SEPARATE OPINION OF JUDGE SIMMA

Matters relating to United States use of force are at the heart of the case, therefore the approach of dealing with Article XX before turning to Article X of the 1955 Treaty is acceptable — The Court's position regarding the United States attacks on the oil platforms, although correct as such, is marked throughout by inappropriate self-restraint — While hostile military action not reaching the threshold of an "armed attack" within the meaning of Article 51 of the United Nations Charter may be countered by proportionate and immediate defensive measures equally of a military character, the United States actions did not qualify as such proportionate counter-measures — The Court's treatment of Article X on "freedom of commerce" between the territories of the Parties follows a step-by-step approach which is correct up to a certain point but then takes turns in two wrong directions: first, the platforms attacked in October 1987 did not lose protection under Article X through being temporarily inoperative because the freedom under the Treaty embraces also the possibility of commerce in the future; secondly, the indirect commerce in Iranian oil going on during the time of the United States embargo is also protected by the Treaty — The Court's finding on the United States counter-claim is profoundly inadequate particularly with regard to the so-called "generic" counter-claim which should have been upheld — The problems of attribution and causality posed by the existence of several tortfeasors in the case could have been solved by recourse to a general principle of joint-and-several responsibility recognized by major domestic legal systems — Neither would the "indispensable-third-party" doctrine have stood in the way of declaring Iran responsible for breaches of Article X.

I have voted in favour of the first part of the *dispositif* of the present Judgment with great hesitation. In fact, I see myself in a position to concur — in principle — with the Court's treatment of only one of the two issues dealt with there, namely that of the alleged security interests of the United States measured against the international law on self-defence. As to the remaining parts of the *dispositif*, neither can I agree with the Court's decision that the United States attacks on the Iranian oil platforms ultimately did not infringe upon Iran's treaty right to respect for its freedom of commerce with the United States; nor do I consider that the way in which the Court disposed of the so-called "generic" counter-claim of the United States is correct. In my view, this counter-claim ought to have been upheld. Regarding the part of the *dispositif* devoted to this counter-claim, I thus had no choice but to dissent.

The reason why I have not done so also with regard to the first part of

the *dispositif*, even though, as I have just pointed out, I concur with the Court's decisions on only the first of the two issues decided therein[1], lies in a consideration of *Rechtspolitik*: I welcome that the Court has taken the opportunity, offered by United States reliance on Article XX of the 1955 Treaty, to state its view on the legal limits on the use of force at a moment when these limits find themselves under the greatest stress. Although I am of the view that the Court has fulfilled what I consider to be its duty in this regard with inappropriate restraint, I do not want to dissociate myself from what after all does result in a confirmation, albeit too hesitant, of the *jus cogens* of the United Nations Charter.

I. Iran's Claims

A. Introduction

1. As paragraph 37 of the Judgment pertinently reminds us, the original dispute between the Parties to the present case related to the legality under the international law on the use of force, that is to say, under the Charter of the United Nations and customary international law, of the attacks of the United States against the oil platforms. Paragraph 37 also points out that, at the time of those attacks, neither Party made any reference to the 1955 Treaty of Amity. When subsequently that Treaty was brought into play by Iran as a basis for the Court's jurisdiction, Iran attempted to ground jurisdiction not only in Article X, paragraph 1, but also Articles I and IV, paragraph 1, of the Treaty. In its 1996 Judgment on the United States Preliminary Objection the Court accepted only Article X, paragraph 1, as the basis of its jurisdiction[2] — which might seem surprising in the face of Article I of the Treaty which reads that "[t]here shall be firm and enduring peace and sincere friendship between the United States . . . and Iran". In the Court's opinion, however, Article I was not to be interpreted as incorporating into the Treaty all of the provisions of international law concerning peaceful and friendly relations. Rather, this Article would have to be regarded as fixing an objective in the light of which the other treaty provisions are to be interpreted and applied[3]. Thus, the Court concluded, Article I was "not without legal significance" for the interpretation of other Treaty provisions relevant in the case, in particular that of Article X, paragraph 1[4].

[1] As well as the reason why I prefer to label the present opinion a "separate" and not a "dissenting" opinion despite disagreeing with the majority of the Court's main findings in the case.

[2] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II),* at pp. 817 ff., 821.

[3] *Ibid.*, p. 814, para. 28.

[4] *Ibid.*, p. 815, para. 31.

In effect, the relevance ultimately assigned to Article I by the present Judgment can only be considered minimal[5].

2. Be this as it may, the 1996 Judgment did decide that "[m]atters relating to the use of force are . . . not *per se* excluded from the reach of the Treaty of 1955"[6]. As a result, the rather businesslike Article X, paragraph 1, on freedom of commerce[7] now serves as the proverbial eye of the needle through which the Court's treatment of the question of the use of armed force by the United States has to be squeezed. In effect, this needle's eye has now been made even smaller, impenetrable in the present case, in the Court's decision on the merits of Iran's claim of violation of Article X, paragraph 1.

3. From the viewpoint of legal policy and political relevance, however, there can be no doubt that in the present case the emphasis is squarely on the question of the legality *vel non* of the use of armed force by the United States against the oil platforms. I therefore accept the Judgment's approach of dealing with Article XX, paragraph 1 *(d)*, of the Treaty before turning to Article X, paragraph 1, not only for the more technical reasons advanced in the Judgment — all of which I consider convincing —, but also out of this broader consideration. For the same reason, I see no problem in the fact that the part of the Judgment devoted to the issue of United States use of armed force is considerably larger than that dealing with the question of the violation of the Treaty as such.

4. Returning to the order in which these matters are taken up in the Judgment, the United States itself has argued that there was no compelling reason for the Court to examine the question of a breach of Article X before turning to the question under Article XX. According to the Respondent, therefore the order in which the issues are to be treated is a matter for the discretion of the Court[8]. The manner in which the Court has exercised such discretion thus appears to me to be indisputable.

B. Article XX, Paragraph 1 (d)

5. In accordance with what I stated at the outset, the reason why I decided to vote in favour of the first part of the Judgment's *dispositif* is

[5] Article I is only referred to in the Judgment once (in paragraph 41) to support a conclusion which I consider cogent for rather more obvious reasons, namely that Article XX, paragraph 1 *(d)*, of the Treaty (on which *infra*) must not be read as allowing any use of force between the parties that is not permissible, or justified, under the relevant rules of international law. Paragraph 41 considers the opposite view "hardly consistent with Article I".

[6] *I.C.J. Reports 1996 (II)*, p. 812, para. 21.

[7] Respectively freedom of navigation; see *infra* on the United States counter-claim.

[8] CR 2003/11, p. 16; CR 2003/12, p. 14.

that I consider it of utmost importance, and a matter of principle, for the Court to pronounce itself on questions of the threat or use of force in international relations whenever it is given the opportunity to do so. In this regard, the desirable standard of vigour and clarity was set already in the *Corfu Channel* case where the Court condemned a right to self-help by armed force claimed by the United Kingdom

> "as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law"[9].

Unfortunately, in the sombre light of developments over the 50 years that have passed since the *Corfu Channel* case, but more particularly in the recent past, this statement of the Court shows traits of a prophecy.

6. My agreement with the present position of the Court in principle does not however keep me from criticizing the Judgment for what I consider the half-heartedness of the manner in which it deals with the question of the use of force.

I recognize of course that there are valid legal reasons for the Court to keep what has to be said on the legality of United States military actions against the oil platforms within the confines of the text of Article XX, paragraph 1 *(d),* of the Treaty. In fact, my criticism of the Court's treatment of the issues arising under that provision does not stem from any disagreement with what the text of the Judgment is saying. Rather, what concerns me is what the Court has decided not to say. I find it regrettable that the Court has not mustered the courage of restating, and thus re-confirming, more fully fundamental principles of the law of the United Nations as well as customary international law (principles that in my view are of the nature of *jus cogens*) on the use of force, or rather the prohibition on armed force, in a context and at a time when such a reconfirmation is called for with the greatest urgency. I accept of course that, since its jurisdiction is limited to the bases furnished by the 1955 Treaty, it would not have been possible for the Court to go as far as stating in the *dispositif* of its Judgment that, since the United States attacks on the oil platforms involved a use of armed force that cannot be justified as self-defence, these attacks must not only, for reasons of their own, be found not to have been necessary to protect the essential security interests of the United States within the meaning of Article XX of the Treaty; they must also be found in breach of Article 2 (4) of the United Nations Charter. What the Court could have done, without neglecting any jurisdictional bounds as I see them, is to restate the backbone of the Charter law on use of force by way of strong, unequivocal *obiter dicta*. Everybody will be

[9] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 35.

aware of the current crisis of the United Nations system of maintenance of peace and security, of which Articles 2 (4) and 51 are cornerstones. We currently find ourselves at the outset of an extremely controversial debate on the further viability of the limits on unilateral military force established by the United Nations Charter[10]. In this debate, "supplied" with a case allowing it to do so, the Court ought to take every opportunity to secure that the voice of the law of the Charter rise above the current cacophony. After all, the International Court of Justice is not an isolated arbitral tribunal or some regional institution but the principal judicial organ of the United Nations. What we cannot but see outside the courtroom is that, more and more, legal justification of use of force within the system of the United Nations Charter is discarded even as a fig leaf, while an increasing number of writers appear to prepare for the outright funeral of international legal limitations on the use of force. If such voices are an indication of the direction in which legal-political discourse on use of force not authorized by the Charter might move, do we need more to realize that for the Court to speak up as clearly and comprehensively as possible on that issue is never more urgent than today? In effect, what the Court has decided to say — or, rather, not to say — in the present Judgment is an exercise in inappropriate self-restraint.

7. Paragraph 78 of the Judgment concludes that the United States attacks against the oil platforms cannot be justified, under Article XX, paragraph 1 *(d)*, of the Treaty of 1955, as being measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying as acts of self-defence under "international law on the question" (see *infra*), and thus did not fall within the category of measures that could be contemplated, "upon its correct interpretation", by the said provision of the Treaty. I admit of course that this passage can be read — indeed, it must be read — as stating by way of implication that the United States actions, constituting unilateral use of "armed force not qualifying, under international law . . . as acts of self-defence", were therefore in breach of Article 2 (4) of the United Nations Charter. *Tertium non datur*. It is a great pity however that the reasoning of the Court does not draw this necessary conclusion, and thus strengthen the Charter prohibition on the threat or use of armed force, in straightforward, terms. To repeat, I cannot see how in doing so the Court would have gone beyond the bounds

[10] Cf. Secretary-General Kofi Annan's Address to the General Assembly of 23 September 2003, General Assembly, 7th Plenary Meeting, 23 September 2003, A/58/PV.7, at p. 3.

of its jurisdiction. The text of the Judgment should have included an unambiguous statement to the effect that the United States military operations against the oil platforms, since they were not conducted in justified self-defence against an armed attack by Iran, must be considered breaches of the prohibition on the use of military force enshrined in the United Nations Charter and in customary international law.

8. Instead of doing so, the text adopted by the majority of the Court explains what is to be understood by the "international law on the question" (para. 78) in a way that comes dangerously close to creating the impression that the Court attempts to conceal the law of the Charter rather than to emphasize it: it speaks throughout its extensive debate on the United States attacks in light of Article XX of "international law on the question" (i.e., the question of the use of force), "international law applicable in the case" or " the relevant rules of international law". What these relevant, applicable etc. rules actually are is spelled out only once, and then in the subordinate part of a sentence: in paragraph 42, the Judgment states that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty to decide any question of interpretation or application of *(inter alia)* Article XX, paragraph 1 *(d)*, of the Treaty extends, where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force "by reference to international law applicable to this question, *that is to say, the provisions of the Charter of the United Nations and customary international law*" (emphasis added). Again: nowhere else in the part of the Judgment dealing with the United States attacks[11] is the United Nations Charter expressly mentioned. It is difficult to view such hiding of the law of the Charter behind the veil of terms like those that I have quoted above as a mere matter of style; it could unfortunately also be understood as a most unwelcome downgrading of the relevance and importance of the rules of the United Nations Charter on the use of force — as I just said, precisely at a time when the effectiveness of these rules is being challenged to the breaking-point.

Having said this, I turn to a number of more specific issues raised by the text of the Judgment devoted to Article XX, paragraph 1 *(d)*, of the 1955 Treaty.

9. I agree with the Judgment's understanding of the relationship between Article XX, paragraph 1 *(d)*, and the limits of general international law on unilateral use of force, according to which — in the words of a former President of this Court — this Article "cannot have contem-

[11] With the exception of a reference in paragraph 51 to Article 51 of the Charter as determining the meaning of "armed attacks".

plated a measure which cannot, under general international law, be justified even as being part of an operation in legitimate self-defence"[12]. The Court, in paragraph 41 of the Judgment, thus accepts, and rightly so, the principle according to which the provisions of any treaty have to be interpreted and applied in the light of the treaty law applicable between the parties as well as of the rules of general international law "surrounding" the treaty[13]. If these general rules of international law are of a peremptory nature, as they undeniably are in our case, then the principle of interpretation just mentioned turns into a legally insurmountable limit to permissible treaty interpretation.

10. The scope of measures taken to protect the essential security interests of a party according to Article XX, paragraph 1 *(d)*, is wider than that of measures taken in self-defence. There are many measures that a party may take on that basis, like import bans, which have nothing to do with the notion of self-defence. On the other hand, any measure taken in self-defence would equally constitute a measure necessary to protect essential security interests within the meaning of the 1955 Treaty. However, only measures which fulfil all of the conditions required for the exercise of the right of self-defence can qualify as action that is permissible under Article XX, paragraph 1 *(d)*. In the present case, to interpret Article XX, paragraph 1 *(d)*, more "liberally" would be both absurd and destructive: absurd, because our provision could then be read to mean that parties to treaties of, among other things, "amity" could be allowed to contract out of the most fundamental of all obligations under present international law, namely the prohibition on the threat or use of force — an obligation which States owe any other State even if they cannot muster any degree of "amity" for each other. Furthermore, such a reading of Article XX, paragraph 1 *(d)*, would be destructive because it would allow a mutual "emancipation" from some of the most cogent of all rules of international law.

11. I also strongly subscribe to the view of the Court expressed in the Judgment's paragraph 73 according to which the requirement of international law that action taken avowedly in self-defence must have been necessary for that purpose, is strict and objective, leaving no room for any "measure of discretion". In my view, this is also due to Article I of the 1955 Treaty ("There shall be firm and enduring peace and sincere friend-

[12] Dissenting opinion of Judge Sir Robert Jennings, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 541. Sir Robert referred to the exact counterpart of Article XX, paragraph 1 *(d)*, in the FNC Treaty between the United States and Nicaragua. The remaining doubts in Sir Robert's mind (cf. *ibid.*) were, in my view, unnecessary.

[13] Article 31, paragraph 3 *(c)*, of the 1969 Vienna Convention on the Law of Treaties.

ship between the United States . . . and Iran") which, according to the Court's Judgment of 1996 on the Preliminary Objection of the United States, must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied[14]. The least which this objective must lead to is a particularly high demand on the standard of "necessity" embodied in Article XX, paragraph 1 *(d)*; every one of the words used in the text of that provision must be carefully weighed and given its full import. Hence, in order to relieve a party from its obligation under Article X, paragraph 1, of the Treaty, a measure must, first, be necessary, not just desirable or useful to protect that State's essential security interests. Second, the measure must be necessary to actually protect these interests, not just to advance or support them. Third, the measure must be necessary to protect the security interests of the State taking it. Fourth, the security interests destined to be protected must be essential. And last, of course, the measure must be concerned with the security of the Respondent itself. Since Article XX, paragraph 1 *(d)*, of the 1955 Treaty is the exception to the rule of freedom of commerce and navigation enshrined in the same Treaty, and, as stated, in light of Article I, all these terms have to be subjected to extremely careful scrutiny.

12. I am less satisfied with the argumentation used in the Judgment by which the Court arrives at the — correct — conclusion that, since the Iranian mine, gunboat or helicopter attacks on United States shipping did not amount to an "armed attack" within the meaning of Article 51 of the Charter, the United States actions cannot be justified as recourse to self-defence under that provision. The text of paragraph 51 of the Judgment might create the impression that, if offensive military actions remain below the — considerably high — threshold of Article 51 of the Charter, the victim of such actions does not have the right to resort to — strictly proportionate — defensive measures equally of a military nature. What the present Judgment follows at this point are some of the less fortunate statements in the Court's *Nicaragua* Judgment of 1986[15]. In my view, the permissibility of strictly defensive military action taken against attacks of the type involving, for example, the *Sea Isle City* or the *Samuel B. Roberts* cannot be denied. What we see in such instances is an unlawful use of force "short of" an armed attack ("agression armée") within the meaning of Article 51, as indeed "the most grave form of the use of force"[16]. Against such smaller-scale use of force, defensive action — by force also

[14] *I.C.J. Reports 1996 (II)*, p. 814, para. 28.
[15] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, e.g., p. 101, para. 191; p. 103, para. 194; p. 127, para. 249.
[16] *Ibid.*, p. 101, para. 194.

"short of" Article 51 — is to be regarded as lawful[17]. In other words, I would suggest a distinction between (full-scale) self-defence within the meaning of Article 51 against an "armed attack" within the meaning of the same Charter provision on the one hand and, on the other, the case of hostile action, for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defence expressly reserved in the United Nations Charter. Here I see a certain analogy with the *Nicaragua* case, where the Court denied that the hostile activities undertaken by Nicaragua against El Salvador amounted to an "armed attack" within the meaning of Article 51, that would have given the United States a right to engage in collective self-defence, and instead qualified these activities as illegal military intervention. What the Court did consider permissible against such unlawful acts were "proportionate counter-measures", but only those resorted to by the immediate victim. The Court said:

> "While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot . . . produce any entitlement to take collective counter-measures involving the use of force. The acts of which Nicaragua is accused . . . could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, . . ."[18]

Hence, the Court drew a distinction between measures taken in legitimate self-defence on the basis of Article 51 of the Charter and lower-level, smaller-scale proportionate counter-measures which do not need to be based on that provision. In view of the context of the Court's above dictum, by such proportionate counter-measures the Court cannot have understood mere pacific reprisals, more recently, and also in the terminology used by the International Law Commission, called "counter-measures"[19]. Rather, in the circumstances of the *Nicaragua* case, the Court can only have meant what I have just referred to as defensive military action "short of" full-scale self-defence. Unfortunately, the present Judgment decided not to address this issue at all.

[17] I have not developed this view *ad hoc*, under the impact of the present case, but as long as 20 years ago; see A. Verdross and B. Simma, *Universelles Völkerrecht. Theorie und Praxis*, 3rd ed., 1984, p. 240, para. 472.

[18] *I.C.J. Reports 1986*, p. 127, para. 249.

[19] Cf. Articles 49-54 of the ILC's text on the Responsibility of States for Internationally Wrongful Acts, adopted in 2001; cf. International Law Commission, Report on the Work of its Fifty-Third Session, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10). The Commission strictly excluded from its concept of "counter-measures" any such measures amounting to a threat or use of force; cf. Article 50, para. 1 *(a)*.

13. To sum up my view on the use of force/self-defence aspects of the present case, there are two levels to be distinguished: there is, first, the level of "armed attacks" in the substantial, massive sense of amounting to "une agression armée", to quote the French authentic text of Article 51. Against such armed attacks, self-defence in its not infinite, but still considerable, variety would be justified. But we may encounter also a lower level of hostile military action, not reaching the threshold of an "armed attack" within the meaning of Article 51 of the United Nations Charter. Against such hostile acts, a State may of course defend itself, but only within a more limited range and quality of responses (the main difference being that the possibility of collective self-defence does not arise, cf. *Nicaragua*) and bound to necessity, proportionality and immediacy in time in a particularly strict way.

14. In the present case, I agree with the Court that neither the broad pattern of unlawful use of force by Iran against United States vessels and their naval escorts nor the two specific attacks against the *Sea Isle City* and the *Samuel B. Roberts* amounted to an "armed attack" within the meaning of Article 51 of the United Nations Charter. These hostile activities could, as I have pointed out, have been countered immediately by "proportionate counter-measures" also of a military nature, consisting of defensive measures designed to eliminate the specific source of the threat or harm to affected ships in, and at the time of, the specific incidents. The Iranian oil platforms and their possible non-commercial activities during the Gulf War were too remote from these incidents (in every sense of this word) to provide a legitimate target for counter-measures within the meaning given to this term in the *Nicaragua* Judgment. Also, there is in the international law on the use of force no "qualitative jump" from iterative activities remaining below the threshold of Article 51 of the Charter to the type of "armed attack" envisaged there. However, as I read the facts of the present case, there was on the part of Iran no iterative or continued pattern of armed attacks against United States ships to begin with. Attacks on ships flying foreign flags could not be relied on by the United States in order to trigger Article 51 action. Furthermore, not a single Security Council resolution adopted at the material time determined that it was Iran (alone) which had engaged in "armed attacks" against neutral shipping in the Gulf.

15. But even if we assume, for the sake of discussion, that the United States had been the victim of an armed attack by Iran within the meaning of Article 51 of the United Nations Charter, the United States attacks on the oil platforms would not qualify as legitimate acts of self-defence under that provision. The United States actions fulfilled neither the condition of necessity nor that of proportionality. In the light of the material before the Court relating to the political and military considerations on

the part of United States authorities that led to the attacks on the oil platforms, the selection of these platforms as targets was made on the basis of decisions by military commanders which may well be considered state of the art from the viewpoint of military efficiency, etc., but to which the notion of "self-defence" was quite foreign. It is possible, indeed probable, that some monitoring of United States as well as any other neutral shipping had actually taken place from aboard the oil platforms. Obviously this was a nuisance to United States military decision-makers. The United States authorities might also have been right in assuming a connection between information flowing, as it were, from the oil platforms and the harassing of neutral shipping in the Gulf. Thus, as I see it, either following the incidents involving the *Sea Isle City* and the *Samuel B. Roberts*, the United States military considered that enough was enough, and thus decided to neutralize the oil platforms, or, rather, the United States used these two incidents to teach Iran a broader lesson. The material put before the Court by the United States contains several more or less convincing reasons as to why it was the oil platforms and not some other military targets that were chosen for the purpose of a "reply" to the specific incidents involving the *Sea Isle City* and the *Samuel B. Roberts*, respectively the broader pattern of unlawful force engaged in by Iran. But nowhere in these materials do we encounter any trace of the considerations that an international lawyer would regard as necessary in order to justify action taken in self-defence.

16. I arrive at the conclusion that the United States military actions against the oil platforms were not of the defensive nature required both by Article 51 of the United Nations Charter and the general international law governing "proportionate counter-measures", to refer again to the *Nicaragua* Court's tantalizing phrase. As I interpret the law on the limits of unilateral use of armed force as it has evolved since 1945, there is no way to regard such actions as lawful or justified.

C. Article X, Paragraph 1

17. With regard to the question whether the United States attacks on the oil platforms constitute a breach of Article X, paragraph 1, of the 1955 Treaty, the Judgment follows a step-by-step approach with which I am able to concur throughout several of its argumentative stages. For instance, I agree with the statement of the Court in paragraph 82 according to which it is oil exports from Iran to the United States that are relevant to the case, not such exports in general. In the same paragraph the Court rightly disposes of the United States argument calling for a distinction between oil produced on Iranian land territory or in the territorial sea of Iran, on the one hand, and oil produced on the Iranian continental shelf, on the other.

18. I also agree with the gist of paragraph 89 of the Judgment, in which the Court considers that where a State destroys another State's means of production and transport of goods destined for export, or means ancillary or pertaining to such production or transport, there is an interference with freedom of international commerce being carried on by those means at that time. However, the Court relativizes this finding by saying that this consideration is valid "in principle". The Court thus introduces a distinction between "freedom of international commerce" in the Treaty sense (which it interprets later on) and the same freedom "in principle", that is, in some more general sense. This is the point from which the present Judgment appears to begin its retreat from the Court's position of 1996 or, to return to the metaphor used above, to close again the needle's eye offered to Iran at that earlier stage. I will turn to this change of course in more detail in paragraphs 21 ff. of my opinion.

19. In paragraph 91 of the Judgment, the Court reminds us that it remains uncontested between the Parties that "oil exports from Iran to the United States were — to some degree — ongoing at least until after the destruction of the first set of oil platforms" on 19 October 1987. In the same paragraph, the Court also points out that it is accepted by both Parties that the oil or petroleum products reaching the United States during this period were to some extent derived from crude oil produced by the platforms that were later subjected to attack. Thus the Court confirms that Iranian oil exports did right up to the beginning of the United States oil embargo constitute "commerce between the territories of the High Contracting Parties" within the meaning of Article X, paragraph 1, of the 1955 Treaty.

20. I also draw attention to paragraph 96 of the Judgment, according to which the Court sees no reason to question the view that, over the period during which the United States embargo was in effect, petroleum products that were derived in part from Iranian crude oil were reaching the United States in considerable quantities. The Court continues:

> "It could reasonably be argued that, had the platforms not been attacked, some of the oil that they would have produced would have been included in the consignments processed in Western Europe so as to produce the petroleum products reaching the United States."

21. Thus far, I can agree with the Court's build-up of the arguments concerning Article X, paragraph 1, of the Treaty. I have gone through the relevant stages of these arguments in order to demonstrate more clearly that from this point onwards the Court's reasoning begins to be flawed.

Where these flaws are summarized, as it were, and where therefore I part company with the reasoning of the Judgment, is at paragraph 98 which encapsulates the two main findings of the Court relating to

Article X, paragraph 1, of the Treaty. Paragraph 98 states that the two United States attacks cannot be said to have infringed upon Iran's rights under Article X, paragraph 1, of the Treaty because

— at the time of the United States attack of 19 October 1987 on the Reshadat platforms there was no commerce between the territories of Iran and the United States in respect of oil produced by those platforms and the Resalat platforms[20], inasmuch as those platforms were under repair and inoperative;
— at the time of the attacks of 18 April 1988 on the Salman and Nasr platforms, all direct commerce in oil between the territories of Iran and the United States had been suspended in pursuance of the United States embargo; consequently there was at that time no commerce "between the territories" of the parties within the meaning of the Treaty.

22. My disagreement with those two conclusions is as follows: as the Permanent Court has observed in the *Oscar Chinn* case[21], freedom of trade consists in the right to engage in any commercial activity, such activity comprising not only the purchase and sale of goods, but also industry, and in particular the transport business. This observation was the basis for the Court's 1996 Judgment on the United States Preliminary Objection to arrive at what it calls the "natural interpretation" according to which the word "commerce" in Article X, paragraph 1, includes commercial activities in general — not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce[22]. In conformity with this finding, the present Judgment includes the oil platforms among the installations performing such ancillary activities.

23. What I cannot agree with is that those oil platforms that at the time of the 1987 attacks were under repair could have lost the protection rendered by Article X, paragraph 1, of the 1955 Treaty by the fact of their thus being temporarily inoperative. First, according to Iran, the Reshadat platforms were at the time of the United States attacks close to being recommissioned[23]: according to Iran, it was contemplated that production would resume several days before the United States embargo set in. But even if the Reshadat platforms had taken up production again at a later date, that is, during the period of the embargo, they would have

[20] Paragraph 47 of the Judgment clarifies that, while the United States attack was made solely on two platforms belonging to the Reshadat complex, it affected also the operation of the Resalat complex.

[21] *Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 65.

[22] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 819, para. 49.

[23] Cf. paragraph 92 of the Judgment.

participated in indirect commerce in oil (on which see *infra*), just like the Salman and Nasr platforms.

24. Concerning the time needed for the repair of the platforms, I see no reason to deny credibility to the Iranian claims as paragraph 93 of the Judgment chooses to do: Iraqi attacks on the Reshadat platforms had taken place way back in 1986 and I would not categorically exclude the possibility that the United States, resolved to "teach Iran a lesson", timed its attacks precisely so as to destroy the installations as imminently before they could resume their function as possible.

25. More importantly, however, I consider, first, that "freedom of commerce" within the meaning of Article X, paragraph 1, of the Treaty implies the coverage by that Treaty provision not only of actual, ongoing commerce but of commerce on a continuing basis. Secondly, with Iran, I read that freedom as embodying an undertaking by the Parties to refrain from any action, not authorized by general international law or expressly contemplated by the Treaty between them, which may be the source of impediments on the other Party related to international commerce[24]. Thus, according to this view, which I consider to be correct on this point, the key issue is not damage to commerce in practice but the violation of *the freedom to engage in commerce*, whether or not there actually was any commerce going on at the time of the violation.

26. To conclude from this interpretation of the Treaty-based "freedom of commerce" that one party to a treaty stipulating such freedom would be obligated to enhance the other party's capabilities to bring about goods destined for such commerce would be absurd. But what certainly follows from it is that the parties are prohibited to prevent each other's use of existing capabilities, particularly by destroying respective installations altogether. I see no other way to interpret the Court's statement of 1996, according to which "any act which would impede that 'freedom' is thereby prohibited"[25]. Further, as a consequence of that — abstract, as it were — understanding of freedom of commerce followed here, such freedom is not founded on momentary reality, it implies a possibility for the future[26]. Thus the destruction of the Reshadat installations did impair the freedom of Iran to engage in commerce in oil also with the United States, irrespective of the fact that at the time of the attacks the platforms were out of order. Even if it had taken Iran longer to render the installations attacked in 1987 operational again, reducing them to ruins is to

[24] Pellet, CR 2003/6, p. 28.

[25] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 819, para. 50.

[26] Pellet, CR 2003/6, p. 33, paras. 68 and 70; p. 34, para. 73.

me as obvious a violation of Iran's freedom of commerce as it could possibly be. Hence, for a violation of Article X, paragraph 1, to occur, no oil must have been flowing at the time of the United States attacks; it is sufficient that the attacks impeded the possibility of such flow. To give an example: let us assume that a person is suffering from a sore throat, depriving her of her voice, the chances being however that the person would be fully able to speak again in a few hours' time. If somebody gagged that person in order to prevent her from then speaking her mind, would such action be seen as an infringement upon that person's respective rights or not? The answer would certainly be yes. Thus I would venture to disagree with the view expressed in paragraph 92 of the Judgment according to which "[i]njury to potential for future commerce is . . . not necessarily to be identified with injury to freedom of commerce, within the meaning of Article X, paragraph 1, of the 1955 Treaty".

27. From the view taken here, the exact time of the projected resumption of operation of the oil platforms is not really relevant.

28. Further, I find myself in disagreement with the view expressed in paragraph 98 of the Judgment that, since at the time of the attacks on the Salman and Nasr platforms in April 1988, commerce in oil between the territories of Iran and the United States had been suspended through the United States President's Executive Order 12613, these platforms had lost protection under Article X, paragraph 1, of the 1955 Treaty as well. Thus, in the view of the Court, even though it recognizes that during the period of the United States embargo petroleum products were reaching the United States in considerable quantities that were derived in part from Iranian crude oil[27], commerce in such products did not constitute "commerce between the territories of Iran and the United States", understood exclusively as direct commerce. Also, the Judgment apparently views the "directness" of commerce in oil and petroleum products as eliminated not by the fact that, having been mixed with oil from other destinations, refined or otherwise processed, for instance in Rotterdam, Iranian crude oil could have lost its Iranian nationality, as it were, but rather by the existence in the context of indirect commerce of a succession of commercial transactions involving in addition to an Iranian seller and a United States buyer some intermediate participant(s) in a third country[28].

29. I find this interpretation of Article X, paragraph 1, plainly wrong. It is too formalistic and due to render the inter-State "commerce" pro-

[27] Cf. paragraph 96 of the present Judgment and *infra* paragraph 30.

[28] Cf. Judgment, paras. 96 ff. In the Court's view "[t]his is not 'commerce' between Iran and the United States, but commerce between Iran and an intermediate purchaser; and 'commerce' between an intermediate seller and the United States" (*ibid.*, para. 97).

tected under the Treaty a prey to private manipulations. In order to assess the ambit of this protection correctly, I would submit that a sharp distinction ought to be drawn between the level of international commercial law, that is, the law and the contractual relationships governing transactions in oil between private parties on the one hand and the level of public international, i.e., treaty law on the other: the 1955 Treaty intends to protect "commerce between the territories of the Parties" as a value, or as a good, belonging, as it were, to the States parties to it; it in no way focuses on the private transactions that make such commerce flow from Iran to the United States. Thus, what the Treaty protection of commerce aims at is the macro-economic aspect of oil trade. And in this regard, the situation was as follows: according to the information before the Court, Iran's economy benefited from an increase in sales of crude oil to Western European markets during the period of the embargo, and this corresponded to increased spending by United States importers on petroleum products in those markets. Just as there was, in some sense, a flow of Iranian oil into the United States in the form of "mixed" crude oil or refined products, so there was also a corresponding flow of capital out of the United States and, ultimately, into Iran to pay for the products. In my view, this is all there is needed to represent "commerce between the territories" of the two Parties for the purposes of a commercial treaty of the kind exemplified by the 1955 Treaty. Trade in oil has to be viewed in light of the realities of that trade[29]. I would presume that even before the enactment of the embargo, indirect trade in oil (products), as such trade is understood by the Judgment, was taking place. Subsequent to the United States President's Executive Order 12613, what happened was that all Iran-United States oil trade became indirect in that way.

30. The figures in that regard are quite telling. According to the report by Professor Odell submitted by Iran, trade in oil between Iran and Europe and Europe and the United States increased very significantly around the time in which the embargo was enacted. Thus Iranian crude exported to European OECD countries rapidly expanded from only 25.2 million tons in 1986 to 37.7 million in 1987, and to 43.0 million tons in 1988: a 70 per cent increase in two years.

In the course of the same two years, exports of oil products from Western Europe to the United States rose by 60 per cent, from 11.2 to 17.9 million tons, while exports of such products as a whole from Europe increased much more modestly by 35 per cent from 24.3 to 32.7 million tons. In 1986, 46.1 per cent of Western Europe's exports of relevant products went to the United States; in 1988, the United

[29] Crawford, CR 2003/5, pp. 3 ff.

States was the destination for 54.7 per cent of the total[30]. Professor Odell concludes:

> "One can reasonably presume that these much larger than previously reported levels of geographically non-specified destinations for oil products ex-Europe for 1988 could have been related to actions which sought to disguise an Iranian origin for large volumes of oil going to the United States through Europe."[31]

Again according to Professor Odell, the "denationalization" process that Iranian oil underwent in Europe was substantial so that it would be very difficult to trace the oil to its origin. Odell states that "it was thus an ideal system into which US embargoed Iranian crude could be introduced"[32].

31. Another critical observation in place would be that the Judgment is rather oblique in its treatment of the exception made in Executive Order 12613. After all, the Order provided that the embargo was not to apply, *inter alia*, to "petroleum products refined from Iranian crude oil in a third country". Must the very existence of this exception from the embargo not be seen as an implicit acknowledgment by the United States that indirect commerce was also to be regarded as "commerce" between itself and Iran? If it had been taken to be otherwise, the exception would not have been necessary at all.

32. The economic interests at the basis of indirect trade in oil (products) between Iran and the United States appear to me quite clear-cut: Iran had an interest in sending its oil to Western Europe because there the oil was mixed with crude from other geographical origins or refined to some degree, so that it was impossible to determine whether oil products subsequently imported into the United States from Western Europe had come from Iran or not. But it is apparent that the United States also had an interest in maintaining this arrangement. It permitted the United States to claim that it had placed an embargo on Iran while at the same time allowing American companies to indirectly import oil products from that country. It allowed Iran to hide the "nationality" of its oil by sending it to a third country where it was mixed with oil from other sources and then could be sold on to the United States without complaints. Thus it seems that one of the main motives behind shipping the oil to Europe before it went on to its final destination, the United States, was to circumvent the embargo rather than substantively change the product by adding significant value to it. The United States clearly had knowledge of these facts but its importers still bought greatly increased quantities of oil from Europe, as described in the Odell Report.

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[30] Reply and Defence to Counter-Claim submitted by Iran (RI), Vol. III, Odell Report, p. 10.

[31] *Ibid.*, p. 12.

[32] *Ibid.*, p. 9.

33. Again, what I cannot but see here is "commerce between the territories" of the two Parties, well within the meaning of Article X, paragraph 1, of the 1955 Treaty. Nowhere does that Treaty require that such commerce be carried on between Iranian and United States natural or legal persons, without any foreign intermediaries, or that the oil should be shipped between the territories of the Parties without any interruption.

Paragraph 97 of the Judgment seeks to strengthen the opposite point of view by saying that:

> "If, for example, the process of 'indirect commerce' in Iranian oil through Western European refineries . . . were interfered with at some stage subsequent to Iran's having parted with a consignment, Iran's commitment and entitlement to freedom of commerce vis-à-vis the United States could not be regarded as having been violated."

But let us assume that it would have been the United States itself that would have thus interfered, would in such case Iran not have regarded its entitlement to freedom of commerce as having been violated by the other Contracting Party? The answer will be a clear no. Thus, the very example chosen by the Court shows that the (as it were, "macro-" rather than "micro-") economic link characterizing the "commerce between the territories . . ." protected by the Treaty would not be severed by any intermediate private transactions involving third-country nationals.

34. With regard to the two groups of oil platforms attacked by the United States I therefore reach the following result:

(a) as far as the Reshadat[33] platforms attacked in October 1987 are concerned, there is the possibility that they could even have returned to contributing to direct commerce between the territories of the two countries before the United States embargo set in. After resumption of performance, they would with certainty have participated in indirect commerce;

(b) the same is valid for the Salman platform attacked in April 1988; as far as the Nasr platform attacked at the same date is concerned, it was operating at the time of the attack, that is, it was participating in Treaty-protected commerce.

Thus, the destruction of the oil platforms violated Iran's freedom of commerce

— given (correctly) what could be called the "abstract" meaning of such freedom in the case of the Reshadat, Resalat and Salman platforms;

— also understood in the "concrete" sense (as done by the Judgment) in case of the Nasr platform.

[33] And Resalat, see *supra*, footnote 20.

Since, in my view, indirect commerce is protected by Article X, paragraph 1, of the Treaty, both United States attacks constituted breaches of the Treaty. The Court should therefore have upheld Iran's respective claim.

II. The United States Counter-Claim

A. Introduction

35. While the Judgment discusses at length the issues of jurisdiction and admissibility of the United States counter-claim, in comparison it devotes very little attention to the substantive questions raised therein. In particular, the reasons for the dismissal of the generic counter-claim given in paragraph 123 of the Judgment appear to me to be plainly inadequate: all the Judgment has to say in this regard is that the high risk for navigation in the Gulf during the Iraq-Iran war is not sufficient for the Court to decide that Article X, paragraph 1, of the 1955 Treaty was breached by Iran, and, further, that the United States was unable to demonstrate an actual impediment to trade or navigation between the territories of the Parties resulting from Iran's hostile activities. After all, paragraph 123 of the Judgment tells us commerce and navigation between Iran and the United States did continue during the war[34]. According to the Court, in the circumstances of this case, a generic claim of breach of Article X, paragraph 1, cannot be sustained independently of the specific incidents involving a number of ships, the entirety of which the Court found as not having led to an interference with the freedom of commerce and navigation protected by the Treaty.

36. Thus far the Court's reasoning, contained in one single paragraph

[34] More precisely, paragraph 123 states that

> "according to the material before the Court the commerce and navigation between Iran and the United States continued during the war until the issuance of the United States embargo on 29 October 1987, and subsequently at least to the extent permitted by the exceptions to the embargo".

As set forth in paragraph 90 of the Judgment, the embargo prohibited the import into the United States of most goods, including oil, and services of Iranian origin. Most but not all goods were affected by the embargo, which means that certain goods could still be imported freely into the United States from Iran. Commerce between the two Parties, which is not limited to commerce in oil, therefore continued even after the issuance of the embargo. However, the fact that commerce between the two Parties continued during the war does not, in and of itself, demonstrate that Iran's actions did not impede on the freedom of commerce and navigation between the two Parties. Had it not been for the impediments resulting from Iranian actions, there might have been *more* commerce between the two Parties. In other words, some commerce was still going on during the war, but not as much as would have been the case absent Iran's actions detrimental to commercial shipping between the Parties.

of the Judgment, and the little there is is borrowed in part from the arguments used by the Court before to dismiss the specific variant of the United States counter-claims. Possibly such short shrift thus given to the generic counter-claim can be explained as the Court's reaction to the somewhat unpersuasive way in which it was pleaded. Indeed, what I would regard as a full-fledged reasoning in support of the generic counter-claim was never really articulated by the United States. I would submit however that there is more merit to this counter-claim than meets the eye.

37. In the following, after a brief explanation of the meaning of "generic counter-claim" underlying the present case, I will scrutinize the main arguments in favour of the United States counter-claim of this nature, as they can be developed on the modest basis of what the United States did actually muster by way of reasoning. In doing so, I do not assume to violate the *ultra petita partium* rule because the generic counter-claim was actually made, if only insufficiently argued.

38. Iran, in its written pleadings on the counter-claim, made a distinction between the general context and worsening conditions for shipping in the Persian Gulf during the period in question, and the specific incidents referred to by the United States as constituting breaches of Iran's obligations under the Treaty[35]. Looking at the written pleadings of the United States, however, one finds no mentioning of an express distinction between a "generic" and a "specific" counter-claim[36]. Rather, in the United States Counter-Memorial and Counter-Claim, the counter-claim was formulated as a single claim. At the stage of the oral pleadings, the United States actually seemed to reject the distinction[37]. I use the word "seemed" because the position of the United States was unclear: after what could be regarded as a rejection of the distinction proposed by Iran, counsel for the United States went on to say that, in the *Nicaragua* case,

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[35] Iran found it

> "useful to analyse the US's claims in two ways: first, to the extent the United States refers to attacks on specific vessels (the specific claims), and secondly, to the extent that it refers to a more general impairment of the freedom of commerce between the territories of the High Contracting Parties (the generic claim)" (RI, para. 9.22).

Iran then proceeded to analyse both "claims".

[36] Specific incidents were mentioned by the United States in order to illustrate the assertion that

> "Iran's actions resulted in extremely dangerous conditions for all vessels operating in the Gulf, including a number of United States vessels which suffered severe property damage and injury to their crews" (Counter-Memorial and Counter-Claim submitted by the United States of America (CMUS), para. 6.09).

[37] CR 2003/13, pp. 42-43, paras. 21.61-21.63.

"[t]he Court did not feel compelled to treat each of the incidents placed before it as individual claims . . . We urge the Court to do the same in this case."[38] In thus requesting the Court not to examine the incidents individually, the United States in fact embraced a more generic approach to the counter-claim implicitly.

39. Regardless of what the position of the United States on this problem of nomenclature ultimately was, the Court found the distinction suggested by Iran useful and took it up in its Judgment. I will therefore also follow it in my analysis. The way in which the Judgment proceeds is to reject the two types of counter-claims independently of each other, even though applying to the generic counter-claim more or less the same criteria that it applies earlier on to its specific variety. I submit that this approach cannot do justice to the generic counter-claim. To be able to stand on its own, the generic counter-claim must be given its distinct substance — a substance independent of that of the various specific incidents referred to by the United States. The Court's way of dealing with the matter in paragraph 123 reduces the generic counter-claim to an empty shell, which is then summarily disposed of.

40. To delineate the contours of the generic counter-claim in an adequate way, it is useful to refer to the 1986 *Nicaragua* Judgment. In the *Nicaragua* case, the Court was faced with similar violations of a similar treaty, which also protected the freedom of commerce and navigation "between the territories" of the two parties. When the Court assessed the impediment to the freedom of commerce and navigation caused by the United States attacks on Nicaraguan ships, it did not consider it necessary to establish whether the particular vessels harmed by mines were flying the Nicaraguan flag, and whether the ships in question were transporting cargo between the United States and Nicaragua[39] (even though Article XIX, paragraph 1, of the FCN Treaty between the United States and Nicaragua of 1956, like Article X of our Treaty, reads: "Between the territories of the two parties there shall be freedom of commerce and navigation").

41. Most importantly, in the *Nicaragua* case, the Court did not analyse each incident in detail. Rather, it gave a broad picture of the context prevailing at the time, and assessed the nature and the extent of United States involvement and, consequently, its responsibility for the resulting violations of general international law and the FCN Treaty. Nowhere do we find a specific account of what happened to each ship. The Court's

[38] CR 2003/13, p. 43, para. 21.64.

[39] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 48, para. 81.

approach, in this sense, was more "generic" than "specific". In our case as well, the analysis of the generic counter-claim should not entail an analysis of what happened to the specific ships named by the United States.

42. One difference, of course, has to be pointed out at once: whereas, in the *Nicaragua* case, responsibility for the military actions taken against Nicaragua could be attributed only to the United States, in the present case two States created the situation adverse to neutral shipping in the Gulf: Iran and Iraq or, to be more precise, Iran *or* Iraq. I do not believe however that this difference is determinant. With respect to the generic counter-claim, all that matters is that Iran was responsible for a significant portion of the actions that impaired the freedom of commerce and navigation between the United States and Iran. This is sufficient to hold Iran in breach of its obligations under Article X, paragraph 1, of the 1955 Treaty, and it is not necessary to determine the particular extent to which Iran was responsible for these actions.

43. Another point is of even greater importance: against the reasoning that follows it cannot be argued that all the impediments to free commerce and navigation which neutral ships faced in the Gulf were caused by legitimate acts of war carried out by the two belligerents, Iran and Iraq, and that therefore neutral shipping had nothing to complain about, so to speak, because it entered the maritime areas affected by the Gulf war at its own risk — a risk which all neutrals must bear if they decide to navigate and trade in such a dangerous environment. This argument appears ill founded because it is well recognized that both Iran and Iraq conducted their activities against neutral shipping in and around the Gulf that are at issue here widely in disregard of the rules of international *jus in bello*, in particular the laws of maritime neutrality. I will exemplify such illegal activities on the part of Iran in the following analysis, but what has to be emphasized already at this point is that these activities were not justified simply because a state of war existed between Iran and Iraq.

B. Analysis

44. In my view, in the present case the purpose of the generic counter-claim is to compensate the United States for the harm done by Iran to commerce and navigation with the United States rather than for the harm done to specific vessels. For the reasons now to be outlined, I will argue (1) that Iran's actions constitute a violation of Article X, paragraph 1, of the 1955 Treaty, and (2) that the impediment on the freedom of commerce and navigation caused by those actions is evidenced by the increase in labour, insurance, and other costs resulting for the partici-

pants in commerce between the two countries during the relevant period[40].

1. Iran's violation of Article X, paragraph 1

45. The United States described in detail the various actions taken by Iran which caused damage to vessels, higher navigational risks, and delayed passage[41]. Let us look at these hostile activities.

First, I consider undeniable that Iran laid mines for the purpose of sinking and damaging ships — also United States-flagged ships and other vessels engaged in commerce between Iran and the United States — sailing in the Gulf and surrounding waters. In this regard, the *Texaco Caribbean* incident of 10 August 1987 is very instructive. A week after this tanker had struck a mine, Iran assisted in minesweeping operations in the area and destroyed a number of mines[42]. A Reuters wire report indicates that six mines were found in the area in the three days following the incident[43]. It is striking that Iran did not identify any of the mines which it found and destroyed; at least no such information appears in any of the reports. Then, from 21 to 28 September 1987, France and the United Kingdom conducted minesweeping operations in the area where the *Texaco Caribbean* incident had taken place. In the course of these operations, no mines could be detected[44]. On 10 October 1987 (that is, two months after the mining of the tanker), warships of the two countries returned to the site and undertook a second minesweeping operation. This time five mines were detected. The United Kingdom Ministry of Defence identified those mines as Iranian-manufactured SADAF-02 mines, on the basis of the serial numbers and characteristics of these weapons[45]. This evidence suggests that Iran had laid mines again, *after* it had cleaned up the area following the *Texaco Caribbean* incident. It also

[40] According to Iran, the United States had to prove the following with respect to the generic claim:

1. the existence of *commerce* between the territories of the High Contracting Parties, independently of any individually named ship or other instrumentality;
2. that conduct *attributable to Iran violated the freedom of that commerce*, contrary to Article X (1) of the Treaty of Amity; and
3. (eventually) the *quantum of damages* or compensation directly attributable to that violation.

Iran's response to the counter-claim at paragraph 9.24 (emphasis added).

[41] CR 2003/13, pp. 20-21, paras. 20.7-20.14.

[42] Observations and Submissions of Iran on the United States Preliminary Objection, Exhibit 27.

[43] CMUS, Exhibit 52.

[44] *Ibid.*, Exhibit 53.

[45] *Ibid.*, Exhibit 43, para. 15, Exhibit 53.

appears highly probable that the mines which Iran destroyed without identifying them back in August were its own[46].

46. To the evidence related to the *Texaco Caribbean* incident can be added that resulting from minesweeping operations undertaken by the United States Navy off the coast of Kuwait in June 1987[47], and such operations undertaken by Kuwait itself in July 1987[48]. The mines swept during those operations were identified as Iranian following the boarding and search of the *Iran Ajr* on 21 September 1987, because they were identical to the mines found on board that vessel. Then, in November 1987, minesweeping operations detected Iranian mines in the location where the *Bridgeton* had been hit. Those are only examples of the evidence showing that Iran repeatedly laid mines in the Persian Gulf during the relevant period.

47. Moreover, Iran gave no warning to ships travelling in the area that mines had in fact been laid. When belligerents lay mines, Article 3 of the 1907 Hague Convention (VIII) Relating to the Laying of Automatic Submarine Contact Mines requires that "every possible precaution must be taken for the security of peaceful shipping"[49]. Even States which did not ratify or accede to the Hague Convention, among them Iran[50], have a duty of notification when laying mines[51]. This prohibition dating from 1907 was reconfirmed by the Court in its *Nicaragua* Judgment of 1986, which stated that:

> "if a State lays mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humani-

[46] The only response provided by Iran was that it could not have laid those mines there since Iranian ships used that route too. See CR 2003/14, p. 21, at para. 39.

[47] CMUS, Exhibit 37.

[48] *Ibid.*, Exhibit 34.

[49] D. Schindler and J. Toman, *Droit des conflits armés*, Comité International de la Croix Rouge & Institut Henry-Dunant (eds.), 1996, pp. 1115-1120.

[50] Information available at www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=1&Count=150&Expand=1919 (last visited 28 October 2003).

[51] CMUS, Annex, Vol. VI, Exhibit 172, p. 282:

> "It is probably also true that [the States which did not accede to the Hague Convention (VIII)] may not lay mines off the enemy coast merely to intercept neutral shipping, *that they are bound to observe the duty to notify the laying of mines*, that they have to take additional safety measures to protect innocent shipping and that they must also remove mines at the end of the war." (Emphasis added.)

See also *ibid.*, Exhibit 173, pp. 168-169.

tarian law underlying the specific provisions of Convention No. VIII of 1907"[52].

It is certainly not within the jurisdiction of the Court in the present case to determine whether Iran's failure to notify ships travelling in the Gulf of the existence of the mines it laid violated the above Hague Convention, or even the principles of humanitarian law underlying that Convention. Yet, it is obvious, and well within jurisdictional reach in the present case, that, had Iran notified neutral ships of its minelaying activities, it would have mitigated the disruption to the freedom of commerce and navigation. There can be no doubt that the laying of the mines, aggravated by Iran's failure to notify, created dangerous conditions for maritime commerce and navigation between Iran and the United States.

48. Secondly, ships engaged in commerce between Iran and the United States were attacked by Iranian aircraft[53]. Whether such attacks were launched from or with the assistance of the oil platforms is irrelevant at this stage. They were carried out by fixed-wing aircraft and helicopters[54]. These attacks, like the mining attacks, disrupted maritime commerce in the Gulf[55].

49. Thirdly, ships engaged in commerce between Iran and the United States were also attacked by Iranian gunboats equipped with machine guns and rocket launchers[56]. The United States listed three attacks of this type in its counter-claim: the attacks on the *Lucy,* the *Esso Freeport* and the *Diane*[57]. Iran argued that close to no damage had been caused by those attacks. However, the impediment to freedom of commerce was not caused by damage to the ships but rather by the insecure environment which these attacks created for merchant shipping, including shipping between Iran and the United States.

2. Evidence of the impediment to freedom of commerce and navigation

50. Concerning, first, freedom of navigation, the Court stated in 1998 that it had jurisdiction "to entertain the United States counter-claim in so far as the acts alleged may have prejudiced the *freedoms* guaranteed by Article X, paragraph 1"[58], thereby including the freedom of navigation. All the vessels mentioned in the United States counter-claim had a right

[52] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 112, para. 215.

[53] CMUS, p. 64, paras. 1.91-1.95.

[54] *Ibid.*, p. 161, para. 6.04.

[55] *Ibid.*, Exhibit 6; Exhibit 17, pp. 3-4; Exhibit 19; Exhibit 52, p. 19.

[56] *Ibid.*, p. 161, para. 6.04. See also *ibid.*, Exhibit 22, p. 2, and Exhibit 32, p. 3.

[57] *Ibid.*, p. 166, para. 6.08.

[58] *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).

to pass innocently, and follow the route of their choice, through Iranian territorial waters on their way to and from the United States, by virtue of the 1955 Treaty. I do not believe that the fact that merchant ships engaged in Treaty-protected commerce were in effect forced to navigate in a narrow channel in the Gulf created an impediment to their freedom of navigation, guaranteed by Article X, paragraph 1. In my view, this was a result of the general military situation in the Gulf rather than due to a deliberate hostile measure taken by Iran. It was simply advisable for ships to keep out of the Iranian war zone. The ensuing factual restriction to the passage of ships therefore does not amount to a violation of Article X, paragraph 1, of the 1955 Treaty by Iran.

51. On the other hand, Iranian attacks on ships engaged in commerce between the Parties through mining, and attacks by aircraft or patrol boats, did very well prevent these vessels from navigating freely and safely through the Gulf. Such vessels had to navigate so as to avoid the areas where Iranian mines had been discovered or were suspected to have been laid, thus effectively being forced to use indirect routes which were lengthier and therefore more expensive. In addition, ships began travelling at night for safety reasons. Thus, by creating conditions too dangerous for ships to travel by daylight, Iran also impeded upon the United States freedom of navigation.

52. Concerning, second, freedom of commerce, measuring the impact of a given hostile measure or action on such freedom is a difficult task. Nevertheless, there is substantial evidence supporting a finding that Iran's actions impeded on the freedom of commerce between the two countries guaranteed by Article X, paragraph 1, of the 1955 Treaty. Let me set out this evidence.

53. As concerns, first, minelaying, the Court declared in the *Nicaragua* case that, when a right of access to a port "is hindered by the laying of mines, this constitutes an infringement of the freedom of communications and of maritime commerce"[59]. In our case, as demonstrated above, the evidence shows that Iran repeatedly laid mines in order to disrupt neutral shipping in the Gulf, which necessarily included shipping between Iran and the United States. Thus, through these minelaying activities, Iran clearly infringed upon the freedom of commerce protected by Article X, paragraph 1, or in the words of the Court in *Nicaragua*, acted in "manifest contradiction"[60] to the freedom of commerce guaranteed by the 1955 Treaty.

[59] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 128 ff., para. 253.
[60] *Ibid.*, pp. 139 ff., para. 278.

54. The Iranian activities also led to an increase in labour costs. In general, wages of crew members had to be raised in order to reflect the increasingly dangerous sailing conditions in the Gulf. As travelling by daylight became more dangerous, ships began travelling at night to avoid attacks by Iranian helicopters, etc., resulting in a further increase of crew members' wages[61] . For instance, Chevron, an American oil company whose tankers transported crude oil from the Gulf to the United States during the Tanker War[62],

> "gave each crewmember the option of disembarking before his or her ship entered the Gulf . . . Virtually all crewmembers stayed with their vessels, and they received a 100 percent pay bonus during the time that they were in the Gulf."[63]

55. Further, because of the war raging between the two countries, insurance premiums related to commerce in the Gulf also increased. For instance, two days following the *Texaco Caribbean* incident, Lloyd's underwriters in London decided to impose an immediately effective war-risk premium charge equivalent to 0.125 per cent of the insured value of the vessels' hull for ships visiting the United Arab Emirates ports before entering the Gulf[64]. At the time, most shipping insurance policies did not include damage caused by military hostilities in war zones, and companies were compelled to purchase additional insurance policies covering the risks the ships now faced in the Gulf[65]. These extra costs contributed to making shipping between the countries of the Gulf (including Iran) and the United States more expensive[66].

56. Iran dismissed this argument by saying that such costs are

[61] "Our routing obviously cost KOTC considerable time and money. The day spent waiting in Jubayl was an extra day of war zone bonuses to the crews and war risk premiums, since war risk premiums had to be paid for the whole period the vessel was within the Arabian Gulf . . ." (CMUS, Exhibit 31, p. 3, para. 8; see also *ibid.*, para. 6.)

[62] Rejoinder of the United States (RUS), Exhibit 180, p. 1, paras. 1-3.

[63] *Ibid.*, para. 7.

[64] CMUS, Exhibit 52.

[65] RUS, Exhibit 180, p. 2, para. 8; see also CMUS, Exhibit 7.

[66] It is instructive that in the *Nicaragua* case the Court also noted that the explosion of mines created "risks causing a rise in marine insurance rates" (*I.C.J. Reports 1986*, p. 48, para. 80). Later, the Court stated again that "Nicaragua's claim is justified not only as to the physical damage to its vessels, but also the consequential damage to its trade and commerce" (*ibid.*, p. 139, para. 278).

unrecoverable under international law[67]. Whether or not there is merit to this claim is irrelevant in the present context. What is relevant, however, is that the increased cost of commerce constituted an impediment to the freedom of such commerce between the two Parties.

57. In addition, Iran argued that evidence relating to ships travelling to and from Kuwait and Saudi Arabia is "strictly irrelevant to any claim based on Article X (1) of the 1955 Treaty"[68]. This argument is to be dismissed since such evidence is indicative of the conditions — military, economic, etc. — prevailing in the Persian Gulf at the time for all its "users". The fact that commercial shipping to and from Kuwait was disturbed reflects a wider, more general context in which shipping in the Gulf was made more dangerous and thus more costly. Since all ships took similar routes within the Gulf, the conditions affecting commercial shipping between the United States and Iran also affected shipping between the United States and Kuwait or Saudi Arabia. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua*,

> "it is clear that interference with a right of access to the ports of Nicaragua is likely to have an adverse effect on Nicaragua's economy *and its trading relations with any State whose vessels enjoy the right of access to its ports*"[69].

58. To finally mention some other financial impact of Iran's actions on commercial shipping between Iran and the United States, before entering the Gulf, tankers had to remove any oil remaining on board for fear of dangerous explosions that could occur if a ship carrying oil struck a mine or was hit by a missile. The cost of such measures was $50,000 for each voyage in the Gulf[70]. Further, ships travelling through the Gulf had to sail at faster speed (17 knots instead of 12-14 knots), resulting in significant penalties and, incidentally, higher navigational risks[71]. In addition, while the passage through the Gulf was normally made without stopping, many vessels actually stopped twice en route to avoid a daylight passage and to allow management to assess the potential for attack. As a result, passage through the Gulf was longer, and thus more expensive for shipping companies. Chevron, for instance, incurred as much as $40,000 a day in additional operating costs while ships were stranded in the Gulf, a loss to which had to be added the

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[67] CR 2003/14, p. 61, paras. 41-43.

[68] RI, Vol. I, p. 220, para. 11.5.

[69] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 129, para. 253; emphasis added.

[70] RUS, Exhibit 180, para. 11.

[71] *Ibid.*, para. 14.

amount of capital (oil barrels) tied up on board (as high as $50,000,000 for a very large crude oil carrier)[72]. Other costs included escort protection for ships to help them avoiding striking mines[73].

C. Conclusions

59. By laying mines without warning commercial ships, by not notifying neutral ships of the presence of mines, and by harassing commercial shipping of all nationalities in the Persian Gulf also in other ways, Iran created dangerous and more onerous conditions for commercial shipping also between the two Parties[74]. As I have emphasized at the outset, the state of war between Iran and Iraq did not provide Iran with a general justification for its hostile activities because these were, for the greatest part, in violation of the laws of war and neutrality. Therefore, Iran ought to have been found in violation of its obligations under the 1955 Treaty, and the generic counter-claim of the United States should have been upheld.

60. To emphasize once again: in order to reach this conclusion, we need not look at each of the specific incidents described by the United States independently, or prove that each of these incidents is attributable to Iran. In fact, doing so would be inappropriate in the context of a generic claim. As long as it is clear that, during the Tanker War, Iran and Iraq were both engaging in actions detrimental to neutral commercial shipping in the Gulf (including, of course, commercial shipping between Iran and the United States)[75], the particular extent to which Iran was responsible for these actions need not be determined with precision. It is sufficient to establish that Iran, because of the Iran-Iraq war, was responsible for a significant portion of those actions, and that such actions impaired the freedom of commerce between the United States and Iran guaranteed by the 1955 Treaty in ways not justifiable simply because of the existence of a state of war.

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[72] RUS, Exhibit 180, para. 15.

[73] *Ibid.*, para. 16. For Chevron, such protection amounted up to $40,000 a day.

[74] CMUS, p. 160. While I believe that Iran's actions were inconsistent with Article X of the 1955 Treaty, it is not my view that such actions reached the level of an "armed attack" against the United States in the meaning of Article 51 of the United Nations Charter. There is thus no inconsistency between what I conclude here and what I have said on Article XX of the 1955 Treaty (see the respective section of the present opinion).

[75] In this regard, cf. paragraph 44 of the Judgment:

> "the Court notes that it is not disputed between the Parties that neutral shipping in the Persian Gulf was caused considerable inconvenience and loss, and grave damage, during the Iran-Iraq war. It notes also that this was to a great extent due to the presence of mines and minefields laid by both sides."

61. An obstacle to admitting the United States counter-claim could be seen in the argument that the acts alleged to have constituted an impediment to the freedom of commerce and navigation under the Treaty cannot be attributed to Iran with certainty. Therefore, the argument would go, it is impossible to find Iran responsible for those acts. I will now proceed to show how this obstacle may be overcome.

62. One remark is to be made right at the outset: in the present case the problem of attribution poses itself almost exclusively with regard to minelaying by the parties to the Gulf war. But as referred to above, in addition to mine attacks, Iran also carried out attacks by helicopters, other aircraft and patrol boats, which largely contributed to the unsafe shipping conditions in the Gulf. Whereas identifying the State responsible for particular minelaying activities is not an easy exercise, identifying the State engaging in attacks by helicopters or patrol boats is much less difficult. Attribution of responsibility therefore can only be problematic with respect to minelaying. As for attacks by helicopters, patrol boats, etc., against ships engaged in commerce between Iran and the United States, there is hardly any doubt that they were carried out by Iran. Therefore, when we move away from the mines, so to speak, the generic counter-claim becomes free of the problem of attribution. Hence, the following reasoning is in essence devoted to the problem of attribution of minelaying in the Gulf.

63. As I have just demonstrated, attribution of responsibility for such minelaying activities certainly represents the principal challenge to the generic counter-claim. Against this challenge militates a sense of fairness. Yet, the thought that Iran could be held responsible for acts that could not be attributed to it beyond a certain threshold of proof is also troubling. The question we face is thus the following: how can we hold Iran responsible for acts which, even though they did create impediments to the freedom of commerce and navigation, cannot be attributed to Iran with certainty?

64. It is common knowledge that the Iran-Iraq war had a destabilizing effect on the regional economy, including American commerce going through the Gulf. This destabilizing effect is easily measurable by the increase in costs for doing commerce in the Gulf, as the evidence discussed above shows. It is more difficult — if not impossible — to measure with any exactitude the negative impact of individual Iraqi or Iranian actions on the economic conditions of commerce, let alone on American commerce specifically. The damage caused by these actions, i.e. the impediment to the freedom of commerce and navigation protected by the 1955 Treaty, is indivisible and as such cannot be apportioned between Iran and Iraq.

65. Responsibility, however, is another matter. It is clear that a series of actions taken by each party to the war necessarily disturbed the economic environment (even if unintentionally). But what conclusion is to be drawn from this? Should we hold both States equally responsible for the impediments caused to commerce and navigation? Or can neither of the two States be held responsible because it is impossible to determine precisely who did what?

66. In order to find a solution to our dilemma, I have engaged in some research in comparative law to see whether anything resembling a "general principle of law" within the meaning of Article 38, paragraph 1 *(c)*, of the Statute of the Court can be developed from solutions arrived at in domestic law to come to terms with the problem of multiple tortfeasors. I submit that we find ourselves here in what I would call a textbook situation calling for such an exercise in legal analogy. To state its result forthwith: research into various common law jurisdictions as well as French, Swiss and German tort law indicates that the question has been taken up and solved by these legal systems with a consistency that is striking.

67. To begin with common law jurisprudence, in a well-known case heard by the Supreme Court of California[76], the plaintiff sued two defendants for injury to his right eye and face as a result of having been struck by birdshot discharged from a shotgun while the two defendants had been hunting in an open range. It was admitted that both defendants had fired at a quail, and that one piece of birdshot had hit the plaintiff's eye and another his lip. However, there was no means of determining which injury had been caused by which defendant. The defendants argued that they were not joint tortfeasors because they had not been acting in concert, and that there was not sufficient evidence to show which of the two was guilty of the negligence that caused the injuries[77].

The trial court had determined that "the negligence of both defendants was the legal cause of the injury — or that both were responsible"[78], even though "the court was unable to ascertain whether the shots were from the gun of one defendant or the other or one shot from each of them"[79]. The California Supreme Court went on to quote Dean Wigmore, a United States authority on tort law:

> "When two or more persons by their acts are possibly the sole cause of a harm . . . and the plaintiff has introduced evidence that the one of the two persons . . . is culpable, then the defendant has the

[76] *Summers* v. *Tice*, 33 Cal. 2d 80 (1948).
[77] *Ibid.*, p. 83.
[78] *Ibid.*, p. 84.
[79] *Ibid.*

> burden of proving that the other person . . . was the sole cause of the harm. The real reason for the rule that each joint tortfeasor is responsible for the whole damage is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all."[80]

As a matter of fairness to the plaintiff, the court then reversed the burden of proof: each defendant had to prove that he had not caused the injury. Since such proof could not be put forward, the court held both defendants liable. The court dismissed the defendants' argument that causation was lacking between their acts and the plaintiff's damage[81]. Most importantly, the court also dismissed the argument that the plaintiff should establish the portion of the damage caused by each tortfeasor in cases where there is a plurality of tortfeasors and where the damage cannot be apportioned among them[82].

68. This solution, which has since been embodied in the Restatement of Torts[83], is interesting in many ways. On the one hand, it recognizes the difficulty of a finding of responsibility where apportionment is impossible. On the other hand, it excludes as unfair a solution in which no one would be held responsible. Finally, this provides an answer by shifting the burden of proof on to each defendant. The solution provides the wrongdoer a way out — acknowledging the peculiarity of a situation where facts cannot be ascertained with certainty —, while at the same time ensuring the plaintiff recovery for his injury if the defendant fails to show his innocence.

69. The same solution was adopted by Canadian courts in *Cook* v. *Lewis*[84]. According to Markesinis and Deakin, English courts faced with the question of multiple tortfeasors are likely to take a similar approach[85].

70. In French law, too, multiple tortfeasors (irrespective of whether they are acting in concert) causing an indivisible damage are each responsible for the entirety of such damage. Each tortfeasor is considered as having caused the entire prejudice to the victim, who can recover in full

[80] *Summers* v. *Tice*, 33 Cal. 2d 80 (1948), p. 85.
[81] *Ibid.*, p. 87.
[82] *Ibid.*, p. 88.
[83] Rest. 2d Torts, s. 433B, subsec. (3).
[84] [1951] SCR 830. On Canadian law, see also Jean-Louis Baudoin, *La responsabilité civile délictuelle*, 1973, p. 164, para. 235.

[85] Markesinis and Deakin, *Tort Law*, 4th ed., 1999, p. 185.

from any of them[86]. In any event, when French courts dealt with this question in the past, they typically discussed the *extent* of each tortfeasor's responsibility (partial or total) rather than responsibility as such. When unable to hold each defendant liable on the basis of a specific damage, French courts resorted to interpretations such as "collective breach of duty" or "collective duty to look after the object which caused the damage" even when tortfeasors had evidently not been acting with a common motive, merely out of fairness for the injured plaintiff[87]. In fact, this solution had already been adopted in Roman law in the form of the cause of action concerning *"effusis et dejectis"* (things spilled or thrown out): whenever someone was injured by an object that had fallen from the unidentified window of an apartment building, all residents of such building were considered liable for the damage caused[88].

71. The same principles can be found in Swiss law, where Article 51 of the Code des Obligations states that, when multiple tortfeasors acting independently of each other cause a damage that cannot be divided among them, any of the tortfeasors can be held responsible in full — just like in the case of tortfeasors acting in concert[89]. A commentary reads as follows:

> "Whether the unlawful acts have been committed by a number of persons knowingly acting in concert (Art. 50, *'solidarité parfaite . . .'*), or acting independently of each other, and even where liability is based on different legal grounds (Art. 51, *'solidarité imparfaite'*), the injured party enjoys an entitlement to *concurrent claims*, without being concerned by any relationship between the joint tortfeasors; he can only make a single claim to reparation, but each tortfeasor will be liable towards him in respect of that claim as a whole and, if he so wishes, the action need only be brought against any one tortfeasor."[90]

72. The way, finally, in which German tort law addresses our issue is

[86] H., L. and J. Mazeaud, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle*, Vol. II, 6th ed., 1970, p. 1078, para. 1952; see also Boris Starck, Henri Roland and Laurent Boyer, *Obligations: 1. Responsabilité délictuelle,* 5th ed., 1996, p. 468, para. 1142; René Rodière, *La responsabilité délictuelle dans la jurisprudence* (1978), pp. 346-348, para. 119. In particular, Rodière reproduces a decision of the Cour de Cassation dating from 1892, which, as he notes, has been consistently followed by various jurisdictions and approved by doctrine (Civ. 11 juillet 1892).

[87] Boris Starck *et al. (ibid.)*, p. 454, para. 1102.

[88] *Ibid.*, p. 455, para. 1104.

[89] Georges Scyboz and Pierre-Robert Gilliéron, *Code civil suisse et Code des Obligations annotés*, 5th ed., 1993; see also Danielle Gauthey Ladner, *Solidarité et consorité en matière délictuelle en droit suisse et américain, en particulier new-yorkais*, 2002, p. 57, para. 2.5, and p. 70, para. 4.

[90] Georges Scyboz and Pierre-Robert Gilliéron, *op. cit.*, commentary on Articles 50 and 51. *[Translation by the Registry.]*

virtually identical with the domestic solutions hitherto outlined. The pertinent provision of the German Civil Code (Bürgerliches Gesetzbuch), § 830, reads as follows:

> "1. If several persons through a jointly committed delict have caused damage, each is responsible for the damage. The same applies if it cannot be discovered which of several participants has caused the damage through his action.
> 2. Instigators and accomplices are in the same position as joint actors."

The first sentence of § 830, paragraph 1, is not relevant to our case because it presupposes the pursuance of a common design by the tortfeasors. The same is valid regarding the provision's paragraph 2. However, the rule contained in the second sentence of § 830, paragraph 1, is to the point: its function is precisely to spare the victim the difficult, indeed impossible, task of proving which one of several tortfeasors actually caused the damage. The rule's applicability depends upon three conditions: first, each of the participants must have engaged in the activity leading to loss or damage (irrespective of causality); second, one of the participants must necessarily have caused such loss or damage; but, third, it is impossible to determine which one of the participants did so, in whole or in part[91].

73. Elevating the joint-and-several liability doctrine thus described to the level of international law in the present case would lead to a finding that Iran is responsible for damages, or impediments, that it did not directly cause[92]. Personally, I would find it more objectionable not to hold Iran liable than to hold Iran liable for the entire damage caused to the United States as a result of actions taken during the Iran-Iraq war. In fact, I see no objection to holding Iran responsible for the entire damage even though it did not directly cause it all. Remember that the question before us is whether Iran can be found in breach of its treaty obligations

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[91] Palandt-Thomas, 62nd ed., 2003, § 830 BGB Rn 7. For some of the precedents in German jurisprudence see BGH NJW 1960, 862 (responsibility of multiple tortfeasors for injuring a person by throwing stones), and BGH NJW 1994, 932 (responsibility of several producers of sweetened tea for the so-called "baby bottle syndrome").

[92] As Markesinis and Deakin point out,

> "by treating the cluster of theoretically apportionable injuries that cannot as a practical matter be apportioned as though they constituted a single indivisible injury, the law of joint and several liability means that each tortfeasor can be made to pay for more harm that he actually caused" (*op. cit.*, p. 234).

It is interesting to note that the Michigan Supreme Court, in *Maddux* v. *Donaldson* (362 Mich. 425, at 433), accepted this not only as an inevitable but also as a just consequence when division of liability among tortfeasors is impossible.

or not; in the present context I do not discuss any question of reparation. This issue would only have arisen at a later stage. With regard to that — now theoretical — issue and looking back at the range of solutions found in domestic tort laws, I find very pertinent the compromise course steered by the Supreme Court of California in the *Sindell* v. *Abbott Laboratories* case. In that case, the court did not feel compelled to dismiss all responsibility claims on the ground that some potential defendants were absent[93]. To the contrary, the court, following *Summers* v. *Tice*, held each of the defendants responsible and attempted, to the best it could, to approximate each defendant's responsibility. The compromise found by the court to account for the absence of interested parties was to hold the defendants liable only for part of the damage suffered by plaintiff, not for its entirety (I will return to the particular problems posed by the absence of a potential respondent in the present case in the final part of this section).

74. On the basis of the (admittedly modest) study of comparative tort law thus provided, I venture to conclude that the principle of joint-and-several responsibility common to the jurisdictions that I have considered can properly be regarded as a "general principle of law" within the meaning of Article 38, paragraph 1 *(c)*, of the Court's Statute. I submit that this principle should have been applied in our present case to the effect that, even though responsibility for the impediment caused to United States commerce with Iran cannot (and ought not, see *infra*) be apportioned between Iran and Iraq, Iran should nevertheless have been held in breach of its treaty obligations.

75. Another authoritative source addressing the issue of a plurality of responsible States can be found in the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001[94]. The ILC's solution is in conformity with the result of the comparative research I have just presented. Article 47 states: "Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act."

76. In the context of the specific variant of the United States counterclaim, Article 47 would apply only if both Iran and Iraq were responsible for a given action — for instance, if Iran had carried out an attack against a ship engaged in treaty-protected commerce, jointly planning and co-ordinating the operation with Iraq. However, in the present case,

[93] *Sindell* v. *Abbott Laboratories*, 607 P. 2d 924 (1980).

[94] See *supra* footnote 19.

the reality is such that the two States never acted in concert with respect to a specific incident, and thus it always was either Iran *or* Iraq which was responsible for a given incident. As a result, Article 47, which requires both States to be responsible for the same internationally wrongful act, cannot be applied to the specific counter-claim.

77. Applied to the generic counter-claim, on the other hand, Article 47 is very helpful. In the context of the generic counter-claim, the "internationally wrongful act" is constituted by the creation of negative economic, political and safety conditions in the Gulf rather than by a specific incident. The bringing about of this environment, taken as a whole, is attributable to both States, as it is common knowledge that they both participated in the worsening of the conditions prevailing in the Gulf at the time. The difference is clear: unlike the specific claim, where only one State is responsible for the act of violating international law, the generic claim falls within the scope of ILC Article 47 because the two States are responsible for the same act. It is the creation of dangerous conditions for shipping and doing commerce in the Gulf which constitutes the internationally wrongful act within the meaning of Article 47.

By application of Article 47 to the generic counter-claim, the United States could invoke the responsibility of either State, that is, also of Iran, individually. Thus, in the principle underlying Article 47, and in the "generic" identification of the internationally wrongful act, lies another basis on which Iran should have been held in violation of its Treaty obligations and the generic counter-claim upheld by the Court.

78. As a result, the problem of attributing responsibility in the face of factually "indivisible" wrongful acts — which I presented earlier as the principal obstacle to the admission of the counter-claim — could have been overcome pursuant both to the general principle that multiple tortfeasors can be held responsible individually even when the damage cannot be apportioned among them, and the principles embodied in ILC Article 47.

79. There remains one last question: it could be argued that dealing with the United States generic counter-claim in the direction indicated would by necessity lead the Court to finding that Iraq, too, violated international law — a pronouncement for which the Court has no jurisdiction in the present case. This is the essence of the so-called "indispensable-third-party" doctrine, consecutively accepted and rejected by the Court depending on the circumstances of the cases at hand.

80. The doctrine, first spelled out in the *Monetary Gold* case, holds that the Court has no jurisdiction to decide a case where a third State's "legal interests would not only be affected by the decision, but would

form the very-subject matter of the decision"[95]. Since then, the Court dismissed the argument in some cases as one which could not prevent the Court from exercising jurisdiction among the parties, such as in the *Nicaragua* case, the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* or the case of *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*. In other instances, the Court did apply the *Monetary Gold* principle and refused to adjudicate absent the consent of the interested third State, such as in *East Timor (Portugal* v. *Australia)*.

81. Taking a closer look at the factual circumstances of each of these cases, it appears that the concept of "indispensable third parties" has been interpreted restrictively by the Court. In the present case, the role of Iraq in impeding the freedom of commerce and navigation between the United States and Iran certainly does not constitute the subject-matter of the dispute. Moreover, any findings by the Court as to Iraq's behaviour would only rely on common knowledge and there would be no need for additional evidence (i.e., proving that, because of the war, Iraq, like Iran, contributed to the deterioration of the shipping conditions in the Gulf). For this reason, the present case would not have fallen within the restrictive ambit of the doctrine of the "indispensable third party". The mere fact that the war in the region involved a State not party to the present proceedings or, for that matter, to the bilateral treaty between Iran and the United States, could not have prevented the Court from deciding upon Iran's responsibility under this Treaty. The Court could have found Iran responsible without engaging in any detailed assessment of Iraq's actions, or rendering any decision as to Iraq's responsibility *per se*[96].

82. Even more convincing, I believe, is the Court's dismissal in the *Nauru* case of Australia's argument that, Australia being only one of three States making up the Administering Authority under the Trusteeship Agreement, a claim could only be brought against the three of them "jointly" but not against each of them individually. The Court distinguished the issue of reparation in full from the question whether Australia could be sued alone[97], and continued:

[95] Case of *Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment, I.C.J. Reports 1954,* p. 32. A similar principle had already been developed by the P.C.I.J. in the Advisory Opinion on the *Status of Eastern Carelia (1923, P.C.I.J., Series B, No. 5)* and by this Court in the *Corfu Channel* case in 1949 *(I.C.J. Reports 1949)*.

[96] In *East Timor* the Court clearly stated that "it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not party to the case" (*I.C.J. Reports 1995*, p. 104, para. 34).

[97] As I have also done, cf. *supra* paragraph 73.

> "The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States."[98]

In the present case, where two States contributed to a single, indivisible damage without having acted in concert (unlike the three States in the *Nauru* case), the holding of the Court in the *Nauru* case applies with even greater strength: if the Court did not see fit to declare the *Nauru* case inadmissible on the basis that States acting "jointly" were absent from the proceedings, it could not have held inadmissible the United States counter-claim, in the context of which States were acting independently of each other.

83. In any case, I have already mentioned that, in contrast to mine-laying, helicopter and patrol boats attacks were clearly attributable to Iran and also contributed to creating an impediment to the freedom of commerce and navigation owed to the United States. Those attacks do not raise any issue pertaining to attribution of responsibility or the absence of Iraq from the proceedings. Had the Court rejected all other arguments, it should at least have upheld the United States counter-claim on that basis.

(Signed) Bruno SIMMA.

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[98] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, I.C.J. Reports 1992*, pp. 258-259, para. 48.