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In the

INTERNATIONAL COURT OF JUSTICE

March 2007

CASE CONCERNING *THE MAPLE PRINCESS*

CANADA, Applicant

v.

THE UNITED STATES OF AMERICA, Respondent

Memorial of the Respondent

Team #: 2007-11 R

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STATEMENT OF THE FACTS

In 2003, long-time Canadian Parliament member Mr. Stephen Sharper purchased *The Maple Princess*, a luxury sailboat. While Sharper sometimes entertained foreign diplomats and dignitaries on this boat, its primary use was for family vacations and other recreational purposes. In 2006, Mr. Sharper became the Canadian Prime Minister, and a few weeks later leased *The Maple Princess* to his half-brother, Flan Tomigan, a citizen and resident of Canada, for two months (June and July of 2006) at a rate of $500 per month. The written lease agreement between Mr. Sharper and his half brother, Mr. Tomigan indicate that the boat's intended use was for a summer vacation from Sydney, Nova Scotia to Ireland and back. Before turning over the boat to the lessee, Mr. Sharper replaced the spinnaker of *The Maple Princess*, which had previously read "Canada: Proud to Call it Home" to a new spinnaker emblazoned with a red maple leaf and featuring the phrase "Thinking new boat? Think Canadian!"

Mr. Flan Tomigan's close college friend, Mohammed Aziz, runs an import-export business based in Ireland. As such, Tomigan invited Aziz to join them in Ireland and sail back to Canada with them in July. The United States government has confirmed that Mr. Aziz is the primary financial figure in the terrorist organization of Al-Qaeda, which has perpetrated many terrorist attacks against the United States. The government further confirmed Aziz's central role in financing Al-Qaeda's terrorist attacks on the United States, in that he was using his profitable import-export business to funnel millions of dollars to Al-Qaeda cells around the world, which was in turn being used to launch terrorist attacks against the United States. Moreover, the United States government has also discovered, through a series of intercepted electronic mail messages that Aziz was planning to carry millions of dollars in Swiss bearer bonds aboard *The Maple Princess* from Galway to Nova Scotia.

On June 21, 2006, the President of the United States issued a Top Secret Presidential Decision Directive (PDD 2006-08) authorizing the "targeted killing of Osama Bin Laden's chief financier, Mohammed Aziz, who is expected to be found aboard a pleasure yacht in the high seas off the coast of Canada on or around July 15, 2006). PDD 2006-08 also observed "the elimination of Al Qaeda's financial mastermind will constitute a severe blow to the organization, which will not be able to launch its operations without the financial lifeblood provided by Aziz".

At 0200 Greenwich Mean Time on July 16, 2006, a team of six United States Navy Seals boarded *The Maple Princess,* which was 260 miles from the coast of Canada. Discovering four passengers asleep, they rendered them unconscious using Taser M-18 stun guns. They then carried out the Presidential Decision Directive eliminating Mr. Aziz. The United States did not ask for permission of the Canadian government prior to carrying out of this directive. During their mission, the Seals discovered two large suitcases beneath Mr. Aziz's bunk, one filled with the millions of dollars in Swiss Bearer Bonds and the other containing what appeared to be heroin. The Seals then left *The Maple Princess* in autopilot and leaving the three passengers behind. They then notified the United States Coast Guard Portsmouth Harbor Station of the whereabouts of *The Maple Princess*, which was still over 200 miles from the Canadian coast, and their suspicion regarding the heroin filled suitcase.

The United States Coast Guard then deployed an MH-68 "Shark" helicopter to the location of *The Maple Princess*, whereupon two crew members boarded the ship and confirmed the presence of approximately $20 million worth of pure Afghan heroin. The Coast Guard then brought the vessel and the three remaining passengers into custody in the Portsmouth Harbor Station. When Mr. Tomigan produced identification, he and the other passengers were released.

However, the United States retained The Maple Princess and instituted forfeiture proceedings pursuant to 21 U.S.C. Section 881, the federal civil forfeiture statute.

In August of 2006, the Canadian appeared in United States District Court for the District of New Hampshire, for the judicial forfeiture proceeding of *United States v. The Maple Princess*. The District Court held 1) that the United States properly exercised universal jurisdiction over *The Maple Princess* in compliance with customary international law, 2) that Mr. Sharper, as head of government rather than head of state, does not enjoy head of state immunity and that even if he did, head of state immunity does not extend to commercial acts or property unrelated to the official functions of head of state, 3) that Article 6 of the Convention on the High Seas does not protect The Maple Princess because it was transporting a major terrorist and carrying a cargo of heroine, thereby rendering it a pirate vessel. The United States Court of Appeal then affirmed.

The wife of Mr. Aziz, then brought suit under the United States Alien Tort Claims Act, 28 U.S.C. Section 1350, in the United States District Court for the District of Columbia. The case was dismissed. The United States Court of Appeals also affirmed this decision. Both the Canadian government and Mrs. Aziz appealed to the Supreme Court of the United States for writs of *certiorari*, however both were denied. In response, Prime Minister Sharper delivered a public address stating that he would close the Peace Bridge, a heavy flow border crossing between Canada and the United States, until the United States agreed to submit the dispute over The Maple Princess to the International Court of Justice for the resolution of Canada's claims against the United States. Just a few hours later the United States agreed and Mr. Sharper rescinded his order to close the Peace Bridge.

QUESTIONS PRESENTED

The Applicant and the Respondent submit four questions to the International Court of Justice:

1) Whether the United States' targeted killing of Al-Qaeda's chief financier, Mohammed Aziz was a violation of international law,

2) Whether the United States violated the Law of the Sea when it boarded, searched and seized the *Maple Princess* without prior Canadian government approval,

3) Whether international law permits the United States' exercise of "universal jurisdiction" over the *Maple Princess*; and

4) Whether head of state immunity extends to a private ship used for recreational and personal purposes, engaged in commercial activity, and being leased by someone other than the head of state thereby preventing judicial forfeiture proceedings.

JURISDICTIONAL STATEMENT

The United States and Canada have reached a Special Agreement to submit this dispute, pursuant to Articles 40(1) and 36(1) of the *Statute of the International Court of Justice*, to a Chamber of three judges of the International Court of Justice.

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SUMMARY OF THE ARGUMENT

The targeted killing of Mohammed Aziz is not a violation of international law. Rather, this is a legitimate act of self-defense in compliance with Article 51 of the United Nations' Charter. Further, the targeted killing of Mohammed Aziz does not violate international customary law regarding self-defense, as the measure was both necessary and proportional. Additionally, the International Covenant on Civil and Political Rights does not prohibit the targeted killing of terrorists. The Covenant only disallows arbitrary deprivations of human life and does not extend to necessary acts of self-defense.

The United States contends that it was acting properly under international law when it boarded, searched and seized *The Maple Princess* on the high seas. The United States is not a party to the 1982 Convention on the Law of the Sea and Canada has never ratified the 1958 Convention on the High Seas, so neither treaty can be invoked. Additionally, the United States asserts it has universal jurisdiction over terrorist cases, as terrorism is a *jus cogens* crime. It would not need to ask Canada's permission to board a ship flying the Canadian flag. As such, the United States did not violate international law by boarding and seizing *The Maple Princess*.

The government of Canada also may not invoke head of state immunity to protect *The Maple Princess* after it was seized on Flan Tomigan's return journey from Ireland. The ship had been leased and was being operated by a third party, not in the immediate family of the Prime Minister. It was not being operated on behalf of the Prime Minister or the government of Canada. Rather, it was being used as pleasure craft for a personal vacation. Finally, even if the vessel were found to be a government ship, it was engaged in commercial activity in the form of an advertisement on the spinnaker, precluding immunity protection.

ARGUMENT

I. THE TARGETED KILLING OF MOHAMMED AZIZ WAS NOT A VIOLATION OF INTERNATIONAL LAW.

A. It was a legitimate act of self-defense in compliance with Article 51 of the United Nations Charter.

Article 51 of the United Nations Charter states that "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".[1] The International Court of Justice affirmed the notion that an armed attack is a requirement of Article 51 in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons.[2] Thus, for purposes of the Charter, whether a measure is a legitimate act of self-defense is predicated on the fact that an armed attack takes place against a member state.

Here, the United States contends that the terrorist attacks, which took place on September 11, 2001, constitute an armed attack. In fact, subsequent United Nations Security Council Resolutions 1368 and 1373, both refer to the acts of September 11, 2001 as "terrorist attacks", indicating that they would constitute an armed attack within the meaning of Article 51.[3] More significantly however, both these Resolutions, in condemning these attacks, strongly reaffirm the United States' inherent right to both collective and individual self-defense.[4] Thus, the Security Council recognized that these attacks constituted an "armed attack" on the United States warranting a response in self-defense.

Resolution 1368 states that the Security Council "recognizing the inherent right to self-defense in accordance with the Charter, unequivocally condemns in the strongest terms the

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[1] UN Char. art 51 emphasis added [hereinafter Charter].
[2] Legality of the Threat or Use of Nuclear Weapons. 1996 I.C.J. 226, 244.
[3] S.C. Res. 1368 U.N. Doc., S/Res/1368; S.C. Res. 1373 U.N. Doc., S/Res/1373.
[4] Id.

horrifying terrorist attacks which took place on September 11, 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security".[5] Security Council Resolution 1373 reaffirms Resolution 1368 and emphasizes the need to "combat by any means" the threat from further terrorist attacks.

The strong language of these Security Council resolutions indicate recognition that the attacks on the United States were armed attacks warranting self defense and falling within the scope of Article 51. As such, the United States maintains that the attacks of September 11, 2001 fulfill the requirement of Article 51, that an act of self-defense be predicated on the existence of an "armed attack".

B. The targeted killing of Mohammed Aziz did not violate customary international law as it complied with the principles of necessity and proportionality.

International law concerning self-defense is derived not only from Article 51 of the UN Charter, but also from customary international law. As stated by this Court in the Nicaraguan judgment, "there can be no doubt that the issues of the use of force and collective self-defense, raised in the present proceeding, are issues which are regulated both by customary international law and by treaties".[6] Thus, a proper analysis of whether the United States violated international law with its targeted killing of Mohammed Aziz must also take into account customary international law on self-defense, as well as a consideration of Article 51.

In addition to the requirement that there be an armed attack in order to invoke self-defense under Article 51, customary international law requires that the means used in self-defense be both "necessary" and "proportionate".[7] In its advisory opinion entitled The Legality

[5] S.C. Res. 1368 U.N. Doc., S/Res/1368 (2001).
[6] Necessity, Proportionality and the Use of Force by States. Gardam, Judith. 100 Am. J. Int'l. L. 973 (2006). ("Internal citations omitted").
[7] Id.

of Threats or Use of Nuclear Weapons, this body states "the submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law."[8] The Court further noted its previous decision in Nicaragua v. U.S. where it was held that there exists a "specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.[9] The opinion elaborates that "this dual condition applies equally to Article 51 of the Charter" and to "whatever the means of force employed".[10] In the recent case of the Islamic Republic of Iran v. U.S., this Court scrutinized the criteria of necessity and proportionality in order to determine whether the United States' action with respect to Iran constituted a valid act of self-defense.[11]

The United States. maintains that its targeted killing of Mr. Aziz, was not only predicated on an armed attack and therefore falling within the scope of Article 51, but was also in keeping with the requirements of customary international law of necessity and proportionality. Mr. Aziz was considered a chief financier of Al Qaeda and was in the process of transferring millions of dollars to the organization.[12] Eliminating Mr. Aziz was necessary to significantly reduce Al Qaeda's ability to launch new attacks.

i. The targeted killing of Mohammed Aziz was necessary under customary international law.

The requirement of necessity, while not grounded specifically in the Charter, is nonetheless a requirement founded upon both general principles of international law and

[8] The Legality of Threats or Use of Nuclear Weapons. 1996 I.C.J. 226, 245.
[9] Id. "Internal citations omitted".
[10] Id.
[11] Islamic Republic of Iran v. U.S., 2003 I.C.J. 161, 183.
[12] Compromis ¶ ¶ 4, 8.

customary international law.[13] This Court stated in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory that in order for the construction of the wall to constitute an act of self-defense, customary international law requires that the act be necessary.[14] Additionally, the recent Inter-American Commission of Human Rights Report on Terrorism and Human Rights, states that "in situations where a state's population is threatened by violence, the state has the right and obligation to protect its population against such threats and in doing so may use lethal force where strictly necessary and appropriate".[15] As Al Qaeda's chief financier, Mr. Aziz posed a significant threat to the United States by providing the organization with the resources to carry out future attacks. Thus, American action against Mr. Aziz was both necessary and appropriate.

The notion of necessity deals with whether the situation is one that warrants the use of armed force.[16] In case after case, this body has held that military force is a necessary mean of combating further armed attacks. In the case of Bosnia and Herzegovina v. Yugoslavia, the Court found that as the Bosnians had suffered armed attacks by air and by land carried out by Yugoslavia, military response by the Bosnians was a necessary act in order to defend itself.[17] The Al-Qaeda attacks of September 11, 2001 are one of many attacks against American interests in an on going campaign by the organization and therefore warrant self-defense and necessitate the use of military force.

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[13] Necessity, Proportionality and the Use of Force by States. Gardam, Judith. 100 Am. J. Int'l. L. 973 (2006).
[14] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. 2004 I.C.J. 136, 160.
[15] Doc. 5 rev. 1 corr. 22 Oct. 2002.
[16] Necessity, Proportionality and the Use of Force by States. Gardam, Judith. 100 Am. J. Int'l. L. 973 (2006).
[17] Bosnia and Herzegovina v. Yugoslavia. 1997 I.C.J. 243, 245.

Thus, the United States maintains that responding to terrorist attacks on American soil and targeting members of the terrorist organization, which perpetrated these acts, is a necessary use of armed force in order to protect its citizens from further terrorist attacks. Security Council Resolutions 1368 and 1373 not only determine that these acts constitute armed attacks, which threaten international peace and safety and warrant self-defense within the meaning of Article 51, they state that such attacks shall be combated by "all means necessary". Such language was undoubtedly intended to include the use of military force. The United States claims military force is necessary to combat international terrorism and to protect and defend itself against further armed attacks by Al-Qaeda.

ii. The targeted killing of Mohammed Aziz was proportional under customary international law.

The targeted killing of Mohammed Aziz meets the requirement of proportionality because the loss of civilian lives and the destruction of civilian property was kept to a minimum, while still achieving the objective of protecting the United States from further terrorist attacks. Proportionality requires an assessment of the harm inflicted from possible collateral damage as compared to the value of the objective itself.[18] In the advisory opinion mentioned above, The Legality of the Threat or Use of Nuclear Weapons, this Court cited respect for the environment as one of the key elements of the principle of proportionality. Mr. Aziz was targeted while he was at sea with only a few others and the general risk to civilians was minimal. Additionally, American special forces used a strategy to ensure only Mr. Aziz would be killed in their operation against the *Maple Princess*.

C. The targeted killing of Mohammed Aziz was in compliance with international human rights law

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[18] Necessity, Proportionality and the Use of Force by States. Gardam, Judith. 100 Am. J. Int'l. L. 973 (2006).

Article VI of the International Covenant on Civil and Political Rights ("ICCPR") states that "every human being has the right to life" a right that "shall be protected by law."[19] It further states "no one shall be arbitrarily deprived of life."[20] As such, the right to life recognized by the ICCPR is not an absolute right. Rather, it protects only arbitrary deprivations of life. The ICCPR goes on to state that in countries where the death penalty has not been abolished, a sentence of death may be imposed for "the most serious of crimes."[21] Thus, the ICCPR's protection of the right to life is not without exception. The targeted killing of Mr. Aziz was not an arbitrary deprivation of life and therefore complies with international human rights law.

II. THE UNITED STATES WAS PERMITTED BY THE LAW OF THE SEA AND HAD UNIVERSAL JURISDICTION TO BOARD, SEARCH AND SEIZE *THE MAPLE PRINCESS*.

The United States did not violate the Law of the Sea when it boarded, searched and seized *The Maple Princess* in international waters. The United States is not a party to the Convention on the Law of the Sea and cannot be found to have violated it. Canada has never ratified the Convention on the High Seas and cannot invoke Article VI against the United States. Even if the United States were a party to the Convention on the Law of the Sea, it would have had authority to act in this particular instance because there were exceptional circumstances and the United States was acting to in response to a violation of international law.

A. The United States has not ratified the Law of the Sea and therefore is not a party to its provisions.

[19] International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.
[20] Id.
[21] Id.

Under the Vienna Convention on the Law of Treaties, a state is not bound by a treaty unless that treaty has been ratified by the signing state.[22] Although the United States has signed the 1982 Convention on the Law of the Sea, it has never been ratified, so the United States is not a party to the agreement.[23] The United States, therefore, cannot be bound by the Convention, nor can it be invoked against the United States. Article 34 of the Law of Treaties states that "[a] treaty does not create either obligations or rights for a third party without its consent."[24] The Law of Treaties has been recognized by the United States government as the "authoritative guide to current treaty law and practice", indicating that despite not being a party to the Law of Treaties, the United States has conformed its practice to its provisions.[25] In doing so, the United States has consented to be bound by the Law of Treaties in a way that it is not bound by the Convention on the Law of the Sea. Canada may not invoke the Convention on the Law of the Sea when trying to assert an American violation of international law.

This Court has found that in rare exceptions certain global treaties can indicate the formation of *opinio juris* and that in addition to the actual treaty law, there is also international custom formed by near universal acceptance of the treaty.[26] The United States asserts that the Convention on the Law of the Sea has become international customary law. Unlike a treaty such as the United Nations Charter, invoked in the Paramilitary Activities Case, the Convention on the Law of the Sea is not a universal treaty ratified by all states.[27] Additionally, the United States

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[22] Vienna Convention on the Law of Treaties art. 14.1(a), May 23, 1969, 1155 U.N.T.S. 331, 335 [hereinafter Law of Treaties].

[23] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 397 [hereinafter Convention on the Law of the Sea].

[24] Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331, 341.

[25] S.Exec. Doc. L., 92d Cong. 1st Sess. (1971).

[26] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 98.

[27] *Supra* note 26 at 99; Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. at 397.

has not undertaken any steps indicating that it intended to be bound by the Convention on the Law of the Sea.[28] To declare that the Convention on the Law of the Sea is so widespread that it is also customary international law, would be to undermine the Law of Treaties and the principle of national sovereignty that gives states the option to join international legal regimes.

B. Canada has not ratified the 1958 Convention on the High Seas and therefore cannot claim the United States had to notify it before acting against *The Maple Princess*.

Canada has also cited Article 6 the 1958 Convention on the High Seas arguing that the United States did not have jurisdiction to act against *The Maple Princess* or its passengers.[29] Canada claims that as the flag state, the United States had a duty to notify Canada before taking action against the vessel.[30] However, Canada cannot cite this convention because it has not ratified it and therefore is not a party to it.[31] Like the Convention on the Law of the Sea, the Convention on the High Seas has not been recognized as customary international law.[32] In the Continental Shelf Cases, this Court held that too few states had ratified the Convention to indicate an international custom.[33] The Government of Canada generally has not followed the 1958 Convention on the High Seas, and thus cannot invoke it for this special case when it becomes convenient.[34] Unlike the United States invocation of the Law of Treaties in the previous section, a report prepared for the Law and Government Division of the government of

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[28] Id. at 397.
[29] Compromis ¶ 12
[30] Convention on the High Seas art 6, Apr. 29, 1958, 450 U.N.T.S. 11, 83.
[31] Id. at 11.
[32] North Sea Continental Shelf Cases (F.G.R. v. Den.), (F.G.R. v. Nor.) 1969 I.C.J. 3, 44.
[33] Id. at 44.
[34] Eric LeGresley, The Law of the Sea Convention (prepared for the Law and Government Division of the Government of Canada) (1993), http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp322-e.htm.

Canada indicates that Canada has never considered itself bound by the treaty, nor has it followed it.[35]

C. Under the Law of the Sea, the United States would have been able to board, search, and seize *The Maple Princess*

The United States maintains that neither the Convention on the Law of the Sea nor the Convention on the High Seas can be invoked by Canada as a reason why American military personnel could not board *The Maple Princess*. Even if the Conventions were applicable, the United States would still have requisite authority to board, search and seize *The Maple Princess*. If the search and seizure of the vessel was simply based on the discovery of narcotics aboard, then there is a possibility that the United States could have overstepped the bounds set out in the Conventions, but this is not what occurred.[36] Article 110 of the Convention on the Law of the Sea articulates the right to visit a ship flying a foreign flag on the high seas.[37] The article grants the right to board if there is reasonable ground for suspecting that the ship is engaged in piracy.[38] Piracy has long been recognized as a universal crime, and thus was written into the Convention on the Law of the Sea. Terrorism, like piracy, is a universal crime and terrorists, like pirates are generally stateless. Therefore, states should be to act in a similar manner against terrorists as they are permitted to do when combating piracy.

D. Terrorism is a universal crime and international law permits any state to take actions designed to prevent it.

The principle reason for boarding and searching *The Maple Princess* was that Mr. Aziz, a known terrorist, was aboard the ship and was in the process of transferring money to fund terrorist attacks against the United States. US Central Intelligence Agency identified Mr. Aziz

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[35] Id.
[36] Convention on the Law of the Sea art. 108, Dec. 10 1982, 1833 U.N.T.S. at 437.
[37] Convention on the Law of the Sea art. 110, Dec. 10, 1982, 1833 U.N.T.S. at 438.
[38] Convention on the Law of the Sea, art. 110(1), Dec. 10, 1982, 1833 U.N.T.S. at 438.

and intercepts pinpointed his location and confirmed that he would be transporting millions of dollars worth of Swiss Bearer Bonds.[39] When American naval personnel boarded *The Maple Princess*, after a brief search, they found Mr. Aziz and the bearer bonds.[40]

Terrorism has been declared a *jus cogens* crime. The United Nations General Assembly unanimously adopted a resolution condemning all acts of terrorism.[41] Although General Assembly resolutions are typically non-binding, passage by unanimous consent indicates that the entire world recognizes the universal threat terrorism poses.[42] The Security Council has also adopted a binding resolution declaring all states are obliged to prevent terrorist acts.[43] The two resolutions indicate the formation of *opinio juris* that terrorism and supporting terrorism is considered a universal crime. And, as a universal crime, the United States did not have to consult Canadian authorities before taking action against Mr. Aziz.

The United States and Canada are also parties to the Convention for the Suppression of Terrorist Bombings. As parties to that particular treaty, both states have an obligation to prevent the transfer of funds to terrorists.[44] Additionally, under Article VII, the United States has the jurisdiction to act against any terrorist threat directed towards it. Al Qaeda's primary target is the United States and therefore the United States is able to act against agents of Al Qaeda. Mr. Aziz was identified as such an agent who was in the process of moving money for the

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[39] Compromis ¶ 5
[40] Compromis ¶ 8
[41] U.N.G.A.Res. 40/60 G.A.O.R., 40th Sess., Supp. 53 (1985).
[42] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996 I.C.J. 226, 255. (holding that G.A. resolutions can be used to indicate a developing custom prohibiting the use of nuclear weapons).
[43] S.C.Res. 579 U.N.Doc. S/RES/579 (1985).
[44] International Convention for the Suppression of the Financing of Terrorism, G.A.Res. 54/109 ¶ 7(2)(a) (Dec. 9, 1999).

organization. He was a legitimate target of the United States and traveling aboard a foreign vessel does not preclude it from taking action.[45]

E. There is an exemption to the rights of a flag state when there are exceptional circumstances

The United States is authorized to take action against *The Maple Princess* because the threat posed by Al Qaeda allows the United States to act under the exceptional measures doctrine of the law of the sea.[46] The rule against boarding a foreign ship has been strictly followed; however, customary international law allows a state to deviate from that rule when there are exceptional circumstances.[47] The measure constitutes so long as it is in self-defense and narrowly targeted.[48] The threat from Al Qaeda is extremely significant and the United States is authorized by the United Nations Charter and Security Council Resolutions to act in self-defense.[49] When *The Maple Princess* was seized, it was seized in a narrowly targeted mission, not part of a larger operation against directed all ships coming to North America. Therefore it is a legitimate use of the exceptional measures doctrine.

III. HEAD OF STATE IMMUNITY DOES NOT EXTEND TO PRIVATE ACTIVTIES ABOARD A PRIVATE SHIP OPERATED BY A PRIVATE CITIZEN

Head of state immunity does not protect *The Maple Princess* because the ship was being leased and operated by Flan Tomigan, a private citizen at the time the ship was seized. He was on a two month pleasure cruise, and at no point during the voyage was the ship was ever used on behalf of the Government of Canada. Finally, *The Maple Princess* would not be protected by

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[45] Id.
[46] R.R. Churchill and A.V. Lowe, The Law of the Sea, 152 (1983).
[47] R.R. Churchill and A.V. Lowe, The Law of the Sea, 152-3 (1983) *citing* Virginiuis (1873) Moore Digest II.
[48] R.R. Churchill and A.V. Lowe, The Law of the Sea, 153 (1983) *citing* Duizar (Ingnazio Messina & Cie. v. l'Etat), 70 RGDIP 1056 (1966).
[49] U.N. Char. art. 51; S.C.Res. 1373 U.N.Doc. S/RES/1373 (2001).

immunity because when Prime Minister Sharper replaced the spinnaker, the ship became an advertisement for the Canadian shipbuilding industry. Thus, the ship was engaged in commercial activity, precluding a finding of sovereign immunity.

The doctrine of head of state and sovereign immunity developed from the European tradition that the King was sovereign and therefore his judgment should not be questioned.[50] Gradually this notion was extended to all heads of state, government and diplomatic personnel. Again, the objective was to facilitate foreign affairs.[51] In the Vienna Convention on Diplomatic Relations, which has been interpreted to cover heads of state and government, certain properties, including private residences and transportation are protected by immunity.[52] However, in both of these cases, the property in question is to be used only by the head of state or for diplomatic purposes. A private yacht used for private purposes certainly is not protected property under this Convention.

The letter by Professor J.B. Tate, legal counsel to the United States' Department of State in the Truman Administration, has been cited by both the United States and Canada as a reference for determining if and when immunity would be applicable.[53] As the Supreme Court of Canada noted in Congo v. Venne, "In general, the immunity of a Sovereign, his Ambassadors, Ministers and their staffs, together with his and their property, extends to all processes of Court."[54] Yet, at the same time the Court made it clear that "[t]he object of international law, in

[50] Emmuel DeCaux, Le statut du chef d'état déchu, [The Statute for Deposed Heads of State] Annuaire Français de Droit International, 102 (1980).
[51] Id. at 102
[52] Vienna Convention on Diplomatic Relations art. 22, Apr. 18, 1961 500 U.N.T.S 95.
[53] Dem. Rep. Congo v. Venne, [1971] 22 D.L.R. 669, 674, *citing* The Tate Letter, 26 Debt. State Bull. 984 (1952) (Can.).
[54] Id at 676

this as in other matters, is not to work injustice."[55] For the Prime Minister to be able to assert immunity for *The Maple Princess* would be to abuse the privileges associated with head of state immunity.

A. Head of State immunity cannot be transferred to a third party.

Prime Minister Sharper, as well as his properties, are protected by head of state immunity by virtue of being the head of government. These immunities protect the Prime Minister and members of the Prime Minister's Office (PMO) when they are conducting official business outside Canada. That immunity does not cover personal possessions that have been leased to a third party. *The Maple Princess* is not the property of the Prime Minister's Office, like his residence at 24 Sussex. Rather it is Prime Minister Sharper's personal pleasure craft. In addition, Prime Minister Sharper and Flan Tomigan signed a fixed term lease agreement that effectively transferred title of *The Maple Princess* to Mr. Tomigan in exchange for $500 per month.[56] Therefore, when American military personnel boarded the ship, it was not the Prime Minister's property.[57]

Protections for government officials, either through customary international law or as found in the Vienna Conventions on Diplomatic and Consular Relations do not cover property whose title has been transferred to a third party. Despite owning *The Maple Princess*, the Prime Minister cannot assert head of state immunity to prevent its seizure.[58]

The Maple Princess is not eligible to qualify for immunity because the vessel was not in the service of the Government of Canada or the PMO. Mr. Tomigan leased the ship from his

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[55] Id at 677.
[56] Compromis ¶ 2
[57] Jerrod Mallory, Resolving the Confusion over Head of State Immunity: the Defined Right of Kings, 86 Colum. L. Rev. 169, 191 (1986).
[58] Vienna Convention on Diplomatic Relations art 36, Apr. 18, 1961, 500 U.N.T.S. 95; Vienna Convention on Consular Relations art 5 (l), Apr. 24, 1963, 596 U.N.T.S. 291.

half-brother for the purpose of talking a summer sailing vacation with Mr. Aziz. This is a personal trip that had nothing to do with the government.

B. *The Maple Princess* was being used for private purposes and therefore, immunity cannot be conferred to it.

In order to qualify for immunity, the action must be directly attributable to the government. The Canadian Supreme Court held in Congo v. Venne that states are allowed to claim immunity for what seems to be private affairs if they are being conducted on behalf of the state.[59] Congo had contracted with a Canadian architect to design and build its pavilion at Expo '67 in Montréal, so immunity could be claimed.[60] Unlike, *The Maple Princess*, the contract was signed by the government of Congo and the pavilion was to be used by the government.[61] Additionally, the Congo had been invited by the Canadian Department of Foreign Affairs to come to Canada and build a pavilion.[62] *The Maple Princess* was sailing back from Ireland as part of a private trip by Mr. Tomigan. He was not sailing on behalf of Canada, nor was he sailing at the request of any government official.[63]

Canadian Courts have held that if an act is purely private, then it is not covered by immunity. The Supreme Court upheld a Québec Court of Appeals decision that if a government engages in an act that is commercial and therefore private, then it cannot claim immunity from prosecution.[64] The Court recognized the growing change in international customary law away from absolute immunity for any action that a state was connected to, "First, it is clear that the absolute doctrine is not today part of the domestic law 'de tous les pays civilisés' [of all civilized

[59] Dem. Rep. Congo v. Venne, 22 D.L.R.3d at 670.
[60] Id.
[61] Id. at 677
[62] Id. at 670
[63] Compromis ¶ 4
[64] Zodiak Int'l Products, Inc. v. Polish People's Republic, [1977] 81 D.L.R. 3d 656 (Can.).

countries]. Second, neither the independence nor the dignity of States, nor international comity, require vindication through a doctrine of absolute immunity."[65] Canada further clarified its position on absolute immunity when Parliament passed the Sovereign Immunities Act of 1982, which like its counter parts in the United States, Britain and elsewhere, exempted certain activities from immunity protections.[66]

In Zodiak, the Court held that a Polish state owned company could not claim immunity because it was conducting business like a private company and was not acting on behalf of the government of Poland. Therefore, even if the party in question was related to a government or government official, immunity protections do not automatically extend to that party. Similarly, *The Maple Princess* was operating for a personal vacation of a relative of the Prime Minister and therefore is not immune.[67] Neither Mr. Tomigan nor Prime Minister Sharper ever considered the ship to be operating as a Canadian government vessel. As such, it is not entitled to immunity protection.

C. *The Maple Princess's* Spinnaker was an advertisement and therefore, the ship was engaged in a commercial activity for which immunity cannot be claimed.

Even if *The Maple Princess* could be considered government property, Prime Minister Sharper's decision to change the spinnaker transformed the ship into a floating advertisement for Canadian shipbuilders. The spinnaker originally read "Canada: Proud to Call it Home."[68] However prior to turning the ship over to Mr. Tomigan, the Prime Minister changed the spinnaker to read, "Thinking New Boat? Think Canadian."[69] This was a deliberate decision by

[65] Id. at 659.
[66] State Immunity Act of 1982, R.S.C. 1985, c. S-18, s. 1 (Can.)
[67] Compromis ¶ 4
[68] Compromis ¶ 2
[69] Id.

the Prime Minister to use his half-brother's trip between Canada and Europe to sell Canadian products. *The Maple Princess* was, thus, being used for commercial purposes.

Opinio juris states that although governments may claim immunity for their actions, they cannot claim immunity if the action is commercial. The first limits to immunity, for commercial actions, were made in Europe with the Brussels Convention of 1926, which waived immunity privileges for government merchant vessels.[70] The Convention and its subsequent update in 1952 have been followed by the United States and Canada. As previously mentioned, in Zodiak, Canadians courts have recognized that the right of immunity was not absolute since the 1970s.[71]

Since Zodiak, laws restricting claims of immunity were passed in Canada, the United States, Great Britain and Europe.[72] Although these acts have slight differences, a common feature among all is that immunity shall not be granted for commercial activities, even if it is government action. The passage of these acts in many different countries and the subsequent jurisprudence indicates the development of an international custom that commercial activity is to be exempted from traditional immunity protections.[73]

The central question in most cases involving commercial activity and immunity is not whether or not there is international law waiving the immunity, but instead revolves around the definition of commercial. There has been little discussion of sovereign immunity in international courts. Therefore, it is important to look at the actions of the various states to determine international custom on what is commercial. Two writings from the United States' Department of State provide a method for determining whether or not an activity is commercial. The first is

[70] Brussels Convention, Apr. 10, 1926, League of Nations Treaty Series 17 (1931).
[71] Zodiak, [1977] 81 D.L.R. 3d at 659.
[72] State Immunity Act of 1982, [1985] R.S.C., c. S-18, s. 1 (Can.); Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1391, 1602-11 (1976); State Immunity Act, [1978], ch. 33. (U.K.)
[73] Customary International Law Applies Absent Contrary Authoritative Act, LOID § 9:6.

an *amicus brief* filed by the government urging a United States court to allow a claim of immunity for the Bolivian Air Force.[74] It was argued that an air force purchasing planes is not commercial activity because the purchase was related to government activity and therefore the Air Force should be immune.[75] Compare this to a memorandum written in response to a suit filed against the Uruguayan ship, *Presidente Rivera*, which ran aground in the Delaware River. Although, the ship was owned by the government of Uruguay, it was transporting oil and therefore engaged in a commercial activity much like a private shipping company.[76] It did not matter that the ship happened to be owned by the Uruguayan government. As such immunity was deemed to be inappropriate.

In Canada, the 1982 State Immunity Act has also allowed for an exception to the immunity protection offered to states if the action is commercial. To determine whether or not an activity is commercial, the Supreme Court of Canada has created a two part test.[77] First the nature of the activity had to be determined, and then there is an assessment of the activity's relationship to the alleged wrong.[78]

The Maple Princess's spinnaker was changed from the fairly innocuous "Canada: Proud to Call it Home" to a direct advertisement for the Canadian shipbuilding industry. It does not matter that a particular firm was not specifically endorsed. Encouraging other boaters to look into Canadian manufactures is an advertisement. And, if *The Maple Princess* is found to be a

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[74] Brief of Amicus Curiae United States, Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C. Cir. 1994).
[75] Id.
[76] Memorandum from David Small to Mary Mochary (U.S. Department of State) on Immunity of Uruguaryan Oil Tanker *Presidente Rivera* (Jul. 13, 1989) (on file with the Department of State).
[77] Re Canada Labour Code [United States v. Public Service Alliance of Canada], 1992 T.L.W.D. Lexis 5178.
[78] Id.

government ship, then it cannot claim immunity when that ship is being used for a commercial activity.

Immunity for heads of state was created to further foreign affairs and allow a head of state to conduct the business of the state without fear of arrest. It was never intended to protect his private property that is being used by relatives on a private trip. *The Maple Princess* is not the official yacht of Canada and thus not a government ship. Head of state immunity does not transfer to private vessels, not operated on government business. Lastly, even if it could be argued that the ship was a government vessel, it still would not be covered by the immunity protections because the ship was engaged in the commercial activity of advertising for Canadian shipbuilders. As such, this Court should find that *The Maple Princess* is not protected by head of state immunity.

CONCLUSION

This case is about protecting the United States from a dangerous man aiding a dangerous organization. Al Qaeda has used its considerable resources to attack American interest around the globe and no doubt intends to do it again. Sensing an opportunity to deal a significant blow to the organization, the United States operated in a lawful manner.

The United States' targeted killing of Mohammed Aziz did not violate International Law since it constituted a legitimate act of self-defense within the scope of Article 51 and was in keeping with the international legal principles of necessity and proportionality. Its actions were designed to target Mr. Aziz and Al Qaeda, while limiting the risk to civilians both in the United States and aboard the *Maple Princess*.

The United States respectfully asks this honorable court to find that it did not violate the Law of the Sea when it boarded the *Maple Princess*, primarily because the United States is not a party to the treaty, but also because it operated in a legal manner when it boarded, searched and seized the ship. To invoke a treaty, which the United States has not signed, would be to disregard the Law of Treaties which allows states the option of joining international regimes.

Finally, Canada cannot assert that the *Maple Princess* is be protected by immunity. To do so, would dramatically alter the current rules as created in the Vienna Conventions on Diplomatic and Consular Relations. The ship was not being operated by the Prime Minister, nor was it in the service of Canada. Instead, it was being used for a personal vacation by a private citizen and his family. Head of state immunity protections are for members of the government who need to travel abroad to conduct foreign relations and a relaxed summer cruise does not constitute foreign affairs or diplomatic work.