SEPARATE OPINION OF JUDGE BUERGENTHAL

Agreement with Court's rejection of Iran's claim against the United States under Article X, paragraph 1, of the 1955 Treaty — Agreement, mutatis mutandis, *with rejection of United States counter-claim under same Article — Violation of* non ultra petita *rule by Court — Erroneous finding regarding relevance of Article XX, paragraph 1* (d), *has no place in* dispositif *— Court's lack of jurisdiction to interpret Article XX, paragraph 1* (d), *once it held that United States did not violate Article X, paragraph 1 — Article 31, paragraph 3* (c), *of Vienna Convention on the Law of Treaties not a valid basis for interpretation of Article XX, paragraph 1* (d), *of Treaty by reference to other rules of international law not subject to Court's jurisdiction — Flawed fact-finding process — Undefined standard of proof.*

1. The Court's Judgment in this case adopts two decisions with which I agree and one with which I disagree. That is, I associate myself with the Court's holdings that the United States of America did not breach Article X, paragraph 1, of the 1955 Treaty between it and Iran, and that, therefore, Iran's claim for reparation must be rejected. I also agree with the Court's decision rejecting the counter-claim interposed by the United States against Iran. In my view that decision of the Court is justified for the very reasons, *mutatis mutandis*, that led the Court to hold, in paragraph 1 of the *dispositif*, that the United States did not breach the obligations it owed Iran under Article X, paragraph 1, of the 1955 Treaty.

2. But the Court also purports to find in paragraph 1 of the *dispositif* of the Judgment that the actions of the United States, in attacking certain Iranian oil platforms, cannot be justified under Article XX, paragraph 1 *(d)*, of the Treaty "as interpreted in the light of international law on the use of force". That pronouncement has no place in the Judgment, much less in the *dispositif*, and I therefore dissent from it for the reasons set out in this separate opinion.

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3. The Court's Judgment, as it relates to Article XX, paragraph 1 *(d)*, is seriously flawed for a number of reasons. First, it makes a finding with regard to Article XX, paragraph 1 *(d)*, of the 1955 Treaty that violates the *non ultra petita* rule, a cardinal rule governing the Court's judicial

process, which does not allow the Court to deal with a subject in the *dispositif* of its judgment that the parties to the case have not, in their final submissions, asked it to adjudicate. Second, the Court makes a finding on a subject which it had no jurisdiction to make under the dispute resolution clause — Article XXI, paragraph 2 — of the 1955 Treaty, which was the sole basis of the Court's jurisdiction in this case once it found that the United States had not violated Article X, paragraph 1, of the Treaty. Third, even assuming that the Court had the requisite jurisdiction to make the finding regarding Article XX, paragraph 1 *(d)*, its interpretation of that Article in light of the international law on the use of force exceeded its jurisdiction. Finally, I believe that the manner in which the Court analyses the evidence bearing on its application of Article XX, paragraph 1 *(d)*, is seriously flawed.

I. Violation of the *Non Ultra Petita* Rule

4. In its Judgment, the Court holds that the United States did not breach Article X, paragraph 1, of the 1955 Treaty. In their respective submissions, Iran asked the Court to find that the United States attacks on Iran's oil platforms violated Article X, paragraph 1, of the Treaty, whereas the United States asked the Court to reject that claim. In deciding the question dividing the Parties, Article XX, paragraph 1 *(d)*, of the Treaty would have been relevant only if the Court had concluded that the United States had violated Article X, paragraph 1. That is, had the Court found such a violation, the question would then arise whether the measures taken by the United States were nevertheless not "precluded" by virtue of the provisions of Article XX, paragraph 1 *(d)*. That Article reads as follows:

> "1. 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."

5. In other words, Article XX, paragraph 1 *(d)*, is intended to come into play or is relevant only if a party to the Treaty is found to have violated one of its substantive provisions. In that case, Article XX, paragraph 1 *(d)*, might provide an excuse or defence against the charge of a

violation, provided, of course, that the challenged measures satisfied the requirements of that Article. This function of Article XX, paragraph 1 *(d)* — its sole function — was recognized by the Court in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*. In that case, when interpreting a comparable provision of the United States-Nicaragua Treaty of 1956, the Court said:

> "Since Article XXI of the 1956 Treaty contains a power for each of the parties to derogate from the other provisions of the Treaty, the possibility of invoking the clauses of that Article must be considered once it is apparent that certain forms of conduct by the United States would otherwise be in conflict with the relevant provisions of the Treaty." (*Merits, Judgment, I.C.J. Reports 1986*, p. 117, para. 225.)

Moreover, in its Judgment on the Preliminary Objection in the instant case (*I.C.J. Reports 1996 (II)*, p. 811, para. 20), the Court characterized the provision as a "possible defence on the merits to be used should the occasion arise". Obviously, such an occasion would arise only if a party to the Treaty is found to have violated some other provision of the Treaty and sought to invoke Article XX, paragraph 1 *(d)*, as a defence.

6. All this does not mean that in analysing the case, the Court is debarred in principle from dealing first with Article XX, paragraph 1 *(d)*, if one of the Parties relies on that Article as a defence. But once the Court concludes that Article XX, paragraph 1 *(d)*, does not provide a valid defence and makes the further finding that Article X, paragraph 1, has not been violated, the *non ultra petita* rule prevents the Court from making a specific finding in its *dispositif* that the challenged action, while not a violation of Article X, paragraph 1, is nevertheless not justified under Article XX, paragraph 1 *(d)*, when the Parties in their submission did not request such a finding with regard to that Article, which they did not do in this case. The order in which the Court takes up consideration of the Articles — whether it looks at Article X, paragraph 1, or Article XX, paragraph 1 *(d)*, first — is irrelevant to the above result as far as the *non ultra petita* rule is concerned.

7. This conclusion finds support in the following explanation provided by the Court in the *Arrest Warrant* case, decided in 2002, which referred to:

> "the well-established principle that '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' (*Asylum, Judgment, I.C.J. Reports 1950*, p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case *the Court may not rule, in the operative part of its Judgment*, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable." (*I.C.J. Reports 2002*, pp. 18-19, para. 43; emphasis added.)

As this language indicates, by not abstaining "from deciding points not included in [the] submissions", the Court in the instant case violated the *non ultra petita* rule and, hence, was not entitled to make a finding relating to Article XX, paragraph 1 *(d)*, of the Treaty.

8. The *non ultra petita* rule has a direct bearing on the scope of the Court's jurisdiction. Since this Court's jurisdiction in a particular case is strictly limited to the consent given by the parties to a case, the function of the *non ultra petita* rule is to ensure that the Court does not exceed the jurisdictional confines spelled out by the parties in their final submissions. That is what is meant by the Court's statement in the *Asylum* case, quoted above, that "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". Fitzmaurice puts the matter in the following terms:

> "The *non ultra petita* rule is not only an inevitable corollary — indeed, virtually a part of the general principle of consent of the parties as the basis of international jurisdiction — it is also a necessary rule, for without it the consent principle itself could constantly be circumvented."[1]

The point Fitzmaurice makes about the risk resulting from the failure of the Court to adhere to the *non ultra petita* rule is particularly relevant to the Court's approach in this case.

9. That is to say, notwithstanding the fact that the Parties in their final submissions asked the Court to decide only whether or not the actions of

[1] Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, p. 529 (1986). See also, Shabtai Rosenne, *The Law and Practice of the International Court of Justice*, Vol. I, p. 173 (1997).

the United States violated Article X, paragraph 1, of the Treaty, a question it resolves in favour of the United States, the Court proceeds to convert a provision of the Treaty — Article XX, paragraph 1 *(d)* — which was clearly relevant only as a defence had there been a violation of Article X, paragraph 1, into an opportunity to use Article XX, paragraph 1 *(d)*, in order to render a decision on the international law on the use of force and thus to find the actions of the United States in breach of that law. This judicial *modus operandi* amounts to clear violation of the *non ultra petita* rule. In my opinion, the Court's pronouncement on the issue not raised in the submissions of the Parties is not a statement entitled to be treated as an authoritative statement of the law applicable to the actions of the United States.

10. It must be remembered, in this connection, that in the Court's practice the contents of the *dispositif* is that part of the judgment which alone is binding on the parties by virtue of Article 59 of the Court's Statute. Everything else in the judgment is merely the reasoning that may or may not support the finding made in the *dispositif*. Hence, when the Court includes matters in the *dispositif* that it was not asked in the submissions of the parties to adjudicate, it exceeds its jurisdiction. This is what we have here as far as the Court's ruling on Article XX, paragraph 1 *(d)*, is concerned.

II. Lack of Jurisdiction

11. Closely related to the issue that has just been discussed is the fact that this case was referred to the Court under Article XXI, paragraph 2, of the 1955 Treaty. The Court has no other basis of jurisdiction in this case. That point is not in dispute between the Parties. Article XXI, paragraph 2, reads as follows:

> "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

12. As we have seen, this dispute was referred to the Court by Iran on the ground that the action of the United States in attacking certain Iranian oil platforms violated Article X, paragraph 1, of the Treaty. The United States, in defending itself against this charge, contended that it had not violated the Article and that, even if it had, the measures could

not be deemed to amount to a Treaty violation since they were not "precluded" under Article XX, paragraph 1 *(d)*[2].

13. Article XX, paragraph 1 *(d)*, is designed to come into play or becomes relevant only in the event that the Court determines that a party to the Treaty has violated another provision thereof, in which case it might serve as a defence to or justification for the action that was found to conflict with the Treaty. Apart from the fact that that reading of Article XX, paragraph 1 *(d)*, is obvious on its face, this Court has on at least two prior occasions so interpreted it. Thus, as we have already noted, in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court described a comparable provision of the United States-Nicaragua Treaty of 1956, as containing "a power for each of the parties to derogate from the other provisions of the Treaty" (*Merits, Judgment, I.C.J. Reports 1986*, p. 117, para. 225). And in its Judgment on the Preliminary Objection in the instant case (*I.C.J. Reports 1996 (II)*, p. 811, para. 20), the Court characterizes the provision as a "possible defence on the merits to be used should the occasion arise". That, of course, is the only possible interpretation of the clause that can legitimately be made. It leads to the obvious conclusion that the clause has no relevance other than to come into play when another Article of the Treaty is found by the Court to have been violated. In short, Article XX, paragraph 1 *(d)*, has no independent significance.

14. Hence, once the Court had found, as it has in this case, that Article X, paragraph 1, of the 1955 Treaty had not been violated by the United States, there no longer exists a dispute within the meaning of Article XXI, paragraph 2, of the Treaty between the United States and Iran. Consequently, the Court lacked jurisdiction to rule that the action

> "cannot be justified as measures necessary to protect the essential security interest of the United States under Article XX, paragraph 1 *(d)*, of the 1955 Treaty . . . as interpreted in the light of international law on the use of force" (Judgment, para. 125 (1)).

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[2] That Article reads as follows:

"1. The present Treaty shall not preclude the application of measures:

. . . . . .

(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."

Only the last phrase of subparagraph 1 *(d)* is relevant to this case, the first part not having been invoked.

The Court would only have had the requisite jurisdiction to make this finding if, apart from the 1955 Treaty, it did have some other jurisdictional basis. But this it clearly did not have.

15. In its Judgment, the Court does not deny the relevance to its jurisdiction of its pronouncements in the *Nicaragua* case and in the 1996 Judgment on the Preliminary Objection in the instant case. As a matter of fact, it sees no reason to depart from them (see paras. 33 and 34). In support of its conclusion that it has jurisdiction to make a finding regarding the applicability and scope of Article XX, paragraph 1 *(d)*, of the Treaty, even after it has determined that there has been no violation of Article X, paragraph 1, of the Treaty, the Court advances a number of arguments. First, it bases itself on the contention of the United States that, if the Court were to find that the United States had a valid defence under Article XX, paragraph 1 *(d)*, "it must hold that no breach of Article X, paragraph 1, of the Treaty has been established" (para. 34). This argument prompts the Court to assert, in support of its jurisdiction, that in order to uphold the claim of Iran, it must be satisfied that the actions of the United States, which Iran contended violated Article X, paragraph 1, did breach that Article and that these actions were not justified under Article XX, paragraph 1 *(d)*. Second, in considering the order in which these questions are taken up, that is, whether or not to follow the order adopted by the Court in the *Nicaragua* case, which dealt with Article X, paragraph 1, first, or to start with Article XX, paragraph 1 *(d)*, the Court concludes that the approach adopted in the *Nicaragua* case was not dictated by the "economy of the Treaty", and that it was therefore free to reverse that order. Third, the Court points to the fact that the United States argued in support of its claim, that its actions satisfied the provisions of Article XX, paragraph 1 *(d)*, and that that Article was a substantive provision which defines and limits the obligations of the Parties, comparable to and on the same level as Article X, paragraph 1.

16. None of these arguments convince. First, there is the Court's reliance on the contention of the United States that, if the Court were to find that the measures taken by the United States satisfied the requirements of Article XX, paragraph 1 *(d)*, it would have to dismiss the claim with regard to Article X, paragraph 1, whereas to rule in favour of Iran, it would have to find a violation of Article X, paragraph 1, and no valid defence under Article XX, paragraph 1 *(d)*. That is all true, of course, but it is irrelevant to the issue of jurisdiction in this case, precisely because of the fact that Iran invoked the Court's jurisdiction by charging a violation of Article X, paragraph 1. That was the sole issue ultimately to be determined unless and until the Court found that there had been a violation of that Article.

17. Second, by deciding to reverse the order and by taking up consideration first of Article XX, paragraph 1 *(d)*, the Court did not overcome its lack of jurisdiction to make separate findings under that Article once it had concluded, whether before or after dealing with one or the other of these Articles, that Article X had not been violated. Here it should not be forgotten that in its Judgment on the Preliminary Objection in the instant case, the Court found "that it has jurisdiction, on the basis of Article XXI, paragraph 2, of the Treaty of 1955, to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of that Treaty" (*I.C.J. Reports 1996 (II)*, p. 821, para. 55 (2)). We are here therefore not dealing with a situation in which the Court, having acquired jurisdiction at the time an action was instituted, cannot be divested of that jurisdiction by later external events. (See, for example, the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), I.C.J. Reports 1998*, pp. 23-24, para. 38.) In the *Lockerbie* case, the external event was a later United Nations Security Council resolution. Similar external events came into play in the two other cases which are frequently cited as authority to uphold the proposition that jurisdiction once acquired is not divested by subsequent events. (See *Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123; and *Right of Passage over Indian Territory (Portugal* v. *India), Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142.) The matter was put as follows by the Court in the *Nottebohm* case, *supra*, where it said: "An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." But what we have in the present case is not an extrinsic fact or event but an event or fact intrinsic to the Judgment itself: the Court, by its own ruling under Article X, paragraph 1, of the 1955 Treaty has divested or deprived itself of jurisdiction to make independent findings with regard to Article XX, paragraph 1 *(d)*.

18. Finally, the Court's reliance on the United States argument that Article XX, paragraph 1 *(d)*, was a substantive provision and that its action satisfied the provisions of the Article is misplaced. The United States did not by that contention confer jurisdiction on the Court to make a separate finding as to whether the measures of the United States satisfied the requirements of Article XX, paragraph 1 *(d)*, once the Court found that these measures did not violate Article X, paragraph 1, of the Treaty. In other words, the unstated implication in the Court's argument that the United States by that proposition submitted itself to the Court's jurisdiction is, in my view, simply untenable. This is certainly not a case of an implicit *forum prorogatum*, but a litigation argument in defence, advanced by the United States solely in case the Court were to find a violation of Article X, paragraph 1. (See *Anglo-Iranian Oil Co. (United*

Kingdom v. *Iran), Preliminary Objection, I.C.J. Reports 1952*, pp. 93-114.)

19. To put it bluntly, here the Court takes a giant intellectual leap lacking a valid judicial and jurisdictional basis that propels it improperly from an analysis of a Treaty provision — Article XX, paragraph 1 *(d)* — to a formal holding in the operative part of the Judgment that the Article provides no justification for the action of the United States, which action the Court declares in the same operative part not to constitute a violation of the very Article of the Treaty — Article X, paragraph 1 — that was the sole basis of Iran's claim in this case. In this creative fashion the Court stigmatizes the actions of the United States as a breach of international law on the use of force without having the requisite jurisdiction to make such a ruling.

III. Erroneous Reliance on International Law on the Use of Force

20. Even if one were to accept the Court's view that it had jurisdiction to make a specific ruling on Article XX, paragraph 1 *(d)*, it would still have to be emphasized that its interpretation of that provision in the light of international law on the use of force exceeded its jurisdiction. In paragraph 41 of the Judgment, the Court concludes that

> "[it] cannot accept that Article XX, paragraph 1 *(d)*, of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force".

21. The Court's assertion that Article XX, paragraph 1 *(d)*, must be interpreted by reference to international law on the use of force, leads it to conclude that, if it were to find that the action of the United States violated international law on the use of force, it would have to rule that such use of force cannot be justified under Article XX, paragraph 1 *(d)*, of the 1955 Treaty. In reaching this conclusion, the Court relies principally on Article 31, paragraph 3 *(c)*, of the Vienna Convention on the Law of Treaties and on Article I of the 1955 Treaty. Article 31, paragraph 3 *(c)*, of the Convention provides that the interpretation of treaties must take into account "any relevant rules of international law applicable in the relations between the parties".

22. The problem with the Court's reliance on this provision of the Vienna Convention is that, while the rule is sound and undisputed in

principle as far as treaty interpretation is concerned, it cannot have the effect of allowing the Court to take account, as it does here, of those "relevant rules of international law applicable between the parties", which the parties to the dispute have not submitted to the Court's jurisdiction under the dispute resolution clause of the 1955 Treaty. That is, the principles of customary international law and whatever other treaties the parties to a dispute before the Court may have concluded do not by virtue of Article 31, paragraph 3 *(c)*, become subject to the Court's jurisdiction. This is so whether or not they might be relevant in the abstract to the interpretation of a treaty with regard to which the Court has jurisdiction. Whether one likes it or not, that is the consequence of the fact that the Court's jurisdiction, in resolving disputes between the parties before it, is limited to those rules of customary international law and to those treaties with regard to which the parties have accepted the Court's jurisdiction. If it were otherwise, a State that has submitted itself to the Court's jurisdiction for the interpretation of one treaty would suddenly find that it has opened itself up to judicial scrutiny with regard to other more or less relevant treaties between the parties to the dispute that are not covered by the dispute resolution clause of the treaty which conferred jurisdiction on the Court in the first place. This would be the natural consequence of the Court's reliance in this case on Article 31, paragraph 3 *(c)*, in order to interpret Article XX, paragraph 1 *(d)*. Such a result would conflict with the consensual basis of the Court's jurisdiction and would jeopardize the willingness of States to accept the Court's jurisdiction for the adjudication of disputes relating to the interpretation or application of specific rules of international law.

23. It should be emphasized, in this connection, that even if the otherwise "relevant rules of international law" happened to be proclaimed in the Charter of the United Nations, for example, the Court would still lack the power to rely on such rules, unless the parties before it had accepted its jurisdiction to adjudicate disputes relating to the interpretation or application of these Charter provisions. Thus, in order for the Court to conclude that the use of force, sought by one of the parties to a bilateral treaty to be excused in reliance on it, could not have been contemplated by the parties to that treaty because of its incompatibility with a provision of the United Nations Charter, the Court would first have to make a preliminary determination that the challenged use of force was in breach of the Charter provision. But that it would be entitled to do only if the parties had agreed to confer jurisdiction on the Court to interpret and apply the Charter in a dispute between them. It would be irrelevant, in that connection, whether the Charter provision in question might also be deemed to be a *jus cogens* rule.

24. In the instant case, the Court lacks the requisite jurisdiction to make such determination, whether or not in reliance on the United Nations Charter or customary international law. It follows that the Court errs when it asserts that it may, on the basis of the general principle of treaty interpretation codified in Article 31, paragraph 3 *(c)*, of the Vienna Convention, interpret Article XX, paragraph 1 *(d)*, of the 1955 Treaty in light of international law on the use of force or any other international law rules with regard to which the United States has not accepted the Court's jurisdiction.

25. The Court, as noted above, also relies on Article I of the 1955 Treaty, and declares that

> "[i]t 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).

Article I provides only that "There shall be firm and enduring peace and sincere friendship between the United States of America and Iran." In its 1996 Judgment on the Preliminary Objection in the instant case, the Court had found that the Article's sole function "is such as to throw light on the interpretation of the other Treaty provisions" (*I.C.J. Reports 1996 (II)*, p. 815, para. 31). It is difficult to see what light Article I can throw on the interpretation of Article XX, paragraph 1 *(d)*. In principle, any use of force, whether lawful or not, would on its face appear to be inconsistent with the proclaimed professions of enduring peace and friendship in Article I. The same would be true of many other measures not involving the use of force. They would nevertheless not be precluded under Article XX, paragraph 1 *(d)*, if they were necessary to protect a State's "essential security interests". That, of course, is the critical question which needs to be answered. But it may not be answered by the Court's ruling that the action is "unlawful" in light of international law on the use of force, when its jurisdiction in this case does not extend to that law.

26. To demonstrate how far afield the Court strays in this case from the jurisdiction conferred on it by Article XXI, paragraph 2, of the 1955 Treaty, one need only to read what the Court has to say in paragraph 39 of the Judgment. Here the Court notes first that the United States argued that

> "the Court need not address the question of self-defence . . . [T]he scope of the exemption provided by Article XX, paragraph 1 *(d)*, is not limited to those actions that would also meet the standards for self-defence under customary international law and the United Nations Charter."

The Court answers this argument in paragraph 39 by emphasizing that the United States

> "does not contend that the Treaty exempts it, as between the parties, from the obligations of international law on the use of force, but simply that where a party justifies certain action on the basis of Article XX, paragraph 1 *(d)*, that action has to be tested solely against the criteria of that Article, and the jurisdiction conferred on the Court by Article XXI, paragraph 2, of the Treaty goes no further than that".

27. Of course, the United States does not advance the contention the Court attributes to it. For the United States the question before the Court is not whether the Treaty exempts the Parties from the obligations of the United Nations Charter or international law on the use of force, but whether the Court has jurisdiction in this case to address the scope and nature of these obligations, either in the abstract or in relation to the 1955 Treaty. And the answer is that it does not, for the United States did not in Article XXI, paragraph 2, of the Treaty confer jurisdiction on the Court to adjudicate the question whether its actions conformed or not to its obligations under the United Nations Charter or international law. Consequently, it is improper for the Court, given the context of the argument of the United States, to assume that the United States agreed with the Court's view regarding the interpretation of Article XX, paragraph 1 *(d)*, which it clearly did not.

28. The above-mentioned substantive rules of international law cannot be brought into this litigation through the back door by invoking Article 31, paragraph 3 *(c)*, of the Vienna Convention on the Law of Treaties in the absence of specific jurisdiction conferred by the Parties on the Court to rule on them. It follows that the Court's conclusion, expressed in paragraph 40, that "[i]n the view of the Court, the matter is one of interpretation of the Treaty, and in particular of Article XX, paragraph 1 *(d)*", is untenable, to say the least. It amounts to an unwarranted distortion of the meaning of the jurisdiction conferred on the Court under Article XXI, paragraph 2, of the Treaty, for it fails to seriously address the jurisdictional restraints on the Court's freedom of treaty interpretation, given the consensual nature of the Court's jurisdiction.

29. In paragraph 42 of its Judgment, the Court professes to be

> "satisfied that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty to decide any question of interpretation or application of *(inter alia)* Article XX, paragraph 1 *(d)*, of that Treaty extends, where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law".

Aware of the jurisdictional problems implicit in this conclusion, the Court hastens to add that "its jurisdiction remains limited to that conferred on it by Article XXI, paragraph 2, of the 1955 Treaty". But these words cannot gloss over the reality of what the Court is doing in this case: on the basis of jurisdiction conferred on it in Article XXI, paragraph 2, to interpret and apply the 1955 Treaty, the Court proceeds to apply international law on the use of force simply because that law may also be in dispute between the parties before it and bears some factual relationship to the dispute of which the Court is seised. That it may not do.

30. That the Court is doing precisely what it may not do becomes even more evident when, in further seeking to justify its decision to interpret Article XX, paragraph 1 *(d)*, by reference to international law on the use of force, it notes 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). To this end, the Court emphasizes that

> "At the time of those actions, neither Party made any mention of the 1955 Treaty. The contention of the United States at the time was that its attacks on the oil platforms were justified as acts of self-defence, in response to what it regarded as armed attacks by Iran, and on that basis it gave notice of its action to the Security Council under Article 51 of the United Nations Charter. Before the Court, it has continued to maintain that it was justified in acting as it did in exercise of the right of self-defence; it contends that, even if the Court were to find that its actions do not fall within the scope of Article XX, paragraph 1 *(d)*, those actions were not wrongful since they were necessary and appropriate actions in self-defence." (Para. 37.)

It should require no argument that a State, which gives notice to the Security Council under Article 51, has no reason there to rely on or to invoke also the provisions of a bilateral commercial treaty, and will quite naturally attempt to justify its conduct by reference to the provisions of that Article. Moreover, such a State is certainly free in the Security Council or in some other forum to advance legal arguments or defences different from those it makes in a specific case in this Court under a dispute resolution clause of a bilateral treaty. This does not mean, however, that all other defensive arguments it has asserted in other forums may therefore now be scrutinized by the Court in this case and serve to justify its assertion of jurisdiction with regard to them.

31. As a matter of fact, the Court's extensive quotations from the arguments advanced by the United States in the United Nations Security

Council with regard to the armed conflict in the Persian Gulf (see, for example, paragraphs 48 and 67) prove, if proof were necessary, that the Court in this case is acting as if it had jurisdiction to judge the action of the United States in attacking the platforms by reference to specific provisions of the Charter of the United Nations or international law. It is much too easy and too transparent an attempt for the Court to gloss over this fact by claiming that

> "In the present case, the question whether the measures taken were 'necessary' overlaps with the question of their validity as acts of self-defence. As the Court observed in its decision of 1986 the criteria of necessity and proportionality must be observed if a measure is to be qualified as self-defence (see *I.C.J. Reports 1986*, p. 103, para. 194, and paragraph 74 below)." (Para. 43.)

32. It is worth noting that the above quote from the *Nicaragua* case comes from that part of the *Nicaragua* Judgment in which the Court was exercising its jurisdiction under customary international law rather than the United States-Nicaragua Treaty of 1956. The Court's failure to apply the language of Article XX, paragraph 1 *(d)*, in its analysis of the evidence relating to the challenged United States measures and its focus, instead, on international law on the use of force has improperly transformed the case into a dispute relating to the use of force under international law rather than one calling for the interpretation and application of a bilateral treaty with regard to which it alone had jurisdiction.

IV. Defective Fact-Finding Process

33. Even assuming that the Court were correct in interpreting Article XX, paragraph 1 *(d)*, in light of international law on the use of force, it is telling that the Court does not really analyse the evidence presented by the United States by reference first to the specific language and purpose of the Article. That, after all, would be the appropriate way to proceed before enquiring whether the measures were compatible with international law on the use of force, if only because such an enquiry might throw some light on the factual considerations the parties to the 1955 Treaty might have thought relevant to the interpretation and application of Article XX, paragraph 1 *(d)*. Instead, the Court concludes that

> "its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty to decide any question of interpretation or application of *(inter alia)* Article XX, paragraph 1 *(d)*, of that Treaty extends, where appropriate, to the determination whether action alleged to be jus-

tified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law" (para. 42).

34. This said, the Court proceeds immediately to examine the facts relevant to the application of that Article by reference to "the principle of the prohibition in international law of the use of force, and the qualification to it constituted by the right of self-defence" (para. 43). Noting that Article XX, paragraph 1 *(d)*, permits a country to take certain measures, which it deems "necessary" for the protection of its essential security interests, the Court quotes from the holding in the *Nicaragua* case, that it was not enough for these measures to "tend to protect the essential security interests of the party taking them", but that they had to "be 'necessary' for that purpose". Moreover, whether "a given measure is 'necessary' is not purely a question for the subjective judgment of the party but may be assessed by the Court". Finally, still in the same paragraph, the Court declares that

> "In the present case, the question whether the measures taken were 'necessary' overlaps with the question of their validity as acts of self-defence. As the Court observed in its decision of 1986 the criteria of necessity and proportionality must be observed if a measure is to be qualified as self-defence (see *I.C.J. Reports 1986*, p. 103, para. 194, and paragraph 74 below)." (Para. 43.)

35. The Court's language, quoted above, creates the impression that the Court in the *Nicaragua* case had analysed the comparable Article in the United States-Nicaragua Treaty of 1956 as the Court now analyses Article XX, paragraph 1 *(d)*. That is not true. In the *Nicaragua* case, it will be recalled, the Court had two bases of jurisdiction: the 1956 Treaty, which contained a dispute resolution clause comparable to Article XXI, paragraph 2, of the 1955 Treaty, and the optional jurisdiction clause set out in Article 36, paragraph 2, of the Statute of the Court. In passing on the legality of the measures taken by the United States against Nicaragua, the Court there was very careful to separate its examination of the legality of these measures under international law, with regard to which it has jurisdiction under Article 36, paragraph 2, of the Statute, from the question whether these measures were justified under the 1956 Treaty. Its analysis of the latter issue focused on the specific language of the applicable Treaty provision, the one comparable to Article XX, paragraph 1 *(d)*, of the 1955 Treaty. (Compare *I.C.J. Reports 1986*, p. 97, para. 183, with *ibid.*, p. 140, paras. 280-282.)

36. It is therefore worth noting that the language from the *Nicaragua* case concerning self-defence, which the Court in the instant case ties to its analysis of Article XX, paragraph 1 *(d)*, is taken *not* from the *Nicaragua* Court's interpretation of the here relevant provision of the 1956 United States-Nicaragua Treaty, but from its examination of the legality of the measures of the United States under customary international law. Without explaining that specific context of the quotation from the *Nicaragua* case, the Court concludes that "[i]n the present case, the question whether the measures taken were 'necessary' overlaps with the question of their validity as acts of self-defence" (para. 43). Logically, given the context of the authority on which the Court relies, this conclusion would be true only if the Court in this case had jurisdiction under Article 36, paragraph 2, of its Statute. That it does not have.

37. The Court's approach distorts the here relevant fact-finding process or focus. The language of Article XX, paragraph 1 *(d)* — "measures . . . necessary to protect essential security interests" — suggests that the parties to the Treaty, without leaving it exclusively to their subjective determination as to whether or not the measures were necessary to protect their respective essential security interests, must nevertheless not be understood to have excluded the right of each party to make that assessment by reference to a standard of reasonableness. That much is implicit in the requirement the Article postulates, if only because the concept of "essential security interests" must of necessity bear some relation to a State's own reasonable assessment of its essential security interests, even if ultimately it is for the Court to pass on that assessment. This is apparent also from the *Nicaragua* Court's holding. Here the Court noted that, whether "a [given] measure is necessary . . . is not . . . *purely* a question for the subjective judgment of the party [but may be assessed by the Court]" (*I.C.J. Reports 1986*, p. 141, para. 282; emphasis added). The *Nicaragua* Court's suggestion that it may not be "purely" a matter of the subjective judgment of a party, implies that while a Government's determination is ultimately subject to review by the Court, it may not substitute its judgment completely for that of the Government which, in assessing whether the disputed measures were necessary, must be given the opportunity to demonstrate that its assessment of the perceived threat to its essential security interests was reasonable under the circumstances.

38. Thus, even if one were to adopt the Court's view that "in the present case, the question whether the measures taken were 'necessary' overlaps with the question of their validity as acts of self-defence", it would be improper to analyse the evidence adduced by the United States

in support of its measures exclusively in light of their validity as acts of self-defence, without recognizing that in Article XX, paragraph 1 *(d)*, the parties opted, not for a rigid or absolute assessment of the evidence, but for an examination of the evidence that asked whether, on the facts before it, a party had convincing reasons for believing that the measures were necessary to protect its essential security interests. This analysis would permit the Court to view the evidence before it in this case in a much more nuanced way and to assess the actions of the United States with the flexibility Article XX, paragraph 1 *(d)*, appears to demand. By not adopting this approach in the instant case, the Court, for all practical purposes, reads Article XX, paragraph 1 *(d)*, out of the Treaty and then proceeds to assess the evidence as if Article XX, paragraph 1 *(d)*, did not exist.

39. That this is in fact what the Court does, is readily apparent from the evidentiary approach it adopts. Thus, in paragraph 57 of the Judgment, the Court concludes that:

> "For present purposes, the Court has simply to determine whether the United States has demonstrated that it was the victim of an 'armed attack' by Iran such as to justify it using armed force in self-defence; and the burden of proof of the facts showing the existence of such attack rests on the United States. The Court does not have to attribute responsibility for firing the missile that struck the *Sea Isle City*, on the basis of a balance of evidence, either to Iran or to Iraq; if at the end of the day the evidence available is insufficient to establish that the missile was fired by Iran, then the necessary burden of proof has not been discharged by the United States."

40. This test takes no account of the facts as they might reasonably have been assessed by the United States before it decided to act, given the context of the Iraq-Iran armed conflict and Iran's consistent denial that it was not responsible for any military actions against neutral shipping. Article XX, paragraph 1 *(d)*, as interpreted in the *Nicaragua* case, would have required such a contextual analysis of the evidence.

41. One might ask, moreover, where the test of "insufficient" evidence comes from (see para. 39, *supra*) and by reference to what standards the Court applies it? What is meant by "insufficient" evidence? Does the evidence have to be "convincing", "preponderant", "overwhelming" or "beyond a reasonable doubt" to be sufficient? The Court never spells out what the here relevant standard of proof is. Moreover, it may well be that each of the pieces of proof the United States adduces, if analysed separately, as the Court does (see, for example, Judgment, paras. 58 *et seq.*),

may not be sufficient to prove that the missile was fired by Iran. Taken together, however, they may establish that it was not unreasonable for the United States to assume that it was fired by Iran, particularly since Iran, in the face of overwhelming evidence that it was responsible for at least some attacks on neutral shipping, denied all such responsibility. A proper application of Article XX, paragraph 1 *(d)*, of the Treaty would have required the Court to take these considerations into account.

42. In paragraph 60 of the Judgment, the Court states

> "In connection with its contention that the *Sea Isle City* was the victim of an attack by Iran, the United States has referred to an announcement by President Ali Khameini of Iran some three months earlier, indicating that Iran would attack the United States if it did not 'leave the region'. This however is evidently not sufficient to justify the conclusion that any subsequent attack on the United States in the Persian Gulf was indeed the work of Iran."

It may not be sufficient to justify the conclusion regarding specific subsequent attacks, but it certainly has a bearing on determining Iran's intentions or policies about attacking United States interests in the Gulf. Such intentions or policies, one would assume, would be highly relevant elements in assessing the facts disputed by the Parties as well as the reasonableness of the assumption made by the United States about threats to its essential security interests. This the Court fails to do.

43. In the same paragraph 60, the Court also comments on the evidence proffered by the United States that

> "Iran was blamed for the attack [on the *Sea Isle City*] by 'Lloyd's Maritime Information Service, the General Council of British Shipping, *Jane's Intelligence Review* and other authoritative public sources'. These 'public sources' are by definition secondary evidence; and the Court has no indication of what was the original source, or sources, or evidence on which the public sources relied. In this respect the Court would recall the caveat it included in its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, that 'Widespread reports of a fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case have no greater value as evidence than the original source.' (*I.C.J. Reports 1986*, p. 41, para. 63.)"

All that may be true, but the Court pays no attention to the evidence indicating that these "public sources" were deemed by mariners in the

Gulf to be highly knowledgable and reputable sources of information, and that they were treated by them as reliable. By simply dismissing this evidence as insufficient, the Court glosses over important elements of proof bearing not only on the assumptions that could reasonably be made about Iran's role in the attacks on vessels in the Gulf, but also the veracity of these reports. Besides, merely because these sources were "secondary", does not mean that they are insufficient to shift the burden of going forward with the evidence to Iran and thus requiring it to prove their unreliability, an issue the Court simply fails to address.

44. Another example of a questionable fact-finding process, given the context of this case, is found in paragraph 71 of the Judgment. Here the United States supports its contention that the mine which the USS *Samuel B. Roberts* struck was laid by Iran, with evidence of "the discovery of moored mines in the same area, bearing serial numbers matching the other Iranian mines, particularly those found aboard the [Iranian] vessel *Iran Ajr*", which had been observed laying mines and subsequently been boarded by the United States. The Court assesses the probative value of this evidence as follows: "[t]his evidence is highly suggestive, but not conclusive". Apart from the fact that the standard of proof has suddenly changed, without an explanation, from "sufficient" to "conclusive", one wonders why evidence that is "highly suggestive" appears for the Court not to be sufficient even in the context of this particular case.

45. More important, because of its focus on the right of self-defence under international law rather than on Article XX, paragraph 1 *(d)*, the Court erroneously invokes and relies on the conceptual differences under international law between individual and collective self-defence. Thus, for example, the Court notes that

> "[t]o justify its choice of the platforms as targets, the United States asserted that they had 'engaged in a variety of actions directed against United States flag and other non-belligerent vessels and aircraft' " (para. 50).

The Court rejects this defence in the following terms:

> "Despite having thus referred to attacks on vessels and aircraft of other nationalities, the United States has not claimed to have been exercising collective self-defence on behalf of the neutral States engaged in shipping in the Persian Gulf; this would have required the existence of a request made to the United States 'by the State

which regards itself as the victim of an armed attack' (*I.C.J. Reports 1986*, p. 105, para. 199). Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it . . ." (Para. 51.)

46. By failing to focus on Article XX, paragraph 1 *(d)*, and by analysing the evidence exclusively in terms of the right of self-defence under international law, the Court draws conclusions from the dichotomy between individual and collective self-defence that have no place in this case. This type of analysis is erroneous when applied to the interpretation of Article XX, paragraph 1 *(d)*, of the 1955 Treaty, since it permits "measures . . . necessary to protect [a State's] essential security interests" without specifying that these measures can only be taken against a State that intended to damage the victim's essential security interests. Hence, even an indiscriminate attack not specifically aimed at the party to the Treaty, would provide a valid defence under Article XX, paragraph 1 *(d)*, if it threatened those interests. By failing to differentiate between the requirements of that Article and those of international law on the use of force, the Court erroneously fails to examine important evidence presented by the United States in justification of the measures it took against Iran.

* * *

47. For all the foregoing reasons, I conclude that the Court erred in its ruling with regard to Article XX, paragraph 1 *(d)*.

(Signed) Thomas BUERGENTHAL.