

2006-07
NIAGARA INTERNATIONAL MOOT COURT COMPETITION

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

THE GOVERNMENT OF
CANADA
(Applicant)

v.

THE GOVERNMENT OF
THE UNITED STATES OF AMERICA
(Respondent)

MEMORIAL OF THE RESPONDENT

TEAM # 2007-03R

TABLE OF CONTENTS

STATEMENT OF FACTS iii

QUESTIONS PRESENTED..... vi

JURISDICTIONAL STATEMENT vii

INDEX OF AUTHORITIES..... viii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

 A. THE TARGETED KILLING OF MR. MOHAMED AZIZ WAS LEGAL..... 2

 I. Resort to force is legal: The United States was acting in self-defence..... 2

 II. The killing of Mr. Aziz was both necessary and proportionate..... 3

 III. The targeted killing of Mr. Aziz is permitted under international humanitarian law..... 4

 IV. As a direct participant in Al-Qaeda hostilities, Mr. Aziz was a lawful target. 6

 B. THE UNITED STATES DID NOT VIOLATE THE LAW OF THE SEA 7

 I. *The Maple Princess* was not a Canadian national ship while on the high seas. 7

 II. UNCLOS authorizes the boarding, search and seizure of a ship without nationality..... 8

 III. In the alternative, *The Maple Princess*, in transporting a direct participant in terrorism
 and carrying a cargo of heroin, is analogous to a pirate ship..... 10

 C. THE UNITED STATES LAWFULLY EXERCISED UNIVERSAL JURISDICTION . 10

 I. Universal jurisdiction is a large and broadening area of international law..... 10

 II. Terrorism should be included within the sphere of universal jurisdiction..... 11

 III. The actions of Mr. Aziz are analogous to crimes against humanity..... 13

 IV. The actions of Mr. Aziz are analogous to piracy..... 13

D. HEAD OF STATE IMMUNITY DOES NOT PREVENT UNITED STATES JUDICIAL FORFEITURE PROCEEDINGS AGAINST <i>THE MAPLE PRINCESS</i>	15
I. The applicable approach are the laws as applied in the United States.....	15
II. The application of <i>Hoffman</i> will not protect <i>The Maple Princess</i> from United States judicial forfeiture proceedings.	16
III. Alternatively, under the restrictive theory, <i>The Maple Princess</i> would not be protected from forfeiture proceedings.	18
CONCLUSION.....	20

STATEMENT OF FACTS

Mr. Max Aziz, a.k.a. Mohamed Aziz was a Canadian citizen and long suspected to be the primary financial figure in the Al-Qaeda terrorist organization, using his import-export business to funnel millions of dollars to Al-Qaeda cells around the world. These suspicions were based on the United States Central Intelligence Agency's analysis of banking records from Cypriot and Swiss financial institutions. During the first two weeks of June 2006, the United States National Security Agency (NSA) intercepted and deciphered a series of electronic mail messages from Mr. Aziz that confirmed his role in Al-Qaeda. The messages also indicated that he was planning to travel with millions of dollars of Swiss Bearer Bonds from Galway, Ireland to Nova Scotia, Canada on July 2, 2006, aboard *The Maple Princess*.

The Maple Princess, a registered Canadian flag ship, is a luxury catamaran owned by Mr. Stephen Sharper, the Prime Minister of Canada. Although sometimes used to entertain Canadian politicians and foreign dignitaries on the yacht, Mr. Sharper used the vessel principally for family vacations. Some time following March 10, 2006, Mr. Sharper leased *The Maple Princess* to his half-brother, Mr. Flan Tomigan, who is also a Canadian citizen. The written lease stated that the vessel was to be used for Mr. Tomigan and his wife's summer vacation on June and July 2006. In April 2006, Mr. Aziz and his wife Estelle were invited by Mr. Tomigan to join the Tomigans on board *The Maple Princess*, in Galway, to sail back with them to Nova Scotia, the vessel's homeport.

On June 21, 2006, the United States President issued a Top Secret Presidential Decision Directive (PDD 2006-08), subsequently declassified in part, which authorized the "targeted killing of Osama bin Laden's chief financier, Mohamed Aziz, who is expected to be found on board a pleasure yacht in the high seas off the coast of Canada on or around July 15, 2006."

PDD 2006-08 further observed 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 its operations against the United States without the financial lifeblood provided by Aziz.”

In executing PDD 2006-08, a team of six United States Navy Seals, from a United States Navy Special Ops vessel, boarded *The Maple Princess* at 0200 Greenwich Mean Time on July 16, 2006 while the vessel was 260 nautical miles on autopilot off the coast of Nova Scotia. The Navy Seals first rendered unconscious the four sleeping passengers using Taser stun guns. They then proceeded to identify Mr. Aziz, shot him in the forehead, threw his body overboard, and thus eliminated him. On board, the Navy Seals also found two large suitcases beneath Mr. Aziz’s bunk, with one containing millions of dollars in Swiss Bearer Bonds and another containing bags of what appeared to be heroin. The Navy Seals took the Bearer Bonds and disembarked, leaving the rest of the passengers unconscious.

The United States Navy immediately notified the United States Coast Guard about the presence of the heroin aboard the vessel. While still well over 200 nautical miles off the coast of Canada, the Coast Guard deployed a helicopter and boarded *The Maple Princess*, confirming the presence of \$20 million dollars worth of pure heroin. As such, they took the vessel and its passengers into custody to Portsmouth Harbor Station. Without further incident, the remaining passengers were released a few hours later after they regained consciousness, but the Coast Guard retained the suitcase of heroin and *The Maple Princess*.

Afterwards, the United States commenced forfeiture proceedings under 21 U.S.C. § 881 before the United States District Court, District of New Hampshire, titled *United States v. The Maple Princess*. Lawyers from the government of Canada made a special appearance to dismiss the case, but in a *per curiam* opinion dated September 4, 2006, the District Court rejected

Canada's arguments finding that (a) under the circumstances, the United States could properly exercise universal jurisdiction over *The Maple Princess* under customary international law; (b) as Head of Government, rather than Head of State, Mr. Sharper does not enjoy the benefits of Head of State immunity; (c) in any event, Head of State immunity does not apply to commercial acts and property unrelated to official functions of the Head of State; and (d) Article 6 of the High Seas Convention did not protect *The Maple Princess*, which was transporting a major terrorist and carrying a cargo of heroin and was therefore analogous to a pirate vessel. The Court of Appeals, First Circuit, affirmed in a one-sentence opinion. The government of Canada petitioned the United States Supreme Court for a writ of *certiorari*, but was denied on October 3, 2006.

QUESTIONS PRESENTED

1. Whether the United States violated international law when it conducted the “targeted killing” of Canadian national Mr. Max Aziz, a.k.a. Mohamed Aziz?
2. Whether the United States violated the Law of the Sea when it boarded, searched, and seized *The Maple Princess* without first obtaining the approval of Canada?
3. Whether the United States’ exercise of “universal jurisdiction” over *The Maple Princess* was lawful under international law?
4. Whether the doctrine of “Head of State immunity” should prevent United States judicial forfeiture proceedings against *The Maple Princess*?

JURISDICTIONAL STATEMENT

The Parties to this dispute, Canada and the United States, come before this Honourable Court, composed of a Chamber of three judges, pursuant to Articles 40(1) and 36(1) of the *Statute of the International Court of Justice*.¹ The Parties each agree to bring its actions and positions in conformity with the legal conclusions of the ICJ with respect to the questions submitted by Special Agreement between the Parties, as described in the *Compromis*.

¹ *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 25 October 1945) [*ICJ Statute*].

INDEX OF AUTHORITIES

INTERNATIONAL TREATIES, INSTRUMENTS & DOCUMENTS

Arab Convention on the Suppression of Terrorism, League of Arab States (1998).

Charter of the United Nations, 26 June 1945, Can. T.S. 1945 No. 7.

Commentary on the third Geneva Convention (Geneva: International Committee of the Red Cross, 1958).

Commentary on the fourth Convention (Geneva: International Committee of the Red Cross).

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668.

Convention [IV] respecting the Laws and Customs of War on Land, 18 October 1907, Can. T.S. No. 227, 36 Stat. 2277, T.S. No. 539 (entered into force 26 January 1910).

European Convention on the Suppression of Terrorism, 27 January 1977, 1137 U.N.T.S. 93, ETS No. 90, 15 ILM 1272 (entered into force 4 August 1978).

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85 (entered into force 21 October 1950).

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31 (entered into force 21 October 1950).

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. No. 3365 (entered into force 21 October 1950).

Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316, T.I.A.S. No. 3364 (entered into force 21 October 1950).

International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, UN GAOR, 54th Sess., Supp. No. 49, UN Doc. A/54/49 (Vol. 1) (1999) (entered into force 10 April 2002) 408.

International Review of the Red Cross, Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict (Geneva: International Committee of the Red Cross, 2005).

Legality of the Treat or Use of Nuclear Weapons, Advisory Opinion, [1996] I.C.J. Rep. 226 at para. 141.

Measures to Eliminate International Terrorism, GA Res. 58/81, UN GAOR, 58th Sess., UN Doc. A/58/518 (2003).

Nyon Agreement, The, 14 September 1937, 181 L.N.T.S. 137.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 6 June 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (entered into force 7 December 1978).

Statute of the International Court of Justice, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 25 October 1945)

Treaty relating to the Use of Submarines and Noxious Gases in Warfare, 6 February 1922, 25 L.N.T.S. 202.

UN SC, 2001, 4370th Mtg., UN Doc. S/RES/1368 (2001).

UN SC, 2001, 4385th Mtg., UN Doc. S/RES/1373 (2001).

UN SC, UN Doc. S/2001/946 (2001) [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].

UN SCOR, 56th Year, 4385th Mtg., UN Doc. S/RES/1373 (2001).

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, UN Doc. E/CONF.82/15, 28 ILM 493 (entered into force 11 November 1990).

United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261.

INTERNATIONAL CASE LAW

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), [1986] I.C.J. Rep. 14.

Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), [2002] I.C.J. Rep. 3 at para. 51.

Prosecutor v. Tadic (Jurisdiction), Decision of 2 October 1995, 105 ILR 419 at 453.

DOMESTIC LEGISLATION

21 U.S.C. § 881.

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330, 1602-11 (1978), 15 I.L.M. 1388.

Marijuana on the High Seas Act, 21 U.S.C. § 955 (1980).

Maritime Drug Law Enforcement Act, 46 App. U.S.C.A. § 1903 (West 2002).

Restatement of the Law: The Foreign Relations Law of the United States Vol. I (American Law Institute Publishers, 1987).

DOMESTIC CASE LAW

The Fidelity, 16 Blatchf. 569, 8 F.Cas. 1189 at 1191 (S.D. N.Y. 1879).

First American Corp. v. Al-Nahyan, 948 F. Supp. 1107 at 1121 (D.D.C. 1996).

In re Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994).

Lafontant v. Aristide, 844 F. Supp. 128 at 137 (E.D. N.Y. 1994).

The Public Committee Against Torture in Israel v. The State of Israel, HCJ 5100/94, (2006) 53(4) PD 817.

Republic of Mexico v. Hoffman, 324 U.S. 30, 65 S. Ct. 530 (1945).

Saltany v. Reagan, 702 F. Supp. 319 at 320 (D.C. Cir. 1989).

Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974).

Tachiona v. Mugabe, 186 F. Supp. 2d 259 at 269 (S.D. N.Y. 2002), aff'd in part, rev'd in part and rem'd, *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

United States v. Marino-Garcia, 679 F. 2d 1373 (11th Cir. 1982).

United States v. Noriega, 117 F.3d 1206 at 1212 (11th Cir. 1997).

SECONDARY MATERIAL: MONOGRAPHS

Arend, Anthony Clark & Beck, Robert J., *International Law & The Use of Force* (London: Routledge, 1993).

Carter, Barry E., Trimble, Phillip R. & Bradley, Curtis A., *International Law*, 4th ed. (New York : Aspen Publishers, 2003).

Currie, John H., *Public International Law* (Toronto: Irwin Law Inc., 2001).

Evans, Malcolm D., ed., *International Law* (New York: Oxford University Press, 2006).

Gunaratna, Rohan, *Inside Al Qaeda: Global Network of Terror* (Berkley, Ca.: Berkley Trade, 2003).

Henckaerts, Jean-Marie & Doswald-Beck, Louise, *Customary International Humanitarian Law* (Cambridge; Cambridge University Press, 2005).

Henkin, Louis *et al.*, *International Law: Cases and Materials*, 2d ed. (St. Paul, Minn.: West Publishing Company, 1987).

Institut de droit international, *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Thirteenth Commission, Rapporteur: Mr. Joe Verhoeven, (Session of Vancouver, 2001), online: Institut de droit international <http://www.idi-iil.org/idiE/resolutionsE/2001_van_02_en.PDF>.

International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, (2000) Committee on International Human Rights Law and Practice, London Conference.

Kalshoven, Frits, ed., *The Centennial of the First International Peace Conference* (Boston: Kluwer Law International, 2000).

Princeton University, *The Princeton Principles on Universal Jurisdiction* (Princeton: Program in Law and Public Affairs, 2001).

SECONDARY MATERIAL: ARTICLES

Burgess, Douglas R., “Hostis Humani Generi: Piracy, Terrorism and a New International Law” (2006) 13 U. Miami Int’l & Comp. L. Rev. 293.

Fitzgerald, Amber, “The Pinochet Case: Head of State Immunity within the United States” (2001) 22 Whittier L. Rev. 987.

Fox, Hazel, “The Resolution of the Institute of International Law on the Immunities of the Heads of State and Government” (2002) 51 ICLQ 119.

Fry, James D., “Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction” (2002) 7 UCLA J. Int’l L. & Foreign Aff. 169..

Gray, Christine, “The Use of Force and the International Legal Order” in Malcolm D. Evans, ed., *International Law*, 2d ed. (New York: Oxford University Press, 2006) 589.

Greenwood, Christopher, “International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq” (2003) 4 *San Diego Int’l L. J.* 7.

Greenwood, Christopher, “The Law of War (International Humanitarian Law)” in Malcolm D. Evans, ed., *International Law* (New York: Oxford University Press, 2006) 783.

Lee, Win-Chiat, “Terrorism and Universal Jurisdiction,” in Steven P. Lee, ed., *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory* (Netherlands: Springer, 2007) 203.

Mallory, Jerrold L., “Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings” (1986) 86 *Colum. L. Rev.* 169.

Toner, Paul J., “Competing Concepts of Immunity: The (R)evolution of the Head of State Immunity Defense” (2004) 108 *Penn St. L. Rev.* 899.

SECONDARY MATERIAL: OTHER

CNN, “Transcript of Osama bin Laden Videotape,” *Cable News Network LP, LLLP* (13 December 2001), online: CNN.com <<http://www.cnn.com/2001/US/12/13/tape.transcript/>>.

Department of National Defence, Backgrounder/Documentation, BG-02.001p, “The Canadian Forces’ Contribution to the International Campaign Against Terrorism” (7 January 2004), online: National Defence and the Canadian Forces <http://www.mdn.ca/site/Newsroom/view_news_e.asp?id=490>.

Government of Canada Privy Council Office, “Cabinet Government and the Prime Minister,” online: Privy Council Office <http://www.pco-cp.gc.ca/default.asp?Page=Publications&Language=E&doc=respons/chap2_e.htm>.

University of Pittsburgh School of Law, “World Anti-terrorism Laws”, online: Jurist – Legal News and Research <<http://jurist.law.pitt.edu/terrorism/terrorism3a.htm>>.

SUMMARY OF ARGUMENT

The use of force by the United States in its “targeted killing” of Mr. Aziz, chief financier of the Al-Qaeda terrorist organization, was legal under the rubric of self-defence, in keeping with Article 51 of the *United Nations Charter*. Mr. Aziz, being a direct participant in hostilities against the United States, was thus a lawful target under customary international law. The targeted killing was conducted in an appropriate and necessary manner as a response to the Al-Qaeda threat, and in accordance with humanitarian law.

The United States boarded, searched and seized *The Maple Princess* in accordance with Article 110 of *United Nations Convention on the Law of the Sea*. It did so because the vessel was not considered a Canadian national ship by virtue of Articles 91, 92 and 94 of UNCLOS. Alternatively, the United States was authorized to board *The Maple Princess* because it was analogous to a pirate vessel, as contemplated by Article 101(1)(ii) of UNCLOS.

The United States lawfully exercised universal jurisdiction over *The Maple Princess*. Terrorism fits into the broadening concept of universal jurisdiction in international law, being analogous to both crimes against humanity and piracy. The actions of the organized Al-Qaeda terrorist network, in which Mr. Aziz was their chief financier, are akin to crimes against humanity and piracy.

By application of *Republic of Mexico v. Hoffman*, Head of State immunity will not extend to protect *The Maple Princess* from United States judicial forfeiture proceedings because Mr. Sharper did not possess the vessel at the time of the incident and it was not being devoted to public use. Alternatively, applying a restrictive approach to the doctrine, *The Maple Princess* would not be protected since it was not engaged in the exercise of official functions and, as private property of a Head of State / Head of Government, is not immune to execution.

ARGUMENT

A. THE TARGETED KILLING OF MR. MOHAMED AZIZ WAS LEGAL

I. Resort to force is legal: The United States was acting in self-defence.

The Respondent submits that self-defence under Article 51 of the *Charter of the United Nations* is the basis for the United States' use of force.² Article 2(4) of the UN Charter is the basic prohibition on the use of force by States and is accepted as representing customary international law and as *jus cogens*.³ An explicit exception to this prohibition is found in Article 51, which provides that if a State experiences an armed attack, that State retains an inherent right to defend itself by using force against the attacking State.⁴

In response to the armed attack it experienced – the terrorist attacks on the World Trade Centre and Pentagon of September 11, 2001 – the United States began *Operation Enduring Freedom* with the aim of disrupting the use of Afghanistan as a terrorist base. The United States' right of self-defence has been asserted by the Security Council in Resolutions 1368 and 1373.⁵ This was the first time the Security Council recognized the right to use force in self-defence against terrorist action.

Operation Enduring Freedom received support from States including Canada. On October 24, 2001, Canada took action against the Al-Qaeda terrorist organization by providing

² *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 [*UN Charter*].

³ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14 [*Nicaragua*].

⁴ Anthony Clark Arend & Robert J. Beck, *International Law & The Use of Force* (London: Routledge, 1993) at 36.

⁵ Christine Gray, "The Use of Force and the International Legal Order" in Malcolm D. Evans, ed., *International Law*, 2d ed. (New York: Oxford University Press, 2006) 589 at 600. For Resolutions: UN SC, 2001, 4370th Mtg., UN Doc. S/RES/1368 (2001); UN SC, 2001, 4385th Mtg., UN Doc. S/RES/1373 (2001) [UN Resolution 1373].

military forces in response to the armed attacks on the United States, in accordance with Canada's right of self-defence in accordance with Article 51.⁶

The September 11th attacks have expanded the notion of armed attack to cover force by not only State actors, but by terrorist organizations.⁷ The Security Council reinforced the notion that States can defend themselves against non-State actors when, in affirming Resolutions 1368 and 1373, it was not concerned with attributing responsibility to a State (Afghanistan) for the actions of Al-Qaeda terrorists.⁸ It "expressly recognized the right to self-defence in terms that could only mean it considered that terrorist attacks constituted armed attacks for the purposes of Article 51 ... [knowing] that the attacks were the work of a terrorist organization rather than a state."⁹ Accordingly, given the actions of Al-Qaeda, the use of force by the United States in self-defence, was legal under international law.

II. The killing of Mr. Aziz was both necessary and proportionate.

As dictated by customary international law and as affirmed by this Honourable Court in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*¹⁰ and in the *Legality of the Treat or Use of Nuclear Weapons* Advisory Opinion,¹¹ actions of self-defence must be necessary and proportionate.¹² On the issue

⁶ Department of National Defence, Backgrounder/Documentation, BG-02.001p, "The Canadian Forces' Contribution to the International Campaign Against Terrorism" (7 January 2004), online: National Defence and the Canadian Forces

<http://www.mdn.ca/site/Newsroom/view_news_e.asp?id=490>.

⁷ Gray, *supra* note 5 at 602.

⁸ *Ibid.*

⁹ Christopher Greenwood, "International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq" (2003) 4 San Diego Int'l L. J. 7 at 17.

¹⁰ *Nicaragua*, *supra* note 3, at para. 194.

¹¹ *Legality of the Treat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226 at para. 141 [*Nuclear Weapons*].

¹² Gray, *supra* note 7 at 599.

of necessity, the targeted killing of Mr. Aziz in international waters was necessary in order to defeat Al-Qaeda. Without the “financial lifeblood” provided by Mr. Aziz, Al-Qaeda’s financial mastermind, the terrorist organization was greatly weakened.¹³

In its letter to the Security Council, the United States asserted its right to use force not only against people in Afghanistan but also against others: “We may find that our self-defence requires further actions with respect to other organizations and other States.”¹⁴ Force is to be used in a way that minimizes collateral damage to civilian persons and property and there must be proportionality between the force used and the anticipated loss of life or property. In the case at hand, the Respondent submits that a targeted killing was the most efficient and humane way to eliminate the danger. The concentration of force on the individual target increased the likelihood that Mr. Aziz’s suffering was not unnecessarily great. Collateral damage was minimized in that there was no damage to property and the remaining civilians on board *The Maple Princess* were only rendered unconscious for a short duration.

III. The targeted killing of Mr. Aziz is permitted under international humanitarian law.

A situation of armed conflict, according to the Geneva Conventions, exists between the United States and Al-Qaeda. The Geneva Conventions apply to situations of armed conflict, but the treaties do not define the term. However, the International Red Cross, the conventions’ official custodian, have provided some guidance. The authoritative *Commentary on the Geneva Conventions* notes that “[a]ny difference between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2 [common to

¹³ Top Secret Presidential Decision Directive (PDD 2006-08), cited in the *Compromis* at para. 6.

¹⁴ UN SC, UN Doc. S/2001/946 (2001) [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].

the four Geneva Conventions], even if one of the parties denies the existence of a state of war”.¹⁵ A similar view has been expressed both judicially and in State practice.¹⁶ As indicated above, in the context of global terrorism, international law recognizes that non-state actors such as Al-Qaeda are to be treated in the same manner as States.¹⁷ The magnitude of Al-Qaeda’s attacks on September 11, 2001, its bombings of the U.S. embassies in Kenya and Tanzania, its attack on the U.S.S. Cole in Yemen, and the bombing of residential compounds in Saudi Arabia are sufficient to result in a qualification of international armed conflict, and thus trigger the application of international humanitarian law.¹⁸ Accordingly, the Respondent submits that the legality of Mr. Aziz’s killing must be judged according to international humanitarian law.¹⁹

¹⁵ *Commentary on the third Geneva Convention* (Geneva: International Committee of the Red Cross, 1958) at 23. The four relevant conventions being: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316, T.I.A.S. No. 3364 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. No. 3365 (entered into force 21 October 1950).

¹⁶ Christopher Greenwood, “International Humanitarian Law (Laws of War)” in Frits Kalshoven, ed., *The Centennial of the First International Peace Conference* (Boston: Kluwer Law International, 2000) 161 at 195 [Greenwood, “International”]. See also *Nicaragua supra* note 3. See also *Prosecutor v. Tadic* (Jurisdiction), Decision of 2 October 1995, 105 ILR 419 at 453.

¹⁷ Gray, *supra* note 5 at 602.

¹⁸ On Al-Qaeda attacks, see generally: Rohan Gunaratna, *Inside Al Qaeda: Global Network of Terror* (Berkley, Ca.: Berkley Trade, 2003).

¹⁹ See e.g. Christopher Greenwood, “The Law of War (International Humanitarian Law)” in Malcolm D. Evans, ed., *International Law* (New York: Oxford University Press, 2006) 783 [Greenwood, “Law of War”].

IV. As a direct participant in Al-Qaeda hostilities, Mr. Aziz was a lawful target.

The First Protocol specifies at paragraph 51(3) that civilians are not targets for attack “unless and for such time as they take a direct part in hostilities”.²⁰ This article constitutes customary international law.²¹ Customary international law regarding armed conflicts distinguishes between military (combatants and military targets) and civilian (non-combatants) objectives.²² Mr. Aziz and Al-Qaeda, with which the United States has an armed conflict of international character, do not fall into the category of combatants.²³

Those persons who collect intelligence for attacks, those who deliver ammunition to an armed group, those who plan attacks, and those who enlist people to take part in them can be the object of a targeted strike, while those who “[aid] the unlawful combatants by general strategic analysis, and [grant] them logistical, general support” cannot be the object of a targeted strike.²⁴ However, as the Israeli court affirmed in *The Public Committee Against Torture in Israel*, a civilian who participates directly in hostilities does not enjoy, during that time, the protection granted to a civilian. Instead, “he is subject to the risks of attack like those to which a combatant is subject, without enjoying the rights of a combatant.”²⁵ Moreover, everyone who qualifies for

²⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 6 June 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 at art. 51(3) (entered into force 7 December 1978) [*The First Protocol*].

²¹ Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge; Cambridge University Press, 2005) at 20; *The Public Committee Against Torture in Israel v. The State of Israel*, HCJ 5100/94, (2006) 53(4) PD 817 at para. 30 [*Public Committee Against Torture in Israel*].

²² See generally, *International Review of the Red Cross*, Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict (Geneva: International Committee of the Red Cross, 2005).

²³ *Convention [IV] respecting the Laws and Customs of War on Land*, 18 October 1907, Can. T.S. No. 227, 36 Stat. 2277, T.S. No. 539 (entered into force 26 January 1910).

²⁴ *Ibid.* at para. 35.

²⁵ *Public Committee Against Torture*, *supra* note 21 at para. 31.

combatant status is a legitimate target, unless wounded and unable to take part in the hostilities, shipwrecked, has baled out of a disabled aircraft, or has surrendered.²⁶

While one who merely provides small financial aid to terrorist groups cannot be targeted, the intensity of Mr. Aziz's involvement is much greater: "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."²⁷ In contrast to the one who supplies "general support", Mr. Aziz's continued and significant financial investment was critical to Al-Qaeda. His involvement as the financial mastermind to the terrorist organization brings him out of the realm of a mere aider and supporter of Al-Qaeda, to one who is sufficiently implicated and important to Al-Qaeda to be deemed to be taking a direct part in hostilities. Therefore, it is the Respondent's position that Mr. Aziz was taking a direct part in terrorism and was thus a lawful target for a targeted killing.

B. THE UNITED STATES DID NOT VIOLATE THE LAW OF THE SEA

I. The Maple Princess was not a Canadian national ship while on the high seas.

The Maple Princess did not have the status as a Canadian national ship while on the high seas by virtue of Articles 91, 92 and 94 of the *United Nations Convention on the Law of the Sea*.²⁸ Article 91 delineates the conditions for the nationality of ships, stating that "[e]very State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag."²⁹ Article 86 defines the "high seas" as, "all parts of the

²⁶ Greenwood, "Law of War", *supra* note 19 at 791.

²⁷ Top Secret Presidential Decision Directive (PDD 2006-08), cited in *Compromis* at para. 6.

²⁸ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261[UNCLOS].

²⁹ *Ibid.* at art. 91.

sea that are not included in the exclusive economic zone, in the territorial sea in the internal waters of a State, or in the archipelagic waters of an archipelagic State.”³⁰

In spite of *The Maple Princess* being both Canadian registered and owned, the vessel was not flying the Canadian flag while on the high seas. Article 92(1) states that “[s]hips shall sail under the flag of one State only and...shall be subject to its exclusive jurisdiction on the high seas.”³¹ The language of this subsection explicitly states that ships shall fly under the flag of a single State. There is no mention of the sufficiency of non-official State flags for denoting national status on the high seas. Furthermore, Article 92(2) notes that “[a] ship which sails under the flags of two or more States...may not claim any of the nationalities in questions with respect to any other State, and may be assimilated to a ship without nationality.”³² Therefore, a ship flying more than one State flag devolves into a ship without nationality, and it follows that anything less than flying one State flag also devolves into a ship without nationality.

The Maple Princess was flying the official Maritime flag while on the high seas. There is no authority recognizing an official Maritime flag as the flag of the State of Canada. Thus, the Respondent submits that *The Maple Princess* was not a Canadian national ship on the high seas within the meaning of Article 92 of UNCLOS.

II. UNCLOS authorizes the boarding, search and seizure of a ship without nationality.

Article 110(1)(d) of UNCLOS states that a warship that encounters a foreign ship on the high seas is not justified in boarding the foreign ship unless “the ship is without nationality”.³³ In

³⁰ *Ibid.* at art. 86.

³¹ *Ibid.* at art. 92(1).

³² *Ibid.* at art. 92(2).

³³ *Ibid.* at art. 110(1).

the context of the War on Terror, this subsection makes clear that the Navy Special Ops vessel was justified in boarding *The Maple Princess*, a ship without nationality, in international waters.

Once a foreign ship is boarded on the high seas, Article 110(2) states that “[T]he warship may proceed to verify the ship’s right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship.”³⁴

The Respondent acknowledges there was no attempt made at the time of boarding to verify the ship’s right to fly a flag through a document check. The immediate identification of Mr. Aziz, a financier of Al-Qaeda, justified further examination of the vessel in virtue of Article 110(2). This inspection led to the discovery of millions of dollars in Swiss Bearer Bonds along with approximately \$20 million worth of pure heroin. The United States, faced with these findings, was justified in seizing *The Maple Princess*.

As further support, the Respondent submits that the United States’ *Maritime Drug Law Enforcement Act* (MDLEA) expressly extends jurisdiction over vessels “without nationality”.³⁵ As a ship without nationality, *The Maple Princess* was subject to United States jurisdiction under the MDLEA. In the *United States v. Marino-Garcia*, the 11th Circuit Court of Appeals upheld the legality under international law of the search of a vessel that claimed two nationalities, and the extension of American jurisdiction under the *Marijuana on the High Seas Act*,³⁶ the immediate predecessor to the MDLEA.³⁷ Therefore, the Respondent submits that United States domestic precedent supports the notion that boarding a ship without nationality on the high seas is lawful.

³⁴ *Ibid.* at art. 110(2).

³⁵ *Maritime Drug Law Enforcement Act*, 46 App. U.S.C.A. § 1903 (West 2002) [*MDLEA*].

³⁶ *Marijuana on the High Seas Act*, 21 U.S.C. § 955 (1980).

³⁷ *United States v. Marino-Garcia*, 679 F. 2d 1373 (11th Cir. 1982).

III. In the alternative, *The Maple Princess*, in transporting a direct participant in terrorism and carrying a cargo of heroin, is analogous to a pirate ship.

Piracy is defined in Article 101(a)(ii) of UNCLOS as “any illegal acts of violence or detention, or any act of depredation... against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.”³⁸ The Respondent submits that in transporting a major terrorist financier and over \$20 million worth of heroin, *The Maple Princess* was analogous to a pirate ship within the purview of Article 101(a)(ii).

Therefore, as a pirate ship on the high seas, the Respondent submits that the United States was justified in boarding, searching and seizing *The Maple Princess* in virtue of Article 105, which states that “[on] the high seas...every State may seize a pirate ship or aircraft...and arrest the persons and seize the property on board.”³⁹

C. THE UNITED STATES LAWFULLY EXERCISED UNIVERSAL JURISDICTION

I. Universal jurisdiction is a large and broadening area of international law.

The United States’ actions against *The Maple Princess* were justified as they fit within the sphere of universal jurisdiction. Several definitions of universal jurisdiction exist but all share basic commonalities. *The Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* describes universal jurisdiction as circumstances where, “a State is entitled, or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim.”⁴⁰ The authority extends to certain heinous acts because there is universal agreement

³⁸ UNCLOS, *supra* note 28 at art. 101(a).

³⁹ *Ibid.* at art. 105.

⁴⁰ International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, (2000) Committee on International Human Rights Law and Practice, London Conference, at 2.

that they are so repugnant to society that all States have an interest in preventing their occurrence.⁴¹ The *Princeton Principles on Universal Jurisdiction*, being one of the leading authorities on universal jurisdiction, points to seven areas in which universal jurisdiction should be applied: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture.⁴² The concept has been widely reflected through State practice in countries such as the United Kingdom, Israel, and Germany.⁴³

II. Terrorism should be included within the sphere of universal jurisdiction.

The list of areas under which universal jurisdiction applies is non-exhaustive.⁴⁴ The United States' *Third Statement* recognized the broadening nature of universal jurisdiction where it advocates expansion beyond piracy.⁴⁵ The *Princeton Principles* point to terrorism as a potential area where universal jurisdiction may be applied.⁴⁶ Widespread global concern for terrorism and its related activities is reflected in no less than thirteen United Nations treaties. These include the *United Nations International Convention on the Suppression of Terrorist Financing* and the *Convention for the Suppression of Unlawful Seizure of Aircraft*.⁴⁷ The UN

⁴¹ James D. Fry, "Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction" (2002) 7 UCLA J. Int'l L. & Foreign Aff. 169 at 171.

⁴² Princeton University, *The Princeton Principles on Universal Jurisdiction* (Princeton: Program in Law and Public Affairs, 2001) at 29.

⁴³ Mark S. Zaid, "Will or Should the United States Ever Prosecute War Criminal?: A Need for Greater Expansion in the Areas of Both Criminal and Civil Liability" (2001) New Eng. L. Rev. 447 at 457-462.

⁴⁴ *Princeton Project*, *supra* note 42 at 29.

⁴⁵ *Restatement of the Law: The Foreign Relations Law of the United States Vol. I* (American Law Institute Publishers, 1987) at 254.

⁴⁶ *Ibid.* at 48.

⁴⁷ *International Convention for the Suppression of the Financing of Terrorism*, G.A. Res. 109, UN GAOR, 54th Sess., Supp. No. 49, UN Doc. A/54/49 (Vol. 1) (1999) (entered into force 10 April 2002) 408 at art. 2.

Security Council and UN General Assembly resolutions⁴⁸ also point to the global concern of terrorism and the will for a coordinated effort to address its incidence, no matter where it occurs.⁴⁹ An extensive number of treaties reflecting State practice in addressing terrorism can also be found at both the regional and national levels, including the *Arab Convention for the Suppression of Terrorism* (1998), the *Convention of the Organization of the Islamic Conference on Combating International Terrorism* (1999), and the *European Convention on the Suppression of Terrorism* (1977).⁵⁰ At the national level, legislation addressing terrorism can be found across a wide spectrum of countries including Canada, France, and Pakistan.⁵¹ Thus, State practice supports the inclusion of terrorism within the sphere of universal jurisdiction.

Universal jurisdiction should not just apply to terrorism because of its heinous nature, but more so because of the risk that a crime of this nature may not be prosecuted if left solely to territorial jurisdiction.⁵² The international community has voiced its concern about the implications of failing to address terrorism.⁵³ This is because, like genocide and torture, officials or agents of the State or parties acting in a semi-official capacity may commit terrorism.⁵⁴ The international community, as a whole, should therefore be provided the tools of universal jurisdiction to deal with terrorism wherever it occurs.

⁴⁸ *Measures to Eliminate International Terrorism*, GA Res. 58/81, UN GAOR, 58th Sess., UN Doc. A/58/518 (2003).

⁴⁹ UN SCOR, 56th Year, 4385th Mtg., UN Doc. S/RES/1373 (2001).

⁵⁰ *Arab Convention on the Suppression of Terrorism*, League of Arab States (1998); *European Convention on the Suppression of Terrorism*, 27 January 1977, 1137 U.N.T.S. 93, ETS No. 90, 15 ILM 1272 (entered into force 4 August 1978).

⁵¹ University of Pittsburgh School of Law, "World Anti-terrorism Laws", online: Jurist – Legal News and Research <<http://jurist.law.pitt.edu/terrorism/terrorism3a.htm>>.

⁵² Win-Chiat Lee, "Terrorism and Universal Jurisdiction," in Steven P. Lee, ed., *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory* (Netherlands: Springer, 2007) 203 at 212.

⁵³ *UN Resolution 1373*, *supra*, note 5.

⁵⁴ Lee, *supra* note 52 at 212.

III. The actions of Mr. Aziz are analogous to crimes against humanity.

The actions of Mr. Aziz, through his involvement with Al-Qaeda, can be interpreted as a crime against humanity, which is an accepted ground of universal jurisdiction. Article 7 of the *Statute of the International Criminal Court* (SIIC) lays out several factors contributing to crimes against humanity, which include: 1) a widespread or systematic attack; 2) against a civilian population; 3) with knowledge of the attack; 4) a course of conduct involving the multiple commission of these types of acts; 5) intention to engage in that conduct; and 6) awareness of the actual or potential consequences.⁵⁵

The above factors describe Al-Qaeda and its terrorist acts. Specifically, Al-Qaeda attacks are not random in their aims but are part of a widespread and systematic war against the United States, demonstrated through coordinated attacks conducted over the last ten years.⁵⁶ The attacks have also been against civilian populations with the intended consequences of killing mass numbers of civilians.⁵⁷ These facts, together, demonstrate the parallels between the actions of terrorist networks such as Al-Qaeda, of which Mr. Aziz was the chief financier, and the factors listed in Article 7 of the ICCS. As such, Mr. Aziz's direct participation with Al-Qaeda constitutes a crime against humanity and universal jurisdiction applies accordingly.

IV. The actions of Mr. Aziz are analogous to piracy.

As discussed, piracy is an accepted area of universal jurisdiction.⁵⁸ Piracy is defined in Article 101(a) of UNCLOS,⁵⁹ but this Article only addresses the private aspect of piracy. Piracy,

⁵⁵ *UN Charter*, *supra* note 2 at art. 30(2)(b).

⁵⁶ Fry, *supra* note 41 at 178.

⁵⁷ CNN, "Transcript of Osama bin Laden Videotape," *Cable News Network LP, LLLP* (13 December 2001), online: CNN.com <<http://www.cnn.com/2001/US/12/13/tape.transcript/>>.

⁵⁸ See Part C(I), above.

⁵⁹ *UNCLOS*, *supra*, note 28 at art. 101(a).

however, includes both a private and political element.⁶⁰ This second aspect involves the usage of piracy as a political tool by States or non-State actors against one or more States.⁶¹ This can be seen historically, where the early conception of piracy was that it was directed not against just individuals but against a nation as a whole.⁶² Pirates often operated in a similar manner to multinational terrorist groups today, effectively removing themselves from the Nation-State, declaring a personal war against civilization itself.⁶³ More recently, piracy has moved from a concept of private robbery to one of so-called “maritime terrorism.”⁶⁴

The commonalities between terrorism and political piracy are in their motivations, aims, methods, to their effects and legal response of the victim State.⁶⁵ Specifically, the components of piracy analogous to terrorism can be summarized as follows:⁶⁶

1. Organizations composed of volunteers
2. Common goal of gaining the notice of States
3. Acts of terror including destruction and seizure of State or private property, frustration of commerce, and homicide
4. Existence outside territorial and jurisdictional boundaries of any State
5. Extra-nationality nature used as a means of pursuing their activities
6. They are not necessarily an enemy of one particular State (even if that is the only State directly affected) but of all States
7. Awareness of their existence outside of society and usage of this as a weapon against all States.

Piracy and terrorism can declare a war against a State (in comparison to non-State conflict). Both use the same tools – homicide, terror, destruction, and disruption of trade, to

⁶⁰ Burgess, Douglas R., “Hostis Humani Generi: Piracy, Terrorism and a New International Law” (2006) 13 U. Miami Int’l & Comp. L. Rev. 293 at 300.

⁶¹ *Ibid.*

⁶² *Ibid.* at 297.

⁶³ *Ibid.*

⁶⁴ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668. See also *Treaty relating to the Use of Submarines and Noxious Gases in Warfare*, 6 February 1922, 25 L.N.T.S. 202.

⁶⁵ Burgess, *supra* note 60 at 296.

⁶⁶ *Ibid.*

draw attention on themselves.⁶⁷ As new political realities come with the incidence of terrorism today, so too must the definition of piracy evolve. Terrorism can thus rightfully be viewed as analogous to piracy and should be addressed under the guise of universal jurisdiction. In the case at hand, Mr. Aziz, who was known to have funnelled millions of dollars to Al-Qaeda cells around the world, was travelling to North America with millions of dollars on a vessel on the high seas. Al-Qaeda has already carried out several attacks, both in the United States and against other countries. Accordingly, Mr. Aziz's presence on *The Maple Princess* represented a terrorist threat not limited to the United States. The United States' reaction to Mr. Aziz was swift and reflected the same universal condemnation as that of piracy. Therefore, the exercise of universal jurisdiction over vessel to target Mr. Aziz was lawful.

D. HEAD OF STATE IMMUNITY DOES NOT PREVENT UNITED STATES JUDICIAL FORFEITURE PROCEEDINGS AGAINST *THE MAPLE PRINCESS*

I. The applicable approach are the laws as applied in the United States.

This Honourable Court ruled in the *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* that the doctrine of Head of State immunity is firmly established in international law.⁶⁸ However, this Court did not elaborate on how to apply the doctrine to claims in civil proceedings. The two general approaches to the doctrine are the 'absolute' and restrictive theories,⁶⁹ but there is no treaty or standard on which approach to apply or how to apply either theory to the doctrine.⁷⁰ Head of State immunity's scope and applicability

⁶⁷ *Ibid.*

⁶⁸ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, [2002] I.C.J. Rep. 3 at para. 51 [*Congo v. Belgium*].

⁶⁹ Jerrold L. Mallory, "Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings" (1986) 86 Colum. L. Rev. 169 at 176-179.

⁷⁰ Amber Fitzgerald, "The Pinochet Case: Head of State Immunity within the United States" (2001) 22 Whittier L. Rev. 987 at 1007.

has thus been undefined or disagreed upon in customary international law.⁷¹ We are then left with the general principle of sovereign, diplomatic and Head of State immunity that is accepted as international law: The immunity of an alien from a host State's jurisdiction is a privilege, and the extent of that immunity is determined by the host State.⁷² Since the host State in the case at hand is the United States, international law concerning Head of State immunity requires that the applicable approach consist of the practices and laws as applied by the United States.

II. The application of *Hoffman* will not protect *The Maple Princess* from United States judicial forfeiture proceedings.

Prior to the enactment of the United States *Foreign Sovereign Immunities Act of 1976*,⁷³ both sovereign and Head of State immunity were the same doctrine in the United States, using the 'absolute' approach.⁷⁴ After the FSIA came into force, the two doctrines diverged⁷⁵ and most courts have concluded that the FSIA, which uses a restrictive approach to sovereign immunities, is not to be applied to Heads of State.⁷⁶ According to the 11th Circuit Court of Appeals in *United States v. Noriega*, the applicable approach to Head of State immunity is the pre-FSIA

⁷¹ Paul J. Toner, "Competing Concepts of Immunity: The (R)evolution of the Head of State Immunity Defense" (2004) 108 Penn St. L. Rev. 899 at 902.

⁷² Louis Henkin *et al.*, *International Law: Cases and Materials*, 2d ed. (St. Paul, Minn.: West Publishing Company, 1987) at 685. See also John H. Currie, *Public International Law* (Toronto: Irwin Law Inc., 2001) at 317.

⁷³ *Foreign Sovereign Immunities Act of 1976*, 28 U.S.C. § 1330, 1602-11 (1978), 15 I.L.M. 1388 [FSIA].

⁷⁴ *Mallory*, *supra* note 69 at 170. See also *Tachiona v. Mugabe*, 186 F. Supp. 2d 259 at 269 (S.D. N.Y. 2002), *aff'd in part, rev'd in part and rem'd*, *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004) [*Mugabe*].

⁷⁵ *Mallory*, *supra* note 69 at 170-171.

⁷⁶ *Lafontant v. Aristide*, 844 F. Supp. 128 at 137 (E.D. N.Y. 1994) [*Aristide*]. See also Barry E. Carter, Phillip R. Trimble & Curtis A. Bradley, *International Law*, 4th ed. (New York : Aspen Publishers, 2003) at 613.

practice of “suggestions” from the Executive Branch to either grant or deny immunity.⁷⁷ The court must follow these “suggestions”, but in the absence of such guidance, courts should make an independent determination regarding immunity.⁷⁸ It is also notable that some courts have also used the lack of a “suggestion” as a factor against granting immunity.⁷⁹

Since the pre-FSIA approach is applicable, *Republic of Mexico v. Hoffman* can give us guidance for the case at hand.⁸⁰ Although *Hoffman* was in the context of sovereign immunities, it is nonetheless applicable to Head of State immunity because this case was decided when the two doctrines were considered as one.⁸¹ Therefore, by analogy, *Hoffman* can be applied to Head of State immunity in the same way that Noriega applied *Spacil v. Crowe*⁸², a pre-FSIA foreign sovereign case, to its ruling on Head of State immunity.⁸³

In *Hoffman*, a sea-going vessel, which was owned by a foreign sovereign but contracted out to a private entity, was being subject to judicial proceedings in the United States.⁸⁴ Although the Executive Branch explicitly denied immunity to the vessel, the United States Supreme Court stated that lower courts have consistently refused to allow claims of immunity based on title of the claimant without possession.⁸⁵ Citing *The Fidelity*,⁸⁶ the Supreme Court stated that mere ownership of property does not necessarily make it a part of the sovereignty: “To make it so it

⁷⁷ *United States v. Noriega*, 117 F.3d 1206 at 1212 (11th Cir. 1997) [*Noriega*].

⁷⁸ *Ibid.*

⁷⁹ *First American Corp. v. Al-Nahyan*, 948 F. Supp. 1107 at 1121 (D.D.C. 1996).

⁸⁰ *Republic of Mexico v. Hoffman*, 324 U.S. 30, 65 S. Ct. 530 (1945) [*Hoffman* cited to S. Ct.].

⁸¹ *Mallory*, *supra* note 69 at 170.

⁸² *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974).

⁸³ *Noriega*, *supra* note 77 at 1212.

⁸⁴ *Hoffman*, *supra* note 80 at 531.

⁸⁵ *Ibid.* at 533-534.

⁸⁶ *The Fidelity*, 16 Blatchf. 569, 8 F.Cas. 1189 at 1191 (S.D. N.Y. 1879).

must be devoted to the public use, and must be employed in carrying on the operations of the government.”⁸⁷

The Respondent acknowledges that Heads of Government, like Mr. Sharper, fall under the definition of the persons who benefit from Head of State immunity, as established in international law and affirmed in *Congo v. Belgium*.⁸⁸ However, pursuant to *Hoffman*, *The Maple Princess* is not immune because it was not in possession by Mr. Sharper at the time of the cause of action because the vessel was leased to, and in possession by, his half-brother, Mr. Tomigan for a vacation. Mr. Sharper’s mere ownership of the vessel does not make it part of his person. Furthermore, *The Maple Princess* was not *devoted* to public use or, by analogy to *Hoffman*, employed to carry on the operations of the Head of Government. Rather, the vessel in question is a privately owned luxury yacht that was primarily used for family vacations. Furthermore, the Respondent submits that, as a relevant factor to weigh, something can be inferred from the absence of a suggestion of immunity from the Executive Branch.⁸⁹ Therefore, *The Maple Princess* is not protected under the doctrine of Head of State immunity and United States forfeiture proceedings should continue under 21 U.S.C. § 881.⁹⁰

III. Alternatively, under the restrictive theory, *The Maple Princess* would not be protected from forfeiture proceedings.

Even if the restrictive approach to Head of State immunity has become customary law or a general principle recognized as law,⁹¹ there still exists no standard to apply such an approach.⁹²

⁸⁷ *Hoffman*, *supra* note 80 at 533.

⁸⁸ *Congo v. Belgium*, *supra* note 68 at para. 51. See also *Mugabe*, *supra* note 72 at 289. See also *Saltany v. Reagan*, 702 F. Supp. 319 at 320 (D.C. Cir. 1989).

⁸⁹ See *Carter, Trimble & Bradley*, *supra* note 76 at 614.

⁹⁰ 21 U.S.C. § 881.

⁹¹ *ICJ Statute*, *supra* note 1 at art. 38(1).

⁹² See Part D(I), above.

However, some guidance for applying the restrictive theory can be found from some of the world's leading scholars at the Institut de droit international in their 2001 adoption of the Resolution on *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*.⁹³ The Respondent submits that provisions of the Institut's Resolution can give this Honourable Court assistance to apply the restrictive approach to the case at hand.

The Institut's Resolution was adopted to help "establish a set of rules, based on practice, to assist national courts in determining whether they have jurisdiction to entertain claims" of Head of State immunity.⁹⁴ Article 3 asserts that Heads of States shall receive "no immunity in civil matters unless in exercise of official functions."⁹⁵ This Article is amenable to the application of s. 1603(b) of the FSIA⁹⁶ in *In re Estate of Marcos*, where the court held that a Head of State was not entitled to immunity if his/her activities were not official acts as permitted under his authority.⁹⁷ As well, Article 4.1 states that the personal property of a Head of State is not immune to execution in giving "final judgment".⁹⁸ While broader than the exceptions in s. 1605 of the FSIA,⁹⁹ the Institut's Resolution and the FSIA both provide that personally owned property of a Head of State or foreign sovereign are not absolutely immune to execution.

⁹³ Institut de droit international, *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Thirteenth Commission, Rapporteur: Mr. Joe Verhoeven, (Session of Vancouver, 2001), online: Institut de droit international <http://www.idi-iiil.org/idiE/resolutionsE/2001_van_02_en.PDF> [*Institut's Resolution*].

⁹⁴ Hazel Fox, "The Resolution of the Institute of International Law on the Immunities of the Heads of State and Government" (2002) 51 ICLQ 119 at 119.

⁹⁵ *Institut's Resolution*, *supra* note 93 at art. 3.

⁹⁶ FSIA, *supra* note 73, § 1603(b).

⁹⁷ *In re Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994) [*Marcos*].

⁹⁸ *Institut's Resolution*, *supra* note 93 at art. 4.1.

⁹⁹ FSIA, *supra* note 73, § 1605.

The Respondent concedes that there was no “commercial act” at the time of seizure of the vessel, contrary to the District Court ruling in *United States v. The Maple Princess*.¹⁰⁰ However, applying *Marcos*, and Articles 3 and 4.1 of the Institut’s Resolution, immunity would not protect the vessel from forfeiture proceedings. Mr. Sharper leased *The Maple Princess* to his half-brother, Mr. Tomigan for a private family vacation. Furthermore, along with carrying a suspected financier of terrorism on board, the vessel was transporting approximately \$20 million of pure heroin, an illegal narcotic under international law.¹⁰¹ These acts can hardly be seen as an “exercise of official functions” within Article 3 of the Institut’s Resolution and, pursuant to *Marcos*, were outside Mr. Sharper’s authority as Head of Government.¹⁰² Additionally, as private property of Mr. Sharper, *The Maple Princess* is not immune to execution under Article 4.1 of the Institut’s Resolution. Therefore, under a restrictive approach, *The Maple Princess* would not receive immunity and forfeiture proceedings should continue under 21 U.S.C. § 881.¹⁰³

CONCLUSION

The Respondent respectfully submits that this Honourable Court adjudge and declare that:

(i) The use of force by the United States in its targeted killing of Mr. Aziz was legal under international law; (ii) The United States boarded, searched and seized *The Maple Princess* in accordance with the law of the sea; (iii) The United States lawfully exercised universal jurisdiction over *The Maple Princess*; and (iv) *The Maple Princess* is not protected under the doctrine of Head of State immunity from United States judicial forfeiture proceedings.

¹⁰⁰ *Compromis* at para. 12.

¹⁰¹ *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, UN Doc. E/CONF.82/15, 28 ILM 493 (entered into force 11 November 1990) at art. 3.

¹⁰² Government of Canada Privy Council Office, “Cabinet Government and the Prime Minister,” online: Privy Council Office <http://www.pco-cp.gc.ca/default.asp?Page=Publications&Language=E&doc=respons/chap2_e.htm>.

¹⁰³ 21 U.S.C. § 881.