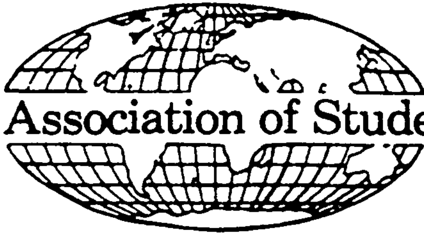

Association of Student International Law Societies

2223 Massachusetts Avenue, N.W.
Washington, D.C. 20008, U.S.A.
(202) 265-4375
Cable "AMINTLAW"

1988 PHILIP C. JESSUP INTERNATIONAL
LAW MOOT COURT COMPETITION

# Case Concerning State Responsibility for Certain Acts of Terrorism

Republic of Yokum

v.

Confederation of Shangri

MEMORANDUM OF LAW AND AUTHORITIES
FOR JUDGES

NOTICE

This Memorandum is exclusively for the use of Judges in the 1988 Jessup Competition. It may not be shown to, read by or in any other way communicated or made available to competitors in the moot court competition.

---

Written by: Bradley R. Larschan, Milbank, Tweed, Hadley & McCloy, Washington, D.C.; Professor Alfred P. Rubin, The Fletcher School of Law & Diplomacy; and Professor John F. Murphy, Villanova Law School.

Copyright 1988, International Law Students Association

# TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES | iii |
| I. INTRODUCTION | 1 |
| II. SUMMARY OF THE PROBLEM | 2 |
| III. SOURCES OF INTERNATIONAL LAW | 3 |
| A. Conventions As A Source of Law | 5 |
| B. Custom As A Source of Law | 10 |
| C. General Principles of Law As a Source of International Law | 13 |
| D. Judicial Decisions and Publicists As Sources of International Law | 16 |
| 1. Judicial Decisions | 16 |
| 2. Publicists | 17 |
| E. Hierarchy of the Sources of International Law | 18 |
| IV. ANALYSIS OF THE CASE | 20 |
| A. Whether the Confederation of Shangri Is Bound to Try or Extradite the Hijackers | 20 |
| 1. Regime of International Law of Peace | 20 |
| 2. Regime of International Law of Armed Conflict | 23 |
| 3. 1977 Geneva Protocols | 25 |
| B. Whether the Confederation of Shangri Has Violated Minimum Standards of State Responsibility By Allowing Its Territory to be Used As a Base of Attacks on Yokum Nationals Both in Shangri and Elsewhere | 29 |

C. Whether the Republic of Yokum Has Violated International Law By Forcibly Diverting a Shangri Aircraft and Abducting Persons on Board, and, If So, Whether the Republic of Yokum Must Return Any of Those Individuals . . . 32

D. Whether the Confederation of Shangri Is Justified in Releasing the PACM Hijackers . . . . 40

## TABLE OF AUTHORITIES

Page

CONVENTIONS:

Convention Against the Taking of Hostages . . . . . . . . . . . . . . . . . 20-23, 34, 37, 41, 45

Convention on Offenses and Certain Other Acts Committed On Board Aircraft (Tokyo Convention) . . . . . . . . . . . . . . . . . . . . . 33

Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) . . . . . . . . . . . . . . . . . . . . . 33

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention) . . . . . . . . . . . . . . . . . . . 33

General Agreement on Tariffs and Trade . . . . . . . . . 6-7

1949 Geneva Red Cross Conventions . . . . . . . 6, 20, 22, 25-26, 28, 34, 42, 43

1977 Geneva Protocols . . . . . . . . . . . . . . . . . 22, 26-29

Genocide Convention . . . . . . . . . . . . . . . . . . . . 6

1907 Hague Conventions . . . . . . . . . . . . . . . . . . 6

U.N. Charter

Article 2, paragraph 4 . . . . . . . . . . . . . . . 31, 36, 38

Article 51 . . . . . . . . . . . . . . . . . . . . . . . 38

Statute of the International Court of Justice

Article 36 . . . . . . . . . . . . . . . . . . . . . 2-3, 16

Article 38 . . . . . . . . . . . . . . . . . . . . 4, 16, 18

Article 59 . . . . . . . . . . . . . . . . . . . . . . 4, 16

Article 62 . . . . . . . . . . . . . . . . . . . . . . . 40

Third United Nations Convention on The Law of the Sea . . 7

Vienna Convention on the Law of Treaties . . . . . . . . . 7-8

Article 26 . . . . . . . . . . . . . . . . . . . . . . . 35

Article 52 . . . . . . . . . . . . . . . . . . . . . . . 46

Article 60 . . . . . . . . . . . . . . . . . . . . . . . 42

Article 62 . . . . . . . . . . . . . . . . . . . . . . . 15

Article 64 . . . . . . . . . . . . . . . . . . . . . . . 19

1815 Vienna Conference Final Act . . . . . . . . . . . . . . 7

CASES (INTERNATIONAL):

Asylum Case (Col. v. Peru), 1950 I.C.J. 266 . . . . . . . . 11

Case Concerning the Corfu Channel (U.K. v. Alb.), 1951 I.C.J. 4 . . . . . . . . . . . . . 11, 36

Case Concerning the Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J., Ser. A/B, No. 53 . . . . . . . . . . . . . . . . . . . . . 8-9

Case Concerning the Factory at Chorzow (Ger. v. Pol.), 1927 P.C.I.J., Ser. A, No. 9 . . . . . . . 14

Case Concerning Anglo-Norwegian Fisheries (U.K. v. Nor.), 1951 I.C.J. 116 . . . . . . . . . . . . . 12

Case Concerning Free Zones of Upper Savoy and the District of Gex (Switz. v. Fr.), 1932 P.C.I.J., Ser. A/B, No. 46 . . . . . . . . . . . . . . . . . . . . . 7

Case Concerning Reservations to the Genocide Convention (Advisory Opinion), 1951 I.C.J. 15 . . . . . 6

Case Concerning the S.S. Lotus (Fr. v. Tur.), 1927 P.C.I.J., Ser. A/B, No. 10 . . . . . . . . . . . . 4

Case Concerning Nuclear Tests (Aust. v. Fr.), 1974 I.C.J. 253 . . . . . . . . . . . . . . . . . . . . . 9-10

Case Concerning the Temple Preah Viheah (Cam. v. Thai.), 1962 I.C.J. 6 . . . . . . . . . . . . . 14-15

ARBITRATIONS (INTERNATIONAL):

Alabama Claims (U.S. v. U.K.) . . . . . . . . . . . . . . 29-30

Gentini Case (Italy v. Venez.), Mixed Claims Comm'n (1903) . . . . . . . . . . . . . . . . . . . . 13

Naulilaa Incident (Por v. Ger.), 8 Rec. des decis. des trib. arb. mixtes 409 (1928) . . . . . . . . . 43

PUBLICISTS:

A. D'Amato, The Concept of Custom in International Law (1971) . . . . . . . . . . . . . . . . . . . 13

T. Elias, "Modern Sources of International Law," in W. Friedmann et al., Transnational Law in a Changing Society (1972) . . . . . 3

G. Fitzmaurice, "Some Problems Regarding the Formal Sources of Law," in Symbolae Verzijl (1958) . . . . . . . . . . . . . . . . . . . . 3

Fourth Interim Report of the Committee on International Terrorism, Report of the Sixtieth Conference of the International Law Association (1984) . . . . . . . . . . . . . . . . . . 23

Friedlander, "Comment: Unmuzzling the Dogs of War," 7 Terrorism: An Int'l J. 169 (1984) . . . . . . . . . . . . . . . . . . 23

Larschan, "Extradition, the Political Offense Exception and Terrorism: An Overview of the Three Principal Theories of Law," 4 B.U. Int'l L.J. 231 (1986) . . . . . . . . . . . . . . 41

Larschan, "Legal Aspects to the Control of Transnational Terrorism: An Overview," 13 Ohio N.U.L. Rev. 117 (1986) . . . . . . . 24-25

Lillich & Paxman, "State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities," 26 Am. U.L. Rev. 27 (1979) . . . . . . . . . . . . . . . . . . . . . . 31

J.F. Murphy, The United Nations and the Control of International Violence: A Legal and Political Analysis (1982) . . . . . . . . . . . . . . 23

J.F. Murphy, "The Future of Multilateralism and Efforts to Combat International Terrorism," 25 Colum. J. Transnat'l L. 35 (1986) . . . . . . . . . . . 39

C. Parry, The Sources and Evidences of International Law (1965) . . . . . . . . . . . . . . . . . . 3

Paust, "Extradition and United States Prosecution of the Achille Lauro Hostage-Takers: Navigating the Hazards," 20 Vand. J. Transnat'l L. 235 (1987) . . . . . . . . . . . . . . . . . . . . . . 23

Report of the Committee on the Use of Force in Relations Among States, Proceedings of the American Branch of the International Law Association (1985-86) . . . . . . . . . . . . . . . . . . . . 38

Restatement (Revised) of the Foreign Relations Law of the United States . . . . . . . . . . . . 44

A.P. Rubin, "Terrorism and The Laws of War," 12 Den. J. Int'l L. & Pol'y 219 (1983) . . . . . . . . . . 23

A.P. Rubin, "The International Legal Effect of Unilateral Declarations," 71 Am. J. Int'l L. 1 (1977) . 10

Schachter, "The Right of States to Use Armed Force," 82 Mich. L. Rev. 1620 (1984) . . . . . . . . 36

Sheehan, "The Entebbe Raid . . .," 1 Fletcher For. 135 (1979) . . . . . . . . . . . . . . . . . . . . . 39

CASES (MUNICIPAL):

The Arantzazu Mendi, 1939 A.C. [H.L.] 256 . . . . . . . . . . . . . . . . . . . . . . 32

The Paquete Habana, 175 U.S. 677 (1900) . . . . . . . . . 17-18

UNITED NATIONS RESOLUTIONS:

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations . . . . . . . . . . . . . . . . . . 22, 37

## I. INTRODUCTION

This Memorandum of Law and Authorities is intended to provide Judges with an analysis of the 1988 Jessup Problem, the *Case Concerning State Responsibility for Certain Acts of Terrorism*. The Memorandum begins with a summary of the legal issues raised. Next, the Memorandum briefly discusses the sources of international law. (Because international law is a distinct system of law, unlike any municipal (*i.e.*, domestic) system, Judges who believe they are not currently well versed in international law are encouraged to review this section.) Finally, this Memorandum analyzes the Problem itself.

The analysis of the Problem is far from exhaustive. Its purpose is to highlight for Judges those issues the authors of the Problem believe are of central importance. It must be emphasized, however, that competitors -- who have had the opportunity to study the Problem for several months -- may conceive other approaches to the Problem.

Judges should consider not only the oral advocacy skills of each competitor, but also the competitor's knowledge of the law and legal reasoning ability. A more detailed discussion of the criteria to be applied to assess the performance of the competitors is provided under separate cover.

## II. SUMMARY OF THE PROBLEM

The Case Concerning State Responsibility for Certain Acts of Terrorism revolves around four issues presented to the International Court of Justice, two of which are presented by each State. First, the Republic of Yokum claims that the Confederation of Shangri has violated its international law obligations by failing to try or extradite the alleged terrorists, headed by Dr. Murpharius. Second, the Republic of Yokum claims that the Confederation of Shangri has violated minimum standards of State responsibility by allowing its territory to be used as a base of operations by terrorists for attacks on Yokum nationals both in Shangri and elsewhere.

The Confederation of Shangri claims, first, that the Republic of Yokum has violated international law by forcibly diverting a Shangri aircraft and abducting persons (Dr. Murpharius and other alleged terrorists) on board. Shangri also seeks the return of those persons. Finally, the Confederation of Shangri claims that it acted permissibly under international law when it released the remaining hijackers.

The Parties have referred the case to the Court pursuant to Article 36, paragraph 1, of the Statute of the

Court. Any contention that the Court lacks jurisdiction in this matter would be inappropriate.

Finally, no question of damages is presented to the Court. Any effort to plead damages also would be inappropriate.

## III. SOURCES OF INTERNATIONAL LAW

It cannot be emphasized enough that international law is a system of law separate from municipal law. Its rule creation and enforcement mechanisms are different. This section briefly discusses the sources of international law. Persons interested in a more complete analysis of the sources of international law may wish to see C. Parry, *The Sources and Evidences of International Law* (1965); G. Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law," *in* *Symbolae Verzijl* (1958); T. Elias, "Modern Sources of International Law," *in* W. Friedmann, L. Henkin & O. Lissitzyn, *Transnational Law in a Changing Society* (1972).

To begin with, international law is founded upon the consent of States. Except in certain extreme situations, or situations in which State conduct threatens the very fabric of the international community, an

international legal obligation may not be imposed upon a State without its consent.

When the International Court of Justice is requested to determine whether a State has committed a delictual act, the Court must first determine whether an international obligation has been violated, because States may engage in whatever activity is not prohibited by international law. Case Concerning the S.S. Lotus (Fr. v. Tur.), 1927 P.C.I.J. Ser. A/B, No. 10. To ascertain whether a rule of international law exists, the Court looks to Article 38, paragraph 1 of the Statute of the Court, which sets forth the sources of international law.

Article 38 provides as follows:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Although the sources of international law appear to be listed in a descending order of priority, they are in fact dynamic. This concept is more fully developed below.

A. Conventions As A Source of Law

There are two types of conventions (treaties): bilateral and multilateral. Bilateral conventions are clearly a source of law as to the two High Contracting Parties. Bilateral treaties are not usually considered a source of general international law when the reason for concluding them was to create an international obligation which did not exist under general international law. Bilateral extradition treaties, by which two States agree, under certain circumstances, to extradite an alleged offender, fall into this category of contract-law. Absent a bilateral agreement, and leaving multilateral conventions aside for the moment, general international law would not usually require the extradition of an alleged offender. (Of course, a State may agree to extradite an alleged offender where no treaty exists, but international law does not oblige States to do so.) The mere existence of a network of bilateral extradition treaties in and of itself has no general law-creating effect.

On the other hand, multilateral conventions with a large number of States Parties may be a source of

international law, either as evidence of what these States declare the law to be among themselves, or by setting forth a new rule of law by implication affecting all States. An example of a multilateral convention which is declaratory, rather than amendatory, of general international law is the set of 1907 Hague Conventions on the Laws of War. These conventions set out many rules of the general international law of armed conflict. Parts of the 1949 Geneva Red Cross Conventions can also be said to codify law observable in the practice of belligerents and their diplomatic correspondence. Thus, all States are bound by many of their substantive law rules, even though a handful of States are not Parties to those instruments. Similarly, the 1948 Genocide Convention declares that genocide violates international law. In this regard, it should be noted that the International Court of Justice in the Case Concerning Reservations to the Genocide Convention (Advisory Opinion), 1951 I.C.J. 15, held that all States were bound to observe the law respecting genocide, not just States Parties, since the Genocide Convention codified rules of international law from which no State may derogate.

In contrast, the General Agreement on Tariffs and Trade creates new rules which cannot be said to have existed under general international law. Its terms are binding only

upon States Parties. Perhaps the leading case on third party obligations under contract treaties is the _Case Concerning Free Zones of Upper Savoy and the District of Gex_ (Switz. v. Fr.), 1932 P.C.I.J. Ser. A/B, No. 46, involving a dispute as to France's ability to adjust its customs frontier in light of the 1815 Vienna Conference Final Act. France, of course, was a party to the Act, but Switzerland was not. The Court confirmed the rule that such multilateral conventions bind only States Parties and States which might otherwise have accepted those obligations.

Many multilateral conventions contain both elements. For instance, the Third United Nations Convention on the Law of the Sea declares the existing law with respect to most issues, including "innocent passage," fisheries, "exclusive economic zones" and so forth. In other parts, it creates new law, such as by declaring the seabed and subsoil of the oceans (outside territorial jurisdiction) to be the "common heritage of mankind." Another convention which contains both elements is the Vienna Convention on the Law of Treaties. In most respects, the Vienna Convention declares the rules of general international law applicable to treaty interpretation, such as the customary international law rule of _pacta sunt servanda_ (agreements must be honored) or the general principle of international

law *rebus sic stantibus* (fundamental change of circumstances vitiating treaties). However, the Vienna Convention also contains the principle of *jus cogens* (peremptory norms) -- a disputed principle of international law which might emerge in due course as an accepted principle or might prove to be a hollow concept. Therefore, when the Court looks to a multilateral convention which is both declaratory and amendatory of international law, it must avoid application of a newly-created international law rule to States which have not -- expressly or by implication of their conduct or diplomatic correspondence -- consented to be so bound.

As a final point, it should be noted that a conventional obligation need not be written. This was decisive to the Court's holding in the *Case Concerning the Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J., Ser. A/B, No. 53. Denmark claimed that Norway was precluded from asserting sovereignty over Eastern Greenland by virtue of assurances given by M. Ihlen, the Norwegian Foreign Minister. The Court found that in July 1919, the Danish ambassador at Christiana informed the Norwegian Foreign Minister that Denmark would not object to Norway's claim to Spitzbergen, then under discussion at the Paris Peace Conference. He also observed that the Danish Government, which was anxious to obtain recognition by all

interested Parties of Danish sovereignty over the whole of Greenland, was confident that the extension of Danish political and economic interests to the whole of Greenland "would not encounter any difficulties on the part of the Norwegian Government." On July 22nd, after he had informed his colleagues in Cabinet, M. Ihlen declared to the Danish ambassador (the so-called "Ihlen Declaration") "that the Norwegian Government would not make any difficulties in the settlement of this question." Denmark raised no objection to the status of Spitzbergen, which was granted to Norway. Later, Norway asserted sovereignty over a part of Eastern Greenland. The Court concluded that it is "beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Governnment in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs." Thus, the elements of a conventional obligation -- consent of the Parties to a particular undertaking -- were present and binding, even though unwritten.

In the Case Concerning Nuclear Tests (Aust. v. Fr.), 1974 I.C.J. 253, the Court went further with respect to unilateral acts, stating:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

Thus, a State may create an international legal obligation as a purely unilateral matter.

Whether the Court's view is still persuasive is open to question. For a thorough discussion of the effect of unilateral declarations, see A.P. Rubin, "The International Legal Effect of Unilateral Declarations," 71 Am. J. Int'l L. 1 (1977).

B. Custom As A Source of Law

States frequently choose to conduct themselves in certain ways because they believe they are bound to do so by international law and that, should they depart from that conduct, a delict is thereby committed. Therefore, the

conduct of States can be evidence of a customary rule of international law arising from "a general practice accepted as law." This concept was discussed by the International Court of Justice in the Asylum case, where the Court observed that:

> The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State [acting] and a duty incumbent in the [other] State.

1950 I.C.J. 266.

In the Case Concerning the Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, the Court found Albania responsible for explosions which occurred when British warships struck mines in the Corfu Channel off Albania, and held that Albanian sovereignty was not violated by the passage of those ships. With respect to the latter point, the Court noted that it is

> generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.

Before an act or assertion becomes a part of customary international law, it must have been accepted (or at least acquiesced in) for a substantial period of time by States. Thus, in the Case Concerning Anglo-Norwegian Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, the United Kingdom objected to Norway's delimitation of northern Norwegian territorial waters. In upholding the delimitation on the basis of customary international law, the Court noted that

> [t]he general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it. . . . The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.

Thus, the Norwegian assertion, which may have been inconsistent with international law at its inception, had evolved into customary international law.

Evidence of custom may be found, inter alia, in diplomatic correspondence, official instructions to diplomatic agents and military officers, acts of municipal legislation and decisions of a State's courts (upon the assumption that they would not knowingly violate an international legal obligation), and the published opinions of legal advisers to governments. It is not unknown that a

State may say one thing but conduct itself in a precisely opposite manner. In such a case, the State's conduct is the relevant factor.

The critical element to the creation of a customary rule of international law is that States generally conduct themselves in a certain way not as a mere policy choice, but because they believe they are bound to do so by international law. For a further discussion, see A. D'Amato, _The Concept of Custom in International Law_ (1971).

### C. General Principles of Law As a Source of International Law

International law is based upon the consent of States. This consent may be found in general principles of law, as evidenced by a legal principle being contained in the municipal law systems of States. In this sense, near universal private law rules may indicate principles of public international law. In the _Gentini Case_ (Italy v. Venez.), Mixed Claims Comm'n (1903), _reprinted in_ Ralston, _Venezuelan Arbitrations of 1903_ 720 (1904), for example, Venezuela argued that the Italian claim, based upon injury to its national, was barred by prescription. The umpire found that prescription was a part of the law of "civilized nations" and, therefore, was a general principle of law.

Application of a general principle was relied upon in the Case Concerning the Factory at Chorzow (Ger. v. Pol.), 1927 P.C.I.J., Ser. A, No. 9. In the course of finding it had jurisdiction over the matter (arising out of Polish expropriation of a factory in Upper Silesia), the Court observed, with respect to the Polish contention that the case should have been brought before the German-Polish Mixed Arbitral Tribunal, although Poland had previously objected to the jurisdiction of that tribunal when the plaintiff company sought relief there, that:

> It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him.

Id. at 31.

A State may be bound by the general principle of law respecting estoppel. In the Case Concerning the Temple Preah Viheah (Cam. v. Thai.), 1962 I.C.J. 6, the Court found that an ancient temple lay on the Cambodian side of a boundary which by treaty was to follow a specific watershed but was to be delimited by a mixed commission. The Court emphasized the fact that Thailand (then Siam) had requested

a map in 1907 from France, indicating the French view of the boundary. The map showed the temple to be on the French Indochina (now Cambodian) rather than the Thai side of the boundary. Thailand failed to raise an objection to the map or the French assertion. Thus, the Court found that Thailand had acquiesced in the Cambodian assertion of sovereignty for 40 years and was estopped from raising the claim.

Another illustration of a general principle is the international law principle of rebus sic stantibus, under which a State may be relieved of its obligation to be bound by the terms of a treaty when there has been a fundamental change of circumstances. This rule of treaty interpretation has its origin in municipal contract law and has been incorporated into public international law. (The principle of rebus sic stantibus has been codified in Article 62 of the Vienna Convention on the Law of Treaties.) It also has been applied to international arbitrations between a private party and a foreign State.

The critical element to the recognition of a general principle of law is its existence in most (but not necessarily all) legal systems.

## D. Judicial Decisions and Publicists As Sources of International Law

Article 38(1)(d) of the Statute of the Court recognizes judicial decisions and the teachings of the most highly qualified publicists as subsidiary means for the determination of rules of international law.

### 1. Judicial Decisions

The judgments of the International Court of Justice and its predecessor, the Permanent Court of International Justice, are but one source of judicial decisions. Also included in this category are the decisions of international arbitral tribunals and the highest courts of States.

Because the international legal system is based upon the sovereign equality of States, from a theoretical point of view there may not exist (without the express consent of States) a rule of stare decisis. Additionally, Article 59 of the Statute of the Court, providing that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case," is an international adoption of the principle of res judicata, and is itself irrelevant to the persuasiveness of prior opinions. It should be noted that any court can overrule itself, but the ICJ does so rarely, for the same reasons that the U.S. Supreme Court does so rarely.

Reasoned court decisions are highly persuasive, even though not technically binding. Thus, the Court may be influenced by its own reasoning in previous cases, even though it is not so required, and decide cases in a manner consistent with the rule of stare decisis. Municipal law courts are not bound to accept ICJ decisions unless the municipal legal order translates treaty commitments into municipal law.

Finally, the Court may look to the decisions of international arbitral tribunals and the highest courts of States as evidence of the rule of international law. If a large number of these municipal courts are in agreement -- and if there is little or no similar authority holding to the contrary -- the Court may conclude that the municipal judicial decisions reflect the position of States or general principles of law recognized by civilized nations.

2. Publicists

The Court also may look to publicists as a subsidiary source of law, not for their opinions on what the law should be, but rather as a statement of what norms constitute customary international law. Perhaps the best formulation of this principle was set forth by the Supreme Court of the United States in The Paquete Habana, 175 U.S. 677 (1900), in which it observed that

> where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Only a few publicists rise to the level of a source (albeit subsidiary) of international law. While Article 38(1)(d) refers to "the most highly-qualified publicists," it is not always easy to discern which scholars rise to this level.

E. Hierarchy of the Sources of International Law

The sources of international law are not to be applied based upon a rigid hierarchical conception. Generally, a treaty is the clearest indication of the consent of States. However, from the moment a treaty enters into force, States may begin the process of modifying its terms by subsequent practice. After a certain period of time, it would be difficult to conceive of the treaty as the appropriate source of law if State practice has been consistently different.

In the same vein, a general principle of law may emerge over time which conflicts with a treaty. In such a situation, the Court would attempt to determine which source of law most clearly reflects the consent of States. Take, for instance, the situation in which two States concluded a treaty in 1800 permitting the trade in slaves. By 1900, nearly all States had abolished slavery within their territory by municipal law, and there is much evidence that slavery was universally condemned on legal as well as moral grounds. The Court, therefore, undoubtedly would find the 1800 treaty unenforceable by virtue of general principles of international law.

Finally, it should be noted that if a new peremptory norm of general international law (jus cogens) emerges, the norm would render an inconsistent treaty obligation a nullity. This principle is codified in Article 64 of the Vienna Convention on the Law of Treaties, which provides: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

## IV. ANALYSIS OF THE CASE

### A. Whether the Confederation of Shangri Is Bound to Try or Extradite the Hijackers.

The Republic of Yokum seeks the trial or extradition of the hijackers of the cruise ship Hasdrubal from the Confederation of Shangri under one of the two regimes of international law: the law of "peace" or the law of "armed conflict." If the "peacetime" regime of international law is applicable to the facts, the 1979 Convention Against the Taking of Hostages (Hostages Convention) becomes the critical law. Alternatively, the "armed conflict" regime of international law may be applicable and, in particular, the fourth 1949 Red Cross Geneva Convention. The facts as applied to the law would dictate which regime is more appropriate.

#### 1. Regime of International Law of Peace.

Normally, the "peacetime regime" applies in international affairs. The international law rules most relevant to the 1988 Problem under the peactime regime are contained in the Hostages Convention. The Hostages Convention applies to

> 1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international

intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offense of taking of hostages ("hostage-taking") within the meaning of this Convention.

2. Any person who:

(a) attempts to commit an act of hostage-taking, or

(b) participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking

likewise commits an offense for the purposes of this Convention.

Article 1, Hostages Convention.

Under Article 8, the High Contracting Party in whose territory the alleged offender is found must try or extradite that person, without respect to the political motivation behind the hostage-taking. It provides:

> The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. These authorities shall take their decision in the same manner as in the case of any ordinary offense of a grave nature under the law of that State.

The relevant limitation to applying the Hostages Convention under the facts of the 1988 Problem is Article 12, which provides:

> In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Article 12, Hostages Convention. Thus, the Hostages Convention applies only when the 1949 Geneva Conventions and/or the 1977 Geneva Protocols, *i.e.*, the law of armed conflict, does not apply. As for the 1988 Jessup Problem, this would mean that in order to apply the Hostages Convention, the Court must find that the international law of peace is applicable, rather than the international law of armed conflict.

If the Hostages Convention applies to the facts of the 1988 Problem, the political motivation of the hijackers would be irrelevant.

For a further discussion of this issue, see Paust, "Extradition and United States Prosecution of the Achille Lauro Hostage-Takers: Navigating the Hazards," 20 Vand. J. Transnat'l L. 235 (1987).

2. Regime of International Law of Armed Conflict.

The facts of the 1988 Problem suggest that a new approach to coping with international terrorism might be applied. While the international community has focused almost exclusively on a criminal law analysis of terrorism in terms of the peacetime regime of international law, some have suggested that an alternative and legally simpler basis exists in the international law of armed conflict. See, e.g., Fourth Interim Report of the Committee on International Terrorism, in Report of the Sixtieth Conference of the International Law Association (1984); J.F. Murphy, The United Nations and the Control of International Violence: A Legal and Political Analysis 198-99 (1982); and A.P. Rubin, "Terrorism and the Laws of War," 12 Den. J. Int'l L. & Pol'y 219 (1983). But see Friedlander, "Comment:

Unmuzzling the Dogs of War," 7 Terrorism: An Int'l J. 169 (1984).

This formulation appears to apply to a large number of international terrorism situations, especially where, as in the 1988 Problem, the terrorists themselves assert that they are soldiers engaged in armed conflict. See, e.g., 1988 Problem at 2. However, neither the terrorists', the other affected governments', nor any third country or organization's categorization of the situation is binding on any international court or on any other party concerned.

International terrorism and armed conflict traditionally have not been considered within the same international legal framework, although they share the classical Clausewitzian objective: to impose one's political will on the enemy. This may be accounted for by the fact that war is conducted by "belligerents," i.e., organized groups capable of obeying the laws and customs of armed conflict, and terrorism is perpetrated by individuals. In the view of some, the emergence of modern transnational terrorism demonstrates that treating terrorists under a municipal criminal law regime has become problematic. According to this view, modern international terrorism may be seen as a form of international armed conflict which rightfully occupies a position on the international legal

continuum measuring use of force. _See_ Larschan, "Legal Aspects to the Control of Transnational Terrorism: An Overview," 13 Ohio N.U.L. Rev. 117, 134-48 (1986). Thus, certain instances of international terrorism may be treated as low intensity armed conflict.

The most relevant rules of the law of armed conflict, for purposes of the 1988 Problem, are contained in the 1949 Geneva Conventions, which have been ratified by nearly all States -- including the Confederation of Shangri and the Republic of Yokum. Each of the four Conventions has an express commitment by all States Parties to "search . . . and . . . bring . . . persons [alleged to have committed or ordered 'grave breaches'], regardless of their nationality, before its own courts . . . [or] hand such persons over for trial to another High Contracting Party concerned . . .." Thus, "universal jurisdiction" applies to "grave breaches."

Article 4 of the Civilians Convention defines protected persons as "those who, at a given moment and in any manner whatsoever, find themselves in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Article 13 expands that coverage to "cover the whole of the populations of the countries in conflict" for some purposes. It is not clear whether both definitions or only the Article

4 definition applies to define persons protected by the "grave breaches" provision, which says:

> Grave breaches . . . shall be those involving any of the following acts if committed against persons or property protected by the present Conventions: wilful killing, torture or inhuman treatment . . ., wilfully causing great suffering or serious injury to body or health . . ., taking of hostages and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.

3. 1977 Geneva Protocols.

Two "Protocols Additional to the Geneva Conventions of 12 August 1949 were signed by many countries on 10 June 1977. They enter into force only on ratification, and only among ratifying States. Several important States, including the United States, have refused to ratify one or both.

Protocol I applies only to international armed conflicts, but Article 1, paragraph 4 categorizes as international armed conflicts "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . .." Article 96, paragraph 3 of the Protocol provides that "the authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in

Article 1, paragraph 4 may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary . . .." The legal effect of such a declaration is stated to be that it brings the Conventions and the Protocol into force. This implies that the Conventions and Protocol are not in force in the absence of such a declaration despite the "objective" language of Article 1, paragraph 4. PACM has not made such a declaration "addressed to the depositary." Moreover, even if it had, neither Yokum nor Shangri are Parties to the 1977 Protocols and, thus, would not be bound by the PACM declaration or by "recognition" of PACM's status under the Protocol by any third party.

Nonetheless, the terms of Protocol I might be regarded as codifying the general international law that should apply in all cases of armed conflict extending beyond the borders of a single State, whether or not the conflict involves a supposed right of self-determination. If that is so, the terms of the Protocol apply to all parties to the conflict, including PACM. Article 51 of the Protocol provides significant protection to the civilian population and individual civilians during military operations. Article 75, paragraph 2 forbids hostage-taking, whether

committed by civilians or military agents. And Article 85, paragraph 3 categorizes making the civilian population or individual civilians the object of attack as a "grave breach" with the legal results that flow under the 1949 Geneva Convention. Under this analysis, Shangri would be legally obliged to try or extradite the PACM alleged offenders to another Party to the 1949 Geneva Conventions concerned with the incident, although not necessarily to Yokum.

Protocol II by its Article 1, paragraph 1 applies in all cases of armed conflict not covered by Protocol I in which the armed forces of a High Contracting Party are engaged with "organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." But Article 1, paragraph 2 says that the Protocol shall not apply to situations of internal disturbances involving only isolated and sporadic acts of violence "as not being armed conflicts." Assuming Protocol II applies to the situation in Shangri or in Midbari, it is difficult to see how it can apply to events in a Beilan-flag ship and to the State of Yokum. There is a gap in the scope of international agreements intended to

cover the entire armed conflict field. As a matter of general international law, the gap can be filled by either the general law of State responsibility, under which Shangri is obliged to enforce its criminal law in ways it clearly cannot, or to compensate the victims for that failure; or the law of armed conflict applies to the situation despite the denial of all parties concerned that they want that set of law to apply (along with its legal results); or there is an area of anarchy, in which the victims lose and unbridled force wins as each party nonetheless maintains the integrity of its favorite legal categories.

### B. Whether the Confederation of Shangri Has Violated Minimum Standards of State Responsibility By Allowing Its Territory to be Used As a Base of Attacks on Yokum Nationals Both in Shangri and Elsewhere.

Shangri's territory has been used by PACM as a base of operations from which it launches terrorist attacks on other States and the nationals of other States. Several States, including Yokum, have protested these attacks to the Shangri Government. Thus, the question is presented whether Shangri has violated an international legal obligation by allowing its territory to be used as a base of operations by terrorists.

The classic formulation of the rule of State responsibility was set forth in the Alabama Claims (U.S. v. U.K.) arbitration. During the American Civil War, which the Union considered criminal activity in time of peace and the Confederacy considered legally a "war," a number of war ships were built in England for use by the Confederacy. Despite repeated protests by the United States, these ships, including The Alabama, were allowed to leave English ports and preyed upon American merchantmen. The ships periodically were replenished in ports under the control of the British Empire. During and after the Civil War, the United States claimed that Britain had violated its international legal obligation. The claim was submitted to arbitration. The compromis for the arbitral tribunal set forth three principles of State responsibility, which may be summarized as follows:

1. A State must use "due diligence" to prevent the arming of a group "which it has reasonable ground to believe is intended to carry on [armed conflict] against a Power with which it is at peace; . . ."

2. "[N]ot to permit or suffer either [State or group engaging in armed conflict] to make use of its . . . [territory] as the base of . . . operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men."

3. "[T]o exercise due diligence in its own . . . [territory], and, as to all persons within its jurisdiction, to prevent any of the foregoing obligations and duties."

The rules of State responsibility are grounded upon customary international law. But it may also be seen as a necessary corollary of conventional law. Article 2, paragraph 4, of the United Nations Charter provides that

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State . . . .

If Yokum may not use force against PACM in Shangri, Shangri has an obligation to prevent PACM from attacking other States, including Yokum. Moreover, the argument can be made that at a certain point PACM becomes a surrogate of the Government of Shangri and, therefore, Shangri itself violates Article 2, paragraph 4. For an excellent discussion of State responsibility in the context of terrorism, see Lillich & Paxman, "State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities," 26 Am. U.L. Rev. 217 (1977).

An exception to this rule is the question of Shangri's "effective control" of the territory in which PACM operates. International law may relieve Shangri of its liability for violation of the rules of State responsibility

if an armed group with a requisite (but not necessarily quantifiable) degree of political organization is in control of the territory in question. See The Arantzazu Mendi, 1939 A.C. [H.L.] 256.

It is possible under the facts of the 1988 Problem that Shangri does not exercise effective control over the territory occupied by PACM; that PACM has at least temporarily achieved the requisite degree of political control to be responsible itself for its actions, to the relief (and detriment to the sovereignty) of Shangri.

C. Whether the Republic of Yokum Has Violated International Law By Forcibly Diverting a Shangri Aircraft and Abducting Persons On Board.

Three days after Yokum made a formal demand to Shangri to try or extradite the hijackers, the Saq Ambassador to Shangri made a similar demand on Shangri. 1988 Problem at 5. "However, the President and Minister of Justice of Saq stated to the news media on the same day that 'these heroes of the Revolution are obviously innocent. We seek their extradition in order to have the honor of setting them free.'" Id.

The Shangri government requisitioned a Shangri National Airlines aircraft, which took off from Taluba (Shangri's capital city) bound for Saq, carrying

Dr. Murpharius and two other hijackers. _Id_. While over international waters, fighters from the _Jimenez_, a Yokum aircraft carrier, intercepted the Shangri plane and forced it to land in Beilan. _Id_. The Yokum anti-terrorist "Tiger" strike team stormed the plane and captured the hijackers. _Id_. at 5-6.

Several issues are presented:

1. Whether or Not Any of the Aircraft Hijacking Conventions (Tokyo, Hague & Montreal) Apply.

There are three multilateral treaties concerning aircraft hijacking -- the Convention on Offenses and Certain Other Acts Committed On Board Aircraft (Tokyo Convention), the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention) -- to which both Yokum and Shangri are States Parties. However, it is doubtful whether these conventions apply to the facts of the 1988 Problem, since the Shangri aircraft was government-requisitioned and, arguably therefore, in police, _i.e._, public service, rather than subject to the regime of civil aviation. [One argument to the contrary is that a Shangri national airlines aircraft must be classified as civil aviation.]

2. Whether Yokum Had Violated International Law By Engaging in Self-Help to Capture Dr. Murpharius and the Other Two Hijackers.

There are two aspects to this issue. First, whether Shangri was acting consistently with its international obligations by extraditing the hijackers to Saq. Second, if not, whether international law prohibits Yokum from diverting the Shangri aircraft and seizing the three hijackers on board.

a. The extradition to Saq.

Both the Hostages Convention and the 1949 Geneva Conventions contain the principle of universal jurisdiction, i.e., any State may assert jurisdiction over the alleged offenders. While the universal jurisdiction principle of the Hostages Convention is unqualified, universal jurisdiction under the 1949 Geneva Conventions is qualified to the extent that the demanding State be "concerned." Under the facts of the 1988 Problem, it is unclear whether Saq is a "concerned" Party. Thus, Saq might have standing to make a demand under the Hostages Convention; but perhaps not under the 1949 Red Cross Geneva Conventions.

A deeper problem exists with respect to the extradition of Dr. Murpharius and the two other hijackers to Saq. Under customary international law, and as codified by

Article 26 of the Vienna Convention on the Law of Treaties, a State is bound to perform its treaty obligations in good faith. The statement by the Saq President and Minister of Justice that "these heroes of the Revolution are obviously innocent. We seek their extradition in order to have the honor of setting them free," 1988 Problem at 5, may indicate that Saq is making the extradition request in bad faith. Moreover, to the extent that Shangri is aware of this statement, it may also indicate that Shangri is acting inconsistently with its international obligations by extraditing Dr. Murpharius and the two other hijackers to Saq.

b. Diversion of the Shangri Aircraft.

Assuming that Yokum had sufficient reason to believe that Shangri and/or Saq acted inconsistently with international law with respect to the attempted extradition of the hijackers to Saq, the question arises whether Yokum violated international law by forcibly diverting the Shangri aircraft.

The general rule of international law is that States must refrain from the use of force in the conduct of their international relations. Under the facts of the 1988 Problem, Shangri would argue that the use of force by Yokum (in diverting the aircraft) was prohibited by general

international law and, in particular, Article 2, paragraph 4 of the U.N. Charter. Yokum would argue that its action was permissible on two somewhat related grounds. First, the aircraft diversion and seizure of the hijackers did not violate Article 2, paragraph 4, which, as previously noted, provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."

As Professor Oscar Schachter has observed, "[i]t is generally assumed that the prohibition was intended to preclude all use of force except that allowed as self-defense or authorized by the Security Council under Chapter VII of the Charter. Yet the article was not drafted that way. The last twenty-three words contain qualifications." Schachter, "The Right of States to Use Armed Force," 82 Mich. L. Rev. 1620, 1625 (1984). Professor Schachter goes on to note that governments and scholars, as well as the International Court of Justice in the Corfu Channel Case, supra, have rejected the argument that the qualifying language of Article 2, paragraph 4 justifies the use of force solely to vindicate or secure a legal right, on the ground that it is not directed against the territorial

integrity or political independence of a State and it is consistent with U.N. purposes. Hence it would follow that Yokum could not use armed force against Shangri on the sole ground that Shangri had failed to fulfill its obligations under the Hostages Convention. Nor, *a fortiori*, could Yokum use force against Shangri by way of reprisal for its violation of that Convention. *See* Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations, Oct. 24, 1970, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1971) ("States have a duty to refrain from acts of reprisal involving the use of force.").

The hijacking of the Shangri aircraft, however, may present a special case. Arguably Shangri had not only failed to fulfill its obligations under the Hostages Convention, but had also become an accomplice of the terrorists by "extraditing" them to Saq, which had declared publicly that it would set them free. Under these circumstances Yokum may have been entitled to use force limited to the extent reasonable under the circumstances. It is important to note that the threat or use of force was not directed against Shangri territory or against Shangri's political structure. (However, some may argue that the

plane was an extension of Shangri territory.) Nor was this threat of force, designed to prevent the escape of terrorists, inconsistent with the purposes of the United Nations. Moreover, arguably nations can threaten more force than they can use. _See_ Report of the Committee on the Use of Force in Relations Among States, _Proceedings of the American Branch of the International Law Association_ 188, 195 (1985-86). Had the Yokum planes fired on Shangri's airliner, a closer case may have been presented.

Assuming that Article 2, paragraph 4 of the U.N. Charter should be interpreted as prohibiting any threat or use of force except in self-defense or in accordance with an authorization from the Security Council, a good case can be made that the Yokum action is justifiable under Article 51 of the Charter, which declares that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs." U.N. Charter Article 51. Although the point is debatable, the taking of Yokum hostages and the murder of the Yokum national arguably constituted an armed attack on Yokum. Recourse to peaceful means had been exhausted when Shangri declined to extradite or prosecute the terrorists and instead participated in what amounted to their attempt to escape. Time did not permit recourse to the Security

Council. The use of force was thus necessary to prevent the escape of the terrorists. In addition, it was the minimum amount necessary to effect the capture and therefore proportionate with the goal. Finally, it did not constitute a reprisal against Shangri because there was no punitive intent with regard to Shangri. It should be noted that reprisals are not limited to periods of armed conflict and may occur during periods of peace. For a further discussion of this issue, see J.F. Murphy, "The Future of Multilateralism and Efforts to Combat International Terrorism," 25 Colum. J. Transnat'l L. 35, 80-83 (1986).

A little-noticed but rather ingenious argument has been made that there exists in international law another self-help category, clearly based on analogy to a category of self-help permissible in the municipal legal systems of many countries. Its only analyst to date has labeled this theory "rectification." See Sheehan, "The Entebbe Raid," 1 Fletcher For. 135 (1979). Under this analysis, a State, like an individual, must be permitted to act in its own interest to discharge the duty of a second State (or individual) whose failure to perform its own duty will result in irreparable harm to the acting State. Thus, in the Entebbe situation, Israel must be permitted to do for Uganda what Uganda was legally bound to do but which it

could not or would not do, when the result of the Ugandan failure would be an injury to Israel which could not be adequately compensated by Uganda.

Any discussion of the permissibility of forcing the Shangri plane to land in Beilan is wholly irrelevant. Beilan is not a Party to the present case and, so far as the 1988 Problem provides, did not protest Yokum's action. Beilan has not asked to intervene in the case, as it may have pursuant to Article 62, paragraph 1 of the Statute of the Court.

There is no substance to the contention that either Beilan or Saq, or both, are indispensable third parties to the case.

### D. Whether the Confederation of Shangri is Justified in Releasing the PACM Hijackers.

The government of Shangri could advance at least three arguments to support the legality of its release of the PACM hijackers: (1) that the acts they committed constituted "political offenses;" (2) that their release constituted a legal "reprisal" in response to Yokum's prior illegality in intercepting the Shangri aircraft; and (3) that the Government of Shangri had promised the hijackers they would grant them asylum in order to prevent them from killing the passengers on the ship. Each of these

arguments, as well as possible responses thereto, will be considered in turn.

1. The Political Offense Exception.

The political offense exception is a complex subject, a full discussion of which is beyond the scope of this Memorandum. (For a detailed discussion, see Larschan, "Extradition, the Political Offense Exception and Terrorism: An Overview of the Three Principal Theories of Law," 4 B.U. Int'l L.J. 231 (1986).) For present purposes it suffices to note that, under the terms of most extradition treaties and often pursuant to national legislation, a State requested to extradite a person accused of a crime is not obligated to do so if the crime in question constitutes a "political offense." Many definitions of international terrorism include political motivation as an integral element of the offense. Accordingly, the political offense exception often constitutes a major obstacle to the extradition and prosecution of terrorists.

Moreover, the Hostages Convention does not explicitly preclude a State Party from invoking the political offense exception in order to avoid extradition. To be sure, under the Hostages Convention there exists a general obligation to submit a case for prosecution if a State Party does not extradite. But Shangri might argue

that, even with this general obligation, it retains the right to grant political asylum. Since the hijackers are accused of a political crime, Shangri might argue, a grant of political asylum is permissable.

Assuming arguendo that the law of armed conflict applies to this situation, it is highly doubtful that Shangri could justify its release of the PACM hijackers on the basis of the political offense exception.

With respect to the law of armed conflict, however, an additional complication arises. The 1988 Jessup Problem at 6 indicates that, although Yokum has ratified the four 1949 Geneva Conventions, it has not yet enacted them as municipal law. Hence Shangri could argue that, Yokum having breached its obligation to give effect to the Conventions under its municipal law, Shangri may suspend its obligation to comply with the convention until Yokum does. Article 60 of the Vienna Convention on the Law of Treaties might be cited in support of this proposition. On the other hand, Yokum may argue that either (1) this is a matter of municipal law and does not effect Shangri or Yokum's international obligations or (2) Yokum constitutional law may not require an enacting statute to make the four 1949 Geneva Conventions applicable as a matter of Yokum municipal law. Notwithstanding these arguments, Yokum could also

argue that the obligations of the four 1949 Geneva Conventions have become part of customary international law, and bind Shangri to submit the hijackers to prosecution even if it is entitled to suspend its obligations under the Conventions with respect to Yokum.

2. The Reprisal Argument.

Shangri could argue that it released the hijackers under its control consistently with international law as a matter of reprisal. A reprisal is an act by one State which would ordinarily be impermissible under international law, but which may be justified as a response to a breach of international law by another State. The classic case of reprisal is the Naulilaa Incident (Por. v. Ger.), 8 Rec. des decis. des trib. arb. mixtes 409 (1928). With respect to reprisal, the arbitral tribunal of three Swiss lawyers stated:

> Reprisals are an act of self-help on the part of the injured State, responding after an unsatisfied demand to an act contrary to international law on the part of the offending State . . . . They would be illegal if a previous act contrary to international law had not furnished the reason for them. They aim to impose on the offending State reparation for the offense or the return to legality in avoidance of new offenses.

The tribunal went on to observe that there was also a requirement of "a certain proportion between the offense and the reprisal . . . ."

More recently, reprisal was discussed in section 905 of the _Restatement (Revised) of the Foreign Relations Law of the United States_, which observes:

> § 905. Unilateral Remedies
>
> (1) Subject to Subsection (2), a state victim of a violation of an international obligation by another state may resort to countermeasures that might otherwise by unlawful, if such measures
>
> (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and
>
> (b) are not out of proportion to the violation and the injury suffered.
>
> (2) The threat or use of force in response to a violation in international law is subject to prohibitions on the threat or use of force in the United Nations Charter as well as to Subsection (1).

Thus, measures of self-help, or reprisal, as they are traditionally called in situations such as this, require a prior violation of international law; a need to terminate or remedy the violation or to prevent future violations; and proportionality between the violation and the reprisal. Here Shangri could argue that all of these criteria were met because Yokum's interception of the airliner was illegal and because release of the hijackers should help deter such acts in the future and is proportional to Yokum's violation, especially since, unlike Yokum, Shangri did not resort to the use of armed force.

The validity of Shangri's argument will turn in part on whether Yokum's interception of the airliner was illegal (*See* the previous section). Assuming *arguendo* that the interception was illegal, Yokum could argue that release of the hijackers was nonetheless impermissible because prosecution of the hijackers was an obligation owed to the world community as a whole (*erga omnnes*), not just to Yokum. There is also some authority for the proposition that a reprisal is impermissible where an agreement between the parties provides for arbitration or judicial settlement. Article 16 of the Hostages Convention provides for reference of disputes arising under the Hostages Convention to the International Court of Justice. To the contrary, other authorities contend that a victim State should not be required to engage in lengthy and expensive litigation before it may suspend its performance in the event of a breach.

3. Shangri's Promise to the Hijackers.

Although there is little or no authority to support this proposition, States have argued in the past that they were obliged to honor a promise made to hostage-takers to provide them with political asylum in exchange for release of their hostages unharmed. Indeed, some arguments to this affect were made in support of Egypt's providing an escape

plane to the hijackers of the Italian cruise ship _Achille Lauro_. The rationale behind this contention is two-fold. First, if a State makes a pledge, even to private parties, it is obligated to carry out that promise under the international law doctrine of _pacta sunt servanda_. Second, such promises must be honored for humanitarian reasons; otherwise in the future hostage-takers will simply kill their hostages, or at the least be less likely to release them unharmed in response to Governments' promises of asylum.

As to the first argument, Yokum might respond that international law does not apply to an agreement between a State and a private party and that, in any event, this agreement was void under Article 52 of the Vienna Convention on the Law of Treaties because it was procured by the threat of force in violation of principles of international law. As to the second, Yokum might contend that providing safe haven for terrorists hardly serves humanitarian principles. On the contrary, it encourages terrorists to engage in future acts of terrorism, thus increasing the sum total of human misery.