

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 RESPONDENT

February 10, 1978

Team Number 333 R

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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

Upon incorporation into the Federal Union Indepesh became a component of a sovereign indivisible State. As a component of a State, Indepesh had no international status nor any of the other attributes of sovereignty. Since international law does not recognize a right of secession, any attempt to do so constitutes insurgency. Therefore, in order to preserve the Union and to ensure domestic tranquility, Balistan had an inalienable right to quell civil discord.

Insurgents do not have an international status and cannot accede to treaties. Further, regardless of how it is categorized, Median aid to a segment of a population in an unlawful rebellion constituted intervention. Since hostilities were civil in nature, treaties which seek to limit conflict between States were inapplicable. Although the legitimate government has a right to execute insurgents, Balistan adhered to the international minimum standard of conduct.

Balistan's conduct exceeded the applicable minimum standard of the Geneva Conventions. The Indepesh irregular forces were not entitled to prisoner of war status because they failed to meet the requirements for such status. The treatment they did receive exceeded the minimum standard which was the maximum protection applicable.

The Genocide Convention was not violated because there was no intent to destroy a specific group. To be unable to quell civil discord would subject States to dismemberment from within. It is inevitable in any hostilities that there would be civilian casualties; however, Balistan's air bombardment was conducted so as to result in minimal unnecessary suffering. This bombardment, therefore, met the minimum standard and did not

represent an intent to destroy a specific group.

In terminating the hostilities Balistan recognized Indepesh and concluded a cease-fire. It is at this time that Indepesh became a state. Upon termination of hostilities with continued assurance of peace on behalf of Balistan, the repatriation of prisoners became mandatory.

ARGUMENTS AND AUTHORITIES

I. INDEPESH DID NOT ACQUIRE THE STATUS OF A SOVEREIGN INDEPENDENT STATE UNTIL THE TERMINATION OF HOSTILITIES.

A. Upon Incorporation Into The Federal Union Indepesh Ceased To Have International Status.

1. The Articles of Association Was a Legally Binding Treaty Under General Rules of International Law.

A treaty is an international agreement concluded between States in written form and governed by international law.¹ It is binding between the parties and must be performed by them in good faith (pacta sunt servanda).² Several leading publicists, including a Justice of this Court, hold that all international law derives from this basic maxim.³

2. The Purpose of the Articles of Association Was to Create a Single Indivisible State.

Treaties should be interpreted according to the ordinary meaning of their terms.⁴ It is 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 at 289 (1969) (hereinafter cited as Vienna Convention). As of June 30, 1977, 28 States had deposited instruments of ratification, 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).

³J. Anzilotti, Corso di Diritto Internazionale 43 (3d ed., 1928).

⁴This 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; Vienna Convention, art. 31, para. 1; 4 Int'l L. Comm'n, Report, 19 U.N. GAOR, Supp (No. 9), U.N. Doc. A/5809 (1964).

what was the "purpose" of the parties in negotiating the treaty.⁵ However, a treaty should not be interpreted so as to reach a result contrary to the letter and spirit of the treaty.⁶ Such would be the case if extensive rights are read into the Articles of Association.

The basic "purpose" of both parties is negotiating the Articles of Association was to create a single indivisible State upon incorporation of Indepesh into the Federal Union. That this was to be a perpetual union is evidenced by the failure of the Articles of Association to provide for withdrawal or denunciation. In the absence of such provision, withdrawal or denunciation of a treaty is not permissible unless the other parties agree.⁷

3. The Failure to Adopt Indemedian Did Not Affect the Primary Purpose of the Articles of Association.

The primary "purpose" of the Articles of Association was to achieve a single indivisible State upon incorporation of Indepesh into the Federal Union. To hold otherwise, would distort the plain intent of the parties and convert the Articles of Association into an Indemedian cultural treaty.⁸ This is evidenced by the definition of a material breach which consists of a violation of a provision essential to the accomplishment of the object or purpose of the treaty.⁹ Knowing that the Federal Union had rejected the adoption of Indemedian as an official language, Indepesh proceeded with incorporation (R. 2).

⁵This 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.

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

⁷C. Starke, Introduction To International Law, 444 (7th ed. 1972) (hereinafter cited as Starke).

⁸Treaties should not be interpreted so as to reach a result contrary to the letter and spirit of the treaty, Supra note 6.

⁹Vienna Convention art. 61, para. 3 (b).

Therefore, the failure to adopt Indemedian cannot be material since the purpose of the treaty, attainment of a single indivisible State upon incorporation, was achieved. Further, after twenty years as a member of the Federal Union, whatever objection Indepesh might have had, with regard to the failure of Balistan to adopt Indemedian, was forfeited.¹⁰

4. Once the Purpose of the Articles of Association Had Been Achieved Indepesh Ceased to Have International Status.

Of the four requirements of statehood, the most important is the capacity to enter into international relations.¹¹ Upon incorporation into the Federal Union, Indepesh ceased to have this capacity. By its very definition, in a Federal State it is the Federal Government which engages in foreign affairs.¹² Therefore, the purpose of the Articles of Association had been achieved. The Federal Union of Balistan was the only entity with international status. Indepesh was not only a component of a State.

B. Components Of A Sovereign State Do Not Have A Right Of Secession.

Once a people consent to participate in a government of their choice

¹⁰A claim to international law must be continuously ascertained or it is forfeited. Anglo-Norwegian Fisheries Case, (1951) I.C.J. 116.

¹¹The essential elements of a State are well settled. Art. 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. It is possible to recognize a State absent one of the first three elements. An example would be the recognition of Israel in 1949, while her boundaries were capable of effective domestic control, as evidenced by the admission of Ruanda and Burundi to the United Nations, See Starke, 101.

¹²A Federal State is an international personality in which the organs of Government exercise direct control over member States and the citizens of those States with the conduct of foreign affairs in the executive of the Federal Government. Starke, 122.

they have exercised their right of self-determination and international protection of that right is extinguished. Under international law a minority population never has the right to secede.¹⁴ In the present instance, there is the added factor that Indepesh freely chose to become a member of the Federal Union. Therefore, there can be no legal justification for secession. The practice of States,¹⁵ as well as international organizations,¹⁶ support this view.

The strict ban against a right of secession is absolutely necessary. Allowing a people to separate from existing States would usher in an era of instability, bloodshed, and war with no guarantee that the resultant frontiers are a substantial improvement over the previous ones.¹⁷ Further, it is too easy

¹⁴Committee of Jurists, Report on the Aaland Islands Question, LEAGUE OF NATIONS O.J., Spec. Supp. No. 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 pelbiscite, 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. . ."

¹⁵Secession movements have been forcibly resisted in Nigeria, Congo, Pakistan, Sudan, Iraq, Ethiopia, and others. See, R. Emerson, Self-Determination Revisited in the Era of Decolonialization 64 (1964); A. Cobban, National Self-Determination 105-22 (Rev. ed. 1948).

¹⁶The Organization of African Unity's (O.A.U.) Resolution on the Nigerian civil war emphasized the need for territorial integrity and denied Biafra's right to self-determination as an separate State. O.A.U. Resolution on the Situation in Nigeria, OAU Doc. AGH/Res. 51 (IV), reprinted in, 6 Int'l Legal Mat'ls 1243 (1967). The U.N. General Assembly by resolution took the same position toward Katanga and strongly denied it any right to self-determination or secession, S/5002. Resolution as submitted, by 3 powers, S/4985/Rev. 2, as amended by the United States, S/4989/Rev. 2, adopted by the Security Council on Nov. 24, 1961 by 9 votes to 0, 2 abstentions.

¹⁷These dangers devolve from the imprecision of the concept of a people; is a people defined by linguistic, religious, cultural, geographical or other criteria? Conflict over choice of criteria leads to war as it did in Alsace-Lorraine.

to justify military intervention in neighboring States,¹⁸ as Hitler's first military adventures and Media's intervention on behalf of Indepesh show, under the guise of aiding the self-determination of minorities. Consequently, Communist,¹⁹ Capitalist,²⁰ and Non-aligned States²¹ all deny that self-determination implies any right of a minority to secede or expect international support in its efforts to do so.²²

C. Indepesh Could Not be a Sovereign Independent State Until the Termination of Hostilities.

1. Upon Secession From the Federal Union Indepesh Initiated a Civil War.

As was previously shown, Indepesh did not have a right of secession. Consequently, the only way that Indepesh could be a sovereign independent State upon seceding from the Federal Union, would be if she met the requirements of statehood. As previously shown, the most important element of statehood is the capacity to conduct international relations.²³ To conduct foreign affairs a State must first be recognized.

¹⁸It can be vigorously argued that self-determination is more conducive to military conquest than democracy, See Hula, National Self-Determination Reconsidered, 10 Soc. Research 2 (1943).

¹⁹The U.S.S.R. representative said: "Self-determination had never been visualized by Lenin or other Marxists as a basis for the dismemberment of nations. . ." 25 U.N. GAOR, AC. 125, at 125 U.N. Doc. A/AC. 125/SR. 91 (1970).

²⁰United Kingdom, 25 U.N. GAOR, AC. 125, at 121, U.N. Doc. A/AC. 125 (1970).

²¹Nigeria, 25 U.N. GAOR, AC. 125, at 121, U.N. Doc. A/AC. 125/SR. 91 (1970).

²²The records of the Special Committee which drafted the Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, reveal the primacy of territorial integrity. The affirmation of the right to self-determination, is a rejection of colonialism not an acceptance of secession. 25 U.N. GAOR, Supp. (No. 18) 26-28, U.N. Doc. A/8081 (1970). For text of the Declaration see 19 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970).

²³Supra note 11.

It is the act of recognition alone which creates statehood or which clothes a new Government with any authority or status in the international sphere.²⁴ This view is supported by the fact that only upon recognition does the recognized State acquire any status in the municipal courts of the recognizing State.²⁵ Equally supportive is the universal condemnation of South Africa's creation of Transkei and Bophutatswana.²⁶ South Africa is the only nation which has extended recognition while the whole international community has withheld recognition and denied that they are States.

Like Transkei, after almost a year of existence, the international community as a whole withheld recognition of Indepesh.²⁷ Indepesh was recognized by only two nations. States generally withhold recognition in accordance with legal principles and precedents.²⁸ Therefore, the recognition by Media and Sinestra should be carefully scrutinized.

There have been numerous instances when recognition has been extended for political purposes. Premature recognition is usually viewed as intervention in the internal affairs of the State from which a section is unlawfully attempting

²⁴Starke 143.

²⁵The principle underlying this rule was well expressed in one American case: ". . . A foreign power brings an action in our Courts not as a matter of right. Its power to do so is the creature of comity. Until such a government is recognized by the United States no such right exists" Russian Socialist Federal Soviet Republic v. Cibrario 235 N.Y. 255, 139 N.E. 259, 199 N.Y.S. 61 (1923).

²⁶See Africa News (Oct.-Nov. 1976).

²⁷Starke 144.

²⁸There are presently 149 members of the United Nations, See U.N. Chronicles (Sept. 1977).

to succeed,²⁹ The recognition extended by Media and Sinestra was obviously premature coming within a month after Indepesh announced her independence (R. 3). In fact, Media extended recognition right after the Federal Union confiscated rice shipments Indepesh had sold Media, Media had suffered a severe crop failure in 1975 and had been attempting to buy rice from Indepesh for over a year (R. 3). That is the real motive behind the premature recognition,³⁰ not to mention the advantages of sharing a border with a friendly weak State composed of the same ethnic origin (R, 1). The only recognition that might be credible is that of Sinestra and that is an aberation. The international community by its withholding recognition has acknowledged that the secession of Indepesh did not acquire the status of a sovereign independent State³¹ but instead initiated a civil war. This state of affairs was reported to the United Nations (R, 3),

2. Upon Termination of the Hostilities Indepesh Became a State,

²⁹An example would be the premature recognition of the United States by France which was viewed as intervention by Britain. A more recent example would be the recognition of Biafra which was viewed as intervention by Nigeria. Resolution passed by the O.A.U. Heads of State, Kinshoa, Sept. 1967 6.1243 (1967).

³⁰In fact, Media could not aid the insurgents without recognizing them. Otherwise, she would have either intervened in the internal affairs of Balistan or violated the duties of neutrality. Consequently, recognition was the only path through which she could gain rice for her populace.

³¹Recognition by its very definition means that the State to be recognized must be "independent of any other existing State," art. 1 of the Resolutions Adopted at Brussels in 1936 by the Institute of International Law, 30 Am. J. Int'l. L. Supp. 1851 (1936). Arbitration between Great Britain and Costa Rica, 1 U.N. Rep. Int'l. Arb. Awards 375 (1948)

"The nonrecognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such."

Only upon cessation of hostilities did the state of civil war terminate. At that time Balistan recognized that Indepesh was a State. By Balistan withdrawing its claim to Indepesh she removed the legal impediment for acceptance into the international community. Prior to this, as has been previously shown, Indepesh could not have been a State.

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

A. War Limitation Treaties Were Inapplicable.

The Hague Conventions of 1907 were inapplicable on two grounds. These treaties were meant to limit war; however, war by its very definition consists of the use of force between States.³² Further, by its own terms,³³ the Hague Convention applies only to Contracting Parties.³⁴ In the present instance, both participants recognized that the hostilities were civil in nature and did not issue a declaration of war (R. 3-4). Thus the hostilities being civil, and Indepesh lacking the capacity to accede to the Conventions,³⁵ rendered the Hague Conventions inapplicable.

B. United Nations Conventions Were Applicable.

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

³²War is defined as a contention between States, 2 L. Oppenheim; International Law 202 (7th ed. H. Lauterpaeht 1952).

³³Treaties should be interpreted by the ordinary meaning of their terms. Supra note 4.

³⁴Balistan is a party to several Hague Conventions (app. B). Each convention has an article to the affect that it only binds "Contracting Parties." See, e.g., Convention Respecting the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, art. 2, 6 U.S.T. 3516, T.I.A.S. No. 3365.

³⁵Art. 1 of the Vienna Convention states that only States can be parties to treaties.

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

This prohibition is reiterated in several United Nations Conventions.³⁸ The only permissible use of force under the United Nations Charter is for self-defense with immediate notice going to the Security Council upon exercise of that right.³⁹ It is a long recognized principle that a State has the right to preserve itself from civil discord.⁴⁰ In the present instance, there is the added factor of active intervention by Media. Accordingly, under article 51 of the United Nations Charter, Balistan notified the Security Council that a state of civil war existed (R. 3) and that she was going to exercise the inherent right of self-defense. Since the Charter recognizes that the right of self-defense is inherent, and gives preference to article 51, the use of force by Balistan to preserve herself renders the United Nations' prohibitions against the use of force inapplicable. The only State who violated the prohibition was Media by actively intervening in the civil war.

³⁸I.e., Declaration Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 1 G.A. Res. 2625, 25 U.N. GAOR, Supp. (No 28) 121, U.N. Doc. A/8028 (1970).

³⁹Art. 51 provides: Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if armed attack occurs against a member of the United Nations. . .

⁴⁰In 1781 James Madison reiterated this principle by stating that it is necessary to quell discord and faction to promote the general welfare within the State. Federalist Papers No. 10, at 1-3 (1781). Today the principle is universally recognized and accepted. See International Covenant on Civil and Political Rights, art. 4, open for signature, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) 52, U.N. Doc. A/6316 (1966). See also Argument I (B). Supra.

C. The Genocide Convention Was Inapplicable.

Treaties should not be interpreted so as to reach a result contrary to the letter and spirit of the treaty.⁴¹ By its own terms,⁴² the Convention on the Prevention and Punishment of the Crime of Genocide, (hereinafter cited as Genocide Convention), requires an "intent" to destroy a specific "group."⁴³ During the hostilities force was utilized not against a specific group, but a sector of the nation with the intent of preserving the State. This is evidenced by the notification to the United Nations that a state of civil war existed as well as the fact that both participants were comprised of several ethnic groups (R. 1). It is clear from the practice of States,⁴⁴ and the recognition by the United Nations that self-defense is an inherent right,⁴⁵ that the Genocide Convention was not meant to deprive States of the right to suppress rebellion within their borders. To hold otherwise, would be detrimental to peace and security and provisions of United Nations Conventions.⁴⁶ The Genocide Convention would only be applicable to civil hostilities if the necessary elements of an "intent" to destroy a specific "group" were present. It is the lack of these elements which rendered the Genocide Convention inapplicable to the present hostilities.

⁴¹Supra note 6.

⁴²Treaties should be interpreted according to the ordinary meaning of their terms. Supra note 4.

⁴³Art. 2 of the Genocide Convention states that a necessary requirement for genocide is that there be an "intent to destroy, in whole or in part" a specific group. 78 U.N.T.S. 277.

⁴⁴Supra Argument I (B).

⁴⁵UNITED NATIONS CHARTER, art. 51.

⁴⁶See International Covenant on Civil and Political Rights, supra note 39.

III. BALISTAN'S CONDUCT DURING HOSTILITIES DID NOT VIOLATE INTERNATIONAL LAW

A. Balistan Adhered to the Hague Conventions.

As previously shown, Indepesh was not a State and did not have the capacity to accede to the Hague Conventions. However, the Hague Conventions were not violated on two grounds. First, by their own terms, the Hague Conventions apply to a state of war. This treaty should be interpreted according to the ordinary meaning of its terms.⁴⁷ Upon the commencement of hostilities Balistan deposited an instrument with the United Nations notifying it that a state of civil war existed (R. 3). The Hague Conventions deal with a state of war which means that it was never meant to limit or intervene in the legal and necessary right of a government to suppress insurrection. A treaty should not be interpreted so as to reach a result contrary to the letter and spirit of the treaty.⁴⁸

Second, under Hague V⁴⁹ the neutral State must give no assistance direct or indirect to either belligerent side. The neutral State is under a duty to prevent within its territory such activities as the enlistment of troops for belligerent armies and the aiding of the belligerent in preparation of hostilities.⁵⁰ Therefore, Media's actions violated international law and not Balistan's.

B. Balistan Adhered to the Geneva Conventions.

⁴⁷Supra note 4.

⁴⁸Supra note 6.

⁴⁹Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague, V) Oct. 18, 1907, art. 5; Prize Cases, 67 U.S. 635 (1862).

⁵⁰See Alabama Claims Arbitration of 1872 where the arbitrals awarded the U.S. a sum of \$15,500,000 in gold as indemnity for Great Britain's failure to prevent the construction and fitting out of The Alabama which was used by the Confederates; Moore's Arb. 495.

1. Indepesh Was Only Entitled to the Minimum Standard of Protection.

As previously shown, Indepesh was not a State and therefore did not have the capacity to accede to the Geneva Conventions. Thus the maximum protection that could be afforded Indepesh is the minimum standard for armed conflicts not of an international character as stated in article 3 of the Geneva Conventions of 1949.

2. Indepesh Never Acceded to the Geneva Conventions Because of Their Reservation to Article 85.

When interpreting treaties primary regard must be paid to the intention of the parties in negotiating the treaty. Hence it is important to consider what is the primary "purpose" of the treaty.⁵¹ Throughout the Geneva Conventions the purpose is to regulate conduct during hostilities. However, the humanitarian principles which these treaties espouse are only granted to other parties that adhere to the principles of the Geneva Conventions.⁵² Consequently, it is necessary, ignoring the question of capacity, to examine the accession of Indepesh to the Geneva Conventions.

Indepesh made a reservation to article 85 of the Geneva Prisoners of War Conventions. Article 85 provides:

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

This Court held that:

. . . a State which has made and maintained a reservation which has been objected to. . . can be regarded as being a party to the Convention if

⁵¹Supra note 5.

⁵²Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2 (hereinafter cited as Geneva Prisoner of War Convention) which states that "they shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

the reservation is compatible with the object and purpose of the convention. . .⁵³

Balistan and Corruna through their foreign ministries in public announcements rejected the accession by Indepesh.⁵⁴ The reservation made by Indepesh is clearly incompatible with the purpose and object of the Geneva Prisoners of War Convention. Indepesh can deny the protection afforded by the Convention by claiming Balistani captives are war criminals. North Vietnam adopted this position in the Vietnam War.⁵⁵ Leading authorities have concluded that North Vietnam's reservation meant she was not a member of the Convention at all.⁵⁶

3. Indepesh's Violations of Their Own Reservation and Other Articles of the Geneva Convention Show a Clear Intent Not to Apply the Convention.

According to Indepesh's own wording of their reservation to article 85, captured Balistani prisoners were entitled to prisoner of war status until they were both "prosecuted and convicted." Indepesh chose to use the conjunctive rather than the disjunctive. Therefore, under her own reservation, Indepesh cannot deny application of the Geneva Prisoner of War Convention. However, Balistani prisoners were both prosecuted and convicted without such status.⁵⁷

⁵³Reservations to the Convention on Genocide (Advisory Opinion), (1951) I.C.J. 15. This decision has been incorporated into the Vienna Convention, art. 19, para. (c).

⁵⁴Foreign Ministers Speak for Their Nation, art. 6, para. 2.

⁵⁵It was necessary for the International Committee of the Red Cross (I.C.R.C.) to remind North Vietnam that although maintaining a reservation to art. 85, having ratified, they were bound by the Geneva Conventions and must adhere to them, 213 U.N.T.S. 383 (1955).

⁵⁶2 R. Falk, ed., The Vietnam War and International Law 516 (1969).

⁵⁷Indepesh's actions were a flagrant violation of international law. The failure to grant prisoner of war status violates art. 13 of the Geneva Prisoners of War Convention. The use of prisoners for heavy labor related to the war effort is also expressly prohibited, Id. art. 50, para. (b); Von Leeb (High Command) Trial, 10 Trials of War Criminals Before the Nuremberg Military Tribunal (1948). The denial of equal food rations and the executions of Balistani officers are also expressly prohibited by the Geneva Conventions, art. 26 and 13 respectively.

Indepesh's accession to the Geneva Conventions was strictly a political move. By acceding to the Conventions, Indepesh sought recognition as a State, since only States can accede to treaties. This accession is similar to the accession made by the Algerian provisional government during the Algerian Revolution, 1954-1962. After Algeria acceded, it continued to blatantly commit violations of war.⁵⁸ Likewise as shown, Indepesh continued to violate the Geneva Conventions after their accession and had no intent to follow the articles of the Convention. Because of Indepesh's failure to accept and apply the Geneva Conventions, Balistan was not bound by the Conventions with respect to Indepesh.

C. Balistan Did Not Violate the Genocide Convention.

As previously shown⁵⁹ the Genocide Convention was found to be inapplicable because Balistan had the sovereign right to quell rebellion within its territory. The Genocide Convention prohibits "acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group." The Convention deliberately excludes political groups from protection.⁶⁰ Article II(c) further provides that these acts may be committed by "deliberately inflicting. . . conditions of life calculated to bring about its physical destruction in whole or in part." Therefore, even assuming Indepesh was a state, Balistan lacked the intent necessary to violate the Genocide Convention.

When Indepesh declared her independence, Balistan occupied most of Indepesh and interned hundreds of Indemedians, mostly members of the Progressive Party

⁵⁸Greenberg, Law and the Conduct of the Algerian Revolution, 11 Harv. Int'l. Law J. 37, 64 (1970).

⁵⁹See Part II(c) of this memorial.

⁶⁰M. Greenspan, supra at 201.

(R, 4), Article 5 of the Geneva Civilian Convention denies protection to civilians who are engaged in activities hostile to the security of the State. Also, article 42 of the Geneva Civilian Convention recognizes the right of an occupying power to intern even protected civilians by providing that "the internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary." Indeed, article 43 of the Hague Rules of Land Warfare places the duty upon the occupying power to restore public order and safety.

Balistan interned members of the Progressive Party, the moving force behind the unconstitutional Universal Franchise Act (R, 2) for the danger they posed to Balistani security. The need to continue this internment was again justified by the doctrine of military necessity because of the civilians who became guerillas at night engaging in terrorism.⁶¹

Balistan did not execute any of the captive civilians. Starvation did occur among the prisoners of war and the civilian captives, but this did not represent any intent to destroy the Indonesians. The facts show that many civilian Balistanis were starving because of the rice contract with Media (R, 3). Thus starvation and lack of proper medical care was common throughout Balistan during the war and, therefore, this cannot represent any intent of starvation.

⁶¹The Nuremberg Military Tribunal in the Hostage Case (United States v. List), 8 War Crimes Trial Rep, 39 (1948) recognized the right to take hostages from the civilian population as follows:

If attacks upon troops and military installations occur, . . . hostages may be taken from the population to deter similar acts. . . provided it can be shown that the population generally is a party to the offense, either actively or passively. Nationality. . . may under certain circumstances afford a basis for hostage selection, . . .

Also Oppenheim, supra at 443, which states that hostages may be taken and may suffer for the acts of others, but may not be killed.

Of course, many States recognize the legitimacy of starvation of civilian population when it causes or is reasonably calculated to cause capitulation.⁶² Mudge branded the starvation of Biafra as genocide because it was obvious that the starvation was no longer going to lead to surrender. The Biafran situation is significantly different from the present situation.

The two respective African tribes had been hostile ethnic groups for many centuries. Thus their hostilities were based upon ethnic differences and hatred, whereas the present hostilities were based on different political representation in the Federal Union.⁶³ Indepeshis and Balistanis were friendly enough to become one State and both had a common religion. The language difference was accepted by Balistanis when they refused to enforce their language requirement in the federal elections (R. 2).⁶⁴ For these reasons, the starvation of prisoners of war, civilian internees, and the air bombardment of civilians did not represent the requisite intent to destroy a group in whole or in part necessary to violate the Genocide Convention.⁶⁵

Finally, the Genocide Convention provides no liability for States, but is

⁶²Mudge, Starvation as a Means of Warfare, 4 Int'l. Law 228, 266 (1970).

⁶³Likewise the present situation can be distinguished from Hitler's Final Solution to the Jewish Question where the intent to destroy a group was rooted in virulent anti-semitism. Bedau, Genocide In Vietnam? 53 B.U.L.R. 574, 602 (1973).

⁶⁴Compare Nazi practice of prohibiting native language instruction in the schools of conquered territories. Id. at 592.

⁶⁵Similarly many commentators have stated that the killing of civilians in Vietnam by the United States does not represent genocide, because the requisite intent is lacking. For this reason, these commentators believe the U.S. should ratify the convention, because the North Vietnamese would have no grounds to convict U.S. pilots of genocide. Goldberg & Gardner, Time to Act on the Genocide Convention, 58 A.B.A.J. 141, 144 (1972).

rather aimed solely at the criminal punishment of the individuals responsible,⁶⁶
Only individuals can form the necessary criminal intent to destroy a group,⁶⁷
Therefore, no reparations should be granted to Indepesh for genocide.

D. Balistan's Conduct Exceeded the Minimum Standard of the Geneva Conventions,

1. The Aerial Bombardment of Indepesh Was Not in Violation of the Minimum Standards.

The minimum standards can at most only be said to ban the indiscriminate bombing of civilians solely to break the morale of the enemy.⁶⁸ Beyond the restriction, little law exists for the regulation of aerial bombardment⁶⁹ and even though this law is not applicable, Balistan's conduct was in compliance. Article 25 of the Hague Rules of Land Warfare, 1907, provides that the "attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited." This article was not meant to prohibit the bombardment of towns behind enemy lines⁷⁰ or to restrict the bombing of military objectives within an undefended town.⁷¹ The dikes, harbors, railroad yards, trucking centers⁷² and training camps⁷³ are all considered through state practice to be

⁶⁶Article IV, Genocide Convention.

⁶⁷See Attorney-General of Israel v. Eichmann, 36 Int'l. L. Rep. 277 (1968); Bedau, supra note 63.

⁶⁸J. Stone, Legal Controls of International Conflict 629-631 (1954); Starke, 513.

⁶⁹M. Greenspan, The Modern Law of Land Warfare 351 (1959).

⁷⁰Id. at 332.

⁷¹Carnahan, The Law of Air Bombardment in its Historical Context, 17 A.F.L. Rev. 39 (Summer, 1975).

⁷²Desaussure, The Laws of Air Warfare: Are There Any? 5 Int'l. Law 527, 543 (1971) wherein the author states North Vietnam's charge of war crimes for bombing of dikes and dams "is a substantial departure from the practice of World War II."

⁷³Israel carried out air strikes against two major camps near Damascus in Syria causing heavy casualties. Falk, The Beirut Raid and the International Law of Retaliation. 63 An. J. Int'l. L 415 (1969).

proper military targets. Moreover, many of the dikes and cities were defended by anti-aircraft emplacements and air defense equipment was placed along the highways leading to the towns (R. 9). A place which is defended by anti-aircraft emplacements is no longer protected from air bombardment as an undefended area under article 25.⁷⁴ Thus the bombardment of these areas was permissible as either a defended place or a legitimate military objective.

The other major authority, though never adopted and purely persuasive, are the Hague Rules of Air Warfare, 1923, in which article 24 provides what may be bombarded.

Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

In the immediate neighborhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings, or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to civilian population.

The foregoing rules basically adopt the principle of proportionality; that is, was the suffering inflicted on civilians and noncombatants justified by the military advantage to be gained.⁷⁵ As to the military objectives and defended areas, there is no question that the doctrine of proportionality was satisfied, but as to the civilian areas and hospitals which were bombed, Indepesh and the realities of modern air warfare must take the responsibility.

The distinction between combatants and noncombatants in modern warfare has

⁷⁴G. Scharzenberger & E. Brown, A Manual of International Law 170 (6th ed.1976).

⁷⁵Id. Schwarzenberger states the significance of these proposed but unadopted rules is that they show the unwillingness of States to limit their freedom in air warfare.

become blurred because of the increasing number of combatants, the increasing number of noncombatants engaged in related military work, and the difficulty of determining military objectives from high altitudes.⁷⁶ Added to this problem was the fact that Indepesh scattered its military objectives and anti-aircraft emplacements throughout the town of Indelabad (R, 9). These anti-aircraft emplacements forced Balistani pilots to fly at higher altitudes, to drop their bombs in a hurry and take evasive action, and to fly their missions on cloudy and foggy days.⁷⁷ Because of the military necessity of saving the lives of Balistani air pilots, some bombs were dropped indiscriminately.

Because of air defenses and the scattering of military objectives, Balistan was forced, as were the Allies in World War II and the United States in Vietnam,⁷⁸ to use target area bombing carried out by anti-personnel and fragmentation bombs.⁷⁹ Only by carpet bombing a given area could Balistan be sure of reaching the military objectives scattered throughout Indelebad.⁸⁰ The presence of civilians as a shield to military objectives is prohibited and does not render the areas immune.⁸¹

Hence Indepesh must be held responsible for the bombing of a hospital. Although

⁷⁶Carnahan, supra at 40.

⁷⁷Nurick, Distinction Between Combatant and Non-Combatant, 39 Am. J. Int'l. Law 680. 692 (1945).

⁷⁸J. Stone, supra at 610; Carnahan, supra at 60.

⁷⁹Krepon, Weapon Potentially Inhumane: The Case of Cluster Bombs, 52 Foreign Aff. 595 (1974). The United States considered these bombs as legal and conventional weapons needed to protect U.S. pilots, and an effective and economical means to destroy anti-aircraft defenses.

⁸⁰Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 28 (hereinafter cited as Geneva Civilian Convention) which prohibits the use of civilians to render certain areas immune from military operations.

⁸¹Greenspan, supra 336; 2 Oppenheim, supra § 214, at 525.

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.

knives and the like (R. 8) which can be construed as violating article 23(e) of the Hague Rules of Land Warfare, 1907, which prohibits the use of arms calculated to cause unnecessary suffering.

Civilians could not be distinguished from the Indepeshi guerrillas who would return to work during the day.⁸⁵ Therefore, Balistani forces would be uncertain whether they are confronting a true civilian or a clandestine guerrilla.⁸⁶ Because of this nature of guerrilla warfare, the Balistani burning of villages believed to shelter Indepeshi guerrillas (R. 7) can be justified by the doctrine of military necessity.⁸⁷ To do otherwise would result in heavy loss of life among Balistani troops.⁸⁸ The burning of the villages did not violate the minimum standard, which protect only true civilians or persons who have laid down their arms.

The denial of the I.C.R.C. does not violate the minimum standards which only provide that the I.C.R.C. may offer its services. Balistan was not bound to allow the I.C.R.C. access to Indepeshi captives, especially in light of Indepeshi refusal to give access to Balistani captives. In judging Balistan's conduct in

⁸⁵Kelly, Legal Aspects of Military Operations in Counterinsurgency, 427-100-21 Mil. L. Rev. 95 (1963), which points out that the purpose of the guerrilla is to totally identify with the civilian population and to use the civilian population to strike the regular army. An example cited is the use of Vietnam civilians to furnish supplies to fighting men.

⁸⁶This same confusion arose in Vietnam because both the Vietcong and the Vietnamese peasant wore black pajamas. 2 R. Falk, supra note 73 at 542.

⁸⁷The doctrine of military justifies resort to all measures which are indispensable to bring about the complete submission of the enemy, as soon as possible, by means of regulated violence which are not forbidden by the laws and customs of war. Nurick, supra note 77 at 680.

⁸⁸The burning down of villages and scorched earth campaigns by the United States and South Vietnam have been justified by the military necessity of driving civilians out of contested areas or be labeled enemy sympathizers and to prevent guerrilla snipers from endangering U.S. troops. 2 R. Falk, supra note 73 at 494.

this regard, the political necessities at the time must be considered. Balistan could not openly apply the Geneva Conventions by giving the I.C.R.C. access to internment camps or granting Indepeshis P.O.W. status. To take this action would have implied that Indepesh was a State and defeat the whole purpose of Balistan's use of armed force.⁸⁹ Therefore, Balistan could not easily grant the full protection of the Geneva Conventions.

3. Guerrillas Are Not Entitled to Prisoner of War Status, and the Other Captives Were Properly Treated.

As previously shown, Indepesh had not acceded to the Geneva or Hague Conventions. Balistan was bound by article 3 of the Geneva Conventions to adhere to the minimum standard of conduct. Thus, Balistan need only treat her captives humanely which was done. Even if Indepesh had acceded to the Conventions, these partisans would still not have been entitled to protection as prisoners of war. They lacked attributes necessary for P.O.W. status.⁹⁰

The minimum standard requires that guerrillas must lay down their arms before they are entitled to protection. Thus any killing of guerrillas who resisted capture does not violate article 3 (R. 7). Indeed, article 42 permits the use of weapons against escaping P.O.W.'s. Second, the minimum standards require that before executing Indepeshi guerrillas there must be a "previous judgment pronounced

⁸⁹ During the Algerian Revolution, the French refused to grant P.O.W. status to Algerian guerrillas who were tried and executed similar to the Balistani procedures. In fact, France refused to even recognize a state of war, and did not even try the Algerian captives under wartime provisions. Greenberg, supra note 52.

⁹⁰ Article 4, Geneva Prisoner of War Convention requires that combatants wear a distinctive sign and adhere to international law.

by a regularly constituted court,"⁹¹ At all times, Indepeshi partisans were granted a summary trial (R. 5, 6). Operating under martial law in an emergency, the established courts of Balistan were not equipped to deal with rebel trials carried out in occupied Indepesh.⁹² Under these circumstances, a summary trial would meet the requirements of article 3,

Third, the conditions of prison camps exceeds the minimum standard. Guerrillas, civilian internees, and Balistanis all died because there was a food shortage throughout Balistan. Prisoners having P.O.W. status are entitled only to conditions as favorable as those of the forces of the detaining power.⁹³ Considering Balistan's own poor condition, the treatment of Indepeshi guerrillas exceeded the minimum standard.

Fourth, Balistan met the other minimum standards. No hostages were taken; nor murder, mutilation, torture or outrages against personal dignity perpetrated. The reprisals taken against Indepeshi prisoners in reducing food rations conforms with the minimum standard in that they were proportional and in response to the illegal reduction of rations taken against Balistani prisoners.⁹⁴

Finally, other members of the Indepesh regular army were accorded more humanitarian treatment than the guerrillas (R. 5). In addition, the Median troops seconded to Indepesh were accorded full P.O.W. status (R. 6). Mercenaries were

⁹¹See Ex parte Quirin, 317 U.S. 1, 31 (1940) and Mohammed Ali v. Public Prosecutor, (1969) 1 A.C. 430 which hold unlawful combatants are not liable to capture and detention, and to trial and punishment by military tribunals for their offenses.

⁹²Bond, Application of the Law of War to Internal Conflicts, 3 Ga. J. Int'l. & Comp. L. 345, 372 (1973).

⁹³Article 25, 51, Geneva Prisoner of War Convention.

⁹⁴Naulilaa Incident Arbitration, (Portuguese-German Arbitral Tribunal), 1928, 2 R.I.A.A. 1011.

treated according to international law,⁹⁵

IV. UPON THE TERMINATION OF HOSTILITIES THE REPARATION OF PRISONERS BECAME MANDATORY.

Article 198 of the Geneva Prisoners of War Convention states: "Prisoners of war shall be . . . repatriated without delay after the cessation of active hostilities." Indepesh has failed to adhere to this article. Active hostilities have ceased. Article 118 does away with the requirement of a peace treaty.⁹⁶ Balistan has recognized Indepesh as a State and agreed to pay reparations should this Court so find. After the end of a state of war, a state of normalcy must return.⁹⁷ Wars are terminated by a ceasefire agreement.⁹⁸

V. BALISTAN IS ENTITLED TO RELIEF

In international law, the breach of a treaty⁹⁹ or customary engagement¹⁰⁰ involves a duty to make adequate reparations,¹⁰¹ In the case of a treaty obligation,

⁹⁵Nothing in the Geneva Conventions confers P.O.W. status on mercenaries. Article 4 reserves P.O.W. status to persons who are members of the armed forces of a party to the conflict. Therefore, mercenaries could be tried and executed as common criminals or as war criminals. 2 Oppenheim, supra note 32, § 552 at 567.

⁹⁶The Geneva Prisoner of War Convention sought to end the experience of World War II where prisoners were held for years after the hostilities. J. Stone, supra note 68 at 662.

⁹⁷Contracts which are suspended during a state of war become enforceable at the end of a state of war. Arab Bank, Ltd. v. Barclays Bank (Dominion, Colonial, and Overseas), (1953) 2 Q.B. 527. and (1954) A.C. 495, and Bevan v. Bevan (1955) 2 Q.B. 227.

⁹⁸Many wars have ended without a peace treaty. A few examples are: Sweden and Poland (1716), France and Mexico (1867) and the Korean Conflict of the 1950's. In fact, a general armistice preceded the Treaty of Versailles in 1919, and was deemed to have ended the status of war. Ruffy-Arnell v. The King, 1 K.B. 599, 612-613.

⁹⁹Charzow Factory (Jurisdiction) Case, (1926) P.C.I.J., Ser. A, No. 9, 21; affirmed in Charzow Factory (Merits) Case, (1928) P.C.I.J., Ser. A, No. 17, 27-29. The "refusal to fulfill a treaty obligation involves international responsibility." Advisory Opinion on the Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, (Second Phase). (1950) I.C.J. 221, 228.

¹⁰⁰Corfu Channel Case, (1949) I.C.J., 4, 23-26.

¹⁰¹Charzow Factory Case, (1928) P.C.I.J. Ser. A, No. 17.

this need not be stated in the treaty itself,¹⁰²

The degree of recovery is the actual loss suffered irrespective of the degree of blame.¹⁰³ Indepesh has suffered no such actual loss. However, Indepesh must repatriate prisoners of war. This Court decided in the Certain German Interests in Polish Upper Silesian Case¹⁰⁴ and affirmed in the Chorzow Factory (Interpretation) Case¹⁰⁵ that it has authority to give a declaratory judgment.

Also, an international tribunal can require specific performance of its decision.¹⁰⁶ Indeed, specific performance is "the normal method of giving effect to a declaratory judgment."¹⁰⁷

Indepesh is in flagrant violation of international law in her refusal to repatriate prisoners of war. Only specific performance of repatriation, rather than monetary compensation, can prevent further injury to Balistan,

CONCLUSION

It is respectfully requested that this honorable Court:

1. Deny Indepesh reparations for the treatment of Indepesh combatants.
2. Declare Indepesh's refusal to repatriate Balistani prisoners of war is an unjustifiable violation of international law.
3. Order the immediate repatriation of all prisoners of war.
4. Grant Balistan such further and other relief as this honorable Court may deem just.

All of which is respectfully submitted.

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¹⁰²Chorzow Factory (Jurisdiction) Case, (1926) P.C.I.J., Ser. A, No. 9.

¹⁰³Chorzow Factory (Indemnity) Case, (1928) P.C.I.J., Ser. A., No. 17, at 46-48; Starke, supra note 7 at 319.

¹⁰⁴(1926) P.C.I.J., Ser. A., No. 7 at 19.

¹⁰⁵(1926) P.C.I.J., Ser. A., No. 13 at 20-21.

¹⁰⁶See Free Zone Cases, (1932) P.C.I.J., Ser. A/B, No. 46 at 172.

¹⁰⁷C. Jenks, The Prospects of International Adjudication 419 (1964).