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2012 Niagara Problem and Bench Memo

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YEAR 2012 NIAGARA MOOT COURT COMPETITION

UNITED STATES OF AMERICA (APPLICANT)

V.

CANADA (RESPONDENT)

**THE CASE CONCERNING
INTERVENTION IN TANGOON**

BENCH MEMORANDUM

**Sponsored by the Canada-United States Law Institute
("CUSLI")**

2012 Niagara Problem and Bench Memo written by

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with the assistance of

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During the first Bush and Clinton Administrations, Professor Scharf served in the Office of the Legal Adviser of the U.S. Department of State, where he held the positions of Counsel to the Counter-Terrorism Bureau, Attorney-Adviser for Law Enforcement and Intelligence, Attorney-Adviser for United Nations Affairs, and delegate to the United Nations General Assembly and to the United Nations Human Rights Commission.

A graduate of Duke University School of Law, and judicial clerk to Judge Gerald Bard Tjoflat on the Eleventh Circuit Federal Court of Appeals, Professor Scharf is the author of seventy-five scholarly articles and fourteen books, including *BALKAN JUSTICE*, which was nominated for the Pulitzer Prize in 1998, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA*, which was awarded the American Society of International Law's Certificate of Merit for the Outstanding book in International Law in 1999, *PEACE WITH JUSTICE*, which won the International Association of Penal Law Book of the Year Award for 2003, *ENEMY OF THE STATE*, won the International Association of Penal Law Book of the Year Award for 2009, and *SHAPING FOREIGN POLICY IN TIMES OF CONFLICT*, which was published by Cambridge University Press in January 2010.

Professor Scharf has testified as an expert before the U.S. Senate Foreign Relations Committee and House Armed Services Committee and his Op Eds have been published by the *Washington Post*, *Los Angeles Times*, *Boston Globe*, *Christian Science Monitor*, and *International Herald Tribune*.

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PART 1: GENERAL INFORMATION

I. INTRODUCTION

The purpose of this Bench Memorandum is to provide judges in the Niagara Moot Court Competition a summary of the basic factual and legal issues in the 2012 Niagara Problem (the “Compromis”). This Bench Memorandum should be read in conjunction with the teams’ briefs that you are judging; the

Compromis, which is in essence a stipulation of facts agreed to by the two Parties; and the Corrections/Clarifications which supplements the Compromis. The Compromis is intended to present the competitors with a balanced problem, such that each side has strengths and weaknesses in its case. This Bench Memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Compromis, and Judges should not be surprised when, in evaluating either a Brief or an oral argument, they see arguments or authorities not discussed in this memorandum. Their absence from this Bench Memorandum does not suggest that such arguments are not relevant or credible.

II. SYNOPSIS OF THE FACTS

The 2012 Niagara Moot Court Case concerns two issues: First, whether the (fictional) Canadian humanitarian intervention into the State of Tagoon was lawful under international law? And second, whether the (fictional) Canadian apprehension of Tagoon's leader, Ishmael Balthasar, and U.S. national Clyde Barrett, for surrender to the International Criminal Court, is lawful under international law.

A. Key Names/Places:

Tagoon: A State situated on the mountainous western half of the Pacific island of Tanmutra, ruled by a religious regime that adheres to an ultra-orthodox form of the Tanmutran religion.

Raffiiki Balthasar: Tanmutran High Priest who led Tagoon as Head of State from its independence in 1960 until recently turning power over to his younger brother, Ishmael Balthasar.

Ishmael Balthasar: Current de facto leader of Tagoon, who holds the title Minister of the Interior.

Mont Demon: Tagoon Mountain (elevation 7,100 feet) that contains the world's largest known deposit of cobaltite, from which the strategic mineral cobalt is derived.

Demonville: Tagoon's largest village (pop. 14,000). The village is located on the lower elevations of the south face of Mont Demon.

Geomin Corp: U.S. incorporated multinational mining company.

Clyde Barrett: U.S. citizen who is CEO and chief geologist of Geomin Corp.

Samutra: State situated on the eastern half of the Pacific island of Tanmutra, ruled by a democratic government.

B. Key Facts/Dates:

1991: Tagoon and Samutra are both admitted into the United Nations.

2010: Samutra becomes Party to the ICC Treaty.

2007: An extremely rich cobaltite vein is discovered on the north face of Mont Demon in Tagoon. U.S. company Geomin Corp. enters into a contract with Tagoon (signed by Ishmael Balthasar) for exclusive rights to mine the site of the cobaltite vein on Mont Demon for 20 years in return for an annual payment to the Tagoon regime of \$20 million. Geomin Corp., in turn, enters into a twenty-year contract with the U.S. Defense Logistics Agency Strategic Materials to provide all of the cobalt mined at Mont Demon to the United States Government at a price of \$20 a pound (15,000 tons were provided in 2010).

January 2011: Geomin Corp. discovers that the village of Demonville is situated directly on top of a second extremely rich cobaltite vein, located very close to the surface. Residents of the village turn down Geomin Corp's offer to purchase the land for a mine.

April 15, 2011: Clyde Barrett of Geomin Corp. meets with Ishmael Balthasar to urge Balthasar to forcibly relocate the Demonville residents in return for an extra \$50 million per year from Geomin. Balthasar agrees to do so. Notes of the meeting are recorded in Balthasar's diary.

May 23, 2011: Barrett and Balthasar meet again. Barrett provides Balthasar weather reports of an approaching tropical cyclone and suggests the huge storm could provide the opportunity that Balthasar was looking for to rid the villagers from the new mining site. Notes of this meeting are also recorded in Balthasar's diary.

May 25, 2011: Tropical Cyclone "Kodo" sweeps through the area of the Pacific Ocean where Samutra and Tagoon are located, battering the island with winds as strong as 160 mph, over 40 inches of rain, and waves as high as 20 feet. The government of Samutra issues timely warnings and takes effective steps to protect its population from the massive storm. In contrast, warnings were issued in Tagoon only to members of the ruling ultra-orthodox religious elite; the Tagoon authorities did nothing to notify the Tagoon civilian population of the imminent danger.

May 30, 2011: U.N. Secretary General issues a report on the situation in Tagoon after the Cyclone, which documents that most of the civilian population of Tagoon was rendered homeless and without potable drinking water, and thousands of unburied corpses were present throughout the lowlands and in the rivers flowing east to Samutra. The village of Demonville was especially hard hit by mudslides, which destroyed nearly all of its structures. The day after the cyclone, Geomin Corp. began blasting and excavating a massive open-pit cobaltite/cobalt mining site on land that had been previously occupied by the Demonville residents. According to eye-witness ac-

counts, Geomin Corp. was using a form of slave labor at the site provided by the Tagoon government under its so-called “National Service Program.” The Secretary General observed that following the storm the Tagoon regime had refused offers of humanitarian assistance from international NGOs and several States, and had taken no action to dispose of the thousands of diseased and rotting corpses, despite the Secretary General’s warning that the unburied corpses were spreading diseases including cholera, typhoid, and dysentery to downstream populations in both Tagoon and Samutra, and that thousands more would die in both countries if immediate action was not taken to address the spread of the disease and dispose of the corpses.

May 30, 2011: The government of Samutra refers the situation to the International Criminal Court and requested that the ICC bring charges against Ishmael Balthasar for Crimes Against Humanity for his wanton actions that were directly responsible for tens of thousands of deaths and the spread of disease in both Tagoon and Samutra. ICC opens an investigation.

May 30, 2011: The government of Samutra requested an emergency session of the U.N. Security Council to address the humanitarian crisis in Tagoon. U.S. threatens to veto French proposed resolution which would have authorized a coalition of willing States “to use all necessary means to enter Tagoon and deliver vital humanitarian aid to its suffering people and take steps to prevent the spread of disease from decomposing corpses. No subsequent action was taken by the Council to respond to the crisis.

June 2, 2011: At an emergency special session, the U.N. General Assembly, invoking its “Uniting for Peace” authority, adopted Resolution A/RES/65/299, recommending “all necessary means” to deliver humanitarian aid to the people of Tagoon.

June 3, 2011: Acting at the request of Samutra, the Government of Canada sends the HMCS *Algonquin*, an Iroquois Class destroyer with a complement of 200 crew and commandos, to Samutra/Tagoon on a humanitarian relief operation.

June 7, 2011: Canadian commandos land on the island and employ explosives to demolish several portions of the wall separating Samutra and Tagoon.

-- One hundred twenty armed Canadian commandos accompanying 500 medical and relief workers in 100 aid trucks from Samutra then entered Tagoon through the gaps in the border wall, and distributed food, clothing, medicine, and temporary shelters to the surviving Tagoon population.

-- The Samutran relief workers also begin the process of disposing of the thousands of diseased and rotting corpses.

-- A group of Tagoon Security personnel led by Ishmael Balthasar tries to block the convoy of aid trucks as it neared the ruins of Demonville. Canadian commandos take Balthasar into custody and confiscate his incriminating diary.

-- Canadian commandos came upon Geomin's blasting and excavating operations at Demonville. Seeing Tagoon workers engaged in conditions of slave-labor for Geomin, the commandos shut down the operation by disabling the bull dozers, excavators, and scooptrams and apprehend Clyde Barrett, who was running the operation.

-- Canadian commandos transport Balthasar and Clyde back to the *Algonquin*, docked at the Port of Samutra, where the two men have been held to this day in the ship's brig.

June 8, 2011: Canada submits a letter to the Security Council, briefing the Council as to its actions in Tagoon.

June 9, 2011: Canada/Samutra turn over Balthasar's incriminating diary to the ICC Prosecutor.

June 10, 2011: The government of Tagoon tells the United States that "the Mont Demon mines shall be shut down until Canada returns Ishmael Balthasar to Tagoon. If the United States wants our cobalt, it will need to obtain the return of our beloved leader."

June 15, 2011: The United States protested that Canada had violated Tagoon's territorial sovereignty under Article 2(4) of the U.N. Charter when the Canadian commandos broke through the border wall and entered Tagoon's territory, employing deadly force against the Tagoon security forces. The U.S. further protested that Canada violated international law when it abducted Ishmael Balthasar and U.S. citizen Clyde Barrett from Tagoon, that the ICC does not have jurisdiction over the nationals of non-Party States for actions taken outside the territory of a State Party, and that Canada's actions violated Ishmael Balthasar's head of state immunity. According to the United States, their abduction and detention by Canada has caused a substantial disruption in America's supply of cobalt, a strategic mineral vital to its ongoing military actions in Iraq, Afghanistan, and Libya. The United States therefore called on Canada to immediately release Ishmael Balthasar and Clyde Barrett.

June 20, 2011: Based on the Secretary-General's Report and the incriminating diary, the ICC issues an arrest warrant for Balthasar and Barrett, charging them with crimes against humanity (but not genocide).

June 22, 2011: Canada responds to U.S. protest, arguing that its actions were justified under the principle of collective self-defense to protect Samutra from the spread of deadly disease from Tagoon, that the action was authorized by the U.N. General Assembly under its "Uniting for Peace" authority, and that the intervention was consistent with the "Responsibility to Protect" doctrine, and therefore did not violate international law. Canada also argued that the apprehension and detention of Ishmael Balthasar and Clyde Barrett was permissible because they had been responsible for serious international crimes within the jurisdiction of the ICC. Canada suggested that the two countries enter into high-level talks to further discuss this matter, and

said that it would postpone surrendering Balthasar and Barrett to the ICC until after such talks were undertaken.

August 29, 2011: Canada and U.S. submit dispute to the ad hoc jurisdiction of the International Court of Justice.

C. List of Legal Issues (each of these issues is analyzed in part II below)

I. Whether Canada's intervention into Tagoon was lawful under international law?

A. Was the Canadian armed intervention justified by the Responsibility to Protect doctrine?

1. *Does R2P apply to environmental catastrophes or just man-made actions such as genocide and crimes against humanity?*
2. *Do the Tagoon leader's actions constitute an act of genocide? Was it justified by religious beliefs?*
3. *Does the R2P doctrine require Security Council authorization?*

B. Was the Canadian armed intervention justified by the U.N. General Assembly Resolution?

1. *Based on past precedent, should the resolution be read as authorizing armed intervention?*
2. *Based on its negotiating record, should the resolution be read as authorizing armed intervention?*
3. *Can the U.N. General Assembly legitimately authorize armed intervention under the "United for Peace" precedent?*
4. *Does the Uniting for Peace resolution apply where there is a threatened veto but the Security Council never brought the issue to a vote?*

C. Was the Canadian armed intervention justified under the doctrine of collective self-defense? Can self-defense apply to the threat of pollution?

1. *Can polluting a down-stream neighboring State constitute a biological "attack" for purposes of the doctrine of self-defense?*
2. *Was Canada's response necessary and proportionate? Did it unnecessarily violate religious practices regarding burial?*

II. Whether Canada's apprehension, detention, and proposed surrender to the ICC of Ishmael Balthasar and Clyde Barrett are lawful under international law?

A. Was the apprehension justified under the Law of War and Human Rights Law?

1. *Was Balthasar's apprehension justified under the law of war as a military action to protect the aid convoy from attack?*
2. *Was Barrett's apprehension justified as a means to stop human rights abuses in progress?*

B. Was the detention lawful under the Mala Captus bene detentis doctrine?

If Balthasar's and Barrett's initial apprehensions were unlawful, is their detention nonetheless lawful because there was a subsequent ICC arrest warrant? In other words, does the mala captus bene detentis principle apply to the ICC?

C. Can the ICC exercise jurisdiction over nationals of a non-party state who take action in the territory of a non-party state if the result is massive deaths within the territory of a State Party to the ICC Statute?

1. *Does the Vienna Convention on the Law of Treaties prevent the ICC from exercising Jurisdiction over the nationals of non-party States?*
2. *Does the objective territorial basis of jurisdiction (the effects test) apply to the question of whether an act was committed within the territory of a State Party to the ICC?*

D. Did Canada violate Balthasar's Head of State immunity when it captured and/or subsequently detained him for eventual surrender to the ICC?

1. *Does Head of State immunity apply to a de facto Head of State who is not the de jure Head of State?*
2. *Does Head of State immunity apply to persons captured for trial by the ICC?*

III. SOURCES OF INTERNATIONAL LAW

This section is an introduction to public international law and the International Criminal Court for judges who might not have professional experience or training in the field. Feel free to quickly skim through this section if you have judged International Law Moot Courts in the past and/or feel that you

have a good familiarity with the general principles of international law. There are important distinctions between international law and domestic legal systems. The most significant for the international law moot judge is the rigid definition of what sources of law are acceptable before the Court.

A. General

The conduct and rules of the International Court of Justice (the "ICJ") are governed by the Statute of the International Court of Justice (the "ICJ Statute"). Under Article 38(1) of its Statute, the International Court of Justice may consider the following sources of international law in order to decide disputes before it:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Commentators disagree as to whether these sources are listed in order of importance.

Judges from common-law systems should note the status of precedent. Article 59 of the ICJ Statute deprives decisions of the Court any status as precedent, stating, "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." In practice, however, the ICJ often cites its prior decisions, and those of its predecessor, the Permanent Court of International Justice, as persuasive authority, pursuant to Article 38(1)(d). Additionally, the Court frequently evaluates rules of customary international law in its opinions and subsequently relies upon those evaluations in later decisions.

Decisions by other tribunals are dealt with in the discussion in Subsection E ("Decisions and Publicists") *infra*.

Resolutions of the United Nations General Assembly are not, of themselves, binding before the Court. Although Resolutions may be evidence of customary international law, the General Assembly's position in international law is not analogous to that of a domestic legislature, and resolutions of the General Assembly do not create positive international law.

B. Treaties

Treaties are agreements between and among States, by which parties obligate themselves to act, or refrain from acting, according to the terms of the treaty. Rules regarding treaty procedure and interpretation are defined in the 1959 Vienna Convention on the Law of Treaties¹ (the “VCLT”), which is accepted by both the United States and Canada as Customary International Law.

The fundamental principle relating to treaties, reiterated in Article 26 of the VCLT, is that of *pacta sunt servanda*: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” In other words, once a State becomes a party to a treaty, it is bound by that treaty. Article 27 of the VCLT provides that a State cannot plead its Constitution, domestic laws, or domestic court cases as an excuse for non-performance of a treaty obligation.

Article 34 of the VCLT adds that a treaty is generally not binding on a State which is not party to the treaty, and does not create rights or obligations for such a State. Article 18 tempers this rule with respect to States that have signed – but not yet ratified – a treaty: “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty. . . .” pending ratification, unless it has “made its intention clear not to become a party to the treaty.” For example, a State that has signed but not ratified a treaty forbidding testing of nuclear weapons would not be held to the minute procedural details of the treaty; however, actual nuclear-weapons testing by the State would probably be seen as a violation of international law, constituting a breach of the “object and purpose” of the treaty.

The treaties potentially relevant to this case, to which both Canada and the United States are parties, include: the U.N. Charter, the Statute of the International Court of Justice, the 1949 Geneva Conventions and their Additional Protocols of 1977, the Genocide Convention, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.

Even if a State is not party to a treaty, a treaty may serve as evidence of customary international law. Article 38 of the VCLT recognizes this “back-door” means by which a treaty may become binding on non-parties. Judges should be aware, however, that situations arise where some provisions of a treaty may reflect or codify customary international law, while other parts do not.

¹ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

The Statute of the International Criminal Court

The International Criminal Court (ICC) is governed by the Rome Statute (ICC Statute), which entered into force in 2002. There are currently 120 countries that are party to the ICC Statute. Note, while Canada and Samutra are party to the ICC Statute, the United States and Tagoon are not.

Pursuant to Article 5 of the ICC Statute, the ICC has jurisdiction over (a) the crime of genocide; (b) crimes against humanity; and (c) war crimes. But, according to Articles 12 and 13 of the ICC Statute, the ICC only has jurisdiction when one of these crimes were committed (1) by a national of a State Party, or (2) in the territory of a State Party, or (3) when the Security Council refers the case to the ICC. In the 2012 Niagara Problem, jurisdiction is based on the theory that the crimes occurred (under the effects doctrine) in the territory of Samutra.

The 2012 Niagara Moot Court problem involves allegations of crimes against humanity, which are defined in Article 7 of the Statute as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

C. Customary International Law

The second source of international law is customary international law. A rule of customary international law is one that, whether or not it has been codified in a treaty, has binding force of law because the community of States treats it and views it as a rule of law. In contrast to treaty law, a rule of customary international law is binding upon a State whether or not it has affirmatively assented to that rule. The exception to this is that a State that has been “a persistent objector” to the rule of customary international law will not be bound by it.

In order to prove that a given rule has become a rule of customary international law, one must prove two elements: widespread state practice and *opinio juris* – the mutual conviction that the recurrence (of state practice) is the result of a compulsory rule.

“State practice” is the material element of customary international law, and simply means that a sufficient number of states behave in a regular and repeated manner consistent with the customary norm. As alluded to above, State practice may also be shown when a sufficient number of States sign, ratify, and accede to a convention. There is some dispute among commentators as to whether the practice of a small number of states in a particular region can create “regional customary international law” or whether the practice of particularly affected states, e.g. in the area of space law or antitrust law, can create custom that binds states which later become affected by these issues, although the ICJ appears to have acknowledged the possibility.²

Opinio juris is the psychological or subjective element of customary international law. It requires that the State action in question be taken out of a sense of legal obligation, as opposed to mere expediency. Put another way, *opinio juris*, is the “conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it.”³

Customary international law is shown by reference to treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and the practice of international organizations. Each of these items might be employed as evidence of State practice, *opinio juris*, or both.

With respect to the burden of proof, in *The North Sea Continental Shelf Cases*, the ICJ stated that the party asserting the existence of a rule of customary international law bears the burden of proving the existence of such a rule.

² North Sea Continental Shelf (Ger./Neth.), Judgment, 1969 I.C.J. 74 (Feb. 20).

³ MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

D. General Principles of Law

The third source of international law consists of “general principles of law.” Such principles are gap-filler provisions: on occasion, the ICJ must have recourse to rules typically found in domestic courts and domestic legal systems in order to address procedural and other issues.

The bulk of recognized general principles are procedural in nature. For example, the laws regarding burden of proof and admissibility of circumstantial evidence. Many others, for example estoppel, waiver, unclean hands, necessity, and *force majeure*, may sound to a common-law practitioner as equitable doctrines. The principle of general equity in the interpretation of legal documents and relationships is one of the most widely cited general principles of international law. The ICJ has upheld the application of equitable principles generally in, among other cases, the *North Sea Continental Shelf Cases* (1969); its predecessor, the Permanent Court of International Justice, recognized equitable principles as part and parcel of international law in *The Diversion of Water from the Meuse*.⁴

It is important to note, however, that “equity” in this sense is a source of international law, brought before the court under Article 38(1)(c) of the Statute of the ICJ. It is an *inter legem* application of equitable principles, and not a power of the Court to decide the merits of the case *ex aequo et bono*, a separate matter treated under Article 38(2) of the Statute.

E. Decisions and Publicists

The final source of international law is judicial decisions and teachings of scholars. This category is described as “a subsidiary means of finding the law.” Judicial decisions and scholarly writings are, in essence, research aids for the Court, used for example to support or refute the existence of a customary norm, to clarify the bounds of a general principle or customary rule, or to demonstrate state practice under a treaty.

Judicial decisions, whether from international tribunals or from domestic courts, are useful to the extent they address international law directly or demonstrate a general principle.

“Teachings” refers simply to the writings of learned scholars. Many student competitors make the mistake of believing that every single published article constitutes an Article 38(1)(d) “teaching.” However, the provision is expressly limited to teachings of “the most highly qualified publicists.” For international law generally, this is a very short list, and includes names like Grotius, Lauterpacht, and Brownlie. Within the context of a specific field of

⁴ *Diversion of Water from Meuse (Neth. v. Belg.)*, 1937 P.C.I.J. (ser. A/B) No. 70, 76-78 (June 28).

international law – for example, environmental law or law of the sea – there are additional experts who would be regarded within their field as “highly qualified publicists.”

IV. BURDENS OF PROOF

In the *Corfu Channel Case*,⁵ the ICJ set out the burdens of proof applicable to cases before it. The Applicant (in this case Canada) normally carries the burden of proof with respect to factual allegations contained in its claim, by a preponderance of the evidence. In the case of counter-claims (the second issue in the present case), the Respondent (here, the United States) bears the burden of proof.

Participants cannot, however, be held responsible for the lack of information in the *Compromis*. They can only be held responsible for the quality of their argument in light of this lack of detail. Judges should not dwell on the evidentiary gaps unless the competitors have themselves drawn implausible or unsupported inferences.

PART 2: LEGAL ANALYSIS

I. WHETHER CANADA’S INTERVENTION INTO TANGOON WAS LAWFUL UNDER INTERNATIONAL LAW?

A. Was the Canadian armed intervention justified by the Responsibility to Protect doctrine?

1. *Does R2P apply to environmental catastrophes or just man-made actions such as genocide and crimes against humanity?*

The United Nations adopted the Responsibility to Protect doctrine (“R2P”) at the 2005 World Summit as a reaction to the NATO intervention to halt ethnic cleansing in Kosovo in 1999, as well as the international community’s failure to respond to the Rwandan genocide in 1994.⁶ The doctrine was codified in a report by the International Commission on Intervention and State Sovereignty (ICISS), established by Canada in 2000, and later endorsed by the General Assembly and Security Council.⁷ There is presently no inter-

⁵ *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 6).

⁶ *Mission Statement*, OFFICE OF THE SPECIAL ADVISOR ON THE PREVENTION OF GENOCIDE, <http://www.un.org/en/preventgenocide/adviser/index.shtml> (last visited Sept. 15, 2011).

⁷ Jayshree Bajoria, *The Dilemma of Humanitarian Intervention*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/human-rights/dilemma-humanitarian-intervention/p16524> (last

national consensus about the scope and application of the doctrine, nor whether it reflects customary international law.

R2P is a doctrine aimed at stopping, through military intervention by U.N. member states, “mass atrocity crimes”—a term that encompasses genocide, war crimes, crimes against humanity and ethnic cleansing—through existing international frameworks. In order for a country to intervene under R2P, that country must normally first get authorization from the U.N. Security Council. R2P draws its power from Chapter VII of the U.N. Charter, and specifically, Article 39, which provides: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”⁸ If, however, the Security Council is paralyzed by a Permanent Member veto, R2P would arguably permit the General Assembly to authorize force under its “Uniting for Peace” authority (discussed below).

One of the criticisms of the R2P doctrine is that its scope is too narrow; it only addresses four crimes.⁹ An instance in which there is some international support for expanding the scope of R2P is to protect civilians from natural disasters in cases in which their own government refuses to accept outside aid.

Also termed environmental disasters, an environmental catastrophe is a sudden onset of a calamity or accident resulting from one or a combination of natural, technological, industrial, or human-caused factors.¹⁰ There are organizations, such as the U.N. Office for the Coordination of Humanitarian Affairs, as well as Non-Governmental Organizations such as CARE, that have been established to respond to these tragedies as they occur. However, these organizations require permission from the countries they work in to be there, and generally have to be invited in before they can provide assistance.¹¹

The question of whether R2P applied to environmental disasters was debated in the context of Myanmar’s handling of Cyclone Nargis in 2008. The cyclone caused the “worst natural disaster in the history” of Myanmar.¹² Despite the very high and increasing death toll, the immense destruction of

visited Sept. 15, 2011).

⁸ U.N. Charter chap. VII.

⁹ Aidan Hehir, *The Responsibility to Protect: Sound and Fury Signifying Nothing?*, 24 INT’L RELATIONS 218 (2010).

¹⁰ UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, *Environmental Emergencies*, <http://www.unocha.org/what-we-do/coordination-tools/environmental-emergencies> (last visited Sept. 16, 2011)

¹¹ CARE INT’L, <http://www.care-international.org/> (last visited Sept. 16, 2011).

¹² Bruce Loudon, *Cyclone is a Sign of Things to Come*, THE AUSTRALIAN, May 9, 2008, at 9.

property and the very real danger of higher fatalities due to lack of water, food, and the spread of disease, the military junta of Myanmar initially resisted accepting international aid.¹³ The international community strongly condemned this action by the junta, with the French U.N. ambassador claiming Myanmar's refusal to allow increased aid into the country could lead to a true crime against humanity." U.K. Prime Minister Gordon Brown accused the junta of "allowing the disaster to grow into a man-made catastrophe through its failure to act,"¹⁴ and there were even a few claims of genocide due to the rapidly increasing death toll in the aftermath of the storm. It was only after severe international pressure and the threat by France to intervene without Myanmar's consent, that Myanmar finally allowed humanitarian aid into the country.¹⁵

While R2P's scope is limited, it does cover crimes against humanity. As the French Ambassador pointed out during the Myanmar situation, a government's refusal to accept aid after an environmental disaster can arguably equate to a crime against humanity if the refusal leads to systematic and widespread deaths. The French Foreign Minister proposed "that the U.N. Security Council invoke the responsibility to protect to authorize the delivery of aid without the consent of the Myanmar/Burma government."¹⁶ The Chinese government, however, responded by insisting that the Responsibility to Protect doctrine did not cover natural disasters. This claim was supported by the Asia-Pacific Centre for the Responsibility to Protect, which found that there was "no prima facie case for arguing that the [Myanmar] regime's failure to provide full access to humanitarian organizations in the wake of Cyclone Nargis triggers the Responsibility to Protect principle."¹⁷

In the present case, the United States may argue that failure to permit outside aid is not the same thing as affirmatively committing a crime against humanity. The U.S. argument will be based on U.N. Charter Article 2 (7), which provides that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."¹⁸ A fundamental aspect of state sovereignty is the right of a state to decide how to care for its own population,

¹³ *India Urges Myanmar to Accept Global Aid, Junta Agrees*, THAIINDIAN NEWS (May 12, 2008, 9:11PM), http://www.thaindian.com/newsportal/uncategorized/india-urges-myanmar-to-accept-global-aid-junta-agrees-lead_10047982.html.

¹⁴ *Burma Guilty of Inhuman Action*, BBC ONLINE (May 17, 2008, 7:27PM), http://news.bbc.co.uk/2/hi/uk_news/politics/7406023.stm.

¹⁵ THAIINDIAN NEWS, *supra* note 13.

¹⁶ ASIA-PACIFIC CENTRE FOR THE RESPONSIBILITY TO PROTECT, CYCLONE NARGIS AND THE RESPONSIBILITY TO PROTECT (2008), *available at* http://www.r2pasiapacific.org/documents/Burma_Brief2.pdf.

¹⁷ *Id.*

¹⁸ U.N. Charter art. 2(7).

taking into account its own particular cultural mores. The United States will further point out that the Myanmar situation did not indicate a consensus for the application of R2P to environmental crises, and therefore Canada cannot establish that its intervention was consistent with customary international law. Finally, the United States may argue that if R2P is expanded too far this will engender resistance to its use in cases for which it was designed, namely those dealing with genocide and intentional crimes against humanity such as in Rwanda.¹⁹

Canada will likely use the Myanmar case to illustrate how adapting R2P to cover environmental disasters is not a new idea. While it was unnecessary to invade Myanmar as the military junta eventually allowed humanitarian aid, military intervention was seriously considered by international powers, such as France. Canada may also point to the original version of R2P where the commission included environmental or natural disasters as possible events after which the international community could intervene if the state failed in its responsibility to protect its population. The United States will respond that in 2005, when the responsibility to protect doctrine was incorporated into the U.N. outcome document, environmental disasters had been dropped as a reason for intervention.²⁰

2. Do the Tagoon leader's actions constitute an act of genocide? Was it justified by religious beliefs?

To determine whether the Tagoon situation might qualify as genocide or attempted genocide, and therefore trigger the R2P doctrine, one must start with the definition of genocide under the 1948 Genocide Convention, which the ICJ has declared represents customary international law. Article 2 of the Genocide Convention defines genocide as:

the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part;

¹⁹ Bajoria, *supra* note 7.

²⁰ *World Summit Document*, INTERNATIONAL COALITION FOR THE RESPONSIBILITY TO PROTECT, http://www.responsibilitytoprotect.org/index.php?option=com_content&view=article&id=398 (last visited Sept. 15, 2011).

- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.²¹

This definition was later adopted by the International Criminal Tribunal for the Former Yugoslavia (ICTY),²² the International Criminal Tribunal for Rwanda (ICTR),²³ and the ICC itself.²⁴

Canada, setting out to prove that the actions of the Tangoon leadership constitute Genocide, will find definition “c” most applicable to the situation on the ground. In this case, the Tangoon leaders have both failed to warn the people of the lowlands of the impending danger, and denied them aid when it became available, thereby inflicting conditions of life so harsh as to kill the villagers and destroy the physical structures of the village, all with the purpose of clearing the land around the Demon Mine. Canada will argue that this is with the intent to bring about the destruction of those people in its care. Furthermore, the distinction drawn by the Tangoon leader that the people of the lowlands are of an impure or untrue form of the state religion would seem to emphasize that it is a distinct religious group that is being purposefully targeted and culled.

Canada will likely cite the case of *Bosnia and Herzegovina v. Serbia and Montenegro*, of 2007, wherein the ICJ established that Serbia had breached the Genocide Convention, but not, in fact, for committing it as an official government act, nor for directly condoning it (although this was contentious in the court, and not decided unanimously). Instead the Court found that in the Serbian government’s failure to prevent the Srebrenica massacre, it was guilty of failing to prevent the genocide, and, in addition, was culpable for not cooperating with the International Criminal Tribunal for the former Yugoslavia in punishing the architects.²⁵ The parallels to the case in Tangoon are readily drawn: even if Serbia was no more directly in control of the paramilitary elements of the country than Tangoon’s leaders were of the Cyclone Kodo, they both had the opportunity, and indeed responsibility, to protect their populations from what amounted to genocidal conditions.

²¹ United Nations Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S 277.

²² Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 4, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

²³ Statute of the International Criminal Tribunal for Rwanda, art. 2, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

²⁴ Rome Statute of the International Criminal Court, art. 6, July 17, 1998 2187 U.N.T.S. 90.

²⁵ Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43 (Feb. 26).

The United States, on the other hand, will point out that genocide is a specific intent crime, the perpetrators must act with the specific intent to destroy the group. The Tagoon leaders, in contrast, denied aid because (1) their religious beliefs prohibited use of medicines; or (2) they wanted to clear people from the mining site in order to get more money from Geomin. Neither of these reflect the intent to destroy a group. As to the first motivation, an analogy can be made between the refusal to accept aid and the individual right to refuse medical attention for religious reasons. Canada may point out, however, that in the United States, adults may refuse lifesaving medical techniques on religious grounds, but may not refuse on behalf of their children. As to the second motivation, the ICJ in its Judgment on Genocide explicitly stated: "The expulsion of a group or part of a group does not in itself suffice for genocide."²⁶ The United States may also cite the rejection of a proposed 6th provision of the genocide convention, which would have barred "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment."²⁷ In the end, the argument about genocide may not be key to the outcome of this case, since the ICC has found that Balthazar's acts and omissions constitute a crime against humanity, and under the R2P doctrine, intervention can be justified to halt either genocide or crimes against humanity.

3. Does the R2P doctrine require Security Council authorization?

The question is whether Canada's intervention, or any humanitarian intervention, under the doctrine of responsibility to protect, requires Security Council authorization. After countries objected to the 1999 intervention of Kosovo by NATO forces without Security Council authorization, the Secretary General of the U.N., Kofi Annan, stated "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?"²⁸ In response to the challenge set forth by the Secretary-General, Canada established the ICISS with the mandate to find a method to reconcile the seemingly conflicting notions of "human protection purposes and sovereignty."²⁹

²⁶ *Id.* at para. 190.

²⁷ William Schabas, *On the Convention on the Prevention and Punishment of the Crime of Genocide: Introduction*, Dec. 9, 1948, available at http://untreaty.un.org/cod/avl/pdf/ha/cppcg/cppcg_e.pdf.

²⁸ U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century*, ¶ 48, U.N. Doc. A/54/2000 (March 27, 2000).

²⁹ INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT XI* (2001).

Canada may argue that the U.N. Charter permits R2P intervention without Security Council authorization under some circumstances. Article 2 (4) of the U.N. Charter states that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.”³⁰ Canada will argue, through a narrow interpretation of the Charter, that its intervention of Tangoon under Article 2 (4) was not “inconsistent with the Purposes of the United Nations” but rather it was to uphold, promote and protect human rights; a motivation consistent with the purposes of the U.N.³¹ The United States will respond that regardless of Canada’s purpose for intervention, Canada still violated the Charter. Chapter VII gives the Security Council the power to authorize force, and also to decide when force is not warranted.

Further, the United States will argue that the version of the R2P doctrine that was adopted in the 2005 World Summit Outcome Document and later endorsed by the Security Council envisioned Security Council authorization as a pre-requisite to R2P intervention. The Summit Outcome Document is a General Assembly resolution that represents the conclusion of the 2005 World Summit, which was the first time that the doctrine of responsibility to protect had been debated officially in the U.N. Paragraph 138 and 139 of the 2005 Summit Outcome Document constitute the agreed upon language of responsibility to protect. Paragraph 139 of the document states:

[W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.³²

Canada will argue that the language in the document does not make implementation of R2P explicitly conditional on Security Council authorization, but that the passage only indicates that the U.N. is prepared to take action “through the Security Council.” In response, the United States will point to the Secretary-General’s 2009 Report, which states that “[t]he responsibility

³⁰ U.N. Charter art. 2(4).

³¹ BRIAN D. LEPARD, *RETHINKING HUMANITARIAN INTERVENTION: A FRESH LEGAL APPROACH ON FUNDAMENTAL ETHICAL PRINCIPLES IN INTERNATIONAL LAW AND WORLD RELIGIONS* 335 (2002).

³² G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Sep. 16, 2005) [hereinafter *Summit Outcome*].

to protect does not alter . . . the legal obligations of the Member States to refrain from the use of force except in conformity with the Charter.”³³ However, the statement is not explicit to the Security Council, and that conformity to the Charter includes the goals and purposes of the U.N. specifically the maintenance of human rights. The debate returns to the language and purposes of the Charter.

To shed light on this question, Canada and the United States may turn to the historical precedent of humanitarian intervention, the predecessor to responsibility to protect. In 1999, NATO strategically bombed Yugoslavia to prevent the ethnic killing of Albanians in Kosovo.³⁴ The action was carried out without Security Council authorization, but was later ratified by Security Council Resolution 1244, which “Authorizes Member States and relevant international organizations to establish an international security presence in Kosovo . . .”³⁵ Canada will argue that this is an example of intervention without authorization, but subsequently authorized by the Security Council, which provides an example of how intervention is considered to be legitimate. The use of force was for the sole purpose of protecting civilians from ethnic cleansing, and crimes against humanity. The United States will argue that Security Council Resolution 1244 was retroactive approval, which is missing in the case of Tanguon.

B. Was the Canadian armed intervention justified by the U.N. General Assembly Resolution?

1. Based on past precedent, should the resolution be read as authorizing armed intervention?

U.N. General Assembly Resolution 65/299 was understood by Canada to justify Canadian armed intervention in the crisis in Tanguon. The key text in the resolution, where the words can be interpreted as allowing armed intervention, is the phrase “*Recommends* that States in coordination with Samutra employ all necessary means to ensure delivery of humanitarian aid and bring an end to this humanitarian catastrophe.”³⁶ Whether the use of “*all necessary means*” authorizes the use of military force can be seen through past precedent.

Over the years, the Security Council has used a variety of phrases that have been interpreted as authorizing force. For example, Security Council

³³ U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 3, U.N. Doc. A/63/677 (Jan. 12, 2009).

³⁴ LEPARD, *supra* note 31, at 337.

³⁵ S.C. Res. 1244, ¶ 7, U.N. Doc. S/Res/1244 (June 10, 1999).

³⁶ G.A. Res 65, ¶ 4, U.N. Doc. A/RES/299 (Aug. 30, 2011).

Resolution 83, adopted on the 27th of June 1950 in response to North Korea's invasion of South Korea, stated: "recommends that the Member Nations of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and restore international peace and security to the area."³⁷ This phrase was interpreted as authorizing armed intervention, as demonstrated by the United States coming to the aid of South Korea, with support from Canada, Australia, Greece and France while the North Korean and Chinese armies received support from the Soviet Union.³⁸ Note, China and the Soviet Union did not veto the resolution because at the time, China was represented by the pro-west Nationalist Government in Taiwan, and the Soviet Union was absent during the vote on the resolution in protest of the exclusion of the People's Republic of China from the Council. The intervention restored the border between North and South Korea to the 38th parallel and created a demilitarized zone between the two Koreas that exists to this day.³⁹

It would be forty more years before the Security Council approved another use of force. In 1991, the Council adopted Resolution 678 in response to the non-compliance of Iraq with earlier resolutions in the context of its invasion of Kuwait. This Resolution "authorizes member states co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use *all necessary means* to uphold and implement resolution 660."⁴⁰ Pursuant to this resolution, a U.S.-led coalition of 34 Member States launched Operation Desert Storm against Iraq, and forced the Iraqis out of Kuwait.⁴¹

Less than two years later, The Security Council passed a series of resolutions regarding the disintegrating situation in the remains of Yugoslavia. The most important of these, Resolution 770, requested that, "all states provide the appropriate support for the actions undertaken in pursuance of this resolution," and demanded that, "all parties concerned take *the necessary measures* to ensure the safety of the U.N. and other personnel engaged in the delivery of humanitarian assistance."⁴² Acting under this authority, NATO carried out a series of air strikes, until Serbia agreed to the Dayton Peace Accords on 21 November 1995.⁴³

³⁷ S.C. Res. 83, ¶ 6, U.N. Doc. S/Res/83 (June 27, 1950).

³⁸ *History and Reference*, KOREAN WAR PROJECT, http://www.koreanwar.org/html/history_and_reference.html (last visited Sept. 7, 2011)

³⁹ *Id.*

⁴⁰ S.C. Res. 678, ¶ 2, U.N. Doc. S/Res/678 (Nov. 29, 1990).

⁴¹ DOUGLAS A. BORER, U.S. ARMY, INVERSE ENGAGEMENT: LESSONS FROM U.S.-IRAQ RELATIONS: 1982-1990 U.S. ARMY PROFESSIONAL WRITING COLLECTION (2003).

⁴² S.C. Res. 770, ¶ 5-6, U.N. Doc. S/Res/770 (August 13, 1992).

⁴³ *Evolution of the Conflict*, NATO HANDBOOK,

The most recent humanitarian intervention concerned Libya, following the severe repression of popular protests that began in February 2011 against the government of Muammar Gaddafi.⁴⁴ With the adoption of U.N. Resolution 1973, the Security Council authorized “member States. . . . acting nationally or through regional organizations or arrangements. . . . to take all necessary measures. . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya. . . . to take all necessary measures to enforce compliance with the ban on flights. . . . calls upon all Member States. . . . to provide assistance, including any necessary over-flight approvals.”⁴⁵ While the text does not specifically call for armed intervention, it was seen as “effectively authorizing the use of force in Libya,”⁴⁶ which was undertaken by NATO, France, the United Kingdom and the United States.

Canada will argue that the resolution recommending “*all necessary means*” in this case is consistent with the past resolutions authorizing the use of force. The United States will argue that the language is different from “*the necessary measures*” language that the Security Council has employed in recent cases. Moreover, the General Assembly’s Tagoon Resolution qualified the use to ensure delivery of humanitarian aid and bring an end to this humanitarian catastrophe; it did not authorize the apprehension of the Head of State of Tagoon. Further, the resolution recommended all necessary means, it didn’t authorize them.

2. *Based on its negotiating record, should the resolution be read as authorizing armed intervention?*

The Vienna Convention on Law of Treaties, which also applies to interpretation of U.N. Resolutions, permits the use of negotiating records when the terms of the resolution are ambiguous. The explanations of vote issued either immediately before or after the adoption of a resolution qualifies as the negotiating record for this purpose. In this case, China, Canada, the United States, and Russia each made a statement following the vote on the Resolution on Tagoon.

China, which abstained, stated that it did not interpret the resolution as authorizing use for armed intervention. It explained its understanding that the

<http://www.nato.int/docu/handbook/2001/hb050102.htm> (last visited Sept. 8, 2011).

⁴⁴ *Live Blog – Libya*, ALJAZEERA (Feb. 17, 2011, 4:39AM),

<http://blogs.aljazeera.net/middle-east/2011/02/17/live-blog-libya>.

⁴⁵ S.C. 1973, ¶ 4, 8-9, U.N. Doc. S/Res/1973 (Mar. 17 2011).

⁴⁶ *Security Council Authorizes All Necessary Measures to Protect Civilians in Libya*, U.N. NEWS CENTRE, <http://www.un.org/apps/news/story.asp?NewsID=37808> (last visited Sept. 13, 2011).

Resolution's recommendation to "employ all necessary means" was only a "recommendation that States work together to provide aid and bring an end to the humanitarian catastrophe in Tangoon." "Necessary means" does not imply use of force.

Canada's negotiating record states nothing about authorizing armed intervention, but discusses "authorizing a humanitarian intervention." It explains that "the international community will not sit idly by while a humanitarian disaster unfolds. . ." It is unclear as to what action comprises "not sit[ting] idly by." Canada will argue that in order to carry out a humanitarian intervention, armed intervention is needed or is inevitable, but nothing in its statement clarifies this for certain.

Russia's statement, on the other hand, clearly denotes that "employ[ing] all necessary means," indicates that "Samutra and her allies may take forceful measures to ensure that humanitarian aid get to . . . Tangoon." In addition, Russia cites a previous use of force (its intervention in South Ossetia) as an example of what the Resolution would allow. Similarly, the statement of the United States, while arguing that the General Assembly does not have the authority to authorize the use for force, clearly implies that the General Assembly has purported to do so here.

3. Can the U.N. General Assembly legitimately authorize armed intervention under the "Uniting for Peace" precedent?

At the core of this debate is the question of whether the powers provided for in Chapter VII of the U.N. Charter are exclusive to the Security Council or not. According to Article 39 of the Charter, the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.⁴⁷

Additionally, Article 42 of the Charter accords the Security Council the power to authorize the use of force to maintain and restore international peace should other diplomatic and coercive measures fail.⁴⁸ Few, if any, would question the Security Council's ability to determine threats to international peace and security and act accordingly. However, when the Security Council fails to act, or is paralyzed from acting because of the threat of a veto by one of the Permanent Members, do the Chapter VII powers, namely the ability to authorize force, become paralyzed as well?

During the Cold War, the Security Council was often at an impasse due to disagreement amongst the "Permanent Five," veto-wielding members of the

⁴⁷ U.N. Charter art. 39.

⁴⁸ *Id.* art. 42.

Council (France, the U.K., China, the USSR, and the United States).⁴⁹ When the USSR continued to block the Security Council from taking action to assist the Republic of Korea against aggression by North Korea, the General Assembly, citing its “subsidiary responsibility with regard to international peace and security,” adopted Resolution 377 (V), known as the “Uniting for Peace” Resolution.⁵⁰ Under the authority of Uniting for Peace Resolution, if the Security Council “because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security” the General Assembly may seize itself of the matter and make recommendations for “collective measures. . . . including the use of armed force when necessary.”⁵¹ This resolution has led to the thought that when the Security Council fails to act, the General Assembly may assume the powers and responsibilities listed in Chapter VII of the Charter.

Canada will put forth this view—that when the Security Council fails to act, the responsibility to determine threats to peace and act accordingly is transferred to the General Assembly—and argue that under the banner of “Uniting for Peace” the intervention in Tangoon was legitimate. In order to convene an emergency General Assembly session under the “Uniting for Peace” procedure, three preconditions must be met: (1) there must be a threat to peace, breach of peace, or act of aggression; (2) there is lack of unanimity in the Security Council; (3) as such, the Security Council is failing to exercise its primary responsibility over the maintenance of international peace and security.⁵² From Canada’s point of view, the devastating impact of the situation in Tangoon on neighboring Samutra represents a serious threat to peace, and since the United States threatened to veto any Security Council resolution regarding the situation, the Council is unable to perform its duty of maintaining international peace. Thus, for Canada, all prerequisites for exercising authority under “Uniting for Peace” have been fulfilled.

The United States, on the other hand, will argue that the threat of the veto by one of the Permanent Members does not mean the Council is “failing” to act and that this use of “Uniting for Peace” goes far and beyond what the resolution has historically been used for. The United States will further argue that only the Security Council may authorize the use of force for purposes other than self-defense, and any humanitarian military intervention without a Security Council resolution, like the one in Tangoon, is contrary to international law.

⁴⁹ G.A. Res. 377 (V), U.N. Doc. A/RES/377 A (Nov. 3, 1950)

⁵⁰ *Id.*

⁵¹ *Id.* at para. 1.

⁵² Kamrul Hossein, *The Complementary Role of the United Nations General Assembly in Peace Management*, 13 REV. INT’L L. & POL. 77 (2008).

For the United States, the intervention in Tangoon stands in violation of international law mainly because the Security Council did not adopt a resolution authorizing the use of force. The United States will likely rest the foundation of its argument on numerous provisions of the U.N. Charter. Article 2(4) of the Charter explicitly prohibits the use of force against the “territorial integrity or political independence of any state”⁵³ The only exceptions to this rule as outlined by the Charter come from self-defense, found in Article 51,⁵⁴ or Security Council resolutions, found in Article 42.⁵⁵ As the intervention in Tangoon arose from neither of these two exceptions, it would seem to be a direct violation of Article 2(4). Thus the strongest evidence for exclusivity of Security Council powers comes from the Charter itself.

The language of Articles 39 and 42 specifically address the *Security Council* as having the primary power to determine threats and authorize forceful responses to maintain peace. These articles make it clear that the Security Council should always be the first point of call when it comes to the authorization of force. Furthermore, Articles 10-14 make it clear that the Security Council and General Assembly cannot be substituted for one another but are instead meant to complement each other. As such, the powers of the Security Council cannot be transferred to the General Assembly, or assumed by the General Assembly by default.⁵⁶

In addition, the United States will argue that there remains “no constitutional basis in the U.N. Charter for the General Assembly to override the right of veto granted to permanent members of the Security Council in Article 27 (3).”⁵⁷ Simply being able to call forth the General Assembly and bypass a veto by claiming the Security Council is failing to act would undermine the authority of the Council. Furthermore, the fact that the Permanent Members of the Council disagree is not proof in and of itself that they are “paralyzed” or “failing to act.” Rather, it can be argued that the Council is “fulfilling its role as a discretionary, governing body of nations whose withholding of consent is indicative of their dissatisfaction with the proposed action.”⁵⁸ To grant the General Assembly rights to bypass the Security Council would “precipitate a constitutional crisis within the United Nations, for they would pit the Assembly against those major powers in the Security Council which had blocked the Council from responding to the humanitarian

⁵³ U.N. Charter art. 2., para.4.

⁵⁴ *Id.* art. 51.

⁵⁵ *Id.* art. 42.

⁵⁶ Hossein, *supra* note 52, at 83.

⁵⁷ Nicholas J. Wheeler, *Operationalising the Responsibility to Protect: The Continuing Debate Over Where Authority Should Be Located for the Use of Force*, 3 NUPI REPORT 5 (2008).

⁵⁸ Daniel H. Joyner, *The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm*, 13 E.J.I.L. 597 (2002).

crisis in the first place.”⁵⁹ In this sense, the United States could argue that more harm would come from bypassing the Council’s right to authorize force than from the unfolding disaster in Tangoon.

Canada will agree that the Security Council is the first point of call for the authorization of force, but will also insist it does not have to be the last. When the Council fails to act, Resolution 377 (V) makes it clear that this “does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security.”⁶⁰ It can then be argued that the “basis of the ‘Uniting for Peace’ resolution was to uphold the purposes and objectives of the United Nations, more precisely, the maintenance of international peace and security.”⁶¹ In this sense, when the Security Council fails to perform its primary responsibility, this responsibility becomes the duty of the General Assembly. Thus, in the simplest of arguments, authorization of force by the General Assembly cannot be said to violate Article 2(4) of the U.N. Charter because the Assembly was “playing the role that should have been played by the Security Council.”⁶²

Canada will further agree that the Security Council has primary power over the maintenance of international peace and security, but contend that this power is not exclusive. The U.N. Charter itself, in Article 27 (1), refers to the Security Council as having “primary responsibility for the maintenance of international peace and security” but does not say this responsibility is absolute.⁶³ This argument finds support in the advisory opinion of the International Court of Justice in the *Certain Expenses* case.⁶⁴ *Certain Expenses* involved disputes over the allocation of funds to General Assembly-established Peace Keeping operations in the Middle East and the Congo. It was argued that expenses related to operations for the maintenance of international peace and security should be dealt with exclusively by the Security Council under their Chapter VII powers. The ICJ, however, held that “the responsibility of the Security Council . . . is ‘primary’, not exclusive.”⁶⁵ Additionally, just as the Charter outlines the Security Council responsibilities, so too does it make it abundantly clear that the General Assembly is to be concerned with matters of international peace and security. The Court went on to find that the General Assembly is not “barred from recommending enforcement action.” This opinion can be seen to legitimize the General As-

⁵⁹ W. Michael Reisman, *10th Commission: Present Problems of the Use of Force in International Law*, 72 I.D.L.-I.I.L. 169 (2007).

⁶⁰ G.A. Res. 377 (V), *supra* note 49.

⁶¹ Hossein, *supra* note 52, at 84.

⁶² *Id.*

⁶³ U.N. Charter art. 27, para. 1.

⁶⁴ *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151 (July 20).

⁶⁵ *Id.* at 163.

sembly as having “secondary” powers to the Security Council, including the ability to assume Chapter VII functions. The ICJ went so far as to equate the General Assembly to the Security Council in its advisory opinion on *The Wall*, when it stated, “the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation.”⁶⁶ It would then seem that the ICJ has already come to the decision that powers of the Security Council are not exclusive and can be used by the General Assembly.

The United States can point out that *Certain Expenses* involved peacekeeping operations in areas where conflict was ongoing; they were not humanitarian interventions like the operation in Tangoon. Therefore, there cannot be a reasonable comparison made between the two cases because there is a marked difference between an armed humanitarian intervention and the deployment of peacekeeping troops, which require the consent of the territorial state.

4. Does the Uniting for Peace resolution apply where there is a threatened veto but the Security Council never brought the issue to a vote?

According to the Uniting for Peace Resolution, an “emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations.”⁶⁷ The annex further elaborated that:

Emergency special sessions pursuant to resolution 377 A (V) shall be convened within twenty-four hours of the receipt by the Secretary-General of a request for such a session from the Security Council, on the vote of any seven members thereof, or of a request from a majority of the Members of the United Nations expressed by vote in the Interim Committee or otherwise, or of the concurrence of a majority of Members as provided in rule 9.⁶⁸

The resolution clearly stated that there does not need to be a vote by the Security Council to legitimize the convening of an emergency special session. One purpose of 377 A (V) is to ensure that international peace and security are maintained even if the Security Council “because of lack of unanimity of the permanent members, fails to exercise [that] primary responsi-

⁶⁶ Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

⁶⁷ G.A. Res. 377 (V), *supra* note 49, at 10-11.

⁶⁸ *Id.*

bility.”⁶⁹ For this reason, the burden to recognize when the Security Council is not exercising its primary responsibility does not fall just to the Security Council itself but to all members of the General Assembly.

There have been ten emergency special sessions called since 1956.⁷⁰ The Security Council has convened seven of these sessions, but only six were convened due to a vote and subsequent veto by one of the permanent members.⁷¹ The emergency special session that was convened on request from the Security Council, without a vote and veto, was in 1958 in regards to the crisis in Lebanon.⁷² In this circumstance, the issue was not that a permanent member used veto power, but that the Security Council was unable to devise any solutions to the crisis at hand.⁷³ In this circumstance, the Security Council did not specifically cite Resolution 377 A (V) as the means for referring the issue to the General Assembly, but did use the this specific language: “[t]aking into account that lack unanimity of its permanent members . . . has prevented the Council from exercising its primary responsibility for the maintenance of international peace and security, [d]ecides to call an emergency special session of the General Assembly.”⁷⁴ Although Resolution 377 A (V) was not specifically cited, the language is identical to the resolution. Members of the General Assembly requested the remaining three emergency special sessions and the majority of members agreed to convene based on those requests.⁷⁵ These special sessions were: (1) the question of Pakistan requested by Senegal first in 1980, (2) the question of Namibia requested by Zimbabwe in 1981, and (3) the question of Israel and Palestine requested by Qatar first in 1997.⁷⁶

Finally, in 1951, in regards to Communist China and Korea, recognizing that permanent members of the Council would not agree, the Council voted to remove the issue from its agenda.⁷⁷ The General Assembly was in regular session and took up the issue there.⁷⁸ In this circumstance, Resolution 377 A (V) was not cited but the issue was diverted to the General Assembly for action and the following language was used in the resulting Resolution 498,

⁶⁹ Christian Tomuschat, UNITED NATIONS, *Uniting for Peace General Assembly Resolution 377 (V): Introduction 1* (2008).

⁷⁰ GENERAL ASSEMBLY OF THE UNITED NATIONS, *Emergency Special Sessions*, <http://www.un.org/en/ga/sessions/emergency.shtml> (last visited Sept. 26, 2011).

⁷¹ Tomuschat, *supra* note 69.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ S.C. Res. 129, U.N. Doc. S/RES129 (Aug. 7, 1958).

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⁷⁵ Tomuschat, *supra* note 69.

⁷⁶ *Id.*

⁷⁷ See RICHARD HISCOCKS, *THE SECURITY COUNCIL: A STUDY IN ADOLESCENCE* 292-93 (1973).

⁷⁸ *Id.* at 289.

“Noting that the Security Council because of lack of unanimity of the permanent members, has failed to exercise its primary responsibility for the maintenance of international peace and security in regard to Chinese Communist intervention in Korea . . .”⁷⁹ The language clearly resembles that of the Uniting for Peace Resolution.

Although in a majority of circumstances the Security Council did vote on an issue and then refer it to the General Assembly, the examples given and the wording of the Resolution itself seem to support that a Security Council vote (and actual exercise of the veto) does not need to occur for an issue to be taken up by the General Assembly.

C. Was the Canadian armed intervention justified under the doctrine of collective self-defense? Can self-defense apply to the threat of pollution?

1. Can polluting a down-stream neighboring State constitute a biological “attack” for purposes of the doctrine of self-defense?

Due to the large number of corpses rotting in Tangoon’s lakes and streams, an epidemic has been spreading throughout the country and into neighboring Samutra. The Tangoon Minister of the Interior Balthasar stated “the deaths and spreading disease are God’s way of cleansing Tangoon and Samutra of those who are unworthy because they do not adhere to the true form of the Tanmutran faith.”⁸⁰ In the eyes of the leaders, the disease appears to be a weapon wielded by God to kill the Samutrans. Whether the international community should consider it to be a biological weapon as well is a close question.

For guidance in answering this question, Canada may cite to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction. The Convention provides that “each state. . . undertakes never in any circumstance to . . . retain: Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes.”⁸¹ If the disease spreading from Tangoon can be equated to a biological weapon according to the definition above, the U.N. Charter justifies using force in aid

⁷⁹ G.A. Res. 498 (V), U.N. Doc. A/RES/498 (Nov. 5, 1951).

⁸⁰ U.N. Secretary-General, *Report of the Secretary General on the Situation in Tangoon*, ¶ 8, U.N. Doc. S/2011/5/30 (May 30, 2011).

⁸¹ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction art. 1, Mar 26, 1975, 1015 U.N.T.S. 163.

of Samutra because “nothing...shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations.”⁸² To understand what qualifies as an armed attack, it is helpful to look at the relevant classifications listed in the “Definition of Aggression” Resolution, General Assembly Resolution 3314. In Article 3, aggression is defined as “the use of any weapons by a state against the territory of another state.”⁸³ Article 4 provides an even broader definition of aggression: “The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.”⁸⁴

The United States, in turn, will argue that such an interpretation of Article 51 of the U.N. Charter is unprecedented and unfounded. While limited countermeasures may be justified to prevent a source of deadly pollution from spreading downwind or downstream to another country, such action does not include an armed invasion of the polluting State.

2. Was Canada's response necessary and proportionate? Did it unnecessarily violate religious practices regarding burial?

Canada's military response appears both necessary and proportionate, two of the most basic metrics of *jus in bello* theory.⁸⁵ The intransigence of Tagoon's government in allowing access to typhoon victims by international relief efforts made the limited destruction of portions of the border wall necessary. It appears the Canadian force destroyed no more of the wall than was necessary to achieve their military objective and Canada took care to do so in a way that resulted in only damaged infrastructure and no loss of life. The only other reported damage to property by military activity was the disabling of excavation equipment in Demonville. Most of the operation has not required the Canadian commandos to use deadly force. In their only fire-fight, the Canadians killed just ten Tagoon security personnel. This seems to be an acceptable number of casualties, particularly considering that the Canadian force was acting in self-defense in that instance. The Canadian force's limited use of force seems well within the limits of proportionality.

On the other hand, the 1949 Geneva Conventions generally discourage both cremation and mass burial of dead civilians, regardless of their religion. This is partly grounded in the concept of respect for the dead, but also on the more practical basis that it makes identification and re-burial difficult later. The Geneva Conventions also encourage adherence to religious customs of

⁸² U.N. Charter art. 51.

⁸³ G.A. 3314 (XXIX), art. 3, U.N. Doc. A/RES/3314 (Dec. 14, 1974).

⁸⁴ *Id.* at art. 4.

⁸⁵ YEHUDA MELZER, CONCEPTS OF JUST WAR 91 (1975).

the deceased. However, they clearly grant exceptions for protection of public health and hygiene, particularly in the face of epidemic disease.⁸⁶ Because of the threat of continuing epidemic posed by the decomposing corpses, burning them in contravention to ultra-orthodox Tanmutran beliefs appears to be justified, although it is unclear from the facts whether the Samutran aid workers are meeting related requirements in regards to marking of mass graves, identification, and recording of deceased persons, etc. It is also worthwhile to note that since most (though possibly not all) of the deceased typhoon victims were from the lower castes, and thus were not ultra-orthodox Tanmutrans, cremation would not even have been a violation of their individual religious beliefs.

II. WHETHER CANADA'S APPREHENSION, DETENTION, AND PROPOSED SURRENDER TO THE ICC OF ISHMAEL BALTHASAR AND CLYDE BARRETT ARE LAWFUL UNDER INTERNATIONAL LAW?

A. Was the apprehension justified under the Law of War and Human Rights Law?

1. Was Balthasar's apprehension justified under the law of war as a military action to protect the aid convoy from attack?

It is not clear that International Humanitarian Law (the law of war) can be used to justify the apprehension of Balthasar, because the laws of war apply only in situations of armed conflict. Armed conflict can be defined as "a situation where fighting takes place between the armed forces of two States in an "international armed conflict"; or within the territory of a State between its regular armed forces and organized armed groups or when such groups fight one another in "internal" or "non-international armed conflict."⁸⁷ In this circumstance, the armed forces were present to protect the humanitarian aid workers and were not there to engage in armed conflict. Furthermore, there was no sustained fighting in Tagoon or between Canada and Tagoon.

On the other hand, the Safety of United Nations and Associated Personnel resolution of the General Assembly established regulations and protections for situations that are not armed conflicts but where U.N. personnel or con-

⁸⁶ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 130, Aug. 12, 1949, 75 U.N.T.S. 973; *see also* Geneva Convention (I) Amelioration of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 970 (providing similar provisions for deceased combatants).

⁸⁷ Alexandre Faite, INT'L COMM. OF THE RED CROSS, *Legal Considerations Regarding the Protection of Humanitarian Workers in the Field*, in SECURE 02, 38 (2002).

tractual organizations are aiding humanitarian efforts.⁸⁸ This resolution states that “States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel.”⁸⁹ The humanitarian mission in Tagoon seems to fall within the scope of the resolution because the U.N. General Assembly recommended that “all necessary means” to deliver humanitarian aid to the Tagoonise people should be used. This case is similar to that of British U.N. forces who were assigned to protect aid convoys in Bosnia. When they were attacked by Bosnian Serb forces in 1994, there was no question that they acted appropriately in returning fire.⁹⁰ It stands to reason that if a party can use deadly force to protect an aid convoy in a U.N. authorized operation, it should be able to capture its attacker to neutralize the threat as well.

2. Was Barrett’s apprehension justified as a means to stop human rights abuses in progress?

The evolution of customary international law has resulted in the designation of certain crimes as so heinous and of universal concern as to constitute crimes against all mankind. These crimes originally included acts of piracy, but have come to include genocide, crimes against humanity, war crimes, and, more recently, terrorism and torture.⁹¹ It is presumed that those who commit these crimes are *hostis humani generis* (enemies of all mankind) and all the nations of the world are said to have the authority to apprehend and prosecute them based on the concept of universal jurisdiction.⁹² Slavery has long been considered a crime against humanity, and thus falls under the umbrella of universally condemned crimes. The definition of slavery has been expanded to include modern slave-like practices, such as forced or compulsory labor, and many conventions and treaties have been established to work towards the abolition of such practices. Additionally, the abuse of children via forced or compulsory labor is considered a gross violation of international laws.

Canada will most likely begin by making the assertion that the slave-labor like conditions experienced by the workers at the Geomin Corp mining site constitutes a crime against humanity. At the very least, the designation of the labor practices as a crime against humanity allowed the Canadian comman-

⁸⁸ G.A. Res. 49/59, U.N. Doc. A/RES/49/59, at 1 (Feb. 17, 1995).

⁸⁹ *Id.* at art. 7.

⁹⁰ Roger Cohen, *Bosnia Serbs Attack Aid Convoy; U.N. Rejects NATO Strike*, N.Y. TIMES, Oct. 19, 1994, at A6.

⁹¹ Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 786 (1988).

⁹² Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 324 (2001).

dos to intervene under the premise of universal jurisdiction to stop the human rights abuses occurring in their presence. Article 4 of the Universal Declaration of Human Rights, in recognizing the equal and inalienable rights of all humans, declares that “[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”⁹³ While originally envisaged as the exercise of ownership over the person of another, the ILO Convention 29: Forced or Compulsory Labor (1932) expanded the term “slavery” to include forced or compulsory labor, meaning “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”

Canada will argue that even though the workers were operating under the guise of Tagoon’s “National Service Program,” this program is a mere front for their compulsory and forced labor. Furthermore, while Tagoon’s cultural history includes a sharp division between the orthodox elite and non-elites, cultural legacy does not entitle the elites to exemption from laws banning slavery; there are legitimate, substantive limitations on cultural practices, even on well-entrenched traditions. Accordingly, all forms of slavery, including contemporary slavery-like practices, are a gross violation of human rights under international law. Since all nations are obliged to stop the commission of certain universally condemned crimes, including slavery, Canada will argue that its forces were justified in their apprehension of Clyde Barrett.

Canada will bolster its case by pointing out that the workers for the mining site included hundreds of *teenage* boys and girls. ILO Convention 182: The Worst Forms of Child Labour (June 17, 1999) defines a “child” as all persons under the age of 18, and considers “forced or compulsory labor” to be one of the worst forms of child labor seen throughout the world. Article 1 of the Convention goes on to state that “[e]ach Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.” Canada, who along with the United States ratified the convention, was thus obliged to step in and stop the human rights abuses taking place via forced child labor.

The United States may argue that there is no proof that the work conditions were some form of “slave labor.” Since Canada is using the claim as an affirmative defense to a *prima facie* violation of international law, Canada bears the burden of proving its claim. Here, there is no proof that the conditions experienced by the teens working in the mine are so horrible so as to be worse than the everyday conditions experienced by those children who are *not* working there. The United States may cite *Flomo v. Firestone Natural Rubber*, a case where twenty-three Liberian children brought suit against the

⁹³ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

Firestone rubber plantation operated in Liberia alleging conditions of forced child labor.⁹⁴ Despite testimony that these children worked in slave-like conditions and suffered from malnutrition, disease, physical ailments from exposure to chemicals, and the lack of decent educational opportunities, the court eventually found it had not been given an adequate basis for inferring a violation of customary international law.⁹⁵ The main reasoning behind the decision was that the court did not know the welfare of those children who did *not* work on the plantation compared to the net effect on their welfare of those working *on* the plantation. Conceivably, the Court reasoned, those on the plantation may have been “better off than the average Liberian child.”⁹⁶ The United States may make a similar argument here.

Furthermore, even *if* a violation of human rights can be found in the work conditions of the Geomin Corp mine, the United States will argue that Clyde Barrett cannot be held liable (and taken into custody) for these violations. Because the laborers were provided to Clyde Barrett and Geomin Corp. through the government of Tangoon, in order to be liable it would have to be shown that Barrett was legally responsible for the forced labor practices of the Tangoon government. In *Doe v. Unocal Corp*, charges were brought against Unocal for forced labor practices in the building of a gas pipeline in Myanmar.⁹⁷ The workers were supplied to the company by the Myanmar military, and the company was well aware of the practices being used. The Court eventually found that mere knowledge of the labor abuses was not enough to constitute liability. Rather, “liability requires participation or cooperation in the forced labor practices.”⁹⁸ Neither Unocal in *Doe* nor Geomin and Clyde Barrett in the case at hand initiated the obtaining of forced labor or controlled the recruitment. Thus, the United States will argue that because Clyde Barrett has no control over the government of Tangoon, which created and maintained the conditions of slave-labor, he could not justifiably have been apprehended in order to stop the abuses.

Canada may respond that the Clyde Barrett could still be liable for aiding and abetting the commission of the abuses. In the appeal of *Doe*, the court held that Unocal could potentially fulfill the *actus reus* and *mens rea* requirements of aiding and abetting.⁹⁹ Because Unocal gave “practical assistance or encouragement” in the form of money, photos, maps, and surveys to the Myanmar military which had a “substantial effect of the perpetration of the crime,” the court reasoned this could fulfill the *actus reus* requirement.

⁹⁴ *Flomo v. Firestone Natural Rubber Co. LLC*, 643 F.3d 1013 (7th Cir. 2011).

⁹⁵ *Id.* at 1025.

⁹⁶ *Id.*

⁹⁷ *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

⁹⁸ *Id.* at 1310.

⁹⁹ *John Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

Additionally, Unocal knew of the use of forced labor and therefore could have (or should have) known that their assistance to the military would encourage the continued use of the labor violations, satisfying the *mens rea* requirement of aiding and abetting.¹⁰⁰ Canada could similarly argue that the offer to increase the annual license fee to the regime in Tangoon by \$50 million for the second mine satisfies the *actus reus* requirement through “practical assistance or encouragement which has a substantial effect of the perpetration of the crime.” Since Clyde Barrett was present at the mining operation at the time, Canada could argue that he would have known of the use of child slave-labor and known the second mine would encourage its use. Therefore, Canada may argue that even if no direct liability exists, it is still reasonable to assert that Barrett could be charged with aiding and abetting the commission of the crime.

B. Was the detention lawful under the *Mala Captus bene detentis* doctrine?

If Balthsar’s and Barrett’s initial apprehensions were unlawful, is their detention nonetheless lawful because there was a subsequent ICC arrest warrant? In other words, does the mala captus bene detentis principle apply to the ICC?

If it is determined that the apprehension of Balthsar and Barrett by Canadian forces was unlawful under the circumstances, there still is the question of whether they can nonetheless be lawfully detained by virtue of the ICC arrest warrants. The principle of *mala captus bene detentus* (unjust capture, but fair detention) states that “a person improperly seized may nevertheless properly be detained.”¹⁰¹ This principle has fallen into disfavor throughout the international legal community, since it tends to erode confidence in the rule of law and opens the door to using abduction as a ‘shortcut’ alternative to extradition.¹⁰² Discomfort with the concept of *mala captus bene detentus* has significantly intensified in response to the United States’ use of “extraordinary rendition” in its prosecution of the war on terrorism.¹⁰³

The Rome Statute of the ICC neither explicitly permits nor forbids the appearance of an illegally obtained suspect before the Court. It provides no clear guidance on how to extradite persons from conflict zones with no functioning government or from non-party States. Its procedures for the arrest and surrender of persons to the Court are written generally under the assump-

¹⁰⁰ *Id.* at 953.

¹⁰¹ Michael P. Scharf, *The Prosecutor v. Slavko Dokmanovic: Irregular Rendition and the ICTY*, 11 LEIDEN J. INT’L L. 369, 379 (1998).

¹⁰² M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION 324-25 (2007).

¹⁰³ *Id.* at 289-94.

tion that the requested State is a willing and able partner in the administration of justice with a competent law enforcement authority.¹⁰⁴ The ICC's underlying purpose of promoting the rule of law, taken in concert with the prevailing rejection of *mala captus bene detentus*, would seem to indicate the Court should not find the detention of Balthsar and Barrett to be lawful if their apprehension was unlawful.

An oft-cited special case, however, is the "Eichmann exception," where the accused's conduct was so heinous as to permit his abduction to be "decoupled" from his trial.¹⁰⁵ If the ICC and Canada wish to pursue Balthsar and Barrett as exceptionally blameworthy international criminals, they arguably can pursue the conviction and apologize for the capture later. In Eichmann's case, the Security Council censured Israel's abduction of Eichmann and required Israel to make "appropriate reparation" to Argentina, which readily accepted Israel's apology, but the Council did not require that Eichmann be returned to Argentina.¹⁰⁶

The International Criminal Tribunal for the Former Yugoslavia applied the Eichmann exception in the *Nicolic Case*. Nicolic had been abducted from his home in Serbia, and argued that the Tribunal should dismiss his case to uphold his human rights. The Tribunal held instead that, given the grave charges, dismissal would be an inappropriate remedy.¹⁰⁷

It will be particularly hard for the United States to prevail on this issue, since the U.S. Supreme Court itself has endorsed the concept of *mala captus bene detentus* in *U.S. v. Alvarez-Machain*.¹⁰⁸ The controversial case involved a Mexican national abducted in Mexico by private Mexican nationals under the direction of agents of the U. S. Drug Enforcement Administration. The Court held that because the extradition treaty between the U. S. and Mexico did not specifically prohibit abduction, "the court need not inquire as to how the respondent [Alvarez-Machain] came before it."¹⁰⁹

C. Can the ICC exercise jurisdiction over nationals of a non-party state who take action in the territory of a non-party state if the result is massive deaths within the territory of a State Party to the ICC Statute?

There are two main issues at hand: First, does the Vienna Convention on the Law of Treaties prevent the ICC from exercising jurisdiction over the

¹⁰⁴ Rome Statute of the International Criminal Court, *supra* note 24.

¹⁰⁵ Scharf, *supra* note 101, at 381.

¹⁰⁶ *Id.*

¹⁰⁷ Prosecutor v. Nicolic, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Case No. IT-94-2-PT, (Oct. 9, 2002), http://www.icty.org/x/cases/nikolic_dragan/tdec/en/10131553.htm.

¹⁰⁸ United States v. Alvarez-Machain, 504 U.S. 655 (1992).

¹⁰⁹ *Id.* at 662.

nationals of non-party States? Second, if no violation exists, does the objective territorial basis of jurisdiction (the effects test) apply to the question of whether an act was committed within the territory of a State Party to the ICC?

The drafters of the ICC Statute decided not to give the Court universal jurisdiction, despite the fact that the crimes within its competence are crimes of universal jurisdiction under international law. Instead, the ICC Statute (Article 12) gives the Court jurisdiction over nationals of State parties, and non-party nationals who commit crimes within the territory of a State party.¹¹⁰ In addition, Article 13 allows the ICC to prosecute non-party nationals when the situation is referred to the prosecutor by the Security Council, “irrespective of the nationality of the accused or the location of the crime.”¹¹¹

Ishmael Balthasar and Clyde Barrett are accused of conspiring to commit a crime against humanity in the region of Tangoon, which resulted in effects equivalent to a biological attack on neighboring Samutra. Both Balthasar and Barrett are nationals of states not party to the ICC Statute, and all alleged criminal action took place within the territory of a state also not a party to the statute. While the crisis in Tangoon was brought before the Security Council, no subsequent action was taken.

The United States will argue that, in the absence of Security Council authorization, the ICC’s exercise of jurisdiction over the defendants without the consent of their states of nationality would represent a violation of the Vienna Convention on the Law of Treaties.¹¹² Article 34 of the Vienna Convention states that “a treaty does not create either obligations or rights for a third State without its consent.”¹¹³

Canada will point out that the Special Court for Sierra Leone provides a precedent for the ICC’s exercise of jurisdiction in this case. The Special Court for Sierra Leone, a treaty based international court, upheld the indictment for Charles Taylor, the Head of State for the neighboring state of Liberia in respect of his participation in the armed conflict in Sierra Leone.¹¹⁴ Despite the fact that Taylor was a citizen of Liberia, which was not a state not party to the treaty, the indictment received wide support, including from the United States, and was upheld by the SCSL Appeals Chamber.

¹¹⁰ Rome Statute of the International Criminal Court, *supra* note 24, at art. 12.

¹¹¹ *Jurisdiction and Admissibility*, INT’L CRIM. COURT, <http://www.icc-cpi.int/Menu/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm> (last visited Sept. 15, 2011).

¹¹² Vienna Convention on the Law of Treaties, *supra* note 1.

¹¹³ *Id.* at art 34.

¹¹⁴ *The Prosecutor v. Charles Ghankay Taylor*, The Special Court for Sierra Leone, <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> (last visited Nov. 16, 2012).

Further, Canada may point out that the United States is party to a number of treaties that create universal jurisdiction over terrorists without concern about whether the State of nationality is a party to the Convention. In *United States v. Yunis*, the United States prosecuted a Lebanese national accused of hijacking a Jordanian airliner that had two American hostages on board.¹¹⁵ In that case, the United States based its jurisdiction on the International Convention on the Taking of Hostages, despite the fact that Lebanon was not party to this treaty.

Even if the ICC can properly exercise jurisdiction over non-party nationals for crimes committed in the territory of a State party, the United States will argue that the alleged crime in this case was committed in Tangoon, which is not a party to the ICC, and there was no intent for the crime to have an effect on neighboring Samutra. Canada will respond that the Secretary-General put Tangoon on notice that the failure by the government in Tangoon to provide medicine to the sick and injured, and refusal to dispose of bodies contaminating shared water resources, had the effect of a direct biological attack on the people of Samutra. As such, the crime was committed both in Tangoon and in Samutra, under the principle of objective territoriality. The notion of objective territoriality declares that a state may exercise jurisdiction over a crime committed extraterritorially “as long as the harmful effect(s) or result(s) take place within the jurisdiction's territorial boundaries.”¹¹⁶ The objective territoriality principle is designed to “punish the perpetrator of conduct which causes harm within the territory of the forum state, even though none of the conduct occurs there.”¹¹⁷ Being party to the Rome Statute, Samutra may then delegate this territorial jurisdiction to the ICC.

One of the most well-known and oft-cited cases of the use of the objective territoriality principle is the *Lotus* case, which Canada is likely to bring up.¹¹⁸ In *Lotus*, Turkey prosecuted a French ship pilot after his ship, the S.S. *Lotus*, collided with a Turkish vessel resulting in the loss of eight Turkish lives.¹¹⁹ Turkey based its objective territoriality jurisdiction on the fact that the “effects of the pilot’s conduct had caused harmful effects on the Turkish vessel.”¹²⁰ France objected, claiming the “flag state alone had jurisdiction in such cases and that Turkey could not legitimately try a French citizen under international law” without proving their jurisdiction. The Permanent Court

¹¹⁵ *United States v. Yunis*, 924 F. 2d. 1086 (1991).

¹¹⁶ Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1123 (1982).

¹¹⁷ *Id.* at 1125.

¹¹⁸ *S.S. Lotus*, (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

¹¹⁹ *Id.*

¹²⁰ M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS* 2 (2008).

of International Justice “rejected France’s argument, ruling that the burden was on France to demonstrate that Turkey’s exercise of jurisdiction violated some prohibitive rule of international law.”¹²¹ Since no rule existed to prove otherwise, Turkey was able to establish objective territorial jurisdiction based on the direct effects experienced by the Turkish vessel. Furthermore, the *Lotus* case demonstrates that the exercise of objective territorial jurisdiction may only be denied if “any international legal rule exists that would prohibit it.”¹²²

The U.S. Supreme Court Opinion in *Strassheim v. Daily*, which although not binding precedent in the case at hand, helps demonstrate that the United States practices objective territoriality in its own proceedings.¹²³ The Court in *Strassheim* held that “[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm.”¹²⁴ Furthermore, the United States regularly uses the effects theory to prosecute narcotics cases where “the criminal acts occurred abroad so long as the drugs were intended to be distributed within the United States.”¹²⁵ For instance, in *Chua Han Mow v. United States*, a Malaysian citizen, who was in Malaysia at the time, was charged by the United States for importing and distributing heroin.¹²⁶ The United States established jurisdiction based on objective territoriality, finding that the defendant had intended to create a detrimental effect in the United States and committed acts which resulted in such an effect when the heroin unlawfully entered the country.¹²⁷ The principles behind objective territorial jurisdiction have also been extended to apply to acts committed by nations that threaten the sovereignty of other nations by producing detrimental acts within them.¹²⁸

The United States will not deny its use of the objective territoriality principle and will instead counter that the drafters of the ICC Statute did not intend for the ICC to exercise jurisdiction based on this principle. The negotiating record is unclear on this point, and the ICC has not yet asserted jurisdiction in a case based solely on the objective territorial principle. Canada will point out, however, that the Special Court for Sierra Leone’s case against Charles Taylor is based on the objective territorial principle, and that the United States has been a strong supporter of the Taylor prosecution.

¹²¹ Scharf, *supra* note 101.

¹²² *Id.*

¹²³ *Strassheim v. Daily*, 221 U.S. 280 (1911).

¹²⁴ *Id.* at 285

¹²⁵ Scharf, *supra* note 101.

¹²⁶ *Chan Han Mow v. United States*, 730 F. 2d. 1308 (1984).

¹²⁷ *Id.* at 1312.

¹²⁸ *Rocha v. United States*, 288 F. 2d. 545 (1961).

D. Did Canada violate Balthasar's Head of State immunity when it captured and/or subsequently detained him for eventual surrender to the ICC?

1. Does Head of State immunity apply to a *de facto* Head of State who is not the *de jure* Head of State?

International law accords sitting Heads of State immunity from arrest, detention, and prosecution. This immunity applies to all of the leader's activities, whether they are performed in an official capacity or private capacity. However, Head of State immunity is not accorded to *de facto* leaders who are not formally recognized by the territorial State. Thus, in the 1997 trial of former *de facto* dictator of Panama, Manuel Noriega, the United States' Eleventh Circuit Federal Court of Appeals held that a foreign leader is only entitled to immunity in U.S. courts if the U.S. government formally recognized the leader.¹²⁹ The court further found that Head of State immunity is granted to the individual that the Executive Branch recognizes as the legitimate head of state, irrespective of whether the leader exercises *de facto* control.¹³⁰

In this case, Raffiiki Balthasar continues to hold the official title Head of State of Tangoon, though he has passed *de facto* power over to his younger brother Ishmael Balthasar. Since neither Canada nor Samutra recognize Ishmael Balthasar as the Head of State of Tangoon, Canada will argue that he is not entitled to any immunity.

In the *Belgium Arrest Warrant Case*, the International Court of Justice declared that "in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister of Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."¹³¹ The ICJ thus held that an arrest warrant issued by Belgium against the sitting Foreign Minister of the Congo violated international law. Drawing from this precedent, the United States may argue that Balthasar formally holds the title of Minister of the Interior, but has broader powers equivalent to a Minister of Foreign Affairs. For example, the *Compromis* indicates that he had the power to enter into a multi-million dollar contract to sell mining rights to foreign investors. As such, the *Arrest Warrant Case* suggests that Ishmael Balthasar would be entitled to the same type of personal immunity as a sitting Head of State.

¹²⁹ *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997).

¹³⁰ *Lafontant v. Aristide*, 844 F.Supp. 128, 132 (E.D.N.Y. 1994) ("Recognition of a government and its officers is the exclusive function of the Executive Branch.").

¹³¹ HAZEL FOX, *THE LAW OF STATE IMMUNITY* 19 (2008).

2. Does Head of State immunity apply to persons captured for trial by the ICC?

The United States will argue that Balthasar's Head of State immunity applies both to prosecution in national courts and to proceedings in national courts to surrender him to the ICC.

Since Balthasar is detained in a Canadian vessel, arguably he is being held by Canada. But since the ship is docked at Samutra's port, that country may be viewed as the custodial state. Either way, since both are parties to the ICC, Canada will argue that Balthasar is not entitled to Head of State immunity because Article 27 of the ICC Statute declares that there is no sovereign immunity from ICC Prosecution.¹³²

The United States may argue that Article 27 only applies to prosecution by the ICC, not to proceedings in national courts. This argument is bolstered by Article 98 of the Rome Statute, which states:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third state. . .¹³³

ICC party nations including Kenya, Chad, and Djibouti have cited this provision in refusing to arrest Omar Al-Bashir during his visits, despite the ICC warrant for his arrest.¹³⁴ The ICC has reported these State Parties' failure to arrest Al-Bashir to the Security Council, but the Security Council has yet to act.¹³⁵

Most recently, with respect to Malawi's failure to arrest Al-Bashir when he visited that country, the ICC Pre-Trial Chamber stated, "the principle in international law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction."¹³⁶

Thus, Canada will argue that Head of State immunity is abrogated even with respect to action taken by national authorities, where those authorities

¹³² Rome Statute of the International Criminal Court, *supra* note 24, at art. 27.

¹³³ *Id.* at art. 98.

¹³⁴ *Djibouti Becomes 3rd ICC Member to Receive Sudanese President*, SUDAN TRIB., May 11, 2011, <http://www.sudantribune.com/Djibouti-becomes-third-ICC-member,38809>.

¹³⁵ *Id.*

¹³⁶ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-139, Pre-Trial Chamber I, ¶ 36, (Dec. 12, 2011).

are acting in accordance with the ICC's request.¹³⁷ This position is justified because reading Article 27 as applicable only to actions by the ICC would leave parts of the provisions meaningless. This is because the Court is forced to rely on national authorities to carry out its arrest warrants. If Head of State immunity were to be left intact with respect to arrests by national authorities, Article 27's declaration that immunities shall not bar the exercise of jurisdiction by the Court would be inapplicable and the Court would be unable to exercise its jurisdiction.¹³⁸ In addition, the text of Article 27(2) states itself that not only international law immunities, but also national law immunities, shall not bar the exercise of the Court's jurisdiction.

¹³⁷ *Id.* at 337-38.

¹³⁸ *Id.* at 338.