IN THE

INTERNATIONAL COURT OF JUSTICE

AT THE

PEACE PALACE, THE HAGUE, NETHERLANDS

April Term 1985

ICBAM	Applicant
v.	
MIRVA	Respondent

MEMORIAL FOR THE APPLICANT

Team no-4

ANJALI IYER

LIM KIEN THYE

MOHAN REVIENDRAN

PRITHIPAL SINGH

ELEANOR WONG

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

Page

JOURNALS

MISCELLANEOUS

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, an organization which comprises the fifteen states of Eurasia. Icbam has long possessed peaceful nuclear technology. Recently, Icbam began constructing a facility for the manufacture of nuclear weapons. The project was located in the Sorgred Desert, within Icbamese territory.

(a) Treaty on the Non-Proliferation of Nuclear Weapons

All fifteen members of the Conclave had signed the Treaty on the Non-Proliferation of Nuclear Weapons in 1968. As of 1982, fourteen members of the Conclave had ratified it. Icbam did not follow suit. Instead Icbam withdrew its signature from the treaty and declared its intention never to ratify it.

(b) The Treaty of Telleraviv

In early 1983, fourteen Eurasian states drafted, adopted and ratified the Treaty of Telleraviv, unilaterally declaring the region of Eurasia to be a Nuclear Free Zone. Icbam did not participate in any way either in signing or ratifying this treaty.

(c) The Conclave's Resolutions of September 1983

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

The Conclave also passed a resolution adopting the text of a telegram sent to the United Nations Security Council which drew the Council's attention to the existence of a dispute between Icbam and the Conclave. Icbam opposed both resolutions.

On 29 September, after several days of debate, the Security Council tabled the matter indefinitely. The Conclave did not, however, make any attempt to bring the alleged dispute to the attention of any other organ of the United Nations.

(d) Icbam's Reassurance

Although there had been hostilities within Eurasia in the past, all fighting ceased more than four years ago. Since then Icbam has neither threatened nor launched an armed attack against Mirva, other members of the Conclave or any other state.

Furthermore, on 14 December 1983, in a formal reply to the Conclave's Resolutions, Icbam reassured the Conclave that any nuclear weapons manufactured would be used only for defensive purposes and even then only against states external to the Conclave. Icbam also explained that its nuclear policy was in the best interests of the Conclave since non-member states may have stockpiles of nuclear weapons which may prove a threat to peace in Eurasia. Finally, the Conclave's attention was drawn to the fact that the nuclear facility was a matter of Icbam's self-defence, within its domestic jurisdiction and inherent sovereign rights.

(e) The Conclave Resolution of 21 December 1983

On 21 December 1983, the Conclave adopted another resolution urging Icbam to reconsider the development of nuclear weaponry. Icbam voted against the resolution. The Icbamese delegate informed the Conclave that he would not convey the resolution to his government. Despite that fact, the Conclave made no attempt to communicate the resolution directly to the Icbamese government.

(f) The Attack

At 8 a.m. on 1 January 1984, fourteen members of the Conclave met. Icbam's representative was not present. Pursuant to a resolution adopted that morning, Mirvan jets at 10 a.m. executed a surprise attack on Icbam's nuclear facility. The meeting itself was adjourned only at 12 noon, two hours after the attack.

Permission to enter Icbamese airspace was not sought and the Icbamese nuclear facility, situated on Icbamese sovereign territory, was destroyed. As a further result of this attack, three technicians present on the site at the time were killed.

Security Council authorization had not been obtained and the Security Council first heard of the attack only after the plant had been destroyed. Even then the news was conveyed to the Security Council only by way of information. No **ex post facto** authorization was sought.

(g) Submission to the International Court of Justice

Both Icbam and Mirva are members of the United Nations and on 4 September 1984, they agreed to submit the present dispute to the International Court of Justice. There are no reservations to the jurisdiction of the Court.

QUESTIONS PRESENTED

1. Whether Mirva's attack on the Icbamese nuclear facility was in violation of Article 2(4) of the United Nations.

2. Whether Mirva's attack could be justified as a legitimate exercise of the right of self-defence.

3. Whether Mirva's action can be justified as authorized enforcement action under the United Nations.

4. Whether Icbam's development of a nuclear weapons capacity could in any way justify Mirva's violation of international law.

SUMMARY OF ARGUMENTS

The interests of international peace and security dictate that a strict view be taken of a state that resorts to the use of armed force against another sovereign state. The prohibition against such use of force is enshrined in Article 2(4) of the Charter of the United Nations and is a cornerstone of the system established under the Charter.

Mirva's act of attacking Icbam's Sorgred Desert nuclear facility showed a blatant disregard for Article 2(4), violating both the spirit and the letter of the article.

Mirva cannot justify its actions as self-defence in the face of Article 51 of the Charter, which makes it clear that such a right can only be invoked when there has been a prior armed attack. Any allegation of such prior armed attack cannot be supported on the facts.

Any attempt to justify the Mirvan armed attack as anticipatory self-defence similarly fails. The Charter has expressly provided for situations where self-defence can be invoked and these provisions do not allow for any right of anticipatory self-defence. To recognise such a right would be an open invitation for individual states to take unilateral action to remove any perceived threat, be it real or imagined. With today's increasingly sophisticated and lethal weapons of destruction, a mistaken assessment of a threat could well lead to catastrophic consequences for the state that is attacked.

Even assuming **arguendo** that such a right exists, Mirva cannot invoke it in the instant case since there was no imminent danger

involved. Icbam made clear its intention to use its nuclear weapon capability solely for defensive purposes, further asserting in its statement of 14 December 1983 that such a capability would be in the interests of the region as well. The circumstances can hardly be said to constitute a threat to any state in the region, let alone an imminent threat.

The Mirvan action also constituted unauthorised enforcement action by a regional arrangement or agency in violation of Article 53(1) of the Charter. The use of armed force in the circumstances of the case clearly amounted to enforcement action and it is evident that the Security Council did not pass any resolution authorising the armed attack.

In any case the Conclave decision to use armed force was **ultra vires** its powers as a regional arrangement or agency. Article 7(a) of the Conclave Constitution limits any use of armed force to situations where the region's peace is endangered. In view of Icbam's declared intentions to use the nuclear weapons purely for defensive purposes, it cannot be said that Icbam's acquisition of these weapons constituted a threat to the region's peace. The Conclave meeting which authorised the attack was held in circumstances which indicated a lack of good faith: the early hour of the meeting, the absence of the Icbamese delegate, the carrying out of the attack in the midst of the meeting to ensure its success as a surprise attack. Further the Conclave chose to resort to armed force before it had exhausted all other avenues of peaceful settlement in violation of Article 52(1) of the Charter. Although the Security Council proved of little help, it was still open to the

Conclave to seek the assistance of the General Assembly. This they failed to do, choosing instead to launch an armed attack.

Icbam, in contrast, has at all times acted in accordance with international law. The development of a nuclear weapons facility was merely an exercise of every state's sovereign right to organise its own self-defence. This development was not in violation of any treaty to which Icbam was a party, or of any rule of customary international law.

International law, under the regime of the Charter, does not recognise any right of forcible self-help. This is supported by judicial decisions and state practice. In these circumstances, Mirva cannot appeal to any right of self-help as justification for its actions. Even if such a purported right exists, it cannot be invoked on the facts of the instant case.

ARGUMENTS AND AUTHORITIES

I. MIRVA'S ATTACK ON THE ICBAMESE NUCLEAR FACILITY WAS IN VIOLATION OF ARTICLE 2(4) OF THE UNITED NATION CHARTER[1]

The prohibition against the use of force as enshrined in Article 2(4) of the Charter, is a fundamental principle of international law[2] and is the very basis of the existence of the United Nations system.[3] As such, any use of force by a member state which contravenes either the letter or the spirit of Article 2(4) should be seen as a breach of a basic treaty obligation. This is the accepted reading of Article 2(4)[4] as supported by the **travaux preparatoires**[5] and by the judgment of this

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1. 59 Stat. 1031 (1945) T.S. No. 993 (hereinafter "the Charter").

2. The 1981 G.A. Res. No. 36/103 on the Inadmissibility of Intervention and Interference in the International Affairs Of States declared that "... it is the fundamental principle of the Charter that all states have a duty not to threaten or use force against the sovereignty, political independence or territorial integrity of other states." 36 U.N. GAOR Supp. (No. 51) at 79 U.N. Doc. A/36/51 (1981). **See also** Schachter, **The Legality of Pro-democratic Invasion**, 78 AM. J. INT'L L. 645, 648 (1984).

3. L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS 43 (3rd ed. 1969) (hereinafter "GOODRICH"). **See also** J.L. BRIERLY, THE LAW OF NATIONS 414 (6th ed. 1963): "Article 2(4) [the essence of which is the nonuse of force] is the corner-stone of the Charter System."

4. GOODRICH, **supra** note 3 at 104-5; L. OPPENHEIM, I INTERNATIONAL LAW 153 (Lauterpacht ed., 7th ed. 1952); BRIERLY, **supra** note 3, at 415; I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 267 (3rd ed. 1963) M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 221 (4th ed. 1982); Wright, **The Cuban Quarantine**, 57 AM. J. INT'L. L. 546, 556 (1963); Waldock, **The Regulation of the Use of Force By Individual States in International Law**, 81 RECUEIL DES COURS 455, 493 (1952).

5. **The Report of Committee I to Commission I**, 6 U.N.C.I.O. Docs. 304, 334, 459 (1945) affirmed that under Article 2(4) "the unilateral use of force or similar coercive measures is not authorized or admitted," and that "the use of force ... remains legitimate only to back up the decisions of the organization etc." **See also** BROWNLIE, **supra** note 4, at 267 where he states that "[t]he conclusion warranted by the **travaux preparatoires** is that the [limbs of Article 2(4)] were not intended to be restrictive but, on the contrary, to give more specific guarantees to small states and that it cannot be interpreted as having a qualifying effect."

Court in the **Corfu Channel Case.**[6] Hence, Mirva's bombardment of the Icbamese nuclear facility being a clear use of force was a direct violation of Article 2(4) of the Charter.

Even if a more restrictive interpretation is to be adopted, Mirva's actions would nevertheless still be in violation of Article 2(4).

First, Mirva violated the territorial integrity of Icbam. The "territorial integrity" of a state includes not only the right to control persons and objects within its boundaries[7] and airspace,[8] but also the right to control access to its territory.[9] Mirva's destruction of the Sorgred nuclear facility, which was situated within Icbam's territory, constituted an interference with Icbam's right to regulate objects within its boundaries. Additionally, in entering Icbamese airspace without permission, however briefly,[10] Mirva violated Icbam's right both to control its own territory and access to it, again thereby interfering with Icbam's territorial integrity.

Secondly, the political independence of Icbam was also threatened by the attack. The political independence of a state includes not only its governmental authority in relation to other governments, but also the freedom to exercise political discretion within its own boundaries

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6. **(U.K. v. Albania)** 1949 I.C.J. 35. This Court stated that the alleged right of intervention could only be regarded as the main manifestation of a policy of force and cannot find a place in international law.
7. BRIERLY, **supra** note 3, at 162.
8. W. LEVI, CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION 129 (1979); J. FAWCETT, THE LAW OF NATIONS 63 (1968); M. McDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 177 (1961).
9. Schachter, **supra** note 2, at 649.
10. "An invasion, however brief in duration, violates the essence of territorial integrity. . . ." **Id.**

and to regulate its own domestic affairs.[11] This attack on the Icbamese nuclear facility will necessarily cloud any future political decisions that Icbam may wish to take with regard to its own self-defence.

Thirdly, Mirva's attack is a gross violation of the purposes of the United Nations, the very basis and foundation of which is the non-use of force.[12] The first purpose stated in Article 1(1), is "[t]o maintain international peace and security, and to that end: to take collective measures for the ... suppression of acts of aggression." It follows then that it would be equally contrary to the purposes of the United Nations for any state to commit an act of aggression. The General Assembly unanimously defined "aggression"[13] in words strikingly similar[14] to those of Article 2(4) of the Charter. Furthermore, Article 3 of the same General Assembly resolution states specifically that the "[b]ombardment by the armed force of a state against the territory of another state ..."[15] shall qualify as an act of aggression. As such, Mirva's act of bombarding the Icbamese nuclear facility was clearly an

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11. H. JACOBINI, INTERNATIONAL LAW: A TEXT 69 (1968).

12. See note 2 **supra. Cf.** A.V.W. THOMAS & A.J. THOMAS, NON-INTERVENTION 131 (1956), where the authors state that "... armed intervention which is not calculated to impair territorial integrity or political independence ... would [nevertheless] clearly seem to fall within the prohibition of the use of force in a manner inconsistent with the purposes of the United Nations, [since] the maintenance of international peace is [a] foremost [purpose]."

13. 1974 G.A. Res. 3314 on the Definition of Aggression, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974).

14. **Ibid.** Article 1 thereof states: "Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition [the resolution]".

15. **Id.**

act of aggression in contravention of the purposes of the United Nations.

Therefore, Mirva's attack on Icbam's nuclear facility was a clear violation of Article 2(4) of the Charter.

II. MIRVA'S ATTACK CANNOT BE JUSTIFIED AS A LEGITIMATE EXERCISE OF THE RIGHT TO SELF-DEFENCE

A. Mirva is not entitled to invoke the right of self-defence in the absence of an armed attack

Article 51 of the Charter preserves the inherent right of individual and collective self-defence solely in the event of an armed attack.[16] Therefore, "[u]nder the Charter alarming military preparations by a neighbouring state would justify a resort to the UN Security Council, but would not justify a resort to anticipatory force by the State which believed itself threatened."[17]

The plain reading of Article 51 is supported by several publicists.[18] This is consistent with Article 33 of the Charter which obliges member states to use "peaceful means" in the settlement of disputes. Read together, these two articles prohibit the use of force

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16. P.C. JESSUP, A MODERN LAW OF NATIONS 166 (1952). See also OPPENHEIM, **supra** note 4, at 156.

17. JESSUP, **supra** note 16, at 166.

18. N. SINGH, NUCLEAR WEAPONS AND INTERNATIONAL LAW 126 (1959); BROWNLIE, **supra** note 4, at 273; H. KELSEN, THE LAW OF THE UNITED NATIONS: 269, 797-8 (1951); Kunz, **Individual & Collective Self Defence in Article 51 of the Charter of the United Nations**, AM.J. INT'L L. 878 (1947); L. HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 232-3 (2nd ed. 1979); OPPENHEIM, **supra** note 4, at 156; D'Amato, **Imagining a Judgment in the Case of Iraq v. Israel - The Israeli Air-Strike**, Hearings before the Senate Committee on Foreign Relations, 97th Cong., 1st Sess., at 85-88 (1981).

in the absence of attack.[19]

In the instant case, Icbam had been doing nothing more than constructing a nuclear weapons plant and had expressly disavowed any hostile relations. There had been no armed attack of any kind by Icbam on Mirva or any other state. Therefore, Mirva had no right of self-defence under the Charter.

B. There is no right of anticipatory self-defence independent of the United Nations Charter

Where the Charter makes no provision regarding a right which existed in international law prior to the coming into force of the Charter, that right arguably survives. Where the Charter makes specific provision in relation to a right, however, that provision is exhaustive.[20] Hence, the right of anticipatory self-defence, which was recognized under pre-Charter international law, has been extinguished by Article 51 of the Charter which recognizes the right of self-defence only in situations where an "armed attack" has occurred.[21] Such a view is entirely consistent with the whole object of the Charter which is to place the unilateral use of force under the control of the United Nations.[22]

C. Sound policy considerations are against recognizing a right of anticipatory self-defence

First, anticipatory self-defence involves a determination of the certainty of attack. This is extremely difficult to make and

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19. Polebaum, **National Self-Defence in International Law: An Emerging Standard for a Nuclear Age**, 59 N.Y.U.L. REV. 187 (1984). See **also** Wright, **supra** note 4, at 560-1.

20. BROWNLIE, **supra** note 4, at 273.

21. **Id.**

22. **Id.**

necessitates an attempt to ascertain the intentions of another government. Such a process could lead to disaster if there is a mistaken assessment of the situation.[23]

Secondly, even if a state is preparing an attack, it still has a **locus poenitentiae** prior to launching its forces against the territory of the intended victim. This is lost if anticipatory self-defence is recognized as a legal defence.[24]

Thirdly, any state which considers itself to be a potential victim of military preparations is not forced to remain supine, but may take all necessary precautions short of commencing an attack. It may also appeal to the competent organs of the United Nations.[25]

Fourthly, the destructive potential of nuclear weapons is so enormous that what little security the world has against a war of annihilation demands maintaining a clear legal rule prohibiting attacks in the form of anticipatory self-defence.[26]

It is thus submitted that international law today does not recognise the right of anticipatory self-defence and that Mirva's actions were consequently in violation of international law.

D. Even if anticipatory self-defence survives the United Nations Charter, it cannot be invoked in the present case

Individual anticipatory self-defence would at least require proof of an imminent danger to the state invoking the right.[27] Although

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23. BROWNLIE, **supra** note 4, at 259.

24. **Id.** **See also** SINGH, **supra** note 18, at 127.

25. BROWNLIE, **supra** note 4, at 259.

26. D'Amato, **Israeli's Air Strike Upon the Iraqi Nuclear Reactor**, 76 AM. J. INT'L L. 584, 588 (1983).

27. D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 187-193 (1958).

Icbam had been developing a nuclear weapons facility, Mirva had no cause to fear that Icbam would have used this facility against it. There was no evidence of any hostilities between the two nations. Furthermore, Icbam had made an official declaration that the weapons would be used for defensive purposes and even then only against states outside the Conclave of Eurasian Unity. This declaration was a formal reply by Icbam to the Conclave resolution urging Icbam to abandon its nuclear armament programme. In these circumstances, Icbam must be taken to have assumed that the Conclave members would rely on it[28] upon communication to the Conclave.[29]

There was no threat of any armed attack of any kind on Mirva let alone an immiment one. Hence Mirva's bombing and total destruction of the Icbamese nuclear facility could not have been, in any case, a legitimate exercise of individual anticipatory self-defence but was a clear violation of international law.

Neither can Mirva invoke a collective right of anticipatory self-defence since this requires that "each participating state has an individual right of self-defence"[30] which Mirva did not have,[31] and also that "there exists an agreement between the participating states to exercise their rights collectively."[32] State practice indicates that

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28. **See The Nuclear Test Cases (Australia v. France)** 1974 I.C.J. 253 and **(New Zealand v. France)** 1974 I.C.J. 457.

29. G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY COURTS AND TRIBUNALS 421-2 (3rd ed. 1957).

30. BOWETT, **supra** note 27, at 207. **See also** Waldock, **supra** note 4, at 505; Higgins, **The Legal Limits to the Use of Force by Sovereign States,** 27 BRIT. Y.B. INT'L L. 269, 307 (1961); J. STONE, LEGAL CONTROL OF INTERNATIONAL CONFLICT 245 (1954).

31. **See** text **supra** accompanying notes 27 to 29.

32. BOWETT, **supra** note 27, at 207.

where states rely on a regional arrangement for collective defence, that agreement expressly incorporates the right of collective self-defence under Article 51 of the Charter.[33] The Constitution of the Conclave of Eurasian Unity has no such provision.

It is thus submitted that Mirva is not entitled to invoke any right of individual or collective anticipatory self-defence.

III. MIRVA'S ACTIONS CANNOT BE JUSTIFIED AS AUTHORIZED ENFORCEMENT ACTION UNDER THE TERMS OF THE UNITED NATIONS CHARTER

A. The aerial strike on the Icbamese nuclear facility amounted to enforcement action within the meaning of the Article 53(1)

1. The use of armed force constitutes enforcement action

The Charter contemplates in Article 2(7) that measures taken under Chapter VII, which includes the use of armed force,[34] are enforcement action. "The **travaux preparatoires** [also] indicate that all action under Chapter VII is enforcement action."[35] Further, this Court has interpreted enforcement action to include measures involving the use of armed force.[36] The practice of the United Nations Security Council,

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33. **See, e.g.,** Art. 5 of the 1949 North Atlantic Treaty (4 April 1949), 34 U.N.T.S. 242; Art. 3 of the 1947 Inter-American Treaty of Reciprocal Assistance (2 September 1947), 21 U.N.T.S. 91 (1948); Art IV of the 1948 Treaty of Economic Social & Cultural Collaboration and Collective Self-Defence (17 March 1948), 19 U.N.T.S. 51.

34. **See** Art. 42 of the Charter.

35. Akehurst, **Enforcement Action by Regional Agencies with Special Reference to the Organization of American States,** 42 BRIT. Y.B. INT'L L. 175 (1967). **See also** GOODRICH, **supra** note 3.

36. **Certain Expenses of the United Nations (Advisory Opinion)** 1962 I.C.J. 151, at 165, where the Court held enforcement action to mean "such action is solely within the province of the Security Council. . . . [this being] that which is indicated by the title of Chapter VII of the Charter." Chapter VII, Article 42, allows action involving the use of armed force.

which is a reliable guide to the meaning of the relevant provisions,[37] substantiates such an interpretation.[38]

Additionally, the use of armed force must constitute enforcement action within the meaning of Article 53(1) because to hold otherwise would have the effect of rendering this provision meaningless. Should an armed attrack by a regional arrangement not amount to enforcement action, then **a fortiori** measures falling short of the use of armed force will also not amount to enforcement action. No conceivable act of a regional arrangement can then constitute enforcement action, since such acts must necessarily involve either measures of armed force or measures falling short of armed force. Such an interpretation is to be avoided because "[i]t is to be taken for granted that the parties intend the provisions of a treaty to have a certain effect, and not to be meaningless".[39] Therefore the interpretation of enforcement action must clearly include measures involving the use of armed force.

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37. "The importance of practice in the interpretation of great constitutional documents, international and national, has long been recognized and is today commonly accepted." Mc Dougal & Gardner, **The Veto and the Charter: An Interpretation for Survival,** 60 YALE L.J. 258, 282 (1951). **See also Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)** 1950 I.C.J. 8-9, and **Certain Expenses of the United Nations, supra** note 36, at 165. In both opinions this Court referred to the practice of the United Nations' organ concerned to substantiate its interpretation of Charter provisions.

38. J.N. Moore, **The Role of Regional Arrangements in the Maintenance of World Order,** 3 THE FUTURE OF THE INTERNATIONAL WORLD ORDER 123, at 156 (Black & Falk eds. 1971); GOODRICH, **supra** note 3, at 365-6. **See generally Repertory of the Practice of United Nations Organs,** 1971 Supp. (No. 3, Vol. II) at 288-299.

39. L. OPPENHEIM, I INTERNATIONAL LAW 956 (Lauterpacht ed., 8th ed. 1955).

2. The armed attack cannot be considered a peace keeping operation

a. The concept of a peace keeping operation is not applicable to regional arrangements

Peace keeping operations undertaken by United Nations forces at the initiative of the General Assembly have been recognized as not amounting to enforcement action by this Court in its opinion in **Certain Expenses of the United Nations.**[40] However, the Court there was only concerned with the competence of the General Assembly to organize such operations and not with the competence of regional arrangements.

In no instance has the United Nations Security Council expressly favoured allowing regional arrangements to carry out peace keeping operations without its authorization.[41]

Further, regional arrangements should not be recognized as competent to organize peace keeping operations on policy grounds. First, regional arrangements may use armed force to pursue their own interests under the pretext of organizing peace keeping operations. Secondly, it would be difficult to ensure that peace keeping operations do not become coercive,[42] especially when the forces are employed in a conflict between different groups within a state. While the United Nations may be able to ensure that the peace keeping forces are not utilised for partisan purposes, major power domination of regional arrangements may result in assertion of special interests.

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40. **Supra** note 36, at 170 - 171.

41. **See generally Repertory of the Practice of United Nations Organs, supra** note 38.

42. Eide, **Peace keeping and Enforcement by Regional Organizations**, 3 J. PEACE RESEARCH 125, 141 (1966).

b. Even if it is applicable to regional arrangements, the use of force in the instant case did not constitute a peace keeping operation

The armed attack was undertaken without the permission of the government[43] of Icbam and without the objective of helping to establish peaceful conditions[44] in the state concerned and therefore cannot be considered a peace keeping operation. The strike was clearly not launched with the consent of the government of Icbam. There is also no evidence of any turmoil disrupting the peace in Icbam. In such circumstances there can hardly be a need to establish peaceful conditions. The armed attack thus cannot be considered a peace keeping action.

B. United Nations Security Council authorization was not obtained for an enforcement action

1. The purported enforcement action was taken in circumstances which required Security Council authorization under Article 53(1) of the Charter.

Article 53(1) expressly provides for three situations in which enforcement action can be initiated without authorization from the Security Council. These are when (a) the Security Council itself decides to utilize the regional arrangement for enforcement action under its authority; (b) the enforcement action is taken against any enemy state pursuant to Article 107; or (c) the enforcement action is directed against renewal of an aggressive policy on the part of any enemy state.

None of these exceptions can apply to the instant case. The first exception is inapplicable since the enforcement action here was taken at the initiative of the regional arrangement and not as a result of a

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43. **Certain Expenses of the United Nations, supra** note 36, at 170 - 171.

44. **Id.**

Security Council decision to utilize the regional arrangement for enforcement action.

The second and third exceptions are similarly inapplicable since Icbam is not an "enemy state" within the meaning of Article 53(1).[45]

None of the exceptions being applicable, the airstrike required Security Council authorization under Article 53(1) to qualify as lawful enforcement action.

2. Security Council authorization under Article 53(1) must be given in advance

Security Council authorization must be obtained prior to the enforcement action being carried out and cannot be postponed until after the enforcement action has begun.[46]

There is no indication in the practice of the Security Council that Article 53(1) should be interpreted to allow authorization **ex post facto**.[47]

Further, strong policy reasons support prior authorization. To allow **ex post facto** Security Council authorization would have the effect of encouraging illegal acts by regional arrangements, since they might be "tempted to initiate enforcement action in the hope that the Security

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45. **See** Clarifications, para. 8.

46. Akehurst, **supra** note 35, at 216.

47. The only instance in which the question of **ex post facto** authorization arose before the Security Council was in 1960 when the Soviet Union suggested that the Council authorize sanctions imposed by the Organization of American States against the Dominican Republic sixteen days earlier. No broad consensus emerged as to the validity of the Soviet interpretation of Article 53(1). **See Report of the 893rd Meeting of the Security Council** (8 September 1960), U.N. SCOR, U.N. Doc. S/P.V. 893 (1960).

Council would give its approval afterwards, but this hope might not always be fulfilled."[48] It would also have the effect of fettering the discretion of the Security Council under Article 53(1) since "it would be politically awkward to withhold authorisation for what had already been done."[49]

3. Security Council authorization must be express

Authorization under Article 53(1) means express authorization by the Security Council. A mere failure to disapprove the enforcement action cannot amount to authorization.[50]

The ordinary meaning of Article 53(1) clearly envisages a positive and active role for the Security Council.[51] If a mere failure to disapprove is accepted as authorization, then it is more of "a tacit Charter amendment ... than a reasonable interpretation of the initial intent of the San Francisco Conference."[52]

An interpretation requiring express authorization is also more consistent with the purposes of the United Nations. With express authorization, approval of the Security Council would only be secured with the concurring votes of all the permanent members of the Council under Article 27. If a mere failure to disapprove is accepted as amounting to authorization, then a regional arrangement will be free

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48. Akehurst, **supra** note 35, at 216.

49. **Id.**

50. Moore, **supra** note 38, at 159-160; Akehurst, **supra** note 35, at 216-219.

51. Article 53(1) states that "no enforcement action shall be taken ... without the authorization of the Security Council."

52. Moore, **supra** note 38, at 160.

from the effective control of the Security Council once it obtains the support of one of the permanent members of the Security Council. Such a consequence clearly cannot contribute towards the maintenance of peace and security and the achieving of international cooperation in solving international problems, both of which are enshrined in Article 1(1) and Article 1(3) as purposes of the United Nations.

Further, there is no instance in the practice of the Security Council which can support this broad reading of the authorisation requirement in Article 53(1).[53]

On the facts of this case, the Security Council has not even debated the question of the aerial strike on the Icbamese nuclear facility, much less authorised it. As such the enforcement action has not received the authorisation of the Security Council as required by Article 53(1).

C. The Eurasian Conclave's purported authorization of Mirva's actions was ultra vires and therefore illegal

1. The decision to use armed force against Icbam was unauthorised under Article 7(a) of the Conclave Constitution

The Conclave Constitution provides in Article 7 that the Conclave is only authorized to use armed force when the peace of the region is endangered.

There is no evidence to indicate that the peace of the region was in any way endangered. There merely existed a difference of opinion between the Conclave and Icbam as to the desirability of nuclear armaments. Icbam took steps to reassure the Conclave that this was not

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53. Akehurst, **supra** note 35, at 219. **See generally Repertory of the Practice of United Nations Organs, supra** note 38.

a threat to the peace of the region. In its formal statement of 14 December 1983 Icbam undertook a legally binding obligation[54] to use its nuclear weapons solely for defensive purposes and even then, only against states external to the Conclave.

Far from endangering the peace of the region, Icbam's nuclear weapon capability may instead have helped to preserve this peace since states external to the Conclave which possessed nuclear weapons would have been deterred from any aggression in the light of Icbam's own nuclear weapon capablity.[55]

Therefore no fact or situation existed which endangered the peace of the region and as such no resort can be had to the powers of the Conclave under Article 7 of the Conclave Constitution.

2. The power of the Conclave to decide on the use of armed force, under Article 7(b) of the Conclave Constitution, was not exercised in good faith

It is a fundamental rule of international law that treaties and the provisions contained therein must be performed in good faith.[56]

The meeting of the Conclave on 1 January 1984 was held in circumstances which did not satisfy this requirement of good faith.

It was held no earlier than the day of the attack itself and was adjourned only after the attack had been successfully carried out.

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54. See text **supra** accompanying notes 28 and 29.

55. See para. 4 of Icbam's formal statement to the Conclave on 14 December 1983.

56. OPPENHEIM, **supra** note 39. **See also** B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 114 (1953); International Law Commission, **Commentary on Article 26, Vienna Convention on the Law of Treaties,** (1966) 2 Y.B. INT'L L. COMM'N. 211. Article 26 reads: "Every Treaty is binding upon the parties to it and must be performed in good faith." U.N. Doc. A/Conf. 39/27 (1971), **reprinted in** 8 INT'L LEG. MATS. 679 (1969).

Furthermore, good faith requires that the broad powers conferred on the Conclave by Article 7(a) must be exercised "according to the common and real intention of the parties at the time the treaty was concluded."[57] That intention could hardly have been to endow the Conclave with the authority to launch a surprise armed attack against any of the parties.

Therefore in launching this surprise armed attack against Icbam, the Conclave had acted in violation of this requirement of good faith.

3. The act of the Conclave in authorizing the armed attack amounted to an activity of a regional arrangement inconsistent with the purpose and principles of the United Nations and was therefore in breach of Article 52(1) of the Charter

Article 52(1) allows the existence of regional arrangements only in so far as, **inter alia**, their activities are consistent with the purposes and principles of the United Nations.[58]

Article 2(3) obliges members to settle their international disputes by peaceful means and in a manner which does not endanger peace and security.

The Conclave had not utilized all peaceful means to settle their dispute with Icbam. After the failure of the Security Council in its primary responsibility to assist in the settlement of the dispute because of a lack of unanimity of the permanent members, the Conclave did not attempt to seek the assistance of the General Assembly, which has a secondary responsibility in such cases.[59]

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57. CHENG, **supra** note 56, at 114.

58. **See** Arts. 1 and 2 of the Charter.

59. 1950 G.A. Res. 377 on Uniting for Peace, 5 U.N. GAOR Supp. (No. 20) 10 U.N. Doc. A/1775 (1950).

Even if the General Assembly was not in session, the Conclave could have convened an emergency special session of the General Assembly with the support of a majority of the members of the United Nations.[60] The fact that the Conclave did not even attempt to obtain the support of the majority of the members of the United Nations to convene such an emergency special session is especially striking in the face of the fact that there was an interval of about three months separating the Security Council's decision to table the matter indefinitely and the armed attack on the Icbamese plant.

In addition, Icbam had indicated its conciliatory attitude towards the dispute by attempting to reassure the Conclave that it was acting in the Conclave's best interests.[61] There is no reason to believe that such an attitude would not have continued if Icbam had been informed of the Conclave's uneasiness[62] even after receiving its reassurances. Instead of exploring the possibilities of further discussion with the Icbamese government by dealing directly with them, the Conclave chose instead to use armed force.

In launching an armed attack the Conclave was attempting to settle the dispute by a non-peaceful means and in a manner which endangered peace and security. This act was therefore clearly in breach of the principle laid down in Article 2(3).

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60. **Ibid.**, Part A, para. 1.

61. **See** Icbam's formal statement of 14 December 1983.

62. **See** the Conclave resolution of 21 December 1983 which the Icbamese delegate, to the knowledge of the Conclave, failed to convey to his government.

The armed attack was thus illegal under the Charter as it amounted to an activity of a regional organization beyond the scope of activities allowed such organization.

IV. ICBAM'S DEVELOPMENT OF A NUCLEAR WEAPONS CAPACITY CAN IN NO WAY JUSTIFY MIRVA'S VIOLATION OF INTERNATIONAL LAW

A. Every state has the sovereign right to organise its self-defence within the limits of international law

It is a corollary of its internal independence and territorial supremacy that a state can organize its forces on land and sea in the manner it sees fit.[63]

In the absence of treaty obligations[64] or a positive rule of international law, Icbam was entitled to construct a facility for the manufacture of nuclear weapons for purely defensive purposes.

B. The mere manufacture and possession of nuclear weapons does not violate international law

1. The declaration of Eurasia as a Nuclear Free Zone cannot bind Icbam who is not party to the Treaty of Tellaraviv

If the declaration of a Nuclear Free Zone is applied to Icbam it would constitute a unilateral imposition of a change of status by the Conclave upon Icbam.[65] This would be an intolerable derogation of Icbam's right of self-defence which is a concomitant of its complete, exclusive and supreme territorial sovereignty.[66] Furthermore, for the

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63. OPPENHEIM, **supra** note 39, at 287; M. SORENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW 316 (1968); Sornarajah, **Indian Ocean as a Peace Zone-Possible Legal Framework**, 12 INDIAN J. INT'L L. 543 at 552 (1972).

64. **See** OPPENHEIM, **supra** note 39, at 291-292.

65. **E.g.**, the nuclear free zone established by the Treaty for the Prohibition of Nuclear Weapons in Latin America does not apply to Cuba (a non-party) even though it is within the region. **See** Robinson, **The Treaty of Tiatelolco and the United States: A Latin American Nuclear Free Zone**, 64 AM. J. INT'L L. 282 (1970).

66. SORENSEN, **supra** note 63, at 316.

declaration to qualify as a customary rule of law, the Conclave must establish that its actions in concluding the Treaty of Telleraviv were expressions of a **duty incumbent** upon the Eurasian states rather than from political expediency.[67]

It is submitted that if the fourteen States which signed the Treaty of Tellaraviv did feel any duty at all, that obligation was a result of their participation in the Treaty on the Non-Proliferation of Nuclear Weapons.[68] Article VII of this treaty encourages parties (which Icbam is not) to take measures towards denuclearization. No inference can therefore be legitimately drawn as to the existence of a customary rule of law[69] apart from treaty obligations.

Even if the denuclearization of Eurasia were emerging as regional customary international law, Icbam could not be bound by such a rule as it has persistently objected to it,[70] refusing from its inception to have any part in the drafting and adoption of the Treaty of Tellarariv.

2. No general principle of international law prohibits the manufacture and possession of nuclear weapons

International law allows the use of tactical nuclear weapons[71] in defence against a conventional attack or in response to a prior nuclear

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67. **Asylum case (Colombia v. Peru)** 1950 I.C.J. 266 at 277 and 286.

68. 729 U.N.T.S. 161.

69. **North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)** 1969 I.C.J. at 43 and 44.

70. **Asylum case, supra** note 67, at 278.

71. Weston, **Nuclear Weapons v. International Law: A Contextual Reassessment**, 28 REVUE BELGE DE DROIT MCGILL 542 at 586 (1983).

offensive[72] provided that the principle of proportionality is satisfied and the laws of war observed.[73]

In the absence of any positive rule of international law, Icbam's development of nuclear arms for defensive purposes[74] was legal.[75] Neither is it contrary to principles of human rights, such as the rights to life and peace since the concept of nuclear deterrence is to prevent other states from using their nuclear weapons thereby avoiding the catastrophe of a nuclear war.[76]

Icbam therefore acted in accordance with international law.

C. Icbam was not bound by the Treaty on the Non-Proliferation of Nuclear Weapons

1. Icbam was not party to the Non-Proliferation Treaty and therefore not bound by it

The principle of **pact tertis nec nocent nec posunt** states that a treaty binds only contracting parties. Neither rights nor duties arise

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72. G. SCHWARZENBERGER, THE LEGALITY OF NUCLEAR WEAPONS 40-41 (1958); SINGH, **supra** note 18, at 218-23.

73. This view is expressed in various manuals of military law. See Brownlie, **Some Legal Aspects of the Use of Nuclear Weapons,** 14 INT'L & COMP. L.Q. 437 at 446 note 38 (1965). The Soviet Ministry of Defence in the official manual of naval law gives tacit approval to the legality of the use of nuclear weapons against military targets. **See** Maggs, **The Soviet Viewpoint on Nuclear Weapons in International Law,** 29 L. & CONTEMP. LEG. PROBS. 956 at 957 (1964).

74. As affirmed by its binding declaration of 14 December 1983; **see** text **supra** accompanying notes 27 to 29.

75. **Lotus Case (France v. Turkey)** 1927 P.C.I.J. Ser. A, No. 10 at 23: "[R]estrictions upon the independence of states cannot be presumed."

76. **See** G.A. Res 36/103, **supra** note 2, at 80.

under it for non-party third states.[77] Icbam, not having ratified the NPT, is not entitled to the benefits[78] thereunder and should not be subject to its obligations.

2. The Non-Proliferation Treaty has not become customary international law

A rule in a treaty may bind non-parties only if it becomes a part of international custom, evidenced by state practice and **opinio juris.**[79] The Non-Proliferation Treaty is, however, only a bargain struck between nuclear weapons and non-nuclear weapons states whereby the latter forego nuclear weapons capability in return for favoured-nation status in the dissemination of peaceful nuclear technology. It is not of a norm-creating nature.[80] Furthermore, the states specially interested, namely, those on the threshold of developing nuclear capability, have largely refrained from ratifying the treaty.[81] State practice is far

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77. See **Free Zones of Upper Savoy and the District of Gex Case (France v. Switzerland)** 1932 P.C.I.J. ser. A/B, No. 46, 95 at 147. See **also** OPPENHEIM, **supra** note 39, at 925; C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 529a (2nd ed. 1945); JESSUP, **supra** note 16; Vienna Convention on the Law of Treaties, Arts. 34 and 35, U.N. Doc. A/Conf. 39/27 (1971), Fitzmaurice, **The General Principles of International Law Considered from the Standpoint of the Rule of Law,** 92 RECEUIL DES COURS 198 (1957).

78. See **Certain German Interests in Polish Upper Silesia (Merits) (Germany v. Poland)** 1926 P.C.I.J., Ser. A. No. 7 at 27 - 29; **Chorzow Factory Case (Indemnity) (Merits) (Germany v. Poland)** 1928 P.C.I.J. Ser. A, No. 17 at 43-46.

79. See Fitzmaurice, **supra** 77, at 198; **see also** Vienna Convention on the Law of Treaties, Art. 38, **supra** note 77.

80. **North Sea Continental Shelf Cases, supra** note 69, at 42.

81. **E.g.,** India, Israel, Pakistan and South Africa have refused to adhere to it. Further, out of five nuclear weapons states in 1968, only three had ratified the Non-Proliferation Treaty. In fact, India detonated its first nuclear explosion in 1974. See **generally** Dolzer, **International Nuclear Cooperation: Obligations, Conditions and Options,** 20 INDIAN J. INT'L L. 366 at 383 (1980).

from showing uniform and constant usage[82] necessary to establish non-proliferation as customary international law. In any event, the Non-Proliferation Treaty cannot apply to Icbam as it has consistently opposed it,[83] and its prior signature does not establish consent to be bound by the treaty.[84]

D. Mirva's action cannot be justified by notions of self-help

The Charter does not recognise any right of forcible self-help.[85] This is borne out by state practice.[86] This Court has previously rejected self-help notions, emphasising that "respect for territorial sovereignty is an essential foundation of international relations."[87]

In particular, specific modes of forcible self-help such as reprisals have been condemned as illegal under the Charter.[88] Armed

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82. **Asylum Case, supra** note 67, at 277.

83. **Anglo-Norwegian Fisheries Case (U.K. v. Norway)** 1951 I.C.J. 116 at 131.

84. See OPPENHEIM, **supra**, note 39, at 903; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 603 (3rd ed. 1979).

85. The Charter regime reserves all use of force to the United Nations itself subject to express exceptions therein. See text **supra** accompanying notes 2 and 6 and authorities cited therein.

86. BROWNLIE, **supra** note 4, at 256.

87. **Corfu Channel Case, supra** note 6, at 35.

88. See 1973 G.A. Res. 2625 on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations. 25 U.N. GAOR Supp. (No. 30) at 52, U.N. Doc. A/9030 (1973); **See also** Bowett, **Reprisals Involving Resort to Armed Force**, 66 AM. J. INT'L L. 1 (1972); BROWNLIE, **supra** note 4, Chap. XI; R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 202 - 205, 217 - 218 (1963); Waldock, **supra** note 4, at 475-494; GOODRICH, **supra** note 3, at 91, 95-96, 102.

intervention violates the absolute principle of non-intervention[89] regardless of the motive of the intervening state,[90] that is, whether on the pretext of protecting nationals abroad or on humanitarian grounds. With respect to the latter, no Charter provision,[91] or any relevant international covenant,[92] grants individual members powers of coercive enforcement. Nor does state practice before[93] or after[94] 1945 support the existence of a doctrine of humanitarian intervention.

In any event, Icbam has acted at all times in accordance with international law.[95] Its development of a nuclear weapons plant could in no way constitute ill-treatment of her own, nor Mirvan nationals, let alone a denial of anyone's human rights.

There being no violation of international law to redress, Mirva was not in any case entitled to invoke any purported general or specific mode of self-help to justify its violation of international law.

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89. See G.A. Res. 2625, **supra** note 88. **See also** the views of many states cited in Fonteyne, **Forcible Self-Help by States to Protect Human Rights: Recent views from the United Nations,** in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 197 App. B. at 205 notes 38 and 39 (Lillich ed. 1973).

90. BROWNLIE, **supra** note 4, at 265-268.

91. See Arts. 1(3), 1(5), 55 and 56 of the Charter.

92. See, e.g., the 1948 Universal Declaration of Human Rights, G.A. Res. 217A (III), GAOR, 3rd session, part 1, Resolutions at 71: **see also** the 1967 International Convenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) 52 U.N. Doc. A/6316 (1967).

93. See Franck & Rodley, **After Bangladesh: The Law of Humanitarian Intervention by Military Force,** 67 AM. J. INT'L L. 275 at 285 (1973); BROWNLIE, **supra** note 4, at 46 and 339.

94. Efforts to justify intervention by alleged humanitarian motives (e.g., the U.S.S.R. in Hungary and Czechoslavakia; the U.S. in Vietnam) have met with heavy criticism. See Donnelly, **Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics,** 37 J. INT'L AFF. 311 at 318 (1973).

95. See text **supra** accompanying notes 63 to 94.

CONCLUSION AND PRAYER FOR RELIEF

CONSIDERING THAT Mirva's airstrike on the Icbamese nuclear weapons facility was in violation of Article 2(4) of the United Nations Charter,

CONSIDERING THAT Mirva's attack was in no way a legitimate exercise of any existing right of self-defence,

CONSIDERING THAT Mirva's attack cannot be justified as authorized enforcement action under either the United Nations Charter or the Constitution of the Eurasian Conclave,

CONSIDERING THAT Icbam acted at all times in accordance with international law,

The Government of Icbam respectfully requests this Honourable Court to:

1. **DECLARE** Mirva's armed attack on military bombardment of Icbam's nuclear facility in the Sogred Desert illegal.

2. **ORDER** Mirva to pay to Icbam 234,999,999 opecs as compensation for the physical damage and loss of life sustained in the attack, and

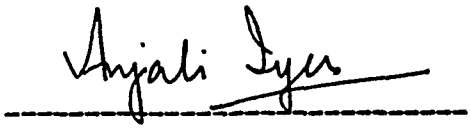
3. **DENY** to Mirva all relief requested by it in the present proceedings.

RESPECTFULLY SUBMITTED,

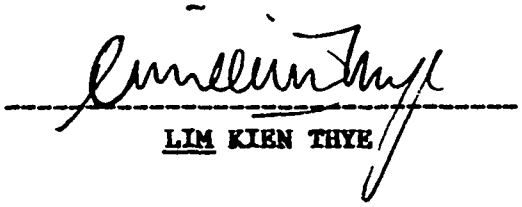
ANJALI IYER
LIM KIEN THYE
MOHAN REVIENDRAN
PRITHIPAL SINGH
ELEANOR WONG

CERTIFICATE

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



ANJALI IYER



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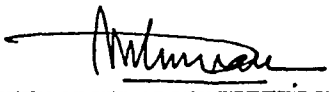

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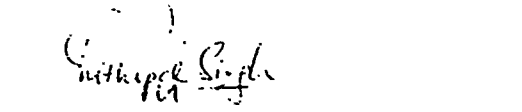

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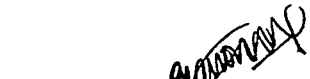

ELEANOR WONG