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NO. 5

IN THE

INTERNATIONAL COURT OF JUSTICE AT THE PEACE PALACE

THE HAGUE, NETHERLANDS

APRIL TERM 1978

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THE REPUBLIC OF INDEPESH,

Applicant,

v.

THE FEDERAL UNION OF BALISTAN,

Respondent.

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ON SUBMISSION TO THE  
INTERNATIONAL COURT OF JUSTICE

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MEMORIAL FOR THE APPLICANT

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## JURISDICTION

The Republic of Indepesh and the Federal Union of Balistan have, by stipulation between the parties, submitted this dispute to the International Court of Justice pursuant to Article 36 of the Statute of the International Court of Justice and in accordance with the applicable international rules of law as set forth in Article 38 of the Statute.

QUESTIONS PRESENTED

- I. WHETHER BALISTAN CAN DEFY THE REPUBLIC OF INDEPESH'S PROPER EXERCISE OF THE PRINCIPLE OF SELF-DETERMINATION BY DENOMINATING THEIR CONFLICT AN INTERNAL DISPUTE.
  
- II. WHETHER BALISTAN VIOLATED THE MANDATES OF INTERNATIONAL LAW AND THE GENEVA CONVENTIONS, TO EXTEND THEIR HUMANE PROTECTIONS TO THE INDEPESHI CAPTIVES, THEREBY ENTITLING INDEPESH TO REPARATIONS.
  
- III. WHETHER THE COMMISSION OF GRAVE WAR CRIMES BY BALISTANI COMBATANTS WARRANTS THEIR RETENTION IN CUSTODY UNTIL THE FINAL CONCLUSION OF A PEACE TREATY.

## SUMMARY OF ARGUMENT

In an attempt to thwart Indepesh's legitimate exercise of the right of self-determination, Balistan breached the treaty creating binding rights and obligations between the parties, and violated customary norms of international law respecting the international personality of Indepesh.

Balistan's inexcusable denial of fundamental human rights to the Indepeshi electorate; the recognition of Indepesh in the international community by Media and Sinestra; and the Indepeshi plebiscite and secession, combined to implement Indepesh's rightful exercise of self-determination. Further, failure to recognize Indepeshi sovereignty constituted an international tort as to the Republic of Indepesh.

Balistan's illegal war of aggression and grave ill-treatment of both Indepeshi captives and civilians violated humanitarian protections guaranteed to individuals under the Geneva Conventions, of which Balistan is a signatory. In contravention of the mandates of the Conventions and fundamental principles of international law, Balistan wrongfully withheld prisoner-of-war status to all Indepeshi combatants.

Further, Indepesh is entitled to receive adequate reparations in the form of monetary compensation from Balistan for damage and destruction.

Pursuant to its reservation to Article 85 of the POW Convention, Indepesh retained both the right to withhold POW status from Bali-

stani combatants who committed war crimes, and the right to hold Balistani prisoners until the conclusion of a peace treaty. The reservation was consistent with the intent of the drafters of the Convention, compatible with international customary law as codified in Hague IV, and ensured full and fair adjudication.

Under the Nuremberg principles prescribing individual responsibility, Balistani combatants, including commanding officers, may be held personally liable for the commission of numerous war crimes, unjustified by any theories of military necessity due to the resulting disproportionate civilian damage.

Because Balistan has inexcusably violated Indepesh's sovereign rights, this Court is respectfully requested to grant the relief prayed for in the conclusion to this Memorial.

## ARGUMENT

- I. BALISTAN VIOLATED NORMS OF INTERNATIONAL LAW BY TREATING THE STRIFE BETWEEN INDEPESH AND BALISTAN AS AN INTERNAL CONFLICT.
  - A. BALISTAN'S BREACH OF THE TERMS OF THE TREATY JOINING INDEPESH AND BALISTAN WORKED AN IMMEDIATE DISSOLUTION OF THE TREATY AND REVIVED INDEPESH AS AN INDEPENDENT STATE.

The Republic of Indepesh proposed the Articles of Association with the fervent hope of concluding a mutually advantageous union with the Balistani state which would allow Indepesh to retain its separate ethnic character. In recognition of the importance of Indepesh's cultural heritage in this regard,<sup>1</sup> the Articles of Association contained detailed language provisions. Although the language provisions failed to be incorporated into the Balistani constitution, Indepesh nonetheless entered into the Union, in the justifiable expectation that Balistan would fully appreciate the vital significance of Indemedian to Indepesh.

The Articles of Association, as it incorporated the constitution, represented a treaty between Indepesh and Balistan, giving rise to legal obligations under international law.<sup>2</sup> The express terms of the treaty accorded Indepesh a status equal to that of the other Balistani states in return for Indepesh's adherence to the constitution.

That the language provisions remained in force is established by the prevailing conduct of the parties during the next twenty-three years:<sup>3</sup> Indepeshis were consistently permitted to vote in Indemedian by individual preference. This consistent and enduring custom unequivocally confirms Balistan's intent to defer to the Indepeshi electorate's practice with regard to language, and it

was thus an implied term of the treaty.<sup>4</sup> Since the primary duty of all states is to perform their treaty obligations in good faith, and there is a presumption they have done so,<sup>5</sup> it must be inferred that Balistan intended to implement the outstanding language provisions by the operative year, 2000.

Balistan's failure, therefore, to allow Indepeshis to vote in Indemedian, during the 1974 elections, constituted a flagrant breach of its duty to carry out its treaty obligations in good faith.<sup>6</sup> Moreover, the dubious results of that election were in grievous derogation of Indepeshi rights. For by drastically reducing Indepeshi representation in the federal parliament,<sup>7</sup> Balistan violated the grant of equal status to Indepesh under the treaty.

When one party to a treaty has breached its terms, the aggrieved party may suspend that treaty in whole or in part.<sup>8</sup> The Indepeshi government clearly could not consider itself bound by the treaty subsequent to Balistan's transgression. The parliament, which was illegally dissolved by Balistan, had no recourse but to reconstitute itself as the legitimate government of Indepesh, to avoid the extinction of the state of Indepesh, and to serve immediate notice of the gravity of the Balistani violation.

Both the breach and suspension of the treaty effected a transformation of Indepesh's character to its original status, that of a fully competent sovereign.

Therefore, the Republic of Indepesh respectfully submits that, in the light of its declaration of independence, the dispute was

clearly between two sovereign states, and Balistan was unwarranted in treating the hostilities as within its domestic jurisdiction.

B. BALISTAN VIOLATED INTERNATIONAL LAW BY IGNORING INDEPESH'S PROPER EXERCISE OF THE RIGHT OF SELF-DETERMINATION.

1. Balistan's denial of fundamental human rights gave rise to Indepesh's recourse to the principle.

Indepesh has a legitimate right to the exercise of self-determination, that is, the right of all peoples "freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right. . . ." <sup>9</sup> Self-determination is a reflection of customary international law; certain commentators state it is a jus cogens as well. <sup>10</sup>

It would be illogical to assert that Balistan does not recognize this right. As a signatory of the International Covenant on Civil and Political Rights [hereinafter referred to as the Civil Rights Covenant] <sup>11</sup> at the time of Indepesh's exercise of the right, <sup>12</sup> and as a member of the United Nations, Balistan has bound itself to uphold the rights of all peoples to self-determination. <sup>13</sup> Indepeshis are a "cohesive, national group," occupying a defined territory, that lies clearly within the scope of the right. <sup>14</sup> Moreover, there have been such grave breaches of fundamental human rights recognized by Balistan that Indepesh was compelled to exercise the principle of self-determination to protect its very existence.

Balistan committed flagrant violations of the Civil Rights Covenant. Although both men and women were arrested for election fraud, internment of the women alone<sup>15</sup> represented unequal treatment in violation of Article 26. Additionally, women are specifically guaranteed the right to vote under Article 3 of the Covenant, and, more particularly, by Article 25 as it refers to Article 2.

The denial of the Indepeshi right to vote in Indemedian egregiously violated Article 25 of the Civil Rights Covenant as it refers to Article 2, which guarantees the right of all citizens to vote without distinction based on language.<sup>16</sup> The consequence was the unconstitutional disenfranchisement of the majority of the Indepeshi population based on an illegal distinction.<sup>17</sup> It is imperative to note that the constitution of the Federal Union guaranteed that each state of the Union would have equal status. Since a majority of the Indepeshi populace could no longer vote, Indepeshi representation in the federal Parliament was drastically reduced.

In addition, the dissolution of the Indepeshi parliament violated the right of all to take part in the conduct of public affairs, and contravened the mandate for adequate representation embodied in Article 25.

Indepesh is not seeking reparations from Balistan for violations of these rights, but is rather asserting that they exist and that they have been specifically recognized by Balistan. The incapacity of individuals to enforce these rights does not negate

their validity as inalienable rights inhering in the Indepeshi people.<sup>18</sup>

2. The plebiscite and secession were valid exercises of the right.

The plebiscite decreed by an effective authority, desirous of ascertaining the will of the Indepeshi people, was an expression of the common goal of a people exercising their rights to self-determination.<sup>19</sup> As stated by Brownlie, one option available to a people exercising its right to self-determination is that of independence as a separate state,<sup>20</sup> an especially appropriate formulation for the "geographically distinct territory" of Indepesh.<sup>21</sup> Furthermore, Levin asserts that, although one state may merge with another in an exercise of self-determination, the aggrieved state may secede upon a breach of the terms of the merger.<sup>22</sup>

Secession was pre-eminently appropriate in this case. Once Balistan barred voting in Indemedian and diminished representation of Indepesh in the federal parliament, it was virtually impossible for Indepeshi rights to be secured within the structure of the Balistani political system. It is these political rights in particular which are the quintessence of self-determination. With the plebiscite indicating the clear intent of the people to secede, and with the presence of all the elements necessary for an exercise of self-determination, Balistan was absolutely obligated upon the Indepeshi declaration of independence to duly regard future relations with the Republic of Indepesh as international in scope.

C. RECOGNITION BY MEDIA AND SINISTRA CONFIRMED INDEPESH'S INTERNATIONAL PERSONALITY.

Even after Indepesh joined the Federal Union, it retained a residuum of international personality.<sup>23</sup> Once the treaty between Balistan and Indepesh was terminated by Balistan's wrongful actions, Indepesh immediately regained its full measure of sovereignty.

There is no doubt that Indepesh fulfilled all the criteria necessary for statehood. Indepesh occupied a defined territory with a stable population, had a responsive, central government, and had the capacity to deal with other subjects of international law on a level of equality.<sup>24</sup> This latter factor is evidenced by the fact that both Media and Sinestra extended full, de jure recognition to Indepesh. There is no basis on which to hold their recognition premature, since such recognition was declaratory of existing facts.

Moreover, according to Lauterpacht, once the conditions for statehood are fulfilled by a political group, a duty is placed on third states to recognize that group as sovereign.<sup>25</sup> Balistan evaded this duty for almost one year. Such failure constitutes an international tort and does not relieve Balistan of its obligation to apply international law in its relations with Indepesh. In addition, in this situation, where a de facto state has formed, refusal to recognize it also constitutes a denial of the right to self-determination.<sup>26</sup>

II. BALISTANI MALTREATMENT OF INDEPESHI CAPTIVES, IN VIOLATION OF INTERNATIONAL LAW AND THE GENEVA CONVENTIONS, ENTITLES INDEPESH TO REPARATIONS.

A. BALISTAN VIOLATED ITS OBLIGATIONS, ARISING FROM AN INTERNATIONAL CONFLICT, TOWARD INDEPESHI CAPTIVES.

Once Indepesh sufficiently manifested its independence, Balistan was duty-bound to extend to it all the considerations of equality due another sovereign. However, rather than allow an amicable resolution of their differences, Balistan chose to attack and occupy the Republic of Indepesh.<sup>27</sup> This illegal war of aggression<sup>28</sup> produced unpardonable suffering in both Balistan and Indepesh, which was further aggravated by Balistan's refusal to afford individuals the protections granted under international law.

The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,<sup>29</sup> the Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea,<sup>30</sup> the Geneva Convention Relative to the Treatment of Prisoners of War [hereinafter referred to as POW Convention],<sup>31</sup> and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter referred to as Civilian Convention]<sup>32</sup> [hereinafter collectively referred to as the Geneva Conventions] were specifically drafted to extend sweeping humanitarian protections to both combatants and civilians without regard to the legal status of their respective countries. As a signatory of the Geneva Conventions, Balistan has incurred the duty to apply their protections upon engagement with another signatory in any international conflict, whether or not a

state of war has been declared. Indepesh has unequivocally bound itself to the treaties,<sup>33</sup> and, therefore, Balistan is required to apply the Conventions to their mutual affairs. For a country to apply the Geneva protections capriciously, as Balistan has done, violates both the spirit and purpose of the Conventions, and must earn the severe condemnation of the international community.

All members of the Indepeshi armed forces are entitled to prisoner-of-war [hereinafter referred to as POW] status and protections under the POW Convention. Responsibility for the fair treatment of captured combatants is placed squarely on the capturing state, and not on the individuals charged with their immediate care.<sup>34</sup> Balistan is, therefore, absolutely liable for withholding any protections mandated by the Convention.

The most contemptible example of the Balistani violations is the severe reduction of food rations in the internment camps. The defense that reprisals are generally permissible<sup>35</sup> is unavailable to Balistan, since Article 13 of the POW Convention contains a specific prohibition of the use of reprisals against POW's.

Another violation, involving the attempted recruitment of Indepeshi junior officers, arises under Article 7, wherein a prisoner is precluded from renouncing the rights the Convention affords him by joining the armed forces of the detaining power.<sup>36</sup> In addition, under Article 6 of the POW Convention, no state may take advantage of such a renunciation.

The maltreatment of senior officers is similarly deplorable. For an individual to be guilty of treason, a breach of a duty of loyalty must be established.<sup>37</sup> Moreover, under Article 87, POW

Convention, a court must take into account, before imposing judgment, that no duty of allegiance is owed the prosecuting state. By joining the Indepeshi armed forces, the senior officers effectively renounced their Balistani citizenship.<sup>38</sup> It would be the height of illogic to allege them guilty of treason, since they were no longer citizens of Balistan.

The foreign specialists who joined the Indepeshi armed forces were distinguished for special abuse. Any allegation that these individuals were mercenaries, however, is unmerited. In order to brand an individual as a "mercenary," there must be evidence that his participation was induced by economic rather than personal incentives,<sup>39</sup> and salary comparisons become significant only with respect to combatants of the same rank and service.<sup>40</sup> Balistan did not sustain this burden of proof. To find otherwise would condemn every officer and specialist to mercenary status based on advanced placement on the pay scale. Furthermore, the status of "mercenary" is not criminal per se, because responsibility must be based on particular conduct, not status.<sup>41</sup> This precept is of particular importance when a designation of status may involve life or death consequences.

These captured contract combatants, as members of the armed forces, are entitled to the same treatment afforded other POW's absent their nonconformance with the rules of war. Balistan has consistently singled out these individuals for exceptionally harsh treatment on the basis of nationality, representing a grave violation of Article 16 of the POW Convention.

The Indepeshi partisans were similarly entitled to POW pro-

tections under recent United Nations protocols.<sup>42</sup> These amendments were purposely drafted to supplement the Geneva Conventions, and are applicable to the Indepesh-Balistan situation, wherein a worthy exercise of self-determination has met the opposition of a racist regime.<sup>43</sup> In particular, this type of armed conflict relies on irregular fighting forces to a much greater degree than conventional warfare. It is not always possible for an embattled group to be effective strategically while complying with the intricately detailed requirements of the POW Convention, Article 4. The protocols extend POW protections even when participants fail to clearly distinguish themselves, as long as the other requirements of Article 4 are substantially met.<sup>44</sup> These criteria were followed by the partisans, who were entitled to POW status, and could not, therefore, be convicted by Balistan of any crimes without receiving full and fair trials pursuant to Article 84.

Moreover, Balistan had no basis on which to prosecute these combatants. As legitimate Indepeshi armed forces, they could not be prosecuted for war treason.<sup>45</sup> All acts engaged in were legal military maneuvers under the rules of war. For example, the Halam ambush was a "ruse," legal under Article 24 of the Regulations Annexed to the Hague Convention on the Laws and Customs of War on Land [hereinafter referred to as Hague IV].<sup>46</sup> The train which was destroyed was a proper target when used to support Balistan's military operations; Balistan must not be permitted to shield its military missions by the presence of civilians in their midst. In view of the indisputably military character of the transport of Balistani

troops, the incidental civilian loss was not disproportionate to the strategic necessities of the Indepeshi forces.<sup>47</sup>

Even if the Indepeshi partisans were not entitled to protections under the POW Convention, they must, minimally, be afforded safeguards under the Civilian Convention.<sup>48</sup> Accordingly, while the partisans may conceivably be tried and sentenced to severe punishments, none may be imposed without full and fair trials, as detailed in Article 71. The summary courts martial held by Balistan did not meet these requirements and can only be considered grave derogations from the Convention.

B. THE HUMANITARIAN PROTECTIONS OF THE GENEVA CONVENTIONS WERE WRONGFULLY CONTRAVENED BY BALISTAN.

At the very least, common Article 3 of the Geneva Conventions was applicable throughout the course of the hostilities, and Indepeshi captives should have been treated in accordance therewith. Nonetheless, Balistan callously ignored both its duty under Article 3 and fundamental standards of civilization.

Article 3 was intended to establish basic humanitarian protections. It was commonly understood by the drafters of the Geneva Conventions that the provisions of the article would protect individuals during the course of hostilities, without regard to the exact categorization of the conflict.<sup>49</sup> However, it is not clear precisely when Article 3 applies. Since the definitional term "internal armed conflict" within the article is ambiguous, it is proper to look to the intent of the parties for interpretive purposes.<sup>50</sup> The High Contracting Parties hoped for widespread adher-

ence to the Conventions; thus, Article 3 must be freely accorded the broadest of applications. This article should have controlled in the instant case in view of the fact that Balistan was forced to employ its regular armed forces in response to Indepesh's use of organized forces, the large scale of hostilities, and the fact that Indepesh had a responsible, stable government.<sup>51</sup>

Despite the paramount concern of Article 3 that captives be treated humanely, Balistan allowed them to develop conditions of rampant sickness, as well as actual starvation, from the deliberate malnutrition of the prisoners.<sup>52</sup> The contract combatants who were, after all, members of the armed forces, were incarcerated under abysmal conditions, frequently without food.

Although the Indepeshi partisans were not technically entitled to Article 3 protections, Balistan was nevertheless under a duty to treat them humanely. Certainly the "dictates of public conscience"<sup>53</sup> must be revolted by the execrable conditions which produced a seventy percent death rate, and by executions following summary trials.<sup>54</sup>

Common Article 3 further mandates that signatories "endeavor to bring into force, by means of special agreements, all or part of the other provisions. . .". Balistan made absolutely no effort to do so, despite the fact that Indepesh intended to, and did abide by the Conventions. These derogations from Balistan's solemn obligations may not be overlooked lightly. Therefore, it is respectfully submitted that the Court grant Indepesh the relief it seeks.

C. BALISTANI VIOLATIONS OF FUNDAMENTAL PRECEPTS OF INTERNATIONAL LAW GIVE RISE TO A DUTY TO MAKE REPARATIONS TO INDEPESH.

Balistan is obligated to make reparations for its unlawful actions. "It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."<sup>55</sup> This obligation is encompassed within general principles of law to be applied by this Court under Article 38(1)(c) of its governing statute.<sup>56</sup>

Balistan's voluntary actions were contrary to Indepesh's will, and unjustifiable under international law.<sup>57</sup> As such, they constitute an international tort, entitling Indepesh, the aggrieved state, to reparations.<sup>58</sup> Since it is impossible for Balistan to effectively make restitution in kind, which is the primary form of reparations, it is respectfully submitted that Indepesh be granted satisfaction by this Court and that Balistan be directed to pay monetary compensation.<sup>59</sup> Indepesh, as the "victim of an unlawful resort to force . . . has a claim for adequate compensation for damage to public and private property, loss of life and injuries among the civilian population, and the cost of reasonable measures of self-defense."<sup>60</sup>

In addition, Indepesh seeks a declaration that Balistan's treatment of Indepeshi captives was an unconscionable international tort.<sup>61</sup> Such ill-treatment impugns Indepesh's honor, reflects Balistan's misapprehension that Indepesh was not its equal, and, moreover, denies the validity of humanitarian principles of international law. The gravity of Balistan's violations must be underscored by a formal condemnation.

III. INDEPESH IS UNDER NO OBLIGATION PURSUANT TO INTERNATIONAL LAW TO REPATRIATE BALISTANI CAPTIVES.

A. INDEPESH RIGHTFULLY DENIED POW STATUS TO BALISTANI COMBATANTS.

Upon reaffirming its commitment to the Geneva Conventions, Indepesh expressly reserved the right to consider as outside the protections of the Conventions members of the armed forces prosecuted for, and convicted of, violations of the Nuremberg principles. The legality of reservations to multilateral treaties has been specifically upheld by this Court with regard to the Genocide Convention of 1948<sup>62</sup>:

[A] State which has made and maintained a reservation which has been objected to by . . . [some] parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention.<sup>63</sup>

The aim of the High Contracting Parties to the Geneva Conventions was to obtain the broadest conceivable application of the Conventions as they embodied humanitarian principles. Approval of the humanitarian principles of the Conventions does not necessarily imply acceptance of all the detailed provisions contained therein.<sup>64</sup> While a reservation may lessen the importance of a particular provision, ultimately it will allow for both the increase of the number of signatories and for the amplification of respect for the treaty as a whole.

The guarantee of POW status to convicted war criminals under Article 85 caused many states, including Indepesh, to make reservations to that provision, in the belief that a combatant who had abused the laws of war was not entitled to its protections.<sup>65</sup> The

Indepeshi reservation, like many others, is compatible with international customary law, codified in Hague IV, which did not grant POW status to combatants convicted of criminal acts in connection with war.<sup>66</sup> In addition, the POW Convention requires repatriation of POW's upon the cessation of active hostilities,<sup>67</sup> rather than at the time a peace treaty is concluded.<sup>68</sup>

The operative effect of the Geneva provisions, together with the reservation, creates serious problems in implementation. Once a state has made the decision to withdraw POW protection from war criminals, conflicting demands arise if that state's reservation is interpreted as requiring conviction. Generally, it is not possible to conform with all the judicial protections required under the POW Convention during the course of hostilities,<sup>69</sup> as Indepesh discovered; and a trial without those safeguards would be a grave breach of the Convention under Article 130. Yet upon the cessation of active hostilities, the state may find itself, as Indepesh did, faced with an obligation to repatriate immediately all prisoners who have not been convicted.

To avoid these difficulties, Indepesh has recognized two distinct bases for the valid withdrawal of POW status: withdrawal is to be determined upon prosecution for, and upon conviction of, war crimes. Indepesh's reservation both ensures the right of the accused to a fair trial, and permits the trial to be held at a time conducive to a proper disposition of the case.

B. INDIVIDUAL BALISTANI COMBATANTS ARE RESPONSIBLE FOR THE COMMISSION OF HEINOUS WAR CRIMES.

There is no question that individual members of the armed forces may be held responsible for war crimes. The Nuremberg Charter expressly upholds this principle,<sup>70</sup> which has long been recognized in international law.<sup>71</sup>

To establish guilt under the Nuremberg principles, a showing must be made that the accused knew or should have known that his act was a travesty of the laws of war.<sup>72</sup> Since both the Union armed forces and the militia received regular training in the laws of war, they were manifestly in a position to know that the acts in question were grave violations of international law.

The fact that the members of the armed forces were acting pursuant to orders does not absolve them from liability, despite the fact that such pleas may be received in mitigation of punishment.<sup>73</sup> Although lack of moral choice could conceivably be asserted as a defense, to do so is inappropriate in this instance. While there was a strong tradition of obedience to orders by the Balistani combatants, there existed an equally dynamic custom of chivalry embracing fairness and mutual respect between opposing forces.<sup>74</sup> To allow these men to assert the defense of lack of choice would make a "mockery of the soldier's oath of obedience of military orders," since oaths related solely to lawful orders, and incorporated the chivalric code.<sup>75</sup>

War crimes are violations of the customs and laws of war [See Appendix A]. These laws cannot be viewed in a vacuum, and

require a balancing of complementary elements.<sup>76</sup> Humanitarian considerations, and principles of the law of war, require that "belligerents should not inflict on their adversaries harm out of proportion to the object of warfare, which is to destroy or weaken the military strength of the enemy."<sup>77</sup> This doctrine of proportionality involves crucial choices both of weaponry and targets; non-combatants must be spared whenever possible.<sup>78</sup> As weapons and fighting methods have become more sophisticated and discriminating, the area encompassed by military necessity has been correspondingly narrowed, a fact which Balistan has failed to appreciate.

Union commanding officers may be held under the principle of individual responsibility for war crimes, as well for crimes against peace [see Appendix A]. Balistan had more than adequate notice that Indepesh was a separate state. Balistan's military actions against Indepesh can only be characterized as an undisguised, wholly illegal wager of aggressive war, actions which have been universally and severely condemned.

The war crimes committed by the Balistani armed forces were numerous. An especially heinous offense was the bombing of the dikes, since the presence of anti-aircraft emplacements does not render them suitable military targets. Recent United Nations protocols have extended special protections to dikes, even where military installations are positioned atop them, as long as their sole purpose is defensive.<sup>79</sup> Balistan has failed to establish that the emplacements were used offensively in any manner.

Not only were the dikes improper targets, but the legitimacy of the types of weapons used, fragmentation bombs, is questionable. Before any particular weapon is employed, the state must look to the possible effects on individuals, not solely to its strategic effectiveness.<sup>80</sup> Fragmentation bombs were created to cause a maximum of injury to "soft" targets, and especially to human bodies, through "extensive destruction of tissues, blood vessels, nerves and organs," in addition to widespread infection, with limited effectiveness against military hardware.<sup>81</sup> Their use, therefore, creates serious conflicts with the specific prohibition against causing unnecessary suffering in Hague IV, Article 23.

The war crimes committed by the Balistani forces were unjustified and resulted in widespread flooding which destroyed Indepesh's major food source, the rice crops. This action was specifically condemned by both the Nuremberg and Tokyo Tribunals and is inconsistent with fundamental humanitarian ideals.<sup>82</sup>

Indiscriminate bombing of cities and seaports has never been justified under any theory of military necessity. The mere presence of military supplies does not render an entire area a strategic target if consequent civilian damage is disproportionately great. Although Balistan was not affirmatively mandated under international law to use "smart bombs," the extensive damage and destruction to Indepeshi cities and seaports cannot be rationalized on any grounds.

The wanton destruction of Indelabad is a particularly conspicuous example of unrestricted bombing. Any bombardment, such as carpet bombing, which fails to distinguish between military and

civilian objectives, is prohibited by the doctrine of proportionality.<sup>83</sup> Such an attack is a prima facie indication that the civilian population is itself a target.<sup>84</sup> In an aerial bombardment, factors involving visibility are similarly important in minimizing civilian damages; if conditions are such that military advantages are outweighed by probable damages to noncombatants, the attack should be postponed.<sup>85</sup> Therefore, Balistan's bombing on cloudy, foggy days, or when smoke impeded visibility, causing extensive civilian damage, is utterly indefensible.

The "scorched earth" policy followed by Balistani ground forces also failed to distinguish between civilian and military targets. Absent evidence that facilities destroyed were intended for military usage, such destruction may only be characterized as wanton, contemptible, and hence illegal.

Even assuming arguendo that the entire conflict is deemed to be internal, Indepeshi courts have jurisdiction to prosecute Balistani combatants for their criminal acts. Under principles established in the Lieber Code, "[a] prisoner of war remains answerable for his crimes against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities."<sup>86</sup>

It is self-evident that an offense contrary to the laws of war is equally delict under the municipal jurisdiction where the crime was committed. This concurrent jurisdiction continues until a peace treaty is concluded; and thus, Indepesh has retained the right to prosecute the Balistani combatants responsible for the commission of war crimes.

The acts engaged in by members of the Balistani armed forces are not to be tolerated by any civilized country respecting the inviolability of the right to life and property. Therefore, Balistan, and those individuals responsible for the deprivations of these rights, must not go unpunished.

REQUEST FOR RELIEF

CONSIDERING THAT Balistan has illegally refused to acknowledge Indepesh's secession from the Federal Union;

CONSIDERING THAT Balistani combatants have illegally engaged in the commission of war crimes against Indepesh;

CONSIDERING THAT Balistan has illegally denied the humanitarian protections of international law to Indepeshi captives and civilians;

Indepesh respectfully requests this Court to

1) DECLARE that withdrawal from the Federal Union validly revived Indepesh's status as a sovereign state under international law; and

2) DECLARE that Indepesh has legitimately retained custody of Balistani combatants; and

3) DECLARE that Balistan's treatment of Indepeshi captives was an international tort worthy of condemnation; and

4) ORDER Balistan to make monetary reparations in the amount this Court deems equitable; and

5) PROVIDE any and all additional relief this Court deems equitable.

Respectfully submitted,

Elizabeth J. Aisenberg  
Elizabeth J. Aisenberg

Jean Bernstein  
Jean Bernstein

Madelaine Eppenstein  
Madelaine Eppenstein

February 14, 1978

Paul Yakaitis

APPENDIX A

Article 6 of the Nuremberg Charter - Excerpts

The following acts, or any of them, are crimes coming under the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war . . . killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

#### FOOTNOTES

1. Dinstein, Collective Human Rights of Peoples and Minorities, 25 INT'L & COMP. L.Q. 102, 120 (1976); McDougal, Freedom From Discrimination in Choice of Language and International Human Rights, 1976 S. ILL. U.L.J. 151, 158 et seq. (1976).
2. I G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 447 (3rd ed. 1957); J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 320 (5th ed. 1963).
3. Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), [1962] I.C.J. 6.
4. D. GRIEG, INTERNATIONAL LAW 491 (1976).
5. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/CONF. 39/27, art 26; I G. SCHWARZENBERGER, supra note 2, at 448.
6. I L. OPPENHEIM, INTERNATIONAL LAW § 503 (8th ed. H. Lauterpacht 1955).
7. Stipulation of Record at 2.
8. Vienna Convention on the Law of Treaties, supra note 5, at art. 60(1); D. O'CONNELL, INTERNATIONAL LAW 258 (1965).
9. Declaration on Principles of International Law Concerning Friendly Relations, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 18), U.N. Doc. A/8018 (1970); Nayer, Self-Determination Beyond the Colonial Context: Biafra in Retrospect, 10 TEX. INT'L L.J. 321, 335 (1975).
10. U. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 187-89 (1976); Dinstein, supra note 1, at 106.
11. G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) [hereinafter cited as Civil Rights Covenant].
12. Stipulation of Record at 3.
13. Civil Rights Covenant, supra note 11, at art. 1; U.N. CHARTER, arts. 1(2), 55, 56.
14. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 575 (2d ed. 1973); U. UMOZURIKE, supra note 10, at 195.
15. Stipulation of Record at 2.
16. V. VAN DYKE, HUMAN RIGHTS, THE UNITED STATES AND WORLD COMMUNITY 49 (1970).
17. Stipulation of Record at 2.
18. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 54 (1950).

19. Dinstein, supra note 1, at 504.
20. I. BROWNLIE, supra, note 14, at 575.
21. Emerson, Self-Determination, 65 AM. J. INT'L L. 459, 465 (1971).
22. Levin, Self-Determination of Nations in International Law, [1962] SOV. Y.B. INT'L L. 46, cited in U. UMOZURIKE, supra note 10, at 193.
23. I L. OPPENHEIM, supra note 6, at § 89.
24. D. GRIEG, supra note 4, at 93; Uibopuu, International Legal Personality of Union Republics of the U.S.S.R., 24 INT'L & COMP. L. Q. 811, 813 (1975).
25. H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 6 (1947).
26. U. UMOZURIKE, supra note 10, at 200.
27. Stipulation of Record at 3-4.
28. See p. 17, infra.
29. Done Aug. 12, 1949, [1955] 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31.
30. Done Aug. 12, 1949, [1955] 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85.
31. Done Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as POW Convention].
32. Done Aug. 12, 1949, [1955] 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter cited as Civilian Convention].
33. Stipulation of Record at Appendix B.
34. POW Convention, supra note 31, at art. 12.
35. STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, THE LAW OF WAR & DUBIOUS WEAPONS 47 (1976).
36. I M. BASSIOUNI & V. NANDA, AN INTERNATIONAL CRIMINAL LAW 404 (1973); U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE subpara. 35 (Field Manual 27-10, 1956).
37. M. GREENSPAN, THE LAW OF LAND WARFARE 330 (1959).
38. I L. OPPENHEIM, supra note 6, at § 302.
39. Assner & Brant, Law of the Mercenary: An International Dilemma, 6 CAP. U.L. REV. 339 (1977).
40. Report of the Secretary-General, Respect for Human Rights in Armed Conflict, U.N. Doc. A/32/144 at 28 (1977) [hereinafter cited as 1977 Report].

41. 2 G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 113 (1968).
42. 1977 Report, supra note 40.
43. Id. at Protocol I, art. 1(4).
44. Id. at art. 44.
45. M. GREENSPAN, supra note 37, at 467; U.S. DEP'T OF THE ARMY, supra note 36, at subpara. 41.
46. Done Oct. 18, 1907 [1910], Annexed Regs., 36 Stat. 2277, T.S. No. 539 [hereinafter cited as Hague IV].
47. M. GREENSPAN, supra note 37, at 318.
48. Civilian Convention, supra note 32, at art. 5; Report of the Secretary-General, Respect for Human Rights in Armed Conflict, U.N. Doc. A/8052 (1971).
49. 3 J. PICTET, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36 (1960); Note, Civilian Protection in Modern Warfare, 14 VA. J. INT'L L. 123, 131 (1973).
50. 1 L. OPPENHEIM, supra note 6, at § 554.
51. 3 J. PICTET, supra note 49, at 35-36.
52. Stipulation of Record at 6.
53. Hague IV, supra note 46, at de Martens Preamble.
54. Civil Rights Covenant, supra note 11, at art. 14(3).
55. Factory at Chorzow Case [1928] P.C.I.J., Ser. A, No. 17, 29.
56. I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 134 (1963).
57. 1 G. SCHWARZENBERGER, supra note 2, at 572.
58. Id. at 563.
59. G. SCHWARZENBERGER & E. BROWN, A MANUAL OF INTERNATIONAL LAW 147 (6th ed. 1976).
60. I. BROWNLIE, supra note 56, at 147.
61. D. GRIEG, supra note 4, at 505-06.
62. Reservations to the Convention on Genocide [1951] I.C.J. 15.
63. Id. at 29.
64. Note, The Geneva Convention and the Treatment of Prisoners of

- War in Vietnam, 80 HARV. L. REV. 851, 865 (1967).
65. See, Trial of Hans Albin Rauter, 14 L. Rep. Trials of War Crim. 89, 115-17 (No. 88) (Special Court of Cassation, Neth. 1948).
  66. AMERICAN ENTERPRISE INSTITUTE, THE PRISONER OF WAR PROBLEM 19-23 (1970).
  67. POW Convention, supra note 31, at art. 118.
  68. Hague IV, supra note 46, at art. 20.
  69. 3 J. PICTET, supra note 49, at 422.
  70. The International Military Tribunal in Nuremberg was established by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, done Aug. 8, 1945 [1945], 59 Stat. 1544, E.P.S. No. 472, 82 U.N.T.S. 279 [hereinafter cited as Nuremberg Charter].
  71. 2 L. OPPENHEIM, INTERNATIONAL LAW § 143 (7th ed. H. Lauterpacht 1952).
  72. DEP'T OF THE ARMY, supra note 36, at subpara. 330(b)(1).
  73. Nuremberg Charter, supra note 70, at principle 4.
  74. M. GREENSPAN, supra note 37, at 316.
  75. 2 G. SCHWARZENBERGER, supra note 41, at 518.
  76. Robblee, The Legitimacy of Modern Conventional Weaponry, 71 MIL. L. REV. 95, 111 (1976).
  77. J. PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 31 (1976).
  78. 1 M. BASSIOUNI & V. NANDA, supra note 36, at 318.
  79. 1977 Report, supra note 40, at art. 56.
  80. Robblee, supra note 76, at 119.
  81. STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, supra note 35, at 70.
  82. Chomsky, The Rule of Force in International Law, 80 YALE L.J. 1456 1474 (1971).
  83. Hague IV, supra note 46, at art. 5.
  84. Bond, Proposed Revisions in the Law of War Applicable to Internal Conflict, 12 SANTA CLARA LAW. 223, 231 (1972).
  85. Reed, Laws of War: The Developing Law of Armed Conflict - Some Current Problems, 9 CASE W. RES. J. INT'L L. 17, 25 (1977).
  86. Lieber's Instructions for the Government of the Armies of the U.S. in the Field, General Order No. 100, art. 59 (1863).