DISSENTING OPINION OF JUDGE TARAZI

[Translation]

Having perused the Application instituting proceedings which the Government of the United States of America filed on 29 November 1979, read the Memorial filed by it on 15 January 1980 and listened to the oral arguments during the hearings of 18, 19 and 20 March 1980, the Court had before it a series of facts, historical developments and legal arguments which were to lead to its delivering a Judgment of, in my view, cardinal importance. I concurred in the findings of the Judgment concerning the necessity of compliance by the Government of the Islamic Republic of Iran with the obligations incumbent upon it under the Vienna Conventions of 1961 and 1963 on, respectively, Diplomatic and Consular Relations. I nevertheless found some difficulty, arising on the one hand from the situation which has developed in Iran since the overthrow of the régime of which the former Shah was the symbol, and on the other hand from the conduct of the applicant State both before and after the events of 4 November 1979, in deciding and declaring only that the Government of the Islamic Republic of Iran was responsible vis-à-vis that of the United States of America while neglecting to point out at the same time that the latter had also incurred responsibility, to an extent remaining to be determined, vis-à-vis the Government of Iran.

My intention here is to indicate, with as brief explanations as possible, the reasons for my attitude and position. To that end I will have to consider the following points :

1. The principle of the inviolability of diplomatic and consular missions and of the immunity enjoyed by their members ;
2. The factors which enter into the assessment in principle of the responsibility incurred by the Government of the Islamic Republic of Iran ;
3. The actions undertaken by the United States Government both before and after the seisin of the Court which were capable of affecting the course of the proceedings.

1. The Inviolability of Diplomatic and Consular Missions and the Immunity Enjoyed by Their Members

I entirely concurred in the reasoning of the Judgment on this point. I was pleased to note that the Judgment took particular account of the traditions of Islam, which contributed along with others to the elaboration of the rules of contemporary public international law on diplomatic and consular inviolability and immunity.

In a course of lectures which he gave in 1937 at the Hague Academy of International Law on the subject of "Islam and *jus gentium*", Professor Ahmed Rechid of the Istanbul law faculty gave the following account of the inviolability of the envoy in Muslim law :

> "In Arabia, the person of the ambassador had always been regarded as sacred. Muhammad consecrated this inviolability. Never were ambassadors to Muhammad or to his successors molested. One day, the envoy of a foreign nation, at an audience granted to him by the Prophet, was so bold as to use insulting language. Muhammad said to him : 'If you were not an envoy I would have you put to death.' The author of the 'Siyer' which relates this incident draws from it the conclusion that there is an obligation to respect the person of ambassadors."

Ahmed Rechid adds further on :

> "The Prophet always treated the envoys of foreign nations with consideration and great affability. He used to shower gifts upon them and recommended his companions to follow his example, saying : 'Do the same as I' [1]."

In a work entitled *International Law,* published by the Institute of State and Law of the Academy of Sciences of the USSR, the following is to be read on the conduct in the Middle Ages of the Arabs, the bearers of the Islamic faith :

> "The Arab States, which played an important part in international relations in the Middle Ages (from the 7th century) had well-developed conceptions regarding the Law of Nations, closely linked with religious precepts.
>
> The Arabs recognised the inviolability of Ambassadors and the need for the fulfilment of treaty obligations. They resorted to arbitration to settle international disputes and considered the observance of definite rules of law necessary in time of war ('the blood of women, children and old men shall not besmirch your victory')."

2. Factors Which Enter into the Assessment in Principle of the Responsibility Incurred by the Iranian Government

The deductions made by the Court from the fact that the Government of the Islamic Republic of Iran had violated its binding international obligations to the United States of America with regard to diplomatic invio-

[1] Ahmed Rechid, "L'Islam et le droit des gens", 60 *Recueil des cours de l'Académie de droit international,* 1937-II, pp. 421 f.

lability and immunity have led it to declare the former responsible by reason of acts of both omission and commission.

I find this approach inadequate. It is not right to proclaim the responsibility of the Iranian Government unless its examination is first preceded by an appropriate study of the historical facts antedating the seizure by Islamic students of the United States Embassy in Tehran on 4 November 1979. In that respect, it is a matter for deep regret that the Iranian Government refused to appear before the Court. Nevertheless, it emerges from the two identical communications addressed to the Court by the Iranian Minister for Foreign Affairs on 9 November 1979 and 16 March 1980 that the Government of the Islamic Republic of Iran considers that the present proceedings are only a marginal aspect of a wider dispute dividing Iran and the United States since the Shah was in 1953 restored to the throne thanks to the intrigues of the CIA and the United States Government continued to meddle in Iran's internal affairs.

In spite, and perhaps because of the absence, of the Government of Iran from the proceedings, it behoved the Court to elucidate this particular point before pronouncing on the responsibility of the Iranian State. That responsibility ought to have been qualified as relative and not absolute.

I recognize that the Court made a laudable effort in that direction. This, however, remained insufficient. It has been argued that more would mean examining deeds of a political nature which lay outside the framework of the Court's powers. But is it possible to ignore historical developments which have direct repercussions on legal conflicts ? The Permanent Court of International Justice well clarified this point when in its Judgment of 7 June 1932 *(Free Zones of Upper Savoy and the District of Gex),* it stated :

> "The era of the Napoleonic Wars preceding the Hundred Days was brought to an end by the treaties concluded at Paris on May 30th, 1814, between France, on the one hand, and Austria, Great Britain, Prussia and Russia respectively, on the other." (*P.C.I.J., Series A/B, No. 46, 1932,* p. 115.)

One could therefore have devoted some attention to the events of 1953 with a view to gauging to what extent the assertion of the Iranian Minister for Foreign Affairs was plausible. On this essential question, I have been able to glean some impression from a source that does not look with any favourable eye upon the Islamic Revolution of Iran. In his work entitled *The Fall of the Shah,* Mr. Fereydoun Hoveyda, the brother of the ex-sovereign's former Prime Minister, Mr. Abbas Amir Hoveyda, who was condemned to death and executed after the ex-sovereign left Iran, says :

> "Some Iranian observers were sceptical, considering that foreign interests were pulling the strings : top-ranking non-British companies on the world market were pushing for a break of the contract with the

AIOC [Anglo-Iranian Oil Company]. Be that as it may, when the nationalist uproar grew, the Iranian ruling class and various foreign powers got the wind up and turned to the Shah again. It was then that the CIA floated the idea of a coup d'état, and in 1953 Kermit Roosevelt visited Tehran to examine the possibilities and find a likely candidate. He found his man in General Zahedi, and the plotters staged the departure of the Shah after having him sign a decree naming Zahedi prime minister. He used CIA money to buy the services of Shaban-bi-mokh (literally Shaban the Scatterbrain), the master of a famous 'Zurkhané' (a traditional gymnastics club), in order to recruit a commando squad of 'civilians' to act in concert with the army. The operation begun in August 1953 did not take more than a day, and then the Shah made a triumphal return. And the very people who had followed Mossadeq right up to the eleventh hour scurried to the airport and prostrated themselves before the sovereign to kiss his boots !

In spite of the facts, which have been disclosed by the Americans themselves, the Shah was pleased to consider the 1953 coup as a 'popular revolution' which gave him the mandate of the people. And apparently he ended up by believing his own propaganda. Already the sovereign was showing a tendency to bend the truth ; it was to intensify to the point of cutting him right off from the realities of the country [1]."

Thus, in the eyes of the present Iranian leaders, the power of the Shah had lacked all legitimacy or legality ever since the overthrow of Dr. Mossadegh in 1953. This point should have been examined carefully, because these same leaders say that they are firmly convinced that the Shah would not have been able to maintain himself upon the throne without the backing given him by the Government of the United States of America.

This opinion concords with the reflections of Dr. Henry Kissinger, the former Secretary of State of the United States of America. In his work entitled *The White House Years,* Dr. Kissinger states that :

"Under the Shah's leadership the land bridge between Asia and Europe, so often the hinge of world history, was pro-American and pro-West beyond any challenge. Alone among the countries of the region – Israel aside – Iran made friendship with the United States the starting point of its foreign policy. That it was based on a cold-eyed assessment that a threat to Iran would most likely come from the Soviet Union, in combination with radical Arab states, is only another way of saying that the Shah's view of the realities of world politics

[1] Fereydoun Hoveyda (trans. Roger Liddell), *The Fall of the Shah,* London, 1979, pp. 92 f.

> paralleled our own. Iran's influence was always on our side ; its resources reinforced ours even in some distant enterprises – in aiding South Vietnam at the time of the 1973 Paris Agreement, helping Western Europe in its economic crisis in the 1970s, supporting moderates in Africa against Soviet-Cuban encroachment ... In the 1973 Middle East war, for example, Iran was the *only* country bordering the Soviet Union not to permit the Soviets use of its air space – in contrast to several NATO allies. The Shah ... refueled our fleets without question. He never used his control of oil to bring political pressure ; he never joined any oil embargo against the West or Israel. Iran under the Shah, in short, was one of America's best, most important, and most loyal friends in the world. The least we owe him is not retrospectively to vilify the actions that eight American Presidents – including the present incumbent – gratefully welcomed [1]."

It is in these words that Dr. Kissinger himself describes the links which existed between the presence of the Shah at the head of the Iranian State and the exigencies of American worldwide and Middle-East strategy. These links do not in any way justify the occupation of the Embassy. But they should be placed in the balance when the responsibility incurred by the Iranian Government falls to be weighed.

Furthermore, the ex-Shah, when in Mexico, was authorized to enter United States territory. The United States authorities were perfectly aware that this authorization might have untoward consequences. They nevertheless granted it, thus committing a serious fault which the Court could have taken into consideration. In what has become a classic work, entitled *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle,* the brothers Henri, Léon and Jean Mazeaud write :

> "If the sole cause of the injury is an act of the complainant, the defendant should always be absolved, for it was not his fault if harm was done. He is thus entitled to rely on the complainant's act, whatever it be. Here it should be pointed out that the question whether the complainant's act contained an element of fault does not even arise. The defendant is absolved because it was not *his* act which was held to be the cause of the injury. In reality, he relies on the complainant's act solely in order to establish the absence of any causal connection between his own act and the harm done [2]."

Similarly, before reaching the point of declaring the Iranian State

[1] H. Kissinger, *The White House Years,* London, 1979, p. 1262.

[2] H., L. and J. Mazeaud, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle,* Tome II, 6th ed., Paris, 1970, p. 552.

responsible, one should take into consideration the circumstances in which the facts complained of occurred. In doing so, one must bear in mind the essential point that Iran is at present traversing a period of revolution. It is no longer valid to assess the obligations of the Iranian State in accordance with the criteria which were current before the departure of the Shah. This corresponds to the essence of the theory recognized in French administrative law with regard to the influence of war on the obligations of the State and public bodies. In its Judgment of 30 March 1916 *(Compagnie du gaz de Bordeaux)* the French Conseil d'Etat confirmed the principle of the collapse of the economy of contracts on account of war [1]. This principle was endorsed by the great French jurist Maurice Hauriou, in his theory of the unforeseen [2].

With this essential factor added to those already mentioned, the responsibility of the Government of the Islamic Republic of Iran ought to have been envisaged in the context of the revolution which took place in that country and brought about, as it were, a break with a past condemned as oppressive. Thus it would in my view be unjust to lay all the facts complained of at the door of the Iranian Government without subjecting the circumstances in which those acts took place to the least preliminary examination.

3. The Actions Undertaken Before and After the Seisin of the Court Which Were Capable of Affecting the Course of the Proceedings

The Government of the United States of America referred its dispute with Iran to the Court on 29 November 1979. It is certain that the Court's jurisdiction is not automatic. The Court possesses only such jurisdiction as is conferred upon it. Two essential consequences flow from this :

(a) any State is free to ignore the possibility of the judicial solution of a dispute, either by omitting to refer it to the International Court of Justice, or by refusing to submit to the Court's jurisdiction, to the extent that the circumstances of the case enable it so to refuse ;

(b) however, once a State presents itself before the Court as an applicant and requests it to direct the respondent State to submit to the law, the option it possessed before the institution of proceedings disappears. The whole dossier of the dispute at issue is taken in hand by the Court. The applicant State must refrain from taking any decisions on the planes of either domestic or international law which could have the effect of impeding the proper administration of justice.

[1] Conseil d'Etat, 30 March 1916, *Recueil Sirey*, 1916, Part III, pp. 17 ff.
[2] Maurice Hauriou, note to judgment in question *(ibid.)*

Yet, even before turning to the Court, the Government of the United States of America had already decided to freeze the Iranian assets in United States dollars lodged in United States banks or their branches abroad.

Subsequently, just when the Court was embarking upon its deliberation prior to the Judgment it was to adopt, the President of the United States of America, on 7 April 1980, announced a series of measures he had decided to take which were closely connected with the case before the Court. Having regard to the normal exercise of the Court's powers, the most important of these measures was unquestionably the third, whereby he ordered the Secretary of the Treasury to :

> "make a formal inventory of the assets of the Iranian Government which were frozen by my previous order and also make a census or inventory of the outstanding claims of American citizens and corporations against the Government of Iran. This accounting of claims will aid in designing a program against Iran for the hostages, the hostage families and other United States claimants."

The President added : "We are now preparing legislation which will be introduced in the Congress to facilitate processing and paying of these claims."

This, in my view, constituted an encroachment on the functions of the Court, for until the Court has ruled upon the principle of reparation the applicant State is not entitled to consider that its submissions, or part of them, have already been accepted and recognized as well founded. What is more, the decision of the United States President to propose the adoption by Congress of legislation granting victims the possibility of receiving compensation out of the Iranian assets frozen in the United States, when the action before the Court has not yet been exhausted, raises the problem of a conflict between the rules of municipal law and those of international law. Were the legislation contemplated to be passed, the conflict would be settled to the detriment of the latter.

However, it was the military operation of 24 April 1980 which was the gravest encroachment upon the Court's exercise of its power to declare the law in respect of the dispute laid before it. This operation was called off by the President of the United States for technical reasons. It is not my intention to characterize that operation or to make any legal value-judgment in its respect, but only to allude to it in connection with the case before the Court. I must say that it was not conducive to facilitating the judicial settlement of the dispute.

In his report to the Security Council of 25 April 1980, Mr. Donald McHenry, the Permanent Representative of the United States of America, stated that the military operation of 24 April 1980 had been undertaken pursuant to Article 51 of the Charter of the United Nations. Yet Article 51 provides for the eventuality of that kind of operation only "if an armed attack occurs against a Member of the United Nations". One can only wonder, therefore, whether an armed attack attributable to the Iranian

Government has been committed against the territory of the United States, apart from its Embassy and Consulates in Iran.

To sum up my position, I would like to mention the following points :

(a) I consider that the Court has jurisdiction to decide the present case only under the provisions of the Vienna Conventions of 1961 and 1963 on, respectively, Diplomatic and Consular Relations. Any direct or indirect reference to the 1955 Treaty between the United States and Iran or to the 1973 Convention is, from my point of view, unacceptable.

(b) I consider that the Iranian Government has violated its obligations under the two Vienna Conventions mentioned above. I concur in those parts of the operative paragraph which deal with this question.

(c) On the other hand, I could not support the idea that the Iranian Government should be declared responsible unless the Court also found :

(i) that the responsibility in question is relative and not absolute, that it must straightway be qualified in accordance with the criteria which I have put forward and others which may be envisaged ;

(ii) that the Government of the United States of America, by reason of its conduct both before and after the institution of proceedings, has equally incurred responsibility.

(Signed) S. TARAZI.