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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 RESPONDENT

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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 THE FEDERAL UNION OF BALISTAN ENFORCED NORMS OF INTERNATIONAL LAW RELEVANT TO AN INTERNAL DISPUTE BY DISCHARGING ITS DUTIES PURSUANT TO THE CONSTITUTION OF THE FEDERAL UNION.
  
- II. WHETHER THE TREATMENT BY BALISTAN OF THE INDEPESHI COMBATANTS IN ACCORDANCE WITH INTERNATIONAL PRINCIPLES WAS JUSTIFIED IN THE CONTEXT OF AN INTERNAL ARMED CONFLICT.
  
- III. WHETHER UPON THE CESSATION OF ACTIVE HOSTILITIES INDEPESH IS OBLIGATED TO EFFECT THE IMMEDIATE REPATRIATION OF ALL BALISTANI COMBATANTS.

## SUMMARY OF ARGUMENT

In an effort to uphold the integrity of both the Federal Union and the rights and requirements emanating from the federal Constitution, Balistan has consistently endeavored to enforce the treaty obligations between itself and Indepesh. By its travesty of the terms of the agreement between the parties, Indepesh threatened the internal stability of the Federal Union. Balistan's good faith attempts to restore harmony to the Union, by invoking the principles of international law governing internal conflicts, were thereby justified. In any case, Indepesh, through its failure to effectively establish its sovereignty through either self-determination or international recognition remained subordinate to federal law throughout the period of conflict.

Pursuant to operative international law, Balistan's posture with regard to Indepeshi combatants was acceptable in the context of an internal uprising. Balistan recognized a duty to apply fundamental humanitarian protections required under the 1949 Geneva Conventions, the International Covenant on Civil and Political Rights, and principles of customary international law. Violations by Indepesh of the selfsame rules and customs of war exonerate Balistan from any liability on equitable grounds.

Indepesh is affirmatively obligated to effect the immediate repatriation of all Balistani combatants in conformity with the Geneva Conventions. The Balistani combatants, none of whom are subject to prosecution for infraction of the principles of the

Nuremberg Charter, may neither be held nor tried under local Indepeshi jurisdiction for war crimes. Balistan concludes that by the terms of its reservation to Article 85 of the Geneva Prisoner of War Convention, Indepesh is not precluded from extending the protections of that Convention and fulfilling its duty under international law to repatriate all Balistani combatants.

## ARGUMENT

I. BALISTAN ACTED PROPERLY BY ENFORCING THE RULES OF INTERNATIONAL LAW APPLICABLE TO AN INTERNAL CONFLICT.

A. PURSUANT TO THE TREATY BETWEEN THE PARTIES, INDEPESH WAS SUBORDINATED TO THE FEDERAL UNION AND WAS REQUIRED TO COMPLY WITH THE FEDERAL CONSTITUTION.

Balistan unequivocally accepted Indepesh as a member of the Federal Union upon amendment of the Constitution of the Federal Union of Balistan in accordance with the Articles of Association. It is indisputable that this constitutional instrument was in effect a treaty between Balistan and Indepesh, as it clearly embodied an agreement between sovereigns creating a binding relationship under international law.<sup>1</sup>

The terms of this treaty were the provisions of the Constitution as it incorporated the Articles of Association.<sup>2</sup> Failure to achieve passage of the language provision contained in the Articles did not void the treaty; although a partial acceptance thereof may be characterized as a rejection of the treaty and a counter-offer, Indepesh's subsequent acquiescence over approximately twenty-three years was a tacit acceptance of the new offer.<sup>3</sup>

Pursuant to the terms of the integrated instrument, the Federal Union retained full sovereignty, and Indepesh placed itself in a subordinate position to the Union; thus Indepesh's international personality was subsumed by Balistan.<sup>4</sup> The territorial components of the Federal Union were comprised of Upper Balistan, Lower Balistan, East Balistan, West Balistan, and Indepesh. As a fully competent sovereign, the Union was, therefore, entitled to exercise

complete and exclusive control over all individuals and constituent states within its borders.<sup>5</sup>

B. SUBSEQUENT ACTIONS BY BALISTAN CONSTITUTED A VALID ENFORCEMENT OF THE RIGHTS AND OBLIGATIONS OF THE PARTIES TO THE TREATY.

A fundamental provision of the treaty gave Indepesh equal status with the other federal states in return for Indepeshi adherence to the federal Constitution. It has been established that Indepesh passed the Universal Enfranchisement Act in 1973 in order to increase its representation in the federal parliament, which representation was proportionally based on voter registration.<sup>6</sup> Indepesh's illegal action in passing the Act, as well as its subsequent attempt at enforcement despite a Supreme Court decision holding it unconstitutional, represented a flagrant breach of the treaty and of Indepesh's duty under international law to perform its treaty obligations in good faith.<sup>7</sup>

Subsequent to Indepesh's material breach, Balistan did not terminate the treaty as it was entitled to under international law.<sup>8</sup> As a general rule, when one party to a treaty breaches its terms, the aggrieved party is entitled to take the necessary steps to enforce it.<sup>9</sup> The Union's actions over the following years, such as enforcing valid voting qualifications, suspending the Indepeshi constitution, and installing a military governor, were good faith attempts to uphold the validity of a treaty into which Indepesh entered freely. In contradistinction, Indepesh is now, in effect, seeking court approval of its blatant and unjustified breach of its treaty obligations.

C. INDEPESH DID NOT PROPERLY OR EFFECTIVELY EXERCISE ITS RIGHTS UNDER THE PRINCIPLE OF SELF-DETERMINATION TO ACHIEVE SOVEREIGNTY.

The Federal Union of Balistan, as a United Nations member, recognizes the principle of self-determination, that is, the right of a cohesive ethnic group to determine its own political status and to enjoy "full democratic rights."<sup>10</sup> Indepesh fully and freely exercised this right by joining the Union upon ratification of the Articles of Association by popular referendum in Indepesh. Because they shared a common ethnic background, their territory was contiguous, and they were mutually and economically dependent, the union was advantageous to both parties. Moreover, by the terms of the treaty, which the Union has consistently upheld, Indepesh was guaranteed equal participation in government. Notwithstanding the fact that one act of choice on the part of the group normally fulfills the principle of self-determination permanently,<sup>11</sup> to allow groups to vacillate repeatedly without substantial grounds would lead to instability and threaten world peace.<sup>12</sup>

The principle of self-determination is not a right accruing to any group at any time.<sup>13</sup> State practice has limited the exercise of the principle to the colonial context. For example, the Organisation of African Unity subordinates the principle of self-determination to that of territorial integrity.<sup>14</sup> As former Secretary-General U Thant stated, with reference to United Nations practice:

Self-determination of peoples does not imply self-determination of a section of a population of a particular Member State. . . .When a State applies to be a Member of the United Nations, and when the United Nations accepts that Member, then the implication is that the rest of the membership of the United Nations recognizes the territorial integrity, independence and sovereignty of this particular Member State.<sup>15</sup>

Indepesh has alleged insubstantial grounds to support the exercise of the principle and to support its breach of the treaty. However, even if it is demonstrated that self-determination applies extrinsically to the colonial context, Balistan respectfully submits that there has been no deprivation of fundamental human rights which would give Indepesh an opportunity to exercise the principle.<sup>16</sup> There are no principles of humanitarian law which would have precluded Balistan's course of action. As a signatory of the International Covenant on Civil and Political Rights [hereinafter referred to as Civil Rights Covenant]<sup>17</sup>, Balistan recognizes the right of every citizen "to take part in the conduct of public affairs" without unreasonable restrictions. However, that same Covenant specifically recognizes the authority to take measures in derogation of this right in times of public emergency. This was a public, albeit internal, emergency, and the United Nations was notified accordingly.

When Indepesh joined the Union, women were not permitted to vote. By enfranchising women in violation of the federal Constitution, Indepesh illegally attempted to gain a greater proportional representation than the other federal states, an act equally in violation of the treaty. While it is true that both men and women were arrested for election fraud, only women were interned in re-education camps, reflecting the different charges brought against them. Women were arrested for violation of the constitutional prohibition against their voting, while men were arrested for failing to meet the literacy requirements.

Furthermore, every state has a legitimate recourse to administrative detention in times of national emergency. The internment

of Indemedians, for example, has many precedents in the practice of states, including Canadian action in Quebec in 1971 against French Canadian terrorists, and British action in Northern Ireland against Irish dissidents in the same year.<sup>18</sup> Since no action was taken against the substantial number of Indemedians living in Balistan, and since no intent, therefore, to destroy the group is present or may be inferred, the internment represented neither a crime against humanity nor genocide [see Appendix A].

It is critical to note that Indepesh retained control of its political process and democratic rights. Indepesh was adequately represented in the federal Parliament, by both Indemedian and Balistani Indepeshis, on an equal footing with the other federal states.<sup>19</sup> Only unqualified voters were turned away from the polls in 1974<sup>20</sup>; thus, the ratio of representatives to qualified voters was the same throughout the Union.

There was a substantial minority of Indemedians throughout the four Balistani states who were also required to vote in Balistani. Indepesh was cognizant of the fact that literacy tests in Indemedian were not sanctioned by the federal Constitution, although they were tolerated for a time. Indepesh was also aware ab initio that Indemedian had never been adopted as the official language of the Union. Therefore, Indepesh's silent acquiescence to these circumstances over twenty-three years precludes it from invoking the valid enforcement of the constitutional language provisions as a breach of the treaty by Balistan.<sup>21</sup>

If Indepesh wished to comply with its obligations but was concerned with federal requirements, it could have attempted to work

within the legal framework of the Union, since the principle of self-determination is satisfied by any method which accords fundamental rights and adequate political control to the group in question.<sup>22</sup> Furthermore, working within the federal system would have preserved the territorial integrity of the Union. Regrettably, Indepesh chose to abrogate its obligations unilaterally and extralegally.

However, assuming arguendo that Indepesh did have the right to exercise self-determination in this situation, the plebiscite held by Indepesh was an inconclusive expression of the will and aspirations of its people. Because no voting lists were found, there is no indication of who voted in the plebiscite or how often. In addition, women in internment camps did not vote. Although women may not be competent to vote in federal and state elections, they do comprise a significant part of the entity attempting to assert its rights, as a group, to self-determination. There were, therefore, serious irregularities in the conduct of the plebiscite.

The basis of self-determination is that it represents the will of a unified group. Only fifty-two percent of those voting approved of secession; and though the Indepeshis may share a common historical and ethnic background, a fifty-two percent vote neither manifests a common goal, nor establishes a preemptory mandate. It is clear that in so crucial a decision, the remaining forty-eight percent, as well as those who did not vote in Indepesh have been denied an equal right to be heard on the question of self-determination.

D. RECOGNITION OF INDEPESH BY MEDIA AND SINISTRA WAS PREMATURE AND INADEQUATE TO ESTABLISH INDEPESHI SOVEREIGNTY.

Not only was the Indepeshi exercise of the principle of self-

determination inadequate to establish Indepesh as an independent state, but recognition by Media and Sinestra was similarly deficient.

One of the essential characteristics of statehood is that a state must be "capable of entering into relations with other entities with international personality."<sup>23</sup> The best evidence of this capability is demonstrated by the willingness of other states to extend recognition. Indepesh was recognized by only two states, was clearly not recognized by two others, Balistan and Corruna, and the remainder of the international community did not express an opinion. Manifestly, the overwhelming majority of the community of nations did not believe Indepesh to have the capacity to enter into international relations. The actions of two states can hardly be decisive.<sup>24</sup> As Professor Oppenheim states:

A dispute arising out of a rebellion ... may become one of international character when ... recognition, in accordance with the requirements of International Law, has been granted to the rebellious province by a number of States of sufficient importance.<sup>25</sup>

No definitive standards have been established, but recognition is generally considered to be premature when the entity in question is not yet emergent.<sup>26</sup> Since Indepesh did not fulfill the essential criteria of statehood, the recognition by Media and Sinestra was premature and, therefore, cannot be considered the basis for creating a new international personality.<sup>27</sup> Moreover, that recognition constituted an international tort as to Balistan as an unwarranted interference with the Union's sovereignty over its domestic territory.

II. INDEPESH IS NOT ENTITLED TO A DECLARATION THAT THE BALISTANI TREATMENT OF INDEPESHI COMBATANTS WAS IN VIOLATION OF INTERNATIONAL LAW.

A. INDEPESHI COMBATANTS RECEIVED JUST TREATMENT IN ACCORDANCE WITH THE RULES OF INTERNATIONAL LAW REGARDING INTERNAL ARMED CONFLICTS.

The Union was justified in using force against Indepesh since it is the right of a sovereign to quash a civil disturbance or rebellion within its territory. "[T]he prohibition of resort to force .... does not apply to force used by the State ... for the suppression of a revolt which has broken out within its territory."<sup>28</sup>

Traditionally, no protection is accorded under international law to those who fight in an internal uprising.<sup>29</sup> However, because of an increasing concern for basic humanitarian principles, the High Contracting Parties to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,<sup>30</sup> the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,<sup>31</sup> the Geneva Convention Relative to the Treatment of Prisoners of War [hereinafter referred to as the POW Convention],<sup>32</sup> and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter referred to as the Civilian Convention]<sup>33</sup> [hereinafter collectively referred to as the Geneva Conventions] realized that certain minimum standards should be applied. Once a civil conflict has reached the level that has all the characteristics of, and produces suffering similar to, a state of war, the provisions of Article 3 (common to all four Geneva Conventions) obtain.<sup>34</sup>

However, not every exercise of legitimate police power rises to that level. Certain fundamental criteria must be met in order

to establish an Article 3-type armed conflict. It is generally considered that Article 3 applies where the party in revolt has an organized military force, control over a determined territory, a responsible authority, and the means to respect the Geneva Conventions, and the legal government is required to resort to an organized military response.<sup>35</sup> These criteria were not satisfied by Indepesh until Balistan was compelled to resort to military force in order to uphold the integrity of the Union.<sup>36</sup> At this point, Balistan recognized a duty to apply the protections of Article 3.

Article 3 provides basic humanitarian considerations to persons taking no active part in the hostilities, and to members of the armed forces placed hors de combat. Members of the Indepeshi armed forces captured by Balistan were treated properly under this Article. However, a legitimate government has the power to treat those who rebel against its authority as criminals.<sup>37</sup> Accordingly, regulars and militia were detained while attempts were made to reintegrate them into the Union's socio-political structure. This course of conduct is permissible under Article 3, and is further sanctioned under Article 10 of the Civil Rights Covenant as a legitimate penal objective.

Indepeshi officers formerly loyal to Balistan, however, were prosecuted for the crime of treason, which is an offense committed against a state to whom a duty of allegiance is owed.<sup>38</sup> Those citizens who participate in a revolutionary movement against the established government may be prosecuted as traitors.<sup>39</sup> Under Article 6 of the Civil Rights Covenant, the death penalty may be imposed for serious crimes; customary international law recognizes treason as belonging to this category of offenses.<sup>40</sup>

Indepesh recruited mercenaries in various countries, in violation of the Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land.<sup>41</sup> The status of mercenary is a question of intent as to whether the individual was motivated by personal or financial considerations; that intent may be inferred from overt acts.<sup>42</sup> Of significance is the Indepeshi recruitment of non-nationals at salaries substantially in excess of those paid lawful combatants.<sup>43</sup>

These contract combatants were properly treated by Balistan under Article 3. While mercenary status is not per se criminal, actions by mercenaries may subject them to punishment for capital crimes under the laws of the detaining power. A precedent for holding trials for mercenaries, and for the imposition of death penalties for serious offenses, was established by trials in the Sudan in 1971 and in Angola in 1976.<sup>44</sup> Following these precedents and scrupulously adhering to the requirements of Article 3, Balistan tried the mercenaries for capital offenses. Among those subsequently convicted, some were sentenced to death, while others served prison terms under the same relative conditions as Union criminals.<sup>45</sup> To have allowed the mercenaries any special considerations as convicted prisoners would have violated the equal protection guarantees of Article 26 of the Civil Rights Covenant.

The Indepeshi partisans were rightfully treated as common criminals as well. They are not entitled to any protections under common Article 3, since they are neither non-participants in the hostilities nor members of the armed forces. However, they were suitably treated under international humanitarian law.

Balistan was entitled to treat them as criminals under municipal law, and intern them as necessary under Article 9 of the Civil Rights Covenant. Those involved in the Halam Ambush were correctly prosecuted for the grave offenses of railroad sabotage, murder of soldiers and civilians, and treason. In such a public emergency, where the government is fighting for its existence, immediate and severe punishment is necessary.<sup>46</sup> In these circumstances, Article 4 of the Civil Rights Covenant permits derogations from the full trial guarantees contained in Article 9. It was regrettable, but unavoidable, that other partisans died while resisting arrest.

B. BALISTAN'S CONDUCT WAS NEVERTHELESS JUSTIFIED, EVEN IF THE FULL PROVISIONS OF THE GENEVA CONVENTIONS APPLIED.

Although Balistan did not grant captured members of the Indepeshi armed forces prisoner-of-war [hereinafter referred to as POW] status, they were given commensurate considerations.<sup>47</sup> Balistan confined prisoners in camps similar to POW camps, but feared that an official decree of POW status would weaken the legitimate government and confer a degree of legality on the rebels. Customarily, many states object to designating, as distinguished from treating, captured nationals as POW's.<sup>48</sup> Moreover, consistent with accepted international practice and principles, Balistan acted in good faith, since it is not necessary to grant POW status to citizens of the detaining power. At that time, it was reasonable for Balistan to believe that Indepesh was still a constituent part of the Federal Union.

It is self-evident that sedentary prisoners require far less sustenance than active fighting men. Therefore, the fact that food

rations were cut in the internment camps did not constitute a violation. At this stage of the conflict, when there was widespread starvation in Balistan,<sup>49</sup> it would have been both unrealistic and unreasonable to require Balistan to feed its prisoners better than its citizens.

Balistan acted suitably towards the mercenaries as well. The United Nations takes the position that mercenaries are not entitled to treatment as either POW's or lawful combatants.<sup>50</sup> Indeed, the laws of war discourage the use of mercenaries by forbidding their recruitment in neutral states and by calling upon states to punish offenders.<sup>51</sup> The only apparent protection given to mercenaries under international law lies within the ambit of the Civilian Convention, Article 4, by virtue of their presence "in the hands of a Party to a conflict or Occupying Power of which they are not nationals." The protection, however, only extends when the country of nationality does not have diplomatic relations with the detaining power. Since the mercenaries' states do have consulates in Balistan,<sup>52</sup> they therefore are not protected persons within the scope of the Civilian Convention.

In addition, Indepeshi partisans were treated appropriately under the full Geneva Conventions. They were not entitled to protection under the POW Convention, because of their non-compliance with Article 4(A)(2).<sup>53</sup> At most, therefore, they were entitled to protection under the Civilian Convention. Since Article 64 of that Convention authorizes an occupying power to try and convict protected persons for violations of its penal law, Balistan did not deviate from its obligations under the Civilian Convention.

C. INDEPESH SHOULD NOT BE GRANTED THE DECLARATION  
IT SEEKS ON EQUITABLE GROUNDS.

As a sovereign and a signatory of the Geneva Conventions, Indepesh is claiming that international law binds the parties, and that it is entitled to a declaration that Balistan acted in contravention of international norms. Yet Indepesh itself violated many of the rules and customs of war, and sundry provisions of the Geneva Conventions.<sup>54</sup> It should, therefore, be denied the declaration requested on equitable grounds.

Principles of equity as part of the "general principles of law recognized by civilized nations" are distinguishable from the Court's power "to decide a case ex aequo et bono."<sup>55</sup> The Court is free to apply equitable principles, according to former Justice Hudson. He stated, in the Diversion Case, that when an applicant, guilty of the same infraction, claims a treaty breach by the other party, equitable principles should be applied.<sup>56</sup> This concept has also been recognized by the Nuremberg Tribunal.<sup>57</sup>

Balistan has acted in good faith throughout this entire controversy in the belief that, as an insurgent uprising, it was governed solely by municipal law. Indeed, if the Indepeshi revolt had been as unsuccessful as the Biafran uprising against Nigeria, there would be no question of the legitimacy of Balistan's actions. To hold Balistan liable in these circumstances would create impossible demands on a state, requiring that international norms be followed in any conflict which could conceivably develop into an uprising.

Moreover, under the principle of intertemporal law,

[T]he creation of a right must be appreciated in the light of the law which is contemporary with the acts which are creative of the right. The subsequent survival of a right at any future time depends on the state and requirements of international law at that particular moment.<sup>58</sup>

The law in effect at the time the alleged violations took place was municipal law, not international law, and Balistan has complied with the requirements of international law as it applies to a domestic situation.

III. INDEPESH HAS AN ABSOLUTE OBLIGATION TO REPATRIATE ALL BALI-STANI NATIONALS CURRENTLY IN DETENTION.

A. ALL PRISONERS HELD BY INDEPESH AND ENTITLED TO POW STATUS MUST BE REPATRIATED WITHOUT DELAY UPON THE CESSATION OF ACTIVE HOSTILITIES.

Indepesh is bound by the Geneva Conventions and all other multilateral treaty commitments of the Federal Union by virtue of its status as a state within the Federal Union. In addition, Indepesh has expressly recognized this obligation.

Therefore, once a cease-fire was established, Indepesh was absolutely required to proceed to execute a plan of repatriation in conformity with the POW Convention, Article 118. At present, Indepesh has obstinately refused to repatriate in the absence of a concluded peace treaty, in derogation of its treaty obligations. Article 118 imposes a clear and unambiguous requirement to repatriate immediately, irrespective of the technical legal status of the parties.<sup>59</sup> This provision was specifically written to impose a more stringent requirement than the Regulations Annexed to the Hague Convention Respecting the Laws and Customs of War on Land [hereinafter referred to as Hague IV]<sup>60</sup>, which did not require repatriation until a peace treaty was concluded.

It is clear from the language of Article 118 that the High Contracting Parties did not intend an interim phase, or "status mixtus," to apply. Although some publicists have contended that a "status

mixtus" exists as an intermediary phase between war and peace, enabling a state to assert traditional rights under the rules of war,<sup>61</sup> that argument is inapplicable here. "Status mixtus" has never been specifically adopted as a legal principle. This Court declined to resolve the issue in the Corfu Channel Case when Albania, claiming "status mixtus," requested a ruling on the legality of its restrictive security measures within the Channel.<sup>62</sup> The Court held the measures justified, reasoning that such actions were compatible with peace and international shipping, without passing on the claim.

The Indepeshi refusal to repatriate is also based on a fear that returning prisoners would replenish the Union's ranks and result in renewed hostilities.<sup>63</sup> This contention is unwarranted in view of Balistan's express and unequivocal recognition of Indepesh as an independent state and the Indepeshi government as its legitimate authority.<sup>64</sup> Balistan has no intention of renewing military operations; Balistan is fully aware that such an action would constitute an aggressive war under the Nuremberg principles as adopted by the United Nations.<sup>65</sup> Impugning Balistan's honorable motives in so serious a manner is unmerited and unjustifiable. Therefore, in the context of the obvious intent of the POW Convention to encourage the swift release of POW's, and in view of the Indepeshi failure to justify non-conformance with this mandate, it is respectfully submitted that all Balistani prisoners entitled to POW status be repatriated immediately.

**B. THE BALISTANI ARMED FORCES ARE NOT PROSECUTABLE FOR ANY VIOLATIONS OF THE RULES OF WAR UNDER THE PRINCIPLES OF THE NUREMBERG CHARTER.**

This conflict was an internal struggle; therefore, the only

international rules of war at issue are those under common Article 3 of the Geneva Conventions. This article, although establishing basic humanitarian rules of conduct, imposes no liabilities on individuals. Furthermore, the United States Supreme Court has repeatedly stated, as a principle of international law, that local courts have no jurisdiction to try members of the occupying army for actions pursuant to military operations, even though alleged to be violations of the laws of war.<sup>66</sup> Therefore, Indepesh should not be allowed to try members of the Balistani armed forces for violations of municipal law.

However, if the conflict is deemed to be international in scope, it is respectfully proposed that the conduct of the Balistani armed forces was nonetheless proper. The principles enumerated in the Nuremberg Charter were conceived as a corpus of directives imposing individual responsibility for war actions.<sup>67</sup> By codifying these principles, the United Nations established general standards of responsibility, whereby an accused, to be held guilty of the acts charged, must be a knowing and voluntary party to the crime.<sup>68</sup> The Nuremberg principles are, thus, authority for Balistan's contention that Indepesh is illegally holding members of its armed forces as criminals by failing to establish the requisite mens rea.

The concept of crimes against peace [see Appendix A] was not intended to apply to these Balistani detainees. It refers only to those leaders of a country in a position to shape policy, having knowledge of the aggressive nature of the conflict.<sup>69</sup> It would be patently absurd to expect a common foot-soldier to possess the required knowledge or intent.

The Balistani armed forces have committed no acts which are prosecutable as war crimes [see Appendix A]. A violation of the laws of war is only triable as a war crime where the act is unjustified by military necessity: that is, the right to apply the quantum and kind of force necessary to compel the submission of the enemy within the briefest measure of time.<sup>70</sup> This concept is specifically recognized in the Civilian Convention, Article 53.

It is unclear, according to Schwarzenberger, whether full-scale aerial warfare violates any extant laws or customs of war, especially in light of state practice during World War II and the Vietnam conflict.<sup>71</sup> Neither is it clear that any doctrine of proportionality is applicable.<sup>72</sup> During the hostilities in question, the Union air force attacked only legitimate military targets. Seaports and railroad yards, when directly used to further the military effort, became proper subjects of attack. The consequent loss of civilian life was as unfortunate as it was unavoidable. Although attacks against a civilian population are strictly prohibited, civilians who find themselves in close proximity to military objectives must accept the inherent risks.<sup>73</sup> Within humanitarian bounds, there is no obligation to refrain from the use of certain weapons; it was, therefore, conscionable for the Air Force to refuse to switch to "smart bombs."

Furthermore, the dikes and highways became susceptible to military attack once anti-aircraft emplacements were installed thereon. Recent United Nations protocols, while prohibiting attacks on dikes which are "works containing dangerous forces," nevertheless withdraw this protection when the dikes are employed in direct support of

military operations.<sup>74</sup> To minimize potential structural damage, Balistan used fragmentation bombs aimed at the enemy personnel manning the weapons, and not at the dikes. It was only after acceding to popular pressure that the Balistani forces substituted conventional bombs<sup>75</sup> and, predictably, the dikes broke. Thus, there was no damage other than that which was dictated by military necessity.

Similarly, the presence of military installations and anti-aircraft emplacements in Indelabad made the city a suitable target for military attack under Hague IV, Article 25. When an area is used predominately to support the war industry, so as to impress this character on the whole vicinity, and the region is so heavily defended that the selection of specific targets within it is impracticable, it becomes a legitimate strategic objective in its entirety.<sup>76</sup> The particular situation in Indelabad warranted the technique of carpet bombing to reach the significant military objectives interspersed throughout the city. Indepesh must not be allowed to use its civilian population to shield its combat operations.<sup>77</sup> The civilian damage that resulted was unintentional, and therefore not a crime against humanity [see Appendix A].

There is no basis for prosecuting Union occupying forces for war crimes under the Nuremberg principles, either. The "scorched earth" policy did not violate the rules of war, and, under proper circumstances, may be demanded by military necessity.<sup>78</sup> This policy's two-fold purpose, to facilitate Balistani military operations by ensuring the safety of retreating troops,<sup>79</sup> and to destroy the base from which Indepesh's effective guerilla forces operated,<sup>80</sup> was entirely justified by strategic demands.

Even if it were established that these acts are prosecutable as war crimes, members of the Union armed forces cannot be held responsible under the Nuremberg Charter. Article IV states:

The fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.<sup>81</sup>

While this provision removes the defense of superior orders, it recognizes circumstances under which an individual may not be held accountable. Obedience to lawful military orders is the duty of every member of the armed forces. In conditions of war, disciplined soldiers cannot be expected to weigh the legal merits of each order. Moreover, rules of war are often controversial.<sup>82</sup> In consideration of the strong emphasis on loyalty and obedience in the Balistani armed forces, it could hardly be said that a moral choice was, in fact, open.

C. THE TERMS OF THE INDEPESHI RESERVATION TO ARTICLE 85 OF THE POW CONVENTION DO NOT PRECLUDE THE IMMEDIATE REPATRIATION OF ALL BALISTANI COMBATANTS.

The Indepeshi reservation to the POW Convention, Article 85, provides that all members of the regular armed forces will be entitled to the protections of the Convention unless and until they have been prosecuted and convicted for violations of the Nuremberg principles.<sup>83</sup> Indepesh has withdrawn many of the following protections guaranteed under the POW Convention, even though there is no evidence that any individuals have been prosecuted and convicted: an officer was executed in retaliation in violation of Article 13; members of different branches of the armed forces were treated differently within the same camp in violation of Article 16; air raid shelters

were not provided in violation of Article 23; high ranking officers were not afforded considerations due their rank in violation of Article 44; junior officers were required to perform heavy labor in violation of Article 49; POW's were confined in prison camps in violation of Article 97; and POW's were stripped of their regulation military equipment in violation of Article 118.<sup>84</sup>

By a distortion of the plain and unambiguous meaning of the terms of the reservation, Indepesh would substitute "or" for "and" to withdraw the protections of the POW Convention upon a minimal commencement of prosecution, as the Democratic Republic of Vietnam has done.<sup>85</sup> This approach has been unequivocally rejected by the International Committee of the Red Cross and the United States, while the Soviet Union, which issued a similar reservation, permits the denial of protection only after a legally enforceable conviction for a war crime.<sup>86</sup> If the reservation is read in the disjunctive, as urged by Indepesh, all the obligations of the Convention would be circumvented simply by accusing POW's of war crimes. This would effectively restore the pre-1949 punitive measures that Article 85 was intended to cure.

All exceptions to the POW Convention protections must be construed narrowly in order to ensure minimum humanitarian safeguards for captured combatants.<sup>87</sup> Indepesh's mere blanket accusations do not rise to the level of prosecution. There is no civilized precedent denying minimum safeguards that prejudices all captives indiscriminately as criminals, and denies them POW status from the date of capture without any hearing. Moreover, although Article 87 of the Convention expressly forbids collective punishment for

individual acts, Indepesh continues to hold arbitrarily all captured members of the armed forces in disregard of the innocence of many.

#### CONCLUSION

For the foregoing reasons set forth in this memorial, Respondent respectfully requests that the International Court of Justice render its decision in favor of the Federal Union of Balistan finding that:

- (1) Balistan has rightfully enforced the Federal Constitution to effect resolution of an internal dispute;
- (2) Under the rules of international war governing internal armed conflicts, Balistan's treatment of Indepeshi combatants was justified;
- (3) Balistan may rightfully require Indepesh to repatriate all Balistani combatants expeditiously.

#### APPENDIX A

##### Article 6 of the Nuremberg Charter - Excerpts

(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. J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 320 (5th ed. 1963).
2. Stipulation of Record at 2.
3. 1 G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 442 (3d ed. 1957).
4. 1 L. OPPENHEIM, INTERNATIONAL LAW § 79 (8th ed. H. Lauterpacht 1955).
5. Id. at § 124; G. SCHWARZENBERGER & E. BROWN, A MANUAL OF INTERNATIONAL LAW 52, 77 (6th ed. 1976).
6. Stipulation of Record at 2.
7. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/Conf. 39/27, art 26; 1 L. OPPENHEIM, supra note 4, at 503.
8. Vienna Convention on the Law of Treaties, supra note 7, at art. 60(1).
9. 1 L. OPPENHEIM, supra note 4, at §527.
10. U.N. CHARTER art. 1(2); A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT TO SELF-DETERMINATION 226 (1973).
11. Schachter, The United Nations and Internal Conflict in LAW AND CIVIL WAR IN THE MODERN WORLD 406 (J. Moore ed. 1974).
12. Sinha, Is Self-Determination Passé?, 12 COL. J. INT'L L. 260, 271 (1973).
13. 1 J. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 322-24 (1968).
14. Nayer, Self-Determination Beyond the Colonial Context: Biafra In Retrospect, 10 TEX. INT'L L.J. 321, 327 (1975); see also 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).
15. U.N. Office of Public Information, Press Release, SG/SM/1201, Jan. 19, 1972 at 2.
16. Dinstein, Collective Human Rights of Peoples and Minorities, 25 INT'L & COMP. L.Q. 102, 103 (1976).
17. G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966).
18. Greenspan, Human Rights in the Territory Occupied by Israel, 12 SANTA CLARA LAW. 377, 388 (1972).
19. Stipulation of Record at 2.

20. Id.
21. D. O'CONNELL, INTERNATIONAL LAW 285 (1965).
22. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 575 (2d ed. 1973).
23. D. GRIEG, INTERNATIONAL LAW 93 (1976); J. STARKE, supra note 1, at 88.
24. D. GRIEG, supra note 23, at 137; Ijalye, Was "Biafra" at Any Time A State in International Law, 65 AM. J. INT'L L. 551, 559 (1971).
25. 2 L. OPPENHEIM, INTERNATIONAL LAW § 52a (7th ed. H. Lauterpacht 1948) (emphasis added).
26. M. BRIERLY, THE LAW OF NATIONS 138 (6th ed. 1963).
27. 1 L. OPPENHEIM, supra note 4, at § 73.
28. 2 L. OPPENHEIM, supra note 25, at § 52a.
29. Falk, Janus Tormented: The International Law of Internal War in INTERNATIONAL ASPECTS OF CIVIL STRIFE 197 (J. Rosenau ed. 1964).
30. Done Aug. 12, 1949, [1955] 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31.
31. Done Aug. 12, 1949, [1955] 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85.
32. Done Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.
33. Done Aug. 12, 1949, [1955] 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287,
34. H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 246 (1947).
35. 3 J. PICTET, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36 (1960).
36. Stipulation of Record at 4.
37. A. BARKER, PRISONERS OF WAR 19 (1975).
38. M. GREENSPAN, THE LAW OF LAND WARFARE 330 (1959).
39. 2 G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 677 (1968).
40. M. GREENSPAN, supra note 38, at 331.
41. Done Oct. 18, 1907, [1910] 36 Stat. 2310, T.S. 540 [hereinafter cited as Hague V].
42. Assner & Brant, Law of the Mercenary: An International Dilemma,

6 CAP. U.L. REV. 339 (1977).

43. Report of the Sec'y-General, Respect for Human Rights in Armed Conflict, U.N. Doc. A/32/144, protocol I, art. 47 (1977).
44. Assner & Brant, supra note 42, at 352.
45. Stipulation of Record at 6.
46. Bond, Proposed Revisions in the Law of War Applicable to Internal Conflict, 12 SANTA CLARA LAW. 223, 243 (1972).
47. Stipulation of Record at 5.
48. A. BARKER, supra note 37, at 19; Bond, supra note 46, at 238.
49. Stipulation of Record at 3.
50. Report of the Sec'y-General, supra note 43, art. 47.
51. Hague V, supra note 41, arts. 4, 5, respectively.
52. Stipulation of Record at 6.
53. Id. at 5.
54. See pp. 19-20 infra.
55. Statute of the International Court of Justice, art. 38.
56. Diversion of Water from the Meuse, [1937] P.C.I.J., Ser. A/B No. 70, 77-78 (concurring opinion).
57. 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]; 2 G. SCHWARZENBERGER, supra note 39, at 520.
58. 1 G. SCHWARZENBERGER, supra note 3, at 23; see Island of Palmas, 2 R. INT'L ARB. AWARDS 829 (1928).
59. M. GREENSPAN, supra note 38, at 610.
60. Done Oct. 18, 1907, [1910] Annexed Regs. art. 20, 36 Stat. 2277, T.S. No. 539.
61. See N. FEINBERG, THE LEGALITY OF A "STATE OF WAR" AFTER THE CESSATION OF HOSTILITIES (1961).
62. (Merits) [1950] I.C.J. 388.
63. Stipulation of Record, Clarification of Sept. 30, 1977 at 1.

64. Stipulation of Record, Clarification of Dec. 28, 1977 at 1.
65. 2 G. SCHWARZENBERGER, supra note 39, at 47.
66. *Freeland v. Williams*, 131 U.S. 405 (1889); *Coleman v. Tennessee*, 97 U.S. 509 (1878); *Ford v. Surget*, 97 U.S. 605 (1878).
67. Falk, *Nuremberg: Past, Present and Future*, 80 YALE L.J. 1501, 1516 (1971).
68. 2 G. SCHWARZENBERGER, supra note 39, at 521.
69. 3 J. PICTET, supra note 35, at 418.
70. M. GREENSPAN, supra note 38, at 313.
71. 2 G. SCHWARZENBERGER, supra note 39, at 159.
72. STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, *THE LAW OF WAR AND DUBIOUS WEAPONS* 10 (1976).
73. Bond, supra note 46, at 230.
74. Report of the Sec'y-General, supra note 43, at art. 56.
75. Stipulation of Record at 9.
76. M. GREENSPAN, supra note 38, at 336.
77. Report of the Sec'y-General, supra note 43, at art. 51.
78. R. WORMSER, *COLLECTION OF INTERNATIONAL WAR DAMAGE CLAIMS* 160 (1944).
79. M. BASSIOUNI & V. NANDA, *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 356 (1973).
80. M. GREENSPAN, supra note 38, at 319.
81. Nuremberg Charter, supra note 57 (emphasis added).
82. U.S. DEP'T OF THE ARMY, *THE LAW OF LAND WARFARE*, subpara. 41 (Field Manual 27-10, 1956); 2 L. OPPENHEIM, supra note 25, at § 253.
83. Stipulation of Record, at Appendix B.
84. Id. at 7, 8.
85. AMERICAN ENTERPRISE INSTITUTE, *THE PRISONER OF WAR PROBLEM* 23 (1970).
86. Letter from Ministry of Foreign Affairs to the Swiss Federal Council, May 26, 1955, cited in 3 J. PICTET, supra note 35, at 424.
87. Note, The Geneva Convention and the Treatment of Prisoners of War in Vietnam, 80 HARV. L. REV. 851, 862 (1967).

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