

## SUMMARY OF ARGUMENT

Under customary international human rights law, individuals are protected from intentional deprivations of life. The targeted killing of Al-Qaeda's Chief Financier does not constitute an arbitrary deprivation of life. When there is a state of armed conflict, the risk of arbitrary deprivation of life must be balanced with military necessity. The use of lethal force will not be deemed an arbitrary violation of the right to life when the use of force is absolutely necessary, and is used to protect against unlawful violence. Al-Qaeda has engaged in unlawful violence against the United States. Based on accurate intelligence, U.S. security forces had a reasonable belief that the use of lethal force against Al-Qaeda's Chief Financier was absolutely necessary. Under customary international humanitarian law, a civilian loses protection when engaged in hostilities. Al-Qaeda's Chief Financier was undertaking hostile acts against the U.S.

The United States did not violate Article 6 of the Convention of the High Seas when boarding *The Maple Princess* without the consent of the Canadian government. Article 6 provides that Canada, the flag state, does not have exclusive jurisdiction over *The Maple Princess* when there are conditions "expressly provided for in international treaties or in these articles." Under Article 105 of the UN Convention on the Law of the Sea, the United States did not need consent from the Canadian government to board, search, and seize *The Maple Princess*, because it is classified as a pirate ship. Under Article 101 of the Law of the Sea, a pirate ship is engaged in "illegal acts of violence...committed by the crew or passengers... against persons or property in a place outside the jurisdiction of any state." Aziz facilitated a known violent organization, as indicated by the substantial evidence of Aziz involvement with the Al-Qaeda

organization. Article 108 authorized the United States to use board, search, and seizure tactics on *The Maple Princess* to suppress the illicit traffic of narcotic drugs.

The U.S. lawfully exercised universal jurisdiction to confiscate the Maple Princess. Under the International Convention for the Suppression of Terrorist Bombings, detonation of an explosive device against a place of public use, state or government facility or a public transportation system or an infrastructure facility is an offense. Al-Qaeda is an international organization that used explosive devices to bomb U.S. embassies in Kenya and Tanzania, as well as turning commercial airplanes filled with highly flammable fuel into explosive devices to destroy the World Trade Center in New York City, and to attack the Pentagon in Washington, D.C. The International Convention for the Suppression of Terrorist Bombings, the International Convention on the Suppression of the Financing of Terrorism, and the Inter-American Convention on Terrorism also recognize that terrorism is a grave concern to the whole international community. This grave, universal, international concern is the underlining reason why the U.S. was lawful in seizing the Maple Princess.

Under customary international law, head-of-state immunity does not extend to those persons that the U.S. does not recognize as the head-of-state. The U.S. recognizes the Prime Minister as the head-of-government, not head of state. Immunity also does not apply to unofficial acts. The Prime Minister was not present on the vessel, nor was the vessel being used for official state use. Head-of-state immunity does not apply to the where the Executive branch provided clear intent to deny head-of-state immunity. The U.S. President manifested intent to deny immunity by signing a top secret presidential directive to pursue Aziz. Furthermore, because the actions involved drug smuggling by a

terrorist organization as a means for funding the Al-Qaeda terrorist organization, the commercial activity exception to immunity should apply, as there is a direct effect upon the U.S.

## ARGUMENT

### **The United States' Operation Against Al-Qaeda's Chief Financier Complies With International Law**

With the 9/11 attacks, Al Qaeda declared war on the United States, and the world has recognized the nature of Al-Qaeda's declaration.<sup>1</sup> The global terrorist organization intends to achieve political aims. Uncertainty about a state's willingness to retaliate can add fuel to a terrorist conflict.<sup>2</sup> The tactics of terrorism are "surprisingly effective in achieving a terrorist group's political aims."<sup>3</sup>

In this context, the targeted killing of Al Qaeda's Chief Financier was lawful under the customary international law of armed conflict. There is a compelling state interest in protecting the citizens of the United States against catastrophic terrorist attacks. U.S. actions do not constitute an arbitrary deprivation of life. Intelligence reports confirmed that Al Qaeda's Chief Financier was directly participating in hostilities against the United States at the time of the targeted killing. The targeted killing was proportionate. Given the state of armed conflict between Al Qaeda and the United States, the court ruling against the United States in this case would have the practical effect of curtailing the ability of the Executive to pursue United States' vital national security interests.

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<sup>1</sup> U.N. S.C. Res. 1368, U.N. Doc. S/Res/1386 (2001); NATO's invocation of collective self-defense measure, accessible at <http://www.nato.int/docu/update/2001/1001/e1002a.htm>; Australian government response, accessible at [http://www.pm.gov.au/news/media\\_releases/2001/media\\_release1241.htm](http://www.pm.gov.au/news/media_releases/2001/media_release1241.htm).

<sup>2</sup> Andrew H. Kydd & Barbara F. Walter, The Strategies of Terrorism, 31 *International Security* 49, 57, No. 1 (Summer 2006).

<sup>3</sup> *Id.*, at 49.

**I. The U.S. Did Not Violate International Human Rights Law Because the Operation Against Al Qaeda’s Chief Financier Was Not an Arbitrary Deprivation of Human Life**

Whether interception of terrorists is a law enforcement matter or a military operation is a central issue. Labeling the conflict with Al-Qaeda as a law enforcement matter implicates the international human rights regime. Under this framework, the intentional use of lethal force by authorities can only be justified under strict conditions.<sup>4</sup>

The International Covenant on Civil and Political Rights (“ICCPR”), the American Convention on Human Rights, and the African Charter refer to express prohibitions against the “arbitrary” deprivation of life.<sup>5</sup> The European Convention for the Protection of Human Rights provides that no one shall be deprived of life intentionally.<sup>6</sup> However, the use of lethal force will not be deemed an arbitrary violation of the right to life when the lethal force is absolutely necessary, and is used to protect against unlawful violence.<sup>7</sup>

Due process of law as contemplated by the international human rights regime includes the right to a hearing, to examine the evidence, and a presumption of innocence, among other protections. However, states may derogate from these procedural rights in times of an emergency.<sup>8</sup> But the right to life is a non-derogable right, even in times of

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<sup>4</sup> David Kretzmer, Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?, 16 E.J.I.L. 171, 176, No.2 (2002)

<sup>5</sup> International Covenant on Civil and Political Rights, Art. 6(1); American Convention on Human Rights, Art. 4; African Charter, Art. 4.

<sup>6</sup> European Convention for the Protection of Human Rights, Art. 2(1).

<sup>7</sup> *Id.*, Art. 2(2). See also McCann v. UK, Eur. Ct. H.R. (1996), at para. 200, accessible at <http://www.echr.coe.int/ECHR>. (British special forces killed 3 IRA terrorists in Gibraltar on the assumption they would denote a bomb if apprehended. The European Court of Human Rights held that the UK did not violate Art. 2(2) because UK security forces reasonably believed the use of lethal force was absolutely necessary, and protected against unlawful violence).

<sup>8</sup> International Covenant on Civil and Political Rights, Art. 4(1)

emergency.<sup>9</sup> When there is a state of armed conflict, the arbitrary deprivation of life must be assessed in view of the laws of armed conflict, and not solely by terms of the ICCPR.<sup>10</sup>

Protection of the American people against the unlawful violence employed by Al Qaeda qualifies as an emergency situation. It would be unacceptable to the United States to conclude that the operation against Al-Qaeda's Chief Financier is a law enforcement matter, and not an armed conflict. Intelligence reported that Aziz funneled millions of dollars to Al Qaeda cells, and was traveling with millions of dollars of Swiss Bearer Bonds.<sup>11</sup> Al Qaeda's Chief Financier was intercepted by U.S. security forces 260 miles off the coast of Nova Scotia, with millions of dollars of Swiss Bearer Bonds.<sup>12</sup> Informed by intelligence reports, U.S. security forces had a reasonable belief that the use of lethal force against Al-Qaeda's Chief Financier was absolutely necessary, because Aziz intended to engage in unlawful violence against the United States. Moreover, Aziz was engaged in "Piracy" under the Law of the Seas.<sup>13</sup> As a result, the United States did not have an affirmative obligation to notify the Canadian government of military operations against Al-Qaeda.

By arguing this position, we do not say that the international human rights regime is wholly inapplicable to the situation. Relying on accurate intelligence reports, U.S. security forces had a reasonable belief that the use of lethal force was absolutely necessary, and would protect against unlawful violence. Based on the facts of the case,

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<sup>9</sup> Id., Art. 4(2)

<sup>10</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, I.C.J., at para. 25.

<sup>11</sup> *Compromis*, para. 4-5.

<sup>12</sup> Id., para. 8.

<sup>13</sup> UN Law of the Sea, Art. 101

U.S. actions do not constitute an arbitrary deprivation of life. Therefore, the U.S. actions do not violate international human rights law in the context of armed conflict.

## **II. The Operation Against Al Qaeda's Chief Financier Was Lawful Under International Humanitarian Law Because He Was A Civilian Taking a Direct Part in Hostilities Against the United States**

International humanitarian law as reflected in the Geneva Conventions is the source of law governing armed conflict. There are two categories of armed conflict: international, and non-international. The Geneva Convention, Additional Protocol I, is applicable to international armed conflict. International armed conflict is understood to mean a conflict between states.<sup>14</sup> The Geneva Convention, Additional Protocol II, applies to non-international armed conflict. Non-international armed conflict includes internal conflicts occurring within a state's boundaries.<sup>15</sup>

Al Qaeda's status as a non-state actor makes classification under international or non-international armed conflict difficult. Nothing in the record indicates that Al Qaeda is basing its operations from state territory, unlike the war in Afghanistan. Moreover, the record does not state that Aziz and his terrorist allies are operating within United States Territory. However, Additional Protocols I and II contain a provision stating that "civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities."<sup>16</sup> Under this provision, a civilian loses protection when engaged in hostilities, and is therefore open to targeted attack.<sup>17</sup> This provision has risen

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<sup>14</sup> Prosecutor v. Tadic, I.C.T.Y., Judgment, 7/15/99, App. Ch., IT-94-1-A, at para. 84.

<sup>15</sup> Geneva Conventions, Additional Protocol II, Art. 1(1).

<sup>16</sup> Additional Protocol I, Art. 51(3); Additional Protocol II, Art. 13(3)

<sup>17</sup> Commentary on Additional Protocol I, ICRC, Geneva, §1942 provides that "a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities."

to the level of customary international law.<sup>18</sup> Thus, regardless of the classification of the armed conflict, the civilian provision provides the framework whereby the US action should be assessed.

Aziz was not a low level player detached from the Al Qaeda leadership. As Al Qaeda's Chief Financier, a principal colleague to Osama Bin Laden, Aziz was engaged directly in hostilities against the United States by virtue of his leadership function in the organization. In accordance with US intelligence reports, Aziz was intercepted with millions of dollars of Swiss Bearer Bonds.<sup>19</sup> Intelligence reports also confirmed that he funneled millions of dollars to Al Qaeda cells.<sup>20</sup> All indications point to the fact that Aziz was in the process of transporting vital funding to support terrorist operations against the United States at the time of interception.<sup>21</sup> As a result, Aziz met all three of the requirements set forth by the civilian provision. He was 1) directly participating, 2) in hostilities against the United States, 3) for such time.

## **II. *The Maple Princess* is considered a pirate ship under Article 105 of the Law of the Sea and could therefore be seized by any State without the consent of Canada.**

The United States did not need consent from the Canadian government to board, search, and seize *The Maple Princess* because it is classified as a pirate ship. Article 105 of the Law of the Sea permits every State to "seize a pirate ship.....and arrest the persons and seize the property on board." This issue discusses whether *The Maple Princess* is

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<sup>18</sup> Jean-Marie Henckaerts, Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict, 87 Int'l Rev. of the Red Cross 175, No. 857 (March 2005).

<sup>19</sup> *Compromis*, para 4.

<sup>20</sup> *Id.*, para. 5.

<sup>21</sup> Commentary on Additional Protocol I, ICRC, Geneva, §1943 states that "'hostilities' covers ... situations in which [the civilian] undertakes hostile acts without using a weapon."

considered a pirate ship when one of its passengers facilitated a known violent organization and transported illegal narcotics.

In an August 2006 forfeiture proceeding, the government of Canada argued that the boarding, search, and seizure of *The Maple Princess* violated Article 6 of the 1958 Convention of the High Seas<sup>22</sup> in that the U.S. did not seek nor obtain consent of Canada, as flag state. The government of Canada based this argument on Article 6 of the Convention of the High Seas, which indicates that ships sailing under the flag of one State shall be subject to its exclusive jurisdiction on the high seas.<sup>23</sup>

The government of Canada does not consider the exceptions to the rule for designating exclusive jurisdiction to the flag state. Article 6 of the Convention of the High Seas expressly states that exclusive jurisdiction will not be given to the flag state where there are exceptions “expressly provided for in international treaties or in these articles.” In this case, the circumstances surrounding the boarding, search, seizure of *The Maple Princess* falls within the exceptions as articulated in Article 6. Among these exceptions to board, search, and seize a private ship are 1) the seizure of a “pirate” ship as defined in Article 105 of the Convention on the Law of the Seas, and 2) to suppress the illicit traffic of narcotic drugs as defined in Article 108 of the Convention on the Law of the Sea.

Article 101 of the Law of the Sea defines a pirate ship as one that engages in “illegal acts of violence...committed by the crew or passengers... against persons or property in a place outside the jurisdiction of any state.” First, Max Aziz, is irrefutably

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<sup>22</sup> The Convention of the High Seas was one of four treaties resulting out of UNCLOS I, with intentions to strategically define and codify rules related to territorial waters.

<sup>23</sup> Convention of the High Seas define the High Seas as all parts of the sea that are not included in the territorial sea or in the internal waters of a State

classified as a “passenger” on the ship. Secondly, Al-Qaeda is a known terrorist organization responsible for acts of terrorism against non-Muslims around the world.<sup>24</sup> The United States Department of State has labeled the Al-Qaeda organization as a Foreign Terrorist Organization (FTO) responsible for planning and constructing acts of terror specifically against United States citizens. Aziz’s position as a primary financier of Al-Qaeda establishes and satisfies the element of engagement in these illegal acts of violence. Specifically, Article 101(c) condemns “any acts exciting or intentionally facilitating,” in such violent illegal activities. As a financial contributor Aziz has intentionally facilitated with the maintenance of the Al-Qaeda organization.

The Canadian government may argue that the boarding, search, and seizure of *The Maple Princess* was based on premature or ungrounded suspicions. Article 110(1) requires that there be reasonable ground for suspecting that a ship is engaged in piracy, among other activities, before boarding the vessel. Only after these grounds for suspecting illegal activity are satisfied will a State be justified in boarding. The boarding, search, and seizure of *The Maple Princess* was not a premature operation.<sup>25</sup> Prior to boarding *The Maple Princess*, the U.S. Central Intelligence Agency suspected that Max Aziz was the primary financial figure in the Al-Qaeda terrorist organization based on banking records from Cypriot and Swiss financial institutions. By intercepting electronic mail messages, The U.S. National Security Agency further confirmed his involvement in Al-Qaeda.<sup>26</sup> This United States investigation proves that their boarding of *The Maple Princess* was not premature but based on substantial evidence of Aziz involvement with the Al-Qaeda organization.

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<sup>24</sup> Section 140(d)(2) of the Foreign Relations Authorization Act

<sup>25</sup> Article 110(1)(a)

<sup>26</sup> *Compromis*, para. 4 and 5

The United States did not need the consent of Canada to board, search, and seize *The Maple Princess* when the ship was engaging in illicit traffic of narcotic drugs as defined by Article 108 of the Law of the Sea. Article 108 encourages States to cooperate in the suppression of illicit traffic in narcotic drugs.<sup>27</sup> When the US Seals boarded *The Maple Princess* they found a white powdery substance that appeared to be heroin. The US coast guard confirmed the presence of roughly \$20 million worth of Afghan heroin. The United States were within their legal rights for searching and seizing *The Maple Princess* with the narcotics therein and should be commended for their efforts to suppress the illegal traffic of narcotics as codified in Article 108 of the Law of the Sea

The facts of the case demonstrate that *The Maple Princess* was considered a pirate ship, that Max Aziz facilitated in the activities of a violent organization, and *The Maple Princess* was involved in the traffic of illegal narcotics. For these reasons the United States did not require the consent of the Canadian government before boarding *The Maple Princess* and therefore does not violate Article 6 of the Convention of the High Seas.

### **III. US confiscation of the Maple Princess is internationally lawful because of applicable terrorism treaties and the specific intent of the US action.**

Article 38 (1) of this court's statute enumerates a hierarchy of international legal sources it will apply when settling a dispute.<sup>28</sup> At the top are international conventions that establish rules that are expressly recognized by the contesting states.<sup>29</sup>

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<sup>27</sup> Convention of the Law of the Sea, Article 8

<sup>28</sup> I.C.J. Statute art. 38 (1).

<sup>29</sup> *Id.*

Both the U.S. and Canada are parties to the Inter-American Convention on Terrorism.<sup>30</sup> Article 2 (1) lists the International Convention for the Suppression of the Financing of Terrorism as one of international instruments that define offenses under this convention.<sup>31</sup>

Article 2 (1) (a) International Convention for the Suppression of the Financing of Terrorism states that “an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex” is an offense of this treaty.<sup>32</sup> The International Convention for the Suppression of Terrorist Bombings is one of the treaties in the annex.<sup>33</sup>

Explicit violations of this treaty are when an individual lawfully or unlawfully detonates an explosive device against a place of public use, state or government facility or a public transportation system or an infrastructure facility.<sup>34</sup> However, article 3 (c) also states that it is an offense for one to intentionally contribute with the aim of furthering the general criminal activity to acts listed above.<sup>35</sup> Mohamed Aziz, Al-Qaeda’s primary financial figure, funneling millions of dollars to various Al-Qaeda cells throughout the world<sup>36</sup> fits within the Inter-American Convention on Terrorism’s defined offenses.

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<sup>30</sup> Inter-American Convention on Terrorism, June 3, 2002, AG/RES. 1840 [hereinafter ICT].

<sup>31</sup> *Id.* art. 2 (1) (j).

<sup>32</sup> G.A. Res. 54/109 ¶ Art. 2 (1) (a), G.A. U.N. A/RES/54/109 (Dec. 1999).

<sup>33</sup> *Id.* Annex 9.

<sup>34</sup> G.A. Res. 52/165 ¶ Art. 2 (1), G.A. U.N. Do.A/RES/52/1645 (Jan. 9, 1998).

<sup>35</sup> *Id.* art. 3 (c).

<sup>36</sup> *Compromis*, para 4.

Al-Qaeda is an international organization that used explosive devices to bomb U.S. embassies in Kenya and Tanzania in 1998, as well as turning commercial airplanes filled with highly flammable fuel into explosive devices to destroy the World Trade Center in New York City and to attack the Pentagon in Washington, D.C. As its primary financial figure, Aziz more than likely was the financial lifeblood behind these acts. Therefore, these actions are violations of the Inter-American Convention on Terrorism.

Turning to jurisdiction under this treaty, the U.S. was lawful to confiscate the *Maple Princess* because the treaty does not restrict it from seizing sea vessels that are carrying terrorists, funds for terrorism, and illegal narcotics that would be sold to generate more funds for terrorism. Rather the treaty prohibits a state from exercising jurisdiction in the territory of another state party when those functions are reserved duties of that state party.<sup>37</sup>

When the U.S. captured the *Maple Princess* it was not in Canadian waters.<sup>38</sup> To the contrary, it was located well over 200 nautical miles from the coast of Canada.<sup>39</sup>

Procedurally, if Canada had objections to the article addressing jurisdiction in the treaty, it was entitled to make a reservation or declaration pertaining to the interpretation of the treaty or its understanding of specific articles just as the United States, Mexico, Chile, Costa Rica, and Venezuela did.<sup>40</sup> However, Canada elected not to when ratifying the treaty in 2003, and therefore is legally bound to jurisdictional statement of the treaty.

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<sup>37</sup> ICT, art. 19.

<sup>38</sup> *Compromis*, para 9.

<sup>39</sup> *Id.*

<sup>40</sup> ICT, General Information of the Treaty: A-66.

Canada will likely argue that although Aziz was Al-Qaeda's primary financial figure and that when the Maple Princess was captured by US authorities the boat was transporting narcotic substances and millions of dollars to be used for terrorist activities, these acts do fall within the scope of the Inter-American Convention on Terrorism, and more specifically article 3 (c) of the International Convention for the Suppression of Terrorist Bombings because this article's wording is ambiguous. Yet the Vienna Convention on the Law of Treaties provides guidelines to address this.

Article 31 (1) of the Vienna Convention on the Law of Treaties specifies that treaty interpretation begins with the ordinary meaning of the text and in their context and in the light of its object and purpose.<sup>41</sup> Article 2 of the International Convention for the Suppression of Terrorist Bombings classifies denotation of explosives against a place of public use, state or government facility or a public transportation system or an infrastructure facility as a violation of the convention.<sup>42</sup> Article 3 notes that intentionally contributing to the acts in article 2 are also in violation.<sup>43</sup>

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<sup>41</sup> Vienna Convention on the Law of Treaties, May 23, 1969, art. 31 (1), 1555 U.N.T.S. 331 [hereinafter VCLT].

<sup>42</sup> G.A. Res. 52/165 ¶ Art. 2 (1), G.A. U.N. Do.A/RES/52/1645 (Jan. 9, 1998).

<sup>43</sup> *Id.* art. 3 (c)

If the language of intentionally contributing in article 3 creates ambiguity, then examining the object and purpose of the convention resolves it. According to the preamble, parties recognize that terrorism is a “grave concern to the international community as a whole.”<sup>44</sup> Furthermore, both the International Convention on the Suppression of the Financing of Terrorism and the Inter-American Convention on Terrorism also recognize that terrorism is a grave concern to the whole community.<sup>45</sup> Hence, bearing in mind the object and purpose of the convention, a proper interpretation of Article 3 construes that Aziz’s actions fit within its meaning.

This grave, universal, international concern is the underlining reason why the U.S. was lawful in seizing the Maple Princess. The Third Restatement of the Foreign Relations of the United States § 404 states that universal jurisdiction enables a state that has jurisdiction “to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern.”<sup>46</sup> As exemplified by the preambles of the treaties and conventions cited above that give the U.S. universal jurisdiction over the maple princess, terrorism is a universal concern.

Canada may concede that terrorism is a universal concern, and thus legally allows the U.S. to confiscate the Maple Princess. However, they will likely assert that factually the U.S. instituted forfeiture proceedings for the Maple Princess under domestic drugs laws, rather than terrorism laws.<sup>47</sup> This is rebutted by explaining that this was a decision made by U.S. domestic legal authorities. And that this court is concerned with the adjudication of international issues.

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<sup>44</sup> *Id.* Preamble.

<sup>45</sup> ICT, Preamble; G.A. Res. 54/109 ¶ Preamble (1) (a), G.A. U.N. A/RES/54/109 (Dec. 1999).

<sup>46</sup> Restatement (Third) of the Foreign Relations of the United States § 404 (1987).

<sup>47</sup> *Compromis*, para 4.

In conclusion, treaty law, the foremost authority that this court considers, establishes that the U.S. had universal jurisdiction to confiscate the *Maple Princess*. It was an instrument used for international terrorist's activities, and these activities are a universal concern for the international community, thus creating universal jurisdiction.

**IV. The doctrine of head of state immunity does not prevent the US from seizing *The Maple Princess* as the Prime Minister does not enjoy head-of-state immunity, and the incidents involved commercial activity which directly affects the US.**

Head-of-state immunity does not extend to those persons that the U.S. does not recognize as the head-of-state. The Foreign Sovereign Immunities Act (FSIA) established guidelines for making immunity determinations, except to heads-of-state.<sup>48</sup> Grounded in customary international law, a head-of-state is not subject to the jurisdiction of foreign courts, at least as to official acts taken during his or her term of office. A strong presumption is given to the Executive branch's intent in granting or denying immunity, and the criminal acts which the allegations surround. For these reasons, the U.S. properly seized *The Maple Princess*, where head-of-state immunity does not apply to the unofficial acts of a prime minister, and where the Executive branch provided clear intent to pursue *The Maple Princess*. Furthermore, the actions involved drug smuggling by a terrorist organization as a means for funding the Al-Qaeda organization, the commercial activity exception to immunity should apply, as there is a direct effect upon the U.S.

The U.S. does not recognize the Prime Minister as the head of state in Canada.<sup>49</sup> The U.S. recognizes the Prime Minister as the head-of-government, and therefore head-of-state immunity should be inapplicable. However, the Prime Minister does enjoy some

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<sup>48</sup> Jerrold L. Mallory, *Resolving the Confusion over Head of State Immunity*, 86 Colum. L. Rev. 169, (Jan. 1986).

<sup>49</sup> United States Dept. of State. <http://www.state.gov/r/pa/ei/bgn/2089.htm>. [Queen Elizabeth II (head of state represented by a governor general), prime minister (head of government),]

sovereign immunity protection, when acting in his official capacity and where the Executive branch intends to provide immunity protection.

Immunity does not apply to unofficial acts. In Congo v. Belgium, the International Court of Justice held that a foreign minister is immune from prosecution for all and any crimes, whether committed during or prior to assuming his or her official capacity, so long as the minister maintains his or her official capacity.<sup>50</sup> In Congo, the incumbent Minister for Foreign Affairs had an arrest warrant issued by a Belgian magistrate, alleging grave breaches of the Geneva Conventions of 1949, the Additional Protocols and crimes against humanity.<sup>51</sup> Congo maintained that the arrest warrant violated the Minister for Foreign Affairs immunity as well as the principle that a State may not exercise its authority on the territory of another State.<sup>52</sup> The Court accordingly concludes that the functions of a Minister of Foreign Affairs are such that, throughout the duration of office, when abroad enjoys full immunity from criminal jurisdiction and inviolability.<sup>53</sup>

The actions of the Prime Minister fall outside the scope of official acts. In Congo, this Court afforded immunity where the Minister of Foreign Affairs acted in his official capacity.<sup>54</sup> The Prime Minister was not present on the vessel, nor was the vessel being used for official state use. However, a passenger, Aziz was smuggling \$20 million worth of heroin and bearer bonds in to Canada.<sup>55</sup> Consequently, without the presence of the Prime Minister on board of the vessel, and because the vessel was leased to his

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<sup>50</sup> Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium), 2002 I.C.J. 3 (Feb. 14, 2002).

<sup>51</sup> *Id.* at 3.

<sup>52</sup> *Id.* at 33.

<sup>53</sup> *Id.* at 142.

<sup>54</sup> *Id.* at 3.

<sup>55</sup> *Compromis*, para 9.

brother, Tomigan, and the voyage was purely recreational, the incident surrounding *The Maple Princess* does not rise to an official act of the state, and therefore head-of-state immunity should be inapplicable.

The Executive branch is primary regarding foreign affair issues.<sup>56</sup> Their willingness to proceed with the operation is sufficient for an intention to deny immunity regarding *The Maple Princess* in international proceedings. In U.S. v. Noriega, the Court of Appeals held that Noriega was properly denied immunity from prosecution of drug-related offenses based on head-of-state immunity.<sup>57</sup> Noriega served as Commander of the Panamanian Defense Forces and claimed that he was the “de facto, if not the de jure” leader of Panama. The Court rejected the claim, reasoning that the U.S. never recognized Noriega as Panama’s legitimate, constitutional ruler.<sup>58</sup> Furthermore, they state the immunity claims fails under either the Doe or the Spacil standard.<sup>59</sup>

By pursuing the capture and the prosecution of Noriega, the Court ruled that the Executive branch had manifested its clear sentiment that Noriega should be denied head-of-state immunity. Similarly, on June 21, 2006, the U.S. President signed a top secret presidential directive to pursue Aziz, who was Osama bin Laden’s CFO.<sup>60</sup> It was known prior to the operation that Aziz would be aboard a vessel belonging to the Prime Minister of Canada, but the Executive branch still issued the order for the incursion, which subsequently turned up the heroin. Additionally, the District Court has already ruled on

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<sup>56</sup> Id.

<sup>57</sup> U.S. v. Noriega, 117 F.3d 1206 (11th Cir. 1997).

<sup>58</sup> Id. at 1211.

<sup>59</sup> Id. at 1212. See, In re Doe, 860 F.2d 40, 45 (2d Cir. 1988)[Some courts have held that absent a formal suggestion of immunity, a putative head-of-state should receive no immunity]. See Spacil v. Crowe, 489 F.2d 614, 618-619 (5th Cir. 1974)[The courts should make an independent determination regarding immunity when the Executive Branch neglects to convey clearly its position on a particular immunity request].

<sup>60</sup> Compromis, para 6.

the issue of head-of-state immunity, and the Executive branch failed to suggest granting immunity.<sup>61</sup> Consequently, it is clear from the conduct and actions of the Executive branch that they do not wish to grant head-of-state immunity.

However, if immunity were suggested, it should be inapplicable to *The Maple Princess*, as it was involved in a commercial activity which directly affects the U.S. Under FSIA, immunity can not be claimed with respect to commercial activity carried on in the U.S., or upon an act outside the U.S. in connection with a commercial activity elsewhere which causes a direct effect in the U.S.<sup>62</sup> Commercial activity is defined as “a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”<sup>63</sup>

The commercial activity exception to immunity is applicable to *The Maple Princess*. For example, where a corporation carries on a purely commercial activity, international law does not “pierce the veil” to grant it sovereign immunity, attaching to the State by which it is wholly owned or managed.<sup>64</sup> In Supra Medical, the Third Circuit set forth a two-part test to analyze the FSIA’s commercial activity exception: Under this test, the initial inquiry is whether there is a sufficient jurisdictional connection or nexus between the commercial activity and the U.S. The second inquiry is whether there exists a substantive connection or nexus between the commercial activity and the subject matter of the cause of action.<sup>65</sup> In applying that test, the Third Circuit held that the Defendant

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<sup>61</sup> *Compromis*, para 12.

<sup>62</sup> 48 C.J.S International Law § 46.

<sup>63</sup> 28 U.S.C.A § 1603(d).

<sup>64</sup> Case Concerning the Barcelona Traction, Light & Power Company, Limited (Belgium v. Spain), 1970 I.C.J. 3 (1970), citing Harvard Research in International Law Report on Competence of Courts in Regard to Foreign States, Art. 12 at 641 (1932).

<sup>65</sup> Supra Medical Corp. v. McGonigle, 955 F.Supp. 374, 376 (E.D.Pa., 1997)

has carried out commercial activity directly in the U.S. or with a substantial connection to the U.S.<sup>66</sup> In Supra Medical, a U.S. company brought suit against various parties including British medical schools, doctors and partnerships alleging misappropriation of trade secrets and confidential information.<sup>67</sup> The Defendants were developing and testing a medical scanner device at wound healing centers in England and the United States.<sup>68</sup> The Court reasoned that UMDS testing of the medical equipment in the U.S. qualified as “commercial activity”, deeming these activities as the type of actions by which a private party engages in trade and traffic.<sup>69</sup>

The commercial activities, including the smuggling of heroin, to fund a terrorist organization directly affect the U.S. Following the terrorists attacks of September 11, 2001, the U.S. declared war against Al-Qaeda for terrorist events that took place within the borders of the U.S. Aziz, who was suspected to be Al-Qaeda’s CFO, was in the process of smuggling large amounts of bearer bonds and heroin, purportedly to aid the financing of Al-Qaeda. The use of *The Maple Princess*, in conveyance of these materials, constitutes a commercial activity that will have a direct effect on the U.S. in the form of funding and supporting future terrorist events. Similar to Supra Medical, where the Court reasoned that testing the medical equipment constituted commercial activity, deeming those actions as the type that a private party engages in trade and traffic, relieved the Defendants of immunity from U.S. jurisdiction. Likewise, the traffic and trade of narcotics and bearer bonds is likely the type of conduct of a private actor, which can not avail immunity for this type of commercial activity. Since, the activities of Aziz, aboard

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<sup>66</sup> Id. at 377.

<sup>67</sup> Id. at 376.

<sup>68</sup> Id. at 378.

<sup>69</sup> Id.

*The Maple Princess*, constitutes commercial activity that directly affects the U.S., immunity should not be afforded to its seizure.

Since head-of state immunity traditionally applies to “official acts” and is guided by the sentiment of the Executive branch, the Prime Minister of Canada should be denied head-of-state immunity. Furthermore, where a sovereign’s property is seized, one can not claim sovereign immunity for commercial activities that directly affect the U.S. For these reasons, the U.S. was warranted in its seizure of *The Maple Princess*.

### CONCLUSION

For all the abovementioned reason argued in this memorial, the United States of America respectfully requests that this honorable Court:

- 1) **Declare** that United States of America did not violate international law when it conducted the "targeted killing" of Canadian national Mohamed Aziz,
- 2) **Declare** that United States of America has not violated the Law of the Sea when it boarded, searched, and seized The Maple Princess,
- 3) **Declare** that United States of America’s exercise of Universal Jurisdiction over The Maple Princess lawful under international law
- 4) **Declare** that the doctrine of "head of state immunity" does not prevent the United States of America from judicial forfeiture proceedings against the Maple Princess?

Respectfully Submitted,