

**THE 1988 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION**

*Case Concerning State Responsibility for
Certain Acts of Terrorism*

IN THE INTERNATIONAL COURT OF JUSTICE

Republic of Yokum,

Applicant

versus

Confederation of Shangri,

Respondent

MEMORIAL FOR THE APPLICANT

February 1988

Team 5-17

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JURISDICTION

The sovereign states of Yokum and Shangri submit their dispute to this Court pursuant to article 36(1) of the Statute of the International Court of Justice, which provides that the jurisdiction of the Court comprises all cases which the parties refer to it. Thus, the Court has jurisdiction in the present controversy and may resolve all legal questions submitted by the parties.

STATEMENT OF FACTS

The Confederation of Shangri and its port city, Taluba, are the headquarters for the People's Armed Conflict Movement (PACM), a well-organized group of self-proclaimed "freedom fighters."(C.1). PACM, through violent raids, is attempting to establish itself as a government in territory now ruled by the sovereign State of Midbari, a State neighboring Shangri.(C.1). Midbari is a prosperous, militarily-strong, developed country whose present established government is recognized by over 140 nations as the country's legitimate government.(C.1,2,3). These 140 plus nations conduct diplomatic relations with the government of Midbari.(C.2). Four States, not including Shangri or the Republic of Yokum (Cl.), recognize the PACM as the government-in-exile of Midbari.(C.1)

Although the PACM does not hold or control any territory specifically, it launches raids against several States from Shangri territory.(C.1,3). On numerous occasions, members of the PACM perpetrators launched violent attacks on Midbari, as well as other States.(C.1,3). After every one of these raids, PACM would return to Shangri, where they would remain unmolested by the Shangrian government.(C.3). Several countries, including the Republic of Yokum, informed Shangri, through proper diplomatic channels, of the activities of PACM and the whereabouts of the PACM perpetrators of particular acts of violence against Yokum nationals and economic interests.(C.3). The Shangrian government acknowledged the existence of the situation--an armed band operating relatively undisturbed and headquartered in Shangrian territory.(C.3). In each and every case, however, the Shangri government refused to take any action, under a claimed lack of effective control over parts of its territory, including portions of Taluba.(C.3).

On 13 February 1987, a Beilan-registered and manned cruise ship, the *Hasdrubal*, set sail at 13:00 hours from Port al-Haj, Saq.(C.1). It carried 350 passengers, more than 200 of whom were nationals of the Republic of Yokum, with the remaining passengers representing 10 other nationalities.(C.1). Two members of PACM had boarded the ship at Port al-Haj, and five more boarded at Taluba, Shangri.(C.1)

Five hours after setting sail (shortly after 18:00 hours) when the ship was in the international waters of the Medford Sea, the seven PACM members seized control of the ship with the use of automatic weapons and explosives.(C.1). In their violent takeover, the PACM killed a Yokum passenger and two crew members.(C.1).

For more than two days, the ship wandered without apparent direction in international waters, the hijackers exploited the occasion for media attention.(C.2). Using the ship's radio, the PACM hijackers told journalists that they were "soldiers fighting for the liberation of Midbari--our homeland which is under alien occupation."(C.2). The group's leader, Dr. Murpharius, stated that he was "acting strictly under orders from his superiors at PACM headquarters in Taluba [Shangri]." (C.2). The hijackers' leader also informed those concerned that "no harm would come to the remaining passengers, who are prisoners of war, unless they try to escape or unless a rescue attempt is made."(C.2). Later in the third day of siege, PACM headquarters in Shangri issued the following communique:

Earlier today, seven heroes of the Revolution seized control of the imperialist ship *Hasdrubal*. PACM directed this military operation and claims credit for this act of hostilities. Our goal is to demonstrate to the world PACM's determination and ability to wage the armed conflict for the liberation of our homeland.(C.2)

At 17:00 hours, 15 February, PACM Headquarters in Shangri radioed an order to the hijackers that they had achieved their mission.(C.3). Upon receipt of this order, the hijackers instructed the Captain of the Hasdrubal to bring the ship to port in Taluba.(C.3). The Captain radioed for permission to dock in Taluba but was refused permission by the Harbormaster.(C.3). Then, under threat of death by Dr. Murpharius, the Captain informed the Taluba Harbormaster that the hijackers were demanding that Shangri grant them asylum or they would begin killing more passengers.(C.3). The Captain also told the Harbormaster that the ship was coming in to the harbor without permission.(C.3,4). After consulting with the Shangrian government, the Harbormaster informed the Captain that the asylum request would be granted.(C.4).

During the seizure of the *Hasdrubal*, Yokum dispatched a submarine and two guided-missile destroyers to follow the ship.(C.2). A unit of the Yokum Navy's highly-trained, anti-terrorist "Tiger" strike team was airlifted to the Yokum aircraft carrier *Jimenez*, also in the general vicinity.(C.2). While several States easily could have also ordered military units into the area, none did so.(C.2). Although the units were on orders "to be ready to attempt a rescue operation," no such attempt was made because of the danger to the passengers and crew.(C.2,3)

Yokum intelligence sources interrupted the communications between the PACM hijackers and their headquarters in Shangri.(C.4). Shortly thereafter, the Yokum Ambassador informed the Shangri Foreign

Minister that, when the seized ship entered the port of Taluba, the government of Yokum expected the government of Shangri "to honor its international obligations and to arrest the perpetrators and free the hostages and ship."(C.4). However, when the ship docked approximately six hours later, the hijackers were greeted by a wildly enthusiastic group of members and supporters of PACM.(C.4). The hijackers were taken to the PACM headquarters in Shangri where they were received as heroes.(C.4). The entire affair was covered by a large contingent of the international press corps and received wide-spread publicity around the world.(C.4)

Finally, at dawn the next day, Shangri troops arrested the seven hijackers and put them in a government-controlled prison.(C.4). Two days later, the Yokum Ambassador handed a Diplomatic Note to the Shangri Foreign Minister requesting the extradition of the seven hijackers.(C.4). The Yokum Note called to the Shangri government's attention the fact that, although there was no bilateral extradition treaty between them, both States are parties to the four 1949 Red Cross Geneva Conventions on the laws of war and the Convention Against the Taking of Hostages.(C.4,5). The Note stated in relevant part that:

The 1949 Geneva Conventions require State Parties to Cooperate to suppress war crimes and crimes against humanity. The Geneva Conventions require a State to search for and bring persons alleged to have committed a "grave breach," regardless of their nationality, before its own courts or to extradite such persons for trial to another High Contracting Party concerned. Moreover, "compelling a protected person to serve in the forces of a hostile power," "willful killing" and "taking of hostages" are "grave breaches" of the fourth Convention. Similarly, the Hostages Convention requires States Parties to cooperate to suppress hostage-taking by extraditing or trying the alleged offenders "without exception whatsoever and whether or not the offense was committed in its territory." Consequently, the government of the Republic of Yokum demands the Confederation of Shangri honor its international obligations by trying or extraditing to the Republic of Yokum the seven hijackers now in custody of the government of the Confederation of Shangri in Taluba.(C.5)

Both Shangri and Yokum have enacted into municipal law legislation giving effect to the Hostages Convention.(C.4). The four 1949 Red Cross Geneva Conventions had been ratified by Yokum, but as yet, their provisions have not been enacted as municipal law by the Yokum legislature.(C.6).

Three days after Yokum demanded extradition, the Saq Ambassador to Shangri handed a similar Diplomatic Note to the Shangri Foreign Minister demanding extradition of the hijackers to it.(R.5). However, in a statement to the news media the same day, the President and Minister of Justice of Saq

stated that "these heroes of the Revolution [the PACM hijackers] are obviously innocent. We seek their extradition in order to have the honor of setting them free."(C.5).

A little over a week after the Saq statements, on 1 March, a government-requisitioned Shangri National Airlines aircraft took off from Taluba bound for Saq with Dr. Murpharius and two other *Hasdrubal* hijackers aboard.(C.5). When the Shangri plane was well over international waters, Yokum Fighters from the *Jimenez* intercepted it and required it to land in Beilan.(C.5). While the plane was at the Beilan Airport, Yokum Tigers entered the plane and captured the PACM hijackers.(C.5,6). The hijackers were secured, put onto a military transport plane, and, under heavy guard, flown directly to Abnerra, Yokum's capital.(C.6). A Yokum Justice Department spokesman announced that the three hijackers would be put on trial in a proper Yokum court.(C.6)

In retaliation for what the government of Shangri called the flagrant violation of international law by Yokum in hijacking the Shangrian aircraft, the government announced that the four hijackers remaining in Shangri had been granted political asylum and accorded a safe haven.(C.6). Shangri released the four hijackers from custody and they continue to reside in Taluba.(C.6). The government of Shangri also demanded the return to it of the other three hijackers.(C.6).

During the period of these events, an armed conflict existed between two religious groups struggling for political control of Shangri.(C.3). This struggle shattered the once prosperous economy of this small developing country, and caused it to be in a state of near anarchy, especially Taluba.(C.3). The confusion of this struggle fostered an atmosphere in which the PACM could operate freely.(C.6).

SUBMISSIONS TO THE COURT

The Government of the Republic of Yokum asks the Court to :

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

The Confederation of Shangri asks the Court to:

1. Declare that the Republic of Yokum has violated international law by forcibly diverting a Shangri aircraft and abducting persons on board, and order the return of those individuals; and;
2. Declare that the Republic of Shangri is justified in releasing the PACM hijackers.

QUESTIONS PRESENTED

- I. Whether the duty to try or extradite the PACM squad which seized the *Hasdrubal* must be fulfilled by Shangri without exception whatsoever, under the Charter of the United Nations, conventional and customary norms, and general principles of law?

- II. Whether Shangri breached its international obligations by allowing its territory to be used by armed bands committing acts of international terrorism against Yokum and its innocent citizens in violation of conventional and customary international law?

- III. Whether Yokum is justified in the use of benign intrusions upon Shangrian territory in self-defense and for the protection of its citizens in response to armed attacks originating from Shangrian territory?

SUMMARY OF ARGUMENT

I

In respect for the status of States as co-equal sovereigns, the community of nations have recognized a class of acts as international crimes. Sovereigns are required, for the protection of all nations, to squelch such activities and arrest perpetrators of war crimes, piracy, hostage-taking , and terrorist acts by groups such as the PACM. All sovereigns have universal jurisdiction over such international criminals. Additionally, countries have acknowledged the duty of each State to prosecute or extradite those international criminals found within its territory.

Shangri has breached its duty to try or extradite the PACM terrorists under the emerged customary laws concerning the control of terrorism. From the laws protecting civilians in armed conflicts to specific conventions outlawing terrorist acts, the duty of *aut dedere aut judicare* is ever-present. For three of the terrorists Shangri provided an escape aircraft. The remaining terrorists were released in Shangri's territory without any required judicial proceedings. Both of these actions are violations of Shangri's obligations to Yokum demonstrable in State practice as a peremptory duty.

Shangri cannot provide asylum to these terrorists by claiming a "political offense" exception to its duty to try or extradite. The political offense exception is inapplicable to terrorist acts. Conventions on the control of terrorism and the customary practice of States exclude violent acts against innocent bystanders from special protection of this exception to extradition. The granting of asylum is also denied the PACM terrorists because asylum is not available to protect persons who have committed crimes against humanity, or that are in direct violation of the purposes and principles of the Charter of the United Nations. Additionally, Shangri cannot extend asylum in contravention of its express treaty obligations.

Since members of the PACM committed "grave breaches" under the Geneva Civilians Convention and Protocol I, they are also war criminals. Therefore, Shangri has the separate duty to prosecute or extradite such international criminals under these multilateral treaties. The Shangrian attempt to transfer the war criminals to a party such as Saq was also a violation of the Geneva Convention. The transfer was actually a release since Shangri knew of Saq's imminent freeing of these international renegades. The

outright release of the remaining four war criminals was an obvious breach of its conventional and customary duties as well.

The Hostage Convention, of which Shangri is a party, also requires the duty of *aut dedere aut judicare* without exception whatsoever. The PACM squad committed the act of holding the Yokum citizens hostage, as well as, killing a Yokum national without provocation during the siege on the *Hasdrubal*. Yokum was a proper party to exercise its passive personality jurisdiction under the Convention. Shangri refused to extradite to any rightful party, including Yokum (Saq being wrongful because of its unwillingness to prosecute). The Convention provides no special flexibility when the hostage-takers claim to be acting for political reasons as part of a liberation movement. The duty of trying or extraditing the offenders was absolute and was resolutely breached.

The actions of the PACM raiders constitute piracy, which is also an international crime. By seizing the *Hasdrubal* in international waters and committing acts of depredation against Yokum passengers, the PACM squad committed international piracy. Similar to the piratical acts committed on the *Santa Maria* and the *Achille Lauro*, the instant crime is an international violation giving all States, including Yokum, universal jurisdiction. When in the hands of Shangrian authorities, the duty to prosecute or extradite became absolute. Shangri breached its obligations by freeing the pirates of the Beilan cruise ship.

When acts of piracy are claimed to be in furtherance of a political goal, as in *The Magellan Pirates*, the duty of *aut dedere aut judicare* is not lessened when such depredations are aimed at non-target governments and their citizens. In the seizure of the *Hasdrubal*, the target of the attack included Yokum and its people rather than Midbari, the avowed object of the PACM political motivation. Thus, Shangri is in violation of its duty under the law of the sea.

II

Shangri has allowed the PACM to operate without control in violation of its sovereign obligations under the Hostage Convention. Article 4 of the treaty requires the eradication of potential hostage-taking groups from a State's territory. Shangri admits its duty apparently, but claims the excuse of lack of effective control. Analogous to this Court's ruling in the *Iran Hostages Case*, a showing of the ability by Shangrian forces to arrest the hostage-takers sheltered in the PACM Headquarters in the aftermath of the

seizure of the *Hasdrubal* demonstrates that Shangri had sufficient effective control to halt other prior hostage preparations on its soil. It chose to ignore its duty under the Hostage Convention.

A basic obligation of each nation is not to allow activities on its land which harm other States. From early customary law through this Court's reaffirmation of this norm in *Corfu Channel*, the duty of States is not to allow harmful acts on its territory which can cause trans-boundary injury. Shangri knew of the dangerous actions of the PACM and did not prevent their effect on Yokum. Shangri is responsible to Yokum for the injuries caused by this lack of due diligence.

Shangri also breached its customary duty to not allow armed bands to form on its territories which can lash out against other nations. The customary duty was affirmed in the Charter of the United Nations and, thus, Shangri's acquiescence is in violation of both customary and treaty obligations. Even without total control of its territory, Shangri has a duty not to allow hostile acts against Yokum to be carried out by armed bands being sheltered in Shangri.

In fact, Shangri has allowed its soil to become a center for PACM terrorism to the detriment of Yokum. The actions of Shangri in purposefully disregarding its obligation to control the international terrorists imputes the acts of the PACM to Shangri under the rules of State responsibility. Therefore, Shangri is responsible for the wrongful actions of the PACM under customary international law. This Court held in the *Iran Hostages Cases* that cooperation with international criminals ratifies the illegal measures of such culprits and, thus, the terrorism is attributable directly to the government. The PACM's unfettered reign of terror against Yokum is imputed to Shangri.

III

International law gives each State the right to to protect its citizens wherever they travel. Nations, therefore, are allowed to intervene for the sake of their nationals if it does not seriously prejudice the rights of other States. Under Article 2(4) of the Charter, such de minimus intrusions are proper if there is no taking of territory or threat to another State's sovereignty. Benign intrusions such as the Israeli raid against a potential nuclear threat and the United States capture of the escaping *Achille Lauro* criminals are examples of permissible intrusions. Similarly, Yokum was justified its forced interception of the fleeing *Hasdrubal* terrorists. While protecting its citizens, the incident had such a negligible effect on Shangri that it cannot be considered a violation of Article 2(4).

States like Yokum retain the inherent right to exercise self-defense both under the Charter's Article 51 and customary law. Since Yokum has already suffered an armed attack on its citizens, its only constraint is the proportionality of its response. In self-defense, Yokum has legally used force on a properly limited level. As many other incidents of self-defense affirm, Yokum did not have to wait to be plummeted by full scale assault to exercise its rights. When constant armed attacks originate in Shangri, it must expect Yokum to protect its citizens by benign actions.

Yokum has properly enforced its rights of self-protection under the doctrine of rectification for the purpose of humanitarian intervention. When a State has refused or is unable to protect the nationals of another country, the latter country may enter and save its citizens. From Entebbe to Grenada the right of humanitarian intervention has been respected. The same right of rectification has been acknowledged when perpetrators of a continuous series of international crimes attempt to escape justice. Such anticipatory humanitarian intervention is proper if future attacks may thus be averted.

Shangri's prior wrongful act of refusing to try or extradite the PACM aggressors allowed Yokum to exercise a proper countermeasure against Shangri. The abduction of the escaping international criminals has prior precedents when other methods of extradition have failed. State practice affirms that jurisdiction is proper no matter the scheme to secure custody of international criminals. Yokum acted with justification in protecting itself and its citizens.

I. SHANGRI IS RESPONSIBLE FOR FAILURE TO TRY OR EXTRADITE INTERNATIONAL CRIMINALS UNDER ITS CONVENTIONAL AND CUSTOMARY OBLIGATIONS.

States enjoy a unique status internationally as sovereign equals.¹ This status accords each country the legal ability to exclude all other nations from its territory and rule.² Such powerful rights of sovereign nations must, by necessity, be balanced with the duty to "co-operate with other states in the maintenance of international peace and security."³ To help achieve this end nations have agreed on two principles. The first qualifies certain classes of crimes as acts against all human beings and treats these as international crimes giving each State the authority to exercise jurisdiction over the perpetrators.⁴ These crimes of international significance, including such atrocities as war crimes, piracy, and the indiscriminate violence of terrorists, cannot be tolerated because these acts threaten the safety and rule of all States. The second principle affirms that all nations have an absolute duty to restore world order by bringing such international renegades to justice.⁵

The international crimes may only be attributable to the individuals instigating the violence. Failure to enforce the duty to restore justice, however, constitutes an "internationally wrongful act by the state" and "entails the international responsibility of that state."⁶ Uniform action by all sovereigns is "so essential for the protection of fundamental interests of the international community"⁷ that any lack of conformity with the required conduct is an international breach. The peremptory responsibility of each nation is to "prosecute or extradite" those culprits found within its territory. When a State breaches this duty it is an offense against nations such as Yokum which have citizens injured by the international criminals.

¹ U.N. Charter, art. 2, ¶ 1.

² *Island of Palmas* (U.S. v. Neth.), 11 R. Int'l Arb. Awards 829 (1928).

³ *Declaration on the 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, 25 U.N. GAOR Supp. (No. 28) at 123, U.N. Doc. A/8028 (1971), reprinted in 9 I.L.M. 1292 (1970) [hereinafter *Declaration on Friendly Relations*].

⁴ *Draft Articles on State Responsibility*, [1980] 2 Y.B. Int'l L. Comm'n 30, U.N. Doc. A/CN.4/SER. A/1980/Add.1 (pt.2), art. 19(2).

⁵ The absolute duty is implied generally from the universal jurisdiction granted to all States to capture and prosecute the offenders. M. McDougal & F. Feliciano, *Law and Minimum World Public Order* 719 (1961).

⁶ *Draft Articles on State Responsibility*, *supra* note 4, art. 1.

⁷ *Id.*, art. 19(2). See also art. 20 for the duty not to deviate from the course of action required.

The PACM squad which attacked the *Hasdrubal* is guilty of the international criminal acts of terrorism, war crimes, hostage-taking of innocents, and piracy. Rather than protect the Republic of Yokum from these criminals, the Confederation of Shangri has sheltered the PACM so they could launch attacks of egregious proportions on Yokum's people. When forced to capture these perpetrators following the long days of seizure on the cruise ship *Hasdrubal*, Shangri quickly found a method of shielding them from punishment. Shangri's actions are in violation of the Charter of the United Nations, conventional and customary norms of international behavior and general principles of law.

A. Shangri Has Breached its Duty under the Charter of the United Nations and Customary Law to Prosecute or Extradite Persons Committing Acts of Terrorism.

Acts of terrorism are intentional acts of violence or such threats against innocent third parties who are symbolic rather than primary targets.⁸ "It [terrorism] is a legal problem because terrorist acts *per se* are considered criminal by all civilized societies throughout the world."⁹ The Charter of the United Nations requires nations to prohibit terrorist acts by groups involving a threat or use of force.¹⁰

1. Terrorist acts like the murderous seizure of the *Hasdrubal* are international crimes and Yokum Is a proper party to punish the criminals.

The early efforts by the League of Nations to control acts of terrorism roundly condemned them as attacks against all people but stumbled on the mechanism of creating an international criminal court to prosecute the offenders.¹¹ After World War II, the previous atrocities aimed at innocent civilian populations both before and during the war were made acts of terrorism absolutely forbidden under the

⁸ Defining terrorism is difficult, but most current attempts center on the innocence of the victims and the non direct nature of attack on the eventual target. Paust, *Correspondence: Some Thoughts on "Preliminary Thoughts" on Terrorism*, 68 Am. J. Int'l L. 502 (1974). For a comprehensive definition of an international terrorist offense, Cf. Art. I(1) of *Draft Single Convention on the Legal Control of International Terrorism* in International Law Association Report of the Fifty Ninth Conference held at Belgrade 497 (1980) [hereinafter Belgrade Conference].

⁹ Friedlander, *Terrorism and Self-Determination: The Fatal Nexus*, 7 Syracuse J. Int'l L. & Com. 263 (1979-80). On the "spiritual heritage" of terrorism, see Y. Alexander, M. Browne & A. Nanes, *Control of Terrorism: International Documents* ix-x (1979). See also Larschan, *Legal Aspects to the Control of Transnational Terrorism: An Overview*, 13 Ohio N.U.L. Rev. 117, 123-24 (1986).

¹⁰ The prohibition which is implicit in the Charter is explicit in the *Declaration On Friendly Relations*, *supra* note 3; see also Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations*, 65 Am. J. Int'l. L. 713 (1971). For the Declaration as customary law, see *Military and Paramilitary Activities in and Against Nicaragua* (Nic. v. U.S.), 1986 I.C.J. 14, 100 (Judgment of June 27).

¹¹ As Bassiouni notes, the international court "was an idea whose time had not come." M. Bassiouni, *International Criminal Law: A Draft International Criminal Code* 16 (1980).

1949 Geneva Conventions relating to war.¹² Recognizing the propriety of the prohibition against hostage-taking and murder of innocent non-combatants under the 1949 Geneva Civilians Convention during war times, countries worked for the same sanctions in other settings. As innocent targets of terrorists are most vulnerable in travel and while serving in foreign countries, the early conventions focused on aerial hijacking¹³ and diplomats.¹⁴ Uniform to these efforts was an affirmation of the ancient duty of *aut dedere aut judicare* -- punish or deliver to one who will, traditionally attributed to Grotius.¹⁵

By 1979, States concluded a multilateral treaty to prohibit terrorist activities in hostage-taking.¹⁶ Nations agreed in the negotiations concerning the Hostage Convention that violence or threats directed at "innocents" were not to be tolerated by countries.¹⁷ During the volatile hostage crisis in Iran in 1980, the Foreign Minister of Iran tacitly admitted the wrongfulness of holding private non-embassy personnel hostage in a letter to this Court.¹⁸ Regional groups have enacted treaties outlawing terrorist activities.¹⁹

¹² Convention (III) Relative to the Treatment of Prisoners of War, *signed* at Geneva, 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316, T.I.A.S. 3364; Convention (IV) Relative to the Protection of Civilian Persons in Times of War, *signed* at Geneva, 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. 3365 [hereinafter Geneva Civilians Convention].

¹³ Convention on Offenses and Certain Other Acts Committed on Board Aircraft, *signed* at Tokyo, 14 September 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941, T.I.A.S. 676, 2 ILM 1042 (1963); Convention for the Suppression of Unlawful Seizure of Aircraft, *signed* at The Hague, 16 December 1970, 860 U.N.T.S. 105, 22 U.S.T. 1642, T.I.A.S. 7192, 10 ILM 133 (1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *signed* at Montreal, 23 September 1971, 974 U.N.T.S. 177, 24 U.S.T. 564, T.I.A.S. 757, 10 ILM 1151 (1971) [hereinafter Montreal Unlawful Acts Convention].

¹⁴ *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents*, 14 December 1973, G.A. Res. 3166, 28 U.N. GAOR Supp. (No. 30), U.N. Doc. A/9030 (1973) [hereinafter *Protection of Diplomats Convention*].

¹⁵ H. Grotius, *The Rights of War and Peace*, 407-08 (A. Campbell trans. 1901).

¹⁶ Convention Against the Taking of Hostages, *done* at New York, 17 December 1979, U.N. Doc. A/RES.34/146 (1979), 18 ILM 1457 (1979) [hereinafter Hostage Convention].

¹⁷ Rosenstock, *International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism* 9 Den. J. Int'l L. & Pol'y 169, 173-74 (1980).

¹⁸ *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 [within the pleadings] [hereinafter *Iran Hostage Case*].

¹⁹ Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb 2, 1971, T.I.A.S. No. 8413, Serie Sobre Tratados [S.S.T.] No. 37, OAS/Off. Doc. OAS/Ser. A.17; European Convention on the Suppression of Terrorism, *opened for signature* Jan. 27, 1977, Eur. T.S. No. 90, *reprinted in* 15 I.L.M. 1272 (1976) [hereinafter European Convention] Murphy, *The Future of Multilateralism and Efforts To Combat International Terrorism*, 25 Colum. J. Transnat'l L. 35, 60 (1986), in analyzing the latter convention concludes: "The principle of *aut dedere aut judicare* governs the Convention."

States have set up similar provisions in bilateral agreements.²⁰ Typical of the United Nations solidarity against terrorism was a unanimous General Assembly resolution in 1985 condemning such acts issued shortly before a Security Council Resolution which specifically denounced terrorist hostage-taking.²¹ The efforts to facilitate the control of terrorism are also evident from the U.S. Draft Convention on Terrorism and the subsequent work of the Ad Hoc Committee of the United Nations.²²

The International Law Association (ILA) has codified the emerging customary norms. The Draft Single Convention on the Legal Control of Terrorism²³ (ILA Convention on Terrorism), condemns violations aimed at "the general public."²⁴ The Convention also provides "that States must be committed to the prosecution of an offender either in the State in which he is found, or, following extradition or expulsion, in another State."²⁵ Furthermore, it makes each country responsible to victims of terrorism when that nation has "failed to act against the alleged offenders or has temporized with them."²⁶ The duties of Shangri under the various conventions to control terrorism and the developed customary norms evidenced by the ILA Convention on Terrorism are set. The ILA Convention recognizes the universal jurisdiction of States under Article II and, therefore, Yokum was a proper party to request extradition of the terrorist squad. As the PACM stands outside the world legal order as international criminals and the enemy of all civilized nations, it is the duty of all States, including Shangri, under the norms for the control of terrorism to bring these criminals to justice.

2. Shangri has violated its duty to ensure punishment of international terrorism by releasing the PACM squad.

²⁰ A survey of States bilateral efforts is found in Evans, *The Apprehension and Prosecution of Offenders: Some Current Problems*, in *Legal Aspects of International Terrorism* 493, 509-510 (A. Evans & J. Murphy eds. 1978).

²¹ *Resolution on Measures to Prevent International Terrorism*, G.A. Res. 40/61, U.N. Doc. A/RES/40/61 (1986); *Security Council Resolution Concerning Hostage-Taking*, S.C. Res. 579, U.N. Doc. S/RES/579 (1985). On the importance of U.N. resolutions as persuasive evidence of legal obligations, see Schachter, *The Right of States to Use Force*, 82 Mich. L. Rev. 1620, 1622 (1984).

²² United States 1972 Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, U.N. Doc. A/C.6/L.850 (1972) [hereinafter U.S. Draft Convention].

²³ Belgrade Conference, *supra* note 9, art. I, 497-98.

²⁴ The ILA studies conducted by special rapporteur Alona Evans showed that the majority of the victims of terrorist attacks between 1969 and 1980 were members of the general public. *Id.* at 506.

²⁵ *Id.* at 502.

²⁶ *Id.* These principles are embodied in art. V(5), at 500-01.

The duty of Shangri, as a responsible and co-equal sovereign, to prosecute or extradite the PACM members has been breached. The obligation is demonstrable both by the uniform duty in conventions regarding narrow enforcement of terrorist acts²⁷ and the absolute requirement of compliance under conventions specific to the prevention and suppression of terrorism.²⁸ State practice also indicates that the majority of sovereigns are fulfilling their duties to punish terrorism. Because of political pressures of being a future target of the terrorist group, many States have employed deportation of terrorists that the State is reluctant to prosecute. This, however, has been done with a keen eye toward justice. "Of the 145 offenders who were deported, 114 were convicted in the state of destination on international terrorist or other criminal charges."²⁹ Similar statistics evidence State practice for extradition of terrorists.³⁰ Widespread State practice infers that nations believe the practice is required.³¹

3. There is No Political Exception or Asylum for Terrorism Excusing Shangri's Duty.

States have denied the right of special protection for crimes of international significance under any theory of political asylum. Such favorable treatment for political offense criminals has been denied for terrorists on three grounds. First, terrorist acts by their nature and definition are not aimed at the offending government, but at the social structure embodied in the innocent symbolic individuals.³² There are three basic tests applied by States to determine if extradition can be refused under circumstances of

²⁷ Montreal Unlawful Acts Convention, *supra* note 14, art. 8; Protection of Diplomats Convention, *supra* note 15, art. 7; Hostage-Taking Convention, *supra* note 19, art. 5.

²⁸ European Convention on the Suppression of Terrorism, *supra* note 19, art. 7; O.A.S. Convention to Prevent and Punish Terrorism, *supra* note 19, art. 5; ILA Conference on Terrorism, Belgrade Conference, *supra* note 9, art. V.

²⁹ Evans, *supra* note 20, at 503; Cf. Friedlander, *Terrorism and International Law: Recent Developments*, 13 Rutgers L. J. 493, 500 (1982), lists States such as France as being especially fearful of reprisal by terrorists.

³⁰ See Evans, *supra* note 20, at 503. Before the rash of air hijackings and other terrorist events, States often attempted to shield the insurgents. The trend has changed since the 1972 Munich killings. See Currin, *Extradition Reform and the Statutory Definition of Political Offense*, 24 Va. J. Int'l L. 419, 422 (1984) (cataloging the high number of asylums before the air hijacking conventions). Cf. Belgrade Conference, *supra* note 9, at 506 (chronicling the turnabout on the part of States to toughen the controls on captured terrorists). Accord, J. Murphy, *Punishing International Terrorists: The Legal Framework For Policy Initiatives*, 109-16 (1985).

³¹ See, e.g., Baxter, *Treaties and Custom*, in 129 Academie De Droit Int'l, Recueil Des Cours 25, 69 (1970).

³² Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 Colum. J. Transnat'l L. 382, 391 (1979).

“political” violence. The French test declares that the crime must be one that directly injures the target nation's government.³³ The Swiss approach looks at whether the political elements “predominate over the common crime.”³⁴ Lastly, the Anglo-American method queries whether the crime is incidental to and committed in furtherance of a political disturbance (i.e., an uprising must, at least, indirectly be the result).³⁵ In addition, under any existing view of the “political offense exception” to extradition, such acts must not be criminally disproportionate to any proper political goal.³⁶ Some recent cases require that the actions of the criminal insurgent must be reasonably designed to achieve the end goal.³⁷

The protection from prosecution is also refused when the requesting country is not the government that the perpetrator is trying to topple and replace.³⁸ Such direct extradition is required because the basic concept of the political offense exception is closely related to asylum, and it could be inappropriate to return the perpetrator to the government against which his actions were directed.³⁹ Terrorists acts are seldom aimed at the target government so there is no reason to refuse extradition to a third State injured by a violent attack. Last, both refusal to extradite and the granting of asylum are wrongful as to a requesting State for any international crime against humanity.⁴⁰ Terrorism is such a crime. The Draft Convention on Territorial Asylum unequivocally denies the availability of asylum to any person who “has

³³ Carbonneau, *Terrorist Acts -- Crimes or Political Infractions? An Appraisal of Recent French Extradition Cases*, 3 Hastings Int'l & Comp. L. Rev. 266, 271 (1980).

³⁴ *Id.*

³⁵ *Id.*

³⁶ States differ as to the measure of necessary closeness between the action and the political target, but all definitions of the political exception seem to require a proportionally reasonable level of the violence in relationship to the end sought. Proportionality is codified in the laws of war. *Protocol Relating to the Protection of Victims of International Armed Conflicts, opened for signature* Dec. 12, 1977, U.N. Doc. A/32/44 (entered into force Dec. 7, 1978), art. 57(j) (1977) [hereinafter *Protocol I*], reprinted in 16 I.L.M. 1391 (1977). The European Convention for Suppression of Terrorism denies such protection when attacks include injuries suffered from the use of automatic weapons. European Convention for the Suppression of Terrorism, *supra* note 19, Art. 1, 5, 8(2). See also Baker, *The Western European Legal Response to Terrorism*, 13 Brooklyn J. Int'l L. 1, 5 (1987).

³⁷ See Boufford, *Extradition Political Offense Exception*, 6 Suffolk Transnat'l L.J. 147, 148 (1982).

³⁸ Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 Harv. Int'l L.J. 61, 66 (1979).

³⁹ *Id.*

⁴⁰ *Universal Declaration on Human Rights*, G.A. Res. 217, 3 GAOR, U.N. Doc. 1/777 (1948). Article 14, ¶ 2, states there is no right to grant asylum for acts contrary to the purpose and principles of the United Nations. Article 1(2) of the Draft Convention On Territorial Asylum, reprinted in 8 M. Whiteman, *Digest of International Law*, 682-83 (1967), applied this directly to international crimes. See also Costello, *International Terrorism and the Development of the Principle aut dedere aut iudicare*, 10 J. Int'l L. & Econ. 483, 495-97 (1975).

committed (a) a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to combat ... acts contrary to the purposes and principles of the United Nations."⁴¹ Since the right to grant asylum is limited by a State's obligation under an international agreement,⁴² Shangri must respond to the needs of all States under its duties stemming from the Charter of the United Nations, the Hostage Convention, and the Geneva Civilians Convention. Shangri had neither the right to refuse extradition nor the lawful option to grant asylum to the international criminals of the PACM. Asylum is the oxygen that fuels terrorism.⁴³

A striking example of the reaction of the community of nations to violations like Shangri's present breach was evident in a hijacking in 1973. Kuwait granted asylum to a group of Arab terrorists after refusing to extradite them to any of four requesting States.⁴⁴ The terrorists had killed a number of the hostages during the bloody incident. Kuwait claimed that it was a "political offense" action and thus Kuwait was exempt from the requirement of *aut dedere aut judicare*. Following an outcry by other States, Kuwait delivered the terrorists to the Arab Liberation Movement to be tried for "crimes against the movement."⁴⁵ Even national liberation groups appear to recognize that certain "terrorist acts [are] inhumane criminal conduct"⁴⁶ and require justice and punishment.

B. Shangri's Failure to Prosecute or Extradite the PACM War Criminals Violates the Geneva Conventions of 1949 and Protocol I.

Specific rules, from the nineteenth century to the present day, have required combatants to dress and act in a manner distinguishable from innocents to better protect the non-combatant civilian population.⁴⁷

⁴¹ See Costello, *supra* note 39, at 496 (citing the Draft Convention on Asylum). As Costello explains, the convention is reflective of customary law on this point.

⁴² Epps, *supra* note 38, at 78 (conventional obligations take precedence). See Larschan, *supra* note 10, at 134.

⁴³ See Larschan, *supra* note 10, at 134.

⁴⁴ See Carbonneau, *The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created*, 1 A.S.I.L.S. Int'l L. J. 1, 3 (1977). Kuwait had no extradition treaty with the four states.

⁴⁵ See Lillich & Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 Am. U.L. Rev. 217, 278 (1977).

⁴⁶ See Carbonneau, *supra* note 33, at 38.

⁴⁷ Prisoner of war status was based on the attire of the fighter. *Instructions for the Government of Armies of the United States in the Field*, prepared by Francis Lieber, L.L.D., Originally issued as General Orders No. 100, Adjunct General's Office, 1863, Washington 1898: Government Printing Office (Engl.), reprinted in *The Laws of Armed Conflicts* (D. Schindler & J. Toman eds. 1981)[hereinafter Schindler & Toman].

The various agreements and regulations declared that fighters in an international conflict who disguised themselves as civilians or committed acts of violence against civilians were international criminals.⁴⁸ In 1949, the customary norms, representing the widespread practice of states evidencing a belief that the duties were a legal obligation,⁴⁹ were codified in the Geneva Civilians Convention.⁵⁰ Since the Geneva Civilians Convention did not expressly cover conflicts of non-state parties⁵¹ (the PACM in the present situation) in attacks across international boundaries, an additional document, also codifying customary practice, was written in 1977 ("Protocol I").⁵² Shangri is bound by the provisions of the Geneva Civilians Convention as a party and by Protocol I as customary international law to bring persons who commit "grave breaches" of the rules of war to justice.

1. "Grave breaches" of the laws of war by the PACM make Shangri's duty absolute.

Under Article 148 of the Geneva Civilians Convention, Shangri is required to bring any "gravely breaching" person "before its own courts" or "hand such persons over for trial to another High Contracting Party [Yokum] concerned." The "grave breaches" committed by the PACM war criminals include willful killing, the taking of hostages, and attacks targeted at a civilian population.⁵³ A prima facie case of all of these international crimes was presented by Yokum, thus making Shangri's duty to prosecute or extradite absolute. "Prosecution is the *duty* of states bound by international agreements that contain this formula."⁵⁴ Extradition is the only legal alternative.

⁴⁸ Regulations Annexed to the Conventions With Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403; and Oct. 18, 1907, 36 Stat. 227, T.S. No. 539, *reprinted in* Schindler & Toman, *supra* note 47, at 69 ("attire" became openly carrying arms). For the modern application of the danger of disguised fighters, see Dinstein, *Interstate Armed Conflict and Wars of National Liberation*, 31 Am. U.L. Rev. 873 (1982).

⁴⁹ *North Sea Continental Shelf* (W. Ger. v. Den. & Neth.), 1969 I.C.J. 3, 43, 45.

⁵⁰ Geneva Civilians Convention, *supra* note 12, art.1.

⁵¹ *Id.*

⁵² See *Protocol I*, *supra* note 35; for its customary legal effect, see Rubin, *Terrorism, "Grave Breaches" And The 1977 Geneva Protocols* 192, 195, in Am. Soc'y Int'l L. Proceedings of the 74th Annual Meeting (1981). Nearly sixty nations have become ratifying parties to Protocol I. Levie, *Pros and Cons of the 1977 Protocol I*, 19 Akron L. Rev. 537, 542 (1985-86); see also Comment, *The Use of Force in Combatting Terrorism*, 25 Colum. J. Transnat'l L. 377, 388 (1987).

⁵³ See Geneva Civilians Convention, *supra* note 12, art. 147; *Protocol I*, *supra* note 13, art. 85(3).

⁵⁴ Evans, *supra* note 20, at 503 (emphasis in original).

The release of all seven war criminals is a violation of Article 148 of the Geneva Civilians Convention. The purported extradition to Saq was wrongful under Article 148 because it was not a transfer to a party which was prepared to put the war criminals on trial. Before the decision to transfer the culprits to Saq was made, Shangri knew that the person holding the dual executive and judicial power of Saq (the President/Minister of Justice) had openly declared that State's intention to ignore its duties under the Geneva Convention by releasing the murderers without trial *aut dedere aut judicare*.⁵⁵ The subsequent attempted transfer to Saq was a breach of good faith obligation to Yokum under the Geneva Civilians Convention.⁵⁶ Wrongfully, Shangri defied its obligations under the Geneva Civilians Convention to Yokum and attempted to aid Dr. Murpharius and his accomplices in their flight from justice. Shangri's provision for the release of the other four perpetrators is even more abhorrent. The duty to bring them before its own courts was not lessened by any actions of Yokum.⁵⁷

2. Shangri is without excuse for its failure to bring war criminals to justice.

Shangri cannot claim special "prisoner of war" rights for the hostage-takers. From Nuremburg through the adoption of Protocol I, the violence of these PACM members constitute war crimes of such "grave" magnitude that the normal protections of the laws of war are inapplicable.⁵⁸ Yokum had the choice under the Geneva Prisoners Convention⁵⁹ of applying its present law or enacting special municipal legislation.⁶⁰ International law gives Shangri no standing to argue the rights of third parties

⁵⁵ Compromis, p. 5 (implying that the Shangrian officials had full knowledge of Saq's intention in time to make a proper decision to extradite to Yokum). It is doubtful, as well, that Saq had a proper nexus to request extradition.

⁵⁶ Geneva Civilians Convention, *supra* note 12, art. 1; *Vienna Convention on the Law of Treaties* art. 26, U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 63 Am. J. Int'l L. 875 (1969).

⁵⁷ In *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran), 1980 I.C.J. 3, 43, this court found a similar duty by Iran was independent of any rescue attempt by the United States.

⁵⁸ The inapplicability of protections for terrorists under Protocol I is affirmed by Levie, *supra* note 51, at 195.

⁵⁹ Geneva Civilians Convention, *supra* note 12, art. 146 (the emphasis is on changing municipal for the purpose of a fair trial).

⁶⁰ See Rubin, *The Status of Rebels Under the Geneva Conventions of 1949*, 21 Int'l & Comp. L.Q. 472, 496 (1972) (for a lack of State practice under art. 146).

which are recognizable entities.⁶¹ The exception to the rule is the ability to stand in the stead of a State's own citizens.⁶² The two PACM henchmen and Dr. Murpharius, however, are not Shangrian citizens.

C. Shangri Has Violated the Duty to Prosecute or Extradite Under the Hostage Convention.

The world community recognized that the horrors of terrorism were so disruptive to domestic and international peace that a convention to punish such acts during times and circumstances not covered by the laws of armed conflict in the Geneva Civilians Convention and Protocol I was appropriate.⁶³ The resulting Hostage Convention applies equally during times of peace or war. To be guilty under the Convention, the individual or group (the seven PACM members) must seize or detain for the purpose of compelling action or omission by a third party (Yokum and other States) as an explicit or implicit condition release of the hostages (refraining from acting militarily against the hostage-takers and granting admission safely into Taluba harbor).⁶⁴ The PACM members are hostage-takers under the Convention. Subsequently, Shangri forcibly assumed control of these violators crystallizing its responsibility under the *aut dedere aut judicare* provisions of the Convention. Under the Hostage Convention Yokum was a proper party to exercise its criminal jurisdiction over these persons pursuant to Article 5 allowing passive personality jurisdiction.⁶⁵ Such jurisdiction allows Yokum to try persons who injure its citizens outside Yokum's territory. Shangri refused extradition to Yokum.

1. Capture of the hostage-takers crystallized Shangri's duty.

Under Article 8, however, Shangri had the duty to "submit the case to its competent authorities for the purpose of prosecution" or extradite to a State with proper jurisdiction which would prosecute. It did not fulfill this duty concerning any of the seven hostage-takers and murderers. The obligation was to be carried out "without exception whatsoever."⁶⁶ Article 12 of the international treaty makes it applicable to

⁶¹ South West African Cases (Second Phase), 1966 I.C.J. 6.

⁶² Compare the attempt of Lebanon to argue the rights of a citizen/terrorist, Fawaz Yunis, taken by the United States: *A Sting on the Mediterranean*, 111 Newsweek 36 (Sept. 28, 1987).

⁶³ Hostage Convention, *supra* note 16.

⁶⁴ Compromis, pp. 1-4.

⁶⁵ Comment, *Legislative Responses to International Terrorism: International and National Efforts to Deter and Punish Terrorists* 9 B.C.L. Rev. 323 (1986).

⁶⁶ See also Hostage Convention, *supra* note 16, art. 8 (mirroring art. 7 of the European Convention, *supra* note 19).

all hostage-taking which will not be governed by the absolute requirements of "try or extradite arising from other conventions in force between the State parties." Both the attempted release of the airliner and the actual freeing of the rest of the hostage-takers is a "bad faith" destruction of the purpose of the Convention. The Preamble of the Hostage Convention (interpreting Article 8)⁶⁷ makes it clear that because the "offense is of grave concern to the international community," Shangri was under an absolute duty to see that the PACM members "shall either be tried or extradited."

The ability to extradite to a country that will grant asylum (such as Saq) under Article 15 (assuming an asylum treaty exists between Shangri and Saq) is a breach of Article 8 if the receiving country will not prosecute the offenders prior to the granting of asylum.⁶⁸ Neither does Shangri have the right to grant asylum to the remaining four criminals, unless Shangri has first prosecuted the hostage-takers. Having released the hostage-takers without fulfilling its duty as a party to the Hostage Convention, Shangri has committed a grave international wrong to Yokum's detriment.

2. The provisions of the Hostage Convention do not release Shangri's obligation.

Shangri is without excuse to refuse extradition to Yokum under Article 9 of the Hostage Convention. Article 9 follows the European Terrorism Convention in allowing extraordinary refusal of extradition to nations which seek to persecute rather than prosecute.⁶⁹ There is no indication that Yokum wanted extradition to punish the PACM members because of their background or beliefs. Yokum only sought the implementation of justice for their heinous actions. Even if Shangri could have denied jurisdiction to Yokum under Article 9, an absolute duty remained to prosecute all seven hostage-takers. The Article 9 right is independent of the Article 8 requirement.⁷⁰

No provisions were allowed in the Hostage Convention for singular exceptions covering groups committing atrocities in the name of national liberation. While the negotiations for the Convention were

⁶⁷ The preamble is to be used to interpret the substantive provisions. *Vienna Convention On the Law of Treaties*, *supra* note 47, art. 31, ¶ 2.

⁶⁸ Asylum is allowed by Article 15, but it could not be exercised in derogation of the "try or extradite" duty under Article 8. *See Costello*, *supra* note 31 at 494-97

⁶⁹ *See Shubber*, *The International Convention Against the Taking of Hostages*, 52 *Brit. Y.B. Int'l L.* 205, 217 (1981).

⁷⁰ *See Verwey*, *The International Hostages Convention and National Liberation Movements*, 75 *Am. J. Int'l L.* 69, 87 (1981).

under way, some States wanted special protections to be accorded to liberation movements.⁷¹ This amendment was denied by the delegates. The act of hostage-taking was affirmed as terrorism and, therefore, outside the legitimate struggle for self determination.⁷² The murder of innocents was not considered to be an offense to be tolerated by the world community no matter how lofty the goal. "[W]e should recognize the fact that these are revolution-criminals who commit atrocities in the name of 'revolution' and 'liberation'."⁷³ Shangri has an obligation to punish such wrongfulness.

D. Shangri Has Violated its Conventional and Customary Duties to Prosecute or Extradite the Pirates of the Hasdrubal.

1. The PACM Has Committed Piracy Which Obligated Shangri to Execute Justice.

"Although a politically motivated group may not have the resources of an established government, such groups can often wreak severe havoc on innocent ships and persons."⁷⁴ "[T]he law of nations considered pirates to be *hostis humani generis* -- the enemy of all mankind."⁷⁵ The pirates were then considered to be international criminals "whom any nation may in the interest of all capture and punish."⁷⁶ Acts of depredation such as murder and hostage-taking against one's own ship or other shipping were piratical according to customary international norms.⁷⁷ Both the 1958 Geneva Convention on the High Seas and the 1982 Convention on the Law of the Sea⁷⁸ support the condemnation of pirates, such as the PACM, if the acts are done for private ends and are threatening to other ships. The early case of the *Santa Maria* in 1961 (interpreting piracy under the new Geneva conventional law) and the

⁷¹ *Id.* at 72-73.

⁷² *Id.* at 75. Cf. Moore, *Toward Legal Restraints on International Terrorism*, 67 Am. Soc'y Int'l L. Proc. 88 (dispelling the myth that anti-terrorism is contra self-determination).

⁷³ P. Wilkinson, *Terrorism: International Dimensions* 4 (1979).

⁷⁴ Crockett, *Toward A Revision of the International Law of Piracy*, 26 DePaul L. Rev. 78, 95 (1976).

⁷⁵ McGinley, *The Achille Lauro Affair -- Implications for International Law*, 52 Tenn. L. Rev. 691, 694 (1984-85).

⁷⁶ *The S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A), No. 10 at 70 (Judgment of Jan. 4) (Moore, J., dissenting).

⁷⁷ 1 L. Oppenheim, *International Law* 558 (7th Lauterpacht ed. 1948).

⁷⁸ Convention on the High Seas, *open for signature* April 29, 1958, *entered into force* September 30, 1962, art. 15, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82 [hereinafter Convention on the High Sea]. *Third United Nations Convention on the Law of the Sea, signed at Montego Bay, 10 December 1982*, U.N. Doc. A/CONF.62/122 and Conv. 1 toll, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter Convention on the Law of the Sea].

depredations committed on the *Achille Lauro*⁷⁹ demonstrate that the actions of groups such as the PACM, with their cloak of political motivation, are to be condemned as violations of the law of the sea still in effect following the conventional definitions of piracy.⁸⁰

In the alleged piracy of the *Santa Maria*, the Portugese group of insurgents seized control of the Portugese ship after having been passengers.⁸¹ Killing some crew members, the leader made political demands for recognition of their defeated candidate as the proper head of the Portugese government. Only the Portugese crew was threatened or held hostage while the rest of the people were treated with care. Other nations, apparently following both customary and conventional law, sought to capture the insurgents regarding them as pirates.⁸² There was some confusion, however, since the objectives sought by the revolutionaries were directed only towards Portugese citizens, property and politics. Due to the uncertainty, sanctuary was given the insurgents in Brazil.⁸³ "Hence the insurrectionists were not pirates because they acted ... against the government they were challenging."⁸⁴

The later seizure of the *Achille Lauro*⁸⁵ had many similarities and some notable differences. Again, revolutionary passengers violently subjugated a ship. The murder of an innocent fellow passenger accompanied the takeover. He was neither from the State of the perpetrators nor their target country. The pirates of the *Achille Lauro* also demanded the release of 50 Palestinians from jail. Persons of many nationalities were threatened with death and other depredations. Before the surrender of the *Achille*

⁷⁹ *Terrorists Seize Cruise Ship in Mediterranean*, 85 U.S. Dept St. Bull. 74-77 (1985).

⁸⁰ The broad customary law of piracy recognized the changing focus of piratical attacks. Typical of this trend is the regarding of piracy as "any armed violence at sea which is not a lawful act of war" as did the Privy Council in 1937. See 49 Lloyd's List L.R. 411, 420 (1934). See generally van Zwanenberg, *Interference With Ships On the High Seas*, 10 Int'l & Comp. L.Q. 785, 816 (1961).

⁸¹ For a full description of the *Santa Maria* seizure, see van Zwanenberg, *supra* note 80, at 798-801.

⁸² The decision of States to treat this incident as piracy is not taken lightly because of sanctions in the law of the sea. Convention on the High Seas, *supra* note 65, art. 20. For the immediate response of the British, Dutch, and the U.S., see Green, *The Santa Maria: Rebels or Pirates*, 37 Brit. Y.B. Int'l L. 496 (1961).

⁸³ See, van Zwanenberg, *supra* note 80, at 801.

⁸⁴ Note, *Towards a New Definition of Piracy: The Achille Lauro Incident*, 26 Va. J. Int'l L. 723, 741 (1986) (concluding analysis of the similar seizure involved in *Republic of Bolivia v. Indemnity Mut. Marine Ins. Co.*).

⁸⁵ A detailed fact summary is found in Liput, *An Analysis Of The Achille Lauro Affair: Towards An Effective And Legal Method of Bringing International Terrorists To Justice*, 9 Fordham Int'l L.J. 328, 334-38 (1986).

Lauro, even the friendly nation of Syria (along with Cyprus) refused entry to the pirates.⁸⁶ When they were attempting escape via the Egyptian airliner, neither the neutral country of Greece nor the more friendly State of Tunisia would grant them landing rights in aid of their flight.⁸⁷

Both conventions place a stern duty on States like Shangri to cooperate to the fullest possible extent in the repression of piracy (incorporating customary requirements concerning international criminals). The Law of the Sea Convention gives full authorization to seize, try and punish pirates.⁸⁸ These provisions and the universal jurisdiction over acts of piracy imply the duty to prosecute or extradite which has developed in sea piracy. The customary obligation concerning sea piracy has been reinforced by the unequivocal stance of *aut dedere aut judicare* found in the development of international treaties to which Shangri and Yokum are parties.

2. Shangri's duty remains despite the PACM claim of political motivation in the seizure of the *Hasdrubal*.

Any argument that Shangri has no duty to prosecute or extradite the PACM pirates because their acts were not for a private purpose cannot be factually supported. Their demands were for their own safety and media attention.⁸⁹ The pirates of the *Hasdrubal* made no demands that can be viewed as promoting their cause of self-determination. Since the grave acts of taking captive an innocent ship and its passengers were not directed at anything but the motives of publicity and self-aggrandizement, the PACM's violence at sea was piracy *jure gentium* -- piracy common to the law of all nations.

Even in a more truly political take-over, the threats and actions must be limited to the country against which war is waged. In a similar incident of "political seizure" involving *The Magellan Pirates*, the British Admiralty Court held that acts by insurgents became the acts of pirates when committed "against the subjects of other states."⁹⁰ The PACM's violent seizure of the *Hasdrubal* was not directed at Midbari (its avowed target) but primarily at the citizens of Yokum. Shangri, however, rather than cooperating to

⁸⁶ See *supra* note 80, at 745-46.

⁸⁷ *Id.* at 736.

⁸⁸ Convention on the Law of the Sea, *supra* note 78, arts. 105, 107.

⁸⁹ Terrorism is theater broadcast to the world, according to Larschan, *supra* note 9, at 130.

⁹⁰ *The Magellan Pirates*, 164 Eng. Rep. 47, 48 (Ecc. & Ad. 1853).

protect the freedom of the sea and the lives of innocents, refused its responsibility to bring these pirates to account or ensure their punishment by others.

II. SHANGRI HAS VIOLATED THE UNITED NATIONS CHARTER, CONVENTIONAL AND CUSTOMARY LAW BY ALLOWING TERRORISTS TO KNOWINGLY OPERATE ON ITS TERRITORY.

A. *Shangri Has Irresponsibly Allowed Terrorist Activities in Violation of the Hostage Convention.*

In the constant struggle against international terrorism, States have a duty to prevent terrorism against other Sovereign nations. The Hostage Convention requires State parties to "prevent preparations in their respective territories for the commission of those offenses [taking of hostages] within or outside their territories."⁹¹ Article 4 of the Convention also specifies that measures be taken to prohibit the illegal activities of such groups that "encourage, instigate, organize, or engage in the perpetration" of this type of terrorist mode of operation. Under the same article, States must also provide information to other sovereigns to help prevent such international crimes. Shangri has breached all of these duties under a binding treaty with Yokum, claiming lack of effective control as its only excuse.

Shangri, however, has aptly demonstrated its administrative and military ability to halt the activity of the PACM. When the media attention and world opinion apparently forced Shangri to act by capturing the PACM members involved in the present incident, the government forces moved in without resistance. In addition, the government adequately imprisoned and arranged to send the terrorist squad from the country without attack by the PACM or other forces within Shangri. Despite holding the PACM members for a number of days, there is no mention of outbreaks by any group during this period. This Court held in the *Iran Hostage Case* that the ability of the revolutionary Government of Iran to quench terrorist acts within its territory on prior occasions showed that the present failure to act was intentional and wrongful.⁹² Iran was responsible, therefore, for the acts of the hostage-takers at the United States embassy despite an original lack of complicity. In the instant situation, Shangri could have acted to

⁹¹ Hostage Convention, *supra* note 16, art. 4.

⁹² *United States Diplomatic and Consular Staff In Tehran* (U. S. v. Iran), 1980 I.C.J. 3, 31 (noting the government's "total inaction" contrasted sharply with its ability to act swiftly and effectively on other occasions).

prevent the fostering of terrorist acts. In fact, its release of the known terrorists of the *Hasdrubal* affair shows its total disdain for its duties under the Hostage Convention.

Shangri had knowledge of the illegal activities of the PACM. On numerous previous occasions attacks had been launched from Shangri's territory and proper protests had been made. In contrast with Shangri, Yokum had complied with its informational duty under the Convention by telling Shangri of the location of the criminals following the previous attacks, but the Shangrian government steadfastly refused to act. No measures were taken in prevention of preparation or prohibition of the organization of illegal group of international criminals as required by Article 4 of the Hostage Convention.

B. Shangri Has Breached its Customary Duty Not to Allow Activities on Its Land Which Endanger Other States.

A basic responsibility of each nation to other co-equal Sovereign States is to allow no activity in a country's territory which directly harms other nations or their people. Early arbitral decisions enunciated the norm.⁹³ In *Corfu Channel*, this Court upheld and affirmed that duty. Albania was found to be responsible to Great Britain for injury to British ships and sailors from mines in Albanian territorial waters of which Albania had knowledge. Although actual knowledge was not proven, this Court concluded that the laying of a minefield "could not have been accomplished without the knowledge of the Albanian government."⁹⁴

The knowledge necessary for the same type of vicarious liability and responsibility should be imputed to Shangri. The constant upheaval between the two religious groups in Shangri would make the gathering of intelligence concerning dissident and terrorist groups a priority of survival for the Shangrian government. In such a situation, knowledge of the dangers to the rights of the other States must be presumed. As Lauterpacht noted long ago, a State "is originally responsible for having culpably omitted to prevent certain acts on the part of private persons...and the duty of the state is reduced to apprehending and meting out punishment to individuals."⁹⁵

⁹³ See *Island of Palmas*, *supra* note 2, at 829; accord, *Trail Smelter Arbitration* (U.S. v. Can.), 9 Ann. Dig. & Reps. Pub. Int'l Cases 315 (1941).

⁹⁴ *Corfu Channel*, (U.K. v. Alb.), 1949 I.C.J. 4, 22.

⁹⁵ Lauterpacht, *Revolutionary Activities By Private Persons Against Foreign States*, 22 Am. J. Int'l L. 105, 128 (1928).

C. Allowing Armed Bands to Operate from Shangrian Territory Violates Conventional and Customary Law.

The Definition of Aggression Resolution, reflecting the consensus of the United Nations General Assembly, prohibits the toleration of the organization of armed bands in a State's territory.⁹⁶ Whether as a base of operations or as a point of departure into other State's territory, the allowance of such groups is an international breach of responsibility. The Declaration on Friendly Relations indicates that it is a serious violation of the Charter, itself, to encourage or allow irregular forces or armed bands.⁹⁷ "The duty to restrain armed bands imposed by this standard is more than a duty owed to the other State injured by the armed band. It is a duty owed to world peace and international legal order."⁹⁸ State practice reflects this statement as the customary norm.⁹⁹ In the arbitration over claims of title to the Island of Palmas, the noted jurist Max Huber declared that the protection of the rights of other nations upon the territory of one's own State was *the* duty of sovereignty.¹⁰⁰ Acquiescence to the operation of armed groups like the PACM is a violation of Article 2(4) and the Definition of Aggression by Shangri.¹⁰¹

The duty to control armed bands is postulated on three elements. There must be knowledge of the organization, acquiescence to their activities and injury to another State.¹⁰² The first two requirements are apparent and the injury to the citizens of Yokum supplies the third. Shangri's laxness is much like the State of Lebanon's acquiescence to the operations of the fedayeen against Israel.¹⁰³ As one international scholar observed, Lebanon "cannot be entitled to simultaneously assert the inability...to perform its

⁹⁶ "Definition of Aggression" Resolution, Annex, G.A. Res. 3314 (XXIX 1974), art. 3(g) (approved without a vote).

⁹⁷ *Declaration on Friendly Relations*, *supra* note 3, § 1, ¶ 8. Schachter flatly asserts that "States generally agree that it violates Article 2(4) to support armed activities or subversive infiltration to overthrow a regime in another State." Schachter, *In Defense of International Rules on the Use of Force*, 53 U. Chi. L. Rev. 113, 136 (1986).

⁹⁸ Levenfeld, *Israel's Counter-Fedayeen Tactics in Lebanon: Self Defense and Reprisal Under Modern International Law*, 21 Colum. J. Transnat'l L. 1, 11 (1982).

⁹⁹ For a comprehensive review of bilateral agreements and other indicia of States' practice, *see generally* Brownlie, *International Law and the Activities of Armed Bands*, 7 Int'l & Comp. L. Q. 712 (1958).

¹⁰⁰ *Island of Palmas*, *supra* note 2, at 829 (emphasis added) (corresponding to the *right* of territorial integrity).

¹⁰¹ *See Military and Paramilitary Activities in and Against Nicaragua* (Nic. v. U.S.), 1986 I.C.J. 4, 277-78, 340-41 (Judgment of June 27) (Schwebel, J., dissenting).

¹⁰² Lillich & Paxman, *supra* note 45, at 275.

¹⁰³ *See generally* Gross, *The Legal Implications of Israel's 1982 Invasion Into Lebanon*, 13 Cal. W. Int'l L.J. 458, 464-9 (1983).

undoubted legal obligation and its right to be immune from responsibility in respect to such defaults."¹⁰⁴ Shangri has failed to properly use its controls as a sovereign to carry out its responsibilities to other co-equal nations.

Summarizing the duties of State responsibility, Garcia-Mora noted that "if a state has obviously used all the means at its disposal to prevent a hostile act of a person against a foreign State but is physically unable to suppress it, it [the State] has certainly not discharged its international duty."¹⁰⁵ If unable to act, the host country must report the matter to the competent organ of the United Nations and offer its cooperation.¹⁰⁶ Shangri has made no such plea and offered no cooperation.

D. Shangri's Refusal to Prohibit the PACM's Use of Its Territory as a Subversive Center Makes Shangri Directly Responsible for PACM Terrorism.

The fostering of illegal havens for the protection of international terrorists and as a base for their operations contravenes the Charter of the United Nations.¹⁰⁷ Such tacit shielding of terrorist centers is a direct threat to all countries. "[In] accordance with Article 39 of the Charter...these activities constitute a threat to international peace and security."¹⁰⁸ The Declaration on Friendly Relations is often cited by jurists as an injunction against State-supported terrorism.¹⁰⁹ When the actions of the sovereign State are shown to support internationally wrongful acts, the offending nation must be responsible.

The customary obligations of state responsibility codified by the Draft Articles on State Responsibility declare that the acts of an "entity empowered to exercise elements of governmental authority...shall be considered as an act of the State under international law."¹¹⁰ The meaning of such attribution was illuminated in the *Iran Hostage Case* by this Court. While acknowledging that the private actors were not an official organ of Iran's government, the refusal to bring the student hostage-takers to justice ratified

¹⁰⁴ Blum, *The Beirut Raid and the International Double Standard*, 64 Am. J. Int'l L. 73, 85 (1970).

¹⁰⁵ M. Garcia-Mora, *International Responsibility For Hostile Acts of Private Persons Against Foreign States* 20 (1962).

¹⁰⁶ Brownlie, *supra* note 99, at 717 (citing the draft history of an early International Law Commission article on aggression).

¹⁰⁷ Art. 39; art. 2(4).

¹⁰⁸ Murphy, *State Self-Help and Problems of Public International Law*, in *Legal Aspects of International Terrorism* 553, 563 (A. Evans & J. Murphy eds. 1978).

¹⁰⁹ *See, e.g.*, Murphy, *United Nations Proposals On the Control And Repression of Terrorism*, in *International Terrorism And Political Crimes* 493, 495 (M. Bassiouni ed. 1975).

¹¹⁰ *Draft Articles on State Responsibility, supra* note 4, art. 10. For its force as customary international law *see* Borkowski, *Use of Force: Interception Of Aircraft*, 27 Harv. Int'l L.J. 76, 767 n.56 (1986).

their functional position as an "entity empowered" to act for the Iranian government.¹¹¹ Shangri has demonstrated the power to act against the PACM but has refused to enforce its international responsibilities. The violent and repeated attacks of the PACM must therefore reflect the policies of the Shangrian government and the attacks themselves must be imputed to Shangri. Obviously, Shangri is directing its military actions within its borders at the religious groups struggling for political control. None of these forceful efforts, however, have been aimed at maintaining control over the PACM terrorists.¹¹² Shangri, because of its unwillingness to control the PACM, has placed its stamp of approval upon the use of its land as a terrorist center.

The ILA Convention on Terrorism requires that direct responsibility is to be placed on nations that cooperate with those committing acts of terrorism.¹¹³ Article V of the Convention makes it plain that no exception for servicing as a haven for these violent international actors exists. Even "[a] State which has been constrained out of humanitarian considerations to co-operate with international terrorists will not be relieved from the obligations imposed by this Article."¹¹⁴ Both under the general rules of State responsibility and special responsibility under the norms for the control of terrorism, Shangri has gravely breached its peremptory international duties to Yokum.

III. YOKUM IS JUSTIFIED BY THE UNITED NATIONS CHARTER AND CUSTOMARY LAW TO PROTECT ITS NATIONALS.

International law places a dividing line between acts of retaliation and other actions of States designed for self protection. The former are considered wrongful while the latter are allowed. Retaliation is designed to punish another sovereign nation for the past wrongful denial of the vindicating State's rights.¹¹⁵ The right of self-protection looks to the State's preservation of its national interests when its citizens are attacked or are in danger from an offending State. Both the Charter of the United Nations and

¹¹¹ *United States Diplomatic and Consular Staff in Tehran* (U. S. v. Iran), 1980 I.C.J. 3, 35.

¹¹² *Cf. Levenfeld, supra* note 83 at 9 n.26 (analyzing the so-called "Cairo Agreement" under which Lebanon recognized the privilege of the PLO to act freely in certain parts of Lebanon in order to facilitate their launching of unfettered attacks upon Israel).

¹¹³ *See* Belgrade Conference, *supra* note 9, at 502.

¹¹⁴ *Id.*, commentary, art. V, 503.

¹¹⁵ E. Zoller, *Peacetime Unilateral Remedies: An Analysis Of Countermeasures* 35-44 (1984). Reprisals are sometimes allowed as countermeasures. *See Draft Article on State Responsibility, supra* note 4, art. 30.

the customary rights of self-defense provide for States to use the force necessary for self-protection. Yokum's interception must be characterized as lawful self-protection.

A. Self-Protection Is Justified Under the Charter and the Right of Self-Defense.

1. De Minimus Intervention is Allowed By Article 2(4) of the United Nations Charter.

The protection of national interests may be regarded as legal under Article 2(4) and the purposes of the Charter as a whole. Such action, however, must take the form of de minimus intrusions upon the rights of the offending State. The French text and the history of negotiations over Article 2(4) demonstrate that the prohibition of force was narrowly intended to continue the allowance of the legitimate use of self-help for overriding State interests and needs.¹¹⁶ To be considered as benign intervention it must not challenge the host nation's claim to its territory or its political structure and independence internally.

The Israeli raid into Iraq and the United States interception of an Egyptian plane are examples of benign self-help. Both illustrate the de minimus exception to Article 2(4). The Israeli intrusion was aimed at eliminating a potentially threatening nuclear reactor in Iraq in 1981.¹¹⁷ The raid was initiated toward ensuring a future right of peace for Israel and "the territory [of Iraq] remained integral. Nor was Iraq's political independence compromised."¹¹⁸ It prevented future breaches of world peace between Israel and Iraq and thus was not "inconsistent with the Purposes of the United Nations." No sanctions or penalties were imposed against Israel following its self-protection.¹¹⁹

Even more strikingly similar to the instant situation was the United States interception of an Egyptian airplane attempting to transfer the terrorists responsible for the seizure of the *Achille Lauro* cruise ship. The Egypt Air jet (requisitioned by the Egyptian government) was taking the wrongdoers to the PLO headquarters in Tunisia. To prevent the murderers' escape from justice, military aircraft of the United States forced a landing on Italian soil. The Italians promptly arrested and eventually prosecuted all but

¹¹⁶ For the French text, see 15 *Documents de la Conférence des Nations Unies sur L'Organization Internationale* 367 (1945); see also Mallison & Mallison, *The Israeli Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 15 *Vand. J. Transnat'l L.* 417, 420-21 (1982).

¹¹⁷ D'Amato, *Israel's Air Strike Upon The Iraqi Nuclear Reactor*, 77 *Am. J. Int'l L.* 584 (1983).

¹¹⁸*Id.* at 585.

¹¹⁹*Id.* at 586. D'Amato suggests that the lack of sanction "tends to support a claim that the act complained of was in fact legal."

one of the terrorists. The world community was supportive of this action.¹²⁰ No resolution questioning the rights of the United States was even offered for a vote in the United Nations Security Council.

The Yokum interference with Shangrian rights parallels these incidents, especially the *Achille Lauro*. Not only was the intrusion of a very short duration with no exchange of armed force between the States, but Shangri emerged unscathed. It had the same territorial control over its airplane and its sovereign rights to properly use that territory. Like with the *Achille Lauro* interception, there was no intrusion into Shangrian airspace or its land. No population center was threatened or abused. Shangri cannot excuse its responsibility to Yokum by claiming both a lack of control for prevention and punishment, and that Yokum's actions lessened its supposedly ineffective territorial rule. Finally, the action served to protect against future attacks by these very terrorists who were about to be granted asylum in Saq. This Court in *Corfu Channel* impliedly affirmed a de minimus exception to Article 2(4) by not holding that self-protective actions are per se violations of the Charter.¹²¹ As an eminent international scholar noted "threat or use of force employed consistently with *these* [Charter] purposes, and not directed against the 'territorial integrity or political independence of any state' may be commendable rather than necessarily forbidden by the Charter."¹²²

2. Yokum is justified under customary law and Article 51 by the right of self-defense.

Self-defense is always a justification for the actions of a State against armed attack by another nation. Judge Schwebel noted that a "State charged with an unlawful use of force, but actually has employed force in self-defense, that State is absolved of any breach of its international responsibility."¹²³ Grotius declared that self-defense derives from the natural right of self-preservation as an inherent attribute of sovereignty.¹²⁴ Article 51 of the Charter affirms the inherent right of States to use self-defense. The use of force must be proportional to the danger to the attacked country. From Daniel Webster's analysis in the *Caroline* incident, the right to self-defense has been limited to a necessitated response to an imminent

¹²⁰ Borkowski, *supra* note 93, at 763.

¹²¹ *Corfu Channel* (U.K. v. Alb.) 1949 I.C.J. 4, 34-35.

¹²² J. Stone, *Aggression And World Order* 43 (1958).

¹²³ *See Military and Paramilitary Activities in and Against Nicaragua* (Nic. v. U.S.), 1986 I.C.J. 4, 377 (Judgment of June 27) (Schwebel, J., dissenting).

¹²⁴ Grotius, *supra* note 15, at 76.

attack.¹²⁵ In the *Caroline* situation, the British opened fire on a ship loaded with armed insurgents while the vessel was on the American side of the Niagara River. The men on the boat were about to invade Canada. In the instant incident, Yokum has already encountered an armed attack upon its citizens on the *Hasdrubal*.¹²⁶ Its response in the interception of the aggressors is within the rule of self-defense to that attack.

The customary right of self-defense is not, however, limited to occasions involving an actual armed attack. It is also well recognized that a nation need not wait until devastated by an aggressor but, rather, may exercise the right of anticipatory self defense.¹²⁷ In a number of incidents such as the Iraqi nuclear reactor incident, the interception of known terrorists by Israel and the United States, as well as, the Cuban Missile Blockade, future attacks were threatened.¹²⁸ In using force to obtain custody of terrorists when the State having custody is unwilling to bring them before a court of justice, a nation like Yokum merely protects itself from the imminent future aggression. As Shangri provides a cauldron for armed violence against Yokum nationals by these armed bands of terrorists, it must tolerate limited intrusions into its territory by States attempting to defend themselves. Such self preservation cannot be viewed as wrongful since it is a proper extension of the exercise of the right of self-defense.

B. Yokum is Justified in Employing Humanitarian Intervention As A Right of Rectification Under Customary International Law.

The right of rectification justifies the intrusion of one nation into the territory of another State. Rectification is the right of one country to do "what another is required by law to do and which the other [the second country] cannot do or will not do."¹²⁹ In deciding that customary self-protection remained

¹²⁵ For the *Caroline* incident, see Malanczuk, *Countermeasures and Self-Defense As Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility*, in United Nations Codification of State Responsibility 241 (M. Sinedi & B. Simma eds. 1987). For the requirement of proportionality see *Naulilaa*, 2 Reports of International Arbitral Awards 1025, 1028 (1928).

¹²⁶ See Blum, *The Legality of State Response to Acts of Terrorism*, in *Terrorism: How the West Can Win*, 133 (B. Netanyahu ed. 1986) (for terrorist acts as "armed attack").

¹²⁷ D. O'Connell, *International Law*, 303 (2d ed. 1965). For a State's right of self-protection when it expects a *series* of attacks, see Schachter, *The Right of States to Use of Armed Force*, 72 Mich. L. Rev. 1635, 1638-39 (1984).

¹²⁸ On the missile blockade, see Chayes, *Law and the Quarantine*, 41 Foreign Aff. 550 (1963). (See also *infra* note 130 and the accompanying text).

¹²⁹ Johnson, *Control of Terrorism in International Life: Cooperation and Self-Help*, 71 Am. Soc'y Int'l L. Proc. 17, 30-31 (1977); see also Sheehan, *The Entebbe Raid: The Principle of Self-Help in*

after the Charter, a former President of the International Court of Justice emphasized that "to give up the right of self-help without obtaining any other adequate means of redress would simply have played into the hands of law-breakers."¹³⁰ A State like Yokum retains the right to intercede for the sake of its people. The customary right of humanitarian intervention is acknowledged under the Preamble of the Charter of the United Nations¹³¹ and is evidenced by state practice subsequent to the Charter's inception. The allowable measures applied by countries fall into the categories of rescue attempts and interceptions to prevent future crimes against humanity.

1. Customary Law Recognizes The Right of Humanitarian Intervention.

The rescue efforts have been generally applauded when directed against terrorists and other international criminals. The rescue attempts at Entebbe, Stanleyville,¹³² Mogadishu¹³³ and Iran are just a few examples of the legal response of limited force. At Entebbe,¹³⁴ for example, the Ugandan government was unwilling to restrict the continued violence directed against Israeli citizens on a hijacked airliner. The failure of Uganda's sovereign responsibility forced an Israeli landing to save its hostages people. Despite the forceful intrusion, no action was taken against Israel by the Security Council of the United Nations.¹³⁵ Limited force aimed toward a narrow goal of self-help, similar to Yokum's level of force, was considered justified.

In the Iran Hostages Case, this Court refused to condemn the abortive rescue attempt by the United States.¹³⁶ When considering whether the rescue effort was an infringement of territorial integrity and

International Law as Justification for State Use of Armed Force, 1 Fletcher Forum 135 (1977); Rubin, *Current Legal Approaches to International Terrorism*, 7 *Terrorism: An Int'l J.* 158 (1985).

¹³⁰ Waldock, *The Regulation of The Use Of Force By Individual States in International Law*, 81 *Académie de Droit Int'l*, II *Receuil des Cours* 455, 468 (1952).

¹³¹ For a comprehensive survey, see generally Lillich and Paxman, *supra* note 45.

¹³² For the combined rescue operation of the United States and Belgium, see Knisbacher, *The Entebbe Operation: A Legal Analysis Of Israel's Rescue Action* 12 *J. Int'l L. & Econ.* 57, 77 (1977).

¹³³ West German forces landed in Somalia and rescued the passengers of a hijacked airliner with minimum intrusion. See A. Lowenfeld, *Aviation Law* § 8-101 (2d ed. 1981).

¹³⁴ See *supra* note 108, at 68.

¹³⁵ 31 U.N. SCOR (1941st mtg.) 41-53, U.N. Doc. 5/pa 1941 (prov. Ed.) (1976). For the draft resolution condemning the hijacking but not Israel's actions, see United Kingdom of Great Britain, Northern Ireland and United States of America's draft resolution, U.N. Doc. 5/12/38, 12 July 1976 (U.N.S.C.). Uganda was, in fact, helping the hijackers. See Boyle, *International Law in Time of Crisis: From Entebbe to the Hostages Convention*, 75 *Nw. U.L. Rev.* 769, 795 (1980).

¹³⁶ *United States Diplomatic and Consular Staff In Tehran* (U. S. v. Iran), 1980 I.C.J. 3, 43.

political independence of Iran, this Court impliedly held that the United States was justified in its efforts at self-protection. The lawlessness of Iran in supporting the actions of the hostage-takers was the apparent rationale.

2. The Anticipatory Humanitarian Intervention of Yokum is Justified.

The same legal justification is essential in the present situation where continued attacks are inevitable. Using an imminent release by Saq to restore these criminals to the environment in Shangri that has served as their base in previous attacks on Yokum hastens their next escapade. Since their goal of the overthrow of the Midbari government had yet to be accomplished future violent crimes seem likely. Terrorists are the most predictable recidivists the world has ever known.¹³⁷ The rescue mission into Grenada before actual United States hostages were taken aptly demonstrates the logical connection of anticipatory rescue and actual rescue.¹³⁸ Benign intrusion is the basic right of rectification. When the United States intercepted the airliner carrying the *Achille Lauro* terrorists, the world community responded in quiet affirmation. Similar interceptions were accomplished by Israel in 1973 and 1986.¹³⁹

All three of the airplane interceptions were in response to terrorist leaders, such as the present Dr. Murpharius, who were circumventing justice. All of these were attempts at preventing future threats to the interceptor's people.¹⁴⁰ None of these anticipatory rescues impaired the territory or rule of the affected nation. The three interceptions viewed together show that the proper limits of this new State practice are two fold: there must be adequate knowledge of the culprits being on the airliner and the least intrusion possible must be exercised. The same level of self-help was used rightfully by Yokum against the Shangrian aircraft. As long as care for the least amount of interference is used against a known and escaping international felon of a State such as Yokum, the technical intrusions will be legally justified.

C. Yokum is justified in its Use of Countermeasures against Shangri In the Forced Extradition of the escaping terrorists.

¹³⁷ See generally Bassiouni, *Prolegomenon To Terror Violence*, 12 Creighton L. Rev. 745, 755-65 (1979).

¹³⁸ Levitin, *The Law of Force And The Force of Law: Grenada, The Falklands, and Humanitarian Intervention*, 27 Harv. Int'l L.J. 621, 649-50 (1986).

¹³⁹ For a legal comparison of the three, see Borkowski, *supra* note 93.

¹⁴⁰ The practical effect of the interception of the *Achille Lauro* was a reduction in the number of attacks on United States citizens rather than the onslaught of reprisals anticipated by some at the time. *Terrorists Seize Cruise Ship in Mediterranean*, 85 U.S. Dept. Stat. Bull. 74, 75 (1985).

When a State has violated an international obligation thus committing a wrongful act, the injured State may institute a countermeasure. A countermeasure is an act which would be internationally wrongful if it were not in response to another States's prior wrongful act.¹⁴¹ The actions of Shangri helping international criminals escape justice is such a wrongful act. The response of Yokum in intercepting and taking custody over the culprits is a proper countermeasure.

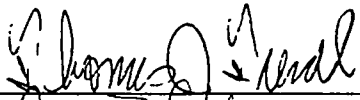
International law has recognized forceful extradition for extraordinary crimes in which escape from justice is otherwise inevitable. The concept is supported by the maxim *nunquam decurritur ad extraordinarium sed ibi deficit ordinarium* --meaning "never resort to the extraordinary until the ordinary fails."¹⁴² The abduction of war criminals such as Adolf Eichmann and Faik Bulut is a necessity when international criminals are escaping justice.¹⁴³ State practice, in finding proper jurisdiction and competence to prosecute the objects of forced extradition, shows the support for this method of obtaining personal jurisdiction.¹⁴⁴ Shangri's refusal to fulfill its duty forced this countermeasure by Yokum, and thus Yokum is justified in protecting its citizens from these international renegades.


CONCLUSION

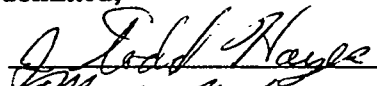
For the foregoing reasons, the Applicant, Republic of Yokum, respectfully requests that this Honorable Court find, adjudge, and declare as follows:


1. That Shangri failed in its duty to try or extradite the hijackers;
2. That the failure to prevent attacks against Yokum makes Shangri responsible for such acts;
3. That Yokum has violated no duty under international law in intercepting the hijackers;
4. That Shangri is bound to try or extradite the hijackers still in its territory;

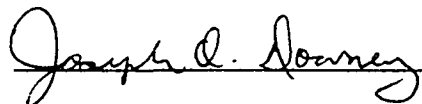
Respectfully Submitted,











¹⁴¹ See Draft Articles on State Responsibility, *supra* note 4, art. 30.

¹⁴² Bassiouni, *Unlawful Seizures of Persons by States As Alternatives to Extradition*, in *International Terrorism and Political Crimes*, 343, 357 (M. Bassiouni ed. 1975).

¹⁴³ See Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israel Precedent in International Law*, 72 Mich. L. Rev. 1087, 1108-09 (1974).

¹⁴⁴ The "Ker-Frisbie" doctrine represents a line of United States opinions ruling that a municipal court can determine its own competence despite the abduction of a criminal defendant. See J. Murphy, *supra* note 30, at 93 (1985); see also C. Warbrick, *Irregular Extradition* 276 (1983).