*CR 2003/15*

**International Court of Justice**

**THE HAGUE**

**Cour internationale de Justice**

**LA HAYE**

**YEAR 2003**

***Public sitting***

***held on Monday 3 March 2003, at 10 a.m., at the Peace Palace,***

***President Shi presiding,***

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

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**VERBATIM RECORD**

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**ANNÉE 2003**

***Audience publique***

***tenue le lundi 3 mars 2003, à 10 heures, au Palais de la Paix,***

***sous la présidence de M. Shi, président,***

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

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**COMPTE RENDU**

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

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

M. Couvreur, greffier

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Ms Laura Romains, United States Embassy, The Hague,

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The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the second round of oral argument of the Islamic Republic of Iran. Iran will take the floor this morning until 1 p.m. and this afternoon, from 3 p.m. to 4.30 p.m. on its own claims. Thus, I shall now give the floor to Mr. Bundy. Mr. Bundy you have the floor, please.

Mr. BUNDY: Thank you, Mr. President.

## THE RELEVANCE OF THE FACTUAL CONTEXT OF THE CASE AND THE UNITED STATES SUPPORT FOR IRAQ

1. Mr. President, Members of the Court, in his closing remarks last Wednesday, the distinguished Agent of the United States claimed that Iran had given the Court an "amazing performance" in its first round presentation by omitting or denying well-established facts held to be true by informed observers in the Persian Gulf (CR 2003/13, p. 45, para. 22.2). If "amazing performance" there was, it was that of the United States which, throughout its entire four-day presentation systematically refused to discuss the essential background facts which place the whole motives — the whole motives — underlying the United States attacks on Iran's oil platforms in their proper context and reveal what the real aims of the United States were during the Iran-Iraq war.

2. Symptomatic of this approach was the fact that every one of the United States counsel began their stories in 1984, a full four years after the Iran-Iraq war had begun. Apart from the Agent's brief acknowledgment that Iran was not responsible for starting the war, there was not a single mention of the events that transpired in the years 1980 to 1983, or of the United States unabashed support for Iraq during this period and afterwards.

3. Now, the reason for this silence is obvious. It is not in the United States interest to recall the fact that Iran was forced to take measures of self-defence as a result of a conflict for which it bore no responsibility. It is not in the United States interest to inform this Court that its own documentary exhibits show that there was not a single allegation of an Iranian attack on shipping carried out against either United States or neutral shipping during this period. It is not in the United States interest to acknowledge that it was Iraq that brought the war to the Persian Gulf. And

it is not in the United States interest to tell the truth to this Court about what it was doing to support Iraq during this period.

4. According to the United States Agent, the actions that Iraq took to threaten the free flow of commerce and navigation in the Persian Gulf are "simply irrelevant to the issues before the Court" (CR 2003/13, p. 47, para. 22.6). And according to Professor Matheson, Iran engaged in no more than "uninformed speculation" about the United States motives and dealings with Iraq throughout the war (CR 2003/12, p. 45, para. 18.38). I will respond to each of these contentions in my presentation.

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**1. Iraq's attacks on neutral shipping and United States support for Iraq**

5. Let me turn to the facts which were ignored by our opponents.

6. According to sources which the United States itself has submitted, from January 1981 to May 1984, Iraq attacked no less than 56 commercial vessels in the Persian Gulf (Counter-Memorial and Counter-Claim of the United States, Exhibit 9). Iraq's attacks caused massive damage. They were indiscriminate in nature; and they impaired the very freedom of commerce under the Treaty of Amity which the United States says it was trying to preserve. As informed observers noted, Iraq's policy was to "shoot first and identify later" (Memorial of Iran, Exhibit 15). Many vessels struck Iraqi mines; others were hit by rockets and missiles.

7. Both Parties agree that the present proceedings concern claims under Article X, paragraph 1, of the Treaty of Amity, not claims against Iraq. The United States, however, has emphasized that its essential security interests lay in protecting the free flow of commerce in the Persian Gulf and the safety of its ships and personnel (CR 2003/12, p. 38, paras. 18.17, 18.25). But what did the United States do about these kinds of unilateral attacks by Iraq? Nothing. It made no attempt to put an end to the very kinds of attacks which it now says that it could be justified in using armed force against Iran. In short, the United States did nothing to protect the very interests which it now claims were so essential.

8. In fact, it was precisely while these attacks were being carried out that the United States began its policy of supporting Iraq in its war efforts. In 1982 alone, documents filed by the United

States reveal that Iraq carried out 22 attacks against shipping in the Persian Gulf (Counter-Memorial and Counter-Claim of the United States, Exhibit 9). There were no reports of any Iranian attacks. Neither of these facts was mentioned by Mr. Beaver, who placed all the blame for attacks on neutral shipping on Iran. What was the United States response to these attacks? First, the United States Government removed Iraq from its list of States supporting terrorism thereby freeing up hundreds of millions of dollars in credits for the Iraqi régime. Second, the United States and President Reagan, in 1982, signed a National Security Decision Directive providing that the United States would do whatever was necessary to prevent Iraq from losing the war.

9. Mr. President, Members of the Court, if you want to know what the security interests of the United States were at the time, you need to look no further than the National Security Decision Directive. As its very title demonstrates, it was directly concerned with perceived United States security interests in the region.

10. Now, the United States is determined that you should not see this document. One can imagine that the United States does not want the international community to see this document either in the light of current events in the region. But we know the substance of what it says because its author has provided sworn testimony before a United States federal court about its contents. And in short and simple terms, it stated that the United States would do whatever was necessary to prevent Iraq from losing the war with Iran (Reply of Iran, Exhibit 10. See also, tab 6 to Book One of the judges' folders provided by Iran to the Court).

11. In two rounds of written pleadings and again in oral presentation last week, the United States has not denied either issuing the National Security Decision Directive in question or what it says. If the United States decides to do so on Wednesday, then let it show the document to the Court so that the Court can judge for itself; but unless and until that happens, Iran's account stands unrebutted.

12. In 1983, Iraq attacked a further 14 ships (Counter-Memorial and Counter-Claim of the United States, Exhibit 9). There were no reports — no reports — of any Iranian attacks. And Iraq also started to use chemical weapons against Iran.

13. What was the United States response? In December 1983, Donald Rumsfeld visited Saddam Hussein in Baghdad to expand bilateral co-operation between the United States and Iraq. He did not criticize Iraq for its attacks on shipping.

14. How, in these circumstances, can it possibly be argued that the United States policies were motivated by a desire to protect shipping in the Persian Gulf when the United States did nothing whatsoever to prevent Iraq from taking the war to the Persian Gulf?

15. Let me take a specific example of Iraqi conduct to put matters in context. *Jane's Intelligence Review*, which is a publication on which Mr. Beaver relied so extensively last week, confirmed that on 27 March 1984 the tanker *Filikon L*. was hit by an Iraqi missile (Counter-Claim of the United States, Exhibit 4).

16. Mr. President, the *Filikon L*. was a Greek tanker chartered to the Kuwait Petroleum Corporation that had been loading at Kuwait's Mena Al Ahmadi oil terminal just before it was hit by a missile. We hear a lot of speculation from the other side about Iranian missiles fired at Mena Al Ahmadi. But this attack was unquestionably Iraqi. And it was directed at a tanker belonging to a so-called or supposedly "friendly" State — Kuwait.

17. What was the reaction of the United States to these kinds of attacks? First, in 1984 Vice-President Bush intervened with the United States Export-Import bank to provide hundreds of millions of dollars in credits to Iraq (Freedman Report, Reply of Iran, Vol. II, pp. 14-20). Second, in November 1984, Tarik Aziz was invited to the White House to re-establish diplomatic relations between the United States and Iraq.

18. Throughout the balance of 1984, Iraq attacked no less than 52 ships (Counter-Memorial of the United States, Exhibit 9). Iran, on the other hand, was recognized by the General Council of British Shipping, another of the United States preferred authorities, as having adopted a "defensive rather than aggressive stance in the so-called tanker war" (Counter-Memorial of the United States, Exhibit 2).

19. In the meantime, Iraq enjoyed the support not simply of the United States, but that of other allies. A 1987 Staff Report to the United States Senate Foreign Relations Committee confirmed that Kuwait was permitting the use of its airspace for Iraqi sorties against Iran, was opening its ports and territory for the transhipment of war material destined for Iraq, and was

providing billions of dollars to finance the Iraqi war effort. That Senate Report concluded: "In clear and unmistakable terms, Kuwait took sides." (Memorial of Iran, Exhibit 28, p. 37.)

20. Now even before the United States commenced its reflagging of Kuwaiti ships, it engaged in further provocative action by using its warships to prevent Iran from exercising its legitimate right of visit and search.

21. In May 1986, for example, an Iranian warship hailed the United States flag merchant vessel, the *President McKinley*, while it was transiting the Gulf of Oman (Memorial of Iran, Exhibit 30, p. 550). A United States destroyer operating in the same area warned the Iranians to stay five miles away from the ship, thus preventing Iran from exercising a right which the United States admits was fully legitimate. This denial of Iran's fundamental rights as a belligerent was exacerbated by the subsequent decision of the United States to reflag and escort ships travelling to Kuwait. Iran made extensive use of its right of visit and search in the Persian Gulf during the war. But the actions of United States warships made any attempt by Iran to verify the cargo of many of these ships impossible.

22. The United States has sought to argue that its reflagging policy was designed to protect shipping in the Persian Gulf. That was not the view of the Chairman of INTERTANKO, one of the other authorities cited by the United States last week. He very clearly stated in May 1987 that the United States policy of reflagging Kuwaiti ships was "counterproductive" because it increased tension and endangered non-United States flag vessels (Counter-Memorial of the United States, Exhibit 1, p. 32). This was also the view of other highly placed figures who observed that the United States reflagging effort simply assisted Iraq while it ignored the fact that Iraq had started both the land war and the tanker war (Memorial of Iran, Exhibits 12 and 32). And meanwhile, Iraq's attacks on neutral shipping continued right up to the end of the war.

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**2. The relevance of United States conduct**

23. Mr. President, Members of the Court, I have placed on the screen and in your folders at tab 1 a time line summarizing the steps that the United States took to support Iraq during the eight-year war. At the same time, to use the words of the former Secretary-General of the United

Nations, the United States adopted a policy of "unremitting hostility" towards Iran (Reply of Iran, Exhibit 6). Amongst the hostile actions that the United States took were the two attacks on Iran's oil platforms which are the subject of this case. In such circumstances, it is understandable that Iranian officials, such as the Speaker of the Majlis, Mr. Rafsanjani, expressed exasperation on occasions at the extraordinarily short-sighted policies of the United States.

24. What is the relevance of all this to the issues before the Court? To answer that question, I would respectfully ask the Court to consider a second question. Why, why did the United States adopt such fundamentally different policies with respect to Iraq and Iran throughout the war? We know that Iraq was responsible for starting the war. We know that Iraq was responsible for using terrible weapons in the prosecution of that war. We know — indeed, it was expressly admitted by counsel for the United States during the jurisdictional phase — that Iraq started the "tanker war" (CR 96/12, p. 23 (Neubauer)). And we know that Iraq attacked the U.S.S. *Stark*. Yet, despite all this, the United States destroyed Iran's oil platforms at the very same time it continued to support Iraq. *Why?* The United States had a Treaty of Amity with Iran, not Iraq. It owed treaty obligations of freedom of commerce and navigation to Iran, not Iraq.

25. The answer is straightforward. It does not involve any alleged United States interests to keep the Persian Gulf safe for shipping. That argument is a nonsense when considered against the background of Iraq's responsibility for starting the tanker war and the United States failure to do anything about those attacks. Rather, as the 1982 National Security Directive Decision clearly stated, the United States was driven by a fundamental policy not to allow Iraq to lose the war. *That* was the real security interest of the United States, and it prefigured how the United States acted towards each of the belligerents throughout the course of the war.

26. Counsel for the United States argues that Iran's conclusions about the United States motives and dealings with Iraq are "mere uninformed speculation" (CR 2003/12, p. 45, para. 18.38). Let me test that contention against the documentary record.

27. The United States motives — its genuine security interests — have been spelled out in black and white by many of the United States highest government officials. I will not read these quotes again. You can see them on the screen and in tab 2 of your folders. But they include

unambiguous statements from three former Secretaries of State, an Assistant Secretary of Defence, a National Security Council staff member, and the Defence Department's head of anti-terrorism.

28. One thing is clear. These sources do not constitute "uninformed speculation". Indeed, the consistent pattern of statements emanating from the highest levels of the United States Government is incontrovertible evidence of two things. *First*, the United States security interests were not identified as being concerned with the protection of neutral shipping in the Persian Gulf. The United States motives were to support Iraq. *Second*, in the implementation of this policy, the United States was predisposed, at every turn of the road, to turn a blind eye to Iraqi aggression and to "teach the Iranians a lesson", as one high level United States government official put it (Memorial of Iran, Exhibit 51).

29. It is in the light of this factual background, Mr. President, that the Court should judge the legality of the United States attacks against Iran's offshore oil platforms under Article X, paragraph 1, of the Treaty of Amity.

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30. Mr. President, I thank the Court for its attention and I ask that the floor now be given to Professor Momtaz. He will be followed by Mr. Sellers and myself on issues of fact which continue to divide the Parties. And then we will subsequently turn to the law with presentations from Professor Pellet, Professor Bothe and Professor Crawford. And the Agent will return at the end to offer concluding remarks and to present Iran's submissions on its claims. Thank you very much Mr. President.

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

M. MOMTAZ : Au nom de Dieu, clément et miséricordieux.

## L'ENVIRONNEMENT HOSTILE À LA RÉPUBLIQUE ISLAMIQUE D'IRAN A ANNIHILÉ SES EFFORTS DIPLOMATIQUES EN FAVEUR DE LA LIBERTÉ DE NAVIGATION DANS LE GOLFE PERSIQUE

1. Monsieur le président, Madame et Messieurs les juges, dans sa plaidoirie introductive, M. William Taft, le distingué agent du Gouvernement des Etats-Unis, reproche à la République

islamique d'Iran d'avoir gardé, dans ses plaidoiries, le silence sur les efforts diplomatiques déployés par son pays ainsi que d'autres gouvernements, et ce à partir de 1984, pour persuader l'Iran de mettre un terme aux prétendues attaques contre la navigation neutre dans le golfe Persique[1].

2. Monsieur le président, les Etats-Unis font remonter leurs efforts diplomatiques à 1984 comme si avant cette date la navigation neutre dans le golfe Persique s'effectuait sans entrave et qu'aucun danger ne la menaçait. Les attaques menées par l'aviation de l'Iraq contre les navires neutres aussi bien à l'intérieur qu'à l'extérieur de la zone d'exclusion de l'Iraq auxquelles j'ai eu l'occasion de me référer lors de ma première plaidoirie attestent que tel ne fut pas le cas. En effet, au cours de cette période, l'Iraq attaqua quelque cinquante-six navires de commerce neutres. Chiffre confirmé par les Etats-Unis eux-mêmes[2]. On est dans ces conditions en droit de se demander pourquoi les Etats-Unis ne se sont pas inquiétés des atteintes ainsi portées à la libre navigation neutre et n'ont entrepris aucune action pour y mettre un terme.

3. A l'opposé des Etats-Unis, la République islamique d'Iran s'est préoccupée dès le déclenchement du conflit armé des atteintes portées à la libre navigation et des attaques menées contre les pétroliers battant pavillon neutre. Pour y mettre un terme et sauvegarder le libre flux du pétrole à travers les voies de navigation du golfe Persique dont il dépendait exclusivement pour l'exportation de son pétrole vers le marché international, l'Iran n'épargna aucun effort diplomatique. Les Etats-Unis ont non seulement refusé d'appuyer ces efforts, mais les ont complètement passés sous silence tant dans leurs écritures qu'au cours de leurs plaidoiries orales de la semaine dernière.

4. C'est ainsi, Monsieur le président, que l'Iran, soucieux d'assurer la sortie sans entrave du Chatt-el-Arab (Arvand-Roud) de soixante-trois navires de commerce neutres pris au piège lors de l'agression de l'Iraq, accepta qu'ils arborent, comme le représentant spécial du Secrétaire général Olaf Palme le suggérait, le pavillon des Nations Unies pour pouvoir quitter la zone des combats et accéder aux eaux internationales. L'intransigeance de l'Iraq qui insistait pour qu'ils portent le pavillon iraquien, et ce au mépris des dispositions pertinentes du traité relatif à la frontière et au

[1] CR 2003/9, p. 11.

[2] Counter-Memorial and Counter-Claim of the United States, Exhibit 9.

bon voisinage du 13 juin 1975 entre l'Iran et l'Iraq, fit échouer cette opération. Tous ces navires neutres ont été perdus à jamais et leurs épaves sont encore visibles dans le Chatt-el-Arab[3].

5. Monsieur le président, dans leurs plaidoiries, M. Taft, l'agent des Etats-Unis[4], ainsi que M. Beaver[5] ont persisté à qualifier la zone de guerre instituée par l'Iran au début du conflit de zone d'exclusion et ceci pour brouiller les pistes. Ils ont prétendu que l'Iran refusait aux navires de commerce neutres qui ne se rendaient pas dans les ports iraniens la possibilité de naviguer à travers cette zone. Ils ont soutenu que l'Iran en leur interdisant l'accès de sa zone de guerre, les forçait en fait à naviguer dans les eaux peu profondes, donc plus périlleuses pour la navigation, situées au sud du golfe Persique. Les Etats-Unis prétendaient enfin que l'Iran, en poussant ces navires vers ses plates-formes, cherchait à transformer ces navires en autant de proies faciles pour sa marine de guerre. Ces affirmations, Monsieur le président, sont dénuées de tout fondement.

6. En effet, quatre mois après le début du conflit, plus précisément le 21 janvier 1981, à l'initiative du ministère iranien des affaires étrangères, même les navires de commerce neutres qui ne se dirigeaient pas vers les ports iraniens furent autorisés à emprunter les couloirs de navigation situés dans la zone de guerre de l'Iran. Pour ce faire, les commandants de ces navires étaient priés de communiquer aux autorités navales iraniennes les caractéristiques de leur navire et l'heure approximative à laquelle ils comptaient s'engager dans la zone de guerre de l'Iran[6]. Contrairement aux allégations des Etats-Unis, c'est donc de leur propre gré que les navires de commerce neutres ont choisi leur itinéraire et que certains d'entre eux se sont engagés dans les eaux situées dans la partie sud du golfe Persique. Dans ces conditions Monsieur le président, la zone instituée par l'Iran ne saurait être qualifiée de zone d'exclusion. La création de cette zone a été tout à fait conforme au droit de la guerre sur mer puisqu'elle n'excluait pas la navigation de commerce neutre et prévoyait, contrairement à la zone d'exclusion de l'Iraq, des dispositions pour en assurer la sécurité et ce en prévoyant des couloirs de navigation pour le passage de ces navires arborant un pavillon neutre.

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[3] Cameron R. Hume, *The United Nations, Iran and Iraq How Peacemaking Changed*, Indiana, University Press, 1994, page 40; *Yearbook of the United Nations*, vol. 34, 1980, p. 315; S/14214.

[4] CR 2003/9, p. 22.

[5] CR 2003/10, p. 30.

[6] Notice to Mariners 23/59 du 21 janvier 1981, A. De Guttry et N. Ronzitti, *The Iran-Iraq war (1980-88) and the Law of Naval Warfare*, Cambridge, 1993, p. 38.

7. Monsieur le président, le recours de l'aviation iraquienne à partir de 1983 à de super-Etendard équipés d'Exocet capables de détruire avec une très grande efficacité leur cible fut une nouvelle source de graves préoccupations pour l'Iran. Pour éviter l'obstruction des voies de navigation du golfe Persique par lesquelles la totalité de son exportation de pétrole transitait, l'Iran mit en branle une nouvelle fois sa diplomatie. C'est ainsi qu'il suggéra, le 29 octobre 1983, que le Conseil de sécurité interdise, et je dis bien interdise, toutes hostilités dans les eaux du golfe Persique[7]. Les préoccupations de l'Iran dans ce domaine furent relayées par le Pakistan et le Nicaragua, membres à l'époque du Conseil de sécurité et incluses dans le projet de résolution 540 présenté au Conseil de sécurité.

8. Ce projet de résolution, tout en affirmant le droit à la liberté de commerce dans les eaux internationales, demandait «aux belligérants de cesser immédiatement toutes hostilités dans la région du Golfe» Persique. Les Etats-Unis qui ont insisté à satiété tout au long de leurs plaidoiries sur le fait que toute atteinte à la liberté de navigation dans le golfe Persique mettait en cause leurs intérêts vitaux en matière de sécurité auraient dû tout naturellement saisir cette occasion pour exprimer leurs préoccupations et condamner les attaques menées par l'aviation iraquienne contre les pétroliers battant pavillon neutre dans le golfe Persique. L'examen du compte rendu des débats du 31 octobre 1983 du Conseil de sécurité consacré à l'examen de ce projet de résolution révèle que le représentant des Etats-Unis a brillé au cours de cette réunion du Conseil de sécurité par son silence[8].

9. La résolution 540, adoptée le 31 octobre 1983 par le Conseil de sécurité[9] ne mit malheureusement pas un terme aux attaques menées par l'Iraq contre les pétroliers neutres. (Monsieur le président, le texte de cette résolution 540 adoptée le 31 octobre 1983, ainsi que le texte des onze autres résolutions adoptées par ce même Conseil en relation avec le conflit armé opposant l'Iraq à l'Iran figurent à l'onlget n°4 pour ce qui est de la version française de ces résolutions et à l'onglet n°5 pour ce qui est de la version anglaise dans le dossier des juges pour le second tour.) Monsieur le président, malgré l'adoption de cette résolution les attaques de l'Iraq

[7] AFP 29 octobre 1983.

[8] S/PV 2493 - 31 octobre 1983.

[9] Voir dossier d'audience du second tour, onglets n$^{os}$4 (version française) et 5 (version anglaise).

contre la navigation neutre continueront. Elles seront plus nombreuses et plus dévastatrices de sorte que l'Iraq fut à même de perturber gravement, au cours de cette période, l'exportation du pétrole iranien à partir du terminal pétrolier de l'île de Kharg.

10. Quelle fut l'attitude des Etats-Unis d'Amérique face à ces attaques menées au mépris de la résolution 540 du Conseil de sécurité ? On était en droit de s'attendre à ce qu'ils réagissent promptement et énergiquement, pour sauvegarder la liberté de navigation et préserver ainsi leurs intérêts essentiels en matière de sécurité. Ils n'en firent paradoxalement rien. La seule explication plausible est que les Etats-Unis n'attribuaient pas les attaques menées à cette époque à l'Iran, d'où leur inaction. Visiblement, selon nos adversaires, seules les prétendues attaques imputées à l'Iran mettaient en cause les intérêts essentiels des Etats-Unis d'Amérique en matière de sécurité.

11. La même remarque s'impose pour ce qui est de l'attitude des Etats arabes, plus particulièrement ceux riverains du golfe Persique, face aux attaques menées contre les pétroliers dans le golfe Persique. Ces Etats ont préféré garder le silence et ne pas réagir aux raids iraquiens contre les pétroliers alors même que dans certains de leurs propres pavillons n'ont pas été épargnés au cours de ces attaques. Par contre, la réaction de ces mêmes Etats arabes riverains du golfe persique furent des plus vives au sein des instances telles que la Ligue arabe et le Conseil de la coopération du Golfe quand les Etats-Unis prétendirent que les attaques de navires de commerce neutres étaient imputables à l'Iran, preuve s'il en est de l'alignement de ces Etats sur l'Iraq.

12. L'alignement des Etats arabes riverains du golfe Persique fut à l'origine de leur initiative au Conseil de sécurité tendant à condamner les prétendues attaques des navires de commerce neutres par l'Iran. Le résultat de la démarche de ces Etats fut la résolution 552 du Conseil de sécurité adoptée le 1er juin 1984[10]. (Je vous renvoie une nouvelle fois au dossier des juges où vous trouverez le texte de cette résolution adoptée le 1er juin 1984 sous l'onglet no 4 en ce qui concerne la version française et sous l'onglet no 5 en ce qui concerne la version anglaise.) Cette résolution à laquelle les Etats-Unis se sont plusieurs fois référés lors de leurs plaidoiries, faut-il le rappeler, ne condamne pas l'Iran. Elle condamne uniquement les «attaques lancées récemment contre les navires marchands à destination ou en provenance de ports d'Arabie Saoudite et du Koweït». Cette

[10] Voir dossier d'audience du second tour, onglets nos 4 (version française) et 5 (version anglaise).

résolution reste malheureusement muette sur les attaques iraquiennes contre les navires marchands à destination ou en provenance de l'Iran. D'ailleurs, l'Iran ne manqua pas de protester et de mettre en doute l'impartialité du Conseil de sécurité qui, en fait, aboutit à encourager les raids menés par l'aviation iraquienne contre les navires de commerce neutres[11].

13. L'alignement des Etats arabes riverains du golfe Persique doit être incontestablement mis à l'actif de la diplomatie de l'Iraq qui a su dès le début du conflit s'attirer la sympathie et le soutien de la majorité des Etats arabes. Ce résultat a été acquis en faisant croire que la République islamique d'Iran présentait un danger pour la sécurité du monde arabe et que l'Iraq était le meilleur rempart contre les prétendues visées expansionnistes de l'Iran. C'est bien l'idée qui a été soutenue par le Koweït au sein du Conseil de sécurité en 1986[12]. L'invasion du Koweït par l'Iraq en 1990 dévoila ce subterfuge et amena les hautes autorités du Koweït à présenter leurs excuses pour l'attitude hostile adoptée à l'égard de l'Iran au cours du conflit armé qui l'a opposé à l'Iraq. Le ministre koweïtien des affaires étrangères a publiquement déploré «les anciennes résolutions» adoptées par le Conseil de la coopération du Golfe en affirmant «ces résolutions avaient été adoptées sous l'influence pernicieuse de l'Iraq»[13]. Ainsi à la suite des événements dans la région du golfe Persique, en 1990, fort heureusement on allait assister à la fin de cet environnement hostile du monde arabe à l'égard de l'Iran. C'est en tenant compte de cet environnement hostile à l'égard de l'Iran qu'il convient, Monsieur le président, d'évaluer les positions adoptées par les Etats arabes lors du conflit opposant l'Iraq à l'Iran.

14. Malgré cet environnement hostile, l'Iran n'a pas été pour autant découragé de poursuivre ses efforts diplomatiques en vue de sécuriser la navigation commerciale dans le golfe Persique. J'en veux pour preuve la lettre du représentant permanent de la République islamique d'Iran au Secrétaire général des Nations Unies de 1986 où il s'est exprimé en ces termes :

> *«I wish to reiterate that since the initiation of Iraqi attacks on ships in the Persian Gulf, we have repeatedly announced in international fora the readiness of the Islamic Republic of Iran to co-operate in every possible way with the Secretary-General of the United Nations and/or other relevant international*

[11] Memorial of Iran, Exhibit 23.

[12] S/PV 2664, 19 février 1986.

[13] Reply and Defence to Counter-Claim of Iran, Exhibit 13.

*organisations in securing the freedom of navigation in and the security of the Persian Gulf.»*[14]

15. Cette lettre du représentant permanent de la République islamique d'Iran aux Nations Unies resta malheureusement sans lendemain. En effet, comme le représentant permanent du Royaume-Uni aux Nations Unies sir Anthony Parsons le fera remarquer par la suite : *«there was no specific international condemnation of the Iraqi attacks and no serious attempts made to persuade or coerce Iraq into desisting from them»*[15]. L'environnement hostile qui prévalait à l'époque a été décisif dans l'adoption de cette position.

16. Avant de terminer mon intervention, j'aimerais, Monsieur le président, dire quelques mots de la série de notes verbales adressées par les Etats-Unis à l'Iran auxquelles les Etats-Unis se sont référés lors de leurs plaidoiries de la semaine dernière[16]. Les Etats-Unis considèrent que ces notes constituent autant de démarches diplomatiques auxquelles l'Iran n'a pas obtempéré. En fait, les quatre notes communiquées par les Etats-Unis constituent autant de menaces à peine voilées adressées à l'Iran.

17. La première note en date du 23 mai 1987[17] met en effet l'Iran en demeure de respecter le cessez-le-feu, de retirer ses forces du territoire de l'Iraq alors que ce dernier continuait d'occuper d'importantes positions et d'importantes portions dans le territoire de l'Iran.

18. La deuxième note datée du 18 juillet 1987[18] traite, Monsieur le président, essentiellement du «repavillonement» des pétroliers koweïtiens et mettait l'Iran en garde contre toute tentative de sa part de les intercepter et de les visiter. Il y avait là une véritable menace de la part des Etats-Unis et ce, en vue d'empêcher l'Iran d'exercer les droits que le *jus in bello* confère à tout belligérant au cours d'un conflit armé en mer.

19. La troisième note qui aurait été communiquée à l'Iran le 31 août 1987 sommait l'Iran d'accepter la résolution 598. Il y a lieu de préciser que l'Iran ne l'avait pas rejetée — cette résolution — de but en blanc et que des négociations étaient à cette époque en cours avec le

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[14] Counter-Memorial and Counter-Claim of the United States, Exhibit 2, p. 30.

[15] Observations and Submissions on the U.S. Preliminary Objection of Iran, Exhibit 16, p. 19.

[16] Voir CR 2003/9, p. 11, par. 1.7-1.8 et p. 13-14, par. 1.19 (M. Taft); CR 2003/10, p. 12-13, par. 8.2 et p. 56, par. 11.18-11.20 (M. Mattler); CR 2003/12, p. 39-40, par. 18.21-18.23 (M. Matheson); et CR 2003/13, p. 23, par. 20.19 (M. Mattler).

[17] Counter-Memorial and Counter-Claim of the United States, Exhibit 39.

[18] Counter-Memorial and Counter-Claim of the United States, Exhibit 42.

Secrétaire général des Nations Unies pour en assurer sa mise en œuvre[19]. Pourtant cette résolution ne condamnait pas l'Iraq. Les Etats-Unis, comme Gary Sick, ancien conseiller pour la sécurité nationale des Etats-Unis, le releva par la suite, ayant très clairement posé, lors de la négociation du projet de cette résolution 598, qu'ils n'accepteraient pas que l'Iraq soit désigné comme agresseur[20].

20. L'Iraq n'a pas saisi cette occasion qui lui était offerte pour mettre un terme au conflit armé et répondit à la bonne volonté de l'Iran, comme Gary Sick le fit remarquer d'ailleurs, par une intense attaque aérienne contre trente-sept agglomérations iraniennes au moyen de missiles Scud[21]. C'est dans ces conditions, Monsieur le président, que les Etats-Unis se sont crus autorisés de recourir à la force contre les plates-formes de Salman et de Nasr.

21. Enfin, la quatrième note diplomatique des Etats-Unis n'est en fait qu'une tentative de leur part de justifier la destruction de l'*Iran Ajr*. Cette note rapporte par ailleurs, et ce sans exprimer aucun regret, que trois marins iraniens ont été tués, et que deux autres ont été portés disparus.

22. Tels sont, Monsieur le président, les prétendus efforts diplomatiques, pour le moins ambigus, des Etats-Unis. Loin de contribuer au rétablissement de la paix, les Etats-Unis ont été au contraire à l'origine de l'intensification du conflit armé, et ce en violation de la résolution 598[22], résolution qui demandait à tous les Etats autres que les belligérants de faire preuve de la plus grande retenue et de s'abstenir de tout acte pouvant avoir une telle conséquence. Paradoxalement, les Etats-Unis se sont fondés sur l'échec de leurs prétendues démarches diplomatiques pour justifier la destruction des plates-formes pétrolières de l'Iran dans le golfe Persique[23].

Parvenu au terme de mon intervention, je vous serais reconnaissant, Monsieur le président, de bien vouloir appeler à la barre M. Sellers.

Merci, Madame et Messieurs les juges, de l'attention que vous avez bien voulu porter à mon intervention.

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[19] Memorial of Iran, Exhibit 39, lettre du 11 août 1987 du Représentant permanent de l'Iran aux Nations Unies.

[20] Memorial of Iran, Exhibit 9.

[21] Memorial of Iran, Exhibits 9 et 41.

[22] Voir dossier d'audience du second tour, onglets n$^{os}$ 4 (version française) et 5 (version anglaise).

[23] CR 2003/12, p. 40, par. 18.23 (M. Matheson).

The PRESIDENT: Thank you, Professor Momtaz. I now give the floor to Mr. Sellers.

Mr. SELLERS: Thank you, Mr. President.

## THE ATTACK OF OCTOBER 1987 ON THE RESHADAT PLATFORMS

Mr. President, Members of the Court, I will now turn to the facts concerning the October 1987 events, and I will deal with these in two parts, in response to the presentation of counsel for the United States on these issues. First, the alleged missile attacks on the *Sea Isle City*. It was this specific incident, the Court will recall, which the United States asserted at the time justified the attack on the platforms as an act of self-defence. Second, I will address certain disputed facts concerning the status of those platforms involved in the 1987 attack.

### A. The *Sea Isle City* incident

1. Mr. President, when Iran brought this case before the Court it knew that it had been accused, at the time of the relevant events, of firing Silkworm missiles at Kuwait, by both United States and Kuwaiti sources. It also knew — at least at that time — that the United States alleged that it had fragments of such missiles. And it knew that the United States would have satellite imagery and aerial reconnaissance photography of the Fao Peninsula. All these matters had been well publicized at the time.

2. In relation to the *Sea Isle City* incident, Iran finds itself in these proceedings — and in relation to those accusations — in the position of being asked to prove a negative. However, it should not be forgotten that it is the United States which must show that Iran carried out these attacks. It is the United States which is relying on the *Sea Isle City* incident both as a defence to Iran's claim and for the purposes of its counter-claim. The United States therefore should establish Iran's responsibility, and establish it with proper evidentiary proof. Iran is confident, however, that this burden cannot be met by the United States.

3. In this regard, it is not enough for counsel for the United States to rely on reports made by international shipping bodies and other such sources at the time suggesting that Iran was responsible for these attacks (CR 2003/9, p. 38, para. 4.7). Where these missiles came from, and the nature of the missiles which were fired were not and could not have been matters of public knowledge. And Iran was held responsible for these incidents specifically because of the kind of

statements made to the world media by the United States at the time, according to which it had obtained Iranian Silkworm missile fragments from the *Sea Isle City* and the *Sungari*. These statements were false, as I pointed out in the first round. The United States now tells us that no such fragments were found (CR. 2003/6, pp. 57-58, paras. 28-32).

4. In this regard also, counsel for the United States stated that it was fantasy to suggest that Iraq was responsible for these attacks (CR 2003/9, p. 39, para. 4.9). However, let me recall the context in which these incidents took place. Iraq was at great risk after Iran's offensive against the Fao Peninsula. At that time also, Iraq had been engaged for several years in an effort to internationalize the conflict, which included several well reported attacks on its purported allies. I referred to several such incidents in the first round, including Silkworm attacks by Iraq on Kuwaiti and Saudi vessels in the waters approaching Kuwait where the *Sea Isle City* was hit (CR 2003/6, pp. 64-65, para. 57). Mr. Bundy has just referred to the attack on the *Filikon L.* which had left Mina al Ahmadi port. Professor Freedman has also referred to such attacks as being part of Iraq's efforts to internationalize the conflict (Reply of Iran, Vol. II, para. 47).

5. Counsel for the United States denied that the missiles which hit the *Sungari* and the *Sea Isle City* could have been fired by Iraq from the air or from a vessel. He said they "could only have been launched from the ground" (CR 2003/9, p. 43). But how does he know this if no fragments were found from these two incidents? And on what basis does he treat as fantasy the possibility of Iraq firing such Silkworm missiles from the air on friendly targets? In response, I would note again the events reported in February 1988, which appear on the screen:

> "Iraqi bombers on successive nights dropped air-launched Silkworm missiles. One of them crashed into a fully-loaded Danish supertanker that had just left the port of Iraq's ally . . . Two other Silkworms dropped the following night roared past a U.S.-led convoy of reflagged Kuwaiti tankers before they crashed into the sea. Kuwait is also an Iraq ally." (Memorial of Iran, Exhibit 68.)

6. The attack on the *Stark* is also significant here. Several commentators, including United States commanders in the Persian Gulf at the time, have expressed the view that this attack may have been intentional (Memorial of Iran, Exhibit 55; Reply and Defence to Counter-Claim of Iran, Freedman Report, paras. 46 *et seq.*). Iran has supplied evidence that a civilian plane was converted by Iraq to carry missiles in order to avoid detection, as well as evidence that it was this kind of civilian plane which was used in the attack on the *Stark* (Reply of Iran, Vol. VI, Pakan Statement).

Why would Iraq do this if it did not intend to lay the blame on Iran? As Cordesman and Wagner, two authors relied on extensively by the United States, note the Iraqi plane which carried out the attack on the *Stark* was apparently carrying two Exocets, twice its rated capacity. And according to the same authors, the Iraqi pilot followed an unusual route, and alleged he received no warning signal from the *Stark*, which is described as "absurd", and then turned on his tracking radar seconds before firing, which he would only have done if he knew he was attacking a warship (*The Lessons of Modern War*, Vol. II, p. 556). Professor Freedman's discussion of this incident is also instructive (Reply of Iran, Vol. II, paras. 46-49). He notes one author reporting that "Reagan administration officials harbor suspicions that the *Stark* incident was not an accident, but a deliberate attempt on the part of the Iraqis to drag the United States into the war" (*ibid*., para. 47). He also notes that this policy was successful. Two days after the *Stark* incident President Reagan approved the announcement that the United States would reflag Kuwaiti tankers, and within three days the United States forces in the Persian Gulf were increased substantially (*ibid*., para. 48).

7. The attack on the *Sea Isle City* occurred a few months after the *Stark* incident. What could have been more effective for Iraq than having Iran held responsible for an attack from the Fao Peninsula? Iraq could have hoped that this would only encourage the United States to assist it in freeing the strategically important peninsula from Iranian occupation.

8. However, the United States did not attack the Fao Peninsula following the *Sea Isle City* incident, apparently because it did not believe that there were any Iranian Silkworm missiles on Fao. As I noted in my first round presentation (CR 2003/6, p. 61, para. 44), United States sources at the time said there were "no Silkworm missile sites on Fao, making a military strike on the area pointless" (Memorial of Iran, Exhibit 69). Moreover, all contemporaneous sources, including United States sources, had always only shown an Iranian Silkworm threat in the Straits of Hormuz, and nowhere else. The United States diplomatic démarche to Iran in July 1987 referred to Iran's testing of a Silkworm in the Straits of Hormuz in February 1987 (Counter-Memorial and Counter-Claim of the United States, Exhibit 42). It made no mention of any Silkworm attacks on Kuwait, although by that time, the United States now alleges, Iran had already fired two Silkworms in January at Kuwait from the Fao area. The Department of State Bulletin of October 1987, which I showed on the screen in my first-round presentation, again only referred to an Iranian Silkworm

threat in the Straits of Hormuz, although by that time Iran had allegedly carried out at least five Silkworm attacks on Kuwait (see Memorial of Iran, Exhibit 67). It is incredible that the United States would not have mentioned such an Iranian Silkworm threat off Kuwaiti waters if that threat had really existed at the time. However, there are no contemporaneous reports of an alleged pattern of Iranian Silkworm attacks on Kuwait. To the contrary, the evidence shows that no such threat from Iran was perceived to exist in that area.

9. Counsel for the United States makes much of its satellite imagery and the expert report of a United States Government analyst on this imagery (CR 2003/9, pp. 44 *et seq.*). However, the United States satellite imagery in fact also confirms Iran's position. The imagery does not show any operational Silkworm site on Iranian-held territory on the Fao Peninsula. These sites are bombed out, and the landscape ravaged, as can be seen clearly on the photographs provided by the United States in the judges' folders. In order to function a Silkworm missile site needs a complex of support equipment and trucks. The Chinese manufacturers' brochure details the 42 trucks of support equipment required (see Reply of Iran, Vol. VI, Youssefi Statement, Ann. C, pp. 4-8 and 4-9). None of these appear on any of the photographs produced. There is simply no sign of any activity on any of these disused Iraqi sites, not even, to use Hans Blix's phrase, of "any routine activity".

10. How then does the United States know where the missiles were fired from? In the United States letter to the Security Council after the incident (Memorial of Iran, Exhibit 73), in its Preliminary Objection (paras. 1.25-1.29 and map 2), and in the Kuwaiti officers' affidavit (Counter-Memorial and Counter-Claim of the United States, Exhibit 82), the missiles are stated to have come from the Fao Peninsula. There was no mention of an alleged fourth site on Iranian territory, at Nahr-e Owyeh, which is not on the Fao Peninsula. This allegation was made for the first time in the United States Counter-Memorial 15 years after the alleged facts. However, again, the satellite imagery does not show any sign of anything which looks like an operational missile site at Nahr-e Owyeh.

11. The United States equivocation as to where the missile was actually fired from is telling, and counsel for the United States general reference to the "Fao area" did nothing to clarify this (CR 2003/9, p. 40, para. 4.11). The fact is that the United States does not know from exactly which

direction the Silkworm was fired. Well, Mr. President, why does the United States not rely on its own evidence in this regard — the allegedly eyewitness reports of the Kuwaiti officers (Exhibit 82). The Kuwaiti officers' statement is precise that the missiles were fired from the Fao Peninsula or from the direction of the Fao Peninsula. However, it does not say that the missiles were fired from Iran nor does it say that any of the missiles were fired from Iranian-held territory on the Fao Peninsula. It is carefully drafted and there is not one word to this effect. However, as I showed in the first round, the south-southeasterly direction given by the Kuwaiti observers, observers who counsel for the United States confirms were familiar with the terrain, is clear. It shows that the missile could only have been fired from Iraqi-held territory on Fao.

12. Let me show on the screen again the south-southeasterly direction of the missile referred to by the Kuwaiti observers, superimposed on the map used by the United States in the judges' folders (tab 41). From this it can be seen that the *Sea Isle City* could have been hit by a missile on this trajectory, without any significant dog-leg, and that a missile on anything like this trajectory could only have come from a missile site on Iraqi territory or from Iraqi naval frigates which were operating in the waters behind Bubiyan Island (Memorial of Iran, Exhibit 18. See Observations and Submissions on the U.S. Preliminary Objection of Iran, Ann., para. 27). In other words, again, this evidence supports Iran's position.

13. The United States of course denies that there was a fourth Iraqi site on the Fao Peninsula at the specific co-ordinates referred to by Iran. It does not however specifically deny that there was a fourth Iraqi site at this time in this area (CR 2003/9, pp. 50-51). Iranian experts however have confirmed that there was such a site, and that missiles were fired from this site (see Youssefi Report, Vol. VI, paras. 21-22). The existence of such a site is in fact the only explanation of the Kuwaiti observers' testimony. I would note finally that the only fragments which were found are said to have come from the January and September attacks (Counter-Memorial and Counter-Claim of the United States, paras. 1.55-1.60). However, these fragments are now said to have disappeared, apparently having been recuperated by Iraqi forces after the invasion of Kuwait (Exhibit 82). This is a curious action considering how much military hardware the Iraqis left behind when they fled Kuwait.

14. In conclusion, Iraq had a history of attacking friendly States, and was sufficiently desperate to use any means "to drag the United States further into the war" (Reply and Defence to Counter-Claim of Iran, Vol. II, Freedman Report, para. 47). The Kuwaiti observers' testimony is only consistent with an Iraqi attack, and the satellite imagery and contemporaneous reports confirm Iran's statement that it had no operational missile sites either on the peninsula or on Iranian territory to the east. Iran must also point again to the lack of evidence produced by the United States. With its array of technology, the United States had detailed knowledge of all Iranian movements on Fao, it could intercept Iranian communications, and it could trace a missile like the Silkworm with AWACS. Moreover, the United States acknowledges that AWACS were present in the area at the time of the incident (Counter-Memorial and Counter-Claim of the United States, para. 1.74). However, there is no such evidence in the record.

15. Mr. President, Members of the Court. The United States asserted at the time that the attacks on the platforms were an act of self-defence in response to a prior armed attack on the *Sea Isle City*. The United States has not shown that there was such a prior armed attack by Iran. But even if it could show that Iran attacked the *Sea Isle City* and that this was an armed attack on the United States, can the United States also show, as it must, that the attack on the platforms was a necessary and proportionate response to Iran's alleged missile attack? Iran submits the answer is no. I will turn to the platforms in a moment, but let me first consider the question of necessity and proportionality in relation to attacks against ships in the area of Kuwait's Mina Al Ahmadi terminal. Kuwait developed "radar deflectors . . . to neutralise this threat". These reflectors were stationed in the vicinity of this terminal. General Crist, whose statement was referred to by counsel for the United States (CR 2003/10, pp. 45-47), noted that this "passive defensive measure" was entirely effective (Exhibit 44, para. 14). This was the necessary and proportionate response to any missile threat in this area, whether from Iran or from Iraq.

**B. The United States attack on the Reshadat oil platforms and the status of the platform**

16. This leads me to the platforms themselves. A number of key facts are not disputed in relation to the status of the platforms. First, that there were military personnel on these platforms. Second, that these personnel were engaged in defensive reconnaissance activities. Third, that they

had a radio and a Decca radar. Fourth, that these personnel were in communication with local naval units. Counsel for the United States makes much of these facts, but bear in mind they were facts put before the Court by Iran (see, also, CR 2003/10, pp. 35-36, paras. 10.6-10.9).

17. The Parties do however differ on a number of key points in relation to these platforms. Let me try to summarize them. Counsel for the United States argues first that documents found on the Reshadat platform and on the *Iran Ajr* show that the Reshadat platform was engaged in offensive activities (CR 2003/10, pp. 39-43). They do not. I will take these documents in turn. First, counsel for the United States referred to a document entitled "The Instructions for Deployment of Observers on the Oil Platforms in the Persian Gulf" (Exhibit 115). These "Instructions" were precisely what they were said to be — "Instructions for Observers". As counsel for the United States noted, they referred to the "establishment of communications" between the observers and fleet headquarters, and the "exchange of intelligence". These Instructions were drawn up in 1980, before the "tanker war" had begun. There is nothing sinister about these Instructions. They are normal and reasonable wartime measures. Moreover, they do not refer to any offensive measures.

18. Second, there is the "Operations Plan" found on the *Iran Ajr* (Exhibit 203). As counsel for the United States recognized, this was a "contingency" plan drawn up in 1984. It set out the defensive measures to be taken in the event of a United States supported attack by Iraq on Iran's islands, merchant vessels or oil facilities. Iran invites the Court to look at this document. Its purpose will be quite clear. Moreover, the United States Department of Defence's introductory comments on the document confirm that it relates to an hypothetical scenario (Exhibit 203, introductory letter, and pp. 7-9 and pp. 21-23).

19. The third document referred to by counsel for the United States consists of a series of messages from the Reshadat platform (Exhibit 118). These certainly do show a handful of examples of personnel on the platform tracking warships in their vicinity, albeit that by early September 1987 the radar is described as not working (Exhibit 116). But is it really surprising that the platforms were tracking warships in a time of war? The platforms were eminently vulnerable as experience showed. Moreover, the contingency "Operations Plan" I have just referred to confirms that what Iran feared was a co-ordinated attack on its oil facilities or its islands. Given

this real threat, Iran had every right to carry out such monitoring. This handful of messages, some no more than handwritten scraps of paper, do not however show any systematic tracking of commercial vessels. In particular, there can be no connection between the notes that a convoy allegedly including the *Sea Isle City* had passed near the platforms in August 1987, and the *Sea Isle City* incident almost three months later (CR 2003/10, pp. 42-42, para. 10.32). This is pure insinuation.

20. What then about the reports of shipping information services, and alleged eyewitness reports, of attacks in the vicinity of the platforms, and the efflorescence of red spots on the United States map in the judges' folder purporting to indicate such attacks (United States judges' folder, Book Two, tab 7)? There are a number of points to note here. First, it is true that there are allegations of a series of incidents, in particular in 1986, in the vicinity of the Reshadat platforms, although a number of these incidents involved Iraqi attacks on the platforms themselves, as counsel for the United States appeared to recognize (CR 2003/11, p. 51, para. 15.66). Second, a number of such incidents were said to involve Iranian helicopters. However, Iran's naval military helicopters operated out of Iran's islands during this period, and were not, and could not be used from the platforms (Reply of Iran, Vol. VI, Salehin Statement).

21. In any event, there are no reports of such helicopter incidents, or indeed of almost any other incidents in 1987 or 1988 in the vicinity of the platforms (see Reply of Iran, para. 3.78). Sources relied on by the United States, including INTERTANKO and the General Council of British Shipping, confirm that there were almost no incidents anywhere near the platforms in either of these years (Exhibit 10, p. 41; Exhibit 2, pp. 19, 21 and 23). This evidence, which is the United States evidence, belies the United States claim that the attacks on the platform were somehow necessary and effective in stopping incidents occurring in the vicinity of the platforms. There were no such incidents at that time. Indeed, the United States evidence also shows that the area south of the platforms through which Kuwaiti tankers had passed since 1985 had the lowest war insurance premium in the Persian Gulf (Exhibit 7).

22. Finally, and most importantly, there are no records at any time of any alleged attacks against any United States vessels or any vessels in which the United States allegedly had an interest anywhere near the platforms (see judges' folder, Book One, tab 11).

23. Mr. President, counsel for the United States poured scorn on the evidence produced by Iran showing that repairs were being carried out on these platforms and that they were due to come back on stream on 23 October 1987, only four days after they were attacked (Reply of Iran, Vol. IV, Hassani Statement, para. 16 and Ann. D; see also CR 2003/6, pp. 53-54). The evidence in question is a contemporary work report and affidavits of the NIOC personnel actually on the platforms and responsible for them at the time of these attacks. This evidence was filed with Iran's Reply and was not contested in the United States Rejoinder. Moreover, we note that counsel for the United States also relied on such evidence in its oral presentation (CR 2003/10, p. 36). The United States has produced no evidence in rebuttal of these issues, although here again with its constant monitoring of Iranian actions and communications in the Persian Gulf it should have been able to produce such evidence if it existed. Finally, as explained in Iran's first round, Iraq certainly regarded these platforms as vital economic targets (CR 2003/6, pp. 52-53). In Iran's submission, Iran's evidence must stand on this issue. The fact is that the platforms were about to produce oil again. The United States destruction of the platforms set this task back several years, until, after complete reconstruction of the platforms, they were again able to resume production.

**C. Concluding remarks**

24. Mr. President, Members of the Court, the October 1987 attack by the United States was not an act of self-defence in response to an armed attack by Iran. The evidence before you confirms this. The evidence also shows that, even if Iran had attacked the *Sea Isle City*, there were, to use General Crist's phrase "passive defensive measures" to be taken which were effective to counter this threat. In such circumstances, the attack on the platforms can at best only be seen as an illegal reprisal. The evidence also shows that there was no connection between these platforms and either the *Sea Isle City* incident or any other alleged incident involving United States vessels or vessels in which the United States purports to have an interest. This further confirms Iran's position that the attack on the platforms was an unjustified use of force.

25. The points I have just made apply irrespective of any alleged Iranian actions by military personnel on the platforms, because the United States does not show that any such actions affected United States vessels. What then of the alleged incidents involving third States vessels in the

vicinity of the platforms. There are three points here. First, this is a matter for these States themselves. It is not a matter for the United States. The United States is not the policeman of the world. Moreover, it does not even pretend to have been acting in collective self-defence. Second, United States attacks on these platforms were neither necessary or useful — as I pointed out there are almost no records of any incidents in the vicinity of the platforms in 1987 or 1988. Third, it is Iran's submission that the United States cannot rely in this case on even its broad interpretation of its essential security actions in protecting commerce in the Persian Gulf or a justification for attacking the platforms, when it was at the same time condoning or even assisting Iraqi attacks on such commerce and on these platforms.

26. The conclusion is that, on any reasonable reading of the facts, the United States has no justification for the October 1987 attack on the Reshadat platforms. Mr. President, that concludes my presentation. I would be grateful if, perhaps after the break, you would again call on Mr. Bundy, who will address the April 1988 attacks.

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

*The Court adjourned from 11.10 a.m. to 11.30 a.m.*

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

Mr. BUNDY: Thank you, Mr. President

## THE LACK OF JUSTIFICATION FOR THE DESTRUCTION OF THE SALMAN AND NASR PLATFORMS ON 18 APRIL 1988

### Introduction

1. Mr. President, Members of the Court, my presentation at this stage will focus on four issues discussed by the United States in its first round presentation, which are relevant to considering whether the United States attacks on the Salman and Nasr platforms on 18 April 1988 were justified, and the United States use of force against those platforms were justified under Article X, paragraph 1, of the 1955 Treaty.

2. First, I will discuss the United States persistent efforts to ignore Iraq's well-documented predilection to attack shipping by a variety of methods, including by mines. As with its arguments with respect to the "tanker war", the United States discussion of the *Samuel B. Roberts* incident simply assumes that every hostile mining action that occurred in the Persian Gulf during the course of the war was Iran's responsibility. But the documents filed by the United States itself demonstrate that such an assumption is unwarranted.

3. Second, I will show once again that there is no evidence — no evidence — that the Salman and Nasr platforms were ever engaged in any attack on United States shipping or that they had any connection with the mining incident involving the *Samuel B. Roberts*. And nothing that counsel for the United States said last week in that connection alters that fundamental conclusion.

4. Third, I will briefly revisit the events of 18 April 1988 themselves and I will address two key points which the United States has either ignored or seriously distorted in its first round presentation. Those two points are:

(i) The fact that the United States attacks on the platforms coincided, and were carried out in tandem, with the largest Iraqi offensive of the war since the Iraqi invasion of September 1980.

(ii) The fact that, according to the captain of the very United States vessel which led the attack on the Salman and Nasr platforms, neither of those platforms were the intended primary target on the day in question. Their destruction was gratuitous and was totally unnecessary to protect any security interests that the United States might have had.

5. In the fourth, and final part of my presentation, I will review very briefly the relevant events of 1988 following the attacks on the platforms. And in setting out these facts, I will show that the argument advanced by the United States last week that its attacks were effective in achieving a pacification of the "tanker war" are without justification (CR 2003/10, p. 49, para. 10.58).

**1. The United States ignores Iraq's own hostile actions including its use of mines**

6. With that introduction, let me turn to the question of mining. The United States seeks to create the impression that Iran was responsible for all mining in the Persian Gulf and that this

necessarily meant that Iran was responsible for the mine that hit the *Samuel B. Roberts*. But this line of argument ignores much evidence to the contrary.

7. Let me start with the incident involving the *Marshal Chuikov*, which is when the United States claims that Iranian mining commenced (CR 2003/9, p. 27, para. 3.6). The Court will recall that the *Marshal Chuikov* hit a mine on 16 May 1987. And it was on the following day, 17 May, that Iraq attacked the U.S.S. *Stark* in the same area of the Persian Gulf where the *Samuel B. Roberts* hit a mine.

8. Permit me to refer to four documents filed by the United States which place the *Marshal Chuikov* incident in its proper perspective, but which were ignored by our opponents in their first round presentation.

9. First, there is the contemporaneous report prepared by one of those so-called "authoritative third party sources" — *Lloyd's List* — relied upon by counsel for the United States. On 28 May 1987, just 12 days after the *Marshal Chuikov* hit a mine, *Lloyd's List* stated the following: "One theory canvassed in the Gulf is that sea mines have drifted down from the northern Iran-Iraq war zone." (Counter-Memorial and Counter-Claim of the United States, Exhibit 36.)

10. That account was entirely consistent with the report that the General Council of British Shipping prepared in 1988 and which I referred to in my first round presentation (Counter-Memorial and Counter-Claim of the United States, Exhibit 2, p. 48). These kinds of reports are hardly consonant with the United States automatic assumption that an Iranian mine was involved. Iraq, as has been amply demonstrated, engaged in extensive mining both in the northern war zone and elsewhere in the Persian Gulf as well.

11. Second, in July 1987 — this is two months after the *Marshal Chuikov* struck a mine, which the United States attributes to Iran —, the CIA prepared a secret intelligence report in which it stated the following: "As of late July 1987, there is no evidence that the Islamic Republic of Iran has been involved in the laying of sea mines in the Persian Gulf." (Counter-Memorial and Counter-Claim of the United States, Exhibit 46.) Recall that this is *after* the *Marshal Chuikov* incident.

12. Third, the United States has ignored the evidence — produced by its own naval authorities — that Iraq laid mines which struck vessels as far south as the *Straits of Hormuz*, that is even further than the position where the *Samuel B. Roberts* was hit (Memorial of Iran, Exhibit 16). I discussed this evidence in my first round presentation, but the United States failed to respond.

13. Fourth, there is the report prepared by the United States Central Command on disclosures that Iraq's military made about the location of its minefields prior to its invasion of Kuwait. What does that document say about Iraqi mining? This was a document prepared by United States officials. *First*, it notes that Iraq admitted that it laid mines in international waters; and *second*, it observes that Iraq was very reluctant to disclose the kind of targets that it was trying to hit when it laid such mines. If I can quote the words of the report: "In response to attempts to glean data on each minefield objective/target, the Iraqis were circumspect." (Counter-Memorial and Counter-Claim of the United States, Exhibit 37.)

14. Given Iraq's conduct during the Iran-Iraq war, including its attacks on United States and neutral shipping, Iraq's circumspection was scarcely surprising.

15. In considering the allegation that Iran was engaged in a systematic pattern of mining, it is also worth recalling, as Mr. Sellers noted last Friday, that with respect to the incident involving the *Bridgeton*, the United States reaction at the time was that it could not assign responsibility for that incident (Memorial of Iran, Exhibit 57). With respect to the mine that hit the *Texaco Caribbean* — a vessel carrying Iranian crude oil —, Iran itself sent a protest note to the Security Council and sent minesweepers to the area (Memorial of Iran, Exhibit 58, and Observations and Submissions on the U.S. Preliminary Objection of Iran, Exhibit 27).

16. As for the *Samuel B. Roberts*, at the end of the day, there is no direct evidence that an Iranian mine was involved. However, the documentary evidence supplied by the United States itself does attest to Iraq's capacity to sow mines throughout the Persian Gulf; and that evidence is ignored by the United States in attributing responsibility to Iran for all mining attacks.

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**2. The United States has failed to produce any evidence that the Salman or Nasr platforms were engaged in attacks on shipping**

17. Mr. President, that brings me to my second point. Regardless of who was responsible for the mine that hit the *Samuel B. Roberts*, the fact of the matter is that there is not a single piece of evidence to suggest that either the Salman or Nasr platforms were involved in that incident or in any documented attack at any stage on neutral vessels or United States shipping, despite the United States mantra-like assertions to the contrary.

18. In my first round presentation, I challenged the United States to produce such evidence. Where, I asked, is there a single report by a merchant vessel or foreign warship stating that it had been a victim of an attack emanating from these two platforms? Where are the "eyewitness accounts" implicating Salman and Nasr to which the United States Co-Agent made repeated references last week? (See, for example, CR 2003/10, pp. 34, 36 and 38; paras. 10.1, 10.11 and 10.14.) Where is the evidence demonstrating that the Salman and Nasr platforms had a "pivotal place" — again to use the Co-Agent's words — in Iran's alleged campaign against neutral shipping? (CR 2003/10, p. 34; paras. 10.1 and 10.3.) And where is there a single diplomatic Note or protest from a third State complaining about activities carried out from either of these two platforms?

19. The answer is nowhere. Not one eyewitness account. Not one documented report of an attack launched from either platform has been produced by the United States. Moreover, there is not a shred of evidence connecting the platforms to the *Samuel B. Roberts* incident hundreds of kilometres away. What we had from the United States, Mr. President, was a presentation long on rhetorical flourish, but singularly lacking in any remotely probative evidence.

20. I invite the Court again to examine the documents that the Co-Agent referred to under tabs C1-C5 of the judges' folders provided by the United States last week. There is not one reference to a documented attack originating from either the Salman or Nasr platforms. Three of those five documents do not even mention the Salman or Nasr platforms. The other two are no more than general cautionary notes suggesting — but providing absolutely no corroborating evidence — that Iran operated helicopters from the platforms. One of those documents — under tab C-3 — is a Guidance Note from the General Council of British Shipping. That was a document which I had referred to in the first round. It stated that "intelligence reports" suggested that

helicopters were being operated from Salman and Nasr. But where are these so-called "intelligence reports"? Nothing has been produced by the United States. They simply do not exist.

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21. What about the other materials on which the Co-Agent relied — the so-called "highly incriminating" documents seized from Iran.

22. First, there are the taped messages found on the *Iran Ajr* (Counter-Memorial of the United States, Exhibits 69-72). Not one of those messages refers to either the Salman or Nasr platforms.

23. Second, there are the Radar Instructions issued in 1983, five years earlier (Counter-Memorial of the United States, Exhibit 114). The Salman and Nasr platforms were not even on the list of recipients for those instructions — instructions, which in any event, were entirely innocuous. Those instructions simply did not apply to these platforms.

24. Third, there is the Operations Plan issued in 1984, to which Mr. Sellers referred, to cover various "worst case" scenarios in the event that the Iranian mainland was occupied during the war. Quite apart from the hypothetical nature of that Plan, it was entirely reasonable to expect that Iran would attempt to monitor movements in the Persian Gulf, during the war, both to keep track of Iraqi forces and to exercise Iran's legitimate right of visit and search.

25. In summary, the United States has been unable to provide any link whatsoever — any causal connection — between the Salman and Nasr platforms and the attacks either on the *Samuel B. Roberts* or on shipping in general. In these circumstances, it is indefensible to argue that it was necessary to destroy these platforms out of self-defence or in order to protect the United States essential security interests.

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**3. The platforms were not, and should not have been, targets for military action on 18 April 1988**

26. Mr. President, I now come to the events of 18 April 1988 themselves. Here, I have two points to make.

27. First, the United States passes over in complete silence the fact that its attacks on the Salman and Nasr platforms coincided with a massive Iraqi offensive carried out in the land war on the very same day.

28. That coincidence was not accidental. It is clear that the United States provided Iraq with military intelligence throughout the war. That is undisputed by the United States.

29. As a result of this intelligence sharing, the United States knew that Iraq intended to launch an offensive on 18 April 1988. This is not a matter of idle speculation. It has been explicitly confirmed by a senior member of the United States National Security Council responsible for the Middle East and Political-Military Affairs (Reply of Iran, Exhibit 10). It has also been confirmed by an informed observer who noted that "U.S. intelligence sources provided data on Iran's equipment and troop strength that guided the Iraqi military in designing and staging a dress rehearsal of the offensive." (*Los Angeles Times*, 16 February 1998.)

30. These facts have a direct bearing on the question of the United States motives behind its use of force against Iran on the day in question.

31. My second point is that the evidence provided by the captain of the warship which led the attacks on the platforms shows that the platforms were *not* the principal intended target of the United States actions on 18 April. The Co-Agent of the United States conceded last Monday that my interpretation of the captain's orders was "colourable". The Agent, however, was less charitable. He called the argument "false" (CR 2003/13, p. 48; para. 22.9). The Co-Agent argued that if you read the captain's account, it would be clear that United States forces were ordered to take action against *both* the Salman and Nasr platforms *and* an Iranian frigate, the *Sabalan*. Counsel went on to argue that only if the *Sabalan* could not be found, then United States forces were to take action against a third platform — the Rakhsh (or Resalat) platform — as well (CR 2003/10, p. 47; para. 10.49).

32. With respect, Mr. President, this argument is incorrect. It is not my interpretation of the United States fleet's orders on the day in question which is "colourable", let alone "false". It is what the orders actually say. Let me put them back on the screen, and you can also find them in tab 3 of your folders, so that the Court can judge for itself. Here is what they say:

"The objectives were *clear*.

Sink the Iranian *Saam*-class frigate *Sabalan* or a suitable substitute.

Neutralize the surveillance posts on the Sassan and Sirri gas/oil separation platforms (GOSPs) and the Rahkish GOSP, *if sinking a ship was not practicable.*"

33. Note, if you would, the reference to the fact that the objectives were "clear". There is no room for any ambiguity in what follows. The Salman and Nasr platforms, and a third platform — the Rakhsh (or Resalat) platform — were to be "neutralized" *only* if sinking a frigate — a sole frigate — was not practicable. These "clear" orders in no way support the interpretation that we heard from the United States last week.

34. Now the Court knows the rest of the story. As a result of an operation which was designed to sink a sole Iranian frigate, the United States attacked and destroyed two sets of oil platforms, two frigates, four patrol boats and an F-4 fighter. Fifty-six Iranians were killed; 150 injured. The *Samuel B. Roberts*, in contrast, was fully repaired: there were no American fatalities, and nine of the ten crewmen affected did not suffer any serious injuries.

35. As for the platforms themselves, the United States systematically targeted the central platforms which had the effect of stopping production from all the associated wells and platforms. As Dr. Zeinoddin explained, oil from the associated wells and platforms could not simply be pumped directly to the mainland, but had to have the gas separated first. But that was impossible, because the United States destroyed the gas separators and the pumping stations on the central platforms. United States forces also boarded the Salman platform on 18 April, but found no incriminating evidence — although they did plant additional explosive charges. Given the fact that the Salman complex was Iran's largest and most important offshore oil facility at the time, the economic and commercial damage to Iran was enormous. The attacks, as I have said, were by no stretch of the imagination necessary, and were wholly disproportionate.

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**4. Events following the attacks of 18 April 1988**

36. I come now to the final part of my presentation, and in it I propose to deal very briefly with the events that took place after 18 April 1988 in order to place in proper perspective the United States assertion that its use of armed force was "effective". The short answer to that

argument is that hostilities in the Persian Gulf ended because a ceasefire was agreed. However, it is useful to refer to some of the basic facts (CR 2003/10, p. 50, para. 10.61).

37. First, let me recall that it was Iraq, not Iran, that was responsible in 1988 for catastrophic damage to shipping. Another document filed by the United States, but not cited in its oral argument, bears this out. It is an INTERTANKO report dated June 1988, and it noted the following: "Our reports show that for the first 4 months of 1988 a record 71 lives have been lost. The main reason for this costly toll was due to an Iraqi jet attack on March 19th . . . This attack constituted the worst maritime loss of life in the seven year Gulf war." (Counter-Memorial and Counter-Claim of the United States, Exhibit 1.)

38. On 9 May 1988, three weeks after the incidents of 18 April, the Security Council issued resolution 612 in which it again condemned the use of chemical weapons in the war. Iraq's use of chemical weapons had continued unabated for five years without any appropriate response from the United States which, in fact, continued to supply the Iraqi régime with support.

39. In his introductory statement, the Agent of the United States stated that his country used force against Iran on three occasions: the two incidents and operations involving the platforms and the operation against the *Iran Ajr* (CR 2003/9, p. 14, para. 1.20). This is not true. The United States also destroyed half of Iran's navy, as you have heard. And on 3 July 1988, in yet another display of United States predisposition to treat Iran with hostility, a United States guided missile cruiser shot down an Iranian civilian Airbus on a routine commercial flight from Iran to Dubai. Two hundred and ninety civilians died. As before, the United States immediate reaction to that incident was to invoke and justify its actions on grounds of self-defence. It argued that the airliner — a civilian airliner — was diving towards a United States warship in an attack mode, that it was flying outside the designated commercial air corridor, that it was not emitting a normal commercial transponding signal from the cockpit, and that the United States navy was simultaneously engaged in incidents and dealing with surface attacks by Iranian small boats. As the captain of a United States warship that was operating in tandem with the cruiser that shot down the Airbus on the day in question has clearly stated in a report that you will find in Exhibit 55 to the Memorial of Iran, all of those allegations turned out to be false.

40. On 18 July 1988, Iran's Foreign Minister sent a letter to the Secretary-General of the United Nations formally accepting resolution 598. Iraq responded with a further occupation of Iranian territory and it again used chemical weapons against Iran — a fact that was confirmed by a United Nations investigative team and recorded in the Security Council's resolution 620 of 26 August 1988 (Memorial of Iran, Exhibit 24).

41. The cease-fire finally went into effect on 20 August 1988. That is why hostilities in the Persian Gulf stopped. Pursuant to paragraph 6 of resolution 598, the Secretary-General entrusted an impartial body to enquire into the responsibility for the conflict. As Iran's Agent has explained, the Secretary-General's report subsequently confirmed Iraq's responsibility for the war.

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42. To paraphrase what counsel for the United States said last Wednesday: had the United States recognized this basic reality at the outset of the war; had it not provided Iraq with military, intelligence, financial, logistical and diplomatic assistance from 1982 onwards; had it taken steps to stop Iraq's instigation and prosecution of the tanker war and Iraq's resort to chemical weapons; and had it not been predisposed to treat Iran with hostility and destroy its oil platforms, we would not be in court here today.

43. Mr. President, that concludes my presentation. I would be grateful if you would now call upon Professor Pellet.

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

M. PELLET : Merci, Monsieur le président.

## REPONSE AUX ARGUMENTS DES ETATS-UNIS CONCERNANT LA VIOLATION DU TRAITE D'AMITIE, DE COMMERCE ET DE DROITS CONSULAIRES DU 15 AOUT 1955

1. Monsieur le président, Madame et Messieurs les juges, lors de sa plaidoirie de mardi dernier, le professeur Weil a énoncé deux principes. Nous reviendrons brièvement sur le second plus tard. Qu'il me suffise de dire que l'Iran n'a assurément aucune objection à l'encontre du premier — je cite le professeur Weil — : «La Cour n'est compétente pour examiner la compatibilité des actions reprochées aux Etats-Unis avec le traité de 1955 qu'au regard d'une seule

disposition de ce traité : celle de l'article X relative à la liberté de commerce et de navigation.»[24] Nous eussions cependant préféré qu'il ne se donne pas la facilité d'appeler, «pour plus de commodité» a-t-il dit[25], le paragraphe 1 de cette disposition : «article X» tout court; ceci donne une image déformée des problèmes en cause. La question, Monsieur le président, est de savoir si les Etats-Unis ont violé le paragraphe 1 de l'article X. Ils l'ont violé — et c'est ce sur quoi je vais revenir ce matin.

2. Le professeur Murphy l'a contesté en faisant valoir deux arguments :

> «First, *Iran has not proven that the United States actions against the platforms impeded any «freedom of commerce and navigation» as that phrase is defined by this Court.»*
>
> «Second, *Iran has not proven that the United States actions against the platforms impeded commerce and navigation «between the territories» of Iran and the United States.»*[26]

Pour sa part, M. Bettauer, a également avancé deux propositions :

1) *«United States actions had no relevant or legally cognizable effect on Iran's international commerce in oil»*[27];
2) *«The use of the platforms for offensive military activities precludes recovery under Article X, paragraph 1.»*[28]

3. Avec votre permission, Monsieur le président, je réserve pour l'instant la discussion de ce dernier point que j'aborderai cet après-midi. En revanche, j'examinerai ce matin, dans l'ordre où ils ont été plaidés, les trois autres moyens de défense américains.

## I. La destruction des plates-formes par les Etats-Unis a porté atteinte à la «liberté de commerce» au sens que la Cour donne à cette expression

4. Comme, contrairement aux Etats-Unis[29], l'Iran ne prétend pas se livrer à la navigation sans navires, la liberté de navigation n'est pas en cause dans la présente affaire, car les

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[24] CR 2003/11, p. 16, par. 13.11.

[25] *Ibid.*, p. 13, par. 13.2.

[26] *Ibid.*, p. 35, par. 15.4 et 15.5.

[27] *Ibid.*, p. 54.

[28] *Ibid.*, p. 57.

[29] Cf. CR 2003/14, p. 37, par. 38 (A. Pellet) et p. 46, par. 6 (J. Crawford); comp. CR 2003/13, p. 26-27, par. 21.10 (M. Murphy).

plates-formes attaquées par les Etats-Unis étaient des installations fixes[30]. En revanche, il n'est pas douteux que leur destruction a porté atteinte à la liberté de commerce garantie par le traité — ce sera mon premier point, Monsieur le président.

5. Je ne chercherai pas querelle au professeur Murphy en ce qui concerne son analyse de votre arrêt de 1996. Nous sommes d'accord avec lui pour considérer que vous n'y avez pas décidé le fond (et donc pas déterminé si, concrètement, les Etats-Unis avaient violé l'article X, paragraphe 1, du traité) et nous ne contestons pas que, pour qu'il en aille ainsi, il faut qu'existent des «actes qui emporteraient la destruction de biens destinés à être exportés, ou qui seraient susceptibles d'en affecter le transport et le stockage en vue de l'exportation» — c'est très exactement ce que vous avez dit dans votre arrêt de 1996[31]. Est-ce le cas ?

6. La réponse courte à cette question me paraît être la suivante : c'est évidemment le cas car il est absurde de soutenir que la liberté de commerce n'est pas violée dès lors que l'une des parties au traité détruit les moyens de production et de transport de biens destinés à l'exportation — et il va de soi qu'en détruisant les trois plates-formes, qui avaient précisément cette fonction, les Etats-Unis ont rendu le commerce d'un bien, le pétrole — dont l'exportation est essentielle, *vitale* même pour l'Iran — impossible; et sans commerce, pas de liberté de commerce. Du reste, comme vous l'avez observé dans l'arrêt de 1996 lorsque vous avez analysé l'article X, «la *production* [et je souligne le mot «production»] pétrolière de l'Iran, pièce maîtresse de l'économie de ce pays constitue une composante majeure de son commerce extérieur»[32]. «[L]'obtention de biens en vue d'une utilisation commerciale «est une «[activité] en amont» évidemment «[essentielle] au commerce»[33]; et il n'est pas douteux que l'extraction du pétrole réalisée sur les trois plates-formes répond à cette définition. M. Murphy, lui, en doute. Reprenons ses arguments.

7. *Premièrement*, affirme-t-il, la destruction des plates-formes n'a pas entraîné la «destruction de biens destinés à être exportés» car *«the oil extracted by [the] platforms was* not *in a form capable of being exported»*[34]. Pour la raison que je viens de dire, je crois que cette

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[30] CR 2003/11, p. 36, par. 15.8 (M. Murphy).

[31] Arrêt du 12 décembre 1996, *C.I.J. Recueil 1996 (II)*, p. 819, par. 50.

[32] *Ibid.*, p. 820, par. 51.

[33] *Ibid.*, p. 818, par. 45.

[34] CR 2003/11, p. 37, par. 15.15.

insinuation repose sur un postulat erroné : la question n'est pas de savoir si le pétrole en question se présentait «sous une forme susceptible d'être exportée» *(in a form capable of being exported)*, mais, comme l'a dit la Cour, s'il était «susceptible d'être exporté».

8. Et la réponse ne peut faire de doute : le pétrole extrait des plates-formes de Resalat, Reshadat, Salman et Nasr *était* susceptible d'être exporté. Il l'était d'abord et tout simplement parce qu'il était au début de la chaîne de production d'un produit dont l'extraction est «essentielle au commerce» et qui était une «composante majeure» du commerce extérieur de l'Iran, comme vous l'avez dit. En outre, et contrairement à ce que les Etats-Unis laissent entendre[35], ce pétrole subissait *sur place* une première transformation : il est impossible de transporter par pipe-line une huile brute tout juste extraite et il était obligatoire de procéder, sur les plates-formes elles-mêmes, à une première transformation consistant en la séparation du pétrole d'une part, du gaz de l'autre, faute de quoi le produit, extrêmement instable, eût présenté un danger majeur[36]. Toutes les installations nécessaires à cette opération de séparation indispensable au transport (séparateurs, compresseurs, turbines, pompes) ont été, dans les trois cas, détruites par les attaques américaines.

9. Une fois cette première transformation effectuée, le pétrole était acheminé vers les îles de Lavan (depuis les plates-formes de Reshadat et de Salman) et Sirri (depuis la plate-forme de Nasr). Ces îles étaient distantes des plates-formes respectivement de 108, 142 et 33 kilomètres. Ici commençait donc le voyage du pétrole vers sa destination finale. Le professeur Murphy nous dit, ce qui n'est d'ailleurs pas totalement exact[37], que les attaques américaines ont été «limitées aux «jackets» des plates-formes» *(«were limited to the «jackets» of the platforms»)* et que, dès lors, rien n'empêchait de transporter le pétrole puisque les oléoducs eux-mêmes n'avaient pas été détruits[38]. Je ne sais pas très bien ce que sont ces *«jackets»*, Monsieur le président, et j'ai noté que les pourtant si compétents services de traduction du Greffe avaient renoncé à traduire ce mot (dont je n'ai trouvé aucune mention dans cette acception dans mon *Robert et Collins*); mais ce que je sais, c'est qu'il faut une bonne dose de cynisme pour prétendre que l'Iran pouvait continuer à transporter

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[35] Cf. duplique, p. 94-95, par. 3.44-3.46, et p. 97-98, par. 3.52 ou CR 2003/11, p. 37, par. 15.15 (M. Murphy).

[36] Voir réplique, p. 28-29, par. 3.6-3.8, et vol. IV, Statement of Mr. Sehat, p. 10, par. 3; Statement of Mr. Emami, p. 1, par. 1, et Statement of Mr. Alagheband, p. 4, par. 16; duplique, annexe 212; CR 2003/6, p. 45, par. 29 (M. Zeinoddin).

[37] Voir réplique, vol. IV, Statement of Mr. Sehat, p. 7, par. 18.

[38] CR 2003/11, p. 38, par. 15.16.

son pétrole depuis les plates-formes (du reste quel pétrole ? Elles ne pouvaient évidemment plus en produire…)

10. D'ailleurs, Madame et Messieurs les juges, regardez ce qui reste du site R4 de Reshadat après l'attaque du 19 octobre 1987[39] … et de la plate-forme de Salman[40]…

Et encore, s'agissant de Salman, les soldats américains avaient déposé des explosifs à l'endroit où le pétrole était pompé, ce qui ne laissait aucun doute sur leurs intentions, et ce n'est que grâce à la défaillance du détonateur que la charge n'a pas explosé[41].

Et voici ce qui reste de la plate-forme de Nasr[42] … ou encore du site R7 de Reshadat[43].

11. Je vois mal, Monsieur le président, comment quoi que ce soit aurait pu être expédié (et par quelque voie que ce soit) depuis ce qui restait de ces malheureuses plates-formes ! Quant au stockage, il est vrai qu'il était effectué à Sirri et à Lavan — mais étant donné l'état dans lequel le passage des Américains avait laissé les plates-formes, on ne voit pas très bien non plus ce qui aurait pu être stocké ! Ce qui est vrai, c'est que la destruction des plates-formes avait purement et simplement exclu toute possibilité, toute *liberté* (je le rappelle : c'est de *liberté de commerce* qu'il s'agit) de vendre le pétrole, qui ne pouvait plus être extrait.

12. Monsieur le président, la destruction des plates-formes, à l'évidence, a violé la «liberté de commerce» garantie à l'Iran par le traité de 1955. Très bien, nous dit le professeur Murphy, mais l'Iran doit encore montrer que c'est la liberté de commerce «entre les territoires des deux Hautes Parties contractantes» qui a été atteinte.

## II. La destruction des plates-formes par les Etats-Unis a porté atteinte à la «liberté de commerce entre les territoires des deux Hautes Parties contractantes»

13. *«The ordinary meaning of the phrase...», he says, «is that the commerce must commence in the territory of one State and then proceed to the territory of the other State»*[44]. Je suis d'accord, mais avec une précision et avec une nuance.

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[39] Document n° 14 dans le dossier d'audience du premier tour.

[40] Document n° 15 dans le dossier d'audience du premier tour.

[41] Voir réplique de l'Iran, vol. IV, Statement of Mr. Emami, p. 3, par. 9.

[42] Document n° 18 dans le dossier d'audience du premier tour.

[43] Document n° 13 dans le dossier d'audience du premier tour.

[44] CR 2003/11, p. 40, par. 15.22.

14. La précision est la suivante : certes, le produit concerné — ici, le pétrole —, doit partir du territoire de l'une des Parties — ici l'Iran — pour être acheminé vers l'autre — les Etats-Unis. Mais il peut y aller directement ou transiter par un ou plusieurs Etats. En d'autres termes, le commerce peut être direct ou indirect. Et, comme l'Iran l'a montré[45], il est patent que le commerce entre les deux pays a continué après l'embargo *via* l'Europe occidentale — il y avait là un moyen bien commode pour les Etats-Unis de tourner leur propre décision dans la mesure où elle se révélait contraire à leurs intérêts. Comme l'a montré le professeur Odell dans son rapport, *«over the 3 year period from 1986-88, the flow of Iranian crude to Europe increased very significantly and, at the same time, there was a similar significant increase in European products' exports to the United States»*[46].

15. La nuance est plutôt un complément : une fois de plus, M. Murphy procède à un amalgame entre «commerce» et «liberté de commerce» sans égard pour la mise en garde de la Cour qui a pourtant clairement indiqué qu'elle «ne saurait en tout état de cause perdre de vue que le paragraphe 1 de l'article X du traité de 1955 ne protège pas à proprement parler le «commerce» mais la «*liberté* de commerce»[47]. Celle-ci n'est pas fondée sur une réalité de l'instant; elle implique une *faculté* pour l'avenir. Elle ne suppose pas qu'un tel commerce soit effectivement pratiqué — il serait absurde de prétendre, par exemple, que les Etats-Unis étaient, du fait de l'article X, paragraphe 1, dans l'obligation d'acheter à l'Iran tout le pétrole que celui-ci désirait lui vendre; ce que cette disposition exige, c'est que les Etats-Unis ne rendent pas ce commerce (entre les territoires des deux Parties) impossible, ou plus difficile, ou, simplement, moins libre.

16. Mon contradicteur croit relever une contradiction entre la position de l'Iran sur la demande principale et celle qu'il prend sur la demande reconventionnelle[48]. Ce n'est pas exact. Dans les deux cas, nous admettons que la liberté de commerce au sens de l'article X, paragraphe 1, concerne le commerce entre les territoires des deux Etats. Mais, s'agissant de la demande reconventionnelle, nous constatons que les Etats-Unis n'ont trouvé strictement *aucun* «exemple»

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[45] Voir réplique, p. 32-36; CR 2003/6, p. 49, par. 46-48 (M. Zeinoddin).

[46] Voir réplique, vol. III, *Odell Report*, p. 12, par. 5.

[47] Arrêt du 12 décembre 1996, *C.I.J. Recueil 1996 (II)*, p. 819, par. 49.

[48] CR 2003/11, p. 40-41, par. 15.24 et p. 50, par. 15.61.

montrant que les actes qu'ils attribuent sans preuve à l'Iran ont porté atteinte à *ce* commerce, malgré tous les efforts qu'ils ont sans nul doute déployés pour étayer leur thèse. Faute de préjudice, ils n'ont aucun *titre* à se prévaloir d'un manquement au traité.

17. Il en va tout différemment de la demande principale :

— d'abord, les faits ne sont pas contestés : les Etats-Unis *ont détruit* les plates-formes;

— ensuite, celles-ci, je l'ai montré, se livraient à des activités d'amont «intrinsèquement liées au commerce»[49];

— enfin, alors que les Etats-Unis n'ont pu montrer que les faits qu'ils attribuent à l'Iran «dans le Golfe» (et d'ailleurs, pour l'essentiel, en dehors des espaces marins placés sous la juridiction de l'Iran), aient porté atteinte ni au commerce entre les deux pays, ni à la liberté d'y procéder, la destruction des plates-formes a purement et simplement supprimé, exclu, anéanti toute possibilité de s'y livrer.

18. Le professeur Murphy a tout à fait raison de rappeler[50] que, dans l'arrêt de 1996, la Cour a déclaré n'être «pas en mesure de déterminer si et dans quelle mesure la destruction des plates-formes iraniennes a eu des conséquences sur l'exportation du pétrole iranien»[51]. C'est la réponse qu'il donne à cette question qui n'est pas convaincante.

19. D'abord, nous dit-il, les plates-formes se trouvaient en dehors de la mer territoriale iranienne[52]. Certes; mais elles sont situées sur le plateau continental et dans la zone économique exclusive de l'Iran, espaces sur lesquels, j'ose à peine le rappeler, les Etats côtiers exercent «des droits souverains» à des fins économiques[53]. Et, comme la Cour l'a rappelé à propos, par exemple, du *Plateau continental de la mer Egée*, «[i]l faut nécessairement présumer que [le sens d'une disposition de ce type] était censé évoluer avec le droit et revêtir à tout moment la signification que

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[49] Arrêt du 12 décembre 1996, *C.I.J. Recueil 1996 (II)*, p. 819, par. 50.

[50] CR 2003/11, p. 41, par. 15.25.

[51] Arrêt du 12 décembre 1996, *C.I.J. Recueil 1996 (II)*, p. 820, par. 51.

[52] CR 2003/11, p. 42, par. 15.28-15.15.31.

[53] Cf. les articles 2 de la convention de Genève de 1958 sur le plateau continental, et 56 et 77 de la convention de Montego Bay de 1982.

pourraient lui donner les règles en vigueur»[54]. S'agissant d'un traité portant sur les «relations économiques», il ne peut faire de doute que la notion de «territoire» vise ces «territoires à des fins économiques» que sont le plateau continental et la zone économique exclusive. La liberté de commerce envisagée à l'article X, paragraphe 1, s'y étend sans aucun doute. Il est d'ailleurs hautement révélateur que, par exemple, l'*Executive Order* n° 12959 du président des Etats-Unis du 8 mai 1995, infligeant des sanctions unilatérales à l'Iran, précise : *«the term «Iran» means the territory of Iran and any other territory or marine area, including the exclusive economic zone and continental shelf over which the Government of Iran claims sovereignty, sovereign rights or jurisdiction…»*[55].

20. Mais, nous dit toujours M. Murphy, il ne peut y avoir eu atteinte à la liberté de commerce puisque, aux moments des attaques américaines, il n'y avait aucun commerce pétrolier entre les plates-formes détruites et les Etats-Unis[56]. Ceci appelle plusieurs remarques :

21.

1) Le traité de 1955 ne garantit pas la liberté de commerce entre *ces trois plates-formes* et les Etats-Unis, mais *entre l'Iran* et les Etats-Unis. En détruisant les plates-formes, ceux-ci ont porté atteinte à la liberté de l'Iran d'organiser son commerce comme il l'entendait depuis son territoire : depuis les plates-formes (ou non), de diminuer la production ailleurs pour l'accroître sur les plates-formes; etc.

2) Avec toujours pas mal de cynisme, le professeur Murphy fait valoir qu'il ne pouvait pas y avoir de commerce depuis Reshadat et Salman (je relève au passage que tel n'était pas le cas pour la plate-forme de Nasr) puisque, au moment de leur destruction par les Etats-Unis ces deux plates-formes étaient en réparation suite à des attaques iraquiennes antérieures[57]. Oui, elles avaient été gravement endommagées. Oui, elles étaient en réparation. Mais précisément ces réparations étaient pratiquement achevées lorsque, par une étrange coïncidence, les

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[54] Arrêt du 19 décembre 1978, *Plateau continental de la mer Egée, C.I.J. Recueil 1978*, p. 32; voir aussi, par exemple, l'avis consultatif du 21 juin 1971, *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, C.I.J. Recueil 1971*, p. 31-32.

[55] Sect. 2, par. *d)*.

[56] CR 2003/11, p. 42-52, par. 15.32-15.68.

[57] *Ibid.*, p. 42-43, par. 15.33-15.34.

Etats-Unis sont venus parachever l'œuvre du pays avec lequel l'Iran était en guerre (rendant, de ce fait «inutile» toute nouvelle attaque iraquienne contrairement à une «spéculation» à laquelle mon contradicteur juge bon de se livrer[58]). En empêchant toute reprise de la production et, par voie de conséquence, du commerce, les Etats-Unis ont, ici encore, porté atteinte à la liberté de l'Iran de commercer avec eux depuis ces plates-formes.

3) A cet égard, le professeur Murphy n'est pas mieux venu à prétendre que la reprise prochaine de la production relève de la «pure spéculation» *(sheer speculation)*[59] : non seulement cette reprise est attestée par des éléments du dossier, mais encore, la suite a montré que face à l'«adversité américaine», les Iraniens se sont aussitôt attachés à réparer les plates-formes : elles ont recommencé à produire à partir du 24 octobre 1990 pour Reshadat, du 5 août 1988 pour Salman, et de janvier 1992 pour Nasr[60], même si elles n'ont à nouveau produit à plein rendement qu'à des dates postérieures (respectivement en 1993 pour les deux premières et au cours de 1992 pour la troisième[61]). Ils avaient, évidemment, procédé de même à la suite de l'«épreuve iraquienne».

4) L'embargo. Ici encore, je ne peux m'empêcher de relever le cynisme du raisonnement de la Partie adverse : en substance, explique mon contradicteur, l'Iran ne peut nous reprocher aucune violation de l'article X, paragraphe 1, puisque, de toutes façons, il ne pouvait exporter son pétrole vers les Etats-Unis du fait que *ceux-ci* avaient interdit les importations de pétrole iranien[62]. En d'autres termes, dit M. Murphy «moi, Etats-Unis d'Amérique, j'ai interdit tout commerce avec l'Iran (auquel me lie un traité de commerce qui en garantit la liberté) et, donc, on ne peut me reprocher de rendre celui-ci physiquement impossible en détruisant les moyens mêmes de ce commerce» ! Tel ne saurait, assurément, être le droit.

22. Mais je pense, Monsieur le président, qu'il y a intérêt à examiner un peu plus en détail ce point en même temps que je répondrai, dans une troisième partie, à l'argument de M. Bettauer,

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[58] CR 2003/11, p. 51, par. 15.66.

[59] *Ibid.*, p. 50, par. 15.63; voir aussi p. 50-52, par. 15.64-15.67.

[60] Voir réplique, vol. IV, Statement of Mr. Sehat, p. 6, par. 17; Statement of Mr. Emami, p. 4, par. 10; et Statement of Mr. Hassani, p. 7, par. 21.

[61] *Ibid.*, Statement of Mr. Hassani, p. 6, par. 18; Statement of Mr. Emami, p. 4, par. 10; et Statement of Mr. Hassani, p. 7, par. 21.

[62] CR 2003/11, p. 43-45, par. 15.35-15.43.

selon lequel la destruction des plates-formes n'a pas eu d'effets concrets sur la liberté de commerce entre les deux Etats.

## III. La destruction des plates-formes par les Etats-Unis a eu des effets concrets sur l'exercice par l'Iran de la liberté de commerce garantie par le traité

23. Dans le même esprit qui fait dire au professeur Murphy que la destruction des plates-formes n'a pas porté atteinte à cette liberté de commerce, le coagent des Etats-Unis affirme que : *«Whatever the case, Iran simply has not shown that it would have exported more oil than it in fact exported had the United States actions not occurred.»*[63] La raison en serait que le ministre iranien du pétrole avait déclaré en décembre 1987 (après la destruction de Reshadat, mais avant celle de Salman et de Nasr, je le note en passant), puis, à nouveau trois ans plus tard (cette fois bien après les faits et quand les plates-formes étaient réparées ou presque) que l'Iran était en mesure d'augmenter sa production si nécessaire[64].

24. Au fond, dans les deux cas, on nous dit : «nous pouvions bien détruire quelques plates-formes pétrolières puisque l'Iran pouvait toujours exporter ce qu'il voulait ailleurs qu'aux Etats-Unis». C'est oublier un point qui a tout de même une certaine importance en ce qui nous concerne : les deux Etats sont liés par un traité *qui garantit la liberté de commerce entre les territoires des deux pays*.

25. Je sais bien, Monsieur le président, qu'en ce qui concerne l'embargo M. Murphy affirme qu'il est licite et qu'en tout état de cause l'Iran ne peut le contester puisqu'il ne fait pas l'objet de sa requête[65]. Il n'y a aucun doute sur le fait que vous ne pouvez, Madame et Messieurs de la Cour, vous prononcer sur ce point par voie d'action et en faire un élément du dispositif de votre arrêt — et l'Iran ne vous le demande pas. En revanche, je ne vois pas pour quelle raison vous ne pourriez pas, si nécessaire, vous prononcer sur ce point par la voie de l'exception d'illégalité. Et il me semble faire peu de doute que, si vous procédez ainsi, vous devriez constater — constater, pas décider — l'illicéité de l'embargo[66].

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[63] *Ibid.*, p. 54, par. 16.4.

[64] *Ibid.*, p. 54, par. 16.3 — voir duplique, vol. II, annexes 212.C et D.

[65] CR 2003/11, p. 44-45, par. 15.42-15.43; voir aussi, p. 55, par. 16.8 (M. Bettauer).

[66] Cf., arrêt du 27 juin 1986, *Activités militaires et paramilitaires au Nicaragua et contre celui-ci, fond, C.I.J. Recueil 1986*, p. 140, par. 279, et p. 148, par. 292.11); voir aussi : CR 2003/5, p. 38-39, par. 24 (M. Crawford).

26. Au demeurant, je ne crois pas que ce soit nécessaire. Comme l'a dit la Cour permanente, «[a]u regard du droit international et de la Cour qui en est l'organe, les lois nationales [permettez-moi de préciser : même les lois des Etats-Unis] sont de simples faits»[67]. L'embargo dont se prévalent les Etats-Unis a été décidé par le président de ce pays et est donc, sans aucun doute, un simple fait qui ne s'impose, juridiquement, au regard du droit international, ni à la Cour, ni à l'Iran. Ce fait ne saurait faire obstacle à ce que vous vous prononciez, indépendamment de lui, sur la licéité de ces autres faits, dont, par contre, vous êtes saisis, la destruction par la force armée des trois plates-formes, et sur la conformité de ces faits avec l'article X, paragraphe 1, du traité. En tout état de cause, en admettant même que l'Iran ne puisse vous demander de constater l'illicéité de l'embargo décrété par les Etats-Unis, ceux-ci ne sauraient obtenir que vous le «légalisiez», fût-ce indirectement.

27. Quant au raisonnement de M. Bettauer, il se heurte, lui aussi, à de sérieuses objections. Indépendamment de l'irrecevabilité de l'argument fondé sur les quotas de l'OPEP, que mon contradicteur semble reconnaître[68], il n'est pas compatible avec la position de la Cour dans son arrêt du 27 juin 1986 dans l'affaire des *Activités militaires*. Elle y a décidé que le minage de *certains* ports du Nicaragua violait l'article XIX, paragraphe 1, du traité de 1956 (l'équivalent de notre article X, paragraphe 1), sans pour autant rechercher au préalable si ce minage empêchait ou non le commerce avec les Etats-Unis, qui aurait pu se poursuivre *via* d'autres ports[69].

28. De la même manière, le raisonnement de M. Bettauer revient à dire que l'Iran pouvait toujours vendre aux Etats-Unis du pétrole extrait d'autres champs que ceux rendus inutilisables par les actions armées américaines. Mais où est alors la *liberté* de commerce de l'Iran. Supposons que les Etats-Unis autorisent les ressortissants iraniens à se rendre sur leur territoire, mais seulement depuis Mashhad, un aéroport lointain du nord-est de l'Iran, et à condition qu'ils débarquent à Fairbanks International Airport, un aéroport perdu au centre de l'Alaska. Dira-t-on que la liberté de circulation entre les deux territoires (garantie, soit dit en passant, par l'article II du traité) est

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[67] Arrêt du 25 mai 1926, *Certains intérêts allemands en Haute-Silésie polonaise, C.P.J.I. série A n° 7*, p. 19; voir aussi, avis consultatif, 31 juillet 1930, *Communautés gréco-bulgares, C.P.J.I. série B n° 17*, p. 32 et les articles 3 et 4 du projet d'articles de la Commission du droit international. sur la responsabilité de l'Etat pour fait internationalement illicite annexé à la résolution 56/83 de l'Assemblée générale du 12 décembre 2001.

[68] CR 2003/11, p. 54, par. 16.3-16.4.

[69] Voir *C.I.J. Recueil 1986*, p. 45, par. 75; p. 48, par. 80 et p. 139, par. 278.

respectée, dès lors qu'il est toujours possible de voyager entre les deux pays ? Assurément non. Eh bien, il en va de même en ce qui concerne la liberté de commerce du fait de la destruction des plates-formes : les Etats-Unis entendent dicter ainsi à l'Iran sa politique d'exportation (lui dire où il peut extraire le pétrole destiné à l'exportation — pas des trois plates-formes détruites; d'où il peut l'exporter — pas de Sirri et de Lavan; etc.).

29. Monsieur le président, tout cela ce n'est pas une conclusion hypothétique reposant sur une relation éventuelle, *«a conceivable relationship»* a dit M. Bettauer[70]; ce sont les conséquences certaines, directes, concrètes, de la destruction des plates-formes sur la *liberté* de commerce de l'Iran. Elles sont, sans aucun doute, incompatibles avec les termes de l'article X, paragraphe 1, du traité d'amitié et de commerce tel que vous l'avez analysé dans votre arrêt de 1996.

Madame et Messieurs les juges, je vous remercie de votre attention, et je vous prie, Monsieur le président, de bien vouloir donner la parole à M. Bothe pour, en principe, la dernière intervention de ce matin.

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

Mr. BOTHE: Thank you, Mr. President.

**SELF-DEFENCE AND RELATED QUESTIONS**

1. Mr. President, Members of the Court. We have been told so eloquently by my eminent colleague Professor Weil that the topic of self-defence is irrelevant for your decision[71]. Iran does not agree, and of course, both Parties continue to argue that question. It is my duty to set the record straight in this respect.

2. In a preliminary remark, I will address the issue of the legality of attacks on neutral or purportedly neutral shipping, raised by the United States in its pleading last Wednesday[72].

In the main part of my argument, I will concentrate on three key issues:

(1) the existence of an armed attack by Iran against the United States;

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[70] CR 2003/11, p. 56, par. 16.10.

[71] CR 2003/11, para. 13.12.

[72] CR 2003/13, paras. 21.36 *et seq.*

(2) the qualification of the action taken by the United States as being self-defence (the principle of necessity); and

(3) the requirement of proportionality.

3. In his pleading on Wednesday, counsel for the United States[73] tried to construct an inconsistency between my earlier writings[74] and the position taken by Iran in its written pleadings. Mr. President, Members of the Court, I do not have to revoke, for the purposes of the present proceedings, anything I wrote before. Counsel for the United States simply misrepresented the Iranian position. That is what counsel for the United States said and what appears at the verbatim record[75]: "Thus, Iran states that 'the alleged Iranian attacks on vessels carrying oil from Kuwaiti and Saudi Arabian ports would be lawful.'" The text you find in the original Iranian brief, however, is as follows[76]: "On the basis of the United States' stance concerning lawful targets in naval warfare the alleged Iranian attacks on vessels carrying oil from Kuwaiti and Saudi Arabian ports would be lawful." The difference between the two texts speaks for itself. Iran's brief then goes on quoting authors criticizing the United States view on naval targeting.

4. Counsel for the United States suggested that it might have been a good idea if I had already served as a counsel to Iran at the time[77]. A nice idea, but why not for the United States? The point I was making in the article he quoted was to refute the thesis disseminated at the time in publications of semi-official North American legal authors to the effect that attacks against neutral shipping carrying oil from ports of belligerent countries were lawful[78]. It is exactly the view I criticized which is put forward in the article, submitted by Iran as an Exhibit to its Memorial[79], but

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[73]CR 2003/13, paras. 21.40 *et seq*., in particular para. 21.44.

[74]M. Bothe, "Neutrality at Sea", in; I. F. Dekker/H. H. G. Post (eds.), *The Gulf War of 1980-1988*, 1992, 205, p. 211.

[75]CR 2003/13, para. 21.40

[76]Further Response to the United States' Counter-Claim of Iran, Vol. I, para. 7.24.

[77]CR 2003/13, para. 21.45.

[78]W. J. Fenrick, "The Exclusion Zone Device in the Law of Naval Warfare", 24 *CanYBIL* (1986) 91, at 120; more recently *ibid.*, "The Merchant Vessel as Legitimate Target in the Law of Naval Warfare", in A. J. M. Delissen/G. J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead. Essays in Honour of Frits Kalshoven*, 1991, 425, p. 442.

[79]Memorial of Iran, Exhibit 13.

also quoted by counsel for the United States[80], written by Naval Captain (as he then was) Ashley Roach[81], one of the leading military lawyers of the United States Armed Forces at the time.

5. If the United States now quotes with apparent approval the critical views I expressed more than ten years ago, this provides me only with limited comfort. The problem of the internal contradiction of the United States stance remains. On the one hand, the United States, on the basis of the highly questionable interpretation of the law of neutrality, which I then criticized, construed the oil coming from Iranian ports as "non-neutral" because it financed the Iranian war effort[82]. That was, the United States said, fair game for Iraq. On the other hand, on the basis of an unacceptable disregard for the real facts, oil coming from Kuwaiti and Saudi Arabian ports was characterized as "truly neutral"[83]. This view completely failed to take into account that the revenues derived from this oil were in large part channelled into Iraq to finance its war effort. Both oil exports were "innocent" from the point of view of the buyers' side, but were instrumental for the war effort of the parties to the ongoing conflict. The United States position was a double standard at its worse.

6. Let me now turn to the major issue, or the real issue in this case: the law of self-defence. First, Mr. President, Members of the Court, there was no armed attack against the United States within the meaning of Article 51 of the Charter.

7. The United States contends that there was "a larger pattern of Iranian actions involving the unlawful use of force against the United States and other neutral vessels"[84], or "a campaign of unlawful attacks on United States and other neutral shipping"[85]. This is an important point, since it determines the scope of permissible self-defence. Thus, we cannot avoid discussing whether this United States allegation is true as a matter of fact and of law. The problem can best be explained by an image. It takes trees to make a forest. If there are trees, there is not necessarily a forest. But if there are no trees, there is no forest. That is why we invited the Court to first look at the

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[80]CR 2003/13, para. 21.46.

[81]J. A. Roach, "Missiles on Target and Defense Zones in the Tanker War", 31 *Virginia JIL* (1991) 592.

[82]Roach, *loc. cit.* p. 603.

[83]Roach, *loc. cit.* p. 606.

[84]Counter-Memorial and Counter-Claim of the United States, para. 4.10.

[85]CR 2003/9, para. 1.3.

individual incidents claimed by the United States to constitute armed attacks against the United States, see whether there are some trees, and then, in a second step, ask whether there was a pattern of armed attacks, that is whether the trees that might be found together make up a forest.

8. Even in its oral pleadings before the Court during the last few days, in particular in its pleadings regarding the counter-claim, the United States has rather stressed generalities than addressed the individual incidents. The United States has time and again complained about an alleged Iranian "relentless campaign of attacks on United States and other neutral shipping"[86]. But if a pattern of armed attacks against the United States existed, there must have been a sufficient number of specific proven cases of armed attacks against the United States. A map with a number of red spots is not enough for this purpose[87].

9. Thus, we must go into the details. Let us assume for a moment, for the sake of argument, that an attack against a commercial ship could be an armed attack within the meaning of Article 51 of the Charter. But armed attack against which State? There is no possibility other than to consider the flag State as the attacked State. The idea that it might also be the State of origin of whoever owns the ship or cargo is absurd. This leaves us with three incidents on which, in the present case, the construction of an armed attack could be built, the two commercial ships the *Bridgeton* and the *Sea Isle City,* and the (non-commercial) *Samuel B. Roberts*. Do three trees form a forest?

10. But do we really have three trees? The *Sea Isle City* was hit by a missile while she was in Kuwaiti territorial waters. Which State can be considered as being attacked if a missile is sent from a distance of about 100 km into a harbour? Would the seeker of a missile (we have received a lecture on what that was[88]) recognize an American flag and direct the missile against that ship? No, that attack, on the premise that there was an attack by Iran, was an attack against Kuwait. An attack against Kuwait is not before the Court. That leaves us with two trees to form a forest.

11. Thus, what about the two trees which remain of our imagined forest? Here, we have to address the question of mine laying. My colleagues Messrs. Sellers and Bundy have once more

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[86]CR 2003/9, para. 2.2., also para. 3.2.; CR 2003/10, para. 7.3.

[87]See the map accompanying the presentation by Mr. Beaver, CR 2003/9, paras. 2.1. *et seq.;* Counter-Memorial and Counter-Claim of the United States, para. 1.90.

[88]CR 2003/9, para. 5.32.

shown that there is not sufficient proof for the contention that the mines which these ships hit were Iranian mines. The standards of proof that were developed with great caution by this Court in the *Corfu Channel* case[89] are not met. The United States infers from the fact that, allegedly, Iranian mine fields were found in the vicinity of the place of the incidents, the respective ship also hit one of those mines[90]. In the *Corfu Channel* case, the Court accepted, as a matter of principle, this method of indirect proof or circumstantial evidence. But it applied it with great caution. It accepted the argument that it could be inferred from the existence of the minefield that the mine in question belonged to that field. But it required an additional element to confirm such inference. In the *Corfu Channel* case there was the fact that the damage corresponded to the properties of the type of mine in question. No such elements which could confirm the inference have been put forward by the United States in the present case.

12. In addition, the question has to be answered: which State, in the case of minelaying, is the attacked State? The United States tells us the story of targeted minelaying[91]. And this type of minelaying could constitute an attack against the State so targeted. But there is no proof for that story.

13. That story does not fit with the method of proving Iranian minelaying which the United States seemed to prefer in its oral pleadings, namely, the inference from the existence of minefields, allegedly discovered later in the vicinity of the incidents, to the fact that it was a mine from this field which actually hit the ship in question. In this situation, the alleged minefield does not constitute an armed attack against any State whose ships happen to hit those mines. In your Judgment in the *Nicaragua* case, you examined the laying of mines in various respects. In so far as mines were laid in the internal or territorial waters of Nicaragua, this was an unlawful use of force *against Nicaragua*, but not against the States whose ships happened to hit those mines. As to mines laid anywhere, that is also outside the territorial waters of Nicaragua, the yardstick of lawful or unlawful minelaying were the rules of international humanitarian law, not the prohibition of the

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[89] *I.C.J. Reports 1949*, pp. 14 *et seq.*

[90] CR 2003/9, paras. 327 *et seq.;* CR 2003/10, paras. 8.41 *et seq.*

[91] Counter-Memorial and Counter-Claim of the United States, paras. 1.27 *et seq*; see also CR 2003/12, para. 18.46.

use of force[92]. The conclusion put forward by Iran is thus confirmed. Minelaying, except in the exceptional circumstance of individually targeted laying, does not constitute an armed attack against the flag State of any ship that hits a mine. The United States contention that it was the object of an armed attack by Iran in the form of minelaying therefore fails. This leaves us with no trees to form a forest.

14. But what about all the other alleged incidents on which the United States keeps insisting and which it invites the Court to take notice of? Mr. President, Members of the Court, they are irrelevant for the present case. This is not a case where the right of collective self-defence is claimed. The requirements of collective self-defence are not met, and the United States does not argue to the contrary. The other States concerned, there is no denying or belittling that fact, were highly critical of the situation in relation to their maritime commerce, yet they were perfectly able to take care of their interests themselves. They did not need and, apparently, they did not want the United States to use force on their behalf, as a self-appointed guardian of other States' interests. In its oral pleadings, the United States seems to have recognized this problem and claimed that Iran was singling out the United States as a preferred object of its attacks. But do these few incidents, if proven, really show that Iran specifically and preferably targeted United States vessels? No, Mr. President, Members of the Court, this construction of an alleged general pattern of armed attacks against the United States is untenable.

15. But even if there was an armed attack on the United States vessel, on either vessel, to come back to the two incidents, the United States action does not qualify as self-defence. Self-defence must be an appropriate means of protection against an armed attack. Use of force in response to an attack which does no longer exist is not self-defence: it is retaliation, and unlawful. Use of force for the purpose of deterrence, for teaching a State a lesson[93], a term which was used by the United States, also does not constitute self-defence. These distinctions are essential in order to limit self-defence to cases of *genuine* defence and to avoid an overbroad reliance on the exception to the prohibition of the use of force, one of the fundamental principles of the Charter of the United Nations and of *ius cogens*. The distinctions thus made are, indeed, part and parcel of

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[92] *I.C.J. Reports 1986*, p. 14; see, on the one hand, para. 227, and paras. 215 *et seq.*, on the other.

[93] Assistant Secretary Korb, Memorial of Iran, Exhibit 51.

positive international law. The United States refuses to make those distinctions, claiming that they would unduly narrow the scope of self-defence and, thus, deprive the right of self-defence of its effectiveness, that they would "render the right of self-defence meaningless"[94]. The United States fails to recognize that the prohibition of the use of force indeed excludes *all* kinds of military action. It is *not* the purpose of Article 51 to reopen the door for any unilateral use of force a State deems useful. The option to use force is limited, and clearly recognizing those limitations does not render that option meaningless.

16. To bring his point across, counsel for the United States evoked the situation after 11 September 2001[95]. This argument is irrelevant for the present proceedings. To make it crystal clear: Iran, in pleading for a reasonable limitation of the right of self-defence, does not intend to invite the Court to establish a rule which would have deprived the United States of its right of self-defence after these tragic events. The differences between the present case and the situation after 11 September are manifold and obvious. Let me just mention one of them. After 11 September the Security Council determined, on the one hand, that there was a threat to the peace, and on the other hand, acknowledged, in this specific situation, the existence of a right of self-defence. This can only be understood as a recognition of a continued situation of an armed attack against the United States. No such authoritative determination exists in relation to the alleged attacks by Iran against United States vessels.

No, Mr. President, Members of the Court, it is not correct to qualify the action taken by the United States as being self-defence within the meaning of the Charter of the United Nations.

17. This conclusion imposes itself also because the United States action blatantly violated the principle of necessity. This principle means that action taken in self-defence must present an added value for the defence and protection of the attacked State. It must be a suitable means to enhance the security of that State. As pointed out by my colleagues Messrs. Sellers and Bundy, the platforms destroyed by the United States were commercial installations and did not have the military functions the United States continue to ascribe to them. They were by no means instrumental in any military operation, for example observing possible targets of assumed Iranian

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[94]CR 2003/12, para. 18.49.

[95]CR 2003/12, para. 18.51.

military actions. Thus, their destruction did not add anything to the security of United States shipping in the Persian Gulf. It was not "necessary".

18. But even if one considers that there was self-defence in the true sense of that legal notion, which I concede only for the sake of discussion, the United States action was wholly disproportionate. The judgment of proportionality means balancing different values, advantages and disadvantages. On one side of the balance, there is the positive effect of defensive action for the protection of the attacked State. On the other side, there is the damage caused by this action. My colleagues Messrs. Sellers and Bundy have already refuted the factual allegations on which the United States tries to base its contention that the principle of proportionality was respected. Let me only briefly summarize. The protective effect of the destruction of the platforms, as just stated, was nil. On the other hand, the economic damage was enormous. It is a fact that the platforms went out of production for several years. Even more, several wells were left open and the oil just spilled into the sea before it was possible, by a very difficult underwater operation, to contain the wells.

19. To summarize, Mr. President, Members of the Court. The United States contention that the destruction of the platforms was justified as a measure of self-defence, fails on three accounts, not only as a matter of fact, but also as a matter of law:

— first, there was no armed attack against the United States,

— second, the United States action did not qualify as self-defence within the legal meaning of that term, and

— third, the United States action was wholly disproportionate.

20. Mr. President, this concludes my presentation on behalf of the Islamic Republic of Iran. This would be a convenient moment for lunch to be taken. I would like to request you to give the floor, after the break, to my colleague, Professor Crawford to continue the presentation. I thank you for your kind attention.

The PRESIDENT: Thank you, Professor. This marks the end of this morning's sitting. The hearing will resume this afternoon at 3 p.m. and will last for one-and-a-half hours. Thank you. The Court is adjourned.

*The Court rose at 12.55 p.m.*

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