

**2006-07**  
**NIAGARA INTERNATIONAL MOOT COURT COMPETITION**

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**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 # 2007-07R**

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## **JURISDICTION**

The Parties, through special agreement, submit this dispute to the International Court of Justice for a binding declaratory judgment pursuant to 40(1) and 36(1) of the *Statute of the International Court of Justice*. Article 40(1) and 36(1) confers upon the Court the jurisdiction to resolve those specific issues as described within the *compromis* (*Compromis* para. 16(d)).

## QUESTIONS PRESENTED

The Applicant and Respondent refer four questions to the Panel:

1. Did the U.S. violate international law when it conducted the "targeted killing" of Canadian national Max Aziz, a.k.a. Mohamed Aziz?
2. Did the U.S. 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 U.S.' 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 early June 2006 the U.S. National Security Agency (NSA) intercepted and deciphered a series of encrypted electronic mail messages identifying and confirming Mohamed Aziz, a.k.a. Max Aziz, as the Al Qaeda terrorist network's financial mastermind. Mohamed Aziz was the owner of an import-export business used as a funnel to finance terrorism world wide. The business was based in Ireland with connections to the Middle East, Europe, United States and Canada. Al-Qaeda has been recognized as a militant Islamist terrorist network by the United Nations Security Council and several UN member states including the U.S. and Canada. It has executed multiple attacks against targets in various countries, the most prominently being the September 11, 2001 attacks on New York and Washington, DC, the August 1998 bombings of the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, and the October 2000 bombing of the USS Cole.

The United States Central Intelligence Agency (CIA) believes the substantial financial contributions from individuals such as Mohamed Aziz enables Al-Qaeda to attack the United States. Based on analyses from the banking records of Cypriot and Swiss financial institutions, the CIA identified Aziz as the primary financial contributor to Al-Qaeda's terrorist operations.

The NSA discovered that Aziz was planning on traveling with millions of dollars in Swiss Bearer Bonds from Ireland to Canada on July 2, 2006, aboard *The Maple Princess*.

*The Maple Princess*, is a private luxury yacht, owned by Stephen Harper, the Prime Minister of Canada. *The Maple Princess* was leased to Harper's half-brother Flan

Tomigan. Tomigan and his wife used the ship for a two-month recreational trip to and from Ireland. Aziz and his wife were guests on board for the return leg of the trip from Ireland.

On June 21, 2006, the U.S. President issued a Top Secret Presidential Decision Directive (PDD 2006-08) which authorized the targeted killing of Aziz. The directive determined that "the elimination of al Qaeda's financial mastermind, Mohamed Aziz, will 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."

On July 16, 2006, *The Maple Princess* was on the high seas, 260 nautical miles east of the coast of Nova Scotia when a team of U.S. Navy Seals departed from a U.S. Navy PC-1 Cyclone Class Special Ops class warship and boarded the *The Maple Princess*. After identifying the terrorist, the Seals strategically eliminated him. No other passengers were harmed. Under Aziz's bunk, the Seals discovered millions of dollars in Swiss Bearer Bonds, and hundreds of bags containing a total of \$20 million worth of illegal Afghan heroin.

The U.S. Coast Guard immediately deployed a helicopter to *The Maple Princess*, where the Coast Guard confirmed the presence of \$20 million worth of heroin aboard the ship. The Coast Guard then took the ship and the remaining passengers into U.S. custody. Although the U.S. released the three remaining passengers, it instituted forfeiture proceedings against *The Maple Princess* under 21 U.S.C. Section 881.

Attorneys for the government of Canada tried to contest the forfeiture proceedings by arguing: 1) the U.S. did not have jurisdiction to retain *The Maple Princess*; 2) the doctrine of head of state immunity precludes the U.S. from instituting forfeiture

proceedings against the ship because it is owned by the Prime Minister of Canada; and 3) the boarding, search, and seizure of the ship violated Article 6 of the 1958 Convention on the High Seas.

The District Court rejected Canada's arguments, holding that: 1) the U.S. could properly assert jurisdiction over *The Maple Princess* under the principles of universal jurisdiction under customary international law; 2) Prime Minister Sharper does not enjoy the benefits of head of state immunity because he is the head of government, not the head of state; 3) head of state immunity does not apply to commercial acts and property unrelated to the functions of the head of state; 4) Article 6 of the Convention on the High Seas does not protect *The Maple Princess* because the ship was analogous to a pirate ship, which is not protected under the Convention. The U.S. Court of Appeals affirmed the ruling of the District Court.

Estelle Aziz, Mohamed Aziz's wife, also tried to bring suit against the U.S. under the U.S. Alien Tort Claims Act, 28 U.S.C. Section 1350, for the killing of her husband. The U.S. District Court for the District of Columbia dismissed the case, citing the U.S. Supreme Court's case in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) . The U.S. Court of Appeals for the District of Columbia Circuit affirmed the ruling as well.

At all times, the U.S. acted with respect to international law, and while simultaneously taking the necessary steps to ensure its national security.

## SUMMARY OF ARGUMENT

The United States' targeted killing of known Al-Qaeda officer Mohamed Aziz, was a legal act of self-defense per Article 51 of the U.N. Charter, and Security Council Resolutions 1368 and 1373. The U.S. is in a state of armed conflict with the Al-Qaeda terrorist network. Mohamed Aziz was taking a direct part in hostilities at the time he was targeted, and as such did not have the protections of being a civilian. The targeting was an act of anticipatory self-defense, necessary to damage the Al-Qaeda terrorist network.

The Law of the Sea sanctions the boarding, search and seizure of stateless or pirate vessels on the High Seas. The U.S. legally boarded, searched and seized *The Maple Princess* as she was de facto stateless, and participating in terrorist activities which are the modern day expression of piracy. Furthermore *The Maple Princess* was not a vessel entitled to complete immunity on the High Seas.

Under the principles of Universal Jurisdiction, the United States does have the authority to retain *The Maple Princess* under judicial forfeiture proceedings. Universal jurisdiction can be asserted for crimes related to terrorism, in particular the financing thereof. The doctrine of the persistent objector does not preclude the U.S. from asserting universal jurisdiction. Further, under customary international law the doctrine of head of state immunity cannot prevent the U.S. from instituting forfeiture proceedings against the ship because head of state immunity does not apply to property in civil proceedings, and because universal jurisdiction precludes protection under head of state immunity.

## ARGUMENT

### **I) The United States' Targeted Killing of Al-Qaeda's Financial Officer Mohamed Aziz was Not a Violation of International Law**

Under international law the transnational use of force must comply with both *jus ad bellum* and *jus in bello*, the laws which govern a state's resort to force and the means how that force is applied.<sup>1</sup>

#### **A) The U.S. is in a State of Armed Conflict with Al-Qaeda and has a Right to Self-Defense Authorized by the United Nations Charter and the Security Council**

The United Nations (U.N.) Charter prohibits the aggressive use of force<sup>2</sup> subject to two exceptions: when authorized by the Security Council<sup>3</sup> or when necessitated by self-defense.<sup>4</sup> The self-defense exception was invoked by the U.S. in response to the attacks of September 11, via a letter dated October 7, 2001, from the U.S. to the United Nations.<sup>5</sup> The U.N. Charter does not specify that the attack must come from another state, and the Security Council recognized that the September 11 attacks were armed attacks triggering the right of self-defense under the Charter thereby placing the U.S. in state of armed conflict with the Al-Qaeda terrorist network.<sup>6</sup>

#### **B) The U.S. has the Right to Target Terrorists Taking a Direct Part in Hostilities at Such Time they are Doing So**

The customary international law of armed conflicts distinguishes between combatants

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<sup>1</sup> See, e.g., Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. Int'l L. & Foreign Aff. 331, 333 (2003).

<sup>2</sup> *Charter of the U.N.*, 26 June 1945, Can. T.S. 1945 No. 7 art. 2, para. 4

<sup>3</sup> *Id.* art. 42.

<sup>4</sup> *Id.* art. 51.

<sup>5</sup> Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. SCOR, U.N. Doc. S/2001/946.

<sup>6</sup> See S.C. Res. 1373, U.N. SCOR, Jan. 2001-July 2002, at 291, U.N. Doc. S/RES/1373 (2001); S.C. Res. 1368, U.N. SCOR, Jan. 2001-July 2002, at 290, U.N. Doc. S/RES/1368 (2001).

and civilians.<sup>7</sup> In general, combatants are legitimate targets for military attack as long as the attacks lack "perfidy" and are not "treacherous killings."<sup>8</sup> Terrorist organizations do not fulfill the conditions for combatants, they have no fixed emblem recognizable at a distance, and they do not conduct their operations in accordance with the laws and customs of war.<sup>9</sup> Terrorists do not enjoy the status of prisoners of war<sup>10</sup> and can be tried for their participation in hostilities, judged, and punished.<sup>11</sup>

"Civilians are protected against attack unless and for such time as they take a direct part in hostilities."<sup>12</sup> Civilians taking a direct part in hostilities are not protected from attack upon them at such time as they are doing so.<sup>13</sup> A civilian who violates that law and commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy the protection granted to a civilian.

As long as a civilian performs the function of a combatant, he is subject to the risks which that function entails and ceases to enjoy the protection granted to a civilian from attack.<sup>14</sup> A civilian is taking part in hostilities when using weapons in an armed conflict, while gathering

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<sup>7</sup> See *Hague Convention (IV) Respecting the Laws and Customs of War on Land*, Oct. 18, 1907, 36 Stat. 2277. *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

<sup>8</sup> Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 *Yale J. Int'l L.* 609, 632 n.109 (1992).

<sup>9</sup> Protocol I, *supra* note 7, Arts. 43, 44.

<sup>10</sup> *Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, Art. 4(2), 6 UST 3316, 75 UNTS 135; Protocol I, *supra* note 7, Art. 43.

<sup>11</sup> *Ex Parte Quirin* 317 U.S. 1, 30 (1942); *see also Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>12</sup> Protocol I, *supra* note 7, Art. 51(3).

<sup>13</sup> *Id.*

<sup>14</sup> Antonio Cassese, *Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law* (June 13, 2003) in H CJ Petition 769/02, available at <http://www.stoptorture.org.il/heb/images/uploaded/publications/65.pdf>

intelligence, or while preparing himself for hostilities.<sup>15</sup> For hostilities to exist the civilian does not have to use his weapon<sup>16</sup> or bear arms.<sup>17</sup> A civilian taking part in hostilities loses the protection from attack "for such time" as they are taking part in those hostilities.<sup>18</sup>

Mohamed Aziz, a civilian, by being Al-Qaeda's financial officer and actively preparing and participating in further attacks against the U.S., by smuggling finances for Al-Qaeda, was preparations for hostilities. As long as Mohamed Aziz was taking part in preparations for hostilities, he was subject to the same risks as a combatant. By taking a direct part in hostilities, Mohamed Aziz lost the protections of being a citizen and was therefore as valid a target as a combatant.<sup>19</sup>

### **C) The Targeted Killing of Al-Qaeda's Financial Mastermind, Mohamed Aziz's was done in Anticipatory Self-Defense per the Caroline Doctrine**

Under customary international law the Caroline doctrine<sup>20</sup> provides a state with a right of anticipatory self-defense.<sup>21</sup> The Caroline doctrine has three conditions: necessity, proportionality, and immediacy.<sup>22</sup> The Nuremberg tribunal reaffirmed the Caroline doctrine as part of customary international law.<sup>23</sup> Modern interpretation of the Caroline doctrine advances

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<sup>15</sup> See *The Handbook of Humanitarian Law in Armed Conflicts* (Dieter Fleck ed. 1995)

<sup>16</sup> *Id* at 232.

<sup>17</sup> Int'l Comm. of the Red Cross, *Commentary on the Additional Protocols 1350* (Yves Sandoz, Christophe Swinarski, Bruno Zimmermann eds., 1987)

<sup>18</sup> Protocol I, *supra* note 7, Art. 51(3).

<sup>19</sup> See Fleck, *supra* note 15, at 211.

<sup>20</sup> J. Moore, *The Caroline (exchange of diplomatic notes between Great Britain, Ashburton, and the United States, Webster 1842)*, 2 *Digest of International Law* 409, 412 (1906).

<sup>21</sup> Y. Jennings, *The Caroline and McLeod Cases*, 32 *Am. J. Int'l L.* 82-92 (1938)

<sup>22</sup> Maureen F. Brennan, *Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law*, 59 *La. L. Rev.* 1195, 1202 (1999).

<sup>23</sup> *Int'l Military Tribunal (Nuremberg)*, Judgment and Sentences, reprinted in 41 *Am. J. Int'l L.* 172, 205 (1947).

the belief that no "armed attack" need occur before a state may use force to counter a threat.<sup>24</sup>

The necessity requirement has been interpreted to provide that force is the only available means of self-defense and that no other peaceful means would be effective.<sup>25</sup>

Al-Qaeda functions as a terrorist network, and the only effect way to combat a network is through the elimination of its nodes.<sup>26</sup> Mohamed Aziz, as a key financial officer, was a central node in Al-Qaeda's terrorist network. The targeting was necessary as it was the only way to remove Aziz from Al-Qaeda's terrorist network. The targeting was also proportional as no innocent civilians were harmed. The timing of the targeting was necessary, as it was the last opportunity to eliminate Al-Qaeda's financial planner before he was able to transfer his illicit cargo and knowledge to other Al-Qaeda members.

## **II) The United States did Not Violate the Law of the Sea when it Boarded, Searched and Seized *The Maple Princess* without first obtaining the approval of Canada**

The U.S. did not need to obtain approval from Canada to board, search and seize *The Maple Princess*. When *The Maple Princess* was boarded, she was located 260 nautical miles east of the coast of Nova Scotia far outside of Canada's territorial waters<sup>27</sup> and its contiguous zone.<sup>28</sup> *The Maple Princess* was on the High Seas and was susceptible to the restrictions of vessels on the High Seas.<sup>29</sup>

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<sup>24</sup> Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, 26 B.C. Int'l & Comp. L. Rev. 1, 16 (2003).

<sup>25</sup> Oscar Schachter, *International Law in Theory and Practice* 152 (1991).

<sup>26</sup> See John D. Moore, *Intelligence, Policy and the New Terror*, 26 Fletcher F. World Aff. 167, 168 (2002).

<sup>27</sup> *U.N. Convention on the Law of the Seas*, arts. 3-4, 11, Dec. 10, 1982, U.N. Doc. A/Conf. 62/122, 1833 U.N.T.S. 3, [hereinafter UNCLOS].

<sup>28</sup> UNCLOS, *supra* note 27, art. 33.

<sup>29</sup> See Ian Patrick Barry, *The Right Of Visit, Search And Seizure Of Foreign Flagged Vessels On The High Seas Pursuant To Customary Inter National Law: A Defense Of The Proliferation Security Initiative*, 33 Hofstra L. Rev. 299, 305 (2004).

## **A) The Law of the Sea explicitly Sanctions the Boarding, Search and Seizure of Vessels on the High Seas in the case of Piracy and Other Offenses**

Article 14 of the 1958 Geneva Convention on the High Seas (“Convention”) states: “All States shall co-operate ... in the repression of piracy on the High Seas.”<sup>30</sup> Article 100 of the U.N. Convention on the Law of the Seas (“UNCLOS”) reiterates this same goal.<sup>31</sup> The Convention further states that States may seize a pirate vessel, and arrest those persons on board.<sup>32</sup>

### **(1) When *The Maple Princess* was Boarded, Searched and Seized she was Engaged in the Hostis Humani Generi Modern Day Equivalency of Piracy**

The definition of piracy under the UNCLOS is a restatement of the definition under the Convention.<sup>33</sup> It requires an act of robbery or depredation for private ends<sup>34</sup> on the High Seas.<sup>35</sup> The Convention specifically excluded political acts as acts of piracy, retaining the 'private ends' language which had been specifically included in the 1958 draft to quash Soviet claims of "piracy" when their vessels were searched at sea.<sup>36</sup> This outdated definition of piracy limits unilateral interdiction on the High Seas to those cases where acts of violence or depredation are actually occurring on the High Seas.<sup>37</sup> This limited definition leads to a failure in addressing contemporary problems evolving from piracy under modern global circumstances.<sup>38</sup> To address these contemporary problems a more comprehensive understanding of piracy is required.

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<sup>30</sup> See *Geneva Convention on the High Seas*, Apr. 29, 1958, art. 14, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter Geneva Convention] .

<sup>31</sup> UNCLOS, *supra* note 27, art. 100.

<sup>32</sup> Geneva Convention, *supra* note 30, art. 19.

<sup>33</sup> UNCLOS, *supra* note 27, art. 101, Geneva Convention, *supra* note 30, art. 15.

<sup>34</sup> *Id.* at art. 101(a).

<sup>35</sup> *Id.* at art. 101(a)(ii).

<sup>36</sup> *Report of the International Law Commission to the General Assembly*, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l. Comm'n 282, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

<sup>37</sup> See Ethan C. Stiles, *Reforming Current International Law To Combat Modern Sea Piracy*, 27 Suffolk Transnat'l L. Rev. 299, 307 (2004).

<sup>38</sup> See Stephen J. Adler, *Fighting Terrorism In The New Age: A Call For Extraterritorial Jurisdiction Over Terrorists*, 18 U.S.F. Mar. L.J. 171 (2006).

Traditionally pirates were defined as persons existing beyond the natural scope of society, outside its actual and juridical borders, whose activities are directed against the persons or commerce of that society.<sup>39</sup> The Declaration of Paris recognized pirates as a unique classification of entity that lacked both the individual liberties and protections of law to be a citizen, and the legitimacy and sovereignty of a state.<sup>40</sup> Pirates were seen as *hostis humani generi*, enemies of the entire human race.<sup>41</sup> Pirates forfeited the protections of citizenship and piracy as a political tool was recognized as beyond the pale of legitimate state behavior.<sup>42</sup> Pirates were deemed to be at 'war' with civilization itself.

Piracy is the ancestor of international terrorism, sharing its essential characteristics. Both pirate and terrorist organizations are composed of volunteers<sup>43</sup> having a common goal of gaining the notice of the Nation States by committing acts of terror such as destruction and seizure of State or private property, frustration of commerce, and homicide.<sup>44</sup> Both exist outside the territorial and jurisdictional boundaries of any State, and thus may not be properly said to be resident in any State.<sup>45</sup> Both use their extra-nationality as a means of pursuing their activities against States and, consequently may be considered not as the enemy of one particular State but of all States.<sup>46</sup> Both are fully cognizant not only of existing outside of jurisdiction, but outside of

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<sup>39</sup> *U.S. v. Smith*, 18 U.S. 153, 161 (1820).

<sup>40</sup> See Theodore D. Woolsey, *Introduction to the Study of International Law* 212-13 (5th ed. 1878).

<sup>41</sup> See Alfred P. Rubin, *The Law Of Piracy* 17 (2nd ed. 1998).

<sup>42</sup> See Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism And A New International Law* 13 U. Miami Int'l & Comp. L. Rev. 293, 301- 323 (2006).

<sup>43</sup> *Id.* at 327.

<sup>44</sup> *Id.* at 301.

<sup>45</sup> See Robert P. DeWitte, *Let Privateers Marque Terrorism: A Proposal For A Reawakened* 82 Ind. L.J. 131, 137 -140 (2007).

<sup>46</sup> See Burgess, *supra* note 42, at 327.

society itself, and use this also as a weapon against the States as well.<sup>47</sup>

The Law of the Sea sanctions interdiction on the High Seas in the case of piracy.<sup>48</sup> This authorization needs to be extended to the modern evolution of piracy that is international terrorism. Historically pirates have been the only class of internationally proscribed, private, non-State oriented international criminals.<sup>49</sup> International terrorist similarly need to be proscribed internationally. International terrorists, like pirates, must be given their proper status in law: *hostes humani generis*, enemies of the human race, and with that legal status be treated in the same manner as pirates.

Warships suspecting a vessel of engaging in piracy may board that suspected vessel on the High Seas.<sup>50</sup> The U.S. Navy PC-1 Cyclone Class Special Ops vessel which interdicted *The Maple Princess* would be classified as a warship.<sup>51</sup> Since terrorism is the modern incarnation of piracy, the same methods should be extended to curbing terrorism as piracy, namely the boarding search and seizure of vessels engaged in terrorist activities on the High Seas.

*The Maple Princess* was engaged the smuggling of funds intended to finance terrorism in violation of international law.<sup>52</sup> *The Maple Princess* was also transporting a known Al-Qaeda terrorist officer across the High Seas while carrying illicit narcotics that could be used to further fund terrorism in violation of international law.<sup>53</sup> *The Maple Princess* as an instrument of international terrorism could therefore be boarded, searched and seized on the High Seas

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<sup>47</sup> See DeWitte, *supra* note 45, at 138.

<sup>48</sup> UNCLOS, *supra* note 27, art. 101.

<sup>49</sup> See Niclas Dahlvang, *Thieves, Robbers, & Terrorists: Piracy In The 21st Cent Ury*, 4 Regent J. Int'l L 17 (2006).

<sup>50</sup> UNCLOS, *supra* note 27, art. 107, 110.

<sup>51</sup> *Id.*, art. 107.

<sup>52</sup> *Int'l Convention for the Suppression of the Financing of Terrorism*, arts. 2(1) G.A. Res. 109, U.N. GAOR 6th Comm., 54 Sess., 76th mtg., Agenda Item 160, U.N. Doc. A/54/109 (1999).

<sup>53</sup> *Id.*

similarly to a pirate vessel committing the same offenses.

## **(2) Canada Relinquished its Link to *The Maple Princess* by Failing in its Obligation to Prevent its Territory from being used for Terrorist Operations**

Canada has a codified obligation to prevent its territory from being used as a base of terrorist operations against another State.<sup>54</sup> After the international terrorist attacks of September 11, 2001, the U.N. Security Council passed resolutions calling on all nations to work together against terrorism.<sup>55</sup> The resolutions "stress[ed] that those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable."<sup>56</sup> The resolutions were legally binding on all U.N. members, including Canada, and had express obligations requiring all States to "prevent and suppress the financing of terrorist acts."<sup>57</sup> States were required to prohibit anyone within their territories from providing support, safe haven or making any funds available, to terrorists and their supporters.<sup>58</sup> All States have an obligation to "take the necessary steps to prevent the commission of terrorist acts," and to ensure that those financing terrorism be brought to justice.<sup>59</sup> Most importantly, all States have an obligation to prevent the movement of terrorists within their borders.<sup>60</sup> A permissible reading of the obligation

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<sup>54</sup> See *Draft Code of Crimes Against the Peace and Security of Mankind*, 2 Y.B. Int'l L.Comm. 149 (1954); *Seventh Report of the Draft Code of Crimes Against the Peace and Security of Mankind*, U.N.Doc. A/CN.4/419 (1989); *Report of the International Law Commission on the Work of its Fortieth Session*, U.N. GAOR, 43rd Sess., Agenda Item 135, at 9-10, U.N.Doc. A/43/539 (1988); *Fifth Report on the Draft Code of Offenses Against the Peace and Security of Mankind*, U.N.Doc. A/CN.4/404 (1987).

<sup>55</sup> S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>56</sup> S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

<sup>57</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001)

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

to refrain from even passive support would require affirmative action against terrorism.<sup>61</sup>

By allowing *The Maple Princess* to be used as an instrument of international terrorism Canada relinquished its link to *The Maple Princess*. For a ship to have the nationality of its flag a genuine link between the State and the ship must exist. “The state must effectively exercise its jurisdiction and control in administrative ... and social matters over ships flying its flag.”<sup>62</sup> By failing to fulfill its obligation per the Security Council resolutions and the Convention, Canada has relinquished its link to *The Maple Princess*. With out a proper link to Canada *The Maple Princess* is in essence a stateless vessel, and per UNCLOS can be boarded, searched and seized.<sup>63</sup>

### **B) *The Maple Princess* was Not a Vessel Entitled to Complete Immunity from Boarding, Search and Seizure**

Complete immunity to boarding is only extended to governmental non-commercial ship and warships.<sup>64</sup> All other ships on the High Seas are susceptible to boarding according to existing treaty and customary international law.<sup>65</sup>

*The Maple Princess* was not a warship or governmental non-commercial ship deserving of complete immunity.<sup>66</sup> *The Maple Princess* was leased, and was not owned or operated by the State, furthermore it was being used for non-governmental purposes, specifically terrorism on the High Seas. *The Maple Princess* was boarded, searched, and seized by U.S. Navy because of its connection to terrorist activities, the modern equivalent of piracy and its stateless character.

### **III) The United States Could Properly Assert Universal Jurisdiction over *The Maple Princess***

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<sup>61</sup> See Dahlvang, *supra* note 49, at 30-31.

<sup>62</sup> Geneva Convention, *supra* note 30, art. 5.

<sup>63</sup> UNCLOS, *supra* note 27, art. 110.

<sup>64</sup> *Id.* at art. 96, 97.

<sup>65</sup> See Barry, *supra* note 27, at 309.

<sup>66</sup> UNCLOS, *supra* note 27, art. 96,97.

Universal jurisdiction can be asserted over property just as it can be asserted over a person. Thus, the issue becomes whether the financing of terrorism is a crime that warrants universal jurisdiction. This question should be answered in the affirmative because financiers of terrorism are enemies of humanity, and the international community has recognized them as such. Taken together, it can only be found that the U.S. did have proper jurisdiction to confiscate *The Maple Princess* because of the nature of the crime for which it was utilized. Further, the Doctrine of the Persistent Objector cannot be used against the U.S., in regards to universal jurisdiction, because the U.S. has not been a persistent objector, but continues to affirm universal jurisdiction.

#### **A) Universal Jurisdiction is a Legitimate Form of Jurisdiction under Customary International Law**

Canada may attempt to argue that universal jurisdiction is not a recognizable form of jurisdiction under international law. However, customary international law does recognize universality as a valid form of jurisdiction for some crimes, and has done so for centuries.<sup>67</sup> One of the first crimes recognized by the international community as warranting universal jurisdiction was piracy.<sup>68</sup> Since then, universal jurisdiction, although still evolving, has been recognized in international law in various conventions and charters. The Nuremburg Charter was the first written document that mentioned universal jurisdiction, but the Charter insisted that it was not

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<sup>67</sup> Amnesty Int'l, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, Ch. 2 *The Evolution of the Practice of Universal Jurisdiction*, AI Index IOR 53/004/2001 (2001), available at <http://web.amnesty.org/library/index/engior530042001?OpenDocument>.

<sup>68</sup> *Id.*

making law, but merely codifying a principle that had been in existence since the days of piracy.<sup>69</sup>

Old or new, it is clear that universal jurisdiction is an accepted form of jurisdiction under current customary international law. Besides the Nuremberg Charter, conventions, courts and domestic laws now recognize universal jurisdiction as a legal form of jurisdiction for some crimes. The U.N. Convention on the Law of the Sea allows for universal jurisdiction on the High Seas for piracy.<sup>70</sup> U.S. domestic court practice has recognized universal jurisdiction in many cases.<sup>71</sup> Other nations have also enacted domestic legislation that recognizes and applies universal jurisdiction for some crimes.<sup>72</sup> Moreover, universal jurisdiction can be asserted over property just as it can be asserted over a person. UNCLOS Article 105 allows a State to seize a pirate ship on the High Seas and subject the ship to action under its domestic law.<sup>73</sup>

Further, the Doctrine of the Persistent Objector cannot be applied to this case because the U.S. is not a persistent objector to universal jurisdiction. The U.S. has never explicitly rejected universal jurisdiction. Rather, the U.S. has merely found legal reasons to choose other forms of jurisdiction over universal jurisdiction. Choosing other forms of jurisdiction over universal jurisdiction is not indicative of a State's rejection of universal jurisdiction.<sup>74</sup> Moreover, the U.S. has on many occasions recognized the legitimacy of universal jurisdiction, even when it

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<sup>69</sup> Linda Malone, "Issue 7: Does Saddam Hussein Have Head of State Immunity?" (2005), [http://law.case.edu/saddamtrial/entry.asp?entry\\_id=2](http://law.case.edu/saddamtrial/entry.asp?entry_id=2)

<sup>70</sup> UNCLOS, *supra* note 27, art. 100.

<sup>71</sup> *U.S. v. Yousef*, 327 F.3d 56 (2003). *In Re Marc Rich & Co*, 707 F.2d 663 (2nd Cir. 1983). *U.S. v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998). *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). *Hamdi v. Rumsfeld*, 542 U.S. 547 (2004).

<sup>72</sup> Amnesty Int'l, Universal Jurisdiction: Belgian prosecutors can investigate crimes under international law committed abroad, AI Index IOR 53/001/2003 (2003), available at <http://web.amnesty.org/library/Index/ENGIOR530012003?open&of=ENG-BEL>.

<sup>73</sup> UNCLOS, *supra* note 27, art. 105.

<sup>74</sup> Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757 (October 2001).

has chosen to apply other forms of jurisdiction.<sup>75</sup> The U.S., through State practice, has consistently reaffirmed its acceptance of universal jurisdiction, but merely opted to use other forms of jurisdiction when possible. It is therefore clear that universal jurisdiction, although still developing, does exist under international law, and the U.S. is not an objector to it.

**B) The Principle of *Hostis Humanis Generis* Requires the Application of Universal Jurisdiction on this Matter.**

Piracy invoked universal jurisdiction because the crime was considered to be a threat to humanity, a breach of *jus cogens*.<sup>76</sup> Nations shared in the material and moral loss resulting from piracy, and therefore considered piracy to be not only a domestic concern, but an issue of international concern. Thus, pirates were considered *hostes humani generis*, and for this reason, universal jurisdiction was appropriate. Additionally pirating required universal jurisdiction because of the complexities it evoked surrounding traditional rules of jurisdiction. Because criminals engaged in piracy were not agents of any State, and because the crimes did not occur on territories of any State, the rules of jurisdiction needed to adapt to the needs of justice.<sup>77</sup>

The financing of terrorism is analogous to piracy with respect to its concern to the international community, as well as the challenges it poses to traditional rules of jurisdiction. For this reason, universal jurisdiction should be applied to the financing of terrorism just as it was applied to piracy.

**(1) Like with Piracy, the International Community Recognizes that Financiers of Terrorism are *Hostes Humani Generis* - Enemies of Humanity**

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<sup>75</sup> Restatement (Third) of Foreign Relations § 404 (1987).

<sup>76</sup> Linda Malone, “Does Saddam Hussein Have Head of State Immunity?” (September 22, 2005), [http://law.case.edu/saddamtrial/entry.asp?entry\\_id=2](http://law.case.edu/saddamtrial/entry.asp?entry_id=2)

<sup>77</sup> Amnesty International, Universal Jurisdiction: The duty for States to enact and enforce legislation, Ch. 3 War Crimes: The legal basis for universal jurisdiction, AI Index IOR 53/005/2001 (2001), available at <http://web.amnesty.org/library/index/engior530052001?OpenDocument>

The principles of universal jurisdiction allow for jurisdiction for crimes that the international community considers a threat to international stability. The *Princeton Principles of Universal Jurisdiction* develops in detail the types of crimes subject to universal jurisdiction.<sup>78</sup> In addition to specifically listing a number of crimes subject to universal jurisdiction, the *Princeton Principles*, Principle 2(b) states that universal jurisdiction may be applied in crimes with such exceptional gravity that “they affect the fundamental interests of the international community as a whole.”<sup>79</sup> The financing of terrorism is such a crime.

Piracy became a crime that warranted universal jurisdiction because the international community recognized it as a crime of international concern.<sup>80</sup> The financing of terrorism is also a crime that the international community has explicitly recognized as a crime of great concern to the international community.<sup>81</sup> The International Convention for the Suppression of the Financing of Terrorism states “the financing of terrorism is a matter of grave concern to the international community as a whole” because the international community recognizes that the number and gravity of terrorist attacks are dependent on the financing that terrorists are able to obtain.<sup>82</sup> The Convention places upon all States the responsibility to act in the suppression of the financing of terrorism.

It is precisely this type of international concern that gives the U.S. universal jurisdiction in this matter. Had the terrorist attacks on the World Trade Center on September 1, 2001 been an isolated incident, the issue of terrorism may not have been of concern to the international

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<sup>78</sup> Princeton Project on Universal Jurisdiction, *Princeton Principles on Universal Jurisdiction* (2001).

<sup>79</sup> *Id.* at 23 (2001).

<sup>80</sup> Geneva Convention, *supra* note 30, art. 19; *See also* UNCLOS, *supra* note 27, art. 100.

<sup>81</sup> The Secretary-General, *Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy*, delivered to the General Assembly, U.N. Doc. A/60/825 (April 27, 2006).

<sup>82</sup> *Int'l Convention on the Financing of Terrorism*, December 9, 1999, 39 ILM 270 (2000).

community. But the September 11 terrorist attacks were followed with a series of terrorist attacks on various places in the world, claiming victims from different parts of the globe. What has become painfully clear to the international community is that the threat of terrorism is of concern to all nations.<sup>83</sup> Moreover, like it did with the crime of piracy, the international community recognizes that not only is the threat of terrorism of international concern, but terrorism can only be prevented and combated through the collaborative efforts of the international community.<sup>84</sup>

On December 9, 1994, the U.N. General Assembly passed resolution 49/50, in which U.N. member states solemnly and unequivocally reaffirmed their commitment to ending international terrorism, recognizing it as an unjustifiable crime that threatened international peace and security.<sup>85</sup> On December 17, 1996, the U.N. General Assembly passed resolution 51/210, calling upon states to prevent and counteract the financing of terrorism.<sup>86</sup> The General Assembly again reiterated the importance of international cooperation in combating the financing of terrorism when it passed resolution 52/165 on December 15, 1997, and resolution 53/108 on December 8, 1998.<sup>87</sup> These are only a few illustrations of the international community's consensus that the financing of terrorism is a crime that threatens humanity as a whole.

## **(2) The Act was not Committed upon the Territory of a State**

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<sup>83</sup> The Secretary-General, *Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy, delivered to the General Assembly*, U.N. Doc. A/60/825 (April 27, 2006).

<sup>84</sup> *Id.*

<sup>85</sup> G.A. Res. 49/50, U.N. Doc. A/49/323 (1994).

<sup>86</sup> G.A. Res. 51/210, U.N. Doc. A/51/49 (1996).

<sup>87</sup> G.A. Res. 52/165, U.N. Doc. A/52/49 (1998), and G.A. Res. 53/108, U.N. Doc. A/53/49 (1998).

One of the main reasons why piracy became a concern to the international community is because of the problems that it posed under traditional rules of jurisdiction, particularly because often the crime of piracy was committed outside of the territory of any State. Similarly, *The Maple Princess* was located on the high seas, 260 nautical miles east of the coast of Nova Scotia, thus not on any State territory.<sup>88</sup> The 1958 Convention of the High Seas would establish that *The Maple Princess* should not be deemed a flagship under the Convention, and that the location of the ship on the high seas at the time it was seized constitutes a *terra nullius*. Having been an instrument for a financier of terrorism, a crime that warrants universal jurisdiction similar to pirating, the U.S. justly fulfilled its obligation to itself and to the international community when it seized the ship.

The Convention requires a “genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”<sup>89</sup> Such a connection between the ship and Canada did not exist for the reasons argued above.<sup>90</sup> Under these circumstances, it would be inappropriate for Canada to argue that it did effectively exercise jurisdiction and control over all matters of *The Maple Princess* since the ship was being used for illegal drug trafficking intended to fund terrorist attacks against another nation at the time it was intercepted.

Further, Article 6 of the Convention, to which Canada appeals with regard to this matter, states that the flagship is under the exclusive jurisdiction of its state “save in exceptional cases expressly provided for in international treaties.”<sup>91</sup> Canada thus ignores its obligations under the 1998 International Convention on the Financing of Terrorism when it claims exclusive

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<sup>88</sup> *Supra* p. 5.

<sup>89</sup> Geneva Convention, *supra* note 30, art. 5.

<sup>90</sup> *Supra* p. 5.

<sup>91</sup> *Id.* at art. 6.

jurisdiction because Article 7 of the Financing of Terrorism Convention grants jurisdiction to a State when the offense was directed towards its territory or a citizen of that State, and Article 8 of the Convention requires States to forfeit funds and property involved in terrorism or the financing thereof.<sup>92</sup> Thus, Article 6 of the Convention on the High Seas does not apply to Canada in this matter. For these reasons, *The Maple Princess* cannot be considered to have been Canadian territory at the time it was confiscated by the United States. The inapplicability of the Convention on the High Seas to the ship, coupled with its location on the high seas at the time it was intercepted constitutes a *terra nullius* and precludes the ship from the territorial jurisdiction any State.

#### **IV) The Doctrine of Head of State Immunity does not Preclude the U.S. from Applying Universal Jurisdiction over *The Maple Princess***

Canada may seek to convince the Court that *The Maple Princess* fell under the protection of *ratione personae*, or personal immunity. However, under customary international law, personal immunity affords a head of state, diplomatic agent or foreign minister immunity from foreign jurisdiction for criminal, not civil, matters. The purpose is to avoid foreign States from either infringing sovereign prerogatives of states or from interfering with the official functions of a foreign State agent under the pretext of dealing with an exclusively private act.<sup>93</sup> Any extension of personal immunity beyond criminal matters is solely based on State practice.<sup>94</sup> The forfeiture proceedings instituted by the U.S. against *The Maple Princess* are civil proceedings and thus Head of State immunity cannot be invoked.

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<sup>92</sup> *Int'l Convention on the Financing of Terrorism*, art. 7-8, December 9, 1999, 39 ILM 270 (2000)

<sup>93</sup> Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes?: Some Comments on the Belgium v. Congo case*, 13 E.J.I.L. 835 available at [www.ejil.org/journal/curdevs/sr31-05.html](http://www.ejil.org/journal/curdevs/sr31-05.html). See also *Kline v. Kaneko*, 535 N.Y.S.2d 303 (N.Y. Sup. Ct. 1988).

<sup>94</sup> *Id.*

Thus personal immunity is not absolute and is not applicable under all circumstances. The U.N. Convention on Jurisdictional Immunities of States and Their Property codifies customary international law in this respect.<sup>95</sup> The convention only recognizes immunity over property when the property is used for State purposes.<sup>96</sup> In the present case, *The Maple Princess* was private property, not used at the time for any State purpose. Therefore, none of the immunities defined by the Convention apply. Customary international law has well developed the principle that Head of State *ratione personae* specifically applies to actors of the State, not their property. The ICJ, in the Case Concerning the Arrest Warrant, concluded that personal immunity applies only to protect the individual from the authority of another State when such authority would “hinder him or her in the performance of his or her duties.”<sup>97</sup> In fact, recent cases involving the application of Head of State Immunity, including *Belgium v. Congo*, have all dealt specifically with crimes brought against the head of state or government – not his or her property.<sup>98</sup> Although *The Maple Princess* had, in the past, been used for official State purposes, at the time the U.S. seized the ship it was under a private lease and was used for non-State purposes. Because the ship was not being used by Prime Minister Sharper for any State purpose, any immunity he may have under customary international law does not extend to *The Maple Princess*.

**A) The Doctrine of Head of State Immunity does not Apply to Cases when Universal Jurisdiction is Employed**

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<sup>95</sup> *U.N. Convention on Jurisdictional Immunities of States and Their Property*, June 3, 2004, 44 I.L.M. 803.

<sup>96</sup> *Id.* at art. 16.

<sup>97</sup> Case Concerning the Arrest Warrant of 11 April 2000 (*Congo v. Belgium*), 2002 I.C.J. LEXIS 5 (February 14).

<sup>98</sup> *Id.* See also Augusto Pinochet Ugarte, [1999] 38 I.L.M. 68 (Q.B. Div'l Ct. 1998).

Should the Court determine that *The Maple Princess* is entitled immunity from forfeiture by the U.S. because of *ratione personae*, the principles of universal jurisdiction bar the application of such immunity. The Princeton Principles of Universal Jurisdiction specify that Head of State or other forms of immunity do not apply to crimes when universal jurisdiction is invoked for crimes under Principle 2(1).<sup>99</sup> Because of the gravity of crimes that warrant universal jurisdiction, it would be bad policy to allow Head of State Immunity to protect individuals from prosecution from these types of crimes.<sup>100</sup> Taking the Princeton Principles *in peri materii*, immunity cannot be applied to crimes when universal jurisdiction is applicable.

The Nuremberg Charter also reiterates this point. The Charter sets out the applicability of universal jurisdiction for crimes against peace and crimes against humanity.<sup>101</sup> It specifies that individuals cannot invoke Head of State Immunity for such crimes.<sup>102</sup> Because international law in this area is continually evolving, the principles set forth in the Nuremberg Charter and the *Princeton Principles* should be extended to apply to all crimes that warrant universal jurisdiction. The policy that this Court should adopt is that crimes with such exceptional gravity that they should warrant universal jurisdiction are also so exceptional in gravity that individuals should not be able to invoke Head of State Immunity to protect them from committing such acts. As established above, the financing of terrorism is a crime of exceptional gravity as recognized by the international community time and again. Because of the serious nature of the crime and its threat to international peace, Head of State Immunity should not be applicable.

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<sup>99</sup> Princeton Project on Universal Jurisdiction, Princeton Principles on Universal Jurisdiction, at 31 (2001).

<sup>100</sup> See Augusto Pinochet Ugarte, [1999] 38 I.L.M. 68 (Q.B. Div'l Ct. 1998).

<sup>101</sup> *Nuremberg Charter of the Int'l Military Tribunal*, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

<sup>102</sup> *Id.* art. 7.

## CONCLUSION

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

- i) The United States' Targeted Killing of Al-Qaeda's financial officer Mohamed Aziz was not a violation of international law.
- ii) The U.S. did not violate the Law of the Sea when it boarded, searched and seized *The Maple Princess* without first obtaining the approval of Canada.
- iii) The United States properly asserted jurisdiction over *The Maple Princess*; and
- iv) The Doctrine of Head of State Immunity cannot be applied to preclude the United States from asserting universal jurisdiction in forfeiture proceedings against *The Maple Princess*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

Counsel for the Respondent,  
the Government of the United States of America (Team #2007 – 07R).