IN THE INTERNATIONAL COURT OF JUSTICE

April, 1978

Between:

THE REPUBLIC OF INDEPESH

Applicant

and

THE FEDERAL UNION OF BALISTAN

Respondent

MEMORIAL FOR THE APPLICANT

Team 6
Agents for the Republic of
Indepesh, Applicant:

Harry Underwood
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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 Articles 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

Whether Indepesh acceded to the Geneva Conventions as a State or otherwise became entitled to their protection.

II

Whether Indepesh became a belligerent during the course of the conflict or otherwise became entitled to the protection of the customary laws of war.

III

Whether Indepesh was entitled to the protection of Article 3 of the Geneva Conventions of 1949.

IV

Whether Balistan was in breach of any applicable international laws , including human rights law, in its treatment of Indepeshi combatants.

V

Whether Balistan is entitled to the immediate release and repatriation of its combatants held captive by Indepesh.

SUMMARY OF ARGUMENT

Indepesh was a state at the time of its declaration of independence. It was entitled to accede to the Geneva Conventions and to be accorded their protection.

Alternatively, if the conflict remained internal, it attained such scope and intensity that Indepesh acquired the rights of a belligerent, including the protection of the customary laws of war. At the very least, Article 3 of the Conventions, applicable to every armed conflict, ought to have been observed vis-a-vis combatants.

In any event, Indepeshi combatants were protected by the international law of human rights.

Balistan violated international law in its treatment of Indepeshi combatants, whichever provisions thereof were applicable to the conflict.

Moreover, Indepesh's refusal to repatriate Balistani prisoners was justified under international law.

ARGUMENTS AND AUTHORITIES

I. INDEPESH ACCEDED TO THE GENEVA CONVENTION AS A STATE.

A. Indepesh was a sovereign State at the time of its declaration of independence.

1. It met the preconditions of statehood.

a. On the facts, it was a State.

During the period of its association with Balistan, Indepesh retained a defined territory, a settled population and a representative government. Parts of its territory later came under the occupation of Balistani troops, but this fact did not per se render the borders uncertain.[1] Even after Balistan purported to suspend the constitution and to install a military governor, the government remained effective and retained the loyalty of the people.

Thus upon resuming its capacity to enter into relations with other states (shown by the licensing of a rice sale to Media against the interests of Balistan), Indepesh met the four conditions of statehood set by customary law.[2]

b. It follows that Indepesh either became seized with the rights of a State at international law[3] or it became entitled to recognition by

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1. Egypt is no less a state because a large part of its territory is under Israeli occupation. "Belligerent occupation clearly does not affect statehood": I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 83 (2d ed. 1973).

2. In Art. 1 of Montevideo Convention on Rights and Duties of States (1933), 28 AM. J. INT'L L. SUPP. 75 (1934); generally accepted as customary law according to D. HARRIS, INTERNATIONAL LAW, 95 (1973).

3. J. BRIERLY, THE LAW OF NATIONS, 138 (6th ed. 1963); W. HALL, INTERNATIONAL LAW § 2b (3d ed. 1890); Deutsche Continental-Gas Gesellschaft (decision of Polish-German Mixed Arbitral Tribunal), 5 ANN. DIG. 11 at 15 (1929-30); Art. 3, Montevideo Convention, supra n. 2.

other States[4] and hence to the exercise of those rights that attach to statehood.

In any event, Indepesh was recognized by Media and Sinestra, and if evidence be required of actual recognition by States, this was sufficient.[5] Since Indepesh merely resumed its prior independent status, such recognition cannot be accounted premature.[6] But even if premature, it was still effective.[7]

2. The Indepeshi people had a right to self-determination.

a. The principle of self-determination is recognized at international law.

It is enshrined in the Charter of the United Nations,[8] of which Balistan is a member, and it has frequently been affirmed

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4. H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW, 74 (1947). This is also the policy of the government of the United Kingdom; see statement at 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, 16-17 (1963).

5. See 2 L. OPPENHEIM, INTERNATIONAL LAW, 212 n. 2 (7th ed. H. Lauterpacht 1952): "The fact that [a community has been recognised as a State] by States -- however few -- other than the opposing belligerent, provides strong evidence that it is a State and that it is entitled to be treated in accordance with the laws of warfare."

6. State practice affords examples of the immediate recognition of States which had voluntarily entered into association with others, and later withdrew. E.g., Syria, which in 1961 unilaterally separated from the United Arab Republic and Singapore which seceded from Malaysia in 1965. Both immediately took up seats in the United Nations. See U.N. Y.B. 168 (1961) and U.N. Y.B. 235 (1965) respectively.

7. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 99(2) (1965).

8. Articles 1(2) and 55.

at the U.N., by the overwhelming consensus of the membership, in the years since 1945.[9] It was relied on by this Court in the Advisory Opinion on Western Sahara.[10]

Whether or not the principle is, as some urge, jus cogens,[11] members of the U.N. cannot now in good faith deny they are bound to respect it.[12]

(b) Its exercise is appropriate in the present case.

The denial of fundamental human rights is often held to be germane to whether a right to self-determination exists in a particular instance.[13] Similarly, it is held that such a right

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9. It is considered a right in the International Covenant in Economic, Social and Cultural Rights, 61 AM. J. INT'L L. 861 (1967) and the International Covenant on Civil and Political Rights, 61 AM. J. INT'L L. 870 (1969). The Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR Supp. 16, at 66, U.N. Doc. A/4684 (1960) condemns the subjection of peoples to foreign domination. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. 18 at 69, U.N. Doc. A/8018 (1970), adopted unanimously by the General Assembly and declared to have the force of law, proclaims that "[e]very state has the duty to refrain from any forcible action" which deprives peoples of their right to self-determination. (Hereinafter cited as Declaration on Friendly Relations.)

10. [1975] I.C.J. 12 at 29-35.

11. Barcelona Traction Case [Second Phase], [1970] I.C.J. 3 at 304 (separate opinion of Judge Ammoun); BROWNLIE, supra n. 1 at 501.

12. R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS, 101-102 (1963).

13. Johnson, Toward Self-Determination, 3 GA. J. INT'L & COMP. L. 145 at 162; Emerson, Self-Determination, 65 AM. J. INT'L L. 459 at 475.

also exists when self-determination would effect an increase in the enjoyment of human rights.[14]

Balistan violated Indepeshi rights in 1974 when it deprived the people of their official language, disfranchised two-thirds of the Indepeshi electorate and suspended the Indepeshi constitution. Women, in particular, were discriminated against, being incarcerated in camps for attempting to exercise the vote.[15] Conversely, Indepesh proposed universal suffrage, a right never enjoyed in Balistan.

It is clear from the wording of the Declaration on Friendly Relations that only those States "possessed of a government representing the whole people" may contend that a minority within has no right to secede.[16] Article 2(7) of the Charter will not by itself bar recourse to the principle.[17]

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14. Chen, Self-Determination as a Human Right in REISMAN & WESTON, edd., TOWARD WORLD ORDER AND HUMAN DIGNITY, 197-261 (1961).

15. Discriminatory practices violated provisions of the Universal Declaration on Human Rights, G. A. Res. 217 A, U.N. Doc. A/810 at 71 (1948); the International Convention on the Elimination of All Forms of Racial Discrimination (1969), Cmnd. 4108; the International Covenant on Civil and Political Rights, supra n. 9.

16. Supra n. 8 at principle 5, para. 7; Chowdhury, The Status and Norms of Self-Determination in Contemporary International Law, 24 NETH. INT'L L. REV. 72 at 80 (1977).

17. BROWNLIE, supra n. 1 at 577.

c. It was the clearly expressed will of the majority to secede.

The plebiscite is a long-established mode of expressing the desire of peoples for self-determination.[18] The U.N. has organised plebiscites for this purpose on a number of occasions.

3. Indepesh was never bound by the Articles of Association with Balistan.

a. The Articles were in the nature of a treaty.

An agreement between States which creates legal rights and duties between them is a treaty and will be governed by international law.[19] A treaty is binding upon the contracting parties and must be performed by them in good faith.[20]

b. By failing to incorporate the language provisions into the federal constitution, Balistan materially breached the treaty.

As franchise rights, and thus representation, depended on the language guarantees, they must be taken to be material to a treaty meant to establish representative federal government. Consequently, Indepesh was entitled to terminate the treaty on the grounds of

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18. Cf. S. WAMBAUGH, A MONOGRAPH ON PLEBISCITES (1920). Plebiscites were used as the basis for Norway's secession from Sweden in 1905 and Hungary's from Austria in 1908.

19. Fawcett, The Legal Character of International Agreements, 30 BRIT. Y.B. INT'L. 381 at 384 (1950); 1 L. OPPENHEIM, INTERNATIONAL LAW 877 (8th ed. H. Lauterpacht 1955). "A federal State is a perpetual union of several sovereign States ... The union is based, first, on an international treaty of the member States and, secondly, on a subsequently-accepted constitution." Id. at 155.

20. Id. at 881; A. McNAIR, LAW OF TREATIES 493 (1961).

"violation of a provision essential to the accomplishment of the object or purpose of the treaty".[21]

c. Balistan is estopped from claiming Indepesh acquiesced in the loss of its rights under the treaty.

The general principle of estoppel is that a "State must not be permitted to benefit by its own inconsistency to the prejudice of another State."[22] Balistan did not interfere with the exercise of language rights from the time of confederation until 1974 even though they did not exist under the federal constitution. Indepesh "in good faith relied upon the conduct"[23] of Balistan, and with reason, considering the obligation previously undertaken by Balistan.

Indepesh would be severely prejudiced by the loss of its language rights. Per contra, Balistan cannot invoke estoppel because it could not be said to have relied, to its detriment, on any inaction on the part of Indepesh.

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21. Advisory Opinion on Namibia [1971] I.C.J. 16 at 47 cited this, Art. 60 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969) as customary law. That it is so was not denied by any delegation at Vienna: Kearney and Dalton, The Treaty on Treaties, 64 AM. J. INT'L L. 495 at 540 (1970). Accord, B. SINHA, UNILATERAL DENUNCIATION OF TREATY BECAUSE OF PRIOR VIOLATIONS OF OBLIGATION BY THE OTHER PARTY (1966).

22. Temple of Preah Vihear Case, [1962] 1 I.C.J. 4 at 38 (separate opinion of Judge Alfaro). "A fortiori, the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it." Id.

23. Bowett, Estoppel Before International Tribunals and its Relation to Acquiescence, 33 BRIT. Y.B. INT'L 176 at 192 (1957).

It follows that when Balistan abrogated Indepeshi language rights in 1974, it was open to Indepesh to treat the Articles as void and to resume statehood.

B. Indepesh validly acceded to the Geneva Conventions.

1. By rules of State succession, it was open to Indepesh, as a new break-away State, to enter into whatever international agreements it considered appropriate.[24] Specifically, the Geneva Conventions are open to accession by any Power not a signatory to them.[25]

2. The reservation to Article 85 of the GPW Convention did not vitiate the accession.

a. A reservation may be effective so long as it is compatible with the object and purpose of the treaty.[26]

The Convention has as its object the protection of prisoners of war. The reservation does not affect the treatment of prisoners generally, nor does it deprive those charged with war crimes of the due process protection accorded by Article 84. It is concerned only with the punishment of war criminals, which is open to the

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24. D. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 32 (1956). Article 7 (relating to multilateral treaties), Draft Articles on Succession in Respect of Treaties U.N. Doc. A/CN.4/224, which have been provisionally approved by the International Law Commission (HARRIS, supra n. 2 at 627).

25. E.g. by Article 139 of Convention (III) Relative to the Treatment of Prisoners of War of 12 Aug. 1949, 75 U.N.T.S. 135 (hereinafter the GPW Convention).

26. Vienna Convention on the Law of Treaties, supra n. 21, Art. 19. Advisory Opinion on Reservations to the Convention on Genocide [1971] I.C.J. 15.

Detaining Power under Articles 85 and 129. It must further be noted that eight States made similar reservations at the time of signature in 1949.[27]

b. In any event, the treaty will enter into force between the reserving State and a State objecting to the reservation unless the latter clearly expresses a contrary intention.[28]

As Balistan merely rejected the accession to the treaty, and did not express the specific intention required, the treaty must be taken to apply as between the parties.

3. Non-recognition of Indepesh by Balistan is irrelevant to the coming into force of the treaty rules.

Treaties of fundamental importance, concerning problems of peace and war, are binding upon States and governments though mutual recognition between them all has not taken place.[29]

C. The Conventions apply whether or not the existence of war is acknowledged by either party.[30]

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27. Albania, Byelorussian S.S.R., Bulgaria, Hungary, Poland, Rumania, Czechoslovakia, Ukranian S.S.R. and U.S.S.R.

28. Vienna Convention on the Law of Treaties, supra n. 21, Art. 20.

29. Lachs, Recognition and Modern Methods of International Co-operation, 35 BRIT. Y.B. INT'L 252 at 259 (1959).

30. The words "even if the state of war is not recognised by one of them" in Article 2 should be read as "by one or both of them". 2 OPPENHEIM, supra n. 5, at 369 n. 6. See further G. DRAPER, THE RED CROSS CONVENTIONS, 10-11 (1958). "The occurrence of de facto hostilities is sufficient": 4 I.C.R.C., COMMENTARY, THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 20 (J. Pictet ed. 1958).

II. IF IT WAS NOT A STATE, INDEPESH ACHIEVED SUCH STATUS AS WAS NECESSARY TO ACCEDE TO THE GENEVA CONVENTIONS OR TO BRING INTO EFFECT THE CUSTOMARY LAWS OF WAR.

A. Indepesh achieved belligerent status in the course of the conflict.

1. Indepesh clearly satisfied the prerequisites for belligerency.[31]

It occupied and administered a substantial portion of the national territory. It fought through regular armed forces responsible to an identifiable authority. It possessed the will to conform to the laws of war, as evidenced by its accession, and the ability to do so, in that it maintained the requisite control over its troops.

Moreover, there existed circumstances that made it necessary for the neighbouring States of Media and Sinestra to acknowledge the status of the insurgents. It is submitted that insofar as these States recognised Indepesh as soyereign, it was recognised as a belligerent.

2. Consequently it was entitled to the protection of the customary laws of war.[32]

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31. Summarised at 2 OPPENHEIM, supra n. 5 at 249.

32. The provisions of the Regulations under Hague Convention (IV) of 1907, T.S. No. 539 [hereinafter cited as Hague Convention] constitute customary law: Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 1946, Cmd. 6964, at 65; affirmed by G.A. Res. 95(1) of 11 December 1946, U.N. Doc. A/CN.4/5, 14-15. The Geneva Convention of 1929 Relative to the Treatment of Prisoners of War, 118 L.N.T.S. 343 [hereinafter cited as the 1929 Convention] may also express customary law: U.S. v. Von Leeb et al. 15 ANN. DIG. 376 at 384 (1948).

Contending belligerents are entitled to be treated as if they were engaged in a war waged by two sovereign States.[33] This subjects the incumbent, even if it does not recognise the insurgents, to a compelling moral obligation - approximating to a legal duty - to treat the insurgents according to the law.[34] Thus it is open to the Court to take judicial notice, as international tribunals have done on other occasions,[35] of the scope and intensity of the conflict, that it must be characterised as a war, though internal and be governed by its laws.

B. Indepesh was a "Power" within the meaning of Article 2 and could accede to the Geneva Conventions.

The powers not party to the Conventions contemplated in

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33. LAUTERPACHT, supra n. 4 at 175 and 245.

34. 2 OPPENHEIM, supra n. 5 at 210; LAUTERPACHT, supra n. 4 at 246; THOMAS AND THOMAS, NON-INTERVENTION 220 (1956). Parties to civil conflicts have recognised the moral and practical necessity of applying the laws of war while refusing to recognise the enemy. E.g., the U.S.A. in Vietnam applied the Geneva Conventions to the Viet Cong 53 DEPT. STATE BULL. (NO. 1368) 447 (Sept. 13, 1965). The Nigerian federal forces considered themselves "honour-bound" to observe the Conventions in the conflict with Biafra: Nwogugu, The Nigerian Civil War: A Case Study in the Law of War, 14 IND. J. INT'L L. 13 at 29 (1974).

35. E.g. Prats (Mexico v. U.S.A.) as in 3 MOORE, INTERNATIONAL ARBITRATIONS 2886 (1868), and Santa Clara Estates Co. (British-Venezuela Mixed Claims Commission) as in 9 R.I.I.A. 455 (1903).

Article 2 include belligerent and insurgent powers.[36] Article 4(3) by including among prisoners of war "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power", indicates the Conventions are open to participation by entities not States (emphasis added). The neutral term "parties to the conflict" prevails throughout the Conventions.

C. Even if Indepesh was not a recognised belligerent, it was still entitled to exercise a belligerent's rights.

1. It was fighting a war of national liberation.

Recognition of belligerency has lost all practical significance, having scarcely ever been accorded since the First World War.[37] Insofar as the traditional rules favour the incumbent in civil conflicts, they embody outdated policy.[38] The Declaration on Friendly Relations recognises a "right to resist" on the part of a people struggling for self-determination. In the Definition of Aggression,[39] such struggles are considered not to be acts of

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36. Farer, Humanitarian Law and Armed Conflicts: Toward the Definition of International Armed Conflict, 71 COLUM. L. REV. 37 at 47 (1971); Report of the Secretary-General, Respect for Human Rights in Armed Conflicts (1969) in 1 THE LAW OF WAR, 748 (L. FRIEDMAN ed. 1972); Hooker and Savasten, The Geneva Convention of 1949: Application to Vietnamese Conflict, 5 VIRG. J. INT'L L. 243 at 259 (1964) say that there is "some authority" for conferring Article 4 status upon insurgents citing 1960 Algerian demands for recognition by the French.

37. Higgins, International Law and Civil Conflict in INTERNATIONAL REGULATION OF CIVIL WAR 171 (E. Luard ed. 1972).

38. Farer, supra n. 36 at 56.

39. G.A. Res. 3314 (XXIX) as in 69 AM. J. INT'L L., 480 (1975) at Art. 7.

aggression. Moreover, the U.N. has adopted the role of pronouncing on the legal status of parties in such conflicts so as to ensure rights to self-determination and to secure humanitarian protection.[40]

Since liberation movements now have a jus ad bellum under international law, the conflict should be subject to the international jus in bello in its entirety.[41]

At the least, the right to self-determination may confer a higher status on an insurgent regime than it could otherwise claim to be entitled to.[42]

2. Participation by Media and Corruna internationalised the conflict.

The International Committee of the Red Cross[43] and numerous publicists[44] have declared that when third states actively intervene on behalf of either party to a civil conflict, the conflict

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40. The General Assembly demanded prisoner of war status for all captured insurgents in South Africa, Rhodesia, and the former Portugese African colonies, even though in some cases domestic violence was so limited as not even to be entitled to "armed conflict" status under conventional law. See G.A. Res. 2445, 23 U.N. GAOR Supp. 18, at 51, U.N. Doc. A/7433 (1968); G.A. Res. 2396, 23 U.N. GAOR Supp. 18, at 19, U.N. Doc. A/7348 (1968); G.A. Res. 2383, 23 U.N. GAOR Supp. 18, at 58, U.N. Doc. A/7290/Add. I (1968).

41. Abi-Saab, Wars of National Liberation and the Laws of War, 3 ANNALES D'ETUDES INTERNATIONALES, 93, 100, 102 (1972).

42. BROWNLIE, supra n. 1 at 83.

43. At its 21st Conference. See I.C.R.C., REAFFIRMATION AND DEVELOPMENT OF THE LAWS AND CUSTOMS APPLICABLE IN ARMED CONFLICT, 100 (1969).

44. E.g. R. FALK, LEGAL ORDER IN A VIOLENT WORLD, 136 (1968); Higgins, supra n. 37 at 178; Farer, supra n. 36 at 70.

becomes international. This is indicated by the plain sense of the word. Moreover, Balistan tacitly conceded the international nature of the conflict when it gave Median captives prisoner of war status. It is illogical to deny such status to Indepeshis fighting alongside Medians under the same regime.

III. EVEN IF THE CONFLICT REMAINED INTERNAL, ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS OF 1949 WAS BINDING UPON BALISTAN.

A. Balistan was bound as a Contracting Party.

Balistan was bound to apply Art. 3 in the case of "an armed conflict not of an international character" occurring within its territory. The words "armed conflict" are meant to exclude only acts of banditry or riots or insurrections capable of rapid suppression by normal police procedures.[45] Any conflict in which the insurgents manifest some element of military organization and political control is covered by the article.[46] Clearly such a threshold was passed on the present facts. That other states may have failed to apply the article to internal armed conflicts is irrelevant since Art. 3 is not merely customary law, but binding conventional law. Thus the violation of the obligation cannot deny the existence of the obligation.

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45. FALK, supra n. 44 at 118.

46. See the Report of the Secretary-General, Respect for Human Rights in Armed Conflicts (1970) in FRIEDMAN ed., supra n. 36, citing Final Record of the Geneva Diplomatic Conference of 1949; see also Draper, The Status of Combatants and the Question of Guerilla Warfare 45 BRIT. Y.B. INT'L 173 at 209 (1971).

B. Balistan was further bound to apply Art. 3 as it represents jus cogens.

1. International law recognises the existence of certain rules possessing the character of jus cogens.

In drafting Art. 64 of the Vienna Convention, dealing with peremptory norms, the International Law Commission recognized the unanimity among States regarding "the existence of rules of jus cogens in the international law of today".[47] Further, the concept has been applied by the World Court.[48]

2. Art. 3 represents jus cogens.

Art. 3 provides for "the most elementary humane treatment"[49] and lays down "the minimum standard of civilisation".[50] It is submitted that Art. 3, like the fundamental provisions of the international law of human rights,[51] contains "principles and rules concerning the basic rights of the human person"[52] which this

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47. Int'l L. Comm'n. Report, [1966] 2 Y.B. INT'L L. COMM'N, 247, U.N. Doc. A/6309/REV. 1. See also Schwelb, Some Aspects of International jus cogens as Formulated by the I.L.C., 61 AM. J. INT'L L. 948 (1967).

48. See Reservations to the Genocide Convention Case supra, n. 26 at 23, 24. Wimbeldon Case (per Judge Shucking) [1923] P.C.I.J., Ser. A, No. 1 at 47; Guardianship of Infants Case (per Judge Moreno Quintana) [1958] I.C.J. 106-107.

49. The words of a delegate to the Diplomatic Conference at Geneva, 1949, quoted in J. PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 57 (1975).

50. 2 G. SCHWARZENBERGER, INTERNATIONAL LAW 718 (1968) where it is further stated that Art. 3 constitutes consensual jus strictum, and jus cogens.

51. See section IV, infra.

52. The Barcelona Traction Case, supra n. 11 at 32.

Court has described as giving rise to "obligations [on the part of a State] erga omnes".[53] It therefore follows that Balistan was bound to apply Art. 3 regardless of its contractual obligations.

IV. IN ANY EVENT, INDEPESHI COMBATANTS WERE ENTITLED TO THE PROTECTION OF HUMAN RIGHTS PROVISIONS WHICH BALISTAN WAS BOUND TO APPLY.

A. The fundamental provisions of the international law of human rights are concerned with "the basic rights of the human person"[54] and have the character of jus cogens.[55]

B. Alternatively, Balistan was bound to apply the provisions of the Universal Declaration of Human Rights[56] as customary law.

Though it was not considered legally binding when first adopted[57] it is submitted that the U.D.H.R. now has the force of law.[58] Successive unanimous declarations of the General Assembly have made it clear that member States "shall observe faithfully and strictly"[59] the provisions of the U.D.H.R. States have applied

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53. Id.

54. Id.

55. See argument under section III(B), supra.

56. Supra n. 15. Hereinafter cited as the U.D.H.R.

57. LUINI DEL RUSSO, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 37-38 (1971).

58. See Sir Humphrey Waldock, INT'L & COMP. L. Q. SUPP. PUB. No. 11 at 15 (1965); J. Humphrey, The U.N. Charter and the Universal Declaration of Human Rights, in THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 53 (E. Luard ed., 1967).

59. Declaration on the Granting of Independence, Art. 7, supra n. 9; see also Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904 (1963), 58 AM. J. INT'L L. 1081 (1964).

it both internationally[60] and nationally as binding law.[61]

C. In any event, as a contracting party, Balistan was bound by the International Covenant on Civil and Political Rights[62] which entered into force on 23 March 1976.[63]

1. The Doctrine of Progressive Realisation is not applicable to Balistan.

The doctrine exists for the benefit of newly-independent States,[64] rather than established States such as Balistan. Moreover, since Balistan ratified the covenant years before its entry into force, she has no excuse for failing to implement its provisions immediately thereafter.

2. The right of derogation is strictly limited.

Though Art. 4 permits Parties to derogate from their obligations under the Covenant in time of officially proclaimed public emergency which threatens the life of the nation, Art. 4(2) prohibits absolutely any derogation from, inter alia, Art. 6 (right to life, prohibition of arbitrary deprivation of life) and Art. 7 (prohibition of torture, or cruel, inhuman, or degrading treatment or punishment).

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60. See Schwelb, The Trieste Settlement and Human Rights 49 AM. J. INT'L L. 242 (1955).

61. Borovsky v. Commissioner of Immigration and Director of Prisons, Chinskoff v. Commissioner et al. [Supreme Court of the Philippines]; summarized in [1951] U.N. Y.B. HUMAN RIGHTS 289-290.

62. Supra, n. 15. Hereinafter cited as the I.C.C.P.R.

63. Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1976 (ST/LEG/SER.D/10) 101.

64. See Robertson, The United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights, 43 BRIT. Y.B. INT'L 21 at 26 (1970).

V. BALISTAN'S TREATMENT OF INDEPESHI COMBATANTS WAS IN VIOLATION OF INTERNATIONAL LAW WHICH IN ALL RESPECTS REQUIRES THAT SUCH PEOPLE BE TREATED HUMANELY.[65]

A. Balistan's treatment of captured regulars violated international law.

1. Balistan's refusal to give prisoner-of-war status to captured regulars violated the laws of war.

Under the GPW Convention (Art. 4A), the 1929 Convention (Art. 1), and the Hague Convention (Art. 1), Balistan was obliged to extend prisoner-of-war status to all members of the regular forces of Indepesh. Instead, all captives were treated as traitors, rebels, or criminals. It is clear that a prisoner of war "is not bound to [the detaining Power] by any duty of allegiance".[66] Therefore Balistan's execution of Indepeshi officers and contract combatants was wilful killing and a grave breach of the GPW Convention (Art. 130) and customary law.[67] In an internal conflict, such action exposes the detaining Power to justifiable retaliation.[68]

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65. The following provisions require humane treatment: GPW Convention Art. s. 13, 130; Convention (IV) Relative to the Protection of Civilians in Time of War, Geneva, 12 August 1949, 75 U.N.T.S. 287 (hereinafter the GC Convention) Art. 5; 1929 Convention, Art. 2; Hague Convention, Art. 4; Article 3 common to the Geneva Conventions of 1949; U.D.H.R. Art. 5; I.C.C.P.R., Arts. 6, 7.

66. GPW Convention, Art. 87.

67. Hague Convention, Art. 23(c); see also Zillman, Political Uses of Prisoners of War, [1975] ARIZ. ST. L. J. 237 at 247-248.

68. OPPENHEIM, supra n.5 at 252. Compare the reaction of Algeria to the execution of Algerian nationalists in France, which reaction resulted in an abatement thereof, in THE INTERNATIONAL LAW OF CIVIL WAR 194-199 (R. Falk ed., 1971).

2. Balistan's treatment of captured regulars was inhumane.[69]

Re-education amounts to brainwashing and must be considered inhumane treatment, as well as violation of prisoners' rights.[70] The alleged reprisal was wholly unjustified and illegal.[71] In particular, reducing food rations to the point where prisoners die from sickness and starvation is wholly inhumane and a breach of the duty to provide sufficient food.[72]

The incarceration of contract combatants under abysmal conditions in prisons where they were not fed cannot but be considered inhumane treatment. Further such treatment was in breach of the duty to treat all prisoners alike without adverse distinction based on nationality[73] and the duty to provide for the maintenance of prisoners.[74]

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69. See the provisions requiring humane treatment, supra n. 65. Note the case of Denmark et al. v. Greece where the European Commission on Human Rights determined that "the notion of inhumane treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable". 12 Y.B. ON THE CONVENTION OF HUMAN RIGHTS 186 (1969).

70. GPW Convention, Art. 7.

71. GPW Convention, Art. 13; 1929 Convention, Art. 2.

72. GPW Convention, Art. 26; 1929 Convention, Art. 11; Hague Convention, Art. 7.

73. GPW Convention, Art, 16; 1929 Convention, Art. 4; Common Art. 3; note that nationals of a neutral power who serve in the armed forces of a belligerent may not be treated more severely than enemy subjects: see OPPENHEIM, supra n. 5 at 270; Cotton, The Rights of Mercenaries as POWs 77 MIL L. REV. 143, 157 (1977); resolutions condemning mercenaries as criminals refer only to mercenaries employed against national liberation movements, see G.A. RES. 3103, 28 U.N. GAOR Supp. (No. 30) 142, U.N. DOC. A/9030 (1974).

74. GPW Convention, Art. 15; 1929 Convention, Art. 4; Hague Convention, Art. 7.

B. Balistan's treatment of captured partisans violated international law.

1. Partisans were entitled to the protection of international law.

a. If the Geneva Conventions of 1949 were applicable, partisans were protected by at least Art. 5 of the GC Convention.

Those combatants not protected by the GPW Convention are protected by the GC Convention,[75] Art. 5 of which provides that even those engaged in activities hostile to the security of the State shall be treated with humanity and, if tried, shall not be deprived of the rights of fair and regular trial.

b. If the conflict remained internal, partisans were entitled to the protection of common Art. 3(1).

The humanitarian protection of Art. 3 is so basic that it must be considered applicable to all captured combatants. Moreover, Art. 3 stands on its own, since common Art. 2 is the gateway into the full Geneva Conventions of 1949. Therefore it is submitted that the conditions for protection contained in Art. 4 of the GPW Convention are not applicable to Art. 3(1). Furthermore, partisans not covered by the GPW Convention are protected by the GC Convention;[76] since Art. 3 is common to both, it follows that its protection extends to all those "placed hors de combat by ... detention".

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75. GC Convention, Art. 5; see also Pictet ed., supra n. 49 at 50 and Esgain and Solf, The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations and Deficiencies, 41 N. CAR. L. REV. 537 at 549 (1962-1963).

76. See n. 75, supra.

c. In any event, partisans were protected by the international law of human rights.

The U.D.H.R. throughout applies its provisions to "everyone". The I.C.C.P.R. protects "all individuals within [the] territory and subject to [the] jurisdiction" of a Party thereto.[77]

2. Balistan's treatment of Indepeshi partisans violated international law and the most elementary dictates of humanity.

Wounded partisans found by Balistani forces were entitled to be "collected and cared for".[78] Instead they were sentenced to hang by summary field court martial which, like the "very summary trial" by which interned partisans were sentenced to death, violated the requirement in common Art. 3(1)(d) of "a regularly constituted court offering all the judicial guarantees recognized as indispensable by civilized peoples", and the similar judicial requirements in Art. 5 of the GC Convention and Art. 30 of the Hague Convention.[79]

Furthermore, the internment of partisans under conditions so appalling that seven in every ten perished constitutes treatment that can only be described as inhumane and cruel, in clear violation of international law.[80]

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77. Art. 2(1).

78. Common Art. 3(2).

79. The provisions of Art. 30 (treatment of spies) were held applicable to partisans by the U.S. Military Tribunal in the Hostages Case, In re List and Others, 15 ANN. DIG. 632 at 640. Note further Art. 11 of the U.D.H.R. which requires that an accused be afforded "all the guarantees necessary for his defence".

80. See supra, pp. 65 and 69.

VI. BALISTAN'S VIOLATIONS OF INTERNATIONAL LAW ADMIT OF NO DEFENCE.

A. The humanitarian law of war is jus strictum.

Pictet has stated that "the rules of humanitarian law are peremptory ... not optional".[81] (emphasis original). Art. 1 of the GPW Convention states that it is to be respected "in all circumstances". Common Art. 3 requires humane treatment "in all circumstances" and states that its provisions shall apply "at any time and in any place whatsoever". Thus there is no element of reciprocity.[82] Customary law is equally strict so that "[t]hese conventional and customary rules cannot be overruled by necessity".[83] Further, the basic protections of the law of human rights may not be derogated from.[84] Consequently violations of these laws may not be excused by claims of necessity, self-defence, or reprisal.

B. The principle of tu quoque is not applicable.

This principle is a procedural argument to the effect that "a belligerent cannot charge his enemy with a particular form of illegal warfare if he himself has violated the same rule or rules, without this being justified as a reprisal".[85] It must be noted

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81. PICTET, supra n. 49 at 19.

82. GREENSPAN, THE MODERN LAW OF LAND WARFARE 622 (1959) citing the Final Record of the Geneva Diplomatic Conference of 1949; Levie, Maltreatment of Prisoners of War in Vietnam, 48 B.U.L. REV. 323 at 334 (1968).

83. OPPENHEIM, supra n. 5 at 232; see also In re Lewinsky (called Von Manstein) 16 ANN. DIG. 509 at 512 (1949).

84. See argument under Section IV(c)(2), supra.

85. F. KALSHOVEN, BELLIGERENT REPRISALS 364 (1971).

that the refusal by Indepesh to grant prisoner-of-war status was justified as Balistani combatants were in violation of the laws and customs of war.[86] Even so, Balistani combatants were humanely treated and maintained in good health. In this regard, Balistan's treatment of Indepeshi combatants must speak for itself.

VII. INDEPESH IS JUSTIFIED IN ITS REFUSAL TO REPATRIATE BALISTANI PRISONERS.

A. The Indepeshi position is in accordance with customary law.

The 1929 Convention and the Hague Convention state that the repatriation of prisoners shall be carried out "as soon [as quickly] as possible" after the conclusion of peace.[87] Thus, under customary law, "one of the important consequences of a treaty of peace was to end the captivity of prisoners of war."[88] The practice of States at the end of the Second World War, whereby prisoners remained in detention long after the unconditional surrender of the Axis Powers due to the fact that no treaty of peace was concluded for some years, if at all, shows that Indepesh has not violated customary law.

B. The Indepeshi position is in accordance with the GPW Convention.

1. Article 118 is open to interpretation.

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86. See Mohamed Ali v. Public Prosecutor, 42 INT'L L. REP. 458 at 466 (1968); Case of Kappler, 49 AM. J. INT'L. L. 96 (1955); In re Yamashita, 327 U.S. 1 at 23 (1945); In re Von Leeb and Others, supra n. 32.

87. 1929 Convention, Art. 75; Hague Convention, Art. 20.

88. OPPENHEIM, supra n. 5 at 613.

Paragraph 1 of Art. 118 calls for "repatriation without delay after the cessation of active hostilities". In paragraph 2, paragraph 1 is clearly defined as a "principle" in broad provision rather than as a specific regularion, and is therefore susceptible of interpretation.[89] This was shortly made clear after the Korean war in the dispute over whether prisoners who refused repatriation must nevertheless be immediately and forcibly repatriated under Art. 118.

2. If there is a substantial reason to believe hostilities might be revived, Art. 118 does not apply.[90]

State practice is clear in this respect. In the Vietnam war repatriation of American prisoners was coordinated with the withdrawal of American troops.[91] In the Mideast war of October 1973, Israel and Egypt concluded peace and exchanged prisoners immediately, but there was a considerable delay as between Israel and Syria due to protracted negotiations and concern over the Golan Heights.[92] In the Bangladesh war, Pakistani captives remained in enemy hands for nearly two years after the cease-fire due to claims that some prisoners should be tried for war crimes, and fears that hostilities had not actually ended.[93]

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89. TAE-HO YOO, THE KOREAN WAR AND THE UNITED NATIONS 172 (1965).

90. GREENSPAN, supra n. 82 at 610-611; see also OPPENHEIM, supra n. 5 at 613.

91. Zillman, supra n. 67 at 261.

92. Id., at 262-263.

93. Id., at 261, where it is noted that India promised compliance with the GPW Convention; see also N.Y. TIMES, Feb. 16, 1973, at 34, col. 3 (Pakistan accused of trying to reclaim "East Pakistan").

In the present case, Balistan was forced to discontinue hostilities only by the magnitude of the opposition. Since then, the attentions of Media have been diverted elsewhere, and Indepesh, without its ally's aid and protection, must depend on a peace treaty to guarantee its safety. The position of Indepesh regarding repatriation thus conforms with State practice and with the legal position, accepted as correct by the International Military Tribunal,[94] that "the only purpose of [war captivity] is to prevent prisoners of war from further participation in the war".

3. In any event, Balistan is precluded by the principle of tu quoque[95] from charging Indepesh with a violation of Art. 118

Paragraph 2 of Art. 118 clearly shows that any duty to repatriate is unilateral and not reciprocal. It is submitted that Balistan cannot, therefore, accuse Indepesh of the breach of a duty of which she is in breach herself.

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94. Nuremberg Judgment, supra n. 32 at 48.

95. On the nature of the principle, see section VI(B), supra. The principle was given effect by the I.M.T. in the Trial of Admiral Dönitz, XXII Trial of the Major War Criminals before the International Military Tribunal at Nuremberg, 1946, 556 at 558 (1948).

CONCLUSION

It is respectfully requested that this honourable Court:

1. Grant Indepesh a declaration that Balistan's treatment of Indepeshi combatants was in violation of international law.
2. Deny Balistan an order for the release and repatriation of prisoners until such time as peace is assured.

All of which is respectfully submitted,

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