

THE OIL PLATFORMS CASE: AN ERROR IN JUDGMENT?

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ABSTRACT

This article examines the Merits Judgment of the International Court of Justice in the Case Concerning Oil Platforms which was delivered on 6 November 2003. It first sets out the background to the case, reviewing how the dispute between the United States of America and Iran originated and setting that dispute in context. The Court's approach to the decision is outlined, both in terms of the methodology employed and the substantive conclusions reached. The decision of the Court in the case is then critiqued. The Court's conclusions as to the scope of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the parties upon which Iran's application was based are questioned, as is the methodological order by which the Court examined the issues before it. It is contended that the ICJ may not have had the jurisdictional grounds to examine the dispute in the way that it did, namely with reference to the law on the use of force and more specifically the doctrine of self-defence. Additionally, given that the Court did in fact reason the case in this way, the contribution that the decision has made to the ICJ's existing jurisprudence on the law of the use of force is examined. Thus the case is placed within the context of the doctrine of self-defence more generally. Ultimately, it is concluded that the Court should not have dealt with the case, at least not in the manner that it did, and that having done so, it dealt with the substantive law of self-defence in an inadequate way.

1 INTRODUCTION

Following the *Nicaragua* case¹ the number of contentious applications to the International Court of Justice (ICJ) regarding incidents which in some measure relate to the law on the use of force have increased greatly, for good or ill.² Yet, despite this notable increase, the first contentious case to result in a judgment on the Merits since 1986 is the *Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States of America)³ decision of November 2003. Thus the case is of obvious importance in relation to the development of the substantive law on the use of force, and particularly that of self-defence. However, the case is also significant in that it raises issues about the Court itself, both in terms of its reasoning and its ability to remain within its conferred jurisdiction.

This article aims first to outline the background to the dispute between Iran and the United States which formed the basis of the *Oil Platforms* case, and then to summarise and critique the Court's decision. Beyond this, it will be argued that the Court may not have had the jurisdictional grounds to examine principles of the law on the use of force in reaching its conclusion. Finally, given that the Court *did* in fact

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¹ *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) Merits (1986) ICJ Reports 14.

² There have been 25 such applications to the ICJ since *Nicaragua*. See C. Gray, 'The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force Since *Nicaragua*,' (2003) 14 *European Journal of International Law* 867, 868.

³ International Court of Justice Press Communiqué 98/10, 6 November 2003. All Judgments, Orders, Written and Oral Pleadings cited herein relating to the *Oil Platforms* case can be found at the ICJ's website, <http://www.icj-cij.org>.

reason the case in this way, the contribution that the decision has made to the ICJ's existing jurisprudence on the law of the use of force is necessarily examined.

2 BACKGROUND TO THE DISPUTE AND THE SUBMISSIONS OF THE PARTIES

The dispute in the case arose out of military action taken by the United States against three offshore oil production complexes owned by the Iranian National Oil Company, which were situated in the Persian Gulf. The destruction of these complexes was not contested by the parties, nor was the fact that this was attributable to warships of the United States Navy. These incidents occurred during the Iran/Iraq conflict of 1980-88, in the course of the so-called 'Tanker War', where that conflict escalated from territorial operations to military action in the Persian Gulf.⁴

The first set of attacks against Iranian oil platforms occurred on 19 October 1987. Four destroyers of the United States Navy opened fire on the Iranian Reshadat complex, R-7 platform, and subsequently detonated explosives on the remainder of that platform, completely destroying it. The warships then proceeded to the R-4 platform of the same complex, and similarly attacked this installation. It was also severely damaged. These attacks caused damage to a second complex, the Resalat, which was connected by a submarine pipeline to the Reshadat. Neither complex was producing oil at the time of the attacks, due to previous damage done to these installations by Iraqi forces.⁵

Naval forces of the United States took military action against Iranian oil installations again on 18 April 1988. This second set of attacks led to the almost total destruction of two further installations, the Salman and the Nasr. In consequence, oil production from these complexes was interrupted for a number of years.⁶

These incidents led to an application by Iran instituting proceeding against the United States before the ICJ, on 2 November 1992, alleging that they amounted to a violation of provisions of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran which was signed in Tehran on 15 August 1955 and entered into force on 16 June 1957.⁷ It was claimed that the attacks breached Articles I and X, paragraph 1 of the Treaty, and international law.⁸ Article I provides for 'firm and enduring peace and sincere friendship' between the parties, whilst Article X, paragraph 1 provides that '[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.' Presumably Iran's invocation of 'international law' was a reference to the law on the use of force,

⁴ For background to the Iran/Iraq conflict, see C. Gray, 'The British Position in Regard to the Gulf Conflict' (1988) 37 *International and Comparative Law Quarterly* 420; R. Leckow, 'The Iran-Iraq Conflict in the Gulf: The Law of War Zones' (1988) 37 *International and Comparative Law Quarterly* 629; H.H.G. Post, 'Boarder Conflicts Between Iran and Iraq: Review and Legal Reflections,' in I.F. Dekker and H.H.G. Post (eds.), *The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective* (1992), 7-38. For useful factual reports from the relevant period, see H. Anderson, 'Iran's Devastating Week' *Newsweek*, 2 May 1988, 11, and W.R. Doerner, 'Tangling with Tehran' *Time*, 2 May 1988, 22-23.

⁵ Between October 1986 and August 1987, see *Oil Platforms*, Merits, para. 46.

⁶ See *Oil Platforms*, Merits, paras. 65 and 66.

⁷ 284 UNTS 93.

⁸ Iranian Application Instituting Proceedings, 2 November 1992.

although this was not explicit in its application.⁹ It is notable that in its oral submissions before the Court, this reference to international law was dropped from Iran's claim.¹⁰ During the course of written proceedings relating to jurisdiction, Iran additionally stated that the actions of the United States breached Article IV, paragraph 1 of the Treaty.¹¹ This Article provides for 'fair and equitable treatment' to be accorded by each party to the nationals and companies of the other.

The United States contended that its actions did not breach the Treaty. However, in the alternative it argued that if the incidents *were* interpreted as a *prima facie* breach, they constituted measures necessary to protect that State's essential security interests and therefore were justified under Article XX, paragraph 1(d) of the 1955 Treaty. In addition, the United States instituted a counter-claim based on the same Treaty, alleging that the military actions of Iran in the Persian Gulf amounted to an analogous breach of Iran's obligations towards the United States. It was the position of the United States that Iran's actions during the 'Tanker War' had caused 'significant' damage to United States commercial and military vessels, and generally had created 'extremely dangerous conditions for shipping' in the Persian Gulf.¹² On this basis it was claimed that Iran was in breach of provisions of the Treaty of 1955.

The Court found, in its Judgment delivered on 12 December 1996 on Preliminary Objections raised by the United States in relation to jurisdiction,¹³ that under Article XXI, paragraph 2 of the 1955 Treaty, it could entertain the dispute. This Article, which was the sole basis of jurisdiction for the ICJ in the case, provides that:

Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

However, the Court found at Preliminary Objections stage that Article I did not offer norms applicable to the dispute.¹⁴ A similar finding was also made regarding Article IV, paragraph 1.¹⁵ This placed these Articles outside of the Court's jurisdiction, leaving Article X, paragraph 1 as the sole substantive basis of Iran's claim.¹⁶ By way of an Order of 10 March 1998 the Court declared the counter-claim of the United States admissible on corresponding grounds.¹⁷ It was made clear that the 'other provisions of the Treaty [were] only relevant in so far as they may affect the interpretation or application of that text.'¹⁸

⁹ *Ibid.* In its application, Iran referred to the actions of the United States as being a violation of 'the applicable principles and rules of international law.'

¹⁰ CR 2003/16, 36.

¹¹ See the Memorial of the Government Submitted by the Islamic Republic of Iran, 8 June 1993, Part III, paras. 3.58-3.60.

¹² Counter-Memorial and Counter-Claim submitted by the United States of America, 23 June 1997, Part VI, particularly paras. 6.01-6.02.

¹³ *Oil Platforms*, Preliminary Objection, (1996) ICJ Reports 803.

¹⁴ *Ibid.*, see *inter alia*, para. 31.

¹⁵ *Ibid.*, see para. 36.

¹⁶ It will be recalled that this Article provides that: 'Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.'

¹⁷ *Oil Platforms*, Counter-Claim Order, 10 March 1998.

¹⁸ *Oil Platforms*, Merits, para. 31.

The question before the ICJ on the Merits was therefore whether there had been a breach of Article X, paragraph 1 of the 1955 Treaty, by either the United States, Iran, or by both parties.

3 THE SUBSTANTIVE CASE BEFORE THE COURT

Oral pleadings on the Merits of the *Oil Platforms* case were heard between 17 February and 7 March 2003. The Court ultimately delivered its Judgment on 6 November 2003. On first examination, it is apparent that the ICJ reasoned its decision in three distinct stages. In considering the Applicant's claim that the attacks on the oil production complexes amounted to a violation of Article X, paragraph 1 of the 1955 Treaty, the Court first dealt with the potential justification offered by Article XX, paragraph 1(d). It examined whether this Article could constitute a sufficient defence for the attacks on the oil installations, so that the actions of the United States did not amount to a breach of the Treaty. Second the Court turned to the interpretation of Article X, paragraph 1 in relation to Iran's claim. Here the Court assessed whether the attacks prejudiced freedom of commerce between the two State territories. Finally, the Court ruled upon the United States counter-claim, examining whether the military actions of Iran during the 'Tanker War' could be seen to violate that same Article.

In dealing with the potential defence to a breach of the Treaty under Article XX, paragraph 1(d) first, the Court presupposed that the United States had *prima facie* violated Article X, paragraph 1, by prejudicing the freedom of commerce or navigation between the territories of the parties. This was perhaps understandable given that neither party contested the fact that the United States had used force against the Iranian platforms. However, as we shall see, the ultimate conclusion of the Court was that the United States did not in fact breach its obligations under this provision. By employing this structure, the Court examined the legitimacy of a defence to the breach of a provision which was not ultimately found to be breached. Therefore, while the analysis in this section stays true to the Court's format, it should be noted that it is questionable whether the order in which the Court reasoned the case was desirable.¹⁹

3.1 Were the Oil Platform Attacks Justified as Measures Necessary to Protect the Essential Security Interests of the United States?

Article XX, paragraph 1(d) of the 1955 Treaty provides that nothing in that Treaty precludes the application by either State of measures '...necessary to protect its essential security interests.' Clearly, if the actions of the United States amounted to such measures, these would not constitute a breach of Article X, paragraph 1. The Court reasoned that there were 'particular considerations militating in favour' of an examination of this justificatory clause before turning to the question of whether the United States were in *prima facie* breach of Article X, paragraph 1.²⁰

¹⁹ See Section 5.1, below.

²⁰ *Oil Platforms*, Merits, para. 37.

In interpreting the scope of Article XX, paragraph 1(d), the Court turned to the general international law on the use of force.²¹ This was because it reasoned that Article XX, paragraph 1 (d) was not intended to act as a justification for unlawful uses of force,²² and that therefore '[i]n the present case, the question of whether measures taken were 'necessary' overlaps with the question of their validity as acts of self-defence.'²³ It concluded that if the uncontested uses of force by the United States could be justified as acts of self-defence, then they equally would amount to measures necessary to ensure their essential security interests. These concepts were thus treated, in essence, as synonymous by the Court.

Given this conclusion, the Court began to outline the principles which determine whether any action can be justified as one taken in self-defence, and then started to apply these principles to the facts of the dispute before it. Therefore, for the attacks on the oil platforms to constitute actions in self-defence, it had to be established that the United States was the victim of an 'armed attack' as provided for in Article 51 of the United Nations (UN) Charter and customary international law. Further, this armed attack must have been attributable to Iran:

...in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as 'armed attacks' within the meaning of that expression in Article 51 of the United Nations Charter, and as understood by customary law on the use of force.²⁴

The ICJ relied on the *Nicaragua* case in defining an armed attack as 'the most grave form of the use of force.'²⁵ The Court also re-affirmed the requirement that an action taken in response to an armed attack must be both necessary and proportional for it to qualify as an action in self-defence. Jurisprudence from *Nicaragua* was similarly cited to support the need for these criteria.²⁶

Following the first set of attacks of 19 October 1987, the United States reported to the UN Security Council that its actions were justified as self-defence under Article 51 of the UN Charter.²⁷ It claimed that a United States flag vessel, the *Sea Isle City*, had been struck by a 'Silkworm' missile on 16 October 1987,²⁸ and that this attack

²¹ The Court first makes mention of the law on the use of force at para. 37, where it states that: 'It is clear that the original dispute between the parties related to the legality of the actions of the United States, in the light of international law on the use of force.'

²² *Ibid*, para. 41. The Court supported this view by stressing the nature of Article I of the 1955 Treaty, providing for 'enduring peace and sincere friendship' between the parties. This Article was interpreted in *Oil Platforms*, Preliminary Objection, para. 31, as being capable of 'shedding light' on the other provisions of the Treaty, and thus it appears incompatible with the use of force by one party against the other.

²³ *Oil Platforms*, Merits, para. 43 (emphasis added).

²⁴ *Ibid*, paragraph 51.

²⁵ *Ibid*. See also *Nicaragua*, Merits, para. 191.

²⁶ These criteria are not present in Article 51, and are derived in customary law, largely from the legendary *Caroline* incident of 1837, see R. Jennings, 'The Caroline and McLeod Cases,' (1938) 32 *American Journal of International Law* 82. These requirements were re-iterated in *Nicaragua*, Merits, see, *inter alia*, para. 194. This was cited in *Oil Platforms*, Merits, para. 74.

²⁷ Article 51 of the UN Charter provides that: 'Measures taken by members in exercise of this right of self-defence shall be immediately reported to the Security Council...'

²⁸ 'Silkworm' missiles are land launched HY-2 cruise missiles, in this case of Chinese manufacture (see *Oil Platforms*, Merits, para. 53).

was attributable to Iran. It stressed that this was an armed attack as required by Article 51 and further contended that the *Sea Isle City* incident was the latest in a series of armed attacks against United States vessels instigated by Iran.²⁹ In front of the ICJ, the United States maintained its position that the attacks were a legitimate response under the law of self-defence. It similarly argued in written pleadings that its actions were legitimate responses in self-defence to one or more armed attack by Iran.³⁰ However, at final submissions stage, the United States made it clear that this was not a question which it felt the Court had jurisdiction to examine.³¹ Its ultimate submission before the Court was therefore that its actions were justified under Article XX, paragraph 1(d) of the 1955 Treaty.

The United States claimed that the missile which struck the *Sea Isle City* was launched from the Fao peninsula in Iraqi territory, which was partially occupied at the time by Iranian forces. It produced satellite photographs of alleged missile sites in the area, but was unable to show these were certainly sites of that nature or that they were controlled by Iran. Similarly, the United States was unable to recover fragments of the missile which struck the vessel. Much weight was placed on the testimony of a Kuwaiti officer who claimed to have witnessed the launch of a missile from Iranian held territory. The officer asserted that the missile had followed a path towards the area of the Persian Gulf in which the *Sea Isle City* was located.³²

The Court therefore approached the question of whether the attack on the *Sea Isle City* could be regarded as an ‘armed attack’ within the meaning of Article 51 of the UN Charter, which was attributable to Iran. It was determined by the Court that the satellite images produced were not ‘sufficiently clear’ to establish that the site was held by Iran at the time of the incident, or that the missile which struck the *Sea Isle City* was launched from this position. It further stated that the testimony of the Kuwaiti officer was given ten years after the event, and did not confirm the exact launch site of the missile, or the fact that it struck the US vessel.³³ Thus, it was held that while the evidence was ‘indicative’ of Iranian responsibility, it was ‘not sufficient to support the contentions of the United States.’³⁴ On the basis of the evidence, in the Court’s view, the occurrence of an armed attack against the United States *by Iran* on the 16 October 1987 had not been established.

In relation to the second set of attacks, the United States contended, again before both the Security Council and then before the Court, that these were legitimate responses (both in self-defence and under Article XX, paragraph 1(d)) to the mining of the USS *Samuel B. Roberts*, a United States warship, which occurred on 14 April 1988, being the latest in a series of Iranian attacks against US vessels. The main evidence supporting the view that this mine was laid by Iran was that mines were found in the same area bearing Iranian serial numbers. However, due to the fact that both parties in the Iran/Iraq conflict were laying mines at this time, this evidence was

²⁹ In its report to the Security Council, the United States contended that the missile attack on the *Sea Isle City* was ‘the latest in a series of such missile attacks against United States flag and other non-belligerent vessels in Kuwaiti waters in pursuit of peaceful commerce. These actions are, moreover, only the latest in a series of unlawful armed attacks by Iranian forces against the United States...’, UN doc. S/19219, 40. For details of the additional incidents which the United States attributed to Iran before the Court, see United States Counter-Memorial and Counter-Claim, Part VI, para. 6.08.

³⁰ United States Counter-Memorial and Counter-Claim, See Part IV.

³¹ See, *inter alia*, CR 2003/11, 11-15.

³² *Oil Platforms*, Merits, para. 53.

³³ *Ibid*, para. 58.

³⁴ *Ibid*, para. 61.

viewed by the ICJ as ‘highly suggestive, but not conclusive.’³⁵ The Court did accept that in principle the mining of a single vessel may give rise to the right of individual self-defence under Article 51. However, the inadequacy of the evidence attributing the attack on the USS *Samuel B. Roberts* to Iran meant, in the view of the ICJ, the United States had not discharged its burden of proof that it had been the victim of an armed attack under international law.³⁶

Furthermore, the Court noted that the second set of attacks against Iranian platforms formed part of a wider United States operation codenamed ‘Operation Praying Mantis’.³⁷ This operation involved not only the destruction of the Nasr and Salman complexes, but also included attacks on Iranian naval vessels and aircraft. As Iran’s application only related to the destruction of the oil platforms, the question of the legality of the wider aspects of the operation was not examined by the Court. However, the Court stated that it could not ‘close its eyes to the scale of the whole operation.’ It was indicated in the Judgment that this wide scale operation could not be considered a *proportionate* response to the mining of the *Samuel B. Roberts* under customary law. Thus, even if the Court had found that the mining of that vessel qualified as an armed attack, the response of the United States would still have amounted to an illegal action.³⁸

The fact that the attacks against the oil platforms constituted a use of force was uncontested by the parties. As was stated in the Judgment, ‘[t]he United States has never denied that its actions against the Iranian platforms amounted to a use of armed force.’³⁹ It follows, logically, that by holding that the use of armed force could not be justified as measures taken in self-defence the Court implicitly found these actions to be in breach of Article 2(4) of the UN Charter and the customary law prohibition of the use of force. As Judge Simma points out in his Separate Opinion, this aspect of the Judgment ‘can be read – indeed must be read – as stating by way of implication that the United States actions...were therefore in breach of Article 2(4) of the United Nations Charter.’⁴⁰ However, the Court declined to state this conclusion explicitly in its decision.

Despite not directly finding it to be in breach of Article 2(4), in concluding that the United States had not shown itself to be the victim of an armed attack, the Court determined that the oil platform attacks could not be justified under Article XX, paragraph 1(d) of the 1955 Treaty of Amity.

3.2 Did the Oil Platform Attacks Interfere with Iran’s Freedom of Commerce?

After concluding that the United States could not rely on Article XX, paragraph 1 (d) of the 1955 Treaty to justify its actions, the Court turned its attention to the question of whether those actions in fact amounted to a breach of Article X, paragraph 1 of the Treaty at all. It will be recalled that this Article provides that: ‘Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.’

³⁵ *Ibid*, para. 71.

³⁶ *Ibid*, para. 72.

³⁷ *Ibid*, para. 68.

³⁸ *Ibid*, para. 77.

³⁹ *Ibid*, para. 45.

⁴⁰ *Ibid*, Separate Opinion of Judge Simma, para. 7.

The Court determined whether the attacks on the Iranian oil installations amounted to a breach of this provision by examining the phrase ‘freedom of commerce’, and interpreting it in the context of the 1955 Treaty. It first noted that Article X, paragraph 1 applied as between the territories of the parties, and thus only ‘oil exports from Iran to the United States [were] relevant to the case, not such exports in general.’⁴¹ The Court concluded following its own Judgment on the preliminary issues of the case⁴² that the relevant provision protected not merely ‘commerce’, but ‘freedom of commerce’⁴³ and that *prima facie* the destruction of oil platforms could amount to a restriction of that freedom.⁴⁴

However, while it was accepted that oil exports from Iran to the United States continued beyond the attacks of 19 October 1987, none of the oil traded between the two States originated from either the Reshadat or the Resalat complexes. Those installations were not in operation at this time due to previous Iraqi attacks. It was uncontested that the attacks on the first set of platforms delayed the resumption of production for those installations. Yet, due to the fact that there was no ongoing actual trade in oil between the parties *vis-à-vis* the platforms in question, the Court determined that the actions of the United States had not violated Iran’s freedom of commerce in this respect. Essentially, the ICJ interpreted the protection offered by Article X, paragraph 1 as encompassing only actual commerce and not the potential for future commerce.⁴⁵

On 29 October 1987, the President of the United States, Ronald Reagan, issued an Executive Order prohibiting the import of Iranian goods and services into the United States.⁴⁶ Therefore, the United States contended that the second set of attacks, against the Salman and Nasr complexes did not violate Article X, paragraph 1, because the trade embargo meant there were no commercial transactions between the United States and Iran at that time.⁴⁷ In response to this, Iran suggested that Iranian oil was ‘necessarily’ imported into the United States.⁴⁸ The contention was that Iranian crude oil was largely diverted, as a response to the embargo, from the American market to the Western European market, and that a corresponding increase in petroleum products from Western Europe was being imported into the United States.

Iran thus indicated that while *direct* trade in oil between the parties had effectively ended as a result of the US embargo, *indirect* commerce continued via third party State territories. The Court reasoned that this ‘indirect’ commerce was in fact ‘a series of commercial transactions.’ This was because the initial sale of Iranian crude oil could be distinguished from any subsequent transactions between intermediate buyers, and also from the ultimate sale of an altered product into the United States.⁴⁹ As Iran had no financial or legal interests in the product following the initial sale, these transactions could not amount to commerce ‘between the territories of the two High Contracting Parties.’

On this basis, the Court concluded that neither in relation to the attacks of 19 October 1987, nor those of 18 April 1988 had the United States breached its

⁴¹ *Ibid*, para. 82.

⁴² *Oil Platforms*, Preliminary Objection, particularly, paras. 43-50.

⁴³ *Oil Platforms*, Merits, para. 83.

⁴⁴ *Ibid*, para. 86.

⁴⁵ *Ibid*, para. 92.

⁴⁶ United States Executive Order 12613, available at http://www.parstimes.com/history/executive_12613.html.

⁴⁷ United States Counter-Memorial and Counter-Claim, Part II, particularly para. 2.27.

⁴⁸ CR 2003/6, 49.

⁴⁹ *Oil Platforms*, Merits, para. 97.

obligations under Article X, paragraph 1 of the 1955 Treaty. The Iranian claim was therefore rejected by the Court.

3.3 Did Iran's Own Actions Interfere with the United States Freedom of Commerce?

The final section of the Judgment related to the counter-claim of the United States alleging that 'in attacking vessels, laying mines in the Gulf and otherwise engaging in military actions in 1987-88 that were dangerous and detrimental to maritime commerce...' Iran had breached its obligations under Article X, paragraph 1.⁵⁰ After dismissing a number of objections of a preliminary character raised by Iran over its ability to entertain the Merits of the counter-claim,⁵¹ the Court examined the question of whether acts attributable to Iran had impaired the freedom of either commerce or navigation between the two parties. The Court approached this by assessing each attack on United States vessels alleged in the pleadings of the United States to be attributable to Iran,⁵² in turn. None of the vessels attacked, in the view of the Court, were engaged in commerce or navigation between the two parties at the time of any of the incidents.⁵³

In addition to alleging a breach of Article X, paragraph 1 based on these specific incidents, the United States also presented its counter-claim in a generic sense, although it did so somewhat tentatively. The assertion here was that the general military actions conducted by Iran in the Persian Gulf made the entire area unsafe, and that this breached Iran's obligations towards the United States. The Court brusquely dismissed this formulation of the counter-claim on the basis that despite the increased risk to vessels in the Persian Gulf due to the Iran/Iraq conflict, 'that alone [was] not sufficient for the Court to decide that Article X, paragraph 1 of the 1955 Treaty was breached by Iran.' In the eyes of the Court, continued trade between the parties during the conflict and the lack of specific evidence of actual impediment to

⁵⁰ United States Counter-Memorial and Counter-Claim, Part VI, and discussion above in Section 2.

⁵¹ See Further Response to the United States Counter-Claim Submitted by the Islamic Republic of Iran, 24 September 2001, Part III. Iran contended that the Court should not have dealt with the Merits of the United States counter-claim, on the basis that:

- (a) the counter-claim was presented without any prior negotiation, contrary to Article XXI, para. 2 of the 1955 Treaty;
- (b) the United States had no title to submit a claim on behalf of third party States;
- (c) the counter-claim extended beyond Article X, para. 1 of the Treaty, the only provision over which the Court had jurisdiction;
- (d) the Court only had jurisdiction concerning 'freedom of commerce' as protected under Article X, para. 1, and not 'freedom of navigation';
- (e) the United States had broadened the subject matter of its claim beyond that set out in its Counter-Memorial.

The Court rejected these objections as follows. First, there was clearly a dispute between the parties relating to issues in the counter-claim which could not be 'satisfactorily adjusted by diplomacy' as required by Article XXI, para. 2 of the Treaty. Second, the Court would limit itself to the question of the infringement of the freedoms of the United States alone in the context of the counter-claim. Third, in its final submissions the United States limited the scope of its counter-claim so as to fall within Article X, para. 1 of the Treaty. Fourth, based on the Court's Order of 10 March 1998, it was able to entertain questions relating to both freedom of commerce and navigation. Finally, the Court concluded that the United States had not altered the substance of its claim following its initial counter-memorial. See *Oil Platforms*, Merits, paras. 106-118.

⁵² See United States Counter-Memorial and Counter-Claim, Part VI, para. 6.08.

⁵³ See *Oil Platforms*, Merits, paras. 119-121.

that commercial activity attributable to Iran was enough to dismiss the United States counter-claim.⁵⁴

4 FREEDOM OF COMMERCE: ISSUES OF INTERPRETATION

By simply glancing at the voting of the Judges who sat on the Merits of the *Oil Platforms* case, one would be forgiven for concluding that there was a general consensus over the decision. Only two Judges voted against the first part of the *dispositif*, whilst only Judge Simma voted against the second part.⁵⁵ However, the fact that eleven of the sixteen Judges delivered Separate or Dissenting Opinions illustrates the contentious nature of the case and the discord within the Court over the Judgment ultimately adopted. These Opinions offer an insight into the diverse range of issues arising from the case, and provide invaluable critiques of the decision. The following sections address a number of significant issues which arise from the Judgment. The majority of these relate to the incorporation of the law on the use of force into the decision, but we shall first assess the Court's interpretation of Article X, paragraph 1, given that Iran's claim was ultimately dismissed on this basis.

4.1 Potential or Actual Commerce

As has been stated, in analysing Article X, paragraph 1 in relation to the first set of United States attacks, the Court preferred an interpretation of 'freedom of commerce' which excluded freedom of potential commerce. Instead, the provision was to be viewed as a protection of interference with actual commerce between the two States, ongoing at the time of the incidents. It should first be noted that the sole justification advanced in the Judgment for interpreting the phrase 'freedom of commerce' in this restrictive way was a passage from the *Oil Platforms* Provisional Objection decision. Here, it had been held that 'the possibility must be entertained that [that freedom] could *actually be impeded*...' ⁵⁶ due to the actions of the other party. On first reading, this statement of 1996 appears to support the Court's assertion in 2003.

However, aside from the fact that it is somewhat unsettling that the Court determined the scope of the Article X, paragraph 1 based only on this passage from its earlier Judgment, it is also evident that the interpretation of this section of the 1996 decision may have been inaccurate. A slight change in emphasis and the character of the passage is altered dramatically:

Unless such freedom [of commerce] is to be rendered illusory, the possibility must be entertained that it *could* actually be impeded... ⁵⁷

This reading of the same sentence indicates that if the actions of one of the parties had the affect of impeding the *possibility* of commercial transactions between them, then

⁵⁴ *Ibid*, para. 123.

⁵⁵ *Ibid*, para. 125.

⁵⁶ *Ibid*, para. 92, citing *Oil Platforms*, Preliminary Objection, para. 50 (emphasis added in Merits Judgment).

⁵⁷ *Oil Platforms*, Preliminary Objection, para. 50 (emphasis added).

this would be enough to amount to a breach of the provision.⁵⁸ This is not to say that the Court's interpretation of the phrase 'freedom of commerce' is *necessarily* incorrect: it is merely to indicate that the opposite conclusion – that this freedom includes *potential* commerce – appears to be equally valid, at least based on the evidence the Court used to support its view. In his Separate Opinion to the Merits, Judge Simma argued that 'the key issue is not damage to commerce in practice but violation of *the freedom to engage in commerce*, whether or not there actually was any commerce going on at the time of the violation.'⁵⁹

In a similar vein, Judge Elaraby rightly stresses the fact that the 1955 Treaty protects the freedom of commerce between the United States and Iran, not *between the United States and the three platforms attacked on 19 October 1987*.⁶⁰ Other platforms were producing crude oil which was being traded with the United States. At a later date, once the attacked platforms were again working, the production distribution between platforms may have been altered. Therefore, despite the fact that the platforms were not in operation at the time of the attacks, the United States 'prejudiced Iran's freedom to organise its commerce as it wished from its own territory...'⁶¹

While none of these points are conclusive, they indicate that the Court could have, and perhaps should have, interpreted the provision less restrictively.⁶²

4.2 Indirect or Direct Commerce

Even if the Court had interpreted 'freedom of commerce' as set out in Article X, paragraph 1 to include freedom of potential commerce, this may not have been enough to uphold the claim of Iran. It was Iran's contention that the platforms of the Reshadat and the Resalat complexes would have been operational (had the attacks by the United States not taken place) before the end of October 1987.⁶³ However, the Court doubted this claim, and indicated that Iran had failed to prove that the production of oil would have recommenced at these complexes before the issue of the trade embargo under United States Executive Order 12613. It has been suggested that the Court had little basis for this conclusion.⁶⁴ However, assuming that the Court was correct in this respect, any products originating from those platforms would have been traded during the period when the embargo was in force, much like that produced by the Nasr and Salman complexes.

There can be little dispute that the evidence offered by Iran shows that products derived from Iranian crude oil entered the United States during the time of the trade embargo. The question here, then, is whether the Court was correct in interpreting 'freedom of commerce' as referring only to *direct* commerce between the parties, and not to *indirect* commerce.

⁵⁸ A similar argument was put forward by Judge Al-Khasawneh, *Oil Platforms*, Merits, Dissenting Opinion of Judge Al-Khasawneh, para. 3.

⁵⁹ *Oil Platforms*, Merits, Separate Opinion of Judge Simma, para. 25.

⁶⁰ *Oil Platforms*, Merits, Dissenting Opinion of Judge Elaraby, para. 2.2.

⁶¹ This was the argument of Iran, CR 2003/15, 44.

⁶² It should be noted that the Permanent Court of International Justice, when interpreting a similar provision relating to 'freedom of trade', opted for a wide ranging interpretation of that phrase, although it did not explicitly refer to 'future' trade as falling within the scope of this. See the *Oscar Chinn* case, Merits, (1934) PCIJ Reports, Series A/B 63, 83-85.

⁶³ CR 2003/6, 42.

⁶⁴ See *Oil Platforms*, Merits, Separate Opinion of Judge Simma, para. 24.

First, it can be argued that the wording of Executive Order 12613 itself indicates that indirect commerce between the parties was envisaged by the United States, in that it provides for an exception for 'petroleum products refined from Iranian crude oil in a third country.'⁶⁵ This suggests that the United States recognised the 'Iranian character' of the products imported from third party States during the embargo.

Moreover, it can also be argued that an examination of the 1955 Treaty strengthens this view. While the Court only had the jurisdictional basis to make findings on Article X, paragraph 1 of the 1955 Treaty, other provisions of that agreement can be employed to shed light on that Article.⁶⁶ An examination of Article VIII, paragraph 1 suggests that the Treaty envisaged commercial activity between the parties through indirect means:

Each High Contracting Party shall accord to products of the other High Contracting Party, *from whatever place and by whatever type of carrier arriving*, and to products destined for exportation to the territories of such other High Contracting Party, *by whatever route and by whatever type of carrier*, treatment no less favourable than that...⁶⁷

However, this Article refers to *products* of the High Contracting Parties. The fact that the oil imported into the United States during the period of the embargo retained an 'Iranian character' does not mean that the product was therefore an *Iranian product*. The arguments employed by Iran, and by a number of the Judges in their Opinions to the case,⁶⁸ fail to acknowledge that the oil imported into the United States was not the same unrefined product which was exported from Iran. The fundamental aspect of Article X, paragraph 1 is that it applies to commerce *between the territories of the two High Contracting Parties*. An Iranian product was not merely being transported through third party States from the territory of Iran to that of the United States. Rather, it was bought, altered and then sold on by third party States, and thus was no longer an Iranian product. The Court appears correct in asserting that Iran no longer had legal or financial interest in the product once it had been sold to a third party. Therefore this 'indirect commerce' between the parties did not constitute 'commerce' within the meaning of Article X, paragraph 1. It was not commerce *between* them, but commerce in general, involving third party States, and significant changes to the character of the product.

In respect of the attacks on the second set of platforms, there was no commerce between the High Contracting Parties, and therefore the Court appears correct in dismissing the claim of Iran *vis-à-vis* these attacks.

⁶⁵ United States Executive Order 12613, Section 2(b).

⁶⁶ The Vienna Convention on the Law of Treaties 1969, Article 31, para. 1 provides that: 'A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty *in their context and in the light of their object and purpose.*' (emphasis added). In *Oil Platforms* the Court affirmed that provisions of the 1955 Treaty other than Article X, para. 1 may have been relevant 'in so far as they may affect the interpretation or application of that text,' *Oil Platforms*, Merits, para. 31.

⁶⁷ This reasoning is employed in *Oil Platforms*, Merits, Dissenting Opinion of Judge Al-Khasawneh, at para 5. (emphasis added).

⁶⁸ See *Oil Platforms*, Merits, Opinions of Judges Al-Khasawneh, Elaraby and Simma.

5 THE USE OF FORCE: ISSUES OF METHODOLOGY AND JURISDICTION

The majority of the *Oil Platforms* Judgment relates to the question of whether the attacks initiated by the United States amounted to legitimate actions taken in self-defence. In this section it is suggested that the Court need not have examined this question, given that the United States actions were found not to interfere with Iran's freedom of commerce. Furthermore, it is argued that the Court may not have had the jurisdictional basis in the first instance to apply the law on the use of force to the dispute.

5.1 Putting the Cart before the Horse

In their final submissions in the case, Iran requested only one substantive finding, being that the United States had violated Article X, paragraph 1 of the 1955 Treaty.⁶⁹ Therefore, to decide the case, it would seem logical for the Court to have begun by assessing the actions of the United States and determining their lawfulness against this provision.

Instead, it began by assessing the possible justification offered by Article XX, paragraph 1(d).⁷⁰ In its oral pleadings, the United States contended that this Article was substantively equal to Article X, paragraph 1, and therefore the order in which these provisions were examined was a matter for the discretion of the Court:

...the order in which the Court decides to address the two key elements of its legal analysis – freedom of commerce and navigation under Article X on the one hand, measures necessary to protect essential security interests under Article XX on the other – is a matter for the discretion of the Court...⁷¹

The Court relied on this contention to justify examining Article XX, paragraph 1(d) first.⁷² It then went on to state that there were 'particular considerations' for choosing to examine this Article before turning to Article X, paragraph 1.⁷³ The first of these was that the 'original dispute' between the parties related to matters of self-defence.⁷⁴ This was undoubtedly true, as evidenced by the notice given to the Security Council by United States that they had acted in self-defence.⁷⁵ Similarly the second consideration was that matters of self-defence were of the 'highest importance to members of the international community.'⁷⁶ Again, this statement can hardly be debated.

However, these 'particular considerations' do not appear persuasive reasons for looking at the provisions this way around. In the *Nicaragua* case, when interpreting a

⁶⁹ See CR 2003/16, 36.

⁷⁰ The Court began its application of Article XX, para. 1(d) to the case at para. 32 of the Merits decision, and did not turn to Article X, para. 1 until para. 79.

⁷¹ CR 2003/12, 6.

⁷² *Oil Platforms*, Merits, para. 36.

⁷³ *Ibid*, para. 37.

⁷⁴ *Ibid*.

⁷⁵ See above, Section 3.1.

⁷⁶ *Oil Platforms*, Merits, para. 38. The United States itself stressed this point: see Rejoinder Submitted by the United States of America, 23 March 2001, Part V, para. 5.05.

comparable provision of the 1956 Treaty between Nicaragua and the United States,⁷⁷ the Court held that:

the possibility of invoking the clauses of that Article [XXI of the 1956 Treaty] must be considered *once it is apparent* that certain forms of conduct by the United States would otherwise be in conflict with the relevant provisions of the Treaty.’⁷⁸

The Court in 1986 therefore interpreted this corresponding provision as a defence, to be examined if a *prima facie* breach of substantive provisions had occurred.

Similarly, the Preliminary Objection Judgment in *Oil Platforms* made it clear that Article XX, paragraph 1(d) of the Iran/United States Treaty offered a ‘possible defence on the Merits to be used *should the occasion arise*.’⁷⁹ However, the occasion could only ‘arise’ if the United States was found to be in breach of Article X, paragraph 1, which was not the case. Furthermore, despite finding that the United States did not breach Article X, paragraph, 1 of the 1955 Treaty, the Court included in its *dispositif* a statement to the effect that the actions of the United States could not be justified as measures necessary to protect their national security interests, under Article XX, paragraph 1(d).⁸⁰ Therefore, reference to this ultimately superfluous provision was made in the operative part of the Judgment.

Admittedly, the methodology employed in examining Article XX, paragraph 1(d) first is not *per se* invalid. The Court does have the freedom to determine the order in which it examines the issues before it. There is not a specific legal requirement that the Court establishes a breach of a provision before turning to a possible defence, although this is surely good practice. It is clear that the Court ‘retains its freedom to select the ground upon which it will base its Judgment...’⁸¹ This freedom is not without limits, however: the Court is restrained by the jurisdiction conferred upon it by the parties.⁸²

⁷⁷ Treaty of Friendship, Commerce and Navigation (with Protocol) between the United States of America and Nicaragua, signed in Managua on 24 April 1956, came into force 24 May 1958, 367 UNTS 4.

⁷⁸ *Nicaragua*, Merits, para. 225 (emphasis added).

⁷⁹ *Oil Platforms*, Preliminary Objection, para. 20 (emphasis added).

⁸⁰ *Oil Platforms*, Merits, para. 125. The relevant section of the *dispositif* reads:

‘THE COURT,

(1) By fourteen votes to two,

Finds that the actions of the United States of America against Iranian oil platforms on 19 October 1987 and 18 April 1988 cannot be justified as measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1(d), of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, as interpreted in the light of the international law on the use of force...’

⁸¹ See *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, Merits, Judgment, (1958) ICJ Reports 54, 62. In *Oil Platforms*, the Court used this as a further justification for its decision to examine Article XX, para. 1(d) first. It considered that the decision to look at the equivalent provision of the 1956 Treaty between the United States and Nicaragua in the *Nicaragua* case following the determination of a breach was not because this was required, but because the Court in that case exercised its freedom in a different manner.

⁸² See Section 5.2. See also *Oil Platforms*, Merits, Separate Opinion of Judge Higgins, para. 13.

That aside, by choosing to examine the issues in the order that it did in this instance, the Court goes against its earlier pronouncements in both *Nicaragua* and the Preliminary Objections decision in *Oil Platforms*. As Judge Parra-Aranguren points out in his Separate Opinion, the suggestion of a State, even the United States, should not be used to justify deviation from a previous decision of the Court in this way.⁸³ Similarly, '[i]nvocations of the 'original dispute' and 'importance' of subject-matter cannot serve to transform a contingent defence into a subject-matter that is 'desirable' to deal with in the text of a Judgment and in the *dispositif*.'⁸⁴

In examining a defence before the substantive issue in *Oil Platforms*, the Court put the cart before the horse.⁸⁵ As a result much time and expense was wasted, given that the case was ultimately decided based on the finding that the United States had not breached Article X, paragraph 1.

This illogical step can be viewed as evidence of the Court attempting to 'stretch' the scope of its Judgment to allow it to make pronouncements on the law of the use of force. The placing of the cart before the horse allowed the Court the chance to discuss these principles, as at the point of the Judgment where Article XX 1(d) was examined it was still a 'live' issue in terms of the resolution of the dispute. As Laursen has pointed out, the methodology of the Court in this respect can be viewed as 'somewhat counter-intuitive for an institution that is often perceived as conservative and cautious.'⁸⁶

5.2 Beyond the Submissions of the Parties

As discussed above, a desire to address the issue of self-defence in international law may have been the reason for the Court's decision to examine a potential defence before a breach of the Treaty was established. However, it can be questioned whether the Court had the jurisdictional grounds to apply this area of the law to the case, whatever order the issues were examined in.

The dispute was referred to the Court under Article XXI, paragraph 2 of the Treaty, and unlike the *Nicaragua* case, where the Court also had jurisdiction under Article 36, paragraph 2 of the Statute of the Court to examine customary international law,⁸⁷ this was the sole jurisdictional base in the case. It will be recalled that Article XXI, paragraph 2 conferred jurisdiction on the Court regarding 'the interpretation or application of the present Treaty.'⁸⁸

The *non ultra petita* rule aims to preserve the consensual nature of the Court's jurisdiction, and provides that the ICJ cannot rule on aspects of the case not raised by

⁸³ *Oil Platforms*, Merits, Separate Opinion of Judge Parra-Aranguren, para. 13.

⁸⁴ *Oil Platforms*, Merits, Separate Opinion of Judge Higgins, para. 23.

⁸⁵ To use the phrase of Judge Kooijmans, *Oil Platforms*, Merits, Separate Opinion of Judge Kooijmans para. 42.

⁸⁶ A. Laursen, 'The Judgment by the International Court of Justice in the *Oil Platforms* Case' (2004) 73 *Nordic Journal of International Law* 135, 146

⁸⁷ See *Nicaragua* case, Jurisdiction of the Court and Admissibility of the Application (1984) ICJ Reports 392, particularly the operative part of the Judgment, para. 113. Here, it is interesting to note that whilst fourteen of the sixteen judges voted in favour of the Court having jurisdiction to entertain Nicaragua's application under the 1956 Treaty of Friendship, Commerce and Navigation between the two States (the corresponding base of jurisdiction to that in *Oil Platforms*), only eleven voted in favour of the Court having jurisdiction under Article 36 of the Statute of the Court.

⁸⁸ Emphasis added.

the parties.⁸⁹ Thus, the ICJ stated in the *Asylum* case that: ‘it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but to abstain from deciding points not included in those submissions.’⁹⁰ Similarly, in 1926, the Permanent Court of International Justice stated that it was able to ‘construe the submissions of the parties,’ but that it could not ‘substitute itself for them and formulate new submissions simply on the basis of arguments or facts advocated.’⁹¹

Iran ultimately dropped the reference to ‘international law’ from its initial application. It stated in its Observations and Submissions of 1994 that: ‘Iran has not asked the Court to judge the US conduct on the basis of general international law and the UN Charter...’⁹² Admittedly, the United States did maintain that its actions were legitimate instances of self-defence in its written submissions to the Court.⁹³ Indeed, even at final submissions stage, it maintained that its actions were justified as measures taken in self-defence.⁹⁴ However, the United States also stated at this stage that the jurisdiction of the Court was confined to the issue of measures necessary to protect its national security interests, and did not extend to the legality of their actions under the law of self-defence. The United States contended that:

The standards against which the actions of the United States must be considered in the present case are the rules of the ‘present Treaty’ – more specifically the principles of freedom of commerce and freedom of navigation – rather than customary or general international law.⁹⁵

Therefore, while the United States maintained that it had acted in self-defence, it also held that the jurisdiction conferred upon the Court by Article XXI, paragraph 2 of the 1955 Treaty did not allow it to apply the law of self-defence to the dispute. A ruling on the legality of the actions of the United States under the law of self-defence was not requested by either of the parties at final submissions stage.

It can thus be argued that the Court did not have jurisdiction to apply the criteria of self-defence to the actions of the United States in the case. The Court appears to justify its methodology by referring to the *desirability* of applying the law on self-defence to the question. This is partly because the ‘original dispute’⁹⁶ between the parties had its basis in the law of the use of force (as evidenced by the claims of the United States before the Security Council), and partly because of the ‘importance’ of the prohibition of the use of force under the Charter system.⁹⁷ Yet, as Judge Higgins rightly points out, while it may be desirable for the Court to examine the law of the

⁸⁹ For an examination of the *non ultra petita* rule, see I.F.I Shihata, *The Power of the International Court to Determine its Own Jurisdiction* (1965), 219-221.

⁹⁰ *Asylum* case (Columbia v. Peru), Merits, (1950) ICJ Reports 394, 402.

⁹¹ *Case Concerning Certain German Interests in Polish Silesia*, Merits, (1926) PCIJ Reports, Series A 7, 35. See also *Nicaragua*, Merits, para. 207.

⁹² Observations and Submissions on the United States Preliminary Objections Submitted by the Islamic Republic of Iran, 1 July 1994, Part III, para. 2.11. Also, at final submissions stage, see CR 2003/16, 36.

⁹³ United States Counter-Memorial and Counter-Claim, See Part IV.

⁹⁴ CR 2003/11, 13.

⁹⁵ *Ibid*, at 14. The United States claimed here that while it had been acting in self-defence, even if it had not been, this would not have been determinative as to whether its actions had been legitimate under Article XX, para. 1(d) of the Treaty.

⁹⁶ *Oil Platforms*, Merits, para. 37.

⁹⁷ *Ibid*, para. 38.

use of force, it cannot (or at least should not) when it does not have the competence to do so.⁹⁸

In the *East Timor* case⁹⁹ the ICJ held that it could not examine the Merits of Portugal's claim against Australia because this would inevitably require an examination of the lawfulness of the actions of Indonesia, a State not party to the proceedings. The jurisdiction conferred upon the Court by virtue of declarations made by the parties under Article 36, paragraph 2 of its Statute did not extend to a ruling on Indonesia's conduct¹⁰⁰ (and therefore the entire dispute). The Court made it clear that this was the case '*whatever the importance of the questions raised by [Portugal's] claims and of the rules of international law which they bring into play.*'¹⁰¹ The Court's scope of jurisdiction does not widen simply because the issues involved are 'important'.

It is not contended that the law on the use of force is totally outside the scope of the interpretation of Article XX, paragraph 1(d) in *Oil Platforms*. Indeed, in the Court's ruling in *Oil Platforms*, Preliminary Objections, it was stated that:

A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955.¹⁰²

As the Court noted,¹⁰³ under the Vienna Convention on the Law of Treaties 1969, Treaty interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties.'¹⁰⁴ Yet it is also clear that the Court cannot 'ascribe to States legal views which they do not themselves advance.'¹⁰⁵ Thus the Court was not excluded from examining the law on the use of force 'to the extent that such examination, ancillary to the examination of Article XX, paragraph 1(d), is found to be necessary for clarifying the interpretation and application of [that Article].'¹⁰⁶

However, it is suggested that the interpretation of Article XX, paragraph 1(d) is not *synonymous* with a determination of the legality of a given action under the law of the use of force.¹⁰⁷ The Vienna Convention on the Law of Treaties does not offer the

⁹⁸ *Oil Platforms*, Merits, Separate Opinion of Judge Higgins, particularly para. 23.

⁹⁹ *Case Concerning East Timor* (Portugal v. Australia), Merits, (1995) ICJ Reports 90.

¹⁰⁰ The Court concluded that a Judgment on Portugal's application would have required it to rule upon 'whether Indonesia's entry into and continued presence in the Territory [of East Timor] are lawful.' *Ibid.*, para. 35.

¹⁰¹ *Ibid.*, para. 36 (emphasis added).

¹⁰² *Oil Platforms*, Preliminary Objection, para. 21.

¹⁰³ *Oil Platforms*, Merits, para. 41.

¹⁰⁴ Vienna Convention on the Law of Treaties 1969, Article 31, para. 3(c).

¹⁰⁵ *Nicaragua*, Merits, para. 207.

¹⁰⁶ *Oil Platforms*, Merits, Separate Opinion of Judge Owada, para. 14.

¹⁰⁷ In his Dissenting Opinion to the *Nicaragua* case, Judge Sir Robert Jennings pointed out in relation to Article XXI of the 1956 Treaty between the United States and Nicaragua [the equivalent provision to Article XX, para. 1(d) of the 1955 Treaty] that: 'The question arising under Article XXI is not...whether such measures are justified in international law as action taken in self-defence, or as justified counter-measures in general international law; the question is whether the measures in question are, or are not, in breach of the Treaty. Any operation which comes squarely within Article XXI, as a measure taken by one party to the Treaty, as being 'necessary to protect its essential security interests,' cannot be in breach of the Treaty.' *Nicaragua*, Merits, Dissenting Opinion of Judge Sir Robert Jennings, 541.

Court the opportunity to rule on matters not submitted to it by the parties. The question submitted for determination by the Court by the parties was whether the actions of the United States amounted to measures ‘necessary to protect its essential security interests.’ The question before the Court was not whether the United States attacks were legitimate actions in self-defence, even though the United States invoked such arguments at various stages of the dispute. It was clearly within the Court’s competence to use the law on the use of force as a means of interpreting the ‘necessity’ of measures avowedly taken to protect national security interests. It was not within that competence for it to test the actions of the United States against the law on the use of force. Whatever the reasons of the parties, neither requested this from the Court; therefore the Court did not have jurisdiction to judge the actions of the United States in this way.

In exceeding its jurisdiction in this manner, the Court runs the risk of alienating States from the judicial process, in what is still ultimately a system of consent. If a State submits to the Court’s jurisdiction in relation to a particular bilateral commerce and navigation Treaty, only to be faced with a ruling in the *dispositif* on the legality of its actions under the law on the use of force, this clearly has the potential to deter future States from utilising the ICJ as a means of dispute settlement.¹⁰⁸ Of course, in maintaining that the attacks on the oil platforms were legitimate actions taken in self-defence, it can be argued that the United States employed this as a subsidiary argument, and thus invited the Court to assess the legitimacy of its actions under that area of law. However, Iran did not request that the Court adjudge the conduct of the United States on this basis. As the United States contended during its oral pleadings:

No government in the world would continue to agree to the inclusion of such a jurisdictional clause [as Article XXI, paragraph 2 of the 1955 Treaty] in a Treaty, if it feared that this would open the back door for the submission to the Court of all disputes challenging the conformity of its acts and actions *vis-à-vis* the entire body of general and customary rules of international law.¹⁰⁹

This point is particularly pertinent in relation to the United States, following their ‘no show’ based on jurisdictional objections in the *Nicaragua* case. It is essential for the Court to retain the confidence of States, especially that of the world’s one remaining superpower. The approach taken by the ICJ in *Oil Platforms* may ultimately decrease State participation in the UN system of international adjudication.

In paragraph 42 of the *Oil Platforms* Merits Judgment, the Court indicated that it was:

...satisfied that its jurisdiction...extends, where appropriate, to the determination whether action alleged to be justified under that paragraph [Article XX, paragraph 1(d)] was or was not an unlawful use of force...The Court would however emphasise that its jurisdiction remains limited to that conferred on it by Article XXI, paragraph 2, of the 1955 Treaty.

This can be viewed as evidence of the Court attempting to walk the tightrope between its desire to make pertinent pronouncements on the fundamental principle of the prohibition on the use of force, and the imperative to remain within its jurisdictional

¹⁰⁸ This warning was raised by Judge Burgenthal. See *Oil Platforms*, Merits, Separate Opinion of Judge Burgenthal, para. 22.

¹⁰⁹ CR 2003/11, 13.

bounds. It is suggested that in *Oil Platforms* the Court strayed beyond these bounds. In finding that a use of force by the United States was not an action taken in self-defence, the Court implicitly condemned these actions as a breach of Article 2(4) of the UN Charter,¹¹⁰ despite the fact that neither party requested that the Court apply such norms to the dispute. The next section questions whether the decision contributes to the undeniably important area of self-defence in international law in such a way as to mitigate against this failing.

6 THE USE OF FORCE: ISSUES OF SUBSTANCE AND EVIDENCE

The *Oil Platforms* Judgment is the first Merits decision to have dealt with the law on the use of force since the *Nicaragua* case of 1986. Therefore, despite the reservations expressed above regarding the dubious ‘importation’ of the law on the use of force into a case based on a bilateral Treaty, it is necessary to critique the substance of the Judgment in this respect. Rightly or wrongly, the *Oil Platforms* case contributes to the ICJ’s burgeoning jurisprudence on the law of the use of force, and particularly that relating to self-defence. This section therefore aims to examine the extent and quality of that contribution.

6.1 Re-affirming *Nicaragua* and ‘Counter-measures’

In many respects, the jurisprudence which can be derived from the case in this area re-affirms the statements made in 1986 by the ICJ in the *Nicaragua* case. For example, in defining the concept of an ‘armed attack’, the Court relies on the *Nicaragua* Judgment to inform its interpretation of armed attacks as being ‘the most grave forms of the use of force’, to be distinguished from ‘other less grave forms.’¹¹¹ Similarly the Court relies on paragraph 195 of the *Nicaragua* judgment to confirm its position that States invoking individual self-defence must themselves have been a victim of an armed attack,¹¹² and also uses statements made in *Nicaragua* (as well as its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*)¹¹³ to confirm the applicability of the customary law principles of necessity and proportionality in relation to the exercise of the right of self-defence.¹¹⁴ In terms of consistency, this

¹¹⁰ This point was made by Judge Simma. In Simma’s view it was regrettable that this implicit finding was not made explicit, albeit as *obiter dicta*, in the Court’s Judgment. See *Oil Platforms*, Merits, Separate Opinion of Judge Simma, para. 7.

¹¹¹ *Oil Platforms*, Merits, para. 51, citing *Nicaragua*, Merits, para. 191.

¹¹² *Oil Platforms*, Merits, para. 51.

¹¹³ (1996) ICJ Reports.

¹¹⁴ *Oil Platforms*, Merits, paras. 56 and 76. It should be noted that the Court’s *application* of the proportionality test in *Oil Platforms* was somewhat inconsistent. At para. 77, the Court states that the first United States attack of 19 October 1987 might ‘have been considered proportionate,’ if the other requirements for invoking self-defence had been met. Yet, within the same paragraph, the Court concludes that Operation Praying Mantis could not be considered a proportionate action, nor could ‘even that part of it that destroyed the *Salman* and *Nasr* platforms.’ (emphasis added). Thus the Court concluded that, *prima facie*, the first United States attack (the destruction of two oil platforms in response to a *missile attack* on a single vessel) could be considered proportionate, whilst the second United States attack (the destruction of two oil platforms in response to the *mining* of a single vessel) could not. This appears an illogical distinction, see A. Laursen, ‘The Judgment by the International

general re-affirmation of *Nicaragua* can be viewed as a desirable position for the Court to take.

However, given that many aspects of *Nicaragua* have received criticism since 1986, particularly regarding its interpretation of an ‘armed attack,’¹¹⁵ the Court has done nothing to rectify potential defects or inconsistencies in its earlier decision. By simply repeating much of what was said in *Nicaragua*, the Court can be seen to be compounding any problems inherent in that decision by a process of jurisprudential accrual. It is, of course, suggested that the Court should have left the principles of the law on the use of force well alone in *Oil Platforms*, given the scope of the application that the Court had before it, but having taken the decision to examine these principles, a simple confirmation of *Nicaragua* appears inadequate.

For example, the tension between the Charter requirement of an ‘armed attack’ and the customary need for necessity and proportionality is rooted even more deeply by *Oil Platforms*. If there is a requirement that all actions in self-defence are both necessary and proportionate, is there any need for a requirement of an armed attack? Surely a ‘less grave use of force’ can be responded to by a ‘less grave’, (i.e. proportionate) forcible response in self-defence? Conversely, if an armed attack is established, does this not automatically prove necessity? The *Oil Platforms* case simply re-iterates the requirements as set out in *Nicaragua*; the defending State must be the victim of an armed attack, *and* its response must be both necessary and proportional.

Of course, the Court could not simply have discarded the need for an armed attack in self-defence cases; Article 51 is clear that an armed attack is required. However, the restrictive view of armed attack taken in *Nicaragua* based on the ‘Definition of Aggression’ annexed to UN General Assembly Resolution 3314¹¹⁶ has meant the widening of the ‘gap’ between a ‘minor’ violation of Article 2(4) of the UN Charter against a State, and the requirement that any violation must amount to an ‘armed attack’ before the victim State can lawfully defend itself under Article 51. This leaves States who are victims of an unlawful use of force not amounting to an armed attack without recourse to defend themselves.¹¹⁷

The response to this problem in *Nicaragua* was the *obiter* suggestion that in such a situation the victim State may be entitled to initiate ‘proportionate counter-measures’, which do not amount to an action in self-defence as such, under Article 51, but can logically only be read as amounting to forcible defensive responses.¹¹⁸ This resolves the problem of leaving States defenceless in the face of a small scale attack against them, ‘plugging’ the ‘gap’ between Article 2(4) and Article 51¹¹⁹.

Court of Justice in the *Oil Platforms Case*’ (2004) 73 *Nordic Journal of International Law* 135, 152-153.

¹¹⁵ See, for example T. Franck ‘Appraisals of the ICJ’s Decision: *Nicaragua v. United States* (Merits) – Some Observations on the ICJ’s Procedural and Substantive Innovations’ (1987) 81 *American Journal of International Law* 116, particularly at 120; R. Higgins, *Problems and Process: International law and How We Use It* (1994), 250-251; J.N. Moore, ‘Appraisals of the ICJ’s Decision: *Nicaragua v. United States* (Merits) – The *Nicaragua* Case and the Deterioration of World Order’ (1987) 81 *American Journal of International Law* 151.

¹¹⁶ Article 3, para. (g), Definition of Aggression, GA Res 3314, UN doc. A/9619. See *Nicaragua*, Merits, para. 195.

¹¹⁷ See B. Simma ‘Article 51’, in B. Simma (ed.), *The Charter of the United Nations: A Commentary (Vol. I)* (2002) 790-792.

¹¹⁸ *Nicaragua*, Merits, para. 249.

¹¹⁹ To use Simma’s terminology, see B. Simma ‘Article 51’, in B. Simma (ed.), *The Charter of the United Nations: A Commentary (Vol. I)* (2002) 790-792.

In his Separate Opinion to *Oil Platforms*, Judge Simma expressed his discontent that the Court failed to stress the legal validity of defensive counter-measures following the less than emphatic way in which they were put forward in *Nicaragua*.¹²⁰ This issue was not dealt with at all by the ICJ in *Oil Platforms*. Perhaps this was understandable given that, on the evidence before the Court, it was concluded that the attacks against the *Sea Isle City* and the *USS Samuel B. Roberts* could not be attributed to Iran. Therefore whether the response of the United States amounted to ‘self-defence’ or ‘counter-measures’ would be irrelevant, as it was not proved that Iran had in fact attacked these vessels. However, once the ICJ began examining the issue of self-defence, it could be argued that it would have been desirable for them to confirm the legality of forcible counter-measures. Additional *dicta* to this effect would have been justified, despite not being directly relevant to the case.

6.2 Military Targets

Despite the fact that in many respects the *Oil Platforms* case simply re-affirmed *Nicaragua*, there are a couple of issues relating to the law of self-defence in the case which appear somewhat novel. The first of these appears in paragraph 51 of the Judgment, where the Court states:

The United States must also show that its actions were necessary and proportional to the armed attack made on it, *and that the platforms were a legitimate military target* open to attack in the exercise of self-defence.¹²¹

The ICJ seems here to be adding a third criterion to the customary requirements of necessity and proportionality. A reading of this passage leads to the conclusion that a use of force in response to an armed attack may be ‘necessary’ (in that military action is the only possible defensive measure), ‘proportional’ (in that the response is not excessive in relation to the attack), but that this still may not be enough for that use of force to be a lawful exercise of the right of self-defence, because the target chosen is not a military one. This clearly goes beyond the *Caroline* criteria as commonly understood; there is no such mention of ‘legitimate targets’ in the relevant passages of the *Nicaragua* decision.

By indicting a requirement that a target must be of a military nature before it can be legitimately attacked in self-defence, the Court appears to have incorporated an element of the *jus in bello* (the law of warfare) into the norms of the *jus ad bellum* (governing the use of force). The rule that targets attacked during an armed conflict must, at least to a certain extent, be military in nature has long formed part of the law of humanitarian warfare.¹²² In *Oil Platforms*, the Court appeared to have used criteria

¹²⁰ *Oil Platforms*, Merits, Separate Opinion of Judge Simma, para. 12.

¹²¹ *Oil Platforms*, Merits, para. 51 (emphasis added).

¹²² This imperative has its basis in customary humanitarian law, but references to it can be found in a number of documents relating to the *jus in bello*. Article 24(1) of the Draft Rules on Aerial Warfare, The Hague, February 1923 provides that: ‘Aerial bombardment is legitimate only when it is directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.’ Article 24(2) then goes on to enumerate what constitutes a ‘military objective’ in more detail. Notably, these Rules were not adopted, despite support from the United States, although they offer a useful guide to the position of international law regarding legitimate objectives during combat. These rules were approved in 1924 by the International Law Commission at its 33rd Conference (33 *Report*, ILA, Stockholm 1924). Similarly, Article 27 of the

applicable to an ongoing conflict in relation to an action taken ostensibly in self-defence. Admittedly, there was clearly an ongoing conflict in the Persian Gulf at the time of the attacks. Yet the United States chose not to argue that its actions were justified due to the fact that it was engaged in an armed conflict with Iran, despite reference to the oil platforms as being military in nature.¹²³

It is not claimed that the nature of the target has no bearing on the legitimacy of an action taken in self-defence; merely that it is preferable, and more logical, for this to form part of the existing requirement that such an action must be necessary. It seems highly unlikely that an attack against non-military targets could amount to a *necessary* action in self-defence, certainly in the Court's previous conception of the necessity requirement.¹²⁴ This is particularly true in relation to actions in response to 'isolated' armed attacks as opposed to action in response to a large scale invasion. It should be noted that later in the Judgment, the Court does appear to include the nature of the target as an aspect of the existing criteria, although its focus is very much on the legitimacy of the oil platforms as targets, not the scale of force employed by the United States. However, the implication that this extra hurdle must be cleared, especially considering the dual burden of an armed attack and the *Caroline* criteria, is disconcerting.

6.3 The Pin-prick Theory

Another contentious aspect of the substantive law on self-defence arising from the case is the Court's acceptance in principle of the theory that a number a small scale uses of force falling below the level of an armed attack could collectively amount to such an attack under Article 51. This is the so-called 'accumulation of events' theory.¹²⁵ In relation to the initial claim of the United States that the attack on the *Sea Isle City* was not the sole ground for its actions against the first set of platforms, the Court responded by stating that '*even taken cumulatively...these incidents do not seem to the Court to constitute an armed attack on the United States...*'¹²⁶ Therefore, while the Court rejected the view that the United States had been the victim of an armed attack by accrual on the facts of the case, it clearly accepted that this was possible in principle.

The idea of a number of 'pin-prick' attacks ultimately amounting to an armed attack is not a novel one. The theory was first invoked by Israel, in relation to the Qibya incident of 1953 and has been later put forward by the United States, the United Kingdom, and Portugal, amongst others.¹²⁷ Indeed, it can be argued that the

Laws and Customs of War on Land (Hague Convention, II), July 1899 states: 'In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science and charity, hospitals and places where the sick and wounded are collected, *provided they are not used at the same time for military purposes.*' (emphasis added).

¹²³ See United States Counter-Memorial and Counter-Claim, Part IV, 148-149.

¹²⁴ See the restrictive interpretation of 'necessity' in the context of self-defence put forward by the Court in *Nicaragua*. Here, the fact that the actions of the United States were not necessary to collectively protect El Salvador was not determinative, but constituted an 'additional ground of wrongfulness.' *Nicaragua*, Merits, 112.

¹²⁵ See N.M. Feder, 'Reading the UN Charter Connotatively: Towards a New Definition of Armed Attack,' (1987) 19 *New York University Journal of Law and Politics* 395, 415-418.

¹²⁶ *Oil Platforms*, Merits, para. 64 (emphasis added).

¹²⁷ Traditionally, an accumulation of small scale attacks have not been viewed by the international community as constituting an armed attack as required by Article 51 of the UN Charter. In 1956 Israel sought to justify its military action across the 1948 UN armistice line on the basis of a 'continuing

principle was implicitly accepted by the ICJ in *Nicaragua*, where it was stated that due to a lack of evidence, it was difficult for the Court to determine whether certain incursions could be treated ‘as amounting, singly or collectively, to an armed attack...’¹²⁸ However, the Security Council has as yet refused to accept the theory, despite clear opportunities to do so.¹²⁹ Due to somewhat limited *opinio juris* supporting the existing state practice its validity is therefore far from certain. However, it should be noted that the accumulation of events theory can potentially be seen as a useful tool in allowing for legitimate military responses against terrorist activity.¹³⁰ As such the explicit acknowledgement of the validity of the theory in principle in *Oil Platforms* may be attributed to the ICJ’s awareness of the current political climate and the ‘War on Terrorism’. Even so, the implicit acceptance of the accumulation of events theory by the Court poses further difficult questions. For example, how many ‘minor’ attacks are required to constitute an armed attack? What if the ‘minor’ attacks are instigated by a number of non-affiliated terrorist organisations which are all based in one State?¹³¹

6.5 The Standard of Evidence

For the Court, the self-defence issue in *Oil Platforms* turned largely on evidential factors. It was not the case that the attacks on the *Sea Isle City* or the USS *Samuel B. Roberts* were found to fall below the level of ‘armed attacks’ in principle, but rather that the United States failed to show to the satisfaction of the Court that these actions were attributable to Iran. Considering that the standard of evidence required was so essential to the decision in this aspect of the case, the Court could have been more clear over what was required by the United States to prove that the attacks against their vessels were attributable to Iran. This is particularly important given that the standard of evidence employed in decisions such as *Oil Platforms* is potentially relevant to future cases regarding claims relating to the law on the use of force.

attack’ against it by the Fedayeen. This was implicitly rejected by the General Assembly, which demanded Israel’s withdrawal (See, *inter alia*, GA Res 997, UN doc. A/3354. However, during the cold war State invocation of the theory continued. Thus, the theory was argued by the United States in relation to Vietnam, the 1970 incursion into Cambodia and the 1986 raid against Libya. Israel again relied on the theory to justify its actions in the 1962 Lake Tiberias incident and its attack on Samu in 1966. Similarly, the United Kingdom indicated that its actions against Yemen in 1964 were in response to an armed attack by accrual. This was also true of Portugal’s action in Senegal of 1969. See D. Bowett, ‘Reprisals Involving Recourse to Armed Force,’ (1972) 66 *American Journal of International Law* 1, 5; C. Gray, *International Law and the Use of Force* (2000), 107-108; R.J. Erickson, *Legitimate Use of Military Force Against State Sponsored International Terrorism* (1989), 143-144; T.J. Farer, ‘Law and War,’ in C.E Black and R.A. Falk (eds.), *The Future of International Order (Vol. III: Conflict Management)* (1971), 64-67; A.C. Arend and R.J. Beck, *International Law and the Use of Force* (1993), 165-166.

¹²⁸ *Nicaragua*, Merits, para. 231 (emphasis added).

¹²⁹ See, for example, SC Res 101, UN doc. S/3139/Rev.2, and more generally, C. Gray, *International Law and the Use of Force* (2000), 108.

¹³⁰ By its very nature, terrorist activity may often involve multiple uses of force, with each action individually falling below the level of an armed attack. This is pointed out by Y.Z. Blum, ‘State Response to Acts of Terrorism’ (1976) 19 *German Yearbook of International Law* 223, 233-234 and by R.J. Erickson, *Legitimate Use of Military Force Against State Sponsored International Terrorism* (1989), 143.

¹³¹ These questions are posed by A. Laursen, ‘The Judgment by the International Court of Justice in the *Oil Platforms Case*’ (2004) 73 *Nordic Journal of International Law* 135, 155.

It is true that the gathering of evidence in cases where military force has been used is particularly problematic.¹³² Indeed, in the circumstances of the case this problem was compounded by the involvement of a third party State, namely Iraq, who was also indisputably involved in belligerent activity in the Persian Gulf at the relevant time.¹³³ This may partly explain why the Court required an apparently high standard of proof from the United States in attributing the attacks against its vessels to Iran. Indeed, the ICJ has repeatedly shown that with regards to evidential standards, the context of each application will be relevant, meaning that in some cases the standard may be higher than others.¹³⁴ However, the issue here is that in *Oil Platforms*, the Court did not clearly state at any point what the standard required was *in the case before it*.

As both Judges Higgins and Bergenthal point out in their Separate Opinions,¹³⁵ at no point does the Court elucidate upon what standard of proof the evidence presented by the United States was being judged against. Instead they merely reject this evidence because it was ‘insufficient’, ‘suggestive but no more’, and then later as ‘highly suggestive, but not conclusive.’¹³⁶ This is a further regrettable continuation of the methodology employed in the *Nicaragua* case, where the Court similarly failed to articulate a standard of proof in reaching its decision on the Merits.¹³⁷

It is not suggested that the Court was necessarily wrong in finding the evidence of the United States as insufficient,¹³⁸ only that it is impossible, when no clear evidential standard has been stated, to know whether its findings on the facts were correct. This is particularly important for current and future State parties before the ICJ.

6.7 Through the Eye of a Needle

¹³² Gardner, for example, suggests that the ICJ is an inappropriate body to deal with the complex evidential issues which inevitably arise in cases where a State has used force. Instead he proposes the Security Council perform a fact finding role in such cases. This would mean disputes relating to uses of force would not go to arbitration, but would be the sole responsibility of the Security Council under Article 33 of the UN Charter. R.N. Gardner, ‘Commentary on the Law of Self-Defence,’ in L.F. Damrosch and D.J. Scheffer (eds.), *Law and Force in the New International Order* (1991), 52-53.

¹³³ This point is raised by Judge Owada. *Oil Platforms*, Merits, Separate Opinion of Judge Owada, para. 43.

¹³⁴ See M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals (Studies & Materials on the Settlement of International Disputes, Vol. 1)* (1996), 323.

¹³⁵ *Oil Platforms*, Merits, Separate Opinion of Judge Higgins, paras. 30-39 and Separate Opinion of Judge Bergenthal, para. 41.

¹³⁶ *Oil Platforms*, Merits, paras. 57, 59 and 71.

¹³⁷ See *Oil Platforms*, Merits, Separate Opinion of Judge Higgins, para. 32. Throughout *Nicaragua*, evidence was rejected as ‘insufficient’ without the Court indicating where the line between sufficiency and insufficiency lay (see paras. 54, 110, 159 and 216). The Court was slightly more clear about the standard required in the *Corfu Channel Case* (United Kingdom v. Albania), Merits (1949) ICJ Reports 4, which related in part to the law on the use of force. Here, the Court held that certain witness statements ‘could be regarded only as allegations falling short of conclusive evidence,’ and that a ‘charge of...exceptional gravity against a State would require a degree of certainty’ (see 17). Yet, this indication of an evidential standard in such circumstances from *Corfu Channel* is at best something for the Court to build upon. Ultimately the evidential standards required by the ICJ are often unclear, particularly in cases of ‘exceptional gravity’ such as those concerning a use of force, and *Oil Platforms* has done nothing to improve this situation. On the ICJ’s standards of evidence generally, see D.V. Sandifer, *Evidence Before International Tribunals* (revised ed., 1975), 123-141.

¹³⁸ Although, both Judges Higgins and Kooijmans suggested that the evidence that Iran was responsible for the mining of the USS *Samuel B. Roberts* was particularly persuasive. See *Oil Platforms*, Merits, Separate Opinion of Judge Higgins, para. 36 and Separate Opinion of Judge Kooijmans, para. 56.

Ultimately, aside from the cumulative effect of the re-affirmation a number of aspects of *Nicaragua*, the law of self-defence appears no clearer following the *Oil Platforms* decision. If anything, the contentious issues which arose from *Nicaragua* have been further complicated with the seeming addition of a 'military target' requirement, and the acceptance of the accumulation of events theory by the Court. This is compounded by the confusion over the standard of evidence employed in the case (and thus to be potentially employed in future use of force cases). Given that the ICJ stretched its jurisdiction so as to be able to examine the law of self-defence, it seems anomalous that the Court's jurisprudence did little to clarify or improve the existing law.

In *Oil Platforms*, the United States was implicitly found to be in breach of Article 2(4) of the UN Charter. Indeed this implicit finding was set out in the *dispositif*.¹³⁹ However, the ICJ did not *explicitly* condemn the United States for what by the Court's own reasoning must have been an illegal action. Nor did it refer to the controversial issue of forcible counter-measures. The reason for this must be that the Court saw that it had already strayed beyond its jurisdictional bounds. The Court was constrained in what it could say on the use of force, and thus what it did say was inadequate. In her Separate Opinion, Judge Higgins rightly expresses her concern with this restricted method of examining such important principles:

It cannot, it seems to me, be 'desirable' or indeed appropriate to deal with a claim relating to freedom of commerce and navigation by making the centre of its analysis the international law on the use of force. And conversely, if the use of force on armed attack and self-defence is to be judicially examined, is the appropriate way to do so through the eye of the needle that is the freedom of commerce clause of a 1955 FCN Treaty? The answer must be in the negative.¹⁴⁰

In pushing the law on self-defence through the eye of the metaphorical needle, the Court ended up with an insufficient picture of that law on the other side.

7 CONCLUSION

It can be inferred from the methodology employed in deciding the *Oil Platforms* case that the Court wished to make pronouncements on the law on the use of force. This is perhaps understandable given the current climate following the coalition intervention in Iraq initiated in March 2003. Of course, it is clearly not appropriate for the Court to reason its Judgment on incidents that took place in the late 1980s based upon the state of the world today. However, faced with undisputed evidence of attacks which appear distinctly like military reprisals instigated by the mightiest State in the world,¹⁴¹ condemnation of these actions from the principal judicial organ of the

¹³⁹ See Section 5.1, above.

¹⁴⁰ *Oil Platforms*, Merits, Separate Opinion of Judge Higgins, para. 26.

¹⁴¹ The media at the time of the second attacks against the Nasr and Salman complexes clearly presented the incidents as retaliatory, see H. Anderson, 'Iran's Devastating Week' *Newsweek*, 2 May 1988, 11, and W.R. Doerner, 'Tangling with Tehran' *Time*, 2 May 1988, 22-23. This view was articulated by a number of Judges in their Separate/Dissenting Opinions to the case: see, for example, *Oil Platforms*, Merits, Separate Opinion of Judge Kooijmans, who states, at para. 62: 'I find it hard to avoid the impression that in reality a punitive intent prevailed.'

United Nations and a re-affirmation of the prominence of the principle of non-use of force would in many ways be desirable. An examination of the role of the ICJ in augmenting existing norms goes far beyond the scope of this article, but it can be argued that the ICJ has a responsibility to progressively develop international law, especially in relation to fundamental principles such as the prohibition on forcible intervention.¹⁴²

Yet, because of the restrictions the Court faced in *Oil Platforms*, it did not explicitly condemn the United States as being in breach of Article 2(4) of the UN Charter. If the Court believed it so crucial to highlight the illegality of the United States in attacking the oil platforms, would it not have been preferable for it to have found that State in breach of Article X, paragraph 1 of the 1955 Treaty? As discussed above, it was certainly arguable that this Article was breached by the United States (particularly with regard to the first set of attacks), and the Court had firm jurisdictional grounds to condemn these actions, albeit under a bilateral Treaty. Instead the Court 'sat on the fence' and refused to hold either party in breach of the Treaty, whilst at the same time initiating a radical examination of the conduct of the United States under the law on the use of force.

By trying to ensure credibility both in the eyes of future parties before the ICJ (who desire consistency and assurance that their application will be what is ruled upon), and those who expect the Court to denounce illegal uses of force at every opportunity, the Court achieves neither objective. In fact it loses credibility in the eyes of both camps, something which can only be harmful for the ICJ. In attempting to make authoritative pronouncements on the law on the use of force by way of an application which was jurisdictionally unsuited for that purpose, the Court further muddied the already murky waters of its *Nicaragua* jurisprudence. Perhaps more disconcertingly, it can be argued that the Court took political steps beyond the boundaries of its jurisdiction. However undesirable it may be for the World Court to be restrained and unable to rule on even the most essential principles of international law, in the context of the current international judicial system, the *Oil Platforms* case represents a brave, but flawed and ultimately dangerous move by the Court.

¹⁴² This view was expounded by Lauterpacht, see Sir H. Lauterpacht, *The Development of International Law by the International Court* (revised ed., 1958), particularly 6-25. See also P. Allott, 'The ICJ and the Voice of Justice,' in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996), 17-39. This position was strongly argued by both Judge Simma and Judge Elaraby. See *Oil Platforms*, Merits, Separate Opinion of Judge Simma and Dissenting Opinion of Judge Elaraby.