

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 RESPONDENT

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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 Yokum's forcible interception of a Shangri aircraft and abduction of the PACM members violated international law.

II

Whether Shangri was justified in granting asylum to the PACM members remaining in its custody.

III

Whether Shangri, given its intractable civil strife, has applied its best efforts to preventing private persons from using its territory as a base for attacks on alien nationals.

IV

Whether Shangri's extradition of the PACM members to Saq is consistent with international law.

STATEMENT OF FACTS

The Confederation of Shangri is a small developing country, whose economy has been devastated by a civil war. The struggle between two warring religious factions for political dominance has brought the country close to anarchy. Despite its best efforts, Shangri's government can no longer control critical parts of its territory, including certain sections of the port city of Taluba.

Taking advantage of the confusion, a well-organized group called the People's Armed Conflict Movement (PACM) operates from Shangri's territory to further its efforts to establish itself as a government in territory now ruled by the neighboring State of Midbari. Shangri, however, does not recognize PACM. In its efforts to reestablish domestic order, Shangri cannot spare the resources necessary to suppress PACM's activities.

On 13 February 1987, seven PACM members of unknown nationality overtook a cruise ship from Bellan, the Hasdrubal. The crew of the Hasdrubal were all from Bellan, while the 350 passengers were of eleven different nationalities. Two of the PACM members boarded the ship at its most recent port of call, Port-al-Haj, Saq. During the takeover, two Bellan crew members and one Yokum passenger died. While the PACM members held the ship, Yokum, waiting for a opportunity to employ force, dispatched a submarine, two guided-missile destroyers, and an aircraft carrier to trail the Hasdrubal. No other State sent military forces into the area although several could have. For two days, the hijackers used the ship's radio to disseminate PACM propaganda to waiting journalists. On 15 February 1987, the PACM-controlled ship requested permission to dock in Taluba. Only when a hijacker threatened the life of the ship's captain did Shangri grant the necessary permission. The hijackers also threatened to kill the passengers unless Shangri granted them asylum.

On 16 February 1987, the government of Shangri arrested and imprisoned the seven hijackers of the Hasdrubal. On 18 February 1987, Shangri received an extradition request from Yokum. On 21 February 1987, Shangri received a similar extradition request from Saq. On 1 March 1987, Shangri decided to extradite three of the PACM members to Saq. The three

were placed on a Shangri National Airlines aircraft. During the flight to Saq, military fighters from Yokum's waiting aircraft carrier forced the Shangri plane to land in Bellan. After the plane was on the ground, Yokum's Tiger strike team stormed it, forced the hijackers from the plane in handcuffs, and transferred them under heavy guard to a Yokum military plane.

Shangri protested these surprise acts of force and asked Yokum to return the hijackers. As a measured response to Yokum's flagrant violation of international law, Shangri granted the remaining hijackers asylum.

On 1 April 1987, the Governments of Shangri and Yokum, in accordance with Article 40 of the Statute of the International Court of Justice, and Article 38 of the Rules of the Court, notified the Registrar of the Court 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

Yokum violated a peremptory norm against the use of force when it forcibly intercepted a Shangri National Airlines aircraft and abducted the passengers on board without any legal justification. In so doing, Yokum also violated its obligation under the civil aviation treaties not to jeopardize the freedom of the air. Shangri never committed any hostile act against Yokum, much less any act which would justify Yokum's armed invasion of Shangri's sovereignty.

Yokum flouted the orderly and legal procedures of proper extradition. Shangri acted within its sovereign discretion when it chose to grant Saq's extradition request. Yokum's request had no legal basis because it had no demonstrable jurisdiction over the PACM members, and its request for their extradition was not based on any applicable treaty.

Shangri is torn by religious dissension and civil war. Shangri is not responsible to Yokum for the acts of PACM members unless it has failed to exercise due diligence in suppressing their behavior. The duty of a State to prevent private persons on its territory from injuring aliens is less exacting in conditions of war. Shangri, given its situation, has exercised due diligence.

Shangri is no less a sovereign nation than Yokum. Yokum is as guilty of taking advantage of Shangri's travail as the PACM members encamped on Shangri's territory. Yokum presumptuously undertook to overrule Shangri's decision to extradite PACM members to the country of its choice. Shangri requests the return of the kidnapped PACM members so that orderly legal process can be vindicated. Shangri also seeks a declaration that its grant of asylum to the PACM members in its custody was a legitimate exercise of its sovereign discretion and was justified by Yokum's aggressive acts. Shangri seeks these remedies, not by unilateral force, but in this Court.

PLEADINGS AND AUTHORITIES

I. YOKUM VIOLATED INTERNATIONAL LAW BY ILLEGALLY DIVERTING A SHANGRI AIRCRAFT.

Yokum committed an egregious violation of international law when it forcibly diverted a Shangri National Air Lines aircraft and interfered with Shangri's sovereign right to extradite the PACM members to the requesting country of its choice. This use or threat of force is not justified under Article 51 of the United Nations Charter since Shangri committed no acts constituting an armed attack. Nor is the interception justified as a permissible countermeasure to Shangri's alleged breach of its state responsibility to try or extradite under the Hostages Convention. Finally, Yokum violated both the customary international and treaty law of aviation.

A. Yokum Violated International Law Against the Threat or Use of Force Under the U.N. Charter.

The principle of the prohibition of the use of force is regarded as a peremptory norm, or jus cogens, of international law¹ from which no derogation is permitted, and which can only be modified by a subsequent norm of the same character.²

Article 2(4) of the U.N. Charter embodies modern customary law³ and prohibits "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."⁴ The United Nations reaffirmed this principle in 1970 in the Declaration on Principles of International Law Concerning Friendly Relations,⁵ as did this Court in the Nicaragua case in 1986.⁶

¹Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), Merits, 1986 I.C.J. 14, 100-101 (June 27, 1986); see also, Schachter, In Defense of International Rules on the Use of Force, 53 U. Chi. L. Rev. 113, 129 (1986).

²Vienna Convention on Law of Treaties, done at Vienna, 23 May 1969, art. 53, U.N. Doc. A/CONF.39/27, (1969), 63 A.J.I.L. 875 (1969), 8 ILM 679 (1969).

³Commentary of the International Law Commission to article 50 of its Draft Articles on the Law of Treaties, para 1, [1966] 2 Y.B. Int'l L. Comm'n 247.

⁴U.N. Charter art. 2, para. 4

⁵G.A. Res. 2625, 25 GAOR, Supp. 28 at 121, U.N. Doc. A/8028, at 121 (1970).

One of the primary purposes of the U.N. is to suppress acts of aggression in an effort to maintain international peace and security.⁷ The U.N. included "an attack by the armed forces of a State on the . . . air fleets of another State" as a qualifying act of aggression.⁸ Yokum's forcible diversion of the Shangri aircraft was the first use of armed force in this dispute by either party before the Court, and as such, constitutes prima facie evidence of an act of aggression.⁹

B. Yokum Is Not Entitled to Rely on Self-Defense under the United Nations Charter or Customary International Law.

Article 51 of the U.N. Charter recognizes "the inherent right of individual or collective self-defence if an armed attack occurs."¹⁰ In the Nicaragua Case, this Court concluded that the scope of the right of self-defence under the Charter or customary international law should be confined to the express terms of Article 51.¹¹ The International Law Commission, after surveying publicists in many countries, concluded that the majority support this view.¹² Thus, the right of individual self-defence is dependent on an armed attack on the State claiming the right.¹³

⁶Nicaragua, supra note 1 at 100-101.

⁷U.N. Charter art. 1, para. 1.

⁸"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).

⁹Id.

¹⁰U.N. Charter art. 51.

¹¹Nicaragua, supra note 1, passim.

¹²International Law Commission Draft Articles on State Responsibility, Report of the International Law Commission to the General Assembly, 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 30-63, 52-53 & nn. 174-75, U.N. Doc. A/CN.4/SER.A/1080/Add.1/ pt.2. For a sampling of such writers, see L. Henkin, How Nations Behave: Law and Foreign Policy 232-33 (2d. ed. 1979); P. Jessup, A Modern Law of Nations 165-68 (1968); I. Brownlie, International Law and the Use of Force by States 275-78 (1963); Kunz, Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations, 41 Am. J. Int'l L. 872, 876-78 (1947).

¹³Nicaragua, supra note 1, at 105.

1. Shangri Did Not Commit an Armed Attack Against Yokum.

At no time did Shangri directly attack Yokum or commit any act which would constitute an indirect attack on Yokum. This Court defined armed attack in the Nicaragua case to include an act of aggression under the U.N. Definition of Aggression.¹⁴ However, the Court did not intimate that every act of aggression in the Definition would constitute an armed attack. Thus, Yokum is not entitled to claim self-defense simply because an aggressive act in the Definition may apply to Shangri. For example, the Definition provides that "[t]he action of a State in 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"¹⁵ is a qualifying act of aggression giving rise to international responsibility.¹⁶ However, this provision does not apply to Shangri for three reasons. First, PACM is not a State, and Shangri does not recognize it as such. (Clarification to Problem) Second, the internal confusion in Shangri afforded PACM the opportunity to use Shangri's territory; Shangri did not place its territory at PACM's disposal. Third, the Definition of Aggression specifically provides that nothing therein, particularly paragraph 3, shall prejudice the right to self-determination.¹⁷ PACM's struggle for the right of self-determination for its people in Midbari does not constitute aggression; therefore, Shangri has not committed an aggressive act.

Shangri does not condone PACM's acts, but killing one person on the Hasdrubal, another State's (Bellan's) territory, does not constitute an "armed attack" against the State of which the deceased is a national. Terrorists' attacks occur with increasing frequency. If they were sufficient provocation, acts of self-defense would be daily occurrences. The Court supported a narrow view of "armed attack" in the context of collective self-defense

¹⁴Id. at 103-04, para. 195.

¹⁵"Definition of Aggression," G.A. Res. 3314, supra note 8, art. 3, para. f.

¹⁶Id., art. 5.

¹⁷Id., art. 7.

in the Nicaragua case,¹⁸ and should continue to support this concept for individual self-defense as well. The considerations are the same, and the risks of laxity no less severe. The world can ill afford the consequences if the Court should err on the side of an expansive interpretation of self-defense.

2. Yokum Cannot Justify Its Attack on Shangri by Claiming that PACM's Acts Are Attributable to Shangri.

Yokum is not entitled to claim that its interception and violation of Shangri's territorial integrity is an act of self-defense when the only instigation was PACM's activities. PACM's activities are not attributable to Shangri for two reasons.

First, in the Nicaragua case, the Court distinguished "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."¹⁹ Specifically included in the less grave forms and therefore not rising to the level of armed attack is the "organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."²⁰ Regardless of whether Shangri acquiesced in PACM's activities, Yokum cannot justify its use of force against Shangri on this basis since acquiescence does not constitute an armed attack.

Second, PACM's acts cannot be attributed to Shangri since under the circumstances PACM did not justifiably exercise any elements of governmental authority in the absence of the official Shangri authorities.²¹ There are no facts to indicate that PACM was performing any governmental function in the areas in which its members lived. PACM's control of its own

¹⁸Nicaragua, supra note 1 at 103, para. 195.

¹⁹Id. at 101, para. 191.

²⁰Id. The Court, in turn, cited the language from General Assembly Resolution 2625, supra note 5.

²¹International Law Commission Draft Articles on State Responsibility, supra note 12, art. 8, para. b.

membership is no different than the Mafia's control of its membership. Mere control over a group does not constitute the performance of governmental functions.

C. Yokum Is Not Entitled to Rely on Anticipatory Self-Defense under Customary International Law to Justify Its Threat or Use of Force.

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-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."²²

Shangri did not attack Yokum, nor did it take any action that could conceivably require Yokum to use force against an aircraft flying from one country to another. The necessity required for anticipatory self-defense has been interpreted to be present where there is a danger to people's lives coupled with unreasonable demands for concessions.²³ No lives were endangered; no demands were made. In addition, the phrase "no moment for deliberation" imposes a temporal limitation. None of Shangri's acts, such as its alleged acquiescence in the improper use of its territory, created a temporal urgency that would justify Yokum's anticipatory response. If the Court were to recognize Yokum's interception as an appropriate response to any of Shangri's acts, then any State could justify a similar interception solely on its belief that a person whom it wanted to extradite was on board any State's aircraft.²⁴

D. Yokum Violated the Civil Aviation Treaties.

Yokum violated both the express provisions of the civil aviation treaties and customary international law as evidenced by the treaties on civil aviation. The controlling principle of the treaties on civil aviation is freedom of the air, and the treaties uniformly

²²J. Moore, Digest of International Law 412 (1906); see also L. Henkin, R. Pugh, O. Schachter & H. Smit, International Law 662-63 (2d ed. 1987).

²³Schachter, The Right of States to Use Armed Force, 82 Mich. L. Rev. 1620, 1635 (1984).

²⁴McGinley, The Achille Lauro Affair - Implications for International Law, 52 Tenn. L. Rev. 691, 721 (1985).

prohibit interference with aircraft.²⁵ Article 87 of the Third United Nations Convention on the Law of the Sea includes the freedom of overflight within the principle of freedom of the seas.²⁶ The airspace over the high seas is international space²⁷ and the exercise of sovereignty against another State within this space is expressly prohibited by international agreement.²⁸ Since aircraft are part of the territory of the State in which they are registered,²⁹ Yokum not only illegally exercised sovereignty in international airspace, but also violated Shangri's sovereignty.

At the time the aircraft was intercepted, Shangri was responding to a request for extradition from Saq, and was escorting the PACM members to the country of extradition. Shangri was free to choose the country to which it would extradite the PACM members. The Hague and Montreal civil aviation treaties do not establish any parameters for the extradition decision, but merely specify offenses to be deemed extraditable offenses in any existing extradition treaties between the States.³⁰ If no bilateral extradition treaty exists, then the

²⁵Convention on International Civil Aviation, signed at Chicago, 7 December 1944, art. 5, 10 (prohibits interception), 15 U.N.T.A. 295, T.I.A.S. 1591, 3 Bevans 944, 61 Stat. 1180; Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo, 14 September 1963, art. 1, para. b (prohibits acts which jeopardize the safety of aircraft, persons or property on board an aircraft), 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 Acts Against the Safety of Civil Aviation, signed at Montreal, 23 September 1971, art. 1 (prohibits any act likely to endanger the safety of an aircraft), 974 U.N.T.S. 177, 24 U.S.T. 564, T.I.A.S. 757, 10 ILM 1151 (1971); Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague, 16 December 1970, art. 1 (prohibits the unlawful seizure or exercise of control over an aircraft), 860 U.N.T.S. 105, 22 U.S.T. 1642, T.I.A.S. 7192, 10 ILM 133 (1971).

²⁶Third United Nations Convention on the Law of the Sea, signed at Montego Bay, 10 December 1982, art. 87, para. 1(b), U.N. Doc. A/CONF.62/122 and Corr. 1 to 11, 21 ILM 1261 (1982).

²⁷Convention on the High Seas, Geneva, 1958, article 2(4), Adopted by the U.N. Conference on the Law of the Sea, U.N. Doc. No. A/CONF. 13/L. 53,.

²⁸Id., art 1. See generally, Chasan, International Law of Territorial Boundaries of Sea, Air, and Outer Space, 4 Northrop U. L. J. of Aerospace, Energy and the Environment 145 (1983).

²⁹Chicago Convention, supra note 25, art 17.

³⁰The Hague Convention, supra note 25, art. 8, para. 1; Montreal Convention, supra note 25, art. 8, para. 1. The Chicago Convention does not address extradition, and the Tokyo Convention specifically states it does not create an obligation to grant extradition, supra note 25, art. 16, para. 2.

States must recognize the offense as extraditable between themselves only if they make extradition conditional on the existence of a treaty.³¹ There are no facts to indicate that either Shangri or Yokum impose this condition. The drafters of the Hostages Convention, the most recent multilateral treaty to impose an obligation to extradite, deliberately rejected a requirement that the extraditing country rank the countries requesting extradition according to the perceived significance of their interest.³²

The fact that Shangri requisitioned an aircraft to transport the PACM members does not diminish in any way the character of the flight as one involving civil aviation. The Shangri government did not use the aircraft for military, customs or police services as is required to exclude it from the operation of the civil aviation treaties.³³ The transport of the extradited parties does not fall within any of these categories.

In 1973, the U.N. Security Council unanimously condemned Israel's interception of a Lebanese aircraft suspected of carrying a Palestinian whose organization was responsible for killing passengers and crew of a hijacked aircraft as a "serious interference with international civil aviation and a violation of the Charter of the United Nations."³⁴ In 1986, a U.S. veto prevented the U.N. Security Council from issuing a condemnation³⁵ when Israel again intercepted a Libyan aircraft over international waters in an attempt to obtain Palestinians involved in planning attacks against Israel. The U.S.'s own interception of an Egyptian aircraft after the Achille Lauro incident intervened between the two Israel

³¹The Hague Convention, supra note 25, art. 8, para. 2, 3; Montreal Convention, supra note 25, art. 8, para. 2, 3.

³²Verwey, The International Hostages Convention and National Liberation Movements, 75 Am. J. Int'l L. 69, 89-90 (1981).

³³Tokyo Convention, supra note 25; art. 1, para. 4, Chicago Convention, supra note 25; art. 3, Montreal Convention, supra note 25, art. 4.

³⁴U.N. Security Council Resolution No. 337, 28 U.N. SCOR (1740th mtg.), Res. & Dec. at 10, U.N. Doc. S/Res/337 (1973).

³⁵U.N. Security Council, Provisional Verbatim Record of the 2655th Meeting, S/PV.2655 at 114 (Feb. 6, 1986).

interceptions and prompted the U.S. veto. The U.S. then conveniently adopted the position that some interceptions of civil aircraft may be justified, although it generally opposes them. Similarly, in 1983, the U.S.S.R. vetoed a U.N. Security Council resolution condemning the Soviet interception and downing of Korean Airlines Flight 007 in which killed 269 people.³⁶

These interceptions reflect a pattern of State behavior, and represent a method that States are increasingly willing to use. Shangri deplores terrorist activities such as the hijacking of the Hasdrubal, but the answer is not to resort to dangerous and illegal interceptions whose consequences can be as tragic as those of KAL Flight 007. These interceptions are no better than the terrorist activities they intend to remedy.

E. Yokum's interception of the Shangri aircraft is not a permissible countermeasure to Shangri's alleged breach of its obligation to try or extradite under the Hostages Convention.

Shangri did not breach its obligation to try or extradite under the Hostages Convention since it chose to extradite the PACM members to Saq, and was in the process of transporting them when the Yokum fighter jets intercepted the aircraft. Nor has Shangri breached its duty to prevent hostage-taking since armed hostilities among its religious factions prevent it from controlling PACM's activities.³⁷ Assuming, arguendo, that Shangri did breach an obligation, the wrongfulness of this violation is precluded under the Draft Articles on State Responsibility,³⁸ a codification of customary international law,³⁹ since Yokum's interception is not a legitimate countermeasure under international law.⁴⁰

³⁶U.N. Security Council, Provisional Verbatim Record of the 2476th Meeting, S/PV.2476, (Sept. 12, 1983, reprinted in 22 ILM 1138, 1144 (1983)).

³⁷See infra text accompanying notes 96-101.

³⁸Report of the International Law Commission on the Work of its Thirty-First Session, U.N. Doc. A/34/10/Corr. 1 (1979), reprinted in [1979] Y.B. Int'l L. comm'n 87-136, U.N. Doc. A/CN.4/SER.A/1979/Add.1 (Part 2).

³⁹Recent Developments, Use of Force: Interception of Aircraft, 27 Harv. Int'l L. J. 761, 767 n. 56 (1986).

⁴⁰Addendum to the Eight Report on State Responsibility, by Mr. Robert Ago, U.N. Doc. A/CN.4/318/Add. 5-7 (1980), reprinted in [1980] Y.B. Int'l L. Comm'n 13-70, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1), article 30.

Legitimate countermeasures are proportional to the injury suffered,⁴¹ are taken only after other peaceful measures are exhausted,⁴² and do not violate a peremptory international law norm (Jus cogens).⁴³ Yokum's interception is not a legitimate countermeasure because its use or threat of force during the interception violated a peremptory norm against the use of force⁴⁴ which cannot be justified as an act of self-defense. Nor does a breach of the Hostages Convention justify the interception since the Convention specifically states that "[n]othing in this Convention shall be construed as justifying the violation of the territorial integrity or political independence of a State in contravention of the Charter of the United Nations."⁴⁵ Since aircraft have the nationality of the State in which they are registered,⁴⁶ Yokum violated Shangri's territorial integrity when it intercepted the aircraft.

Regardless of whether Shangri breached the Convention, Yokum is not entitled to threaten or use force to vindicate a legal right, i.e., redress of the harm caused by Shangri's alleged breach.⁴⁷ The Corfu Channel Case specifically rejected the argument that

⁴¹International Law Commission Draft Articles on State Responsibility, Part II, Report of the International Law Commission to the General Assembly, U.N. Doc. A/Cn.4/389 (1985), reprinted in [1985] 2 Y.B. Int'l L. Comm'n 1, 3-15, 11, U.N. Doc. A/CN.4/SER.A/1985/Add.1 (pt.1), art. 9, para. 2.

⁴²Id., art. 10.

⁴³Id., art. 12

⁴⁴International Law Commission Draft Articles on State Responsibility, supra note 12, art 33, and commentary at [1980] 2 Y.B. Int'l L. Comm'n 13, 55, U.N. Doc. A/CN.4/SER A/1980/Add.1 (pt. 1).

⁴⁵Convention Against the Taking of Hostages, done at New York, 17 December 1979, art. 14, U.N. Doc. A/Res.34/146 (1979), 18 ILM 1457 (1979).

⁴⁶Chicago Convention, supra note 25, art. 17.

⁴⁷Murphy, The Future of Multilateralism and Efforts to Combat International Terrorism, 25 Colum. J. Transnat'l L. 35 (1987). Cf. Schachter, supra note 23, at 1626; M. Akehurst, A Modern Introduction to International Law (5th Ed. 1984) (qualifying language cannot be used to justify use of force to vindicate a legal right).

the qualifying words "against the territorial integrity or political independence"⁴⁸ in Article 2(4) permitted the use of force to vindicate a legal right.⁴⁹

F. Yokum was not entitled to intercept the Shangri aircraft as an act of reprisal.

Reprisals are "injurious acts that ordinarily would be illegal but which become legal acts of enforcement by dint of the target State's prior illegal act."⁵⁰ Reprisals are currently regarded as illegal under the United Nations Charter.⁵¹ The United Nations Declaration on Friendly Relations also requires that "States . . . refrain from acts of reprisal involving the use of force."⁵² The U.N. Security Council has condemned reprisals "as incompatible with the purpose and principles of the United Nations."⁵³ Reprisals have been condemned since the Naullaa Arbitration⁵⁴ in 1928.⁵⁵ The Security Council has repeatedly rejected the rationale that reprisal is justified following an "accumulation of events," or that the act of reprisal should be judged in the whole context of events.⁵⁶

Even if reprisals were legal, Yokum is not entitled to act against Shangri since the vindication of a legal right does not give rise to the right to threaten or use force. Yokum might have a right to reprisal against the hijackers' country, but not against Shangri for its

⁴⁸U.N. Charter art. 2, para. 4.

⁴⁹The Corfu Channel Case, (U.K. v. Alb.), 1949 I.C.J. 4, 34-35 (April 9, 1949).

⁵⁰Taulbee and Anderson, Reprisal Redux, 16 Case W. Res. J. of Int'l L. 309, 312 (1984).

⁵¹Schachter, 53 U. Chi. L. Rev. 113, supra note 1, at 132; Roberts, Self-Help in Combatting State-sponsored Terrorism: Self-Defense and Peacetime Reprisals, 19 Case W. Res. J. of Int'l L. 243, 282-83 (1987); Bowett, Reprisals Involving Recourse to Armed Force, 66 Am. J. Int'l L. 1, 33-36 (1972); Intocchia, American Bombing of Libya: An International Legal Analysis, 19 Case W. Res. J. of Int'l L. 177, 198-200, (1987).

⁵²Declaration, supra note 5; Taulbee and Anderson, supra note 50, at 315.

⁵³I. Brownlie, supra note 12, at 281.

⁵⁴2 Rep. Int'l Arb. Awards 1011 (1928).

⁵⁵P. Jessup, supra note 12, at 178; D. Bowett, supra note 51, at 13; I. Brownlie, supra note 12, at 222, 223.

⁵⁶Bowett, supra note 51, at 7.

alleged breach of an independent duty owed under the Hostages Convention.⁵⁷

II. YOKUM'S ABDUCTION OF THE PACM MEMBERS IS AN ILLEGAL STATE-SPONSORED KIDNAPPING.

Yokum's seizure of the Shangri aircraft and capture of the PACM members constitutes an illegal State-sponsored kidnapping. The abduction, performed by Yokum's government agents acting under color of law, violated Shangri's sovereignty and territorial integrity since it occurred within Shangri's jurisdiction and without its consent.⁵⁸ The abduction is also a disruption of world order and a violation of international legal process.

A. Yokum Failed to Exhaust Ordinary Measures and Prematurely Resorted to Extraordinary Means.

Yokum violated the international legal process under the doctrine of nunquam decurritur ad extraordinarium sed ubi deficit ordinarium (never resort to the extraordinary until the ordinary fails) by failing to exhaust all ordinary procedures available to it before resorting to forcible abduction.⁵⁹ The Court must not condone Yokum's illegal kidnapping unless and until all possible extradition procedures have been attempted without success.⁶⁰

Yokum must exhaust not only extradition procedures, but also international procedures for peaceful settlement before it is entitled to take otherwise illegal measures.⁶¹ The U.N. provides procedures for the peaceful settlement of disputes. Articles 2(3) and 33 impose an obligation to seek a peaceful solution to any dispute.⁶² Article 37 obligates members to refer disputes not settled by peaceful means to the

⁵⁷Note, The Achille Lauro Incident and The Permissible Use of Force, 9 Loy. L.A. Int'l & Comp. L. J. 481, 493 (1987).

⁵⁸Bassiouni, Unlawful Seizure and Irregular Rendition Devices as Alternatives to Extradition, 7 Vanderbilt J. Trans'n'l L. 25 (1973).

⁵⁹M.C. Bassiouni, International Terrorism and Political Crimes XIV, section 5-1 (1975).

⁶⁰Note, Federally Sponsored International Kidnapping: An Acceptable Alternative to Extradition? 64 Wash. U. L. Q. 1205 (1986).

⁶¹International Law Commission Draft Articles on State Responsibility, Part II, *supra* note 41, art. 10, para. 1.

⁶²U.N. Charter art. 2, para. 3; art. 33.

Security Council.⁶³ Yokum did not even attempt to comply with these U.N. procedures. Therefore, Yokum cannot make the blanket assertion that these procedures are ineffective.

B. Yokum's Abduction Violates Shangri's Sovereignty and Territorial Integrity.

"International abduction violates the sovereignty and territorial integrity of the asylum State, thus contravening a fundamental tenet of customary international law."⁶⁴ This principle of customary international law is codified in the U.N. Charter.⁶⁵ "[T]ransnational kidnapping even of alleged criminals is violative of the U.N. Charter. . . .The problem with . . .claim[ing] that terrorists can lawfully be captured in international waters or airspace is that 'capture' involves precisely the same general problem as kidnapping from foreign State territory without foreign State consent."⁶⁶ The U.N. Security Council specifically condemned abduction in a resolution issued on the kidnapping of Adolph Eichmann.⁶⁷ In a more recent resolution, the Security Council unequivocally condemned hostage-taking and abduction, and affirmed "the obligation of all States in whose territory hostages or abducted persons are held urgently to take all appropriate measures to secure their safe release and to prevent the commission of acts of hostage-taking and abduction in the future."⁶⁸

C. Yokum's Abduction Disrupted World Public Order, and Circumvented International Legal Process.

Abduction, as a retaliatory measure, creates immediate peril to world peace and if sanctioned, would establish a dangerous precedent. It will continue to be an attractive alternative if no negative consequences flow from its use. The Court will strengthen

⁶³Id., art. 37.

⁶⁴Note, supra note 60, at 1214.

⁶⁵U.N. Charter art. 2(5).

⁶⁶Paust, Responding Lawfully to International Terrorism: The Use of Force Abroad, 8 Whittier L. Rev. 711, 726-27 (1986).

⁶⁷U.N. Security Council Resolution No. 138, 15 U.N. SCOR (868th mtg.) 1, U.N. Doc. S/4349 (1960).

⁶⁸U.N. Security Council Resolution No. 579 Condemning Hostage Taking and Abduction, S.C. Res. 579 (XL 1985), reprinted in 25 ILM 243 (1986).

extradition as an institution in the international legal process by strongly sanctioning the illegal use of abduction. To allow Yokum's actions to go unpunished would set the stage for similar self-help actions in the future, justified solely on the basis that the State was unable to obtain jurisdiction over persons it wishes to prosecute.

An illegal abduction cannot result in valid personal jurisdiction.⁶⁹ It is irrelevant to this Court's resolution of the dispute that national courts assert personal jurisdiction over the abducted person under the principle of mala captus bene detentus (improperly captured, properly detained). National courts are created to interpret and apply national laws; they follow international law only when there is no overriding national law.⁷⁰ Moreover, not all States uniformly apply the principle. For example, the United States, Switzerland, England, Denmark, and Germany each admitted that its abduction of an alien was in error, apologized, and returned the person to his country.⁷¹

Yokum's violation of Shangri's sovereignty and territorial integrity requires the imposition of a sanction and the attachment of a remedy. The only remedy which would redress the wrong committed by Yokum is the return of the persons unlawfully seized. The integrity of the international legal order is imperiled unless the Court awards such a remedy.

III. SHANGRI WAS JUSTIFIED IN RELEASING THE PACM MEMBERS.

Shangri's grant of asylum to PACM members in its territory was within Shangri's sovereign discretion. Shangri has not consented to any limitation on this well-recognized principle of discretion. The Hostages Convention, even if applicable to the PACM members' conduct, requires Shangri to make hostage-taking illegal in its municipal law, but it does not intrude upon Shangri's sound exercise of prosecutorial discretion in particular cases.

⁶⁹M.C. Bassiouni, supra note 59, section 5-1.

⁷⁰Laker Airways, Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 951 (D.C. Cir. 1984).

⁷¹M.C. Bassiouni, International Extradition and World Public Order 174-75 (1974).

A. Shangri's Grant of Asylum Is Within Its Domestic Discretion.

Yokum cannot question Shangri's grant of asylum to the PACM members just as it cannot question Shangri's extradition of the PACM members to Saq.⁷² A State's grant of asylum is entirely within its discretion. A State can accord asylum to any individual who flees prosecution and enters its territory.⁷³ International law places no bounds on this discretion unless the State specifically consents to such limits by treaty.⁷⁴

B. The Hostages Convention Does Not Limit Shangri's Power to Grant Asylum to PACM Members.

The grant of asylum to PACM members does not contravene the Hostages Convention. The conduct of the PACM members does not fall within the Convention's definition of hostage-taking. The Hostages Convention applies only when the hostage-takers detain individuals to compel a State to do or to abstain from doing any act.⁷⁵ The PACM hijackers did not seize, detain or threaten to kill anyone on board the Hasdrubal to compel Yokum to do or abstain from doing any act as a condition for the release of the hostages. The PACM members threatened to kill the passengers only if third parties attempted a rescue. (C. 2) PACM's purpose was to publicize its struggle against the State of Midbari. The PACM members voluntarily freed the hostages after achieving their goals. (C. 4)

Pursuant to article 2 of the Convention,⁷⁶ Shangri has made hostage-taking punishable in its domestic law. (C. 6) Like other States, Shangri does not enforce its criminal legislation by arrest, prosecution and punishment in every case where its official authorities have reason to believe that the law has been violated. The Hostages Convention, even if it applies, does not limit this prosecutorial discretion. Instead, it explicitly recognizes that States will exercise it, even in cases of suspected hostage-taking.

⁷²See infra text accompanying notes 118 to 121.

⁷³L. Oppenheim, International Law 676-77 (8th ed. Lauterpacht 1955).

⁷⁴Id. at 677.

⁷⁵Hostages Convention, supra note 45, art. 1, para. 1.

⁷⁶Id., art. 2.

Article 5(2) of the Convention obliges a State to establish its jurisdiction over an alleged hostage-taker who is within its territory and who is not extradited to another State in accordance with article 5(1).⁷⁷ Article 5(1)(b) provides: "Each State Party shall take such measures as may be necessary to establish its jurisdiction over any [acts of hostage-taking] which are committed . . . by any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory."⁷⁸ Some or all of the PACM members to whom Shangri has granted asylum have their habitual residence in its territory. Therefore, the Convention obliged Shangri to establish jurisdiction over their alleged offenses only if Shangri considered it appropriate. The Convention also provides that even when a party does not extradite an alleged hostage-taker, the decision whether to pursue the case lies with its prosecutorial authorities.⁷⁹

C. Shangri's Grant of Asylum Was in Retorsion for Yokum's Forcible Violation of Shangri's Sovereignty.

Yokum forcibly violated Shangri's territorial sovereignty when it intercepted a Shangri aircraft, forced it to land, and abducted the PACM members on board. When an injured State takes countermeasures against an offending State which are permissible under international law regardless of the offending State's prior breach, it performs an act of retorsion.⁸⁰ Retorsion is always a legitimate means of self-help unless a State abuses it by arbitrarily inflicting an unjustifiable injury upon another State.⁸¹

Shangri's grant of asylum to the PACM members is a carefully tailored and proportional response to Yokum's wanton violation of its sovereignty. Only after Yokum kidnapped three PACM members from its territory did Shangri respond by granting asylum to

⁷⁷Id., art. 5, para. 2 ("Each State Party shall likewise take such measures" [emphasis added]).

⁷⁸Id., art. 5, para. 1(b) (emphasis added).

⁷⁹Id., art. 6, para. 1; art. 8, para. 1.

⁸⁰L. Henkin, R. Pugh, O. Schachter, H. Smit, International Law 542 (2d. ed. 1987).

⁸¹L. Oppenheim, International Law 345 (8th ed. Lauterpacht 1955).

the four remaining members in its custody. (C. 6) Shangri declined to prosecute the PACM members in retorsion for Yokum's unjustifiable violation of its sovereignty.

IV. SHANGRI HAS APPLIED ITS BEST EFFORTS TO FULFILL ITS INTERNATIONAL OBLIGATIONS AND HAS NOT CONDONED OR WILLINGLY PERMITTED THE USE OF ITS TERRITORY BY ANY INDIVIDUALS AS A BASE FOR FOR ATTACKS ON YOKUM NATIONALS.

Shangri has fulfilled its obligation under the Hostages Convention to take such measures as it deems practicable to prevent hostage taking. Though customary law does not impose upon Shangri any special duty of protection toward alien nationals, Shangri has exercised due diligence in protecting alien nationals from harm. Shangri's civil strife prevents it from expending its scarce resources on controlling PACM's activities.

A. Shangri Has Complied With Article 4 of the Hostages Convention.

Article 4(a) of the Hostages Convention,⁸² to which both Shangri and Yokum are parties (C. App. 1[b]), obliges Yokum and Shangri to "cooperate in the prevention" of hostage-taking,⁸³ in particular by "taking all practicable measures to prevent preparations in their respective territories for the commission of [hostage-taking] within or outside their territories, including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages. . . ."⁸⁴ Under the Convention, it is a matter within Shangri's domestic jurisdiction⁸⁵ as a sovereign State whether it will undertake such prohibitive measures. Shangri has enacted municipal laws making hostage-taking punishable pursuant to article 2 of the Hostages Convention.⁸⁶ (C. 6) It is a matter within Shangri's sovereign

⁸²Hostages Convention, supra note 45, art. 4, para. a.

⁸³The Hostages Convention, id., defines "hostage-taking" in art. 1.

⁸⁴id., art. 4, para. a.

⁸⁵See U.N. Charter, art. 2, para. 7.

⁸⁶Hostages Convention, supra note 45, art. 2 ("Each State Party shall make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave

discretion, in formulating its domestic policy, whether it will enforce those laws in any particular circumstance.

Shangri would not be a party to the Hostages Convention if it did not subscribe to the goal of "develop[ing] international cooperation between States in devising and adopting effective measures for the prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism."⁸⁷ When a State by treaty or convention undertakes to cooperate with other States to attain certain objectives, it does not always give up the right to choose the means by which it will promote those objectives. The treaty or convention does not remove that choice of means from the domestic jurisdiction of the State.⁸⁸ Shangri is not violating the obligation of good faith in the performance of treaty obligations, nor is Shangri invoking its municipal law as a justification for its failure to perform a treaty. Article 4(a) recognizes that the preventive measures a State will take as a matter of its domestic policy are within that State's discretion precisely because that State is in the best position to judge what is "practicable."⁸⁹

Up to and including the time of the Hasdrubal's seizure, all of Shangri, and the port city of Taluba in particular, was in a state of near anarchy. Shangri's State peace and economy have been shattered by a breakdown of accommodation between the religious groups composing its citizenry and armed hostilities between them. Thus, the government of Shangri has lost effective control over parts of its territory, including the part where PACM maintains its headquarters. (C. 1, 3)

Shangri, within its discretion as a sovereign State, and in compliance with Article 4(a) of the Hostages Convention, concluded it was impracticable to take measures to prevent or forestall all activities of PACM posing a threat to alien nationals. Such measures would of nature of those offences".

⁸⁷Id., preamble, cl. 5.

⁸⁸L. Goodrich, The United Nations 78 (1959).

⁸⁹Hostages Convention, supra note 45, art. 4, para. a (emphasis added)..

necessity have entailed acts of physical prevention or preclusion by the police and armed forces of Shangri. In striving to reestablish a unitary government and civil peace among its domestic religious factions, it was within Shangri's sovereign discretion to conclude that it could not expend its limited military and police forces toward any other immediate end.

In any event, Article 4's obligation of prevention extends only to prevention of acts of hostage-taking.⁹⁰ Yokum did not transmit any information to Shangri from which one could reasonably infer that PACM members threatened to take Yokum nationals hostage, since PACM's past acts had consisted only of "acts of violence against Yokum nationals and economic interests." (C. 3)

B. Shangri Is Not Obligated to Accord More Protection to Alien Nationals than to Its Own Nationals.

Shangri is not bound by a duty under customary international law to prevent the use of its territory for ends contrary to the rights of other States, and, derivatively, the rights of nationals of other States. This principle "grew up or came to be adopted" in the pre-1945 era "when the international community was restricted to only a few States, including those, fewer still, admitted into it from time to time."⁹¹ Shangri, a small developing country, (C. 3), was not among these States. "[T]he birth of a new world community has brought about a radical change which makes the traditional basis of obligation outmoded."⁹²

While Shangri is not bound to this outmoded obligation, this does not mean that Shangri regards the infliction of injuries on alien nationals by private individuals who may be operating from within its territory with indifference. Shangri strives to safeguard alien nationals, but only as a matter within its domestic jurisdiction. Alien nationals, like Shangri's own citizens, are free to seek redress for their injuries under Shangri's municipal law.

⁹⁰Id., art. 4 (preamble).

⁹¹Roy, Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?, 55 A.J.I.L. 863, 888 (1961).

⁹²Id.

[T]he responsibility of a State for injuries to aliens remains . . . the same . . . as in the case of its own nationals, but it remains its responsibility not to the home State of the injured alien but to the injured alien himself. In other words, it ceases to be an international responsibility and becomes a responsibility only under the municipal law of the State concerned.⁹³

Shangri acknowledges a duty under customary international law to provide to alien nationals only the degree of protection it affords to its own nationals. Shangri does not renounce its obligation to strive to comply with international standards and goals of human rights in its domestic law,⁹⁴ but Shangri insists that how it achieves those goals is a matter within its domestic jurisdiction,⁹⁵ unaffected by any principle of customary law.

C. Even If Shangri Is Bound by Customary International Law to Exercise Due Diligence, Shangri Has Fulfilled This Duty.

In the Corfu Channel Case, this Court spoke of "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."⁹⁶ Since the parties to Corfu Channel were members of the international community before 1945, the underdeveloped States emerging after 1945, Shangri among them, (C. 3), are not included within this announcement of a principle of customary law binding on "every State."⁹⁷

Assuming arguendo that Shangri is bound by this duty, this Court has acknowledged that the measure of compliance with it varies with the circumstances; the duty is "even more exacting in peace than in war. . . ."⁹⁸ There is no question that Shangri is in a state of civil war. (C. 3) A State's duty not to allow knowingly its territory to be used for acts

⁹³Id.

⁹⁴U.N. Charter art. 55, para. c ("[T]he United Nations shall promote . . . universal respect for, and observance of, human rights. . . ." [emphasis added]).

⁹⁵Id. art. 2, para. 7.

⁹⁶Corfu Channel, 1949 I.C.J. at 22.

⁹⁷See supra text accompanying notes 91–95; see also Statute of the International Court of Justice, June 26, 1945, art. 59, 59 Stat. 1055, T.S. 993, 3 Bevens 1179 ("The decision of the Court has no binding force except between the parties and in respect of that particular case").

⁹⁸Corfu Channel, 1949 I.C.J. at 22.

contrary to the rights of other States is less exacting in time of international war because armed conflict with other States distracts the State from pursuing its normal policies of domestic regulation. Civil war is even more disruptive of a State's regulation and control of its domestic affairs. Thus, even were Shangri bound by the duty announced in the Corfu Channel Case, the measure of Shangri's compliance with that duty must be less exacting.

The standard of due diligence takes account of the availability of means to contend with the source of the attacks on alien nationals.⁹⁹ Shangri, with its limited means of enforcement, must allocate those means to the most urgent problem facing it: the reestablishment of civil peace and a unitary regime.¹⁰⁰ Given these circumstances, Shangri, lacking the available means to physically prevent or preclude any acts by PACM posing a threat of injury to alien nationals, has exercised due diligence. While Shangri by no means disavows the obligations it has to prevent injury to human beings and to property, Shangri respectfully requests that its conduct be judged in the light of its tremendously difficult circumstances of civil strife.

It is not proper for Yokum to seek a general declaration of breach of minimum standards of state responsibility. At the most, all Yokum can request is a declaration as to each instance of claimed harm. The standards of "practicability"¹⁰¹ in the Hostages Convention and of due diligence in customary law cannot be applied without taking into account the particular facts surrounding each instance of claimed injury.

D. Even If Shangri Has Breached Any Duties of Prevention, That Breach Is Justified Under the Doctrines of Force Majeure and Necessity.

Even if this Court were to find that Shangri has breached any duties of prevention under Article 4 of the Hostages Convention or customary international law, this Court should recognize that Shangri's breach was justified under accepted doctrines of international law.

⁹⁹Lillich & Paxman, State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities, 26 Am. U. L. Rev. 217, 241-43 (1977).

¹⁰⁰See supra text following note 89.

¹⁰¹Hostages Convention, supra note 46, art. 4(a).

First, a breach is not wrongful if it was due to an irresistible force rendering it materially impossible for the State charged with the breach to act in conformity with its obligations.¹⁰² Shangri's civil peace was founded on an accommodation among the religious groups composing its citizenry. (C. 3) Hostility arising from religious beliefs and loyalties is an intractable phenomenon, and, as such, constitutes an irresistible force. Shangri's first duty is to strive to reestablish this delicate accommodation with the limited means available to it. Religious strife renders it impossible for Shangri to physically remove any threat that PACM members or other private individuals within its territory will attack alien nationals.

Second, a breach is not wrongful if the State charged with the breach "had no other means of safeguarding an essential State interest threatened by a grave and imminent peril."¹⁰³ Given the circumstances under which it labors, Shangri would have sacrificed an essential State interest, the very existence of a national regime over its territory, if it had taken military or police action against PACM.

Shangri's failure, if any, to comply with its duties toward Yokum is justified under this doctrine of necessity so long as Shangri's breach "does not entail the sacrifice of an interest of [Yokum] comparable or superior to the interest which it was intended to safeguard."¹⁰⁴ Yokum's interest in protecting its nationals from economic or personal harm is not comparable or superior to Shangri's interest in preserving a national regime. In assuring the continued existence of a national regime over its territory, Shangri's ultimate purpose is precisely to protect the lives and safety of its own ordinary citizens and of alien nationals. The Hostages Convention recognizes this plea of necessity.¹⁰⁵

¹⁰²International Law Commission Draft Articles on State Responsibility, supra note 12, art. 31, para. 1.

¹⁰³Id., art. 33, para. 1.

¹⁰⁴Id.

¹⁰⁵See id., art. 33, para. 3(b); Hostages Convention, supra note 46, art. 4(a) ("all practicable measures...." [emphasis added]); see also supra text accompanying notes 82-89.

V. SHANGRI WAS NOT OBLIGED TO EXTRADITE THE HIJACKERS TO YOKUM.

Yokum cannot assert jurisdiction over the PACM members under either customary international law or the Hostages Convention. Therefore, Shangri was not obliged to extradite them to Yokum. Even if Yokum could validly establish jurisdiction, Yokum was only one of two States requesting extradition. Shangri's decision to extradite three of the PACM members to Saq rather than to Yokum was a matter within its sovereign discretion.

A. Yokum Has No Right to Extradition under the Hostages Convention.

There is no treaty obligation upon which Yokum can base its request for extradition from Shangri. Since the Hostages Convention does not apply to the PACM members conduct,¹⁰⁶ and Shangri and Yokum do not have a bilateral extradition treaty, (C. 4), Shangri was not obligated to extradite the PACM members to Yokum. "[I]n the absence of treaty, surrender of an alleged criminal cannot not be demanded as of right."¹⁰⁷

Even if the Court should decide that the Hostages Convention applies, Yokum still lacks the treaty and jurisdiction necessary for extradition of the PACM members. The Convention, in and of itself, including the provision authorizing jurisdiction if the hostages are nationals of the requesting State, cannot confer jurisdiction over culprits who are nationals of a non-signatory State.¹⁰⁸ First, a non-signatory State cannot consent to the Convention's jurisdictional provisions. Second, the Convention does not authorize States to exercise jurisdiction over nationals of non-signatory States.¹⁰⁹ Yokum cannot prove that the PACM members were nationals of a State which has acceded to the Hostages Convention because the nationality of all seven PACM members is unknown. (C. 1)

¹⁰⁶See infra text accompanying note 75.

¹⁰⁷I. Brownlie, Principles of Public International Law 307 (2d ed. 1973).

¹⁰⁸McGinley, supra note 24, at 711.

¹⁰⁹Id. at 711, n. 129.

B. Yokum Has No Jurisdiction Under Customary International Law.

Each of the five possible customary law bases of jurisdiction is too tenuous to support Yokum's request. The passive personality theory is the least accepted and least justifiable theory of jurisdiction.¹¹⁰ In The S.S. Lotus,¹¹¹ the majority of the Court refused to decide the validity of this theory, while all six dissenting judges rejected it. The Court did determine that a State cannot rely solely on the passive personality theory to enforce its penal laws against a person whose conduct was performed outside its territory. According to the Court, the theory can be used at most to reinforce another, stronger claim of jurisdiction.

The passive personality theory of jurisdiction is invalid because it is intolerable for an individual to be subject to the laws of all States at all times and in all places.¹¹² The courts of other countries are apt to be biased, and their punishments extreme.¹¹³ Few countries have used this theory to establish jurisdiction because its application tends to violate sovereign rights.¹¹⁴ If Yokum's request for extradition was based upon the passive personality theory, Shangri properly denied the request.

Shangri also properly denied Yokum's extradition request if the request was based upon the universality theory of jurisdiction. This is the only theory of jurisdiction not recognized in the Hostages Convention.¹¹⁵ The universality theory, like the passive

¹¹⁰I. Brownlie, Principles, supra note 107 at 296.

¹¹¹The Case of the S.S. Lotus, (France v. Turkey) 1927 P.C.I.J. Ser. A, No. 10 at 70 (Judgment of Jan. 4, 1927).

¹¹²Id. at 165.

¹¹³Id.

¹¹⁴Bowen, Jurisdiction Over Terrorists Who Take Hostages: Efforts to Stop Terror -- Violence Against the United States, 2 Am. U. J. Int'l L. & Pol'y 153, 183 (1987).

¹¹⁵Hostages Convention, supra note 45, art. 5

personality theory, is not generally accepted. In modern times, only twenty four nations have attempted to establish jurisdiction under either theory.¹¹⁶

Yokum also lacked jurisdiction under either the nationality and or the territoriality theory. The Hasdrubal incident did not occur within its territory. Yokum has not shown that any of the seven PACM members was a Yokum national. Finally, Yokum cannot appeal to the protective principle of jurisdiction. Under the protective principle, a State has jurisdiction over the extraterritorial conduct of alien nationals directed against its national security.¹¹⁷ The PACM members seized a Beilan ship with private persons aboard. PACM did not intend to jeopardize Yokum's national security.

C. Shangri Has Exclusive Competence to Determine Where to Send the Hijackers Given Competing Jurisdictional Claims.

Shangri was faced with Saq's and Yokum's competing claims to jurisdiction over the hijackers. There are no universal guidelines for resolving the concurrent jurisdictional claims,¹¹⁸ and international law "does not provide for choosing among competing bases of jurisdiction to prescribe rules of conduct."¹¹⁹ However, international law recognizes that the requested State's determination of jurisdictional issues is a matter within its domestic discretion.¹²⁰ Assuming that the Hostages Convention is applicable, its drafters rejected any attempt to establish priorities among the jurisdictional theories in article 5(1).¹²¹

Shangri decided to extradite the hijackers to Saq as a matter of domestic policy. Yokum had no valid jurisdictional claim under international law. Therefore, Saq's extradition request was appropriately granted.

¹¹⁶Akehurst, Jurisdiction in International Law, 46 Brit. Y.B. Int'l L. 145, 163-64 (1972-3).

¹¹⁷Dickinson, Introductory Comment to the Harvard Research Draft Convention on Jurisdiction with Respect to Crimes, 29 Am. J. Int'l L. Supp. 519, 543 (1935).

¹¹⁸7 M.C. Bassiouni, International Extradition, United States Law and Practice VI section 9-1 (Feb. 1983).

¹¹⁹Akehurst, 46 Brit. Y.B. Int'l L. 145, supra note 116, at 168.

¹²⁰M.C. Bassiouni, International Extradition and World Public Order, supra note 71, at 274.

¹²¹Verwey, supra note 32, at 89-90.

CONCLUSION

WHEREFORE, it is respectfully requested that this Honorable Court:

- 1) DECLARE that Yokum violated a peremptory norm prohibiting the threat or use of force when it intercepted the Shangri aircraft;
- 2) DECLARE that Yokum committed an illegal state-sponsored kidnapping by abducting the PACM members from the intercepted aircraft;
- 3) ORDER Yokum to return the three kidnapped PACM members to Shangri;
- 4) DECLARE that Shangri was justified in granting asylum to the PACM members in its custody;
- 5) DENY all of Yokum's claims for relief; and
- 6) GRANT Shangri such further relief as this Court may deem just.

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