1978 PHILIP C. JESSUP

INTERNATIONAL LAW MOOT COURT

COMPETITION

JUDGES' BENCH MEMORANDUM

Not to be seen by student participants

1978 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

MEMORANDUM FOR JUDGES

I. General

The Jurisdiction of the Court is not in issue. The parties have submitted the dispute to the International Court of Justice by special agreement pursuant to Articles 36 and 40 of the Statute of the International Court of Justice. The rules, procedures and statute of that Court shall apply.

The participant may assume that the information given in the statement of facts which he/she considers relevant has been established by convening evidence presently before the Court. It may also be assumed that the threshold of violence in May 1976, reached the level of an armed conflict. Facts not included in the Statement of Facts, but implied, may also be assumed. The issues are (a) whether the armed conflict was international in character at the outset, or (b) whether it ever became international in character in respect to the relationship between the Federal Union and Indepesh.

If the conflict is international in character, privileged (or lawful) combatants captured by the adverse party are immune from criminal liability for participating in the conflict. They are also immune from criminal liability under the Municipal Law of the detaining power for acts against persons or property so long as these acts are not prohibited by international law.

On the other hand, if the conflict is non-international in character, rebels and insurgents remain liable under the Municipal Law in force both for treasonable acts and for ordinary crimes committed in the course of hostilities. Of course, if the government in power recognizes the belligerence of the insurgents, the immunity which the law of war provides to privileged combatants would also apply to the combatants of the belligerent party who conform to international standards for entitlement to prisoner of war status.

Within their discretion, governments affected by large scale civil wars sometimes accord limited prisoner of war treatement to the combatants of the adverse party without also recognizing the belligerence of that party, and without binding themselves to accord immunity for violation of treason laws, particularly to the leaders of the rebellion.

Illustrative of such a policy was the U.S. practice in the Civil War as expressed in Articles 152-154 of the Lieber Code, General Orders No. 100, April 24, 1863, which provided in part:

"152. When humanity induces the adoption of rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgement of their government, *** or of them, as an independent power. Neutrals have no right to make the adoption of the rules of War by the assailed government toward rebels the ground of their own acknowledgement of the revolted people as an independent power.

153. Treating captured rebels as prisoners of war,*** neither proves nor establishes an acknowledgement of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of War toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife, and settles the future relations between the contending parties.

154. Treating, in the field, the rebellious enemy according to the law and usages of war, has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly unless they are included in a general amnesty."

In recent practice, similar policies have sometimes been followed. In the Nigerian conflict, the central government considered the conflict to be an internal Nigerian affair, but treated captured Biafran combatants as prisoners of war. The operational code of conduct for the Nigerian Army, issued in July 1971 provided, that "Soldiers who surrender will not be killed, they are to be disarmed and treated as prisoners of war. They are entitled in all circumstances to humane treatment and respect for their person and their honor." Nigeria did not, however, consider herself bound by the Geneva Conventions except for common Article 3, dealing with non-international conflicts. (Rosas, The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflict (Finland 1977). Pp. 196-197, 277).

In the Vietnamese conflict, the U.S. and the Republic of Vietnam extended PW treatment to Vietcong guerrillas who were captured while actually engaging in, or for whom there was proof of their having participated or engaged in, combat or a belligerent act under arms, other than an act of terrorism, sabotage or spying (Annex A, to MACV Directive No. 381-46, 27 Dec. 1967 62 Am. J. Int'l Law 766 (1969). In view of their South Vietnamese nationality, however, the RVN did not consider itself bound by the provisions of Article 7 of the 1949 Geneva Prisoner of War Convention which provides that

prisoners of war may in no circumstances renounce their rights or status under the Convention, Thus, volunteers among Vietcong prisoners of war were permitted to participate in RVN war effort. (Rosas, op cit 170-171).

For a short general review of contemporary law applicable to civil wars, including war of national liberation, see Baxter, "Ius in Bello Interno; The Present and Future Law" in J. Moore, (ed,) The Law of War and Internal Conflict (1973). Pp. 515-536. For a balanced exposition of the case for considering colonial wars of national liberation as international armed conflict see Abi-Saab, Georges, "Wars of National Liberation and the Laws of War", 3 Annals of International Studies, 93-117(1972) attached to this memorandum. Judges should familarize themselves with United Nations General Assembly Resolution 2625 (XXV) Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United Nations (1970) (attached to this memorandum). Reference to this resolution was specifically made in the text of Article I, Protocol I Additional to the Geneva Conventions at 12 August 1949, (adopted 10 June 1977, but not in force as of 15 December 1977).

II. The Issues Before the Court

A. Context of the Issues Raised by the Pleadings.

After the military defeat of Balistan, a cease fire was concluded under the terms of which Balistan acknowledged prospectively the independence of Indepesh and the authority of its government to administer the territory of Indepesh free of Balistan control.

During the course of the ensuing negotiations for a peace treaty, the negotiators settled many outstanding issues. In the context of negotiating a claims settlement agreement, however, Balistan denied liability for claims of Indepeshi combatants who had fallen into the hands of Balistan, arising from alleged mistreatment from the outset of hostilities until the cease fire agreement.

Balistan, acknowledging that the rules of international law applicable in international armed conflict applied from the time of the cease fire agreement to the relationship between Balistan and Indepesh, demanded the immediate release and repatriation of its combatants. In accordance with Article 118, paragraph 1 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, Indepesh, fearing that the repatriation of the prisoners held by it would enable Balistan to renew hostilities, refused such repatriation until the conclusion of a peace treaty.

B. The Legal Issues.

1. Was Balistan's treatment of Indepeshi combatants in violation of international law? If so in what respect?

a. Was the armed conflict which began in April 1976 between the Federal Union of Balistan and Indepesh an international armed conflict? If not at the outset, when if at any time before the cease fire did it become an international armed conflict?

b. Were Indepeshi combatants, or any of them, entitled as a matter of international law to the status or treatment as prisoners of war?

c. If, and while, the armed conflict was non-international in character, was Balistan's treatment of any Indepeshi combatants in its power violative of international humanitarian law applicable in non-international armed conflict, or of internationally enforceable human rights norms? If so, what specific course of conduct was in violation of international law?

d. If, and while, the armed conflict was international in character, was Balistan's treatment of those Indepeshi combatants in its power who were not entitled to prisoner of war status violative of international law? If so, what specific conduct was a breach of international law?

2. Did an obligation under international law to release and repatriate prisoners of war and other captured combatants become vested upon the conclusion of the cease fire agreement?

III. Anticipated Argument For Each Party on the Issue.

a. Issue No. 1a. International Character of the Conflict.

1. For Indepesh

a. The claim of Indepesh for prisoner of war status of its combatants is predicated on the claim that the armed conflict was international in character and that Balistan was bound to apply the law applicable to international armed conflict.

(1) The conflict from its outset in April 1976 was not only international in character but also a clear interstate armed conflict.

(2) In their exercise of the U.N. Charter Right to Self-determination (Art.1, par.2; Art. 55), as elaborated in 1970 UNGA

Declaration on Principles of International Law Concerning Friendly Relations, the people of Indepesh established an independent state on 2 April, 1976. The use of forcible means by Balistan to deprive the people of their right to self-determination, freedom and independence, and the resistance thereto by the people of Indepesh, established a situation of armed conflict which was international in character, under the terms of the declaration on friendly relations.

(3) The Declaration is declaratory of present international law applicable in armed conflict because it was adopted by consensus without a Note on abstention by the UNGA after seven years of negotiations and because it is cited expressly in the text of Protocol I, Additional to the 1949 Geneva Convention adopted on 10 June, 1977, by the Diplomatic Conference on International Humanitarian Law as a basis for applying international law applicable to international armed conflict to peoples fighting for self-determination.

(4) The independent state of Indepesh was from the outset represented by a government and had all of the attributes of a state (people, territory, armed forces, administration and the demonstrated capability and willingness to observe international law applicable in armed conflict).

(5) Assuming, without conceding, that the conflict was non-international from the outset, it became an international conflict when Indepesh was recognized as a state by third parties. In any event the armed conflict became international on July 1, 1976, when Media entered the conflict.

(6) Indepesh concedes that it had previously exercised its right to self-determination when it voluntarily became a state in the Federal Union of Balistan, but this action became voidable when the Federal Union engaged in material breaches of the Articles of Association and particularly when the people of Indepesh were denied an equal participation in the Federal Government and were subjected to a form of racial discrimination. (Article 1, International Convention on the Elimination of all Forms of Racial Discrimination (Entered into force on January 1, 1969) defines "racial discrimination" follows:

> "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.")

(7) The ultimate acknowledgement by Balistan in the cease fire agreement was not prospective only but served to acknowledge the independence of Indepesh from the outset of the hostilities.

2. For Balistan.

a. Because of its own experience in a peaceful struggle for self-determination and independence from colonial domination, Balistan firmly supports the principle of self-determination as enshrined in the U.N. Charter, the Declaration on Principles of International Law Concerning Friendly Relations, and in Article 1, Protocol I additional to the 1949 Geneva Conventions (10 June, 1977).

b. The principle, however, was not applicable to provide Indepesh with international personality because it had already exercised in full its right to self-determination when it decided to associate itself with the Federal Union and integrated itself as a component state of that Federal Union (U.N. Declaration on Principles of International Law Concerning Friendly Relations). The Declaration provides:

> "Nothing in the foregoing paragraphs shall be construed as authorizing any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples*** and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color."

c. Under the provisions of Article 1, Protocol I Additional to the 1949 Geneva Conventions, only armed struggles for self-determination against "colonial domination and alien occupation and against racist regimes" justify the status of international armed conflict. The negotiating record, as well as the practice of states involved in recent wars of secession (Nigerian-Biafra, Ethiopia- Eritrean Liberation Front, Iraq-Kurds, Pakistan-Bangladesh, Congo-Katanga) show a clear intent by the proponents of the provision for wars of national liberation to limit the doctrine to colonial wars and to struggles against oppressive racial minorities. (Rosas, op. cit. pgs. 270-276) None of these situations are established by the circumstances of this case. Neither the negotiating record of the initiatives to Reaffirm and Develop International Humanitarian Law Applicable in Armed Conflict nor the practice of states supports the contention that either recognition by third states or direct intervention by a third state converts a civil war into an international armed conflict so far as the relations of the government in power and the rebel authorities are concerned. Various proposals to effect such a result based on

19th century examples were overwhelmingly rejected by the diplomatic conference. (Rosas, op cit. 241-235, 282-288), but intervention by a third state may result in international armed conflict between the intervening state and the government in power. Balistan had consistently acknowledged that law applicable to international armed conflict applied in relation to Median forces aiding Indepesh. Thus Balistan has accorded to Median combatants prisoner of war status.

d. The negotiating record of the diplomatic conference also shows a rejection of the concept that objective factors may create a situation of de facto belligerence to which the rules of international armed conflict apply automatically by operation of law. In fact, the objective factors usually associated with the threshold of belligerence have been expressly made the threshold which must attained for Application of Protocol II on non-international armed conflict. (Rosas op.cit.277-281). Despite some 19th century dictum (Prize Cases, 2 Black (67 U.S.) 635 (1862)), to the contrary, the practice of states and the negotiating record of the recent diplomatic conference indicate clearly that only recognition of belligerence by the government in power, its unilateral discretion or mutual agreement, can result in the application of international armed conflict norms in a civil war.

e. The ultimate recognition of Indepesh's statehood by Balistan at the conclusion of active hostilities was prospective only; it did not, and could not, convert lawful acts performed in good faith into unlawful acts by a retroactive change of underlying premises.

B. Issue 1b, Entitlement of Indepeshi Combatants to P.W. status or treatment.

1. For Indepesh

Having assumed the obligations under applicable international conventions relative to the treatment of prisoners of war, Indepesh and her combatants were entitled to have them applied fully by Balistan.

a. From the outset of the hostilities Indepesh was bound, through state succession, to customary international law, as well as all multilateral treaties binding on the Federal Union of Balistan. These include (but are not limited to) the Hague Convention No. IV of 1907 and the Regulations attached thereto Respecting the Laws and Customs of War on Land, and the four 1949 Geneva Conventions, (except to the extent that its reservation to Art. 85 of the Convention releived it of certain obligations under that convention) and the International Covenants on Civil and Political Rights and Social and Cultural Rights. Indepesh reaffirmed its obligations under the

Geneva conventions by formal accession in May 1976. The obligations under the conventions became effective immediately because of the on going hostilities (1949GPW Art. 141). Balistan's rejection of this accession on the ground that it does not recognize Indepesh as a state can have no effect in view of Balistan's obligations under Article 1 and 2 common to the Conventions.

b. Assuming, without conceding, that Balistan's rejection of the accession precluded the establishment of formal treaty relations between Indepesh and Balistan, Indepesh's action must be construed as a declaration that it accepts and applies the provisions of each of the 1949 Geneva Conventions, under Common Article 2, para. 3. Therefore, Balistan was bound by the 1949 Geneva Convention Relative to the Treatment of Prisoners of War in relation to Indepesh until the final release and repatriation of all prisoners of war.

c. With respect to persons not protected under the 1949 Geneva Prisoner of War Convention, Balistan remains bound to afford them protection under customary international law (including the 1907 Hague Convention No. IV and its annex and the humanitarian principles of the 1929 Geneva Convention Relative to the Protection of Prisoners of War, which were held, at Nuremberg to have passed into customary international law (U.S.v. Leeb, "High Command Case" XI Trials of the War Criminals 534, 535, 538, 587). Additionally, Balistan would be bound to accord toany person who does not qualify for PW status, the safeguards and protections mandated by the 1949 Geneva Convention for the Protection of Civilian Persons (see Art. 4 for a definition of protected persons and PartIII for scope and details of protection) and the human rights treaties to which Balistan is a party.

2. For Balistan

The armed conflict, insofar as it involves relationships between the Federal Union and one of its component states which attempted to secede, remained non-international in character, until the cease fire agreement. Accordingly, Balistan remained bound only by Article 3 common to the Conventions and the two 1976 Human Rights Treaties which are subject to certain emergency derogations. Balistan's treatment of Indepeshi captives exceeded in every respect the standards of those instruments.

a. Assuming, without conceding, that the armed conflict somehow became international at some time prior to the cease fire, Balistan's rejection of the Indepesh accession to the 1949 Prisoner of War Convention would preclude the establishment of treaty relations as to that convention. Balistan's rejection was predicated primarily on its non-recognition of Indepesh as a state. (Note: Balistan might argue that Indepesh's reservation is incompatible with the purpose and intent of the 1949 Geneva PW Convention, , invoking Art. 19(c). of

the Vienna Convention on the Law of Treaties. As a result, Balistan could conclude that Indepesh's reservation was so fundamental that on that basis alone it could not be considered to be a Party to the Geneva Prisoners of War Convention. (Article 20, Vienna Convention on the Law of Treaties, 23 May 1968, 8 International Legal Materials 679 (1969) (While this Convention may not be in force for some States, it is treated as declaratory of the general and customary international law). This argument however, would preclude its later contention that the obligation to repatriate under Article 118 vested when the cease fire agreement was concluded and Balistan recognized the independence of Indepesh).

b. In any event, Balistan was not bound by the PW Convention vis a vis Indepesh under Art. 2, Para.3 of that Convention, because such obligation arises only when the non-party not only accepts, but also applies the provisions of the Convention. The dismal record of Indepesh s treatment of captured combatants shows clearly that it had no intention to apply the Convention. A partial list of breaches resulting from policy decisions follows:

(1) Reprisal execution of prisoners of war in violation of GPW Article 13, para. 3, which prohibits reprisals against prisoners of war. The same prohibition exists under customary international law through Art. 2, 1949 Geneva Convention Relative to the Protection of Prisoners of War.

(2) Denial of PW status on a wholesale basis on the alleged ground that Balistanis were guilty of crimes against peace, crimes against humanity and war crimes. This blanket declaration cannot be justified even under the reservation to Art. 85 to GPW (3rd Convention). Under that reservation, loss of PW status becomes effective only after final conviction, but Indepesh deprived all PW's of their status without any effort to fix individual culpability. It thus clearly indicated that it had no intention to apply the Prisoner of War Convention.

(3) The further contention justifying denial of PW status to members of the Air Force with the argument that the air force was not conducting its operations in accordance with the laws and customs of war is a strained and highly dangerous construction of GPW Art.4 A(2), which is applicable only to irregular combatants whose nexus to the armed force is nebulous. In any case the courts of Indepesh have rejected this contention.

(4) Prison camps did not conform to minimum standards under the Conventions.

(5) The employment of prisoners of war on the construction of air raid shelters without permitting them to construct such shelters for themselves during working hours clearly violated GPW Art. 23.

f. Discimination against air force prisoners of war by way of reduced rations is a clear violation of GPW Articles 16 and 26.

C. Specific acts or omissions by Balistan alleged to be violative of international law applicable to armed conflict relative to treatment of captured combatants considered under both hypotheses, international and non-international armed conflict (Issues 1c and 1d, as well as 1 General):

1. Treason trials and execution of high ranking Indepeshi officers.

a. If considered an interstate armed conflict, this action would be a grave breach of the 1949 PW Convention. (1949 GPW Art. 130). As combatants, these officers are immune from criminal liability for participation in the armed conflict under the Conventions and under customary international law. (See Discussion under IA above).

b. If considered as a non-international conflict there is nothing in Common Article 3, or under the Human Rights Treaties to which Balistan was a party, which prohibits such trial or punishment provided minimum due process standards were applied. The action taken is consistent with the practice of states affected by large scale civil wars where PW treatment is extended to rebel captives even though belligerence is not recognized.

2. Reeducation and efforts to recruit Indepeshis into Balistan armed forces.

a. If viewed as an international armed conflict:

(1) Balistan would seek to justify the reeducation program under 1949 GPW Art. 38, which provides "While respecting individual preference of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational and recreational pursuits*** and shall take measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment."

On the other hand, the ICRC commentary on this provision sums up the dangers of this practice:

"***Where propaganda involves inhuman treatment, it is ipso facto contrary to the Convention, since such treatment is expressly prohibited. Where no inhuman treatment is involved, propaganda is nevertheless usually dangerous*** and contrary to the convention since it may be inconsistent with equality of treatment, respect for honor and*** the present provision which affirms the right of prisoners to use their leisure time according to their own preference." (Commentary to III Geneva Convention, ed. J. Pictet. Geneva (1960) Page 237.)

(2) It would seem that so long as participating in an educational program is voluntary, and does not result in preferential or discriminatory treatment among PW's, it is not violative of the Geneva Conventions. Experience indicates, however, that reeducation usually results in discrimination. Discriminatory treatment against those who do not participate in recruitment into the armed forces of the detaining power is a clear violation of GPW Art. 7, which prohibits changes in the status of prisoners of war even at their own request. Compulsion to effect such recruitment is a grave breach (GPW Art. 130) and is also violative of customary international law (1907 HR. Art. 6). Voluntary recruitment, however, was not prohibited prior to 1949 Geneva Conventions.

b. If viewed as a non-international armed conflict:

Unless prisoners of war treatment is accorded in a civil war the conduct is not violative of any international law norm applicable in non-international armed conflict. The underlying purpose of each party in such conflicts is to broaden its base of allegiance. Even where PW treatment is accorded, the practice of states is to provide encouragement for a transfer of to provide encouragement to assure allegiance to the detaining party. There is authority to the effect that a party is not bound to treat its own nationals as PW's. (1949 GPW Art. 100, 102; Public Prosecutor v. Oie Hee Kio (1968) 2 W.L.R. 715 (PC) noted in 63 Am. J. Int'l L.290 (1969); cf. re Territo 156.2d 142 (9th Cir.1946)

3. Reduction of rations of captives as a reprisal.

a. If viewed as an international armed conflict:

Reprisals, are acts of retaliation which are otherwise illegal, but which become legally acceptable for the sole purpose of inducing the adversary to cease a manifest and grave violation. Reprisals are legally justifiable only if other means of securing the same objective have failed, after warning, and on the order of the highest available authority (FM. 27-10, The Law of Laws Warfare , Para. 494). Reprisals against prisoners of war and against civilians in the hand of an adverse party are prohibited respectively by Art. 13 of the 1949 PW Convention and by Art. 33 of the Civilian Convention.

Reprisals against prisoners of war were also prohibited under any circumstances by Art. 2 of the 1929 Geneva Convention for the Protection of Prisoners of War. As the general principles of that convention were held at Nuremberg to have passed into customary international law, and are treated as part of the jus cogens, it is arguable that such reprisals are prohibited even if the 1949 Convention is not applicable, particularly as the act involves inhuman treatment

seriously endangering health of prisoners of war. (High Command Case, U.S. v. von Leeb, XI, Trial of War Criminals before the Nuremberg Military Tribunals 534, 535, 538, 587).

b. If viewed as a non-international conflict.

Reprisals as such are not expressly prohibited in non-international conflicts. Justification for reprisals is usually stated to be the unavailability or ineffectiveness of other enforcement means. Generally the availability of criminal sanctions within domestic jurisdiction is greater than in interstate conflicts, thus diminishing the need to resort to reprisals in non-international conflicts.

4. Contract Combatants.

(a) If the conflict is an international armed conflict, the following issues are presented:

(1) Are they entitled to PW status or treatment?

Art. 5, Hague Conv. No. V requires neutrals to prohibit recruitment of combatant units on their territories, but under Art. 6 of that Convention, a neutral is not required to prevent individuals from leaving to serve in foreign armed forces in war. Art. 17 of that convention provides the governing norm to be applied where a neutral individual participates in the hostilities,"*** the neutral shall not be more severly treated by the belligerent, as against whom he had abandoned his neutrality, than a national of the other belligerent state would be for the same act."

The GPW does not deal with mercenaries as such. If they qualify as PW's they are entitled to PW status. U.N. Resolutions on this subject are neither authoritative nor dispositive of this issue. It is to be noted that, in the relevant UNGA resolutions condemn as outlaws only mercenaries fighting against people struggling for self determination. Presumably those assisting freedom fighters, are not stigmatized. (UNGA Res. 2965 (XXIII) 1968); UNGA Res. 2708 (XXV) (1976) and UNGA Res. 3103 (XXVIII) (1973). UN. Doc. A/9030(1974).

Whether the contract combatants held by Balistan were entitled to be PW's is a question of fact for initial determination by GPW Art.5 tribunal, and is subject to review by the ICJ under the submitted issues. It seems that the controlling question is whether they were members of the Indepesh armed forces (including Volunteer Corps) or whether they are independent contractors performing services for high pay and not subject to the military law of Indepesh.

(1) In any event they are entitled to basic human rights including humane treatment. As they appear to be nationals of states with which Balistan maintained diplomatic relations (or at least consular relations), they are probably not protected persons under Article 4 of the 1949 Geneva Convention for the Protection of Civilians. See 1949 Geneva Convention for the Protection of Civilians, Art. 4, para.2.

(b) If the conflict is considered as non-international:

The principal problem is whether conditions of confinement met minimum human rights standards.

5. Treatment of Partisans

a. If the conflict is international:

(1) Taking the Halam ambush as a typical case of partisan operations and the treatment of captives, it is clear that the partisans did not meet the minimum standard for distinguishing themselves from civilians while engaged in military operations. (1907 Hague Regulations Article 1, 1949 GPW Art. 4(a)(2)&(6). It is possible that they might have qualified for PW treatment under the very liberal classification standards applied by the US in the Vietnam conflict (MACV. Dir. 381-46 op.cit.). As they did not carry arms openly during their infiltration to the ambush site they used their disguise as civilians in order to effect surprise, they would not have qualified as privileged combatants under the formula developed in Article 44, Protocol I, Additional to the 1949 Geneva Conventions. Accordingly it would be difficult to find that they are entitled to privileged combatant status or PW status under conventional or customary international law. Accordingly, Balistan was entitled to treat them as violators of Balistan's criminal law. Their claim to PW status, however, should have been adjudicated under 1949 GPW Art. 5.

(2) The principal issue is whether the procedures under which they were tried and executed conformed to minimum standards under international law.

(a) As persons not entitled to protection under the 1949 Prisoners of War Convention, consideration must be given to their entitlement to protected persons status under article 4, 1949 Geneva Convention for the Protection of Civilians. Did the trial procedures and the execution of the death sentence conform to the standards laid down in Articles71-76 of the Civilians Convention, except to the extent that derogations are permitted under Art. 5

of that convention? The characterization of the trials as "very summary" casts considerable doubt as to whether these standards were respected.

(b) Balistan will probably contend that as the partisans are considered to be Balistan nationals, the foregoing standards are inapplicable. Nevertheless, the question remains whether the procedures used conformed with minimum standards applicable in non-international armed conflict.

(c) If the conflict is non-international character:

The principal question is whether the summary trials conform to Article 3 Common to the 1949 Conventions. In relevant part it prohibits "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensible by civilized peoples". Consideration should also be given to Art. 6 and other nonderogatable provisions of the U.N. Covenent on Civil and Political Rights.

6. Denial of Access to the International Committee of the Red Cross (ICRC).

(a) International Armed Conflict:

Balistan acknowledged that Median captives were entitled to PW status and that the 1949 Geneva Conventions were applicable.

Nevertheless it denied access to such prisoners to the ICRC. It would appear that Balistan did not permit the ICRC to have access to Indepeshi prisoners.

Under GPW Art. 10, the detaining power has a duty to arrange for Protecting Power services, or to request or accept the offer of the ICRC to perform the humanitarian functions of a Protection Power.

Although not obliged to consent to ICRC function under Art. 9, it appears that there is an obligation to accept an offer under Art. 10, if no Protecting Power is functioning.

We don't know how the ICRC offered its services. It usually makes an offer without specifying whether it is merely offering humanitarian services under its traditional role (Art. 9) or as a substitute protecting power under Art. 10. If pressed the ICRC will claim to act under Art. 9. If this is the case Balistan was not under a legal duty to consent, but it did deprive itself of a favorable public relations measure.

B. Issue 2

Balistan's claim for immediate repatriation of its prisoners of war.

1. General statement of relevant international law.

In the 18th century it became a generally recognized standard of international law that prisoners of war are in the custody of the detaining power only for the purpose of preventing their further participation in the war. A principle derived from this standard is that prisoners of war should be repatriated when their return no longer threatens to increase the military potential of the enemy. The customary international law rule implementing this principle was stated in Article 20 of the 1907 Hague Regulations annexed to Hague Convention No. IV:

> "After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible."

This rule caused no problems in an era when the termination of hostilities and the conclusion of a peace treaty usually coincided in point of time.

Delays in the conclusion of peace treaties after World War I hostilities which were ended by armistice agreements, showed some infirmities in the customary rule.

Article 75 of the 1929 Geneval Prisoners of War Convention urged the Parties to provide for repatriation of prisoners of war in armistice agreements or in subsequent negotiations but it did not otherwise change the rule which created an obligation to repatriate at the conclusion of a peace treaty.

World War II hostilities were concluded in 1945 with the unconditional surrender of Germany and Japan. There was no immediate prospect for a Peace Treaty. As there was almost no possibility for Germany and Japan to resume the hostilities, it would seem that their prisoners of war should have been repatriated shortly after the hostilities were concluded, but when the Diplomatic Conference met to negotiate the 1949 Conventions, the USSR still held millions of German and Japanese as prisoners of war. Other allies had retained the prisoners of war held by them for prolonged periods and employed them in the rehabilitation of their economies.

These were the clauses which the 1949 Diplomatic Conference sought to correct. Art. 118 provided a unilateral obligation

to release and repatriate prisoners of war "without delay after the conclusion of active hostilities". As the obligation to release and repatriate is unilateral, no agreement is necessary except as to technical arrangements.

Hostilities which have taken place since 1949 have frequently resulted in cease fires and truces ordered by the U.N. Security Council or arranged through other external pressures without a military solution of the underlying political problem. Frequently these cease fires were unstable intervals between periods of military operations. Thus India and Bangladesh refused to repatriate Pakistani prisoners at the conclusion of hostilities in Banlgadesh in December 1971. They contended that the re-enforcement of Pakistan with the large numbers of Pakistani prisoners of war would enable Pakistan to resume hostilities on the western front or in Kashmir. Moreover, they properly refused to repatriate prisoners of war against whom charges of war crimes were pending (GPW Art. 119). It was not until August 1973 that an agreement was reached settling outstanding political issues and providing for the mutual exchange of all prisoners of war and other detainees.

Although the prolonged delay in repatriation in that conflict is not typical of post World War II history, it is not unusual for parties to a conflict to use prisoners of war repatriation as a bargaining "chip" to exact military or political concessions in the negotiations for a cease fire. Legal justification for this apparent disregard of the unilateral obligation to repatriate is based on the theory that the obligation under Art. 118 does not vest until the probability of early resumption of hostilities is remote.

2. For Balistan

a. When Balistan acknowledged the independence of Indepesh and its statehood, treaty relations as to the 1949 Geneva Prisoners of War Convention became effective through the prior accession of Indepesh to that convention.

b. Article 118 establishes an unambiguous obligation to release and repatriate prisoners of war without delay after the cessation of active hostilities. This contingency took place when the cease fire was concluded, followed immediately with the initiation of negotiations for a peace treaty.

c. Indepesh's failure to repatriate Balistani prisoners of war is a clear breach of the convention and should be rectified by the Court.

3. For Indepesh

a. The principle which Article 118 is intended to implement is that prisoners of war should not be held after they no longer present a threat that they will augment the military potential of an enemy. Thus the term "cessation of active hostilities" must be considered as referring to a condition when it is unlikely that hostilities will be resumed in the forseeable future. This construction follows from the context of the evil which the 1949 Diplomatic Conference sought to correct After their unconditional surrender in 1945 the Axis Powers posed no military threat to the victorious Detaining Powers. Accordingly there was no legitimate security interest in the continued detention of more than one million Axis prisoners of war.

This is not the present situation. Indepesh has no guarantees that the return to Balistan of the large number of highly trained prisoners of war will not enable Balistan to reconstitute her force and launch a new attack. Indepesh cannot consider herself secure until the security provisions of the peace treaty now being negotiated are effective.

b. It would be an unreasonable construction of Art. 118 to consider every temporary cease fire or unstable truce as vesting an obligation to repatriate prisoners of war. Balistan, in its action, if not in its memorial to this Court, has indicated that it shares this construction, for it has not unilaterally repatriated the Indepesh prisoners it holds as Balistan would be obliged to do under the construction Balistan advances.