# CASE CONCERNING OIL PLATFORMS
## (Islamic Republic of Iran v. United States of America)

## RESPONSE TO THE ISLAMIC REPUBLIC OF IRAN TO THE QUESTIONS OF JUDGE RIGAUX ADDRESSED TO BOTH PARTIES

### FIRST QUESTION:

**"What is the legal status of oil platforms constructed by a State on its continental shelf? What types of jurisdiction are exercised over such installations? How does the status of oil platforms vary depending on whether they are situated within a State's territorial sea or outside it?"**

The legal status of oil platforms is regulated by the provisions of the United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982, *United Nations Treaty Series*, vol. 1833 p. 3. The Islamic Republic of Iran is a signatory to the 1982 Convention, but has not yet ratified it. However, the provisions of the Convention relating to installations within the Exclusive Economic Zone and continental shelf may be accepted as reflective of general international law on the matters dealt with. Iran possesses continental shelf rights and has proclaimed an Exclusive Economic Zone over the area where each of the platforms is located. Article 14 of Iran's Act on its Marine Areas of 20 April 1993 reiterates the principles set forth in the Convention in this regard.

Under international law, a coastal State has sovereignty over the seabed, water column and superjacent airspace within its territorial sea. This sovereignty extends to installations such as oil platforms located on the seabed of the territorial sea.

Within the continental shelf and exclusive economic zone, the coastal State has sovereign rights for the purpose of exploring and exploiting the natural resources situated therein (Articles 56(1)(a) and 77(1) of the 1982 Convention) and thus has exclusive jurisdiction to license and to control the operation of oil platforms. This exclusive jurisdiction is clearly recognized in Articles 56 and 60 of the 1982 Convention (see also Article 80, which applies

Article 60 *mutatis mutandis* to installations and structures on the continental shelf). In accordance with Article 60(2) of the Convention, the exclusive jurisdiction includes "jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations." But it is not limited to these matters: it extends, for example, to cover general civil and criminal jurisdiction with respect to events occurring on oil platforms. The coastal State may also take measures necessary for the protection of its oil platforms and the personnel present on the platforms. In particular, it may position defensive military equipment and post military security personnel on the platforms for that purpose.

Neither within the territorial sea nor the Exclusive Economic Zone do oil platforms and other installations and structures equate to islands, and they do not generate a territorial sea of their own. The coastal State is however entitled to establish reasonable safety zones around such installations and structures (Article 60(4) of the 1982 Convention).

The purpose of oil platforms is to exploit the non-living resources of the Exclusive Economic Zone and continental shelf. These resources fall exclusively within the sovereign jurisdiction and control of the coastal State, and that State's authority over its oil platforms is sovereign authority which is shared with no other State.

An attack on installations situated on Iran's continental shelf and within its Exclusive Economic Zone constitutes an attack on installations engaged in the commercial production of petroleum resources over which Iran has sovereign rights.

In Iran's view, the United States' attack on the oil platforms, located on Iran's continental shelf, impaired the freedom of commerce in oil between the territories of the High Contracting Parties. It will be recalled that, after initial processing on the platforms, the oil extracted was conveyed to nearly Iranian islands for further processing, after which it was exported (and susceptible to be exported) *inter alia* to the United States. The Court has already recognized that this oil formed part of Iran's export trade in oil and was protected by Article X, paragraph 1, of the Treaty. See I.C.J. Reports 1996 at pp. 819-820 (paras. 50-51).

## SECOND QUESTION

**"During the war between Iran and Iraq was Kuwait a neutral state, a non-belligerent state, or a co-belligerent state with Iraq? Would the response to this question be different depending on whether it was given during the war or today, bearing in mind the additional information now available?"**

In its contemporary communications with the Security Council, Kuwait described itself as "not being a party to" the war between Iran and Iraq (see. e.g. S/19872, 9 May 1988). However, it is clear that Kuwait massively supported Iraq in its war of aggression against Iran and did not respect the obligations of abstention and impartiality, which are incumbent upon neutral States. Iran has detailed aspects of Kuwait's support for Iraq in both its written pleadings and in its oil pleadings (see, for example, Iran's Reply, paras. 2.12-2.26; Iran's Further Response, paras. 3.23-3.27; and CR 2003/5, pp. 49-50). Kuwait's violations of the laws of neutrality included *inter alia* financing the Iraqi war effort, opening up its ports to allow transshipment of war material to Iraq, and assisting Iraq in its attacks against Iran by allowing the use of its territorial waters, islands and, in particular, its airspace. Senior U.S. officials recognized at the time that Kuwait was *de facto* Iraq's ally (Iran's Memorial, Exhibit 51).

During the conflict, Iran knew and always claimed that Kuwait was indeed massively supporting Iraq. After the conflict, the extent of this support has become clear beyond reasonable doubt. Kuwait has repeatedly asked Iran's forgiveness for its support for Iraq (see, Iran's Reply, Exhibit 13). In addition, the Emir of Kuwait expressed his regret at the resolutions adopted by the Gulf Cooperation Council during the conflict, several of which were unfavourable to Iran. He noted that these resolutions had been passed "sous l'influence pernicieuse de l'Irak" (Ibid.). Kuwait's own admission and apology has thus laid any doubt to rest.

The expression "non-belligerency" may be used to describe the situation of Kuwait. In the history of the law of war and neutrality, the expression has been used to describe a

situation where a State has violated the rules of neutrality by supporting one party to the conflict while at the same time claiming not to be a party to that conflict. But international law does not confer any specific status or rights upon a "non-belligerent". A State is either a party to a conflict or it is not. In the latter case, it is bound to observe the law of neutrality, subject to a decision of the Security Council which is not relevant in the present case.

Even if the support given to Iraq did not entail Kuwait becoming a party to the conflict, it constituted a violation of the law of neutrality. In addition, however, the extent and nature of this support meant that Kuwait participated in Iraq's aggression. It was also an unlawful act on that account, and was a serious violation of the Charter of the United Nations and of *ius cogens*, which prohibit the use of force.

QUESTIONS DU JUGE RIGAUX ADRESSÉES AUX DEUX PARTIES

Première question: quel est le statut juridique de plates-formes pétrolières aménagées par un Etat sur son plateau continental? Quelles sont les compétences exercées sur ces installations? Quelle est la différence entre le statut des plates-formes pétrolières selon qu'elles sont localisées respectivement dans la mer territoriale d'un Etat ou en dehors de celle-ci?

Answer:

1. International law draws a clear distinction between a coastal State's territory, including its territorial sea, over which it enjoys sovereignty, and its continental shelf, over which it enjoys certain, expressly enumerated sovereign rights. Article 2(1) of the 1982 UN Convention on the Law of the Sea ("LOS Convention"), which reflect customary international law, provides:

> "The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea" (emphasis added).

2. A coastal State's continental shelf has a different legal status. Customary international law, as reflected in Article 76(1) of the LOS Convention, provides that the continental shelf of a coastal State:

> "comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer

edge of the continental margin does not extend up to that distance" (emphasis added).

(*See also* Article 1(a) of the 1958 Convention on the Continental Shelf, which refers to the continental shelf as "adjacent to the coast but outside the area of the territorial sea.")

3. Customary international law, as reflected in Article 77(1) of the LOS Convention, provides that the coastal State:

"exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources" (emphasis added).

(*See also* Article 2(1) of the 1958 Convention on the Continental Shelf, which is identical to Article 77(1) of the LOS Convention. This language first appeared as Article 68 of the articles concerning the law of the sea, as adopted in 1956 by the International Law Commission. (Yearbook of the International Law Commission 1956, Vol. II, A/CN.4/SER.A/1956/Add.1, p. 264.))

4. Sovereign rights over the continental shelf are not the equivalent of sovereignty. As the International Law Commission explained in the 1956 Commentary to Article 68 of the articles concerning the law of the sea:

"The Commission desired to avoid language lending itself to interpretations alien to an object which the Commission considers to be of decisive importance, namely the safeguarding of the principle of the full freedom of the superjacent sea and the air space above it. Hence it was unwilling to accept the sovereignty of the coastal State over the seabed and subsoil of the continental shelf."

(*Ibid.*, pp. 253, 297)

5. Further, the sovereign rights enumerated with respect to the continental shelf are for a limited purpose (i.e., that of exploring the continental shelf and exploiting its natural resources).

6. Moreover, under international law, the exercise of enumerated sovereign rights over the continental shelf is expressly limited, for example, by the principle that the exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided under international law. (*See* Article 78 (2) of the LOS Convention, which reflects customary international law on this point.)

7. With respect to oil platforms in particular, whereas a coastal State enjoys sovereignty over such platforms in its territorial sea, a coastal State's rights with respect to such platforms not in its territory, but rather on its continental shelf, are limited in various ways. For example, coastal States are obliged under international law to give due notice of the construction of such platforms and maintain permanent means for giving warning of their presence. Where such platforms are abandoned or disused, international law provides that coastal States shall remove them or give appropriate publicity to the depth, position, and dimensions of any structures not entirely removed. Such removal shall also have due regard to fishing, the protection of the marine environment and the rights and

duties of other States. This customary international law is reflected in Articles 60, paragraph 3, and Article 80 of the LOS Convention.

QUESTIONS DU JUGE RIGAUX ADRESSÉES AUX DEUX PARTIES

Deuxième question: selon les Parties, durant la guerre entre l'Iran et l'Iraq, le Koweït était-il un Etat neutre, un Etat non-belligérant ou un Etat cobelligérant de l'Iraq?

La réponse à cette question serait-elle différente, selon qu'elle ait été formulée durant la guerre elle-même ou aujourd'hui, compte tenu du complément d'informations dont on dispose?

Answer:

1. At all times during the Iran-Iraq War, Kuwait was a neutral, non-belligerent State. At no time during the Iran-Iraq War was it a co-belligerent State with Iraq. The attached Diplomatic Note from the Ministry of Foreign Affairs of the State of Kuwait to the Embassy of the United States of America, dated March 16, 2003, confirms this status.

2. As is stated in the attached Diplomatic Note, Kuwait's status as a neutral, non-belligerent State at all times during the Iran-Iraq War does not change depending on whether one considers the question in terms of the information available at that time or also taking into account additional information available at present. The information available at the time of the Iran-Iraq War and subsequently supports the conclusion that, as the Ministry of Foreign Affairs of Kuwait stated in the Diplomatic Note, "[t]he State of Kuwait remained completely neutral".

Ministry of Foreign Affairs
Americas Department

وزارة الخـــارجيـــة
إدارة الامريكتين

تهدى وزارة خارجية دولة الكويت اطيب تحياتهـا لسـفارة الولايـات المتحـدة الامريكية لدى دولة الكويت ،،

وتود ان تبين ان دولـــة الكويت اثناء فترة الحرب العراقية الايرانية ( ما بين ١٩٨٠-١٩٨٨) لم تكن طرفا فى الحرب ، وانها قد التزمـت الحياد التام ازاء الطرفين المتحاربين .

يجب اعتبار دولة الكويت دولة محايـدة سـواء بالاسـتناد الـى المعلومات التى كانت سائدة خلال الحرب العراقية الايرانية او المعلومـات المتوفرة حاليا .

تنتهز وزارة الخارجية هذه المناسبة لتعرب للسفارة الموقرة عـن فائق تقديرها واحترامها ،،،

الى : سفارة الولايات المتحدة الامريكية
- الكويت -
١٦/٣/٢٠٠٣م

**U.S. DEPARTMENT OF STATE**
**OFFICE OF LANGUAGE SERVICES**
**Translating Division**

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**Arabic**
**SK**

In the Name of God, the Merciful, the Compassionate

[Emblem of the State of Kuwait]

Ministry of Foreign Affairs
Americas Department

TO: Embassy of the United States of America
Kuwait

03/16/2003

The Ministry of Foreign Affairs of the State of Kuwait extends its warmest greetings to the Embassy of the United States of America in the State of Kuwait.

The Ministry of Foreign Affairs of the State of Kuwait wishes to note that the State of Kuwait was not a party to the Iraq-Iran War throughout its duration, between 1980 and 1988. The State of Kuwait remained completely neutral and did not side with either of the parties involved in that war.

The State of Kuwait must be considered a neutral state. The neutrality of the State of Kuwait is based on information that was widely known during the Iraq-Iran war and on information that is available at the present time.

The Ministry of Foreign Affairs avails itself of this opportunity to express its utmost appreciation and esteem to the distinguished Embassy [of the United States of America].

[illegible signature]
[Round, imprint seal of the Ministry of Foreign Affairs, State of Kuwait]

QUESTIONS PUT BY JUDGE AL-KHASAWNEH TO THE UNITED STATES OF AMERICA

First Question: In the opinion of counsel of the United States, are the concepts of *lex specialis*, on the one hand, and self-contained régimes, on the other, synonymous? If not, what are the differences between them? This question is of course in relation to the 1955 Treaty.

Answer:

1. In his statement of February 26, 2003 (CR 2003/12, pp. 18-19, para. 17.20) Professor Weil stated that Article XX of the Treaty of 1955 between the United States and Iran is a *lex specialis* within the meaning of Article 55 of the 2001 International Law Commission's Draft Articles on State Responsibility. Counsel for the United States referred in this respect to the Commission's Commentaries, according to which this provision "makes it clear... that the articles [of the draft] have a residual character", so much so that "[w]here some matter otherwise dealt with in the articles is governed by a special rule of international law, the latter will prevail to the extent of any inconsistency" (Introductory remarks to Part IV of the Draft, pp. 355-6; see also J. Crawford, *The International Law Commission's Articles on State Responsibility*, 2002, p. 306). No disagreement appears to exist between the Parties since Iran explicitly states in its written pleadings that "[a]s a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law."

2. Counsel for the United States did not rely on the concept of self-contained regime, but rather on the concept of *lex specialis* of Article 55 of the ILC's Draft, of which, so the Commission said, the concept of self-contained regime is given as an example of "the strong form" – an example of the "weaker form" being "specific treaty provisions on a

single point" (para. 5 of the commentary on Article 55). While the concepts of self-contained regime and *lex specialis* are not synonymous, they are closely related. A self-contained regime is a particular form of *lex specialis*; a *lex specialis*, however, is not necessarily a self-contained regime. The decisive issue in the instant case is whether Article XX of the 1955 Treaty is a *lex specialis*, which as such supersedes the provisions of the otherwise applicable customary rules as may be expressed in the Commission's Draft; it is not whether Article XX creates a self-contained regime. In other words, for the purpose of the instant case it suffices to note that Article XX of the 1955 Treaty is a *lex specialis* within the meaning of Article 55 of the ILC's Draft, without there being any need to determine whether it gives rise to a self-contained regime. This is all the more so in that the very concept of self-contained regime, recognized as it was by the Court in the *Hostages* case, has been disputed – and sometimes even put into question – within the International Law Commission itself (see, e.g., 4th Report by G. Arangio-Ruiz, *Yearbook of the International Law Commission, 1992*, vol. II, Part I, paras. 97 and ff.) and in the literature. Professor (now Judge) B. Simma – who clearly regards self-contained regimes as *leges speciales* (*Self-Contained Regimes*, in *Netherlands Yearbook of International Law*, vol. XVI (1985), pp. 111 and ff., at p. 135) – points to the "high degree of abstraction with which the topic has been discussed" within the Commission and "the resulting confusion permeating this debate" (p. 118).

3. It may be added that the concept of *lex specialis* is an application of the well-known and well-established principle of interpretation according to which *specialia generalibus derogant*. As the Commission's commentary on Article 55 states, the question is one of interpretation, and "[i]t will depend on the special rule to establish the extent to which the

more general rules on State responsibility set out in the present articles are displaced by that rule" (*op. cit.*, p. 357, para. 3). Counsel for the United States has put forth such an interpretation when he argued that the concept of "measures . . . necessary to protect [a Party's] essential security interests" referred to in Article XX of the 1955 Treaty provides the basis for the Court's review of the claims in the current case. (CR 2003/12, paras. 17.21 and ff.)

4. Likewise, D. Bodansky and J. R. Crook write in their article *Symposium: The ILC's State Responsibility Articles: Introduction and Overview* that

> It should be borne in mind... that although the articles are general in coverage, they represent only default or residual rules; they do not necessarily apply in all cases. Particular treaty regimes or rules of customary international law can establish their own special rules of responsibility... that differ from those set forth in the articles (*American Journal of International Law*, vol. 96 (2002), pp. 773 and ff., at p. 780).

5. It should be added that, as Mr. (now Judge) Al-Khasawneh pointed out in his capacity as a member of the International Law Commission, "[t]he tendency in the field of State responsibility was to establish different regimes for the various types of responsibility", because "[s]uch compartmentalization would bring greater precision and clarity into the rules governing instrumental consequences...." (Summary Records of the Meetings of the 44th Session, *Yearbook of the International Law Commission, 1992*, vol. I, pp. 159-60).

6. In conclusion, to determine the scope and effect of Article XX of the 1955 Treaty there is no need to determine whether it creates, or not, a self-contained regime. Even if, as Professor Crawford argued, "the Treaty of Amity is not a self-contained regime" but "a normal bilateral treaty governed by international law" (CR 2003/16, p. 12, para 6), it is indisputably a *lex specialis* which applies in the instant case.

QUESTIONS PUT BY JUDGE AL-KHASAWNEH TO THE UNITED STATES OF AMERICA

Second question: In his statement, provided by the United States and contained at tab C9 of the judges' folders, General Crist explained the reason why a choice was made to attack the oil platforms as follows: "Iran could not have attacked U.S. ships without using the oil platforms as they had no other offshore means to maintain continuous surveillance over the transit routes, other than on Farsi Island." Why did the United States choose the platforms and not the means of surveillance located on Farsi Island?

Answer:

1. The criteria the United States considered in selecting targets for military action are described in the Statements of General George Crist (U.S. Exhibit 44), Rear Admiral Harold Bernsen (U.S. Exhibit 43), and Vice Admiral Anthony Less (U.S. Exhibit 48). These criteria included the following: the need to degrade Iran's ability to attack U.S. vessels transiting the Gulf; the desire to avoid direct involvement in the Iran-Iraq war and to maintain the status of the United States as a neutral; the desire to minimize the risk of casualties to U.S. and Iranian armed forces; and the desire to minimize the risk of casualties to civilians.

2. As explained in the attached Statement of Rear Admiral Bernsen, dated March 13, 2003, Farsi Island was a far less suitable target than Iran's offshore platforms according to these criteria.

3. First, taking action against Farsi Island would have done less to degrade Iran's ability to attack U.S. shipping than would action against the platforms. Because Farsi Island was not within visual range of the shipping channel U.S. ships followed through the Gulf, and provided a much lower vantage point than Iran's offshore oil platforms, it

provided a less effective surveillance point than did the platforms. That Farsi Island posed less of a threat to shipping than did the platforms is also reflected in the fact that more Iranian attacks on shipping took place within radar range of Iran's platforms than took place within radar range of Farsi Island.

4. Second, because Farsi Island was Iranian land territory and was within Iran's declared wartime exclusion zone, targeting it could have been perceived as a more serious escalation of tension with Iran than targeting Iran's offshore oil platforms, and could have given rise to questions whether the United States intended to remain neutral in the Iran-Iraq War. The importance of these factors was indicated by the decision of the U.S. military's National Command Authority that no facilities on Iranian land territory were to be considered as targets for the U.S. defensive action.

5. Third, targeting Farsi Island would have created a more serious risk of casualties to both U.S. and Iranian personnel. The United States believed that Farsi Island was defended with mines, which would have posed danger to ships sailing near it. To avoid the risks to U.S. forces posed by such mines, any military action against Farsi Island would have needed to be taken from the air. Such an action still would have posed risks to U.S. forces from anti-aircraft defenses on Farsi Island. Action from the air would also entail using less precise weapons than those that could be used from closer proximity on the ground. This would necessarily entail a greater risk of casualties to Iranian personnel. By contrast, action against the platforms could be taken from close range, and in a

manner allowing advance warning to personnel located on the platforms, thus creating minimal risk of casualties to Iranian personnel.

Statement of Rear Admiral Harold J. Bernsen, 13 March, 2003

**STATEMENT OF**
**REAR ADMIRAL HAROLD BERNSEN, U.S. NAVY (RETIRED)**

1.I, Harold Bernsen, retired from the U.S. Navy with the rank of Rear Admiral in December 1991. During the period June 1986 to March 1988 I commanded the U. S. Navy's Middle East Force, which operated in and around the Arabian (Persian) Gulf.

2. I understand that a question has arisen concerning the reasons "why the United States chose to attack the platforms and not the means of surveillance located on Farsi Island." Paragraphs 24 and 25 of my statement dated 26 May 1997, which was attached to the U.S. Counter-Memorial and Counter-Claim as Exhibit 43, provide information relevant to the United States decision to target Iran's offshore oil platforms. This statement provides additional information regarding why the United States decided not to target Farsi Island. There were several reasons for this decision.

3. First, Farsi Island was Iranian land territory. The National Command Authority directed that no defensive military operation would be launched against Iranian land territory. This decision reflected a desire to avoid escalating unnecessarily the tense situation between Iran and the United States and to avoid any possible undermining of the neutral status of the United States.

4. Further, risk of both U.S. and Iranian casualties was much greater in an attack on a ground target such as Farsi Island. The island's location, inside Iran's wartime exclusion zone, surrounded by shallow water which was very likely mined, posed risks to U.S. forces approaching the island from the sea. This would have dictated the use of aircraft rather than surface ships for an attack, though this still would have involved some risk to U.S. forces because Iran maintained anti-aircraft defenses on Farsi Island. Moreover, taking action from the air would have entailed the use of bombs, less precise weapons than could be employed from the ground and consequently would have involved increased risk of casualties to Iranian military personnel on the ground. This risk would have been particularly acute because warning the personnel on the island in advance of an attack would have been difficult. Since the Iranians did not maintain sufficient water craft at Farsi island to accommodate the personnel based there, ensuring their evacuation and safety would have been virtually impossible.

5. And finally, Farsi Island did not present as great a threat to U.S. shipping transiting the Gulf as Iran's offshore oil platforms did. Unlike the platforms, which were located within both radar and visual range of the shipping channel that U.S. ships followed through the Gulf, Farsi was not within visual range of the shipping channel, thereby inhibiting its usefulness as a surveillance point. Farsi Island is a low-lying landmass only three meters above sea level. In contrast, the platforms offered a much higher position, approximately 35 meters, on which to mount a radar or from which to observe visually vessels in the shipping channel. The unobstructed view of the

shipping channel from the platforms was clearly superior to that which could be achieved from Farsi Island.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: March 13, 2003

Harold J. Bernsen