CR 2003/8

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting

held on Wednesday 19 February 2003, at 3 p.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 15 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

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

Mr. M. H. Zahedin-Labbaf, Agent of the Islamic Republic of Iran to the Iran-US Claims Tribunal, Deputy Director for Legal Affairs, Bureau of International Legal Services of the Islamic Republic of Iran, The Hague,

as Agent;

Mr. D. Momtaz, Professor of International Law, Tehran University, member of the International Law Commission, Associate, Institute of International Law,

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

Mr. Michael Bothe, Professor of Public Law, Johann Wolfgang Goethe University of Frankfurt-am-Main, Head of Research Unit, Peace Research Institute, Frankfurt,

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the English and Australian Bars, member of the Institute of International Law,

Mr. Alain Pellet, Professor at the University of Parix X-Nanterre, member and former Chairman of the International Law Commission,

Mr. Rodman R. Bundy, avocat à la cour d'appel de Paris, member of the New York Bar, Frere Cholmeley/Eversheds, Paris,

Mr. David S. Sellers, avocat à la cour d'appel de Paris, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

as Counsel and Advocates;

Mr. M. Mashkour, Deputy Director for Legal Affairs, Bureau of International Legal Services of the Islamic Republic of Iran,

Mr. M. A. Movahed, Senior Legal Adviser, National Iranian Oil Company,

Mr. R. Badri Ahari, Legal Adviser, Bureau of International Legal Services of the Islamic Republic of Iran, Tehran,

Mr. A. Beizaei, Legal Adviser, Bureau of International Legal Services of the Islamic Republic of Iran, Tehran,

Ms Nanette Pilkington, avocat à la cour d'appel de Paris, Frere Cholmeley/Eversheds, Paris,

Mr. William Thomas, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

Mr. Leopold von Carlowitz, Research Fellow, Peace Research Institute, Frankfurt,

Mr. Mathias Forteau, docteur en droit, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris X-Nanterre,

as Counsel;

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

M. M. H. Zahedin-Labbaf, agent de la République islamique d'Iran auprès du Tribunal des réclamations Etats-Unis/Iran, directeur adjoint des affaires juridiques au bureau des services juridiques internationaux de la République islamique d'Iran à La Haye,

comme agent;

M. D. Momtaz, professeur de droit international à l'Université de Téhéran, membre de la Commission du droit international, associé à l'Institut de droit international,

M. S. M. Zeinoddin, chef du service juridique de la National Iranian Oil Company,

M. Michael Bothe, professeur de droit public à l'Université Johann Wolfgang Goethe de Francfort-sur-le-Main, directeur de la recherche à l'Institut de recherche pour la paix à Francfort,

M. James R. Crawford, S.C., F.B.A., professeur de droit international, titulaire de la chaire Whewell à l'Université de Cambridge, membre des barreaux d'Angleterre et d'Australie, membre de l'Institut de droit international,

M. Alain Pellet, professeur à l'Université de Paris X-Nanterre, membre et ancien président de la Commission du droit international,

M. Rodman R. Bundy, avocat à la cour d'appel de Paris, membre du barreau de New York, cabinet Frere Cholmeley/Eversheds, Paris,

M. David S. Sellers, avocat à la cour d'appel de Paris, Solicitor auprès de la Cour suprême d'Angleterre et du Pays de Galles, cabinet Frere Cholmeley/Eversheds, Paris,

comme conseils et avocats;

M. M. Mashkour, directeur adjoint des affaires juridiques au bureau des services juridiques internationaux de la République islamique d'Iran,

M. M. A. Movahed, conseiller juridique principal à la National Iranian Oil Company,

M. R. Badri Ahari, conseiller juridique au bureau des services juridiques internationaux de la République islamique d'Iran, Téhéran,

M. A. Beizaei, conseiller juridique au bureau des services juridiques internationaux de la République islamique d'Iran, Paris,

Mme Nanette Pilkington, avocat à la cour d'appel de Paris, cabinet Frere Cholmeley/Eversheds, Paris,

M. William Thomas, Solicitor auprès de la Cour suprême d'Angleterre et du Pays de Galles, cabinet Frere Cholmeley/Eversheds, Paris,

M. Leopold von Carlowitz, chargé de recherche à l'Institut de recherche pour la paix à Francfort,

M. Mathias Forteau, docteur en droit, chercheur au Centre de droit international de Nanterre (CEDIN) de l'Université de Paris X-Nanterre,

comme conseils;

Mr. Robert C. Rizzutti, Vice-President, Cartographic Operations, International Mapping Associates,

as Technical Adviser.

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

Mr. William H. Taft, IV, Legal Adviser, United States Department of State,

as Agent;

Mr. Ronald J. Bettauer, Deputy Legal Adviser, United States Department of State,

as Co-Agent;

Mr. Michael J. Matheson, Professor, George Washington University School of Law,

Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

Mr. Michael J. Mattler, Attorney-Adviser, United States Department of State,

Mr. Sean Murphy, Professor, George Washington University School of Law,

Mr. Ronald D. Neubauer, Associate Deputy General Counsel, United States Department of Defence,

Mr. Prosper Weil, Professor Emeritus, University of Paris II, member of the Institut de droit international, member of the Académie des sciences morales et politiques (Institut de France),

as Counsel and Advocates;

Mr. Paul Beaver, Defence & Maritime Affairs Consultant, Ashbourne Beaver Associates, Ltd., London,

Mr. John Moore, Senior Associate, C & O Resources, Washington, D.C.

as Advocates;

Mr. Clifton M. Johnson, Legal Counsellor, United States Embassy, The Hague,

Mr. David A. Kaye, Deputy Legal Counsellor, United States Embassy, The Hague,

Ms Kathleen Milton, Attorney-Adviser, United States Department of State,

as Counsel;

Ms Marianne Hata, United States Department of State,

Ms Cécile Jouglet, United States Embassy, Paris,

Ms Joanne Nelligan, United States Department of State,

M. Robert C. Rizzutti, vice-président des opérations cartographiques, International Mapping Associates,

comme conseiller technique.

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

M. William H. Taft, IV, conseiller juridique du département d'Etat des Etats-Unis,

comme agent;

M. Ronald J. Bettauer, conseiller juridique adjoint du département d'Etat des Etats-Unis,

comme coagent;

M. Michael J. Matheson, professeur à la faculté de droit de l'Université George Washington,

M. D. Stephen Mathias, directeur chargé des questions concernant les Nations Unies auprès du conseiller juridique du département d'Etat des Etats-Unis,

M. Michael J. Mattler, avocat-conseiller au département d'Etat des Etats-Unis,

M. Sean Murphy, professeur à la faculté de droit de l'Université George Washington,

M. Ronald D. Neubauer, assistant au bureau du conseiller juridique adjoint du département de la défense des Etats-Unis,

M. Prosper Weil, professeur émérite à l'Université de Paris II, membre de l'Institut de droit international, membre de l'Académie des sciences morales et politiques (Institut de France),

comme conseils et avocats;

M. Paul Beaver, expert consultant en questions de défense et affaires maritimes, *Ashbourne Beaver Associates, Ltd.*, Londres,

M. John Moore, associé principal, *C & O Resources*, Washington D. C.,

comme avocats;

M. Clifton M. Johnson, conseiller juridique à l'ambassade des Etats-Unis à La Haye,

M. David A. Kaye, conseiller juridique adjoint à l'ambassade des Etats-Unis à La Haye,

Mme Kathleen Milton, avocat-conseiller au département d'Etat des Etats-Unis,

comme conseils;

Mme Marianna Hata, département d'Etat des Etats-Unis,

Mme Cécile Jouglet, ambassade des Etats-Unis à Paris,

Mme Joanne Nelligan, département d'Etat des Etats-Unis,

Ms Aileen Robinson, United States Department of State,

Ms Laura Romains, United States Embassy, The Hague,

as Administrative Staff.

Mme Aileen Robinson, département d'Etat des Etats-Unis,

Mme Laura Romains, ambassade des Etats-Unis à La Haye,

comme personnel administratif.

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

Mr. CRAWFORD: Thank you, Mr. President. Before the break I had analysed the language of paragraph 1 *(d)* in the context of the Treaty and in the light of its object and purpose and I had referred briefly to the scanty *travaux préparatoires* of the paragraph in this Treaty.

15. The United States also relies on the *travaux préparatoires* of other f.c.n. treaties, but it provides no evidence that at any stage it suggested to any of its Treaty partners that paragraph 1 *(d)* gave it the right, at its own discretion and effectively on a non-justiciable basis, to use force against the territory of another State in contradiction to the Treaty. If that was its view of the paragraph — as it now is — well, it is not surprising it kept quiet about it. Concerns were expressed by Germany and the Netherlands during the negotiations for their treaties and those concerns would not have been alleviated by such a statement. In the negotiations with the Netherlands, the United States is reported as having assured the Netherlands that the reservation "was not intended to be a loophole through which arbitrary actions would or could be taken so as to defeat the purposes of the Treaty"[1]. Now, of course, Iran had no reason to be aware of what was said in negotiations between the United States and the Netherlands — but it would have had no reason to disagree with that statement.

16. In this context it is highly relevant to note that there were several well-known models for language that the parties could have used in paragraph 1 *(d)*, had they wished to adopt the interpretation which the United States now favours. For example Article XXI of the GATT refers to "action which it [i.e., the invoking State] considers necessary for the protection of its essential security interest". There is a clear element of subjectivity here, just as there was in the Connally Amendment — the automatic reservation to the jurisdiction of this Court under the optional clause declaration which the United States deposited in 1946. You pointed this out in the *Nicaragua* case, dealing with the equivalent provision, Article XXI of the United States-Nicaragua Treaty of 1956. You noted that: "Article XXI of the Treaty does not employ the wording which was already to be

[1]Counter-Memorial and Counter-Claim of the United States, Exhibit 151, para. 3.34.

found in Article XXI of the General Agreement on Tariffs and Trade . . . The 1956 Treaty, on the contrary, speaks simply of 'necessary' measures, not of those considered by a party to be such."[2]

17. More recently one may note Article 2102 of the North American Free Trade Agreement (NAFTA), which likewise provides for a national security exception, and which reads in part as follows:

> "1. [N]othing in this Agreement shall be construed:
>
> *(a)* to require any Party to furnish or allow access to any information the disclosure of which *it determines* to be contrary to its essential security interests;
>
> *(b)* to prevent any Party from taking any actions that *it considers* necessary for the protection of its essential security interests . . .
>
> (ii) taken in time of war or other emergency in international relations . . ."
>
> (Emphasis added.)

So we have the phrase "it determines" in the context of essential security interests and "it considers" in the context of necessity. The other States did not call for such language in paragraph 1 *(b)*.

18. Thus applying the interpretation provided for in Articles 31 to 33 of the Vienna Convention, there is no support for the United States view of paragraph 1 *(b)*.

19. So far I have analysed this Article without reference to any precedent, but of course you have considered the question in the *Nicaragua* case in relation to the identically worded paragraph 1 *(b)* of Article 21 of the 1956 Treaty. In your Judgment in the present case — in the *Oil Platforms* case — on the Preliminary Objection, you saw no reason to depart from *Nicaragua* on the question whether paragraph 1 *(d)* was an exclusion from jurisdiction or a possible defence[3]. You said it was the latter. Neither is there any reason for you to depart from the interpretation you gave in 1986 to paragraph 1 *(d)* as a matter of substance. But since the United States in effect argues that *Nicaragua* is wrong on this point, it is necessary to say something more about it.

20. In *Nicaragua*, you first upheld your jurisdiction under the bilateral treaty — and you did so by a considerably greater majority than you did under the optional clause. Referring to

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[2] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222.

[3] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment on Preliminary Objection, I.C.J. Reports 1996 (II)*, p. 811, para. 20.

paragraph 1 *(d)* you went on to say: "The Court has therefore to assess whether the risk run by these 'essential security interests' is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but 'necessary'."[4] You noted that paragraph 1 *(d)* had to be applied not in advance of the facts as a preliminary matter but only "once it is apparent that certain forms of conduct by the United States would otherwise be in conflict with the relevant provisions of the Treaty". In your view, this exercise could only be undertaken "in the context of [the] general evaluation of the facts established in relation to the applicable law" — in other words, after you had found the facts and the law[5]. Now this was logical, if I may say so with respect, because paragraph 1 *(d)* does not have a categorical operation. It does not exclude the Court from considering the facts and the law and finding them — on the contrary it requires it. It is only by doing that that the Court can assess the reasonableness of the interest claimed and the necessity of the measure in question.

21. In terms of the provisions of the 1956 Treaty, in *Nicaragua* you went on to hold the United States responsible for direct attacks on ports and oil installations, including by mining[6], and for the imposition of a trade embargo[7]. You further held that these measures were not justified on the basis of individual or collective self-defence. So that left the remaining question: whether the measures were "at the time they were taken, measures necessary to protect" the essential security interests of the United States[8]. You held they were not. The crucial paragraph in the reasoning is as follows: it is a rather long paragraph and I hope you will forgive me if I read the whole thing — English barristers are sometimes prone to read passages at length, but this passage is so important I am going to read it at length. It is paragraph 282 (tab 22 in the judges' folders).

> "282. Secondly, the Court emphasizes the importance of the word 'necessary' in Article XXI [this is you speaking]: the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be 'necessary' for that purpose. Taking into account the whole situation of the United States in relation to Central America, so far as the Court is informed of it (and even assuming that the justification of self-defence, which the Court has rejected on the legal level, had some validity on the political level), the Court considers that the

[4] *I.C.J. Reports 1986*, p. 117, para. 224.

[5] *Ibid.*,p. 117, para. 225.

[6] *Ibid.*, pp. 139-140, para. 278.

[7] *Ibid.*, p. 140, para. 279.

[8] *Ibid.*, p. 141, para. 281.

> mining of Nicaraguan ports, and the direct attacks on ports and oil installations, cannot possibly be justified as 'necessary' to protect the essential security interests of the United States. As to the trade embargo, the Court has to note the express justification for it given in the Presidential finding . . ., and that the measure was one of an economic nature, thus one which fell within the sphere of relations contemplated by the Treaty. But by the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not, as the Court has emphasized . . ., purely a question for the subjective judgment of the party; the text does not refer to what the party 'considers necessary' for that purpose. Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to 'essential security interests' in May 1985, when those policies had been consistent, and consistently criticized by the United States, for four years previously, the Court is unable to find that the embargo was 'necessary' to protect those interests. Accordingly, Article XXI affords no defence for the United States in respect of any of the actions here under consideration."[9]

22. Now it is evident from a careful reading of that passage that the Court had more difficulty with the trade embargo than it did with the mining of ports and the attacks on installations. As to the attacks on ports and installations, it simply made the categorical global finding that these attacks "cannot possibly be regarded as 'necessary' to protect the essential security interests of the United States". The emphasis in the phrase "cannot possibly" is significant; there was no question here of any margin of appreciation, any "measure of discretion", as argued by the United States[10]. No doubt there are issues of judgment and appreciation in applying the law of self-defence, for example in the assessment of proportionality. But once the scope of self-defence is exhausted, the idea that under a treaty of amity a State still has a broad measure of discretion to engage in military measures, in the use of force against another State in contradiction of the substantive provisions of the treaty "cannot possibly" be right. Such an idea flies in the face of developments in international law according to which the use of force is no longer — as it was in the nineteenth century — a matter of sovereign discretion. And as I have said, it would tend to contradict the very purposes of the treaty of amity to reserve such a measure of discretion.

23. It should be stressed that on this point the Court was nearly if not quite unanimous, and the fact that military action was involved was a significant factor for two of the judges who dissented on other issues. Thus Judge Oda said that

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[9] *I.C.J. Reports 1986*, pp. 141-142, para. 282.

[10] Rejoinder of the United States, paras. 4.24-4.35.

> "Article XXI of the Treaty, being simply one provision in a commercial treaty, can in no way be interpreted to justify a State party in derogating from this principle of general international law [he was referring to the prohibition on the use of force]. I must add that this action did not meet the conditions of necessity and proportionality that may be required as a minimum in resort to the doctrine of self-defence under general and customary international law."[11]

24. Judge Jennings took essentially the same position. Although he expressed some doubt on the issue, he concluded clearly: "Article XXI cannot have contemplated a measure which cannot, under general international law, be justified even as being part of an operation in legitimate self-defence."[12]

25. The position on the embargo evidently caused more difficulty, and on this Judges Oda and Sir Robert Jennings dissented. As the Court pointed out, at least the embargo was a purely economic measure, one which "fell within the sphere of relations contemplated by the Treaty". Moreover, an express justification for it had been given in a public Presidential finding, so that the essential security interest was articulated at the time as such — and not as a measure of self-defence. Moreover, although the Court had already found that Nicaragua did not engage in an armed attack against the United States, it did not exonerate Nicaragua entirely in terms of its relations with its neighbours: there was at least something in Nicaragua's conduct for the United States to respond to. But despite all these factors, the Court held that the embargo could not be justified or excused by reference to paragraph 1 *(d)*. In particular, the Court held that there was no evidence of how Nicaraguan policies threatened essential interests of the United States, nor of any changes in the situation which could have justified the introduction of such a measure after four years.

26. It is worth pointing out that not only had the United States in *Nicaragua* articulated the national security interest through a Presidential finding, it had actually given notice of the termination of the Treaty, in accordance with its termination clause. It was not in the position of continuing to rely on the benefits of the Treaty for itself while denying those benefits to the other party, as the United States has done here. The derogation from the Treaty which was represented by the embargo and which was purportedly justified by the Presidential finding was only temporary in character, since it lasted only so long as the period of notice under the Treaty. Nor did it, like the

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[11] *I.C.J. Reports 1986*, p. 253, para. 89, dissenting opinion of Judge Oda.

[12] *Ibid.*, p. 541, dissenting opinion of Judge Jennings.

mining and the attacks on the ports, involve substantial, direct, physical damage to the target State. Yet for all this, the Court by a substantial majority held that the embargo was in contradiction of the Treaty, and that this breach was not saved by the essential security interests clause. This implies a relatively strict standard of assessment.

27. In its Rejoinder the United States attributes to Iran the view that the interpretation and application of paragraph 1 *(d)* "is *solely* a question for the Court to answer, denying any role for" the acting State[13]. But that is not the Iranian argument. In all of these matters it is for the acting State in the first place to take a position, and for the Court to assess that position; as you made clear in *Nicaragua*, the position taken by the State at the time of the action is important in determining the application of paragraph 1 *(d)*. But there are two important provisos here. First, when confronted with a claim under paragraph 1 *(d)*, the Court must assess the position objectively; the views of the acting State are relevant but they are not decisive. Secondly, the application of paragraph 1 *(d)* depends on the context. It is one thing for a State to determine what interests are essential in relation to its own internal affairs, its own internal security. It is quite another for a State unilaterally to determine the scope of necessity in international relations and in respect of core obligations that underpin the whole system of international relations. Even in internal affairs paragraph 1 *(d)* requires that the action be "necessary", not merely useful. The position is *a fortiori* in relation to a matter governed by the peremptory provisions of the United Nations Charter, that is to say, the use of military force against another State. In relation to such matters international law already *has* a standard of necessity. This is implicit in the Court's finding that mining and attacks on port facilities "cannot possibly be justified as 'necessary'".

28. Mr. President, Members of the Court, let me summarize. Paragraph 1 *(d)* constitutes an exception to a treaty obligation, excluding conduct which would otherwise be wrongful and thus providing a possible defence on the merits to an acting State. As to the second part of the paragraph — the last seven words — the primary focus is on the application of measures concerning internal security — as compared with the first part, which is concerned with international peace and security and has no relevance to the facts of the present case. But

[13]Rejoinder of the United States, para. 4.24 (emphasis in original).

accepting, for the sake of argument, that the second part of paragraph 1 *(d)* is capable of applying to acts committed on the territory or continental shelf of another State, the requirements of paragraph 1 *(d)* in this context are both objective and relatively strict. The security interest must be identified, it must be reasonably considered essential, it must be at risk and the measures taken must be necessary to meet the risk in the circumstances.

29. Iran's primary submission is that, in the context of a use of force against another State on its territory or continental shelf, paragraph 1 *(d)* is only satisfied by proof of circumstances which would amount to self-defence. To use the words of Judge Sir Robert Jennings, paragraph 1 *(d)* "cannot have contemplated a measure which cannot, under general international law, be justified even as being part of an operation in legitimate self-defence"[14]. Although the majority in *Nicaragua* did not express the principle in so many words, Iran does not detect any difference in substance: the Court was categorical in holding that the United States action involving the use of force in and against Nicaragua "cannot possibly be justified".

30. With respect, it would be very odd — and would create a very unhappy and ominous precedent — if this Court, the principal judicial organ of the United Nations, established under the Charter, were to hold that measures plainly unlawful under the Charter were nonetheless lawful under the Treaty of Amity because they were necessary to protect the essential security interests of the United States. Such a finding would imply that self-defence is not enough — that force can be justified as necessary in international relations outside the limits of the Charter. There is one standard of necessity for the use of force in international relations; it is a Charter standard, and it is peremptory. Paragraph 1 *(d)* should not be interpreted to adopt any different standard.

B. Article XX, paragraph 1 *(d)*, does not excuse the attacks on the platforms

31. Mr. President, Members of the Court, I turn to the second issue, which concerns the application of paragraph 1 *(d)* to the circumstances of the present case.

32. Now if Iran's primary submission — as I have just set it out — is accepted, then the attacks on the platforms cannot be defended under paragraph 1 *(d)*, unless they are justified as actions taken by way of individual or collective self-defence. It is neither "necessary", nor can it

[14] *I.C.J. Reports 1986*, p. 541, dissenting opinion of Judge Jennings.

serve "essential security interests" as conceived of within the framework of a Treaty of Amity, for a State to engage in an unlawful use of force aimed at destroying the commercial facilities of the other party to that Treaty. For the reasons I have given, paragraph 1 *(d)* has no additional exempting force, over and above the provisions of the Charter, so far as the use of military force is concerned. It "cannot have contemplated a measure which cannot, under general international law, be justified even as being part of an operation in legitimate self-defence"[15].

33. Now Professor Bothe has already dealt with the issue of self-defence. He has shown that the attacks on the platforms cannot be justified in this way. What I am about to say on the issue of essential security interests is only relevant if the Court concludes that paragraph 1 *(d)* has a wider scope as a possible defence than does self-defence under the Charter. But even on that hypothesis — which I have said the Court should, with respect, reject — these attacks were not defensible under paragraph 1 *(d)*. Even irrespective of their illegality in terms of the law relating to the use of force, those measures were not necessary, nor could they be justified by reference to any avowed essential security interests of the United States. They were justified neither in law nor in fact, as will now be demonstrated.

34. For this purpose it is necessary to ask three questions. First, what security interests did the United States invoke, and are they reasonably regarded as essential? Secondly, was the United States perception of risk reasonable? Thirdly, were the measures taken — the destruction of the oil platforms — necessary to protect those interests? I will deal with those three points in turn.

(a) ***The identification of United States essential security interests***

35. I begin by asking what justifications were given by the United States at the time of the attacks on the platforms. In *Nicaragua* you paid particular attention to the acting State's articulation of its security interest at the time of the putative breach of the treaty. There, it was significant that a Presidential finding had been made and published — indeed, the Court was reluctant to take into account any possible invocation of paragraph 1 *(d)* in relation to any period before the Presidential finding[16]. Now as Mr. Bundy has pointed out, the general position of the

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[15] *I.C.J. Reports 1986*, p. 541, dissenting opinion of Judge Jennings.

[16] *Ibid.*,p. 141, para. 281.

United States in relation to the Gulf War was set out in a National Security Decision Directive of June 1982 which has never been published and which the United States has declined to make available to the Court. There is no equivalent here — at least no precise equivalent — of the published Presidential finding to which the Court referred on several occasions in *Nicaragua*.

36. But of course our concern for present purposes is with the attacks on the platforms themselves, which occurred much later than June 1982. Now it is significant that the United States did not justify these as essential to achieve the security objective of assisting Iraq in its war effort, including for example Iraq's 1988 offensive which was launched on the same day as the Nasr and Salman platforms were attacked. It did not say that its security objective was to assist Iraq in achieving a ceasefire on favourable terms — I should say the terms included the continued occupation by the aggressor of significant areas of Iranian territory. Whether such matters could be essential security interests of the United States is an interesting question — they were certainly useful security objectives of Iraq, but Iraq's objectives are not protected under the Treaty. However — and perhaps fortunately — the Court is not asked by the United States to assess its action in destroying the platforms by reference to the alleged security interest of aiding and assisting Iraq in its war effort. The Court will not therefore have to ask whether "drill[ing] the Iranians back to the fourth century" — to use the colourful language of Admiral Ace Lyons, quoted by Mr. Bundy[17] — was an essential interest of the United States, or whether it was necessary in order to secure that interest to destroy the platforms — they did not have oil platforms in the fourth century. Even if these factors may have been wellsprings of United States policy in fact, they are not put forward — and were certainly not put forward at the time — as essential security interests of the United States. They might have been explanations, they were not justifications. For the purposes of paragraph 1 *(d)*, a State party is judged by its avowed security interests, not by its subjective motivations.

37. At the time of the attacks on the platforms the United States invoked self-defence. Self-defence is a security interest and an essential one; it was invoked by the United States at the

[17]CR 2003/7, p. 11 (Mr. Bundy).

time in relation to the attacks and we invite the Court to judge it on that basis. Professor Bothe has already dealt with this, and I will not repeat what he has said.

38. Now however the United States opposes the Court's assessing the attacks by the criteria of self-defence[18]. Instead it suggests a number of alternative interests of a more general character. These are — I am quoting the summary which is in the Rejoinder of the United States — "the integrity of U.S. merchant and military vessels, the safety of U.S. citizens and military personnel and their cargo, the uninterrupted flow of maritime commerce (in particular, oil commerce) in the [Persian] Gulf and the freedom of navigation in the [Persian] Gulf"[19]. In effect there are two compendious interests: first, the safety of United States vessels, whether civilian or military and their crew; second, freedom of commerce and navigation in the Persian Gulf, especially for commerce in oil.

39. As to the safety of United States vessels and crew, this is a reasonable security interest of the United States, just as the safety of the platforms and their crew was a reasonable security interest of Iran.

40. As to "the uninterrupted flow of maritime commerce in the Gulf"[20], again this was certainly a security interest. For Iran it was absolutely vital; but it was also important for the United States. It was only by maritime commerce, particularly commerce in oil produced from platforms such as these, that Iran could sustain its economy and its people, not to speak of its defence against Iraq. So this was a shared security interest.

41. In respect of both these interests, I would simply observe that the United States cannot reasonably claim a higher level of protection for its vessels and personnel than they were entitled to under international law. For example, as Professor Momtaz has shown you, Iran was entitled to exercise belligerent rights in the Persian Gulf to ensure that neutral vessels were not carrying contraband for Iraq.

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[18]Rejoinder of the United States, para. 4.36.

[19]*Ibid.*, para. 4.05.

[20]Counter-Memorial and Counter-Claim of the United States. para. 3.11.

(b) ***The risk presented to those United States interests***

42. I turn now to the second question involving the application of paragraph 1 *(d)*, that is to say, the risk presented to the security interests which I have identified. Now it is clear that there were risks to navigation and commerce in the Gulf at the relevant time, and to the vessels sailing in the region (many of them to Iranian ports and terminals). But I have to say the risks can be exaggerated. Less than 1 per cent of the vessels sailing to and from the Gulf were affected in any way, and in most cases they were affected in only a minor way. The flow of oil continued, the price of oil actually dropped. Only three United States flagged or reflagged vessels were affected by attacks that could even arguably have come from Iran. Iran credibly denies responsibility for each of those attacks (of course it will be for you to judge) — but in any event, no one was killed in any of those attacks. By contrast, 37 sailors were killed in the incident involving the U.S.S. *Stark.*

43. So there were risks: the Persian Gulf area was a war zone. And the essential reason for those risks, and for the war, must be borne in mind. It is completely and systematically ignored by the United States.

44. The reason for the war was Iraq. The reason for the tanker war was Iraq. Iraq had commenced an unprovoked war, and was prosecuting it by all means including air strikes far down the Gulf, minelaying, missile attacks including attacks on neutral shipping, attacks on Iranian cities and facilities and the use of chemical weapons. It is universally agreed that Iraq started the "tanker war", and that the great preponderance of damage done during that part of the conflict was attributable to Iraq. By far the most serious single incident to occur to a United States ship during the war was the attack on the U.S.S. *Stark*: that was an act of Iraq. If there was a risk presented to freedom of navigation and commerce, it was primarily presented by, and wholly attributable to, the conduct of the war by Iraq. Yet, as Sir Laurence Freedman demonstrates in his report: "There is no evidence of a policy debate governed by the question of what actions would best protect international shipping, nor that concerns with freedom of navigation brought US warships to the Gulf."[21] That is an independent view.

[21]Freedman Report, Ann. X, para. 4 *(c)*.

(c) ***Whether the attacks were not merely useful but necessary***

45. I turn to the third question, which is whether the measures taken — the destruction of the platforms — were necessary to protect the security interests identified above, having regard to the risks presented. In the *Nicaragua* case you stressed that the measures taken had to be "not merely useful but necessary"; this is a general requirement for the invocation of paragraph 1 *(d)*.

46. Now here there is a disputed fact which, if decided against the United States, will determine the issue under paragraph 1 *(d)* without any further enquiry into broader issues concerning the conduct of the Gulf War or the source of the risks to neutral shipping. The United States asserts that "the platforms contributed to attacks on neutral shipping"[22]. It makes that assertion as a systematic assertion. It was not merely that on one occasion a helicopter possibly took off from a platform and approached a neutral vessel; the allegation is that the platforms were systematically part of Iranian military activities, and therefore legitimate military targets[23]. Iran flatly denies that assertion. There is no evidence of a systematic involvement whatever, and the only evidence of individual use of the platforms even on a single occasion is controversial and equivocal. You have heard what counsel had to say on this. There is no evidence at all that the platforms had the slightest role in relation to the events which at the time the United States took as a pretext for the destruction of the platforms — the incidents involving the *Sea Isle City* and the *Samuel B. Roberts*.

47. Mr. President, Members of the Court, It will be for you to assess the evidence on this point. I think it is obvious — I say this with great respect — that if the oil platforms were not used as a base for attack on shipping then their destruction cannot have been necessary, nor even useful, for any avowed purpose — and therefore that the action cannot possibly qualify as a possible defence under paragraph 1 *(d)*. Iran's position is that they were not so used, and Iran has supported that position with evidence. If you agree — then even on the extended view of paragraph 1 *(d)*, even on the view that it extends beyond combat in self-defence — that is the end of a possible United States defence under paragraph 1 *(d)*. The United States would simply — on this basis — have picked convenient valuable targets to vent its wrath, targets of high value to Iran, which were

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[22]Rejoinder of the United States, para. 4.12.

[23]See also Counter-Memorial and Counter-Claim of the United States, para. 3.14.

defenceless against the armadas approaching undetected to destroy them. The targets that the United States hit might as well have been any other civilian targets. This is not necessity, as it is understood in international law.

48. However, the United States does attempt to justify the attacks on the platforms on the generic basis of Iranian attacks on neutral shipping. It does so, for example, in the following passage:

> "[I]t was clear at the time of the attacks on *Sea Isle City* and U.S.S. *Samuel B. Roberts* that diplomatic measures were not a viable means of deterring Iran from its attacks . . . Accordingly, armed action in self-defense was the only option left to the United States to prevent additional Iranian attacks."[24]

First, as to diplomatic measures not being viable, there is little evidence that they were seriously tried (other than in the context of actions clearly slanted in favour of Iraq and seeking to extricate it from any responsibility for its action in starting the war). In particular, no issues are raised in any of the diplomatic correspondence in relation to the military use of the platforms, or their possible availability as targets.

49. Secondly, the "diplomatic measures" which were taken, so far as they related to concerns in the Security Council, nowhere stated or implied that the United States had any entitlement to use armed force against the platforms, or indeed in any other way against Iran.

50. Thirdly, neither the Security Council, nor any other State, complained of the use of the platforms at the time. Nor did they identify the platforms as military targets. Apart from the United States, the only other State which ever threatened or attacked the platforms militarily was Iraq and yet it is said that it was necessary.

51. Mr. President, Members of the Court, I move from the question of the safety of shipping to the second essential security interest asserted by the United States, that is, to maintain the free flow of commerce, especially commerce in oil, in the Gulf. But if the platforms were not themselves a base for attacks on shipping, then they were *part* of the free flow of commerce in oil in the Gulf. The United States was attacking the protected interest! That is not merely not necessary to protect the interest, it is a contradiction of the interest.

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[24]Counter-Memorial and Counter-Claim of the United States, paras. 3.13-3.14.

52. In any event, virtually all commentators at the time took the view, which is amply justified by the evidence, that the initiator and overwhelming source of difficulty for neutral shipping was Iraq. Even after the *Stark* incident, the United States did not attack Iraq or target its commercial facilities. Yet Iraqi attacks never stopped. Diplomacy did not work — at least, it did not work then. If the United States seeks to rely on the freedom of commerce and navigation in the Gulf as an essential security interest, it must act in a way which is consistent with that interest. The United States never took action against Iraq in respect of its "essential security interests"; it did nothing to persuade Iraq to stop the tanker war. It is quite clear that Iran had no independent interest whatever in pursuing that aspect of the conflict. If the United States had really wanted to maintain the "uninterrupted flow of maritime commerce", the simplest and quickest way to do it was to tell Iraq to stop its provocations. That the United States never attempted to do this completely discredits its reliance on this essential security interest. According to Sir Laurence Freedman: "In mid-1987, the United States decided against putting pressure on Iraq to end the tanker war because this would benefit Iran."[25] Thus the United States conduct, far from being necessary to protect its avowed security interest, was actually inconsistent with it.

53. And then there is the question of proportionality. Proportionality is by way of being a general principle of law; it is cognate to necessity and it is relevant whenever issues of necessity arise. Here, in response to these two individual alleged attacks, the United States killed and injured people, destroyed a panoply of targets, commercial and military. Between them the attacks on the platforms damaged or destroyed approximately 10 per cent of Iran's productive capacity for export. This was a massive blow to an economy much affected by the war. Indeed, as Mr. Bundy has argued, the 1988 attacks, which were associated with simultaneous attacks on Iranian naval forces, seem objectively to have been calculated to give Iraq the upper hand in negotiating the terms of a ceasefire. That ceasefire left Iraq in control of substantial amounts of the territory it had invaded back in 1980.

54. For all these reasons, and even on the basis of an extended interpretation of paragraph 1 *(d)* going beyond the requirements of self-defence, the destruction of the oil platforms

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[25]Freedman Report, Reply of Iran, Vol. II, para. 38.

"cannot possibly" be justified under the Treaty of Amity as the application of a measure necessary to protect an essential security interest of the United States.

Conclusion

55. Mr. President, Members of the Court, I hope I may summarize what I have said in two sentences. One: the security of nations, their essential security interests, are to be sought having regard to our shared heritage of international law, and not in opposition to it. Two: deliberate destruction of civilian, commercial facilities, including "targets of opportunity" cannot be necessary to protect essential security interests under a treaty such as the Treaty of Amity.

Mr. President, Members of the Court, thank you for your patient attention. Mr. President, I would like you to call on Professor Pellet who will shortly discuss the United States invocation of the "clean hands" doctrine.

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

Mr. PELLET: Thank you very much, Mr. President. Mr. President, I am afraid that my friend and colleague, James Crawford, has made a slight mistake in the very last sentence of his speech when he said that I would be "short". It will not be as long as his own presentation but this does not mean "brief", properly speaking! This being said, Mr. President, my presentation should last approximately 45 minutes, as we are not going to take up all the time left this afternoon and we have only another short — short — presentation. I do not know if you are contemplating having a break, but please do not hesitate to stop me at any time you deem it appropriate.

L'INVOCATION INFONDEE DE LA DOCTRINE DES «MAINS PROPRES» PAR LES ETATS-UNIS

1. Monsieur le président, Madame et Messieurs les juges, ce matin, le professeur Bothe a montré que la légitime défense n'excluait en aucune manière l'illicéité du comportement des Etats-Unis à l'encontre de l'Iran. Et le professeur Crawford vient d'établir qu'ils ne pouvaient pas non plus invoquer l'exception de sécurité fondée sur l'article XX, paragraphe 1 *d)*, du traité d'amitié de 1955, pour justifier la destruction des ensembles de plates-formes de Reshadat, de Nasr

et de Salman. Il me revient de répondre à l'ultime défense de l'Etat défendeur, fondée sur la doctrine des «mains propres» ou des *clean hands*, comme l'on dit en bon (?[26]) franglais.

2. J'emploie à dessein ce mot un peu vague de «défense» car, à vrai dire, nous ne savons toujours pas très bien à quel titre les Etats-Unis utilisent cet argument dont ils s'essaient visiblement à faire une sorte de *joker* «attrape-tout». S'agit-il d'un argument de fond comme le laissent entendre, par exemple, les paragraphes 5.04 et 5.07 du contre-mémoire[27] ? Ou d'une exception d'irrecevabilité qui ne veut pas dire son nom, comme cela ressort du paragraphe 5.06 du contre-mémoire[28] ? Ou encore d'un principe invoqué à l'appui d'une demande d'atténuation du montant de la réparation comme semble l'impliquer le mot «dommage» *(damage)*, mentionné à plusieurs reprises à ce propos dans la duplique[29] ? Pour le reste, les écritures américaines se bornent prudemment à affirmer, à au moins dix-huit reprises, que la Cour devrait «refuser d'accorder remède» *(refuse relief)* à l'Iran[30], ce qui, à vrai dire, n'entre dans aucune des catégories juridiques usuelles.

3. L'Iran ne conteste évidemment pas que, comme les Etats-Unis semblent le découvrir à travers une citation de l'arrêt de la Cour du 11 juin 1998 sur les *exceptions préliminaires* dans l'affaire de la *Frontière terrestre et maritime entre le Cameroun et le Nigéria*, «[l]e principe de la bonne foi est un principe bien établi du droit international»[31]. Mais nos adversaires auraient eu avantage à tourner la page du *Recueil des arrêts* de 1998 et à lire le paragraphe qui suit immédiatement le passage dont ils extraient cette citation; ils y auraient constaté que, se référant à l'affaire des *Actions armées frontalières et transfrontalières*, la Cour a noté «par ailleurs que, si le principe de la bonne foi «est l'un des principes de base qui président à la création et à l'exécution d'obligations juridiques…, il n'est pas en soi une source d'obligation quand il n'en existerait pas

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[26] Voir cependant J. Salmon dir., *Dictionnaire de droit international public*, Bruylant/AUPELF, Bruxelles, 2001, p. 187.

[27] P. 157-158 et p. 159.

[28] P. 158.

[29] P. 57, par. 2.01; voir aussi p. 58, par. 2.03 ou p. 59, par. 2.05.

[30] Cf. duplique, p. 1, par. 1.02; p. 57, titre de la deuxième partie; p. 58, titre du chapitre 1; p. 58, par. 2.03; p. 59-60, par. 2.05; p. 61, titre du chapitre II et par. 2.06; p. 62-63, par. 2.09; p. 64, titre du chapitre III et par. 2.10 et 2.11; p. 64-65, par. 2.12; voir aussi contre-mémoire, p. 4; par. I.09; p. 156, titre de la cinquième partie; p. 156-157, par. 5.03; p. 157-158, par. 5.04-5.05, p. 158; p. 159, par. 5.07.

[31] *C.I.J. Recueil 1998*, p. 296, par. 38, cité *in* duplique, p. 60, par. 2.05.

autrement» (*Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988,* p. 105, par. 94)»[32].

4. Que la doctrine des *clean hands* découle de l'idée générale de bonne foi, cela ne fait aucun doute. Encore faut-il déterminer si elle constitue la source d'obligations juridiques, dans quelle mesure, et si les conditions pour qu'il en soit ainsi sont remplies en fait. Le défendeur ne le fait pas; je vais tenter de montrer qu'en la présente espèce en tout cas, cette doctrine ne trouve à s'appliquer ni en tant que motif d'irrecevabilité, ni en tant que circonstance excluant l'illicéité. La réplique iranienne avait présenté, à ces deux points de vue, une argumentation rigoureuse[33] à laquelle les Etats-Unis se sont gardés de répondre. Je me permets donc, Madame et Messieurs de la Cour, de vous y renvoyer et je me limiterai à rappeler les principales propositions sur lesquelles repose la position de l'Iran en y apportant, le cas échéant, quelques éléments complémentaires.

5. Ces propositions peuvent être synthétisées de la manière suivante :

1) la doctrine des mains propres ne peut jouer (peut-être) que dans le cadre de la protection diplomatique;
2) elle ne constitue en tout cas pas une cause d'irrecevabilité de la requête en dehors de ce cadre;
3) elle n'est pas davantage une «circonstance excluant l'illicéité» au sens du droit de la responsabilité;
4) et en tout état de cause, si l'un des protagonistes a les «mains sales» dans cette affaire, ce n'est pas celui que dénonce le défendeur.

J'examinerai ces propositions brièvement et dans cet ordre.

1. La doctrine des «mains propres» ne peut jouer (peut-être) que dans le cadre de la protection diplomatique

6. Comme l'Iran l'a montré dans sa réplique[34], si l'invocation de la doctrine des mains propres devait avoir un effet juridique quelconque, ce ne pourrait être que dans le cadre de l'exercice de la protection diplomatique. Les Etats-Unis répondent à l'argument par prétérition et se bornent à y faire une fugitive allusion à la fin de la note 156 de leur duplique.

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[32] *C.I.J. Recueil 1998,* p. 297, par. 39.

[33] Voir chap. 8, p. 175-185.

[34] Voir p. 178-179, par. 8.11 ou par. 8.23-8.24, p. 182.

7. Je peux lire les trois phrases pertinentes; elles sont d'une sobriété saisissante :

> *«[T]he doctrine's applicability … was not applied solely in the context of diplomatic protection… In any case, the argument that the clean hands doctrine is applicable «only» to diplomatic protection claims entirely misses the point. This Court's jurisprudence makes clear that when a State decides to espouse a claim of its national, his claim becomes the claim of the State.»*[35]

Et de faire référence à l'arrêt de la Cour permanente dans l'affaire des *Chemins de fer Panevezys-Saldutiskis*[36] — dont je vois mal la pertinence : cet arrêt se borne à rappeler le très fameux «principe *Mavrommatis*»[37] selon lequel, lorsqu'un Etat exerce sa protection diplomatique en faveur de l'un de ses nationaux, il «fait valoir son droit propre, le droit qu'il a de faire respecter le droit international en la personne de son ressortissant».

8. Assurément, ceci relève de la stricte — et peut-être discutable d'ailleurs — orthodoxie juridique; mais cela n'a aucun rapport avec le problème posé. Cela, comme l'écrit la Partie américaine, *«entirely misses the point»*. Si, en revanche, on s'attache sérieusement à la question posée, au *point*, qui consiste à se demander si la doctrine des mains propres peut avoir, en tant que telle, des effets juridiques en dehors des affaires de protection diplomatique, la réponse ne peut faire aucun doute : la doctrine des mains propres ne joue que dans ce cadre; et encore…

9. Dans son deuxième rapport, le dernier rapporteur spécial de la Commission du droit international sur la responsabilité des Etats, a rapidement évoqué, en 1999, «la jurisprudence dite «des mains propres»», problème qu'à une exception près, aucun de ses prédécesseurs n'avait abordé, ce qui, en soi, est révélateur. Le dernier rapporteur spécial sur la responsabilité soulignait que cette «jurisprudence» était parfois «utilisée comme «défense» [le mot est, de manière significative, entre guillemets] … pour l'essentiel dans le cadre de la protection diplomatique»[38]. Auparavant, seul le premier rapporteur spécial sur le sujet, Garcia Amador, avait abordé la question, comme le releva, du reste, M. Crawford, mais uniquement «en rapport avec la «faute de l'étranger [au sens de *alien* ou de *foreigner*]», qui a été incorporée [dans la partie relative à la

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[35] P. 59.

[36] 28 février 1939, *C.P.J.I. série A/B n° 76*, p. 16.

[37] Cf. arrêt du 30 août 1924, *C.P.J.I. série A n° 2*, p. 12.

[38] Doc. A/CN4/498/Add.2, p. 52, par. 330.

réparation du projet sur la responsabilité] en vue de limiter le montant de l'indemnisation due[39]»[40]. La très grande majorité des auteurs se rallient d'ailleurs à cette façon de voir et n'abordent la question des mains propres, quand ils l'abordent, que lorsqu'ils étudient la protection diplomatique et, en général, pour ne voir dans le manquement au droit de la personne protégée qu'un élément à prendre en considération dans le calcul de l'indemnité[41].

10. Il n'est pas moins symptomatique que l'actuel rapporteur spécial de la Commission du droit international sur la protection diplomatique, le professeur John Dugard, n'ait, jusqu'à présent, envisagé à aucun moment de traiter la question des mains propres ce qui montre au moins que, même dans ce cadre, elle joue un rôle très limité. Et le débat spontané qui s'est engagé l'an dernier entre les membres de la Commission (et dont le rapport de M. Dugard rend compte[42]) témoigne, pour le moins, d'hésitations et de réticences à considérer que la doctrine des mains propres avait une place quelconque dans le droit positif, fût-ce dans le cadre de la protection diplomatique[43].

2. Les «mains propres» ne constituent pas une cause d'irrecevabilité de la requête

11. Une chose est certaine en tout cas : même dans le cadre de la protection diplomatique, dans lequel les *«clean hands»* ont peut-être un rôle à jouer (et je suis de ceux qui le pensent), elles ne constituent pas une cause d'irrecevabilité d'une réclamation ou d'une requête, contrairement à ce que les Etats-Unis laissent entendre.

12. D'abord, Monsieur le président, il y a un temps pour tout. Il y en a un pour les exceptions préliminaires, dont les délais — que vous avez fort opportunément raccourcis — sont fixés à l'article 79 du Règlement de la Cour, et sont expirés. Il y en a un autre pour le fond.

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[39] *Annuaire de la Commission du droit international*, 1958, vol. II, p. 55 et 56.

[40] Doc. A/CN4/498/Add.2, p. 52, par. 331.

[41] Voir en ce sens : Jean J. A. Salmon, «Des «mains propres» comme condition de recevabilité des réclamations internationales», *AFDI*, 1964, p. 225-266; Charles Rousseau, *Droit international public*, t. V, *Les rapports conflictuels*, Sirey, Paris, 1983, p. 170-177; Luis Garcia-Arias, «La doctrine des «*clean hands*» en droit international public», *Annuaire de l'association des auditeurs et anciens auditeurs de l'Académie de droit international de La Haye*, 1960, p. 14-22; B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale*, Pedone, Paris, 1973, p. 302-315; R. Kolb, *La bonne foi en droit international public. Contribution à l'étude des principes généraux de droit*, P.U.F., Paris, 2000, p. 568-574.

[42] Cinquante-quatrième session, *Documents officiels de l'Assemblée générale, cinquante-septième session, supplément n° 10*, A/57/10, p. 140-141, par. 137-138.

[43] Voir aussi le rapport de la Commission du droit international sur sa cinquante et unième session (1999), *Documents officiels de l'Assemblée générale, cinquante-quatrième session, supplément n° 10*, A/54/10, p. 152-153, par. 411-415.

13. Les Etats-Unis semblent éprouver quelque difficulté à se faire à l'idée que le temps des exceptions préliminaires est révolu. Ils en ont soulevé une; votre arrêt du 12 décembre 1996 l'a rejetée (tout en réduisant la base de compétence invoquée par la requête iranienne). Mais ceci ne les empêche pas de «revenir à la charge» — très directement, en remettant en cause la base de compétence constituée par l'article X, paragraphe 1, du traité de 1955, comme je l'ai montré hier; plus indirectement, en tentant de présenter la doctrine des *clean hands* comme une cause d'irrecevabilité de la requête : même s'ils n'utilisent pas le mot «irrecevabilité» ils entendent «interdire» à l'Iran d'invoquer l'article X, paragraphe 1, du traité de 1955 au prétexte des violations qu'ils lui imputent (à tort, nous aurons l'occasion d'y revenir, mais c'est un problème différent)[44].

14. En effet, en demandant à la Cour de subordonner l'examen de la requête, dans les limites définies par l'arrêt de 1996, à l'absence de tout fait internationalement illicite de l'Iran, les Etats-Unis remettent une fois de plus en cause l'arrêt par lequel vous avez rejeté leur (unique) exception préliminaire, ainsi d'ailleurs qu'ils remettent en cause votre ordonnance de 1998 qui admet leur demande reconventionnelle, dans les limites de l'article X, paragraphe 1, en tant que procédure incidente venant se greffer sur la demande principale.

15. Ce faisant, les Etats-Unis essaient d'inverser l'ordre du procès en s'efforçant de vous conduire à statuer d'abord sur l'attitude de l'Iran, alors que l'objet premier du présent différend est la responsabilité des Etats-Unis que, seule, une circonstance excluant l'illicéité pourrait «effacer». Qui plus est, ceux-ci tentent par ce biais d'imposer l'examen d'une question préalable avant tout traitement au fond de la requête iranienne, alors même que vous avez reconnu sans aucune condition votre compétence en 1996 pour connaître de cette demande, telle, du moins, que vous l'avez définie. Non seulement ceci constitue un détournement de procédure et porte atteinte à l'autorité de la chose jugée (en vertu de l'arrêt de 1996, l'affaire introduite par la requête de l'Iran peut et doit être examinée au fond — de même, d'ailleurs que la demande reconventionnelle des Etats-Unis), mais encore, les prémisses mêmes dont part le défendeur sont erronées.

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[44] Cf. duplique, p. 62, par. 2.08 ou 2.09; voir aussi contre-mémoire, p. 4, par. 1.09; p. 156, par. 5.02; p. 158, par. 5.04; etc.

16. En effet, Monsieur le président, même si, pour les besoins de la discussion, on rouvre ce débat que je qualifierai de «revanchard», la doctrine des mains propres n'a, de toute manière, rien à voir avec la recevabilité d'une requête.

17. En premier lieu, je n'y reviens que pour mémoire, elle — cette «doctrine», ou cette «jurisprudence» — n'a d'effet, si elle en a, que dans le cadre de la protection diplomatique et nul ne conteste que ce n'est pas l'objet de la présente instance.

18. En second lieu, lorsque, comme en l'espèce, un dommage «immédiat» a été causé à un Etat par le fait internationalement illicite d'un autre Etat, il ne saurait être question que la Cour soit empêchée d'examiner la requête du premier au prétexte que celui-ci aurait, à son tour, commis une violation du droit international au détriment du second : ce serait légitimer le droit de chacun de se faire justice à lui-même, ce que la possibilité d'un règlement judiciaire a précisément pour objet d'éviter et qui n'est de tout manière jamais possible par le recours à la force armée. Comme l'a écrit le professeur Jean Salmon au terme d'une étude minutieuse de la jurisprudence internationale en la matière : lorsque l'on se trouve dans un tel cas de figure, «les arbitres n'ont jamais déclaré la demande irrecevable. Accueillir l'irrecevabilité dans cette hypothèse aurait eu pour conséquence de reconnaître la légalité des représailles.»[45]

19. Pour autant que l'on puisse suivre leur argumentation qui ne distingue pas les points d'irrecevabilité et de fond, les Etats-Unis affirment le contraire principalement en invoquant l'autorité de sir Gerald Fitzmaurice et du président Schwebel[46].

20. En ce qui concerne sir Gerald, l'Etat défendeur joue sur les mots : sans doute l'éminent auteur écrit-il que *«a State which is guilty of illegal conduct may be deprived of the necessary* locus standi in judicio *for complaining of corresponding illegalities on the part of other States…»*; mais ce passage concerne «le rôle des représailles» *(The Place of Reprisals)* — ce que, dans le jargon contemporain du droit international nous appellerions les contre-mesures —, et ne saurait justifier l'irrecevabilité d'une requête dans une situation de ce genre, non plus évidemment que le recours à la force armée.

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[45] «Des mains propres comme condition de recevabilité», *AFDI* 1964, p. 259.

[46] Duplique, p. 66, par. 2.13.

21. En ce qui concerne la position du président Schwebel dans l'affaire du *Nicaragua*, il est exact qu'il a vigoureusement défendu l'applicabilité de la doctrine des mains propres — qu'il illustre par un très grand nombre de citations (je dirai presque un patchwork) données hors contexte et sans distinguer entre les cas où la victime est un Etat ou un particulier — et qu'il a, en effet, semblé adhérer à la thèse de l'irrecevabilité[47]. Mais, contrairement aux affirmations des Etats-Unis[48], ce n'est pas seulement parce que la Cour a conclu que leurs affirmations factuelles n'étaient pas fondées qu'elle a écarté l'argument. Bien au contraire, la haute juridiction a méthodiquement examiné les arguments juridiques qui auraient pu être opposés aux demandes nicaraguayennes et :

— d'une part, elle se place sur le terrain du fond et, en aucune manière sur celui de la recevabilité; et,

— d'autre part, elle juge le comportement des Etats-Unis injustifié *en droit* (et pas seulement en fait comme le défendeur veut le faire croire aujourd'hui) :

> «[Les] violations [par les Etats-Unis des principes de la souveraineté territoriale, de l'interdiction de l'emploi de la force et de la non-intervention] ne peuvent être justifiées ni par la légitime défense collective, puisque, comme la Cour l'a reconnu, les circonstances nécessaires à sa mise en jeu ne sont pas réunies [— ici, elle se fonde sur le fait], ni *par un droit* qu'auraient les Etats-Unis de prendre des contre-mesures impliquant l'usage de la force … *un tel droit étant inconnu du droit international applicable*… [Les activités alléguées du Nicaragua au Salvador] *ne créent au bénéfice des Etats-Unis aucun droit qui justifierait les mesures en question*.»[49]

22. Ceci me conduit à ma troisième proposition :

3. La doctrine des «mains propres» ne constitue pas une circonstance excluant l'illicéité au sens du droit de la responsabilité

23. Le *dictum* de la Cour que je viens de citer est éclairant : même l'allégation par un Etat de l'usage de la force par un autre Etat n'autorise pas le premier à faire usage de la force contre le second, «un tel droit étant inconnu du droit international applicable». En cela, le droit international contemporain se distingue de la loi des *cowboys*, même si certains Etats ont tendance à l'oublier. La seule exception est l'exercice du droit naturel de légitime défense, mais mon collègue et ami

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[47] *C.I.J. Recueil 1986*, p. 392-394, par. 268-272 — et non «par. 394» comme l'indiquent par inadvertance les Etats-Unis, duplique, p. 66, par. 2.13 et note 169.

[48] *Ibid.*

[49] Arrêt du 27 juin 1986, *C.I.J. Recueil 1986*, p. 128, par. 252; les italiques sont de moi.

Michael Bothe a montré qu'il ne pouvait trouver à s'appliquer ici. Restent les autres circonstances excluant l'illicéité; mais aucune de celles qui ont pignon sur rue, qui sont énumérées, limitativement, aux articles 20 à 25 du projet de la Commission du droit international, n'a été invoquée par les Etats-Unis pour justifier leur comportement ni ne pourrait l'être.

24. L'invocation de la doctrine des «mains propres», cet objet juridique mal identifié, apparaît donc comme un ultime effort pour ajouter une nouvelle circonstance excluant l'illicéité à celles retenues par la Commission du droit international. Et une circonstance à laquelle, je le souligne d'emblée, la Commission a, en une formule lapidaire, clairement dénié cette qualité : «La théorie dite des «mains propres» a été principalement invoquée à propos de la recevabilité de demandes devant des cours et tribunaux [invoquée mais rarement acceptée, et seulement dans des cas anciens de protection diplomatique]. Il n'y a pas lieu non plus de l'inclure ici»[50].

25. Le dernier rapporteur spécial de la Commission du droit international. sur la responsabilité de l'Etat pour fait internationalement illicite avait d'ailleurs eu la même idée que le défendeur dans la présente affaire, mais pour l'écarter aussitôt.

26. En effet, dans son deuxième rapport, le professeur Crawford s'était, à la différence de ses prédécesseurs, demandé s'il convenait de faire place à la «jurisprudence des mains propres» parmi les circonstances excluant l'illicéité[51] — j'ai fait allusion à ceci tout à l'heure[52] — mais pour, aussitôt, rejeter cette éventualité, en termes sans appel. Après avoir constaté qu'au mieux il pourrait s'agir d'un motif d'irrecevabilité dans le cadre de la protection diplomatique; que, même dans ce cadre, elle n'est pas clairement reçue; et qu'en tout état de cause «rien ne suggère que la conduite illégale [illicite] d'un Etat lésé (et encore moins en l'absence de «mains propres»), enlève tout caractère d'illicéité à la conduite qui a lésé ledit Etat», il conclut

[50] Rapport de la Commission du droit international, cinquante troisième session, 2001, *Documents officiels de l'Assemblée générale, cinquante-sixième session, supplément. n° 10*, A/56/10, p. 184.

[51] A/CN.4/498/Add.2, p. 52-54, par. 330-334.

[52] Par. 9.

> «il n'est pas justifié d'inclure la jurisprudence des mains propres comme une nouvelle «circonstance enlevant le caractère d'illicéité», distincte de l'exception [*sic* : de l'*exceptio inadimpleti contractus*] ou des contre-mesures. Au contraire, la conclusion à laquelle était parvenu Charles Rousseau semble toujours d'actualité : «il n'est pas possible de considérer la théorie des mains propres comme une institution du droit coutumier général»[53].»[54]

27. Bien entendu, la Commission du droit international a discuté ce rapport. Quelques membres ont pris la défense du principe. Mais, de façon significative, *aucun* n'a souhaité le voir mentionné dans le chapitre du projet consacré aux circonstances excluant l'illicéité, projet qui, en effet, ne l'accepte pas comme telle. Le projet d'articles final de la Commission du droit international, annexé à la résolution 56/83 de l'Assemblée générale du 12 décembre 2001, ne fait qu'une allusion assourdie à la doctrine des mains propres dans l'article 39 sur la «Contribution au préjudice» consacré à la détermination de la réparation mais ceci n'affecte, en aucune manière, le principe même de la responsabilité qui, dans cette phase de l'affaire, nous occupe seul.

28. D'ailleurs, en refusant de faire des «mains propres» une circonstance excluant l'illicéité, la Commission du droit international n'a fait que s'aligner sur votre propre jurisprudence. Dans l'affaire de la *Barcelona Traction*, la Cour s'est en effet prononcée sans aucune ambiguïté en ce sens. Elle a constaté que la société, par la voix de la Belgique, et l'Espagne s'accusaient mutuellement l'une de faits internationalement illicites, l'autre de violations de la loi espagnole; et la Cour a clairement affirmé qu'«[à] supposer que les faits soient établis dans les deux cas, *les derniers ne sauraient en aucune façon légitimer les premiers*»[55].

29. Monsieur le président, si je me suis attardé quelque peu sur le traitement réservé à la doctrine des «mains propres» par la Commission du droit international — ce qui est une façon de parler : elle l'a exclue purement et simplement de son projet sur la responsabilité —, c'est d'abord à cause de l'autorité qui s'attache aux positions prises par cet organe — autorité que la Cour a (parfois) reconnue. Mais c'est aussi parce que l'Iran n'avait pu faire état de l'«épisode» dont je

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[53] *Droit international public*, t. V, *Les rapports conflictuels*, Paris, Sirey, 1983, p. 177, par. 170.

[54] A/CN.4/498/Add.2, p. 54, par. 334. La traduction française laisse à désirer; version originale anglaise :

> *«For these reasons there is in the Special Rapporteur's view no basis for including the clean hands doctrine as a new «circumstance precluding wrongfulness», distinct from the* exceptio *or from countermeasures. On the contrary, the conclusion reached by Charles Rousseau seems still to be valid: «it is not possible to consider the «clean hands» theory as an institution of general customary law».»* (P. 50, par. 334).

[55] Arrêt du 5 février 1970, *C.I.J. Recueil 1970*, p. 51. Voir également dans le même sens R. Kolb, *La bonne foi en droit international public. Contribution à l'étude des principes généraux de droit*, P.U.F., Paris, 2000, p. 573-574.

viens de parler dans sa réplique qui est antérieure aux débats de la Commission du droit international de 1999 — l'affaire qui nous occupe, comme vous le savez, Madame et Messieurs les juges, est inscrite au rôle de la Cour depuis un certain temps… En revanche, il est très frappant que les Etats-Unis, dont la duplique est bien postérieure, se sont très soigneusement abstenus d'y faire la moindre allusion. Il est vrai que ces développements récents ne sont pas à proprement parler de nature à renforcer leur cause.

30. La duplique américaine se borne à solliciter quelques arrêts ou les opinions personnelles de certains juges, en en extrayant des passages isolés de leur contexte, à l'appui d'une «défense» dont on ne sait toujours pas très bien quelle est la portée juridique que ses auteurs lui assignent.

Monsieur le président, le développement sur les *Prises d'eau à la Meuse* est un peu long. Si vous souhaitez une pause, ce serait peut-être le bon moment, sinon, je continue.

The PRESIDENT: The Court will now go for recess for ten minutes.

The Court adjourned from 4.25 p.m. to 4.30 p.m.

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

M. PELLET : Monsieur le président.

31. L'arrêt de la Cour permanente dans l'affaire des *Prises d'eau à la Meuse*[56] constitue l'un des principaux chevaux de bataille des Etats-Unis qui invoquent cet arrêt à plusieurs reprises. Dans cette affaire, je me permets de le rappeler, les Pays-Bas reprochaient à la Belgique d'avoir construit une écluse constituant une prise d'eau, en violation d'un traité de 1863 liant les deux Etats. La Cour a estimé «difficile d'admettre que les Pays-Bas soient fondés à critiquer aujourd'hui la construction et le fonctionnement d'une écluse dont eux-mêmes avaient antérieurement donné l'exemple»[57]. Il ne s'agit en réalité que de l'application du principe d'interprétation des traités, aujourd'hui codifié à l'article 31, paragraphe 3 *b)*, de la convention de Vienne de 1969, invitant à tenir compte dans l'interprétation d'un traité «de toute pratique ultérieurement suivie dans l'application du traité». Ceci n'a qu'un rapport lointain avec l'affaire qui nous occupe, ne fût-ce

[56] Cf. duplique, p. 58, par. 203; p. 61, par. 2.07; p. 63, par. 2.09.

[57] Arrêt du 28 juin 1937, *C.P.J.I. série A/B n° 70*, p. 25.

que parce que, même en admettant que l'Etat fût responsable des actes dont l'accusent les Etats-Unis, *quod non*, aucune des deux Parties ne prétend qu'il pourrait s'agir d'une pratique établissant le sens qu'il convient d'attribuer au traité de 1955, dont, je le rappelle à nouveau, seul l'article X, paragraphe 1, est en cause dans cette enceinte. Du reste, en introduisant une demande reconventionnelle, fondée sur des faits identiques à ceux qu'ils mettent en avant dans leurs développements sur les *clean hands*, les Etats-Unis ont clairement manifesté leur conviction selon laquelle ces faits ne sauraient constituer un élément pertinent pour interpréter le traité : il s'agirait justement de faits *contraires* à l'article X, paragraphe 1, et évidemment en aucun cas d'une pratique établissant «l'accord des Parties à l'égard de l'interprétation» de cette disposition.

32. Il est vrai que les Etats-Unis invoquent également l'opinion individuelle du juge Hudson dans la même affaire[58]. Se plaçant sur le terrain de l'équité (qu'il incorpore peut-être un peu rapidement dans le droit international), le juge américain, lui aussi, cale clairement sur les questions d'interprétation les longs développements qu'il consacre — dans l'affaire des *Prises d'eau ¾* à l'idée selon laquelle «quand deux parties ont assumé une obligation identique ou réciproque, une partie qui, de manière continue, n'exécute pas cette obligation, ne devrait pas être autorisée à tirer avantage d'une non-observation analogue de cette obligation par l'autre partie»[59]. Il ajoute d'ailleurs :

> «On ne saurait certainement estimer que, pour qu'un Etat pût se présenter devant un tribunal international afin d'obtenir *l'interprétation* d'un traité [je souligne : *l'interprétation*], il faudrait que cet Etat eût préalablement prouvé qu'il a rempli toutes les obligations assumées par lui en vertu de ce traité.»[60]

Et il conclut que,

> «[p]ar leur manière d'agir durant un certain nombre d'années, les parties au traité de 1863 ont indiqué qu'elles ne sont pas satisfaites de la situation qui existe en vertu de ce traité»[61].

Mais, Madame et Messieurs de la Cour, déduirez-vous des faits qu'invoquent les Etats-Unis que les Parties — qui, toutes deux, considèrent que le traité de 1955 demeure applicable — ont «indiqué qu'elles n'étaient pas satisfaites de la situation qui existe en vertu de ce traité» d'amitié et qu'elles

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[58] Duplique, p. 58, par. 2.03; p. 61, par. 2.07; voir aussi contre-mémoire, p. 156-157, par. 5.03.

[59] *C.P.J.I. série A/B n° 70*, p. 77.

[60] *Ibid.;* les italiques sont de moi.

[61] *Ibid.*, p. 79.

entendent pouvoir paralyser l'exercice de la liberté de commerce garantie par l'article X, paragraphe 1, en recourant à la force armée dans leurs relations mutuelles ? Puis-je suggérer que ce ne serait guère raisonnable ?

33. Le défendeur commet également un contre-sens dans son interprétation de l'arrêt de la Cour permanente du 26 juillet 1927 relatif à l'*Usine de Chorzów*[62]. La Cour y a appliqué le principe selon lequel «une partie ne saurait opposer à l'autre le fait de ne pas avoir rempli une obligation … si la première, par un acte contraire au droit, a empêché la seconde de remplir l'obligation en question…»[63]. Contrairement à ce qu'écrivent les Etats-Unis[64], ceci ne constitue pas une application de l'*exceptio inadimpleti contractus*; c'est une illustration de l'idée selon laquelle lorsque le respect d'une obligation est rendu impossible par une partie, celle-ci ne peut reprocher à l'autre de ne pas s'en acquitter — et c'est une illustration, *a contrario*, du fait que si, en revanche, l'obligation en question peut être exécutée, elle demeure applicable, comme la Cour actuelle le montre bien dans l'affaire relative au *Projet Gabèíkovo-Nagymaros*, dans laquelle elle reprend la citation que je viens de faire pour l'appliquer à la situation inverse[65].

34. Curieusement, ceci n'empêche pas les Etats-Unis de faire grand cas de l'arrêt de 1997 dans l'affaire du *Projet de Gabèíkovo-Nagymaros*[66]. Curieusement, parce que cet arrêt contredit de manière éclatante la thèse qu'ils avancent. Il suffit, pour s'en convaincre, de citer en entier et dans l'ordre retenu par la Cour, le passage même sur lequel ils s'appuient, en le citant à l'envers. Interprétant l'extrait que je viens de citer de la décision de son prédécesseur dans l'affaire de l'*Usine de Chorzów*, la Cour dit :

> «La Hongrie, par son comportement, avait porté atteinte à son droit de mettre fin au traité; il en serait demeuré ainsi *même si la Tchécoslovaquie avait*, au moment de la prétendue terminaison du traité, *violé une disposition essentielle* pour la réalisation de l'objet ou du but du traité.»[67]

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[62] Cf. duplique, p. 65, par. 2.12.

[63] *C.P.J.I. série A/B n° 9*, p. 31.

[64] Duplique, p. 65, note 167.

[65] *C.I.J. Recueil 1997*, p. 67, par. 110.

[66] Duplique, p. 64-65, par. 2.11-2.12.

[67] *C.I.J. Recueil 1997*, p. 67, par. 110; les italiques sont de moi.

35. En d'autres termes : quelque violation du traité de 1977, entre la Hongrie et la Tchécoslovaquie, qu'aurait pu commettre cette dernière, cette violation fût-elle «essentielle», la Hongrie ne s'en serait pas trouvée exonérée de sa responsabilité et je ne vois dans les opinions personnelles de certains juges, auxquelles le défendeur se réfère également[68], pas le moindre élément pouvant conduire à une solution différente; certaines, au contraire, renforcent le raisonnement de la majorité[69].

36. D'ailleurs, la Cour, tout en laissant ouverte la question de la compensation possible des indemnités[70], a constaté que chacune des Parties avait manqué à ses obligations en vertu du traité de 1977, sans que les violations commises par l'une excluent l'illicéité de celles attribuables à l'autre — exactement comme ici, quand bien même les violations du traité de 1955 que les Etats-Unis imputent à l'Iran seraient avérées, le défendeur n'en demeurerait pas moins tenu de répondre de ses propres violations de l'article X, paragraphe 1.

37. L'Iran a montré, dans sa réplique, que la doctrine des «mains propres» n'avait aucune autonomie en ce sens qu'elle n'a, en elle-même, en tout cas dans un cas de ce genre, aucun effet juridique. Les arguments que je viens de développer me paraissent le confirmer à tous égards :

— cette doctrine a peut-être (bien que ce soit douteux) pour effet d'entraîner l'irrecevabilité d'une requête introduite au titre de la protection diplomatique si la personne protégée a les «mains sales»; mais l'affaire qui vous est soumise ne se situe pas dans ce cadre;

— il n'en va, de toute manière, pas ainsi dans les affaires «immédiates», «d'Etat à Etat», dans lesquelles une partie n'est jamais fondée à se prévaloir du fait internationalement illicite de l'autre pour empêcher la Cour de statuer; du reste, le stade des exceptions préliminaires est, décidément, dépassé;

— une partie ne saurait davantage s'exonérer de sa propre responsabilité sur cette base : la doctrine des «mains propres» n'est pas une circonstance excluant l'illicéité, et en tout état de cause, ne saurait justifier le recours à la force armée dont l'interdiction est une règle impérative du droit international général.

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[68] Duplique, p. 65, note 168.

[69] Cf. les opinions individuelles des juges Bedjaoui, *C.I.J. Recueil 1997*, p. 134, par. 51, et Koroma, p. 151-152; et dissidentes des juges Ranjeva, p. 170 et Fleischhauer, p. 212.

[70] *Ibid.*, p. 81, par. 153.

4. Les Etats-Unis ont les «mains sales»

38. Il y a, au demeurant, Monsieur le président, quelque impudence de la part des Etats-Unis à accuser l'Iran de n'avoir pas les «mains propres». Au mieux, ce serait le problème de la poutre et de la paille.

39. Voici un Etat qui, non seulement a violé le traité d'amitié le liant à l'Iran — je l'ai montré hier matin; qui, non seulement n'a rien fait de ce qui était en son pouvoir pour empêcher l'agression — maintenant enfin reconnue — dont l'Iran était victime de la part d'un tiers, mais qui, ouvertement, s'est rangé aux côtés de l'agresseur; voici un Etat qui vient, aujourd'hui, reprocher à la victime d'avoir pris des mesures de défense, dont mes collègues ont montré qu'elles étaient limitées et raisonnables à l'encontre de cet agresseur; et qui voudrait vous faire croire, Madame et Messieurs les juges, que cette même victime a «bien mérité» les mesures de représailles armées qu'il a prises à son encontre au mépris des principes les plus élémentaires du droit international, du principe sans doute le mieux établi parmi les normes impératives du droit international général, l'interdiction du recours à la force armée dans les relations internationales, principe qui ne connaît qu'une exception, le droit de légitime défense, dans les limites fixées par l'article 51 de la Charte des Nations Unies.

40. Si d'aventure, Madame et Messieurs les juges, vous deviez retenir la pertinence de la doctrine des «mains propres» sous un angle ou un autre, il vous faudrait *remonter* la chaîne de causalité dans son ensemble. Vous constateriez alors :

— *quatrièmement*, que les Etats-Unis ont détruit les trois ensembles de plates-formes pétrolières — ce fait n'est pas contesté;

— *troisièmement*, qu'ils disent l'avoir fait pour riposter à de prétendues atteintes aux droits des neutres qu'ils imputent à l'Iran;

— *deuxièmement*, que ces actes (dont ils ne prouvent pas l'attribution à l'Etat requérant) seraient, en tout état de cause, des mesures de réaction légitime à ceux des Etats-Unis, qui, eux-mêmes, ne sont en aucune manière compatibles avec le droit de la neutralité; et

— *premièrement*, qu'ils se sont produits dans le cadre d'une guerre d'agression dont l'Iran est la victime reconnue tandis que les Etats-Unis ont pris fait et cause pour l'agresseur.

41. Aux deux bouts de la chaîne, *quatrièmement* et *premièrement*, vous retrouveriez les Etats-Unis et si la théorie des «mains propres» devait avoir un effet quelconque, c'est à eux que vous devriez l'appliquer. Nous ne vous demandons pas expressément d'en faire application car nous sommes convaincus que la doctrine ne se suffit pas à elle-même; mais, si vous le faisiez de votre propre chef, il faudrait le faire jusqu'au bout, en en respectant la logique, en remontant toute la chaîne de causalité comme je viens de le faire.

42. Au fond, Monsieur le président, l'objectif des Etats-Unis en invoquant la théorie des «*clean hands*» est d'empêcher la Cour de statuer au fond sur la requête de l'Iran. Mais ils ne sont pas dupes eux-mêmes de leur stratégie «tous azimuts» (et passablement obscure) à cet égard et ils admettent, incidemment, que ce moyen de «défense» est inopérant.

43. Dans sa réplique, l'Iran, se plaçant sur le terrain choisi par les Etats-Unis — mais sans en admettre la pertinence — avait fait valoir que :

> *«[s]hould the Court decide that the «clean hands» argument does have an autonomous and intrinsic legal relevance […,] the United States does not have «clean hands» in the present case and therefore is precluded from having* locus standi in judicio *both on its defence and on its counterclaim, insofar as these are based on facts which are tainted by the United States' unlawful behaviour»*[71].

44. S'emparant de cet argument (que l'Iran n'a nullement fait sien contrairement à ce que les Etats-Unis laissent entendre de fort mauvaise foi), ceux-ci écrivent dans leur duplique :

> *«Insofar as this assertion would apply to prevent the Court from entertaining the United States defense, it appears to state the jurisprudentially novel theory that the Court cannot «entertain» the defense of a state accused of a wrongful act. Not surprisingly, no authority is cited for this proposition.»*[72]

45. C'est, en effet, très exactement ce que l'Iran reproche à la fonction, assurément très originale, que les Etats-Unis entendent faire tenir à la doctrine des «mains propres», sans citer la moindre autorité en ce sens. On voit mal au nom de quoi la Cour ne pourrait connaître que de la défense au fond des Etats-Unis, ou de leur demande reconventionnelle, et non de la demande iranienne, alors même que *chacun des deux Etats* allègue une violation du droit international commise par l'autre. Dans ce cas, chacun peut bien accuser l'autre de ne pas avoir les «mains propres», ceci n'a, juridiquement, aucun effet spécifique, sauf à démontrer que les faits qui

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[71] Réplique, p. 185, par. 8.33.

[72] Duplique, p. 67, note 171.

justifient cette accusation constituent une circonstance excluant l'illicéité. Nous avons établi que les Etats-Unis n'avaient rien démontré de tel.

Monsieur le président, Madame et Messieurs les juges, je vous remercie de votre attention et je vous prie de bien vouloir donner la parole au Professeur Crawford pour une ultime et très brève intervention, il l'a promis, qui sera consacrée aux «remèdes» que l'Iran attend de votre haute juridiction. Merci beaucoup.

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

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

IRAN'S CLAIM: REMEDIES IN THE CONTEXT OF ARTICLE X, PARAGRAPH 1, OF THE TREATY

1. In this presentation, I will deal briefly, as Professor Pellet has said, with the question of remedies and then make a few concluding remarks.

Issues of remedies

2. First, is the issue of remedies. The Court may recall that in my opening on Monday I mentioned that there was one point of agreement between the Parties, that is to say the Treaty of Amity is still in force[73]. Actually that was an understatement: there are *two* points of agreement between the Parties. The other is that you are not called on at this stage of the proceedings to do more than grant a declaratory remedy, leaving questions of quantification of damages to a subsequent phase. Of course we disagree on what the compensation will be for. The claimant calls for a declaration that the United States is under an obligation to make full reparation to Iran for the violation of Article X, paragraph 1, in a form and amount to be determined by the Court at a subsequent stage of the proceedings, and that the United States counter-claim be dismissed. The position of the United States is a mirror image of this: according to it, the Court should dismiss the Iranian claim and declare that Iran is under an obligation to make full reparation to the United States on the counter-claim in a form and amount to be determined by the Court at a subsequent stage of the proceedings[74]. Evidently Iran provided the form of words and the United States was able to copy it, *mutatis mutandis*!

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[73]CR 2003/5, p. 29.

[74]Rejoinder of the United States, p. 227, and see *ibid.*, para. 226.

3. In short, the Parties agree that the Court has power, in accordance with the *Chorzów Factory* principle, to award full reparation for any breach of the Treaty of Amity which the Court finds to exist; they agree that in the first place the Court's judgment should take the form of a declaration, and they agree that any questions of quantification are reserved to a later stage of the proceedings. So there are two points of agreement in this phase of the case, and all the Court has to do is to decide on the multiple points of disagreement in between the application of the Treaty of Amity and the postponement of the question of quantum!

4. In its Memorial, Iran gave a very preliminary account of the elements of compensation it claims[75]. In view of the fact that both Parties consider that the issues of reparation should be postponed, I will not go into detail on these at this stage. The relevant principles for determining the scope of full reparation, in particular the amount of compensation, are set out in general terms in Chapters I and II of Part Two of the ILC Articles on State Responsibility. I would also draw your attention to the remark you made, in the context of the bilateral treaty claim, in the *Nicaragua* case, where you said: "In the commercial context of the Treaty, Nicaragua's claim is justified not only as to the physical damage to its vessels, but also the consequential damage to its trade and commerce."[76] Of course, the same principle applies here, and the recoverability of consequential losses is all the more justified in that they arise as a result of destruction deliberately and directly inflicted by the United States, in a situation where it knew or must be taken to have known of the consequences.

5. In the circumstances, and given the time that has passed since the attacks on the oil platforms, the primary form that full reparation will take is compensation, which will "cover any financially assessable damage, including loss of profits insofar as it is established"[77]. The compensation should cover the amount which is necessary to put Iran in the position it would have been in if the oil platforms had not been wrongfully destroyed. In this respect, the issue of the embargo is irrelevant. Once you have determined that there has been a breach of the Treaty, Iran is entitled to recover the value of the damage caused to it — including the cost of the repair of the

[75]Memorial of Iran, paras. 5.19-5.41.

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

[77]ILC Articles, Art. 36 (2).

platforms and the value of the lost or deferred production. The fact that while the embargo was in force, oil could not be sold directly to the United States is irrelevant at the level of quantification. It could have been sold to others and Iran suffered losses as a direct consequence of the United States action, for which it is entitled to be compensated.

6. In this situation, there is no question of any intervening or underlying cause. If the United States is legally responsible for this conduct, it is responsible for all the consequences flowing from it which are not too indirect or remote. Thus all the costs of the repair of the oil platforms, the damage to personnel killed or injured in the attacks, and the consequential damage to Iran's commerce in oil are part of the full reparation which is payable in accordance with the *Chorzów Factory* principle. And it is irrelevant for this purpose whether the oil platforms would subsequently have been used for the purposes of commerce between the territories of the High Contracting Parties or not. The position may be contrasted with what would have arisen in respect of a claim exclusively concerning the embargo. The embargo only had a bilateral effect and, indeed, only a partial effect since it did not stop the flow of oil from Iran to the United States, as the Odell Report shows. But even if we assume a fully effective and watertight — perhaps I should say oil-tight — embargo, it would only have operated bilaterally, and the compensation payable for the imposition of the embargo would have been correspondingly limited.

7. But the United States was not content with an embargo, with a bilateral measure. It destroyed the platforms *erga omnes*, so to speak. Indeed, we have argued, that was the actual point of the attacks, to cause the maximum economic damage to Iran. That is one crucial reason the attacks were not a legitimate exercise of self-defence, whatever events may have preceded them; it is one crucial reason why their destruction was not necessary to protect any essential security interest of the United States. And the total destruction of the platforms carried with it the obligation to pay compensation for the full value of Iran's losses, which you will be called on to assess, we submit, in a subsequent stage of the proceedings.

Closing remarks

8. Mr. President, Members of the Court, it is neither customary nor necessary to make a formal closing statement in the first round and Iran will not do so. But two observations are in order.

9. The first of these concerns the extent to which it has been necessary in our presentation to discuss the general context of the war between Iraq and Iran, and in particular the role of Iraq. I can imagine that the Court may feel that it is being asked to pronounce in some general way on that terrible conflict, but I can assure you that that is not the case: at any rate it is not Iran's case. As I said on Monday, Iran's claim under Article X, paragraph 1, depends on three simple propositions. First, the United States by its own unaided acts destroyed the oil platforms, and this was a breach of Article X, paragraph 1. Second, when it did so it was not acting lawfully in self-defence. Third, its destruction of the oil platforms was in no sense necessary to protect the essential security interests of the United States. Of course, once Iran makes out the first of these propositions, the burden of proof of justification or excuse shifts to the United States. But Iran has not taken refuge in considerations related to the burden of proof: it has made its substantive arguments on all three points. Responding as we have on issues of self-defence and essential security interests, it has been necessary for Iran to some extent to anticipate what the United States will say and in effect to rebut those points in advance.

10. Now, however the burden of proof may be distributed in relation to these three basic propositions, what is perfectly clear is that they arise exclusively between Iran and the United States. There is no suggestion here that the United States could qualify as entitled to exercise some putative right of collective self-defence on behalf of any other State: the conditions for collective self-defence as you laid them down in *Nicaragua* are in no way present here, and indeed so far the United States hardly argues to the contrary. So the legal issues raised by Iran's claim arise exclusively between Iran and the United States, and concern no other State.

11. Nonetheless in order to assess Iran's case against the United States, it will be necessary for the Court to take into account the overall context in which the transactions and events occurred, as it did in *Nicaragua*. The complete failure of the United States to do this, so far, is a remarkable feature of its pleadings. To summarize, while the issues of State responsibility arising from the

breach of this bilateral treaty are necessarily bilateral issues, the *context* in which those legal issues arose is not merely bilateral. The Court can decide whether the destruction of the platforms was a violation of Article X, paragraph 1, without regard to the legal position of any other State. But in considering the possible United States defences based on self-defence and essential security interests, a broader consideration of the factual context of the years 1987 and 1988 is inevitable.

12. To take an example — the missile attack on the *Sea Isle City* which Mr. Sellers so ably discussed yesterday — Iran does not doubt that the *Sea Isle City* was hit by a missile on 16 October 1987. But because this was — I cannot say the *casus belli* — I suppose we have to say *casus destructionis* — in relation to the Reshadat and Resalat platforms, Iran has to respond to the United States assertion that Iran was responsible for the missile attack. Of course, one response is a legal argument: even if hypothetically Iran was responsible for firing a missile from 100 km away at Kuwait, and even if it was lucky enough to hit a reflagged Kuwaiti tanker with no loss of life, this was not an armed attack on the United States and it did not justify the destruction of the platforms. That answer — you have heard Professor Bothe give it — is legally convincing. But Iran goes further. It denies the fact of its responsibility. And that presents a problem. The claim that Iran was responsible for this missile is a pure assertion by the United States. There is no direct evidence — no AWACS plot showing the trail of the missile from areas under Iranian control, no missile fragments — sheer assertion.

13. Mr. President, Members of the Court, yet again Iran has to make a defence in advance; and what is more, it has apparently to prove a negative, that it was *not* responsible for the missile. In the context of a long and desperate conflict the proof of a negative is more than usually difficult. In this exercise, Iran cannot be limited to arguments based on the range of missiles and the still indistinct images shown on belatedly produced satellite photos. It is highly relevant to point out that while there was no track record whatever of Iran firing missiles at neutral ships or ports, Iraq did so on a number of occasions, in some cases hitting, in some cases missing. This is done not with a view to having the Court condemn Iraq. It is done exclusively to enable you to assess, in its true context, the United States assertion that Iran fired a missile from 100 km away without any targeting assistance and somehow managed conveniently to hit this one reflagged ship.

14. Similar considerations apply to the incident involving the U.S.S. *Samuel B. Roberts*, which Mr. Bundy dealt with this morning. Again Iran is in effect called on to prove a negative, that it did not lay the mine that hit the *Samuel B. Roberts*. Again, Mr. Bundy has pointed to the capacity and propensity of Iraq to attack friendly shipping as far south as the Straits of Hormuz, including by mines. Again, he did not do so with a view to the Court making any final determination on the point — as to which, in any event, the United States bears the burden of proof. Again, this is a necessary part of the context which the Court has to take into account in reaching its conclusion on the issues raised by these two deliberate United States attacks on Iranian commercial facilities in the Persian Gulf.

15. My second observation is perhaps implicit in what I have said already. Iran has limited itself in these proceedings to claims concerning two specific United States actions on two days against specific commercial targets. It did not bring a wider range of claims which were open to it, although it has expressly reserved its position on these wider claims[78]. The Court, I might say, has itself further narrowed the scope of the case by eliminating Article IV of the Treaty of Amity from the calculation and significantly limiting the legal significance of Article I. The result is a clear, narrowly focused claim by Iran. It might be more accurate to say, two clear, narrowly focused claims, each relating to attacks on a single day. Thus, as you recognized in your Judgment on the Preliminary Objection, you will have to consider separately the application of Article X, paragraph 1, to each of these separate attacks, and you have to consider separately the United States defences as they apply to each of them. It is the United States that has sought to raise generic claims and counter-claims, which was sought on the basis of a few disputed incidents to advance the claim of a generic armed attack by Iran against the United States. Iran at no stage suggested that there was a general armed attack by the United States on it, even if it might have had greater cause to do so. So it has been necessary to review the general situation of the Iraq-Iran war to show that these generic United States claims are without any foundation. We will do the same in more detail for the counter-claims next week.

[78]See Reply of Iran, p. 226.

16. Mr. President, Members of the Court, in our view we come back to the specific claims, on which Iran first made out its Application. Iran is confident that the Court will assess these in their context with all its customary care. When you have done so, Iran is left in no doubt that you will conclude that by these astonishing instances of the destructive capacity of the United States, overshadowing by any measure anything that can possibly be held in Iran, the result is the international responsibility of the United States under paragraph 1 of the Treaty, read, of course, in the context of general international law against which all treaties have to be read and applied.

17. Mr. President, Members of the Court, this concludes Iran's presentation in the first round of these proceedings. We thank you for your patient attention.

The PRESIDENT: Thank you, Professor Crawford.

This marks the end of today's sitting. The Court will meet again, starting on Friday 21 February at 10 a.m., to hear the first round of oral argument of the United States of America, both on the claims of Iran and on the counter-claim of the United States. I would take this opportunity to remind you that on Friday 28 February at 10 a.m., following that presentation, Iran will conclude its first round of oral argument, with respect to the counter-claim. Thank you. The Court is adjourned.

The Court rose at 5.05 p.m.

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