DECLARATION OF JUDGE KOROMA

Article XX, paragraph 1 (d), *of the 1955 Treaty and principles of international law* — Non ultra petita — *Order in which issues addressed* — *The burden of proof and facts* — *Finding on law.*

Although I have voted in favour of the Judgment, I consider it necessary to state the following.

Crucially, the Court has found, consistent with its jurisprudence, that measures involving the use of force and purporting to have been taken under Article XX, paragraph 1 *(d)*, of the 1955 Treaty have to be judged on the basis of the principle of the prohibition under international law on the use of force, as qualified by the inherent right of self-defence.

Article XX, paragraph 1 *(d)*, provides as follows:

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

The Court applied this rule, as it was bound to do, and came to the conclusion that the Article was not intended to operate wholly independently of general international law on the use of force, so as to be capable of justifying, even in the limited context of a claim for breach of the Treaty, the unlawful use of force. Thus, the Court holds, rightly in my view, that the application of general international law on the question forms part of the interpretation process which it has been entrusted to carry out. In other words, the determination whether an action alleged to be justified under the paragraph was or was not an unlawful measure has to be made by reference to the *criteria* of the United Nations Charter and general international law.

Based on these criteria, the Court deliberated and reached the conclusion that the actions carried out against the oil installations on 19 October 1987 and 18 April 1988 were not lawful under Article XX, paragraph 1 *(d)*, of the 1955 Treaty, as measures necessary to protect the essential security interests of the United States, since such actions constituted recourse to armed force not qualifying, under the United Nations

Charter and general international law, as acts of self-defence, and thus did not fall within the category of measures contemplated by that provision of the Treaty. This, in my view, constitutes a reply by the Court to the submissions of the Parties, which the Court is entitled to construe as well as obliged to rule on. And that is what the Court has done, namely, held that the actions in destroying the platforms were contrary to international law. Accordingly, the issue of *non ultra petita* cannot therefore arise on this occasion. Nor can it apply to the Court's finding as to whether Article X, paragraph 1, of the 1955 Treaty was violated by the actions taken against the oil platforms. On this, the Court finds that the protection of freedom of commerce under the Article applied to the platforms and that the attacks, in principle, impeded Iran's freedom of commerce within the meaning of that expression in the text. This finding is not devoid of significance.

It is also worth noting that the order in which the Court dealt with the questions before it was not only appropriate for the reasons stated in the Judgment and as seen in the light of its jurisprudence (*Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, I.C.J. Reports 1958*, p. 62), but that the Parties themselves were at one in their pleadings that the matter was one for the discretion of the Court.

On the issue of the burden of proof, it could not escape attention that the Court in making its finding not only ensured the observance of the rule, as was its duty, but also carefully considered the facts and evaluated the evidence presented; while the facts are to be taken into consideration, the finding reached in the Judgment must be made on the law.

I consider these points worth emphasizing in relation to the Judgment.

(Signed) Abdul G. KOROMA.