CR 2003/18

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting

held on Wednesday 5 March 2003, at 3 p.m., at the Peace Palace,

President Shi presiding,

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

VERBATIM RECORD

ANNÉE 2003

Audience publique

tenue le mercredi 5 mars 2003, à 15 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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The PRESIDENT: Please be seated. The sitting is open and I first give the floor to Mr. Mathias.

Mr. MATHIAS: Thank you, Mr. President.

26. IRAN'S CLAIM SHOULD BE REJECTED BECAUSE OF IRAN'S VIOLATIONS OF ITS RECIPROCAL OBLIGATIONS, BECAUSE THE UNITED STATES MEASURES WERE A CONSEQUENCE OF ITS OWN UNLAWFUL ACTS, AND BECAUSE IT ARISES OUT OF IRAN'S MANIFESTLY WRONGFUL CONDUCT

26.1. Mr. President, Members of the Court, during the next 20 minutes I shall respond to the points made by counsel for Iran in respect of the United States argument that the application of fundamental principles of international law to Iran's own conduct precludes Iran from invoking the 1955 Treaty and maintaining its claim against the United States. We have asked the Court to accept our argument for three reasons: because of the application of the principle of reciprocity; because United States measures were a consequence of Iran's own breach; and because Iran's claim arises out of its own manifestly unlawful conduct. I shall first make some general observations that apply equally to all three of these propositions and then will deal very briefly with each of them separately.

26.2. Counsel for Iran suggested that there was some inconsistency between the position of the United States concerning the application of general international law in the context of Iran's ability to invoke the 1955 Treaty, on the one hand, and the United States position that Article XX, paragraph 1 *(d)*, of the 1955 Treaty should be read according to its terms and not rewritten to incorporate provisions of general international law, on the other hand (CR 2003/16, pp. 11-12, para. 4). Frankly, this observation seemed to have been prompted by a desire more to score some rhetorical points than to illuminate the issue before the Court. After all, counsel for Iran then launched into the statement that the United States position was that "it is general international law for others. The United States benefits from the exception, the rest of the world has to comply with the rule." (CR 2003/16, p. 12, para. 5.)

26.3. I suggest that when the Court examines this question, it will not find any "formal incoherence" in the United States position (CR 2003/16, p. 12, para. 5). The rule is the same for everyone: questions arising under general international law are to be decided in accordance with

general international law, no matter who raises them. The impact of Iran's own conduct on its ability to invoke the 1955 Treaty and maintain its claim in the Court is a question arising under general international law. The Court can be expected to consider the relevant fundamental principles of international law in determining whether Iran's conduct precludes it from invoking the Treaty. The proper method of interpretation of Article XX, paragraph 1 *(d)*, or any other provision of the Treaty is also a question arising under international law, and the Court can be expected to apply the relevant rules of interpretation in making its interpretation. But it does not follow from any of the foregoing propositions that questions concerning the substantive scope of a specific treaty provision are to be answered by simply inserting into that treaty provision the corpus of general international law. Thus it does not follow that the Court must interpret Article XX in the particular way that counsel for Iran suggests, as incorporating substantive provisions derived from Article 51 of the United Nations Charter or from general international law. Such an interpretation would, in fact, not conform to the relevant international law rules governing the interpretation of treaties, pursuant to which the Court must give meaning to the terms actually used in the Treaty and not replace those terms with words that do not appear in the Treaty. In short, the Court may use general international law to determine whether the Treaty may be invoked, but once invoked, it must use the Treaty itself to determine the existence of a breach.

26.4. Let me turn to the issue at hand. The United States argues that the consequence of Iran's own wrongful conduct is that Iran may not invoke the 1955 Treaty. The starting point is Judge Hudson's opinion in the *River Meuse* case (*Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, pp. 73-80). The United States agrees with Judge Hudson that the principles that it is asserting here are ones to which the Court should give "very sparing application" (*ibid.*, p. 77). Only in an exceptional case should the Court decide that a principle of "obvious fairness" *(ibid.)* requires that the Applicant's own conduct precludes its claim. The United States submits that this case meets that test. The Court could specifically address the exceptional character of its decision should it apply these principles in the case.

26.5. Counsel for Iran argues, in essence, that whatever may be the case generally with respect to the three propositions asserted by the United States, they cannot be applied in the context of the use of force (CR 2003/16, p. 21, para. 7; p. 23, para. 12; p. 25, para. 19). Such an

application would, he suggested, undermine the foundation of contemporary international law (*ibid.*, para. 19), and the principal judicial organ of the United Nations should have no part in that.

26.6. As an initial matter, to be clear, a dismissal of Iran's claim on the basis of its own conduct would not constitute a finding by the Court with respect to the lawfulness of the United States measures that Iran complains of. The Court's decision would be limited to certain findings about Iran's conduct and a dismissal of the claim on the basis of that conduct.

26.7. Moreover, however, in the specific circumstances of the case before you, a decision on the basis urged by the United States would uphold the foundation of contemporary international law, and a decision on the grounds urged by Iran would undermine it. The Court has before it the conduct of both Parties, including the use of force by both Parties. The United States submits that the Court should find that the United States measures against the platforms were the consequence of Iran's own unlawful uses of force, which were unlawful both under the 1955 Treaty and its other international obligations. Should the Court make such a finding, we submit that appropriate legal consequences should be attached to that finding. To do otherwise would be, in effect, to give a "free pass" to Iran for its unlawful attacks against United States shipping and a United States naval vessel, as well as its attacks on other neutral shipping. This could be seen more generally as a "blank cheque" for breaching States, and a signal that their conduct is of no consequence to the Court so long as they are the first to arrive with an application at the Registry.

26.8. The approach we propose would need to be carefully circumscribed. The case before you is not a case in which one State used force following a non-forcible breach by the other State. This is also not a case in which a trivial use of force by one State was followed by an excessive use of force by the other. In such cases, it may not be appropriate for the Court to apply the principles the application of which we are urging; those cases are for another day. The Court can make these limitations clear in its judgment. But the Court should not disregard sustained and serious violations of the laws relating to the use of force by an applicant State.

26.9. Counsel for Iran wants the Court to test the principles cited by the United States by the standards of different principles on which we have not relied (CR 2003/16, pp. 20-23). The Court should see past this tactic. Counsel for Iran notes that the United States measures against the platforms cannot be regarded as countermeasures within the meaning of this Court's decisions or

the International Law Commission's Articles on State Responsibility (*ibid.*, pp. 22-23, paras. 9-12). The United States has not suggested that its actions constitute countermeasures. Counsel for Iran discussed the application of the exception of non-performance — and, presumably, the principle of reciprocity generally, although he did not say so — solely in the context of the suspension or termination of a treaty under the law of treaties (*ibid*., p. 21, para. 7), though the United States has not sought to suspend or terminate the Treaty at issue. Therefore, neither the countermeasures régime nor the law of treaties régime has any applicability here. In particular, Iran has not argued or shown that either the countermeasures régime or the law of treaties régime limits the Court's ability in this case to apply the fundamental principles of international law in the way that the United States is urging and to decide that Iran may not invoke the 1955 Treaty because of its own conduct. There is no such limitation found in those régimes.

26.10. Iran has argued that any Iranian responsibility for its wrongful acts can be addressed in the context of the United States counter-claim and that consequences should not be attached to those acts in the context of its own claim (Reply and Defence to Counter-Claim of Iran, pp. 183-184). While some of the facts supporting our arguments in this context are the same facts that support the counter-claim, others are different. For example, Iran's manifestly unlawful mining of shipping lanes in international waters of the Gulf as it affected non-United States shipping would not be a basis for United States recovery in the counter-claim, but it is an aspect of Iran's conduct that the Court should consider in deciding whether Iran may invoke the 1955 Treaty.

26.11. In any event, the issues of recovery by Iran on its own claim and its defences with respect to the counter-claim are jurisprudentially distinct. If, as we believe, Iran may not prevail on its own claim by reason of the application of principles of "obvious fairness", to use Judge Hudson's phrase, these principles would not cease to apply because Iran's conduct is also the subject of a counter-claim.

26.12. Counsel for Iran returned on Monday to his point that none of the propositions that we are advancing, or the fundamental principles on which they are based, are reflected in the International Law Commission's Articles on State Responsibility as circumstances precluding wrongfulness. He said that the only "trace" of the "clean hands" doctrine in the Articles could be found in Article 39, which deals with "Contribution to the Injury" (CR 2003/16, p. 25, para. 17).

On this basis he took issue with the argument of the United States that general principles which "are not specific circumstances precluding wrongfulness" can "generate consequences", including the consequence that a State should have its claim denied on the basis of its own conduct (see Commentaries, Chap. V). If I understood correctly, counsel for Iran would limit such consequences to the determination of reparation due. With respect, this limitation on the nature of the consequences that can be generated does not appear in the Commentaries. In addition, the placement of the relevant passage of the Commentaries which is in Part One, Chapter V, which deals with Circumstances Precluding Wrongfulness, rather than in Part Two, Chapter II, dealing with Reparations for Injury, suggests that no such limitation was intended by the Commission. In any case, to be clear, the United States is not asking the Court to apply these principles as circumstances precluding the wrongfulness of the United States actions in this case; our point is that the Court should dismiss Iran's claim on the basis of its own conduct, without more.

26.13. Mr. President, Members of the Court, each of the principles — reciprocity, the exception for consequential acts, the equitable principles that we are discussing under the heading of "clean hands" — these are general principles that are "capable of generating consequences" with respect to the ability of an applicant to maintain a claim before the Court. They are central to the Court's consideration of Iran's claim and they should not be relegated to a reparations proceeding.

26.14. I now turn briefly to each of the three related but independent propositions of the United States by virtue of which Iran's claim should be denied as a consequence of its own unlawful conduct under the Treaty and more generally.

26.15. The first United States proposition is that Iran's claim should be denied because Iran breached its reciprocal obligations under the 1955 Treaty. In the first round, I cited Fitzmaurice, who wrote that "the failure of one State to perform its international obligations in a particular respect will . . . *disentitle that State from objecting to . . . corresponding non-performance*" (*Yearbook of the International Law Commission*, A/CN.4/Ser.A/1959/ADD.1, 1959, Vol. II, p. 70, "*Article 20. Conditions implied in the case of all treaties: condition of reciprocity or continued performance by the other party or parties*"; emphasis in original). This consequence, identified by Fitzmaurice, is, of course, the very consequence that we are urging the Court to adopt in this case. Counsel for Iran did not discuss Fitzmaurice's specific conclusion on this point of law.

26.16. Let us turn to the second principle: that Iran should not be permitted to prevail on a claim based on United States conduct that was a consequence of Iran's own breaches of the Treaty and otherwise wrongful conduct. Counsel for Iran made two points with respect to this principle. First, he noted that the United States measures against the platforms, because they involved the use of force, did not constitute countermeasures and should not be exonerated by the Court as such (CR 2003/16, p. 23, para. 12). I dealt with that argument a few moments ago. Second, he noted that, if Iran acted wrongfully, which he said in making this argument he did not accept, the Court could assess the "independently unlawful" (*ibid.*, p. 23, para. 13) conduct of both sides, along the lines of its decision in the *Gabèíkovo-Nagymaros Project (Hungary/Slovakia)* case, *(Judgment, I.C.J. Reports 1997)*. But, Members of the Court, neither of the parties in the *Gabèíkovo* case had engaged in the kind of manifestly unlawful conduct that Iran has engaged in with respect to this claim. The Court decided that it was appropriate to apply the *Gabèíkovo* model, where both parties had engaged in wrongful conduct under the treaty at issue in that case. If one party had attacked the vessels of the other on the Danube, the Court might have come to a different conclusion.

26.17. Counsel for Iran also referred to but did not discuss at any length the decision of the Permanent Court in the *Factory at Chorzów* case *(Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9)*, to which I referred last week. As I noted at that time, the decision of the Permanent Court in that case was that Poland could not "avail itself" of the non-compliance of the factory owners with the procedures that were to have been established under the 1922 Geneva Convention but that Poland had not implemented (*ibid.*, p. 31). In the same sense, the United States submits, Iran "cannot avail itself" in this Court of the alleged United States violations of its obligations under the 1955 Treaty. Neither of counsel for Iran's observations addressed this point.

26.18. We turn now to the third principle: that Iran's manifestly unlawful conduct with respect to the subject-matter of the claim should preclude its recovery. Counsel for Iran said that this formulation of the principle "begged the question" because it assumed the unlawfulness of Iran's conduct (CR 2003/16, p. 24, para. 16). But Iran's conduct is before this Court. If the Court determines that Iran launched unlawful mine, missile and other attacks on neutral shipping in the international waters of the Gulf and that the United States measures of which Iran complains were a result of those attacks, then it should, we submit, attach legal consequences to those findings in the

context of Iran's own claim. Counsel for Iran would limit those consequences, if any, to the reparations stage, for consideration consistent with Article 39 of the Draft Articles on State Responsibility (*ibid.*, p. 25, para. 17). The United States submits, however, that, in light of the centrality of Iran's wrongful conduct to its claim, the Court should determine that Iran may not invoke the Treaty.

26.19. For the Court to act as the United States urges would, far from undermining the contemporary international legal foundation, specifically confirm the continuing vitality of these principles — such as reciprocity and *ex injuria jus non oritur*. For the Court to decline to apply these principles, as Iran suggests, on the other hand, would cast doubt on the continuing vitality of these fundamentally just principles. If the Court does not rely on the fundamental principle of reciprocity here, where Iran's interference with freedom of commerce and navigation is manifest, in what case would it be appropriate for the Court to apply that principle? If the Court does not decide here that a State cannot prevail on a claim that results from its own wrongful acts, in circumstances in which the United States made a contemporaneous report to the Security Council which documented that United States measures were the result of Iran's unlawful attacks on United States vessels, in what case would the Court apply that principle? The United States asks the Court to recall the often-quoted words of Judge Anzilotti in his dissenting opinion in the *River Meuse* case, writing about the *inadimplenti* principle: "I am convinced that the principle underlying this submission . . . is so just, so equitable, so universally recognized, that it must be applied in international relations also." (*Op. cit.*, p. 50.)

26.20. Mr. President, Members of the Court, the three propositions that I have discussed would each independently support a decision on behalf of the United States in this proceeding. On the facts of this case, they are all applicable and mutually reinforcing, together providing a compelling case for their application. A decision to apply them here and dismiss Iran's claim as a consequence of its own conduct would be a fair result in the specific circumstances of this case. It would, moreover, confirm the continued force of these fundamental principles of justice in the international legal system. In any case, the United States submits that justice requires that the Court, in assessing Iran's claim, attach appropriate legal consequences to Iran's own unlawful conduct.

26.21. I thank the Members of the Court for their attention. Mr. President, I ask that you now call on Professor Weil.

The PRESIDENT: Thank you, Mr. Mathias. I now give the floor to Professor Weil.

M. WEIL :

27. DUPLIQUE

27.1. Monsieur le président, Madame et Messieurs les juges, à écouter les professeurs Crawford et Pellet on aurait pu croire qu'ils s'attaquaient à des plaidoiries américaines qui avaient fait l'apologie du recours à la force et qui avaient revendiqué pour les Etats-Unis, en tant que *world policeman* (gendarme du monde), (c'est le titre que le professeur Crawford a donné à sa plaidoirie) un droit discrétionnaire de violer à leur convenance les règles les plus fondamentales du droit international contemporain. Sans doute, le professeur Pellet a-t-il déclaré que «l'Iran ne vous demande pas de juger que les Etats-Unis ont utilisé la force armée contrairement à la Charte et aux principes généraux du droit international» mais seulement qu'«ils ont violé l'article X, paragraphe 1, du traité» de 1955 (CR 2003/16, p. 32, par. 39). Sans doute le professeur Crawford a-t-il de son côté déclaré que l'insistance mise dans les écrits de l'Iran sur le droit international général et la Charte appartenait au passé et a-t-il confirmé lui aussi que l'Iran fondait sa demande exclusivement sur l'article X (CR 2003/14, p. 46, par. 5). Mais ces moments de lucidité ont été fugaces, car tout au long de ce second tour des plaidoiries iraniennes les conseils de l'Iran n'ont cessé d'accuser, d'accuser encore et d'accuser toujours les Etats-Unis d'avoir recouru à la force au mépris des règles les mieux établies du droit international contemporain.

27.2. C'est dans cette perspective que nous avons entendu le professeur Pellet présenter les actions américaines comme des «actes de «justicier» auto-proclamé» (CR 2003/16, p. 26, par. 22). C'est dans cette perspective encore que nous avons entendu nos adversaires reprendre le thème de l'identification des mesures nécessaires à la protection des intérêts essentiels de sécurité de l'article XX du traité de 1955 avec la légitime défense de l'article 51 de la Charte : *«since the destruction of the platforms obviously could not be justified as measure of self-defence . . ., it cannot be justified under paragraph 1* (d) *either»* (CR 2003/16, p. 11, par. 2). C'est dans cette perspective aussi que le professeur Crawford a affirmé que le traité d'amitié n'a pas pu autoriser ou

légitimer des comportements violant des normes impératives du droit international telle celle qui prohibe l'usage de la force : *«the Treaty of Amity»*, a-t-il dit, *«cannot have authorized or legitimized, as between the United States and Iran, conduct violative of a peremptory norm, such as that prohibiting the use of force . . .»* (CR 2003/16, p. 13, par. 7). Mais où donc, Monsieur le président, où donc avons-nous soutenu pareille thèse ?

27.3. Car c'est bien là le thème majeur — pour ne pas dire le thème unique — de nos adversaires au cours de ce second tour : les Etats-Unis s'appuient sur l'article XX du traité de 1955, ont dit et redit les conseils de l'Iran, pour s'octroyer le droit de recourir à la force en toutes circonstances s'ils estiment que cela est nécessaire à la protection de leurs intérêts essentiels en matière de sécurité. Les conseils de l'Iran ont inlassablement repris ce thème, qui se trouvait déjà longuement développé dans les écrits iraniens et que j'ai dénoncé dans ma précédente plaidoirie comme un «total travestissement», une «complète dénaturation de la thèse des Etats-Unis» (CR 2003/11, p. 21, par. 13.21-13.22). Je croyais pourtant avoir été clair : *les Etats-Unis n'ont jamais soutenu, et ne soutiennent pas, que le traité de 1955 les autorise à violer les obligations nées de la Charte et du droit international général.* Ce que les Etats-Unis soutiennent, c'est que la compétence de la Cour se limite aux violations des dispositions du traité. Le fait que ce traité n'interdit pas certains actes n'implique pas que ces actes sont autorisés par le droit international général; il signifie que ces actes ne violent pas les dispositions expresses du traité et que les différends nés d'un tel comportement ne relèvent pas de la compétence de la Cour sur la base de l'article XXI du traité. Pour me conformer à votre souhait, Monsieur le président, je ne m'étendrai pas davantage sur ce point, que j'ai amplement développé au cours du premier tour des plaidoiries.

27.4. C'est également pour me conformer à votre souhait, Monsieur le président, que je ne répéterai pas l'analyse des rapports entre la légitime défense et les mesures nécessaires à la protection des intérêts essentiels en matière de sécurité. Il aura fallu ce deuxième tour des plaidoiries pour voir la partie adverse faire enfin une discrète mention — une mention très discrète — du passage capital de l'arrêt *Nicaragua* qui analyse le concept de mesures nécessaires à la protection des intérêts essentiels en matière de sécurité comme «débordant certainement» — *«certainly extends beyond»* — celui de légitime défense (CR 2003/16, p. 14, par. 9). Sur ce *dictum*, le conseil de l'Iran a glissé rapidement — il a glissé «comme chat sur

braise», pour reprendre une expression favorite de Roberto Ago. Mieux encore : ce *dictum*, le conseil de l'Iran a essayé de le minimiser, pour ne pas dire le vider de son contenu, en affirmant que, selon lui, la légitime défense vient en premier, et les mesures nécessaires à la protection des intérêts essentiels en second *(«self-defence first, paragraph 1* (d) *second») (ibid.)*. La tentative de priver de toute autonomie la disposition de l'article XX du traité en l'absorbant purement et simplement dans la règle de l'article 51 de la Charte gouvernant la légitime défense a une fois de plus constitué le *leitmotiv* de nos adversaires ¾ à tel point que le professeur Bothe n'a pas hésité à parler de *«the real issue in this case : the law of self-defence»* (CR 2003/15, p. 55, par. 6).

27.5. C'est toujours pour me conformer à votre souhait, Monsieur le président, que je ne reviendrai pas non plus sur la confusion systématiquement entretenue par nos adversaires entre le fond du droit et la compétence de la Cour. Ce n'est pas parce que la Cour n'est pas compétente pour se prononcer sur la licéité internationale d'un acte ou d'un comportement que cet acte ou ce comportement serait nécessairement licite. Contrairement à ce que nos adversaires on tenté de faire croire, nous n'avons jamais, jamais, jamais, analysé l'article XX du traité comme «une sorte de «boîte noire», comme a dit le professeur Pellet, mettant l'application du traité «à l'abri» des règles de droit international général» et comme autorisant le recours à la force (CR 2003/16, p. 31, par. 36). C'est là, une nouvelle fois, un complet travestissement de notre thèse : je me permets de renvoyer la Cour à ce sujet aux paragraphes 13.15 à 13.17 de mon intervention du mardi 25 février (CR 2003/11, p. 18-19).

27.6. Voilà, Monsieur le président, pour la tentative de l'Iran de faire glisser le débat du plan des mesures nécessaires de l'article XX du traité vers celui de la légitime défense de l'article 51 de la Charte. Probablement l'Iran espère-t-il avoir plus de chance de gagner la bienveillance de la Cour en se plaçant sur le terrain du recours à la force et de la légitime défense plutôt que sur celui de l'article XX du traité...

27.7. Mais l'Iran est allé plus loin. Dans ses efforts pour escamoter la discussion autour de cet article XX qui le gêne parce qu'il légitime de toute évidence les actions américaines, le conseil de l'Iran est allé jusqu'à faire disparaître cette disposition d'un coup de baguette magique en prétendant qu'elle n'a aucune pertinence dans notre affaire. Ce n'est pas sans surprise, je dois l'avouer, que nous avons entendu le professeur Crawford affirmer que la partie de l'article XX qui

vise les mesures nécessaires à la protection des intérêts essentiels en matière de sécurité n'intéresse pas les rapports internationaux. C'est la première partie de ce paragraphe 1 *d)* de l'article XX, a-t-il soutenu, qui seule concerne les rapports internationaux, c'est-à-dire la disposition qui déclare que le traité ne fera pas obstacle aux mesures «nécessaires à l'exécution des obligations de l'une ou l'autre des Hautes Parties contractantes relatives au maintien ou au rétablissement de la paix et de la sécurité internationales». Quel sort réserve alors le professeur Crawford à la seconde partie de cette disposition, celle dont nous avons tant parlé ici, celle relative aux mesures nécessaires à la protection des intérêts essentiels en matière de sécurité ? Eh bien, il l'expulse tout simplement hors de notre problème en soutenant qu'elle concerne la sécurité intérieure des parties. Voici ce qu'a dit le professeur Crawford :

> *«It is one thing for a State to determine what interests are essential in relation to its own internal affairs, its own internal security. It is quite another for a State to determine the scope of necessity in international relations . . .»* (CR 2003/8, p. 15, par. 27.)

C'est la première partie du paragraphe 1 *d)* qui, à en croire le professeur Crawford, exclut l'illicéité d'une conduite et fournit à l'Etat une possible défense de fond. Quant à la seconde partie de ce paragraphe 1 *d)* — les sept derniers mots, a-t-il affirmé — elle ne concerne pas au premier chef la paix et la sécurité internationales :

> *«As to the second part of the paragraph ¾ the last seven words ¾ the primary focus is on the application of measures concerning internal security ¾ as compared to the first part, which is concerned with international peace and security and has no relevance to the facts of the present case.»* (*Loc. cit.*, par. 28.)

Faut-il que nos adversaires aient peur de l'article XX pour tenter de lui échapper par de tels arguments ! Comment imaginer, comment imaginer un instant, que les parties au traité de 1955, de même que les nombreux gouvernements signataires de traités qui comportent une clause identique ou analogue à celle de notre article XX, aient inséré dans un traité international une clause régissant leur sécurité intérieure ? Lorsque la Cour a analysé, dans les paragraphes 223 et 224 de son arrêt *Nicaragua* de 1986, une clause du traité entre les Etats-Unis et le Nicaragua identique à la nôtre, elle n'a pas eu un mot, pas le moindre mot qui puisse donner à penser qu'à ses yeux le paragraphe 1 *d)* de l'article XX comporterait deux dispositions de sens et de portée radicalement

différents : l'une intéressant les rapports internationaux et le droit international, l'autre intéressant la sécurité interne et le droit interne.

27.8. Mais, Monsieur le président, la thèse de l'Iran n'est pas seulement invraisemblable : elle est aussi contradictoire. Comment la partie adverse ne se rend-elle pas compte qu'elle ne peut pas soutenir que la deuxième partie de l'article XX concerne la sécurité intérieure et soutenir en même temps — dans le même souffle, allais-je dire — qu'elle vise des mesures de légitime défense, une institution typiquement de droit international et qui se situe exclusivement sur le plan des rapports interétatiques (CR 2003/8, p. 16, par. 29, 32, 33) ? Mesures purement internes et mesures de légitime défense internationale : les mesures de l'article XX ne peuvent pas être l'un et l'autre à la fois. Bref, nos adversaires veulent bien lire l'article XX de mille manières différentes mais ils ne veulent surtout pas le lire tel qu'il est écrit ! L'article XX ne parle ni de légitime défense ni de mesures internes de sécurité, et la Cour n'acceptera pas d'en dénaturer le sens. Le professeur Crawford m'a reproché d'avoir ignoré son argumentation sur ce point lors de ma première plaidoirie (CR 2003/16, p. 16, par. 15). Si je n'en ai pas parlé, c'était parce que je voyais dans sa remarque ce que sir Gerald Fitzmaurice a appelé un jour — en français — un «argument de plaidoirie», c'est-à-dire un argument qui pouvait être négligé.

27.9. Monsieur le président, tout au long de la procédure orale, la Partie iranienne a tenté, comme elle l'avait déjà fait lors de la procédure écrite, de déplacer le problème en demandant à la Cour de répondre à des questions qui ne se posent pas de préférence aux questions qui se posent. Les questions qui se posent, ce sont, comme la Cour l'a décidé avec force de *res judicata* en 1996, celles de l'article X et celle de l'article XX. Sur les rapports entre ces deux dispositions nos adversaires sont restés aussi discrets pendant le second tour des plaidoiries orales qu'ils l'ont été pendant le premier. Sur ce problème je me permets de me référer à ma plaidoirie du 25 février (CR 2003/11, p. 14 et suiv., par. 13.5 et suiv.). La question qui ne pose pas, c'est celle de la légitime défense; mais c'est là-dessus que l'Iran insiste et invite la Cour à se prononcer.

27.10. Il me faut dire aussi un mot, Monsieur le président, des objections soulevées par le professeur Crawford (CR 2003/16, p. 15 et suiv., par. 12 et suiv.) à mes développements relatifs à l'étendue du contrôle judiciaire (CR 2003/12, p. 28 et suiv., par. 17.40 et suiv.). Mon collègue soutient qu'il n'existe aucune marge d'appréciation au profit des Etats parties au traité de 1955.

Parler d'une marge d'appréciation, soutient-il, favoriserait les Etats les plus puissants et créerait une présomption de légalité du recours unilatéral à la force.

27.11. Pour faire justice de cette critique, j'observerai simplement que refuser toute marge d'appréciation priverait la disposition de l'article XX de tout effet utile et mettrait ainsi en danger l'équilibre établi par le traité. C'est donc à juste titre que le professeur Schachter a écrit, dans l'article que j'ai déjà cité, que dans l'application des mesures intéressant la sécurité, l'Etat intéressé doit posséder une «*very wide margin of appreciation*» (Schachter, *International Law in Theory and Practice*, 1991, p. 221-222). A quoi s'ajoute — et cela est décisif — que lorsque dans l'affaire *Nicaragua* la Cour a, comme je l'ai rappelé dans ma précédente intervention, délimité avec soin l'étendue et les contours de son contrôle, elle a pris position, de manière explicite, en faveur de l'existence d'une marge de pouvoir discrétionnaire (CR 2003/12, p. 29, par. 17.43 et suiv.).

27.12. Monsieur le président, pour terminer ces brèves observations, je voudrais faire remarquer que, mises à part les quelques questions que je viens d'évoquer, nos adversaires n'ont pas apporté une véritable contradiction aux analyses auxquelles j'ai procédé lors du premier tour de la procédure orale (CR 2003/11, p. 12 et suiv. et 2003/12, p. 10 et suiv.).

27.13. En conclusion, c'est à juste titre, que les Etats-Unis ont estimé que les mesures aujourd'hui contestées par l'Iran étaient nécessaires à la protection de leurs intérêts essentiels en matière de sécurité. C'est ce que le professeur Matheson confirmera dans un instant.

27.14. Au moment de clore mon intervention, permettez-moi, Monsieur le président, de dire à la Cour combien je me sens honoré d'avoir pu prendre la parole devant elle. Je vous remercie, Monsieur le président, Madame et Messieurs les juges, de l'attention que vous avez bien voulu me prêter, et je vous prie, Monsieur le président, de bien vouloir donner la parole au professeur Matheson.

The PRESIDENT: Thank you, Professor Weil. I now give the floor to Professor Matheson.

Mr. MATHESON:

28. ARTICLE XX AND SELF-DEFENCE

28.1. Mr. President and distinguished Members of the Court, this morning, Mr. Bettauer addressed the points made by counsel for Iran on disputed questions of fact. Professor Weil has

just responded to Iran's points about the conceptual aspects of Article XX. I will now respond to the Iranian arguments concerning the applicability of Article XX and the right of self-defence to the facts that we have demonstrated. I do not propose to repeat what we have said in the first round, but only to address a few of the points made by counsel for Iran that seem to require additional comment, and to summarize what we see as the overall posture of the case on these matters.

Article XX

28.2. Let me start with Article XX. There can hardly be any question that the long and violent Iranian campaign against neutral shipping in the Gulf presented a very serious threat to essential security interests of the United States, both in the flow of oil and neutral commerce generally, and in the protection of United States warships, merchant vessels and nationals particularly. We have explained in some detail the reasons for our contention that the United States reasonably determined that military action was necessary to protect these essential security interests, and that it reasonably determined to take such action against the platforms (CR 2003/12, paras. 18.18-18.40).

28.3. There is no need to repeat all of this. However, some points made during the Iranian rebuttal argument deserve comment. *First*, counsel for Iran characterized the United States position under Article XX as amounting to an assertion of the right "to enforce the alleged collective interest of neutral States" (CR 2003/16, p. 17), and he objected that the United States was not entitled to do this. With respect, this characterization of the United States position is incorrect. It is certainly true that Iranian attacks against other neutral shipping were an important part of the threat to essential security interests that the United States sought to protect through its actions against the platforms.

28.4. However, this does not amount to United States enforcement of the rights of others. Rather, the United States is asserting that its *own* essential interests were threatened and damaged by Iranian attacks on other neutral shipping. Specifically, these attacks threatened seriously to disrupt the flow of oil from the Gulf, which would have had severe effects on the United States economy and on United States strategic interests, whether the ships attacked were of United States

nationality or otherwise. These were interests of the United States, and the United States had the right under Article XX to protect them, even if they coincided with the interests of others, which of course they did.

28.5. *Second*, counsel for Iran argued on Monday that the United States position under Article XX should be disregarded because the real "operative motive" of the United States in acting against the platforms was allegedly its hostility toward Iran and its desire to assist Iraq (CR 2003/16, p. 18). With respect, these repeated allegations by Iran, besides being untrue, are irrelevant to the application of Article XX in the circumstances of this case.

28.6. Our showing of the threats to United States security interests and the necessity of the United States response stands on its own, and must be evaluated as such for the purposes of this Treaty. As the Court itself indicated in the *Nicaragua* case, if a State has a valid legal basis for its actions, it is irrelevant that it might have had additional political motives, even if those motives were "more decisive" (Judgment of 27 June 1986, para. 127). In other words, if the prerequisites of Article XX are otherwise met, then Iran's allegations that the United States was also motivated by hostility toward Iran are legally of no consequence. We believe that it is obvious that the United States did have essential interests in the protection of its ships and nationals from attack, and in the maintenance of unimpeded commerce and navigation with friendly States in the Gulf, regardless of its position on the conflict between Iran and Iraq. These interests are valid grounds for the invocation of Article XX.

28.7. *Finally*, with respect to the hypothetical applicability of Article XX to the Iranian actions described in the United States counter-claim, little needs to be said at this point. Iran had suggested in its pleadings that it might assert that its attacks would have been justified as measures necessary to protect its essential security interests under Article XX, but counsel for Iran have not attempted to make this case in the present oral proceedings, and Professor Murphy had previously shown that there would be absolutely no basis for such an argument (CR 2003/13, pp. 40-42). Iran's security interests in no way were threatened by such maritime commerce, and if they had been threatened in any particular case, Iran had available non-forcible means of dealing with such threats.

Self-defence

28.8. Let me next turn to the question of self-defence. Again, we do not believe that the Court need rule on this question, given the valid basis in Article XX for United States actions. And I do not in any event propose to repeat what we said in the opening round: only a few additional points need to be made.

28.9. *First,* counsel for Iran suggested on Monday that, to sustain an argument of self-defence, the United States must show both a "forest" and individual "trees" — that is, both that armed attacks occurred against individual United States targets and that these individual attacks formed a larger pattern of continuing attack (CR 2003/15, p. 56). In fact, we have shown both the "forest" and the "trees" in this case, in that the evidence shows that Iran conducted a whole series of attacks on United States ships and openly announced its intention to do so for the purpose of driving United States shipping from the Gulf. Nonetheless, it would be sufficient for the purposes of self-defence to show one or more individual "trees" without necessarily showing the "forest" — that is, to show that Iran conducted armed attacks against one or more United States ships without necessarily proving some overall continuing pattern (see Rejoinder of the United States, paras. 5.14-5.15, 5.22, in which the United States argued that an attack on a single merchant ship may indeed be an armed attack for which the flag State has a right of self-defence). This is particularly true in the present case, where one of these "trees" was a United States warship and the others were United States merchant vessels under the protection of United States warships. Whether you believe that Iran was merely trying to fell individual "trees", or rather to give the axe to the entire "forest" — which we have shown to be the case — the right of self-defence still applies.

28.10. *Second,* counsel for Iran argued on Monday that the missile attack on the *Sea Isle City* could, at best, have only been an attack on Kuwait because it took place while the ship was in Kuwaiti territorial waters (CR 2003/15, p. 56). But the fact that the ship was in Kuwaiti waters — and therefore that the attack could be seen as an armed attack on Kuwait — does not mean that it was not an armed attack on the United States as well. For example, it is widely considered that an armed attack on an embassy is an attack on the State to which that embassy belongs, even though it is of course located in the territory of another State (e.g., Dinstein, *War, Aggression and*

Self-Defence 177; see also *Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, para. 57); and the same considerations apply to an attack on a ship in foreign territorial waters.

28.11. Whatever the rights of a coastal State to exercise jurisdiction over foreign vessels in its waters, it remains the case that the flag State has a concurrent right to exercise control over its flag vessels and has every independent interest and right to defend them from attack by a third State. Surely the right of self-defence should not be dependent on precisely which juridical parts of the seas a ship happens to be at the time of the attack. And in any event, there is in the present case no question of any intrusion by the United States into the sovereignty of Kuwait: Kuwait was very supportive of United States actions, and the United States actions against the platforms did not take place in the territory or waters of Kuwait or in any way harm Kuwaiti interests. It would be bizarre, under such circumstances, to deny the United States its inherent right of self-defence against an attack by Iran simply because Iran chose to conduct its attack while the ship in question was temporarily in the waters of another State.

28.12. *Third*, counsel for Iran reiterated on Monday his contention that the laying of mines — even in international waters — cannot be an armed attack on the flag State of any ship that may strike one of those mines unless that particular ship — and that particular flag State — were specifically targeted for attack. I have already addressed this issue at length last week (CR 2003/12, paras. 18.46-18.48); I will not attempt to repeat that argument. We have in fact shown that Iran specifically targeted United States vessels for such attacks: beyond that I would only observe at this point that it is simply incredible to think that no State would have a right of self-defence if such indiscriminate minelaying took place in international waters, that any number of neutral ships could be damaged or sunk without there ever having been an armed attack on anyone, and that the flag States of the ships attacked would be limited to diplomatic protest, or to a futile attempt to clear mines from vast areas of the high seas. This simply cannot be the scope of the right of self-defence when it comes to such indiscriminate methods of warfare.

28.13. Contrary to the suggestion made by counsel for Iran (CR 2003/15, p. 57), nothing in the *Nicaragua* case says anything like this. In that case, the Court was of course not called on to decide whether the United States had attacked any State other than Nicaragua, but certainly the

Court did not hold that other States were *not* the victims of armed attack: and the Court made clear that it considered the laying of mines in the territorial waters of a State to be unlawful in such circumstances both with respect to the territorial State and to any other State whose vessels exercise the right of innocent passage in such waters or enjoy a "right of access to ports" (Judgment, para. 214).

28.14. *Third,* counsel for Iran objected on Monday to the analogy I had earlier drawn to the attacks of 11 September, concerning which I had pointed out that Iran's view of self-defence, if applied to those attacks, would mean that the right to take action in self-defence would have ended once the hijacked aircraft had struck their targets. Counsel argued that the 11 September attacks were different because the Security Council had in that case determined that the attacks were a threat to the peace and acknowledged the existence of a right of self-defence (CR 2003/15, p. 16). But, of course, the right of self-defence is not dependent on acknowledgment by the Security Council, as Iran well knows; indeed, Iran would never have agreed that it did not have a right of self-defence against Iraqi attack because the Council had not acknowledged it. And in any event, as we have shown, the Council did condemn Iranian actions against neutral shipping, did treat them as "Iranian attacks" and did characterize them as amounting to a threat to the peace.

28.15. But more to the point, the Council's acknowledgment of the right of self-defence in the case of 11 September precisely proves the point that in such circumstances the right to act in self-defence does not necessarily end just because the specific attack in question ends. In fact, although the two cases of course differed in various respects, the circumstances of 11 September were in this respect very much the same as in the present case. Al Qaeda had committed a series of attacks on United States targets and so had Iran; Al Qaeda had made known its intention to continue these attacks and so had Iran; Al Qaeda had the capability of conducting further attacks and so had Iran; the likelihood of such further attacks by Al Qaeda posed a serious threat to United States lives, and the same was true with respect to Iran; measures not involving the use of force would not have given adequate protection against further Al Qaeda attacks, and the same was true with respect to Iran; forcible action in self-defence was therefore justified to protect against further attacks from Al Qaeda, and the same was true with respect to Iran. In every respect relevant to this case, the situations were essentially identical. And in the case of Al Qaeda, the Security Council

agreed that the United States was entitled to act in the exercise of self-defence. The same conclusion would apply in this case.

28.16. *Finally*, counsel for Iran again argued on Monday that the United States actions served no legitimate protective purpose because the platforms were not being used for military functions as alleged by the United States, and consequently that those United States actions met neither the necessity nor the proportionality tests of the doctrine of self-defence. We have laid out our evidence on this point at great length, both in this round and previously, and I will not attempt to repeat that now. I would only make one point.

28.17. Even if Iran suffered significant damage as a result of the United States actions, as counsel for Iran have repeatedly argued (e.g., CR 2003/15, p. 60), that does not resolve the question of proportionality. If an installation that normally has a commercial role is used for military purposes and therefore becomes the object of military action in self-defence, it would not be unusual for there to be collateral economic damage that, in and of itself, does not serve the defensive purpose. That fact does not by itself make the action unlawful; only if the damage is actually disproportionate is this so. In the present case, we have shown not only that the consequences of the United States actions were not in excess of what was necessary to deter or stop Iranian attacks, but also that the damage caused by United States actions was not excessive in relation to the loss of United States life and property that would have resulted if Iran had continued those attacks.

The overall posture of the case on Article XX and self-defence

28.18. Let me conclude with a brief comment on the overall posture of this case as regards Article XX and self-defence. It is important to deal with the specific points of fact and law that we have been discussing. But the Court's decision on Article XX, and if necessary on the right of self-defence, depends not merely on the accumulation of these individual points. In the end, the Court must ultimately decide a more fundamental question: what could the international community have expected — what could international law have required — the United States to do when faced with the long and brutal Iranian campaign against United States and other neutral shipping? The United States had resorted to diplomatic approaches, to the United Nations Security

Council, to defensive military deployments, but the attacks continued. Indeed, Iran began to use more dangerous and indiscriminate methods of attack, particularly the laying of mines in shipping channels and the launching of long-range anti-ship missiles. United States warships and merchant ships, along with their crews, were seriously at risk.

28.19. Under these circumstances, what limits did the 1955 Treaty place on United States action? Was the United States required under the Treaty to withdraw its shipping from the Gulf and abandon its vital interests in the flow of oil and commerce in that region — which was Iran's announced objective? No — Article XX makes clear that measures necessary to protect such essential security interests do not violate the Treaty.

28.20. If the United States remained in the Gulf, was it required under the Treaty to abstain from military action and permit Iranian attacks to continue and escalate, at the cost of seeing its ships damaged or sunk, and its nationals injured or killed? No — military action is one legitimate means of protecting a party's essential security interests and if such action was necessary to protect these interests, it was excluded from the Treaty; and under the right of self-defence, a State need not refrain from military action in the event of armed attack to prevent or terminate such attacks when non-forcible means are inadequate.

28.21. Then if the United States was justified in taking military action, was it required to limit that action to passive defence of its vessels, hoping that it would somehow be able to put warships in the path of every mine or missile and that those warships would be so fortunate as to be able safely to destroy those mines or missiles before they struck their targets? No — a State cannot possibly be required by the law of self-defence to limit itself to measures that had proven both ineffective and highly dangerous, as these most certainly had.

28.22. If, then, the United States was justified in taking military action in response against Iranian forces or facilities that were a significant part of the threat of continuing attack — as were the Iranian platforms, was it nonetheless required to direct that action only against Iranian targets that presented greater risks of civilian casualties, or of involvement in the Iran-Iraq conflict, or of United States casualties, than were presented by action against the platforms? No — certainly the law of self-defence does not require such a choice.

28.23. In short, Mr. President, the United States acted as it had to do, and as it was entitled to do. United States action was consistent with the law of self-defence, but the Court need not rule on that issue and should rather dispose of the case on the basis of Article XX of the Treaty. Certainly the Treaty did not require the United States to take alternative courses of action that would have meant the abandonment of essential United States security interests, or the endangering of United States ships and nationals, or the acceptance of continuing serious disruption to commerce between the parties to the Treaty, or the resort to actions that would have caused much greater damage and involvement in the ongoing Iran-Iraq conflict. On this fundamental level, we firmly believe that United States actions against the platforms were within Article XX and did not violate the Treaty.

28.24. Mr. President, this concludes my presentation. I now suggest you recognize the United States Agent, Mr. Taft, to conclude the presentation of the United States.

The PRESIDENT: Thank you, Professor Matheson. I now give the floor to His Excellency Mr. Taft, the Agent of the United States of America.

Mr. TAFT:

29. CLOSING AND SUBMISSIONS OF THE UNITED STATES

29.1. Thank you, Mr. President.

29.2. Mr. President, Members of the Court. I will summarize the United States position and conclude our presentation in rebuttal. At the outset, however, I would like to thank you, Mr. President, and Members of the Court, for your patience and careful attention to all the oral pleadings over the past weeks. I would also like to thank the members of the Court staff, particularly the interpreters and those in the Registrar's office in charge of preparing transcripts of each day's proceedings and making arrangements for use of the courtroom. They have really been terrific; you are lucky to have them and I thank them.

29.3. Let me first summarize the facts that have been established in the record of the case.

29.4. The Court should find that over a period of four years Iran carried out a series of armed attacks on United States and other neutral shipping in the Gulf. These attacks included the missile attack on the *Sea Isle City* and the mine attack on the *Samuel B. Roberts*. These attacks and others endangered American lives and caused extensive damage to persons and property. United States

ships that were not damaged by Iranian attacks were required to adjust sailing routes and schedules and to incur substantial additional costs. Freedom of commerce and navigation between the United States and Iran were impeded as a result of these attacks.

29.5. The Court should find that the United Nations, the United States, other international organizations and other States tried many times to persuade Iran through diplomatic means to stop its attacks on neutral shipping. Neither these efforts nor the defensive naval operations undertaken by the United States and other States prior to October 1987 were effective in safeguarding United States shipping from the Iranian attacks.

29.6. And finally, the Court should find that Iran made use of its oil platforms in identifying targets, co-ordinating and in several instances launching its attacks on neutral shipping. These platforms were not, at the time of the United States operations against them, engaged in commerce between Iran and the United States. The operations against the platforms played an important role in bringing to an end Iran's attacks on United States and other neutral shipping, something that over the course of four years no other steps had been able to do.

29.7. The legal conclusions that follow from these facts may, likewise, be shortly stated.

29.8. Iran's attacks on United States and other neutral shipping impeded the freedom of commerce and navigation between Iran and the United States, thus violating Article X, paragraph 1, of the 1955 Treaty.

29.9. Because Iran's unlawful acts, including its violation of Article X, paragraph 1, were the direct cause of and made necessary the United States operations against the oil platforms, Iran is precluded from challenging those operations under the same provision of the Treaty that it has violated.

29.10. The United States operations against the oil platforms did not violate Article X, paragraph 1, of the Treaty because the operations did not impede the freedom of commerce, as defined by this Court, between the territories of Iran and the United States.

29.11. Iran's attacks on neutral shipping also threatened essential security interests of the United States. Because the operations against the oil platforms were measures necessary to protect United States essential security interests, they are not precluded by the Treaty. They were also lawful exercises of the United States inherent right to self-defence.

29.12. As the Court will have seen, the facts in this case are straightforward. They obviously do not, however, fit in very well with Iran's legal case. How has Iran attempted to deal with this problem in presenting its arguments to this Court? Essentially, in three ways. First, as I mentioned in opening the United States presentation this morning, Iran tries to focus the Court's attention on points that — whether true or not — have no legal significance. Second, Iran ignores key facts, when they undermine its position. Third, when finally brought face to face with facts that undermine its position, Iran insists that such facts are not proven until all other imaginable explanations of events are conclusively disproved.

29.13. I will not repeat here the catalogue of irrelevant facts Iran has tried to bring to the Court's attention. I reviewed the most important of them this morning.

29.14. Among the key facts Iran ignores are: extensive reports by a wide range of organizations and governments about Iran's attacks on United States and other neutral shipping in the Gulf — there were more than 200 of these; and United States diplomatic efforts to persuade Iran to stop its attacks — there were five of these in the five months prior to the first operation against Iran's oil platforms. Only by ignoring Iran's attacks and the many efforts to bring them to an end peacefully can Iran make it appear as if United States essential security interests were in little danger in the Gulf or that there was no need for the use of force to protect them. Only if these facts are ignored do United States operations appear as unprovoked actions designed to damage Iran's prospects in its war with Iraq. And, so, Iran ignores them.

29.15. There are, however, some difficult facts that Iran cannot ignore. The *Iran Ajr* was caught laying mines in the Gulf. Iran's missiles were seen on their way from the Faw area to hit the *Sea Isle City* on the same day as satellite photography shows Iran's missile launching sites there to be operational. Iran's mines — its calling cards — were found laid in fields where several United States ships hit mines. Documents, eyewitness accounts and the pattern of attacks show that the oil platforms were used to support Iran's attacks on United States and other neutral shipping. Iranian officials have made statements acknowledging responsibility for the attacks and threatening future attacks. Counsel for Iran, Professor Momtaz, has written that Iran conducted attacks on neutral shipping. How does Iran deal with these facts?

29.16. Its preferred approach in these circumstances is twofold. First, it puts its imagination to work. It fantasizes about other possible explanations for observed events. Some of these fantasies are truly remarkable. Iran asks the Court to believe the *Iran Ajr* was transporting mines, not laying them. The Court has seen the photographs. Iran asks the Court to believe Iraq launched a missile from a non-existent launch site. Again, the Court has seen the photographs. It asks the Court to believe that the Norwegian Ambassador files erroneous reports with his Foreign Ministry. And so forth.

29.17. But Iran is not satisfied with simply putting out implausible scenarios. It next demands that the United States prove that these scenarios are impossible. And we have done our best. But, I would remind the Court, the United States has already carried its burden of proof with regard to the critical facts in the case. The United States is not required, in addition, to prove that every alternative scenario that Iran can conceive of is impossible. In making its findings the Court must weigh evidence against evidence, not, as Iran prefers, evidence against speculation.

29.18. Mr. President, Members of the Court, that is what I wanted to say about the facts of the case, the findings the Court should make, and the manner in which it should reach them. The United States believes that the Court will readily conclude — what is generally known — that Iran was responsible for a series of attacks on United States and other neutral shipping in the Gulf and that the United States used military force to bring these attacks to an end. The Court has heard the legal arguments applying the language of the Treaty to the facts and it will decide the issues as it sees best.

29.19. In addition to their legal arguments, however, under the Treaty, both Parties have also asked the Court to consider how its ruling in this case will be seen as setting standards concerning when States may resort to the use of force. This is an important point, though we should keep in mind while thinking about it that the 1955 Treaty is but one component in the system of international law and certainly not the most significant one when it comes to regulating the use of force. That is to say, the fact that some uses of force may not be in breach of the 1955 Treaty does not mean that such uses of force are not subject to other controls, including the actions of the Security Council, which has continuous responsibility for maintaining peace and security.

29.20. Iran evidently misses this point, when its counsel darkly warns the Court that finding that the United States was not precluded by the 1955 Treaty from using force to protect its essential security interests in the extraordinary circumstances of this case will somehow unleash the United States to act as a global policeman. Obviously, the 1955 Treaty authorizes nothing of this kind. In fact, the Treaty does not "authorize" the use of force at all. What it does do is say that measures to protect essential security interests, not excluding measures involving the use of force when necessary, are not precluded by the terms of this single Treaty. If the Treaty did not exist — and the number of States that do not have such bilateral treaties between them is legion — the situation would be the same.

29.21. Yet, we may wish to consider Iran's vision just a bit further. Of course, no one wants a world with a self-appointed policeman operating free from the restraints of international law. No one wants to be such a policeman: and there is no such policeman. But no one wants a world that is safe for outlaws either, a world where States are unable to protect their essential security interests against attacks by other States. Iran conducted just such attacks over a period of four years and now it asks this Court to say that the 1955 Treaty prevented the United States from protecting itself. There is no reason to believe that the Parties to the Treaty intended to allow such a result. The language of Article XX indicates that they took care not to do so.

29.22. Mr. President, Members of the Court, despite all that you have heard about Iran's war with Iraq, Iran's rights of self-defence in that war, and Iraq's activities against neutral shipping in the Gulf, the claims that you actually have before you are limited to the 1955 Treaty.

29.23. For Iran to prevail on its own claim under the Treaty, the Court must determine three things:

— First, that Iran's own unlawful conduct, including under the 1955 Treaty, which made necessary the United States measures at issue, does not preclude Iran from invoking the Treaty and maintaining its claim in the Court. The United States has demonstrated that fundamental principles such as reciprocity and the principle of *ex injuria jus non oritur* do in fact preclude Iran's claim in the exceptional circumstances of this case. Iran has argued that for the Court to adopt this approach would undermine other international legal régimes, such as those for countermeasures and the use of force, but has not dealt squarely with the application of these

principles to Iran's conduct in the manner urged by the United States here. The Court should decide that it can and should apply these principles of fundamental fairness in the circumstances before it.

— Second, the Court would have to determine that Iran has proven that the United States interfered with freedom of commerce and navigation between the territories of the Parties within the meaning of the 1955 Treaty. Iran has failed to carry its burden on this issue. To prevail, Iran should have proven that the crude oil produced by the platforms was a product capable of being exported, and that the United States actions destroyed the crude oil or the means for its transport or storage. Further, Iran should have proven that at the time of the United States actions, the oil platforms were actually engaged in exporting crude oil to the United States — not to third States — such that those actions impeded the freedom of Iran to engage in such commerce. Iran has not proven either of these points and therefore its claim should be dismissed on this ground.

— Third and finally, to find for Iran on its claim, the Court would have to determine that the measures that the United States undertook against the platforms were not necessary to protect its essential security interests. For the Court to reach such a conclusion in this case would be manifestly wrong. The United States has shown that its vessels were being attacked by Iran during the period in question and that Iran was conducting attacks against other neutral shipping that threatened essential United States security interests. The United States has proved that it pursued all possible means short of the use of force to stop these Iranian attacks before using force. The United States has proved that Iran was using its oil platforms for offensive military purposes and that the United States reasonably concluded that its measures against the platforms would help prevent future Iranian attacks. The United States need not prove anything more than this under the Treaty. In particular, the Court need not and should not adopt rarefied academic theories about the self-defence doctrine, for example, to adopt Iran's theory that it can lay minefields in international waters with impunity, so long as it acts indiscriminately.

29.24. Mr. President, Members of the Court, for the reasons stated, the United States submits that you should deny Iran's claim.

29.25. With respect to the United States counter-claim, the Court's task is even more straightforward.

29.26. Iran does not appear to have pursued its argument that the conduct of the United States precludes its action in this Court. In any case, the principles of reciprocity and *ex injuria jus non oritur* do not even arguably apply in the context of the United States counter-claim.

29.27. Nor has Iran argued that its attacks on United States vessels were required to protect its essential security interests. Such an argument would have been, of course, inconsistent with its refusal to accept responsibility for its actions, although I trust that the Court is under no illusions about Iran's responsibility in this regard.

29.28. The only issue with respect to the United States counter-claim, therefore, is whether the United States has proved that Iran impeded the freedoms of commerce and navigation between the territories of the two Parties within the meaning of the 1955 Treaty. I will not repeat Professor Murphy's discussion of this issue this morning. He showed that there was extensive commerce and navigation between the two States that Iran's actions impeded, to the detriment of the United States and its nationals. The United States submits that it has met its burden of showing that Iran's actions violated its obligations under the Treaty.

29.29. Mr. President, Members of the Court, in light of the foregoing, the United States makes the following submissions:

29.30. The Government of the United States requests the Court to adjudge and declare:

(1) That the United States did not breach its obligations to the Islamic Republic of Iran under Article X, paragraph 1, of the 1955 Treaty between the United States and Iran; and

(2) That the claims of the Islamic Republic of Iran are accordingly dismissed.

With respect to its counter-claim, the United States requests that the Court adjudge and declare:

(1) Rejecting all submissions to the contrary, that, in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran, the Islamic Republic of Iran breached its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty; and

(2) That the Islamic Republic of Iran is accordingly under an obligation to make full reparation to the United States for its breach of the 1955 Treaty in a form and amount to be determined by the Court at a subsequent stage of the proceedings.

Mr. President, Members of the Court, that concludes the United States pleadings in this case. Thank you very much.

The PRESIDENT: Thank you, Mr. Taft. The Court takes note of the final submissions which you have read on behalf of the United States of America. This brings to an end the second round of oral argument by the United States. Oral argument in the case will resume next Friday 7 March, from 10 a.m. to 11.30 a.m. in order for the Islamic Republic of Iran to be heard on the counter-claim of the United States. The sitting is closed.

The Court rose at 4.35 p.m.

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