
IN THE INTERNATIONAL COURT OF JUSTICE

February 1985 Term

Between:

ICBAM,

Applicant,

and

MIRVA,

Respondent.

MEMORIAL FOR THE APPLICANT

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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 or matters specially provided for in treaties and conventions in force. The parties to the present dispute submit to the Court's jurisdiction pursuant to both Article 40 of the Statute and Article 16 of the Constitution of the Conclave of Eurasian Unity.

STATEMENT OF FACTS

Icbam and Mirva are members of the Conclave of Eurasian Unity and the United Nations. All fifteen Conclave members are at similar levels of economic and military development, and have a history of fraternal relations. A series of armed border conflicts in the last half of the 1970's resulting from Icbam's irredentist claims disturbed these relations, but these conflicts never reached full scale war. There has been no fighting of any consequence since March of 1980.

Although fourteen Conclave members are parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), Icbam declined to ratify it. In February, 1983, Icbam also declined to ratify the Treaty of Telleraviv, which declared the Conclave region to be a nuclear-free zone.

Asserting its sovereign right to organize its self-defense, Icbam embarked on a nuclear weapons development program. On September 22, the Conclave called upon Icbam to dismantle its Sorgrid Desert nuclear project, and notified the Security Council of the dispute between Icbam and the other Conclave members. On September 29, the Security Council tabled the matter.

On December 14, Icbam responded to the Conclave by explaining that its nuclear weapons would be exclusively for the Conclave's defense against non-Conclave nuclear states. One week later Icbam refused the Conclave

request to reconsider its nuclear position. Icbam also announced that it would boycott any future meetings concerning its nuclear program.

At 10:00 A.M. on January 1, 1984, Mirvan jets attacked without warning and destroyed Icbam's Sorgred Desert facility, killing three technicians. Following the attack, the Conclave asserted to the United Nations Secretary-General that it took the action pursuant to the principle of self-defense as embodied in the the UN Charter.

Icbam now requests the International Court of Justice to declare illegal Mirva's armed attack and destruction of the Sorgred facility, and to award Icbam 234,999,999 opecs in compensation for the destruction of its property and the loss of life.

QUESTIONS PRESENTED

I.

WHETHER ICBAM'S NUCLEAR FACILITY WAS LAWFUL
UNDER TREATY AND CUSTOMARY INTERNATIONAL LAW.

II.

WHETHER MIRVA HAD ANY RIGHT OR AUTHORITY
TO ATTACK AND DESTROY ICBAM'S PROPERTY.

III.

WHETHER ICBAM IS ENTITLED TO DAMAGES
REGARDLESS OF THE LEGALITY OF MIRVA'S STRIKE.

SUMMARY OF ARGUMENT

I.

The principles of the United Nations guarantee Icbam's right to regulate matters of domestic jurisdiction without interference. National defense is an element of domestic jurisdiction, so Icbam has a right to develop nuclear weapons as an element of its defense strategy.

There is no treaty limiting Icbam's right to develop a nuclear defense. Icbam is not a party to either the Treaty of Telleraviv or the Non-Proliferation Treaty (NPT), so the restrictions these treaties impose on nuclear development do not bind Icbam.

Customary international law does not prohibit Icbam's nuclear weapons. Any custom arising from the Treaty of Telleraviv restricting nuclear weapons does not bind Icbam because Icbam did not consent to the custom. The provisions of the NPT have created no rule of customary law outlawing nuclear weapons because the relevant state practice has been inconsistent. Finally, the customary laws of war serve only to limit nuclear weapons use, not to render the weapons illegal.

II.

Mirva's military strike against Icbam was illegal because it was not one of the two permissible uses of force under the Charter of the United Nations. Mirva's attack is properly characterized as an enforcement action. The use of military force, coupled with Icbam's lack of consent to the force, precludes defining Mirva's strike as an Article 52 act of collective security maintenance.

Mirva failed to obtain Security Council authorization for its enforcement action. The Council has responsibility for the control of force in the

international arena, and Mirva's refusal to obtain Council authorization rendered its enforcement action illegal.

Article 51 of the U.N. Charter permits states to resort to self-defense under very restrictive conditions. Since the Charter has modified prior customary rights of self-defense, the only criteria for judging the legality of Mirva's action is within the conditions of Article 51. Self-defense is permissible only in the case of an armed attack. Mirva's claim of self-defense did not fulfil this condition and, therefore, was illegal.

Moreover, Mirva cannot justify its attack upon Icbam by invoking anticipatory self-defense. Such a claim is unfounded since the Charter does not authorize anticipatory self-defense. Article 51 requires a restrictive interpretation. To interpret the Article as allowing anticipatory self-defense would uphold a rationale that could ultimately lead to catastrophic results.

Even if anticipatory self-defense were applicable, Mirva did not meet the requirements as given by customary law. A state invoking anticipatory self-defense must face a threat of such magnitude that it gives the sense of an imminent and compelling necessity to act. Further, the state must exhaust all available peaceful means before initiating the preemptive strike, and the strike must be proportional to the threat. Mirva did not satisfy any of these.

The rights of collective self-defense parallel those of individual self-defense. The legality of any collective action depends upon whether the state in whose favor the action was taken had a right of individual self-defense. Neither Mirva nor the Conclave can claim any legitimate privilege of self-defense.

III.

Mirva must compensate Icbam for the injury Mirva caused. Mirva's liability stems from the harm done and equity demands compensation regardless of whether the surgical strike was legal. Furthermore, Mirva's liability without fault falls within a contemporary regime of international law. Finally, Mirva's claim of sovereign rights to self-defense does not diminish its liability because, even if Mirva has such rights, it abused them.

I. THE PRINCIPLE OF STATE SOVEREIGNTY GIVES ICBAM THE CLEAR RIGHT TO DEVELOP NUCLEAR WEAPONRY AS AN ELEMENT OF ITS NATIONAL DEFENSE.

A. Icbam Has An Inherent Right To Develop Its National Defense.

Sovereign equality of its Members is the first principle of the United Nations.¹ While sovereign equality is difficult to fully define, it is clear that it includes the idea that each state has the inherent right to handle matters of domestic jurisdiction without interference from another state.² The drafters of the UN Charter (Charter) intended that national armaments are a matter of domestic jurisdiction,³ and that each state should be free to determine its own armaments policy without interference.

B. Neither Conventional Nor Customary International Law Prohibits Icbam's Development Of Nuclear Weapons.

1. No treaty obligation prohibits Icbam's nuclear weapons.

There is no treaty which renders nuclear weapons per se illegal.⁴ There are treaties which limit development of nuclear arms, but they are not binding on Icbam.

The Treaty of Telleraviv established a prohibition on nuclear weapons among the "Contracting parties"⁵ to the treaty. Icbam has no obligation under the treaty. Icbam had no part in drafting the treaty, did not sign it, did not ratify it, and is, therefore, not bound by it.

1. U.N. Charter, art. 2, para. 1.

2. L. Goodrich, E. Hambro, and A. Simons, Charter of the United Nations 37 (3d ed. 1969) (citing UNCIO, Documents, VI, 457) and 39 (citing GA Res. 2131(XX), Dec. 21, 1965) [hereinafter cited as Goodrich].

3. G. Jones, The United Nations and the Domestic Jurisdiction of States 31 (1979).

4. Feinrider, International Law as Law of the Land: Another Constitutional Constraint on Use of Nuclear Weapons, 7 Nova L.J. 103, 113 (1982).

5. Treaty of Telleraviv, February, 1983, art. 2, 1985 Jessup Competition.

Similarly, the Nuclear Non-Proliferation Treaty (NPT)⁶ prohibited the parties to it from developing nuclear weapons. The NPT does not bind Icbam because Icbam is not a party to it. The treaty explicitly provides that it shall be ratified and shall come into force when the ratifications are deposited.⁷ Icbam has not ratified it, and has expressed its intention never to do so. The International Court of Justice (I.C.J.) held, in parallel circumstances, that Colombia could not invoke the Montevideo Convention of 1933 against Peru, a non-ratifying state.⁸ Similarly, the NPT cannot be invoked against Icbam.

It is not persuasive to argue that Icbam has implicitly ratified the treaty. To treat non-ratification as ratification renders the requirement meaningless. It is pointless to insert a ratification requirement in the NPT if it is to be fulfilled simply by the passage of an arbitrary time period.

Although Icbam never ratified the NPT, it did sign it. Article 18 of the Vienna Convention requires that Icbam not act in a manner which would defeat the purpose of the treaty.⁹ This obligation expired when Icbam "made its intention clear not to become a party to the treaty"¹⁰ by declaring its intent never to ratify the NPT. Since Icbam is not a party to either the Treaty of Telleraviv or the NPT, its inherent right to develop nuclear arms cannot be reduced by these treaties.¹¹

6. 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.

7. Id., art. IX(3).

8. Asylum (Colom. v. Peru), 1950 I.C.J. 266, 276 (Judgment of 20 November).

9. Vienna Convention on the Law of Treaties, art. 18(a), opened for signature May 23, 1969, U.N. Doc. A/CONF. 39/27 (1971).

10. Id.

11. See Wright, The Cuban Quarantine, 57 Am. J. Int'l L. 546, 547 (1963).

2. Customary law does not outlaw Icbam's nuclear weapons.

Treaties are a recognized source of customary law. "Not only do they carve out law for the immediate parties, but they also have a profound impact upon general customary law for nonparties."¹² The I.C.J. recognizes this principle, stating that a norm-creating principle of a convention may pass into the general body of international law so as to become binding on non-parties to the convention.¹³

a. The Treaty of Telleraviv creates no custom binding Icbam.

Telleraviv, as a strictly regional treaty, could create a special custom among the states in the Conclave region, although this special custom would bind only those states who have consented to the customary rule. The I.C.J., in the Asylum case, held that "(t)he Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party."¹⁴ Mirva must prove that the custom (i.e., that the region is a nuclear-free zone) binds Icbam. This is impossible because Icbam has never consented to the custom. The I.C.J. held in the Asylum case that an alleged regional rule did not bind Peru because Peru did not consent to the rule. The I.C.J. inferred Peru's lack of consent from its failure to ratify a convention embodying the rule.¹⁵ The facts here are almost identical. Icbam's refusal to participate in the formation of the Treaty of Telleraviv and its subsequent refusal to become a party to it

12. A. D'Amato, The Concept of Custom in International Law 104 (1971).

13. North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 41 (Judgment of 20 February).

14. Asylum, 1950 I.C.J. at 276.

15. Asylum, 1950 I.C.J. at 276-278; D'Amato, supra note 12, at 246.

demonstrate Icbam's lack of consent. This lack of consent is further illustrated by Icbam's immediate embarkation on a nuclear development program after the entry into force of the Treaty of Telleraviv. Because of this lack of consent, there is no regional custom binding Icbam to a nuclear-free zone.

b. The NPT creates no customary norm outlawing nuclear weapons.

The NPT creates no customary law binding on Icbam. There are two requirements for the creation of customary law: extensive and virtually uniform state practice accompanied by a recognition that a general rule of customary law compels this practice.¹⁶

Although most states have not developed nuclear weapons, it is incorrect to conclude that such practice establishes customary law. As of 1984, over 120 states had ratified the NPT.¹⁷ The actions of these states are in response to treaty obligations, and "(f)rom their action no inference could legitimately be drawn as to the existence of a rule of customary international law"¹⁸ (emphasis added).

It is the practice of the 40 non-party states that might establish a rule of customary law based on the NPT. However, the practice of many of these states (e.g. Belize, Guyana, Seychelles) is not relevant because they have no capacity to create a nuclear arsenal. "Only the failure to commit possible acts can have any legal consequence."¹⁹ The failure of these states to do

16. North Sea Continental Shelf, 1950 I.C.J. 266. See also Akehurst, Custom as a Source of International Law, 47 Brit. Y.B. Int'l L. 1, 43 (1974-1975).

17. L. Spector, Nuclear Proliferation Today 440-41 (1984).

18. North Sea Continental Shelf, 1969 I.C.J. at 43. See also Akehurst, supra note 16.

19. D'Amato, supra note 12, at 82.

the impossible (create nuclear weapons) is not evidence of a customary rule of international law prohibiting such weapons.

Of the remaining relevant states, a significant number have developed or are developing nuclear weapons. These include Argentina, Brazil, India, Israel, Pakistan, and South Africa.²⁰ Among the states who could establish a rule of customary law based on the NPT, state practice has not been extensive enough to establish such a rule outlawing nuclear arms.

c. The customary laws of war do not prohibit nuclear weapons.

Although neither mentions nuclear weapons, the 1907 Hague Regulations²¹ and the Geneva Gas Protocol²² both prohibit the use of poison in war.²³ Nuclear radiation is not poison.²⁴ The prohibitions against poison use, therefore, could outlaw nuclear weapons only by analogy. Since there is doubt about the similarities between the physiological effects of poison and radiation,²⁵ the analogy between the two is inadequate to support a conclusion that nuclear weapons are illegal.²⁶

20. Spector, supra note 17, at 8.

21. Hague Regulations, Annex to the Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 205 Parry's T.S. 277 [hereinafter cited as Hague Regulations].

22. Geneva Gas Protocol, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65.

23. Hague Regulations, art. 23(a), supra note 21; Geneva Gas Protocol, supra note 22.

24. Bright, Nuclear Weapons as a Lawful Means of Warfare, 30 Mil. L. Rev. 1, 14-23.

25. M. McDougal and F. Feliciano, Law and Minimum World Public Order 663 (1961) [hereinafter cited as McDougal].

26. M. Akehurst, A Modern Introduction to International Law 232 (5th ed. 1984); McDougal, supra note 25, at 665.

The Hague Regulations further prohibit using weapons "calculated to cause unnecessary suffering."²⁷ To determine whether the suffering is unnecessary, it must be weighed against the corresponding military advantage gained from nuclear weapons use.²⁸ While nuclear weapons use can cause enormous suffering, it can also produce tremendous military advantage.²⁹ In such cases where the military advantage is proportional to the suffering, the suffering is not unnecessary,³⁰ and, therefore, not prohibited.

Nuclear weapons fall under no prohibitory rule of conventional or customary international law,³¹ so they are not per se illegal.³² The Sorogred facility was, therefore, a legal element of Icbam's armaments policy.

II. MIRVA HAD NO RIGHT OR AUTHORITY TO ATTACK AND DESTROY ICBAM'S PROPERTY.

The prima facie case against the legality of Mirva's strike rests on the following principles of the Charter: "All members shall settle their international disputes by peaceful means."³³ The Charter further states that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity of any state."³⁴

27. Hague Regulations, art. 23(e), supra note 21.

28. See Akehurst, supra note 26; McDougal, supra note 25; Bright, supra note 24, at 39.

29. Akehurst, supra note 26, at 233.

30. Id.

31. Cassese, Means of Warfare: The Traditional and the New Law, in The New Humanitarian Law of Armed Conflict 196 (A. Cassese ed. 1979).

32. Falk, Renunciation of Nuclear Weapons Use, in Nuclear Proliferation: Prospects for Control 135 (1970); Weston, Nuclear Weapons Versus International Law: A Contextual Reassessment, 28 McGill L.J. 542, 547 (1983).

33. U.N. Charter art. 2, para. 3.

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

That Mirva's bombing raid is not a peaceful means of settlement could hardly be more evident. Its actions were also a clear use of force against Icbam's territorial integrity. Icbam has sovereignty over its airspace, and Mirva's violation of that airspace was a serious breach of international law.³⁵ Mirva's actions were a territorial invasion - a use of force inconsistent with Charter principles and violative of Article 2(4).³⁶

A. Mirva's Strike Against Icbam Was An Unauthorized, Illegal Enforcement Action.

While the Charter outlaws any use of force against the territorial integrity of a state,³⁷ it does provide two major exceptions to the prohibition against states' use of force. One category of permissible force is a legitimate enforcement action by a regional organization,³⁸ and the other is an action in self-defense.³⁹ Article 2(4) "entirely prohibits the use or threat of armed force against another State except in self-defense or in execution of collective measures authorized by the Council."⁴⁰

1. Mirva's attack was an enforcement action.

Mirva's attack had both elements of an enforcement action: Mirva used military force against Icbam, and Icbam did not consent to the use of force.

35. See Akehurst, supra note 26, at 286; L. Henkin, How Nations Behave 300 (2d ed. 1979); Wright, supra note 11.

36. See Wright, supra note 11, at 557.

37. Henkin, supra note 35, at 291-292.

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

39. U.N. Charter, art. 51.

40. J. Brierly, The Law of Nations 415 (6th ed. H. Waldock 1963). See also G. Tunkin, Theory of International Law 57 (1974).

I.C.J. describes such an act as an enforcement action.⁴¹

- a. Mirva's actions constituted a use of military force against Icbam.

Mirva's strike against Icbam is properly characterized as an enforcement action. An aerial attack of this kind is precisely what the drafters of the Charter contemplated as an enforcement action.⁴² Indeed, "a non-permissive collective military intervention must constitute enforcement action if that phrase is not to lose all meaning."⁴³

- b. Icbam did not consent to the attack.

Article 17 of the Conclave Constitution grants the Conclave the legal capacity to carry out its functions under the Constitution.⁴⁴ Article 17 is almost identical to Article 104 of the Charter.⁴⁵ Article 104's purpose is to authorize the U.N. to perform necessary legal transactions (e.g. acquire property, institute legal proceedings).⁴⁶ The Conclave members logically intended to give the Conclave similar powers under Article 17. This consent to allow the Conclave to function does not extend to the execution of an armed attack against Icbam. Such an attack violates both the Conclave

41. Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), 1962 I.C.J. 151 (Advisory Opinion of 20 July). See also Akehurst, Enforcement Action by Regional Agencies with Special References to the O.A.S., 42 Brit. Y.B. Int'l L. 175, 202 (1967).

42. Goodrich, supra note 2, at 365.

43. W. Gilmore, The Grenada Intervention 46 (1984).

44. See Conclave Const. art. 17.

45. See U.N. Charter, art. 104.

46. H. Kelsen, The Law of the United Nations 337 (1964).

Constitution⁴⁷ and the Charter,⁴⁸ and is not a legitimate Conclave function contemplated by Article 17.

2. The Security Council did not authorize Mirva's strike.

The plain language of the Charter requires Security Council authorization for all enforcement actions.⁴⁹ Because Mirva ignored this requirement, its enforcement action against Icbam was illegal.

To conclude, as the United States did in the Cuban Missile Crisis, that a fundamental change of circumstances has rendered this requirement obsolete is incorrect. This conclusion is based on the assumption that events since 1945, specifically the use of Security Council veto power, have made the Council "substantially useless in keeping the peace."⁵⁰ Since the Council is allegedly paralyzed, other entities, such as regional organizations, must fill the void.

The argument fails as a general proposition for two reasons. First, while it is true that on occasion bodies other than the Council have taken the initiative in peace-keeping,⁵¹ it is erroneous to claim that the Security Council is incapable of discharging its peace-keeping duties. The Council authorized peace-keeping forces in the Congo in 1960,⁵² in Cyprus in

47. See Conclave Const. arts. 2, 4(a), 4(b).

48. See U.N. Charter, arts. 2, paras. 3 and 4, 53, para. 1.

49. U.N. Charter, art. 53, para. 1. See also Akehurst, supra note 41, at 182.

50. Chayes, The Legal Case for US Action in Cuba, 47 Dep't St. Bull. 763, 765 (1962). See also Meeker, Defensive Quarantine and the Law, 57 Am. J. Int'l L. 522.

51. See, e.g., Uniting for Peace Resolution, 5 U.N. GAOR (302nd plen. mtg.), GA. Res. 377 (1950).

52. 15 U.N. SCOR (873rd mtg.), U.N. Doc. S/4387 (1960).

1964,⁵³ in the Middle East in 1973,⁵⁴ and in Lebanon in 1978.⁵⁵ This record indicates that the Security Council is still a viable institution.

Second, the objectionable use of veto power is not a fundamental change of circumstances. The possibility of the unreasonable use of veto power was foreseen at the San Francisco Conference.⁵⁶ Therefore, the argument that regional organizations should be given more power to take enforcement actions is "not well founded."⁵⁷ The responsibility for control of force was designed to belong, and does belong, to the Security Council.⁵⁸

It is also incorrect to conclude that the Security Council is powerless in these specific circumstances. The record indicates that a threatened veto prevented action on the Conclave dispute. However, if the veto were the only element preventing action, the other members of the Security Council could easily transfer the matter to the General Assembly for consideration. The Uniting for Peace plan provides that a procedural vote by seven Council members can transfer a veto-bound matter to the Assembly.⁵⁹ This step was not taken. In short, the Council was not unable to act, it chose not to act.

B. Mirva's Surgical Strike Against Icbam Did Not Constitute A Legitimate Exercise Of The Privilege of Self-Defense.

53. 19 U.N. SCOR (1102nd mtg.), U.N. Doc. S/5575 (1964).

54. 28 U.N. SCOR (1750th mtg.), U.N. Doc. S/11046/Rev. 1 (1973).

55. 33 U.N. SCOR (2074th mtg.), U.N. Doc. S/12610 (1978).

56. Kourula, Peace-Keeping and Regional Arrangements (citing Eide, Peace-Keeping and Enforcement by Regional Organizations, in Journal of Peace-Keeping 133 (1966)), in United Nations Peace-Keeping 100 (A. Cassese ed. 1978).

57. Id. at 120.

58. Id.

59. Jones, supra note 3, at 118.

1. Mirva did not conduct the surgical strike in response to an armed attack as required by Article 51.
 - a. Article 51 modifies the customary right of self-defense.

Self-defense, as delineated by Article 51 of the Charter, is a privilege which legitimizes an otherwise illegal action.⁶⁰ Article 2(4) explicitly states that nations are required to refrain from "any threat or use of force," while Article 33 requires member states to seek "peaceful means" to settle disputes. A state using force can only exonerate itself if it can demonstrate that it acted in self-defense under Article 51.⁶¹

This privilege of self-defense is not an extension of the residual rights of self-defense as embodied in customary international law.⁶² Rather, the concept of self-defense is exceptional in the Charter's context.⁶³ Prior customary standards are not applicable since the Charter modifies and restricts them.⁶⁴ Thus, the inclusion of the term "inherent rights of

60. D. Bowett, Self Defense in International Law 269 (1958); Farrer, Law and War, in 3 The Future of the International Legal Order 29 (C. Black & R. Falk eds. 1971); Note, Tensions Between International Law and Strategic Security: Implications of Israel's Preemptive Raid on Iraq's Nuclear Reactor, 24 Va. J. Int'l L. 459, 466 (1984).

61. Badr, The Exculpatory Effect of Self Defense in State Responsibility, 10 Ga. J. Int'l & Comp. L. 1 (1980); Fitzmaurice, The General Principles Of International Law Considered From The Standpoint Of The Rule Of Law, 92 Recueil Des Cours (vol. 2), 5, 171 (1957); Waldock, The Regulation of The Use Of Force By Individual States In International Law, 81 Recueil Des Cours (vol. 2), 455, 493 (1952).

62. Summary Records of the 14th Meeting, [1949] 1 Y.B. Int'l L. Comm'n, 108 U.N. Doc. A/Cn.4/SR.14/1949; Summary Records of the 95th Meeting, [1951] 1 Y.B. Int'l L. Comm'n 115, U.N. Doc. A/CN.4/SER.A/1951; Question of Defining Aggression [1951] 1 Y.B. Int'l L. Comm'n 37, U.N. Doc. A/CN.4/SER.A/1951/Add. 1.

63. I. Brownlie, International Law And The Use Of Force By States 265 (1963).

64. P. Jessup, A Modern Law of Nations 166 (1948); Wright, United States Intervention in the Lebanon, 53 Am. J. Int'l L. 118 (1959).

self-defense" in Article 51 expresses that the right is "in the very existence of nationhood,"⁶⁵ and is applicable whether or not a state is a member of the U.N.⁶⁶

- b. Article 51 establishes an armed attack as a condition precedent for self-defense.

A state claiming self-defense, like Mirva, must meet the concise, limited, and restrictive condition required in Article 51. Self-defense is permissible only in the case of an armed attack.⁶⁷ Any attempt to justify a recourse to force apart from an armed attack is a legally incorrect interpretation of Article 51.⁶⁸ The prerequisite of an armed attack⁶⁹ upholds the Charter's basic rule of non-use of force and reduces the discretion of states to determine for themselves the scope of permissible self-defense.⁷⁰

Mirva's claim to a self-defensive action is not predicated upon any claim of a current attack as required under Article 51. Since 1980, a condition of non-belligerence has existed in the Conclave, constituting a de facto cease fire.⁷¹ Mirva, therefore, cannot claim a freedom of action permitted by a

65. North Atlantic Treaty: Hearings Before The Senate Committee On Foreign Relations, 81st Cong., 1st Sess. 15 (1949) (Statement of Dean Acheson, Secretary of State).

66. Summary Records of the 20th Meeting, [1949] 1 Y.B. Int'l L. Comm'n 146-47, U.N. Doc. A/CN.4/SR.20/1949; Goodrich, supra note 2, at 345.

67. J. Castel, International Law 1219 (1976); Goodrich, supra note 2, at 345; Henkin, supra note 35, at 141; 2 L. Oppenheim, International Law: A Treatise 546-47 (8th ed. H. Lauterpacht 1955); Weightman, Self-Defense In International Law, 37 Va. L. Rev. 1109 (1951); Wright, supra note 11, at 560.

68. Badr, supra note 61, at 12.

69. Brownlie, The Use Of Force In Self-Defense, 37 Brit. Y.B. Int'l L. 266 (1961).

70. Badr, supra note 61, at 12.

71. Mallison & Mallison, The Israeli Aerial Attack Of June 7, 1981, Upon The Iraqi Nuclear Reactor: Aggression Or Self-Defense?, 15 Vand. J. Transnt'l L. 433 (1982) [hereinafter cited as Mallison].

state of war. Moreover, the four year lack of hostilities prevents Mirva from justifying its attack under an alleged state of intermediacy.⁷²

2. Mirva's application of anticipatory self-defense to its use of force against Icbam is unfounded.

a. Anticipatory self-defense is incompatible with the United Nations Charter.

Customary international law recognizes anticipatory self-defense as a legitimate measure for a state.⁷³ However, the Charter places the whole concept of anticipatory self-defense in an entirely new and different setting.⁷⁴ The Charter does not authorize anticipatory self-defense.⁷⁵ A state that believes it is threatened, even by alarming military preparations by a neighboring state, may resort to the Security Council, but may not resort to anticipatory force.⁷⁶

Article 51 requires a restrictive interpretation because it is a prohibitive norm. It is an axiom of legal interpretation that where a general prohibitive norm is established, any permissive exceptions to it must be provided for explicitly.⁷⁷ The Charter makes no explicit provision for anticipatory self-defense.

72. See Jessup, Should International Law Recognize An Intermediate Status Between Peace And War?, 48 Am. J. Int'l L. 100-01 (1954).

73. Case of The Caroline, 2 Moore, Digest Of International Law 409-14 (1906); Brownlie, supra note 63, at 255; Bowett, supra note 60, at 31, 58, 256, 269; J. Stone, Legal Controls of International Conflict 244 (1954); Wright, Intervention, 1956, 51 Am. J. Int'l L. 270-72 (1957).

74. Gordon, Bilder, Rovine, and Wallace, International Law And The United States Action In Grenada: A Report, 18 Int'l Law. 366 (1984) [hereinafter cited as Gordon].

75. N. Bentwich and A. Martin, A Commentary On The Charter Of The United Nations 106 (1969); Henkin, Force, Intervention, And Neutrality In Contemporary International Law, 56 Am. Soc. Int'l L. Proc. 151 (1962).

76. Jessup, supra note 64, at 166.

Furthermore, Article 51 is an exception to the prohibition against the use of force contained in Article 2(4).⁷⁸ An exception to a principle requires a restrictive interpretation in order not to undermine the principle itself.⁷⁹ To allow a state, like Mirva, to utilize force in response to a mere perceived threat violates the clear meaning of Article 51.

Moreover, the concept of jus cogens requires states to apply Article 51 restrictively. The Vienna Convention defines jus cogens as a preemptory norm which binds the subjects of international law absolutely, and from which derogation is impossible.⁸⁰ In Barcelona Traction, the I.C.J. referred to jus cogens as obligations toward the international community as a whole.⁸¹ The principle of non use of force is a prime example of jus cogens.⁸² Thus, the prohibition on the use of force in Article 2(4) and the self-defense exception in Article 51 both represent preemptory norms.⁸³ A permissive interpretation of Article 51 runs counter to a fundamental tenet of jus cogens,⁸⁴ which states that a treaty is void if it conflicts with a preemptory norm.⁸⁵ Accordingly, a broad application of Article 51 creates a direct conflict between jus cogens and the Charter.

77. Badr, supra note 61, at 13.

78. Brownlie, supra note 63, at 265; Henkin, supra note 75, at 151.

79. Akehurst, supra note 26, at 243; Badr, supra note 61, at 12.

80. Summary Records of the 880th Meeting [1966] 1 Y.B. Int'l L. Comm'n 247-49, U.N. Doc. A/CN.4/SER.A/1966.

81. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32. (Second Phase).

82. Verdross, Jus Dispositivum and Jus Cogens in International Law, 60 Am. J. Int'l L. 55 (1966).

83. Badr, supra note 61 at 13.

84. Id.

85. A. Saab, The Concept of Jus Cogens in International Law 9-10 (1967). See also Schwarzenberger, International Jus Cogens, 43 Tex. L. Rev. 455 (1965).

Mirva's justification for anticipatory self-defense rests upon the presumption that in an age of nuclear weapons nations cannot wait for an armed attack. The claim is that a post Charter norm is emerging explicitly because of the threat presented by atomic weapons.⁸⁶ On superficial analysis, to require an armed attack before a state can legitimately invoke self-defense seems unreasonable; however, the alternatives are manifestly more unreasonable and can only lead to catastrophic results.⁸⁷ The allowance of a preemptive strike in a nuclear age could open the door to abuse and fabrication, or allow states like Mirva to use force against strategic or tactical imbalance.⁸⁸

Finally, anticipatory self-defense necessarily involves a determination of intent. The possibility of mistaking a state's intent along with the subjectivity of an anticipated attack renders anticipatory self-defense too manipulable a standard to be a viable exception to article 2(4).⁸⁹ A rule permitting preemptive strikes whenever a nation regards itself threatened is so subjective that it serves as no rule at all.⁹⁰ Rather, an anticipatory attack against a perceived threat would destroy the rule against the use of force.⁹¹ The United States' actions during the Cuban Missile Crisis explain

86. See also McDougal, supra note 25, at 236; Note, National Self-Defense In International Law: An Emerging Standard For A Nuclear Age, 59 N.Y. U. L. Rev. 187 (1984).

87. Franck, Who Killed Article 2(4)?, 64 Am. J. Int'l L. 822 (1970); Henkin, The United Nations and Its Supporters: A Self-Examination, 78 Pol. Sci. Q. 532-33 (1963).

88. N. Singh, Nuclear Weapons and International Law 120-21 (1959); Henkin, supra note 75, at 166.

89. Gordon, supra note 74, at 368.

90. Franck, supra note 87, at 821.

91. Henkin, supra note 75, at 151.

the rationale for the prohibition of the use of anticipatory force. The United States initiated a blockade against Cuba to prevent the deployment of nuclear missiles in Cuba. However, in justifying the actions, the United States relied on Article 52, not Article 51.⁹² Had the United States invoked Article 51, virtually any state feeling threatened by a neighboring state could conduct a preventive strike.⁹³

- b. Mirva's use of force against Icbam is incompatible with the customary requirements of anticipatory self-defense.

Authorities use a reasonable nation standard to test the permissibility of a preemptive strike with conventional weapons in anticipation of a nuclear strike.⁹⁴ Any preemptive strike must conform to the guidelines of the Case of the Caroline.⁹⁵ The Caroline requires the perceived threat to be immediate, requiring a necessity to act that is instant, overwhelming, leaving no choice of means, and no moment of deliberation.⁹⁶

- (1) Icbam's threat did not create a necessity to act.

To justify anticipatory self-defense, a state must experience a threat that gives the sense of an imminent, compelling, overwhelming and instant necessity to act.⁹⁷ Icbam's future possession of nuclear weapons did not present such a threat to Mirva. Anticipatory self-defense does not sanction

92. Chayes, supra note 50, at 764; Chayes, Law and the Quarantine of Cuba, 41 For. Affairs 554 (1968); Goodrich, supra note 2, 345.

93. Akehurst, supra note 26, at 243.

94. See, e.g., McDougal, supra note 25, at 218; Note, supra note 86, at 208.

95. Rohlik, Some Remarks on Self-Defense and Intervention, 6 Ga. J. Int'l L. 395 (1976).

96. Letter from Mr. Webster to Mr. Fox, April 24, 1841, 29 British and Foreign State Papers 1138 (1840-41).

97. Gordon, supra note 74, at 368. Note, supra note 60, at 478.

an action against a speculative threat.⁹⁸ The bombing of Iraq's OSIRAK nuclear reactor by Israel is analogous. Iraq had repeatedly threatened Israel, creating a fear of nuclear attack.⁹⁹ Yet, the Security Council repudiated Israel's anticipatory attack.¹⁰⁰ The threat from Iraq simply was not overwhelming or imminent. Similarly, Mirva faced no imminent threat from Icbam.

Moreover, international law also requires that a threatening nation must manifest in some verifiable or documented way that it would use the nuclear weapons on the defending state.¹⁰¹ Vague, unclear, or speculative threats are insufficient. Icbam has never demonstrated any evidence of an intent to use nuclear weapons against Mirva or the Conclave. Icbam's nuclear weapons arsenal was for defensive purposes only. The threat, if any, was not against Mirva or the Conclave. Icbam made a unilateral declaration of non use against the Conclave members. Such a unilateral declaration constitutes a binding treaty upon which Mirva could rely.¹⁰²

(2) Mirva must exhaust all available peaceful means.

To uphold a State's actions as reasonable, international law requires the state to pursue all available means possible with no alternatives left before

98. The Fundamental Principles of International Law, 87 Hague Recueil, 334 (1955); Mallison, supra note 71, at 429.

99. U.N. Doc. S./P.V. 2280 at 37-60 (1981) (statement of Mr. Yehuda Blum, Permanent Representative of Israel of the United Nations).

100. 36 U.N. SCOR (2288th mtg.), U.N. Doc. S/Res./487 (1981).

101. Note, supra note 86, at 210.

102. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Judgment of 20 December).

it initiates a strike.¹⁰³ The threatened nation must continue to make all reasonable efforts to avert the attack until the danger, or threat of danger, is virtually unavoidable and immediate.¹⁰⁴ A state must have the perception that the situation has become so desperate that no time for non-military efforts remain.¹⁰⁵ Mirva and the Conclave, however, had a repertoire of actions available before launching the fatal strike. These included economic sanctions, boycotts, diplomatic actions, negotiations, or further appeal to the Security Council or General Assembly.

The United States response to Israel's attack on the Iraqi OSIRAK nuclear reactor illustrates the all available means requirement. The Security Council condemned the Israeli attack.¹⁰⁶ Ambassador Kirkpatrick stated that the United States voted for the resolution because Israel failed to exhaust all peaceful means.¹⁰⁷ Secretary of State Haig also noted that Israel did not pursue all diplomatic negotiations before its recourse to an armed attack.¹⁰⁸ A use of force in anticipatory self-defense is illegal unless all peaceful means are exhausted. Mirva and the Conclave did not exhaust all available means.

(3) Mirva's strike must meet proportionality requirements.

103. Bowett, supra note 60, at 53.

104. Id.

105. Note, supra note 86, at 199.

106. S.C. Res. 487, supra note 100.

107. Id.

108. Friedlander, Might Can Also Be Right: The Israeli Nuclear Reactor Bombing and International Law, 28 Chitty's L. J. 354 (1980).

International law mandates that measures taken in anticipatory self-defense must correspond proportionally to the level of the threat presented.¹⁰⁹ The quantum of the responding measures must correspond proportionally, both in kind and amount, to the character of the threat.¹¹⁰ A present armed attack in response to an assumed, future, non-imminent threat, even if nuclear, does not meet the requirement of proportionality.¹¹¹ Committing a state to an actual conflict on only circumstantial evidence, would be to disregard the requirement of proportionality.¹¹² Mirva invalidated any proportionality claim by responding to a perceived, future attack.

(4) Icbam did not breach any duty to Mirva.

The precipitating event giving rise to an anticipatory use of force must arise out of a breach of a legal duty owed to the state claiming the right of self-defense.¹¹³ Mirva asserts that Icbam's future acquisition of nuclear weapons constitutes a breach of duty. However, Icbam breached no duty to Mirva under international law.¹¹⁴ Icbam has the right to maintain measures for its own defense.¹¹⁵

109. Brownlie, supra note 63, at 261.

110. Case Concerning the Air Service Agreement of 27 March, 1946 (U.S. v. Fr.), 18 R. of Int'l Arb. Awards 443 (1982).

111. Mallison, supra note 71, at 432.

112. Brownlie, supra note 63, at 259.

113. Farrer, supra note 60, at 28. See also Bowett, Reprisals Involving Recourse to Armed Force, 66 Am. J. Int'l L. 3 (1972); Rohlik, supra note 95, at 395; Shapira, The Six Day War and the Right of Self-Defense 6 Isr. L. Rev. 65 (1971).

114. Kunz, Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations, 41 Am. J. Int'l L. 872 (1947); Weston, supra note 32, at 546.

115. See text accompanying notes 1-3 supra.

3. Mirva's surgical strike against Icbam was not a legitimate action of collective self-defense.

The Charter legalizes collective self-defense only under the conditions and limits of Article 51.¹¹⁶ The right of collective self-defense parallels the same basic privilege as individual self-defense, and extends only to cases of a prior armed attack.¹¹⁷ Discussions at the San Francisco Conference and subsequent practice of member states indicate that collective self-defense justifies measures taken by states to support another state that is the sole victim of an armed attack.¹¹⁸

The legality of a state's action, therefore, depends upon whether the state in whose favor the action is taken has a right of individual self-defense.¹¹⁹ Neither Mirva nor the Conclave had any rights or privileges of individual self-defense.

Mirva's use of force did not meet the most minimal obligations of international law. Mirva simply did not satisfy the requirements of anticipatory self-defense. The reasonable nation standard, with its objective criteria, illustrates that Mirva acted contrary to customary international law. Thus, Mirva should be held responsible for all losses and damages resulting from its unlawful use of force.¹²⁰

116. Kunz, supra note 114, at 875.

117. Brownlie, supra note 63 at 898.

118. Goodrich, supra note 2, at 348.

119. Kunz, supra note 114, at 875.

120. Badr, supra note 61, at 27.

III. MIRVA IS LIABLE FOR DAMAGES RESULTING FROM ITS DELIBERATE SURGICAL STRIKE AGAINST ICBAM'S NUCLEAR FACILITY EVEN IF THE STRIKE WAS LEGAL.

A. International Law Calls For High Levels Of Liability To Ensure Behavior Beneficial To The World Community.

Contemporary international law articulates doctrines recognizing the inherent rights of all human beings, and in order to maintain these rights the world community issues sanctions against activities resulting in violations of fundamental obligations to maintain human dignity.¹²¹ Mirva, like all members of the world community, is obligated to compensate for the transboundary harms it causes.¹²²

1. Mirva's liability stems from the harm done, and equity demands compensation regardless of whether the activity creating the harm was legal.

As evidenced by the Trail Smelter arbitration, international law recognizes transboundary harm liability even if the activity creating the harm is legal.¹²³ In Trail Smelter, the arbitral tribunal found Canada liable for damages after Canada's mineral smelting facility emitted vapors harmful to foliage in the United States.¹²⁴ The tribunal looked to analogous water pollution, air pollution, and shooting range cases to hold that "no state has the right to use or permit the use of its territory in such a manner as to cause injury ... to the territory of another or the properties or persons

121. M. Reisman, The Future of the International Legal Order 285 (1971); Jenks, Liability for Ultra-Hazardous Activities in International Law, 117 Hague Recueil 99, 103-06 (1966).

122. See generally International Law Commission Preliminary Report On International Liability For Injurious Consequences Arising Out Of Acts Not Prohibited By International Law, U.N. Doc. A/CN.4/334 and Add. 1 and 2 (1980); International Law Commission Second Report On International Liability For Injurious Consequences Arising Out Of Acts Not Prohibited By International Law, U.N. Doc. A/CN.4/346 and Add. 1 (1981).

123. Trail Smelter Arbitration (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905, 1957-1975 (1941).

124. Id.

therein..."¹²⁵ Mirva is not only prohibited from causing harm, but it has a duty to protect other states against injurious acts originating from within its jurisdiction.¹²⁶ Thus, Mirva's liability arose when harm occurred because the duty to compensate need not stem only from notions of illegality.

Thermonuclear bomb tests resulting in the destruction of the Japanese fishing vessel, the Fukuryu Maru, present a good example of equity created liability.¹²⁷ A crewman of the Japanese vessel died and the United States tendered two million dollars in damages to the Japanese government.¹²⁸ The significance of the Fukuryu Maru incident is two-fold. First, the compensation was made without reference to the question of legal liability.¹²⁹ Second, the United States, while reasserting its right to develop the hydrogen bomb, also recognized its duty to prevent any recurrence of the incident.¹³⁰ Thus, just as the United States recognized its equity created liability, Mirva must compensate Icbam for the death of the technicians and the destruction of the nuclear facility.¹³¹

125. Id. at 1965 (citing New York v. New Jersey, 256 U.S. 296, 309 (1920); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Schindler, The Administration of Justice in the Swiss Federal Court in Intercantorial Disputes, 15 Am. J. Int'l L. 172-174 (1921)).

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

127. M. McDougal and Associates, Studies in World Public Order 763-843 (1960).

128. Compensation to Japanese for Damage Resulting From Nuclear Tests, 32 Dep't St. Bull. 90-91 (1955); Death of Japanese Fisherman, 31 Dep't St. Bull. 492 (1954); U.S. and Japan Discuss Mutual Interests, 31 Dep't. of Bull. 765-6 (1954); Fukuryu Maru Accident, 30 Dep't St. Bull. 598 (1954).

129. Compensation to Japanese for Damage Resulting From Nuclear Tests, supra note 128.

130. Fukuryu Maru Accident, supra note 128.

131. R. Jankovic, Public International Law 152 (1983); Fisher, Bringing Law to Bear on Governments, 74 Harv. L. Rev. 1130, 1139 (1961).

2. A variety of international law sources recognize Mirva's liability.

a. International agreements and organizations recognize that ultrahazardous activities create liability without fault.

States are preeminent members of the world community, and the I.C.J. may apply custom, practice, and treaties to this case.¹³² Many international agreements recognize increased liability for dangerous activities.¹³³ In addition, several international organizations, including the World Health Organization and the International Atomic Energy Agency, submit to harm liability monitoring and recognize the growing trend toward increasing liability in transnational harm disputes.¹³⁴

b. Liability without fault is a common regime in worldwide domestic law.

States, geographically and politically diverse, use some form of liability without fault. These states include the Soviet Union, the United States, Switzerland, France, Poland, Japan, Canada and Italy.¹³⁵ Sophisticated legal systems enjoy the benefits of efficiently spreading liability risks, and

132. Factory at Chorzow, 1927 PCIJ, ser. A, No. 17 at 29 (Merits); Statute of the International Court of Justice, Art. 38(1). See also Akehurst, supra note 26 at 45.

133. See, e.g., Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 21 I.L.M. 1261; Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 26 U.S.T. 765, T.I.A.S. No. 8068, 9 I.L.M. 45; Outer Space Treaty, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

134. International Law Commission, "Replies received in response to the questionnaire prepared by the Special Rapporteur with the assistance of the Secretariat," International Liability for Injurious Consequences Arising Out of Acts Not Prohibited By International Law, U.N. Doc. A/CN.4/378.

135. Orban, Product Liability: A Comparative Legal Restatement -- Foreign National Law and the EEC Directive, 8 Ga. J. Int'l L. 342, 360-374 (1978); Ramon, Strict Liability, 42 La. L. Rev. 1679, 1699-1704 (1982); Vukelich, Strict Products Liability "Just(ice) Out of Reach" -- A Comparative Canadian Survey, 33 v. Toronto Fac. L. Rev. 46, 69-75 (1975).

the international legal order also should enjoy these advantages.¹³⁶ Mirva's liability conforms with the legal doctrines of custom as evidenced by treaties and generally recognized domestic law.¹³⁷ Moreover, Icbam, by receiving compensation for damages, will gain the equitable result required following the death of its technicians and the destruction of its property.

B. The Military And Aggressive Nature Of Mirva's Attack Increases Its Duty To Compensate.

1. Mirva had a duty to prevent the military disaster.

The I.C.J. recognizes state responsibility to prevent disaster and preserve international order.¹³⁸ The Corfu Channel Case, arising from the mining of British ships in the territorial waters of Albania, set forth two duties for Albania: first, Albania had a duty to prevent the mining of the ships, and second, Albania had a duty to warn the British ships.¹³⁹ By analogy, Mirva had a duty to prevent a military strike and a secondary duty to warn of the strike. Mirva's failure to meet these duties killed technicians and destroyed Icbamese property, thus violating elementary considerations of humanity, even more exacting in peace than in war.¹⁴⁰

2. Mirva's claim of a sovereign right to self defense does not diminish its liability.

It does little good for Mirva to claim that Icbam caused the strike by creating an imminent danger. Liability for harm ensues when the harm results

136. 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).

137. North Sea Continental Shelf, 1969 I.C.J. at 42.

138. Corfu Channel (U.K. v. Alb.) 1949 I.C.J. 4, 23 (Judgment on Merits of 9 April); I. Brownlie, supra note 63, at 281-86.

139. Corfu Channel, 1949 I.C.J. at 15-21.

140. 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) at p. 29.

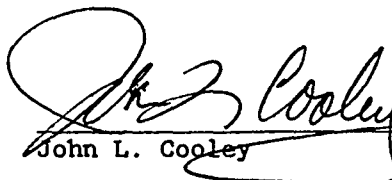
from an abuse of rights, which is when rightful activities degenerate into wrongful activities because of a privilege abuse.¹⁴¹ Thus, even if Mirva had a limited right to retaliate, it abused that right in three ways: first, Mirva failed to warn of the destruction of Icbam's facility;¹⁴² second, Mirva failed to exhaust available alternative remedies;¹⁴³ and finally, by attacking a nuclear facility, Mirva created an undue risk.¹⁴⁴ Thus, Mirva abused whatever rights it had to retaliate against Icbam. These abuses of rights clearly render Mirva liable for damages.¹⁴⁵

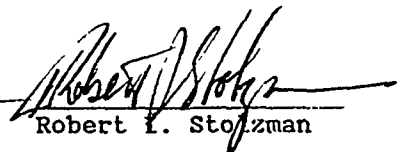
IV. CONCLUSION

In accordance with the authorities and arguments herein presented, Icbam requests this Honorable Court to declare Mirva's armed attack on Icbam's property illegal and that Mirva pay damages, as stipulated, for the death of technicians and the destruction of Icbam's property. Icbam also asks that the Court award damages to compensate for the harm Mirva caused regardless of whether Mirva's attack violated international law.

Respectfully submitted,


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141. H. Lauterpacht, The Function of Law in the International Community 286 (1966).

142. See Corfu Channel, 1949 I.C.J. 4.

143. See text accompanying notes 103-108 supra.

144. G.A. Res. 38/9, 38 GAOR Supp. 47 at 20, U.N.Doc. A/38/47 (1983) (grave consequences of armed Israeli attack against Iraqi nuclear facility).

145. See Elkind, Footnote to the Nuclear Test Cases: Abuse of Right -- A Blind Alley for Environmentalists, 9 Vand. J. Transnat'l L. 57, 66-73 (1976).

