

THE 1988 PHILIP C. JESSUP
INTERNATIONAL LAW MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE

February Term 1988

REPUBLIC OF YOKUM

Applicant

v.

CONFEDERATION OF SHANGRI

Respondent

MEMORIAL FOR THE APPLICANT

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JURISDICTION

Pursuant to Article 36(1) of the Statute of the International Court of Justice, the governments of Yokum and Shangri have agreed to submit to the jurisdiction of this Tribunal. In accordance with Articles 36 and 38 of the Statute, the Court may settle all questions presented in the Compromis.

QUESTIONS PRESENTED

I

Whether Shangri breached its duty either to try the hijackers of the Hasdrubal or to extradite them for trial.

II

Whether Shangri is internationally responsible to Yokum for allowing armed bands to use its territory as a base for attacks on Yokum nationals, both within Shangri and elsewhere.

III

Whether Yokum was justified in diverting the Shangri aircraft and abducting the terrorists on board as an act of self-help.

STATEMENT OF FACTS

The Republic of Yokum has been the victim of numerous, unprovoked attacks against its nationals by the People's Armed Conflict Movement (PACM). PACM is a well-organized and heavily armed band. PACM's purported purpose is to establish itself as a government in the territory of Midbari. Over 140 States, including Yokum, refuse to recognize PACM as Midbari's legitimate government; only four States accord PACM such recognition.

PACM enjoys a safe haven within the territory of Shangri, to which its members return after terrorizing innocent civilians. Yokum and other States have repeatedly notified Shangri through diplomatic channels of these attacks and of the whereabouts of the attackers. Shangri admits the existence of the situation, but openly refuses to take any action to remedy the problem. Shangri thereby has insured that PACM will continue to launch attacks from its territory.

On 13 February 1987, PACM attacked a Bellan-registered cruise ship, the Hasdrubal. Over 200 of the ship's 350 passengers were Yokum nationals; the remainder were from ten other States. Five of the seven PACM hijackers boarded the ship at Taluba, a Shangri port. While the ship was in international waters, the hijackers seized control using automatic weapons and explosives. The hijackers murdered two crew members and a Yokum national. For more than two days, the survivors were held hostage and threatened with death. The PACM members' used these repeated acts of violence and terror merely to generate publicity for their "cause". Throughout, PACM directed and controlled the hijackers via radio from its headquarters in Shangri. While on board the Hasdrubal, the hijackers' leader admitted that he was acting strictly under orders from his superiors at PACM headquarters in Taluba.

Finally, on 15 February 1987, PACM headquarters in Shangri radioed the ship to dock in Taluba. After docking, the hijackers were welcomed by cheering supporters. The next morning after the celebration had ended, officials of Shangri eventually took the hijackers into custody.

On 18 February 1987, Yokum presented Shangri with a timely request for extradition of the hijackers. Yokum asked Shangri to honor its obligations under the four 1949 Geneva Conventions and the Hostages Convention. Shangri did not reply to this request. Three days later on 21 February 1987, Saq, another State, requested receipt of the hijackers. The same day, the President of Saq publicly announced that his country believed the hijackers were heroes who should be set free.

On 1 March 1987, an aircraft, requisitioned by Shangri's government to deliver three of the hijackers to freedom, departed for Saq. Faced with a situation that demanded immediate action, Yokum intercepted the aircraft over international waters and took custody of the hijackers. A Yokum Justice Department spokesman announced that the three hijackers would be tried for their crimes in a proper Yokum court. Shangri then granted asylum to the criminals who remained in its care. Shangri has requested that Yokum return the other criminals so that they also may enjoy asylum in Shangri.

On 1 April 1987, the Governments of the Republic of Yokum and the Confederation of Shangri, in accordance with Article 40 of the Statute of the Court and Article 38 of the Rules of the Court, notified the Registrar of the International Court of Justice that they were submitting the matter by special agreement to the jurisdiction of the Court under Article 36, paragraph 1, of the Statute of the Court.

SUMMARY OF PLEADINGS

Shangri had a duty under international law to extradite or prosecute the PACM hijackers. Since Shangri did not elect to prosecute the hijackers themselves, it should have extradited to Yokum since Yokum satisfied the two requirements under international law for extradition of the PACM hijackers: a valid jurisdictional claim and a treaty obligation to try or extradite. Shangri did not satisfy its duty to extradite by sending the hijackers to a State whose express intention was to set them free rather than to submit them to the proper authorities for prosecution.

Shangri breached its duty under the Hostages Convention and customary international law to prevent the use of its territory as a base for attacks on alien nationals in three ways. First, Shangri failed to exercise due diligence by openly refusing to take any action against PACM when other States, including Yokum, complained of its attacks on their nationals and specified the location of the offenders. Second, Shangri was PACM's accomplice because it assisted PACM by openly refusing to discharge its duties of prevention. Third, PACM's acts are attributable to Shangri since PACM exercised elements of governmental authority in Shangri's territory in the absence of the official authorities.

Yokum was justified in diverting the Shangri aircraft carrying the hijackers to Saq. This action was a necessary and proportional act of anticipatory self-defense: a narrowly-tailored response to a narrowly-defined circumstance.

Shangri has no discretion to grant asylum to hijackers. It gave up this right when it became a party to the Hostages Convention. Shangri breached its duty to prosecute the PACM hijackers when it granted asylum to the four remaining in its custody.

Yokum has strengthened world public order by effectively ensuring that they are arrested and tried in a court of law. This Court should recognize that, in the absence of other effective instruments of enforcement, Yokum's actions were necessary to bring the hijackers to justice.

PLEADINGS AND AUTHORITIES

I. SHANGRI COMMITTED A GROSS VIOLATION OF INTERNATIONAL LAW BY FAILING IN ITS DUTY EITHER TO TRY THE HIJACKERS OF THE HASDRUBAL OR TO EXTRADITE THEM FOR TRIAL.

Shangri failed to respond to Yokum's valid request for the extradition of the hijackers of the Hasdrubal pursuant to a treaty. Yokum's request for extradition met the two conditions required under international law: the existence of an extradition treaty between Yokum and Shangri,¹ and a valid basis for Yokum's assertion of jurisdiction over the accused criminals.² Yet Shangri neither extradited the hijackers nor prosecuted them. Instead, it tried to send them to Saq, where it knew they would be set free.

A. Shangri Breached Conventions Which Require It to Try the Hostage-Takers or Extradite Them for Trial.

Extradition is an important device in the international community because of the interdependence of nations, the common international desire to suppress criminality, the need to discourage a show of arms to retrieve fugitives, the concern for public world order, and the acknowledgement that private and public wrongs now touch more than one nation.³ "The basic tradition of international law applicable with respect to fugitives from justice is one of cooperation between nations to enhance their capacity to maintain the lawful order and security upon which all liberty ultimately depends."⁴

Yokum bases its extradition claim on the International Convention Against the Taking of Hostages⁵ to which both Yokum and Shangri are parties. (C. 4-5) Shangri, as a

¹Note, An Analysis of the Achille Lauro Affair: Towards an Effective and Legal Method of Bringing International Terrorists to Justice, 9 Fordham Int'l L.J. 328, 338 (1986).

²Id.

³Basslouni, International Extradition in American Practice and World Public Order, 35 Tenn. L. Rev. 1, 2 (1968).

⁴Sofaer, The Political Offense Exception and Terrorism, 15 Den. J. Int'l L. & Pol'y 125, 126 (1986).

⁵International Convention Against the Taking of Hostages, done at New York, 17 December 1979, G.A. Res. 34/146, 34 U.N. GAOR, Supp. (No. 46) 245, U.N. Doc. A/Res.34/146 (1979), 18 ILM 1456 (1979).

signatory State, agreed "that the taking of hostages is an offence of grave concern to the International community and that, in accordance with the provisions of this Convention, any person committing an act of hostage-taking shall either be prosecuted or extradited."⁶ The drafters of the Convention disputed its applicability to hostage-taking by liberation movements,⁷ but the final document provides that the parties have the duty to try or extradite for trial all hostage-takers.⁸

All the elements necessary for the application of the Hostages Convention to the hijacking of the Hasdrubal are present. The first element, that another person be seized or detained,⁹ was satisfied when seven PACM members seized control of the Hasdrubal and the persons on board. (C. 1) The second element, a threat to kill or injure that person,¹⁰ was fulfilled when the hijackers actually killed three innocent individuals on board the ship, and then threatened to kill the passengers shortly before docking at Taluba. (C. 1, 4) Finally, the third element, to compel a third party, such as a State, to do or not to do an act which is linked to the release of the hostages,¹¹ was met when the hijackers conditioned the hostages' safety on no State attempting a rescue, (C. 2), and when the hijackers threatened to kill the passengers unless Shangri granted them asylum. (C. 4) Therefore, Shangri was obligated to try or extradite them.

The Hostages Convention provides two exceptions to the obligation to try or extradite, neither of which apply to the present dispute. Article 9 allows a State to refuse to extradite a fugitive if it has substantial grounds for believing "that the request for

⁶Id., preamble, para. 4.

⁷Verwey, The International Hostages Convention and National Liberation Movements, 75 Am. J. Int'l L. 69 (1981).

⁸Id. at 92.

⁹Hostages Convention, supra note 5, art. 1, para. 1.

¹⁰Id.

¹¹Id.

extradition . . . has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion."¹² No facts before this Court support the notion that Article 9 prohibits extradition to Yokum.

Article 12 provides an exceedingly narrow exception which permits suspension of the Convention when the Geneva Conventions of 1949 or the Additional Protocols¹³ apply. In such cases, article 12 states that "the present Convention shall not apply to an act hostage-taking committed in the course of armed conflicts . . . in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination."¹⁴

The Geneva Conventions of 1949, if applicable, impose a duty on a State in possession of hostage takers to try or extradite for trial, if the hostages were seized as part of an armed conflict involving a people's right to self-determination.¹⁵ Shangri cannot claim that PACM's seizure of innocent passengers on a Bellan cruise ship sailing in international waters was part of an armed conflict between PACM and Midbari. Therefore, the Geneva Conventions do not apply. Whether this Court finds that the Geneva Conventions of

¹²Id., art. 9, para. 1(a).

¹³Convention (I) for the Amelloration of the Condition of the Wounded and Sick of Armed Forces in the Field, signed at Geneva, 12 August 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114, T.I.A.S. No. 3362; Convention (II) for the Amelloration of the Condition of the Wounded, Sick and Shipwrecked of Armed Forces at Sea, signed at Geneva, 12 August 1949, 6 U.S.T. 3217, 75 U.N.T.S., 85 T.I.A.S. No. 3363; Convention (III) Relative to the Treatment of Prisoners of War, signed at Geneva, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, T.I.A.S. No. 3364; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, signed at Geneva, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, T.I.A.S. No. 3365. At its 4th session, the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts adopted, on June 8, 1977, the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 72 A.J.I.L. 457 (1978); and the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 72 A.J.I.L. 502 (1978).

¹⁴Hostages Convention, supra note 5, art. 12.

¹⁵Geneva Convention IV, supra note 13, at art. 146-47.

1949 or the Hostages Convention applies to the instant situation, Shangri was under a duty to try the hijackers or extradite them for trial.

B. Shangri Violated Its Duty to Extradite the Hijackers to Yokum because Yokum had a Valid Jurisdictional Claim Over the Hijackers.

The State requesting extradition must show that it has jurisdiction over the fugitive before the asylum State can grant an extradition request.¹⁶ The asylum State will not comply unless it determines that the requesting State has "jurisdiction over the subject matter and over the individual if and when that person is returned to face those charges alleged in the request."¹⁷ Yokum has jurisdiction over the hijackers based on both the passive personality and the universality theories of jurisdiction.

1. Yokum has Jurisdiction Over the Hijackers Based on the Passive Personality Theory.

Under the passive personality theory, a State may assert jurisdiction over any offender who harms or threatens one of the State's citizens abroad.¹⁸ In this instance, the terrorists threatened over 200 Yokum nationals with harm, and murdered one of them. (C. 1) Shangri, as a party to the Hostages Convention, has explicitly agreed that the passive personality theory of jurisdiction applies in cases of hostage-taking. In fact, all parties to the Convention agreed that the theory was appropriate for this purpose. Article 5 (1)(d) of the Hostages Convention empowers Yokum to establish jurisdiction over offenses involving the taking of its nationals as hostages.¹⁹

The passive personality jurisdiction theory has long been recognized and used by civil law countries.²⁰ Common law States, conscious of the numerous occasions when

¹⁶M.C. Bassiouni, International Extradition and World Public Order 203 (1974).

¹⁷Id. at 203-04.

¹⁸I. Brownlie, Principles of Public International Law 296 (2d ed. 1973).

¹⁹Hostages Convention, supra note 5, art. 5, para. 1(d).

governments have been held ransom by threats of violence against their nationals, have increasingly accepted the theory over the last two decades. Even the United States, once the chief opponent of the doctrine,²¹ now vigorously advocates this jurisdictional theory.²²

This Court should recognize the passive personality theory. The doctrine should, at the very least, be applied for the limited purpose of securing the safety of a State's nationals from terrorist acts abroad. Terrorists should not be allowed to escape criminal liability through a jurisdictional loophole, and should be held accountable to the State whose citizens they harm. "For while it may be too much to ask an average citizen to be familiar with all of the criminal laws of every country, it is not unrealistic to assume he would realize that committing a terrorist act might subject him to foreign prosecution."²³

2. Yokum has Jurisdiction Over the Hijackers Based on the Universality Theory of Jurisdiction.

Yokum also has jurisdiction over the fugitives based on the universality theory which allows States to assert jurisdiction over fugitives when the nature of their crimes justifies their repression as a matter of international policy.²⁴

The international community recognizes certain principles which safeguard values of vital importance for humanity and correspond to fundamental moral principles: these principles are of concern to all States and protect interests which are not limited to a particular State or group of States, but belong to the community as a whole.²⁵

²⁰Dickinson, Introductory Comment to the Harvard Research Draft Convention on Jurisdiction with Respect to Crimes, 29 Am. J. Int'l L. Supp. 519 (1935).

²¹J. Moore, Digest of International Law, Sec. 201 (1906).

²²United States v. Benitez, 741 F. 2d 1312 (11th Cir. 1984); U.S. v. Layton, 509 F. Supp. 212 (N.D. Cal. 1981); U.S. v. Marino-Garcia, 679 F. 2d 1373 (11th Cir. 1972).

²³Note, Bringing the Terrorist to Justice: A Domestic Law Approach, 11 Cornell Int'l L.J. 71, 79 (1978).

²⁴I. Brownlie, supra note 18, at 297.

²⁵Jimenez de Arechaga, 159 Rec. des Cours 9, 64-67 (1978-I).

These universal interests include the prohibition against hostages-taking,²⁶ piracy, and war crimes.²⁷

The same rationale which places piracy within universal jurisdiction also applies to hijacking. "Hijacking threatens international communications to the same extent as piracy; it is an attack on international order and injures the international community as a whole, which means that all States have a legitimate interest in repressing it."²⁸ Yokum had jurisdiction over the fugitives entitling it to an affirmative response to its extradition request.

C. Shangri Did Not Satisfy Its Duties Under the Hostages Convention by Releasing Three of the Hijackers to Saq.

Under the Hostages Convention, Shangri had two choices upon taking the hijackers into custody. Shangri could either extradite the hijackers to a nation that intended to prosecute them;²⁹ or prosecute the hijackers itself.³⁰ Shangri chose instead to flout its treaty obligations and send the fugitives to Saq.

Shangri's act of sending three of the fugitives to Saq was not within the definition of extradition. Extradition is commonly defined as:

a process by which, in accordance to treaty provisions and subject to its limitations one State requests another to surrender a person charged with a criminal violation of the laws of the requesting State who is within the jurisdiction of the requested State, for the purposes of answering criminal charges, stand[ing] trial or execut[ing] a sentence arising out of the stated criminal violation.³¹

Shangri's action also does not serve the recognized purposes of extradition. "The object of extradition is to prevent serious crimes from going unpunished, by securing the return of

²⁶Id.

²⁷Akehurst, Jurisdiction in International Law, 46 Brit. Y.B. Int'l L. 145, 160 (1972-73).

²⁸Id. at 162.

²⁹Hostages Convention, supra note 5, preamble, para. 4.

³⁰Id. art. 8, para. 1.

³¹Basslouni, supra note 16, at 27.

persons accused of crime to the country from which they fled in a bid to escape trial and punishment."³²

Shangri was aware that Saq had no intention of trying the fugitives. (C. 5) Shangri was required under international law to use good faith in executing its treaty obligations³³ under both the Hostages Convention and the Geneva Conventions of 1949. A recent Security Council Resolution unequivocally condemned all acts of hostage-taking, and demonstrated the importance of adhering to the obligations of the Hostages Convention.³⁴ Shangri's action in sending the fugitives to Saq did not satisfy Shangri's obligation to try or extradite for trial.

D. Yokum's Right to Extradition Is Superior to Saq's Since Its Interest in Prosecuting Them is Greater.

The U.N. Security Council considers hostage-taking an offense "of grave concern to the international community, having severe adverse consequences for the rights of the victims and for the promotion of friendly relations and co-operation among States."³⁵ Therefore, Yokum's desire to bring the hijackers to trial is consistent with international traditions as they have evolved in the last two decades. Saq's intention to treat the hijackers as innocent heroes, (C. 5), would have undermined extradition as an international institution. Yokum's interest in extraditing the hijackers is greater and should prevail over Saq's. Yokum is entitled to the extradition of the hostage-takers because it is a party to a treaty which requires extradition, and because it has two strong jurisdictional bases for its extradition request.

³²Kassim-Momodu, Extradition of Fugitives by Nigeria, 35 Int'l & Comp. L.Q. 512, 513 (1986).

³³U.N. Charter art. 2, para. 2; Vienna Convention on the Law of Treaties, done at Vienna 23 May 1969, art. 26 and art. 31, para. 1, U.N. Doc. A/CONF. 39/27 (1969), 63 A.J.I.L. 875 (1969), 8 ILM 679 (1969).

³⁴U.N. Security Council Resolution Condemning Hostage-Taking and Abduction, S.C.Res. 579 (XL 1985), reprinted in 25 ILM 243 (1986).

³⁵id.

Shangri must overcome two obstacles to defeat Yokum's claim that its right to extradition is superior to Saq's. First, Shangri must show that it was party to a treaty with Saq that governed and permitted the extradition. Second, Shangri must demonstrate that Saq's interest in the events on board the Hasdrubal allowed Saq to assert jurisdiction over the hijackers.

There are no facts before this Court by which Shangri can prove that Saq's jurisdictional claim is superior to Yokum's. Saq cannot invoke the territorial theory of jurisdiction because the hijacking occurred on a Bellan ship while it was in international waters. (C. 1) Saq cannot use the nationality theory because the nationality of the hijackers is unknown. (C. 1) Saq cannot use the protective theory to establish jurisdiction because the hijackers never threatened its national security. Saq's interest under the passive personality theory cannot exceed Yokum's interests because none of those murdered were from Saq. (C. 1) Additionally, since 200 of the 350 passengers held hostage were Yokum nationals, (C. 1), PACM could not have threatened and detained more Saq nationals than Yokum nationals.

Finally, Saq, at best, only shares Yokum's claim to jurisdiction under the universality theory. However, it would make a mockery of attempts to achieve world order if Saq were allowed to rely on the universality theory. This theory "allows States to protect universal values and the interest of mankind."³⁶ Saq intended to treat the PACM hijackers as heroes and release them without punishment. (C. 5) Therefore, Saq is unfit to protect the universal values and interests endorsed by the United Nations. The General Assembly has condemned terrorism and urged States to prosecute terrorists.³⁷ The Security Council has also condemned hostage-taking and affirmed the obligation of all States to prevent future acts of hostage-taking.³⁸

³⁶Basslouni, supra note 16 at 263.

³⁷General Assembly Resolution on Measures to Prevent International Terrorism, G.A. Res. 40/61 (XL 1985), reprinted in 25 ILM 239 (1986).

Shangri shirked an important international duty when it ignored Yokum's request for extradition.

When a State requests another to surrender a fugitive to its jurisdictional control, it asserts that: (a) it has jurisdiction over the subject matter of the conduct allegedly performed by the actor; (b) it is a competent forum to prosecute the offender, and (c) when the actor is surrendered, he or she will be properly submitted to its judicial authorities for the exercise of their competent jurisdictional authority.³⁹

Shangri knew that Saq met none of these criteria and that Yokum met all of them.

Therefore, Yokum's right to the extradited hijackers was superior to Saq's.

E. Shangri Is Precluded from Using the Political Offense Exception to Justify Its Decision to Permit the Terrorists to Escape to Saq.

Shangri did not raise the political offense exception at the time that the hijackers were sent to Saq, and none of the facts before this Court would have warranted Shangri's application of the political offense exception. The hijacking of the Hasdrubal was not a "pure" political offense, such as advocating the overthrow of a government or other conduct punishable as seditious or treasonous. Rather, it was a common crime perpetrated in a political context.⁴⁰ The political offense exception was intended to protect the actions of opponents of oppressive governments, not to permit the exportation of political violence or international terrorism.⁴¹ Over twenty European nations have excluded the crime of hostage-taking from the political offense exception in the European Convention on the Suppression of Terrorism.⁴²

³⁸Security Council Resolution 579, supra note 34.

³⁹Basslouni, supra note 16 at 270.

⁴⁰Hannay, International Terrorism and the Political Offense Exception to Extradition, 18 Colum. J. Transnat'l L. 381, 386 (1979).

⁴¹Quinn v. Robinson, 783 F.2d 776, 806-07 (9th Cir. 1986).

⁴²European Convention on the Suppression of Terrorism, done at Dublin, 4 December 1979, art. 1, para. 1, T.S. 90, 15 ILM 1272 (1976).

Shangri, having decided not to prosecute the hostage-takers themselves, was under a duty to extradite them to a nation that did intend to present them for prosecution. The only nation that stood ready to try the hostage-takers, and had a genuine concern for protecting their citizens abroad, was Yokum, not Saq.

II. SHANGRI IS INTERNATIONALLY RESPONSIBLE TO YOKUM FOR ALLOWING THE USE OF ITS TERRITORY AS A BASE FOR ATTACKS ON YOKUM NATIONALS, BOTH WITHIN SHANGRI AND ELSEWHERE.

Shangri's failure to fulfill its obligation to try or extradite the hijackers of the Hasdrubal is but one instance of a broader pattern of internationally wrongful conduct by Shangri in aiding and abetting, or neglecting to prevent, activities of PACM injurious to nationals of Yokum and other States. Shangri has consistently permitted members of PACM to launch attacks from Shangri territory and to return to Shangri as a safe haven. (C. 3) Yokum requests that this Court declare that Shangri is internationally responsible to Yokum by virtue of such conduct.

A. Both Customary International Law and the Hostages Convention impose a Duty on Shangri to Prevent the Use of its Territory as a Base for Attacks on Nationals of Other States.

The Hostages Convention obliges the parties to cooperate in preventing not only hostage-taking, but also attempts to take hostages and complicity in hostage-taking or attempted hostage-taking.⁴³ In addition to this general obligation to prevent hostage-taking, the Convention in particular imposes upon Shangri an obligation to

- (a) tak[e] all practicable measures to prevent preparations in [its] territor[y] for the commission of those offenses within or outside [its] territor[y], including measures to prohibit in [its] territor[y] illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages;
- (b) exchang[e] information and coordinat[e] the taking of administrative and other measures as appropriate to prevent the commission of those offenses.⁴⁴

⁴³Hostages Convention, supra note 5, art. 4.

⁴⁴id.

Shangri, therefore, is obliged to proscribe and to forestall the activities of entities, such as PACM, which use Shangri's territory to "encourage, instigate, organize or engage in" hostage-taking.

Under customary international law, all States have a duty to prevent the use of their territory as a base for attacks on the nationals of other States.⁴⁵ This Court has recognized "every State's obligation not to allow knowingly its territory to be used contrary to the rights of other States."⁴⁶ The rights of other States include the right of nationals of those States to remain unmolested and not to be taken as hostages.⁴⁷ The duty of a State not to allow knowingly "its territory to be used contrary to the rights of other States" therefore includes an obligation to prevent injury to aliens. The U.N. General Assembly has called upon "all States to fulfill their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist activities in other States, or acquiescing in activities within their territory directed towards the commission of such acts."⁴⁸

Shangri cannot argue that this duty to other States, where their nationals have incurred harm within Shangri's territory, is delineated according to the treatment or protection Shangri affords its own nationals. While a State's duty of protection toward aliens in such cases might coincide with the degree of protection it provides to its own nationals in cases of economic injury,⁴⁹ there is no such parallel where the alleged injury is

⁴⁵Lillich & Paxman, State Responsibility For Injuries to Aliens Occasioned by Terrorist Activities, 26 Am. U. L. Rev. 217, 251-76 (1976).

⁴⁶Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 22 (April 9, 1949).

⁴⁷See Mavromattis Palestine Concessions, Jurisdiction, (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2 at 11-12 (August 30, 1924).

⁴⁸General Assembly Resolution 40/61, supra note 37.

⁴⁹See 1985 Report of the Centre on Transnational Corporations on Work on the Formulation of the United Nations Code of Conduct on Transnational Corporations at 15-18, U.N. Doc. E/C. 10/1985/s/2 (1985).

a violation of the basic human rights of alien nationals: the right to live, the right to bodily integrity, and the right to be free from captivity.⁵⁰

B. Shangri Has Breached Its Duty of Prevention.

Shangri has breached its duty of prevention because it has failed to exercise due diligence in controlling and restraining activities of private individuals within its territory that pose a threat to alien nationals. In fact, Shangri has failed to fulfill its duty of prevention because it has acted in complicity with the PACM terrorists. At the very least, the activities of the terrorists are attributable to Shangri.

1. Shangri Has Failed to Exercise Due Diligence in Controlling the Activities of PACM in Its Territory.

A State breaches its duty to prevent private individuals within its territory from committing acts of hostage-taking or other violent acts toward alien individuals when (1) the State knows that its territory is being used as a base for such operations and (2) it fails to take measures to prevent the threatened injuries.⁵¹ A State fails to exercise due diligence when another State notifies it that its territory is being used as a base for perpetrating violent acts against alien nationals, and it then fails to take measures to prevent such acts.⁵²

PACM is headquartered in Shangri. PACM prepares attacks in Shangri and launches them from Shangri territory. In the Hasdrubal incident, five of the seven PACM hijackers boarded the Hasdrubal from a Shangri port. (C. 1) PACM actually controls attacks from within Shangri as its members carry them out. During the Hasdrubal seizure, both the leader of the hijacking squad aboard the ship and PACM headquarters in Taluba acknowledged that PACM was directing the hijacking from Shangri. (C. 2) When PACM headquarters radioed the

⁵⁰Hostages Convention, supra note 5, preamble, cl. 2; see also Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 2, art. 3, art. 9, U.N. Doc. A/810, at 71 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 6, para. 1, art. 9, para. 1, 999 U.N.T.S. 171, 174, 175 (1976), 6 ILM 368, 370, 371 (1967).

⁵¹Lillich & Paxman, supra note 45, at 275.

⁵²Id.

hijackers to bring the seizure to an end, the hijackers forced the Hasdrubal's captain to bring the ship to port in Taluba. (C. 3) This confirmed that PACM directed and controlled the Hasdrubal hijacking, like other extraterritorial attacks against non-Shangri States and nationals, from within Shangri's territory.

Prior to the Hasdrubal attack, Yokum, as well as other States, gave Shangri specific notice "of the activities of PACM and the whereabouts of the perpetrators of particular acts of violence against Yokum nationals and economic interests." (C. 3) This notice was actual, not merely constructive; it was given to Shangri not by a mere private party, but by the governments of other States through diplomatic channels.⁵³ Shangri acknowledged this notice and acknowledged its contents as true. (C. 3) The notice specified the whereabouts of PACM members who, by virtue of their past activities, posed a further threat to Yokum nationals. The hijacking of the Hasdrubal demonstrated that this threat was genuine.

Yokum, by giving such notice, presented Shangri with a clear opportunity to take effective measures to prevent the PACM members whose whereabouts were known to it from launching further acts of violence or hostage-taking against alien nationals. By positively refusing to take any action, (C. 3), Shangri manifestly failed to exercise due diligence in controlling or restraining activities of private individuals within its own territory posing an obvious threat of injury to alien nationals. Shangri could have put a stop to PACM's activities; indeed, after the Hasdrubal docked at Taluba, Shangri arrested all seven hijackers.

Yokum complied with its obligation under Article 4(b) of the Hostages Convention, viz., "exchanging information . . . to prevent the commission of [hostage-taking],"⁵⁴ by giving this notice to Shangri prior to the attack on the Hasdrubal. At the same time, Shangri breached its obligation, under Article 4(a) of the Convention, to take "all practicable measures" to prevent private individuals within its territory from preparing to take hostages, including

⁵³See Id. at 257.

⁵⁴Hostages Convention, supra note 5, art. 4, para. b.

measures to put a stop to the activities of PACM, which coordinates and engages in acts of hostage-taking.

The fact that PACM often has inflicted injuries on Yokum nationals outside Shangri territory, as in the Hasdrubal incident, in no way lessens Shangri's responsibility to Yokum. Shangri is responsible for PACM attacks, not because they occur within its territory, but because they originate there. When private individuals prepare an attack within a State's territory, but complete the attack elsewhere, the extraterritorial locus of the attack does not bar the imposition of responsibility.⁵⁵

2. Shangri is an Accomplice of PACM.

When a State assists private individuals or groups who attack other States and their nationals, it becomes their accomplice and thus internationally responsible for the attacks.⁵⁶ One can infer from several facts that Shangri was a willing participant in, and facilitator of, PACM's acts. First, Shangri willfully refused to take any action against PACM's members despite the notice given to Shangri by Yokum and other States that PACM members based at a specific location posed a threat to alien nationals. Second, the attack on the Hasdrubal was directed and controlled entirely from within Shangri. Third, Shangri subsequently accorded the PACM hijackers of the Hasdrubal friendly treatment, including the attempted sham extradition of three of those hijackers to Saq, and the grant of asylum to the remainder.

3. PACM's Acts are Attributable to Shangri.

Under customary international law, the conduct of a person or group of persons is attributable to the State in whose territory they reside if that person or group of persons "in fact exercis[es] elements of the governmental authority in the absence of the official authorities, and in circumstances which justif[y] the exercise of those elements of

⁵⁵C.F. Amerasinghe, State Responsibility for Injuries to Aliens 49 (1967).

⁵⁶1 L. Oppenheim, International Law 293 (H. Lauterpacht 8th ed. 1955).

authority."⁵⁷ Shangri, by its own admission, lacked effective control over parts of its territory, especially parts of Taluba, (C. 3), where PACM maintains its headquarters. (C. 1) In these areas, there was a lack of official authority and the circumstances justified filling the vacuum of that authority. While PACM does not hold or control any territory as such, (C. 1), and therefore cannot be deemed a State,⁵⁸ it exercises elements of governmental authority in areas where the official government of Shangri lacks effective control. At the very least, it exercises the authority, as a well-structured organization, (C. 3), to restrain its own members from perpetrating acts of violence and hostage-taking against other States and their nationals. This constitutes an element of governmental authority.⁵⁹

PACM is not an insurrectional movement in relation to Shangri since it does not seek to overthrow Shangri's government or is not actively hostile to Shangri.⁶⁰ Therefore, Shangri cannot appeal to the rule that the conduct of an organ of an insurrectional movement established in the territory of a State is not attributable to that State.⁶¹ Even if provisions of Shangri's municipal law render such quasi-governmental conduct by PACM illegal, the critical point for the purpose of attributing the activities of PACM to Shangri is that PACM in fact exercises elements of governmental authority.⁶² Whether such exercise of governmental authority is legitimate under Shangri's municipal law is irrelevant.

⁵⁷International Law Commission Draft Articles on State Responsibility, Report of the International Law Commission to the General Assembly, 35 U.N. GAOR, Supp. (No. 10) 49, 59-68, U.N. Doc. A/35/10 (1980), reprinted in [1980] 2 Y.B. Int'l. L. Comm'n. 1, 30-63, U.N. Doc. A/CN.4/SER. A/1980/Add. 1 (Pt. 2), art. 8, para. b.

⁵⁸See Restatement (Revised) of Foreign Relations Law of the United States section 201 (1986) (tentative draft).

⁵⁹See supra text accompanying notes 46-50.

⁶⁰See Report of the International Law Commission to the General Assembly on the Work of its Twenty Seventh Session, U.N. Doc. A/10010/REV. 1/1975, reprinted in [1975] 2 Y.B. Int'l. L. Comm'n, 25, 91-93, U.N. Doc. A/CN. 4/SER. A/1975/Add. 1.

⁶¹I.L.C. Draft Articles on State Responsibility. supra note 57, art. 14, paras. 1-2.

⁶²Id., art. 8, para. b.

Because PACM's acts are attributable to Shangri, and because one can infer from the circumstances that Shangri willfully aided and abetted those acts, it is all the more evident that Shangri has breached its obligations. It is then Shangri itself which has perpetrated, or has participated as an accomplice in perpetrating, the acts of hostage-taking and acts injurious to the nationals of other States. Accordingly, this Court has ample grounds to declare that Shangri is internationally responsible to Yokum for allowing the use of its territory as a base for attacks on Yokum nationals.

III. YOKUM WAS JUSTIFIED IN DIVERTING THE SHANGRI AIRCRAFT AND
IN ABDUCTING THE TERRORISTS AS AN ACT OF SELF-HELP.

Article 51 of the U.N. Charter is the self-defense exception to the general prohibition against the threat or use of force contained in article 2(4). It states that "[n]othing shall impair the inherent right of individual or collective self-defense if an armed attack occurs."⁶³

Article 51 does not define the scope of the right to self-defense, but merely recognizes that the right exists and that it is inherent.⁶⁴ The negotiating history of the Charter indicates that article 51 was intended to incorporate the entire customary international law of self-defense which includes reasonable and necessary anticipatory self-defense.⁶⁵ The Report of the Rapporteur to the San Francisco Conference states that "the use of arms in legitimate self-defense remains admitted and unimpaired."⁶⁶

⁶³U.N. Charter art. 51.

⁶⁴L. Goodrich, E. Hambro & A. Simons, Charter of the United Nations 344 (3d ed. 1969); Note, The Attack on Osirak: Delimitation of Self-Defense under International Law, 4 N.Y.J. Int'l & Comp. L. 131, 146 (1982).

⁶⁵Mallison and Mallison, The Israeli Aerial Attack of June 7, 1981, upon the Iraqi Nuclear Reactor: Aggression or Self-Defense, 15 Vanderbilt J. of Transnat'l L. 417, 420 (1982).

⁶⁶D. Bowett, Self-Defence in International Law 182 (1958) (quoting Report of the Rapporteur of Committee I to Commission I, 6 United Nations Conference on International Organization 459 June 13, 1945).

This court recently rejected the argument that the Charter "subsumes and supervenes" customary international law,⁶⁷ and noted that Article 51 refers to pre-existing customary international law by using the language, the "inherent right" of self-defense.⁶⁸

The Court further stated that

It is hard to see how [the inherent right of self-defense] can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover, the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content.⁶⁹

For example, the Charter does not refer to the requirements of necessity and proportionality.

A. Yokum's Interception Was a Necessary and Proportional Act of Anticipatory Self-Defense under The Caroline Criteria.

Daniel Webster stated the classic formulation of the law of anticipatory self-defense in The Caroline case. A State has a right to self-defense prior to armed attack when "the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."⁷⁰ Thus, a State must have a compelling necessity to act, but only with force proportionate to the threat and after exhausting all peaceful means.

Shangri responded to Yokum's attempt to peacefully extradite the hijackers by illegally sending them to Saq, whose self-proclaimed intention was to "have the honor of setting them free." (C. 5) Shangri's action precluded further attempts at peaceful settlement, and Yokum responded by intercepting the aircraft over international waters. If the hijackers were set free, they would not only escape liability for hijacking the Hasdrubal, but also would continue to violently attack Yokum nationals.

⁶⁷Military and Paramilitary Activities In and Against Nicaragua, (Nicaragua v. United States), Merits, 1986 I.C.J. 14, 92-3, para. 172-74.

⁶⁸Id. at 93, para. 176.

⁶⁹Id.

⁷⁰J. Moore, Digest of International Law 412 (1906); L. Henkin, R. Pugh, O. Schachter & H. Smit, International Law 663-64 (2d ed. 1987).

Under similar circumstance, the United States justified its interception of the Egyptian aircraft carrying the Achille Lauro hijackers as necessary to bring them to justice.⁷¹ The U.S. later stressed that such interceptions are justifiable only in narrow counter-terrorism cases.⁷² The world reaction to the U.S. interception was generally favorable, and indeed, no attempt was made to bring the matter before the Security Council, nor was it directly raised in the General Assembly.⁷³ Like the U.S. action before it, Yokum's interception was a narrowly-tailored response to a narrowly-defined circumstance, and as such, was legal under The Caroline criteria.

B. Yokum's Interception was a Justifiable Act of Self-Defense under the Nicaragua Case.

Terrorists have reached unprecedented levels of sophistication, and can act with impunity precisely by depending on traditional rules of international law. Definitions must be changed so that both terrorist groups and the States that support them can no longer evade responsibility.

The Nicaragua case did not raise and this Court did not decide whether self-defense is justified in the face of an imminent threat of armed force, i.e., anticipatory self-defense.⁷⁴ The Court did decide, however, that a State may not invoke individual or collective self-defense under customary international law unless it has been the object of an armed attack.⁷⁵ Thus, the Court emphasizes that not all forms of force justify self-defense; only those that rise to the level of armed attack.⁷⁶

⁷¹Recent Developments, Use of Force: Interception of Aircraft, 27 Harv. Int'l L.J. 761, 762 (1986).

⁷²Id. at 764.

⁷³Id. at 763; Gooding, Fighting Terrorism in the 1980's: The Interception of the Achille Lauro Hijackers, 12 Yale J. Int'l L. 158, 169-175 (1987).

⁷⁴Nicaragua, supra note 67 at 103, para. 194.

⁷⁵Id. at 103, para. 195.

⁷⁶Id. at 101-02, para. 191-92.

If an armed attack is required to precede an act of self-defense, then "armed attack" must be redefined specifically with terrorism in mind. Commentators have argued that a State has the right to respond in self-defense when any aggressive event occurs,⁷⁷ that a State should look to the entirety of events to determine if a methodical crusade amounting to an armed attack exists,⁷⁸ or that an armed attack occurs when a nation fails to curtail aggressive exploits of armed bandits using its territory to launch attacks on a neighbor State.⁷⁹ The requirements of proportionality and necessity can serve as limiting principles if "armed attack" is redefined in this way. Yokum acted with justifiable self-defense under any of the preceding definitions.

In the Nicaragua case, this Court specifically linked the concept of armed attack with one of the enumerated acts under the U.N.'s Definition of Aggression,⁸⁰ which it considers to reflect customary international law.⁸¹ Shangri has committed one of the enumerated acts of aggression under the Definition by "allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State."⁸² Although this definition requires that both participants be States, Shangri should not be allowed to evade the consequences of its aggressive behavior by relying on the technical point that PACM is not a State. PACM is recognized as Midbari's government in exile by four States. The fact that few States presently recognize PACM as a State should not be taken to reflect anything more than current political

⁷⁷Rostow, The Legality of the International Use of Force by and from States, 10 Yale J. Int'l L. 286 (1985).

⁷⁸Gordon, Article 2(4) in Historical Context, 10 Yale J. Int'l L. 271 (1985).

⁷⁹Schachter, The Lawful Resort to Unilateral Use of Force, 10 Yale J. Int'l L. 291 (1985).

⁸⁰"Definition of Aggression" Resolution, G.A. Res. 3314, 29 GAOR Supp. (No. 31) at 142, U.N. Doc. A/9890 (1975), reprinted in 13 ILM 710 (1974).

⁸¹Nicaragua, supra note 67 at 103, para. 195.

⁸²"Definition of Aggression," supra note 80, art. 3, para. f.

circumstances which are subject to change at any time. The Peoples Republic of China and Taiwan is a case in point.

Shangri made a policy decision to support PACM by allowing it to use Shangri's territory as a base for attacks against Midbari. This constitutes an aggressive act from which States should not be permitted to conveniently distance themselves.

Nor should the Court permit terrorist activities in the name of self-determination. The U.N. Charter,⁸³ the Definition of Aggression,⁸⁴ and the U.N. Resolution on Measures to Prevent International Terrorism⁸⁵ specifically state that they either affirm or do not prejudice the right of a people to self-determination. The failure to distinguish between acts of terrorism and act of self-determination only diminishes legitimate efforts of other peoples to achieve self-determination.

C. Yokum's Interception Is a Reasonable Act of Reprisal under Current State Practice.

Since the birth of the United Nations, the Security Council has not condemned "reasonable" reprisals.⁸⁶ As such, it has affirmed a State's right to resort to proportionate reprisals,⁸⁷ and they have gained de facto acceptance even if they remain de jure illegal.⁸⁸

The Naullaa Case outlined three requirements for legitimate reprisals which include (1) a prior illegal action by the target State; (2) an unsuccessful attempt to obtain redress for the alleged international wrong; and (3) a proportionate response by the injured State.⁸⁹

⁸³U.N. Charter art. 1, para. 2.

⁸⁴"Definition of Aggression," supra note 81, art. 7.

⁸⁵G.A. Res. 40/61 supra note 38.

⁸⁶Roberts, Self-Help in Combatting State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals, 19 Case W. Res. J. Int'l L. 243, 283 (1987); Bowett, Reprisals Involving Recourse to Armed Force, 66 Am. J. Int'l L. 1, 10 (1972).

⁸⁷Roberts, supra note 86 at 283.

⁸⁸Bowett, supra note 86 at 11.

⁸⁹Naullaa Incident Arbitration (Portugal v. Germany), 2 Rep. Int'l Arb. Awards 1011 (1928).

The facts of the present dispute meet these criteria. Shangri not only failed to try or extradite the hijackers as required under the Hostages Convention, but also attempted an illegal extradition. Yokum's attempts to legally extradite the hijackers failed. Yokum was not obliged to seek redress from the United Nations if it is "inappropriate or impossible in the circumstance."⁹⁰ Yokum had no effective remedy from the U.N. since, at most, the U.N. would sanction Shangri; it could not prosecute or extradite the hijackers.⁹¹ Finally, Yokum executed an interception and recovered the hijackers without firing a shot. In addition, the interception was proportional to Shangri's wrong since it achieved precisely what Shangri refused to do -- try or extradite the hijackers.⁹²

D. The Civil Aviation Treaties Are Not Applicable to the Interception.

The Conventions that address terrorist acts relating to aircraft⁹³ to which Yokum and Shangri are parties do not apply by their express provisions since they are applicable only to civilian aircraft.⁹⁴ The Shangri National Airlines aircraft on which the terrorists were travelling was government-requisitioned, and was used by the Shangri government to assist in the escape of the terrorists. It was not carrying passengers for hire in private civil aviation, and thus, its use should be characterized as military or police. Similarly, the Yokum

⁹⁰Bowett, supra note 86 at 3.

⁹¹Note, The Achille Lauro Incident and the Permissible Use of Force, 9 Loyola L.A. Int'l & Comp. L.J. 481, 494 (1987).

⁹²id. at 495.

⁹³Convention on International Civil Aviation, signed at Chicago, 7 December 1944, 15 U.N.T.S. 295, T.I.A.S. 1591, 3 Bevans 944, 61 Stat. 1180; Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed at Tokyo, 14 September 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941, T.I.A.S. 676, 2 ILM 1042 (1963); Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague, 16 December 1970, 860 U.N.T.S. 105, 22 U.S.T. 1642, T.I.A.S. 7192, 10 ILM 133 (1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal, 23 September 1971, 974 U.N.T.S. 177, 24 U.S.T. 564, T.I.A.S. 757, 10 ILM 1151 (1971).

⁹⁴Tokyo Convention, supra note 93, art. 1(4); Chicago Convention, supra note 93, art. 3; Montreal Convention, supra note 93, art. 4.

fighters were on a military mission and should be judged by military standards, not those designed to control the flow of civil aviation.

Moreover, even if the aircraft is erroneously viewed as civilian, Yokum did not violate the conventions. The primary purpose of the civil aviation treaties is to combat aerial hijacking. Thus, the Tokyo and The Hague Conventions require the person who commits the prohibited offenses to be on board the aircraft,⁹⁵ and Yokum committed no acts from on board the Shangri aircraft. The Montreal Convention does not apply since Yokum did not commit any of the enumerated acts.

E. Yokum was Justified in Abducting the Terrorists Because It Had No Other Effective Means to Bring Them to Justice.

Shangri frustrated Yokum's peaceful and orderly attempts to extradite the hijackers for trial by illegally attempting to send them to Saq. A State might resort to abduction as an alternative to extradition when another State will not honor its treaty obligations.⁹⁶ Shangri did not abide by its obligation under the Hostages Convention.⁹⁷ Since legitimate non-forcible efforts to secure the extradition, arrest and prosecution of the terrorists had failed, Yokum was justified in abducting the terrorists from the Shangri aircraft. Yokum had no other recourse but to abduct the PACM hijackers. (C. 4, 5).

Non-forcible remedies, such as economic sanctions and diplomatic processes, do not effectively prevent States from undermining international efforts to apprehend and prosecute international terrorists.⁹⁸ Official censure of a State's harmful activities is merely a rhetorical condemnation, not an effective sanction. A State will not cease its illegal activities because of a loss of credibility. Nor has the threat of economic sanctions

⁹⁵Tokyo Convention, supra note 93, art. 2; The Hague Convention, supra note 93, art. 1.

⁹⁶Note, supra note 1, at 346-47 (1986).

⁹⁷See supra text accompanying notes 5 to 15.

⁹⁸J. Murphy, Punishing International Terrorists 131 (1985).

proved effective. For example, the imposition of sanctions has not induced South Africa to abandon apartheid.⁹⁹

States have accepted abduction as a method of last resort by allowing it to serve as a basis for personal jurisdiction. National courts, employing the doctrine of mala captus bene detentus (improperly captured, properly detained) have overlooked the manner by which a State secures a fugitive's presence to stand trial, and have upheld the court's personal jurisdiction.¹⁰⁰ For example, courts in the United States, England, South Africa, Palestine, Belgium and Germany support the application of this doctrine.¹⁰¹

F. The Remedy Is to Allow the Accused Hijackers to Remain in Yokum to Stand Trial for Their Alleged Crimes.

Were the Court to find in Shangri's favor and order the return of the terrorists to Shangri, the hijackers will have achieved their terrorist mission with impunity. The Court can remedy any claim of a violation of Shangri's sovereignty by less drastic means. In the Eichmann case, Argentina's acceptance of Israel's apology for Eichmann's abduction constituted the entire and adequate reparation.¹⁰² Yokum's apology for the abduction is sufficient reparation to Shangri, and the hijackers should remain in Yokum's custody to stand trial for their crimes.

Shangri abused its discretionary power to grant asylum by allowing four of the hijackers to remain in its territory unpunished. A State's discretion to grant asylum is

⁹⁹Namibia (South West Africa) 1971 I.C.J. 16 (June 21, 1971).

¹⁰⁰Ker v. Illinois, 119 U.S. 436 (1886); Frisbie v. Collins, 342 U.S. 519 (1952). See also United States ex rel. Lujan v. Gengler, 510 F. 2d 62, 66 (2d Cir.), cert. denied, 421 U.S. 1001 (1975) (held that absent the allegations of torture or brutality, abduction alone was insufficient to divest the court of jurisdiction); Note, Federally Sponsored International Kidnapping: An Acceptable Alternative to Extradition?, 64 Wash. U. L. Q. 1205 (1986).

¹⁰¹Ker v. Illinois, supra note 100; Ex Parte Susannah Scott, 115 Eng. Rep. 116 (K.B. 1829); Abrahams v. Minister of Justice, 4 S. Afr. L.R. 542 (1963); Afouneh v. Attorney General, Ann. dig. 327 (No. 97) (Supreme Court of Palestine sitting as a Court of Criminal Appeal 1942); Geldof v. Meulemeester and Steffen, 31 I.L.R. 385 (Cour de Cassation, 1961); Extradition (Jurisdiction) Case, Ann. Dig. 348 (No. 165) (Supreme Court of the Reich, 1936).

¹⁰²The Attorney General of the Government of Israel v. Adolf Eichmann 36 I.L.R. 5 (Israel, Dist. Ct. of Jerusalem, 1961).

unrestrained only if no extradition treaty imposes an obligation to prosecute offenders if they are not extradited. The Hostages Convention imposes just such an obligation to prosecute the PACM hostage-takers.¹⁰³ This Court would allow Shangri to compound this abuse by ordering Yokum to return the hijackers in its custody to Shangri. In the Asylum Case, this Court observed that "the practice [of granting asylum] has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any consistent and uniform usage accepted by law."¹⁰⁴ Asylum "should be granted only when the fugitive truly is seeking political asylum and not just trying to avoid prosecution for a terrorist act."¹⁰⁵

Asylum should not be granted to terrorists under any circumstances. Terrorism is gaining recognition as a crime against humanity.¹⁰⁶ Asylum's counterpart, the political offense exception to extradition, excludes crimes against humanity from its protection because their "barbarity [is] out of proportion to the political end in view."¹⁰⁷ Even if crimes against humanity are committed during a violent political uprising, they have "no connection with furthering the legitimate policy of the State."¹⁰⁸ Shangri, in effect, condones terrorism by granting asylum to the hijackers. Yokum requests that the Court send a clear message to both terrorists and the States that support them that such criminal behavior will no longer be condoned.

¹⁰³Hostages Convention, supra note 5, art. 8, para. 1.

¹⁰⁴Asylum Case, (Columbia v. Peru), 1950 I.C.J. 266, 277 (November 20, 1950).

¹⁰⁵Lillich and Paxman, supra note 46, at 299.

¹⁰⁶Reiss, The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine, 20 Cornell Int'l L. J. 281, 310 (1987).

¹⁰⁷Garcia-Mora, The Present Status of Political Offenses in the Law of Extradition and Asylum, 12 U. Pitt. L. Rev. 371, 396 (1953).

¹⁰⁸Garcia-Mora, Crimes Against Humanity and the Principle of Nonextradition of Political Offenses, 62 Mich. L. Rev. 927, 944 (1964).

CONCLUSION

WHEREFORE, It is respectfully requested that this Honorable Court:

- 1) DECLARE that Shangri is bound either to try or to extradite for trial all of the PACM hijackers and has breached this duty;
- 2) DECLARE that Shangri is internationally responsible to Yokum for allowing armed bands such as PACM to use its territory as a base for attacks on Yokum nationals, both within Shangri and elsewhere;
- 3) DENY all of Shangri's claims for relief;
- 4) GRANT Yokum such further relief as this Court may deem just.

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