

SUMMARY OF THE ARGUMENT

Targeted killing is unlawful under international law because it violates international treaty obligations, as well as customary international law. The United States violated international law when it conducted the targeted killing of Max Aziz, a Canadian citizen. Targeted killing is unlawful under international law because it violates the respect to the right to life, which is a peremptory norm of customary international law. The only exception to right to life is the right to use lethal force in an act of self-defense against an imminent threat. Moreover, Mr. Aziz was not a legitimate target of a targeted killing because his death does not minimize al-Qaeda's threat against the United States. Lastly, even if Mr. Aziz had been a legitimate target, the United States violated international law when they killed him *after* taking him into custody while he was unconscious.

The United States also violated the Law of the Sea because it boarded, searched, and seized *The Maple Princess* without first obtaining approval from Canada, the flag state. There was no international threat that Canada would not have pursued and prosecuted Mr. Aziz because Canada has the duty under international law to prosecute terrorists. It is customary international law that all vessels are subject to the *exclusive* jurisdiction of the flag state. Further, the Convention of the High Seas and the Convention on the Law of the Sea each have exceptions to when a Party may board a foreign vessel, but none of the exceptions were applicable. *The Maple Princess* was clearly identifiable as a Canadian flag ship. Yet, Navy SEALs and the Coast Guard each boarded, searched, and seized the vessel without consent of the Canadian authorities.

Next, the United States violated international law because it could not exercise universal jurisdiction over Max Aziz or *The Maple Princess*. Universal jurisdiction may only be practiced in special circumstances. Universal jurisdiction is allowed under either customary international law or treaty. Neither terrorism nor drug trafficking are international crimes that are subject to universal jurisdiction. Although there are international treaties which permit the assertion of a limited form of universal jurisdiction, no treaty allows a State to assert universal jurisdiction in another State's territory. Therefore, the United States was in violation of international law when it asserted jurisdiction of Mr. Aziz and *The Maple Princess* on a Canadian flag ship.

Lastly, the United States must return *The Maple Princess* to Canada because P.M. Sharper is granted with head of state immunity from prosecution. The purpose of the head of

state immunity is to permit a head of state to perform his obligations to the state unimpaired by the distractions of prosecution and imprisonment. The forfeiture proceedings impair P.M. Sharper's ability to govern for several reasons. First, the forfeiture proceedings act as a blemish on his character because he is at risk of being associated with terrorism and drug trafficking. Second, it is a distraction for the Prime Minister to have to defend his property in the forfeiture proceedings. Lastly, he is an innocent owner who is entitled to have his vessel returned to him under the U.S. forfeiture statute.

ARGUMENT

I. THE UNITED STATES VIOLATED INTERNATIONAL LAW WHEN IT EXECUTED MAX AZIZ, A CANADIAN NATIONAL SUSPECTED OF INDIRECT INVOLVEMENT IN ACTS OF TERRORISM WHO WAS IN THE CUSTODY OF THE UNITED STATES WHEN HE WAS KILLED.

“Targeted killing,” which is the government-ordered extra-judicial execution of enemies, violates the rights to life and fair trial.¹ Therefore, the United States violated international law when it conducted the targeted killing of Max Aziz (“Mr. Aziz”). However, if this Court decides that targeted killing is justifiable under certain circumstances, the United States still violated international law by conducting the targeted killing of Mr. Aziz because he was not a legitimate target. Most importantly, even if this Court decides that Mr. Aziz was a legitimate target, the United States violated international law by killing Mr. Aziz when he was unconscious and in United States custody.²

¹ See International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368, Art. 4, 14 (1967) (hereinafter “ICCPR”).

² *Compromis* ¶ 7.

A. The United States violated international law by conducting the targeted killing of Max Aziz because both United States treaty obligations and customary international law prohibit targeted killing.

As a party to the International Convention on Civil and Political Rights (“ICCPR”), the United States is required by international law to protect the inherent right to life afforded to all human beings.³ According to the ICCPR, the right to life cannot be derogated from even “[i]n time of public emergency which threatens the life of the nation.”⁴ The ICCPR also guarantees “all persons” the right to a fair trial,⁵ a right that is necessarily denied to all subjects of targeted killing. By conducting the targeted killing of Mr. Aziz, the United States deprived him of the right to life and the right to a fair trial, thereby violating its obligations under the ICCPR.

In addition to the duty under treaty law, the duty to respect the right to life is a peremptory norm of customary international law.⁶ Therefore, customary international law prohibits targeted killing. The ICCPR, the American Convention on Human Rights, the European Convention for the Protection of Human Rights (“ECPHR”), and the African Charter of Human and People’s Rights prohibit the deprivation of the right to life.⁷ Few circumstances allow derogation from this rule. This Court has held that even in a time of war, the right to not be arbitrarily deprived of one’s life does not cease.⁸

³ ICCPR Art. 6.

⁴ ICCPR, Art. 4.

⁵ ICCPR, Art. 14.

⁶ Kretzmer at 185 citing Dinstein, ‘The right to Life, Physical Integrity, and Liberty’ in L. Henkin (ed), *The International Bill of Rights – the Covenant on Civil and Political Rights* (1981), at 114-5; Gormley, ‘The right to Life and the Rule of Non-deogability: Peremptory Norms of *Jus Cogens*,’ in B.G. Ramcharan (ed), *The Right to Life in International Law* (1985), at 51.

⁷ ICCPR, Art. 6(1); American Convention on Human Rights, Art. 4; European Convention for the Protection of Human Rights, Art. 2 (hereinafter “ECPHR”); African Charter of Human and People’s Rights, Art. 4.

⁸ *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep 226 at ¶ 25.

The use of lethal force in an act of self-defense against an imminent threat is an exception to the duty not to deprive the right to life. Although there is no single definition for “imminent threat,” the ECPHR provides a widely accepted explanation for when lethal force may be used in self-defense.⁹ According to the ECPHR, lethal force may be used only when it is absolutely necessary and when no lesser degree of force can be employed.¹⁰ It is undisputed that the use of lethal force against a person who can be otherwise detained violates international law.¹¹

No definition of “imminent” can characterize the type of threat Mr. Aziz posed to the United States. Unarmed and unprotected, Mr. Aziz was vacationing with three friends on a sailboat in the middle of the ocean at the time he was executed.¹² He posed an imminent threat to nobody. Furthermore, he did not present a flight risk since *The Maple Princess* only had a top speed of 20 knots¹³ and the U.S. Cyclone Class Special Ops vessel conducting surveillance of Aziz had a top speed of 35 knots.¹⁴ As discussed below, detaining Mr. Aziz evidently was an option, since the SEALs did detain him before shooting him in the forehead and dumping his body overboard.¹⁵

⁹ Kretzmer at 177.

¹⁰ Kretzmer 178 citing ECPHR, Art. 2(2).

¹¹ Kretzmer 180 citing *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr, 22 Oct. 2002, (available at: <http://www.cidh.oas.org/Terrorism/Eng/exe.htm>) (last accessed 9 Feb. 2007); A. Guiora, *Targeted Killing as Active Self-Defense*, 36 Case W. Res. J. Int'l L. 319, 329 (2004); A. MacDonald, “Terrorism, Counter-Terrorism and the Jus in Bello” in International Institute of Humanitarian Law (ed.), *Terrorism: Challenges and Response*, at 60 (2002).

¹² *Compromis* ¶¶ 3, 7.

¹³ *Compromis* ¶ 1.

¹⁴ See NavSource (available at: <http://www.navsource.org/archives/12/0301.htm>) (last accessed 9 Feb. 2007).

¹⁵ *Compromis* ¶ 7.

B. The United States violated international law when it conducted the targeted killing of Max Aziz because he was not a legitimate target.

Even if this Court decides that targeted killing does not violate international law, Mr. Aziz was not a legitimate target. Although he allegedly was a principle source of finance for al-Qaeda, his death, unlike the death of an active participant in the terrorist organization, does not necessarily minimize al-Qaeda's threat against the United States.

PDD 2006-08 claims that al Qaeda "will not be able to launch operations against the United States without the financial lifeblood provided by Aziz."¹⁶ However, the United States cannot prove that Mr. Aziz's money will continue to fund al Qaeda even after his death. Furthermore, PDD 2006-08's claim is illogical because there is no guarantee al-Qaeda will not acquire funds from a new source.

If this Court decides that a mere financier, although criminally liable, is a legitimate subject of a targeted killing, it will find itself looking back up a slippery slope. It will allow the United States to proceed to conduct targeted killings against anyone remotely associated with al-Qaeda.

C. Even if targeted killing were consonant with international law and Max Aziz had been a legitimate target, the United States violated international law by killing him *after* taking him into custody.

The SEALs' conduct was more than just a targeted killing; it was what commentators refer to as an "extra-judicial killing"¹⁷ or a "summary execution,"¹⁸ in which a deliberate killing is carried out by order of a government despite arrest being an option. The Inter-American Commission on Human Rights' has explained that States must not use force against individuals

¹⁶ *Compromis* ¶ 6.

¹⁷ Guiora at 329 citing J. Nicholas Kendall, *Israeli Counter-Terrorism: "Targeted Killings" Under International Law*, 80 N.C. L. Rev 1069, 1073 (2002).

¹⁸ See al-Haq extrajudicial killings article page 1.

who have been apprehended.¹⁹ Even proponents of the targeted killing of terrorists concede that killing a suspect who has been taken into custody violates international law.²⁰

When the U.S. Navy boarded the *Maple Princess* in the middle of the night on July 15, 2006, the vessel's four passengers, including Mr. Aziz, were asleep.²¹ Presumably, to ensure their own safety and to identify Mr. Aziz, the SEALs rendered all four passengers unconscious with the use of Taser M-18 stun guns.²² At that moment, the SEALs had effectively secured the *Maple Princess*. The boat and its four occupants were completely within the SEALs' control. Since the vacationers were unconscious, they posed neither a threat nor a flight risk to the SEALs. By any standard, Mr. Aziz and his traveling companions were in the SEALs' custody. Once the four passengers were unconscious, at which point arrest was undeniably an option, the SEALs failed to arrest, charge, try, or sentence him. Instead, they executed him.²³

By killing Mr. Aziz after he was in custody, the United States also violated international law because it disregarded its obligations under the International Convention on the Suppression of the Financing of Terrorism²⁴ ("ICSFT"). The ICSFT affords defendants who have been arrested on allegations of financing terrorism the right to communicate with and be visited by a representative of the State of which he is a national.²⁵ The treaty also requires States that have

¹⁹ Kretzmer 180 citing *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr, 22 Oct. 2002,

(available at: <http://www.cidh.oas.org/Terrorism/Eng/exe.htm>) (last accessed 9 Feb. 2007).

²⁰ Guiora at 18; MacDonald at 60.

²¹ *Compromis* ¶ 7.

²² *Id.*

²³ *Compromis* ¶ 7.

²⁴ International Convention on the Suppression of the Financing of Terrorism (hereinafter "ICSFT").

²⁵ ICSFT Art. 9(3)(a-b).

taken suspects into custody to contact other States that might have jurisdiction pursuant to Art. 7 of the treaty and inform them of the situation.²⁶

After attaining custody of Mr. Aziz, the United States was bound by the ICSFT to inform Canada, the State of Mr. Aziz's nationality and a State with jurisdiction pursuant to Art. 7.²⁷ Rather than notifying Canada, however, the United States chose to shoot Mr. Aziz in the forehead and discard his body in the ocean.²⁸

II. THE UNITED STATES VIOLATED THE LAW OF THE SEA WHEN IT BOARDED, SEARCHED, AND SEIZED THE *MAPLE PRINCESS* WITHOUT FIRST OBTAINING APPROVAL FROM CANADA, THE FLAG STATE.

Like the United States, Canada is a leader in the global campaign against terrorism. The Canadian government is committed to protecting its citizens from al Qaeda, which has identified Canada as a "priority target" and has threatened to carry out attacks both in Canada and against Canadians abroad.²⁹ While the United States has suffered the bulk of al-Qaeda's aggression over the past 15 years, Canada has not gone unscathed. Twenty-four Canadians were killed in the September 11th attacks,³⁰ and forty-four Canadian soldiers have lost their lives in the counterterrorism campaign in Afghanistan.³¹

Furthermore, there is no question that Canada is opposed to Mr. Aziz's alleged conduct. In its effort to eradicate terrorism, Canada has signed every multinational treaty on terrorism.³²

²⁶ ICSFT Art. 9(6).

²⁷ ICSFT Art. 9(3) and (6).

²⁸ *Compromis* ¶ 7.

²⁹ S. Bell, "Al Qaeda Warns Canada," in *National Post*, Oct. 28, 2006 (available at: <http://www.canada.com/nationalpost/news/story.html?id=e9f20f44-ec19-470c-9ac3-6c79218d4d91&k=70612>) (last accessed 9 Feb. 2007).

³⁰ "Canadian Casualties," CBC News Report, 3 Feb. 2004 (available at: <http://www.cbc.ca/news/background/sep11/cdncasualties.html>) (last accessed 9 Feb. 2007).

³¹ Operation Enduring Freedom—Coalition Fatalities by Year (available at: <http://www.icasualties.org/oef/>) (last accessed 9 Feb. 2007).

³² "Canada Signs International Convention for the Suppression of Financing Terrorism," Press Release from the Office of the Minister of Foreign Affairs of Canada, 10 Feb. 2000, (available

Under Canada's chairmanship, the United Nations Sixth Committee Working Group successfully negotiated one of the most important of these treaties, the ICSFT.³³

The ICSFT requires the State in which an offender is located to ensure that the offender remains present for prosecution and is subsequently prosecuted.³⁴ Consequently, if the United States had informed Canada of the evidence it had collected against Mr. Aziz, Canada would have had no choice but to detain him. Under the circumstances, Canada might have consented to the United States boarding the *Maple Princess* to detain Mr. Aziz. Nonetheless, the United States chose not to inform or obtain consent from Canada. In addition, the United States disregarded Canada's exclusive jurisdiction as a flag State.³⁵ Therefore, the United States twice violated the Law of the Sea when it boarded, searched, and seized the *Maple Princess*.

A. The United States violated the Law of the Sea when its Navy boarded and searched the *Maple Princess* on the high seas without obtaining Canada's consent.

It is a principle of customary international law that all vessels are subject the *exclusive* jurisdiction of the flag State. This principle is codified in the United Nations Convention on the Law of the Sea ("UNCLOS"), as well as in the 1958 Convention on the High Seas ("COHS"), a treaty to which the United States is a party.³⁶ Customary international law also provides that when a warship encounters a foreign vessel on the high seas, the warship is not justified in boarding the foreign vessel unless there is reasonable ground for suspecting: that the vessel is

at:http://w01.international.gc.ca/minpub/PublicationContentOnly.asp?publication_id=377482&Language=E&MODE=CONTENTONLY&Local=False (last accessed 9 Feb. 2007) (hereinafter "MFA Press Release of 10 Feb. 2000"); Statement by the Canadian Prime Minister at the signing of the International Convention for the Suppression of Acts of Nuclear Terrorism, 14 Sept. 2005 (available at: http://geo.international.gc.ca/canada_un/ottawa/statements/other_forums-en.asp?id=4457&content_type=2) (last accessed 9 Feb. 2007).

³³ MFA Press Release of 10 Feb. 2000.

³⁴ ICSFT, Art. 9(2), 10(2).

³⁵ See United Nations Convention on the Law of the Sea, Art. 92(1) (hereinafter "UNCLOS"); 1958 Convention On the High Seas, Art. 6(1) (hereinafter "COHS").

³⁶ UNCLOS, Art. 92(1); COHS, Art. 6(1)

engaged in piracy or slave trade; that the vessel, although flying a foreign flag or no flag at all, is in reality the same nationality as the warship; that the vessel is without nationality; or that the vessel is engaging in illegal broadcasting.³⁷

The U.S. Navy boarded the *Maple Princess*, a vessel flying the Canadian ensign which is reasonably identifiable as Canadian.³⁸ Of the exceptions to the rule against boarding foreign vessels without consent of the flag State provided in the COHS and UNCLOS, none were present. Contrary to the U.S. District Court's opinion,³⁹ the *Maple Princess* was not analogous to a pirate vessel because neither financing terrorism nor transporting illicit narcotics constitutes an "illegal act of violence or detention, or [an] act of depredation."⁴⁰ Therefore, the United States violated its obligations under the COHS and customary international law when it boarded the *Maple Princess* without Canada's consent.⁴¹

B. The United States violated the Law of the Sea when its Coast Guard boarded, searched, and seized the *Maple Princess* on the high seas without obtaining Canada's consent.

After executing Mr. Aziz, the SEALs disembarked the *Maple Princess* leaving the vessel's three remaining occupants unconscious.⁴² The U.S. Navy informed the U.S. Coast Guard of the *Maple Princess*' status and location, and subsequently boarded the vessel, violating the Law of the Sea for the second time in a matter of hours.⁴³

Like the U.S. Navy, the U.S. Coast Guard had no authority to board the *Maple Princess* without Canada's consent. Of the exceptions to the rule against boarding foreign vessels

³⁷ UNCLOS, Art. 110(1)(c) and (d); COHS Art. 22 (1)(a)-(c).

³⁸ *Compromis* ¶¶ 1, 7, 9; *Clarifications* ¶ 1.

³⁹ *Compromis* ¶ 12.

⁴⁰ See UNCLOS, Art. 101.

⁴¹ See COHS, Art. 6; UNCLOS, Art. 92, 110.

⁴² *Compromis* ¶ 8.

⁴³ *Compromis* ¶ 9.

provided by the COHS and UNCLOS, none existed.⁴⁴ Although illicit narcotics were present with the three remaining passengers, the U.S. District Court's opinion that the *Maple Princess* was analogous to a pirate vessel was incorrect, as none of the elements of piracy were present.⁴⁵

Furthermore, if the U.S. Coast Guard had requested Canada's consent to board the *Maple Princess*, there is a reasonable possibility that consent would have been granted. The United States, a party to the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances⁴⁶ ("UNCAIT"), is bound to cooperate in the suppression of drug trafficking by sea.⁴⁷ Requesting permission from Canada pursuant to UNCAIT to board the *Maple Princess* and seize its illicit cargo would have been a proper way for the United States to fulfill its treaty obligation.⁴⁸ (However, UNCAIT does not authorize a State to board or search a foreign vessel without authorization from the flag State.)⁴⁹ Canada, also a party to UNCAIT, could have fulfilled its obligations under the treaty by allowing the United States to board *The Maple Princess*. Therefore, it is likely that Canada would have granted the United States permission to board. However, even if Canada had denied such a request, once informed of the illicit narcotics aboard *The Maple Princess*, Canada would have been forced to act to satisfy its obligations under UNCAIT. Accordingly, the United States violated Canada's exclusive jurisdiction over the *Maple Princess* when it boarded her without Canada's consent.⁵⁰

⁴⁴ See COHS, Art. 6; UNCLOS, Art. 110.

⁴⁵ See COHS, Art. 15; UNCLOS, Art. 101.

⁴⁶ United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter "UNCAIT").

⁴⁷ UNCAIT, Art. 17(1); see also, UNCLOS, Art. 8(1).

⁴⁸ UNCAIT, Art. 17(3).

⁴⁹ Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Art. 6 (available at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/156.htm>) (last accessed 9 Feb. 2007).

⁵⁰ UNCLOS, Art. 92; COHS, Art. 6; *Compromis* ¶ 9.

III. THE UNITED STATES VIOLATED INTERNATIONAL LAW BECAUSE IT COULD NOT EXERCISE UNIVERSAL JURISDICTION OVER MAX AZIZ OR THE MAPLE PRINCESS.

The primary restriction imposed by international law upon States is that they may not exercise their power in the territory of another State, except by a permissive rule under customary international law or by treaty.⁵¹

Universal jurisdiction is the most controversial and exceptional form of international jurisdiction and is only permitted under special circumstances.⁵² Universal jurisdiction allows States to exercise jurisdiction where any nexus to the state is absent.⁵³ States are limited to asserting jurisdiction over crimes under international law that rise to the level of *jus cogens*⁵⁴ or as agreed to between States in international treaties.⁵⁵

Yet, a state may not exercise jurisdiction *in abstentia*.⁵⁶ Universal jurisdiction *in abstentia* is jurisdiction over any alleged offender when he or she is not present in the territory of the state asserting jurisdiction. Practices of jurisdiction *in abstentia* it would risk arbitrary assertions of jurisdiction by more powerful states against nationals of weaker states.⁵⁷ This would erode international cooperation and threaten state sovereignty, which is contrary to the purpose of

⁵¹ The Lotus Case, P.C.I.J., Series A, No. 10, pp. 18-19 (September 7, 1927).

⁵² L. Benavides, 'The Universal Jurisdiction Principle: Nature and Scope', 1 A.M.D.I. 19, 26 (2001).

⁵³ *Id.*

⁵⁴ Regina v. Bartle, Bow Street Stipendiary Magistrate and Commissioner of Police, Ex Parte Pinochet, 38 I.L.M. 581 (1999).

⁵⁵ Institute of International Law, Krakow Session, Seventeenth Commission, *Universal Jurisdiction with regard to the crime of genocide, crimes against humanity, and war crimes*, Art. 2., (2005).

⁵⁶ Arrest Warrant Case of 11 April 2000 (Congo v. Belgium), 2000 I.C.J. 121 (separate opinions of President Gullaume and J. Rezek).

⁵⁷ Arrest Warrant Case (joint separate opinions of Judge Rezek at ¶9 and Judge Guillaume at ¶15).

international law.⁵⁸ Therefore, the exercise of universal jurisdiction requires that the alleged offender be in the territory of the prosecuting state.⁵⁹

Prior to the Nuremburg Trial, a group of Israelis entered Argentinean territory and abducted Nazi war criminal, Adolph Eichmann. When Argentina objected to Israel's assertion of jurisdiction on their sovereign territory, the U.N. Security Council issued a resolution that disapproved of Israel's actions.⁶⁰ The Security Council reasoned that such assertions of jurisdiction on another State's territory affect the sovereignty of States and could endanger international peace and security.⁶¹

Similarly, in the Arrest Warrant Case, Belgium issued an arrest warrant for the Minister of Foreign Affairs of Congo who was suspected of war crimes and genocide.⁶² After the decision of the ICJ, the Belgian Court of Appeals ruled that the proceedings against the Congolese Foreign Minister were not valid because he had not been voluntarily present in Belgium.⁶³

Acts on a flag ship are to be considered as if they occurred on territory of the State where the vessel is registered.⁶⁴ Therefore, like to the Israeli's who entered Argentinean territory to prosecute Eichmann, the Navy Seals and Coast Guard entered Canadian territory when it boarded the Canadian flag ship. Since Mr. Aziz was a Canadian citizen not in the territory of the United States, he was similar to the Congolese Foreign Minister who was not present in Belgian territory. Mr. Aziz was on a Canadian vessel which not only had clear marking of the Canadian

⁵⁸ See Charter of the United Nations, Art. 1 (June 26, 1945).

⁵⁹ *Id.* at Art. 3(b); Security Council Resolution S/4349 adopted on June 23, 1960.

⁶⁰ Security Council Resolution S/4349 adopted on June 23, 1960.

⁶¹ *Id.*

⁶² Arrest Warrant Case, Summary of the Judgment at www.icj-cij.org/icjwww/ipresscom/ipress2002/ipress2002-04bis_cobe_20020214.htm (last visited on February 4, 2007).

⁶³ Colenjelo, Anthony J. "The New Universal Jurisdiction: In Abstentia Signaling Over Clearly Defined Crimes," 36 *Geo. J. Int'l L.* 537 (Winter 2005).

⁶⁴ The Case of the S.S. Lotus (France v. Turkey), P.I.C.J. Ser. A No. 10 (1927).

flag, but also flew a Canadian flag.⁶⁵ Therefore, the United States was in violation of international law when they asserted jurisdiction over a Canadian citizen in Canadian territory.

A. The United States could not exercise universal jurisdiction because no *jus cogens* crime had been committed on *The Maple Princess*.

A crime is elevated to the level of *jus cogens* when it becomes a crime that is accepted and recognized by the international community as a norm which cannot be derogated from by States under any circumstances.⁶⁶ The offenders of *jus cogens* crimes are “common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.”⁶⁷ Examples of *jus cogens* crimes which are subject to universal jurisdiction include war crimes, torture, slavery, and genocide.⁶⁸

There are two rationales for *jus cogens* crimes being subject to universal jurisdiction. The first is pragmatic and the second is humanitarian. The pragmatic rationale provides a basis for jurisdiction where no state would otherwise be able or willing to assert jurisdiction.⁶⁹ This ensures that international crimes do not go unpunished merely because no state could assert jurisdiction.⁷⁰ The humanitarian rationale for universal jurisdiction asserts that specific crimes are so heinous that they are against the interest of the entire international community.⁷¹

i. Terrorism is not a *jus cogens* crime subject to universal jurisdiction.

Terrorism does not satisfy either of the rationales for universal jurisdiction. The pragmatic rationale is not at issue since Canada prosecutes terror suspects and is an active

⁶⁵ *Compromis* at ¶ 2.

⁶⁶ Vienna Convention on the Law of Treaties, Art. 53 (1969); *Demjanjuk v. Petrovsky*, 603 F.Supp. 1468 (1985).

⁶⁷ *Id.*

⁶⁸ “Princeton Principles on Universal Jurisdiction,” Principle 2, par. 1 (2001).

⁶⁹ Bykhovsky, Gene, *An Argument Against the Assertion of Universal Jurisdiction by Individual States*, 21 *Wis. Int’l. L.J.* 161, 165 (2003).

⁷⁰ *Id.*

⁷¹ Bassiouni, M. Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 *Va. J. Int’l. L.* 81, 89 (2001).

participant in the fight against worldwide terror. Here, Canada would have willfully investigated and prosecuted Max Aziz due to their obligations under the ICSFT and their self-imposed domestic legislation which obligates Canada to investigate and try terrorists.⁷²

The humanitarian rationale is also not relevant because the concept of terrorism is not universally rejected, unlike genocide, torture, and slavery. Many states still harbor and support terrorist because they view terror as politically acceptable.⁷³ What some states may perceive acts as terrorism, other states perceive as freedom fighters or militants, thereby making it difficult for the international community to come to a consensus on the definition of terrorism.⁷⁴ Therefore, the international community has approached specific acts of terrorism individually over time.⁷⁵ Therefore, it is clear that terrorism is not subject to universal jurisdiction as a *jus cogens* crime because there is no international consensus regarding what groups are terrorist groups and what groups are militant political organizations.⁷⁶

Max Aziz allegedly funded al-Qaeda, which has received political support from Sudan, Saudi Arabia, Pakistan, Afghanistan, Tajikistan, Kyrgyzstan, Uzbekistan, and other parts of Central Asia.⁷⁷ This extensive international support exemplifies that al-Qaeda's actions were politically acceptable to many states, and not universally condemned by the international community. Although al-Qaeda is an enemy of most the western world, including Canada, it is

⁷² *Id.*; The Anti-Terrorism Act, Royal Assent Bill C-36, 37th Parliament, 1st Session (January 29, 2001-September 16, 2002).

⁷³ Tel-Oren v. Libyan Arab Republic, 726 F. 2d 774, 795-796 (D.C. Cir. 1984).

⁷⁴ Cheema v. Ashcroft, 383 F.3d 848, 858 (9th Cir. 2004); Also see Young, Reuven, "Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation," 29 B.C. Int'l & Comp' L. Rev. 23, 38-39 (Winter 2006).

⁷⁵ See the 13 Conventions on Terrorism at <http://www.un.org/terrorism/instruments.html> (last viewed on February 3, 2007); also see S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

⁷⁶ United States v. Yousef, 327 F.3d 56, 107-08 n.42 (2d Cir. 2003).

⁷⁷ Fogelquist, Alan F., Ph.D., "Al-Qaeda and the Question of State Sponsorship," (August 29, 2002).

not a “common enemy to all mankind.” It follows that Max Aziz is not subject to universal jurisdiction because the international community does not universally condemn the alleged financial support that Mr. Aziz allegedly contributed to Al-Qaeda.

ii. Drug trafficking is not a *jus cogens* crime subject to universal jurisdiction.

Drug trafficking does not rise to the level of *jus cogens* because there is a fluctuation throughout the international community regarding aggressive prosecution of drug trade. This is evidenced where the drafters of the International Criminal Court did not include drug trafficking among the crimes that are subject to its jurisdiction.⁷⁸ The crimes that are subject to its jurisdiction—genocide, crimes against humanity, and war crimes—are traditional *jus cogens* crimes subject to universal jurisdiction.⁷⁹ Additionally, the drafters of the Princeton Principles for Universal Jurisdiction also failed to include drug trafficking as a crime subject to universal jurisdiction.⁸⁰

Moreover, there are practical distinctions between the drug trade and traditional *jus cogens* crimes. For instance, the risks associated with drug trafficking could be avoided by legalizing drugs since the crime can be separated from the harm.⁸¹ More specifically, legalizing drugs would disassociate organized crime from the drug trade itself. The organized crime associated with the drug trade is responsible for many of the humanitarian concerns, such as the violence that occurs in consequence to the drug trade.⁸² In contrast, the numerous deaths resulting from acts of genocide would not be avoided if genocide were made legal. Therefore, drug trafficking is not subject to universal jurisdiction as a *jus cogens* crime.

⁷⁸ The Rome Statute of the International Criminal Court, Part 2, Art. 5 (July 17, 1998)

⁷⁹ *Id.*

⁸⁰ *Supra* note 68 at Principle 2.

⁸¹ Geraghty, Anne H. “Universal Jurisdiction and Drug trafficking: A Tool for Fighting One of the World’s Most Pervasive Problems,” 16 Fla. J. Int’l L. 371, 386 (June 2004).

⁸² *Id.*

The Coast Guard boarded *The Maple Princess* because heroin was allegedly on board the Canadian vessel. Canada was the only State that had jurisdiction over the Canadian vessel because drug trafficking is not a *jus cogens* crime which would allow any other state to assert jurisdiction. It necessarily follows that the United States is in violation of international law.

B. No treaty allowed the United States to exercise universal jurisdiction over *The Maple Princess*.

In addition to the exercise of universal jurisdiction for *jus cogens* crimes, universal jurisdiction may also be established by treaty where the treaty allows for jurisdiction over crimes wherever the crime was committed.⁸³ However, a party may not assert universal jurisdiction in the territory of another state unless there is an explicit agreement between the relevant states to allow such assertions of jurisdiction.⁸⁴

Both the ICSFT and the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs (UNCAIT) contain universal jurisdiction provisions which indicate that Party states must extradite or prosecute alleged offenders in their territory regardless of whether there is a nexus between the custodial state and the offense.⁸⁵ On the other hand, neither treaty permits Parties to assert jurisdiction within the territory of another without express consent and cooperation between the States.⁸⁶

The United States could not extradite or prosecute Mr. Aziz because he was not in the territory of the United States. There is no authority under international law that permits the United States to enter Canadian territory. However, the United States could have asserted

⁸³ Supra note 55 at Art. 1-2.

⁸⁴ *Id.* at Art. 2.; also see Princeton Principles at Art. 1, 4, and 10 (promoting cooperation between states through extradition in order to avoid violations of sovereignty by one state entering the territory of the other)

⁸⁵ ICSFT at Art. 10; 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, E/CONF.82/15, Art. 4, par. 2(b) (December 20, 1988).

⁸⁶ UNCAIT at Art. 16; also see generally ICSFT.

universal jurisdiction under international law by obtaining the consent of the Canadian authorities or by requesting the extradition of Mr. Aziz.⁸⁷ The United States violated international law because it exceeded the jurisdiction granted to it by both treaty and customary international law when it entered Canadian territory to investigate alleged offenses without the consent or cooperation of the Canadian government.

IV. THE UNITED STATES MUST RETURN *THE MAPLE PRINCESS* TO PRIME MINISTER SHARPER BECAUSE HIS PROPERTY IS PROTECTED BY “HEAD OF STATE IMMUNITY” FROM ANY FOREIGN PROSECUTION.

A foreign minister is immune from prosecution of all crimes, regardless of the when the crime was committed, so long as the minister maintains his or her official capacity.⁸⁸ There is a distinction between the acts of a head of state performed in their official capacity, *ratione materiae*, and the acts performed closely related to an official state function, *ratione personae*.⁸⁹ While both immunities exist during the time in office, only *ratione materiae* is enjoyed by the head of state once he ceases to be head of state.⁹⁰ In other words, a head of state loses *ratione personae* immunity for offenses he or she committed while head of state once he or she ceases to be in office.

The purpose of the head of state immunity is to benefit the State so that his performance as a head of state is not impeded.⁹¹ More specifically, a State’s property is immune from the jurisdiction of the courts of foreign states.⁹² A head of state’s personal property may not be

⁸⁷ See Treaty with Canada on Mutual Legal Assistance in Criminal Matters, 1985-03-18; See also UNCAIT at Art. 4.

⁸⁸ Vienna Convention on Diplomatic Relations (VCDR), Art. 29 and 31; Arrest Warrant Case at ¶ 2.

⁸⁹ Regina v. Bartle (Ex Parte Pinochet), 2 W.L.R. 827 (1999). VCDR at Art. 31(2).

⁹⁰ *Id.*

⁹¹ Institute de Droit, “Immunities from Jurisdiction and Heads of State and of Government in International Law,” Preamble (Session at Vancouver-2001).

⁹² United Nations Convention on Jurisdictional Immunities of States and Their Property, Art. 1 (adopted December 2, 2004).

taken from him or her for the purposes of prosecution.⁹³ Further, if the status of the head of state is not known to the prosecuting state at the time of acquiring his property, then the acquiring state is obligated to afford the head of state immunity as soon as that status is known to them.⁹⁴ Lastly, it is illegal to commit a violent attack upon the private accommodation or means of transport of a head of state.⁹⁵

In the Arrest Warrant Case, the ICJ held that a foreign minister who had allegedly committed war crimes was immune from prosecution so long as the minister maintained his official capacity.⁹⁶ It did not matter whether the offenses were committed during or prior to his official capacity.

In the Case Against Mouammar Ghaddafi, the French Supreme Court similarly held that Ghaddafi, as head of state of Libya, was immune from prosecution for his involvement with the bombing of a French airplane.⁹⁷ The court reasoned that customary international law prohibits exercising jurisdiction over sitting heads of state.⁹⁸

In *Ex Parte Pinochet*, the English court held that General Pinochet enjoyed no head of state immunities.⁹⁹ General Pinochet was being tried for torture and a former head of state at the time of his prosecution.¹⁰⁰ The court reasoned that because torture rises to the level of *jus cogens*, it could not be considered an official act of a head of state, it must be considered a private act.

⁹³ *Id.* at Art. 4(1); Fox, Hazel “The Resolution of the Institute of International Law on the Immunities of heads of State and Government,” 51 ICLQ 119, 122 (January 2002).

⁹⁴ *Supra* note 42 at Art. 6.

⁹⁵ “Convention for the Prevention and Punishment of Crimes Against Internationally Protected Persons,” 28 T.I.A.S. No. 8532, Art. 2(1)(b) (adopted December 14, 1973).

⁹⁶ Arrest Warrant Case at ¶ 53.

⁹⁷ Zappala, Salvatore. “Do Heads of States in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation, 12 Eur. J. Int’l L. 391, 610-611 (2001).

⁹⁸ *Id.*

⁹⁹ See generally Ex Parte Pinochet.

¹⁰⁰ *Id.*

Therefore, there could be no immunities for acts of torture performed *ratione personae* because he was no longer a head of state.¹⁰¹

Similar to the Arrest Warrant Case and the Ghaddafi case, Prime Minister Sharper is presently the sitting Prime Minister and head of state of Canada. Therefore, he is immune from any prosecution in the courts of a foreign state. Sharper and his property are subject to the criminal jurisdiction of the United States due to the forfeiture proceedings of Sharper's vessel, *The Maple Princess*. This is in direct conflict with the Vancouver Resolution.¹⁰²

Unlike Pinochet, Sharper is not subject to jurisdiction because of torture or any other crime against humanity. Instead, Sharper's boat was allegedly used for crimes that do not rise to the level of *jus cogens*. Moreover, unlike Pinochet, Sharper was not criminally liable for the actions of anyone on his vessel because he rented the boat to his brother in law.

Further, Sharper uses *The Maple Princess* for diplomatic purposes when he entertains politicians and foreign dignitaries. Diplomacy is an essential element of a head of state's functions and responsibilities to meet and entertain diplomats and politicians. *The Maple Princess* is essential to Sharper's ability to entertain diplomats and politicians. Therefore, Sharper's ability to perform his diplomatic functions is deteriorated since he does not have access to his vessel.

The forfeiture proceedings also act as a blemish on Sharper's character because it looks suspicious that Sharper is involved with terrorism or drug trafficking. Sharper is an innocent owner of *The Maple Princess*. The perceived blemish on his character is detrimental to Sharper's ability to govern because he could lose support of his colleagues and constituents. Support of your colleagues and constituents determines how effectively a head of state governs.

¹⁰¹ *Id.*

¹⁰² *Supra* note 91 at Art. 4.

Although the Navy Seals or Coast guard were not aware that *The Maple Princess* was the private property of the Prime Minister of Canada, they failed to acknowledge head of state immunity and return the vessel once they were aware that Sharper owned it. The United States would not have been in violation of international law if they had only granted the head of state immunity when the status of head of state was known to them.

Lastly, it takes a great deal of time and energy to defend property forfeiture in United States court system. Forcing a head of state to privately cope with a forfeiture proceeding in a foreign state is contrary to the principle that a head of state should free from prosecution to govern effectively.

The Maple Princess should be returned to Sharper because he is an innocent owner whose ability to govern effectively is hindered without the vessel.