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INTERNATIONAL LAW MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE

April 1985

ICBAM

Applicant

v.

MIRVA

Respondent

MEMORIAL FOR THE RESPONDENT

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STATEMENT OF JURISDICTION

The sovereign states of Icbam and Mirva hereby apply to the International Court of Justice to adjudicate their dispute 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 THE FACTS

Icbam and Mirva are both members of the Conclave of Eurasian Unity, a regional agency within the meaning of Section 52(1) of the Charter of the United Nations.

Although the members of the Conclave have common cultural bonds and a history of friendly relations, the peace of the region was disrupted during the late 1970's when Icbam's pursuit of irredentist claims led to a number of border skirmishes with members and non-members of the Conclave. Although there has been no significant fighting since March of 1980, the current Icbamese government has ratified the previous irredentist policies.

As of two years ago, the members of the Conclave, with the exception of Icbam, ratified the Treaty of Non-Proliferation of Nuclear Weapons. Icbam had signed the treaty, but the succeeding Fundamentalist Government withdrew the signature and refused to ratify.

Five months after the NPT had been ratified, the Conclave drafted and adopted the Treaty of Telleraviv, which establishes Eurasia as a nuclear-free zone under the NPT. Icbam was the only member of the Conclave not to ratify the Treaty of Telleraviv.

Within three months of the ratification of the Treaty of Telleraviv, reports surfaced that Icbam was building a nuclear munitions

facility in the Sorgred desert.

On September 22, the Conclave passed a resolution urging Icbam to dismantle the facility and to ratify the NPT and the Treaty of Telleraviv. The Conclave also notified the U.N. Security Council of the existence of a dispute via telegram. The Security Council resolved to table the matter indefinitely when it became apparent that any action would be blocked by a veto.

On December 14, Icbam formally replied to the September 22 resolution and asserted that the weapons were for defensive purposes only, and would only be used on adversaries who were outside of the Conclave. It also asserted that it was "acting in the best interests of the Conclave."

On December 21, the Conclave passed a second resolution urging Icbam to reconsider its position. The Icbamese representative refused to convey the resolution to his government, and informed the Conclave that any further meetings on the matter would be met with a boycott by Icbam.

On January 1, 1984, the Conclave met and decided to launch the surgical strike. The representative from Icbam was not present. Following the strike, in which three technicians died, the Conclave informed the Secretary-General of the United Nations of the action.

QUESTIONS PRESENTED

I. Whether Icbam, in obtaining nuclear weapons, violated customary international law?

II. Whether Icbam violated the Treaty establishing the Conclave of Eurasian Unity?

III. Whether Mirva's action is justifiable under the international

law principle of self-defense?

IV. Whether Mirva is liable for damages to Icbam?

SUMMARY OF THE ARGUMENT

I. Under customary international law, which can be defined as the product of consistent, repeated actions by states, Icbam is prohibited from possessing or producing nuclear weapons. The large number of treaties, signed over a thirty year period, which prohibit or restrict the possession, use and production of nuclear weapons are evidence that nuclear non-proliferation has attained the status of customary international law which binds all nations. In promulgating the treaties, the parties intended to set up a rule of conduct. In building the nuclear munitions plant, Icbam violated customary international law.

II. By building nuclear weapons, Icbam breached the treaty establishing the Conclave of Eurasian Unity. Under the Conclave Constitution, decisions are to be made by at least a simple majority. The majority of the members of the Conclave desired not to obtain nuclear weapons. In producing nuclear weapons on behalf of the Conclave, Icbam breached the treaty by acting unilaterally and in contradiction to the will of the majority of the members of the Conclave.

III. Customary principles of international law establish a state's right to resort to anticipatory self-defense, which is also not prohibited by the Charter of the United Nations. Mirva fulfilled the legal criteria for self-defense: alternative means, proportionality, and immediacy. Alternatively, the principle of necessity would justify Mirva's action. The action was taken pursuant to a

decision by the Conclave of Eurasian Unity and was for collective self-defense.

IV. A prerequisite for state responsibility is a violation of international law. Invocation of self-defense is not considered to be a breach of international duty. In light of all the circumstances surrounding the action, and because Mirva acted on behalf of the Conclave, Mirva is not responsible for the injurious consequences of its legal act.

ARGUMENT AND AUTHORITIES

I. POSSESSION OF NUCLEAR WEAPONS IS GENERALLY PROHIBITED UNDER CUSTOMARY INTERNATIONAL LAW.

Although Icbam chose not to become a signatory to the Non-Proliferation Treaty of 1968, under customary international law, Icbam is prohibited from possessing nuclear weapons. The illegality of possession is reflected in more than thirty years of state practice and treaties designed to check the spread of nuclear weapons.

A. Custom, which is the product of consistent, repeated actions by states, is a chief source of international law.

According to Corpus Juris Secundum, "the chief sources of international law are customs and usages of civilized nations, treaties and other interstate agreements, and the decisions of international tribunals."[1] The value of international custom is recognized by the International Court of Justice. Article 38 of the Statute of the International Court of Justice states: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international custom, as evidence of a general practice accepted as law."[2]

International custom is the product of consistent, repeated actions of states which are accompanied by a sense that the state is acting as a matter of right or duty. Max Sorenson, writing in Public International Law, states:

> The classical analysis of custom discerns two distinct elements in the operation of this source of law: . . . the practice or multiplication of precedents . . . and a mental element . . . [a] conviction on the part of the creators of precedents that they are, in creating them, implementing a legal rule.[3]

B. There is a long line of treaties whose purpose is to limit nuclear proliferation.

The history of attempts to limit the spread of nuclear weapons is almost as long as the history of the weapons themselves. As Diana Fernandez points out in the Brooklyn International Law Journal, "The proliferation of nuclear weapons has been an international concern since atomic bombs were dropped on Hiroshima and Nagasaki in 1945."[4] For example, under Article 26 of the United Nations Charter, "The Security Council shall be responsible for formulating . . . plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments,"[5] and under Article 11(1), "The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the members or the Security Council or both."[6] Joseph Nye points out the various attempts to limit nuclear arms have fostered:

> . . . an international regime that establishes a general presumption against proliferation. International regimes are the sets of rules, norms, and procedures that regulate behavior and control its effects in international affairs. . . . For non-proliferation, the main regime norms and practices are found in the Non-Proliferation Treaty and its regional counterparts . . . [and] the safeguards, rules, and procedures of the I.A.E.A., as well as in various U.N. resolutions.[7]

1. Attempts have been made to limit proliferation through regulation of information.

International attempts to limit proliferation have taken a number of forms. The first approach sought to thwart proliferation by regulating the dissemination of information to non-nuclear coun-

tries and restricting the use of technology to peaceful purposes. In 1957 this approach was developed into a plan to establish the International Atomic Energy Agency (I.A.E.A.), and by 1976, the statute creating the agency had been signed by 108 nations.

The avowed purpose of the agency, as outlined in Article 2 of the Statute is:

> . . . to seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity through the world. It shall ensure, so far as it is able, that the assistance provided by it . . . is not used in such a way as to further any military purpose.[8]

Ten years later, in 1968, the Non-Proliferation Treaty was opened to ratification, and took effect in 1970. The Treaty, which by 1976 had been ratified by 98 countries, prohibits all parties from transferring nuclear technology or source material to any non-nuclear state without international safeguards promulgated by the I.A.E.A.[9] It further forbids the transfer of nuclear weapons to a non-nuclear state and obliges non-nuclear states to neither accept nuclear weapons nor build them.

2. The testing and deployment of nuclear weapons has been excluded from specified geographic areas.

The second approach to limiting the spread of nuclear weapons has been to exclude their testing or use from specified geographic areas.

In 1959, parties to the Antarctic Treaty agreed to limit their nuclear activities in the region to peaceful purposes only.[10] In 1967, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, was opened for ratification. This treaty demilitarized the moon and other celestial bodies and denuclearized that

part of outer space under exploration.[11] The Treaty on the Prohibition of the Employment of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, similarly prohibited the placing of nuclear weapons in the seabeds of the world's oceans. It was opened for ratification in 1971, and became effective in 1972.[12]

The first denuclearization of a heavily populated area was accomplished by the 1971 Treaty for the Prohibition of Nuclear Weapons in Latin America.[13]

Treaties restricting nuclear tests have been enacted as well. The 1963 Nuclear Test Ban Treaty, negotiated by the United States, the U.S.S.R. and the United Kingdom, and ratified by some 104 other states, banned the testing of nuclear devices in the atmosphere, in outer space and under water.[14]

3. Weapons growth has been limited via bilateral treaties.

The third general method of limiting proliferation has been through bilateral treaties between the nuclear powers. Treaties such as the S.A.L.T. treaties between the U.S. and the U.S.S.R. have attempted to limit the stockpiling of nuclear weapons by reducing or restricting the number each party may possess.

The tripartite approach to restricting and eliminating nuclear weapons is clear evidence of a practice or multiplication of precedents. Professor R.R. Baxter writes: "The practice of five or ten states, not on its face wholly consistent, may be sufficient to establish that the asserted rule constitutes a general practice creative of rights and duties for states and individuals . . . ."[15] In this instance, the asserted rule is supported by seven separate

treaties, most signed by large numbers of states, and thirty years of state practice, all intended to prevent the acquisition of nuclear weapons by non-nuclear states.

C. The parties, in signing the treaties, intended for them to serve as precedent and to set up a rule of international law.

The parties, in signing the treaties, intended for them to create a rule of law. Anthony D'Amato, writing in the Harvard International Law Club Bulletin, draws a distinction between treaties designed to give effect to a bargain between the parties and those intended to lay "down a general rule of conduct or rights and privileges . . . ."[16] Whereas contractual treaties realize a particular juridical operation and disappear as soon as that operation is realized, law making treaties present an entirely different interest of stability and generality. They aim to establish a rule of law and are true legislative acts. The treaties which evidence the custom of nuclear non-proliferation do not reflect a mere bargain between the parties; rather, they give voice and effect to rules of law. Each of the multilateral treaties established a regime governing the use and distribution of nuclear technology and weapons. The parties acted legislatively in order to achieve a common aim, rather than to gain an individual advantage.

Nations not parties to the Non-Proliferation Treaty have recognized the need to restrict proliferation. France has repeatedly declared that it will act toward non-nuclear nations as if it were a member of the Non-Proliferation Treaty,[17] and India has maintained its public opposition to the development of nuclear weapons.[18] There have been no reported exports by China of nuclear weapons, technology or source material.[19]

D. The multiplication of precedents indicate that possession of nuclear weapons is generally illegal under customary international law.

The numerous treaties governing nuclear weapons provide clear evidence of a practice and multiplication of precedents and testify to a belief on the part of the parties that they were implementing a legal rule prohibiting the possession of nuclear weapons by all but a few nations. Icbam, as a non-nuclear country, is prohibited from acquiring nuclear weapons or from developing them independently. Icbam's attempt to build a nuclear munitions plant violated customary international law.

Icbam may be heard to complain that the state practice of the major parties to the Non-Proliferation Treaty and other nuclear treaties is inconsistent with the objectives of these treaties. Even if this is true, such inconsistencies do not destroy the custom-creating power of the treaties. As R.R. Baxter points out:

> Reliance on a multilateral treaty as evidence of customary international law is not conditional on any demonstration that the signatory states have actually observed the norms of the treaty for any length of time. The process of establishing the state of customary international law is one of demonstrating what states consider to be the measure of their obligations. The actual conduct of states in their relations with other states is only a subsidiary means whereby the rules which guide the conduct of states are ascertained. The firm statement by the state of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts.[20]

E. The use of nuclear weapons is illegal under the customary rules of war.

1. The 1907 Hague Convention prohibits combatants from causing unnecessary suffering.

Under the 1907 Convention, the right of belligerents to adopt means to injure the enemy is not unlimited, and it is especially

"forbidden . . . to employ arms, projectiles, or materials calculated to cause unnecessary suffering," and "attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended, is prohibited."[21] Under this well-recognized principle, nuclear weapons, which by force and fallout would severely injure civilian populations unless deployed against the remotest military facility, would be illegal because of the "unnecessary suffering" wrought on the population by the explosion of a nuclear weapon.

2. The 1925 Gas Protocol governs nuclear weapons.

The 1925 Gas Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare also limits warfare. It prohibits the use of "asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices."[22] Nuclear weapons, whose radiation effects on victims are analogous to the effects of poison gas, serve the same purpose and cause comparable effects as poisonous gas and thus fall within the definition of "all analogous liquids, materials or devices." As Charles S. Rhyne points out in International Law: "The use of poison to contaminate food and water supplies, poisonous gases, biological and bacterial weapons, explosive bullets and the use of other weapons to cause mass and unnecessary human suffering are clearly prohibited by international law. This would implicitly prohibit the use of nuclear weapons."[23] As Burns Weston concludes:

> Perhaps not all nuclear weapons which are conceivable, but certainly all nuclear weapons now deployed or planned, including the so-called neutron or enhanced radiation weapon . . . manifest radiation effects that for all intents and purposes are the same as those that result from poison gas and bacteriological means of war-

> fare; and in any event, the 1925 Geneva protocol is so comprehensive in its prohibition that it may be said to preclude the use of nuclear weapons altogether.[24]

3. Discussions in the U.N. General Assembly indicate that the rules of warfare apply to nuclear weapons.

During discussion of General Assembly Resolution 2444 in 1968, a deletion, at the request of the Soviet delegation, was made, of a provision that the "general principles of war apply to nuclear and similar weapons." The deletion was allowed, however, only with the understanding that the remaining provisions of the Resolution would apply regardless of the nature of the armed conflict or types of weapons used, and over the objections of the United States, which asserted that the traditional rules of warfare did apply to nuclear weapons.[25]

4. The General Assembly has held nuclear weapons to be illegal.

As early as 1959, the General Assembly accepted the goal of "general and complete disarmament under effective international control," and in a series of resolutions beginning in 1961 declared the use of nuclear weapons to be "a direct violation of the Charter of the United Nations, contrary to the rules of international law and to the laws of humanity, and a crime against mankind and civilization, and therefore a matter of permanent prohibition."[26]

Although the rules of warfare and the U.N. resolutions refer to the use of nuclear weapons, they implicitly ban their possession and manufacture as well. Icbam, in constructing the nuclear weapons facility, violated this ban.

II. ICBAM ACTED IN VIOLATION OF THE CONSTITUTION OF THE CONCLAVE OF EURASIAN UNITY.

A. Icbam's act of acquiring nuclear weapons violated the Constitution of the Conclave of Eurasian Unity.

By acquiring nuclear weapons on behalf of the Conclave, Icbam breached the Treaty establishing the Conclave of Eurasian Unity. Under Article 5(Q) of the Conclave's Constitution, "member states will endeavor to coordinate, harmonize, and pursue joint policies, particularly in the fields of . . . mutual defense and security." Article 6 provides for a voting procedure to be followed in most Conclave decision making. Under the Article, "all decisions . . . shall be achieved through a simple majority vote of the Members present at such meetings."

Under the auspices of the Conclave and according to Conclave procedures, the Treaty of Telleraviv, which establishes Eurasia as a nuclear free zone, was drafted, signed and ratified. Although Icbam voted to reject the treaty, it is bound as a member of the Conclave by the majority's decision. Yet despite the will of the majority and resolutions asking it to reconsider, Icbam persisted in its plan to build nuclear weapons. By unilaterally continuing its project, Icbam breached the requirements of Article 6. In its official explanation, Icbam states it "is acting in the best interests of the Conclave," thus replacing its judgment for the judgment made by the majority of the Conclave members in accordance with the Constitution of the Conclave.

B. The Conclave is permitted to act under the Constitution.

Under Article 7(A) of the Conclave Constitution,

> If the peace of the region is endangered by an armed attack, an aggression which is not an armed attack, an extra-

> regional or intra-regional conflict, or by any other fact or situation, the Conclave shall meet immediately in order to agree on the measures to be taken for the maintenance or restoration of the peace and security of Eurasia.

The conflict between Icbam and the Conclave permitted the Conclave to act to preserve the peace and security of the region.

C. Approval of the U.N. Security Council is not required.

As a unilateral act undertaken by a regional security organization, the surgical strike did not need to be approved by the U.N. Security Council under Article 53 of the U.N. Charter. Under a well accepted construction of Article 53, the term enforcement action only applies to actions taken by virtue of a Security Council decision.[27] This general construction was first used in order to justify the 1950 "Uniting for Peace" resolution, which permitted the General Assembly to act where the Security Council would not or could not act. Because the Security Council was unwilling to act to resolve the conflict, the Conclave as a regional agency was able to take action without first seeking the Security Council's approval.

D. The Conclave's actions are consistent with the U.N. Charter.

The action, taken pursuant to Article 52 of the U.N. Charter, was consistent with Article 2(4) of the U.N. Charter in that no attempt was made to impinge on the political integrity of Icbam, nor was its territorial integrity violated. As a member of the Conclave, Icbam, by its absence, constructively consented, and hence was legally bound by it. Quincy Wright argues that the 1962 blockade of Cuba could similarly be justified. "As a member of the O.A.S. Cuba had constructively consented and so was legally bound by it."[28] The

League of Nations used a similar rationale to justify sanctions against Italy in response to the Ethiopian crisis of 1935.[29] Davis Robinson, in reiterating the U.S. position on Grenada stated that "we are not aware of any serious contention that actions falling within the scope of Article 52 could violate Article 2(4) of the Charter."[30]

E. Icbam's breach created an immediate threat to the Conclave.

Had Icbam been permitted to place the nuclear munitions plant into operation, it would have been an immediate and serious threat to the security of the region.

While Icbam sought to increase its security by procuring nuclear weapons, such a move would actually have decreased its security and the security of the region. The Report of the Secretary General: Basic Problems of Disarmament states:

> So far as international security is concerned, it is highly probable that any further increase in the number of nuclear weapons states . . . would lead to greater tension and greater instability in the world at large . . . additional nuclear powers accentuating regional tensions could only add to the complexity of the problems of assuring peace.[31]

Not only did the acquisition of nuclear weapons threaten to destabilize the region, it made Icbam and Eurasia a prime target for a nuclear strike. The Report further observes, "[H]aving nuclear weapons on one's own territory might bring with it the penalty of becoming a direct target of a nuclear attack." The nuclear weapons Icbam sought to produce would have little deterrence effect relative to the massive stockpiles held by the larger nuclear powers; the sheer size of these accumulations would render Icbam's weapons impotent.

The weapons would have been useful for another purpose, however. Although Icbam claimed that the weapons would only be used for defen-

sive purposes against states outside the region, the weapons would have served as a persuasive device to be used by Icbam in pursuit of its irredentist claims. Although there has been no actual conflict since 1980, the present Icbamese government has ratified the irredentist policies. The presence of nuclear weapons could only serve to intensify the seriousness of the situation.

III. MIRVA'S ACTION IS JUSTIFIABLE UNDER THE PRINCIPLE OF SELF-DEFENSE.

A. Customary principles of international law establish a state's right to resort to self-defense or to anticipatory self-defense

The right of self-defense has existed since ancient times and in all systems of law: vim vi repellere omnia jure permittent.[32]

The sources of international law also uphold this national right of self-defense. The first source is international conventions. Since all signatories are bound by the terms of their convention, the rules contained therein are perhaps the most definitive source of international law.[33] The best example is the United Nations Charter which in Article 51 reasserts the inherent right of self-defense for all member nations. Custom, the second source requires a "generalised repetition of similar acts by competent authority,"[34] and the shared sentiment that their actions are legally permissible.[35] Acts by nations demonstrating this national right of self-defense include the Monroe Doctrine,[36] and the Kellogg-Briand Pact of 1928[37] which do not contain an express reservation as to national self-defense claims. The Statute of the International Court of Justice, a third source characterizes "general principles of law recognized by civilized nations,"[38] which reflect the influence of natural law theory. From this source, we can analogize the criminal law of self-defense to the international rules formulated, though the rules in criminal law are

more stringent.[39]

The principle of customary international law as to self-defense is considered broad enough to permit anticipatory action against imminent threats as well as defensive action in response to actual attacks,[40] such as occurred in the Caroline Case. In this case, Canadian troops (under the sovereignty of Great Britain), destroyed the Caroline, a supply ship being used by the United States to aid the Canadian rebels. Since then, most commentators agree that the Caroline case created a legal doctrine of the right of self-defense.[41]

B. The United Nations Charter does not prohibit the right to anticipatory self-defense.

1. Article 51 does not prohibit anticipatory self-defense.

The Charter incorporates the customary law of self-defense in Article 51 which states:

> 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 until the Security Council has taken measures to maintain international peace and security.

A literal reading of Article 51 would permit self-defense only in response to an actual armed attack.[42] Mirva submits that this Article is not restricted only to an actual armed attack. Many commentators broadly interpret Article 51 to include anticipatory self-defense for the following reasons:[43] Article 51 does not extinguish rights; it preserves rights by stating, "nothing shall impair" the right to defend. The authors of the Charter chose not to use prohibitory language. This initial phrase seems to be purely declaratory and is not a limitation on the obligations of Article 2(4), which contains the relevant obligations of the members of the United Nations.[44] A contrary opinion is that Article 51 of the Charter intended self-

defense not to be invokable except where an armed attack occurs.[45]

2. Interpretation of "armed attack" would permit anticipatory self-defense.

Differences of opinion are also found in the interpretation of the term "armed attack." The French version of Article 51 uses the phrase "aggression armeé," instead of armed attack. The difference lies in determining when a State can claim it is in a situation requiring self-defense. The French version which allows a State to respond to armed aggression is tantamount to permitting self-defense in response to threats, since aggression can exist separate from and prior to an actual attack.[46] Mirva submits that the French version is a more carefully drafted and equally authentic text that is consistent with the negotiating history of the United Nations.[47] The International Law Commission further substantiates Mirva's assertion, as they decided not to attempt to settle these questions or to define self-defense.[48] The Commission merely recognized that self-defense is a principle recognized both in the Charter of the United Nations and in customary international law.[49]

On the basis of these diverging opinions, as to when and whether anticipatory self-defense is permitted, Mirva submits that under customary rules of international law, it was permitted to resort to anticipatory self-defense.

3. Nuclear weapons and modern technology preclude a strict interpretation of Article 51.

Commenting on the meaning of Article 51 of the Charter, notable authors have observed:

> The defect of Article 51 is limitation to "armed attack," a limitation which is both naive and futile in an atomic age. Must a State wait until it is too late before it may defend itself? Must it permit another the advantages of military

> build-up, surprise attack, and total offence, against which there may be no defence? It would be unreasonable to expect any State to permit this—particularly when given the possibility that a surprise nuclear blow might bring about total destruction, or at least total subjugation, unless the attacks were forestalled.[50]

In similar vein, Sir Humphrey Waldock stated:

> . . . it would be a travesty of the purpose of the Charter to compel a defending State to allow its assailant to deliver the first and perhaps fatal blow. . . . To read Article 51 otherwise is to protect the aggressor's right to the first strike.[51]

The decision to carry out the air strike was made by the Conclave and Mirva acted on it only after all the usual international procedures failed. Given the nature and record of the Icbamese government (its past armed conflicts, ratification of irredentist policies), Mirva submits that in accordance with the views expressed above, it was justified in acting the way it did. There was no other way to halt the Icbamese nuclear weapons project, and to wait for the Security Council to resolve the conflict would have been too late.

C. The circumstances surrounding Mirva's action satisfied the legal requirements of self-defense: alternative means, proportionality and imminency.

Various sources of international law have combined to establish three standard elements necessary to assert the right of self-defense.[52] First the threatened State must exhaust all alternative means of protection.[53] Second, the defensive measures must be proportionate to the threatened danger.[54] Third, the danger must be immediate.[55]

Alternate Means: The threatened State should make all reasonable efforts and continue to do so in an effort to avert the danger, which entails diplomatic efforts and direct negotiation.[56] The Conclave attempted direct negotiations with Icbam. The Conclave also submit-

ted the dispute to the United Nations Security Council for resolution, but to no avail. Icbam refused to participate in any of the talks with the Conclave about its nuclear weapon facility. In spite of this failure to negotiate, the Conclave did not cease all efforts and continued to attempt to resolve the dispute.

The Conclave was further hampered in its attempt to seek a peaceful resolution because Icbam was no longer a party to the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT"). Under the NPT, parties to the Treaty undertake to meet the requirements of the International Atomic Energy Agency, and to comply with its safeguards and obligations.[57] Deprived of this alternate authority, and on the basis of the facts, Mirva submits that it exhausted all practicable alternative means of forestalling the operation of the nuclear weapons facility.

Proportionality: The proportionality doctrine appraises the "character and quantum of the responding coercion in relation to the threat presented by the defending State."[58] Mirva's air-raid was proportional to the threat of the proposed facility and was terminated once the self-defense needs were fulfilled. Mirva abided by this rule by focusing only on the establishment that posed the imminent threat.

Immediacy: This means that there must be a necessity for self-defense, "instant, overwhelming, leaving no means for choice and no means for deliberation."[59] Icbam had declared it was manufacturing nuclear weapons which would be developed by the end of that year. Considering the irredentist policies of the Icbamese government, its past aggressions against neighboring States, Icbam's statement not to use the weapons against Members of the Conclave would imply that it

would use the weapons against other neighboring non-Member States. The Conclave and Mirva were therefore justified in believing that when the Sorgred facility became operative, there would be no stopping Icbam from using or threatening to use the nuclear weapons. Further, if the Conclave had delayed acting, the facility would have become operational and less than minimal injury could not be avoided.[60]

D. Alternatively, Mirva's action is justifiable under the principle of necessity.

The International Law Commission defined the state of necessity as a ground for precluding the wrongfulness of an act not in conformity with an international obligation only if:

> . . . the act was the only means of safeguarding an essential interest of the State against a grave or imminent peril and (b) the act did not seriously impair an essential interest of the State towards which the obligation existed . . . [but not if] 2(c) the State in question has contributed to the occurrence of the state of necessity.[61]

The Commission elaborated on the conditions which must co-exist for a State to be entitled to invoke a state of necessity, all of which are met by Mirva.

1. "An essential interest of the State must be involved which should be judged in the light of the particular case."[62] The "essential" interest involved here is the very existence of Eurasia. In a nuclear-free zone, as it was, introduction of nuclear weapons would have tipped the balance of equality between the Member States and jeopardized the peace and security of the region.

2. "The threatened peril must be extremely grave and the act adopted, the only means of warding off the imminent danger."[63] Icbam proved to have a tendency to violence, in support of its irredentist policies which it had claimed even against some Members of the Conclave. To these threatened States, it would logically follow

that this acquisition of nuclear weapons constituted a most imminent threat. Icbam had also flatly refused to dismantle the facility or to enter into any negotiations, thus making the danger impossible to avoid.

3. "The State claiming necessity must not have provoked the occurrence of the state of necessity."[64] The facts do not indicate that the Conclave or Mirva had provoked or contributed to Icbam's construction or need to construct the nuclear weapons facility.

4. "The interest sacrificed on the altar of 'necessity' must obviously be less important than the interest it is thereby sought to save."[65] In this case, Icbam could argue that its sovereign right to organize its self-defense was the "essential interest." However, the acquisition of nuclear weapons was not in the "best interests of the Conclave" as Icbam claimed it was, because the Conclave had decided to establish a nuclear-free zone. Hence, in balancing the interest of the Conclave in its very existence, peace and security, versus Icbam's desire to have a superior self-defense system, Mirva submits that a State's desire to organize its self-defense is a lesser "essential" interest.

E. Mirva's action is permissible under the rule of collective self-defense.

In appraising the validity of collective self-defense claims, the same criteria used to test the legality of national self-defense claims are applicable. Use of force is lawful under the Charter of the United Nations if authorized by a competent organ of the United Nations, if pursuant to action of a regional arrangement "relating to the maintenance of international peace and security" as provided in Chapter VIII of the Charter.[66] It is recognized that regional peace-

keeping actions consistent with the purposes and principles of the United Nations are lawful under the Charter.[67] Such actions are not enforcement actions which require Security Council approval and may be undertaken at the initiative of a genuinely independent regional arrangement. This incident in Eurasia, can be analogized to the United States' intervention in Grenada at the request of the Organization of Eastern Caribbean States (OECS).[68] While the General Assembly of the United Nations passed a resolution condemning the Grenada intervention, that resolution was not binding under the United Nations Charter.[69] It was also voted over the objections of the OECS States.[70] The Grenada action was jointly requested or participated in by almost one-third of the membership of the Organization of American States (OAS).[71] The OECS Treaty is a special regional treaty, but the only applicable regional security arrangement for the Eastern Caribbean. Likewise, the Conclave of Eurasian States is a regional body under the United Nations Charter, and its provisions as to peacekeeping (Article 7), are valid regional security arrangements whose enforcement does not violate the provisions of the United Nations Charter.

When a regional body resorts to collective self-defense, one source considers that there is no need to inquire into the reasonableness of the expectation of necessity and the degree of proportionality involved.[72] If the larger unit, acting through its appropriate officials, makes an initial determination of a claim of collective self-defense for the unit, this is enough.[73] In spite of this opinion, the Conclave considered the necessity of its actions, waited until the peril was absolutely unavoidable, and did not exceed the degree of proportionality.

The existence of multilateral agreements like the OAS and the OECS, indicate that it is no longer necessary for one State, like the United States, and in this instance, Mirva, to act alone, when the collective interest of the larger unit is involved. Mirva submits that as the decision to neutralize the nuclear weapons facility was authorized by a majority of the Members of the Conclave, this action, based on a need for collective self-defense, is justifiable under both the Constitution of the Conclave and the Charter of the United Nations.

IV. MIRVA IS NOT LIABLE FOR DAMAGES TO ICBAM.

A. A prerequisite for responsibility is a violation of international law.

As stated in the International Fisheries Claim Case, "States, according to a thoroughly established rule of international law, are responsible only for those injuries which are inflicted through an act which violates some principle of international law."[74] The principle involved here is that of self-defense, which in accordance with the arguments presented above, was not violated. Besides good faith and consent, the responsibility of the State should also be considered in light of all the circumstances. In the Home Missionary Society Case, the Arbitrator held that there was no responsibility for damage by a government which was neither guilty of a lack of good faith nor negligent in doing its duty.[75] This principle also is applicable here, absolving Mirva of liability.

CONCLUSION

In accordance with the arguments and authorities herein presented, the State of Mirva respectfully requests this Honorable Court to declare that Mirva's surgical strike was consistent with customary and conventional international law and the purposes and principles of the Charter of the United Nations, and to declare Mirva to be without liability for damage to Icbam.

Respectfully submitted,

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FOOTNOTES

1. 48 C.J.S. 5, International Law (1979).

2. Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1095, T.S. 993.

3. Sorenson, Manual of Public International Law 133 (1968).

4. Note, Nuclear Proliferation: Dim Prospects for Control, 111 Brooklyn J. Int'l L. 58 (1976).

5. U.N. Charter, art. 11.

6. U.N. Charter, art. 26.

7. Nye, Maintaining a Nuclear Proliferation Regime, 35 Int'l Org. 16 (1981).

8. Statute of the International Atomic Energy Agency, October 26, 1956, 8 U.S.T. 1093, T.I.A.S. No. 3873, art. 2.

9. Note, supra, note 4 at 64.

10. Antarctic Treaty, December 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

11. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, January 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

12. Treaty for the Prohibition of the Employment of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, February 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337.

13. Treaty for the Prohibition of Nuclear Weapons in Latin America, February 14, 1967, 634 U.N.T.S. 281.

14. The Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, August 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43

15. Baxter, Multilateral Treaties as Evidence of Customary International Law, 61 Brit. Yrbk. of Int'l L. 275.

16. D'Amato, Treaties as a Source of General Rules of International Law, Harv. Int'l Law Club Bull., at 15, April 1962.

17. Note, Prospects for Nuclear Proliferation and its Control, 6 Denver J. Int'l L. & Pol. at 164 (1976).

18. Id. at 164.

19. Id. at 164.

20. Baxter, supra, note 15, at 300.

21. 1907 Hague Regulations Respecting the Laws and Customs of War On Land, October 18, 1907, 36 Stat. 2277, T.S. No. 539 (art. 23).

22. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 575, T.I.A.S. 8061, 94 U.N.T.S. 65.

23. Rhyne, International Law 441 (1971).

24. Weston, Nuclear Weapons Versus International Law: A Contextual Reassessment, 28 McGill L. J. 561 (1983).

25. G.A. Res. 2444, 23 U.N. GAOR, Supp. (No. 18) 50, U.N. Doc. A/7218 (1968).

26. G.A. Res. 1653, 16 U.N. GAOR, Supp. (No. 17) 4, U.N. Doc. A/5100 (1961) and G.A. Res. 2936, 27 U.N. GAOR, Supp. (No. 30) 5, U.N. Doc. A/8730 (1972).

27. Wright, The Cuban Quarantine, 57 Am. J. Int'l L. 558 (1963).

28. Id. at 559.

29. Id. n. 47 at 558.

30. Letter from Davis S. Robinson, Legal Advisor, U.S. Dept. of State, to Prof. Edward Gordon, in Moore, Law and the Grenada Mission 127 (1984).

31. The Report of the Secretary General: Basic Problems of Disarmament.

32. Bowett, Self-Defense in International Law, 3 [1958].

33. Brownlie, Principles of Public International Law, 2, 4 [3d. ed. 1979].

34. O'Connell, International Law, 3 [1965].

35. Id. at 16.

36. Root, The Real Monroe Doctrine, 8 Am. J. Int'l L. 427, 432 [1914].

37. 1 Hyde, International Law, 239-240, 821-822 [2d. ed. 1945].

38. Statute of the I.C.J., supra note 2.

39. Note, National Self-Defense in International Law: An Emerging Standard for a Nuclear Age, 59 N.Y.U. L. Rev. 187, 208, n. 133 [1984].

40. See 12 M. Whitman, Dig. of Int'l L., 47 [1971].

41. The Caroline & MacLeod Cases, 1837-1842, Moore, 2 Dig. of Int'l L., Sect. 217.

42. Note, supra, note 39, at 291.

43. Report of the International Law Commission to the General Assembly, 35 U.N. GAOR Supp. [no. 10] at 125-126, U.N. Doc. A/35/10 [1980], hereinafter cited as Report.

44. U.N. Charter Art. 2[4] states:
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 manner inconsistent with the Purposes of the United Nations.

45. Report, supra, note 43, at 126-127.

46. Note, supra, note 39, at 202.

47. Mallison, The Israeli Attack of June 7, 1981: Aggression or Self-Defense Under International Law?, 15 Vand. J. Trans. L. 417, 421 [1982].

48. Report, supra, note 43, at 127.

49. Id. at 129.

50. Kaplan & Katzenbach, The Political Foundations of International Law, 212 [1961].

51. Waldock, Regulation of the Use of Force by Individual States in International Law, 81 Hague Recuil desCours, 455, 498 [vol. 2, 1952], quoted in 5 Whitman, Dig. of Int'l L. 986 [1965].

52. Bowett, supra, note 32, at 53.

53. Id. at 53.

54. Id. at 53.

55. Id. at 53.

56. Note, supra, note 39, at 198.

57. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161.

58. Mallison, supra note 47, at 432.

59. Waldock, supra note 51, at 463.

60. See, 36 U.N. SCOR, U.N. Doc. A/36/610, S/14732 [1981] at 57. Israel documented the effects of radiation that would be emitted from an operative reactor.

61. Report, supra note 43, at 69.

62. Id. at 105.

63. Id. at 105.

64. Id. at 106.

65. Id. at 106.

66. Moore, Law and the Grenada Mission, 23 [1984].

67. Id. at 24.

68. Treaty for the Organization of Eastern Caribbean States, reprinted in 20 ILM 1166 [1981].

69. G.A. Res. 38/7, U.N. GAOR Supp. (No. 47) at 19, U.N. Doc. A/38/L.8 (1983).

70. Moore, supra,note 66, n. 17 at 40.

71. Moore, supra,note 66,at 41. Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

72. Mallison, Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Under International Law, 31 Geo. Wash. L. Rev. 335, 366 [1962].

73. McDougal & Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion, 251 [1961].

74. International Fisheries Case, United States-Mexico Claims Commission, 1931.

75. Home Missionary Society Case, Annual Dig. of Public Int'l Law cases, 1919-1922, 173-174.