
YEAR 2007 NIAGARA MOOT COURT COMPETITION

**CANADA
(APPLICANT)**

V.

**THE UNITED STATES OF AMERICA
(RESPONDENT)**

THE CASE CONCERNING *THE MAPLE PRINCESS*

BENCH MEMORANDUM

*****CONFIDENTIAL*****

FOR JUDGES EYES ONLY

**Sponsored by the Canada-United States Law Institute ("CUSLI")
2007 Competition hosted at Case Western Reserve University School of Law in Cleveland
Problem and Bench Memo written by Michael P. Scharf**

ABOUT THE AUTHOR

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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 over sixty scholarly articles and ten 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, and casebooks on The Law of International Organizations (2ND ed. 2007) and International Criminal Law (3rd ed. 2007).

Professor Scharf has testified as an expert before the U.S. Senate Foreign Relations Committee and House Armed Services Committee; his Op Eds have been published by the Washington Post, Los Angeles Times, Boston Globe, Christian Science Monitor, and International Herald Tribune; and he has appeared on ABC World News Tonight with Peter Jennings, Nightline with Ted Koppel, The O'Reilly Factor, The NewsHour with Jim Lehrer, The Charlie Rose Show, NBC's The Today Show, the BBC's The World, CNN, and National Public Radio. Professor Scharf also hosts an award-winning Blog about the trials of Saddam Hussein and other former leaders before the Iraq High Tribunal: <http://www.law.case.edu/saddamtrial> .

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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 with the basic factual and legal issues in the 2007 Niagara Problem (the “Compromis”). This Bench Memorandum should be read in conjunction with the Compromis and Clarifications, which are in essence a stipulation of facts agreed to by the two Parties. The Compromis is intended to present the competitors with a balanced problem, such that each side has strengths and weaknesses in its case. The Compromis contains a number of legal issues that are relevant to more than one claim for relief, and participants will often be required to argue in favor of a rule of law in support of one claim and distinguish the same rule with respect to another claim. Judges should note and question any internal inconsistencies that may arise in a competitor’s or team’s argument. This memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Compromis. 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. This does not suggest that such arguments are not relevant or credible.

II. Synopsis of the Facts

The following is a summary of the people, places and events in the Compromis.

A. PERSONS, PLACES AND ENTITIES

Stephen Harper: Prime Minister of Canada since March 10, 2006. Owner of *The Maple Princess*.

Flan Tomigan: The Canadian Prime Minister’s half brother.

Max Aziz: Canadian citizen who runs import-export business based in Ireland. Married to Estelle Aziz. Life-long friend of Flan Tomigan. Suspected by US of being Mohamed Aziz, al Qaeda’s financial mastermind.

Al Qaeda: Terrorist organization responsible for a series of attacks against the United States including bombing a US warship at port in Yemen and American embassies in Africa, and the September 11, 2001 attacks on the World Trade Center and Pentagon.

National Security Agency (NSA): US intelligence agency which intercepted email messages confirming that Mohamed Aziz was al Qaeda’s primary financial figure.

PDD 2006-08: Secret (now de-classified) Directive issued by President Bush authorizing the targeted killing of Mohamed Aziz.

The Maple Princess: An \$ 5.8 million 85-foot luxury yacht owned by Stephen Sharper. Leased in March 2006 to Flan Tomigan. Built and registered in Canada and flying the Canadian flag at all relevant times. Spinnaker sail says “Thinking new boat? Think Canadian.”

US Navy PC-1 Cyclone Class Ops vessel: Sent Navy Seals to surreptitiously board *The Maple Princess* on July 16, 2006, some 260 nautical miles off the coast of Canada, without Canada’s consent. Navy seals used stun guns to render the passengers unconscious, and then shot Mohamed Aziz and threw his body overboard. Discovered suitcases under Aziz’s bunk containing millions of dollars in Swiss Bearer Bonds and hundreds of bags of heroin. Called in the Coast Guard.

US Coast Guard MH-68 Shark: Helicopter dispatched from Portsmouth Harbor Station. Crew members boarded *The Maple Princess* without Canada’s consent. Took vessel and passengers into custody at Portsmouth Harbor Station.

B. CHRONOLOGY OF EVENTS

April 2003	Stephen Sharper, Member of Parliament, purchases <i>The Maple Princess</i> for 5.8 million dollars. The vessel is registered as a Canadian Flag ship. Sharper entertained Canadian politicians and foreign dignitaries on the yacht, and used it for family vacations.
March 10, 2006	Stephen Sharper becomes Prime Minister of Canada.
Late March 2006	Stephen Sharper agrees to lease <i>The Maple Princess</i> to his half-brother Flan Tomigan for \$500 per month, for June and July 2006. Sharper replaces the yacht’s spinnaker which featured the slogan “Canada: Proud to Call it Home,” with a new spinnaker featuring a giant maple leaf emblazoned with the words “Thinking new boat? Think Canadian.”
April 2006	Flan Tomigan invites Max and Estelle Aziz to sail from Ireland to Canada aboard <i>The Maple Princess</i> in July 2006.
Early June 2006	NSA intercepts email messages from Maz Aziz confirming his role as al Qaeda’s financial mastermind, and indicating that Aziz would be sailing with millions of dollars in Swiss Bearer Bonds aboard <i>The Maple Princess</i> from Ireland to Canada in July.
June 21, 2006	President Bush issues PDD 2006-08 authorizing a targeted killing of Max/Mohamed Aziz, noting that the killing of Aziz will constitute a severe blow to al Qaeda, “which will not be able to launch operations against the United States without the financial lifeblood provided by Aziz.”
2:00 am GMT on July 16, 2006	UN Navy PC-1 Cyclone Class Special Ops vessel sends Navy Seals to surreptitiously board <i>The Maple Princess</i> in international waters, 260 nautical miles off the coast of Canada, without Canada’s consent. Navy Seals use stun guns to render the four passengers unconscious. Navy Seals then shoot Max Aziz and dump his body overboard. Navy Seals discover suitcases containing millions of dollars in Swiss Bearer Bonds and hundreds of ziplock bags containing heroin. Navy Seals take money, leave drugs and unconscious

	passengers, and alert Coast Guard.
A few hours later on July 16, 2006	US Coast Guard deploys an MH-68 Shark helicopter to <i>The Maple Princess</i> , which was still in international waters. Coast Guard crew boards the vessel, confirms the presence of approximately \$20 million worth of pure Afghan heroin. Coast Guard takes vessel and passengers into custody, sailing it into Portsmouth Harbor Station.
A few hours later on July 16, 2006	When Flan Tomigan wakes up and produces identification and documentation proving that he is the half-brother of the Prime Minister of Canada, the Coast Guard release all three detained passengers, but keep <i>The Maple Princess</i> and the suitcase containing heroin.
Late July 2006	United States institutes civil forfeiture proceedings for <i>The Maple Princess</i> .
August 17, 2006	Lawyers for government of Canada make a special appearance to request dismissal of the forfeiture proceedings for <i>The Maple Princess</i> . Argue: (1) US lacked jurisdiction over the vessel which was registered to Canada, located in international waters, and headed to Canada; (2) Since the vessel was the property of the Canadian Head of State, it could not be subjected to forfeiture; and (3) Since the US did not first obtain the consent of the Flag State, the Law of the Sea required dismissal of the forfeiture proceeding.
September 4, 2006	US District Court rejects Canada's arguments, and the First Circuit Federal Court of Appeals later affirms the District Court.
September 2006	Estelle Aziz sues the United States in the US District Court for the District of Columbia under the Alien Tort Claims Act for the killing of Max Aziz. On September 16, 2006, the District Court dismisses the case, and the DC Circuit Federal Court of Appeals later affirms the District Court.
October 3, 2006	US Supreme Court denies Canada and Estelle's Aziz's respective petitions for certiorari.
October 5, 2006	Canadian Prime Minister Stephen Harper delivers a public address in which he threatens to close the Peace Bridge unless the United States agrees to submit the case to the ICJ. A few hours later, the United States agrees to submit the case to the ICJ.

C. PRAYERS FOR RELIEF OF EACH PARTY

Applicant Canada requests that the ICJ adjudge and declare:

- (a) The United States violated international law when it conducted the targeted killing of Max Aziz;
- (b) The United States violated the Law of the Sea when it boarded, searched, and seized *The Maple Princess* without first obtaining Canada's consent;
- (c) The United States' exercise of universal jurisdiction over *The Maple Princess* was exorbitant;
- (d) The Head of State immunity doctrine prevents U.S. judicial forfeiture proceedings against *The Maple Princess*.

Respondent the United States requests that the ICJ adjudge and declare:

- (a) The United States did not violate international law when it conducted the targeted killing of Max Aziz;
- (b) The United States did not violate the Law of the Sea when it boarded, searched, and seized *The Maple Princess* without first obtaining Canada's consent;
- (c) The United States' exercise of universal jurisdiction over *The Maple Princess* was lawful;
- (d) The Head of State immunity doctrine does not prevent U.S. judicial forfeiture proceedings against *The Maple Princess*.

III. Sources of International Law

This section is an introduction to public international law for judges who might not have professional experience or training in the field. There are important distinctions between international law and domestic legal systems. The most significant for the international law moot court 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: "The decision of the Court has no binding force except between the parties and in respect of that particular case." In practice, 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 which 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 relevant to this case, to which both Canada and the United States are parties, include: the UN Charter, the International Covenant on Civil and Political Rights, and the 1958 Geneva Convention on the High Seas. In addition, Canada is a Party to the 1982 UN Convention on the Law of the Sea. The United States has signed, but not yet ratified the 1982 Law of the Sea Convention.

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 – for example, many provisions of the 1982 Law of the Sea Convention -- may reflect or codify customary international law, while other parts do not.

¹ 1155 U.N.T.S. 331 (1969), available at <http://fletcher.tufts.edu/multi/texts/BH538.txt>. (hereinafter, the "VCLT").

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.

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.

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

² *North Sea Continental Shelf Cases*, (F.R.G. v. Den.), 1969 I.C.J. 1 (1969).

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

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 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 normally carries the burden of proof with respect to factual allegations contained in its claim, by a preponderance of the evidence.

⁴ P.C.I.J. Ser. A/B, No. 70, 76-78 (1937).

⁵ *Corfu Channel Case (Merits)* (*U.K. v. Alb.*), 1949 I.C.J. Rep. 4.

The burden falls on the Respondent with respect to factual allegations contained in a counter-claim.

In addition, where the Respondent possesses exclusive control of the evidence regarding the specifics of the Applicant's claim, and has not produced it or stipulated to it in the Compromis, pursuant to *Corfu Channel*, the Court may take liberal inferences of fact against the Respondent.

Participants cannot 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 unsupportable inferences.

V. Jurisdiction and Admissibility

The Compromis stipulates that no arguments are to be made addressing the legality of the closure of the Peace Bridge, the propriety of the ICJ's jurisdiction, or issues of standing, ripeness, exhaustion, or the admissibility of the case.

PART 2: LEGAL ANALYSIS

This section identifies and provides a basic analysis of the major issues that the 2007 Niagara Moot Court Problem raises. It also sets forth some of the main arguments that the two sides are likely to make.

I. Did the United States violate international law with the targeted killing of Canadian national Max Aziz?

A. Which applies – Human Rights Law of International Humanitarian Law?

Under human rights law, any intentional use of lethal force by state authorities that is not consistent with the provisions regarding the right to life will be regarded as an unlawful “extra-judicial execution.” The International Covenant on Civil and Political Rights (ICCPR), and the American Convention on Human Rights, to which both Canada and the United States are parties, prohibit “arbitrary” deprivation of life.⁶ Under these human rights instruments, suspected offenders are entitled to the following rights: (1) the presumption of innocence; (2) arrest, detention, and interrogation in accordance with due process of law; (3) a fair trial before a competent and independent court; and (4) if convicted, a sentence by the court to a punishment provided by law. Under international human rights law, a state may not prevent criminal acts by eliminating the potential perpetrators; prevention is to be achieved by apprehension or threat of

⁶ See Art. 6 of the International Covenant on Civil and Political Rights; and Art. 4 of the American Convention on Human Rights.

legal sanction. Use of deadly force can never be regarded as necessary and therefore lawful unless it is clear that there was no feasible possibility of protecting the prospective victim by apprehending the suspected perpetrator.⁷

Pursuant to the doctrine of *lex specialis*, the United States has taken the position that International Humanitarian Law (ILH), rather than International Human Rights Law, applies to persons killed or detained pursuant to its Global War on Terrorism.⁸ Pursuant to Article 13 of Additional Protocol II to the Geneva Conventions, civilians are protected from attack “unless and for such time as they take a direct part in hostilities.”⁹ According to the International Committee of the Red Cross Commentary on that provision, “those who belong to armed forces or armed groups may be attacked at any time.”¹⁰ The United States thus argues that since an armed conflict exists between the United States and al Qaeda, active members of al Qaeda or al Qaeda leaders are combatants who may be targeted.

Canada will respond by pointing to the Inter-American Commission’s decision in the *Detainees at Guantanamo Bay* case.¹¹ While recognizing that the concept of *lex specialis* applies where there is a specific conflict between the rules of International Humanitarian Law and Human Rights law in the context of armed conflict, the Commission held that Human Rights Law nonetheless complements and reinforces International Humanitarian Law during armed conflict, such that no one may fall into a law-free zone. The International Court of Justice similarly ruled in the *Advisory Opinion on the Israeli Wall Being Built in Palestine*, that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.”¹² Consequently, Canada will argue that international human rights law and international humanitarian law apply concurrently, and the United States must afford Mr. Aziz the fundamental protections under both regimes.

Canada may also argue that the term war on terrorism is appropriately only used in a metaphoric sense, and consequently the “war” between the United States and al Qaeda cannot trigger the application of the laws of war outside the territory of Afghanistan and Iraq. Outside

⁷ David Kretzmer, Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense, 16 *European Journal of International Law* 171, 178-179 (2005).

⁸ Statement by Andre Surena at Hearing of the Inter-American Commission on Human Rights on Issues Relating to Prisoners Detained at Guantanamo Bay, Cuba (October 20, 2003), available at: <http://www.state.gov/s/1/2003/44385.htm>.

⁹ Article 13(2) of Additional Protocol II to the 1949 Geneva Convention.

¹⁰ ICRC Commentary on Protocol II Additional to the Geneva Conventions of 12 August 1949, at para. 4441.

¹¹ Inter-American Commission on Human Rights, *Detainees at Guantanamo Bay, Cuba*, March 12, 2002, available at: http://www.photius.com/rogue_nations/guantanamo.html.

¹² *Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 2004 ICJ Rep; Human Rights Committee, General Comment No. 31 [80], U.N. Doc. CCPR/C/21/Rev.1/Add.13, para. 106.

of those countries, the sporadic acts of violence committed by al Qaeda against the United States before and after 9/11 do not rise to the level of protracted armed violence between governmental authorities and organized armed groups as required to trigger the laws of war. This is consistent with the holding of the U.S. court in the *Pan-Am Inc. v. Aetna Casualty and Surety Co. case*, in which the court ruled that the United States could not have been at war with the terrorist group known as the PFLP because it had engaged in terrorist acts as a non-state, non-belligerent, non-insurgent actor.”¹³ In such a case, Human Rights Law, rather than International Humanitarian Law, governs this case.

B. Does the Covenant on Civil and Political Rights apply on the High Seas?

The United States may argue that, by its terms, the Covenant on Civil and Political Rights (and American Convention on Human Rights) only applies to U.S. actions undertaken within its own territory, and would not apply to the actions of US military authorities undertaken on a foreign flag ship on the high seas. In making this argument, the United States may draw on the case law of the European Court of Human Rights, which has taken the view that the European Convention on Human Rights is regionally bounded. Thus, in the *2001 Bankovic* case, the European Court noted that “the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.”¹⁴ Canada may point out, however, that the European Court’s jurisdiction is in flux with respect to this issue. In *Issa v. Turkey*, a November 2004 judgment concerning the conduct of Turkish forces during cross-border incursions to route out terrorists who had taken refuge in northern Iraq, the Court indicated that once individuals come within an area under the control of a Contracting State, those individuals are deemed to be within the legal space of that State.¹⁵

Canada may further respond by drawing the Court’s attention to the ICJ’s Advisory opinion in the *Construction of a Wall in the Occupied Palestinian Territory* case, and to the General Comments of the Human Rights Committee, which affirm that the ICCPR extends to “those within the power or effective control of the forces of a State party acting outside its territory.”¹⁶

C. Can Self-Defense justify targeted killing of a terrorist financial figure?

¹³ *Pan-Am Inc. v. Aetna Casualty and Surety Co.*, 505 F.2d 989, 1013-1015 (2nd Cir. 1974).

¹⁴ *Bankovic and Others v. Certain NATO Member States*, Grand Chamber Decision as to the Admissibility of Application no. 52207/99, 12 December 2001 (holding that Convention did not apply to NATO bombing of Belgrade TV station since Serbia was not a party to the Convention).

¹⁵ *Issa and Others v. Turkey*, Application no. 31821/96, Judgment, 6 November 2004 (The Court noted that if Turkey “could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq” and if it could be shown that “at the relevant time, the victims were within that specific area,” then “it would follow logically that they were within the jurisdiction of Turkey).

¹⁶ *Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 2004 ICJ Rep; Human Rights Committee, General Comment No. 31 [80], U.N. Doc. CCPR/C/21/Rev.1/Add.13, para. 10.

Under customary international law, dating back to the 1837 *Caroline incident*, anticipatory or pre-emptive self-defense was deemed lawful when “the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”¹⁷ After the embassy bombings in Kenya and Tanzania in 1998, the U.S. fired seventy-nine tomahawk missiles on the alleged terrorist outposts of Osama bin Laden in Sudan and Afghanistan. President Clinton justified the strikes as “a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities.”¹⁸ There was scant international protest of this action (indeed Canada supported it), and since then, the United States has committed a number of targeted killings of al Qaeda leaders in various countries across the globe by firing “hell fire” missiles from “Predator Drone” aircraft.

In December 2006, the Israeli Supreme Court became the first court in the world to issue an opinion on the legality of targeted killing under international law. The Court held that such action against terrorists “taking direct part in hostilities” is lawful where it meets the requirements of necessity and proportionality.¹⁹

Drawing on this precedent, Canada may argue that Max Aziz does not take a direct part in hostilities; he is a financier, not a fighter. Citing the precedent of the Inter-American Commission on Human Rights, the Israeli Supreme Court noted that civilians whose activities merely support the adverse party’s war or military effort cannot be considered legitimate targets. The Court specified that this would apply to “a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid.”²⁰

The United States, in response, may point out that Aziz does not simply provide monetary aid to al Qaeda; he is the organization’s chief financial figure. According to the *Compromise*, in authorizing the targeted killing, the United States determined that the elimination of al Qaeda’s financial mastermind would constitute a severe blow to the organization which will not be able to launch operations against the United States without the financial lifeblood provided by Aziz. And according to the Israeli Supreme Court, “[g]ray areas should be interpreted liberally, i.e., in favor of finding direct participation” because “[o]ne of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants. Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by combatants endangered by their activities.”

Canada may also argue that the killing of Max Aziz was unlawful since it occurred after he was rendered unconscious, at which point he could be apprehended at little risk. As the Israeli Supreme Court stated, “[i]f a terrorist taking a direct part in hostilities can be arrested,

¹⁷ The *Caroline* (exchange of diplomatic notes between Great Britain, Ashburton, and the United States, Webster, 1842), 2 J. Moore, *Digest of International Law* 409, 412 (1906).

¹⁸ See Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 *Case W. Res. J. Int’l L.* 319, 326 (2005).

¹⁹ *Public Committee against Torture in Israel v. Israeli*, Slip. Op., December 11, 2006.

²⁰ *Id.* at para 35.

interrogated, and tried, those are the means which should be employed. Trial is preferable to use of force.”²¹ The United States may respond that the Court should defer to its judgment as to the risks involved in trying to apprehend, rather than kill Aziz. The Israeli Supreme Court, however, stressed that “Not every efficient means is also legal. The ends do not justify the means. The army must instruct itself according to the rules of the law.”²²

II. Did the United States violate the Law of the Sea by boarding, searching and seizing *The Maple Princess* without Canada’s consent?

A. The Piracy exception to the rule requiring Flag State consent.

Under Article 15 of the 1958 Geneva Convention on the High Seas, to which the United States is a party, and Article 101 of the 1982 United Nations Law of the Sea Convention, to which Canada is a party, the flag state has exclusive jurisdiction over the ships registered to it when they are found on the high seas, and no other state may board, search, or seize such vessels without first obtaining the consent of the flag state.

For the past 500 years, States have exercised jurisdiction over piratical acts on the high seas, even when neither the pirates nor their victims were nationals of the prosecuting state.²³ While the consent of the Flag State is generally required before the authorities of a second State can board, search, or seize a vessel on the high seas, there has always been a customary international law exception to this rule for vessels suspected of engaging in piracy. The exception is codified in both the 1958 and 1982 Law of the Sea Conventions. Piracy’s fundamental nature and consequences explained both this exception and the rationale for subjecting pirates to universal jurisdiction. Piracy often consists of heinous acts of violence or depredation, which are committed indiscriminately against the vessels and nationals of numerous states.²⁴ Moreover, pirates can quickly flee across the seas, making pursuit by the authorities of particular victim States difficult.

If *The Maple Princess* is deemed a pirate vessel because it is being used by an international terrorist to promote the objectives of the Al Qaeda organization, than the United States had a right under international law to board, search, and seize the vessel without the consent of Canada, the flag state.

²¹ Id. at para. 40.

²² Id at. Para 63.

²³ Like other international criminals, pirates can retain their nationality and still be subject to universal jurisdiction. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 793 (1988).

²⁴ Hari M. Osofsky, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L. J. 191 (1997); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 793 (1988); Daniel Bodansky, *Human Rights and Universal Jurisdiction, in WORLD JUSTICE? U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS* 9 (Mark Gibney, ed., 1991).

B. Can *The Maple Princess* be deemed a pirate vessel?

Although it has long been well-settled under international law that any state could apprehend a pirate vessel, there was no authoritative definition of “piracy” under customary international law. It was not settled, for example, whether an intent to rob was a necessary element of piracy, whether acts of insurgents seeking to overthrow their government should be considered piratical, or whether the act had to be by one ship against another.²⁵

Both the 1958 Geneva Convention on the High Seas, to which the United States is a party, and the 1982 United Nations Law of the Sea Convention, to which Canada is a party, define piracy narrowly to consist of the following acts: “(a) any illegal acts of violence, detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft....”

Canada will argue that the definition in the 1958 and 1982 Law of the Sea Conventions should control in this Case, and that under that definition *The Maple Princess* was not a pirate vessel since it had not attacked another vessel on the high seas for private gain. The United States, in turn, will argue that the Law of the Sea Conventions supplement, but do not replace the customary law of piracy. The United States will contend that customary law would recognize terrorism on the high seas as the functional equivalent of piracy. Terrorists today, like pirates of old, are a threat to all states and no state is willing to assume responsibility for their acts. Since they do not confine their attacks to the vessels of a particular state, but attack vessels and nationals of many states indiscriminately, they are *hostis humani generis* (enemies of all humankind) in the truest sense. Indeed, the leader of the al Qaeda terrorist organization has been referred to by one distinguished commentator as “The Dread Pirate Bin Laden.”²⁶

Canada may respond by pointing out that *The Maple Princess* itself was not involved in any act of terrorism, let alone piracy, and that customary international law never recognized a right to search for pirates aboard innocent vessels on the high seas without the consent of the flag state. The United States may argue that this case is not just about the transport of a terrorist, but also the transport of millions of dollars in drugs and bearer bonds to aid the terrorist organization in conducting future acts of terrorism; therefore the ship is involved in terrorist activity.

C. Can the doctrine of necessity justify the boarding of a vessel without consent of the flag state?

Even if the piracy exception is inapplicable, the United States may argue that the boarding of *The Maple Princess* was justified under the “necessity defense.” Article 25 of the

²⁵ Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW 269, 272-273 (1988)

²⁶ Douglass R. Burgess Jr., *The Dread Pirate Bin Laden: How Thinking of Terrorists as Pirates Can Help Win the War on Terror*, LEGAL AFFAIRS, July-August 2005.

International Law Commission's (ILC) Articles on State Responsibility defines the necessity defense as follows:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole;
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a) The international obligation in question excludes the possibility of invoking necessity; or
 - (b) The State has contributed to the situation of necessity.²⁷

In 1997, the International Court of Justice confirmed that Article 25 of the Articles on State Responsibility reflect customary international law in the *Gabcikovo-Nagymaros Project case*.²⁸

To illustrate the necessity Defense, the ILC's commentary to Article 25 references the 1967 *Torrey Canyon* incident. The *Torrey Canyon* was a Liberian oil tanker that ran aground outside Britain's territorial waters and began to leak millions of barrels of oil through a hole in the vessel, posing a threat to the British coast and its population. Because the spill threatened the protection of the British marine and coastal environment, without obtaining the consent of Liberia or the ship's owners, the British government bombed the ship and burned the remaining oil – an act the International Law Commission concludes is lawful because of a state of necessity.²⁹

More recently, the necessity defense was applied by a French court in the 1987 *Nachfolger Navigation Case*. In that case, the French navy sank a cargo ship, the *Ammersee*, twenty-five nautical miles off the coast (i.e., in international waters). The ship was carrying two hundred tons of dynamite. During a storm, the ship caught fire and the crew abandoned the ship. Although the fire had been extinguished, the French authorities destroyed the ship because it posed a danger to shipping and to installations along the French coast. The French court denied the owner's suit for compensation, holding that the destruction did not violate any principle of international law because the *Ammersee* constituted "a grave and immediate danger" to the safety of the French coast "and no other measures would have been sufficient to remove the danger."³⁰

²⁷ Draft Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 53rd sess., G.A. Supp. No. 10 (A/56/10), art. 25.

²⁸ *Gabcikovo-Nagymaros Project* (Hung. V. Slov.), 1997 I.C.J. 7, at 40 (Sept. 25, 1997).

²⁹ International Law Commission, Commentaries on Responsibilities of States for Internationally Wrongful Acts, 53rd sess., GA Supp. No. 10 (A/56/10) (Nov. 2001), at 39.

³⁰ *The Nachfolger Navigation Company Ltd. And Others*, 89 INT'L L. REP. 3, 3-5 (1987).

Drawing on these precedents, the United States may argue that even if it violated the law of the sea, the unconsented boarding, search, and seizure of *The Maple Princess* can nevertheless be justified by the necessity defense. The United States will contend that with the vital support of Mohamed Aziz, Al Qaeda poses a continuing grave threat to the U.S. population and the country's security. In this respect, Aziz is like the leaking oil on the *Torrey Canyon* or the unexploded dynamite on the *Ammerssee*.

Canada may respond that the United States could have apprehended Max Aziz after obtaining Canadian consent and without seizing the Prime Minister's yacht. The United States, in turn, may argue that given the involvement of the Canadian Prime Minister's brother and the fact that it was the Prime Minister's yacht, requesting Canadian government permission would just have tipped off the elusive Aziz, thereby compromising the success of the vital operation.

III. Was the U.S. exercise of universal jurisdiction over the *Maple Princess* lawful under international law?

A. Did Universal Jurisdiction Apply to *The Maple Princess*?

Because *The Maple Princess* was not a US-flagged ship, was not in U.S. territorial waters, was not headed for the United States, and was not transporting U.S. citizens, the United States' exercise of extraterritorial jurisdiction over the vessel must be based on the "universality principle." The concept of "universal jurisdiction" provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of where the offense occurred, the nationality of the perpetrator, or the nationality of the victim.

While universal jurisdiction was first applied to piracy (permitting prosecution of pirates and forfeiture of pirate vessels), it was extended after World War II to war crimes and crimes against humanity, and has been further extended in recent years through the negotiation of multilateral conventions to a number of specific terrorist offenses, including aircraft hijacking,³¹ aircraft sabotage,³² attacks against diplomats and government officials,³³ hostage taking,³⁴ torture,³⁵

³¹Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 22 U.S.T. 1641, I.I.A.S. No. 7192, 860 U.N.T.S. 105.

³²Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, 974 U.N.T.S. 177.

³³Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 14 December 1973, 28 U.S.T. 1975, T.I.A.S. 8532.

³⁴International Convention Against the Taking of Hostages, 18 December 1979, U.N. G.A. Res. 34/145 (XXXIV), 34 U.N. GAOR Supp. (No. 46), at 245, U.N. Doc. A/34/146.

³⁵Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 7 December 1984, U.N. Doc. A/Res/39/46.

attacks at airports,³⁶ attacks against civilian vessels,³⁷ attacks against UN peacekeeping personnel,³⁸ and use of bombs against the civilian population.³⁹ These treaties permit the state in whose territory an offender “is found” to prosecute such a person under universal jurisdiction.

Canada may argue that these treaties only apply when an offender “is found” on a state’s territory. The treaties do not give a state a license to assassinate offenders found outside their territory, let alone seize foreign vessels on the high seas that were transporting such persons. The United States may respond that al Qaeda’s attacks constitute crimes against humanity, given the widespread and systematic number of civilians who are victimized, and that as the organization’s chief financial figure, Aziz’s responsibility for such crimes triggers universal jurisdiction under customary international law. As precedent, the United States may point out that Israel asserted universal jurisdiction under customary international law to justify the kidnapping of the infamous Nazi, Adolph Eichmann, from Argentina. Although the UN Security Council condemned Israel for violating Argentina’s territorial sovereignty in apprehending Eichmann, there was no averment that Israel lacked jurisdiction to try him. In upholding the District Court’s conviction and death sentence, the Supreme Court of Israel stated:

There is full justification for applying here the principle of universal jurisdiction since the international character of crimes against humanity ... dealt with in this case is no longer in doubt. ... The basic reason for which international law recognizes the right of each State to exercise such jurisdiction in piracy offenses ... applies with even greater force to the above-mentioned crimes. Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.⁴⁰

B. Did the U.S. Action in this case run afoul of limits to universal jurisdiction under Customary International Law? The Subsidiary Principle vs. The Lotus Principle

Recent cases involving assertions of universal jurisdiction have engendered diplomatic tensions between states, such as in 2002 when Belgium indicted Israeli Prime Minister Ariel Sharon

³⁶Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention of September 23, 1971, Feb. 24, 1988, *S. Treaty Doc. No.* 100-19 (1988).

³⁷Convention and Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted by the International Maritime Organization, at Rome, 10 March 1988, I.M.O. Doc. SVA/CON/15.

³⁸The Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 34 I.L.M. 482 (1995) (entered into force on January 15, 1999).

³⁹International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249 (1998).

⁴⁰Attorney General of Israel v. Eichmann, 36 I.L.R. 277, 299, 304 (Isr. Sup. Ct. 1962).

for crimes committed by forces under his command in Lebanon, or in 2006 when Germany indicted former U.S. Secretary of Defense Donald Rumsfeld for acts of torture committed by U.S. troops at Abu Ghraib and Guantanamo Bay detention facilities.⁴¹ To avoid such inter-state tension, courts and legislatures have begun to apply various limits to the exercise of universal jurisdiction. Thus, in the 2003 *Judgment on the Peruvian Genocide Case*, the Supreme Court of Spain held that there was an inherent limit on the principle, which it called “the necessity of jurisdictional intervention,” according to which Spanish courts should only exercise universal jurisdiction if Peruvian courts fail to take effective steps to prosecute. Observing that Peru was in the process of initiating criminal investigations related to the crimes alleged by the petitioners in their claims, the Spanish Supreme Court held that “for the present time” there was no need for the Spanish courts to intervene on the basis of universal jurisdiction.⁴² Analogous to the complementarity principle applicable to the International Criminal Court,⁴³ this “subsidiary principle” articulated by the Supreme Court of Spain would permit exercise of domestic universal jurisdiction only upon a finding that the territorial jurisdiction is unwilling or unable to prosecute. Canada may point out that the United States never requested judicial assistance with respect to the apprehension of Max Aziz, which Canada would have been obliged to render under the US-Canada Mutual Legal Assistance Treaty.⁴⁴ In the absence of such a request or any evidence to indicate that Canada would have denied it, Canada may urge the ICJ to apply the subsidiary principle to the case at bar.

The United States, in turn, may point out that whether a State's exercise of extraterritorial jurisdiction is legitimate is governed by the so called “*Lotus* Principle,” articulated by the Permanent International Court of Justice (PCIJ) in 1927. In one of the most frequently quoted passages of the PCIJ's jurisprudence, the World Court stated: “Restrictions upon the independence of States cannot ... be presumed” and that international law leaves to States “a wide measure of discretion which is only limited in certain cases by prohibitive rules.”⁴⁵ The context in which this principle was articulated was a dispute between France and Turkey about whether Turkey had jurisdiction to try a French sailor for negligence on the high seas. A French vessel (The *SS Lotus*) had run into a Turkish vessel, causing the death of Turkish citizens. When the French vessel anchored at a Turkish port, Turkey took custody over and prosecuted the French watch officer for criminal manslaughter. France argued that the flag state alone had jurisdiction in such cases and

⁴¹Stefaan Smis and Kim Van der Borght, *ASIL Insight: Belgian Law Concerning the Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives* (July 2003), available at <http://asil.org.insights>; Scott Lyons, *ASIL Insight: German Criminal Complaint Against Donald Rumsfeld and Others* (December 14, 2006), available at <http://asil.org.insights>.

⁴²Tribunal Supremo (Supreme Court) of Spain: *Judgment on the Peruvian Genocide Case*, Judgment No. 712/2003 (May 20, 2003).

⁴³ Rome Statute for the International Criminal Court arts. 16, 53, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at [http://www.un.org/law/icc/statute/english/rome_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf).

⁴⁴ Treaty Between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, 1990 Can. T.S. No. 19.

⁴⁵*S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18.

that Turkey could not legitimately try a French citizen under international law since it could not "point to some title of jurisdiction recognized by international law."⁴⁶ The PCIJ 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.⁴⁷ Despite the fact that the *Lotus* opinion began its jurisprudential life as a 6-6 decision of the World Court (with the tie broken by the President of the Court), the *Lotus* principle continues to be cited with approval by the International Court of Justice, most in its July 8, 1996, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*.⁴⁸

With respect to the question of the exercise of universal jurisdiction as a basis for the forfeiture proceedings against *The Maple Princess*, the United States may argue that application of the *Lotus* principle would mean that such an exercise of jurisdiction must be deemed lawful unless it can be shown that this violates a prohibitive rule of international law. So long as States have a legitimate interest in exercising universal jurisdiction under such circumstances, the question is not whether international law or precedent exists permitting it, but rather whether any international legal rule exists which would prohibit it. The United States successfully made a similar argument to justify its prosecution of German war criminals after World War II in military courts. In response to the Defense argument in the *Hadamar Trial*⁴⁹ that no international legal authority existed that would permit an occupying power's military commissions to try offenders whose crimes were committed prior to the occupation, the United States argued "The principle of the *Lotus Case*, applied to the case before this Commission, means that the jurisdiction of the Commission, as a question of international law, need be denied only upon a showing that there is a generally accepted rule of international law which would prohibit the exercise of such jurisdiction."⁵⁰

IV. Does the doctrine of Head of State immunity prevent the United States forfeiture of the Maple Princess?

⁴⁶S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18.

⁴⁷S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18.

⁴⁸The ICJ majority opinion concluded: "State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition" -- which the Court found existed in the form of international humanitarian law. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. 1996 at para. 52. Only the dissenting judges (Weeramantry and Shahabuddeen) argued that the burden of showing "authorization" fell on the nuclear powers. *Id.*, Shahabuddeen Dissent, at 15.

⁴⁹The case involved claims that the defendants and their underlings had executed by lethal injection nearly five hundred Polish and Russian civilians at a sanatorium in Hadamar, Germany.

⁵⁰Charles H. Taylor, *Memorandum, Has the Commission Jurisdiction to Hear and Determine the Hadamar Case?*, U.S. JAGD Document - declassified on June 19, 1979 (on file with the author).

A. Does Head of State immunity apply to the property of a Prime Minister?

Head of State immunity is a principle of customary international law, requiring that a head of state be immune from the jurisdiction of a foreign state's courts, at least with respect to authorized official acts taken while the ruler is in power. Although the contours of head of state immunity are still under debate, the doctrine has been applied by courts around the world to such persons as Prime Minister Thatcher of Great Britain, President Aristide of Haiti, President Castro of Cuba, the Prince of Wales, the King of Saudi Arabia, and the Foreign Ministers of Korea and the Congo.⁵¹

Canada has a parliamentary democracy form of government. Its head of state is the Queen of England, represented by a Governor General – a mostly ceremonial position. Its head of government is the Prime Minister – who wields executive and foreign policy powers similar to the American President. Therefore, the Prime Minister of Canada would be entitled to head of state immunity.

The purposes of head of state immunity are (1) to provide recognition of an appropriate degree of respect for foreign leaders as a symbol of their state's sovereign independence; and (2) to ensure that the foreign rulers are not inhibited in performing their diplomatic functions. Thus, head of state immunity prevents a domestic court from prosecuting a foreign head of state or from entertaining any law suits against him or her. The immunity has also been applied to a head of state's property, including bank accounts located in a foreign state. It would therefore apply to the yacht owned by Prime Minister Sharper.

B. Does Head of State immunity apply to the private, commercial transactions of a Head of State?

Historically, heads of state, like states themselves, were absolutely immune for acts committed either in a public or a private/commercial capacity. As the international community moved toward a restrictive form of sovereign immunity, stripping away a state's immunity for private or commercial acts, it became unclear whether the doctrine of head of state immunity would follow that course as well.⁵²

In the United States, there is a split in authority as to whether head of state immunity applies to purely private acts. In 1994, the U.S. Federal Court of Appeals for the Ninth Circuit ruled that former Philippine head of state Ferdinand Marcos enjoyed no protection from lawsuits based on private acts committed while in office, including human rights violations.⁵³ The Court held that a head of state could be considered "an agency or instrumentality of a foreign state

⁵¹ Shobha Varughese George, *Head of State Immunity in the United States Courts: Still Confused After All These Years*, 64 *Fordham Law Review* 1051-1088 (1995), at 1062n.79.

⁵² Michael A. Tunks, *Diplomats or Defendants? Defining the Future of Head of State Immunity*, 52 *DUKE L. J.* 651 (2002), at 655.

⁵³ *In Re Estate of Ferdinand Marcos*, 25 F. 3rd 1467, 1471 (9th Circ. 1994).

within the meaning of the Foreign Sovereign Immunities Act,” which exempts a state’s private or commercial acts from immunity. The court reasoned that a lawsuit against a foreign official (including a head of state) acting outside the scope of his authority “does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts.” Similarly, the Second Circuit has opined that “the head of state defense does not apply to “private or criminal acts in violation of American Law.”⁵⁴ The United States will argue for a similar approach in this case before the ICJ.

Canada, in turn, will point out that other U.S. courts have rejected this approach. For example, in *Lafontant v. Aristide*, the Federal District Court in New York applied head of state immunity in dismissing a suit alleging that the President of Haiti had tortured and killed political opponents of his regime. The court reasoned that the restrictive approach to immunity embodied in the Foreign Sovereign Immunities Act does not apply to heads of state because the statute was “crafted primarily to allow state-owned companies ... to be sued in United States Courts in connection with their commercial activities.”⁵⁵

Recent state practice in other states provides several other examples of head of state immunity applying to even private acts including the most serious international crimes. In 1999, the National Court of Spain ruled that it had no authority to prosecute sitting Cuban head of state Fidel Castro for human rights violations. March 2001, France’s highest court, the Cour de Cassation, held that Libyan head of state Muammar Qaddafi was entitled to immunity in a suit alleging that Qaddafi was responsible for the bombing of a French DC 10 aircraft.⁵⁶ And in 2002, the International Court of Justice ruled in the *Belgian Arrest Warrant Case (Congo v. Belgium)* that a Belgian arrest warrant against the Congo Foreign Minister alleging that he had participated in crimes against humanity violated head of state immunity under customary international law. The ICJ emphasized that the nature of a head of state or foreign minister’s office requires him to travel to other nations without apprehension that he could be exposed to legal liability.⁵⁷

Although the weight of international authority is against the United States, the US may make several policy arguments supporting its position. First, the purposes of head of state immunity, namely comity and its related principles, would not be implicated in holding a foreign head of state liable for his private and commercial activities. A head of state who behaves as a private actor in commerce should be subject to the same rules as other private actors. Second, in the modern global economy many heads of state are involved as independent private actors in commercial activities. Consider the BCCI scandal, where the head of state of Abu Dhabi, Sheikh Zayed bin Sultan al-Nahyan, was sued for \$1.5 billion for conspiring to defraud the US banking system. Third, the head of state should be treated neither more nor less favorably than the state

⁵⁴ Doe v. United States, 860 F.2d 40, 45 (2nd Cir. 1988).

⁵⁵ Lafontant v. Aristide, 844 F. Supp. 128, 135 (E.D.N.Y., 1994).

⁵⁶ Michael A. Tunks, *Diplomats or Defendants? Defining the Future of Head of State Immunity*, 52 DUKE L. J. 651 (2002), at 662.

⁵⁷ Arrest Warrant of 11 April 2000 (Congo v. Belg.), 41 ILM 536, 541 (2002).

itself. Nearly all states now apply restrictive sovereign immunity, such that a sovereign's conduct as a merchant subjects it to the same laws as other merchants.

If head of state immunity does not apply to private and commercial activities, the United States will assert that it should not cover the lease of Prime Minister Sharper's yacht, which was then used for smuggling drugs and facilitating terrorist financing. Canada, may respond that *The Maple Princess* was engaged in official governmental activities at the time it was seized, as evidenced by the fact that Sharper had installed a "buy Canadian" spinnaker sail.

PART 3: POSSIBLE QUESTIONS FOR ORALISTS

I. Questions Concerning International Law Generally

1. Is there any priority or hierarchy of the sources of international law mentioned in Art. 38 of the ICJ Statute?
2. If a State has conflicting obligations under these two treaties (or under a treaty on the one hand and customary international law on the other), which obligation controls? What principles does the Court use to determine which obligation controls?
3. What are the obligations of a State that has signed but has not yet ratified a treaty?
4. What is customary international law? What are the elements of customary international law?
5. What is the role of precedent in the International Court of Justice? Is this Court bound by its prior decisions? How should it treat precedent from other international tribunals?
6. Do Resolutions of the U.N. General Assembly create binding obligations?
7. What are *travaux préparatoires*? When are the records of the drafting and negotiations of the treaty relevant?
8. What is the standard of proof with respect to each issue? Which party bears the burden of proof?

II. Questions Concerning the Targeted Killing of Aziz:

For Canada:

1. Which applies to this case – international human rights law or international humanitarian law? Why is this question important to the outcome of the case?
2. Does the Covenant on Civil and Political Rights apply outside a state party's territory?
3. Since Canada did not object to the US cruise missile attacks on al Qaeda leaders in the Sudan and Afghanistan, shouldn't Canada now be estopped from arguing that such targeted killings are unlawful under international law?
4. Does the December 2006 Israeli Supreme Court decision on targeted killing accurately reflect customary international law? If not, in what respects did the Court get the law wrong?
5. The Israeli Supreme Court held that that targeted killings of terrorists "taking direct part in hostilities" is lawful where it meets the requirements of necessity and proportionality? Why wouldn't participating as the chief financial figure in al Qaeda qualify as "taking a direct part" in hostilities?

For the United States:

1. Is the so-called “war on terror” a genuine armed conflict, such that international humanitarian law, rather than human rights law should apply? Why is the difference important to your argument?
2. Even if the International Covenant on Civil and Political Rights does not apply outside of a state party’s jurisdiction, didn’t the United States extend its jurisdiction to *The Maple Princess* when it boarded, searched and seized the vessel, thus triggering its responsibilities under the Covenant?
3. The Israeli Supreme Court held in December 2006 that that targeted killings of terrorists “taking direct part in hostilities” is lawful where it meets the requirements of necessity and proportionality? How did Aziz take “direct part in hostilities”? Once he was rendered unconscious, what was the necessity of killing him instead of taking him into custody?

III. Questions Concerning the Boarding, Search and Seizure of The Maple Princess:

For Canada:

1. If *The Maple Princess* was engaged in piracy or its modern day equivalent, terrorism, wouldn’t that provide the United States justification to board the ship without the consent of the flag state? Why shouldn’t terrorism be considered the equivalent of piracy for this purpose?
2. Could the “necessity defense” justify the U.S. unconsented boarding of *The Maple Princess*? What are the requirements for the necessity defense? Which of these requirements are not met in this case?

For the United States:

1. Since the US is a party to the 1958 High Seas Convention, why shouldn’t the Convention’s narrow definition of pirate vessel (requiring an attack on one ship from another for private gain) apply to this case?
2. Even if the Court agrees that terrorism is the equivalent of piracy for purposes of applying an exception to the exclusive jurisdiction of a flag state over a ship on the high seas, why should it apply in this case, where *The Maple Princess* was never engaged in any acts of terrorism?
3. The “necessity defense” does not apply if there was any other way to accomplish the objective. Because the US-Canada Mutual Legal Assistance Treaty would have required Canada to cooperate in the apprehension of Aziz, doesn’t this mean that the necessity defense is not available in this case?

IV. Questions Concerning the Exercise of Universal Jurisdiction:

For Canada:

1. With respect to the question of the exercise of universal jurisdiction as a basis for the forfeiture proceedings against *The Maple Princess*, wouldn’t application of the so-called “*Lotus*

principle” mean that such an exercise of jurisdiction must be deemed lawful unless it can be shown that this violates a prohibitive rule of international law? Is the *Lotus* principle still good law? What prohibitive rule does the exercise of universal jurisdiction violate in this case?

For the United States:

1. The several counter-terrorism conventions permit the state in whose territory an offender “is found” to prosecute the person under universal jurisdiction. Doesn’t it violate these treaties for a state to seize offenders outside of its territory?
2. In the 2003 *Judgment on the Peruvian Genocide Case*, the Supreme Court of Spain held that there was an inherent limit on the application of universal jurisdiction called “the necessity of jurisdictional intervention,” which some commentators refer to as the “subsidiary principle.” This principle is analogous to the International Criminal Court’s “complementary principle.” Why shouldn’t the ICJ adopt this principle, which would require that the United States prove that Canada was not willing to prosecute Aziz before the United States could exercise universal jurisdiction over him?

IV. Questions Concerning the issue of Head of State Immunity:

For Canada:

1. What are the purposes of head of state immunity?
2. Why should head of state immunity apply to a head of state’s private property?
3. Since Foreign Sovereign immunity does not apply to commercial acts, why shouldn’t head of state immunity apply the same exception?

For the United States:

1. What are the purposes of head of state immunity?
2. Why shouldn’t head of state immunity apply to the private property of a head of state?
3. In the 2002 *Belgium Arrest Warrant case*, this Court decided that heads of state are absolutely immune, even from charges of crimes against humanity. Aren’t we bound by that precedent in this case?
4. What policies support a rule that head of state immunity should not apply to the commercial acts of a head of state?