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Memorial of the Applicant

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2011-2012
NIAGARA INTERNATIONAL MOOT COURT COMPETITION

A DISPUTE ARISING UNDER THE
STATUTE OF THE INTERNATIONAL COURT OF JUSTICE
FEBRUARY, 2012
THE GOVERNMENT OF THE UNITED STATES
(Applicant)
v.
THE GOVERNMENT OF CANADA
(Respondent)
MEMORIAL OF THE APPLICANT

James van Wyck & Justin Dick

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STATEMENT OF FACTS

International law is founded on the idea of the sovereign equality of nations. While countries strive to work together in an increasingly globalized world, respect for national sovereignty stands as the foundational concept of international relations. While international law does contain mechanisms
through which national sovereignty may, on occasion, be lawfully infringed, rules and procedures ensure that such infringements are only warranted in limited circumstances. Balancing the concept of sovereignty with the protection of individual rights in particular countries can be a complex task. The dispute in Tangoon and Samutra is illustrative in this regard.

I. THE ISLAND OF TANMUTRA

Tanmutra is a small island located just south of the equator in the Pacific Ocean. The inhabitants of Tanmutra, who are an ancient seafaring people that adhere to the Tanmutran religion, have been settled on the island for over a thousand years. In the past century, the Tanmutran religion has split into two distinct sects. Approximately five percent of the island’s population adheres to an ultra-orthodox form of the religion. Adherents to this sect are required to pray in mountain-top temples three times a day, believe in faith healing, shunning the use of medicine, insist that the dead must be buried under a pile of stones and under no circumstances can be incinerated, and reject the use of most modern technology. Conversely, those that adhere to the non-orthodox religion pray while they are outdoors; allow the use of medicines, alcohol, and technology; and permit either burial or incineration of the dead.

For over one hundred years Tanmutra was a French colony known as French Samutra, but it achieved independence in 1990 as the Republic of Samutra. Shortly thereafter, the country divided into two separate, independent, states: Tangoon and Samutra. Both nations were admitted to the United Nations in 1991, and affirmed that treaties ratified by French Samutra in 1990 would continue in force. However, in 2010, when Samutra elected to ratify the Rome Statute of the International Criminal Court (ICC), Tangoon declined to do so. Followers of the ultra-orthodox form of the Tanmutran religion settled in the mountainous regions of Tangoon where they could more easily adhere to the stringent requirements of their faith. Upon gaining independence, Raffiiki Balthasar ("Raffiiki"), the first Head of State of Tangoon, elected to govern his country in accordance with the principles of the ultra-orthodox Tanmutran faith.

Since the separation of the two countries, Samutra has become a world-class tourist destination. As a result, Canadian hotel giant Fairmont Hotels

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1 Compromis, ¶ 2.
2 Id. ¶ 3.
3 Id.
4 Id.
5 Id. ¶ 4.
6 Id. ¶ 5.
and Resorts has been able to profit a great deal from the island's natural beauty.\(^7\) This influx of foreign investment has allowed the citizens of Samu-
tra to enjoy one of the highest standards of living in the world.\(^8\) Unfortunate-
ly, Tangoon has not received the same type of financial support from interna-
tional tourism. As a result, the country's political leaders must rely on, among other things, the extraction and sale of natural resources to sustain their fragile economy.\(^9\) De facto political and military leader Ishmael Bal-
thasar (''Balthasar''), the younger brother of Head of State Raffiiki, has been forced to deal with the challenge of leading this disadvantaged nation.

II. THE DEMON MINE

In 2007, the world's largest known deposit of cobalite was discovered on the face of Mont Demon in Tangoon.\(^10\) Ishmael Balthasar took advantage of this rare opportunity to raise capital in his country by granting the US-based Geomin Corporation a license to mine and process the cobalite. As part of this agreement, Tangoon provided workers from its National Service Pro-
gram to assist with the mining operations. While the mining was taking place, Geomin CEO Clyde Barrett (''Barrett'') temporarily moved to Tangoon to ensure that the license agreement was being properly carried out.

After three years of very successful mining, geologists from Geomin dis-
covered a second extremely rich cobalite vein located just beneath the sur-
face of Demonville, a village located on the south face of the mountain.\(^11\) After villagers declined Geomin's generous offer to purchase their land, Bar-
rett met with Balthasar to discuss how profitable this new site could be for both Geomin and Tangoon. Recognizing his country's desperate need for continued infusions of capital, Balthasar informed Barrett that he would find a way to solve this problem.

III. CYCLONE KODO AND ITS AFTERMATH

On May 25, 2011, a deadly cyclone ripped through the island of Tanmu-
tra. Tragically, the unsuspecting citizens of Tangoon, specifically the people of Demonville, were hit the worst.\(^12\) As a result of the State's religious be-
liefs prohibiting the use of modern technology, the citizens of Tangoon were

\(^7\) Id. ¶ 6.
\(^8\) Id.
\(^9\) Id. ¶ 8.
\(^10\) Id.
\(^11\) Id. ¶ 9.
\(^12\) Id. ¶ 12.
not aware that the cyclone was coming. Furthermore, the State’s religious views lead them to refuse offers of medical assistance after the storm.

The government of Samutra requested an emergency session of the United Nations Security Council (UNSC) after disease from bodies in Tangoon began to spread into their country.\(^{13}\) While a draft resolution was circulated, the United States indicated that it would veto any such resolution, as it feared that it would constitute an unwarranted intrusion into the domestic affairs of a member state without any real threat to international peace and security.\(^{14}\) Circumventing UN procedure, which grants jurisdiction over such matters to the UNSC, Samutra turned to the General Assembly (GA). The GA subsequently adopted Resolution A/RES/65/299 recommending the use of all necessary means to deliver aid to the citizens of Tangoon.\(^{15}\)

Following the GA resolution, the government of Canada sent an Iroquois Class destroyer carrying armed forces to Tanmutra. After landing in Samutra, the 120 armed commandos employed explosives to demolish parts of the border wall and invaded Tangoon.\(^{16}\) Upon entry, Canadian forces encountered a blockade of Tangoon security personnel led by Balthasar. Canada aggressively broke through the barricade, sparking a firefight between the groups, resulting in the death of ten Tangoon security personnel. In the course of battle, Canadian forces captured seven Tangoon nationals, including Balthasar.\(^{17}\) During Balthasar’s apprehension, Canadian commandos confiscated his personal diary.\(^{18}\)

Shortly after the armed conflict, the Canadian commandos arrived at Demonville and immediately shut down the Geomin mining site, operating pursuant to a contract with the government of Tangoon.\(^{19}\) When Clyde Barrett approached the commandos to protest this unauthorized act he was abruptly taken into custody. Both he and Ishmael Balthasar were transferred back to the Canadian destroyer where they have been held for a period spanning 83 days.\(^{20}\)

**STATEMENT OF JURISDICTION**

The United States and Canada (the Parties) respectfully submit this dispute to the International Court of Justice (ICJ) pursuant to Article 36(1) of

\(^{13}\) Id. ¶ 14.
\(^{14}\) Id. ¶ 2.
\(^{15}\) Id. ¶ 15.
\(^{16}\) Id. ¶ 16.
\(^{17}\) Id. ¶ 18.
\(^{18}\) Id.
\(^{19}\) Id. ¶ 19.
\(^{20}\) Id. ¶ 26.
the Statute of the International Court of Justice (ICJ Statute), and in accordance with the Compromis submitted to the Court on 29 August 2011. The Compromis and its attachments reflect an accurate account of the facts as negotiated by the Parties. In accordance with Articles 26-28 of the ICJ Statute, and following the precedent of the Canada-US Gulf of Maine Case, the Parties have agreed that the case be referred to a “special chamber” of the ICJ, consisting of three judges. The Parties have agreed to take no further action to enforce their positions with respect to this dispute pending the outcome of this case. Finally, both States have agreed to fully and immediately implement whatever decision the ICJ renders.

QUESTIONS PRESENTED

The United States respectfully asks this Honourable Court to decide:

I. Whether Canada’s unilateral intervention into Tangoon following Cyclone Kodo constituted an unjustified breach of international law; and

II. Whether Canada, by proceeding without a warrant, acted lawfully in apprehending, detaining and attempting to surrender citizens of non-State parties to the ICC.

SUMMARY OF ARGUMENT

Canada’s intervention into Tangoon violated several foundational concepts of international law. These violations cannot be justified under the United Nations’ (UN) collective self-defence provisions, nor can they be justified under the Responsibility to Protect doctrine. The General Assembly (GA) had no right to authorize intervention, as the situation in Tangoon posed no threat to international peace and security.

The apprehension and detention of both Ishmael Balthasar and Clyde Barrett was unlawful in its disregard of norms of customary international law. Furthermore, the prosecution of Ishmael Balthasar or Clyde Barrett at the International Criminal Court (ICC) would be an unjustified extension of the Court’s jurisdiction.

ARGUMENT

I. CANADA’S INTERVENTION INTO TANGOON WAS NOT LAWFUL UNDER INTERNATIONAL LAW

The applicant will establish that the use of force against Tangoon constituted a violation of international law. It will then be demonstrated that the
existing exceptions to the prohibition on the use of force could not be relied upon.

A. Canada’s actions violate fundamental principles of the United Nations, including the prohibition on the use of force and the preeminence of sovereignty

There are a number of principles that all UN member states are required to act in accordance with. They reaffirm two of the most fundamental aspects of international law: (i) the importance of peaceful resolutions to international conflicts, and (ii) the significance of sovereign equality.

1. The prohibition on the use of force

One of the quintessential principles of the United Nations is that member states are not to use force against one another. This concept is firmly entrenched in Article 2(4) of the UN Charter (the Charter), which Canada, Tungoon, and Samutra are all parties to. This Court has further affirmed the importance of the prohibition on force by holding that it is also a principle of customary international law. GA Resolution 2625 (XXV), which clarifies what actions amount to force, confirms that Canada’s actions were exactly the type of behaviour that is prohibited. In demolishing portions of Tungoon’s border wall and proceeding to break through the barricade set up by Tungoon security personnel, Canada disregarded a fundamental concept of international law.

2. The importance of state sovereignty

International relations are founded on the principle of national sovereignty, with each individual nation being considered equal in the international arena. While some exceptions to sovereignty have been acknowledged, international law is still based on the idea that nation-states have the inalienable:
able right to resolve domestic issues and make independent decisions in their relations with other nations. This idea is enshrined in Article 2(7) of the Charter. The prohibition contained in Article 2(7) applies only to the UN, and not to the actual member-states. Nonetheless, GA Resolution 65/299 (the Tangoon Resolution), which authorized the use of all means necessary to provide aid to Tangoon, was issued by the UN and thus contravened Article 2(7). No organ of the UN can pass resolutions aimed at individual states on matters that are not usually regulated by international law, even if the resolutions are norms of customary international law.\(^{29}\) The Tangoon Resolution was aimed at one specific nation and dealt with the forcible provision of humanitarian aid. The concept of forcible humanitarian intervention is not customary international law, let alone a norm, and thus Canada’s actions in Tangoon contravened established legal principles.

**B. The principle of collective self-defence does not justify Canada’s unlawful entry into Tangoon**

The UN has recognized narrow exceptions to the prohibition of force. None of these exceptions, however, were engaged by the crisis in Tangoon.

1. **Collective self-defense in the Charter**

   Article 51 of the Charter sanctions the use of force where a nation, or group of nations, is acting for the purpose of individual or collective self-defence. The present situation could only be one of collective self-defence as Canada was a third-party to the dispute between Tangoon and Samutra. This Court has previously acknowledged that collective self-defence under Article 51 is a matter of customary international law.\(^{30}\) As such, it is only justified where: (i) the action was requested by an attacked state; (ii) the request was made in response to an armed attack; (iii) the action taken was necessary and the force used was proportional; and (iv) the action was reported to the United Nations Security Council (UNSC).\(^{31}\) The limited scope of this provision illustrates the emphasis that was placed on eliminating forceful actions when the Charter was drafted. Only when all of these conditions have been satisfied may a country legally claim to have been acting in collective self-defence. While Canada’s intervention in Tangoon met the first and fourth requirements listed above, neither the armed attack, nor the necessity requirements were satisfied.


\(^{30}\) Nicaragua, supra note 25, ¶ 194.

\(^{31}\) Id. ¶¶ 193-195.
i. There was no armed attack committed by Tangoon capable of warranting a Canadian response

While no concrete definition of “armed attack” has been settled on, GA Resolution 3314 clarifies what actions can appropriately be considered aggressive. An act of aggression is a much broader term than an armed attack. Accordingly, if an action is not an act of aggression, it cannot be an armed attack. There is also a distinction to be drawn between an armed attack and the use of force. Similar to acts of aggression, the use of force is a broader term than an armed attack and thus where a country does not use force it cannot be said that an armed attack was committed. As this Court held in Nicaragua, armed attacks capable of triggering the right of self-defence must be “the most grave use[s] of force”.

In the aftermath of the cyclone, Tangoon neither used force, let alone the gravest types of force, nor committed an act of aggression against any UN member state. The unintentional spread of disease to a neighbouring country does not meet the armed attack requirement needed to engage Article 51.

ii. Canada’s forcible intervention was neither necessary nor proportionate

This Court has stated on multiple occasions that any use of force taken in the name of collective self-defence must be both a necessary and proportional response to the armed attack. The necessity requirement suggests that force must be used as a last resort, which did not occur in Tangoon. The spread of disease through the river flowing from Tangoon to Samutra could have been halted by means such as damming the river or filtering the water flowing into Samutra. This would have prevented the need to forcibly enter Tangoon. The attack that Samutra claimed to be defending itself from was the spread of disease, which is completely unrelated to the necessity for medical aid. Regardless of whether or not entry into Tangoon was necessary for the provision of aid, which it will soon be argued was not, any armed attack that may have been perceived by Samutra could have been averted without the use of force.

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34 Nicaragua, supra note 25, ¶ 176; Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996 I.C.J. 226, ¶ 41 (July 8).
2. Other Charter exceptions to the prohibition of force

The only legitimate justifications for the use of force apart from Article 51 can be found in the other provisions of Chapter VII of the Charter. For these justifications to be engaged, however, the actions must be taken by the UNSC, in an attempt to restore international peace and security. While the UNSC did not pass any resolutions regarding Canada's action in Tangoon, any such resolution would have been unlawful. None of the occurrences in the aftermath of Cyclone Kodo threatened international peace and security, as the provision of aid was a domestic issue.

C. Responsibility to Protect doctrine cannot be used to justify Canada's unlawful actions

The need for humanitarian intervention has not been recognized as a legitimate basis for the use of force or violation of state sovereignty. The prohibition on force and the preeminence of sovereignty remain pillars of international law. These foundational concepts cannot be ignored in favour of nascent doctrines or theories. The Responsibility to Protect doctrine ("R2P") was first put forward by the International Commission on Intervention and State Sovereignty (ICISS). It was, however, narrowed substantially when adopted by the UN in the Outcome Document of the 2005 World Summit and by the UNSC in Security Council Resolution 1674.

1. Canada's actions in Tangoon were not carried out in accordance with the Responsibility to Protect doctrine that has been endorsed by governments

The R2P doctrine to which governments have pledged support must not be confused with what was contained in the ICISS report, or any other formulations that have been advocated for. The doctrine can only authorize the use of force where it is recommended by the UNSC. Even then it must be used as a last resort.

35 UN Charter, supra note 21, at Chapter VII.
i. Action taken in Tangoon in the name of Responsibility to Protect doctrine was not authorized by the Security Council

R2P doctrine does not layout a route for intervention that is not authorized by the UNSC. The international community explicitly rejected the idea that the GA should be able to authorize humanitarian intervention where the UNSC refuses to do so. While this concept was contained in the initial ICISS report, it was purposefully left out when the doctrine was endorsed at the 2005 World Summit. Even if the situation in Tangoon could be considered the appropriate type of crisis to which the R2P doctrine applies, which is arguable on these facts, absent UNSC authorization forcible intervention in the name of R2P could not be considered lawful. Canada’s actions constituted an inappropriate attempt to manipulate R2P for its own desired outcome, and must be swiftly condemned.

ii. Peaceful measures were not exhausted in Tangoon prior to the forcible provision of humanitarian aid

Ignoring the requirement of UNSC approval for the use of force, the R2P doctrine, as it has been endorsed, only permits the use of force where peaceful means of protection are inadequate. Not only could the spread of disease have been prevented in a peaceful manner, but the aid could have been provided without the use of force as well. Airdrops could have provided food and shelter to the civilian population of Tangoon, and would have been a lesser violation of Tangoon’s sovereignty. Additionally, non-violent pressure could have been applied before any actual intervention took place. This was the approach taken by the international community towards Myanmar in 2008 after the devastation caused by Cyclone Nargis. By doing this, countries around the world ensured that, unlike Canada, they were not infringing upon a UN member state’s right to sovereignty.

2. Responsibility to Protect doctrine is not customary international law

Canada cannot rely on aspects of R2P that have not been endorsed by the UN, as these practices are not customary international law. Article 38.1(b) of this Court’s statute recognizes that repeated state practice and opinio juris are

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40 Alex Bellamy, “The Responsibility to Protect and the Problem of Military Intervention” (2008) 84 International Affairs 615 at 624.
41 ICISS Report, supra note 37, ¶ 6.29.
42 Global Politics, supra note 39, at 9.
43 2005 World Summit Outcome, supra note 38, ¶ 139.
required elements of customary international law.\textsuperscript{44} This Court has further affirmed these requirements in several cases.\textsuperscript{45} The use of force without UNSC approval in the name of R2P does not meet either of these requirements. R2P has only been used to authorize the use of force on one occasion, which hardly meets the repeated practice requirement.\textsuperscript{46} Moreover, states have consistently iterated that they do not believe R2P creates any legal obligations.\textsuperscript{47} As the conditions for being considered customary international law are not met by any broader formulations of R2P, the doctrine cannot be used in any manner inconsistent with UNSC Resolution 1674.\textsuperscript{48} Accordingly, the recommendations made in the Tongoon Resolution authorizing the use of force in accordance with R2P were illegal.

\textit{D. The General Assembly may only authorize the use of force under its Uniting for Peace Powers where there has been a breach of the peace or act of aggression}

In order to quell the fear of UN inaction posed by the UNSC permanent member vetoes, the GA adopted the Uniting for Peace resolution.\textsuperscript{49} This resolution, however, only grants the GA the right to authorize force where the UNSC is not exercising its primary responsibilities.\textsuperscript{50} Where there is no threat to a breach of the peace and no act of aggression is present, the Uniting for Peace Powers do not grant any additional powers.

While internal conflicts have been viewed as threats to international peace in the past, this has only occurred in situations involving extreme violence, such as civil war.\textsuperscript{51} Nothing that transpired in Tongoon threatened the peace and security of the international community. The tragedy was not a violent one, but merely a natural internal calamity that bore no threat beyond Tongoon's borders. The Uniting for Peace Powers exist to ensure that the permanent member veto is not used contrary to the primary purposes of the UN. In authorizing the use of force in Tongoon, the GA explicitly contra-

\textsuperscript{44} Statute of the International Court of Justice, 26 June 1945, 33 UNTS 993.
\textsuperscript{45} Nicaragua, supra note 25, ¶ 186; North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), [1969] ICJ Rep ¶ 77 (Feb. 20).
\textsuperscript{47} Concept Note on Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity, UNGAOR, 63d Sess. UN Doc A/63/958, (2009) at 3; Follow-up to the Outcome of the Millennium Summit, UNGAOR, 63rd Sess 98th Plenary Mtg, UN Doc A/63/PV.98 (2009) at 24.
\textsuperscript{48} Protection of Civilians, supra note 38.
\textsuperscript{49} Uniting for Peace, GA Res 377 (V), UNGAOR, 5th Sess. UN Doc A/377, (1950).
\textsuperscript{50} Id. at 10.
vended two of the UN's most fundamental purposes: the preeminence of sovereignty and the prohibition on the use of force.

II. THE APPREHENSION, DETENTION, AND SURRENDER TO THE ICC OF ISHMAEL BALTHASAR AND CLYDE BARRETT WAS AN UNJUSTIFIED EXTENSION OF ICC JURISDICTION THAT CONTRAVERSED INTERNATIONAL LAW

A. The ICC lacks jurisdiction over the nationals of non-party states for actions taken inside the territory of a non-party State

International Criminal Court (ICC) jurisdiction is governed by Article 12 of the Rome Statute, which states that the Court has jurisdiction over nationals of state parties and over crimes committed on the territory of state parties. Canada's proposed surrender of Ishmael Balthasar and Clyde Barrett lacks justification on either ground. Both men are citizens of countries that are not parties to the Rome Statute. Furthermore the alleged actions of the two men surrounding Cyclone Kodo took place solely within the territory of Tangoon, a non-party territory. Accordingly, Canada's proposed surrender of Ishmael Balthasar and Clyde Barrett to the ICC violates international law.

1. The Rome Statute does not provide justification for the surrender to the ICC of either Ishmael Balthasar or Clyde Barrett

Principles of treaty interpretation, as expressed in Article 31 of the Vienna Convention on the Law of Treaties (VCLT) dictate that a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty. The Rome Statute outlines ICC jurisdiction in the aforementioned ways. As the United States and Tangoon are not parties to the Rome Statute, the only legal basis for the transfer of the two men to the ICC would have required the alleged crimes to have taken place within the territory of a state that ratified the Rome Statute. The actions in question were confined to Tangoon, and were thus beyond the reach of the ICC.

Where no jurisdiction exists, the Court may exercise jurisdiction over the nationals of non-party states if the UNSC refers a matter to the court. As the United States is a permanent UNSC member with the power of veto, any such referral would require American consent, which was not issued in this case.

54 Rome Statute, supra note 52, art. 13.
case. Conversely, the United States actively objected to the exercise of ICC jurisdiction in this matter.

Effects jurisdiction is the concept that alleged crimes perpetrated in a non-party state may be punishable for the effect they have on state parties. The Rome Statute is silent on this concept. To infer such jurisdiction for the ICC would be contrary to the plain and ordinary meaning of the words used by the drafters of the statute. Canada’s actions cannot be justified on such grounds.

2. The Rome Statute excludes the principle of universal jurisdiction, precluding Canada from claiming justification for its actions on these grounds

Universal jurisdiction is arguably the most contentious method of establishing jurisdiction in international law. The inclusion of the concept in the Rome Statute would have been highly problematic and controversial, as evidenced by its exclusion. The drafters of the Rome Statute acknowledged that, in practice, states rarely exercise universal jurisdiction. To secure ratification, the document was intentionally drafted in a way that would not force states into situations they regularly chose to avoid. There is no legal basis for a court that can exercise jurisdiction over any citizen in any country.

Proponents of universal jurisdiction argued that the Rome Statute would never receive the requisite number of ratifications without it, and were proven incorrect. The United States submits that countries accepted an ICC without universal jurisdiction precisely because Article 12 represented a reasonable compromise between furthering justice while respecting national sovereignty and norms of customary international law. Canadian attempts to justify its actions based on an extension of the universal jurisdiction concept must be categorically rejected.

B. Canada’s detention and proposed surrender of Ishmael Balthasar is unlawful in its disregard for the customary norm of Head of State immunity and its contravention of the Geneva Conventions

Customary international law has long held that a Head of State is not subject to the jurisdiction of foreign courts. This principle is widely confirmed

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56 WILLIAM A SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 66 (2007) [An Introduction to the ICC].
57 Id. 58 Id. 59 United States v. Noriega, 746 F. Supp. 1506, 1519 (S.D. Fla. 1990) aff’d, 117 F.3d 1206 (11th Cir. 1997), citing In re Grand Jury Proceedings, Doe No. 700, 817 F.2d 1108, 1110 (4th
by the case law of nations and was reaffirmed by this Court in the *Arrest Warrant* case. The rationale behind this custom is the protection of sovereignty, respect among nations, and freedom of action by heads of state without fear of repercussions.

1. *As de facto* political and military leader of Tangoon entrusted to represent the country at the international level, personal immunity is validly extended to Ishmael Balthasar

While Raffliki Balthasar still currently holds the title of Head of State and Government, *de facto* military and political leadership rests with his younger brother, Ishmael. Personal immunities apply not only to the individual with the official Head of State title; they extend to state officials who are entrusted to represent the state at the international level, such as foreign ministers and diplomats. As *de facto* military and political leader, Ishmael Balthasar’s responsibilities include interacting with the international community. Issuing an official response to the communiqué delivered by Canada to the border wall was one such example of Ishmael Balthasar being entrusted to represent Tangoon. As a result, he is validly entitled to Head of State immunity.

2. Head of State Immunity is a recognized norm of customary international law which, when ignored, contravenes Article 98 of the *Rome Statute*

There are two relevant provisions in the *Rome Statute* that outline the status of Head of State immunity before the ICC: Article 27 and Article 98. Article 27 makes it clear that neither the immunity of a Head of State nor the official position of a suspected international criminal will prevent the ICC from exercising its jurisdiction. However, this provision must be read in conjunction with Article 98, which acknowledges that obligations relating to immunities arising either from customary international law or treaties may conflict with an ICC request for the surrender of a particular person. From a procedural perspective, Article 98 dictates that deference is shown to the norms of customary international law, preventing states such as Canada from

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62 *Id.*
63 *Rome Statute, supra* note 52, arts. 27, 98.
64 *Id.* art. 27.
65 *An Introduction to the ICC, supra* note 56, at 79.
surrendering immunized non-party citizens.\(^6^6\) It is a misguided overextension to suggest that Article 27(2) applies to nationals of non-party states.\(^6^7\) The personal immunity of Ishmael Balthasar is recognized in customary international law, and Canada cannot lawfully disregard it.

Recent decisions of the ICC do not, as some would argue, compromise the correct interpretation of Articles 27 and 98.\(^6^8\) In the 2009 Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, the ICC misunderstood the application of Head of State immunity to non-state parties.\(^6^9\) Omar al-Bashir is the current President of Sudan, a non-party to the Rome Statute. On March 4, 2004, the ICC Pre-Trial Chamber issued an arrest warrant against him. It is important to note that the ICC took this action after the UNSC directly referred the matter to the Court’s jurisdiction. This referral obliged parties to the conflict to cooperate with the ICC and urged other states to do so as well.\(^7^0\) There is some debate as to whether or not the referral in UNSC Resolution 1593 made the Rome Statute binding upon Sudan.\(^7^1\) Regardless of the precise answer to this question, the UNSC referral was one of the primary factors upon which the ICC issued al-Bashir’s warrant.\(^7^2\) There has been no such UNSC referral regarding the situation in Tangoon.

This view is strengthened by the ICC’s approach to the similar situation that recently developed in Libya. Following UNSC referral, the ICC issued an arrest warrant for the now-deceased Libyan Head of State, Muammar Gaddafi.\(^7^3\) Instead of echoing the approach in the al-Bashir case, the ICC Prosecutor did not request that states other than Libya itself surrender Gaddafi. This implicitly acknowledged that their previous request regarding al-Bashir was an instance of the Court overreaching its authority. Canada’s unilateral apprehension and detention of Ishmael Balthasar preceded the issuance of an ICC warrant by 13 days. Even if Canada had prudently waited, Tangoon’s Head of State could not have been arrested without violating Article 98. Balthasar’s immunity, thus, remains inviolable under customary international law.


\(^{6^7}\) An Introduction to the ICC, supra note 56, at 79.

\(^{6^8}\) Rome Statute, supra note 52, arts. 27, 98.

\(^{6^9}\) Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir (4 March 2009) (International Criminal Court, Pre-Trial Chamber 1).

\(^{7^0}\) President Al Bashir Immunity, supra note 61, at 330-331.

\(^{7^1}\) Reports of the Secretary-General on the Sudan, SC Res 1593 UNSCOR UN Doc S/RES/1593 (2005) at preambular ¶ 2.

\(^{7^2}\) Id.

3. Canada’s treatment of Ishmael Balthasar violated Article 18 of the Third Geneva Convention, rendering his personal diary inadmissible at the ICC.

The Geneva Conventions (the Conventions), which were ratified by Canada in 1965, establish standards of international law for the humanitarian treatment of victims of war. The Conventions apply in situations of international armed conflict. The flagrant use of prohibited force, as previously outlined, amounted to an international armed conflict between Tangoon and Canada. The Third Geneva Convention relates to the treatment of Prisoners of War (POWs), and defines the term at length in Article 4. When Ishmael Balthasar was captured as an enemy combatant in an international armed conflict, he became a prisoner of war.

Canada’s violations were particularly egregious with respect to Article 18 of the Third Geneva Convention. According to Article 18, all effects and articles of personal use shall remain in the possession of a POW. Items such as notecases, prayer-books, and writing paper have been regarded as effects and articles of personal use. It follows that a personal diary would qualify as such an item. Canada’s seizure of the diary was thus in violation of international law. This illegally obtained evidence cannot be admissible at the ICC. To admit it would contradict a general principle of law: *ex injuria non oritur ius* — that no one is allowed to take advantage of his own wrongdoing. The approach taken by this Court in the *Corfu Channel Case* is consistent with this position.

C. Clyde Barrett was arbitrarily apprehended and detained in Tangoon

The aforementioned principles that govern ICC jurisdiction illustrate that, like Ishmael Balthasar, Clyde Barrett does not fall within the authority of the Court.

1. The apprehension of Clyde Barrett was not prescribed by law and is therefore an arbitrary arrest and detention

The fundamental right to liberty, expressed in the UN Declaration of Human Rights and the International Covenant on Civil and Political Rights

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75 *Id.* art. 4.
76 *Id.* art. 18.
77 *Id.* art. 18 (commentary).
78 CHITTHARANJAN F. AMERASINGHE, EVIDENCE IN INTERNATIONAL LITIGATION 118 (2005).
(ICCPR), endeavor to protect individuals from arbitrary arrest or detention.\(^{80}\)
The language most commonly found in these provisions is that no person shall be deprived of his liberty "except in accordance with such procedure as established by law."\(^{81}\) In this case, Canada not only used information in an illegally-obtained diary to arrest Clyde Barrett, it did so before an arrest warrant had even been requested. Canada’s unilateral detention of an American citizen thirteen days before an arrest warrant was issued is an outrageous violation of international law, and must be swiftly condemned.

2. Geomin Corporation’s use of Tangoon’s National Service Program is not a form of slavery for which Clyde Barrett can be held criminally responsible

Mr. Barrett’s arrest and detention cannot be justified on the grounds that he was responsible for the crime against humanity of enslavement. According to various human rights documents, including the ICCPR, no one shall be required to perform forced or compulsory labour.\(^{82}\) To apply this accepted principle to the situation in Tangoon, the definition of “forced or compulsory labour” must be clarified. According to Article 8.1(c)(iv), “forced or compulsory labour” shall not include any work or service which forms part of normal civil obligations.\(^{83}\) In Tangoon, the National Service Program qualifies as a civil obligation, removing alleged criminal culpability from Mr. Barrett or Tangoon’s government.

Regardless of how Tangoon’s National Service Program is characterized, Clyde Barrett is not guilty of a crime against humanity as it is defined in Article 7(1)(c) of the Rome Statute.\(^{84}\) The ICC’s interpretive guide, the “Elements of Crimes,” outlines the requirements Canada must meet to demonstrate that Mr. Barrett is guilty of the crime against humanity of enslavement.\(^{85}\) Firstly, Canada must show that Mr. Barrett exercised power attaching to the right of ownership over one or more persons.\(^{86}\) Secondly, his conduct must have been committed as a part of a widespread or systematic attack

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\(^{81}\) *Human Rights*, supra note 80.

\(^{82}\) *ICCPR*, supra note 80, art. 8.3(a).

\(^{83}\) *Id.* art. 8(c)(iv).

\(^{84}\) *Rome Statute*, supra note 52, art. 7(1)(c).


\(^{86}\) *Id.*
directed against a civilian population. 87 Finally, Canada must prove the mens
rea element: that Mr. Barrett knew or intended that Geomin Corporation’s
use of Tangoon’s National Service Program would be part of a widespread or
systematic attack. 88 There is no factual basis for concluding that Mr. Barrett
knew or intended that his use of a government program would constitute
such an attack. The government of Tangoon rather than Geomin Corp admin-
istered the National Service Program. There is no evidence that Mr. Barrett
was aware of any of the details of the National Service Program beyond its
most basic features.

Canada’s characterization of the National Service Program is misguided.
Tangoon is among the poorest nations in the world. It is logical to presume
that coordinated government programs like the National Service Program are
necessary in a country where jobs and sustenance are scarce. While these
working conditions may not meet the standard present in Canada and the
First World, it is reckless to impart these expectations on a nation with such a
vastly different socioeconomic structure.

CONCLUSION

In forcibly entering Tangoon and apprehending, detaining and proposing
the surrender to the ICC of both Ishmael Balthasar and Clyde Barrett, Canada
showed a repeated disregard for established international law. Sovereignty
and peaceful relations are the concepts on which international law is prem-
ised. No recognized exceptions to these norms justify Canada’s actions. Can-
da’s actions recklessly blurred the purpose and scope of the ICC as defined
in its constitutive document, the Rome Statute. The ICC is not and should not
be regarded as a panacea. When states disregard its prescribed limits, it un-
dermines the legitimacy and effectiveness of the Court. The United States
respectfully requests the immediate release of both Clyde Barrett and Ish-
mael Balthasar. In addition, it is requested that Canada be sanctioned for
failing to obey established rules of international law.

87 Id.
88 Id.