nor actions against the state.

Lippman, *Supra*, page 7 at 6.

c. *In Richard III, failure to obey a tyrant is punishable by death and rebellion is utterly ineffective.*

42. Brackenbury is constrained to give the keys to Clarence's chamber to the murderers because he has no right to question the validity or the purpose of their commission. Had Brackenbury refused to turn over the key, he would have been killed as well; any act of rebellion on his part would not have prevented Clarence's murder since it had been ordered by Richard, who is the head of state due to his title as Lord Protector.

1.4.89-98.

43. Tyrrel, under the orders of the head of state, oversees the murder of the two young princes with the help of Dighton and Forrest. Despite the horror of this "most arch deed of piteous massacre / That ever yet this land was guilty of", none of these three murderers

are held accountable for their actions or punished for following the orders of the head of state. The only person legally accountable for this act is the head of state who gives a token that sanctions the deed and absolves the killers of responsibility.

4.3.1-35.
4.2.78.

44. Just as the first murderer says, “My voice is now the King’s, my looks mine own”, so too Hitler’s subordinates are “acting in the will of the Fuhrer.”

1.4.159.
History Rooms, “Hitler’s Aims” (10 February 2003), online:
<http://www.kdhs.org.uk/history/as/as_unit3/hilters_aims.htm> [“Hitler’s Aims”].

45. In Shakespeare, those persons employed in the service of the head of state are themselves executed as soon as the head of state deems them a threat to his own position or as soon as he suspects disloyalty from them. Hastings is killed because Richard deems him untrustworthy to his regime. Even Brackenbury, Richard's most loyal supporter in the beginning of the play, is immediately executed as soon as Richard begins to believe he can no longer trust him to follow his orders. When a tyrant is the head of state, all rebellion or failure to obey orders immediately leads to execution, which becomes a form of coercion that severely limits the free will of individuals.

3.4.
5.1.

d. *Disobedience may lead to death or torture*

46. In *The Tempest*, under the rule of all-powerful tyrant, disobedience results in lengthy torture worse than death. Under the all-powerful rule of Sycorax, Ariel is tortured with confinement for 12 years in a pine tree.

1.2.270-281.

47. Under the all-powerful rule of Prospero, Ariel is threatened with being returned to the pine tree, and Caliban is tortured with cramps, stitches, urchins, and pinches like bee-stings.

1.2.325-330.

48. In *Henry VI, Part II*, rebellion results in death and public disgrace. Jack Cade leads a rebellion against King Henry IV. When captured and killed, his body is dragged to a dunghill where he is decapitated, and his body is left for crows to feed upon while his head is brought to the ruler.

4.10.80ff.

49. In *Antony and Cleopatra*, failure to follow the tactics of the leader of a military force results in both individual death as well as the collapse of the nation. Cleopatra fails to support Antony during the sea battle. Her retreat is rebellious treason against the military leader and is the turning point leading to their loss of Egypt and their own deaths.

3.8.11ff

50. Shakespearean law reinforces the situation in which Hienrich lived. Disobedience in Nazi Germany often led to State execution. Knowing these punishments, it would be unjust for this Honourable Court to compel a person to disobey.

e. *In Richard II, subjects are not deemed guilty for obedience to the head of state. Guilt lies solely with the head of state.*

51. Richard II, in his abdication speech, clearly assumes all guilt for the actions of those who attempt to depose him. A king cannot be removed from the throne by his subjects because the king has absolute authority. Richard must therefore depose himself, and in doing so he assumes all responsibility for this action, calling himself a traitor, for he is a traitor to the state in questioning the absolute authority of the head of state.

4.1.223ff.

52. Similarly, all guilt for persons executed under Hitler's reign lies only with Hitler, not his subordinates since "Hitler was the sole authority within the party."

Hitler's Aims, *supra*, page 10.

53. Thus Heinrich is not guilty. He felt that he was in the same position as Adolf Eichmann, who said that "[t]he guilt for the mass murder is solely that of the political leaders. . . I would stress that I am guilty of having been obedient." Just as Richard III was responsible for the actions of his subordinates, so too was Hitler responsible for the extermination camps.

54. Hitler himself stated that he is "responsible for the fate of the German nation and hence the supreme law lord of the German people."

U.S.A. v. Alstoetter (1940), Nuremberg War Trials: The Ministries Cases (The Nazi Judges Cases) (18 January 2003), online:
<<http://www.law.umkc.edu/faculty/projects/ftrials/nurembert/Alstoetter.htm>> at 5.

ii. This Court should be sensitive to practical considerations involving Heinrich's situation

55. This Court need not be concerned with overly theoretical discussions regarding the nature of the law. This Court's opinion about the merits of the Nazi regime is not at issue. The important question pertains to what the people living in the regime perceived to be the law. Does the 'bad man' fear legal consequences if he were to disobey the law? This Court should take a realistic approach to Heinrich's actions. There is no doubt that people living in Nazi Germany feared serious reprisals if they were to break Hitler's law.

O.W. Holmes, Jr., "The Path of the Law" in Joel Feinberg and Hyman Gross, eds., *Philosophy of Law*, 5th ed. (Belmont: Wadsworth Publishing Company, 1995) 168.
Jerome Frank, "Legal Realism" in Joel Feinberg and Hyman Gross, eds., *Philosophy of Law*, 5th ed. (Belmont: Wadsworth Publishing Company, 1995) 174.

56. Heinrich's situation in Nazi Germany mirrors Shakespearean law, which demonstrates that disobedience to authority can result in severe consequences. People do

not have to agree with a law in order for a law to exist, but a law exists when disobedience leads to punishment by the State. Though John Austin's command theory may fail as a sound theory, there are times when it represents a true picture of the law: if Heinrich disobeyed Hitler, he probably would have been executed.

Richard A. Wasserstrom, "The Obligation to Obey the Law" in Robert S. Summers, ed., *Essays in Legal Philosophy* (Oxford: Basil Blackwell, 1968) 274 at 280.

57. As Lord Patrick Devlin stated, "[l]aw is concerned with the minimum and not with the maximum." He aptly quoted the judgment of African elders: "We have power to make you divide the crops, for this is our law, and we will see this is done. But we have not power to make you behave like an upright man."

Lord Patrick Devlin, "Morals and the Criminal Law" in Ronald Dworkin, ed. *The Philosophy of Law* (Oxford: Oxford University Press, 1977) 68 at 82.

58. This Court has power to enforce the law, but it does not have the power to make people act like heroes. Heinrich was under no legal obligation to sacrifice his life by disobeying Hitler.

C. THIS COURT SHOULD EXERCISE ITS DISCRETION BY REFUSING TO GRANT A WRIT OF MANDAMUS TO FORCE THE PROSECUTION OF KARL HEINRICH

59. The very nature of a writ of *mandamus* requires the Court to exercise its discretion. A proper exercise of discretion, in the present matter, is for the Court to deny the Applicant's request.

EVEN IF HEINRICH HAD BROKEN THE LAW, SHAKESPEAREAN LAW RECOGNIZES THE RIGHT TO EXERCISE MERCY

60. Based on the laws of Shakespeare, this Court has the right to be merciful to Heinrich and to refuse to grant the writ of *mandamus*.

i. Three central plays illustrate this Court's ability to exercise mercy

a. All criminals are shown mercy in Measure for Measure

61. In *Measure for Measure*, although Angelo does not show mercy when following the Duke's orders to punish lawbreakers, as a higher authority the Duke follows Isabella's plea and exercises mercy upon Angelo, recognizing that he should not be put to death for executing the Duke's own orders. In the spirit of forgiveness, the Duke further pardons Claudio, Lucio and the unrepentant Barnardine, all three of whom were guilty of breaking the existing laws.

62. This Court should follow the Duke's example of compassion and refuse the applicant's request for a writ of *mandamus*.

b. The Merchant of Venice presents mercy as an ideal

63. In *The Merchant of Venice*, the esteemed Portia makes an eloquent plea asking for Shylock to show Antonio mercy: "The quality of mercy is not strained,/ It droppeth as the gentle rain from heaven/ Upon the place beneath./ It is twice blest; 'Tis the mightiest in the mightiest. It becomes/ The thronèd monarch better than his crown." Though Shylock does not heed Portia's supplication, it is Portia who has the respect of the community gathered at the hearing. Shakespeare, thus, presents Portia's words as the ideal.

The Merchant of Venice, IV, i, ll. 184-9.

64. Shylock eschewed mercy, calling instead for justice. This Court has the opportunity to show magnanimity in a manner that Shylock could not. At the end of *Merchant*, mercy even saves the unmerciful when the Duke pardons Shylock from a death sentence. This Court should emulate Portia's picture of ideal mercy rather than Shylock's miserable portrait of justice.

c. Prospero displays mercy in The Tempest

65. In *The Tempest*, the rightful Duke of Milan, Prospero, is deposed by his brother Antonio, with the aid of Alonso, the King of Naples. Despite having been left to die by Antonio and Alonso, Prospero shows them mercy. Furthermore, Prospero exercises mercy toward Stephano and Trinculo, who had also plotted to kill him.

66. At the end of the play, Prospero is once again in a position of authority, but he does not wield his power authoritatively. Prospero chooses to demonstrate mercy to those who had wronged him.

67. This Honourable Court should emulate the merciful Prospero by showing mercy to Heinrich.

ii. It is in this Court's best interest to show mercy to Heinrich

68. This Honourable Court must end the cycle of violence demonstrated in Shylock's disturbing speech regarding retributive justice in the *Merchant*: "And if you wrong us, shall/ we not revenge? . . . The villainy/ you teach me I will execute, and it shall go hard/ but I will better the instruction." This Court should be a better instructor, and instead exemplify mercy rather than retribution.

3.1.67-9, 75-6.

69. Shylock refused the monetary fulfillment of the contract, which would have resolved the dispute in a practical manner, and instead pursued his demand for Antonio's pound of flesh. Shylock did so only to satisfy his desire for vengeance.

70. This Court should not emulate Shylock, who the Duke described as an "inhuman wretch" who was "uncapable of pity." Instead, this Court should aspire to do what is right, which, in this case, is to dismiss the application for a writ of *mandamus*.

IV. i. 4-5.

iii. Karl Heinrich should not be made to go through the ordeal of a trial

71. Karl Heinrich is an aged and ill man who supervised Sobibor and Chelmno over 50 years ago. He has had two strokes in the past year, has experienced brain damage, memory loss, comprehension problems, and symptoms of Parkinson's disease. For this 82-year-old man, a lengthy criminal trial would likely be equivalent to a death penalty.

72. Furthermore, Heinrich has been a model Canadian citizen since he arrived in Canada. He "did not persecute Jews with avidity and passion," which is evidenced by his lack of violence or hate crimes in the last 50 years. In fact, he has lived "a modest and exemplary life, raising a family and, by all accounts, participating quietly in the local community."

73. This Court should show mercy to Karl Heinrich. He is not a danger to society, he is aged and in poor health, and, finally, he is guilty only of obedience to authority.

PART IV—ORDERS SOUGHT

74. In the present matter, the Respondents request that the Court of Shakespeare find that Karl Heinrich did not violate the laws of Shakespeare for three reasons:

- 1) The law of Shakespeare does not afford protection to civilians during times of war;
- 2) Current conceptions of morality should not be infused into the law; and,
- 3) Karl Heinrich was under no obligation to disobey governmental authority.

75. In the alternative, if this Court finds that Karl Heinrich violated Shakespearean law, the respondents request that this Court exercise mercy toward Karl Heinrich.

76. Further, the respondents request that this Honourable Court decline jurisdiction in this matter since Divine Will is a more appropriate tribunal for Karl Heinrich's actions.

77. Therefore, this Honourable Court should reject the Applicant's application for a writ of *mandamus*.

All of which is respectfully submitted.

Kathleen Murphy

Jennifer Drouin

Counsel for the Respondent

PART V—LIST OF AUTHORITIES

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