SEPARATE OPINION OF JUDGE HIGGINS

Legal nature of Article XX as a defence — Findings on defences not usually contained in dispositif — Ultra petita *rule — Exceptions of necessity and desirability — Neither applicable in present case — Freedom to choose grounds of judgment operates within the* ultra petita *rule — Failure to identify the standard of proof required — Need for even-handedness and transparency in treatment of evidence — International law and the interpretation of Article XX, paragraph 1* (d) *— Difference between interpreting by reference to international law and replacing applicable law — Inconsistency with 1996 Judgment.*

1. I have voted in favour of the *dispositif*, having regard to the fact that in its final submissions Iran asked the Court to find that the military action by the United States against the platforms referred to in its Application constituted a violation of Article X, paragraph 1, of the Treaty of Amity, and the Court has decided that "it cannot uphold this submission". My reasons for concurring with this conclusion are essentially those deployed by the Court at paragraphs 79-98. I also agree with the dismissal by the Court in subparagraph (2) of the *dispositif* of the counter-claim of the United States.

2. However, I have felt it necessary to explain that I do not believe that a finding as regards Article XX, paragraph 1 *(d)*, of the Treaty should have found a place in the *dispositif* at all, still less as the first question determined by the Court. Further, elements of the Court's reasoning and methodology seem to me to be problematic.

Nature of Article XX

3. The nature of Article XX, and of comparable clauses in other treaties, has been variously categorized by the Court. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court described the comparable clause in the FCN Treaty in that case as "provid[ing] for exceptions to the generality of its other provisions" (*Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222). Elsewhere, the Court referred to Article XXI of the Nicaragua-United States FCN Treaty as providing criteria whereby apparent violations of that Treaty might be "nonetheless justifiable" (*I.C.J. Reports 1986*, p. 136, para. 272, and p. 139, para. 278).

4. These alternative assessments are, with respect, all preferable to the single reference in the 1986 Judgment to the clause giving "a power for each of the parties to derogate from the other provisions of the Treaty" (*I.C.J. Reports 1986*, p. 117, para. 225). "Derogation" is generally understood as a power relied on by one party not to apply, for a fixed period of time, the terms of a particular clause. Neither Article XX of the Iran-United States Treaty nor Article XXI of the Nicaragua-United States Treaty appear to be a derogation clause in the normally understood sense of that term. Rather, these clauses are, as the Court elsewhere repeatedly said, in the nature of a defence or justification of acts which would otherwise constitute a breach of an obligation under the treaty concerned. The Court has in the present case also made it clear that Article XX, paragraph 1 *(d)*, is to be regarded as a defence (*Preliminary Objection, I.C.J. Reports 1996 (II)*, p. 811, para. 20).

5. Notwithstanding the way in which the Court has classified the comparable clause in 1986, and notwithstanding the way in which the Court has classified Article XX in the preliminary objections phase of this case in 1996, the United States has approached it somewhat differently. It has told the Court that "Article XX is not a restriction of Article X . . . Article XX is a substantive provision which, concurrently and concomitantly with Article X, determines, defines and delimits the obligations of the parties" (CR 2003/12, p. 14). The Court, after referring to this in its Judgment, goes on to say that "On this basis, the United States suggests, the order in which the issues are treated is a matter for the discretion of the Court." (Judgment, para. 36.) And this in turn is used by the Court to justify the inclusion in the *dispositif* findings on Article XX, paragraph 1 *(d)*, before turning to Article X, paragraph 1.

6. However, when these phrases are read, not in isolation, but in the context of the United States overall contentions, a different picture emerges. The United States statement that the order was a matter for the discretion of the Court was clearly prefaced by these explanations:

> "If the Court concludes that the actions of the United States did not violate the principle of freedom of commerce and navigation under Article X, it need not then consider whether they were rendered lawful on grounds of protection of essential security interests under Article XX. Conversely, if the Court concludes that the United States actions were 'justified' on grounds of protection of essential security interests under Article XX, it need not then consider whether they contravened the principle of freedom of commerce and navigation under Article X." (CR 2003/11, p. 16).

7. Of course, in order to arrive at a final determination as to whether a treaty obligation has been breached, the Court will necessarily examine

any justifications or defences offered by the Respondent on conduct that appears to infringe the rights of the Applicant. This is entirely normal and is an exercise engaged in in many, many cases. But this is simply the reasoning on which the final conclusion is based. The Court will take the claimed defence into account in reaching its conclusion as to whether the Applicant's claim fails or succeeds; and it is this last conclusion which then constitutes the *dispositif*.

8. What the Court does not normally do is to accept or reject a claimed defence as an element in its *dispositif*. In fact in all the jurisprudence of the Permanent Court or this Court there is only one other case where a determination that a possible defence is rejected appears in the *dispositif* itself, namely the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* Judgment of 1986. In that case the United States position that it was acting in collective self-defence was rejected in the *dispositif*. One can only speculate as to whether the absence of the United States from the merits phase had any role in this unusual state of affairs. Further, it is also to be noted that Nicaragua had in its final submissions asked the Court to "adjudge and declare that the United States has violated the obligations of international law indicated in the Memorial" (oral arguments on the merits, *I.C.J. Pleadings, Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Vol. V, p. 238) — and in its Memorial Nicaragua had deployed detailed contentions on this point (Memorial of Nicaragua, *I.C.J. Pleadings, Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Vol. IV, pp. 51-54, 75-83). This particular element in the Nicaragua submissions is wholly absent in the present case.

THE *ULTRA PETITA* RULE

9. The Application of Iran of November 1992 instituting proceedings in this case asked the Court for a judgment on five points. The first of these (*(a)*) referred to a finding on jurisdiction. The second and third (*(b)* and *(c)*) sought findings of breaches of obligations under Articles I and X, paragraph 1, of the Treaty of Amity and under international law. The fourth and fifth (*(d)* and *(e)*) related to remedies.

10. During the course of the written pleadings on jurisdiction, Iran claimed that Article IV, paragraph 1, had been infringed by the United States and this was reflected in its concluding submissions.

11. By March 2003, when Iran came to make its final submissions, the Court had given its Judgment of 12 December 1996 on jurisdiction, and oral argument on the merits had been heard. Paragraphs 2 and 3 of these asked for certain findings of the Court as regards remedies. The sole sub-

stantive finding now sought by Iran was specified in paragraph 1, as follows:

> "That in attacking and destroying on 19 October 1987 and 18 April 1988 the oil platforms referred to in Iran's Application, the United States breached its obligations to Iran under Article X, paragraph 1, of the Treaty of Amity, and that the United States bears responsibility for the attacks." (Judgment, para. 20.)

12. In contrast to the requests in the Application, and during the preliminary objection phase, the final submissions of Iran thus make no request for findings relating to Article I of the Treaty of Amity, Article IV, paragraph 1, Article X other than paragraph 1 thereof, or to international law. And at no time, from beginning to end, has there been a request for any finding under Article XX, paragraph 1 *(d)*.

13. The Court offers as an explanation for its unusual course of action in including findings on Article XX, paragraph 1 *(d)*, in the *dispositif*, its "freedom to select the ground upon which it will base its judgment" (paragraph 37, citing *Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, I.C.J. Reports 1958,* p. 62). That freedom, of course, is not without limits. As was stated in the *Asylum* Judgment (*I.C.J. Reports 1950,* p. 402): "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions".

14. At the same time, it is well established that the *ultra petita* rule, while limiting what may be ruled upon in its *dispositif*, does not operate to preclude the Court from dealing with certain other matters "in the reasoning of its Judgment, should it deem this necessary or desirable" (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002,* p. 19, para. 43). Thus, exceptionally, the Court has found it necessary to elaborate on a consequence of its findings that the Parties will need to know (case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001,* p. 117, para. 252 (2) *(b)*). And occasionally the Court has thought it desirable to include in its *dispositif* a clause establishing as an obligation an undertaking given or solemn statement made during the course of oral argument (case concerning *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II),* p. 1108, para. 104 (3); case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* p. 457, para. 325 (V) (C)). The Court has also found it desirable to remind States generally as to their duty to negotiate to

achieve disarmament (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 267, para. 105 (2) (F)). None of these entailed a determination that one party had acted contrary to international law when no such determination on that point of law had been sought by the other party in its final submission.

15. It is hard to see why it is *necessary* to address Article XX, paragraph 1 *(d)*, at all, let alone in the *dispositif*. In the present case the Court has not reached the first hurdle (violation of treaty rights) that necessitates an examination of whether there is a defence or justification. Had that been the case, then an analysis of the provisions of Article XX, paragraph 1 *(d)*, might well have been expected to form part of the Court's reasoning — but even then not to constitute part of the *dispositif*. Nonetheless, in the present case the Court devotes large parts of its Judgment, and part of its *dispositif*, to an element that is not asked for in the submissions of the Applicant and whose nature is a defence to a breach — a breach which has not yet been, and is not, determined by the Court.

16. The Court seemingly endeavours to fall within the *ultra petita* jurisprudence by emphasizing the *desirability* of a finding on Article XX, paragraph 1 *(d)*, notwithstanding that such a finding was not asked for by Iran in its final submissions. As these "reasons of desirability" relate both to the inclusion of a finding on Article XX, paragraph 1 *(d)*, in the reasoning and the *dispositif*, and to it being placed as the first element in the *dispositif*, it is convenient to deal with these two aspects together.

17. The Court refers to "particular considerations" militating in favour of an examination of the application of Article XX, paragraph 1 *(d)*, before turning to Article X, paragraph 1 (para. 37). These very considerations lead me to the opposite conclusion.

18. The reasons it offers are that "the original dispute between the Parties related to the legality of the actions of the United States, in the light of international law on the use of force" (para. 37), and that "both Parties are agreed as to the importance of the implications of the case in the field of the use of force . . ." (para. 38).

19. The Court was in 1996 well aware that there was a general dispute between the Parties in which each claimed unlawful uses of force by the other. Certainly Iran has been interested in seeking a basis of jurisdiction that could allow it to proceed with substantive claims relating to the United States' uses of force. The emphasis put by Iran, in the preliminary objections, on Article I of the Treaty was but one element of many evidencing that its real and only interest lay in the use of force. Iran has not provided hard economic and commercial data during the merits phase in order to substantiate a violation of its freedom of commerce and navigation, further indicating what matters have been of real importance to it.

Its failure formally to protest to the United States when the latter, in October 1987, introduced its crude oil embargo is also striking and significant, suggesting that actions that might raise legal issues as to obligations of freedom of commerce, under Article X, paragraph 1, of the 1955 Treaty, were never of great concern.

20. Be that as it may, the International Court in 1996 determined there was no basis for the Court's jurisdiction to be found either in Article I (though that Article had relevance to the interpretation of the Treaty as a whole) or in Article IV, paragraph 1. By contrast, the United States military actions might yet be shown to have affected freedom of commerce between the two countries under Article X, paragraph 1, and the issue that was allowed to proceed to the merits was not a dispute on the legality of the use of force by reference to international law including Charter law, but rather "a dispute as to the interpretation and the application of Article X, paragraph 1, of the Treaty of 1955" (*I.C.J. Reports 1996 (II)*, p. 820, para. 53). The Court had jurisdiction to entertain claims made by Iran under that provision (*ibid.*, p. 821, para. 55). The Court further tied the use of force issues to Article X, paragraph 1, by its finding that actions by a party to the Treaty could in principle violate an obligation thereunder "regardless of the means by which it is brought about" (*ibid.*, p. 811, para. 21).

21. Having clearly explained in 1996 that Article XX, paragraph 1 *(d)*, "is confined to affording the Parties a possible defence on the merits to be used should the occasion arise" (*I.C.J. Reports 1996 (II)*, p. 811, para. 20), for that "occasion [to] arise" the Court would first need to find that these measures constituted a violation of the agreement under Article X, paragraph 1, that "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation" (*ibid.*, p. 817, para. 37).

22. That the Court carefully limited the exercise of its jurisdiction to a future analysis of whether the United States military measures violated freedom of commerce and navigation is crystal clear. "The original dispute" is of no relevance at the present time and it is inappropriate that in 2003 the Court should now treat Article X, paragraph 1, as an afterthought to "the original dispute" over which in 1996 it did not find it had jurisdiction.

23. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court did not deal with Article XXI on the basis that the use of force was "the original dispute" and that it had "important implications". Rather, it clearly saw the functions of Article XXI of the Nicaragua-United States FCN Treaty as a means to check whether an interference with a treaty right could be

defended or justified. The Court found that various provisions of the Treaty had indeed been violated. As the Court put it, having found a violation of Article XIX, paragraph 1, on freedom of navigation "there remains the question whether such action can be justified under Article XXI" (*I.C.J. Reports 1986*, p. 139, para. 278). That first hurdle — a violation of Article X, paragraph 1 — has not here been met. Invocations of the "original dispute" and "importance" of subject-matter cannot serve to transform a contingent defence into a subject-matter that is "desirable" to deal with in the text of the Judgment and in the *dispositif*.

24. In summary, Article XX, paragraph 1 *(d)*, was not claimed by Iran in 1996 as affording a basis of jurisdiction; it was not a clause by reference to which Iran in its final submissions in 2003 requested the Court to adjudge and declare that the United States had acted unlawfully; and it is a proviso described by the Court in 1996 as "a possible defence on the merits . . . should the occasion arise" (*I.C.J. Reports 1996 (II)*, p. 811, para. 20). The Court has thus not shown anything that falls within any qualification to the *non ultra petita* rule.

Freedom to Choose the Grounds on Which to Base the Judgment

25. The Judgment contains an alternative explanation for including, and indeed leading with, Article XX, paragraph 1 *(d)*, in the *dispositif*. The Court states that it does not consider that the order in which the Articles of the 1956 Treaty were dealt with in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, was dictated by the economy of the Treaty; it was rather an instance of the Court's "freedom to select the ground upon which it will base its judgment" (Judgment, para. 37). But a proper reading of the relevant passages in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, would seem to suggest otherwise. The Court there elaborated how it could determine acts as an interference of a substantive obligation, but that it would not be able to classify them as a breach of the treaty without first seeing if these were "measures . . . necessary to protect" the essential security interests of the United States (*I.C.J. Reports 1986*, p. 136, para. 272).

26. While it is indeed for the Court to choose the ground upon which it will base its judgment (within the constraints of the *ultra petita* rule indicated above including the qualifications thereto), it has always done so with a strong sense of what is the "real" applicable law in a particular case. Thus in *Legality of the Threat or Use of Nuclear Weapons* Advisory

Opinion, faced with, *inter alia,* legal argument on the Genocide Convention, and Article 6 of the International Covenant on Civil and Political Rights, the Court had no hesitation in knowing that it should exercise its "freedom to choose" by grounding its Opinion in Charter law and in humanitarian law. It cannot, it seems to me, be "desirable" or indeed appropriate to deal with a claim that the Court itself has categorized as a claim relating to freedom of commerce and navigation by making the centre of its analysis the international law on the use of force. And conversely, if the use of force on armed attack and self-defence is to be judicially examined, is the appropriate way to do so through the eye of the needle that is the freedom of commerce clause of a 1955 FCN Treaty? The answer must be in the negative. These questions are of such a complexity and importance that they require a different sort of pleading and a different type of case.

27. Moreover, it is unlikely to be "desirable" to deal with important and difficult matters, which are gratuitous to the determination of a point of law put by the Applicant in its submissions, when the Applicant has carefully sought to preclude examination by the Court of its own conduct as regards these matters. In the present case the United States argued that it had not violated Article X, paragraph 1, of the Treaty, but contended that should the Court find to the contrary, such actions (which were admitted as to their facts) would have been justified by virtue of Article XX, paragraph 1 *(d)*. Faced with United States counter-claims, Iran has, as it was entitled to do, adopted the strategy of simply denying all allegations of illegal use of force at the relevant time, often casting blame elsewhere. It has carefully avoided invocation of Article XX, paragraph 1 *(d)*, even on a contingent basis. The failure of the United States' counter-claim on the grounds specified in the Judgment (paras. 119-124) means also that no purpose is served in the examination of Iran's own actions.

28. The consequence is that the Court is thus precluded from examining Iran's prior conduct either by reference to the Article XX, paragraph 1 *(d)*, standard, or as a matter of international law more generally. It seems to me unwise, as a matter of judicial policy, to strain to examine the conduct of a Respondent on a basis of law which the Applicant has sought to preclude from the scrutiny of the Court so far as its own conduct is concerned.

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29. The function served by a separate or dissenting opinion is to allow a judge to explain why she or he disagrees with part or all of the *dispositif* or the reasoning. It is not the occasion for writing an alternative judgment. Accordingly, I have not thought it appropriate, given that I believe Article XX, paragraph 1 *(d)*, should not have been addressed by the Court at all, to offer my own assessment of the United States' actions by reference to that provision. I have thought it right, however, to make some short observations on a few legal issues regarding proof and methodology.

Standard of Proof of Evidence and Equality of Treatment of Evidence

30. The first relates to the handling of evidence in the Court's Judgment. In its examination of Article XX, paragraph 1 *(d)*, the Court asserts that the United States has the "burden of proof of the existence of an armed attack" such as to justify it using force in self-defence (Judgment, para. 61). Leaving aside for the moment whether this is indeed the right legal test, it may immediately be noted that neither here nor elsewhere does the Court explain the *standard* of proof to be met. That a litigant seeking to establish a fact bears the burden of proving it is a commonplace, well-established in the Court's jurisprudence (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 437). But in a case in which so very much turns on evidence, it was to be expected that the Court would clearly have stated the standard of evidence that was necessary for a party to have discharged its burden of proof.

31. As to standard of proof in previous cases, the Court's prime objective appears to have been to retain a freedom in evaluating the evidence, relying on the facts and circumstances of each case (see Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals,* 1996, at p. 323; Sandifer, "Evidence before International Courts", in Volume 25, *Acta Scandinavica Juris Gentium,* 1955, at p. 45).

32. In *Corfu Channel*, the Court simultaneously rejected evidence "falling short of conclusive evidence" *(Merits, Judgment, I.C.J. Reports 1949,* p. 17); and referred to the need for "a degree of certainty" (*ibid.*, p. 17). In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court did not even attempt to articulate the standard of proof it relied on, merely holding from time to time that it found there was "insufficient" evidence to establish various

points (*Merits, Judgment, I.C.J. Reports 1986,* p. 37, para. 54; p. 62, para. 110; p. 85, para. 159; p. 86, para. 159; p. 113, para. 216).

33. Beyond a general agreement that the graver the charge the more confidence must there be in the evidence relied on, there is thus little to help parties appearing before the Court (who already will know they bear the burden of proof) as to what is likely to satisfy the Court. Other judicial and arbitral tribunals have of necessity recognized the need to engage in this legal task themselves, in some considerable detail (for example, Prisoners of War, Eritrea's Claim 17, Eritrea and Ethiopia, *Eritrea Ethiopia Claims Commission, Partial Award* of 1 July 2003, at paras. 43-53; *Velásquez Rodríguez* case, Judgment of 29 July 1988, Inter-American Court of Human Rights, paras. 127-139). The principal judicial organ of the United Nations should likewise make clear what standards of proof it requires to establish what sorts of facts. Even if the Court does not wish to enunciate a general standard for non-criminal cases, it should in my view have decided, and been transparent about, the standard of proof required in this particular case.

34. The Court has satisfied itself with saying that it does not have to decide "on the basis of a balance of evidence", by whom the missile that struck the *Sea Isle City* was fired: it suffices for it to say that the United States has not discharged the necessary burden of proof because "the evidence available is insufficient". But by which criteria is sufficiency/insufficiency being tested?

35. The Court also found it significant that there was

> "no direct evidence at all of the type of missile that struck the *Sea Isle City*; the evidence as to the nature of other missiles fired at Kuwaiti territory at this period is suggestive, but no more" (para. 59).

It is not clear whether the Court is rejecting indirect evidence *per se* (though it was clearly accepted by the Court in *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949,* p. 18), or whether it was accepting indirect evidence but that in this particular case it did not meet the standard "no room for reasonable doubt" enunciated in 1949 (*ibid.*, p. 18).

36. As for the evidence concerning responsibility for the mine which struck the USS *Samuel B. Roberts*, the Court acknowledges — albeit in a mere five lines — that there were comparable moored mines in the same area, that they bore serial numbers matching other Iranian mines, and that these included the mines found on board the vessel *Iran Ajr*. The

evidence on the mine that struck the USS *Samuel B. Roberts*, as well as to related mining evidence, is on any test rather weighty, and was without the technical uncertainties and inconsistencies undoubtedly present in the *Sea Isle City* missile evidence. Certainly there was significant direct relevant evidence of a sort lacking in respect of the missile that hit the *Sea Isle City*. The United States also submitted evidence suggesting that Iran placed mines in shipping lanes known to be used by neutral ships, including those of the United States. All this evidence, states the Court, is "highly suggestive, but not conclusive" (para. 71). But it is impossible to know, in the absence of any articulated standard or further explanation, why the Court reached this conclusion.

37. Finally, it does not seem to me that the Court has been even-handed in its treatment of the evidence. The complicated and conflicting evidence on the *Sea Isle City* missile is correctly deployed in the Judgment at very considerable length. The uncertainties are rehearsed over 15 detailed paragraphs. The evidence as to mining was offered to the Court in equal detail and volume, comprising a voluminous quantity of testimony. This detailed evidence, which all points in but one direction, is dealt with by the Court in a single paragraph (para. 71).

38. It is also the case that the Court hardly deals at all with the evidence relating to the alleged use of the platforms in the laying of mines. There was a huge amount of evidence presented to the Court. Some of it was direct and some of it indirect. Some of it was from several sources, some mere repetition from a single source. Some sources were partisan, some neutral. Some were reports of participants, others of those removed from the scene. Some were contemporaneous, some not. There is no attempt by the Court to sift or differentiate or otherwise examine this evidence. It merely says that it is "not sufficiently convinced" with it, without any further analysis or explanation (para. 76).

39. My point is not to agree or disagree with the Court on any of the conclusions as to evidence that it reaches. It is rather to say that the methodology it uses seems flawed.

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INTERNATIONAL LAW AND THE INTERPRETATION OF ARTICLE XX (1) *(d)*

40. Underlying this inadequate treatment of the evidence in the Judgment is the belief of the Court that, as it puts it, "even accepting those contentions" (para. 76) the real issue is whether the United States attacks on the platforms "could have been justified as acts of self-defence" *(ibid.)*. The Court offers as the basis of its analysis of the United States' attacks on the platforms the *jus ad bellum* on armed attack and self-defence. The Court recalls the divergent position of the Parties on the relationship between self-defence and Article XX, paragraph 1 *(d)*, at paragraph 39 of the present Judgment.

41. The text of Article XX, paragraph 1 *(d)*, does not suggest any answer to the question of whether the use of force was ever envisaged as a "measure" that might be "necessary" for the protection of "essential security interests". The Court has in 1986 answered the question, at least to a degree. The Court there said that "action taken in self-defence, individual or collective, might be considered as part of the wider category of measures qualified in Article XXI" — the text in that case corresponding to Article XX of the 1955 Treaty (*I.C.J. Reports 1986,* p. 117, para. 224). No *travaux préparatoires* exist to sustain this. The Court in 1986 simply referred to proceedings of the United States Foreign Relations Committee for support for this proposition. All this is cited at paragraph 40 of the present Judgment.

42. Certainly the Court in 1986 thought that action taken in self-defence might constitute a "measure" regarded by a party as necessary to protect essential security interests. But today's Judgment slides from that verity to the proposition that the Court has in 1986 found that the only permitted military action that might justify what otherwise might be a breach of an obligation of the Treaty is an exercise of self-defence in response to an armed attack. The proposition may or may not be right — but in my view it goes beyond what was decided in 1986.

43. The Court in 1986 certainly recognized that "less grave forms" of the use of force might occasion other responses (*I.C.J. Reports 1986*, p. 101, para. 191). Whether the Court envisaged only non-forceful countermeasures is, for the moment, a matter of conjecture. That, too, is not addressed in the present Judgment. The Court simply moves on from the Court's 1986 statement that a necessary measure to protect essential security interests could be action taken in self-defence to the rather different determination that an armed attack on a State, allowing

of the right of self-defence, must have occurred before any military acts can be regarded as measures under Article XX, paragraph 1 *(d)*. But some stepping stones are surely needed to go from one proposition to the other.

44. The Court then asks whether any use of force for which Article XX, paragraph 1 *(d)*, is invoked was "contemplated, or assumed" by the Parties as having "to comply with the conditions laid down by international law" (para. 40). The Court answers that

> "It is hardly consistent with Article I to interpret Article XX, paragraph 1 *(d)*, to the effect that the 'measures' there contemplated could include even an unlawful use of force by one party against the other." (Para. 41.)

But, with respect, is not the issue precisely whether the Court has jurisdiction to determine, in respect of Article XX, paragraph 1 *(d)*, whether a measure *is* "an unlawful use of force"?

45. It is a commonplace that treaties are to be interpreted by reference to the rules enunciated in Article 31 of the Vienna Convention on the Law of Treaties, which Article is widely regarded as reflecting general international law. Article 31, paragraph 3 *(c)*, on which the Court places emphasis, states that, in interpreting a treaty, "There shall be taken into account, together with the context, . . . any relevant rules of international law applicable in the relations between the parties."

46. The Court reads this provision as incorporating the totality of the substantive international law (which in paragraph 42 of the Judgment is defined as comprising Charter law) on the use of force. But this is to ignore that Article 31, paragraph 3, requires "the context" to be taken into account: and "the context" is clearly that of an economic and commercial treaty. What is envisaged by Article 31, paragraph 3 *(c)*, is that a provision that requires interpretation in Article XX, paragraph 1 *(d)*, will be illuminated by recalling what type of a treaty this is and any other "relevant rules" governing Iran-United States relations. It is not a provision that on the face of it envisages incorporating the entire substance of international law on a topic not mentioned in the clause — at least not without more explanation than the Court provides.

47. Having recounted the differing views of the Parties on the role of the Charter and customary international law in relation to Article XX, paragraph 1 *(d)*, the Court states that the matter is really "one of interpre-

tation of the Treaty, and in particular of Article XX, paragraph 1 *(d)*" (para. 40). But the reality is that the Court does not attempt to interpret Article XX, paragraph 1 *(d)*. It is not until paragraph 73 that there is any legal reference at all to the text of that provision. The intervening 15 pages have been spent on the international law of armed attack and self-defence and its application, as the Court sees it, to the events surrounding the United States attacks on the oil platforms.

48. An interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties) would surely have led to a scrutiny of the very terms of Article XX, paragraph 1 *(d)*, especial attention being given to the provision "necessary" and "essential security interests". The Court should, in my view, have itself first assessed whether there were essential security interests at risk. It would have noted that Iran itself conceded that the events in the Gulf generally, and the dangers to commerce presented by the so-called "Tanker War", and the concomitant costs, did affect United States essential security interests (see paragraph 73 of the Court's Judgment). The Court should next have examined — without any need to afford a "margin of appreciation" — the meaning of "necessary". In the context of the events of the time, it could certainly have noticed that, in general international law, "necessary" is understood also as incorporating a need for "proportionality". The factual evidence should then have been assessed in the light of these elements — treaty interpretation applying the rules of the Vienna Convention on the Law of Treaties.

49. The Court has, however, not interpreted Article XX, paragraph 1 *(d)*, by reference to the rules on treaty interpretation. It has rather invoked the concept of treaty interpretation to displace the applicable law. It has replaced the terms of Article XX, paragraph 1 *(d)*, with those of international law on the use of force and all sight of the text of Article XX, paragraph 1 *(d)*, is lost. Emphasizing that "originally" and "in front of the Security Council" (paras. 62, 67, 71 and 72 of the Judgment) the United States had stated that it had acted in self-defence, the Court essentially finds that "the real case" is about the law of armed attack and self-defence. This is said to be the law by reference to which Article XX, paragraph 1 *(d)*, is to be interpreted, and the actual provisions of Article XX, paragraph 1 *(d)*, are put to one side and not in fact interpreted at all.

50. The United States — perhaps especially remembering the injunction of the Court in *Military and Paramilitary Activities in and against*

Nicaragua (Nicaragua v. *United States of America)* of 1986 as to the legal requirement of reporting any self-defence measures to the Security Council — had taken care to do so in this instance. But it is not the legality of *that* claim of self-defence before the Security Council that the Court is asked to adjudicate. The Judgment is formulated as if *in this case* the United States has formulated its main defence as an invocation of the right of self-defence. It has not. It invoked that argument as a final submission in the alternative, arising only should the Court find that its other arguments do not avail. But the Court never looks at its major submission, which was a justification of the use of force by reference to the criteria specified in Article XX, paragraph 1 *(d)*. In spite of repeatedly stating in 1996 that this clause would on the merits afford a possible defence that would then be examined (*I.C.J. Reports 1996 (II)*, p. 811, para. 20), the Court never does so. It effectively tells the United States that as it had reported the acts to the Security Council as being acts of self-defence, it is now to be judged on that, and that alone.

51. Further, in reformulating the matter as one of self-defence under international law rather than "necessary" action for the "protection of essential security interests" within the terms of the 1955 Treaty, the Court narrows the range of factual issues to be examined. Through this recasting of the United States case the Court reduces to nil the legal interest in what was happening to oil commerce generally during the "Tanker War". Instead it makes the sole question that of whether an attack on two vessels (*Sea Isle City* and USS *Samuel B. Roberts*) constituted an armed attack on the United States that warranted military action in self-defence.

52. Moreover, the Court has in this Judgment done what it had set its face against doing in 1996. The Court — entirely aware, even then, that the issue over which Iran would have liked a ruling was that of the legality of the use of United States military actions by reference to international law on the use of force — determined that it had jurisdiction over one issue alone: whether the use of force by the United States had violated its obligations relating to freedom of commerce under Article X, paragraph 1, of the 1955 Treaty. The Court would later also look at any defence the United States raised under Article XX, paragraph 1 *(d)*. There is no indication whatsoever that the Court envisaged the reintroduction, through an "interpretation" of Article XX, paragraph 1 *(d)*, of the much broader issue over which it had so clearly said in 1996 that it had no jurisdiction.

53. The Applicant in 1996 sought a jurisdictional basis to bring a case against the Respondent regarding the use of force under customary inter-

national law and Charter law. The Court held that the only dispute before it was one over freedom of commerce under Article X, paragraph 1, of the 1955 Treaty.

54. The present Judgment, through a series of steps that I have described (each, in my view, open to challenge), essentially reverses the 1996 decision, allowing a clause described by the Court in 1996 as a "defence" to be a peg for a determination by the Court as to the legality of the United States military actions under international law.

(Signed) Rosalyn HIGGINS.