SEPARATE OPINION OF JUDGE RIGAUX

[Translation]

Asymmetry of the two Parties' positions — Reasoning underlying dismissal of the counter-claim — Absence of proof of Iran's responsibility — Non-American nationality of vessels attacked — Reasoning underlying dismissal of the original claim — Defence based on paragraph 1 (d) *of Article XX of the 1955 Treaty — Self-defence — Impact of the damage to the platforms from the Iraqi attacks — Effect of Executive Order 12613 of 29 October 1987 — "Indirect" commerce between the territories of the High Contracting Parties — Contradiction between the reasons for dismissal of the original claim and the terms of the operative paragraph — Prohibition of the use of force as fundamental principle of international law.*

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I. The Asymmetry of the Two Parties' Positions

1. Seised of two crossing actions, the claim brought by the Islamic Republic of Iran against the United States and a counter-claim by the Respondent to the original proceedings, the Court has found that both claims must be rejected. In even-handedly dismissing both Parties, the operative paragraph of the Judgment presents a simplified image of their respective claims. I can accept point 2 and the first part of point 1 of the operative paragraph without being in agreement on all aspects of their underlying reasoning. On the other hand, I must distance myself more radically from the Court's finding set out in the second part of point 1. This opinion is thus a dissenting one only in relation to that part and concurring on the other elements of the operative paragraph.

2. In adopting two substantially equivalent *dispositifs* the Court ignores the asymmetry in the Parties' respective positions and in the dispute's underlying issues. Although each Party accuses the other of illegal use of armed force, which constitutes the legal subject-matter common to the two actions, the approach to verification of the facts and determination of jurisdiction under paragraph 1 of Article X of the 1955 Treaty will be radically different according to whether those issues are addressed in relation to the original claim or to the counter-claim.

As regards the facts, it is not disputed — and moreover could not be disputed — that three oil platforms belonging to the NIOC were intentionally destroyed or damaged by American armed attacks (see paras. 66 to 68 of the Judgment). By contrast, the charges against Iran, whether in regard to the laying of mines or to the firing of missiles at vessels navigating in the Persian Gulf, have not been proved to the satisfaction of the Court.

In addition to this asymmetry as to the facts, there is a comparable lack of symmetry in terms of the nationality of the objects of verified or alleged attacks. The oil platforms were an Iranian public asset, whereas the ships damaged by mines or missiles did not satisfy the condition of nationality required by Article X of the 1955 Treaty (see paras. 9 and 10 below), one of them being moreover excluded from the scope of that Article because it was a warship.

3. It follows from this dual asymmetry that Iran could have confined itself to disputing the truth and relevance of facts in respect of which the counter-claimant had failed to provide adequate proof, whereas the United States was obliged to seek out legal grounds which would strip the proven facts of their illegal character. The United States position varied on this point. In the period immediately following the armed attacks, the American Government relied on its "inherent right of self-defence" (see paras. 67 and 72 of the Judgment). Later, and in particular before the Court, justification was sought in paragraph 1 of Article XX of the

1955 Treaty, although the self-defence argument was never totally abandoned. In reality, as is confirmed by the objection to jurisdiction raised before the Court, it was not initially the intention of the American Government to justify its military action under a provision of the 1955 Treaty. However, the Court was in any event bound to consider the international legality of the United States armed attacks both in light of paragraph 1 of the above-mentioned Article XX and of general international law governing the use of force (see para. 41 of the Judgment). It was to address the defences raised by the United States that the Court was compelled to interpret and apply Article XX of the 1955 Treaty in light of general international law.

II. Observations on the Reasoning Underlying Dismissal of the Counter-Claim

4. The counter-claim is dealt with in paragraphs 101 to 124 of the Judgment. Subject to the following observations, which relate in particular to paragraph 123, I have no difficulty in subscribing to the Court's findings and to point 2 of the operative paragraph. I do, however, regret the excessively narrow limits within which the Court confined the grounds for its decision. As it explains in paragraph 120 of the Judgment, the Court sets out "in chronological order" Iran's alleged attacks and, in relation to each of them, confines itself to examining whether the vessel mentioned in the counter-claim was engaged in commerce or navigation between the territories of the two High Contracting Parties (para. 120 of the Judgment). The overall conclusion, as set out in paragraph 121, is negative: "none of the vessels described by the United States as being damaged by Iran's alleged attacks was engaged in commerce or navigation 'between the territories of the two High Contracting Parties' ".

5. Two further grounds, either of which would have sufficed for the counter-claim to be dismissed, were omitted by the Court.

The first concerns the attributability of the acts alleged against Iran. That the events in question occurred was not in doubt, but it still remained to be shown that they were attributable to an agency of the Respondent to the counter-claim. Not only did Iran consistently dispute that its responsibility had been established for any of the incidents set out in the American claim, but the Court itself was not convinced by the arguments presented by the American Government on this point (see in particular paras. 58-59 and 71-72 of the Judgment). However, the arguments relied on by the Court to dismiss the grounds of justification or defence put forward by the Respondent to the original action are not re-addressed when the counter-claim is considered.

6. During the war between Iran and Iraq, what became known as the "Tanker War" consisted in the use of force against ships, mainly oil

tankers, flying the flag of States other than the two belligerents. For the latter, the export of petroleum products, their principal economic resource, was indispensable to the pursuit of the war, which required substantial financial resources. This was particularly so for Iran, which, unlike Iraq, was receiving no outside aid. Another difference between the two States concerned the means used to transport the oil abroad: whilst a part at least of the Iraqi oil was exported overland, the entirety of the Iranian oil had to be shipped by sea through the Persian Gulf.

The Tanker War has been analysed in two studies, which largely concur on the facts, one by an Egyptian researcher, Ms Nadia El-Sayed El-Shazly[1], the other by an American professor, George K. Walker[2]. During the initial years of the war between Iran and Iraq (1981-1984), the main protagonist in the Tanker War was Iraq (Walker, p. 46), which sought to interrupt the export flow of Iranian oil and achieved a degree of success (Walker, p. 51). The Iranian attacks began only in February 1984 (El-Shazly, p. 202). The number of vessels, almost all of them tankers, hit by attacks by one or other of the two States exceeded 400 (Walker, p. 74), and according to El-Shazly (p. 307) reached a total of 463. Other sources, consistent with these, report that Iraq attacked 234 vessels and Iran 163[3]. Ms El-Shazly and Professor Walker provide relevant data regarding the composition of tanker traffic in the Persian Gulf. According to Walker:

> "By 1986, US-flag foreign-trade tankers were almost non-existent; their role had been taken by other nations' vessels, particularly those flying flags of convenience but often beneficially owned by US business interests." (P. 37.)

This is confirmed by Ms El-Shazly:

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[1] Nadia El-Sayed El-Shazly, *The Gulf Tanker War, Iran and Iraq's Maritime Swordplay*, 1998.

[2] George K. Walker, *The Tanker War, 1980-88: Law and Policy*, International Law Studies, 2000, Vol. 74.

[3] David L. Peace, "Major Maritime Events in the Persian Gulf War", paper presented at the 82nd Annual Meeting of the American Society of International Law, 21 April 1988, p. 3, cited by Mark W. Janis, "Neutrality", Chap. VI of *The Law of Naval Operations*, International Law Studies, 1991, Vol. 64, ed. Horace B. Robertson Jr., p. 150. The figure of approximately 400 is also quoted by Francis V. Russo, Jr., "Neutrality at Sea: State Practice in the Gulf War as Emerging International Customary Law", 19 *Ocean Development and International Law* (1988), p. 381. F. L. Wiswall, "Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf", 31 *Virginia Journal of International Law* (1991), p. 620, is alone in proposing a figure of 536 attacks.

"Owners of ageing tanker fleets, registered with poorly regulated countries, motivated them to send their old tankers to the Gulf. They were mostly flying flags of convenience, manned by cheap and poorly trained crews, and had structural defects." (P. 44.)

These two statements are mutually corroborative and explain why, during the Tanker War, the United States assumed the duty of protecting freedom of navigation in general, including that of vessels not flying its own flag. Thus it is no surprise to find on the successive lists produced by the United States in this case two Panamanian vessels *(Texaco Caribbean, Grand Wisdom)*, five Liberian vessels *(Lucy, Diane, Stena Explorer, Stena Concordia, Sungari)*, and a Bahamian vessel *(Esso Freeport)*. Apart from the two Kuwaiti tankers flying an American flag of convenience, to which I shall return, only the *Esso Demetia* bore the flag of a State (the United Kingdom) not belonging to the category of States notorious for the ease with which they register ships not having any real link with them and for the laxity of the control exercised by them over such vessels.

7. The most serious incident in the Tanker War, that which resulted in the greatest number of victims (36 killed and 21 seriously injured), was the destruction of the American warship USS *Stark* by two Iraqi Exocet missiles on 17 May 1987. The Iraqi Government expressed its regrets to the United States Government and in 1989 paid it compensation (Walker, p. 60; El-Shazly, pp. 282-292). Ironically, after this attack (whose only purpose may well have been to make it appear attributable to Iran and to provoke the internationalization of the war), the position of the United States continued to be favourable to Iraq. It was at the end of that same month (29 May) that Assistant Secretary of Defense, Richard Armitage, stated: "We can't stand to see Iraq defeated."[4] Ms El-Shazly, who cites this statement, adds: "Thus he sealed the death certificate of US neutrality in the Iran-Iraq war, and this myth was officially laid to rest." (P. 291.)

A no less paradoxical consequence of the Iraqi attack on the USS *Stark* is that it accelerated the decision to reflag under American colours tankers belonging to a Kuwaiti State company, the Kuwaiti Oil Tanker Company (KOTC). Negotiations lasted several months, because the proposal met with resistance in the United States, particularly in Congress.

[4] Compare the information in an article by Eric Leser in *Le Monde*: "The United States heavily armed Iraq during the 1980s" (8 March 2003, p. 4), and again in the same newspaper on 27 March 2003, p. 8. See also Francis A. Boyle, "International Crisis and Neutrality: United States Foreign Policy toward the Iran-Iraq War", 43 *Mercer Law Review* (1992), pp. 523-562. See also the American statements cited by Mr. Bundy, CR 2003/5, pp. 4 *et seq.*

What was ultimately decisive was the fact that during the same period the Soviet Union had offered Kuwait a similar service. The American decision may be seen as the expression of its determination not to allow the USSR to gain a foothold in the Persian Gulf (El-Shazly, pp. 237, 271-282, 301; Walker, pp. 60-62)[5]. One of the two United States-reflagged vessels mentioned in the counter-claim, the *Bridgeton*, had also changed its name (when flying the Kuwaiti flag, it had been called the *Al Rekkah*; El-Shazly, p. 292). It should further be noted that China and France had refused to allow Kuwaiti tankers to fly their flags, whilst the United Kingdom had stated that it was prepared to protect them without any change of flag (El-Shazly, p. 273). The totally artificial nature of the reflagging, an act of expediency inspired by the circumstances, can be shown by the fact that from January 1989 these vessels were returned to the Kuwaiti flag ("deflagging": see Walker, p. 73; Wiswall, p. 623, note 13).

In order to persuade the Senate Foreign Relations Committee that the American reflagging of 11 Kuwaiti tankers was justified, Michael H. Armacost, Under Secretary for Political Affairs, gave a detailed explanation of American policy in the Persian Gulf:

> "It is to frustrate Iranian hegemonic aspirations that the Arab gulf states continue to support Iraq. It is for similar reasons that other close friends, such as Egypt and Jordan, also assist Iraq . . ."[6]

The aid to Kuwait was subsequently justified by the financial support provided by that State and by other Arab countries to Iraq.

> "We understand why Kuwait and many Arab nations believe their own security and stability depend on Iraq not collapsing before Iran. We do not wish to see an Iranian victory in that terrible conflict.
>
> Nevertheless, the United States remains formally neutral in the war."[7]

8. Only from a rapid and superficial reading of Security Council resolution 552 (1984) of 1 January 1984 can any condemnation, even an implicit one, of the attacks attributed to Iran be inferred. The resolution was adopted following a letter of 21 May 1984, "in which the Representatives of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates complain[ed] against Iranian attacks on commercial ships en route to and from the ports of Kuwait and Saudi Arabia". However, the State accused of these attacks is identified only in the first

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[5] As regards the role played by Soviet competition, see, apart from El-Shazly and Walker, Ademuni-Odeka, "Merchant Shipping and the Gulf War", 10 *Marine Policy Reports* (1988), Vol. 10, No. 3, pp. 8-9, who describes the Soviet offer as "blackmail".

[6] 26 *International Legal Materials* (1987), p. 1429.

[7] *Ibid.*, p. 1430.

recital of the preamble to the resolution, from which the text cited above is taken. The operative part of the resolution confines itself to reaffirming "the right of free navigation" (point 1), and applying this principle to "shipping en route to and from all ports and installations of the littoral States that are not parties to the hostilities" (point 2), to calling upon "all States . . . to refrain from any act which may lead to a further escalation and widening of the conflict" (point 3), and to condemning "the recent attacks on commercial ships en route to and from the ports of Kuwait and Saudi Arabia" (point 4). There is no trace of any condemnation of Iran, despite its being clearly named in the letter of 1 June 1984, and it can well be appreciated that the Security Council, which had not named — or not dared to name — the aggressor in the war launched in 1980, could hardly condemn Iran at a time when, in 1984, the initial and almost exclusive responsibility for the Tanker War lay with Iraq. It would thus be wrong to confuse the re-statement in the resolution's first recital of the text of the complaint by the littoral States of the Persian Gulf with the Council's own assessment. It may be considered, *a contrario*, that, inasmuch as it did not expressly condemn the State named in the document whereby it had been seised, the Security Council was deliberately refraining from issuing the specific condemnation sought by the States which had signed the letter[8].

9. There was a further ground for rejecting the counter-claim, namely that which could — and should — have been derived from the nationality of the vessels victim of the attacks wrongly attributed to Iran.

If we apply the factor connecting a ship to a State by virtue of its flag, i.e. its registration, to the list referred to in paragraph 6, we observe that only one vessel, the USS *Samuel B. Roberts,* indisputably satisfied that condition, but this was a warship, which, as such, must be exempted from application of the 1955 Treaty, as the Court found (para. 120 *(i)* of the Judgment). Apart from two Kuwaiti ships reflagged in the United States, the *Bridgeton* and the *Sea Isle City,* which also merit special attention, none of the tankers which Iran is accused of attacking was under the United States flag. These were the *Texaco Caribbean*, a Panamanian vessel, the *Lucy* and the *Diane,* registered in Liberia, and the *Esso Freeport,* flying the Bahamian flag. Even if we accept the expanded list, first provided in the Rejoinder of 23 March 2001, we find that it does not include any vessel satisfying the nationality requirement. Three of these vessels, the *Stena Explorer,* the *Stena Concordia* and the *Sungari,* flew the Liberian flag, one was Panamanian, the *Grand Wisdom,* and the last, the *Esso Demetia*, British.

[8] Cf., similarly, Russo, *op. cit.*, pp. 395-396; W. J. Fenrick, "The Exclusion Zone Device in the Law of Naval Warfare", XXIV *The Canadian Yearbook of International Law* (1986), p. 120.

Both Article 6 of the Geneva Convention on the High Seas of 29 April 1958 and Article 92 of the Montego Bay Convention of 10 December 1982 recognize only one nationality for a ship, that of the flag State. This principle has been applied by the Court of Justice of the European Communities[9].

The United States attempts to respond in two ways to the question whether vessels having the nationality of a third State fall within the scope of the jurisdictional clause in the 1955 Treaty. First, it argues that it had assumed responsibility for protecting freedom of navigation *in general* in the Persian Gulf during the war between Iran and Iraq. It is true that nothing prohibited the United States from taking this initiative, but it cannot be relied on against Iran for purposes of applying and interpreting the 1955 Treaty. Moreover, none of the States appearing on the list — neither the Bahamas, Liberia, Panama nor the United Kingdom — gave notice to Iran of any claim and none of them entrusted the defence of its interests to the United States. In paragraph 123 of the Judgment the Court considered that,

> "in the circumstances of this case, a generic claim of breach of Article X, paragraph 1, of the 1955 Treaty cannot be made out independently of the specific incidents whereby, it is alleged, the actions of Iran made the Persian Gulf unsafe for commerce and navigation, and specifically for commerce and navigation between the territories of the parties".

In the second sentence of the second subparagraph of paragraph 123, and in paragraph 124, the Judgment finds that for this reason it must dismiss the United States claim.

10. Another justification offered by the United States consists in an attempt to identify an "American interest" in making good flag States' failure to act. It is sufficient to point out, without addressing in detail the arguments made in this regard, that they run directly counter to the very firm position which the Court took more than 30 years ago in the *Barcelona Traction* case and has never repudiated, i.e., that by forming a company under the laws of a particular State (or, as in the present case, by registering a ship in a particular country), the shareholders in the company (or the shipowners) had sought certain advantages for which there was a countervailing consideration, i.e., that that State alone was per-

[9] Judgment of 24 November 1992, case C-286/90, *Anklagemyndigheden* v. *Peter Michael Poulsen and Diva Navigation Corp.*, ECR, p. I-6019, cited by Rosalyn Higgins, "The ICJ, the ECJ and the Integrity of International Law", 52 *International and Comparative Law Quarterly* (2003), pp. 6-7. Paragraph 13 of that judgment recalls that: "under international law a vessel in principle has only one nationality, that of the State in which it is registered". The judgment goes on to hold that, for purposes of an EEC Regulation, a vessel cannot be treated as a vessel of a Member State "on the ground that it has a genuine link with that Member State" (para. 16).

mitted to grant its diplomatic protection to the company (or to rely on a bilateral treaty in its favour). One of the reasons given by the Court for not "adopt[ing] . . . the theory of diplomatic protection of shareholders as such", that it would open "the door to competing diplomatic claims" and "could create an atmosphere of confusion and insecurity in international and economic relations" (case concerning *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970,* p. 49, para. 96), applies just as strongly to the right of protection of ships, which could potentially be exercised concurrently by the flag State, the national State of the individual or undertaking holding a majority of the ownership interests in the undertaking owning the vessel, by the State of the cargo owner, etc. In respect of the counter-claim brought by the United States, the principle deriving from the Judgment in the *Barcelona Traction* case is of particularly compelling force because the freedom of navigation protected by Article X, paragraph 1, of the 1955 Treaty is not freedom of navigation in general, on all seas throughout the world and in favour of all vessels whatever their flag, but freedom of navigation of "[v]essels under the flag of either High Contracting Party" exercising that freedom "[b]etween the territories of two High Contracting Parties". If both of these conditions are not satisfied and one of them remains unmet, the claim does not fall within the jurisdiction of the Court as defined in Article XXI, paragraph 2, of the Treaty. In respect of vessels not meeting the conditions laid down in Article X, paragraph 1, the Court lacks jurisdiction to decide whether the damage they suffered is imputable to Iran.

Three of the vessels referred to in the above-mentioned list merit special attention. The *Samuel B. Roberts* is excluded as a warship (see paragraph 9 above).

Equally, the reflagging of the two Kuwaiti tankers does not bring the alleged damage within the scope of Article X, paragraph 1. Such reflagging, carried out during the war between Iran and Iraq in order to place under the aegis of the United States vessels having the nationality of a State which supported Iraq in its war effort against Iran, cannot be relied upon against Iran. It should be noted that by 1989 the Kuwaiti ships which had temporarily adopted the United States flag had already recovered their original registration ("deflagging")[10]. Moreover, since this change occurred before the date on which the counter-claim was submitted, that claim fails to satisfy the rule requiring continuity of the bond of nationality. Further, the terms under which these two vessels

[10] See George K. Walker, *op. cit,* p. 73; George P. Politakis, "From Action Stations to Action: US Naval Deployment, 'Non-Belligerency' and 'Defensive Reprisals' in the Final Year of the Iran-Iraq War", 25 *Ocean Development and International Law* (1994), p. 40.

were reflagged with a United States flag of convenience prevent the counter-claim from satisfying another condition laid down by Article X, paragraph 1, i.e., it cannot claim the benefit of freedom of commerce and navigation "[b]etween the territories of the two High Contracting Parties", because under the United States own domestic law, vessels having thus obtained United States registration are not granted access to United States ports.

11. Several passages in the Judgment refer to the "context of the general events that took place in the Persian Gulf between 1980 and 1988, in particular the armed conflict that opposed Iran and Iraq" (para. 23 of the Judgment). It is only in veiled terms that in the following sentence the Court implies that Iraq was the aggressor State. The truth of this is generally accepted today, and I feel it would be not unhelpful to indicate what the attitude of third States was, and in particular the United States, in the course of the conflict.

At the start of the war, the United States and the other western Powers adopted a wait-and-see attitude marked by a certain cynicism: after the fall of the régime of the Shah of Iran, the alliance with whom had been one of the key elements in America's Middle East policy, there was a vacuum in the region. At the start of the war, neither the United States nor the other western Powers wished to see a total victory by either of the two belligerents. They were waiting — and hoping — to see the two adversaries exhaust themselves without either being able to achieve hegemony in the region. The fact that neither of the two belligerents was named as aggressor by the Security Council enabled the other States to sell them arms, whereas it would have been unlawful to provide military aid to a State defined as the aggressor. The relations between the United States and Iran had just gone thorough a particularly severe crisis following the hostage-taking at the United States embassy in Tehran, and the Court had condemned Iran for this[11]. For their part, the Arab States of the Gulf had no particular sympathy for the anti-monarchist views of the Islamic Republic of Iran. All of these circumstances encouraged Iraq to attack Iran.

After Iraq's initial successes, which enabled it to occupy part of Iranian territory, Iran succeeded in reversing the position, and it was then that the United States began its about-turn. Compliance with the obligations of neutrality was not incompatible with American interests in the Middle East as long as an Iranian victory appeared out of reach. By contrast, as soon as Iraq's chances appeared to be fading, it became necessary to restore the balance between the opposing forces. It was also from then on that American aid to the Iraqi war effort increased substantially, a phenomenon hardly compatible with the maintenance of strict neutrality

[11] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 3.

in relation to the two belligerents: the launching of "Operation Staunch", a campaign seeking to dissuade the western allies from selling arms to Iran (El-Shazly, p. 215); the transmission to Iraq of satellite intelligence (El-Shazly, p. 323); authorization for the sale of 60 helicopters "for agricultural purposes", and a loan of $460 million for the purchase of rice (Walker, p. 47). In addition, there was significant diplomatic support: in 1982, Iraq was removed from the list of countries supporting international terrorism and in November 1984 diplomatic relations were resumed (Walker, pp. 48, 55). Ms El-Shazly summarizes American policy during the war between Iran and Iraq in the following terms:

> "Washington conducted a *realpolitik* strategy. It repeatedly proclaimed its neutrality, stated its interests and clear objectives in the Gulf, hand in hand with a concealed agenda, the blueprint of which combined the leaning toward Iraq with the yet undisclosed licensing of arms sales." (P. 207.)

While Iran may have failed to establish decisively the relationship between the American attack on Sassan and Sirri and Iraq's reconquest of the al-Faw area close to Basra, the coincidence of the two events is disturbing to say the least. The operation termed "Praying Mantis" resulted in the destruction of the two platforms and of two Iranian frigates and was considered by Professor Walker as "[t]he largest combined air and surface engagement in war at sea for the US Navy since World War II" (p. 69).

While it is admittedly not for the Court to rule on the support given to the Iraqi war effort by Saudi Arabia or by Kuwait, who are absent from the present proceedings, yet the case of Kuwait deserves special mention because of the aid provided by the United States to that State, in particular by authorizing the American reflagging of 11 Kuwaiti tankers. On this point, I cannot do better than quote a distinguished American international lawyer, Professor Louis Henkin:

> "In the Gulf, some spokesman said recently, the United States remain formally neutral. But even if the concept of neutrality can apply in some cases, can the United States be neutral here? No one would accuse us of being a friend of Iran, but there is a strong case that Iraq is probably the aggressor. No one has mentioned that for some years now. It is true that the Security Council refrained from so holding, in part because the United States would not permit it, or because the Russians would not permit it. That raises some questions, but that doesn't change the law; in the absence of a Security Council determination that one party was the aggressor, do the laws of the Charter not apply? In the absence of such a finding by the

Security Council, are States free to be neutral even if it is clear that one side launched the war in violation of the Charter? Is Kuwait neutral, or is it, as the first speaker suggested, perhaps a co-belligerent? Is the United States supporting Kuwait, and, if so, are we also co-belligerents? If so, we may not be only supporting the aggressor but if the old laws of war apply — we may also be violating the law of war.

I suggest we may not only have slipped into the war but, from the international lawyer's point of view, we seem to have slipped into a particular position of international law without much thought about it and without any thought to the long-term consequences. In fact, we seem to be taking seriously the outdated law of war, but not the contemporary law against war. In the process we may have eroded both. At least it cannot be said that the law on neutrality and belligerency is what it was before 1945."[12]

12. On 9 December 1991 the supplementary report of the United Nations Secretary-General on the implementation of Security Council resolution 598 (1987) (doc. S/23273) expressed in unequivocal terms the view that Iraq was responsible:

"6. The Iraqi reply to my letter of 14 August 1991 is not a substantial one; therefore I am bound to rely on explanations given by Iraq earlier. That these explanations do not appear sufficient or acceptable to the international community is a fact. Accordingly, the outstanding event under the violations referred to in paragraph 5 above is the attack of 22 September 1980 against Iran, which cannot be justified under the Charter of the United Nations, any recognized rules and principles of international law or any principles of international morality and entails the responsibility for the conflict.

7. Even if before the outbreak of the conflict there had been some encroachment by Iran on Iraqi territory, such encroachment did not justify Iraq's aggression against Iran — which was followed by Iraq's continuous occupation of Iranian territory during the conflict — in violation of the prohibition of the use of force, which is regarded as one of the rules of *jus cogens*."

[12] "The Persian/Arabian Gulf Tanker War: International Law or International Chaos", 26 January 1988, 19 *Ocean Development and International Law* (1988), pp. 309-310. Cf. Tod A. Phillips, "Exchanging Excuses for Uses of Force — The Tug of War in the Persian Gulf", 10 *Houston Journal of International Law* (1987), pp. 275-293.

The supplementary report confines itself to responsibility for land operations; it contains no observation regarding the war at sea, and in particular the Tanker War.

13. Thus there were two grounds for dismissal of the counter-claim that were not invoked by the Court. The first is that the claim was not justified *in terms of fact* (paras. 5-7 above), the second being that it did not satisfy the nationality requirement in respect of the vessels attacked during the war between Iran and Iraq. Yet either of these two grounds should logically have taken precedence over the sole ground relied on in the Judgment, namely that none of the vessels "was engaged in commerce or navigation 'between the territories of the two High Contracting Parties'" (para. 121 of the Judgment).

The choice of this ground alone is doubtless explicable by the Court's desire to establish an artificial parallel between the two claims, both being rejected for the same reason.

III. Observations on the Reasoning Underlying Dismissal of the Original Claim

(a) *The Distinction Drawn between the Defence Based on Article XX, Paragraph 1* (d), *of the 1955 Treaty and That Based on the Right of Self-defence*

14. In paragraph 78 of the Judgment the Court finds that the actions carried out by United States forces against Iranian oil installations cannot be justified either under Article XX, paragraph 1 *(d)*, of the 1955 Treaty or as acts of self-defence. This is a situation analogous to that in criminal law where one and the same act is covered by two offences, and thus falls to be assessed by reference to the terms of each of those offences.

Paragraph 41 of the Judgment fails to do proper justice to this dual characterization. Thus in that paragraph the Court interprets subparagraph *(d)* in light of general international law without first addressing the issue of the High Contracting Parties' intention. And yet this is a provision which occurs in a number of treaties of friendship similar to that signed in 1955 by Iran with the United States and also in Article XXI of the GATT, and on which there exists a substantial body of comment in the literature.

Paragraph 1 *(d)* reads as follows:

"*Article XX*

1. The present Treaty shall not preclude the application of measures:

. . . . . .

(d) [French translation: Ou nécessaires à l'exécution des obligations de l'une ou l'autre des Hautes Parties contractantes relatives au maintien ou au rétablissement de la paix et de la sécu-

rité internationales ou à la protection des intérêts vitaux de cette Haute Partie contractante sur le plan de la sécurité.]"

This translation, which is taken from the United Nations *Recueil des traités*, does not correspond entirely to the English-language text of the Treaty, which is equally authoritative with the original Farsi. The English text reads as follows:

"*(d)* necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests".

In repeating the adjective "necessary", the original text avoids an ambiguity to which the French translation could lead. The repetition brings out more clearly the distinction between what is necessary to fulfil a State's international obligations and what is necessary to protect the essential (or vital) interests of the State itself. In the French translation, the repetition of the conjunction *"ou"* ("or") could suggest that the State is under a duty to protect its own interests. On the other hand, the distinction between the adjective "essential" and the French translation *"vitaux"* ("vital") appears to be of little significance. In any event, in case of doubt we should rely on the English text.

15. The question of interpretation faced by the Court today was also addressed by it in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* in relation to Article XXI, paragraph 1 *(d)*, of the Treaty of Friendship, Commerce and Navigation concluded in 1956 between the United States and Nicaragua, which was drafted in similar terms to Article XX, paragraph 1 *(d)*, of the 1955 Treaty with Iran[13].

A passage from the 1986 Judgment has been given differing interpretations by the Parties to the present dispute. What is the relationship between the use of force exceptionally permitted in exercise of the right of self-defence and the measures which a State may take because they are "*nécessaires à la protection de ses intérêts vitaux sur le plan de la sécurité*/necessary to protect its essential security interests"? (The English text is clearer and more concise.)

According to the 1986 Judgment:

"224. On the other hand, action taken in self-defence, individual or collective, might be considered as part of the wider category of measures qualified in Article XXI as 'necessary to protect' the 'essential security interests' of a party.

. . . . . .

It is difficult to deny that self-defence against an armed attack cor-

[13] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 115-116, para. 221.

responds to measures necessary to protect essential security interests. But the concepts of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past. The Court has therefore to assess whether the risk run by these 'essential security interests' is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but 'necessary'."[14]

In reality, there are three issues here: what are the circumstances in which, respectively, Article 51 of the Charter and Article XX of the 1955 Treaty apply? What measures is it lawful to take in either case? What power of review does the Court have over the lawfulness of action taken by a State having accepted a jurisdictional clause?

16. The answer to the first question can be gleaned more clearly from Article 51 of the Charter than from paragraph 1 *(d)* of Article XX of the 1955 Treaty. Exercise of the "inherent right of individual or collective self-defence" is authorized only where a Member of the United Nations has been the subject of "an armed attack". It is necessary, but suffices, that the facts alleged in support of the exercise of self-defence satisfy this requirement. The situation referred to in paragraph 1 *(d)* of Article XX of the 1955 Treaty is described in much vaguer terms: in order for the measure taken to satisfy the requirements of this provision, it must be necessary to protect a State's essential security interests. This requirement contains three undefined or poorly defined concepts: "necessary to protect", "essential" and "security".

There is a similar difference in regard to the form and scope of the authorized response. In a system where self-defence constitutes the sole exception to the prohibition of the use of force laid down in Article 2, paragraph 4, of the Charter, Article 51 authorizes, to the extent necessary and subject to compliance with the principle of proportionality, a reaction to an "armed attack" by the use of force which, in other circumstances, would have been prohibited. In paragraph 1 *(d)* of Article XX of the 1955 Treaty, the lack of definition in regard to the relevant circumstances is matched by a vagueness in respect to the "measures" which a State may take where its security is at risk.

What measures may be considered "necessary" (subject always to respect for the principle of proportionality) to protect a State's essential security interests? More specifically, the lack of a clear definition of

[14] *I.C.J. Reports 1986*, p. 117, para. 224.

"necessity" operates at two levels: the characterization of the situation and the measures which it justifies.

Of the three questions, the third is the easiest. If the application of Article 51 of the Charter or of Article XX of the 1955 Treaty becomes the subject of a judicial dispute, then the competent court undoubtedly has the power — and indeed the duty — to verify that the rules of international law have been applied correctly. The Court had already reached this conclusion in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*:

> "But by the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not, as the Court has emphasized (paragraph 222 above), purely a question for the subjective judgment of the party; the text does not refer to what the party 'considers necessary' for that purpose."[15]

This explanation is necessary in order to dispel an apparent ambiguity in the text of paragraph 224 of the 1986 Judgment: action taken in self-defence may be considered as part of the wider category of measures described in Article XXI only on the implied condition that the State exercising its right of self-defence has a choice from among various types of forcible action, some more far-going than others. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court itself stated that it was "necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms"[16]. By the same token, the proposition that "the concept of essential security interests certainly extends beyond the concept of an armed attack" is acceptable only if it signifies that there is a difference in kind (rather than the one of degree suggested by the phrase "extends beyond") between an armed attack and the various other kinds of conduct of a State against which another State considers it "necessary", by appropriate measures, to protect its essential security interests.

17. The question to be answered for purposes of applying and interpreting Article XX, paragraph 1 *(d)*, of the 1955 Treaty is whether the use of force falls within the "measures" that a State may take to protect its essential security interests. Or, in other words, do the measures from which a State may choose in order to protect its essential security interests include the use of armed force against another State? For that was certainly what the attack on the oil platforms was, since these, being located on Iran's continental shelf, fall within the exclusive jurisdiction of that State.

There are two ways of answering the question as posed in these specific terms. Either we accept that paragraph 1 *(d)* of Article XX falls to be

[15] *I.C.J. Reports 1986*, p. 141, para. 282.
[16] *Ibid.*, p. 101, para. 191.

considered in some form of isolation which cuts it off from the other rules of international law, in particular the United Nations Charter and the norms of customary international law prohibiting the use of force, or we accept that the prohibition of the use of force in accordance with the terms of Article 2, paragraph 4, of the Charter and with customary international law forms part of *jus cogens*, which would prohibit States from derogating therefrom in their bilateral treaty relations. For that would indeed be the consequence to which the first reply to the question would lead: paragraph 1 *(d)* of Article XX would permit either of the contracting States to use armed force against the other State in circumstances which would not have to satisfy the requirements of Article 51 of the Charter but which it would be entitled to take under the — undefined — guise of "measures to protect its essential security interests".

18. In its 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court did indeed reject the United States defence based on paragraph 1 *(d)* of Article XXI of the Treaty of Friendship with Nicaragua (having first rejected the self-defence argument). However, in holding that "the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, cannot possibly be justified as 'necessary' to protect the essential security interests of the United States"[17], the Court does not expressly explain the reason for its decision: is it because the actions attributed to the United States go beyond the nature and scope of measures which may be taken under Article XXI of the Treaty of Friendship, or, more simply, because such actions were not necessary to protect essential security interests, but would not have been unlawful if they had satisfied that requirement? Point 2 of the operative paragraph of the 1986 Judgment expressly rejects "the justification of collective self-defence maintained by the United States of America", whilst no other part of that operative paragraph refers to Article XXI of the Treaty of Friendship.

In order to decide that the measures which a State is authorized to take under paragraph 1 *(d)* of Article XX of the 1955 Treaty and numerous similar provisions in other bilateral treaties of friendship and commerce do not include the use of force, the Court need not have recourse to the United Nations Charter or the customary rules of international law on the use of force. It is open to the Court, while confining itself to interpreting and applying the bilateral treaty — its sole basis of jurisdiction — to conclude, simply by interpreting paragraph 1 *(d)*, that the High Contracting Parties did not intend to confer upon one another a mutual freedom to have recourse to armed force in the context of a measure necessary to protect essential security interests.

[17] *I.C.J. Reports 1986,* p. 141, para. 282.

American jurists who have written commentaries on treaties of friendship or on the GATT article which similarly authorizes derogations from the Agreement's other provisions where this is necessary to protect a State's essential security interests categorically reject the idea that the use of armed force can be one of the "measures" envisaged by such a provision[18]. M. J. Hahn very clearly excludes the use of force in the context of measures authorized under Article XXI *(d)* of the GATT Rules. He then gives a list of examples, taken from State practice, of the implementation of that Article, but not one of them includes the use of force. An embargo or measures of economic retaliation are what are generally used, such as the United States embargo on Cuba (Hahn, p. 571).

Not one of the recent works on GATT even suggests that Article XXI of the GATT would authorize a State to use force to protect a serious security interest. According to Andreas F. Lowenfeld:

> "Well before the United Nations Security Council began to use economic sanctions as a primary tool, individual countries used economic sanctions as an important instrument of foreign policy, less dangerous than military force, but more serious — and sometimes more effective — than diplomacy alone . . . A variety of sanctions have been employed, from total embargoes to selective controls on exports and imports, to freezing of assets, blocking of financial transactions, and restrictions on shipping and aviation."[19]

The same applies to measures of retaliation or reprisal, with which the American action against the oil platforms would bear a certain comparison, if armed reprisals were not prohibited by general international law[20] (see also the resolution of the Institut de droit international,

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[18] See *inter alia* Pamela B. Gann, "The U.S. Bilateral Investment Treaty Program", XXI *Stanford Journal of International Law* (1985), pp. 373-457, at p. 425; Michael J. Hahn, "Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception", 12 *Michigan Journal of International Law* (1991), pp. 558-620. See also Olivia Q. Swaak-Goldman, "Who Defines Members' Security Interest in the WTO?", 9 *Leiden Journal of International Law* (1996), pp. 361-371. The latter, moreover, cites only embargo cases, in particular at the time of the Falklands War (pp. 365-366) or under the Helms-Burton Act (pp. 367-368).

[19] Andreas F. Lowenfeld, *International Economic Law*, 2002, p. 764. See similarly *Legal Problems of International Economic Relations, Cases, Materials and Text . . .*, 4th ed. by John H. Jackson, William J. Davey and Alan O. Sykes, Jr., 2002, Section 21.5, pp. 1045 *et seq.*; Raj Bhala, *International Trade Law, Theory and Practice,* 2nd ed., 2001, pp. 594-604.

[20] See, for example, Rosalyn Higgins, *Problems and Process, International Law and How We Use It,* 1994, pp. 240-241, 244-245; Michel Virally, "Le principe de réciprocité

"Régime des représailles en temps de paix", Art. 4, *Annuaire de l'Institut de droit international*, 1934, p. 709).

19. It may be concluded on this point that the Court could have better distinguished between the arguments deriving from the exception provided for in Article XX, paragraph 1 *(d)*, of the 1955 Treaty and those based on the right of self-defence. While the Court did indeed reject both defences relied on by the United States, it failed to rule expressly on the specific nature of subparagraph *(d)*. Only in the event of a finding that the High Contracting Parties had intended to authorize each other to derogate from the provisions of the Charter concerning the use of force should the Court have decided that such an attempt to circumvent a peremptory norm of international law *(jus cogens)* was outside their treaty-making power.

This analysis is not at variance with the solutions reached by the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. The 1986 Judgment is neither clear nor decisive on issues concerning the relationship between the clause in the Treaty of Friendship and the Charter rules on self-defence.

(b) *Observations on the Interpretation and Application of Article X, Paragraph 1, of the 1955 Treaty*

20. The Judgment devotes lengthy passages to the issue of whether Iran's claim falls within the terms of Article X, paragraph 1, of the 1955 Treaty (paras. 79-98 of the Judgment). The questions of interpretation on which I feel myself bound to differ from the Court's decision and its reasoning relate to the following points:

(i) in respect of the Reshadat platforms, the finding that, because the damage which they had suffered as a result of an attack by Iraq had rendered them inoperative, there was no activity capable of being interrupted by the subsequent American attack;
(ii) in respect of the Salman and Nasr platforms, the finding that the export of Iranian oil to the United States was in any event prevented for a different reason, namely the embargo on imports of

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dans le droit international contemporain", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 122 (1967), pp. 51-54; Avra Constantinou, *The Right of Self-Defence under Contemporary International Law under Article 51 of the United Nations Charter*, 2000, pp. 129-155, in regard to counter-measures, which are lawful only in so far as they are not accompanied by the use of force; D. W. Bowett, "Reprisals Involving Recourse to Armed Force", 66 *American Journal of International Law* (1972), pp. 1-36; Robert W. Tucker, "Reprisals and Self-Defence: The Customary Law", *eod. loco*, pp. 586-594; Richard A. Falk, "The Beirut Raid and the International Law of Retaliation", 63 *American Journal of International Law* (1969), pp. 415-443; Serge Regourd, "Raids 'anti-terroristes' et développements récents des atteintes illicites au principe de non-intervention", 32 *Annuaire français de droit international* (1986), p. 88.

Iranian oil imposed by Executive Order 12613 of 29 October 1987;

(iii) the finding that Iran had not succeeded in showing that the damage to the Iranian oil platforms had interfered with freedom of trade "between the territories of the High Contracting Parties".

(i) *The causal link between the damage to the Reshadat platforms and the length of the period during which they remained out of commission*

21. At the time when the Iranian oil platforms were attacked by the United States armed forces, some of them were already temporarily out of commission because of damage previously caused by Iraqi attacks. According to the statements of Mr. Zeinoddin and Mr. Sellers at the hearing on 18 February 2003 (CR 2003/6, pp. 39 *et seq.*), the R-7 platform of the Reshadat complex was attacked by Iraq on 19 October 1986 and this temporarily stopped oil production at the Reshadat and Resalat complexes. A second Iraqi attack occurred on 15 July 1987, when repair work was under way, but it was anticipated that production would resume at the end of October 1987 at a level of 20,000 barrels per day. The Salman complex, made up of seven interconnected platforms, was also attacked by Iraq on 16 October 1986 but suffered only light damage and production resumed three days later.

The United States attacks on 19 October 1987 completely destroyed the Reshadat production complex and R-7 at a time when engineers were busy repairing it. The R-4 platform was also attacked. Production could only resume at a lower level three years later and did not reach its normal level until 1993. On 18 April 1988 the United States attacked the Salman and Nasr complexes. The Americans had left explosives on the power generating platform but the detonator failed. The damage was however substantial enough that production could not return to its normal level until 1993. According to the information provided by Mr. Zeinoddin at the hearing on 18 February 2003 (CR 2003/6, pp. 32 *et seq.*), the Reshadat and Resalat complexes, according to the diagram at tab No. 7 in the judges' folder submitted by the Applicant, worked together in the following way. The Reshadat complex consisted of three drilling and production platforms (R-3, R-4 and R-7) linked to a total of 27 oil wells. The oil produced by the R-3 platform was transported by submarine pipeline to the R-4 platform and thence, together with the crude oil extracted at the R-4 platform, to the R-7 platform, from which the oil, after initial water and gas separation, was transported by submarine pipeline to Lavan Island, 108 km away.

22. The Resalat offshore complex consisted of three linked drilling and

production platforms, referred to as R-1, to which 14 wells were connected. The crude oil produced by them was transported by a 29-km submarine pipeline to the Reshadat R-7 platform, where it underwent the same treatment as the oil produced by the R-3, R-4 and R-7 platforms. Thus, R-7 was the key platform on which the whole of the Reshadat and Resalat fields depended.

The Salman complex, a diagram of which appears at tab No. 9, consisted of seven interconnected platforms, including one drilling and two production platforms. Oil from 21 wells was transported by pipeline to this complex and from there to Lavan Island after initial water and gas separation. Like the crude oil from Reshadat and Resalat, oil from Salman underwent further water and gas separation on Lavan Island and was either refined there for domestic consumption or exported.

The Nasr complex, a diagram of which appears at tab No. 11, comprised a central platform (A), a flaming point and six oil producing platforms grouped around the central platform, supplied by 44 wells in the Sirri field and four wells in the Nosrat field. Crude oil from all of these wells was transported by submarine pipeline to the central platform and from there to Sirri Island for secondary processing and export, as there are no refineries on Sirri Island. Unlike the two complexes previously described, the Nasr complex was not attacked by Iraq and was functioning normally at the time of the United States attack.

Normal daily production at Reshadat-Resalat was 20,000 barrels, at Salman 125,000 barrels. At the time of the United States attack, the Nasr complex was producing some 36,000 barrels daily, although it was capable of producing 120,000 barrels per day.

23. In order for Article X, paragraph 1, to apply to the destruction of the three oil complexes of Reshadat-Resalat, Salman and Nasr, three conditions must be satisfied: the platforms must have been the site of commercial activity, freedom of commerce must have been prejudiced and that freedom must have been exercised, or been capable of being exercised, between the territories of the two High Contracting Parties.

By their very nature, the three oil platform complexes were intended for the production, processing and transport of oil to a place where it could be "placed in commerce". The fact that platforms are artificially erected on the continental shelf of a State for the purpose of extracting oil resources lying in that State's exclusive economic zone and that advanced technology is applied to produce crude oil with a view to its commercialization unquestionably places the resultant activities within the realm of the exercise of "freedom of commerce". To this must be added the vulnerability and therefore fragility of the effective enjoyment

of that freedom. The damage inflicted on just one part of facilities which are necessarily interconnected unavoidably breaks the chain of production and, consequently, the chain of commercialization. When, moreover, the destruction takes place during a war in which those same installations are under constant threat of attack by enemy forces, their repair requires particularly arduous efforts.

24. The second condition concerns the notion of *freedom* of commerce. In order for such a freedom to be prejudiced, it is not necessary for the actual or immediate conduct of the commercial activity, in the present case the protected oil production activity, to be brought to a halt. It is no defence to argue that two of the oil complexes were temporarily out of commission as a result of the Iraqi attacks, since repair work was in progress. Even in a country like Iran, which possesses abundant oil resources and numerous production centres, the disabling of even one part of the machinery of production prejudices *freedom* of commerce, that is to say, the ability to choose from production sites for purposes of commercialization.

I cannot in particular subscribe to the following statement by the Court in paragraph 92 of the Judgment: "Injury to potential for future commerce is however, in the Court's view, not necessarily to be identified with injury to freedom of commerce, within the meeting of Article X, paragraph 1, of the 1955 Treaty."

Freedom of commerce implies not only freedom for Iran to choose where it will produce and sell its petroleum wealth, but also includes control over the future development of that commerce.

25. The third and last question concerns the spatial or relational element of freedom of commerce: that freedom is protected in so far as it is exercised between the territories of the two High Contracting Parties. Having been built on the Iranian continental shelf, the oil platforms are part of Iranian territory. The same is true of Lavan Island, to which oil from the Salman complex is transported, and of Sirri Island, through which oil from the Nasr complex passes. But was there infringement of freedom of commerce between this territory and the territory of the United States? The response to this question is bound up with that just given to the preceding question. Throughout the war between Iran and Iraq, Iran never stopped supplying oil to the United States. The temporary disabling of the facilities of the three oil complexes prejudiced Iran's freedom of commerce because it was restricted in its freedom to choose the centres of production from which oil was to be exported to the United States.

(ii) *The effect on freedom of commerce of Executive Order 12613 of 29 October 1987*

26. In its Rejoinder of 23 March 2001 (Nos. 3.55 to 3.59) the United

States puts forward two arguments in justification, one erroneous and the other audacious. The first has already been refuted: the fact that production at some installations had to be halted as a result of the Iraqi attacks is irrelevant because the subsequent destruction of those installations by United States forces destroyed the repair work being completed and delayed the resumption of operations. The justification which must be adjudged audacious seeks to found itself on the United States President's Executive Order of 29 October 1987, as a result of which all Iranian oil imports by the United States purportedly ceased. The Court is wrong in accepting this ground for holding Article X, paragraph 1, inapplicable (see paras. 93 and 94 of the Judgment). In so doing, it upholds the right of a State party to a bilateral treaty to exonerate itself by a unilateral administrative act from responsibility engaged by an earlier act committed in violation of that treaty. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court found that the unilateral decision to impose an embargo on ships registered in Nicaragua constituted *per se* a violation of the Treaty of Friendship between the United States and Nicaragua (*I.C.J. Reports 1986*, p. 140, para. 279). Whether viewed as cumulative to the use of force, as in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, or as potentially exonerating the State from responsibility incurred as a result of the use of force, as is claimed in the present case, a unilateral administrative measure adopted by a State party to a treaty has to be assessed in the light of the treaty obligations of both parties; it cannot have the effect of discharging one of the States from any of those obligations.

According to the Judgment:

> "The Iranian contention rests on the hypothesis that the embargo was a breach of the 1955 Treaty, and not justified under Article XX, paragraph 1 *(d)*, thereof; but these are questions which Iran has chosen not to put formally in issue, and on which the Court has thus not heard full argument." (Para. 94.)

This is to misrepresent the "Iranian contention". It is not a question of determining whether the embargo "was a breach of the 1955 Treaty" but, which is something altogether different, whether the embargo could be invoked in order to escape the consequences of a prior illegal act, the destruction of the Iranian oil platforms.

(iii) *The existence and relevance of "indirect" commerce between the territories of the two High Contracting Parties*

27. Both in their oral statements and in their written pleadings, the two Parties referred to the report drawn up by Mr. Peter Odell at Iran's request, which explained that the embargo did not prevent continued Iranian oil exports to the United States, but that this was done indirectly,

Iranian crude oil being exported to Western Europe and then re-exported to the United States after refining. The report by Mr. Odell, a British expert, confirms the statement by Mr. Seyed-Hossein Hosseini, NIOC Director of International Affairs. The statement and report appear, together with their annexes, in Volume III of Iran's Reply of 10 March 1999. This commerce, characterized as "indirect", raises two questions concerning the interpretation of Article X, paragraph 1: if a product originating in Iran transits through a third country before arriving in the United States, does it fall within the scope of freedom of commerce "[b]etween the territories of the two High Contracting Parties"? Did the refining process carried out in the third country result in changing the nature of the oil to the point of breaking the flow of commerce between the two States?

28. The beginnings of a response, if not the response itself, to these two questions can be found in the Judgment delivered on 12 December 1996 by the Court on the Preliminary Objection of the United States. The extremely broad conception of the notion of commerce which emerges from the long discussion devoted by the Judgment to this point (*I.C.J. Reports 1996 (II)*, pp. 817-820, paras. 42-52) enables it to encompass the multiple, diversified operations characterizing contemporary international commerce and the myriad participants therein. Paragraph 42 of the 1996 Judgment is particularly significant in this respect, notably when it refers to "the entire range of activities dealt with in the Treaty" *("toute la gamme d'activités auxquelles le traité s'étend")*. Today, a product typically passes through several countries before reaching its final destination and undergoes successive transformations adapting it for the use to which it is to be put by the end-user. The transformation of crude oil into a refined product does not result in a product of a nature different from that which it had at the outset. Oil production comprises successive phases leading to the final product and it would be artificial to draw lines between them. To decide otherwise would be to introduce a metaphysical distinction in objects of international commerce between substance and treatment, the successive stages in the processing of the initial "crude" product resulting in the identification of different "substances" depending on the form of the final product.

29. The reasoning in the Judgment focuses not so much on the "successive technical processes that [the oil] underwent" as on the "nature of the successive commercial transactions relating to the oil". The Judgment continues:

> "What Iran regards as 'indirect' commerce in oil between itself and the United States involved a series of commercial transactions: a sale by Iran of crude oil to a customer in Western Europe, or some third country other than the United States; possibly a series of intermediate transactions; and ultimately the sale of petroleum products to a customer in the United States. This 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." (Para. 97.)

This is a plausible scenario, but the Court presents it as if it had been verified in practice. However, there is nothing either in the Parties' written pleadings or in their oral statements which lends any support for what can only be regarded as pure speculation, to which the Judgment appears to accord a substance which it does not merit.

It could equally well be assumed that "indirect" commerce took the form of the sale of crude oil to an American customer, with the contract providing for refining to take place in a third State. Such a hypothesis is indeed more plausible than that assumed by the Court in its reasoning, since it relieves the "intermediary" of the risk of purchasing crude oil without any assurance of finding a market for the finished product.

"Direct" commerce of this kind is all the more credible in that Section 2 *(b)* of Executive Order 12613 contained an exception whereby the embargo was not to apply to "petroleum products refined from Iranian crude oil in a third country" (para. 96 of the Judgment). The consequence of this exception is twofold. First, it means that, in its absence, such an operation would have been caught by Section 1 and accordingly been prohibited. Secondly, it implies that the Iranian origin of a product refined in a third State could have been detected, making the exception necessary so as to forestall a consequence which the President of the United States wished to avoid in light of his country's energy needs.

(c) *Is There Not a Contradiction between the Reasons for the Dismissal of the Original Claim and the Terms of the Operative Paragraph?*

30. In paragraph 42 of the Judgment the Court declares itself competent to rule on the compatibility of the American military actions against the oil platforms with international law regarding the use of force. After examining the factual and legal issues enabling it to reach its decision (paras. 43-77 of the Judgment), the Court concludes in paragraph 78 that those actions

> "cannot be justified, under Article XX, paragraph 1 *(d)*, of the 1955 Treaty, as being measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defence, and thus did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty".

This purely negative conclusion is reproduced in the first part of point 1 of the Judgment's operative paragraph. In paragraphs 96 to 98, the Court absolves from all responsibility a State which it has found guilty of violation of a principle of international law as fundamental as

the prohibition on the use of force in relations between States. Even if one were to accept — contrary to what has been demonstrated above — that the destruction of the Iranian oil platforms did not violate freedom of commerce between the two High Contracting Parties, it would still be illogical to find that the destruction of those platforms was carried out by an unlawful use of armed force and yet did not entitle the State victim of that wrongful act to reparation. Already in paragraph 41 of the Judgment, the Court states:

> "The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty."

Having, in execution of that task, found that there has been a breach of the prohibition on the use of force in connection with Iran's claim based on Article X, paragraph 1, of the Treaty, the Court has failed to complete its mission in leaving that breach uncompensated.

IV. The Prohibition of the Use of Force Is a Fundamental Principle of International Law

31. If, notwithstanding my reservations as set out above, I voted in favour of the first point in the operative paragraph, it was because, not being offered the possibility of choosing between the Court's conclusion on the use of force and its refusal to uphold Iran's legitimate claim, I considered that I must in all conscience give preference to the first of these two limbs of point 1 of the operative paragraph.

In recent decades, some distinguished American jurists have deplored the retreat from support for the principle on the prohibition on the use of force. Among many others, I would cite: Thomas M. Franck, "Who Killed Article 2, Paragraph 4? Or: Changing Norms Governing the Use of Force by States", 64 *American Journal of International Law* (1970), pp. 809-837; Oscar Schachter, "In Defence of International Rules on the Use of Force", 53 *University of Chicago Law Review* (1986), pp. 113-146; Oscar Schachter, "The Role of Power in International Law", *Proceedings of the 93rd Annual Meeting of the American Society of International Law* (1999), pp. 200-205. These two eminent jurists have stressed in particular the perverse effect of a justification founded on a misconception of the "inherent right of self-defence". It cannot, however, be said that everyone subscribes today to the view that Article 2, paragraph 4, of the Charter still remains in force. Thus we find published works which categorically deny this. See, for example, the recent article by John. R. Bolton, "Is There Really 'Law' in International Affairs?", 10 *Transnational Law and Contemporary Problems* (2000), pp. 1-48.

Such a position carries a certain weight, for its author was for five years (1989-1993) Assistant Secretary of State for International Organization Affairs. The article begins with a theoretical discussion of the legal status of international law: "Is it Law or isn't it?" This is a piece of outdated dogma, for it is based on a restrictive definition of the notion of "law" or legal order. The author then proceeds to base his argument on the United States Supreme Court's application of the "last-in-time rule", under which courts must apply a domestic statute in preference to a prior treaty, from which the legislator is deemed to have derogated. This constitutional doctrine is presented in far too summary a manner, failing to mention the efforts of jurisprudence to reconcile two contradictory sources of law. One means employed to this end is the principle that courts should seek to interpret a statute conflicting with a directly applicable provision of an international treaty in a manner rendering it compatible with the treaty[21]. Moreover, the status of international law within a State's domestic order tells us nothing about the nature of the legal order governing inter-State relations. Finally, the dismissal of international law as not being "law", which is based *inter alia* on the proposition that no court exists capable of settling inter-State disputes, is contradicted by the circumstances of the present case: there is an international court, and it has clearly ruled on the respect owed to the prohibition of the use of force.

32. In reality, this "doctrine" defended by Mr. Bolton is a grievously outdated one. It seeks, without daring to say so, to restore to the agenda the teachings of Hobbes and Spinoza.

The two leading works of Thomas Hobbes (1588-1679) are: *De Cive* (1642) and *Leviathan, seu de civitate ecclesiastica et civili* (1651). The author has a conception of natural law diametrically opposed to that offered by scholastic tradition. The state of nature *(status naturae)* is the site of an unending struggle, *bellum omnium in omnes* (*De Cive,* I, XII), which the establishment of civil society has failed to bring to an end. The modern State has succeeded in imposing peace thanks to the power exercised by its rulers, the citizens having agreed to give up their natural freedom in return for peace. States as between themselves remain in this state of nature. The strongest dominates by conquest, subjecting other peoples to its rule.

> "To this war of every man, against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place. Where there is no common power, there is no law: where no law, no injustice. Force, and fraud, are in war the two cardinal virtues. Justice, and injustice are none of the faculties neither of the body, nor mind. If they were, they might be in a man that were alone in the world, as well as his senses, and

[21] Since *Murray* v. *The Charming Betsy*, 6 US (2 Cranch) 64 (1804), pp. 117-118.

passions. They are qualities, that relate to men in society, not in solitude. It is consequent also to the same condition, that there be no propriety no dominion, no *mine* and *thine* distinct; but only that to be every man's, that he can get: and for so long, as he can keep it. And thus much for the ill condition, which man by mere nature is actually placed in; though with a possibility to come out of it, consisting partly in the passions, partly in his reason." (*Leviathan,* Chap. XIII.)

"The liberty, whereof there is so frequent and honourable mention, in the histories, and philosophy of the ancient Greeks, and Romans, and in the writings, and discourse of those that from them have received all their learning in the politics, is not the liberty of particular men; but the liberty of the commonwealth: which is the same with that which every man then should have, if there were no civil laws, nor commonwealth at all. And the effects of it also be the same. For as amongst masterless men, there is perpetual war, of every man against his neighbour; no inheritance, to transmit to the son, nor to expect from the father; no propriety of goods, or lands; no security; but a full and absolute liberty in every particular man: so in states, and commonwealths not dependent on one another, every commonwealth, not every man, has an absolute liberty, to do what it shall judge, that is to say, what that man, or assembly that representeth it, shall judge most conducing to their benefit. But withal, they live in the condition of a perpetual war, and upon the confines of battle, with their frontiers armed, and cannons planted against their neighbours round about." (*Leviathan,* Chap. XXI.)[22]

Since the community of States lacks any superior power, any governing authority, the notions of justice and injustice can have no currency there, being the product of a duly constituted society. Hobbes's view of international law was a voluntarist one: *jus gentium* is totally distinct from natural law, the law of nature (rather than natural law) being that of the triumph of force, of the domination of the weak by the strong.

We find an echo of certain of Hobbes's ideas in Spinoza (1632-1677). According to the *Tractatus politicus* and the *Tractatus theologico-politicus,* published posthumously in 1677, the irresistible power of the supreme authority *(summa potestas)* within the State is reflected in the State's external sovereignty.

[22] Thomas Hobbes, *Leviathan, or the Matter, Forme and Power of A Commonwealth Ecclesiasticall and Civil,* ed. Michael Oakeshott, 1946.

Hence, if a nation wishes to make war on another nation and is prepared to have recourse to any appropriate means in order to force that nation into dependency, it is perfectly entitled to attack it. For all it requires, in order to find itself in a state of war, is to have the will to do so (*Tractatus politicus,* Chap. III, para. 13).

33. The legal régime to which the United Nations Charter has subjected the use of force between States must be regarded as the "fundamental norm" *(Grundnorm)* of international law in Kelsen's sense of the term. The principal judicial organ of the United Nations should have taken the opportunity offered it by the present case to recall that Article 2, paragraph 4, of the Charter is a provision possessing binding force. The Court had jurisdiction to do so, for the two actions of which it was seised both had as their subject-matter a claim based on a use of force alleged to have been unlawful, the focus of the dispute being the nature and extent of the right of self-defence.

(Signed) François RIGAUX.