

**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 RESPONDENT

February 1988

Team 5-17

Diane B. DeGeorge
Joseph O. Downey
J. Todd Hayes
Mark C. Metzger
Thomas J. Trendl

TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES	iii
JURISDICTION	viii
STATEMENT OF FACTS	ix
SUBMISSIONS TO THE COURT	xiv
QUESTIONS PRESENTED	xv
SUMMARY OF ARGUMENT	xvi
ARGUMENT	1
I. YOKUM’S INTERCEPTION OF THE SHANGRIAN AIRCRAFT AND ABDUCTION OF ITS PASSENGERS CONSTITUTE VIOLATIONS OF SHANGRI’S SOVEREIGNTY AND TERRITORIAL INTEGRITY	1
A. <i>Yokum’s Interception Of The Shangrian Aircraft Is A Violation Of The Charter Of The United Nations, Conventional Law, Customary Norms, And General Principles Of Law</i>	2
1. Yokum’s forcible interception of the Shangrian aircraft constitutes a breach of duty under Article 2(4) of the Charter of the United Nations	2
2. Yokum’s failure to utilize peaceful means for resolution of the dispute constitutes a breach of duty under the Charter of the United Nations	5
3. Yokum’s forcible interception of the Shangrian aircraft constitutes a breach of duty under the Convention Against The Taking Of Hostages	6
4. Yokum’s forcible interception of the Shangrian aircraft constitutes an act of aerial hijacking in violation of conventional and customary law	6
5. Yokum’s forcible interception of the Shangrian aircraft constitutes a breach of duty under the Third United Nations Convention on the Law of the Sea	8
6. Yokum’s forcible interception with the Shangrian aircraft cannot be justified under the doctrines of self-defense or self-help	8
B. <i>Yokum’s Abduction Of The PACM Combatants Is A Violation Of The Charter Of The United Nations, Conventional Law And Customary Norms</i>	11

1. The forcible abduction of the PACM combatants constitutes a breach of duty under Article 2(4) of the Charter of the United Nations and customary law.....	12
2. The forcible abduction of the PACM combatants constitutes a breach of duty under the Geneva Conventions.....	13
II. SHANGRI'S ACTIONS IN RELEASING THE PACM COMBATANTS ARE IN ACCORD WITH INTERNATIONAL LAW.....	16
A. <i>Shangri Is Under No Conventional Or Customary Duties To Extradite Or Prosecute The PACM Combatants</i>	16
1. The actions of the PACM are not within the scope of the Hostage Convention.....	16
2. The actions of the PACM are not within the scope of piracy.....	18
3. Shangri is under no duty to extradite the PACM combatants to Yokum.....	19
a. <i>Shangri's duty to extradite under the Geneva Conventions does not extend to Yokum</i>	19
b. <i>Shangri's duty to extradite under the Hostage Convention does not extend to Yokum</i>	20
c. <i>Shangri was unable to effect any extradition due to Yokum's interference</i>	20
B. <i>Shangri Was Justified In Releasing The PACM Combatants Under Customary Norms And General Principles Of Law</i>	21
1. The doctrine of self-preservation justifies the release of the combatants.....	21
2. The doctrine of countermeasures justifies the release of the combatants.....	22
3. Yokum's claims are barred by the "Clean Hands" doctrine.....	22
III. SHANGRI IS NOT RESPONSIBLE FOR THE ACTS OF THE PACM COMBATANTS.....	23
CONCLUSION.....	25

INDEX OF AUTHORITIES

INTERNATIONAL TREATIES, CONVENTIONS AND AGREEMENT

- 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. 13, 15
- Convention Against the Taking of Hostages, *done* at New York, 17 December 1979, U.N. Doc. A/Res. 34/146 (1979), *reprinted in* 28 I.L.M. 1457 (1979). 6
- 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, *reprinted in* 10 I.L.M. 1151 (1971). 7
- 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, *reprinted in* 10 I.L.M. 133 (1971). 7
- Convention on International Civil Aviation, *signed* at Chicago, 7 December 1944, 15 U.N.T.S. 295, T.I.A.S. 1591, 3 Bevans 944, 61 Stat. 1180. 3, 6
- Convention on Offenses and Certain Other Illegal 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. 679, *reprinted in* 2 I.L.M. 1042 (1963). 7
- Geneva (IV) Convention Relative to the Protection of Civilian Persons in Time of War *signed* at Geneva, 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. 3365. 19
- Protocol Additional to the Geneva Conventions of 12 Aug. 1949, And Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, U.N. Doc. G.A. A/32/144 (1977) *reprinted in* 16 I.L.M. 1391 (1977). 14, 15
- 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 Corr. 1 to 11, *reprinted in* 21 I.L.M. 1261 (1982). 8, 18
- U.N. Charter. 1, 2
- Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27, (1969), *reprinted in* 8 I.L.M. 679 (1969). 6, 23

DOCUMENTS OF THE UNITED NATIONS

- Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/8082 (1970), *reprinted in* 9 I.L.M. 1292 (1970). 1, 14
- Excerpts from the Provisional Verbatim Records of the U.N. Security Council during Its Consideration of the Iraqi Complaint*, U.N. Doc. S/PV.2280, *reprinted in* 20 I.L.M. 970 (1981). 10

<i>Report the International Law Commission on the Work of its Thirty-First Session</i> , [1979] Y.B. Int'l L. Comm'n 87-136, U.N. Doc. A/CN.4/SER.A/1979/Add.1(part 2).	8
U.N.S.C. Res. 487, 36 U.N. SCOR. (2288 th mtg), U.N. Doc. S/RES/487 (1981), reprinted in 75 Am. J. Int'l L. 724 (1981).	4
U.N.S.C. Res. 4349, (June 23, 1960).	12
<i>Universal Declaration of Human Rights</i> , G.A. Res. 217, 3 GAOR, U.N. Doc. 1-777 (1948).	13

JUDICIAL AND ARBITRAL DECISIONS

<i>Barcelona Traction Light and Power Co.</i> (Belg. v. Spain), 1970 I.C.J. 3.	22
<i>The Caroline Case</i> , reprinted in 2 J. Moore, <i>A Digest of International Law</i> , 412 (1906)	10
<i>Corfu Channel</i> (U.K. v. Alb.), 1949 I.C.J. 4.	1, 4, 10, 11, 24
<i>Diversion of the River Meuse</i> , (Neth. v. Belg.), 1937 P.C.I.J. ser.A/B No. 70, 77.	22
<i>Factory at Chorzów</i> (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 17.	23
<i>Island of Palmas</i> (U.S. v. Neth.), 11 R. Int'l Arb. Awards 828 (1928).	1
<i>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276</i> , 1970 I.C.J. 4.	22, 23
<i>Military and Paramilitary Activities in and Against Nicaragua</i> (Nicar. v. U.S.), 1986 I.C.J. 14.	1, 4, 9, 22, 23
<i>Naulilaa Incident Arbitration</i> 2 R. Int'l Arb. Awards 1011 (1928).	22
<i>S.S. Lotus Case</i> (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10.	3
<i>U.S. v. Herrera</i> , 504 F. 2d 859 (5th Cir. 1975) cert. denied, 421 U.S. 1001 (1975).	12
<i>U.S. v. Toscanino</i> , 500 F. 2d 267 (2d Cir. 1974).	12
<i>United States Diplomatic and Consular Staff in Tehran</i> (U.S. v. Iran), 1980 I.C.J. 3, 43.	5, 23

TREATISES, DIGESTS AND BOOKS

6 M. Bassiouni, <i>International Extradition, United States Law and Practice</i> (1983).	3, 11
A. Billot, <i>Traite De L'Extradition</i> (1874).	19
J. Brierly, <i>The Law of Nations</i> (6th ed. 1963).	3, 22
I. Brownlie, <i>International Law and the Use of Force by States</i> 275 (1963).	9

B. Cheng, <i>General Principles of Law as Applied by International Courts and Tribunals</i> (1958).	23
M. Garcia-Mora, <i>International Responsibility for Hostile Acts of Private Persons Against Foreign States</i> (1962).	24
L. Goodrich, E. Hambro & A. Simons, <i>Charter of the United Nations</i> (3d ed. 1969).	8
G. von Glahn, <i>Law Among Nations</i> (1986).	21, 22
L. Henkin, <i>How Nations Behave</i> (2d ed. 1979).	9
A. Hershey, <i>The Essentials of International Public Law</i> (1904).	22, 23
H. Kelsen, <i>The Law of the United Nations</i> (1950).	9
P. Jessup, <i>A Modern Law of Nations</i> (1956).	9
W. Levi, <i>Contemporary International Law: A Concise Introduction</i> 242 (1979).	24
2 J. Moore, <i>A Digest of International Law</i> (1906).	10
1 J. Moore, <i>A Treatise On Extradition And Interstate Rendition</i> (1891).	19
J. Murphy, Punishing International Terrorists: The Legal Framework for Policy Initiatives (1985)	11, 12
M. Pearlman, <i>The Capture of Adolf Eichmann</i> (1961).	12
S. Pufendorf, <i>De Jure Naturae et Gentium Libri Octo</i> , bk. VIII, ch.V1 §12 (D.H. & W.A. Oldfather trans. 1964).	24
I. Shearer, <i>Extradition in International Law</i> (1971).	11
E. de Vattel, <i>The Law of Nations or Principles of the Law of Nature</i> (J. Chitty ed. 1834).	19
5 M. Whiteman, <i>Digest of International Law</i> 986 (1965)	2

ARTICLES

Bassiouni, <i>The Political Offense Exception in Extradition Law and Practice</i> , in <i>International Terrorism and Political Crimes</i> 398 (M. Bassiouni ed. 1975).	14
Bassiouni, <i>Unlawful Seizures of Persons by States as Alternatives to Extradition</i> in <i>International Terrorism and Political Crimes</i> (M. Bassiouni, ed. 1975).	13
Borkowski, <i>Recent Developments -- Use of Force: Interception of Aircraft</i> , Feb. 3, 1986, 27 Harv. Int'l L. J. 761 (1986).	7
Bowett, <i>Reprisals Involving Recourse to Armed Force</i> , 66 Am. J. Int'l L. 1 (1972).	22

Comment, <i>The Achille Lauro Incident and the Permissible Use of Force</i> , 9 Loy. L.A. Int'l & Comp. L.J. 481 (1987).	8, 9
Costello, <i>International Terrorism and the Development of the Principle <u>aut dedere aut judicare</u></i> , 10 J. Int'l L. & Econ. 483 (1975).	15
D'Amato, <i>Israel's Air Strike Upon the Iraqi Nuclear Reactor</i> , 77 Am. J. Int'l L. 584 (1983).	4
Dinstein, <i>Commentator: Counterproductive Clauses in Protocol I</i> , 31 Am. U.L. Rev. 849 (1982).	14
Friedlander, <i>Terrorism and International Law: Recent Developments</i> , 13 Rutgers L.J. 493 (1982).	21
Kittrie, <i>Patriots and Terrorists: Reconciling Human Rights with World Order</i> , 13 Case W. Res. J. Int'l L. 291 (1981).	14
Knisbacher, <i>The Entebbe Operation: A Legal Analysis of Israel's Rescue Action</i> , 12 J. Int'l L. & Econ. 57 (1977).	11
Lauterpacht, <i>Revolutionary Activities by Private Persons Against Foreign States</i> , 22 Am. J. Int'l L. 105 (1928).	23
Levie, <i>Pros and Cons of the 1977 Protocol I</i> , 19 Akron L. Rev. 537 (1986).	14
Levitin, <i>The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention</i> , 27 Harv. Int'l L.J. 621 (1986).	2, 5
Lillich & Paxman, <i>State Responsibility For Injuries To Aliens Occasioned By Terrorist Activities</i> , 26 Am. U.L. Rev. 217 (1977).	19, 20
Malanczuk, <i>Countermeasures and Self-Defence As Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility</i> in United Nations Codification of State Responsibility (M. Spinedi & B. Simma eds. 1987).	9
Mallison & Mallison, <i>The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?</i> , 15 Vand. J. Transnat'l L. 417 (1981).	4, 10
Murphy, <i>Legal Controls and the Deterrence of Terrorism: Performance and Prospects</i> , 13 Rutgers L.J. 465 (1982).	21
Murphy, <i>The Future of Multilateralism and Efforts to Combat Transnational Terrorism</i> , 25 Colum. J. Transnat'l L. 35 (1986).	21
Note, <i>Towards a New Definition of Piracy: The Achille Lauro Incident</i> , 26 Va. J. Int'l L. 723 (1986).	18
O'Higgins, <i>Unlawful Seizure and Irregular Extradition</i> , 36 Brit. Y.B. Int'l L. 279 (1980).	11
Rosenstock, <i>International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism</i> , 9 Den. J. Int'l L. & Pol'y 169 (1980).	6

Rubin, <i>Terrorism and the Laws of War</i> , 12 Den. J. Int'l L. & Pol'y. 219 (1983).	14
Sarkar, <i>The Proper Law of Crime in International Law</i> in <i>International Criminal Law</i> (G. Mueller & E. Wise eds. 1965).	16, 18
Schachter, <i>Self-help in International Law: U.S. Action in the Iranian Hostages Crisis</i> , 37 J. Int'l Aff. 231 (1984).	9
Schachter, <i>The Right of States to Use Armed Force</i> , 82 Mich. L. Rev. 1620 (1984).	2, 3, 5
Shubber, <i>The International Convention Against the Taking of Hostages</i> , 52 Brit. Y. B. Int'l L. 205 (1981).	16, 17
Suzuki, <i>A State's Provisional Competence to Protect Human Rights in a Foreign State</i> , 15 Tex. Int'l L.J. 231 (1980).	4, 13
Verwey, <i>The International Hostages Convention and National Liberation Movements</i> , 75 Am. J. Int'l L. 69 (1981).	14, 16
Waldock, <i>The Regulation of the Use of Force by Individual States in International Law</i> , 81 Académie de Droit Int'l, Recueil des Cours 455 (1952, Vol.II).	2, 3, 9
van Zwanenberg, <i>Interference With Ships on the High Seas</i> , 10 Int'l & Comp. L.Q. 785 (1961).	18
MISCELLANEOUS	
N.Y. Times, Aug. 16, 1973.	7, 8
N.Y. Times, Feb. 8, 1986.	7

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 is a small developing country bordering the territory of the State of Midbari.(C.3, 1). All of Shangri is in a near state of anarchy as a result of armed conflict between two religious groups struggling for political control of the nation.(C.3). The internal conflict has been especially significant in the City of Taluba.(C.3). The result for the Shangrian government has been a lack of effective control over parts of its territory.(C.3). The ongoing struggle has shattered the once prosperous economy of Shangri.(C.3).

Due to the internal confusion and the self proclaimed lack of effective control over Taluba, the People's Armed Conflict Movement (PACM) is able to operate out of Taluba relatively undisturbed.(C.3). The PACM is a well-organized group of self-proclaimed "freedom fighters". With the goal of establishing itself as the government in territory now controlled by the government of Midbari.(C.1). The "freedom fighters" view this territory as the homeland of their people.(C.2). Approximately 140 States have recognized the effective government of Midbari and through it conduct diplomatic relations.(C.2). Four other nations have shown their support for the "freedom fighters" by recognizing the PACM as the government-in-exile of the State of Midbari. However, Shangri and Yokum are not among the four recognizing States.(Cl.). The PACM does not hold or control any territory in Midbari.(C.1).

Because of the relative weakness of PACM as compared to the prosperous, militarily-strong and developed State of Midbari, PACM seeks to promote the liberation of its homeland by launching raids against Midbari from the territory of neighboring States.(C.1). The PACM has launched similar attacks against other countries on numerous occasions.(C.3). Portions of the territory of Shangri provide a primary source for these raids.(C.1). Several states including the militarily-strong Yokum informed the government of Shangri of the activities of PACM against Yokum economic interests and nationals.(C.3). After each excursion, the freedom fighters returned to Shangri without fear of retribution.(C.3). The government acknowledged the existence of the situation, however, it justified its inaction by pointing to its lack of effective control over the area in which the PACM is based.(C.3).

The current dispute arose out of actions taken by the "freedom fighters" to promote the liberation of their homeland.(C.2). On February 13, 1987, the Beilan-registered cruise ship *Hasdrubal* set sail at

13:00 hours from Port al-Haj, Saq, carrying 350 passengers.(C.1). More than 200 of the passengers were nationals of the Republic of Yokum with the remaining passengers representing ten other nationalities. The crew members were all Beilan nationals.(C.1).

Shortly after 18:00 hours, when the ship was in international waters in the Medford Sea, seven PACM “freedom fighters” sought to draw attention to their efforts to liberate their homeland by seizing control of the ship.(C.1). The “freedom fighters” were aided in their seizure of the ship through the use of automatic weapons and explosives.(C.1). During the initial stages of the seizure, a Yokum national and two crew members were killed.(C.1). Dr. Murpharius, who was the leader of the “freedom fighters” in control of the ship, assured reporters that no harm would come to the remaining passengers unless they try to escape or unless a rescue attempt is made.(C.2).

The “freedom fighters” which seized the *Hasdrubal* had boarded the ship at two different ports of call. Two of them had boarded at Port al-Haj; the others had boarded at the previous port of call, Taluba.(C.1). The nationality of these “freedom fighters” is unknown.(C.1).

For more than 48 hours, the cruise ship aimlessly wandered in international waters as the “freedom fighters” used the occasion to promote their cause.(C.2). Among other things, the “freedom fighters” told journalists (via the ship's radio) that they were “soldiers fighting for the liberation of Midbari--our homeland which is under alien occupation.”(C.2). It was further stated that the passengers were considered prisoners of war.(C.2). The group's leader, Dr. Murpharius, stated that he was “acting strictly under orders from my superiors at PACM headquarters in Taluba.”(C.2). Later in the day, PACM headquarters 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).

Meanwhile, Yokum dispatched a submarine and two guided-missile destroyers to follow the cruise ship with orders “to be ready to attempt a rescue operation.”(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). Although several other States easily could have ordered military units into the

area, none chose to do so.(C.2). Due to the possible danger to passengers and crew, no rescue attempt was made.(C.2, 3).

At 17:00 hours, on February 15, an order was radioed from PACM headquarters to the “freedom fighters” aboard the ship that their mission had been achieved.(C.3). Upon receipt of the order, the “freedom fighters” 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). Under threat of death by Dr. Murpharius, the Captain informed Taluba's Harbormaster that the ship was coming in with or without permission.(C.3). The Captain also informed Taluba's Harbormaster that Dr. Murpharius was demanding that the Shangrian government grant them asylum or they would begin killing the passengers on the ship.(C.4). After consulting with the Shangri government about the threat, the Harbormaster informed the Captain that the request would be granted.(C.4). The communications were intercepted by Yokum intelligence sources.(C.4). Subsequent to this interception, the Yokum Ambassador instructed the Shangri Foreign Minister that, when the ship entered the port of Taluba, the Shangrian government must honor its international obligations and arrest the perpetrators and free the hostages and the ship.(C.4).

Approximately six hours passed before the *Hasdrubal* reached port.(C.4). When the ship docked, the “freedom fighters” were greeted by a wildly enthusiastic group of members and supporters of the well-organized People's Armed Conflict Movement.(C.4). The entire affair was covered by a large contingent from the international press corps and received wide-spread publicity around the world.(C.4). The proclaimed heroes from the ship seizure were taken to PACM headquarters where they were given yet another heroes welcome. While the proclaimed “heroes” were being greeted by this wildly enthusiastic group of supporters, the Shangri government took no initial action; the next morning, however, under cover of dawn, Shangri troops arrested the seven “freedom fighters” involved in the *Hasdrubal* incident and placed them in a prison which was still under the control of the Shangri government.(C.4).

Two days later, the Yokum Ambassador handed a Diplomatic Note to the Shangri Foreign Minister demanding the extradition of the seven hijackers.(C.4). The Diplomatic Note called attention to the fact that although there was no bilateral extradition treaty between Yokum and Shangri, 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 declared 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).

Three days later, the Saq Ambassador to Shangri handed a similar Diplomatic Note to the Shangri Foreign Minister, demanding the extradition to it of the hijackers.(C.5). Meanwhile, the President and Minister of Justice of Saq informed the news media on the same day that “these heroes of the Revolution are obviously innocent.”(C.5). He further indicated that his country was seeking their extradition in order to have the honor of setting them free.(C.5).

The government of Shangri took actions to honor the Saq extradition request when on March 1 the government-requisitioned Shangri National Airlines aircraft took off from Taluba.(C.5) The Shangrian plane was bound for Saq with Dr. Murpharius and two other hijackers aboard.(C.5). The other hijackers remained in the custody of the Shangrian government .(C.6).

When the plane was well over international waters, Yokum fighters from the *Jimenez* intercepted it and forced it to land in Beilan.(C.5). Yokum Tigers then stormed the plane at Beilan Airport and took the “freedom fighters” prisoner.(C.5,6). The prisoners were handcuffed, put onto a military transport plane under heavy guard and flown directly to Abnera, Yokum's capital.(C.6). A Yokum Justice Department spokesman announced that the prisoners would be put on trial in a proper Yokum court.(C.6). Although the four 1949 Red Cross Geneva Conventions had been ratified by Yokum, their provisions as such have not been enacted as municipal law by the Yokum legislature.(C.6). The Hostages Convention had been enacted into municipal law legislation by both Shangri and Yokum.(C.6).

The government of Shangri demanded the return of the “freedom fighters” taken from the hijacked Shangri plane.(C.6). When the return was not forthcoming, the government of Shangri acknowledged that in retaliation for the flagrant violation of international law by Yokum in hijacking the Shangri aircraft, the remaining prisoners had been granted political asylum and accorded safe haven in Shangri.(C.6). The PACM hijackers were released from custody by the Shangrian government and continued to reside in Taluba.(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 Yokum breached its peremptory duty of respecting the sovereignty and territorial integrity of Shangri by its unjustified interference and forcible entry into the territory of Shangri, under the Charter of the United Nations, conventional and customary law, and general principles of law?
- II. Whether Yokum is in violation of its international obligations to Shangri as a result of the forcible abduction of persons within the territory of Shangri?
- III. Whether Shangri is justified under the rules of international law in exercising its sovereign right to deny extradition to a State, such as Yokum, which is lacking a proper nexus to assert jurisdiction over the PACM members?
- IV. Whether Shangri is justified in the granting of political asylum to the remaining PACM members as a non-violent and proportionate countermeasure stopping short of the prohibited use of force under the Charter of the United Nations and customary international law?

SUMMARY OF ARGUMENT

I

Shangri, as a co-equal sovereign and as a member of the United Nations, has a right to exercise control over its territory without interference by any other State. The principle of sovereign equality has resulted in an absolute prohibition of the use of force by a State against the territorial integrity or political independence of another State. This prohibition exists within the Charter of the United Nations and conventional law, as well as under customary law. Thus, States are under an obligation to resolve international disputes through peaceful procedures.

The prohibition of the use of force expressed in Article 2(4) of the Charter is an absolute duty. The Charter has been interpreted by the Security Council of the United Nations, by this Court, and by State practice as prohibiting any infringements of the sovereign rights and territorial integrity of a State through the use of force, regardless of the aggressor State's motive for the action.

Yokum has intentionally violated Shangri's sovereign rights of political independence and equality. By intercepting the Shangrian aircraft, Yokum has usurped Shangri's right to determine its international actions and to apply its domestic law. These violations are particularly damaging to Shangri due to its current position of civil war and internal strife. In addition to these grave infringements of sovereign rights, Yokum has forcibly interrupted Shangri's right to control its territory and, even more offensively, has invaded this territory with its armed forces to achieve its own political goals. The Charter of the United Nations imposes a duty upon States to settle their international disputes by peaceful resolution. Yokum, upon learning its desire for custody of the PACM combatants would not be fulfilled, immediately attempted to force compliance with its objectives by invading Shangri's territory and disrupting world peace. Such actions constitute a grave breach of the Charter.

The International Convention Against the Taking of Hostages reaffirms the Charter rules regarding the duty of States to refrain from the use of force in their international relations. Yokum has violated its duty in an attempt to assert its claims to jurisdiction under the Hostage Convention. The Convention explicitly provides that the rights created therein are not intended to be secured or protected through the use of force. Yokum has committed a material breach of the Convention contrary to its intended scope and purpose.

Shangri possesses a right of freedom and equality in international air travel under the 1944 Convention on Civil Aviation. This Convention, together with the Tokyo, Hague, and Montreal Conventions, creates an international regime prohibiting any interference with civil aviation. Yokum has committed an act of hijacking in violation of these Conventions and their customary law interpretation. Yokum has also violated Shangri's freedom of overflight of the high seas in violation of the Third United Nations Convention on the Law of the Sea.

These multiple violations of international law can not be justified under the doctrines of self-defense or self-help. Self-defense requires a necessary response to an armed attack. To invoke the doctrine against Shangri, Yokum must show that Shangri has attacked its territorial integrity. Shangri's actions do not meet this definition. The attempt to extradite the PACM combatants is by no means an aggressive action and the standard of an "armed attack" does not include assistance to rebels. Shangri cannot be considered to have attacked Yokum through their actions and, thus, Yokum's interception cannot be justified as a legitimate act of self-defense.

The doctrine of self-help is equally inapplicable. Self-help as a means of redressing legal rights is strictly prohibited under customary law. Yokum has forcibly effected jurisdiction over the PACM combatants in order to assert its claims against them. Such actions are a violation of international law.

In addition to the wrongful interception of the Shangrian aircraft, Yokum has abducted the PACM combatants in violation of the Charter of the United Nations, the Geneva Conventions, and customary law. The abduction constitutes an infringement of the basic human rights of the abducted combatants and a grave disruption of world peace. Yokum has also breached its duties under the Geneva Conventions through its failure to enact the Conventions into municipal law. The lack of proper procedures for the treatment of prisoners of war makes Yokum an improper detaining party under the Conventions and obligates its to return the combatants to Shangri upon request. Yokum must make proper reparations to Shangri and should be ordered to return the combatants.

II

Shangri's actions in releasing the PACM combatants are in accordance with international law. Under customary law, each State possesses the ultimate sovereign right to apply its criminal and extradition laws in whatever manner it may choose. This discretion may, however, be limited through

the assumption of conventional or customary duties to try or extradite. Shangri is obligated under the Geneva Conventions and under the Hostage Convention to try or extradite the offenders whose actions fall within the scope of their provisions.

Shangri is under no duty to prosecute or extradite the PACM members under the Hostage Convention. Acts of hostage-taking under the Convention require that the actors demand a particular response from a third party in exchange for the release of the hostages. The PACM did not issue any such demands during the course of the *Hasdrubal* incident. The seizure of the vessel was aimed at staging a protest of the Midbarian occupation of the PACM homeland and not as a bargaining tool for political concessions. Under the express language of the Convention, these actions would not constitute hostage-taking and, thus, the duty to try or extradite under the Hostage Convention does not apply in this situation.

Although the Third United Nations Convention on the Law of the Sea does not include such a duty, the customary law of piracy may require States to take action against alleged offenders. Piracy is defined as an act of violence against another ship undertaken for private ends. The PACM insurgents were acting for public ends as a demonstration of their political views. Such actions do not constitute piracy and the actors are not subject to prosecution or extradition under the customary law of piracy. Thus, Shangri has violated no international laws in releasing them.

Assuming Shangri was bound by a conventional duty to extradite the combatants under the Geneva Conventions, Yokum's wrongful actions prevented Shangri from fulfilling this obligation. Under the Geneva Conventions, all parties are required to enact legislation into their municipal law which implements the Conventions. Yokum has failed to comply with this duty and cannot be considered a competent party to receive extradition under these conventions.

Likewise, extradition to Yokum under the Hostage Convention would be improper. The Convention expressly prohibits the detaining party from extraditing offenders to a State when the prosecution of the offender may be prejudiced due to his political beliefs. Yokum does not support or recognize the goals of the PACM movement and apparently has strong political motivations contrary to these goals. The prejudices held by Yokum against the PACM are illustrated by their flagrant disregard of international law

in an attempt to abduct and punish them. Under the express language of the Convention, Yokum's request for extradition must be denied.

Shangri is further precluded from extraditing the PACM members to other competent States under these conventions or under customary law due to the interference of the Yokum military forces. It is a reasonable assumption that any future extradition attempts would encounter similar interference. Thus, Shangri was faced with only two alternatives, prosecution or release of the combatants.

The ongoing civil war in Shangri and the high risk of retaliation by the PACM operate to prevent Shangri from prosecuting the PACM combatants. The fundamental right of self-preservation overrides lesser conflicting obligations. Under customary law, State practice establishes that nations are not bound to compromise their sovereign existence to effect prosecution or extradition of armed guerrilla bands such as the PACM. Thus, Shangri was justified in releasing them as a means of self-preservation.

The release of the PACM is also a justifiable action under the doctrine of countermeasures. Yokum has wrongfully violated Shangri's sovereign and territorial rights. In response, Shangri has engaged in a peaceful and legitimate reprisal, an acceptable countermeasure under international law.

Yokum is fully barred by the Clean Hands doctrine from bringing any claims regarding Shangri's release of the combatants. The very source of Shangri's actions has been Yokum's wrongful and unlawful interference with its sovereignty. Yokum cannot assert Shangri's actions as part of a legal claim when Yokum is responsible for those actions.

III

The doctrine of State responsibility does not impose liability upon Shangri for the actions of the PACM. Shangri does not, however, support or aid the PACM in any way. Shangri is presently engaged in an internal civil war and must, as an exercise of self-preservation and self-defense, focus its resources on this area. Thus, Shangri has complied with the standards of due diligence as fully as possible and has not violated the standards of State responsibility.

I. YOKUM'S INTERCEPTION OF THE SHANGRIAN AIRCRAFT AND ABDUCTION OF ITS PASSENGERS CONSTITUTE VIOLATIONS OF SHANGRI'S SOVEREIGNTY AND TERRITORIAL INTEGRITY.

International law rests upon the basic premise of sovereign equality of States.¹ Sovereignty, within international law, represents the totality of rights a State holds and its ultimate authority to exercise those rights in controlling its territory and determining its political behavior.² In order to uphold the rights of States to exist as co-equal sovereigns despite their differing stages of development, the sovereign rights and territorial integrity of each nation must be protected from the intervention of other States.

This principle is firmly established in the post-World War II international legal order and has culminated in an absolute prohibition of the use of force by States in their international relations.³ States are obligated to settle their disputes by peaceful means rather than resorting to armed confrontations.⁴ The fundamental nature of the prohibition of force is evidenced by its inclusion in the Charter of the United Nations, as well as its application in customary norms and general principles of law.⁵

The actions of Yokum in forcibly intercepting and invading the Shangrian aircraft constitute a deliberate violation of Shangri's sovereignty, political independence, and territorial integrity. Shangri has been denied the right to determine its international actions and to apply its laws regarding extradition and criminal conduct. Through its unacceptable display of force, Yokum has effectively declared to the world that the government of Shangri has no right to control its own territory and dictate its own behavior. These inferences are particularly damaging to Shangri due to its current state of civil war and internal strife. The actions of

¹ U.N. Charter, art. 2, ¶ 1. *See also Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/8082 (1970), reprinted in 9 I.L.M. 1292 (1970) [hereinafter Declaration on Friendly Relations].

² "By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States." *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 43. *See also Island of Palmas* (U.S. v. Neth.), 11 R. Int'l Arb. Awards 828 (1928).

³ U.N. Charter art. 2, ¶4.

⁴ U.N. Charter art. 2, ¶3.

⁵ *See Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14.

Yokum have also deprived Shangri of its rights to engage in international air travel and overflight of the high seas. These acts of violence and depredation cannot be justified under the doctrines of self-defense or self-help. Yokum's desire to punish the PACM does not warrant this flagrant disregard of the basic principles of international legal order.

A. *Yokum's Interception Of The Shangrian Aircraft Is A Violation Of The Charter Of The United Nations, Conventional Law, Customary Norms, And General Principles Of Law.*

1. Yokum's forcible interception of the Shangrian aircraft constitutes a breach of duty under Article 2(4) of the Charter of the United Nations.

Article 2(4) of the Charter of the United Nations ("Charter") provides that "[a]ll members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."⁶ This provision was developed in the aftermath of World War II and was designed to express an absolute prohibition of the use of force in the relations between States.⁷ The obligation to settle all disputes by peaceful means and to refrain from the use or threat of use of force is generally viewed as the heart of the Charter and has been reaffirmed in many unanimously approved U. N. General Assembly declarations.⁸ The prohibition is two-fold as it protects both the sovereign rights and territorial integrity of States. Yokum's forcible diversion of the Shangrian national aircraft constitutes a violation of the duty to refrain from the use of force in contravention of these basic rights.

The sovereign rights of a State inherently include the right to determine its actions on the international and domestic plane. This principle is expressed as the right of political independence in Article 2(4) of the Charter. Acts in violation of a nation's political independence occur whenever "another state attempts through armed force to coerce it, to limit

⁶ U.N. Charter art. 2, ¶4.

⁷ Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *Académie de Droit Int'l, Recueil des Cours* 455, 493 (1952, Vol.II); see also 5 M. Whiteman, *Digest of International Law* 986 (1965); Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 *Harv. Int'l L.J.* 621, 627-29 (1986).

⁸ For a partial listing of these resolutions, see Schachter, *The Right of States to Use Armed Force*, 82 *Mich. L. Rev.* 1620 (1984).

its choices on the international plane, or to interfere with its domestic political regime.”⁹ The actions of Yokum in intercepting the flight of the Shangrian aircraft and in dictating its subsequent destination are within the scope of these prohibited means of coercion.

Shangri’s power to exercise its internal laws regarding the decision to extradite the PACM prisoners has been usurped by Yokum’s military forces. As a nation undergoing a period of civil war and internal strife, these violations are particularly damaging to Shangri both internationally and domestically. It is vital that the Shangrian government represent itself as a co-equal sovereign with the power to act on the international plane. Yokum has unjustifiably intervened in the domestic functions of the Shangrian government, further diminishing its sovereign authority. Such forcible intervention constitutes a serious and grave breach of the Charter.

In addition to these grave infringements of the sovereign rights protected under Article 2(4) of the Charter, Yokum has violated the territorial integrity of the Shangrian nation. The principle of territorial integrity provides that each State possesses an exclusive power of sovereignty within its own territory.¹⁰ No other nation may assert any form of control therein. The actions of Yokum in capturing and subsequently invading the Shangrian aircraft are a violation of this right.

The captured aircraft constitutes Shangrian territory the same as the land within its borders. This “territorial” status is attributed to aircraft under a basic principle of customary law¹¹ and is codified in the 1944 Convention on International Civil Aviation.¹² By capturing the plane, Yokum has restricted the right of Shangri to control its own territory and, even more offensively, has invaded this territory with armed forces in order to achieve its own political goals. These actions constitute a direct violation of Article 2(4).

⁹ Levitin, *supra* note 7, at 629 n.27.

¹⁰ See 6 M. Bassiouni, *International Extradition, United States Law and Practice* V § 5-3 (1983).

¹¹ *S.S. Lotus Case* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10.

¹² Convention on International Civil Aviation, *signed* at Chicago, 7 December 1944, 15 U.N.T.S. 295, T.I.A.S. 1591, 3 Bevens 944, 61 Stat. 1180 [hereinafter Chicago Aviation Convention].

Article 2(4) expresses an absolute prohibition on the use of forcible intervention.¹³ This Court firmly established the absolute nature of this prohibition in the 1949 conflict between Great Britain and Albania regarding the Corfu Channel.¹⁴ Great Britain argued that it was justified in the use of force aimed at securing its right of passage through international waterways.¹⁵ Because the use of force was not directly aimed against the territorial integrity or political independence of Albania, Great Britain claimed it was not a violation of international law.¹⁶ This proposition was soundly rejected by this Court in deciding the case. This Court noted that, notwithstanding its purpose, the British intervention was a direct violation of Albanian territorial sovereignty in contravention of international law.¹⁷ Thus, the fundamental rights of political independence and territorial integrity were deemed to be absolutely protected from the use of force regardless of the motive of the aggressor State.¹⁸

The conclusion that Article 2(4) prohibits even limited or “benign” assertions of force was reaffirmed by the language of the Security Council resolution issued in response to the Israeli air strike upon an Iraqi nuclear reactor on June 7, 1981.¹⁹ Israel argued that its raid was of a temporary nature not aimed at the taking of Iraqi territory and thus a justifiable use of force.²⁰ This proposition was rejected by the Council in its resolution which “strongly condemns the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.”²¹

¹³ Schachter, *supra* note 8 at 1625; Waldock, *supra* note 7, at 493; J. Brierly, *The Law of Nations* 415 (6th ed. 1963).

¹⁴ *Corfu Channel* (U. K. v. Alb.), 1949 I.C.J. 4.

¹⁵ *Id.* at 35.

¹⁶ *Id.*

¹⁷ *Id.* See also Suzuki, *A State's Provisional Competence to Protect Human Rights in a Foreign State*, 15 *Tex. Int'l L.J.* 231, 245 (1980).

¹⁸ *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 35.

¹⁹ U.N.S.C. Res. 487, 36 U.N. SCOR. (2288th mtg), U.N. Doc. S/RES/487 (1981), *reprinted in* 75 *Am. J. Int'l L.* 724 (1981). For a discussion of the factual background of the incident, see D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 *Am. J. Int'l L.* 584 (1983).

²⁰ Mallison & Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 15 *Vand. J. Transnat'l L.* 417 (1981). See also D'Amato, *supra* note 19.

²¹ U.N.S.C. Res. 487, 36 U.N. SCOR. (2288th mtg), U.N. Doc. S/RES/487 (1981), *reprinted in* 75 *Am. J. Int'l L.* 724 (1981).

The recognition of a right of intervention would result in a policy of force which would be available only to the most powerful States and would be easily manipulated to secure political objectives.²² For these reasons, Article 2(4) has been authoritatively interpreted by the Security Council as prohibiting any armed crossing by a State into the territory of another nation, regardless of the aggressor's motive.²³ The actions of Yokum constitute a grave infringement of the sovereign independence and territorial integrity of Shangri in violation of Article 2(4). This violation is in no way justified merely because the invasion was limited in time and purpose.

2. Yokum's failure to utilize peaceful means for resolution of the dispute constitutes a breach of duty under the Charter of the United Nations.

Article 2(3) of the Charter of the United Nations charges member States with a duty to "settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered." The "peaceful means" referred to are explicitly set out in Article 33(1) of the Charter and include a duty to seek a peaceful solution through negotiation, inquiry, mediation, conciliation, arbitration, or other peaceful means mutually agreed upon. Furthermore, Article 37(2) provides that parties to a dispute who are unable to reach a peaceful settlement are under a duty to refer the matter to the Security Council.

The actions of Yokum violated these provisions. Upon learning that its desire to obtain extradition and custody of the PACM members would not be fulfilled, Yokum immediately attempted to force compliance with its objectives by invading Shangri's territory and disrupting world peace. No preliminary efforts of negotiation, mediation, or other peaceful methods preceded this display of force. Yokum has ignored its duties to attempt a peaceful resolution through its own efforts or through the Security Council and has created a grave disruption of world peace contrary to the very purpose of the dispute resolution procedures. Such actions grievously undermine the foundations of law "vital for the security and well-being of the

²² See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 35; see also *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 106-13 (condemning the United States for engaging in such actions against a weaker State); Cf. Schachter, *supra* note 8, at 1625 (general condemnation for such measures of self-help).

²³ Levitin, *supra* note 7, at 629 n.27.

complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.’²⁴

3. Yokum’s forcible interception of the Shangrian aircraft constitutes a breach of duty under the Convention Against The Taking Of Hostages.

Article 14 of the Convention Against the Taking of Hostages (“Hostage Convention”) provides that the Convention is not to be “construed as justifying the violation of territorial integrity or political independence in contravention of the Charter of the United Nations.”²⁵ The provision was drafted with the intent of clarifying that the Charter rules regarding the use of force were in no way alleviated or modified by the Hostage Convention.²⁶ Through its actions in capturing and invading Shangrian territory, Yokum has violated this provision. An assertion of jurisdiction under the Convention may not be forcibly effected. This is precisely the situation Article 14 was designed to preclude.²⁷ By declaring that rights or duties under the Convention are not to be construed as modifying the prohibition of the use of force, the Convention inherently prohibits such intervention.

4. Yokum’s forcible interception of the Shangrian aircraft constitutes an act of aerial hijacking in violation of conventional and customary law.

Shangri possesses a right of equality in establishing international civil aviation under the 1944 Convention on International Civil Aviation.²⁸ The Convention is designed to grant a basic right of overflight and usage of airspace to all contracting parties.²⁹ Thus, its parties possess the right of an equal opportunity to establish and engage in international air travel. The forcible

²⁴ *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 43.

²⁵ Convention Against the Taking of Hostages, done at New York, 17 December 1979, U.N. Doc. A/Res. 34/146 (1979), reprinted in 28 I.L.M. 1457 (1979) [hereinafter Hostage Convention].

²⁶ Rosenstock, *International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism*, 9 Den. J. Int’l L. & Pol’y 169, 186 (1980).

²⁷ *Id.*

²⁸ Chicago Aviation Convention *supra* note 12..

²⁹ *Id.*, Preamble. According to article 31(2) of the Vienna Convention on the Law of Treaties, the Preamble constitutes part of the “context for the purpose of interpretation of a treaty.” See Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27, (1969), reprinted in 8 I.L.M. 679 (1969) [hereinafter Law of Treaties].

actions of Yokum in dictating the flight path of the Shangrian aircraft constitute a deprivation of this right.

Under Article 4 of the Convention, each contracting State is bound not to use civil aviation for any purpose inconsistent with the aims of the Convention. This principle of cooperation and safety in international aviation is reaffirmed by the Tokyo Convention of 1963,³⁰ the Hague Convention of 1970,³¹ and the Montreal Convention of 1971.³² Each of these conventions is narrowly drafted to outlaw specific acts of violence and hijacking. When analyzed from the perspective of an overall policy, however, these Conventions create a broad and absolute prohibition of interference with civil aviation. Under this international regime, interception by one State of another nation's aircraft is prohibited as an act of hijacking in violation of State sovereignty and basic human rights.

Recent events illustrate the *opinio juris* that under customary law the anti-hijacking regime applies to the actions of States in forcibly diverting the aircraft of another nation. On February 3, 1986, Israel forcibly diverted a Libyan civil airplane over international waters with the intent of capturing Palestinian leaders thought to be on board.³³ Israel attempted to justify its interception as an assault upon terrorism. This rationale, however, was not accepted as a justification for the intervention and Israel's actions were denounced by several States.³⁴ An emergency session of the United Nations Security Council was convened to discuss the diversion at which a resolution condemning Israel for "aerial hijacking and piracy"³⁵ was proposed. The resolution, however, was vetoed by the United States.³⁶ This veto was not

³⁰ Convention on Offenses and Certain Other Illegal 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. 679, reprinted in 2 I.L.M. 1042 (1963).

³¹ 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, reprinted in 10 I.L.M. 133 (1971).

³² 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, reprinted in 10 I.L.M. 1151 (1971).

³³ For a discussion of the facts see Borkowski, *Recent Developments -- Use of Force: Interception of Aircraft*, Feb. 3, 1986, 27 Harv. Int'l L. J. 761, 763 (1986).

³⁴ *Id.* at 764.

³⁵ N.Y. Times, Aug. 16, 1973, at A12, col. 6; Borkowski, *supra* note 33, at 764.

³⁶ *Id.*, Feb 8, 1986, at A3, col. 3.

surprising as the United States had engaged in a similar act of interception only four months prior to the Israeli diversion. The United States' interception of an Egyptian aircraft for the purpose of abducting terrorists known to be on board was also denounced as an act of air piracy by the international community.³⁷ In addition to these two incidents, Israel was denounced by the Security Council in 1973 for engaging in similar diversion.³⁸ The consistency of the international community's reaction to these events establishes a customary prohibition of aerial hijacking which has been flagrantly violated by Yokum.

5. Yokum's forcible interception of the Shangrian aircraft constitutes a breach of duty under the Third United Nations Convention on the Law of the Sea.

The sovereign rights of Shangri to act as an independent State in exercising freedom on the high seas have been violated. Article 87(1)(b) of the the Third United Nations Convention on the Law of the Sea³⁹ provides that each State shall have freedom of overflight of the high seas. In addition, Article 88 limits the use of the high seas to peaceful purposes, while Article 89 provides that no State may claim any portion of the high seas as being under its sovereign control. The actions of Yokum in forcibly attempting to control the high seas and to restrict Shangri's right of overflight are a direct violation of these provisions.

6. Yokum's forcible interception with the Shangrian aircraft cannot be justified under the doctrines of self-defense or self-help.

The Charter provides for a limited exception to the prohibition on the use of force. Article 51 declares that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations....” This doctrine of self-defense is described as an “inherent right,” implying that it is basic to the existence of States and is recognized by the Charter rather than created by it.⁴⁰ This “inherent right” of self-defense, however, serves to justify the use of force by a State only in the case of

³⁷ *Id.*, Feb 8, 1986, at A3, col. 3; *See also* Borkowski, *supra* note 33, at 765.

³⁸ N.Y. Times, Aug. 16, 1973, at A12, col. 6.

³⁹ 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 Corr. 1 to 11, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter Law of Sea].

⁴⁰ L. Goodrich, E. Hambro & A. Simons, *Charter of the United Nations* 344 (3d ed. 1969).

an armed attack upon that nation and only when the defensive measures are absolutely necessary and proportional to the armed attack.⁴¹ Such measures are justified only against the aggressor State who created the need for the defensive reaction.⁴²

The actions of Yokum in forcibly diverting the Shangrian airliner do not fall within the defined scope of self-defense. To properly invoke the doctrine against Shangri, Yokum must show that Shangri was engaged in an attack upon its territorial sovereignty.⁴³ Although the PACM was engaged in conflict with Yokum, no such attack can be found in the actions of Shangri. In the *Military and Paramilitary Activities in and Against Nicaragua* (“*Nicaragua case*”), this Court held that the concept of armed attack does not include assistance to rebels in the form of the provision of weapons or logistical or other support.⁴⁴ The case established a stringent and very aggressive standard for imputing the acts of rebels to the territorial State. Shangri’s actions do not reach the level of the assistance envisioned by this Court. Yokum did not act in response to an armed attack by Shangri and is, therefore, unable to invoke the doctrine of self-defense.

Some aggressive States have attempted to expand the doctrine of self-defense to include actions taken to prevent an anticipated armed attack. This doctrine is a direct contradiction of the language of Article 51 of the Charter and is not generally accepted by the international community.⁴⁵ The recognition of a right of anticipatory self-defense would effectively eliminate the function of Article 2(4) of the Charter.⁴⁶ If each State were allowed to unilaterally determine

⁴¹ For the elements of self-defense, see Comment, *The Achille Lauro Incident and the Permissible Use of Force*, 9 Loy. L.A. Int'l & Comp. L.J. 481, 484-85 (1987).

⁴² See Report of the International Law Commission on the Work of its Thirty-First Session, [1979] Y.B. Int'l L. Comm'n 87-136, U.N. Doc. A/CN.4/SER.A/1979/Add.1(part 2), art. 34 and commentary.

⁴³ Schachter, *Self-help in International Law: U.S. Action in the Iranian Hostages Crisis*, 37 J. Int'l Aff. 231, 249 (1984); see also Comment, *supra* note 41, at 485.

⁴⁴ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 103-04.

⁴⁵ I. Brownlie, *International Law and the Use of Force by States* 275-78 (1963); H. Kelsen, *The Law of the United Nations* 269, 297-98 (1950); P. Jessup, *A Modern Law of Nations* 165-66 (1956); L. Henkin, *How Nations Behave* 141-45 (2d ed. 1979).

⁴⁶ Malanczuk, *Countermeasures and Self-Defence As Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility* 197, in United Nations Codification of State Responsibility (M. Spinedi & B. Simma eds. 1987). See also, L. Henkin, *supra* note 45, at 141-5 (arguing that such anticipatory use of force gives States too much latitude).

when it was faced with a potential armed attack requiring a preventive strike, the prohibition of the use of force would be meaningless.

Assuming, however, that the doctrine of anticipatory self-defense may be appropriate in certain exceptional situations, such preventive strikes must still be premised on the threat of an armed attack which is manifestly imminent, rather than speculative or hypothetical.⁴⁷ As declared by the United States Secretary of State, Daniel Webster, “preventive action in foreign territory is justified only in case of an instant and overwhelming necessity for self-defense, leaving no choice of means and no moment for deliberation.”⁴⁸ The actions of Yokum do not meet this criteria. The interception of the Shangrian aircraft was not undertaken in response to an instant and overwhelming necessity for self-defense leaving no choice of means.

A comparison of Yokum’s actions to the Israeli bombing of the Iraqi nuclear reactor in 1981, alleged to be a necessary act of anticipatory self-defense, reaffirms this point.⁴⁹ Israel attempted to characterize its actions as an exercise of “its inherent right of self-defense...well within the meaning of Article 51 of the United Nations Charter.”⁵⁰ The Security Council, however, condemned the attack on the grounds that, among other reasons, it “was not a response to an armed attack on Israel by Iraq. There was no instant and overwhelming necessity for self-defense. Nor can it be justified as a forcible measure of self-protection. The Israeli intervention amounted to a use of force which cannot find a place in international law or in the Charter and which violated the sovereignty of Iraq.”⁵¹ Likewise, the actions of Yokum could not be justified as an attempt to prevent future PACM activities. Such a justification would be premised upon the mere speculation of a potential threat and would be violative of international law.

⁴⁷ Waldock, *supra* note 7, at 498.

⁴⁸ *The Caroline Case*, reprinted in 2 J. Moore, *A Digest of International Law*, 412 (1906).

⁴⁹ Mallison & Mallison, *supra* note 20, at 418.

⁵⁰ *Excerpts from the Provisional Verbatim Records of the U.N. Security Council during Its Consideration of the Iraqi Complaint*, U.N. Doc. S/PV.2280, at 37-60, reprinted in 20 I.L.M. 970 (1981) [hereinafter UNSC Iraqi Records]; see also Malanczuk, *supra* note 46, at 249.

⁵¹ UNSC Iraqi Records, *supra* note 50, at 977; see Malanczuk, *supra* note 46, at 251.

The actions of Yokum must also be denied any legal justification under the doctrine of self-help. The capture of the Shangrian aircraft is an impermissible attempt to exercise self-help. Such actions are violative of customary law prohibiting the use of force as a means of redressing legal rights. This issue was authoritatively decided by this Court in the *Corfu Channel* case.⁵² The case arose from a dispute between Great Britain and Albania over the status of the Corfu Channel as an international waterway. Two British naval vessels struck mines during their passage through the channel. To obtain evidence to support its suspicions that Albania was responsible for these injuries, Great Britain went back into the channel to gather evidence that the mines had been freshly laid. The British subsequently brought a claim before this Court alleging that Albania had violated international law in mining the channel. The Court fully recognized the right of British ships to pass through the international waterway, however, it condemned the British actions in sweeping the channel for mines.⁵³ Great Britain attempted to justify its actions as a means of self-help necessary to enforce its claim against Albania, thereby excusing the violation of Albanian sovereignty. The Court explicitly denied the existence of any right of self-help aimed at redressing a previously violated legal right.⁵⁴ The actions of Yokum must also be denied any legal justification under the rubric of self-help. Yokum is attempting to forcibly establish jurisdiction over the PACM combatants in order to assert its claims against them. The *Corfu Channel* decision affirms that such actions are a violation of international law.⁵⁵

B. Yokum's Abduction Of The PACM Combatants Is A Violation Of The Charter Of The United Nations, Conventional Law And Customary Norms .

Abduction is an illegal substitute for valid extradition procedures and is an unacceptable breach of international law.⁵⁶ Abduction is defined as “the seizure of a person by the agents of

⁵² *Corfu Channel* (U. K. v. Alb.), 1949 I.C.J. 4.

⁵³ *Id.* at 36.

⁵⁴ *Id.* at 30.

⁵⁵ See Knisbacher, *The Entebbe Operation: A Legal Analysis of Israel's Rescue Action*, 12 J. Int'l L. & Econ. 57, 66 (1977).

⁵⁶ O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 Brit. Y.B. Int'l L. 279, 280 (1980).

one state from another, non-cooperative state.”⁵⁷ At least three distinct violations of law are involved: 1) infringement of the sovereignty and territorial integrity of another State; 2) violation of the human rights of the individual unlawfully seized; and 3) disruption of world public order.⁵⁸ The very definition of abduction illustrates its status as an unacceptable use of force in violation of a State’s sovereignty and territorial integrity.

1. The forcible abduction of the PACM combatants constitutes a breach of duty under Article 2(4) of the Charter of the United Nations and customary law.

Yokum has engaged in an act of abduction in violation of Article 2(4) of the Charter and the customary norms of international law. This act constitutes a grave infringement of State sovereignty and territorial integrity and presents a threat to world peace and order. An example of the *opinio juris* of the international community regarding the illegality of abduction is presented by the Israeli kidnapping of Adolf Eichmann from Argentina.⁵⁹ The parties concluded a joint communique in which Israel admitted it had violated the fundamental sovereignty and territorial integrity of Argentina.⁶⁰ In addition, the United Nations Security Council recommended that Israel “make appropriate reparation [to Argentina] in accordance with the Charter of the United Nations and the rules of international law.”⁶¹ Likewise, Yokum should be required to make reparations to the Confederation of Shangri and return the abducted combatants.

The practice of the United States further illustrates the illegality of abduction under customary law. In the case of *United States v. Toscanino*,⁶² the defendant claimed to have been unlawfully abducted in Uruguay and transported to the United States for trial. Toscanino claimed the United States lacked jurisdiction and the court agreed that “a federal court must

⁵⁷ Bassiouni, *supra* note 10, at V §1-1; *see also* I.A. Shearer, *Extradition in International Law* 72-6 (1971).

⁵⁸ Murphy, *Punishing International Terrorists: The Legal Framework for Policy Initiatives* 90 (1985); M. Bassiouni, *supra* note 10, at V §2-1.

⁵⁹ Even the most ardent supporters of the abduction conceded that it was a violation of international law. *See, e.g.*, M. Pearlman, *The Capture of Adolf Eichmann* 161 (1961).

⁶⁰ Murphy, *supra* note 58, at 90.

⁶¹ S.C. Res. 4349 (June 23, 1960); Murphy, *supra* note 58, at 89-90.

⁶² *U.S. v. Toscanino*, 500 F. 2d 267 (2d Cir. 1974).

divest itself from jurisdiction over the person of a defendant where it has been acquired as a result of the government's deliberate, unnecessary, and unreasonable invasion" of the accused's basic rights.⁶³ The court indicated the defendant could assert the violation of international treaties, particularly the U.N. Charter, as a defense to jurisdiction.

Yokum has also violated the basic humanitarian rights of the combatants guaranteed to them under conventional and customary law. The Universal Declaration of Human Rights provides that all persons have the right to life, liberty, and security, and no one shall be subjected to torture, to cruel, inhuman or degrading treatment or punishment, or to arbitrary arrest.⁶⁴

Yokum's actions in forcibly and unfairly abducting the PACM combatants is a violation of these basic rights. As proclaimed by Bassiouni, "Surely, Charter principles and rules of international law include protection of human rights and proscribe the violation of those rights by the practices exemplified by the Eichmann case."⁶⁵ The infringement of the basic rights of the PACM prisoners constitutes an injury to Shangri due to its position of responsibility for those persons.⁶⁶ Sanctions for such acts include charges of kidnapping, return of the individual seized, plus damages paid to the individual, and reparations and apologies to the State in which the seizure occurred.⁶⁷ Yokum should be subjected to similar sanctions and ordered to return the kidnapped combatants.

2. The forcible abduction of the PACM combatants constitutes a breach of duty under the Geneva Conventions.

The Geneva Convention (III) Relative to the Treatment of Prisoners of War ("Third Geneva Convention") was specifically designed to ensure that participants in armed conflicts were accorded basic humanitarian rights while in detention.⁶⁸ The Convention applies "to all cases of declared war or of any other armed conflict which may arise between two or more of the High

⁶³ *Id.*; *Accord U.S. v. Herrera*, 504 F. 2d 859 (5th Cir. 1975) *cert. denied*, 421 U.S. 1001 (1975).

⁶⁴ *Universal Declaration of Human Rights*, G.A. Res. 217, 3 GAOR, U.N. Doc. 1-777 (1948), art. 3, 5, and 9.

⁶⁵ Bassiouni, *Unlawful Seizures of Persons by States as Alternatives to Extradition* 343, 367, in *International Terrorism and Political Crimes* (M. Bassiouni, ed. 1975).

⁶⁶ Suzuki, *supra* note 17, at 243.

⁶⁷ Bassiouni, *supra* note 65, at 368.

⁶⁸ *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 [hereinafter *Third Geneva Convention*].

Contracting Parties, even if the state of war is not recognized by one of them.”⁶⁹ Under the Convention, prisoner of war status is to be accorded to participants in the armed conflict who are members of the regular armed forces of a party to the conflict or who are members of irregular forces meeting certain criteria.⁷⁰

The First Protocol Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (“Protocol I”),⁷¹ adopted in 1977, ensures that combatants in a national liberation movement or war of self-determination will be accorded humanitarian treatment and prisoner of war status under the rules of the Third Geneva Convention.⁷² Article 1(4) of Protocol I provides that the armed conflicts to which the Third Geneva Convention applies shall include “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning the Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.” Protocol I reflects State practice illustrating that “self-determination and other advancements of fundamental human rights and freedoms have become a major goal of the international community and its jurisprudence in the post United Nations Charter era.”⁷³

The principle of self-determination is the right of all peoples to freely determine “without external interference, their political status and to pursue their economic, social, and cultural

⁶⁹ Third Geneva Convention, *supra* note 68, art. 2.

⁷⁰ *Id.* art. 4.

⁷¹ *Protocol Additional to the Geneva Conventions of 12 Aug. 1949, And Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, art. 44, U.N. Doc. G.A. A/32/144 (1977) reprinted in 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

⁷² See Levie, *Pros and Cons of the 1977 Protocol I*, 19 Akron L. Rev. 537, 540 (1986); Verwey, *The International Hostages Convention and National Liberation Movements*, 75 Am. J. Int'l L. 69, 77 (1981).

⁷³ Kittrie, *Patriots and Terrorists: Reconciling Human Rights with World Order*, 13 Case W. Res. J. Int'l L. 291, 297 (1981). For a discussion of State practice see Dinstein, *Commentator: Counterproductive Clauses in Protocol I*, 31 Am. U.L. Rev. 849, 852 (1982). Rubin, *Terrorism and the Laws of War*, 12 Den. J. Int'l L. & Pol'y. 219, 226 (1983). Bassiouni, *The Political Offense Exception in Extradition Law and Practice*, in *International Terrorism and Political Crimes* 398, 415 (M. Bassiouni ed. 1975).

development.”⁷⁴ This right may be implemented through the “establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by the people.”⁷⁵ The PACM combatants abducted by Yokum are freedom fighters exercising their fundamental right of self-determination in a legitimate effort to liberate their homeland from alien occupation. Under the express language of the Protocol, they are engaged in an “international armed conflict” governed by the laws of war and will qualify as “combatants” entitled to prisoner of war treatment according to the rules of the Third Geneva Convention.⁷⁶ By abducting the combatants and treating them as common criminals, Yokum has violated its duty to provide humanitarian prisoner of war treatment.

In fact, Yokum is inherently unable to apply the prisoner of war rules of the Third Geneva Convention due to its failure to enact any operational legislation into its municipal code.⁷⁷ The failure to enact implementing legislation into municipal law is a direct breach of Article 129 of the Convention. Article 129 is designed to ensure that all prisoners of war receive fair treatment and an impartial trial. The failure to grant such a fair trial is held to be a grave breach under Article 130. Yokum, having no internal law governing the procedure and operation of prisoner of war trials, is inherently unable to comply with these provisions.

This breach of duty is an infringement of the sovereign powers granted to Shangri under the Convention. Article 12 of the Convention creates a responsibility on the part of the Detaining Power holding combatants to ensure that the combatants are accorded proper treatment. Those prisoners may only be transferred by the Detaining Power to a power which is a party to the

⁷⁴ *Declaration on Friendly Relations*, *supra* note 1.

⁷⁵ *Id.*

⁷⁶ Article 43 of Protocol I defines combatants as any organized armed forces under a command responsible to the party in conflict even if that party is represented by a government or authority not recognized by an adverse party. Any combatant meeting this definition who falls into the power of an adverse party shall be a prisoner of war under article 44. Violation of the laws of war by the combatants will be treated as a forfeiture of prisoner of war status, but the combatant shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Geneva Convention.

⁷⁷ See Compromis, p. 6; Costello, *International Terrorism and the Development of the Principle aut dedere aut judicare*, 10 J. Int'l L. & Econ. 483, 485 (1975).

Convention and only after the Detaining Power has satisfied itself of the willingness and ability of the transferee to apply the Convention. If that power fails to carry out the provisions of the Convention in any important respect, the prior Detaining Power shall correct the situation or request the return of the prisoners and such requests must be complied with.⁷⁸ Thus, Shangri, as the original Detaining Power, had a sovereign right and duty to ensure that Yokum would comply with the Convention before granting custody of the PACM combatants to it. Yokum has violated Shangri's sovereign right to exercise this control and to protect the prisoners in its custody. Under Article 12, Yokum is an improper Detaining Party and must comply with Shangri's request for the return of the PACM combatants.

II. SHANGRI'S ACTIONS IN RELEASING THE PACM COMBATANTS ARE IN ACCORD WITH INTERNATIONAL LAW.

A. Shangri Is Under No Conventional Or Customary Duties To Extradite Or Prosecute The PACM Combatants.

A State having custody of a person accused of a crime can choose from several courses of action. The State may extradite, prosecute, or release the prisoner.⁷⁹ Under customary law, any of these alternative actions is acceptable. There are no absolute duties imposed to act in any particular manner.⁸⁰ A State is given the discretion to determine its conduct as an exercise of its sovereign powers. This discretion, however, may be limited by conventional duties. Among the conventions binding these parties, only the 1949 Geneva Conventions and the Hostage Convention create a duty to try or extradite alleged offenders.

1. The actions of the PACM are not within the scope of the Hostage Convention.

Although Article 8 of the Hostage Convention establishes a duty to try or extradite alleged offenders, the actions of the PACM do not fall within the scope of its provisions. Article I of the Convention provides that "any person who seizes or detains and threatens to kill, to injure or to continue to detain another party (hereinafter referred to as the "hostage") in order to compel a third party, namely a state. . . to do or abstain from doing any act as an explicit or implicit

⁷⁸ Third Geneva Convention, *supra* note 68, art. 12.

⁷⁹ Sarkar, *The Proper Law of Crime in International Law* 50, 72 in International Criminal Law (G. Mueller & E. Wise eds. 1965).

⁸⁰ *Id.*

condition for the release of the hostages commits the offence of taking of hostages (hostage-taking) within the meaning of the Convention.” (emphasis added). Thus, the act of hostage-taking consists of three elements: 1) the seizure or detention of hostages; 2) the threat to kill or harm the hostages; and 3) the compulsion of third parties to perform or refrain from performing a specific act in return for release of the hostages.⁸¹

Applying this definition to the actions of the PACM aboard the *Hasdrubal*, the seizure of the vessel did not constitute an act of hostage-taking. The Convention requires a threat to harm the hostage directed by the hostage-taker towards producing a certain result, the achievement of which is a condition for the release of the hostage. “For example, if a group of urban guerrillas were to seize the ambassador of State A and take him to their mountain base in protest against his government’s attitude towards their movement but made no threats to kill or injure him or continue to keep him unless his government changed its attitudes, no offence of hostage-taking under the Convention would have taken place...”⁸² If, however, the guerrillas were to demand that the government of State A change its policies towards their movement as a condition for the release of the seized ambassador, then the act would constitute hostage-taking. This is illustrated by the case of the American hostages in Tehran, which would have been outside the scope of the Convention had it not been for the demand of the militant students for the extradition of the former Shah of Iran.

In the instant case, the PACM combatants made no such demands, implicit or otherwise. The PACM is a group of combatants fighting for the liberation of their homeland, which is under alien occupation by the Midbarian government. The goal of the *Hasdrubal* seizure was “to demonstrate to the world the PACM’s determination and ability to wage the armed conflict for the liberation of our homeland.”⁸³ Once the PACM leaders felt that the purpose of the mission had been achieved, they informed the combatants that the demonstration and protest was concluded and that the ship and passengers should be released. The seizure was intended

⁸¹ Verwey, *supra* note 72, at 70 n. 6; Shubber, *The International Convention Against the Taking of Hostages*, 52 Brit. Y. B. Int’l L. 205, 210-15 (1981).

⁸² Shubber, *supra* note 81, at 213.

⁸³ Compromis, p. 2.

to operate as a protest of the Midbarian occupation and not as a bargaining tool to secure the exchange of political prisoners or other concessions. The statements of the PACM leaders that the mission had been accomplished and that the ship was to be docked and returned to the authorities ended the protest. The subsequent actions of the PACM were steps necessary to conclude its demonstration and to dock the ship safely in Taluba. The requests for permission to dock and for asylum and safe passage were essential to this conclusion. Thus, these actions do not constitute a violation of the Hostage Convention.

2. The actions of the PACM are not within the scope of piracy.

Under the general rules of rendition, a State is given the discretion to extradite, prosecute or release alleged offenders.⁸⁴ This discretion may be limited, however, by customary or conventional duties to prosecute or extradite. Although the Third United Nations Convention on the Law of the Sea does not impose such a duty, the customary law of piracy may limit States' discretion in this manner.

An act of piracy consists of an attack against another ship undertaken for private purposes.⁸⁵ Under this definition, the acts of insurgent passengers in seizing control of a ship for political motives would not constitute an act of piracy. The case of the *Santa Maria* affirms this point.⁸⁶ A group of Portugese insurgents aboard a Portugese vessel, the *Santa Maria*, seized control of the ship. Some of the crew members were killed during the takeover. The leader of the insurgents then asserted political demands upon the Portugese government for recognition of their group. Due to the public nature and goal of the seizure, the insurgents were not classified as pirates under customary law and were granted asylum from prosecution by Brazil. “[T]he insurgents were not pirates because they acted against the government they were challenging.”⁸⁷ Applying these customary norms to the actions of the PACM, there has been no

⁸⁴ Sarkar, *supra* note 79.

⁸⁵ Law of the Sea, *supra* note 39, art. 101.

⁸⁶ For a full description of the *Santa Maria* seizure see van Zwanenberg, *Interference With Ships on the High Seas*, 10 Int'l & Comp. L.Q. 785, 816 (1961).

⁸⁷ Note, *Towards a New Definition of Piracy: The Achille Lauro Incident*, 26 Va. J. Int'l L. 723, 741 (1986) (concluding analysis of a similar seizure involved in *Republic of Bolivia v. Indemnity Mut. Marine Ins. Co.*).

act of piracy. The PACM members were engaged in a political protest similar to the *Santa Maria* insurgents. Shangri is under no customary duty to try or extradite the insurgents under the law of piracy and was justified in releasing them.

3. Shangri is under no duty to extradite the PACM combatants to Yokum.

Extradition is generally defined as “the act by which one nation delivers up an individual accused or convicted of an offense outside of its own territory, to another nation which demands him and is competent to try and punish him.”⁸⁸ As a matter of political expediency, many States have concluded extradition treaties aimed at simplifying the extradition process. Absent such a treaty, however, there is no legal duty to comply with extradition requests and each State possesses “the unfettered discretion either to grant or to refuse the extradition request.”⁸⁹ Among the conventions binding these parties, the Fourth Geneva Convention and the Hostage Convention, if applicable, may impose a duty of extradition upon the Shangrian government.

a. Shangri’s duty to extradite under the Geneva Conventions does not extend to Yokum.

Under the Geneva Conventions, the principle of *aut dedere aut judicare* only applies to grave breaches of the conventions. The Geneva (IV) Convention Relative to the Protection of Civilian Persons in Time of War⁹⁰ (“Fourth Geneva Convention”) is the only one of these Conventions which provides that acts of hostage-taking constitute a grave breach. Article 146 of the Fourth Geneva Convention declares that a State party is under a duty to bring persons accused of hostage-taking before its courts or it may, in its discretion extradite such persons to another competent party. Thus, the Convention, like customary law, creates a discretionary right of extradition but does not impose a duty to extradite alleged offenders. The decision to deny Yokum’s request for extradition was entirely within the power of the Shangrian Foreign

⁸⁸ 1 J. Moore, *A Treatise On Extradition And Interstate Rendition* 3 (1891). See also A. Billot, *Traite De L’Extradition* 1 (1874).

⁸⁹ Lillich & Paxman, *State Responsibility For Injuries To Aliens Occasioned By Terrorist Activities*, 26 Am. U.L. Rev. 217, 219 n.1 (1977).

⁹⁰ Geneva (IV) Convention Relative to the Protection of Civilian Persons in Time of War signed at Geneva, 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. 3365 [hereinafter Fourth Geneva Convention]. The fundamental principle of protecting innocent civilians from the ravages of war was enumerated in E. de Vattel, *The Law of Nations or Principles of the Law of Nature* (J. Chitty ed. 1834).

Minister and was, in fact, compelled by Yokum's failure to enact municipal legislation administering the Geneva Conventions. Article 146 expressly requires all parties to implement legislation providing procedures to administer the Convention and to ensure a proper and fair trial rising to the standards contained in the Third Geneva Convention. Yokum has failed to comply with this duty and can not be considered a competent party able to apply the Convention's provisions. Extradition to Yokum for the purpose of prosecuting the PACM combatants under the Fourth Geneva Convention would be improper in light of these facts.

b. Shangri's duty to extradite under the Hostage Convention does not extend to Yokum.

Article 9 of the Hostage Convention prohibits Shangri from complying with Yokum's extradition request. Article 9 provides that "a request for extradition. . . shall not be granted if the requested state has substantial grounds for believing that the . . . person's position may be prejudiced due to his political opinion." The provision is aimed at securing a fair trial for alleged offenders and avoiding persecution of political actors. Yokum's abduction of four of the PACM combatants illustrates the vehement and irrational attitude it holds towards these freedom fighters. This strong desire to punish the PACM will be prejudicial in any judicial proceedings conducted by Yokum. Yokum has failed to recognize the legitimacy of the PACM as a national movement exercising its right of self-determination. Thus, the request submitted by Yokum for extradition under the Hostage Convention was properly denied.

c. Shangri was unable to effect any extradition due to Yokum's interference.

Absent a conventional duty of extradition, the decision to extradite is entirely within the discretion of the detaining State.⁹¹ Shangri attempted to exercise its sovereign discretion by extraditing the PACM prisoners to Saq, but was prevented from doing so by the Yokum intervention. Most likely any additional attempts at extradition would meet similar interference and could result in an armed conflict with substantial harm to both parties. Thus, Shangri was effectively foreclosed from extraditing the freedom fighters and was forced to choose between prosecution or asylum.

⁹¹ Lillich & Paxman, *supra* note 89, at 300.

B. Shangri Was Justified In Releasing The PACM Combatants Under Customary Norms And General Principles Of Law.

Among the treaties binding these parties, the Fourth Geneva Convention and the Hostage Convention, if applicable, create a duty to prosecute the PACM prisoners. Shangri, however, is released from any duty of compliance with these provisions due to its current state of civil war and internal upheaval and the prior wrongful acts of Yokum.

1. The doctrine of self-preservation justifies the release of the combatants.

Each nation has a fundamental right to continue its existence.⁹² This right of self-preservation is the most basic aspect of statehood. A State's need to focus its resources on self-preservation is deemed to override other lesser international obligations. Shangri is currently undergoing a period of civil war and internal strife elevating its concern for self-preservation to an even higher level.

The primary concern of the government is to resolve this internal violence. By attempting to prosecute the PACM prisoners, Shangri would be exposing itself to a substantial risk of retaliation. In its current weakened state, Shangri would be highly vulnerable to any attacks by the PACM guerrillas. The Shangrian government is under no duty to compromise its sovereign existence in this manner. The need for self-preservation overrides any such obligations. The French government has refused to act against guerrilla units such as the PACM based in its territory due to fear of reprisals.⁹³ It has been noted that the prosecution and imprisonment of such individuals often stimulates further terrorist activities.⁹⁴ Due to this tendency, States have developed a practice of self-preservation and neutrality effected through the non-prosecution of guerrilla combatants.⁹⁵ Under these circumstances, Shangri's exercise of discretion to release the combatants is in accord with State practice and customary law.

⁹² G. von Glahn, *Law Among Nations* 118 (1986).

⁹³ Friedlander, *Terrorism and International Law: Recent Developments*, 13 Rutgers L.J. 493, 500 (1982).

⁹⁴ Murphy, *Legal Controls and the Deterrence of Terrorism: Performance and Prospects*, 13 Rutgers L.J. 465 (1982).

⁹⁵ For recent examples of State practice see Murphy, *The Future of Multilateralism and Efforts to Combat Transnational Terrorism*, 25 Colum. J. Transnat'l L. 35, 47-49 (1986).

2. The doctrine of countermeasures justifies the release of the combatants.

The release of the PACM prisoners constitutes a legitimate countermeasure taken in response to Yokum's flagrant violations of international law. Even if the decision of the Foreign Minister is found to be a violation of a duty to prosecute or extradite the combatants, the release would be justified as an act of reprisal. Reprisals are "acts of retaliation for violations of law which caused injury to the State exercising the reprisal."⁹⁶ A reprisal may seek to impose a satisfactory settlement of the dispute created by the initial illegal act to compel the delinquent State to abide by the law in the future, or to secure reparation for the harm done.⁹⁷ There are essentially two conditions which must be complied with to effect a legitimate reprisal: (1) the act of the offending State must have been illegal and (2) a reasonable degree of proportionality must be shown to exist between the initial offense and the retaliatory action.⁹⁸ The actions of Shangri in releasing the combatants fall within the scope of these conditions. Yokum has committed several grave breaches of international law, particularly of the Charter of the United Nations, and has refused to comply with requests for reparation and return of the abducted combatants. These acts created a justification for the peaceful and proportionate countermeasure of releasing the remaining offenders.

3. Yokum's claims are barred by the "Clean Hands" doctrine.

Yokum's claims are fully barred by the "Clean Hands" doctrine. This Court and its predecessor have applied this doctrine as a general principle of law.⁹⁹ The basic premise underlying the "Clean Hands" doctrine is that an unlawful action cannot serve as the basis of an

⁹⁶ A. Hershey, *The Essentials of International Public Law*, 343 (1904); *See also* Brierly *supra* note 13, at 399.

⁹⁷ Bowett, *Reprisals Involving Recourse to Armed Force*, 66 Am. J. Int'l L. 1, 3 (1972).

⁹⁸ G. von Glahn, *supra* note 92, at 568. A third condition, failure to achieve redress before resorting to a reprisal, found in the *Naulilaa Arbitration* case, has found no support in customary law and is not encountered in modern practice. *See Naulilaa Incident Arbitration* 2 R. Int'l Arb. Awards 1011 (1928).

⁹⁹ *Diversion of the River Meuse*, (Neth. v. Belg.), 1937 P.C.I.J. (ser.A/B No. 70, 77); *See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, 1970 I.C.J. 4, 16 [hereinafter *Namibia*], 1971 I.C.J. 16; *Barcelona Traction Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3. For a more recent enunciation of this doctrine, see *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 393 (Schwebel, J., dissenting).

action at law.¹⁰⁰ This is expressed in the rule that “one party cannot avail himself of the fact that another has not fulfilled some obligation ... if the former party has, by some former illegal act, prevented the latter from fulfilling the obligation in question....”¹⁰¹

Under this rule, Yokum cannot assert any claims against Shangri regarding the PACM freedom fighters. Shangri’s attempt to extradite the offenders in accordance with international law was forcibly disrupted by Yokum’s wrongful interception. As a matter of self-preservation and the avoidance of additional intervention, Yokum’s actions forced Shangri to refrain from extraditing the remaining combatants. The subsequent release of these combatants was a direct result of Yokum’s wrongful violations of international law. Yokum is barred from asserting any such claims under the “Clean Hands” doctrine.

In addition, Yokum’s claims are brought under the Geneva Conventions and the Hostage Convention, both of which have been materially breached by Yokum. It is a commonly recognized principle of international law that a State which has intentionally or materially breached the provisions of a binding convention cannot assert that convention as a basis of legal rights.¹⁰² This principle is codified in article 60 of the Vienna Convention on the Law of Treaties¹⁰³ and was recognized by this Court as a binding customary norm.¹⁰⁴ Thus, Yokum is precluded from relying on these Conventions as a source of legal rights.

III. SHANGRI IS NOT RESPONSIBLE FOR THE ACTS OF THE PACM COMBATANTS.

A State is required to exercise its territorial rights in a manner duly respectful of the sovereign rights of other nations.¹⁰⁵ Thus, a State is obligated to exercise due diligence to prevent those within its territory from committing injurious acts against other States.¹⁰⁶ A

¹⁰⁰ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 155 (1958).

¹⁰¹ *Factory at Chorzów* (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 17, at 31.

¹⁰² *United States Diplomatic and Consular Staff in Tehran* (U. S. v. Iran), 1980 I.C.J. 3, 52 (Morozov, J., dissenting). See also *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 393 (Schwebel, J., dissenting).

¹⁰³ Law of Treaties, *supra* note 29.

¹⁰⁴ *Namibia*, *supra* note 99, at 46.

¹⁰⁵ Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, 22 Am. J. Int'l L. 105-06 (1928).

¹⁰⁶ *Hershey*, *supra* note 96, at 102.

State, however, does not automatically incur responsibility for hostile acts of persons committed from its territory.¹⁰⁷ If the State was unaware of such conduct¹⁰⁸ or knew but was unable to prevent the hostile activities,¹⁰⁹ the State would not be deemed responsible. As one commentator has noted, “What is required is a union of knowledge of the fact *and* the power to prevent, neither of these alone being sufficient to implicate [the State for] the crime of another...”¹¹⁰ For example, if a State was unaware that armed bands were basing operations within its territory or if it was aware of, but unable to prevent these operations, it would not be held to have violated customary laws governing State responsibility.¹¹¹

Applying this standard to Shangri’s inability to prevent the PACM operations, the doctrine of State responsibility would not impose liability on the Shangrian government for the acts of the PACM. Due to its current civil war and internal upheaval, the government of Shangri lacks effective control over certain portions of its territory. The PACM group has chosen these areas as a base for their operations. Shangri does not support their actions,¹¹² but due to its internal conflict, it is unable to expend its resources to remove the PACM at this time. The executive, judicial and military resources are fully occupied by the need to meet the direct attacks of its internal guerrilla fighters. In contrast, the PACM do not present an immediate threat to the continued existence of the Shangrian nation. The need for self-preservation and the right of self-defense takes precedence over the duty to prevent armed bands from utilizing a State’s territory to the detriment of another State. Thus, Shangri cannot be held responsible for the acts of the PACM group.

¹⁰⁷ M. Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States* 17 (1962).

¹⁰⁸ *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 18.

¹⁰⁹ W. Levi, *Contemporary International Law: A Concise Introduction* 242-43 (1979).

¹¹⁰ S. Pufendorf, *De Jure Naturae et Gentium Libri Octo*, bk. VIII, ch. V1 §12 (D.H. & W.A. Oldfather trans. 1964) (emphasis added).

¹¹¹ Levi, *supra* note 109, at 242-43.

¹¹² Clarification.

CONCLUSION

For the foregoing reasons, the Respondent Confederation of Shangri respectfully requests that this Honorable Court find, adjudge, and declare as follows:

1. That the interception of the Shangrian aircraft by Yokum constitutes a breach of international law.
2. That the abduction of the PACM combatants by Yokum constitutes a breach of international law.
3. That Yokum is obligated to return the combatants.
4. That Shangri has violated no duty under international law by releasing the PACM combatants.
5. That Shangri is not responsible under international law for the actions of the PACM combatants.

Respectfully Submitted,










