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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting

held on Wednesday 19 February 2003, at 10 a.m., at the Peace Palace,

President Shi presiding,

***in the case concerning* Oil Platforms**
(Islamic Republic of Iran *v.* United States of America)

VERBATIM RECORD

ANNÉE 2003

Audience publique

tenue le mercredi 19 février 2003, à 10 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

***en l'affaire des* Plates-formes pétrolières**
(République islamique d'Iran c. Etats-Unis d'Amérique)

COMPTE RENDU

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Guillaume
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Simma
		Tomka
	Judge *ad hoc*	Rigaux
	Registrar	Couvreur

Présents : M. Shi, président
M. Ranjeva, vice-président
MM. Guillaume
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby
Owada
Simma
Tomka, juges
M. Rigaux, juge *ad hoc*

M. Couvreur, greffier

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The PRESIDENT: Please be seated. I now give the floor to Mr. Bundy.

Mr. BUNDY: Thank you, Mr. President.

THE 18 APRIL 1988 ATTACKS ON THE SALMAN AND NASR PLATFORMS

Introduction

1. Mr. President, Members of the Court. My task this morning is to address the second set of attacks perpetrated by the United States, and these are the attacks against the Salman and Nasr platforms that were carried out on 18 April 1988.

2. The Court will see from the map that appears on the screen (it is also the first map in your folders) that the Salman and Nasr platforms are situated within Iran's continental shelf. Dr. Zeinoddin has already described the manner in which the platforms in question were laid out, as well as their connection to oil storage, transport and export facilities on Lavan and Sirri Islands. For the convenience of the Court, I would refer back to the schematic depictions that are included at tabs 9 and 11 of your folders for the layout of both the Salman and Nasr platforms.

3. These attacks were carried out as part of a massive display of United States military force in the region on the day in question. A total of three battle groups comprising nine of the United States most sophisticated warships participated in their destruction and they were accompanied by a contingent of Marines with helicopter and Air Force support located on an aircraft carrier nearby. The platforms themselves, as has been explained, were virtually undefended and offered no resistance.

4. The destruction of both the Salman and Nasr platforms did not take place in isolation. The attacks against them were part of a much larger naval operation on the day in question, which had, as its purpose and as its main objective the sinking of a single Iranian frigate. In actual fact, as I shall describe later in my presentation, the destruction of the two sets of platforms — Salman and Nasr — was not even the principal target of the operation on that day. Nonetheless, on the same day that the platforms were destroyed, the United States naval forces hunted down and systematically sank or damaged two Iranian frigates, four patrol boats, and an F-4 aeroplane, in the process killing 56 Iranians and injuring 150 others. As the former United States Secretary of Defence, Casper Weinberger wrote in his curiously entitled book, *Fighting for Peace*: "On a single

day nearly half the Iranian Navy was destroyed. The other half never emerged to fight." (Memorial of Iran, Ann. 44, p. 425.)

5. But even that is not the end of the story. For the actions of United States forces in destroying the platforms and eliminating half of Iran's navy coincided with a major Iraqi offensive on the Fao Peninsula that took place and which was launched on the very same day — 18 April — and which represented a fundamental turning point in the Iran-Iraq war. The fact that the United States was actively engaged at the time in intelligence sharing with Iraq is, as I recalled in my intervention on Monday, a matter of public knowledge which has been confirmed by high-ranking United States government officials. Howard Teicher, as you will recall, co-authored the National Security Decision Directive which provided the basis for United States support for Iraq, described the situation on 18 April in the following way:

> "Admiral Ace Lyons had developed plans to 'drill the Iranians back to the fourth century' when U.S. forces struck back hard four days later, sinking six Iranian warships and destroying two oil rigs. At the same time, the Iraqi Army launched a surprise attack against Iran to recapture the strategic Fao peninsula. Using U.S.-supplied military intelligence and knowing that U.S. strikes against Iranian targets would commence on April 18, the Iraqis launched their only successful ground assault of the war, just before the United States destroyed the Iranian Navy." (Reply of Iran, Exhibit 23, p. 392.)

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6. In the light of the close co-operation that the United States was extending to Iraq's military, it strains credibility to believe that there was no correlation between the events of 18 April. In the north, Iraq launched a massive military offensive. In the south, the United States severely damaged Iran's economy by destroying a critical group of oil platforms and eliminating half of Iran's Navy. That was not an exercise in self-defence. In fact, as Daniel Fairhall, who was writing in the *Guardian* newspaper at the time observed, "it seems as if local American commanders were looking for a fight and needed only the slightest pretext from the Iranians" (Memorial of Iran, Exhibit 83).

7. With that introduction, Mr. President, permit me to outline how the balance of my presentation will be structured. First, I shall review in more detail the events of 18 April 1988,

including the fact that the Salman and Nasr platforms were not supposed to be the principal targets of the United States attacks. That issue obviously has a fundamental bearing on the Respondent's allegation that its actions were justified as a matter of self-defence or that they were necessary to protect its essential security interests. Next, I will examine the United States claim that Iran was responsible for the mine that hit the *Samuel B. Roberts* to which the destruction of the platforms was said to be a response. That will include an analysis of the so-called "smoking gun" that the United States professes to have found in the form of secret communications on this Iranian vessel, the *Iran Ajr*, and elsewhere. Finally, in the third part of my presentation, I shall show that there is no evidence that the Salman or Nasr platforms had any role whatsoever in either the mining incident on which the United States relies or on attacks on neutral shipping in the Persian Gulf generally. The platforms were purely commercial installations and they were engaged in commercial activities when they were attacked and destroyed by the United States.

*

1. The events of 18 April 1988

(a) ***The status of the platforms before and after the attacks***

8. As Dr. Zeinoddin has explained, prior to the United States assault on the Salman platforms, the installation looked like this — as you can see on the screen. In total, the complex consisted of seven interconnected platforms — for drilling, production, gas separation facilities and living quarters. These platforms, in turn, were linked by underwater pipelines to 21 separate oil wells located at various distances around the complex. Production from these installations was ordinarily in the range of 125,000 barrels of oil per day. And just to give the Court an indication of the commercial value of that, at today's oil prices, that represents $4,000,000 of production per day.

9. On 16 October 1986 and again in November 1986, the Salman platforms —as you have heard — had been attacked by Iraqi aircraft. As a result of those actions, the NIOC technicians had been forced to undertake repairs, and those repairs were nearing completion when the United States attacked on 18 April.

10. Ordinarily, the Salman platforms were serviced by a contingent of about 76 persons, although that number had been reduced during the period that the repairs were being carried out. As a result of Iraq's attacks, the NIOC had requested and had received a contingent of ten military personnel to be stationed on the platforms for defensive purposes. That cadre was largely symbolic, but it did provide at least a small measure of support to the technicians who were working there.

11. As to the Nasr platforms, prior to being attacked they looked like this — as you can see on the screen — and unlike the Salman platforms, the Nasr platforms had never been the subject of attack by Iraq. These central platforms which you see were linked by pipeline to six other oil platforms which, in turn, were connected to some 44 oil-producing wells and a number of water injection wells; and they were also linked to wells in the nearby Nosrat field (see statement of Mr. Alagheband, Reply of Iran, Vol. IV). You can see the central platforms, and you can see the associated platforms, on the diagram that appears in tab 11 of your folders, but that does not show all of the wells — the 44 wells that they were connected to.

12. All of the oil produced from these wells had to pass via the central Nasr platforms — the one you see on the screen — before being transported by underwater pipeline to the Sirri Oil Export Terminal on Sirri Island. The consequence of that fact was that if the central platforms were attacked and destroyed — as they were by the United States on 18 April — then production from all the associated oil wells and platforms would be cut off as well.

13. Shortly before 0800 on the morning of 18 April 1988, three American warships approached the Salman platforms and three others converged on the Nasr platforms. A message was then broadcast stating that Iranian personnel had five minutes to abandon the platforms before the platforms would be destroyed.

14. In its written pleadings, the United States has sought to create the impression that Iran's oil platforms were bristling with communications equipment, permitting Iran to co-ordinate and track attacks on merchant shipping (see, for example, para. 1.22 of the Rejoinder of the United States). But the Commander of the United States naval force which destroyed the Salman platforms, a man named Captain Perkins, has provided a different account. You will find a copy of Captain Perkins's account of the events in question under tab 19 in your folders (Memorial of Iran,

Exhibit 80, p. 68). In his article on "Operation Praying Mantis" — that was the code name for United States military operations on 18 April 1988 — Captain Perkins wrote: "The GOSP [the Gas Oil Separation Platform] appeared unalerted as we came into view from the southwest and turned to a northerly firing course." Are we to believe that these platforms were systematically able to co-ordinate attacks on merchant shipping when they could not even spot a flotilla of warships approaching to destroy them?

15. With respect to both the Salman and Nasr attacks, five minutes after the warnings were given, the United States opened fire. Our colleagues claim that time was given to the Iranian personnel to depart from the platforms (Rejoinder of the United States, para. 1.72), but that was clearly not the case. As Captain Perkins himself states, the workers on the Salman platform pleaded for more time, but to no avail (Memorial of Iran, Exhibit 80). As for the Nasr platforms, Captain Perkins writes: "Sirri [which is another word for Nasr] was an active oil-producing platform . . . and one of the initial rounds hit a compressed gas tank, setting the GOSP ablaze and incinerating the gun crew." (Memorial of Iran, Exhibit 80.)

16. The platforms were raised about 60 ft off the sea level. At the Salman installation, a few NIOC personnel were able to scramble over the side and into a small boat that was moored to the platforms. Others were not so fortunate. Some were forced to plunge into the sea while under intense shelling from the United States. Others were trapped. Eight Iranians were injured, three very seriously. It was only after 50 rounds had been fired that a tugboat was allowed to return to the platforms to pick up the few remaining personnel. Thereafter, United States military personnel boarded the platforms and planted explosive charges. However, when they went onto the platforms, planting the charges, they found absolutely no incriminating evidence that the Salman platforms had been implicated in any activities harassing merchant shipping or in any way connected to the incident involving the *Samuel B. Roberts*. Nor was any such evidence found on the Nasr platforms.

17. Mr. President, Members of the Court, here, once again, is a photograph of the Salman platforms before they were attacked, and this is what they looked like afterwards. In Captain Perkins's words: "It was a textbook assault, and I caught myself stopping to admire it."

(Memorial of Iran, Exhibit 80.) An enormous amount of damage was caused to the platforms and their structures, and as a result, full production could not resume for five years.

18. As for the Nasr platforms, once again let me remind you of what the central platforms looked like before they were attack. Here is what they looked like afterwards. The Court will see that the destruction was virtually total. Moreover, I would ask the Court to recall that, by destroying these central platforms, production from all the associated wells and other platforms was stopped, and the United States knew that full well when it carried out its assault. By targeting the central platforms, maximum commercial damage was inflicted on Iran.

19. Despite the really overwhelming weight of the evidence, the United States alleges that its actions in destroying the platforms were restrained and were not designed to inflict economic damage. For example, the United States asserts that it did not target the portions of the platforms below the water or the foundations on which the platforms rest (Rejoinder of the United States, para. 1.73).

20. That argument is unsustainable. In the first place, the Commander of the United States assault force which destroyed the Salman platforms has admitted, in his report, that the United States attack plan was based on practical factors, not on any benevolent attempt to avoid economic damage. In his own words: "Their [the platforms'] distinctive construction makes shooting off platform legs a non-starter and a waste of ammunition." (Memorial of Iran, Exhibit 80, p. 70.)

21. More importantly, the United States argument is contradicted by the fact that our opponents cannot point to a single complaint by any owner of a vessel operating in the Persian Gulf, or any captain of such a vessel, indicating that the Salman and Nasr platforms had ever been used to attack merchant shipping or to assist in mining. I will revert to this point later in my presentation. But given the fact that there was no evidence that the Salman and Nasr platforms were engaged in any military-related operations, the only reason they were attacked was to inflict economic harm on Iran at a highly sensitive point in its conflict with Iraq.

(b) ***The platforms were not the primary intended target***

22. Of equal importance — equally crucial importance — is the fact that the platforms were not even the intended target of the United States operations on the day in question. This has been

made very clear by the commander of the lead warship which attacked the Salman platforms, Captain Perkins, to whose account I would now like to return.

23. As I noted, the battle plan that the United States put in place was called "Operation Praying Mantis". In his account of the events of 18 April 1988, Captain Perkins reveals that Operation Praying Mantis had had its genesis ten months earlier and that, in itself, suggests a certain premeditated quality to the United States actions. What were the United States fleet's orders on the day in question? As Captain Perkins writes:

> "The objectives were clear:
>
> — Sink the Iranian *Saam*-class frigate *Sabalan* or a suitable substitute.
>
> — Neutralize the surveillance posts on the Sassan and Sirri gas/oil separation platforms (GOSPs) and the Rahkish GOSP, *if sinking a ship was not practicable*."

24. Quite apart from the fact that the Salman and Nasr platforms were not surveillance posts, it is clear that *neither* platform was the primary target of United States military action. The United States Navy's instructions were to sink an Iranian frigate or a suitable alternative. *Only* if sinking a ship was not practicable was the Navy to "neutralize" the platforms.

25. It is apparent that the United States forces went far beyond these orders. Captain Perkins' description of "Operation Praying Mantis" shows that the United States simultaneously formed three separate battle groups to carry out the attacks. One group was assigned to attack the Salman complex, the second was assigned to attack the Nasr complex and the third was to attack an Iranian warship — preferably the *Sabalan* or another suitable substitute.

26. The two battle groups assigned to attack the Salman and Nasr platforms did not bother to wait to determine whether the third group had been successful in sinking an Iranian frigate before they acted. "At first light" — these are Captain Perkins words — on the morning of 18 April 1988, the Salman and Nasr platforms were attacked and destroyed. In the meantime, the third battle group went hunting for Iranian warships. Initially, the frigate *Sabalan* could not be located, but another frigate, the *Sahand*, was located and it was attacked and sunk.

27. In the meantime, an Iranian patrol boat — the *Joshan* — was coming to the assistance of the personnel stationed on the platforms. It was also attacked by the United States with six missiles and sunk. When an Iranian F-4 fighter plane approached the area, it too was targeted and hit by

United States missiles and severely damaged. A further Iranian high-speed patrol boat was also destroyed along with two other patrol vessels. Later in the day, the same day, United States naval forces succeeded in locating the frigate *Sabalan*, and bombed it leaving it dead in the water. These attacks can all be seen on the map on the screen which is No. 20 in your folders.

28. The end result, Mr. President, was that as a consequence of a mission — a mission allegedly carried out in self-defence — that was designed to sink a sole Iranian frigate, United States forces systematically attacked and destroyed two sets of oil platforms, two frigates, four patrol boats, and an F-4 fighter plane. Fifty-six Iranians were killed and 150 injured. There were no American casualties. Moreover, all of this occurred on the very same day when Iraqi forces, armed with United States intelligence, commenced a massive ground attack in the north in the area that is indicated on the map. The conduct of the United States forces was not an exercise in self-defence. Nor were the platforms even the primary target. Their gratuitous and premeditated destruction had as its purpose the infliction of serious commercial damage on Iran — "to teach Iran a lesson", as informed experts concluded. The damage caused was out of all proportion to the risk that the platforms posed to neutral shipping — a risk which, I have explained — and which I will come back to — did not exist.

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2. The United States has not demonstrated that Iran was responsible for the mining of the *Samuel B. Roberts*

29. Mr. President, I now turn to the second part of my presentation in which I will address the United States allegation that the Salman and Nasr platforms were destroyed in response to the fact that a United States warship — the *Samuel B. Roberts* — had hit a mine four days earlier.

30. Iran does not dispute that the *Samuel B. Roberts* did hit a mine on 14 April 1988. It does dispute that this event can be shown to be Iran's responsibility or that it provided any justification for attacking two sets of platforms which the evidence shows had no role in the *Samuel B. Roberts* incident and no role more generally in attacks on neutral shipping in the Persian Gulf, whether by mining or otherwise.

(a) ***Iran's interests lay in keeping the Persian Gulf safe for merchant shipping***

31. To place the whole issue over mining in context, it is important to recall that Iran, unlike Iraq, had a fundamental interest in keeping the Persian Gulf safe for shipping. All of Iran's oil exports, which provided it with virtually its only source of foreign exchange, were transported via the Persian Gulf. In contrast, as we have heard, Iraq relied on overland pipelines for the export of most of its crude. As the United States has admitted in these proceedings, Iraq instigated the "Tanker War", and it repeatedly carried out attacks on shipping in the Persian Gulf precisely in an attempt to stifle Iranian trade in crude oil.

32. The reality of that situation was recognized by United States government officials and independent observers alike. Permit me to cite just one example. I cite from an expert on the region whose writings are representative of opinion at the time:

> "the Iranians are the party most interested in keeping the Gulf open to tankers. It has been Iraq, not Iran, that over the years has attacked and disrupted by far the most shipping, for the simple reason that Iran depends completely on the Gulf and the Strait of Hormuz to export all its oil, while Iraq sends its oil abroad by pipeline. The United States could do far more to pacify the Gulf, if that is what it really wants to do, by persuading Iraq to stop its attacks on Iranian shipping, which are what started and perpetuate the naval war in the Gulf." (N. Keddie; Memorial of Iran, Exhibit 34.)

33. I will not repeat the United States sources to which I referred in my intervention on Monday which took the same position. The point is that Iraq had a clear interest in attacking shipping operating in the Persian Gulf, whether by mines or missiles, while Iran did not. It was, after all, Iraq that had attacked the United States warship, the *Stark*, in 1987, killing 37 United States sailors at a location not far from where the *Samuel B. Roberts* hit a mine. Yet, the United States showed no interest in sanctioning Iraq.

34. It is also a matter of public record that United States political and military officials did not view Iranian naval forces as threatening. In fact, a July 1987 State Department Bulletin noted that: "To date, Iran has been careful to avoid confrontation with US flag vessels when US Navy vessels have been in the vicinity." (Memorial of Iran, Exhibit 54.) The Commander of the U.S.S. *Sides*, one of the warships on duty in the Persian Gulf in 1988 when an American guided missile cruiser shot down an Iranian Airbus — he voiced a similar opinion. He said: "My experience was that the conduct of Iranian military forces in the month preceding the incident was pointedly non-threatening. They were direct and professional in their communications . . ."

(Memorial of Iran, Exhibit 55.) Even Secretary of State Weinberger acknowledged the point. He wrote that Iran "has clearly demonstrated in the past a decided intent to avoid American warships . . ." (Memorial of Iran, Exhibit 44, p. 401)

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(b) *The* Samuel B. Roberts *incident and Iraqi mining capabilities*

35. Despite these admissions, the United States maintains that its attacks on the Salman and Nasr platforms were based on the assumption that the mine that hit the *Samuel B. Roberts* was an Iranian mine and that the platforms were somehow implicated. There is no direct evidence for this. In fact, a document which the United States filed with its Counter-Memorial entitled "Persian Gulf Mine Update, 28 April 1988" showed that no serial number was identified for the mine that hit the *Samuel B. Roberts* (Exhibit 123). So absent any direct evidence of Iranian responsibility, the United States has tried to piece together a circumstantial case.

36. The same document furnished by the United States, to which I have just referred, indicates that other mines that were claimed to have been found in the same general area were old "M-80" mines — a Soviet-developed mine which Iraq had ready access to. And that was confirmed by the report of the French mining expert, Mr. Fourniol, which was furnished in Volume VI to Iran's Reply. Mr. Fourniol also noted that Iraq had captured Iranian mines laid in the Khor Abdullah, which is north of Bubiyan Island in the northern reaches of the Persian Gulf, and would have had no problems deploying those mines elsewhere.

37. Despite Iraq's well-documented predilection to attack ships operating in the Persian Gulf, including a United States warship, the United States insists that Iraq did not have the minelaying capabilities that extended to the central or southern Persian Gulf (Counter-Memorial of the United States, paras. 1.109-1.110). But that contention is belied by evidence supplied by United States own official military publications themselves. For example, the Court is respectfully referred to Exhibit 16 of the Memorial of Iran which contains a document taken from a publication called *U.S. Naval Review Proceedings*. That document records a whole series of Iraqi attacks throughout the Persian Gulf and includes an entry that reads as follows: "An Iraqi mine blew a

hole below the waterline on the side of the Liberian freighter *Dashaki* near the Strait of Hormuz." That document also records other Iraqi mining attacks in the Persian Gulf.

38. If Iraq could sow mines as far south as the Strait of Hormuz, it certainly could do so in areas lying further north where the *Samuel B. Roberts* was hit. As Professor Momtaz has explained, Iraq's Navy enjoyed the support of friendly countries along the Gulf, and its planes could also drop mines from the air. Even one of the sources which the United States has attached to its own written pleadings notes that, "the U.S. frigate *Samuel B. Roberts* (FFG-58) was very nearly lost in the Tanker War after striking an Iraqi mine in April 1988" (Preliminary Objection of the United States, Exhibit 12, Vol. I, footnote 26, p. 626).

39. It has also been admitted in further documents that the United States has filed — this time a 1988 report by the General Council of British Shipping — that mines which both Iran and Iraq had laid in the very northern reaches of the Persian Gulf had broken loose and drifted down the southwest side of the Gulf — in other words, into precisely those areas where the *Samuel B. Roberts* and other ships were operating (Counter-Memorial of the United States, Exhibit 2, p. 48). Thus, it was entirely possible that one of those Iraqi mines could have hit the *Samuel B. Roberts* as well.

40. In its Counter-Memorial, the United States has attempted to discredit the possibility that an Iraqi mine was responsible for the damage suffered by the *Samuel B. Roberts*. For example, the United States has asserted that Iraq subsequently disclosed the location of its minefields: "As part of the process by which the Iran-Iraq conflict was ended, Iraq disclosed the type and location of the mines it had laid in the Gulf in 29 different mine fields." (Counter-Memorial of the United States, para. 1.111.)

41. Now, despite the fact that the map which the United States attaches in its pleadings — it is map 1.13 in their Counter-Memorial — despite the fact that that map only shows seven Iraqi minefields not 29, the confidence in the reliability of Iraqi disclosures exhibited by the Counter-Memorial of the United States stands in stark contrast to the level of confidence that Secretary of State Colin Powell showed in Iraq's military disclosures in his speech to the Security Council last Friday.

42. The United States also asserts that its AWACS would "certainly" have detected any Iraqi aircraft that had attempted to fly south along the Persian Gulf to lay mines (Counter-Memorial of the United States, p. 80, para. 1.110 and fn. 205). But can we really be so sure? After all, American AWACS apparently failed to detect Iraq's attack on the U.S.S. *Stark*. We also know that the United States has failed to present any evidence taken from its AWACS on the day that the *Sea Isle City* was struck by a missile, as discussed by Mr. Sellers yesterday. Given the United States assertion that its AWACS "certainly" would have been able to track aircraft, this omission in the documents that the United States has filed is really quite striking.

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(c) ***Documents found on the* Iran Ajr *in no way incriminate Iran***

43. One of the centerpieces of the United States arguments lies on documents found on an Iranian vessel — the *Iran Ajr* — when it was captured and sunk by United States forces in September 1987. The United States alleges that the *Iran Ajr* was engaged in laying mines when it was destroyed (Counter-Memorial of the United States, paras. 1.40-1.42). This is an assertion which Iran denies. So let us examine what the relevant documents actually show.

44. The United States allegation is based on a second-hand account prepared by a United States naval officer in the region who did not actually witness the events in question. (Counter-Memorial of the United States, Exhibit 49). In that account, it is stated that the pilots of a number of United States helicopters operating in the middle of the night allegedly saw Iranian personnel laying mines off a small ramp on the *Iran Ajr*. The helicopters then opened fire on the vessel, which was unaware of the helicopters' presence and presented no threat to them: and that attack killed three Iranians and injured a number of others. The Iranian personnel on the *Iran Ajr* were forced to abandon the ship, which was in flames, and the following day the United States boarded the vessel, seized a number of documents found there, planted explosive charges and blew up the ship. That was the account of a United States naval officer who did not actually see the events in question.

45. In contrast to these materials, the Captain of the *Iran Ajr* has filed a first-hand account of what transpired on the night in question (Reply of Iran, Vol. VI, Farshchian Statement) Captain Farshchian states that the *Iran Ajr* was carrying a consignment of mines from the Iranian port of Bandar Abbas, which is located in the Strait of Hormuz, up to a port further north called Bushehr, on the Iranian coast. But he flatly denies that the *Iran Ajr* was engaged in any minelaying operation when the American helicopters attacked.

46. We have here obviously, Mr. President, contradictory reports. But what does the rest of the documentation show? First, Iran has produced the *Iran Ajr's* mission report, its orders for its mission (Farshchian Statement, Ann. A). And that indicates that the captain's orders were to proceed with a consignment of mines, lubricating oil and ropes to the Second Maritime District, which was Bushehr, and he was to proceed via a secure route — in other words, away from Iran's coasts which were subject to Iraqi attacks. There is nothing in those orders which in any way indicates that the *Iran Ajr* was to engage in minelaying. Second, we have the documents that the United States forces seized on the *Iran Ajr* when they boarded the vessel prior to sinking it. I will come back to these in just a few moments. But for present purposes, what is clear is that these documents, seized by the United States, do not contain a single reference suggesting that the *Iran Ajr* was engaged in minelaying when it was attacked. Consequently, the documentary evidence, including documents submitted by the United States, supports Captain Farshchian's record.

47. Let me deal with these documents found on the *Iran Ajr* in a little more detail.

48. The United States apparently considers that these documents, together with others found on the Reshadat platform, constitute crucial evidence demonstrating Iran's responsibility for laying the mine which hit the *Samuel B. Roberts*. The United States also claims that the documents seized, which included an "Operations Plan" and other communications, had previously been treated as "highly classified" by the United States, but that the United States took the "extraordinary step" of declassifying them for the purposes of this case.

49. As I shall show, what the United States calls "highly incriminating instructions and communications" are entirely innocuous, and they in no way establish either Iranian responsibility for the mining of the *Samuel B. Roberts* or any link whatsoever between the Salman and Nasr

platforms and that incident involving the *Roberts* or, indeed, the existence of any improper conduct emanating from either the Salman or Nasr platforms.

50. Let me start with the "Operations Plan" found by the United States. This was a document prepared in 1984 (Rejoinder of the United States, Exhibit 203), four years before the events that I am discussing this morning took place. The introduction to the Operations Plan refers to the situation that had been caused by Iraq's invasion of Iran. Under the heading "Iranian Forces", the Plan stated that its purpose was: "while providing effective guidance for a defensive war, [to] defend against Iraq and any aggression against Iranian interests in the Persian Gulf or Gulf of Oman . . .".

51. Mr. President, this is an entirely understandable instruction given the fact that Iran was faced with a war that it neither sought nor started. Was it unreasonable for Iran, in the legitimate exercise of its right of self-defence, to draw up a plan to defend itself?

52. At the same time, the Plan, as is completely normal with such contingency planning, did address various "worst case" scenarios — they were called "suppositions" in the Plan itself — which Iranian forces were instructed to be in a position to counteract in the event that certain events occurred. For example, the Plan provided for contingencies in the event that someone else blocked the Strait of Hormuz, or if the Iranian coast was occupied, or its islands occupied, or overland routes on mainland Iran were seized and held, and so forth.

53. Obviously, none of those events ever transpired, and as a result, the Plan never became operative. In fact, the hypothetical nature of the Plan was highlighted at numerous places by very clear instructions that the Plan was entirely contingent. Thus, one finds, if one reads the Plan, under the heading, "Co-ordination orders", the following instructions: "When received, this plan is for planning purposes only and will be executed only upon receipt of further orders." Elsewhere, the Plan very clearly states that various actions will be undertaken "upon receipt of orders".

54. No such orders were ever issued for the simple reason that the "worst case" scenarios outlined in the Plan never materialized. Undoubtedly, the United States itself plans for all kinds of military contingencies around the world. But that hardly means that such scenarios are put into action. In short, the "Operations Plan" relied on by the United States so heavily is entirely irrelevant to the issues in this case.

55. The United States also attaches significance to the fact that in 1983, a full five years before the attacks on the Salman and Nasr platforms took place, the Iranian Navy issued "Radar Instructions" for various defensive installations (Counter-Memorial of the United States, para. 1.103 and Exhibit 114). The premise underlying that argument is that if a platform was equipped with radar, this necessarily meant that it was used to attack United States vessels. That assumption is entirely unwarranted. If the Court examines Attachment J to the Instructions — the Instructions themselves are Exhibit 114 to the Counter-Memorial of the United States — it will find a List of Recipients to whom the Plan was sent. Neither the Salman nor the Nasr platforms are on that list. They never received the Instructions in question. Quite simply, the Instructions in no way justify the United States attack on either the Salman or Nasr platforms.

56. Elsewhere, the United States argues that Iran issued "Operating Instructions for the Deployment of Observers on Oil Platforms in the Persian Gulf" (Counter-Memorial of the United States, para. 1.103 (2) and Exhibit 115). Apparently, the mere fact that observers may have been present on Iran's offshore oil platforms implies a sinister purpose. What the United States fails to point out, however, is that these Instructions were issued in October 1980, immediately after Iraq's invasion of Iran, and eight years before the attacks on the Salman and Nasr platforms took place.

57. In its Counter-Memorial, the United States has advanced the really quite extraordinary proposition that when Iran referred to the "enemy" in this plan, this "necessarily" had to mean vessels of non-belligerent States, including the United States (Counter-Memorial of the United States, p. 73). That argument cannot be sustained. As I have noted, the Operating Instructions were issued in 1980, well before the United States had sent its fleet to the Persian Gulf. And how, in those circumstances, the Instructions could be deemed to be directed at the United States is left unexplained. The United States also fails to point out that the very first page of the Instructions stated that the people of Iran and the armed forces of the Islamic Republic were engaged in a state of war with Iraq, no one else.

58. There was no mention of any other "enemy" such as the United States. The enemy was Iraq. Furthermore, the Instructions went on to note: "The fleet of the First Naval District (Bandar Abbas) must maintain the Straits of Hormuz to maritime traffic so that commercial ships and oil tankers can easily reach Iranian and other ports of friendly countries in the region." (P. 2.)

59. That instruction simply underscores the point I made earlier in my presentation that it was Iran that was interested in ensuring the safety of maritime traffic in the Persian Gulf. Iran's actions, including these Deployment Instructions referred to by the United States, were implemented with that purpose in mind.

60. Instead of drawing attention to these portions of the Instructions, the United States focuses on an Annex to those Instructions (Ann. G) which instructs observers on the platforms to establish a communications link with Iran's mainland bases and to exchange intelligence (Counter-Memorial of the United States, para. 1.103 (2)). The United States concludes from that mere fact alone as follows: "These documents show beyond question that Iran's offshore oil platforms at Rostam, Sirri, and Sassan [that is Reshadat, Salman and Nasr] were an integral part of Iran's military intelligence and communications network and were employed to mount attacks against U.S. shipping." (Counter-Memorial of the United States, para. 1.104.)

61. Mr. President, that argument is a complete *non sequitur*. What could be more reasonable than establishing a communications network in a time of war using whatever assets were available to Iran? Iran had just been attacked by Iraq the month before. It was entirely natural that Iran would attempt to marshal its resources to monitor the situation in the Persian Gulf and to defend its interests. Was Iran supposed to do nothing in the face of Iraq's aggression? Nothing in the document furnished by the United States, which, I remind the Court, was issued eight years before the Salman and Nasr platforms were destroyed, in any way points to hostile actions to be taken against the United States or other countries.

62. Our opponents also consider that the tapes found on the *Iran Ajr* — these are tapes that record messages sent to and from the vessel — are highly relevant. But what do these messages show? Nothing. I have placed in the judges' folders under tab 21 the English translation of a sample of the messages found on the *Iran Ajr* which the United States has included in Exhibit 69 to its Counter-Memorial and which the United States claims support its position. There is not the slightest mention of minelaying or any other activity of significance in these messages. They are completely innocuous. Nor do any of the other transcripts of messages found on the *Iran Ajr* show any evidence of minelaying or hostile activities. I respectfully invite the Court at its convenience to examine the transcripts of these messages which are included, not simply in Exhibit 69, but in

Exhibits 70, 71 and 72 of the Counter-Memorial of the United States. Nothing in any way incriminating will be found.

63. Notwithstanding this, the United States asserts that:

> "The multiple Iranian naval instructions regarding the deployment of observers on the oil platforms in the Persian Gulf found on the Rostam platforms were irrefutable evidence that the offshore oil platforms at Sassan and Sirri collected and reported intelligence concerning passing vessels — intelligence clearly designed to facilitate attacks on shipping." (Counter-Memorial of the United States, para. 1.117.)

64. That is simply not true. At the end of the day, all of these secret documents — these so-called "highly incriminating" materials, which were so specially declassified — are much ado about nothing. They provide absolutely no evidence that the Salman and Nasr platforms had anything to do with the events involving the *Samuel B. Roberts*, that the platforms were used for any illegal purpose or that the *Iran Ajr* was engaged in minelaying when it was blown up by United States forces with the loss of three Iranian lives.

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3. There is no evidence that the Salman or Nasr platforms had any role in alleged attacks on neutral shipping

65. Mr. President, that brings me to the third, and final, part of my presentation. In it, I shall show that in addition to what I have already said, the United States has been unable to provide any evidence that either the Salman or the Nasr platforms were involved in any way in attacks on neutral shipping in general, or on United States shipping in particular.

66. I have already shown that on 18 April 1988 the platforms were not even the primary intended target of United States forces. The Navy's instructions were to attack an Iranian frigate, and only — only — if such a target could not be found were the platforms to be destroyed. Those orders were disregarded and the platforms — both sets of platforms — were destroyed along with half of Iran's Navy.

67. It has also been shown that there is absolutely no evidence linking either platform with the mining of the *Samuel B. Roberts*. The Salman platforms were over 100 km away from the place where the *Samuel B. Roberts* hit a mine; and the Nasr platforms were over 200 km away.

Neither platform had anything to do with this incident, and the United States has been unable to show otherwise.

68. In the light of this fundamental defect in our opponent's case, the tactic seized upon by the United States has been to try to create prejudicial inferences as a substitute for real evidence. The principal vehicle by which such inferences have been presented to the Court is by way of "expert studies" presented by foreign military personnel with no direct knowledge of the events in question, the reports being prepared years after those events took place.

69. For example, the United States places heavy reliance on a report that it commissioned from two retired British naval officers in 1997 (Counter-Memorial of the United States, Exhibit 57). If one reads that report, one will see that it is entirely hypothetical and speculative. It does not cite a single documented account of any attacks emanating from the platforms. Instead, it rests its conclusions on suppositions such as the following. Let me give you a flavour with some quotes:

— "The oil platforms were highly likely to have been used for radar, and to a small extent, visual surveillance of shipping." (P. 22.)

— "Oil platforms could have provided position and advisory control to helicopters." (P. 13.)

— "They could have acted as forward operating bases . . ." (P. 13.)

— "They may in addition provide fuel and logistical services, albeit temporary." (P. 7.)

70. I could go on in this vein, but I scarcely think it is necessary. The report is nothing more than a collection of hypotheses — "could haves"; "might haves". It is not evidence.

71. The report prepared by Admiral Heger and Mr. Boyer, which the United States has also cited extensively in its pleadings, is similar in nature (Counter-Memorial of the United States, Exhibit 18). It is an after-the-fact, theoretical study of what Iranian forces might have done in certain circumstances and under certain scenarios, but not one piece of hard evidence in the form of actual reports referring to attacks emanating from the platforms is cited.

72. Then there are the guidance notes prepared by the General Council of British Shipping, on which the United States also relies. Yet they are no more specific than any of the other sources cited by our opponents (Counter-Memorial of the United States, Exhibits 103-105). These notes

are entirely hearsay in nature and quote no sources. But as one might expect in a war situation, the General Council did adopt a cautious tone in advising vessels as to conditions prevailing in the Persian Gulf. However, none of the guidance notes are able to document a specific attack launched from either the Salman or Nasr platforms.

73. The fact of the matter is that the United States has been unable to point to a single complaint that the Salman and Nasr platforms were actually involved in an attack on neutral shipping. Hundreds of documents have been filed in this case, Mr. President; I scarcely need to remind you. But you will not find in this mass of documentation:

— a single report by a captain or crew member of a merchant or military vessel operating in the Persian Gulf that it had been the target of an attack which was launched from either the Salman or Nasr platforms;

— a single diplomatic protest to Iran pointing to a specific incident involving either of those two platforms;

— a single eyewitness account of any kind, throughout the entire eight-year war, stating that an attack had emanated or been co-ordinated from the Salman and Nasr platforms.

74. Mr. President, I regret having to review these materials in some detail, but the exercise really is important to debunk the impression that the United States tries to convey that the Salman and Nasr platforms were engaged in a well-documented pattern of attacks on neutral shipping. They were not, and the evidence supplied by the United States shows as much.

75. Out of the hundreds of documents which the United States has filed in this case, there is only one which deals with an incident which the United States can even place in the vicinity of the Salman platforms. That incident involves a report filed by United States military sources according to which on either 6 March 1988 or 6 May 1988 — the dates are not clear, the United States Counter-Memorial refers to 6 May 1988, after the platforms attack, but the document in question refers to 6 March 1988 — but on those dates, two American helicopters that were flying around at night without identifying themselves, were alleged to have been fired upon "in the vicinity of the Sassan oil field" (Counter-Memorial of the United States, Exhibit 131). The helicopters could not identify who had fired at them and neither of them was hit by anything. The only conclusion which

the United States military officers could reach at the time was simply to "raise the possibility" — those were the words — that Iran "may have staged some small boats" to Sassan *(ibid.)*.

76. That is the sum total of the United States evidence that the Salman and Nasr platforms were engaged in actual attacks against United States and neutral shipping. As my colleague, Professor Bothe, will show, none of this remotely justified destroying the platforms out of any notion of legitimate self-defence.

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77. At the end of the day, the platforms were attacked because of the economic damage and pressure that their destruction would bring to Iran. They were not the intended target on the day in question and they had been guilty of nothing more than engaging in commercial oil operations.

78. Mr. President, that concludes my presentation. I would be grateful if you could now call upon Professor Bothe to continue. Thank you.

The PRESIDENT: Thank you, Mr. Bundy. I now give the floor to Professor Bothe.

Mr. BOTHE: Mr. President, Members of the Court. It is a great honour and a privilege for me to appear today before this high court, as counsel for the Islamic Republic of Iran.

SELF-DEFENCE

A. Introduction

1. It has been shown by my colleague, Professor Pellet, that the United States breached Article X, paragraph 1, of the Treaty of Amity. My colleagues Messrs. Zeinoddin, Bundy and Sellers have presented the relevant facts. It is now my task to show that the United States attempt to justify that breach by relying on circumstances precluding wrongfulness is totally unfounded, both as a matter of fact and law. In particular, the United States claims to have acted in self-defence. That claim, I will show, fails. Quite to the contrary. The attacks on the platforms do not only constitute a breach of the Treaty; they are an unlawful use of force in violation of the Charter of the United Nations and of *ius cogens*.

2. For that claim of self-defence, the United States bears the burden of proof. The United States relies on an exception to both the fundamental rule of international responsibility of the State which commits an internationally wrongful act, and to the prohibition of the use of armed force. As the International Law Commission puts it in its commentary to Chapter V of the Draft Articles on State Responsibility[1]: "Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance [precluding wrongfulness], . . . the onus lies on that State to justify or excuse its non-performance." It is, thus, the United States which has to establish that the requirements of this circumstance precluding wrongfulness, namely of self-defence, are met. This, the United States cannot do.

3. If one analyses the United States argument more closely, it is apparent that the plea of self-defence is used in two different ways. On the one hand, it is argued that there was a general situation of an armed attack by Iran against the United States. In this perspective, according to the United States, the attack on the platforms would be justified as a reaction against that general armed attack, whatever circumstances may have constituted such an attack. On the other hand, and more concretely, two specific instances are claimed to constitute armed attacks by Iran against the United States, and the purported justification of the attacks against the platforms is that they constitute self-defence against these two particular attacks. Both lines of argument are fundamentally flawed as a matter of fact and law.

4. My presentation will, thus, be divided in two parts. I will, first, refute the first allegation[2]. I will show that the concept of a general pattern of armed attacks is flawed and that allusions to a justification as collective self-defence are unfounded and irrelevant. In the second part, I will then address more concretely the two incidents alleged to constitute attacks by Iran, that of the *Sea Isle City* and the *Samuel B. Roberts*[3], and show that the attacks on the platforms did also not meet the requirements of self-defence in relation to these two particular incidents.

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[1]ILC, Report on the Work of the 53rd Session, Chap. V, p. 169.

[2]Part B.

[3]Part C.

B. The flawed concept of a general situation of armed attack

I. The facts: there was no continuous armed attack against the United States

5. Let me now turn to this flawed concept of a general situation of armed attack, and first address the facts. In its Counter-Memorial, the United States puts its general claim in these terms: "the evidence shows that these attacks were part of a larger pattern of Iranian actions involving the unlawful use of force against U.S. and other neutral vessels"[4]. In its Rejoinder, the United States claims: "An analysis of this case must begin with the undisputed fact that Iran systematically and deliberately attacked U.S. and other neutral shipping . . ."[5] With due respect, Mr. President, Members of the Court, this fact is *not* undisputed. The United States claim that there existed a general pattern of armed attacks is an invention put forward in order to detract from the true context in which the United States attacks were launched, which has already been laid before you by my colleague Mr. Bundy. It is a context of systematic United States support for Iraq and hostile behaviour against Iran.

6. What then of the United States allegation that there was a series of attacks against the United States, linked to each other by some kind of factual bond, amounting to a continuous armed attack. The allegation does not stand up on the facts.

7. At a closer look, it becomes obvious that all the United States could put forward in substantiating this allegation is assembled in the Counter-Claim. Thus, let us have a look at the Counter-Claim. The cases complained of are, first, the two specific incidents involving the *Sea Isle City* and the *Samuel B. Roberts*. My colleagues Mr. Bundy and Mr. Sellers have shown that there was no attack by Iran against the United States in these two cases. But can one elsewhere find support for the thesis that there existed a general armed attack against the United States?

8. Most of the vessels for which the United States now submits a Counter-Claim did not even fly the United States flag. Why would there be an attack against the United States? The only other United States flagged vessel allegedly attacked by Iran was the *Bridgeton*, a reflagged Kuwaiti tanker hit by a mine. Iran will deal with this allegation in detail in its response to the United States Counter-Claim, but it may be noted here that Washington officials said at the time that the United

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[4]Counter-Memorial, para. 4.10.

[5]Para. 1.11.

States would not retaliate against this incident "since it was not sure who was responsible"[6] and that no specific protest was made by the United States to Iran in relation to that incident.

9. Furthermore, Mr. Bundy has referred extensively to the fact that United States forces and senior United States officials regarded Iranian forces as "pointedly non-threatening", which is hardly compatible with any situation of an armed attack. I would just like to remind you of the two quotes just given by Mr. Bundy to the effect that "Iran has been careful to avoid confrontations with U.S. flag vessels"[7]. And Secretary of Defence Weinberger "had clearly demonstrated in the past a decided intent to avoid American warships . . ."[8].

10. Mr. President, Members of the Court, there is no basis for the United States allegation that there was a situation of continuous armed attacks by Iran against the United States. How could one combine those instances of non-attacks into a consistent pattern of attacks? If there is a consistent pattern, it is a pattern of dubious allegations. In Cologne, they have an old carnival song: "Three times zero is zero, and remains zero!"

11. It is into this non-existing pattern of armed attacks that the United States tries to squeeze an alleged military role of the platforms it attacked, thus presenting them as an appropriate objective of action taken in self-defence. A look at the facts shows that there was no such role, which sheds some further light on the quality of the United States claim.

12. The United States pretends that the platforms it attacked were military installations used for attacking neutral shipping[9]. The facts on which the United States relies to make this point are simply inconclusive, or they constitute unsubstantiated general allegations. In order to get a real picture of the situation regarding the platforms, it is necessary to recall that the platforms had been attacked by Iraq which was trying to reduce the war-sustaining economic capacity of Iran by destroying its oil production facilities. Thus, the platforms were extremely threatened. Some military presence on these platforms was therefore required by the circumstances. It was also natural that the personnel on the platforms carefully monitored what was happening around them,

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[6]Memorial, Exhibit 57.

[7]Statement by Senator Nunn, 19 May 1987, Memorial, Exhibit 54.

[8]C. C. Weinberger, *Fighting for Peace: Seven Critical Years in the Pentagon*, 1999, p. 401, Memorial, Exhibit 44.

[9]Counter-Memorial, paras. 1.86 *et seq.*, Rejoinder, paras. 1.17 *et seq.*

especially military operations, conducted by whomever. But this does not mean that they were involved in any aggressive activity against commercial or neutral military shipping in the Gulf. The military presence on the platforms was not capable of conducting any aggressive action in the Persian Gulf. Quite to the contrary. It was even insufficient for defensive purposes, a fact complained of by the NIOC, as we have heard from my colleague Dr. Zeinoddin.

13. My colleagues Messrs. Zeinoddin, Sellers and Bundy have already demonstrated that the facts on which the United States tries to base its allegation that the platforms formed part of a military effort are unsubstantiated, unproven or inconclusive. Let me simply summarize:

— *first*, the equipment found on some of the platforms was either innocuous, being standard equipment found on any commercial platform (radar and communication facilities), or defensive only (light anti-aircraft batteries);

— *second*, the communications monitored were completely innocuous;

— *third*, the documents found on the platforms or on the *Iran Ajr* were completely innocuous;

— *fourth*, no reliable evidence exists as to specific cases of attacks being launched from the platforms;

— and finally in relation to the Salman and Nasr platforms, there is even no concrete allegation whatsoever that they were used for hostile purposes.

14. The way in which the United States tries to convey the impression that the platforms played a role in preparing the alleged attack against the *Sea Isle City* is particularly revealing[10]. It tries to show that the movement of a convoy was monitored from the Reshadat platform — and that this was a kind of preparation for the attack against that ship which occurred much later[11]. Any relationship between the alleged monitoring of shipping movements and a missile attack taking place more than 600 km away is a mere insinuation having nothing to do with hard facts.

15. No, Mr. President, Members of the Court, there is no proof that the platforms were in any way involved in attacks against neutral shipping, nor could they, thus, be regarded as an element of this alleged general pattern of armed attacks.

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[10]Rejoinder, para. 1.22.

[11]Rejoinder, para. 1.46 *et seq.*

16. Nevertheless, an additional word of explanation should be added in order to explain the position of the Islamic Republic of Iran. Context matters, and the Iranian actions must be explained in this context. A war was going on, indeed, namely between Iran and Iraq, which Iran was fighting in self-defence. In this war, Iran did possess the rights of a belligerent. It was entitled to take legitimate measures of warfare. These include the use of mines at sea, which is not illegal *per se*, but subject to certain legal limitations. They include measures of control against neutral shipping — as has been explained by my colleague Professor Momtaz — and attacks against Iraqi military vessels and aircraft. It is in this context that Iran's actions in the Persian Gulf have to be seen and evaluated. In this context, it has to be emphasized that, in contradistinction to Iraq, Iran used restraint in its action. It was Iraq who seriously damaged a United States military vessel, the U.S.S. *Stark*, causing 37 deaths, vastly more than all casualties taken together caused by the incidents which the United States alleges to be attributable to Iran, and there were no American fatalities among them. It was Iraq, not Iran, which started an outright campaign against neutral shipping in the Persian Gulf, which came to be known as the Tanker War. Iran uttered its indignation about the fact that other nations supported Iraq and condoned in the unlawful Iraqi actions. But it showed restraint.

17. For all these reasons, Mr. President, Members of the Court, the United States allegation that there existed a general situation of an armed attack against the United States is unfounded as a matter of fact.

Mr. President, that concludes my exposition of the facts. That would be a good moment for a break before I start my exposition concerning matters of law.

The PRESIDENT: Thank you, Professor. The hearing is now suspended for 15 minutes.

The Court adjourned from 11.25 a.m. to 11.45 a.m.

The PRESIDENT: Please be seated. Professor Bothe, please continue.

Mr. BOTHE: Thank you, Mr. President. Before the break it was my purpose to show that the construction of a general situation of an armed attack was flawed as a matter of facts. I would now like to turn to questions of law.

II. The law: the construction of a general situation of an armed attack is flawed

18. To the extent that this alleged general pattern of armed attacks is used as a legal concept, it is designed to broaden the scope of self-defence beyond what would be permissible if one considered only the two specific incidents as acts possibly triggering a right of self-defence. I will first show that as a legal concept, this "general pattern of armed attacks" is, in relation to the circumstances of the present case, an invalid legal construction. That construction does not withstand a critical analysis of the concepts of armed attack and self-defence under the Charter. For it is to the Charter which we have to turn, it is the Charter which is the yardstick of this particular circumstance precluding the wrongfulness of the breach of the Treaty. As Article 21 of the ILC Draft Articles puts it: "The wrongfulness of an act of a State is precluded if that act constitutes a lawful measure of self-defence *taken in conformity with the Charter of the United Nations.*"[12] It is, thus, to the principles of Charter interpretation, for which this Court has given us so much valuable guidance, that we must now turn in order to analyse the legal claim put forward by the United States.

19. The United States tries to make us believe that a loose interpretation of the right of self-defence, based on a loose definition of an armed attack, is necessary in order to protect national security[13]: "The first fifteen words of Article 51 assure Members of the United Nations that the Charter does not diminish their security . . . The expansive phrase . . . carries a reassuring quality, *without the restrictiveness pleaded by Iran.*"[14] Those are the words of the Rejoinder of the United States. True, the right of self-defence is a necessary means for safeguarding the very existence and survival of States[15]. Iran, having been forced to fight a war of self-defence against Iraq, is the last State to deny its importance. But that does not mean that the right of self-defence can serve as a kind of magic wand to justify any use of force a State deems useful to preserve its interests. It may well be that powerful nations feel more comfortable with a broader legal option to use military force. For weaker nations, and this is the majority, the situation is just the reverse. As early as in the *Corfu Channel* case, this Court has made its position clear: "Intervention is perhaps

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[12]Emphasis added.

[13]Rejoinder of the United States, para. 5.11.

[14]Emphasis added.

[15]*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 263, para. 96.

still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself."[16] The same applies to self-defence. Self-defence is the exception to the rule prohibiting unilateral recourse to the use of force. The more this exception is expanded, the more room there is for unilateral use of force, and the narrower becomes the scope of the prohibition.

20. The argument that in a particular case the use of force is for some reason "necessary" is often used all too easily. The United States expressly invites us to such an easy use of the argument of self-defence — and I quote again from the Rejoinder: "[B]y its very nature an 'armed attack' requires the victim State to evaluate the threat to its security and actions it must take to defend itself . . . (A)ny review should account for the victim State's assessment of the overall situation at the time it took action in self-defence."[17] The United States supports this statement with a quotation from the writings of Judge Higgins[18]. Frankly speaking, Mr. President, Madame, Members of the Court, this made me a little nervous when I read it. Therefore, I checked the quotation. Let me share with you a fuller analysis of this quotation because it sheds a significant light on the methodological flaws of the United States line of reasoning. The phrase actually quoted by the United States Rejoinder is preceded by the following sentences:

> "It should be noted that under Article 51 the inherent right of self-defence is available until the Security Council has taken the measures necessary to maintain international peace and security . . . [and further on] That there are situations so immediate and pressing that a state must be allowed to act in defence has never been denied. This is totally in keeping with the basic nature of self-defence, which is that of an exceptional right which may only be exercised if no other means are available."

And now comes the phrase quoted by the United States: "Temporarily, then, a state must be judge in its own cause." But this sentence is followed by another one, not quoted by the United States: "However, in order that the right shall not be abused, it is essential that it is subjected to international review."

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[16] *I.C.J. Reports 1949*, p. 35.

[17] Rejoinder, para. 5.12.

[18] R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, 1963, p. 205.

21. As you can see, taking the single phrase out of its context has truncated its sense. I leave you with a simple question: What is the value of an argument which must have recourse to this type of misrepresentation of the authority on which it pretends to rely?

22. It is the type of review demanded by Judge Higgins which the Secretary-General of the United Nations performed in relation to the aggression of Iraq to which Iran was the victim. It is this review which Iran today requests the Court to undertake in relation to the United States claim of self-defence. Any such review must be based on objective criteria. Otherwise, it would leave a fundamental rule of international law to the subjective appreciation of decision-makers of a State determined to go to war. The "subjectivation" of the standards of legal restraints on the use of force which the United States proposes is the first step on a slippery slope. The content of those standards will no longer be discernible. This loose construction of the right to unilaterally use force would undermine the very existence of the prohibition which is one of the major cultural achievements of the last century.

23. There is, thus, indeed, a need for strict and objective construction of the prohibition to have recourse to the use of force. It is in this spirit that I would like to offer to the Court the argument of the Islamic Republic of Iran as to the meaning and scope of self-defence. In this approach, we feel encouraged by the holding of this Court in the *Nicaragua* case. This decision teaches three basic lessons which are relevant for the present case:

1. The prohibition of the use of force contained in the Charter and the corresponding customary law prohibition are identical. Thus, there is no customary law justification of the use of force beyond the law of the Charter[19].
2. An armed attack within the meaning of the Charter requires a certain threshold of violence. There must be an act of violence of a certain gravity[20].
3. The exercise of the right of collective self-defence depends on a request by the victim of an armed attack which possesses the right of individual self-defence[21].

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[19] *I.C.J. Reports 1986*, p. 100, para. 211.

[20] *Ibid*., p. 101, para. 191.

[21] *Ibid*., p. 103, para. 195.

These three basic principles stand for a strict construction of the prohibition of the use of force and its exception, the right of self-defence. This is not, as the United States claims, inappropriate restrictiveness. It is the appropriate approach to interpreting the Charter. As the Commentary to the Charter edited by Judge Simma puts it, referring to your Judgment in the *Nicaragua* case: "[T]he right of self-defence cannot be against acts not reaching the threshold of an armed attack . . . [T]he remarks made by the ICJ as a whole entail the outright rejection of a right of self-defence extending far into the purview of self-help."[22]

24. It is in this spirit that I will now turn to the relevant question of the requirements of self-defence in the present case on which, on a general level, there is no disagreement[23]. The first one is the existence of an armed attack. If there is such an armed attack, the reaction, secondly, must constitute self-defence in the true sense of the word, not punishment, retaliation or the like. Third, it must respect the principles of necessity and proportionality. As self-defence constitutes the exception to the rule prohibiting the use of force, the burden of proof lies on the party claiming to act in self-defence.

25. The argument that there was a general situation of armed attack starts from a point of departure with which nobody can disagree. But a correct point of departure does not mean that the way is right all along. And the way proposed by the United States argument is flawed because it fails to make the right distinctions.

26. The correct point of departure is this: what constitutes an armed attack has to be ascertained in the light of all relevant circumstances[24]. If there is, for example, an invasion into the territory of another State and the territory of a victim State is occupied, there is an armed attack as long as that territory is occupied. This can be called a general situation of an armed attack. Any attempt to expel the aggressor from the occupied territory constitutes, then, lawful self-defence.

27. This has to be distinguished from a different situation: If the armed forces of country A intrude into a small area of country B for a couple of days and then withdraw, and force is no more used between the two countries, the armed attack is over. No right of self-defence exists

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[22]A. Randelzhofer, Art. 51, note 13, in: B. Simma (ed.), *The Charter of the Untied Nations*, 2nd ed. 2002.

[23]Rejoinder, para. 5.30.

[24]Rejoinder, para. 5.12.

anymore[25]. If the same happens two years later, the same applies. If that armed attack ends as the previous one, the legal consequences still are the same: the right of self-defence ceases to exist as it did before. Each incident has to be considered on its own merits. There is no general situation of an armed attack.

28. This distinction is clear. It has to be kept clear even where a State which wants to justify an unlawful use of force tries to blur it. Admittedly, the dividing line between the two situations might be somewhat difficult to draw where it could be argued that a link exists between the individual incidents which allows or even requires us to consider these individual incidents as one event, indeed as a general situation of armed attack. This is both a question of law and fact. Two questions have to be asked: first, does this link exist as a matter of fact? And secondly, is the link, if any, strong enough to consider the individual incidents, as a matter of law, as constituting one attack?

29. If that link is accepted too easily, the consequences would be dangerous. The concept of an armed attack would become diffuse, the limits of the right of self-defence become uncertain. This is probably why this concept of a general situation of continuous attack is difficult to find in State practice unless there really is a fully fledged armed conflict. The United States has been unable to point any relevant precedent for this construction of a general situation of armed attack.

30. A case where a similar construction was not accepted is the practice of the Security Council in the Arab-Israeli conflict. In this case, even the claim of the continued existence of a state of war was not recognized by the Security Council as a sufficient link between various cases of recourse to military force, a link which would have rendered unnecessary the legal evaluation of each single event in the light of the *ius ad bellum*. The argument of a continuous existence of a state of war was never accepted by the Security Council as a means which could justify Israeli action in relation to Arab States[26].

31. However, it is not necessary, in the present case, to decide that question of law on a general level. As already pointed out, the facts of this case do not begin to justify the conclusion that there exists such a pattern of continuous armed attacks.

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[25]See R. Ago, Eighth Report on State Responsibility, *YILC* 1980, p. 53.

[26]See SC resolutions 228 (1966); 248 (1968); 256 (1968); 265 (1969); 270 (1969); 332 (1973).

32. Furthermore, if one accepts, be it only for the sake of argument, the existence of an armed conflict between the parties as an indication of a continuous armed attack, one cannot but note that in the present case, neither country has ever recognized the existence of such a situation. The United States has consistently claimed a neutral status[27]. Neutrality means peaceful relations between the parties to the conflict and third States. The claim that there exists a general situation of attack is incompatible with the claim of neutrality.

33. It has been shown by my colleague Mr. Bundy that the United States has consistently supported Iraq and thus violated its obligations of neutrality. But this unneutral behaviour does not automatically lead to the loss of the status of a neutral. Thus, the United States did not become a party to the conflict. It continues to claim a neutral status, and Iran does not deny that status to the United States. Iran's stance in relation to the United States attack against the platforms is consistent with that position. The United States stance is not. The English proverb "you can't have the cake and eat it" is true — and relevant in this context: A State cannot claim neutral rights and thus the rights deriving from a generally peaceful relationship and at the same time claim belligerent rights as it sees fit.

34. To conclude at this stage. The claim put forward by the United States that there was a situation of a continuous armed attack is flawed as a matter of fact and of law. Consequently, a right of self-defence cannot be construed on the basis of this loose concept of a general pattern of armed attack; it can, if at all, only be based on the two specific incidents which I will discuss a bit later.

III. There is no basis for a claim of collective self-defence

35. Before turning to these incidents, it is appropriate to analyse an additional aspect of the United States claim. The United States refers *in extenso* to alleged Iranian attacks on neutral, or purportedly neutral, vessels which were not United States vessels. This is yet another attempt to distort the true context of the conflict and to create, by means of unsubstantiated factual allegations, a general mood unfavourable to Iran. But from a strictly legal point of view, the allegations made by the United States would be relevant for the present case only and to the extent that the United

[27]See for example the Statement by the Under-Secretary for Political Affairs, Michael H. Armacost, before the United States Senate Foreign Relations Committee, 16 June 1987, reproduced in 26 *ILM* 1429, at 1430.

States exercises a right of collective self-defence. The United States, however, does not explicitly seek to make such a claim. And for good reason. The legal conditions for any argument based on collective self-defence are simply not met. First, there must be an armed attack against a specific State (which then possesses the right of individual self-defence). No State other than the United States has ever claimed to possess such a right. Secondly, as you held in the *Nicaragua* case in 1986[28], the exercise of a right of self-defence requires a request by the State which is the actual victim of the attack. No such request has ever been made. Thus, any alleged attacks against vessels of third States are from a strictly legal point of view irrelevant to the United States plea of self-defence. Suffice it to add that on the facts, too, the United States reference to such alleged attacks is unjustified.

36. The United States is obviously aware of this problem and invites the Court to take judicial notice of "the extensive public record"[29]. Judicial notice of what? It is unacceptable procedure in matters of evidence to replace a substantiated allegation of facts, capable of being proven, by some type of loose hints to press reports and ask the Court to found its judgment thereupon.

37. As Iran has shown extensively both in its written pleadings and in these oral presentations, it was Iraq which brought the war into the Persian Gulf in an attempt to cut off Iran's oil flow and to internationalize the conflict[30]. Furthermore, as Mr. Bundy has shown, citing senior United States officials, the United States was fully aware that "the challenges to freedom of navigation originate with . . . Iraq"[31].

38. Third, as Mr. Bundy has also explained, Iran's actions in fact confirmed its interest in keeping the Persian Gulf open and safe for neutral shipping. A well-known commentator [N. Keddie], already cited by Mr. Bundy, is worth citing again[32].

> "the Iranians are the party most interested in keeping the Gulf open to tankers. It has been Iraq, not Iran, that over the years has attacked and disrupted by far the most shipping, for the simple reason that Iran depends completely on the Gulf and the Strait

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[28] *I.C.J. Reports 1986*, p. 14, para. 195.

[29] Rejoinder, para. 1.12.

[30] Memorial, paras. 1.33–1.40; Reply, paras. 2.15–2.20.

[31] Letter by Senator Nunn, 29 June 1987, Memorial, Exhibit 32.

[32] Memorial, Exhibit 34.

> of Hormuz to export all its oil, while Iraq sends its oil abroad by pipeline. The United States could do far more to pacify the Gulf, if that is what it really wants to do, by persuading Iraq to stop its attacks on Iranian shipping, which are what started and perpetuate the naval war in the Gulf."

39. To conclude at this stage. The allegation concerning Iranian attacks against neutral shipping put forward by the United States are unfounded as a matter of fact and irrelevant as a matter of law.

C. The individual incidents

40. I would now like to address legal questions in relation to the two specific incidents. The relevant facts have already been presented by my two colleagues. They have clearly shown that the United States allegations are unwarranted as a matter of fact. But in addition, the claim put forward by the United States is also unfounded as a matter of law, for a number of reasons. Any of these reasons would be sufficient to invalidate the United States claim. Let me take them in order.

41. I will, first, show that there was no act of hostility which would qualify as an "armed attack" against the United States within the meaning of Article 51 of the Charter. Secondly, I will demonstrate that even if the existence of such an act could be proven, the action taken by the United States would still not be justified as self-defence because:

— first, it did not constitute self-defence within the meaning of that term;

— second, it did not meet the requirement of necessity; and

— third, it did not meet the requirement of proportionality.

I. The non-existence of an armed attack against the United States

42. First, there was no armed attack within the meaning of Article 51 of the Charter. Thus, there was no reason in which a right of self-defence could exist.

43. I would like to re-emphasize that it is the United States which bears the burden of proof for the existence of an armed attack. My colleagues, Messrs. Sellers and Bundy, have demonstrated that the United States failed to discharge this onus in relation to both incidents. In respect of the *Sea Isle City*, the United States was neither able to prove that the vessel was shot at from an Iranian missile site, nor that it was specifically targeted. Similarly, the United States did not succeed in proving that the mine which hit the *Samuel B. Roberts* was of Iranian origin.

44. Nevertheless, even if one accepted, for the sake of argument, that the vessels were damaged by Iranian weapons, the United States claim of self-defence would still be flawed. Even on the basis of the facts alleged by the United States, there was no action by Iran that would legally qualify as an armed attack against the United States.

45. To begin with the damage caused to the *Sea Isle City*. Being directed against a single merchant ship, it was not an attack within the meaning of Article 51 of the Charter, and even if and to the extent it was, it was not an attack against the United States.

46. The fact that the *Sea Isle City* was shot at does not amount to an armed attack in the legal sense, within the meaning of Article 51. As it is only States which have a right of self-defence under international law, the attack triggering a right of self-defence can only be a forcible action directed *against a State*. Obviously, there is an armed attack against a State where its territory is attacked. However, if the forcible action occurs outside the State's territory, the object must be certain external manifestations of the "victim" State, if one could really speak of an armed attack against that State.

47. Armed forces or warships situated outside a State's territory no doubt constitute such external manifestations of the State. An individual merchant ship, however, cannot be regarded as such. Forcible action against the ship might violate the flag State's rights, it might even allow the flag State to take certain protective measures, but it would not trigger a right to take military action amounting to self-defence. Contrary to the claim put forward by the United States[33], this view is held by a number of renowned authors[34]. It is also confirmed by Article 3 *(d)* of the United Nations General Assembly resolution concerning the Definition of Aggression[35] which lists as one of the examples of aggression "an attack by the armed forces of a State on the land, sea, air forces, *marine and air fleets* of another State". The use of the term "fleets" was deliberate in order to exclude single acts of force against individual ships from the scope of a definition of aggression. As it is clearly stated in the Report of the Sixth Committee preparing the adoption of the resolution: "the

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[33]Rejoinder, para. 5.17.

[34]Y. Dinstein, *War, Aggression and Self-Defence*, 3rd ed., 2001, p. 180; S. Alexandrov, *Self-Defence Against the Use of Force in International Law*, 1996, pp. 194 *et seq.*

[35]General Assembly resolution 3314.

words 'marine and air fleets' implied a massive attack and not isolated acts"[36]. In the *Nicaragua* case, you held an essential part of this Article 3 of the Declaration to constitute an expression of customary international law, and you used it in order to determine what constitutes an armed attack triggering a right of self-defence[37]. Thus, it is clearly appropriate if Iran relies on this provision as a basis for the interpretation of what constitutes an armed attack.

48. The conclusion that there was no attack against the flag State imposes itself with even more strength where the ship is hit within the internal or coastal waters of another State. If a missile is fired into the territorial waters of a State, the essential characterization of that action is it is an attack against the territorial State, regardless of whether there are persons or things belonging to a third State present in those waters.

49. An armed attack is a forcible action *directed* against a State. A negligent shot across the border or against a warship may constitute an international tort, but it is not an attack triggering a right of self-defence. There is no such notion as an armed attack "to whom it may concern". By definition, an attack is directed against a specific target. In order to trigger a victim State's right of self-defence, the attack must be directed against that specific State. Otherwise, the distinction between individual and collective self-defence, on which you relied in the *Nicaragua* case, would be meaningless. The United States, arguing the contrary, relies on municipal law analogies which do not concern comparable situations. That necessary element of intentional targeting is absent in the present case. Mr. Sellers has shown that the United States did not provide any evidence that the *Sea Isle City* was targeted by an Iranian missile. This is all the less probable as the missile had arrived at the very limit of its reach, even if one accepts the United States view on the technical possibilities. How could it, under these circumstances, possibly be targeted at a particular ship? How could it be intended to damage a particular ship which, 100 km away, flew the United States flag? No, Mr. President, Members of the Court, there *was* no attack against the United States.

50. The true character of the alleged attack was different. If there were an attack, it was an attack against the territory of Kuwait. The victim of the attack, if any, was Kuwait, not the United States. In relation to that attack, the United States did not possess a right of individual self-defence,

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[36] *General Assembly Official Records*, 28th session, Anns., Agenda item 95, para. 20.

[37] *I.C.J. Reports 1986*, p. 14, para. 195.

it could only react in the exercise of the right of *collective* self-defence. This, however, would require a request made by the victim, as already pointed out. There is no such request. Therefore, the claim of self-defence put forward by the United States fails.

51. The fact that the ship in question flew the American flag does not change this conclusion. It does not give rise to a right of individual self-defence of the flag State. The fact that property of persons belonging to a third State is situated on the territory of the attacked State and is affected by an attack does not make this attack an armed attack against the State of origin of those persons. In addition, in the present case, ownership and control over the ship did not really belong to the flag State. The *Sea Isle City* was a reflagged Kuwaiti tanker, and this reflagging was a specious operation. No real change in the ownership of, and control over the ships was intended or achieved. For all these reasons, if there was an attack, it was an attack against a Kuwaiti vessel and against the territory of Kuwait.

52. Let me now turn to the incident of the *Samuel B. Roberts*. Mr. Bundy has just explained that the United States was unable to prove Iran's responsibility for laying the mine which hit that ship. But even if the mine had been Iranian, the incident would still not amount to a specifically targeted attack which could justify the United States use of force against Iran. As just stated, such direction or intent would be required in order to be able to characterize the mining as an attack against the United States.

53. Mining is certainly subject to legal restraints under the laws of war. But this is a completely different matter, pertaining to the law of armed conflict, the *ius in bello*, which must not be confused with the issue of self-defence arising under the *ius ad bellum*. Even where these limitations imposed by the law of armed conflict were not respected, which Iran categorically denies as far as its own use of mines is concerned, this does not mean that the mining in question constitutes an armed attack against any State whose ships may happen to hit one of those mines. Therefore, any claim that mining was unlawful under the law of war is irrelevant for the question to be decided by the Court, namely whether the alleged mining constituted an armed attack according to the rules of the *ius ad bellum*. For that reason, too, there is no armed attack triggering a right of self-defence. The claim of self-defence fails.

II. The United States action was not self-defence

54. But let us assume, for the sake of argument, that it could be construed that the two incidents amount to an armed attack against the United States. The United States was still not able to justify its actions on the basis of self-defence, because the destruction of the platforms:

— did not constitute self-defence within the meaning of the Charter;

— did not meet the requirement of necessity;

— did not meet the requirement of proportionality.

55. Self-defence is action taken in order to repel, or to protect oneself against, an armed attack. This is the natural meaning of the word "self-defence", which is also valid for its interpretation as a concept of international law. Thus, any action in self-defence must directly relate to the armed attack. Once the attack is over, that relation is interrupted. Any further reaction by force can no longer be considered as self-defence.

56. In international legal reasoning, this simple rule is formulated as the principle of necessity: self-defence is the action necessary to protect the victim against the attack. In your Advisory Opinion on the *Threat or Use of Nuclear Weapons*[38] and in your 1986 Judgment in the *Nicaragua* case[39], you have held this rule to be part of customary international law: "self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it . . ."[40]. Professor (later Judge) Roberto Ago had already formulated this rule in the Annex of his Eighth Report to the International Law Commission on State Responsibility: "The reason for stressing that action taken in self-defence must be *necessary* is that the State attacked . . . must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force."[41] Two fundamental rules are contained in this phrase. Self-defence must be a genuine means available to the victim to achieve protection. And it must be the only means for this purpose. Thus, action in self-defence must be directly related to the attack. In other words, a direct and immediate link must exist between the armed attack and the action claimed to be taken in

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[38]*I.C.J. Reports 1996 (I)*, p. 245, para. 41.

[39]*I.C.J. Reports 1986*, p. 94, para. 176.

[40]*Nicaragua* Judgment, *loc. cit.*

[41]R. Ago, Annex to the Eighth Report on State Responsibility, *YILC* 1980, Vol. II, p. 69, para. 120; emphasis in the original.

self-defence. Action which does not contribute to the protection of the victim does not constitute self-defence.

57. In this perspective, it is necessary to re-emphasize that there was no generic situation of an armed attack. Thus, the action justified as self-defence can only be taken in order to repel the two specific (alleged) attacks. In the present case, this link between the destruction of the platforms and the two incidents cannot be established. The alleged Iranian attacks against the *Sea Isle City* and the *Samuel B. Roberts* were both terminated before the United States acted rather than reacted by destroying the platforms. Clearly, there was no immediacy in response. There was no more need for any protective action in relation to those two incidents. The link required between attack and defence which is required did not exist any more. Therefore, the action taken by the United States cannot constitute self-defence.

58. The true character of the actions was different. As a reaction to prior alleged attacks, they could simply be considered as retaliation or punitive action — and therefore unlawful. If they were to be seen as a means to make Iran desist from allegedly illegal behaviour, they are armed reprisals — and therefore unlawful. Whatever the true characterization of those attacks — it is different from lawful self-defence, it is an unlawful use of force.

59. The attacks on the oil platforms did not constitute self-defence in the correct meaning of that word, nor did they meet the criterion of necessity required. The principle of necessity implies that an action must at least be appropriate to achieve the purpose of protecting the attacked State. Therefore, the principle was violated because, due to the purely commercial use of the platforms, their destruction did not and could not add anything to the security of neutral shipping in the Persian Gulf. Furthermore, one cannot but note that the operation plan, which at least can give an idea of what the supposed victim thought was appropriate, did not even provide for the destruction as performed by the United States Navy. Mr. Sellers showed yesterday that in the case of the Reshadat complex, the attack went beyond that plan; an additional “target of opportunity”, as an American officer put it, was destroyed — a clear violation of the principle of necessity.

60. Also in the case of the Salman and Nasr complex, the destruction was unnecessary according to the United States Navy’s own operation plan. According to that plan, the primary target was the Iranian frigate *Sabalan*. The platforms, erroneously called “surveillance posts”,

were only to be attacked "if sinking of a ship was not practicable". The ship was destroyed indeed, not only this ship but half the Iranian Navy, and still, in a kind of insatiable rage, the platforms were annihilated. At a closer analysis of the United States argument, there is no real plea of necessity. The attack was random destruction, not necessary and therefore not self-defence.

III. The United States action was disproportionate

61. Finally, Mr. President, Members of the Court, self-defence, in order to be lawful, must also be proportionate[42]. The United States responses to the alleged Iranian attacks on the *Sea Isle City* and the *Samuel B. Roberts* were not. Proportionality of a counter-action means that it is not excessive, it must, in other words be commensurate to the act triggering it, i.e., to the first use of force. Let us look again at the specific incidents. The *Sea Isle City* was damaged at its bridge, accommodation and starboard tank. Six persons were injured. The United States suffered no financial damage of its own. The *Samuel B. Roberts* was hit by a mine, whether or not Iranian. Ten persons were lightly injured. The cost of repair is alleged to be in the order of US$ 50 million.

62. Apparently, the United States thinks that the proportionality test is met because, according to the United States, the platforms made an important contribution to a military effort against the United States (and neutral shipping in general). But this is, as has so often now been shown in the present proceedings, simply not true. There was no military significance of those platforms which might have allowed to consider their destruction as a proportionate response.

63. In addition, the claim that the platforms constituted military targets is irrelevant in so far as the question of proportionality is concerned. The qualification of an object as a military target, according to the *ius in bello,* has nothing to do with the proportionality of the destruction of this very object according to the yardstick of the *ius ad bellum*.

64. In comparison to the damage caused to the American or allegedly American ships, the damage caused to the oil platforms was excessive. As has been shown, the platforms were completely destroyed. In the case of the Reshadat platforms, four United States destroyers were pounding the platforms with gunfire and finished their business by using dynamite. Similarly, the Nasr and Salman platforms were completely destroyed by not less than nine United States Navy

[42] *Nicaragua* case, *I.C.J. Reports 1986*, p. 14, para. 194.

ships. Again, dynamite was planted on the Salman platform at the end of the operation to make the destruction complete. The platforms could not be repaired for a long time. It was the central platforms of each complex of installations which were targeted, thereby putting also the rest out of operation. This clearly shows that the purpose was the weakening of Iran's war economy. That purpose was indeed achieved. A total loss of their productive capacity lasting for several years resulted. This was an enormous financial damage. It caused a serious blow to the Iranian economy which was not only dependent on the production of oil, but at the time faced severe constraints as Iran was subject to massive Iraqi aggression and then to stringent sanctions by the United States.

65. This damage caused to the Iranian economy bears no reasonable relationship to any protective purpose legitimately pursued by action of self-defence. For that reason it is excessive.

66. Moreover, the fact that in both cases the destruction envisaged in the American operations plan was even grossly exceeded accounts for the disproportionate character of the attack.

67. All in all, the attacks against the oil platforms, used exclusively for commercial purposes, even if they were considered to be self-defence, can only be called disproportionate and excessive.

68. To conclude my statement, the United States attempt to justify its attacks by claiming to have acted in self-defence is flawed for a number of reasons. There was no armed attack against the United States which could be attributed to Iran. The United States, who bears the onus of proof for the existence of such attack, failed to provide sufficient evidence to this effect. But even if an armed attack by Iran against the United States could be assumed, the United States responses would still be unlawful as they did not meet the criteria of necessity and proportionality.

69. Thank you, Mr. President, Members of the Court. I would now like to request you, Mr. President, to call on Professor Crawford to continue the presentation of Iran's case.

The PRESIDENT: Thank you, Professor Bothe. I now give the floor to Professor Crawford.

Mr. CRAWFORD: Mr. President, Members of the Court:

10. THE UNITED STATES DEFENCE BASED ON ESSENTIAL SECURITY INTERESTS

Introduction

1. In this presentation I will address the United States argument excusing any breach of the Treaty of Amity on the ground that the actions they took were "necessary to protect" the essential security interests of the United States. This possible defence is based on Article XX of the Treaty of Amity, which provides as follows:

> "1. The present Treaty shall not preclude the application of measures:
>
> . . . . . .
>
> *(d)* necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, *or necessary to protect its essential security interests*." [Emphasis added.]

It is on the seven last words of paragraph 1 *(d)*, rather perhaps than the 15 first words of Article 51 of the Charter, that the United States relies. It argues that its conduct in destroying the platforms "fell squarely within the terms of" paragraph 1 *(d)*; that the United States has "the primary responsibility" of applying the exception, and that it should be accorded "a wide area of discretion" in doing so[43].

2. Now although the United States effectively relies on paragraph 1 *(d)*, as I shall call it for short, as its first line of defence, legally speaking it is its last line of defence. Because the issue of the application of paragraph 1 *(d)* only arises once the United States has lost two other arguments. First, it must be established that the conduct in question would otherwise be in breach of the Treaty. If it is not a breach of the Treaty no question can arise under Article XX. If paragraph 1 *(d)* is to be relevant, the United States must already have lost the argument based on Article X, paragraph 1: the destruction of the oil platforms must have held to have been inconsistent with the freedom of commerce. Secondly, paragraph 1 *(d)* will only be relevant if the United States loses the argument based on self-defence. In other words, the Court will only need to consider paragraph 1 *(d)* if the destruction of the oil platforms has been held not to have been a lawful exercise of the inherent right of the United States to self-defence.

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[43] Rejoinder of the United States, para. 4.24.

3. It is true that the United States urges the Court not to consider the self-defence arguments and instead to excuse it under paragraph 1 *(d)*[44]. In Iran's view, there are good reasons for considering the self-defence argument first. One, self-defence was the justification actually used by the United States at the time: as a matter of principle it is better to consider the justification actually invoked by a State at the time, rather than something that has been thought of later. Two, it is what you did in *Nicaragua*: you considered first the issue of breach of the bilateral treaty, then self-defence, then essential security interests. Three, self-defence, if made out, would exonerate the United States entirely; it would provide a complete justification for their conduct, in accordance with Article 21 of the ILC's Articles. The United States seems not to want a complete justification — it merely wants to escape from your jurisdiction by the back door of paragraph 1 *(d)*.

4. But the essential point is this. Conduct in the lawful exercise of self-defence would by definition have been necessary to safeguard the essential security interests of the United States. The right of self-defence is itself the cardinal way by which international law allows States, unilaterally, to take steps to protect their security interests in the context of the use of military force. The requirements of self-defence, as spelt out by Professor Bothe, ensure -- ensure — that conduct in self-defence will also qualify for the purposes of paragraph 1 *(d)*. So if the United States is correct in its self-defence argument — the argument it actually used at the time — you would simultaneously uphold the legality of its conduct under the Charter *and* under the Treaty of Amity. The United States would leave this Court completely vindicated. It is odd that it does not seem to want that.

5. But let us assume for the sake of argument that the United States is wrong on self-defence. Still it relies on a broader right to use force under paragraph 1 *(d)* vis-à-vis the Treaty of Amity. In other words, the issue of paragraph 1 *(d)* will only arise on the hypothesis that the United States used major military force against the platforms in breach of the Treaty of Amity *and* in breach of the United Nations Charter. It is implicit in the United States argument that paragraph 1 *(d)* gives it a licence to flout the Treaty of Amity and the Charter at the same time, so far as this Court is

[44]Rejoinder of the United States, paras. 4.36-4.37.

concerned. That would be a curious construction of a Treaty of Amity, especially a Treaty containing Article I. Most United States f.c.n. treaties do not contain a substantive Article I[45], the 1955 Treaty does, and you have held that Article I is relevant in the interpretation of the other Articles. On the United States view of things, paragraph 1 *(d)* would cover an unlawful armed invasion between States in a situation of amity! If so, heaven preserve us from amity!

6. Mr. President, Members of the Court, this presentation is in two parts. In the first part, I will explore the meaning of paragraph 1 *(d)* in the light of its context, its object and purpose, its *travaux préparatoires*, other treaties and general international law. The result achieved is entirely consistent with the position taken by virtually the whole Court in the *Nicaragua* case, as I will show. Then, in a second part, I will apply that meaning, that interpretation, to the circumstances of the present case. I will show that in no way was the destruction of the oil platforms necessary to protect any security interest of the United States, still less any essential security interest.

A. The interpretation of Article XX, paragraph 1 *(d)*

7. Turning then to the issue of interpretation, we must start with the actual words relied on, "necessary to protect its essential security interests". The two longest words in this seven-word phrase, the words "necessary" and "essential", strike the reader at once. The measure must not merely have been useful or helpful, it must have been necessary. And the security interest must not have been merely real or existent, it must have been essential. But a shorter word among these seven words is also striking — the word "its". It is the security interests of the United States which are to be protected, not the security interests of some third State. Collective security is dealt with in the first part of paragraph 1 *(d)*. No doubt the interests of a third State or States may be implicated in the security interests of the State party invoking paragraph 1 *(d)*. But still they must be such that the essential security interests of the invoking State itself are engaged.

8. Now two things are already clear from the actual language of paragraph 1 *(d)*. First, the conditions for its application are cumulative: the measure must be "necessary" and the security interest must be "essential". Second, the test is objective, not subjective. The question is not whether the invoking State considered the security interest essential or the measure necessary —

[45]See Memorial of Iran, paras. 3.27-3.28 for details.

the question is whether in truth they were so. The security interest must be identified, it must be reasonably judged to have been essential, and the measure taken must have been necessary to achieve it. International law is familiar with the notion of "necessity", for example in the law of self-defence and in Article 25 of the ILC Articles. Invocation of necessity carries with it a strict burden of proof, the need to show a clear link between the measure taken and the valid purpose sought; the need to consider other less damaging alternatives: in short, a valid purpose in the aims, proportionality in the means to ensure those aims.

9. So much for the actual words of paragraph 1 *(d)*. Then there is their context in the Treaty — I might call those a series of concentric circles. First there is the context of paragraph 1 *(d)* itself; then there is the context of Article XX, then there is the context of the Treaty as a whole.

10. Turning first to the context of paragraph 1 *(d)* itself. There are two phrases combined in that subparagraph; first, there is an exclusion for measures which are "necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security"; then there is the exclusion for essential security interests. The first phrase is narrowly defined, the measures must be essential, they must be essential to fulfil an obligation, and the obligation must be for the maintenance or restoration of international peace and security. Like the word "necessary", the word "security" occurs twice in paragraph 1 *(d)*, once in the context of international peace and security, once in the context of the essential security interests of the State invoking the paragraph. As to international peace and security there must be nothing less than a legal obligation to act; only then does the bilateral obligation under the Treaty of Amity give way. As to the security interest of the invoking State, the seven last words, there is no requirement of a legal obligation, but on the other hand the interest has to be essential and the measure taken has to be necessary to secure that interest. The evidently strict and objective requirements of the first part of the paragraph support the view that the second half of the paragraph likewise imposes strict objective requirements. It would after all be odd for the first part of paragraph 1 *(d)* only to exempt conduct otherwise contrary to the Treaty if it was essential to comply with an obligation for the maintenance of international peace and security — the highest value under the Charter — while, in the second part, it went on to allow virtually any conduct which the invoking State thought useful

to protect its subjective interests, even if it was in flagrant breach of the Charter. That is simply not a plausible interpretation of the words in their immediate context.

11. Then we have the context of paragraph 1 as a whole, which you can see on the screen. The other paragraphs are clearly defined in objective terms, they concern specific situations or activities such as the import or export of gold and silver, measures relating to fissionable materials and the traffic in arms; one knows in advance and in principle the extent of the exclusion. They are not consistent with a broad, sweeping exception for unilateral measures regarded as in some way relevant to some asserted security interest. Indeed if the last seven words of paragraph 1 *(d)* were interpreted broadly, it is not clear why you would need paragraph *(c)*, or possibly also paragraph *(b)*. Thus the principle of systematic interpretation likewise supports a defined and objective approach to paragraph *(d)*.

12. And then we have the context of the Treaty of Amity as a whole. It is tab 2 in your folders. You will be pleased to know that I am not going to read it to you; I will not take you through its provisions one by one. But when you read it, you will be struck by the number of its provisions that embody obligations under general international law, or at least obligations which in 1955 were developing in international law, or at least common provisions which are the subject of guarantees in hundreds of bilateral treaties. Overall, the obligations embodied in the Treaty of Amity reflect a wide range of matters which one would expect two States in amity to observe as between themselves in any event. In other words it embodies either obligations of a general kind or at least legitimate expectations between States in amity. These provisions include constant protection and security for the nationals of one State in the other; compensation for expropriation; juridical recognition of companies; access to justice; fair and equitable treatment of enterprises; intellectual property protection; most favoured nation treatment in a number of different respects; non-discrimination, and consular privileges and immunities. A number of these provisions have their own carefully worked out exceptions. None of these provisions comes as any surprise. What would be a surprise would be a reservation of the right, for example, to deny justice to foreign nationals, to tax consular property or to expropriate, without compensation, foreign investments, on the basis of a subjective appreciation of national security interests. You will note that many of these provisions reflected — and to this day reflect — United States views about particular matters

such as investment protection and compensation for expropriation. One would not have expected the United States to have countenanced an exception to such obligations which was readily invoked and depended on the subjective appreciation of the acting State. A broad and loose interpretation of paragraph 1 *(d)*, such as that now advocated by the United States, would be inconsistent with the rest of the Treaty and would tend to undermine its object and purpose.

13. The United States seeks to make an argument based on the *travaux préparatoires* of similar treaties as well as on its own internal documents, including reports to the Senate[46]. But even if these materials were admissible, which they mostly are not, they do not support the view that paragraph 1 *(d)* confers a subjective discretion to use military force against the territory or installations of the other party. Indeed it seems that what the United States principally had in mind in these negotiations was internal measures taken on its own territory, not assaults on the territory of its amicable treaty partner. Thus the United States cites a passage from the negotiations with Iran concerning limitations on the rights of United States investors to acquire control over strategic Iranian companies, that is a purely internal measure[47]. Similarly Iran was assured that paragraph 1 *(d)* would safeguard Iranian rights to impose "internal safety regulations"[48]. Those are the only two passages from the negotiations of this Treaty which are relevant to paragraph 1 *(d)*; neither of them supports the United States position here.

14. In fact an emphasis upon what we would now no doubt call homeland security, rather than international peace and security, was understandable for the second part of paragraph 1 *(d)*, in its context, even at that time. The two areas are separately treated in paragraph 1 *(d)*. Moreover, the chapeau to Article XX refers to "the application of measures". That again has an internal ring — suggesting, at least primarily, the application of legislation or of regulatory measures, and not at all the application of warships.

Mr. President, that would be a convenient moment to break.

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[46]Counter-Memorial and Counter-Claim of the United States, paras. 3.24-3.28.

[47]Counter-Memorial and Counter-Claim of the United States, Exhibit 154, as cited in Counter-Memorial and Counter-Claim of the United States, para. 3.36.

[48]Counter-Memorial and Counter-Claim of the United States, Exhibit 155, as cited in Counter-Memorial and Counter-Claim of the United States, para. 3.37.

The PRESIDENT: Thank you, Professor Crawford. The hearing is now suspended until this afternoon, when it resumes at 3 o'clock.

The Court rose at 1 p.m.

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