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INTERNATIONAL LAW

MOOT COURT COMPETITION

IN THE INTERNATIONAL

COURT OF JUSTICE

April 1985

ICBAM

Applicant

v.

MIRVA

Respondent

MEMORIAL FOR APPLICANT

Dorothy Cusker
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Agents for Icbam

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JURISDICTION

The Government of Icbam and the Government of Mirva have, by special agreement between the parties, submitted this dispute to the International Court of Justice pursuant to Article 16 of the Constitution of the Conclave of Eurasian Unity and Article 36 of the Statute of the International Court of Justice.

STATEMENT OF FACTS

The Applicant-State of Icbam and the Respondent-State of Mirva are, with the other 13 nations of Eurasia, members of the Conclave of Eurasian Unity. The Eurasian nations share cultural roots and enjoy generally fraternal relations.

These bonds do not preclude differences among the Eurasian nations. Although the remaining members of the Conclave had ratified the Treaty on the Non-Proliferation of Nuclear Weapons (the NPT) as of September 1982, the newly elected government of Icbam at that time withdrew the former government's signature of the NPT and declared its future resolve not to ratify the treaty. Nor did Icbam choose to ratify the later Treaty of Telleraviv which sought to declare Eurasia a nuclear-free zone.

Rather, in mid-1983, electing to include a nuclear component in its military defense, Icbam began construction on a nuclear facility in the Sorgred Desert.

Attempting to prevent Icbam from developing nuclear capability, the other member-States of the Conclave passed resolutions urging Icbam to ratify the NPT and to cease work on its Sorgred facility. One resolution consisted of a telegram to the U.N. Security Council to inform it of the situation; the other was addressed directly to Icbam.

While the Security Council merely tabled indefinitely any resolution of the situation, Icbam responded directly with assurances as to the defensive nature and intent of the nuclear capability it was developing.

Nevertheless, in December of 1983, the Conclave passed another resolution directed to Icbam, which its delegate refused to convey to his government. He further announced his intention to boycott any further Conclave meetings where the topic of the Sorgred facility was to be discussed.

On January 1, 1984, in the absence of the Icbamese representative, the remaining member-States met and, pursuant to their resolution, Mirvan jets were dispatched to attack and destroy the Sorgred facility. The air strike caused both that facility's destruction and the death of three technicians.

After the air strike was accomplished, the Conclave informed the U.N. Security Council of its actions.

Icbam and Mirva agree to the jurisdiction of the International Court of Justice over this dispute pursuant to Article 16 of the Constitution of the Conclave and Article 36 of the Statute of the International Court of Justice.

QUESTIONS PRESENTED

I. Whether Icbam, a non-party to the Non-Proliferation Treaty and the Treaty of Telleraviv, is bound by their provisions.

II. Whether Mirva's premeditated armed attack and military bombardment of Icbam's nuclear facility on January 1, 1984, violated conventional international law.

III. Whether Mirva's destruction of the Icbam nuclear facility constitutes an illegal act under customary international law.

IV. Whether the nature of nuclear force prohibits the application of established customary international law to this dispute.

SUMMARY OF ARGUMENT

Icbam has not ratified either the Non-Proliferation Treaty or the Treaty of Telleraviv, thus it is not a party to these treaties. The signing of the NPT by Icbam's previous government is not enough to bind the State. Courts and international scholars have consistently upheld the principle that a State must manifest its consent to be bound in the required manner, in this case by ratification. Because Icbam has not done this, the treaty has no binding effect. Icbam refuses to support the unbalanced regime of power that the Non-Proliferation Treaty encourages.

Because Icbam is not a party to the NPT or the Treaty of Telleraviv, it has no duties under these treaties. Thus Mirva had no basis for executing its aerial attack on Icbam's nuclear facility on January 1, 1984. This was an act of aggression which flagrantly violated conventional international law. Both the United Nations Charter and the Conclave's Constitution prohibit the use of force against the territorial integrity or political independence of a State.

Mirva also violated other provisions of the Charter by failing to exhaust peaceful measures before it resorted to its use of force. Moreover, after referring the matter to the Security Council, Mirva recklessly disregarded the Council's decision not to take measures against Icbam, and resorted to aggression.

Since Mirva's preemptive strike fails to meet the criteria of an act of self-defense, customary international law provides no justification for it. Notwithstanding the unique and urgent problems posed by the development of nuclear military force, no principle of customary law has emerged which would justify such an attack on a sovereign state's nuclear facility.

Under both conventional and customary international law, Mirva's act of aggression against Icbam must be adjudged an illegal act for which Icbam is owed compensation.

ARGUMENT AND AUTHORITIES

I. ICBAM, A NON-PARTY TO THE NON-PROLIFERATION TREATY AND THE TREATY OF TELLERAVIV, IS NOT BOUND BY THEIR PROVISIONS.

Before discussing Mirva's violation of conventional and customary international law, it is necessary to show, by reference to the Vienna Convention on the Law of Treaties[1] (Convention), that Icbam is not bound by either the Non-Proliferation Treaty[2] (NPT) or the Treaty of Telleraviv.[3]

The Vienna Convention provides the guidelines to determine when a treaty becomes binding on a state. It is not necessary, in relying on the Convention, for Icbam or Mirva to be a party to it. Because it codified the existing customary law of treaties,[4] the Convention can appropriately be referred to by both parties and non-parties. As one scholar explained, "Treaties will apply to non-signatories if based on existing principles of international law."[5]

A. Icbam Is Not Bound By the Treaty of Telleraviv Under Article 6 of the Conclave's Constitution.

Mirva may not correctly assert that the ratification of the Treaty of Telleraviv was a "decision" within the meaning of Article 6 of the Conclave's Constitution. This article reads: "Decisions of this Conclave . . . shall be achieved through a simple majority vote of the members present at such meetings." The term "decision" as used above does not encompass an arrangement like the Treaty of Telleraviv. The decisions referred to in Article 6 should be in fur-

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[1] Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/CONF. 39/27 at 289 (1969), reprinted in 8 I.L.M. 679 (1969).

[2] Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839,729 U.N.T.S. 161.

[3] Compromis, Page 2.

[4] B. Weston, R. Falk, & D'Amato, International Law and World Order 32 (1980).

[5] Sharma, Treaties as a Source of International Law, 19 Indian J. of Int'l L. 500, 504 (1979).

therance of the Conclave Constitution's purposes. None of the six purposes listed in Article 4 of the Constitution even remotely involves the establishment of a nuclear free zone.

Members of the Conclave may not rely on Article 6 to bind members who are not willing to participate in a regional treaty; if this were possible, a "simple majority vote" by member states could usurp the non-participating members' inherent right to choose whether or not to be bound by a treaty.

This position is supported by the NPT itself. The Treaty of Telleraviv invoked Article VII of the NPT, which states, "Nothing in this treaty affects the right of any group of states to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories." (emphasis added) The regional treaty which States have a right to conclude only assures the absence of nuclear weapons in the territories of the States which are parties to the treaty.

Therefore, although the Conclave members had a right to conclude a treaty banning nuclear weapons from their respective territories, they did not have a right to declare, as they did via the Treaty of Telleraviv, the entire Eurasian region a nuclear-free zone. By doing so, the parties to the treaty have misconstrued Article VII of the NPT, and have violated Icbam's sovereign right to refrain from labeling its own territory a nuclear-free zone.

B. Icbam Did Not Express Its Consent To Be Bound By the NPT or the Treaty of Telleraviv.

1. Ratification is required under Articles 11 and 34 of the Vienna Convention.

Article 11 of the Convention describes the "Means of Expressing Consent to Be Bound by a Treaty": "The Consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty ratification, acceptance, approval or accession, or by any other means if so agreed."

Article 34 then states, "A treaty does not create either obligations or rights for a third State without its consent." Unlike the Vienna Convention on the Law of Treaties, the NPT and the Treaty of Telleraviv do not merely codify existing customary law. They propose new behavior and restrictions which must be unequivocally consented to, according to Article 34, before they become binding on States.

These two treaties use the method most treaties typically follow to indicate a state's consent to be bound by a treaty, i.e., negotiation, signature, and ratification.[6] International scholars have consistently recognized that these steps are almost always required, with an emphasis on ratification by the state itself as the final binding measure.[7] Because Icbam did not participate in either the negotiation, signing, or ratification of the Treaty of Telleraviv, Icbam has not expressed its consent to be bound by it, and the treaty has no binding effect on Icbam.

The reasons for holding that the Treaty of Telleraviv does not bind Icbam also apply to the NPT. Like the Treaty of Telleraviv, the NPT requires ratification to indicate a State's consent to be bound by it. Since Icbam has only signed, not ratified, the NPT it has not fulfilled all the steps necessary to confirm its consent to be bound by the treaty, and thus under Article 34, the NPT creates no obligations for Icbam.

C. Signature Alone Is Not Enough to Bind Icbam.

Icbam's former government did sign the NPT, but customary law, as codified in the Vienna Convention, and the decisions of the courts,[8] indicate that this signa-

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[6] Compromis, Page 2; Non-Proliferation Treaty, Article IX.

[7] R. Hingorani, Modern International Law 206 (1979). See also 14 M. Whiteman, Digest of International Law 50 (1965).

[8] See Case Concerning Free Zones of Upper Savoy and the District of Gex, [1932] P.C.I.J. ser. A/B, 46. The Court held that Article 435 of the Treaty of Versailles was not binding on Switzerland because it was not a party to the treaty.

ture is not enough to bind Icbam's present government.

1. Icbam's signature does not fall within Article 12 of the Vienna Convention.

Article 12 of the Convention describes three situations in which a mere signature can be binding on a treaty signatory. The circumstances surrounding the former government's signature of the NPT do not fall into any of the three categories.

The article states:

> The consent of a State to be bound by a treaty is expressed by the signature of its representative when:
> (a) the treaty provides that signature shall have that effect;
> (b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or
> (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

Paragraph (a) is not applicable, since the NPT expressly refers to ratification as the method of expressing consent to be bound. It does not provide that signature alone will bind a State.

Mirva may not rely on paragraph (b) either; there is nothing in the Compromis, nor has Mirva offered evidence, to establish that during the NPT negotiations the States agreed that a signature would be binding.

Regarding paragraph (c), there is also no evidence that the representative of Icbam's previous government possessed more power than is usually given a representative. When an agent is sent to represent a State at treaty negotiations typically the agent has authority to negotiate and sign, i.e. conclude, the treaty on behalf of his government. Rarely would a government want to relinquish to one agent the additional authority to bind the State, a power the government usually reserves to itself as a final safeguard. Indeed, the facts give no indication that the Icbamese representative had such power. Instead, the Conclave's attempts to convince Icbam to ratify the NPT after its representative had signed the trea-

ty indicate the opposite, i.e., that Icbam had not authorized its agent, through his signature, to bind the State. Because Icbam's signing of the NPT does not fit into the exceptions in Article 12, the established principle that a State must further approve a signed treaty through ratification still applies.[9]

2. International tribunals require ratification.

In the Jurisdiction of Oder Commission[10] the Permanent Court of International Justice supported the need for ratification, holding that treaties " . . . save in certain exceptional cases are binding only by virtue of their ratification."

In 1969, the International Court of Justice reinforced this theory in the North Sea Continental Shelf Cases.[11] The Netherlands and Denmark sought to bind West Germany, a non-party, to Article 6 of the Geneva Convention on the Continental Shelf. In denying their claim, the Court explained:

> In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the regime of the convention is to be manifested—namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way.[12]

The Court's reasoning pertains to Icbam's situation as well. West Germany, like Icbam, had signed the Convention, but did not ratify it. Moreover, many international scholars consider the Geneva Convention a universal treaty which

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[9] See also the Harvard Draft Convention on the Law of Treaties, Article 9, 29 Am. J. Int'l L. Supp. 778 (1935). Although these draft conventions are not intended to be ratified by nations, they provide an impartial restatement of State practice. See also M. Akehurst, A Modern Introduction to International Law 51 (1983).

[10] Jurisdiction of the International Commission of the River Oder, [1929] P.C.I.J. ser. A, No. 23, p. 20.

[11] North Sea Continental Shelf Cases, [1929] I.C.J.20, reprinted in 7 I.L.M. 340.

[12] Id. at 7 I.L.M. 360.

codifies existing custom,[13] yet the Court did not hold West Germany bound by it. Certainly Icbam, also a non-party, cannot be bound by the NPT, which establishes new rules and restrictions, instead of merely codifying established principles of law.

3. Icbam's signature does not create obligations for it under Article 18 of the Vienna Convention.

Furthermore, Article 18 of the Vienna Convention does not preclude Icbam from disregarding the NPT restrictions. The article reads:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

These provisions do not render Icbam's possession of nuclear weapons unlawful. First, paragraph (b) does not apply because Icbam has not expressed its consent to be bound in the manner required, i.e. ratification.

Second, even though paragraph (a) potentially applies to States, like Icbam, who have signed a treaty but not ratified it, the requirements set out in the provision apply to these States only until they have made it clear that they do not intend to become a party to the treaty. Icbam's failure to ratify the NPT should itself indicate that Icbam did not intend to become bound by the treaty.

In addition, before Icbam even began constructing its facility for manufacturing the nuclear weapons, the act allegedly in violation of the NPT, Icbam's new government had already announced that it would not ratify the NPT. "When the Fundamentalist Party took office, it withdrew Icbam's signature from the NPT

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[13] R. Hingorani, Modern International Law 202 (1979).

and declared its intention never to ratify the NPT." (Compromis, P.2) Surely this declaration satisfies the requirement of Article 18(a) that the State make clear its intention not to become a party. Mirva, or any other party to the NPT, could not possibly misconstrue this express and prompt denunciation of the NPT.

As did the drafters of Article 18, scholars have consistently put great emphasis on the intention manifested by a potential State-Party, in determining whether a treaty is binding on that State. "Even in the case of a multilateral convention . . . non-parties must by their conduct distinctly indicate an intention to accept such provisions as general rules of international law."[14] Icbam's withdrawal of its prior signature and its unequivocal rejection of the NPT clearly expressed its intention not to become a party.

D. The NPT Creates An Unfair Regime of Power.

Icbam's opposition to the NPT is logical if one considers the unbalanced system of nuclear power the NPT supports. The treaty essentially guarantees the nuclear-weapon State-Parties the opportunity to maintain and increase their nuclear capabilities while prohibiting the non-nuclear State-Parties from doing so. Referring to this type of treaty, one scholar offered an example, using China (a non-nuclear power then), to show how ridiculous the arrangement would be.

> . . . it is unwise to assume that, while the United States, the Soviet Union, and other powers possess them, China will rest content without the weapons even though she possesses the knowledge and technology to become a nuclear power. . . . These non-nuclear powers are well aware that a test ban, without nuclear disarmament, would simply freeze them out of nuclear technology while others increased their stocks.[15] (emphasis added)

Although reference there was to a test ban treaty, the same logic can apply to a

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[14] Sharma, Treaties as a Source of International Law, 19 Indian J. of Int'l L. 500, 506-7 (1979).

[15] Taubenfeld, Nuclear Testing and International Law, 16 Sw. L. J. 365, 407 (1962).

non-proliferation treaty. Icbam, also a non-nuclear power, wisely chose not to commit itself to the NPT, to avoid being trapped in an analogous situation. The NPT's structure skillfully prevents non-nuclear-weapon nations like Icbam from achieving equality with the nuclear-power states. If Icbam is unable to acquire parity with the nuclear powers, it will not be regarded seriously by them; thus the NPT fosters the nuclear powers' continued dominance.[16] The political gap between the non-nuclear and nuclear-weapon nations is sure to become even more pronounced via the NPT, an environment Icbam refuses to tolerate or encourage.

Icbam opposes the NPT not only because it creates an unfair regime of nuclear power, but also because it fails to promote international security. The NPT merely prohibits the transfer of nuclear weapons from nuclear-weapon states to non-nuclear-weapon states; it does not encourage a freeze on nuclear weapons. The NPT's objective assures neither the safety of the nuclear powers nor of the rest of the states, because these nations are still threatened by the deployment of nuclear weapons, which is not prohibited in the treaty. If Icbam had ratified the NPT, this would not have given it any more protection than it already had against a nuclear attack. In fact, Icbam's ratification would merely deny the State its right to defend itself in a nuclear war; under the treaty, Icbam would not have access to nuclear weapons as technologically advanced as those possessed by the nuclear powers. Because none of the NPT provisions prohibits the use of nuclear weapons, even successful enforcement of the provisions would not result in more safety internationally.

E. The NPT Is An Illusory Contract.

Even for those nations which have ratified the NPT, the treaty's binding force is dubious. Article X(1) gives each Party the right to withdraw from the Treaty

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[16] See, e.g., U.S. Arms Control and Disarmament Agency: Documents on Disarmament 463 (1980): Statement by Chinese representative to the First Committee of the General Assembly.

with only three months' notice. Art. X(2) then states: "Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely . . . . "

These liberal provisions are not common in international agreements. Most treaties provide, from the date of signing, that they shall be of unlimited duration. At the very least, they do not permit a State-Party to withdraw from the treaty, and renounce its obligations.[17] The NPT's tentative duration and the State-Parties' freedom to withdraw at any time prohibit the treaty from having a binding effect. Thus the NPT creates an illusory commitment, and is not a true treaty.

II. MIRVA'S ARMED ATTACK AND MILITARY BOMBARDMENT VIOLATED CONVENTIONAL INTERNATIONAL LAW.

Because Icbam is not a party to either the Treaty of Telleraviv or the NPT, its activities are not subject to their restrictions, and Mirva thus had no justification on which to base its armed attack on Icbam's nuclear facility. This act of aggression violated both conventional and customary international law. First, Mirva's violation of the Conclave's Constitution, and more important, of the United Nations Charter, will be discussed.

A. Mirva Violated the Constitution of the Conclave.

Both Mirva and Icbam are parties to the Constitution of the Conclave of Eurasian Unity, thus both states have rights and obligations under it.

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[17] See, e.g., Agreement On Measures to Reduce the Risk of Outbreak of Nuclear War, Sept. 30, 1971, United States-Union of Soviet Socialist Republics, 22 U.S.T. 1590, T.I.A.S. No. 7186.

Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

1. Mirva's disregard of the U.N. Charter violated Article 4(a) of the Conclave's Constitution.

Among the purposes of the Conclave is Article 4(a), " . . . to promote cooperation among the Member States . . . having due regard to the Charter of the United Nations." Section II.B will discuss Mirva's violation of the U.N. Charter; because Mirva did not have "due regard" to the Charter, it also violated Article 4(a) of the Conclave's Constitution.

2. Mirva's invasion of Icbam's sovereign territory violated Article 4(b).

Furthermore, Mirva's attack was in flagrant disregard of Article 4(b), which requires that the Conclave defend the member states' " . . . sovereignty, territorial integrity and independence." As will be shown in Section II.B, a use of armed force against any of these rights constitutes an act of aggression. Instead of defending Icbam's sovereignty, Mirva attacked it.

Through its military bombardment, Mirva essentially denied Icbam its sovereign right to dictate what went on within its borders. In addition, Mirva's attack not only threatened, but injured Icbam's territorial integrity by the danger it created within Icbam and the damage that resulted. Finally, Mirva recklessly disregarded Icbam's right to pursue independence in the manner it deemed appropriate. Icbam's decision to manufacture nuclear weapons was in response to its present inability to protect itself against an attack by a nuclear power. This vulnerable position prevents Icbam from achieving independence, because an integral aspect of independence is self-sufficiency, and self-sufficiency for a state includes the ability to protect itself.

B. Mirva's Military Bombardment and Actions Preceding the Attack Violated the United Nations Charter.

1. Mirva's attack was an act of aggression, which violated Articles 1(1) and 2(4) of the U.N. Charter.

In Article 1(1), the Charter lists among its purposes the maintenance of

international peace and security, " . . . and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression." (emphasis added) It is possible to conclude that Mirva's bombardment constitutes an act of aggression by reference to the U.N.'s Resolution on the Definition of Aggression.[18] Article 1 of the Resolution defines aggression as " . . . the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State. . . ."

There is no disagreement that Mirva's bombardment involved the use of armed force, and it has already been established (Section II.A.2) how this attack violated Icbam's sovereignty, territorial integrity, and political independence. In addition, the last component of Article 1 considers aggression also to be the use of armed force " . . . in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."

For example, Article 2 of the Resolution states, "The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression. . . . "[19] Mirva's attack was the first and only use of armed force between it and Icbam, and it was in contravention of many provisions of the U.N. Charter, as will be illustrated below.

Mirva's actions disregarded Article 2 of the Charter. In pursuit of the U.N. purposes, Article 2 requires the U.N. members to act in accordance, inter alia, with the following principle: "(4) 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."[20] The article prohibits the use

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[18] Resolution on the Definition of Aggression, Dec. 14, 1974, U.N.G.A. Res. 3314, reprinted in 13 I.L.M. 710 (1974).

[19] The provision also allows the Security Council the discretion to determine that an act of aggression had not been committed but this is not relevant because the Council did not exercise this option.

[20] See, L. Goodrich, E. Hambro, and A. Simons, Charter of the United Nations: Commentary and Documents 43-44 (1969): "[T]he United Nations' success is obviously dependent on the extent to which its members respect this basic principle. . . . "

of force in the same manner as the Conclave Constitution and Article (1) of the Resolution defining aggression, except the Charter does not include the term "sovereignty" as in the other two provisions. Mirva's attack, nonetheless, was against Icbam's territorial integrity and independence and hence violated Article 2(4) of the Charter, as it did the Conclave Constitution.

In recent history, Mirva's type of attack has been viewed as a violation of Article 2(4) by the United Nations. In response to the Israeli aerial attack on the Iraqi nuclear reactor in June 1981, the Security Council adopted Resolution 487 at its 2288th meeting on June 19, 1981, strongly condemning the attack as violative of Article 2(4) and of the norms of international conduct.[21]

2. Mirva's anticipatory attack violated Article 51.

Mirva may not justify its bombardment under Article 51 of the U.N. Charter. This provision states, in part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations. . . . " (emphasis added) Mirva's aerial bombing was not a legitimate act of self-defense under this article, because Icbam did not first carry out "an armed attack" against Mirva, nor against any other Conclave member. The plain meaning of Article 51 requires some use of force against a state before that state may appropriately resort to self-defense.

Admittedly, this interpretation of Article 51 has not been universally accepted. It has been argued[22] that Article 51 merely codified the customary law of

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[21] See also, examples of the international community's condemnation of the Israeli raid: Nydell, Tensions Between International Law and Strategic Security: Implications of Israel's Preemptive Raid on Iraq's Nuclear Reactor, 24 Va. J. Int'l L. 459, 492 (1984): These types of attack set "a dangerous precedent."; Reston, Jerusalem and the Bomb, N.Y. Times, June 10, 1981, at A31, col. 5: "What would happen if all nations thought . . . they had the right to bomb any other nation that might be developing atomic weapons . . . . "

[22] Polebaum, National Self-Defense in Int'l Law: An Emerging Standard for a Nuclear Age, 59 N.Y.U.L. Rev. 187, 201 (1984).

self-defense, which included a right to anticipatory self-defense. International publicists have disagreed with this view,[23] however, including the renowned scholar, Philip C. Jessup. He emphasized that Article 51 did not incorporate the customary law theory of anticipatory self-defense.

> A case could be made out for self-defense under traditional law where the injury was threatened but no attack had yet taken place. Under the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened.[24]

Under the Charter, even if the mere construction of Icbam's defensive nuclear facility could be construed as an "alarming military preparation," Mirva only had recourse to the Security Council, not to an anticipatory attack.

Assuming, for argument's sake, that the more inclusive interpretation of Article 51 is plausible, Mirva's attack would still be unjustified. Section III will discuss the theory of anticipatory self-defense in detail to show that Mirva did not meet the criteria needed under customary law to resort to such a harsh alternative. Therefore, regardless of how Article 51 is interpreted, it offers no justification for Mirva's attack.

3. Mirva's failure to exhaust peaceful procedures violated Articles 2(3) and 33.

Mirva disregarded Article 2(3), which requires the U.N. members to " . . . settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Mirva did not sufficiently exhaust the peaceful procedures it had access to. Article 33 of the

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[23] See, e.g., I. Brownlie, Int'l Law and the Use of Force by States 278 (1963): "It can only be concluded that the view that Article 51 does not permit anticipatory action is correct and that arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence." Also found in 37 Brit. Y.B. Int'l L. 266 [1962]. See also, Wright, The Cuban Quarantine, 57 Am. J. Int'l L. 546, 560 (1963): "It appears that the Charter intended to limit the traditional right of defense by states to actual armed attack. . . . "

[24] P. Jessup, A Modern Law of Nations 166 (1948).

Charter suggests non-violent methods of dispute settlement that Mirva had recourse to, " . . . negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

Mirva did not attempt to contact another Icbamese official once the initial delegate of Icbam announced he would not convey the 12-21-83 Conclave Resolution to his government. Furthermore, Mirva's belief that Icbam had violated an international norm or threatened international peace should have prompted it to seek the support of the world community, instead of turning to unilateral State action. The Conclave's support cannot be deemed to reflect the will of the international community. Two legal scholars suggested this alternative in their discussion of the Israeli attack on the Iraqi nuclear reactor in 1981. They concluded that because Israel did not seek help internationally it had not fulfilled the peaceful procedures requirement.[25] Likewise, Mirva did not take advantage of this same option and thus failed to satisfy Articles 2(3) and 33 of the Charter.

4. Mirva's lack of deference to the Security Council violated Articles 37, 24, and 25 of the U.N. Charter.

Even though Mirva had not exhausted these alternatives, it exercised its option to seek the aid of the Security Council. Article 37(1) reads: "Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council." Mirva's resort to the Council, via the Conclave, implicitly acknowledged that all other peaceful measures had failed; once Mirva decided to avail itself of the Council it was required to respect the Council's disposition of the matter, since the State had thus far been unsuccessful on its own. Article 37(2) reflects this

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[25] Mallison and Mallison, The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?, 15 Vand. J. Transnat'l L. 417, 429 (1982).

requirement: "If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate." The Charter now places the decision-making in the Council's hands. The Council's lack of alarm or concern regarding the situation reflected its conclusion that Icbam's activities did not threaten international peace and security.

Mirva violated other Charter provisions regarding the Security Council by its attack on Icbam, which was unwarranted after the Council's decision not to take any action whatsoever. Article 24 states that the U.N. members " . . . confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." Through its actions Mirva refused to give the Security Council the deference it deserves under Article 24. This also violated Article 25 of the Charter: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." If Mirva had acted in conformity with these provisions, it would have conceded that the Council acted on its behalf when it decided not to take action against Icbam. Instead, Mirva circumvented the Council and these Articles by attacking Icbam's nuclear facility.

5. As a member of the Eurasian Conclave, Mirva's actions violated Articles 52, 53 and 54.

Chapter VIII of the Charter deals with regional arrangements. Article 52(1) explains that regional agencies are not prohibited under the Charter, provided that " . . . their activities are consistent with the Purposes and Principles of the United Nations." Although the references in Chapter VIII are to the Conclave, as the regional agency, Mirva, a member, actually performed the attack on Icbam. Thus Mirva was individually responsible for ensuring that its actions conformed

to the Charter provisions. The claims of the Conclave to have acted in furtherance of these principles[26] cannot reconcile the armed attack on the Sorgred facility with the purposes and principles of the United Nations.

Article 52(2) states that regional agencies " . . . shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council." (emphasis added) As in Article 37, Mirva's agreement to refer the dispute to the Council implied that it had exhausted all other methods of settlement; once the matter was placed before the Council, all decisions needed to be approved by it. Article 53 mandates that " . . . no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council." Mirva's attack flagrantly contravened this provision by bombing Icbam's facility without the Security Council's knowledge or authorization.

Also, Article 54 requires that "The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security." Since the aerial strike was allegedly a "peace-keeping" action, the Council was entitled to be informed about it. Notification after the fact does not satisfy Article 54, because the strike was not an impromptu attack; at 10 a.m., January 1, 1984, Mirva "proceeded" with the attack (Compromis, P.4). One can infer from this language that the attack had been in contemplation prior to its execution.

III. MIRVA'S DESTRUCTION OF THE ICBAM NUCLEAR FACILITY IS AN ILLEGAL ACT UNDER INTERNATIONAL LAW FOR WHICH ICBAM IS OWED COMPENSATION.

A. Mirva's Destruction of the Icbam Nuclear Facility is an Act of Aggression Under International Law.

The intrusion of Mirva military force into the territory of Icbam for the

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[26] Text of Conclave's telegram, Compromis, Page 4.

purpose of destroying property of Icbam constituted an act of aggression as defined by the United Nations General Assembly.[27] As demonstrated by Sections I and II of this brief, Mirva violated existing conventions of international law by destroying the Sorgred facility. It is here asserted that Mirva's act of aggression constituted a violation of existing customary international law.

Mirva cannot contend reasonably that the limited nature of the attack rendered it inoffensive to Icbamese sovereignty.[28] Mirva violated the air space of Icbam.[29] Mirva destroyed the property of Icbam[30] and must accept responsibility for three deaths.[31] Mirva could not point to the authorization of the Conclave of Eurasian Unity to legitimize its attack against Icbam. To do so would strip Icbam of control of its own self-defense and undermine its political independence. Thus, the destruction of the Icbam facility by Mirva satisfies fully the definition of an act of aggression, an act unjustified by the principles of customary international law.

B. Mirva's Armed Attack Fails to Meet the Criteria of an Act of Self-Defense.

As the record shows, no armed attack by Icbam precipitated the military action by Mirva. Thus, as stated earlier, the air strike does not qualify as an act of self-defense under a narrow interpretation of Article 51 of the U.N. Charter. Both customary law,[32] however, and some interpretations of the U.N. Charter[33] indicate that the inherent right to self-defense permits necessary and reasonable

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[27] G.A. Res. 3314, 29 GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974).

[28] cf. D'Amato, Israel's Air Strike Upon the Iraqi Nuclear Reactor, 77 Am. J. Int'l L. 584 (1983).

[29] Compromis, P. 4.

[30] Compromis, pps. 4-5.

[31] Compromis, p. 5.

[32] See, e.g., 12 M. Whiteman, Digest of International Law 47 (1971).

[33] U.N. Charter, art. 51; see also the negotiating history for this article, 12 U.N.C.I.O. Doc. 680 (1945).

anticipatory self-defense. The generally accepted formulation of this self-defense involves a "necessity of self-defense, [which is] instant, overwhelming, leaving no choice of means, and no moment of deliberation."[34] Historically, such actions have been subject to stricter scrutiny, and must meet the three criteria for an act of anticipatory self-defense; the prior exhaustion of peaceful procedures for resolution of the conflict, an armed response to an imminent and compelling threat, and a response reasonably proportionate to the harm actually threatened.[35] The action of a state must fulfill all three criteria if it is to be adjudged anticipatory self-defense.[36] Since the actions of Mirva fail to meet any of these prescribed criteria, the air strike on the Sorgred nuclear facility does not constitute an act of anticipatory self-defense.

1. Mirva failed to exhaust peaceful procedures for resolution of its conflict with Icbam before resorting to an armed attack.

As discussed in Section II, Mirva failed to pursue further dialogue and a peaceful resolution to the dispute with Icbam, although its membership in the Conclave and the United Nations not only facilitates but also mandates exhaustion of peaceful procedures. Mirva turned instead to an impermissibly aggressive course of action.

2. Icbam's incipient nuclear capability posed no threat to Mirva's security which would justify an act of anticipatory self-defense.

   a. Icbam's nuclear facility was not a present and compelling threat to Mirva's security.

Mirva offers no authoritative proof that the Icbamese nuclear plant was

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[34] Letter from Mr. Webster to Mr. Fox, April 24, 1841, 29 British and Foreign State Papers 1129, 1138 (1840-41), concerning the Caroline incident, 2 J. Moore Digest of International Law, 409-14 (1906).

[35] 1 Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg 205-209 (1974).

[36] Note, Tensions Between International Law and Strategic Security: Implications of Israel's Preemptive Raid on Iraq's Nuclear Reactor, 24 Va. J. Int'l L. 459 (1984).

actually operational; at any stage short of fully operational, such a plant poses no present military threat which would justify a preemptive strike.

b. Mirva has offered no proof that the Icbamese intended their nuclear capabilities to threaten Mirva.

Mirva and Icbam share historical and economic interests; their relations have never degenerated to the point of war. Common bonds, including membership in the Conclave of Eurasian Unity, would certainly mandate against nuclear aggression. Additionally, in its 14 December 1983 reply to the Conclave, Icbam assured its neighbors of the defensive nature of the nuclear facility and of Icbam's renewed commitment to the best interest of the Conclave. Thus, Mirva's characterization of its armed attack on Icbamese territory is reduced to mere speculation, incapable of justifying an act of anticipatory self-defense.

3. The total destruction of the Sorgred facility was an unreasonably aggressive reaction to Icbam's incipient facility.

International law, and the world community, have consistently condemned a disproportionate response to a perceived threat. Two incidents from World War II sketch out the parameters of acceptable and non-acceptable acts of self-defense. The British destruction of French warships which were potentially subject to the Axis-dominated Vichy government was an act of justified anticipatory self-defense. In several instances, the British were compelled to destroy French ships when French commanders refused to assure the neutrality of their vessels. In response to the threat posed to British air and sea power by the French ships, the acts of the British navy constituted justifiable self-defense.[37]

In sharp contrast, however, stands the assault upon Poland by Germany in 1939 in response to alleged border skirmishes. Condemnation of this act as unreasonable,

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[37] 1 L. Oppenheim, International Law 303 (H. Lauterpacht 8th ed. 1955).

unprovoked, and self-willed was universal.[38]

In the present dispute, Mirva faced no imminent use of force by a declared aggressor as England did in 1940. Like Germany in 1939, Mirva attempts to justify present aggression by pointing to past border disputes and future fears.

Additionally, historical precedent exists for a less aggressive and more reasonable response to a perceived threat of nuclear capability. Illustrative of a more restrained use of force to prevent regional nuclear development is the U.S. response to the Cuban Missile Crisis of 1962. In response to the evidence of placement of nuclear weapons by a hostile adversary, the United States imposed a naval blockade to prevent the introduction of further offensive weapons and to effect the removal of those in place.[39] Not only did this response abate the military buildup, but it maintained diplomatic channels necessary for peaceful resolution.

C. Under International Law, Mirva Is Liable for the Unjustified Destruction of the Sorgred Facility.

Unjustified aggression is unlawful.[40] Mirva's armed attack on Icbam was an unjustified act of aggression. Therefore, Mirva's armed attack was illegal. Every subject of international law is responsible for an act adjudged illegal under international law. This principle has been firmly established by the Court of International Justice.[41] Equally well-settled is the right of an injured subject to compensation. The Permanent Court of International Justice has promulgated

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[38] 1 Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg 198-204 (1947).

[39] See, generally, Mallison, Limited Naval Blockade or Quarantine Interdiction: National or Collective Defense Claims Valid Under International Law, 31 Geo. Wash. L. Rev. 335, 366-71 (1962); McDougal, The Soviet-Cuban Quarantine and Self-Defense, 57 Am. J. Int'l L. 597 (1963).

[40] See, for example, [1980] Yearbook of the Int'l Law Commission, Vol. 2, part 2, art. 34, 52-53 (1981).

[41] E.g., Corfu Channel Case (United Kingdom v. Albania), 1949 I.C.J. Rep. 4, 36; Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Reports 181-182.

a standard of reparation for material damage:

> Reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[42]

Just compensation, therefore, implies a complete restitution of the status quo ante.

Since just compensation implies a complete restitution of the status quo ante, Icbam rightfully demands reparation from Mirva for its illegal attack on the Sorgred facility with its consequent destruction of life and of property.

IV. NO PRINCIPLE OF INTERNATIONAL LAW HAS EMERGED WHICH JUSTIFIES A PREEMPTIVE STRIKE AGAINST A SOVEREIGN STATE'S NUCLEAR FACILITY.

A. As a Deterrent to Aggression, Nuclear Capability is a Recognized Factor in International Relations.

Not only the super powers, but also other nations have exercised their sovereign right to include nuclear capability in their national self-defense. Since Icbam was bound by no conventional duty to the contrary, Icbam was within its rights in developing the facility at Sorgred.

B. Both the United Nations and the Many States Have Recognized the Right of Subjects to Covenant Concerning the Control and Placement of Nuclear Weapons.

These covenants discredit the notion of the per se illegality of nuclear weapons. They also demonstrate reasonable and voluntary controls on the use and proliferation of these weapons. Perhaps most important to the dispute at hand, no language in these documents recognizes the right to prevent nuclear development

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[42] Chorzow Factory Case, (Poland v. Germany), 1928 P.C.I.J. Ser. A. No. 17 at 46-48.

by force.[43]

C. The Only Prior Preemptive Strike on a Nuclear Facility Has Met With the Condemnation of the United Nations and of the World Community.

On June 7, 1981, Israel attacked the Iraqi nuclear reactor known as Tamuz I. Carried out by F15 and F16 aircraft, the attack killed several workers and severely damaged the reactor.[44] Despite Israel's allegations of acting in self-defense,[45] virtually no other government in the world strongly supported the Israeli strike.[46]

The Israeli attack on Tamuz I provides no precedential justification for the attack of Mirva on the Sorgred facility. Indeed, a comparison of the two acts of aggression reveals Mirva's act as clearly less defensible than that of Israel, and thus less deserving of the approbation of the world community.

1. The Icbamese government posed no threat to the security of Mirva.

Icbam has been a member, with Mirva, in the Conclave of Eurasian Unity since its inception in 1973. Although Icbam was involved in armed border conflicts with neighboring states in the past, there has been no fighting of any consequence since March 1980. At no time did these border conflicts escalate to the level of war. Additionally, Icbam has held general elections within the last two years which resulted in the establishment of a majority government.

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[43] See, e.g., Treaty of Tlatelolco, Feb. 14, 1967, 634 U.N.T.S. 281, art. XX, Measures in the Event of Violation of the Treaty; Treaty On The Non-Proliferation of Nuclear Weapons ("NPT"), July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 (1968).

[44] Russel, Attack - and Fallout: Israel Blasts Iraq's Reactor and Creates a Global Shock Wave, Time, June 22, 1981, at 24.

[45] U.N. Doc. S/P.V. 2280 at 37-60 (1981), Statement of Mr. Blum, Israel Permanent Representative to the United Nations.

[46] See, e.g., Ruben, That Israeli Raid on the Iraqi Reactor: The Facts - and Deeper Issues, Christian Sci. Monitor, June 24, 1981, at 12; U.N. Doc. S./P.V. 228 at 61-62 (1981), Statement of Mrs. Kirkpatrick, U.S. Permanent Representative to the U.N.

In contrast, Iraq was and is a politically unstable nation; at the time of the Tamuz I air strike, Iraq was in violation of international law for its war of aggression against Iran and for its treatment of Assyrian minorities in northern Iraq.[47]

2. The historical and political ties of Icbam and Mirva indicate that Icbam posed no threat to the security of Mirva.

Icbam and Mirva have common cultural and historical roots. As members of the Conclave of Eurasian Unity, they are committed to their mutual well-being. Additionally, Icbam had assured the nations of the Conclave that the facility at Sorgred was intended for defensive purposes against states external to the Conclave of Eurasian Unity.

In contrast, the enmity of Iraq and Israel has deep historical, political, and cultural roots. Iraq had publicly called for the annihilation of Israel as a nation.[48] Iraqi official newspapers had declared that the nuclear reactor at Tamuz was intended to be used against "the Zionist entity."[49]

3. The facility at Sorgred posed no threat to the security of Mirva.

The conflict of Mirva and Icbam on the issue of the Sorgred reactor had not escalated from the negotiation stage prior to the actual preemptive strike. While the issue of whether a state of war existed between Israel and Iraq at the time of the Tamuz I attack is unsettled,[50] the nations were and are undebatedly hostile; only the level of these hostilities has changed throughout the history of modern

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[47] See generally, The Israel Air Strike: Hearings Before the Senate Comm. on Foreign Relations, 97th Cong., 1st Sess. 85-88 (1981).

[48] Id. at 87.

[49] Id. at 88.

[50] Mallison & Mallison, supra at 432-433, c.f. D'Amato, Israel Air Strike, 77 Am. J. Int'l L. 584 (1983).

Israel.[51] Israel had expressed concern, both through the media and through diplomatic channels, that it considered the Tamuz I reactor a threat to Israeli security.[52]

A comparison of the two preemptive strikes reveals plainly that neither historical precedent nor the actual situation justified Mirva's act of aggression.

D. The Unique Nature of Nuclear Force Does Not Render Customary International Law Incompetent to Adjudge This Dispute.

International law has developed as a system for stabilizing the interactions of states and government by defining legality in terms of the customary acts of the states themselves.[53] Unquestionably, the development and proliferation of nuclear force has affected this evolutionary process. Yet that impact does not justify the rejection of the very process of employing custom to determine lawfulness.

When a state violates an existing rule of customary law, it sows the seeds of a new legality.[54] Nevertheless, it has violated a legal rule and is therefore guilty of a presently illegal act.

If the destructive potential of nuclear weapons renders some existing rules inapplicable, those rules may be subject to change. Nevertheless, the unilateral attempt to effect such a change by means of armed force must be adjudged illegal. Under existing customary international law, Mirva's destruction of the Icbamese nuclear facility must be adjudged illegal.

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[51] See, e.g., U.N. Doc. S/P.V. 2280 at 42 (1981), statement of Mr. Blum, Permanent Representative of Israel to the United Nations, stating "Iraq declares itself to have been in a state of war with Israel since 1948."

[52] The Israel Air Strike: Hearings Before the Senate Comm. on Foreign Relations, 97th Cong., 1st Sess., 87 (1981).

[53] D'Amato, Israel's Air Strike Upon the Iraqi Nuclear Reactor, 77 Am. J. Int'l L. 586 (1983).

[54] D'Amato, The Concept of Custom in International Law 74-97 (1971).

V. PREMISES CONSIDERED, MIRVA COMMITTED AN ILLEGAL ACT OF AGGRESSION AGAINST ICBAM FOR WHICH ICBAM IS ENTITLED TO COMPENSATION.

No application of conventional or customary law justifies the destruction of the Icbamese facility at Sorgred by Mirva. Thus, Icbam is entitled to full compensation for the illegal air strike.

PRAYER FOR RELIEF

Wherefore, it is respectfully implored that this Honorable Court:

1. Declare illegal the armed attack on Icbam's property in the Sorgred Desert.
2. Order Mirva to pay to Icbam 234,999,999 opecs as compensation for the physical damage and loss of human lives that resulted from its attack.

Respectfully submitted,

Dorothy Cusker

Dorothy Cusker

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Agents for Icbam

January 31, 1985