THE PHILIP C. JESSUP INTERNATIONAL LAW

MOOT COURT COMPETITION

1985

THE NUCLEAR FREE ZONE CASE

Icbam

v.

Mirva

Memorandum for Judges*

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CONFIDENTIAL

1985 Philip C. Jessup International Law Moot Court Competition

Memorandum for Judges

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Note to the reader

This bench brief provides an overview of the facts, arguments and law likely to be needed as a basis for judging the 1985 Jessup competition. It is designed for those judges who have little or no background in international law, though it may also be useful for international lawyers with limited exposure to the particular issues central to this year's problem. The coverage is not exhaustive. The literature is replete with scholarly studies of the issues raised by the problem, and this brief cannot serve as a substitute for either in-depth study of that literature or for the background expertise of specialists in international law, international organizations or the control of nuclear weapons. Hopefully, though, it will suffice.

Introduction

This year's problem focuses on anticipatory self-defense, regional authorization of the use of force, the ability of nations in a region to outlaw nuclear weapons despite the objection of one nation in that region, and, the per se illegality of nuclear weapons.

This problem differs from those of previous years in several regards: the facts of the problem will be of less use to the participants in their crafting of their arguments than in previous years; few treaties are involved and they serve to

create rather than dispose of issues; and the customary law likely to be cited by participants has little supportive state practice directly related to the issues presented in the problem. The arguments this year will have to be based on a mastery of the sources of international law, argument by analogy, sensitivity to the relationship between international law and practice, and creative analysis of the nature of the international community and the effects on the law-making process produced by changes in that community during the past several decades.

As has been said elsewhere, "the destructive potential of nuclear weapons is so enormous as to call into question any and all received rules of international law regarding the transboundary use of force."

Summary of the facts

The parties, Icbam and Mirva, are members of the United Nations and are among the fifteen members of the Conclave of Eurasian Unity ("the Conclave"), a regional organization within the meaning of Article 52(1) of the United Nations Charter. They have common cultural roots as well as roughly similar levels of economic and military development. The Eurasian region has a history of fraternal relations, though the last half of the 1970s was marked by a series of armed conflicts, all falling short of full-scale war, which were prompted by Icbam's pursuit of irredentist claims.

All members of the Conclave except Icbam are parties to the Treaty on the Non-Proliferation of Nuclear Weapons ("the NPT").

They are also parties to the Conclave-sponsored Treaty of Telleraviv, which requires them not to test, use, manufacture, produce, possess or deploy nuclear weapons, and which declares Eurasia to be a nuclear-free zone within the meaning of Article VII of the NPT. Icbam, however, has admitted to constructing a facility in its Sorgred Desert for production of nuclear weapons and announced its intention to have a nuclear weapons capability, purportedly "for defensive purposes against states external to the Conclave," by the end of 1983.

After several requests to Icbam to desist from pursuing the development of nuclear weapons, and after an attempt to have the matter resolved by the U.N. Security Council was blocked by a threatened veto, the Conclave (by a vote of 14-0, Icbam being absent) authorized Mirva to carry out a January 1, 1984 surgical air strike with conventional weapons against Icbam's nuclear weapons plant. The raid destroyed the plant, and though carried out in a manner to minimize injury to persons, nevertheless resulted in the death of three technicians at the plant. The parties have agreed, without prejudice to the question of liability, that 234,999,999 opecs represents the amount of damages for loss of Icbamese life and property.

Position of the Parties

Icbam asserts that Mirva's armed attack on its Sorgred nuclear facility was illegal and that Mirva is therefore obliged to compensate Icbam for the resulting loss of life and property.

Mirva asserts that its surgical strike on the Sorgred nuclear facility was consistent with customary international law

and relevant treaty obligations and therefore created no obligation to compensate Icbam for losses suffered as a consequence of the raid.

Jurisdiction

This case comes to the International Court of Justice pursuant to Article 36 of the Court's Statute, and in accordance with Article 16 of the Constitution of the Conclave in which the members of the Conclave "agree to accept without reservation the compulsory jurisdiction of the International Court of Justice in all disputes where all the contesting parties are Member States." Thus, jurisdiction is not an issue and should not be disputed.

The Law

Mastery of the sources of international law is the key to international legal argument and analysis, and participants should be questioned in-depth about the source of any law they may seek to invoke. Article 38 of the Statute of the International Court of Justice, which controls the sources of law that may be used by participants, provides in pertinent part as follows:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognizd by

civilized nations;

> d. ...judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

With regard to subsection (a), it is generally held that a state must be a party to a convention (which is the same as a treaty) before it is bound by it, and particpants should be questioned along this line when they attempt to cite a treaty. It should be noted, however, that treaties may also serve to reflect pre-existing custom, or may play a role in the creation of new custom.

As to subsection (b), the creation of custom, which the Statute recognizes as a source of law independent of treaties, is thought to require widespread state practice in accordance with the custom, engaged in under a belief that such practice is required by law. (Participants should be prepared to discuss both elements with regard to any custom they may allege.)

General principles of law, referred to in subsection (c), are deemed to emanate from the practice of all legal systems and should not be accepted merely because they comport with the principles of the one legal system with which either the judge or the participant citing the principle is familiar.

In the international legal system, contrary to the practice of most domestic legal systems, the writings of scholars are recognized as a subsidiary source for the determination of law, as set forth in subsection (d). Participants ought to be sufficiently familiar with the credentials of the scholars they cite to qualify the scholars, as required, as being among "the

most highly qualified publicists."

International tribunals do not operate according to the principle of stare decisis, though they usually attempt to create a jurisprudence built upon consistent rulings. As a result, they remain free to adapt their rulings to changing times if supported by changes in the law which they are applying.

In our age, the United Nations Charter provides the fundamental law for the international community, and is the closest thing to a constitutional document for the family of nations. Judges should feel free, at any time, to ask participants how their arguements comport with the Charter, especially with its purposes and principles.

Summary of the legal argument

Article 2(4) of the U.N. Charter prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Icbam will argue that the air strike by Mirva violated this fundamental tenet of international law, and was not justified by any of the recognized exceptions to this doctrine of non-aggression, including the right to individual or collective self-defense. Further, Icbam will contend that the Conclave could not authorize the use of armed force and therefore afforded no lawfulness to Mirva's actions. Moreover, Icbam will also argue that the development of nuclear weapons as part of its self-defense capability is a matter of inherent sovereign right and domestic jurisdiction, and may not be limited or prohibited by any treaty to which it is not a

party, including the Treaty of Telleraviv which purports to convert Eurasia into a nuclear-free zone. Icbam will contend there is no universal international custom prohibiting possession of nuclear weapons, and assert that international law does not recognize regional customs as binding on a state within the region which objects to the custom at the time of its creation. Icbam will claim a right to damages because of the illegal acts perpetrated against it by Mirva. It will also likely argue, apart from any issue of illegal conduct by Mirva, that it has an independent right to damages for losses it suffered.

Mirva, on the other hand, will argue that nuclear weapons are illegal in view of humanitarian principles, and treaty and customary law prohibitions of poisonous gases, weapons causing unnecessary suffering, and indiscriminate weapons. Nuclear weapons present such an enormous threat to Mirva, the other members of the Conclave, and the very survival of all humankind, as to allow invocation of the doctrine of necessity and engage the right of anticipatory self-defense recognized under customary international law, thus making Mirva's armed attack on the Sorgred weapons facility lawful. Moreover, Mirva will argue that it resorted to only a limited use of force, and then only after it, and every other nation in the Eurasian region, had explored all peaceful avenues for resolution of the problem presented by the impending Icbamese nuclear threat, as required by international law, and failed because of Icbamese recalcitrance. Further, it will claim that its action was sanctioned by the Conclave of Eurasian Unity, to which it and

Icbam both belong, in conformity with Article 7 of the Conclave's Constitution which authorizes "measures ... for the maintenance or restoration of the peace and security of Eurasia," and in accordance with Article 52 of the U.N. Charter which recognizes the right of regional organizations to engage in such peacekeeping. As to damages, Mirva will first assert that it owes nothing to Icbam because it had committed no wrong under international law. Regarding damages absent fault, Mirva will contend that it ought not be held liable for any damages because it had used force only to enforce world public order for the good of all.

CAVEAT

The presentation of issues below is intended to provide judges with a brief review of the most likely arguments to be expected so that they can follow, and, when appropriate, challenge the positions put forward by Jessup teams. This year's problem, however, was specifically designed to invite the development of highly creative arguments, which should not be dismissed or given lesser credit because they do not appear in this bench brief. Similarly, those teams that may choose not to make all the arguments set out below should not automatically be scored down, but should be judged according to the arguments they do make and the reasons they may give for not taking other positions.

Judges should bear in mind that some participants, especially among those in the international division, will not have access to all of the source materials mentioned below. They

should not be unduly penalized, but should be called upon to bolster their arguments with citations from the sources with which they are most familiar and to which they have ready access.

Judges should be aware that on some of the issues to be argued, one team may have a disproportionate amount of the law on its side. Accordingly, participants should be judged according to the force of the argument they make with the law available, and not on whether they in the end prevail.

The Issues

A. Was the Mirvan attack a lawful act of self-defense?

The starting point for this inquiry will be Article 2(4) of the U.N. Charter which requires that

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

and Article 51 of the Charter which provides that

> "nothing in the Charter [obviously including Article 2(4)] shall impair the inherent right of individual or collective self- defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

Icbam can be expected to argue that because it had not itself committed an armed attack or any other act of aggression against Mirva or the other members of the Conclave, Mirva's attack on the Sorgred facility could not be justified as self-defense, and therefore violated Article 2(4) and was unlawful. Icbam will argue for the restrictive definition of aggression,

which provides that the only aggression prohibited by the Charter is that amounting to an actual armed attack against the territorial integrity or political independence of a state. It will contend that it had not committed an aggression in violation of Article 2(4) which would justify invocation by Mirva of the Article 51 right of self-defense, but that in fact it was Mirva that had violated Article 2(4). It will support its view with the U.N. General Assembly Resolution on the Definiton of Aggression which defines aggression as "the use of force against the sovereignty, territorial integrity or political independence of another state," and show that while it had not committed such an act, Mirva had. It should then argue, in the alternative, that if a broader definition of aggression is accepted, one that encompasses acts short of the use of force, it had committed no delict under international law that would qualify as aggression even under that definition. In particular, Icbam will here argue that the mere possession of nuclear weapons is not illegal under international law and does not constitute behaviour sufficiently threatening to Mirva and the other members of the Conclave to allow them to use the doctrine of self-defense to justify the armed attack upon the Icbamese nuclear plant.

Mirva will respond that its attack on the nuclear facility did not violate Article 2(4) in that its use of force was for a limited purpose and not against "the territorial integrity or political independence" of Icbam, and will cite similar arguments made on behalf of Israel at the time of its 1981 attack upon the Iraqi nuclear reactor near Baghdad. (Israel's attack on

the Iraqi reactor raised many of the same issues contained in this problem, and, though Israel's conduct was never judged by a court, the articles and arguments provoked by it may well serve here as a fruitful source of authority and state practice.) Mirva will contend that its use of force was not against Icbam's territorial integrity in that there was no attempt to seize land, and it will similarly argue that the use of force was not against Icbam's political independence in that the attack left Icbam as politically free and independent as any other member of the Conclave.

Mirva next will argue that its attack on the Sorgred facility did not violate Article 2(4) because it was in response to a prior violation of Article 2(4) by Icbam, a threat of nuclear aggression that, though falling short of an armed attack, nonetheless justified the use of force in self-defense. (Mirva may well also argue that even if Icbam's weapons were not aimed at any member of the Conclave, they nevertheless presented a threat to the Conclave by threatening other nuclear nations which might in turn aim their weapons at Eurasia.) Mirva will argue that though the legal regime derived from Articles 2(4) and 51 seems to prohibit absolutely the use of force except in response to an armed attack, the practice of nations, as well as the writings of scholars, supports the proposition that a nation need not wait for an actual attack before it can invoke the Article 51 right of self-defense. This doctrine of anticipatory self-defense requires that the defending nation reasonably perceives the immediate necessity for self-defense or reasonably apprehends an imminent attack, attempts peaceful resolution of the peace-

threatening dispute, and then uses force in a manner and to an extent proportional to the threat perceived. (Here, discussion of the 1837 Caroline incident between the United States and the United Kingdom (as the then sovereign in Canada), and the writings of Julius Stone, Myres McDougal, Thomas Mallison, Wolfgang Friedmann, Ian Brownlie, Thomas Franck, Louis Henkin, John Norton Moore, and D.W. Bowett would be appropriate.)

Of course, the potentially great magnitude of the harm threatened by Icbam's impending nuclear capability may have outweighed the slight degree of imminence presented by Icbam's mere possession, rather than use or threatened use, of nuclear weapons. This line of reasoning would be used by Mirva to suggest that the possible harm that could be inflicted by Icbam was sufficient to justify the limited harm inflicted by Mirva in the name of self-defense. Whether the mere possession of nuclear weapons creates sufficient threat and imminence of harm is an open question, though Mirva might well support its position by citing the United States blockade and quarantine of Cuba during the 1962 Cuban missile crisis, and the 1981 Israeli attack on Iraq's nuclear reactor. It will also likely argue that, even regarding non-nuclear weapons, past state practice has demonstrated that mere possession of weapons can provide a sufficient threat to justify resort to self-defense, and will cite U.S. statements regarding Nicaragua's recent possible acquisition of Soviet-made MiG jets, British World War II attacks on French naval vessels in the port of Oran after the Vichy armistice with Germany, and the 1967 Israeli preemptive strike on

Arab states.

Mirva will additionally argue that the radical change in power relations among the nations of Eurasia that would be brought about by Icbam's nuclear weapons capability provides the necessity for self-defense, and Icbam's announced intention to have the capability by the end of 1983 provides the imminence of the harm. Further, Mirva will cite the unique character of the threat posed by nuclear weapons, the principle of necessity, the demands of self-preservation, as well as the authorization of its use of force in conformity with a treaty (the Constitution of the Conclave) to which Icbam is a party, all to be discussed below.

Alternatively, Mirva may argue that Article 2(4) has been honored more in the breach than in the adherence, and no longer affords protection from aggression because the veto has hobbled the U.N. Security Council, which was originally intended to act as the world's policeman. In this view, raw power unfortunately still determines what a nation may or may not do. (Here, participants might well discuss the writings of John Norton Moore, as well as Thomas Franck's editorial essay in the American Journal of International Law entitled "Who Killed Article 2(4)?" and Louis Henkin's response entitled "The Reports of the Death of Article 2(4) are Greatly Exaggerated.") In this view, Mirva, faced with a choice of evils, will have attacked Icbam's nuclear weapons plant, with minimal force, to forestall a future aggressor (Icbam) from being in a postion to use much greater force to impose its will and wrath upon less powerful nations such as Mirva and the other members of the Conclave.

Icbam, however, will respond that Article 2(4) is the

fundamental norm of the international community, the only protection of the weak from the strong, and ought to be construed strictly so as to prevent it being devoured by exceptions freely invoked and self-judged. Because Icbam had neither attacked or threatened any nation, nor given reason for others to believe that it would, there were no grounds for invoking the right, whether collective or individual, of self-defense. Icbam will then go on to argue, in the alternative, that even if the Court accepts an expansive definiton of aggression which allows for self-defense against an aggression less than an armed attack, there still was not sufficient imminence of harm to Mirva or necessity for immediate military action to justify Mirva's attack. Moreover, Icbam will argue that there was no necessity to prevent Icbam from producing nuclear weapons in view of the possession of nuclear weapons by at least a half dozen other nations, and that there was no basis for Mirva perceiving a threat of imminent harm in that mere possession of nuclear weapons does not equal a "threat or use of force."

Icbam, somewhere in its argument, ought to cite Security Council Resolution 487 (1981) in which the Council unanimously condemned the Israeli attack on Iraq's nuclear reactor as a "clear violation of the Charter ... and the norms of international conduct." Mirva, in response, ought to point out that Iraq was a party to the NPT, and never claimed that it was developing nuclear weapons, thus distinguishing that incident from the one presented to the Court in this problem.

B. Did the Conclave's authorization for Mirva's use of force render it lawful?

Article 52 of the U.N. Charter provides that nothing in the Charter "precludes the existence of regional arrangements ...for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action." Mirva will argue, citing scholarly writings in support, that this allows for regional authorization of the use of force for peacekeeping purposes and to ensure regional security, especially when, as here, all parties to a dispute are members of a regional organization constitutionally authorized to take "measures ... for the maintenance or restoration of the peace and security" of the region (Constitution of the Conclave, art.7).

In support of this reading of Article 52 it will cite United States practice wherein the Charter of the Organization of American States, the Rio Pact, the Charter of the Organization of Eastern Carribean States and the SEATO Treaty have been invoked to justify U.S. intervention in, inter alia, the Dominican Republic, Grenada, and Vietnam, and Soviet use of the Warsaw Pact to justify its 1968 invasion of Czechoslovakia. Both Icbam and Mirva might here refer to the abuses inflicted on Article 2(4) in the name of regional organizations, as chronicled and commented upon by Thomas Franck in "Who Killed Article 2(4)?"

Mirva will likely point out that the Conclave's Constitution allows for resort to Article 7 peacekeeping measures even in response to "an aggression which is not an armed attack" or "if the peace of the region is endangered ... by any other fact or situation." Mirva will note that the U.N. Security Council had

been called upon, but was unable to resolve the dispute, thereby imposing even greater responsibility for peacekeeping on the Conclave, as well as satisfying the requirement that all peaceful avenues be explored before resorting to force.

Icbam will respond by arguing that a regional organization may not authorize what the U.N. Charter forbids in Article 2(4). (Louis Henkin: "There have been few instances of groups claiming the right to do together what the Charter forbids them singly.") Nor may the Conclave act in a manner forbidden to the U.N. itself: the Conclave, as a regional organization, is subordinate to the United Nations and derives its authority from the U.N. Charter, which, in Article 2(7), prohibits even the U.N. from intervening in matters essentially within the domestic jurisdiction of any state.

Icbam will argue further that in the absence of Security Council authorization, enforcement action is specifically prohibited to regional organizations (with only one exception not here relevant) by Article 53 of the U.N. Charter:

> "The Security Council shall, where appropriate, utilize ... regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements ... without the authorization of the Security Council."

Moreover, Icbam will go on to argue that since the Charter only approves collective use of force in cases involving Security Council-authorized enforcement actions, Mirva's reading of Article 51 to allow regional organizations to use force for peacekeeping is incorrect in light of the doctrine inclusio unius est exclusio alterius. In support, it will cite the writings of scholars and widespread criticsm by states of U.S. and Soviet

interventionism purportedly regionally authorized. Additionally, discussion of the San Francisco Conference negotiating history of the U.N. Charter would be relevant here on the issue of the meaning of Articles 52 and 53.

Mirva will also likely argue, as the United States did with regard to the relationship between Grenada and the other members of the Organization of Eastern Caribbean States, that in view of common history and cultural roots, and similar levels of economic and military development, membership in and the resulting devolution of certain aspects and rights of sovereignty upon the Conclave should be seen as integrating the member states into an organic whole akin to one single large quasi-state or federation, thus accomplishing something more than merely forming an international body. In this view, Icbam, by ceding some of its sovereignty to the Conclave, agreed to yield to a common discipline similar to that generally imposed upon states or provinces belonging to a federal republic, thus rendering lawful the Conclave's authorization of force.

Icbam will respond to this analysis by arguing that customary rules of treaty interpretation require that treaties purporting to limit a nation's sovereignty must be clear as to intent and read narrowly. Further, Icbam will cite the qualifying language in Article 4 of the Constitution of the Conclave ("The major purposes of this Conclave shall be ... to seek to adopt, as far as possible, common positions on international issues") and Article 5 ("the Member States will endeavor to co-ordinate, harmonize and pursue joint

policies....") to suggest that no such high level of integration or federation was envisioned by either the drafters of or parties to the Conclave's Constitution.

C. Could Mirva and the other members of the Conclave create a nuclear-free zone in Eurasia binding upon Icbam despite its objection?

A question separate from regional authorization of the use of force relates to the ability of an international organization or community of nations to impose a norm or legal regime upon a member nation against its will. Here, the Conclave sought to outlaw nuclear weapons and create a regional nuclear-free zone by means of the Treaty of Telleraviv, and to impose this on Icbam. Mirva must argue either that the Conclave has the right to legislate for the nations of Eurasia, or that a regional custom binding on Icbam has been created.

It will be Icbam's position that the Treaty of Telleraviv and its nuclear-free zone cannot bind Icbam without its assent. Icbam ought to cite, among other sources, Article 34 of the Vienna Convention on the Law of Treaties: "A treaty does not create either obligations or rights for a third State without its consent." The Vienna Convention, though not binding upon the parties before the Court as a treaty, does, in this instance accurately recite custom. Mirva might respond by citing the 1932 Permanent Court of International Justice Case Concerning the Free Zones of Upper Savoy and the District of Gex, but this would be inappropriate because that case dealt only with the conferral of rights on a third party, not the imposition of obligations.

Icbam will argue that the current international legal regime, in both its normative and organizational aspects, is built upon state sovereignty and consent. Icbam, in its view, is not bound by the NPT because it has never been a party to it and has even withdrawn its signature. Similarly, Icbam will argue that it is not bound by the Treaty of Telleraviv, or the nuclear-free regime established thereby, because it is not a party to it, either, and did not even particpate in its drafting.

Mirva will respond by arguing that the structure of the international community, under which the traditional rules relating to the creation of custom were developed, has changed dramatically and therefore the old rules about law-creation no longer obtain. Citing demands by many Third World nations and the writings of "progressive" scholars from among the developed nations, Mirva will argue that the international community has moved into a new era in which the high level of interdependence, as well as the world order values of participation, peace, security, and democracy require that, at least regarding issues of such vital concern and danger to all as nuclear weapons, the will of a very small minority ought not be allowed to thwart the will of a majority truly representative of all factions of the particular geographic region concerned.

Additionally, Mirva will argue that regional norms may be created. It will cite in support of this position the Asylum Case, state behavior in the Americas such as that alleged to exist in that case by Colombia, the East Bloc custom of communism alleged to be permanent by the Brezhnev Doctrine, and European adherence to a particular level and type of human rights standard

(referred to in the Preamble of the European Convention on Human Rights and Fundamental Freedoms). It will then go on to argue the existence of such a regional custom in Eurasia with regard to the illegalization of nuclear weapons, and bolster its postion by deriving authority from the Conclave, and the common roots and traditions of Eurasia.

As for regional custom, Icbam will argue that it may be imposed on a state within the "region" only with that state's assent. It will cite in support of this the 1951 Asylum/Haya de la Torre Case (Colombia v. Peru) in which the International Court of Justice ruled that a regional custom, if it exists, does not bind a nation within the region which has not demonstrated its consent or acquiesence to it.

In that silence may be inferred to imply acquiescence to the creation of an emerging international custom, however, it is usually thought that a state must make clear its objection to and desire not to be bound by a custom at the time of its purported creation. Icbam will use the facts given in the problem to demonstrate that it had made its objection to the regional non-nuclear custom eminently clear through deed and word.

With regard to any asserted anti-nuclear custom, whether regional or universal, Icbam will argue that no matter how many states believe nuclear weapons to be illegal or desire to establish a nuclear free-zone, Icbam may not be bound without its consent. Icbam will cite its work on the Sorgred facility, its withdrawal of signature from the NPT, its non-participation in the Telleraviv process, as well as its December 14 reply to the

Conclave of Eurasian Unity as making clear, in conformity with the Asylum Case discussed above, its objection to being bound by any regional custom outlawing nuclear weaponry.

With regard to the imposition of a custom, whether regional or universal, on an objecting state, Mirva may well point to the global community's view that South Africa's system of apartheid is a crime under international law though South Africa has never ratified a treaty on the subject and has clearly objected to any customary prohibition of a racially-based system of social organization. On this point, Mirva may also look to the doctrine of jus cogens (peremptory norms), as set forth in the Vienna Convention on the Law of Treaties, which, though only dealing with the possible invalidity of a treaty in violation thereof, may well serve as the basis for an argument by analogy. The argument would be based on the recognition by the international legal system in the context of the jus cogens doctrine that there may be some norms so fundamental that no nation may set itself above them no matter what its will.

As to the imposition of an institutional regime, such as a nuclear-free zone, on a nation not voluntarily joining the regime, Mirva will cite, and argue by analogy to Article 2(6) of the U.N. Charter. In the Charter chapter on purposes and principles, Article 2(6) provides that the U.N. "shall ensure that states which are not Members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security." Mirva will argue that the same imperative of global survival underlying Article 2(6) justifies the Conclave's imposition of a nuclear-

free zone on all nations within Eurasia.

Icbam would do well to respond by pointing out that the Vienna Convention article on jus cogens was not a recitation of custom but an attempt at legislation which does not bind states such as Icbam and Mirva that are not parties to the Convention. It will then go on to argue, vehemently, that the international legal system remains based on respect for the rights of co-equal sovereigns, and therefore requires sovereign consent to the imposition of law upon a state. The family of nations does not yet accept majority rule, no matter how large the majority or how small the number of states objecting to a given rule of law. As for the imposition of U.N. purposes and principles on non-Member nations, Icbam will point out that this exception to the principle of consent is unique in all of international law.

D. Are nuclear weapons illegal per se under international law?

This is perhaps the most intriguing issue in this year's problem. It juxtaposes the desires of humankind and the views of an overwhelming majority of states against the reality of the power and will of a small handful of the most powerful states, those possessing nuclear weapons. The argument that nuclear weapons are illegal under international law may be perceived by some teams as not entirely justifiable. They may choose not to make it but to rely instead on the threat posed by nuclear weapons as support for a more traditional self-defense argument, or on the right of a regional organization to order the peace among its member nations.

This issue has been the subject of a spate of scholarly writings during the last several years. Citation to a study by the Rand Corporation (Builder & Graubard) and writings by Professors Harry Almond, Anthony D'Amato, Richard Falk, Martin Feinrider, John Fried, Hisakazu Fujita, Elliot Meyrowitz, Henri Meyrowitz, John Norton Moore, Jordan Paust, Michael Reisman, B.V.A. Roling, Georg Schwarzenberger, Nagendra Singh, and Burns Weston are likely.

Mirva will allege the existence of a universal customary norm outlawing nuclear weapons, as set out below. Icbam, however, will cite its own practice as well as the nuclear practice of the United States, the Soviet Union, Great Britain, France, China, India, and those states working on developing a nuclear capability to suggest that no universal norm outlawing nuclear weapons exists. Mirva will respond that contradictory behaviour by the relatively small number of states cited by Icbam as opposing the illegalization of nuclear weapons represents not state practice opposing the creation of such a norm, but illegal behaviour in violation of the norm. In fact, Mirva will bolster its argument in favor of taking immediate action to maintain the nuclear-free character of Eurasia by pointing out that it has been forced to endure the illegal nuclear conduct of states already having such weapons because of their great power, and it therefore should be allowed to head off such a dilemma in its own backyard.

Mirva should begin by arguing that the "Martens Clause" of the Regulations attached to the 1907 Hague Convention Concerning the Laws and Customs of Land Warfare, which is reaffirmed in the

four 1949 Geneva Conventions as well as the 1977 Protocols Additional, and which is recognized as customary internatonal law, requires that in the absence of specific treaty regulations the law of war is informed by custom, "the laws of humanity and... the dictates of the public conscience." In support of this position, which contends that even absent specific treaty law there remain constraints on conduct related to war and weaponry binding upon all nations, Mirva may well cite the Judgment of the Nuremberg Tribunal:

> "The law of war is to be found not only in treaties, but in customs and practices of states, which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. The law is not static, but by continued adoption follows the needs of a changing world...."

Mirva will then go on to discuss the extent to which norms set forth in pre-nuclear age treaties, and nuclear age treaties not specifically addressing nuclear weapons, may be said to have become universal custom. Here, Mirva will discuss, inter alia, the substantive content of the 1907 Hague Convention and Regulations Respecting the Laws and Custom of Land Warfare, the 1923 Hague Draft Rules on Aerial Warfare (never ratified), the Geneva Conventions of 1949 on the Law of War, and the 1977 Protocol I Additional to the 1949 Geneva Conventions. Mirva will argue that though there is no treaty specifically making nuclear weapons illegal per se, treaties which regulate weaponry generally also apply to nuclear weapons and in fact render them illegal. In that there is no indication in the facts of the problem that either Icbam or Mirva is a party to these treaties,

participants should discuss the extent to which the norms set forth in these treaties have become customary rules of international law, a task which should only become difficult when it is attempted to be shown that the resulting customary rules apply to nuclear weaponry.

To help define the norms incorporated into the law of war by the Martens Clause, Mirva will discuss the applicability to nuclear weapons of humanitarian principles, originally formulated as a restraint on pre-nuclear age weaponry not specifically addressed by treaty law and still regarded as binding. It will likely discuss these principles as articulated by Jean Pictet of the International Committee of the Red Cross, the international organization responsible for oversight of humanitarian law (the law of war). These universally recognized principles, based on the fundamental customary tenet of all law of war that belligerents do not have unlimited choice in the methods and means of warfare to be employed, include the following:

> belligerents must act in a way to minimize injury to non-combatants (the principle of discrimination);
>
> belligerents must not use weaponry that will inflict excessive and unnecessary suffering;
>
> belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy.

Mirva will cite, among other things, the recogniton of and general adherence to these principles by many nations, including, for example, the United States.

In response, however, Icbam should be expected to show that a number of the nuclear powers, including the United States,

contend that nuclear weapons are different from other weaponry and are not regulated in the same way by customary internatonal law or by "humanitarian principles," at least with regard to possession of nuclear weapons. Specific reference will likely be made to the fact that the United Kingdom, France and the United States have formally indicated their view, at the time of negotiating or signing Protocol I of 1977, that the restrictions embodied therein do not apply to nuclear weapons, thereby bolstering Icbam's view that restrictions on non-nuclear weaponry may not be assumed to apply automatically to nuclear weapons. Additionally, though the military manuals of Western nuclear powers recognize that the limitations imposed on the use of weapons by customary law and humanitarian principles do in theory restrict the ways in which nuclear weapons may be used, they deny that these principles restrict development, possession or deployment.

Mirva will also discuss a series of General Assembly resolutions, passed by substantial majorities, that decry the nuclear arms race and pronounce the use of nuclear weapons a crime under international law.

Icbam will point out that General Assembly resolutions are, according to the U.N. Charter, merely recommendations without binding force, and are generally thought not to be a direct source of law (though they may reflect custom or play a role in the creation of custom).

Additionally, Mirva will cite a series of treaties which outlaw or limit certain uses or deployments of nuclear weapons, including the Antarctic Treaty (prohibiting deployment or use in

Antarctica), the Treaty of Tlatelolco (creating a Latin American Nuclear Free Zone), the Outer Space Treaty (prohibiting deployment or use in earth orbit or outer space), the Seabed Treaty (prohibiting deployment on the seabed beyond the twelve mile limit of national territorial seas), the Non-Proliferation Treaty (to which both Icbam and Mirva are parties, and which prohibits possessors of nuclear weapons and nuclear weapons technology from transferring such weapons or technology to non-nuclear weapons states), and the Partial Test Ban Treaty (which prohibits nations from even testing nuclear weapons in outer space, underwater, or within the earth's atmosphere).

Mirva's argument here is that, in view of these treaties, international custom, and humanitarian principles, there are so few, if any, uses of nuclear weapons remaining legal that mere possession is no longer justified or lawful.

Additionally, Mirva may well discuss the nuclear weapons-related treaties in force between the United States and the Soviet Union, and those that have been negotiated or are in the process of being negotiated, and suggest that the entire negotiation process between the two superpowers seems to occur under the injunction of a moral, if not legal imperative.

Mirva will also argue that the balance of terror which underlies the system of nuclear deterrence so endangers the maintenance of the peace and security of the global community as to be clearly unlawful in view of the principle of self-preservation. Therefore, in view of the principle of necessity, Mirva's attack on the Sorgred facility was permissible.

Mirva may also rely on positions more creative than the ones listed above, including arguments of illegality based on the U.N. Charter, human rights and the right to survival, or world order values. If this is done, citation to Burns Weston, Martin Feinrider or Saul Mendlovitz would be appropriate.

Once Mirva has addressed the issue of the illegality of nuclear weapons, judges should be sure that Mirva proceeds to tie the contention of illegality with the elements of its arguments seeking to legitimize its use of force. In particular, it should be expected to allege that if nuclear weapons are illegal, Icbam's conduct in the Sorgred Desert provides the delict required before invocation of self-defense, as well as the basis for Icbam's behaviour appropriately becoming the object of regional peacekeeping.

Icbam's response to the argument of nuclear illegality will be straightforward and based on rather traditional principles of internationall law. It will argue state sovereignty, domestic jurisdiction, the lack of harm caused by mere possession (as opposed to use or threatened use), state practice by the nuclear powers, the lack of state practice supportive of any alleged custom outlawing nuclear weapons, absence of any treaty specifically prohibiting possession of nuclear weapons, as well as the reality of a global community whose peace is secured by nuclear deterrence of others' use of nuclear weapons. It will rely on the official position of the United States, as well as writings by John Norton Moore, Henry Almond, Michael Reisman, and others.

Icbam will argue that the Court must apply international law

as it is, not as some, apparently including Mirva and the Conclave, wish it to be.

E. Damages

The question of damages is limited to the issue of compensation for losses suffered by Icbam as a result of the attack by Mirva. Traditionally, entitlement to damages here will depend on Icbam proving that Mirva committed a delict under international law. This element would be satisfied by demonstration of Mirva's violation of Article 2(4).

Alternatively, Icbam may well try to win on the question of damages even if it loses on its assertion that Mirva's use of armed force was illegal. It will argue that even if the Court finds Mirva's raid to be lawful, Mirva should be liable for the losses suffered by Icbam as it would be under international law for losses incurred as a result of a lawful nationalization, or as it would be liable under domestic law for losses suffered as a consequence of an action in eminent domain. Here, some participants may draw upon the testimony of Anthony D'Amato before the U.S. Senate Foreign Relations Committee on the issue of the Israeli raid on the Iraqi nuclear reactor.

Mirva will respond that it has not violated Article 2(4) or any other norm of international law binding upon it, and therefore owes no compensation to Icbam for damages suffered as a result of the raid on the Sorgred facility. It will also argue that any obligation for compensation that Icbam suggests may exist in the absence of legal fault on Mirva's part is simply not supported by

the past practice of nations and is unknown to international law. Icbam and Mirva ought to be called upon here to discuss the observations of Ian Brownlie and Oppenheim (Lauterpacht, 8th ed.) on the subject of a duty to compensate absent legal fault.

*** end ***
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