

INTERNATIONAL COURT OF JUSTICE
FOR THE UNITED NATIONS



The Republic of Yokum,

Applicant,

- against -

The Confederation of Shangri,

Respondent.

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

The Parties referred the present dispute to the Court by written application pursuant to Article 40 of the Statute of the International Court of Justice. In accordance with Article 36(1) of the Statute, each Party has submitted to the jurisdiction of this Court and agrees to accept its decisions and orders as final and binding.

STATEMENT OF FACTS

On February 13, 1987, the Beilan-registered cruise ship Hasdrubal departed from Port al-Haj, Saq, carrying 350 passengers. The majority of those passengers, some 200 people, were Yokum nationals. The remaining 150 passengers and the crew members represented 10 other nationalities.

Five hours after the ship's departure, seven members of the People's Armed Conflict Movement (PACM), armed with automatic weapons and explosives, seized control of the ship. While taking control of the ship, the hostage-takers killed one passenger, a Yokum national, and two crew members. Five of the hostage-takers had boarded the Hasdrubal in Taluba, Shangri; the other two hostage-takers boarded the ship during its stop at Port al-Haj, Saq. The nationality of the PACM members is unknown.

PACM, a self-styled group of "freedom fighters," is fighting for the liberation of its homeland, Midbari. Unable to establish a stronghold in Midbari, the PACM freedom fighters launch their attacks from Shangri. Several States, including Yokum, have repeatedly informed the Shangri Government through diplomatic channels of the activities of PACM and the whereabouts of the perpetrators of particular acts of violence against Yokum. The Shangri Government has acknowledged the situation, but has refused in each case to take any action. After each PACM attack, the perpetrators have returned to Shangri, where they have remained unmolested. Only four States have recognized PACM as

the government-in-exile of Midbari; more than 140 States have recognized the current Midbari government as the State's legitimate government and conduct diplomatic relations with it.

The Hasdrubal drifted aimlessly in international waters for two days, while the hostage-takers issued PACM propoganda. During this period, Yokum dispatched military units to the vicinity of the ship. It refrained, however, from any actions which would endanger the passengers or crew of the ship. On February 15, following instructions from PACM headquarters in Taluba, the hostage-takers threatened to kill the Hasdrubal passengers unless they were permitted to dock in Taluba and were granted asylum by Shangri. Shangri allowed the ship to enter its port. Shortly thereafter, the Yokum Ambassador informed the Shangri Foreign Minister that Yokum expected Shangri "to honor its international obligations and to arrest the perpetrators and free the hostages and ship."

Upon arrival of the Hasdrubal in Taluba, the hostage-takers were greeted by a group of fellow PACM members and supporters of the movement. The hostage-takers were allowed to return to PACM headquarters, where they were received as heroes. The entire affair was covered by the international press corps and received wide-spread publicity. The next day, Shangri troops arrested the seven hostage-takers and imprisoned them.

Two days later, the Yokum Ambassador requested the extradition to Yokum of the seven hostage-takers. Yokum based its extradition claim on the 1949 Geneva Conventions and the

Convention Against the Taking of Hostages, to which both nations are parties.

Three days later, the Saq Ambassador requested extradition to Saq of the alleged hostage-takers, based on the same Conventions cited by Yokum. At the same time, however, the President and Minister of Justice of Saq publicly stated that "these heroes of the Revolution are obviously innocent. We seek their extradition in order to have the honor of setting them free."

On March 1, the Government of Shangri requisitioned an aircraft to transport three of the hostage-takers to Saq. Learning of Shangri's intention to release the hostage-takers to Saq, Yokum intercepted the Shangri aircraft in international airspace, retrieved the hijackers, and transported them to Yokum for trial. In retaliation, Shangri has released the remaining four hostage-takers, who continue to reside in Taluba.

On April 1, the Governments of Yokum and Shangri submitted this matter by special agreement to the Court.

QUESTIONS PRESENTED

I. Did Shangri fulfill its obligations under the Fourth Geneva Convention of 1949 and the Hostages Convention to extradite or prosecute the PACM hostage-takers?

II. Has Shangri violated minimum standards of state responsibility by failing to prevent PACM from using its territory as a base for attacks on Yokum nationals?

III. Was Yokum justified under international law in diverting the plane to obtain custody over the PACM hostage-takers?

SUMMARY OF THE PLEADINGS

Shangri is bound under international law to extradite or prosecute the PACM hostage-takers in accordance with the Fourth Geneva Convention of 1949 and the Hostages Convention. The Fourth Geneva Convention, which has evolved into binding customary international law, applies to groups like PACM fighting against "alien occupation." Under the Fourth Geneva Convention, PACM is a belligerent power engaged in an international armed conflict. Moreover, the passengers of the Hasdrubal were "protected persons" and PACM's violent act of hostage-taking constituted a "grave breach" of the laws of war. Shangri, a Party without reservation to the Fourth Geneva Convention, is bound to extradite or prosecute the PACM hostage-takers. Shangri has not fulfilled this duty.

Furthermore, Shangri is bound to extradite or prosecute the PACM hostage-takers under the Hostages Convention. The Hostages Convention supplements the Geneva Convention and imposes an obligation to try or extradite hostage-takers in all instances not already covered by the 1949 Geneva Conventions. By allowing all seven of the PACM hostage-takers to escape justice, Shangri has breached its duty to implement the Hostages Convention in good faith.

In addition, Shangri has violated international standards of state responsibility by allowing its territory to be used by PACM for the organization of attacks against Yokum nationals. Under

the law of state responsibility, a State is duty-bound to prevent armed groups from using its territory as a base for attacks against other States. The World Court's seminal judgment in the Corfu Channel Case, and the arbitral award in the Alabama Claims dispute, both confirm the existence of a well-recognized obligation to prevent the activities of armed groups on a State's territory. Moreover, this duty is codified in the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in accordance with the Charter of the United Nations, and other authoritative international documents.

Shangri cannot deny its responsibility by arguing that it lacks effective control over parts of its territory. This defense has been rejected by numerous international tribunals. Furthermore, Shangri's arrest of the hostage-takers in their Taluba headquarters, and other assertions of effective Governmental authority, demonstrate that Shangri in fact did have the power to control PACM.

Yokum acted consistently with international law in temporarily diverting a Shangri aircraft to fulfill the legal duties that Shangri failed to discharge. The concept of seeking a remedy through the limited use of self-help is supported by long-standing legal doctrine. Cases such as the Entebbe rescue mission evidence the contemporary international community's endorsement of carefully circumscribed measures to redress international wrongs. The diversion of the plane was a

necessary and proportional action designed to fulfill the purposes of the Fourth Geneva Convention and the Hostages Convention. Since the hostage-takers would have been released in Saq, Yokum had no other means of ensuring that the hostage-takers would be brought to justice.

Furthermore, Yokum did not violate Shangri's territorial integrity or political independence and thus, acted consistently with Article 2(4) of the United Nations Charter. Moreover, Yokum's actions served to promote a fundamental purpose of the Charter, the maintenance of peace and security.

ARGUMENT

I. SHANGRI IS BOUND TO TRY OR EXTRADITE THE HOSTAGE-TAKERS.

A. HOSTAGE-TAKING IS AN INTERNATIONAL CRIME IN PEACE AND WAR.

The international community condemns certain crimes as offenses against the law of nations (delicti jus gentium).¹ Hostage-taking is an international crime,² defined as an international offense in Article 1 of the International Convention Against the Taking of Hostages³ and as a "grave breach" of the laws of war in Article 147 of the Fourth Geneva Convention of 1949.⁴

In order to ensure that those who commit international crimes are brought to justice, the international community has also adopted in a growing number of instruments the judicial procedure aut dedere aut judicare, which imposes upon any State that refuses to extradite an international criminal the obligation to prosecute him himself.⁵ Shangri and Yokum have accepted this obligation by ratifying the Hostages Convention and

¹ M. C. Bassiouni, International Criminal Law 1-9 (1986).

² Id. at 475-480.

³ Done at New York, 17 December 1979, U.N. Doc. A/RES/34/146 (1979), reproduced in 18 I.L.M. 1456 (1979) ("Hostages Convention").

⁴ Convention (IV) Relative to the Protection of Civilian Persons in Time of War, signed at Geneva, 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. 3365 ("Fourth Geneva Convention").

⁵ See generally Costello, International Terrorism and the Development of the Principles Aut Dedere Aut Judicare, 10 J. Int'l L. & Econ. 483 (1975).

the Fourth Geneva Convention,⁶ which require States Parties to prosecute hostage-takers if they do not extradite them.⁷

B. SHANGRI IS BOUND TO TRY OR EXTRADITE THE PACM HOSTAGE-TAKERS UNDER THE FOURTH GENEVA CONVENTION.

1. The Fourth Geneva Convention Applies to The Conflict Between PACM and Midbari.

Article 2 of the Fourth Geneva Convention of 1949 states that the provisions of the Convention "shall apply to all cases of declared war or of any other armed conflict . . . even if the state of war is not recognised by one of them."⁸ The fact that PACM is not a Contracting Party is immaterial. Moreover, although PACM is not a State, this does not mean that the rules of the Geneva Conventions do not apply to the conflict between PACM and Midbari. It is generally recognized that the four Geneva Conventions, which have been ratified by 165 States,⁹ have evolved into binding customary international law.¹⁰

Moreover, the international community supports the notion that the threshold at which an armed struggle becomes an

⁶Yokum and Shangri are Parties without reservation to the Hostages Convention and the Four Geneva Conventions of 1949. Jessup Problem at Appendix 1(a).

⁷See Hostages Convention, art. 8; Fourth Geneva Convention, arts. 146 & 147.

⁸Fourth Geneva Convention, art. 2 (emphasis added).

⁹International Committee for the Red Cross: Status of the Four Geneva Conventions and Additional Protocols I and II (As of December 31, 1986), 26 I.L.M. 553, 560 (1987).

¹⁰See, e.g., J. Pictet, Humanitarian Law and the Protection of War Victims 18 (1975) ("[O]wing to their long standing and the fact that they have spread to the whole world . . . the Conventions of Geneva . . . have largely lost the aspect of reciprocal treaties . . . and have become absolute commitments.").

international armed conflict has been lowered, such that armed struggles of national liberation movements are deemed to be governed by the Fourth Geneva Convention. A majority of the members of the United Nations believe that national liberation movements fighting against alien occupation are subject to the laws of international armed conflict embodied in the Geneva Conventions of 1949. Eighty-three States adopted Resolution 3103 in 1973, proclaiming that:

[A]rmed conflicts involving the struggle of peoples against alien domination . . . are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions¹¹

Consistent with this international consensus, the Secretary-General of the United Nations recently exhorted the international community to "make a concerted effort to persuade Israel to accept the de jure applicability of the Fourth Geneva Convention in the occupied territories" of the West Bank and Gaza Strip.¹² By ratifying Protocol I of 1977,¹³ sixty-six States¹⁴ have

¹¹G.A. Res. 3103, 1 U.N. GAOR Supp. (No. 30) at 142, U.N. Doc. A/9030 (1974). See also G.A. Res. 2674, U.N. GAOR Supp. (No. 28) at 75, U.N. Doc. A/8028 (1970) ("the participants in resistance movements . . . in . . . territories under . . . alien domination and foreign occupation . . . should be treated . . . as prisoners of war [under] the Geneva Conventions of 1949").

¹²U.N. Chief Calls For Urgent Action By Council on Arab-Israel Accord, New York Times Jan. 22, 1988, at A.6, col. 5. The International Committee for the Red Cross maintains that the Fourth Geneva Convention applies to the occupation of the West Bank and Gaza Strip. International Committee of the Red Cross, Annual Report 1985 72 (1986).

¹³Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflict, opened for signature Dec. 12, 1977, U.N. Doc. A/32/44 (1977) (entered into force Dec. 7, 1978), reprinted in 16 I.L.M. 1391 (1977) ("Protocol I").

confirmed that the armed conflicts covered by the 1949 Geneva Conventions "include armed conflicts in which peoples are fighting against . . . alien occupation . . . in the exercise of their right of self-determination . . ."15 Since only one State, Israel, objected to this provision at the Geneva Diplomatic Conference on Protocol I, it clearly codifies a customary norm binding on all States, whether or not they have ratified the Protocol.16

Scholars support the view that national liberation movements fighting against alien occupation are engaged in international armed conflicts under the Fourth Geneva Convention.17 Significantly, the Committee on International Terrorism of the International Law Association, a body of distinguished jurists, endorses this viewpoint.18

¹⁴ICRC: Status of the Four Geneva Conventions and Additional Protocols I and II (As of December 31, 1986), supra note 9, at 560.

¹⁵Protocol I, art. 1(4).

¹⁶Cassese, The Geneva Protocol of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law, 13 U.C.L.A. Pacific Basin L. J. 55, 70-71 (1984); Abi-Saab, Wars of National Liberation in the Geneva Conventions and Protocols, 165 Recueil des Cours 355, 432-33 (1979).

¹⁷See generally Rubin, Terrorism and Social Control, 6 Ohio N.U.L. Rev 60 (1979); J. Murphy, The United Nations and the Control of International Violence: A Legal and Political Analysis 198-99 (1982); Boyle, Preserving the Rule of Law in the War Against International Terrorism, 8 Whittier L. Rev. 735, 739 (1986); Larschan, Legal Aspects to Control of Transnational Terrorism: An Overview, 13 Ohio N.U.L. Rev. 117, 147 (1986).

¹⁸International Law Association, Report of the Sixtieth Conference (Montreal), 349-375 (1982).

PACM is a national liberation movement "fighting for the liberation of Midbari," its "homeland which is under alien occupation." The members of PACM are self-proclaimed "freedom-fighters," and the hostages were their "prisoners of war." Moreover, the hostage-taking was portrayed by PACM as a "military operation . . . [an] act of hostilities."¹⁹ These facts indicate that PACM is engaged in an international armed conflict against alien occupation governed by the Fourth Geneva Convention.

2. Shangri Is Bound To Try Or Extradite The PACM Hostage-Takers Under the Fourth Geneva Convention.

The Fourth Geneva Convention protects "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict . . . of which they are not nationals."²⁰ The Yokum passengers on board the Hasdrubal, held hostage by the PACM group, were thus protected persons entitled to the protections of the Fourth Geneva Convention.

During the seizure of the Hasdrubal, the PACM group committed three wilful killings. They held the passengers and crew of the ship hostage for forty-eight hours and threatened to kill them if their demands were not met.²¹ These acts against

¹⁹Jessup Problem at 1-2.

²⁰Fourth Geneva Convention, art. 4.

²¹Jessup Problem at 1-4.

protected civilians clearly constitute "grave breaches"²² under the Fourth Geneva Convention.

Article 146 of the Fourth Geneva Convention imposes an obligation upon Parties to the Convention to "search for persons alleged to have committed . . . grave breaches," and states that a Party "shall bring such persons, regardless of their nationality, before its own courts."²³ A Party "may also, if it prefers . . . hand such persons over for trial to another High Contracting Party"²⁴

Thus, Article 146 consists of a permissive clause and a mandatory clause.²⁵ A Party has the discretion to "hand [a war criminal] over for trial" to another Party. This language plainly excludes transporting a war criminal to a State that has expressed its intention to release him without trial.²⁶ If the Party does not exercise the discretion to hand over a war

²²"Grave breaches" are defined in Article 147 of the Fourth Geneva Convention to include "wilful killing," "wilfully causing great suffering or serious injury to body or health," "unlawful confinement," and "taking of hostages," when these acts are "not justified by military necessity and [are] carried out unlawfully and wantonly" against protected persons. Terrorist attacks upon civilians for the purpose of calling attention to the goals of the terrorists cannot be construed as acts of "military necessity". D'Amato, "National Prosecution for International Crimes", in 1 M. C. Bassiouni, International Criminal Law 169, 177 (1986).

²³Fourth Geneva Convention, art. 146 (emphasis added).

²⁴Id. (emphasis added).

²⁵Green, Political Offenses, War Crimes and Extradition, 11 Int'l & Comp. L.Q. 329, 349-51 (1962).

²⁶Before three of the PACM hostage-takers were placed on an aircraft bound for Saq, the Saq President and Minister of Justice stated that Saq sought their "extradition" in order to "have the honor of setting them free". Jessup Problem at 5.

criminal for trial, it comes within the mandatory clause: it "shall bring [him] . . . before its own courts." Thus, there is no legal justification for the decision to release three of the hostage-takers within Shangri without trial. The fact that Article 146 was intended to ensure that those who commit grave breaches would be prosecuted is confirmed by the obligation incumbent on every Signatory to "enact any legislation necessary to provide effective penal sanctions" for persons committing grave breaches.²⁷

C. SHANGRI IS BOUND TO TRY OR EXTRADITE THE PACM HOSTAGE-TAKERS UNDER THE HOSTAGES CONVENTION.

1. The Hostages Convention Supplements the Fourth Geneva Convention.

The Hostages Convention supplements the Fourth Geneva Convention to ensure that hostage-takers will be prosecuted regardless of whether the offence occurs in time of armed conflict or in time of peace. The travaux preparatoires of the Hostages Convention reveal that the drafters intended to "draft a Convention which would fill the gaps in the existing international law,"²⁸ "to cover cases of hostage-taking not provided for" in existing international instruments.²⁹ Since the Fourth Geneva Convention proscribes hostage-taking in armed conflicts, the Hostages Convention was drafted to extend the

²⁷Fourth Geneva Convention, art. 146.

²⁸Ad Hoc Committee Report, 32 U.N. GAOR Supp (no. 39) at 20, U.N. Doc. A/32/39 (1977).

²⁹Ad Hoc Committee Report, 33 U.N GAOR Supp. (No. 39) at 22, U.N. Doc. A/33/39 (1978).

proscription to peacetime.³⁰ Article 12 of the Hostages Convention shows how the Hostages Convention supplements the Fourth Geneva Convention.³¹ One delegate summed up the Committee's goal in drafting Article 12 of the Hostages Convention by stating that the Convention was designed to "provide a basis for prosecution or extradition in all cases where the Geneva Conventions or their additional Protocol did not apply."³² Therefore, if the Fourth Geneva Convention does not apply to PACM, Shangri is still bound to try or extradite the hostage-takers under the Hostages Convention.³³

The seizure and detention of the Hasdrubal and its passengers falls squarely within the definition of "hostage-taking" under the Hostages Convention. Article 1 of the Hostages Convention states that "the offence of taking of hostages" is

³⁰On the express intention of the drafters of the Hostages Convention to close any gaps left by the Fourth Geneva Convention, see Verwey, The International Hostages Convention and National Liberation Movements, 75 Am. J. Int'l L. 69, 81-92 (1981); Rosenstock, International Convention Against Hostages: Another International Community Step Against Terrorism, 9 Den. J. Int'l L. & Pol. 169, 183-185 (1980) ("[A]rticle 12 [of the Hostages Convention] achieves the goal of ensuring that a state will be obligated to prosecute or extradite hostage-takers . . . unless it is equally bound to do so under the 1949 Geneva Conventions").

³¹Article 12 of the Hostages Convention provides that "[i]n so far as the Geneva Conventions of 1949 for the protection of war victims or the additional Protocols . . . are applicable . . . and in so far as States Parties to this Convention are bound under those Conventions to prosecute or hand over the hostage-takers, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts"

³²U.N. Doc. A/C.6/34SR. 62, at 7 (1979) (emphasis added).

³³Verwey, supra note 30, at 86 (the drafters intended to guarantee that "a hostage-taker would be prosecuted or extradited either under the Convention itself, or under the Geneva Conventions").

committed by:

Any person who seizes or detains and threatens to kill,
. . . in order to compel a third party, namely a State
. . . to do or abstain from doing any act as an
explicit or implicit condition for the release of the
hostage³⁴

2. Shangri Violated The Hostages Convention By Sending Three
Hostage-Takers To Saq.

Article 8 of the Hostages Convention states in unequivocal
language that Shangri is bound to try or extradite the PACM
hostage-takers. It provides that:

The State Party in the territory of which the alleged
offender is found shall, if it does not extradite him,
be obliged, without exception whatsoever and whether or
not the offense was committed in its territory, to
submit the case to its competent authorities for the
purpose of prosecution³⁵

Article 8 precludes any argument to the effect that State
Parties are permitted to transport hostage-takers to a State
which intends to release them without trial. The final paragraph
of the Preamble to the Hostages Convention states that it was
designed to meet the "urgent" need for "international co-
operation between States in devising and adopting effective
measures for the prevention, prosecution and punishment of all
acts of hostage-taking" ³⁶ Moreover, one of the delegates
on the U.N. Committee drafting the Hostages Convention stressed
that it was "vital that the perpetrators of such offenses should
be denied a safe haven . . . to ensure that hostage-takers would

³⁴Hostages Convention, art. 1.

³⁵Id., art. 8.

³⁶Hostages Convention, Preamble (emphasis added).

be brought to justice wherever they went.³⁷ Thus, Shangri's attempt to transport three of the PACM hostage-takers to Saq, where they would have been set free, was clearly a breach of Shangri's duty to "perform [its obligations] in good faith."³⁸

3. Shangri Violated The Hostages Convention By Releasing The Remaining Hostage-Takers.

Since Shangri refused to extradite the four remaining PACM hostage-takers who were not sent to Saq, it was bound under the Hostages Convention to prosecute them itself.³⁹ Shangri's failure to initiate criminal proceedings of any kind,⁴⁰ and its explicitly "retaliatory" decision to release them, are clearly breaches of Shangri's obligation to perform its responsibilities under the Hostages Convention in good faith.⁴¹

³⁷32 U.N. GAOR Supp. (No. 39) at 51, U.N. Doc. A/33/39 (1977) (emphasis added); see also Shubber, The International Convention Against the Taking of Hostages, 1981 Brit. Y.B. Int'l L. 205, 234 ("[i]t is . . . the policy of the [Hostages] Convention that the hostage-taker should be punished").

³⁸Vienna Convention on the Law of Treaties, done at Vienna on May 23, 1969, entered into force on Jan. 27, 1980, U.N. Doc. A/CONF. 39/27 (1969), reprinted in 63 Am. J. Int'l L. 875 (1969), art. 26.

³⁹Hostages Convention, art. 8.

⁴⁰There is no evidence in the record to suggest that Shangri fulfilled the minimal duty of "submit[ting] the case to its competent authorities for the purpose of prosecution" before releasing three hostage-takers to Saq and four hostage-takers within Shangri.

⁴¹See 1 M. C. Bassiouni, International Extradition 24 (1987) ("[A] signatory State . . . that refuses to extradite an alleged offender . . . is under a positive duty to prosecute the individual. Failing this, the requested state is in violation of its obligations under the convention[]").

Moreover, Shangri cannot avoid the obligation to extradite or prosecute the PACM hostage-takers by invoking Article 9 of the Hostages Convention, which states that a request for extradition may be refused if the requested State believes that it is for the purpose of punishing a person "on account of his . . . political opinion."⁴² The travaux preparatoires indicate that Article 9 was designed to "prohibit the extradition of an alleged offender under certain circumstances, but would not affect the obligation to prosecute him."⁴³ Thus:

It is clear that Article 9 does not impair the obligation to prosecute or extradite. To the extent that it would prevent extradition, the state party refusing extradition is under the obligation to prosecute the alleged offender itself.⁴⁴

The drafters' intention to ensure that all State Parties would prosecute hostage-takers if they did not extradite them is also evident in the language of Article 2, which states that "[e]ach State Party shall make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave nature of those offenses."⁴⁵

⁴²Hostages Convention, art. 9.

⁴³Verwey, supra note 30, at 87 (emphasis added).

⁴⁴Id. at 92 (emphasis added).

⁴⁵Hostages Convention, art. 2.

II. THE CONFEDERATION OF SHANGRI HAS VIOLATED MINIMUM STANDARDS OF STATE RESPONSIBILITY BY ALLOWING ITS TERRITORY TO BE USED AS A BASE FOR ATTACKS ON YOKUM NATIONALS.

A. SHANGRI HAS VIOLATED CUSTOMARY INTERNATIONAL LAW BY FAILING TO SUPPRESS THE ACTIVITIES OF PACM WITHIN ITS TERRITORY.

1. Judicial and Arbitral Decisions.

Shangri has breached its international duty not to tolerate armed attacks by private persons launched from its territory.

"States are under a duty to prevent and suppress such subversive activity against foreign Governments as assume the form of armed hostile expeditions"46 The responsibility of States not to tolerate activities on their territory that are injurious to other States has been consistently enunciated in judicial and arbitral decisions. In the Corfu Channel Case⁴⁷ the United Kingdom alleged that the mines which damaged British ships were laid "by or with the connivance or knowledge of the Albanian Government".⁴⁸ The Court found that although "no firm conclusion" could be reached regarding Albania's complicity,⁴⁹ the government was held liable for its passive knowledge.⁵⁰ The

⁴⁶ L. Oppenheim, International Law sec. 127a, 292-293 (H. Lauterpacht 8th ed. 1955). See generally Lillich & Paxman, State Responsibility For Injury to Aliens Occasioned By Terrorist Activities, 26 Am. Univ. L. Rev. 217 (1977); Kelsen, Principles of International Law 205-206 (1966).

⁴⁷The Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. Reports 4 (Merits).

⁴⁸Id. at 10.

⁴⁹Id. at 17.

⁵⁰Id. at 22. The Court found that "the laying of the minefield . . . could not have been accomplished without [Albania's] knowledge".

World Court described the legal duties that Albania had failed to fulfill in the following language:

The obligations incumbent upon the Albanian authorities . . . are based . . . on certain well-recognized principles, namely: . . . every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.⁵¹

The Shangri Government can, without question, be imputed with the knowledge that PACM utilized its territory to organize armed attacks against other States. Shangri did have actual notice that PACM existed within its borders and had previously launched terrorist attacks against Yokum and other states.⁵² Shangri is unequivocally responsible for tolerating the use of its territory "in such a manner as to cause injury . . . in . . . the territory of another [State]."⁵³

Similarly, in the Alabama Claims⁵⁴ arbitration between Great Britain and the United States, the tribunal was called upon to determine whether Great Britain had violated its duty to remain neutral in the American Civil War. The tribunal found in favor of the United States, holding Great Britain liable for its failure to curtail, in spite of repeated protests by the United States Government, the building of battleships for the use of the

⁵¹Id. (emphasis added).

⁵²Jessup Problem at 3.

⁵³The Trail Smelter Arbitration, (U.S. v. Canada), 35 Am. J.Int'l L. 684, 716 (1941), 3 U.N.R.I.A.A. 1905 (1941). The tribunal enunciated the maxim sic utere tuo alienum non laedas, or "use your own property in such a manner as not to injure that of another."

⁵⁴Alabama Claims Arbitration (U.S. v. Great Britain) (1871); 7 J.B. Moore, Digest of International Law 1059-1067 (1906).

Confederate States during the Civil War.⁵⁵ Here, as in the Alabama Claims case, Shangri has "refused . . . to take any action" in spite of repeated protests by Yokum and other States.⁵⁶

The duties established in the Alabama Claims arbitration served as a building block for later efforts to define and codify the duty of a State to suppress the activities of armed groups on its territory. The League of Nations took up the matter in 1934 when Yugoslavia claimed that Hungary was responsible for the assassination of King Alexander of Yugoslavia and the French Minister of Foreign Affairs. The subsequent debates culminated in a resolution which the Council of the League adopted unanimously making it clear that:

[I]t is the duty of every State neither to encourage or tolerate on its territory activity with a political purpose . . . every state must do all in its power to prevent and repress acts of this nature.⁵⁷

2. International Documents.

The duty to prevent armed attacks from a State's territory has been codified in a wide variety of international documents. The Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations⁵⁸ states explicitly that "[e]very State has a duty to refrain from organizing . . . acts

⁵⁵Id.

⁵⁶Jessup Problem at 3.

⁵⁷12 League of Nations O.J. 1759, Part II (1934).

⁵⁸G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/8082 (1970) at 121, adopted on 24 October 1970.

of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts"59 Moreover, the Declaration embodies "basic principles of international law" enshrined in the United Nations Charter, and therefore requires "strict observance" by States.⁶⁰

On December 9, 1985 the U.N. General Assembly reaffirmed this duty in a resolution adopted by consensus that called upon States "to fulfill their obligations under international law to refrain from . . . acquiescing in activities within their territory directed towards the commission of [terrorist acts]."⁶¹

The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,⁶² adopted by the U.N. General Assembly by a vote of 109 to zero,⁶³ categorically states that ". . . no State shall . . . tolerate subversive, terrorist or armed activities directed toward the violent overthrow of another

⁵⁹Id. at 123 (emphasis added).

⁶⁰Id. In the Nicaragua Case, the I.C.J. accorded special weight to this resolution in defining the international duty of non-intervention. *Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.)*, 1986 I.C.J. at 14, para. 202.

⁶¹G.A. Res. 40/61, 40 U.N. GAOR Supp. (No. 53) at 301, U.N. Doc. A/40/53 (1985).

⁶²Res. 2131, 20 U.N. GAOR Supp. (No. 14) at 11, U.N. Doc. A/6014 (1965).

⁶³The United Kingdom abstained.

State"64

Furthermore, Shangri's refusal to take any action to prevent the continued use of its territory by PACM,⁶⁵ arguably goes beyond a minor endurance by the Shangri Government of the anti-PACM activities and constitutes tacit endorsement.⁶⁶

3. Multi-lateral Treaties As Evidence Of Opinio Juris.

Multi-lateral treaties establish that "complicity in or negligence in control[ing] armed bands" is an "international delinquency for which the State affected can demand . . . pecuniary reparations . . . and preventative measures by the State from the territory of which the bands operate."⁶⁷ Article 4 of the Hostages Convention, for example, states that:

States Parties shall co-operate in the prevention of the offenses set forth in article 1 . . . by . . . taking all practicable measures to prevent preparations in their respective territories for the commission of those offenses within or outside their territories . . .
68

⁶⁴Res. 2131, supra. Similar language can be found in other U.N. resolutions, see The Resolution on Non-Interference in the Internal Affairs of States, U.N. Doc. A/Res.31/91 (12 January 1977); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, U.N. Doc. A/Res.36/103 (1981).

⁶⁵Jessup Problem at 3.

⁶⁶Blum, The Beirut Raid and the International Double Standard: A Reply to Professor Richard A. Falk, 64 Am. J. Int'l L. 73, 82 (1970). See also International Court of Justice, Case Concerning Border and Transborder Armed Actions (Nic. v. Costa Rica), Memorial of Nicaragua (Merits), 98 (1987) ("It is equally clear that a State's failure to prevent the use of its territory as a base for hostile activities . . . is intervention [in the affairs of another State]") (emphasis added).

⁶⁷Brownlie, International Law and the Activities of Armed Bands, 7 Int'l & Comp. L. Q. 712, 735 (1958).

⁶⁸Hostages Convention, art. 4 (emphasis added).

The Organization of American States' (OAS) 1971 Convention to Prevent and Punish Acts of Terrorism also prescribes a duty ". . . to prevent and impede the preparation in their respective territories of . . . crimes . . . that are to be carried out in the territory of another contracting state."⁶⁹ As early as 1948 the Council of the OAS acknowledged this duty in a report over Nicaragua's role in an invasion of Costa Rica launched from Nicaraguan territory. Nicaragua, the Council determined, "should have taken more adequate measures to prevent the development in its territory of a movement intended to overthrow the Government of Costa Rica."⁷⁰

B. SHANGRI IS RESPONSIBLE FOR ITS FAILURE TO SUPPRESS PACM'S ACTIVITIES REGARDLESS OF ITS ALLEGED LACK OF "EFFECTIVE CONTROL".

The Government of Shangri has refused to take action to prevent PACM's use of its territory for the organization of hostile activities against Yokum and other States, "citing its lack of effective control over parts of its territory" ⁷¹ This claim is unfounded in both law and fact.

If a State has used its best efforts to prevent a malevolent act against a foreign State but remains unable to contain the activity, "it certainly has not discharged its international

⁶⁹O.A.S. Doc. AG/Doc. 88 rev.1 corr. 1, done at Washington, February 2, 1971, art. 8, reprinted in 10 I.L.M. 255 (1971) (emphasis added).

⁷⁰Fenwick, Preparation for the International Law Commission, 43 Am. J. Int'l L. 325, 330 (1949).

⁷¹Jessup Problem at 3.

duty."⁷² If a State does not even attempt to discharge its duty, it is responsible, a fortiori, regardless of its alleged failure to act.⁷³ Accordingly, international tribunals have rendered numerous judgments against States that have violated their duty to protect aliens within their borders, even though the tribunals recognized that the State might not have had the power to provide the necessary protection.⁷⁴ In the Alabama Claims case Great Britain was held liable for its breach of duty notwithstanding its claim that it was legally incapable of preventing the shipbuilding activity.⁷⁵

The travaux preparatoires of the U.N. Definition of Aggression⁷⁶ support applying such a high standard of liability with respect to a State which fails to prevent the use of its territory by armed bands. At the drafting stage of the Definition of Aggression, Paraguay introduced a clause that would have exculpated States if they were "unable to suppress the

⁷²M. Garcia-Mora, International Responsibility for Hostile Acts of Private Persons Against Foreign States 30 (1962).

⁷³Blum, supra note 66, at 84-85.

⁷⁴See, e.g., Montijo Case, Baldwin Case, Davy Case, discussed in C. Eagleton, The Responsibility of States in International Law 90 (1928).

⁷⁵Alabama Claims Case, supra note 54, at 1061. The Tribunal stated that Great Britain "can not justify itself for a failure in due diligence on the plea of insufficiency of legal means of action which it possessed"

⁷⁶G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31) at 146, U.N. Doc. A/RES 3314 (1974).

activities of armed bands in [their] territory".⁷⁷ This proposal, however, was rejected by the United Nations Sixth Committee.⁷⁸

Coupled with the legal insufficiency of this claim, Shangri's argument lacks factual support. The Shangri Government effectively controls the dock in Taluba (the hostage-takers had to seek "permission" to dock there), and is able to requisition a civilian aircraft to transport the PACM hostage-takers to Saq.⁷⁹ Furthermore, although Shangri is in a state of civil strife, the Government's ability to exercise police power by arresting the PACM hostage-takers and placing them "in prison under the control of the Shangri Government",⁸⁰ distinctly suggests that it possesses more power than it is willing to admit.

Even if these facts are insufficient to impute adequate police power to the Government of Shangri to prevent PACM's continued use of its territory, there is no excuse for its failure to adopt preventive measures. For example, Shangri could have tightened its border controls or immigration procedures to prevent the very entry of terrorist groups.⁸¹ Likewise, Shangri

⁷⁷Paraguayan draft, A/C.6/L. 334 Rev. 1, Report of the Special Committee on the Question of Defining Aggression, 9 U.N. GAOR Supp. (No. 11), U.N. Doc. A/2638 (1953); 12 U.N. GAOR Supp. (No. 16), U.N. Doc. A/3574 (1957).

⁷⁸Id.

⁷⁹Jessup Problem at 3, 5.

⁸⁰Id. at 3, 4.

⁸¹Brownlie, supra note 67, at 729.

could have employed security devices and personnel at the port of Taluba to prevent PACM members from boarding the Hasdrubal.

III. YOKUM ACTED CONSISTENTLY WITH INTERNATIONAL LAW IN DIVERTING THE SHANGRI AIRCRAFT.

A. YOKUM'S DIVERSION OF A SHANGRI AIRCRAFT PROTECTED A LEGAL INTEREST IN DUTIES THAT SHANGRI FAILED TO PERFORM.

1. Yokum Was Acting In Self-Help.

Shangri's breach of its international responsibility to prosecute or extradite the hostage-takers allows Yokum to protect its interests by resort to self-help.⁸² It is internationally recognized that "a State injured by a violation of an international obligation by another State may resort to measures of self-help that might otherwise be unlawful"83

Recent State practice demonstrates that self-help is justified when a State seeks protection or redress by the use of limited force when another State has failed to discharge its duties and such a failure would, in the absence of self-help, result in irreparable harm to the injured state.⁸⁴ In 1976, for example, Israel launched a mission to rescue hostages held by members of the Palestinian Liberation Organization (PLO), in

⁸²Lauterpacht has written in this context that "[t]he consequences of a breach of a treaty of this kind, in defiance of the public opinion of the world may justifiably cover acts of reprisal and self help" Lauterpacht, The Law of Nations and the Punishment of War Crimes, 21 Brit. Y. B. Int'l L. 58, 92 (1944) (emphasis added).

⁸³Restatement (Revised) of U.S. Foreign Relations Law, sec. 905 (1987).

⁸⁴Sheehan, The Entebbe Raid, 1 The Fletcher Forum 135, 144-146 (1977); Rubin, supra note 17, at 67.

Entebbe, Uganda.⁸⁵ Like Shangri, Uganda failed to perform its obligations under international law to try or extradite the hijackers⁸⁶ and to prevent the use of its territory for the infliction of injury on another state.⁸⁷ Israel's surgical use of force, which, like Yokum's, was an attempt to discharge Uganda's duties, was not condemned by the United Nations Security Council after four sessions of deliberation.⁸⁸

Similarly, the international community acquiesced in the French use of force in Somalia to rescue a bus of French schoolchildren who were being held hostage there with the material assistance of the Somali authorities.⁸⁹ Again, the United Nations Security Council refused to condemn France's resort to limited force in self-help.⁹⁰

2. Yokum's Actions Were Necessary And Proportionate.

Self-help can only be employed if the measures undertaken are "necessary to terminate the violation or prevent further violation, or to remedy the violation; and are not out of

⁸⁵Sheehan, supra note 84, at 146-147.

⁸⁶Both Israel and Uganda were signatories to the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague, 16 Dec. 1970, 860 U.N.T.S. 1642, T.I.A.S. 7192, 10 I.L.M. 133 (1971).

⁸⁷See Sheehan, supra note 84, at 146-150.

⁸⁸Id. at 150.

⁸⁹Id. at 149-150.

⁹⁰Id.

proportion to the violation and the injury suffered."⁹¹ Yokum's response in self-help fulfills the requirements of necessity and proportionality.

International law recognizes the right to a remedy which, according to the Chorzow Factory Case,⁹² is an "indispensable complement" to a breach of international law.⁹³ Had Yokum not acted in self-help, it would have been denied an adequate remedy to the injuries inflicted by the PACM hostage-takers. Shangri's refusal to honor its obligations under the Hostages Convention and the Fourth Geneva Convention to try or extradite the PACM hostage-takers left Yokum with no alternative to self-help to achieve the object and purpose of those treaties i.e., to ensure that no act of hostage-taking should go unpunished. Had Yokum invoked diplomatic or economic sanctions against Shangri in lieu of the diversion of the aircraft, for instance, the penalty imposed would not have accomplished the prosecution or extradition of the hostage-takers or prevented them from perpetrating future crimes against Yokum nationals. Likewise, resort to action by the Security Council, or other dispute settlement procedures, would not have prevented the escape of the

⁹¹Restatement (Revised) of U.S. Foreign Relations Law, sec. 905(1)(a) & (b) (1987). See also Paust, Responding Lawfully to International Terrorism: The Use of Force Abroad, 8 Whittier L. Rev. 711, 722 (1986); Bowett, Reprisals Involving the Use of Armed Force, 66 Am. J. Int'l L. 1, 10 (1972).

⁹²Chorzow Factory Case (Jurisdiction), PCIJ Ser. A, No. 9 (1927).

⁹³Id. at 21.

terrorists.⁹⁴

In addition, the diversion of the plane was strictly in proportion to the goal of obtaining custody over the hostage-takers. Yokum's actions caused neither damage, injury, nor loss of life.

B. THE DIVERSION WAS CONSISTENT WITH ARTICLE 2(4) OF THE UNITED NATIONS CHARTER.

The prohibition against the use of force in Article 2(4) of the United Nations Charter is qualified by the subsequent language regarding territorial integrity, political independence and the purposes of the United Nations Charter.⁹⁵ Yokum's diversion of the Shangri aircraft was not directed "against the territorial integrity or political independence" of Shangri, nor was it "inconsistent with the Purposes of the United Nations".⁹⁶ Yokum diverted the aircraft for the sole purpose of apprehending the PACM hostage-takers in order to prosecute them. Since the

⁹⁴See Case Concerning the Air Services Agreement of 27 March 1946, Arb. Award of 9 Dec. 1978, 54 I.L.R. 304 (1979) (a preexisting commitment to arbitrate does not require a Party to refrain from self-help); Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24, 1980) (the U.S. did not have to initiate an adjudicatory proceeding and wait for an order from the Court before seizing Iranian assets). See also Damrosch, Retaliation or Arbitration - Or Both? The 1978 United States-France Aviation Dispute, 74 Am. J. Int'l L. 783 (1980).

⁹⁵J. Stone, Aggression and World Order 95 (1958) ("Article 2(4) does not forbid 'the threat or use of force' simpliciter; it forbids it only when directed 'against the territorial integrity or political independence of any State, or in any manner inconsistent with the purposes of the United Nations.'").

⁹⁶U.N. Charter, art. 2(4) (emphasis added).

diversion occurred over international waters⁹⁷ there was no violation of Shangri's territorial borders. While the flight of the aircraft was admittedly temporarily interfered with, this was incidental to the main purpose of the act.

Moreover, the reference to "political independence" in Article 2(4) should not be read to immunize a State's decision to undermine the fundamental duties enshrined in the United Nations Charter, including the duty to "respect the . . . obligations arising from treaties and other sources of international law".⁹⁸ Shangri's duty to try or extradite the PACM hostage-takers is an international obligation; its decision to breach this duty cannot be defended as an exercise of "political independence" without undermining the rule of law.

Lastly, the use of limited force to prevent the escape of international criminals is not inconsistent with the "Purposes of the United Nations". One of the principal purposes of the U.N. Charter is "to maintain international peace and security".⁹⁹ The prevention of acts of hostage-taking is clearly consistent with

⁹⁷Jessup Problem at 5. Since the freedom to fly over international waters, see Third U.N. Convention on the Law of the Seas, signed at Montego Bay, 10 December 1982, U.N. Doc. A/CONF. 62/122, reprinted in 21 I.L.M. 1261 (1982) ("LOS Convention") art. 87(1)(b), is subject to the permissible use of force under the U.N. Charter, Yokum has not violated the Law of the Seas Convention. L. Henkin, Changing Law For The Changing Seas 72 (1968). Moreover, Article 105 of the LOS Convention permits States to seize "pirate ships or aircraft" in international waters. Murphy, The Future of Multilateralism and Efforts to Combat International Terrorism, 25 Colum. J. Transnat'l L. 35, 81 n. 218 (1986).

⁹⁸U.N. Charter, Preamble.

⁹⁹U.N. Charter, art. 1(1).

this purpose. On the other hand, by tolerating the preparation of harmful armed expeditions on its territory, Shangri has failed to live up to its obligation to promote peace and security. The Security Council in 1985 reaffirmed the importance of quelling acts of international violence to help preserve peace and security by urging all States to "facilitate the prevention, prosecution and punishment of all acts of hostage-taking . .

. . ."100

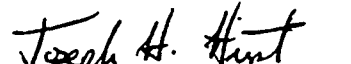
IV. CONCLUSION.

For the above-stated reasons, Yokum respectfully asks the Court to rule that Shangri breached its obligation to extradite or prosecute the PACM hostage-takers. Yokum further urges the Court to find that Shangri has violated minimum standards of State responsibility by failing to prevent PACM from using its territory as a base for attacks against Yokum nationals. In light of this, Yokum asks the Court to declare that it was justified in diverting the plane to obtain custody of the PACM hostage-takers.

Respectfully Submitted,



Marcus D. Wilkinson



Joseph H. Hunt



Mary Rose Alexander



Michael A. Gerstenzang



Michael D. Murray

¹⁰⁰S.C. Res. 579, 40 U.N. SCOR (2637th mtg.) at 24-25, U.N. Doc. 5/17, 685 (1985).