IN THE INTERNATIONAL COURT OF JUSTICE

February 1985 Term

Between:

ICBAM,

Applicant,

and

MIRVA,

Respondent.

MEMORIAL FOR THE RESPONDENT

Paul G. Beers
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JURISDICTION

Article 36 of the Statute of the International Court of Justice confers to the Court jurisdiction over all cases that parties to a dispute submit to it. The parties to the present dispute submit to the Court's jurisdiction pursuant to Article 40 of the Statute.

STATEMENT OF THE FACTS

Icbam and Mirva are members of the Conclave of Eurasian Unity and the United Nations. Icbam has long claimed that the other Conclave states are occupying Icbamese territory. Icbam's irridentism has led to armed and often intense clashes between Icbam and its neighbors. The last battle took place in March of 1980.

In September of 1982 the Fundamentalist Party gained control of Icbam. The Fundamentalists ratified the irridentist policy of their predecessors and withdrew Icbam's signature from the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). The other fourteen members of the Conclave, all of whom were parties to the NPT, drafted, adopted and ratified the Treaty of Telleraviv in February of 1983. The treaty remains in force and prohibits the testing, possession or use of nuclear weapons in Eurasia. Icbam ignored the treaty-making process and did not ratify the Treaty of Telleraviv.

Icbam proceeded to construct a nuclear weapons manufacturing plant. The Conclave learned of Icbam's desert-based operation through reports. On September 22, 1984 the Conclave requested that Icbam become a party to the NPT and to the Treaty of Telleraviv. Icbam refused.

The Conclave notified the United Nations Security Council that a serious dispute between Icbam and its fourteen neighbors threatened regional peace and security. The Security Council could not take any remedial action. It became clear that a veto would block any proposal concerning the Eurasian missile crisis. The Security Council tabled the matter indefinitely.

On December 14, 1984, Icbam announced that it would possess combat ready nuclear weapons by December 31st. The Fundamentalist government asserted that it had an unrestricted right to use its weapons in self-defense and to pursue Icbam's "historic patrimony." Icbam also announced that it would boycott any future meetings of the Conclave concerning Icbam's nuclear weapon's capability.

The Conclave met on January 1, 1984. The fourteen states present unanimously decided to authorize Mirva to carry out a surgical air strike against the Icbamese nuclear weapons plant. The strike was swift and successful. Within hours of the attack the Conclave informed the Security Council of Mirva's success. The Conclave explained that Mirva's mission was self-defensive and that its purpose was to maintain regional peace and collective security.

Mirva requests the International Court of Justice to declare its mission legal and to deny Icbam's claim for the stipulated award.

QUESTIONS PRESENTED

I.

WHETHER ICBAM'S FACILITY WAS ILLEGAL.

II.

WHETHER MIRVA'S MISSION WAS A LEGAL USE OF FORCE.

III.

WHETHER MIRVA'S MISSION WAS A JUSTIFIABLE ACT OF SELF-DEFENSE.

IV.

WHETHER THE COURT SHOULD AWARD DAMAGES TO ICBAM.

SUMMARY OF ARGUMENT

I.

Icbam ignored the general custom prohibiting inhumane weapons and tactics when it developed and threatened to use nuclear weapons. Additionally, the Treaty of Telleraviv generated a regional custom that bound Icbam and absolutely prohibited the development of nuclear weapons in Eurasia. The Treaty of Telleraviv is semi-legislative. It established Eurasia as a nuclear free zone even without Icbam's consent. Finally, Icbam abused its right to bear arms. Icbam's nuclear missiles jeopardized the Eurasian's basic human right to life and violated their right to human dignity.

II.

The purpose of Mirva's mission was humanitarian. Enforcement of basic human rights is a central objective of the United Nations (U.N.) Charter. The lawful purpose of the mission justified the slight breach of Icbam's territorial integrity which it entailed. Further, Icbam consented to live by the democratically authorized measures of the Conclave. It cannot now be heard to complain that it dislikes the outcome of the organization's decision making process.

Mirva's mission, because it had the implicit consent of Icbam, did not need the consent of the Security Council. Only enforcement actions under Article 53(1) of the U.N. Charter need the Security Council's authorization. A collective peacekeeping action is not an enforcement action, and does not require the Security Council's authorization to be lawful.

Mirva's mission was legal under the U.N. Charter for the independent reason that a fundamental change in circumstances necessarily permits regional

organizations to perform enforcement actions without the Security Council's authorization. The Security Council lacks the armed contingents and police force that the Charter's founders had envisioned would be at the Security Council's constant disposal. Equally important, the Security Council's permanent members are no longer allies. Their veto power, especially that of the two superpowers, has prevented the Security Council from performing its intended function as peacekeeper. A veto prevented the Security Council from taking any measures concerning the threat to peace in Eurasia. The Conclave had the right and responsibility to maintain regional peace and security. Mirva, as the Conclave's duly authorized agent, acted lawfully.

III.

Customary international law entitles States to take reasonable measures of anticipatory self-defense in response to the threat of armed attack. The United Nations Charter governs and incorporates the customary right of self-defense. Self-defense is not limited to instances of actual armed attack. Further, Article 51 of the Charter includes the inherent right to national and collective self-defense. The Conclave is a valid collective security organization within the terms of the Charter. The Conclave's authorization validated Mirva's strike as both a national and collective measure of self-defense.

The doctrine of anticipatory self-defense requires exhaustion of peaceful procedures of dispute resolution. If these procedures fail, states may respond reasonably and proportionally to imminent threats of armed attack. Icbam's unbridled nuclear arms build-up, coupled with the limited state of war that existed between Icbam and the Conclave, rendered the threat of attack imminent. Mirva exercised a limited surgical strike calculated to avoid

danger and to preserve the status quo ante. The strike was a necessary and proportional response to the anticipated nuclear attack.

IV.

Customary international law renders states liable in damages only for acts which violate international law. Since the Conclave's aerial strike was a legitimate act of self-defense, Icbam is not entitled to receive damages. Furthermore, liability without fault is not a general principle of international law. Therefore, Icbam is not entitled to damages based upon a theory of liability without fault.

I. THE ICBAMESE FACILITY WAS ILLEGAL.

A. The Treaty Of Telleraviv Instantly Generated A Regional Custom Prohibiting Nuclear Weapons In Eurasia That Bound Icbam.

Treaties which inspire nearly uniform practice by most specially interested states generate customary laws that bind non-parties.[1] Provisions in such treaties that are of a norm creating character may establish customary law within an extremely short period of time.[2] In order to avoid the binding effect of an emerging norm, a state must declare its intent not to be bound at the earliest stages of the norm's development.[3]

The probibition against development of nuclear weapons contained in Article II of the Treaty of Telleraviv almost instantly became regional custom.[4] All the Conclave states are at similar levels of military and industrial development and thus share Icbam's special interest in the article's prohibition against nuclear weapons. Icbam acquiesced while the other Conclave members were in the process of drafting, adopting and ratifying the treaty. The virtual uniformity of Eurasian state practice, combined with the tacit consent

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1. North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J.3, 428 (Judgment of 20 Feb. 1969).

2. Id.; see Akehurst, Custom as a Source of International Law, 1974 Brit. Y.B. Int'l L. 53, 15-16; Lee, The Law of the Sea Convention and Third States, 77 Am. J. Int'l. L. 541, 562 (1983); see also Cheng, United Nations Resolutions on Outer Space: "Instant" International Customary Law?, 5 Indian J. Int'l L. 23.

3. See Akehurst, supra note 2, at 24.

4. Treaty of Telleraviv, February, 1983, Conclave member states, 1985 Jessup Competition.

of Icbam, generated an instaneous regional custom.[5] The treaty provision bound Icbam despite Icbam's eventual announcement that it did not feel obliged by the treaty provision.

1. The Treaty of Telleraviv established a binding custom because the treaty is semi-legislative.

A group of states which seek to further regional interests can draft and ratify a treaty which binds a third state even without the non-party's consent.[6] Such multilateral treaties must have a semi-legislative or public law character.[7] Some degree of acceptance by nations of a new arrangement is necessary. However, it is not necessary to have the acceptance of a non-party directly affected by the treaty in order to bind that non-party.[8] Semi-legislative treaties include neutralization and demilitarization zone agreements.[9] Such treaties create geographically defined legal regimes. The nation which is neutralized or has its territorial status in other ways affected, may be bound whether or not it consents to the new arrangement.[10]

The Treaty of Telleraviv is semi-legislative. In furtherance of the public interest, the treaty defines Eurasia as a nuclear free zone. The

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5. See generally Fisheries Jurisdiction (U.K. and N. Ir. v. Ice.), 1973 I.C.J. 3, 26 (Judgment of 2 February).

6. International Status of South-West Africa (South-West Africa), 1950 I.C.J. 128, 153 (Advisory Opinion of 11 July 1950). H. Lauterpacht, The Development of International Law by the International Court, 180-182 (1958); A. McNair, The Law of Treaties 259-71 (1961).

7. A. McNair, supra note 6, at 259-71.

8. Id. at 271.

9. Id. at 259-71.

10. Id.

treaty has widespread acceptance inside the Conclave and there is no evidence of protests from countries outside of Eurasia. The treaty's provisions bind Icbam even without Icbam's consent. Icbam therefore acted illegally when it began developing nuclear weapons on Eurasian soil.

B. Nuclear Weapons Are Illegal Under International Law.

1. Numerous treaties and United Nations General Assembly Resolutions prohibit and condemn nuclear weapons.

Icbam violated international law on December 14 when it threatened to use nuclear missiles in defense of its "historic patrimony." Treaties prohibit nuclear weapons development or use in Antarctica,[11] Latin America,[12] outerspace and on celestial bodies,[13] and deployment on the seabed beyond a nation's territorial sea.[14] In addition, 124 nations are parties to the Treaty on the Non-Proliferation of Nuclear Weapons.[15] Moreover, a stream of United Nations (U.N.) General Assembly Resolutions articulate the international consensus that nuclear weapons are contrary to the principles of the U.N. Charter.[16]

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11. Antarctic Treaty, signed Dec. 1, 1979, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

12. Treaty of Tlatelolco, Feb. 14, 1967, 634 U.N.T.S. 281.

13. Outer Space Treaty, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

14. Seabed Treaty, Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337, 10 I.L.M. 146.

15. 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.

16. See, e.g., Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons, G.A. Res. 1653, 16 U.N. GAOR, Supp. (No. 17) at 34, U.N. Doc. A/5100 (1961); Declaration on the Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons, G.A. Res. 2936, 27 U.N. GAOR Supp. (No. 30) at 5, U.N. Doc. A/8730 (1972).

2. The traditional laws of war render nuclear weapons illegal.

Under the traditional laws of war, a nation has a strictly limited right to injure a belligerent during battle.[17] Nations may not use weapons which cause unnecessary and indiscriminate suffering.[18] Belligerents must strive to leave civilians and neutral states outside the sphere of fire.[19] Several multilateral conventions codify customary norms of war which render nuclear weapons unlawful.[20] The Geneva Gas Protocol of 1925 prohibits bacteriological arms, poisoned gas and "all analogous liquids, materials or devices."[21] Nuclear weapons have radioactive effects that are analogous to the devastating effects of poisoned gas and bacteriological weapons.[22] Poison includes any substance which when introduced to or absorbed by a living organism destroys life or injures health.[23] The fallout from a nuclear assault causes long term genetic and environmental injury.[24] The broad prohibition against

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17. Falk, Meyrowitz, Sanderson, Nuclear Weapons and International Law, 20 Indian J. Int'l L. 541, 558-72 (1980) [hereinafter cited as Falk].

18. Id.

19. Id.

20. See, e.g., Hague Convention (No. V.) Respecting Rights and Duties of Nuetrals in War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540, 205 Parry's T.S. 299; Hague Regulations, Annex to the Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 227, T.S. No. 539, 205 Parry's T.S. 277; The Nuremberg Charter, Aug. 8, 1945, art. 6, para. c, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 284; Protocol I on Humanitarian Law Applicable to Armed Conflict, June 8, 1977, 16 I.L.M. 1391.

21. Geneva Gas Protocol, June 17, 1925, 26 U.S.T. 571, T.I.A.S. 8061, 94 L.N.T.S. 65; see Falk, supra note 17, at 563.

22. Falk, supra note 17, at 563-64.

23. Id. at 561.

24. Id.; Feinrider, International Law as the Law of the Land: Another Constitutional Constraint on the Use of Nuclear Weapons, 7 Nova L. J. 103, 113 (1982); Weston, Nuclear Weapons Versus International Law: A Contextual Reassessment, 28 McGill L. Rev. 542, 559-62 (1983).

germ warfare and analogous tactics thus made Icbam's threat to launch nuclear missiles illegal.

3. The Shimoda court established the illegality of nuclear weapons by applying universal norms.

The Shimoda case[25] demonstrates the relevance of the law of war to nuclear weapons. In August 1955, five Japanese citizens claimed damages from the Japanese government for injuries resulting from the U.S. atomic bombings of Hiroshima and Nagasaki. The court applied the traditional laws of war and compared the lethal qualities of poison gas to the effects of nuclear bombs.[26] The court reasoned that both types of weapons cause unnecessary and extraordinary suffering. The court held that nuclear attacks are illegal under the laws of war.[27]

C. Icbam's Facility Constituted An Abuse Of Its Sovereign Rights And Was Therefore Unlawful.

The doctrine of the abuse of rights is a general principle of law accepted by civilized nations.[28] Abuse of a right occurs when a state

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25. The Shimoda, District Court of Tokyo, (Judgment of 7 December 1963), reprinted in [1964] Jap. Ann. Int'l L. 212 (English Translation).

26. Id. at 241-242.

27. Id.

28. I. Brownlie, Principles of Public International Law 431 (2d ed. 1973); B. Cheng, General Principles of Law 121-3 (1953); International Law Commission Fifth Report on International Responsibility, U.N. Doc. A/CN, 4/125 at 50-54 (1960), reprinted in 5 Whiteman, Digest of International Law 224 (1965); H. Lauterpacht, The Function of Law in the International Community 286 (1933). See also Rogoff, The International Legal Obligations of Signatories to an Unratified Treaty, 32 Me. L. Rev. 263, 295 (1980).

exercises its sovereignty to such an extent that it injures neighboring states.[29] The doctrine's core principle is that sovereign rights are relative and must be balanced against each other when they conflict.[30]

Icbam, in forging the most dangerous weapons known to humanity, abused its sovereign right to bear arms. Icbam's threat to use nuclear weapons in defense of its historic patrimony was a threat against the lives of all Eurasians. The right to life is a fundamental human right that takes precedence over a state's national rights.[31] Icbam held Eurasia hostage with its announcement on December 14th that it would pursue its right to its historic patrimony by both conventional and nuclear means.

II. MIRVA'S MISSION WAS LEGAL.

A. Mirva's Use Of Force Was Lawful Because It Upheld Fundamental Human Rights.

Mirva used force for a humanitarian purpose. Under customary international law, humanitarian intervention is lawful when there is "an immediate and extensive threat to fundamental human rights, particularly a threat of

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29. Lauterpacht, supra note 28, at 286.

30. Id.; see Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, at 149 (Judgment of Dec. 18, 1951); Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1932 P.C.I.J., ser. A/B, No. 46 (Judgment of June 7, 1932).

31. Reisman, Humanitarian Intervention to Protect the Ibos, in Humanitarian Intervention and the United Nations, (R. Lillich, ed. 1973).

widespread loss of human life."[32] The purpose of Mirva's mission was to guarantee the survival of the fifteen Conclave states.

1. Mirva's mission did not violate Article 2(4) of the U.N. Charter because it served the purposes of the Charter.

Article 2(4) of the U.N. Charter prohibits the use of force that violates the territorial integrity or political independence of a nation or which is inconsistent with the purposes of the U.N. Charter.[33] The prohibition against the use of force in Article 2(4) is not a per se prohibition.[34] Article 2(4) prohibits forceful actions that are for unlawful purposes. The first article of the Charter provides that the protection of fundamental human rights is one of the U.N.'s primary purposes.[35] Articles 55 and 56 of the Charter call upon the member states to observe and take joint and separate action to uphold fundamental human rights.[36] An additional purpose of the U.N. is to save states from war through arms regulation.[37] Article 47(1) provides that a Military Staff Committee shall assist the Security Council in "the regulation of armaments

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32. Moore, The Control of Foreign Intervention in Internal Conflicts, 9 Va. J. Int'l L. 205, 264 (1969).

33. U.N. Charter art. 2, para. 4.

34. Reisman, supra note 31, at 177.

35. U.N. Charter art. 1, para. 3.

36. U.N. Charter arts. 55 and 56; see also Universal Declaration of Human Rights, G.A. Res. 271A, U.N. Doc. A/810, at 71 (1948); Feinrider, supra note 24, at 120; H. Lauterpacht, International Law and Human Rights, 178 (1968).

37. See U.N. Charter, arts. 11, 26 and 47; D'Amato, Israel's Air Strike upon the Iraqi Nuclear Reactor, 77 Am. J. Int'l L. 584, 586 (1983).

and possible disarmament."[38] Mirva's mission did not violate Article 2(4) because the air strike furthered these purposes of the U.N.

2. The human dignity and freedom preserved by the strike justified the de minimis violation of Icbam's territorial integrity.

Mirva's strike reinforced the U.N. Charter. Mirva's mission was identical in scope to the forceful rescue of hostages held by a foreign government. The strike upheld the fundamental right to live free of terror.[39] The right to freedom from fear is as fundamental as the right to life itself.[40] The Eurasians' right to human dignity far outweighed in importance the momentary infringement of Icbam's territorial sovereignty.[41]

B. Mirva's Mission Did Not Require Security Council Authorization Because It Was Not An Enforcement Action.

Mirva's mission was a lawful peacekeeping operation within the meaning of article 52(1) of the U.N. Charter. Article 53(1) requires that "enforcement actions" have the authorization of the Security Council.[42] The distinction between enforcement actions under article 53(1) and peacekeeping missions under article 52(1) turns on whether the host state consents to the

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38. U.N. Charter art. 47, para. 1.

39. See Feinrider, supra note 24, at 123-24.

40. Id.

41. Id.; see International Covenant on Civil and Political Rights entered into force March 23, 1976, G.A. Res. 2200, 21 U.N. GAOR Supp. (16) at 52; U.N. Doc. A6316 (1966), International Covenant on Economic, Social and Cultural Rights, entered into force March 23, 1976, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966).

42. U.N. Charter art. 53, para. 1.

collective use of force.[43] Mirva's mission was not an enforcement action because Icbam had assented to the decision making procedures and authority of the Conclave.[44] Article 7(b) of the Conclave's Constitution indicates that armed force is permissible to resolve "an intra-regional conflict." Additionally, Article 5(q) of the Conclave's constitution cites mutual defense and security as a proper function of the Conclave.

The Conclave, then, acted well within its authority when it designated Mirva to destroy Icbam's weapons factory. Icbam had remained a member of the Conclave despite the Conclave's stance that the presence of nuclear weapons in Eurasia was unacceptable. Icbam was bound by the majority's decision to destroy the illegal facility. Mirva's mission, because it had Icbam's implied consent, was legal without the Security Council's authorization.[45]

C. Mirva's Mission Was Lawful Due To The Inability Of The Security Council To Assume Its Primary Responsibility.

1. A fundamental change in international politics made it necessary for the Conclave to act without authorization from the Security Council.

Even if Mirva's strike were an enforcement action under article 53(1), it was neither necessary nor possible to seek the Security Council's authorization. Mirva and the other U.N. members consented to the restrictions on the use of collective force contained in article 53(1). They gave their consent on the assumption that the post-war big power coalition that organized the U.N.

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43. Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), 1962 I.C.J. 151 (Advisory Opinion of 20 July); Akehurst, Enforcement Action by Regional Agencies with Special Reference to the Organization of American States, 1967 Brit. Y.B. Int'l L. 175, 176.

44. See Wright, The Cuban Quarantine, 1963 Proc. Am. Soc. Int'l L. 9, 10.

45. See U.N. Charter art. 52, para. 2.

would endure as the five nations took permanent seats on the Security Council.[46] The Security Council was given the capacity to take immediate and forceful measures against threats to international peace.[47]

A fundamental change of circumstances soon eroded the absolute monopoly over the use of force originally extended to the Security Council. The victorious coalition that organized the U.N. fractured into the bipolar world of the 1950s. The veto power of the permanent members has paralyzed the Security Council.[48] Only during the Korean War was the Security Council able to forcefully confront a transgressing state with a sizeable U.N. force.[49] That single instance of collective enforcement was only possible because the Soviet representative was fortuitously absent when the Security Council voted to authorize the action.[50] Equally important, the Security Council does not have the armed forces and police force that the Charter states is to be at its immediate disposal.[51]

Since the basis for their consent to article 53(1) no longer exists, the Conclave states lawfully relied upon their regional organization to forcefully eliminate the threat to regional peace. The doctrine of fundamental change of circumstances formulated in Article 62 of the Vienna Convention on the Law of

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46. Franck, Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States, 64 Am. J. Int'l L. 809, 810-11 (1970).

47. Id.

48. Id.; Meeker, Defensive Quarantine and the Law, 57 Am. J. Int'l L. 515, 519-20.

49. Franck, supra note 46.

50. Id.

51. Id.; see U.N. Charter art. 47.

Treaties is a basis for invoking suspension of a treaty.[52] Article 62 of the Vienna Convention released the Conclave from the authorization requirement of Article 53(1) of the U.N. Charter. It became clear that a veto would prevent the Security Council from even contemplating any peacekeeping action concerning the Eurasian missile crisis.

2. State practice supports the legality of Mirva's mission.

The United States defended its use of naval force against Cuba in 1962 as a legitimate use of force by the Organization of American States (OAS) under Articles 52(1) and 53(1) of the U.N. Charter.[53] Prior to the Cuban missile crisis the U.S. repeatedly argued before the Security Council that the OAS had a residual right to forcefully resolve hemispheric conflicts at least until the Security Council was able to resume its enforcement responsibilities.[54] Nearly every nation in the world acquiesced when the OAS, again making this assertion, used force against Cuba to settle the missile crisis.[55] The precedential importance of the Cuban missile crisis supports the legality of Mirva's mission.

III. MIRVA'S SURGICAL STRIKE WAS A VALID MEASURE OF SELF-DEFENSE UNDER INTERNATIONAL LAW.

A. Customary International Law Recognizes Mirva's Inherent Right To Self-Defense.

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52. Vienna Convention on the Law of Treaties, art. 62, opened for signature May 23, 1969, U.N. Doc. A/CONF. 39/27 (1980).

53. Meeker, supra note 48.

54. A. Chayes, The Cuban Missile Crisis, 57-59 (1974).

55. L. Henkin, How Nations Behave 296 (1974).

Customary international law upholds the right of nations to protect themselves from armed attack and imminent threats of attack.[56] A state may take reasonable measures of anticipatory self-defense when it reasonably apprehends a threat of imminent armed attack.[57]

The Caroline incident demonstrates the principle of anticipatory self-defense. In 1837 the United States employed the steamer Caroline to assist Canadian rebels on Navy Island in Canada. Great Britain, as the sovereign, demanded that the United States stop the military assistance. The United States nevertheless persisted, and the Caroline remained a threat to Canada. Responding to the threat, Britain authorized troops to cross into United States territory. In the ensuing conflict, at least two United States nationals were killed and the Caroline was wrecked on the Niagara Falls. Great Britain claimed its actions were reasonable and justified anticipatory self-defense. The lack of legal claims by the United States was interpreted as acquiescence in the legality of the action.[58]

B. The Charter Of The United Nations Incorporates In Full The Customary Right Of Self-Defense.

1. Article 51 embraces the customary right of anticipatory self-defense.

Article 51 states in part: "Nothing in the present Charter shall impair the customary right of self-defense if an armed attack occurs...." The plain

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56. D. Bowett, Self-Defense in International Law 58 (1958); I. Brownlie, Principles of Public International Law 255 (2d. ed. 1973); J. Stone, Aggression and World Order 41-44 (1958)

57. The Caroline, 2 Moore, Digest of Int'l Law 409, 412 (1906).

58. L. Goodrich, E. Hambro, A. Simons, Charter of The United Nations 342-44 (3d. ed. 1969); Mallison and Mallison, The Israeli Attack Of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense? 15 Vanderbilt J. Transnat'l L. 417, 422 (1982).

meaning of these words indicates full retention of customary self-defense. The framers of the Charter did not limit self-defense to instances of actual armed attack by inserting the words "only if" armed attack occurs.[59] Rather, they clearly stated that "the use of arms in legitimate self-defense remains admitted and unimpaired."[60] Subsequent state practice further demonstrates retention of anticipatory self-defense. President Kennedy, for instance, stated during the Cuban missile crisis, "Our unswerving objective must be to prevent the use of missiles against this or any other country."[61] (emphasis added.)

2. Article 51 retains the customary right to collective self-defense.

In addition to national self-defense, Article 51 includes the inherent right to collective self-defense.[62] Collective self-defense entitles one state to aid another state which is the victim of armed aggression.[63] Article 51 also entitles states to exercise collectively their individual

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59. M. McDougal and F. Feliciano, Law and Minimum World Public Order 235-237, n.71 (1961). See, Mallison and Mallison, supra note 58.

60. Report of the Rapporteur of Committee 1 to Commission I, 6 U.N.C.I.O. Docs. 446, 459; Report of the Rapporteur of Commission I to the Plenary Session, 6 U.N.C.I.O. Docs. 202, 204.

61. Kennedy, The Soviety Threat to the Americas 47 Dep't St. Bull. 715-720 (1962). See generally Hearings Before the Senate Committee on Foreign Relations on the North Atlantic Treaty, 81st Cong., 1st Sess., exec. L. pt. 1 (1949) [hereinafter, NATO Hearings].

62. Goodrich, Hambro & Simons, supra note 3, at 349-53; McDougal and Feliciano, supra note 59 at 244.

63. E.g., Mutual Defense Assistance Agreement, July 23, 1952, United States-Israel, 3 U.S.T. 4985 T.I.A.S. No. 2675; Mutual Defense Treaty, Oct. 1, 1953, United States-Korea, 5 U.S.T. 2368, T.I.A.S. No 3037.

rights through regional security organizations such as the Conclave.[64] The drafters intended to accommodate regional organizations within a centralized global security system.[65] Article 51, therefore, preserves the functioning of regional organizations in the event of the Security Council's veto.[66]

3. Mirva was properly authorized to exercise the Conclave's right of collective self-defense.

a. The Conclave of Eurasian Unity is a legitimate collective security organization under the Charter of the United Nations.

The legal validity of a regional security system depends upon the consistency of its charter with the Charter of the United Nations.[67] The Conclave of Eurasian Unity is a valid collective security arrangement. The Constitution of the Conclave represents common interests of its members in several fields including self-defense. While Article 2 makes the Conclave a "regional organization" under Chapter VIII of the U.N. Charter, it expressly adopts the inherent right to collective self-defense consistently with Article 51.[68] Articles 3 and 6 of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) similarly adopt Article 51 as the expression of inherent self-defense for the regional Organization of American States.[69]

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64. E.g., Inter-American Treaty of Reciprocal Assistance (Rio Treaty), Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838, 21 U.N.T.S. 147.

65. Act of Chapultec, Mar. 3, 1945, 60 Stat. 1831, T.I.A.S. No. 1543; see generally NATO Hearings, supra note 61.

66. See Mallison and Mallison, supra note 58, at 372.

67. Goodrich, Hambro and Simons, supra note 58 at 351-52; Mallison, Limited Naval Blockade or Quarantine Interdiction National and Collective Self-Defense Claims Valid Under International Law 31 Geo. Wash. L. Rev. 335-372 (1962-63); McDevitt, The U.N. Charter and the Cuban Quarantine, 17 JAG J. 71, 75, 77 (1963).

68. Constitution of the Conclave, Articles 4(a),(b), and 7.

69. See Rio Treaty, supra note 64; but see Chayes, The Legal Case for U.S. Action on Cuba, 47 Dept. State Bull. 763 (Nov. 19, 1962).

b. The Conclave properly authorized Mirva to act on behalf of its member states.

Mirva has renounced all claim to nuclear weapons through the NPT.[70] As a non-nuclear state, Mirva and all other Eurasian states are similarly threatened by Icbam's unbridled nuclear proliferation. The non-nuclear states, recognizing that it is no longer feasible to act alone in a nuclear age, vested their individual claims to self-defense in the Conclave. Through the Treaty of Telleraviv and the Charter of the Conclave the Eurasian states assumed multilateral responsibility for the security of the Nuclear Free Zone.[71] At the meeting of January 1, 1984, the community democratically and unambiguously authorized the Mirvan air strike.[72] It thereby collectively legitimized the Mirvan strike as a valid measure of self-defense.[73]

c. The Conclave reported the air strike in accordance with Article 51 procedures.

While Article 51 entitles States to make an initial determination of the necessity of self-defense, any measures taken must be immediately reported to

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70. Treaty On the Nonproliferation of Nuclear Weapons, supra note 15; Treaty of Telleraviv, February 1983, 1985 Jessup Competition.

71. Mallison, supra note 67 at 367, citing L. Oppenheim, International Law 317-18 (8th ed. H. Lauterpacht 1955).

72. See, e.g., Kunz, Individual and Collective Self-Defense Under Article 51 of the Charter of the United Nations, 41 Am. J. Int'l L. 872, 878 (1947), Note, National Self-Defense in International Law: An Emerging Standard for A Nuclear Age, 59 N.Y.U. L. Rev. 187, 210-212 (1984).

73. Mallison, supra note 67, at 379-380.

the Security Council. The Conclave fully complied with the Charter by immediately reporting the attack to the Security Council via the Secretary General.[74]

C. The The Conclave Fully Satisfied The Requirements Of Anticipatory Self Defense.

A state exercising anticipatory self-defense must first exhaust peaceful procedures of dispute resolution. If peaceful procedures fail, a state must respond proportionally to the perceived threat.

1. The Conclave exhausted peaceful procedures of dispute resolution.

Customary international law requires states to exhaust peaceful procedures before resorting to measures of force in self defense.[75] The Conclave has thoroughly exhausted all avenues of peaceful dispute settlement. Through diplomatic channels, the Conclave requested Icbam to dismantle its nuclear weapons facility. The Conclave unsuccessfully invited Icbam to become a member of the NPT and the Treaty of Telleraviv. The possibility of economic or other peaceful measures was outruled by the imminence of the plant's operation. The absence of any other peaceful procedures entitled the Conclave to resort to a forceful but limited measure of self-defense.[76]

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74. U.N. Charter, art. 51; see also L. Gordenker, The U.N. Secretary General and the Maintenance of Peace 104 (1967).

75. 2 Moore, Digest of Int'l Law 412 (1906); see also U.N. Charter art. 2, para. 3, and art. 33.

76. See, e.g., Report by the Secretary-General on the Question of Defining Aggression, Oct. 3, 1952, 7 U.N.G.A.O.R. Annex (Agenda Item 54) 17, 74 U.N. Doc. A/221 (1953); Charter of Economic Rights and Duties of States, Dec. 12, 1974, U.N.G.A. Res. 3281 (XXIX), 29 U.N.G.A.O.R. Supp. (No. 31) 50, U.N. Doc. A/9631 (1975). See also Lillich, Economic Coercion and the International Legal Order, 51 Int'l Affairs 358, 363 (1975).

2. The limited surgical strike was a necessary response to an imminent threat of nuclear attack.

a. The Conclave's perception of necessity of self-defense conformed to customary and contemporary requirements.

Customary requirements of necessity include conditions of imminent danger or a threat of substantial deprivation of human rights in order to resort to self-defense.[77] Contemporary scholars similarly conclude that conditions of necessity require the State's perception of a threat of attack of such a high degree that it precludes a non-violent response.[78] Thus, States have never been required to await actual armed attack to fulfill the requirement of necessity.

Israel's preemptive attack on Egypt during the Six Day War is recognized as a valid measure of anticipatory self-defense.[79] Egypt's publicly expressed goal to occupy Israel's territory and its mobilization on the Israeli borders constituted only preparations for attack. However, in light of the "limited state of war" which had embroiled the region throughout the decade, most publicists considered the preparations equivalent to an armed attack.[80]

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77. 2 Moore, Digest of Int'l Law 412 (1906); Lillich, Forcible Self-Help by States to Protect Human Rights, 53 Iowa L. Rev. 325, 347-51 (1967); von Glann, Law Among Nations, 131-32 (1981).

78. P. Jessup, A Modern Law of Nations, 165 (1948); McDougal and Feliciano, supra note 4 at 237; J. Brierly, Law of Nations 320 (6th ed. H. Waldock); accord, Correspondence of Secretary of State Webster to Ambassador Fox (note of April 24, 1841) reprinted in British and Foreign State Papers, 1129, 1138 (1840-41).

79. Note, supra note 72, at 221.

80. Wright, The Legal Aspects of the Middle Eastern Situation, 33 Law and Contemp. Probs. 5 (1968); see generally Jessup, Should International Law Recognize an Intermediate Status Between Peace and War? 48 Am. J. Int'l L. 98, 103 (1953).

b. Icbam's preparation for nuclear war compounded the imminence of the threat of attack.

Icbam's preparations for nuclear warfare far exceed the imminence of the threat of conventional armed attack.[81] Icbam's geographic proximity to the Conclave would facilitate instantaneous delivery of a nuclear warhead once the plant became operational.[82] The Conclave could not be required to permit the destruction of its own military capacity before it could act legally.[83] The moment of imminence, then, occurred upon verification of the military purpose of the nuclear facility.

Even if armed attack is a requirement, publicists interpret preparations for nuclear war constructively as armed attack. Professor Jessup states "that armed attack is now something entirely different from what it was prior to the discovery of atomic weapons.... [it is] not simply the dropping of an atomic bomb, but also certain steps in themselves preliminary to such action."[84]

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81. McDougal and Feliciano, supra note 59, at 600-601.

82. See The Nature of Radioactive Fallout and Its Effects on Man: Hearings Before the Special Subcommittee on Radiation of the U.S. Cong. Joint Comm. on Atomic Energy, 85th Cong., 1st Sess. (1957); Moore, Lessons for the Future, 63 Freedom at Issue 6, 7 (1981).

83. Waldock, The Regulation of the Use of Force by Individual States in International Law, 81 Hague Receuil Des Cours, 455, 498 (1952) quoted in 5 M. Whiteman, Digest of International Law 986 (1965).

84. P. Jessup, A Modern Law of Nations, supra note 78 at 166-67 (1948).

Publicists interpret the Cuban missile crisis as a legal exercise of anticipatory self-defense.[85] President Kennedy maintained that the mere presence of nuclear missiles so near United States territory constituted an immediate threat. The discovery of the offensive nature of the weapons triggered the necessity of the United States' exercise of national and collective measures of self-defense.[86]

c. Icbam's declaration of defensive use of its nuclear weapons is illusory.

Icbam's unilateral declaration of defensive intentions is highly suspect. International law requires Icbam to limit its self-defense measures to aggressor states.[87] Since most uses of nuclear weapons are likely to have an indiscriminate impact on states not parties to the conflict, Icbam could not possibly abide by its unilateral declaration.[88]

Icbam's status as a belligerent in a "limited state of war"[89] further clarifies its irridentist objectives. Icbam initiated a war of aggression[90] in the 1970s in pursuit of its irridentism. There has been no formal cease fire. Icbam has retreated only long enough to compound its irridentism through nuclear proliferation. The fundamentalists declaration to "take

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85. McDougal, Some Comments on the Quarantine of Cuba, 57 Am. J. Int'l L. 592-604 (1963); Meeker, supra note 48, at 524.

86. See Kennedy, 47 Dept. State Bull., supra note 61 at 715-16.

87. See, e.g., supra note 20; Weston, supra note 24 at 554-61.

88. Nuclear Tests (Austl. v. Fr.) 1974 I.C.J. 273.

89. See supra note 80.

90. Resolution on the Definition of Aggression, Dec. 14, 1974, U.N.G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. (No. 31) 142, U.N. Doc. A/9631 (1975) draft articles reprinted in 13 I.L.M. 710 (1974), 69 Am. J. Int'l L. 480 (1975).

whatever action is necessary" to preserve its historic patrimony clarified Icbam's coercive intentions. Thus, Icbam's perception of the imminence of the threat was entirely justified.

3. The Conclave's aerial strike was proportional to Icbam's imminent threat of attack.

"Proportionality" requires that the means used to limit the initiating coercion must be limited in intensity and magnitude to that which is necessary to eliminate the potential danger.[91] Mirva's employment of a conventional air strike was certainly a proportional response to an imminent threat of nuclear attack. Very little other than Mirvan air forces stood between the nuclear claims of Icbam and a successful invasion of Mirva. Icbam's sources of intelligence indicated that the safest time of attack was Sunday, New Years Day, when few if any employees would be at the plant. In addition, the facility's location in the Sorgred Desert ensured that the air strikes would not involve damage to civilian population centers.[92]

4. In total context, Mirva's surgical strike was a reasonable measure of self-defense.

The legitimate objectives of self-defense include the conservation of important values by compelling an opposing state to cease coercive

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91. D. Bowett, supra note 56, at 53; 1 L. Oppenheim, International Law 303 (H. Lauterpacht 8th ed. 1955); McDougal and Feliciano, supra note 59 at 242.

92. See H. Lauterpacht, The Revision of the Law of War, 29 Brit. Y.B. of Int'l L. 368 (1952); Weston, supra note 24.

actions.[93] The Conclave sought only to preserve the status quo ante and the very survival of its members as world participants. By comparison, Icbam's goal of obtaining a nuclear weapons capability radically altered the fragile military balance of the Eurasian region. As such, the surgical strike was a legitimate and reasonable measure of anticipatory self-defense.

Finally, the General Assembly's denunciation of Israel's attack on Iraq's nuclear research reactor in 1981 has no application to the present dispute.[94] Iraq was a party to the NPT and possessed only a nuclear research facility. Israel refused to sign the NPT and failed to pursue diplomatic peace efforts. Further, Israel acted on an unverified suspicion that Iraq was planning to convert its facility to a nuclear weapons plant. In stark contrast, the Mirvan surgical strike was a limited and necessary community response to Icbam's verified nuclear weapons arsenal.

D. Mirva's Strike Was Legitimate Because It Occurred During An Intermediate State Between War And Peace.

Mirva's strike was legal even if the U.N. Charter does not incorporate the doctrine of anticipatory self-defense. State practice has established a state of intermediacy between war and peace.[95] This condition of intermediacy grants to nations greater freedom of action than they have during

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93. McDougal and Feliciano, supra note 59 at 222; see Bowett, Reprisals Involving Recourse to Armed Force, 66 Am. J. Int'l L. 3 (1972); D'Amato, Israel's Air Strike Upon the Iraqu Nuclear Reactor, 77 Am. J. Int'l L. 584 (1983); Rohlik, Some Remarks on Self-Defense and Intervention, 6 Ga. J. Int'l & Comp. L. 395 (1976).

94. 36 U.N. SCOR (2288th mtg.) 10 U.N. Doc. S/Res/487 (1981); see generally Mallison and Mallison, supra note 58; Note, Tension Between International Law and Strategic Security: Implications of Israel's Raid on Iraq's Nuclear Reactor, 24 Va. J. Int'l L. 459 (1984).

95. P. Jessup, supra note 78.

total war. In this gray area between war and peace states legally can use some military power to supplement peaceful forms of pressure.[96]

A hostile set of conditions prevailed in Eurasia that met the conventional criteria for the existence of a state of intermediacy. Icbam's territorial disputes with its neighbors are deeply-rooted and have proven irreconcilable. Armed confrontations took place as recently as 1980.

Mirva's strike was permissible. It was limited in nature. It did not form part of a campaign of total aggression. It therefore was a legal supplement to the political pressure the Conclave was placing upon Icbam to dismantle its facility in the interests of creating a nuclear free zone.

IV. MIRVA IS NOT LIABLE IN DAMAGES TO ICBAM.

A. Customary International Law Renders States Liable In Damages Only For Their Illegal Acts.

The International Court of Justice (I.C.J.) may impose damages only for actions which violate international law.[97] According to the traditional doctrine of state responsibility, whoever infringes on the rights of another person is liable for the damage resulting from the illegal act.[98] The Conclave's surgical strike was a legitimate act of self-defense. Therefore, the Conclave is not liable for the damage resulting from the necessary and legal act.

The I.C.J. articulated the essential relation between fault and liability in the Corfu Channel Case. The I.C.J. found that Albania had

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96. See generally S. Malawer, Studies in International Law, 192-94 (1977); Wright, supra, note 80.

97. Corfu Channel (U.K. v. Alb.) 1949 I.C.J. 4.

98. C. Jencks, The Prospects of International Adjudication 543-4 (1964); D. O'Connell, International Law 1115 (2d ed. 1970).

violated Britain's "innocent right of passage." The Court found that Albania had prior knowledge of mines in its territorial waters which damaged British ships. Albania's knowledge of the mines in its territorial waters rendered it liable for "acts contrary to the rights of other states" arising therein. The liability imposed on Albania arose only from a specific violation of the norms of international law.[99]

B. Liability Without Fault Should Not Be Imposed On Mirva.

1. The concept of liability without fault is not an established principle of international law.

In response to modern technology and the danger created by the installation or use of ultrahazardous materials, the municipal law of a few states acknowledges a theory of liability without fault.[100] However, the principle is neither a custom nor a general principle of international law under the Statute of the I.C.J.[101] The only examples of its development in international law are specific treaties and settlements in which compensation was tendered to innocents harmed by ultrahazardous activities.[102] Since liability without fault "only results from conventional law, has no basis in customary law or general principles and, since it deals with exceptions rather

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99. Corfu Channel, 1949 I.C.J. 4.

100. R. Falk, The Role of Domestic Courts in the International Legal Order 170-176 (1964); Goldie, Liability for Damage and the Progressive Development of International Law, 14 Int'l & Comp. L. Q. 1189, 1220-1224 (1965).

101. I.C.J. Statute art. 38, 59 Stat. 1053, T.S. 933.

102. See, e.g., Fukuyu Maru Accident, 30 Dept. St. Bull. 152 (1983); Trail Smelter Arbitration (U.S. v. Can.) 3 R. Int'l Arb. Awards 1905 (1941); International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Brussels, Nov. 29, 1969) reprinted in 9 I.L.M. 45 (1970).

than general rules, [it] cannot be extended to fields not covered by specific instruments."[103]

Notably, such an exception has never been extended to military acts of self-defense. Self-defense is by nature an equitable defense which precludes liability.[104] Mirva has followed the primary rules of legality by resorting to the most conservative use of force in response to Icbam's nuclear aggression.[105] Imposition of liability would both emasculate Mirva's right to self-defense and encourage Icbam's nuclear proliferation. In any event, Icbam, as a belligerent in a limited state of war, cannot establish its threshold innocence as required by the doctrine.[106] Therefore, Mirva is not liable in damages to Icbam.

V. CONCLUSION

In accordance with the authorities and arguments herein presented, the Government of Mirva respectfully requests this Honorable Court to declare that the Government of Icbam's nuclear weapons facility was illegal under customary international law and that Mirva's use of force to eliminate the facility was

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103. Jimenez de Arechaga, International Law in the Past Third of a Century, 159 Recueil Des Cours, 271 (1978) quoted in Partsch, Remnants of War as a Legal Problem in Light of the Libyan Case 78 Am. J. Int'l L. 395-96 (1984).

104. See generally C. Eagleton, Responsibility of States in International Law 80 (1928).

105. See International Law Commission Fifth Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, U.N. Doc. A/CN/4/383 (1984).

106. See Argument, supra pts. III(C)2(C), and (D); see also McDougal and Schlei, The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security, 64 Yale L. J. 649-55, reprinted in M. McDougal & Associates, Studies in World Public Order 763 (1960).

lawful and in self-defense. The Government of Mirva finally asks the Court to deny damages to the Government of Icbam.

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