In The Name of God

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING OIL PLATFORMS

(ISLAMIC REPUBLIC OF IRAN V.
UNITED STATES OF AMERICA)

REPLY AND DEFENCE TO COUNTER-CLAIM

Submitted by the

ISLAMIC REPUBLIC OF IRAN

Volume I

10 March 1999

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PART I
INTRODUCTION

CHAPTER 1. THE STRUCTURE OF IRAN'S REPLY AND DEFENCE TO COUNTER-CLAIM

1.1 This Reply and Defence to Counter-Claim is filed in accordance with the Court's Order of 10 March 1998, as extended by its Orders of 26 May 1998 and 8 December 1998, the latter of which extended the time-limit for the filing of Iran's Reply and Defence to 10 March 1999. It responds both to the United States' Counter-Memorial of 23 June 1997 and to the United States' Counter-Claim of the same date. The United States' Counter-Claim was held admissible by the Court under Article 80 of the Rules of Court, in the Order of 10 March 1998, on the basis set out in that Order.

1.2 *In appreciating the issues before the Court, it is essential to view the* incidents which are the subject of Iran's claims and the United States' counter-claim within the overall perspective of the Iraq-Iran War (1980-1988). This is the subject of Chapter 2 of this Part, which sets out a number of largely uncontested propositions about that conflict - propositions which the United States nonetheless tends to ignore if not conceal.

1.3 *Against this essential* background, this Reply and Defence consists of four further Parts. Part II addresses the United States' factual allegations. Chapter 3 of Part II will show that the platforms were not engaged in offensive military operations but were commercial installations with a continuing role to play in commerce between Iran and the United States at the time they were attacked. Chapters 4 and 5 of Part II will then describe the U.S. attacks on these platforms and will address the United States' allegations concerning Iranian attacks on U.S. vessels.

1.4 Part III addresses the legal defences of the United States. This Part will show that the attacks were a breach of Article X(1) of the Treaty of Amity (Chapter 6), which cannot be excused either as lawful self-defence or by reference to alleged U.S. essential security interests under Article XX(1)(d) of the Treaty of Amity (Chapter 7). Finally, it will

show that Iran's claims cannot be set aside by reference to the notion of "clean hands" (Chapter 8).

1.5 Part IV will then present Iran's Defence to the U.S. counter-claim (Chapters 9-11). In Chapter 12, Iran sets out certain specific reservations as to its own legal position in, and the scope of, these proceedings. These reservations arise from the Court's finding as to the admissibility of the U.S. counter-claim. Finally, Part V presents Iran's submissions both with regard to its claims and with regard to the U.S. counter-claim.

1.6 In addition to the Reply and Defence - which is Volume I - there are 5 volumes of evidentiary materials attached to this pleading. Volume II contains an expert report on the U.S. position in the Iraq-Iran war as well as documentary exhibits. Volume III contains reports on the continuing oil commerce between Iran and the United States contemporaneous with the attacks on the platforms. Volume IV contains statements by oil company and military personnel responsible for, or actually present on, the platforms at the time of the attacks. Finally, Volumes V and VI contain statements, evidence and expert reports relevant in particular to the United States' allegations concerning Iranian attacks on U.S. interests.

1.7 In Part V of its Memorial, Iran analysed in a preliminary way the substance of Iran's claim for compensation. This issue has not been addressed further in this pleading. Iran continues to reserve the right to defer until a subsequent stage of the proceedings a detailed discussion on the form and quantum of compensation owing.

1.8 Iran also reserves the right to respond to any new allegations or evidence that may be referred to in the United States' Rejoinder and in particular to any further allegations by the United States with regard to its counter-claim[1].

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[1] The United States has itself made a specific reservation in this regard (U.S. Counter-Memorial, para. 6.26). Iran addresses this issue further in Chapter 10 below.

CHAPTER 2. THE GENERAL CONTEXT UNDERLYING THE U.S. ATTACKS ON THE PLATFORMS

Section 1. Introduction

2.1 In both its Memorial and its Observations and Submissions on the U.S. Preliminary Objection Iran stressed to the Court the importance of understanding the general factual context underlying the U.S. attacks on the oil platforms[1]. Iran submits that the relevant factual context is the following:

- Iran was acting in self-defence in an imposed war in response to massive Iraqi aggression;

- Iraq was responsible for the so-called tanker war and nearly all commentators recognise that the Persian Gulf would have been entirely safe for shipping if the international community had taken action to stop Iraqi attacks on shipping;

- Iraq received substantial financial and military assistance in its war effort from its Persian Gulf allies, principally Kuwait and Saudi Arabia; and

- The United States also assisted Iraq politically, economically and militarily both in the war in general and in its operations in the Persian Gulf.

It is only against this background that the Court can appreciate the legality of the actions which are the subject of the present dispute.

2.2 The United States sought to avoid facing these issues in the jurisdictional phase. It argued that such issues were only relevant to claims over which the Court had no jurisdiction, and it relied on the bare assertion that the United States acted neutrally and was only concerned to protect freedom of navigation[2]. The United States did

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[1] *See*, Iran's Memorial, Chapters II and III, and Iran's Observations and Submissions, Annex, Sections A to D.

[2] *See*, for example, U.S. Preliminary Objection, Introduction and Summary, paras. 5-6.

not, however, explicitly contest a single one of the factual statements made by Iran concerning the underlying context.

2.3 The United States continues to seek to avoid these issues in the Counter-Memorial. It notes that the Court has concluded that its jurisdiction is limited to Article X(1) of the Treaty, and on that basis argues:

> "All of Iran's past allegations regarding all forms of alleged U.S. misconduct, other than the U.S. actions against the oil platforms, are accordingly no longer at issue, and the United States has not addressed them in this Counter-Memorial"[3].

This of course misstates the issue. Iran is not arguing that the Court has jurisdiction over a claim based on any other alleged U.S. misconduct[4]. It is arguing that a consideration of the factual context is relevant to an appreciation of what led the United States to attack a series of largely undefended commercial oil platforms operated by the National Iranian Oil Company ("NIOC"), and in particular to any consideration of the legality of such acts in the light of any alleged Iranian acts.

2.4 In reality, the United States has been unable to avoid addressing this underlying context and has itself sought to justify its own position in the war. Thus the United States asserts at paragraphs 1.12-1.13 of its Counter-Memorial that it was a "neutral party" in the conflict, that it was the policy of the United States to prohibit arms sales to both Iran and Iraq, and that it insisted that both belligerents should respect the neutrality of States not party to the conflict, and "the right of such [S]tates to navigate freely their vessels through, and engage in commerce in, the Persian Gulf"[5]. It is precisely such assertions as to the nature of U.S. policy at the time which Iran contests, and which are addressed in this Chapter. Similarly, the United States spends many pages of its Counter-Memorial seeking to justify its attacks on Iran's oil platforms by reference to Iran's alleged role in the so-called tanker war, specifically Iran's alleged attacks on neutral shipping and on U.S. vessels. Finally, the underlying context is relevant to the U.S. defence based on Article XX(1)(d) of the Treaty of

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3 U.S. Counter-Memorial, Introduction and Summary, para. I.13.

4 Not in these proceedings, and subject to the reservation made in Chapter 12, below.

5 U.S. Counter-Memorial, para. 1.13.

Amity that the "uninterrupted flow of maritime commerce in the [Persian] Gulf was essential to the economy and security interests of ... the United States"[6].

2.5 While such issues will be addressed in this Chapter, Iran would also draw the Court's particular attention to the Report of Professor Lawrence Freedman attached in Volume II hereto. Iran has asked Professor Freedman, a world-renowned expert on military, diplomatic and political history, to express his own independent view on the policy of the United States towards the Iraq-Iran war and on the situation in the Persian Gulf in particular. Professor Freedman is an independent expert, and Iran does not necessarily agree with every statement he makes. Where possible, Professor Freedman has used official U.S. sources and statements by senior U.S. administration officials[7]. His report speaks for itself, but it may be pointed out that, on the basis of the statements and evidence adduced in his report, Professor Freedman confirms a number of the points addressed by Iran in this Chapter:

- U.S. policy was not governed by how best to protect international shipping or freedom of navigation[8];

- U.S. policy during the war shifted from equivocal neutrality at the beginning to direct actions against Iran in the 1986-1988 period[9]; and

- Kuwait and Saudi Arabia gave substantial support to Iraq[10].

2.6 Professor Freedman's analysis only refers to published sources. Relatively little is known publicly about the covert operations conducted by the United States in support of Iraq. Information that is in the possession of Iran supports the view that the pattern of direct U.S. military support to Iraq was on an even more extensive scale than Professor Freedman suggests. This evidence will be referred to in what follows.

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6 *Ibid.*, para. 3.11.

7 *See*, Report of Prof. Freedman, Vol. II, para. 3; Prof. Freedman's other sources are listed in his bibliography.

8 *Ibid.*, para. 4(c).

9 *Ibid.*, para. 23.

10 *See*, in general, *ibid.*, paras. 33-45.

2.7 This Chapter will be kept brief, not least because of the detail in Professor Freedman's Report, but also because the United States has not sought to rebut the statements made by Iran in its Memorial and in its Observations and Submissions concerning the general context underlying the U.S. attacks.

Section 2. Iraqi Aggression against Iran

2.8 The most important aspect of the general context is the fact that Iran was acting in self-defence in an imposed war in response to massive Iraqi aggression. This basic fact is conspicuously ignored by the United States.

2.9 On 22 September 1980 Iraq launched simultaneous strikes against Iran's airfields (including Tehran airport) while its armies advanced along a 450-mile front into the west of Iran, an area containing some 90 percent of Iran's oil production[11]. For almost eight full years Iran was subject to continuous aggression from Iraq, an aggression which threatened Iran's territorial integrity, in one of the longest and most destructive conflicts of this century. Iraqi occupation of Iranian territory continued throughout the war. Even after Iran agreed unconditionally to a cease-fire pursuant to Resolution 598 on 18 July 1988, Iraq again refused to accept the cease-fire and continued its attacks on Iran, making even further incursions into Iranian territory than during its September 1980 invasion, and launching further chemical weapons attacks on Iran[12]. Iraq's occupation of Iranian territory did not end until August 1990 and the Iraqi invasion of Kuwait.

2.10 During this conflict, Iran's civilian population was subject to repeated missile and chemical weapons attacks. As early as 1981, Iran protested at such attacks to the Security Council. At the initiative of the Secretary-General, and at Iran's repeated request, independent experts visited both States to examine these protests. The reports on this issue in 1984, 1985, 1986, 1987 and 1988 by a fact-finding commission established by the Secretary-General all provided conclusive proof of Iraq's continuous use of chemical weapons against military and civilian targets. None of these reports found any evidence of chemical attacks by

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11 Iran's Memorial, Exhibit 9, p. 230.

12 *Ibid.*, pp. 242-243.

Iran[13]. In March 1988, after Iran had captured the Iraqi town of Halabja, Iraq attacked the town with chemical weapons, killing over 5,000 of its own citizens[14].

2.11 Iran will not dwell at length on the Security Council's reaction during the conflict to Iraq's aggression or to Iraq's use of chemical weapons. This issue has already been discussed in Iran's earlier pleadings, and Iran's position has not been questioned by the United States[15]. Professor Freedman also discusses the U.N. response at paragraphs 9-14 of his report, largely confirming Iran's position. Sir Anthony Parsons, then British Ambassador to the United Nations, summed up his view on the Council's reaction as follows:

> "Given that the Iran-Iraq war was precisely the kind of conflict which the United Nations was created to deter or, failing that, to bring to a conclusion, and that the deliberations of the Security Council were not vitiated by super-power rivalry, the Council's performance was, not to mince words, contemptible"[16].

The Security Council did not issue its first Resolution until one week after Iraq's invasion of 22 September 1980. The Security Council failed to recognise that there had been a breach of the peace let alone an Iraqi aggression, failed to demand Iraqi withdrawal to internationally recognised boundaries, and subsequently failed to condemn unequivocally Iraqi chemical weapons attacks and Iraq's attacks on shipping in the Persian Gulf. Only in 1987 was a breach of the peace acknowledged. As will be discussed further below, the United States was at the forefront of opposition to any Security Council action which would be against Iraq's interests[17].

2.12 The United States has sought in the past to argue that Iran was the recalcitrant party in bringing an end to the conflict. Despite the unacceptable nature of many Security Council resolutions, Iran repeatedly showed itself willing to accept a solution moderated by the United Nations, and in particular worked throughout the conflict with the office of the Secretary-General to achieve this end. Iran's positive reaction to Resolutions 582

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13 *See, ibid.*, Exhibits 11 and 12.
14 *Ibid.*, Exhibit 20.
15 *See*, Iran's Memorial, paras. 1.58-1.74, and Iran's Observations and Submissions, Annex, paras. 5-7.
16 Exhibit 1, Vol. II, p. 44.
17 *See*, para. 2.29, below.

(1986) and 598 (1987) has been discussed in Iran's Memorial[18]. Iran's position on Resolution 598 (1987) is confirmed by Professor Freedman's analysis[19]. It was Iraq which violated the cease-fire provisions of this Resolution.

2.13 Eleven years after the conflict began Iran's position was vindicated. Iran recalls to the Court the conclusions of the Further Report of the Secretary-General to the Security Council on the Implementation of Security Council Resolution 598 (1987). This Report, dated 9 December 1991, placed full responsibility for the conflict on Iraq. The Report began by noting that:

> "... the war between Iran and Iraq, which was going to be waged for so many years, was started in contravention of international law, and violations of international law give rise to responsibility for the conflict"[20].

It went on to note that the specific concern of the international community in this context was "the illegal use of force and the disregard for the territorial integrity of a Member State"[21]. The Report then gave its finding that the "outstanding event" amongst these violations was:

> "... 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*"[22].

2.14 The Report pointed out that Iraq's explanations for its actions on 22 September 1980 "do not appear sufficient or acceptable to the international community" and added that Iraq's aggression against Iran "*which was followed by Iraq's continuous occupation of Iranian territory during the conflict*" was "in violation of the prohibition of the use of force, which is regarded as one of the rules of *jus cogens*"[23].

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18 Iran's Memorial, paras. 1.63-1.71.
19 *See*, Report of Prof. Freedman, Vol. II, paras. 57-66.
20 Iran's Memorial, Exhibit 42, p. 2.
21 *Ibid.*
22 *Ibid.*; emphasis added.
23 *Ibid.*; emphasis added.

Section 3. Iraqi Attacks in the Persian Gulf

2.15 There is no doubt that Iraq started the so-called "tanker war" as a matter of deliberate war policy[24]. This policy appears to have been adopted on the basis of U.S. recommendations. As one author notes:

> "American foreign-policy specialists helped Iraq evolve the strategy that came to be known as 'the tanker war', arguing forcefully for Iraqi attacks on shipping to and from Iran in the [Persian] Gulf as a way of focusing world attention on the war".[25]

Taking the war into the Persian Gulf had two main aims for Iraq - to weaken Iran economically and to internationalise the conflict[26].

2.16 The United States acknowledges that Iraq started the tanker war:

> "In 1984 ... Iraq commenced attacks against tankers carrying Iranian oil through the [Persian] Gulf, seeking to disrupt Iran's oil industry and to deprive Iran of oil revenues. Iraq's attacks, accomplished largely by fighter aircraft, targeted tankers exporting oil from Iranian terminals - in most cases on the Iranian side of the [Persian] Gulf, within 80 nautical miles (148 kilometers) of Kharg Island"[27].

2.17 This is almost all the United States has to say about Iraq's role in the tanker war. It is inaccurate on a number of points. First, Iraq's attacks began in 1981, when Iraq attacked and destroyed a Panamanian tanker, the *Louise I*[28]. Second, Iraqi attacks were carried out not only by fighter aircraft but also by ground-based and ship-based missiles, helicopters and by mines[29]. Third, Iraq did not just attack in or near Kharg Island but was able to carry out attacks anywhere in the Persian Gulf, with numerous attacks on vessels near Sirri Island, Lavan Island and Larak Island, as well as on some of Iran's oil platforms in the

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24 Exhibit 2 , Vol. II, page 48.

25 Exhibit 3, Vol. II, p. 166. *See,* also, Report of Prof. Freedman, Vol. II, para. 19, fn. 17.

26 *See*, Report of Prof. Freedman, Vol. II, paras. 16-19.

27 U.S. Counter-Memorial, para. 1.01.

28 *Ibid.*, Exhibit 9, page 1.

29 For helicopter attacks, *see*, for example, U.S. Counter-Memorial, Exhibit 2, p. 57. For mine attacks, *see*, for example, the references in Iran's Observations and Submissions, Annex, para. 45.

southern Persian Gulf[30]. Finally, Iraq did not just attack vessels trading with Iran. As will be discussed further in Section 8 below, Iraq attacked a number of vessels of "friendly" States, including the *U.S.S. Stark*, a U.S. naval vessel which was in international waters when it was hit, as well as Saudi and Kuwaiti vessels, and even a U.A.E. oil rig[31]. As one author notes, Iraq operated a "shoot first - identify later" policy[32]. A U.S. military analyst confirms that "few Iraqi ship attacks were preceded by visual identification[33]". The result was that all vessels were potential targets for Iraqi attack.

2.18 Iraq's attacks increased in number and in violence as the war went on, specifically from 1984 when it gained access to Exocet missiles fired from Super Etendard aircraft, and through its use of Chinese Badger bombers armed with C601 missiles with a 515 kg warhead[34].

2.19 As numerous commentators have noted, the international community took no steps either to stop or even to condemn Iraqi attacks. Sir Anthony Parsons notes that -

> "... there was no specific, international condemnation of the Iraqi attacks and no serious attempts made to persuade or coerce Iraq into desisting from them"[35].

Professor Freedman refers to various proposals for multilateral or U.N.-sponsored efforts to protect shipping, noting that these did not succeed because it was felt that Security Council approval would not be forthcoming and that they would be challenged by Iraq[36].

2.20 It is equally clear that Iran had absolutely no interest in a "tanker war". Iran on several occasions requested an end to Iraq's hostile actions in the Persian Gulf[37]. As Sir Anthony Parsons puts it, "Iran had no interest in endangering the sea lanes through which

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30 *See*, Statement of Mr. Hassani, Vol. IV, paras. 14-21.

31 *See*, Iran's Memorial, para. 1.38, 1.92-1.93, and 1.105; and also, Report of Prof. Freedman, Vol. II, para. 47.

32 Iran's Memorial, Exhibit 15.

33 *Ibid.*, Exhibit 13, p. 606.

34 U.S. Counter-Memorial, Exhibit 2, p. 32.

35 Iran's Observations and Submissions, Exhibit 16, p. 19.

36 Report of Prof. Freedman, Vol. II, paras. 54-55.

37 *See*, Report of Prof. Freedman, Vol. II, para. 53.

all her exports and most of her imports passed"[38]. This view is reflected by another commentator:

> "... the Iranians are the party most interested in keeping the [Persian] Gulf open to tankers ... The United States could do far more to pacify the [Persian] Gulf, if that is what it really wants to do, by persuading Iraq to stop its attacks on Iranian shipping, which are what started and perpetuate the naval war in the [Persian] Gulf"[39].

Section 4. Kuwait and Saudi Arabia supported Iraq

2.21 Kuwait and Saudi Arabia, and certain other Persian Gulf States, actively supported the Iraqi war effort. Iran has described in its Memorial and in its Observations and Submissions the nature of this support[40]. None of these points have been rebutted or even contested by the United States. Further details of the nature of this support are provided in Professor Freedman's Report[41].

2.22 These facts concerning Kuwaiti and Saudi support are not controversial. The nature of this support was known to the United States at the time. A November 1987 Report to the Senate Committee on Foreign Relations stated explicitly that Kuwait had "chosen to serve as Iraq's entrepot and thus as its de facto ally"[42]. The same Report noted that "from the beginning of hostilities ... Kuwait put aside its past differences with Iraq" and entered into a "'strategic marriage of convenience' with Baghdad"[43]:

> "Kuwait permitted the use of its airspace for Iraqi sorties against Iran, agreed to open its ports and territory for the transshipment of war materiel (mostly of French and Soviet origin), and joined with the Saudis in providing billions of dollars in oil revenues to help finance the Iraqi war effort. In clear and unmistakable terms, Kuwait took sides"[44].

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38 Iran's Observations and Submissions, Exhibit 16, pp. 19-20.

39 N.R. Keddie, in Iran's Memorial, Exhibit 34, p. 46.

40 *See, ibid.*, paras. 1.45-1.48, and Iran's Observations and Submissions, Annex, paras. 26-28.

41 *See*, Report of Prof. Freedman, Vol. II, paras. 33-45.

42 Iran's Memorial, Exhibit 28, p. 27. One commentator refers to "500 to 1000 heavy trucks a day carting goods to Iraq" from Kuwait, even at the beginning of the war. *See*, Exhibit 4, Vol. II, p. 77.

43 Iran's Memorial, Exhibit 28, p. 36.

44 *Ibid.*, p. 37; emphasis added.

2.23 Saudi Arabia and Kuwait provided massive financial aid to Iraq for its war effort and under the War Relief Crude Oil Agreement committed themselves to providing to Iraq the proceeds of neutral zone crude sales[45]. By the end of the war "Baghdad owed the best part of 100 billion dollars to the oil-rich Arab [S]tates which had financed [its] war effort"[46].

2.24 While such financial aid and maritime trade with these countries supported the Iraqi war effort, the same countries also supplied military aid. In some cases, this was logistical. Cordesman and Wagner, two U.S. commentators, note that Kuwait "seems to have allowed the Iraqi Navy to send small ships down the Sebiyeh waterway between Kuwait and Bubiyan Island" and thus gain access to the Persian Gulf[47]. There are also numerous references to Saudi Arabia providing AWACS intelligence reports to Iraq, and both sides allowing use of their airspace and even their territory as staging posts for Iraqi attacks[48]. Iranian intelligence reports confirm these points[49].

2.25 However, these States were also direct or indirect suppliers of arms to Iraq. The Report to the Senate Committee cited above refers to Kuwaiti ports being used for transshipment of war material[50]. Moreover, several Persian Gulf States were known to have issued end-user certificates for military material in fact destined for Iraq. Evidence produced in the Scott Report, an independent judicial enquiry into the British Government's arms sales practice to Iraq during this period, confirms this:

> "... the Iraqis have no problems over obtaining equipment thanks to the willingness of countries such as Saudi Arabia and Jordan to act as the notional end-user".
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> ...
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> An SIS Report dated 13 November 1986 reported information that end-user certificates had been supplied by Abu Dhabi (6 shipments), Jordan

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45 *See*, Iran's Memorial, Exhibits 25, 26 and 27, p. 105.
46 Exhibit 1, Vol. II, p. 55.
47 Iran's Observations and Submissions, Exhibit 18, p. 278.
48 On AWACS, *see*, Report of Prof. Freedman, Vol. II, para. 25(F).
49 *See*, Statement of Gen. Fadavi, Vol. V, paras. 9-20.
50 *See*, also, *ibid.*

> (11 shipments), Oman and Saudi Arabia (1 shipment) for munitions which had been passed on to Iraq"[51].

In other words, not only were proceeds from the commercial maritime trade of a number of Persian Gulf States being used to finance the Iraqi war effort, but also there was significant trade in military equipment going to the ports of these countries, but destined ultimately for Iraq. Again, the United States is careful to avoid consideration of these issues.

2.26 Finally, it should be noted that Kuwait has publicly apologized for its support of Iraq in the war. For example, in an interview in *Der Spiegel*, in September 1994, Kuwait's Foreign Minister stated:

> "I would like to use this opportunity for us to ask Iran publicly... for forgiveness for us having supported Iraq in the war against Iran from 1980 to 1988. We committed a great error then"[52].

Earlier, in August 1990, on a visit to Tehran, the Foreign Minister had expressed regret for the position taken by his Government in the war, as well as for the resolutions adopted by the Gulf Cooperation Council at the time, which he deplored and confirmed had been made under pressure from Iraq. A similar message was given in 1992 by another Kuwaiti official[53]. These official recognitions of Kuwait's position make it impossible for the United States to assert that Kuwait was a neutral in the conflict.

Section 5. The United States disregarded the Obligations of a Neutral State

2.27 The United States asserts that it was neutral in the conflict, although it has not actually sought to rebut a single one of the examples of U.S. support for Iraq cited in Iran's Memorial or in Iran's Observations and Submissions[54]. Nor has it taken issue with Iran's position as to the duties incumbent on the United States in the face of Iraq's aggression against Iran whether under general international law, the U.N. Charter or under Security Council

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51 Exhibit 5, Vol. II, para. E2.14.
52 Exhibit 13, Vol. II.
53 *Ibid.*
54 *See*, Iran's Memorial, paras. 1.75-1.90, and Iran's Observations and Submissions, Annex, paras. 8-19.

Resolutions, the latter of which explicitly called on other States "to exercise the utmost restraint and to refrain from any act which may lead to a further escalation and widening of the conflict". This language from Resolution 479 (1980) was repeated virtually word for word in Resolution 598 of 20 July 1987 adopted under Articles 39 and 40 of the Charter[55].

2.28 As the neutral State which it asserts itself to be, the United States had to comply with the basic duties of the law of neutrality, namely the duty of abstention and the duty of impartiality. However, it is well-known, and widely confirmed by a variety of sources, including U.S. officials, that the United States supported Iraq diplomatically, politically, economically and militarily, while at the same time taking increasingly hostile actions against Iran. It was this support for Iraq and hostility to Iran which ultimately led the United States to attack Iran's oil platforms.

2.29 On the diplomatic and political front the United States supported Iraq in the Security Council and elsewhere. In the Security Council it opposed all attempts to identify Iraq as the aggressor or in any way to blame Iraq either for refusing to withdraw to internationally recognised boundaries, or for its actions in the tanker war, or for its use of chemical weapons[56]. Javier Perez de Cuellar, then Secretary-General, noted that the United States "was unremittingly hostile to Iran, and therefore it was not inclined to support any Security Council action that might be favourable to Tehran"[57].

2.30 The United States also acted to rehabilitate Iraq by taking Iraq off its list of States supporting terrorism in 1982 and by resuming full diplomatic relations with Iraq in 1984[58]. For the U.S. Defense Department's Director for Counter-Terrorism, there was no doubt about Iraq's continued involvement in terrorism. The true reason for removing Iraq from the list "was to help [Iraq] succeed in the war against Iran"[59]. Under U.S. law, removal of Iraq from the list of States supporting terrorism and renewal of full diplomatic relations

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55 Iran's Memorial, Exhibit 24, p. 23.

56 *See*, Iran's Observations and Submissions, Annex, para. 10; *see*, also, Report of Prof. Freedman, Vol. II, para. 25(H).

57 Exhibit 5, Vol. II, p. 178; emphasis added.

58 Report of Prof. Freedman, Vol. II, para. 25(A) and (G).

59 Exhibit 7, Vol. II.

allowed an increase in trade with Iraq, the granting of large U.S. financial credits, and the export to Iraq of dual-use equipment.

2.31 As a result, trade between the United States and Iraq increased substantially during the course of the war. Between 1983 and 1989, trade between the two countries grew from $571 million to $3.6 billion[60]. Substantial U.S. Export-Import (EXIM) Bank and Commodity Credit Corporation credits were also granted to enable Iraqi purchase of U.S. goods, and as much as $730 million of direct exports of sensitive dual-use technology occurred[61].

2.32 The United States also provided direct and indirect military assistance to Iraq. This included sharing of intelligence information, joint military briefings and providing assistance to Iraq in obtaining weapons from third countries. These facts have already been referred to in Iran's pleadings and have not been contested by the United States[62]. The intelligence-sharing arrangement has been referred to explicitly in U.S. Congressional Records, its purpose being described there as to provide Iraq with "*intelligence and advice with respect to the pursuit of the war*"[63]. The AWACS assistance, either direct or through Saudi Arabia, is also well-attested[64]. The U.S.-supplied data was said to include satellite reconnaissance photos of strategic Iranian sites for targeting bombing raids, data on Iranian air force and troop positions, communications intercepts, and other vital information[65]. One commentator notes that Iraq received:

> "... reports every 12 hours on the Iranian military activity on the ground - culled from the information gathered from the many American satellites orbiting the [Persian] Gulf and from the American Awacs - which were passed on to Baghdad via Riyadh. This information played a vital role in aiding the effectiveness of the operations mounted by Baghdad"[66].

These facts are also confirmed by Iraqi sources[67].

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60 *Ibid.*
61 Report of Prof. Freedman, Vol. II, para. 25(B), (C) and (D).
62 *See*, for example, Iran's Observations and Submissions, Annex, para. 12.
63 Iran's Memorial, Exhibit 47; emphasis added.
64 Exhibit 4, Vol. II, p. 120. *See*, also, Report of Prof. Freedman, Vol. II, para. 25(F).
65 Exhibit 8, Vol. II, p. 46.
66 D. Hiro, at Exhibit 4, Vol. II, p. 160.
67 Exhibit 9, Vol. II.

2.33 This support started in 1982, at a critical moment in the conflict after Iran's recapture of Khorramshahr, when it was perceived that there was a real risk of Iranian victory. This has also been confirmed under oath in judicial proceedings in the United States by Howard Teicher, a staff member of the U.S. National Security Council from 1982-1987:

> "6. In June, 1982, President Reagan decided that the United States could not afford to allow Iraq to lose the war to Iran. President Reagan decided that the United States would do whatever was necessary and legal to prevent Iraq from losing the war with Iran...
>
> 7. CIA Director Casey personally spearheaded the effort to ensure that Iraq had sufficient military weapons, ammunition and vehicles to avoid losing the Iran-Iraq war... the United States actively supported the Iraqi war effort by supplying the Iraqis with billions of dollars of credits, by providing U.S. military intelligence and advice to the Iraqis, and by closely monitoring third country arms sales to Iraq to make sure that Iraq had the military weaponry required. The United States also provided strategic operational advice to the Iraqis to better use their assets in combat. For example, in 1986, President Reagan sent a secret message to Saddam Hussein telling him that Iraq should step up its air war and bombing of Iran. This message was delivered by Vice President Bush who communicated it to Egyptian President Mubarak, who in turn passed the message to Saddam Hussein ... I authored Bush's talking points for the 1986 meeting with Mubarak"[68].

2.34 Apart from intelligence assistance, observers also confirm that the United States specifically encouraged arms sales to Iraq. One author reports a senior U.S. diplomat in Baghdad proposing that there be a "covert selective lifting" of U.S. "restrictions on third-party transfers of U.S.-licensed military equipment to Iraq"[69]. According to the same author such arms apparently were received by Iraq from Egypt, Jordan, Kuwait and Saudi Arabia and "[a]mong the weapons so supplied were TOW anti-tank missiles, Huey [*sic*] helicopters, small arms, mortars, and one-ton MK-84 bombs"[70].

2.35 At the same time as it was pursuing this policy of support for Iraq, the United States had put into place Operation Staunch against Iran in the spring of 1983. The

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[68] Exhibit 10, Vol. II, paras. 6 and 7. This statement was filed in an action before the Florida District Court. The United States, which was a party to the action, challenged Mr. Teicher's statement largely on the grounds of its irrelevance to that action.

[69] B.W. Jentleson, at Exhibit 8, Vol. II, p. 45.

[70] *Ibid.*

aim of this policy was to stop or discourage all third States as far as possible from selling arms to Iran. Caspar Weinberger, then Secretary of Defense, confirmed that the aim of this policy was to limit Iran's "ability to secure weapons, ammunition and other supplies"[71]. All such actions have to be considered in the light of the fact that Iran was subject to aggression and that Iraq was responsible for the conflict. At a minimum, the United States had the obligation to act neutrally - to treat each belligerent equally and impartially.

2.36 U.S. support for Iraq and its actions against Iran were most obvious with regard to the situation in the Persian Gulf. Here intimidation and direct action were used against Iran. On countless occasions, U.S. military forces violated Iran's territorial sovereignty, infringed its airspace and intercepted its aircraft and naval vessels in violation of international law[72]. The United States also carried out electronic jamming of Iran's communications while at the same time openly communicating with Iraqi forces engaged in attacks against shipping[73].

2.37 One example of U.S. assistance to Iraq was its decision to reflag and provide convoy protection for Kuwaiti tankers. Sales proceeds from the crude supplied by these tankers formed the basis for Kuwait's continued financial support for Iraq's war effort. The United States appeared to justify Iraqi attacks on the basis that international shipping trading with Iran was a legitimate military target. Professor Freedman refers to President Reagan's statement in 1984 that "the enemy's commerce and trade is a fair target", contrasting that with attacks on vessels trading with "neutrals" like Saudi Arabia and Kuwait[74]. Such a distinction was necessary to U.S. policy. It explains why the United States would not support multilateral efforts to protect international shipping because this would have hindered Iraq's attacks on shipping trading with Iran[75]. It also explains why, until near the end of the conflict, the U.S. Navy's instructions were only to protect U.S. flag vessels[76]. Any wider protection could also potentially have hindered Iraq. Hence also the need to reflag Kuwaiti vessels under the U.S. flag. However, the United States cannot make this distinction. Both Saudi Arabia

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71 *See*, Exhibit 11, Vol. II, p. 1449.

72 *See*, Iran's Memorial, Exhibit 31.

73 *See, ibid.*, and Exhibit 48; *see*, also, Statement of Col. Rezai, Vol. VI.

74 Report of Prof. Freedman, Vol. II, para. 71.

75 Professor Freedman refers to the proposals to provide international protection to shipping or reflagging under a U.N. flag. Report of Prof. Freedman, Vol. II, paras. 55-56.

76 *See*, Iran's *Observations and Submissions*, Annex, para. 24.

and Kuwait were exporting crude oil on behalf of Iraq and were allowing their ports to be used for Iraqi supplies.

2.38 Other U.S. commentators have recognised that any distinction between shipping for Kuwait and shipping for Iraq was spurious. The U.S. Assistant Secretary of Defence at the time noted that in reflagging Kuwaiti ships the United States "became *de facto* allies of Iraq"[77]. Senator Sam Nunn, Chairman of the Senate Armed Services Committee made the same point, noting that "[t]he U.S. decision to protect Kuwaiti tankers is viewed in the region *as a clear alignment with Iraq and its [Persian] Gulf allies*"[78]. As one Congressman noted in considering U.S. reflagging policy:

> "The reality is that not only we are tilting toward Iraq, but we *are trying to help Iraq win the sea war by guarding Iraqi and Kuwaiti shipping*"[79].

2.39 It should also not be forgotten that Kuwait, unlike the United States, has repeatedly and publicly apologised to Iran for its support of Iraq during this period[80].

2.40 Thus, U.S. policy was not determined by concerns for international shipping or freedom of navigation. Rather it was part of an overall policy of support for Iraq, about which U.S. officials have been explicit. In general terms, Henry Kissinger has stated baldly that "the Reagan and Bush administrations supported Iraq against Iran"[81]. In July 1987, a U.S. spokesman admitted that the United States had *"an important stake in Iraq's continuing ability to sustain its defenses*"[82]. Then Vice-President Bush stated that at the time, the United States was looking for means "to bolster Iraq's ability and resolve to withstand Iranian attacks"[83]. Assistant Secretary Korb noted that in reflagging Kuwaiti ships the United States had a hidden agenda:

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77 Iran's Memorial, Exhibit 51; emphasis added.
78 *Ibid.*, Exhibit 32, p. 1469; emphasis added.
79 Exhibit 12, Vol. II, p. 107; emphasis added.
80 Exhibit 13, Vol. II.
81 Iran's Memorial, Exhibit 45.
82 *Ibid.*, Exhibit 49, p. 66; emphasis added.
83 *Ibid.*, Exhibit 50.

"... when we went in, we wanted to ensure that Iran didn't win that war from Iraq. That was our real objective, and so we were doing a lot of things to ensure that we could teach the Iranians a lesson"[84].

2.41 It was this hostility to Iran and support for Iraq, combined with a determination to "teach the Iranians a lesson", which led the United States to make a series of direct attacks against Iran:

- Destruction of the *Iran Ajr* on 21-22 September 1987;

- The sinking of three Iranian patrol boats on 8 October 1987 near Farsi Island;

- The attack of October 1987 on the Reshadat platforms closely followed by the imposition of U.S. sanctions against Iran;

- The attack of April 1988, at the same time as a major Iraqi offensive on the Fao peninsula, on the Salman and Nasr platforms, as well as simultaneous attacks on Iranian naval vessels and aircraft; and

- The attack of July 1988 on various Iranian patrol boats, followed by the shooting-down of a civil airliner, IR 655, causing the loss of 290 lives.

Section 6. Iran's Position in the Persian Gulf

2.42 In considering Iran's position in the Persian Gulf, the United States ignores the entirety of the points made in the preceding Sections of this Chapter. It ignores the fact that Iraqi attacks went uncondemned. It ignores the financial and military assistance given by other States to Iraq, assistance which depended on crude oil and military hardware shipments through the Persian Gulf, and which in Iran's view were a clear violation of these States' professed neutrality. It ignores its own support for Iraq, and the significance of its reflagging of Kuwaiti vessels.

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84 *Ibid.*, Exhibit 51; emphasis added.

2.43 All these facts are however essential to an appreciation not only of U.S. actions in the Persian Gulf, but also of Iran's actions. As to these actions, Iran comments as follows:

> First, Iran should be judged by its actions and not by political statements made by some of its officials. Such statements, made in time of war, necessarily with political and other considerations in mind, cannot be determinative of Iran's actual responsibility.
>
> Second, it should not be forgotten that only one percent of shipping passing through the Persian Gulf (there were almost 600 monthly transits by ships of all flags) was affected by the "tanker war", with an even smaller percentage suffering any serious damage[85].
>
> Third, by far the greatest sufferers in the "tanker war" were vessels trading with Iran. Even U.S. sources acknowledge that Iraqi attacks against shipping continued from 1981-1984 without international condemnation and without Iranian response[86].
>
> Fourth, U.S. Exhibits filed with the Counter-Memorial confirm that Iran neither had the weaponry nor the intention to inflict major damage on other vessels:
>
> "[The air launched missiles used by Iran] are ... of little use against large ships and can be fired only by day. *At sea, the Iraqis had weapons of destruction, while the Iranians had only weapons of harassment* ... The Iranian navy did not have many ships suitable for the attack of merchantmen"[87].
>
> Fifth, even the various tables of attacks attached to the U.S. pleadings show that out of an estimated 230 alleged Iranian attacks, in over half no damage or

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85 *Ibid.*, Exhibit 32, p. 1467.

86 *Ibid.*

87 U.S. Counter-Memorial, Exhibit 18, pages 5-7; emphasis in original.

only very slight damage was caused, and in almost 200 cases there is no evidence of any serious injuries. There are only a handful of reports of vessels being severely damaged or of constructive total losses as a result of alleged Iranian attacks[88].

Sixth, Iran was engaged in extensive stop-and-search activities throughout the war precisely in order to stop the illegal transport of goods destined directly or indirectly for Iraq[89]. These actions were consistent with international law and recognised to be so[90]. In many instances vessels resisted stop-and-search. In some cases, Iranian forces were able to arrest and search the vessel in question. In others, although the vessel did not show that the goods were destined for Iraq, it was known that Iraq was the "end-user"[91].

Finally, it should be noted that no other State has brought any action against Iran as a result of Iran's alleged attacks. As noted above, Kuwait has apologised to Iran for its role in the war.

Section 7. Iran's Alleged Attacks on the United States

2.44 The large part of the U.S. allegations concerning Iran's actions in the tanker war relate to alleged actions against non-U.S. flag vessels. The United States' concern for non-U.S. flag shipping is a pretence. At the time, the United States did nothing to prevent Iraqi attacks on non-U.S. flag shipping. U.S. naval forces were instructed not to take actions to defend non-U.S. flag shipping, and the United States has never sought to argue that its attacks on the platforms were justified by collective self-defence, *i.e.*, the defence of other States whose flagged vessels might be affected[92].

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88 *See*, also, Iran's Observations and Submissions, Annex, para. 29. Moreover, at least 70 percent of all attacks were, according to U.S. sources themselves, attributed to Iraq. *See*, Iran's Memorial, Exhibit 32, p. 1467.

89 *See*, Statement of Gen. Fadavi, Vol. V, paras. 33-39.

90 For the U.S. attitude, *see*, Report of Prof. Freedman, Vol. II, para. 34, fn. 58.

91 *See*, Iran's Observations and Submissions, Annex, para. 28; *see*, also, Statement of Gen. Fadavi, Vol. V, paras. 33-39.

92 *See*, Iran's Observations and Submissions, Annex, paras. 20-31, for a more detailed discussion of this issue.

2.45 The real focus of the U.S. complaint is that U.S. forces and U.S. flag vessels were subject to specific attacks by Iran, and in particular that the alleged Iranian attacks against the *Sea Isle City* and the *Samuel B. Roberts* were the culmination of a pattern of hostile acts by Iran against the United States.

2.46 This does not reflect the position taken by U.S. Administration officials or military personnel at various times during the conflict. Caspar Weinberger noted that Iranian forces "clearly demonstrated ... a decided intent to avoid American warships"[93]. A July 1987 State Department Bulletin confirms this:

> "To date, Iran has been careful to avoid confrontation with U.S. flag vessels when U.S. Navy vessels have been in the vicinity"[94].

The Commander of the *U.S.S. Sides*, a U.S. naval vessel operating in the Persian Gulf at the time, stated as follows:

> "My experience was that the conduct of Iranian military forces ... was pointedly non-threatening. They were direct and professional in their communications, and in each instance left no doubt concerning their intentions"[95].

2.47 The United States refers to three U.S. flag vessels which it alleges were subjected to attack by Iran, as well as "at least six" alleged attacks on U.S.-owned vessels flying the flags of other States. The three U.S.-flagged ships were the *Bridgeton*, the *Sea Isle City* and the *Samuel B. Roberts*. While the substance of these allegations will be addressed in Chapters 4 and 5 below, Iran would note here that two of these vessels were reflagged Kuwaiti tankers. The link between these vessels, which remained Kuwaiti-owned, and the United States was entirely artificial[96]. Moreover, Kuwait's role in the war has been discussed above. The revenues from the trade conducted by these tankers was being used specifically to support

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93 Iran's Memorial, Exhibit 44.
94 *Ibid.*, Exhibit 54; emphasis added.
95 *Ibid.*, Exhibit 55.
96 *See*, Exhibit 14, Vol. II, p. 161.

the Iraqi war effort. The reflagging and protection of these tankers thus provided significant support to Iraq's war effort.

2.48 The alleged attacks on the U.S.-owned (but not U.S.-flagged) vessels will be addressed in the context of the U.S. counter-claim. Attacks against such vessels (even if attributable to Iran) cannot be considered as attacks against the United States giving rise to a right of self-defence according to Article 51 of the Charter. As already noted, the U.S. Navy's own operating instructions at the time confirm that no protection would be offered to non-U.S. flag vessels.

2.49 Although there were no fatalities in the attacks on the *Bridgeton*, *Sea Isle City* and the *Samuel B. Roberts*, there were injuries, and damage to the vessels. However, and irrespective of the question of responsibility for these incidents, such damages must be set against the overwhelming political, economic and military support given by the United States to Iraq in a war which was started by Iraq's aggression, for which Iraq has been held responsible, and which cost hundreds of thousands of Iranian lives.

Section 8. Iraq's Attacks on "Friendly" Targets

2.50 It is also a relevant aspect of the background to this case that Iraq frequently attacked "friendly" targets whether by accident or by design. Professor Freedman refers to several Iraqi attacks on Saudi and Kuwaiti-flagged vessels which were picking up crude from Iran's Kharg Island, Iraq's aim being to dissuade those countries from allowing their flagged vessels to trade with Iran[97]. Reference is also made to an Iraqi attack on a U.A.E. oil rig apparently to encourage the Emirates to lend greater support to the Iraqi war effort[98].

2.51 This was a pattern throughout the war. As early as 1984, the Middle East Economic Survey noted as follows:

> "Perhaps the most striking feature of Iraq's attacks on shipping in the [Persian] Gulf over the past week has been not so much their escalation in intensity as the misdirection of their targets. One of them turned out to be a Greek products

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97 Report of Prof. Freedman, Vol. II, paras. 47-48.

98 *Ibid.*, para. 47.

> tanker chartered by Kuwait and another a Saudi offshore drilling supply vessel. When attacked both of these vessels appear to have been quite a long way from Kharg Island and well outside the exclusion zone declared by Iraq in 1982. Not surprisingly, the whole affair has been a cause of embarrassment and dismay in the two [Persian] Gulf states concerned which have been among the staunchest backers of Iraq in its three and a half year old war with Iran"[99].

There are numerous examples of such conduct. As the same source notes, in 1985, the *Serifos* travelling in ballast from Saudi Arabia to Kuwait was reported as having been struck by Iraqi jets[100]. Even in 1988 such attacks continued:

> "Iraqi bombers on successive nights dropped air-launched Silkworm missiles. One of them crashed into a fully-loaded Danish supertanker that had just left the port of Iraq's ally, Saudi Arabia. Two other Silkworms dropped the following night roared past a U.S.-led convoy of reflagged Kuwaiti tankers before they crashed into the sea. Kuwait is also an Iraq ally"[101].

2.52 The best known example was the Iraqi attack on the *U.S.S. Stark*. This attack was conducted well outside the Iraqi exclusion zone, apparently by a converted civilian plane[102]. There have been persistent reports that Iraq had hoped that the blame for this attack would fall on Iran, and that only when this proved impossible did it take responsibility for the attack[103]. Whatever the truth of this, it was the U.S. policy of treating Iraq as friendly and taking no steps to condemn or stop Iraqi attacks which led to the death of 37 U.S. sailors in this incident.

Section 9. The Essential Security Interests of Iran and the United States

2.53 There can be no issue about the essential security interests of Iran in this Case. Iran was subject to aggression, and its position has been vindicated - although without any compensation of any kind - by the Secretary-General's Report. In the Persian Gulf, Iran was faced with Iraqi attacks against its commercial shipping, attacks which were unfortunately not met with timely condemnation by the international community, and which were

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99 Exhibit 15, Vol. II. The Iraqi exclusion zone referred to in this citation is shown on Map 2 attached to Iran's Memorial. Iran declared a war zone which, unlike an exclusion zone, is legal under international law. *See*, Iran's Memorial, para. 1.42.

100 Exhibit 15, Vol. II.

101 Iran's Memorial, Exhibit 68.

102 Statement of Col. Pakan, Vol. VI, paras. 8-12.

103 *See*, for example, Report of Prof. Freedman, Vol. II, para. 47.

effectively supported by the United States. Iran cannot now be accused by the United States for actions which, even on the United States' own case, were markedly lesser in scope than Iraq's actions. All Iran's interests lay in keeping the Persian Gulf safe, and Iran sought a cease-fire in the Persian Gulf.

2.54 The United States describes its essential security interests at this time in paragraphs 3.11-3.12 of its Counter-Memorial. These are said to include the "uninterrupted flow of maritime commerce", which the United States argues - in a telling phrase -

> "... was severely threatened by Iran's repeated attacks on neutral vessels which were neither carrying contraband nor visiting Iraqi ports".

According to the United States, these attacks made navigation hazardous, caused damage and financial loss, and increased insurance costs.

2.55 The United States rests its entire case that the alleged Iranian attacks were different from Iraqi attacks on the assertion that the vessels allegedly attacked by Iran were not visiting Iraqi ports. As already shown, and quite apart from any question of Iran's responsibility for such attacks, this distinction cannot be sustained. By entering the Persian Gulf to protect Kuwaiti vessels, the United States actually increased the risk to shipping. The attack on the *Stark* was a prime example of the result of this policy[104].

2.56 In any event, the United States simply does not show how its own essential security interests suffered as a result of hazardous navigation, what damage it suffered if any, nor how it was affected by increased insurance costs, even assuming these could be regarded as *essential security* interests. Nor does it show why such factors, assuming they did exist, were the responsibility of Iran and not Iraq. Finally, the United States fails to comment on the fact that maritime commerce did continue largely uninterrupted.

2.57 The other "essential security interests" to which the United States points relate to the alleged Iranian attacks on U.S. warships and commercial vessels, the threat to U.S. nationals, and the impeding of U.S. escort duties. Iran's alleged responsibility for these

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104 *See*, also, Report of Prof. Freedman, Vol. II, paras. 46-49.

attacks will be discussed in subsequent Chapters. Suffice it to note here again that it was U.S. policy to protect Iraq's allies and to provide a shield for Iraqi attacks which brought the United States to the Persian Gulf. The United States' actions in the Persian Gulf at this time were taken unilaterally, and without Security Council authorisation. While the forces of other States entered the Persian Gulf, it is remarkable that none of them became involved in hostile actions. The United States chose a unilateral approach because of its determination to support Iraq and its hostility to Iran, and because it knew that any multilateral efforts in the Persian Gulf would primarily have to be directed at Iraq, a restriction on Iraq's war strategy that the United States would not support.

PART II
THE ATTACKS ON THE PLATFORMS

CHAPTER 3. THE PLATFORMS IN RELATION TO THE OIL TRADE AND THE CONFLICT IN THE PERSIAN GULF

3.1 The oil platforms that are the subject of the present Case were commercial installations which, at the time of the U.S. attacks which destroyed them, were either actually producing oil or were under repair with a view to resuming production following damage caused by earlier Iraqi attacks. This is acknowledged by the United States[1]. Nevertheless, the United States also alleges that the oil platforms were used to launch helicopter and gunboat attacks on U.S. shipping and other commercial vessels and formed an integral part of Iran's military intelligence and communications network[2]. On this basis, the United States claims that its destruction of the platforms was justified in the name of self-defence[3].

3.2 This Chapter will demonstrate that the United States' allegations as to the military use of the platforms are unfounded. Any military equipment on the platforms was of a very limited nature, and destined for the defence of the platforms themselves. The greater part of it had been installed only following Iraqi attacks on oil platforms in 1986. It was not in Iran's interest to militarise the platforms for offensive purposes, nor would it have served any practical purpose since Iran had sufficient military sites on nearby islands and its mainland, and the platforms were of no military value at all.

3.3 It will also be shown that, in reality, the attacks were directed at Iran's freedom of commerce, including commerce with the United States. This is reflected by the fact that the United States decided (i) to destroy commercial installations of great economic importance to Iran, and (ii) to target the central production platform in each attack (as had Iraq

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[1] U.S. Counter-Memorial, para. 1.84, fn. 137.

[2] *Ibid.*, paras. 1.05 and 1.104. As will be seen in Chapters 4 and 5, below, the United States makes no claim that the oil platforms were involved in either the *Sea Isle City* incident or the *Samuel B. Roberts* incident - even though the decision to attack the platforms was ostensibly taken as a result of these two events.

[3] U.S. Counter-Memorial, paras. 1.99 and 1.115.

previously), thereby causing maximum commercial damage by putting out of action all of the satellite platforms, and regardless of whether or not the particular platform it targeted was equipped with military personnel or equipment.

Section 1. The Platforms were Commercial Installations

3.4 The development of Iran's offshore fields and facilities following the signing of the Treaty of Amity on 15 August 1955 has been described in Iran's Memorial[4]. The Reshadat, Resalat, Salman and Nasr fields were developed by U.S. and other foreign companies at the end of the 1960s. All of the platforms on these fields are located on Iran's continental shelf and within its exclusive economic zone[5]. Ever since the development of these fields, the oil platforms have formed an essential part of Iran's offshore oil production. Their average combined production figure before the Iraqi attacks was nearly 200,000 barrels per day[6].

3.5 A diagram of the Reshadat and Resalat platforms was reproduced with Iran's Memorial[7]. These platforms were linked to some 40 separate wells[8].

3.6 The Reshadat Offshore Complex (referred to by the United States as "Rostam") consisted of three drilling and production platforms, R-3, R-4 and R-7, linked to a total of 27 oil wells. The R-7 platform was itself composed of three drilling platforms, containing production facilities and living quarters[9]. As may be seen from Diagram No. 1 contained in Mr. Hassani's Statement, the crude oil produced by the R-3 platform was transported by submarine pipeline to the R-4 platform and thence, together with the crude oil produced by R-4, to the R-7 platform, which was the main platform upon which all production from the Reshadat field depended[10]. The oil produced by all the Reshadat platforms including

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4 Iran's Memorial, paras. 1.11, *et seq.*
5 The geographical positions of the oil platforms are shown on Map 1 of Iran's Memorial.
6 For more detail, *see*, Statement of Mr. Hassani, Vol. IV, Annexes C, F and I.
7 Iran's Memorial, Exhibit 5. *See*, also, Statement of Mr. Hassani, Vol. IV, p. 3.
8 *See*, Statement of Mr. Hassani, Vol. IV, paras. 5 and 7.
9 *See*, Statement of Mr. Sehat, Vol. IV, para. 4.11.
10 Statement of Mr. Hassani, Vol. IV, p. 3.

R-7 was then transported, after initial water and gas separation on R-7, by submarine pipeline stretching some 108 km to Lavan Island where storage and export facilities existed[11].

3.7 The Resalat Offshore Complex (referred to by the United States as "Rakhsh") consisted of one drilling and production platform (R-1). The crude oil produced from the 14 wells linked to this platform was transported by submarine pipeline to the Reshadat R-7 platform, and from there, after water and gas separation, along with oil from the Reshadat field to Lavan Island[12].

3.8 Salman Offshore Complex (referred to by the United States as "Sassan") consisted of seven inter-connected platforms, including one drilling and two production platforms, together with 21 separate satellite oil wells. The oil from these platforms and wells was transported by submarine pipeline to the main complex and thence, after water and gas separation, to Lavan Island[13].

3.9 Nasr Offshore Complex (referred to by the United States as "Sirri") comprised one central platform, one flaring point, and six oil platforms located around the central platform, serving 44 production wells. Crude oil from the latter was transported by submarine pipeline to the central platform and thence the 33 km to Sirri Island for secondary processing and export[14]. In addition, the Nasr central platform served as a collection point, for transfer by pipeline to Sirri Island, for the crude oil produced by the four oil wells in the Nosrat Field[15].

3.10 After the crude oil produced from the Reshadat/Resalat fields and Salman, which had undergone an initial separation process on the platforms, had been pumped by undersea pipe-line to Lavan Island, further processing took place in order to separate more

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11 *See, ibid.*, Vol. IV, para. 6.
12 *Ibid.*, para. 7.
13 *Ibid.*, para. 8; *see*, also, Statement of Mr. Emami, Vol. IV, para. 1.
14 *See*, Statements of Mr. Hassani, Vol. IV, p. 4, and Mr. Alagheband, Vol. IV, paras. 3-8 and Annexes A and B.
15 *See*, Statements of Mr. Hassani, Vol. IV, p. 4, and Mr. Alagheband, Vol. IV, para. 9.

gas and water. A part of production was refined on Lavan Island (with a refinery capacity of up to 25,000 barrels per day) and the refined products were then used for domestic consumption in Iran. The remainder of the crude was destined for export. A similar process occurred for crude produced on the Nasr platform, although in that case crude went via Sirri Island. There was no refinery on Sirri Island and thus all production was used for export.

3.11 It should be noted that the extraction of crude oil for export was (and is still) effected by Iran (as by other producer States) on the basis of commercial production progammes which take into account not only the needs of the market, but also the contractual engagements that the producing State has entered into previously. In particular, Iran's oil would often have been sold prior to its actual production under long-term contracts. The actual extraction of crude oil thus represented the first stage in the fulfilment of commercial obligations undertaken by Iran.

3.12 Before the war with Iraq, crude would be shipped direct from Lavan for export. However from 1985 onwards, with the upsurge of Iraqi attacks, especially against the Kharg, Sirri and Lavan terminals, and the danger faced by the ships trying to reach these terminals, it was decided to create floating oil terminals ("FOTs"). This meant that the crude oil produced from onshore and offshore fields would be carried by shuttle ships to the FOTs to be stored there and then exported on a ship to ship basis[16].

3.13 The Reshadat R-7 platform had been attacked by Iraq on 16 October 1986, resulting in the stoppage of production not only from R-7 itself, but also from the Reshadat R-4 and R-3 platforms and the Resalat platform[17]. Various actions were taken following that attack in order to resume production, as described in the Statement of Mr. Sehat, attached hereto[18]. While a second attack by Iraq on the Reshadat complex had occurred

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[16] In order to safeguard their security, and thus the security of essential Iranian petroleum exports against Iraqi attacks, such terminals were constantly moved around. For instance, the floating petroleum terminal from around 8 February 1985 was the Valfajr 1, located near Sirri Island; from 29 June 1986 it was moved close to Bandar Abbas (Hormuz) and renamed Valfajr 2; and it was in turn relocated from around 31 July of the same year near Sirri Island under the name of Valfajr 1, to be further relocated from 15 August 1986 near Bandar Abbas as Valfajr 2, and from 30 September 1986 in a location close to Sirri Island under the name Valfajr 3. *See*, Statement of Mr. Hassani, Vol. IV, paras. 12-13.

[17] *See*, Statement of Mr. Sehat, Vol. IV, para. 13.

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

on 15 July 1987 and caused certain setbacks to the reconstruction work, it was anticipated that crude oil production from the Reshadat and Resalat fields would resume by the end of October 1987[19].

3.14 Like Reshadat, the Salman complex had also been attacked by Iraq on 16 October 1986. It suffered very light damage on that occasion, and after repairs was able to resume normal production after three days[20]. The following month, however, on 14 November 1986, Iraq attacked again and succeeded in inflicting more extensive damage on the platform[21]. Once again, a work programme was undertaken immediately in order to repair the damage and resume production. These works had been virtually completed at the time of the U.S. attack in April 1988[22].

3.15 As for Nasr, the complex had escaped any attack by Iraq, and was producing normally at an average rate of more than 36,000 barrels per day at the time of the U.S. attack on 18 April 1988[23].

3.16 In sum, given the disruption the Iraq-Iran war was causing to Iran's economy, the oil platforms, which had always played an important role in Iran's economy, became even more important during the war. The economic importance of the platforms was clearly recognised by Iraq and this resulted in Iraq's aggressive strategy for attempting to put an end to Iran's offshore oil production capabilities. The economic importance of the platforms also explains why, when the platforms were damaged by Iraq, repairs were immediately undertaken by NIOC with a view to resuming production and export via Lavan, Sirri and the FOTs.

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19 *Ibid.*, para. 16.
20 *See*, Statement of Mr. Hassani, Vol. IV, para. 17.
21 *See*, *ibid.*, and Statement of Mr. Emami, Vol. IV, para. 6.
22 *See*, Statement of Mr. Emami, Vol. IV, para. 6.
23 *See*, Statement of Mr. Hassani, Vol. IV, Annex 1.

Section 2. The Role of the Platforms in Relation to Commerce with the United States

3.17 In its Counter-Memorial, the United States asserts that in order to prevail on its claims:

> "Iran must prove that it exported to the United States oil produced by these particular platforms and that these exports would have continued had the U.S. military actions not taken place"[24].

3.18 The United States continues by noting that Iran acknowledges that the Reshadat platforms were not producing oil when they were damaged by the United States on 19 October 1987[25], and that in any event the U.S. Executive Order 12613, issued ten days after the military action against the Reshadat platforms and six months prior to the attacks on the Nasr and Salman platforms, ended all direct oil exports between Iran and the United States[26]. On this basis, the United States concludes that "[t]he destruction of these platforms could not have affected commerce 'between the territories of' Iran and the United States"[27].

3.19 Iran submits that the position taken by the United States in this regard is misguided both as a matter of treaty interpretation and as a matter of fact. The question of the United States' erroneous interpretation of Article X(1) of the Treaty of Amity is dealt with in Chapter 6 of this Reply. As far as the facts are concerned, and while Iran does not accept the stringent test put forward by the United States, Iran will demonstrate below, purely on a subsidiary basis, that it can satisfy even that test. Iran will show that it did export to the United States oil produced by the platforms concerned, and that those exports would have continued had the U.S. military actions not taken place.

3.20 As for the first branch of the United States' argument - that "Iran must prove that it exported to the United States oil produced by these particular platforms" - it should be noted that whereas in peacetime Iran had sold crude oil in cargoes where the

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24 U.S. Counter-Memorial, para. 2.22.
25 *Ibid.*, para. 2.23.
26 *Ibid.*, paras. 2.25-2.27.
27 *Ibid.*, para. 2.27.

producing field was specifically identified, this system changed during the war with Iraq. At that time, all Iranian light crudes and heavy crudes, respectively, were mixed and sold generically as either "Iranian light" or "Iranian heavy". The low level of production of these fields as compared with that of onshore fields allowed this oil to be absorbed by both light and heavy crude oil produced by onshore fields. In the context of the war, therefore, NIOC mixed oil produced by the offshore platforms with every cargo of crude[28].

3.21 With respect to the Reshadat platforms in particular, the United States asserts that "Iran acknowledges that the platforms were not producing oil when they were damaged by the United States on 19 October 1987". However, as has been shown above, these platforms were in the process of being repaired following an Iraqi attack, and had they not been attacked by the United States while they were under repair, they would have been able to resume production within a matter of days[29].

3.22 It is true that the sanctions adopted under Executive Order No. 12613 on 29 October 1987 effectively put an end to any imports of Iranian crude oil into the United States just ten days after the attack on the Reshadat platforms. However, those sanctions did not have the effect - nor were they intended to have the effect - of prohibiting imports of petroleum products refined from Iranian crude oil into the United States, nor the purchase by U.S. companies of Iranian crude oil[30].

3.23 As is demonstrated by a White House Fact Sheet dated 26 October 1987, there were substantial imports of Iranian crude oil into the United States during 1987[31]. That Fact Sheet states:

> "- U.S. purchases from Iran in 1986 totalled some $600 million, $500 million in petroleum and $100 million in other products. Oil earnings by Iran from sales to the U.S. from January through July of 1987 are estimated to be over one billion dollars.

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28 *See*, Statement of Mr. Hosseini, Vol. III, para. 6.
29 *See*, Statement of Mr. Sehat, Vol. IV, para. 16.
30 *See*, in general, Report of Prof. Odell, Vol. III.
31 *See*, Exhibit 16, Vol. II.

> - Imports of Iran crude oil into the U.S. and its territories averaged 90,000 barrels per day (bpd) in 1986; they jumped to an average of 250,000 bpd in the first seven months of 1987 (620,000 bpd in July alone). Estimates for August are 468,000 bpd and for September 345,000 bpd. The rise can be explained, in part, by increased Iranian production to obtain additional revenue for the war effort"[32].

There was thus clearly a market for Iranian crude oil directly imported into the United States right up to the issuance of Executive Order No. 12613 of 29 October 1987, which temporarily halted these imports of crude oil[33]. As noted, however, the Executive Order did not halt imports into the United States of petroleum products refined from Iranian crude oil.

3.24 As has been explained, the oil produced from the platforms in question was systematically blended with every cargo of crude during the war with Iraq. Therefore, each cargo of crude oil exported from Iran contained a certain percentage of oil produced by those platforms[34], or would have contained it had the platforms not been put out of action by the United States. When the sanctions were imposed by the United States in October 1987, Iran found itself with a surplus crude oil production of approximately 345,000 bpd, which until then had been imported by the United States. It therefore had to find other outlets for this production. The solution was to use the surplus refining capacity in the Mediterranean and North-West Europe.

3.25 Iran has attached to this pleading an expert report by Professor Peter Odell, an authority on the international oil economy[35]. That report shows that exports of Iranian crude oil to Western Europe increased considerably from 1986 to 1987, and again in 1988. In 1986 such exports amounted to 25.2 million tons, representing 7.3% of total Western European crude oil imports. In 1987, these figures leapt significantly to 36.7 million tons and 11.2%, respectively, and the total volume of imports increased again in 1988, to 43 million tons, representing 12.3% of total imports[36].

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32 *Ibid.*
33 *See*, Statement of Mr. Hosseini, Vol. III, paras. 14-17, and 19-21.
34 *Ibid.*, paras. 8, *et seq.*
35 *See*, Report of Prof. Odell, Vol. III.
36 *Ibid.*, p. 11.

3.26 At the same time, the United States had to make good the shortfall that it suffered when Iranian crude oil imports were prohibited. It had, in the past, already been importing petroleum products from Western European refineries in the Mediterranean and North-West Europe. After the imposition of the sanctions, these imports increased from 11.2 million tons in 1986 to 13.6 million tons in 1987 and 17.9 million tons in 1988[37].

3.27 Crude oil is a fungible product that does not retain its original identity once it reaches a refinery and is processed. It is thus impossible to prevent crude oil of a particular origin from being included in refined products destined for a particular customer. It is, of course, also impossible to state categorically that any particular fraction of crude oil of a particular origin is necessarily included in any particular refined product. However, there is statistical evidence that a quantity of oil found its way to the United States. If Iranian crude oil was received by a refinery, and if that refinery in turn exported products to the United States, then it follows that a quantity of Iranian oil was necessarily imported into the United States in the form of products. It is in the nature of the international oil trade that Iranian oil could not be excluded from the United States. As former U.S. Defense Secretary Caspar Weinberger has stated:

> "... oil is a fungible commodity – once it leaves port it can end up anywhere ... a very large percentage of the oil in the [Persian] Gulf is lifted, shipped and refined through and by American oil companies ... There is one market for oil, and it is a global market"[38].

3.28 While there is no way of determining the exact quantities of Iranian oil imported into the United States, it is possible to reach a notional figure, based on a ratio between the total quantities of Iranian crude oil imported into Western Europe, and the total quantities of refined products exported from Western Europe to the United States. Taking the figures provided in Professor Odell's Report, this exercise leads to notional quantities of 560,000 tons in 1986, increasing to 1.02 million tons in 1987 and 1.51 million tons in 1988[39].

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37 *Ibid.*

38 Exhibit 17, Vol. II.

39 *See*, Report of Prof. Odell, Vol. III, p. 11.

3.29 Furthermore, the sanctions on imports of Iranian crude oil into the United States were lifted in 1990 and 1991 when the U.S. State Department allowed certain imports, provided that payments were made into the Security Account controlled by the Iran-U.S. Claims Tribunal[40]. The sale of Iranian crude oil to U.S. companies continued until 1995, when new Presidential Orders were issued by President Clinton. During that period, the oil platforms that had been attacked by the United States were either still under repair following the U.S. attacks or were functioning at less than their normal production level[41]. While production on Salman was provisionally resumed at the rate of 10,673 barrels per day on 2 August 1988, final commissioning and regular production at the rate of 23,667 barrels per day after completion of reconstruction works took place only in mid-September 1992, with full production at the rate of 131,292 barrels per day being reached only during 1993[42]. Similarly, the major repairs and commissioning of the Nasr complex were completed only on 21 January 1992 with average production eventually rising to close to the rate prevailing prior to the U.S. attacks[43]. As for Reshadat, provisional production commenced on 24 October 1990 at the rate of only 856 barrels per day, and only 365 barrels per day for Resalat, and also gradually increasing thereafter to a rate of 10,516 barrels per day by 1993-1994[44]. In other words, the U.S. attacks on the platforms had a direct detrimental effect on the commerce of crude oil between Iran and the United States during this period.

3.30 Iran submits, therefore, that there continued to be a flow of oil commerce between Iran and the United States following the issuance of Executive Order 12613, and that the level of that commerce could have been greater if the United States had not attacked Iranian oil platforms that were producing crude oil for export.

Section 3. Steps that Iran took to defend the Platforms

3.31 It was widely known that one of Iraq's prime objectives in the war was to impede Iranian oil production, since it was well aware that oil was essential to the Iranian economy and thus to its war effort. This point is confirmed by many of the exhibits relied

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40 *See*, Exhibit 18, Vol. II.
41 *See*, Statement of Mr. Hassani, Vol. IV, paras. 16-21.
42 *See*, Statements of Mr. Emami, Vol. IV, para. 10, and Mr. Hassani, Vol. IV, para. 18.
43 *See*, Statements of Mr. Hassani, Vol. IV, para. 21, and Annex J, and Mr. Alagheband, Vol. IV, para. 18.
44 *See*, Statement of Mr. Hassani, Vol. IV, para. 16, and Annex E.

upon by the United States in its Counter-Memorial[45]. In addition to the Iraqi attacks on the Reshadat and Salman platforms referred to above, there were numerous Iraqi attacks on Lavan and Sirri Islands[46]. Although there was no successful Iraqi attack on the actual oil platforms making up the Nasr complex, Iraq carried out various attacks and inflicted damage on neighbouring installations such as Sirri oil jetty and the Valfajr floating oil terminal at times when it was situated near Sirri Island, thereby underscoring the fact that Nasr too was vulnerable to attack.

3.32 Iraq had weapons with sufficient range to attack anywhere in the Persian Gulf, and its attacks on the Reshadat and Salman oil platforms in 1986 demonstrated both its desire and capability to attack Iran's oil installations wherever they were situated in the Persian Gulf. Furthermore, the increasingly sophisticated weapons available to Iraq as the war progressed meant that the threat of attack increased rather than decreased from 1986 onwards.

3.33 In these circumstances, it can hardly be disputed that Iran had a legitimate right to defend the platforms by a military presence and the installation of defensive military equipment. As will be seen, that presence was commensurate only with the need to defend the platforms, and was not designed for offensive use. Indeed, there is no evidence that the presence of the military personnel with their light weapons was particularly effective in deterring further Iraqi attacks. Reshadat platform was attacked a second time by Iraq on 15 July 1987 after further military equipment had been installed following the first attack on 16 October 1986[47] and Salman platform was also attacked a second time on 14 November 1986[48].

3.34 While Iran had to ensure that provision was made for the defence of the platforms against attack, it would have run counter to its own interest to risk further involving

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45 *See*, U.S. Counter-Memorial, Exhibit 102, p. 1, referring to "Iraq's strategy... to stop or hamper Iran's oil exports" and *ibid.*, Exhibit 105, p. 12, which notes as follows: "As part of its policy of attacking Iranian targets to restrict the flow of Iranian oil, and consequently the revenue to fight the war, Iraq attempted an attack on an offshore oil facility in the Sassan field on 16th October [1986]. This attack was unsuccessful although a further strike on an oil platform in the same area on the 14th November [1986] caused considerable damage".

46 *See*, Statement of Mr. Hassani, Vol. IV, para. 14.

47 *See*, Statement of Mr. Sehat, Vol. IV, paras. 13, 15 and 19.

48 *See*, Statement of Mr. Emami, Vol. IV, para. 4.

the platforms in the war by militarising them to a greater extent and thus making them even more obvious targets. The steps taken by Iran to defend its platforms were therefore measured and limited in scope. The equipment it installed on them was notably less sophisticated than the military equipment installed on the platforms of neighbouring States in the Persian Gulf[49], and there were only a small number of low level military personnel on the platforms who were conscripts and not highly trained[50].

3.35 Prior to the Iraqi attack on the Reshadat Complex on 16 October 1986, the military equipment on that Complex was limited to a 23mm air defence cannon. There was also a navigation radar, installed on the R-4 platform. This was not however a military radar, but a general use Decca navigation surface radar commonly used on yachts and commercial vessels. As a surface radar it was only able to detect objects approaching the platforms from the sea or aircraft flying at very low altitude[51]. It could not distinguish targets in the same way as a military radar. The range of frequency and the band width were limited and it had no "International Friend or Foe" capacity. It could only distinguish one target at a time, and could not follow several targets simultaneously[52]. Under ideal climatic conditions, the maximum range of the radar was 48 nautical miles. Moreover, the radar was old and in a general state of disrepair[53].

3.36 After Iraq's attack, further light weapons were installed for the defence of the platform, including a second 23mm cannon on R-4[54]. These cannons had a range of approximately 2,000 metres, but could only be fired horizontally or into the air, and not downwards at passing boats. Twelve soldiers were stationed on the same platform under the command of a Navy chief petty officer[55].

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49 *See*, Statement of Mr. Hassani, Vol. IV, para. 26.

50 *See*, Statements of Mr. Salehin, Vol. VI, para. 7 (v), Mr. Mokhlessian, Vol. VI, para. 7, and Mr. Salmanian, Vol. IV, para. 1.

51 *See*, Statement of Mr. Mokhlessian, Vol. VI, para. 4.

52 *See*, Statement of Gen. Fadavi, Vol. V, para. 25.

53 *See*, U.S. Counter-Memorial, Exhibit 117, and Statement of Gen. Fadavi, Vol. V, para. 25.

54 *See*, Statement of Mr. Sehat, Vol. IV, para. 19.

55 *See*, Statement of Mr. Salmanian, Vol. IV, para. 1.

3.37 Following the Iraqi raids on the Salman Complex, two 23mm anti-aircraft cannons were installed to defend those platforms. They were operated by about twelve Navy soldiers who were also armed with several G-3 rifles[56].

3.38 In reaction to Iraqi attacks on Sirri Island and the nearby Valfajr floating oil terminal, the Nasr complex was also equipped with a 23mm limited-range anti-aircraft cannon and, subsequently, a manually operated machine gun operated by up to 15 naval conscripts[57].

3.39 This was the sum total of military equipment and personnel on the oil platforms at the time of the U.S. attacks in October 1987 and April 1988. All the remaining personnel on the platforms were NIOC personnel, and the remaining equipment was of a kind that was perfectly usual on commercial oil installations.

3.40 At the time of the U.S. attacks, 59 NIOC personnel were working on the repairs on the Reshadat Complex and 14 on the Salman Complex; 15 were carrying out routine duties on the Nasr Complex[58].

3.41 The equipment on each platform was standard equipment that would be found on any oil platform. It included communications equipment such as, on Nasr, a VHF radio and a multi-channel sailor radio, which was used for providing contact with supply boats and the oil fields[59]. Likewise, Reshadat had a telephone link and a short-range sailor radio[60], and Salman a telephone link and a radio room. The military personnel used NIOC's radios to communicate with the Lavan and Sirri Island bases.

3.42 In order to allow for the transport of NIOC personnel, spare parts and provisions to and from the platforms, each complex had a helicopter pad for NIOC's Bell and Alouette helicopters and mooring facilities for the relatively large NIOC boats that were used

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56 *See*, Statement of Mr. Ebrahimi, Vol. IV, para. 5.
57 *See*, Statement of Mr. Alagheband, Vol. IV, para. 13.
58 *See*, Statement of Mr. Hassani, Vol. IV, paras. 22-24.
59 *See*, Statement of Mr. Alagheband, Vol. IV, para. 12.
60 *See*, Statement of Mr. Sehat, Vol. IV, para. 21.

for personnel. These, again, were perfectly ordinary facilities that could be found on virtually any offshore oil platform[61].

3.43 In sum, the United States has provided no evidence for its assertion that the type of equipment and extent of military personnel on the platforms shows that the off-shore installations were highly militarised for offensive purposes[62]. Iran's measures to defend its oil platforms were very modest and were entirely reasonable and legitimate given the history of Iraqi attacks. As will be shown in paras. 3.55 to 3.65 below, the documents said by the United States to have been found on the platforms are proof that the role of the military personnel and the equipment on the platforms did not extend beyond defending the platforms.

Section 4. The Oil Platforms were not used for Non-Commercial Purposes

3.44 Iran did not need to use the platforms as part of its military structure. Iran has an extensive coast-line and numerous islands. During the war against Iraq, Iran made use of these natural assets and of its military bases and stations on Abu Musa, Sirri, Lavan, Larak, Kish and other islands, as well as its numerous mainland military posts, for example at Bandar Abbas[63]. It was more effective and much safer for Iran to make use of all of these specialised military facilities and to keep the vulnerable and highly visible platforms demilitarised except to the extent required for their own defence and to provide comfort to NIOC personnel.

3.45 The United States accepts that the platforms were producing oil at the time of the U.S. attacks on the platforms or were under repair following Iraqi attacks, but it asserts that it has "compelling evidence" that Iran's offshore oil platforms - particularly those concerned in the present case - were also serving as military facilities[64]. As will be shown below, the United States has produced no evidence of use of either the Salman or Nasr platforms as military facilities; such "evidence" as it has produced with regard to the Reshadat

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61 *See*, Statement of Mr. Hassani, Vol. IV, para. 27.

62 In any event, the radar and other equipment on Reshadat was destroyed by the United States after they had boarded the platform: the Nasr platform was completely destroyed in the U.S. attacks thereby making independent analysis of the platform equipment impossible; and although the United States boarded the Salman platform, there is no record of its having found any military or dual-use equipment of any kind on that platform.

63 *See*, Statements of Mr. Mokhlessian, Vol. VI, paras. 1-3 and Mr. Salehin, Vol. VI, para. 4.

64 U.S. Counter-Memorial, para. 1.84.

platforms will be shown below to be unreliable or speculative, and is contradicted by the evidence produced by Iran.

A. Communications and radar

3.46 One allegation by the United States is that the platforms were serving as general communications relay and radar stations for military purposes, guiding Iranian forces and tracking the movements of other countries' shipping. Iran will discuss hereafter various Exhibits to the U.S. Counter-Memorial which are documents allegedly found by the United States on the *Iran Ajr* and the Reshadat platform[65]. In each case the United States has provided what it refers to as "selected" messages and what purports to be a complete collection of such messages. The United States has also exhibited various documents concerning instructions for radar operators and observers[66]. Before entering into a detailed discussion of those Exhibits, Iran must make two general points. First, with regard to the messages, Exhibits 70, 72 and 118 purport to be a "complete collection" of messages found by the United States. It must however be assumed that the United States has exhibited only those messages that it can attempt to use in support of its case, and that there were other messages that were even more innocuous than those that the United States has chosen to exhibit. Second, with regard to all the Exhibits for which the United States has provided an English translation of the original Farsi, there are inaccuracies in the translation, the most serious of which have been noted in the footnotes to the following discussion.

3.47 The first category of evidence relied upon by the United States in this regard consists of documents allegedly found on the Iranian vessel *Iran Ajr*, which the United States had attacked on 21 September 1987 because it was said to have been laying mines[67]. According to the United States, those documents prove that Reshadat passed along tactical military messages between the *Iran Ajr* and other Iranian naval units[68]. Exhibits 69 and 70 to the U.S. Counter-Memorial, being the documents allegedly found on the *Iran Ajr*, contain "Selected Farsi Messages" and a "Complete Collection of Teletype Communications", respectively. The "selected" messages are mostly querying whether previous messages have

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65 *Ibid.*, Exhibits 69, 70, 71, 72, 118 and 119.
66 *Ibid.*, Exhibits 114, 115, 116 and 117.
67 *See*, paras. 5.20-5.21, below.
68 U.S. Counter-Memorial, para. 1.86.

been received, or responding to such queries. They are entirely innocuous. In particular, no military instructions are given, and there is no mention of minelaying or any other aggressive activity. As to the "complete" set of communications, the same observation applies. To the extent that there is any mention of military matters, these documents confirm that the communications were intended for the defence of the platforms. For example, message S/111710 states that "the possibility of any type of enemy air attack on vital and sensitive points - especially ports, islands and vessels... is conceivable", and gives them the "[o]rder that while being completely vigilant, you have *complete defensive readiness* to confront air threats"[69]. This was nothing more than a warning to be on guard against possible Iraqi attacks.

3.48 Exhibits 71 and 72 to the U.S. Counter-Memorial, which contain "Selected Paper-Tape Messages" and a "Complete Collection" of such messages, respectively, purport to be messages sent between the *Iran Ajr* and the 1st Naval District. These invite the same comments as Exhibits 69 and 70. Again, they are perfectly innocuous, and contain no mention of minelaying or any other aggressive activity. Two out of the three "selected" messages either query whether previous messages have been received or confirm that messages have been sent or received. The third message - which does not even mention Reshadat - appears to be giving the position of the *Iran Ajr* and nothing else. Furthermore, only *two* of the total 41 tapes contained in Exhibit 72 contain any mention of Reshadat, and those are duplicates of tapes already presented in Exhibit 71. Iran submits, therefore, that the documents allegedly found on the *Iran Ajr* provide no evidence whatsoever that Reshadat was involved in offensive military activities. Moreover, there was no mention at all of Salman and Nasr platforms.

3.49 The United States also relies on what it terms "military analysis" to assert that the platforms used radar and visual surveillance to report on merchant shipping, and that helicopters and small boats also used the platforms for target-finding. Iran will deal below with the allegations relating to the existence of radars on the platforms and to helicopter and small boat attacks.

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69 *Ibid.*, Exhibit 70; emphasis added.

3.50 It suffices to make here just a few comments about the conclusions drawn by two of the United States' main military experts with regard to visual surveillance. Exhibit 57 to the U.S. Counter-Memorial is a report by Rear Admiral Cobbold and Commander Codner of The Royal United Services Institute for Defence Studies. It states that "platforms were *highly likely* to have been used for radar, and to a small extent, visual surveillance of shipping crossing the area"[70]. In other words, the authors of the report were making no more than a supposition without corroborating evidence. The United States infers from this report, however, that the platforms were actually used for visual surveillance in connection with attacks by Iranian forces[71]. Leaving aside the hypothetical nature of the evidence relied upon for the statement, the allegation regarding visual surveillance is in itself contradictory. On the one hand, the United States argues that poor visibility in the Persian Gulf meant that the unsophisticated Iranian helicopters and patrol-boats could not function without radar and visual surveillance assistance from the platforms[72]; on the other hand it argues that the platforms themselves were used for the visual monitoring of merchant shipping at considerable distances[73].

3.51 The United States claims that personnel on the platforms could detect shipping up to 15 nautical miles away, and could visually identify shipping by class up to 10 nautical miles in "good visibility"[74]. On the other hand, it is acknowledged that the flag of a vessel could only be identified at a distance of 1-2 nautical miles[75] and Rear Admiral Cobbold and Commander Codner, the experts relied upon by the United States, note that "an attack unit may require to close a target to within 1 mile to achieve positive visual identification"[76]. Moreover, even if vessels passed close enough for personnel on a platform to be able on occasion to distinguish the flag or name of a ship, the hazy weather much of the time in the Persian Gulf normally made such identification impossible. In any event, most merchant shipping stayed as far south as possible in order to avoid the war zone[77].

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70 U.S. Counter-Memorial, Exhibit 57, p. 22; emphasis added.

71 U.S. Counter-Memorial, para. 1.91.

72 *See, ibid.*, para. 1.93, fn. 162, where it is stated that "Persian Gulf meteorological conditions (dust and sand storms, and dry haze) further hindered the ability of helicopters to locate visually targets".

73 *See, ibid.*, para. 1.93, fn. 164, where it is stated that "Visual detection of shipping during the day could typically have been achieved of large ships at 15 nm".

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*, Exhibit 57, p. 5.

77 *See*, U.S. Counter-Memorial, para. 1.88(6).

3.52 Rear Admiral Cobbold and Commander Codner also talk hypothetically about the role the platforms could have had in making for belligerent purposes a "compilation of a plot of shipping tracks"[78]. However, no such documentation has been exhibited or is even alleged to have been found. Nor is there any evidence demonstrating that personnel on the platforms were involved in a task of this kind. In any event, Lloyds of London provide information on all maritime commercial traffic by telex, and such activities by the personnel on the platforms would therefore have been quite superfluous.

3.53 The experts further assert, again without any proof, that the platforms concerned were all equipped with Decca 1 radar which, they acknowledge, is "similar to the radar fitted to many commercial ships"[79]. Even if this had been the case (which it was not, Reshadat R-4 alone being equipped with such radar), it provides no evidence of offensive military activity on the platforms.

3.54 Most of the conclusions made in the report by Rear Admiral Cobbold and Commander Codner are based on conjecture and make no reference to any factual supporting evidence. When discussing "*Potential* Iranian Supporting Assets", the experts' concluding paragraph with regard to the oil platforms uses the phrase "could have" eight times in connection with the supposed military activities of the platforms[80]. Quite simply, the experts do not make a single definite statement in this regard. Evidence to show the kind of military assistance offered by the platforms, had it existed, would have been easy to collect upon boarding the Reshadat platforms. None has been adduced by the United States.

3.55 The final category of evidence relied upon by the United States in connection with the role allegedly played by the platforms in communications and surveillance consists of certain documents that it says were found on "one of the Rostam

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78 *Ibid.*, Exhibit 57, p. 22.
79 *Ibid.*, p. 12.
80 *Ibid.*, p. 13; emphasis added.

platforms" which "confirmed that Iran had integrated its offshore oil platforms at Rostam, Sassan, and Sirri into its military structure"[81].

3.56 However, the only documents produced by the United States in this category are completely consistent with the restricted local defence role that the military personnel stationed on Reshadat played. As has already been noted in Iran's Memorial, they had means of communication with Lavan Island's defensive operating station and in particular acted as look-outs for Iraqi planes flying low to avoid radar detection which were reported to Lavan Island[82].

3.57 It is in this context that the United States' comments on a document entitled "Instructions for the Deployment of Observers on Oil Platforms in the Persian Gulf" must be read[83]. The United States alleges that this document was found on Reshadat and points out that it included instructions "to gather information about the enemy's air and sea traffic and destroy its craft". The United States then proceeds to give an interpretation of these instructions that goes against all common sense: "Iraq did not operate naval craft in the central and southern [Persian] Gulf during the Iran-Iraq conflict; thus, the reference to the enemy sea traffic in the Instructions for Oil Platforms document necessarily refers to to [*sic*] the vessels of non-belligerent states including the United States"[84]. It is quite obvious, however, that in the sentence quoted by the United States, reference is being made to both the air and sea "craft" of the "enemy" - *i.e.*, Iraq; and as already noted above, Iraq was to attack the oil platforms consistently during the war, developing air capacity throughout the entire Persian Gulf[85]. Furthermore, given that the document is dated 23 October 1980, *i.e.*, at the very beginning of the war, it cannot permit an assertion that the "document necessarily refers to to [*sic*] the vessels of non-belligerent states including the United States, whose warships most prominently escorted merchant convoys through the [Persian] Gulf"[86].

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81 U.S. Counter-Memorial, para. 1.103.
82 *See*, Iran's Memorial, para. 1.102.
83 U.S. Counter-Memorial, Exhibit 115.
84 U.S. Counter-Memorial, para. 1.103(1).
85 *See*, paras. 2.17 and 3.31-3.33, above.
86 U.S. Counter-Memorial, para. 1.103(1).

3.58 The document explicitly sets out a "Protection plan for rigs and platforms"[87] as well as covering the duties of observers on oil platforms. These duties consist of helping to ensure that maritime traffic "can easily reach Iranian and other ports of friendly countries in the region", and assisting in the detection of Iraqi units by close observation of air and sea traffic[88]. In keeping with Iran's policy not to militarise the platforms, the instructions include the order - as translated by the United States - that: "The observers will cooperate with the NIOC officials during their stay on the platforms" and "will not carry arms while on the platforms"[89].

3.59 The United States attributes great importance to certain words assigned communications codes in Annex G to the same document, picking out certain examples such as "America", "Britain", "French", "vessel", "escort ship", "aircraft carrier", "heading", "speed", "course", etc., and concluding that the use of such words demonstrates that "Iran's oil platform personnel were tasked with observing, and reporting on, the movements of merchant vessels and their naval escorts, including U.S. vessels"[90]. Leaving aside the fact that these instructions date from 1980, seven years before the destruction of Iran's oil platforms, it should be noted that a total of 136 communications codes are listed, from which the United States has taken a highly selective sample. If the complete list is consulted, it becomes clear that the codes served a descriptive purpose which would allow the situation to be monitored objectively[91]. It would be unrealistic not to have descriptive terms such as these, if only to avoid instances of mistaken identity.

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87 *Ibid.*, Exhibit 115, p. 2.

88 *Ibid.*, pp. 2-3.

89 *Ibid.*, p. 5. A review of the U.S. translation of these documents in fact reveals a number of discrepancies. For example, the order translated by the United States as "The observers will not carry arms while on the platforms" is in fact much more detailed and precise when properly translated, reading as follows: "The observers dispatched to the oil platforms shall be unarmed and, for security purposes, shall be prohibited from carrying any arms to the oil platforms". Similarly, paragraph 1(B) is translated by the United States as "They [the Islamic Republic Naval Forces] must fight to the end the enemies who invaded their beloved countries", whereas a more accurate translation shows again that the original is much more specific: "They must wage war against the *Iraqi military forces* and fight to the end the invading enemy of Iran"; emphasis added.

90 U.S. Counter-Memorial, para. 1.103(2). Note that the U.S. mistakenly refers to Exhibit 114 here, when in fact commenting on Exhibit 115.

91 Examples of the communication codes include: sky, awacs, antenna, peaceful, friendly, dangerous, underwater, submarine, civilian, military aircraft and civil aircraft, etc.

3.60 The United States also refers to Exhibit 118 to its Counter-Memorial[92], an "Archive of Incoming Messages" allegedly retrieved from Reshadat, stating that it demonstrates that the personnel on board the platforms "carried on military surveillance of naval and merchant shipping to facilitate Iran's attacks on such shipping"[93]. However, a review of these messages once again shows that the platforms were involved only for purposes of their own defence.

3.61 A message dated 18 October 1987 - which was sent to Reshadat only for information - states that there must be "instantaneous *defensive* readiness" to counter "the possibility of an air attack on military and *economic* facilities"[94]. A message dated 6 October 1987 states that "the possibility of an attack on the islands, platforms, and units at sea is conceivable". Another message, which appears to be dated 11 October 1987, is reproduced in the U.S. Counter-Memorial[95]. It gives details of a military convoy in the vicinity. However, no nationality is specified and there is no mention of attacking the convoy[96]. A further message, dated 6 October 1987, requests confirmation that the platforms are to be operational 24 hours a day. Other messages deal with practical matters such as sending new binoculars. In fact, the messages are the type of routine messages that one would expect in the circumstances. They lend no credence to the United States' allegation that the platforms were engaged in coordinating attacks on merchant shipping.

3.62 Lastly, the United States comments on a document, also allegedly found on Reshadat, entitled "Instructions for Radar Stations"[97]. The only comment that the United States makes is that the Annex to these instructions required observers "to report the position, course, speed, and other information about 'surface targets' - that is, shipping"[98]. It seems that the United States may be trying to imply that use of the word "surface targets" means that

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92 U.S. Counter-Memorial, para. 1.103(3), fn. 188. Here again, the U.S. mistakenly refers to Exhibit 117 when in fact commenting on Exhibit 118.

93 U.S. Counter-Memorial, para. 1.103(3).

94 Emphasis added.

95 *U.S. Counter-Memorial, Exhibit 119, and U.S. Counter-Memorial, para. 1.103(3).*

96 It should also be borne in mind that when the word "target" is used in these messages, it is clear from the context that it is used in the sense of a radar target and not a military target.

97 U.S. Counter-Memorial, Exhibit 114.

98 U.S. Counter-Memorial, para. 1.103(4).

shipping was designated as a military target. In fact there is nothing sinister about the use of the word "target" in this context, since it designates an object to be observed on radar.

3.63 The most the document shows is that Reshadat was part of a communications network of stations connected with each other for defensive purposes. There is nothing in these instructions relating to offensive actions or intelligence gathering for offensive purposes. Furthermore, neither Salman, Nasr nor Resalat is mentioned in the list of radar stations referred to in this document[99] - contrary to the United States' allegations that Salman and Nasr were using radar to assist in Iran's war effort. Indeed, the fact that Salman was not equipped with radar may be inferred from Exhibit 33 filed by the United States with its Preliminary Objection, where it is stated that the Salman platform "appeared unalerted" before the U.S. attack[100].

3.64 With respect to the document entitled "Instructions for Exchanging Radar Intelligence", the United States has made no comment[101]. This is again a perfectly innocuous document that merely confirms that the radar on the Reshadat platform was used for purposes of defending the platform (and makes no mention of the other platforms attacked by the United States). As with the documents described above, the main purpose of these Instructions was to lay down standard procedures for communication of information relevant to defence against Iraqi air attacks. This purpose is explicitly set out in paragraph 1 of the Instructions[102].

3.65 Finally, the United States has no comments to make on the document entitled "Transfer and Turnover List of the Reshadat Oil Platform Radar Custodian"[103]. That document consists of a series of hand-written receipt notes concerning the turnover of the

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99 U.S. Counter-Memorial, Exhibit 114, p. 31 refers to: "the East Radar Stations consisting of the LARAK Radar and observer stations, and the Western Radar stations consisting of the ABU MUSA Radar and observer station. The RESHADAT platform Radar stations (MORVARID, R4) and the SIRRI Island Radar Station".

100 U.S. Preliminary Objection, Exhibit 33, p. 68.

101 U.S. Counter-Memorial, Exhibit 116.

102 It may be noted in this regard that, once again, the English translation differs from the original Farsi version in a significant respect. At page 5 of the English translation, under the heading "General", the second sentence states, *inter alia*, that radar coverage can help to "identify and coordinate all air targets". This translation omits the next words that appear in the Farsi text, which refer to "warning against attack by hostile aircraft".

103 U.S. Counter-Memorial, Exhibit 117.

radar and other equipment on the Reshadat Platform. It sets out a catalogue of that equipment which runs counter to the United States' attempts to make the platforms appear to be sophisticated command centres with highly developed surveillance capabilities that were essential to Iran's military activities. The first message is representative:

> "1. The wire for the lighting of the DECCA-1226 radar is out.
> 2. The DECCA-1226 radar tuning does not work.
> 3. The night vision binoculars are broken and unusable.
> 4. The tripod binoculars are broken and missing the primary lens".

Moreover, this supposedly sophisticated military equipment can be seen to have included such items as a plastic set-square, a file cabinet and a sewing machine.

3.66 In fact, Iran had perfectly adequate methods of obtaining information about maritime traffic in the Persian Gulf, and had no need to use the platforms for this purpose. First, it had radar bases at such places as Bandar Abbas and Kish Island. Second, aerial reconnaissance was performed by the Air Force. Third, there was a telex link to Lloyds of London which provided information on all maritime commercial traffic. And fourth, there were small speed boats which would stop vessels to obtain information as to whether they were carrying commercial or military goods, and to verify the name, flag and destination[104]. There was no need for the platforms to become involved in these activities and they were not so involved.

B. Small boats and helicopters

3.67 In addition to general surveillance activities, the United States also alleges that the platforms were used to launch small boat and helicopter attacks on neutral vessels and that they caused a "significant threat to the safety of neutral merchant and naval vessels, including U.S. vessels"[105].

3.68 The materials produced as evidence by the United States in this regard comprise articles and reports produced by commercial entities, giving indirect accounts of the

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104 *See*, Statement of Gen. Fadavi, Vol. V, paras. 33-39.
105 U.S. Counter-Memorial, para. I.104.

alleged military use of the platforms. Apart from the fact that many of the reports carry disclaimers[106], the language in both the reports and the articles cannot be considered as proof of the U.S. allegations. On the contrary, the language is extremely cautious, using phrases such as "helicopters (possibly operated from oil platforms)"[107]; "believed to have been"[108]; "attributed to"[109]; "Iran is reported to be"[110].

1. Small boats

3.69 The United States claims that Iran's small gunboats needed and obtained staging and target-finding assistance from offshore facilities as they did not possess sophisticated radio equipment[111]. This allegation does not withstand scrutiny. Map 1.12 in the U.S. Counter-Memorial (for which the United States indicates no source) plots just four alleged small boat attacks in the central Persian Gulf region, three of which are shown as roughly equidistant from Reshadat platform and Lavan island, and seven alleged small boat attacks in the southern Persian Gulf region, six of which are shown as much closer to Abu Musa and Sirri Islands than to the Nasr platform, and the seventh being nevertheless well within a 50 nautical mile radius of those islands.

3.70 Of note in this regard are statements made by Rear Admiral Cobbold and Commander Codner in their report referred to above, as follows:

> "Radars, wharfage, landing pads and logistic facilities on Iranian islands could provide similar support in surveillance, picture compilation, co-ordination, control and logistics as the oil platforms. From the pattern of small craft attacks in the approaches to the Straits of Hormuz and the Straits themselves it appears likely that Abu Musa and other islands were used extensively as forward operating bases"[112]

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106 U.S. Counter-Memorial, Exhibit 2, p. 1 states that "GBCS... cannot accept responsibility in any way for any errors, omissions or misinterpretations"; U.S. Counter-Memorial, Exhibit 1, preface, states that: "No action or presumption should be taken or made without independent confirmation".

107 U.S. Counter-Memorial, Exhibit 103, p. 12.

108 *Ibid.*, Exhibit 107.

109 *Ibid.*, Exhibit 109.

110 *Ibid.* These reports often refer to "Rostam island" and not to an oil platform, and generally do not refer to Salman and Nasr.

111 U.S. Counter-Memorial, para. 1.92.

112 *Ibid.*, Exhibit 57, p. 13.

and

> "Problems of target identification may explain why only four small craft attacks... took place in the South-East Basin as compared with the much larger numbers in the very much more confined areas south-east of Abu Musa and in the Straits of Hormuz"[113].

These passages support the view that the platforms were not used for Iran's alleged attacks by small boats, and confirm that there were very few alleged incidents in the vicinity of the platforms.

3.71 The gunboats were based on land and needed a jetty to be launched. It would therefore have been impractical to use the platforms as staging bases even if Iran had wanted to (which was not the case). Quite apart from the fact that the gunboats had no need to berth at the platforms, their size posed a risk that in rough sea conditions they would damage themselves by crashing against the platforms. It was equally impractical for medium sized boats such as minelayers or patrol boats to tie up at the platforms.

3.72 Despite the fact that the platforms were close to Saudi Arabian and U.A.E. platforms as well as the shipping lanes, and thus could easily be monitored by third parties, and despite the fact that all communications from the platforms were made over open channels and were thus easily intercepted, the United States has provided no evidence to support its contention that the platforms were used for launching small boat attacks or that small boats were "loitering"[114] behind them. The U.S. Counter-Memorial contains no concrete evidence such as photographs, intercepted messages or even contemporaneous eye-witness reports to support its contentions in this regard, but instead has relied merely on general speculation and the presentation of the inconclusive and unsubstantiated Map 1.12.

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113 *Ibid.*, p. 20.

114 U.S. Counter-Memorial, para. 1.90.

3.73 In any event, there is no record of any alleged Iranian small gunboat attack on a U.S. vessel during the entire Iraq-Iran war. On the contrary, there is strong evidence that there was not even a threat of such attack[115].

2. Helicopters

3.74 The United States further alleges that Iran used its platforms to launch helicopter attacks, as its helicopters lacked "the range and the target-finding capability to conduct these attacks without assistance from an offshore facility"[116]. This is wrong. The Agusta Bell 212 helicopters owned by the Iranian Navy were equipped with an auxiliary fuel tank and had a range of 360 nautical miles[117]. As may be seen from the maps annexed to the Statement of Mr. Salehin, attached hereto, even at half that range (*i.e.*, allowing for the helicopter to return to the same base), the helicopters did not need to use the platforms, given the number of Iranian military bases on Iran's mainland and offshore islands[118].

3.75 The view expressed in the U.S. Counter-Memorial as to the range that the standard Agusta Bell 212 helicopter could cover is in any event contradicted by the United States' own Exhibits. The Counter-Memorial quotes *Jane's All the World's Aircraft 1975-76* which, albeit out of date, gives a maximum range of 267 nautical miles[119], which the United States then reduces to what it describes as a "realistic" range of 60 miles. Another source used by the United States gives a maximum range of 350 nautical miles[120]. But even under the United States' own incorrect estimate of 60 miles, more than half of the alleged helicopter attacks occurred within reach of Sirri, Abu Musa and Lavan Islands. Under the estimate of 350 nautical miles, all of the alleged attacks were well within reach of those Iranian islands.

3.76 The United States is also wrong when it claims that all the platforms were equipped with surface-search radar[121] which, it alleges, was used to assist helicopters in locating their targets. It has produced no evidence in support of this assertion. Iran had one

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115 *See*, para. 2.46, above.
116 U.S. Counter-Memorial, para. 1.92.
117 *See*, Statement of Mr. Salehin, Vol. VI, para. 2.
118 *See*, in general, Statement of Mr. Salehin, Vol. VI, and Annex B to that Statement.
119 U.S. Counter-Memorial, para. 1.94, fn. 166.
120 *Ibid.*, Exhibit 2, p. 61.
121 U.S. Counter-Memorial, para. 1.90.

general use radar on one platform (R-4) in the Reshadat/Resalat complex. This was not a military radar and it was old and defective.

3.77 The United States claims that Iranian helicopters lacked sophisticated radio equipment and therefore needed the platforms to receive and relay messages to and from Iran's mainland[122]. This again is incorrect. The Iranian helicopters were equipped with a direction finder system which allowed them to be guided during missions by means of radio communications[123]. Sirri Island is within 100 miles even of the furthest platform, Reshadat. Abu Musa Island is also within approximately 100 miles of the other three platforms. As both of these islands were equipped with radar and radio facilities, it is disingenuous to assert that helicopters in this area had to use the platforms in order to be in direct contact with the mainland[124]. In any event, as has been noted above, the radio facilities on the platforms were unsophisticated and were designed for civilian and not military use, broadcasting over open airwaves.

3.78 Moreover, the United States is misleading in the conclusions it draws from many of the publications upon which it relies. For example, it states that the 1987 and 1988 GCBS Guidance Notes confirm that Iran was using the platforms to stage helicopter attacks[125]. Reference to the relevant Exhibits shows, however, that the 1987 report states that "Iran has not conducted a helicopter attack since the beginning of October 1986[126]" and the 1988 report states that "only one helicopter attack has been reported since November 1986 involving the 'Tenryu Maru', on 20th April 1987"[127]. There is no suggestion that this alleged attack was staged from an oil platform, nor was it reported that there was any damage to the vessel itself. Again, therefore, Iran submits that the United States has produced no credible evidence in this category to sustain its allegations of the military use of the platforms.

3.79 The only piece of purportedly direct evidence that the United States puts forward in support of its assertion that the Reshadat platform was used as a base for

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122 U.S. Counter-Memorial, para. 1.95.
123 *See*, Statement of Mr. Salehin, Vol. VI, para. 4.
124 *See, ibid.*
125 U.S. Counter-Memorial, para. 1.88(2).
126 *Ibid.*, Exhibit 105, p. 20.
127 *Ibid.*, Exhibit 2, p. 36.

helicopter attacks on merchant shipping is a "sea protest" by the Captain of a French merchant vessel, the *Chaumont*, concerning an incident that occurred on 4 March 1986 - again more than eighteen months before the United States attacked Reshadat[128]. This evidence cannot however be considered as reliable, for a series of reasons.

3.80 *First*, the protest is written by the Captain of the *Chaumont*, who does not claim personally to have seen the helicopters taking off from Reshadat. Rather, he is reporting what he had been told by his watch officer, who in turn was simply reporting what his watch seaman had told him. In other words, the Captain's "sea protest" is no more than a twice-removed hearsay account.

3.81 *Second*, the incident is reported as having taken place at 1758 hours local time, on 4 March 1986. In the area where the *Chaumont* was located, the sun sets at about 1820 hours local time on 4 March. The attack therefore took place shortly before sunset. Iranian helicopters were not equipped with night flight equipment[129]. For this reason they could only operate only in daylight and in good weather, from 30 minutes after sunrise to 30 minutes before sunset[130].

3.82 *Third*, the *Chaumont* was reported to be located at 25°47'N, 52°43'E when the incident occurred. That point is located at approximately 23 kilometres from Reshadat. Therefore, even in daylight and in good weather conditions, it is highly unlikely that it would have been possible from that distance to see a helicopter taking off from Reshadat.

3.83 A review of the U.S. Exhibits shows that there is no independent record of a single alleged Iranian helicopter attack on a U.S. vessel during the entire Iraq-Iran war. There did not even appear to be a perceived threat of such an attack on U.S. vessels[131]. According to the most comprehensive sources listing alleged Iranian attacks and relied on as Exhibits by the United States, the last reported Iranian helicopter attack in the Iraq-Iran war was on that on the *Tenryu Maru*, a Japanese vessel (with regard to which sources agree that

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128 *Ibid.*, Exhibit 110.
129 *See*, Statement of Mr. Salehin, Vol. VI, para. 5.
130 *See, ibid.*, paras. 5 and 7 (vii).
131 *See*, para. 2.46, above.

the shots missed the vessel, there was no damage or injury and the vessel continued on its journey to Kuwait). That incident occurred six months before the first U.S. attack on Iran's platforms. What is more, for over a year before 19 October 1987, when Reshadat was attacked by the United States, only one other helicopter attack is recorded, in February 1987 on the Turkish Cypriot product tanker, *Sea Empress* (with respect to which sources agree that there was only minor damage, there were no injuries or casualties and the vessel continued on its journey to Kuwait), and there is moreover conflicting evidence as to whether the vessel was attacked by gunboats or helicopters[132].

3.84 There is therefore no evidence of any helicopter threat to shipping in the Persian Gulf for over a year before the first U.S. attack and for over a year and a half before the second U.S. attack; and even before 1986, the reported attacks in the vicinity of the platforms were few in number and caused little damage. What is more, the U.S. assertion that U.S. shipping was at risk[133] finds no independent corroboration in the United States' own Exhibits.

3.85 In an attempt nevertheless to justify its attacks against the platforms, the United States asserts that "on 8 October 1987, a U.S. Navy helicopter on a reconnaissance mission in the central [Persian] Gulf was fired upon by a heavy machine gun on the Rostam oil platform. The U.S. helicopter did not return fire"[134]. The United States annexes a statement by Rear Admiral Bernsen describing this alleged incident[135]. There is however no report of this incident in any of the other U.S. Exhibits, including press reports and sources which aim comprehensively to list the different attacks and attempted attacks allegedly perpetrated by Iran. This is most surprising given the prompt dissemination by the United States into the press of reports of any supposed Iranian act of aggression.

3.86 At the time of the alleged attack, the United States stated that the helicopter had seen some shots being fired from the Reshadat platform but that "the helicopter... left the area without shooting back because it was not certain whether the gunfire

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132 According to U.S. Preliminary Objection, Exhibit 6, the vessel was attacked by gunboats; but according to U.S. Preliminary Objection, Exhibit 10, the vessel was attacked by a helicopter.

133 U.S. Counter-Memorial, para. 1.80.

134 *Ibid.*, para. 1.51.

135 *Ibid.*, Exhibit 43, para. 17.

was aimed at it"[136]. In another U.S. document dated the day after the incident, it is stated that the helicopter was fired on "by an *unidentified source* vicinity Rostam oil field"[137]; and the same language is repeated in the letter dated 9 October 1987 from the Permanent Representative of the United States to the United Nations, addressed to the President of the Security Council[138]. Thus, there is simply no evidence of any hostile act by Iran in connection with this alleged incident. Moreover, the United States ignores the important question: what possible right did a U.S. military helicopter have to approach Iran's commercial oil platforms at such short range?

3.87 Finally, the United States has put forward no evidence of any allegedly incriminating equipment on board the Salman and Nasr platforms. It appears that the United States did not even seek to recover any equipment or documentation from those platforms, preferring instead to engage in wholesale destruction. In any event, there could not have been any evidence of Salman and Nasr forming part of an offensive military network as they played no offensive part in Iran's war effort, and there could not have been any evidence of any helicopter or small boat attacks using these platforms as no such alleged attacks had even been reported in the vicinity for over a year and a half before the attack.

3.88 In conclusion, this review of the United States' contentions and alleged evidence confirms that the platforms played no offensive military role in relation to the conflict in the Persian Gulf. The platforms were commercial installations serving an important economic function, including trade with the United States, and Iran had a legitimate right to defend them. The United States has produced no evidence that the platforms were used for extraneous, non-commercial purposes beyond the requirements of low-level local self-defence. On the contrary, the few examples of factual evidence put forward by the United States, such as the documents allegedly found on Reshadat after the event, merely confirm Iran's position that Reshadat was playing a perfectly innocuous role, one which was quite normal and legitimate in the circumstances. The fact that it was only the key platforms, upon

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136 *See*, Iran's Memorial, Exhibit 64; *see*, also, *ibid.*, Exhibit 74, in which the U.S. helicopter pilot is reported as saying that the Iranians "might just have been testing their weapons".

137 U.S. Counter-Memorial, Exhibit 78; emphasis added.

138 U.S. Preliminary Objection, Exhibit 16.

which all the other interconnected installations depended for initial oil processing and transport to export terminals, that were so thoroughly destroyed by the U.S. attacks, leaving intact other structures which could equally well have served the aggressive military purposes alleged by the United States, is also suggestive. In short, the United States had no reason to attack the platforms, unless it was to cause disruption to Iran's oil production capacity, thereby in effect assisting Iraq in its war effort[139].

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[139] With regard to the Reshadat complex, the United States set out to attack the central production platform (R7), the same platform which had been attacked twice by Iraq. It was R4 which was the only platform in the complex with a radar; and it was also on R4 that the bulk of the military personnel and equipment was located (*see*, Statement of Mr. Salmanian, Vol. IV, paras. 3-4). However, the United States admits that it had not intended to bomb R4, but that this platform was attacked "as a target of opportunity" (Iran's Memorial, Exhibit 69). The United States also targeted the main platforms in the Salman and Nasr complexes, causing maximum long term economic damage.

CHAPTER 4. THE OCTOBER 1987 ATTACK ON THE RESHADAT PLATFORMS

Section 1. Introduction

4.1 It is undisputed that on 19 October 1987 the United States carried out the attack which destroyed the Reshadat platforms. There is compelling evidence that this attack was not a spontaneous reaction to events that had occurred a few days earlier, but that it had been planned for months in advance as part of the United States' predisposition to treat Iran with hostility in the context of the United States' support for Iraq during the Iraq-Iran war.

4.2 *Prima facie*, the destruction of Iran's oil platforms was an inherently illegal act which violated Article X(1) of the Treaty of Amity[1]. It follows that the United States bears the burden of proving that its actions were legally justified. Given the gravity of those actions which involved the use of force, the onus on the United States is particularly heavy.

4.3 In an attempt to meet this burden, the United States has relied on a mixture of circumstantial evidence and pure speculation to support the allegation that its destruction of Iran's platforms was a necessary response to a missile attack that had occurred three days earlier against the *Sea Isle City*. That missile attack is said, rather vaguely, either to have come from Iranian held territory on the Fao peninsula or from another Iranian missile site "in the Fao area". Briefly stated, the United States advances the following assertions to legitimize its actions.

4.4 First, the United States argues that in 1986 Iran captured Iraqi missile sites in the Fao peninsula from which the missile launch is said to have emanated. Nowhere, however, does the United States actually identify with evidence the missile site from which the missile was supposedly launched[2].

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[1] The legal implications of the attack with respect to the Treaty of Amity are discussed in Chapters 6 and 7, below.

[2] U.S. Counter-Memorial, para. 1.54.

4.5 Next, the United States alleges that Iran had Silkworm missiles on the Fao peninsula or in the Fao area, although no proof is offered for this contention[3]. In particular, the United States fails to address the contemporaneous evidence issued by the State Department and other sources indicating that, to the extent that Iran possessed Silkworms, these were located along the Strait of Hormuz hundreds of kilometres to the south[4]. Nor does the United States disclose that Iraq maintained a fourth site on Fao which went uncaptured by Iran. This site was pointed southwards towards Kuwait, meaning that it was entirely possible for Iraq to have launched the missiles in question.

4.6 Third, the United States argues that the operational range of a Silkworm, contrary to evidence which the United States itself has placed in evidence, was more than 95 kilometres[5]. The conclusion which the United States seeks to establish is that such missiles could therefore have been fired from the Fao peninsula which was more than 95 kilometres from the *Sea Isle City*. But the contemporaneous record shows the contrary[6]. Moreover, to the extent that the United States argues that a Silkworm could theoretically have an operational range greater than 95 kilometres, the United States fails to point out that Iraq itself had such missiles whose range had been upgraded. The United States does not even address the possibility that the missile that hit the *Sea Isle City* could have been fired from land-based sites in Iraq where there were extensive Silkworm inventories.

4.7 Fourth, the United States offers statements from Kuwaiti observers on Faylakah and Bubiyan Islands who claim that they saw missiles coming from the direction of the Fao peninsula[7]. What the United States fails to disclose, however, is the fact that any such observers, if they really did see the missiles in question, could not have witnessed the actual launch of the missiles because they were too far away. Nor does the United States discuss the fact that missiles do not have to fly in a straight line to reach their target. Such missiles are often programmed to fly in a curved, or dog-leg, trajectory. Hence, the mere fact that someone spots a missile overhead coming from a certain direction does not constitute evidence as to where that missile was launched from. The missile in question could perfectly well have

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3 *Ibid.*
4 *See*, Iran's Memorial, Exhibit 67.
5 U.S. Counter-Memorial, paras. 1.76-1.77.
6 *See*, Section 3, below.
7 U.S. Counter-Memorial, paras. 1.69-1.70.

originated from the Iraqi missile site which remained operational on an unoccupied portion of the Fao peninsula.

4.8 Fifth, the United States rules out the possibility that the missile could have been fired from an Iraqi aircraft on the basis that missile fragments said to have been recovered by Kuwaiti authorities some ten months prior to the events of October 1987 (but subsequently destroyed) were not from air-launched missiles[8]. Surprisingly, however, no fragments were recovered from the missiles which hit the *Sea Isle City* or the *Sungari* in October 1987. Thus, it is impossible to say what kind of missiles were used on those occasions.

4.9 In addition, the United States alleges that on 16 October 1987 its AWACS aircraft failed to spot any Iraqi planes capable of firing a missile in the area[9]. But the United States has not provided any information about the location of its AWACS or their operational capabilities on the day in question. The Court is simply invited to accept at face value the United States' assertions without any corroborating proof. Moreover, there is no evidence that the AWACS, wherever they were, were able to track the actual missile which hit the *Sea Isle City*. If AWACS could not detect a missile of the size of a Silkworm, they could equally well have failed to spot a small aircraft firing a missile, as happened with the *U.S.S. Stark*. Nor does the United States discuss the possibility that the missile could have been launched from a ship - indeed, an Iraqi ship - operating in the Khor Abdullah north of the island of Bubiyan[10].

4.10 Finally, the United States has introduced various satellite photographs which purport to show an Iranian missile staging area[11]. These photographs are totally inconclusive as to the components that they are said to identify. Moreover, the United States has not demonstrated any connection between the so-called "staging area" and the actual firing of any missiles of the type said to have originated from the Fao peninsula.

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8 *Ibid.*, para. 1.71.
9 *Ibid.*, para. 1.74.
10 These points are discussed in the Report of Mr. Briand, Vol. VI, paras. 1.6-1.7 and 2.6-2.7.
11 *See*, U.S. Counter-Memorial, para. 1.75 and Exhibit 94.

4.11 In the following sections, Iran will expand on each of these points to show that, at the end of the day, the United States has simply failed to prove that the missile which hit the *Sea Isle City* was an Iranian missile. Although Iran cannot be expected to prove a negative, it will also demonstrate that Iraq maintained an uncaptured missile site on the Fao peninsula which was pointed towards the south - in other words, towards Kuwait - and that Iraq possessed ship-to-surface and air-to-surface missiles capable of striking Kuwaiti waters as well. It follows that it was entirely possible that the missile which hit the *Sea Isle City*, as well as the other missiles to which the United States refers, could have originated from Iraq. The fact that Iraq had every interest to "internationalize" the conflict in 1987 by provoking third States will be discussed in Section 5 below.

4.12 While Iran is confident that, even on the evidence it has submitted, the United States has failed to satisfy its burden of proving that Iran was responsible for the missile attack on the *Sea Isle City* which triggered the destruction of the Reshadat platforms, Iran is submitting in Volume VI to this Reply an expert report prepared by Mr. Jean-François Briand[12]. Mr. Briand is a former French naval officer and an expert in missile technology. His report discusses the materials introduced by the United States relating to missiles and confirms two important conclusions. First, on the basis of the information provided by the United States, it cannot be concluded that the missile that struck the *Sea Isle City* - or the *Sungari* for that matter - came from Iran. Second, Iraq had the capability to launch the same kind of missile attack, and the United States has not shown that Iraq was not at the origin of the incidents in question[13].

4.13 Iran is also furnishing three further statements by Colonel Mahmood Farshadfar, Mr. Mohammad Youssefi, and Colonel Abdol-Hossein Pakan which provide further information undermining the U.S. thesis. These statements are attached as Exhibits in Volume VI.

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12 Report of Mr. Briand, Vol. VI.

13 *Ibid.*, paras. 1.7 and 2.13.

4.14 Colonel Farshadfar, an Iranian Air Force officer, addresses the satellite photographs introduced by the United States and explains how they in no way demonstrate either the presence of Iranian Silkworm (HY-2) missiles in the "staging area" said to have been photographed or that such missiles could have been fired from Iranian-held portions of the Fao Peninsula towards the *Sea Isle City*. Mr. Youssefi is an Iranian missile expert. His testimony reveals that Iran had no Silkworm missile capacity on the Fao peninsula capable of striking at Kuwait. Colonel Pakan is an Iranian Air Force officer. His statement, which discusses the air-borne missile capability that Iraq had, is based on information that Iran gathered during the course of the Iraq-Iran war.

4.15 Together, these statements confirm the conclusion that the United States had not demonstrated that the missile attacks in question were of Iranian origin. They also affirm, together with other independent reports that are being furnished with this Reply, that Iraq did have such capabilities and that it was entirely plausible that the events which precipitated the United States' retaliation against Iran's oil platforms were instigated by Iraq.

4.16 As a matter of fact, Iran denies any and all responsibility for the missile attack that hit the *Sea Isle City*. But there is an additional point, which the Court is respectfully asked to bear in mind. For whatever the provenance of the missile launches relied upon by the United States to justify its attack, the United States has not shown any link between the Reshadat platforms that were destroyed and the attacks in question. These platforms were located over 500 kilometres southeast of the Fao peninsula. Yet this did not prevent the United States from purposely destroying the central producing platform in the Reshadat complex, together with a nearby auxiliary platform that was not originally intended to be attacked by the United States, in order to shut down production from all the surrounding oil fields and maximize the economic damage to Iran.

Section 2. The Failure of the United States to demonstrate that Iran had Silkworm Missiles in the Fao Area which could have been fired at Kuwait

A. The absence of credible U.S. evidence

4.17 In its Counter-Memorial, the United States asserts that Iran maintained missile sites either on captured parts of the Fao peninsula or in the "Fao area" from which the missile that hit the *Sea Isle City* is alleged to have been launched. To support this assertion, the United States has introduced satellite photographs of a so-called Iranian missile "staging area" located in Iranian territory. These photographs were purportedly taken on 9 October 1987 and 16 October 1987, the latter being the day that the *Sea Isle City* was struck. As will be seen below, the photographs are not only of such a poor resolution as to preclude any identification of missiles, they also fail to establish in any way that Iran actually fired a Silkworm on the day in question from that or any other, undisclosed, site in the Fao area. In short, no evidence has been offered linking the missile launches to any particular site or to the "staging area".

4.18 The circumstances in which Iran captured various Iraqi missile sites on the Fao peninsula are described in the Statement of Mr. Mohammad Youssefi which appears in Volume VI.

4.19 As Mr. Youssefi explains, it is true that Iran captured three Iraqi missile sites located on Fao as part of its counter-offensive during the course of 1986. These sites contained concrete shelters and fixed launching pads for Iraqi missiles. Due to the fact, however, that the Fao peninsula was subject to some of the most intense fighting of the war throughout 1986 and 1987 and that there were technical limitations to Iran's capacity to deploy missiles from Fao, it was impossible for Iran to use these sites[14].

4.20 Despite the sophisticated nature of the United States' resources in the area including, if the United States is to be believed, AWACS surveillance and the capability to photograph Iranian "staging areas" on the very day the *Sea Isle City* was struck, the United

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[14] Statement of Mr. Youssefi, Vol. VI, paras. 14-15.

States has failed to produce a single piece of evidence showing either the captured Iraqi sites that Iran was said to have used or the presence of Iranian Silkworms in other parts of the "Fao area". Thus, there is simply no proof for the U.S. contention that it was an Iranian Silkworm missile fired from the Fao area which was responsible for the damage inflicted on the *Sea Isle City*[15].

4.21 Even the satellite images produced with the U.S. Counter-Memorial do not purport to show a missile launching site. All that these photographs are said to depict is a "staging area". But a staging area for what?

4.22 Iran was in the midst of a war that had been imposed on it by Iraqi aggression dating back to September 1980. It is thus hardly surprising that in the mid-1980s Iran had military installations on its territory near the Iraqi front. But introducing blurred pictures of an alleged Iranian installation hardly constitutes proof either that Iran possessed Silkworm missiles at the northern end of the Persian Gulf or that such missiles, if they existed, were transported to other sites so that they could be used to attack the *Sea Isle City*. There is simply no link between the installation said to have been photographed and the missile launch which triggered the U.S. attack on the Reshadat oil platforms.

4.23 The photographs in question are of such poor quality that they do not prove anything. As Mr. Briand's Report concludes, the photographs do not permit one to distinguish the components said to comprise the "staging site"; nor do they suggest that the site was even operational[16].

4.24 Colonel Farshadfar confirms these observations. After analysing in detail each of the graphics introduced by the United States, he concludes that the photographs do not depict a site of the configuration that one would expect either for an HY-2 (Silkworm) missile launching area or a "staging area"[17]. Photographs of sheds or trucks prove nothing

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[15] Facing page 42 of its Counter-Memorial, the United States has placed a map which purports to show missile attacks emanating from locations both in the occupied portion of the Fao Peninsula and areas to the east in Iranian territory. As discussed above, the United States provides no evidence showing the presence of Silkworm missiles at either of these sites.

[16] Report of Mr. Briand, Vol. VI, para. 1.5.2.

[17] Statement of Col. Farshadfar, Vol. VI.

since they do not identify what is contained therein. Moreover, the alleged "missile transporters" purportedly identified by the United States do not possess the same characteristics that would be found if Silkworm missiles had actually been present or if the area was indeed a missile site[18].

B. The existence of evidence contradicting the U.S. thesis

4.25 It should come as no surprise that the United States has failed to demonstrate the existence of Iranian Silkworm missiles either on the Fao peninsula or at the alleged "staging area" or indeed at any other Iranian site in October 1987. This is because all of the evidence at the time pointed to the fact that, to the extent that Iran possessed Silkworms, they were positioned far to the south along the Strait of Hormuz.

4.26 In Exhibit 67 to Iran's Memorial, Iran furnished a document prepared by the United States Department of State in October 1987 - *i.e.*, precisely at the relevant time - which showed the deployment of Iranian Silkworms along the Strait of Hormuz[19]. Despite the fact that this document showed other Iranian military bases further north, there was no suggestion that Iran had stationed Silkworms in the northern reaches of the Persian Gulf or on the Fao peninsula. Moreover, the State Department document indicated that the range of Iran's Silkworms was only 85 kilometres, far less than the distance between the captured Iraqi sites on Fao and the *Sea Isle City*.

4.27 This item was far from an isolated example. On 28 March 1987, for example, *Jane's Defence Weekly* reached the same conclusion, namely, that Iran's Silkworms were located along the Strait of Hormuz[20]. Further evidence taken from *Jane's* publications on 6 June 1987 and 1 August 1987 shows the same thing. There was no suggestion that Iran had Silkworms in the northern Persian Gulf[21], and the range of the missiles in question was stated to be 80 kilometres at most.

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18 *Ibid.*, paras. 6-23.
19 Iran's Memorial, Exhibit 67.
20 *See*, Exhibit 19, Vol. II.
21 Exhibits 20 and 21, Vol. II.

4.28 Further documents introduced by the United States show a consistent pattern. For example, in Exhibit 97 to the U.S. Counter-Memorial the United States has included an extract from Cordesman and Wagner's *The Lessons of Modern War: The Iran-Iraq War (1990)*. This source, at page 274, indicates that Iran's HY-2 (Silkworm) missiles were only located along the Strait of Hormuz. It also confirms that Iran's Silkworms had "a maximum range of 95 kilometers" but that they were "most effective at ranges under 40 kilometers"[22].

C. The existence of an Iraqi missile site on an unoccupied part of the Fao peninsula

4.29 As the discussion above reveals, the United States has been highly selective about the information it has elected to disclose to the Court concerning the situation on the Fao peninsula in the autumn of 1987. Notable in this regard is the United States' failure to disclose that, when Iran took over portions of the Fao peninsula, it did not capture a fourth Iraqi missile site located just to the west of Iranian-held territory. Mr. Youssefi's Statement provides the details of this site together with an aerial photograph and a map indicating where it was located[23].

4.30 The Iraqi site became fully operational after Iran occupied portions of the Fao peninsula. It contained a missile launching pad which, significantly, was oriented at a 165° angle which meant that the missiles launched from it were pointed towards the south, not towards Iran[24]. As will be explained below, it was thus entirely possible for Iraq to launch a missile from this site which could have struck at Kuwaiti territory.

4.31 There is also evidence documenting the fact that during the 1980s, Iraq had modified its own Silkworm missiles so as to increase their range. If reference is made to the document that appears at Exhibit 22, it can be seen that a missile expert affiliated with *Jane*'s reported as follows:

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22 U.S. Counter-Memorial, Exhibit 97, pp. 274-275.
23 Statement of Mr. Youssefi, Vol. VI.
24 *Ibid.*, para. 9.

> "Iraq developed extended range 'Silkworm' variants in the mid-1980s, known as FAW-150 and FAW-200 with ranges of 150 and 200 km respectively... Basically, the Iraqi FAW-150/200 design concept was to extend the 'Silkworm's' liquid propellant tanks, in much the same way that Iraq extended the tanks of the SS-1 'Scud B' to make the extended range Al-Hussein ballistic missile"[25].

Iraq's use of such weapons became all too familiar during its subsequent conflict in Kuwait in 1990, but that did not prevent Iraq from utilizing such weapons three years earlier.

4.32 With respect to the location of missiles in October 1987, therefore, the record shows the following:

- *First*, no evidence has been introduced by the United States actually showing operational Iranian missile sites, on either the Fao peninsula or on Iranian territory, capable of striking at Kuwait.

- *Second*, the area photographed by the United States cannot be said to be a missile site based on the information provided; nor is there any evidence of Iranian Silkworms at this or any other site.

- *Third*, the United States' own evidence points to the existence of Iranian Silkworms in the Strait of Hormuz, but no missiles at the northern end of the Persian Gulf, whether on Iranian territory or on occupied portions of the Fao peninsula.

- *Fourth*, Iraq did have an operational missile site located at a position on Fao just to the west of areas occupied by Iran. This site contained a fixed missile launching system aimed at Kuwait. Moreover, Iraq had engaged in extensive missile attacks against Iran and "friendly" third States and possessed a significant arsenal of such weapons[26].

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25 Exhibit 22, Vol. II, p. 20.

26 *See*, para. 2.51, above.

- *Fifth*, Iraq possessed Silkworm missiles with an upgraded range capability of 150 to 200 kilometres, which was well within the range of Kuwait's harbour.

Section 3. The Question of Range

4.33 In the factual Annex to Iran's Observations and Submissions, Iran pointed out that the maximum range of a Silkworm missile was stated to be 95 kilometres, but that the effective range was in fact much less - usually in the range of 80 kilometres. Iran then went on to describe how the nearest point on Iranian-held territory on the Fao peninsula in 1987 was 98 kilometres from the *Sea Isle City*, thus placing the vessel out of range of any hypothetical Iranian missile launch. Several independent sources were furnished which confirmed these conclusions.

4.34 The United States simply ignores all of this evidence by arguing that "[t]he fact is that they traveled at least 98 kilometers"[27]. The only support introduced by the United States for this bald assertion is the allegation that Kuwaiti observers on Bubiyan and Faylakah Islands saw missiles that were said to have been fired towards Kuwait "approaching from the Faw area"[28].

4.35 In the following section, Iran will address the deficiencies which undermine the validity of the statements made by Kuwaiti military personnel regarding their contentions that they saw missiles coming from the Fao area. In this section, Iran will demonstrate again that the factual assertions concerning the range of Iran's missiles upon which the U.S. argument is predicated ignore all of the contemporaneous evidence.

4.36 It should come as no surprise that when a manufacturer of a missiles - in this case, China - advertises that the missile has an operational range of a particular distance, this distance is likely to be the maximum range of the missile's capability. Suppliers are not in the habit of understating their product's performance.

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27 U.S. Counter-Memorial, para. 1.76.

28 *Ibid.*

4.37 In the case of Chinese HY-2, or Silkworm, missiles, the maximum range was stated to be 95 kilometres[29]. Iran has already pointed to the fact that a number of authoritative sources in 1987 placed the effective range of an Iranian Silkworm at much less than 95 kilometres. For example, *Jane's Defence Weekly* noted on 6 June 1987 that:

> "In its sales brochure, the missile's range is stated as 95 km, although Western analysts credit the range as no more than 80km, similar to that of the Soviet SS-N-2C"[30].

4.38 Two experts whom the United States relies on, Cordesman and Wagner, make a similar observation. They state that:

> "The Silkworm is most effective at ranges under 40 kilometers, but it has an effective range of 70-80 kilometers if a ship or aircraft can designate the target and allow the Silkworm to reach the point where its on-board guidance can home in on the target"[31].

4.39 Two further technical documents supplied by the United States attest to the limited range of a Silkworm. The first is a brochure for the HY-2 (Silkworm) missile produced by POLY Technologies. Under the missile's characteristics, the range is indicated as "20-95km")[32]. The second is an extract from *Jane's Weapons Systems 1988-1989*. Here, too, the range of a Chinese HY-2 missile is recorded as being "20-95 km"[33].

4.40 Thus, there is extensive independent evidence introduced by both Parties which contradicts the United States' theory that Iran possessed missiles of sufficient range to strike the *Sea Isle City*.

4.41 In the face of this evidence, the United States has fallen back on a report by an Australian military analyst prepared in 1997, ten years after the events in question. That

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29 *See*, Statement of Mr. Youssefi, Vol. VI, which refers to the Chinese manufacturer's specifications for the missile.

30 Exhibit 20, Vol. II.

31 U.S. Counter-Memorial, Exhibit 97, p. 274.

32 *Ibid.*, Exhibit 85.

33 *Ibid.*, Exhibit 98.

report is based on no more than a hypothetical simulation of an HY-2 missile launch performed years after the fact. Such after-the-fact suppositions can in no way overcome the weight of the contemporaneous evidence which uniformly reflects a different view.

4.42 Even if one accepts (*arguendo*) the supposition that a Silkworm missile could hypothetically be used with effectiveness at ranges greater than 95 kilometres, this still would not prove where the missile that hit the *Sea Isle City* came from. This is so for several reasons.

4.43 *First* of all, the United States has admitted that no missile fragments were recovered either from the attack on the *Sea Isle City* or, for that matter, on the *Sungari*. As the Report of Mr. Briand notes, this lacuna in the U.S. submissions is surprising[34]. Whatever its cause, the end result is that it is impossible for the United States to identify what kind of missile hit these vessels. There could be any number of possibilities: air-to-surface, ship-to-surface, land-to-surface. But there is no evidence that the missiles in question were Silkworms, much less that they originated from Iran.

4.44 *Second*, as has been seen, Iraq also possessed an operational missile site in the vicinity of Fao. This site was equipped with a fixed launcher, which was pointing at Kuwait, and was only 103 kilometres from the point where the *Sea Isle City* was struck. It follows that, to the extent that the United States now argues that a Silkworm could have travelled 105 kilometres[35], it could just as plausibly have originated from this Iraqi site.

4.45 *Third*, as has been shown, there are independent reports by missile experts working for *Jane's* that during the mid-1980s, Iraq had acquired the ability to upgrade its Silkworms so as to extend their range to 150 kilometres and more[36]. Once again, therefore, it was entirely possible that Iraq could have been the origin of the attack on the *Sea Isle City*. As the Report of Mr. Briand confirms, "Les arguments développés dans les annexes au

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34 Report of Mr. Briand, Vol. VI, paras. 1.2-1.4.
35 U.S. Counter-Memorial, para. 1.77.
36 *See*, Exhibit 22, Vol. II.

Contre-Mémoire des Etats-Unis ne permettent pas d'affirmer que les missiles incriminés n'ont pas pu être tirés par l'Irak"[37].

Section 4. The Testimony of Kuwaiti Military Observers does not establish the Provenance of the Missiles in Question

4.46 The United States has tried to compensate for its lack of evidence demonstrating that Iran had the capability of firing the missile that hit the *Sea Isle City* by introducing the testimony of two Kuwaiti military observers who claim that they, or forces under their command, saw various missiles which were launched towards Kuwait coming from the Fao area[38]. The conclusion that the United States draws from this report is that Iran must have fired the missiles in question.

4.47 There are a whole host of reasons why this report is simply not credible evidence of the provenance of the missiles.

4.48 Iran has already pointed out that the United States itself admits that there are no missile fragments from either the 15 October 1987 missile attack on the *Sungari* or the 16 October 1987 attack on the *Sea Isle City*. The two Kuwaiti officials who signed the report annexed to the U.S. Counter-Memorial go further. They state that nor are there any missile fragments remaining from the January 1987 and September 1987 missile launches, which were also supposedly directed at Kuwait by Iran. All the evidence concerning fragments was apparently lost when Iraq invaded Kuwait in 1990[39]. The Court will thus appreciate that there is no way that any of the Kuwaiti officials' testimony regarding the nature of the missiles that were fired can be independently verified.

4.49 That being said, it is important to read carefully what is alleged in the observers' report. For example, it is alleged that on 21 January 1987 and 24 January 1987 Kuwaiti Air Defence personnel stationed on Faylakah Island tracked on radar and visually observed a missile in flight "originating from the direction of the Faw peninsula"[40].

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37 Report of Mr. Briand, Vol. VI, para. 2.13.
38 U.S. Counter-Memorial, paras. 1.69-1.70 and Exhibit 82.
39 *Ibid.*, para. 10.
40 *Ibid.*, para. 4.

4.50 At the outset, it should be noted that Faylakah Island is some 60 kilometres south of the Fao peninsula. As the Report of Mr Briand notes, it was thus impossible for anyone stationed on Faylakah to have observed the actual launch of a missile[41]. At most, all that an observer could say is that he saw a missile flying in a general direction.

4.51 Missiles, however, do not have to travel in a straight line. Indeed, it is common practice for a missile to be programmed to turn, or take a dog-leg, during its flight in order to strike a particular target. The Report of Mr. Briand concludes, therefore, that it was entirely possible for a missile targeting Kuwait's harbour to be launched from the remaining Iraqi site in the vicinity of Fao and to be programmed so as to fly over both Bubiyan and Faylakah Islands en route to its destination[42]. Merely spotting a missile flying in a certain direction overhead is not probative evidence of where that missile was fired from. This is particularly the case when the records and specifics of the Kuwaiti radar tracking systems, which are said to have followed the missiles, have not been produced by the United States.

4.52 The same deficiencies undermine the statement that missiles were seen being launched "from the Faw peninsula" on 2 September, 4 September and 5 September 1987[43]. Once again, the Report of Mr. Briand notes that, even from Bubiyan Island, it is doubtful that the actual launch of a missile could be observed with precision[44]. At most, only a short segment of a missile's flight could reasonably have been seen, given the small profile that a missile in flight presents.

4.53 Of course, much of the Kuwaiti account is no more than hearsay and must be discounted as such. Nowhere is it alleged that the authors of the report themselves witnessed the events of January or September 1987, or that of 15 October 1987 against the *Sungari*. They simply rely on other, undisclosed, reports of unverifiable origin from other individuals.

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41 Report of Mr. Briand, Vol. VI, para. 1.5.1.
42 *Ibid.*, para. 2.9.
43 U.S. Counter-Memorial, Exhibit 82, paras. 7-9.
44 Report of Mr. Briand, Vol. VI, para. 1.5.1.

4.54 The only account that purports to be from an eyewitness is that of one of the signatories to the report, General Al-Suwaiti, concerning the events of 16 October 1987. On that day, General Al-Suwaiti states that he was visiting Auha Island, a small island to the south-east of Faylakah which is even further away from the Fao peninsula than Faylakah[45]. He says that he observed "a missile flying overhead, between Faylakah Island and Auhat [*sic*] Island, in a south-south-easterly direction - originating from the direction of the Faw peninsula and flying in the direction of the Sea Island Terminal"[46].

4.55 Due to the possibility that a missile could follow a curved trajectory, it is impossible for someone to say with any certainty where the missile was launched from when the person in question is over 60 kilometres away from the launch site. Moreover, he does not even say that he saw this missile actually hit the *Sea Isle City*. It follows that the testimony adduced by the United States in this respect cannot be regarded as dispositive as to the provenance of such missiles. This conclusion is reinforced by the fact that the United States has not demonstrated the existence of Iranian Silkworm missiles in the Fao area at any time during the relevant period.

Section 5. Iraq's Missile Capabilities and its Interests in "internationalizing" its Conflict with Iran

4.56 At this juncture, it is worth recalling that the United States bears the burden of proving that its destruction of the Reshadat platforms was justified as a matter of self-defence and that Iran was responsible for the missile which struck the *Sea Isle City*, which triggered the U.S. response. Based on the foregoing discussion, Iran believes that it has thoroughly rebutted the theories advanced in the U.S. Counter-Memorial pointing to Iran as the source of the missile. While it is not up to Iran to prove where the missile that hit the *Sea Isle City* came from, it may be instructive to refer to Iraq's capabilities in this respect in order to place the issue in proper perspective.

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45 For the location of Auha (or Awhah) Island, *see*, U.S. Counter-Memorial, Map 1.10.

46 U.S. Counter-Memorial, Exhibit 82, para. 14.

A. Iraq's missile capabilities

4.57 In the preceding sections, Iran has introduced evidence which establishes the following:

- Iraq had a well-developed Silkworm missile capability at the time of the events in question.

- Iraq possessed an operational missile site on the Fao peninsula just to the west of areas occupied by Iran in 1986 and 1987.

- That missile site was oriented in a southerly direction towards Kuwait.

- Iraq had also demonstrated the ability to upgrade the range of its Silkworm missiles in the 1980s to cover ranges up to 150 or even 200 kilometres.

4.58 In addition, the evidence also establishes the following:

- Iraq possessed ship-to-surface Silkworm-type missiles which it had deployed against Iranian and other ships during the Iraq-Iran War. In particular, Iraq operated OSA-class vessels in the Khor Abdullah waterway north of Bubiyan Island.

- None of the arguments advanced by the United States based on missile fragments from earlier launches allegedly analysed in Kuwait are inconsistent with the possibility that these kinds of missiles fired from naval vessels could have struck the *Sea Isle City*.

- Iraq also possessed air-to-surface missiles which had been used throughout the war. These missiles had been deployed not only against Iran, but also against vessels belonging to third States including the *U.S.S. Stark*.

- Since no fragments were recovered from either the *Sea Isle City* or *Sungari* incidents, it is impossible to rule out the possibility that both vessels were hit by air-launched Iraqi missiles.

4.59 The fact that Iraq's inventory included STYX missiles which were fitted on OSA-class vessels was well known by 1987 and has been confirmed by the Report of Mr. Briand[47]. These missiles were also known as "Silkworms" and were adapted from Chinese HY-2 and C-601 missiles[48].

4.60 Although Iraq's access to the Persian Gulf was limited, its OSA-class vessels operated in areas around Bubiyan Island and to the north of Faylakah. As the Report of Mr. Briand makes clear, it was perfectly possible for Iraq to have launched missile attacks directed towards the harbour at Kuwait from this type of vessel and for the missiles to have overflown look-out posts on Faylakah and Bubiyan[49].

4.61 It was also common knowledge that Iraq possessed air-to-surface missiles which could be fitted on to military aircraft such as Mirage F-1 or Super Etendard fighters, mid-range bombers and even modified civilian planes such as the Falcon jet.

4.62 Perhaps the best known example of Iraq's use of airborne missiles concerned its attack on the *U.S.S. Stark* on 17 May 1987, just a few months before the events of October. The conventional wisdom was that the missile that hit the *Stark* had been fired from an Iraqi Mirage F-1 fighter. But, Colonel Pakan notes, Iranian military intelligence confirmed that the attack had actually been carried out by a small, modified Iraqi civilian aircraft[50].

4.63 The United States has endeavoured to show that the missiles which were fired towards Kuwait, including the missile that hit the *Sea Isle City*, were not launched from Iraqi aircraft. The United States bases its conclusion on the allegation that the missile

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47 Report of Mr. Briand, Vol. VI, para. 2.2.
48 *Ibid.*
49 *Ibid.*, para. 2.8.
50 Statement of Col. Pakan, Vol. VI, para. 9.

fragments recovered from the January and September missile launches did not have the type of airframe found on air-launched missiles and that on 16 October 1987, the day the *Sea Isle City* was hit, U.S. AWACS did not detect any Iraqi aircraft operating in the northern Persian Gulf[51].

4.64 There are several flaws to this argument. With respect to the January and September incidents, the United States has acknowledged that no missile fragments exist for independent verification because they were lost when Iraq invaded Kuwait in 1990. With respect to the missile launches on 15 and 16 October 1987, it is said that no fragments were ever found. Thus, it is impossible to rule out the possibility that the missile that struck the *Sea Isle City* was an air-launched missile.

4.65 As for the United States' argument that its AWACS did not spot any Iraqi aircraft operating in the area on 16 October 1987, the information provided by the Respondent is simply insufficient to support the conclusion for which it is advanced. For example, the Court is given no information about the location or operational capabilities of AWACS on the day in question. It is expected to accept at face value the U.S. assertions. Moreover, as the Report of Mr. Briand points out, there is the unexplained question of how, if the United States did have AWACS capable of monitoring the northern Persian Gulf at the time, they did not detect the flight path of the missile that hit the *Sea Isle City*[52]. As Mr. Briand observes, if an AWACS was incapable of spotting and tracking a missile launch, it could equally well have missed a low-profile Iraqi fighter or a modified civilian plane armed with missiles[53].

4.66 What is known is that Iraq possessed missile capabilities on land (the uncaptured fourth site on the Fao peninsula), sea (small OSA-class vessels) and in the air (bombers, fighters and Falcon jets). Any one of these could have been the source of the missile that struck the *Sea Isle City*.

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51 U.S. Counter-Memorial, paras. 1.73-1.74.

52 Report of Mr. Briand, Vol. VI, para. 1.6.

53 *Ibid.*, para. 2.7.

B. Iraq's interest in "internationalizing" the conflict

4.67 In response to this possibility, the United States asserts that "it would have been unwise and contrary to its interests for Iraq to attack oil tankers in Kuwaiti waters"[54]. This oversimplistic view of matters fails to take into account Iraq's genuine interest at the time to further engage its neighbours and the United States in the conflict.

4.68 Chapter 2 has already discussed Iraq's predilection for attacking "friendly" targets during the course of the Iran-Iraq war. These matters are also addressed by Professor Freedman in his Report[55]. Suffice it to recall here that there are several well-documented examples where Iraq attacked vessels or installations belonging to its allies.

4.69 These included a tanker chartered by Kuwait, a Saudi drilling supply vessel, another tanker travelling from Saudi Arabia to Kuwait, and various European and other vessels which were dealing with Kuwait. In 1988, Iraq fired on Danish supertanker leaving Saudi Arabia with Silkworm missiles, and two other Silkworms were fired by Iraq on a U.S.-led convoy of reflagged Kuwaiti tankers[56].

4.70 The missile attack on the *Stark* is another such example. Although this incident was explained away as a "mistake", the evidence is not so clear-cut. As Commander David Carlson, the Commanding Officer of a U.S. naval frigate operating in the Persian Gulf at the time, observed:

> "If the attack was intentional, then it was a successful ploy to get us [the United States] involved in sorting out their [Iraq's] surface picture through the process of elimination that would be made possible by greater cooperation"[57].

4.71 During 1987, Iraq was in a particularly vulnerable position in its war against Iran. It had lost portions of the Fao peninsula and was suffering from the debilitating

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54 U.S. Counter-Memorial, para. 1.66.
55 Report of Prof. Freedman, Vol. II, paras. 46-49.
56 *See*, para. 2.51, above.
57 Iran's Memorial, Annex 55.

effects of a prolonged conflict with Iran. Iraq was in need of further assistance from its Arab neighbours and embarked on an attempt to internationalize the conflict.

4.72 In these circumstances, it was in Iraq's interest to convince neighbouring States such as Kuwait to step up their support for Iraq. On a number of occasions, Iraq expressed dissatisfaction with the level of support it was receiving from Kuwait. The Court will be aware that three years later Iraq invaded Kuwait.

4.73 There were thus plausible reasons why Iraq may have wished to provoke Kuwait and others into its conflict in 1987. Whatever the case, the fact remains that the United States has not satisfied its burden of proof that Iran was responsible for either the missile that hit the *Sea Isle City* or any other missile attacks launched towards Kuwait.

Section 6. The United States' Retaliation was designed to cause Maximum Economic Damage to Iran by destroying Oil Platforms that had no Connection with the Events related to the *Sea Isle City*

4.74 On 19 October 1987, NIOC personnel on the central Reshadat-7 platform had been dismantling turbines for major overhaul and repair of damage caused by an Iraqi attack on the platform on 16 October 1986[58]. At 14:25 hours, U.S. forces informed personnel on the platform, via radio, of their intention to destroy the platform, allowing them only five minutes within which to evacuate. At this point, the remedial work abruptly ceased and the workers were removed to a stand-by ship[59]. It is noteworthy that Pentagon officials confirmed that "[t]he Iranians made no attempt to fire back"[60].

4.75 Thereafter, the U.S. forces, consisting of four destroyers, and other naval support craft and aircraft, proceeded to attack the Reshadat-7 production complex[61]. After 90 minutes of shelling, they achieved the total devastation and sinking of the installations platform, including the turbines which supplied power to the platforms, the

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58 *See*, Statement of Mr. Sehat, Vol. IV, para. 18.

59 *Ibid.*, There were 59 NIOC personnel working on the Reshadat complex at the time (*see*, Statement of Mr. Hassani, Vol. IV, para. 22).

60 Iran's Memorial, Exhibit 69.

61 *See*, Iran's Memorial, paras. 1.106, *et seq.*

control room, the laboratory and the instrument and general repair workshop[62]. The outbreak of fire on the drilling platform resulted in the blowing out of 12 oil producing wells and the destruction of a drilling rig and the living quarters. Further damage was incurred at the connecting point of the submarine pipelines from the R-1 and R-4 platforms to the main pipeline transporting crude to Lavan Island; and the water and chemicals storage tanks, water treatment plant and spare parts warehouse were totally destroyed[63]. As is made clear in the Statement of Commander Marc Thomas, the leader of the assault team, the object of the exercise was not merely to neutralise the alleged military facilities on Reshadat. Commander Thomas states: "According to the plan, my unit would board and *destroy what was left of the platforms* after U.S. Navy ships shelled them"[64]. Thus, after the shelling ended, the destruction was finished off by an explosive ordnance disposal detachment, which boarded the heavily damaged platform by combat rubber craft and boat. Charges were placed in two of the damaged stanchions, the third stanchion having been severed already by the shelling[65].

4.76 After having totally destroyed the Reshadat-7 platform, the United States destroyed a second platform in the same complex, the R-4 platform, that had not been included in the original plan of attack, but which was seen as an "unexpected 'target of opportunity'"[66]. The result of this gratuitous action was to further increase the damage to Iran as a matter of pure revenge.

4.77 There is no dispute between the Parties as to the United States having carried out the attack on the Reshadat platforms on 19 October 1987. According to the United States its attack was in legitimate response to the firing of the missile which struck the *Sea Isle City*[67]. Yet as Iran has demonstrated, before launching its attack on the Reshadat

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62 Statement of Mr. Sehat, Vol. IV, para. 18.

63 *Ibid.*

64 U.S. Exhibit 61, para. 8; emphasis added.

65 *Ibid.*, para. 9.

66 Iran's Memorial, Exhibit 69.

67 *See*, U.S. Counter-Memorial, para. 1.79 and fn. 135 and Exhibit 99, and para. 1.102; and Iran's Memorial, paras. 1.110, 1.112 and 4.71 and Exhibits 70 and 73. *See*, also, U.S. Counter-Memorial, para. 1.132 and Exhibits 43 and 100. As stated by Rear Admiral Harold Bernsen: "The U.S. National Command Authority ultimately decided that U.S. forces should strike Rostam as a defensive measure, in response to Iran's most recent attack against *Sea Isle City*" (U.S. Counter-Memorial, Exhibit 43). *See*, also, Iran's Memorial, Exhibit 69: "... the United States plans to take no further action in response to the Iranian Silkworm missile attack on the US-flagged Kuwaiti ship Sea Isle City..."; and Exhibit 71: "The precision with which we tried to identify a target was proportionate to their attack by a Silkworm missile... of the Sea Isle City...".

platforms, the United States failed to determine - and made no effort to determine - the source of the missile which struck the *Sea Isle City*. Indeed, there is evidence that the United States was determined to go ahead with its assault, regardless of whether it had any justification for doing so.

4.78 As was explained during the jurisdictional phase of the proceedings, the actions of the United States were carefully planned so as to destroy the central production platform - the R-7 platform - which in turn was connected to a series of other producing platforms and wells and to the export facilities on Lavan Island. By attacking the central platform, the United States eliminated the possibility of oil being produced and transported from any of the other connected facilities.

4.79 In Chapter 3, Iran showed that the Reshadat platforms destroyed by the United States were commercial installations which had no military role except for the presence of a small number of defensive personnel who were stationed there to help repel Iraqi air attacks on the platforms themselves. The Reshadat complex was located over 500 kilometres to the southeast of the Fao peninsula. The United States has shown absolutely no connection between these installations and the incident that took place on 16 October 1987. On the face of it, there could be no such connection given the distances involved and the lack of any communication link to Fao. As the *Washington Post* reported on 20 October 1987, U.S. intelligence sources confirmed that there were "no Silkworm launch sites at Faw, making a military strike on the area pointless"[68].

4.80 Despite the obvious lack of any link between the Reshadat complex and the alleged missile attacks far to the north, the United States in its Counter-Memorial argues that the platforms contained radar that was used to assist Iranian attacks on neutral shipping and that they were thus a legitimate target. For example, the statement of Rear Admiral Bernsen contains the following comment:

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[68] Iran's Memorial, Exhibit 69.

> "There were a number of factors supporting the choice of Rostam [Reshadat]. The platform's radar, strategically located in the central Gulf, routinely monitored all shipping that passed within radar and line-of-sight range"[69].

Similarly, the letter dated 19 October 1987 from the U.S. Representative to the United Nations Security Council which raised the matter also sought to justify the attack on the basis that the Reshadat platform had radar on it which was used to harass neutral shipping[70].

4.81 These allegations are scarcely credible. There was no radar on the central R-7 Reshadat platform. There was only standard communication equipment of the kind that one would expect to find on a producing major oil platform. The only radar that existed in the complex was situated on the nearby R-4 platform, and it was in a state of serious disrepair[71]. Yet the R-4 platform was not even on the target list prepared by the United States in response to the events concerning the *Sea Isle City*. The United States' original intention had been to destroy the central platform - the R-7 platform - alone. The only reason why the R-4 platform was attacked at all is because the U.S. military happened to see it nearby and decided to destroy it as "a target of opportunity"[72].

4.82 It follows that the assertion that the platforms were attacked because of their radar facilities was no more than a pretext. The true intent of the United States was to destroy the central platform so that production and transportation of crude oil from all the surrounding fields would be stopped.

4.83 As a result of the attack by the United States on the Reshadat platforms, Iran suffered substantial damage. In particular, it suffered damages including, but not limited to:

- Expenses and costs resulting from rescue operations, extinguishing of fires on the platforms, etc.

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69 U.S. Counter-Memorial, Exhibit 43, para. 26.
70 *Ibid.*, Exhibit 100.
71 *See*, para. 3.65, above.
72 *See*, Iran's Memorial, Exhibit 69.

- *Expenses and costs incurred for the reconstruction and recommissioning of the* platforms;
- Loss of production, damage to the oil fields, environmental damage, and other related elements; and
- Injuries to personnel on board the platforms at the time of the attacks.

Section 7. Conclusions

4.84 Iran submits that it has amply shown that the United States has failed to prove that Iran was responsible for the missile that struck the *Sea Isle City*, or, indeed, for any of the other missile attacks addressed by the United States. Notwithstanding the dearth of evidence linking Iran to the events in question, the United States embarked on the pre-meditated destruction of virtually defenceless oil platforms which had no connection whatsoever to any alleged missile activities that took place in the vicinity of the Fao peninsula.

CHAPTER 5. THE APRIL 1988 ATTACK ON THE NASR AND SALMAN PLATFORMS

5.1 As was the case with the Reshadat platforms, the Nasr and Salman platforms were installations of a purely commercial nature. They had a sole function - the production of oil - and they were again an entirely inappropriate target for military attack.

Section 1. The Events of 18 April 1988

5.2 United States forces attacked the Salman and Nasr offshore installations on 18 April 1988, in what has been described as "a major surface action against a determined and fanatical enemy"[1] resulting in an "American victory in the [Persian] [G]ulf"[2]. In the course of that action, not only were the Salman and Nasr platforms destroyed, but also "half the Iranian Navy"[3]. This U.S. attack happened at precisely the same time as Iraq had launched its successful offensive to recapture the Fao peninsula.

5.3 The U.S. attack on Salman occurred at a moment when about 14 NIOC platform personnel were implementing the final steps to resume that platform's crude oil production, which had been halted by an attack by Iraqi warplanes on 14 November 1986. Initially, at 06:00 hours, two U.S. destroyers and a supply ship closed in to a distance of approximately 1.5 miles from the platforms. One hour later, personnel on the platforms were warned by radio that they would be given five minutes to evacuate. Upon expiry of the five minutes, and before the evacuation could be completed, the U.S. warships opened fire on the drilling platform. As the shelling intensified, platform employees and soldiers, some of whom had been wounded, plunged into the sea and were rescued by boat[4]. After they had travelled one mile from the platform they were able to observe sixteen helicopters and two warplanes

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1 U.S. Preliminary Objection, Exhibit 32, p. 144.

2 *Ibid.*, p. 145.

3 *See*, Iran's Memorial, Exhibit 44, p. 425.

4 *See*, Statement of Mr. Ebrahimi, Vol. IV, para. 10. In this regard the words of one of the commanders of the operation are illuminating: "Warning an armed [oil platform]... prior to opening fire may register high on the humane scale, but it clearly ranks low in terms of relative tactical advantage. We should rethink this requirement" (U.S. Counter-Memorial, Exhibit 132, p. 70).

bombarding the platform. After the bombardment, U.S. forces boarded the platform[5]. However, they found no evidence that Salman was being used for military purposes. Following the boarding, the complex was destroyed by means of explosives.

5.4 Eight soldiers stationed on Salman were wounded in the course of the U.S. attack, two of them seriously[6]. In addition, there was severe material damage. When the NIOC personnel returned to the Salman platforms 24 hours later, they found that seven pumps on the power generation platform, three gas compressor turbines and two power generators on the main oil well platform, as well as the control room and two living quarters had been completely destroyed[7]. Explosives had been placed on the power generation platform, but had failed to detonate, and were later neutralised by Iranian military experts. If these explosives had detonated, this would have destroyed the equipment necessary for the transport of oil to Lavan Island, and would thus have disrupted for a considerably greater length of time the production of crude oil from the Salman complex[8]. As it was, production from the whole of the Salman complex and its satellite oil wells was totally interrupted for four months as a result of the U.S. attacks on essential parts of the complex; and regular production did not resume until September 1992, reaching a normal level only in 1993[9].

5.5 At about 8:13 hours on the same day, the U.S. Navy also attacked the Nasr complex, which at the time was producing oil normally. NIOC's 15 platform personnel were informed by radio of the U.S. intention to destroy the platform. All personnel working on that platform, after ascertaining that the U.S. attack was indeed imminent, left the platform by tug boat. Seven minutes later the platform was under attack by U.S. helicopters and warships. The operation stopped only at 16:00 hours, and the U.S. forces then left the area after having destroyed and melted down all four decks of the Nasr Main Production Platform (or Central Platform)[10]. Yet again, the United States had concentrated its fire upon the platform which centralised all oil production in the complex. The result was that all production in both the Nasr and Nosrat fields was interrupted, since the oil produced by those

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5 This may be seen from the slogans that were painted on the wrecked platform (*see*, Iran's Memorial, photograph on back page facing p. 50).

6 Statement of Mr. Emami, Vol. IV, para. 7.

7 *Ibid.*, para. 8.

8 *Ibid.*, para. 9.

9 *Ibid.*, para. 10.

10 Statement of Mr. Alagheband, Vol. IV, para. 15.

fields could no longer be transported to the Central Platform for initial processing and transfer by pipeline to Sirri Island[11]. Normal production did not resume until nearly four years later. In addition, water injection, which was performed by means of a separate pipeline from Sirri Island to the Nasr main producing platform and from there to various subsidiary platforms, was interrupted for several years as a result of the destruction of the main platform. This led to a drop in reservoir pressure and thus to a reduction in the quantities produced[12].

5.6 The U.S. attack on both the Salman and the Nasr platforms was part of an overall military plan called "Operation Praying Mantis". The operation was on such a large scale that it has been compared with a major naval battle fought by the United States during the Second World War, in which about 30 ships were sunk:

> "For the first time since the Battle of Leyte Gulf on 23-26 October 1944, U.S. naval forces and supporting aircraft fought a major surface action against a determined and fanatical enemy"[13].

5.7 It is perhaps no coincidence that U.S. forces engaged so large a part of the Iranian navy and attacked two Iranian oil platforms at the southern end of the Persian Gulf on the very day when Iraq had launched its offensive to recapture the Fao peninsula, which had been occupied by Iran for the previous two years. It has been reported that the United States informed Iraq of its intention to put "Operation Praying Mantis" into action on that date:

> "Admiral Ace Lyons had developed plans to 'drill the Iranians back into the fourth century' when U.S. forces struck back hard [on 18 April 1988], sinking six Iranian warships and destroying two oil rigs. At the same time, the Iraqi Army launched a surprise attack against Iran to recapture the strategic Fao peninsula. *Using U.S.-supplied military intelligence and knowing that U.S. strikes against Iranian targets would commence on April 18*, the Iraqis launched their only successful ground assault of the war, just before the United States destroyed the Iranian Navy"[14].

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11 Statements of Mr. Hassani, Vol. IV, para. 21, and Mr. Alagheband, Vol. IV, para. 16.
12 Statement of Mr. Alagheband, Vol. IV, para. 17.
13 U.S. Preliminary Objection, Exhibit 32, p. 144.
14 Exhibit 23, Vol. II.

5.8 As Iran has shown, U.S. policy during the Iraq-Iran war was consistently to favour Iraq, despite the fact that it was Iraq which, by its aggression against Iran, had started the war. The United States "actively supported the Iraqi war effort", such support taking the form of financial assistance, the provision of military intelligence and advice, and the giving of "strategic operational advice to the Iraqis to better use their assets in combat"[15]. Against this background, it may be surmised that U.S. assistance to Iraq also took the form of distracting the attention of Iranian forces by attacking the Salman and Nasr platforms and Iranian naval vessels at the same time as Iraq was attacking the Fao peninsula.

5.9 In official statements following the destruction of the Salman and Nasr platforms, the U.S. authorities attempted to portray the attack as a spontaneous response to a specific incident, the mining of the *Samuel B. Roberts*, which had occurred four days earlier[16]. However, the plan had taken months of shaping by U.S. military forces, who were merely looking for an opportunity to put it into operation. Preparations had begun ten months earlier[17]. They had involved, *inter alia*, "exercises stressing anti-Silkworm ... tactics, boarding and search, Sledgehammer (a procedure to vector attack aircraft to a surface threat), convoy escort procedures, naval gunfire support, ... mine detection and destruction exercises ..., a 96-hour Persian Gulf scenario, with a three submarine threat overlaid ... [and] live, coordinated Harpoon missile firings"[18]. It was reported that "[b]y late March [1988], each ship had completed dozens of these exercises"[19].

5.10 The operation itself has been described as a "textbook assault" which "went as planned"[20]. After the destruction of the Nasr complex, the U.S. ships involved in the attack patrolled the area for several hours. In the afternoon of the same day they fired six missiles at the *Joshan*, an Iranian patrol boat, scoring direct hits with five of them, and then sank the ship with gunfire[21]. There were 11 killed and 33 injured. Shortly before this, an

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15 Exhibit 10, Vol. II, para. 7.

16 *See*, U.S. Counter-Memorial, Exhibits 129 and 130.

17 *Ibid.*, Exhibit 132, p. 66.

18 *Ibid.*, p. 67.

19 *Ibid.*

20 *Ibid.* In Commander Perkins' words: "[t]he objectives were clear: - Sink the Iranian *Saam*-class frigate *Sabalan* or a suitable substitute. - Neutralize the surveillance posts on the Sassan and Sirri gas/oil separation platforms (GOSPs) and the Rahkish GOSP, if sinking a ship was not practicable" (*ibid.*, p. 68).

21 U.S. Counter-Memorial, Exhibit 132, p. 69.

Iranian F-4 plane approaching the area had been struck by a missile fired from one of the U.S. ships[22]. In a separate incident at around the same time, near the Mubarak oil-field, U.S. A-6 war planes sank a small Iranian patrol boat with Rockeye bombs, and two further small patrol boats were disabled by the U.S. war planes[23].

5.11 A third group of U.S. warships had originally been assigned the task of sinking the Iranian frigate, *Sabalan,* which could not initially be located. Later in the day, however, a similar *Saam*-class frigate, the *Sahand,* was discovered in the Strait of Hormuz. Several U.S. A-6 war planes, together with a U.S. warship, launched numerous bombs and missiles at the *Sahand,* which sank a few hours later[24]. In this attack, there were 45 killed and 87 injured. About an hour and a half later, the *Sabalan* was located on the north side of the Strait of Hormuz. A U.S. A-6 war plane crippled it with a laser-guided bomb, leaving it dead in the water[25].

5.12 Operation Praying Mantis thus achieved sweeping losses on the Iranian side. In the words of former Defense Secretary, Caspar Weinberger, "*on a single day nearly half the Iranian Navy was destroyed*"[26]. In total, one frigate (the *Sahand*) was sunk, another frigate (the *Sabalan*) severely damaged, two patrol boats (the *Joshan* and one Boghammar) sunk, and two further patrol boats (also Boghammars) disabled. One Iranian F-4 plane was also damaged. In addition, there were heavy Iranian casualties. It will be recalled that one of the commanders of the operation, Commander Perkins, stated afterwards that "[t]actics and procedures that had been *honed over the previous nine months had been dramatically validated*"[27]; in other words, there was no question of the attack being a spontaneous and limited response to a particular incident. *The Guardian* newspaper, on 20 April 1988, commented that "[a]lthough Washington may have intended no more than a 'measured response'..., it seems as if local American commanders were looking for a fight and needed only the slightest pretext from the Iranians"[28]. Given the scale of this attack and its timing to

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22 *Ibid.*, p. 70.
23 *See, ibid.*, Exhibit 133, p. 58 and Iran's Memorial, Exhibit 79.
24 *See*, U.S. Counter-Memorial, Exhibit 133, p. 59.
25 *See, ibid.*
26 *See*, Iran's Memorial, Exhibit 44, p. 425.
27 U.S. Counter-Memorial, Exhibit 132, p. 70.
28 Iran's Memorial, Exhibit 83.

coincide with the Iraqi offensive on Fao, it appears that the true aims of the United States were to destroy Iran's defensive capabilities and to assist Iraq.

5.13 As a result of the attacks by the United States on the Salman and Nasr platforms, Iran suffered substantial damage. In particular, it suffered damages including, but not limited to:

- Expenses and costs resulting from rescue operations, extinguishing of fires on the platforms, etc.;
- Expenses and costs incurred for the reconstruction and recommissioning of the platforms;
- Loss of production, damage to the oil fields, environmental damage, and other related elements; and
- Injuries to personnel on board the oil platforms at the time of the attacks.

This is quite apart from the damage to the various naval vessels and personnel referred to above.

Section 2. The Mining of the *Samuel B. Roberts*

5.14 According to the United States, its attack on the Salman and Nasr platforms was made in self-defence, and specifically in reaction to the incident involving the *Samuel B. Roberts*, which had struck a mine in the Persian Gulf four days previously. President Reagan stated as follows in his letter of 19 April 1988 to the Speaker of the House of Representatives and the President *Pro Tempore* of the Senate:

> "On April 14, 1988, the USS SAMUEL B. ROBERTS struck a mine in international waters of the Persian Gulf...
>
> An examination of the mines remaining in the water established that they were M-08 mines, the same type Iran was caught placing in the water from the IRAN AJR on September 21, 1987. They had been freshly laid in an area transited by U.S. convoys. No barnacles or marine growth were on the mines. Most important, the mines bore markings of the same type and series as on those laid by the IRAN AJR. No doubt exists that Iran laid these mines for the specific

> purpose of damaging or sinking U.S. or other non-belligerent ships. We have warned Iran repeatedly against such hostile acts.
>
> In response to this attack on the ROBERTS and commencing at approximately 1:00 a.m. (EDT), April 18, 1988, Armed Forces of the United States assigned to the Joint Task Force Middle East, after warning Iranian personnel and providing an opportunity to escape, attacked and effectively neutralized the Sassan and Sirri Platforms, which have been used to support unlawful Iranian attacks on non-belligerent shipping"[29].

Similarly, the United States' Acting Permanent Representative to the United Nations wrote as follows to the President of the Security Council:

> "At approximately 1010 Eastern Daylight Time on 14 April the USS Samuel B. Roberts was struck by a mine approximately 60 miles east of Bahrain, in international waters. Ten U.S. sailors were injured, one seriously, and the ship was damaged. The mine which struck the Roberts was one of at least four mines laid in this area. The United States has subsequently identified the mines by type, and we have conclusive evidence that these mines were manufactured recently in Iran. The mines were laid in shipping lanes known by Iran to be used by U.S. vessels, and intended by them to damage or sink such vessels.
> ...
>
> Starting at approximately 0100 Eastern Daylight Time 18 April U.S. forces attacked military targets in the Persian Gulf which have been used for attacks against non-belligerent shipping in international waterways of the Persian Gulf"[30].

5.15 The United States begins its attempt to establish Iran's responsibility for a general pattern of minelaying and specifically for the mining of the *Samuel B. Roberts* by referring to "Iran's response to the reflagging of Kuwaiti vessels"[31]. According to the United States, this "response" began in May-June 1987 when the Soviet oil tanker *Marshal Chuykov* and three other vessels allegedly struck mines laid at the deep water entrance to Kuwait's al-Ahmadi port, close to the edge of the Iraqi exclusion zone[32]. Reports differ as to whether these vessels were hit by missiles or mines. Moreover, a number of reports suggest that if the vessels were hit by mines, the mines had probably floated down from the war zone in the

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29 U.S. Counter-Memorial, Exhibit 129, p. 477.
30 *Ibid.*, Exhibit 130.
31 U.S. Counter-Memorial, Part I, Chapter II, Section 2.
32 *Ibid.*, para. 1.19.

north - very possibly from the Shatt Al Arab or from the entrance to the port of Bandar Khomeini, where Iraq was known to have laid mines. The United States produces no evidence to show the mines were Iranian. In any event, none of the four vessels concerned was American, and all the reports suggest that the vessels suffered only minor damage, with no casualties[33].

5.16 On 24 July 1987, the U.S.-flagged *Bridgeton* - which was in fact a reflagged Kuwaiti tanker - struck a mine in the international shipping channel, off Iran's Farsi Island[34]. Following the mining of the *Bridgeton*, a U.S. navy mine-clearing force apparently located a field of mines "south of Iran's Farsi Island", which the United States describes as being "near the location where the... *Bridgeton* was struck"[35]. In fact the United States' exhibits show that this exercise took place 17 miles away[36]. No mines were found in the immediate vicinity of where the *Bridgeton* was struck. Moreover, this mine-sweeping exercise took place four months after the *Bridgeton* had struck a mine[37]. It can hardly be considered that the discovery of mines four months later and 17 miles distant is sufficient evidence to prove that the particular mine which struck the *Bridgeton* was of the same provenance.

5.17 At the time, the United States was less clear as to what happened to the *Bridgeton*. One report refers to Washington sources stating that there would be no retaliation for the attack on the *Bridgeton* because the United States "was not sure who was responsible"[38]. In one of the United States' own Exhibits, it is noted that:

> "Early in the war mines were laid by both sides at the head of the [Persian] Gulf. Some of these have occasionally been reported to have broken loose. These would drift SE on the SW side of the [Persian] Gulf and could, due to prevailing currents, drift anti-clockwise round the area. They are brown or rust coloured and, floating low in the water, would be difficult to see. The Farsi

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33 *See,* Iran's Observations and Submissions, Exhibit 18. In that Exhibit it is stated that one of these four vessels was hit by an "unidentified warplane". It is also suggested that the *Primrose* and the *Marshal Chuykov* were damaged by "free-floating or breakaway" mines.

34 *See,* U.S. Counter-Memorial, paras. 1.25-1.31.

35 *See, ibid.*, para. 1.29, fn. 52.

36 *See, ibid.*, Exhibit 49, p. 2. Although not specified in the Exhibit, this presumably refers to 17 nautical miles.

37 *See, ibid.*, Exhibit 43, p. 1.

38 *See,* Iran's Memorial, Exhibit 57.

Island area is the most likely area where these mines would interfere with neutral vessels"[39].

5.18 The United States however now alleges not only that the mine that hit the *Bridgeton* was Iranian, but also that the *Bridgeton* was targeted deliberately by Iran[40]. In this regard Iran has consulted an expert in mine warfare, whose report is attached to the present Reply[41]. That expert concludes that the mine that hit the *Bridgeton* was probably of the M-08 type, of which both Iraq and Iran had manufactured derivatives. In other words, it could have been either a Soviet M-08, an Iraqi LUGM or an Iranian SADAF-02[42]. He further concludes that it would have been to all intents and purposes impossible deliberately to target the *Bridgeton*, given the handling difficulties that would be experienced in trying to lay a mine from a small patrol boat[43], the risk of detection, and the enormous margin for error resulting, *inter alia*, from the time necessary for the mine to complete its arming cycle, the size of the *Bridgeton*, and the possibility of a change in course[44].

5.19 Two other vessels (neither of which was a U.S.-flag vessel) are alleged to have hit mines in the territorial waters of the United Arab Emirates off Fujairah in the Gulf of Oman in August 1987[45]. The first incident involved the *Texaco Caribbean*, which was carrying Iranian crude oil from Larak Island, and was therefore hardly likely to be a target of Iranian attack. The second involved the *Anita*, a small service vessel. Again, there is no evidence that Iran had any part in placing these mines. Iran was as concerned as anyone about the appearance of mines in this area, outside the Persian Gulf, which was used by a large number of Iranian vessels as a stopping-off point before entering the Strait of Hormuz. Following the *Texaco Caribbean* incident, Iran immediately protested about the laying of mines in this area and offered and obtained permission to assist in the minesweeping efforts there[46].

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39 U.S. Counter-Memorial, Exhibit 2, p. 48.
40 *Ibid.*, para. 1.27.
41 Report of Mr. Fourniol, Vol. VI.
42 *Ibid.*, paras. 4.2-4.4.
43 The Soviet M-08 mine weighed 226.8 kg. *See*, U.S. Counter-Memorial, Exhibit 38, p. 7.
44 *Ibid.*, paras. 4.5-4.16.
45 U.S. Counter-Memorial, para. 1.34.
46 *See*, Iran's Memorial, Exhibit 58, and Iran's Observations and Submissions, Exhibit 27.

5.20 The United States has also alleged that on 21-22 September 1987, its forces caught the landing craft *Iran Ajr* in the act of minelaying in international waters. The United States has however produced no independent evidence that the *Iran Ajr* was involved in such minelaying. In fact, as Mr. Farshchian, the Commander of the *Iran Ajr*, makes clear in his Statement attached to this Reply, the *Iran Ajr* was simply transporting mines to the northern end of the Persian Gulf[47]. This is further borne out by the explicit instructions that are attached to Mr. Farshchian's Statement[48]. Those instructions simply refer to carrying a special consignment, and make no mention of minelaying. As for the fact that the *Iran Ajr* was travelling in international waters on the southern side of the Gulf when it was attacked by the United States, this was a perfectly normal route to take, since it avoided the more dangerous war zone close to the Iranian shore[49].

5.21 The proposition by the United States that mines were pushed off the side of the *Iran Ajr* by means of a ramp cannot realistically be sustained. All minelaying is done from the rear of a vessel, and pushing a mine off the side of a vessel would create a dangerous situation. In any event, the ramp found on the *Iran Ajr* was too flimsy to support the full weight of a complete mine system, and was also positioned in such a way that handling of the mines would have been very difficult[50].

5.22 It was after its attack on the *Iran Ajr* that the United States allegedly devised a means of determining whether mines were of Iranian manufacture or not. This was because the mines that were being transported on the *Iran Ajr* bore a stencilled number on their outer casing[51]. Given the close similarities between the Soviet M-08, Iraqi LUGM and Iranian SADAF-02 mines, this was the only detail which, according to the United States' evidence, immediately marked out Iranian mines from their Soviet and Iraqi counterparts.

5.23 It should be recalled that the United States seeks to justify its attack on the Salman and Nasr platforms by the specific incident of the *Samuel B. Roberts* striking what

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47 *See,* Statement of Col. Farshchian, Vol. VI, para. 4. *See*, also, Iran's Memorial, paras. 1.97-1.98, and Iran's Observations and Submissions, Annex, para. 34.

48 Statement of Col. Farshchian, Vol. VI, Annex 1.

49 *See, ibid.*, para. 6.

50 *See*, Report of Mr. Fourniol, Vol. VI, paras. 3.2-3.4.

51 *See*, U.S. Counter-Memorial, Exhibit 37.

was allegedly an Iranian mine. The United States' Exhibit 123, entitled "Persian Gulf Mine Update", dated 28 April 1988, is a cable from the U.S. Naval Joint Task Force Middle East. That cable lists various mines which were located and detonated between 15 and 28 April 1988. The entry for the mine allegedly struck by the *Samuel B. Roberts* reads as follows:

> "Shah Allum Minefield: A total of eight M-08 mines have been discovered in the Shah Allum Minefield starting with the mine S.B. Roberts struck on 14 April. Following are the locations and mine serial numbers found on the mines:
>
UNIT	DATE DESTROYED/LOCATION	SERIAL NUMBER
USS S.B. Roberts	14 Apr. 26-22.80M/052-18.00E	No mine Number"[52].

If the only way of immediately characterising a mine as Iranian was by means of a numbering system which was allegedly uniquely Iranian, responsibility could hardly be attributed to Iran for a mine for which the United States had been unable to determine a number. Moreover, it should be noted that the mines stated to have been discovered by the United States in the Shah Allum minefield were described here as "M-08 mines", *i.e.* the Soviet mines from which not only SADAF-02 but also the Iraqi LUGM mines were derived[53].

5.24 Iran must therefore reiterate what it has already stated in its Observations and Submissions on the U.S. Preliminary Objection: the United States has produced no independent evidence of Iran's responsibility for the mine which struck the *Samuel B. Roberts*[54].

5.25 As Iran has explained in its Memorial, the only mines laid by Iran were laid in the Khor Abdullah channel north of Bubiyan Island. These mines were laid for defensive purposes to prevent Iraq from using this waterway to attack Iranian positions. Such mines had no effect on commercial shipping.

5.26 In any event, the mine threat in the Persian Gulf should not be exaggerated. According to the United States, only 176 mines were found during the eight

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52 *Ibid.*, Exhibit 123.

53 *See,* Report of Mr. Fourniol, Vol. VI, paras. 1.10-1.12.

54 Iran's Observations and Submissions, Annex, para. 52.

years of the war. Of these, 95 were Myams[55]. Myams are small Soviet mines with only a 20 kg charge and are designed for use in rivers and lakes against small craft. They were used extensively by Iraq in 1990, after its invasion of Kuwait[56]. The rest were apparently Soviet M-08 mines or derivatives thereof. Even these mines were of little danger to tankers and larger merchant vessels.

5.27 Furthermore, the United States cannot simply ignore Iraq's involvement in the mining of the Persian Gulf. Iraq chose to attack any vessel quite indiscriminately, regardless even of whether the vessel was trading with Iran, regarding them all as legitimate targets.

5.28 On 14 February 1982, an Iranian tanker, the *Mokran*, hit an Iraqi mine near the port of Bandar Mahshahr[57]. A Greek freighter, the *Evangelia S.*, hit an Iraqi mine on 11 September 1982[58]. A Cypriot freighter, the *City of Rio*, struck an Iraqi mine close to Bandar Khomeini on 1 February 1984[59]. A Liberian freighter, the *Dashaki*, is reported as having struck an Iraqi mine some four miles from the Nasr oil fields on 7 June 1984, as it was leaving Iran to travel to Saudi Arabia[60]. Iraq thus could lay its mines almost anywhere in the Persian Gulf. As the experience during the Kuwaiti crisis shows, Iraq had a large arsenal of mines and had no hesitation in using them[61].

5.29 The United States is unable to sustain its statement that Iraq was never known to lay mines in the central Gulf where the *Samuel B. Roberts* struck a mine[62]. As has been seen above, Iraq had already launched attacks against the Reshadat and Salman oil platforms, and also against Lavan Island, in the Straits of Hormuz, and near Larak Island[63]. In particular, ships had struck Iraqi mines close to the Nasr oil fields and off the coast of Fujairah. Iraq achieved this range by using the facilities of friendly Persian Gulf States[64].

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55 U.S. Preliminary Objection, Annex, p. 67, para. A1.17, fn. 57.
56 *See*, Report of Mr. Fourniol, Vol. VI, para. 1.3.
57 *See*, Iran's Memorial, Exhibit 16, p. 164.
58 *Ibid.*
59 *Ibid.*, p. 165.
60 *Ibid.*
61 *See*, U.S. Preliminary Objection, Exhibit 12, p. 626.
62 U.S. Counter-Memorial, para. 1.109.
63 *See*, paras. 3.31-3.33, above.
64 *See*, Statement of Mr. Fadavi, Vol. V, paras. 9-20.

5.30 As Iran noted in its Observations and Submissions on the U.S Preliminary Objection, the United States itself has pointed to reports that the mine which struck the *Samuel B. Roberts* was an Iraqi mine or floating mine of unknown provenance[65].

5.31 Finally, even if mines could be identified as being definitely of Iranian manufacture, this does not necessarily mean that they were laid by Iran in the locations where they were discovered. Iraq was known to have cleared mines from the Khor Abdullah channel located north of Bubiyan island, where Iran had laid mines to target Iraqi vessels. That channel is very shallow, and mines laid there were easily visible. Once spotted, the mines could be recovered. It would then have been perfectly feasible for Iraq to recover these Iranian mines and then to re-lay them; and it would have been normal military practice for it to do so[66].

5.32 Iraq at least had an interest in laying mines, whereas Iran had none. Unlike Iraq, Iran was dependent on shipping for exporting its oil from the Persian Gulf. Mines were a threat to Iranian shipping as much as to any other shipping. In particular, the areas in the southern part of the Persian Gulf and in the Gulf of Oman, where Iran is alleged to have laid mines, were regularly used by Iranian shipping or shipping trading with Iran. The *Texaco Caribbean*, which hit a mine off the port of Fujairah in the Gulf of Oman on 10 August 1987, was carrying Iranian crude oil[67]. It was out of concern for the danger of mines to its shipping that Iran engaged in extensive minesweeping operations. As one Iranian Naval Commander pointed out in a radio interview on 17 April 1987:

> "For seven years, the Iranian Navy has maintained security in the Persian Gulf. For seven years, Iraq has laid mines and we have gathered them... We have minehunting helicopters, minesweeping ships, as well as minehunting diving teams"[68].

5.33 Iraq, on the other hand, did have an interest in minelaying, not only to disrupt shipping trading with Iran, but also to create exactly the kind of threat which would be

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65 U.S. Preliminary Objection, Annex, p. 67, para. A1.17, fn. 55.
66 *See,* Report of Mr. Fourniol, Vol. VI, paras. 1.23, *et seq.*
67 *See,* Iran's Observations and Submissions, Exhibit 25.
68 *See, ibid.*, Exhibit 26.

bound to increase the western powers' presence in the Persian Gulf and thus increase the pressure on Iran. Iraq was successful on both counts.

5.34 In sum, as with the attack on the *Sea Isle City*, the United States has provided no proof that it was Iran who was responsible for any of the mining incidents that it attributes to Iran, and specifically for the attack on *the Samuel B. Roberts*. The evidence that it has provided for the *Samuel B. Roberts* - the "Persian Gulf Mine Update" of 28 April 1988[69] - refers to the mine concerned as an M-08, of which both Iraq and Iran had manufactured derivatives[70]. No serial number which, according to the United States, might have linked it to the mines found on the *Iran Ajr* was found on that mine[71]. Finally, even if the mine had been positively identified as an Iranian-manufactured mine, this is not evidence that it was Iran, and not Iraq, who had laid it in the position where it struck the *Samuel B. Roberts*.

Section 3. The Lack of Connection between the Mining of the *Samuel B. Roberts* and the U.S. Attack on the Salman and Nasr Platforms

5.35 As with its attack on the Reshadat platforms, while the United States attempts to justify its attack on the Salman and Nasr platforms as an act of self-defence in response to the mining of the *Samuel B. Roberts*, there was no connection whatsoever between this particular mining incident, or indeed any other mining incident, and the Salman and Nasr platforms, nor has any such connection been alleged.

5.36 What meagre evidence the United States has submitted to the Court in an attempt to show that the Salman and Nasr platforms were used for military purposes is unrelated to mining. As the United States itself admits, targets which it considered were involved in minelaying were deliberately excluded from attack:

> "Once again, to avoid compromising the perception of the United States as a non-belligerent, and to avoid any escalation of military conflict with Iran, the United States excluded Iranian land-based targets such as an ordnance storage site north of Bandar Abbas where the United States believed sea mines were

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69 U.S. Counter-Memorial, Exhibit 123.

70 *See*, Report of Mr. Fourniol, Vol. VI, paras. 1.9-1.12 and 1.19.

71 U.S. Counter-Memorial, Exhibit 123.

> stored, and the port facility at Bandar Abbas where vessels were loaded with mines before they sailed on their mine-laying missions"[72].

Instead, it was concluded that the Salman and Nasr platforms "would be the most appropriate targets for a defensive response, in view of the military function served by these platforms"[73].

5.37 There is an evident contradiction between a wish to "avoid compromising the perception of the United States as a non-belligerent" and a selection of vital installations which were also regarded as "military" targets. The reasoning appears *post hoc* and unconvincing. The professed desire of avoiding compromising the perception of the United States as a non-belligerent hardly squares with the scale of the operation, as described in paras. 5.6, *et seq.*, above.

5.38 In any event, in its catalogue of alleged military activities of these platforms, the United States makes no reference to mining, let alone to the *Samuel B. Roberts* incident. Iran has already demonstrated the falsity of the United States' allegations as to the military use of the platforms[74]. It suffices to note here that in any event the alleged activities - collection of intelligence, radar, helicopter launching, the harbouring of small gunboats and the firing of guns[75] - have nothing to do with mining.

5.39 In sum, the United States chose targets that, even in its own admission, were unrelated to mining activity, were distant from where the mine which struck the *Samuel B. Roberts* was laid, and were non-military in character. The Nasr and Salman platforms served a sole objective, which was oil production. The fact that the U.S. attack was aimed at neutralising oil platforms which did not harbour mines and which had nothing to do with mine laying clearly suggests that the United States' aim was to strike economic targets that were an essential part of Iran's war effort, and thus to weaken Iran and assist Iraq[76].

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72 U.S. Counter-Memorial, para. 1.115.

73 *Ibid.*

74 *See,* Chapter 3, above.

75 U.S. Counter-Memorial, paras. 1.117-1.120.

76 *See*, U.S. Preliminary Objection, Exhibit 32, p. 142, where it is stated that "the purpose of U.S. retaliation... was to neutralize Sassan and Sirri gas-oil separation platforms (GOSP) and to target an Iranian naval vessel in recompense for damage inflicted on *Samuel B. Roberts*".

5.40 This is confirmed by the fact that the U.S. National Security Planning Group chose the option of attacking the oil platforms "because it avoided any strike on Iranian land targets, was far from the fighting in the upper [Persian] Gulf, and *demonstrated Iran's acute vulnerability to any interruption to its oil exports*"[77]. In the words of a U.S. Commander involved in the operation:

> "As the sun set on 18 April, all objectives of Operation Praying Mantis had been achieved... The Iranian war effort had been struck a decisive and devastating blow"[78].

This was hardly the language of a neutral State concerned "to avoid compromising the perception of [itself] as a non-belligerent"[79].

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77 *See, ibid.*, Exhibit 11, p. 376; emphasis added.

78 U.S. Counter-Memorial, Exhibit 132, p. 70.

79 *See*, U.S. Counter-Memorial, para. 1.115.

PART III
REPLY TO THE LEGAL DEFENCES OF THE UNITED STATES

CHAPTER 6. THE U.S. ATTACKS BREACHED ARTICLE X(1) OF THE TREATY OF AMITY

Section 1. Article X(1) creates Specific Legal Obligations that can be enforced by the Court

6.1 In Chapter I of Part II of its Counter-Memorial, the United States endeavours to demonstrate that it did not breach Article X(1) of the 1955 Treaty of Amity, asserting that this provision is "aspirational", *i.e.*, that it establishes a general goal and not specific legal obligations. Hence, the United States Counter-Memorial takes the position that the Court's 1996 Judgment did not resolve all interpretative issues regarding Article X(1)[1].

6.2 In the following paragraphs, Iran will rebut the United States' allegations, both in the light of the structure of the 1955 Treaty of Amity and from the standpoint of general principles of international law related to the law of treaties.

6.3 As for the allegation that the Court did not resolve the issue in its 1996 Judgment, the United States contends that the Court confined itself merely to jurisdictional matters. In so doing, the United States confuses two different conceptual problems: a) the question of the interpretation of Article X(1); and b) the question of the alleged "aspirational" character of this provision. It will be shown here that not only has the Court, both in its Judgment of 1996 and in its Order of 1998, provided an interpretation of Article X(1) which is definitive, but also that in so doing it has clearly and definitely ruled out the alleged "aspirational character" of this provision.

6.4 It is useful to recall in the first place the reasoning that the Court followed with regard to Article I of the 1955 Treaty of Amity. The Court denied having jurisdiction on the basis of that Article because it saw Article I as "by itself... not capable of generating legal rights and obligations"[2]. Rejecting the position taken by Iran, the Court

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1 U.S. Counter-Memorial, paras. 2.03-2.15.

2 *I.C.J. Reports 1996*, p. 820, para. 52.

decided that "Article I must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied"[3]. Furthermore, the Court stated that its conclusion was in conformity with the interpretation it had given of the FCN Treaty between the United States and Nicaragua[4].

6.5 In contrast, when analysing Article X(1), the Court employed a completely different reasoning. There, the Court concentrated on the guarantee by Article X(1) of "freedom of commerce", expressly putting aside the part of the provision concerning "freedom of navigation" that was not invoked by Iran[5]. Far from stating that Article X(1) was too general a provision, the Court upheld its jurisdiction on that basis. It thereby clearly confirmed that the provision concerning "freedom of commerce" does indeed create specific and enforceable legal obligations. Moreover, the Court was unequivocal on this issue since, regarding the destruction of the oil platforms by the United States, it decided *expressis verbis* that "its lawfulness *can be evaluated* in relation to that paragraph" (*i.e.* Article X(1))[6].

6.6 The same idea is stated in other passages of the 1996 Judgment. In paragraph 50, for instance, the Court upheld the argument that Article X(1) was a source of specific legal obligations:

> "... Article X, paragraph 1, of the Treaty of 1955 does not strictly speaking protect 'commerce' but '*freedom* of commerce'. Any act which would impede that 'freedom' is thereby prohibited"[7].

In other words, this provision is considered as prohibiting *by itself* certain acts and, on this basis alone, the Court will be able to give a Judgment on the merits of whether the U.S. attacks against the oil platforms were a violation of the 1955 Treaty of Amity.

6.7 In the same vein, the Court noted, in paragraph 51 of the 1996 Judgment, that the destruction of the oil platforms was capable of having harmful

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3 *Ibid.*, p. 814, para. 28.
4 *Ibid.*
5 *Ibid.*, p. 817, para. 38.
6 *Ibid.*, p. 820, para. 51; emphasis added.
7 *Ibid.*, p. 819, para. 50; emphasis in original.

consequences on Iranian oil exports and could thereby have "an adverse effect upon the freedom of commerce *as guaranteed by Article X, paragraph 1, of the Treaty of 1955*"[8]. This clearly proves that Article X(1) does not establish a general goal merely to be used in the interpretation of other paragraphs of the Article, but that it does indeed create autonomous legal obligations (which do not need other provisions to be enforced).

6.8 The United States attempts to include within the jurisdiction of the Court in the present case not only "freedom of commerce" but also "freedom of navigation". Accordingly, while it contends that the Court should decide against the Iranian claim, as the part of Article X(1) concerning "freedom of commerce" is asserted to be "purely aspirational", on the other hand, it asks the Court to uphold its counter-claim, based on the allegation that Iran has violated the other part of Article X(1), *i.e.*, the provisions concerning "freedom of navigation". The reason given by the United States for this anomalous contention is that the principle of "freedom of navigation" is specified in the subsequent paragraphs of Article X (and specifically in paragraph 3), and that therefore the Court would be able to apply it without further difficulties. In contrast, in the United States' view, the principle of "freedom of commerce" could not be used by the Court, as it is not specified anywhere other than in the first paragraph of Article X. In other words, the United States claims that its destruction of Iranian oil platforms does not constitute a breach of Article X(1) but, in turn, that alleged Iranian attacks on United States (owned or reflagged) ships would be a breach of the same provision since, in its submission, those attacks infringed the only enforceable freedom protected by the aforementioned provision, namely "freedom of navigation".

6.9 This theory must be rejected. It must be noted that "freedom of navigation", as guaranteed by Article X(1), cannot be taken into account at the stage of the merits in the present case. As Iran will further demonstrate below, the Court established its jurisdiction exclusively with respect to a dispute related to "freedom of commerce". The Court has defined its jurisdiction in this case very precisely, stating that it will evaluate both the Iranian claim and the United States' counter-claim only in the light of the freedom of commerce as guaranteed by Article X(1) of the Treaty of Amity of 1955. An analysis of alleged violations of the freedom of navigation by the Parties would fall outside the scope of

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[8] *Ibid.*, p. 820, para. 51; emphasis added.

the Court's jurisdiction in the present case, as the Court itself has clearly and definitely decided.

6.10 Consequently, it is unnecessary and irrelevant to deal with "freedom of navigation" in the present instance, as the United States does: attention must be focused exclusively on "freedom of commerce" as guaranteed by Article X(1). The very fact that no reference is made to "freedom of commerce" in the remainder of Article X must mean that it was seen as already self-sufficient and enforceable, as the negotiators of the Treaty did not feel the need further to delineate it. On the other hand, the negotiators did feel that necessity as far as "freedom of navigation" was concerned, as they implemented it in paragraphs 2 to 6 of Article X. This confirms the interpretation that the protection of "freedom of commerce" in Article X(1) creates specific enforceable obligations for the Parties, as was stated by the Court in 1996.

6.11 The United States contends that "[t]he limited nature of Article X(1) is clearly demonstrated by the fact that it cannot resolve the many practical questions about rights and duties that characteristically arise in a complex commercial relationship... For example, it is not apparent whether 'freedom of commerce and navigation' allows the Parties to the 1955 Treaty to impose quantitative restrictions on imports or exports of particular products. The broad language might suggest that quantitative restrictions may not be allowed"[9]. Iran cannot agree with this interpretation of the scope and extent of Article X(1) of the 1955 Treaty of Amity. On the contrary, it respectfully submits that the expression "there shall be freedom of commerce", which has been employed frequently by treaty-drafters for centuries, certainly does not have the effect of forbidding all kinds of barriers or restrictions, nor of regulating *all* the aspects of commercial transactions between States. This expression declares and solemnly enunciates a principle governing commercial intercourse between the two High Contracting Parties. As Walker, who served in the United States Department of State, rightly pointed out:

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[9] U.S. Counter-Memorial, paras. 2.09-2.10.

"The treaties [*viz.* United States commercial treaties] deal with the subjects within their purview in language of simple elementary principle, of a constitution-like character. *Their avoidance of detail and of statute-like elaboration and specificity is in keeping with their essential character*... Being designed to serve as a basic charter of relations for a long period of years, they must be confined to fundamentals so framed as to preserve their validity over the vicissitudes and changing conditions of an indefinite future"[10].

6.12 As one of the most distinguished authorities in this field has rightly stated:

"*La liberté de commerce ne veut pas dire franchise de commerce*. Tout le commerce international est basé, depuis des siècles, sur l'existence de droits de douane perçus à l'occasion de l'entrée, de la sortie ou du transit des marchandises. La taxation des échanges est un fait de première importance pour toute la réglementation du commerce international"[11].

6.13 In other words, Article X(1) states that neither of the High Contracting Parties can prohibit commerce and/or impede the free flow of trade between them. This does not mean that taxes may not be levied or that quantitative restrictions cannot be imposed on commerce between "the territories of the two High Contracting Parties"[12]: it implies that the High Contracting Parties cannot take any measures that impede commerce between them. In short, "la circulation des marchandises entre les pays contractants à travers les frontières douanières ne doit pas être interdite"[13] or rendered impossible.

6.14 This analysis was confirmed by the reasoning of the Court in its Judgment on the merits of the *Nicaragua* case in 1986, when it stated that Article XIX(1) of the FCN Treaty - which is formulated in the same terms as Article X(1) of the 1955 Treaty of

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[10] Walker, H., "The post-war commercial treaty program of the United States", *Political Science Quarterly*, Vol. 73 (1958), p. 74; emphasis added.

[11] Nolde, B., "Droit et technique des traités de commerce", *Collected Courses of The Hague Academy of International Law*, Vol. 3 (1924-II), p. 391; emphasis added.

[12] According to Nolde, "[L]a liberté de commerce, quelle que soit la formule qui la proclame, n'est pas un principe absolu. Jamais les Etats n'ont voulu et ne voudront admettre que toutes marchandises dans toutes circonstances puissent librement entrer dans le pays ou librement en sortir. La liberté commerciale est une règle sujette à de multiples conditions et à de multiples restrictions", *op. cit.*, p. 374. In this respect, it is worth recalling that this authoritative opinion reflects a long tradition in this matter going back to Vattel, E., *Le droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires de la Nation et des Souverains*, Amsterdam, 1758, Livre II, Ch. II, para. 23.

[13] Nolde, B., *op. cit.*, p. 374.

Amity between Iran and the United States - entails legal effects. There, the Court said that it "must uphold the contention that the mining of the Nicaraguan ports by the United States is in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX, paragraph 1, of the 1956 Treaty"[14].

6.15 Furthermore, the interpretation of Article X(1) that is put forward by Iran is the only interpretation that is plainly in accordance with the letter and spirit of Article I of the 1955 Treaty of Amity. This further confirms the Iranian position, as the Court has expressly stated that "Article I must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied"[15].

6.16 On the basis of the foregoing, it is respectfully submitted that the Court should reaffirm - as it has already finally ruled in its Judgment of 1996 - that Article X(1) of the Treaty of Amity of 1955 does establish specific and enforceable legal obligations concerning "freedom of commerce". The United States cannot reopen the argument on this point, which is already *res judicata* between the Parties. The Court has clearly and definitively stated that "[t]he argument made on this point by the United States must be rejected"[16]. The Court has also definitively decided that the "lawfulness [of United States attacks on the Iranian platforms] can be evaluated in relation to" Article X(1). In point 2 of the dispositive part of its Judgment, the Court has held that it has jurisdiction "pour connaître des demandes formulées par la République islamique d'Iran au titre du paragraphe 1 de l'article X" (as it is worded in the French text of the 1996 Judgment, which is the authoritative text)[17]. In other words, Article X(1) is unquestionably a treaty rule on the sole basis of which the Iranian claim can be examined on its merits by the Court.

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[14] *I.C.J. Reports 1986*, p. 139, para. 278.

[15] *I.C.J. Reports 1996*, p. 814, para. 28.

[16] *Ibid.*, p. 820, para. 51.

[17] In English "to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of that Treaty".

Section 2. Interpretation of Article X(1)

A. The meaning of "commerce"

6.17 The Court has already had occasion to express its view as to the interpretation of the word "commerce" and as to the meaning to be attributed to that word, in its 1996 Judgment. The Court recalled that the United States sought to restrict the meaning of the word to activities of "actual sale or exchange of goods"[18], whereas Iran, adopting a wider interpretation, argued that the word also covers upstream activities "which, at a prior stage, enable the goods to be made ready for exchange"[19]. After an analysis based on several definitions of the word "commerce" taken from legal or general dictionaries, the Court expressly adopted a broad interpretation of the notion of commerce. At paragraph 45 of its Judgment, the Court held that:

> "Thus, whether the word 'commerce' is taken in its ordinary sense or in its legal meaning, at the domestic or international level, it has a broader meaning than the mere reference to purchase and sale"[20].

6.18 The Court therefore concluded that Article X(1) of the 1955 Treaty covers not only the activities of sale and purchase, but also the ancillary activities that are integrally related to commerce[21].

6.19 In adopting this broad interpretation, the Court reached a decision which is in conformity with the etymology of the word "commerce". The notion of commerce flows from the Latin word *commercium*, which designates very broadly all legal relationships between private persons concerning the use of their goods[22].

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18 *Ibid.*, p. 817, para. 40.

19 *Ibid.*, para. 39.

20 *Ibid.*, p. 818, para. 45.

21 *Ibid.*, p. 819, para. 49. The Court recalled this definition of commerce in paragraph 35 of its Order of 10 March 1998 concerning the U.S. Counter-Claim. It should be noted here that Judge Higgins confirmed in her Separate Opinion that: "The Court has persuasively shown in paragraph 45 of the Judgment that 'commerce' is generally understood as going beyond purchase and sale and including a multitude of activities ancillary thereto" (*I.C.J. Reports 1996*, p. 859, para. 43).

22 *See*, Jauffret, A., *Droit commercial*, 22nd ed. by Mestre, J., Paris, 1995, p. 1. The word "commerce" originates from a contraction of the Latin words *cum* and *merx* (a word meaning merchandise, derived from Mercury, the Roman messenger god). *Ius commercii*, a branch of Roman private law, is commonly defined as all

6.20 It is true that under the influence of an economic approach, this word has taken on a narrower meaning, referring mainly to the circulation and distribution of goods. However, this rather restrictive concept has remained limited to the economic world, and has not affected the juridical notion of commerce[23].

6.21 As the Court has stated, modern law - be it municipal or international - declines to limit "commerce" to no more than activities of sale and exchange, but also includes within the notion of commerce all those ancillary activities which are integrally linked thereto, among which the most frequently mentioned are operations of production[24] and transport.

6.22 For example, U.S. municipal law attributes a broad meaning to "commerce", as is demonstrated by the legal interpretation that is placed upon Article 1, Section 8 of the Constitution of the United States (often referred to as the "Commerce Clause") which authorises Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". The U.S. legislative authorities, with the approval of judicial bodies - and in particular the Supreme Court - have given a very broad interpretation of the notion of commerce and have legislated on this basis in areas going far beyond the simple sale or purchase of goods. As a court in the District of New York has held:

> "'Commerce', in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities and enter into commerce"[25].

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activities relating to the exchange and transport of goods. *See*, in particular, Volterra, E., *Istituzioni di diritto privato romano*, Rome, 1961, p. 63, and Guarino, A., *Diritto privato romano*, 4th ed., Naples, 1970, p. 299. Gaudel notes that there was an evolution in Roman Law, the very strict legal meaning of *commercium* being gradually extended until it finally became much broader than the economic definition. According to that author, the notion of *commercium* may even define the right to be a party to legal relationships. *See*, Gaudel, G., "Essai sur la notion de 'commercium' à l'époque ancienne", *Varia, Etudes de droit romain*, Paris, Vol. IX, 1962, pp. 34 and 57.

[23] In doctrinal works, a distinction is made almost systematically between the purely economic - and therefore restrictive - notion of commerce, and the much broader juridical notion. *See, inter alia*, on this point Jauffret, A., *op. cit.*, p. 1; Houin, R., Rodière, R. *Droit commercial*, 7th ed., Tome 1, Paris, 1981, p. 2; De Juglart, M., Ippolito, B., *Cours de droit commercial*, Vol. I, 9th ed., Paris, 1988, p. 6.

[24] *See*, for example, *Legal Thesaurus*, 2nd ed., New York 1980, p. 86, which refers to "*production* and distribution" (emphasis added) under the word "commerce".

[25] *Lenroot v. Western Union Tel. Co.*, D.C.N.Y., 52 F. Supp. 142, 148, 149.

6.23 Although the distinction between activities of production *stricto sensu* and of commerce is not absent in the case law of the United States Supreme Court, that Court considers that the latter exists as soon as an instrument is used which allows the commercial operation to be performed, or as soon as goods for export begin their movement towards the final destination[26]. This flows from the *Daniel Ball* case (1871) concerning the application of a federal safety regulation to a small vessel operating in the waters of the Grand River, *i.e.*, exclusively within the State of Michigan. In that judgment, the Supreme Court noted as follows:

> "So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States. *[She] was employed as an instrumentality of that commerce: for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.* The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States does in no respect affect the character of the transportation"[27].

6.24 It is quite clear in this context – and U.S. municipal case law is unambiguous in this regard - that any activity of transport is an integral part of commerce[28]. This includes navigation and shipping[29], but also all other means of interstate transportation, in particular railways[30], as well as interstate telecommunications[31].

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[26] In its judgment in *The United States v. E.C. Knight*, 156 U.S. 1, 15 S.Ct. 249, 39 L.Ed. 325 (1895), the Supreme Court held that an antitrust law did not apply to a sugar refinery because production preceded and was distinct from commerce. Even if the products were intended to be sold in other States, the impact of the monopoly on subsequent commerce was only indirect, and could not constitute justification for applying the "Commerce Clause".

[27] The *Daniel Ball*, 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1871); emphasis added.

[28] *See, inter alia*, the following citations: "'Commerce' includes transportation of commodities between the citizens of the different states", *Barksdale v. Ford, Bacon and Davis*, D.C. Ark., 70 F. Supp. 690, 700; "'Commerce' consists of intercourse and traffic, and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities", *Veazey Drug Co. v. Fleming*, D.C. Okl., 42 F. Supp. 689, 693; "Where goods are purchased in one state for transportation to another the 'commerce' includes the purchase as much as it does the transportation", *Hamlet Ice Co. v. Fleming*, C.C.A.N.C., 127 F. 2d 165, 170.

[29] *Gibbons v. Ogden*, 9 Wheat, 1 (1824).

[30] *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894); *Houston & Texas Railway v. United States*, 234 U.S. 342 (1914).

[31] *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1 (1878).

6.25 Iran does not wish to enter into unsound comparisons or to apply to Article X(1) of the 1955 Treaty of Amity the U.S. courts' interpretation of the "Commerce Clause". The sole aim of these remarks is to demonstrate that the notion of commerce is given a broad interpretation in the U.S. legal system, and that the authors of the 1955 Treaty of Amity can neither have been unaware of it nor disregarded it. When they negotiated that Treaty, it was against the background of this broad notion of commerce.

6.26 The broad interpretation of "commerce" is moreover confirmed by both U.S. and continental (especially French) doctrinal authorities, who often include within this term the activities of production, storage and transport. For example, *The Guide to American Law* defines commerce as "[t]rade and traffic carried on between different peoples or states and their inhabitants, including not only the purchase, sale, and exchange of commodities but also the instrumentalities, agencies and means by which business is accomplished", adding that the word "commerce" also includes the transport of persons and goods[32]. The *Dictionnaire de droit privé*, published by the Centre de recherche en droit privé et comparé du Québec, defines commerce (indicating that the equivalent term in English is "commerce") as "l'ensemble des activités, faites dans un but de spéculation, *qui contribuent à la production et à la circulation des biens*, ainsi qu'à la fourniture de services"[33].

6.27 As far as continental doctrine is concerned, Jauffret has noted that:

> "[l]e commerce que régit le droit commercial s'entend tout aussi bien de la distribution des produits *que de leur fabrication, de l'industrie au sens économique que du négoce et couvre même des activités connexes telles que celles de la banque, du transport, des assurances...*"[34].

Houin and Pédamon emphasise that there can be no doubt that commerce is understood as having a broad meaning:

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32 *The Guide to American Law, Everyone's Legal Encyclopaedia*, Vol. 3, St. Paul, pp. 53-54.

33 *Dictionnaire de droit privé et lexiques bilingues, Deuxième édition revue et augmentée, Centre de recherche en droit privé et comparé du Québec*, Cowarsville, 1991, p. 103.

34 *See*, Jauffret, A., *op. cit.*, p. 1; emphasis added.

> "[i]l recouvre non seulement les activités de distribution et de circulation des biens et des richesses: achats et revente, *transport... mais aussi les activités de production et de transformation: manufacture...*"[35].

Similarly, Houin et Rodière note that:

> "le mot 'commerce' dans le langage juridique a un sens beaucoup plus large que celui qu'on donne à ce mot dans le langage ordinaire et dans la science économique. Il englobe non seulement l'activité de ceux qui se bornent à acheter des marchandises pour les revendre sans transformation, *mais aussi celle des industriels*, des banquiers, des assureurs, des commissionnaires, courtiers et agents d'affaires, des entrepreneurs de spectacles, *des transports...*"[36].

In this regard mention may also be made of the book by De Juglart and Ippolito, who make a distinction between the legal and economic definitions of commerce and note that the legal definition is broader. In their view:

> "[d]ans l'expression 'commerce' envisagée du point de vue juridique, il faut comprendre non seulement les opérations de circulation et de distribution des richesses que font les commerçants *mais aussi les opérations de production que font les industriels* et les opérations financières que font les banquiers"[37].

As a final example of what could otherwise become a tedious enumeration, the authors of a work entitled *Droit du commerce international, Droit international de l'entreprise* also make a distinction between the narrow definition of commerce as being limited to trading and distribution activities, and the broad definition which also includes service, financial and production activities. They note as follows:

> "Observé d'un point de vue international, il est généralement enseigné que le commerce regroupe les mêmes notions en les entendant largement au point d'englober la plupart des activités économiques"[38].

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35 *See*, Houin, R., Pédamon, M., *Droit commercial*, 8th ed., Paris, 1985, p. 2; emphasis added.

36 *See*, Houin, R., Rodière, R., *op. cit.*, p. 2; emphasis added.

37 *See*, De Juglart, M., Ippolito, B., *op. cit.*, p. 6; emphasis added.

38 Mousseron, J.-M., Fabre, R., Raynard, J., Pierre, J.-L., *Droit du commerce international. Droit international de l'entreprise*, Paris, 1997, p. 13.

6.28 This is the legal context within which should be viewed the opinion that was clearly expressed by the Court in its 1996 Judgment in the present case. Relying on the jurisprudence of its predecessor in the *Oscar Chinn* case, the Court cited the following decisive *dictum* of the Permanent Court in that case:

> "Freedom of trade, as established by the Convention, consists in the right - in principle unrestricted - to engage in any commercial activity, whether it be concerned with trading properly so-called, that is the purchase and sale of goods, or whether it be concerned with industry, and in particular the transport business; or, finally, whether it is carried on inside the country or, by the exchange of imports and exports, with other countries"[39].

According to the present Court, freedom of commerce was thus understood by the Permanent Court as:

> "contemplating not only the purchase and sale of goods, but also industry, and in particular the transport business"[40].

6.29 Numerous dictionaries confirm that the notion of commerce includes the concept of industry. For example, the *Encyclopédie Dalloz* notes that "[d]u point de vue juridique, l'industrie est une forme de commerce"[41]. The *Dictionnaire de droit privé*, referred to above, cites Professor Perrault's book on commercial law, according to which "[l]e mot commerce, correspondant ici à l'industrie manufacturière, à l'industrie commerciale, et à celle du transport, englobe les opérations, posées en vue d'un bénéfice, pour la transformation des matières premières, l'échange des objets ouvrés et leur déplacement"[42]. *West's Legal Thesaurus*, published in 1986 under the editorship of Professor Stasky, and also Burton's *Legal Thesaurus* adopt a similar approach, by including the English notion of "industry" under the heading of commerce[43]. If one agrees with *Collins English Dictionary* that the notion of

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39 *I.C.J. Reports 1996*, p. 819, para. 48.

40 *Ibid.*

41 *Encyclopédie Dalloz, Répertoire de droit international*, Paris, 1968, p. 344.

42 Perrault, *Droit commercial*, tome 1, n° 6, p. 19, cited by the *Dictionnaire de droit privé et lexiques bilingues*, *op. cit.*, p. 103.

43 *West's Legal Thesaurus*, St Paul, 1986, p. 151; *Legal Thesaurus*, 2nd ed., New York 1980, p. 86. *See*, however, *contra*, the Dissenting Opinion of Vice-President Schwebel, who made a distinction between the notions of "trade" and "commerce", stating that the former has a broader meaning which, unlike the latter, can be extended to cover industry (*I.C.J. Reports 1996*, pp. 887-888).

"industry" covers any "organized economic activity concerned with manufacture, extraction and processing of raw materials or construction", it is difficult to understand how the activity of oil platforms could fail to be included within the scope of commerce. In this regard, the French *Code minier* states that: "L'exploitation des mines est considérée comme un acte de commerce..."[44]. The same Code explicitly includes within the definition of "mines", "les gîtes connus pour contenir... des hydrocarbures liquides ou gazeux"[45]. Consequently, the whole process of exploitation of oil wells is clearly considered in the French *Code minier* as being a commercial activity.

6.30 The Court has issued an express ruling on this point, adopting an absolutely unambiguous position which is *res judicata* for the remainder of the present case. The Court's *dictum* was that "oil production, a vital part of [Iran's] economy, *constitutes an important component of its foreign trade*"[46]. It should be noted in this regard that the French text of the Judgment (which is the authoritative text) uses the following words "la production pétrolière de l'Iran, pièce maîtresse de l'économie de ce pays, constitue une composante majeure de son *commerce* extérieur". It is therefore indisputable, for the later stages of the present case, that freedom of commerce covers not only the sale and purchase of petroleum products and their transport and storage, but also oil production.

6.31 It may therefore be concluded that in adopting a broad definition of the notion of commerce as including industry and, in particular, oil production, the Court has aligned itself fully with the meaning that is normally attributed to that expression in both municipal law and positive international law. This position is final and is *res judicata* in the present case. Indeed, this is quite apparent from the Separate Opinion of Judge Shahabudeen appended to the Judgment of 12 December 1996 and from the reaction of the doctrinal authorities to that Judgment[47].

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44 France's *Code minier*, D.n. 56-838 of 16 August 1956, Article 23.

45 *Ibid.*, Article 2.

46 *I.C.J. Reports 1996*, p. 820, para. 51; emphasis added.

47 Judge Shahabudeen stresses in his Separate Opinion appended to the Judgment of 12 December 1996 that "... the remainder of the Judgment makes it clear that what the statement means is that the Court is required to make a *definitive interpretation of the Treaty at this juridictional phase*". He adds that "if, in deciding the jurisdictional issue, the Court could competently render a definitive interpretation of the Treaty, it is difficult to see how that interpretation could fail to govern at the merits stage... But, given the importance of the opposite interpretation to the holding made by the Court at the preliminary stage, it is difficult to see how that interpretation could be reversed at the merits stage". *See, I.C.J. Reports 1996*, pp. 822 and 839; emphasis added.

6.32 However, one cannot remain silent with regard to the criticisms provoked by the Court's decision in this regard. The most clear-cut criticism came from Vice-President Schwebel who, in his Dissenting Opinion, criticised the Court for having included production activities within the notion of commerce. In his view, all production activities, far from being ancillary to commerce, are prior and separate activities[48]. Three comments may be made with regard to this criticism.

6.33 *First*, this semantic distinction and its legal consequences do not accord with the reality of industrial activities. From the logical point of view, how can a boundary line be drawn between the two when extraction is one of the very few operations that take place prior to the marketing of a raw material on the international market? When a natural resource is intended for export immediately after its extraction, it is difficult to see how the destruction of the facilities that are necessary for its production and/or transport would not affect commerce[49]. In this particular case, extraction and marketing are not two consecutive and separate phases in time, but one and the same continuous operation which permits the transfer of goods to consumers on the world market, in other words "world commerce". This is particularly evident if it is considered that crude oil contracts are very often signed on a long-term basis and consequently that crude oil in the ground is frequently sold even before its actual extraction: the activity of the oil platforms constitutes then the first step in the execution of the pre-agreed commercial transaction. In addition, the particular nature of oil extraction, and the highly sophisticated techniques and facilities that it involves, and in

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For doctrinal comment, *see*, for example, Jos, E., "Affaire des plates-formes pétrolières, Iran c. Etats-Unis", *A.F.D.I.*, Vol. 42, 1996, p. 408; Bekker, P.H.F., "International decisions. Oil Platforms", *A.J.I.L.*, Vol. 91 (July 1997), p. 522; Ruiz-Fabri, H., Sorel, J.-M., "Jurisprudence. Cour internationale de Justice. Affaire des plates-formes pétrolières", *J.D.I.*, Vol. 124 (1997), p. 869; Evans, M.D., "Oil Platforms (Islamic Republic of Iran v. United States of America) Preliminary Objection", *International and Comparative Law Quarterly*, Vol. 46 (1997), p. 699.

[48] *I.C.J. Reports 1996*, p. 887. In Vice-President Schwebel's view, none of the references put forward by the Court would permit the conclusion that production activities are included within the notion of commerce. In particular, he concludes that "commerce in ordinary and in legal usage is simply not understood to embrace production". *See*, also, the Separate Opinion of Judge Higgins, who states that "[b]ut yet a further step is required to show that commerce is generally understood to *include* the means of production of that which may, much later in the chain, form the subject matter of international commerce", *I.C.J. Reports 1996*, p. 859, para. 43; emphasis in original. Finally, Judge Shahabudeen notes in his Separate Opinion that there is clearly a distinction to be made between the processes of production and commerce; *see*, *I.C.J. Reports 1996*, p. 838.

[49] Even Judge Shahabudeen acknowledges, in his Separate Opinion, that although a distinction should be made between the processes of production and commerce, "where the precise line is to be drawn between them is

particular its importance in the present case for Iranian exports, are all factors that clearly militate in favour of their inclusion under the heading of commerce.

6.34 *Second*, even if one were to admit, *arguendo*, that the Court should not have given a broad interpretation of the notion of commerce, it is important not to make a similar error in giving too extensive an interpretation of the notion of production. If it were admitted that a distinction should be made between operations of production and of commerce (which would be wrong, as has been shown above, following the opinion that has been explicitly upheld by the Court), it should then be noted - with regard to the exploitation of mineral raw materials - that the former does not go beyond the simple extraction of the products. When such extraction is given an added value resulting either from the transformation of natural resources or from transport with a view to making such resources available to the consumer, it moves on from the realm of production as such, to that of commerce *stricto sensu*[50].

6.35 The *third* remark is that the Dissenting Opinion of Vice-President Schwebel highlights quite clearly the opinion upheld by the majority of the Court with regard to the definition of "commerce". The Court has held - and this judgment is now *res judicata* between the Parties - that the notion of commerce, and thus the freedom of commerce guaranteed by Article X(1), covers production activities, and in particular oil production.

6.36 Finally, it should be emphasised that it is quite indisputable and undisputed that the notion of transport is an integral part of commerce. This flows from very long-standing jurisprudence of the Permanent Court, in the *Oscar Chinn* case, as confirmed by the present Court in this case[51]. Moreover, this is in line with municipal U.S. case law, as mentioned above. It is therefore sufficient to refer here to the dictionaries cited by the Court in

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less clear in the case of an industry in which production was closely articulated to external commerce", *I.C.J. Reports 1996*, p. 838.

[50] *See*, with regard to this distinction, Jauffret, A., Lagarde, G. and Hamel, J., *Droit commercial*, 2nd ed. Tome 1, Paris, 1980, p. 2.

[51] "The expression 'freedom of trade' was thus seen by the Permanent Court as contemplating not only the purchase and sale of goods, but also industry, and in particular the transport business", *I.C.J. Reports 1996*, p. 819, para. 48. In this regard the Court relied on the precedent of the *Oscar Chinn Case*. In that case, the United Kingdom had stressed in its Memorial at p. 35: "It is submitted that the expressions 'commerce', 'commercial', is one of wide scope and includes all activities connected with the sale, purchase, exchange and *transportation* of commodities for gain", *P.C.I.J.*, Series C, No. 71; emphasis added.

its Judgment of 12 December 1996[52], to the doctrinal authorities mentioned above, and to the numerous text-books and dictionaries which clearly include transport within commerce. This is recognised by Judge Higgins in her Separate Opinion, when she states that the transport of goods is a fundamental aspect of commerce[53].

6.37 In conclusion, it may therefore be emphasised that by giving a broad interpretation of the notion of commerce, covering both the exchange of oil products and their production, transport and storage, the Court has aligned itself with the view that has been adopted by international practice and the majority of doctrinal authorities. However, even if one were to accept the theory that extraction as such would not fall within the notion of commerce (which is a theory that, as has been noted, the Court did not accept), it is indisputable that any additional function adding to the production operation either a transport activity or an improvement in quality allows such activity to be categorised as commerce. It is quite clear, as will be demonstrated below, that the oil platforms were at the origin not only of the extraction of crude oil, but also of an improvement in the quality of the crude oil and its transport to export terminals.

B. Article X(1) protects "freedom of commerce"

6.38 The Court has noted that Article X(1) of the 1955 Treaty of Amity does not protect commerce as such, but "freedom of commerce". Once commerce has been defined as covering all ancillary activities that are intrinsically linked to commerce, including (but not limited to) production, transport and storage, it is clear that any encroachment upon such activities is a violation of freedom of commerce. This was in fact the position that was taken by Iran in its Memorial, where it stated that:

> "The very fact of preventing goods from reaching the stage of sale, by intervening in a previous phase through coercive or restrictive measures,

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[52] Thus, the *Dictionnaire de la terminologie du droit international* expressly mentions transport as one of the exchange relationships covered by international commerce, and *Black's Law Dictionary* mentions "... transportation of persons as well as of goods, both by land and sea"; *see, I.C.J. Reports 1996*, p. 818, para. 45.

[53] According to Judge Higgins: "That transportation (or 'carriage of goods') is an essential part of commerce is well recognized in the leading textbooks on the subject, as well as in the citations relied on by the Court in paragraphs 45 and 46", *I.C.J. Reports 1996*, p. 861, para. 50. It may be noted that Vice-President Schwebel, who makes a clear distinction between production and commerce, says nothing about the classification of transport in one or other of these categories.

> equally represents a violation of the freedom of commerce. In other words, such a violation could be caused by obstacles blocking any of the processes of production, packaging, stockage, carriage or distribution of goods, and not only during the final part of this process"[54].

6.39 By protecting freedom of commerce, Article X(1) of the 1955 Treaty of Amity prohibits any obstruction not only of specific commercial activities, but also, more broadly, of the ability to enter into actual commercial relations or to continue a flow of exchange that has already been established.

6.40 In its Judgment of 12 December 1996, the Court accepted Iran's argument. Paragraph 50 of that Judgment, which defines freedom of commerce, states that:

> "Unless such freedom is to be rendered illusory, the possibility must be entertained that it could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and their storage with a view to export"[55].

6.41 The Court has thus already decided that it is not only when one of the Parties to the Treaty of Amity destroys goods that are already in existence and are ready to be exported that a violation of Article X(1) occurs. The principle of "freedom of commerce" comes into play at an earlier stage, since it prohibits any action that might prevent or impede commerce in any way whatsoever, including actions directed against facilities whose purpose is to enable such goods to reach the market and enter commercial circuits. Iran considers that by attacking the three oil platforms at issue in this case, the United States not only destroyed natural resources whose importance for Iranian exports was recognised by the Court itself[56], but also caused serious damage to important workings of a well-established commercial mechanism. The U.S. attacks on the Iranian oil platforms are a perfect example of the Court's description of acts that are prohibited under Article X(1) as violations of the freedom of

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[54] Iran's Memorial, para. 3.64.

[55] *I.C.J. Reports 1996*, p. 819, para. 50. The Court cited this passage again in its Order of 10 March 1998, at para. 35.

[56] "The Court notes that Iran's oil production, a vital part of that country's economy, constitutes an important component of its foreign trade", *I.C.J. Reports 1996*, p. 820, para. 51. *See*, also, in this regard the Separate Opinion of Judge Higgins, stating: "It is equally true that petroleum is an important commercial export from Iran to the United States", *I.C.J. Reports 1996*, p. 859, para. 43. Judge Shahabudeen also implicitly recognises this point when, dealing with the distinction between commerce and production, he mentions: "... but where the precise line is to be drawn between them is less clear in the case of an industry in which production was closely articulated to external commerce", *I.C.J. Reports 1996*, p. 838.

commerce. Indeed, the U.S. actions consisted not only of the "destruction of goods destined to be exported", but above all seriously impaired Iran's ability to market and export the products of its oil industry, precisely because such actions were capable "of affecting their transport and their storage with a view to export"[57].

6.42 The question whether there actually were commercial exchanges of petroleum products between the Parties at the time of the attacks on the platforms is hardly significant. Article X(1) does not require specific commercial activities to be underway before, during, and after any obstruction of the freedom of commerce. This provision is designed to guarantee free-flowing commercial relations between Iran and the United States, and its aim would clearly be prejudiced if the export of goods were impeded by obstacles of any kind, including the destruction of indispensable links in the chain of international commerce.

6.43 This interpretation flows logically from the broad definition of the notion of commerce that has been adopted by the Court, as has been shown in this Reply. The same interpretation is an obvious corollary of the notion of "freedom of commerce" as discussed by the Court in its Judgment of 12 December 1996. Moreover, it is the only interpretation that is compatible with the letter and spirit of Article I of the 1955 Treaty of Amity, since a hostile attitude, resulting in the placing by one party of obstacles in the way of the other party's ability to enter into commercial relations, conflicts with the principle laid down in that article, according to which "[t]here shall be firm and enduring peace and sincere friendship between the United States of America and Iran". It may be noted in passing that this conflict is even more flagrant when it is remembered that the acts in question were a violation of the fundamental principle of the non-use of force in international relations. In fact, as the Court has indicated, the principle laid down in Article I is an essential criterion for interpreting the other provisions of the 1955 Treaty of Amity and particularly, in the present case, Article X(1).

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[57] *I.C.J. Reports 1996*, p. 819, para. 50.

C. The meaning of "between the territories of the two High Contracting Parties"

6.44 In its Counter-Memorial, the United States alleges that, concerning the interpretation of Article X(1) of the 1955 Treaty of Amity, Iran "asks the Court to strike the phrase 'between the territories of the two High Contracting Parties', and to create a new Article X(1) that declares: 'There shall be freedom of commerce and navigation'"[59]. Instead, the United States puts forward a narrow interpretation of the provision, alleging that it "addresses only trade moving directly from the territory of one country to the territory of the other"[60].

6.45 By doing so, the United States both completely misunderstands Iran's allegations and puts forward a wrong, restrictive and unexplained interpretation of Article X(1).

6.46 Far from "striking" the expression "between the territories of the two High Contracting Parties", Iran has already stated that the interpretation of this expression is a question of special relevance in the present case[61].

6.47 *First*, there can be no doubt that the words "between the territories of the two High Contracting Parties" do impose a territorial scope and limitation of application for Article X(1) that are partly different from those of other provisions in the 1955 Treaty. For example, commerce carried on by an Iranian citizen between the territories of the United States and a third country would certainly not fall within the scope of this provision, as it does not involve freedom of commerce "between the territories of the two High Contracting Parties" to the 1955 Treaty of Amity. On the other hand, there shall be freedom of commerce, even conducted by nationals of a third State, between the territories of Iran and the United States. In other words, the expression "between the territories [and not 'peoples' or 'citizens'] of the two High Contracting Parties" means that commerce between the territories of the two Parties shall be free, in the sense of not being obstructed or prevented, whatever may be the nationality of the persons conducting them.

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59 U.S. Counter-Memorial, para. 2.30.
60 *Ibid.*, para. 2.19.
61 Iran's Memorial, para. 3.62.

6.48 *Second*, as stated above, Article X(1) specifically ensures "freedom of commerce" between the territories of Iran and the United States. It is clear that this provision would be violated if the free circulation of goods between the territories of the two countries were hindered by obstacles of any kind, including the destruction of facilities designed for that purpose, regardless of the question of whether such facilities were actually participating in commercial activities between the Parties at the precise time of the attacks.

6.49 Iran submits that this interpretation is strongly supported not only by the ordinary meaning to be given to the terms of the provision (specifically, "freedom of commerce"), but also by the Court's 1986 Judgment in the *Nicaragua* case. As is well-known, the Court held in that case that "the mining of the Nicaraguan ports by the United States [was] in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX, paragraph 1, of the 1956 Treaty"[62] between the United States and Nicaragua (which contains exactly the same language as Article X(1) of the 1955 Treaty of Amity with Iran).

6.50 In order to reach this conclusion, nowhere in the 1986 Judgment did the Court concern itself with verifying whether specific commercial activities were taking place between the territories of Nicaragua and the United States at the moment of the U.S. attacks. Notably, the Court did not seek to determine whether the oil in the terminal that was attacked was intended to reach directly the territory of the United States nor whether the ships that were sunk or that avoided stopping at mined Nicaraguan ports were carrying on commerce between the territories of the two Parties at that precise moment. The Court only pointed out that "[i]n the commercial context of the Treaty, Nicaragua's claim [was] justified not only as to the physical damage to its vessels, but also the consequential damage to its trade and commerce"[63].

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62 *I.C.J. Reports 1986*, p. 139, para. 278.

63 *Ibid.*

6.51 Thus, it is clear from the 1986 Judgment that the Court was concerned with the harm that had been done to Nicaragua's capacity to carry on external commercial relations, specifically with the territory of the United States. The mining and the attacks were directed against Nicaragua's infrastructure destined to participate in its external commerce (namely, ports, oil terminals, etc.). Consequently, they severely impaired Nicaragua's normal course of trade and thus constituted a clear violation of "freedom of commerce" in the sense explained above, no matter whether specific commercial activities were under way at that precise time. Furthermore, as the installations that were targeted were located in a zone where Nicaragua enjoyed sovereign rights and as it had been demonstrated in the proceedings that the United States was a traditional and important commercial partner of Nicaragua, there could be no doubt that the asserted breach amounted to a violation of freedom of commerce "between the territories of the two High Contracting Parties". Consequently, the Court needed to go no further in its findings.

6.52 The United States' allegation that the Court's Judgment in the *Nicaragua* case is not pertinent in the present instance is unconvincing[64]. The similarities between the two cases are evident. In both, military actions were directed against facilities mainly used for foreign trade. In both, the targets were located in a zone where the injured State enjoyed sovereign rights. Both Nicaragua and Iran were traditional commercial partners of the United States. Therefore, it is patent in both cases that the United States' actions caused severe prejudice to the freedom of commerce between the territories of the two Parties to the 1956 and the 1955 Treaties, respectively. The United States' allegation in the present case that there was no ongoing commerce between Iran and the United States at the precise time of the attacks is totally irrelevant, for the reasons explained above.

6.53 In addition, Iran strongly rejects the United States' allegation that the phrase "between the territories" of the Parties means that Article X(1) only protects goods *directly* exported from Iran to the United States[65]. Such an interpretation would result in

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64 *See*, U.S. Counter-Memorial, paras. 2.28-2.29.

65 *See*, *ibid.*, para. 2.19.

adding a supplementary condition which is absent in Article X(1). Nothing in the wording of this provision allows it to be affirmed - as the United States does - that the trade of goods departing from Iran and transiting through or being modified in third countries before reaching the United States is excluded from the protection of "freedom of commerce". Particularly, Iran cannot understand how the United States can assume such a limitation from the expression "between the territories of the two High Contracting Parties". The interpretation suggested by the United States results from an entirely arbitrary reading of the provision. That reading is supported by absolutely no authoritative opinion, is unexplained, and patently contradicts the Court's 1986 Judgment in the *Nicaragua* case.

6.54 Iran also wishes to highlight the intrinsic paradox contained in the United States' theories. The United States alleges that Article X(1) cannot be applied in the present instance as all direct oil exports from Iran to the United States were ended by U.S. Executive Order 12613 of 29 October 1987 (an order that the United States considers to be "lawful under the 1955 Treaty")[66]. In other words, the United States is asking the Court to rule, in manifest contradiction with the principle *pacta sunt servanda*, that a unilateral act of one of the Parties to the Treaty of Amity of 1955 can put an end to the protection granted by a provision of the Treaty itself. The guarantee of "freedom of commerce" contained in Article X(1) would then have virtually no effect, as either one of the Parties could abolish it by simply adopting a unilateral measure such as an embargo.

6.55 This unacceptable conclusion would also entail absurd effects, as it would imply that one of the Parties would be allowed to invoke a temporary interruption in trade between the Parties, due to an embargo, to justify the destruction of installations that are vital for the exercise of the "freedom of commerce" that is permanently protected by the Treaty, thus causing damage that would be perpetuated even beyond the period of the embargo itself.

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[66] *See, ibid.*, paras. 2.25-2.27, in particular footnote 244.

6.56 In addition, Iran would point out that the United States' allegation concerning the embargo is in any case inapplicable to the first attacks, which occurred on 19 October 1987, *i.e.* ten days *before* the U.S. Executive Order. It is self-evident that the United States cannot justify a wrongful act that has already taken place on the basis of an event that allegedly interrupts the guarantee contained in Article X(1) but which occurs after the wrongful act. The embargo would then have the curious effect of "curing" *ex post*, unilaterally and with *ex tunc* effects, the illegality of the U.S. attacks against the platforms at a time when the platforms were protected by Article X(1).

6.57 In parallel, the United States argues that the Court cannot judge the lawfulness of the Executive Order in the present instance[67]. Though Iran agrees that the legality of the U.S. embargo, as to which Iran expressly reserves its position, is not here at stake, it must stress the further contradiction contained in this argument. It is self-evident that a State cannot invoke a situation that it has itself provoked in order to exclude the application of a provision and argue, at the same time, that the Court cannot pronounce judgment on the resulting situation.

Section 3. Application of Article X(1) in Relation to the Attacks on the Platforms

A. The platforms were protected by Article X(1) at the time

6.58 As has been demonstrated above, Article X(1) of the 1955 Treaty of Amity protects "commerce" within the juridical meaning of the term, *i.e.* not only the functions of sale and purchase, but also any ancillary activities that are intrinsically linked to commerce, in particular the activities of production, transport, storage or improvement of the raw material. In this sense, it is clear that the oil platforms play a direct role in Iranian commerce, for three main reasons.

6.59 *First*, those platforms were technological facilities that were indispensable for the industrial exploitation of goods which were essential products for Iranian commercial exports. The intrinsic link between the production activity of the

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[67] *See, ibid.*

platforms and Iran's commerce is particularly evident as many crude oil contracts were (and are) signed on a long-term basis, so that crude oil in the ground is often "sold" even before its actual extraction; the exploitation of the oil wells is then an element of the commercial transaction itself, an activity constituting the performance of a contractual commercial obligation. As has already been shown, all the platforms that were attacked had apparatus for the drilling and extraction of oil from the various submarine wells. Reshadat Offshore Complex consisted of three drilling and production platforms (R-3, R-4 and R-7) connected to 27 oil wells; Resalat Offshore Complex consisted of a drilling and production platform (R-1) exploiting 14 oil wells; Salman Offshore Complex consisted of seven inter-connected platforms, of which one was for drilling and two for production, and 21 separate satellite oil wells; Nasr Offshore Complex had a central platform, a flaring point and six other platforms, exploiting 44 oil wells; and four oil wells were exploited in the Nosrat field, which was linked to Nasr Offshore Complex[68].

6.60 *Second*, the central platform of each complex was also designed to separate off gas and water from the oil, the latter being sent by submarine pipeline to Lavan or Sirri, where further separating off took place[69]. Thus, the R-7 platform in the Reshadat Offshore Complex collected the oil that it produced together with the oil received from platforms R-1, R-3 and R-4, and performed a first separation of gas and water from the oil before the oil was sent to Lavan Island[70]. The oil produced by the various platforms making up the Salman Offshore Complex was collected at the central complex, where a first separation of oil and gas and water was performed before the oil was sent to Lavan Island[71]. Similarly, the oil produced by the various platforms in the Nasr and Nosrat fields underwent the same process on Nasr main production platform, before being sent for further processing to Sirri Island[72]. The platforms therefore performed a subsequent operation that went beyond mere extraction and which also falls within the notion of commerce, insofar as it refines the quality of the raw material intended for export and thus gives it added value.

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68 *See*, paras. 3.4-3.9, above. *See*, also, Statement of Mr. Hassani, Vol. IV, paras. 5-10.

69 *See*, Statement of Mr. Sehat, Vol. IV, para. 10; Statement of Mr. Emami, Vol. IV, para. 1; Statement of Mr. Alagheband, Vol. IV, para. 10.

70 *See*, paras. 3.6-3.7, above; and Statement of Mr. Sehat, Vol. IV, para. 10.

71 See, para. 3.8, above; and Statement of Mr. Emami, Vol. IV, para. 1.

72 *See*, Statement of Mr. Alagheband, Vol. IV, para. 10.

6.61 *Third*, all of the platforms that were attacked also allowed transport of the crude oil from its place of extraction to a further destination, through pipelines. This operation was indispensable for the export of the oil, since tankers had no docking facilities at any of the platforms themselves. Thus, at Reshadat Offshore Complex the oil produced by the R-3 platform was transported by submarine pipeline to the R-4 platform, from where it was sent, together with the oil produced by the R-4 platform, to the R-7 platform; platform R-1 of the Resalat Offshore Complex sent all the production of its 14 oil wells via pipeline to the R-7 platform; and R-7 was linked by pipeline to Lavan Island, where it sent all the oil produced by the Reshadat and Resalat Complexes. Similarly, the oil produced by the various platforms of the Nasr Offshore Complex and by the wells in the Nosrat field was transported by pipeline to the central platform of the Nasr Offshore Complex and from there to Sirri Island, through a 33-kilometre pipeline[73]. In her Separate Opinion appended to the Court's 1996 Judgment, Judge Higgins considered that "no comparable allegations of fact were made as to the transportational function of the installations destroyed" in the Salman complex[74]. Iran must respectfully point out that this statement is incorrect. As has already been shown in Iran's Memorial[75] and above[76], the central platform of the Salman Offshore Complex was connected to Lavan Island by pipeline, and sent through the pipeline to Lavan all the oil produced by the seven inter-connected platforms and the 21 satellite wells of the complex.

6.62 The United States argues that Article X(1) did not protect the platforms *at the time of the attacks*. With respect to the Reshadat and Resalat platforms, attacked on 19 October 1987, the United States alleges that these facilities had previously been damaged by Iraq and consequently were not producing oil at the time. Furthermore, the United States argues that no exports of oil would have been possible even if the repair work on these facilities had been completed as, ten days after the military actions against the platforms, United States Executive Order 12613 ended all direct oil exports from Iran to the United States[77]. With respect to the Salman and Nasr platforms, attacked on 18 April 1988, the United

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[73] *See*, para. 3.9, above. *See*, also, Statement of Mr. Hassani, Vol. IV, paras. 6-10.

[74] *I.C.J. Reports 1996*, p. 861, para. 51. For this reason, and in accordance with her interpretation of Article X(1), Judge Higgins considered that the Court did not have jurisdiction with regard to the Salman complex.

[75] Iran's Memorial, para. 1.17.

[76] *See*, para. 3.8, above. *See*, also, Statement of Mr. Hassani, Vol. IV, para. 8 and diagram 1; and Statement of Mr. Emami, Vol. IV, para. 1.

[77] U.S. Counter-Memorial, paras. 2.23-2.26.

States only recalls that, by that date, the direct importation of Iranian oil into the United States had ceased[78].

6.63 These allegations are irrelevant because, as has been previously demonstrated, the existence of ongoing direct exports between the two Parties is not required for the application of Article X(1). What has to be shown is that the relevant platforms were facilities designed for the performance of activities that were covered by the principle of freedom of commerce between the territories of Iran and the United States.

6.64 In this context, it must be recalled, as the Court stated in 1996, that "Iran's oil production, a vital part of that country's economy, constitutes an important component of its foreign trade"[79]. As may clearly be seen from Chapter 3, Section 2, above, the platforms that were attacked were valuable elements of an existing complex of Iranian oil production intended for foreign trade, including with the United States. Even after the embargo of 29 October 1987, their production continued to find its way to the territory of the United States or could have so continued if the United States had not destroyed the platforms. Consequently, it cannot be denied that all the oil platforms that were attacked were components in a system of Iran/United States commercial relations that existed before the United States embargo, survived during the embargo, and was available for future direct or indirect exports from the territory of Iran to the territory of the United States. As such, all the oil platforms were and are protected *at any time* under the provision ensuring freedom of commerce between the territories of the two Parties to the 1955 Treaty of Amity, regardless of their actual production at any given time.

6.65 Subsidiarily, Iran wishes to point out that even if a more restrictive interpretation of Article X(1) were to be adopted, the oil platforms, at the time of the attacks, would still have been covered by the protection of the freedom of commerce guaranteed by the 1955 Treaty of Amity. In fact, as has already been shown in Chapter 3, Section 2, above, either the oil platforms were producing oil at the time of the attacks, and their production reached, directly or indirectly (through third States) the territory of the United States, or they

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78 *Ibid.*, para. 2.27.

79 *I.C.J. Reports 1996*, p. 821, para. 51.

were under repair at that precise time, and were expected to resume their activity imminently. In other words, these platforms were not only a vital component of a system of potential commerce between the Parties, they were also participating at the time of the attacks in the oil exports from the territory of Iran to the territory of the United States.

6.66 Moreover, with regard to the platforms attacked on 19 October 1987, the United States argues that they were not to be considered as being protected *at the time of the attacks*, since ten days later a U.S. embargo ended all direct exports from Iran to the United States. As noted above, this argument is incoherent, as the United States alleges that the protection granted by Article X(1) could at any given time be "brushed aside" *ex post* and with retroactive effect, by means of a unilateral decision interrupting trading activities between the Parties. Also subsidiarily, Iran submits that, in order to determine the scope of protection *ratione temporis* of Article X(1) and the illegality of the U.S. actions against the platforms, reference should be made only to the time when the platforms were attacked, and not to later events, such as the U.S. Executive Order.

6.67 For these reasons, it is Iran's submission that the platforms were protected by Article X(1) at the time of the U.S. attacks.

B. The attacks breached Article X(1)

6.68 The attacks against the platforms were carried out by United States military personnel. As described above, the attack on 19 October 1987 was conducted by U.S. naval destroyers, war-planes and helicopters[80]; and numerous U.S. military forces were involved in the attacks on 18 April 1988[81]. Consequently, there can be no doubt - and this is not disputed by the United States - that the attacks against the platforms are attributable to the United States in application of the general principles of international law concerning State responsibility as codified by the International Law Commission's Draft articles[82].

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80 *See*, para. 4.75, above.

81 *See*, paras. 5.2, *et seq.*, above.

82 *See*, United Nations, *Report of the International Law Commission to the General Assembly, 1996*, U.N. doc. A/51/10, pp. 125-151. The articles concerning attribution in the I.L.C.'s Draft Articles were further discussed by the Commission in 1998, following the suggestions by the Special Rapporteur (*see*, notably, United Nations, Report of the International Law Commission to the General Assembly, 1998, U.N. doc. A/53/10, paras. 359-408).

6.69 The attacks were directed against commercial facilities that were protected by Article X(1) at the time and located in a zone where Iran enjoyed sovereign rights. The details of the way in which the attacks were conducted and of their consequences are described above[83].

6.70 It is clear that all the attacks impeded the normal functioning of the oil platforms and that they even resulted in the complete interruption of the platforms' activities for a period of time, thus preventing gravely *ab ovo* the possibility for Iran to enjoy freedom of commerce as guaranteed by Article X(1). Notably, on 19 October 1987, the Reshadat and Resalat Offshore Complexes were under repair, following Iraqi attacks, and were expected to resume their activity shortly[84]. As described above, the U.S. attacks destroyed the R-4 platform, as well as the vital installations of the R-7 platform, thus damaging the central component of the complex which was essential for the normal functioning of the whole[85]; as a consequence of the attacks, the repair work was interrupted and provisional production did not recommence until three years later[86]. On 18 April 1988, the works undertaken in the Salman Offshore Complex, following the Iraqi attacks, were about to be completed[87]. The U.S. attacks caused severe damage to the installations of the platforms and interrupted all the repair activities in the Salman complex, with normal production levels only being reached again in 1993[88]. That same day, the U.S. attack against the Nasr Offshore Complex - which was functioning normally at the time - resulted in the destruction of vital installations thereon and caused the disruption of the activities not only of the Nasr complex itself, but also of the Nosrat oil field[89].

6.71 As all these platforms were protected by Article X(1) at the time, Iran submits that the Court must inevitably conclude that the U.S. attacks violated that provision, as they created a severe obstacle to the freedom of commerce between the territories of Iran and the United States.

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83 *See*, paras. 4.74, *et seq.* and 5.2, *et seq.*, above.
84 *See*, para. 3.13, above.
85 *See*, paras. 4.76 and 4.78, above.
86 *See*, para. 3.29, above.
87 *See*, para. 3.14, above.
88 *See*, paras. 5.3-5.4, above.
89 *See*, para. 5.5, above.

6.72 In addition, Iran must stress that the attacks were conducted through the use of armed force against oil platforms in an area where Iran exercised sovereign rights, thus violating a norm of customary international law, also embodied in the U.N. Charter (Article 2, paragraph 4). Although this fact is not directly relevant to the present instance, it serves as a further indication that the U.S. actions breached Article X(1). As the Court stated in its 1996 Judgment, "the objective of peace and friendship proclaimed in Article I of the Treaty of 1955 is such as to throw light on the interpretation of the other Treaty provisions, and in particular of Articles IV and X"[90]. It is clear that the creation of obstacles to the freedom of commerce between the territories of the two High Contracting Parties, by the use of force in breach of customary international law embodied in the U.N. Charter, rides roughshod over the objective of peace and friendship of the Treaty of Amity and constitutes a flagrant violation of Article X(1).

6.73 As a result of the attacks, and as has also been described above, severe damage was incurred by all the relevant Iranian oil platforms, resulting in a decrease in Iran's oil production intended for foreign commerce for a protracted period of time. In addition, Iran was obliged to engage in extensive remedial actions in order to re-establish the previous levels of activity and rebuild its infrastructure on the platforms designed for foreign commerce, specifically with the United States, and to ensure the protection of the environment.

6.74 For these reasons, Iran asks the Court to adjudge and declare that, by its actions on 19 October 1987 and 18 April 1988, the United States violated Article X(1) protecting freedom of commerce between the territories of the two High Contracting Parties to the 1955 Treaty of Amity, that the United States has consequently engaged its international responsibility and, as a consequence, that it has the duty to make full reparation to Iran for all the damages, losses and injuries caused.

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[90] *I.C.J. Reports 1996*, p. 815, para. 31.

CHAPTER 7. THE ABSENCE OF JUSTIFICATION FOR THE UNITED STATES' ATTACKS

Section 1. Introduction

A. Overview

7.1 This Chapter deals with the counter-arguments raised by the United States that:

(a) its attacks were justified as self-defence, and

(b) Iran's claim cannot be upheld because the attacks were justified or excluded from the Treaty of Amity by Article XX(1)(d), since they were measures necessary to protect the "essential security interests" of the United States.

Iran will show that the claim of self-defence is completely flawed both as a matter of fact and as a matter of law, and that the United States cannot escape its responsibility under the Treaty of Amity by relying on Article XX(1)(d).

7.2 In order to put the Iranian argument into its proper context, some general legal comments must be made on the status of the conflict between Iran and Iraq, as well as on the impact which that conflict had, in legal terms, on the relationship between the Parties to the present proceedings and, in particular, so far as the law of neutrality is concerned.

7.3 For reasons explained in Chapter 2 above, it should not be forgotten, in considering these issues, that Iran was subject to a massive and continuing aggression by Iraq, for which Iraq has been held responsible. It is Iran's position that the international community should have assisted in resisting this aggression. At a very minimum, third States were obliged to remain strictly neutral. It should also not be forgotten in this context that the United States in particular was party to a Treaty of Amity with Iran.

B. The armed conflict between Iraq and Iran and the law of neutrality

7.4 At the relevant time an international armed conflict was taking place between Iraq and Iran. There seems to be general agreement that, as a minimum, obligations arising from the law of neutrality applied to that conflict, even though no formal state of war was recognised by the Parties to the conflict[1]. Under current international law, the application of the law of neutrality does not presuppose the existence of a state of war in the formal sense. The existence of an armed conflict of a certain scale is sufficient[2]. There can be no doubt that the armed conflict between Iraq and Iran was of a scale sufficient to trigger the applicability of the law of neutrality.

7.5 The law of neutrality is an established domain of international law. It has been modified by the Charter of the United Nations, in particular by the prohibition of the use of force, as well as by the powers of the Security Council to react to a threat to or breach of the peace or an act of aggression. But subject to these modifications, the law of neutrality is still a valid concept. As the Court held in its *Advisory Opinion on the Legality of the Use or Threat of Use of Nuclear Weapons*:

> "The Court finds that as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves us no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict..."[3].

Consequently, the position of the United States with regard to the armed conflict has to be evaluated in the light of the applicable rules of the law of neutrality. Then, it has to be determined whether and, if so, to what extent the modifications of the law of neutrality

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1 *See*, Bothe, M., "Neutrality at Sea", in Dekker, J. F., Post H.H.G. (eds.), *The Gulf War of 1980-1988*,1992, pp. 205, *et seq.*, at p. 206.

2 Schindler, D., "Transformations of the Law of Neutrality since 1945", in Delissen, A.J.M., Tanja, G.J. (eds.), *Humanitarian Law of Armed Conflict. Challenges Ahead. Essays in Honour of Frits Kalshoven*, 1991, pp. 367, *et seq.*, at p. 375; Bothe, M., "The Law of Neutrality", in Fleck D. (ed.), *The Handbook of Humanitarian Law in Armed Conflict*, 1995, pp. 485, *et seq.*, at pp. 490, *et seq.*

3 *I.C.J. Reports 1996*, p. 261, para. 89.

effected by the Charter of the United Nations confirm the evaluation arrived at under the traditional rules of the law of neutrality.

7.6 Any State which is not an actual party to an armed conflict is subject to the rights and duties of a neutral State. As a matter of law, there is no intermediate status of non-belligerency between participation in an armed conflict and neutrality. The fact that in relation to some conflicts, the status of certain States has been described as one of "non-belligerency" has not led to a change of the well-established customary rule[4]. This question has to be distinguished from the question whether and, if so, to what extent, the law of the U.N. Charter has modified the law of neutrality. As will be shown, the U.N. Charter gives certain rights to and imposes certain duties on neutral States[5]. But these specific modifications must not be confused with a wholesale sweeping away of the restraints of neutrality by a unilateral claim of simple non-belligerency. Thus, the first question to be asked is what are the rights and duties of the Parties to the present proceedings under the law of neutrality. Then, as a second step, it has to be determined whether and, if so, to what extent different or additional rights and duties arise under the Charter.

7.7 The United States accepts that it was at no stage a party to the armed conflict between Iraq and Iran. Accordingly, the rights and duties of the United States have to be determined by applying the rules of the law of neutrality, subject to any qualification that may be necessary under the Charter. This, too, seems to have been accepted by the United States, at least in its official statements[6]. There are two basic obligations under the law of neutrality, namely the duty of abstention and the duty of impartiality[7]. The duty of abstention means that the neutral State has to abstain from providing military assistance to a belligerent. Under this rule, the neutral State is not only prohibited from becoming involved in actual fighting, but also from providing arms and other military equipment, whether the State does so itself or whether it permits arms to be furnished by private persons or enterprises within its

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4 Bothe, M., "The Law of Neutrality", *op. cit.*, p. 486, note 2.

5 Schindler, D., *op. cit.*, at p. 371, *et seq.*

6 Menefee, S.P., "United States - Commentary", in de Guttry, A., Ronzitti, N. (eds.), *The Iran-Iraq War (1980-1988) and the Law of Naval Warfare*, 1993, pp. 99, *et seq.*, at p. 112.

7 Bindschedler, R.L., "Neutrality, Concept and General Rules", in Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, Vol. 3, 1997, pp. 549, *et seq.*, at pp. 551-552; Castrén, F., *The Present Law of War and Neutrality*, 1954, p. 441; Politakis, G.P., *Modern Concepts of the Law of Naval Warfare and Maritime Neutrality*, pp. 366, *et seq.*; *see*, also, Article 9 of Hague Convention V and Article 9 of Hague Convention XIII of 1907.

jurisdiction[8]. The duty of impartiality means that the State must refrain from behaviour which would tip the balance of the conflict in favour of one party or the other. The neutral State must, in other words, refrain from interfering in the outcome of the conflict.

7.8 The duty of abstention and that of impartiality were grossly violated by the U.S. "tilt" towards Iraq. This tilt resulted in a number of activities supporting Iraq which had a significant influence on the course of the conflict[9]. U.S. support for Iraq, although incompatible with the official status of neutrality claimed by the United States, was not a state secret, but was in part at least overt. That does not make it any less unlawful.

7.9 As has been explained above, this support took various forms. The United States systematically protected the interests of Saudi Arabia and Kuwait, two States which gave (and were known to be giving) substantial military and financial aid to Iraq. These two States are generally considered to have been allies of Iraq. Concerning Kuwait, this is proved indisputably by the very fact that Kuwait officially recognised it later, when it presented to Iran its apologies for having supported Iraq. The United States, furthermore, actively helped to facilitate Iraq's access to war technology and arms deliveries from third States. It placed at Iraq's disposal decisive military intelligence. It went so far as to give directions to Iraq's fighter planes attacking Iranian targets in the Persian Gulf. On the other hand, it took active steps to bar Iran's access to military equipment[10]. These forms of support for one of the belligerents are clear-cut violations of the duties of neutrality. Furthermore, the extraordinary change of trade patterns to the advantage of Iraq also constitutes a measure which tips the balance in favour of one of the belligerents and therefore constitutes a violation of the duty of impartiality.

7.10 As already stated, the behaviour of the United States must not only be evaluated according to the yardstick of the law of neutrality, but also in the light of the rules of the United Nations Charter relating to the use of military force. There is no denying the fact that the armed conflict between Iraq and Iran was started by Iraq. As the Report of the Secretary-General of the United Nations confirms, it was a war of aggression perpetrated by

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8 Oeter, S., *Neutralität und Waffenhandel*, 1992, at pp. 216, *et seq.*

9 Report of Prof. Freedman, Vol. II, para. 25.

10 *See*, in general, Chapter 2, above.

Iraq of which Iran was the victim[11]. The United States, in its Counter-Memorial, does not make any attempt to deny this legal evaluation of the conflict.

7.11 Under current international law, it is not only aggression in the sense of the act of the aggressor State itself which is unlawful, but also any assistance given to the aggressor[12]. Thus, the support given by the United States to Iraq was not only unlawful under the law of neutrality, it was also illegal under the provisions of the Charter relating to the use of force.

7.12 It is inconceivable that the law of neutrality or the provisions of the Charter relating to the use of force could legitimise, by whatever legal construction, support being given to an aggressor. Such legitimation would be contrary to the basic purpose of the Charter to protect the victim of aggression. If and to the extent that the United States became involved in actual fighting related to this conflict, this would mean, on the part of the United States, fighting in support of an aggression, and it would therefore be unlawful. It may be that the Charter does not require third States actively to assist States confronted by aggression, and that collective self-defence is a right but not a duty. At the very least, however, the duties of neutrality and impartiality imposed on a third State in relation to a State which is a victim of aggression must be reinforced and made even more rigorous. In the present case the law of neutrality and the provisions of the Charter may not have pointed in exactly the same direction, but they combined to prohibit any form of assistance to the aggressor.

Section 2. The Flawed Claim of Self-Defence

7.13 Against this background, it is possible to assess the basic counter-argument against Iran's claim – the United States' argument that its attacks on the platforms were justified as self-defence. Iran's refutation of this argument will proceed as follows.

(1) Under the Charter of the United Nations, the right of self-defence as recognised by Article 51 has to be restrictively interpreted.

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[11] *See*, Iran's Memorial, Exhibit 42; *see*, also, paras. 2.12 and 2.14, above; Kaikobad, K.H., "*Ius ad bellum*: Legal Implications of the Iran-Iraq War", in Dekker, J.F., Post, H.H.G. (eds.), *op. cit.*, pp. 51, *et seq.*, pp. 59, *et seq.*; Weller, M., "Comments", *ibid.*, pp. 70, *et seq.*

[12] Meyrowitz, H., *Le principe d'égalité des belligérents devant le droit de la guerre*, 1970, pp. 375, *et seq.*

(2) This applies in particular to the notion of an armed attack which triggers the right of self-defence. There must be a specific armed attack.

(3) Even if there were a general situation of hostile behaviour of Iran against the United States, which Iran denies and the United States cannot prove, this did not amount to an armed attack. Thus, the only possible bases for a right of self-defence are the two single incidents invoked by the United States, namely the fact that the *Sea Isle City* was hit by a missile and the fact that the *U.S.S. Samuel B. Roberts* hit a mine. In relation to these events, the United States bears the burden of proof that there was an attack which can be attributed to Iran. The United States is unable to establish that this was the case.

(4) Even if there were, in both cases, acts attributable to Iran, the claim of self-defence fails as a matter of law. The attack against the *Sea Isle City* was not an armed attack within the meaning of Article 51, because a single merchant ship does not belong to those external manifestations of a State which are protected under the prohibition contained in Article 2(4) of the Charter, especially if they are in foreign ports. Thus, the military action against this individual merchant ship did not trigger a right of self-defence. In relation to the *Samuel B. Roberts*, the essential point is that mine-laying during an armed conflict is not illegal *per se* and cannot be considered equivalent to an armed attack.

(5) Even if the two events amounted to armed attacks by Iran, the military operations by the United States would not be justified, as they did not constitute self-defence within the meaning of Article 51. Self-defence is limited to that use of force which is necessary to repel an attack (the principle of necessity). This rule was violated, in particular, because the choice of the target for the U.S. measures by way of "self-defence" was totally unrelated to the alleged attack. Furthermore, once an attack is over, as was the case here, there is no need to repel it, and any counter-force no longer constitutes self-defence. Instead it is an unlawful armed reprisal or a punitive action. The use of force in order to deter future attacks does not come within the definition of lawful self-defence, but constitutes unlawful pre-emptive action.

(6) Finally, even if the two operations launched by the United States constituted self-defence, they were still illegal as violations of the principle of proportionality, the damage inflicted by them to Iran being grossly disproportionate to the damage caused by the two events alleged to constitute armed attacks by Iran.

A. The interpretation of the right of self-defence

7.14 In seeking to justify its operations in destroying the three oil platforms, the United States has principally relied on the contention that these operations constituted a valid exercise of the right of self-defence. The United States' contention is not only unfounded as a matter of fact; it is also based on an erroneously expansive interpretation of the notion of self-defence. A few introductory words concerning the interpretation of the United Nations Charter and the prohibition of the use of force are accordingly necessary.

7.15 The basic point of departure for any argument or interpretation is the purpose of the Charter to protect future generations from the scourge of war, as the Preamble of the Charter puts it. Accordingly, Article 2(4) of the Charter contains a general prohibition of the use of force in international relations. For the same reason, the Charter has kept the exceptions to this prohibition of the use of force to an absolute minimum. Unilateral recourse to armed force is thus limited to the exercise of the right of self-defence. Other justifications for the use of force, whether or not legitimate in earlier times, are no longer valid.

7.16 This basic approach has important implications for the interpretation of the right of self-defence as recognised by Article 51 of the Charter. An extensive construction of this provision could easily undermine the absolute character of the prohibition of the use of force[13]. As pointed out by one author[14], the wording of Article 51 is "deliberately restrictive". Along the same lines, Brownlie argues that:

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13 *See*, Schachter, O., "Self-Defence and the Rule of Law", 83 *AJIL* 259 (1989), pp. 272, *et seq.*

14 Dinstein, Y., *War, Aggression and Self-Defence*, 2nd ed., 1994, p. 183.

> "... a restrictive interpretation of the provisions of the Charter relating to the use of force would be justifiable and that even as a matter of 'plain' interpretation the permission in Article 51 is exceptional in the context of the Charter"[15].

7.17 As a consequence, the notion of armed attack triggering a right of self-defence must be more narrowly construed than the notion of unlawful use of force in Article 2(4) of the Charter. As the Court held in its *Nicaragua* Judgment of 27 June 1986:

> "the Court does not believe that the concept of 'armed attack' includes... also assistance to rebels... Such assistance may be regarded as a threat or use of force..."[16].

This statement clearly implies that not every use of force is tantamount to an armed attack[17]. In the words of Professor Randelzhofer:

> "It is to be emphasised that Articles 51 and 2(4) do not exactly correspond to one another in scope, i.e. not every use of force contrary to Article 2(4) may be responded to with armed self-defence. The U.N. Charter did not intend to exclude self-defence entirely, but restricted its scope considerably. A comparison of the different wording of the two provisions illustrates that, remaining uncertainties apart, 'armed attack' is a much narrower notion than the 'threat or use of force'... The view of the present author, namely that there exists a gap between Arts. 2(4) and 51, corresponds to the prevailing view in international legal writings and is supported by U.N. practice..."[18].

7.18 The United States' stance, on the other hand, is based on a concept that the end justifies the means, that any action which it alleges is useful to defend the security of a State[19] automatically falls within the definition of lawful self-defence. The jurisprudence of the Court in the *Nicaragua* case suggests the need for a more careful and restrictive approach. It is in this spirit that the right of self-defence has to be interpreted.

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15 Brownlie, I., *International Law and the Use of Force by States*, 1963, p. 273.

16 *I.C.J. Reports 1986*, pp. 103-104, para. 195.

17 Higgins, R., "International Law and the Avoidance, Containment and Resolution of Disputes", *RdC* 230 (1991 V), pp. 9, *et seq.*, at p. 320.

18 Randelzhofer, A., "Art. 51 m.n. 4", in Simma, B. (ed.), *The Charter of the United Nations*, 1994.

19 *See*, in particular, U.S. Counter-Memorial, para. 4.07.

B. The United States was not subjected to an armed attack

1. The requirement of a specific armed attack

7.19 The United States claims that it acted in self-defence against armed attacks launched by Iran. The acts of hostility principally singled out as armed attacks and alleged to be attributable to Iran are the missile attack on the tanker *Sea Isle City* on 16 October 1987 and the fact that the *Samuel B. Roberts* hit a mine on 14 April 1988. In addition, the United States also makes reference to several other attacks which it attributes to Iran, contending that they constitute "a larger pattern" of Iranian actions[20]. It is, however, not possible to conclude on the basis of the facts alleged by the United States that there was a general situation amounting to an armed attack against which the United States could claim to be in a position of self-defence.

7.20 The situation of a continuous armed attack could exist if there were an armed conflict between the United States and Iran. In this case, it would indeed not be necessary to evaluate each single act of hostility in the light of the rules concerning *ius ad bellum*; the legality or otherwise of the hostilities would fall to be determined in relation to the conflict as a whole. In the case of such an armed conflict, the relevant question in relation to the right to self-defence would be which State was responsible for the act of aggression which initiated the fighting. The State acting in self-defence against an armed attack is not precluded from taking the initiative in relation to a particular military operation, within the framework of the overall armed conflict resulting from the attack.

7.21 The notion of armed conflict is, thus, also a key to the answer to the question whether it is a situation as a whole which has to be evaluated in the light of the *ius ad bellum*, and not each particular military operation, which may or may not have been a response to another one undertaken by an enemy. For this purpose, the definition of the term "armed conflict" in the context of the *ius in bello* can be relied upon. A correct definition of the term "armed conflict" is given in the Declaration made by the United Kingdom on signature of Protocol I Additional to the Geneva Conventions of 1977:

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20 *See*, for instance, U.S. Counter-Memorial, para. 4.10.

> "the term... implies a certain level of intensity of military operations... and this level of intensity cannot be less than that required for the application of Protocol II..."

The latter part of the phrase refers to the negative definition of the term "armed conflict" contained in Protocol II:

> "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar natures, as not being armed conflicts".

Similarly the manual *The Law of Armed Conflict* approved in 1981 by the U.K. Ministry of Defence defines the term "armed conflict" as

> "sustained and concerted military operations akin to war"[21].

7.22 Whatever incidents may have occurred between the United States and Iran during the Iraq-Iran war may have been evidence of "tension", they may have been "isolated and sporadic acts of violence", but they were not "sustained and concerted military operations akin to war", and certainly not on the part of Iran. Thus, there was no overall armed conflict where the question of who attacked first would be meaningful. The situation existing between the United States and Iran *was not* comparable to that of an invasion which existed, for instance, between Iraq and Kuwait in 1990/91. In that case, there was a continuous situation of an armed attack which justified counterforce being used at a time when there was no longer actual fighting going on[22]. It was the continuous occupation of Kuwaiti territory which perpetuated the armed attack made by Iraq. Nothing of the kind existed in the present case, as between Iran and the United States. Thus, the question whether there was an armed attack triggering the right to self-defence on the part of the United States cannot be asked and answered for the situation as a whole, but only for each single incident which occurred.

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21 *The Law of Armed Conflict*, Manual prepared by the U.K. Chief of General Staff, 1981, p. 6.

22 Higgins, R., *op. cit.*, pp. 297, *et seq.*

7.23 This type of approach has also been adopted by the Security Council, for example, in relation to issues arising between Israel and its Arab neighbour States. The Security Council has consistently treated such situations as not amounting to continuous international armed conflict, but rather has:

> "... treated each new complaint arising out of a non-contested act of armed force as though it had occurred in a non-belligerent, if not truly peaceful, environment"[23].

The U.N. Secretariat has described U.N. practice as follows[24]:

> "It was also stressed that self-defence could not be invoked continually, but only for a single case of aggression at a time".

In relation to an Israeli incursion into Lebanon, the Delegate of Argentina, for instance, stated before the Security Council:

> "... these actions have gone beyond what can be justified as a legitimate exercise of the right of self-defence, particularly *in relation to the specific incidents* referred to in the Israeli Ambassador's letter"[25].

7.24 In the present case, likewise, there is also no basis for the application of a "cumulation of events" theory of self-defence. It is noteworthy that such a theory has never been accepted by the Security Council, either in this or in other contexts[26].

7.25 The United States itself, in earlier statements, has consistently relied on specific acts allegedly triggering its right of self-defence. As pointed out in the U.S. Counter-Memorial:

> "... the legality of acts as self-defense can only be determined in relation to specific events and circumstances"[27].

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23 O'Brien, W.V., "Reprisals, Deterrence and Self-Defence in Counterterror Operations", 30 *Va. Jl. of International Law* 421 (1990), at p. 426.

24 *Repertory of Practice of U.N. Organs*, Suppl. 5, Vol. II, p. 177.

25 SCOR, 1649 mtg, 24 June 1972, p. 19 (emphasis added).

26 Alexandrov, S. A., *Self-Defence Against the Use of Force in International Law*, 1996, p. 167.

27 U.S. Counter-Memorial, para. 4.08.

And further on:

> "... each of the two specific attacks that preceded United States defensive measures - the missile attack on *Sea Isle City*, and the mining of the *USS Samuel B. Roberts* - was an armed attack giving rise to the right of self-defense"[28].

7.26 The United States, at the time of the events, considered each alleged act of hostility on its own. When its Permanent Representative to the U.N. complained to the U.N. Security Council about several acts attributed to Iran, reference was made to specific events[29]. Along the same lines, the Secretary of Defense stated on 19 October 1987 after the U.S. attack on the Reshadat oil platform:

> "The action is now complete... We consider this matter as now closed"[30].

This position can only be explained on the basis that the United States was itself of the view that there was no overall general situation of armed attack placing it in a continuous situation of self-defence. Moreover, the United States did not raise, at the time of the events, any claim in relation to the incidents which it now has made the subject of the counter-claim.

7.27 The United States wants to have it both ways: it wants to have the rights of a neutral State and at the same time the rights it would have only if it were a party to an armed conflict. Thus, the United States maintains that it was neutral in relation to the conflict between Iraq and Iran and that the overall relations between the United States on the one hand and each of the two parties to the armed conflict on the other hand were generally peaceful and governed by the law of peace. If this is the true characterisation of the situation, then each incident has to be evaluated on its own merits as to whether it constitutes an armed attack or an action in self-defence. On the other hand, if there had been, as the United States also claims, a general pattern of aggressive behaviour on the part of Iran, this would have placed it in a general situation of self-defence, and one could no longer say that the situation was exclusively governed by the law of peace.

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28 *Ibid.*, para. 4.10.
29 De Guttry, A. and Ronzitti, N., *op.cit.*, pp. 220-224.
30 *Ibid.*, pp. 194-195.

2. The facts and the burden of proof

7.28 The burden of proof concerning the existence of an armed attack which would trigger the right of self-defence lies on the United States. It is a general rule of the law of evidence that the party relying on the exception to a general rule must prove the facts which are the basis for this exception. In this sense, the general rule is the rule prohibiting the use of force, and self-defence is the exception. Furthermore, as the Court held in the *Nicaragua* case[31]:

> "it is the litigant seeking to establish a fact who bears the burden of proving it...".

There is no doubt that a State which relies on self-defence must prove that it is, as a matter of fact, in a situation of self-defence. As has rightly been pointed out:

> "...the state claiming self-defence must establish armed attack or its related notion of aggression..." [32].

7.29 To the extent that the United States relies on the existence of a general pattern of aggressive behaviour on the part of Iran, it must prove it. This the United States is unable to do. In regard to the alleged pattern of aggressive behaviour on the part of Iran, the only discernible "pattern" is one of unsubstantiated allegations. In particular, the U.S. Counter-Memorial misquotes the Security Council when it states that the Security Council "condemned Iran's attacks"[33]. Neither in Resolution 552, quoted by the United States, nor in any other resolution did the Security Council make any determination as to the origin of attacks on shipping, about which the Council was "deeply concerned" (Resolution 552) and which it "deplored" (Resolutions 582 and 598). Nor did the Council state or determine that any of the acts mentioned in the Council resolutions constituted an armed attack or a pattern of aggressive behaviour against any State. The Council never went to the other extreme so as to specifically blame Iran for anything. It is, thus, inappropriate to quote the Security Council in support of the allegation that Iran adopted an aggressive behaviour against any State, let

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31 *I.C.J. Reports 1984*, p. 437, para. 101.
32 Kaikobad, K. H., *op. cit.*, p. 59.
33 U.S. Counter-Memorial, para 1.10.

alone the United States. On the contrary the subsequent Report of the Secretary-General pursuant to Resolution 598 held Iraq responsible for the entirety of the conflict[34].

7.30 The United States tries to draw a general picture of Iranian attacks on neutral shipping[35]. However, the United States cannot justify its attacks on Iran's oil platforms by reference to alleged Iranian attacks on "neutral" vessels. The United States cannot, and has never sought to, sustain an argument based on collective self-defence. As pointed out in Chapter 2, U.S. policy in the Persian Gulf at the time was only to protect U.S.-flag vessels.

7.31 The United States however also refers to alleged hostile acts by Iran against U.S.-flag vessels or U.S. forces, as constituting this "pattern" of Iranian aggression. As Iran has already explained, these allegations are unsubstantiated. Also, at least two of the incidents - the attacks on the *Iran Ajr* on 21-22 September 1987 and on Iranian patrol boats on 8 October 1987 - were attacks on Iranian vessels by the United States.

7.32 Turning to the two specific individual incidents which are alleged by the United States to form a basis for an exercise of the right of self-defence, it has already been pointed out in Iran's Memorial and is explained in more detail above, that the United States' assertions with regard to these incidents are essentially flawed on the facts. The new evidence put forward by the United States by no means establishes that the damage to the two ships could be attributed to Iran, still less that the incidents in question constituted armed attacks.

7.33 In the case of the *Sea Isle City*, the only clearly established fact is that it was hit by a missile. The United States has failed to prove that the missile was fired from a site which was under Iranian control at the relevant time. Iran has submitted persuasive evidence that there are a number of different possibilities which contradict the U.S. version of the facts.

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34 *See*, paras. 2.13-2.14, above.

35 In particular, U.S. Counter-Memorial, para. 1.04.

7.34 In the case of the *Samuel B. Roberts*, the only clearly established fact is that it hit a mine. The evidence submitted by Iran shows that it is simply not possible to determine with any certainty whether a particular detonated mine was Iranian or Iraqi. The mines possessed by both countries were very similar. But even if it could be shown that the mine which hit the *Samuel B. Roberts* was of Iranian origin, this does not exclude the possibility that the mine was laid by Iraq. Iraq could have "harvested" mines legitimately laid by Iran in the Khor Abdullah area and reused them elsewhere. The evidence produced by Iran shows that Iraq had the capacity to lay mines in the Persian Gulf both by ships and helicopters[36]. Furthermore, in order to be qualified as an armed attack, at the very least the mine-laying would have had to be specifically directed against a U.S. target. There is no evidence produced by the United States to support such a contention.

7.35 Thus, there are many plausible alternatives to the version of the facts put forward by the United States. In this situation, the Court cannot accept a claim of self-defence. The United States has fallen well short of satisfying its burden of demonstrating an armed attack.

3. The specific incidents

(a) The *Sea Isle City*

7.36 The *Sea Isle City* was a reflagged Kuwaiti tanker. Even assuming that its reflagging was opposable to Iran, so that for present purposes it is to be treated as a United States commercial vessel[37], the fact that it was hit by a missile does not amount to an armed attack on the United States. An attack against such a ship in a foreign port was not an armed attack against the United States for the purposes of Article 51 of the Charter. This is especially so when there is no evidence that the *Sea Isle City* was specifically targeted.

7.37 Article 2(4) of the U.N. Charter prohibits the use of force between States, *i.e.* by States against States. What is protected by the prohibition of the use of force is the State, in particular State territory. Certain external manifestations of a State are also

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36 *See*, Report of Mr. Fourniol, Vol. VI, paras. 2.1-2.12.

37 *See*, paras. 10.9-10.14, below, for the argument that the reflagging was not opposable to Iran in the circumstances.

protected, but not all of them[38]. Armed forces and warships are generally considered to be such external manifestations. On the other hand, individual merchant ships are not an external manifestation of the flag State, protected by Article 2(4). Thus, military action against an individual merchant ship may be an infringement of the rights of the flag State, but it does not constitute an armed attack against that State triggering that State's right of self-defence. This is the view held by a considerable number of authors[39]. In particular, this view was stressed in comments relating to the *Mayaguez* incident. In that case, the United States had reacted to the seizure by Cambodian armed forces of a single U.S. merchant vessel by attacking targets in Cambodia. According to a well-known jurist:

> "...the United States erred in 1975, when it treated a temporary seizure of the merchant ship Mayaguez by Cambodian naval units as an armed attack (invoking self-defence to legitimise the use of force in response)"[40].

7.38 This view is confirmed by the United Nations General Assembly Resolution concerning the Definition of Aggression. Article 3(d) of that resolution lists among the acts which qualify as acts of aggression:

> "An attack by the armed forces of a State on the land, sea or air forces, marine and air fleets of another State"[41].

The word "fleets" was deliberately chosen in order to make clear that only massive acts of violence against the merchant shipping of a State, attacking whole fleets, would amount to an act of aggression[42].

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38 This is in particular controversial in relation to foreign nationals abroad; *see*, Alexandrov, S.A., *op. cit.*, p. 204; Bothe, M., "Neutrality at Sea", *op. cit.*, p. 209.

39 Bothe, M., *ibid.*; and 18 *German Yearbook of International Law* 127 (1975), at 134; Alexandrov, S.A., *op. cit.*, pp. 194, *et seq.*; Donner, M., *Die neutrale Handelsschiffahrt im begrenzten militärischen Konflikt*, 1993, p. 64; Lagoni, R., "Gewaltverbot, Seekriegsrecht und Schiffahrtsfreiheit im Golfkrieg", *Festschrift für Wolfgang Zeidler*, 1987, pp. 1833, *et seq.*, at p. 1840; *contra,* Greenwood, C., in Dekker, J.F., Post, H.H.G. (eds)., *op. cit.*, pp. 213, *et seq.*

40 Dinstein, Y., *op. cit.*, p. 198; in the same sense Beyerlin, U., "Mayaguez Incident", in Bernhardt, R., (ed.), 3 *EPIL* 333; Alexandrov, S.A., *op. cit.*, p. 194, *et seq.*

41 XIII *I.L.M.*, p. 713.

42 *See*, Bothe, M., *op. cit.*; Donner, M., *op. cit.*; and Lagoni, R., *op. cit.*; *see*, in addition Broms, B., "The Definitions of Aggression", *RdC* 154 (1977 I), pp. 299, *et seq.*, at p. 351; Ferencz, B.B., *Defining International Aggression*, 1975, Vol. 2, p. 36; Report of the Special Committee on the Question of Defining Aggression, Report of the Sixth Committee, U.N. Doc. A/9411, para. 20.

7.39 The conclusion to be derived from the preceding considerations is clear. The missile attack on the *Sea Isle City*, whoever launched it, did not constitute an armed attack against the United States and thus cannot trigger the right of individual self-defence for the United States.

7.40 As the missile hit its target in Kuwait's territorial waters, there was an attack against Kuwait. This would, as a matter of principle, entitle the United States to exercise a right of collective self-defence in favour of that State. But the United States does not claim to have acted in the defence of Kuwait. Furthermore, as the Court held in the *Nicaragua* case[43], this would require a request or at least the consent of the victim of the armed attack, *i.e.*, Kuwait. There was no such request or consent. On the contrary, Kuwait expressly stated that it alone was responsible for the defence of its territory.

7.41 On the other hand, an armed attack against an individual merchant ship constitutes an illegal infringement of the sovereignty of the flag State. Under international law, a State has the right to protect itself against such infringements. This is clear and obvious in relation to violations of territorial sovereignty. It is not necessary to evoke the right of self-defence to justify preventing persons (whether agents of another State or not), vehicles or aircraft from penetrating into the State's territory. Similarly, a flag State can use force against a foreign vessel or aircraft actually attacking a merchant ship under its flag. It need not stand idle and let the ship be destroyed. But this is where lawful counterforce ends. The essential point in the *Mayaguez* case was that the United States reaction went far beyond that legitimate degree of counterforce. This is also the situation in the present case.

(b) The *Samuel B. Roberts*

7.42 The *Samuel B. Roberts* was hit by a mine. Even assuming that the mine had been laid by Iran, it by no means follows that laying the mine which finally hit a U.S. warship constituted an armed attack against the United States. This could only be the case if the mine had been laid specifically for the purpose of hitting U.S. warships, but there is no evidence to support this. In any event, laying mines in international waters during an armed

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43 *I.C.J. Reports 1986*, p. 105, para. 199.

conflict is not illegal *per se*[44]. This has been the consistent position of the United States and its NATO allies. It is, for instance, reflected in the United States' *Commander's Handbook on the Law of Naval Warfare*[45]:

> "Naval mines are lawful weapons, but their potential for indiscriminate effects has led to specific regulation of their deployment and employment by the law of armed conflict".

7.43 It is true that restrictions apply if the laying of naval mines is to be lawful. In particular, precautions must be taken in order to limit the effects on neutral shipping. Notifications must be made (as soon as military exigencies permit), anchored mines must become harmless as soon as they have broken their moorings, the locations of mine fields must be recorded and the mining must not impede transit passage through international straits or archipelagic sea lanes passage. If these precautionary measures are not taken, this may constitute a violation of the applicable law relating to the conduct of hostilities in respect of the other belligerent or of neutral States. But any failure to take such precautionary measures, whether negligent or intentional, does not give the mine-laying the character of an armed attack. The notion of an armed attack by negligence is contradictory. An armed attack requires an intent to attack[46]. It is only under very specific circumstances, which are not present here, that offensive mine-laying may amount to an armed attack. The mere fact that a United States ship hit a mine, even if that mine were proven to be an Iranian one, is not sufficient to establish that there was illegal mine-laying, let alone an armed attack against the United States.

C. The link between an armed attack and action taken in self-defence: The requirements of necessity and proportionality

7.44 Even if, contrary to the conclusions reached so far, it is supposed that there was an armed attack against the United States, the destruction of the two oil platforms

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[44] *See*, Hague Convention VIII of 1907 relating to the laying of automatic submarine contact mines. This Convention, sometimes criticised as being too permissive, is still held to be a valid expression of the law relating to the laying of mines. *See*, also, the Court's finding in its 1986 Judgment in the *Nicaragua* case (*I.C.J. Reports 1986*, para. 215, p. 112). *See*, also, Levie, H.S., "1907 Hague Convention VIII Relative to the Laying of Submarine Automatic Contact Mines", in Ronzitti, N. (ed.), *The Law of Naval Warfare*, 1988, pp. 129, *et seq.*, at p. 146.

[45] *The Commander's Handbook on the Law of Naval Operations*, NWP 9 (REV. A)/FMFM 1 - 10, 9.2.3.

[46] Higgins, R., *op. cit.*, p. 314.

still cannot be regarded as a valid exercise of the right of self-defence. The exercise of the right of self-defence is strictly limited by the principles of necessity and proportionality[47]:

> "According to the better and prevailing view, any recourse to the right of self-defence... is subject to the principle of proportionality. Consequently, lawful self-defence is restricted to the repulse of an armed attack and must not entail retaliatory or punitive actions"[48].

7.45 On the level of abstract principle, the United States concurs in the rules of necessity and proportionality. But it will now be shown that its claim that its attacks were both necessary and proportionate in relation to the alleged attacks is, once more, flawed, both as a matter of fact and of law.

1. Necessity and the prohibition of reprisals

7.46 The United States argues that the actions claimed to constitute self-defence were "necessary" as there were, according to the United States, "no peaceful alternatives to self-defense" because "Iran consistently denied responsibility" for the alleged attacks[49]. This is contrasted with Iraq's behaviour in the *Stark* incident where Iraq "acknowledged its responsibility"[50]. This line of argument amounts to saying that if a State denies having attacked the United States, this denial renders "necessary" a United States response using military force. This requires no further comment.

7.47 The principle of necessity means that only that use of force which is necessary in order to repel an attack constitutes lawful self-defence. If an armed attack is terminated, there is no further need to repel it[51]. Thus, self-defence is limited to an "on-the-spot reaction", *i.e.*, the necessary, immediate response to an armed attack. This is the principle of immediacy: it means that the employment of counter-force must be temporally

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47 *I.C.J. Reports 1986*, p. 94, para. 176.

48 Randelzhofer, A., "Art. 51 m.n. 37", in Simma, B. (ed.), *op. cit.*; Ago, R., Addendum to the Eighth Report on State Responsibility, *YILC* 1980 II/1, p. 53; Brownlie, I., *op. cit.*, p. 434; Dinstein, Y., *op. cit.*, p. 202.

49 U.S. Counter-Memorial, para. 4.24.

50 *Ibid.*, para. 4.25.

51 Ago, R., *op. cit.*, p. 70; Malanczuk, P., "Counter-Measures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility", in Simma, B., Spinedi M. (eds.), *United Nations Codification of State Responsibility*, 1987, pp. 197, 254.

interlocked with the armed attack triggering it[52]. In the case of the invasion of another State's territory, in principle an attack still exists as long as the occupation continues. But in cases of single armed attacks (as distinguished from a general situation of armed conflict), the attack is terminated when the incident is over. In such a case the subsequent use of counter-force constitutes a reprisal and not an exercise of self-defence[53]. In the present case, both the attack on the *Sea Isle City* and that on the *Samuel B. Roberts* had terminated when the counter-force was exercised. Thus, the counter-force did not constitute an act of self-defence within the meaning of Article 51. It cannot, therefore, be justified under this provision.

7.48 In such a situation, counter-force is not defensive; it is a means of retaliation or punishment, and as such cannot constitute self-defence within the meaning of Article 51. Retaliation, punishment or the enforcement of rights (*i.e.*, reprisals) are not valid reasons justifying the use of force[54]. As was stated by R. Higgins in 1963[55]:

> "Forcible self-help for the purposes of obtaining rights already violated is illegal".

7.49 More recently, Judge Higgins has said that:

> "... self-help is unlawful under the Charter... The texts of Articles 2(4) and 51 clearly do not allow reprisals; and the study of other instruments and practices and judicial decisions does not allow one to conclude that there has been any *de facto* amendment of the Charter on this point..."[56].

An author quoted by the United States, Oscar Schachter, clearly agrees:

> "...a reprisal for revenge or as a penalty (or 'lesson') would not be defensive. United Nations bodies or third States may legitimately condemn such retaliatory actions as violations of the Charter"[57].

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52 Dinstein, Y., *op. cit.*, pp. 214, *et seq.*

53 *See*, also, Cassese, A., "Article 51", in Cot, J.P., Pellet, A., *La Charte des Nations Unies*, 1991, pp. 773, *et seq.*

54 Schachter, O., "The Right of States to Use Armed Force", 82 *Michigan Law Review* 1620 (1984), at p. 1638.

55 Higgins, R., *The Development of International Law Through the Political Organs of the United Nations*, 1963, p. 217.

56 Higgins, R., "International Law and the Avoidance, Containment and Resolution of Disputes", *op. cit.*, pp. 308, *et seq.*

57 Schachter, O., *International Law in Theory and Practice*, p. 154; *see*, U.S. Counter-Memorial, para. 4.27.

7.50 In the practice of United Nations organs, armed reprisals or punitive action have constantly been condemned[58]. To quote the Ambassador of France before the Security Council:

> "While it is clear that France regards terrorist acts as totally reprehensible, it is also clear that we take the same attitude towards acts of reprisal"[59].

To conclude, the purpose of the United States' attacks on the platforms was not that of repelling an actual attack. It was, at most, a reaction to an alleged wrong that had happened in the past. In fact the true nature of the attacks was not even a reaction to any alleged previous attack. They were attacks on Iran's economy which had been planned for a long time and for which the incidents only furnished a desired pretext.

2. Illegality of anticipatory self-defence or forceful deterrence

7.51 The United States, however, relies on a broader concept of "necessity", defining self-defence as an action "necessary to restore security"[60].

7.52 It is sometimes argued, indeed, that a valid exercise of the right of self-defence also exists where counter-force is used in order to prevent a recurrence of the first use of force. The United States' argument mainly relies on a passage in the *San Remo Manual*, a statement of the law of naval warfare elaborated by a group of experts which has, however, no official status. The passage reads as follows:

> "The principle of necessity and proportionality apply equally to armed conflict at sea and require that the conduct of hostilities by a State should not exceed the degree and kind of force, not otherwise prohibited by law of armed conflict, *required to repel an attack against it and to restore its security*"[61].

The problem posed by the formula used by the *San Remo Manual* and by opinions advocating a broader concept of necessity consists in the need to distinguish a more permissive concept of

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58 O'Brien, W.V., *op. cit.*, pp. 438, *et seq.*
59 33 UNSCOR, 2072nd mtg., p. 5.
60 *See*, U.S. Counter-Memorial, Part. IV, Chap. IV, Sect. 2.
61 *San Remo Manual*, Sec. 4; emphasis added.

self-defence from pre-emptive military action which does not constitute lawful self-defence. As already noted, international law does not recognise merely pre-emptive action as self-defence[62]. In the words of Y. Dinstein:

> "Regardless of the shortcomings of the system, the option of a pre-emptive use of force is excluded by Article 51..."[63].

7.53 Some authors take a nuanced stance on the question whether self-defence is restricted to the case where an armed attack has already occurred. But in the light of the fact that a claim of anticipatory self-defence can be, and often has been, abused, they define the circumstances in which a first strike could be legitimised as self-defence in a very restrictive way, using the old formula of the *Caroline* case[64]. Self-defence is restricted to those cases where the necessity is "instant, overwhelming, leaving no choice of means, and no moment for deliberation". This view is shared by American authors on whom the United States relies[65]. The United States has failed to give any proof that this restrictive customary law standard for anticipatory self-defence has been replaced by any more permissive rule[66].

7.54 It is worth noting that the United States Rules of Engagement for the Forces in the Gulf were based on a concept of self-defence based on the *Caroline* formula. "Self-defence" which the on-scene commander is authorised to undertake is defined as follows:

> "US ships or aircraft are authorized to defend themselves against an air or surface threat whenever a hostile intent or a hostile act occurs"[67].

The key notions of "hostile intent" and "hostile act" are defined as follows:

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62 Alexandrov, S.A., *op. cit.*, p. 165; Brownlie, I., *op. cit.*, p. 278; Bothe, M., Lohmann, T., "Der türkische Einmarsch im Nordirak", 5 *Schweizerische Zeitschrift für internationales und europäisches Recht/ Revue suisse de droit international et de droit européen* 441 (1995), at p. 449; Mrazek, J., "Prohibition of the Use and Threat of Force: Self-Defence and Self-Help in International Law", 27 *CanYIL* 81 (1989), p. 96.

63 Dinstein,Y., *op. cit.*, p. 184.

64 Higgins, R.,"International Law and the Avoidance, Containment and Resolution of Disputes", *op. cit.*, p. 310.

65 *See*, for example, Schachter, O., *International Law in Theory and Practice*, p. 152.

66 *See*, U.S. Counter-Memorial, paras. 4.43-4.44.

67 26 *I.L.M.* 1433 (1987), p. 1454.

> "Hostile intent: The threat of imminent use of force against friendly forces, for instance, any aircraft of surface ship that manoeuvres into a position where it could fire a missile, drop a bomb or use gunfire...
>
> Hostile act: Occurs whenever an aircraft, ship or land-based weapon system actually launches a missile, shoots a gun or drops a bomb toward a ship"[68].

7.55 If correctly understood, the *San Remo Manual* does not go beyond this limited concept of necessity. In the sentence following the one quoted by the U.S. Counter-Memorial, the restrictions to which the right of self-defence is subject are clearly indicated:

> "How far a State is justified in its military actions against the enemy will depend on the intensity and scale of the armed attack for which the enemy is responsible and the gravity of the threat posed"[69].

7.56 The question raised by this formulation and by the U.S. argument is whether it is possible to combine two variations of the right of self-defence, namely that of self-defence against an actual attack and anticipatory self-defence, and by doing so to justify actions which would not be justified under either concept, considered on its own. The expression coined by Oscar Schachter in this respect, "defensive retaliation", is revealing. This is a very dangerous concept which the Court, it is respectfully submitted, should not accept. It would certainly be contrary to the principle of the restrictive interpretation of the right of self-defence accepted by the Court in the *Nicaragua* case[70]. The authors on which the U.S. Counter-Memorial relies use this concept in a much more cautious way than does the United States[71], and in the way they use it, the concept would not justify the attacks in the present case.

7.57 The U.S. argument, in the final analysis, tries to blur all the relevant distinctions which international law has developed to prevent abuses of the claim of self-defence, of which there are far too many examples. The distinction between self-defence on the one hand and reprisals and punitive action on the other must be upheld. Only reaction to

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68 *Ibid.*

69 *San Remo Manual*, sec. 5.

70 *See*, para. 7.17, above.

71 Henkin, L., "Use of Force: Law and U.S. Policy", in Council on Foreign Relations (ed.), *Right vs. Might. International Law and the Use of Force*, 1991, p. 45, clearly refers to the situation of a fully-fledged war of aggression which has to be distinguished from that of single incidents, which is the case here. As to Schachter, *see*, below.

an existing, ongoing attack constitutes self-defence. Similarly, the distinction between self-defence and pre-emptive self-help must be upheld. Only such anticipatory self-defence as is legitimised under the *Caroline* formula can be considered lawful.

7.58 It is obvious that the United States' actions did not constitute self-defence in this sense. Even the "Schachter formula" just mentioned, *i.e.* the concept of "defensive retaliation" does not cover the U.S. actions. Such a formula would only legitimise action to prevent the recurrence of attacks "*from the same source*"[72]. It might have justified a counter-attack against a missile launching site in the case of the *Sea Isle City* incident or against mine-laying boats in the case of the *Samuel B. Roberts*. It would not justify the attacks against the oil platforms.

7.59 In order for the United States to meet the requirements of instant and overwhelming necessity, the platforms which were the objects of the attacks must at least have constituted some kind of a threat. This, clearly, was not the case, though it helps to explain the United States' obsession with characterising the platforms as "military installations". The evidence submitted by Iran clearly shows that the platforms were not, and could not be, used for such purposes as harassing U.S. maritime commerce or militarily threatening U.S. naval vessels in the Persian Gulf. If, for instance, radar installations on a platform were considered a military threat, as the United States claims they were, it must be emphasised that the only installation which had a radar set (albeit a commercial navigation set, in disrepair and malfunctioning) was the R-4 platform. The destruction of that platform had not originally been planned by the United States, and the commander of the operation ordered its destruction only as a "target of opportunity"[73]. The U.S. operation was directed against the central platform which had no radar. This can only be explained by the fact that it was the easiest way to put the entire oil production system out of operation and, thus, to inflict maximum economic damage to Iran. But the infliction of maximum economic harm certainly was not "necessary" for the purposes of self-defence. Thus, the whole design of the attack on the Reshadat complex can only be explained as a punitive measure or reprisal, which is not lawful under international law. As explained in Chapter 5 above, the same remarks apply to the U.S. attacks on the Salman and Nasr platforms.

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72 Schachter, O., *International Law in Theory and Practice*, p. 154; emphasis added.

73 *See*, para. 4.76, above.

7.60 To summarize, preemptive military action going beyond anticipatory self-defence in this strictly limited sense is unlawful and has constantly been condemned by the United Nations[74]. A strictly limited right of anticipatory self-defence in the sense of the *Caroline* formula must not be confused with deterrence and retaliation which do not constitute lawful self-defence[75].

7.61 Thus, the political legitimation used, namely "teaching Iran a lesson" not to use force against the United States and its allies, cannot justify the United States' use of counter-force as a matter of law. The claim made by the United States that the operations were necessary in order to deter future acts thus cannot justify the operations.

3. The attacks were, in any event, wholly disproportionate

7.62 In order for the use of armed force against another State to constitute lawful self-defence, in addition to the principle of necessity the principle of proportionality applies. It is an uncontroversial requirement of self-defence that counter-force must not be excessive in relation to the first use of force[76]. This means that the damage done by the counter-force must be commensurate with or generally comparable to that caused by the first use of force.

7.63 Despite the U.S. affirmations to the contrary, there was a gross lack of balance between the damage allegedly caused by the "attacks" on the United States and the destruction which resulted from the United States' attacks on the platforms. The U.S. attacks inflicted extremely heavy damage on the oil platforms, resulting in a total loss of their productive capacity, which, under the circumstances, was a very serious blow to the economy of Iran. Again, it should not be forgotten that Iran was at that time subject to massive Iraqi aggression, and that Iraq's own attacks focused on Iran's oil activities, which are of course the life-blood of the Iranian economy. It should also not be forgotten that the first U.S. attack in October 1987 was followed ten days later by stringent sanctions against Iran; and that the

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[74] Alexandrov, S.A., *op. cit.*, p. 159, *et seq.*, and pp. 172, *et seq.*; O'Brien, W.V., *op. cit.*, pp. 426, *et seq.*; Schachter,O., "The Right of States to Use Armed Force", *op. cit.*, p. 1635.

[75] Higgins, R., "International Law and the Avoidance, Containment and Resolution of Disputes", *op. cit.*, p. 313; Schachter, O., "Self Defence and the Rule of Law", *op. cit.*, p. 273.

[76] Randelzhofer,A., "Art. 51 m.n. 37", in Simma, B. (ed.), *op. cit.*.

second set of attacks on Iran's oil platforms, on 18 April 1988, was part of a major military operation, "Operation Praying Mantis", which also involved the destruction of half the Iranian Navy, simultaneous with a major Iraqi offensive on the Fao peninsula. The United States must show that these operations in their entirety were proportional. However, the incidence of the damage caused to two U.S.-flagged ships, one of which was a reflagged Kuwaiti tanker, can in no way be compared; it was wholly incommensurate with and out of proportion to the damage caused to the platforms and to Iran. Furthermore, this harm was excessive in relation to any damage suffered by the United States, because the platforms were purely civilian installations that served no offensive military purposes[77]. It must be concluded that the U.S. counter-force was disproportionate to the alleged first use of force.

D. Conclusion

7.64 The United States' attempt to justify its actions by relying on self-defence fails for a number of reasons. There was no armed attack against the United States which could be attributed to Iran. The United States bears the burden of proving the facts constituting such an attack, and has fallen well short of satisfying this requirement. But even if there had been such an attack, the United States' actions were still unlawful as they did not meet the requirements of necessity and proportionality.

Section 3. The United States' Defence relating to Essential Security Interests

A. Introduction

7.65 Article XX (1) (d) of the Treaty of Amity provides that:

> "1. The present Treaty shall not preclude the application of measures
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> ...
>
> (d) necessary to fulfil the obligation of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests".

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[77] This is explained in more detail in Chap. 3, above.

7.66 In its Preliminary Objection, the United States argued that "the Court cannot entertain a claim under the 1955 Treaty unless it is first satisfied that the conduct complained of does not constitute 'measures... necessary to protect' the essential security interests of the United States"[78]. The Court rejected this argument. It noted that the United States' position on this point had been modified during oral argument on the Preliminary Objection, and that this was consistent with its previous decision on an identical provision of another Treaty of Amity in the case concerning *Military and Paramilitary Activities in and against Nicaragua.* The Court concluded that:

> "Article XX, paragraph 1 (d), does not restrict its jurisdiction in the present case, but is confined to affording the Parties a possible defence on the merits to be used should the occasion arise"[79].

And it went on to reject a related United States argument that the Treaty of Amity has no application to the use of force.

7.67 Now the United States makes the argument based on "essential security" interests by way of a defence at the merits stage[80]. In considering this argument, it is necessary first to consider the meaning of Article XX(1)(d), and then its application to the present case.

B. The meaning and interpretation of Article XX(1)(d)

7.68 As the Court observed during the Preliminary Objection phase of the present case, an identically-worded provision of a similar treaty with the United States was considered by it in the *Nicaragua* case. The Court decided that there was "no reason to vary the conclusions it arrived at in 1986"[81]. Conformably with the well-established practice of the Court with respect to its own previous decisions[82], those conclusions are accordingly the starting point for analysing the present case.

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78 U.S. Preliminary Objection, para. 3.38.

79 *I.C.J. Reports 1996*, p. 811, para. 20.

80 U.S. Counter-Memorial, Part III.

81 *I.C.J. Reports 1996*, p. 811, para. 20.

82 *See, e.g.*, the analysis by Shahabudeen, M., *Precedent in the World Court,* Cambridge, 1997, in particular Chap. 10.

7.69 In *Nicaragua*, the Court made four points about the interpretation of Article XXI(1)(d) of the Nicaragua-United States FCN Treaty:

(a) First, it held that the interpretation and application of that exclusion was a matter for the Court, and that the invoking State had no right of "auto-interpretation" with respect to that provision[83]. It contrasted this with the language of Article XXI of the General Agreement on Tariffs and Trade, which refers to action which the party in question "*considers* necessary for the protection of its essential security interests in specified fields"[84].

(b) In the same vein the Court stressed that the requirement that the measures be "necessary" was an objective one for judicial application by the Court[85]. It may be noted that the word "necessary" occurs no fewer than nine times in this Treaty, in different formulations (*viz.*, in Articles II(3), (4) ("reasonably necessary"); IV(4) ("necessary or incidental"); VII(1); VIII(5) (twice); XV(1) ("necessary and appropriate"), XIX(c), XX(1)(d)). This is objective language, the language of necessity. It is not the language of subjective self-judgment.

(c) As to the first element of paragraph (1)(d), relating to "measures... necessary to fulfil the obligations of a Party for the maintenance or restoration of international peace and security", the Court noted that this phrase only applies to measures which the State concerned was *obliged* to take, *e.g.*, by virtue of Article 25 of the Charter, and that it therefore had no application to "the eventuality of the exercise of the right of individual or collective self-defence"[86].

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83 *I.C.J. Reports 1986*, p. 116, para 222.

84 *Ibid.*, emphasis added. Another relevant contrast would have been the Connally Amendment to the United States' acceptance of jurisdiction under the Optional Clause. The United States knew perfectly well how to phrase an automatic reservation, excluding some class of issues from the Court's jurisdiction on the basis of its own subjective determination. But Article XX(1)(d) does not say "necessary, in the opinion of the United States of America, to protect its essential security interests as determined by the United States of America".

85 *I.C.J. Reports 1986*, p. 116, para. 222.

86 *Ibid.*, p. 117, para. 223.

(d) The Court accepted that measures taken in self-defence would be covered by paragraph (1)(d). However, it was for the Court:

> "... 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'"[87].

By inference, in such a case the onus is on the State relying on paragraph (1)(d) to establish the justification. This is consistent with the Court's emphasis, in its 1996 Judgment in the present case, on the point that paragraph (1)(d) creates "a possible defence on the merits". Even if paragraph (1)(d) is formulated as an exclusion of certain conduct from the ambit of the Treaty ("shall not preclude the application of measures..."), nonetheless its effect is to legitimize conduct otherwise unlawful under the Treaty, and it therefore has the effect of a substantive defence[88]. The onus is on the Party invoking it to establish such a defence[89].

7.70 Guidance as to the interpretation and application of Article XX(1)(d) of the 1955 Treaty of Amity can also be obtained from the way in which the Court in *Nicaragua* applied the equivalent provision of the 1956 Nicaragua-United States Treaty to the facts of that case. Having determined that the United States had committed acts "in contradiction with the terms of the Treaty"[90], the Court made the following points.

(a) First, the question was whether the activities were necessary at the relevant time, having regard to the factual situation at that time.

> "If the activities of the United States are to be covered by Article XXI of the Treaty, they must have been, *at the time they were taken*, measures necessary to protect its essential security interests"[91].

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87 *Ibid.*, para. 224.

88 The United States describes Article XX(1)(d) as creating "a complete defense to any claim that covered actions violate the Treaty" (U.S. Counter-Memorial, para. 3.04). It goes on to treat the paragraph as effectively a "self-judging" reservation, in which case it would not be a defence properly so-called at all.

89 Thus the United States' argument that the Court must be "first satisfied that the conduct complained of does not constitute 'measures... necessary to protect' the essential security interests of the United States" (U.S. Preliminary Objection, para. 3.38) precisely inverts the situation.

90 *I.C.J. Reports 1986*, p. 140, para. 280.

91 *Ibid.*, p. 141, para. 281; emphasis added.

Thus, it is not enough that some general or generic response might have been called for; the *particular* response in the particular circumstances of the case has to be looked at, and seen to be justified by the particular facts.

(b) Secondly, re-emphasising the importance of the objective requirement of necessity, the Court went on to hold that the measures taken by the United States in that case (attacks on ports and oil installations, the mining of the ports and the general trade embargo) were not "necessary" and were therefore not exempted by paragraph (1)(d). The relevant passage reads as follows:

> "282. Secondly, the Court emphasizes the importance of the word 'necessary' in Article XXI : the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be 'necessary' for that purpose. Taking into account the whole situation of the United States in relation to Central America, so far as the Court is informed of it (and even assuming that the justification of self-defence, which the Court has rejected on the legal level, had some validity on the political level), the Court considers 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. As to the trade embargo, the Court has to note the express justification for it given in the Presidential finding quoted in paragraph 125 above, and that the measure was one of an economic nature, thus one which fell within the sphere of relations contemplated by the Treaty. 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. Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to 'essential security interests' in May 1985, when those policies had been consistent, and consistently criticized by the United States, for four years previously, the Court is unable to find that the embargo was 'necessary' to protect those interests. Accordingly, Article XXI affords no defence for the United States in respect of any of the actions here under consideration"[92].

Clearly the Court was here applying an objective standard, having regard to all the facts including the impact of the measures on the targeted State and the consistency of the position adopted by the United States.

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92 *Ibid.*, pp. 141-2, para. 282.

(c) *In the present case, what is primarily relevant is the Court's decision in relation to the* mining of ports and the use of force against Nicaraguan ports and oil installations, as *distinct from the trade boycott. In relation to this, it is significant that two members of* the Court who dissented from its decision on the application of paragraph (1)(d) to the *trade boycott, nonetheless agreed with the Court in relation to the mining of ports.* Thus Judge Oda in his Dissenting Opinion said:

> "From my point of view, the United States decision on a trade embargo, quite unlike that on laying of mines, is open to justification under Article XXI. Trade is not a duty of a State under general international law but may only be a duty imposed by a treaty to which that State is a party, and can be suspended under certain circumstances expressly specified in that treaty. In fact, the United States, when declaring a trade embargo on 1 May 1985, did not announce its reliance on this particular provision of the Treaty, but, instead, gave notice on the same day to terminate the Treaty. Even so, I am inclined to maintain that, in principle, the trade assured by Article XIX, paragraph 3, of the Treaty, could also justifiably have been suspended in reliance on another provision, Article XXI, of the same Treaty.
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> 89. 'Laying mines' is totally different, in that it is illegal in the absence of any justification recognized in international law, while Article XXI of the Treaty, being simply one provision in a commercial treaty, can in no way be interpreted to justify a State party in derogating from this principle of general international law. I must add that this action did not meet the conditions of necessity and proportionality that may be required as a minimum in resort to the doctrine of self-defence under general and customary international law. I thus conclude that, under the jurisdiction granted to the Court by Article XXIV of the 1956 Treaty, the Court should have found the United States responsible only for violation of Article XIX by laying mines in Nicaraguan waters. It was for this reason only that I voted for subparagraph (14) in the operative clause".[93]

Judge Jennings took essentially the same position in his Dissenting Opinion:

> "Again it must be emphasized that the issue here is not simply the lawfulness or unlawfulness of the act in general international law, but whether it was also in breach of the terms of the Treaty? Certainly it is prima facie a breach of Article XIX, providing for freedom of navigation; but is it a 'measure' excepted by the proviso clause of Article XXI? Although not without some remaining doubts, I have come to the conclusion that Article XXI cannot have

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93 *Ibid.*, pp. 252-3, paras. 88-89.

contemplated a measure which cannot, under general international law, be justified even as being part of an operation in legitimate self-defence"[94].

7.71 In the light of the positions taken by Judges Oda and Jennings, as well as by the Court itself, it is submitted that paragraph (1)(d) must be interpreted in the light of general international law, and that it cannot legitimise or permit breaches of the Treaty of Amity which are also clear breaches of mandatory rules of international law. Although it may be that, as the Court has held, the rules of general international law are not incorporated by reference into the Treaty of Amity by way of its Article I, nonetheless, as it has also held, Article I is relevant to the interpretation of the Treaty, and thereby so too are the rules of international law relating to friendly relations between States in accordance with the Charter of the United Nations[95]. This is true not only of Article X(1) but also of Article XX(1)(d). In a Treaty of Amity which includes Article I, an exception clause relating to conduct necessary to protect the essential security interests of the parties must be read in a restricted sense. It certainly should not be interpreted so as to allow one State to judge for itself what measures it can take, no matter how damaging to the other party. Nor can it be interpreted so as to allow that party to act in a way which is wholly unjustified under the normal rules for maintaining friendly relations between States. So interpreted, the Treaty would become not a treaty of amity but a framework for making unacceptable derogations from the normal standards of interstate relations.

7.72 It must be stressed here that the rules of international law relating to the use of force and self-defence themselves seek to balance the necessity and proportionality of measures which would otherwise interfere with or impair the rights of the target State, and that they accordingly operate within the same sphere of reference as paragraph (1)(d)[96]. It

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[94] *Ibid.*, p. 541. Judge Schwebel (dissenting) did not deal in much detail with the issue of essential security interests in relation to unlawful behaviour. He relied rather on the obligations of the United States under the Rio Treaty (the first limb of paragraph (1)(b)), and noted only that the United States' "contention... cannot be dismissed in view of the increasing integration of Nicaragua into the group of States led by the Soviet Union, and Nicaragua's continuing subversion of its neighbours"; *ibid.*, p. 387, para. 254.

[95] *I.C.J. Reports 1996*, p. 815, para. 31.

[96] The same thing can be said of the rules of international law relating to counter-measures, as formulated in the Draft Articles on State Responsibility of 1996 and considered by the Court in the *Case concerning the Gabcikovo-Nagymaros Project* (*I.C.J. Reports 1996*, pp. 55-57, paras. 82-87). Under those rules, countermeasures involving the use of force are unlawful *per se* (Draft Articles on State Responsibility, Article 50 para. (a), and see also paras. (b) and (e)). In other words, the law of countermeasures cannot be used to evade the restrictions international law imposes on the use of force in international relations. Nor, it is submitted, should Article XX(1)(d) be so interpreted. It should be added that the United States does not rely on countermeasures as

would be odd indeed if the Court, the principal judicial organ of the United Nations established under the Charter, were to hold that measures plainly unlawful under the Charter were nonetheless lawful under the Treaty of Amity because they were objectively "necessary" to protect the "essential security interests" of the United States. The Charter regime is carefully constructed and carefully balanced so as to preserve and protect the essential security interests of States, including the most powerful States. Yet the United States in effect calls on the Court to hold that the regime of self-defence under modern international law made it impossible for the United States lawfully to protect its essential security interests in the present case. If it were possible for the United States by lawful means (*e.g.*, through self-defence or other lawful means) to protect its alleged essential security interests, then it would not have been necessary for it to do so by means which plainly violated international law. In other words, it is reasonable to regard the provisions of the Charter relating to the use of force and self-defence as a long-standing and carefully considered reflection of essential security interests, including those of the most powerful States (who were, after all, the authors of the Charter regime). The valid, necessary, objectively justifiable security interests of States find sufficient room for expression within the framework of the Charter. The corollary is that conduct which is clearly unlawful under the Charter cannot be legitimized by reference to Article XX(1)(d), or the notion of essential security interests. As has been demonstrated already, that is the case with the United States' attacks on the platforms.

7.73 These considerations are reinforced by two further elements of Article XX.

(a) The chapeau of Article XX, which refers to "the application of measures" enumerated in paragraphs (a) - (d). Most of those measures are concerned with regulatory activity, or with administrative action taken pursuant to law or with legal authority. It is the *application* of such measures which is not precluded, and not the extra-legal application of armed force at the discretion of one of the parties[97].

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justifying the attacks on the oil platforms in the present case. Nor (unsurprisingly) does it rely on any doctrine of belligerent reprisals.

[97] The United States seeks to rely on the travaux préparatoires of other FCN treaties negotiated around this time, in support of a view of paragraph (1) (d) rejected by the Court in *Nicaragua* and inconsistent with Article I of the 1955 Treaty (which was not contained in the treaties referred to) (U.S. Counter-Memorial, paras. 3.27-3.35). In fact the only relevant passages in the negotiations with Iran (cited in U.S. Counter-Memorial, paras. 3.36-3.37) lend support to the view that paragraph (1)(d) was concerned with the application of measures such as regulations or local laws otherwise consistent with the treaty.

(b) The first limb of paragraph (1)(d) is limited to measures "*necessary* to fulfil the *obligations* of a High Contracting Party for the maintenance or restoration of international peace and security"[98]. The careful language of this proviso speaks against the interpretation of the rest of Article XX(1)(d) as embodying an unqualified, extra-legal discretion to use force on whatever occasion. If paragraph (1)(d) only applies to measures which are necessary to fulfil obligations of a Party for so important a purpose as the maintenance or restoration of international peace and security (a term clearly borrowed from the Charter), then it would be incongruous and even contradictory to interpret the rest of the sub-paragraph in the lax and permissive terms advocated by the United States, terms which would allow it to violate the Charter so far as the Treaty is concerned. On this view, the "auto-interpretation" excluded by the Court in *Nicaragua* would return by the back door.

7.74 These arguments establish that a reasonable and consistent interpretation of Article XX(1)(d) cannot justify or permit conduct involving a use of armed force which is clearly unlawful under the United Nations Charter. Indeed this is consistent even with the history of the clause presented by the United States. Certain qualifications by reference to times of national emergency were deleted from earlier versions of paragraph (1)(d), after 1945. The United States notes that the earlier provisions "had to be reconciled with the Charter, which authorized Security Council sanctions and other actions potentially affecting treaty compliance. Moreover, in light of Article 2(4) of the Charter, 'war' seemed less likely to provide the relevant legal framework"[99]. In other words, paragraph (1)(d) as a whole was modified to bring its language and operation into line with Charter concepts, not to create a subjective and self-serving method of evading the Charter entirely.

7.75 Under these circumstances, it is not necessary to consider what the position would be if a bilateral treaty provision did expressly purport to authorize a breach of a *jus cogens* norm, such as that contained in Article 2(4) of the United Nations Charter. Under Article 53 of the Vienna Convention on the Law of Treaties, a provision of a treaty

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98 Emphasis added.

99 U.S. Counter-Memorial, para. 3.26.

which conflicts with a norm of *jus cogens* is void, and under Article 44(5), no separability of such treaty provisions is permitted. That is to say, the treaty as a whole is void. These rigorous provisions must in turn generate a stringent principle of interpretation, so that any provision of a treaty is to be interpreted, if at all possible, so as not to conflict with such a rule. The principle that a treaty is to be interpreted to be consistent with international law combines here with the principle of the effectiveness of the treaty as a whole (*ut res magis valeat quam pereat*). The Treaty should be interpreted so as to be valid; and Article XX(1)(d) should be interpreted consistently with general international law, and in particular with the standard rules for amity and friendly relations between States which inspire its Article I. In the present case, there is no question that the terms of Article XX(1)(d) allow ample scope for the interpretation and application of the proviso in ways which are consistent with the peremptory norms of international law. Among such peremptory norms, those relating to the use of force provide the clearest case, and their relevance for interpretative purposes is reinforced by the existence of Article I of the 1955 Treaty of Amity.

7.76 To summarize, a peremptory norm of international law must be allowed peremptory effect at the level of the interpretation of agreements governed by international law, including the Treaty of Amity. For these reasons Article XX(1)(d) cannot be interpreted so as to create a defence or justification in relation to a use of force unlawful under the Charter because it plainly, indeed flagrantly, exceeds the requirements of self-defence.

C. Article XX(1)(d) does not excuse the attacks on the platforms

7.77 If the argument just made is correct, then it follows that the attacks on the platforms can be neither justified nor excused by reference to Article XX(1)(d), unless they can be justified by reference to the right of individual or collective self-defence. It is neither "necessary", nor can it serve "essential security interests" as conceived of within the framework of a Treaty of Amity, for a State to engage in an unlawful use of force aimed at the facilities of the other party to that Treaty. For these reasons, Article XX(1)(d) has no additional exempting authority, over and above the provisions of the Charter, so far as the use of force is concerned. It does not render lawful or permissible under the Treaty of Amity conduct that "did not meet the conditions of necessity and proportionality that may be required as a minimum in resort to the doctrine of self-defence under general and customary

international law"[100]. The "essential security interests" exemption "cannot have contemplated a measure which cannot, under general international law, be justified even as being part of an operation in legitimate self-defence"[101].

7.78 It has already been demonstrated that the attacks on the oil platforms did not meet the requirements of international law in relation to individual or collective self-defence. It follows that those attacks were not justified under Article XX(1)(d) as "necessary to protect [the] essential security interests" of the United States.

7.79 However, even if this argument is not accepted (and that would involve rejecting a virtually unanimous decision of the Court on an identical treaty provision in *Nicaragua*), nonetheless the United States' attacks on the platforms were not justified or excused under Article XX(1)(d). Independently of their illegality in terms of the law relating to the use of force, those measures were not objectively necessary, nor were they justified by reference to any actual security interests of the United States. They were justified neither in law nor in fact, as will now be demonstrated.

7.80 Before doing so, an initial question needs to be raised. In order to establish its defence under Article XX(1)(d), must the United States refer to the facts as proved before the Court, or is it entitled to rely on its perception of the facts at the time, even though that perception can now be shown to have been incorrect and inaccurate? The answer, it is submitted, is clear. As the Court held in *Nicaragua*, the requirement of necessity under paragraph (1)(d) has to be established objectively, and does not involve any measure of auto-interpretation. But if the United States could rely on its own (incorrect) interpretation of the facts, auto-interpretation would again be reintroduced by the back door. For these reasons, and because it involves the application of a legal instrument binding on the parties, paragraph (1)(d) can only be applied by reference to the facts of the case as found by the Court.

7.81 Indeed, it appears that the United States does not contest this, since it argues that:

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100 To use the language of Judge Oda in *Nicaragua, I.C.J. Reports 1986*, p. 253; *see*, para. 7.70(c), above.

101 To use the language of Judge Jennings, *ibid.*, p. 541; *see*, para. 7.70(c), above.

> "The *facts* also make clear why these measures were necessary, given the military role of the platforms in facilitating and supporting unlawful mining and small boat, helicopter and missile attacks against U.S. and other neutral vessels. *Therefore*, pursuant to Article XX(1) (d), the 1955 Treaty does not apply to them"[102].

Iran does not of course agree with the United States' view of the facts. But in this passage and elsewhere the United States seeks to justify its conduct by reference to facts as found, not any "facts" as they may have been perceived or presented at the time. With this approach, at least, Iran agrees.

7.82 On this basis, the relevant test, as formulated by the Court in *Nicaragua*, involves asking two questions: first, whether the risk run by the "essential security interests" is reasonable and, secondly, whether the measures presented as being designed to protect these interests, that is to say, the attacks on the platforms, were not merely useful but "necessary"[103]. This involves a number of questions which it is convenient to take in turn.

1. The identification of United States essential security interests.

7.83 The principal United States security interest identified in the Counter-Memorial is "the uninterrupted flow of maritime commerce in the [Persian] Gulf"[104]. The United States fails to note that this interest was, in the same general terms, of equal concern to Iran itself. Virtually the whole of Iran's export trade was maritime based, and it had an absolutely vital interest in the continued safe production of oil, and in its safe export from the Gulf region. At the general level, that vital interest was a shared one.

7.84 Indeed, the interest was more vital to Iran than it was to the United States, since it was Iran which was fighting desperately in a war of self-defence against clear and undisguised aggression. Iraq, the aggressor, had other means of fuelling its war effort, including overland pipelines and financial assistance from other Persian Gulf States.

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102 U.S. Counter-Memorial, para. 3.02; emphasis added.
103 *I.C.J. Reports 1986*, p. 117, para. 224.
104 U.S. Counter-Memorial, para. 3.11.

7.85 In addition, if the United States seeks to rely on an essential security interest, it must at least act in a way which is consistent, *i.e.*, which is reasonably adapted to maintain and secure that interest, and which does not use that interest merely as a screen for actions taken for quite other reasons. The United States never took action against Iraq in respect of its "essential security interests", and did little or nothing to persuade Iraq to stop the "tanker war". It is quite clear that Iran had no independent interest in pursuing that aspect of the conflict. As explained in Chapter 2 above, if the United States had really wanted to maintain the "uninterrupted flow of maritime commerce", the simplest and quickest method was to urge (or even compel) Iraq to stop its provocations. That it never even attempted to do so discredits its reliance on an objectively justifiable "essential security interest" of the kind avowed in this case. To the contrary, the United States encouraged and assisted Iraq in its attacks in the Persian Gulf.

7.86 Part of the difficulty lies in the fact that the term "uninterrupted flow of maritime commerce" includes both legitimate trade with third States in the Persian Gulf, and trade which was clearly and notoriously intended to assist Iraq in waging a war of aggression[105]. For an avowed neutral such as the United States, the encouragement of the Iraqi war effort can hardly be presented as an "essential security interest", yet it is important not to allow the use of "neutral" language, referring to what were shared interests, to obscure the real picture.

7.87 The United States goes on to cite "other more immediate U.S. security interests"[106], including the prevention of attacks on U.S. warships and commercial vessels and the protection of the personnel on those ships and vessels. The first point to be made here is that Iran denies responsibility for the actions in question: in relation to the seven cases specified in the United States Counter-Claim, these issues are discussed in further detail below[107]. But in any event the points made already in this Chapter are equally applicable: United States actions at the time were motivated by a general hostility to Iran and support for

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105 *See*, Article 27 of the Draft Articles on State Responsibility (1996), which provides that:
"Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation".

106 U.S. Counter-Memorial, para. 3.12.

107 *See*, Chap. 10, below.

Iraq, and not for any genuine concern for freedom of navigation, which was on any view threatened much more, and more seriously, by Iraq than by Iran.

2. The risk presented to those United States interests.

7.88 It is clear that there were risks to freedom of navigation and commerce in the Persian Gulf at the relevant time, and to the vessels sailing in the region (many of them to Iranian ports and terminals). But the essential reason for these risks, and for the war, must be borne in mind. It is completely and systematically ignored by the United States.

7.89 Iraq had commenced an unprovoked war, and was prosecuting it by all means including air strikes far down the Persian Gulf, mine-laying, missile attacks including on neutral shipping, attacks on Iranian cities and facilities and the use of chemical weapons. It is widely recognised that the risk presented to freedom of navigation and commerce was attributable to Iraq. Moreover, as Professor Freedman demonstrates in the annexed report:

> "There is no evidence of a policy debate governed by the question of what actions would best protect international shipping, nor that concerns with freedom of navigation brought U.S. warships to the Persian Gulf"[108].

7.90 Moreover the risks need to be kept in perspective. Only a very small proportion of ships were affected and those mostly by a form of harassment[109]. The success of convoying carried out in a non-confrontational way can be seen from the Armilla Patrol, which was a British naval protection exercise introduced in 1980. According to one British source:

> "Incidents, once escort was introduced, there were apparently none. This may have been due to relatively tight rules of engagement... The Armilla Patrol continues to this day"[110].

This is a vital point. Even when they encountered difficulties (due primarily to Iraq, and quite apart from the fact that the whole war was the responsibility of Iraq), none of the States present in the Persian Gulf (except for the United States and Iraq) found it "necessary" to

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108 Report of Prof. Freedman, Vol. II, para. 4(c).

109 *See, ibid.*, para. 33.

110 Hill, R.J., "Armilla Patrol Gulf Misions", *The Naval Review*, April 1994.

target the platforms, or even to mention them in any expressions of concern about freedom of navigation.

3. The relationship between those United States interests and the attacks on the platforms.

7.91 The United States implicitly accepts the need to link its attacks on the platforms with the wider context of the so-called "tanker war". It does so by the repeated assertion that the platforms were "military facilities", that they "played an important role in guiding and conducting Iran's attacks on U.S. and other neutral ships"[111]. For the reasons already given, this is simply not true. The platforms were essential production facilities, wholly unsuited to perform the "military" role in which they are cast by the United States. If that is so, then an essential link in the chain by which the United States seeks to establish a defence under Article XX(1)(d) breaks.

4. Whether the attacks were not merely useful but necessary

7.92 In addition, the Court in *Nicaragua* required that the measures taken be "not merely useful but necessary". The case for necessity is made by the United States in the following passage:

> "... it was clear at the time of the attacks on *Sea Isle City* and *USS Samuel B. Roberts* that diplomatic measures were not a viable means of deterring Iran from its attacks... Accordingly, armed action in self-defense was the only option left to the United States to prevent additional Iranian attacks"[112].

This passage calls for several observations.

(a) First, as to diplomatic measures not being viable, there is little evidence that these were seriously tried (other than in the context of actions clearly slanted in favour of Iraq and seeking to extricate it from any responsibility for its action in starting the war). In particular, no specific issues were raised in diplomatic correspondence in relation to the military use of the platforms, or their possible availability as targets.

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111 U.S. Counter-Memorial, para. 3.14.

112 U.S. Counter-Memorial, paras. 3.13-3.14.

(b) Secondly, the "diplomatic measures" taken, so far as they related to the Security Council's concerns, nowhere stated or implied that the United States had any entitlement to use armed force against the platforms, or indeed in any other way against Iran.

(c) Thirdly, neither the Security Council, nor any other State, complained of the use of the platforms for military purposes at that or any other time. Nor did they identify the platforms as military targets. Apart from the United States, the only other State which ever attacked the platforms militarily was... Iraq.

(d) The question has nothing to do with self-defence, and the United States' argument cited above, which refers to "armed action in self-defence", therefore misses the point. Iran accepts that *if* the United States was acting in self-defence in attacking the platforms, then its conduct was justified or excused by Article XX(1)(d). But it has already been demonstrated that the United States was not acting within the limits of individual or collective self-defence. What the United States needs to establish, for present purposes, is that, on the assumption that its attacks on the platforms were unlawful and in breach of the United Nations Charter, nonetheless they were necessary in order to protect its essential security interests, within the meaning of a treaty provision in force. Neither in the passage quoted, nor elsewhere in the Counter-Memorial, does the United States directly seek to sustain that remarkable, and untenable, proposition[113].

7.93 Quite apart from the lack of credible evidence that the platforms were military facilities employed to orchestrate attacks on United States ships, there is no evidence that the attacks on them actually had, or were calculated to have, the effect intended. Iran was at the time trying to cope with an aggressor, an aggressor strongly supported by certain neighbouring States and even by the United States (despite its professed neutrality). The attacks on the platforms (associated with simultaneous attacks on Iranian naval forces) were

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[113] Not even Judge Schwebel in his dissent in *Nicaragua* unequivocally supported this proposition. In his view the United States was acting in collective self-defence in that case, even if some of its conduct was *prima facie* inconsistent with the Treaty of Amity (*I.C.J. Reports 1986*, p. 387, para. 254).

rather calculated to give Iraq the upper hand in negotiating the terms of a cease-fire. That was not an essential security interest of the United States, nor were the attacks on the platforms necessary or conducive for the purpose now relied on by the United States.

7.94 Above all, the requirement of necessity fails to confront the clear inconsistency in the United States' conduct. If the United States' concern was the safety of neutral shipping in the Gulf, why were Iraqi facilities not targeted? Even U.S. sources acknowledge that it was Iraq which carried out by far the larger number of attacks on shipping, as well as causing by far the greatest destruction. If the United States' dominant concern was the safety of its own ships, why did it not respond by way of self-defence when the *Stark* was hit with significant damage and loss of life? The lack of any "necessity" for U.S. action against the platforms is clearly demonstrated by the absence of significant action by it against Iraq, faced with far worse provocation on its part. In fact, there is clear evidence of U.S. support for Iraq's actions in the Persian Gulf. The United States may conceivably have been acting in its perceived "interests" at the time, the interests of supporting an aggressor in a continuing war of aggression - but it is unable to bring itself candidly to admit its real reasons for action. Nor could those reasons possibly suffice to justify destructive attacks on a vital commercial facility as "necessary" to protect "essential security interests".

7.95 In addition, the following further elements of fact are relevant to the Court's appreciation of the issues of necessity and of the relationship between means and ends which are raised by Article XX(1)(d):

- No other State considered that its security interests in the region called for a military response against Iran; all confined themselves to diplomatic measures and limited measures of self-protection. This contrasts sharply with the collective military action taken by many States at the time of Iraq's invasion of Kuwait.

- The military strikes against the platforms were evidently the result of many months of planning. They were not planned or conceived in terms of an operation justified by Article XX(1)(d), for the simple reason that the alleged events which are now said to have justified the actions had not occurred and were not foreseeable.

- The April 1988 attacks coincided with Iraqi attacks on the Fao peninsula; there are indications that the timing was not fortuitous.

- The specific targeting of the particular platforms (like earlier Iraqi targeting) bore no relationship to the alleged "military" use of particular platforms but was calculated to cause maximum damage to Iran's economy, injury to which is not relied on by the United States as one of its essential security interests. The aim was, in other words, to destroy the platforms as commercial productive installations, and not merely to neutralise their (very limited) self-defensive capacity.

D. Conclusion

7.96 For these reasons, the defence based on the essential security interests of the United States fails to justify the United States' attacks on the platforms.

CHAPTER 8. THE UNITED STATES "CLEAN HANDS" DEFENCE

Section 1. The United States' argument according to which Iran's hands are not clean

8.1 In Part V of its Counter-Memorial, the United States argues that Iran "is precluded from complaining that the United States has not fulfilled its obligations under the Treaty when its own illegal conduct gave rise to the measures of which it now complains"[1]. Hence, the United States contends that in the present case Iran has no *locus standi in judicio*.

8.2 In an attempt to corroborate this assertion, the United States alleges that Iran has breached not only relevant provisions of the 1955 Treaty of Amity, but also general rules of international law, namely those pertaining to the prohibition of use of force[2], as well as other, as yet unspecified, breaches of international law.

8.3 Even though neither the Court nor the Judges who appended Separate or Dissenting Opinions to the 1998 Order made any reference to this argument, Iran will show in this Chapter that the Court must state - and has in fact already implicitly stated - its irrelevance in the present case and that it must therefore dismiss it.

8.4 Before discussing the notion of "clean hands" and its implications for the present case, Iran is obliged to highlight the egregious nature of the United States' argument. Iran questions how the United States can invoke such an argument, vis-à-vis Iran. During the relevant years Iran was fighting to repel an aggression committed by Iraq, and was thus exercising its inherent right of self-defence against an aggressor. In this context, Iran could have legitimately expected significant assistance from the other United Nations member States, who are bound by the United Nations Charter provisions to condemn aggression. Having regard to Article I of the Treaty of Amity, Iran might have expected to be actively supported by the United States in the exercise of its inherent right of self-defence against aggression. At the very least, it was entitled to expect genuine neutrality from the United States, and a scrupulous refusal to favour the aggressor. Instead, the United States, from the

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1 U.S. Counter-Memorial, para. 5.07.
2 *Ibid.*, para. 5.01.

beginning of the conflict, adopted a hostile stance vis-à-vis Iran. The United States' conduct was inconsistent with the spirit, as well as the letter, of the 1955 Treaty of Amity. In this respect, Iran can only point to the extreme character of the United States' "clean hands" argument, given the United States' own behaviour in the circumstances.

Section 2. The Concept of "Clean Hands" in State Claims and the United States' Twofold Argument on that Basis

8.5 In Iran's view, the concept of "clean hands", while reflecting and incorporating fundamental principles of law inspired by good faith, is not an autonomous legal institution. On the contrary, the concept of "clean hands" requires the operation of other institutions or legal rules for its implementation. It is only in the context of the large number of principles and legal maxims permeated by this concept, that the requirement of good faith between States is finally made concrete.

8.6 The concept of "clean hands" finds its origins in Roman law, as an equitable doctrine, in English law and also in Islamic law[3].

8.7 This principle is implemented in international law by the operation of all those legal institutions that prevent a State either from benefiting from its wrongs or from harming other Parties, for example by a change of representation or attitude (estoppel or preclusion). According to "the teachings of the most highly qualified publicists of the various nations"[4], the prerequisite of clean hands in certain State claims is just one more application

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[3] Islamic law acknowledges the condition of "good faith" which is often put into practice through the notion of "abuse of rights" or through the obligation to comply with accepted undertakings and, more generally, through the obligation to adopt an "honest" attitude in commercial relations and transactions. *See*, in this respect: Sami A. Aldeeb Abu-Sahlieh, S.A., "L'abus de droit en droit musulman et arabe", in *Abus de droit et bonne foi* (Ed. Pierre Widmer and Bertil Cottier), Fribourg, 1994, pp. 89-113; Weeramantry, C.G., *Islamic Jurisprudence. An International Perspective*, London, 1988, pp. 66, 72, 141.

[4] It may nonetheless be observed that there is no entry for "clean hands", or other similar concepts, in some of the most influential works in this field, among which may be cited: *Encyclopaedia of public international law* (1st & 2nd ed.), Amsterdam; Strupp, K., Schlochauer, H.-J., *Wörterbuch des Völkerrechts*, Berlin, 1960-1962; and even in the *Restatement of the Law (Third). The Foreign Relations of the United States*, St. Paul; *American International Law Cases* (Déak, Reams *et al.*), Dobbs Ferry; Eisemann, P.-M., in Coussirat-Coustère, V. *Répertoire de la jurisprudence arbitrale internationale*, Paris, 1989, it appears only under the heading of "diplomatic protection"; Bin-Cheng, *General Principles of Law as applied by International Courts and Tribunals*, London, 1953, pp. 149-155.

of the paramount principle of "good faith"[5]. Classic Roman law had already highlighted this condition: *Nemo ex suo delicto meliorem suam conditionem facere potest*[6], which was inherited by mediaeval law in such maxims as *Nemini dolus suus prodesse debet, Ex turpi causa non oritur actio*[7], *Nullus commodum capere de sua propria iniuria*[8]. In English law, maxims such as "He who seeks equity, must do equity"[9], "He who comes into equity, must come with clean hands"[10], "Equity does not suffer a wrong to be without a remedy"[11] are to similar effect. Indeed, the requirement of clean hands shares a common source with another well-known adage, *Ex iniuria ius non oritur*[12].

8.8 A review will be made here of all those legal institutions or rules which implement in different manners and in different circumstances the good faith principle, by refusing to allow a party to benefit from its wrongful conduct or to change its attitude or conduct in order to harm another party's legally protected interests[13]. Indeed, it must not be

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5 Fitzmaurice, Sir G., *op. cit.*, pp. 117-122; Miaja de la Muela, A. "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux", *Mélanges offerts à Juraj Andrassy*, The Hague, 1968, pp. 189-191; "Bona Fides ... est donc un concept strictement juridique; c'est la fides du bonus vir romani, l'attitude sociale du Romain qui aide les autres autant qu'il peut et ne nuit à personne, selon la phrase quelque peu emphatique du *de officis* 3,80 de Cicéron: 'bonus vir qui prodest quibus potest et nocet nemini'", Broggini, G. "L'abus de droit et le principe de la bonne foi. Aspects historiques et comparatifs", *in Abus de droit et bonne foi..., op. cit.*, p. 5.

6 *Digest* 50.17.134 (Ulpianus). This adage was cited in the *Good Return* and *Medea* case (Ecuador v. United States of America), award delivered 8 August 1865, by the Mixed Commission, in *Moore*, Vol. 3, p. 2378. However, in that case the Commissioners were dealing with a diplomatic protection claim and not with a pure interstate claim.

7 The affinity between the "clean hands" and *Ex turpi causa* maxims is stressed by Kodilinye, G., "A fresh approach to the *Ex Turpi Causa* and 'Clean Hands' maxims", *Denning Law Journal*, 1992, p. 102, where the author states that: "It seems that the [municipal law] courts now see the two maxims not as separate principles but as expressions of the same broad principle, founded on public policy [only embryonic in international law], that the Court will not entertain an action in contract or tort or establish an equitable right if to do so would be an affront to the public conscience".

8 Arminjon, P., Nolde, B., Wolff, M., *Traité de droit comparé*, Vol. II, Paris, 1950, p. 513.

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 *See, inter alia*, Judge Schwebel's Dissenting Opinion appended to the Court's Judgment (Merits) in the *Military and Paramilitary Activities in and against Nicaragua* case, *I.C.J. Reports 1986*, p. 373, para. 222. International law jurisprudence is imbued with this principle; *see,* for instance *INA Corporation v. Iran* case (Mixed Tribunal), case No. 161, decision rendered 12 August 1985, in *I.L.R.*, Vol. 75, p. 444: "The principle of *ex malo jus non oritur* is a general principle of law that bars a party from profiting from his wrongful conduct".

13 *See*, Judge Alfaro's Separate Opinion appended to the Court's Judgment (Merits) in the *Temple of Preah Vihear* case, *I.C.J. Reports 1962*, p. 40.

permitted that "la cause finale du délit devienne le motif de l'absolution du délinquant et que de l'œuvre de la fraude accomplie surgisse le moyen d'innocenter le fraudeur"[14].

8.9 Before dealing with the functions of the clean hands principle in modern international law, mention should be made of the obvious theoretical confusion which affects the U.S. Counter-Memorial regarding this principle. At two points in particular this conceptual confusion becomes quite clear: the United States is concerned about Iran's alleged lack of clean hands, and thus the clean hands of a State, yet it strives to support this claim with a long enumeration of doctrinal and case law quotations dealing with diplomatic protection, where the clean hands of foreign nationals, and not of their State, are at issue[15]. The doctrine is clear as to the need to distinguish between these two quite different situations[16].

8.10 It should also be observed at the outset that the United States seems to invoke the "plaintiff's own wrongful conduct" defence in Part V of its Counter-Memorial as both: a) a ground for *inadmissibility*[17] of the Iranian claim and b) a defence on the merits. However, in neither case has the United States succeeded in showing that the clean hands principle has an autonomous legal scope and standing in international law, nor that it can bar Iran from claiming reparation for the United States' violations of the 1955 Treaty. The following paragraphs will deal with Iran's response to the United States' twofold argument.

Section 3. The Clean Hands Argument as a Ground for denying the Admissibility of the Iranian Claim

8.11 It is true that in another field of State responsibility, the clean hands concept appears as one of the prerequisites for the admissibility of State claims, namely those

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[14] *Alabama* case (United States of America v. United Kingdom), award delivered on 14 September 1872, *La Pradelle*, Vol. 2, p. 891. Likewise: *Corsaire "General Armstrong"* case (United States of America v. Portugal), award delivered on 30 November 1852, *Pasicrisie internationale*, pp. 30-31.

[15] *See*, respectively, U.S. Counter-Memorial, para. 5.04 and fn. 350, *in fine*.

[16] Garcia Arias, L., "La doctrine des 'clean hands' en droit international public", in *Annuaire de l'Association des auditeurs et des anciens auditeurs de l'Académie de droit international*, Vol. 30 (1960), p. 18, particularly the field of clean hands where a clear-cut distinction between the two situations is drawn. *See*, also, the *B.E. Chattin vs. United Mexican States* case, award delivered by the General Claims Commission on 23 July 1927, *R.S.A.*, Vol. 4, pp. 284-285, where the Mixed Commission rightly made a distinction between the "national's wrongful conduct" and his own State's.

[17] This is precisely the function that common law recognises and ascribes to this institution: "Under this doctrine, equity will not grant relief to a party, who, as an actor, *seeks to set judicial machinery in motion and*

arising in the context of diplomatic protection. But, it must be stressed, the prerequisite is exclusively confined to that context, and hence it deals only with a foreign individual's clean hands and not his own State's. Therefore, one can only agree with the United States' contention, supported by extensive jurisprudential and doctrinal quotations, according to which a citizen requesting diplomatic protection from his own State must present himself with clean hands. Yet this falls far short of demonstrating that such a principle is required in direct State-to-State claims.

8.12 In this respect, the United States has failed to demonstrate in its Counter-Memorial that international law has accepted the first of these uses, namely that of unclean hands as a bar to the admissibility of a State's claim. In fact, it is civil law that has had a far more important influence in this respect, and the meagre case law in this field shows that international law recognises this principle as having legal significance only at the merits stage, or even only at the stage of quantification of damages[18].

8.13 Furthermore, since the Court has already established its jurisdiction in the present case to adjudge and declare whether the United States' activities have violated legal obligations arising out of Article X(1) of the 1955 Treaty of Amity, the clean hands argument does not allow the United States to argue that Iran is "deprived of the necessary *locus standi in judicio*"[19]. For these reasons, the Court should reject the United States' argument based on clean hands as a ground for rejecting the admissibility of the Iranian claim in the present case.

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obtain some remedy, if such party in prior conduct has violated conscience or good faith or other equitable principle", *Black's Law Dictionary*, 6th ed., 1991, St. Paul, p. 250; emphasis added.

[18] *See*, Salvioli, G., "La responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux", *Collected Courses of The Hague Academy of International Law*, Vol. 28 (1929-III), pp. 265-266.

[19] *See*, U.S. Counter-Memorial, para. 5.05, which quotes Fitzmaurice, Sir G., "The General principles of international law considered from the standpoint of the rule of law", *Collected Courses of The Hague Academy of International Law*, Vol. 92 (1957-II), p. 119: "[A] State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality - in short were provoked by it. *In some cases, the principle of legitimate reprisals will remove any aspect of illegality from such counter-action*"; emphasis added. Whatever may be the appropriateness of this statement, the United States fails to give adequate weight to the last portion of this quotation. In fact, the rationale for this argument rests on the concept of legitimate reprisals and not on "clean hands" *per se*. This means that the U.S. clean hands defence in the present case must be viewed in the light of the law of State responsibility (*see* Chap. 7, above). This long sentence was previously reproduced in Judge Schwebel's Dissenting Opinion appended to the Court's Judgment (Merits) in the *Nicaragua* case, *I.C.J. Reports 1986*, p. 394, para. 271.

8.14 Furthermore, Iran must stress that the United States' position, as set out in the four pages of its Counter-Memorial devoted to this subject, is far from being indisputable from "the standpoint of the rule of law". The United States' assertion of Iran's lack of clean hands is no more than a *petitio principii*: according to the United States, Iran has no right to *locus standi in judicio* because it has itself infringed the 1955 Treaty of Amity. In order for the Court to admit such a claim, the United States would have to adduce evidence proving such alleged violations by Iran. This means, from a procedural point of view, that the Court must have the necessary jurisdiction in the present case to entertain such a claim!

8.15 *Ex hypothesi*, should the Court establish that Iran has infringed Article X(1) of the 1955 Treaty of Amity, then the United States' clean hands defence may have an effect only at the damage quantification stage[20]. Indeed, as the Court has recently stated, even where there have been intersecting wrongful acts, the obligation to make reparation nonetheless subsists[21].

8.16 To this end, the United States will have to prove that the alleged Iranian acts are a violation of freedom of commerce under Article X(1) and consequently fall within the only jurisdictional basis in the present case, *i.e.* Article X(1).

8.17 As Iran has shown above, international law has espoused the civil law position concerning the concept and the operation of "clean hands". Thus, since Iran is not, as the United States Counter-Memorial claims, "deprived of the necessary *locus standi in judicio*", as the Court has rightly found in its 1996 Judgment, the United States can only avail itself of this argument as a defence at the merits stage. But the question remains as to how the United States may avail itself of the argument. In fact, as Iran will show in the following paragraphs, the "clean hands" argument as formulated by the United States has no autonomous standing in international law and hence cannot be used alone as a defence at the merits stage.

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[20] *See*, Salmon, J., "La place de la faute de la victime dans le droit de la responsabilité internationale", *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago*, Vol. 3, Milan, 1987, pp. 385, *et seq.*.

[21] Case concerning the *Gabcikovo/Nagymaros Project (Hungary v. Slovakia), Judgment (Merits)*, 25 September 1997, *I.C.J. Reports 1997*, pp. 81-82, paras. 152-155.

Section 4. The "Clean Hands" Argument as a Defence at the Merits Stage

8.18 Since, as Iran has already shown in the preceding paragraphs, the "clean hands" argument fulfils no function whatsoever as far as the admissibility of claims is concerned, it is necessary to analyse the role and functions of that argument at the merits stage. As Iran will demonstrate, this principle has no autonomous legal scope or relevance at this stage either.

8.19 First of all, the "clean hands" concept cannot *per se* be considered and invoked as a "circumstance precluding wrongfulness". The International Law Commission of the United Nations (hereinafter referred to as the "ILC") in its Commentary on Draft articles on State responsibility[22] has affirmed that *all* the circumstances precluding wrongfulness are exhaustively and restrictively enumerated therein (articles 29-34)[23], "clean hands" not being mentioned[24]. Thus, if the concept of "clean hands" is to be applied, it must be construed as falling within one of the categories identified by the ILC.

8.20 In this regard, the United States has relied upon a "self-defence" argument in order to justify the destruction of Iranian oil platforms. The Iranian response to this argument has already been given elsewhere in this Reply[25]. Nevertheless, and however sound this argumentation may be, the "clean hands" concept can play no autonomous role as a defence.

8.21 Secondly, the ILC rightly highlighted in 1979 the difference between "circumstances precluding wrongfulness" and other "circumstances which might have the effect not of precluding the wrongfulness of the act of the State but of attenuating or

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[22] This Commentary is considered not only by the most eminent international jurists but also by recent jurisprudence as a reflection of general international law in the field of State responsibility. *See,* for instance, *Rainbow Warrior* (New Zealand v. France), arbitral award delivered on 30 April 1990, in *Revue générale de droit international public,* Vol. 94 (1990), pp. 838, *et seq.*, paras. 76, *et seq.*; Case concerning the *Gabcikovo/Nagymaros Project. I.C.J. Reports 1997*, pp. 39, *et seq.*, paras. 50, *et seq.*.

[23] *Y.I.L.C.*, *1979*, Vol. II., Part II, p. 109.

[24] The ILC did not retain the "plaintiff's wrongful conduct" as a circumstance precluding wrongfulness. *See*, Salmon, J., *op. cit.*, p. 372.

[25] *See*, Chap. 7, above.

aggravating the responsibility entailed by that act"[26]. This means that, at the most, the clean hands defence could have an effect in relation to the quantification of damages. Iran has disposed of this argument above, and will therefore not deal with it any further here.

8.22 However, since the "clean hands" argument does not fit into one of the "circumstances precluding wrongfulness", and since the United States has failed to show that this argument can bar the Iranian claim or be an autonomous defence, the Court should reject it.

8.23 Finally, the United States asks the Court to dismiss the Iranian claim on the *petitio principii* that Iran had previously committed unlawful acts which "gave rise to the measures of which it now complains"[27]. It is not clear whether this statement is made in an attempt to justify the destruction of Iranian oil platforms on the basis of *inadimplenti non est adimplendum*, the well-known principle of the law of treaties, or on the basis of self-defence and reprisals[28]. In any event, as Iran has already shown, the "clean hands" argument has no legal relevance *per se*, since other concepts or mechanisms, drawn from the law of treaties and the law of State responsibility, fulfil this function. Outside the specific context of diplomatic protection, the "clean hands" concept does not operate independently: it is certainly not a substitute for the Court's decision on issues of substance, nor a "catch all" principle incorporating or supplanting every other legal principle.

8.24 The question then arises whether the "clean hands" principle plays any role at all outside the field of diplomatic protection (which is clearly not at issue here). The answer is in the affirmative only where this legal concept is implemented by the operation of other institutions. Furthermore, the lack of autonomous legal relevance of the "clean hands" defence is particularly strengthened in the present case, since the United States has filed a counter-claim, in regard to which the United States invokes, to a great extent, the *same facts* as it invokes in support of its "clean hands" defence. Iran will deal with the "clean hands" defence in the light of the United States' counter-claim in the following Section.

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26 *Y.I.L.C.*, 1979, Vol. II. Part II, p. 109.

27 U.S. Counter-Memorial, para. 5.07.

28 *Ibid.*, para. 5.05. Iran's responses to these allegations are given elsewhere in other Sections of this Reply. Chapter 7, particularly, deals with their soundness, from the point of view of international law, notably in the light of principles of State responsibility.

Section 5. Conclusion on the United States' Argument based on "Clean Hands"

8.25 Iran has shown in the preceding Sections that the common law construction of the "clean hands" concept as a bar to the admissibility of State-to-State direct claims has not been endorsed by international law. Furthermore, it has been established that, at the merits stage, this concept plays no autonomous juridical role and consequently that the United States cannot invoke it as such to justify the destruction of Iranian oil platforms.

8.26 In this Section, Iran will demonstrate that the filing by the United States - and the provisional acceptance by the Court - of a counter-claim founded on the *same facts* as those which are adduced to support the "clean hands" defence, results in the legal irrelevance of that defence. The fact that the Court has already given a ruling provisionally establishing its jurisdiction on the United States' counter-claim divests the "clean hands" defence of its last vestiges of legal soundness and relevance.

8.27 The United States has filed a counter-claim asking the Court to adjudge and declare that Iran has committed unlawful acts in the "same factual context". First of all, it is proper to distinguish between U.S. allegations concerning on the one hand violations of Article X(1) of the Treaty of Amity and, on the other hand, violations of other Treaty provisions as well as other unspecified breaches of general international law[29].

8.28 Concerning the former, the United States argues in its Counter-Claim that alleged Iranian attacks on United States (reflagged or owned) vessels infringed Article X(1) of the 1955 Treaty of Amity[30]. In this regard, the Court has already given a decision stating that it has jurisdiction to entertain all those United States claims, provided that the latter are based on facts which constitute a violation of Article X(1) of the 1955

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[29] Among these should be noted asserted violations of international humanitarian law or armed conflict (*see*, U.S. Counter-Memorial, paras. 6.21-6.23). The question of the validity of the United States' allegations in this respect cannot be entertained by the Court, since the latter has no jurisdiction on that matter.

[30] Part III of this Reply will deal with the legal validity of these assertions from the point of view of international law.

Treaty of Amity ("freedom of commerce"). Therefore, the United States' argument based on "clean hands" loses any autonomous legal relevance, if indeed it had any before the filing of the United States' counter-claim[31]. Its irrelevance is all the more evident since the Court has upheld its jurisdiction to look into the alleged Iranian violations of Article X(1).

8.29 The strong logical connection between the United States' "clean hands" defence and the counter-claim is highlighted by the fact that that defence is located at the end of the Counter-Memorial and paves the way for the Counter-Claim. Thus, the "clean hands" defence finds itself at the crossing point between the rebuttal of the Iranian allegations and the filing of the United States' own claims[32]. In its discussion of the U.S. counter-claim in Part III, below, Iran will show that there has been no infringement by Iran of Article X(1).

8.30 On the other hand, no claim based on breaches of other provisions of the Treaty or other unspecified breaches of general international law alleged by the United States can be entertained by the Court.

8.31 In conclusion, and on the basis of the foregoing, the United States' argument based on Iran's unlawful conduct has no autonomous legal relevance in the present case and the Court should reject it.

Section 6. Should the Court however decide that the "Clean Hands" Argument does have an Autonomous and Intrinsic Legal Relevance in Direct State-to-State Claims, this would militate in Favour of the Iranian Claim

8.32 Should the Court nevertheless decide that the "clean hands" argument does have an autonomous and intrinsic legal relevance in direct State-to-State claims, Iran respectfully requests the Court to adjudge and declare that it has "clean hands" in the present

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31 Furthermore, it should not be forgotten that Judge Anzilotti, in his Dissenting Opinion appended to the Judgment in the *Diversion of Water from the Meuse* case, (*P.C.I.J., Series* A/B, No. 70, p. 52), considers the counter-claim to be the jurisdictional application of the *exceptio non adimpleti contractus*.

32 The U.S. Counter-Memorial itself ingenuously betrays this entanglement: "In passing upon whether Iran's claim or the U.S. claim of self-defense is well-founded, the Court *by necessity* will pass upon the *same facts* that underlie the U.S. counter-claim. Further, in delineating the scope of Article X of the 1955 Treaty and considering its applicability to military attacks, the Court will address many of the *same legal issues* at stake in the U.S. counter-claim. In short, an assessment of the validity of Iran's demand for reparation 'rests largely' on the *same factual and legal issues* at stake in the U.S. claim for reparation for Iran's attacks on U.S. vessels in the [Persian] Gulf" (para. 6.12; emphases added).

case and therefore is *not* precluded from having *locus standi in judicio*. In fact, the "clean hands" argument as a bar to admissibility could only exclude a claim where the alleged illegality of the conduct of a claimant is indissolubly and intimately related to the heart of the claim. In the present case, on the contrary, as Iran has already demonstrated and will further demonstrate below, there is neither a factual nor a legal link between the attacks on the Iranian oil platforms by the United States, on the one hand, and, on the other hand, the incidents alleged by the United States to entail Iran's international responsibility. Thus, Iran is not divested, by virtue of its alleged unlawful conduct, of its natural *locus standi in judicio*.

8.33 A second point in the same vein must be stressed. Should the Court decide that the "clean hands" argument does have an autonomous and intrinsic legal relevance in direct State-to-State claims, Iran respectfully requests the Court to adjudge and declare that the United States does not have "clean hands" in the present case and therefore is precluded from having *locus standi in judicio* both on its defence and on its counter-claim, insofar as these are based on facts which are tainted by the United States' unlawful behaviour.

8.34 The United States cannot rely upon the alleged unlawfulness of asserted Iranian activities in the Persian Gulf. During the Iraq-Iran war, the United States failed to abide by well-established rules pertaining to neutrality, and failed to comply with its special bilateral obligations under both the Algiers Declarations and, of direct concern here, the Treaty of Amity. Specifically, it encouraged and assisted Iraq in its attacks on shipping in the Persian Gulf. It also protected the maritime trade of Iraq's allies, which was contributing towards Iraq's war effort. Thus, Iran respectfully submits that the Court should not entertain the United States' defence and counter-claim based on those acts which are tainted by the United States' wrongful conduct during the relevant period.

PART IV
IRAN'S DEFENCE TO THE UNITED STATES' COUNTER-CLAIM

CHAPTER 9. THE UNITED STATES COUNTER-CLAIM AND THE BASIS FOR ITS ADMISSIBILITY

Section 1. Introduction

9.1 With its Counter-Memorial of 23 June 1997, the United States lodged a counter-claim alleging violation of Article X of the 1955 Treaty of Amity by Iran. In its Order of 10 March 1998, the Court held the counter-claim admissible under Article 80 of the Rules, though subject to important provisos which will be analysed below.

9.2 In its counter-claim, the United States alleges that "actions by Iran... created extremely dangerous conditions for shipping" and "resulted in significant damage to U.S. commercial and military vessels... [which] ultimately led the United States to take lawful, defensive measures against the offshore platforms Iran used to support its attacks on shipping"[1]. In particular the United States refers to damages allegedly incurred by seven vessels, although - despite the implications of the passage quoted above - most of these incidents bore no relationship whatever, causal or otherwise, to the United States' attacks on the oil platforms. In this context, the United States attempts to provide a background for its counter-claim through statistical information relating to the value of goods exported from the United States to Iran in 1987 and 1988 and to the fact that these goods, for the most part, were transported through the Persian Gulf to Iran by ship[2]. As those data show, there was a substantial *increase* in the volume of trade in these years, which seems to have been limited only by the unilateral trade sanctions imposed by the United States.

9.3 In its submissions, the United States defines its counter-claim in the following terms:

> "1. That in attacking vessels, laying mines in the [Persian] Gulf and otherwise engaging in military actions in 1987-88 that were dangerous and detrimental to

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1 U.S. Counter-Memorial, Part VI, para. 6.01.
2 *Ibid.*, paras. 6.06-6.07.

> maritime commerce, the Islamic Republic of Iran breached its obligations to the United States under Article X of the Treaty..."[3].

Paragraph (2) of the submission goes on to refer to the requirement of full reparation for these alleged breaches.

9.4 In terms of Article 80 of the Rules, it is of course the submissions which define the scope of any counter-claim. In its submissions the United States alleged conduct of Iran which is "detrimental to maritime commerce". In doing so it echoes, after a fashion, Iran's claim against the United States which, so far as it falls within the jurisdiction of the Court, is based on freedom of commerce "between the territories of the two High Contracting Parties".

Section 2. The Court's Order of 10 March 1998

9.5 In its Order of 10 March 1998 the Court dealt with the issue of its jurisdiction over the counter-claim in the following terms:

> "Whereas the counter-claim presented by the United States alleges attacks on shipping, the laying of mines, and other military actions said to be 'dangerous and detrimental to maritime commerce'; whereas such facts are capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty as interpreted by the Court; and whereas the Court has jurisdiction to entertain the United States counter-claim *in so far as the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1*"[4].

9.6 In Iran's submission, this passage is significant in the following three ways.

- First, although the Court upholds its jurisdiction over the counter-claim, it does so only to the extent that it can be shown that the facts alleged by the United States (which facts, of course, it is for the United States to prove) did in truth involve prejudice to the freedoms guaranteed by Article X(1) of the Treaty of Amity. In that sense the Court

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3 *Ibid.*, p. 180.

4 Order of 10 March 1998, para. 36; emphasis added.

only upheld its jurisdiction *prima facie* over the United States' claim, and it remains to be seen whether that claim does actually fall under paragraph 1 of Article X.

- Secondly, Article X(1) is not to be read as a general guarantee of freedom of commerce in the vicinity of Iran, or in the Persian Gulf region. The Treaty only protects freedom of commerce between the United States and Iran. Thus there is a specific bilateral inter-State element to the protection afforded by Article X(1), and the United States has to show that protected commerce was impaired in its freedom by unlawful action attributable to Iran. This burden of proof has already, of course, been imposed on Iran in respect of the oil platforms[5]. It applies equally to the United States in respect of the categories and instrumentalities of commerce in respect of which it claims.

- Thirdly, just as Iran's claim (to the extent it falls within the Court's jurisdiction) is concerned only and exclusively with Article X(1), so this is true of the United States counter-claim. Other paragraphs of Article X are only relevant in the present proceedings to the extent that they may be relevant to the interpretation or application of paragraph 1[6]. Thus, for example, paragraph 5 is an independent guarantee concerning vessels in distress: it is not limited to vessels engaged in commerce or navigation between the territories of the High Contracting Parties, and it is irrelevant in the present proceedings[7]. This limitation is consistent with the Court's insistence that "the Respondent cannot use a counter-claim as a means of referring to an international court claims which exceed the limits of its jurisdiction as recognized by the Parties"[8]. In the present case, the extent of the jurisdiction recognised by the Parties, and accepted by the Court, is that defined by Article X(1).

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5 *See, I.C.J. Reports 1996*, p. 820, para. 51.

6 This consequence of the Court's Order was pointed out by Judge Higgins in her Separate Opinion to the Order of 10 March 1998. *See*, also, Judge *ad hoc* Rigaux, dissenting.

7 The United States gives no particulars of United States vessels within the meaning of the Treaty seeking haven in Iranian ports in circumstances of distress.

8 Order of 10 March 1998, para. 33, citing the Court's Order of 17 December 1997 in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Yugoslavia), I.C.J. Reports 1997*, p. 257, para. 31. In turn this insistence on the reciprocal effect of jurisdiction accepted *in casu* goes back to the crucial debates in the Permanent Court on the predecessor of Article 80. *See*, the Report of the Committee of Co-ordination of 14 May 1934; *P.C.I.J.*, Series D, No. 2, 3rd addendum at p. 871, which noted that the allowance for counter-claims did not cause difficulty "étant donné

Section 3. Outstanding Issues in relation to the Court's Order of 10 March 1998

9.7 Three issues however remain to be considered by way of preliminaries to the consideration of the counter-claim.

A. The issue of freedom of navigation

9.8 Article X(1) of the Treaty of Amity protects both freedom of commerce and freedom of navigation; both protections are qualified by the introductory words "between the territories of the two High Contracting Parties". Iran's claim in the present case, to the extent that it falls within the jurisdiction of the Court, is limited to freedom of commerce[9]. This was made very clear in the Preliminary Objection phase, where the Court noted that:

> "the question the Court must decide, in order to determine its jurisdiction, is whether the actions of the United States complained of by Iran had the potential to affect 'freedom of commerce' as guaranteed by the provision quoted above".

And in the following paragraphs the Court focused exclusively on freedom of commerce in relation to Article X(1)[10].

9.9 The United States' submission, in its counter-claim, likewise refers to conduct which is "dangerous and detrimental to maritime commerce"[11]. It would appear, therefore, that the claims of the Parties are limited to freedom of commerce as protected by Article X(1), and not to freedom of navigation as such, and that the Court precisely qualified its jurisdiction in this sense in 1996.

9.10 The Court in its Order of 10 March 1998 was perhaps less clear. After referring to passages of its 1996 Judgment interpreting the concept of freedom of commerce, and after referring also to the United States' submission with its own emphasis on "maritime

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qu'elle était prévue seulement dans les limites de la compétence de la Cour *telles qu'elles étaient établies pour les besoins de l'instance au cours de laquelle la demande serait faite*" (emphasis added).

9 The United States has accused the platforms of many things, but not yet of a capacity for navigation.

10 *I.C.J. Reports 1996*, p. 817, para. 38; and *see*, the whole passage from pp. 817-820.

11 U.S. Counter-Memorial, p. 180.

commerce", the Court said that "such facts are capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty *as interpreted by the Court*; and whereas the Court has jurisdiction to entertain the United States counter-claim in so far as the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1"[12]. As has been seen, the only aspect of Article X(1) interpreted by the Court was the aspect dealing with freedom of commerce, and this was the sole basis of jurisdiction upheld. On the other hand, it is true that the Court referred in the plural to "the freedoms guaranteed" by that paragraph.

9.11 Iran accepts that commercial navigation between the territories of the High Contracting Parties, within the meaning of Article X(1), is covered by the guarantee in that paragraph, and that this covers whatever is properly incidental to such commerce, including production for the purposes of commerce. It does not, however, accept that non-commercial navigation is protected by paragraph 1, or that the freedom of such navigation is in issue in the present case, for the following reasons:

(1) The United States' counter-claim is couched exclusively in terms of maritime commerce, as noted already.

(2) So is the Iranian claim in this case, as it now stands. For the United States to be able to bring claims based on non-commercial navigation would expand the case significantly, and there are strong indications, in the Order of 10 March 1998 as well as in the earlier Judgment, that such issues are excluded from the present case.

(3) In any event, non-commercial vessels (*i.e.* vessels of war) are not protected by Article X(1). This is expressly provided in Article X(6):

> "The term 'vessels', as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated; but this term does not, except with reference to paragraphs 2 and 5 of the present Article, include fishing vessels or vessels of war".

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[12] Order of 10 March 1998, para. 36; emphasis added.

It is true that paragraph 1 does not actually use the word "vessels". But it does refer to freedom of navigation, and such navigation connotes, indeed requires, the use of vessels. Interpreted in the general context of Article X as a whole, it is clear that vessels of war only benefit from the discrete guarantee in paragraph 5. They are expressly excluded from paragraph 1[13].

B. What is the commerce "between the territories of the two High Contracting Parties" whose freedom is guaranteed by Article X(1)?

9.12 The second outstanding question is the identification of the commerce whose freedom is protected by Article X(1). As noted already, that commerce must be "between the territories of the High Contracting Parties". The Court made it clear in its 1996 Judgment that commerce for this purpose was not restricted to mere acts of purchase and sale: it extends to "all transactions of import and export, relationships of exchange, purchase, sale, transport, and financial operations between nations"[14]. Its freedom could be impeded by "acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and their storage with a view to export"[15] - it being understood that the facilities attacked in this case were very largely dedicated to the export trade, including trade with the United States.

9.13 In Iran's view, whether a particular transaction, facility or instrument is part of commerce "between the territories of the High Contracting Parties" depends on the particular facts and on the nature of the transaction, facility or instrument. As shown in Chapter 6, it is possible to give a broad meaning to the notion of commerce and of freedom of commerce (as the Court did), and still to insist that the actual words introducing Article X(1), be given their ordinary and natural meaning. The question is essentially one of fact in each case, based on a broad conception of the idea of commerce and ordinary meaning of the words "between the territories of the High Contracting Parties".

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[13] *See*, Chapter 6, above for further discussion of the scope of Article X.

[14] *I.C.J. Reports 1996*, p. 818, para. 45, citing *Dictionnaire de la terminologie du droit international* (1960), p. 126.

[15] *I.C.J. Reports 1996*, p. 819, para. 50.

9.14 Iran has also explained in Chapter 6 above that the oil platforms were engaged in protected commerce within Article X(1). It will be shown below, however, that the incidents which are referred to in the U.S. counter-claim cannot in fact be considered, on any reasonable reading of Article X(1), as being involved in protected commerce[16].

C. The admissibility of the United States' counter-claim (independently of Article 80)

9.15 The third issue that requires clarification relates to the question of the admissibility of the United States' counter-claim, independently of the requirements of Article 80. The Court in its Order of 10 March 1998 did not deal with issues of admissibility other than those specifically mentioned in Article 80. Indeed the United States' position was that the only question for the Court at that stage was whether the counter-claim was "directly connected"[17]. The Court dealt also with the question of jurisdiction over the counter-claim, to the extent (but only to the extent) of deciding that if the United States counter-claim fell within the scope of Article X(1), it fell within the Court's jurisdiction. The Court did not address issues of admissibility not covered by Article 80, which therefore remain open.

9.16 The first of these concerns the United States' right to espouse claims in relation to the specific incidents it identifies. The United States addresses this issue in a summary way in paragraph 6.24 of the Counter-Memorial, but it goes on to note in paragraph 6.25 that the "counter-claim is not dependent on an espousal of claims held by U.S. nationals". It is not clear to Iran whether in fact the United States is seeking to espouse claims in respect of any or all of the specific incidents to which it refers. The United States' submission with regard to its counter-claim, which is framed in general terms, suggests that this may not be the case. Indeed, the damages identified by the United States appear to concern primarily the costs of deploying forces in the Persian Gulf[18].

9.17 Without clarification of these issues, Iran must limit itself to making a general objection that any such purported espousal is inadmissible. The United States has

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16 Subject to the possible exception of the *Texaco Caribbean*, a claim in respect of which must in any event be dismissed on other grounds.

17 As the Court noted in the Order of 10 March 1998, para. 22.

18 U.S. Counter-Memorial, para. 6.25.

simply not shown, or even attempted to show, that in the context of a claim under Article X(1) of the Treaty of Amity it has the right to espouse claims in respect of the specific incidents mentioned[19]. Iran reserves its right to develop these arguments further in the light of any subsequent clarification of this issue.

9.18 The second issue of admissibility concerns Article XXI of the Treaty of Amity. It will be recalled that Article XXI(2) allows either Party to submit to the Court a dispute as to the interpretation or application of the Treaty of Amity, which has not been "satisfactorily adjusted by diplomacy". It is true that this is, in Sir Robert Jennings' words, "not an exigent requirement"[20]. However, the words must be given some meaning; there must have been some attempt, not a purely formal gesture, in the direction of satisfactory adjustment by diplomacy. This is further confirmed by the preceding paragraph of that Article, Article XXI(1), which reads as follows:

> "Each High Contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other High Contracting Party was make with respect to any matter affecting the operation of the present Treaty".

As will be shown below, the United States failed to meet these obligations.

9.19 The relevant correspondence is set out in Exhibit 24. It includes the following:

- United States' letter of 26 March 1997;
- United States' letter of 3 April 1997;
- Iran's response of 22 April 1997;
- Iran's further response of 12 June 1997;

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[19] The *Samuel B. Roberts* was a warship and is thus excluded from the Treaty. The ultimate ownership interests in the reflagged tankers *Bridgeton* and *Sea Isle City* lay with the Kuwaiti State, and in any event the reflagging was not opposable to Iran. The United States has produced no evidence as to the ownership interests of the other vessels, let alone any justification for its espousal of such ownership interests.

[20] *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction) I.C.J. Reports 1984*, p. 556.

- United States' letter of 16 June 1997;
- Iran's response of 20 June 1997.

The Court will see from this correspondence that Iran was willing to discuss issues of compensation arising from the events in the Persian Gulf at the relevant period, including the incidents mentioned by the United States in its letter of 26 March 1997, without a prior admission of responsibility by either side. In its letter to the Court of 23 June 1997, the United States inferred that Iran had rejected negotiations, "proposing instead that the Parties conduct negotiations on a broader range of subjects". This is a complete mischaracterisation. The letter of 12 June 1997 expressly referred to Iran's "readiness to enter into negotiations", and this was reaffirmed in the letter of 20 June 1997.

9.20 Other features of the claims raised in the United States' letter of 26 March 1997 include its listing of incidents affecting particular ships, 9-10 years after the event, which had never previously been dealt with in diplomatic correspondence, let alone been the subject of diplomatic claims. Details of the particular incidents are set out further in the following Chapter.

9.21 It is, of course, for the Court to interpret the language of Article XXI of the Treaty of Amity. If the requirements of the phrase "not satisfactorily adjusted by diplomacy" are to be considered as satisfied just because Iran - while agreeing to open negotiations - declined to accept responsibility in advance and on the basis of an artificially limited description of the dispute (only the claims of the United States, none of the claims of Iran), then it may be that the counter-claim was "not satisfactorily adjusted by diplomacy". But it is odd to treat the "satisfactory workings of diplomacy" as equivalent to the acceptance of a *diktat*. The United States' position is indeed paradoxical. For the purposes of jurisdiction over its counter-claim, it went out of its way to stress the close relationship between claim and counter-claim, the identity of the facts, etc. When it comes to a possible negotiated settlement, however, the United States regards the claim and counter-claim as completely different and unrelated. Iran's position at the time (which has not changed) is that it is willing to negotiate with the United States all unresolved issues between the two States arising from this period; naturally such negotiations would be without prejudice on both sides. The United States has never shown the slightest interest in a diplomatic resolution of any of these issues.

It made no effort, beyond the most nominal, to bring about any adjustment. In the special circumstances of the present case, Iran submits that the United States has not shown that its counter-claim could not be "satisfactorily adjusted by diplomacy", and that such counter-claim is accordingly inadmissible. This conclusion is confirmed by the United States' failure to meet its obligations under Article XXI(1) to accord any consideration or allow any consultation with regard to Iran's concerns.

Section 4. Structure of Iran's Defence to the United States Counter-Claim

9.22 Although the United States in its letter of 26 March 1998 cited a number of specific vessels whose right to freedom of navigation under Article X(1) was, in its view, impaired, it does so in support of a generic claim to freedom of navigation in the area at the time. It further reserves the right to bring forward further allegations (although that freedom is not available to Iran, which has from the beginning been clear as to the instances and events in respect of which it was claiming). For the reasons already given, in respect of any particular allegation of a violation of Article X(1), it must be shown, in addition to unjustified impairment of the freedom, that the subject in question was either itself part of commerce between the territories of the High Contracting Parties, or that it was sufficiently associated with such bilateral commerce. In this regard, it is useful to analyse the United States' claims in two ways - first, to the extent that 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 freedom of commerce between the territories of the High Contracting Parties (the generic claim).

9.23 As to the *specific* claims, the United States must prove the following elements:

(1) that relevant instrumentalities of commerce (including vessels as defined in Article X(6) of the Treaty of Amity), were engaged in commerce between the territories of the High Contracting Parties;

(2) that conduct attributable to Iran violated their freedom to do so, contrary to Article X(1) of the Treaty of Amity; and

(3) (eventually) the quantum of damages or compensation directly attributable to that violation.

9.24 As to the *generic* claim, the United States must prove the following elements:

(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.

9.25 In both respects the onus of proof is on the United States, in line with the principle that the international responsibility of a State is not to be presumed[21].

9.26 In the circumstances it is proposed to deal first with the specific instances so far relied on by the United States (*see*, Chapter 10), and secondly with the "generic claim" under Article X(1) (*see*, Chapter 11). Finally, certain reservations as to Iran's legal position vis-à-vis the United States will be made, with a view to preserving the equality of the Parties under the Treaty and before the Court (*see*, Chapter 12).

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[21] In the *Spanish Zone of Morocco Claims (Claim 27)*, Arbitrator Huber was faced with damage caused but in circumstances which remained unclear. In those circumstances the claim failed:

> "Les documents et explications orales fournis par les Représentants des Parties n'indiquent pas l'époque exacte à laquelle le vol a eu lieu. Or, dans le doute, il ne semble pas admissible de présumer que le vol se soit produit à une époque où un état normal de pacification régnait encore dans la région. Pareille présomption serait décisive pour la question de la responsabilité de l'Espagne. Mais, tout en renvoyant à son rapport préliminaire sur la notion de la responsabilité, le Rapporteur déclare, pour ce qui est de l'espèce, se rallier au principe suivant lequel la responsabilité internationale de l'Etat ne se présume pas".

U.N.R.I.A.A., Vol. 2 (1924), p. 699.

CHAPTER 10. THE SPECIFIC ALLEGATIONS OF THE UNITED STATES IN RELATION TO ARTICLE X(1) OF THE TREATY OF AMITY

Section 1. Introduction

10.1 This Chapter addresses the specific allegations so far made by the United States of breach of Article X(1) of the Treaty of Amity. It takes each allegation separately and considers, in relation to that allegation, the following preliminary questions:

(1) *United States nationality and/or economic interest*? It is true that there can be commerce "between the territories of the High Contracting Parties" in foreign vessels (*i.e.*, vessels which are neither Iranian nor United States). Thus the nationality of the ship or other mode of transport is not decisive for this purpose. Nonetheless, it is plainly relevant to the question of any right the United States may have to espouse a claim. Moreover, for reasons to be explained shortly, it is Iran's view that the United States by its conduct at the time limited itself to protecting United States flag vessels only and is thus precluded from claiming on behalf of other vessels. For these reasons, the first question is whether the vessel concerned had United States nationality. An associated question, relevant at least in terms of the United States' right to claim reparation, is who was beneficially interested in the vessel in question and its cargo.

(2) *Engaged in inter-Party commerce*? Was the vessel or other instrumentality engaged in commerce between the territories of the High Contracting Parties, as required by Article X(1)?

(3) *Engaged in inter-Party navigation*? In the alternative, was it engaged in navigation between those territories, for the purposes of Article X(1)[1]?

10.2 These issues are preliminary to the question of whether the incidents in question are attributable to Iran, or had any connection with the platforms, or constitute a

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[1] It was argued in paragraphs 9.8-9.11 above that the Court's jurisdiction in the present case extends only to commerce and not to non-commercial navigation. This question is asked in the alternative, and without prejudice to this position.

breach of Article X(1). It is the answer to these preliminary questions which will determine whether in fact these incidents do fall within the Court's jurisdiction.

10.3 The various incidents referred to will be dealt with *seriatim*, and in chronological order. Before doing so, however, several common issues as to the nationality of the claims brought by the United States arising out of these specific incidents need to be discussed.

Section 2. The United States' Claims with Respect to Non-U.S.-Flagged Vessels

10.4 The United States expressed its concern about possible attacks on its shipping in a number of communications sent to Iran in 1987. In one of these communications the United States cautioned Iran against "any act which threatens our naval units or any *U.S. flag* shipping"[2]. In another communication, dated 31 August 1987, the United States avowed that:

> "Our military forces operating in the [Persian] Gulf pose no threat to Iran, but will assist in maintaining freedom of navigation and will protect *U.S. flag* vessels. U.S. flag vessels are strictly neutral with respect to the conflict between Iran and Iraq. *They carry no cargo of any kind for either country...*"[3].

Iran has already pointed out that the United States policy for shipping security in the Persian Gulf concentrated on U.S.-flag vessels, as illustrated by its need to reflag Kuwaiti vessels[4]. In addition, of course, the last phrase of this citation is a clear admission by the United States that the relevant vessels were not engaged in commerce between the territories of the High Contracting Parties.

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2 *See*, U.S. Counter-Memorial, para. 1.24; emphasis added; *see*, also, the U.S. communication to Iran of 18 July 1987 (U.S. Counter-Memorial, Exhibit 42). In this communication, the United States refers to the reflagging of Kuwaiti vessels and states: "[a]fter they are registered under United States law, protection accorded them in the Persian Gulf will be the same as that provided to any other *U.S. flag* vessel"; emphasis added. The United States states in the same letter: "The Government of the Islamic Republic of Iran should be fully aware that the United States will take all appropriate measures to protect and defend all *U.S. flag* ships...."; emphasis added. *See*, also, letter from the United States to Iran dated 23 May 1987 (U.S. Counter-Memorial, Exhibit 39). The United States also referred to U.S.-flagged merchant vessels prior to the day the *Texaco Caribbean* struck a mine (U.S. Counter-Memorial, Exhibit 43).

3 U.S. Counter-Memorial, Exhibit 56; emphasis added.

4 *See*, Chapter 2, above; *see*, also, Iran's Observations and Submissions, Annex, para. 24.

10.5 The United States has also qualified the actions taken against the platforms as necessary for the protection of shipping under its own flag. For example, the United States has described its action against the Reshadat platforms as "a reasonable, proportionate defensive measure" allegedly "intended to undermine Iran's ability to attack U.S. flag shipping and U.S. naval escort forces"[5]. When the United States addressed the selection of targets for its attack on Iran's Reshadat platforms, code-named "Operation Nimble Archer", it argued that the target had to be "directly related to Iranian belligerence against U.S. flag shipping"[6]. The reason for choosing to attack the Salman and Nasr platforms during Operation Praying Mantis was the same. According to General George Crist: "In recommending targets to the Secretary of Defense and Chairman of the Joint Chiefs of Staff, my priorities were essentially unchanged from operation Nimble Archer"[7].

10.6 Prior to its letter to Iran of 26 March 1997, the United States had not suggested that it had any claim against Iran, nor justification for its attacks on the platforms, other than in respect of U.S.-flagged vessels. In its letter to the Security Council dated 19 October 1987, referring to its attack that day on Iran's oil platforms, the United States sought to justify its actions by specific reference to the *Sea Isle City* "a United States flag vessel, [struck] in the territorial waters of Kuwait"[8]. The United States alleged in the same letter that the attack on the *Sea Isle City* was the latest in a series of "unlawful armed attacks by Iranian forces against the United States, including laying mines in international waters for the purpose of sinking or damaging United States flag ships". In that letter the United States did not specifically mention alleged Iranian attacks on the *Bridgeton* or the *Texaco Caribbean*, which had also occurred before the U.S. action against Iran's platforms on 19 October 1987. Yet it now purports to be able to claim for damages to those vessels in its counter-claim.

10.7 Moreover, in the oral pleadings before the Court on its Preliminary Objection, the United States mentioned only three vessels with regard to what the United States called "hostile engagements" between the United States and Iran: the *Bridgeton*, the *Sea*

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5 U.S. Counter-Memorial, Exhibit 43.
6 *Ibid.*, Exhibit 44.
7 *Ibid.*
8 Iran's Memorial, Exhibit 73.

Isle City and the *Samuel B. Roberts*. Commander Neubauer, speaking for the United States, stated:

> "Should the Court proceed to the merits in this case, it would be called upon to determine complex legal and factual controversies regarding these hostile engagements. Was the Islamic Republic of Iran responsible as the United States contends, for the unlawful attacks on the US tankers *Bridgeton*, and *Sea Isle City*, and the guided missile frigate *USS Samuel B. Roberts*?"[9].

Similarly, in its letter to the Security Council dated 18 April 1988, the United States sought to justify its attack on the Nasr and Salman platforms on the same date by reference only to the alleged Iranian attack on the *Samuel B. Roberts*. Although the incidents involving the *Esso Freeport*, *Diane* and *Lucy* occurred prior to the U.S. decision to attack the Nasr and Salman platforms, the United States did not invoke them as justification for its attack. It is undoubtedly only since its belated decision to file a counter-claim that the United States has attempted to find grounds for asserting a claim for damages with respect to those vessels.

10.8 When each of the seven specific incidents alleged in the U.S. counter-claim occurred, only three of the vessels involved, in addition to the *U.S.S. Samuel B. Roberts*, which was a U.S. war vessel, were sailing under the flag of the United States. Having regard to the statements consistently made at the time, the United States is precluded now from relying on alleged incidents involving foreign flag vessels in terms of its rights under Article X(1) of the Treaty of Amity.

Section 3. Nationality of Claims: The Issue of Reflagging

10.9 A second preliminary issue relates to the reflagging of non-neutral shipping with a view to its protection. In December 1986 the Kuwait Oil Tanker Company, a Kuwaiti corporation, expressed an interest in reflagging its vessels under the U.S. flag. Despite confirmation by the United States that the reflagging would be allowed only if the vessels in question met United States requirements, the U.S. Coast Guard did not carry out a full inspection of the Kuwaiti tankers to be reflagged. In order to circumvent the problem of non-inspection, the Department of Defense authorised waivers allowing one year for Kuwaiti

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[9] CR96/12, 16 September 1996, pp. 38-39.

ships to comply with United States safety regulations[10]. As of 2 June 1987 the Kuwait Oil Tanker Company and the U.S. Coast Guard had signed a formal memorandum of agreement by which the parties agreed to a one-year safety requirement waiver and to minimal manning requirements[11]. In particular, only the master of each vessel was required to be a United States citizen.[12]

10.10 Transfer to U.S. registered ownership of the vessels was arranged by Santa Fe Corporation, a company owned by Kuwait Petroleum Corporation, through the creation in May 1987 of Chesapeake Shipping Inc., a company formed under Delaware Law. By June 1987 ownership of all 11 Kuwaiti tankers had been transferred to Chesapeake Shipping, Inc. All stock in Chesapeake was owned by the Kuwait Oil Tanker Company, a subsidiary of the State-owned Kuwait Petroleum Company. The company's assets were $350 million, the value of the tankers. After Chesapeake Shipping had assumed ownership and operation of the tankers, it immediately rechartered them back to Kuwait Oil Tanker Company[13].

10.11 It was possible for the United States to apply minimal manning requirements due to a loophole in the registration regulations: if a vessel was not departing from a U.S. port, it was not required to employ U.S. mariners until such time as it returned to a U.S. port – a remote possibility for the reflagged Kuwaiti tankers[14]. This "loophole" was, however, closed by Law H.R. 2598, adopted on 11 January 1988, which in turn required a review of the registration of the Kuwaiti tankers. The new law required that on U.S.-flagged vessels all licensed seamen, and 75% of unlicensed seamen, be U.S. citizens, regardless of whether the ship called at American ports[15]. At the time of writing, Iran has not been able to discover whether the reflagged vessels complied with the new law, were granted an exemption from it, or reverted to their earlier registration. The United States, which has this information in its archives, will no doubt be able to inform the Court accordingly.

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10 *See*, Exhibits 25 and 26, Vol. II.
11 *See*, Exhibit 26, Vol. II.
12 *See, ibid.*
13 *See*, Exhibit 33, Vol. II
14 *See*, Exhibit 26, Vol. II.
15 *Ibid.*

10.12 However this may be, it is known that when the *Bridgeton* struck a mine, and when the *Sea Isle City* was struck by a missile, it was the Kuwait Oil Tanker Company, a Kuwaiti corporation, which appears to have met the cost of repairs. Indeed, the United States does not even seem to have asked Kuwait Oil Tanker Company for an assessment of the alleged damages until April 1997[16]. United States naval officers evidently continued to think of the *Bridgeton* as being Kuwaiti despite its reflagging. According to Rear Admiral Bernsen: "Prior to the attack on the Bridgeton, Iranian forces had attacked a number of other Kuwaiti-owned vessels; it was clear that Iran was targeting Kuwaiti vessels for attack"[17].

10.13 The determination of the nationality of vessels for the purposes of the Treaty of Amity is regulated by Article X(2).

> "Vessels under the flag of either High Contracting Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that High Contracting Party both on the high seas and within the ports, places and waters of the other High Contracting Party".

It might perhaps be argued that this provision is effective to overcome any general difficulty with flags of convenience which were granted other than in accordance with the normal procedures and in contexts where there was no effective change of ownership, beneficial interest or control. Iran does not accept that paragraph 2 was effective to displace normal rules for the nationality of ships. But the cardinal point is that the matter is quite otherwise where the reflagging is carried out for a non-neutral purpose. Whatever its general effect might be, Article X(2) has to be read in the context of the well-established rule of general international law, to the effect that the reflagging of a non-neutral vessel, as a device to achieve protection, is void.

10.14 As a rule, the neutral or non-neutral character of a ship is determined by the flag it flies. But for that very reason, the transfer of a belligerent ship to a neutral flag is

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16 *See*, U.S. Counter-Memorial, Exhibits 45 and 89.

17 *Ibid.*, Exhibit 43.

void, at least as a general rule[18]. There are exceptions to this rule if the transfer was unrelated to the purpose of protecting the ship. But there is an unrebuttable presumption that the transfer is void if a retransfer is reserved. In the case of the transfer of Kuwaiti ships to the U.S. flag, in view of the unneutral behaviour of Kuwait (a point which cannot be disputed, as Kuwait has officially recognised it), the flag of Kuwait must be considered as equivalent to a belligerent flag for the purposes of the application of this rule. Clearly, the reflagging was made exclusively for protective purposes. This was the explicit and avowed sense of the measure[19]. Whether there were arrangements for a retransfer is not known. But the clear protective purpose is enough to render the transfer void, and thus it is not opposable to Iran in the present proceedings. That conclusion is reinforced by the fact that the transfer itself (which involved a waiver of the normal rules for U.S. registration of a flag) constituted a breach of neutrality by the United States: it was part and parcel of a policy which violated the two basic obligations of neutrality, namely the duty of abstention and the duty of impartiality. Therefore, for the purpose of the application of the Treaty of Amity, the reflagged ships cannot be considered as U.S.-flagged vessels. As explained above, the United States is not entitled to bring any claim in relation to such vessels.

Section 4. The Specific Incidents on which the United States Relies

10.15 Iran turns then to the specific incidents to which the United States refers in its counter-claim. These were:

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[18] *See*, Art. 56 of the 1909 London Declaration: "The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed". The Declaration is considered to be an expression of customary law, at least to a large extent. For details *see*, Kalshoven, F., "1909 London Declaration, Commentary", in Ronzitti N., (ed.), *The Law of Naval Warfare*, 1988, pp. 271, *et seq.* Art. 56 is not among the provisions which Kalshoven mentions as being modified by subsequent practice. In the same sense *see* Verzijl, J.H.W., *International Law in Historical Perspective*, Part IX-D, 1979, p. 225. Earlier British and American practice seems to have been somewhat more liberal, but always required that a transfer was made *bona fide*, which probably meant that the transfer was really commercial, and not protective; *see*, Colombos, C.J., *The International Law of the Sea*, 1967, pp. 560, *et seq.*; Oppenheim/Lauterpacht, *International Law*, Vol. II, 7th ed. 1952, p. 284. During the First World War, Art. 56 was indeed considered as binding, *i.e.*, an expression of customary law; *ibid.*, p. 286. The *San Remo Manual* does not contain a provision on reflagging, but it considers the flag only as *prima facie* evidence of the neutral character of a ship (Sec. 113).

[19] Menefee, S.P., in De Guttry, A., Ronzitti, N., (eds.), *The Iran-Iraq War (1980-1988) and the Law of Naval Warfare*, p. 122, *et seq.* Reflagging was requested by Kuwait for this very purpose. *See*, Secretary of Defense, A Report to the Congress on Security Arrangements in the Persian Gulf, 15 June 1987, in De Guttry, A., Ronzitti, N., *op. cit.*, pp. 158, *et seq.*: "...in March 1987, the U.S. agreed in principle to Kuwait's decision to reflag eleven of its tankers and agreed to provide them protection in the Persian Gulf...".

(A) The *Bridgeton* (24 July 1987)

(B) The *Texaco Caribbean* (10 August 1987)

(C) The *Sea Isle City* (16 October 1987)

(D) The *Lucy* (15 or 16 November 1987)

(E) The *Esso Freeport* (16 November 1987)

(F) The *Diane* (7 February 1988)

(G) The *U.S.S. Samuel B. Roberts* (14 April 1988)

They will be dealt with in turn.

A. The *Bridgeton* (24 July 1987)

10.16 The *Bridgeton*, a reflagged Kuwaiti tanker, struck a mine on 24 July 1987. That incident occurred when the *Bridgeton* was approximately 18 nautical miles southwest of Farsi Island, in the northern part of the Persian Gulf. Three days earlier, the *Bridgeton* had departed from Khor Fakkan in the Gulf of Oman, off the United Arab Emirates, accompanied by three U.S. Navy warship escorts and another merchant vessel, the *Gas Prince*, another reflagged Kuwaiti vessel. The *Bridgeton*, which was in ballast, was en route to Kuwait and, in fact, continued on its journey after it had struck a mine. Damage to the vessel was on its port side, 100-200 feet from the bow and no injuries resulted.

10.17 With regard to the preliminary questions of whether U.S. nationality and/or economic interest was involved; whether the *Bridgeton* was engaged in inter-Party commerce, and whether it was engaged in inter-Party navigation, the answers are as follows:

(1) *U.S. nationality and/or economic interest*? Prior to its reflagging by the United States, the *Bridgeton* was the *Al Rekkah*, a Kuwaiti owned, registered and flagged oil tanker. It has been shown above that the reflagging is not opposable to Iran. In any event there was no change in the real economic interests involved, which were not those of any U.S. company.

(2) *Engaged in inter-Party commerce*? The *Bridgeton* was in ballast, and was not intending to carry petroleum products from Iran, but was en route to Kuwait.

(3) *Engaged in inter-Party navigation*? No.

It follows from the above that the *Bridgeton* does not fall within the scope of Article X(1) of the Treaty.

10.18 The United States' allegation that the *Bridgeton* had been "targeted for attack"[20], and the evidence that it relies on in support of this allegation has serious flaws, as has been shown above[21]. In the light of these facts, there is accordingly no basis for establishing a breach of the Treaty of Amity by Iran, even if the United States could overcome the preliminary requirements as to jurisdiction and admissibility set out above.

B. The *Texaco Caribbean* (10 August 1987)

10.19 The *Texaco Caribbean* was a Panamanian-registered tanker which struck a mine of unknown provenance at the Khor Fakkan anchorage in the Gulf of Oman off Fujairah, United Arab Emirates on 10 August 1987[22]. As a hole blown in the ship's hull had caused oil to leak into the water, the *Texaco Caribbean* off-loaded its cargo to another vessel (the *D'Artagnan*) and made its way to Bahrain for repairs. There were no casualties. The *Texaco Caribbean* had loaded Iranian light crude oil at the Iranian trans-shipment terminal at Larak Island[23] and was to transport its cargo - which belonged to the Norwegian shipping and trading company, Seateam - to Rotterdam[24].

10.20 Iran itself submitted a protest to the United Nations following the attack[25]. Iran also asked permission to clear the United Arab Emirates' waters of mines and obtained permission to assist in minesweeping operations there[26]. Iran's concern about mines

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[20] U.S. Counter-Memorial, para. 1.27. The United States offers as proof that the *Bridgeton* had been targeted for attack its own Central Intelligence Agency report (U.S. Counter-Memorial, Exhibit 46). *See*, also, U.S. Counter-Memorial, Exhibit 32.

[21] *See*, paras. 5.16-5.18, above.

[22] U.S. Preliminary Objection, Annex 1, p. 65.

[23] Iran's Observations and Submissions, Exhibit 25.

[24] *See*, U.S. Counter-Memorial, para. 6.08(2), footnote thereto and Exhibit 169, and Iran's Observations and Submissions, Exhibit 25.

[25] Iran's Memorial, Exhibit 58.

[26] Iran's Observations and Submissions, Annex, para. 51, and Iran's Memorial, para. 58. *See*, also, U.S. Counter-Memorial, Exhibit 52.

in this area was self-evident, since a large number of Iranian vessels used this area as a stopping point before entering the Strait of Hormuz[27].

10.21 The answers to the preliminary questions in relation to the *Texaco Caribbean* are as follows:

(1) *United States nationality and/or economic interest*? When the *Texaco Caribbean* struck a mine on 10 August 1987, it was registered in Panama and Panamanian-flagged. According to reports, on the day of the incident it was under a single-voyage charter to the Norwegian shipping and trading company, Seateam, and "was under orders to proceed to Northwest Europe with a cargo belonging to that company"[28]. The United States alleges that this vessel was U.S.-owned, but has produced no evidence to confirm this, or to justify its espousal of this claim.

(2) *Engaged in inter-Party commerce*? For the reasons set out in Chapter 6 above, it is accepted that the *Texaco Caribbean* was engaged in commerce between the territories of the High Contracting Parties, since it was carrying oil from Iran which was part of a general flow of trade in oil in which the United States participated as a major importer and consumer.

(3) *Engaged in inter-Party navigation*? The *Texaco Caribbean* was not, however, engaged in inter-Party navigation since it was sailing from the territory of Iran to the territory of the Netherlands.

10.22 In any event, there is no evidence whatever, and certainly no sufficient evidence, that the mine was laid by Iran. Nor is there any evidence of any connection, legal or factual, between the alleged attack on this vessel and the attack on either of the platforms, and none is alleged by the United States. Finally, even if it was an Iranian mine which struck the *Texaco Caribbean* (of which there is no evidence), this would be an insufficient basis for responsibility on the basis of a breach of the Treaty of Amity by Iran. If the mine was an

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27 Iran's Observations and Submissions, Annex, para. 51. *See*, also, para. 5.32, above.

28 Iran's Observations and Submissions, Exhibit 25.

Iranian mine, it is certain that this was an accident. Iran could have had no interest whatever in deliberately mining a ship carrying oil from one of its own ports, and there is no indication whatever that it did so; indeed all the indications are to the contrary. It should also be noted that there were no casualties, and neither the owners nor the charterers made any claim against Iran for compensation.

C. The *Sea Isle City* (16 October 1987)

10.23 Another reflagged vessel included in the Counter-Claim, the *Sea Isle City*, was struck by a missile of unknown provenance on 16 October 1987 at approximately 6:00 a.m., local time. The *Sea Isle City* had been "proceeding from its anchorage to the oil loading terminal at Kuwait's Mina al-Ahmadi port"[29]. Iran has discussed the circumstances surrounding the attack on the *Sea Isle City* in detail in Chapter 4.

10.24 The answers to the preliminary questions in relation to the *Sea Isle City* appear to be as follows:

(1) *United States nationality and/or economic interest*? Like the *Bridgeton*, until late 1987, the *Sea Isle City* was a Kuwaiti-flagged vessel, the *Umm Al Maradem*. The issue of reflagging has already been dealt with. As explained, there was no change in the real economic interests involved, which were not those of any U.S. person.

(2) and (3) *Engaged in inter-Party commerce or navigation*? The *Sea Isle City* was engaged in neither inter-Party commerce nor inter-Party navigation. It was neither travelling to an Iranian port, nor carrying or intended to carry Iranian cargos.

10.25 Furthermore, for the reasons explained above in Chapter 4, responsibility for the attack on the *Sea Isle City* cannot be attributed to Iran, and no connection between the attack and the platforms has even been alleged by the United States.

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[29] U.S. Counter-Memorial, para. 6.08(3).

The question of whether there was a breach is inapplicable since the missile was not fired by Iran, and the *Sea Isle City* was in any event not protected by Article X(1) of the Treaty.

10.26 Finally, the United States characterised the attack on the *Sea Isle City* as an attack on Kuwait[30], and prior thereto had stated that it had no obligation to defend Kuwait[31]. U.S. officials had, moreover, declared that "the umbrella of American deterrence did not extend beyond international waters"[32]. When hit by the missile, the *Sea Isle City* was in Kuwaiti territorial waters and, thus, under the protection of Kuwaiti forces:

> "Diplomatic sources said the possibility of a U.S. response to the attack was complicated by the fact that the Sea Isle City was in Kuwaiti territorial waters under the protection of Kuwaiti forces.
>
> U.S. Secretary of State George Shultz... described the missile strike as an attack on Kuwait"[33].

D. The *Lucy* (15 or 16 November 1987)

10.27 The *Lucy*, a Liberian-registered vessel, was attacked near the Strait of Hormuz, while en route to the United Arab Emirates. The *Lucy* was sailing from Japan via Singapore to Ruwais.

10.28 The answers to the preliminary questions in relation to the *Lucy* appear to be as follows:

(1) *United States nationality and/or economic interest*? The Lucy was registered in Liberia, and its home port was Monrovia. The United States has produced no evidence to confirm U.S. ownership of this vessel or to justify its espousal of a claim for any damage to the vessel.

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30 When the *Sea Isle City* was struck, the response of Secretary of State George Shultz was that the incident "constituted an attack on Kuwait"; *see*, U.S. Preliminary Objection, Exhibit 57, p. 190.

31 U.S. Counter-Memorial, Exhibit 97, p. 332.

32 Exhibit 27, Vol. II.

33 Exhibit 28, Vol. II.

(2) and (3) *Engaged in inter-Party commerce or navigation*? The *Lucy* was neither travelling to an Iranian port, nor carrying or intended to carry Iranian cargos.

10.29 The Report of the Secretary-General of the United Nations refers to this attack taking place on 15 November 1987 at 03:00 hours local time, and notes there were no casualties[34]. This was the date used in the U.S. Preliminary Objection[35]. Other reports suggest an attack occurred on 16 November at 08:30 hours, which is the date now relied on in the counter-claim. There appears only to have been relatively minor damage to the vessel, and no injuries, and the vessel was able to continue its voyage. The alleged incident occurred far from the oil platforms, and in the circumstances described above this incident cannot constitute a breach of Article X(1) of the Treaty.

E. The *Esso Freeport* (16 November 1987)

10.30 The *Esso Freeport* was a Bahamian-registered oil tanker, sailing from Ras Tanura, Saudi Arabia to Louisiana. According to the United States, it was attacked at 11:35 hours on 16 November 1987, near the Strait of Hormuz, off the coast of Oman[36]. It was loaded with a cargo of Saudi crude oil[37]. The United States alleges that it was "severely damaged near the Strait of Hormuz as it was departing the Gulf with a cargo of Saudi oil"[38]. However, the grenades allegedly fired against the *Esso Freeport* did not penetrate and after it had proceeded to Fujairah for inspection, the *Esso Freeport* continued on its voyage[39]. There is not even a damage report for the vessel.

10.31 The incident occurred a month after the United States attacked the Reshadat platforms and five months prior to the U.S. attack on the Nasr and Salman

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34 U.S. Preliminary Objection, Exhibit 14, p. 15.
35 U.S. Preliminary Objection, para. 1.13.
36 U.S. Counter-Memorial, Exhibit 168.
37 The United States stated in its Preliminary Objection (para. 1.13, fn. 27) that "[o]utbound tankers attacked by Iraq generally carried Kuwaiti or Saudi oil".
38 U.S. Counter-Memorial, para. 6.08(5).
39 *See, ibid.*, Exhibit 9, p. 90.

platforms. No mention was made of this attack at the time as justification for the United States' attacks on the Nasr and Salman Platforms[40].

10.32 In any event, the answers to the specific preliminary questions in relation to the *Esso Freeport* show that there can have been no breach of Article X(1).

(1) *United States nationality and/or economic interest*? At no relevant time has the *Esso Freeport* either flown a U.S. flag or had a registered owner of U.S. nationality. At the time of the incident, the *Esso Freeport* was registered in the Bahamas. The United States has produced no evidence to justify its claim that this vessel was U.S.-owned or for its purported espousal of such a claim.

(2) and (3) *Engaged in inter-Party commerce or navigation*? The *Esso Freeport* was engaged in trade between the territories of Saudi Arabia and the United States, and therefore was engaged in neither inter-Party commerce nor inter-Party navigation.

F. The *Diane* (7 February 1988)

10.33 The *Diane*, a Liberian-flagged tanker, was allegedly attacked on 7 February 1988 when it was sailing at position 25°49'N - 55°40'E, approximately 17 miles off Ras al-Khaimah in the United Arab Emirates. It was loaded with Saudi crude oil and was en route to Japan. It proceeded through the Strait of Hormuz to Fujairah, United Arab Emirates for temporary repairs for damage resulting from a small fire. Thereafter, the vessel proceeded to Japan where it completed discharge of all of its cargo[41].

10.34 According to Exhibit 171 to the U.S. Counter-Memorial, an Iranian ship had requested identification from the *Diane* when it was at position 25°51'N - 55°41'E concerning "name/port of registry/last port/port of destination". Iran has already pointed out that out of a concern to protect its own trade and shipping, to dissuade third States from

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[40] General Crist has put the incidents in context: "for the same reasons that Rostam was attacked after Iran's attack on the *Sea Isle City*, I thought Iran's offshore oil platforms at Sassan and Sirri would be valid targets"; U.S. Counter-Memorial, Exhibit 44.

[41] U.S. Counter-Memorial, Exhibit 171.

violating laws of neutrality and to counter continuing Iraqi aggression, Iran exercised a right of visit and search[42]. It was therefore not surprising that an Iranian ship requested the *Diane* to identify itself.

10.35 The answers to the specific preliminary questions appear to be as follows:

(1) *United States nationality and/or economic interest*? The *Diane* was not a U.S.-flagged ship. Again, the United States has furnished no evidence as to its espousal of alleged U.S.-ownership interests in this vessel.

(2) and (3) *Engaged in inter-Party commerce or navigation*? The *Diane* was engaged in trade between the territory of Saudi Arabia and, in the first instance, that of Japan. There is no indication that any of its cargo was Iranian in origin. It was therefore engaged neither in inter-Party commerce nor in inter-Party navigation.

10.36 Again, in such circumstances there can have been no breach of Article X(1) of the Treaty of Amity. There is no record of any inquiries, and no previous claim has been made against Iran in respect of this vessel.

G. The *U.S.S. Samuel B. Roberts* (14 April 1988)

10.37 The seventh vessel referred to in the U.S. Counter-Claim, the *Samuel B. Roberts*, was a U.S. naval vessel which struck a mine on 14 April 1988 near Shah Allum Shoal. The *Samuel B. Roberts* was returning to Bahrain after having completed its mission of escorting U.S. flag merchant ships.

10.38 The answers to the preliminary questions in relation to the *Samuel B. Roberts* are straightforward. The *Samuel B. Roberts* was a United States warship, and it was not engaged in inter-Party commerce or in inter-Party navigation.

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[42] Iran's Observations and Submissions, Annex, paras. 27-28.

10.39 In any event, there is no sufficient evidence that the mining was attributable to Iran, for the reasons already given. Although the United States relied on the mining incident in seeking to justify the attack of April 1988, there is no evidence that the platforms had anything whatever to do with the mining incident. There was no breach of the Treaty of Amity, since (a) the mining was not attributable to Iran; (b) the *Samuel B. Roberts*, as a warship, is not entitled to the protection of Article X(1)[43]; (c) even if the mine was Iranian, there is no credible evidence of an attack by Iran; in the context of a defensive war, contact with a drifting mine does not necessarily imply unlawful conduct.

Section 5. The United States' Reservation of a Right to add Further Vessels

10.40 Finally, while the United States specifically refers in its counter-claim to damages incurred by seven vessels, it considers it "appropriate" to enlarge its counter-claim and request the Court to "consider all damage to the interests of the U.S. Government and its nationals, regardless of the legal form under which those interests arise"[44]. Additionally, the United States has reserved the right in a subsequent stage of the proceedings, during which the Court is to determine the form and amount of reparation, to "supplement information contained in this pleading regarding attacks on U.S. vessels, as well as to add further instances of Iranian attacks on U.S. vessels in the Gulf in 1987-88"[45].

10.41 Iran fails to see how the United States can at this stage further enlarge its counter-claim. A respondent must specify, no later than in its Counter-Memorial, the precise grounds on which it brings a counter-claim[46]. Thus while both parties have the right to supplement the information available to the Court in relation to claims already properly before it, neither has the right to bring any new claim beyond those which are contained, respectively, in the Application and in any Counter-Claim[47]. In fact the alleged events on which the United States bases its counter-claim occurred over ten years ago, and it is thus hardly conceivable

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43 *See*, para. 9.11(3), above.

44 U.S. Counter-Memorial, para. 6.25; emphasis in original.

45 *Ibid.*, para. 6.26.

46 *See*, Article 80 of the Court's Rules, which is mandatory in its langauge.

47 *See, Certain Phosphate Lands in Nauru, I.C.J. Reports 1992*, p. 240 (claim with respect to the assets of the British Phosphate Commissioners, cognate with original claim but not included in Application, held inadmissible).

that any new ground for a claim could be discovered now. As has been seen above, the United States has failed even to show that it has a valid claim with respect to the seven incidents on which it presently relies.

10.42 Accordingly, in Iran's view the claims and counter-claims presently before the Court are closed, and cannot be added to. Each party may of course adduce new evidence in relation to those claims and counterclaims, but they may not do more than that. Iran reserves the right to object to the admissibility of any new counter-claims that may be brought by the United States.

Section 6. Conclusion

10.43 Of the seven specified incidents of alleged Iranian interference with "United States shipping" in the Gulf during the years 1987-88:

- No fewer than six incidents involved vessels which were not (even arguably) engaged in commerce or navigation between the territories of the High Contracting Parties (*Bridgeton*; *Sea Isle City*; *Lucy*; *Esso Freeport*; *Diane*; *U.S.S. Samuel B Roberts*).

- Only one of the vessels was even arguably covered by Article X(1) of the Treaty of Amity[48]. And there is no evidence linking Iran with the incident involving the *Texaco Caribbean*; indeed the evidence is to the contrary[49].

This conclusion is hardly surprising. Iran had no history of expressing hostility toward, still less attacking, U.S. vessels. As its officials were aware "Iran [had] been careful to avoid confrontations with U.S. flag vessels"[50].

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[48] In addition, the *Samuel B. Roberts* as a vessel of war was expressly excluded from the scope of Art. X(1) of the Treaty by Art. X(6). It was, in any event, not engaged in navigation between the territories of the High Contracting Parties.

[49] The United States did not refer to or rely on the alleged attack on the *Texaco Caribbean* as a justification for either attack on the platforms. There is no evidence whatever that any of the platforms was in any way involved in the alleged attack on the *Texaco Caribbean*.

[50] Iran's Observations and Submissions, Annex, para. 33, and Iran's Memorial, Exhibit 54.

10.44 For the reasons given, to the extent that the United States' counter-claim is based on the seven attacks specified (and whether these are treated as individual incidents each potentially the subject of their own claim, or as evidence in support of the generic claim), there is no substance in them and no basis of claim with respect to those incidents exists under Article X, paragraph 1, of the 1955 Treaty.

CHAPTER 11. THE UNITED STATES "GENERIC CLAIM" UNDER ARTICLE X(1)

Section 1. Introduction

11.1 As noted above, the United States' counter-claim is primarily formulated in general terms, to the effect that "actions by Iran in the Persian Gulf during 1987-88... created extremely dangerous conditions for shipping, and thereby violated Article X of the 1955 Treaty". The consequence was, it is said, that there was "significant damage to U.S. commercial and military vessels"[1]. The particular allegations of such damage have been reviewed in the previous paragraph, and have been shown to be, collectively, unfounded, not attributable to Iran, not covered by Article X(1) of the Treaty, and/or comparatively minor. The question is what is left of the United States' counter-claim when all the particular instances or cases (so far adduced) which are used to substantiate it have been shown to be unfounded. In this regard it should be stressed, again, that the onus of proof is on the United States, and that onus cannot be evaded by couching a claim in broad and general terms.

Section 2. Iran as a State exercising the Right of Self-Defence

11.2 One general fact must be noted at the outset, although the United States is conspicuously silent about it. The war from 1980-1988 was begun by Iraq, without the slightest justification. It was, throughout its duration, a war of self-defence so far as Iran was concerned. During that war there were flagrant breaches of neutrality by other States in the region. Even when an eventual cease-fire was proclaimed, Iraq remained in occupation of important areas of Iranian territory, an occupation which did not cease (and then only fortuitously) until after the Iraqi invasion of Kuwait[2]. During that conflict, Iranian cities were repeatedly bombed by Iraq, chemical weapons were repeatedly used by Iraq, and Iran

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1 U.S. Counter-Memorial, para. 6.01.

2 It is also noteworthy in this context that one of the factors said to underlie the Iraqi invasion was Kuwait's late insistence that the vast funds made available to Iraq for the prosecution of its aggressive war against Iran had been provided on the basis of a loan rather than an outright grant. *See*, Exhibit 1, Vol. II, p. 55.

suffered huge casualties, civilian and military. Third States, owing a duty under general international law of strict neutrality towards a State defending itself against aggression, cannot expect the same levels of freedom and security as would be the case in peace. The circumstances of such a conflict must be relevant in assessing compliance with standards such as those contained in Article X(1).

Section 3. The Scope of Protection of the Treaty of Amity, Article X(1)

11.3 Turning to the actual content of Article X(1) of the Treaty of Amity, which requires "freedom of commerce" between the territories of the High Contracting Parties, several points need to be made.

- It is submitted that the Court's reference to conduct "having an adverse effect" upon protected commerce does not express the test for a breach of that provision. Rather, the possibility of an "adverse effect" merely shows that there is a case to answer. The legality of particular conduct can be evaluated by reference to the "adverse effect" standard[3], but must also take into account the fact that freedom is never absolute, and a variety of factors (*e.g.* domestic price or exchange control) could have an "adverse effect" on the protected commerce without raising issues of breach.

- Article X(1) should be interpreted as requiring, as a prerequisite, an "adverse effect" upon protected commerce, but something more is necessary before it can be held that there has been a breach of that provision. Such a breach may be constituted in a variety of ways. A direct military attack on a vessel engaged in protected commerce, or on some other instrumentality relevantly concerned with such commerce, is clearly an infringement of the freedom of that commerce. So also would be discrimination against such vessels or instrumentalities, or the imposition of clearly unreasonable and oppressive regulations or administrative requirements. On the other hand the undertaking in respect of freedom of commerce "between the territories of the High Contracting Parties" does not involve an unconditional guarantee. Those engaged in commerce and navigation with a State have to submit to the normal legal system of

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[3] *I.C.J. Reports 1996*, p. 820, para. 51.

that State and to any burdens or disadvantages that may occur as a result of outside circumstances - of which perhaps the most extreme is aggression.

11.4 To some extent these comments are of an abstract character having regard to the facts of the present case. The Parties agree that an unjustified military attack on a facility or vessel engaged in the process of commerce between the territories of the High Contracting Parties would violate the guarantee contained in Article X(1) - at least if the State responsible for the attack knew or ought to have known that the facility or vessel belonged to the other Party. Questions of justification would then be raised, and in particular the application of Article XX(1) of the Treaty.

Section 4. The Generic Allegations of the United States

11.5 Against this background it is useful to review the general allegations made by the United States in respect of the counter-claim. These may be summarized as follows. In each case, the United States' allegation is followed by brief comment, a more detailed refutation of the United States' allegations being found elsewhere in this Reply and Defence to Counter-Claim.

- *"actions by Iran in the Persian Gulf during 1987-88... created extremely dangerous conditions for shipping"*[4].

- Comment: The claim that it was Iran which "created" these conditions distorts the truth. Although the United States cannot deny that "Iraq initiated attacks on tankers using Iran's oil terminal at Kharg Island"[5], it thereafter systematically ignores that fact, and the wider fact that, as has been seen in Chapter 2 above, it was Iraq which throughout sustained the "tanker war". Authoritative U.S. sources confirm that the danger in the Persian Gulf came from Iraq. It is clear that the United States directly and indirectly supported Iraq in its attacks in the Persian Gulf. It is instructive to note, in this regard, that the three most destructive incidents involving third States during the entire war were the various United States attacks on the platforms (and on the Iranian

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4 U.S. Counter-Memorial, para. 6.01.
5 *Ibid.*, para. 6.03.

navy), the shooting down of the Iran Air flight by the United States, and the attack on the *U.S.S. Stark*. In the face of these facts, it is said that it was Iran who "created" the relevant conditions.

- "*Iran chose to retaliate against neutral commercial vessels going to and from the ports of the Gulf Cooperation Council member States, including Saudi Arabia and Kuwait*"[6].

- Comment: On the face of it, this allegation relates to vessels not engaged in trade between the territories of the High Contracting Parties, and it is therefore strictly irrelevant to any claim based on Article X(1) of the 1955 Treaty. Of course, each individual incident would have to be examined, as between, on the one hand, a State or States claiming to be injured as a result of the incident and, on the other hand, Iran. Such an examination would require the Court to look at such issues as (a) whether the ship in question declined to cooperate in the exercise by Iran of its legitimate belligerent rights; (b) whether it was in fact assisting in a breach of neutrality on the part of Kuwait or Saudi Arabia; (c) what precisely was involved in each incident; and (d) what damage was caused. This examination would take place against the background of the relevant applicable law, which would not be the 1955 Treaty. The United States has no standing to complain in the context of a State responsibility claim on behalf of third States, a point it seems expressly to have accepted at the time when it disavowed any right to protect ships which were not U.S.-flagged[7].

In any event, Iran does not accept that it "chose to retaliate against neutral commercial vessels going to and from the ports of the Gulf Cooperation Council member States". But the essential point for present purposes is that this allegation cannot be resolved at the general level at which it was made The individual incidents have to be examined,

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6 U.S. Counter-Memorial, para. 6.03.

7 *See*, paras. 9.16-9.17, above.

their relation to the commerce and navigation protected by Article X(1) examined, and relevant conclusions drawn as between States with standing to raise those issues.

- *Iran engaged in indiscriminate mine-laying in the Persian Gulf, as witness the Iran Ajr incident*[8].

Comment: Iran denies that it engaged in indiscriminate mine-laying. The *Iran Ajr* incident has been dealt with above, and comprehensively refuted[9].

- "*Iran's primary objective was simply to engage in a form of maritime terrorism, presumably in an effort to coerce other States to take sides against Iraq*"[10].

Comment: The notion that Iran was seeking to coerce other States "to take sides against Iraq" is a curious one. Iran had a right to expect, *a fortiori* in a war of self-defence, that the Persian Gulf States, as well as States outside the region, should act at least in accordance with strict measures of neutrality. Whatever the legal position may have been before 1945, in the period of the Charter, third States are not at liberty actively to assist a State engaged in a war of aggression. This obligation is not dependent on Security Council resolutions but exists under general international law. It is independent of particular definitions of what constitutes contraband; an aggressor is just as much assisted by money as it is by munitions. The fact that the United States now equates "tak[ing] sides against Iraq" with neutral behaviour in the war only illustrates how far its own behaviour was from neutrality.

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8 *Ibid.*, para. 6.04.
9 *See*, paras. 5.20-5.21, above.
10 U.S. Counter-Memorial, para. 6.05.

- *Iran's conduct "severely disrupted maritime commerce in the [Persian] Gulf", including United States commerce with Iran*[11].

  Comment: Article X(1) does not protect "maritime commerce in the [Persian] Gulf", but "commerce between the territories of the High Contracting Parties". In fact on the evidence of the United States' own figures[12], commerce between the two States increased significantly, a fact the United States makes no attempt to explain.

- *Despite warnings, "Iran's attacks continued, and ultimately resulted in severe damage to several vessels of U.S. flag or owned by U.S. persons"*[13].

  Comment: This statement does not even allege attacks on commerce between the territories of the High Contracting Parties. The cases of the seven vessels specifically mentioned have already been dealt with in Chapter 10.

- *"Iran eviscerated key rights of U.S. vessels under Article X of the 1955 Treaty to come and pass through Iranian ports, places and waters and to carry products into and through the [Persian] Gulf"*[14].

  Comment: The deliberate imprecision of this pleading is remarkable. The vessels specifically mentioned by the United States were at no stage prevented from access to "Iranian ports, places and waters". None of them were bound for those ports, places or waters. There was substantial commerce between the two States during the relevant period (as the United States' own figures show) but none of it had anything to do with six of the seven vessels it mentions. And of course Article X(1) of the Treaty of Amity - the only relevant provision for present purposes - does not guarantee freedom of commerce and navigation "into and through the [Persian] Gulf". The United States'

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11 *Ibid.*, para. 6.01.
12 *Ibid.*, paras. 6.06-6.07.
13 *Ibid.*, para. 6.08.
14 *Ibid.*, para. 6.09.

reaction to a claim by Iran to act as guarantor of freedom of commerce and navigation in the Persian Gulf region as a whole can be imagined!

Section 5. The United States' Claim for the Costs of its Intervention in the Persian Gulf

11.6 Finally, a word should be said about the extraordinary claim by the United States that Iran is responsible for "the significant costs incurred by the United States in deploying additional forces to the [Persian] Gulf to protect maritime commerce by escorting vessels, clearing minefields, and other activities"[15]. As formulated, this belongs strictly not to the present phase of the case but to the subsequent stage at which any damages for which either party may be held responsible are to be quantified. Nonetheless, a number of points should be made at this stage, without prejudice to the more detailed argument, if necessary, at a later stage:

- The U.S. forces were not requested to act in the Persian Gulf by Iran, and were certainly not engaged in the protection of commerce and navigation with Iran.

- The general presence of U.S. forces in the Persian Gulf was a matter of its own strategic interests and allegiances. As such these were neither lawful nor unlawful; they are simply facts[16]. But they are undeniable facts, and they show how extraordinary it is to claim that the United States' presence in the Persian Gulf arose from, or is to be attributed to, alleged breaches by Iran of Article X(1) of a bilateral Treaty of Amity.

- The effect of the presence of those forces in the Persian Gulf was to provide a shield for non-neutral behaviour by Kuwait, and thus to support the Iraqi war effort. To claim that the cost of these measures is imputable to Iran is unsupportable.

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[15] *Ibid.*, para. 6.25.

[16] Of course the use of those forces in particular operations is another matter: *see*, in general, Chapter 2, above.

Section 6. Conclusion

11.7 The compilation of individual cases establishes no pattern at all, let alone a generic case of State responsibility, if none of the individual cases can be established. Claims of State responsibility need to be particularised, and proved as such. Deficiencies in such proof, or limitations in the applicable law, are not to be remedied by the multiplication of general phrases, or the interlarding of adjectives. As soon as it descends to the particular, the United States' counter-claim fails, on technical grounds (the vessels were not covered by Article X(1) of the Treaty of Amity; they were not engaged in commerce between the territories of the High Contracting Parties; the United States has no standing to complain in relation to the particular vessels), on substantial grounds (there is no evidence of attribution to Iran, there is no evidence of breach); most often on both. A case that fails in all relevant particulars cannot survive as a matter of "general impression". For these reasons, Iran submits that the United States' generic counter-claim, like the specific claims or assertions on which it is based, fails and should be dismissed.

CHAPTER 12. RESERVATION AS TO FURTHER IRANIAN RIGHTS AND CLAIMS

12.1 Finally, in relation to the United States' counter-claim, certain formal reservations are in order.

Section 1. Reservation: "Essential Security Interests"

12.2 The first relates to the question whether, in respect of any particular incident, or indeed the general course of conduct alleged by the United States, Iran has available to it a defence or justification pursuant to Article XX(1)(d) of the 1955 Treaty of Amity. Iran has already set out its position with respect to Article XX(1)(d)[1], and what is said there applies equally in terms of a defence to the counter-claim. Iran does not believe that Article XX(1)(d) can be used to exclude from the Treaty of Amity, or to justify, conduct involving a use of force which is otherwise in breach of the Treaty, and clearly contrary to the relevant, peremptory rules. In relation to the general situation facing it in the Persian Gulf, Iran was entitled to take all appropriate measures in self-defence. In that context some impact on the freedom of trade and commerce was inevitable and cannot be held to breach the Treaty. Beyond that the assessment of necessity has to take into account the relevant legal standards.

12.3 On the other hand, if the Court should hold, contrary to this primary submission, that the United States was "entitled" by virtue of Article XX(1)(d) to take action, irrespective of the legality of the action under general international law, on the basis that such action was deemed necessary to preserve the essential security interests of the State taking that action, Iran claims exactly the same freedom for itself. That essential security interests were involved on Iran's part is absolutely clear; Iran was defending itself against aggression, in a war which was costing countless casualties and extraordinary damage to its territory, infrastructure and people. Iran's security interests were much more nearly engaged than those of the United States.

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[1] *See*, Chap. 7, Sect. 3, above.

Section 2. Reservation: The Issue of "Clean Hands"

12.4 Similarly, Iran has already set out its views on the United States' invocation of the "clean hands" doctrine[2]. Iran does not believe that that doctrine can be used to prevent an examination of the merits of Iran's claim or, to the extent that it may fall within Article X(1) of the 1955 Treaty of Amity, of the United States' counter-claim. Again, however, should the Court hold that the clean hands doctrine does have an autonomous exclusionary operation in favour of the United States, Iran reserves the right to invoke the very same doctrine against the United States. The reason is, *inter alia*, that the United States' indiscriminate use of force and its express and tacit support for the aggressor State in the conflict collectively were such as to disentitle it to any relief.

Section 3. Reservation of Iranian Rights with respect to Further Categories of Damage to Iran

12.5 Finally, to the extent that the United States is held entitled to introduce what are effectively new claims to relief in the present proceedings, Iran again reserves the right to do likewise. Iran has limited the scope of this claim to damage to the commercial property of a separate State commercial enterprise, deliberately targeted by the United States with a view to maximising the damage to Iran. The Court has further limited that limited claim in its Judgment on the Preliminary Objection. If the United States seeks now to widen the scope of the case to include damage to naval vessels expressly excluded from the scope of Article X(1) of the Treaty of Amity, and generally the whole range of actions associated with this phase of the Iraq-Iran War, Iran must reserve the same rights to do so to the extent procedurally possible (and if necessary in separate proceedings).

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[2] *See*, Chap. 8, above.

PART V
SUBMISSIONS

With regard to Iran's claims, and in the light of the facts and arguments set out above, and subject to the reservations set out in Chapter 12 above, the Government of the Islamic Republic of Iran requests the Court to adjudge and declare:

1. That in attacking and destroying on 19 October 1987 and 18 April 1988 the oil platforms referred to in Iran's Application, the United States breached its obligations to Iran under Article X(1) of the Treaty of Amity, and that the United States bears responsibility for the attacks; and

2. That the United States is accordingly under an obligation to make full reparation to Iran for the violation of its international legal obligations and the injury thus caused in a form and amount to be determined by the Court at a subsequent stage of the proceedings, the right being reserved to Iran to introduce and present to the Court in due course a precise evaluation of the reparation owed by the United States; and

3. Any other remedy the Court may deem appropriate.

With regard to the United States' counter-claim, and in the light of the facts and arguments set out above, and subject to the reservations set out in Chapter 12 above, and, in view of the present uncertain nature of the United States' counter-claim, further subject to the reservation of Iran's right to amend these submissions, Iran requests the Court to adjudge and declare:

1. That the United States' counter-claim does not fall within the scope of Article X(1) of the Treaty of Amity as interpreted by the Court in these proceedings, and accordingly that the counter-claim should be dismissed.

2. That the United States' counter-claim is, in any event, inadmissible:

(a) generally, in that the United States has not satisfied the requirements of Article XXI of the Treaty of Amity with respect to the satisfactory diplomatic adjustment of the claim;

(b) in any event, to the extent that it relates to vessels which were not of United States nationality or whose United States flag was not opposable to Iran at the time.

3. That Iran did not, in any event, breach its obligations to the United States under Article X(1) of the Treaty of Amity as interpreted by the Court in these proceedings.

4. That accordingly the United States' counter-claim be dismissed.

Date: 10 March 1999

[*Signed*]
M. Zahedin-Labbaf
Agent of the Government of
the Islamic Republic of Iran

LIST OF EXHIBITS, STATEMENTS, AND EXPERT REPORTS

VOLUME II

A. Expert Report

"The United States Position on the Iran-Iraq War"
Report prepared by Professor Lawrence Freedman

B. Documentary Exhibits

1. Anthony Parsons, *From Cold War to Hot Peace - UN Interventions 1947-1994*, "The Iran-Iraq War: 1980-88", London, 1995, pp. 44 and 55..

2. Eric Hooglund, "Strategic and Political Objectives in the Gulf War - Iran's View", in *The Persian Gulf War - Lessons for Strategy, Law, and Diplomacy*, edited by Christopher C. Joyner, New York, Connecticut, London, pp. 39-58.

3. Elaine Sciolino, *The Outlaw State - Saddam Hussein's Quest for Power and the Gulf Crisis*, New York, 1991, p. 166.

4. Dilip Hiro, *The Longest War - The Iran-Iraq Military Conflict*, New York, pp. 71, 76-77, 119-120 and 158-160.

5. The Right Honourable Sir Richard Scott, "Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions", Vol. II, pp. 823-827.

6. Javier Pérez de Cuéllar, *A Pilgrimage for Peace*, London, 1997, pp. 131 and 178.

7. "At War, Iraq Courted US Into Economic Embrace", *The Washington Post*, 16 September 1990.

8. Bruce W. Jentleson, *With Friends Like These - Reagan, Bush, and Saddam 1982-1990*, New York/London, 1994, pp. 31-36, 42-67.

9. "Officers in exile plot Saddam's fall", *The Independent*, 13 March 1998, and translation of excerpts from interviews in Al-Hayat, 5 September 1997 and 6 September 1997, together with original Arabic text.

10. Declaration of Howard Teicher before the United States District Court, Southern District of Florida, Case No.: 93-241-CR-Highsmith.

11. United States: Secretary of Defense Report (Weinberger Report) to the Congress on Security Arrangements in the Persian Gulf, 15 June 1987, reprinted at *26 I.L.M 1433 (1987)*, p. 1449.

12. A. Reza Sheikholeslami, "Saudi Arabia and the United States: Partnership in the Persian Gulf", in *Iran-Iraq War - The Politics of Aggression*, edited by Farhang Rajaee, University Press of Florida, pp. 103-109.

13. "Gehirn einer Ameise" ("Brain of an Ant"), *Der Spiegel*, October 1994, with English translation of extract; "Kuwait apologizes to Iran for backing Iraq during eight-year-war", *Tehran Times*, 26 October 1994; "Un haut responsable koweitien condamne 'l'agression' de l'Irak contre l'Iran", *AFP*, 14 February 1992; "Cheikh Sabah se félicite de la 'position de principe' de l'Iran", *AFP*, 23 August 1990; "Cheikh Sabah regrette les anciennes prises de positions du Koweit contre l'Iran, selon Radio-Téhéran", *AFP*, 23 August 1990.

14. David D. Caron, "Choice and Duty in Foreign Affairs - The Reflagging of Kuwaiti Tankers", in *The Persian Gulf War - Lessons for Strategy, Law and Diplomacy*, edited by Christopher C. Joyner, New York, Connecticut, London, pp. 161-167.

15. *Middle East Economic Survey*, Vol. XXVII, No. 25, 2 April 1984, pp. A1-A2 and *Middle East Economic Survey*, Vol. XXVIII, No. 17, 4 February 1985, p. A5.

16. "Iran Trade Sanctions", White House Fact Sheet, 26 October 1987.

17. Caspar Weinberger, *Fighting for Peace - Seven Critical Years at the Pentagon*, London, 1990, pp. 274-275.

18. "U.S. Permits Import of Iranian Oil to Bolster Security Account", *Mealey's Litigation Reports, Iranian Claims*, 31 December 1990.

19. "Iran steps up cover of Hormuz with Chinese-supplied Styx", *Jane's Defence Weekly*, 28 March 1987, p. 531.

20. "Iran's Silkworm threat in the Gulf", *Jane's Defence Weekly*, 6 June 1987, p. 1113.

21. "Running the gauntlet in the Gulf", *Jane's Defence Weekly*, 1 August 1987, p. 182.

22. "Cruise: A missile for the '90s", *Jane's Defence Weekly*, 7 May 1994, pp. 19-20.

23. Howard Teicher and Gayle Radley Teicher, *Twin Pillars to Desert Storm*, New York, 1993, p. 392.

24. Exchanges of correspondence between the Agent of the Islamic Republic of Iran and the Agent of the United States of America, dated 26 March 1997, 3 April 1997, 22 April 1997, 12 June 1997, 16 June 1997 and 20 June 1997.

VOLUME VI

CERTIFICATION

I, the undersigned, M. Zahedin-Labbaf, Agent of the Islamic Republic of Iran, hereby certify that the copy of each document attached in Volumes II to VI of the Reply and Defence to Counter-Claim submitted by the Islamic Republic of Iran is an accurate copy; and that all translations prepared by the Islamic Republic of Iran are accurate translations.

[*Signed*]
M. Zahedin-Labbaf
Agent of the Islamic
Republic of Iran