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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1996

Public sitting

held on Monday 16 September 1996, at 3 p.m., at the Peace Palace,

President Bedjaoui presiding

in the case concerning Oil Platforms

(Islamic Republic of Iran v. United States of America)

Preliminary Objection

VERBATIM RECORD

ANNEE 1996

Audience publique

tenue le lundi 16 septembre 1996, à 15 heures, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

en l'affaire des Plates-formes pétrolières

(République islamique d'Iran c. Etats-Unis d'Amérique)

Exception préliminaire

COMPTE RENDU

Present:	President	Bedjaoui
	Vice-President	Schwebel
	Judges	Oda
		Guillaume
		Shahabuddeen
		Weeramantry
		Ranjeva
		Herczegh
		Shi
		Fleischhauer
		Koroma
		Vereshchetin
		Ferrari Bravo
		Higgins
		Parra-Aranguren
	Judge *ad hoc*	Rigaux
	Registrar	Valencia-Ospina

Présents : M. Bedjaoui, Président
M. Schwebel, Vice-Président
MM. Oda
Guillaume
Shahabuddeen
Weeramantry
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin
Ferrari Bravo
Mme Higgins,
M. Parra-Aranguren, juges
M. Rigaux, juge *ad hoc*

M. Valencia-Ospina, Greffier

The Government of the Islamic Republic of Iran is represented by:

Mr. M. H. Zahedin-Labbaf, Agent of the Islamic Republic of Iran to the Iran-U.S. Claims Tribunal,

as Agent;

Mr. S. M. Zeinoddin, Head of Legal Affairs, National Iranian Oil Company,

Mr. James R. Crawford, Whewell Professor of International Law, University of Cambridge, Member of the International Law Commission,

Mr. Luigi Condorelli, Professor of International Law, University of Geneva,

Mr. Rodman R. Bundy, Avocat à la Cour de Paris, Member of the New York Bar, Frere Cholmeley, Paris,

as Counsel and Advocates;

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A., Whewell Professor of International Law, Emeritus, University of Cambridge,

Dr. N. Mansourian, Legal Advisor, Bureau of International Legal Services of the Islamic Republic of Iran,

Dr. M. A. Movahed, Senior Legal Advisor, National Iranian Oil Company,

Dr. H. Omid, Legal Advisor, National Iranian Oil Company,

Dr. A. A. Mahrokhzad, Legal Advisor, National Iranian Oil Company,

Mr. David S. Sellers, Solicitor, Frere Cholmeley, Paris,

Ms Loretta Malintoppi, Avocat à la Cour, Frere Cholmeley, Paris

as Counsel.

The Government of the United States of America is represented by:

Mr. Michael J. Matheson, Acting Legal Adviser, U.S. Department of State,

as Agent;

Dr. John H. McNeill, Senior Deputy General Counsel, U.S. Department of Defense,

Professor Andreas F. Lowenfeld, Rubin Professor of International Law, New York University School of Law,

Le Gouvernement de la République islamique d'Iran est représenté par :

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M. James R. Crawford, professeur de droit international, titulaire de la chaire Whewell à l'Université de Cambridge,

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Le Gouvernement des Etats-Unis d'Amérique est représenté par :

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comme agent;

M. John H. McNeill, conseiller juridique principal adjoint du département de la défense des Etats-Unis,

M. Andreas F. Lowenfeld, professeur de droit international, titulaire de la chaire Rubin à la faculté de droit de l'Université de New York,

Mr. John R. Crook, Assistant Legal Adviser for United Nations Affairs, U.S. Department of State,

Dr. Sean Murphy, Counselor for Legal Affairs, United States Embassy, The Hague,

Mr. Jack Chorowsky, Special Assistant to the Legal Adviser, United States Department of State

Commander Ronald D. Neubauer, JAGC, United States Navy,

as Counsel and Advocates;

Mr. Allen Weiner, Attache (Office of the Legal Counselor), United States Embassy, The Hague

as Counsel.

M. John R. Crook, conseiller juridique adjoint pour les questions concernant l'Organisation des Nations Unies au département d'Etat des Etats-Unis,

M. Sean Murphy, conseiller pour les affaires juridiques à l'ambassade des Etats-Unis aux Pays-Bas,

M. Jack Chorowsky, assistant spécial du conseiller juridique du département d'Etat des Etats-Unis,

Le capitaine de frégate Ronald D. Neubauer, *Judge Advocate General's Corps,* de la Marine des Etats-Unis,

comme conseils et avocats;

M. Allen Weiner, bureau du conseiller juridique, attaché à l'ambassade des Etats-Unis aux Pays-Bas,

comme conseils.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today, pursuant to Articles 43 *et seq.* of its Statute and Article 79, paragraph 4, of the Rules of Court, to hear the oral statements of the Parties on the preliminary objection raised by the United States of America in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*.

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* *

La Cour ne comptant pas sur le siège de juge de la nationalité du demandeur, celui-ci a fait usage du droit que lui confère l'article 31, paragraphe 2, du Statut de désigner un juge *ad hoc*. Le choix de la République islamique d'Iran s'est porté sur M. François Rigaux, de nationalité belge. Il est heureux pour la Cour qu'une personnalité aussi éminente ait été désignée pour siéger en qualité de juge *ad hoc* en l'affaire.

M. Rigaux a à peine besoin d'être présenté, tant il est bien connu, non seulement des internationalistes, mais aussi des spécialistes de maintes autres disciplines juridiques. Rares sont en effet les juristes qui, comme M. Rigaux, ont acquis une si vaste culture et une si grande intelligence du droit qu'ils peuvent s'exprimer dans ses différents domaines avec une maîtrise aussi sûre et une autorité aussi incontestée. M. Rigaux a été formé à l'école de la prestigieuse Université catholique de Louvain, où il a étudié non seulement le droit, mais aussi la philosophie et les sciences criminelles. Agrégé de l'enseignement supérieur en droit, il a accompli une carrière aussi brillante que

féconde consacrée à l'enseignement et à la recherche dans diverses branches du droit, tant à l'Université de Louvain que dans d'autres universités ou institutions scientifiques de son pays et à l'étranger. Auteur de nombreuses publications qui constituent autant d'ouvrages de référence dans les matières concernées, M. Rigaux est aussi le distingué membre de plusieurs académies et sociétés savantes, parmi lesquelles l'Académie royale de Belgique et l'Institut de droit international. M. Rigaux a par ailleurs acquis une vaste expérience de la pratique du droit en exerçant successivement, dans son pays, les fonctions d'avocat, de magistrat de l'ordre judiciaire et d'assesseur de la section de législation du Conseil d'Etat belge.

Conformément aux dispositions de l'article 31, paragraphe 6, du Statut de la Cour, les juges *ad hoc* doivent prendre l'engagement solennel prévu à l'article 20 dudit Statut. J'invite en conséquence M. Rigaux à faire maintenant la déclaration dont le texte figure à l'article 4 du Règlement de la Cour, et je demande à l'assistance de bien vouloir se lever.

Monsieur le juge Rigaux, je vous en prie.

M. RIGAUX :

«Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

Le PRESIDENT : Veuillez vous asseoir. Je vous remercie, Monsieur Rigaux. Je prends acte de la déclaration faite par M. Rigaux et

le déclare dûment installé comme juge *ad hoc* en l'affaire des *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique)*.

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The proceedings were brought on 2 November 1992 by the filing in the Registry of the Court of an Application by the Islamic Republic of Iran against the United States of America, in respect of a dispute

> "aris[ing] out of the attack and destruction of three off-shore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, by several warships of the United States Navy on 19 October 1987 and 18 April 1988 respectively".

In its Application, the Islamic Republic of Iran asserts that those acts constitute a "fundamental breach" of various provisions of the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran which was signed in Tehran on 15 August 1955 and entered into force on 16 June 1957, as well as of international law; and the Islamic Republic requests the Court to adjudge and declare that the United States is under an obligation to "make reparations ... for the violation of its international legal obligations". The Application invokes, as a basis for the Court's jurisdiction, Article XXI, paragraph 2, of the Treaty of Amity.

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By an Order dated 4 December 1992, the President of the Court fixed 31 May 1993 and 30 November 1993 as the respective time-limits for the filing of the Memorial of the Islamic Republic of Iran and the Counter-Memorial of the United States of America. At the request of Iran, the time-limit for the filing of its Memorial was extended until June 1993 by an Order of the President dated 3 June 1993; while the time-limit for the filing of the Counter-Memorial of the United States was extended, by the same Order, until 16 December 1993. The Memorial of the Islamic Republic of Iran was filed within the time-limit thus extended. Within the extended time-limit fixed for the filing of the Counter-Memorial, the United States of America raised a preliminary objection to the jurisdiction of the Court to entertain the case, pursuant to Article 79, paragraph 1, of the Rules of Court.

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The follow-up to the filing of a preliminary objection is laid down in Article 79 of the Rules of Court. In accordance with paragraph 3 of that Article, upon receipt by the Registry of a preliminary objection the proceedings on the merits are suspended, and a particular proceeding has to be organized in order to enable the Court to consider that objection. By an Order dated 18 January 1994, the President of the Court fixed 1 July 1994 as the time-limit within which the Islamic Republic of Iran could present a written statement of its observations and submissions in respect of the preliminary objection raised by the United States of America. Within the time-limit thus fixed, the Islamic Republic filed

such a statement, at the end of which it asks the Court to adjudge and declare:

> "1. That the Preliminary Objection of the United States is rejected in its entirety;
>
> 2. That, consequently, the Court has jurisdiction under Article XXI (2) of the Treaty of Amity to entertain the claims submitted by the Islamic Republic of Iran in its Application and Memorial as they relate to a dispute between the Parties as to the interpretation or application of the Treaty;
>
> 3. That, on a subsidiary basis in the event the Preliminary Objection is not rejected outright, it does not possess, in the circumstances of the case, an exclusively preliminary character within the meaning of Article 79 (7) of the Rules of Court; and
>
> 4. Any other remedy the Court may deem appropriate."

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Pursuant to Article 79, paragraph 4, of the Rules of Court, it now falls to the Court to hear the Parties on the questions relating to its jurisdiction. I note the presence here of the Agents of the two Parties. For the purposes of the oral proceedings on the preliminary objection, the Agent of the United States of America will be the first to take the floor.

However, before giving him the floor, I must announce that, after having ascertained the views of the Parties, the Court has decided, in accordance with Article 53, paragraph 2, of the Rules of Court, to make accessible to the public the pleadings and documents annexed thereto filed to date in the present proceedings.

I now give the floor to Mr. Matheson, the distinguished Agent of the United States of America to open the pleadings for his government.

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MR. MATHESON: Mr. President and Members of the Court, it is again my great honour and pleasure to appear before you on behalf of the United States of America.

We are here to explain the basis for the preliminary objection of the United States to the Application filed by the Islamic Republic of Iran. We will refer in the course of our presentation to decisions of the Court, exhibits in the record, and other supporting materials. With the Court's indulgence, we will not read the citations to these materials, but they are included in the texts which we have submitted to the Registry.

Before proceeding to explain the preliminary objection, and without wishing to enter into any lengthy discussion of the merits of the case, let me reiterate briefly for the record the basic position of the United States regarding the allegations made in the Iranian Application.

The United States does not accept the allegation that the actions of US forces in question were unlawful or a manifestation of a design to assist Iraq in the prosecution of its war effort. If this case were to proceed to the merits, we would show that the United States acted at all times in lawful defence of its forces, its nationals and ships of its registry from unlawful attack by Iranian forces.

We would be prepared to establish that the Iranian platforms in question were destroyed because of their use to facilitate Iranian attacks on neutral shipping, including US warships and merchant vessels. Accordingly, the United States is not, by its preliminary objection, seeking to avoid responsibility for wrongful acts. If this case should proceed to the merits phase, the United States would deny liability for the loss and damage resulting from these incidents, and would demonstrate that it is the Islamic Republic of Iran which must bear that loss.

Returning now to the basis for the US preliminary objection, we will show in these proceedings that the claims brought by Iran under the 1955 bilateral Treaty of Amity, Economic Relations and Consular Rights have no reasonable basis under that Treaty, but are in fact assertions that the United States violated obligations under general international law - assertions that do not fall within the Court's jurisdiction pursuant to the Treaty. We will show that the Treaty has no reasonable application to the events that are at issue in this case, which were part of a series of military encounters between Iranian and US forces having no relationship to the commercial and consular matters regulated by the Treaty.

The invocation of the 1955 Treaty by Iran for this purpose is remarkable in many ways. For many years, when the United States and US claimants invoked the Treaty before the Iran-United States Claims Tribunal with respect to commercial issues, Iran insisted that the Treaty was no longer in force. It would appear from the record that Iran maintained this position right up to the moment of the filing of its Memorial in the case concerning the *Aerial Incident of 3 July 1988*, when

the Treaty apparently became attractive as an alternative basis for jurisdiction in that case.

To our knowledge, Iran had not previously invoked the Treaty as an all-purpose charter governing every aspect of friendly relations, including the use of force. Nor has the United States done so; in the case concerning *United States Diplomatic and Consular Staff in Tehran*, the United States alleged violation of the specific consular provisions of the Treaty rather than some broader notion of a violation of friendly relations. During the Iranian Revolution, when Iran complained of illegal intervention by the United States in Iranian internal affairs, we know of no instance in which the Government of the Islamic Republic of Iran cast this complaint in terms of the Treaty.

During the long years of the Iran-Iraq War, when Iran complained repeatedly that the United States was unlawfully aiding Iraq in its prosecution of a war of aggression, there was, to our knowledge, no Iranian allegation that this conduct violated the Treaty. Further, so far as we know, Iran never raised the Treaty in connection with the incidents in question in this case until nearly five years after the first of the two incidents, when it decided to file the current Application before this Court. Until that moment, Iran had consistently based its complaints in political fora about these actions of the United States on the alleged violation of the United Nations Charter and other aspects of general international law. Not until Iran needed to find a basis for invoking the jurisdiction of this Court was there, to our knowledge, any suggestion that the United States had violated the provisions of a bilateral commercial treaty.

Having no other jurisdictional alternative, Iran chose to base its claims in the present case on a treaty designed to protect maritime commerce and business relationships, even though the incidents in question arose precisely because of attacks by Iranian forces against neutral shipping that was not engaged in support of the war effort of either Iran or Iraq. In effect, Iran has elected to invoke a bilateral commercial treaty to shield itself from the legal consequences of its own armed attacks on peaceful commerce.

All of this suggests what we believe to be true: that the invocation of the 1955 Treaty was a mere afterthought - an expedient jurisdictional vehicle for complaints that had nothing to do with the substance and purpose of the Treaty.

In any event, it is now for the Court to determine whether this Treaty on commercial and consular relations is a proper jurisdictional basis for this complaint concerning the legality of the use of force. We will show that this is not the case, and that Iran's Application should accordingly be dismissed for want of jurisdiction.

We will begin with a review of the events that gave rise to these military encounters. Dr. John McNeill, Senior Deputy General Counsel of the US Department of Defense, was to have appeared today to deal with this aspect of our presentation. Unfortunately, he has been hospitalized and has been unable to come to The Hague. In his place, his senior assistant, Commander Ronald Neubauer, will deliver the presentation that he and Dr. McNeill had prepared.

Commander Neubauer will show that all of the facts needed to support the preliminary objection of the United States are well documented in the public record and are not contested by Iran. In particular, he will show

that the events in question were part of a series of hostile encounters involving US and Iranian forces, which occurred during the course of a major international armed conflict. This, in our view, constitutes a sufficient factual predicate for the US preliminary objection.

Commander Neubauer will also deal briefly with various other factual allegations contained in the Observations and Submissions on the US preliminary objection submitted by the Islamic Republic of Iran - allegations that the Court need not rule on in this jurisdictional phase, but that cannot be left unchallenged on the record of these proceedings.

Next, Professor Andreas Lowenfeld, Rubin Professor of International Law at the New York University School of Law, will explain the basis for our belief that the Iranian Application is not within the Court's jurisdiction. He will show that the United States has not consented to the jurisdiction of the Court in this case. He will show that the allegations raised by the Iranian complaint deal not with matters governed by the Treaty, but with a broad range of legal issues regarding neutrality and the use of force that are not within the Court's jurisdiction in this case.

Mr. John Crook, Assistant Legal Adviser for United Nations Affairs in the US Department of State, will continue this argument tomorrow with a more detailed examination of the purposes and provisions of the 1955 Treaty. He will show that it regulates only commercial and consular relations by each party with the nationals of the other, and he will rebut the contention that it governs the entirety of peaceful relations between the Parties.

Next, Dr. Sean Murphy, Legal Counselor to the US Embassy in The Hague, will address the relevance of the decisions of this Court in

the *Nicaragua* case. He will show, contrary to Iran's assertions, that the Court declined in that case to accept the very arguments being made by Iran in the current proceeding, and that the reasoning which led the Court to apply a similar treaty on narrow grounds in the *Nicaragua* case is not applicable to the case brought by Iran.

Mr. Jack Chorowsky, Special Assistant to the Legal Adviser in the Department of State, will then show the Court that it can and should rule in this preliminary phase on the issues raised by our objection. He will explain our view that Iran must, to defeat our objection, establish that its claim has a reasonable connection to the 1955 Treaty.

Finally, I will offer a summary of our arguments. I will ask the Court to uphold the preliminary objection of the United States and to find that it does not have jurisdiction over the Application of the Islamic Republic of Iran.

Mr. President, the distinguished Members of the Court may ask themselves: "Why should the Court decide the issues raised by the United States at this preliminary phase of our proceedings? Do they not relate to issues of substantive interpretation of the 1955 Treaty that would more readily be dealt with in a merits phase, when the Court would have the benefit of a detailed examination of the facts of the case as well as the substance of the provisions of the Treaty?"

These are natural and logical questions, and ones to which the Islamic Republic of Iran has made allusion in its briefs. Let me therefore suggest several reasons why the Court should resolve now the issues raised by the United States in its preliminary objection.

First and foremost, we believe that the legal case for doing so is compelling, for the reasons my colleague and I will develop over the next

two days. The US preliminary objection does possess an exclusively preliminary character and falls within the scope of Article 79 of the Rules of Court. It can be decided on the basis of facts that are uncontested and clear on the public record.

Second, if this case were to proceed to a merits phase, the two Parties would of necessity invest a great deal of time, effort and resources in further fact-finding, preparation and argument that would all be obviated by a clear decision upholding the preliminary objection. The Iranian Complaint deals with a long series of events which took place nearly ten years ago and involved the actions of dozens of ships and aircraft and thousands of men and women of many countries. In light of the high financial and political stakes involved in this case, each Government would certainly wish to investigate and record these events thoroughly. Each would gather eyewitness and expert testimony, material evidence, and background information to prove every aspect of the case.

The United States would also be able in such a merits proceeding to raise counter-claims, such as claims for the damage and costs suffered by the United States as a result of the unlawful actions of Iran committed in connection with these events. If the prodigious expense and effort of such a merits proceeding could be avoided by a decision now, it certainly should be.

Third, if this case were to proceed to the merits, the Court would be confronted with a lengthy and very difficult evidentiary proceeding that would rival or exceed anything of the kind it has yet faced. For example, the disputed events of this case are far more complex and far-ranging than the *Corfu Channel* case. It would, among other things, become necessary for the Court to consider and decide such technical

matters as the characteristics and origin of the mines and missiles used, the character and purpose of the actions conducted on the Iranian platforms, and the sequence of events in a number of hostile encounters.

Since both Parties would be present and actively litigating, these proceedings would inevitably be far more lengthy and complex than those in the *Nicaragua* case and could even rival those of the *South West Africa* cases. Clearly such a merits proceeding would occupy the Court's time and attention for a very long period, and entail a heavy drain on the resources of the Court. If possible, it would be desirable to avoid this through a decision now on the US objection.

Needless to say, if the proper resolution of this case genuinely required the Court to engage in such a merits proceeding, even with all the attendant cost and consequences, the Court should decide to do so. In that event, the United States would vigorously defend its position. On the other hand, if these consequences could be avoided through a proper decision in the current phase on the issues raised by the United States, this would clearly be the preferable course. That is the whole purpose of the preliminary-objections phase. There is nothing to be gained by postponing a decision on issues that can properly be resolved now.

Mr. President, this concludes my introductory remarks. I now suggest that the Court invite Commander Neubauer to address the Court concerning the factual aspects of the case. Thank you, Sir.

The PRESIDENT: Thank you very much Mr. Matheson for your statement. I now give the floor to Commander Neubauer:

Commander NEUBAUER:

I. INTRODUCTION

Mr. President, and distinguished Members of the Court. It is an honour and a privilege for me to be here today to present this statement on behalf of the United States of America. As Mr. Matheson explained Mr. McNeill is hospitalized and regrets very much that he cannot be here today. I will present this statement as Mr. McNeill's senior assistant on this case.

Mr. President, distinguished Members of the Court. It is fundamental that this Court has jurisdiction only in cases where each State has properly consented to the Court's jurisdiction. The Islamic Republic of Iran bases its assertion of jurisdiction in this case exclusively on the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States and the Islamic Republic of Iran (1955 Treaty). In accordance with Article 79 of the Rules of Court I will now briefly, yet - I trust - compellingly, depict a set of facts entirely outside the scope of the compromissory clause of the 1955 Treaty.

The 1955 Treaty deals with commercial, investment, and consular affairs. Its compromissory clause provides that disputes concerning such matters may be referred to this Court. As we will demonstrate, however, this case concerns a matter - the use of armed force in self-defense by a non-belingerent in a wartime context - entirely outside the 1955 Treaty.

In my presentation I will seek to distinguish those facts which are undisputed from those facts which the Islamic Republic of Iran disputes. Although both categories of facts will be discussed, the Court need only consider the undisputed facts to uphold our preliminary objection. These

undisputed facts establish that this Court is without jurisdiction to consider the merits of Iran's claims. So as to give the Court a full apppreciation of the factual context, however, I will also address the disputed facts of this case, noting with particular attention the numerous areas where Iranian claims could be refuted by overwhelming evidence.

This factual presentation is based on publicly available sources found in the record. I shall be careful to identify the specific exhibits submitted by both the Islamic Republic of Iran and the United States that relate to the particular issues that we will address. Should it become necessary at a subsequent stage of this case, the United States would be prepared to prove the disputed facts with overwhelming testimonial, documentary, and physical evidence obtained from US sources, from foreign countries, and from private entities. But, I repeat, the Court does not need to resolve these factual disputes in order to uphold the US preliminary objection.

First, by way of introduction, I will provide an overview of the Iran-Iraq War, focusing particular attention on the "Tanker War" (as it came to be called) that developed from 1984 through 1988. I will describe the defensive response of various States, including the United States, European countries, and the nations of the Gulf Cooperation Council to the very real, and very well-documented, threat that the Islamic Republic of Iran posed to innocent merchant shipping in the Gulf. Also by way of introduction, I will recall that the United States was never a party to the Iran-Iraq War.

Second, I will describe to the Court a series of naval encounters involving Iranian and US armed forces that took place from July 1987 to

July 1988. Please note that the series of military engagements that I will discuss today is not all-inclusive. All of these encounters took place in an environment marked by the threat to innocent merchant shipping resulting from the Tanker War, and by the increased hostility of the Islamic Republic of Iran towards the United States after 11 Kuwaiti-owned tankers were reflagged as US vessels. Included in this series of military engagements were the US responses directed against the Iranian off-shore platforms at Rostam (19 October 1987), and Sirri and Sassan (18 April 1988). I will describe how the Islamic Republic of Iran employed these platforms in connection with the identification, tracking, and targeting of merchant and naval vessels for attack; the coordination of mine-laying in the path of US naval and merchant vessels; and in staging helicopter and small-boat attacks on merchant shipping.

After my presentation, Professor Andreas Lowenfeld will explain further the jurisdictional aspects of why such military engagements fall entirely outside the scope of the 1955 Treaty.

II. THE SETTING. IRAN-IRAQ WAR (1980-1988)

The setting for this case is the Iran-Iraq War which raged from 1980-1988. In 1984, Iraq began the so-called "Tanker War" when it commenced its attacks against tankers carrying Iranian oil through the Gulf. Iraq sought to achieve on the seas the military momentum it was then losing in the ground war, and to deprive Iran of revenues from oil exports.

Because Iraq exported its oil through pipelines, not via tankers, Iran could not respond in kind against Iraqi shipping (US Exhibit 3 at 10; Iranian Memorial, Exhibit 16 at 163-64). Accordingly, Iran

retaliated by attacking commercial shipping going to, from, and through the ports of Gulf Cooperation Council Member States. It is well documented that Iran attacked merchant vessels from over 25 different nations (US Exhibits 6 and 10) There is also much evidence that Iran singled out for attack neutral shipping to and from Kuwaiti and Saudi Arabian ports, reflecting Iran's apparent belief that these States supported the Iraqi war efforts.

The Islamic Republic of Iran does not appear to deny that it attacked other nations' vessels; Iran's own pleadings and exhibits describe such attacks. Apparently, the Islamic Republic of Iran views these incidents as the legitimate exercise of the belligerent's right to visit and search. It is the view of the United States, however, that these attacks did not conform to the law of armed conflict, particularly the rules governing a belligerent's right to visit and search neutral commercial vessels.

These events produced a strong international reaction. On 21 May 1984, the UN Permanent Representatives of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates requested an urgent meeting of the Security Council:

> "to consider the Iranian acts of aggression on the freedom of navigation to and from the ports of our countries. Such acts of aggression constitute a threat to the stability and security of the area and have serious implications for international peace and security." (UN Doc. S/16574; US preliminary objection, p. 8, note 14, and US Exhibit 13 (UNSC res. 552).)

The UN Security Council responded to this plea for help by adopting Security Council resolution 552 on 1 June 1984, which condemned the attacks on commercial ships calling on the ports of Kuwait and Saudi Arabia (US Exhibit 13). The UN Security Council demanded that such

attacks cease immediately and "that there should be no interference with ships en route to and from States that are not parties to the hostilities".

Notwithstanding such international reactions and the unequivocal demand of the UN Security Council, Iran persisted in targeting and destroying the ships of States not parties to the hostilities. As I have noted previously, however, the Islamic Republic of Iran denies that it conducted any unlawful attacks on neutral ships.

III. US POLICY AND ACTIVITIES IN IRAN-IRAQ WAR

The United States never became a party to the hostilities (US Exhibit 3 at 6 and US Exhibit 11). However, this did not mean that the United States was unconcerned with the war. In fact, the policy of the United States was to bring about the immediate cessation of hostilities and a peaceful resolution of the dispute (US Exhibit 3 at 9). The United States desired the war to end without victor or vanquished, preserving the territorial integrity of both belligerents. The United States believed that freedom of navigation had to be preserved, to and from the Gulf. The United States desired that the war not expand, lest it create further threats to regional security. In all of these respects, the policies of the UN Security Council and the United States were the same. US policy fully conformed to the eight UN Security Council resolutions passed to this effect from 1980 through 1987 (US Exhibit 13)

The Islamic Republic of Iran apparently disputes these descriptions of US policy. The Court does not have to resolve these differences of view.

In the face of continued Iranian attacks on neutral shipping, and in the absence of meaningful negotiations to end the Iran-Iraq War, the United States took several actions. In 1987, responding to Kuwait's request, the United States reflagged as US vessels 11 Kuwaiti-owned tankers, in conformity with both international law and US law and procedures (US Exhibit 3 at 7-8). These vessels were then under US registry with US captains, under the jurisdiction and control of the United States. All of these ships adhered strictly to the rules of neutrality. None carried contraband or served belligerent ports.

The Islamic Republic of Iran opposed the US reflagging of the Kuwaiti-owned tankers (Iran's Memorial at 24-25 and 112-113; US Exhibit 8 at 35598 and Exhibit 41 at 234-35). Iran claimed that the reflagging was intended to aid Iraq against Iran and, accordingly, disputed the legality of this action (Iranian Memorial, para. 4.75 at 117; Iranian Observations and Submissions, Annex, para. 12 at 5). It is interesting to observe that, after the US reflagging of Kuwaiti-owned tankers and until the US actions against Iran's off-shore platforms at Sirri and Sassan, Iran's attacks on US-flag vessels were committed only against the reflagged Kuwaiti-owned tankers or their US naval warship escort. The tanker *Bridgeton* was on the very first voyage of the reflagged tankers when it struck an Iranian-laid mine; *Sea Isle City*, another Kuwaiti-owned reflagged tanker, was struck by an anti-ship cruise missile fired from the Iranian-occupied Faw Peninsula; and the guided missile frigate, *USS Samuel B. Roberts*, hit an Iranian-laid mine while returning to Bahrain after escorting such tankers.

Similarly, a Soviet-flag tanker, *Marshal Chuykov*, leased by Kuwait from the Soviet Union, struck an Iranian-laid mine while it was under escort by Soviet naval units en route to Kuwait (Iran's Observations and Submissions, Exhibit 18 at 288).

In the face of continued attacks on neutral shipping, the United States increased its existing naval presence in the Gulf. This presence had existed, without interruption, since 1949 (US Exhibit 3 at 1). Other countries also increased their naval forces during this period. In addition to the United States, Belgium, France, Italy, the Netherlands, the Soviet Union, and the United Kingdom all sent naval vessels to the Gulf to escort merchant shipping and/or to hunt and sweep for naval mines (US Exhibit 3; Iranian Memorial Exhibit 44 at 421). All of these States were endeavouring to protect innocent merchant shipping from unlawful attacks, while at the same time remaining non-belligerents in the Iran-Iraq War.

Attacks on merchant shipping during the Tanker War resulted in enormous losses. Between 1984 and 1988, more than 300 persons were reported killed, wounded, or missing in action as a result of attacks on merchant shipping by Iran and Iraq (US Preliminary Objection, p. 7, note 11). The Oslo-based International Association of Independent Tanker Owners estimated the total tonnage of ships sunk or declared as lost to be nearly one-half the 24 million tons of allied merchant shipping sunk during World War II (US Exhibit 6 at Introduction). Another authority explained that merchant ship losses in the Tanker War exceeded the total of all merchant shipping lost in all other actions since the end of World War II (US Exhibit 12 at 620).

Iran's position before this Court is that it did not unlawfully attack any neutral shipping. The Court does not need to resolve these differences between the Parties to decide the US preliminary objections on jurisdiction.

IV. THE US ACTIONS AGAINST THE IRANIAN OIL PLATFORMS WERE PART OF A SERIES OF HOSTILE MILITARY ENCOUNTERS BETWEEN US AND IRANIAN ARMED FORCES

For about a year, beginning with the US reflagging of the Kuwaiti-owned tankers in July 1987, and lasting until just before the August 1988 cease-fire between the Islamic Republic of Iran and Iraq, a series of military engagements took place involving Iranian and US armed forces. The two engagements underlying Iran's claim are included in this series of events. Iran does not dispute that a series of hostile engagements took place, although it does not always agree with the United States' descriptions of what occurred. The Court does not now need to resolve these differences between the Parties' descriptions of these events. It is sufficient now for the Court to recognize this year-long pattern of military encounters between Iranian and US forces.

The following discussion is the US explanation of what occurred, noting where Iran apparently disagrees.

1. Iranian-Laid Mine Damages **Bridgeton** *(24 July 1987)*

On 24 July 1987, *Bridgeton*, a US-flagged, Kuwaiti-owned tanker under US naval escort en route to Kuwait, hit an Iranian-laid mine in the international shipping channel approximately 18 nautical miles (33 km) south-west of the Iranian island of Farsi. The ship sustained extensive damage. This was the very first voyage of such a reflagged vessel; its

route was highly predictable, because its extremely deep draft severely limited where it could safely sail. Although Iran does not dispute that the *Bridgeton* hit a mine, Iran denies responsibility for it (Iranian Memorial, para. 1.95 at 39). We do not think this denial is credible (US Exhibit 19 at 131). We are prepared to present compelling evidence implicating Iran's responsibility in this mining, should the case go to a subsequent stage and make this necessary.

Acting in self-defense, the United States responded to this hostile use of mines by sending mine counter-measures vessels to the Gulf to neutralize this threat. The United States was joined in this effort by Belgium, France, Italy, The Netherlands, and the United Kingdom (US Exhibit 15).

2. US Capture of* Iran Ajr *(21-22 September 1987)

Two months later, on 21 September 1987, US helicopters observed an Iranian landing craft, *Iran Ajr*, engaged in illegal mine-laying at night near the Bahrain Bell, in an international shipping channel known to be used regularly by US ships in the Central Gulf. This was a hostile action. It posed a direct threat to the safety of US warships and other US-flag vessels operating out of Bahrain. Accordingly, acting in self-defence, two US helicopters operating from *USS Jarrett* engaged *Iran Ajr* with machine-guns and rockets. When *Iran Ajr* resumed mine-laying, the US helicopters re-engaged it, disabling it with rocket and machine-gun fire, and thereby halting further mine-laying (US Exhibits 19, 20, 21 and 22).

The next day, on 22 September, US forces boarded *Iran Ajr*. *Iran Ajr* was manned by regular Iranian navy personnel. Three Iranian crewmen were

found dead on the vessel. Twenty-six survivors were recovered from the water and lifeboats. The survivors were transported to US naval ships for medical treatment, and subsequently flown to Oman and released to the International Red Crescent for repatriation. Nine armed Iranian-made mines ready for deployment were found on the vessel. Nine more mines were subsequently located in the waters off Bahrain; these mines were neutralized by US mine counter-measures forces. Iran gave no notice to the international community that these minefields had been laid, nor did Iran set the mines to disarm when they broke loose from their moorings, both of which were required by the Convention relative to the laying of automatic submarine contact mines of 18 October 1907 (Hague Convention No. VIII) (US Exhibits 20, 21, 22, and 24). The Court confirmed these principles in the *Corfu Channel* case and the *Nicaragua* case *(Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C. J. Reports 1949*, and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986)*

On 22 September 1987, in accordance with Article 51 of the United Nations Charter, the United States notified the Security Council of its actions in self-defence against *Iran Ajr* (US Exhibit 20). The Islamic Republic of Iran agrees that there was an engagement between Iranian and US forces involving the *Iran Ajr*, but contends that the vessel was "commercial and unarmed" and was not engaged in mine-laying (US Exhibit 22 at 20; Iranian Memorial, Exhibit 61). As in other instances, we would be prepared to present compelling evidence, including physical evidence, regarding this event, should that become necessary at a later stage.

3. Iranian and US Armed Forces Exchange Fire on 8 October 1987

On 8 October 1987, three US helicopters, on routine night-time patrol over international waters of the Gulf, were fired upon without warning by three small Iranian naval vessels. In defending themselves from this attack, the US helicopters returned fire with rockets and machine-guns. The three Iranian vessels were hit and sank. US patrol boats were despatched to the scene and recovered six Iranian crewmen from the water. Although all available medical care was rendered, two of the crewmen died. Once again, the Iranian survivors were repatriated and the remains of the dead were returned to Iran. The Islamic Republic of Iran agrees that this event took place, but disputes the US description of it (Iranian Memorial, para 1.99 at 40-41). We would be prepared to prove the defensive nature of these US actions should that become necessary at a later stage of this case.

4. Iranian Missile Strikes Sea Isle City *(16 October 1987)*

About one week later, on 16 October 1987, the US-flagged *Sea Isle City* was struck by an anti-ship cruise missile fired by Iran (US Exhibit 11 at 329 and Exhibit 27). *Sea Isle City* was one of the 11 Kuwaiti-owned tankers that, at Kuwait's request, had been reflagged as a US vessel. At the time of the attack, *Sea Isle City* was in Kuwaiti territorial waters, proceeding to an oil loading terminal from its anchorage 7 nautical miles (13km) east of Mina al-Ahmadi. Eighteen seamen, including the US captain, were injured (US Exhibit 11 at 329). Although Iran does not dispute that this attack occured, it denies culpability for it (Iranian Memorial, para. 4.74 at 116). Should this case be heard on the merits, the United States would present compelling evidence that Iran launched

this anti-ship cruise missile from a launching facility in the Faw Peninsula that it had captured from Iraq in January 1986.

5. US Action Against Iranian Off-shore Platforms at Rostam (19 October 1987)

As a consequence of these events, the United States Government decided that it had to take appropriate action in self-defense, and that the most appropriate target for this purpose was the Iranian off-shore platform complex at Rostam. This decision followed careful assessment which included the risks to civilians, incidental injury, collateral damage, and the additional risks associated with possible attacks on alternative targets. The Rostam complex was not then an oil producing facility, but it had been a military outpost for several years. The Islamic Republic of Iran denies that the Rostam complex was being used as a military facility (US Exhibit 39); should the case proceed to the merits, the United States would present compelling evidence that it was so used.

First, the Rostam complex was the principal Iranian military outpost in the south-central Gulf used to identify, track, and monitor ships' movements, and assist in targeting innocent ships for attack. Second, it had been used as a staging and supply facility for Iranian helicopter and small boat attacks against innocent shipping during 1986 and 1987. Third, it had in fact been used the month before to assist *Iran Ajr* in its mine-laying operation off Bahrain. Using armed force in self-defense against the Rostam complex was, in the view of the United States, clearly necessary and proportionate, and no different than such actions against a warship or other military base (US Exhibit 29).

At approximately 14:00 hours (local time) on 19 October 1987, personnel on the Rashadat platform at Rostam were given loudspeaker warnings in Farsi and English and were given time to depart. US forces then fired upon and substantially destroyed the abandoned platform. The Rashadat platform, which was already inoperative as an oil production facility, was manned at the time by Iranian military personnel and equipped with military armaments, radar, and communications devices (US Exhibits 27 and 29).

While searching the Rashadat platform, US forces noticed that on another Rostam platform (Resalat) Iranian military personnel were manning one of two twin 23mm guns, thereby threatening US forces. As a US team approached the Resalat platform, the Iranian military personnel departed. Subsequently, the US team boarded and searched the abandoned platform, discovering a variety of equipment useful in supporting and coordinating attacks on ships, including a marine-surface-search radar with a range of 48 nautical miles (89km) and communications equipment also was found. The Resalat platform was also substantially destroyed to prevent its continued use in supporting attacks on shipping in the Gulf (US Exhibit 29).

As in the *Iran Ajr* incident, the United States, pursuant to Article 51 of the UN Charter, notified the UN Security Council of its defensive actions against these military targets (US Exhibit 27).

6. Iranian-Laid Mine Damages* USS Samuel B. Roberts *(14 April 1988)

Violent encounters directly involving Iranian and US forces resumed the following April. At approximately 17:00 hours (local time) on 14 April 1988, the guided missile frigate, *USS Samuel B. Roberts*, was in

international waters in the vicinity of the Shah Allum Shoals, returning to Bahrain after escorting US merchant vessels in the Gulf (US Exhibit 11 at 375-76, US Exhibit 18, and US Exhibit 25). Lookouts on the ship had recently spotted three mines lying perpendicular to the ship's course, about 700 yards (650 metres) away. When the ship tried to back out of the mine field, it struck a mine which had been set deeper than the rest and was not visible. Ten US sailors were injured, one seriously. The ship was severely damaged and almost sank (US Exhibit 15, US Exhibit 23 at 44, and US Exhibit 26).

Examination of the mines remaining in the water established conclusively that they were Iranian-made (SADAF-02) contact mines, identical to the mines captured from *Iran Ajr* on 21-22 September 1987. The mines cleared from the area where *USS Samuel B. Roberts* was struck were not encrusted with marine growth – proof that they had been laid recently. These mines were laid in an international shipping channel used frequently by US warships as well as innocent merchant ships. Once again, contrary to well-established principles of international law (including Hague Convention Number VIII of 1907 Relative to the Laying of Automatic Submarine Contact Mines) (US Exhibit 24), no notice had been given to the international community that these minefields had been laid, nor were the mines set to disarm when they detached from their moorings. Although the Islamic Republic of Iran does not dispute that *USS Samuel B. Roberts* hit a mine, it denies responsibility for it. We would prove these matters with compelling evidence should that become necessary in a later stage of this case.

7. US Actions Against Iranian Off-shore Platforms at Sirri and Sassan (18 April 1988)

The United States Government determined that the most appropriate lawful targets in self-defense, following *USS Samuel B. Roberts'* hitting of the Iranian-laid mine, would be the platforms having military equipment and garrisons at the Iranian off-shore oil complexes at Sirri (located 19 nautical miles (35km) south-west of Sirri Island) and Sassan (located 3.5 nautical miles (6km) north of the Abu Al Bu Khoosh oil field owned by the United Arab Emirates). Like the Rostam platforms, the platforms targeted by the United States at Sirri and Sassan were being used as military facilities and were manned by military personnel (US Exhibit 19 at 139, 25, 26, and 33; Iranian Memorial, Exhibit 80 and 89). In addition to identifying, tracking, monitoring, and targeting innocent ships for attack, these platforms served as staging bases and supply bases for the Iranian helicopters and small boats used in such attacks. They were also used to coordinate mine-laying in the path of US and other neutral vessels.

On 18 April 1988, after warning Iranian personnel and giving them the opportunity to depart, US military forces substantially destroyed the specific platforms at Sirri and Sassan. Notably, to the best of our knowledge and belief, no Iranian casualties were suffered during these operations (US Exhibits 18 and 33; and Iranian Memorial Exhibit 80).

8. More Iranian and US Military Engagements on 18 April 1988

The engagements at Sirri and Sassan on 18 April were only part of a wider pattern of hostilities on that day (US Exhibit 18 and US Exhibit 32 at 142-44). While US armed forces were engaging the Sirri and Sassan platforms, an Iranian helicopter and small boats attacked the SCAN BAY

oil platform, located off Abu Musa Island, with American civilian workers on board, and the US-flag supply ship *Willie Tide* in the Mubarak oil field. US aircraft fired upon three Iranian small boats, sinking at least one.

Thereafter, US forces were approached by the Iranian patrol gunboat *Joshan*, which, after ignoring radio warnings, fired a missile at *USS Wainwright* (US Exhibit 33 at 57). Within the hour, an Iranian F-4 fighter plane streaked toward *USS Wainwright* in a threatening manner. In response, US forces returned fire, sinking the Iranian gunboat and *USS Wainwright* fired upon and hit the Iranian F-4, causing it to retreat (US Exhibit 32 at 144).

Two Iranian frigates were then detected departing from the Hormuz anchorage, proceeding south towards the northernmost US Navy Surface Action Group. The first frigate, *Sahand*, was taken under fire by *USS Strauss* when it closed to within missile range and was subsequently sunk by aircraft from a US aircraft carrier (US Exhibit 32 at 144). The second frigate, *Sabalan*, after directing anti-aircraft fire at the US aircraft, was immobilized by a single bomb down its stack (US Exhibit 32 at 144). After this ship was immobilized, the US Navy terminated its attack, refraining from sinking the vessel (US Exhibit 32 at 145).

Once again, the United States, in accordance with Article 51 of the United Nations Charter, immediately notified the United Nations Security Council of these actions (US Exhibit 26).

The US actions against Sirri and Sassan off-shore platforms were part of a long day of military confrontations between Iranian and US forces. The Islamic Republic of Iran disputes the defensive nature of the US actions; it generally does not dispute that the military

encounters of 18 April 1988 occurred, or that the platforms were destroyed (US Exhibit 40; Iran's Memorial at 118-119). Should it become necessary at any later stage, we would present evidence proving that the platforms were indeed to support attacks against both commercial and military vessels in the Gulf.

9. Iranian and US Military Engagements 2-3 July 1988

There was a final series of military encounters involving Iranian and US forces during the first days July of 1988. On 2 July 1988, *USS Elmer Montgomery* responded to a distress signal from a Danish tanker under attack by Iranian small boats. After *USS Elmer Montgomery* approached and fired a warning shot, the Iranian small boats stopped their attack on the Danish tanker. However, the Iranian boats regrouped and made repeated, deliberate attacks on *USS Elmer Montgomery*. *USS Elmer Montgomery* returned fire in self-defence, sinking several of the Iranian gunboats (US Exhibit 15). The Islamic Republic of Iran apparently does not acknowledge this engagement.

These military engagements between Iran and the United States continued the next day. Most regrettably, on 3 July, in the course of these events, an Iranian civilian airliner was shot down by *USS Vincennes* in the mistaken belief that it was a hostile military aircraft. As you know, the United States immediately offered *ex gratia* compensation to the families of the passengers and crew who were killed. On 22 February 1996, the United States and the Islamic Republic of Iran settled the case which arose out of this tragic incident.

V. CONCLUSION

Mr. President and Members of the Court. We have shown here, and in our earlier submissions to the Court, that the measures taken by the United States on which this claim is founded were not isolated actions aimed at Iranian economic installations, as the Islamic Republic of Iran would have you believe. Rather, these were but two events in a series of hostile military encounters involving Iranian and US forces between July 1987 and July 1988.

Iran does not dispute that a series of hostile engagements took place between Iranian and US forces. The specific details surrounding these engagements, including those involving US actions against Iranian off-shore platforms, are often in dispute. However, the Court does not need to address these factual disputes, which would involve lengthy and complex evidentiary proceedings, in order to uphold the US preliminary objection. The facts that are not in dispute show that this Court does not have jurisdiction in this case. These facts show that the US actions involving the off-shore platforms were part of a series of hostile encounters between Iranian and US armed forces, which occurred during the course of a major international conflict. As such, they are wholly outside the scope of the 1955 Treaty, and are governed by rules and instruments of international law that do not fall within the jurisdiction of the Court in this case.

Should the Court proceed to the merits in this case, it would be called upon to determine complex legal and factual controversies regarding these hostile engagements. Was the Islamic Republic of Iran responsible, as the United States contends, for the unlawful attacks on

the US tankers *Bridgeton* and *Sea Isle City*, and the guided missile frigate *USS Samuel B. Roberts*? Were the United States responses to these events consistent with the requirements of the law of armed conflict and self-defence? None of these issues fall within the scope of the 1955 Treaty, which is the sole basis invoked by the Islamic Republic of Iran for jurisdiction in this case.

Mr. President and distinguished Members of the Court, this completes my presentation. I thank you for your attention. Next, my distinguished colleague, Professor Andreas Lowenfeld will, with the Court's permission, set forth our views as to why the 1955 Treaty provides no basis for jurisdiction. But, may I suggest that this might be a convenient time to break for coffee.

Thank you, Mr. President.

The PRESIDENT: Thank you very much, Commander Neubauer. The hearing is suspended for a break of 15 minutes.

The Court adjourned from 4.15 to 4.30 p.m.

The PRESIDENT: Please, be seated. I now give the floor to Professor Andreas Lowenfeld.

Professor LOWENFELD: Thank you, Mr. President. Mr. President, Members of the Court, may it please the Court. This is my first time before you, and it is an honour and privilege to appear here after all the blood and guts and so on that you have just heard.

Introduction: The Importance of Jurisdictional Concerns

I want to begin by talking about the functions of the Court and emphasizing the importance that jurisdictional concerns have in the Courts' place in the community of nations. I can do no better than by quoting from Sir Gerald Fitzmaurice, who graced this bench for more than a decade, and who has written an elegant series of essays about the Court. I am quoting particularly from volume 2 around pages 513 and following (Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice,* Vol. II (1986)).

> "It is rare indeed [he writes, at pp. 513-14] for a State, whether by treaty or by unilateral declaration, to assume an unlimited jurisdictional obligation . . . If, by a process of interpretation, the scope of the obligation is widened beyond its inherent and natural limits, or those imposed by the State itself, so as to embrace matters extraneous to what was covered by the consent given, it is clear that the State will find itself saddled with an obligation to submit disputes to arbitration or judicial settlement which it had never intended to assume. Thus the matter resolves, or may appear to resolve itself into the familiar question of the liberal or restrictive interpretation of arbitral clauses. [I think he means compromissory clauses generally.] Yet [Fitzmaurice continues] it should be evident that neither a deliberately liberal nor a deliberately restrictive interpretation of such clauses can be justified. The first is unfair to one party (usually the defendant State) by imputing to it a consent which it may not really have intended to give, or realized it was giving; the second [that is the deliberately restrictive] is unfair to the other party (usually the plaintiff State) by depriving it of a means of recourse the benefit of which it was entitled to expect under the clause in question. But [and this is the point I want to emphasize] while neither [interpretation] is justified, it is safe to say that the first, though it may appear superficially to promote the ideal of an enlargement of international arbitral and judicial jurisdiction, involves by far the greater long-term dangers for the standing and prestige of this jurisdiction - since nothing undermines confidence in the process of international adjudication so quickly and completely as the feeling that international tribunals may assume jurisdiction in cases not really covered by the intended scope of the consents given by the parties."

Perhaps I can read the last phrase again:

> "nothing [says Fitzmaurice] undermines the confidence in the process of international adjudication so quickly and completely as the feeling that international tribunals may assume jurisdiction in cases not really covered by the intended scope of the consents given by the parties".

Fitzmaurice goes on to address the argument that because international jurisdiction is limited by the necessity of consent, and because international adjudication is a good thing, the Court should give the maximum scope to any given consent that it can be made to bear. The argument is plausible, he says, but it is based on a mistaken premise. It is not the case that jurisdiction exists, subject to limitations for the Court to construe. On the contrary, without the initial consent there would be no international jurisdiction, and no need for limitations.

> "Consequently, jurisdiction ought at the very least not to be assumed in cases in which there is room for any serious doubt as to whether consent was given, and whether it covers the dispute."

Fitzmaurice goes on to propose an even higher standard - that jurisdiction ought only to be assumed

> "if it is quite clear that the parties . . . have expressed themselves in such terms . . . that . . . the view that they did *not* consent cannot, in law be reconciled with the term used, or the acts performed, or the behaviour manifested".

I think, Mr. President, we need not choose between these two standards. However the case before you is viewed, there can be no denying that there is "room for serious doubt" about whether consent was given by the United States to hear this dispute about the use of force in the Gulf. My colleagues and I will be demonstrating to you that there is much more than serious doubt - indeed that there is no room to believe that consent to adjudication of this kind of dispute was given by the

United States. But you need not agree fully with Fitzmaurice's proposition that the onus of proof is on the plaintiff State, to conclude that this case is not one in which the Court would be justified in reaching the merits. As the Court said in the *Ambatielos* case,

> "in the absence of a clear agreement between the Parties in this respect, the Court has no jurisdiction to go into . . . the merits of the present case". (*I.C.J. Reports 1952*, p. 28 at p. 39)".

II

Specific Jurisdiction and the Principle of Consent

I want in a few minutes to turn to the Treaty of Amity of 1955 on which Iran bases its claim - its only claim - to your jurisdiction in this case. Before I do, however, I want to make a more general point, which I think that a comparison with private international law will help to clarify. I refer to the distinction between general and specific jurisdiction of courts.

Under private international law, now embodied in a series of conventions - notably the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968, and the companion Convention signed in Lugano - an individual can be sued in the State of his or her domicile on any claim, or almost any claim, no matter where the events giving rise to the claim occurred; the same is true with respect to corporations or similar entities at their principal place of business or *siège social*. That is *general jurisdiction*. Both individuals and corporations are also amenable to suit in other places, but typically only on claims arising from or linked to those places. A corporation may be sued, for instance, in the courts of a State where it

maintains a branch, as regards a dispute arising out of the operations of the branch, to use the words of the Brussels and Lugano Conventions. Similarly a person - natural or juridical - may be sued in tort in a State other than its domicile, where the harmful event occurred. A number of other links or contacts between activity and amenability to suit are widely accepted and understood, for example with contracts at the place of performance and in some States where the contract was entered into. For each of these links, there is *specific jurisdiction*, that is the defendant may be brought before a court on some claims, but not on others. Finally, there is jurisdiction by *agreement or consent*, that is jurisdiction by virtue of a forum selection clause.

Forum selection clauses, as you know, are virtually always upheld in accordance with their terms (with exceptions one need not go into, family matters and insurance matters for instance) (Article 17 of the Brussels and Lugarno Conventions spell that out and the law of most states confirms that). So suppose Sr. Bellini, an Italian seller, and Mr. Davis, an English buyer, make a contract for the sale of leather gloves, and the contract contains a clause stating that "all disputes arising out of or related to this contract, if not amicably settled, will be resolved in the Commercial Court in Milan, well, in that case the court will have jurisdiction in an action by Sr. Bellini against Mr. Davis growing out of the contract, even if Mr. Davis never set foot in Italy. But if Sr. Bellini sought to bring Mr. Davis before the court in Milan on a claim arising out of an automobile accident or libel, the court in Milan would have no jurisdiction. The forum selection clause — that is to say the consent to jurisdiction — is limited to the subject matter of the contract between them.

In public international law, and in particular in regard to the powers of this Court, there is no analogous concept to comprehensive general jurisdiction at the defendant's domicile or *siège social*. But there is an analogous concept of *specific jurisdiction by consent*, either with a particular dispute that has arisen or by a *forum selection clause* in treaties dealing with particular subjects. That of course is the thrust of Article 36(1) of the Statute of the Court, in contrast to the broader consent authorized (but not required) by Article 36(2) of the Statute, the famous optional clause.

What Iran has tried to do in the present case is to convert the consent to *specific jurisdiction* that the United States (and Iran) gave in the forum selection clause contained in the Treaty of Amity - i.e., a 36(1) consent – into a consent to *general jurisdiction*, i.e., a 36(2) consent. Iran's application asks you to consider claims and responses focused on the law of armed conflict, including the constituent elements of that law – the right of self-defense, the principle of neutrality, and the principle of proportionality and so on – it asks you to consider those kinds of claims on the basis of a consent to jurisdiction limited to the subject matter of a treaty focused on commerce and investment in peacetime. This effort, Mr. President, must fail, for the same reason that, in my hypothetical case, the attempt of the Italian plaintiff to bring a libel action on the basis of a clause in a contract concerned with the sale of gloves must fail. Jurisdiction founded on consent cannot be expanded beyond the terms of the consent as I read earlier. Iran's attempt to found jurisdiction of its claim concerning the law of armed conflict on the Treaty of Amity, Economic Relations and Consular Rights can only be characterized, with all respect, as an invitation to

the Court to convert itself from an institution whose standing and legitimacy rest upon constant attention to the expressed consent of its members to a quite different institution, one that I would not even dare to characterize.

III

The Treaty of Amity: Consent to Jurisdiction and Standards of Conduct

I want now to turn to the Treaty of Amity, Economic Relations and Consular Rights signed by representatives of the two Parties in August of 1955. The first thing that strikes one about this treaty is how routine and how ordinary it is. The Treaty of Amity is not a peace treaty, or a mutual assistance treaty, or a security pact. There were some of these kinds of agreements between Iran and the United States in the past, but as I need not tell you they have long since been overtaken by events. In fact, if I may use an American colloquialism, the Treaty of Amity was an off-the-shelf document, practically the same as some 20 or so Treaties of Friendship, Commerce, and Navigation concluded by the United States in the first two decades following World War II – from Belgium to Yemen if one looks at the alphabet, from China to Togo if one looks at chronology. The Iran-United States Treaty was number 13 for the United States since World War II.

The subjects are always the same, nearly always in the same sequence, and (in their English version) in almost the same words. Under the *national treatment* clauses, each State party undertakes to grant to the nationals, companies, products, and vessels of the other party the same treatment that it grants to its own nationals, companies, products and vessels. Under the *Most Favoured Nation* clauses, each State party

undertakes to grant to the nationals, companies, products, and vessels of the other party treatment no less favourable that the treatment accorded to the nationals, companies, products, and vessels of any Third state. These undertakings apply to entry and sojourn within the territory of either state party, and usually (including the Iran-US Treaty) to the right of establishment of companies of one country in the territory of the other, coupled with the right to own, buy, or lease property, and equal treatment in respect to taxes and comparable fees or charges. There are also, as you know, provisions concerning expropriation of property, right of access to courts, transfer of funds, and rights of employment in the receiving country by senior personnel of companies of the sending country. Some of the FCN treaties contain provisions on social security and workers compensation, the Iran-US treaty does not. Others, including the Iran-US Treaty, contain provisions on privileges and immunities of consular officers. The entry on Treaties of Friendship, Commerce and Navigation in the Encyclopedia of Public International Law sums up the content and purpose of such treaties as follows:

> "According to accepted principles of international law the host State has the right to regulate the legal situation of aliens and foreign companies within its territory. The aim of treaties of friendship, commerce and navigation is to extend the rights of those aliens and foreign companies who are nationals of the contracting parties beyond the minimum required by international law and to clearly define their limits." (Blumenwitz, *Encyclopedia of Public International Law*, Vol. 7, p. 485 (1984).)

More significant for present purposes, the FCN treaties, including the Treaty of Amity between Iran and the United States, provide substantive legal norms to be applied by the chosen forum to disputes that may arise under the treaties. Focusing on the Iran-US Treaty, if

one party alleges that the other party expropriated property belonging to its nationals, the Court — this Court — can look to Article IV(2) of the Treaty; if one party alleges unequal tax treatment by the authorities of the other party, the Court can look to Article VI, and can rule on whether or not the disputed tax comes under one of the exceptions in that article; if a dispute arises concerning the administration of customs regulations, the Court can look to Article IX . . . and so on. In short, the Treaty lays down standards — legal standards — by which the chosen forum can judge a claim brought under the Treaty. In contrast, it is evident that a court asked to judge the claim brought in the present case — involving the laws of armed conflict, self-defense, and so on — could find no guidance whatever in the Treaty of Amity. Why? Because neither party had any intention to subject these types of issues to the jurisdiction of the chosen forum — or indeed any forum, since they had not negotiated, let alone reached agreement about them. I might add that in addition to adjudication before this Court, the parties agreed to afford each other adequate opportunity for consultation with respect to "*any matter* affecting the operation of the present Treaty". (Article XXI(1)). But their only mention of issues of peace and security and armed forces and so on is in Article XX, which says the Treaty shall have no application. Either way one looks at it, whether from the point of view of the scope of the consent to jurisdiction or from the point of view of the standards to be applied in interpretation of the Treaty, there is no fit between the Treaty and the claims here asserted. There is, in short, much more here than the "serious doubt" in Judge Fitzmaurice's formulation. There is quite simply no reason at all to suspect, let alone to believe or conclude, that the two parties agreed to

subject controversies about armed force, attacks on shipping and use of oil platforms in the Gulf, to adjudication in this Court pursuant to the Treaty of Amity.

IV

The Jurisdiction Clause in the Treaty of Amity

As I have said, the modern FCN treaties were primarily an American policy initiative. It is striking that the United States draft from which all the negotiators worked contained a compromissory clause selecting the International Court of Justice as the residual forum for settling disputes, without any reservation comparable to the reservations that the United States (and others) attached to its declaration under Article 36(2) of the Statute of the Court. How could it be that in its declaration under the optional clause, the United States made the famous Connally Reservation, designed to withhold from its consent to the jurisdiction of the Court disputes with regard to matters within the domestic jurisdiction of the United States as determined by the United States, but made no similar reservation or exclusion from the World Court clauses in the FCN treaties which clearly dealt with matters within internal jurisdiction, like taxes and labour and so on? Again, how could it be that France, which had made a reservation to its 36(2) declaration in almost identical terms to that of the United States, also agreed, in its Convention of Establishment with Iran of 1959, to a clause accepting the jurisdiction of the Court without any reservation?

Robert Renbert Wilson, who is the author of one the leading books on United States commercial treaties, raises that question. It surely occurred to others before and certainly before it occurred to me, and he proceeds to answer. He says:

> "The omission of reservations [from the FCN treaties] was not inadvertent. When the first of the post-World War II treaties was under consideration, a subcommittee of the United States Senate raised the question of whether the compromissory clauses in it were consistent with the conditions upon which the Senate had agreed to acceptance of the Optional Clause in the Court Statute. The Department of State . . . suggested that provisions of commercial treaties were, in general, familiar, that there were numerous Court decisions interpreting them. It was one thing to commit the United States toward particular foreign States on this limited subject matter. It might be going much further, the Department of State memorandum suggested, to commit the United States in advance to adjudicate 'any question of international law' in relation to a large group of States, that is those also accepting the Optional Clause."

The Senate Committee accepted the argument and approved the treaty before it which happened to be with the Republic of China as well as some 20 other treaties with the same wording, including the Treaty of Amity here before you.

The full memorandum submitted to the Senate by Ambassador Charles E. Bohlen on behalf of the State Department appears in our Exhibit 52 at pages 29-30. The excerpt from Professor Wilson's book that I have read, I think, accurately reflects the memorandum and the discussion in the Senate Committee, but at the risk of some repetition I want to read one paragraph of the memorandum, which I think will tie together this part of my presentation with the first part of my presentation:

> "The compromissory clause of the treaty with China . . . is limited to questions of the interpretation or application of this treaty: i.e., it is a *special, not a general compromissory*

> *clause*. It applies to a treaty on the negotiation of which there is voluminous documentation indicating the intent of the parties. This treaty deals with subjects which are common to a large number of treaties, concluded over a long period of time by nearly all nations. Much of the general subject matter - and in some cases almost identical language - has been adjudicated in the courts of this and other countries. The authorities for the interpretation of this treaty are, therefore, to a considerable extent established and well known. Furthermore, certain important subjects, notably immigration, traffic in military supplies, and the 'essential interests of the country in time of national emergency', are specifically excepted from the purview of the treaty. In view of the above [Bohlen concludes], it is difficult to conceive how Article XXVIII [which was comparable to Article XXI of the Treaty before us] could result in this Government's being impleaded in a matter in which it might be embarrassed."

That is the end of the section of the memorandum that I want to quote, the whole memorandum is in the exhibit. I submit that this passage completes the circle necessary for this Court's exercise of its *compétence de la compétence*. The Court's jurisdiction depends on consent, in this instance the consent of the United States. Such consent may be general, or it may be specific or special. We have here a clear record that, in Ambassador Bohlen's words, the compromissory clause is a special, not a general clause. It confers special, and not general jurisdiction on the Court, limited to the defined subjects of the FCN treaty, and excluding those having to do with defence and security. Of course the debate and explanation from which I have quoted concerned a treaty between the United States and China but there can be no doubt that once the question was settled between the United States Senate and the US Department of State, the text of the forum selection clause remain the same for all the other FCN treaties, and all were governed by the same understanding, including the Iran-US Treaty here invoked.

V

The Relevance of the* Nicaragua *case

Now I want to turn just briefly to the *Nicaragua* case, in so far as it is relevant to the present controversy. Please be assured that I have no intention to revive that controversy, either in respect of the United States' policy, or in respect of the Court's decisions. I trust you will allow me, nevertheless, to take a purely technical look at the Court's approach to the question of the effect of the World clause in the FCN treaty. You will hear more about the *Nicaragua* case tomorrow from Mr. Murphy. I want to make just one point today.

I believe it is important for present purposes to note that the claim by Nicaragua that the World Court clause of the Nicaragua-US Treaty supported the jurisdiction of the Court was raised as an afterthought by counsel for the Applicant [Nicaragua], after it became clear that the claim based on the coincidence of two unilateral declarations pursuant to Article 36(2) and Article 36(5) of the Statute was running into trouble, and what did the Court do? Well, the Court focused on the contention by the United States that this claim of jurisdiction had come too late (you will find that in the jurisdiction phase, paras. 78-80), and on the relation of the claim of jurisdiction under the bilateral treaty to the so-called multilateral treaty reservation contained in the 1946 declaration by the United States under the optional clause (and that interestingly enough shows up in the merits phase, paragraphs 42 and following) and the result was not only a confusion in the Court's Judgment on the merits, as Judge Oda pointed out in his separate opinion in the Merits phase. More important for present purposes, the Court

never examined, so far as appears, the character and scope of the compromissory clause of the FCN Treaty. The Court did not, in other words, consider the points that I have been making, the distinction between general and specific jurisdiction and the express narrow focus of the clause, as shown in the Bohlen memorandum and the Senate debate. My analysis, I submit, is not foreclosed by anything decided, or so far as appears, even discussed, in the *Nicaragua* case. If the Court finds my analysis persuasive, it is free to follow it.

I am not suggesting a narrow distinction between the two cases, in the manner of a common law barrister; I am suggesting that it is appropriate for the Court to take a fresh and in-depth look at how FCN treaties - focused on protection by receiving States of the rights of nationals of sending States, and excluding essential security interests - fit in with a broad claim of jurisdiction of this Court. The few paragraphs in the Court's Judgment devoted to this question suggest that no such in-depth look was taken on this question in the *Nicaragua* case, and, I submit, confirm the wisdom of the drafters of Article 59 of the Statute of the Court.

I may add that I have had the pleasure of reading Judge Shahabuddeen's book, just off the press, on *Precedent in the World Court* (1996), and I think what he says at pages 122 to 127 which begins "case law is not statute law", is very appropriate in this context.

VI

The Claim for "Amity" as a Legal Standard

Finally, Iran in the present case makes an even broader claim under the Treaty of Amity: Amity means friendship, any act that is not

friendly constitutes a breach of the treaty, and anything that breaches the treaty is actionable and justiciable before this Court. With respect, it is a mind-boggling claim.

If the test were, as Iran suggests, there would be no limits at all on the Court's jurisdiction. Consider just the most recent relations between Iran and the United States. The United States has imposed restrictions on trade and financial transactions by its nationals with Iran, and urges its European allies not to permit their companies to invest in oil exploration in Iran. Would these actions fall within the Treaty? The leaders of Iran persist in pronouncements that the United States embodies the Great Satan. Is that an expression of sincere friendship? The United States accuses Iran of sponsoring terrorist activities. Would such an accusation fall within the Treaty? True or false? Are all these conflicts, accusations, even crises, subject to adjudication by this Court?

Iran contends that there is a significant difference between the Treaty of Amity and most other FCN treaties because the expression of sincere friendship, which appears somewhere in all these treaties, appears in Article I of this Treaty rather than in the preamble. It offers the explanation - which may or may not be correct - that in 1955 the Shah, returning from exile and still shaky on his throne, wanted a little extra endorsement, and the United States negotiators said "why not?". It may or may not be a correct interpretation, in fact, I have checked some 30 other treaties of friendship or amity concluded by Iran or Persia in the period 1905-1955. Most contain declarations of eternal friendship or something like it in Article I; a few have such recitals

in the preamble. Thus the hypothesis of the extra boost for the Shah may not be true at all, and the explanation may lie simply in the routine practices of the Iranian Foreign Office. Either way the significance, I submit, is negligible.

As a *prediction*, Article I worked well for two decades, and thereafter, as I need not remind you, turned out to be spectacularly wrong. But the idea of building an obligation on Article I - an obligation linked to the compromissory clause - would make all the rest of the treaty superfluous, and would convert the compromissory clause into an all-purpose dispute settlement accord: it would, in other words, change Article XXI (2) from a special to a general jurisdiction agreement.

Perhaps the world would be a better place if all States concluded treaties that provided:

> "Whenever a high contracting party considers that the other high contracting party has committed an insincere or unfriendly act, it may apply to the International Court of Justice for relief."

Surely the world we live in is not that kind of a world, and there is no evidence that countries concluding Treaties of Friendship or Treaties of Amity sought to create such a world.

In their reply Observations, counsel for Iran themselves realize the extraordinary breadth of their claim under Article I. They now say, in effect:

> "OK, if we have to fit into a commercial mould, we can do it, because the platforms were supposed to extract oil, oil is a commodity, and commodities are commercial. Moreover, the platforms have to do in some way with the aftermath of the seizure of the Anglo-Iranian Oil Company and the restructuring of Western interests in Iran through establishment of the Consortium and its relationship to the National Iranian Oil Company."

Well, with respect, none of this has anything to do with the present

case. Some of the claims against NIOC (National Iranian Oil Company) arising out of the Iranian Revolution have been heard - properly heard - not far from here by the Iran-United States Claims Tribunal. Those are the commercial claims, having to do with supply contracts, inventories, letters of credit, and so on. Adjudication or arbitration of those claims is of course supported by an elaborate forum-selection - indeed forum-creation - agreement, that is the Algiers Accords of January 1981. But whatever their normal function, the oil platforms involved in the present case were being used, as you have heard, from Commander Neubauer, for guiding armed attacks on shipping in the Gulf - hardly a commercial activity. To build a jurisdictional basis for a controversy about the use of force in a war zone on the commercial provisions of the Treaty of Amity and on the commercial uses to which the platforms *might have been put* would, I submit, be to create a wholly contrived, a wholly artificial basis of jurisdiction, inconsistent with this Court's traditions and with the status of sovereign States everywhere.

In this context, it may be illuminating to look at the Court's recent Advisory Opinion in the *Nuclear Weapons* case. In that case, as you will recall, the claim was made that human rights and environmental instruments informed the question of the lawfulness of the use of nuclear weapons. Yes, the Court said, human rights and the environment might well be adversely affected by the use of nuclear weapons. But the standards by which to judge the use of nuclear weapons had to be "the most directly relevant applicable law governing the question," i.e.,

> "[the law] relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any

> specific treaties on nuclear weapons that the Court might determine to be relevant" (para. 34).

It follows, I suggest, that even if Iran's characterization of the events were correct, that is even if the attack by the United States Navy on the platforms violated international law, "the most directly relevant applicable law" would be the law of armed conflict - and surely not the Treaty of Amity here invoked.

* * *

In their final fall-back, counsel for Iran reply to the preliminary objections of the United States in effect as follows (pp. 70-71):

> "The United States contends that the Treaty of Amity is only about commercial relations, Iran says an attack on commercial installations comes under the Treaty. Therefore there is a dispute about interpretation of the Treaty which supports the Court's jurisdiction."

I submit that this kind of argument could be made with regard to any challenge to the jurisdiction of the Court; acceptance of such an argument would lead to complete elimination of the preliminary objection phase of the Court's procedures. The correct procedure, I would have thought, is to accept for purposes of a test of jurisdiction the factual assertions made by the applicant, but not the legal characterizations. Thus, for present purposes, the Court may accept - subject of course to later challenge if jurisdiction were to be sustained - it may accept the assertion on behalf of Iran that on a given date American warships fired on Iranian oil platforms. But whether the acts of US forces implicate commercial as contrasted with security interests is surely a legal question for the Court to decide at the stage of preliminary objections. Any other approach, I submit, would be in emulation of the famous Baron

Munchhausen, who as you will recall, pulled himself out of a swamp by tugging on his own bootstraps.

* * *

Mr. President, my colleagues will go into some of the issues I have raised in more detail tomorrow. For my part, I am content to leave you with a quotation from Judge Nagendra Singh, your colleague for two decades and President for four years. The passage I want to read comes from his Lecture entitled "The Court's Integrity and the Discharge of the Judicial Function", published in his book *The Role and Record of the International Court of Justice*. Commenting on the *Aegean Sea Continental Shelf* case (*Greece* v. *Turkey*), *I.C.J. Reports 1978*, p. 28, he wrote:

> "The Court's approach in this vital aspect of its function [that is determining its jurisdiction] has shown the flexibility necessary for it to adhere to the straight path of pursuing the true will and intention of the litigants before it. In this respect the Court has rightly moved in the direction in which the will of the States has taken it. There has been no display of a radical attitude by the Court in pursuing 'progressive and developmental' aspects by extending its jurisdiction at the cost of the overriding principle of consent on which both the Court and the law it administers are based. The Court has maintained its sense of integrity at every step. This well-established approach of the Court to respect the will and wish of the parties must help to inspire confidence in the community that the Court has no intention to examine and adjudicate on the merits of every case brought before it, if it is shown to be against the clear desire of the litigants as expressed in a treaty or agreement." (N. Singh, *The Role and Record of the International Court of Justice*, p. 179 (1989).)

This wise and eloquent statement may serve as a guide to the present case as well. I thank you for your attention.

The PRESIDENT: Thank you very much Professor Lowenfeld. Having no more speaker in my list for this afternoon, the Court will now adjourn and the hearing will resume tomorrow morning at 9.30 a.m.

The Court rose at 5.15 p.m.