

2006-07
NIAGARA INTERNATIONAL MOOT COURT COMPETITION

A Dispute Arising Under
The Statute of the International Court of Justice
March 2007

THE GOVERNMENT OF
CANADA
(Applicant)

v.

THE GOVERNMENT OF
THE UNITED STATES OF AMERICA
(Respondent)

MEMORIAL OF THE RESPONDENT

TEAM # 2007-05

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Statement of Jurisdiction

The Parties to this dispute, Canada and the United States, submit to the International Court of Justice for a binding declaratory judgment, pursuant to Article 36(1) of the *Statute of the International Court of Justice*.¹ Article 36(1) confers upon the Court the jurisdiction to resolve those specific issues as described within the Problem.

¹ Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute].

Questions Presented

The United States and Canada submit the following four questions to the Panel:

1. Did the United States violate international law when it conducted the "targeted killing" of Canadian national Max Aziz, a.k.a. Mohamed Aziz?
2. Did the United States violate the Law of the Sea when it boarded, searched, and seized *The Maple Princess* without first obtaining the approval of Canada?
3. Was the United States' exercise of "universal jurisdiction" over *The Maple Princess* lawful under international law?
4. Should the doctrine of "head of state immunity" prevent U.S. judicial forfeiture proceedings against *The Maple Princess*?

Statement of Facts

In June 2006, The United States National Security Agency intercepted and decoded a series of encrypted emails sent by Mohamed Aziz confirming he was the financial mastermind of the Al-Qaeda terrorist organization.² Through the use of his import-export business, based in Galway, Ireland, Aziz funneled millions of dollars to various Al-Qaeda cells throughout the world.³ These encrypted emails also indicated Aziz had plans to travel aboard *The Maple Princess*,⁴ with millions of dollars in Swiss Bearer Bonds, from Galway to Nova Scotia in July 2006.⁵ Based on the confirmation of Aziz's senior role in Al-Qaeda, the U.S. President issued a Presidential Decision Directive (PDD) which authorized the targeted killing of Osama Bin Laden's chief financier, Mohamed Aziz.⁶

On July 16th, 2006, *The Maple Princess* was 260 nautical miles of the coast of Nova Scotia.⁷ In order to implement the PDD, a team of 6 Navy Seals boarded *The Maple Princess*.⁸ While performing their duties, the Seals discovered two large suitcases under Aziz's bed.⁹ One suitcase contained millions of dollars in Swiss Bearer Bonds; the other contained hundreds of zip lock bags filled with a white powdery substance that appeared to be heroin.¹⁰ Upon departure from *The Maple Princess*, the Seals took the Swiss Bearer Bonds, and the U.S. Navy informed the Coast Guard of *The Maple Princess's* location and their concerns about the drugs.¹¹

² *Compromis*, at ¶5.

³ *Id.*

⁴ *The Maple Princess* is the personal yacht of Stephan Sharper, the Prime Minister of Canada. For the months of June and July, Mr. Sharper leased his yacht to his half-brother, Mr. Flan Tomigan, for purposes of vacationing, as indicated in the written lease agreement.

⁵ *Compromis*, at ¶5.

⁶ *Id.* at ¶6.

⁷ *Id.* at ¶2.

⁸ *Id.* at ¶7.

⁹ *Id.* at ¶8.

¹⁰ *Id.*

¹¹ *Id.*

The Coast Guard deployed a helicopter to *The Maple Princess's* location, which was still well over 200 nautical miles off the coast of Nova Scotia.¹² Once onboard, they confirmed the presence of nearly 20 million dollars worth of Afghan heroin.¹³ The Coast Guard took the vessel and the three remaining passengers into custody.¹⁴

Once in the Portsmouth Harbor Station, the Coast Guard released Tomigan and the other passengers, but retained *The Maple Princess* and the heroin.¹⁵ The United States then instituted forfeiture proceedings against *The Maple Princess* pursuant to 21 U.S.C. § 881.¹⁶

¹² *Id.* at ¶9.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

Summary of Arguments

The United States adhered to the standards of international law when conducting the targeted killing of Mohamed Aziz, Al-Qaeda's chief financier. International law does not proscribe targeted killing; in fact, many circumstances exist which allow States to use force. The U.S. conducted the targeted killing of Mohamed Aziz pursuant to the laws of war, the United Nations Charter, customary international law, and other treaty obligations. Further, a state of necessity existed at the time of the targeted killing that validated the actions taken by the United States.

The United States Navy Seals, as well as the United States Coast Guard, boarded, searched, and eventually seized *The Maple Princess* pursuant to the Law of the Sea. The United States had reasonable grounds to suspect that *The Maple Princess* was engaged in piracy, as well as in violation of the Convention for the Suppression of the Financing of Terrorism and the Convention Against the Illicit Traffic of Drugs. It was under these international treaties that the United States properly exercised universal jurisdiction over *The Maple Princess*.

Finally, the doctrine of head of state immunity is not applicable to heads of government. As Prime Minister, Stephen Harper is a head of government; therefore, the head of state immunity doctrine cannot prevent the U.S. forfeiture proceedings against *The Maple Princess*.

Arguments

I. The United States did not violate international law when it conducted the targeted killing of Mohamed Aziz.

a. Although there is an internationally accepted right to life, international law does not outlaw targeted killing.

Every major human rights convention is predicated upon the protection of every person's inherent right to life. This right is non-derogable; but not absolute.¹⁷ Under the International Covenant on Civil and Political Rights (ICCPR),¹⁸ the American Convention on Human Rights

¹⁷ David Kretzmer, Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?, 16 EJIL 171, 177 (2005).

¹⁸ International Covenant on Civil and Political Rights art. 6, G.A. Res 2200, G.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966).

(ACHR),¹⁹ and the African Charter on Human and Peoples' Rights (AfCHPR),²⁰ the right to life only protects against the arbitrary deprivation of life. Consequently, targeted killing violates this right only in cases where it was arbitrary.²¹ Unfortunately, there is not, at present, a clear definition of arbitrariness. However, the European Convention on Human Rights (ECHR) provides guidance.

The ECHR does not impart the term arbitrariness to its definition of the right to life, but it does offer examples where the deprivation of life would not violate international law. This includes the protection of any person from unlawful violence, so long as no more force is used than absolutely necessary.²² The *McCann* case in the European Court of Human Rights illustrates this principle. In *McCann*, British police officers were sent to apprehend three suspected IRA terrorists. During this process, the officers shot all three terrorists at close range. The court determined these killings did not violate the right to life: "the officers honestly believed in light of the information given...the actions were absolutely necessary in order to safeguard innocent lives."²³ Because the U.S. killed Aziz believing it was absolutely necessary to ensure the protection of innocent lives, his death is not a violation of accepted international law.

b. All members of the U.N. are required to carry out Security Council directives relating to the maintenance of international peace and security. As the U.S. was following such a directive, its actions were valid under international law.

The purpose of the United Nations is to maintain international peace and security.²⁴ One facet of this is the effective prevention and removal of threats to the peace as well as the suppression of acts of aggression and other breaches of the peace.²⁵ Article 39 of the U.N. Charter grants the

¹⁹ American Convention on Human Rights art. 4, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18th, 1978.

²⁰ African Charter on Human and Peoples' Rights art. 4, adopted 27 June 1981, 21 I.L.M. 58 (1982), entered into force Oct. 21st, 1986.

²¹ Kretzmer, *supra* note 17, at 177.

²² Tom Ruys, License to Kill? State-Sponsored Assassination Under International Law, Institute for International Law Working Paper No. 76, 2 (2005).

²³ *McCann and others v. U.K.*, ECHR, Judgment of 27 September 1995, Series A, No. 324, para. 200.

²⁴ U.N. Charter art. 1.

²⁵ *Id.*

Security Council the power to determine: 1) the existence of any threat to international peace; and 2) what actions should be taken in response to such a threat.²⁶ Once a threat is identified and the proper response is determined, the Charter *requires* all member States, including the U.S., to carry out the decision of the Security Council.²⁷

On September 28th, 2001, the Security Council issued resolution 1373, which identified all acts of international terrorism as threats to international peace and security.²⁸ Further, the resolution called upon all states to respond to the threat through the prevention and suppression of all international terrorist attacks by taking “all necessary steps.”²⁹

The International Convention for the Suppression of the Financing of Terrorism evinces the amount of financing a terrorist organization receives directly affects the number and seriousness of the attacks it performs.³⁰ Therefore, by limiting the financing a terrorist organization receives, the number and seriousness of the attacks they perform will also be limited. As such, the organization will effectively be prevented from performing at least some terrorist attacks.

Mohamed Aziz was the primary financier of Al-Qaeda, a terrorist organization responsible for more than 30 attacks and countless deaths worldwide in the past decade. Through the targeted killing of Aziz, which falls under the umbrella of “all necessary steps,” the U.S. drastically reduced Al-Qaeda’s financial support and therefore, effectively prevented and suppressed future acts of international terrorism. Not only was this U.S. action consistent with the purpose of the U.N., it was clearly taken under the direction and compulsion of the Security Council.

²⁶ U.N. Charter art. 39.

²⁷ U.N. Charter art. 48 [emphasis added].

²⁸ S.C. Res. 1373, pmb., U.N. Doc S/RES/1373 (Sept. 28, 2001).

²⁹ *Id.* at para. 8.

³⁰ U.N. International Convention for the Suppression of the Financing of Terrorism pmb., G.A. Res. 54/109, U.N. Doc. A/RES/54/109 (Feb. 25, 2000) [hereinafter Finance Convention].

c. As a member of Al-Qaeda, Mohamed Aziz was subject to valid attack any time, anywhere under the laws governing non-international armed conflicts.

A non-international armed conflict exists when the forces of a state are in conflict with an organized armed group. According to the commentaries on the Second Additional Protocol to the Geneva Convention, those who belong to such armed forces or groups are subject to attack anytime if an armed conflict exists.³¹ This is supported by a close reading of Common Article III of the Geneva Conventions, which prohibits violence, at any time and in any place, to the life and person of those taking no active part in hostilities, including members of armed forces who have laid down their arms.³² Nothing in the wording of this article limits this prohibition to the territory of the State which is party to the conflict. The statutory construction implies that, as long as a member of the organized armed group has not surrendered, s/he is a valid target at any time and in any place, regardless of whether the action took place within the territory of the State with which the conflict exists. As discussed *infra*, both the U.S. and Al-Qaeda recognize the existence of an armed conflict in which both sides have actively participated. Further, Al-Qaeda is an armed group to which Mohamed Aziz not only belonged, but had a very active senior role. As an active member of Al-Qaeda who in no way has surrendered, Aziz was a legal target at anytime and in any place.

d. Mohamed Aziz was actively participating in direct hostilities against the U.S. at the time he was killed. He was therefore subject to valid attack by the U.S.

The Third Geneva Convention requires the following before classifying individuals as combatants: a chain of command, they wear fixed insignia; they openly carry arms; and they conduct operations in accordance with the laws of war.³³ Anyone who does not meet these requirements is considered a civilian.³⁴ Civilians are immune to attack “unless and for such time as

³¹ Kretzmer, *supra* note 17, at 198.

³² Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316.

³³ *Id.* at 4(A), para. 2.

³⁴ *Id.*

they take direct part in hostilities.”³⁵ Taking a direct part in hostilities has been defined to include delivering ammunition, gathering intelligence,³⁶ supervising operations, servicing weapons, and preparing for military operations and the intent to partake; however, these actions must directly relate to hostilities and represent a direct threat to the “enemy”.³⁷ Mohamed Aziz was transporting well over \$20 million in bearer bonds and drugs. In light of the fact he was Al-Qaeda’s chief financier, this money was likely part of preparations for future military operations. As such, not only did Aziz commit an offense under Article 2 of the U.N. International Convention for the Suppression of the Financing of Terrorism, but more importantly, he was actively participating in hostilities against the U.S., which made him a valid target under the Laws of War.

e. The United States properly exercised its right to self-defense under the U.N. Charter when it targeted and killed Mohamed Aziz.

Article 51 of the U.N. Charter states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”³⁸ The U.N. Charter does not restrict the concept of “armed attack” to attacks by states.³⁹ This idea is further supported by Security Council Resolution 241, which explicitly condemned the “armed attacks” committed by foreign mercenaries against the Democratic Republic of the Congo.⁴⁰ Further, the International Court of Justice (ICJ) labeled the 1979 hostile takeover of the U.S. embassy in Iran an “armed attack” by a militant group.⁴¹ Therefore, non-state sponsored terrorist organizations can perform “armed attacks,” which states may invoke the right of self-defense against.

³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 51, opened or signature on 8 June 1977.

³⁶ Ruys, *supra* note 22, at 2.

³⁷ Kretzmer, *supra* note 17, at 192.

³⁸ UN Charter art. 51.

³⁹ Tom Ruys & Sten Verhoeven, Attacks by Private Actors and the Right of Self-Defense, 10 J. Conflict & Sec. L. 289, 311 (2005).

⁴⁰ S.C. Res. 241, para. 4, U.N. Doc. S/RES/241 (Nov. 15, 1967).

⁴¹ United States Diplomatic and Consular Staff in Tehran (U.S. America v. Iran), 1980 I.C.J. 64 (May 24), para. 91.

In response to Israel's preemptive strike on Egypt in 1967 -- which the UN did not condemn -- scholars, including Professor Quincy Wright,⁴² who believe an actual armed attack must occur before a state can use force in self-defense proposed the following definition of armed attack: "it would appear the well-authenticated acts of Egypt, especially its insistence that "a State of war" existed and its policy to terminate the existence of Israel, accompanied by the closure of the Straits of Tiran and extensive mobilization on Israeli frontier, could be regarded as amounting to an armed attack on Israel."⁴³ Under this standard, the acts of Al-Qaeda over the past decade are "armed attacks." In 1996, Osama Bin Laden issued his "Ladenese Epistle: Declaration of War" in which Bin Laden called for all Muslims to make holy war (*jihad*) against American forces in Saudi Arabia.⁴⁴ Then in 1998, Bin Laden declared Muslims should kill Americans and their allies, civilian or military, when and wherever possible.⁴⁵ Further, U.S. President George W. Bush declared in an address to the American people during a joint session of Congress on September 20, 2001, that a state of war exists between the U.S. and Al-Qaeda: "On September 11th, enemies of freedom committed an act of war on our country...our war on terror begins with Al-Qaeda."⁴⁶ When also considering the nearly 30 attacks Al-Qaeda carried out over this time frame, and their continued preparation for future attacks, including the transportation of bearer bonds and drugs by their financial mastermind, it is clear an armed attack which allows for the use of protective self-defense has already occurred. As such, the U.S. was well within its rights to perform this action under Article 51 of the U.N. Charter.

⁴² Quincy Wright (1890-1970), a world renowned social scientist who specialized in the study of warfare and known for strongly supporting the restrictionist viewpoint of Article 51 of the U.N. Charter.

⁴³ Beth Polebaum, National Self-Defense in International Law: An Emerging Standard for a Nuclear Age, 59 N.Y.U. L. Rev. 187, 208 (1984).

⁴⁴ Davis Brown, Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses, 11 Cardozo J. Int'l. & Comp. L. 1, 25 (2003).

⁴⁵ *Id.*

⁴⁶ Chris Downes, 'Targeted Killings' in an Age of Terror: The Legality of the Yemen Strike, 9 J. Conflict & Sec. L. 277, 282 (2004).

f. As drafters of the U.N. Charter intended the law pertaining to self-defense to remain unimpaired from its pre-Charter status, the preemptory strike on Mohamed Aziz was valid under both treaty and customary international law.

The San Francisco Conference convened in 1945 to create an organization determined to preserve peace and help build a better world. The result was the United Nations Charter. The commission report from the Conference pertaining to self-defense declared “the use of arms in legitimate self-defense remains admitted and unimpaired.”⁴⁷ This statement strongly supports the idea that even after the Charter was adopted, the pre-Charter concept of self-defense remained intact and valid under international law. Article 51 indicates “nothing shall impair the inherent right of...self-defense if an armed attack occur” This wording preserves the right to self-defense in the case of an armed attack; it does not limit any other rights, including the right to self-defense as it existed prior to the Charter.⁴⁸ The proposition if A, then B (the form seen in the Charter), is not equivalent to, and does not imply, *if and only if* A, then B.⁴⁹ Further, where the drafters wanted to prohibit the use of force, they chose the proper language to complete that task, as seen in Article 2(4).⁵⁰ As the Charter is silent on the use of defensive force prior to an armed attack, international law consistent with the rights and responsibilities of the Charter govern such acts.⁵¹

i. The U.S. acted properly under its treaty obligations when it performed the targeted killing of Mohamed Aziz.

Moreover, the drafting history of the Charter indicates the purpose of Article 51 was to safeguard the validity of The Act of Chapultepec,⁵² which indicates that a State may use armed force to prevent or repel aggression.⁵³ Given that the drafters did not want the Charter to supersede

⁴⁷ Oscar Schachter, International Law: The Right of States to Use of Armed Force, 82 Mich. L. Rev. 1620, 1633 (1984).

⁴⁸ Polebaum, *supra* note 43, at 201.

⁴⁹ Myres McDougal, The Soviet-Cuban Quarantine and Self-Defense, 57 Am. J. Int'l. L. 597, 600 (1963).

⁵⁰ Polebaum, *supra* note 43, at 201.

⁵¹ *Id.* at 202.

⁵² Self defense agreement between the governments at the Inter-American Conference on War and Peace, brought to force shortly before the creation the U.N. Charter.

⁵³ Act of Chapultepec part II, March 3, 1945.

the Act, or the concepts of self-defense therein,⁵⁴ they employed the term “attack” in Article 51 instead of “aggression.” Since it uses attack in place of the broader term aggression, the Act of Chapultepec does not always address the same scenarios as the Charter. Therefore, consistent with the drafter’s intent, the Act, and its enumeration that a State may utilize armed force in order to prevent or repel armed aggression remains valid and accordant with the requirements of the U.N. Charter. The United States carried out the targeted killing of Mohamed Aziz to prevent armed aggression against a member of an American Republic. This was and remains valid under the Act of Chapultepec.

ii. *The U.S. properly followed customary international law when it conducted the targeted killing of Mohamed Aziz.*

The customary international law doctrine which covers the use of preemptive self-defense is known as the Caroline Doctrine.⁵⁵ This standard requires the necessity of self-defense to be instant, overwhelming, leaving no choice of means, and no moment for deliberation in order to validate preemptive self-defense.⁵⁶ In 1967, as discussed above, Israel invoked the right to preemptive self-defense when it precipitated the Six Day War with an air strike against Egypt. The U.N. did not condemn this preemptive action, indicating a widespread willingness among the international community to embrace the traditional right to preemptive defensive action.⁵⁷

In 1962, the U.S. quarantined Cuba to stop the Soviets from delivering missiles to the island.⁵⁸ Although this as action constituted a violation of Article 2(4)’s prohibition against the threat or use of force, the U.N. did not condemn it because if the missiles had reached Cuba; the last opportunity to remove the threat would have passed.⁵⁹ There is no indication the U.S. would continue to know

⁵⁴ Schachter, *supra* note 47, at 1633.

⁵⁵ Outlined in a note from then U.S. Secretary of State Daniel Webster on August 6th, 1842 to Lord Ashburton, Britain’s special minister to Washington, in response to an attack by British militia on a U.S. ship.

⁵⁶ Polebaum, *supra* note 43, at 191.

⁵⁷ *Id.* at 194.

⁵⁸ *Id.* at 205.

⁵⁹ *Id.* at 207.

the whereabouts of Aziz, or the bearer bonds and drugs he possessed once he reached Canada the next morning. Therefore, the threat posed by Aziz was “instant,” in that the U.S. action occurred at the last possible moment in which the U.S. could neutralize the threat.

At the same time, had the U.S. acted any earlier, it would have done so before the last possible moment of deliberation. By waiting until shortly before Aziz was to arrive in Canada, the U.S. allowed as much time as possible for considering alternatives to the use of force. Since the U.S. goal is to defend itself from terrorist attacks, Aziz was much more valuable in U.S. custody, as a source of information, than as a dead man. As Al-Qaeda’s financial mastermind, he likely could have provided interrogators priceless information pertaining to the structure of Al-Qaeda’s financial system, including its financial supporters, means of support, and the location of monetary assets. This type of information is far more valuable over time than the immediate benefit provided to the U.S. when it killed Aziz and confiscated the funds aboard *The Maple Princess*. The U.S. and its allies could use such information in the war against terror to seriously damage Al-Qaeda’s financial infrastructure. Therefore, it is logical to conclude at this last moment of deliberation, no viable alternatives to the use of force had emerged and the U.S. had no choice but to use force to eliminate the overwhelming threat posed by Aziz. As the chief financier of Al-Qaeda, Aziz was likely to use the bearer bonds and drugs to further the goals of Al-Qaeda. Al-Qaeda has made it clear it intends to acquire and use nuclear weapons against the U.S.;⁶⁰ this clearly represents an overwhelming threat. The four criteria of the Caroline Doctrine were fulfilled before the U.S. used force in self-defense. Consequently, its actions are valid under customary international law.

⁶⁰ Central Intelligence Agency, *Unclassified Report to Congress on the Acquisition of Technology Relating to Weapons of Mass Destruction and Advanced Conventional Munitions (July-December 2003)*.

g. The state of necessity doctrine can be invoked to excuse a State's action which is inconsistent with an international obligation. As a state of necessity existed at the time of the U.S. action, even if the action were contrary to an international obligation of the U.S., it should be excused.

A state can invoke the state of necessity doctrine as a ground for negating the wrongfulness of an act not in conformity with an international obligation,⁶¹ including incursions into foreign territory to forestall harmful operations by private individuals preparing an attack on the territory of another state.⁶² Article 25 of the International Law Commission's (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts requires the following two conditions before a state can invoke necessity: 1) the act is the only way a State can safeguard an essential interest against a grave and imminent peril, and 2) the act does not seriously impair an essential interest of the State or States toward which the obligation exists.⁶³

The ILC commentary on this article notes that "essential interests" are situation specific.⁶⁴ However, it suggests a few broad categories: the state's economic survival, the maintenance of internal peace, and the survival of a sector of the population.⁶⁵ The U.S. actions clearly qualify as protecting an essential interest against a grave peril, because it acted to protect the lives of a large number of citizens. The ILC commentary also notes that simply because there is a "measure of uncertainty about the future, does not disqualify necessity from being invoked, so long as the peril is clearly established on the basis of the evidence reasonably available at the time."⁶⁶ It has been established time and time again that Al-Qaeda intends to inflict as much harm as possible on the citizens of the U.S. Although a state can never know with absolute certainty where, when, and how

⁶¹ Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 92 (Sept. 25), para. 51., *see also* Andreas Laursen, The Use of Force and (the State of) Necessity, 37 Vand. J. Transnat'l. L. 485, 491 (2004).

⁶² Ruys, *supra* note 39, at 309.

⁶³ U.N. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 25, U.N. Doc. A. /56/10 (Nov. 2001).

⁶⁴ Laursen, *supra* note 61, at 502.

⁶⁵ *Id.*

⁶⁶ *Id.* at 505.

an attack will occur, necessity is still a valid ground to preclude the United States' actions in this case.

The requirement of "imminence" refers to the last moment of opportunity to eliminate the threat.⁶⁷ This is nearly identical to the "instant" requirement of the Caroline Doctrine; discussed *infra* in section (g).

The targeted killing of Al-Qaeda's chief financier does not seriously impair an essential interest of Canada. Although Mohamed Aziz was a Canadian citizen, the U.S. performed its action in such a way to limit collateral damage. The loss of one life does not constitute impairment to an "essential interest"⁶⁸ of Canada, particularly because Mohamed Aziz was a high ranking Al-Qaeda operative.

II. The United States boarded, searched, and seized *The Maple Princess* pursuant to the law of the sea.

The events involving *The Maple Princess*, on and after July 16, 2006, occurred well over 200 nautical miles off of the Canadian coast.⁶⁹ The territorial waters of Canada reach 200 nautical miles off its coast line. Article 87 of the United Nations Convention of the Law of the Sea states that "the term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State."⁷⁰ Therefore, the conduct of the Navy Seals, as well of that of the U.S. Coast Guard, took place on the high seas. Article 87, entitled Freedom of the High Seas, states that "the high seas are open to all States," and that the high seas are not the territory of any particular State.⁷¹ Therefore, States only hold jurisdiction over their own ships on the high seas.⁷² However, the Law

⁶⁷ Polebaum, *supra* note 43, at 207.

⁶⁸ As noted above, "essential interest" must be determined case by case based on the relevant circumstances

⁶⁹ *Compromis*, ¶7 & 8.

⁷⁰ United Nations on the Law of the Sea (UNCLOS or Law of the Sea or LOS) art. 86, 1958, Law of the High Seas entered into force on September 30, 1962.

⁷¹ *Id.* art. 87.

⁷² *Id.* art. 92 & 94.

of the Sea defines exceptions to a State’s exclusive jurisdiction. One such exception is that of reasonable grounds to suspect that a vessel is engaged in piracy.⁷³

a. The United States had reasonable grounds to suspect that The Maple Princess was engaged in piracy, and therefore, the boarding, search, and seizure of the vessel was legal under Articles 105 and 110 of The Law of the Sea.

Article 110, entitled Right of Visit, states that “a warship, which encounters on the high seas a foreign ship, . . . is not justified in boarding it *unless* there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; . . .”⁷⁴ Piracy, as defined by the Law of the Sea, consists of “any illegal acts of violence, detention, or any acts of depredation, committed for private ends by the crew or the passengers of a private ship, and directed; on the high seas, against another ship.”⁷⁵

The United States contends that the Navy Seals, who boarded and searched *The Maple Princess*, did in fact have “reasonable grounds for suspecting” that the vessel was engaged in piracy. The grounds for suspicion were based on the NSA intelligence which confirmed Aziz’s role in Al-Qaeda, as Osama Bin Laden’s chief financier, and which also “indicated that he was planning on traveling with millions of dollars in Swiss Bearer Bonds” on board *The Maple Princess*.⁷⁶ The financing of terrorism is a crime, codified by the Convention for the Suppression of the Financing of Terrorism.⁷⁷ Therefore, Aziz, by transferring terrorist funds across the high seas, was using *The Maple Princess* to commit a crime. The United States was acting in its best interest to protect its nation by intercepting funds used to sponsor Al-Qaeda cells across North America. Such criminal behavior can be characterized as an “act of depredation,” as required by the definition of piracy.

In addition, the definition of piracy requires that the crime be “committed for private ends,” and that it be “directed, on the high seas, against another ship.”⁷⁸ The first requirement is easily

⁷³ *Id.* art. 110.

⁷⁴ *Id.* [*emphasis added*].

⁷⁵ *Id.* art. 101.

⁷⁶ *Compromis*, ¶ 5.

⁷⁷ Finance Convention, *supra* note 30.

⁷⁸ United Nations on the Law of the Sea, *supra* note 70, art. 110.

met. Aziz was a member of Al-Qaeda, a stateless organization working for personal gain. Regardless of whether the goals are financial or political, the organization itself is not a governmental organization and therefore, its “ends” are private ones.

Piracy is the oldest form of terrorism. Pirates, like terrorists, are stateless criminals, whose purpose is to induce fear with indiscriminate attacks on innocent civilians. “Terrorists today, like pirates of old, are a threat to all states and no state is willing to assume responsibility for their acts.”⁷⁹ Unfortunately, as the old-fashioned pirate has evolved over time, the definition of piracy has remained the same. Numerous international legal scholars have criticized the actual definition of piracy for being much too narrow and constraining.⁸⁰ This definition has been accused of being “outdated and unnecessarily restrictive because of the requirements that acts must be done for private ends and against another ship.”⁸¹ Terrorism is a still-developing form of warfare and therefore, pre-existing laws ought to be flexible enough to encompass these modern tactics.

The issue of an outdated definition of piracy was brought to the forefront of international law in the aftermath of the Achille Lauro incident of 1985. Members of the Palestine Liberation Front boarded a cruise ship, the Achille Lauro, in Genoa, and posed as tourists. Once the ship reached the high seas, the hijackers took control and held the crew and the passengers hostage. They threatened to kill the passengers, even to blow the ship up, unless Israel released 50 Palestinian prisoners. A day after the initial take over, having none of their demands met, the hijackers shot and killed a Jewish-American tourist, named Leon Klinghoffer. Partially paralyzed and in a wheelchair, the hijackers threw both Klinghoffer and his wheelchair overboard.⁸²

President Reagan announced, in the days following the incident, that he suspected that the “hijackers would be tried for piracy in Italy and then in the United States for murder.” The

⁷⁹ Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 *Am. J. Int'l. L.* 2 (1988).

⁸⁰ George Constantinople, *Towards a new Definition of Piracy: The Achille Lauro Incident*, 26 *Va. J. Int'l L.* 725 (1985)., *see also* Douglas R. Burgess Jr., *Piracy Law as a Weapon in the War on Terror*, 27 *Am. Bar Assoc. Nat. Sec. L. Report* 3 (2005).

⁸¹ Halberstam, *supra* note 79.

⁸² *Id.*

hijackers were later charged with “hostage taking, piracy on the high seas, and conspiracy.”⁸³ The charge of piracy was later removed because without a second ship involved in the incident, the requirements for piracy were not met. The outdated definition of piracy limited the international legal response to this atrocity. The result of the Achille Lauro incident was the creation of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, signed at Rome, in March of 1988. Despite this step forward in international treaty law, it does not address the definition of piracy or the application of piracy law to modern day terrorists.

The United States would compel this Court to contemplate the out-dated definition of piracy and its unrealistic requirements within the context of modern day terrorism and attempt to reconcile the two. Mohamed Aziz was using the high seas to commit the crime of financing terrorism and therefore, the boarding and search of *The Maple Princess* was authorized by international law and a modern day interpretation of the definition of piracy.

Consistent with the above argument for a broader definition of piracy, the United States Coast Guard legally seized *The Maple Princess* based on Article 107 of the Law of the Seas, which states that military vessels are “entitled” to seize other vessels on account of piracy. In fact, Article 14 of the Geneva Convention states the “any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law.”⁸⁴

In conclusion, the boarding, search, and seizure of *The Maple Princess* was authorized by the Law of the Sea, based on the reasonable ground of suspecting that it was engaged in piracy. The United States was at no time, therefore, under an obligation to request approval from Canada.

⁸³ *Id.* at 247.

⁸⁴ *Quoted in* Harvard Research in International Law, Comment to the Draft Convention on Piracy, 26 AJIL Supp. 749 (1932).

b. The boarding, search, and seizure of The Maple Princess by the United States Coast Guard was authorized both by treaty law and the principle of universal jurisdiction over vessels suspected of trafficking illegal drugs.

Even if the Court is not persuaded that *The Maple Princess* was engaged in piracy, the United States Coast Guard was authorized by treaty law to legally board, search, and seize *The Maple Princess*.

In assuming that Canada will argue that if the first search, in which the Navy Seals discovered the heroine, was itself illegal, then the subsequent search must be considered illegal as well. However, the evidentiary concept of “the fruit of the poisonous tree” is uniquely an American theory, and is not adhered to by international courts. Illegally obtained evidence “does not, in and of itself, necessarily amount to seriously damaging the integrity of the proceedings. Rather, in situations of armed conflict, intelligence which may be the result of illegal activity may prove to be essential in uncovering the truth; all the more so when this information is not available from other sources.”⁸⁵ Courts are encouraged to only exclude illegally obtained evidence if it would *seriously* damage the integrity of the proceedings,⁸⁶ especially when the situation in which the initial evidence was discovered was done in good faith, as is the case with the Navy Seals. Therefore, regardless of the legality of the first boarding and search by the Navy, the second boarding, search and seizure by the Coast Guard is in no way damaged or delegitimized.

Article 108 of the Convention on the Law of the Sea, entitled illicit traffic in narcotic drugs, demands that States cooperate in the suppression of illicit traffic in narcotic drugs engaged in by ships on the high seas.⁸⁷ The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances affords universal jurisdiction to all States in the global war on drug trafficking. All States are empowered to take appropriate action against those who traffic illicit

⁸⁵ *Prosecutor v. Radoslav Brdjanin*, Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia, Case No. IT-99-36-Y, October 3, 2003.

⁸⁶ *Id.* at D (61).

⁸⁷ See United Nations on the Law of the Sea, *supra* note 70, art. 108.

drugs and to confiscate the drugs themselves.⁸⁸ The boarding and search by the Coast Guard was necessary and authorized by the Convention in order to confiscate the heroine on board *The Maple Princess*. Article 17 of this Convention states that a party who has reasonable grounds to suspect that a vessel is engaged in illicit traffic “may” so notify the flag State,⁸⁹ however, such notification is not mandatory.

In seizing *The Maple Princess*, the Coast Guard was taking “appropriate action with respect to the vessel.” The Coast Guard also seized *The Maple Princess* with authorization from the Convention for the Suppression of the Financing of Terrorism, based on the intelligence of Aziz’s terrorist ties and the fact that this vessel could potentially be one of his “assets.”⁹⁰ Article 8 of the Convention for the Suppression of Financing Terrorism states that “each party shall take appropriate measure, . . . , for the identification, detection, and freezing or *seizure* of any funds . . . [or] for the *forfeiture* of funds used or allocated for the purpose of committing the offence set forth”⁹¹ “Funds” as defined by this Convention, means “assets of every kind.”⁹² The Convention requires that these funds be used to compensate victims of the terrorist’s offences. In this case, the funds could be used to compensate victims of the Al-Qaeda terrorist attacks of September 11th on the World Trade Center.

To conclude, the United States Coast Guard was authorized by treaty law and universal jurisdiction⁹³ to board, search and seize *The Maple Princess* and the Afghan heroin located on board, regardless of Canadian approval.

⁸⁸ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 4 & 5 (1988).

⁸⁹ *Id.* art. 17.

⁹⁰ Finance Convention, *supra* note 30, art. 1.

⁹¹ *Id.* art. 8. [emphasis added].

⁹² *Id.* art. 1.

⁹³ Please refer to the extended argument on Universal Jurisdiction in Section III below.

III. The United States' exercise of Universal Jurisdiction over *The Maple Princess* was lawful under international law.

a. Universal jurisdiction is a widely accepted principle of customary international law.

The Restatement (Third) of the Foreign Relations Law states that “[i]nternational law recognizes five principles of jurisdiction by which a state may reach conduct outside its territory: (1) the objective territorial principle; (2) the protective principle; (3) the nationality principle; (4) the passive personality principle; and (5) the universality principle.”⁹⁴

The universality principle, also known as universal jurisdiction, is defined as “the exercise of authority of any State over certain offenses of universal concern, regardless of where or by whom the offense was committed.”⁹⁵ “Crimes subject to the universality principle are so threatening to the international community or so heinous in scope and degree that they offend the interest of all humanity, and any state may, as humanity’s agent, punish the offender.”⁹⁶

Although the definition of universal jurisdiction has remained the same, the application of this legal norm has evolved dramatically over the past century. The earliest known crime subject to universal jurisdiction was piracy. Because pirates were criminals who roamed the high seas without nationality and out of the reach of any territory’s sovereign jurisdiction, universal jurisdiction was applied to their crimes.⁹⁷

After World War II and the creation of the Nuremberg and Tokyo tribunals, universal jurisdiction was newly applied to war crimes.⁹⁸ These tribunals recognized that the prosecution of violations of *jus cogens* norms has supremacy over the law of a sovereign State.⁹⁹ In fact, in the

⁹⁴ The Restatement (Third) of the Foreign Relations Law of the United States, §402(1)(a) (1987).

⁹⁵ Michael P. Scharf, The ICC’s Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position, 64 *Wtr Law and Contemp. Probs.* 67, 76 (2001)., *see also generally*, Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 *Tex. L. Rev.* 785 (1988).

⁹⁶ Michael P. Scharf, Symposium: Universal Jurisdiction: Myths, Realities and Prospects: Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States, 35 *New Eng. L. Rev.* 363, 370 (2001).

⁹⁷ *See* Scharf, *supra* note 95, at 81.

⁹⁸ *Id.* at 82.

⁹⁹ M. Cherif Bassiouni, Crimes Against Humanity in International Law, 524-525 (1992)., *see also* Mark S. Zaid, Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Will or Should

aftermath of World War II, the United Nations General Assembly “unanimously affirmed the ‘principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal,’ thereby ‘codifying the jurisdictional right of all States to prosecute the offenses addressed by the IMT [Nuremberg Tribunal].’”¹⁰⁰

Decades later, with the creation of the Tribunals for the Former Yugoslavia and Rwanda, as well as with the decisions of certain domestic courts such as the United States, Spain, Israel, Belgium, and Canada,¹⁰¹ the subject matter of universal jurisdiction expanded again to include crimes against humanity. Since crimes against humanity and war crimes can be considered customary international law, each state has the ability to prosecute individuals for these offenses under universal jurisdiction.

The scope and definition of a “heinous crime of international concern” and “crimes against humanity” are ever-evolving within international law. Crimes themselves are ever-evolving, as evidenced by the suicide-bomber and the airline hijacker. Terrorism has changed the face of international crime in the last half a century. This is illustrated in The Restatement (Third) of the Foreign Relations Law, which states that “under the universality principal, states may prescribe and prosecute certain offenses recognized by the community of nations as of universal concern, such as . . . and perhaps certain acts of terrorism.”¹⁰²

b. The International Convention for the Suppression of the Financing of Terrorism authorized the United States’ use of universal jurisdiction over Mohamed Aziz, and The Maple Princess.

This ever-evolving definition of crimes against humanity, as it contains acts of terrorism, is beginning to be codified in treaty law. The International Convention for the Suppression of the

the United States Ever Prosecute War Criminals?: A need for Greater Expansion in the Areas of Both Criminal and Civil Liability, 35 New Eng. L. Rev. 447, 458 (2001).

¹⁰⁰ See Scharf, *supra* note 95, at 83.

¹⁰¹ See *Pinochet; Filartiga; R. v. Finta*, 28 C.R. (4th)265(1994); *Attorney General of Israel v. Eichmann*, 36 Int’l L. Rep. 18 50 (1961); *In the matter of Demjanjuk*, 603 F. Supp. 1468 (N.D. Ohio, *aff’d*, 776 F. 2d 571)(6th Cir. 1985).

¹⁰² The Restatement (Third) of the Foreign Relations Law of the United States, §404 (1987).

Financing of Terrorism was ratified by the United States and Canada, in 2002. Concerned about the escalation of terrorist activity, this treaty declares that the financing of terrorism is of grave concern to the international community. Article 2 states that “any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) any act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex.”¹⁰³ The annex includes nine treaties ranging in subject matter from bombings, to hostage taking, to hijacking, to nuclear warfare.

Article 7 states that “[e]ach State Party shall take such measures as may be necessary to establish its jurisdiction over the offense set forth in article 2” and that “a State Party may also establish its jurisdiction over any such offence when: (a) the offence was directed towards or resulted in the carrying out of an offence referred to in article 2, in the territory of or against a national of that State; . . .”¹⁰⁴ The United States, having been attacked by Al-Qaeda both at home and abroad, may establish its jurisdiction over Mohamed Aziz in order to protect its nationals from future attacks. Therefore, the United States legally exercised universal jurisdiction over Mohamed Aziz and *The Maple Princess* pursuant to treaty law and customary international law.

IV. The doctrine of Head of State immunity does not prevent U.S. forfeiture proceedings against *The Maple Princess*.

Constitutional monarchies are a form of government where a monarch is the Head of State.¹⁰⁵ Some constitutional monarchies, such as Canada, are also representative democracies.¹⁰⁶ In these systems, while the monarch is recognized as the Head of State, an elected prime minister is the head

¹⁰³ Finance Convention, *supra* note 30, art. 2.

¹⁰⁴ Finance Convention, *supra* note 30, art. 7.

¹⁰⁵ Britannica Concise Encyclopedia, *Constitutional Monarchy*, Encyclopedia Britannica Online, accessed on 25 Jan. 2007, available at <http://search.eb.com/ebc/article-9361475>.

¹⁰⁶ Encyclopedia Britannica, *Canada*, Encyclopedia Britannica Online, accessed on 25 Jan. 2007, available at <http://search.eb.com/eb/article-237199>.

of government. Canada is no exception, as Canada's Parliament has very clearly enumerated the Queen is the Head of State and the Prime Minister is the head of government.¹⁰⁷ Since Canada is a member of the Commonwealth, Queen Elizabeth II is the official Canadian Head of State, while Prime Minister Stephen Harper is the official head of government. As the Prime Minister, Mr. Harper is in some cases protected by the immunity granted to heads of government. However, under no circumstances is he protected by head of state immunity, as it is reserved for only heads of state, in this case the Queen. Therefore, the doctrine of head of state immunity cannot prevent forfeiture proceedings against *The Maple Princess*; as it does not apply to Mr. Harper, or his property.

Further, Article 38 of the ICJ Statute explains the court's function is to decide only the disputes submitted to it.¹⁰⁸ The Special Agreement between the U.S. and Canada submitted only the issue of head of state immunity to this court;¹⁰⁹ as such, other forms of immunity are outside the purview of this court.

Conclusion

THEREFORE, we respectfully submit that this Honourable Court adjudge and declare that:

- i) The United States (Respondent) conducted the targeted killing of Mohamed Aziz pursuant to international law;
- ii) The Respondent boarded, searched, and seized *The Maple Princess* pursuant to the Law of the Sea;
- iii) The Respondent's exercise of universal jurisdiction was lawful; and
- iv) The doctrine of head of state immunity does not prevent the judicial forfeiture proceedings against *The Maple Princess*.

¹⁰⁷ Canadian Parliament, Glossary of Parliamentary Terms, available at <http://www.parl.gc.ca/information/about/education/gloss-lem/index.asp?Language=E#02>

¹⁰⁸ ICJ Statute, *supra* note 1, art. 38, para. 1.

¹⁰⁹ *Compromis*, at ¶ 15.