
INTERNATIONAL COURT OF JUSTICE
FOR THE UNITED NATIONS



The Government of Yokum,
Applicant,

-against-

The Government of Shangri,
Respondent.

MEMORIAL FOR RESPONDENT

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STATEMENT OF JURISDICTION

The parties submit the present dispute to this Court by written application pursuant to Article 40 of the Statute of the Court. In accordance with Article 36 of the Statute, each party accepts 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 passengers represented 11 nationalities, including approximately 200 Yokum nationals. The entire crew were Beilan nationals.

Five hours after their departure, once the ship had entered international waters, seven members of the People's Armed Conflict Movement (PACM), seized control of the ship. During the struggle for control of the ship, one passenger and two crew members were killed. Two of the hijackers had boarded the Hasdrubal at Port al-Haj, Saq; the other five had boarded the ship during its previous stop in Taluba, Shangri. The nationality of the PACM members is unknown.

PACM is a well-organized group attempting to overthrow the militarily strong government of Midbari. Because of Midbari's overwhelming strength, the PACM freedom fighters must launch their attacks from neighboring Shangri. Four States have recognized PACM as the government-in-exile of Midbari; most States have recognized the current Midbari regime, citing its "effective control" of the territory.

In Shangri, by contrast, a state of near anarchy prevails, especially in Taluba, because of the struggle between two religious groups for control of Shangri. The struggle shattered Shangri's once prosperous economy. The confusion caused by the struggle has constrained Shangri's effective control over parts

of its territory, including PACM headquarters in Taluba, preventing Shangri from halting PACM attacks launched from its territory.

The Hasdrubal remained in international waters for 48 hours, allowing PACM to demonstrate its ability to challenge the alien occupation of Midbari. During this period, Yokum dispatched a heavily armed military unit in the vicinity of the ship. Although several other States could also have ordered military units into the area, none did so. Following the 48 hour period, PACM demanded permission to dock in Taluba and to gain asylum there. To save the lives of the passengers, Shangri complied with PACM's demands.

Upon arrival of the Hasdrubal in Taluba, the accused hijackers were greeted by a wildly enthusiastic group of fellow PACM members and supporters. The accused hijackers were taken to PACM headquarters, where they were received as heroes. At dawn the next day, Shangri troops arrested the seven accused hijackers and imprisoned them.

Two days later, the Yokum Ambassador demanded the extradition to Yokum of the seven alleged hijackers. Yokum acknowledged that there was no bilateral extradition treaty between Yokum and Shangri, but based its claim on the 1949 Geneva Conventions and the 1979 Convention Against the Taking of Hostages.

Three days later, the Saq Ambassador demanded extradition to Saq of the alleged hijackers, based on the same conventions cited

by Yokum.

On March 1, a government-requisitioned civilian aircraft departed to extradite three of the alleged hijackers to Saq. When the aircraft was well over international waters, Yokum fighters intercepted it and forced it to land in Beilan. Yokum troops then stormed the plane and captured the hijackers. They were handcuffed and flown directly to Yokum's capital, Abnerra, on a military plane. The Government of Shangri has demanded the return to it of the alleged hijackers and, in reaction to Yokum's violation of international law, has granted political asylum to the remaining PACM members accused in the hijacking.

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

QUESTIONS PRESENTED

(1) Has the Republic of Yokum violated international law by forcibly diverting a Shangri aircraft and abducting persons on board?

(2) Was the release of the PACM hijackers by the Confederation of Shangri justified under international law?

SUMMARY OF PLEADINGS

The forceful diversion of the Shangri aircraft by Yokum fighter planes constituted coercive interference with the territorial integrity and political independence of Shangri in violation of Article 2(4) of the U.N. Charter. The diversion cannot be justified as self-defense pursuant to Article 51 of the Charter because there was no armed attack by Shangri against Yokum, nor even a threat to Yokum nationals at the time of the diversion. The aircraft diversion violated several other Yokum treaty obligations, including the Hostages Convention which prohibits the use of force in capturing accused hijackers, and the Law of the Seas Convention which protects free passage through international airspace.

Furthermore, Yokum's diversion of the aircraft violated principles of customary international law. The customary right of anticipatory self-defense, already questionable because of Article 2(4), does not justify Yokum's actions, which were neither necessary nor proportionate to the danger posed to their nationals. Similarly, Yokum violated customary principles of self help by using force in contravention of the U.N. Charter. Indeed, the diversion, which compelled Shangri to abide by its alleged international obligations, was a forcible reprisal in violation of customary international law.

Finally, because Shangri complied with the international due diligence standard for controlling activities within its

territory, there was no justification for the aircraft diversion. Given the unstable political climate in Shangri and the local popularity of PACM, any action to eradicate the movement would have risked political collapse.

Shangri's decision to release the PACM hijackers was in accord with international law. State sovereignty preserves complete discretion over the extradition decision in the absence of treaty obligations to the contrary. The two Conventions relevant to this dispute do not detract from Shangri's inherent discretion to choose not to extradite the PACM members. The Geneva Conventions were not designed to cover the "freedom fighter" operations of PACM, which is not recognized as the representative of its State by the world community. In the event that the Geneva Conventions do apply in this case, their terms do not require Shangri to try or extradite the PACM hijackers. The provision on extradition states that a party "may" choose to extradite alleged offenders to a requesting State, preserving its customary right to grant asylum.

Like the Geneva Conventions, the International Convention Against the Taking of Hostages does not remove Shangri's inherent right to release the PACM hijackers. The Hostages Convention was not designed to cover violent struggles for national liberation. Moreover, under the terms of the Convention, Shangri has the option of deciding whether or not the Convention should be the basis for extradition. Assuming that the Hostages Convention does apply to this dispute, Shangri fulfilled its obligations by

submitting the alleged offenders to its competent authorities for their decision on whether or not to prosecute.

The decision to send three PACM members to Saq was justified since Saq had a legitimate claim of jurisdiction. The release of the remaining PACM members was also justified. States are not obliged to extradite alleged offenders whose acts are politically motivated. Furthermore, the release of the remaining hijackers was permissible as a responsive countermeasure to Yokum's unlawful diversion of the Shangri aircraft.

ARGUMENT

I. THE REPUBLIC OF YOKUM HAS VIOLATED INTERNATIONAL LAW BY FORCIBLY DIVERTING A SHANGRI AIRCRAFT AND ABDUCTING PERSONS ON BOARD.

A. THE FORCIBLE DIVERSION OF THE AIRCRAFT VIOLATED THE UNITED NATIONS CHARTER.

1. YOKUM VIOLATED ARTICLE 2(4) OF THE CHARTER.

The forcible diversion of a Shangri aircraft by Yokum fighter planes¹ was in direct contravention of Article 2(4) of the U.N. Charter, a binding treaty obligation accepted by both Shangri and Yokum.² Article 2(4) states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." The diversion interfered with Shangri's territorial integrity because aircraft, like ships,³ are considered part of a nation's territory under international law.⁴

Moreover, Yokum's use of force was a unilateral veto of Shangri's sovereign decision to send the alleged hijackers to Saq.⁵

¹Problem at 5.

²Problem at appendix 1.

³The S.S. Lotus (France v. Turkey), P.C.I.J., Ser. A, No. 10, (1927).

⁴Convention on International Civil Aviation, article 17, opened for signature Dec. 7, 1944, T.I.A.S. 159, 15 U.N.T.S. 295; United Nations Convention on the Law of the Sea, A/Conf. 62/122 (1982), Art. 91.

⁵Sovereignty is defined as the right of states to "be their own ultimate authority in determining their behavior." W. Levi, Contemporary International Law: A Concise Introduction 16 (1979); see also Declaration on the Inadmissibility of Intervention into

"Clearly the 'political independence' of a state is in fact violated if a state is coerced through the threat or use of force by a more powerful state into taking action which it would not otherwise take."⁶

Finally, diversion of the aircraft contravened the purposes of the United Nations, embodied in the U.N. Charter and subsequent United Nations declarations. Article 2(3) of the U.N. Charter states: "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Article 33 of the Charter requires that parties to a dispute "seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Yokum's failure to attempt these pacific alternatives to the use of force contravened the central purpose of the United Nations.⁷ Furthermore, the Declaration of Principles of Law Concerning Friendly Relations and Cooperation Among States,⁸ considered by United Nations members to

the Domestic Affairs of States, G.A. Res. 2131 (1965), article 1: "No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."

⁶Goodrich & Hambro, Charter of the United Nations: Commentary and Documents 105 (2d ed. 1949).

⁷See, e.g., Essentials of Peace Resolution, G.A. Res. 290 (IV), 4 U.N. GAOR Supp. (No. 13), U.N. Doc. A/1159 (1949).

⁸G.A. Res. 2625 (XXV), 25 U.N. GAOR Supp. (No. 28) 121, U.N. Doc. A/8028 (1970).

be an authoritative interpretation of the U.N. Charter,⁹ states that "the practice of any form of intervention...violates the spirit and letter of the Charter...."¹⁰ The Declaration "solemnly proclaims" that the threat or use of force "constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues."¹¹

That the target of Yokum's use of force was limited to an aircraft does not exculpate Yokum from its violation of Article 2(4). Interpreting the phrase "territorial integrity or political independence" in Article 2(4) to protect only the most serious uses of force, for example, an invasion, would vitiate the substantive significance of the use of force prohibition.¹²

International response to an incident similar to the diversion of the Shangri aircraft evidences the impermissibility of Yokum's use of force. On August 10, 1973 a Lebanese aircraft was intercepted by Israeli military jets and forced to land because the

⁹Lillich & Paxman, State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities, 26 Amer. U.L. Rev. 217, 271 (1977); See Rosenstock, The Declaration of Principles of International Law Concerning Friendly Relations: A Survey, 65 Am. J. Int'l L. 713, 714-15 (1971); Sahovic (ed.), Principles of International Law Concerning Friendly Relations and Cooperation (1972).

¹⁰G.A. Res. 2625, supra note 8.

¹¹G.A. Res. 2625, supra note 8, at Principle 1.

¹²J. Stone, Aggression and World Order 95 (1958). See also the General Assembly's Definition of Aggression which cites "[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State" as an illustration of the use of force against a state's territorial integrity or political independence. U.N. Definition of Aggression, G.A. Res. 3314 (XXIX), 29 UNGAOR Supp. No. 31, 142 U.N. Doc. A/9631 (1974), at Article 3(d).

Israelis believed the aircraft carried terrorists responsible for a massacre at the Athens airport. The United Nations Security Council, "in a rare display of solidarity over a Middle East question",¹³ unanimously condemned Israel's action as "a serious...violation of the Charter of the United Nations."¹⁴

2. THE DIVERSION WAS NOT JUSTIFIED BY ARTICLE 51.

Yokum's forcible diversion of the Shangri aircraft cannot be justified as an exercise of self-defense pursuant to Article 51 of the U.N. Charter. Article 51 provides in relevant part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations...." Article 51 would have permitted Yokum's use of force only if it had been first attacked by Shangri. "The fair reading of Article 51 permits unilateral use of force only in a very narrow and clear circumstance, in self-defense if an armed attack occurs."¹⁵ According to the International Court of Justice in Nicaragua v. United States,¹⁶ use of force in self-defense "can only be exercised in response to an

¹³McGinley, The Achille Lauro Affair-Implications for International Law, 52 Tenn. L. Rev. 691, 720 (1985).

¹⁴See 28 U.N. SCOR (1740th mtg.), Res. & Dec. at 10, U.N. Doc. S/Res/337 (1973).

¹⁵L. Henkin, How Nations Behave 141 (2d ed. 1979) ("Nothing in the history of its drafting suggests that the framers of the Charter intended something broader than the language implied."). See also P. Jessup, A Modern Law of Nations 166-67 (1948).

¹⁶Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14. Though the Court's decision was based on customary international law, it found that "the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law." Id. at para. 187.

'armed attack', [for example],...action by regular armed forces across an international border [or] the sending by a State of armed bands on to the territory of another State...."¹⁷ Shangri's extradition of the hijackers to Saq was obviously not an armed attack on Yokum. The diversion by Yokum cannot, therefore, be justified as self-defense under Article 51.

B. YOKUM VIOLATED THE HOSTAGES CONVENTION.

The 1979 Convention Against the Taking of Hostages,¹⁸ to which both Shangri and Yokum are parties without reservation,¹⁹ proscribes the use of force in attempting to obtain jurisdiction over suspected hostage-takers. Article 14 of the Convention expressly states: "Nothing 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." Thus, Yokum is forbidden by the Convention from resort to the use of force. Furthermore, the Convention forecloses the use of force in response to a dispute by specifying the acceptable means of dispute resolution. Article 16, paragraph 1, of the Hostages Convention states: "Any dispute between two or more State parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration." In the analogous aircraft diversion following the Achille Lauro incident,

¹⁷Id. at para. 187-201.

¹⁸Done at New York, December 17, 1979, U.N. Doc. A/Res. 34/146 (1979), reprinted in 28 I.L.M. 1457 (1979).

¹⁹Problem at appendix 1.

for example, the United States made no claim that the act of forcing the Egyptian aircraft to land was justified under international law.²⁰ Moreover, no other government has acceded to the legitimacy of the act in law.²¹

C. YOKUM VIOLATED THE LAW OF THE SEAS CONVENTION.

Yokum's diversion of the Shangri aircraft interfered with the aircraft's free passage through international airspace, violating Article 87 of the United Nations Convention on the Law of the Seas, to which Yokum and Shangri are parties.²² Article 87 of the Convention states that "[t]he high seas are open to all States, [including] (b) [f]reedom of overflight." Breach of this mutual treaty obligation²³ is a violation of international law.

D. YOKUM VIOLATED THE 1949 GENEVA CONVENTIONS.

The use of force by Yokum against the aircraft initiated "armed conflict" between two High Contracting Parties, Yokum and Shangri, which triggered the application of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.²⁴

²⁰McGinley, supra note 13, at 691. "Egypt's failure to carry out its obligations under the Hostage Convention did not permit the United States to exercise self help to bring the alleged hijackers of the Achille Lauro to justice." Id. at 720. See also Schachter, In Defense of International Rules on the Use of Force, 53 U.Chi. L. Rev. 113, 140 (1986).

²¹McGinley, supra note 13, at 721.

²²U.N. Convention on the Law of the Seas (1982), supra note 4.

²³Problem at appendix 1.

²⁴T.I.A.S. No. 3365, 75 U.N.T.S. 287, Art. 2. Both Shangri and Yokum are parties to the Geneva Conventions. Problem at appendix 1.

Article 4 of the Convention protects civilians 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." The Convention obligation not to unlawfully confine protected persons²⁵ was violated, however, when Yokum diverted a Shangri aircraft whose crew members were civilians.

E. YOKUM VIOLATED CUSTOMARY INTERNATIONAL LAW.

In addition to violating numerous treaty obligations, Yokum's diversion of the aircraft breached customary international law.²⁶

1. ANTICIPATORY SELF-DEFENSE DOES NOT JUSTIFY THE DIVERSION.

Some scholars suggest that, despite the peremptory customary norm prohibiting the use of force,²⁷ the narrow right to use force in anticipation of an attack remains intact.²⁸ Even if customary anticipatory self-defense is recognized, however, Yokum's diversion of the aircraft does not qualify as anticipatory self-defense under the conditions of customary law.

²⁵Article 147.

²⁶See generally I. Brownlie, International Law and the Use of Force by States 432-33 (1963).

²⁷There has been "widespread affirmation of the rules on force as jus cogens." Schachter, supra note 20, at 126. See also Henkin, supra note 15, at 233-36.

²⁸See generally McDougal & Feliciano, Law and Minimum World Public Order 719 (1961); McDougal, The Soviet-Cuban Quarantine and Self-Defense, 57 Am. J. Int'l L. 597, 599 (1963); D. Bowett, Self-Defense in International Law 187-88 (1958); Waldock, The Regulation of the Use of Force by Individual States in International Law, 81 Hague Recueil des Cours 455, 459-98 (1952).

First, since no Yokum nationals were in danger at the time of the diversion, the action violated the necessity requirement of customary anticipatory self-defense espoused in the classic Caroline case (1842).²⁹ The need for the use of force in self-defense was not "instant, overwhelming, leaving no choice of means, and no moment for deliberation."³⁰ In the Entebbe rescue case, by contrast, "[t]he requirements of this right to protect nationals were clearly met....Israel had good reason to believe that at the time it acted Israeli nationals were in imminent danger of execution by the hijackers."³¹ The possibility that these same accused hijackers could, if not captured by Yokum, attack Yokum nationals in the future is purely speculative and lacks sufficient imminence to justify the use of force in anticipatory self-defense.³²

Second, Yokum's action against the aircraft violated the proportionality requirement of customary anticipatory self-defense. The Caroline case states: "measures of protection [must be] strictly confined to the object of protecting [nationals]"

²⁹In the Caroline case "self-defense was changed from a political excuse to a legal doctrine." Jennings, The Caroline and McLeod Cases, 32 Am. J. Int'l L. 82 (1938).

³⁰J.B. Moore, A Digest of International Law 409-14 (1906).

³¹Statement of Ambassador Scranton, 74 Dept. State Bull. 181 (Aug. 2, 1976) (emphasis added), cited in Murphy, "State Self-Help and Problems of Public International Law," Legal Aspects of International Terrorism (Evans and Murphy, eds. 1978).

³²"[U]nder customary law only an absolute necessity could justify intervention to protect nationals." Waldock, supra note 28, at 467.

against injury."³³ Considering the absence of any threat to Yokum nationals already released from the Hasdrubal, the forcible diversion of the aircraft was grossly disproportionate.

2. THE FORCIBLE DIVERSION WAS NOT PERMISSIBLE SELF HELP.

The use of force is strictly excluded from the permissible range of self help, the customary doctrine allowing States to take countermeasures if another State breaches a mutual international obligation.³⁴ In the Corfu Channel³⁵ case, for example, the International Court of Justice flatly rejected the United Kingdom's forcible self help response to the mining of an international waterway.³⁶ The Court's reasoning in Corfu Channel is compelling: the right to use force "in the cause of justice" would "be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself."³⁷ In short,

³³Waldock, supra note 28, at 467.

³⁴Rodick, The Doctrine of Necessity in International Law (1928), at 32; see also The Restatement (Revised) of Foreign Relations Law of the United States, section 905.

³⁵Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4; see also C.H.M. Waldock, Use of Force in International Law 501 (1951).

³⁶1949 I.C.J. at 5.

³⁷Id. at 4, 35. The Eichmann case does not diminish the importance of the Corfu Channel. Although the 1960 abduction in Argentina of Adolf Eichmann by members of the Israeli Security Service was not condemned by the Security Council, its resolution did call for Israel's payment of "appropriate reparation" to Argentina. 15 U.N. SCOR Supp. (Apr.-June) at 35, U.N. Doc. S/4349 (1960). The relatively mild international reaction to the Eichmann case should be attributed to the special significance of the crimes of which Eichmann was accused (crimes against the Jewish people, war crimes and crimes against humanity) and to Argentina's waiver of the violation of its sovereignty, not as evidence of the acceptability of the use of force. See generally M. Pearlman, The Capture and Trial of Adolf Eichmann (1963).

the use of force to compel another nation to abide by its perceived international obligations is a violation of Article 2(4) and the customary right of self help.³⁸ Moreover, Yokum had numerous alternatives³⁹ to the forcible diversion, including suspension of treaty benefits, economic sanctions, or resort to an international tribunal.⁴⁰

The importance of this international norm in cases involving aviation has been expressed by numerous conventions that afford special protection to aircraft.⁴¹ The preamble of the Hague Convention,⁴² for example, recognizes that "acts of seizure or exercise of control of aircraft in flight jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of peoples of the world in the safety of civil aviation." Protection of aircraft from

³⁸McCredie, Contemporary Uses of Force Against Terrorism: The United States Response to Achille Lauro--Questions of Jurisdiction And Its Exercise, 16 Ga. J. Int'l & Comp. L. 435, 462 (1986).

³⁹See Schachter, Self-Help in International Law, 37 J. Int'l Aff. 231 (1984).

⁴⁰See generally Joyner, The Transnational Boycott as Economic Coercion in International Law: Policy, Place and Practice, 17 Vand. J. Transnat'l L. 205 (1984); G. Hufbauer & J. Schott, Economic Sanctions Reconsidered (1985).

⁴¹Yokum and Shangri are parties to, among others, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague, 16 December 1970, 860 U.N.T.S. 105, 22 U.S.T. 1642, T.I.A.S. 7192, 10 ILM 133 (1971), and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal, 23 September 1971, 974 U.N.T.S. 177, 24 U.S.T. 564, T.I.A.S. 757, 10 ILM 1151 (1971).

⁴²Convention for the Suppression of Unlawful Seizure of Aircraft, supra note 41.

forceful diversion is particularly important in cases, such as this one, in which the diverting nation is acting on intelligence reports. The danger that aggressive actions may be based on faulty intelligence was illustrated by two recent cases: first, the Soviet destruction of a KAL civilian aircraft which the Soviets mistakenly believed was a military craft; second, the February 4, 1986 interception of a Libyan jet by Israeli military aircraft acting under the mistaken belief that suspected terrorists were on board.⁴³ The danger to passengers and crew, and the potential disruption of international peace and security posed by such incidents must not be sanctioned by international law.⁴⁴

3. THE DIVERSION WAS A FORCIBLE REPRISAL.

The aircraft diversion, inconceivable as an act of self-defense, constituted the use of force in reprisal for Shangri's decision not to extradite the accused hijackers to Yokum. The object of reprisal is "to compel the offending state to make reparation for the injury or return to legality, by avoiding further offences...."⁴⁵ The diversion breached the rule, "clearly established by the terms of articles 2(3), 2(4), and 51 of the United Nations Charter, by several Security Council resolutions, and by the writings of eminent jurists, that reprisals involving

⁴³Friedman, Israelis Intercept a Libyan Civil Jet and Then Let It Go, N.Y. Times, Feb. 5, 1986, at A1, col. 1.

⁴⁴McGinley, supra note 13, at 721.

⁴⁵D. Bowett, Self-Defense in International Law (1958) at 13.

the use or threat of force are illegal."⁴⁶

F. SHANGRI DID NOT VIOLATE STANDARDS OF STATE RESPONSIBILITY.

1. SHANGRI IS OBLIGATED TO PROMOTE SELF-DETERMINATION.

Article 1(2) of the U.N. Charter calls for "respect of the principle of equal rights and self-determination of peoples...." This principle is reiterated in numerous international documents.⁴⁷ "Every State has the duty to promote...the realization of the principle of equal rights and self-determination of peoples...."⁴⁸ Shangri has not organized, instigated or participated in PACM activities,⁴⁹ it has inadvertently allowed this nascent self-determination movement to develop. Quashing PACM's struggle against alien domination would have violated the international obligation to promote self-determination.

2. SHANGRI ABIDED BY THE DUE DILIGENCE STANDARD OF STATE RESPONSIBILITY.

In determining Shangri's responsibility for allowing its territory to be used by PACM, "consideration must be given to its ability to prevent terrorist activities."⁵⁰ Article 4(a) of the

⁴⁶Murphy, supra note 31, at 565 (emphasis added). The U.N. Declaration on Principles of International Law Concerning Friendly Relations provides categorically that "[s]tates have a duty to refrain from acts of reprisal involving the use of force." G.A. Res. 2625, supra note 8; see also Paust, Responding Lawfully to International Terrorism: The Use of Force Abroad, 8 Whittier L. Rev. 711, 717-19 (1986).

⁴⁷See, e.g., the Preamble to the Hostages Convention, supra note 18, and the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, supra note 5.

⁴⁸G.A. Res. 2625, supra note 8, at Principle 5.

⁴⁹G.A. Res. 2625, supra note 8.

⁵⁰Lillich & Paxman, supra note 9, at 268.

Hostages Convention requires only that a State "tak[e] all practicable measures" to prevent the preparation and initiation of terrorist activities within its territory.⁵¹ Under the "due diligence" standard of state responsibility, Shangri may not be held liable for PACM's activities within its territory.

During the entire period relevant to this case, Shangri was embroiled in a state of near anarchy as a result of armed conflict between two religious groups struggling for control of the State.⁵² This struggle has caused the government to lose effective control over parts of its territory, including Taluba, where PACM maintains its headquarters. Indeed, it was "the confusion caused by the struggle [that] allowed PACM to operate relatively undisturbed," not any protective policy of the Shangri government.⁵³ The return of the alleged hijackers, considered "heroes" by the local population, exacerbated Shangri's internal disorder.⁵⁴ Given Shangri's situation and the strength of PACM, an attempt to extinguish the group would have provoked massive internal disruptions, possibly government overthrow. "Present law clearly says that whether a State is to prevent the formation of a hostile expedition is inevitably limited by the capacity of the State, which must be interpreted as being as far as possibilities will

⁵¹Supra note 18. (emphasis added).

⁵²Problem at 3.

⁵³Id.

⁵⁴Id.

reasonably permit."⁵⁵ No State in Shangri's weak position would reasonably be expected to uproot a popular political movement like PACM.

II. **THE CONFEDERATION OF SHANGRI WAS JUSTIFIED IN RELEASING THE PACM HIJACKERS.**

A. SHANGRI HAS NO DUTY TO TRY OR EXTRADITE THE PACM HIJACKERS.

1. ABSENT AN EXTRADITION TREATY, THE DECISION TO EXTRADITE IS DISCRETIONARY.

Because it is sovereign over actions, persons, and property within its territory,⁵⁶ a State's duty to extradite must arise by virtue of a treaty.⁵⁷ Opinio juris, as expressed by state practice,⁵⁸ establishes that in the absence of a treaty obligation, a State has no duty under international law to extradite fugitives.⁵⁹ The decision regarding extradition of the PACM hijackers was, therefore, a matter of discretion properly bestowed upon Shangri by virtue of its sovereignty.

2. SHANGRI HAS NO DUTY UNDER THE GENEVA CONVENTIONS ON THE LAWS OF WAR.

a. THE GENEVA CONVENTIONS DO NOT APPLY.

⁵⁵M. Garcia-Mora, International Responsibility for Hostile Acts of Private Persons Against Foreign States 63 (1962).

⁵⁶S.D. Bedi, Extradition in International Law and Practice 28 (1966).

⁵⁷4 H.H. Green, Digest of International Law 11 et seq. (1942); 6 M. Whiteman, Digest of International Law 732 (1968); S.P. Sinha, Asylum and International Law 155-57 (1971).

⁵⁸All developed, and most developing, countries are parties to at least some extradition treaties. See M.C. Bassiouni, International Extradition and World Public Order 9-10 (1974).

⁵⁹1 L. Oppenheim, International Law 618 (H. Lauterpacht 7th ed. 1948).

The plain language of the Geneva Conventions of 1949 indicate their inapplicability to the dispute between Shangri and Yokum. The four Conventions have an identical threshold article which states:

The present convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them....⁶⁰

Since an armed conflict exists not between Yokum and Shangri, but between Yokum and PACM, which is not a High Contracting Party, the condition precedent to the obligations found within the Conventions has not been met.

Moreover, the fact that a group of self-styled "freedom fighters" commits an act of violence does not automatically trigger application of the Geneva Conventions. The Conventions only apply to an armed conflict when that conflict is accorded "international" status. For "freedom fighter" groups to come within the terms of the Conventions, they must represent, in the eyes of the international community, the government of a High Contracting Party.⁶¹ That over 140 states recognize the effective Government of Midbari as the legitimate Government and, through it, conduct diplomatic relations with Midbari⁶² attests to PACM not having become the government or representative of Midbari before the international community.

Separate Convention provisions for armed conflicts of an

⁶⁰See Fourth Geneva Convention, supra note 24, at Article 2.

⁶¹Rubin, The Status of Rebels Under the Geneva Conventions of 1949, 21 Int'l & Comp. L. Q. 472, 474 (1972).

⁶²Problem at 1-2.

international character and armed conflicts of a "non-international" character does not imply that the Conventions were designed for all armed conflicts. The need to develop Optional Protocol I,⁶³ a new treaty that expands the Geneva Conventions,⁶⁴ is evidence that the drafters excluded a number of situations from the reach of the Conventions. Shangri and Yokum are parties only to the original formulation of the Geneva Conventions.⁶⁵ Protocol I, which requires a separate ratification procedure, is not a part of the Geneva Conventions.⁶⁶

b. THE GENEVA CONVENTIONS DO NOT COMPEL EXTRADITION OR TRIAL.

Even if the Geneva Conventions were applied to this dispute, the terms of the Conventions would not compel extradition of the PACM members to Yokum. Article 146 states that a High Contracting Party "may also, if it prefers, and in accordance with the provisions of its own legislation...hand such persons over for trial to another High Contracting Party...."⁶⁷ The extradition clause is permissive and entirely dependent upon each country's

⁶³Protocol 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) (hereinafter "Protocol I").

⁶⁴See generally Rubin, Terrorism and the Laws of War, 12 Den. J. Int'l L. & Pol'y 219 (1983).

⁶⁵Problem at Appendix 1.

⁶⁶Protocol I, supra note 63, at Arts. 92-94.

⁶⁷Fourth Geneva Convention, supra note 24, at Art. 146.

legislation.⁶⁸ Consequently, Shangri's right not to extradite is maintained,⁶⁹ as well as its right to grant asylum to the PACM members. In deciding to whom they will grant asylum, the "absolute discretion" of States is rooted in customary international law.⁷⁰ The fact that extradition treaties are necessary to achieve the surrender of a fugitive illustrates the competence of States to grant asylum to those in its territory.⁷¹ Since the claims of Shangri and Yokum conflict, Yokum's claim of personal jurisdiction over the alleged hijackers must yield to Shangri's territorial jurisdiction.⁷²

3. SHANGRI HAS NO DUTY UNDER THE INTERNATIONAL CONVENTION AGAINST THE TAKING OF HOSTAGES.

a. THE HOSTAGES CONVENTION DOES NOT APPLY.

The Hostages Convention⁷³ itself provides that if there is no extradition treaty between two State parties,⁷⁴ the requested State is free to decide whether or not to consider the Hostages Convention as the basis for extradition. Article 10 states:

If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no

⁶⁸Garcia-Mora, War Crimes and the Principle of Non-Extradition of Political Offenders, 9 Wayne L. Rev. 269, 285 (1963).

⁶⁹3 M.C. Bassiouni, International Criminal Law 93 (1987).

⁷⁰Sinha, supra note 57, at 155; Green, Extradition v. Asylum for Aerial Hijackers, 10 Israel L. Rev. 207, 208 (1975); see also 1 L. Oppenheim, International Law 676-78 (H. Lauterpacht 8th ed. 1955).

⁷¹Sinha, supra note 57, at 155.

⁷²Cf. The S.S. Lotus, supra note 3.

⁷³See supra note 18.

⁷⁴There is no extradition treaty between Shangri and Yokum. See Problem at 4.

extradition treaty, the requested State may at its option consider this convention as the legal basis for extradition in respect of the offences set forth in article 1. Extradition shall be subject to the other conditions provided by the law of the requested State.⁷⁵

The travaux preparatoires of the Hostages Convention⁷⁶ reveal that this provision is identical to and completely consistent with the corresponding provisions in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft.⁷⁷ The intention of these identical provisions was not to create an extradition treaty in the absence of one.⁷⁸ Rather, the delegates to the Convention overwhelmingly rejected a draft article that would have automatically made the Convention the basis for extradition in the absence of a treaty.⁷⁹ Thus, in the absence of an extradition treaty, the final draft permits State parties to choose whether or not to make the Convention a basis for extradition.

Moreover, the travaux preparatoires of the Hostages Convention indicate that the Convention was not designed to apply

⁷⁵Hostages Convention, supra note 18.

⁷⁶See generally Ad Hoc Committee Report, 32 U.N. GAOR Supp. (No.39), U.N. Doc. A/32/39 (1977).

⁷⁷Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague, 16 December 1970, 860 U.N.T.S. 105, 22 U.S.T. 1642, T.I.A.S. 7192, 10 I.L.M. 133 (1971).

⁷⁸1 ICAO, International Conference on Air Law 182-91 (1972) (ICAO Doc. 8979-LC 1165-1); see also White, The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 6 Int'l Comm. of Jurists 38, 43-44 (1971).

⁷⁹1 ICAO, International Conference on Air Law, supra note 78, at 191.

to national liberation movements.⁸⁰ During the debate over the Convention's stipulations, numerous delegates demanded assurances that the Convention would not be used with respect to liberation movements.⁸¹

b. THE HOSTAGES CONVENTION DOES NOT COMPEL EXTRADITION OR TRIAL.

Even if the Hostages Convention applies to this situation, its provisions in no way obligate Shangri to extradite the PACM hijackers to Yokum. The extradition provisions state, in pertinent part:

The State Party in the territory of which the alleged offender is found must, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its own competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.⁸²

The travaux preparatoires of the Hostages Convention⁸³ establish that Article 8 is consistent with corresponding extradition provisions in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft⁸⁴ and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents.⁸⁵ In its

⁸⁰Ad Hoc committee Report, supra note 76, at 47.

⁸¹Id. at 30-47.

⁸²Hostages Convention, supra note 18, at Art. 8.

⁸³Ad Hoc Committee Report, supra note 76, at 47.

⁸⁴Supra note 77. See also Wood, The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 23 Int'l & Comp. L.Q. 791, 810-11 (1974).

⁸⁵Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted by the U.N. General Assembly on Dec. 14, 1973,

commentary on the identical extradition provision in the latter Convention, the International Law Commission stated:

As the article is drafted, it is clear that no obligation is created thereunder to punish or to conduct a trial. The obligation of the State where the alleged offender is present will have been fulfilled once it has submitted the case to its competent authorities....It will be up to those authorities to decide whether to prosecute or not....⁸⁶

Thus, since the Hostages Convention obligation is to submit the case for consideration, not necessarily to prosecute, Shangri's duty was "fulfilled under the article even if the decision which those authorities may take is not to commence criminal trial proceedings."⁸⁷

Not only are States free under Article 8 to not extradite offenders, but if they do submit them to their competent authorities, the subsequent proceedings are governed "in accordance with the laws of that State." Shangri arrested the PACM hijackers, submitted them to their competent authorities for a two week detention period,⁸⁸ and decided not to prosecute.

B. IF THE GENEVA CONVENTIONS OR HOSTAGES CONVENTION APPLY, SHANGRI COMPLIED WITH THEIR PROVISIONS IN SENDING THREE PACM MEMBERS TO SAQ.

Assuming that the Geneva Conventions or Hostages Convention apply to the dispute between Shangri and Yokum, Shangri's decision

⁸⁶Report of the International Law Commission on the Work of its Twenty-Fourth Session, 28 U.N. GAOR Supp. (No. 10) at 146, U.N. Doc. A/8710/Rev.1 (1972) (emphasis added).

⁸⁷Id. See also, Wood, supra note 84, at 42; Kearney, The Twenty-Fourth Session of the International Law Commission, 67 Am. J. Int'l L. 84, 90 (1973).

⁸⁸Problem at 5.

to extradite three PACM members to Saq was proper. Article 146⁸⁹ of the Convention does not specify that extradition must take place between parties to the Conventions. Moreover, since extradition under the Conventions is "in accordance with the laws of the State,"⁹⁰ the Conventions do not deprive Shangri of sovereignty over persons within its territory.

The Hostages Convention also supports Shangri's decision to send three PACM members to Saq. Saq had a legitimate claim to jurisdiction based on Article 5 of the Convention: 5(b) creates jurisdiction because the PACM members who boarded the Hasdrubal in Port Al-Haj may have had their habitual residence in Saq; 5(c) supports jurisdiction since Saq was compelled to refrain from attempting any rescue; and 5(d) establishes jurisdiction because, since the Hasdrubal stopped at Port Al-Haj prior to the hijacking, it is likely that nationals of Saq were among the eleven nationalities aboard the ship.⁹¹

C. IF THE GENEVA CONVENTIONS OR HOSTAGES CONVENTION APPLY, SHANGRI WAS JUSTIFIED IN RELEASING THE FOUR REMAINING PACM MEMBERS.

1. THE RELEASE WAS JUSTIFIED UNDER THE POLITICAL OFFENSE EXCEPTION.

The exemption of political offenders from extradition is a well-recognized principle of customary international law. The exception has been incorporated into numerous treaties, national

⁸⁹Fourth Geneva Convention, supra note 24, at Art. 146.

⁹⁰Id.

⁹¹Problem at 1.

constitutions, and domestic laws.⁹² When a State requests extradition, customary international law suggests that they do so with the understanding that political offenders, charged with pure or relative political offenses,⁹³ will not be extradited.⁹⁴ The action of the PACM hijackers was political because their goal was to advance their self-determination movement by exploiting the situation for propoganda.⁹⁵

The Geneva Conventions also contemplate the exception of political offenders from extradition. By stipulating that extradition remains subject to the domestic law of the requested party, all the traditional exceptions to extradition have been maintained.⁹⁶ On this basis, a State may consider breaches of the

⁹²Hannay, International Terrorism and the Political Offense Exception to Extradition, 18 Colum. J. Transnat'l L. 381, 385 (1979); see also Statement by the Legal Advisor, Office of United States High Commissioner for Refugees, in International Law Association, Report of the Committee on the Legal Aspects of the Problem of Asylum, at Appendix 1, in the Report of the Fifty-First Conference Held at Tokyo 283, 285-89 (1964); Garcia-Mora, The Present Status of Political Offences in the Law of Extradition and Asylum, 14 U. Pitt. L. Rev. 371, 375 (1953).

⁹³The terms "political offense" may cover both "pure" political acts as well as so-called "relative" political offenses, i.e., ordinary crimes undertaken from political motive. See generally Hannay, supra note 92; Larschan, Extradition, the Political Offense Exception and Terrorism: An Overview of the Three Principle Theories of Law, 4 B. U. Int'l L. J. 231 (1986).

⁹⁴See Garcia-Mora, supra note 68, at 277. According to Oppenheim, "non-extradition of political criminals...is the rule...and the principle that has conquered the world...." 1 L. Oppenheim, International law sec. 333 at 704-07 (H. Lauterpacht 8th ed. 1955). The political offense exception has also come to reflect the practice of States that extradite without a treaty. See Restatement (Revised) of U.S. Foreign Relations Law sec. 477 at 92 (1987).

⁹⁵Problem at 2.

⁹⁶M.C. Bassiouni, supra note 69.

Conventions as political offenses for which extradition will not be granted.⁹⁷ Moreover, the Convention provisions relating to extradition or bringing to trial of war criminals, representing a significant departure from customary law, have never been invoked and remain a dead letter.⁹⁸ The practice of States shows an almost universal refusal to extradite war criminals on grounds of the political nature of the crime.⁹⁹

Article 9 of the Hostages Convention, to which Yokum has acceded, indicates that the offense of hostage-taking may be characterized as a political offense.¹⁰⁰ Article 9 provides, in part:

I. A request for the extradition of an alleged offender, pursuant to this Convention, shall not be granted if the requested State Party has substantial grounds for believing:

(a) That the request for extradition for an offense set forth in article I has been for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion; or

(b) That the person's position may be prejudiced:
(i) For any of the reasons mentioned in subparagraph (a) of this paragraph....¹⁰¹

Based upon the history of discord between Yokum and PACM,¹⁰²

⁹⁷Gutteridge, The Geneva Conventions of 1949, 26 Brit. Y.B. Int'l L. 294, 306 (1949).

⁹⁸Cassese, The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law, 13 U.C.L.A. Pacific Basin L. J. 55, 101 (1984).

⁹⁹Bassiouni, supra note 69, at 93.

¹⁰⁰See Shubber, The International Convention Against the Taking of Hostages, 1981 Brit. Y.B. Int'l L. 205, 216.

¹⁰¹Hostages Convention, supra note 18, at Art. 9.

¹⁰²Problem at 3.

Shangri has a reasonable basis for believing that a Yokum trial of the alleged hijackers would be prejudiced.

2. THE RELEASE WAS JUSTIFIED AS A COUNTERMEASURE.

Article 60 of the Vienna Convention on the Law of Treaties¹⁰³ states that a breach by one party entitles the other party to terminate the treaty or suspend its operation in whole or in part.¹⁰⁴ Thus, since Yokum violated Articles 16 and 14 of the Hostages Convention¹⁰⁵ by forcibly diverting Shangri's aircraft, Shangri is entitled to suspend its Convention obligations under customary international law.¹⁰⁶ This fundamental principle was upheld in the Case Concerning Air Services Agreement Between France And the United States,¹⁰⁷ in which the tribunal concluded:

If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled...to affirm its rights through countermeasures.¹⁰⁸

Shangri's release of the four remaining PACM members was justified on the belief that Yokum had violated its obligations by diverting

¹⁰³Vienna 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 8 I.L.M. 679 (1969), art. 60.

¹⁰⁴The basic principle underlying Article 60 is, in the words of Judge Anzilotti's famous dissent in Diversion of Water from the Meuse, "so just, so equitable, so universally recognized, that it must be applied in international relations also." 1937 P.C.I.J. (ser. A/B) No. 70, at 50 (June 28); see also 14 M. Whiteman, Digest of International Law 468-78 (1970).

¹⁰⁵Hostages Convention, supra note 18, at Art. 14, 16. The principle of settling disputes peacefully is consistent with international law. See supra note 7 and accompanying text.

¹⁰⁶Damrosch, The United States-France Aviation Dispute, 74 Am. J. Int'l L. 785, 792 n.25 (1980).

¹⁰⁷18 U.N.R.I.A.A. 417, 443-46 (Arbitral Award of Dec. 9, 1978).

¹⁰⁸Id. at para. 81.

the aircraft.¹⁰⁹

Yokum's violation of international obligations also entitled Shangri to release the remaining four PACM hijackers as an act of retorsion.¹¹⁰ This release was lawful under widely accepted asylum principles and was justified by Yokum's wrongful act.¹¹¹

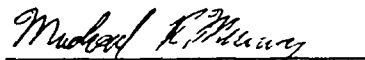
CONCLUSION

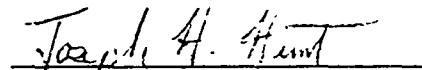
For the above stated reasons, Shangri urges the Court to rule that Yokum violated international law by forcibly diverting the Shangri aircraft. Further, Shangri seeks a finding that it was justified in releasing the alleged PACM hijackers.

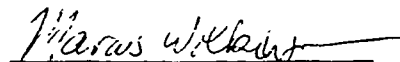
Respectfully submitted,


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¹⁰⁹The belief that another State has violated its obligations is enough to permit the use of countermeasures. See Damrosch, supra note 106, at 796. See also Case Concerning United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. Rep. 3, 27-28 (United States countermeasures against Iran were taken "in response to what the United States believed to be grave and manifest violations of international law by Iran....").

¹¹⁰A retaliatory act that is not itself illegal falls into the category of retorsion. L. Oppenheim, 2 International Law 136 (7th ed. H. Lauterpacht, 1952).

¹¹¹See generally E. Zoller, Peacetime Unilateral Remedies: An Analysis of Countermeasures 5 (1984).