CR 2003/13

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting

held on Wednesday 26 February 2003, at 3 p.m., at the Peace Palace,

President Shi presiding,

***in the case concerning* Oil Platforms**
(Islamic Republic of Iran *v.* United States of America)

VERBATIM RECORD

ANNÉE 2003

Audience publique

tenue le mercredi 26 février 2003, à 15 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

***en l'affaire des* Plates-formes pétrolières**
(République islamique d'Iran c. Etats-Unis d'Amérique)

COMPTE RENDU

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Guillaume
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Simma
		Tomka
	Judge *ad hoc*	Rigaux
	Registrar	Couvreur

Présents : M. Shi, président
M. Ranjeva, vice-président
MM. Guillaume
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby
Owada
Simma
Tomka, juges
M. Rigaux, juge *ad hoc*

M. Couvreur, greffier

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The PRESIDENT: Please be seated. I now give the floor to Professor Murphy.

Mr. MURPHY:

19. JURISDICTION AND ADMISSIBILITY OF THE UNITED STATES COUNTER-CLAIM

Thank you, Mr. President. May it please the Court.

19.1. On 23 June 1997, the United States filed a counter-claim in this case, asserting that Iran's systematic attacks against maritime shipping in the Gulf during the 1980s impeded commerce and navigation between Iran and the United States, and thus constituted a violation of Article X of the 1955 Treaty. Consequently, in our submissions, we asked the Court not only to reject Iran's wholly unsubstantiated claim, but that the Court uphold the rule of international law under the 1955 Treaty by holding Iran accountable for its egregious and inexcusable conduct.

19.2. In the Court's Order of 10 March 1998, the Court found that the United States counter-claim "is admissible as such and forms part of the current proceedings". Thereafter, Iran responded to the counter-claim in pleadings filed in March 1999 and September 2001, while the United States supplemented its counter-claim in a pleading filed in March 2001.

19.3. Mr. President, the factual and legal issues relating to the counter-claim are fully addressed in the written pleadings. The United States task now is to state succinctly for the Court the key elements of the United States counter-claim, to respond to issues raised by the Government of Iran, and to highlight certain deficiencies in Iran's final pleading on the counter-claim, including the rather stark contradictions in standards that Iran applies in advancing its own claim as compared with its defence on the counter-claim. Our purpose is to assist the Court in reaching a consistent and careful interpretation of the meaning of Article X, the language of which is the same in numerous treaties of friendship, commerce and navigation.

19.4. The United States presentation on the counter-claim will proceed in three parts. First, I will address Iran's assertions regarding jurisdiction and admissibility as they relate to the counter-claim. Second, Mr. Mattler will briefly set forth the basic facts in support of the United States counter-claim, drawing largely on the information and evidence already presented to the Court in the context of defending against Iran's claim. And third, with your permission,

Mr. President, I will return to the podium to relate those facts to the legal interpretation of Article X of the 1955 Treaty, showing that Iran's actions constituted a violation of that Article.

19.5. Mr. President, in Iran's lengthy final pleading on the counter-claim, Iran devoted considerable attention to issues concerning jurisdiction and admissibility of the counter-claim. The United States will not respond in kind since this Court, in its 1998 Order, has largely resolved these issues. However, the United States is obliged to address what the Court said in its 1998 Order about jurisdiction and admissibility, and to address three points raised by Iran.

A. The 1998 Order addressed issues of jurisdiction and admissibility

19.6. Let me begin by briefly recounting the context in which the Court's 1998 Order was issued.

19.7. In 1996, the Court decided it had jurisdiction over Iran's claim against the United States based on Article X, paragraph 1, and decided that Iran's claim was admissible (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, (I.C.J. Reports, 1996 (II),* p. 803). In 1997, the United States filed the counter-claim, which Iran then challenged on grounds of jurisdiction and admissibility. Since the case was now proceeding to a decision on the merits, it made some sense for the Court to decide the issues of jurisdiction and admissibility of the counter-claim. And consequently, both Parties made detailed written arguments to the Court at that time on those issues.

19.8. The United States argued that, pursuant to Article 80 of the Rules of Court as adopted in 1978, the counter-claim was directly connected to Iran's claim, was within the jurisdiction of the Court, and was admissible (Counter-Memorial and Counter-Claim of the United States, paras. 6.10-6.12). In response, Iran argued extensively that the United States counter-claim was not directly connected to Iran's claim, was not within the jurisdiction of the Court, and was not admissible, noting, among other things, the correspondence between the two governments concerning negotiations for settlement of the matter (Iran letter of 2 October 1997; Iran letter of 27 October 1997; Iran request for a hearing of 18 November 1997).

19.9. After fully considering the arguments of both sides, this Court found that the "attacks on shipping, the laying of mines, and other military actions" alleged by the United States "are

capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty as interpreted by the Court". The Court also stated that it "*has jurisdiction* to entertain the United States counter-claim in so far as the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998*, (*I.C.J. Reports 1998*, p. 204, para. 36) (emphasis added). The Court further found that the counter-claim was directly connected to Iran's claim (*ibid*., p. 205, para. 39). And, since those conditions were met, the Court found that "the counter-claim presented by the United States in its Counter-Memorial is admissible as such and forms part of the current proceedings" (*ibid*., p. 206, para. 46). The Court further noted that doing so "in no way prejudges any question which the Court will be called upon to hear during the remainder of the proceedings" (*ibid.*, p. 205, para. 41).

19.10. The Court, therefore, determined that it had jurisdiction over the counter-claim and that the counter-claim was admissible in these proceedings, although the Court left open, of course, whether, on the merits, Iran had in fact violated Article X.

19.11. Nevertheless, in subsequent pleadings on the counter-claim, Iran essentially asks this Court to revisit the prior decision on jurisdiction and admissibility, and in that regard Iran has raised three points. Let me address each in turn.

B. The Court's jurisdiction encompasses both the freedom of commerce and the freedom of navigation

19.12. First, Iran says that the Court has jurisdiction over the counter-claim only to the extent that the counter-claim alleges a violation of the freedom of *commerce*, and not to the extent that it alleges a violation of the freedom of *navigation* (Further Response of Iran to the United States Counter-Claim, para. 5.10).

19.13. With all due respect, the Court's Order of March 1998 could not have been clearer in rejecting that position. The Court said that it "has jurisdiction to entertain the United States counter-claim in so far as the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1" (p. 204, para. 36). The *freedoms*, Mr. President, I emphasize the plurality of that word. There are two freedoms captured in Article 10, paragraph 1: the freedom of

commerce and the freedom of navigation. When the Court said that it had jurisdiction over the alleged acts prejudicing these "freedoms", it was referring to both freedoms.

19.14. Iran's tries to construct a reading of the Court's Order built upon the idea that the United States counter-claim was never concerned with the freedom of navigation. Yet the United States first pleading on the counter-claim is replete with references that encompass both freedoms. To give just one example, the United States said, in its pleadings: "it is difficult to imagine a more direct form of interference with *freedom of navigation* and commerce than a series of armed attacks against commercial vessels of another party and the military vessels escorting them" (see Counter-Memorial and Counter-Claim of the United States, para. 6.16 (emphasis added); see also *ibid*., paras. 6.01, 6.05, 6.06, 6.09). Our counter-claim was clearly predicated on both freedoms and the Court in its 1998 Order recognized it as such.

C. There is no issue of jurisdiction over Liberian claims

19.15. Second, Iran seeks to argue that the United States is advancing claims on behalf of Liberia (Further Response to the United States' Counter-Claim of Iran, para. 5.21). The United States, of course, is doing nothing of the sort. The United States is not seeking any damages owed to third States as a result of Iran's unlawful attacks and mining. Rather, we are seeking a decision by this Court that Iran violated the obligations *owed to the United States* under Article X which caused damage to the United States and its nationals. Any damages that might be owed to third States are not before this Court. The statement by Liberia referred to by Iran was simply an indication that Liberia has no objection to the United States advancing a claim that involves, among other things, Liberian flagged vessels. Liberia's assertion that it wished to receive any compensation owed to Liberia obviously reflected some misunderstanding on the part of the Liberian Government as to the nature of this proceeding.

D. The counter-claim remains admissible

19.16. Third, Iran advances certain arguments in an effort to show that the counter-claim is not admissible, notwithstanding the Court's Order that the counter-claim "is admissible as such and forms a part of the current proceedings". None of these arguments has any merit.

19.17. So, the United States has not introduced, for instance, "new claims" in the counter-claim (see Further Response to the United States Counter-Claim of Iran, paras. 5.26-5.29). There is just one claim at issue in the counter-claim: that Iran violated Article X by attacking vessels in the Gulf and otherwise engaging in military actions that impeded commerce and navigation. This is the claim advanced in the United States written pleadings and it remains the claim of the United States advanced before this Court today. The claim is supported by evidence of specific Iranian military actions against neutral shipping representing United States interests. There is nothing "inadmissible" about the United States providing to the Court, in its March 2001 pleading, additional information regarding Iran's unlawful acts, nor in providing additional information if and when the counter-claim is considered at the damages phase.

19.18. In support of the argument that the United States is introducing "new claims", Iran points to the Court's 1992 Judgment in the *Certain Phosphate Lands in Nauru* case. In that case, Nauru filed an Application relating to an alleged failure of Australia to observe the Trusteeship Agreement approved by the General Assembly in 1947. When it came time to file its Memorial, Nauru included a further claim concerning the overseas assets of British Phosphate Commissioners. The Court found that this new claim was inadmissible. In doing so, the Court noted that there was no reference in the Application to the disposal of such overseas assets "either as an independent claim or in relation to the claim for reparation submitted . . ." (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 265, para. 64). Further, the Court noted that there was no reference in the Application to the 1987 trilateral agreement under which those assets were marshalled and disposed. And finally, the Court noted that the new claim resulted in a supplemental final submission in the Memorial. And so, in conclusion, the Court said that this further claim "is inadmissible inasmuch as it constitutes, both in form and in substance, a new claim, and the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim" (*ibid.*, p. 267, para. 70).

19.19. Thus, the *Nauru* case suggests the exact opposite of Iran's contention regarding the counter-claim in this case. The additional information provided to the Court in March 2001 in the present case regarding damage to vessels is completely within the scope of the 1997 counter-claim and the reparations sought thereunder. The additional information relates to the same provision of

the same agreement as was raised in the 1997 counter-claim. The new information falls squarely within the original submission by the United States. So, in short, there are no new claims and no transformation of the dispute presently before the Court.

19.20. Similarly, the United States is not expanding the relevant time frame of the counter-claim (see Further Response to the United States' Counter-Claim of Iran, paras. 5.30-5.33). The counter-claim stated that it was based on actions in the Gulf during the Iraq-Iran war. The Court's 1998 Order found that the counter-claim was directly connected to Iran's claim in part because the relevant facts "are alleged to have occurred in the Gulf during the same period" (*I.C.J. Reports 1998*, p. 205, para. 38). If the Court proceeds to a damages phase, it will be perfectly equipped to determine which types of damages in what time-frame are justified as a matter of law.

19.21. Finally, Iran argues that the counter-claim is inadmissible because of Article XXI of the 1955 Treaty, which provides that either party may submit to the Court a dispute as to the interpretation or application of a treaty that has not been "satisfactorily adjusted by diplomacy" (see Reply and Defence to Counter-Claim of Iran, paras. 9.18-9.21; Further Response to the United States' Counter-Claim of Iran, para. 5.73). According to Iran, there is still some chance that the United States counter-claim could be resolved by diplomacy, and therefore the counter-claim is not admissible.

19.22. Yet Iran argued this very point to the Court prior to the Court's March 1998 Order and the Court rejected it. In its letter of 2 October 1997, Iran submitted to the Court the communications between the two governments regarding negotiation of the United States claim for damages. In its letter of 18 November 1997 to the Court, Iran argued that the counter-claim was inadmissible in part because "the United States has effectively refused to . . . resolve [the counter-claim] . . . by diplomatic negotiations, despite Iran's agreement to such negotiations". The Court, in its March 1998 Order, noted this argument (*I.C.J. Reports 1998*, p. 194, para. 6; p. 196, para. 12), but nevertheless found that "the Court has jurisdiction to entertain the United States counter-claim" and, in that context, found it to be admissible.

19.23. It comes as no surprise that the Court rejected Iran's interpretation of Article XXI. When faced with this issue in the *Nicaragua* v. *United States* case, the Court had no trouble finding that the dispute was not "satisfactorily adjusted by diplomacy" even though, in that case, there had

been no reference whatsoever in *any* diplomatic communications between the United States and Nicaragua to the alleged violation of the 1956 Treaty at issue in that case. The standard applied by the Court was not whether there remained some possibility that the two governments might resolve the matter diplomatically. Rather, the standard applied by the Court was simply that the "United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 428, para. 83; see also *ibid.*, separate opinion of Judge Jennings, at Section IV, p. 556 ("It seems indeed to be cogently arguable that all that is required is, as the clause precisely states, that the claims have not in fact already been 'adjusted' by diplomacy.")).

19.24. The same standard was applied by the Court in this very case with respect to Iran's claim against the United States. In its December 1996 Judgment, the Court simply found that "a dispute has arisen between Iran and the United States; it has not been possible to adjust that dispute by diplomacy and the two States have not agreed 'to settlement by some other pacific means' . . ." (*I.C.J. Reports 1996 (II)*, pp. 809-810, para. 16). Applying that same standard here, Iran was well aware that the United States alleged that its conduct was a breach of international obligations before the counter-claim was instituted; and it is now aware of the specific treaty provision at issue. As we stand before you today, the dispute underlying the counter-claim has not been satisfactorily adjusted by diplomacy. That is enough to satisfy Article XXI of the 1955 Treaty.

19.25. I should also note that the Agent for Iran in his opening remarks took up the issue of the counter-claim. He stated that the counter-claim was "artificial" in part because the United States did not bring the claim to the Court until 1996, and in part because "no other nation has seen fit to claim compensation from Iran for such damage" (CR 2003/5, p. 27). As the Court well knows, there is nothing artificial about evidence of secretly-laid mines that spill oil in the Gulf, or about powerful missiles that blind and maim sailors, or about gunboats aiming their weapons at the undefended quarters of innocent sailors. Moreover, if the timing of filing a claim before this Court is of relevance to the merits, we can only note that Iran waited more than five years from the date

of the first United States action against the platforms before bringing its case to the Court. And if the absence of claims for compensation from other States is of relevance to the merits of a claim, then Iran must think that the Court decided the *Nicaragua* case wrongly, since in that case the Court recognized that it had before it in that case no other diplomatic protests against the United States mining. (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986*, p. 47, para. 79) In short, there is nothing artificial about the counter-claim.

Conclusion

19.26. Mr. President, Members of the Court, in conclusion let me state that the Court has already addressed the issues of jurisdiction and admissibility with respect to the counter-claim. To the extent that Iran has raised additional points on the matter, we believe that those points cannot be sustained.

19.27. That concludes my presentation on jurisdiction and admissibility. I ask you, Mr. President, to now call upon Mr. Mattler to continue the United States presentation.

The PRESIDENT: Thank you, Professor Murphy. I now give the floor to Mr. Mattler.

Mr. MATTLER: Thank you, Mr. President.

20. THE FACTS OF THE UNITED STATES COUNTER-CLAIM

20.1. Having just heard from Professor Murphy that the counter-claim is properly before this Court as a matter of jurisdiction and admissibility, it is now my task to recount the essential facts upon which the counter-claim is based. While these facts are extensive, my presentation will be relatively brief since many of these facts have already been raised in the course of the United States response to Iran's claim.

The evidence before the Court

20.2. The United States has provided the Court with ample evidence of Iran's attacks on United States and other neutral vessels, which largely occurred in international waters and outside Iran's declared "wartime exclusion zone". Our evidence includes captured Iranian military orders and communications, admissions by senior Iranian officials, statements by senior officials of the

United States and of other countries, extensive contemporary military documentation, analyses by military experts, physical evidence, and credible eyewitness accounts. Further, our evidence also includes extensive reporting of knowledgeable third party sources, including the International Association of Independent Tanker Owners, Lloyd's Maritime Information Service, the General Council of British Shipping, the Norwegian Shipowners' Association, and *Jane's Defence Weekly*.

20.3. What does that evidence show? That evidence reflects the following:

— Beginning in 1984, Iran used naval vessels, gunboats, mines, helicopters, fixed-wing aircraft, and land-based missiles to attack merchant ships operating in the Gulf (Counter-Memorial and Counter-Claim of the United States, paras. 1.04-1.08, 6.03-6.05; Rejoinder of the United States, paras. 1.11-1.16; Exhibits 2-10, 14, 17, 18-22, 27, 31-32, 180-202). Iran's minelaying and other attacks impeded commerce and navigation. The indiscriminate manner in which Iran conducted them also violated core obligations of the laws of war (see, e.g., Hague Convention No. VII of 1907), as well as "elementary considerations of humanity" applicable in both times of war and peace (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 22). The United States provided detailed evidence on these issues in its presentations last Friday.

— Iran attacked more than 200 merchant ships from 31 neutral countries between 1984 and 1988 (Counter-Memorial and Counter-Claim of the United States, para. 1.04; Exhibits 1, 9-11). On the screen before you now is a map showing the approximate locations of these attacks based on the documentary evidence.

— At least 63 people were killed in these attacks; at least 99 more were injured *(ibid.)*.

— As demonstrated by the evidence recounted in Mr. Beaver's presentation last Friday, Iran's responsibility for these attacks is well-documented within the international shipping community, such as by Lloyd's Maritime Information Service (see Rejoinder of the United States, para. 6.07).

— According to Lloyd's:

> "The significant volume of reporting received by the [Lloyd's] Casualty Department regarding Iran's attacks did not indicate that Iran targeted its attacks against vessels carrying war matérial destined for Iraq. It was clear that most merchant vessels were not carrying such cargo. Nor did the reporting reflect that Iran limited its attacks to vessels that resisted Iran's attempts to visit and search; indeed, few, if any vessels appeared to have been attacked for this reason." (Exhibit 10,

para. 23; see also Counter-Memorial and Counter-Claim of the United States, para. 1.07.)

— Indeed, Iran has presented no evidence whatsoever to this Court that such vessels were carrying war matérial.

— Rather, the "apparent motive" of Iran's attacks was to disrupt the trade of countries which were generally sympathetic with Iraq, in the hope that they would pressure Iraq in the conduct of the war (Exhibit 2, at 4).

20.4. These facts are confirmed by statements of the Government of Iran itself. Iran's President, the Speaker of its Parliament, its Ambassador to the United Nations, the Commander of its Navy, and other Iranian officials made public statements admitting Iranian attacks on third country merchant ships and threatening further such attacks (Exhibits 6, 13, 41, 50, 51, 55, 198). As this Court stated in the *Nicaragua* case, and as counsel for Iran agrees (CR 2003/5, p. 56), "statements of this kind, emanating from high-ranking official political figures, . . . are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *I.C.J. Reports 1986* p. 41, para. 64 (Judgment of 27 June 1986).) The best Iran can do in explaining these statements is that some of them were "made at prayer meetings or in radio interviews for the home audience" during the course of a perilous war (Further Response to the United States' Counter-Claim of Iran, para. 3.42), as though that somehow made them less truthful.

20.5. Further, as I noted on Monday, Iran's Deputy Foreign Minister told Norway's Ambassador to Tehran in 1988 that Iran had attacked Norwegian vessels simply because they were carrying cargo to and from docks in Saudi Arabia and Kuwait, and even acknowledged that Iran was aware that this violated international law (Exhibit 198). Norwegian officials subsequently relied on these statements in considering how to address the threats such attacks posed to Norway's interests and to the lives of its seamen (Exhibit 263).

20.6. Moreover, the United States submits that Iran's attacks on shipping in the Gulf were so widely and publicly known — in the press, in the reports of companies and shipping associations, in the communications of governments and international organizations — that the Court should accept them as established fact (see M. Kazazi, *Burden of Proof and Related Issues* 174 (1996);

"the concept of judicial notice itself is undoubtedly admitted in international procedure and is applied by different tribunals including the International Court of Justice"; *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980,* pp. 9-10, paras. 12-13 (Judgment of 24 May 1980); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986,* p. 40, paras. 62-63 (Judgment of 27 June 1986)).

The harm to United States interests

20.7. Mr. President, Members of the Court, Iran's attacks and minelaying created conditions that impeded commerce and navigation. Vessels seeking to navigate in the Gulf were in jeopardy. Commercial goods passing through the Gulf were in jeopardy. The United States has identified several specific examples of these Iranian attacks against commerce and navigation, although it has not tried to document in detail all of Iran's actions against neutral vessels (Counter-Memorial and Counter-Claim of the United States, para. 6.08; Rejoinder of the United States, para. 6.06; and Exhibits cited therein). The evidence before you, however, demonstrates that Iran's attacks caused several types of harm to the commerce and navigation of the United States.

20.8. First, Iran's actions damaged United States flag vessels. For example, in July 1987, the United States flagged tanker *Bridgeton,* struck a mine laid by Iran not far from Farsi Island. The mine ripped a large hole in the *Bridgeton*'s hull, requiring 150 tons of steel repair (Rejoinder of the United States, pp. 183-184, para. 6.06).

20.9. Second, Iran's actions damaged United States owned vessels. In October 1987, the United States owned tanker *Sungari* was struck by an Iranian missile which ripped a large hole in its starboard tank and set the tanker ablaze (*ibid*., p. 185). In November 1987, the United States owned tanker *Lucy* was attacked by rocket propelled grenades launched from Iranian gunboats. In February 1988 the United States owned tanker *Diane* was attacked by an Iranian frigate. Attacks such as these resulted in extensive damage to United States owned property (*ibid*., pp. 185-187).

20.10. Third, Iran's actions damaged United States owned cargo. For example, the United States has provided extensive evidence regarding an Iranian mine that blew a 1-m wide hole in the tanker *Texaco Caribbean* in August 1987. The *Texaco Caribbean* was chartered to a United States

company, Texaco, Inc. After hitting the mine, it spilled into the Gulf approximately 57,000 barrels of Iranian light crude oil owned by Texaco.

20.11. Fourth, Iran's actions harmed property beneficially owned by United States nationals. Vessels such as the *Esso Freeport* and the *Esso Demetia* — which Iran attacked in November 1987 and June 1988 respectively — were owned by companies that were in turn wholly owned by United States companies. When such vessels were harmed, United States ownership interests were also harmed.

20.12. Fifth, Iran's actions resulted in serious injury to United States nationals. For instance, when Iran's HY-2 missile hit the United States flagged tanker *Sea Isle City* in October 1987, the explosion not only severely damaged the vessel, but the flying glass from the bridge windows blinded the captain, and he further suffered a fractured skull, a collapsed lung, and many broken bones. Other crew members were seriously injured as well (*ibid.*, pp. 185-186; see Exhibit 88).

20.13. Sixth, Iran's actions resulted in costs to the United States for rescue, transport, and repair operations. Moreover, Iran's actions resulted in costs to the United States in providing protection for United States vessels in the Gulf, for clearing minefields, and for other activities. For example, as the Court has heard, when returning from a voyage escorting United States merchant vessels in the Gulf, the U.S.S. *Samuel B. Roberts* struck a mine laid by Iranian forces, causing extensive damage to the vessel and injuring ten United States sailors (Rejoinder of the United States, pp. 187-188, para. 6.06).

20.14. Seventh, Iran's actions generally threatened and impeded all commerce and navigation between the United States and Iran, whether or not it involved United States flagged or owned vessels or cargo. For example, Iran's actions resulted in higher costs for all vessels engaged in such commerce and navigation, such as through higher insurance rates (Rejoinder of the United States, paras. 1.11, 6.08-6.09, 6.12-6.16). Mr. Beaver addressed this type of harm in his presentation on Monday, and Professor Murphy will return to it shortly in the course of analysing Iran's violation of the 1955 Treaty.

The "context" of Iran's attacks

20.15. Mr. President, Members of the Court, before I conclude, let me say something about the broader context in which these attacks occurred. Iran argues that the "context" of the armed conflict in the Gulf must be taken into account when considering the United States counter-claim (Further Response to the United States' Counter-Claim of Iran, para. 3.4). The broader context, however, simply highlights that Iran unlawfully engaged in brutal attacks against innocent vessels operating in the Gulf, causing extensive personal injury, loss of life and property, and other damages.

20.16. When Iran speaks of "context," it is essentially asking this Court to find that Iraq invaded Iran in 1980 and that Iran had to respond by laying mines, launching missiles, and deploying gunboats against unarmed commercial vessels operating in the Gulf. Iran's version of the Iran-Iraq war is, of course, self-serving and incomplete. For instance, Iran's own evidence shows that the United Nations efforts to arrange a ceasefire after Iraq's withdrawal from Iranian territory in June 1982 was thwarted not by Iraq, but by Iran, which thereafter proceeded to launch its own invasion into Iraq (Memorial of Iran, Vol. II, Exhibit 9, p. 236; Further Response to the United States' Counter-Claim of Iran, Exhibit 1).

20.17. Yet, even if Iran had to respond in self-defence to Iraqi attack, and even if it could show — which it has not — that some of the many commercial vessels in the Gulf were surreptitiously engaging in commerce with Iraq, none of this would justify Iranian attacks against *any* vessels (even suspected smugglers) without warning and without visit and search. As the Court has seen, few if any of the ships Iran attacked had resisted Iranian attempts to visit and search.

20.18. Moreover, none of Iran's arguments even begins to justify Iranian attacks against the many vessels Iran had no reason to believe were engaged in commerce with Iraq. Regardless of whether Iran was the victim of Iraqi aggression, international law does not recognize such acts against neutral vessels as part of the right of self-defence. Iran accepts in its Further Response to the United States' Counter-Claim that ships operating in the Gulf in this period belonging to the United States "must, as a matter of principle, be considered as neutral" (Further Response to the United States' Counter-Claim of Iran, para. 7.10).

20.19. Thus, it is no surprise that, after hearing the concerns of the States in the region (Exhibits 181, 193, 201, 202), the Security Council in resolution 552 (1984) expressly condemned Iran's attacks on vessels in the Gulf, which the Security Council viewed as constituting "a threat to the safety and stability of the area" and as having "serious implications for international peace and security" (Exhibit 27). Nor is it a surprise that both the Arab League and the Gulf Co-operation Council denounced Iran's attacks (Exhibits 182-183), as did numerous countries, including Bahrain, Egypt, France, Japan, Jordan, Kuwait, Saudi Arabia, the Soviet Union, and the United Kingdom (Exhibits 184-202; Memorial of Iran, Vol. II, Exhibit 23). As the reactions of these institutions and States make clear, the "context" of the Gulf in the 1980s was simply one of Iran acting well outside the bounds permitted to a belligerent in the course of an armed conflict, and in ways that damaged the interests of States around the world.

Conclusion

20.20. Mr. President, Members of the Court, that concludes my presentation on the facts as they relate to the counter-claim. I ask that you now call again on Professor Murphy to continue the United States presentation.

The PRESIDENT: Thank you, Mr. Mattler. I give the floor once again to Professor Murphy.

Mr. MURPHY: Thank you, Mr. President. May it please the Court.

21. IRAN VIOLATED ARTICLE X, PARAGRAPH 1, OF THE 1955 TREATY

21.1. Mr. Mattler has summarized for you the facts upon which the counter-claim is based. It is now my task to explain why Iran's attacks and minelaying in the Gulf constituted a violation of Iran's obligations under Article X, paragraph 1, of the 1955 Treaty.

21.2. My presentation will proceed in seven parts. First, I will address how Iran's actions impeded "freedom of commerce and navigation". Second, I will discuss why that commerce and navigation was "between the territories" of Iran and the United States. Third, I will explain the types of United States interests that were harmed by Iran's violation of Article X. Fourth, I will address why the laws of war and neutrality do not excuse Iran's actions. Fifth, I will discuss why

Iran's actions cannot be justified as a matter of Article XX of the Treaty or in self-defence. Sixth, I will address Iran's characterization of the counter-claim as either a "generic" claim or as a series of "specific" claims. And finally, seventh, I will touch upon the issue of remedy.

A. Iran's actions impeded "freedom of commerce and navigation" in violation of Article X, paragraph 1

21.3. First, let me explain how Iran's actions impeded "freedom of commerce and navigation" as understood in Article X, paragraph 1. Based on the extensive evidence presented to the Court, as just summarized by Mr. Mattler, there can be little doubt that Iran's attacks in the 1980s impeded such freedoms in myriad ways.

21.4. Article X, paragraph 3, of the 1955 Treaty — which appears at tab 11 of the judges' folders — as well as customary rules on the law of the sea, make clear that freedom of navigation is to include the liberty to pass innocently through territorial waters. I note that the United States refers to Article X, paragraph 3, here as a means of interpreting Article X, paragraph 1, a general approach to interpreting that provision which Iran agrees is appropriate (see Reply and Defence to Counter-Claim of Iran, para. 9.6). After the Iran-Iraq war broke out, Iran declared a wartime exclusion zone that forced vessels not inbound for Iranian ports to stay outside Iranian territorial waters in the Gulf. While the establishment of such an exclusion zone is permissible under the laws of war and under Article XX of the Treaty, it was incumbent upon Iran to provide a safe alternative route for such excluded vessels.

21.5. This Iran did not do. Outside Iran's exclusion zone, such vessels were attacked by Iranian gunboats, by Iranian helicopters, their naval vessels, and their aircraft, as well as exposed to and damaged by Iranian mines. As a result, all vessels were exposed to higher navigational risks, which led to increased costs, costs of navigation in the form of delays, higher insurance rates, and extraordinary measures that had to be taken to protect crews and vessels (see Counter-Memorial and Counter-Claim of the United States, paras. 6.13-6.16). Indeed, as we have demonstrated, such vessels were forced to use a very narrow strip of navigable waters that channelled such traffic past Iran's offshore oil platforms.

21.6. Mr. President, Members of the Court, it is hard to imagine a more obvious encroachment upon the freedom of navigation and commerce than affirmatively attacking

commercial vessels on the high seas or in neutral shipping lanes. The Court's decision in the *Nicaragua* case could not be more on point. There, the Court found that the United States had placed mines in Nicaraguan harbours, causing extensive damage to both Nicaraguan and non-Nicaraguan vessels. The Court held that the United States had acted "in manifest contradiction with the freedom of navigation and commerce" protected by the similar bilateral treaty that was at issue in that case (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 139, para. 278).

21.7. Moreover, Article X, paragraph 1, should be read in light of Article X, paragraph 5, of the 1955 Treaty — that, too, is at tab 11 in the judges' folders. Reading those two provisions together — Article X, paragraph 5 and Article X, paragraph 1 — it is clear that Iran was obliged to assist vessels in distress and to provide them with friendly treatment and assistance. By doing the exact opposite — by placing them in distress and threatening them — Iran was clearly impeding core elements of the freedoms of commerce and navigation (see Rejoinder of the United States, paras. 6.24-6.28).

21.8. The *Nicaragua* case is not the only time that this Court has unequivocally condemned a State for laying mines in waters open to freedom of navigation by foreign vessels. As the Court well knows, in the *Corfu Channel* case, the Court had before it a claim by the United Kingdom that Albania violated international law by laying mines in an international waterway. Albania claimed that it had not laid such mines and further claimed that "exceptional circumstances" allowed Albania to regulate the passage of foreign vessels (*I.C.J. Reports 1949*, pp. 11-12). The Court closely analysed the evidence before it, in that case, and concluded that the mines were of a particular type — German GY mines — and were in a particular location such that the Court could infer that Albania was responsible for the laying of the mines (*ibid.*, pp. 16-22). In the face of Albania's assertion that the mines might have "floated" into the Corfu Channel from somewhere else, the Court looked at the evidence and found that the evidence was inconsistent with such a theory (*ibid.*, p. 15). In the face of Albania's assertion that the mines might have been laid by another government — in that case, purportedly by the Greek Government — the Court saw no need to dwell on the assertion, saying that it was "mere conjecture" and "based on no proof" (*ibid.*, p. 17). And, finally, the Court concluded that the "obligations incumbent upon the Albanian

authorities consisted in notifying, for the benefit of shipping in general", the existence of the minefield, an obligation that arose in part from "the principle of freedom of maritime communication" (*ibid.*, p. 22). Thereafter, as the Court well knows, the Court conducted further proceedings to quantify the amount of compensation due.

21.9. Now, in finding Albania responsible in the *Corfu Channel* case, the Court determined that Albania must have known about the minefield and yet failed to notify others. The Court was not prepared, in that case, to determine that Albania itself had, in fact, laid the mines, because the United Kingdom furnished no evidence in support of that assertion (*ibid.*, p. 16). By contrast, in this case, the United States has presented to the Court overwhelming evidence that it was Iran who laid the mines, as was recounted in depth by my colleague, Mr. Mathias, this past Friday (CR 2003/9, paras. 3.1-3.39) and Mr. Mattler on Monday. I will not repeat that evidence here, but I do note that it consists of a wide variety of credible and unrefuted evidence: evidence of Iranian minelaying from the reports of shipping companies and the shipping industry; evidence of mines recovered at the scene where the mines were struck; evidence from experts worldwide who determined that the mines were Iranian, based on the size, on the shape, and on the type of mine, and on their unique serial numbers; and even evidence catching an Iranian vessel "red-handed" on the high seas in the act of laying such mines. The only further evidence that could possibly be provided to this Court would be a complete and honest admission by the Government of Iran itself, and even there, we submit that United States Exhibits 50 and 55 constitute such an admission when read in context. In short, this Court has before it the kind of evidence that would have allowed a direct finding in the *Corfu Channel* case that Albania had laid the mines.

21.10. In order to protect United States flagged vessels in the Gulf, the United States had to deploy military escort ships, such as the *Samuel B. Roberts*. By mining the shipping lane known to be used by these vessels, Iran severely impeded the ability of these military vessels to navigate through the Gulf as well. Iran has noted that Article X, paragraph 6, of the 1955 Treaty — again, at tab 11 in the judges' folders — defines the word "vessels" as *not* including "vessels of war". But, with all due respect Mr. President, Article X, paragraph 1, of the Treaty speaks of the "freedom of navigation" without any use at all of the term "vessels", and thus does not exclude under its

protection freedom of navigation for military vessels. Contrary to Iran's position, there is simply no express exclusion of military vessels from Article X, paragraph 1.

21.11. Again, the *Nicaragua* case supports the United States position on this point. In that case, the Court found that the United States breached an analogous article protecting freedom of commerce and navigation, which similarly excluded in its final paragraph "vessels of war" as well as "fishing vessels" from the definition of "vessels". In that case, the Court found a violation of "freedom of commerce and navigation" in part based on damage caused by mines to "fishing vessels" — indeed, the only Nicaraguan flagged vessels that struck mines in that case appear to have been fishing vessels (*I.C.J. Reports 1986*, p. 46, para. 76; p. 147, paras. 292 (7); see also Rejoinder of the United States, paras. 6.18-6.19). Thus, the Court in the *Nicaragua* case did not regard the exclusion of "fishing vessels" in paragraph 6 of that Treaty as applying to the freedoms being protected in paragraph 1. As such, we submit that this Court today should not regard the exclusion of "vessels of war" in paragraph 6 of the 1955 Treaty as applying to the freedoms at issue in this case.

21.12. Moreover, the Court in this case has interpreted the "freedom of commerce" to include "not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce" (*I.C.J. Reports 1996 (II)*, p. 819, para. 49). As such, an activity in which a military vessel is either escorting a commercial vessel, or is present in the area to protect a commercial vessel during its voyage, and thus to promote commerce, must be regarded as an "ancillary activity" protected under the "freedom of commerce" provision of Article X, at least where the threat being addressed stems from the actions of the other party (see Rejoinder of the United States, para. 6.17). Indeed, the Court has expressly envisaged a violation of Article X, paragraph 1, by acts "capable of affecting" the transport of goods (*ibid.*, p. 819, para. 50 (emphasis added); see also Reply and Defence to Counter-Claim of Iran, para. 6.41 (Article X, paragraph 1, "prohibits any action that might impede commerce in any way whatsoever")). Because military escort was deemed necessary to ensure the safe transport of commercial goods, mining of sea lanes and other similarly hostile action that inhibits the use of such military escorts, is an act directly "affecting" the transport of commercial goods. And as such, that act impedes the freedom of commerce and navigation, and violates Article X.

21.13. In short, the acts undertaken by Iran without question impeded commerce and navigation; indeed, we submit, that was the very purpose of Iran's actions.

B. Iran's actions impeded commerce and navigation "[b]etween the territories of the two High Contracting Parties" within the meaning of Article X, paragraph 1

21.14. Now let me turn to now to the second part of my presentation, which addresses how Iran's actions impeded freedom of commerce and navigation "between the territories" of the two States. As I discussed yesterday (CR 2003/11, para. 15.21), this too is an important element of Article X, paragraph 1.

21.15. Unlike the situation with stationary platforms that, when attacked, either were not producing oil or were producing oil at a time when it could not be exported to the United States, the United States has established in its pleadings that, during the time period of Iran's attacks on neutral vessels, there was extensive commerce in goods — as well as extensive navigation of merchant vessels — directly between the United States and Iran.

21.16. Indeed, in 1987 alone, the United States imported from Iran goods valued at some $1.6 billion; most of those goods travelled by seagoing vessel. In the same year, the United States exported to Iran some $54 million worth of goods, of which approximately $35 million in goods travelled by seagoing vessel. Such commerce and navigation continued at substantial levels in 1988 (Rejoinder of the United States, para. 6.10). In this regard, the Court will wish to note that, while the October 1987 embargo by the United States banned the import of Iranian origin oil and oil products, it did not ban the import of any other Iranian origin products, nor did it ban United States exports to Iran.

21.17. The fact of this substantial commerce is not questioned in this proceeding; Iran itself concedes its existence (Reply and Defence to Counter-claim of Iran, p. 222, para. 11.5). Where the Parties apparently differ is whether Iran's indiscriminate attacks and minelaying against vessels in the Gulf actually impeded commerce and navigation between the territories of the two States.

21.18. For the United States, it seems obvious that Iran's actions did impede such commerce and navigation. Vessels travelling from United States ports or territorial waters to Iranian ports or territorial waters, even if to pass innocently through Iranian territorial waters to another destination, were clearly in jeopardy because of Iran's acts. Vessels departing the United States that

approached the Persian Gulf risked hitting Iranian-laid mines in the Gulf of Oman (see, e.g., Exhibits 16 and 53). Vessels departing the United States that entered the Gulf but stayed outside Iran's exclusion zone risked being attacked surreptitiously, with loss of life and loss of property. As a consequence, vessels and crewmen feared approaching and entering the Gulf, whether to call at Iranian ports, or to pass through Iranian territorial waters, or — having been forced out of those waters — to navigate anywhere at all in the Gulf.

21.19. Although Iran would have it otherwise, vessels travelling to and from Iranian ports were not immune from Iran's wrongful acts, as evidenced by the disaster that befell the *Texaco Caribbean* in August 1987. Having picked up Iranian light crude oil from Iran's Larak Island terminal, the *Texaco Caribbean* departed the Gulf, but then hit an Iranian-laid mine in the Gulf of Oman (see Rejoinder of the United States, para. 6.06; Exhibit 53). Such were the perils of engaging in commerce and navigation with Iran given Iran's dangerous and wrongful conduct in the region.

21.20. Those vessels that entered the Gulf and managed to avoid being mined or attacked nevertheless incurred considerable financial costs due to Iran's behaviour. The evidence we have presented to you shows that vessels entering the Gulf had to transit in areas of higher navigational risk, including shallow waters, and had to increase their speed at night, thus further endangering safety (see, e.g., Exhibit 3; Exhibit 11; Exhibit 31; Exhibit 180, para. 14). Voyages that otherwise could have been done continuously now had to stop during the daytime, thus extending the cost of the voyage (see, e.g., Exhibit 180, para. 15; Exhibit 31, para. 8). Our evidence shows that the owners of such vessels had to pay much more expensive insurance premiums, had to physically modify the vessels so as to anticipate potential attacks, and had to incur increased labour costs both by paying danger pay to crew members and by delaying routine maintenance activities (see, e.g., Exhibits 1, 7 and 31, para. 2; Exhibit 180, para. 8). Such conditions impeded commerce and navigation between the territories of the two States.

21.21. The Court's approach in the *Nicaragua* case supports this position (see Rejoinder of the United States, para. 6.22). In that case, there was no dispute between the parties as to the existence of trade between them, and thus the Court found that such trade existed. In the case now before this Court, there is no dispute between the Parties that there existed trade between the two

States in the relevant time period, except for the United States embargo on Iranian origin oil after October 1987. Further, in the *Nicaragua* case, the Court considered the laying of mines and the attacks on port facilities to be the type of acts that inherently impeded the ability of maritime vessels to engage in such trade. In the case now before this Court, the United States has demonstrated that Iran engaged in a series of similar acts that inherently impeded the ability of maritime vessels to engage in commerce and navigation between the territories of the two States. In short, the United States has made no less showing in this case than was made by Nicaragua in the *Nicaragua* case.

21.22. By contrast, with respect to its claim, Iran has not made a sufficient showing. Iran has failed to show, and the United States denies that there was, *any* oil trade between the territories of the two States in the relevant time period, at either geographic end. And further, given that the platforms were used for offensive military purposes, the platforms were not entitled to any protection under Article X.

21.23. The United States suggests that the Court approach with considerable caution Iran's interpretation of the phrase "between the territories" in Article X, paragraph 1, for Iran's interpretation has evolved considerably over the course of this case. I direct your attention to the screen and to tab 12 in the judges' folders. In its Memorial, Iran asserted that "freedom of commerce" in Article X, paragraph 1,

> "is affected in substance as soon as one Party causes harm to the commercial activities of the other. This approach is perfectly logical since in the majority of cases it is impossible to know in advance to whom goods destined for commerce and export will be finally sold or resold, in the same way as it is impossible to foresee in which territory they will ultimately arrive." (Memorial of Iran, para. 3.66; see also Application of Iran, Part II *(b)*.)

21.24. Thus, Iran commenced this case with an extraordinarily and unsustainably broad interpretation of the scope of Article X, paragraph 1. Only after the filing of the United States counter-claim did Iran disown such a broad interpretation, and instead find at least some real meaning in the phrase "between the territories". I direct your attention to the next slide, which appears at tab 13 in the judges' folders. In its final pleading, Iran settles on this standard that:

> "any claim under Article X(1) is justified if the claimant proves that the commerce in goods departing from the territory of one of the Parties, even if transiting through or being modified in third countries, and then reaching the territory of the other Party is

> obstructed or prevented without justification by conduct attributable to the respondent" (Further Response to the United States' Counter-Claim of Iran, para. 6.28).

Now, this is obviously a very self-serving standard, one that is tailored to meet Iran's claim. For the reasons I discussed yesterday, Iran's standard is inappropriate in this case both as a matter of law and as a matter of the facts of this case applied to law (CR 2003/11, paras. 15.22-15.72). But if one were to use such a standard, it is clear that the commerce and navigation at issue in the counter-claim certainly falls within it.

21.25. Indeed, contrast Iran's basic assertion in its claim with the facts of the counter-claim. Iran advances a claim based on an alleged sequence whereby crude oil extracted via the three oil platforms located outside Iranian territory, is then piped to Iranian territory for processing, then transported by vessels to certain other countries, then offloaded and co-mingled with other crude oil, transformed into new products through refinement, and then those new products sometimes are re-exported by different vessels under different contractual relations to further countries, including possibly the United States. That's the sequence of Iran's claim. Iran cannot possibly maintain that, on the one hand, such an extraordinarily attenuated movement of oil falls within the scope of "between the territories" language of Article X, paragraph 1, while, on the other hand, Iranian attacks and mining that directly impeded commerce and navigation between the United States and Iran did not.

C. United States interests at stake in this counter-claim are protected by the 1955 Treaty

21.26. Mr. President, I turn to the third part of my presentation, which addresses the types of United States interests that were harmed by Iran's violation of the Treaty.

21.27. As a general matter, the full range of Iran's violent acts against neutral shipping in the region harmed United States interests. There was extensive commerce and navigation between the two States in the relevant time period. There were Iranian attacks that directly and severely affected such commerce and navigation.

21.28. To assist the Court, the United States has presented information on particular vessels because it demonstrates the various ways in which United States interests were affected (see Rejoinder of the United States, paras. 6.32-6.38). Some of those vessels were United States flagged vessels and thus the United States interest concerns —among other things—the nationality

of the vessel. Other vessels that were attacked or mined by Iran were owned or operated by United States companies. Some vessels contained cargoes owned by United States nationals. And many other vessels were simply engaged in commerce and navigation between the United States and Iran. Regardless of the juridical status of their vessels, the United States and its nationals were directly harmed by Iran's failure to abide by a treaty that protects such commerce and navigation.

21.29. Now, Iran attempts to deflect the Court's attention from the overall interference in commerce and navigation between the two States by trying to pick apart the juridical status of the various vessels selected by the United States as examples of harm to United States interests. In arguing that Iran's attack on each of the vessels was outside the scope of Article X, paragraph 1, Iran argues either that (1) the vessel was not under United States flag or (2) the vessel was improperly placed under United States flag. Both of those arguments are specious.

21.30. First, there is no requirement in Article X, paragraph 1, that the "freedom of commerce and navigation" between the parties be limited solely to United States flagged vessels. Nor is there any limitation that the "freedom of commerce and navigation" is limited to United States owned vessels or even United States owned cargo. To take a simple example, consider a merchant who sends a rug to an Iranian port, where it is transferred to a French vessel for shipment to the United States, where it is then sold. That commerce and navigation between Iran and the United States is fully protected by Article X, paragraph 1, regardless of the fact that the vessel is not United States flagged, the vessel is not United States owned, and the cargo is not even United States owned. In Article X, paragraph 1, Iran pledged that there would be freedom of commerce and navigation between the territories of our two States, without any further requirement regarding the flagging or ownership interests of vessels between the two States. By violating Article X, paragraph 1, Iran has harmed United States economic interests.

21.31. Consequently, in addition to evidence of United States flag vessels that were attacked, the United States has presented to the Court examples of five vessels that were owned indirectly by United States companies through wholly owned subsidiaries, and a sixth that was chartered by a United States company and was carrying cargo owned by that company. When Iran attacked those vessels, the United States and United States companies were directly injured — injured by virtue of the harm done to their economic interests. The United States has cited authority in its pleadings

regarding the ability of a State to protect a vessel in which its nationals have ownership interest (Rejoinder of the United States, para. 6.35). Such authority is all the more compelling in the context of a bilateral treaty in which Iran has agreed that there shall be freedom of commerce and navigation between the two States, without any limitation that such commerce or navigation occur by United States flagged vessels. And further, to satisfy the Court that flag States other than the United States do not object to the United States advancing this claim, we have submitted evidence to you that the flag State for each of the non-United States flagged vessels has no objection to the United States counter-claim (Exhibits 179, 258).

21.32. In its final pleading, Iran cites too the *Saiga* case, the *Barcelona Traction* case, and the *ELSI* case in support of Iran's view that the United States may not advance a claim that is based on harm to United States nationals when the vessel that was attacked was not under the United State flag. None of those cases, however, stands for that proposition. In the *Saiga* case (38 *ILM*, 1323), the Tribunal for the Law of the Sea had before it as a claimant the *flag State* of the vessel concerned. The Tribunal did not pass upon the rights of non-flag States as they might relate to the *Saiga*. In the *Barcelona Traction* case (*I.C.J. Reports 1970*, p. 3), this Court was called upon to decide Belgian shareholders' rights on the basis of *customary international law* as it existed in 1970. In denying Belgium standing to bring the case, the Court expressly stated that it might have reached a different conclusion if it had been construing a treaty (*ibid*., paras. 87, 90). By contrast, the issue before this Court is precisely that — the interpretation of a bilateral treaty. And when the Court was confronted in the 1989 *ELSI* case (*I.C.J. Reports 1989*, p. 15) with a bilateral treaty, the Court looked at the general structure of the treaty, at the specific language of its provisions, and in some cases at the practical application of those provisions, in order to disregard the corporate form and to recognize broad rights of owners. The Court can and should do the same in this case.

21.33. Second, notwithstanding the irrelevance to the counter-claim, the United States feels obliged to address briefly Iran's allegations concerning United States flagging procedures. In our written pleadings, we have set out in detail why the reflagging of 11 Kuwaiti tankers was fully consistent with international law and applicable national law (see Rejoinder of the United States, paras. 6.29-6.31). Moreover, the various authorities cited by Iran in its final pleading actually support the legitimacy of the United States flagging procedures. For instance, the 1991 United

States court case, that Iran appends as Exhibit 7 to its final pleading, found that the 11 tankers *were properly under the United States flag* (Further Response to the United States' Counter-Claim of Iran, Exhibit 7, at 2027 ("The eleven reflagged tankers squarely meet the definition of an American vessel provided in [the Fair Labor Standards Act]. These eleven vessels were documented under the laws of the United States so that they were permitted to fly the American flag.")).

21.34. Similarly, the law review article that Iran appends as Exhibit 8 to its final pleading, analysed the United States reflagging of Kuwaiti tankers, but then found that both this Court and United States courts view such reflagging as consistent with the so-called "genuine link" requirement (Further Response to the United States' Counter-Claim of Iran, Exhibit 8). Indeed, that law review article noted this Court's Advisory Opinion in the *IMCO* case (*I.C.J. Reports 1960*, p. 150), in which this Court *declined* to apply the *Nottebohm* principle (*I.C.J. Reports 1955*, p. 4) to the nationality of ships. In the *IMCO* case, faced with the issue of determining the "largest ship-owning nations" for the purposes of membership in the Maritime Safety Committee, the Court relied on where the shipping tonnage was registered and not on who beneficially owned the tonnage. Consistent with that approach, the United States reflagged vessels are properly to be considered vessels of the United States.

21.35. And, in light of the *IMCO* case, it is no surprise that legal analysts of the Iran-Iraq tanker war have concluded that a neutral State may place its merchant shipping under the flag of another neutral State in order to provide it with adequate protection (see Andrea de Guttrey & Natalino Ronzitti, *The Iran-Iraq War (1980-1988) and the Law of Naval Warfare* 12 (1993); Wolff Heintschel von Heineeg, "The Law of Armed Conflict at Sea", in *The Handbook of Humanitarian Law in Armed Conflict*s, p. 426 (Dieter Fleck, ed. 1995)).

Mr. President, at this point I am ready to proceed to the fourth part of my presentation, but I note the hour and that the United States has about one hour left, in total, in its presentation. Consequently, this might be an appropriate point for the Court's break.

The PRESIDENT: Thank you, Professor Murphy. The hearing is suspended for 15 minutes.

The Court adjourned from 4.20 to 4.35 p.m.

The PRESIDENT: Please be seated. Professor Murphy, please continue.

Mr. MURPHY: Thank you, Mr. President.

D. The laws of war and neutrality do not excuse Iran's actions

21.36. Mr. President, the fourth part of my presentation on the counter-claim concerns the laws of war and neutrality as they relate to the counter-claim. Prior to Iran's final pleading, Iran simply denied that it attacked any neutral vessels. Now, however, with the weight of the evidence against Iran on this point, Iran has also argued, apparently in the alternative, that such attacks were justified under international law. And to that end, Iran included in its final pleading various arguments regarding the laws of war and neutrality which did not appear in Iran's Reply Brief (Further Response to the United States' Counter-Claim of Iran, paras. 7.1-7.51).

21.37. The arguments advanced by Iran are nothing short of astounding. Iran accepts that it is illegal to attack neutral vessels, but also says that the vessels it attacked "were indeed to be characterized as enemy vessels from an Iranian point of view" (*ibid*., para. 7.6). Iran's theory seems to be that, by producing a smattering of evidence that Kuwait, Saudi Arabia, and the United States purportedly supported Iraq in certain ways during the course of the Iran-Iraq war, that somehow proves that Iran had free licence to attack any vessels calling at Kuwaiti and Saudi ports. Mr. President, Iran does not explain why acts that satisfy the *jus in bello* are therefore incapable of violating Article X, paragraph 1. But leaving that issue aside, there is no acceptable theory under the laws of war that would countenance such attacks.

21.38. Iran's theory initially asserts that Kuwait and Saudi Arabia were belligerents in the Iran-Iraq war, because Iran believed that they were "deeply involved in the conflict on the side of Iraq" (*ibid*., para. 7.8). By contrast, we are told that the United States was not a belligerent because, while it "tilted" toward Iraq, it did not "become so deeply involved in the conflict that it had to be considered a party thereto" (Further Response to the United States' Counter-Claim of Iran, paras. 7.09-7.10). And as such, apparently Iran thinks that it was entitled to attack Kuwaiti and Saudi vessels.

21.39. Yet, Members of the Court, there can be little doubt on the record before this Court that Kuwait and Saudi Arabia fall within the definition of "neutral". Neither of those countries

declared war on Iran; neither of those countries engaged in an international armed conflict with Iran; and both of those countries assumed neutral status with respect to the Iran-Iraq war. And, even if those countries were supporting Iraq in a manner that violated the law of neutrality, such support would not make those countries "belligerents", nor would it not justify Iran attacking Kuwait with missiles or otherwise. One need look no further than the writings of Iran's own counsel to support this point. I direct you to the screen and also to tab 14 in the judges' folders. Professor Bothe has written: "While thus the support given by certain Arab States to Iraq probably was a violation of neutrality and thus triggered a right of reprisal for Iran, these reprisals could not include a use of force against those states." (See, e.g., Michael Bothe, "Neutrality at Sea", in *The Gulf War of 1980-1988* at 207 (I. F. Dekker & H. H. G. Post, eds. 1992).)

21.40. Further, the core of Iran's theory seems to be that *all* oil tankers — not just Kuwaiti flagged oil tankers, not just Saudi flagged oil tankers — but all oil tankers calling at Kuwaiti and Saudi ports were making an effective contribution to military action because they might be transporting Iraqi oil. Thus, Iran states that "the alleged Iranian attacks on vessels carrying oil from Kuwaiti and Saudi Arabian ports would be lawful" (*ibid*., para. 7.24; see also CR 2003/5, p. 47, para. 12). In other words, Iran asserts a right to attack the ships of *all 30 neutral nations* that called at Kuwaiti and Saudi ports for the purpose of carrying oil out of the Gulf!

21.41. Mr. President, this, too, cannot stand. As the Court is well aware, international humanitarian law, and the laws of naval warfare, contain certain core principles diametrically opposite to the theory advanced by Iran (see generally Wolff Heintschel von Heineeg, "The Law of Armed Conflict at Sea", *in The Handbook of Humanitarian Law in Armed Conflict*s, p. 418 (Dieter Fleck, ed. 1995)). Civilians may not be the object of attacks (see 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts, 1125 *UNTS* 3, Art. 51 (2)). Belligerents must at all times distinguish between combatants and non-combatants (*ibid*., at Art. 48; see also Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 226, para. 78). Neutral merchant vessels are entitled to carry goods other than contraband to and from belligerents, so long as it is done indiscriminately. Goods are only "contraband" if they are destined for the enemy and are susceptible to use in armed conflict (see, e.g., Michael Bothe, "The Law of

Neutrality", in *The Handbook of Humanitarian Law in Armed Conflicts*, pp. 506-510 (Dieter Fleck, ed. 1995); Leslie C. Green, *The Contemporary Law of Armed Conflict*, pp. 165-167 (2d ed. 2000); Ingrid Detter, The Law of War, pp. 351-358 (2d ed. 2000)).

21.42. Now, neutral merchant vessels can acquire the character of an enemy merchant vessel if they are operating directly under enemy control or are resisting an attempt to establish their identity, including through visit and search (see Memorial of Iran, Vol. III, Exhibit 13, p. 600). Yet, even if the merchant vessel acquires the character of an enemy merchant vessel, that alone does not provide a licence to attack the vessel. Rather, capture of the vessel is the expected result, and only if military circumstances preclude such capture, may the merchant vessel be destroyed after all possible measures are taken to provide for the safety of the passengers and crew (see, e.g., Leslie C. Green, *The Contemporary Law of Armed Conflict*, pp. 170-173 (2d ed. 2000); Michael Bothe, "Neutrality at Sea," in *The Gulf War of 1980-1988*, p. 209 (I. F. Dekker & H. H. G. Post, eds. 1992; "force . . . used against a merchant vessel which is unrelated to, or inappropriate for, the exercise of a right of visit and search . . . is clearly illegal"). These are core principles of the law of naval warfare and of international humanitarian law.

21.43. Applying this law to the facts of Iran's attacks establishes that the attacks were far from justified and indeed were violations of the *jus in bello*. The vast majority of oil shipped from Kuwait and Saudi Arabia was not Iraqi in origin, and the record is clear that Iran made no effort to ascertain which ships were carrying Iraqi oil. Instead, Iran just indiscriminately attacked oil tankers. But the more important point is that *even if there was Iraqi oil exported on neutral vessels, that oil was not contraband*. Iran had no right to stop and seize such cargo let alone attack it surreptitiously.

21.44. Again, Iran's own counsel supports this point. The slide on the screen appears at tab 15 of the judges' folders. Professor Bothe has written:

> "Oil leaving a belligerent port is not contraband. Contraband is defined as material destined for a belligerent. The fact that the revenue derived from the sale of oil is important for the war effort of a belligerent does not mean that the oil becomes contraband.
>
> For a similar reason, neutral tankers cannot be military objectives. Their significance for the war effort of the belligerent is only indirect and their contribution to this effort too remote. The idea that also a neutral tanker carrying oil bought from a

> belligerent is so to say incorporated into that belligerent's war effort, really widens the concept of the legitimate military objectives beyond acceptable limits." (Michael Bothe, "Neutrality at Sea", in *The Gulf War of 1980-1988* at 211 (I. F. Dekker and H. H. G. Post, eds. 1992.)

21.45. One can only regret that Professor Bothe was not also advising Iran in the mid-1980s, since then perhaps we would all not be here. But there were others advising Iran. When Kuwait and Saudi Arabia, along with the other Gulf States, went to the United Nations Security Council to complain about "Iranian acts of aggression on the freedom of navigation to and from the ports of our countries" (Exhibit 189), the Security Council did not respond by telling those States "too bad, you are co-belligerents with Iraq" or "too bad, vessels calling at your ports are fair targets for Iran". Rather, the Security Council responded by reaffirming the rights of navigation in the Gulf, condemning Iran's attacks on commercial ships en route to and from the ports of Kuwait and Saudi Arabia, and demanding — demanding — that Iran's attacks "cease forthwith" (Exhibit 27).

21.46. Now is there some other lawful basis for justifying Iran's attacks, some sort of theory of lawful retaliation? Well, consider the following assessment extracted from one of Iran's own exhibits, which appears at tab 16 in the judges' folders. At Exhibit 13 of Iran's Memorial, Iran was quite comfortable with the following assessment by Captain J. Ashley Roach. He stated:

> "[M]any of the ships hit by Iran were factually neutral ships engaging in truly neutral commerce, e.g., carrying free goods to or from neutral ports. In short, many of the ships Iran deliberately attacked were neutrals known by Iran to be carrying goods exempt from capture or destruction. Iran seemed to justify those attacks as retaliation — indeed Iran conducted those attacks only after Iraqi attacks on oil tankers servicing Iranian oil terminals. Iran justified her attacks as a means of bringing pressure on the Gulf Cooperation Council (GCC) States to stop Iraq from attacking Iranian oil facilities and tankers. However, retaliation provided no legal basis for the attacks on those truly innocent civilians and civilian property engaged in maritime commerce with countries that were not parties to the Iran-Iraq conflict."

This is straight out of Iran's own exhibit.

21.47. Suffice it to say, Iran's actions violated other core principles of international humanitarian law as well. Iran affirmatively made civilians the object of its attack (see Rejoinder of the United States, paras. 6.45-6.48; see also Exhibit 1, pp. 8-9). Iran used missiles and mines in a manner incapable of distinguishing between combatants and non-combatants. Iran's mines, by being laid in neutral shipping lanes without warning, violated the laws of war on the use of mines (*ibid.*, paras. 6.49-6.51).

21.48. Now, to obtain support for its theory of naval warfare, Iran goes so far as to claim that it is one endorsed by the United States (*ibid*., paras. 7.20-7.24). Yet the United States has never endorsed an approach to the laws of war that so blithely disregards the rights of non-combatants and the rights of neutral vessels. Rather, the United States has always maintained a sharp distinction between the legal status of belligerents and that of neutrals. In Exhibit 10 of its final pleading, Iran has cut and pasted together portions of the 1989 United States *Commander's Handbook on the Law of Naval Operations*. In the parts left out by Iran, the *Handbook* clearly defines "neutrals" and "belligerents" and the relationship between them (see United States Naval Warfare Publication, *The Commander's Handbook on the Law of Naval Operations*, NWP 9 (Rev. A)/FMFM 1-10 at para. 7.1 (1989)). And under those definitions, there is little doubt that Kuwait, Saudi Arabia, and the United States were all neutrals in the Iran-Iraq war.

21.49. Moreover, the United States *Handbook* clearly confirms that neutral merchant vessels only acquire the character of enemy merchant vessels when they are operating directly under enemy control or resisting an attempt to establish their identity, including visit and search (*ibid*., para. 7.5). On the facts of this case, Iran has not shown that either of those conditions were met. Rather, the extensive evidence before you shows that those conditions were not met.

21.50. Iran also cites the *San Remo Manual*, which is not — as the Court knows — a legally binding document. Yet, in any event, the *San Remo Manual* does not license attacks against neutral merchant vessels, such as were conducted by Iran. The *San Remo Manual* confirms that neutral vessels are to be protected. Even if such vessels are carrying contraband — which Iran has not shown — and even if such vessels resist visit and search — which again Iran has not shown — the *San Remo Manual* clearly states in paragraph 67 that an attack on a merchant vessel may only take place where "it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions." Iran has not established the infeasibility of such measures for any single attack it undertook and it cannot establish that such measures were infeasible for the hundreds of attacks Iran committed throughout the course of the Iran-Iraq war.

21.51. In short, Mr. President, Iran is pressing upon this Court a theory of the laws of war that even Iran, at least in a footnote that it has, admits is controversial (*ibid.*, para. 725, note 27) and

that was rejected by the Security Council. Were this Court to adopt such a theory, it would provide a wide-ranging licence for belligerents to attack neutral vessels.

E. Iran's actions were not "necessary" either in self-defence or to protect Iran's "essential security interests"

21.52. I turn now to the fifth part of my presentation. Iran seeks to justify its violation of Article X on grounds that "essential security interests" and "self-defence" were at stake, since Iran was responding to Iraqi aggression (Reply and Defence to Counter-Claim of Iran, para. 12.2). In the course of undertaking such measures, Iran asserts that "some impact on the freedom of trade and commerce was inevitable and cannot be held to breach the Treaty" *(ibid.)*.

21.53. While unquestionably a state of armed conflict raises issues of self-defence, and of essential security interests within the meaning of Article XX, paragraph 1 *(d)*, the acts of Iran at issue in the counter-claim cannot be so justified.

21.54. First, Iran has not established to this Court that its essential security interests in fact were seriously threatened and damaged by commerce and navigation of neutral vessels in the Gulf. In the nearly 50 exhibits that Iran has presented to this Court in this phase, there is not a shred of evidence showing that the vessels Iran attacked were carrying goods which were destined to Iraq and which were susceptible to use in the Iran-Iraq war. There is no evidence of any kind showing that these vessels were carrying munitions, were carrying weapons, were carrying uniforms destined for Iraq, nor any evidence that they were carrying goods susceptible to warlike purposes, such as materials for constructing weapons. Such trade cannot simply be assumed to threaten Iranian essential security interests, nor support a right of self-defence. Indeed, many vessels Iran attacked were outbound from the Gulf and, indeed, carrying goods that were not even Iraqi in origin.

21.55. Second, even if Iran had proven to this Court that trade on these neutral vessels threatened Iran's essential security interests, Iran cannot establish, and has not established, that Iran reasonably determined that attacks on the neutral vessels were "necessary" to protect those interests. We have recounted repeated efforts on the part of the United States, as well as other States and international organizations, to resolve diplomatically any concerns that Iran might have

had with respect to the neutral character of these vessels. Iran could have, but did not, take advantage of those efforts.

21.56. Iran has not, in any case, even attempted to make a showing that Iran reasonably concluded that the attacks on neutral vessels were necessary to protect its essential security interests. Iran had an alternative, an alternative that was a lawful means of addressing its security interests. If Iran was concerned about the carriage of Iraqi goods through the Persian Gulf, through the Strait of Hormuz, through the Gulf of Oman, Iran could have engaged in lawful visit, search and seizure of such cargo, as is permitted by the laws of war. In light of the Iran-Iraq war, such action would have been viewed by all States as a reasonable measure that either belligerent could undertake to protect its security.

21.57. Indeed, one might contrast Iran's actions in attacking the neutral vessels with Iran's act of establishing the Iranian exclusion zone. Creation of the exclusion zone allowed Iran to minimize the likelihood of Iraqi attacks against Iran's territory, against its property, against its people, just as the United States measures against Iran's oil platforms allowed the United States to minimize the likelihood of Iranian attacks against United States and other neutral vessels, thus protecting United States essential security interests.

21.58. With respect to the issue of self-defence, I note that Iran's attacks on neutral vessels and its laying of mines, by their very nature, cannot be regarded as satisfying the requirement of "necessity" (see, e.g., Wolff Heintschel von Heineeg, "The Law of Armed Conflict at Sea", in *The Handbook of Humanitarian Law in Armed Conflict*s 405, at 418 (Dieter Fleck, ed. 1995) ("Offensive mining may not be undertaken solely to interdict merchant shipping"; "when belligerents employ missiles . . . they are obliged to ensure that they are directed exclusively at military objectives")). By their nature, indiscriminate attacks on innocent vessels falls outside the scope of any such requirement.

21.59. I also note that Iran cannot establish that its attacks on neutral vessels met the requirement of proportionality that is inherent in the exercise of the right of self-defence. Even if one were to assume that — of the hundreds of vessels that Iran attacked in the Gulf in this time period — a few were carrying goods that was contraband, Iran's acts of launching missiles, laying

mines, and otherwise attacking vessels indiscriminately were acts wildly disproportionate to whatever harm Iran suffered from the hypothetical contraband.

21.60. In short, by simply attacking such vessels and laying mines without notice in neutral shipping lanes, Iran was not engaged in the protection of essential security interests, nor engaged in necessary and proportionate self-defence; it was simply terrorizing the vessels of other States.

F. Iran's classification of the counter-claim as being either "generic" or "specific" is misguided

21.61. Mr. President, let me move on to the sixth part of my presentation. Iran seems to find it helpful to analyse the United States counter-claim as being either a "generic" claim or, a series of "specific" allegations. The United States does not see any particular utility in such an analysis and so we simply discuss the counter-claim as one would any claim: there are general aspects to it, along with a variety of specific facts that underlie it. Further though, we note that Iran's generic/specific analysis does not reflect the manner in which this Court decides cases.

21.62. For example, consider the Court's approach in the *Nicaragua* v. *United States* case. In that case, Nicaragua made very general submissions in its Application that the United States was "directing military and paramilitary actions in and against Nicaragua" in violation of international law and that by such action the United States "has infringed and is infringing the freedom of the high seas and interrupting peaceful maritime commerce" (Nicaragua Application of 9 April 1982, in *I.C.J. Pleadings, Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Vol. I, at 9, para. 26 *(a)*). Very general allegation. Nicaragua then presented to the Court in its written and oral pleadings both general information and specific information about the alleged United States actions. Among that information, Nicaragua presented evidence regarding 12 specific incidents of Nicaraguan and non-Nicaraguan vessels striking mines, plus information from *Lloyd's*, from press reports, and from other sources indicating that the United States laid mines without warning (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 46-48, paras. 76-80).

21.63. In the Court's its Judgment on the merits, the Court reviewed such evidence, and concluded that the United States was responsible for laying mines "without warning" during a

particular time period and in a particular geographic area, "and that personal and material injury was caused by the explosion of the mines, which also [the Court said] created risks causing a rise in marine insurance rates" (*ibid.*, p. 48, para. 80). In its *dispositif*, the Court then found that by laying such mines "the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce, and Navigation . . ." (*ibid.*, p. 147, para. 292 (7)).

21.64. Now, I don't know whether Iran thinks that Nicaragua in that case made a "generic" claim or made a series of "specific" allegations regarding harm to specific vessels, or made both, or made neither. What I do know is that, in the *Nicaragua* case, this Court had no difficulty accepting a general submission alleging that a provision on "freedom of commerce and navigation" had been violated, no difficulty in considering general and specific evidence of acts in support of that allegation, and no difficulty in then issuing a judgment stating that the provision had been violated. The Court did not feel compelled to treat each of the incidents placed before it as individual claims and it certainly left to the damages phase the more detailed enquiry into what persons or property were damaged and to what extent. We urge the Court to do the same in this case.

G. Remedy

21.65. In the final part of my presentation, Mr. President, I would like to address very briefly the issue of remedies, which Iran also addressed in the course of its first round presentation (CR 2003/8, pp. 40-42). The United States has asked the Court to find that Iran is "under an obligation to make full reparation to the United States for its breach of the 1955 Treaty in a form and amount to be determined by the Court at a subsequent stage of the proceedings". We do not believe that a more detailed finding on this issue would be appropriate at this stage of the proceedings. Given the variety of the acts that Iran unlawfully committed, as well as the variety of loss, damage and injury caused by Iran, that underlie the our counter-claim, any further consideration by the Court on the nature and the scope of the damages should only occur through thorough written and oral pleadings by both Parties at the reparations stage.

21.66. Iran has requested a similar finding on reparations with respect to its claim. If the Court were to find Iran's claim to have merit, then we would likewise expect the Court not to

undertake any further decision into the nature or scope of the damages owed to the United States until the reparations stage of these proceedings.

III. CONCLUSION

21.67. Mr. President and Members of the Court, allow me to conclude. The counter-claim presented by the United States in this case is fully within the jurisdiction of the Court and is admissible. As the United States demonstrated in its prior written pleadings and oral arguments, there can be no question that Iran engaged in numerous attacks on neutral shipping in the Persian Gulf, the Strait of Hormuz, and the Gulf of Oman. Further, there was extensive commerce and navigation directly between the United States and Iran that was impeded by Iran's attacks.

21.68. Article X, paragraph 1, of the 1955 Treaty protects the freedom of commerce and navigation between the territories of the two States. The text, the history, the practice of Article X, paragraph 1, demonstrate that this provision should be interpreted, in the first instance, so as to focus on freedom of "commerce and navigation" and, in the second instance, to focus on "between the territories" of the two States.

21.69. Article X, paragraph 1, does not protect offshore oil platforms that are incapable of engaging in commerce "between the territories" of Iran and the United States, nor does it protect offshore platforms used for offensive military purposes. At the same time, Iran's ongoing military actions during the 1980s directed against neutral shipping — including United States vessels — directly impeded commerce and navigation between the territories of Iran, and the United States, and as such, violated Article X, paragraph 1. Therefore, we submit that Iran is obligated to make full reparation to the United States for its breach, in an amount to be determined by the Court at a subsequent stage of the proceedings.

21.70. Mr. President, I thank the Court for its patience. I now ask you to call upon the United States Agent, Mr. Taft, to close the United States presentation in this opening round.

The PRESIDENT: Thank you, Professor Murphy. I now give the floor to Mr. Taft, the Agent of the United States.

Mr. TAFT: Thank you. Mr. President, Members of the Court.

22. CLOSING STATEMENT BY THE AGENT OF THE UNITED STATES

22.1. I will now conclude the United States presentation for the opening round. Before I do so, however, I would like to thank the Court for its close attention during these four days of often detailed presentations, as well as for its understanding of my need to be absent from these proceedings on Monday and Tuesday of this week: I am glad to be back with you. As I said at the beginning of the United States presentation, the Court bears a unique burden, as the principal judicial organ of the United Nations, to maintain the confidence of States appearing and potentially appearing before it. We are confident of the Court's ability to carry that burden.

22.2. Last week, during the three days in which Iran presented its case, the Court witnessed first-hand an amazing performance. Counsel for Iran stood before this Court and omitted to mention, or even denied, facts that are so well established that they were and are uniformly held to be true by every observer of events in the Gulf in the 1980s — every observer, that is, except Iran. Those facts include that Iran attacked ever-increasing numbers of neutral vessels in the Gulf over a period of four years from 1984 until 1988. Those attacks only ceased after the United States took military action for a second time to bring them to an end. Those facts include both Iran's repeated use of naval mines and long-range missiles to attack neutral shipping in a highly indiscriminate manner, and its helicopter and boat attacks on specific neutral vessels. Those facts include Iran's use of its oil platforms in the Gulf to facilitate and launch many of those attacks, and the repeated efforts, by the United States, by the United Nations, and by many other international bodies and individual States, to convince Iran to stop those attacks without the need to resort to military action. Unfortunately, all those efforts failed.

22.3. Where are we then? Let me summarize the status of the evidence before the Court. Mr. President, I am confident that the Court will conclude that the following facts have been established by the United States over the course of the last five sessions.

— First, the uninterrupted flow of maritime commerce, particularly commerce in petroleum, through the Gulf was essential to the economic stability of the entire developed and developing world, including to the United States. The safety of United States vessels, cargoes and crews

was likewise an essential security interest of the United States. Indeed, counsel for Iran appears to have conceded these facts last week.

— Second, Iran's attacks on neutral shipping in the Gulf killed at least 63 people and injured many more. The attacks also dramatically increased the risks and costs of carrying oil and other merchandise through the Gulf. Iran threatened that those attacks would continue.

— Third, Iran used its oil platforms to facilitate, and in some cases as a base to launch, those attacks.

— Fourth, many countries, again including the United States, both expressed, and eventually acted on, their grave concern about the threat posed by Iran's attacks. Several of those countries deployed military vessels to the Gulf in an attempt to deter Iran from continuing these attacks.

— Fifth, the United Nations, the United States and many other bodies and States took steps to try to bring an end to Iran's attacks diplomatically.

— Sixth, all those attempts failed.

— Seventh, the United States took military action on two occasions to end the Iranian attacks.

22.4. Mr. President, what contested issues are there before the Court? On the question of the application of Article XX of the 1955 Treaty, the United States submits that there is only one real issue: whether, given the facts I have just listed, the United States actions were "necessary" to protect its essential security interests.

22.5. While this issue is contested, Professors Weil and Matheson have shown that — on the facts I have just listed — this Court should find that the United States actions did not breach Article X, paragraph 1, of the Treaty because a violation is precluded by the express terms of Article XX, paragraph 1 *(d)*. They have shown that Article XX applies if the United States actions were necessary to protect the essential security interests of the United States. The United States actions are not to be judged here by the standards of self-defence under customary international law and Article 51 of the United Nations Charter. Nor do the United States actions have to have been more than "necessary." In particular, the Treaty does not require that the precise means chosen by the United States be the only way of addressing Iran's threat to United States essential security interests. Indeed, as Professor Weil explained, the United States should be accorded appropriate discretion in determining whether its essential security interests were threatened and in determining

how to respond to that risk. Finally, my colleagues have shown that the actions taken by the United States fell well within that range of discretion.

22.6. What does Iran say in response to these points? Iran asserts that the actions against the platforms were not necessary to protect United States essential security interests because, on the one hand, it says those security interests were not really at risk and, on the other, that the United States actions were not necessary to respond to any existing risk. However, it is hard to give much credence to these arguments because they are premised on Iran's denials that it was engaging in *any* attacks on United States and other neutral shipping. We have shown that those denials are false and that United States security interests were clearly at risk from Iran's missile, mine, helicopter and boat attacks. Iran attempts to muddy the waters by arguing that Iraq's actions also threatened those interests; that argument is simply irrelevant to the issues before the Court.

22.7. With respect to the "necessity" of the United States actions, Iran really does little more than deny that they were necessary. Indeed, in the almost 20-year history of this case, Iran has never suggested that any other act by the United States would have convinced Iran to bring its attacks to an end. It has never said: if the United States had only written one more letter, or the United Nations had used slightly different language, or the United States had taken action against other Iranian targets, it would have ceased its attacks. This, at least, is honest on Iran's part because — as the Court has heard — Iran's leaders were intent on continuing the attacks. The only step that Iran suggests the United States could legitimately have taken to end *Iran's* attacks was to put pressure on *Iraq*. That argument is nonsense.

22.8. Rather than arguing that the United States overreacted, because lesser steps would have been sufficient, Iran has suggested in its pleadings that the Court ought to doubt the sincerity of the United States belief that it had to take action to stop the attacks, because the United States did not take actions against targets on the Iranian mainland, or against purely military targets. That argument also is absurd on its face. The United States was not obligated to risk more American and Iranian lives or greater escalation of the Iran-Iraq war in order to bring Iran's attacks on neutral vessels to an end.

22.9. In its presentations last week, Iran argued that the United States acted unlawfully because, after its initial, limited action against the Rostam platform proved insufficient, and Iran

stepped up its attacks on United States shipping and other neutral vessels, the United States took measures against two additional platforms and an Iranian frigate. My colleagues have shown, first, that Iran's assertion that the platforms were only fallback targets is false and, second, that the United States actions were, unfortunately, necessary to bring Iran's devastating attacks to an end. And they were, fortunately, effective in eliminating Iran's threat to commerce and navigation in the Gulf, effective in eliminating Iran's threat to the safety of United States vessels, cargoes and crews, and thus effective in eliminating Iran's threat to the essential security interests of the United States.

22.10. Because the Iranian attacks threatened United States essential security interests and the United States response was necessary and appropriate to protect those interests, the United States actions are outside the scope of the parties' undertakings in Article X. The Court need go no further to dispose of this case.

22.11. In particular, the Court need not address the question of self-defence. As Professor Weil has demonstrated, the scope of the exemption provided by Article XX, paragraph 1 *(d)*, is not limited to those actions that would also meet the standards for self-defence under customary international law and the United Nations Charter. Any such limitation is contrary to the language of the Treaty, as well as contrary to this Court's conclusions in the *Nicaragua* case. As it has explained on many occasions in making this point, the United States is not claiming that its actions were exempt from the strictures of the United Nations Charter or customary international law. It is only saying that the question of whether the United States actions complied with those rules, rules that are extraneous to the Treaty, was not submitted to this Court's jurisdiction pursuant to the dispute resolution clause of the Treaty. We have also shown that — in any case — the United States actions were in full compliance with the Charter and with customary international law.

22.12. Application of Article XX precludes viewing the United States military actions as prohibited by Article X, paragraph 1. Yet — if we look at the terms of Article X — it is apparent that Iran has failed to meet the burden of proof that it carries on the only Iranian complaint against the United States that is truly before this Court: that is, Iran's claim that the United States interfered with the freedom of commerce between the territories of Iran and the United States. Indeed, uncontested facts undercut an essential element of Iran's claim. Among those facts are:

— The United States did not destroy any goods destined for export, nor destroy any means for transporting or storing such goods.

— The first platform, Rostam, had not been functioning for over a year at the time the United States took action against it.

— The second platform, Sassan, not only was not functioning, but it also could not have produced oil for sale to the United States in any case due to the imposition of the oil embargo six months prior to the United States action against it.

— The third platform, Sirri, also could not produce oil for sale to the United States at the time of the United States action against it due to the same embargo.

No one knowledgeable about the international trade in crude oil and refined oil products would accept Iran's assertion that its exports of crude oil to Europe constituted commerce between Iran and the United States. Nor should this Court accept Iran's argument based merely on speculation that because it might hypothetically have engaged in oil trade with the United States at some time in the future there has been a violation of Article X.

22.13. Accordingly, Iran's claims under Article X, paragraph 1, must be dismissed because even Iran's own evidence demonstrates that, at the time of the United States operations it complains of, there was no commerce in oil from the platforms between the territories of Iran and the United States. As a result, the United States could not even potentially have interfered with the freedom of that commerce.

22.14. While these facts regarding the application of Article X, paragraph 1, are dispositive, I do want to remind the Court of the importance of an additional reason Article X does not apply to the oil platforms — and that is their offensive military use. Mr. President, Members of the Court, the provision at issue in this case — "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation" — does not mean that a State can immunize its offensive military actions, and carry out indiscriminate attacks on neutral vessels, simply by using a facility that has some connection with commerce between the two States. Stretching this provision to shield Iran's attacks from any effective response is wholly contrary to the purpose of the 1955 Treaty.

22.15. Are there any additional uncontested or definitively established facts with which the Court ought to be concerned? Yes, there are: specifically, the crucial facts with respect to the United States counter-claim. In particular:

— There was substantial commerce and navigation between the territories of the United States and Iran in 1987 and 1988.

— Iran's regular attacks on neutral shipping impeded all commerce and navigation in the Gulf, including that protected by Article X, paragraph 1, of the Treaty. They did so by, for example, requiring vessels to travel more circuitous and perilous routes, by requiring them to hide from Iranian attacks during the day and to travel only at night, by driving up the cost of insurance for vessels transiting the Gulf, by killing and maiming sailors on vessels that Iran was able to catch notwithstanding precautions they may have taken, and causing very serious damage to the vessels themselves.

— Finally, vessels protected under Article X, paragraph 1, were directly targeted by Iran and were damaged by mines Iran laid in shipping lanes in international waters.

22.16. One legal conclusion follows from these facts — which we developed in the presentation of our counter-claim this afternoon — and that is the same conclusion as was reached by this Court in the *Nicaragua* case: actions such as those constitute a breach of the undertaking in Article X, paragraph 1, with respect to freedom of commerce and navigation.

22.17. How does Iran respond to this? Iran offers incredible theories both to explain and to justify those attacks. First, Iran blames Iraq for the attacks we have shown Iran itself conducted. Then Iran attempts to justify the very acts it has denied committing by suggesting that its attacks on vessels of neutral countries were justified due to its war with Iraq. However, as we have shown, Iran cannot justify its indiscriminate attacks on neutral vessels, which is why it continues to deny them. Never, in the almost four years during which Iran engaged in its attacks against neutral shipping did Iran accept responsibility for those attacks or explain why it thought they were necessary or how they were consistent with the law of armed conflict and neutrality. Rather, Iran's plan was and evidently remains today before this Court to deny its responsibility, at least officially. Just as Ali Akbar Hashemi-Rafsanjani, then Speaker of the Iranian Majlis, said: "[i]f our ships are

hit, the ships of Iraq's partners will be hit. Of course, we will not claim responsibility for anything, for it is an invisible shot that is being fired."

22.18. As my colleagues have explained, the unavoidable conclusion that Iran breached Article X, paragraph 1, of the Treaty has two consequences. The most obvious is that it triggers Iran's obligation to make reparations to the United States for that international wrong.

22.19. Equally important, however, in the view of the United States, is the fundamental international legal principle that prevents a State from prevailing on a claim based on allegedly wrongful acts when that State has previously breached its reciprocal obligations. That rule is an eminently just one. So too is the related rule that precludes a State from prevailing on a claim with respect to an act that was a consequence of its own wrongful deeds. Even if the United States actions against the platforms had happened to amount to a breach of the 1955 Treaty, which they did not, those acts were taken only because of Iran's prior, and far more egregious, breaches of its obligations, including Iran's obligations under the laws of war and neutrality. Iran's claim must also be dismissed because the claim arises out of Iran's own manifestly wrongful conduct.

22.20. Mr. President, Members of the Court, at the outset of these proceedings, counsel for Iran expressed a concern that the Court not show any preference for the United States because it is a powerful State. It is not my purpose to quarrel with Iran's characterization of the United States. It is a powerful country. Nor do I question counsel's observation that the advantages a powerful State enjoys in other contexts are of no consequence in this Court. I would, however, add to this point.

22.21. From 1984 to 1988, when Iran carried out its attacks on United States and other neutral shipping in the Gulf and the United States took action against the oil platforms, Iran was engaged in a brutal and seemingly endless war with Iraq — a war which, Iran has correctly pointed out, it did not start. While at war, States occasionally do not observe the same standard of conduct as at other times. Quite often, for example, States do not reveal their war plans or take responsibility for military operations where publicity would jeopardize their ability to carry out similar operations in the future. Denial of responsibility and even deceit are common. Often ambiguous disclaimers are incongruously mixed with threats of future action. This was, as we have seen, a favoured practice of Iranian officials, including the Speaker of the Majlis, the

Ambassador to the United Nations, the Deputy Foreign Minister and others, when addressing the subject of the attacks on neutral shipping in the Gulf.

22.22. In this Court, however, deception and ambiguity have no place. A litigant here must abandon entirely these ugly habits of war. Regrettably, Iran has not recognized this. It still, in this Court, denies responsibility for its actions.

22.23. The Court must, of course, as counsel for Iran has said, protect the integrity of its proceedings against a State seeking to influence this Court's judgment because it is powerful. The Court must also, however — and with no less vigour — protect the integrity of its proceedings against too casual a respect for truth.

22.24. At the time it was attacking United States and other neutral shipping in the Gulf, Iran carefully avoided formally taking responsibility for its actions even as it tried to convey the impression, without being explicit, that it was responsible for the attacks, so as to intimidate States trading with Saudi Arabia and Kuwait. Iran did not expect, and did not even want, to be believed when it failed to take responsibility then. Nor, as the Court has seen, did anyone in fact believe that Iran was not responsible then, and the Court should not believe this now.

22.25. Mr. President, I thank you and the Members of the Court. This concludes the United States presentation for the opening round.

The PRESIDENT: Thank you, Mr. Taft. Your statement indeed brings to an end the first round of oral argument by the United States of America. Oral argument in the case will resume next Friday, 28 February, at 10 a.m. in order for the Islamic Republic of Iran to be heard with respect to the counter-claim of the United States. The sitting is closed.

The Court rose at 5.50 p.m.

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