2012

Memorial of the Respondent

Paul Allen
Kathleen D. Pitts

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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 RESPONDENT
Paul A. Allen & Kathleen D. Pitts

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**JURISDICTIONAL STATEMENT**

The United States (Applicant) and Canada (Respondent) jointly submit this dispute to the International Court of Justice ("ICJ") under the Court's ad hoc jurisdiction pursuant to Article 36(1) of the ICJ Statute. All Parties have complied with the Article 36(1) requirements. Additionally, both Parties have agreed that Tangoon and Samutra are not essential third parties in this case. The United States and Canada agree to comply with the Court's ruling

1 Statute of the International Court of Justice art. 36(1), June 26, 1945, 33 U.N.T.S. 993.
2 Compromis Between the United States (Applicant) and Canada (Respondent) Concerning Intervention in Tangoon, ¶ 26, (Aug. 29, 2011) [Compromis].
on this matter and shall fully and immediately implement the issued decision.\(^3\)

**QUESTIONS PRESENTED**

I. Whether Canada’s humanitarian intervention and actions under the “Responsibility to Protect” doctrine and United Nations approval were permitted under international law?

II. Whether Canada’s apprehension, detention, and proposed surrender to the International Criminal Court of Ishmael Balthasar and Clyde Barrett, both of whom are suspected of committing crimes against humanity and genocide, are permitted under international law?

**STATEMENT OF FACTS**

**History: Tangoon and Samutra**

Two independent States, Tangoon and Samutra, currently share the island of Tanmutra.\(^4\) Formerly a French colony, the island gained its independence in 1990 as the Republic of Samutra.\(^5\) Only months after the decolonization of the island, the new Republic of Samutra faced a successful secession movement by a small group of elitist, ultra-orthodox adherents to the Tamutran religion who formed the State of Tangoon in the western portion of the island.\(^6\) Tangoon and Samutra were admitted as separate State into the United Nations (“UN”) in 1991 and have ratified the Genocide Convention, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, and the Geneva Conventions and Additional Protocols. Samutra has also become a party to the Rome Statute of the International Criminal Court (“ICC”).\(^7\)

Although they share an island, the States of Tangoon and Samutra could not be more different. Samutra has a democratic, secular government and its citizens enjoy the benefits of a strong, foreign tourism-based economy.\(^8\)

\(^3\) Id.
\(^4\) Id. at ¶ 2.
\(^5\) Id. ¶ 4.
\(^6\) Id.
\(^7\) Id.
\(^8\) Id. ¶ 6.
Tangoon, however, is ruled by a small, elite group of the ultra-orthodox adherents to the Tanmutran religion. Raffliki Balthasar is currently the Head of State and Government, although his younger brother, Ishmael Balthasar, holds de facto military and political power as Minister of Internal Affairs. The Tangoon population has been forced into a caste system, has been banned to possess telephones, radios, and other means of communication to the rest of the world, and has been restricted to the territory by a border wall between Tangoon and Samutra. Tangoon’s citizens are some of the poorest in the world and suffer health issues under an oppressive, elitist regime within their State that utilize their religious beliefs to prevent the population’s use of modern medicine and technologies.

The Demon Mine

Despite its population’s sufferings, Tangoon has very rich cobaltite veins with the world’s largest known deposits located on Tangoon’s Mont Demon and below a large Tangoon village known as Demonville. In 2007, the Tangoon government gave a U.S. corporation, Geomin Corp., an exclusive license to mine the Mont Demon area and export the findings to the United States in return for a fee paid to the Tangoon government. The CEO of Geomin Corp. is U.S. citizen Clyde Barrett. Tangoon agreed to help supply the mining labor from its “National Service Program.”

In early 2011, Geomin Corp. offered to purchase the land in Demonville in order to set up a mining site, but the Demonville villagers declined the offer. Barrett and Geomin Corp proceeded to set up a meeting with Ishmael Balthasar a few months later to discuss a mine site in Demonville. Barrett told Balthasar that a mine in Demonville would increase Tangoon’s profits from the licensing arrangement and aggressively urged Balthasar to force the residents out of Demonville, stating “burn them out if you have to.” Balthasar agreed that he would work to find a way to remove the villagers from the area. On May 23, 2011, almost a month after their first meeting, Bal-
thasar and Barrett met again, with Barrett bringing weather reports about an approaching cyclone that could be the answer to their Demonville problems. All of the conversations between Barrett and Balthasar were recorded in Balthasar’s diary, which is now in the possession of the Office of the Prosecutor of the ICC.

The May 25 Cyclone

Severe Tropical Cyclone “Kodo” hit the island on May 25, 2011. While Samutra had taken the proper precautions to warn its citizens in advance, the Tangoon government only issued warnings to its ruling members and did nothing to alert Tangoon’s citizens to the disastrous cyclone. The cyclone effectively demolished entire villages, including Demonville. It killed thousands of Tangoon citizens, leaving corpses in rivers and lowlands throughout the State, according to a report filed by the Secretary-General of the UN on May 30, 2011. Tangoon refused humanitarian aid offers, took no action to clean up and dispose of diseased corpses, and continued to force its citizens into slave-like working conditions in its “National Service Program” for the new mine Geomin Corp. blasted in Demonville after the cyclone. Tangoon’s lack of action to clean up its State resulted in the spread of disease throughout Tangoon and downstream into Samutra. Despite warnings from the UN Secretary-General on the continuing spread of disease and potential deaths of thousands of citizens in Tangoon and Samutra, Tangoon continually refused to act.

The Humanitarian Intervention

On the same day as the UN Secretary-General issued his report, Samutra referred the case to the ICC and requested that the ICC take action against Tangoon’s Ishmael Balthasar. The following day the Samutran government asked for an emergency session of the UN Security Council; the Council met but took no action due to a veto threat from the United States on a resolution.
to address the crisis. The Security Council took no other actions. An emergency session of the General Assembly met on June 2, 2011, and under its “Uniting for Peace” powers, the General Assembly issued a nearly unanimous resolution dictating that all necessary means be taken to help deliver humanitarian aid to Tangoon.

On June 3, 2011, Canada, per a request from Samutra, sent its HMCS Algongquin, a destroyer with 200 crewmembers and commandos, to the island to help deliver humanitarian aid. The destroyer arrived in Samutra and together with Samutra aid workers, Canadian commandos destroyed portions of the wall separating the two States and entered Tangoon with aid truck and relief workers to help distribute food, clothing, medicine and temporary housing to Tangoon citizens. Samutran aid workers also began the process of burning and disposing of the diseased corpses. Tangoon’s security personnel began to intervene when the humanitarian operation moved its way towards Demonville; led by Balthasar himself, Tangoon security personnel opened fire on the Canadian commandos. Canada responded by returning fire, killing ten and taking seven Tangoon security personnel into custody. Balthasar was also taken into custody and searched, resulting in the Canadian commandos locating the diary on his person, which had the details of the plan he and Barrett hatched to refuse aid to the Demonville victims in order for Geomin Corp. to begin its mining operations.

During this operation the Canadian commandos discovered the slave-like working conditions forced upon Tangoon’s teenagers working on the mine. The commandos subsequently shut down operations and were approached by Barrett who protested the commandos’ actions, stating they had no right to interfere with the mining in Demonville. The commandos took Barrett into custody and transported him and Balthasar back to Samutra.

Canada filed a report with the Security Council on June 8, 2011, outlining their operations and the actions they had taken in Tangoon. They turned over Balthasar’s diary to the ICC Prosecutor and the Prosecutor, based on the diary evidence, issued arrest warrants for Barrett and Balthasar for crimes.
against humanity. The United States expressed its issues with Canada's operations in Tangoon in a Diplomatic Note sent June 15, 2011, arguing that Canada had violated Tangoon's territorial sovereignty and had violated international law in its apprehension of Balthasar and Barrett from Tangoon. Canada responded with its own Diplomatic Note on June 22, 2011, defending its actions and stating it had not violated international law on either issue. When dispute resolution negotiations failed between the two nations, they agreed to submit to ICJ's jurisdiction to handle the matter.

**SUMMARY OF THE ARGUMENT**

Canada's intervention into Tangoon was necessary in order to provide humanitarian aid to Tangoon's devastated population and was lawful under international law. Canada's intervention was in response to Samutra's request for assistance to help protect Samutra from the biological assault it was suffering from Tangoon. The intervention was necessary and proportional to the attacks Samutra faced by Tangoon, meeting the requirements of collective self-defense. In addition, Canada's intervention was authorized by the UN General Assembly under its "Uniting for Peace" authority, granting Canada the ability to employ the means necessary to deliver humanitarian aid to Tangoon. Canada also has a responsibility to protect Tangoon's citizens from the atrocities currently faced pursuant to the "Responsibility to Protect" doctrine. The Court should uphold Canada's lawful intervention into Tangoon.

Furthermore, the apprehension and detention of Clyde Barrett and Ishmael Balthasar by Canada was lawful, as is their surrender to the ICC. Due to the gravity and proximity, the crimes against humanity and genocide that have taken place in Tangoon created a nexus with Samutra. Samutra, being a party to the ICC, possessed the lawful right of referral for acts constituting a violation of the Rome Statute. Canada, under full compliance with both international and domestic law, apprehended and detained Barrett and Balthasar while conducting an intervention on the island. Canada is now permitted to delegate the prosecution of Barrett and Balthasar to the ICC, and is also required to cooperate as a party to the Court. Lastly, Ishmael Balthasar's claim of head of state immunity should be denied. Head of state immunity has traditionally not acted as a barrier to individual criminal responsibility for crimes against humanity and genocide. The Court should

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44 Id. ¶ 21.
45 Id. ¶ 23.
46 Id. ¶ 24.
47 Id. ¶ 26.
uphold Canada’s apprehension and detention of Barrett and Balthasar, and further permit their surrender to the ICC for prosecution.

ARGUMENT

I. CANADA’S INTERVENTION INTO TANGOON IS LAWFUL UNDER INTERNATIONAL LAW.

Both customary international law principles and UN authorization justifies Canada’s intervention into Tangoon to provide humanitarian assistance to Tangoon’s citizens and to aid in the protection of Samutra. In addition, Canada accepted its responsibility to protect Tangoon’s population in the absence of protections taken by Tangoon’s national authorities and after peaceful attempts to provide aid had been rejected. The actions taken by Canada in Tangoon were in accordance with what is required under the international laws under which Canada was operating. Therefore, Canada’s intervention into Tangoon should be upheld as lawful under international law.

A. Canada’s intervention into Tangoon was lawful under the theory of collective self-defense to assist in the protection of Samutra from Tangoon’s biological assault.

A state, under both customary international law and expressly under the Charter of the United Nations (“UN Charter”), is traditionally prohibited from using force or a threat of force that impedes on the territorial integrity or political independence of another state. However, customary international law recognizes that the inherent right of collective self-defense, in addition to being a right granted to states under Article 51 of the UN Charter, is an exception to the use of force or threat of force prohibition. The Court, in its decision in Nicaragua v. United States, has also addressed the right of collective self-defense under customary international law and the conditions that have to be met by an intervening state in order for the prohibition on the use of force or threat of force to be lifted and considered permissable. The Court should resolve the issues in this case by applying the collective self-defense principles outlined by the Court in the Nicaragua case, reinforced by customary international law.

In its discussion of collective self-defense, the Court lays out three conditions established under customary international law that have to be met in order for a state to successfully make the case that its intervention was lawful under this theory. The first condition the Court places on the use of this theory is that the victim state—in this case, Samutra—must suffer an armed attack from another state. The Court goes on to provide a somewhat narrow definition of what constitutes an armed attack, but scholars have recently argued that customary international law has evolved to allow the victim state the ability to make its own determination as to what constitutes an armed attack. This newer theory also complements the Court’s second condition, which is that the victim state must formulate and declare that it itself is under attack.

It is clear in this case that Samutra suffered an armed attack from Tangoon in the form of a biological assault. The government of Tangoon refused to take steps to prevent the spread of disease into Samutra caused by diseased corpses and disastrous conditions located within its territory. Tangoon indicated in its communiqué from its Interior Minister that Tangoon had the intent to cause the deaths of Samutran citizens. This kind of attack is one that can be considered a significant attack and not merely an attack falling within the same category as that of assistance or logistical support by a state as contemplated by the Court in the Nicaragua case. Additionally, Canada stated that Samutra reasonably considered that it was under attack from Tangoon, meaning that Samutra had both formed this view and declared that it had been attacked. These actions indicate that Canada has met the first two conditions of collective self-defense outlined by the Court.

The third condition placed on the use of collective self-defense by customary international law is that there must be a request for assistance from the victim state to the third-party intervening state. The Court stated that the request from the victim state must be directly expressed and both the request and the armed attack must precede the intervention by the third-party state. Canada received an express request from Samutra for assistance to aid in its self-defense from the assault it faced from Tangoon. Both the request and the armed attack occurred prior to the intervention into Tangoon. The third condition for an express request from Samutra was also met in this case.

51 Id. at 103-104.
52 Azubuike, supra note 49, at 157.
54 Id. at 105.
55 Id.; Azubuike, supra note 49, at 180.
Although not dictated by customary international law, the Court in the *Nicaragua* case also indicated that a third-party intervening state using Article 51 of the UN Charter’s theory of collective self-defense to justify intervention should comply with all of the requirements under that Article.\(^{56}\) The Court notes that if actions of a state are being justified pursuant to UN Charter provisions, then that state is obligated to meet requirements outlined in the UN Charter articles on which that state relies.\(^{57}\) Article 51 requires that a state utilizing the right to collective self-defense must immediately report any measures taken to the UN Security Council (“Security Council”).\(^{58}\) Canada also meets this condition in this case; Canada submitted a report to the Security Council the day following its intervention into Tangoon. Canada has indicated that it is invoking the right of collective self-defense pursuant to Article 51 in the UN Charter, and the submission of its report provides further indication to the Court that it was operating under this theory to justify its intervention.

The conditions placed on the right of collective self-defense by the Court in the *Nicaragua* case are all successfully met by Canada in this instance. In addition to these conditions, there are two more limitations that customary international law has placed on both individual state self-defense and collective self-defense: proportionality and necessity.\(^{59}\) This means that Canada’s actions in this case must have been both proportional and necessary in order to be upheld as lawful, in addition to meeting the conditions established specifically for collective self-defense. The Court has stated that necessity requires that an attack has already occurred or is occurring and the only way for the victim state to protect its interests against the attack is to challenge the attack.\(^{60}\) The necessity often results from the need to protect the victim state with actions that are the only means available to protect the state from the attack.\(^{61}\) Canada’s actions to protect Samutra were necessary in this case; the only feasible option was to intervene in Tangoon in this manner to ensure that the deadly spread of disease was stopped. Any delay would have caused more casualties in Samutra and all other diplomatic means of preventing these attacks had been rebuffed by Tangoon’s government.

Canada’s actions were also proportional to the attacks Samutra was facing from Tangoon. Proportionality requires that the response to the attack be

\(^{56}\) *Military and Paramilitary Activities*, 1986 I.C.J. at 105.

\(^{57}\) *Id.*

\(^{58}\) U.N. Charter art. 51.


\(^{60}\) *Azubuike, supra* note 49, at 162-163; Legal Consequences of Construction of Wall In Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194-195 (July 9).

\(^{61}\) *Azubuike, supra* note 49, at 146,162.
limited in scope so as to avoid unnecessary or excessive action.\textsuperscript{62} The response is not limited, however, to the use of the same tactics or degree of force used by the attacking state.\textsuperscript{63} Canada’s actions were proportional as they were limited and were by no means excessive or unwarranted. Canada deployed a small force to cross into Tangoon with the intent to restrict its actions to the prevention of the spread of disease and to aid relief workers in their efforts. It was only after Tangoon’s armed forces opened fired on Canada’s troops did Canada employ deadly force and use an armed attacks to respond. The initial response by Canada, however, to the armed attack on Samutra was proportional in addition to being necessary. Canada, therefore, meets the elements required to assert that its intervention into Tangoon was lawful under the theory of collective self-defense.

\textbf{B. Canada’s intervention into Tangoon was appropriately authorized by the United Nations General Assembly in its Resolution on the situation in Tangoon offered under its “Uniting for Peace” authority.}

One of the primary principles of the UN is to maintain international peace and security.\textsuperscript{64} The UN Charter delegates to the Security Council the primary responsibility of upholding this maintenance. However, a failure to act by the Security Council on an issue that creates a breach of international peace and security does not relieve the other bodies of the UN, particularly the UN General Assembly (“General Assembly”), from its duties to remedy that breach.\textsuperscript{65} Under its Uniting for Peace authority outlined in Resolution 377(V), the General Assembly can recommend actions be taken by states, including the use of force, to remedy breaches or threats to international peace and security.\textsuperscript{66} Tangoon’s actions in this case created a breach of international peace and security to its citizens, the citizens and territory of Samutra, and citizens of other nations residing on the island. The Security Council refused to act in this case, therefore giving the General Assembly the responsibility to handle the situation.

The General Assembly passed Resolution A/RES/65/299 on June 2, 2011, during an emergency session twenty-four hours after a request was made in accordance with the Uniting for Peace procedures.\textsuperscript{67} Resolution A/RES/65/299 authorized Member States, in coordination with Samutra, to use all means necessary to provide humanitarian aid and to help bring an end

\textsuperscript{62} Id. at 145.
\textsuperscript{63} Id. at 163.
\textsuperscript{64} U.N. Charter art. 1.
\textsuperscript{65} Id. at 8.
\textsuperscript{67} Id. ¶ A(1).
to the disaster that had occurred in Tangoon. The actions taken by Canada in its intervention in Tangoon follow the authorization granted by this Resolution passed almost unanimously by the General Assembly Member States. Canada acted with Samutra and took necessary steps to ensure humanitarian aid was delivered, utilizing appropriate actions to help control the crisis situation in Tangoon. Additionally, Canada’s actions did not venture beyond the scope of this Resolution. Therefore Canada’s intervention Tangoon is also lawful pursuant to the General Assembly’s authority under its Uniting for Peace powers.

C. Canada had a responsibility to intervene in Tangoon pursuant to the principles under the “Responsibility to Protect” doctrine.

States have the primary responsibility to protect their territories and those populations living within their territories.68 These responsibilities are inherent under the theory of individual state sovereignty and include protecting citizens and residents of the state from suffering serious harm from crime, internal conflict, or other issues that arise within the state.69 However, when a state is unwilling or unable to sufficiently protect its populations, or it cannot or will not alleviate the suffering of its populations, the international community has a responsibility to intervene to protect those affected within that state.70 This “Responsibility to Protect” doctrine was adopted in the 2005 World Summit by the General Assembly and has been reaffirmed by subsequent resolutions in both the General Assembly and by the Security Council.71 While it has yet to be considered part of customary international law, this doctrine is trending within the international community as a new norm, focusing on the principle that state sovereignty does not insulate a state from humanitarian intervention for human protection purposes.72

The 2005 World Summit Report paragraphs 138 and 139 outline the General Assembly’s understanding of the Responsibility to Protect doctrine originally put forward by a report from the International Commission on Intervention and State Sovereignty (ICISS). It states that the international com-

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69 ICISS, supra note 68, at XI.
munity has a responsibility to intervene within a state to protect its populations when at least one of four human rights violations is taking place: genocide, war crimes, ethnic cleansing, and crimes against humanity.\textsuperscript{73} Attempts at intervention by the international community—working through the UN—should be appropriate and peaceful, however, if peaceful means are inadequate and national authorities fail to adequately protect their populations from these crimes, the international community may then take collective action and intervene accordingly.\textsuperscript{74} These collective measures can be authorized by the Security Council under its authorities, or can be authorized by the General Assembly under its Uniting for Peace procedures if the Security Council fails or refuses to act.\textsuperscript{75}

The situation in Tangoon creates a responsibility for the international community to intervene under this doctrine. Under the “Responsibility to Protect” doctrine adopted by the UN, Canada acted appropriately and pursuant to the procedures outlined by the 2005 World Summit Report and implementing resolutions. First, it has to be established that Tangoon has committed at least one of the four listed human rights violations. It is clear in this case that the actions taken by the Tangoon authorities constitute genocide; Tangoon’s actions meet the definition of genocide laid out in the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), to which Tangoon is a party.\textsuperscript{76} Tangoon deliberately inflicted on its non-elite populations within its State conditions of life that were intended to destroy that population by its refusal to warn and protect those populations from natural disasters, supporting State-sanctioned, slave-like working conditions, and refusing to provide aid to those communities who were left without basic life necessities after the cyclone, leaving those populations severely malnourished. In addition, Tangoon has intentionally caused seriously bodily injury and death to members of its non-elite class of citizens by refusing to aid in the prevention of the spread of deadly disease amongst the non-elite populations. Not only does Tangoon’s actions show its intent to commit genocide but also establishes that its national authorities are “manifestly failing” to protect its populations.\textsuperscript{77}

Furthermore, Canada’s actions were in accordance with the preferences outlined by the UN for how the “Responsibility to Protect” doctrine should be carried out. Scholars interpreting the “Responsibility to Protect” doctrine

\textsuperscript{73} 2005 World Summit Outcome, \textit{supra} note 71, ¶ 139.
\textsuperscript{74} \textit{Id.}
\textsuperscript{77} 2005 World Summit Outcome, \textit{supra} note 71, ¶ 139.
understand that the doctrine prefers states act through the UN and should attempt peaceful means before resulting to any kind of military actions.\textsuperscript{78} Both preferences were met in this case; Canada intervened in Tangoon pursuant to the General Assembly’s resolution authorizing action through its Uniting for Peace procedures, which is a means considered permissible under this doctrine.\textsuperscript{79} Peaceful means were attempted and proved inadequate when Tangoon rebuffed offers of aid to its citizens from the UN, Canada, Samutra, and various NGOs; Tangoon reiterated its intent to allow the spread of death and disease within its borders and to Samutra, thereby necessitating military intervention. Canada’s military intervention was limited to providing humanitarian aid and only resulted in violence after first facing violence from Tangoon’s armed forces. Therefore, Canada’s actions are also lawful under international law pursuant to the “Responsibility to Protect” doctrine.

II. THE APPREHENSION AND DETENTION OF CLYDE BARRETT AND ISHMAEL BALTHASAR WAS PERMITTED UNDER INTERNATIONAL LAW, AS IS THEIR SURRENDER TO THE INTERNATIONAL CRIMINAL COURT.

Contemporary international law gives the ICC authority to adjudicate this case. The legality of this case should be considered with respect to four points: first, the ICC’s preconditions to the exercise of jurisdiction over non-party states; second, the apprehension and detention of Clyde Barrett and Ishmael Balthasar; third, the surrender of Barrett and Balthasar to the ICC; and lastly, the claim of head of state immunity by Balthasar. The situation in Tangoon resulted in extraterritorial effects that justified Samutra’s referral and the ICC’s subsequent exercise of jurisdiction. Canada, bound by the principles of international law and its obligations under the Rome Statute, is required to surrender Clyde Barrett and Ishmael Balthasar to the ICC. Lastly, Balthasar’s claim of head of state immunity is not applicable by both factual circumstances and contemporary international law.

\textit{A. The situation in Tangoon has resulted in extraterritorial effects in the State of Samutra, which permits the prosecutor of the ICC to conduct an investigation after a lawful referral.}

The preamble to the Rome Statute for the ICC states that “... grave crimes threaten the peace, security and well-being of the world ...”\textsuperscript{80}

\textsuperscript{78} Bannon, \textit{supra} note 72, at 1164.
\textsuperscript{79} \textit{Report of the Secretary-General, supra} note 75, ¶ 63.
When the UN General Assembly adopted the Universal Declaration of Human Rights in 1948, the world recognized that certain standards exist for the treatment of individuals, including condemnations regarding slavery and inhuman treatment. The situation that has arisen on the island of Tanmutra concerns the very principles of the ICC and the UN. This situation, as indicated by the record, is a result of the actions of Clyde Barrett and Ishmael Balthasar, and their adjudication is necessary for justice.

The ICC is mandated by the Rome Statute, depending on how the matter reaches to court, to only consider cases for prosecution if certain criteria are met. Article 13 of the Rome Statute allows the court to exercise jurisdiction in a matter when at least one of three events occur: a referral by a party to the court, a referral by the UN Security Council, or upon an investigation under the ICC Prosecutor. In the present case, the State of Samutra, a full party to the ICC, issued a referral to the Court pursuant to Article 13(a).

Before proceeding to assert jurisdiction, however, the Rome Statute also requires that a precondition to the exercise of jurisdiction be satisfied. Article 12 allows the ICC to assert jurisdiction in cases of state referral or prosecutorial investigation only when, regardless of the legitimacy of the referral or investigation, one of the following criteria is met: the crime has occurred on the territory of a party to the Court, the accused is a national to a party to the court, or the relevant non-party state has expressly declared its acceptance of the Court’s jurisdiction in the matter. The preeminent issue concerns whether ICC is permitted to accept jurisdiction when neither Clyde Barrett nor Ishmael Balthasar are nationals of a party to the court, and the criminal conduct purportedly occurred solely within the state of Tangoon.

Although the overt acts of Barrett and Balthasar are isolated within the borders of Tangoon, the effects of their acts are not isolated. The record indicates that the entire island’s water supply has been severely contaminated by several diseases, including cholera, typhoid, and dysentery. This contamination is the result of Barrett and Balthasar’s conduct within the state of Tangoon, which has had extraterritorial effects on Samutra. In the S.S. Lotus case before this Court’s predecessor, the issue of collateral effects was considered when Lt. Demons’ negligence solely on board the Lotus was found to have had an effect on the Boz-Kourt. If the same understanding is applied to the present case, the collateral effect on Samutra satisfies Article 12(2) of

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82 Rome Statute, supra note 80, art. 13.
83 Id. arts. 13(a), 14.
84 Id. art. 12.
85 Id.
86 S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 30 (Sept. 7).
the Rome statute. Furthermore, the Rome Statute’s preconditions should not be interpreted as a blanket prohibition on prosecution, but rather, a mere conditional restriction on the assertion of basic criminal jurisdiction. Therefore, upon a lawful referral by Samutra, and upon satisfying Article 12, the ICC is empowered to accept jurisdiction in this matter, and subsequently investigate and prosecute all relevant crimes under its statutory grant of authority.

The United States contends that the ICC has no right to assert jurisdiction due to the nationality of the offenders, and suggests that a treaty creation, such as the ICC, cannot obligate non-party third states according the Vienna Convention on the Law of Treaties. However, the United States is incorrect with regard to two issues. First, it is a misinterpretation of Article 34 to conclude that the ICC’s assertion of jurisdiction implies an obligation on a non-party; on the contrary, the United States is under no affirmative duty to assist the ICC with the prosecution of these individuals and is merely a third party bystander. Second, a number of treaty regimes have been applied to the nationals of non-party states. For example, the Convention for the Suppression of Unlawful Seizure of Aircraft (“Hijacking Convention”) has been used by the United States on multiple occasions to try nationals of states not a party to the convention for crimes committed wholly abroad.

B. Canada acted in accordance with both international and domestic law when it apprehended and detained Clyde Barrett and Ishmael Balthasar.

When Canada apprehended and detained Clyde Barrett and Ishmael Balthasar, it was acting under its lawful assertion of universal jurisdiction and in accordance with the law of armed conflict. The basis for jurisdiction by a state arises out of a necessity to affect its legal interests. When a state attempts to assert its interests and authority beyond its own borders, however, it must rely on one or more principles of jurisdiction, including territoriality, nationality, passive personality, or the protective principle. An additional basis for the assertion of jurisdiction is the previously mentioned universality principle, which allows any state to assert jurisdiction over crimes of serious international concern. The more traditional bases of jurisdiction require some link with the prosecuting state; however, the universality principle rests

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90 Id. at 787-88.
91 Id. at 788.
on the belief that every state has an interest in adjudicating serious violations of international law, including crimes against humanity.

Some debate exists whether crimes against humanity fit into the category of crimes meant to be prosecuted using universal jurisdiction, such as piracy. However, the Geneva Conventions and their 1977 Additional Protocols, to which Canada and Tangoon are parties, contains language indicating that crimes against humanity are meant to be covered by universal jurisdiction. The Conventions identify grave breaches, including inhumane treatment, and uses definitions that reflect those used at the Nuremberg proceedings against the Nazi regime.

The Conventions also hold that state parties are "... under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." Furthermore, a number of treaty regimes to which Canada and Tangoon are parties, including the Geneva Conventions, provides not only for universal jurisdiction, but also obligates states to assist in the prevention and punishment of certain international crimes. Canada and Tangoon are parties to both the Genocide Convention and the UN, both of which express affirmative duties to prevent crimes against humanity. For example, UN General Assembly Resolution 3074 states that parties "... shall assist each other in detecting, arresting and bringing to trial persons ..." who are suspected of crimes against humanity, and that these crimes wherever "... committed, shall be subject to investigation."

Furthermore, Canada's own laws recognize the assertion of universal jurisdiction for crimes against humanity. Canada's Crimes against Humanity and War Crimes Act makes it clear that it considers crimes against humanity to be part of customary international law, and that it was explicitly criminal

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93 Corrections and Clarifications to the Compromis Between the United States and Canada Concerning Intervention in Tangoon, correction 1 (Jan. 17, 2012).
94 Randall, *supra* note 89, at 816-17.
according to the law of nations even prior to World War II. The Act provides that "[e]very person who . . . commits outside Canada, (a) genocide, (b) a crime against humanity, or (c) a war crime . . . may be prosecuted for that offence . . .".

In addition to its prescriptive authority to exercise universal jurisdiction, Canada was permitted under the customary international law related to armed conflict to detain Barrett and Balthasar. As noted in the International Committee of the Red Cross’ publication on customary international humanitarian law, states are required to remove captured persons from the area of combat for their own protection. Moreover, captured persons may continue to be held following the cessation of hostilities if "... penal proceedings are pending against them or if they are serving a sentence lawfully imposed." If this Court follows the trend established by the international community dating back to at least 1949, it should find that Canada possessed the lawful right to assert jurisdiction over Clyde Barrett and Ishmael Balthasar for crimes against humanity and genocide. These crimes have been established to be crimes of such gravity as to warrant universal jurisdiction. As Barrett and Balthasar are believed to have committed these crimes, Canada had a right and obligation under numerous international treaties and customary international law, as well as its own laws, to apprehend and detain them.

C. Canada is allowed to choose a judicial forum other than its national courts to prosecute Clyde Barrett and Ishmael Balthasar, and is also obligated to cooperate with the International Criminal Court as party to the Court.

As discussed in the above section, Canada has the legislative authority to try Barrett and Balthasar for crimes against humanity. That legislative authority, however, does not deny Canada the option to surrender them to an international forum for prosecution. The power of a state to delegate its judicial authority in special circumstances has precedent dating back to World War II. The International Military Tribunal at Nuremberg was a treaty creation, which provided for the jurisdiction over several crimes that were not directly linked to any of the parties to the treaty. The London agreement that established the tribunal was a combination of territorial and universal jurisdiction, but as the court reasoned, the Nazi defendants could not argue

98 Crimes Against Humanity and War Crimes Act § 6(2), S.C. 2000, c. 24 (Can.).
99 Id. § 6(1).
101 Id. at 451-52.
102 Scharf, supra note 92, at 103.
103 Id.
that there was lack of jurisdiction as the court was merely doing "... together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law." Therefore, although Canada, as well as a number of other states, has the authority to try Barrett and Balthasar for crimes against humanity, no rule of law prohibits them from delegating to an international judicial body such as the ICC.

Furthermore, international law often expressly provides for adjudication in international forums. For example, the Genocide Convention states that a competent tribunal, either in the territory where committed, or by one that is of international character, is the proper forum to try acts of genocide. In addition, the origins of the ICC reveal the intention of states to utilize the court for serious international crimes. The United States itself declared during the drafting of the Rome Statute that certain crimes justifiably warrant international prosecution, merely due to the fact that the crimes are grave and because the international community at large has an interest in seeing them resolved. Moreover, the United States also stated that it was committed to prosecuting crimes against humanity "... both at the national and the intentional level."

Lastly, not only is Canada lawfully permitted to delegate its judicial authority to the ICC, it is bound to cooperate with the court. State parties to the ICC are required to fully cooperate with the Court, both during the investigational phase and during the prosecution. Furthermore, when the court's prosecutor has sought a valid arrest warrant, as has occurred in the present case, states that are party to the ICC can be required, upon request, to comply and surrender individuals within their custody. Therefore, Canada is bound as a party to the court to surrender Barrett and Balthasar upon request by the ICC.

104 22 Trial of the Major War Criminals before the International Military Tribunal 461 (1948).
105 See Genocide Conv., supra note 76, art. 6.
106 Ad Hoc Committee on the Establishment of an International Criminal Court, Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on Establishment of an International Criminal Court, ¶ 64, UN Doc. A/AC.244/1/Add.2 (March 31, 1995).
107 Id. ¶ 7.
108 Rome Statute, supra note 80, art. 86.
109 Id. art. 89(1).
D. International law prohibits Ishmael Balthasar’s claim of head of state immunity for his crimes against humanity.

Immunity for state and diplomatic officials is a long recognized principle of customary international law. A number of exceptions to this immunity exist, however, particularly with regard to violations of international criminal law when adjudicated in an international forum. The court should first consider, however, the argument that Ishmael Balthasar does not factually qualify for head of state immunity. As the record indicates, Balthasar holds the title, Minister of Internal Affairs, while his brother, Raffiiki Balthasar retains the actual position of head of state or government. Although a diplomatic agent abroad qualifies for criminal immunity, a government official, whether acting as the de facto head or not, should not legitimately fall within the protection of head of state immunity. Furthermore, diplomatic and head of state immunity are designed to immunize only for acts abroad. If one carefully examines this Court’s opinion in the Arrest Warrant case, one will find that the court stated specifically that a diplomatic official “. . . when abroad enjoys full immunity from criminal jurisdiction . . . .” Therefore, as Ishmael Balthasar’s overt criminal acts occurred while inside the territory of Tangoon, he is not immunized from criminal liability resulting from the effects abroad.

Even if Balthasar is deemed to be Tangoon’s head of state, and therefore, technically eligible for immunity, he is still barred from asserting it to avoid prosecution in the present case. Contemporary thought on head of state immunity dictates that state officials are not immune from prosecution for international criminal acts such as genocide or crimes against humanity. This assertion is supported by the belief that such criminal conduct could not be considered official acts. Furthermore, the international community has generally denied head of state immunity with regard to grave violations of international criminal law. The London Charter for the International Military Tribunal in 1945, the Charter for the Military Tribunal of Tokyo, Con-

111 Vienna Convention on Diplomatic Relations art. 31, April 18, 1961, 500 U.N.T.S. 95.
14).
114 Id.
vention on the Prevention and Punishment of the Crime of Genocide, the Statute of the International Criminal Tribunal for the former Yugoslavia, and the Statute of the International Criminal Tribunal for Rwanda all maintain individual criminal liability regardless of official status. In the present case, Article 27 of the Rome Statute expressly denies immunities attaching to official status, and further states that the provisions of the statute apply equally, including to heads of state. If Article 27 is considered in conjunction with the opinion expressed by the applicant in the Arrest Warrant case, then Balthasar cannot claim immunity. In the Arrest Warrant case, the Congo conceded that even if a specific court at a particular time is barred from prosecuting due to an attached immunity, that bar does not prevent another court "... not bound by that immunity ..." from subsequently exercising jurisdiction. If the court considers the customary trend with regard to Ishmael Balthasar, a de facto head of state within his territory, alleged to have committed grave international crimes, it is clear that the Rome Statute, as an international agreement with a positive provision barring head of state immunity, should be respected and Balthasar's claim to immunity denied.

CONCLUSION

International law permitted Canada's intervention in Tangoon, the apprehension and detention of Clyde Barrett and Ishmael Balthasar, and further permits their surrender to the ICC. Canada lawfully responded to a request for assistance from Samutra, and entered Tangoon under the authority of the UN's "Uniting for Peace" resolution and the principles of collective self-defense. Moreover, Canada maintained a right of action under the "Responsibility to Protect" doctrine. Upon lawfully entering Tangoon, Canada was lawfully permitted to apprehend and detain Clyde Barrett and Ishmael Balthasar. Furthermore, Canada is allowed to choose a non-domestic judicial forum, such as the ICC, to adjudicate the suspected crimes. Lastly, Ishmael Balthasar is not entitled to head of state immunity due to his actual position within the government, and the denial of head of state for grave violations of international criminal law. The State of Canada prays that this Court uphold its humanitarian actions, the apprehension and detention of Clyde Barrett and Ishmael Balthasar, and that it allows their surrender to the ICC.

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117 Genocide Conv., supra note 76, art. 4.
Respectfully submitted,

TEAM#: 2012-16R
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the Government of Canada