

**IN THE  
INTERNATIONAL COURT OF JUSTICE AT THE PEACE PALACE  
THE HAGUE, NETHERLANDS**

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REPUBLIC OF YOKUM,

Applicant

v.

CONFEDERATION OF SHANGRI,

Respondent

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February 1988

On Submission to the International Court of Justice

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**MEMORIAL FOR THE APPLICANT**

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<i>Austin Claim</i> , 4 R. Int'l Arb. Awards 623 (1930).	14
<i>Caroline Case</i> , 29 B.F.S.P. 1137, 30 B.F.S.P. 195 (1837).	19
<i>Corcoran Claim</i> , 4 R. Int'l Arb. Awards 470 (1929).	15
<i>Cotesworth &amp; Powell Claim</i> (Gr. Brit. v. Colom.), 2 J. Moore, <i>History and Digest of the International Arbitrations to Which the United States Has Been a Party</i> 2050 (1898).	16
<i>Eain v Wilkes</i> , 641 F. 2d. 504 (7th Cir. 1981).	9
<i>Escabedo v United States</i> , 623 F. 2d. 1098 (5th Cir. 1980).	9
<i>In Re Castioni</i> , [1891] 1 Q.B. 149.	9
<i>In Re Giovanni Gatti</i> , [1947] Ann. Dig. 145 (No 70) (Fr.).	9
<i>In Re Karphengst</i> , [1929-30] Ann. Dig. 292 (No 8) (Swit.).	9
<i>Lotus Case</i> (Fr. v. Turk.), 1927 P.C.I.J. 10	4,7
<i>Magellan Pirates</i> , 164 Eng. Rep. 47 (1853).	5
<i>McGlinchey v Wren</i> , [1983] Ir. L. Rep. 169 (Ir.).	9
<i>Military and Paramilitary Activities in and Against Nicaragua</i> (Nicar. v. U.S.), 1986 I.C.J. 14	18,19
<i>Montijo Case</i> (U.S. v. Colom.), 2 J. Moore, <i>History and Digest of the International Arbitrations to Which the United States Has Been a Party</i> 1421 (1898).	16
<i>Naulilaa Arbitration</i> , 2 R. Int'l Arb. Awards 1011 (1928).	22
<i>Neer Claim</i> , 4 R. Int'l Arb. Awards 60 (1926).	14
<i>Nuclear Tests Cases</i> (Aust. v. Fr.; N.Z. v. Fr.), 1974 I.C.J. 253	7,15
<i>Nottebohm Case</i> (Lichtenstein v Guat.), 1955 I.C.J. 4	7
<i>Quinn v Robinson</i> , 783 F. 2d. 776 (9th Cir. 1986).	9

<i>Spanish Zone of Morocco Claim</i> (Gr. Brit. v. Spain), 2 R. Int'l Arb. Awards 615 (1925).	14
<i>Steinway Case</i> (Italy v. U.S.), 14 R. Int'l Arb. Awards 149 (1953).	12,13,14
<i>Texas Cattle Claims</i> , 8 M. Whiteman, <i>Digest of International Law</i> 749 (1948).	12,15
<i>United States Diplomatic and Consular Staff in Teheran</i> (U.S. v. Iran), 1980 I.C.J. 3	12
<i>West Case</i> , 4 R. Int'l Arb. Awards 270 (1927).	16

### Treaties

Convention Against the Taking of Hostages, <i>opened for signature</i> at New York, 17 Dec. 1979, U.N. Doc. A/Res. 34/146 (1979), 28 I.L.M. 1457 (1979).	1,2,3, 7,19
Convention for the Amelioration of the Condition of Wounded and Sick Armed Forces in the Field, <i>opened for signature</i> at Geneva, 12 Aug. 1949, 75 U.N.T.S. 31, 6 U.S.T 3114, T.I.A.S. 3362.	3,4,7
Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Armed Forces at Sea, <i>opened for</i> <i>signature</i> at Geneva, 12 Aug. 1949, 75 U.N.T.S., 85, 6 U.S.T 3217, T.I.A.S. 3363.	3,4,7
Convention for the Suppression of the Unlawful Seizure of Aircraft, <i>opened for signature</i> at The Hague, 16 Dec. 1970, 869 U.N.T.S. 105, 22 U.S.T. 1642, T.R.A.S. 7192, 10 I.L.M. 133 (1971).	6,18
Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, <i>opened for signature</i> at Montreal, 23 Sept. 1971, 974 U.N.T.S. 177, 24 U.S.T. 564, 10 I.L.M. 1151 (1971).	6,18
Convention on the High Seas, <i>opened for signature</i> at Geneva, 19 Apr. 1958, 450 U.N.T.S. 82, 1963 U.K.T.S. 5 (Cmd. 1929).	5
Convention on the Law of the Sea, <i>opened for signature</i> at Montego Bay, 10 Dec. 1982, U.N. Doc. A/Conf. 63/122 and Corr. 1 to 11, 21 I.L.M. 1261 (1982).	4,5,7,19

Convention on the Rights and Duties of States, <i>opened for signature</i> at Montevideo, 26 Dec.1933, 165 L.N.T.S. 19, U.S.T.S. 881, 4 Malloy 4807.	4
Convention Relative to the Protection of Civilian Persons in Time of War, <i>opened for signature</i> at Geneva, 12 Aug. 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. 3365.	1,3,4,7
Convention Relative to the Treatment of Prisoners of War, <i>sopened for signature</i> at Geneva, 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T 3316, T.I.A.S. 3364.	3,4,7
Protocol I Additional to the 1949 Geneva Conventions and Relating to the Victims of International Armed Conflicts, <i>opened for signature</i> at Geneva, 8 June 1977, 16 I.L.M. 1391 (1977).	4
United Nations Charter	8,17,19
Vienna Convention on the Law of Treaties, <i>opened for signature</i> at Vienna, 23 May 1969, 1980 U.K.T.S. 58 (Cmd. 7964), 8 I.L.M. 679 (1969), U.N. Doc. A/Conf. 39/27.	1

#### Treatises and Digests

1 M. Bassiouni, <i>International Criminal Law</i> (1986).	4,6
M. Bassiouni, <i>International Extradition and World Public Order</i> (1974).	8
I. Brownlie, <i>Principles of Public International Law</i> (3d ed. 1979).	4
E. Colbert, <i>Retaliation in International Law</i> (1948).	22
D. Dubner, <i>The Law of International Sea Piracy</i> (1980).	18
M. Farrell, <i>Sheltering the Fugitive?:The Extradition of Irish Political Offenders</i> (1985).	9
D. Greig, <i>International Law</i> (2d ed. 1976).	4,5
H. Kelsen, <i>Principles of International Law</i> (1952).	20
H. Lauterpacht, <i>Oppenheim's International Law</i> (1967).	5
E. McWhinney, <i>Aerial Piracy and International Terrorism: The Illegal Diversion of Aircraft and International Law</i> (1987).	7

W. O'Brien, <i>The Conduct of Just and Limited War</i> (1981).	23
2 D. O'Connell, <i>International Law</i> (2d ed. 1970).	14
2. D. O'Connell, <i>The Law of the Sea</i> (1984).	5
L. Sohn and R. Baxter, <i>Convention on the International Responsibility of States for Injuries to Aliens</i> (1961).	13
I. & C. Stanbrook, <i>The Law and Practice of Extradition</i> (1980).	9
C. Van den Wijngaert, <i>The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order</i> (1980).	8

#### Journals and Periodicals

Article, <i>Howe Praises U.S. Action Against Hijackers</i> , FBIS (W.Eur.) (11 Oct. 1985).	17
Barsotti, <i>Armed Reprisals</i> in A. Cassese (ed.), <i>The Current Legal Regulation of the Use of Force</i> 79 (1986).	23
Bowett, <i>Reprisals Involving Resort to Armed Force</i> , 66 Am. J. Int'l L. 1 (1972).	21,23
Bowett, <i>The Use of Force to Protect Nationals Abroad</i> in A. Cassese (ed.), <i>The Current Legal Regulation of the Use of Force</i> 39 (1986).	19
Clarke, <i>Political Offences in Extradition: Time for Judicial Abstention</i> , 5 Hastings Int'l & Comp. L. Rev. 131 (1982).	8
Comment, <i>The Political Offence Exception as Applicable to Terrorists: Judicial Interpretation and Legislative Reform</i> , 25 Duq. L. Rev. 481 (1987).	9
Costello, <i>International Terrorism and the Development of the Principle of Aut Dedere Aut Judicare</i> , Irish Jurist 209 (1974).	6,8
Gooding, <i>Fighting Terrorism in the 1980s: The Interception of the Achille Lauro Hijackers</i> , 12 Yale J. of Int'l L. 158 (1987).	16,17
Green, <i>The Santa Maria: Rebels or Pirates?</i> , 38 Brit Y.B. Int'l L. 496 (1961).	5
Greenwood, <i>The Concept of War in Modern International War</i> ,	21

36 Int'l & Comp. L. Q. 283 (1987).	
Greenwood, <i>International Law and the United States' Air Operation Against Libya</i> , 89 W. Va. L. Rev. 933 (1987).	19,21,22
Larsen, <i>The Achille Lauro Incident and the Permissible Use of Force</i> , 9 Loy. L.A. Int'l & Comp. L. J. 481 (1987).	18,20
Lillich and Paxman, <i>State Responsibility for Injuries to Aliens by Terrorist Activities</i> , 26 Am. U.L. Rev. 219 (1977).	8,12,13
Lippman, <i>The Trial of Adolf Eichmann and the Protection of Universal Human Rights under International Law</i> , 5 Hous. J. Int'l L. 1 (1982).	16
McGinley, <i>The Achille Lauro Affair: Implications for International Law</i> , 52 Tenn. L. Rev. 691 (1985).	5
Moore, <i>Legal Standards for Intervention in Internal Conflicts</i> , 13 Ga. J. Int'l & Comp. L. 191 (1983).	19
Note, <i>The Extradition of John Demjanjuk</i> , 20 Cornell Int'l L. J. 282 (1987).	10
O'Higgins, <i>Unlawful Seizure and Irregular Extradition</i> , 36 Brit. Y.B. Int'l L. 279 (1960).	16
Roberts, <i>Self-Help in Combating State Sponsored Terrorism: Self-Defence and Peace-Time Reprisals</i> , 19 Case W. Res. J. Int'l L. 243 (1987).	23
Rosenstock, <i>The International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism</i> , 9 Den. J. Int'l L. & P. 169 (1980).	2
Rubin, <i>The Status of Rebels Under the Geneva Conventions of 1949</i> , 21 Int'l & Comp. L. Q. 472 (1972).	4
Schachter, <i>The Right of States to Use Armed Force</i> , 82 Mich. L. Rev. 1620 (1984).	22,23
Shubber, <i>The International Convention Against the Taking of Hostages</i> , 52 Brit. Y.B. Int'l L. 205 (1981).	2,3
Stuesser, <i>Active Defence: State Military Response to International Terrorism</i> , 17 Cal. W. Int'l L. J. 1 (1987).	19,21,23
Verdross, <i>Jus Dispositivium And Jus Cogens In International Law</i> , 60 Am. J. Int'l L. 55 (1966).	10

Verwey, *The International Hostages Convention and National Liberation Movements*, 75 Am. J. Int'l L. 69 (1981). 2,3,4

United Nations Documents

- Ago (*Fourth*) *Report on State Responsibility*, [1972] 2 Y.B. Int'l L. Comm'n 126, U.N. Doc. A/CN.4/264 and Add.1 (1972). 13
- Commentary to the Draft Articles on State Responsibility, [1973] 2 Y.B. Int'l L. Comm'n 9, U.N. Doc. A/9010/Rev. 1 (1973). 14
- Debates of the Drafting Committee of the Convention Against the Taking of Hostages, U.N. Doc. A/AC. 188/SR 14 (1977). 2
- Debates of the Sixth Committee (Legal) of the United Nations General Assembly (60th mtg.), U.N. Doc. GA/L/2544. 11
- Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G. A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) at 121, U.N. Doc. A/8028 (1971). 12,13, 20,22
- Declaration on Territorial Asylum, G. A. Res. 2312 (XXII), 21 U.N. GAOR, Supp. (No. 16) at 81, U.N. Doc. A/6716 (1968). 8
- Garcia-Amador, *The Responsibility of States for Damage Caused to the Person or Property of Aliens*, [1961] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/134 and Add.1 (1961). 13
- International Law Commission, *Draft Articles on State Responsibility*, [1979] 2 Y.B. Int'l L. Comm'n 3, U.N. Doc. A/CN.4/318 and Add. 1-4 (1979). 13
- Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance and Despair and Which Cause Some People to Sacrifice Human Lives, Including Their Own, in an Attempt to Effect Radical Changes: G.A. Res. 3034 (XXVII), 27 U.N. GAOR, Supp. (No. 30) at 179, U.N. Doc A/8727 (1973); G.A. Res. 31/102, 31 U.N. GAOR, Supp. (No. 39) at 185, U.N. Doc. A/31/39 (1975); G.A. Res. 32/147, 32 U.N. GAOR, Supp. (No. 45) at 212, U.N. Doc. A/32/45 (1978); G.A. Res. 34/145, 34 U.N.

GAOR, Supp. (No. 46) at 244, U.N. Doc. A/34/46 (1980); G.A. Res. 36/109, 36 U.N. GAOR, Supp. (No. 51) at 241, U.N. Doc. A/36/51; (1982) G.A. Res. 38/130, 38 U.N. GAOR, Supp. (No. 47) at 266, U.N. Doc. A/38/47 (1984); G.A. Res. 40/61, 40 U.N. GAOR, Supp. (No. 53) at 301, U.N. Doc. A/40/45 (1986); Sixth Comm. (Legal) (42nd Session Agenda Item 126), U.N. Doc. A/C.6/42/L.24 (1987).

Report of the Ad Hoc Committee of the Drafting of an International Convention Against the Taking of Hostages, 33 U.N. GAOR, Supp. (No. 39), U.N. Doc. A/33/39 (1979).	3
Report of the I.L.C. to the General Assembly, 30 U.N. GAOR, Supp. (No. 10) at 21, U.N. Doc. A/10010/Rev. 1 (1975).	14
Resolution on the Definition of Aggression, G.A. Res. 3314 (XXIX), 29 U.N. GAOR, Supp. (No. 31) at 142, U.N. Doc. A/9631 (1975).	20
Security Council Debates of 9 July 1976, U.N. Doc. S/PV. 1939 (1976), 15 I.L.M. 1224.	20
Security Council Resolution 138, 15 U.N. SCOR at 35, U.N. Doc. S/4349 (1960).	16
Security Council Statement of 9 October 1985, U.N. Doc. S/17554 (1985).	17
Universal Declaration of Human Rights, G.A. Res. 217A (III), 3 U.N. GAOR 135, U.N. Doc. A/810/1998 (1948).	8

## JURISDICTION

The Governments of the Republic of Yokum and the Confederation of Shangri have submitted the following matter by special agreement to the International Court of Justice pursuant to paragraph 1 of Article 36 of the Statute of the International Court of Justice. Both states have accepted the jurisdiction of the Court without reservation.

## STATEMENT OF FACTS

The Peoples Armed Conflict Movement (PACM) is a group of self-proclaimed "freedom-fighters" who are attempting to overthrow the legitimate government of Midbari, [Problem at 1.] recognised by the overwhelming majority of the world community. [Id. at 1-2.] PACM holds no territory in Midbari. Its headquarters are maintained in Taluba, Shangri, [Id. at 2.] from where it has regularly launched terrorist raids into surrounding states. [Id. at 1.] These attacks have involved acts of violence perpetrated against Yokum nationals and economic interests. [Id.] After the raids, the perpetrators have returned to Taluba, where they have remained unmolested by the government of Shangri. [Id. at 3.] Shangri, always duly informed of the activities and whereabouts of these criminals, has consistently refused to take any action. [Id.] Shangri has alleged that civil strife has denied it control of those areas where PACM is based. [Id.]

On 13 February 1987, the *Hasdrubal* set sail from Port al-Haj, Saq. [Id. at 1.] More than two hundred of the three hundred and fifty passengers were Yokum nationals. [Id.] While the ship was in international waters, seven heavily armed PACM terrorists seized control of the ship taking the lives of two crew members and one passenger. [Id.] That passenger was a Yokum national. [Id.] The hijackers boarded at Taluba, Shangri and Port al-Haj. [Id.].PACM headquarters claimed responsibility for their actions. [Id. at 2.]

The ship spent the next forty-eight hours wandering aimlessly in international waters while PACM broadcast its propaganda on international frequencies. [Id.] The group's leader threatened to inflict harm on the passengers if any rescue attempt was made. [Id.] Yokum forces were mobilised for a rescue attempt, but the Yokum strike team was compelled to withdraw in the interests of the safety of the passengers and crew. [Id. at 2-3.] Further threats of violence enabled the terrorists to negotiate permission to dock and a promise of asylum from the Shangri government. [Id. at 3-4.] Upon learning of this deal, Yokum

informed Shangri that it expected Shangri to honour its international obligations by arresting the hijackers and freeing the ship. [*Id.* at 4.] When the ship docked, it received a tumultuous welcome by a crowd of PACM supporters, an incident widely reported by the international press. [*Id.*] Shangri failed to arrest the hijackers until the day after their triumphant return to Taluba. [*Id.*]

Yokum sought the extradition of the seven terrorists pursuant to the provisions of the Hostages Convention and the 1949 Red Cross Geneva Conventions. [*Id.* at 4-5.] Shangri failed to comply with this request and instead sent three of the hijackers to Saq where they were to be set free as "heroes of the revolution". [*Id.* at 5.] In order to prevent this release of the terrorists, Yokum diverted the plane which carried them to Beilan airport where they were duly arrested by Yokum forces. [*Id.* at 5-6.] They were flown to Yokum to face trial. Shangri has set the other four terrorists free. [*Id.* at 6.]

Shangri and Yokum are members of the United Nations and have consented to be bound by numerous treaties in their mutual interest. [*Id.*, appendix 1.] Both states are signatories to the 1944 Chicago Convention on International Civil Aviation, the 1949 Red Cross Geneva Conventions, the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, the 1982 Third United Nations Convention on the Law of the Sea, and the 1979 New York Convention Against the Taking of Hostages. [*Id.*]

The four 1949 Geneva Conventions have been ratified by Yokum, but it has not yet enacted their provisions in municipal law. [*Id.* at 6.] Both Shangri and Yokum have enacted into municipal law legislation giving effect to the Hostages Convention. [*Id.*]

The parties have agreed to submit this dispute by special agreement to the International Court of Justice.

## QUESTIONS PRESENTED

1. Is Shangri obligated at international law to try or extradite the PACM hijackers in its territory notwithstanding that PACM was purporting to exercise a right of self-determination?

2. Is Shangri responsible at international law for the activities of PACM originating on Shangri's territory?

3. Is Yokum, whose nationals have been attacked by PACM, justified in apprehending known PACM hijackers by diverting a Shangri aircraft?

## SUMMARY OF ARGUMENT

Peoples Armed Conflict Movement (PACM) is a group of rebel insurgents conducting a campaign of hostilities from within Shangri territory. PACM claims to be waging armed conflict for the liberation of Midbari. However, PACM is not a state. It holds no territory, and has achieved only inconsequential recognition from the international community. PACM members' actions in seizing the *Hasdrubal* amount to the offences of hostage-taking and piracy, according to customary and conventional definitions.

In the unlikely event that PACM is held to be engaged in international armed conflict under common article 2 of the Geneva Conventions, their actions constitute the "grave breaches" of civilian hostage-taking and wilful killing pursuant to article 147 of Geneva Convention IV.

Whether PACM's crimes are characterised as hostage-taking, piracy or "grave breaches" Shangri is under a duty to ensure such international criminals are apprehended and prosecuted. Under treaties and customary international law, Shangri is obligated either to prosecute the hijackers or to extradite them to a state with the appropriate jurisdiction. Shangri is certainly not entitled to release such criminals, nor to grant them asylum or safe passage to a state which intends glorifying them as heroes. The political offence exception to trial or extradition is not applicable.

Along with other states in the international community, Shangri is under an obligation to suppress terrorism. Shangri has failed to discharge this obligation. It failed to take any action to prevent its territory being used as a base for PACM's illegitimate and hostile raids on other states. This is sufficient to impute international responsibility to Shangri for PACM's offences. Shangri is further implicated by its consistent refusal to take punitive or preventative measures against PACM. It not only provided a safe haven for the campaign, but granted the *Hasdrubal* hijackers either asylum or safe passage to Saq.

The fact that Shangri is in the throes of civil strife does not absolve it from complicity in PACM's offences. Not even cursory attempts were made to exercise control over and curtail PACM's action. The due diligence required by minimum standards of state responsibility as indicated in relevant case law was clearly absent. At international law, a state which pardons criminals assumes responsibility for their past acts. Shangri's conduct in relation to the *Hasdrubal* hijackers on their territory was tantamount to pardoning them. Shangri is thus responsible for PACM's crimes at international law.

Yokum's interception of the Shangri jet and the arrest of the hijackers on board was legitimate. Yokum sought merely to ensure that international criminals who had killed Yokum nationals would not go unpunished. It was attempting to fulfil its international duty to suppress terrorism, a duty which Shangri had so blatantly flouted. Yokum intended no violation of Shangri's sovereignty and indeed neither entered into Shangri territory nor endangered nor intimidated any Shangri civilians. The only direct force used was against the PACM hijackers themselves.

Even if Yokum's interception is held to amount to a use of force, it was justified under the inherent right of self-defence, specified in article 51 of the Charter of the United Nations. PACM's prior campaign of attacks, its armed attack on the *Hasdrubal* and Yokum nationals and the probability that the terrorism would continue, necessitated urgent and immediate defensive action. PACM's attacks, Shangri's complicity in them and the statements of the terrorists themselves indicating a firm resolve to continue their systematic campaign of terror, legitimised Yokum's response.

I. THE CONFEDERATION OF SHANGRI (SHANGRI) IS BOUND TO TRY OR EXTRADITE THE HIJACKERS OF THE HASDRUBAL. SHANGRI BREACHED ITS OBLIGATIONS IN SENDING THREE HIJACKERS TO SAO AND IN RELEASING THE FOUR WHO REMAINED IN SHANGRI TERRITORY.

This obligation arises as the hijackers have committed several offences under international law. The offences and concomitant obligations upon Shangri are made out irrespective of whether the laws of war or the laws of peace are applicable to the activities of the Peoples Armed Conflict Movement (PACM). If the laws of peace apply, PACM's actions are offences under the provisions of the 1979 New York Convention Against the Taking of Hostages (Hostages Convention).<sup>1</sup> If the laws of war apply, PACM's actions constitute grave breaches of 1949 Red Cross Geneva Convention IV.<sup>2</sup> Under either régime, PACM's actions constitute piracy.

A. PACM's Hijacking of the *Hasdrubal* constitutes an Act of Hostage-taking.

Both Shangri and Yokum are parties to the 1979 Hostages Convention and have enacted its provisions into their municipal law pursuant to article 5. The Convention has entered into force and thus State Parties are bound to perform their treaty obligations in good faith, that is, the principle *pacta sunt servanda* applies.<sup>3</sup>

1. The seizure of the *Hasdrubal* is an act of hostage-taking under article 1 of the Hostages Convention.

The three requisite elements of hostage-taking detailed in article 1 have been fulfilled, namely: (1) the seizure or detention of persons;<sup>4</sup> (2) the continued detention of such persons or threats to kill or injure them;<sup>5</sup> (3) in order to compel a third party to do or abstain from doing any act as an explicit or implicit condition for

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<sup>1</sup> Convention Against the Taking of Hostages, *opened for signature* at New York, 17 Dec. 1979, U.N. Doc. A/Res.34/146 (1979), 28 I.L.M. 1457 (1979).

<sup>2</sup> Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* at Geneva, 12 Aug. 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. 3365.

<sup>3</sup> Article 26 of Vienna Convention on the Law of Treaties, *opened for signature* at Vienna, 23 May 1969, 1980 U.K.T.S. 58 (Cmd. 7964), 8 I.L.M. 679, U.N. Doc. A/Conf. 39/27 (1969).

<sup>4</sup> The *Hasdrubal* was seized on 13 February 1987: Problem at 1.

<sup>5</sup> The crew and passengers were detained for two days after the seizures: Problem at 2; with threats to kill them being issued at various stages of their detention: Problem at 2, 3-4.

the release of the hostages. The element of third party compulsion is demonstrated by the fact that the release of the hostages was conditional upon: (1) no outside intervention; (2) the granting of asylum to the hijackers by the Shangri government; and (3) the achievement of some degree of recognition by the international community and media.<sup>6</sup>

2. There is an unequivocal obligation to try or extradite offenders under the Hostages Convention.

Under article 8, if an alleged offender is found on the territory of a State Party to the Convention, that State Party has two options only: it must either extradite the offender or submit the offender to its own competent authorities for the purposes of prosecution. The absolute nature of this obligation is supported by the language of article 8 itself,<sup>7</sup> other sections of the Convention,<sup>8</sup> the preamble<sup>9</sup> and the *travaux préparatoires*.<sup>10</sup> It is in no way diminished by the application of article 3 which requires State Parties to take all measures to facilitate the release of hostages held upon their territory. Whilst such measures might include the promise of asylum, a state cannot be bound to honour such a promise in order to evade its obligations to try or extradite.<sup>11</sup> In any event, Shangri is estopped from claiming it is so bound as it dishonoured its promise by later arresting the hijackers and purportedly extraditing three of them.<sup>12</sup>

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<sup>6</sup> Problem at 2, 3-4, 2.

<sup>7</sup> It states the obligation to try or extradite is *without exception whatsoever*; see generally Verwey, *The International Hostages Convention and National Liberation Movements*, 75 Am. J. Int'l L. 69 (1981) (on the absolute nature of the obligation to try or extradite.).

<sup>8</sup> See, e.g., art. 5, para. 2.

<sup>9</sup> See para. 4 of the Preamble; see also Shubber, *The International Convention Against the Taking of Hostages*, 52 Brit. Y.B. Int'l L. 205, 206 (1981); Rosenstock, *The International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism*, 9 Den. J. Int'l L. & P. 169, 176-177 (1980).

<sup>10</sup> See generally Verwey, *supra* note 7.

<sup>11</sup> See comments of delegates in Debates of the Drafting Committee of the Convention Against the Taking of Hostages, U.N. Doc. A/AC. 188/ SR 14, (1977) at 6.

<sup>12</sup> Problem at 5.

3. The Hostages Convention abrogates both the right to grant asylum and the right to refuse extradition based upon the alleged political nature of the offence.

Article 15, which preserves the operation of existing Treaties of Asylum, was included merely as a concession to regional Latin-American arrangements, and is not intended to preserve a general right to grant asylum with respect to offences committed under the Convention.<sup>13</sup>

The inclusion of a comprehensive list of exceptions to the obligation to extradite in article 9 is intended to displace any customary international law on the subject, that is, it displaces the political offence exception.<sup>14</sup> In any event, even if the application of article 9 results in a decision not to extradite, a State Party is obliged to try the offender.<sup>15</sup>

4. The obligation to try or extradite hostage-takers arises under either the Hostages Convention or the 1949 Red Cross Geneva Conventions.

The effect of article 12 of the Hostages Convention is that it supplements the Geneva Conventions by also applying to any situation where the Geneva Conventions operate but do not impose an obligation to try or extradite.<sup>16</sup>

B. Should the Laws of War Apply to PACM's Activities, these Activities are clearly in Breach of the 1949 Red Cross Geneva Convention IV.

1. PACM hijackers are guilty of hostage-taking and wilful killing, which are grave breaches under article 147 of 1949 Red Cross Geneva Convention IV.

By taking innocent civilians hostage and wilfully killing three of them, the PACM hijackers have committed 'grave breaches' of the Convention.<sup>17</sup> Given the large number of passengers and crew aboard the *Hasdrubal* and the violent means employed to seize the ship,<sup>18</sup> the glaring inevitability of injury or death prevents

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<sup>13</sup> See generally Verwey, *supra* note 7.

<sup>14</sup> *Id.* at 90-92.

<sup>15</sup> Shubber, *supra* note 9.

<sup>16</sup> See comments of delegates from Nigeria, United Kingdom, the Netherlands, Iran and France, in Report of the Ad Hoc Committee of the Drafting of an International Convention Against the Taking of Hostages, 33 U.N. GAOR, Supp. (No. 39), U.N. Doc. A/33/39 (1979).

<sup>17</sup> As enumerated in article 147.

<sup>18</sup> Problem at 1.

PACM from claiming that the killings were not wilful. The seizure also amounted to an act of hostage-taking, being an unlawful detention for the purpose of extracting benefits from third parties.<sup>19</sup> Article 146 of Geneva Convention IV obliges Shangri to search out all persons guilty of grave breaches and to bring them before its courts. If it does not adopt this course of action, it must extradite such offenders to another High Contracting Party.<sup>20</sup>

2. It is doubtful that PACM is engaged in international armed conflict. Common article 2 of the 1949 Geneva Conventions, which defines international armed conflict and represents customary international law on the subject, implies that powers which are parties to a conflict must be states.<sup>21</sup> PACM is not a state within the meaning given in the 1933 Montevideo Convention on the Rights and Duties of States.<sup>22</sup> The extension of common article 2, by article 1(4) of 1977 Protocol 1 to the Geneva Conventions does not apply as neither Shangri nor Yokum are parties to the Protocols. Moreover, they do not represent customary international law.<sup>23</sup>

C. PACM's Actions in Hijacking the *Hasdrubal* Constitute an Act of Piracy.

The offence of piracy exists both under customary international law<sup>24</sup> and under article 101 of the 1982 United Nations Convention on the Law of the Sea (1982 Montego Bay Convention).<sup>25</sup> Article 101 is a reiteration of article 15 of the 1958

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<sup>19</sup> 1 M. Bassiouni, *International Criminal Law* 135 (1986).

<sup>20</sup> Article 146.

<sup>21</sup> Rubin, *The Status of Rebels Under the Geneva Conventions of 1949*, 21 Int'l & Comp. L. Q. 472, 476 (1972).

<sup>22</sup> Convention on the Rights and Duties of States, opened for signature at Montevideo, 26 Dec. 1933, 165 L.N.T.S. 19, U.S.T.S. 881, 4 Malloy 4807. See also the definition of a state in D. Greig, *International Law* 93 (2d ed. 1976); I. Brownlie, *Principles of Public International Law* 74 (3d ed. 1979).

<sup>23</sup> See Verwey, *supra* note 7, at 81.

<sup>24</sup> *Lotus Case* (Fr. v. Turk.), 1927 P.C.I.J. 10

<sup>25</sup> Convention on the Law of the Sea, opened for signature at Montego Bay, 10 Dec. 1982, U.N. Doc. A/Conf. 62/122 and Corr. 1 to 11, 21 I.L.M. 1261 (1982).

Geneva Convention on the High Seas which codified contemporary customary international law.<sup>26</sup>

The offence is made out in the instant case, as there are illegal acts of detention or violence,<sup>27</sup> which were committed for private ends. The term 'private ends' covers acts of insurgents against third parties. PACM's actions were directed predominantly against Yokum nationals and a Beilan-registered and crewed ship,<sup>28</sup> and must therefore be characterised as being for 'private ends'. State responses to international incidents<sup>29</sup> and municipal decisions<sup>30</sup> support this interpretation as do eminent publicists such as Oppenheim and O'Connell.<sup>31</sup>

The fact that the hijacking of the *Hasdrubal* was an internal seizure does not prevent it amounting to piracy. The requirement of article 101 that acts be committed by the passengers or crew of one ship against another has no rational foundation<sup>32</sup> and does not represent the position at customary international law.<sup>33</sup> Article 100 of the 1982 Montego Bay Convention requires State Parties to co-operate "to the fullest possible extent in the suppression of piracy on the high seas." This requirement can only be effectuated if Shangri tries or extradites all persons responsible for the hijacking of the *Hasdrubal* who are within its territory.

Shangri is obligated to try or extradite the PACM hijackers at customary international law. For an international penal code to have any value it must have an

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<sup>26</sup> See Preamble to Convention on the High Seas *opened for signature* at Geneva, 19 Apr. 1958, 50 U.N.T.S. 82, 1963 U.K.T.S. 5 (Cmd. 1929): *see also* Green, *The Santa Maria: Rebels or Pirates?*, 38 Brit. Y.B. Int'l L. 496, 503 (1961).

<sup>27</sup> Killing three people and holding 350 hostages: Problem at 1.

<sup>28</sup> Problem at 1.

<sup>29</sup> E.g., the *Santa Maria* incident: US, UK, Holland et al; the seizure of *S.S. Falke*: Trinidad, U.S.: *see* Green, *supra* note 26.

<sup>30</sup> *Ambrose Light*, [1885] 25 F. 408; *Magellan Pirates*, 164 Eng. Rep. 47 (1853).

<sup>31</sup> H. Lauterpacht, *Oppenheim's International Law*, 610 (1967); 2 D. O'Connell, *The Law of the Sea* 975-76 (1984).

<sup>32</sup> D. Grieg, *supra* note 22, at 330-31; H. Lauterpacht, *supra* note 31, at 576; D. O'Connell, *supra* note 31, at 970-73; McGinley, *The Achille Lauro Affair: Implications for International Law*, 52 Tenn. L. Rev. 691, 696-97 (1985).

<sup>33</sup> *See supra* notes 29-31.

effective means of enforcement.<sup>34</sup> In the absence of an international criminal tribunal to provide a direct means of enforcing international criminal law, there must be some means of indirect enforcement.<sup>35</sup> Such an indirect means can only be provided by an application of the *aut dedere aut judicare* (that is, try or extradite) principle to serious international crimes.<sup>36</sup> This principle has been enshrined in unequivocal terms in numerous treaties dealing with such crimes.<sup>37</sup>

D. Groups Pursuing the Objective of Self-Determination must Pursue their Rights within the Framework of International Law.

The fact that PACM members may be exercising a right of self-determination does not justify the commission of serious international offences.<sup>38</sup> In any event, it is not clear that PACM is engaged in a legitimate struggle for self-determination. There is no evidence to support its claim that the state of Midbari is, in fact, under alien occupation: the only evidence available is the self-serving rhetoric of the hijackers themselves.<sup>39</sup> The dubious value of their claim is demonstrated by the fact that a paltry four states are prepared to grant recognition to this self-proclaimed government-in-exile.<sup>40</sup>

E. Shangri has not Fulfilled its International Obligation in Sending Offenders to Saq.

Shangri has breached its international obligation in sending three of the hijackers on a plane bound for Saq. The government of Saq clearly never intended to subject the hijackers to anything more rigorous than a farcical trial.<sup>41</sup> This was made

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<sup>34</sup> Costello, *International Terrorism and the Development of the Principle of Aut Dedere Aut Judicare*, Irish Jurist 209 (1974).

<sup>35</sup> M. Bassiouni, *supra* note 19, at 8-9.

<sup>36</sup> *Id.*, Costello, *supra* note 34, at 210-11.

<sup>37</sup> See e.g., Convention for the Suppression of the Unlawful Seizure of Aircraft, opened for signature at The Hague, 16 Dec. 1970, 869 U.N.T.S. 105, 22 U.S.T. 1642, T.R.A.S. 7192, 10 I.L.M. 133 (1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, opened for signature at Montreal, 23 Sept. 1971, 974 U.N.T.S. 177, 24 U.S.T. 564, 10 I.L.M. 1151 (1971).

<sup>38</sup> See *infra* notes 66-70 and accompanying text.

<sup>39</sup> Problem at 2.

<sup>40</sup> Problem at 2-3 (PACM is recognised by only 4 states out of over 140).

<sup>41</sup> Problem at 5.

apparent by the statement of the Saq President and Chief Minister of Justice, which statement may be relied upon by Yokum in seeking to ascertain the intention of that state.<sup>42</sup>

Furthermore, there is no evidence that Saq had jurisdiction to deal with the matter, except under universal jurisdiction. It had demonstrated that it was unwilling to invoke in good faith. Yokum, however, does have jurisdiction under international law to try the PACM hijackers. Yokum's claim for extradition as the alternative to prosecution by Shangri rests on two bases: (1) universal jurisdiction, for piracy (both at customary international law and under the 1982 Montego Bay Convention), or for grave breaches of the Geneva Conventions; and (2) the passive personality principle both under customary international law<sup>43</sup> and under subparagraph 5(1)(d) of the Hostages Convention.

F. Shangri is not Entitled to Grant Asylum to Members of PACM Guilty of International Offences.

1. Shangri's action in releasing the PACM hijackers is not a legitimate exercise of its state sovereignty as that state is prohibited from granting them asylum.

Shangri's action in releasing the PACM hijackers is not a legitimate exercise of its state sovereignty. The exercise of sovereignty is not unqualified. The parameters of each state's domain are determined by its obligations existing at international law, which it cannot evade by pleading inconsistency with its municipal laws or executive practices.<sup>44</sup> The practice of granting asylum or safe passage may thus be restricted by a variety of international obligations.

Customary international law prohibits Shangri granting asylum to the PACM hijackers. The granting of asylum to international criminals, especially terrorists, is a breach of customary international law as it has developed over recent decades.<sup>45</sup> Shangri is prohibited from granting asylum to the perpetrators of offences

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<sup>42</sup> *Nuclear Tests Cases* (Aust. v. Fr.; N.Z. v. Fr.), 1974 I.C.J. 253.

<sup>43</sup> *Lotus Case*, see *supra* note 24.

<sup>44</sup> *Nottebohm Case* (Lichtenstein v. Guat.), 1955 I.C.J. 4

<sup>45</sup> The Institut du Droit International supported this approach in their 1880, 1882 and 1983 sessions, by advocating that extremely serious offences should never

*de jure gentium*. This principle is evidenced in the Declaration on Territorial Asylum<sup>46</sup> which stresses that the right to seek and enjoy asylum cannot be invoked by any person who is seriously suspected of committing a crime against peace, a war crime or a crime against humanity, as defined in the relevant international instruments.<sup>47</sup>

The Universal Declaration of Human Rights qualifies the right of a state to grant asylum.<sup>48</sup> Paragraph 14(1) establishes that the right does not extend to where the fugitives are merely trying to avoid prosecution for terrorist acts and are not truly seeking political asylum.<sup>49</sup> There is no right to grant asylum where the prosecution arises from non-political crimes or from acts contrary to the purposes and principles of the United Nations. This declaration represents an authoritative interpretation of the United Nations Charter to which both Yokum and Shangri are parties.

2. PACM's actions do not fall within the political offence exception.

Shangri cannot refuse extradition on the basis that PACM's actions are political in nature.<sup>50</sup> PACM's acts do not fall within the political offence exception. PACM's crimes fall outside the scope of *pure* political offences, which are limited to treason, espionage and sedition, all of which involve non-violent actions and none of which victimize private citizens.<sup>51</sup>

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qualify as political: E. McWhinney, *Aerial Piracy and International Terrorism: The Illegal Diversion of Aircraft and International Law* 151-152 (1987).

<sup>46</sup> Declaration on Territorial Asylum, G. A. Res. 2312 (XXII), 21 U.N. GAOR, Supp. (No. 16) at 81, U.N. Doc. A/6716 (1968).

<sup>47</sup> Costello, *supra* note 34, at 217.

<sup>48</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), 3 U.N. GAOR 135, U.N. Doc. A/810/1998 (1948).

<sup>49</sup> Lillich and Paxman, *State Responsibility for Injuries to Aliens by Terrorist Activities*, 26 Am. U.L. Rev. 219, 299 (1977).

<sup>50</sup> For definition, see C. Van den Wijngaert, *The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order* 2 (1980).

<sup>51</sup> Clarke, *Political Offences in Extradition: Time for Judicial Abstention*, 5 Hastings Int'l & Comp. L. Rev. 131, 133 (1982).

For the political offence exception to operate at all, PACM's acts must therefore amount to a *relative* political offence.<sup>52</sup> Crimes committed by PACM terrorists do not amount to relative political offences under any of the accepted tests. None of these tests proposes that political motive alone suffices to characterize any offence as a 'political offence'<sup>53</sup>:

(i) The Objective Test (principal proponent France)<sup>54</sup>

This relies on the predominance of the political character of the crime over the elements of common criminality.<sup>55</sup> An offence is political in nature if it affects the political organization of the state, whereas a common crime affects rights apart from those of the state.<sup>56</sup>

(ii) The Proportionality Test (principal proponent Switzerland)<sup>57</sup>

Under this test, a crime is political in nature when the actions perpetrated are appropriate for achieving the desired political objective and are not disproportionate to their degree of contribution to the desired end.<sup>58</sup>

(iii) The Incidence Test (followed by Anglo-American tribunals)<sup>59</sup>

The traditional approach has been to classify as political, offences committed in the course of an organized revolt against an established government.<sup>60</sup> Recent decisions have qualified this test by imposing additional criteria.<sup>61</sup> These include the requirements of relevance and proportionality and that the uprising be carried out by organized, non-dispersed military forces.<sup>62</sup>

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<sup>52</sup> M. Bassiouni, *International Extradition and World Public Order* 383-411 (1974).

<sup>53</sup> *Eain v Wilkes*, 641 F. 2d. 504 (7th Cir. 1981); *Escabedo v United States*, 623 F. 2d. 1098 (5th Cir. 1980); I. & C. Stanbrook, *The Law and Practice of Extradition* 13 (1980).

<sup>54</sup> Comment, *The Political Offence Exception as Applicable to Terrorists: Judicial Interpretation and Legislative Reform*, 25 Duq. L. Rev. 481, 489 (1987).

<sup>55</sup> *In Re Giovanni Gatti*, [1947] Ann. Dig. 145 (No. 70) (Fr.).

<sup>56</sup> *Id.*

<sup>57</sup> Comment, *supra* note 54, at 484.

<sup>58</sup> *In Re Karphengst*, [1929-30] Ann. Dig. 292, 293 (No. 8) (Swit.).

<sup>59</sup> See *supra* note 56, at 492. See generally M. Farrell, *Sheltering the Fugitive?: The Extradition of Irish Political Offenders* (1985).

<sup>60</sup> *In Re Castioni*, [1891] 1 Q.B. 149.

<sup>61</sup> *Eain v Wilkes*, *supra* note 53.

<sup>62</sup> *Quinn v Robinson*, 783 F. 2d. 776 (9th Cir. 1986); *McGlinchey v Wren*, [1983] Ir. L. Rep. 169 (Ir.).

The events surrounding the hijacking of the *Hasdrubal* - including piracy and wilful killing - are of such a heinous nature that they cannot be cloaked with the mantle of political legitimacy.<sup>63</sup> PACM's actions clearly infringe the rights and interests of entities other than the state of Midbari. The *Hasdrubal* was a Beilan registered and crewed ship and the majority of its passengers were Yokum nationals.<sup>64</sup> In fact, Midbari interests remained totally unscathed by the entire incident. For this reason PACM's actions bear no relevance to their ongoing struggle to overthrow the Midbari government. Their actions could not be said to form part of the ongoing struggle in any way whatsoever and thus under no accepted test constitute a relative political offence.

## II SHANGRI HAS VIOLATED MINIMUM STANDARDS OF STATE RESPONSIBILITY AND IS RESPONSIBLE AT INTERNATIONAL LAW FOR THE UNLAWFUL ACTIONS OF PACM.

### A. Shangri Failed to Discharge its Obligations at International Law to Suppress PACM's ongoing Campaign of Violence.

#### 1. There is a paramount obligation upon states to suppress terrorism.

It is submitted that the obligation upon states to suppress terrorism is a norm of *jus cogens*. It has its foundation in morality, is important to world peace and order, is generally accepted by the international community and serves global, not merely individual state, interests.<sup>65</sup> The obligation is restated by the draft resolution on Measures to Prevent Terrorism adopted overwhelmingly<sup>66</sup> by the Sixth Committee (Legal) of the United Nations General Assembly.<sup>67</sup>

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<sup>63</sup> Note, *The Extradition of John Demjanjuk*, 20 Cornell Int'l L. J. 282, 300 (1987).

<sup>64</sup> Problem at 1.

<sup>65</sup> See generally Verdross, *Jus Dispositivium And Jus Cogens In International Law*, 60 Am. J. Int'l L. 55, 58-63 (1966) (for a discussion of the requisite elements of *jus cogens*).

<sup>66</sup> Only one state (Israel) voted against, and one (the United States of America) abstained.

<sup>67</sup> Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance and Despair and which Cause Some People to Sacrifice Human Lives, Including their Own, in an Attempt to Effect Radical

The resolution:

"[c]alls upon all States to fulfil their obligations under international law to refrain from ... acquiescing in activities within their territory directed towards the commission of terrorist acts;

"Urges all States to fulfil their obligations under international law and take effective and resolute measures for the speedy and final elimination of international terrorism to that end to:

- (a) Prevent the preparation and organisation in their respective territories for the commission within or without their territories of terrorist acts and subversive acts directed against other States and their citizens;
- (b) ensure the apprehension, prosecution or extradition of perpetrators of terrorist acts ..."<sup>68</sup>

Although paragraph 14 of the draft resolution "[c]onsiders that nothing in the present resolution could in any way prejudice the right of self-determination, freedom and independence...nor...the right...to struggle to this end and to seek and receive support", several states have already explained that this paragraph is not to be interpreted as justifying or seeking to justify terrorism, no matter what the alleged ends might be.<sup>69</sup> These principles find expression in numerous other General Assembly resolutions.<sup>70</sup>

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Changes, Sixth Comm. (Legal) (42d Session Agenda Item 126), U.N. Doc. A/C.6/42/L.24 (1987).

<sup>68</sup> *Id.* at 4, paras. 4 and 5.

<sup>69</sup> Debates of the Sixth Committee (Legal) of the United Nations General Assembly (60th mtg.), U.N. Doc. GA/L/2544 per Denmark (speaking on behalf of the European Committee) at 3; Finland (speaking on behalf of the Nordic countries) at 4; Uruguay at 4; Canada at 4; New Zealand at 4-5; Australia at 5; United States at 3-4; Israel at 4.

<sup>70</sup> Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance and Despair and which Cause Some People to Sacrifice Human Lives, Including their Own, in an Attempt to Effect Radical Changes: G.A. Res. 3034 (XXVII), 27 U.N. GAOR, Supp. (No. 30) at 179, U.N. Doc. A/8727 (1973); G.A. Res. 31/32, 31 U.N. GAOR, Supp. (No. 39) at 185, U.N. Doc. A/31/39 (1977); G.A. Res. 32/147, 32 U.N. GAOR, Supp. (No. 45) at 212, U.N. Doc. A/32/45 (1978); G.A. Res. 34/145, 34 U.N. GAOR, Supp. (No. 46) at 244, U.N. Doc. A/34/46 (1980); G.A. Res. 36/109, 36 U.N. GAOR, Supp. (No. 51) at 241, U.N. Doc. A/36/51 (1982); G.A. Res. 38/130, 38 U.N. GAOR, Supp. (No. 47) at 266, U.N. Doc. A/38/47 (1984); G.A. Res. 40/61, 40 U.N. GAOR, Supp. (No. 53) at 301, U.N. Doc. A/40/45 (1986).

2. Shangri is responsible at international law for allowing its territory to be used as a base for raids and for failing to apprehend the perpetrators of these raids.

Responsibility at international law is imputed to states where they either: (1) fail to take action preventing their territory from being used as a base for raids directed against nationals of other states,<sup>71</sup> or (2) neglect, over a long period, to prosecute the perpetrators or otherwise discourage or prevent such raids.<sup>72</sup> Shangri, whilst not necessarily guilty of direct complicity in the PACM raids, is responsible for those raids because of its failure to take any appropriate steps to suppress these systematic and ongoing acts of violence.<sup>73</sup> This toleration of PACM amounted to encouragement for it to continue further raids, and amounted to an adoption of PACM's activities by Shangri so as to make that State responsible for them.<sup>74</sup>

Shangri's failure to apprehend, or even attempt to apprehend, the perpetrators of illegal raids is analogous to the Mexican dereliction in the *Texas Cattle Claims*.<sup>75</sup> Like Mexico, Shangri has failed to institute any measures to prevent the raiders from continuing their systematic illegal acts against the nationals of another state,<sup>76</sup> and is therefore responsible for them at international law. It is clear that even with regard to individual acts of an illegal nature, a state's failure to take steps to apprehend the perpetrators is sufficient to found responsibility on the part of the state for those acts.<sup>77</sup>

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<sup>71</sup> *Texas Cattle Claims*, 8 M. Whiteman, *Digest of International Law* 749, 751 (1948).

<sup>72</sup> *Id.* at 751-52.

<sup>73</sup> *United States Diplomatic and Consular Staff in Teheran* (U.S. v. Iran) 1980 I.C.J. 3 at 32

<sup>74</sup> *Id.* at 34.

<sup>75</sup> *Supra*, note 71.

<sup>76</sup> Problem at 3.

<sup>77</sup> See *infra* notes 100-106 and accompanying text.

The Declaration on Friendly Relations<sup>78</sup> reflects standards of state responsibility against which Shangri's behaviour may be evaluated.<sup>79</sup> In particular Shangri is clearly in breach of its "duty to refrain from ... acquiescing in organised activities within its territories directed towards the commission of [terrorist] acts."<sup>80</sup>

Even on the most generous view of their political motivations, PACM's acts of violence against Yokum nationals and economic interests are not directed against the allegedly 'alien occupying force'<sup>81</sup> in control of Midbari, but rather against innocent civilians of states not parties to the conflict.<sup>82</sup> Accordingly, Shangri is clearly obligated to suppress these terrorist activities. In failing to carry out its obligations at international law, Shangri is responsible for any injuries to Yokum (and other) nationals sustained from PACM's attacks.<sup>83</sup>

3. Shangri is responsible at international law for failing to exercise due diligence in the protection of Yokum nationals.

Attempts by the United Nations to codify the law of state responsibility have consistently stressed the duty to afford protection to aliens.<sup>84</sup> Although the language of the recommendations to the International Law Commission has varied slightly,<sup>85</sup> all impose responsibility on states for injury caused to aliens where preventative measures by the state authorities fell short of the due standards of

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<sup>78</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G. A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) at 121, U.N. Doc. A/8028 (1971).

<sup>79</sup> *Steinway Case* (Italy v. U.S.), 14 R. Int'l Arb. Awards 149, 163 (1953). See also Lillich and Paxman, *supra* note 49 at 272.

<sup>80</sup> *Supra*, note 78, art. 1.

<sup>81</sup> PACM description of the Midbari government, problem at 2.

<sup>82</sup> See *supra* notes 63-64 and accompanying text.

<sup>83</sup> *Steinway Case*, *supra* note 79.

<sup>84</sup> Garcia-Amador, *The Responsibility of States for Damage Caused to the Person or Property of Aliens*, [1961] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/134 and Add.1 (1961); L. Sohn and R. Baxter, *Convention on the International Responsibility of States for Injuries to Aliens* (1961); Ago, *(Fourth) Report on State Responsibility*, [1972] 2 Y.B. Int'l L. Comm'n 126, U.N. Doc. A/CN.4/264 and Add.1 (1972).

<sup>85</sup> "[M]anifestly negligent", Garcia Amador, *supra* note 84, art. 7, para. (1); "failure to exercise due diligence", L. Sohn and R. Baxter, *supra* note 84, art. 13, para. 1; "ought to have acted .... and failed to do so", Ago, *supra* note 84, art. 11.

diligence.<sup>86</sup> The 'due diligence' formulation is that most commonly invoked to characterise the standard of care required by international law,<sup>87</sup> and imposes on states a higher duty than the mere absence of negligence.<sup>88</sup> The text finally adopted by the International Law Commission.<sup>89</sup> retained the principle of imposing responsibility upon a state for the acts of individuals when the state has not lived up to its international obligation to prevent such acts.<sup>90</sup>

B. Shangri's Civil Strife does not Excuse it from State Responsibility.

Shangri's obligations are to be measured objectively by international standards.<sup>91</sup>

The International Law Commission explained the rationale for this principle in its *Commentary to the Draft Articles on State Responsibility*<sup>92</sup>:

States establish themselves as equal members of the international community as soon as they achieve an independent and sovereign existence. If it is the prerogative of sovereignty to be able to assert its rights, the counterpart of that prerogative is the duty to discharge its obligations.<sup>93</sup>

Even if Shangri's civil strife is considered in a determination of whether it has satisfied its international obligations, it remains clear that it has failed to do so. In the *Austin Claim*<sup>94</sup> it was held that although it was clearly impossible for the Mexican authorities to apprehend a murderer because he had fled into territory held by rebels, Mexico was still responsible for its denial of justice. The Commission held that a denial of justice had occurred because the authorities, although faced with extenuating circumstances, had done *nothing whatsoever* in the matter.<sup>95</sup> Shangri's

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<sup>86</sup> *Id.*

<sup>87</sup> Lillich and Paxman, *supra* note 49, at 231 n. 46.

<sup>88</sup> *Id.*

<sup>89</sup> International Law Commission, *Draft Articles on State Responsibility*, [1979] 2 Y.B. Int'l L. Comm'n 3, U.N. Doc. A/CN.4/318 and Add. 1-4 (1979), arts. 1, 3(a).

<sup>90</sup> Report of the I.L.C. to the General Assembly, 30 U.N. GAOR, Supp. (No. 10) at 21, U.N. Doc. A/10010/Rev. 1 (1975).

<sup>91</sup> *Neer Claim*, 4 R. Int'l Arb. Awards 60, 61 (1926); *Spanish Zone of Morocco Claim* (Gr. Brit. v. Spain), 2 R. Int'l Arb. Awards 615, 642 (1925); 2 D. O'Connell, *International Law* 943 (2d ed. 1970).

<sup>92</sup> [1973] 2 Int'l L. Comm'n 9, U.N. Doc. A/9010/Rev. 1 (1973).

<sup>93</sup> *Id.* at 173.

<sup>94</sup> 4 R. Int'l Arb. Awards 623 (1930).

<sup>95</sup> *Id.*

failure to make any attempt to apprehend the perpetrators of the PACM raids<sup>96</sup> is thus clearly in breach of the relevant international standard, and renders it responsible under international law.<sup>97</sup>

C. Shangri is, in particular, Responsible for the Hijacking of the *Hasdrubal*.

1. Shangri's failure to deal with previous terrorist acts by PACM encouraged this further terrorism.

The Shangri Government allowed PACM to continue its campaign of terrorist actions without any intervention. This effectively encouraged PACM to continue such actions.<sup>98</sup> By failing to take action over the earlier offences, Shangri thus became responsible for those actions which followed, including the hijacking of the *Hasdrubal*.<sup>99</sup>

2. Shangri breached its international obligations regarding the apprehension and punishment of the *Hasdrubal* hijackers.

Shangri allowed an unacceptable delay before it arrested the hijackers. Although aware of their whereabouts, Shangri failed to arrest them until the day after their return.<sup>100</sup> Failure to act immediately, thus allowing the hijackers an opportunity to escape, placed Shangri in breach of its international obligation to bring them to justice.<sup>101</sup>

Shangri further breached international law by enabling three of the hijackers to depart for Saq.<sup>102</sup> Shangri was under an obligation to try or extradite the hijackers,<sup>103</sup> but instead sent them to a state which had publicly announced an intention to honour them as heroes and set them free,<sup>104</sup> an announcement which Shangri was obliged to regard as having legal significance.<sup>105</sup> By sending the

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<sup>96</sup> Problem at 3.

<sup>97</sup> *Steinway Case*, *supra* note 79.

<sup>98</sup> *Texas Cattle Claims*, *supra* note 71, at 151.

<sup>99</sup> *Id.*

<sup>100</sup> Problem at 4.

<sup>101</sup> *Corcoran Claim*, 4 R. Int'l Arb. Awards 470 (1929).

<sup>102</sup> Problem at 5.

<sup>103</sup> *See supra*, at 1-10.

<sup>104</sup> Problem at 5.

<sup>105</sup> *Nuclear Tests Cases*, *supra* note 42.

hijackers to Saq, Shangri was thereby, in reality, releasing them. Shangri's responsibility is analogous to that of Mexico in the *Corcoran Claim*,<sup>106</sup> where a prisoner's escape was facilitated by jail officials.

Shangri's grant of asylum to the remaining four hijackers also gave rise to its responsibility for the seizure of the *Hasdrubal*. In the *Cotesworth and Powell Claim*<sup>107</sup> it was held to be a "well established principle in international polity that by pardoning a criminal a nation assumes the responsibility for his past acts."<sup>108</sup>

### III: THE YOKUM INTERCEPTION OF THE SHANGRI AIRCRAFT AND ARREST OF THE PACM HIJACKERS WAS A LEGITIMATE COUNTER-MEASURE.

#### A. Yokum acted Justifiably to Prevent the PACM Hijackers Flying to Freedom.

1. Yokum's objective was merely to escort the Shangri aircraft to a location where the criminals could be apprehended and subsequently tried for their offences.

Intervention for the purpose of bringing international criminals to justice is supported by widely accepted state practice.<sup>109</sup> In the Eichmann incident<sup>110</sup> a suspected war criminal was apprehended in Buenos Aires by the Israeli Security Service. Although Israel acknowledged that Argentina's sovereignty had been violated, it maintained that the 'special significance' of the case justified the apprehension.<sup>111</sup> The Security Council neither condemned nor criticised Israel but rather supported the action taken. Its resolution expressed "the concern of people in all countries that Eichmann should be brought to appropriate justice for the crimes

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<sup>106</sup> *Supra* note 101.

<sup>107</sup> (Gr. Brit. v. Colom.) 2 J. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* 2050 (1898).

<sup>108</sup> *Id.* at 2085; see also *Montijo Case* (U.S. v. Colom.) 2 J. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* 1421 (1898); *West Case*, 4 R. Int'l Arb. Awards 270 (1927).

<sup>109</sup> Gooding, *Fighting Terrorism in the 1980s: The Interception of the Achille Lauro Hijackers*, 12 Yale J. of Int'l L. 158, 161 (1987). (Gooding's conclusions rely on such incidents as the Adolf Eichmann apprehension, the *Achille Lauro* incident and the 1986 Israeli interception of a Libyan jet suspected of carrying terrorists).

<sup>110</sup> See Lippman, *The Trial of Adolf Eichmann and the Protection of Universal Human Rights under International Law*, 5 Hous. J. Int'l L. 1 (1982).

<sup>111</sup> Gooding, *supra* note 109 at 162.

of which he is accused."<sup>112</sup> The international community acquiesced in and largely approved of the Israeli action.<sup>113</sup> No established norm exists against the abduction of suspected criminals *not* involving civilian planes or endangering civilians.<sup>114</sup>

2. The capture and prosecution of terrorists may in certain circumstances justify the interception of aircraft granting them safe passage.

It is submitted that where suspected terrorists can be identified and apprehended without great danger to others, the right to take such action exists.<sup>115</sup> The 1985 United States interception of the Egyptian plane carrying the Achille Lauro hijackers was largely supported by the international community.<sup>116</sup> The statement issued by the United Nations Security Council resolutely condemned "this unjustifiable and criminal hijacking [of the Achille Lauro] as well as other acts of terrorism, including hostage-taking .... [and] condemn[ed] terrorism in all its forms, wherever and by whomever committed."<sup>117</sup> The matter was never directly raised in the General Assembly.

The final verdict of international opinion seems to be that the scourge of international terrorism requires extraordinary action and states that take such action to capture those who have unambiguously committed terrorist acts will not be condemned.<sup>118</sup>

British Foreign Secretary Geoffrey Howe stressed in response to the *Achille Lauro* incident:

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<sup>112</sup> Security Council Resolution 138, 15 U.N. SCOR at 35, U.N. Doc. S/4349 (1960).

<sup>113</sup> Gooding, *supra* note 109, at 163; O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 Brit. Y.B. Int'l L. 279, 296 (1960).

<sup>114</sup> Gooding, *supra* note 109, at 163.

<sup>115</sup> *Id.* at 169.

<sup>116</sup> *Id.* at 169-175

<sup>117</sup> Security Council Statement of 9 October 1985, U.N. Doc. S/17554 (1985).

<sup>118</sup> Gooding, *supra* note 109, at 175.

If you think of the object of the conventions against terrorism, they place an obligation on the state concerned to see that people are either prosecuted or extradited. The important thing is, the effect of what has happened is that the terrorists will face trial in a court of law. This would never have happened, it seems, if this action had not been taken.<sup>119</sup>

3. Yokum did not violate the sovereignty or territorial integrity of Shangri. The Charter of the United Nations only forbids acts involving the threat or use of force which are directed against the political independence or territorial integrity of another state.<sup>120</sup> The Shangri aircraft was specifically requisitioned for the illegitimate purpose of granting the hijackers safe passage to Saq. It was not a civilian aircraft carrying civilian passengers.<sup>121</sup> Consequently the civil aviation conventions do not apply.<sup>122</sup>

Yokum had no intention to undertake military operations against Shangri, occupy its territory or threaten its political independence. The operation was of short duration and terminated when the PACM hijackers were apprehended.

The hijackers are international criminals whom Shangri was aiding to escape. It has been suggested that such aiding and abetting of an international fugitive is a passive violation of international law by failing to assist in the suppression of piracy.<sup>123</sup> Eminent publicists argue that a state guilty of such aiding and abetting of an international crime should forfeit temporarily its right to territorial sovereignty. Alternatively an "international zone" could be created surrounding and following the alleged international fugitive because of that person's international crime.<sup>124</sup>

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<sup>119</sup> Article, *Howe Praises U.S. Action Against Hijackers*, FBIS (W.Eur.) (11 Oct., 1985).

<sup>120</sup> U.N. Charter art. 2, para 4.

<sup>121</sup> Cf. *The Achille Lauro* incident (hijackers carried on commercial airliner). See Larsen, *The Achille Lauro Incident and the Permissible Use of Force*, 9 *Loy. L.A. Int'l & Comp. L. J.* 481, 482 (1987).

<sup>122</sup> Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 37; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra* note 37.

<sup>123</sup> 2 M. Bassiouni, *A Treatise on International Criminal Law*, referred to in D. Dubner, *The Law of International Sea Piracy*, 34-35, 164 (1980).

<sup>124</sup> D. Dubner, *supra* note 123, at 164-65.

B. Even if Characterized as Use of Force, the Coercion Exerted by Yokum was Reasonable and Permissible under the Inherent Right of Self-Defence Recognized by Article 51 of the United Nations Charter.

1. Yokum acted in response to a campaign of armed attacks.

Article 2(4) of the United Nations prohibits any significant use of force that will violate the territorial or political integrity of a nation, unless that use of force is justified by exceptions contained in the Charter or customary international law.<sup>125</sup> The primary exception is self-defence if an armed attack occurs, as enunciated in article 52. In terms of terrorist activities, three reference points are commonly used in the context of self-defence: the immediate armed attack, the past campaign of attacks and the potential danger of future attacks.<sup>126</sup> PACM's sustained campaign of terrorists attacks against Yokum and other states amounted was a violation of the customary international law, the Hostages Convention and the 1982 Montego Bay Convention.

Armed attack as understood by the International Court of Justice in *Nicaragua* means "not merely action by regular armed forces across an international border but also [attacks] ... by ... armed bands to the territory of another State, if such an operation because of its scale and effects would have been classified as an armed attack ... if it had been carried out by regular armed forces."<sup>127</sup>

Customary international law does not confine the right to invoke self-defence to cases where an armed attack has occurred and article 51 of the Charter of the United Nations is not intended to curtail that right.<sup>128</sup> It is submitted that the right to effective defense against covert forms of attack exists just as the right exists against overt attacks with armies on the march.<sup>129</sup> The inherent right to self-defence recognised in article 51 is premised on three traditional requirements

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<sup>125</sup> U.N. Charter, art. 2, para. 4, art. 51; *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 at 94-105.

<sup>126</sup> Stuesser, *Active Defence: State Military Response to International Terrorism*, 17 Cal. W. Int'l L. J. 1, 37 (1987).

<sup>127</sup> *Nicaragua*, *supra* note 125 at 103.

<sup>128</sup> Bowett, *The Use of Force to Protect Nationals Abroad*, in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* 39, 40 (1986).

<sup>129</sup> Moore, *Legal Standards for Intervention in Internal Conflicts*, 13 Ga. J. Int'l & Comp. L. 191, 195 (1983).

enunciated in the *Caroline Case*: a prior international wrong of such a magnitude to justify the use of force by way of self-defence; necessity and proportionality.<sup>130</sup> An attack on a state's nationals outside its territory amounts to a use of force sufficient to allow the victim state to invoke the right of self-defence.<sup>131</sup> When that attack constitutes an international crime and is coupled with clear evidence that the attacks are likely to continue the case for legitimate self-defence is stronger still.

Yokum nationals have been attacked and killed by members of PACM.<sup>132</sup> Yokum is therefore justified in using reasonable force to prevent future attacks, to seize the perpetrators of crimes to ensure prosecution or to rescue any of its citizens still in danger where no other means is available.

2. Shangri's acquiescence and complicity in the activities of PACM amounted to an act of aggression.

Yokum suffered two distinct but related harms. Yokum nationals were taken hostage and one was murdered. Shangri failed to prosecute or to extradite the perpetrators. Furthermore, Shangri breached its duty to refrain from assisting or acquiescing in terrorist acts involving the use of force.<sup>133</sup> Allowing Shangri to be used as a base for terrorist activities including the hijacking of the *Hasdrubal* amounts to an act of aggression as enunciated in article 3(f) of the Definition of Aggression.<sup>134</sup> This type of aggression has been termed 'indirect aggression'. Indirect aggression includes the hostile

[A]ctions of individuals not acting as organs of another state, but operating from the territory of another state. Then the attacked state exercises its right of self-defence ... against these individuals on the territory of the [tolerating] state only if the latter has violated its obligations to take measures to prevent or repress the illegal attack.<sup>135</sup>

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<sup>130</sup> *Caroline Case*, 29 B.F.S.P. 1137-1138, 30 B.F.S.P. 195-196 (1837).

<sup>131</sup> Self-defence to protect nationals abroad, invoked in Suez Crises, Entebbe incident and the rescue of the *Mayaguez*. See Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 W. Va. L. Rev. 933, 941 (1987).

<sup>132</sup> Problem at 1,3.

<sup>133</sup> Declaration on Friendly Relations, *supra* note 78, art. 1.

<sup>134</sup> Resolution on the Definition of Aggression, G.A. Res. 3314 (XXIX), 29 U.N. GAOR, Supp. (No. 31) at 142, U.N. Doc. A/9631 (1975).

<sup>135</sup> H. Kelsen, *Principles of International Law* 60 (1952).

In failing to comply with the fundamental principle of *aut dedere aut judicare*, Shangri became an accessory after the fact, aiding and abetting the *Hasdrubal* hijackers in their delinquencies, in a manner analogous to Egypt in the *Achille Lauro* incident and Uganda in the Entebbe incident.<sup>136</sup>

3. The likelihood that the terrorist campaign of attacks would continue necessitated anticipatory defensive action by Yokum.

Necessity can be defined as the threat of an imminent armed attack and the lack of an effective alternative for preventing that imminent attack.<sup>137</sup> Shangri had previously refused requests to take any punitive or preventative action against PACM. PACM's stated aim was to wage armed conflict for the liberation of Midbari. Such statements can be seen as convincing evidence of hostile intent and preparedness for further armed attacks.<sup>138</sup> This indication of the scope of the attacks and the intention that they would continue have an enormous bearing on the exercise of the right of self-defence.<sup>139</sup> Many states now adopt a wider approach to self-defence which takes account of the accumulation of events and assesses a state's response to a campaign of terrorist attacks rather than treating each incident separately.<sup>140</sup> This wider approach is endorsed by eminent publicists<sup>141</sup> and state action in the nature of anticipatory self-defence has been condemned neither by the Security Council nor the General Assembly. This is clearly seen in relation to Israel's anticipatory resort to force in 1967 Six-Day War.<sup>142</sup> Naturally anticipatory defensive action must still conform to all the self-defence requirements. Any anticipated armed attack must be imminent.<sup>143</sup> If a terrorist organization has attacked a state and retains the means and intention to continue the attacks, the threat of future

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<sup>136</sup> Larsen, *supra* note 121. See also, Security Council Debates of 9 July 1976, U.N. Doc. S/PV.1939 (1976), 15 I.L.M. 1224, 1231 (Herzog's comments).

<sup>137</sup> Greenwood, *supra*, note 131, at 959.

<sup>138</sup> Greenwood, *The Concept of War in Modern International War*, 36 Int'l & Comp. L. Q. 283, 302 (1987).

<sup>139</sup> *Id.* at 305.

<sup>140</sup> Greenwood, *supra* note 131, at 959.

<sup>141</sup> Steusser, *supra* note 126, at 17 (citing Brownlie and Higgins).

<sup>142</sup> Greenwood, *supra* note 131, at 943.

<sup>143</sup> Bowett, *Reprisals Involving Resort to Armed Force*, 66 Am. J. Int'l L. 1, 3, 11 (1972).

violence remains "ever imminent."<sup>144</sup> Against the background of accumulated past attacks by PACM and their stated resolve to continue such attacks, the interception and arrest of the PACM hijackers was a legitimate defensive intervention in anticipation of expected unlawful attacks in the immediate future.

4. Yokum's act of self-defence was in proportion to the initial wrong. A Yokum national had been killed, some 200 had been held hostage, and a sustained campaign of terrorist attacks against Yokum nationals was likely to continue. In response, Yokum merely intercepted and arrested the perpetrators. No civilians were endangered. No person was injured or killed. Coercion, if used, was moderate.<sup>145</sup>

#### C. Yokum's Action Constituted a Legitimate Retaliatory Measure.

1. Reasonable retaliatory action is not illegal.

Traditional international law permitted a state to use reasonable force as a reprisal for a prior wrong committed against it.<sup>146</sup> Legitimate retaliatory acts are appropriate as "a response to the prior illegalities of another state, the original lawbreaker having refused to give satisfaction for its wrongs"<sup>147</sup> PACM's heinous crimes and the tacit complicity of Shangri justify Yokum's reprisal at international law. Yokum sought prior redress of its grievance and Shangri had refused to take any action against PACM operations from its territory or obey the extradite or prosecute principle. Furthermore the Declaration of Friendly Relations prohibits only "acts of reprisal involving the use of force". It is submitted that there exists no blanket prohibition of reprisals involving a mere threat of force. In compelling the Shangri aircraft, on its illegitimate mission, to land, Yokum fired no shot. The interception involved neither loss of life, injury nor damage to property. The arrest of the PACM hijackers by Yokum troops, even if characterised as more than a mere threat of force, was directed only towards those PACM members. Thus any actual forcible reprisal

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<sup>144</sup> Steusser, *supra* note 126, at 31.

<sup>145</sup> Problem at 5.

<sup>146</sup> Greenwood, *supra* note 131, at 948.

<sup>147</sup> E. Colbert, *Retaliation in International Law* 1 (1948).

was directed only against PACM members who had attacked Yokum nationals and interests. It is submitted that such a reprisal is reasonable.

A 'reasonable reprisal' is proportionate<sup>148</sup> and seeks not merely to punish but to end a continuing wrong or deter the repetition of a wrongful act.<sup>149</sup> An examination of Security Council responses to armed reprisals, suggests that the Council has not considered all reprisals to be unlawful.<sup>150</sup> Moreover the Security Council has often failed to condemn an act of reprisal which is proportional to the prior use of force by which it is justified.<sup>151</sup> The Security Council practice is consistent with the view that armed reprisals are unlawful by virtue of "the frequent reference to their disproportionate character as a motive for the condemnation of the the claimant state".<sup>152</sup> Yokum submits that this view is correct: if reprisals are illegal then proportionality is not relevant. Security Council practice condemning in particular disproportionate reprisals justifies the submission that Yokum's action, being both reasonable and proportional in the circumstances, is lawful. Yokum sought merely to apprehend identified terrorists and escort them to a jurisdiction willing to try and prosecute them. If characterized as a reprisal, its action was entirely reasonable.

2. The proliferation of terrorism demands a reappraisal of the rules of self-defence .

Given the escalation of terrorism, and in the absence of an international criminal tribunal, exceptional circumstances may militate against interception of non-civilian aircraft carrying international criminals being condemned by the international community. The 'hydra of carnage' requires a radical response.

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<sup>148</sup> *Naulilaa Arbitration*, 2 R. Int'l Arb. Awards 1011 (1928).

<sup>149</sup> Schachter, *The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620, 1638 (1984).

<sup>150</sup> Bowett, *supra* note 143, at 11.

<sup>151</sup> *Id.* at 11,12.

<sup>152</sup> Barsoitti, *Armed Reprisals* in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* 79 (1986).

Whether this response is characterized as 'defensive retaliation',<sup>153</sup> anticipatory self-defence,<sup>154</sup> legitimate reprisal,<sup>155</sup> or 'active defence'<sup>156</sup> is a matter of semantics for international jurists to debate. What is clear, however, is that such action by victimized states is a legitimate response in the face of terror.

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<sup>153</sup> Schachter, *supra* note 149, at 1638.

<sup>154</sup> W. O'Brien, *The Conduct of Just and Limited War* 133 (1981).

<sup>155</sup> Roberts, Self-Help in Combating State-Sponsored Terrorism: Self-Defence and Peace-Time Reprisals, 19 *Case W. Res. J. Int'l L.*, 243, 278-288 (1987).

<sup>156</sup> Steusser, *supra* note 126, at 14.

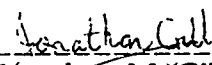
CONCLUSION AND PRAYER FOR RELIEF

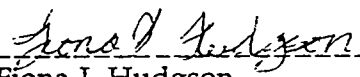
The Government of Yokum respectfully requests that this court:

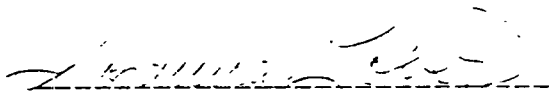
1. declare that the Confederation of Shangri is bound to try or extradite the hijackers;

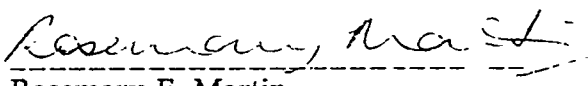
2. declare that the Confederation of Shangri has violated minimum standards of state responsibility by allowing its territory to be used as a base for attacks on Yokum nationals both in Shangri and elsewhere.

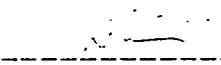
Respectfully submitted,

  
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Jonathan M. Gill

  
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