IN THE INTERNATIONAL COURT OF JUSTICE

April 1978

Between:

THE REPUBLIC OF INDEPESH

Applicant

and

THE FEDERAL UNION OF BALISTAN

Respondent

COUNTER-MEMORIAL FOR THE RESPONDENT

Team 6
Agents for the Federal Union of
Balistan, Respondent:

Philippe Lalonde
Christopher Grauer

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JURISDICTION

The parties submit the present dispute to this Court by special agreement, pursuant to Art. 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, Art. 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 Arts. 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

Was Indepesh ever entitled to claim the protection of the Geneva Conventions of 1949 for its combatants?

II

Was Indepesh ever entitled to claim the protection of the customary laws of war for its combatants?

III

Was Indepesh ever entitled to claim the protection of Article 3 of the Geneva Conventions, or of any other international law for its combatants?

IV

If Indepesh was entitled to claim the protection of international law, did Balistan treat captured Indepeshi combatants appropriately?

V

Is Indepesh's refusal to repatriate Balistani prisoners in violation of international law?

VI

Is Balistan entitled to the immediate release and repatriation of her prisoners?

SUMMARY OF ARGUMENT

At the time of the purported accession to the various multilateral conventions, Indepesh was neither a recognized State nor a recognized belligerent Power. Nor did it become so in the course of the hostilities. Consequently, it was never a party to the conventions.

Customary international law and Article 3 of the Geneva Conventions have no application. Moreover, Indepesh may not charge Balistan with a violation of international human rights provisions. The only applicable law governing the treatment of combatants was the domestic law of Balistan.

Furthermore, even if international law applied to the conflict, Balistan treated Indepeshi combatants appropriately. Even if such treatment was not appropriate, Indepesh is precluded from complaining due to its systematic violation of the laws of war.

In any event, the refusal by Indepesh to repatriate Balistani prisoners after the cease-fire is a violation of Conventional and customary law.

ARGUMENT AND AUTHORITIES

I. THE REPUBLIC OF INDEPESH WAS NOT A SOVEREIGN STATE AT THE TIME IT PURPORTED TO SUCCEED TO THE VARIOUS MULTILATERAL TREATIES TO WHICH THE FEDERAL UNION OF BALISTAN IS A PARTY. CONSEQUENTLY INDEPESH IS NOT A PARTY TO SUCH TREATIES AND INDEPESHI COMBATANTS DERIVE NO PROTECTION THEREFROM.

A. Indepesh ceased to exist as a sovereign State upon her union with Balistan.

1. A State may cease to exist through a voluntary arrangement.

'By voluntarily merging into another State, a State loses all its independence and becomes a mere part of another".[1] International law prescribes no particular form for the voluntary transfer of territorial sovereignty.[2] It only requires that the transfer take place with the full consent of the States concerned.[3] The critical moment is the moment of the actual transfer of sovereignty.[4] Indepesh's consent to the alienation of its sovereignty was expressly declared in the national referendum and its existence at the time of the transfer of sovereignty "may be inferred from acts conclusively establishing it".[5] It is submitted that consent was

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1. I L. OPPENHEIM, INTERNATIONAL LAW 156 (8th ed. H. Lauterpacht ed. 1955).

2. G. Schwarzenberger, Title to Territory: Response to Challenge, 51 AM. J. INT'L L. 308, at 319 (1957).

3. Jaworzina Case (Poland v. Czechoslovakia), [1923] P.C.I.J., ser. B, No. 8, at 53.

4. Polish Upper Silesia (Merits), [1926] P.C.I.J., ser. A, No. 7, at 30; Establishment of Czechoslovakia State Case, 3 ANN. DIG. 13 (1925); Poland v. Siehen, 3 ANN. DIG. 16 (1926).

5. Rights of Minorities Case, [1928] P.C.I.J., ser. A, No. 15, at 24; see also Temple Case, [1962] I.C.J. 33; J. BRIERLY, THE LAW OF NATIONS, 321 (6th ed. 1963).

amply manifested by Indepesh through the actual transfer to Balistan of legislative and judicial authority over Indepesh. And once "the community which was until that moment a state loses its own independent government", it ceases to exist.[6]

2. When a State is extinguished by incorporation into another State, its treaties expire.

Since a treaty presumes the continued existence of parties to it, it follows that "[i]f one of the parties disappears, either through its annexation, dismemberment or federation, it ceases to be able to fulfill the obligations of the treaty, which thus expires"[7] (emphasis added). Thus,even if the Articles of Association constituted a treaty between Indepesh and Balistan, they expired once Indepesh ceased in fact to exist as a sovereign State.

B. The principle of self-determination is of no assistance to Indepesh.

1. The principle has not crystallized into a legal right.

This Court has held that to show the existence of a new rule of customary international law it is necessary to show that State practice is both "extensive and virtually uniform" and motivated by a "sense of legal duty".[8] This must be especially true where an alleged legal right would derogate from long established and fundamental norms of customary international law - the principle of the

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6. H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 262-63 (1952).

7. D. O'CONNELL, THE LAW OF STATE SUCCESSION 15 (1956); See I.J. WESTLAKE, INTERNATIONAL LAW 59-60 (2nd ed. 1910) who states: "When a state is extinguished and its territory is incorporated with another state ... the treaties of the extinguished state fall to the ground."

8. North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. The Netherlands), [1969] I.C.J. 3, at 43-44.

maintenance of the territorial integrity of states and the exclusive competence of each state over its domestic affairs.[9] Where, therefore, publicists are in substantial disagreement over the status and scope of the principle,[10] where there exists no generally accepted criteria for the determination of the right[11] and where State practice is neither "constant nor uniform" nor based on legal obligation,[12] it cannot be said that international law recognizes a rule of law permitting self-determination.

2. In any event, the principle has no application to secessionist movements.

Whether or not there exists a recognized legal right to self-determination in decolonization struggles[13] "the customary verdict has been that self-determination does not embrace secession".[14] That this should be so in principle is shown by the U.N. Charter. Articles 1(3), 13(1)(b), 55 and 62(2) clearly indicate that

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9. U.N. CHARTER Articles 2(4) and 2(7); Declaration on Friendly Relations, G.A. Res. 2625, 25 U.N. G.A.O.R., Supp. 18, at 69, U.N. Doc. A/8018 (1970); Art. 6 of the Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. G.A.O.R., Supp. 16, at 66, U.N. Doc. A/4684 (1960).

10. For a review of the authorities see R. Emerson, Self-Determination, 65 AM. J. INT'L L. 459 (1971); S. Chowdhury, The Status and Norms of Self-Determination in Contemporary International Law, 24 NETH. INT'L L. REV. 72 (1977).

11. Emerson, id., at 462; see also D. Bowett, Self-Determination and Political Rights in Developing Countries, 60 PROC. AM. SOC. INT'L L. 129, at 131 (1966).

12. L. Gross, unpublished manuscript, quoted in Emerson, id., at 462.

13. R. Higgins, Internal War and International Law, in III THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 81, at 104-108 (R. Falk, ed. 1971).

14. Emerson, supra n. 10, at 464.

> " the concept of nation contemplated by the Charter in the context of self-determination is a plural society composed of different racial, linguistic or religious groups sharing a larger common national identity.[15]"

Judicial opinions[16] and State practice[17] confirm that the principle of self-determination does not apply to secessionist movements. Furthermore, on this issue "the United Nation's attitude is unequivocable. [It] ... has never accepted ... the principle of secession of a part of its Member State".[18]

C. Indepesh had not fulfilled the objective requirements of Statehood at the time it claimed to succeed to the various multilateral conventions.

1. Customary law requires that the insurgents enjoy the obedience of the bulk of the population.[19]

At this time almost half the population had reaffirmed its loyalty to the Federal Union. Consequently this requirement cannot be said to have been met.

2. Customary law requires that the insurgents have effective control of much the greater part of the State's territory.[20]

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15. Chowdhury, supra n. 10, at 75.

16. Aaland Islands Case, Report of an International Committee of Jurists, [1920] L.N.O.J., Sp. Supp. 3, at 5.

17. For the position of African States during the Nigerian Civil War see J. Samuels, Humanitarian Relief in Man Made Disasters, 10 CAN. Y.B. INT'L L. 3, at 11 and 37 (1972); for U.N. involvement in the Congo see G.A. Res. 1474, 15 U.N. G.A.O.R., Supp. 1, at 1, U.N. Doc. A/4510.

18. Secretary-General U. Thant, 7 U.N. Monthly Chronicle 36 (1970).

19. H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 28 (1947).

20. Foley, British Joint Under-Secretary for Foreign Affairs, Hansard, H.C., Vol. 799, Col. 23, (Feb. 27, 1967).

At this time Balistani forces controlled much of the state of Indepesh, including the capital, Pesha, and several major cities and ports. Consequently, Indepesh failed to meet this requirement.

3. Customary law requires a stable government possessing a reasonable prospect of permanence.[21]

A government must be "strong enough to assert [itself] throughout the territories of the State without the assistance of foreign troops".[22] It is submitted that without undisputed possession of the territory and without the allegiance of almost half the people there existed no "stable and effective government",[23] and absolutely no assurance of continued existence.

4. Customary law requires that a State possess a government able and willing to fulfill international obligations.[24]

In April 1976 the insurgents possessed no capacity to enter into international agreements. The sale of rice to Media was a mere licensing of Indepeshi merchants. Moreover, the insurgents showed, even at this early stage, their unwillingness to comply with the laws of war.

D. Mere factual existence does not confer legal personality; the act of recognition is required.

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21. S. PATEL, RECOGNITION IN THE LAW OF NATIONS, 59 (1959). See also LAUTERPACHT, supra n. 19, at 409.

22. Aaland Islands Case, supra n. 16, at 9.

23. LAUTERPACHT, supra n. 19, at 30.

24. P. JESSUP, A MODERN LAW OF NATIONS, 47 (1956); see also R. FALK, THE INTERNATIONAL LAW OF CIVIL WAR 157 (1971).

1. At customary international law recognition is the sole act by which an entity attains statehood.

Having prescribed the factual prerequisites of statehood, international law further

> provides a procedure to decide whether or not in the concrete case a community fulfills these conditions and therefore is, or is not, a state in the sense of international law.[25]

Thus, while the formation of a new State is a matter of fact and not of law "[i]t is through recognition which is a matter of law that such a new State becomes a subject of International Law."[26] The natural consequence of this rule is "that both the unrecognized government and its acts are a nullity".[27]

2. State practice affirms the principle.

The rule that a new State has no existence before recognition "is followed universally by the states in their practice ..."[28]

3. Judicial decisions affirm that the grant of recognition is the legal birth of the State.

Both municipal courts[29] and the World Court[30] have refused to enforce rights claimed under treaty by a newly created State at least as against a State that had not recognized the new State.

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25. KELSEN, supra n. 6, at 269.

26. OPPENHEIM, supra n. 1, at 544.

27. LAUTERPACHT, supra n. 19, at 147.

28. PATEL, supra n. 21, at 19.

29. International Registration of Trade-Mark Case, 28 I.L.R. 82 (1959) (German Federal Supreme Court).

30. Polish Upper Silesia Case, supra n. 4, at 28.

E. The grant of recognition by Media and Sinestra was invalid and in any event not binding on Indepesh.

1. There is a rule of customary international law that premature recognition is a delict and is invalid.

> If an entity does not fulfill all the factual conditions of statehood as required by international law, a declaration of recognition by a State is invalid, and any consequential participation by the new entity in international relations cannot be on the footing of international law.[31]

This rule is widely acknowledged by eminent publicists.[32]

2. The recognition of Indepesh by Media and Sinestra was premature.

At customary international law recognition is premature if "it is not abundantly clear that the lawful government has lost all hope or abandoned all effort to reassert its dominion".[33]

3. In any event, recognition of Indepesh by other States cannot impose obligations on Balistan.

> [R]ecognition is a means by which States express their willingness to acknowledge vis a vis themselves the existence, and legal effect, of a situation or transaction which, in the absence of such recognition, would not be opposable to them.[34] (emphasis added)

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31. D. Ijalay, Was Biafra at Any Time a State in International Law? 65 AM. J. INT'L 551, at 559 (1971).

32. LAUTERPACHT, supra n. 19, at 9, who stated that premature recognition was an act "which an international tribunal would declare not only to constitute a wrong but probably also to be itself invalid" (emphasis added); FALK, supra n. 24, at 157.

33. LAUTERPACHT, supra n. 19, at 45-46; see also BRIERLY, supra n. 5, at 139 who states "[So] long as a real struggle is proceeding recognition is premature".

34. G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 69 (5th ed. 1967).

This relative nature of recognition is confirmed by judicial decisions,[35] State practice[36] and the writings of publicists.[37]

II. INDEPESH DID NOT BECOME A SOVEREIGN STATE AT ANY TIME DURING THE COURSE OF THE CONFLICT.

A. Indepesh was never a State prior to the cessation of hostilities.

It is submitted that at no time prior to the ceasefire did Indepesh possess "an effective government wielding power over the entirety of national territory with a reasonable prospect of permanency".[38] It is only with the cessation of hostilities and Balistan's recognition of Indepesh that these "conditions of statehood as laid down by international law"[39] were fulfilled.

B. The principle of retroactivity of recognition is of no assistance to Indepesh.

The principle of retroactivity "means that the act of recognition relates back to and commences from the moment the new state in fact became a state".[40] (emphasis added) As shown above[41]

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35. Nationality Decrees in Tunis and Morocco (Advisory Opinion), [1923] P.C.I.J. ser. B, No. 4, at 27; Eastern Greenland Case, [1933] P.C.I.J. ser. A/B, No. 53, at 68-69.

36. A. Rubin, The Status of Rebels Under the Geneva Convention of 1949, 21 INT'L COMP. L.Q. 472, at 476 (1972).

37. KELSEN, supra n. 6, at 271.

38. LAUTERPACHT, supra n. 19, at 409.

39. Id., at 409.

40. PATEL, supra n. 21, at 50; KELSEN, supra n. 6, at 277.

41. See Part I(C) of this memorial.

Indepesh had no factual existence at the time she purported to succeed to the conventions. Consequently, Balistan's recognition cannot reach back and validate the attempted succession.

C. Alternatively, if Indepesh were a State and a Party to the Geneva Conventions, they are inapplicable in the absence of a recognized state of war.

The plain implication of the last phrase of Article 2(1) of the Geneva Conventions, ("even if the state of war is not recognized by one of them") when considered in light of the travaux preparatories[42] is that a formal declaration of war by at least one country is necessary. Thus where "neither party recognizes the state of war ... the Convention ... cannot be invoked".[43]

III. INDEPESH WAS NOT A RECOGNIZED BELLIGERENT POWER AT ANY TIME PRIOR TO THE CEASEFIRE. CONSEQUENTLY INDEPESHI COMBATANTS DERIVE NO PROTECTION FROM THE GENEVA CONVENTIONS BY VIRTUE OF ARTICLE 2(3) OF THE SAID CONVENTIONS.

A. Indepesh had not fulfilled the objective requirements of belligerent Power status at the time of the attempted succession to the conventions.

Customary international law prescribes four criteria for the attainment of belligerent status:

> First, there must exist within the State an armed conflict of a general character; secondly, the insurgents must occupy and administer a substantial portion of national territory, thirdly, they must conduct the hostilities in accordance with the rules of war and through armed forces acting under a responsible authority; fourthly, there must exist cir-

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42. The early drafts provided for the application of the Convention even where neither party recognized a state of war. J. PICTET, COMMENTARY ON THE GENEVA CONVENTIONS 20 (1952).

43. J. PICTET, HUMANITARIAN LAW AND PROTECTION OF WAR VICTIMS 50 (1975).

> cumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency.[44]

It is submitted that at the time of the purported succession to the conventions these conditions had manifestly not been met.

B. Indepesh did not achieve the status of a belligerent Power during the course of the hostilities.

1. At no time had Indepesh fulfilled all of the objective prerequisites of belligerent status.

Customary international law requires "that the insurgent element itself complies with the laws of war".[45] The existence of this rule is acknowledged by eminent publicists[46] and is confirmed by judicial decisions.[47] Moreover, the rule is embodied in Article 2(3) itself.[48] There is ample evidence before the Court of Indepesh's frequent and consistent violations of the laws of war.[49] Consequently, it cannot be said that this condition was satisfied.

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44. LAUTERPACHT, supra n. 19, at 176; cf. JESSUP, supra n. 24, at 53; T. Bartelle, Counterinsurgency and Civil War, 40 N. DAK. L. REV. 254, at 259-60 (1964).

45. G. Draper, The Status of Combatants and the Question of Guerrilla Warfare 45 BRIT. Y.B. INT'L L. 173, at 208 (1971).

46. 2 L. OPPENHEIM, INTERNATIONAL LAW 209 (7th ed. H. Lauterpacht ed. 1952); M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 19 (1959).

47. In re List et al. (Hostage Case) 15 ANN. DIG. 632, at 639 (1948).

48. See GREENSPAN, supra n. 46, at 68.

49. See Part V(D) and VI(B) of this memorial.

2. Indepesh was never recognized as a belligerent Power.

a. Recognition of belligerency is required.

At customary law "recognition of belligerency was required before the rights and duties of the laws of war and neutrality were conferred upon the recognized party".[50] Consequently, insofar as Article 2(3) refers to "Powers in conflict", it is only where "belligerency has been recognized ... [that] ... the Convention applies in full in respect of States which are bound by it provided the other belligerent accepts and applies the Convention"[51] (emphasis added).

b. There had been no recognition of belligerency by any existing state.

i. Balistan had not recognized Indepesh as a belligerent Power.

On the contrary, Balistan had by word and deed amply demonstrated that throughout the hostilities it regarded the Indepeshi combatants as mere insurgents. Balistan's reliance on outside assistance cannot be said to imply recognition of belligerency since there is a rule of customary international law, recognized by publicists[52] and confirmed by State practice,[53] that "it is lawful to assist a widely recognized government at its request and unlawful to assist insurgents, at least until belligerency is attained".[54]

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50. R. Higgins, supra n. 13, at 89; see also LORD McNAIR, LEGAL EFFECTS OF WAR 33 (1966).

51. OPPENHEIM, supra n. 46, at 371; FALK, supra n. 24, at 123.

52. J. Leurdyk, Civil War and Intervention in International Law 24 NETH. INT'L L. REV. 143, at 146 (1977).

53. R. Higgins, supra n. 13, at 98.

54. J. Moore, The Control of Foreign Intervention in Internal Conflict 9 VA. J. INT'L L. 205, at 315 (1969).

ii. Nor has Media impliedly recognized Indepesh as a belligerent Power.

Since a third State granting recognition to a belligerent falls under the obligations of a neutral State[55] it follows that the only legitimate occasion for implying recognition is a proclamation of neutrality.[56] Therefore Media's intervention cannot be construed as the lawful act of the grant of recognition. On the contrary it must be seen as "a violation of international law and the Charter of the United Nations".[57]

3. In any event, recognition of belligerency by third States cannot impose obligations on Balistan.

At customary law the effect of recognition is to confer on the rebels "the rights and duties of legal warfare as regards the recognizing State".[58] (emphasis added) Consequently recognition by third States cannot be binding upon a parent State which has not granted recognition.[59]

C. There is no rule of law that intervention by a third State 'internationalizes' a conflict.

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55. Bartelle, supra n. 44, at 261; FALK, supra n. 24, at 144-145.

56. OPPENHEIM, supra n. 1, at 147-148.

57. Declaration on Friendly Relations, supra n. 9, Art. 1(1).

58. Bartelle, supra n. 44, at 261; Higgins, supra n. 13, at 95.

59. OPPENHEIM, supra n. 46, at 370 n. 1; Higgins, supra n. 13, at 96; GREENSPAN, supra n. 46, at 19.

The proposition that the intervention of a third State internationalizes the conflict for the purpose of the laws of war "is probably not the legal position at the present time".[60] On the contrary, "the requirement of recognition of belligerency ... under the present state of the law is a prerequisite to the application of the entire Convention".[61] It is emphasized that State practice supports the traditional rule.[62]

IV. NEITHER THE CONVENTIONS, AS EVIDENCE OF CUSTOMARY INTERNATIONAL LAW, NOR ARTICLE (3) OF THE GENEVA CONVENTIONS ARE APPLICABLE.

A. Under existing international law the laws of war do not apply to civil wars.

"[U]nder international customary law, a sovereign State is under no legal duty to comply with the laws of war in an internal armed conflict".[63] This principle has been accepted by the General Assembly,[64] State practice,[65] and renowned international publicists.[66]

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60. Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, I.C.R.C. (Geneva, August 1971) as quoted in Draper, supra n. 45, at 212.

61. Bartelle, supra n. 44, at 289; see also FALK, supra n. 24, at 122; Higgins, supra n. 13, at 89; OPPENHEIM, supra n. 46, at 371.

62. For examples see T. Farer, Humanitarian Law and Armed Conflicts: Toward a Definition of International Armed Conflict, 71 COLUM. L. REV. 37, at 52-60 (1971).

63. 2 G. SCHWARZENBERGER, INTERNATIONAL LAW, 679 (1968).

64. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, G.A. Res. 2131, 20 U.N. G.A.O.R. Supp. 14, at 11, U.N. Doc. A/6014.

65. See FALK, supra n. 24, at 191, 195, 257; Farer, supra n. 62, at 52, 60; D. Ciobanu, The Concept and Determination of the Existence of Armed Conflicts Not of an International Character, 58 RIV. DIR. INT'L 43, at 64 (1975), who states "[i]t is a general consensus among governments that internal armed conflicts are essentially matters of domestic jurisdiction."

66. LAUTERPACHT, supra n. 19, at 175; Farer, supra n. 62, at 40.

B. Article 3 of the Geneva Conventions is not applicable.

It is submitted that Article 3 is inapplicable where the armed conflict within the State falls short of the factual requirements of belligerency.[67] This interpretation of the Article is supported by the "convenient criteria" set out in the Final Record of the Geneva Conference[68] and by State practice.[69] As shown above, Indepesh never met the criteria of belligerency.[70]

V. EVEN IF INTERNATIONAL LAW WERE APPLICABLE TO THE CONFLICT, BALISTAN TREATED CAPTURED INDEPESHI COMBATANTS APPROPRIATELY.

A. Indepesh cannot charge Balistan with a violation of international human rights provisions.

1. The Universal Declaration of Human Rights is not legally binding either directly or indirectly.

This was recognized by most of the governments which voted for its adoption.[71] It was not a treaty and was not meant to have binding force, as evidenced by the debates preceding its adoption.[72] It is submitted that there has been no uniform State practice since then such as would give it the force of law.

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67. Bartelle, supra n. 44, at 269.

68. See Moore, supra n. 54, at 274.

69. See Higgins, supra n. 13, at 91-92; Farer, supra n. 62, at 52-60. The United Kingdom in the case of Kenya, Malaya and Cyprus, and France in the case of Algeria, denied the application of Article 3. Moreover, the introduction of Protocol II to the Geneva Conventions 1949 is evidence of the high threshold of Article 3.

70. See Part III(B) of this memorial.

71 OPPENHEIM, supra n. 1, at 745.

72. See LUINI DEL RUSSO, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 37 (1971).

2. Indepesh cannot charge Balistan under the International Covenant on Civil and Political Rights which contains its own system of enforcement.

Art. 41(1) provides that claims may only be made by one Party against another and only if the latter Party has accepted the right of the former Party to do so. Any such claim must be brought before the Human Rights Committee. The Covenant confers no power on any international judicial body to hear complaints.[73]

B. Indepesh cannot charge Balistan with the crime of genocide.

Art. 2 of the Convention on the Prevention and Punishment of the Crime of Genocide 1948[74] clearly states that an essential ingredient of the crime is the intent to destroy a national, ethnical, racial or religious group as such. It is submitted that there is no evidence to support the contention that Balistan had any such intent, let alone that any act approximating the charge was committed. Any evidence concerning the treatment of civilians is irrelevant, since only the treatment of combatants is in issue before the Court.

C. The treatment of captured contract combatants is not at issue before this Court.

1. As nationals of other States, they do not come within the questions presented before the Court.

2. Whatever treatment to which captured contract combatants were entitled, Balistan is not responsible to Indepesh for any alleged violations thereof.

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73. 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 (1968-69). Contrast the Genocide Convention which specifically gives jurisdiction to this Court in Art. 9. Compare, by analogy, the local remedies rule of international responsibility; see the Barcelona Traction Case, (Preliminary Objections, Judgment) [1964] I.C.J. 6.

74. 78 U.N.T.S. 277.

"A State may be injured ... through any act that violates the person or property of its citizens abroad".[75] Since no contract combatant is a national of Indepesh, there is no nationality of claim,[76] and it is submitted that Indepesh has no locus standi before this Court to put forward a claim concerning their alleged mistreatment.

D. The treatment of captured Indepeshi combatants was not in violation of the Geneva Conventions of 1949.

1. Captured Indepeshi partisans were not entitled to protection under the Conventions.

a. Indepeshi partisans were not entitled to the protection of either Convention (I) for the Amelioration of the Wounded and Sick in Armed Forces in the Field,[77] or Convention (III) Relative to the Treatment of Prisoners of War.[78]

Article 4A(2) of the GPW Convention and Article 13 of the GW Convention lay down identical conditions which must be met by a partisan before he becomes protected. The essence of these conditions is that the partisan must be commanded by a responsible authority, distinguish himself from the civilian population, and operate according to the laws of war. It is patent on the facts that none of these qualifications was met by Indepeshi partisans. Control over them was weak, they failed to so distinguish them-

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75. OPPENHEIM, supra n. 1, at 343-344,

76. Id., at 347-348.

77. Geneva, 12 August, 1949, 75 U.N.T.S. 31. Hereinafter cited as the GW Convention.

78. Geneva, 12 August, 1949, 75 U.N.T.S. 135. Hereinafter cited as the GPW Convention.

selves from civilians,[79] and most heinous among many violations of the laws and customs of war, they rarely took prisoners, killing disabled captives on the spot.

b. Indepeshi partisans were not entitled to the protection of the Convention (IV) Relative to the Protection of Civilian Persons in Time of War.[80]

At all material times Indepeshis were nationals of the Federal Union, and thus denied the protection of the GC Convention by Article 4.

2. Captured Indepeshi regulars were not entitled to prisoner-of-war status and the protection of the Conventions.

It is clear that "deserters and subjects of a belligerent who serve in the armed forces of the enemy cannot claim the status of prisoners of war when they fall into the hands of their own country. They are traitors, and liable to be punished as such".[81] In particular it must be noted that the Indepeshi officer corps consisted of professional soldiers who resigned their commissions in the Union Army to take up arms against their country.

E. The treatment of captured Indepeshi combatants was not in violation of customary law.

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79. This was especially apparent in the Halam Ambush. See R. Baxter, So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs 28 BRIT. Y.B. INT'L 323, at 328 (1951) where it is stated that such persons are "subject to the maximum penalty which the detaining belligerent desires to impose".

80. Geneva, 12 August, 1949, 75 U.N.T.S. 287. Hereinafter cited as the GC Convention.

81. GREENSPAN, supra n. 46, at 99; see also British Manual of Military Law, Amendments (No. 12) 1936, Chap. xiv, par. 36.

It is well settled that the Hague Convention[82] is declaratory of the customary laws of war. This has been recognized by the International Military Tribunal,[83] the United Nations,[84] and by qualified publicists.[85]

1. Captured Indepeshi partisans were not entitled to protection under the customary laws of war.

The qualifications for the protection of the customary laws of war are contained in Article 1 of the Hague Convention and are essentially the same as those contained in Article 4A(2) of the GPW Convention. Clearly, then, Indepeshi partisans were not entitled to such protection.[86]

2. Captured Indepeshi regulars were treated appropriately under the customary laws of war.

a. The status accorded captured regulars is immaterial.

As rebels and traitors, Indepeshi regulars were properly denied prisoner-of-war status. Nevertheless they were treated as prisoners of war and sent to camps "similar to POW camps".

b. Reprisals are permissible at customary law.

Reprisals against prisoners are impermissible only under Conventional law.[87] It must further be remembered that Balistani

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82. Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 1907, and Regulations thereunder. T.S. 359.

83. Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 1946, Cmd. 6964-65.

84. G.A. Res. 95(1) of 11 December 1946, A/CN.4/5 14-15.

85. See, e.g., G. Draper, supra n. 45; OPPENHEIM, supra n. 46, at 229.

86. See argument under section V(D)(1)(a), supra.

87. OPPENHEIM, supra n. 46, at 562, n. 2.

citizens were suffering from severe malnutrition and actual starvation as a result of the Indepeshi rice embargo.

c. Indepeshi regulars were not forced to take part in operations of war directed against Indepesh.[88]

Though it is admitted that attempts were made to re-educate and recruit captured regulars into Union forces, there is no evidence that this resulted in a breach of the customary laws of war.

F. The treatment of captured Indepeshi combatants was not in violation of Article 3 of the Geneva Conventions.

1. Captured Indepeshi partisans were not entitled to protection under Article 3.

a. Article 3 excludes partisans on the face of it.

Article 3 extends protection only to "Persons taking no active part in hostilities", and to "members of armed forces" who have laid down their arms or who have been placed hors de combat.[89] Partisans are clearly not covered by the former designation, and cannot be covered by the latter since the term "armed forces" is used throughout the conventions in contradistinction to partisans.[90]

b. The protection of Article 3 is not wider than that of the full Conventions.

Even if the GPW Convention applies in full, Indepeshi partisans would not be protected.[91] It follows that they cannot, then, claim the benefit of the minimum protection offered by Article 3.

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88. See the Hague Convention, Article 23(h).

89. See Draper, supra n. 45, at 211.

90. See e.g. the GPW Convention, Article 4A.

91. See argument under section V(d)(1)(a), supra.

2. The treatment afforded captured Indepeshi regulars was appropriate under Article 3.

VI. IN ANY EVENT, INDEPESH IS PRECLUDED BY EQUITABLE PRINCIPLES AND THE PRINCIPLE OF TU QUOQUE FROM ASSERTING THAT BALISTAN'S TREATMENT OF INDEPESHI COMBATANTS VIOLATED INTERNATIONAL LAW.

A. Equitable principles may be applied by this Court.

Judge Hudson of the Permanent Court of International Justice noted the direction in that Court's Statute to apply "general principles of law recognized by civilized nations"[92] and concluded that principles of equity were included therein, stating that "[t]he Court's recognition of equity as a part of international law is in no way restricted by the special power conferred on it 'to decide a case ex aequo et bono, if the parties agree thereto'."[93]

B. Equitable principles would preclude Indepesh from asserting against Balistan violations of the laws of war which she has blatantly violated herself.

Judge Hudson stated that it was

> an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.[94]

In this case, whatever law was binding on Balistan also was binding on Indepesh, who denied Balistani combatants prisoner-of war status on spurious and illegal grounds,[95] denied the ICRC

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92 Article 38.

93. The Diversion of Waters from the Meuse Case (Netherlands v. Belgium), [1937] P.C.I.J., ser. A/B, No. 70, at 76. See also the North Sea Continental Shelf Cases, supra n. 8, per the Court, and judges Jessup and Ammoun.

94. Id. at 77.

95. See Levie, Maltreatment of Prisoners of War in Vietnam 48 B.U.L. REV. 323, at 344-352 (1968); In re Lewinsky 16 ANN DIG. 509 at 516 (1949).

access to prisoners, forced officers and men to perform hard labour, unjustifiedly cut prisoners' rations and recruited captives into her own armed forces. Further, she indulged in reprisals and the killing of prisoners of war in cold blood, "the gravest of all breaches of customary law and the Geneva Conventions".[96]

C. The principle of tu quoque is applicable to the same effect.

This principle is that "a belligerent cannot charge his enemy with a particular form of illegal warfare if he himself has violated the same rule, without this being justified as a reprisal".[97] It was given effect by the International Military Tribunal in the trial of Admiral Donitz,[98] and, it is submitted, ought, under the circumstances,[99] to be given effect here.

VII. THE REFUSAL BY INDEPESH TO REPATRIATE PRISONERS OF WAR IS IN VIOLATION OF INTERNATIONAL LAW.

A. Indepesh is in breach of Article 118 of the GPW Convention.

1. Indepesh is bound by the Convention.

Indepesh publicly expressed her intention, erga omnes, to be bound by the Geneva Conventions when she had not the status to be so. Now that she has that status and has not revoked that intention,

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96. Zillman, Political Uses of Prisoners of War, [1975] ARIZ. ST. L.J. 237, at 247.

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

98. XXII Trial of the Major War Criminals before the International Military Tribunal at Nuremberg 1946 556, at 558 (1948). See also KALSHOVEN, supra n. 100, and A. VON KNIERIEM: THE NUREMBERG TRIALS 313 (1959).

99. See argument under section VI(B), supra.

she must now be considered so bound.[100] Ipso facto, and in accordance with the principle of intertemporal law,[101] all captives on either side who satisfy the requirements of Article 4 of the GPW Convention must as of the cease-fire be considered prisoners of war and entitled to immediate repatriation under Article 118.

2. Article 118 requires repatriation "without delay after the cessation of active hostilities".

a. There is no reason to suppose that hostilities have not permanently ceased.

Balistan fought to preserve the integrity of its territory and sovereignty as a State, not to threaten the integrity of another State.[102] Under the terms of the cease-fire, Balistan accepted its loss and recognized Indepesh as an independent State, leaving nothing to fight for. It would be unreasonable to suppose that Balistan would reopen hostilities in a hopeless attempt to regain what she could not preserve.

b. In spite of the repeated requests by Balistan for immediate joint repatriation, Indepesh has refused, in violation of Article 118.

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100. Cf. The Nuclear Tests Case (Australia v. France), [1974] I.C.J. 253 where this Court held that France was bound by her unilateral statements made public and erga omnes; North Sea Continental Shelf Cases, supra n. 8 at 120.

101. See R. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 29 (1963) and The Island of Palmas Case (Netherlands v. U.S.A.), 2 R.I.A.A. 829, at 845 (1928).

102. Balistan is bound by the U.N. Charter, Art. 2(4), to refrain from such an act. See The Eastern Greenland Case, [Orders of 2 and 3 August 1932] P.C.I.J. Ser. A/B, No. 48, 268.

3. Indepesh cannot use her spurious charges of war crimes as justification for her breach of Article 118.

Even if the charges were justified, which is strenuously denied, Indepesh has no excuse for failing to bring the accused to trial long before now. Furthermore,

> [w]ith the establishment of peace between former belligerents, reparation under the peace time law of international responsibility becomes possible again ..., Thus ... war crimes jurisdiction ends with the termination of a state of war.[103]

Indepesh has recognized this in her position taken during treaty negotiations concerning reparations.

4. Indepesh's position on repatriation is an untenable use of prisoners of war for political ends.

Indepesh is taking the position, not unknown in State practice and justly condemned,[104] that unresolved political differences justify the retention of prisoners indefinitely. This amounts to using prisoners as political hostages in clear violation of Article 118 and humanitarian law in general.

B. Indepesh is in breach of customary law which requires that repatriation be carried out "as quickly as possible" after the "conclusion of peace".[105]

The terms of the cease-fire cannot be regarded as anything but a conclusion of peace since they resolve the issue that was the sole cause of the war: the independence of Indepesh. Since then, she has had ample time, ability and opportunity to repatriate,

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103. SCHWARZENBERGER, supra n. 63, at 478.

104. Cf. the position taken by India after the Bangladesh War: see Zillman, supra n. 96, at 265.

105. Hague Convention, Article 20.

which she has refused to do, thus breaching her duty to do so "as quickly as possible".

C. Balistan is justified in refusing to repatriate Indepeshi prisoners unilaterally.

It is submitted that unilateral repatriation is unknown to State practice. Thus after the Mid-East War of October 1973[106] Israel and Egypt arranged an immediate exchange of prisoners. Syria, however, refused to repatriate until certain demands were met. Consequently, Israel did not repatriate Syrian prisoners until a mutual exchange was arranged in June 1974. Balistan's repeated attempts to arrange for joint repatriation attest to her good faith. The refusal by Indepesh to co-operate must speak for itself.

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106. Zillman, supra n. 96, at 262-263.

CONCLUSION

It is respectfully requested that this honourable Court

1. Decline to grant Indepesh a declaration that Balistan's treatment of Indepeshi combatants was covered by or in violation of international law.
2. Grant Balistan a declaration that Indepesh's refusal to repatriate Balistani prisoners is in violation of international law, and Order their immediate release and repatriation.
3. Grant Balistan such further and other relief as this honourable Court may deem just.

All of which is respectfully submitted,

Phil Lalonde

Christopher Grauer

Agents for the Federal Union of Balistan.