

IN THE  
INTERNATIONAL COURT OF JUSTICE  
AT THE  
PEACE PALACE, THE HAGUE, NETHERLANDS

April Term 1985

ICBAM

Applicant

v.

MIRVA

Respondent

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MEMORIAL FOR THE RESPONDENT

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4

ANJALI IYER  
LIM KIEN THYE  
MOHAN REVIENDRAN  
PRITHIPAL SINGH  
ELEANOR WONG



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## **JURISDICTION**

The Governments of Mirva and Icbam have submitted the following dispute for resolution by the International Court of Justice pursuant to paragraph 1 of Article 36 of the Statute of the International Court of Justice and Article 16 of the Constitution of the Conclave of Eurasian Unity. The parties have not qualified the jurisdiction or competence of this Court.

**SUMMARY OF FACTS**

Icbam and Mirva are members of the Conclave of Eurasian Unity. For over a decade, the Conclave has comprised all fifteen nations of Eurasia. All members of the Conclave share proximate economic, political, cultural and geographical links.

**(a) Past Hostilities**

The peace of the region was disrupted during the latter half of the 1970s when Icbam's pursuit of irredentist claims led to a series of armed border conflicts with several nations some of whom were members of the Conclave. The fighting was at times intense and the conflicts stopped just short of full scale war. Although there has been no major outbreak of hostilities since 1980, the new Icbamese Government has endorsed previous irredentist claims.

**(b) The Treaty on the Non-Proliferation of Nuclear Weapons**

In 1968, all fifteen members of the Conclave, including Icbam, signed the Treaty on the Non-Proliferation of Nuclear Weapons. All the members of the Conclave, with the exception of Icbam, have also ratified the Non-Proliferation Treaty.

Fourteen years after signing it, Icbam withdrew its signature from the Non-Proliferation Treaty, expressly declaring an intention not to ratify it.

**(c) The Treaty of Telleraviv**

In February 1983, the Treaty of Telleraviv, drafted under the auspices of the Conclave, came into force. This treaty declared the Eurasian region to be a Nuclear Free Zone within the meaning of

Article VII of the Non-Proliferation Treaty. All members of the Conclave, again with the exception of Icbam, adopted and ratified the treaty.

**(d) The Nuclear Weapons Plant**

In March 1983, the Conclave began receiving reliable reports that Icbam, which previously possessed no nuclear weapons capability, was constructing a plant for the manufacture of nuclear weapons. Assistance was being received from various unofficial foreign sources acting as independent contractors. It also became known that Icbam was negotiating with state and non-state sources for the purchase of uranium and plutonium. The other members of the Conclave however, do not possess and have bound themselves under the NPT not to acquire such weapons in the future.

**(e) The Conclave Resolutions**

On 22 September 1983, the Conclave passed a resolution calling upon Icbam to dismantle the nuclear project and become a party to both the Non-Proliferation Treaty and the Treaty of Telleraviv.

The Conclave also resolved to inform the United Nations Security Council of the existence of a dispute between Icbam and the other members of the Conclave which was likely to endanger the maintenance of international peace and security.

**(f) Failure of the United Nations to Act**

On 29 September 1983, after several days' debate, the Security Council postponed indefinitely discussion of the matter when it became apparent that any action would be blocked by a veto. The General Assembly did not take any action in respect of the dispute.

**(g) Icbam's Formal Reply**

On 14 December 1983, Icbam in its formal reply to the Conclave resolution confirmed that it was in fact developing and expected to have nuclear weapons capability by the end of 1983. Although the reply stated that the weapons would be used only for defensive purposes, it also categorically warned that Icbam would take whatever action necessary to defend its historic patrimony, asserting that this was a matter within its domestic jurisdiction.

**(h) Icbam's boycott**

On 21 December 1983, the Conclave again attempted without success to persuade Icbam to reconsider its position on nuclear weapons. In response Icbam stated that it would boycott any further meetings of the Conclave that dealt with the matter of Icbam's nuclear weapons.

**(i) The Surgical Air Strike**

The members of the Conclave, pursuant to their obligations under Article 7(a) of the Constitution of the Conclave, met on 1 January 1984, to consider measures for the restoration of peace and security in Eurasia. Icbam did not attend this meeting.

At the meeting, it was unanimously resolved that Mirva would execute a surgical air strike on the Icbamese nuclear weapons plant. Immediate action was felt to be necessary because of the imminence of the plant becoming operational. Once that happened, the Conclave concluded, any attack on the plant would be extremely dangerous due to the greatly increased chances of nuclear fallout.

The air strike itself was executed with the greatest care. The date, New Year's Day, was selected for the strike because it was a

public holiday and therefore few if any persons would be present on the site. Consequently, the risk of injury to persons would be kept to a minimum. This proved to be entirely accurate.

Mirva was designated to carry out the air strike because of its demonstrated ability to handle a military action with technological sophistication and minimal injury to persons. Also, only precision-guided conventional weapons were used, removing no more than the actual threat i.e. the nuclear weapons plant itself.

**(j) Security Council Authorization**

That very same morning the Conclève informed the Secretary General of the United Nations of the surgical air strike. No organ of the United Nations has at any time registered disapproval of the action.

**(k) Submission to the International Court of Justice**

Both parties are members of the United Nations and on 4 September 1984 both agreed to submit this dispute to the International Court of Justice. There are no reservations to the jurisdiction of the Court.

**QUESTIONS PRESENTED**

1. Whether Mirva's actions were in violation of Article 2(4) of the Charter of the United Nations.
2. Whether Mirva was entitled, under the United Nations Charter, to invoke the right of self-defence.
3. Whether Mirva's actions amounted to regional action consistent with both the United Nations Charter and the Constitution of the Conclave.
4. Whether Mirva was entitled to invoke measures of self-help to redress Icbam's violation of international law.

**SUMMARY OF ARGUMENTS**

The maintenance of international peace and security requires that states should refrain from acts which threaten the security and existence of neighbouring states. Icbam has committed acts that have blatantly violated this norm.

Mirva was compelled to act in response to Icbam's violation of international law. In so doing, Mirva has at all times acted in a manner consistent with international law.

The surgical air strike against the Icbamese nuclear weapons facility was in accordance with the terms of Article 2(4) of the Charter of the United Nations. The action was not directed against the territorial integrity or political independence of Icbam, there being no intention to either acquire Icbamese territory or diminish the governmental authority of Icbam in relation to other governments. Furthermore the removal of what constituted both a threat to the survival of mankind and a violation of the fundamental concept of the rights to life and international peace, is clearly consistent with the purposes of the Charter.

In any case, it is clear that Article 2(4) does not restrict the use of force in the exercise of the right of self-defence. The right of self-defence includes anticipatory self-defence. The existence of such a right of anticipatory self-defence in international law is evidenced by state practice and judicial decisions, and is supported by policy considerations. Mirva's actions, taken in the face of the imminent danger posed by Icbam's nuclear weapons' facility, constituted anticipatory self-defence.

The aerial strike also amounted to regional action consistent with the provisions of both the Charter and the Constitution of the Conclave of Eurasian Unity. It did not amount to regional enforcement action as the strike was no more than a peace keeping action undertaken to restore the peace and security of the Eurasian region. Even if the surgical strike amounted to enforcement action, the lack of disapproval by the Security Council after the United Nations had been informed of the action constituted the necessary authorisation.

The Conclave of Eurasian Unity was also acting within its powers as set out in the Constitution of the Conclave. The possession of nuclear weapons by a state whose present government has endorsed irredentist claims which in the past has led to the use of armed force, in a region where no other state possesses similar armaments clearly endangers the peace of the region. The Conclave Constitution allows the use of armed force under these circumstances.

Not only was Icbam's development of the nuclear weapons facility a threat and danger to the peace of the region, it was a violation of international law. The manufacture and possession of nuclear weapons violates both the laws of war and fundamental principles of human rights. Proliferation of nuclear weapons violates rules of customary international law applicable in general and in particular to Eurasia. Such proliferation also offends against *jus cogens*.

In the face of what amounted to an imminent threat to the region's peace, Mirva, was compelled to resort to self-help. All peaceful means of settling the conflict had failed. Even in so doing, the actions taken were no more than the absolute minimum necessary to remove the threat to peace in Eurasia.

## ARGUMENTS AND AUTHORITIES

### I. MIRVA'S AIRSTRIKE ON THE ICBAMESE NUCLEAR WEAPONS FACILITY WAS NOT IN VIOLATION OF ARTICLE 2(4) OF THE UNITED NATIONS CHARTER<sup>1</sup>

Article 2(4) does not forbid "the threat or use of force" *simpliciter*. It prohibits it only when directed: (a) against the territorial integrity of any state; (b) against the political independence of any state; and (c) in any other manner inconsistent with the purposes of the United Nations. Use of force which is not prohibited by the express words of Article 2(4) is not a violation of the Charter. This is the accepted reading<sup>2</sup> of Article 2(4) and is entirely consistent with its plain meaning.

A threat or use of force is not directed "against the territorial integrity" of a state unless its purpose is acquisition of the territory belonging to that state.<sup>3</sup> In this case a use of the territory - namely, to construct a nuclear reactor - was interfered with, but the territory itself remained integral.<sup>4</sup>

Secondly, the political independence of a state is violated only if a state is coerced, through a threat or use of force, into taking action it would not otherwise have taken.<sup>5</sup> The attack on the Icbamese nuclear reactor in no way diminished the governmental authority of Icbam in relation to other sovereign governments.

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1. 59 Stat. 1031 (1945) T.S. No. 993 (hereinafter "the Charter").
  2. J. STONE, *AGGRESSION AND WORLD ORDER* 94 - 103 (1954); P. C. JESSUP, *A MODERN LAW OF NATIONS* 162 - 163 (3rd ed. 1953); D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 584 (1983); Meeker, *Defensive Quarantine and The Law*, 57 AM. J. INT'L L. 515, 523 (1963).
  3. See D'Amato, *supra* note 2, at 585.
  4. *Id.*
  5. L. GOODRICH, E. HAMBRO & A. SIMONS, *CHARTER OF THE UNITED NATIONS* 51 (3rd ed. 1969) (hereinafter "GOODRICH").

Thirdly, Mirva's airstrike on the nuclear weapons facility was for the purpose of maintaining regional peace and security and was consistent with the purposes of the Charter.<sup>6</sup> Icbam introduced the nuclear reactor into Eurasia for the express purpose of manufacturing nuclear weapons. No other state in the region possesses such capability and all have also bound themselves<sup>7</sup> to refrain from acquiring any nuclear weapons in the future. In light of the new Icbamese government's endorsement of Icbam's irredentist policies, an operational nuclear weapons facility would threaten the peace of the region.

Furthermore, Mirva's strike was aimed at promoting respect for human rights and, to that end, it was consistent with Article 1(1). The rights to life and international peace are basic principles of human rights and nuclear weapons, which possess such vast destructive powers, constitute a threat to mankind and violate these fundamental norms.<sup>8</sup> As such, Mirva's action was entirely consistent with the purposes of the Charter.

## II. MIRVA'S ACTION WAS A LEGITIMATE EXERCISE OF THE RIGHT OF SELF-DEFENCE

### A. Article 2(4) does not restrict the inherent right of self-defence recognized by Article 51 of the United Nations Charter.

Notwithstanding the prohibition of the use of force under Article 2(4), "the use of arms in legitimate self-defence remains admitted and unimpaired."<sup>9</sup>

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6. See Art. 1(1).

7. 1968 Treaty on the Non-Proliferation of Nuclear Weapons, 729 U.N.T.S. 161.

8. See text accompanying notes 58-67 *infra*.

9. Report of Rapporteur of Committee I to Commission I, VI UNCIO at 459 (1945).

**B. Self-defence includes the right of anticipatory self-defence**

The inherent right to self-defence under international law included not only defensive action in response to an actual attack but also pre-emptive action against imminent threats.<sup>10</sup> By providing that "nothing shall impair" this inherent right, Article 51 clearly preserves the right of anticipatory self-defence recognized by prior international law.<sup>11</sup> The Charter incorporates pre-Charter international law except where that law afforded rights inconsistent with the responsibilities assumed under the Charter.<sup>12</sup> The plain and natural meaning of Article 51 does not restrict the customary right of self-defence. To interpret it otherwise would be to substitute for the words "if an armed attack occurs," the very different words "if and only if, an armed attack occurs."<sup>13</sup> Since the Charter does not make illegal the defensive use of force in anticipation of an imminent attack, a presumption arises that pre-Charter law remains and that pre-emptive attacks are permitted.

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10. See M. MCDUGAL & F. FELICIANO, *LAW & MINIMUM WORLD PUBLIC ORDER* 232-41 (1961); Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *RECUEIL DES COURS* 455 at 498 (1952); D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 184-93 (1958); J.L. BRIERLY, *THE LAW OF NATIONS* 414-32 (1963); R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 200 (1963); GOODRICH, *supra* note 5, at 344; MacChesney, *Some Comments on the Quarantine of Cuba*, 57 *AM. J. INT'L L.* 592, 595 (1963); JESSUP, *supra* note 2, at 71; McDougal, *The Soviet-Cuban Quarantine & Self Defence*, 57 *AM. J. INT'L L.* 597 (1963).

11. BOWETT, *supra* note 10, at 191; Waldock, *supra* note 10, at 498; McDougal, *supra* note 10, at 598; Higgins, *supra* note 10, at 203; MacChesney, *supra* note 10, at 595.

12. See BOWETT, *supra* note 10, at 184-5.

13. McDougal, *supra* note 10, at 600.

Secondly, had the intention been to extinguish the right of anticipatory self-defence clear language appropriate for that purpose would have been used. The relevant prohibitory language is contained in Article 2(4) and not Article 51. Article 2(4) prohibits, *inter alia*, the use of force against the territorial integrity or political independence of another state but does not prohibit such use in defence of a nation's own territory and independence. Hence, nothing in the Charter prohibits the defensive use of force in anticipation of imminent attack.<sup>14</sup>

Thirdly, Article 2(4) commits members to refrain from the threat or use of force against any other state. It is submitted "that a conception of impermissible coercion, which includes threats of force, should be counted with an equally comprehensive and adequate conception of permissible or defensive coercion honouring appropriate response to threats of imminent attack."<sup>15</sup>

Fourthly, the French version of Article 51 uses the phrase "aggression armée" - armed aggression - instead of armed attack. Leeway to respond to armed aggression must include the capacity to respond to threats, since aggression can exist separate from and prior to an actual attack.<sup>16</sup> Such a reading is entirely consistent with the *travaux préparatoires*, which suggest that Article 51 should only safeguard the right of self-defence and not restrict it.<sup>17</sup>

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14. Polebaum, *National Self-Defence in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 202 (1984). See also McDougal, *supra* note 10, at 600.

15. McDougal, *supra* note 10, at 600.

16. Polebaum, *supra* note 14, at 202. See also Mallison & Mallison, *The Israeli Aerial Attack of June 7, 1981 Upon the Iraqi Nuclear Reactor: Aggression or Self Defence?* 15 VAND J. TRANSNAT'L L. 417, 420-1 (1982).

17. See BOWETT, *supra* note 10, at 188.

Lastly, judicial authority<sup>18</sup> and state practice<sup>19</sup> support the view that preventive self-defence under Article 51 may justify the use of force in the absence of any actual prior use of force.

**C. Sound policy considerations dictate that anticipatory self-defence be recognized under international law**

The necessary pre-condition for a restrictive right of self-defence is that the United Nations Security Council be reasonably effective in resolving disputes. Article 51 envisions self-defence as an interim right to be exercised only until the Security Council assumes responsibility for resolving the dispute and restoring the peace. Recent history, however, has shown that the Security Council is unable to do this<sup>20</sup> due to political bias and paralysis in the face of superpower disputes. Given this, the Charter should not be read so as to give rise to the anomalous situation in which members of the United Nations may be left without a remedy.

Secondly, the Charter should keep pace with technological developments that render traditional views of self-defence obsolete. The restrictive interpretation of Article 51, however reasonable it may

18. See *The Nuremberg International Military Tribunal Judgment*, 13 Ann. Dig. 203, 210 (1946), where the Court held that preventive action could be justified by the necessity or self-defence.
19. E.g., the French incursion into Tunisia, discussed by Brownlie, *International Law and the Activities of Armed Bands*, 7 INT'L & COMP. L.Q. 712, 733 (1958). Other examples include Pakistan's entry into Kashmir in 1950, Israel's invasion of Sinai in October 1956 and June 1967, and the U.N. action by ONUC in Katanga in December 1961 and December 1963. See generally Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 14 (1972). The Israeli permanent representative to the U.N., Mr. Blum, justified the Israeli attack on the Iraqi nuclear reactor in 1981 as a legitimate exercise of the right of self-defence. See Mallison & Mallison, *supra* note 16, at 435.
20. Schwarzenberger, *The Fundamental Principle of International Law*, 87 RECUEIL DES COURS 195, 338 (1955).

once have seemed, unrealistic and dangerous.<sup>21</sup> The menacing potential of modern weaponry compels a definition of "armed attack" that includes threats asserted outside the defending nation's territory. When nuclear weapons are involved, a nation cannot be expected to await an armed attack before invoking the right of self-defence. If the Charter is to an effective instrument, it should be so to accommodate the needs of the contemporary world.<sup>22</sup>

**D. Mirva's attack was within the scope of the right of anticipatory self-defence**

Mirva has satisfied the conditions necessary to invoke the right of anticipatory self-defence. The first requirement is that the threatened victim must exhaust all alternative means of protection.<sup>23</sup> The Conclave of the Eurasian Unity tried to resolve the situation<sup>24</sup> but the Icbamese delegate threatened to boycott any further meetings dealing with Icbam's nuclear weapons. The Conclave also brought the dispute to the attention of the Security Council, but there the matter was tabled indefinitely. Furthermore, the United Nations General Assembly had not taken any steps to resolve the problem. In these circumstances, Mirva and the Conclave had clearly exhausted all alternative means of protection.

The second requirement is that the defensive measures must be

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21. Levenfeld, *Israel's Counter Fedayeen Tactics in Lebanon: Self-Defense and Reprisals Under Modern International Law*, 21 COLUM. J. TRANSNAT'L L. 1, 21 (1983). See also Bowett, *supra* note 19, at 4: "... the rejection of an anticipatory right is in this day and age totally unrealistic...."

22. McDougal, *supra* note 10, at 600-1.

23. See BOWETT, *supra* note 10, at 53.

24. See Conclave resolutions of 22 September 1983 and 21 December 1983 urging Icbam to discontinue its policy of nuclear armament.

proportionate to the threatened danger.<sup>25</sup> In this case, the Mirvan government simply removed the threat and no more. The surgical air strike was carefully planned and executed on New Year's day; a day when there was the least likelihood of injury to persons.

The third requirement is that there must be an imminent danger of attack to the state invoking the right.<sup>26</sup> Icbam's pursuit of irredentist claims in the 1970s had led to a series of border conflicts with other members of the Conclave. When the Fundamentalist Party took power in Icbam two years ago, the government ratified these irredentist policies and very recently that regime declared that it would "take whatever action necessary to protect its historic patrimony."<sup>27</sup> There was thus a grave threat that Icbam would use its nuclear weapons against the other members of the Conclave, including Mirva, as these states possess economic, political and geographical ties which make the security of one dependent on the security of the other. An attack or threat of attack on one state amounts to an attack or threat of attack on the vital interests of the others.

Mirva was therefore justified in invoking its individual right to self-defence and the threat to the region entitled the regional states to so act collectively.<sup>28</sup>

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25. See BOWETT, *supra* note 10, at 53.

26. *Id.*

27. Icbam's Declaration of 14 December 1980.

28. See McDougal & Feliciano, *Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective*, 68 YALE L.J. 1057, 1155-60 (1959); Mallison, *Limited Naval Blockade or Quarantine Interdiction, National and Collective Defence Claims valid under International Law*, 31 GEO. WASH. L. REV. 335, 364-6 (1962).

**III. MIRVA'S ACTION WAS PURSUANT TO A DECISION OF THE CONCLAVE OF EURASIAN UNITY WHICH WAS CONSISTENT WITH BOTH THE UNITED NATIONS CHARTER AND THE CONSTITUTION OF THE CONCLAVE**

**A. The decision of the Conclave to use armed force and the air strike by Mirva pursuant to that decision are entirely consistent with the United Nations Charter**

1. Mirva's air strike on the Icbamese nuclear weapons facility did not require Security Council authorization under Article 53(1) of the Charter

The surgical air strike was analogous to a peace keeping operation undertaken by the Conclave. Peace keeping operations do not constitute enforcement action within the meaning of Article 53(1).<sup>29</sup> Peace keeping operations initiated by the General Assembly have been acknowledged by this Court as not amounting to enforcement action.<sup>30</sup> This extends to peace keeping operations initiated by regional arrangements since many of the same considerations apply to both.<sup>31</sup>

The peace keeping forces considered in the *Certain Expenses Case*<sup>32</sup> were utilised: (a) with the consent of the state into which they were sent;<sup>33</sup> and (b) with the purpose of helping to reestablish peaceful conditions in the region.<sup>34</sup> The operation in the instant case satisfied both conditions. It was carried out with the constructive consent of Icbam. In becoming a party to the Conclave Treaty, Icbam had consented

29. Moore, *ROLE OF REGIONAL ARRANGEMENTS IN THE MAINTENANCE OF WORLD ORDER* in 3 *THE FUTURE OF THE INTERNATIONAL WORLD ORDER* 123, 156 (Black & Falk eds. 1971).

30. *Certain Expenses of the United Nations (Advisory Opinion)* 1962 I.C.J. 151, 165.

31. Moore, *supra* note 29, at 154.

32. *Supra* note 30.

33. *Ibid.* at 171.

34. *Id.*

to all actions that the Conclave would take in legitimate exercise of the powers granted it thereunder. The decision to remove Icbam's weapons facility was legitimately taken under the powers and procedures of the Conclave. The operation was a response to a situation that endangered the peace of the region, and aimed at restoring that peace. The forces used were "in no way a military force temporarily controlling the territory in which ... stationed."<sup>35</sup>

2. Even if Mirva's action amounted to enforcement action, it was authorised by the Security Council in accordance with Article 53 (1) of the Charter

a. Security Council authorisation of enforcement action under Article 53(1) need not be prior authorisation.

The requirements of Article 53(1) permits *ex post facto* authorisation of action by the Security Council.<sup>36</sup> This conclusion is supported by the plain meaning of Article 53(1),<sup>37</sup> as well as by the practice of the Security Council,<sup>38</sup> and policy considerations further support recognition of that conclusion by this Court.<sup>39</sup>

35. Report of the United Nations Secretary General on the plan for an emergency force, cited in the *Certain Expenses Case*, *supra* note 30, at 172.

36. Moore, *supra* note 29, at 158 - 159; Chayes, *Law and the Quarantine of Cuba*, 41 FOR. AFF. 550, 556 (1963); Meeker, *supra* note 2, at 520.

37. Article 53(1) requires that: "... no enforcement action shall be taken ... without the authorization of the Security Council." It should not be interpreted as if it read: ". . . no enforcement action shall be taken . . . without the prior authorization of the Security Council."

38. In the one instance in which Security Council authorization *ex post facto* under Article 53(1) was considered, the Council did not rule that authorization could not be given on the ground that it was sought the commission of the relevant acts. *Report of the 893rd Meeting of the United Nations Security Council* (8 September 1960), U.N. SCOR (1960).

39. Moore, *supra* note 29, at 159.

b. Security Council authorization need not be express

The Security Council's failure to disapprove amounted to authorization within the plain meaning of Article 53(1),<sup>40</sup> which does not refer to **express** authorization.<sup>41</sup> Such a reading of Article 53(1) "does no violence to the notion of the United Nations as the paramount organization. Regional organizations continue subordinate to the United Nations by the terms of the Charter. . . . Like an individual state, the . . . [regional organization] can be called to account for its action in an appropriate agency of the more encompassing organization."<sup>42</sup>

**B. The Conclave's decision to use armed force was in accordance with the provisions of the Conclave Constitution**

1. The Conclave acted in accordance with Article 7(a) of the Constitution which allows the use of armed force

Article 7(a) of the Conclave Constitution allows the Conclave to resort to the use of armed force if the peace of the region is endangered by, *inter alia*, "any fact or situation." The acquisition of nuclear weapons by Icbam, a state which has used armed force in the past against its neighbours in pursuit of irredentist claims, coupled with the present government's endorsement of these claims, clearly posed a danger to the peace of Eurasia.

This danger was aggravated by the fact that no other state in Eurasia possessed nuclear weapons and also by Icbam's statement of 14

40. Chayes, *supra* note 36, at 556; Meeker, *supra* note 2, at 522.

41. Article 53(1) requires only "the authorization of the Security Council."

42. Chayes, *supra* note 36, at 557.

December 1983 that it would "take whatever action is necessary to protect its historic patrimony." In view of Icbam's past hostility and persistent refusal to abandon its program of nuclear armanent,<sup>43</sup> the Conclave reasonably concluded that this statement was a reference to Icbam's willingness to use nuclear weapons in pursuit of irredentist claims. The peace of the region was clearly endangered and the Conclave's use of armed force was in accordance with Article 7 of the Conclave Constitution.

2. The decision to use armed force was adopted in accordance with the procedure laid down in Article 7(b) of the Conclave Constitution

Article 7(b) requires that any decision taken under Article 7(a) which involves the use of armed force must be supported by "an 80% vote of the Members." It would thus be sufficient if 12 members, constituting 80% of the 15-member Conclave, voted for the decision to use armed force. In this case, the vote was carried by 14 members, and was therefore consistent with the procedure laid down by the Conclave Constitution.

**IV. IN ANY EVENT, MIRVA'S ACTIONS WERE A JUSTIFIABLE EXERCISE OF SELF-HELP AGAINST ICBAM'S VIOLATION OF INTERNATIONAL LAW**

**A. The development of the Icbamese nuclear weapons facility was a violation of customary international law**

1. The laws of war prohibit the possession and use of nuclear weapons

The right of belligerents to adopt means of injuring the enemy is limited by the laws of war.<sup>44</sup> The inherent qualities of nuclear

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43. See Conclave resolutions cited *supra* at note 24.

44. 1907 Hague Regulations Respecting the Laws and Customs of War on Land, Article 22; Annex to the 1907 Hague Convention (no. IV) Respecting the Laws and Customs of War on Land, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631.

weapons, specifically the impossibility of preventing the spread of radioactive fallout,<sup>45</sup> inevitably renders any use of them in violation of those laws.<sup>46</sup> Such weapons cause needless and disproportionate damage relative to military necessity, thereby violating international law which prohibits weapons that are cruel in their effects and cause unnecessary suffering.<sup>47</sup> Secondly, the Geneva Gas Protocol of 1925,<sup>48</sup> which now represents customary law,<sup>49</sup> prohibits the use of materials or devices analogous<sup>50</sup> to asphyxiating, poisonous or other gases. The protocol extends to nuclear weapons since the effect of nuclear fallout and radiation is equivalent to that caused by poison gas and bacteriological weapons, both of which are banned.<sup>51</sup> Thirdly, the laws of war require observance of distinctions of which nuclear weapons are

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45. See generally NATIONAL ACADEMY OF SCIENCES, NATIONAL RESEARCH COUNCIL, THE BIOLOGICAL EFFECTS OF ATOMIC RADIATION XII-2 (1956); Report of the United Nations Scientific Committee on the Effects of Atomic Radiation, 17 GAOR Supp. (No. 16), 1 U.N. Doc. A/5216 at 35 (1962).
46. That such laws are applicable to nuclear weapons was affirmed by *Shimoda & Ors. v. The State* Tokyo District Court (7 December 1963), English trans. in (1964) JAP. ANN. INT'L L. 212.
47. Preamble, 1868 Declaration Renouncing the Use in War of Certain Explosive Projectiles reprinted in 1 AM. J. INT'L L. (Supp.) at 95-96 (1907); 1907 Hague Regulations, Art. 23(e), *supra* note 44; 1977 Geneva Protocol I Additional Relating to Victims of International Armed Conflict, Art. 35(2), 30 U.N. Doc. A/32/144, reprinted in 16 INT'L L. MATS. 1391 (1977).
48. 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 94 L.N.T.S. 65.
49. G.A. Res. 2630A on the Question of Chemical and Bacteriological (Biological) Weapons, 24 U.N. GAOR Supp. (No. 30) at 16 U.N. DOC. A/7630 (1969). See also O'Brien, *Biological/ Chemical Warfare and the International Law of War*, 51 GEO. L.J. 1, 32-36 (1962).
50. G. SCHWARZENBERGER, THE LEGALITY OF NUCLEAR WEAPONS 34-41 (1958).
51. 1899 Hague Declaration Respecting Asphyxiating Gases, reprinted in DOCUMENTS ON THE LAWS OF WARS 35 (Roberts & Guelff eds. 1982); 1907 Hague Regulations, Art. 23(a), *supra* note 44.

inherently incapable, e.g. distinctions between combatant and non-combatant, a "vital principle of the modern law of war";<sup>52</sup> between belligerent and neutral states;<sup>53</sup> and between combatants and those who are to be absolutely protected during hostilities, namely the wounded and sick in the field,<sup>54</sup> medical and religious personnel.<sup>55</sup>

Furthermore, the use of nuclear weapons even in defence against conventional attack would violate the cardinal requirement of proportionality.<sup>56</sup>

Since any use of nuclear weapons is illegal, their possession as part of a deterrence strategy is also unlawful, as such a strategy is predicated on the threat to use an illegal weapon.<sup>57</sup>

52. J.B. MOORE, *INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS* viii (1924). See 1977 Geneva Protocol, Art. 48, *supra* note 47; See also 1949 Geneva Convention No. IV Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287; 1907 Hague Regulations, Arts. 25 and 27, *supra* note 44, G.A. Res. 2675 on Basic Principles for the Protection of Civilian Populations in Armed Conflicts, 25 U.N. GAOR Supp. (No. 28) at 76 U.N. DOC. A/8028 (1970).
53. 1907 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Arts. 1, 2, 3, 4 & 10, 36 Stat 2310, T.S. No. 540, 1 Bevans 654; 1907 Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Arts. 1 and 2, 36 Stat. 2415, T.S. No. 545, 1 Bevans 723.
54. 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art. 12, U.N.T.S. 39 (1958), Cmnd. 550.
55. 1949 Geneva Convention, *supra* note 54, as amplified by Art. 15 of the 1977 Geneva Protocols, U.N. Doc. A/32/144, reprinted in 16 INT'L LEG. MATS. 1391, 1402 (1977).
56. M. WHITEMAN, 12 DIGEST OF INTERNATIONAL LAW 46 (1971). 1977 Geneva Protocol, Arts. 20, 51, 53, 55 *supra*, note 47.
57. Similarly, the prohibition on poison gas and bacteriological weapons seems intended to cover production, possession and threat to use. See Falk, Meyrowitz & Sanderson, *Nuclear Weapons and International Law*, 20 INDIAN J. INT'L L. 541, 562 (1980).

2. Icbam's production of nuclear weapons violated basic human rights and constituted a crime against humanity.

The right to life is a customary norm which underlies the entire corpus of international human rights<sup>58</sup> while the preservation of international peace, the most fundamental norm of the Charter,<sup>59</sup> gives rise to a human right to peace under international law.<sup>60</sup> Since nuclear weapons are of such vast destructive powers as to pose a threat to the survival of mankind, they amount to a threat against humanity, negate the right to peace,<sup>61</sup> and their existence is inconsistent with the basic thrust of the Charter.<sup>62</sup> Moreover, genocide is defined as "acts committed with intent to destroy in whole or in part, a national group"<sup>63</sup> and is a crime under international law.<sup>64</sup> A nuclear strategy

58. See the 1948 Universal Declaration of Human Rights, Art. 3, G.A. Res. 217A (III), GAOR 3rd Session, Part I, and International Covenant on Civil and Political Rights, Art. 6, G.A. Res. 2200, 21 U.N. GAOR (No. 16) 52, U.N. Doc. A/6316 (1967), both generally accepted as declaratory of customary norms. See generally HUMPHREY, *THE WORLD REVOLUTION AND HUMAN RIGHTS IN HUMAN RIGHTS, FEDERALISM AND MINORITIES* 147, 149 (A. Gotlieb ed. 1970).
59. See the Preamble and Art. 1 of the Charter.
60. See 1979 Declaration on the Preparation of Societies for Life in Peace. G.A. Res. 3314 29 U.N. GAOR Supp. (No. 31) at 55 para. 1, U.N. Doc. A/33/45.
61. "Continuation of the arms race endangers international peace and security." G.A. Res. 31/189 B, 31 U.N. GAOR Supp. (No. 39) 44, U.N. Doc. A/31/39 (1979). Such resolutions evidence the existence of customary international law. See generally J. CASTANADA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* 168 (1969).
62. Nanda, *Nuclear Weapons and the Right to Peace Under International Law*, 9 *BROOKLYN J. INT'L L.* 283, 205 (1983).
63. Convention on the Prevention and Punishment of the Crime of Genocide, Art. 1, 78 U.N.T.S. 277. See also Charter of the Nuremberg Military Tribunal, Art. 6(1), 69 Stat. 1555, 1556, E.A.S. No. 472, 13-14 (1945).
64. Genocide Convention, Art. 3, *supra* note 63. See also the *Barcelona Traction Case (Belgium v. Spain)* 1970 I.C.J. 4.

based upon policies of deterrence and massive retaliation which would result in annihilation of an entire state and its population constitutes preparation for the commission of genocide,<sup>65</sup> and such strategy must be illegal. Finally, the production of nuclear weapons is contrary to a universally accepted objective<sup>66</sup> and amounts to a proscribed threat to use such weapons.<sup>67</sup>

3. International law imposes a duty on non-nuclear weapons states not to acquire nuclear weapons capability

a. The principle of horizontal non-proliferation represents customary international law and is binding on Icbam.

Nuclear proliferation affects the very foundation of world public order,<sup>68</sup> and the provisions of the Treaty on the Non-Proliferation of Nuclear Weapons<sup>69</sup> are therefore of a fundamental norm-creating character and represent customary law. State practice is reflected in widespread and representative participation in the NPT, including those states specially interested,<sup>70</sup> namely non-nuclear weapon states, which

65. See Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons*, 14 INT'L & COMP. L.Q. 437, 444 (1965); Weston, *Nuclear Weapons and International Law: Prolegomenon to General Illegality*, 4 N.Y.L. SCH. J. INT'L & COMP. L. 227, 255 (1983).

66. It is a universally accepted objective to cease production of nuclear weapons, as expressed in the 1981 Declaration on the Prevention of Nuclear Catastrophe, U.N. G.A. Res. 36/100, 36 U.N. GAOR Supp. (No. 51) 76, U.N. DOC. A/36/51 (1981).

67. 1981 G.A. Res. 36/92I on the Non-Use of Nuclear Weapons and Prevention of Nuclear War, para. 1(a), 36 U.N. GAOR Supp. (No. 51) 64, U.N. Doc. A/36/51 (1981).

68. See Dai, *Treaty on the Non-Proliferation of Nuclear Weapons with Special References to Canada's position*, 6 CAN. Y.B. INT'L L. 226, at 227 (1968).

69. *Supra* note 7 (hereinafter "the NPT").

70. See *North Sea Continental Shelf Cases (Fed. Rep. of Germany v. Denmark; Fed. Rep. of Germany v. Netherlands)* 1969 ICJ Rep. 3 at 42-43.

through ratification of the NPT have given up the right to develop a nuclear weapons capability.<sup>71</sup> In view of the broad acceptance by the international community of the principles therein,<sup>72</sup> it is customary international law which has emerged rapidly in the wake of dynamic technological evolution.<sup>73</sup> Icbam, a non-nuclear weapons state, committed an unlawful act in constructing a nuclear weapons plant.

Icbam cannot invoke the exception of persistent objector. Far from having always opposed<sup>74</sup> the rule against proliferation, Icbam signed the NPT at a decisive stage in the norm's emergence.<sup>75</sup> It is thus assumed an obligation of good faith to refrain from acts calculated to frustrate its object.<sup>76</sup> The act of signing demonstrated consent to the treaty and cannot be considered a mere formality.<sup>77</sup>

71. By 1980, 102 countries had ratified the NPT, 99 of them non-nuclear weapons states. France, a non-party, has declared her intention to act as if bound by it. See Dolzer, **International nuclear cooperation: obligations, conditions and options**, 20 *IND. J. INT'L L.* 336, 383 (1980).
72. As expressed in: 1959 G.A. Res. 1380 on Prevention of the Wider Dissemination of Nuclear Weapons, 14 *G.A.O.R. Supp. No. 16*, U.N. Doc. A/4354; 1961 G.A. Res. 1665, on Prevention of the Wider Dissemination of Nuclear Weapons, 16 *U.N. GAOR Supp. No. 17* U.N. Doc. A/5100; 1965 G.A. Res. 2028 on the Non-Proliferation of Nuclear Weapons, 20 *U.N. GAOR Supp. No. 14*, U.N. Doc. A/6014; and also in the absence of controversy over NPT Arts. 1 and 2 which law down the basic obligation of non-proliferation.
73. See Opinion of Judge *ad hoc* Sorensen (dissenting), **North Sea Continental Shelf Cases**, *supra* note 69, at 244. Although in force only in 1970, this must be measured against the recent advent of the atomic age in 1945.
74. **Anglo-Norwegian Fisheries Case (U.K. v. Norway)** 1951 *I.C.J.* 116, 131.
75. See Opinion of Judge *Ad Hoc* Sorensen (dissenting), **North Sea Continental Shelf Cases**, *supra* note 69, at 247.
76. I. BROWNLIE, **PRINCIPLES OF PUBLIC INTERNATIONAL LAW** 603 (3rd ed. 1979).
77. See I L. OPPENHEIM, **INTERNATIONAL LAW** 904-905 (Lauterpacht ed., 8th ed. 1955).

b. Icbam's production of nuclear weapons violated a pre-emptory norm of international law

**Jus cogens** takes precedence over customary and conventional law.<sup>78</sup> It protects basic international interests and maintains standards of public morality recognized by international society.<sup>79</sup> The non-proliferation of nuclear weapons constitutes a part of **jus cogens** because it is founded in morality;<sup>80</sup> is important to international peace and order;<sup>81</sup> is accepted as a fundamental norm by the international community<sup>82</sup> and serves global interests as against those of individual

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78. Whiteman, **Jus Cogens in International Law with a Projected List**, 7 G.A. J. INT'L & COMP. L. 609 (1977); Schwelb, **Some Aspects of International Jus Cogens as Formulated by the International Law Commission**, 61 AM. J. INT'L L. 946 (1967); Verdross, **Jus Dispositivum and Jus Cogens in Law**, 60 AM. J. INT'L L. 55 (1966); Rao, **Jus Cogens and the Vienna Convention on the Law of Treaties** 14 Ind. J. Int'l L. 362 (1977).
79. A.D. McNAIR, **LAW OF TREATIES** 213-215 (1961).
80. **Jus Cogens** involve considerations of morals and of international good order. Fitzmaurice, **Third Report of Special Rapporteur on the Law of Treaties**, [1958] 2 Y.B. INT'L L COMM'N. 40-41. See also Verdross, *supra* note 78, at 574; Gangl, **The Jus Cogens Dimensions of Nuclear Technology**, 13 CORNELL INT'L L.J. 63, 79 (1980).
81. "Nuclear disarmament is essential for the prevention of nuclear war and for the strengthening of international peace and security." G.A. Res. 36/92, *supra* note 66. See also Verdross, *supra* note 78, at 572.
82. As reflected in international and regional treaties. E.g., the NPT, *supra* note 7; 1963 Treaty Banning Nuclear Weapons Tests in the Atmosphere in Outer Space and Under Water, 480 U.N.T.S. 43; 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America, 634 U.N.T.S. 681. See also 1961 G.A. Res. 1652 on Consideration of Africa as a Denuclearized Zone, 16 U.N. GAOR Supp. (No. 17) at 4 U.N. Doc. A/4942/Add 2. The 1963 G.A. Res. 1911 on Denuclearization of Latin America, 18 U.N. GAOR Supp. (No. 15) 14, U.N. Doc. A/5618, followed a declaration by the Presidents of Bolivia, Brazil, Chile, Ecuador and Mexico expressing the intention not to manufacture nuclear weapons. The declaration is reprinted in 18 U.N. GAOR, 3 Annex (Agenda Item 74) 1, U.N. Doc. A/5415/Rev. 1 (1963).

states.<sup>83</sup> Icbam, a non-nuclear weapons state, violated the pre-emptory norm of non-proliferation by attempting to acquire a nuclear capability.

**B. The development of the Icbamese weapons facility was a violation of regional customary international law**

The 15 members of the Conclave together constitute a distinct region within the meaning of international law.<sup>84</sup> The emergence of Icbam as a nuclear weapons state would disrupt the fragile balance of regional peace in view of the close geographic, economic and military relationship amongst of the Conclave members. It would also breach the regional Nuclear Free Zone,<sup>85</sup> endangering other states and derogate from Icbam's obligation to harmonise and co-ordinate its defence and security policies within the Conclave.<sup>86</sup>

The principle of denuclearization has received widespread, consistent and near-unanimous acceptance within Eurasia as seen in the ratification of the NPT and the declaration of Eurasia as a Nuclear Free Zone by 14 out of 15 Conclave members. Constant and uniform usage is evidence of a regional rule of international law<sup>87</sup> which obliges Icbam,

83. In the **Barcelona Traction** case, *supra* note 64 at 32, this Court stated that "obligations of a state towards the international community as a whole ... (which) by their very nature ... are the concern of all states." Self-serving claims are eliminated by emphasizing this requirement. See also the expression of concern in the Final Document of the Special Session of the General Assembly (13 July 1978), U.N. Doc. A/Res/S-10/2, reprinted in 17 INT'L LEG. MATS. 1016 (1978).

84. See M. SORENSEN, *MANUAL OF PUBLIC INTERNATIONAL LAW* 133 (1968).

85. Established by the 1983 Treaty of Telleraviv.

86. Constitution of the Conclave of Eurasian Unity, Art. 5 (q).

87. **Asylum case (Colombia v. Peru)** 1950 I.C.J. 266, 277, 294, 316, 333 and 370; **United States Rights in Morocco case (France v. U.S.)**, 1952 I.C.J. 176, 200.

as a member of the region,<sup>88</sup> to refrain from producing or possessing nuclear weapons within its territory. In the circumstances, the principle of non-proliferation within Eurasia takes on the character of a **fundamental regional norm**. Icbam breached this obligation by constructing its nuclear weapons plant.

**C. Mirva was justified in taking self-help measures to remove the illegal nuclear weapons facility**

**1. Customary international law recognizes a right of self-help**

Pre-Charter customary international law recognised a state's right to resort to forcible measures short of war as a means of self-help, which arises when a wrong is about to be, or has been, committed. Its function is to preserve or restore the **status quo**.<sup>89</sup> Such measures include self-defence, retortions, reprisals, humanitarian intervention and intervention for the protection of nationals abroad.<sup>90</sup> They may be taken within the territory of another state,<sup>91</sup> and do not amount to **unjustifiable** intervention, i.e., interference in or denial of that state's independence.<sup>92</sup>

The customary right of self-help is not prohibited by the Charter.

88. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 1, 97 (1957).

89. Schwarzenberger, *supra* note 20, at 343.

90. Waldock, *supra* note 10, at 458. This right was left unimpaired by the Hague Conventions of 1907. See I. MALLOY, *TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS* 248 (1910).

91. In the context of protection of nationals, see D. O'CONNELL, *INTERNATIONAL LAW* 326 (1965); A. THOMAS and A. THOMAS, *THE DOMINICAN REPUBLIC CRISIS 1965 - LEGAL ASPECTS* 13 (1966).

92. H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 167 (1950); **Accord** L. OPPENHEIM, *supra* note 78, at 305; C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 69 (2nd ed. 1945).

Its exercise seeks neither a territorial change nor a challenge to political independence.<sup>93</sup> In the absence of effective collective machinery to protect against attack and redress wrongs under the United Nations regime, the right survives and is available today.<sup>94</sup> In particular, international law continues to accord states a right to intervene for the protection of nationals abroad and on humanitarian grounds. The former is justified in view of the close identification of a state's interests and security with that of its nationals.<sup>95</sup> The forcible protection of those interests is thus analogous to self-defence, although distinct from it, and consonant with Article 51 of the Charter.<sup>96</sup> Intervention on humanitarian grounds is grounded on the principle that observance of human rights is a matter of international concern which all states have a right to enforce.<sup>97</sup> The import of Articles 55 and 56, as well as Article 1(1) and Article 3 of

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93. See J. STONE, *supra* note 2, at 43; M. REISMAN, HUMANITARIAN INTERVENTION TO PROTECT THE IBOS in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 177 (Lillich ed. 1973).
94. McDougal, *Authority to Use Force on the High Seas*, 20 NAVAL WAR L. REV. 19, 28-29 (1967); J. STONE, *supra* note 2, at 99; REISMAN, NULLITY AND REVISION 848-49 (1971), M. REISMAN, SANCTIONS AND ENFORCEMENT in 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 273, at 332-3, (Black & Falk eds. 1971).
95. See Bowett, *The Use of Force in the Protection of Nationals*, 43 TRANS GROT. SOC'Y III 116, 117 (1957); D.W. BOWETT, THE INTERRELATION OF THEORIES OF INTERVENTION AND SELF-DEFENCE in LAW AND CIVIL WAR IN THE MODERN WORLD 38 at 44 (J.N. Moore ed. 1974).
96. Certainly Article 51 does not expressly forbid it. See Goodhardt, *the North Atlantic Treaty of 1949*, 79 RECEUIL DES COURS 187, 202 (1951). Rather, the use of arms in legitimate defence remains admitted and unimpaired under the Charter. BOWETT, *supra* note 10, at 188; Waldock, *supra* note 10, at 496-497. See generally D. O'CONNELL, *supra* note 91; Fitmaurice, *supra* note 88; Fenwick, *The Dominican Republic: Intervention or Collective Self-Defence*, 60 AM. J. INT'L L. 64 (1966).
97. HENKIN, HUMAN RIGHTS AND DOMESTIC JURISDICTION in HUMAN RIGHTS - INTERNATIONAL LAW AND THE HELSINKI ACCORD 21-40 (Buergenthal ed. 1979).

the Charter is to obligate members of the United Nations to engage in joint and separate action for that purpose.<sup>98</sup>

This Court in the *Corfu Channel case*<sup>99</sup> pronounced legal Britain's forcible affirmation of the right to innocent passage.<sup>100</sup> A state thus has recourse to forcible self-help in affirming vested rights with which another state is interfering or threatening to interfere.<sup>101</sup>

2. Mirva's surgical air strike was a legitimate exercise of self-help

Mirva's actions satisfy all the elements necessary for the invocation of a general right of self-help. These elements are common to all specific modes of self-help<sup>102</sup> and represent general principles governing legitimate use of force.

98. Such a right was recognised by the Nuremberg Tribunal. Its continued existence under the U.N. regime is affirmed by publicists including Lillich, Stone and Reisman. See authorities cited in R. LILLICH, *HUMANITARIAN INTERVENTION - A REPLY TO IAN BROWNLIE AND A PLEA FOR CONSTRUCTIVE ALTERNATIVES IN LAW AND CIVIL WAR IN THE MODERN WORLD* 229 (Moore ed. 1974). This is supported by state practice in the instances of the Indian invasion of East Pakistan (1971) and Tanzania's invasion of Uganda (1979).

99. (*U.K. v. Albania*) 1949 I.C.J. 28.

100. *Ibid.* at 30.

101. H. Kelsen & P. Tucker, *PRINCIPLES OF INTERNATIONAL LAW* at 84-85, note 75 (2nd ed. 1966); Accord McDougal, *supra* note 94, at 23; Schwarzenberger, *Report on Some Aspects of the Principle of Self-Defence in the Charter of the United Nations and the Topics Covered by the Dubrovnik Resolution*, 42 *INT'L L. A. REP.* 572-3 (1958); Waldock, *supra* note 10, at 501; Fitzmaurice, *supra* note 88, at 172.

102. They are also common to certain retaliatory acts which, despite the general illegality of armed reprisals, have escaped condemnation by the U.N. See Bowett, *supra* note 19, where he cites the examples of the Nahhalin Incident of 28 March 1954, the Patish, Gaza and Nahal Oz Incidents of March-April 1955, and the Gaza Incident of September 1955. See also Falk, *The Beirut Raid and the International Law of Retaliation*, 63 *AM. J. INT'L L.* 415 (1969).

- (i) Mirva acted in response to Icbam's prior illegal acts<sup>103</sup> and threat of breach of a duty<sup>104</sup> owed to Mirva<sup>105</sup>
- (ii) Icbam's illegal act was directed against<sup>106</sup> Mirva and the Conclave

Mirva and the Conclave were under a reasonable apprehension of imminent danger to their security and their nationals.<sup>107</sup> Furthermore, Icbam's impending possession of nuclear arms constituted a threat to all mankind,<sup>108</sup> including Mirva, the Conclave and Icbam's own nationals who would suffer the effects of any nuclear exchange involving Icbam.

- (iii) Mirva's acts affirmed vested rights<sup>109</sup> and vital interests<sup>110</sup> threatened or violated by Icbam

Icbam was endangering the peace and security of the Conclave, of vital interest to Mirva.<sup>111</sup> By pursuing an arms policy diametrically opposed to the purposes of Conclave,<sup>112</sup> Icbam was also destabilising

103. In the context of protection of nationals, see Waldock *supra* note 10, at 467. See also the *Naulilaa Arbitration (Germany v. Portugal)* (31 July 1928), 2 INT'L ARB. AWARD 1013, for the law relating to reprisals.

104. See Lillich's criteria for humanitarian intervention where he cites "the immediacy of the violation of human rights." Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967.)

105. See text accompanying notes 44-88 *supra*.

106. See the *Naulilaa Arbitration*, *supra* note 103.

107. See text accompanying notes 26 and 27 *supra*.

108. See text accompanying notes 44-88 *supra*.

109. *Corfu Channel Case*, *supra* note 99. E.g., humanitarian intervention is predicated on the right of all human beings to enjoy a minimum standard of human rights.

110. E.g., the safety of a states nationals or in response to violations of a state's territorial sovereignty and political independence.

111. See text accompanying notes 43, 84-88 *supra*.

112. Constitution of the Conclave of Eurasian Unity Arts. 4 and 5.

the regional arrangement. Moreover, Mirva has an interest in the preservation and observance of human rights by all states, particularly those close to it, and Icbam's nuclear facility violated such rights. Since humanitarian intervention would be justified to protect Icbamese nationals<sup>113</sup> against large scale human rights deprivations of this nature,<sup>114</sup> a fortiori such action is justified when the interests of the whole world are affected.

(iv) **Mirva had no other recourse and acted out of necessity<sup>115</sup>**

Despite numerous Conclave resolutions calling upon Icbam to ratify the NPT and the Treaty of Telleraviv, Icbam refused to do so. Instead it unilaterally broke off negotiations. The nature of the harm threatened, namely massive loss of life and grave physical injury, was irremediable.<sup>116</sup> Prevention of its occurrence was the only remedy. The plant would soon have become operational. Delay was unthinkable because any strike after it began operating would have resulted in dangerous radioactive fallout. All other measures had failed to yield results. Finally, the source of the illegality being within Icbam, Mirva could not take measures to protect herself except within Icbam's

113. See Henkin, *supra* note 97, at 21. See also authorities cited at note 98.

114. 1981 Declaration on the Prevention of Nuclear Catastrophe, G.A. Res. 36/100, para. 2, 36 U.N. GAOR Supp. (No. 51) 76, U.N. Doc. A/36/51.

115. See generally Weidenbaum, *Necessity in International Law*, 24 GROTIIUS SOC'Y TRANS. 105 (1939), where he cites, *inter alia*, Grotius, Vattel, Martens, Rivier, Phillimore, Stowell and the doctrine of necessity. See also the *Naulilaa Arbitration*, *supra* note 103; in the context of reprisals. See also Waldock, *supra* note 10, at 467, where the failure or inability of the territorial state to protect aliens allows the aliens' state to intervene.

116. Fitzmaurice, *supra* note 88, at 173.

territory.<sup>117</sup>

- (v) **The air strike was a measure proportionate<sup>118</sup> to Icbam's illegality and involved no more force than strictly necessary<sup>119</sup> to remove the illegal nuclear weapons facility**

The surgical strike was neither disproportionate nor excessive in light of the exceptionally large scale deprivation of human rights that would result from the use of nuclear weapons. Furthermore, special care was taken to minimise any loss of Icbamese lives.<sup>120</sup>

- (vi) **Mirva's motives were not punitive in nature**

Mirva's motives were to protect its own as well as Icbam's nationals,<sup>121</sup> to prevent the continued perpetration of an illegality by Icbam, and to affirm its rights to peace and life. Mirva's "intervention" lasted no longer than strictly necessary to remove the illegal plant, indicating its non-dictatorial nature.<sup>122</sup> Finally, Mirva's actions were authorized by the Conclave. They were not taken for narrow partisan interests, but in order to preserve the peace and security of the region<sup>123</sup> and in the interests of the world community.

117. See Guideline No. 9 in Bowett, *supra* note 19 at 27.

118. With respect to intervention see Lillich, *supra* note 104 at 349-50; Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 205 at 264 (1969); See also Naulilaa *Arbitration*, *supra* note 103. On reprisals see Bowett, *supra* note 19, at 27.

119. Waldock, *supra* note 10, at 467.

120. See text accompanying note 25 *supra*.

121. See paragraph 2 of the telegram sent by the Conclave to the United Nations Secretary General on 1 January 1984.

122. Falk, *The United States and the Doctrine of Non-Intervention in the Internal Affairs of Independent States*, 5 HOW. L.J. 163, 176 note 34 (1959).

123. *Ibid.* at 168-169.

**CONCLUSION AND PRAYER FOR RELIEF**

**CONSIDERING THAT** Mirva's air strike on the Icbamese nuclear weapons facility was not in violation of Article 2(4) of the United Nations Charter,

**CONSIDERING THAT** even if the letter of Article 2(4) was infringed, Mirva's actions were a legitimate exercise of the right of self-defence,

**CONSIDERING THAT** Mirva's actions amounted to regional action consistent with both the United Nations Charter and the Constitution of the Eurasian Conclave,

**CONSIDERING THAT** in any event, Mirva's actions were justifiable measures of self-help to redress Icbam's violation of international law,

The Government of Mirva respectfully requests this Honourable Court to:

1. **DECLARE** that Mirva's surgical strike was consistent with customary and conventional international law and in furtherance of the purposes and principles of the United Nations,
2. **DECLARE** Mirva to be without liability for damages to Icbam, and
3. **DENY** to Icbam all relief requested in the present proceedings.

**RESPECTFULLY SUBMITTED,**

**ANJALI IYER**

**LIM KIEN THYE**

**MOHAN REVIENDRAN**

**PRITHIPAL SINGH**

**ELEANOR WONG**



**CERTIFICATE**

We hereby certify that this Memorial complies with the OFFICIAL  
RULES of this competition.

*Anjali Iyer*

ANJALI IYER

*Lim Kien Thye*

LIM KIEN THYE

*Mohan*

MOHAN REVIENDRAN

*Prithpal Singh*

PRITHPAL SINGH

*Eleanor Wong*

ELEANOR WONG

