

IN THE
INTERNATIONAL COURT OF JUSTICE
AT THE
PEACE PALACE, THE HAGUE, THE NETHERLANDS

REPUBLIC OF INDEPESH

Applicant

v.

FEDERAL UNION OF BALISTAN

Respondent

MARCH TERM

1978

MEMORIAL IN BEHALF OF APPLICANT

February 10, 1978

Team Number 333 A

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INTERNATIONAL DOCUMENTS

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--	---

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D. Bowett, <u>Self-Defense in International Law</u> (1958).....	9
J. Greenspan, <u>The Modern Law of Land Warfare</u> (1959).....	13
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JOURNALS

Bowett, <u>Self-Determination and Political Rights in the Developing Countries</u> , Proc. Am. Soc'y Int'l L. 129 (1966)..	4
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King, <u>Revolutionary War, Guerrilla Warfare and International Law</u> , 3 Case W. Res. J. Int'l L. 91 (1972).....	15
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Levie, <u>Legal Aspects of the Continued Detention of the Pakistani Prisoner</u> , 67 Am. J. Int'l L. 512 (1973).....	20
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Zillman, <u>Prisoners in the Bangladesh War</u> , 8 Int'l L. 124 (1974).....	20

MISCELLANEOUS

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JURISDICTION

The parties submit the present dispute to this Court by special agreement, pursuant to Article 40 of the Statute of the International Court of Justice, which provides:

1. Cases are brought before the Court, as the case may be, either by notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

Moreover, Article 36 of the Statute of the International Court provides that the jurisdiction of the Court comprises all cases which the parties refer to it. It must therefore follow that the Court has jurisdiction to resolve the present dispute. In addition, by virtue of Article 36 and 38 of the Statute, the Court may settle all the questions presented.

STATEMENT OF FACTS

The parties have agreed to the Statement of Facts which has been filed before the Court.

QUESTIONS PRESENTED

I.

When did Indepesh acquire the status of a sovereign independent State.

II.

Whether any multilateral conventions and general rules of international law were applicable to the hostilities.

III.

What violations, if any, of multilateral conventions or general rules of international law occurred.

IV.

Have hostilities terminated mandating repatriation of prisoners.

V.

The nature of the remedy, if any, to which either party may be entitled.

SUMMARY OF ARGUMENT

The Articles of Association was not solely an instrument of merger. The primary purpose of the Articles of Association was to ensure to Indepesh and her citizens equal status with the other sectors of the Federal Union upon incorporation. The initiation of military control and the denial of civil and political rights in Indepesh constituted a material breach of the Articles of Association. A material breach of a treaty constitutes grounds for terminating the treaty. Indepesh, as a member of a Federal State, had the capacity to invoke the breach as grounds for terminating the Articles of Association. Upon termination of the Articles of Association, either through operation of law, or by possessing the elements of statehood, Indepesh became a sovereign independent State.

As a sovereign independent state, Indepesh acceded to all the treaties to which Balistan was a party. Consequently, when hostilities commenced, the Geneva Conventions of 1949 and other humanitarian treaties were applicable. It was irrelevant whether Balistan recognized the government of Indepesh or whether a state of war existed, since it is de facto hostilities which triggers their application.

The primary purpose of humanitarian conventions is to ameliorate unnecessary suffering. The failure of Balistan to extend prisoner of war status to Indimedian forces violated international law and frustrated the primary purpose of the conventions. The international community has condemned such practices and adopted the position that all combatants should be granted prisoner of war status. However, Balistan utilized prisoners as a means for executing reprisals against Indepesh. Equally reprehensible was the indiscriminate aerial bombardment, which inflicted unnecessary suffering on noncombatants.

Legally, and in the light of Balistan's conduct, a cease-fire is insufficient to terminate hostilities. Only a treaty of peace, which would contain adequate safeguards against a renewal of hostilities, can terminate hostilities. Until such a treaty is concluded, the hostilities have not terminated and repatriation of prisoners is not mandated.

Therefore, Indepesh seeks a declarative injunction that Balistan's conduct violated international law, repatriation of prisoners is premature, and that reparations should be made to Indepesh.

ARGUMENTS AND AUTHORITIES

I. THE REPUBLIC OF INDEPESH ACQUIRED THE STATUS OF A SOVEREIGN STATE PRIOR TO THE COMMENCEMENT OF HOSTILITIES.

A. The Articles of Association Was a Legally Binding Treaty.

A treaty is an international agreement concluded between States in written form and governed by international law.¹ It is binding upon the contracting parties and must be performed by them in good faith (pacta sunt servanda).²

B. Indepesh Was Legally Justified in Terminating the Treaty.

1. Balistan Committed a Material Breach of the Articles of Association.

Treaties should be interpreted according to the ordinary meaning of their terms.³ It is to the intention of the parties at the time the instrument was concluded, and in particular the meaning attached by them to the terms, that primary regard must be paid. Hence, it is legitimate to consider

¹Vienna Convention on the Law of Treaties, opened for signature, May 23, 1969, art. 2, para. 1 (a), U.N. Doc. A/CONF. 39/27 289 (1969) (hereinafter cited as Vienna Convention). As of June 30, 1977, 28 States had deposited instruments of ratification, See U.N. Chronicles (July 1977).

²Vienna Convention, 3rd recital of preamble (affirming that the principles of free consent, good faith, and pacta sunt servanda are "universally recognized"), and art. 26 (all treaties are binding on the parties thereto, and must be performed in good faith). See Kearney & Dalton, The Treaty on Treaties, 64 Am. J. Int'l L. 561 (1970).

³This principle was reaffirmed by this Court in the Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, (1960) I.C.J. 150 (the words "largest ship-owning nations" in art. 28 of the Convention of March 6, 1948, establishing the Organization, were held to mean the countries with the largest figures of registered tonnage, without regard to questions of real national ownership). Under the Vienna Convention, art. 31, para. 1, a treaty is to be interpreted in good faith "in accordance with the ordinary meaning to be given" to its terms in their context and in the light of its object and purpose.

what was the "purpose" of the parties in negotiating the treaty.⁴ However, a treaty should not be interpreted so as to restrict unduly the rights intended to be protected by it,⁵ or reach a result contrary to the letter and spirit of the treaty.⁶ Such would be the case if the Articles of Association is viewed solely as an instrument of merger.

The "purpose" of the Articles of Association was to ensure equal status for Indepesh and her citizens with the other sectors of the Federal Union upon incorporation (R. 1). A material breach of a treaty consists in the violation of a provision essential to the accomplishment of the object or purpose of the treaty.⁷ The initiation of military control and the denial of civil and political rights⁸ in Indepesh (R. 2-3), constituted a material breach of the basic purpose of the Articles of Association.

2. A Material Breach of a Treaty Constitutes Grounds for Terminating the Treaty.

⁴This Court had recourse to the "purpose" of the treaty in the Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands-Sweden), (1958) I.C.J. 55. Under the Vienna Convention, art. 31, para. 1, a treaty is to be interpreted "in the light of its object and purpose."

⁵See Kolovrat v. Oregon, 366 U.S. 187 (1961).

⁶See South West Africa Cases, (Second Phase) (1966) I.C.J. 6, 48.

⁷Vienna Convention, art. 60, para. 3 (b).

⁸Balistan's actions equally frustrated the primary purpose of the International Covenant on Civil and Political Rights to which she is a party (R. Annex A). Article 2, para. 1, provides:

Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

G.A. Res. 2200A, 21 U.N. GAOR Supp. 16, 52, U.N. Doc. A/6316 (1966).

A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty,⁹ This Court has previously held comparable breaches sufficient to terminate a treaty,¹⁰

3. Indepesh Had the Capacity to Invoke the Breach as Grounds for Terminating the Treaty.

The Aaland Islands Case¹¹ implied a qualified right of secession when there is "a manifest and continued abuse of sovereign power, to the detriment of a section of the population of the State."¹² Similarly, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations affirms the primacy of territorial integrity only for States "conducting themselves in compliance with the principles of equal rights and self-determination of peoples. . . possessed of a government representing the whole people belonging

⁹Vienna Convention, art. 60, para. 1.

¹⁰In the Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), (1971) I.C.J. 16, 47-48, this Court upheld the view that the failure of South Africa to comply with its obligations, as Mandatory Power in South West Africa, to submit to supervision by United Nations organs, resulted in the termination of its mandate, and therefore of its authority to administer the Territory.

¹¹Committee of Jurists, Report on the Aaland Islands Question, LEAGUE OF NATIONS O.J., Spec. Supp. 3 (1920). This case involved a dispute between Sweden and Finland over whether the inhabitants of those islands, Swedish speaking but under Finnish rule, could determine for themselves with which State to belong. Finland resisted the suggested plebiscite, insisting the matter was one of domestic, not international concern. The Commission of Jurists appointed by the League of Nations to investigate the matter stated: "Positive International Law does not recognize the right of any national groups, as such, to separate themselves from the State of which they form a part. . ." However, the committee qualified its finding with the statement that its decision "does not give an opinion concerning the question as to whether a manifest and continued abuse of sovereign power, to the detriment of a section of the population of the State, would" justify a right of secession, Id. at 5 (emphasis added).

¹²Id.

to the territory without distinction as to race, creed, or colour,"¹³ Balistan's initiation of military control and the denial of civil and political rights (R. 2-3), which frustrated the "purpose" of the Articles of Association and the International Covenant of Civil and Political Rights, was the type of "abuse" envisioned in the Aaland Islands Case.¹⁴ During the Nigerian-Biafran crisis, Tanzanian President Nyerere addressing the Organization of African Unity in 1969 stated: "(W)e must be even more concerned about peace and justice in Africa than we are about the sanctity of the boundaries we inherited."¹⁵ Several leading publicists share the view that given Balistan's actions there was a right of secession.¹⁶ Indeed, it was through secession that many nations achieved independence.¹⁷

¹³G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, 124, U.N. Doc. A/8028 (1971).

¹⁴Supra note 10.

¹⁵J. Nyerere, The Nigerian Biafran Crises 12 (1970).

¹⁶The Soviet writer D. B. Levin contends that the principle of self-determination extends to "a people. . . possessing a common territory, and most often a common language, who are united by the community of aims in the struggle for liberation. . . (and who) live in compact masses on a definite territory. . .," Self-Determination of Nations in International Law, 1962 SOVIET Y.B. INT'L L. 45. D. W. Bowett has suggested that a right of secession exists "if the seceding territory is economically and politically viable, and the State from which it secedes is not thereby deprived of its economic base," Self-Determination and Political Rights in the Developing Countries, Proc. Am. Soc'y. Int'l L. 129,131 (1966), The Nigerian writer U. Umozurike contends that "(t)here is no rule of international law that condemns all secessions under all circumstances. The principle of fundamental human rights is as important, or perhaps more so, as that of territorial integrity," Self-Determination in International Law 199 (1972).

¹⁷During the drafting of the U.N. human rights covenants, the representative of Syria reminded the committee that "most of the members of the Third Committee represented nations which at one time or another had seceded from others to claim their independence," 10 U.N. GAOR C.3, 120, U.N. Doc. A/C.3/SR. 648 (1955). A more recent example would be Bangladesh.

The United Nations recognizes that States can merge into a single entity and subsequently return to their original status.¹⁸ In the present instance, there is the added factor that Indepesh had joined a Federal Union where the components retain a considerable degree of sovereignty and self-autonomy.¹⁹ The proposed plebiscite on secession was a legitimate exercise of sovereignty. That this was a legitimate exercise is evidenced by the Premier's deliberate nonenforcement of an injunction against it.²⁰ The complete inaction and silence of the Federal Government from the announcement to passage of the plebiscite five months later (R. 3), if not an acknowledgment that Indepesh had the capacity to hold a plebiscite, still constituted acquiescence.²¹

¹⁸ Egypt and Syria were original members of the United Nations from 24 October 1945. On 21 February 1958, the United Arab Republic was established by a union of Egypt and Syria, and continued as a single member of the United Nations. On 13 October 1961 Syria resumed its status as an independent State, at the same time resuming its membership in the United Nations.

¹⁹ There are instances where the sovereignty retained by the components of a Federal State, is so extensive as to negate the rule that external policy is conducted by the Federal Government. The member States of the pre-1914 Federal Germany were to some extent States at international law; they could conclude treaties, appoint and receive envoys, etc., and questions of law affecting their relations were decided according to international law. More recently, the Canadian province of Quebec has concluded cultural treaties with France, Fitzgerald, Educational and Cultural Agreements Ententes: France, Canada and Quebec, 60 Am. J. Int'l L. 529 (1966). The extent of sovereignty retained by Indepesh, was evidenced by her concluding a grain sale with a Foreign Power without objection from the Federal Government (R. 3).

²⁰ Even if the Premier's course of action over five months did not constitute an acknowledgment that Indepesh had the capacity to hold a plebiscite, Balistan is still estopped from asserting the contrary. In the Nuclear Tests Case (Australia v. France; New Zealand v. France), (1974), I.C.J. 253, statements made by the President of France were held to bind that State and France was estopped from asserting a contrary position.

²¹ A State must consistently assert a claim based on a violation of international law to avoid forfeiting the right, Anglo-Norwegian Fisheries Case, (1951) I.C.J. 116.

C. UPON PASSAGE OF THE PLEBISCITE INDEPESH ACQUIRED THE STATUS OF A SOVEREIGN INDEPENDENT STATE.

1. Through Operation of Law Indepesh Became A Sovereign Independent State.

(a) Indepesh followed the recommended procedure for terminating the Articles of Association.

The Vienna Convention establishes a preferred procedure for terminating a treaty. This procedure was adhered to by Indepesh. Under Article 65, paragraph 1, the party intending to either terminate or withdraw from a treaty must notify the other party of the proposed action. This notice, according to Article 67, must be in writing and communicated to the other party. In the present instance, the Indepesh parliament passed a resolution announcing the proposed plebiscite on secession. The Premier of the Federal Union had actual knowledge of the proposed plebiscite, but deliberately chose not to object. In fact, the Federal Government remained silent from the announcement to passage of the plebiscite five months later (R. 3). Under Article 65, paragraph 2, if after three months after notification, no party has raised any objection, then the party making the notification can proceed. Consequently, upon passage of the plebiscite, the Articles of Association terminated.

(b) Upon termination of the Articles of Association Indepesh became a sovereign independent State.

According to Article 70, paragraph 1 (a), of the Vienna Convention, the termination of a treaty releases the parties from any obligation under the treaty. In the Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa),²² this Court upheld the view that the failure of South Africa to

²²(1971) I.C.J. 16, 47-48.

comply with its obligations, as Mandatory Power in South West Africa, resulted in the termination of its mandate, and therefore of its authority to administer the Territory. Similarly, Balistan's failure to comply with its obligations under the Articles of Association, resulted in the plebiscite terminating the treaty, and therefore of Balistan's authority to govern Indepesh. At that moment, Indepesh once again became a sovereign independent State.

2. Even Without the Operation of Law, Indepesh Became a Sovereign Independent State by Meeting the Requirements of Statehood.

The essential elements of a State are well settled. Article 1 of the Montevideo Convention of 1933 on the Rights and Duties of States is illustrative:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a Government; and (d) a capacity to enter into relations with other States.²³

As a sovereign independent State prior to, and a member State of a Federal Union during incorporation, Indepesh always met the first three requirements. Upon termination of the Articles of Association, the only qualification necessary to establish statehood was the capacity to enter into relations with other States.

The ability to enter into relations with other States was acknowledged when Media and Sinestra recognized Indepesh (R. 3). According to Article 1 of the Resolutions adopted at Brussels in 1936 by the Institute of International Law, recognition consists of:

²³Likewise, the Restatement of the Foreign Relations Law of the United States, § 4 (1965), defines a State as an "entity that has a defined territory and population under the control of a government and that engages in foreign relations." See also J. Starke, Introduction to International Law 101 (1972) (hereinafter cited as Starke).

. . .the free act by which one or more States acknowledge the existence on a definite territory of a human society politically organized, independent of any other existing State, and capable of observing the obligations of international law, and by which they manifest their intent to consider it a member of the international community.²⁴

Thus, the State, to be recognized, must possess the four characteristics mentioned in the Montevideo Convention, with particular regard to the capacity to conduct international affairs.²⁵ The act of recognition was merely a formal acknowledgment of an established situation of fact.

This view is supported by the following rules:

(a) If a question arises in the Courts of a new State as to the date at which the State came into existence, it will be irrelevant to consider when other States recognized it. The only material date is when the requirements of statehood were in fact first fulfilled.²⁶

(b) Recognition of a new State has retroactive effect, dating back to its actual inception as an independent State.²⁷

²⁴30 Am. J. Int'l. L. Supp. 185 (1936).

²⁵Of the four requirements of statehood, definiteness of territory is not generally insisted upon. An example would be the recognition of Israel in 1949, while her boundaries were still undetermined. Also, the requirement of a government does not mean one capable of effective domestic control, as evidenced by the admission of Ruanda and Burundi to the United Nations. Under the Advisory Opinion on Conditions of Membership in the United Nations, (1948) I.C.J. 57, since statehood is a primary qualification for admission, that admission was tantamount to recognition of the Member admitted as a State.

²⁶See Rights of Citizenship in Succession States Cases, Annual Digest of Public International Law Cases, 1919-1922, Nos. 5, 6, and 7. See also Article 9 of the Charter of the Organization of American States, Bogota, 1948: "The political existence of the State is independent of recognition by other States."

²⁷In British Courts, the retroactive operation of recognition is very broad. A cause of action based upon the existence of a particular State at the institution of proceedings, is nullified if by the time of the hearing, the British Government recognizes another State as having been in existence when the action was commenced, Bank of Ethiopia v. National Bank of Egypt and Liguori, (1937) Ch. 513. Also, a judgment may be set aside on appeal if the British Government recognizes another State as having been in existence at the time of judgment, Aksionairnoye Obschestvo A. M. Luther v. Sagor (James) & Co., (1921) 3 K.B. 532. Further authority is the Tinoco Arbitration (1923), where it was held that prior nonrecognition did not estop Great Britain from later alleging that the Tinoco Government was in fact duly constituted, 1 U.N. Rep. Int'l. Arb. Awards 375 (1948).

Therefore, Indepesh met all the requirements of statehood upon termination of the Articles of Association. Media and Sinestra's granting of recognition one month later confirmed this reality.

II. MULTILATERAL CONVENTIONS AND GENERAL RULES OF INTERNATIONAL LAW WERE APPLICABLE TO THE HOSTILITIES

A. International Law Recognizes the Right of Individual and Collective Self-Defense Against Armed Attack.

International law has traditionally recognized the right of self-defense against armed attack. This proposition has been continually asserted through the centuries in which international law developed, and been acted on numerous times by governments. Today the principle of self-defense against armed attack is universally recognized and accepted.²⁸

The Charter of the United Nations²⁹ imposes an important limitation on the use of force by United Nations members.³⁰ Article 2, paragraph 4, provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

²⁸See P. Jessup, A Modern Law of Nations 163 (1948); L. Oppenheim, International Law 297 (8th ed., 1955); Bowett, Self-Defense in International Law (1958) (hereinafter cited as Bowett).

²⁹59 Stat. 1031, T.S. No. 993.

³⁰While nonmembers, such as Indepesh, have not formally undertaken the obligations of the United Nations Charter as their own treaty obligations, it should be recognized that much of the substantive law of the charter had become part of the general law of nations through a wide acceptance by States. This is particularly true of the charter provisions bearing on the use of force. Moreover, the Indepesh Government expressed its ability and willingness to abide by the charter, by committing itself to all Balistani multilateral treaty commitments which includes the United Nations Charter (R. Appendix B). Thus, it seems entirely appropriate to appraise the actions of Indepesh in relation to the legal standards set forth in the United Nations Charter.

However, the charter expressly states in Article 51 that the remaining provisions of the charter, including the limitation of article 2, paragraph 4, in no way diminish the inherent right of self-defense against armed attack. Article 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations. . .

Thus, article 51 restates and preserves a long recognized principle of international law. The article is a "saving clause" designed to make clear that no other provision in the charter impairs the inherent right of self-defense.

B. The Right of Individual and Collective Self-Defense Applies in the Case of Indepesh.

1. Indepesh Enjoys the Right of Self-Defense.

The right of self-defense is not limited to members of the United Nations. In article 51, the United Nations Charter expressly recognizes that the right of self-defense is an inherent right under international law. Thus, as a sovereign independent State Indepesh had the inherent right to resist the use of force by Balistan. To hold otherwise, would be prejudicial to the maintenance of international peace and undermine the principles of the United Nations.

2. Media Had the Right to Assist in the Defense of Indepesh.

The cooperation of two or more States in the defense of one or both against armed attack is called collective self-defense. Media's participation in the defense of Indepesh, at the latter's request (R. 4), was a valid exercise of collective self-defense.

The principal provision of the United Nations Charter limiting the use of force by members, is article 2, paragraph 4. It states that they

. . .shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. . .

Action taken in defense against armed attack cannot be characterized as falling within this proscription. The record of the San Francisco conference makes clear that article 2, paragraph 4, was not intended to restrict the right of self-defense against armed attack.³¹ Indeed, if anyone has violated this provision it was Balistan.

There are no other provisions in the Charter that would preclude Median aid to Indepesh. Although article 51 speaks only of the situation where "an armed attack occurs against a Member of the United Nations," this is not a prohibition against Median participation in the collective defense of a non-member. By its own terms, the article preserves an inherent right. Thus, Media had the right to aid Indepesh. Leading authorities support this view.³² To hold otherwise, would be detrimental to international peace and inconsistent with the purposes of the United Nations.³³

C. War Limitation Treaties Were Applicable.

Upon attaining the status of a sovereign State, Indepesh acceded to all the multilateral treaties to which Balistan had been a party (R. Appendix B). Therefore, Indepesh was entitled to the protection those treaties confer.

³¹6 U.N.I.C.O. Docs. 495 (1945). Under art. 32 of the Vienna Convention, recourse to the preparatory work of a treaty is a valid method for confirming the meaning of an article.

³²Bowett, 193-195; GOODHART, The North Atlantic Treaty of 1949, 79 Recueil Des Cours 183, 202-204 (vol. II, 1951), quoted in 5 Whitman, Digest of International Law 1067-1068 (1965).

³³Article 1 of the Charter states that the purpose of the United Nations is (t)o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression. . ."

As other nations have attempted to deny the applicability of war limitation treaties by perverting the facts,³⁴ so Balistan cloaked the hostilities with the title of "civil war." Concerning this situation, the International Committee of the Red Cross (I.C.R.C.) stated:

. . .there have been many cases where Parties to a conflict have contested the legitimacy of the enemy Government and therefore refused to recognize. . .a state of war. In the same way, the temporary disappearance of sovereign States as a result of annexation. . .has been put forward as a pretext for not observing. . .humanitarian Conventions. It was necessary to find a remedy. . .³⁵

In the Stockholm draft conventions (the working papers for the Diplomatic Conference which drafted the four 1949 Geneva Conventions),³⁶ the I.C.R.C. proposed employment of a phrase making each Convention applicable "to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." This proposal was adopted by the Diplomatic Conference without change or debate.³⁷ The same I.C.R.C. study said of this all-inclusive phrase:

By its general character, this paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration to the application of the Convention. . .The occurrence of *de facto* hostilities within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. . .³⁸

³⁴In an attempt to circumvent prohibitions of the League of Nations, Japan labeled the Sino-Japanese conflict of 1937 a "police action." Although there had been no declaration of war, nor had diplomatic relations been severed, a state of war did exist, Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham Steamship Co. Ltd., (1939), 2 K.B. 544.

³⁵C. Pictet, Commentary on the 1949 Geneva Convention Relative to the Treatment of Prisoners of War 19-20 (1960) (hereinafter cited as Pictet).

³⁶6 U.S.T. 3115, T.I.A.S. No. 3362, et seq.

³⁷I Final Record of the Diplomatic Conference of Geneva of 1949, 47.

³⁸Pictet, 22-23.

Consequently, it is irrelevant that Balistan labeled the hostilities a "civil war." It is the actual commencement of hostilities which renders the laws of war applicable. To hold otherwise, would circumvent the basic premise upon which all humanitarian conventions are based and would endanger international peace and security. That this is the view of the international community is evidenced by the fact that 145 nations have ratified or acceded to the 1949 Geneva Conventions.³⁹

III. BALISTAN'S CONDUCTION OF THE HOSTILITIES VIOLATED INTERNATIONAL LAW.

A. Balistani Aerial Bombardment Was Indiscriminate.

The primary "purpose" of the Geneva Conventions of 1949 was to limit the scope of all hostilities. This is indicated by article 3 which is common to all four Conventions and applies to hostilities of a noninternational character within the territory of a Contracting Party.⁴⁰ Article 3 distinguishes between combatants and noncombatants, with a strict prohibition against "violence to life and person," and any other actions that would inflict unnecessary suffering on noncombatants.⁴¹ Consequently, aerial bombardment is legitimate only if directed at a military objective of a distinct advantage to the belligerent.⁴²

³⁹U.N. Chronicles (Sept. 1977).

⁴⁰Although Indepesh was a sovereign independent State and as such entitled to the full protection of the Geneva Conventions, article 3 is utilized here to show that there is a minimum standard of conduct which Balistan was legally bound to adhere to regardless of how she categorized the hostilities.

⁴¹Article 3, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, 6 U.S.T. 3115, 3116, T.I.A.S. No. 3362.

⁴²Although not adopted, this was the position of art. 24 of the Hague Rules of Air Warfare (1923), 17 Am. J. Int'l L. Supp. 245 (1923). This proposition was incorporated in the I.C.R.C. Draft Rules submitted to the XIX International Conference of the Red Cross at New Delhi in 1957. The new art. 24 limits air bombardment solely to identified military targets, J. Greenspan, The Modern Law of Land Warfare 351 (1959).

Balistan's carpet-bombing⁴³ of defenseless dikes,⁴⁴ with fragmentation bombs (R. 9),⁴⁵ constituted a flagrant violation of international law. The civilian population cannot be the primary subject of an attack.⁴⁶ Equally prohibited is the destruction of objects indispensable to the survival of the civilian population, as well as construction necessary to regulate such resources. Balistani aerial bombardment, erratic at best, conducted by poorly trained airmen on days when targets were not visible (R. 9), was clearly indiscriminate and totally violative of international law.

B. Balistan's Treatment of Captives Violated International Law.

1. The Geneva and Hague Conventions Protections Should Have Been Extended to Indepesh Forces.

⁴³Aside from violating art. 24, supra, note 42, the international community has condemned carpet-bombing and prohibited its use, see art. 51, Additional Protocol to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflict (Protocol I), adopted by Conference on 8 June 1977, U.N. Doc. A/32/144 Annex I, (1977) (hereinafter cited as Protocol I).

⁴⁴Bombing on the dikes resulted in flooding and the destruction of a major portion of the Indepesh food supply (R. 9). The Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, under art. II defines genocide as deliberately inflicting on a "group conditions of life calculated to bring about its physical destruction in whole or in part," 78 U.N.T.S. 277 (hereinafter cited as Genocide Convention). Article 54 of Protocol I prohibits destruction of dikes, food-stuffs, and rendering agricultural areas useless.

⁴⁵Fragmentation bombing inflicts shrapnel wounds indiscriminately. Under art. 23 of the Hague Convention Relating to Regulations Respecting the Law and Customs of War on Land (Hague IV) of October 18, 1907, 36 Stat. 2277, T.S. No. 539 (hereinafter cited as Hague IV), combatants are forbidden "to kill or wound treacherously individuals belonging to the hostile nation," (emphasis added). Balistan is a party to this treaty (R. Appendix A), and her actions are subject to the standard of Shimoda & Orr v. The Japanese State, (1963 D. Tokyo), 32 I.L.R. 676 (1963), where culpability was based on the intent to inflict unnecessary suffering on non-combatants.

⁴⁶"Attack by bombardment by whatever means of towns, villages, dwellings, and buildings which are undefended is prohibited," art. 25, Hague IV, (emphasis added). Likewise, G.A. Res. 2444, 23 U.N. GAOR 19, U.N. Doc. A/7433 (1968).

When hostilities commenced, there were Balistani forces within Indepesh (R. 3) necessitating the use of irregular forces to repel the attack. Irregular forces, however, are entitled to the same legitimate character as regular forces provided they are headed by a responsible commander, wearing a fixed distinctive emblem, carrying arms openly, and conducting their operations in accordance with the laws and customs of warfare.⁴⁷ The primary rationale for requiring visible weapons and a distinctive sign, is to aid in identification during battle.⁴⁸ However, States utilized these requirements as a means for justifying the denial of the protection afforded by the Geneva Conventions. Consequently, the I.C.R.C. has had to assert that the Geneva Conventions should be liberally construed.⁴⁹

In battle, the partisans, weapons, and hierarchial structure of the Indemedian forces was easily ascertainable (R. 5). The intention to adhere to international law is evidenced by Indepesh's accession to the Geneva Convention and other humanitarian treaties (R. Appendix B). Although the record is silent as to whether Indemedian forces wore a distinctive sign,⁵⁰ the failure to do so should not be used as a bar to the application of the Geneva Conventions. Such

⁴⁷Article 4, Geneva Convention Relative to the Treatment of Prisoners of War of August 21, 1949, 3 U.S.T. 3317, T.I.A.S. No. 3363 (hereinafter cited as Third Geneva Convention).

⁴⁸King, Revolutionary War, Guerrilla Warfare and International Law, 3 Case W. Res. J. Int'l L. 91,118 (1972) (hereinafter cited as King).

⁴⁹Report of the International Committee of the Red Cross to the World Federation Association: Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflict, 21st Int. Conf. of the Red Cross at 121 (1969), (hereinafter referred to as the I.C.R.C. Report); King 121.

⁵⁰The impracticality of such signs was a primary reason for the I.C.R.C. stressing liberal construction of the Geneva Conventions, I.C.R.C. Report, note at 116-117; King note at 119.

a result is contrary to the basic purpose of the Geneva Conventions which seek to ameliorate warfare. Recognizing this, the international community has discarded these requirements and adopted the position that all combatants should be granted prisoner of war status.⁵¹

2. Balistan Violated the Minimum Standard of Conduct.

Once a combatant is disabled, whether through wounds or capture, he must be afforded prisoner of war status.⁵² Article 3 of the Geneva Conventions of 1949, establishes a minimum standard of conduct towards prisoners. Expressly forbidden is "violence to life and person," and any other actions that would inflict unnecessary suffering.⁵³

Balistan's treatment of prisoners falls below this minimum standard. Reprisals are defensible only if the State at which they are aimed first violated international law, ignored a request to redress the grievance, and the reprisals are not excessive.⁵⁴ Reprisals against prisoners though, can never be tolerated. Such reprisals exacerbate unnecessary suffering. The reduction of rations in response to a rumor is a clear example (R. 5). Even if the food and conditions were equal to Balistani nationals, if cruel and inhumane, such treatment would be below the minimum standard.⁵⁵ That

⁵¹Under art. 22 of Hague IV, the belligerents conduct of warfare is governed by the Hague Conventions and Regulations, other international instruments, and customary international law. Over 100 States recently participated in drafting art. 44 of Protocol I, which states that any combatant "who falls into the hands of an adverse party shall be a prisoner of war."

⁵²Id.; G.A. Res. 3103, 28 U.N. GAOR 20, U.N. Doc. A/9412 (1973).

⁵³Supra note 41.

⁵⁴See Naulilaa Incident, (1928-Portuguo-German Arbitral Tribunal) 2 R.I.A.A. 1011.

⁵⁵Roberts (United States) v. United Mexican States, (1926-General Claims Commission) IV U.N. Rep. Int'l Arb. Awards 77 (1948).

Balistani treatment was cruel and inhumane is evidenced by the deaths of 70% of those in detention camps. The attempt to alter allegiances,⁵⁶ and the execution of prisoners, was equally reprehensible (R. 5-6). Whether judged under the minimum standard, or the specific provisions of the Geneva Conventions,⁵⁷ Balistan violated international law. The Geneva Conventions confer rights on individuals which must be recognized and given effect.⁵⁸

C. Indepesh's Reservation Does Not Diminish Balistan's Obligations To Prisoners.

Previously, a State making a reservation could do so only with the consent of other contracting States. In the Advisory Opinion on Reservations to the Genocide Convention,⁵⁹ this Court held that there need not be an express assent by other interested States; such assent may be by implication, particularly in the case of multilateral conventions. Under article 20 of the Vienna Convention, a contracting State is deemed to have accepted a reservation, if it has raised no objection within twelve months of notification. Such objec-

⁵⁶Article 45, Hague IV; Rockwell, The Right of Nonrepatriation of Prisoners of War Captured by the United States, 83 Yale L. J. 258, 367 (1973): "To engage in a policy of encouraging prisoners to alter their allegiances would be in accordance neither with the general purposes of the Geneva Conventions nor with standards of equity."

⁵⁷Articles 13, 22, 25, 99-108, Third Geneva Convention.

⁵⁸It was authoritatively decided by the Permanent Court of International Justice in the Advisory Opinion on the Jurisdiction of the Courts of Danzig, (1928) P.C.I.J. Ser. B, No. 15, that if by a particular treaty the parties intended to confer rights on individuals, then these rights should receive recognition and effect at international law.

⁵⁹(1951) I.C.J. 15.

tions must be in writing and duly communicated.⁶⁰ Balistan's position with regard to this reservation came in the form of a public pronouncement. Thus, Balistan has lost the right of objecting to the reservation and the full protection of the Geneva Conventions should have been extended to prisoners.

Even if Balistan's objection was valid, a reservation only affects the reserved article leaving intact the remaining obligations of the treaty.⁶¹ The only exception would be where the reservation is incompatible with the object and purpose of the Convention.⁶² However, States have reserved to article 85 of the Third Geneva Convention without defeating their ratification.⁶³ In fact, such a reservation aids amelioration of warfare by notifying those who would perpetrate crimes against humanity, that such conduct is intolerable.⁶⁴ Further, the minimum standard delineated in article 3 of the Geneva Conventions, refers to hostilities of a noninternational character,

⁶⁰Article 23, Vienna Convention.

⁶¹Article 20, Vienna Convention; Advisory Opinion on Reservations to the Genocide Convention, (1951) I.C.J. 15.

⁶²Id.

⁶³Smith, The Geneva Prisoner of War Convention: An Appraisal, 42 N.Y. Int'l L. Rev. 880, 888 n. 29 (1967): The I.C.R.C. sent letters of inquiry, concerning prisoner of war treatment, to North Vietnam, stating therein that although maintaining a reservation to Article 85, having ratified, they are bound by it, and must adhere thereto; 213 U.N.T.S. 383 (1955): on ratifying the Convention, the United States announced that, though it rejected the reservation other States had made, it accepted "treaty relations with all parties to that Convention, except as to the changes proposed by such reservations.

⁶⁴In re Hirota and Others, (1948-I.M.T. Tokyo) Annual Digest 356-365 (1948): "if. . .the war. . .is. . .unlawful, then this involves unlawful killings. . .at all places in the theatre of war and at all times throughout the period of the war."

and is thus, unaffected by reservations. Consequently, Balistan cannot use Indepesh's reservation as a means for circumventing her treaty obligations.

D. Balistan's Actions Constituted Genocide.

Under article II of the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948,⁶⁵ genocide is defined as the killing, causing serious bodily or mental harm, or inflicting of conditions calculated to bring about the physical destruction in whole or in part, of a national, ethnical, racial, or religious group. Although Indepesh has an ethnic origin and culture entirely distinct from Balistan (R. 1), under article II it is irrelevant whether Indemedians constitute a separate ethnic group or are part of a national group for protection under the Genocide Convention. Under article I, the protection afforded by the Convention is applicable in time of peace or war, and since the treaty protects groups, it is applicable to situations solely under the domestic control of States. In fact, there is substantial authority for holding that the Genocide Convention is a peremptory norm of general international law from which no derogation is permitted.⁶⁶

⁶⁵78 U.N.T.S. 277 (hereinafter cited as Genocide Convention).

⁶⁶Under art 53 of the Vienna Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted. The extent of recognition necessary by the international community is evidenced by the Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, (1949) I.C.J. 174, where this Court held that "fifty States representing the vast majority of members of the international community had the power," to force nonmembers to recognize the international personality of the United Nations. Out of 149 United Nations members, 89 States have ratified the Genocide Convention, U.N. Chronicles (Sept. 1977). Other States have signed the Convention and adhere to its principles. An example would be the United States which has yet to ratify the treaty. This Court gave great deference to the Convention's ideals and allowed for universal acceptance in the Advisory Opinion on Reservations to the Genocide Convention, supra note 59. The universal adherence for the principles of the Convention is evidenced by the reiteration of its prohibitions in subsequent humanitarian conventions, i.e., art.6, International Covenant on Civil and Political Rights, supra note 8.

hospitals are clearly protected under the Geneva Conventions and also protected under the minimum standards which require that care be given to the sick and wounded. article 18 of the Geneva Civilians Convention recommends that hospitals be situated as far as possible from military objectives.⁸² Considerable saving of civilian life was brought about in the Sino-Japanese conflict, 1937-1938, by the establishing of civilian sanctuaries in Shanghai, Hankow and other Chinese cities.⁸³ Similarly the United States' claim of few civilian casualties in bombing North Vietnam was due more to an effective civil defense system and the evacuation of urban centers, than to United States' efforts.⁸⁴

The facts show that Indepesh made no effort to separate or evacuate their civilians. Rather Indepesh was willing to sustain high civilian losses in order to gain world sympathy for their cause. With all the civilian bombing in World War II, no one was charged with a war crime for such bombardment. Therefore, under these facts, it can hardly be said that Balistan has violated the minimum standard in the conduct of its air bombardment.

2. Other Conduct by Balistan Also Exceeded the Minimum Standards.

The conduct of Balistani guerrillas was not in violation of the minimum standard. Balistani guerrillas did not enter the conflict until after the use of guerrillas by Indepesh (R. 8); carried their weapons more openly (R. 8); and took prisoners "more often than not" while Indepeshi guerrillas rarely took prisoners (R. 8). Indepeshi guerrillas also made use of garroting weapons, bayonets,

⁸²Article 14 to the Geneva Civilian Convention allows for the Parties to establish hospital zones to protect civilians and the wounded and sick. The zones should be undefended, removed from military objectives, and clearly marked. Annex I, Draft Agreement Relating to Hospitals and Safety Zones and Localities.

⁸³These civilian sanctuaries sheltered a quarter of a million persons and contained no Chinese working in military related areas.

⁸⁴2 R. Falk, supra 552.

B. Indepesh is Legally Justified in Not Repatriating Balistani Prisoners of War for Fear of a Renewal of Hostilities.

The only agreement here in evidence is a cease fire and agreement to help resolve the issue before the International Court of Justice. There is no concrete assurance Balistan wishes an end to its simmering hostility with Indepesh.

No prisoners of war need be released until a peace treaty is signed.⁷³ Although the Geneva Convention relative to prisoners of war states prisoners of war shall be released and repatriated after the cessation of hostilities,⁷⁴ the circumstances of the present dispute necessitate the finding that hostilities as such have not ceased.

The interpretation of a treaty must weigh many factors other than the normal meanings of the words taken out of context,⁷⁵ including the history of the document, the subsequent conduct of the parties in applying its provisions, the signatory's major expectations, and the development of pertinent international legal norms.⁷⁶ It is Indepesh's contention that the object and purpose

⁷³Geneva Convention of July 27, 1929, Relative to the Treatment of Prisoners of War, 118 L.N.T.S. 303.

⁷⁴Art. 118, Third Geneva Convention.

⁷⁵A treaty should not be interpreted so as to reach a result contrary to the letter and spirit of the treaty, South West Africa Case (Second Phase), (1966) I.C.J. 6, 48; Harvard Research in International Law commented, in regard to its Draft Convention on the Law of Treaties, that the process of interpretation cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text or of searching for and discovering some preexisting specific intention of the parties with regard to every situation arising under a treaty. It is because words rarely have exact and single meanings, and because all situations which may arise under it cannot be foreseen and expressly provided for by the parties at the time of its drafting, that the necessity of interpretation occurs. Harvard Research in International Law, "Draft Convention on the Law of Treaties," (Comment on art. 19), 29 Am. J. Int'l L. Supp. 653, 946 (1935).

⁷⁶Id.

of the Third Geneva Convention, art. 118 when taking into consideration these factors, is non-repatriation until such time as hostilities have totally ceased.⁷⁷

A view of the history preceeding the Third Geneva Convention as evidenced by the Geneva Convention of 1929 relative to prisoners of war, distinctly provides for repatriation only after a peace treaty is signed.⁷⁸ In addition, Balistan's non-adherence to international law precludes early repatriation. There is a possibility of a renewal of hostilities. Indepesh has a larger number of prisoners. If these prisoners were repatriated, Balistan could utilize them in renewing the conflict. Only the moral persuasion of art. 117 of the Third Geneva Convention⁷⁹ provides a deterrence and in view of past Balistani non-adherence to international law, this is certainly a most tenuous deterrence. Through the pressure of world opinion, Balistan will be less likely to violate a formal peace treaty. It is therefore proposed that art. 118 of the Third Geneva Convention be interpreted to permit repatriation only when hostilities have legally terminated.

V. THE REPUBLIC OF INDEPESH IS ENTITLED TO RELIEF.

Breach of international law governing war crimes involves an obligation to make reparation in an adequate form. Reparations must, as far as possible,

⁷⁷A treaty is to be interpreted in the light of its object and purpose, supra note 4.

⁷⁸Article 75, Geneva Convention of July 27, 1929, Relative to the Treatment of Prisoners of War, 47 Stat. 2021, 2055, T.S. No. 846, 118 L.N.T.S. 343, 387.

⁷⁹"No repatriated person may be employed on active military service," art. 117, Third Geneva Convention.

"wipe out all the consequences of the illegal act."⁸⁰ In the case of a conventional obligation there is no need for this to be stated in the convention itself.⁸¹ Under the relative Conventions of which both parties have acceded to, (R. Appendix A) each party is liable to the other for grave breaches of the Convention when the breach is directed toward the other party.⁸² An international court or tribunal has the authority to require the specific performance of its decision and order reparations to be paid⁸³ to compensate the victim of breaches of international law.

Indepesh has suffered grievous harm at the hands of the Balistani armed forces, as evidenced by Balistan's flagrant violations of international law embodied in Conventions to which both the Applicant and Respondent are Parties (R. Appendix A) and customary international in general.

Conclusion

It is respectfully requested that this Honorable Court:

1. Grant the Republic of Indepesh reparations in the form of monetary damages sufficient to compensate the Applicant for war crimes perpetrated upon Indepeshi combatants, Indepeshi prisoners of war, and the Indepeshi population as a whole.

⁸⁰Chorozow Factory (Merits) Case, (1928) P.C.I.J. Ser. A, No. 17, 41; See also, Vasarhely, Restitution in International Law, 10, 74 (1964).

⁸¹Chorozow Factory (Jurisdiction) Case, (1927) P.C.I.J. Ser. A, No. 9, 21, aff'd in Chorozow Factory (Merits) Case, (1928) P.C.I.J. 27-29; See also Advisory Opinion on the Interpretation of the Peach Treaties with Bulgaria, Hungary and Rumania (Second Phase), (1950) I.C.J. 221, 228: Where this Court stated, "refusal to fulfill on a treaty obligation involves international responsibility."

⁸²Article 129, Third Geneva Convention; Hague IV, art. 3.

⁸³Case of Free Zones of Upper Savoy and the District of Gex, (1932) P.C.I.J. Ser. A/B, No. 46; Corfu Channel (Assessment) Case, (1949) I.C.J. 244.

2. Grant a declaration ruling the Federal Union of Balistan's treatment of Indepeshi combatants and non-combatants was a violation of international law.
3. Deny the Federal Union of Balistan's request for the Court to order immediate repatriation of Balistani prisoners of war.
4. Grant the Republic of Indepesh such further and other relief as this Honorable Court may deem just.

All of which is respectfully submitted.

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Agents for the Republic of
Indepesh