DISSENTING OPINION OF JUDGE ELARABY

Court should have drawn the consequences of unlawful use of force — United States military action against Iran being an armed reprisal — Court's reasons for rejecting Iran's claim of violation of Article X, paragraph 1, being unsound — Irrelevance of what particular platforms were producing oil — Indirect commerce continued under the embargo — Article X, paragraph 1, cannot be interpreted as excluding indirect commerce — Court should have ruled more exhaustively on the issue of use of force.

After due reflection, and not without hesitation, I voted against the first paragraph of the *dispositif* and supported the second. My hesitation was due to the fact that as a matter of principle I subscribe to the thrust of the first finding of the Judgment. The reason for my negative vote is that I am unable to accept the conceptual formulation adopted by the Court. In my view, the formulation does not purport to encompass all the parameters associated with the boundaries defined by the Charter and the relevant rules of international law regarding the prohibition of the use of force. Based on my reading of the relevant facts and my understanding of the case law and jurisprudence of the Court, I append this dissenting opinion to put my views on record. Since I voted for the Court's rejection of the counter-claim, I will refrain from addressing this issue.

I shall channel the reasoning of my dissent through three points:

(i) the prohibition of the use of force;
(ii) the issue of whether the obligations emanating from Article X, paragraph 1, were breached;
(iii) aspects of jurisdiction.

I. The Prohibition of the Use of Force

1.1. The case, in essence, is about international responsibility. It evolves around whether it is permissible for a State to use force against another State outside the boundaries defined by the Charter of the United Nations. Thus when it is proven that a State has committed a wrongful act, the Court is duty bound to pronounce authoritatively on the legal consequences of the wrongful act provided of course that it has jurisdiction to do so. The Court, it should be recalled, held in the first finding that the

United States action is not justified and in paragraph 42 held that the yardstick to gauge the legality of an act involving the use of force is "the provisions of the Charter of the United Nations and customary international law" (Judgment, para. 42). This in my view is an inescapable recognition that the Court has jurisdiction to adopt a comprehensive pronouncement on the legality of the use of force. In the present case, the use of force did not require proof. It was admitted. Yet no legal consequences flowed.

The principle of the prohibition of the use of force in international relations as enshrined in Article 2, paragraph 4, of the Charter is, no doubt, the most important principle in contemporary international law to govern inter-State conduct; it is indeed the cornerstone of the Charter. It reflects a rule of *jus cogens* from which no derogation is permitted. This fundamental principle draws a distinction between a post-Charter era of law-abiding, civilized community of nations and the pre-Charter era when the strong and powerful States were not restrained from attacking the weak at will and with impunity.

The main question to be answered in the Judgment would therefore be: is it legally acceptable that a State escape its international responsibility for the consequences of a deliberate armed attack by advancing:

(a) a defence based on a clause in a commercial treaty; or, alternatively, by
(b) invoking the right of self-defence under Article 51 in the absence of the conditions established by the United Nations Charter and customary international law?

In the 2003 Judgment, the Court held that "It is clear that the original dispute between the Parties related to the legality of the actions of the United States" (Judgment, para. 37).

It follows that if the Court were to hold that the United States measures were unlawful then the Court is duty-bound to declare that the United States has acted contrary to its obligations under the Charter of the United Nations and under customary international law.

The Court rightly rejects the United States claim that its use of force can be justified as measures to protect the essential security interests of the United States under the provisions of Article XX, paragraph 1 *(d)*, of the Treaty of Amity, Economic Relations and Consular Rights. On this finding, I would like to reiterate that I concur. A clause in a commercial treaty cannot possibly be invoked to justify the use of force.

In the *Nicaragua* case in 1986 the Court, when considering the provisions of Article XXI of the Treaty of FCN between Nicaragua and the

United States, did not satisfy itself by merely expressing that the use of force was not justified. The Court went further and addressed the prohibition of various aspects and consequences of the use of force in international relations in a comprehensive manner. The *Nicaragua* judgment recognizes that the United States, by using force "has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Judgment, I.C.J. Reports 1986*, p. 147, para. 292 (6)). In the present case, the Court, however, adopted a formulation which is, in my opinion, rather truncated and consequently incomplete. The formulation of the finding in the Judgment, regrettably fell short of the required standard. The Court

> "*Finds* that the actions of the United States of America against Iranian oil platforms on 19 October 1987 and 18 April 1988 cannot be justified as measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1 *(d)*, of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, as interpreted in the light of international law on the use of force." (Judgment, para. 125 (1).)

My primary concern is that the parameters defined in the United Nations Charter and reaffirmed by the Court's jurisprudence established in the *Nicaragua* case may be detrimentally affected as a result of the formulation adopted. This occurs at a time when the rule of law is confronted with great challenges in various parts of the globe and the judicial pronouncements of the principal judicial organ of the United Nations would reinforce and add weight to the prohibition.

The Judgment in the present case, moreover, stops short of addressing the consequential legal corollaries of the finding which were clearly enunciated and established by the *Nicaragua* Judgment. The terminology used by the Court is very restrained. More legal clarity would have been expected from the Court on such a grave matter as the use of force by one party to a privileged FCN treaty against another party to the same treaty.

In the 1986 *Nicaragua* case the Court held that: "in the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986, Merits, Judgment*, p. 103, para. 195). Nowhere in this Judgment is it asserted that the United States was a victim of an "armed attack". On the contrary, the Court noted in clear terms that the incidents advanced by the United States

> "do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, qualified as a 'most grave' form of the use of force" (Judgment, para. 64).

On the basis of this finding the Court reached the conclusion that the United States use of force cannot be considered as an exercise of legitimate self-defence.

Yet the Court shied away from drawing the only available conclusion which logically flows from its finding that the United States use of force

> "cannot be justified as measures necessary to protect the essential security interests of the United States under Article XX, paragraph 1 *(d)*, of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and the Islamic Republic of Iran, as interpreted in the light of international law on the use of force" (Judgment, para. 125 (1)).

1.2. In light of the above, it would have been advisable for the Court to be consistent with its 1986 Judgment by inserting in the reasoning on Article XX, paragraph 1 *(d)*, a decisive and straightforward statement that defines the legal character of the United States use of armed force. The following three main elements should, in my view, have been included:

(i) Pronounce that the use of force by the United States cannot be justified under Article XX of the 1955 Treaty, which the Court in fact did, though it did not follow up as in the *Nicaragua* case by referring to a breach of obligations by the United States under the Treaty, on the basis of a line of arguments which is not substantiated by fact or supported by a sound analysis of law.

(ii) Pronounce in clear terms that the use of force by the United States was a breach of its obligations under customary international law not to use force in any form against another State.

(iii) Find that such use of force by the United States violates Iran's sovereignty.

There is, moreover, another aspect that was absent in the Judgment. The Court concluded in paragraph 72 that it "is unable to hold that the attacks on the Salman and Nasr platforms have been shown to have been justifiably made in response to an 'armed attack' on the United States by Iran" (Judgment, para. 72). The Court also noted that

> "the attacks on the Salman and Nasr platforms were not an isolated operation, aimed simply at the oil installations, as had been the case with the attacks of 19 October 1987; they formed part of a much more extensive military action, designated 'Operation Praying

> Mantis', conducted by the United States against what it regarded as 'legitimate military targets'; armed force was used, and damage done to a number of targets, including the destruction of two Iranian frigates and other Iranian naval vessels and aircraft" (Judgment, para. 68).

If such use of force, as the Court held, was not exercised in self-defence then it would amount to armed reprisal. In point of fact, General George Crist flatly labelled the operation as "to degrade their ability to observe our forces, in effect, to put out their eyes", and stated in 1997 that his "goal was to further protect our forces by putting out more of the Iranian eyes" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Counter-Memorial and Counter-Claim of the United States of America, Annexes, Vol. II, Exhibit 44, p. 6, para. 11). Iran's Exhibit 69 contains a *Washington Post* report dated 20 October 1987 with the following sentence:

> "[t]he attack, prompted when US forces spotted Iranians fleeing the facility, was described by a Defense Department spokesman as an unexpected 'target of opportunity' and had not been planned" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Memorial submitted by the Islamic Republic of Iran, Documentary Exhibits 41-90, Vol. III, 8 June 1993, Exhibit 69).

Iran, however, was at war with Iraq and not with the United States. As such, the United States military action against Iran must be considered as military reprisals. It will be recalled that the Court held in the 1986 *Nicaragua* Judgment that "States have a duty to refrain from acts of reprisal involving the use of force" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 101, para. 191).

The reference to the illegality of reprisals in international law should, in my view, have been addressed in the reasoning in an *obiter dictum*. A pronouncement by the highest world Court would have, no doubt, added authority to the illegality of such practice due to the existence of what Professor Derek Bowett termed, as far back as 1972, as the "credibility gap" which emerged "by reason of the divergence between norm and the actual practice of states" (D. Bowett, "Reprisals Involving Recourse to Armed Force", 66 *AJIL* 1 (1972)). The Court had already addressed the illegality of forcible self-help as far back as the *Corfu Channel* case in 1949 when it held that "to ensure respect for international law, of which it is an organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty" (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 35). Profes-

sor Sir Humphrey Waldock's analysis on this point is penetrating. He wrote that

> "the Court thus drew a sharp distinction between forcible affirmation of legal rights against a threatened unlawful attempt to prevent their exercise and forcible self-help to obtain redress for rights already violated; the first it accepted as legitimate, the second it condemned as illegal. But although the legitimacy of affirming the exercise of a legal right was upheld, the scope of this ruling must not be exaggerated. It is very far from meaning that a State may resort to force whenever another State threatens to violate its rights; for in its second pronouncement the Court said with the utmost emphasis that respect for territorial sovereignty is an essential rule." (Sir Humphrey Waldock, "States and the Law Governing Resort to Force", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 106 (1962), p. 240.)

The *Oil Platforms* case presented the Court with an occasion to reaffirm, clarify, and, if possible develop, the law on the use of force in all its manifestations, so that the Court could continue to make "a tangible contribution to the development and clarification of the rules and principles of international law" (Judge Sir H. Lauterpacht, *The Development of International Law by the International Court of Justice*, reprinted edition, 1982, p. 5). The Court regrettably missed this opportunity. The Judgment refrained from exploring refinements and progressive development of the existing doctrine. Even an *obiter dictum* was not contemplated. The international community was entitled to expect that the International Court of Justice, on an issue as important as the prohibition of the use of force, would seize the opportunity to clarify and enhance the prohibition, and add probative value to the existing jurisprudence.

II. The Second Finding on Article X, Paragraph 1

2.1. The 1996 Judgment confined the ground for jurisdiction for the Court to Article X, paragraph 1. The narrowness of this base influenced the approach to the case and tied the hands of the Court, and it restricted the general ambit of the present Judgment which led to the Court holding that it

> "cannot however uphold the submission of Iran that those actions constitute a breach of the obligations of the United States of America under Article X, paragraph 1, of that Treaty, regarding freedom of commerce between the territories of the parties" (Judgment, para. 125 (1)).

The Court's reasoning for reaching this conclusion is, in my view, not supported by the available facts. This finding does not seem to me to be well founded, in fact or law, nor do I find it consistent with aspects of the 1996 conclusion, which are now considered as *res judicata.* The 1996 Judgment, it will be recalled, held that:

> "The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955. The arguments put forward on this point by the United States must therefore be rejected." (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II),* pp. 811-812, para. 21.)

> "The Court should not in any event overlook that Article X, paragraph 1, of the Treaty of 1955 does not strictly speaking protect 'commerce' but '*freedom* of commerce'. Any act which would impede that 'freedom' is thereby prohibited. Unless such freedom is to be rendered illusory, the possibility must be entertained that it could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and their storage with a view to export.
>
> The Court points out in this respect that the oil pumped from the platforms attacked in October 1987 passed from there by subsea line to the oil terminal on Lavan Island and that the Salman complex, object of the attack of April 1988, was also connected to the oil terminal on Lavan by subsea line." (*Ibid.*, pp. 819-820, para. 50.)

It also held that:

> "On the material now before the Court, it is indeed not able to determine if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil; it notes nonetheless that their destruction was capable of having such an effect and, consequently, of having an adverse effect upon the freedom of commerce as guaranteed by Article X, paragraph 1, of the Treaty of 1955. It follows that its lawfulness can be evaluated in relation to that paragraph. The argument made on this point by the United States must be rejected." (*Ibid.*, p. 820, para. 51.)

How did the Court reach this conclusion, which, in my view, contains an element of inconsistency with its previous Judgment? I read the analysis of the reasoning advanced to support the 2003 finding on this point as predicated on three unsound premises.

2.2. The first premise is that the October 1987 attack on the Reshadat and Resalat complexes did not impede the flow of oil because the platforms were out of commission as a result of Iraqi attack. This conclusion completely disregards the fact that the 1955 Treaty provides for an obligation not to impede freedom of commerce and commercial activities between the territories of the two parties in general. Thus whether a particular platform was or was not producing oil at a certain moment is irrelevant. Iran's territory was producing oil which reached the territory of the United States. A destruction of any single platform prejudices and impedes and restricts Iran's ability to export oil which, as the Court recognized in 1996, forms a vital part of its economy and constitutes an important component of its foreign trade.

The Court further noted that

> "[i]t could reasonably be argued that, had the platforms not been attacked, some of the oil that they would have produced would have been included in the consignments processed in Western Europe so as to produce the petroleum products reaching the United States" (Judgment, para. 96).

The Court in 1996 adopted a comprehensive, all-encompassing definition of the expression "freedom of commerce". The Court, by holding that any act which would impede that freedom is thereby prohibited, has made it clear that the Parties are under a legal obligation to protect the freedom of commerce and that impeding the freedom of commerce is a breach of the Treaty which engages the responsibility of that party.

In the *Oscar Chinn* case, the expression, "freedom of commerce", was seen as contemplating not only the purchase and sale of goods but also "industry". In the 1996 Judgment the Court held that

> "it would be a natural interpretation of the word 'commerce' in Article X, paragraph 1, of the Treaty of 1955 that it includes commercial activities in general — and not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 819, para. 49).

The 1996 Judgment, which possesses the power of *res judicata*, cannot be reconciled with the 2003 findings on Article X, paragraph 1, in the Judgment.

At the time of the first attack, export of oil to the United States was flowing as usual. Moreover, according to Iran, the Reshadat and Resalat complexes were scheduled to resume production on 24 October 1987. The Court somehow observes in paragraph 93 of the current Judgment that it "has no information whether, at the time of the attacks, the works were up to schedule" (Judgment, para. 93). Whether oil turbines were repaired or not before 29 October 1987, the date of the enactment of Executive Order 12613 and imposition of the embargo, is irrelevant.

What is relevant is that the October 1987 attack occurred at a time when oil, albeit from other platforms, was being exported to the United States. In paragraph 91, the Court notes that

> "Iran has asserted, and the United States has not denied, that there was a market for Iranian crude oil directly imported into the United States up to the issuance of Executive Order 12613 of 29 October 1987. Thus Iranian oil exports did up to that time constitute the subject of 'commerce between the territories of the High Contracting Parties' within the meaning of Article X, paragraph 1, of the 1955 Treaty." (Judgment, para. 91.)

This statement clearly recognizes that Article X, paragraph 1, was breached during the ten days between 19 October 1987, date of the first attack on the Reshadat and Resalat complexes, and 29 October 1987. This is an established incontrovertible fact. Whether oil was at that time produced or processed by the two platforms which were attacked or not is irrelevant. The fact remains that commerce in oil was going on during that period. I fail, with all due respect, to see where in the Treaty a distinction is drawn on the basis of what platforms produced the oil which is protected by its provisions. This point has been accepted by the Court in paragraph 82 where it observes that "it is oil exports from Iran to the United States that are relevant to the case, not such exports in general" (Judgment, para. 82).

It should be reiterated in this context that the freedom of commerce which is protected under the Treaty is not confined to commerce between the three platforms and the United States, it is between Iran as a whole and the United States. As counsel for Iran remarked:

> "in destroying the platforms, the United States prejudiced Iran's freedom to organize its commerce as it wished from its own territory: whether from the platforms (or not), whether to reduce production elsewhere and increase it on the platforms" (CR 2003/15, p. 7, para. 21).

2.3. The second premise is that, once the embargo was imposed upon the adoption of Executive Order 12613 on 29 October 1987, the legal

situation was altered as a result of the termination of oil importation from Iran. In point of fact, oil importation from Iran was never interrupted. It was only confined to the parameters allowed by the provisions of the Executive Order. Thus commerce between the territories of the two Parties did not come to a complete stop. The Court acknowledged this fact when it noted that

> "The Court sees no reason to question the view that, over the period during which the United States embargo was in effect, petroleum products were reaching the United States, in considerable quantities, that were derived in part from Iranian crude oil. Executive Order 12613 contained an exception (Section 2 *(b)*) whereby the embargo was not to apply to 'petroleum products refined from Iranian crude oil in a third country'. It could reasonably be argued that, had the platforms not been attacked, some of the oil that they would have produced would have been included in the consignments processed in Western Europe so as to produce the petroleum products reaching the United States." (Judgment, para. 96.)

The fact of the matter is that prior to the embargo, commerce in oil between the territories of the Parties proceeded as usual. After the imposition of the embargo, only *direct* exportation of oil to the United States was apparently halted. It was worthy of note in the latter case that Iran's economy benefited from an increase in demand for crude oil in Western European markets and that this corresponded to increased spending by United States importers of oil from Western Europe. Thus a flow of Iranian oil to the United States, albeit through third countries, and a corresponding flow of capital which ultimately reached Iran took place and was fully authorized by Article 2 *(c)* of the Executive Order.

In the *Nicaragua* case, the Court resolved that "the United States of America, . . . by declaring a *general* embargo on trade with Nicaragua . . . has acted in breach of its obligations under . . . the Treaty" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 148, para. 292 (11); emphasis added). Iran however, as the Court has rightly noted, "has chosen not to put formally in issue" (Judgment, para. 94) the imposition of the embargo. The legality of the embargo was not pleaded by the Parties. It must therefore, for the purposes of the Judgment, be considered moot. The Court consequently declared that it is concerned only with the "practical effects of the embargo" (Judgment, para. 94). The first practical effect should be to recognize that Executive Order No. 12613, dated 29 October 1987, did not terminate all the importation of Iranian oil to the United States: in Section 2 *(b)* which reads: "[t]he prohibition contained in Section 1 shall not apply to: . . . *(b)* petroleum products refined from Iranian crude oil in a third country" (*Oil Plat-*

forms (Islamic Republic of Iran v. *United States of America)*, Counter-Memorial and Counter-Claim of the United States, Vol. V, Exhibit 138).

Thus it is clear that only *direct* import of *Iranian* oil was prohibited following the imposition of the embargo on 29 October 1987. Petroleum products refined in a third country from Iranian crude oil continued to be imported legally in the United States. In this context it is relevant to take note of the phrase "Iranian crude oil" which demonstrates quite clearly that the Executive Order endorses the view that a refined *product* in a third country could still be traced, identified, and continue to retain its certificate of origin as *"Iranian"*. In paragraph 96 of the current Judgment, the Court also endorses this view by saying that it

> "sees no reason to question the view that, over the period during which the United States embargo was in effect, petroleum products were reaching the United States, in considerable quantities, that were derived in part from Iranian crude oil" (Judgment, para. 96).

It will be recalled, in this context, that the United States expressed the view that oil imported from third countries cannot be identified as Iranian oil. The United States insisted that due to several chemical operations the original identity is altered. The United States contends that

> "[t]he crude oil underwent an even greater transformation in Europe, first being mixed with crude oil from other sources . . . and then being refined into oil products, such as fuel oil . . . At that point, the refined oil products, such as fuel oil, were capable of another sale, either for consumption in Europe or for export to other countries, including possibly the United States . . ." (CR 2003/11, pp. 46-47, para. 15.50.)

The embargo, as drafted in Executive Order 12613, provides the answer. Whatever chemical transformation occurs in third countries, the imported petroleum products are considered Iranian by the explicit wording of the Executive Order. The logical conclusion to be drawn is that the importation of Iranian crude oil through third countries was not illegal. Hence it was feasible. Executive Order 12613 allows the indirect importation of Iranian crude oil. It follows that commerce continued and did not stop after the imposition of the embargo.

The Court however asserts that

> "Whether, according to international trade law criteria, such as the 'substantial transformation' principle, or the 'value added approach', the final product could still retain for some purposes an Iranian character, is not the question before the Court";

and that

> "What the Court has to determine is not whether something that could be designated 'Iranian' oil entered the United States, in some form, during the currency of the embargo; it is whether there was 'commerce' in oil between the territories of Iran and the United States during that time, within the meaning given to that term in the 1955 Treaty." (Judgment, para. 96.)

2.4. The third premise is that the 1955 Treaty covers only *direct* commerce between the territories of the United States and Iran. Indirect commerce is considered by the Judgment as excluded from the protection offered by the Treaty provisions. This rationale, in my view, is not well founded in law in the context contemplated by the Treaty. Nowhere in the Treaty is there a reference that its provisions apply to direct commerce.

The Treaty, moreover, has settled any interpretative speculation about direct and indirect commerce by providing for a most favoured nation clause to cover products of the one party whether they reach the territory of the other party directly or indirectly. Article VIII provides that:

> "1. Each High Contracting Party shall accord to products of the other High Contracting Party, *from whatever place and by whatever type of carrier arriving,* and to products destined for exportation to the territories of such other High Contracting Party, by whatever route and by whatever type of carrier, treatment no less favourable than that accorded like products of or destined for exportation to any third country, in all matters relating to: *(a)* duties, other charges, regulations and formalities, on or in connection with importation and exportation and *(b)* internal taxation, sale, distribution, storage and use. The same rule shall apply with respect to the international transfer of payments for imports and exports." (*Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Documentary Exhibits submitted by the United States of America, Vol. I, Exhibit 1, Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States and Iran.)

It is clear that Article VIII extends the most favoured nation clause to products "from whatever place and by whatever type of carrier arriving" "in all matters relating to: *(a)* . . . regulations and formalities, on or in connection with importation and exportation". This "exemption" in my view matches the exception referred to above in Executive Order 12613. They both cater for the treatment of indirect commerce.

It is submitted that the interpretation of Article X, paragraph 1, in light and in the context of Article VIII, strongly supports a broad reading of the word "commerce" which encompasses "indirect commerce". The Court held in the *Libya* v. *Chad* case that

> "a treaty must be interpreted in good faith in accordance with the ordinary meaning given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the Treaty." (*Territorial Dispute (Libyan Arab Jamahiriya* v. *Chad), Judgment, I.C.J. Reports 1994,* pp. 21-22, para. 41.)

The 1955 Treaty extends protection to products *"from whatever place and by whatever carrier"*. The text is quite clear. From whatever place by definition covers crude oil reaching the United States indirectly through third countries. The 1955 Treaty is a special and privileged type of FCN. The correct interpretation of the general coverage of Article VIII must therefore be construed as extending protection to indirect commerce. Article 31 of the Vienna Convention on the Law of Treaties stipulates that "A treaty shall be interpreted 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." Any other interpretation would lead to what the Vienna Convention on the Law of Treaties termed as "a result which is manifestly absurd or unreasonable" (Article 32 *(b)* of the Vienna Convention on the Law of Treaties).

Article X, paragraph 1, protected Iran's "freedom of commerce". Consequently Iran's choice to decide what oil will be used for local consumption and what oil will be destined for export is protected by the treaty provisions. In 1996 the Court was indeed careful and avoided trespassing into the merits of the case. It therefore confined its finding to stating that "on the material now before the Court, it is indeed not able to determine if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil".

However, it did hasten to add that

> "it notes nonetheless that their destruction was capable of having such an effect and, consequently, of having an adverse effect upon the freedom of commerce as guaranteed by Article X, paragraph 1, of the Treaty of 1955" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 820, para. 51).

The Court should have been, at the merits phase, consistent with its 1996 Judgment by recognizing that the freedom of commerce had been breached.

III. Aspects of Jurisdiction

The 1996 Judgment anchored the jurisdiction of the Court on very narrow ground, namely "to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of that Treaty" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 821, para. 55 (2)). Claims under I and IV of the 1955 Treaty were rejected. The Court, however, made quite clear in the 1996 Judgment that

> "the objective of peace and friendship proclaimed in Article I of the Treaty of 1955 is such as to throw light on the interpretation of the other Treaty provisions, and in particular of Articles IV and X. Article I is thus not without legal significance for such an interpretation, but cannot, taken in isolation, be a basis for the jurisdiction of the Court." (*Ibid.*, p. 815, para. 31.)

Two points regarding the jurisdiction of the Court in this case need to be addressed. The first relating to the selection of the approach. In other words, whether to start with Article XX or Article X. The second is whether it was proper to address the legal consequences of the use of force as the Court deemed fit to do in the *Nicaragua* case.

3.1. With respect to the first point, it is appropriate to express my full support for the road map followed by the Court in choosing to start by the consideration of Article XX, paragraph 1 *(d)*. The case as already pointed out revolves around the legality of the use of force by the United States against the Iranian oil platforms. The Court's decision to follow that path was an instance of its "freedom to select the ground upon which it will base its judgment" (*Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, I.C.J. Reports 1958*, p. 62). The Court further noted that "In the present case, it appears to the Court that there are particular considerations militating in favour of an examination of the application of Article XX, paragraph 1 *(d)*, before turning to Article X, paragraph 1" (Judgment, para. 37).

3.2. As for the second point, it is a fact that the jurisdiction of the Court in this case differs from the Court's jurisdiction in the *Nicaragua* case mainly because the United States withdrew its acceptance of the compulsory jurisdiction of the Court by a declaration in 1984. Yet notwithstanding the narrow scope of its jurisdiction in this case, the reasoning in the Judgment follows the *Nicaragua* methodology. Several paragraphs more or less emulate *Nicaragua*, such as:

> "This approach is consistent with the view that, when Article XX, paragraph 1 *(d)*, is invoked to justify actions involving the use of

armed force, allegedly in self-defence, the interpretation and application of that Article will necessarily entail an assessment of the conditions of legitimate self-defence under international law." (Judgment, para. 40.)

The Court also rightly observed in paragraph 41 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. Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Art. 31, para. 3 *(c)*). The Court 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. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty." (Judgment, para. 41.)

3.3. More significantly, the Court while holding that it "is always conscious that it has jurisdiction only so far as conferred by the consent of the parties" (Judgment, para. 41), rightly concluded 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*" (Judgment, para. 42; emphasis added).

This conclusion constituted an express recognition that the "United Nations criteria" apply. This was, however, not adequately spelled out and reflected in the operative part as the Court opted for an incomplete finding. A reader of the Judgment would notice a conceptual legal gap between the reasoning and the *dispositif*. A comprehensive judicial pronouncement of an exhaustive nature on a grave matter like the use of force should have been included to reaffirm the law. The Court would have been well advised to follow the adage of Judge Sir Hersch Lauter-

pacht when he wrote that "there are compelling considerations of international justice and of development of international law which favour a full measure of exhaustiveness of judicial pronouncements" (Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, reprinted edition, 1982, p. 37).

For the aforementioned reasons I was unable to vote with the majority. Hence my negative vote.

(Signed) Nabil ELARABY.