

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING OIL PLATFORMS

(ISLAMIC REPUBLIC OF IRAN V. UNITED STATES OF AMERICA)

COUNTER-MEMORIAL AND COUNTER-CLAIM

SUBMITTED BY
THE UNITED STATES OF AMERICA

23 JUNE 1997

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**COUNTER-MEMORIAL AND COUNTER-CLAIM
OF THE UNITED STATES OF AMERICA**

INTRODUCTION AND SUMMARY

1.01 In its 12 December 1996 Judgment, the Court decided that it had jurisdiction in this case to consider only Iran's claims based upon Article X, paragraph 1 of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran. Thereafter, on 16 December 1996, the President of the Court ordered the United States to file this Counter-Memorial by 23 June 1997.

1.02 The United States will show in this Counter-Memorial that the Court should reject Iran's claims on four separate grounds, each one of which independently requires dismissal of this case. First, the actions of the United States did not violate Article X(1) of the 1955 Treaty because of the limited nature of any obligations under that Article, and because Iran's offshore platforms were not producing oil that could have entered commerce between the territories of Iran and the United States. Second, the U.S. actions were "necessary to protect" the "essential security interests" of the United States and were thus excluded from the Treaty by Article XX(1)(d). Third, these actions were lawful because they were taken in legitimate self-defense in response to unlawful armed attacks by Iran. Fourth, the Court should deny relief to the Islamic Republic of Iran because of Iran's own serious violations of the Treaty.

I.03 Summary of the Counter-Memorial: The Facts. Part I of this Counter-Memorial contains a detailed examination of the facts and evidence disproving Iran's claims. This evidence contradicts many of Iran's most important factual representations. The facts are proved by many different types of evidence. These include highly incriminating captured Iranian military orders and communications showing the platforms' role in Iran's attacks against shipping. There are statements by senior military officers and other well-informed officials from the United States and other countries. There are documents and other evidence assembled by several governments and armed forces; reports from respected international shipping sources; analyses by military experts of several nations; and much other evidence, including physical evidence.¹

I.04 The evidence documents Iran's attacks upon U.S. and other neutral shipping in the Gulf and explains the role of these attacks in Iran's strategy in the Iran-Iraq War. Captured records of Iranian naval communications, contemporary reports from shipping sources, and reports of naval analysts, show the importance of Iran's offshore platforms in Iran's naval command, control, communications and intelligence systems, and add to the proof of the platforms' role in guiding and conducting Iran's attacks on neutral ships.

¹ The evidentiary Annexes submitted with the U.S. Counter-Memorial contain numerous forms of evidence, including Iranian documents, statements of witnesses, reports of experts and expert shipping and defense information organizations, photographs, and newspaper reports. In no case does the United States rely primarily on newspaper reports to prove facts relevant to its defense. Such reports are submitted for the purpose of corroborating, and providing context to, other sources of evidence. The subject of many of these reports are matters of public knowledge which received extensive coverage in the world press. Other reports document the statements of high-ranking Iranian officials.

I.05 The evidence shows how Iran carried out deadly armed attacks on U.S. vessels. Eyewitness accounts of Iran's missile attack on the U.S. - flag tanker *Sea Isle City* on 16 October 1987, analysis of missile fragments, and satellite imagery help to demonstrate Iran's responsibility for that attack. Compelling evidence derived from mine warfare experts of several nations, including the physical characteristics of the mines involved, establish Iran's responsibility for the 14 April 1988 mine attack upon *USS Samuel B. Roberts*.

I.06 Legal Issues. Part II of this Counter-Memorial considers the interpretation and application of paragraph X(1) of the 1955 Treaty in light of the Court's December 1996 Judgment. It shows how U.S. actions did not violate paragraph X(1) of the 1955 Treaty because the aspirational and imprecise character of that provision does not give rise to relevant legal obligations. Moreover, Iran's offshore platforms were not engaged in producing oil that could have entered commerce between the territories of the two parties. The platform at Rostam was not producing oil at all in October 1987 because it had been seriously damaged by Iraq; at the time of the April 1988 U.S. actions against the platforms at Sirri and Sassan, the United States had prohibited imports of Iranian oil and bilateral oil trade had come to an end.

I.07 Part III analyzes the application of paragraph XX(1)(d) of the 1955 Treaty, which excludes from the Treaty's coverage any measures by a party "necessary to protect its essential security interests." This Part analyzes the scope and meaning of this provision, showing how the U.S. defensive actions against Iran's offshore platforms clearly met its requirements. Part III also reviews the history of paragraph XX(1)(d)

and other similar provisions, showing how they consistently have been understood to create a broad exemption to the Treaty's requirements in security matters.

I.08 Part IV examines the law of self-defense in response to armed attack. The parties agree that there is no international responsibility for actions taken in lawful self-defense. Part IV thus shows how the U.S. actions responded to armed attacks by Iran on U.S. vessels and nationals, and were necessary and appropriate to restore their security and prevent continuing attacks. The U.S. actions were proportional to the antecedent attacks, and were deliberately limited in scope and duration. They were planned and conducted so as to avoid unnecessary suffering and collateral damage. Part IV also refutes Iran's claim that the U.S. actions were reprisals intended to inflict economic damage and not actions in self-defense, recalling how Iran used its platforms to coordinate and conduct attacks on U.S. and other neutral vessels.

I.09 Part V shows that Iran's unlawful attacks on U.S. and other neutral ships in the Gulf preclude it from obtaining the relief it seeks from this Court. This Part recalls that Iran's attacks violated Article X of the Treaty and other relevant legal rules, and shows how Iran may not selectively invoke the Treaty to obtain redress for alleged violations of legal obligations which it has itself violated in a gross and systematic manner.

I.10 The Counter-Claim. Finally, Part VI sets forth the U.S. counter-claim in this case, which is based on facts directly at issue in assessing Iran's claim. The United States submits that Iran's actions in the Gulf during 1987-88 which, among other things, involved mining and other attacks on U.S.-flag or U.S.-owned vessels, both justified the

actions taken in self-defense against the offshore platforms and constituted a violation of Article X of the Treaty of Amity for which reparation should be paid to the United States.

I.11 As required by Article 80 of the Court's Rules, this counter-claim is "directly connected with the subject-matter" of Iran's claim, and "comes within the jurisdiction of the Court." In the counter-claim, the United States seeks recompense for damages it suffered as a result of Iran's recurring and significant breaches of its obligations under Article X of the 1955 Treaty.

I.12 The Effect of the Judgment of 12 December 1996. We conclude this introduction with a brief observation concerning the future proceedings in light of the Court's December 1996 Judgment.

I.13 The Court did not accept the U.S. contention that the 1955 Treaty does not regulate questions involving the use of force, concluding that "(m)atters relating to the use of force are not ... per se excluded from the reach of the Treaty of 1955²." The Court further found that neither Article I nor Article IV(1) of the 1955 Treaty provides a basis for Iran's claims against the United States or for the Court's jurisdiction under Article XXI, paragraph 2 of the Treaty³. The Court concluded that its jurisdiction with respect to Iran's claims was limited to the consideration of claims under Article X(1) of the Treaty. All of Iran's past allegations regarding all forms of alleged U.S.

² *Ibid.*, para 21.

³ *Ibid.*, paras. 31, 36.

misconduct, other than the U.S. actions against the oil platforms, are accordingly no longer at issue, and the United States has not addressed them in this Counter-Memorial.

I.14 The United States has been guided by the Court's Judgment in preparing this Counter-Memorial. Under the Court's Statute and Rules, both Parties are bound by the Judgment. The Court having decided that Articles I and IV do not provide a legal basis for Iran's claims against the United States, the Parties cannot reargue the point.

PART I

STATEMENT OF FACTS

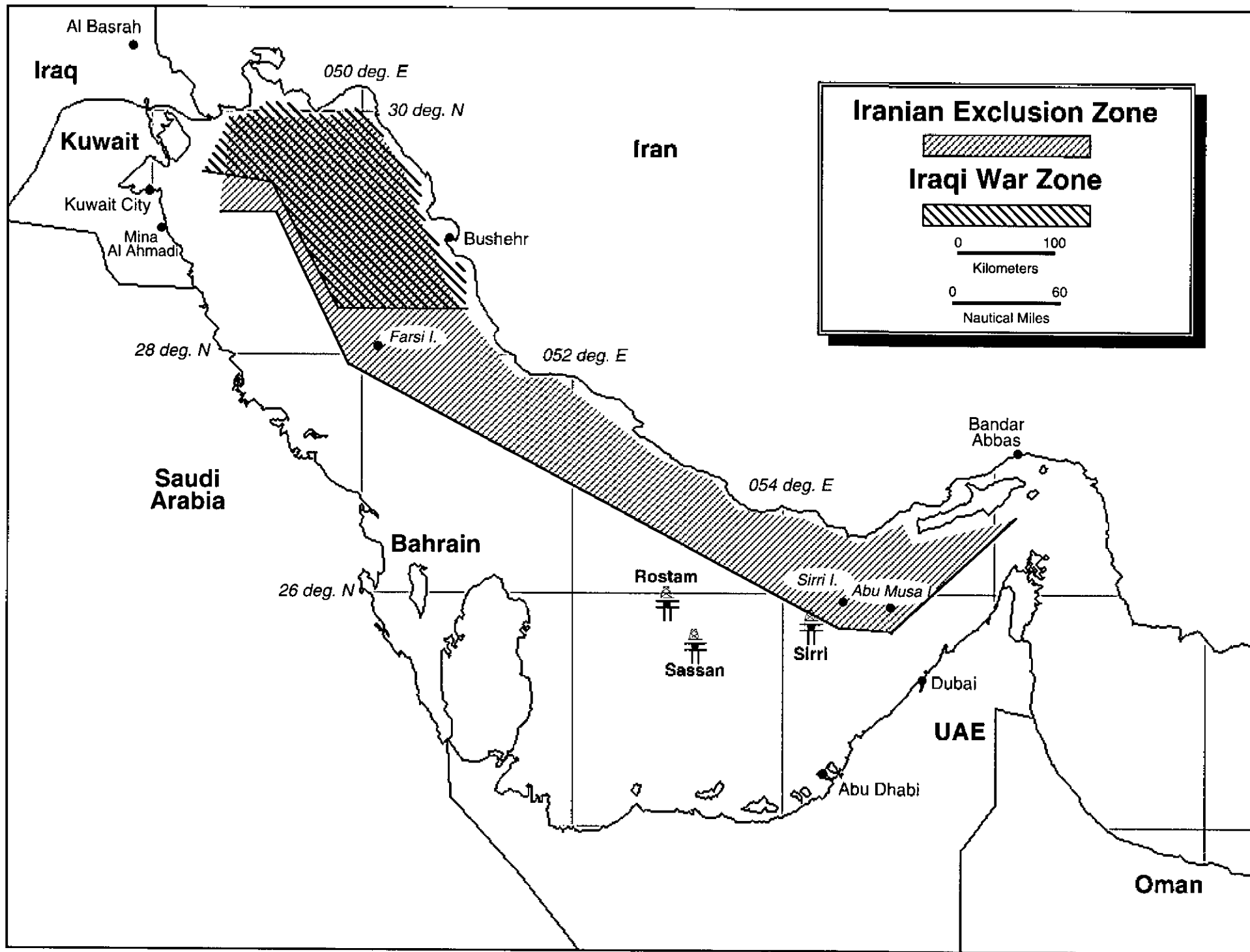
CHAPTER I

AN OVERVIEW OF THE "TANKER WAR"

1.01. The setting for this case is the Iran-Iraq War, which was fought during the period 1980 - 1988. In 1984, the conflict spread to the waters of the Persian Gulf and began affecting the lives and commerce of neutrals. In some of the first incidents of what became known as the "Tanker War," Iraq commenced attacks against tankers carrying Iranian oil through the Gulf, seeking to disrupt Iran's oil industry and to deprive Iran of oil revenues. Iraq's attacks, accomplished largely by fighter aircraft, targeted tankers exporting oil from Iranian terminals -- in most cases on the Iranian side of the Gulf, within 80 nautical miles (148 kilometers) of Kharg Island⁴. (See Map 1.1 on the following page.)

1.02. Because Iraq exported its oil through overland pipeline, rather than seagoing tankers, Iran could not respond in kind against shipping directly linked to Iraq's oil economy. Instead, Iran retaliated by attacking neutral commercial shipping transiting

⁴ International Association of Independent Tanker Owners ("Intertanko"), *Iran/Iraq Conflict, The Tanker War - No End?*, June 1988, p. 23, ("The Tanker War"), Exhibit 1; General Council of British Shipping, *Iran/Iraq: The Situation in the Gulf, Guidance Notes For Shipping*, February 1988, p. 32, ("Guidance Notes For Shipping"), Exhibit 2, ("[Iraqi] attacks on shipping, with several notable exceptions, have been confined to the Iranian side of the Gulf and, in particular, to the area around and to the south of Kharg Island").



to and from the ports of Gulf Cooperation Council member states, particularly Saudi Arabia and Kuwait⁵.

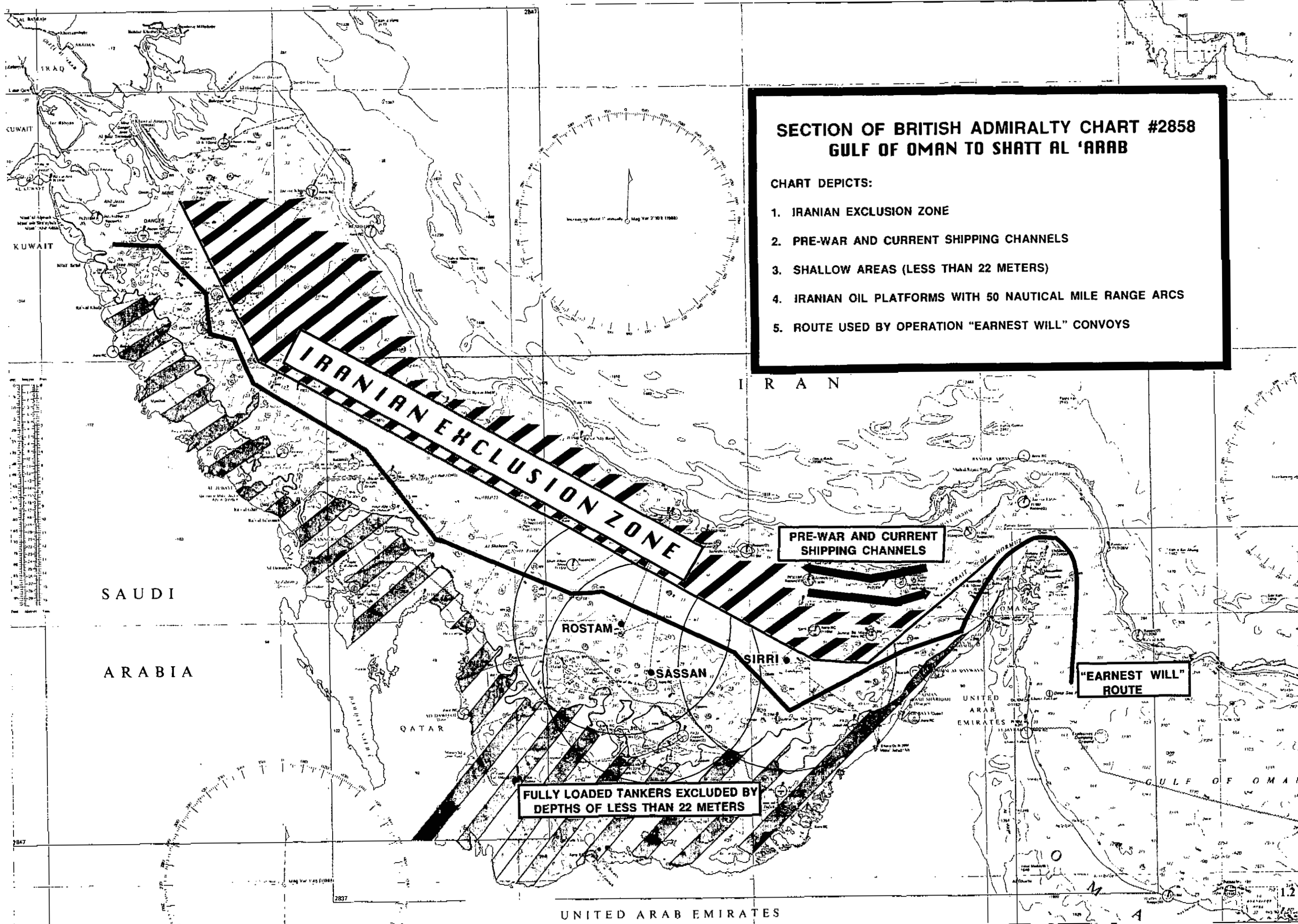
1.03. In September 1980, Iran issued a "Notice to Mariners" establishing a wartime exclusion zone; commercial vessels not inbound for Iranian ports were ordered to remain outside the area noted on map 1.1 -- between 12-60 nautical miles (22-111 kilometers) from Iran's coastline. The stated purpose of the exclusion zone was to "ensure the safety and security of commercial shipping" by decreasing the likelihood that commercial vessels would come under attack by Iraqi forces targeting ships that appeared to be bound for Iran⁶. The effect of the exclusion zone was to narrow substantially the navigable waters which commercial shipping transiting the Gulf could safely use, and to channel maritime traffic within close proximity of Iran's offshore oil platforms. (See Map 1.2 on the following page.)

1.04. The events of 1984-88 pointedly demonstrated that Iran's actions were not consistent with the "safety and security" concerns expressed in its Notice to Mariners.

⁵ See General Council of British Shipping, *Guidance Notes For Shipping*, p. 30, Exhibit 2; Intertanko, *Tanker Safety Circular Letter No. 52*, 12 February 1986, Exhibit 3; Ted Hooton, "The Tanker War in the Gulf, 1984-1988," *Jane's Intelligence Review*, May 1992, p. 218, Exhibit 4; John Jordan, "The Iranian Navy," *Jane's Intelligence Review*, May 1992, p. 215, Exhibit 5.

According to *Jane's Defence Weekly*, Iran's Majlis Speaker Hashemi-Rafsanjani warned in a 1986 *Pasdare Islam* article that Iran would use surface-to-surface missiles against Saudi and Kuwaiti territory. The article constituted "the first official admission by Iran that the Iranian Air Force had struck Saudi Arabian and Kuwaiti tankers in air strikes against tanker traffic in the Persian Gulf." "Iran admits Gulf attacks on merchant ships," *Jane's Defence Weekly*, 9 August 1986, p. 195, Exhibit 6. Because Iran targeted ships trading with Kuwait for attack, insurance rates for ships traveling to and from Kuwait nearly doubled in 1987. See "How insurers assess shipping risks," *Lloyd's List*, August 7, 1987, p. 2, Exhibit 7.

⁶ Iran's "Notice to Mariners" was reprinted in General Council of British Shipping, *Guidance Notes for Owners and Masters with vessels in the Arabian Gulf*, 29 June 1984, pp. 3-4, Exhibit 8.



**SECTION OF BRITISH ADMIRALTY CHART #2858
GULF OF OMAN TO SHATT AL 'ARAB**

CHART DEPICTS:

1. IRANIAN EXCLUSION ZONE
2. PRE-WAR AND CURRENT SHIPPING CHANNELS
3. SHALLOW AREAS (LESS THAN 22 METERS)
4. IRANIAN OIL PLATFORMS WITH 50 NAUTICAL MILE RANGE ARCS
5. ROUTE USED BY OPERATION "EARNEST WILL" CONVOYS

**PRE-WAR AND CURRENT
SHIPPING CHANNELS**

**"EARNEST WILL"
ROUTE**

**FULLY LOADED TANKERS EXCLUDED BY
DEPTHS OF LESS THAN 22 METERS**

IRANIAN EXCLUSION ZONE

ROSTAM

SASSAN

SIRRI

**UNITED
ARAB
EMIRATES**

GULF OF OMAN

UNITED ARAB EMIRATES

SAUDI

ARABIA

According to credible public sources, Iranian forces -- regular air force and navy units, and Iranian Revolutionary Guard personnel -- were responsible for more than 200 attacks on merchant shipping *outside* the Iranian exclusion zone, in international waters and the territorial seas of Gulf states⁷. Iranian forces attacked the vessels of 31 flag nations, killing at least 63 people⁸. As will be detailed below, three U.S.-flag vessels (that is, vessels under U.S. registry), and at least six U.S.-owned vessels flying the flags of other states were among the neutral vessels subject to assault. In the words of Commodore Mohammad Hoseyn Malekzadegan, commander of the Iranian Navy, the harassment and attack of neutral shipping was "a wholehearted task by the [Iranian] Navy over the past

⁷ See Lloyd's Maritime Information Service, *Vessels Reported To Have Been Attacked and Damaged Due to Acts of Hostility By the Iraqis and Iranians in the Gulf Area Since May 1981*, ("Vessels Damaged in the Gulf") Exhibit 9. *Vessels Damaged in the Gulf* was compiled by Lloyd's, the authoritative maritime information services company. In monitoring the Tanker War, Lloyd's turned to a variety of sources including "local Lloyd's Agencies, news agencies and also shipowners, shipmanagers, shipbrokers and insurers." Information received by Lloyd's "was checked by the Casualty Department to confirm the validity, ensuring that each vessel that was reported to have been attacked was actually in the area. To this end, Lloyd's Agents, Marine Radio Stations, tug and salvage companies and vessel owners/managers would be contacted to verify this information." Statement of Norman Hooke, Assistant Manager, Lloyd's Maritime Information Service, 15 May 1997, para. 19, Exhibit 10.

See also Statement of Captain Christen Feyer Puntervold, 15 January 1997, and the 6 January 1989 Letter from Captain Puntervold to Norwegian War Risks Insurance for Ships Managing Director Hans Peter Michelet annexed thereto, Exhibit 11. Captain Puntervold was the director of the Norwegian Shipowner's Association (NSOA) Contingency Planning Section during the Tanker War. The NSOA record of Iran's attacks on shipping is attached to his 6 January 1989 letter at Exhibit 12. Other records of Iranian ship attacks are contained in General Council of British Shipping, *Guidance Notes for Shipping*, pp. 5-20, Exhibit 2; Intertanko, *The Tanker War*, pp. 3-4, Exhibit 1. Of the Iranian ship attacks depicted on Map 1.4, 208 are documented in the references noted above. Six additional attacks were documented in U.S. Navy records.

⁸ Vessels of the following flag states were attacked: Bahamas, Belgium, Republic of China, Cyprus, Denmark, France, Germany, Greece, India, Italy, Japan, Kuwait, Liberia, Maldives, Norway, Panama, Pakistan, Philippines, Qatar, Romania, Saudi Arabia, Singapore, South Korea,

year [1987-88], comprising indirect blows in particular to the U.S. fleet, affecting both its warships and its merchant vessels, with mines or missiles⁹” Iran’s attacks spanned much of the Gulf, ranging from the coast of Kuwait in the North, to the coast of Oman in the South. Iran used mines, fighter aircraft, helicopters, gunboats, Iranian Navy warships, and cruise missiles to accomplish these attacks¹⁰. (See Illustration 1.3 and Map 1.4 on the following pages.)

1.05. Iranian helicopter and gunboat attacks on commercial vessels were launched in the northern Gulf from Farsi Island, and in the southern Gulf, from Abu Musa and Sirri Islands, and from Iran’s oil platforms¹¹. Typically, the gunboats “approached close to their victims in order to rake them with automatic weapon fire, usually with armour-piercing bullets, and then deliver the coup de grace with a rocket¹².”

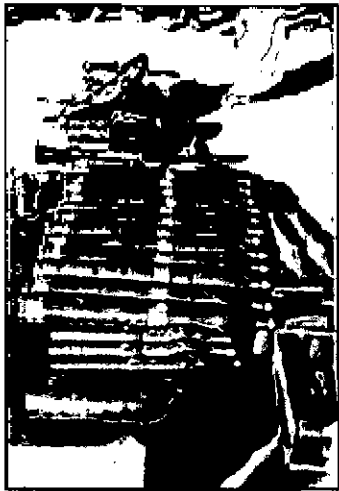
Soviet Union, Spain, Sri Lanka, Turkey, United Arab Emirates, United Kingdom, United States, and Yugoslavia. See Intertanko, *The Tanker War*, p. 43, Exhibit 1.

⁹ Foreign Broadcast Information Service, “Radio Phone-In Program With Defense Officials,” 14 April 1988, p. 53, col. 2 (emphasis added) (program entitled “In Line With the Officials, in Step With the People), Exhibit 13.

¹⁰ General Council of British Shipping, *Guidance Notes For Shipping*, pp. 35-38, Exhibit 2; Statement of Norman Hooke, para. 30, Exhibit 10; Intertanko, *The Tanker War*, pp. 24-25, Exhibit 1; Jordan, *Jane’s Intelligence Review*, p. 215, Exhibit 5; “Gulf War Intensifies,” *International Defense Review*, March 1987, p. 279, Exhibit 14; Hooton, *Jane’s Intelligence Review*, p. 220, Exhibit 4; “Iran Building Up Its Own Arms Industry,” *Jane’s Defence Weekly*, 20 June 1987, p. 1302, Exhibit 15.

¹¹ General Council of British Shipping, *Guidance Notes For Shipping*, pp. 38, 41, Exhibit 2; Jordan, *Jane’s Intelligence Review*, p. 215, Exhibit 5 (Iran’s gunboats were “scattered among the small Iranian-held islands and oil platforms at the southern end of the Gulf.”); see also pp. 58-63, para. 1.88 *infra*. Iran’s oil platforms are often referenced by alternative names. References herein to the Rostam platform complex or Rostam oil field encompass both the oil platforms designated Reshadat and Resalat in Iran’s submissions. See Iran’s Memorial, para. 1.13-1.18. The platforms described herein as Sassan and Sirri are designated Salman and Nasr, respectively, in Iran’s submission. *Ibid*.

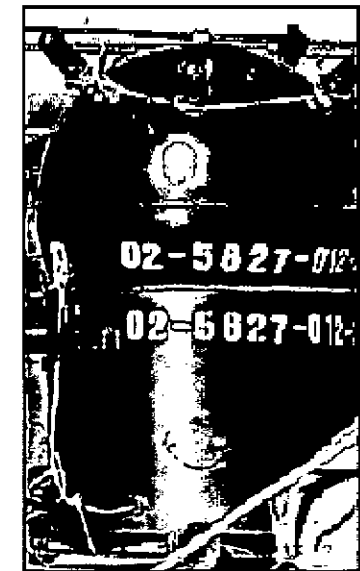
¹² Hooton, *Jane’s Intelligence Review*, p. 220, Exhibit 4.



Incendiary
Rounds

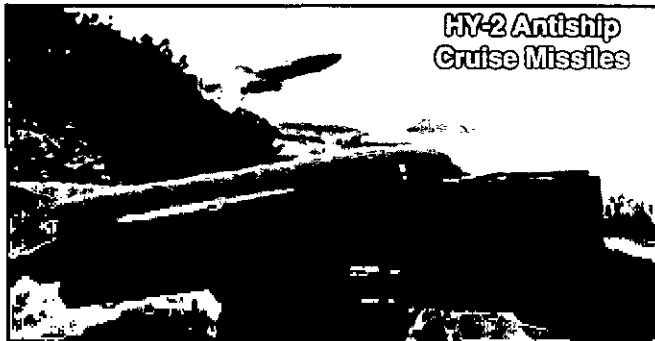


F-4 Phantom Fighter Bomber



SADAF-02
Mine

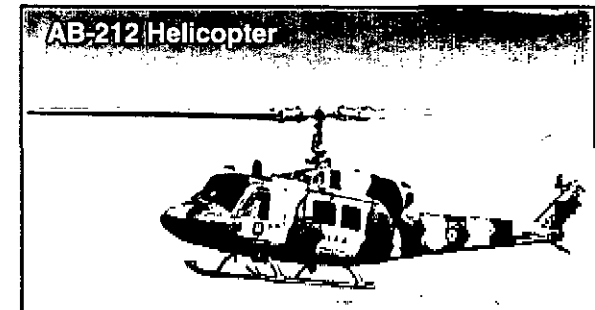
**Iranian Weapon Systems
used to Attack Merchant Shipping in the Gulf,
1984-1988**



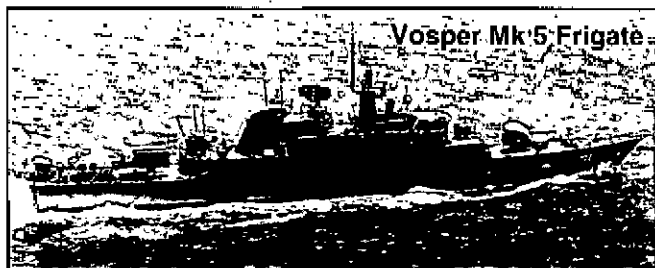
HY-2 Antiship
Cruise Missiles



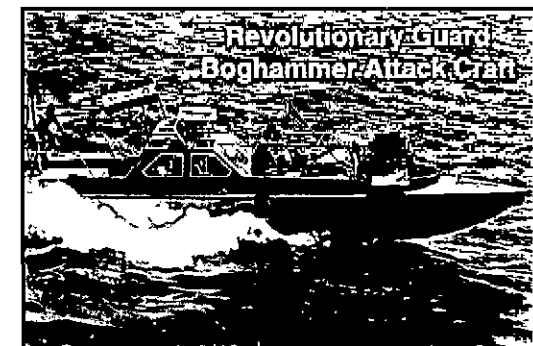
Revolutionary Guard
"Ashura" Attack Craft



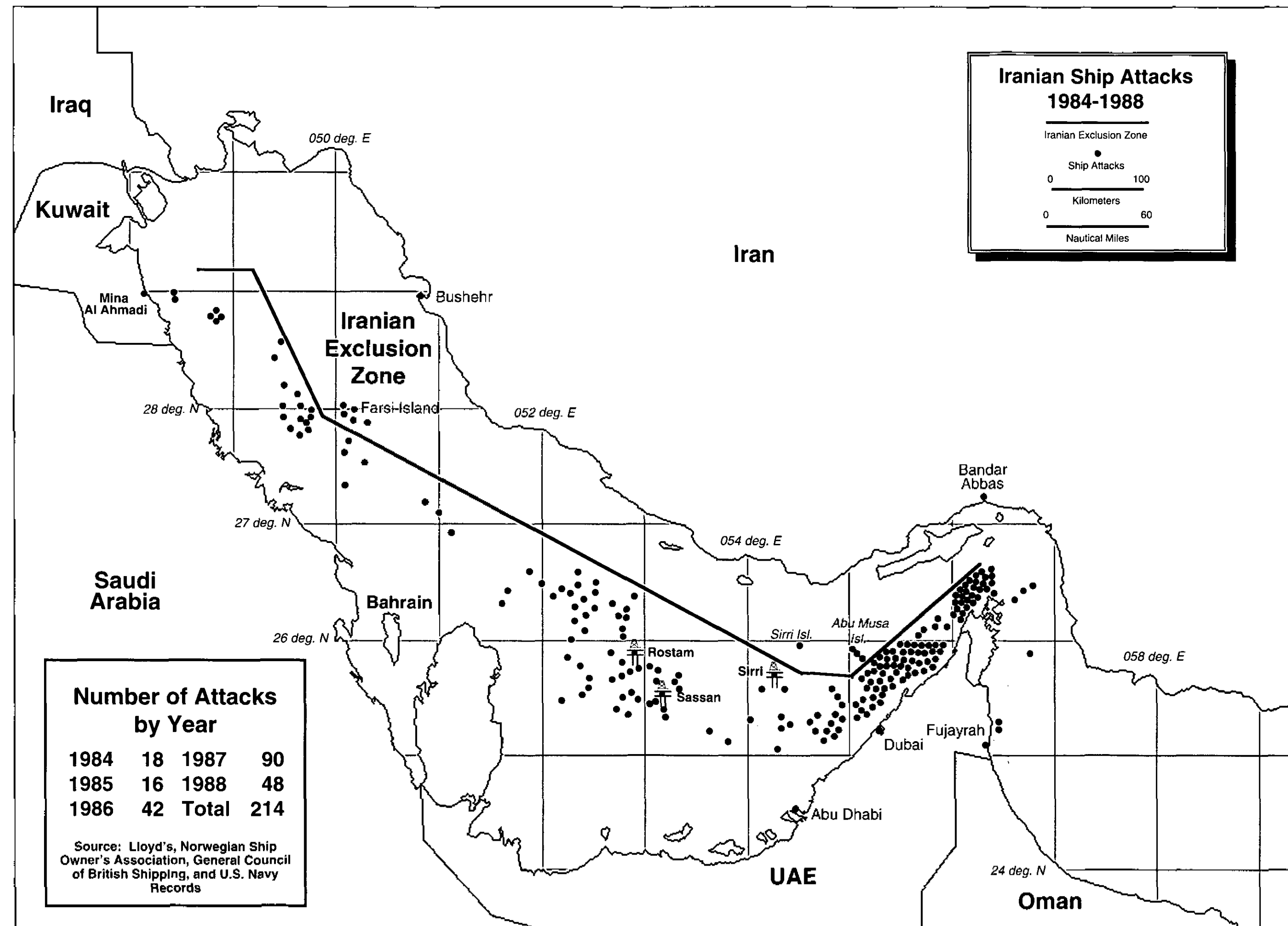
AB-212 Helicopter



Vosper Mk 5 Frigate



Revolutionary Guard
Boghammer Attack Craft



The Oslo-based International Association of Independent Tanker Owners -- an organization with every economic incentive to maintain strict neutrality in the Iran-Iraq war -- concluded that the "main objectives" of Iran's gunboat attacks on commercial vessels were "to kill sailors as an act of terrorism"¹³. That the plain purpose of many of these attacks was to kill mariners was evident from their character. From very close range, Iranian helicopters and gunboats often fired machine guns, rocket-propelled grenades, and missiles into the *accommodations quarters* of vessels, targeting the crew members housed within, rather than other areas of a ship where crew members would not be found¹⁴.

1.06. The targets attacked by Iranian forces frequently appeared to be chosen carefully¹⁵. After identifying their targets, Iranian helicopters, gunboats and naval units

¹³ Intertanko, *The Tanker War*, p. 25, Exhibit 1. Crews on merchant vessels entering the Gulf war zone had the right to decline the voyage, and compel their employers to seek substitute crews, but "many seafarers did not exercise this option for fear of prejudicing their jobs or career prospects." "Ships banned from Gulf of Oman danger zone," *Lloyd's List*, August 14, 1987, p.1, Exhibit 16.

¹⁴ The Lloyd's Maritime Information Service compilation of Tanker War ship attacks contains numerous examples of Iranian forces targeting accommodations quarters, including the following: 18 February 1985 attack on *Al-Manakh* (missiles fired into crew accommodation quarters killing one crew member); 21 May 1987 attack on *Rashidah* (12 rockets and 100 heavy machine gun rounds fired into accommodation and engine room); 27 June 1987 attack on *Mia Margaritha* (crew quarters struck by rocket-propelled grenades); 14 January 1988 attack on *Petrobulk Pioneer* (Iranian frigate fired 4.5 inch shells, rocket-propelled grenades and machine gun rounds into accommodation area); 22 March 1988 attack on *Stavros* (rocket-propelled grenades fired into accommodation area). See *Vessels Damaged in the Gulf*, pp. 22, 69, 71, 102, 111, Exhibit 9; see also Intertanko, *Tanker Safety Circular No. 54*, 16 April 1986, p.4, Exhibit 17 (5 April 1986 attack on *Petrostar XVI*; crew accommodations area gutted upon being struck by missiles fired from two helicopters, injuring seven crew).

¹⁵ Statement of Norman Hooke, para. 31, Exhibit 10; Contre-amiral Michel (R) Heger et Yves Boyer, "U.S. and Iran issues in the Gulf (1987-88)," pp. 5, 7, Exhibit 18.

would stand off, seeking permission to attack, and then return to attack if permission was granted¹⁶.

1.07. Iran did not limit its attacks to vessels carrying war materiel destined for Iraq. Nor does the public record reflect that Iran limited its attacks to vessels that resisted Iranian efforts to visit and search for war materiel¹⁷. The United States has identified only one instance in which a commercial vessel was attacked upon refusing to submit to interrogation or search. In fact, Iranian forces were known to attack commercial vessels without even first attempting to interrogate them, and in other circumstances attacked vessels that willingly submitted to interrogation¹⁸.

1.08 Iran often assured other States that its forces would not attack their shipping, and then reneged on such assurances. Following two attacks on Norwegian merchant

¹⁶ *Ibid.*; see also "New pattern of attack on ships trading with Kuwait," *Lloyd's List*, January 13, 1987, Exhibit 19 (upon interrogating vessels, Iranian gunboats would "allow the vessel to continue on her route, often leaving her in the belief that she is clear of suspicion. Then, within hours, an Iranian helicopter or gunboat closes in for an attack."); General Council of British Shipping, *Guidance Notes For Shipping*, pp. 37-38, Exhibit 2; Intertanko, *Tanker Safety Circular Letter No. 62*, 12 December 1986, p. 2, Exhibit 20 (the *Crown Hope* was intercepted by an Iranian frigate "about two hours" before the frigate returned to attack.); Intertanko, *Tanker Safety Circular No. 54*, 16 April 1986, p. 3, Exhibit 17 ("to be able to identify vessels" Iranian helicopters attacked in daylight).

¹⁷ Statement of Norman Hooke, paras. 23-24, Exhibit 10.

¹⁸ Iranian forces regularly attacked without attempting first to interrogate the ships they targeted. See, e.g., Reuters wire report, 9 July 1987, reprinted in *Lloyd's Weekly Casualty Reporting Service*, Exhibit 21, quoting the master of the *Peconic*, attacked by an Iranian gunboat ("Without asking me any information -- the name of the ship, nationality, from where I was coming or where I was going -- they start shooting grenades. We count 18 grenades.") In those cases when Iranian forces elected to interrogate vessels, and did so successfully with the cooperation of ship masters, they persisted in assaulting the merchant ships they queried. For example, before attacking the *Five Brooks* on 17 October 1986, killing ten people, and the *Al Faiha* on 22 October 1986, Iranian gunboats "intercepted the tankers and asked for details on cargo and destination." Intertanko, *Tanker Safety Circular No. 61*, 12 November 1986, p.2, Exhibit 22.

vessels, Norway protested diplomatically to Iran in December 1987. Iran had previously assured Norway that Norwegian ships would not be subject to attack¹⁹. Weeks later, two Iranian gunboats attacked the Norwegian-flag *Igloo Espoo*, firing rocket-propelled grenades and machine-gun rounds²⁰. On 18 March 1988 Iranian gunboats raked the Norwegian tanker *Berge Lord* with machine-gun fire²¹. Similarly, in July 1987, Iran's national assembly speaker Hashemi-Rafsanjani assured Japan's foreign minister Tadashi Kuranari that Iran would not attack Japanese shipping in the Persian Gulf²². Despite such assurances, Iranian gunboats firing rocket-propelled grenades attacked the Japanese-flag *Nisshin Maru* on 2 September 1987, and the Japanese-flag *Nichiharu Maru* on 30 September 1987²³.

1.09 The onset of attacks on shipping produced an immediate reaction from the world community. On 21 May 1984, the Permanent Representatives of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates to the United Nations requested an urgent meeting of the United Nations Security Council "to consider the Iranian acts of

¹⁹ "Norway Tells Iran It Will Not Tolerate Gulf Ship Strikes," *Reuters*, 24 December 1987, Exhibit 23.

²⁰ Lloyd's Maritime Information Service, *Vessels Damaged in the Gulf*, p. 102, Exhibit 9.

²¹ "Iran attacks Panamanian and Norwegian tankers in Gulf," BBC Summary of World Broadcasts, 19 March 1988, Exhibit 24.

²² "Iran Promised to Leave Japanese Shipping Alone, Kuranari Says," Kyodo News Service, Japan Economic Newswire, 4 July 1987, Exhibit 25.

²³ See Lloyd's Maritime Information Service, *Vessels Damaged in the Gulf*, pp. 78, 82, Exhibit 9.

aggression on the freedom of navigation to and from the port of our countries. Such acts of aggression constitute a threat to the stability and security of the area²⁴

1.10 By Resolution 552 (1 June 1984), the Security Council condemned Iran's attacks on commercial shipping, and demanded "that there should be no interference with ships en route to and from States that are not parties to the hostilities²⁵." Convinced that these attacks constituted a threat to the safety and stability of the region, with serious implications for international peace and security, the Security Council called on all States to respect the right of free navigation and warned Iran that, in the event of non-compliance, it would consider "effective measures."

1.11 In 1986, the Security Council furthered deplored attacks on shipping by Iran and Iraq in Resolutions 582 and 598, and again called upon the belligerents to respect "the right of free navigation and commerce²⁶."

1.12 As a neutral party, the United States supported the efforts of the United Nations, the Nonaligned Movement, and the Organization of the Islamic Conference to end the Tanker War and the underlying conflict between Iran and Iraq. The aim of the United States was a diplomatic resolution that would assure the independence and territorial integrity of both belligerents, and provide security to neutral Gulf Cooperation

²⁴ Andrea de Guttry and Natalino Ronzitti, *The Iran-Iraq War (1980-1988) and the Law of Naval Warfare* (1993) (hereafter, "de Guttry and Ronzitti") p. 536, Exhibit 26.

²⁵ Resolution 552, United Nations Security Council (2546th meeting, 1 June 1984), reprinted in United Nations Document S/RES/552, Exhibit 27.

²⁶ Resolution 598, United Nations Security Council (2730th meeting, 22 December 1986), reprinted in United Nations Document S/INF/42, p. 13, Exhibit 27; *See also* Resolution 582, United Nations Security Council (2666th meeting, 24 February 1986) reprinted in United Nations Document S/RES/582, Exhibit 29.

Council States that were directly threatened by the hostilities. It was therefore the policy of the United States to prohibit U.S. arms exports both to Iran and Iraq²⁷.

1.13 The international community's efforts to facilitate a peaceful resolution to the Iran-Iraq conflict proved unsuccessful for many years. As detailed below, it was both the policy and the practice of the United States to insist that, so long as the war raged on, the belligerents respect the neutrality of states not party to the conflict, and the right of such states to navigate freely their vessels through, and engage in commerce in, the Persian Gulf.

²⁷ "U.S. Policy in the Persian Gulf," U.S. Department of State Special Report No. 166, p. 9, July 1987, Exhibit 30.

CHAPTER II

IRAN'S ATTACKS ON MERCHANT SHIPPING

Section 1. The Flagging of Kuwaiti Tankers Under U.S. Registry and the Launch of Operation Earnest Will by the United States

1.14 In late 1986 and early 1987, Kuwait requested the United States, the United Kingdom, and the Soviet Union to reflag a number of Kuwaiti vessels. Kuwait's request was prompted by the recognized fact that Iranian forces were targeting Kuwaiti vessels for attack in Persian Gulf waters²⁸.

1.15 The United States, the United Kingdom, and the Soviet Union all responded to Kuwait's request. Consequently, the Kuwait Oil Tanker Company chartered a number of Soviet vessels, flagged four ships under United Kingdom registry, and flagged eleven ships under U.S. registry²⁹.

1.16 Iran vehemently and openly opposed the U.S. and British flagging of Kuwaiti tankers³⁰. Iran disputed, and apparently still disputes, the legality of this procedure, claiming that the transfer of registry was intended to aid Iraq against Iran³¹. In

²⁸ See *supra* note 5.

²⁹ Interanko, *The Tanker War*, p.6, Exhibit 1; Statement of Colin Eglington, 8 May 1997, para.17, Exhibit 31.

³⁰ Iran's Memorial, paras. 1.52-.53, 4.61-62; see also Letter from Iranian Foreign Minister Vellayati to the U.N. Secretary General, 23 July 1987, quoted in part in 33 Keesings Record of World Events 35598, Exhibit 32 and *Iran v. United States (Case Concerning the Aerial Incident of 3 July 1988)*, Memorial of the Islamic Republic of Iran, 234-35, Exhibit 33.

³¹ Iran's Memorial, para 4.75 at 117; Annex to Iran's Observations and Submission, p. 5, para. 12.

fact, the U.S. flagging procedure was consistent with international law and applicable U.S. laws. As discussed below in Part IV, paragraphs 4.13 - 4.18, the United States fully satisfied the requirements of international and U.S. law, and established, in conformity with international law, a "genuine link" between the United States and the registered vessels by exercising its jurisdiction and control in administrative, technical and social matters.

1.17 Nor did the flagging of Kuwaiti vessels under U.S. registry affect their neutral status. The vessels did not carry war materiel and did not call at either Iraqi or Iranian ports. Iran has not presented *any* evidence to dispute these facts.

1.18 In addition to flagging Kuwaiti ships under U.S. registry, the United States agreed, consistent with the law of neutrality, to provide all U.S.-flag vessels with a U.S. naval escort when transiting the Gulf, in an effort to deter further Iranian attacks. This escort mission was initiated in July 1987, under the designation "Operation Earnest Will."

Section 2. Iran's Response to the Reflagging of Kuwaiti Vessels; Iran's First Attack On U.S.-flag Shipping -- the Mining of the Oil Tanker *Bridgeton*

A. THE MINING OF KUWAITI WATERS

1.19 From the outset, the vessels involved in Kuwait's chartering and reflagging effort came under attack by Iran. On 16 May 1987, the Soviet oil tanker *Marshall Chuykov*, which was on its first mission as a charter vessel carrying Kuwaiti oil, struck a

Al-Ahmadi Mining June 1987

0 50

Kilometers

0 20

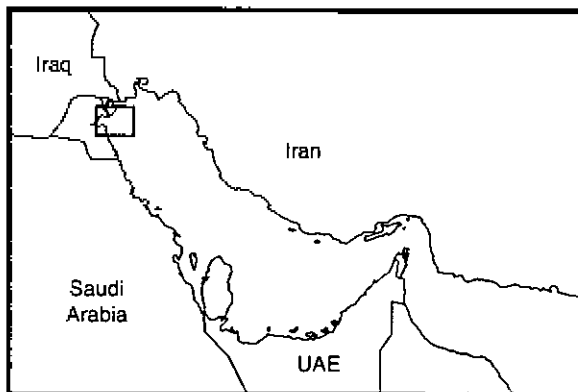
Nautical Miles

29 deg. 20 min. N

Kuwait

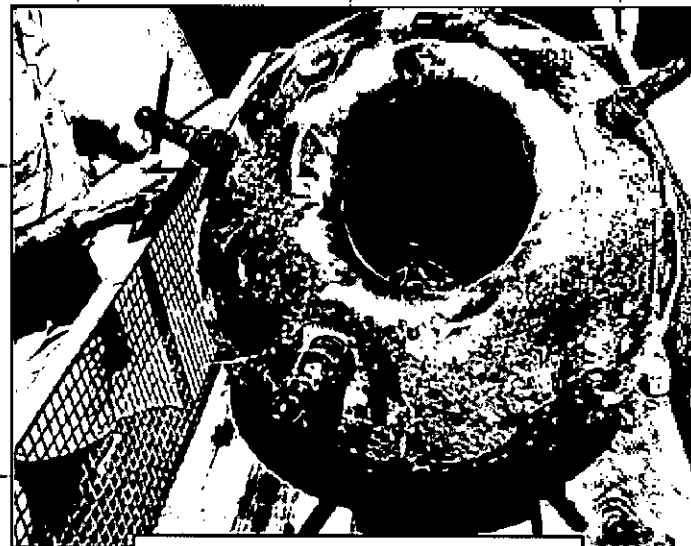
29 deg. 10 min. N

Mina Al-Ahmadi

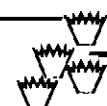


Sea Island Oil
Terminal

Kubbar Island



Iranian SADAF-02 mine following
removal of explosive and analysis,
28 June 1987



Al-Ahmadi Minefield
16 Iranian SADAF-02 mines laid,
4 ships hit:
Marshal Chuikov, 17 May
Primrose, 27 May
Ethnic, 9 June
Stena Explorer, 20 June

048 deg. E

048 deg. 20 min. E

³⁶ See Statement of Donald Jones, 3 May 1997, para. 6-10, Exhibit 37; Naval Technical Intelligence Center, "Foreign Materiel Exploitation Memorandum Report," pp. 7-8, Exhibit 38.

³⁵ Lloyd's Maritime Information Service, *Vessels Damaged in the Gulf*, p. 67, Exhibit 9.

³⁴ Statement of Kuwait Naval Force, para. 6, Exhibit 34.

³³ A shipping industry source quoted in *Jane's Defence Weekly* reported that "[t]he Chuikov had left its Soviet escort behind as it approached Kuwait and the Iranians laid mines specifically for it. . . . Another vessel had used the channel less than an hour before and it was not hit. It seems the Revolutionary Guard sneaked in and ambushed the Soviet vessel. . . ." "Iranians in mine-laying campaign against Kuwait," *Jane's Defence Weekly*, 27 June 1987, p. 1344, Exhibit 35; see also "Another ship hits a mine off Kuwait," *Lloyd's List*, 28 May 1987, Exhibit 36 (reporting that the master of the *Chuykov* had told Tass news agency that "another tanker passed safely through the same channel an hour before his vessel").

³² Lloyd's Maritime Information Service, *Vessels Damaged in the Gulf*, p. 67, Exhibit 9; Statement of Kuwait Naval Force Officials Regarding the Mining of Waters Near Al-Ahmadi Port During the Iran-Iraq War, para. 5, Exhibit 34 (signed by Col. Ahmed Al-Mulla, Col. Ali Al-Dashiti, and Col. Mahmoud Shishreen) (hereafter "Statement of Kuwait Naval Force").

respects³⁶. For example, the mine found in Kuwaiti waters had an anchor shaped like a used Soviet mine, but nonetheless *distinct* from the Soviet mine in a variety of crucial retrieved from its mooring in Kuwaiti waters was unique: it was similar to a commonly-"Cluster Gin," which has been annexed as Exhibit 31. The report indicates that the mine forces was retrieved and analyzed. This analysis was documented in a report code-named One of the mines subsequently found in the Al-Ahmadi minefield by U.S. and Kuwaiti assistance of U.S. Navy mine counter-measures forces in clearing its waters of mines.

1.20 After discovery of the Al-Ahmadi minefield, Kuwait requested the

on the following page.) Credible public sources attributed this mining to Iran³⁵. struck mines laid at the deep water entrance to Kuwait's al-Ahmadi port³⁴. (See Map 1.5 that the *Marshal Chuikov* was deliberately singled out for attack³³. Three other vessels mine in the northern Persian Gulf, off the coast of Kuwait³². Shipping officials believed

pot or deep bowl, whereas the Soviet mine had an anchor shaped like a cradle; the captured mine had a smaller diameter (800 mm) than the Soviet mine (876 mm); and the captured mine had a thinner outside casing (2.7 mm) than the Soviet mine (4 mm)³⁷. U.S. forces were able to confirm, months later, that the mine with distinct characteristics retrieved from al-Ahmadi minefield near Kuwait harbor matched nine mines found on a captured Iranian mine-laying vessel, *Iran Ajr*, and mines found in other sectors of the Gulf³⁸.

1.21 Iran has suggested that the mines which struck commercial vessels near Kuwait and elsewhere in the Gulf "had probably floated down" from areas in the northern Gulf where Iraq was known to have laid mines³⁹. The facts belie this claim. The mines found off the coast of Kuwait were moored to anchors⁴⁰ -- they could not have been laid by Iraq elsewhere and simply floated, en masse, to Kuwaiti waters.

1.22 Following these mining incidents, the United States transmitted two messages to the Islamic Republic of Iran, through Switzerland's Ambassador to Iran. The first message, in May 1987, (attached as Exhibit 39), emphasized that the United States did not seek confrontation with Iran, and that the United States was committed to using its influence to end the war which had visited suffering upon the people of both

³⁷ Statement of Donald Jones, para. 6-10, Exhibit 37.

³⁸ See pp. 28-35, paras. 1.40-1.47 *infra*; see also Statement of Donald Jones, paras. 13-14, Exhibit 37.

³⁹ Annex to Iran's Observations & Submissions, p. 20, para. 48.

⁴⁰ See Statement of Donald Jones, para. 4, Exhibit 37. The mines later found by coalition mine-clearing forces elsewhere in the Gulf were also moored to anchors. *Ibid.*, para. 16.

sides. The communication also urged that "Iranian forces take no steps which will provoke a U.S. reaction," and that "[r]ecent Iranian actions to increase the danger to neutral international shipping . . . by naval and air attack and by taking steps to install the Silkworm anti-ship missiles are unhelpful and dangerous⁴¹." The communication closed with the hope that "the problems discussed above can be resolved rather than lead to further difficulties."

1.23 Shortly thereafter, in response to questioning about the flagging of Kuwaiti tankers to U.S. registry, Iran's Ambassador to the United Nations, Said Rajaie-Khorassani, announced on U.S. television that "if my country has the intention of attacking a Kuwaiti tanker, it will continue with that policy, regardless of whose flag it is carrying⁴²."

1.24 On 18 July 1987, the United States transmitted another communication to Iran via the Swiss government⁴³. The focus of this second message was the decision of the United States to flag Kuwaiti vessels to U.S. registry. The United States alerted Iran that the vessels in question "will have American masters and will serve neutral ports. They will abide strictly by rules of international law. They will simply transport non-contraband goods -- specifically oil and oil-product exports -- between neutral ports,

⁴¹ See United States Department of State document entitled "Message to Iran," 23 May 1987, Exhibit 39. The United States and other states demarched Iraq in similar fashion. See "Diplomatic Note: Attacks on Merchant Vessels," 25 September 1986, U.S. Department of State Cable, Exhibit 40.

⁴² "Weinberger warns against attacks in Gulf; Iran threatens," *United Press International*, May 25, 1987, Exhibit 41.

⁴³ See United States Department of State document entitled "Demarche to Iran: Use of Silkworms/Protection Regime," Exhibit 42.

traversing international waters.” The communication emphasized that U.S. warships escorting these U.S.-flag vessels “pose no danger to Iran” and would not “undertake provocative activities.” Finally, the communication warned Iran that the United States regarded as unacceptable “any act which threatens our naval units or any U.S.-flag shipping” and that the United States would take all appropriate defensive measures to protect U.S. vessels from attack.

B. THE MINING OF THE U.S.-FLAG *BRIDGETON*

1.25 Iran’s response to the U.S. diplomatic effort came six days after the July U.S. communication. The first U.S. Navy-escorted merchant vessel convoy under Operation Earnest Will gathered at the Khor Fakkan anchorage outside the Strait of Hormuz on 21 July 1987. The convoy consisted of three U.S. Navy warship escorts, and two merchant vessels, *Bridgeton* and *Gas Prince*, which were flagged under U.S. registry. This first convoy received considerable publicity⁴⁴. Its departure from Khor Fakkan was well known, and the merchant vessels in the convoy communicated freely on open radio channels.

1.26 On 24 July 1987, *Bridgeton* struck a mine in the international shipping channel approximately 18 nautical miles southwest of Iran’s Farsi Island. Located approximately 160 kilometers east of the coastal Saudi Arabian city Al Mishab, Farsi was

⁴⁴ Statement of Rear Admiral Harold Bernsen, 25 May 1997, para. 3, Exhibit 43.

a known base for Iranian forces⁴⁵. The mine explosion ripped a hole in *Bridgeton*'s hull, necessitating 150 tons of steel repair⁴⁶. (See Map 1.6 on the following page.)

1.27 Notably, a merchant ship had transited through the shipping lane shortly before *Bridgeton*'s voyage and emerged unscathed⁴⁷. This fact led U.S. commanders to the conclusion that the mine which struck *Bridgeton* had been laid in its immediate path, following the passage of the other vessel⁴⁸. In short, the first U.S. Navy-escorted convoy of U.S.-flag neutral vessels had been targeted for attack.

1.28 U.S. surveillance of Iranian forces stationed on Farsi Island indicated that they mobilized during the early morning hours of July 24th to engage in mining activities⁴⁹. Moreover, in the days and weeks following the *Bridgeton* attack, U.S. forces received information from two different covert sources in Iran's armed forces that Iranian Revolutionary Guard diving units were responsible for laying the mine which struck *Bridgeton*⁵⁰.

⁴⁵ General Council of British Shipping, *Guidance Notes for Shipping*, pp. 38, 41, Exhibit 2; Statement of General George Crist, 15 May 1997, para. 11, Exhibit 44; Statement of Rear Admiral Harold Bernsen, para. 4, Exhibit 43.

⁴⁶ See 16 April 1997 letter of Captain Turki Al Turki, Superintendent of Operations, Kuwait Oil Tanker Company to Nancy Mullen, Economic Officer, Embassy of the United States, Exhibit 45.

⁴⁷ Statement of General George Crist, para 5, Exhibit 44; Statement of Colin Eglington, para. 19, Exhibit 31.

⁴⁸ Statement of General George Crist, para. 5, Exhibit 44.

⁴⁹ Statement of Rear Admiral Harold Bernsen, para. 4, Exhibit 43.

⁵⁰ According to Iranian sources reporting to the United States, Iranian divers approached *Bridgeton* under cover of darkness and then placed mines in the water, directly in the path of the approaching tanker. See Central Intelligence Agency, "Revolutionary Guard Responsibility for *Bridgeton* Mining Incident," July 1987, para. 1; Central Intelligence Agency, "Involvement of

Bridgeton strikes an Iranian Mine, 24 July 1987

Iranian Exclusion Zone

0 50

Kilometers

0 30

Nautical Miles

Iranian Exclusion Zone

Bushehr

U.S. Shipping Convoy Route

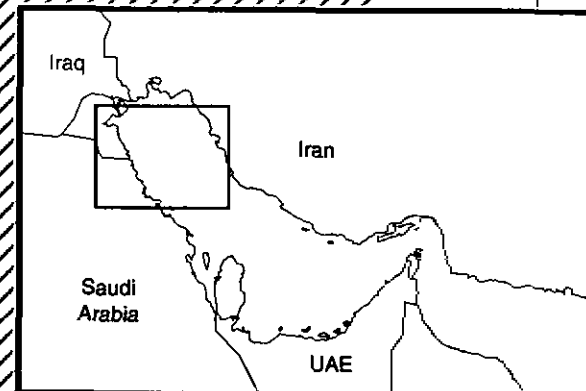
Mina Al-Ahmadi

Sea Island Oil Terminal

29 deg. N

28 deg. 30 min. N

Mine damage to *Bridgeton*



Farsi Island

28 deg. N

Navigation Aids:

1. Q Buoy (shoal water)
2. Harqus Island Navigation Aid
3. Karan Island Navigation Aid
4. Middle Shoals Buoy

Location where *Bridgeton* struck mine

1.29 It was also easy to conclude that Iraq was not responsible for the *Bridgeton* mining. Iraq was known to limit its mining activities to specific sectors of the northern Gulf, within easy helicopter flying distance of Iraqi staging bases⁵¹. *Bridgeton* was not in such a sector when it was mined. (See Map 1.13 following p. 81 which depicts areas of Iraqi mining activity.) Further evidence of Iran's responsibility for the *Bridgeton* mine attack was subsequently discovered in November 1987⁵².

1.30 In a sermon on the day of the *Bridgeton* mining, Iran's Majlis Speaker Hashemi-Rafsanjani praised the forces responsible for the mining, hailing them as "God's angels that descend and do what is necessary at the appropriate time." Hashemi-Rafsanjani emphasized that Iran intended to continue to assault shipping associated with Kuwait, notwithstanding the U.S. escort operation:

Revolutionary Guard in Bridgeton Mining Incident," August 1987, para. 1, both annexed at Exhibit 46. U.S. national security laws and regulations required the deletion of the names of the Iranian sources in these reports, as well as certain other information that was unrelated to the subject of the *Bridgeton* mining.

⁵¹ Affidavit of Commander C.W. Tempelaars, Dutch Navy, 3 April 1997, para. 6, Exhibit 47; Statement of Rear Admiral Harold Bernsen, para. 5, Exhibit 43; Statement of Admiral Anthony Less, 29 May 1997, para. 7, Exhibit 48; Statement of Donald Jones, para. 18-19, Exhibit 37.

⁵² On 19 November 1987, U.S. Navy mine-clearing forces discovered a field of moored mines south of Iran's Farsi Island, near the location where the U.S.-flag *Bridgeton* was struck by a mine in July 1987. Statement of Rear Admiral Harold Bernsen, para. 4, Exhibit 43. A U.S. Navy diver examined these moored mines in the water, and discovered them to be Iranian SADAF-02 mines -- Iranian variants of the Soviet M-08 mine. When the diver began attaching explosive cord to the mine, he "immediately noted that the mine had a welded eye, but was not fitted with a lift ring." Statement of Senior Chief Jay Ulrich, 12 May 1997, para. 7, Exhibit 49. Welded eyes and lift rings are small features on a mine to which cable may be attached to lift the mine case. Soviet M-08 mines were fitted with lift rings, whereas the Iranian mines found throughout the Gulf were not -- they featured only welded eyes. *Ibid.*, para. 5; see also Statement of Donald Jones, para. 10, Exhibit 37. The diver thus concluded that the mines in the water were laid by Iran. The discovery of these Iranian mines near the location of the *Bridgeton* incident provided further evidence of Iran's responsibility for mining in the Farsi Island area, and for the mining of *Bridgeton*.

" If our ships are hit, the ships of Iraq's partners' will be hit. *Of course, we will not claim responsibility for anything, for it is an invisible shot that is being fired.*

. . . [T]hey will provide escort for four ships, what about the rest? Each day several ships berth in Kuwait and then set sail; these are cargo ships carrying goods, oil and other commodities. Therefore, several vessels visit Kuwait every day. How extensive a retaliation do we need? Two per week, eight per month, five? . . . Consequently, nothing can stop us from retaliating. Then why is the United States bothering to undertake such an expensive operation⁵³?"

1.31 In a more directly threatening statement only days later, "Iranian president Mr Ali Khomeini warned the United States to pull its forces out of the 'dangerous whirlpool' of the Gulf. 'They had better leave the region, otherwise we shall strike them so hard they will regret what they have done'⁵⁴."

Section 3. Iranian Mining Activities Continue; Hostile Encounters Between U.S. and Iranian Forces

1.32 Iran's attacks on neutral shipping throughout the Gulf increased following the mining of *Bridgeton*, compelling the United States to increase its naval presence in the Gulf, and prompting other States to send naval forces to the area to assist in the protection of neutral shipping. In one well-publicized incident, Iranian forces were caught, *in flagrante delicto*, trying to lay mines in the Gulf; in another incident, Iranian

⁵³ Foreign Broadcast Information Service, "Hashemi-Rafsanjani Political Sermon," 24 July 1987, p. S2, col. 2, p. S4, col. 1 ("Political sermon delivered by Majlis Speaker 'Ali Akbar Hashemi-Rafsanjani during Friday prayer ceremonies in Tehran on 24 July") (emphasis added), Exhibit 50.

⁵⁴ "Iran warning as 'Bridgeton' begins loading," *Lloyd's List*, 1 August 1987, p.1, Exhibit 51.

forces succeeded in doing so, substantially damaging two vessels and causing multiple deaths and injuries. Hostile encounters subsequently took place between Iranian and U.S. forces.

A. IRANIAN FORCES MINE WATERS OFF THE COAST OF FUJAYRAH, NEAR THE ENTRANCE TO THE PERSIAN GULF

1.33 On 8 August 1987, U.S. forces received reports of a possible Iranian mine-laying activity in the vicinity of the Khor Fakkan anchorage, off the coast of Fujayrah⁵⁵. At the time of the report, Iran was engaging in naval maneuvers in nearby waters; news services reported that Iranian Revolutionary Guards "practiced" mine-laying during these maneuvers⁵⁶. U.S. naval warships and U.S.-flag merchant vessels frequently anchored at Khor Fakkan; upon being alerted to possible Iranian mine-laying activity, U.S. naval forces withdrew from the anchorage, and warned U.S.-flag merchant vessels to stay clear of the area⁵⁷.

1.34 On 10 August 1987, the U.S.-owned tanker *Texaco Caribbean* carrying Iranian crude oil struck a mine at the Khor Fakkan anchorage. The mine blew a four meter hole in the ship's hull, resulting in the spillage of 2.5 million gallons of oil⁵⁸. Five days later, on 15 October 1987, the U.A.E.-flag service vessel *Anita* struck a mine and

⁵⁵ Statement of Rear Admiral Harold Bernsen, para. 7, Exhibit 43.

⁵⁶ See Reuters wire report, 10 August 1987, reprinted in *Lloyd's Weekly Casualty Reporting Service*, Exhibit 52.

⁵⁷ Statement of Rear Admiral Harold Bernsen, para. 7, Exhibit 43.

⁵⁸ Lloyd's Maritime Information Service, *Vessels Damaged in the Gulf*, p.74, Exhibit 9.

sank, killing six crew members⁵⁹. (See Map 1.7 on the following page.) Most commercial vessels transiting the Gulf stopped at the Khor Fakkan anchorage outside the Strait of Hormuz to change crews and load supplies; the mining of this area therefore constituted a substantial threat to all Gulf shipping.

1.35 Shipping sources suspected that Iran had laid the mines to disrupt the escorting of vessels to and from Kuwait⁶⁰. In the weeks following the mining incidents, these suspicions were confirmed by British and French mine counter-measure forces.

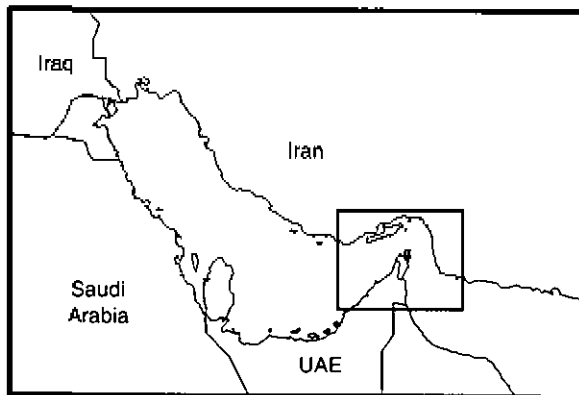
1.36 In late August 1987, prompted by the Khor Fakkan mining, Belgium, France, The Netherlands, and the United Kingdom dispatched mine counter-measures forces to the Gulf. Naval forces from the United Kingdom and France sailed to the Khor Fakkan area and commenced mine-clearing operations in October 1987. U.K. forces found five mines and four mine anchors in the area. Analysis of these mines by U.K. experts indicated that they were Iranian-manufactured mines -- distinctive variants of a common Soviet mine⁶¹.

1.37 Iran has suggested that it was not responsible for the Fujayrah mining, claiming that it would not have taken actions that resulted in damage to *Texaco*

⁵⁹ *Ibid.*

⁶⁰ Reuters wire report, 11 August 1987, reprinted in *Lloyd's Weekly Casualty Reporting Service*, Exhibit 52.

⁶¹ See United Kingdom Ministry of Defence, "Mine Clearance Operations Off Fujayrah By HM Ships - 21 September to 25 October 1987," para. 4, Exhibit 53. This document indicates that the Iranian mines found were "contact mines of an early design," *ibid.* para. 4, and thus were not "sophisticated seabed mines" laid by Iraq, as Iran contended in its Memorial at paragraph 1.95. A photograph of one of the Iranian mines defused by French forces at Khor Fakkan is inset on Map 1.7 on the following page.



Bandar
Abbas

27 deg. N

Qeshm Island

Iranian Mining of Khor Fakkan, August 1987

0 50

Kilometers

0 30

Nautical Miles

055 deg. E

057deg. E

Iran

Oman

26 deg. N



French diver with Iranian SADAF-02 mine
from Khor Fakkan Minefield

Khor Fakkan

UAE

Anita - 15 August 1987
Texaco Caribbean - 10 August 1987



Minefield containing
16 Iranian SADAF-02 mines

25 deg. N

Carribean -- a vessel carrying Iranian oil. But the fact that Iran's mining activities inadvertently resulted in damage to Iran's economic interests does not absolve Iran of responsibility for the mining, which was established by U.K. forces, and which may well have been intended to target U.S. forces and U.S.-flag shipping.

1.38 In a sermon shortly after the Khor Fakkan attacks, Iranian Majlis Speaker Hashemi-Rafsanjani taunted the United States about the mining. He said:

"When the Lord wants to exact revenge, He will do it . . .

You have seen two examples of [our forces]: the mines and the boats. There are other things that you have not seen. We do not reveal everything. When a disagreement arises, then you will see. This time you came and realized that you needed mine sweepers. You had to wait for mine sweepers to come . . . from the other side of the world.

. . . . Do you think because you have brought some 27 or 28 naval vessels to the Persian Gulf that the situation will be resolved on your behalf. *Each one of these vessels is a target for us. There used to be 4 targets, now there are 27.*

. . . . It is not like an ocean where there are many sealanes. It does not matter who mines the Persian Gulf. We have not yet accepted the responsibility for mining it.

. . . . However, if we intend to plant mines, well then, oh God, it is quite a different story because we can move from any point. We can cover an area for half an hour, making it unfit to use for shipping. This is fully within our means⁶²."

1.39 Following the Khor Fakkan mining, the United States again transmitted a message to the Islamic Republic of Iran through the Government of Switzerland on 2 September 1987. The message warned that Iran's use of mines against neutral shipping

⁶² Foreign Broadcast Information Service, "Majlis Speaker's Prayer Sermon Views Gulf Events," 21 August 1987. pp. S5, col 1; S4, col 1, Exhibit 55 (emphasis added).

was a "clear, dangerous violation of international law," and again emphasized the strict neutrality of U.S.-flag vessels, which "carried] no cargo of any kind for either country and operate in full conformity with international law⁶³." Any further mine-laying activities endangering U.S. warships or commercial vessels, the communication noted, would be viewed as "an extremely dangerous escalation and a direct military threat."

B. SEPTEMBER 1987: U.S. FORCES CAPTURE AN IRANIAN VESSEL CAUGHT IN THE ACT OF LAYING MINES IN INTERNATIONAL WATERS, AND FIND NUMEROUS MINES ON DECK; THE MINES FOUND ON THE IRANIAN VESSEL MATCHED MINES LAID ELSEWHERE IN THE GULF

1.40 The events of September 1987 confirmed Iran's mine warfare activities in the Gulf, and provided critical evidence establishing Iran's responsibility for the mining of Kuwaiti waters and Fujayrah's Khor Fakkan anchorage. On 21 September 1987, U.S. reconnaissance forces detected an Iranian mine-laying vessel departing Iran's exclusion zone near the Rostam oil platform, and heading toward Bahrain. A U.S. warship was tasked to investigate. The vessel, *USS Jarrett*, launched surveillance helicopters outfitted with special long-range night-vision equipment, and engines designed to run extremely quietly, to observe the suspicious vessel⁶⁴.

⁶³ U.S. Department of State, "Message For the Government of Iran," Exhibit 56.

⁶⁴ Statement of Rear Admiral Harold Bernsen, para. 8, Exhibit 43. Following the *Bridgeton* mining, U.S. forces were concerned that Iran sought to target its mine-laying activities against U.S.-flag merchant ships and naval vessels. Targeted mine-laying of this nature is known as "tactical mining." See Rear Admiral Richard Cobbold (Royal Navy, retired) and Commander Michael Codner (Royal Navy, retired), Royal United Services Institute for Defence Studies, "The Utility of Iranian Offshore Oil Platforms in the Conduct of Helicopter, Small Craft, and Mine Attacks Against Merchant Shipping During the Iran-Iraq War," May 1997, p. 6, (hereafter "*Royal United Services Institute Report*"), Exhibit 57.

1.41 The helicopters approached the vessel. Because the ship was running into the wind, the diminished sound of the special helicopters was further masked. From approximately 400 meters away, the U.S. Army crew observed the ship's crew removing canvas covering from mines, and beginning to lay them in the water, using a ramp that had been extended over the side of the vessel⁶⁵. Upon advising the U.S. Navy command ship that the Iranian vessel was engaging in mine-laying in international waters, the U.S. helicopters received instructions to attack the vessel and terminate its mine-warfare activities. The helicopters fired on the vessel, and for a period of time, the mine-laying ceased. Approximately 30 minutes later, the ship's crew resumed mine-laying and U.S. helicopters opened fire again, interrupting its mine-laying activities again⁶⁶.

1.42 Early on the next day, U.S. forces boarded the vessel, which was named *Iran Ajr*. Injured crew members were provided medical care and subsequently turned over to the Red Crescent organization in Oman⁶⁷. U.S. mine-counter measure forces detonated in the water the mines which had been laid by personnel on the vessel⁶⁸. Nine mines were found on *Iran Ajr*, as was a ramp, attached to the side of the vessel to facilitate laying

⁶⁵ Declaration of Robert Codney, 4 June 1997, para. 4-8, Exhibit 58; Statement of Rear Admiral Harold Bernsen, para. 11, Exhibit 43.

⁶⁶ *Ibid.*, para. 12. A contemporaneous record of the *Iran Ajr* incident can be found in "Landing Craft Engagement," 21 September 1987 cable from Commander, U.S. Navy Middle East Force, Exhibit 59.

⁶⁷ "U.S. escorts 'Gas Prince' despite threats," *Lloyd's List*, September 24, 1987, p. 1, Exhibit 60.

⁶⁸ The location of the mines was recorded in a contemporaneous U.S. military cable. See "Landing Craft Engagement," Exhibit 59.

mines in the water⁶⁹. (See Illustration 1.8 on the following page for photographs of the vessel and its mine cargo⁷⁰.) Subsequent analysis of the mines found on *Iran Ajr* indicated that they matched the mines laid off the coast of Kuwait, and the mines laid at Khor Fakkan. All of the mines shared special characteristics which distinguished the captured mines from a similar mine -- the Soviet M-08 -- held in many naval inventories. A detailed description of these differences can be found in the statement of U.S. mine analyst Donald Jones (Exhibit 30), and the report of the Belgium/Netherlands Mine Warfare Forces, who conducted extensive mine countermeasure operations during the Tanker War (Exhibit 63). For example, the Iranian mine had an anchor shaped like a deep bowl; the Soviet M-08 mine features an anchor shaped like a cradle⁷¹. The Iranian mine also had a smaller diameter (800 mm) than the Soviet mine (876 mm), and a thinner outside casing (2.7 mm) than the Soviet mine (4 mm). The mines also had different features to which cable could be attached to lift the mine case. Soviet M-08 mines were fitted with lift rings, whereas the Iranian mines found throughout the Gulf were not -- they featured only welded eyes⁷². These distinctions confirmed that the mines which had

⁶⁹ Statement of Commander Marc Thomas, 21 May 1997, para. 6. Exhibit 61.

⁷⁰ See also Exhibit 62 for additional photos of *Iran Ajr* and its mine cargo. As the Court will see, the configuration of *Iran Ajr*'s deck and the ramp shown in the photographs at Exhibit 62 made it easy for the vessel to lay mines, notwithstanding Iran's denials in its Memorial at paragraphs 1.97 and 4.68.

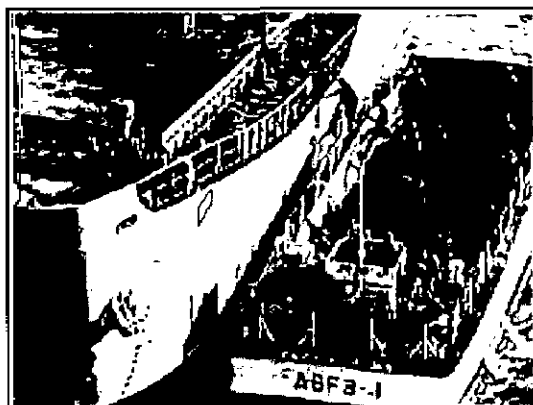
⁷¹ Statement of Donald Jones, para. 10, Exhibit 37; Belgium-Netherlands Mine Warfare School, *Belgian/Dutch Analysis Report of Persian Gulf Mines*, 29 May 1997, p. 2, Exhibit 63. Photographs annexed at Exhibit 64 reflect the differences between the mines found onboard the Iranian mine-laying vessel, and the common Russian M-08 mine.

⁷² Statement of Donald Jones, para. 10, Exhibit 37; *Belgian/Dutch Analysis Report of Persian Gulf Mines*, p. 2, Exhibit 63.

Iran Ajr Captured Mining Waters near Bahrain, 21 September 1987



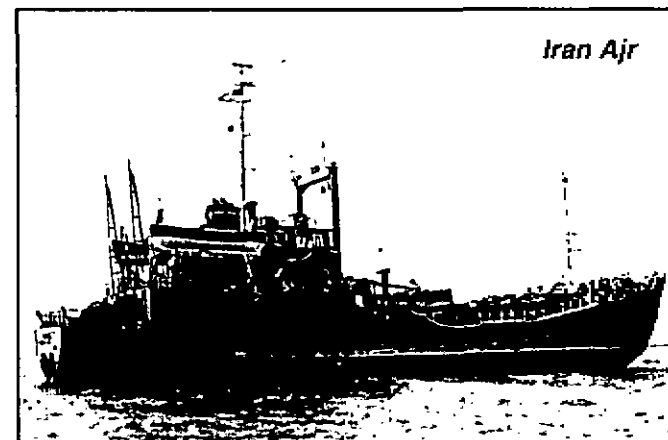
Iranian SADAF-02 mines on deck of *Iran Ajr*



U.S. Naval forces boarding *Iran Ajr*
22 September 1987



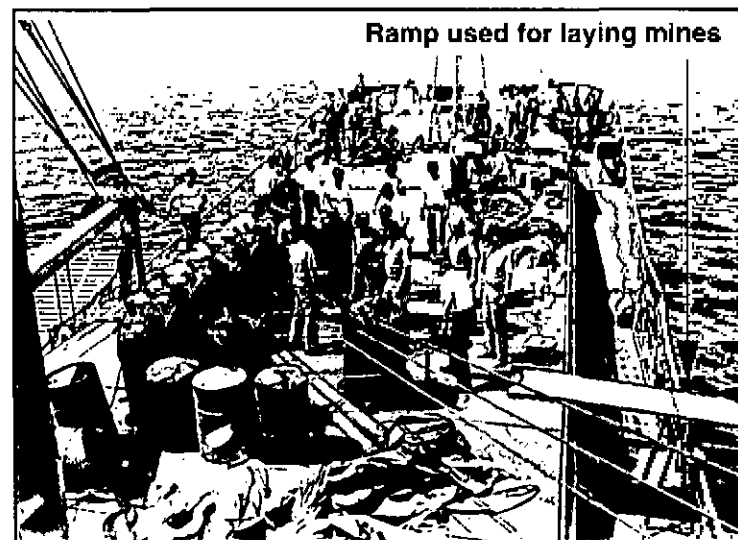
General View of Deck
showing SADAF-02 Mines



Iran Ajr



Iran Ajr radio room with teletype



Ramp used for laying mines

been found in the Gulf were unique, and were not manufactured by the Soviet Union, or by other known mine manufacturers⁷³. The mines exhibiting these characteristics were likely manufactured in the Tehran factory to which Iran's Majlis Speaker Hashemi-Rafsanjani publicly referred when he said "we have a mine producing factory which could produce mines like seeds"⁷⁴.

1.43 One characteristic in particular linked the mines found on *Iran Ajr* and the mines discovered in the Gulf off the coast of Kuwait, off the coast of Fujayrah, and later, in another location: the mines all bore a unique "signature" -- a numbering system that was stenciled on each mine. U.S. forces had not previously seen such a numbering system stenciled on mines⁷⁵.

- the mine found anchored off the coast of Kuwait was numbered **02-5627-016-5**⁷⁶;
- the mines found anchored off the coast of Fujayrah included those numbered **02-6627-061-17** and **02-6627-061-22**⁷⁷;

⁷³ See Statement of Donald Jones, para. 12, Exhibit 37; see also Affidavit of Chief Petty Officer A.J.D.M. Verhulst, Dutch Navy, 11 April 1997, para. 9, Exhibit 65 (describing distinct characteristics of Iranian mines subsequently discovered in Gulf waters).

⁷⁴ "Iran Majlis Speaker on Oil Exports and Mine Production," *BBC Summary of World Broadcasts*, 18 August 1987, Exhibit 66.

⁷⁵ Statement of Donald Jones, para. 3, Exhibit 37.

⁷⁶ *Ibid.*, para. 6.

⁷⁷ United Kingdom Ministry of Defence, "Mine Clearance Operations Off Fujayrah By HM Ships - 21 September to 25 October 1987," Exhibit 53.

- the mines found on the *Iran Ajr* included those with numbers ranging from 02-5627-008-4 to 02-5627-014-17. All nine had a similar number series stenciled on them⁷⁸.

1.44 U.S. forces also found onboard *Iran Ajr* various Iranian naval documents and materials⁷⁹. These materials included:

1. Farsi messages from a teletype communications device on *Iran Ajr*.

These printed messages reflected that the vessel was in communication with the Reshadat (Rostam) oil platform during its mine-laying mission. The messages demonstrated that Reshadat/Rostam functioned as a communications relay station for Iranian special forces, relaying communications between Iranian warships and Iranian naval headquarters⁸⁰.

2. A paper-tape record of messages sent from, and received by *Iran Ajr*⁸¹.

The paper tape was processed through a common tape reader to generate the Farsi

⁷⁸ Statement of Donald Jones, para. 14, Exhibit 37. U.S. and allied mine analysts were able to discern the meaning of the numerical mine signature. The first number grouping "02", referred to the type of mine: the Sadaf -02 contact mine. (Iran also manufactured a considerably smaller, and less powerful Sadaf-01 contact mine.) When the first two digits of the second number grouping (frequently 5627 or 6627) were *inverted*, they designated the last two digits of the Islamic year in which the mine was manufactured. Thus, mines designated 5627 were believed to have been manufactured in the Islamic year 1365 (March 1986 - March 1987), and mines designated 6627 were believed to have been manufactured in the Islamic year 1366 (March 1987 - March 1988). U.S. analysts believed that the third number grouping in the Iranian mine signature denoted the batch number of the manufactured mine, and that the last number was the individual mine number. *Ibid.*, para. 15.

⁷⁹ Statement of Commander Marc Thomas, para. 7, Exhibit 61. Statement of Captain Conway Zeigler, 5 June 1997, para. 4, Exhibit 67. Contemporaneous news reports likewise indicated that U.S. forces had indeed seized materials on the *Iran Ajr*. See 24 September 1987 report from the United Press International wire service, Exhibit 68.

⁸⁰ See, e.g., selected Farsi messages from a teletype communications device on *Iran Ajr* (tapes 16 and 21), Exhibit 69. The complete collection of teletype messages seized on-board *Iran Ajr* is attached at Exhibit 70.

⁸¹ See, e.g., selected paper-tape messages sent from, and received by, *Iran Ajr*, Exhibit 71. Translations of the complete collection of paper-tape messages sent from and received by *Iran*

language messages on this tape. The messages indicate that *Iran Ajr* was identified in communications as a "Special Mission Unit," and again, that the Reshadat/Rostam platform acted as a communications station, passing along tactical military messages between *Iran Ajr* and other Iranian naval units.

3. A communication from Iran's 1st Naval District (Intelligence) to Iranian naval units including *Iran Ajr*, listing the "new names for the Kuwaiti ships which are traveling in the Persian Gulf with the U.S.-flag." This document indicates that Iranian forces specifically targeted U.S.-flag Kuwaiti shipping⁸².

1.45 Initially, Iranian officials claimed *Iran Ajr* was carrying only "foodstuffs"⁸³. As reflected in its submissions to the Court, Iran subsequently changed its position. Iran has admitted that *Iran Ajr* was carrying mines, but not, it claims, for the purpose of mine-laying -- only for the purpose of *transporting* them, presumably from one Iranian port to another⁸⁴.

1.46 During oral proceedings, the United States is prepared to bring before the Court, if circumstances permit, one of the mines found on *Iran Ajr*⁸⁵. Even apart from

Ajr is attached at Exhibit 72. The United States will introduce the collection of paper-tape messages as evidence in future oral proceedings before the Court.

⁸² See Exhibit 73.

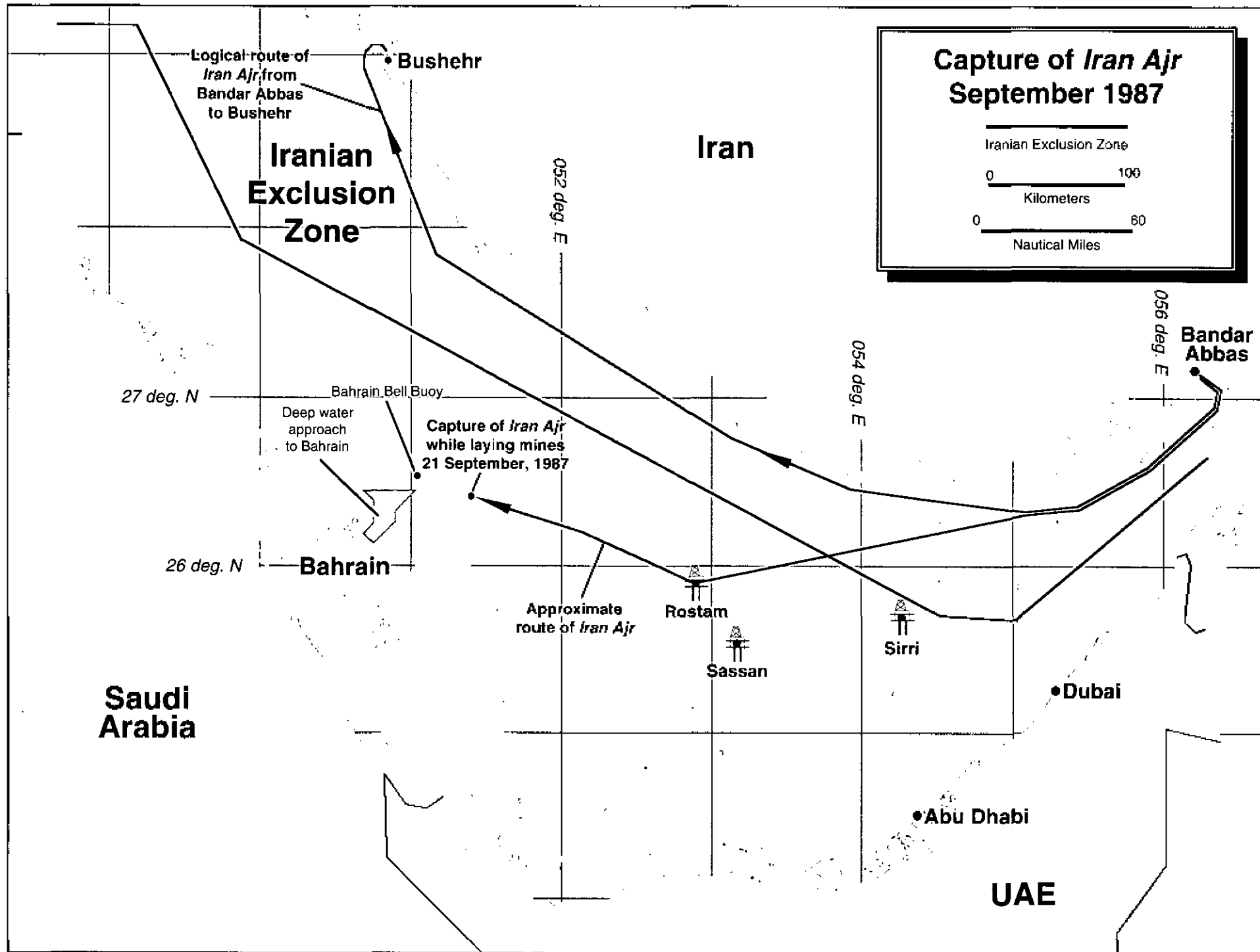
⁸³ See Reuters wire report, 22 September 1987, reprinted in *Lloyd's Weekly Casualty Reporting Service*, Exhibit 74.

⁸⁴ Iran's Memorial, pp. 39-40, para. 1.97.

⁸⁵ Two *Iran Ajr* mines were transferred in 1987 to the Belgium/Netherlands mine-countermeasures force. *Belgian/Dutch Analysis Report of Persian Gulf Mines*, p. 1, Exhibit 63. A photograph of one of these mines, currently in the possession of the Belgian Navy, is annexed at Exhibit 75.

this evidence, Iran's explanation of *Iran Ajr*'s supposedly innocent and unobjectionable mission does not withstand minimal scrutiny. First, if *Iran Ajr* was merely transporting mines between Iranian ports, it would have had no reason to travel in international waters, 85 nautical miles (157 kilometers) west of the Iranian coastline, and 40 nautical miles (74 kilometers) south of Iran's exclusion zone. If the vessel was on an ordinary supply mission, it would have plotted a course in Iranian waters, within Iran's exclusion zone, which would have provided the vessel a significant measure of protection by remaining near land-based Iranian forces and Iranian warships. Indeed, if the vessel was on a supply mission between Iranian ports it would have had no conceivable reason to be sailing only 50 nautical miles (92 kilometers) from Bahrain, in the vicinity of the entrance to Bahrain's deep water shipping channel, where it was found by U.S. helicopters. (See Map 1.9 on the following page.) Second, if *Iran Ajr* was carrying mines on a supply mission, its mine cargo would have been stored in the ship's hold, where it would be much safer and not at risk of being lost overboard in heavy seas. However, as indicated in photographs taken of *Iran Ajr* on the morning after it was discovered by U.S. helicopters, *Iran Ajr*'s mines were stored on the vessel's deck -- obviously to facilitate placement of the mines in the water. Third, the photograph of *Iran Ajr* in Illustration 1.8 following page 30 reflects that the vessel had deployed a ramp to place mines in the water when it was engaged by U.S. forces; a supply ship would not have deployed such a ramp during a journey through international waters.

1.47 On 22 September 1987, the United States delivered to the Government of Switzerland a communication regarding the *Iran Ajr* incident which was, in turn,



transmitted to Iran. The communication noted that Iran had sent *Iran Ajr* on its mine-laying mission despite four different diplomatic warnings by the United States regarding "the consequences of taking actions that would interfere with the free passage of U.S.-flag vessels." The message indicated that U.S. disruption of *Iran Ajr*'s mine-laying mission was "a limited defensive response to a direct threat against U.S. interests and freedom of navigation" and that the United States "reserves the right to take all necessary measures against similar threats in the future⁸⁶."

C. OCTOBER 1987: IRANIAN VESSELS AND THE ROSTAM OIL PLATFORM FIRE UPON U.S. HELICOPTERS

1.48 In October 1987, in the days prior to Iran's attack on the U.S.-flag tanker *Sea Isle City*, Iranian forces fired upon U.S. helicopters in two separate incidents. These engagements marked a significant turning point, indicating the willingness of Iranian forces not only to mine waters transited by U.S. forces and U.S.-flag shipping in the Gulf as they had done in previous months, but to fire directly upon U.S. naval forces.

1.49 Following the mining of the U.S.-flag tanker *Bridgeton* in July 1987 in the vicinity of Farsi Island, U.S. forces began monitoring international waters near Farsi Island more carefully. In addition to *Bridgeton*, six neutral merchant ships were attacked by Iranian forces in the vicinity of Farsi Island during 1986 and early 1987. To deter

⁸⁶ See Memorandum of Edward P. Djerejian, Acting Assistant Secretary of State for Near East Affairs, attaching "Message to Iran on Naval Incident," Exhibit 76; see also Letter dated 22 September 1987 from the Acting Permanent Representative of the United States of America to the President of the United Nations Security Council, U.N. Document S/19149, Exhibit 77.

further attacks on shipping from Farsi Island, the U.S. Navy established a mobile sea base in international waters southwest of Farsi⁸⁷.

1.50 On 8 October 1987, the mobile sea base near Farsi Island launched three helicopters on a routine surveillance mission. The helicopters sighted boats in the water, which they initially thought to be U.S. Navy boats. However, as the helicopters approached, they were fired upon by at least two machine guns mounted on these boats. The helicopters identified the vessels as gunboats manned by the Iranian Revolutionary Guard and returned fire, sinking the vessels⁸⁸. Following the establishment of the U.S. Navy mobile sea base near Farsi Island and the U.S. helicopter engagement of Iranian gunboats, Iranian attacks on neutral merchant shipping in the vicinity of Farsi Island diminished⁸⁹.

1.51 Also on 8 October 1987, a U.S. Navy helicopter on a reconnaissance mission in the central Gulf was fired upon by a heavy machine gun on the Rostam oil platform⁹⁰. The U.S. helicopter did not return fire.

1.52 U.S. commanders took note of the increased threat represented by these attacks and redoubled their vigilance.

⁸⁷ Statement of Rear Admiral Harold Bernsen, para. 16, Exhibit 43; *See also* Statement of General Crist, para. 8, Exhibit 44.

⁸⁸ Statement of Rear Admiral Harold Bernsen, para. 17, Exhibit 43; Statement of General George Crist, para. 8, Exhibit 44. A contemporaneous record of this incident can be found in "Iranian Small Boat Engagement," 9 October 1987 cable from Commander in Chief, U.S. Central Command, Exhibit 78. U.S. forces provided immediate medical assistance to wounded Iranian forces and subsequently repatriated all Iranian personnel through the Red Crescent organization.

⁸⁹ General Council of British Shipping, *Guidance Notes For Shipping*, p. 38, Exhibit 2.

⁹⁰ Statement of Rear Admiral Harold Bernsen, para. 17, Exhibit 43.

CHAPTER III

THE EVENTS SURROUNDING IRAN'S 15 OCTOBER MISSILE ATTACK ON THE TANKER *SUNGARI* AND IRAN'S 16 OCTOBER 1987 MISSILE ATTACK ON THE U.S.-FLAG TANKER *SEA ISLE CITY*

1.53 On 15 October 1987, the Liberian-flag oil tanker *Sungari* was struck by a cruise missile near Kuwait harbor. On 16 October 1987, the U.S.-flag tanker *Sea Isle City* was also struck by a cruise missile in the same location. These missiles were fired by Iranian forces from the Faw area in the northern Gulf. Iran denies responsibility for these unlawful acts. The facts and evidence discussed below amply demonstrate Iran's culpability.

Section I. Iranian Forces in the Faw Area Launched a Series of Missile Attacks on Kuwaiti Territory in the Months and Days Preceding the Attack on the U.S.-flag Tanker *Sea Isle City*

A. CAPTURE OF THE FAW PENINSULA/EARLY MISSILE ATTACKS

1.54 In February 1986, Iranian forces captured from Iraq the strategically important Faw peninsula⁹¹. Iraq had previously established cruise missile sites on the Faw peninsula. Iranian forces took control of those sites and established additional missile sites in the Faw area. In January 1987, soon after Iran began to target ships transiting to and from Kuwait for attack, Iranian forces began using the Faw area missile sites to launch cruise missiles at Kuwaiti territory. Kuwaiti military personnel on Bubiyan Island and Faylakah Island observed missiles approaching from the Faw peninsula area on 21 January

⁹¹ Edgar O'Ballance, *The Gulf War* (1988), p. 175, Exhibit 79; Sreedhar Kapil Kaul, *Tanker War* (1989), p. 44, Exhibit 80; Anniversary Offensive: Gulf Flare-Up, *Jane's Defence Weekly*, 1 March 1986, p. 365, Exhibit 81.

1987 and again on 24 January 1987⁹². See Map 1.10 following page 42. The missiles were easily visible to the observers because of their bright plumes, low altitude, and relatively slow speed of flight. The first missile landed on Faylakah Island; fragments from the missile's impact were collected by Kuwait Armed Forces personnel. The 24 January missile landed in the water north of Faylakah⁹³. Kuwait responded to this threat to its territory by positioning observers on Faylakah and Bubiyan to ensure that future missile launches were properly sighted and tracked.

B. IDENTIFICATION OF THE 21 JANUARY MISSILE

1.55 During the ensuing months, Kuwait military intelligence personnel invited U.S. missile analysts to conduct an analysis of the fragments from the 21 January missile firing. Among the fragments collected from the 21 January firing were parts of the missile's seeker -- a guidance component. Based on the particular character of these components, U.S. missile experts concluded that the 21 January missile was a Chinese-manufactured HY-2 cruise missile⁹⁴. Subsequently, U.S. missile analysts created a report

⁹² Statement of Kuwait Armed Forces Officials Regarding Missile Attacks on Kuwaiti Territory During the Iran-Iraq War, 21 May 1997, paras. 4-5 (signed by Major General Yacoub Al-Suwaiti and Colonel Sultan Al-Ramyan) (hereafter "Statement of Kuwait Armed Forces"), Exhibit 82.

⁹³ *Ibid.*, paras. 5-6.

⁹⁴ Statement of Norman Lesko, 31 March 1997, para. 3, Exhibit 83; see also Statement of Kuwait Armed Forces, para. 10, Exhibit 82.

detailing the findings of this analysis⁹⁵.

1.56 According to the brochure published by its Chinese manufacturer, the HY-2 is a "surface-to-surface" (that is, land-launched) "tactical anti-ship missile" which carries 380 kilograms of high explosive. The manufacturer notes that the HY-2 "has a good concealment and flexibility to conduct sustained and mobile combats"⁹⁶.

1.57 Upon learning that the Islamic Republic of Iran in its Memorial denied responsibility for the missile attack on *Sea Isle City*, the United States asked an independent expert to verify some of the critical evidence leading up to the attacks on *Sea Isle City*. The United States requested the Senior Missile Analyst at the Australian Defense Intelligence Organization to examine the U.S. analysis of the 21 January missile fragments found on Kuwait's Faylakah Island, as documented in the U.S. report found at Exhibit 86.

1.58 The Australian analyst was provided with photographs of the fragments originally examined⁹⁷. His statement, found at Exhibit 75, confirms that the missile which

⁹⁵ See Naval Intelligence Support Center, Foreign Material Exploitation Program, "Cluster Copy," Exhibit 84; Statement of Norman Lesko, para. 2, Exhibit 83.

⁹⁶ POLY Technologies, *HY-2 Coast-Defense Missile*, Exhibit 85 (brochure prepared and disseminated by the Chinese manufacturer of the HY-2 missile). China's defense industries also manufacture a missile very similar to the HY-2 which is commonly known as the "Silkworm." Because the Silkworm was one of the first missiles manufactured by China in the 1960s (development of the HY-2 began in 1970), "Silkworm" became the common, though imprecise, name used to describe the entire family of related missiles manufactured by China, including the HY-2. Thus, the Court will find many news reports, and U.S. government documents including the Preliminary Objection submitted by the United States in this case, referring generically to Chinese "Silkworm" missiles. Such generic references are suitable for general reporting, but they lack the particularity necessary in this case.

⁹⁷ Mark Pitt, "Statement on Examination of Missile Photographs and Reports," 27 March 1997, paras. 4-5, Exhibit 86. The original fragments, maintained in the possession of the Kuwait Armed Forces, were lost when Iraqi forces invaded Kuwait and destroyed Kuwait military intelligence headquarters. Statement of Kuwait Armed Forces, para. 10, Exhibit 82.

struck Faylakah on 21 January 1987 was indeed a land-launched HY-2 cruise missile⁹⁸.

C. SEPTEMBER 1987: MISSILE ATTACKS FROM THE FAW AREA

1.59 Iran's forces in the Faw area resumed firing missiles at Kuwaiti territory in September 1987. On 2 September, and again on 4 September, Kuwaiti military personnel on Faylakah Island and Bubiyan Island visually observed the launch of a cruise missile from the Faw area⁹⁹. Each missile was tracked on radar. The 2 September missile was observed landing in the water northeast of Faylakah Island. The 4 September missile, launched from the site noted on map 1.12 (following p. 42), landed ashore, 3 kilometers south of Mina Abdullah, and almost 10 kilometers southwest of the Al-Ahmadi Sea Island Oil Terminal -- clearly demonstrating sufficient range to reach tankers anchored at the Oil Terminal¹⁰⁰. On 5 September, Kuwaiti military personnel on Bubiyan and Faylakah Islands again visually observed the launch of a cruise missile from the Faw area. Radar tracking of the missile indicated that it landed in the waters of Kuwait Bay. See Map 1.10.

1.60 Kuwait military officials invited U.S. missile experts to analyze fragments from the 4 September land impact. A U.S. expert traveled to Kuwait, and was provided access to a large number of cruise missile fragments, including many guidance components and sections of the airframe. Among the fragments were pieces of the missile's seeker that were distinctive to the HY-2 anti-ship missile. The U.S. expert concluded again that the

⁹⁸ Pitt, "Statement on Examination of Missile Photographs," paras. 8, 13, Exhibit 86.

⁹⁹ Statement of Kuwait Armed Forces, paras. 7-9, Exhibit 82.

¹⁰⁰ *Ibid.*, para. 8.

fragments of the 4 September missile were from a land-launched HY-2 missile¹⁰¹.

Furthermore, based on the airframe parts examined by the U.S. expert, he concluded that the 4 September missile was not the type of missile that could be launched from an aircraft¹⁰².

Section 2. 15 October 1987: A Missile Launched From the Faw Area Strikes the Liberian-Flag *Sungari* Outside Kuwait Harbor

1.61 In the early morning of 15 October, Kuwait military observers on Bubiyan and Faylakah Islands observed the launch of another missile from the Faw area¹⁰³. The missile traveled south and struck the main deck of the Liberian-flag tanker *Sungari*, anchored south of the Sea Island Terminal. *Sungari* immediately caught fire; its master

¹⁰¹ Statement of Norman Lesko, para. 5, Exhibit 83; *see also* Statement of Kuwait Armed Forces, para. 10, Exhibit 82.

¹⁰² Ground launched missiles such as the HY-2 examined by the U.S. expert have mounting skids on the airframe *bottom* to facilitate attachment to a ground launcher. By contrast, air-launched missiles feature airframes with mounting assemblies at the *top* of the missile which allow for attachment to an aircraft from above. Likewise, air-launched missiles are outfitted with umbilical connectors that attach *at the top* of the airframe and connect to the launch aircraft for the transmission of power and information. Umbilical connectors serving these functions connect to land-launched missiles *behind the wing*. Because of these differences, ground-launched missiles cannot be launched from aircraft. *See* Statement of Norman Lesko, para 5, Exhibit 83.

¹⁰³ Statement of Kuwait Armed Forces, para. 11-12, Exhibit 82.

and crew were forced to abandon ship, and the vessel sustained extensive fire damage¹⁰⁴.

1.62 The attack on *Sungari* demonstrated that Iran's missile sites in the Faw area presented a serious threat to Kuwait's oil trade. On the afternoon of 15 October, following the attack on *Sungari*, Colonel Yacoub Al-Suwaiti, Commander of Kuwait Air Defense, traveled to Faylakah Island to oversee personally air defense efforts to track incoming missiles. To improve Kuwait's ability to observe and intercept incoming missiles, Colonel Al-Suwaiti placed additional military personnel on Auhat Island, just east of Faylakah Island¹⁰⁵.

Section 3. The 16 October 1987 Attack on the U.S.-flag *Sea Isle City*

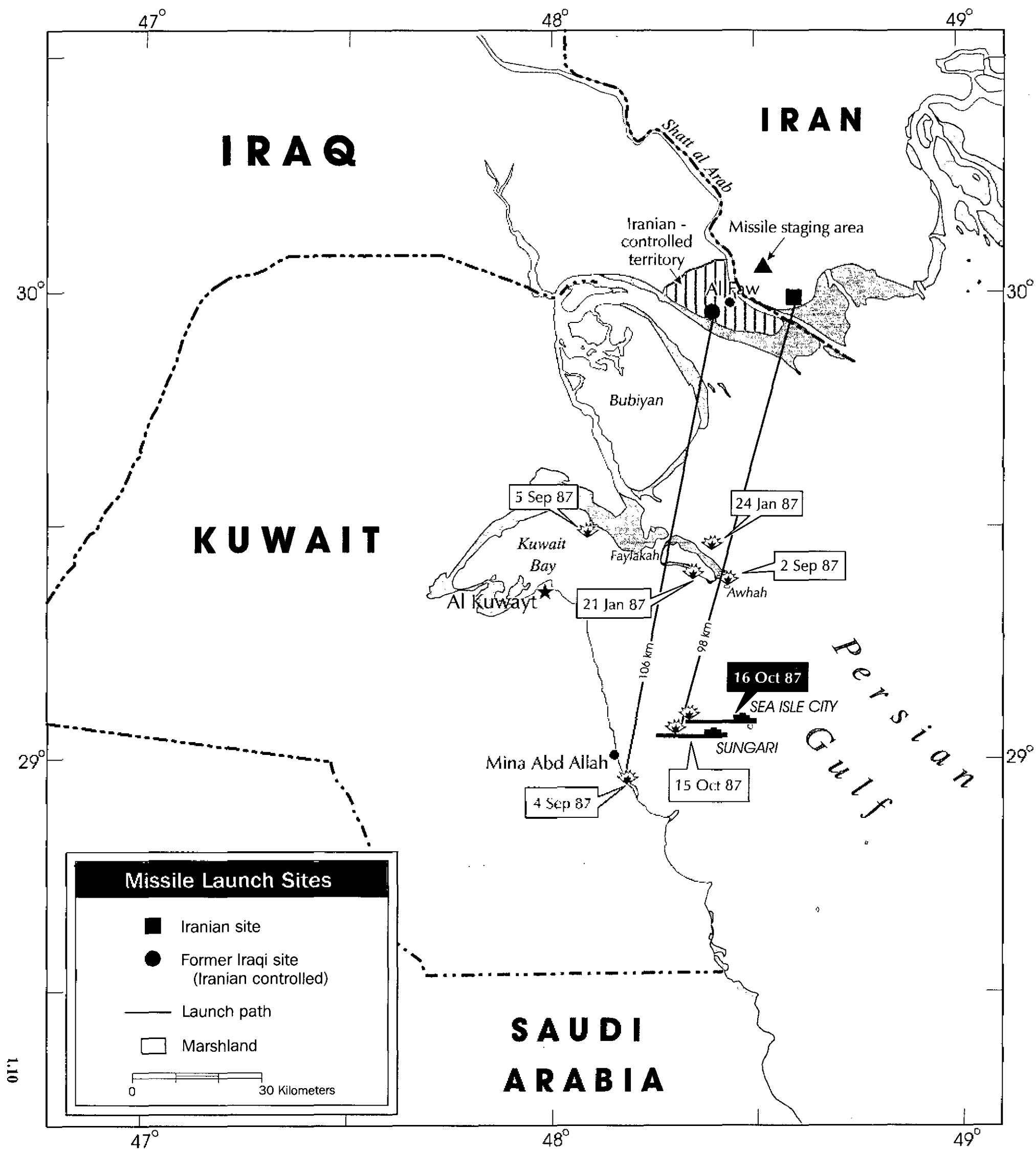
1.63 On the morning of 16 October, the U.S.-flag oil tanker *Sea Isle City* began steaming into Kuwait harbor. At approximately the same time, Colonel Al-Suwaiti visited the military personnel he had stationed on Auhat Island the previous day. During the course of his morning visit, Colonel Al-Suwaiti observed the approach of a missile from the Faw area. The missile flew overhead, between Auhat Island and Faylakah Island, in the direction of the Sea Isle Terminal¹⁰⁶. (See Map 1.10 on the following page which illustrates Iran's missile launches from the Faw area.)

¹⁰⁴ See Reuters and United Press International wire reports, 15 October 1987, reprinted in *Lloyd's Weekly Casualty Report Service*, Exhibit 87; Statement of Captain John Joseph Hunt, 25 March 1997, para. 5, Exhibit 88.

¹⁰⁵ Statement of Kuwait Armed Forces, para. 13-14, Exhibit 82.

¹⁰⁶ *Ibid.*, para. 14-15.

Iranian HY-2 Cruise Missile Attacks from the Faw Area



1.64 Soon thereafter, the missile approached Kuwait harbor. Captain John Joseph Hunt, master of *Sea Isle City* described what happened next, as his vessel was slowly making its way into the harbor:

"As the helmsman turned to me to report the ship's course, he looked over my shoulder and said 'What is that?' I turned and saw a small plume of black smoke emanating from a large missile. I immediately tried to reach the helm to take evasive action, but I did not succeed. The last thing I remember was hearing a metal on metal sound. It was the missile striking us. Then all went black¹⁰⁷."

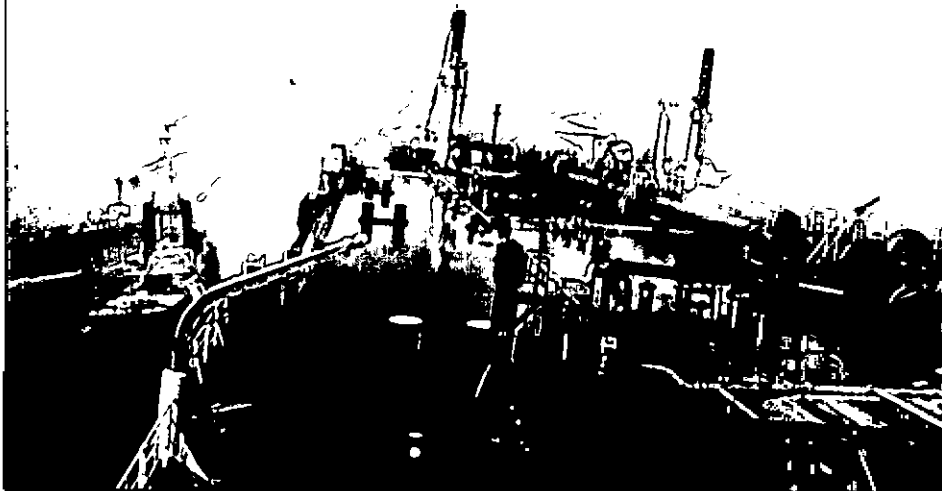
1.65 The missile caused extensive damage to the bridge, accommodation, and starboard wing tank¹⁰⁸. (See Illustration 1.11 on the following next page.) Six crew members suffered significant injuries. Captain Hunt was permanently blinded and suffered a fractured skull and many broken bones¹⁰⁹. *Sea Isle City* Seaman Victorino Gonzaga, a citizen of the Philippines, was also blinded in the attack.

¹⁰⁷ Statement of Captain Hunt, para. 7, Exhibit 88.

¹⁰⁸ Repairs to *Sea Isle City* took four months, and involved extensive steelwork. The Kuwait Oil Tanker Company incurred additional costs associated with the attack due to loss of hire. See April 21, 1997 Letter from Capt. Turki Al Turki, General Superintendent, Kuwait Oil Tanker Company, to Ms. Nancy Mulenex, Embassy of the United States of America, Kuwait, Exhibit 89.

¹⁰⁹ Statement of Captain Hunt, para. 9, Exhibit 88; see also Statement of Colin Eglington, para. 22, Exhibit 31 ("I remember [Captain Hunt] telling me during a visit to him in hospital when his head was still bandaged that he couldn't wait to have the bandages removed because darkness was terrible").

Tugs putting out fires on *Sungari*



**Iranian HY-2 Missile Attacks on Merchant Ships
Anchored off Kuwait, 15 & 16 October 1987**

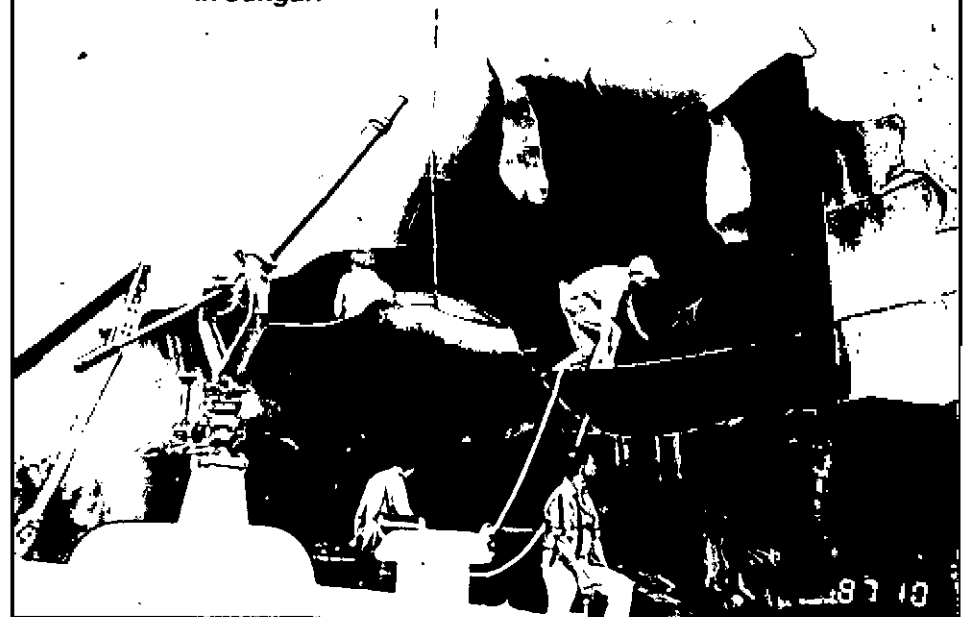


Damage to *Sea Isle City*



Damage to *Sea Isle City* from 16 October HY-2 missile strike

Close-up of HY-2 missile entry hole
in *Sungari*



CHAPTER IV

IRAN WAS RESPONSIBLE FOR THE 16 OCTOBER MISSILE ATTACK ON *SEA ISLE CITY*

1.66 Numerous public sources attributed the missile attack on *Sea Isle City* (and the previous day's attack on *Sungari*) to Iran¹¹⁰. Such attribution comported with common sense. It was common knowledge that Iran targeted Kuwaiti ships and ships bound to and from Kuwait in the Tanker War¹¹¹; to the extent that Kuwait may have been sympathetic to Iraq in the Iran-Iraq war, it would have been unwise and contrary to its interests for Iraq to attack oil tankers in Kuwaiti waters.

1.67 Iran has repeatedly claimed in its pleadings that any hostile acts that might have been perpetrated against U.S.-flag merchant vessels or U.S. naval vessels in the Gulf were accomplished by *Iraq*, rather than Iran, but offers no evidence to support this claim¹¹². In keeping with this pattern of denial, Iran has suggested in its Memorial that Iraqi forces fired the missile which struck *Sea Isle City* on 16 October 1987 -- specifically, Iran intimates that the missile which struck the ship may have been launched

¹¹⁰ See Reuters and United Press International wire reports, 16 October 1987, reprinted in *Lloyd's Weekly Casualty Report Service*, Exhibit 90; Lloyd's Maritime Information Service, *Vessels Damaged in the Gulf*, pp. 86-87, Exhibit 9; Statement of Norman Hooke, para. 26-27, Exhibit 10; General Council of British Shipping, *Guidance Notes For Shipping*, p. 39, Exhibit 2; Hooton, *Jane's Intelligence Review*, p. 221, Exhibit 4; de Lionis, "The Coastal Missile Threat in the Middle East," *Jane's Intelligence Review*, January 1994, p. 25, Exhibit 91.

¹¹¹ See *supra* note 5.

¹¹² See Iran's Memorial, p. 43, para. 1.105; p. 113, para. 4.64; pp. 116-117, para. 4.74; Annex to Iran's Observations and Submissions, pp. 18-19, paras. 44-45.

from an Iraqi aircraft¹¹³.

1.68 Iran also attempts to elude responsibility for the *Sea Isle City* attack by introducing a variety of other arguments it cannot sustain. Iran contends that: (1) Iran did not maintain missile sites on the Faw and could not have done so because the Faw was essentially marshland¹¹⁴; and (2) the missile which struck *Sea Isle City* did not have sufficient range to have been fired from the Faw¹¹⁵. Summarized below, the facts conclusively demonstrate that these contentions are completely without foundation and that Iran was responsible for the attack on *Sea Isle City*. Iran maintained missile sites in the Faw area, Kuwaiti military personnel observed missiles approaching from the Faw area, and the missiles fired from Iran's Faw area missile sites clearly had sufficient range to strike targets off the coast of Kuwait.

Section 1. The Missile Was Land-Launched From the Faw Area, Not Launched From an Iraqi Aircraft

A. KUWAITI MILITARY PERSONNEL OBSERVED THE MISSILES WHICH STRUCK SUNGARI AND SEA ISLE CITY AND OTHER MISSILES WHICH STRUCK KUWAITI TERRITORY APPROACHING FROM THE FAW AREA

1.69 As noted above, the missile which struck *Sea Isle City* was the seventh missile in a series of anti-ship cruise missiles which were fired from the Faw area. The first three missiles (21 and 24 January, and 2 September, 1987) landed short -- on and

¹¹³ Iran's Memorial, p. 43, para. 1.105.

¹¹⁴ Annex to Iran's Observations and Submissions, pp. 15-16, para. 37.

¹¹⁵ *Ibid.*, pp. 16-17, para. 39.

around Faylakah Island. A subsequent missile (4 September) overshot the Sea Isle Terminal and Kuwait harbor. The fifth missile (5 September) landed short again, in Kuwait bay. The sixth and seventh missiles finally found targets -- *Sungari* and *Sea Isle City*, anchored off the coast of Kuwait.

1.70 Kuwaiti military observers on Kuwaiti islands located near the Faw peninsula¹¹⁶ observed *each* of these missiles approaching from the Faw area¹¹⁷. Colonel Yacoub Al-Suwaiti, then-Commander of Kuwait Air Defense Forces personally observed the missile which struck *Sea Isle City* approaching from the direction of the Faw area. The missiles were easily visible because of their bright plumes, low altitude and relatively slow speed of flight¹¹⁸.

B. THE MISSILES FIRED AT KUWAITI TERRITORY WERE HY-2 CRUISE MISSILES --
ORDNANCE WHICH COULD ONLY BE LAUNCHED FROM LAND

1.71 Because of the nature of the explosions that occurred when cruise missiles struck *Sungari* and *Sea Isle City*, military personnel were not able to collect sizable fragments from the October impacts which could be analyzed. However, U.S. and Kuwaiti missile fragment analysis confirmed that two of the missiles in the series fired from the

¹¹⁶ Iran's counsel emphasized in oral proceedings on the U.S. preliminary objection that the Faw peninsula was in fact Iraqi territory -- the suggestion being that if missiles were fired from the Faw, they were fired by Iraqi forces. It is, however, common knowledge that Iranian forces captured the Faw peninsula in February 1986. See *supra* note 91.

¹¹⁷ Statement of Kuwait Armed Forces, paras. 4-5, 7-9, 11, 14, Exhibit 82.

¹¹⁸ *Ibid.* Thus, contemporaneous U.S. intelligence reporting distributed to military and political decisionmakers reflected the conclusion that *Sea Isle City* had been struck by a missile fired from the Faw area by Iranian forces. "Persian Gulf: Military Activity," *National Intelligence Digest*, 16 October 1987, Exhibit 92.

Faw area (21 January and 4 September) were HY-2 anti-ship missiles¹¹⁹. U.S. analysis further established that the 4 September missile did not have the type of airframe found in an air-launched missile.¹²⁰ More recent analysis by an Australian missile expert confirmed the accuracy of the previous U.S. analysis documented in the U.S. Naval Intelligence report found at Exhibit 86¹²¹.

1.72 Iran has not denied that the anti-ship missiles in its ordnance inventory were HY-2 missiles. To the contrary, Iran has effectively acknowledged this fact by making prominent reference in its own pleadings to articles from *Jane's Defence Weekly* which state that Iran's military forces deployed HY-2 anti-ship missiles during the Iran-Iraq war¹²².

1.73 The significance of Iran's acknowledgement and the analysis conducted by the United States and Australia demonstrating that the missiles fired were HY-2 missiles is that HY-2 missiles are *surface-launched* ordnance¹²³. That is, an HY-2 missile cannot be launched from an aircraft. As explained in note 104, ground-launched and air-launched missiles have airframes with distinct mounting features. The mechanical and electronic mounting features on a ground-launched missile allow for its attachment from the *bottom* to a land-based launcher, whereas the same features on air-launched missiles are located on

¹¹⁹ See Statement of Norman Lesko, para. 3, Exhibit 83.

¹²⁰ *Ibid.*, para. 5.

¹²¹ Pitt, "Statement on Examination of Missile Photographs," para. 10, Exhibit 86.

¹²² Annex to Iran's Observations & Submissions, p. 17, n. 58, citing Exhibits 23 and 24.

¹²³ See the brochure produced by the Chinese manufacturer of the HY-2 missile, annexed as Exhibit 85; *Jane's Weapons Systems (1988-89)*, Exhibit 93.

the *top* of the missile to allow for attachment to an aircraft. Consequently, the HY-2 airframe, designed to be launched from the ground, could not be properly attached to, and launched from, an aircraft.

C. NO IRAQI AIRCRAFT CAPABLE OF LAUNCHING A CRUISE MISSILE AT *SEA ISLE CITY* WERE AIRBORNE IN THE RELEVANT AREA AT THE TIME OF THE ATTACK

1.74 For defensive purposes, U.S. forces in the Persian Gulf carefully monitored Iraqi and Iranian aircraft activity. U.S. Air Force airborne radar planes -- "AWACS" planes -- were aloft 24 hours per day in the northern Gulf monitoring Iraqi aircraft. As noted by Rear Admiral Harold Bernsen, then Commander of the U.S. Navy Middle East Force, in his statement attached as Exhibit 43, U.S. radar planes did not detect any Iraqi military aircraft aloft in the northern Gulf on the morning *Sea Isle City* was attacked¹²⁴. Rear Admiral Bernsen thus discarded, on the basis of this intelligence, the possibility that the missile was fired by an Iraqi aircraft.

SECTION 2. Iran Maintained Missile Sites in the Faw Area

1.75 On 9 September 1987, just days after three Iranian missile launches from the Faw area, U.S. reconnaissance satellites photographed a missile staging site in the Faw area. On 16 October 1987 -- only four hours following the missile attack on *Sea Isle City* -- U.S. reconnaissance satellites again photographed the same Faw area missile site. The photographs in question are appended at Exhibit 94. Both sets of photographs reveal an

¹²⁴ Statement of Rear Admiral Harold Bernsen, para. 21, Exhibit 43.

active cruise missile staging facility composed of missile launchers, missile crates, and missile transporters¹²⁵. The United States believes that the attack on *Sea Isle City* was staged from the missile site depicted in the annexed photographs¹²⁶. During oral proceedings on the merits, the United States will present the testimony of satellite imagery experts who will explain and confirm the substance of this evidence to the Court. This photographic evidence and expert testimony will squarely refute Iran's claim that it did not maintain missile sites in the Faw area, including its claim that the Faw was composed "almost entirely" of marshland, and was therefore incapable of sustaining missile sites¹²⁷.

¹²⁵ Additional photographic evidence appended at Exhibit 94 establishes that the missile equipment photographs in question were specifically derived from satellite observation of territory in the Faw area.

The missile site photographs annexed at Exhibit 94 were produced from original photographic data captured by U.S. reconnaissance satellites. As will be explained during the Court's oral proceedings, U.S. analysts based their assessment of Iran's Faw area missile facilities on the original photographic data, which provided the analysts with greater detail and clarity than can be seen in the the photographs that accompany this submission. National security considerations preclude the United States from submitting the original photographic data to the Court. To allow for their submission to the Court, and ultimately, dissemination to the public in a manner consistent with national security guidelines, the United States has reduced the resolution of the original images using computer image processing techniques. Although this process reduced the visual clarity of the original images, it did not affect their integrity with respect to the depiction of the equipment observed on the ground.

¹²⁶ That is, a missile and launcher from this site were transported by truck to the Iranian launch site, identified on Map 3.1. The missile was fired and the launcher was then withdrawn.

¹²⁷ Annex to Iran's Observations and Submissions, pp. 15-16, para. 37. The annotated British Admiralty Chart annexed at Exhibit 95 demonstrates that the missile staging site photographed by U.S. satellites, and the launch sites used by Iranian forces were located on dry land rather than marshland, the latter being depicted on the Admiralty Chart in green. See Iranian HY-2 Cruise Missile Sites, Depicted on British Admiralty Chart 2847, Exhibit 95.

Section 3. The Missile Which Struck *Sea Isle City* Had Sufficient Range to Have Been Fired From the Faw Area

1.76 Iran has claimed that any missile fired from the Faw area did not have sufficient range to strike *Sea Isle City* on 16 October 1987¹²⁸. It has cited in support of this proposition three references speculating that the range of the HY-2 missile was approximately 80 kilometers. (If the missile's range was limited to 80 kilometers, then it could not have struck *Sea Isle City*, which was approximately 98 kilometers from Iran's Faw missile site when attacked.) Two of these references were published in March and June of 1987, prior to the missile attacks in question; the third reference was published in 1990, but merely references the June 1987 article¹²⁹. This debate regarding missile range obscures the basic fact that Kuwait Armed Forces personnel observed numerous missiles -- including that which struck *Sea Isle City* -- approaching from the Faw area. Whether the sources of the speculation cited by Iran believed that HY-2 missiles could travel only 80 kilometers is, ultimately, irrelevant. The fact is that they traveled at least 98 kilometers, demonstrating that the capabilities of the missiles exceeded the initial speculations of experts.

¹²⁸ Annex to Iran's Observations and Submission, pp. 16-18, paras. 39-31, Exhibit X.

¹²⁹ See *ibid.*, p. 17, para. 39, and Exhibits 18, 23, and 24 annexed thereto. The two *Jane's Defence Weekly* articles referenced by Iran cite unnamed sources. *Ibid.*, Exhibits 23 and 24. Notably, the 1987-88 edition of *Jane's Weapons Systems* does not list a range for the HY-2 missile, indicating that this statistic was subject to speculation and not yet verified. See Exhibit 96. Iran's third authority, Cordesman, *Lessons of Modern War, Volume II*, p. 274, merely cites to one of the *Jane's Defence Weekly* articles already cited by Iran. See Cordesman, *Lessons of Modern War, Volume II*, pp. 274 and 342, n. 9, Exhibit 18 to Iran's Observations and Submissions, and Exhibit 97 annexed hereto. Notably, on the page immediately following that cited by Iran, Cordesman includes a table which contradicts the text cited by Iran and states that the range of the HY-2 is 95 kilometers.

1.77 In any event, and contrary to Iran's assertions, the distance traveled by the missiles fired from the Faw did *not* exceed their capabilities, as reported by the missile's manufacturer and verified by independent experts. As noted above, the anti-ship missiles in Iran's inventory were HY-2 cruise missiles. The Chinese manufacturer's brochure for the HY-2 specifies that the missile has a "powered range" of *105 km*. This product claim has been verified by the Australian Defense Intelligence Organization which subjected to rigorous testing a fully functional HY-2 anti-ship missile. On the basis of an aerodynamic and fuel analysis of the HY-2 missile, the Australian Defence Intelligence Organisation concluded that the missile has a range of 105 kilometers¹³⁰. The 16 October missile, launched from the site designated on Map 1.10, traveled *98 kilometers* before striking *Sea Isle City*¹³¹ -- a distance clearly within the missile's powered range capability¹³².

1.78 The missile analysts invoked in the articles cited by Iran were required to speculate regarding the HY-2's limited range because, until Iran's deployment and use of the HY-2

¹³⁰ Pitt, "Statement on Examination of Missile Photographs," para. 12, Exhibit 86.

¹³¹ Iran's submissions to the Court devoted considerable discussion to whether the 4 September 1987 cruise missile which struck Mina Abdulla on Kuwait's coast had sufficient range to have been fired from the Faw peninsula. This missile launch is not directly relevant to Iran's claim or to the defense of the United States. Nonetheless, the United States notes that the 4 September missile fired from the Faw missile site designated on Map 1.10 which struck Mina Abdulla traveled 106 kilometers -- a distance not significantly in excess of the 105 kilometer powered range of the HY-2.

¹³² "Powered range" is the range that a fueled, functional missile is capable of traveling. "Effective range," by contrast, is the lesser range at which a manufacturer represents that a missile is *consistently* likely to strike targets accurately and effectively -- it is not, however, the outer range limitation on a missile's function. The Chinese manufacturer's brochure indicates that the "effective range" of the HY-2 is up to 95 km. Likewise, beginning with its 1988-89 volume, *Jane's Weapons Systems* listed the effective range of the HY-2 as 95 km. See Exhibit 98. Thus, the missile which traveled 98 kilometers and struck *Sea Isle City* did not significantly exceed the stated effective range of the HY-2 anti-ship missile.

in the Persian Gulf, military analysts had not observed the missile's actual combat performance. According to *Jane's Intelligence Review*, with the exception of one launch of an MM-38 Exocet in the Falklands War in 1982, "the record of other launches of coast defence missiles in combat is based almost exclusively on the performance of the Chinese HY-2 . . . in the Persian Gulf¹³³." Thus, Iran's launches of anti-ship missiles during the Tanker War helped *define* experts' understanding of the HY-2's capabilities. Prior to the Iran-Iraq war, the Western analysts referenced in the articles cited by Iran were necessarily engaging in speculation regarding the range of the HY-2 missile. The Iran-Iraq war, and the series of missiles launched by Iran from the Faw area, proved such speculation inaccurate¹³⁴.

¹³³ de Lionis, *Jane's Intelligence Review*, p. 25, Exhibit 91.

¹³⁴ Iran cited in its Memorial and in the Annex to its Observations and Submissions to a U.S. Department of State document characterizing the range of Iran's missiles as 85 kilometers. Iran's Memorial, Exhibit 67; Annex to Iran's Observations and Submission, p. 17, para. 39 and n. 60. Iran further points to the fact that this document contains a map which details Iranian missile sites at Qeshm Island and Kuhestak, but not in the Faw area. However, the map did not purport to reflect an exhaustive assessment of Iran's military capabilities. Rather, it merely identified those missile sites that appeared to pose the greatest threat to freedom of navigation and the U.S. escort mission at the time: missile sites which could have targeted shipping entering the Gulf through the very narrow Strait of Hormuz.

The notation in the U.S. document suggesting that Silkworm missiles have a range of 85 kilometers reflects confusion regarding missile nomenclature. As noted above, Iran deployed HY-2 anti-ship missiles during the Iran-Iraq conflict. These missiles, and others in the same family of ordnance, are commonly known as "Silkworm" missiles. In fact, the true Silkworm and the HY-2 used by Iran are *distinct* in a number of respects, including range. Silkworm missiles have a listed effective range of 85 kilometers. See *Jane's Strategic Weapons Systems* (September 1996), Exhibit 93. The HY-2 anti-ship missile has a listed effective range of 95 kilometers, and as noted above, its powered range is even greater (105 km). Thus, because the HY-2 missile deployed by Iran was loosely termed a "Silkworm" in common parlance, the author of the document mistakenly referenced the listed effective range of a true Silkworm missile in the map, not the listed effective range of an HY-2 missile.

CHAPTER V

IN RESPONSE TO IRAN'S UNLAWFUL ACTS, THE UNITED STATES TOOK DEFENSIVE MEASURES AGAINST IRAN'S ROSTAM OIL PLATFORM COMPLEX

1.79 After Iran's 16 October 1987 attack on *Sea Isle City*, the United States determined that military action in self-defense was necessary to stop Iran's continuing attacks on U.S. vessels¹³⁵.

1.80 Iran's pattern of armed attack was clearly aimed at disrupting neutral maritime commerce, and in particular, the continued operation of U.S.-flag tankers carrying oil from Kuwait and their U.S. naval escorts. As detailed above, Iran unlawfully mined routes commonly sailed by U.S.-flag vessels near Fujayrah where U.S. convoys formed up, in the vicinity of Farsi Island (damaging the U.S.-flag *Bridgeton* on the first Operation Earnest Will escort mission), near the Bahrain Bell navigation aid (the *Iran Ajr* mine-laying incident), and near the deep water entrance to Kuwait's port. Iranian forces then engaged U.S. forces directly, firing upon U.S. helicopters near Farsi, and from the Rostam offshore oil platform complex. This pattern culminated with Iran's missile attack on the U.S.-flag *Sea Isle City*. Repeated U.S. diplomatic efforts to convince Iran to suspend its hostile actions against U.S. shipping had obviously failed, and there was no

¹³⁵ Letter dated 20 October 1987 from President Reagan to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, Book II, *Public Papers of the Presidents of the United States, Ronald Reagan* (1987), p. 1212, Exhibit 99 (hereinafter cited as President Reagan's letter to Congress dated 20 October 1987); Letter dated 19 October 1987 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, United Nations Document S/19219, Exhibit 100 (hereinafter cited as UN Doc S/19219); Statement of General George B. Crist, para. 10, Exhibit 44; Statement of Rear Admiral Harold J. Bernsen, para. 23, Exhibit 43.

reason to believe that Iran's attacks would cease. To the contrary, the belligerent rhetoric of Iran's leaders suggested that Iran would continue to target U.S. merchant and naval vessels.

Section 1. The Formulation of a U.S. Defensive Response -- Consideration of Possible Targets

1.81 U.S. military and political decisionmakers thus turned to the formulation of a limited, necessary and proportionate way to respond to Iran's armed attacks. The necessity was to protect U.S. merchant and naval vessels in the Persian Gulf and to seek to restore their security by undermining Iran's capability to identify, locate, and attack U.S. merchant vessels and their naval escorts.

1.82 In the first instance, the obvious target for such defensive measures would seem to be the missile facility in the Faw area involved in the attack on *Sea Isle City*. Upon closer study, however, this option proved not to be advisable. Among other things, the Faw peninsula had been captured from Iraq by Iran in early 1986, and the Faw area was still an active battle front. Attacking targets in the Faw area could have influenced the course of the war and would likely have been perceived as an effort to do so. Such an attack thus would have risked compromising the perception of the United States as a non-belligerent, and threatened escalation of, or involvement of the United States in, the conflict. Defensive responses against other possible military targets in Iranian land

territory presented the same risks, as well as risks of unacceptable collateral damage and civilian and military casualties and were therefore dismissed¹³⁶.

1.83 Equally important, striking Iran's cruise missile site in the Faw area would not have significantly reduced Iran's overall threat to U.S. vessels -- a threat which included undersea mines, and attacks by helicopters, naval vessels, and gunboats. Iran's cruise missiles in the Faw area could not range past Kuwait, but Iran's total threat to U.S. vessels extended southeast of Kuwait all the way to the Strait of Hormuz.

Section 2. The Decision to Select the Rostam Platform Complex as the Target of the U.S. Defensive Response

1.84 One defensive measure offered the potential of reducing the threat to U.S. vessels without the serious risks of widening the conflict and other risks posed by striking targets in Iranian territory. As will be shown here, the United States had compelling evidence that Iran's offshore oil platforms -- particularly Rostam, Sirri, and Sassan -- were serving as military facilities, supporting Iranian naval activities and facilitating attacks on neutral shipping¹³⁷. Because of the involvement of the platforms in Iran's armed attacks, these facilities were considered appropriate targets for defensive

¹³⁶ Statement of Rear Admiral Harold Bernsen, para. 25-28, Exhibit 43; Statement of General George Crist, para. 10-11, Exhibit 44.

¹³⁷ The United States does not deny that Iran's offshore oil platforms at Rostam, Sassan, and Sirri were either producing at least some oil or might have been capable of doing so if they had not been previously attacked by Iraq. However, in addition to any commercial purpose and use, Iran employed these offshore oil platforms as military facilities.

measures¹³⁸. The evidence supporting this conclusion falls into four principal categories. First, operational documents and materials found by U.S. forces aboard the Iranian mine-laying vessel, *Iran Ajr*, established that Rostam served as a military communications facility, transmitting messages between Iran's First Naval District Headquarters and other naval units. Second, contemporaneous reporting of many commercial entities that closely monitored threats to shipping in the Gulf confirmed the platforms' military role. This included reports of direct observations of helicopter attacks against neutral shipping being launched from the oil platforms. Third, the circumstances surrounding Iranian attacks on neutral shipping, as analyzed by military experts, indicated the involvement of Iran's oil platforms in many of these attacks. Such analyses were originally conducted contemporaneously by U.S. forces in the Gulf; in preparation for this proceeding, they were corroborated by British and French experts¹³⁹.

1.85 Finally, documents seized by U.S. forces which boarded the Rostam complex further confirmed the conclusions reached by U.S. military planners. These documents dispel all doubt that Iran's Rostam, Sassan, and Sirri oil platforms were engaging in military activities which facilitated Iran's attacks on U.S. vessels and other neutral shipping.

¹³⁸ Statement of Rear Admiral Bernsen, para. 26, Exhibit 43; Statement of General Crist, para. 12, 16-17, Exhibit 44.

¹³⁹ Rear Admiral Richard Cobbold (Retired), and Commander Michael Codner (Retired), *Royal United Services Institute for Defence Studies*, "The Utility of Iranian Offshore Oil Platforms in the Conduct of Helicopter, Small Craft, and Mine Attacks Against Merchant Shipping During the Iran-Iraq War," May 1997, Exhibit 57; Contre-amiral Michel Heger (Retired) et Yves Boyer, "U.S. and Iran issues in the Gulf (1987-88)," Exhibit 18.

A. DOCUMENTS SEIZED FROM THE IRANIAN MINE-LAYING VESSEL *IRAN AJR* SHOWED
ROSTAM'S MILITARY ROLE IN ATTACKS AGAINST MERCHANT SHIPPING

1.86 When U.S. forces captured *Iran Ajr* on 21 September 1987, they found evidence establishing that the Rostam oil platform was being used as a military facility involved in operations against shipping. U.S. forces seized a teletype roll of radio naval communications transmitted, received, and monitored by *Iran Ajr*¹⁴⁰. The teletype recorded communications between *Iran Ajr* and Rostam, and between Rostam and other Iranian military units. These recordings, annexed in their entirety at Exhibit 70 (both in the original Farsi and English translation) show that Iranian naval units had difficulty maintaining direct contact with each other and with Iran's naval headquarters over many kilometers of open water. The centrally-located Rostam platform complex played a key role in surmounting these difficulties by acting as a military communication link, coordinating communication between Iranian naval forces. This was not a benign, civilian task. These messages show that the Rostam platform served as a tactical communications link between Iran's naval headquarters -- referred to as "the Fleet" in the teletype messages included in Exhibit 69 -- and Iran's mine-laying ship *Iran Ajr*, on the very day (21 September 1987) that *Iran Ajr* was embarked on its mine-laying mission¹⁴¹. Other messages show that Rostam was a communications link for Iranian warships,

¹⁴⁰ A photograph of the teletype machine found onboard *Iran Ajr* is displayed in Illustration 1.8, following p. 30. U.S. forces seized three general types of documents from *Iran Ajr*: teletype messages (see Exhibits 69 and 70), paper-tape messages (see Exhibits 71 and 72), and standard forms that were completed by hand (see Exhibit 101).

¹⁴¹ Selected messages from teletype communications device, Messages 1 and 2, Exhibit 69.

including *Alvand* and *Sabalan*, which played a prominent, and particularly destructive role in attacking neutral shipping during the Tanker War¹⁴².

1.87 These recorded communications established that Rostam was a military communications facility, relaying messages between Iranian naval headquarters and Iranian military vessels on the water -- a function that is vital to the conduct of naval operations and inconsistent with Iran's claim that the platform was an exclusively civilian facility defended by a few anti-aircraft gunners.

B. CREDIBLE SHIPPING AND DEFENSE SOURCES THAT MONITORED THE TANKER WAR REPORTED THAT IRAN LAUNCHED ATTACKS ON MERCHANT SHIPPING FROM THE OIL PLATFORMS

1.88 Many credible non-American shipping and defense sources that closely and contemporaneously monitored attacks on merchant shipping reported on Iran's use of its offshore oil platforms as military facilities. These reports confirmed other intelligence gathered by U.S. forces which indicated that the platforms were being used as actual staging bases, to *launch* helicopter and small boat attacks on neutral commercial vessels.

1. The Oslo-based International Association of Independent Tanker Owners (Intertanko), periodically published *Tanker Safety Circular Letters* to its members, describing the evolving threat to shipping caused by the Tanker War. *Safety Circular No. 54* of 16 April 1986 related as follows:

"One of the crew members on *BERGE KING*, on her way to pick up cargo from Ras Tanura, said that he saw two helicopters on the Iranian off-shore installation, Rostam Island. One of them lifted and attacked, but the missile fell harmlessly

¹⁴² *Ibid.*, Messages 3 and 4. The role played by Iranian naval vessels in attacking neutral merchant shipping is described in Hooton, *Jane's Intelligence Review*, p. 219, Exhibit 4; see also Jordan, *Jane's Intelligence Review*, p. 215, Exhibit 5.

into the sea. The other helicopter lifted when the first one returned to the installation and fired a missile (*sic*) which landed in the air conditioning room without exploding. The Norwegian government made a protest to Iran after this attack.

At least 14 ships are reported to have been attacked from this installation called Rostam Island, located about 100km from the Iranian shore line."

STELIOS was in ballast when set ablaze by an air strike as a missile smashed into the engine room. The captain on STELIOS reported that he saw the attacking helicopter take off from Rostam Island¹⁴³."

Likewise, in *Safety Circular No. 58,B* of 20 August 1986, Intertanko reported "that attacks must be expected both from Abu Musa, Rostam, and Sassan Island. Iran is denying being responsible for these attacks. Helicopters are known to operate within a range of 60nm, and vessels should try to stay out of the range of these helicopters during day light¹⁴⁴."

2. The General Council of British Shipping (GCBS), an association of British ship owners and operators, provided its members with periodic "Guidance Notes to Owners with Vessels in Arabian Gulf" from 1985-1988. These reports were designed to help GCBS members understand and respond to the risks involved in sailing in the Persian Gulf war zone. Beginning in 1985, GCBS warned its members that "[r]ecent reports indicated that the Iranians are now also using helicopters (possibly operated from oil platforms) both to overfly vessels, launch missiles and intercept

¹⁴³ Intertanko, *Tanker Safety Circular Letter No. 54*, 16 April 1986, para. 3, Exhibit 16.

¹⁴⁴ Intertanko, *Tanker Safety Circular Letter No. 58,B*, 20 August 1986, para. ii, Exhibit 102; see also Intertanko, *Tanker Safety Circular Letter No. 62*, 12 December 1986, para. iii, Exhibit 20.

vessels¹⁴⁵.” In 1986, GCBS reported that Iran was launching helicopter attacks from the Rostam and Sassan oil platforms, and described the weapons used by the helicopters¹⁴⁶. GCBS again confirmed that Iran was conducting air reconnaissance and staging helicopter attacks on merchant vessels from its oil platforms at Rostam and Sassan in its publications in 1987 and 1988¹⁴⁷.

3. Lloyd's Maritime Information Service, a highly respected British maritime information service company affiliated with Lloyd's of London, published a number of reports on the Tanker War stating that Iran used its offshore oil platforms to observe and report on passing vessels and to stage attacks on vessels by helicopters and small boats. Lloyd's reporting discussed the involvement of Rostam¹⁴⁸, and also Sassan and Sirri¹⁴⁹ in these attacks.

¹⁴⁵ General Council of British Shipping, *Guidance Notes*, 1 October 1985, pp. 12, 17, Exhibit 103.

¹⁴⁶ General Council of British Shipping, *Guidance Notes*, 30 May 1986, pp. 12, 14, Exhibit 104.

¹⁴⁷ General Council of British Shipping, *Guidance Notes*, February 1987, pp. 13, 17, Exhibit 105; General Council of British Shipping, *Guidance Notes for Shipping*, pp. 36, 61, Exhibit 2.

¹⁴⁸ See “Iran launching attacks from Gulf oil platform,” *Lloyd's List*, April 3, 1986, p. 1, Exhibit 106; see also “Saudi Arabian tanker damaged in Gulf attack,” *Lloyd's List*, April 7, 1986 p. 1, Exhibit 107 (helicopter attack believed to be mounted from Rostam platform).

¹⁴⁹ See “Iran sets up new tanker attack base,” *Lloyd's List*, May 14, 1986, p. 1 (discussing Rostam and Sassan as attack bases); “How Gulf shipping toll is mounting,” *Lloyd's List*, August 7, 1986, p. 2 (discussing Iranian helicopter attacks launched from oil rigs near the Sirri and Fateh oil terminals); “Iraqi jets set Sassan field ablaze,” *Lloyd's List*, November 15, 1986, p. 1 (discussing Sassan as an attack base). All of these articles are annexed at Exhibit 108.

4. Jane's Information Group, a British company recognized as the world's preeminent private defense information services firm, extensively reported on the Tanker War, and published several reports indicating that attacks on merchant vessels were launched from the Rostam platform complex. One such report related that --

"Iran is reported to be operating helicopters from an oil platform to mount strikes against vessels in Gulf shipping lanes, writes Mark Daly.

The Rostam platform, 65 nm [nautical miles] from the Iranian mainland, has been the base for at least 14 strikes this year, British shipping sources have said¹⁵⁰."

5. The Norwegian Shipowners' Association (NSOA) also provided guidance to its members regarding the Tanker War. Such guidance was provided by the organization's Contingency Planning Section, headed at the time by Captain Christen Feyer Puntervold¹⁵¹. Captain Puntervold collected information on threats to shipping from various sources including representatives from shipping companies in the Gulf who received first-hand reports from crews; ship masters who were attacked in the Gulf; and representatives of companies which ferried supplies in the Gulf and therefore were knowledgeable of area conditions and risks¹⁵². Captain Puntervold determined that more than fifty Iranian attacks on neutral shipping occurred in the vicinity of the Iranian oil platforms at Rostam, Sassan, and Sirri, and that Iranian forces were using these platforms

¹⁵⁰ "Iran mounts air strikes from oil platform," *Jane's Defense Weekly*, 26 April 1986, p. 747, Exhibit 109; see also "Gulf war intensifies, shipping and oil rigs face increasing threat," *Jane's International Defense Review*, 3/1987, p. 279, Exhibit 14; Jordan, *Jane's Intelligence Review*, p. 220, Exhibit 5.

¹⁵¹ Statement of Captain Christen Feyer Puntervold, para. 2, Exhibit 11.

¹⁵² *Ibid.*, para. 5.

for military purposes -- specifically, to launch small boat and helicopter attacks on neutral shipping¹⁵³.

One example of a report from a ship master describing an attack on his vessel is Master M. Faury's report of the 4 March 1986 attack on his vessel, *Chaumont*, owned by the French affiliate of British Petroleum. Master Faury reported that his starboard watch seaman observed

"du décollage de deux hélicoptères non identifiés des deux plate formes du champ pétrolifère ROSTAN, a alors aperçu un des hélicoptères ouvrir le feu d'une distance évaluée à 1'5 et d'une altitude de 60 mètres. Aussitôt à 17.58 par 25.47N et 52.43E le navire a été touché par un missile à tribord arrière à la hauteur du pont 2 sous une incidence de 20° environ de l'axe du navire. Sous l'impact extinction de la chaudière Tribord, émission de fumée noire épaisse. Retour des hélicoptères à leur base¹⁵⁴."

6. Shipping companies, acutely aware of the danger of sailing near Rostam, Sassan, and Sirri, resorted to extraordinary measures to distance their vessels from these platforms. For example, both the Kuwait Oil Tanker Company and Chevron Oil Company loaded their tankers with less oil to reduce their draft so they could sail in increasingly shallow waters farther south from the oil platforms -- a significant departure from the route they would have normally taken. This procedure increased the costs and

¹⁵³ *Ibid.*, para. 8-9.

¹⁵⁴ Sea Protest of Captain M. Faury, 5 March 1986, Exhibit 110. The English translation of the passage quoted above is as follows.

"[a crew member observed] the take-off of two unidentified helicopters from two rigs in Rostam oil field. He then saw one of the helicopters open fire at an estimated distance of 1'5 and an altitude of 60 meters. Thereupon, at 1758 hours, at 25°47' N and 52°43' E, the vessel was hit by a missile on the rear starboard side, level with deck 2, at an angle of approximately 20° in relation to the vessel's axis. The starboard boiler went out on impact, releasing thick black smoke. The helicopters returned to base."

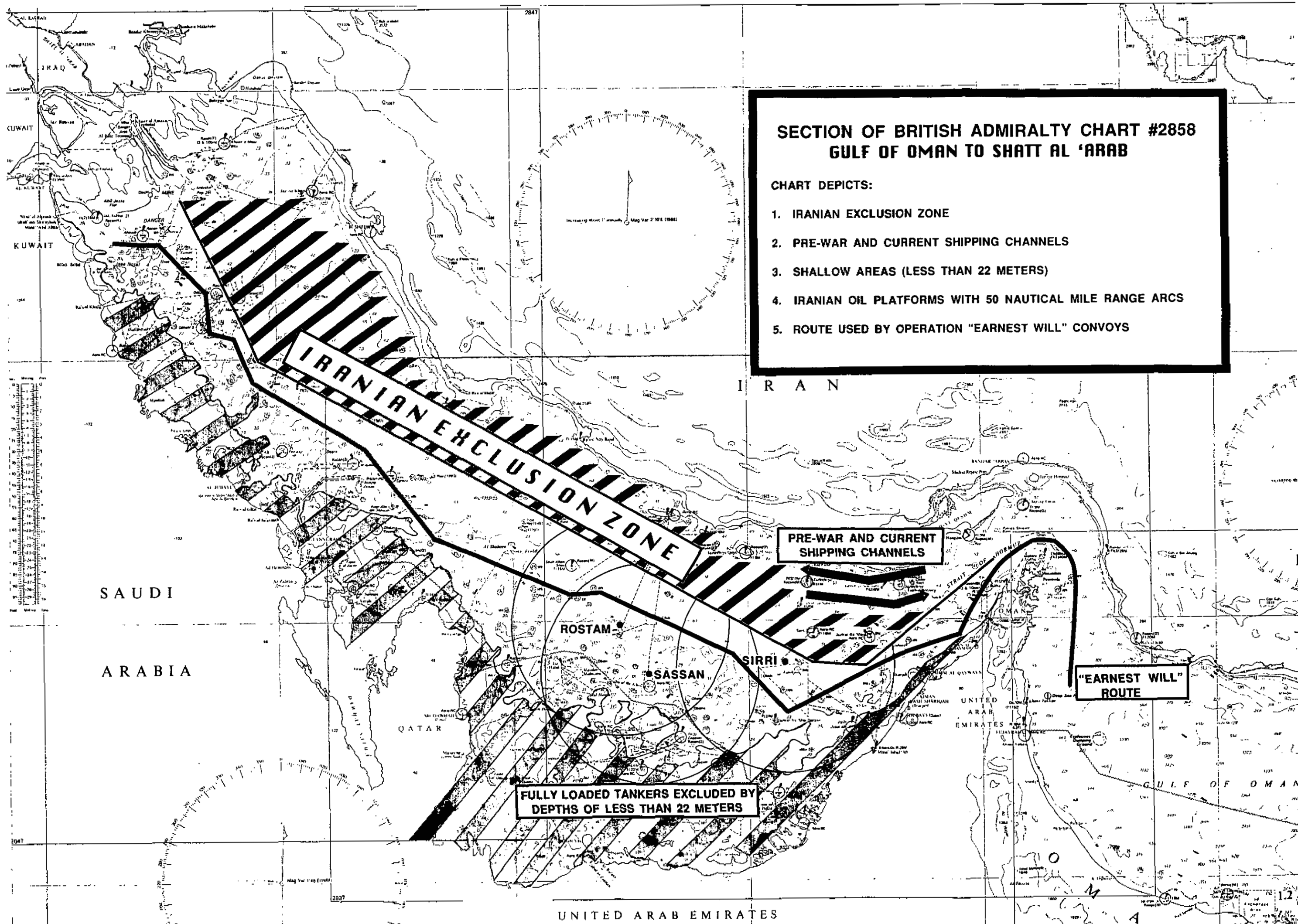
risks of sailing in the Gulf: oil tankers sailed without a full cargo, and followed a less direct route; in waters so shallow that the risk of grounding was enhanced significantly¹⁵⁵. These risks and costs were incurred to reduce what was clearly perceived to be an even greater and more serious risk -- an attack by Iranian forces launched from, or coordinated by, Iran's Rostam, Sirri, and Sassan oil platforms.

C. IRAN'S ATTACKING HELICOPTERS AND GUNBOATS REQUIRED OFFSHORE ASSISTANCE FROM IRAN'S OIL PLATFORMS

1.89 The oil platforms' role in launching and facilitating attacks on commercial vessels and U.S. naval vessels was not only shown by the direct evidence noted above. It was also clear from expert analysis of the conditions and circumstances surrounding Iran's attacks on neutral vessels.

1.90 The analysis of Iran's attacks on merchant ships began with a careful study of the location of those attacks. Map 1.12 on the following page plots Iranian attacks on neutral shipping in the central and southern Gulf. This map reflects that more than 80 of Iran's attacks on neutral merchant shipping occurred within 50 nautical miles of Iran's oil platforms at Rostam, Sassan, and Sirri. Iran's announced maritime exclusion zone, also depicted on Map 1.12, forced ships to sail within a very narrow corridor -- a corridor that channeled shipping very near Iran's oil platforms. The distance from Iran's oil platforms to the route of U.S. tankers was short: less than 15 nautical miles from Sirri and Rostam,

¹⁵⁵ Statement of Colin Eglington, para. 10, Exhibit 31; "Arab Gulf Transit Instruction," 21 May 1986 Chevron Oil Company telegram, Exhibit 111.



**SECTION OF BRITISH ADMIRALTY CHART #2858
GULF OF OMAN TO SHATT AL 'ARAB**

CHART DEPICTS:

1. IRANIAN EXCLUSION ZONE
2. PRE-WAR AND CURRENT SHIPPING CHANNELS
3. SHALLOW AREAS (LESS THAN 22 METERS)
4. IRANIAN OIL PLATFORMS WITH 50 NAUTICAL MILE RANGE ARCS
5. ROUTE USED BY OPERATION "EARNEST WILL" CONVOYS

**PRE-WAR AND CURRENT
SHIPPING CHANNELS**

**"EARNEST WILL"
ROUTE**

**FULLY LOADED TANKERS EXCLUDED BY
DEPTHS OF LESS THAN 22 METERS**

IRANIAN EXCLUSION ZONE

UNITED ARAB EMIRATES

and less than 30 nautical miles from Sassan. The platforms were equipped with surface-search radar,¹⁵⁶ and with helicopter pads to facilitate helicopter launches. Iranian vessels -- both vessels ferrying supplies and gunboats loitering between missions -- were also able to tie-up to the platform structures.

1.91 The platforms were therefore in an excellent position to observe the flow of merchant shipping (both visually and with radar), and to stage helicopter and gunboat attacks on merchant shipping. In fact, Iranian forces attacked 45-50 ships within 50 nautical miles of Rostam¹⁵⁷. Iranian forces similarly attacked 35-40 ships within 50 nautical miles of Sassan¹⁵⁸, and approximately the same number within 50 nautical miles of Sirri. Each of these attacks -- and the pattern they created -- are noted on Map 1.12.

1.92 The platforms had to play a role in these attacks because of Iran's decision to use helicopters and small boats to attack shipping. Independent military experts asked by the United States to study the tactical circumstances surrounding Iran's attacks on shipping in connection with this case agree¹⁵⁹. Iran's helicopters had neither the range nor the target-finding capability to conduct these attacks without assistance from an offshore facility near the intended targets. Iran's small gunboats also needed staging and

¹⁵⁶ See "Transfer and Turnover List of the Reshadat Oil Platform Radar Custodian," Exhibit 117.

¹⁵⁷ Locations of the Iranian attacks on merchant ships noted on Map 1.12 are based on data compiled by Lloyd's Maritime Information Service, see Exhibit 9, the Norwegian Ship Owners Association, see Exhibit 12, the General Council of British Shipping, see Exhibit 2; and in the case of the February 16, 1985 attack on *Petroship A*, by Exxon Oil Company, see Exhibit 112.

¹⁵⁸ Because the Sassan platform complex is only 30 nautical miles from Rostam, attacks that occurred between the two platforms may be within 50 nautical miles of both platforms. Sixteen of the attacks within 50 nautical miles of Rostam were only 20 nautical miles from Sassan.

¹⁵⁹ See *Royal United Services Institute Report*, Exhibit 57; Admiral Michel Heger and Yves Boyer, "U.S. and Iran issues in the Gulf," Exhibit 18.

target-finding assistance from offshore facilities. Iran used its offshore oil platforms at Rostam, Sassan, and Sirri for precisely these purposes.

1.93 The helicopter Iran principally used to attack ships was the Augusta-Bell 212, which was not equipped with radar¹⁶⁰. Absent radar instrumentation, Iran's attacking helicopters required assistance in locating merchant shipping targets over the more than 3,600 square nautical miles (6,667 square kilometers) of Persian Gulf waters in which helicopter attacks on shipping largely took place¹⁶¹. Without such assistance, the helicopters could not have located their targets, as they did not have the fuel or range to traverse the Gulf searching visually for ship targets.¹⁶²

"Before shipping can be attacked effectively, a surface picture (shipping plot) must be built up by surveillance. Surveillance can be carried out by dedicated . . . reconnaissance aircraft equipped with a suitable radar, by radar equipped ships or by fixed radar installations. Surveillance entails the recording of the positions and tracks of ship contacts¹⁶³."

Consider, for example, a helicopter that launched from Iran's military base on Abu Musa Island, and sought to attack shipping in the vicinity of Rostam or Sassan -- approximately

¹⁶⁰ *Royal United Services Institute Report*, pp. 8-9 Exhibit 57; Admiral Michel Heger and Yves Boyer, "U.S. and Iran issues in the Gulf," p. 7, English translation p. 8, Exhibit 18; Intertanko, *The Tanker War*, p. 24, Exhibit 1; General Council of British Shipping, *Guidance Notes For Shipping*, p. 61, Exhibit 2; *Jane's All the World's Aircraft 1975-76*, p. 129, Exhibit 113.

¹⁶¹ *Royal United Services Institute Report*, p. 3, Exhibit 57.

¹⁶² Persian Gulf meteorological conditions (dust and sand storms, and dry haze) further hindered the ability of helicopters to locate visually targets. See Admiral Michel Heger and Yves Boyer, "U.S. and Iran issues in the Gulf," p. 8, English translation, pp. 9-10, Exhibit 18.

¹⁶³ *Royal United Services Institute Report*, p. 3, Exhibit 57. The report continues: "Construction of a comprehensive shipping plot takes time. Typically an airborne reconnaissance unit . . . will take 45 minutes to an hour to construct a ship plot of positions courses and speeds of shipping in an area of 3,600 nautical miles with levels of shipping density, typical of the Gulf." *Ibid*.

120 miles (222 kilometers) away. See Map 1.12. Unless directed to a target, the pilot would not know in which precise direction to plot a course so as to locate, intercept, and attack a vessel on the water 222 kilometers away. Equipped with radars, the platforms served this target-tracking function, relaying the location of shipping to Iranian military forces¹⁶⁴. No other Iranian facilities were positioned effectively to surveil the Gulf waters monitored by the oil platforms with their radar instruments¹⁶⁵.

1.94 Iran's oil platforms also served as bases which *launched* helicopter attacks on shipping. This, too, was dictated by the tactical limitations of the helicopters. The AB-212 helicopter has a maximum range of 267 miles¹⁶⁶. This listed range illustrates the distance a helicopter can travel in a straight line from point A to point B. If, however, the AB-212 helicopter seeks to travel from point A to point B, and then return to point A, the range must be immediately halved. The range must then be further reduced to take account of the weight of weapons, the altitude at which it is flying (lower altitude flying

¹⁶⁴ Sitting high above the water, platform personnel could also observe shipping visually. "Visual detection of shipping during the day could typically have been achieved of large ships at 15 nm . . . Visual identification of shipping by class could have been provided from the platform out to ranges of about 10 nm in good visibility. Identification by name of flag could have been achieved at ranges of 1 to 2 miles." *Ibid.*, p. 12.

¹⁶⁵ Occasionally, Iranian forces used aircraft to observe shipping. But the use of such aircraft surveillance was infrequent and episodic, and had diminished substantially by 1987. Statement of Vice Admiral Anthony Less, para. 13, Exhibit 48; *Royal United Services Institute Report*, p. 11, Exhibit 57. Indeed, mariners "never saw C130 over flights in the region around the platforms." Statement of Colin Eglington, para. 10, Exhibit 31. From a tactical perspective this was to be expected. "[I]t is considerably more difficult" to surveil ships accurately if "surveillance is not continuous, for example if airborne surveillance do not relieve one another on station Ships or fixed platforms do not of course have a problem of continuity." *Royal United Services Institute Report*, pp. 3-4, Exhibit 57.

¹⁶⁶ *Jane's All the World's Aircraft 1975-76*, p. 129, Exhibit 113.

expends more fuel) and the amount of time required by the helicopter to maneuver over its target. When these factors are considered, experienced pilots conclude that the AB-212 helicopter can effectively, and safely, attack targets that are approximately 60 nautical miles from its launch point¹⁶⁷. As map 1.12 indicates, the only Iranian launch facilities within 60 nautical miles of many helicopter attacks on shipping were Iran's platforms, including Rostam. Thus, the oil platforms allowed Iran to best --

- économiiser au maximum le potentiel des hélicoptères tant lors de la phase de recherche de la cible, de son identification et de l'attente de l'autorisation de tir,
- dans une moindre mesure, mettre ces hélicoptères à l'abri des aléas météorologiques parfois brutaux,
- étendre au maximum la durée de la présence diurne sur zone . . . ,
- garantir la fiabilité des communications radio . . .
- stationner les hélicoptères dans une position d'attente la plus proche possible (moins de 60M) de cette zone à haute densité de trafic . . .¹⁶⁸

¹⁶⁷ Admiral Michel Heger and Yves Boyer, "U.S. and Iran issues in the Gulf," p. 7, English translation p. 9, Exhibit 18; Intertanko, *The Tanker War*, p. 24, Exhibit 1; Intertanko, *Tanker Safety Circular Letter No. 58B*, 20 August 1986, p. 2, para. ii, Exhibit 102. British military studies experts consulted by the United States have concluded that the AB 212 helicopter had an effective range of "rather less than 100 nm [nautical miles]." *Royal United Services Institute Report*, p. 9, Exhibit 57. At this range, however, a helicopter would have only "ten minutes on task" -- that is, only ten minutes to fly around once reaching a point 100 miles away from its launch base. *Ibid* Considerably more time than that is required for a helicopter to surveil shipping effectively. *Ibid.*, p. 3. Allowing helicopters greater time and opportunity to maneuver and to engage in surveillance substantially reduces tactical range, which is why French and U.S. experts and those cited by Intertanko concluded that the AB 212 helicopter had an effective tactical range of approximately 60 nautical miles.

¹⁶⁸ *Ibid.*, pp. 10-11. The English translation of the quoted passage follows:

- "economize the potential of helicopters during the phases of searching for the target, identifying it, and waiting for authorization to fire,
- to a lesser extent, shelter these helicopters from sometimes brutal meteorological hazards,

1.95 Iran's helicopters and small gunboats needed the oil platforms for another reason as well. As noted by Admiral Heger and Professor Boyer, helicopters and small gunboats which identified commercial shipping targets and sought permission to attack from the Iranian chain-of-command did not possess sophisticated radio equipment which could reach Iran's mainland between 100-200 miles away.¹⁶⁹ These attacking units therefore needed the oil platforms to relay military communications, and indeed used them for such purposes, as evidenced by messages found on *Iran Ajr*.

1.96 British military studies experts consulted by the United States to assess independently Iran's attacks on shipping reached a similar conclusion regarding the use of the platforms to stage helicopter attacks. Following their study of Iran's attacks on merchant shipping in the central and southern Gulf, Admiral Richard Cobbold (Royal Navy, retired) and Commander Michael Codner (Royal Navy, retired) of the Royal United Studies Institute in London concluded that such attacks "would not have been feasible without the use of the Rostam, Sassan, and Sirri platforms"¹⁷⁰. Their conclusions elaborate:

-
- and extend to the maximum the length of daytime presence in the zone . . .
 - guarantee the reliability of radio communications, [and]
 - place the helicopters in a readiness position as close as possible (less than 60 miles) to the zone of high shipping density . . ."

¹⁶⁹ *Ibid.*, pp. 7, 9, 13, English translation pp. 8, 10, 15.

¹⁷⁰ *Royal United Services Institute Report*, p. iv, para. 12, Exhibit 57.

"The oil platforms were highly likely to have been used for radar, and to a small extent, visual surveillance of shipping crossing the area . . ."

"Helicopters are highly likely to have been deployed to the oil platforms serving as forward operating bases. . . . The shorter transit times [resulting from use of the platforms as forward bases] would allow helicopters to spend very much longer times on task doing visual reconnaissance and carrying out attacks."

"This judgement is confirmed by the dense pattern of ship attacks around the Rostam and Sassan platforms, a pattern that is not easily explained otherwise. Some attacks can be associated similarly with Sirri GOSP."

"By the same token, it is probable that the oil platforms fulfilled similar functions in support of small boat attacks and tactical mine-laying¹⁷¹."

These judgments reflect the British experts' detailed analysis of Iran's capabilities and tactics, including the basic military principles governing "the planning and execution of attacks on shipping" by armed forces; the capabilities of Iranian equipment; the command and control arrangements required for successful attacks; and the supporting facilities and assets required to achieve probabilities of success that military judgment would deem prudent and adequate¹⁷²."

1.97 Admiral Heger and Professor Boyer likewise concluded upon analysis of the circumstances that "la seule méthode raisonnable pour attaquer les navires de commerce dans le Golfe à l'aide d'hélicoptères de masse moyenne consiste à placer ceux-ci en 'embuscade,' principalement sur les plateformes pétrolières de Sirri, Sassan et Rostam et,

¹⁷¹ *Ibid.*, p. 21.

¹⁷² *Ibid.*, p. 1.

dans une moindre mesure, sur l'île d'Abu Musa.”¹⁷³

1.98 As noted above, teletype recordings found on board the Iranian vessel *Iran Ajr* indicated that it used the Rostam platform as a communications link on the night it was caught in the act of mine-laying by U.S. forces. The Royal United Services Institute study helps to explain the role of Iran's offshore oil platforms in laying mines. The study shows how Iran's oil platforms would have been necessary to Iran's "tactical mining" -- that is, the laying of mines in advance of specific targets based on their likely route. The study explains:

“For successful tactical mining it is necessary for the minelayer to be able to respond at short notice to intelligence and surveillance information giving data of the potential target's likely movements. The minelayer would berth alongside an oil platform waiting for these target details. When alerted, it would sortie out and lay a number of mines fairly densely to ensure detonation across an area of water that would span the assessed track of the target¹⁷⁴.”

This explanation confirms the conclusions reached at the time by U.S. forces regarding the manner in which Iran laid the mines which struck the U.S.-flag oil tanker *Bridgeton*.

¹⁷³ Admiral Michel Heger and Yves Boyer, "U.S. and Iran issues in the Gulf," p. 11, English translation p. 13, Exhibit 18. The English translation of the quoted passage is: "the only reasonable way to attack commercial vessels in the Gulf using medium-weight helicopters is to place them in 'ambush' primarily on the Sirri, Sassan, and Rostam oil platforms and to a lesser extent on the island of Abu Musa."

¹⁷⁴ *Royal United Services Institute Report*, p. 20, Exhibit 57.

Section 3. The United States Took Defensive Measures Against the Rostam Platform Complex

1.99 With evidence such as that noted above, and other intelligence in hand, the United States concluded that Iran's oil platforms played a significant role in facilitating and staging attacks on neutral shipping. The platforms directly launched helicopter attacks, transmitted communications between Iranian naval forces involved in attacks on merchant shipping, and acted as crucial forward observation bases. The platforms directly participated in and performed belligerent-offensive actions and as such forfeited any conceivable claim to civilian status. Therefore, following Iran's 16 October missile attack on *Sea Isle City*, the United States determined that attacking the Rostam platform complex in self-defense would lessen the threat to the security of U.S. vessels and reduce or terminate Iranian attacks, thus meeting the military and legal requirements of necessity and proportionality.

1.100 At approximately 1400 hours (local time) on 19 October 1987, personnel on the Rostam platform complex were warned by loudspeaker and over open radio channels in Farsi and English to depart before the platform complex was attacked by U.S. forces. Following the departure of Iranian personnel, U.S. forces searched the complex and discovered 23 millimeter guns and equipment useful in coordinating attacks on ships, including a marine surface-search radar with a range of 48 nautical miles (89km) and communications equipment¹⁷⁵. U.S. forces subsequently used artillery and explosives to

¹⁷⁵ Statement of Commander Marc Thomas, para. 11-12, Exhibit 61.

cause substantial damage to structures in the abandoned platform complex to prevent its continued use in supporting attacks on shipping.

1.101 The United States has no independent evidence of injuries to Iranians during the Rostam platform engagement. Iran claims that "a large number of civilian technical employees" were injured¹⁷⁶. As noted however, warnings were given and personnel were seen to evacuate the platform before it was attacked.

1.102 In accordance with Article 51 of the UN Charter, the United States promptly reported this action in self-defense to the UN Security Council¹⁷⁷.

Section 4. Documents Discovered on the Rostam Platform Complex Confirmed the Military Function of Rostam, Sirri, and Sassan

1.103 The U.S. forces which boarded one of the Rostam platforms found documents which confirmed that Iran had integrated its offshore oil platforms at Rostam, Sassan, and Sirri into its military structure.¹⁷⁸ These included an Iranian Navy order entitled "Instructions for Radar Stations"¹⁷⁹; an Iranian Navy order entitled "Operating Instructions for the Deployment of Observers on Oil Platforms in the Persian Gulf"¹⁸⁰; an

¹⁷⁶ Iran's Memorial, para 1.113.

¹⁷⁷ UN Doc S/19219, Exhibit 100.

¹⁷⁸ Statement of Commander Marc Thomas, paras. 12-13, Exhibit 61; Statement of Conway Zeigler, para. 4, Exhibit 67.

¹⁷⁹ Armed Force of the Islamic Republic of Iran, The First Naval District Fleet <<Intelligence>>, "Instructions for Radar Stations," Exhibit 114.

Iranian Navy order entitled "Instructions for Exchanging RADAR Intelligence"¹⁸¹; a file entitled "The RADAR Custodian Turnover and Transfer file"¹⁸²; and a 2-ring notebook hand-titled "Archive of Incoming Messages," which contained sheets of original message traffic, both typewritten and handwritten¹⁸³.

1. The "Instructions for Deployment of Observers on the Oil Platforms in the Persian Gulf" directed the First Naval District to deploy military observation posts on Rostam, Sassan, and Sirri. The document specifies:

"The First District has the mission of deploying four (4) observations posts on the oil platforms in southern parts of the Persian Gulf in order to gather information about the enemy's air and sea traffic and *destroy its craft*. (Emphasis added)¹⁸⁴."

Iraq did not operate naval craft in the central and southern Gulf during the Iran-Iraq conflict; thus, the reference to enemy sea traffic in the Instructions for Oil Platforms document necessarily refers to the vessels of non-belligerent states including the United States, whose warships most prominently escorted merchant convoys through the Gulf.

¹⁸⁰ Islamic Republic of Iran Armed Forces, Fleet, 1ST Naval District, ((Intelligence)), "Instructions for the Deployment of Observers on Oil Platforms in the Persian Gulf," Exhibit 115.

¹⁸¹ Iranian Islamic Republic Navy, Persian Gulf and Gulf of Oman Fleet, Operations, "Instructions for Exchanging Radar Intelligence," 26 May 1987, with cover letter, Exhibit 116.

¹⁸² "Transfer and Turnover List of the Reshadat Oil Platform Radar Custodian," Exhibit 117. This file contains inventories of equipment, including DECCA 1226 Surface Radar, and ship recognition and navigation equipment.

¹⁸³ "Archive of Incoming Messages," Exhibit 118.

¹⁸⁴ Islamic Republic of Iran Armed Forces, Fleet, 1ST Naval District, ((Intelligence)), Instructions for the Deployment of Observers on Oil Platforms in the Persian Gulf, English translation p. 3, Exhibit 115.

2. The Iranian Navy order entitled "Operating Instructions for the Deployment of Observers on Oil Platforms in the Persian Gulf" confirmed the observers' direct role in gathering military intelligence. It established the following "purpose" and "goal":

"1. PURPOSE .

TO ESTABLISH COMMUNICATIONS BETWEEN THE OBSERVERS DEPLOYED ON THE SALMAN, ROSTAM, RAKHSH, AND P.P. (PRODUCTION PLATFORM) OIL PLATFORMS AND THE ISLAND OF SIRRI AND LAVAN AND FROM THESE ISLANDS TO FLEET HEADQUARTERS AND 1ST NAVAL DISTRICT (BANDAR ABBAS.)

2. GOAL

THE IMMEDIATE EXCHANGE OF INTELLIGENCE FROM THE OIL PLATFORMS TO SIRRI AND LAVAN USING THE RADIOS OF OBSERVERS ON THE PLATFORMS AND THEN, THE IMMEDIATE AND SECURE TRANSMISSION OF THESE MESSAGES FROM THE ISLANDS TO FLEET HEADQUARTERS AND THE 1ST NAVAL DISTRICT (BANDAR ABBAS)¹⁸⁵."

This document indicates that the "Production Platform" mentioned in the "Purpose" paragraph was 32 kilometers south-west of Sirri Island -- the platform we describe as the "Sirri platform," against which the United States ultimately took defensive measures in April 1988. The platform designated "Salman" is referred to herein as the "Sassan" platform¹⁸⁶.

These instructions also contained communications codes to be used by observers on the platforms. The codes assign number groupings to represent particular words used

¹⁸⁵ *Ibid.*, Annex G (Communications), English translation p. 9, Exhibit 114.

¹⁸⁶ *Ibid.*, English translation p. 3.

in messages by platform observers. Among the words assigned codes were: "America," "Britain," "French," "Kuwait," "Saudi Arabia," "vessel," "merchantman," "escort ship," "aircraft carrier," "destroyer," "heading," "speed," and "course"¹⁸⁷. These codes plainly demonstrate that Iran's oil platform personnel were tasked with observing, and reporting on, the movements of merchant vessels and their naval escorts, including U.S. vessels.

3. The "Archive of Incoming Messages," contains a variety of outgoing and incoming messages of the kind one would expect from a naval outpost tasked with collecting and reporting intelligence on vessel movements and with serving as a tactical communications link. The following excerpt of an outgoing message from Rostam is illustrative:

"2. THE CONVOY AT 172327 WAS SEEN ON RADAR AT BEARING 096 DISTANCE 48 MILES FROM THE PLATFORM AND WAS TRACKED AND PLOTTED.

3. THE NUMBER OF MILITARY VESSELS IN THE CONVOY IS 6 SHIPS AND THEY ARE TRAVELING IN SINGLE FILE AND THEIR CURRENT POSITION IS 335 DEGREE, DISTANCE 21 MILES FROM THE PLATFORM AND THEIR COURSE AND SPEED IS 285 DEGREE, 7 KNOTS.

4. IF APPROVED, THE PLATFORM WILL TURN OFF THE RADAR, AND ONCE EVERY 15 OR 30 MINUTES, WILL TURN ON THE RADAR AND PLOT THE CONVOY. FACTS ARE REPORTED FOR INFORMATION AND NECESSARY ACTION"¹⁸⁸.

¹⁸⁷ *Ibid.*, Annex G (Communications), English translation pp. 13-18, codes 1-136.

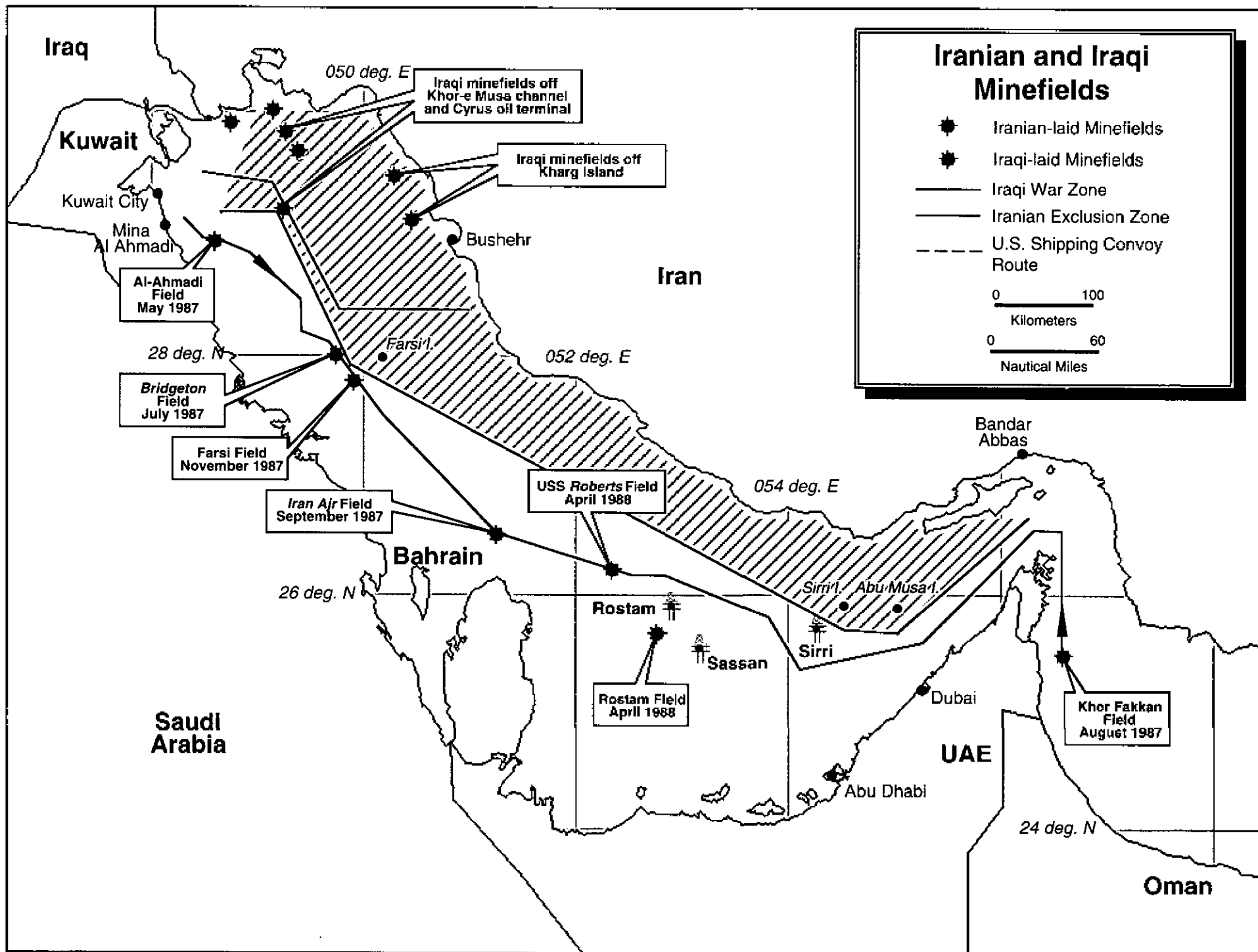
¹⁸⁸ Selected messages from Archive of Incoming Messages, Message Number 4, Exhibit 117; *see also* Message Number 5 which follows a more standard format and in handwriting on the back refers to "Spruance," a destroyer class of U.S. warships.

This message, and the instructions for observers quoted above, demonstrate that the personnel on board the platforms did not limit themselves to commercial activities and air defense functions as Iran claims. Rather, they carried on military surveillance of naval and merchant shipping to facilitate Iran's attacks on such shipping by providing the precise courses and locations of vessels to be attacked. The documents also confirm the conclusion drawn from the teletype roll seized on *Iran Ajr*: that the platforms functioned as military communications relay stations.

4. The document "Instructions for Radar Stations," contains an Annex entitled "Method of Reporting Radar Targets." This annex instructs observers to report the position, course, speed, and other information about "surface targets" -- that is, shipping.¹⁸⁹

1.104 In sum, these documents show beyond question that Iran's offshore oil platforms at Rostam, Sirri, and Sassan were an integral part of Iran's military intelligence and communications network and were employed to mount armed attacks against U.S. shipping. The documents confirmed the U.S. conclusion that the platforms posed a significant threat to the safety of neutral merchant and naval vessels, including U.S. vessels involved in Operation Earnest Will.

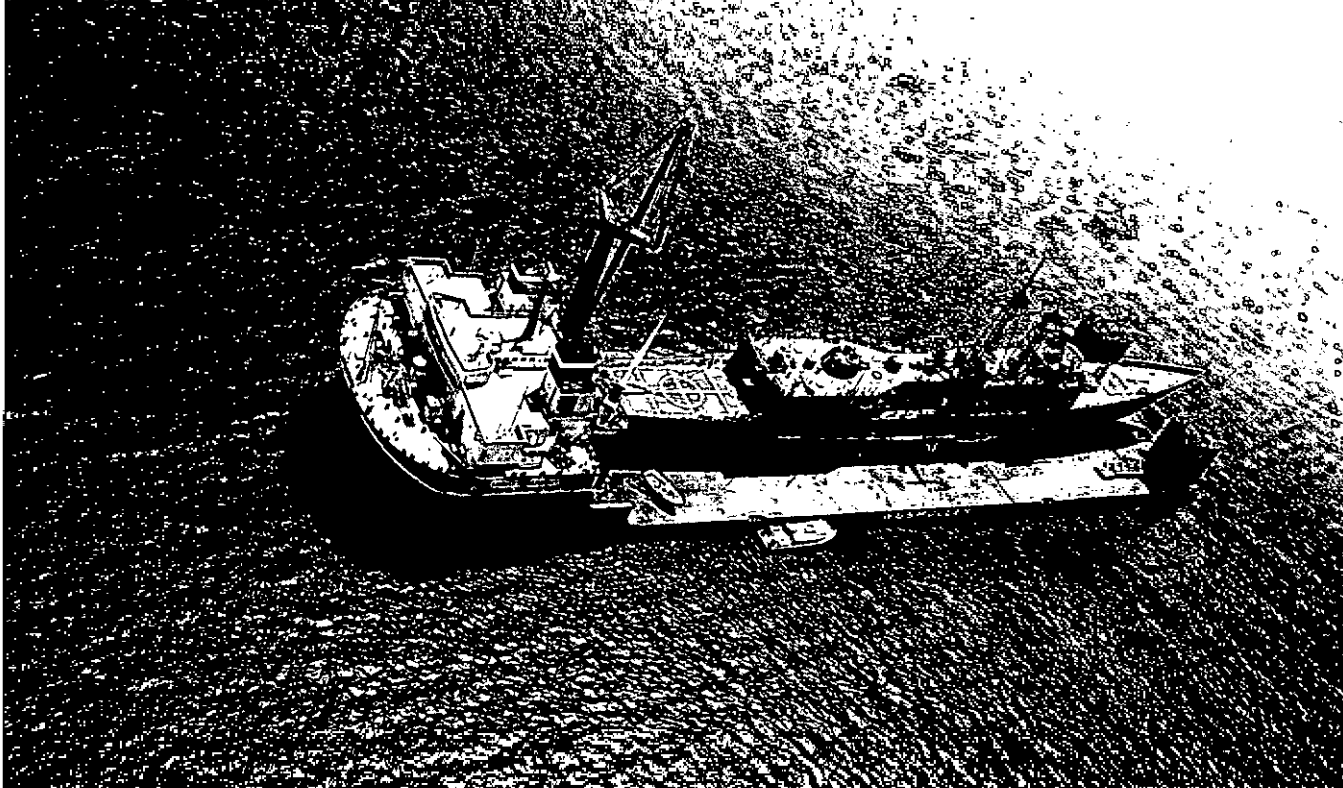
¹⁸⁹ Armed Force of the Islamic Republic of Iran, The First Naval District Fleet <<Intelligence>>, "Instructions for Radar Stations," English translation pp. 15-16, Exhibit 114.



**Mine damage to USS *Samuel B. Roberts* (FFG-58),
14 April 1988**



**USS *Samuel B. Roberts* headed for repair on Dutch heavy lift
ship *Mighty Servant 2***



CHAPTER VI

THE USS SAMUEL B. ROBERTS STRIKES AN IRANIAN MINE, AND IS SEVERELY DAMAGED

1.105 On 14 April 1988, while returning to Bahrain after escorting a convoy of U.S.-flag merchant vessels, the U.S. warship *USS Samuel B. Roberts* struck a mine near the Shah Allum Shoal -- a common navigation reference for vessels transiting the central Gulf. (See Map 1.13 and Illustration 1.14 on the following pages.) Ten U.S. sailors were injured by the mine explosion. The United States incurred almost \$50 million in costs associated with the rescue, transport and repair of the *USS Samuel B. Roberts* following the Iranian attack¹⁹⁰.

1.106 Upon successfully navigating out of the mine field without further incident, U.S. forces summoned U.S. and allied mine-clearing forces to the Shah Allum area, to hunt and detonate any remaining mines in the water. First on the scene was the U.S. warship *USS Trenton*, with a complement of mine-hunting and mine-clearing personnel. On 15 April, explosive ordnance disposal divers from *USS Trenton* discovered two mines in the vicinity of the *USS Samuel B. Roberts* attack¹⁹¹. The mines were moored to

¹⁹⁰ The *USS Roberts* was initially towed to a Dubai drydock, where preliminary repairs were made upon the vessel to enable it to be transported to the United States. *Q&A on USS Samuel B. Roberts Repair*, 21 September 1988, Exhibit 120. After these initial repairs, *USS Roberts* was transported from Dubai to Newport, Rhode Island on the *MV Mighty Servant 2*, and later towed to the Bath Iron Works in Portland, Maine. Over the next twelve months, the Bath Iron Works repaired *USS Roberts*. The costs of the repairs made at the Bath Iron Works are fully detailed in the Post Overhaul Analysis Report attached as Exhibit 121. As reflected in this report, the United States paid \$45,979,647 to repair damage caused by the Iranian mine.

¹⁹¹ Statement of Vice Admiral Less, para. 5, Exhibit 48; *see also* Declaration of Rear Admiral Nutwell, 11 April 1997, para. 4, Exhibit 122; "Persian Gulf Mine Update," 28 April 1988 U.S. military cable from Commander, Joint Task Force Middle East, Exhibit 123.

anchors and were not encrusted with marine growth¹⁹², indicating that they had been laid recently. The numbers clearly visible on the two mines were 02-5627-051-16 and 02-5627-026-18¹⁹³. These number signatures matched the numbering found on --

- (1) mines onboard *Iran Ajr*;
- (2) a mine from the Al Ahmadi minefield laid in the deep water approach to Kuwait harbor retrieved in June 1987; and
- (3) mines found at the Khor Fakkan anchorage in waters off the coast of Fujayrah in October 1987.

The mines were thus identified as Iranian¹⁹⁴.

1.107 On 17 April 1988, Belgium/Netherlands¹⁹⁵ mine-clearing forces found additional mines bearing Iran's signature numbering system in the vicinity of the *USS Samuel B. Roberts* mining¹⁹⁶. The Belgium/Netherlands forces transmitted this information to the U.S. Navy command, confirming the observations made by U.S. divers

¹⁹² Statement of Donald Jones, para. 17, Exhibit 37.

¹⁹³ *Ibid.*, para. 16. The precise mine numbers were recorded in a contemporaneous U.S. military cable. See "Persian Gulf Mine Update," 28 April 1988 cable from Commander, Joint Task Force Middle East, Exhibit 123.

¹⁹⁴ An intelligence summary provided to U.S. political and military leaders in the United States chain of command on 16 April 1988 reflects this identification. See "More Mines Found in Persian Gulf," *National Intelligence Daily*, 16 April 1988, Exhibit 124; see also Declaration of Rear Admiral Robert Nutwell, para. 4. See para. 1.43, *supra*, for a review of the mine numbers found on other Iranian mines in the Gulf.

¹⁹⁵ Belgium and The Netherlands maintain a joint mine warfare command, conducting training and operations in an integrated unit.

¹⁹⁶ Affidavit of Commander C.W. Tempelaars, Dutch Navy, para. 11-12, Exhibit 47.

on 15 April 1988¹⁹⁷. Belgium/Netherlands forces subsequently located and detonated three additional moored mines¹⁹⁸. (See Illustration 1.15 on the following page.) On 20 April 1988, they also retrieved an anchor that held one such mine in position¹⁹⁹. A Dutch mine expert discovered that the mine anchor (known to Dutch experts as a mine "chair") "was shaped like a pot or deep bowl, which was *very different* from the mine chair for a Russian M-08 mine [which] . . . was shaped more like a cradle²⁰⁰." The Dutch mine expert further noted that the mine anchor/mine chair "was unlike any of the mine chairs recorded in our [NATO technical] manual²⁰¹."

1.108 Thus, the numbering of the mines found in the *USS Roberts* minefield matched the numbering found on other Iranian mines, and the distinctive "deep bowl" character of the mine anchor found in the *USS Roberts* minefield matched the deep-bowl anchors found on the mines on board *Iran Ajr* and those found in Kuwaiti waters.

1.109 Iran insists that any mine which struck the *USS Samuel Roberts* was laid by Iraq. Iraq, however, was never known to lay mines in the central Gulf where the *USS*

¹⁹⁷ Statement of Captain Larry Andrews, 30 May 1997, paras. 9-10, Exhibit 125.

¹⁹⁸ Affidavit of Commander C.W. Tempelaars, paras. 13-15, Exhibit 47. On 19 April 1987 and 22 April 1987, during a search of waters near the *USS Roberts* mining, French and U.S. mine-countermeasure forces located additional Iranian mines in an adjacent minefield in the vicinity of the Rostam oil platform. See "Persian Gulf Mine Update," 28 April 1988 cable from Commander, Joint Task Force Middle East, Exhibit 123.

¹⁹⁹ Affidavit of Commander C.W. Tempelaars, para. 14, Exhibit 47.

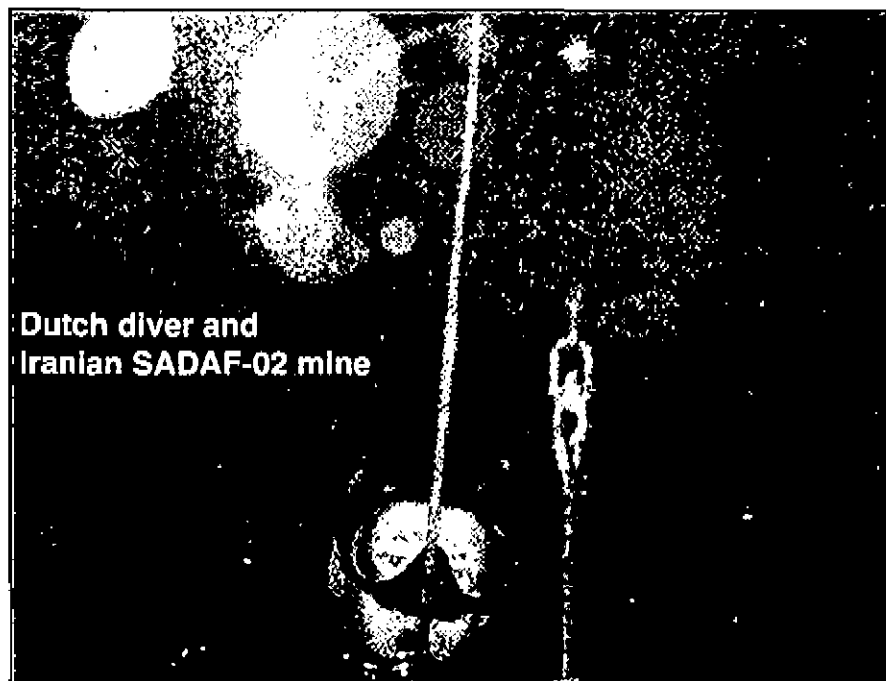
²⁰⁰ Affidavit of Chief Petty Officer A.J.D.M. Verhulst, para. 9 (emphasis added), Exhibit 65. Comparison photographs of an Iranian mine anchor and a Russian M-08 mine anchor are annexed at Exhibit 64.

²⁰¹ Affidavit of Chief Petty Officer A.J.D.M. Verhulst, para. 9, Exhibit 65.



Photos from USS *Roberts*
Minefield

Iranian SADF-02 mine before
detonation by US divers



Dutch diver and
Iranian SADF-02 mine



Iranian SADF-02 mine

Samuel B. Roberts struck a mine²⁰². U.S. experts had documented Iraqi mine-laying only in the northern reaches of the Gulf -- not in the central or southern Gulf, or outside the Strait of Hormuz²⁰³. Likewise, the understanding of expert Belgium/Netherlands mine forces was that Iraq confined its mine-laying to the northern Gulf²⁰⁴.

1.110 Iraqi forces did not lay mines in the central and southern Gulf because they could not. First, Iraqi naval vessels capable of laying mines did not operate in the central and southern Gulf. Second, Iraq did not have the capability effectively to deploy mine-laying aircraft 300 miles (555 kilometers) or more south of its land territory in the central and southern Gulf²⁰⁵.

²⁰² Iran notes that Iraq was responsible for the mining of three merchant vessels in 1982-1984, (more than three years before the various mining incidents described herein) thus implying that Iraq might have been responsible for the *USS Roberts* mining. Based on these three incidents, Iran boldly states that Iraq could lay mines "almost anywhere in the Gulf." Annex to Iran's Observations and Submissions, p. 19, para. 45. Iran fails to explain that the ships struck by Iraqi mines (*Mokran*, *Evangelia-S*, and *City of Rio*) were located in the most northern reaches of the Gulf, in the vicinity of the Khor Musa channel and within approximately 50 miles of Iraq -- approximately 300 miles from the site of the *USS Roberts* mining.

²⁰³ Statement of Captain Larry Andrews, para. 6, Exhibit 125.

²⁰⁴ Affidavit of Commander C.W. Tempelaars, para. 6, Exhibit 47.

²⁰⁵ Statement of Rear Admiral Harold Bernsen, para. 5, Exhibit 43; Statement of Vice Admiral Anthony Less, para. 7, Exhibit 48; Affidavit of Commander Tempelaars, para. 6., Exhibit 47. Iraq did possess helicopters which could lay mines by air. But flying such helicopters into the central or southern Gulf would have been difficult if not impossible, and was never reported attempted. More than that, "the process of laying mines from the air is extremely difficult and time-consuming, and would have exposed the Iraqi forces to almost certain detection from Iranian forces." Statement of Captain Larry Andrews, para. 6, Exhibit 125. Indeed, Captain Andrews, the commander of U.S. mine counter-measures forces in the Gulf notes that Iraqi aircraft engaged in such an extended mine-laying journey "certainly would have been detected flying south by our 'AWACS' airborne radar aircraft in the Gulf." *Ibid*. No such Iraqi activity was ever detected, and Iran has not pointed to any evidence suggesting otherwise.

1.111 Neither was Iraq known to use the type of mines found in the *USS Samuel B. Roberts* minefield, elsewhere in the Gulf, and on board *Iran Ajr*. As part of the process by which the Iran-Iraq conflict was ended, Iraq disclosed the type and location of the mines it had laid in the Gulf in 29 different mine fields. (See Map 1.13.) The 1988 U.S. military cable annexed with the Statement of Donald Jones at Exhibit 37 memorialized the information received by the United States and other States from Iraq. The cable indicates that Iraqi forces laid numerous Myam and Manta mines, but exclusively in the northern Gulf. There is no mistaking the Myam and Manta mines used by Iraq, with the mines found near the *USS Samuel B. Roberts* incident and on *Iran Ajr* -- they are radically different²⁰⁶. The types and locations of Iraq's minefields further confirm that the mining of U.S. and other shipping described above was accomplished by Iran, and not by Iraq.

1.112 In contrast to its denials in this proceeding, Iran's military leaders were more forthright at the time of the *USS Samuel B. Roberts* mining in claiming responsibility for mine attacks on shipping. In radio-broadcast remarks on the day of the *USS Samuel B. Roberts* mining, Commodore Mohammad Hoseyn Malekzadegan, commander of the Iranian Navy, affirmed that Iranian forces were engaged in mine and

²⁰⁶ Myam mines are considerably smaller than the mines used by Iran in the Gulf. The Myam weighs approximately 50 kilograms; the mines found in the Gulf weighed more than 170 kilograms and were more than 250 millimeters wider in diameter than the Myam. The Italian-manufactured Manta mine is also very different from the Iranian mine found in the Gulf: while the Iranian mine is a large sphere with a steel casing, the Manta is shaped like a truncated cone, and features a glass-reinforced plastic casing. See the comparison photographs of Myam, Manta and Iranian mines at Exhibit 127; see also Statement of Donald Jones, para. 21, Exhibit 37; Naval Technical Intelligence Center, "Foreign Material Exploitation Memorandum Report," pp. 4-8, Exhibit 38. If circumstances permit, the United States intends to make available to the Court sample Myam and Manta mines for inspection during oral proceedings.

missile attacks on U.S. vessels in an effort to drive U.S. forces out of the Persian Gulf region. He explained that the harassment of allied navies toward this end "has been a wholehearted task by the [Iranian] Navy over the past year, comprising indirect blows in particular to the U.S. fleet, affecting both its warships and its merchant vessels, with mines or missiles²⁰⁷"

²⁰⁷ Foreign Broadcast Information Service, "Radio Phone-In Program With Defense Officials," 14 April 1988, p. 53 (program entitled "In Line With the Officials, in Step With the People), Exhibit 13.

CHAPTER VII

IN RESPONSE TO IRAN'S MINING OF THE USS SAMUEL B. ROBERTS, THE U.S. TOOK DEFENSIVE MEASURES AGAINST IRAN'S SASSAN AND SIRRI OIL PLATFORMS

Section 1. The Decision to Take Defensive Measures

1.113 After *USS Samuel B. Roberts* struck the Iranian-laid mine on 14 April 1988, the United States determined that military action in self-defense was again necessary to seek to halt further Iranian attacks on U.S. vessels²⁰⁸. The attack on *USS Samuel B. Roberts*, and the discovery of the minefields laid by Iran demonstrated that Iran continued to threaten U.S.-flag merchant ships and their U.S. warship escorts.

1.114 U.S. officials launched a process to determine a necessary and proportionate defensive response to Iran's continued attacks. Once again, the need was to diminish Iran's capability to identify, locate, and attack U.S. vessels. General George B. Crist, then the Commander-in-Chief, U.S. Central Command, explained his reasoning in planning the U.S. defensive response as follows:

"In recommending targets to the Secretary of Defense and the Chairman of the Joint Chiefs of Staff, my priorities were essentially unchanged from Operation Nimble Archer, the attack on the Rostam platforms; further degrade Iran's ability to attack our Navy ships and the oil tankers they were escorting, maintain our

²⁰⁸ Statement of General Crist, para. 16, Exhibit 44; Statement of Vice Admiral Anthony Less, para. 9, Exhibit 48; Letter dated 19 April 1988 from President Reagan to the Speaker of the U.S. House of Representatives and the President Pro Tempore of the U.S. Senate, Book I, *Public Papers of the Presidents of the United States, Ronald Reagan (1988)*, pp. 477-478 (1990), Exhibit 129 (hereinafter "President Reagan's letter to Congress dated 19 April 1988"); Letter dated 18 April 1988 from the Acting Permanent Representative of the United States of America to the President of the Security Council, UN Document S/19791, Exhibit 130 (hereinafter "UN Doc 19791").

status as non-belligerents, avoid escalating military hostilities with Iran, and keep out of war with Iran²⁰⁹.”

1.115 Once again, to avoid compromising the perception of the United States as a non-belligerent, and to avoid any escalation of military conflict with Iran, the United States excluded Iranian land-based targets such as an ordnance storage site north of Bandar Abbas where the United States believed sea mines were stored, and the port facility at Bandar Abbas where vessels were loaded with mines before they sailed on their mine-laying missions²¹⁰. Ultimately, General Crist and others in the chain of command concluded that Iran's offshore oil platforms at Sassan and Sirri would be the most appropriate targets for a defensive response, in view of the military function served by these platforms, and the desire of the United States to minimize collateral and incidental damage resulting from a defensive response.

1.116 The considerations that guided this decision were those that led to the selection of the Rostam platform complex as a target, as detailed in Chapter V.

1.117 The multiple Iranian naval instructions regarding deployment of observers on the oil platforms in the Persian Gulf found on the Rostam platforms were irrefutable evidence that the offshore oil platforms at Sassan and Sirri collected and reported intelligence concerning passing vessels -- intelligence clearly designed to facilitate attacks on shipping²¹¹.

²⁰⁹ Statement of General Crist, paras. 16, Exhibit 44.

²¹⁰ Statement of Vice Admiral Less, paras. 10, 16, Exhibit 48.

²¹¹ See pp. 72-76, paras. 1.103-1.104, *supra*.

1.118 The location of Iranian attacks on shipping in the southern Gulf provided further evidence of these platforms' deadly role. As is apparent from Map 1.12, the Sirri platform is approximately 12 miles from the route sailed by U.S. convoys. Iran attacked more than 40 neutral merchant ships within 50 nautical miles of this platform. Iran attacked approximately 40 neutral merchant ships within 50 nautical miles of Sassan, the southern-most of Iran's oil platforms/military outposts. Sassan was less than 30 miles from the shipping route transited by U.S. convoys. Like Rostam, both Sirri and Sassan were equipped with surface-search radar and helicopter launch facilities, and could harbor small gunboats. The concentration of attacks near these platforms -- and the absence of other Iranian facilities capable of facilitating these attacks on shipping -- led U.S. forces to conclude that the platforms played an important role in Iranian attacks on shipping. As detailed above at pp. 64-70, independent British and French military experts have since reached the same conclusion.

1.119 Contemporaneous reporting by commercial entities vitally concerned about the safety of shipping in the Gulf -- Lloyd's Maritime Information Service, Intertanko, the General Council of British Shipping, and Jane's defence publications -- confirmed the military function of the platforms²¹². The statements of Captain Puntervold from the Contingency Planning Department of the Norwegian Shipowners' Association and Captain Colin Eglington from the Kuwait Oil Tanker Company show that the merchant shipping community understood Iran's use of the Sassan and Sirri platforms both to

²¹² See pp. 58-63, para. 1.88, *supra*.

observe and report on potential targets and to stage its helicopter and small gunboat attacks²¹³.

1.120 Further evidence of Sassan's military role occurred at approximately 0200 hours (local time) on 6 May 1988, when two U.S. helicopters on routine patrol from *USS Simpson* were fired upon by heavy weapons from the Sassan platform and by three small boats in the vicinity of the platform. The helicopters did not return fire and flew away without being hit²¹⁴.

Section 2. U.S. Forces Attack the Sassan and Sirri platforms

1.121 The mining of *USS Samuel B. Roberts* demonstrated that Iranian forces continued to threaten the safety and security of U.S. merchant and naval vessels and fully intended to continue their attacks. In view of the mass of evidence described above, the United States determined that attacking these platforms in self-defense would reduce or terminate such Iranian attacks and limit Iran's ability further to threaten the security of U.S. vessels, thus satisfying the military and legal requirements of necessity and proportionality.

1.122 The U.S. attack on Sassan began at approximately 0800 hours (local time) on 18 April 1988²¹⁵. Personnel on Sassan were warned in Farsi and English that the

²¹³ See Exhibits 11 and 31.

²¹⁴ See "Sassan Oil Field Incident," 6 March 1988 cable from Commander, Joint Task Force Middle East, Exhibit 131.

²¹⁵ The following description of the U.S. attack on the Sassan and Sirri platforms is drawn principally from Perkins, "Operation Praying Mantis: The Surface Views," *U.S. Naval Institute*

platform would be attacked, and were given ten minutes to depart. Thirty minutes after the U.S. assault began, the platform was boarded. The boarding party discovered that helicopter rocket fire in the initial assault had destroyed and set ablaze the command and communications center of the platform, making a search of the area impossible²¹⁶. Other structures on the platform were then substantially destroyed with explosives. Iran claims that "[s]everal Iranian personnel suffered injuries²¹⁷. The United States is not aware of any Iranian civilian casualties.

1.123 The U.S. attack on the platform in the Sirri complex began at approximately 0815 hours (local time) on 18 April 1988. Personnel on the Sirri platform were warned in Farsi and English that the platform would be destroyed, and were given time to depart. Much of the top portion of the Sirri platform was destroyed by naval gunfire. A boarding party could not board the platform because secondary explosions and fires rendered such action unsafe²¹⁸. Iran claims that "[t]here were a number of casualties and injured²¹⁹." The United States is not aware of any Iranian civilian casualties.

Proceedings, May 1989, pp. 66-70, Exhibit 132; *see also* Statement of Vice Admiral Anthony Less, paras. 17-19, Exhibit 48; President Reagan's letter to Congress dated 19 April 1988, Exhibit 113; UN Doc 19791, Exhibit 130.

²¹⁶ Statement of Vice Admiral Less, para. 18, Exhibit 48.

²¹⁷ Iranian Memorial, p. 49, para. 1.122.

²¹⁸ Perkins, "Operation Praying Mantis: The Surface Views"; p. 69, Exhibit 132; Statement of Vice Admiral Anthony Less, para. 18, Exhibit 48; President Reagan's letter to Congress dated 19 April 1988, Exhibit 129; UN Document 19791, Exhibit 130.

²¹⁹ Iran's Memorial, p. 49, para. 1.123.

1.124 As was the case with the attack against Rostam, the defensive measures taken against Sassan and Sirri were motivated by military considerations -- not by an intent to inflict economic damage, as Iran has claimed. Vice Admiral Less, then Commander, Joint Task Force Middle East, notes that --

“we did not generate military options with the goal of damaging Iran's economic and commercial interests. Had we sought to inflict economic damage, we would have ultimately attacked, or at a minimum, considered attacking a variety of more significant economic targets such as Iran's major oil facility at Kharg Island, or the key oil loading facility at Sirri Island²²⁰.”

Nor did the United States decide to attack Iran's significant oil installation on Lavan Island, which would have inflicted considerably greater economic damage upon Iran than the U.S. attack on the oil platforms. Ultimately, the most telling evidence of the intentions of the United States in engaging Iran's platforms was the manner in which the platforms were attacked by U.S. forces. Had the United States intended to inflict economic damage upon Iran, it would have attacked the platforms in a manner that destroyed them *completely*, thus rendering the rebuilding process as difficult, expensive, and lengthy as possible. U.S. forces possessed the explosive power and technical expertise to demolish comprehensively not only the top structures, but the very foundations of Iran's oil platforms. In the event, however, the United States elected not to use such overwhelming force in attacking the platforms. U.S. military personnel employed sufficient explosives to render the oil platform structures uninhabitable and unfit for use as radar outposts or attack launch facilities. To be sure, the attacks were also

²²⁰ Statement of Vice Admiral Less, para. 9, Exhibit 48.

calibrated in their magnitude to prevent Iran from quickly restoring the platforms to use as military bases. But they did not involve the more significant magnitude of force that would have been employed had the U.S. intended to inflict economic damage upon Iran's oil industry.

1.125 Notably, after the U.S. defensive responses against the Sirri and Sassan platforms, Iranian forces attacked only two commercial vessels within 50 nautical miles of the Sirri or Sassan platforms during the remainder of the Iran-Iraq war²²¹.

1.126 Although not the subject of Iran's claim for reparations, Iran has discussed in its written submissions additional naval engagements between Iran and the United States on 18 April 1988²²². During these engagements, the Iranian guided missile patrol boat *Joshan* was sunk after it approached U.S. Navy vessels and refused to alter course upon request by U.S. forces. U.S. forces then observed the Iranian frigate *Sahand* sailing at high speed in the direction of U.A.E. oilfields. Concerned that *Sahand* was on a retaliatory mission, U.S. commanders tasked aircraft to investigate. As the U.S. aircraft approached the area, they were fired upon by forces on *Sahand*. The aircraft returned fire, sinking the Iranian frigate. U.S. aircraft were also tasked to locate the Iranian frigate

²²¹ The Danish-flag *Karam Maersk* was attacked 2 July 1988, and the Norwegian-flag *Berge Lord* was attacked 4 August 1988. Both were assaulted by Iranian small gunboats in the vicinity of Abu Musa Island. See Lloyd's Maritime Information Service, *Vessels Damaged in the Gulf*, p. 122, Exhibit 9; Iranian ship attack records of the Norwegian Ship Owners Association, annexed at Exhibit 11.

²²² Iran's Memorial, pp. 50-52, paras. 1.124-1.132; Annex to Iran's Observations and Submissions, pp. 24-25, paras. 57-60.

Sabalan. They did so later in the day on 18 April 1988, and were fired upon by *Sabalan*. Again, the U.S. aircraft returned fire, disabling *Sabalan*²²³.

1.127 In accordance with Article 51 of the UN Charter, the United States promptly reported this action in self-defense to the UN Security Council²²⁴.

²²³ See Statement of Vice Admiral Anthony Less, para. 19, Exhibit 48; Perkins, "Operation Praying Mantis: The Surface View," p. 5, Exhibit 132; Langston and Bringle, "Operation Praying Mantis: The Air View," *U.S. Naval Institute Proceedings*, May 1989, pp. 56-59, Exhibit 133; President Reagan's letter to Congress dated 19 April 1988, Exhibit 129.

²²⁴ UN Doc S/19791, Exhibit 130.

PART II

U.S. MILITARY ACTIONS AGAINST THE PLATFORMS DID NOT VIOLATE ARTICLE X(1) OF THE 1955 TREATY

2.01 At the previous phase of this case, the Court left to the merits the issue of whether Iran could show that the U.S. military actions against the offshore platforms violated Article X(1) of the 1955 Treaty. This Part will show that Iran cannot make such a showing. Article X(1) does not by itself create specific legal obligations relevant to Iran's claims. The provision is aspirational. Absent specific content derived from other provisions of the Treaty (and there are no such implementing norms pertinent to Iran's claims in other articles of the Treaty), Article X(1) cannot regulate this dispute.

2.02 In addition, this Part will show that, even if Article X(1) could be construed as urged by Iran, Iran can prove no violation of the Article. At the relevant times, the Rostam, Sirri and Sassan platforms were not producing oil that entered into direct commerce between Iran and the United States.

CHAPTER I

THE U.S. MILITARY ACTIONS DID NOT VIOLATE ARTICLE X(1) BECAUSE THAT PROVISION MERELY ESTABLISHES A GENERAL GOAL, NOT ENFORCEABLE OBLIGATIONS

Section 1. The Court's Judgment on Jurisdiction Did Not Resolve All Interpretative Issues Presented by Article X(1)

2.03 In its Judgment on jurisdiction, the Court rejected the U.S. contentions concerning the inapplicability of Article X(1) to U.S. military actions against the platforms. However, the Court made clear that it did not decide all interpretive issues presented by Article X(1). The language of the Judgment of 12 December 1996 reflects the care taken by the Court to confine its ruling to the question of whether it had jurisdiction to further examine Iran's claims under Article X(1).

2.04 The Court thus stressed that it was only considering "what consequences, *in terms of the jurisdiction of the Court*, can be drawn from Article X, paragraph 1²²⁵". The Court also observed that while the lawfulness of the destruction of the platforms "*can be evaluated in relation to that paragraph*²²⁶," there remained "a dispute as to the

²²⁵ *Oil Platforms (Islamic Republic of Iran v. United States of America) (Preliminary Objection)*, para. 37 (emphasis added).

²²⁶ *Ibid.*, para. 51 (emphasis added).

interpretation and application" of Article X(1). Hence, the Court still had before it the task of actually "entertain[ing] this dispute²²⁷."

2.05 This careful language shows that the Court, in finding that it had jurisdiction "to entertain" a dispute about the meaning of Article X(1), did not resolve the difficult interpretive issues presented by that provision. As the Court recognized, it can only definitively adjudicate the rights and obligations arising out of Article X(1) at the merits phase.

Section 2. Article X(1) Establishes a General Goal, Not Specific Legal Obligations That Can Be Enforced by the Court

2.06 A key interpretive issue not yet addressed by the Court is whether Article X(1), regardless of the types of "commerce" to which it may pertain, in fact gives rise to legal obligations that are sufficiently defined and precise to regulate this dispute. As this section will demonstrate, Article X(1) does not create such obligations. Rather, it establishes a general goal whose operational content can only be found in other specific provisions of the Treaty.

2.07 Article X(1) of the 1955 Treaty²²⁸ provides, in its entirety:

²²⁷ *Ibid.*, para. 53. See also para. 55(2) (concluding, in the *dispositif*, that the Court had jurisdiction "to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1" of the 1955 Treaty).

²²⁸ As the Court knows, the 1955 Treaty was one of a number of substantively similar treaties concluded by the United States after World War II. The model U.S. text for such treaties appears in a comprehensive study prepared by Mr. Charles Sullivan for the Department of State. Charles Sullivan, Department of State, *Treaty of Friendship, Commerce and Navigation. Standard Draft (Analysis and Background)* (hereinafter "*Sullivan Study*"). Except for the use of the phrase "High Contracting Party" in the 1955 Treaty, instead of the term "Party" in the Standard Draft,

"Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

2.08 The 1955 Treaty is a long and technically sophisticated agreement containing detailed rules regulating many complex commercial and investment issues. By contrast, Article X(1) is strikingly general. It is far too imprecise to define the legal rights and obligations of the Parties in specific settings. Rather, the United States submits that Article X(1) establishes a general goal. The specific legal rights and obligations of the Parties in furtherance of that goal are elaborated and implemented through other, far more precise, provisions in the Treaty. The Court's conclusion regarding the function of Article I of the 1955 Treaty is equally apt with respect to Article X(1): it "must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied²²⁹."

2.09 The limited nature of Article X(1) is clearly demonstrated by the fact that it cannot resolve the many practical questions about rights and duties that characteristically arise in a complex commercial relationship. Thus, for example, it is not possible on the basis of Article X(1) to determine whether the 1955 Treaty would authorize one Party to impose access charges on vessels of the other entering its ports. A general obligation to maintain "freedom of commerce and navigation" might suggest that such charges are prohibited. However, the specific rights and obligations

Article X of the 1955 Treaty is identical to Article XIX of the Standard Draft. A copy of the *Sullivan Study* has been submitted to the Court in this case.

²²⁹ *Oil Platforms (Islamic Republic of Iran v. United States of America) (Preliminary Objection)*, para. 28.

prescribed in other provisions -- in this case, Article X(3) -- make clear that such charges can be imposed in appropriate circumstances.

2.10 Article X(1)'s inability to provide meaningful guidance regarding specific legal rights and obligations appears in many other situations outside the context of maritime commerce. For example, it is not apparent whether "freedom of commerce and navigation" allows the Parties to the 1955 Treaty to impose quantitative restrictions on imports or exports of particular products. The broad language might suggest that quantitative restrictions may not be allowed. However, the more specific text of Article VIII(3) shows that they are, if specified conditions are satisfied.

2.11 Similarly, the broad affirmation of "freedom of commerce and navigation" in Article X(1) would not automatically entitle an Iranian lawyer to practice his or her profession in the United States, or a U.S. lawyer to do so in Iran. The matter is not governed by Article X(1). Instead, the Parties' specific rights and obligations are established by Article II(2), requiring that professionals of one Party must satisfy the other Party's domestic requirements for admission to professions.

2.12 Moreover, notwithstanding Article X(1)'s call for "freedom of commerce and navigation," the 1955 Treaty would not obligate either Party to allow nationals of the other to purchase real property in its territory. Article V(1) of the 1955 Treaty provides rights only for the leasing of real property, although other similar treaties authorize ownership. For example, the 1954 Treaty of Friendship, Commerce and Navigation Between the United States and Greece also declares that "[b]etween the

territories of the two [Parties] there shall be freedom of commerce and navigation²³⁰."

Unlike the U.S. -Iran Treaty, however, it confers the right to national treatment in purchasing real property. Because Article X(1) does not establish precise and enforceable legal rights or obligations, there can be many such significant differences in the overall system of obligations in FCN treaties containing identical provisions on "freedom of commerce and navigation."

2.13 Nothing in the practice of the Parties suggests that Article X(1) created a broad legal requirement to protect commerce in areas not specifically addressed elsewhere in the 1955 Treaty. Many issues potentially affecting freedom of commerce between the United States and Iran are simply left outside the Treaty. For instance, the 1955 Treaty does not include a provision entitling nationals of one Party to transit through the territory of the other. While such transit might well foster commerce, in the absence of a specifically elaborated right, no Party has asserted the right under the 1955 Treaty to such transit²³¹. Similarly, commercial aviation landing and overflight rights fall within some conceptions of "commerce." It is clear, however, that neither the United States nor Iran claims that Article X(1) entitles aircraft of either country to land in or overfly the territory of the other. Such rights are governed, with specificity, in other international agreements.

²³⁰ 5 UST 1829, TIAS 3057, 224 UNTS 279, Article XXI(1).

²³¹ Other U.S. post-World War II commercial treaties do provide for a right of transit. Although such treaties typically contain a general provision comparable to Article X(1) concerning "freedom of commerce and navigation," *see, e.g.*, Art. XIX(1), Treaty of Friendship, Commerce and Navigation Between the United States and Japan, 4 UST 2063, TIAS 2863, 206 UNTS 183 (1953), the right of transit is established through a specific provision, Article XX.

2.14 Commentators who have addressed provisions in U.S. commercial treaties comparable to Article X(1) of the 1955 Treaty confirm the provisions' limited role. Sullivan describes the article in the Standard Draft corresponding to Article X(1) of the 1955 Treaty, as "in the nature of a declaration of principle rather than a definitive legal rule"²³². Similarly, in his review of navigation provisions in U.S. commercial treaties, Piper characterizes the stipulation regarding "the freedom of commerce and navigation between the territories of the parties," commonly found in both pre-World War II and post-World War II commercial treaties, as a "broad declaration" that "appears to be hortatory, indicative of the parties' good intentions, and not a commitment to undertake specific action"²³³.

2.15 Thus, the Parties to the 1955 Treaty did not use the term "freedom of commerce" to create a broad universe of additional rights or obligations beyond those specifically and carefully negotiated elsewhere. Article X(1) is not a residual, catch-all provision creating broad rules governing matters not specifically addressed elsewhere. Any such broad construction of Article X(1) would swallow up the rest of the Treaty and render ineffective the many careful compromises it contains. Just as Article X(1) of the 1955 Treaty does not regulate harbor charges or quantitative restrictions on trade, it does not, by itself, regulate actions by a Party because they might have the incidental effect of interfering with production of goods for export.

²³² *Sullivan Study, supra*, at p. 286.

²³³ Don Piper, "Navigation Provisions in United States Commercial Treaties," 11 *Am. J. Comp. Law*, pp. 191-92 (1962), Exhibit 134.

CHAPTER II

IRAN HAS FAILED TO SHOW THAT U.S. ACTIONS AGAINST THE PLATFORMS HAD ANY CONSEQUENCES FOR TRADE BETWEEN THE PARTIES

2.16 Even if Article X(1) could be construed to create an independent legal obligation to refrain from actions potentially affecting the production of certain types of goods, Iran's claim must fail. In the context of this dispute, any protections afforded by Article X(1) would apply only if U.S. military actions against the platforms affected "the export trade in Iranian oil"²³⁴ where such trade was "between the territories" of the Parties²³⁵. As this Chapter demonstrates, Iran has not shown -- and cannot show -- that the U.S. military actions against the offshore platforms in fact affected commerce in Iranian oil between Iran and the United States as required by the Treaty.

Section 1. Article X(1) Can Only Apply To Iranian Trade With The United States

2.17 The express territorial limitation of Article X(1) is clear. The text applies only to trade "[b]etween the territories of the High Contracting Parties." At the jurisdiction phase, the Court noted the care taken by the Parties in defining the territorial

²³⁴ *Oil Platforms (Islamic Republic of Iran v. United States of America)(Preliminary Objection)*, para. 51. See also para. 50 (holding open the possibility that freedom of commerce under Article X(1) could be impeded only with respect to "goods destined to be exported, or capable of affecting their transport and storage with a view to export").

²³⁵ Article X(1) of the 1955 Treaty.

scope of various provisions of the 1955 Treaty. Thus, in rejecting the U.S. contention that Article IV(1) applied only to the treatment by one Party of nationals of the other within its territory, the Court noted that Article IV(1), "unlike the other paragraphs of the same Article, does not include any territorial limitation" and thus has a "wider scope" than those other paragraphs²³⁶.

2.18 Similar attention to the territorial scope of the Parties' undertakings in Article X(1) is required here. The different paragraphs of Article X have different territorial fields of application. Thus, Article X(4) establishes certain protections for cargoes carried "to or from the territories of such other High Contracting Party." Unlike Article X(1), this provision is not framed in terms of cargoes carried between the two Parties. Article X(3) also applies broadly to "[v]essels of either High Contracting Party" that "come with their cargoes to all ports, places and waters" of the other Party. It is not limited to vessels arriving from the territory of the other Party.

2.19 By contrast, if Article X(1) is regarded as having independent legal effect, it can apply only to commerce and navigation "[b]etween the territories" of the Parties. The phrase "between the territories" of the Parties (instead of "between the Parties") is a significant limitation. It makes clear that the article does not encompass, for example, goods that transit through or are modified in third countries. Instead, Article X(1) addresses only trade moving directly from the territory of one country to the territory of the other. Any obligation arising under this provision can apply only to actions potentially affecting goods *directly* exported from Iran to the United States.

²³⁶ *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Preliminary Objection), para. 35.

Section 2. Iran Has Not Established That U.S. Military Actions Against the Platforms Had Any Effect Upon Iranian Trade With The United States

2.20 Iran has thus far failed to establish that U.S. military actions against the platforms had any tangible, legally relevant effect on Iranian trade with the United States, specifically on Iran's oil exports to the United States. Given the production status of the platforms at the time of the U.S. military actions against them and the prevailing trade relations between the United States and Iran, Iran has not shown that any oil produced by these platforms was in fact being shipped to the United States at the relevant times. Thus, it has not shown -- and, we submit, cannot show -- that the U.S. actions against the platforms brought about any diminution in oil exports to the United States.

2.21 The oil produced by these platforms at the time of the U.S. military actions constituted a small portion of Iran's overall oil production. In October 1987, as Iran has acknowledged in its Memorial, the Rostam and Rakhsh platforms simply were not producing any oil²³⁷. None of Iran's daily oil production of 2.39 million barrels at that time came from these facilities²³⁸. In April 1988, the Sirri and Sassan platforms were

²³⁷ Iran's Memorial, para 1.101. Iran explains that these platforms were not producing as a result of Irai attacks initiated in 1986. See Table II.A.1: Iran's offshore oil production history on a field-by-field basis, in "Oil Production Capacity in the Gulf, Part III, Islamic Republic of Iran," Centre for Global Energy Studies, p. 1-103 (1995)(hereinafter "CGES Study"), Exhibit 135.

²³⁸ See Table on "Worldwide crude oil and gas production," *Oil & Gas Journal*, 8 February 1988, p. 62, Exhibit 136.

together producing only about 60,000 barrels per day²³⁹, or 2.8% of Iran's daily production of 2.15 million barrels per day at that time²⁴⁰.

2.22 At the jurisdiction phase, the Court noted merely that oil exports from Iran to the United States were ongoing until after 19 October 1987, the date of the first U.S. military action against the Iranian offshore platforms²⁴¹. As the Court correctly noted, the United States does not contest this fact. However, to prevail on its claim that Article X(1) protects the production of goods for commerce, Iran must do more than establish that it exported oil to the United States in October 1987. Iran must show that the particular actions underlying its claims -- the U.S. military actions against the platforms -- affected oil exports from Iran to the United States. Iran must prove that it exported to the United States oil produced by these particular platforms and that these exports would have continued had the U.S. military actions not taken place.

2.23 This Iran cannot do. With respect to the Rostam and Rakhsh platforms, Iran acknowledges that the platforms were not producing oil when they were damaged by the United States on 19 October 1987²⁴². Iran cannot prevail on a claim that the United States violated Article X(1) by damaging an installation already severely damaged by Iraq and that was not at the time engaged in the production of oil.

²³⁹ See Table II.A.1, CGES Study, Exhibit 135.

²⁴⁰ See Table on "Worldwide crude oil and gas production," *Oil & Gas Journal*, 8 August 1988, p. 31, Exhibit 137.

²⁴¹ *Oil Platforms (Islamic Republic Of Iran v. United States of America)* (Preliminary Objection, para. 44.

²⁴² Iran's Memorial, para 1.101.

2.24 Iran cannot reasonably contend that U.S. military actions against these non-producing platforms violated Article X(1) because the facilities *might* at some later date have resumed production of oil that *might* have been exported to the United States. (Iran asserts that repair work on these platforms was "close to completion" on 19 October 1987, but offers no supporting evidence for this, nor does Iran explain why Iraq would not have immediately attacked and disabled these platforms once again, had they resumed production.)

2.25 Speculative assertions cannot provide the basis for a finding that a State has violated its international legal responsibilities. Here, no exports of oil from the Rostam complex from Iran to the United States would have been possible even if production eventually had resumed. On 29 October 1987, ten days after the military actions against these platforms, President Reagan signed Executive Order 12613, which prohibited the import into the United States of most goods -- including oil -- and services of Iranian origin²⁴³.

2.26 Thus, the October 1987 U.S. military actions involved facilities not then producing any oil, let alone oil for export to the United States. Ten days later, all direct oil exports between Iran and the United States were ended -- including exports of any crude oil that might someday have been produced by the Rostam and Rakhsh platforms.

²⁴³ 52 F.R. 41940, Exhibit 138. In 1987, Iran exported some \$1.7 billion in goods to the United States, the bulk of which consisted of crude oil and other petroleum products. U.S. General Imports, World Area and Country of Origin by Schedule A Commodity Groupings, 1987 December and Annual 549 (1988), Exhibit 139. Direct exports from Iran to the United States virtually ceased after the issuance of Executive Order 12613. See U.S. General Imports, World Area and Country of Origin by Schedule A Commodity Groupings, 1988 December and Annual 652 (1989), Exhibit 140. Executive Order 12613 did not prohibit imports into the United States of petroleum products refined from Iranian crude oil in third countries.

Under the circumstances, Iran has not shown -- and cannot show -- that the U.S. military actions against these platforms had any affect on commerce between Iran and the United States. Iran thus cannot show any violation of Article X(1) by the United States involving these platforms²⁴⁴.

2.27 The case is even more clear with respect to the Sirri and Sassan platforms damaged by the United States on 18 April 1988. By that date, the direct importation of Iranian oil into the United States had ceased²⁴⁵. Thus, even if the Sirri and Sassan platforms were producing oil in April 1988, they could not have produced oil for export to the United States. The destruction of these platforms could not have affected commerce "between the territories of" Iran and the United States.

²⁴⁴ Iran has not claimed in this case that Executive Order 12613 violates the 1955 Treaty, and rather bases its claim solely on U.S. military actions against the offshore platforms. It is the position of the United States that Executive Order 12613, which reflected a Presidential finding that "Iran is actively supporting terrorism as an instrument of state policy" and "has conducted aggressive and unlawful military action against U.S.-flag vessels and merchant vessels of other non-belligerent nations engaged in peaceful commerce in international waters of the Persian Gulf and territorial waters of non-belligerent nations of that region," is entirely lawful under the 1955 Treaty. Given the nature of Iran's claim, however, the status of Executive Order 12613 is not before the Court.

²⁴⁵ See U.S. General Imports and Imports for Consumption, Schedule A Commodity by Country, Table 2, Section 3330040 (Crude Petroleum, Testing 25 Degrees API or Over), October 1987 - December 1988, Exhibit 141. According to this monthly U.S. Census Bureau report, the last Iranian crude oil export to the United States permitted under Executive Order 12613 was delivered in December 1987, and there were no exports of Iranian crude to the United States whatsoever in 1988. *Ibid.*

Section 3. The Court's Judgment in the *Nicaragua* Case Is Not Pertinent

2.28 Given the dramatically different factual circumstances, the Court's consideration of the U.S.-Nicaragua FCN Treaty in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* is simply not relevant here. First, the actions that the *Nicaragua* Court found to violate the Friendship, Commerce and Navigation Treaty between the United States and Nicaragua ("the FCN Treaty") were of a quite different character from those involved here. There, the Court found that the United States violated the FCN Treaty through the mining of Nicaraguan harbors and attacks on port facilities. Such acts directly affected harbors and ports, which are vital components in the system of maritime commerce. They threatened far greater and more direct effects on commerce and navigation between the territories of the Parties than did the U.S. actions here, involving offshore platforms that at the relevant times either could not produce oil or could not export oil to the United States.

2.29 Moreover, the mining of ports and the attacks against Nicaraguan facilities that the *Nicaragua* Court found to violate the FCN Treaty occurred in 1983 or early 1984, long before trade between the territories of the United States and Nicaragua ended pursuant to the 1 May 1985 U.S. Executive Order that ended bilateral trade. Accordingly, the U.S. actions in the *Nicaragua* case potentially affected ongoing commerce between the territories of the Parties in a way U.S. actions in this case did not. In contrast to the *Nicaragua* case, the narrowly-targeted U.S. actions against Iran's offshore platforms did

not have a legally significant effect on commerce between the territories of Iran and the United States²⁴⁶.

2.30 In ignoring such critical distinctions, Iran in effect asks the Court to rewrite the 1955 Treaty. It asks the Court to strike the phrase "between the territories of the two High Contracting Parties," and to create a new Article X(1) that declares: "There shall be freedom of commerce and navigation." Such an article, Iran asserts, would be violated whenever "one Party causes harm to the commercial activities of the other"²⁴⁷. This imaginative construction of Article X(1), however, is not supported by the text or by the practice of the Parties. Read "literally" as Iran would have the Court rewrite it, Article X(1) would seem to obligate each Party to maintain full freedom of navigation and commerce with all other countries, an outcome in no way supported by the practice of either the United States or Iran.

2.31 Iran's Memorial urges the Court to dispense with the territorial restrictions of Article X(1) because it is impossible to know to whom Iranian goods introduced into the stream of commerce will ultimately be sold or resold²⁴⁸. As noted above, this ignores the plain wording, which is limited to commerce and navigation "between *the territories of the High Contracting Parties.*" Moreover, Iran essentially asks the

²⁴⁶ Even absent these important factual differences, characteristics of the *Nicaragua* case limit its usefulness in guiding the Court in assessing the 1955 Treaty here. At the jurisdiction phase, both Nicaragua and the United States devoted only limited attention to the FCN Treaty; the Court at the merits stage had the benefit of only Nicaragua's views. As a result, questions such as the legal effect of the counterpart to Article X(1) of the 1955 Treaty were not fully presented. Moreover, at the merits stage, the Court's consideration of the issues related to the FCN Treaty in the *Nicaragua* case were subsidiary to the other, broader bases of the Court's judgment.

²⁴⁷ Iran's Memorial, para. 3.66.

²⁴⁸ *Ibid.*

Court to disregard principles of international trade law which draw significant legal conclusions from the movement through and the conversion in one State of goods originating in another State. It asks the Court to announce new principles under which the export to the United States by a third country of any product at some point connected with Iran, regardless of the form in which it arrives in the United States, becomes "commerce" between the territories of Iran and the United States governed by a bilateral treaty between the United States and Iran. The Court should not rewrite clear treaty language in this inventive way.

2.32 Thus, as we have shown, Iran has not shown that the U.S. actions against the offshore platforms interrupted any commerce potentially subject to Article X(1) of the 1955 Treaty. The Court cannot allow Iran to escape its burden of proving the facts essential to its claims simply by asserting that goods of Iranian origin might some day in some way find their way to the United States. Such suppositions cannot substitute for evidence.

PART III

THE U.S. ACTIONS AGAINST THE OIL PLATFORMS CAME WITHIN THE EXCEPTION CREATED BY ARTICLE XX(1)(D)

INTRODUCTION

3.01 The U.S. actions against Iran's offshore platforms did not violate the 1955 Treaty because they were within the "essential security interests" exception created by Article XX(1)(d) of the Treaty. The plain language of this provision, earlier discussions of similar language by the Court, and the provision's history and context, all show that the U.S. defensive measures are not prohibited by the Treaty.

3.02 The facts presented in Part I of this Counter-Memorial show that these actions were taken to protect essential U.S. security interests, including both the security of U.S. vessels and nationals in the Persian Gulf and essential U.S. security interests of a broader nature in the region. The facts also make clear why these measures were necessary, given the military role of the platforms in facilitating and supporting unlawful mining and small boat, helicopter and missile attacks against U.S. and other neutral vessels. Therefore, pursuant to Article XX(1)(d), the 1955 Treaty does not apply to them.

CHAPTER I

ARTICLE XX(1)(D) CLEARLY APPLIES TO THIS CASE

Section 1. The Language of Article XX(1)(d) Is Broad in Scope

3.03 Article XX of the 1955 Treaty clearly excludes the measures complained of by Iran from the application of the Treaty. Article XX(1)(d) states:

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

.....

(d) . . . necessary ... to protect its [a Party's] essential security interests."

3.04 The first clause establishes that no provision of the Treaty prohibits the types of measures described in the Article. Obligations under the Treaty simply do not apply to, and cannot prohibit or limit, measures falling within the exception. Article XX(1)(d) creates a complete defense to any claim that covered actions violate the Treaty.

3.05 To come within this exception, a Party's measures must have been necessary to protect its essential security interests. This treaty requirement, like any other, is to 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 light of its object and purpose"²⁴⁹.

²⁴⁹ Article 31, Vienna Convention on the Law of Treaties.

3.06 The ordinary meanings of the terms used are clear. A measure is "a plan or course of action intended to attain some object²⁵⁰," that is, "an action taken as a means to an end²⁵¹". There is no reason to believe that the term was used in any narrower sense in the Treaty. The term would therefore include armed actions as well as other types of measures.

3.07 Article XX(1)(d) requires that covered measures be "necessary to protect [a Party's] essential security interests." "Necessary" measures are those "needed to achieve a certain result or effect²⁵²," or that are "required or needful to be done²⁵³". Necessity must be determined in light of the facts.

3.08 The terms "essential" and "security" are also germane. "Essential" conveys the idea of importance; standard dictionaries define "essential" as "affecting the essence of anything; 'material,' important²⁵⁴". Article XX(1)(d) thus applies to security interests of importance, and not to interests that are limited or marginal. The security interests in question here certainly met this standard.

²⁵⁰ 9 *The Oxford English Dictionary*, p. 528 (2d ed. 1989).

²⁵¹ *The American Heritage Dictionary of the English Language*, p. 1117 (3d ed. 1992).

²⁵² *Ibid.*, p. 1207.

²⁵³ 10 *The Oxford English Dictionary*, p. 276 (2d ed. 1989).

²⁵⁴ 5 *The Oxford English Dictionary*, p. 402 (2d ed. 1989).

3.09 The term "security" means "the safety or safeguarding of the interests of a State, organization, person, etc., against danger²⁵⁵," and "freedom from risk or danger; safety²⁵⁶". The plain meaning of the term "security" can thus be quite broad.

Section 2. U.S. Measures Met the Requirements of the Exception

3.10 The actions of the United States in this case fell within the exception created by Article XX(1)(d).

3.11 Iranian actions during this period clearly threatened essential security interests of the United States. The uninterrupted flow of maritime commerce in the Gulf was essential to the economy and security interests of many States, including the United States. This commerce was severely threatened by Iran's repeated attacks on neutral vessels which were neither carrying contraband nor visiting Iraqi ports. These attacks made navigation in the international waters of the Gulf very hazardous, caused substantial damage and financial loss, and dramatically increased maritime insurance rates and other costs of operation.

3.12 Iranian attacks on U.S. warships and commercial vessels also threatened other more immediate U.S. security interests. The lives of U.S. nationals, including members of the U.S. Armed Forces, were put directly at risk. U.S. naval vessels were seriously impeded in escorting U.S.-flag vessels and in other essential security duties. The U.S. Government and U.S. nationals suffered severe financial losses. Any State

²⁵⁵ 14 *The Oxford English Dictionary*, p. 853 (2d ed. 1989).

²⁵⁶ *The American Heritage Dictionary of the English Language*, p. 1632 (3d ed. 1992).

faced with recurring attacks on its warships and commercial vessels would certainly treat such actions as serious threats to its essential security interests. The exception in Article XX(1)(d) clearly applies to such events.

3.13 Further, it was clear at the time of the attacks on *Sea Isle City* and *USS Samuel B. Roberts* that diplomatic measures were not a viable means of deterring Iran from its attacks. As described in Part I²⁵⁷, the United States and other governments made repeated diplomatic protests to the Iranian Government in reaction to earlier Iranian attacks. The issue was raised in the United Nations Security Council, which clearly condemned and demanded an end to Iran's attacks. Iran's conduct, however, made clear that the attacks would continue.

3.14 Accordingly, armed action in self-defense was the only option left to the United States to prevent additional Iranian attacks. As shown in Part I, Iran's offshore oil platforms played an important role in guiding and conducting Iran's attacks on U.S. and other neutral ships²⁵⁸. Military action against these platforms was necessary, in every sense of the word, to protect essential U.S. security interests.

Section 3. Other Governments Also Saw Iran's Actions As Threatening Their Security Interests

3.15 The actions and views of other governments corroborated the U.S. view of the threat to its security. Many other States also saw Iranian actions in the Gulf as

²⁵⁷ See, e.g., *supra*, paras. 1.08 - 1.11, 1.22, 1.24, 1.39, 1.47.

²⁵⁸ *Supra*, paras. 1.84 *et seq.*

threatening both their own interests and global security. The Security Council, in Resolution 552 (1984), expressed deep concern about Iran's attacks. The Council was "[c]onvinced that these attacks constitute a threat to the safety and stability of the area and have serious implications for international peace and security²⁵⁹". In Resolution 598, adopted on 20 July 1987, the Security Council deplored attacks on neutral shipping²⁶⁰.

3.16 Many other States deployed warships to the Gulf in response to Iran's attacks, including Belgium, France, Italy, The Netherlands, the Soviet Union, and the United Kingdom. Some States publicly endorsed the necessity and appropriateness of the U.S. defensive actions against the Iranian oil platforms. Following the Rostam action, the British Government stated that the U.S. action "was entirely justifiable in exercise of their right of self-defence in the face of imminent threat of future attacks²⁶¹". Following the action against Sirri and Sassan, the British Government again expressed its support. The British Secretary of State declared "I do not believe that we would be any nearer preventing the spread of hostilities in the Gulf if the United States refused to

²⁵⁹ Resolution 552, Exhibit 27.

²⁶⁰ Resolution 598, Exhibit 142.

²⁶¹ de Guttry and Ronzitti, p. 370, Exhibit 26.

take action on the provocation offered by this fresh mine-laying incident²⁶².” The

French Government stated that it:

“reaffirms its attachment to the freedom of navigation and safety in the Gulf and has requested an immediate end to mining operations and any other act hostile to shipping in international waters, since such activities can only lead to measures of self-defence being taken in accordance with international law and the United Nations Charter²⁶³.”

²⁶² *Ibid.*, p. 286, Exhibit 26.

²⁶³ *Ibid.*, p. 414, Exhibit 26.

CHAPTER II

THE NICARAGUA CASE DOES NOT LIMIT THE APPLICATION OF THE EXCEPTION HERE

3.17 Language identical to Article XX(1) of the 1955 Treaty also appeared in the U.S. Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua, and was considered in the Court's 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. The Court recognized that the exception in that treaty encompassed measures taken in self-defense:

“[A]ction taken in self-defence, individual or collective, might be considered as part of the wider category of measures qualified in Article XXI as 'necessary to protect' the 'essential security interests' of a party. . . . It is difficult to deny that self-defence against an armed attack corresponds to measures necessary to protect essential security interests²⁶⁴.”

Although the Court thus concluded that the broad concept of "essential security interests" encompasses self-defense against armed attack, it ultimately found that particular U.S. measures involving Nicaragua did not fall within that treaty's exception.

3.18 The United States does not agree with many of the factual and legal conclusions involved in the Court's 1986 Judgment, but these issues are not germane here. The Court's finding with respect to the essential security interests exception in

²⁶⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, para. 224.

that case reflected the Court's view of the facts, and in particular, its view that Nicaragua had not engaged in any armed attack and that there was insufficient evidence of significant Nicaraguan support for insurgent forces in neighboring countries, so that U.S. essential security interests were not threatened. Indeed, the Court considered only one piece of evidence of a threat to U.S. security interests: a 1 May 1985 Presidential finding by President Reagan. The Court stated that, even if this finding showed a threat to national security, it could not justify U.S. actions before it was executed²⁶⁵.

3.19 In contrast, this Counter-Memorial presents extensive evidence showing the threat to U.S. security interests resulting from Iran's continued unlawful attacks on U.S. vessels and its general disruption of neutral maritime commerce in the region.

3.20 The Court also evaluated the necessity of the U.S. measures taken in Nicaragua in response to alleged threats to U.S. security interests, concluding that mining and attacks on ports and oil installations were not "necessary" within the meaning of the Treaty. The Court indicated that a finding of necessity cannot be based wholly on the subjective judgment of a party, and found no evidence that Nicaraguan policies were a threat to essential U.S. security interests²⁶⁶.

3.21 The situation in this case again is dramatically different. The Court has before it a detailed and compelling record showing the necessary connection between U.S. actions and the protection of U.S. security in the face of Iran's continued deadly attacks. The necessity of U.S. actions is shown by specific facts before the Court,

²⁶⁵ *Ibid.*, para. 281.

²⁶⁶ *Ibid.*, para 282.

documenting Iran's widespread attacks on shipping. The dangers of letting such attacks on U.S. vessels continue without response were not subjective or hypothetical. The evidence shows that lives, the safety of ships, and vital sea lanes were at risk.

3.22 Thus, the application of the treaty exception in this case involves circumstances fundamentally different from those in the *Nicaragua* case. Here, the evidence compels the conclusion that the U.S. measures were necessary to protect the essential security interests of the United States.

CHAPTER III
THE HISTORY AND CONTEXT OF ARTICLE
XX(1)(D) CONFIRM ITS BROAD SCOPE

3.23 The background of Article XX(1)(d) confirms that it creates a broad exception applicable in this case. The Court has already noted that in interpreting the 1955 Treaty, "recourse may be had to supplementary means of interpretation such as the preparatory work and the circumstances in which the treaty was concluded²⁶⁷", and has considered other similar U.S. treaties in construing the 1955 Treaty²⁶⁸. Iran has likewise cited such materials as guides to interpretation²⁶⁹.

3.24 This section shows how the history of Article XX(1)(d), and of corresponding provisions in other FCN Treaties, confirms the breadth of the Article XX(1)(d) exemption. This history shows that the "essential security interests" provision is a broad exception intended to cover a wide range of measures and situations. It confirms, as the Court said in the *Nicaragua* case, that "the concept of essential security

²⁶⁷ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, para. 23.

²⁶⁸ *Ibid.*, paras. 29 and 47.

²⁶⁹ See, e.g., Iran's Memorial paras. 2.24 - 2.27 and 3.27.

interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past²⁷⁰.

3.25 The predecessors to "essential security" clauses in U.S. treaties were originally designed primarily for cases of war or hostilities, but they were later extended to apply to other situations. The first such clause appears to have been in a 1938 trade agreement between the United States and Canada. It provided that nothing in the agreement "shall be construed to prevent the enforcement of such measures" as either party "may see fit to adopt . . . (c) relating to neutrality or to public security; or (d) should that country be engaged in hostilities or war²⁷¹". Similar provisions were included in wartime U.S. trade agreements in the early 1940's. These helped to remedy uncertainty stemming from the unsettled state of customary international law as to the effect of war on treaties.

3.26 Following the Second World War, the scope of such exceptions was broadened. Treaties had to be reconciled with the Charter, which authorized Security Council sanctions and other actions potentially affecting treaty compliance. Moreover, in light of Article 2(4) of the Charter, "war" seemed less likely to provide the relevant legal framework. Other possible uses of force, as well as other possible emergency situations, had to be addressed.

²⁷⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, para. 224.

²⁷¹ Reciprocal Trade Agreement, 17 November 1938, United States - Canada, Article XII(1), 53 Stat. 2348, EAS No. 149, Exhibit 143.

3.27 The "essential security" provision in the 1955 Treaty evolved against this background. The first U.S. post-war FCN treaty, signed in 1946 with China, provided in Article XXVI(1)(d) that:

"1. Nothing in this Treaty shall be construed to prevent the adoption or enforcement of measures:

.....
(d) necessary in pursuance of obligations for the maintenance of international peace and security, or for the protection of the essential interests of the country in time of national emergency²⁷²."

3.28 This provision was thought to confer broad rights of unilateral action. The State Department report on the Treaty for the Senate stated that "exceptions also are included to give the two parties the requisite freedom of action in times of national emergency²⁷³". Another State Department memorandum for the Senate noted that:

"certain important subjects, notably . . . the 'essential interests of the country in time of national emergency,' are specifically excepted from the purview of the treaty. In view of the above, it is difficult to conceive of how article XXVIII could result in this Government's being impleaded in a matter in which it might be embarrassed²⁷⁴."

²⁷² Treaty of Friendship, Commerce, and Navigation between the United States of America and the Republic of China, 4 November 1946, 63 Stat. 1299, TIAS No. 1871, 25 UNTS 69, Exhibit 144.

²⁷³ *Friendship, Commerce, and Navigation with China: Message from the President of the United States*, S. Exec. Doc. J, 80th Cong., 1st Sess., p. 3 (1947), Exhibit 145.

²⁷⁴ *A Treaty of Friendship, Commerce, and Navigation between the United States of America and the Republic of China: Hearing before a Subcommittee of the Senate Committee on Foreign Relations*, 80th Cong., 2d Sess., p. 30 (1948), Exhibit 146. Article XXVIII was the dispute settlement clause in that treaty.

The Senate Foreign Relations Committee's Report on the Treaty similarly emphasized the Senate's view that under the Treaty, "[w]e retain freedom of action in times of national emergency²⁷⁵".

3.29 The second FCN Treaty, with Italy in 1948, contained an "essential interests" clause like that in the treaty with China.²⁷⁶ The U.S. FCN Treaty with Ireland in 1950, however, made important changes in the scope of this clause and set the pattern for later treaties, including the 1955 Treaty between the United States and Iran. Article XX(1) of the 1950 United States - Ireland treaty reads:

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

.....
(d) necessary . . . to protect its essential security interests²⁷⁷."

3.30 The 1950 text thus added the word "security" to give greater precision regarding the interests to be protected. The new text also dropped the previous limitation to actions taken "in time of national emergency." Action was authorized whenever it was "necessary . . . to protect . . . [a party's] essential security interests." The exception was no longer restricted to circumstances of "war," "hostilities," or "national emergency."

²⁷⁵ *Treaty of Friendship, Commerce, and Navigation with China*, S. Exec. Rep. No. 8, 80th Cong., 2d Sess., p. 3 (1948), Exhibit 147.

²⁷⁶ *Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic*, 2 February 1948, 63 Stat. 2255, TIAS No. 1965, 79 UNTS 171.

²⁷⁷ *Treaty of Friendship, Commerce and Navigation between the United States of America and Ireland*, 21 January 1950, 1 UST 785, TIAS No. 2155, 206 UNTS 269, Exhibit 148.

3.31 The "essential security" clause in the United States - Ireland FCN Treaty was repeated in ensuing FCN Treaties, including the 1955 Treaty between the United States and Iran. The clause consistently was seen to create a broad and far-reaching exception. Senator Hickenlooper summed up this view in 1953, during the final Senate debate on several such treaties:

"These treaties have been formulated . . . to avoid any interference with or qualifications of the right of the United States to apply such security measures as it may find necessary. . . . Each of the treaties . . . contains a general reservation making it clear that nothing in the treaty shall be deemed to affect the right of either party to apply measures 'necessary to protect its essential security interests'²⁷⁸."

3.32 In 1954, the year in which the United States and Iran began FCN Treaty negotiations, the United States was also negotiating similar treaties with Germany and The Netherlands. Germany, concerned about the breadth of the exception, sought a definition of the words "to protect its essential security interests." The U.S. side argued against such a definition. It explained that:

"no precise delineation or interpretation existed for this expression and that the language had been drafted in such a manner as to leave a wide area of discretion to both parties in order to allow for necessary action over an indefinite future. They added that no serious consequences were expected from this reservation as long as the relations between both countries remained friendly, and stressed the word [sic] 'necessary' and 'essential' had been added to emphasize that the reservation was not to be invoked in a frivolous manner²⁷⁹."

²⁷⁸ 99 *Congressional Record*, p. 9315 (1953), Exhibit 149.

²⁷⁹ Dispatch No. 2254 from U.S. High Commission, Bonn to U.S. Department of State, 17 February 1954, pp. 1-2, Exhibit 150.

3.33 The German delegation then asked whether the clause was justiciable. The U.S. side thought "that national as well as international courts would probably give very heavy weight to arguments presented by the government invoking the reservation and would have difficulty in finding a justiciable issue²⁸⁰". The U.S. negotiators cited the Senate debate of 21 July 1953, cited above, as showing the importance and breadth of the exception.

3.34 In the negotiations between the United States and the Netherlands, the Netherlands delegation also sought to narrow the security interests exception. The U.S. side did not agree:

"[T]hey concurred in the thought that this reservation was to be used for serious reasons, and was not intended to be a loophole through which arbitrary actions would or could be taken so as to defeat the purposes of the Treaty. The U.S. side emphasized that the presence in the Treaty of an ample security reservation is, however, deemed essential by the United States. They added that they could see no advantage whatsoever in trying to elaborate on the present wording, and that any attempt to elaborate on it would give rise to misapprehensions lest its scope was being narrowed to the detriment of the United States to take the measures it might consider essential or vital to the national security. . . . They emphasized that each Party would have to determine, according to its own discretion, what was essential from the viewpoint of its security interests²⁸¹."

3.35 The negotiators ultimately agreed to a Protocol to the FCN Treaty recording their common understanding that "each Party determines, according to its own best

²⁸⁰ *Ibid.*, p. 3.

²⁸¹ Dispatch No. 238 from U.S. Embassy, The Hague to U.S. Department of State, 15 September 1954, p. 2, Exhibit 151. See also, Dispatch No. 107 from U.S. Embassy, The Hague, to U.S. Department of State, 3 August 1954, Exhibit 152.

judgment, the measures deemed necessary to protect its essential security interests²⁸² .

3.36 The specific wording of the "essential security" clause does not appear to have been examined in detail during the negotiations between Iran and the United States on the 1955 Treaty. However, the clause was cited at least twice in contexts showing that it was understood to create a broad exception. In response to Iran's concerns that the Treaty would permit foreign state enterprises to acquire control of Iranian corporations by purchasing stock, the U.S. side , *inter alia*, cited the security interests clause as showing how the U.S. draft treaty need not compel this result²⁸³ .

3.37 The State Department also instructed the U.S. Embassy to reject an Iranian proposal to subject the right to entry in Article II to " internal safety regulations"²⁸⁴ . The U.S. side contended that the right to enforce internal safety regulations was amply covered by Article XX(1)(d). The Embassy was authorized to provide a written statement recording that the treaty recognized the paramount right of a State to take measures to protect itself and public safety.

3.38 In sum, the history and context of Article XX(1)(d), including the history of similar articles in other treaties, confirm that it creates a broad exception to the obligations of the 1955 Treaty for all types of measures needed to protect essential

²⁸² Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of the Netherlands, 17 March 1956, Protocol, para. 18, 8 UST 2043, TIAS No. 3942, 285 UNTS 231, Exhibit 153.

²⁸³ Telegram No. 1174 from U.S. Department of State to U.S. Embassy, Tehran, 13 December 1954, p. 2 , Exhibit 154.

²⁸⁴ Telegram No. 1561 from U.S. Department of State to U.S. Embassy , Tehran, 15 February 1955, Exhibit 155.

security interests. The article leaves each Party wide discretion to determine, according to its own best judgment of the circumstances, the measures necessary to protect its security interests.

CHAPTER IV

THE APPLICATION OF ARTICLE XXI(1)(D) OBVIATES THE NEED TO RESOLVE A NUMBER OF ISSUES REGARDING THE RIGHT OF SELF-DEFENSE

3.39 The next section of this Counter-Memorial will explain in detail the position of the United States that its actions against the Iranian platforms were lawful exercises of the right of self-defense. The Court's review of this position would require judgments, *inter alia*, as to whether the preceding Iranian actions constituted armed attacks, whether the U.S. response met the requirements of necessity and proportionality, and whether any aspect of the timing or selection of targets affects the validity of U.S. actions as legitimate measures of self-defense.

3.40 Except for the issue of the necessity for U.S. actions, none of these issues must be decided in order to apply Article XX(1)(d). If the measures taken were necessary to protect essential U.S. interests, they are excluded from the Treaty without regard to their compliance with any other criteria, including the requirements for the exercise of self-defense. This is consistent with the purpose of Article XX(1)(d), which was to exclude such measures from scrutiny under the Treaty. Of course, this would not exempt them from the reach of other applicable rules of international law -- including limits on the use of force and the law of self-defense. However, such matters would fall outside the jurisdiction of the Court in this case, which is limited to the Treaty.

3.41 Accordingly, if the Court concludes that U.S. actions fall within Article XX(1)(d), it need not, and indeed, may not, proceed further with respect to the issues discussed in the following section of this Counter-Memorial.

PART IV

U.S. MEASURES WERE LAWFUL ACTIONS IN SELF-DEFENSE

CHAPTER I

THE ACTIONS OF U.S. FORCES AGAINST THE OFFSHORE PLATFORMS WERE LAWFUL ACTIONS IN SELF-DEFENSE RESPONDING TO ARMED ATTACKS BY IRAN

4.01 While the United Nations Charter bans most uses of force, it also makes abundantly clear that States subjected to armed attack have the right to act in self-defense. The United States will show in this section that U.S. actions met all legal requirements for the exercise of self-defense. They were taken in response to armed attacks by Iranian forces on U.S. naval and commercial vessels. They were necessary in order to curb Iran's ability to continue such attacks and to restore the security of U.S. vessels. They were proportional to Iran's armed attacks. They were timely. They complied fully with all other relevant requirements of the law of armed conflict.

4.02 Iran in its Memorial agrees that such actions, if taken in lawful self-defense, are not wrongful:

“The preclusion of the wrongfulness of an act of a State by a lawful measure of self-defence *is well-established* and is reflected in Article 34 of the 1980 draft Articles on the Law of State Responsibility, prepared by the International Law Commission²⁸⁵.”

²⁸⁵ Iran's Memorial, para. 4.11 (citation omitted, emphasis added).

We agree with Iran in this respect. If the U.S. measures were lawful acts of self-defense, they were not wrongful, under the 1955 Treaty or otherwise.

4.03 Resolution of the issues raised in this Part of the Statement of Defense thus calls for the Court to examine the right of self-defense. The right of self-defense in response to armed attack is today of fundamental importance to the safety and stability of the international order. The United Nations Charter contains a vital system for collective security, but, as the Court is well aware, that system cannot ensure the protection of States from unlawful armed attack in all circumstances. Hence, as the Charter recognizes, States must be able to ensure their continued existence and to protect themselves from armed attack through the appropriate use of armed force for the limited purpose of self-defense. In practice, it remains true that "[t]he scope of the right of self-defense within international society may largely determine the degree of security states legally enjoy²⁸⁶."

4.04 Thus, this case poses matters of great importance to the international order. The Court's judgment can have profound implications for the protection and preservation of international peace and security.

²⁸⁶ Robert Tucker, "Reprisals and Self-Defense: The Customary Law," *66 American Journal of International Law*, pp. 590-91 (1972).

CHAPTER II

THE U.S. ACTIONS SATISFIED THE CHARTER'S REQUIREMENTS REGARDING FORCE AND SELF-DEFENSE

Section 1. Self-Defense and the Charter

4.05 The U.S. actions in this case were taken for limited defensive purposes in response to armed attacks by Iran. They were not aimed at altering the integrity or political independence of the Islamic Republic of Iran, or at changing its territorial or maritime boundaries or system of government. The U.S. actions were not carried out to punish Iran or to damage its economy. Instead, they were taken for the limited purpose of restoring the security of U.S. vessels and their crews by eliminating facilities used by Iran to conduct or support unlawful armed attacks against them.

4.06 These actions were quintessential actions in self-defense permitted by the Charter.

Article 51 of the Charter expressly recognizes and affirms the inherent right of self-defense:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council”

As we shall show, the United States consistently acted in accordance with these requirements²⁸⁷.

²⁸⁷ *Inter alia*, immediately following its actions against Rostam, Sirri and Sassan, the United States submitted to the Security Council the reports required by Article 51. Exhibits 100 and 130.

4.07 Neither the text nor history of Article 51²⁸⁸, nor the practice of States, indicates that the right of self-defense is to be construed narrowly or that it is, as some suggest, “a privilege²⁸⁹.” The right of self-defense remains a fundamental safeguard of the contemporary international order. It cannot be construed in artificial or unreasonable ways that deny States facing armed attack the right and capacity to defend their security²⁹⁰.

Section 2. The Right of Self-Defense Must Be Assessed in Light of All the Surrounding Circumstances

4.08 Like other important parts of the law regulating the use of force, the legality of acts as self-defense can only be determined in relation to specific events and circumstances. The applicable legal standards “have to be interpreted and applied to individual cases. Facts, analysis and deliberation will be required to reach appropriate conclusions that take into account both standards and circumstances²⁹¹.”

²⁸⁸ On the history of Article 51, see, e.g., Yoram Dinstein, *War, Aggression and Self-Defence*, p. 177 (2nd, ed. 1994); Myres McDougal and Florentino Feliciano, *The International Law of War: Transnational Coercion and World Public Order*, p. 235 (1994) (“It is of common record in the preparatory work of the Charter that Article 51 was not drafted for the purpose of deliberately narrowing the customary-law permission of self-defense against a current or imminent unlawful attack by raising the required degree of necessity. The moving purpose was, rather, to accommodate regional security organizations (most specifically the Inter-American system...) within the Charter’s scheme...”); Oscar Schachter, “The Right of States to Use Armed Force,” 82 *Michigan Law Review*, pp. 1633-34 (1984).

²⁸⁹ Ian Brownlie, *International Law and the Use of Force by States*, p. 273 (1963).

²⁹⁰ On the contemporary importance of self-defense, see, e.g., Dinstein, *supra*, p. 204 (“The facts of life at present are such that a State confronted with an armed attack cannot seriously expect an effective international police force to come to its aid . . .”); McDougal and Feliciano, *supra*, pp. 235-38.

²⁹¹ Oscar Schachter, *International Law in Theory and Practice*, p. 147 (1991).

4.09 General Principle 5 of the *San Remo Manual* emphasizes that the nature and extent of military action necessary in each case of self-defense depends on the circumstances. "How far a State is justified in its military actions against the enemy will depend upon the intensity and scale of the armed attack for which the enemy is responsible and the gravity of the threat posed²⁹²." Thus, the overall pattern of Iran's continuing deadly and illegal uses of force must be taken into account in applying the elements of the law of self-defense.

4.10 As the next section will demonstrate, each of the two specific attacks that preceded United States defensive measures -- the missile attack on *Sea Isle City*, and the mining of the *USS Samuel B. Roberts* -- was an armed attack giving rise to the right of self-defense. However, the evidence shows that these attacks were part of a larger pattern of Iranian actions involving the unlawful use of force against U.S. and other neutral vessels. This pattern of Iranian conduct added to the gravity of the specific attacks, reinforced the necessity of action in self-defense, and helped to shape the appropriate response.

²⁹² *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Principle 5, at p. 7. (Louise Doswald-Beck, ed.) (1995, hereinafter "*San Remo Manual*"). While not agreeing with the *San Remo Manual* in all respects, the United States believes that most of its provisions reflect customary international law.

CHAPTER III

IRAN'S ACTIONS WERE ARMED ATTACKS

Section 1. Iran's Actions Were Armed Attacks

4.11 Article 51 preserves the inherent right of self-defense where there is an armed attack against a Member of the United Nations. Under any plausible definition, Iran's actions here were armed attacks. The defensive actions of the United States against the platforms followed two specific attacks -- the missile attack on the U.S.-flag tanker *Sea Isle City* on 16 October 1987 and the mining attack on *USS Samuel B. Roberts* on 14 April 1988. As the evidence shows, Iran attacked these vessels using powerful and deadly weapons causing injury, great danger to life, and extensive damage to property. These were not isolated border incursions by a few soldiers following a confused or rash junior officer, or other matters of limited consequence. These were deliberate, dangerous military actions that were part of a broad pattern of unlawful use of force by Iran against U.S. vessels and their naval escorts participating in Operation Earnest Will.

4.12 These were clearly armed attacks giving rise to the right of self-defense. The Definition of Aggression adopted by the General Assembly includes as an act of aggression "[a]n attack by the armed forces of a State on the land, sea or air forces, or marine or air fleets of another State²⁹³." Professor Brownlie writes that "the conditions in which forcible measures of

²⁹³ Article 3(d), Definition of Aggression. GA Res. 3314 (XXIX)(14 December 1974), Annex, GAOR 29th Sess. Supp. No. 31 (Vol. 1), Doc. A/9631.

self-defence are justified are: (a) The occurrence of a resort to force which affects the state . . . or ships . . . under its protection (if these are attacked on or over the high seas. . .)²⁹⁴.”

Section 2. The Attack on *Sea Isle City* Was an Armed Attack Against the United States

4.13 Iran contends that the Court cannot consider the missile attack on the *Sea Isle City* as an armed attack on the United States because the ship lacked any connection to the United States. “[T]he *Sea Isle City* had no connection with the United States and an attack on this vessel could not justify the exercise of the right of self-defence by the United States²⁹⁵.” This claim cannot stand. *Sea Isle City* was properly registered in the United States and flew the U.S. flag in compliance with all applicable standards of international and U.S. law. She was a U.S.-flag vessel, and the attack upon her justified acts of self-defense by the United States²⁹⁶.

4.14 The applicable international law on nationality of ships was codified in two international conventions, the 1958 Convention on the High Seas²⁹⁷ and the 1982 UN Convention on the Law of the Sea²⁹⁸. The United States is party to the first and not the second, although it views the provisions in the 1982 Convention on nationality of ships as reflective of

²⁹⁴ Ian Brownlie, *International Law and the Use of Force by States*, p. 433 (1963) (emphasis added)

²⁹⁵ Iran’s Memorial, para. 4.75.

²⁹⁶ The following discussion relates to *Sea Isle City*, but her situation is identical in these respects to the other ten tankers formerly registered in Kuwait that transferred to U.S. registry: *Bridgeton*, *Chesapeake City*, *Gas King*, *Gas Prince*, *Gas Princess*, *Gas Queen*, *Middleton*, *Ocean City*, *Surf City* and *Townsend*.

²⁹⁷ 1958 Convention on the High Seas, 13 UST 2312, TIAS 5200, 450 UNTS 82. Articles 4-6 of the 1958 Convention address nationality of ships. See Exhibit 156.

²⁹⁸ 1982 UN Convention on the Law of the Sea, U.N. DOC A/CONF.62/122, entered into force 16 November 1994. Articles 91-92 and 94 address nationality of ships. See Exhibit 157.

customary international law. Iran is not party to either Convention. The relevant provisions of both Conventions are substantially the same -- some provisions are identical. The U.S. registration of the former Kuwaiti vessels satisfied fully the requirements of both Conventions.

4.15 Under international law, States have the right to confer their nationality on ships by registering the ship, authorizing it to fly its flag, and issuing papers documenting the ship's nationality. There are two fundamental limitations on registration of vessels. First, vessels may only be registered to one State²⁹⁹. Registration of *Sea Isle City* was transferred exclusively to the United States.

4.16 Second, there must be a "genuine link" between the ship and its flag State. Both the 1958 and 1982 Conventions show that this concept requires that a State effectively exercise jurisdiction and control over administrative, technical and social matters aboard a vessel³⁰⁰. Additionally, States "shall take such measures for ships under its flag as are necessary to ensure safety at sea . . . ³⁰¹." The domestic measures taken by the United States in connection with *Sea Isle City* fully met these requirements. The grant of U.S. registry to the vessel subjected it to a range of requirements and stringent controls under U.S. law, including, inter alia, strict safety requirements. There was indeed a "genuine link" between the vessel and the United States.

²⁹⁹ 1958 Convention, art. 6: "Ships shall sail under the flag of one State only . . .". 1982 Convention, art. 92: "ships shall sail under the flag of one State only."

³⁰⁰ 1958 Convention, art. 5: "There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." 1982 Convention, art. 91(1): "There must exist a genuine link between the State and the ship"; and art. 94(1): "Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

³⁰¹ 1958 Convention, art. 10(1); 1982 Convention, art. 94(3).

4.17 The international legal requirements for the grant of U.S. nationality of vessels have been implemented through a series of U.S. statutory and administrative provisions³⁰². In brief, U.S. law requires that vessels be designed, constructed, and equipped to ensure safe operation³⁰³, and that vessels have a U.S. captain and be manned by the appropriate number of properly trained officers and crew³⁰⁴. The U.S. Coast Guard is required to inspect vessels to ensure compliance with all design, construction, equipment and manning requirements³⁰⁵. This elaborate statutory and regulatory scheme was applied to *Sea Isle City* and fully satisfied the international law requirement of "genuine link." The United States effectively exercised jurisdiction and control over administrative, technical, and social matters, as well as over operational safety.

4.18 Registration of *Sea Isle City* and other similarly situated vessels was done in conformity to existing U.S. laws and regulations. No new laws or regulations were enacted. Appropriate certificates of documentation were issued³⁰⁶. Ownership and title of the vessels were transferred to a U.S. corporation, and the vessels became subject to U.S. legal requirements authorizing the U.S. Government to requisition them in the event of a national emergency.

³⁰² Relevant statutes and regulations are reproduced at Exhibit 158.

³⁰³ Code of Federal Regulations, Title 46, Chapter 33, Section 3306. Exhibit 158.

³⁰⁴ Code of Federal Regulations, Title 46, Chapter 121, Section 12110(d); Title 46, Chapter 81, Sections 8101-8103. Exhibit 158.

³⁰⁵ Code of Federal Regulations, Title 46, Chapter 33, Section 3306. Exhibit 158.

³⁰⁶ *Sea Isle City's* U.S. registration documents are at Exhibit 159. The General Index or Abstract of Title reflects that the vessel was transferred to Chesapeake Shipping, Inc. and renamed *Sea Isle City* on 10 June 1987.

Accordingly, *Sea Isle City* possessed a genuine link with the United States, and was fully entitled to the registry and protection of the United States.

Section 3. The *Nicaragua* Decision and Armed Attack

4.19 Nothing in this Court's brief discussion of the concept of armed attack in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, affects the conclusion that these were armed attacks. The Court there primarily considered whether the sending of armed bands or irregular forces can constitute an armed attack, concluding that they would if they were of such gravity as to constitute an armed attack if carried out by regular forces³⁰⁷. Nothing in the Court's opinion suggested that mine and missile attacks on naval and commercial vessels were anything less than an armed attack.

4.20 Thus, the evidence shows convincingly that the United States acted in response to serious armed attacks by Iran. Should the Court conclude that these were not armed attacks, extremely difficult questions would arise for the international legal order. It cannot be that international law leaves a State unable to defend itself if its vessels are subjected to deadly attacks by missiles and mines.

³⁰⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, para. 195.

CHAPTER IV

THE USE OF FORCE WAS NECESSARY

4.21 As the Court recently has confirmed, the use of force in self-defense is subject to the fundamental requirements of necessity and proportionality:

“The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (I.C.J. Reports 1986, p. 94, para. 176.): ‘There is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.’ This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed³⁰⁸.”

The *San Remo Manual* makes clear that the “principles of necessity and proportionality apply equally to armed conflict at sea and require that the conduct of hostilities by a State should not exceed the degree and kind of force . . . required to repel an armed attack against it and to restore its security³⁰⁹.” The U.S. Navy’s *Commander’s Handbook on the Law of Naval Operations* similarly provides that the use of self-defense is subject to the requirements of necessity and proportionality³¹⁰.

³⁰⁸ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, para. 41.

³⁰⁹ *San Remo Manual*, Principle 4, at p. 7.

³¹⁰ U.S. Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations (NWP 1-14M)*, October 1995, (hereinafter, *Commander’s Handbook*) section 4.3.2., Exhibit 160. The *Commander’s Handbook* is widely regarded as an authoritative statement of the legal rules governing the

4.22 The U.S. actions at issue here satisfied both requirements. This section will analyze the requirement of necessity, showing how the actions taken by the United States were necessary "to repel an armed attack and to restore its security," in the words of the *San Remo Manual*. The next section will analyze proportionality.

Section 1. There Were No Peaceful Alternatives to Self-Defense

4.23 Action in self-defense was necessary because peaceful means could not bring an end to Iran's repeated uses of force culminating in the armed attacks on *Sea Isle City* and *USS Samuel B. Roberts*. Diplomatic efforts did not succeed in eliminating the threats to U.S. vessels. The United States and other countries resorted to the Security Council, seeking a halt to Iran's dangerous behavior. Through diplomatic communications transmitted to Iran through the Swiss protecting power, the United States called for Iranian restraint³¹¹. All such diplomatic efforts failed. Iran's aggressive behavior continued.

4.24 Moreover, when the armed attacks on the *Sea Isle City* and on the *USS Samuel B. Roberts* took place, Iran consistently denied responsibility for them, as it continues to deny responsibility to this day³¹². Indeed, Iran seeks to deny, or in any event to

law of armed conflict at sea. It is used by approximately 25 nations as a principal legal guide regarding these matters.

³¹¹ See, e.g., *supra* paras. 1.22, 1.24, 1.39, 1.47.

³¹² See, e.g., Iran's Memorial, paras. 4.66, 4.74; Iran's Objections and Submissions on the United States Preliminary Objection, Vol. I, paras. 1.04 - 1.05, 3.44, and Annex paras. 36-52. (While Iran denies responsibility for these attacks in these proceedings, Iranian leaders in other fora have been less circumspect. See *supra* paras. 1.30, 1.31, 1.42, 1.112.)

minimize, its involvement in the numerous and well-documented Iranian attacks on neutral vessels in the Gulf³¹³.

4.25 Thus, this case stands in sharp contrast to Iraq's missile attack on *USS Stark*. Iran asserts that the United States did not act even-handedly, because it did not respond militarily to the missile attack on *USS Stark*³¹⁴. This is not correct. The missile firing on *USS Stark* was an isolated and unintended event, not part of a systematic and continuing pattern of attacks on U.S. vessels. There was no indication or reason to believe that Iraq had deliberately attacked a U.S. vessel. Following the event, Iraq expressed regret, offered compensation and promptly entered into diplomatic negotiations to address claims and settle the matter on mutually agreed terms. Thus, unlike Iran, Iraq acknowledged its responsibility for the damage it caused and entered into a negotiated peaceful resolution.

4.26 Iran's continuing refusals to moderate its behavior, and its constant denials of involvement, ruled out the possibility of any peaceful diplomatic solution. In the absence of peaceful means to restore security, military action in self-defense became necessary.

Section 2. Action in Self-Defense Was Necessary to Restore Security

4.27 The right to use force in self-defense is not limited to repelling an attack while it is in progress. A State can also use force in self-defense to remove continuing threats to its future security. As the *San Remo Manual* explains, a State that has been attacked "is entitled to resort

³¹³ See, e.g., Iran's Memorial, paras. 4.52, 4.62 (the latter paragraph includes a quotation describing deliberate machine gun and rocket attacks on ships' bridges by Iranian Revolutionary Guard Forces.)

³¹⁴ Iran's Observations and Submissions to the United States Preliminary Objections at para. 1.14, Annex, para. 23.

to force against the attacker but only to the extent necessary to defend itself and to achieve such defensive goals as repelling the attack, recovering territory, *and removing threats to its future security*³¹⁵.” Professor Henkin agrees that “self-defense includes a right both to repel the armed attack and to take the war to the aggressor state in order effectively to terminate the attack and prevent a recurrence³¹⁶.” Professor Schachter adds that use of force may be justified “when a State has good reason to expect a series of attacks from the same source and such retaliation serves a deterrent or protective function³¹⁷.”

4.28 Iran’s position is apparently that self-defense is limited to actions to repel an attack while it is in progress³¹⁸. Iran’s Memorial refers to the possibility that:

“[T]here may be circumstances in which the victim State has experienced a series of attacks, and apprehends further attacks, so that the measures taken, although after the last actual attack are designed to protect the State against future attacks. An illustration would be in the destruction of bases from which attacks had occurred in the past, and from which future attacks were anticipated.”

Iran seems to contend that such action would not be self-defense³¹⁹.

4.29 Such a limited view would render self-defense illusory in cases like this. The armed attacks here lasted only a few seconds. They involved mines secretly hidden in the sea and anti-ship missiles that struck anonymously and with little warning. Following such attacks, the

³¹⁵ *San Remo Manual*, p. 76 (emphasis added).

³¹⁶ Louis Henkin, “Use of Force: Law and U.S. Policy,” p. 45 in *Right v. Might. International Law and the Use of Force* (Council on Foreign Relations) (2nd. ed., 1991).

³¹⁷ Oscar Schachter, *International Law in Theory and Practice*, p. 154 (1991).

³¹⁸ Iran’s Memorial, para. 4.32

³¹⁹ Iran’s Memorial, para 4.33 (emphasis in original).

status quo ante could not be restored simply by driving an attacking force back across the border from whence they came. Mines had exploded and missiles had been fired; sailors were gravely injured and vessels damaged. The threat of further attacks against U.S. vessels and their naval escorts continued. Thus, it was necessary to restore conditions in which the vessels of the party that was attacked could again go about their lawful business safely and freely³²⁰.

4.30 The U.S. actions against these offshore platforms were necessary to restore such conditions for the safety of navigation. As Part I shows in detail, the offshore platforms destroyed by U.S. forces were used by Iran to identify and target vessels for attack. They were part of Iran's system of command and control, for directing attacks by Iranian combat forces, and were used as bases for attacking vessels and aircraft. Iran claims that the U.S. attacks were unlawful because they involved the wrong target, insisting that these platforms had little military use³²¹. The Court must judge the persuasiveness and integrity of this position in light of the compelling evidence presented regarding the platforms' role in Iran's attacks on shipping.

³²⁰ The U.S. Navy's *Commander's Handbook* specifies that the use of force in self-defense must be "in all circumstances limited in intensity, duration, and scope to that which is reasonably required to counter the attack or threat of attack *and to ensure the continued safety of U.S. forces.*" Section 4.3.2 (emphasis added.) Exhibit 160.

³²¹ Iran's Memorial, paras.1.101 - 1.103.

CHAPTER V

THE U.S. USE OF FORCE WAS PROPORTIONATE

4.31 Actions in self-defense must be proportionate. Force can be used in self-defense, but only to the extent that it is required to repel the armed attack and to restore the security of the party attacked³²².

4.32 Proportionality does not require that actions taken in self-defense be limited to a mirror image of the armed attacks that have been suffered. On this particular point, like Iran, we agree with Judge Ago:

"It would be mistaken . . . to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the "defensive" action, and not the forms, substance and strength of the action itself Its lawfulness cannot be measured except by its capacity for achieving the desired result³²³."

Similarly, proportionality does not necessity dictate that defensive actions be restricted to a particular geographic zone. "[I]t does not seem unreasonable as a rule to allow a State to retaliate beyond the immediate area of the attack when that State has sufficient reason to expect continuation of attacks (with substantial military weapons) from the same source³²⁴."

³²² *San Remo Manual*, General Provisions 4 and 5, p. 7.

³²³ Iranian Memorial, para. 4.21, quoting Roberto Ago, "Addendum to the Eighth Report on State Responsibility," *Yearbook of the International Law Commission*, 1980, Vol. II, Part One, Doc. A/CN.4/318/ADD.5-7, p. 60, para 121. (Hereinafter, "Ago Report.")

³²⁴ Oscar Schachter, *International Law in Theory and Practice*, p. 154 (1991).

4.33 The U.S. actions in this case were proportionate both to Iran's armed attacks on U.S. vessels and to the circumstances created by those attacks. Iran's attacks were extremely serious in themselves. Iran used deadly weapons that inflicted casualties on the crews of the *Sea Isle City* and the *USS Samuel B. Roberts* and badly damaged both vessels. Only chance, and the exertions and skill of the crew of the *USS Samuel B. Roberts*, prevented the sinking of the ship and substantial loss of life. The gravity of these attacks was magnified by the history of unlawful and aggressive Iranian conduct and by Iran's clear hostility to the continued operation of U.S. vessels in the Gulf. The attacks on *Sea Isle City* and *USS Samuel B. Roberts* were not isolated events. They were parts of a recurring pattern of attacks on U.S. vessels and their naval escorts that began with the mining of the *Bridgeton* on 24 July 1987 and that posed a clear threat of further attacks.

4.34 Thus, U.S. authorities had to identify proportionate military actions that could help to restore the safety of U.S. vessels. As the record shows, U.S. authorities considered a range of possible actions to do so. Some options were rejected because of concerns related to proportionality, among other factors. Some possible targets were rejected because their destruction threatened an excessive level of casualties or of damage to civilian property;

because they threatened expanding the scope or level of conflict between the United States and Iran; or for other similar reasons³²⁵.

4.35 The targets ultimately chosen were installations used for military purposes, whose destruction helped substantially to restore the safety of navigation and was proportionate to Iran's armed attacks. The U.S. uses of force were limited in time, place and objective. Further, the choice of these targets greatly limited the risk of collateral damage. The targets were not located in or near population centers. Substantial (and successful) efforts were made to further limit the extent of casualties and of damage to non-military targets; so far as the United States is aware, there were no Iranian casualties in these operations. The targets chosen -- offshore platforms with relatively small crews -- by their nature limited the risk of Iranian casualties. U.S. forces warned Iranian personnel on the platforms and allowed them to evacuate to safety before the platforms were fired on. (No similar warning was given to the crews of the *Sea Isle City* and the *USS Samuel B. Roberts*.) Finally, the platforms were not completely destroyed. The damage inflicted was consistent with the U.S. purpose of neutralizing their military functions threatening U.S. vessels.

³²⁵ See *supra* paras. 1.81 - 1.84, 1.113 - 1.120.

CHAPTER VI

THE U.S. ACTIONS WERE TIMELY

4.36 Iran contends that the U.S. actions were not self-defense because they were taken after the armed attacks on U.S. vessels. Iran contends that “in the nature of things measures of defence against an armed attack have to be undertaken during the actual attack³²⁶.”

4.37 The Court cannot accept this contention. As we have shown, Iran’s position would render self-defensive measures against attacks at sea by mines or missiles impossible, for attacks by such weapons last but a few seconds, and the initiators of the attack may be many miles away. Accepting Iran’s position would merely encourage an aggressor to adopt such methods of attack³²⁷. Of greater importance, neither the concept of self-defense, nor the concept of necessity, demands instant response to an armed attack. International law does not require that a State choose between resorting to armed force instantly and without reflection, or sacrificing its right to take prudent and considered defensive action.

4.38 Instead, the law must accord a State that has been attacked the opportunity to investigate matters, not least to confirm that it has indeed been attacked, and by whom. This is especially true of attacks at sea using weapons that are hidden, like mines, or that can be launched from great distances, like missiles. In such attacks, the cause of particular damage often may only be discovered through careful investigation.

³²⁶ Iran’s Memorial, para. 4.32.

³²⁷ Dinstein, *supra*, p. 223.

4.39 Even when the identity of an attacker is known, it will often take time to assemble and instruct the forces that will carry out the response. Time will also be required to select targets whose destruction will have the necessary effect and yet not pose disproportionate risks of collateral damage and casualties. Requiring instantaneous response could dramatically increase the risk of disproportionate damage.

4.40 Such care and deliberation in the exercise of self-defense does not impair the defensive character of the actions ultimately taken, although their character can be misconstrued (as Iran seeks to do here). As Judge Higgins has noted, "[w]hen a state is not able to engage immediately in action to defend itself, subsequent action can (wrongly) take on the appearance of reprisals, though it is still action in self-defence³²⁸."

4.41 As authority for its position, Iran's Memorial again quotes Judge Ago for the idea that "armed resistance to armed attack should take place immediately, i.e. while the attack is still going on and not after it has ended³²⁹." For the reasons described above, this cannot be the general rule. Moreover, in situations like this, involving a campaign of unlawful attacks, there must be the right to act in self-defense through actions generally aimed at terminating further attacks and at restoring security, as by neutralizing the platforms used to launch attacks or to identify their targets. In such circumstances, Judge Ago indicated a quite different, and far more appropriate, principle in a sentence closely following that quoted by Iran:

"If, however, the attack in question consisted of a number of successive acts, the requirement of the immediacy of the self-defensive action would have to be looked at in the light of those acts as a whole³³⁰."

³²⁸ Rosalyn Higgins, *Problems and Progress. International Law and How We Use It* (1994), p. 241.

³²⁹ Iran's Memorial, para. 4.32, quoting Ago Report, p. 70, para 122.

³³⁰ Ago Report, p. 70, para. 122, Exhibit 161.

This is precisely the case here, where Iran's attacks were part of a continuing campaign of attacks on U.S. vessels operating lawfully in the Gulf.

4.42 Iran also contends³³¹ that the pre-planning of possible defensive measures precludes the possibility of self-defense. Again, this cannot be. Modern military organizations regularly plan for possible future contingencies; for the most part, such plans are filed away and never acted upon. Here, as Part I makes clear, the process of selecting the platforms as targets for defensive action involved a wide-ranging consideration of options following the attacks on *Sea Isle City* and *USS Samuel B. Roberts*, including options previously identified by military planners. Indeed, the need for such a careful assessment of possible military actions helps to show why immediate response to armed attack may not be appropriate.

4.43 Iran's also invokes Secretary of State Webster's noted discussion of self-defense in the dispute between the United States and Great Britain regarding *The Caroline* as demanding instant action in self-defense, but in doing so takes Webster's argument quite out of its context³³². Webster's analysis established the requirements of necessity and proportionality as cornerstones of the legal doctrine of self-defense. However, it is not correct to invoke his

³³¹ Iran's Memorial, para. 4.36.

³³² On the *Caroline* dispute, see Myres McDougal and Florentino Feliciano, *The International Law of War*, p. 217 (1994) ("the standard of required necessity has been habitually cast in language so abstractly restrictive as almost, if read literally, to impose paralysis. Such is the clear import of the classical peroration of Secretary of State Webster in the *Caroline* case . . ."); John Basset Moore, II *Digest of International Law*, pp 409-414 (1906); Robert Jennings, "The Caroline and McLeod Cases," 32 *Am. J. Int'l Law*, p. 82 (1938); Martin Rogoff and Edward Collins, "The *Caroline* Incident and the Development of International Law," 16 *Brooklyn J. Int'l Law*, p. 493 (1990).

argument to contend that each act of self-defense must be instant, instinctive and without reflection³³³.

4.44 As many writers have noted, "[t]he famous *Caroline* case . . . underscores the limitations imposed on *anticipatory* defense³³⁴." The *Caroline* was tied to a dock in Schlosser, New York when British forces crossed the Niagara River at night, entered the United States, seized the ship, set her afire, and set her adrift over Niagara Falls. The British forces were not responding to a past attack. Instead, they anticipated the vessel's possible use to support a future one. It was in these special circumstances, involving the anticipation of a future attack, that Webster argued for a very high standard of necessity -- that the need to use force be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation³³⁵." Whether or not these ringing words accurately express contemporary international law with respect to action taken in anticipation of a future attack, they do not apply where an attack has already taken place. Such an attack creates a need and justification for considered, proportional action as necessary to restore the security of the victim.

³³³ Cf. Iran's Memorial, para 4.18.

³³⁴ Oscar Schachter, *International Law in Theory and Practice*, p. 151 (1991.) See also Brownlie, *supra*, pp. 256-60; Higgins, *supra*, p. 242 and Higgins, "The Attitude of States Towards the International Regulation of the Use of Force," in *The Current Legal Regulation of the Use of Force*, pp. 442-44 (A. Cassese, ed., 1986); McDougal and Feliciano, *supra*, p. 231; Rogoff and Collins, *supra*, p. 506.

³³⁵ The text of Webster's letter of 24 April 1841 is quoted by Robert Jennings, *supra*, at 32 *Am.J. Int'l Law*, p. 89.

CHAPTER VII

THE PLATFORMS WERE LAWFUL TARGETS, AND U.S. ACTIONS OTHERWISE SATISFIED ALL APPLICABLE REQUIREMENTS OF THE LAW OF ARMED CONFLICT

4.45 The evidence plainly shows that the Rostam, Sirri and Sassan platforms were legitimate military targets under the law of armed conflict. Whatever the circumstances of their original construction, they were being used for important military purposes in support of Iran's attacks upon non-belligerent vessels, including U.S. vessels. They had command, control, communications and intelligence functions. As was demonstrated in Part I of this Counter-Memorial, the platforms were used, *inter alia*, as staging points for helicopter and boat attacks; as part of Iran's naval communications system; and as platforms to identify and track targets for Iranian attacks.

4.46 The U.S. attacks on the platforms satisfied all other applicable requirements of the law of armed conflict. The most important of these were summarized by the Court in its recent advisory opinion regarding the *Threat or Use of Nuclear Weapons*:

"The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attacks and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering³³⁶."

4.47 As we have shown, these obligations were fully satisfied in the U.S. operations against the platforms. Civilians were not made the object of attack; indeed, the United States

³³⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, para. 78.*

sought to avoid Iranian casualties, civilian and military. Advance notice was given of the intended U.S. action, and the platforms' crews were given the opportunity to evacuate to safety if they chose to do so. Many crew members did evacuate the platforms before they were destroyed. While Iran alleges that there were casualties related to these operations, the United States has no information regarding any casualties. The means employed by the United States, generally naval gunfire and demolitions placed by boarding parties, involved lawful weapons not posing the risk of unlawful suffering. The extent of destruction was limited to that required to attain the military objective sought, that is, to end the platforms' use for military purposes.

CHAPTER VIII

THE U.S. MEASURES WERE NOT REPRISALS

4.48 As we have shown in this Counter-Memorial, the United States acted in self-defense to restore the security of U.S. vessels operating in the Gulf, including those involved in Operation Earnest Will. The facilities destroyed were used by Iran for a range of military purposes related to its attacks on U.S. vessels. These actions were proportionate, and were deliberately limited in scale. The United States acted shortly after Iran's attacks. Its actions involved military targets and were carefully executed to minimize damage to life and other risks.

4.49 Iran, persisting in its denials that it attacked U.S. vessels and that its platforms had any naval role, attempts to portray these U.S. actions as illegal reprisals. Indeed, counsel for Iran contended during the September 1996 oral proceedings concerning jurisdiction that "the US attacks had all the hallmarks of economic retaliation against Iran," and were not taken for reasons of self-defense³³⁷.

4.50 These claims cannot stand. Part I presented extensive evidence showing the platforms' military roles. They performed command, control, communications and intelligence functions related to Iran's attacks on U.S. and other neutral vessels, and provided a staging point for such attacks. Statements by senior U.S. commanders detailed the military considerations that led to selection of the platforms as appropriate targets for defensive action. The evidence shows convincingly that these actions were measures taken in self-defense, and not reprisals.

³³⁷ C/R 96/14 of 19 September 1996, p. 38.

5.51 As Iran's Memorial acknowledges, it is difficult to articulate or apply an effective distinction between self-defense and reprisals³³⁸. Iran contends that the key to this distinction lies "in the aim or purpose of the action taken;" actions taken for a punitive rather than defensive purpose are prohibited reprisals³³⁹. This is a frequently expressed view of the distinction³⁴⁰.

5.52 Iran's Memorial offers a series of "characteristics" supposed to show that U.S. actions had a prohibited punitive purpose³⁴¹. The first is timing, which we have discussed at length. As we have shown, international law does not require that force be used in self-defense instantly, instinctively and without due attention to the consequences. Particularly in cases of armed attacks by weapons like missiles or mines, there must be an appropriate opportunity to confirm the attacker's identity, and then to assess appropriate measures to restore security in the face of such attacks, in a manner that does not involve disproportionate collateral damage.

5.53 Iran's other criteria largely involve assessment of disputed facts, particularly regarding Iran's use of its offshore platforms as part of its naval command, control, communications and intelligence systems in attacking neutral vessels. As to these matters, the Court is now well aware of the U.S. position. Their resolution will ultimately depend upon the Court's assessment of the facts, which offer a surer foundation for legal analysis than does

³³⁸ Iran's Memorial, para. 4.30.

³³⁹ *Ibid.*

³⁴⁰ See, e.g., I. Oppenheim's *International Law*, p. 419 n. 12 (9th Ed., Sir Robert Jennings and Sir Arthur Watts, eds.) (London 1992) and authorities there cited.

³⁴¹ Iran's Memorial, para. 4.31.

speculation about high officials' motives or lay authors' or hurried officials' characterizations of events. In its reports to the Security Council filed pursuant to Article 51 of the Charter, the United States expressed its view that these actions were taken in self-defense. Other statements in which non-lawyer officials try to describe events to public and press do not have such legal significance³⁴².

5.54 This Court also has made clear that the presence of additional motives on the part of some actors do not impair the right to act in self-defense, where the legal requirements for it are otherwise present. In *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), the Court rejected the contention that improper motives would preclude an otherwise valid claim of self-defense:

"Nicaragua claims that the references made by the United States to the justification of collective self-defence are merely "pretexts" for the activities of the United States. It has alleged that the true motive for the conduct of the United States is . . . to impose its will upon Nicaragua and force it to comply with United States demands. In the Court's view, however, if . . . the other appropriate conditions are met, collective self-defence could be legally invoked by the United States, even though there may be the possibility of an additional motive, one perhaps even more decisive for the United States, drawn from the political orientation of the present Nicaraguan Government. The existence of an additional motive, other than that officially proclaimed by the United States, could not deprive the latter of its right to resort to collective self-defence³⁴³."

³⁴² In a similar situation, sole arbitrator Pierre LaLive declined to treat as legally determinative a broadcast statement by the President of Pakistan to the effect that Pakistan and India were at war, on the ground that references to "war" should not be understood in a legal or technical sense. *Dalmia Cement Ltd. v. National Bank of Pakistan*, 67 I.L.R. p. 618 (1984).

³⁴³ *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Merits, Judgment, I.C.J. Reports 1986*, para. 127.

4.55 Thus, the U.S. measures at issue in this case were valid measures in self-defense, not reprisals.³⁴⁴

³⁴⁴ This case does not raise the issue of "belligerent reprisals" -- that is, actions by one party to an armed conflict that would otherwise violate the rules of warfare, but which are permissible for the limited purpose of compelling another party to the conflict to cease its own violations. Here, there was nothing about the U.S. actions that would violate the rules of warfare. If the Court were, however, to find that U.S. forces had violated the rules of armed conflict, the doctrine of belligerent reprisal would be an alternative legal justification for U.S. actions.

CHAPTER IX

THE 1955 TREATY DOES NOT LIMIT ACTIONS TAKEN IN SELF-DEFENSE

4.58 This Part has shown how the law of self-defense applies in the circumstances of this case. The 1955 Treaty between the United States and the Islamic Republic of Iran does not in any way restrict or impair the right of the Parties to act in self-defense in accordance with the principles discussed here.

4.59 Some treaties can limit or channel the exercise of the right of self-defense. “[W]e now find many arrangements, bilateral and multilateral, that involve reciprocal restraints on national military activity. They extend to kinds of weapons, deployment of forces, military exercises, testing and in some cases size of force³⁴⁵.” However, treaties that limit the right of self-defense affect matters of fundamental importance for the security or even the survival of States. States accept such limitations deliberately, explicitly, and with great care. They are not entered into unintentionally or by accident.

4.60 The 1955 Treaty is not a treaty limiting the exercise of the right of self-defense. It does not control the use of arms or regulate the conduct of military operations in self-defense. None of its provisions can plausibly be read to do so. The Treaty's plain words make clear that it is not one of the special class of treaties which the parties intend to limit the scope of possible actions in self-defense.

³⁴⁵ Oscar Schachter, “Self-Defense and the Rule of Law,” 83 *American Journal of Int'l Law*, p. 269 (1989). Illustrations of such treaties include the Treaty on Non-Proliferation of Nuclear Weapons, 1 July 1968, 21 UST 483, 729 UNTS 161; the bilateral U.S.-Soviet Treaty on the Limitation of Anti-Ballistic Missile Systems, 26 May 1972, 23 UST 3435, 944 UNTS 13; and the U.S.-Soviet Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (The INF Treaty), reprinted in 27 *Int'l. Legal Materials* 84 (1988).

4.61 This Court rightly recognized in its recent advisory opinion regarding the *Legality of the Threat or Use of Nuclear Weapons* that treaties such as this, designed for conditions of peace, cannot be interpreted to deprive a State of its right to self-defense. The Court there examined the contention that treaties for the protection of the environment prohibited the use of nuclear weapons. The Court rejected this claim, employing reasoning that applies with equal force here:

“The Court does not consider that the treaties in question could have been intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment³⁴⁶.”

Neither was this treaty intended to deprive the United States of its right to self-defense in the face of armed attack. Nothing in its language or history, or in the practice of the parties, indicates that it limits or supersedes the fundamental, inherent right of self-defense in response to armed attack.

³⁴⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para. 30.

PART V

THE COURT SHOULD DENY THE RELIEF SOUGHT BY IRAN BECAUSE OF ITS OWN ILLEGAL CONDUCT

5.01 As is shown in Part I of this Counter-Memorial, Iran carried on a widespread and deliberate campaign of deadly attacks against neutral commercial vessels bound to and from ports of other States in the Gulf. Iran attacked merchant vessels from more than 30 countries including the United States. As will be shown in the U.S. counter-claim in the next Part, Iran's conduct violated the 1955 Treaty. These attacks also violated other vital principles of international law prohibiting such uses of force.

5.02 Notwithstanding its own manifestly illegal armed attacks against neutral shipping and neutral trade, Iran seeks in this case to invoke a treaty designed to regulate friendly relations between States. It asks this Court to adjudge that the United States, through its defensive actions against Iran's offshore platforms, violated a provision of the 1955 Treaty calling for "freedom of navigation and commerce" between the territories of Iran and the United States. Under the circumstances, the United States submits that Iran's cynical and selective reliance upon this treaty, and its effort to enlist the Court for these ends, are inconsistent with the principle of good faith which is a key element of the interpretation and application of treaties.

5.03 The Court should reject Iran's claim in this case and honor the basic principle that a tribunal should "refus[e] relief to a plaintiff whose conduct in regard to

the subject-matter of the litigation has been improper³⁴⁷.³⁴⁸ Iran should not be able to invoke selectively the Court's authority to promote its own interests and at the same time expect the Court to ignore Iran's serious breaches of international law which gave rise to the measures of which it now complains.

5.04 The principle that a party in litigation may not attempt to reap advantages from its own wrong --*nullus commodum capere de sua injuria propria*-- is well-established in international law³⁴⁸. Numerous arbitral decisions reflect the unwillingness of international tribunals to grant relief to parties whose own conduct with respect to the underlying dispute was wrongful³⁴⁹. This principle that a party that

³⁴⁷ *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70, p. 77* (Separate Opinion of Judge Hudson) (quoting 13 Halsbury's *Laws of England*, (2nd ed. 1934), p. 87).

³⁴⁸ See B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, pp. 149-58 (reprint ed. 1987). The Permanent Court of Justice applied the principle that a State may not profit from wrongdoing in the context of treaty relations. *Factory at Chorzow, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, no. 9, p. 31*; *Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, P.C.I.J., Series B, No. 15, pp. 26-7*; see also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950, p. 244* (Judge Read dissenting) (there can be no doubt that, as settled in the *Chorzow Factory Case*, a State should not be permitted "to profit from its own wrong" in any judicial proceeding). See also Cheng, pp. 149-50; Gerald Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law," 92 *Recueil des Cours*, pp. 117-19 (1957); Jenks, *The Prospects of International Adjudication*, p. 413 (1964).

³⁴⁹ See, e.g., *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA*, 6 Iran-U.S. C.T.R., pp. 219, 228 (1984) ("It is a well recognized principle in many municipal systems and in international law that no one should be allowed to reap advantages from their own wrong, *Nullus Commodum Capere De Sua Injuria Propria*."). See also *The Mary Lowell Case* (1879), 3 *Moore Int'l Arb.*, pp. 2772, 2776 (upholding dismissal of a claim where an allegedly wrongfully seized vessel was engaged in illegal conduct; "this illegality was of such a character as to carry with it forfeiture of the protection of the United States flag"); *The Montijo Case* (1875), 2 *Moore Int'l Arb.*, pp. 1421, 1437 ("No one can be allowed to take advantage of his own wrong"); *The Medea and The Good Return Cases* (1866), 3 *Moore Int'l Arb.*, pp. 2730, 2739 (noting, in rejecting a claim where the claimant engaged in piracy, that "[a] party who asks for redress must present himself with clean hands").

has engaged in wrongful conduct loses the right to demand judicial relief is also recognized in the writings of publicists³⁵⁰.

5.05 Sir Gerald Fitzmaurice rightly indicated that a State may be debarred from complaining of actions taken by another States, when it provoked those actions through its own unlawful conduct:

“[A] State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality -- in short were provoked by it. In some cases, the principle of legitimate reprisals will remove any aspects of illegality from such counter-action. But even where the acts remain *per se* illegal, it may be that the State suffering from it is deprived by its own prior illegality of juridical grounds of complaint³⁵¹.”

As we have shown in this Counter-Memorial, the U.S. actions against the oil platforms were lawful. But in any case, they were only necessary because of Iran's campaign of unlawful armed attacks against U.S. and other neutral ships.

5.06 Iran itself has invoked such principles. In several cases before the Iran-United States Claims Tribunal, Iran has pressed to have claims against it dismissed because of alleged deficiencies in the conduct of the claimant. In its pleadings, Iran has invoked and described the doctrine as follows:

“The claim should be dismissed under the universal, equitable doctrine of ‘clean hands.’ The doctrine, which is supported by a vast and diverse body of

³⁵⁰ See, e.g., Cheng, pp. 149-58; Fitzmaurice, pp. 117-19; E. Borchard, *Diplomatic Protection of Citizens Abroad*, p. 713 (1915) (“It is an established maxim of all law, municipal and international, that no one can profit by his own wrong, and that a plaintiff or a claimant must come into court with clean hands.”); C. Rossi, *Equity and International Law*, pp. 164-65 (1993) (the principle of “clean hands” is a “general principle of law”).

³⁵¹ Fitzmaurice, p. 119.

international legal literature, State practice and international case-law, states that anybody wishing to bring a claim before an international court, must have acted properly and correctly prior to the claim. . . ³⁵² ."

5.07 As the record makes clear, Iran, in view of its widespread unlawful attacks on neutral commerce and navigation, cannot pass its own test of having "acted properly and correctly prior to the claim." Accordingly, Iran is precluded from complaining that the United States has not fulfilled its obligations under the Treaty when its own illegal conduct gave rise to the measures of which it now complains. The Court accordingly should reject Iran's claims.

³⁵² *Aryeh v. Iran*, Cases Nos. 842, 843 & 844, Respondent's Hearing Memorial and Written Evidence, Vol. III, Doc. 80, Exhibit C, p. 44 (23 Mar. 1993) (Iran-U.S. Claims Tribunal), Exhibit 162.

PART VI

COUNTER-CLAIM

6.01 In light of the Court's decision on jurisdiction in this case, the United States submits with its Counter-Memorial this counter-claim, as permitted under Rule 80 of the Rules of the Court. The counter-claim is based on actions by Iran in the Persian Gulf during 1987-88 that created extremely dangerous conditions for shipping, and thereby violated Article X of the 1955 Treaty. Iran's actions resulted in significant damage to U.S. commercial and military vessels and, as explained previously, ultimately led the United States to take lawful, defensive measures against the offshore platforms Iran used to support its attacks on shipping. This counter-claim is within the jurisdiction of the Court and is directly connected with the subject matter of Iran's claim.

6.02 The United States asks the Court to find that Iran violated its obligations under the 1955 Treaty and that, accordingly, Iran is under an obligation to make full reparation to the United States for these violations and for the injury thus caused, in a form and amount to be determined by the Court at a subsequent stage of the proceedings. As Iran has done with respect to its claim, the United States reserves the right to introduce and present to the Court in due course a detailed evaluation of the reparation owed by Iran.

CHAPTER I

FACTUAL BACKGROUND

6.03 Much of the information relevant to the counter-claim has already been recounted in establishing the U.S. defense to Iran's claim. In particular, the United States has shown how the war between Iran and Iraq extended into the Gulf in 1984 with the Tanker War, when Iraq initiated attacks on tankers using Iran's oil terminal at Kharg Island³⁵³. Lacking comparable Iraqi targets which could be easily attacked, Iran chose to retaliate against neutral commercial vessels going to and from the ports of Gulf Cooperation Council member States, particularly Saudi Arabia and Kuwait. To that end, Iran conducted more than 200 attacks outside the wartime exclusion zone it had established against vessels from 31 different States, including at least seven U.S. vessels³⁵⁴.

6.04 These attacks took many forms. Iranian gunboats, equipped with machine guns, rocket launchers, and small arms conducted unprovoked attacks on vessels of various nations, causing extensive damage and the deaths of numerous merchant seamen³⁵⁵. Iranian fixed-wing aircraft and helicopters staged numerous attacks against merchant ships in the central and southern Gulf³⁵⁶. Iran without notice seeded mines on the high seas in international shipping channels, and even in Kuwaiti territorial waters, to threaten and damage merchant vessels³⁵⁷.

³⁵³ See, generally, *supra*, paras. 1-1.01 - 1.1.08.

³⁵⁴ See, generally, *supra*, paras. 1.02 - 1.104.

³⁵⁵ See, generally, *supra*, paras. 1.04 - 1.06.

³⁵⁶ *Ibid.*

³⁵⁷ See, generally, *supra*, paras. 1.04, 1.19 - 1.47, 1.105 - 1.112.

Indeed, as stated above, the United States seized an Iranian ship, *Iran Ajr*, as it was planting mines in international waters of the Gulf³⁵⁸. Further, Iran established sites from which it launched missiles to disrupt maritime commerce³⁵⁹.

6.05 These Iranian attacks severely disrupted maritime commerce in the Gulf. They created conditions that were extremely dangerous for all merchant vessels, including those of the United States. Iran did not limit its attacks to vessels carrying war material for Iraq, nor vessels that resisted Iranian efforts to visit and search. Indeed, Iran's primary objective was simply to engage in a form of maritime terrorism, presumably in an effort to coerce other States to take sides against Iraq.

6.06 After a plea for help from several Gulf States affected by Iran's attacks³⁶⁰, the Security Council adopted Resolution 552 of June 1, 1984, which condemned the attacks and demanded that they cease³⁶¹. Nevertheless, the attacks continued unabated. The United States was extremely concerned about the Iranian attacks, particularly in light of the large volume of U.S. maritime trade passing through the Gulf. Most of this trade was with States other than Iran, but there was a significant amount of trade between the United States and Iran. For instance, in 1987, Iran exported some \$1.7 billion in goods to the United States³⁶², while the United States

³⁵⁸ See *supra*, paras. 1.40 - 1.47.

³⁵⁹ See *supra*, paras. 1.04, 1.53 - 1.78.

³⁶⁰ See *supra*, para. 1.09.

³⁶¹ See *supra*, para. 1.10.

³⁶² See, e.g., U.S. General Imports, World Area and Country of Origin by Schedule A Commodity Groupings, 1987 December and Annual 549 (1988), Exhibit 139.

exported to Iran goods valued at approximately \$54 million³⁶³. Until November 1987, the majority of Iranian exports to the United States consisted of crude oil and other petroleum products³⁶⁴, but significant quantities of other commodities were also exported from Iran to the United States³⁶⁵. Further, while Iranian exports to the United States ceased after the issuance of U.S. Executive Order 12613 on October 29, 1987³⁶⁶, exports from the United States to Iran continued. Indeed, in 1988, at the height of Operation Earnest Will, the value of United States exports to Iran increased -- by nearly \$20 million -- to some \$73 million³⁶⁷.

6.07 Most goods transported between the United States and Iran were carried on ships traveling through the Persian Gulf. Of the approximately \$54 million in goods exported from the United States to Iran in 1987, \$35,215,695 in goods were transported through the Persian Gulf to Iran by ships³⁶⁸. In 1988, of the approximately \$73 million in goods exported from the United

³⁶³ See International Monetary Fund, *Direction of Trade Statistics Yearbook* (1991), p. 226, Exhibit 163.

³⁶⁴ See U.S. General Imports, World Area and Country of Origin by Schedule A Commodity Groupings, 1987 December and Annual (1988), p. 549, Exhibit 139.

³⁶⁵ According to trade statistics compiled by the U.S. Bureau of the Census, the United States imported some \$92 million in manufactured goods, primarily textiles, and some \$12 million in food products in 1987. *Ibid.*

³⁶⁶ Executive Order 12613, 52 Fed. Reg. 41940 (Oct. 29, 1987), Exhibit 138. Trade statistics indicate that some \$9 million of Iranian exports, primarily manufactured textile products, shipped prior to the imposition of sanctions were delivered to the United States in 1988. See U.S. General Imports, World Area and Country of Origin by Schedule A Commodity Groupings, 1988 December and Annual (1989), p. 652, Exhibit 140. As discussed earlier, no Iranian oil products were directly exported to the United States in 1988. See *supra*, para. 2.25 - 2.27.

³⁶⁷ See International Monetary Fund, *Direction of Trade Statistics Yearbook*, p. 226, Exhibit 163.

³⁶⁸ U.S. General Exports: World Area and Country of Origin by Schedule E Commodity Groupings, 1987 December and Annual Report (1988), p. 632, Exhibit 164.

States to Iran, \$62,797,701 in goods were transported through the Persian Gulf to Iran by ships³⁶⁹. Similarly, during this period, ships traveling through the Persian Gulf were the principal mode of carriage of goods from Iran to the United States. In 1987, some \$1.4 billion of goods (approximately 12 million tons) were transported to the United States by ships³⁷⁰. Of the approximately \$9 million in Iranian exports delivered to the United States in 1988, some \$3 million were transported to the United States by ships³⁷¹.

6.08 Reflecting its concern with the effect on this maritime trade of Iran's attacks and mining in the Gulf, in 1987 the United States sent a number of communications to Iran through the Government of Switzerland stating that Iran's actions were dangerous and cautioning Iran about actions against U.S. vessels³⁷². Nevertheless, Iran's attacks continued, and ultimately resulted in severe damage to several vessels of U.S. flag or owned by U.S. persons. None of these vessels was bound to or from Iraqi ports or carried Iraqi war materials, nor had any been requested by Iranian forces to submit to visit and search. Iran's attacks included the following:

1. Mine attack on *Bridgeton* (24 July 1987). As described above³⁷³, on 24 July 1987 the U.S.-flag *Bridgeton* struck an Iranian mine in an international shipping channel approximately 18

³⁶⁹ U.S. General Exports: World Area and Country by Schedule E Commodity Groupings, 1988 December and Annual Report (1990), p. 789, Exhibit 165.

³⁷⁰ U.S. General Imports: World Area and Country of Origin by Schedule A Commodity Grouping, 1987 December and Annual Report (1988), p. 549, Exhibit 139. According to this statistical survey, the majority, in terms of dollar value and tonnage, of imports to the United States from Iran consisted of mineral fuels and related products. *Ibid*.

³⁷¹ U.S. General Imports, World Area and Country of Origin by Schedule A Commodity Groupings, 1988 December and Annual Report (1989), p. 652, Exhibit 140.

³⁷² See *supra*, paras. 1.22, 1.24, 1.39, 1.47.

³⁷³ See *supra*, paras. 1.25 - 1.31.

nautical miles southwest of the Iranian island, Farsi. The mine blew a large hole in the hull, flooding several compartments³⁷⁴.

2. Mine attack on *Texaco Caribbean* (10 August 1987). On 10 August 1987 the U.S.-owned *Texaco Caribbean* struck a mine at the Khor Fakkan anchorage off Fujairah, blowing a four-meter hole in the ship's hull, and causing oil to leak into the water³⁷⁵. After off-loading its cargo to another vessel, *Texaco Caribbean* made its way to Bahrain for repairs. Particular note must be paid to the fact that *Texaco Caribbean* was carrying Iranian crude oil, which it had loaded at Hormuz Island; the vessel was visiting at Fujairah before its expected voyage to Rotterdam³⁷⁶. Iran's acts of mining narrow waters and anchorages to terrorize maritime shipping with other Gulf States inescapably also damaged and inhibited trade with Iran itself.

3. Missile attack on *Sea Isle City* (16 October 1987). At about 6 a.m. local time on 16 October 1987, an Iranian missile fired from the Faw area hit the U.S.-flag *Sea Isle City*, which was proceeding from its anchorage to the oil loading terminal at Kuwait's Mina al-Ahmadi port³⁷⁷. The missile hit the accommodations quarters, injuring several seamen and permanently blinding the U.S. captain. The missile set *Sea Isle City* on fire and caused extensive damage.

³⁷⁴ See Lloyd's Maritime Information Service, *Vessels Damaged in the Gulf*, p. 74, Exhibit 9; Sreedhar & K. Kaul, *Tanker War: Aspect of Iraq-Iran War 1980-8* (1989), p. 120 (hereafter "Sreedhar & Kaul"), Exhibit 80; M. Palmer, *Guardians of the Gulf: A History of America's Expanding Role In the Persian Gulf, 1833-1992*, (1992), p. 131 (hereafter "Palmer"), Exhibit 166; "After the Blast, Journey Continues," *N.Y. Times*, July 25, 1987, Exhibit 167; Report of the Secretary-General in Pursuance of Security Council Resolution 552 (1987), United Nations Document S/16877/Add.5, p. 9 (hereafter "U.N. Document S/16877/Add.5") (1987), Exhibit 168.

³⁷⁵ See *supra*, paras. 1.33 - 1.36; see also U.N. Document S/16877/Add.5, p. 9, Exhibit 168.

³⁷⁶ See, generally, Statement of General and Particular Damage and P and I Claim per *Texaco Caribbean*, Exhibit 169.

³⁷⁷ See *supra*, paras. 1.63 - 1.78.

4. Gunboat attack on *Lucy* (15 November 1987). On 15 November 1987, three Iranian gunboats attacked and damaged the U.S.-owned oil tanker *Lucy* near the Strait of Hormuz³⁷⁸. *Lucy*, which was en route to the United Arab Emirates, lost power temporarily due to engine room damage, but after emergency repairs made her way to Dubai for permanent repairs.

5. Gunboat attack on *Esso Freeport* (16 November 1987). On 16 November 1987 Iranian gunboats attacked and severely damaged the U.S.-owned oil tanker *Esso Freeport* near the Strait of Hormuz as it was departing the Gulf with a cargo of Saudi oil³⁷⁹. Like *Lucy* the day before, *Esso Freeport* headed for Dubai for repairs.

6. Frigate/gunboat attack on *Diane* (7 February 1988). The U.S.-owned bulk carrier *Diane*, en route from Bahrain and the United Arab Emirates for Japan, was attacked by an Iranian frigate and Iranian gunboats on 7 February 1988, setting her on fire and causing extensive damage to her hull, decks, and equipment. After emergency repairs, *Diane* proceeded to Fujairah for permanent repairs³⁸⁰.

7. Mine attack on *USS Samuel B. Roberts* (14 April 1988). As previously described³⁸¹, on 14 April 1988, while returning to Bahrain after escorting a convoy of U.S. flag merchant vessels, the U.S. warship *USS Samuel B. Roberts* struck a mine near the Shah Allum Shoal. Ten

³⁷⁸ See Statement of General And Particular Average on Motor Vessel *Lucy* (Rocket Attack - November 15th, 1987), Exhibit 170; Lloyd's Maritime Information Service, *Vessels Damaged in the Gulf*, p. 89, Exhibit 9; U.N. Document S/16877/Add.5, p. 15, Exhibit 168.

³⁷⁹ See Lloyd's Maritime Information Service, *Vessels Damaged in the Gulf*, p. 90, Exhibit 9; Sreedhar & Kaul, p. 125, Exhibit 80; U.N. Document S/16877/Add.5, p. 15, Exhibit 168.

³⁸⁰ Statement of General and Particular Average on Motor Vessel *Diane* (Attacked by Iranian Gun Boats - February 7, 1988), Exhibit 171.

³⁸¹ See *supra*, paras. 1.105 - 1.112.

U.S. sailors were injured. So severely damaged that it could not continue under its own power, *USS Samuel B. Roberts* had to be towed to Dubai for preliminary repairs, and then taken to the United States for final repairs, a process that took twelve months.

6.09 Thus, Iran's actions resulted in extremely dangerous conditions for all vessels operating in the Gulf, including a number of U.S. vessels which suffered severe property damage and injury to their crews. The United States submits that Iran's actions eviscerated key rights of U.S. vessels under Article X of the 1955 Treaty to come to or to pass through Iranian ports, places, and waters and to carry products into and through the Gulf. Moreover, Iran's actions were totally inconsistent with its obligation to provide friendly treatment and assistance to U.S. vessels.

CHAPTER II

JURISDICTION AND ADMISSIBILITY OF THE COUNTER-CLAIM

6.10 Jurisdiction over this counter-claim is based on Article 36(1) of the Statute of the Court, as read in conjunction with Article XXI(2) of the 1955 Treaty. As the Court is well aware, Article XXI(2) provides:

“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.”

In its decision on jurisdiction³⁸², the Court rejected the U.S. view that military actions are outside the scope of the 1955 Treaty. In light of that decision, the United States submits that Iran's actions in the Persian Gulf in 1987-88 against U.S. vessels violated Iran's obligations under Article X of the 1955 Treaty. Following the Court's December 1996 Judgment, the United States requested that the Government of Iran enter into negotiations for the payment of compensation to the United States for damages incurred from Iran's actions, on the grounds that they violated Article X of the 1955 Treaty. The Government of Iran, however, has not agreed to enter into such negotiations. Consequently, there exists a dispute between the Parties concerning the interpretation or application of the 1955 Treaty that has not been satisfactorily adjusted by diplomacy and therefore is within the jurisdiction of this Court.

6.11 The facts and law upon which the United States relies in defending against Iran's claim and the facts and law upon which the United States relies in presenting this counter-claim

³⁸² *Oil Platforms (Islamic Republic of Iran v. United States of America)*(Preliminary Objection), para. 55(2).

are intimately connected. Iran has alleged that the United States violated Article X(1) of the 1955 Treaty. The U.S. defense includes, among other things, showing that Iran engaged in extensive efforts to disrupt maritime commerce in the Gulf by laying mines and attacking commercial and non-commercial vessels of States not involved in the Iran-Iraq conflict. Those Iranian efforts included armed attacks on U.S. vessels, which led to a lawful exercise of self-defense by the United States against the Iranian oil platforms in 1987-88.

6.12 In passing upon whether Iran's claim or the U.S. claim of self-defense is well-founded, the Court by necessity will pass upon the same facts that underlie the U.S. counter-claim. Further, in delineating the scope of Article X of the 1955 Treaty and considering its applicability to military attacks, the Court will address many of the same legal issues at stake in the U.S. counter-claim. In short, an assessment of the validity of Iran's demand for reparation "rests largely" on the same factual and legal issues at stake in the U.S. claim for reparation for Iran's attacks on U.S. vessels in the Gulf³⁸³. As such, under the rules and jurisprudence of the Court, the U.S. counterclaim is properly before the Court.

³⁸³ See *Asylum case*, *I.C.J. Reports 1950*, p. 266 at p. 280 ("It emerges clearly from the arguments of the Parties that the second submission of the Government of Colombia, which concerns the demand for safe-conduct, rests largely on the alleged regularity of the asylum, which is precisely what is disputed by the counter-claim.")

CHAPTER III

IRAN'S ACTIONS AGAINST U.S. VESSELS VIOLATED ARTICLE X OF THE 1955 TREATY

6.13 Iran's actions against U.S. commercial and military vessels in the Gulf during 1987-88 violated Iran's obligations under Article X of the 1955 Treaty. Article X provides:

"1. Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.

2. Vessels under the flag of either High Contracting Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that High Contracting Party both on the high seas and within the ports, places and waters of the other High Contracting Party.

3. Vessels of either High Contracting Party shall have liberty, on equal terms with vessels of the other High Contracting Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other High Contracting Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other High Contracting Party; but each High Contracting Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, inland navigation and national fisheries.

4. Vessels of either High Contracting Party shall be accorded national treatment and most-favored-nation treatment by the other High Contracting Party with respect to the right to carry all products that may be carried by vessel to or from the territories of such other High Contracting Party; and such products shall be accorded treatment no less favorable than that accorded like products carried in vessels of such other High Contracting Party, with respect to: (a) duties and charges of all kinds, (b) the administration of the customs, and (c) bounties, drawbacks and other privileges of this nature.

5. Vessels of either High Contracting Party that are in distress shall be permitted to take refuge in the nearest port or haven of the other High Contracting Party, and shall receive friendly treatment and assistance.

6. The term "vessels", as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated; but this term does not, except with reference to paragraphs 2 and 5 of the present Article, include fishing vessels or vessels of war."

Section 1. Application of Article X(1)

6.14 The Court in its judgment on jurisdiction did not pronounce itself definitively on the scope and application of Article X(1) of the 1955 Treaty. Rather, the Court simply found that it had jurisdiction "to entertain the claims" by Iran under Article X(1)³⁸⁴. As discussed in Part II, the United States contends that Article X(1) establishes a general goal regarding the freedom of commerce and navigation between the United States and Iran, but does not itself create specific enforceable legal obligations. It is the other specific provisions of Article X that define the particular rights and obligations owed by the Parties in matters of commerce and navigation. The U.S. counter-claim is consistent with this view, in that Iran's violations with respect to Article X arise under other provisions of Article X.

6.15 Should the Court, however, decide that Article X(1) itself establishes independent rights and obligations, the United States submits that the legal basis of the counter-claim is all the more forceful. To the extent that the Court finds that Article X(1) imposes an independent legal obligation protecting Iranian commercial activities from U.S. attack, it surely must also protect U.S. vessels in the Gulf from unprovoked attacks by Iran.

6.16 In particular, it is difficult to imagine a more direct form of interference with freedom of navigation and commerce than a series of armed attacks against the commercial vessels of another Party and the military vessels escorting them. The Iranian attacks on neutral shipping in the Gulf, particularly the laying of mines and firing of long-range surface-to-surface missiles, severely threatened all U.S.-owned and U.S.-registered vessels in the Gulf, including

³⁸⁴ *Oil Platforms (Islamic Republic of Iran v. United States of America) (Preliminary Objection)*, para. 55(2).

those carrying cargo between the territories of the two Parties. In its decision in *Nicaragua v. United States*, the Court found, among other things, that the alleged U.S. mine laying violated a comparable provision of the U.S. Nicaragua Treaty of Friendship, Commerce, and Navigation³⁸⁵. Given that Iran relies on that case to support its claim in this case, Iran must likewise concede that the alleged Iranian mine-laying and other armed actions against maritime commerce in the current case, if proven, would violate its interpretation Article X(1) of the U.S.-Iran Treaty of Amity.

Section 2. Application of the Remainder of Article X

6.17 Whatever the Court may conclude about the scope of Article X(1), the United States submits that Iran's actions in the Gulf against U.S. vessels during 1987-88 violated Iran's obligations under the remainder of Article X to respect, and to accord favorable and friendly treatment to, U.S. vessels operating in the Gulf. Article X as a whole reflects Iran's agreement that U.S. vessels would be favorably treated when conducting maritime trade in the Gulf, i.e., when passing through the Strait of Hormuz and potentially calling at Iranian ports or passing through Iranian waters. Iran's gunboat, missile, helicopter, and aircraft attacks, and its laying of mines in the Gulf, were completely inconsistent with this right. Iran's actions imposed the gravest of dangers on U.S. vessels conducting maritime trade in the Gulf, including trade with Iran. Iran's campaign of armed attacks was neither favorable nor friendly to U.S. vessels. It both generally hindered the ability of U.S. vessels to engage in maritime commerce in the Gulf, and

³⁸⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits, Judgment, I.C.J. Reports 1986, paras. 253, 278.*

placed several U.S. vessels in severe distress. In short, Iran's actions did not just violate some technical aspect of the provisions of Article X. They violated the very heart of the Article.

6.18 The United States showed in Part II that there was no trade between the territories of Iran and the United States in oil from the Rostam and Sirri/Sassan platforms when those platforms were destroyed in October 1987 and April 1988, respectively, so that Iran's claim under Article X(1) regarding the platforms must fail. The facts that refute Iran's claim under Article X(1) do not, however, affect this counter-claim. First, the United States has shown here that there was extensive maritime commerce between the United States and Iran which was directly threatened by Iranian attacks. Second, while Article X(1) is expressly limited to trade between the territories of the two Parties, the other provisions of Article X are not so limited. For instance, under Article X(3), Iran must permit U.S. vessels originating from or destined to U.S. ports to come with their cargoes to all "ports, places and waters" of Iran open to foreign commerce and navigation, which includes innocent passage through Iranian territorial waters, whether or not the vessels visit at Iranian ports. In considering the scope of this right of access to ports, this Court has found that:

"[I]n order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; Article 18, paragraph 1(b), of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones which may exist beyond territorial waters (Art. 58 of the Convention), and secondly, beyond territorial waters and on the high seas (Art. 87), it follows that any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for maritime navigation. It may therefore be said that, if this right of access to the port is hindered by the laying of mines by another State, what is infringed is the freedom of communications and of maritime commerce³⁸⁶."

³⁸⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, *Merits*, *Judgment*, *I.C.J. Reports 1986*, para. 214.

6.19 Iran violated this general freedom to conduct maritime navigation -- which is integrally linked to the specific right of U.S. vessels to call at Iranian ports or pass through its waters -- by hindering U.S. vessels through the laying of mines and other attacks, whether or not specific vessels were in fact calling at Iranian ports. Similarly, under the provisions of Article X, the United States enjoyed a general freedom from any Iranian actions directed at placing U.S. vessels in distress, regardless of whether particular vessels were calling at Iranian ports³⁸⁷.

6.20 There is no justification for Iran's actions under other norms of international law, nor under Article XX(1)(d) of the 1955 Treaty, on the theory that they were necessary to protect Iran's "essential security interests." Iran had no need to attack neutral vessels that were neither visiting Iraqi ports nor carrying any Iraqi war materials. Iran's security interests were in no way affected by this peaceful commerce.

6.21 Further, these attacks did not conform to the law of armed conflict, particularly customary rules governing a belligerent's obligations governing visit and search³⁸⁸ of neutral

³⁸⁷ Iran certainly cannot contend that its actions satisfied its obligations under Article X because Iran attacked all nations equally. First, Articles X(3) and X(4) require not just most-favored-nation treatment, but national treatment as well. Iran did not attack Iranian vessels. Second, Article X(5) is an absolute standard; treatment of non-U.S. vessels is irrelevant. Third, as shown in Part I, Iran's attacks, including the laying of mines, were apparently directed against particular vessels of the United States and other countries operating in the Gulf (particularly carriers of oil).

³⁸⁸ See, e.g., Erik Castren, *The Present Law of War and Neutrality* (1954), pp. 316 *et seq.* (hereafter "Castren"), Exhibit 172 (describing the conditions under which a belligerent may undertake capture proceedings); L.C. Green, *The Contemporary Law of Armed Conflict*, p. 163-164, Exhibit 173 ("On encountering enemy merchant ships or a neutral vessel which he suspects may be liable to seizure, a belligerent commander may instruct it to heave-to and submit to visit and search. If after the visit he has grounds for seizing the vessel, he must divert it to the nearest prize court to adjudicate upon the legality of the seizure and to authorize condemnation of the vessel or its cargo if these prove to be of enemy character.")

vessels and obligations with respect to the laying of mines. Indeed, by targeting commercial vessels of non-belligerent States that posed no threat to Iran, Iran's conduct was entirely at odds with a host of humanitarian rules of warfare embodied in customary international law and reflected in a wide variety of scholarly writing³⁸⁹, manuals of warfare issued by many States³⁹⁰, and widely-accepted Conventions, including the 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines, the 1907 Hague Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, and the Convention Concerning the Rights and Duties of Neutral Powers in Naval War. Because Iran's attacks against non-belligerent vessels violated such basic rules governing armed conflict, the Security Council condemned the attacks, referring specifically to shipping en route to and from

In this case, the vessels attacked by Iran were not delivering goods to Iraq (indeed, several were en route *out* of the Gulf). Yet even if they were engaged in such trade, customary international law permits such trade so long as it does not include contraband of war (war materiel) or otherwise contribute to the belligerent's war fighting capability. See, e.g., A. Gioia & N. Ronzitti, *The Law of Neutrality: Third States Commercial Rights and Duties*, in *The Gulf War of 1980-88: The Iran-Iraq War in International Legal Perspective* (I. Dekker & H. Post eds.), pp. 221, 222-23, Exhibit 174 (The right of neutrals to engage in trade with belligerents, subject to certain limitations, was recognized by the traditional customary law of war. The existence of this right was confirmed by the most highly qualified international legal writers and could be inferred from a number of instruments of treaty law.)

The doctrine of contraband of war would certainly not support Iran's attacks. *Ibid.*, p. 233 ("the doctrine of contraband of war could certainly not justify Iran's frequent attacks on non-belligerent merchant vessels bound for non-belligerent ports or, even more so, attacks on vessels coming from such ports.")

³⁸⁹ See, e.g., Jean Pictet, *The Principles of International Humanitarian Law* (1966), p. 32, Exhibit 175; (Humanitarian law demands that each person be treated with humanity); Frits Kalshoven, *Constraints on the Waging of War* (1987), pp. 34-35, Exhibit 176 (noting the cardinal humanitarian law principles that a belligerent should not attack civilian populations as such, and must distinguish at all times between persons taking part in the hostilities and members of the civilian population); Géza Herczegh, *Development of International Humanitarian Law* (1984), pp. 139-143, Exhibit 177.

³⁹⁰ See generally, *National Implementation of International Humanitarian Law* (M. Bothe ed. 1990) (selected bibliography provides references for military and red cross manuals).

all ports of States that were not parties to the hostilities³⁹¹. These customary rules remained fully in force at the time of these incidents and fully applicable to Iran³⁹².

6.22 This Court's past discussions of the principles applicable to the use of submarine mines clearly show the deficiencies in their use by Iran. In the *Nicaragua* case, the Court observed that if a State lays mines in any waters "in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions" of the 1907 Hague Convention on contact mines³⁹³. In the *Corfu Channel* case, the Court characterized the requirement for such notification as deriving from "certain general and well recognized principles, namely: elementary considerations of humanity"³⁹⁴ The use of mines against non-belligerent commercial vessels (as well as directing land-based missiles and other weapons at such vessels) clearly contravenes what the

³⁹¹ S.C. Res. 552 (1 June 1984), Exhibit 27; *see also* S.C. Res. 582 (24 February 1986), Exhibit 29; S.C. Res. 598 (20 July 1987), Exhibit 178.

³⁹² *See, e.g.*, Castren, p. 282, Exhibit 172:

"The States which *did not accede* to the *Hague Convention* (VIII) cannot be held to have an unlimited right to lay mines. It is quite clear that even these Powers may not lay mines in the territorial waters of neutral States. It is probably also true that such Powers may not lay mines off the enemy coast merely to intercept merchant shipping, that they are bound to observe the duty to notify the laying of mines, that they have to take additional safety measures to protect innocent shipping and that they also must remove mines at the end of the war."

³⁹³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, I.C.J. Reports 1986, para. 215.

³⁹⁴ *Corfu Channel*, *Merits, Judgment*, I.C.J. Reports 1949, p. 22.

Court has characterized as one of the cardinal principles of humanitarian law -- that States must never make civilians the object of attack³⁹⁵.

6.23 Nor can Iran's vicious attacks against unarmed vessels engaged in commercial activities, without first resorting to visit and search, be justified as a means of Iranian self-defense. Such attacks on non-military, non-Iraqi targets were not, in any sense, a necessary or proportionate response to Iraqi armed action. Even if it could be argued that Iran had some right to take action with respect to third country vessels supporting Iraq's conduct of the war, unlawful mining and wanton attacks (as opposed to visit and search) cannot be excused as necessary and proportionate self-defense, nor as "necessary to protect . . . essential security interests." As such, Iran's actions were not permissible either under international norms on the use of force or under Article XX(10(d) of the 1955 Treaty.

6.24 The United States notes that some, but not all, of the U.S. vessels attacked by Iran were under the U.S. flag. Nevertheless, the jurisprudence of this Court recognizes that it is appropriate to protect *ownership* interests under contemporary commercial treaties in appropriate circumstances³⁹⁶. In the circumstances of this case, the States under whose flag these U.S.-owned vessels operated have confirmed that they have no objection to the presentation by the United States of a claim based on attacks against these U.S.-owned vessels³⁹⁷. This is important,

³⁹⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para. 78.

³⁹⁶ *See, generally, Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, para.132 (finding under a commercial treaty that the United States could claim on behalf of U.S. nationals for damage to immovable property technically titled in a foreign company, where the company was wholly owned by the U.S. nationals).

³⁹⁷ *See* Exhibit 179, containing communications from foreign governments indicating consent to U.S. presentation of the claims at issue. Liberian authorities have confirmed their lack of objection orally.

for where the Court previously has found the nationality of the injured entity to be of relevance in precluding a claim, it has done so out of concern that the rights of the State of nationality be respected³⁹⁸. Moreover, in the circumstances of this case, presentation of claims respecting U.S.-owned vessels in this forum are intimately related to the claims based on U.S.-flag vessels and may be the only means for their vindication. Finally, to the extent that the Court finds that Article X(1) provides independent legal protection to maritime commerce, the Court must find that such protection encompasses U.S.-owned vessels engaged in maritime trade in the Gulf and their cargo regardless of whether the vessels are under U.S. flag.

6.25 The United States also submits that its counter-claim is not dependent on an espousal of claims held by U.S. nationals. Rather, the United States claim is based on Iran's obligation to the United States itself to abide by the provisions of Article X. Iran's overall conduct in creating extremely dangerous conditions for the conduct of U.S. maritime trade in the Gulf, including the attacks on U.S. vessels, violated Iran's obligations under Article X. In ascertaining what reparation should be made for such a violation, it is appropriate to consider all damage to the interests of the U.S. Government and its nationals, regardless of the legal form under which those interests arise. Such damage would include the significant costs incurred by the United States in deploying additional forces to the Gulf to protect maritime commerce by escorting vessels, clearing minefields, and other activities³⁹⁹.

³⁹⁸ *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, paras. 85 - 103 (finding under customary international law that Belgium did not have standing to bring a claim on behalf of Belgian shareholders for injury to a company formed under Canadian law.)

³⁹⁹ See, e.g., United States General Accounting Office, *Burden Sharing: Allied Protection of Ships in the Persian Gulf*, September 1990, Exhibit 32.

6.26 Accordingly, the United States requests that the Court find that, in laying mines in the Gulf and otherwise engaging in military actions in 1987-88 that were dangerous and detrimental to maritime commerce, the Government of Iran breached its obligation to the United States under Article X of the 1955 Treaty. As such, Iran is obligated to make full reparation to the United States for violating the 1955 Treaty, in a form and amount to be determined by the Court at a subsequent stage. *The United States reserves the right in that subsequent stage to supplement information contained in this pleading regarding attacks on U.S. vessels, as well as to add further instances of Iranian attacks on U.S. vessels in the Gulf in 1987-88.*

SUBMISSIONS

On the basis of the facts and arguments set out above, the Government of the United States of America requests that the Court adjudge and declare:

1. That the United States did not breach its obligations to the Islamic Republic of Iran under Article X(1) of the Treaty of Amity between the United States and Iran, and,
2. That the claims of the Islamic Republic of Iran are accordingly dismissed.

With respect to its counter-claim, and in accordance with Article 80 of the Rules of the Court, the United States requests that the Court adjudge and declare:

1. That in attacking vessels, laying mines in the Gulf and otherwise engaging in military actions in 1987-88 that were dangerous and detrimental to maritime commerce, the Islamic Republic of Iran breached its obligations to the United States under Article X of the 1955 Treaty, and
2. That the Islamic Republic of Iran is accordingly under an obligation to make full reparation to the United States for violating the 1955 Treaty in a form and amount to be determined by the Court at a subsequent stage of the proceedings.

The United States reserves the right to introduce and present to the Court in due course a precise evaluation of the reparation owed by Iran.

23 June 1997.

Michael J. Matheson

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Agent of the United States of America

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