THE PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

1985

ICBAM

(Applicant)

v.

MIRVA

(Respondent)

THE NUCLEAR FREE ZONE CASE

MEMORIAL FOR THE RESPONDENT

TEAM NO. 17

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JURISDICTION

Mirva and Icbam have agreed to submit the present dispute for resolution by the International Court of Justice.

The parties have not qualified the jurisdiction of this Court nor have they agreed that the Court may decide the issues ex aqueo et bono, pursuant to paragraph 2 of Article 38 of the Statute of the International Court of Justice.

STATEMENT OF FACTS

The parties have agreed to the statement of facts as appear in the Compromis and Clarifications. The nationality of the three deceased technicians is not clarified and has been argued in the alternative that they are all of Icbam nationality or that they are all of other nationality.

SUMMARY OF ARGUMENT

The respondent will submit that its use of force was justified under three separate and independent heads of international law. They are:

(a) The possession of nuclear weapons is in breach of a jus cogens of international law which prohibits activities that threaten the survival of mankind. It will be submitted that the commission of such a "crime against humanity" provided Mirva on behalf of the Conclave with a right to use armed force to redress the breach, such a right being recognised in international law.

(b) The possession of nuclear weapons by Icbam was a breach or threatened breach of international peace and security in contravention of the United Nations Charter. As such, it was a matter "appropriate for regional action" pursuant to Chapter VIII of the Charter. It will be submitted that the Security Council has by its own practice re-interpreted the requirements of Chapter VIII such that in the circumstances of this case there was no requirement for the Conclave or Mirva to obtain prior authorisation from the Security Council for its action.

(c) In the circumstances of this case, Icbam's possession of nuclear weapons posed a real and immediate threat to the peace and security of the region, and to the territorial integrity and political independence of Conclave States both individually and collectively. The threat was of a kind giving rise to a right to use armed force in self-defence pursuant to Article 51 of the United Nations Charter.

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CHAPTER 1: SCOPE OF THE RESPONDENT'S SUBMISSION

In submitting that Mirva's use of force was legal and justified in international law, it is acknowledged that Mirva must demonstrate both that Icbam's actions were themselves illegal and that the illegality was of a kind which gave Mirva a right to use force in response. It is for this reason that the Respondent does not seek to rely on the possibility that Icbam's acquisition of nuclear weapons was in breach of customary international law, or of regional customary law. While it may well be argued that the principle of non-proliferation has crystallised into customary law (either generally or within the Eurasian region), to establish that Icbam breached such customary law would not thereby establish Mirva's right to use force to remedy the breach. It is acknowledged that breach of a treaty or of customary law is delictual in nature and that such a delict does not of itself provide a State or a region with the right to use force to remedy the breach.

Consequently the Respondent's submission rests upon three separate and independent heads of international law which, it will be submitted, provided Mirva with a right to use force in response to Icbam's illegal actions. They are:

(a) In chapter 2, the submission that Icbam's actions breached a jus cogens of international law and that Mirva was entitled to use force to remedy the breach.

(b) In chapter 3, the submission that Icbam's actions were a matter "appropriate for regional action" pursuant to chapter (viii) of the U.N. Charter and that the security council of the United Nations has by its own practice reinterpreted chapter 8 so as to remove the requirement for prior authorisation of enforcement actions in circumstances such as those here applying.

(c) Also in chapter 3, the submission that Icbam's actions provided Mirva with a right to use force in self defence pursuant to Article 51 of the U.N. Charter.

Although the Respondent submits that all three of these heads of international law are applicable on the facts of this case, it is respectfully submitted that the Court's acceptance of any one of them is sufficient to exonerate the Respondent.

CHAPTER 2 MIRVA AS AN AGENT OF THE CONCLAVE WAS ENTITLED TO ACT IN RESPONSE TO ICBAM'S CRIME AGAINST HUMANITY

2.1 Icbam's manufacture and/or possession of nuclear weapons contravenes the jus cogens prohibiting 'crimes against peace and humanity'.

2.1.1 Jus cogens are the highest manifestation of international law

The doctrine of jus cogens as the paramount authority in international law was formally recognized in Article 53 of the Vienna Convention on the Laws of Treaties (1969) which states in part:

> ... a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted ...

Despite its relative youth as a formal precept of international law, the existence of the peremptory norm has been continually recognized by jurists since at least the 16th century(1). The distinguishing feature of such a rule is its relative indelibility when compared with the ephemeral existence of normal rules of custom, which is why the I.L.C. refused to provide a positive definition in the Vienna Convention, preferring instead to allow state practice to determine its content and parameters.(2) The International Court of Justice has recognized the existence of these peremptory norms on at least two occasions, including in its examples the law of genocide and crimes against humanity such as slavery and racial discrimination.(3) Other examples include the crimes of piracy and of political terrorism and the taking of hostages, while the principles of inter alia self-determination and of permanent sovereignty over natural resources have been proposed as 'candidate' jus cogens.(4) The essential feature of such peremptory norms is that no nation may contract out of their formation unlike the more usual

normative process, and hence the rules of objection, recognition and acquiescence are irrelevant in this context.(5)

2.1.2 THE PROHIBITION OF CRIMES AGAINST PEACE AND HUMANITY IS A RECOGNIZED JUS COGENS

The concept of crimes against peace and humanity originated in the judgment of the Nuremberg Military Tribunal which established seven principles that were codified by the International Law Commission as the "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal", and affirmed as principles of international law by the United Nations General Assembly in 1946.(6) Principle VI reads in part, "the crimes hereinafter set out are punishable as crimes under international law: a) crimes against peace: ... b) war crimes: ... c) crimes against humanity ..."

The principle has subsequently been the subject of several draft codifications and proclamations(7) and has been endorsed as a peremptory norm by numerous international authorities.(8) It is acknowledged that the precise category of crimes remains undefined, but this does not detract from the status of the rule as a recognized 'jus cogens'.

2.1.3 THE USE AND POSSESSION OF NUCLEAR WEAPONS ARE ILLEGAL UNDER CUSTOMARY INTERNATIONAL LAW

(a) Rules of humanitarian warfare prohibit the use of nuclear weapons

The use of nuclear weapons is prohibited by established customary rules of humanitarian warfare. Although there is no positive statement of international law that expressly proscribes the use of nuclear weapons, a prohibition can be inferred as a rule of custom from a number of sources of international law that include treaties, judicial statements and jurisprudential writings. The doctrine that warfare is governed by the laws of nature and of humanity is of ancient usage among

civilized nations{9} and the modern origin of the doctrine is found in the Declaration of St. Petersburg (1868){10} which established two fundamental principles:

1. The conduct of warfare is governed by the laws of humanity.
2. Military necessity cannot override the humanitarian laws of war.

This concept of an overriding code of natural law that governs the conduct of warfare in the absence of express undertakings by States has been endorsed fo. centuries by eminent jurists{11} and it is most clearly expressed in the famous "Martens Clause" contained in the preamble to the Convention Respecting the Laws and Customs of War on Land (Hague IV, 1907){12}:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

The principle contained in the "Martens Clause" was relied upon by the Nuremberg Military Tribunal{13} in its rejection of Kreigsraison,{14} and was applied by the Tokyo District Court in the Shimoda Case{15} where the Court concluded that the use of nuclear weapons was illegal under public international law. The use of nuclear weapons is not illegal simply because their potential uses may break recognized rules of warfare. Rather, nuclear weapons are qualitatively different from conventional weapons, and consideration of their inherent characteristics necessitates the conclusion that their deployment in any capacity must contravene international law.

The laws of humanitarian warfare proscribe two conceptually different types of conduct. The first is the use of weapons that are prohibited per se because they cause unnecessary and inhumane suffering to combatants. Included among the specific prohibitions are the use of poisonous or poisoned weapons, asphyxiating gases, and chemical and bacteriological weapons.{16} The widespread and uncontainable

radiation that emanates from a nuclear explosion places such weapons within this conceptual category. Although the conventions on unlawful weaponry have not specifically mentioned nuclear weapons, they all reiterate the cardinal principle that 'the right of belligerents to adopt means of injuring the enemy is not unlimited',(17) and provide standards by which to judge the legality of current and future technological developments.(18).

In addition to proscribing certain types of weapons, customary international law restricts the conduct of belligerents during war. Among the prohibited activities are the use of weapons to damage the environment; the waging of war against civilians irrespective of whether the consequence is the terrorization of the population, or their extermination in whole or in part;(19) and the laws of neutrality require that acts of belligerency and their consequences be confined to the defined zones of combat. The use of nuclear weapons necessarily involves violation of each of these precepts because the effects of a nuclear explosion cannot be controlled either spatially or temporally. The spread of radioactive contamination is dependent on the prevailing airflow and weather conditions and hence cannot be confined to the zone of military activity, while the enormous blast area of a thermonuclear explosion and the subsequent widespread conflagration and radiation renders it impossible to differentiate between military and civilian targets. This construction of the humanitarian laws of warfare is further supported by a number of General Assembly resolutions which prohibit the use of nuclear weapons as a direct violation of the United Nations Charter and as a crime against humanity.(20)

(b) <u>The possession of nuclear weapons is illegal</u>

(i) <u>The possession of nuclear weapons is predicated upon their use</u>

The possession of nuclear weapons is purportedly justified by the claim that their mere possession constitutes a guarantee that they will never be used. However, the theory of deterrence contains an inherent logical inconsistency inasmuch as it is

only the demonstrable resolve to use them that provides the deterrence. Hence, the possession of nuclear weapons is pointless as a tool of foreign policy without the guarantee that they will be used, and such use, under any conditions, is illegal.

(ii) Their mere possession violates fundamental norms of human rights law

The possession of nuclear weapons necessarily entails the violation of a number of human rights guaranteed by international law. Foremost among these is the right of human beings to live in peace. Peace as a human right is not merely the absence of armed conflict. Rather, the concept, as developed by international scholars,(21) embraces such concepts as economic equality among nations, social justice and the absence of coercion and fear on both the municipal and international planes. It is acknowledged that there is an everpresent "temptation to believe that a desirable proposition is a human right, and to rely on the slightest evidence to prove it",(22) but the human right to peace has evolved as a legal entitlement. An overwhelming variety of orthodox norm-creating sources such as multilateral treaties,(23) the Universal Declaration of Human Rights 1948(24) and the U.N. Charter itself evidences this. The mere existence of nuclear weapons negates this fundamental right as their threatened use endangers human survival.

(iii) THE PRINCIPLE OF NON-PROLIFERATION IS AN ESTABLISHED RULE OF CUSTOMARY INTERNATIONAL LAW

Non-proliferation, as a concept, can be identified by reference to Article 1 and 2 of the Nuclear Non-Proliferation Treaty (1968). The principle of non-proliferation satisfies the two-fold requirement for recognition by the court as a binding norm of international law. The North Sea Continental Shelf Case(25) discusses the element of time for the formation of a custom, but "even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected."(26) "[N]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way,

as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it."(27)

The principle was first raised in 1946 with the introduction to the United Nations of the Baruch Plan calling for an international agency with full regulatory control over all uses of nuclear energy.(28) It was refined and developed continuously since that time culminating in the formation of the NPT. The NPT went into force on March 5, 1970. As of January 1, 1983 there had been accession, notification and succession to the NPT by 119 States. The NPT was accompanied by a Security Council assurance resolution(29) adopted by the U.K., U.S.S.R. and the U.S.A.. The two remaining nuclear powers, France and China, did not adopt the resolution nor are they party to the NPT. The NPT does not of itself create a normative principle of customary international law inasmuch as a significant number of States,(30) did not sign. This does not mean, however, that they cannot be held to be bound by the principles underlying the Treaty. A Treaty by itself is not sufficient evidence as to whether a principle has become binding customary international law.(31)

However, prior and subsequent State practice can also be a determining factor in the formation of custom.(32) Although States that are particularly affected by the Treaty have not signed it they have evinced their intentions to be bound by the principles of the Treaty in various ways.(33)

> To the extent that the treaty creates a climate in which a state does not sign for one of a number of reasons but, nevertheless, decides not to develop nuclear weapons, the treaty has fulfilled most of its functions.(34)

An exhaustive investigation of the State practice prior and subsequent to the coming into force of the NPT clearly demonstrates a universal acceptance of the principle of non-proliferation. Examples of such State practice include: numerous General Assembly resolutions;(35) unilateral declarations;(36) bilateral(37) and multilateral(38) agreements; and the creation of the Latin American Nuclear Free Zone.(39)

The conclusion can be reached that the principle of non-proliferation as enshrined in Articles I and II of the NPT has become a rule of customary international law and is, therefore, binding on the international community as a whole.

2.1.4 This illegality is a recognition that the possession of nuclear weapons constitutes a crime against peace and humanity

Establishing the illegality of the use and possession of nuclear weapons does not of itself constitute a demonstration of the criminal nature of Iobam's activity. Rather, it is the specific nature of the illegality that legitimate's Mirva's actions. The use and possession of nuclear weapons constitute a breach of both the traditional corpus of humanitarian law and the more recently conceived, but nonetheless valid, normative rules of human rights, and it was the recognition of this threat to civilization that provided the impetus for the evolution of non-proliferation as a norm of customary international law. This multi-faceted illegality is clearly a reflection of the international recognition that nuclear weapons in every aspect are a threat to the peace and future existence of mankind.

It is acknowledged that a small number of powerful and politically dominant nations that possess nuclear weapons deny their illegality, but this does not derrogate from the validity of the jus cogens that guarantees mankind's right to continued existence by prohibiting crimes against peace and humanity. The existence of this peremptory norm is accepted by virtually all nations, and the denial of the illegality of nuclear weapons is only material to the question as to whether their possession constitutes a proscribed crime. Within this context the attitude of the nuclear powers is not determinative of the illegality of nuclear weapons, given that they constitute only a small percentage of the international community, every member of which has a vital interest in preventing a nuclear conflict.

2.2 Regional organisations have a right to act against members who commit crimes against humanity.

> The existence of the concept "international crimes," i.e., offences which endanger the fundamental values of the international community as a whole, has given rise to the universality principle, whereby every state which is a member of that community has the power to retaliate against such offences wherever they may have been committed.(40)

The universality principle was developed in response to an increasing awareness that there exist supranational interests that affect the common well-being of all nations, and which require legal protection within the framework of an international criminal jurisdiction. The doctrine that any state can prosecute an 'international criminal' has been recognised with respect to acts of piracy for many years, but it has undergone a remarkable transition from the merely permissive right of States to prosecute individuals guilty of piracy to that of an imperative obligation to co-operate in its suppression. Article 18 of the Harvard Draft Research Convention on Piracy (1932) contained only the right of the parties "... to make every expedient use of the powers to prevent piracy." However, the Geneva Convention on the High Seas (1958)(41) extended this to co-operative obligations of the parties, and the United Nations Convention on the Law of the Sea (1973)(42) establishes an imperative duty to co-operate in the suppression of piracy.

The catalogue of international crime has expanded rapidly since its inception, and (43) but the formulation by the Nuremberg Military Tribunal of crimes against peace and humanity was accompanied by the realization that the universality principle was not of itself a sufficient mechanism for preserving mankind's peaceful coexistence. Such crimes are as much instruments of State policy as they are the acts of the individuals who perpetrate them, and in recognition of this a number of organs of the wartime German Government were tried before the Tribunal and declared to be criminal organisations.(44) The attribute of criminal responsibility to a State has subsequently begun to evolve as a norm of international law and the International Law Commission (hereinafter called I.L.C.) in a series of reports on State responsibility has sought to codify the principles in accordance with which a State may be held responsible for its intentionally wrongful acts.(45) The most important development has been the recognition of a distinction between the international crimes of a State which result from its contravention of a jus cogens, and its

international delicts which are a consequence of all other breaches of international law. An international crime is defined in Article 19(2) of the Draft Code of State Responsibility as a breach of "...an international obligation so essential for the protection of the fundamental interests of the international community that its breach is recognised as a crime by the community as a whole,...".(46) The normative significance of the distinction (which is based on a dictum of the I.C.J.(47)) is that the commission of an international crime entitles subjects other that the State directly injured to invoke the "'special form' of responsibility" entailed by the breach(48). However, such a distinction is of little value without the requisite means of enforcement, which is why Professor Brownlie suggested more than a decade ago that the principle of universal jurisdiction might need to develop in relation to jus cogens.(49) Mirva recognises that even a universal legal interest cannot entitle any State to take individual action when it believes that an international crime has been committed, for anarchy would inevitably result. Nevertheless, it is submitted that in the continued absence of an international court of criminal jurisdiction (such as the one proposed by the General Assembly but not established(50)), an alternative method of enforcement must be sought for the protection of mankind's most vital interests, and it is further submitted that the only body capable of such action is a regional organization. Although such a proposal(51) is fraught with the danger of coercion directed against individual States, the imposition by the Court of a rigid and objective set of criteria for the exercise of such authority would limit regional enforcement to that necessary for the preservation of peace and fundamental human rights.

CHAPTER 3 MIRVA'S ACTIONS WERE NOT IN VIOLATION OF ARTICLE 2.4 OF THE U.N. CHARTER

3.1 Icbam's actions were in breach of Articles 2.4 and 1.1 of the U.N. Charter

Icbam's construction of a nuclear weapons facility was a "threat of force" against other States and a breach of "international peace and security" (Articles 2.4 and 1.1 respectively).

The particular circumstances of the case may convert an otherwise benign act into a veiled threat.(52) In this case Icbam's actions showed an increasing degree of belligerence towards the Conclave States, especially by the reassertion of its irredentist policies and by its expressed willingness to "take whatever action is necessary to protect its historic patrimony".(53) In these circumstances possession of nuclear weapons posed an immediate and unacceptable threat to the peace and security of the region. Icbam's assertion of a purely defensive and external role for its weapons is patently unconvincing in the light of its irredentist aspirations. Moreover the December 14, 1983 statement by Icbam leaves open the possibility of Icbam using its weapons in a 'first strike' against external States, such a strike being justified as anticipatory self-defence. Thus, even if Icbam's claim was true it would still pose a threat to the region because the effects of nuclear conflict between Icbam and non-Conclave States would unavoidably embroil the Conclave. Radiation clouds are no respecters of State boundaries.

The fundamental purpose of the U.N. per Article 1.1 is the maintenance of international peace and security. Acquisition of nuclear weapons by an aggressively-inclined State is contrary to this purpose; is a threat to neighbouring States contrary to Article 2.4; and calls for the taking of "effective measures" to restore peace and security as provided for by Article 1.1

3.2 Mirva's actions fall within the recognized exceptions to Article 2.4 of the U.N. Charter

3.2.1 The Conclave was entitled to authorize Mirva to act under Chapter VIII of the U.N. Charter

(a) Mirva was entitled to act under the Conclave Constitution

(i) The peace of the region was endangered by an "intra-regional conflict".(53)

A treaty must be interpreted "in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context."(54)

"Conflict" has been defined as "the clashing or variance of opposed principles, statements, arguments, etc."(55) and in the present case there is a clash of opposing views as to the defence of Eurasia between Icbam and all other members of the Conclave within the meaning of "conflict", especially given the context of endangerment to peace overriding Article 7.

(ii) The peace of the region was endangered by another "fact or situation".(56)

The words "any other fact or situation" must be interpreted in the context(57) of the endangerment to peace and the maintenance of peace and security envisaged by Article 7 of the Conclave Constitution.

In accordance with Article 7(a) of the Conclave Constitution, the Conclave met on January 1, 1984 and agreed to use force to restore the peace and security of Eurasia,(58) with the necessary 80 percent of Members voting in favour of using armed force,(59) which Article 7(b) establishes as a measure which may be authorized under Article 7(a).

(b) <u>Mirva's actions were not in breach of Chapter VIII of the U.N. Charter as amended by State and Security Council practice</u>

In the circumstances of this case, Mirva's actions were "appropriate for regional action" per Article 52.1. As the group of States most immediately affected by Icbam's actions, and as the only body capable of effectively removing the threat of force and ensuring the maintenance of regional peace and security, the Conclave is an "appropriate" body, and the matters were appropriate for regional action.

Under Articles 52(2) and 33(1) the Conclave was first obliged to seek "pacific settlement" of its dispute with Icbam. It consistently sought consensus with Icbam, until the Icbamese declaration of December 21 exhausted the possibility of reconciliation "through such regional arrangements" under Article 52(2). The Conclave notified the Security Council of the dispute, which then failed to fulfill its imperative duty under Article 39 to determine and act on "any threat to the peace". Resort to either the General Assembly or the International Court of Justice after December 21 would have proved fruitless given the time constraints involved. The Conclave has therefore also satisfied the requirement of Article 33(1) to use "peaceful means of their own choice".

Mirva's eventual actions were authorized by Articles 7(a) and 7(b) of the Conclave Treaty, inasmuch as more than 80% of the Members agreed to use armed force in response to ".. an aggression which is not an armed attack, an .. intra-regional conflict, or .. any other fact or situation".

The obligations of the Conclave States were not inconsistent with their obligations as members of the U.N. (Article 103 U.N. Charter). Article 1.1 of the Charter stresses the need for "effective collective measures" in order to "maintain international peace and security", this being the fundamental raison d'etre of the U.N.(60) "None of the other purposes of the Organization can be achieved without peace and security .. Armed peace with the fear of war as a recurrent theme is not sufficient for the achievement of the purposes of the [U.N.] ...".(61) This goal requires that "... any breach of the peace will be nipped in the bud and prevented from growing into large proportions".(62) The necessity for effective measures for maintaining peace is thus not in conflict with Article 7 of the Conclave Treaty.

The U.N. Charter envisages three bodies which are to have a role in maintaining peace and security. They are the Security Council (Article 24); the General Assembly (Articles 10, 11 and 14, and the 'Uniting for Peace' Resolution(63)); and Regional Organizations (Articles 33, 52-54). Although the Security Council is given

primary responsibility for this function, its responsibility is not exclusive.(64) The fact that the Security Council was unable to carry out its primary responsibility was recognized as early as 1947, when the Military Staff Committee Report on the implementation of Article 43 revealed irreconcilable differences between the Security Council members.(65) No further attempt to implement Article 43 has occurred, nor have the transitional security arrangements in Article 106 ever been invoked. The paralysis of the Security Council led to the Uniting for Peace Resolution by which the General Assembly attempted to fill the vacuum. Its residual responsibility for the "maintenance of international peace and security" was confirmed in the Certain Expenses Case.(66) Security Council impotence also led to the formation of a number of regional collective defence organizations, e.g., NATO, Warsaw Pact, SEATO, ANZUS, and the Rio Treaty. "The withering away of the Security Council has led to a search for alternative peace-keeping institutions ... Regional organizations are another obvious candidate".(67)

It is in this context that the actions of Mirva fail to be assessed. The U.N. Charter is a constitution, and "... is not a static thing. It and the Organization that it creates must be adapted to new and changing circumstances .... by a process of interpretation and application to situations".(68) The need for flexibility and adaptability was stressed at the San Francisco Conference itself: "We do not want to lay down rules which may in the future be the signpost for the guilty and a trap for the innocent".(69) The viability of the U.N. can only be assured by its ability to respond to unforseen circumstances, and by preventing its Constitution from rendering it a dead letter through blinkered literalism. The purposes which it was originally intended to serve will not be attained if Constitutional rigidity causes the world community to ignore the U.N. as irrelevant to the practical imperatives which determine State policy. The Court is faced with a choice between two views of the basic purpose of the U.N. Charter:

(a) to attempt to maintain peace and provide a context for peaceful adjustment of disputes and to that end to read the Charter as a dynamic rather than static instrument; or

(b) to maintain the formal and rigid separation of function between the Security Council and the two other bodies envisaged as having a similar role, i.e. the General Assembly and the regional organization.

Both the General Assembly and the I.C.J. have in the past supported the former view.(70)

Treaties, of which the U.N. Charter is one, must be interpreted in their context,(71) including the taking into account of subsequent state practice(72). There is already a well established tradition of amendment of the U.N. Charter by interpretation in order to make crucial provisions effective. Although the clear intention of the delegates at San Francisco was that while the Security Council was to act, the General Assembly was only to discuss and amend, in 1950 it interpreted Articles 10, 11 and 14 as giving it the power to take military action when the Security Council has "failed to exercise its primary responsibility."(73) Further, to prevent total stultification of Security Council business by the veto, the requirement of "concurring" votes of the five permanent members in Article 27.3 has been reinterpreted to be satisfied by the abstention, or even absence, of a permanent member.(74)

The Security Council, like other U.N. organs, has the power to determine its own jurisdiction(75) and has done so with regard to its powers under Chapter VIII. A modification of the role of Regional Organizations has occurred since 1945, in terms of the requirement for authorization of enforcement actions under Article 53(1), and the requirement to keep the Security Council informed of actions which such organizations undertake or have "in contemplation" under Article 54. In the Dominican Crisis in 1960; the Punta del Este decision in 1962; and the Cuban crisis of 1962, the O.A.S. informed the Security Council of its sanctions after they had been taken, not while they were still in contemplation.(76) The Council made no mention of any need for advance notice. It thus appears that the Security Council has waived this requirement for prior authorization, and the Conclave has met the requirements of s.54 by its telex of January 1, 1984. Alternatively, if prior

notification was still required under Article 54, this is a separate obligation owed to the Security Council alone and not to Icbam. It is not a pre-condition to the legality of any action for the "maintenance of peace and security". The right to notification is conferred on the Council, not on Icbam.

The requirement of Security Council authorization under Article 53 has been similarly modified by State and Security Council practice. Jessup conceded that inaction by the Council was "... the only possible argument against the substitution of collective measures under the Security Council for individual measures by a single State".(77) This is precisely what has occurred, and the Security Council, recognizing its own impotence, has progressively narrowed the scope of Article 53. In the Dominican Debates (1960) and Punta del Este Debates (1962) it interpreted "enforcement action" so as to exclude diplomatic and economic sanctions by a regional organization.(78) In 1965 in the 2nd Dominican Crisis the use of actual armed force by the O.A.S. was also not treated as an "enforcement action" requiring authorization.(79) The most striking example is provided by the Cuban Crisis of 1962.(80) Repeated U.S. attempts to persuade the Council to take over direction and settlement of the dispute were unsuccessful. At no time did the Council assert any right of approval or disapproval of U.S. actions. This is all the more remarkable considering the significant level of armed force employed in that dispute, where there could be no question of "consent" by the State against which it was directed. The draft resolution presented by Ghana and the United Arab Republic presented the Security Council with an opportunity to bring the U.S. blockade within the ambit of Article 53, and the Security Council's refusal to consider the resolution must constitute an admission that it did not regard such actions as being ones which it was appropriate for the Security Council to control and authorize.

As MacDonald has pointed out, regional organizations have moved into a key place in the Charter's scheme for maintaining international peace and security. They are free to invoke wide-ranging measures of coercion provided only that they observe their own procedural due-process provisions together with the purposes and principles of the Charter.(81) This view is strengthened if, as in this particular dispute, the Security Council has abrogated its role.

Mirva has acted in accordance with the provisions of the Conclave Treaty - its acts support the purposes and principles of the U.N. - and its use of force is on a par with that of the U.S.A. during the Cuban Crisis, exercised only after a refusal to intervene by the Security Council. Hence Mirva did not require "authorization" under Article 53.

Such action by a regional organization constituted the most appropriate vehicle for the carrying out of the requirement of "effective collective measures" to "maintain international peace and security", which primary purpose of the U.N. is enshrined in Article 1.1. As Churchill said of world experience under the League of Nations, "it was only the countries whose interests were directly affected by a dispute who could be expected to apply themselves with sufficient vigour to secure a settlement."(82) The history of the world since 1945 shows that this analysis remains valid. The attempted introduction of nuclear weapons into the Eurasian region by Icbam threatened the peace and security of that area. Only the Conclave was in a position to take "effective" measures, such "effectiveness" including the ability to take timely action before the weapons became available to Icbam. The Security Council had already washed its hands of this matter. The General Assembly was incapable of acting in a timely and effective manner. Even if an emergency sitting within 24 hours was convened,(83) the necessary investigation of the facts and formal procedure for taking a decision, followed by the period for assembling of forces to police or enforce the Assembly's decision, would have rendered the action futile in preventing the weapons becoming available.

To allow this degree of autonomy to regional organizations is not to encourage anarchy. These bodies are bound to act according to the rules of their own constitutions, which must themselves not be in conflict with the U.N. Charter. Nor would they be unaccountable for their actions. If they abused this privileged position they would be subject to Security Council discipline under Chapter VII. Moreover it would be against their interests to abuse their power, since this could lead to a reassertion by the Council of its power to control and/or forbid regional

action. Furthermore, the Conclave is answerable to the I.C.J. under Article 16 of the Conclave Treaty and to the General Assembly under the 'Uniting for Peace' Resolution, whose unwieldy nature and composition. makes it more fitted for supervision than initiation.

In light of the failure of the Security Council to carry out its peace-keeping role, to also deny such a role to regional organizations would be to sacrifice the fundamental purpose of the U.N. on the altar of a literalistic and unrealistic division of powers.

3.2.2 Mirva's actions were a legitimate exercise of its rights of self-defence under Article 51 of the U.N. Charter

(a) Anticipatory self-defence is permitted under Article 51

Customary law has always recognized a right of self-defence in response to an actual or anticipated attack. Although the doctrine is of ancient derivation(84) its modern statement is closely identified with the Caroline Case(85) in 1837. The undoubted existence of the doctrine was not affected, and in fact was expressly preserved, by Article 51 of the U.N. Charter which refers to an 'inherent' right of self-defence, i.e. one which exists independently of the Charter. Reference to an 'armed attack' must be read in the light of this 'inherent right' to refer to an anticipated as well as an actual attack.(86) This interpretation is supported by the history of the Article, which was inserted to reassure the O.A.S. and other regional groups that their limited rights of action under Chapter VIII did not deprive them of their traditional right of self-defence.(87) The right to use force in anticipatory self-defence has been subsequently confirmed by State practice.(88) In 1961, the General Assembly confirmed that its own peace-keeping force the ONUC, had, in taking anticipatory action, acted within its mandate to only act in self-defence.(89)

(b) Mirva's actions constituted a legitimate exercise of its right of individual self-defence

A State invoking the right of anticipatory self-defence must "show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation",(90) that is, a threat of force in breach of Article 2(4). Such a necessity confronted Mirva and the Conclave States. The operational status of the weapons facility was imminent.(91) To allow it to come on stream would have immediately left the Conclave helpless before a nuclear capability against which it had no defence. To have delayed the destruction of the plant until after it was operational would have involved the risk of destruction of a large area by nuclear fall-out.(92) The time chosen for the attack minimized loss of life and property.(93) In all these respects, Mirva was responding to a pressing and urgent need for immediate action.

The threat to Mirva's security was substantial. The possession of nuclear weapons by a State which has reasserted its irredentist policies(94) and asserted its willingness to use "whatever means are necessary"(95) to protect its claimed patrimony posed an immediate threat. The capacity of nuclear weapons to determine a conflict by a single strike negates the necessity for a State to adopt a "sitting duck" posture(96) without taking steps to remove the threat.

Further, Icbam has been responsible for the deployment of a substantial nuclear strike force in an area which had previously been free of nuclear weapons and the associated and immediate threat of nuclear war from other nuclear nations outside the Conclave. The balance of power within the Conclave will also be upset by Icbam's possession of nuclear weapons which will increase the necessity for measures of self defence by the other members. Mere possessions of weapons, both nuclear(97) and conventional,(98) has in the past constituted a threat sufficient to justify the exercise of the right of anticipatory self-defence.

The necessity for proportionality in the anticipatory attack(99) has also been met by Mirva. There was no assertion of control over Icbam's territory or political independence.(100) The action was limited strictly to the removal of the source of the threat, and was taken in such a manner as to minimize collateral loss of life.(101)

(c) Mirva's actions were a legitimate exercise of the Conclave's right of collective self-defence

The foregoing arguments apply as much to the Conclave's collective acts as they do to Mirva's individual assertion of its right of self-defence.(102) The threat was one which affected all member States, either directly as a result of Icbam's irredentist aspirations, or indirectly as a result of the inevitable consequences of a nuclear conflict with other nations in the region. No formal basis is necessary for the exercise of collective self-defence(103) aside from agreement by the relevant Regional Organization that collectively they face an actual or imminent armed attack and must exercise their right of self-defence.(104) Such actions are contemplated by Article 7(a) and 7(b) of the Conclave Treaty.

CHAPTER 4 ICBAM IS NOT ENTITLED TO THE FULL AMOUNT OF DAMAGES SOUGHT

4.1 As Mirva's actions were lawful no damages should be awarded.

Mirva submits that as its actions were at all times lawful, no award of damages should be made in favour of Icbam. It is conceded that international law recognises liability for lawful acts in very restricted circumstances, but these are not applicable to Mirva's actions. The doctrine of abuse of rights cannot be asserted by Icbam as the Mirvan air strike was intended to preserve international peace and security rather than to cause malicious damage to Icbam's property.(105) Similarly, no analogy can be made with the requirement of compensation for the lawful

nationalisation of alien property which accrues solely because the injured alien suffers loss through no fault of his own, whereas Icbam at all times knew that its acquisition of nuclear weapons contravened the express wishes of the Conclave.

4.2 Alternatively, Icbam is not entitled to compensation for the deaths of the three technicians.

States may only bring claims in international law on behalf of their own nationals,(106) and the statement that the project "...was aided by technicians from various countries..."(107) raises the prima facie assumption that at least some of those killed were foreign nationals. The burden of establishing the nationality of the victim rests on the State bringing the claim and this burden has not been discharged by Icbam. Furthermore, as the technicians were independent contractors(108) it cannot be said that they were in the service of the State,(109) and even if they were, Icbam may only claim for the loss of their services (110) and not for their deaths which is a matter for the State of nationality.(111)

AS MIRVAS ACTIONS

Respectfully submitted

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FOOTNOTES

1. Jean Bodin and Hugo Grotius were among the earliest scholars who recognized the principle. More recent discussion can be found in the writings of Lauterpacht, Fitzmaurice, de Arechaga and Tunkin.
2. Y.B. INT'L L. COMM'N., 1966, II, 247-248.
3. North Sea Continental Shelf Cases, [1969] I.C.J. 97-8; Barcelona Traction Case, [1970] I.C.J. 32.
4. I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 513 (3rd Ed., 1979).
5. Id. at 514.
6. Resolution Affirming the Principles of International Law Recognized by the Charter of the Nuremberg Trial,G.A. Res.95(1),U.N. Doc.A/64/Add.1 at 188 (1946).
7. A history of the Nuremberg principles can be found in: The Charter and Judgement of the Nuremberg Tribunal: History and analysis, U.N. Doc. A/CN 4/5, esp. 11-33.
8. For example: I. BROWNLIE, supra at 513; C. Weeramantry, Nuclear Weaponry and Scientific Responsibility, paper presented at the SCOPE/ENUWAR conference, Tokyo, 1/2/1985; Falk, Meyrowitz and Sanderson, Nuclear Weapons and International Law, 20 INDIAN J. INT'L. L. 542-595 (1980).
9. For an excellent account of the history of the concept see: C. Friedman, THE LAW OF WAR: A DOCUMENTARY HISTORY, Vol. 1, 3-15 (1972).
10. Declaration Renouncing the Use in War of Certain Explosive Projectiles, St. Petersburg, December, 1869, in FRIEDMAN, supra at 192.
11. Including Vattel, Grotius, St. Augustine and Francisco de Vitorio - Recent advocates include Falk, Stone and Lillich.
12. FRIEDMAN, supra at 308.
13. Trial of the Major War Criminals, Vol. 22, 445 (1950).
14. Kriegsraison was the Nazi doctrine of absolute war and military necessity.
15. The Shimoda Case (Tokyo District Court, 7/12/1963), Judgement reprinted in 8 JAP. ANN. INT'L. L. 212-252 (1964).
16. For a comprehensive list of all the treaties and conventions on the rules of warfare see FRIEDMAN, supra 156-775.
17. This expression first appeared in Article XII of the Declaration of Brussels 1874; FRIEDMAN supra 194, and was reaffirmed most recently in Article 35 of the Protocols I and II to the Geneva Conventions, 1977; 16 I.L.M. 1391-1442.
18. Examples include Article 23 of Laws and Customs of War on Land (Hague, IV) 1907, and the prohibition on the use of gas and "all analogous liquids, materials and devices" contained in the Geneva Gas Protocol (1925).
19. FRIEDMAN, supra. The Geneva Protocols 1977, supra.
20. For example: Resolution 1653 of the U.N. General Assembly.
21. For example: Nanda, Nuclear Weapons and the Right to Peace Under International Law, 9 BROOKLYN J. INT'L L. 283-296 (1983); Marks, Emerging Human Rights: A New Generation for the 1980's?, 33 RUTGERS L. REV. 435-452 (1981).
22. Marks, supra at 435.
23. European Convention on Human Rights 1950, E.T.S. No. 5; U.K.T.S. 70 (1950), (Cmd. 8969); American Convention on Human Rights (1970), 9 I.L.M. 673 (1970).
24. G.A. Resolution 217A(III), G.A.O.R., 3rd Session, Part 1, 71.
25. North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) [1969] I.C.J. REP. 3.
26. Id., para 73 (majority judgement).
27. Id., para 77 (majority judgement).
28. Referred to in Firmage, Anarchy or Order ? The Nth Country Problem and the International Rule of Law 29 MO. L. REV. 138, 142-144 (1964).
29. S.C. Res. 255, 23 U.N. SCOR 1430th meeting 12, 17-18, 23 U.N. Doc. S/PV 1430 (1968).
30. Including Brazil, Argentina, Chile, India and South Africa.
31. North Sea Continental Shelf Cases, supra.

32. [1969] I.C.J. REP., para 73 (majority judgement).
33. Brazil signed the Treaty of Tlatelolco. French Foreign Minister made statements saying France will abide by the terms of the NPT. Ehrlich, The NPT and Peaceful uses of Nuclear Explosives 56 VA. L. REV. 567 (1970). Pronouncements of renunciation by Indian leaders: Nehru (1957); Prasad (1958); Shastri (1964); Ghandi (1968) in Walczak, Legal Implications of Indian Nuclear Development, 4 DEN. J. INT'L. L. & POL'Y 237 (1974).
34. B. Boskey & M. Willrich, Nuclear Proliferation: Prospects for Control, 7 (1970).
35. G.A. Res. 1576(XV), 15 U.N. GAOR, Supp, (No. 16)3, U.N. Doc. A/4684 (1960);
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37. Agreement for co-operation concerning civil uses of atomic energy. Signed at Washington June 25, 1969; entered into force July 25, 1969, 20 UST 2587; TIAS 6721; 719 UNTS 229 (U.S. & Argentina): Agreement for co-operation concerning civil uses of atomic energy with appendix and related notes. Signed at Washington July 17, 1972; entered into force September 20, 1972. 23 UST 2477; TIAS 7439 (U.S. & Brazil): Agreement relating to co-operation for peaceful applications of atomic energy. Signed at Brussels May 29 and at Washington June 18, 1958; entered into force August 27, 1958. 9 UST 1116; TIAS 4091; 335 UNTS 161 (U.S. & EURATOM): Agreement for co-operation on uses of atomic energy for mutual defence purposes. Signed at Washington May 7, 1959; entered into force July 20, 1959. 10 UST 1279; TIAS 4268; 354 UNTS 83 (France & U.S.).
38. Antarctic Treaty, signed at Washington December 1, 1959; 12 UST 794; TIAS 4780; 402 UNTS 71. Treaty banning nuclear weapons tests in the atmosphere, in outer space and under water. Done at Moscow August 5, 1963. 14 UST 1313; TIAS 5433; 480 UNTS 43. Treaty on prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the seabed the ocean floor and in the subsoil thereof. Done at Washington, London & Moscow February 11, 1971, 23 UST 701; TIAS 7337.
39. Treaty for the prohibition of nuclear weapons in Latin America. 22 UST 762; TIAS 7137; 634 UNTS 281. Additional Protocol I to the treaty of February 14, 1967 for the prohibition of nuclear weapons in Latin America. Done at Mexico February 14, 1967. TIAS 10147. Additional protocol II to the treaty of 38. February 14, 1967 for the prohibition of nuclear weapons in Latin America. Done at Mexico February 14, 1967. 22 UST 754; TIAS 7137; 634 UNTS 364.
40. Feller, Jurisdiction Over Offences with a Foreign Element, in INTERNATIONAL CRIMINAL LAW, 41 (Bassiouni and Nanda ed.)
41. Article 14, U.N. Doc. A/CONF. 13/L. 53; 450 U.N.T.S. 11.
42. Article 100, U.N. Doc. A/CONF. 62/122.
43. The U.N. Convention on the Law of Sea also establishes imperative duties with respect to the suppression of slavery in Article 99 and the illicit traffic in drugs and other psychotropic substances in Article 108.
44. These included the S.S., the Gestapo, the S.D. and the entire Leadership Corps of the Nazi Party.

45. Examples include: Draft Code of Offences against the Peace and Security of Mankind, 9 U.N. GAOR, Supp. 9, at 11-12, U.N. Doc A/2693 (1954); The Internationally Wrongful Act of the State, Source of International Responsibility, A/Cn. 4i 246.
46. Yearbook of the International Law Commission 1976 Vol II pt. 2,95.
47. Barcelona Traction Case [1970] I.C.J. 32.
48. I.L.C. Yearbook, supra note 46 p.104.
49. I.BROWNLIE supra note 4 p.503.
50. Draft Statute for an International Criminal Court, 1951.
51. This proposal has its origins in the jurisprudential theory of Hans Kelsen and Roscoe Pound.
52. Secretary-General of the U.N., report on the question of defining aggression, U.N. Doc. A/2211 at 52 (1952) para. 367.
53. Article 7(a) of the Constitution of the Conclave of Eurasia (hereinafter Conclave Constitution).
54. Article 31(1) of Vienna Convention on the Law of Treaties, opened for signature May 22, 1969, U.N. Doc. A/CONF 39/27 (1969).
55. The Oxford English Dictionary, Vol. II, 8 (1933).
56. Article 7(a) of the Conclave Constitution.
57. See supra note 54.
58. Compromis 3-4.
59. Id. 4. 14 out of 15 is more than 80%.
60. Advisory Opinion on Certain Expenses of the United Nations, [1962] I.C.J. 151 at 168.
61. L. Goodrich & E. Hambro, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 139 (2nd ed. 1949).
62. A. Ross, CONSTITUTION OF THE UNITED NATIONS: ANALYSIS OF STRUCTURE AND FUNCTION 110 (1950).
63. 5 U.N. GAOR, Supp. (No. 20) 10, U.N. Doc A/1775 (1950).
64. Certain Expenses Case [1962] I.C.J. 151 at 163.
65. D. Harris, CASES AND MATERIALS ON INTERNATIONAL LAW 694-95 (2nd ed., 1979).
66. [1962] I.C.J. 151 at 163.
67. Address to Harvard Law School by Abram Chayes, Legal Adviser to the Department of State, (Nov. 3 1962), CUBAN CRISIS OF 1962: SELECTED DOCUMENTS AND CHRONOLOGY 244 at 247 (D. Larson ed. 1963).
68. L. Goodrich, E. Hambro & A. Simons, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 13 (3rd ed. 1969).
69. Speech of Lord Halifax, representative of U.K., in Commission I, VI DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 26 (1945).
70. In the Certain Expenses Case [1962] I.C.J. 151, and Uniting for Peace Resolution, supra.
71. See supra note 54
72. Article 31(3)(b) of the Vienna Convention, supra note 54.
73. Uniting for Peace Resolution, supra.
74. See e.g. L. Sohn, CASES ON UNITED NATIONS LAW 148 note (2nd ed. 1967). This Security Council practice with respect to Art.27 (3) of the U.N. Charter is cited as a primary example of "subsequent practice" under Art.31 (3) (b) of the Vienna Convention on the Law of Treaties in Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES 137 (2nd ed.1984).
75. Certain Expenses Case [1962] I.C.J. 151 at 168; Report of Technical Committee on Charter Interpretation, XIII DOCUMENTS OF THE UNITED NATIONS, supra at 709-10.
76. MacDonald, The Developing Relationship between Superior and Subordinate Political Bodies at the International Level, CANADIAN Y.B. INT'L L. (1964) 21 at 40, 46.
77. A MODERN LAW OF NATIONS 170-71 (1949).
78. See Goldman, Action by the Organization of American States: When is Security Council Authorization required under Article 53 of the United Nations Charter?, 10 U.C.L.A.L. REV. 837 at 850-51 (1963).
79. L. GOODRICH, E. HAMBRO & A. SIMONS, supra at 366-67.

80. MacDonald, supra at 45-50.
81. Id. at 49.
82. Quoted in R. Russell, A HISTORY OF THE UNITED NATIONS CHARTER, 107 (1958).
83. See Part A, para. 1, Uniting for Peace Resolution, supra.
84. H. GROTIUS, DE JURE BELLI AC PACIS III 169 (Translation, II, 1925).
85. 28 BRITISH AND FOREIGN STATE PAPERS 1129, 1138 (1840-41).
86. D. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 185 (1958).
87. Delegate of Colombia, SUMMARY REPORT OF THE FOURTH MEETING III 14, Doc. 576; III 1419 (25/5/45). 12 DOCUMENTS OF THE U.N. CONFERENCE ON INTERNATIONAL ORGANISATION (1945).
88. For example: (1) Israel's pre-emptive strike of the Iraqi Osirak nuclear research reactor June 7, 1981; (2) United States-South Vietnamese action in Cambodia April 30, 1970; (3) The Sinking of the Argentinian Warship, General Gelgrano, by British submarine Falkland Islands May 2, 1982.
89. Halderman, Regional Enforcement Measures and the United Nations, 52 GEO. L.J. 89, 114 (1963).
90. The Caroline Case, American Secretary of State Webster; supra, note 94.
91. Reply of Icbam, December 14, 1983, Compromis 3.
92. S. GLASTON, EFFECT OF NUCLEAR WEAPON, published by the United States Atomic Energy Commission, referred to by the Tokyo District Court in The 'Shimoda' Case, (7/12/1963) Case No. 2, 914 of 1955 and case No. 4, 177 of 1957. Reprinted in 8 AM. J. INT'L. L. 212-252 (1964).
93. Telegram adopted at the meeting of the Eurasian Conclave, 1st January, 1984, Compromis 4.
94. Compromis 2.
95. Formal reply of Icbam to September 22, 1983 Conclave Resolution, December 14, 1983 Compromis 3.
96. Waldock, The Regulation of the Use of Force by Individual States in International Law, 81 RECUEIL DES COURS 455, 498 (1952 II).
97. Examples include The Cuban missile crisis of 1962 and the Israeli air strike on the Iraqi Osarik nuclear reactor on June 7 1981.
98. The preemptive strike by Israel against the Arab armies in June 1967.
99. Birnberg, The Sun Sets on Tamuz 1: The Israeli Raid on Iraq's Nuclear Reactor, 13 CAL. WEST INT'L. L. 86, 105 (1983).
100. D'Amato, Israel's Air Strike Upon the Iraqi Nuclear Reactor, 77 AM. J. INT'L. L. 584, 885 (1983).
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103. Schou, The U.N. and Collective Security: Some Normative and Empirical Considerations, 2 GA. J. INT'L. L. & COMP. L. 139, 145 (1972).
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106. See for example the Barcelona Traction Case [I.C.J.J.1970,p.3.
107. Compromis, p.2.
108. Compromis, p.2.
109. As required, see Fitzmaurice, The Law and Procedure of the International Court of Justice: General Principles and Substantive Law, 27 BRITISH Y.B. INT'L. L., 25 (1950).
110. Id. 25, especially footnote 3 therein.
111. Id. 26.