INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING OIL PLATFORMS

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

REJOINDER

SUBMITTED BY

THE UNITED STATES OF AMERICA

23 MARCH 2001

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REJOINDER OF THE UNITED STATES OF AMERICA

INTRODUCTION

I.01 In its Judgment of 12 December 1996, the Court found that it has jurisdiction, on the basis of Article XXI, paragraph 2, of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran (hereinafter "1955 Treaty") to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of that Treaty. On 23 June 1997, the United States filed its Counter-Memorial and Counter-Claim (hereinafter "Counter-Memorial"). In its Order of 10 March 1998, the Court found that the counter-claim "is admissible as such and forms a part of the current proceedings". Iran filed its Reply and Defence to Counter-Claim (hereinafter "Reply") on 10 March 1999. This Rejoinder responds to Iran's Reply.

I.02 The United States will argue in this Rejoinder that there remain four independent grounds upon which Iran's claim should be rejected in its entirety. First, the Court should deny relief to Iran because of Iran's own repeated illegal conduct. Second, the Court should determine that the actions of the United States did not violate Article X, paragraph 1, of the 1955 Treaty, because these actions did not impede the freedom of commerce between the territory of Iran and the territory of the United States within the meaning of that provision. Third, the Court should find that the actions of the United States were necessary to protect the essential security interests of the United States, and accordingly were excluded from the reach of the 1955 Treaty by Article XX, paragraph 1(d). Finally, the Court should find that the actions of the United States were not wrongful because these actions were taken in lawful self-defense in response to illegal armed attacks by Iran. The United States will not repeat in this Rejoinder each assertion that it has

made previously in these proceedings; unless otherwise indicated in this Rejoinder, it incorporates such assertions into this pleading by means of this reference.

I.03 The final Part of this Rejoinder addresses the issues raised by Iran with respect to the counter-claim of the United States. Notwithstanding Iran's resort to arguments in its Reply which are plainly inconsistent with the positions it has taken with respect to its own claim, the United States will demonstrate in this Part that Iran's illegal conduct was dangerous and detrimental to maritime commerce and impeded the freedoms of commerce and navigation between Iran and the United States within the meaning of the 1955 Treaty. It will demonstrate further that the defenses put forward by Iran for its illegal conduct are without merit.

I.04 As will become clear in the course of a review of this Rejoinder, Iran seeks in this proceeding to invoke the legal responsibility of the United States with respect to circumstances and conduct for which Iran itself was plainly and ultimately responsible. Iran seeks to disguise its responsibility, in some cases, by false representations to this Court, and in others, by incomplete and misleading representations. Iran's representations are belied by the protests submitted to Iran by numerous countries, the statements of its own officials, reports in authoritative sources, the statements and actions of the international shipping community, accounts of eyewitnesses, photographic evidence, physical evidence and internal Iranian government documents. The United States urges the Court to review carefully Iran's conduct in this matter, and to attribute responsibility in this proceeding to that State which should appropriately bear it.

PART I

STATEMENT OF FACTS

INTRODUCTION

1.01 Although the Parties to this case have submitted detailed and voluminous evidence to the Court, the basic facts of the case are simple: Iran launched illegal armed attacks on U.S. ships and cargo as part of its campaign of attacking neutral shipping during the Iran-Iraq War, and these attacks compelled the United States to take legitimate and necessary actions both in self-defense and to protect essential U.S. security interests.

1.02 Between 1984 and 1988 Iran systematically and deliberately attacked ships traveling in the Gulf from the United States and from other countries that were neutral in Iran's war with Iraq. Over 200 ships from 31 neutral countries were victims of Iran's attacks[1]. At least 63 people died as a result of these attacks; 99 more were wounded[2]. U.S. ships which Iran attacked included *Bridgeton, Sungari, Sea Isle City, Lucy, Esso Freeport, Diane, Esso Demetia,* and *USS Samuel B. Roberts.*

1.03 In response to Iran's unprovoked and ongoing attacks on U.S. shipping, the United States took limited self-defense actions against three offshore Iranian oil platform complexes -

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[1] *See* U.S. Counter-Memorial, 23 June 1997 (hereinafter "Counter-Memorial"), para. 1.04.

[2] *Ibid.*; Statement of Capt. Christian Feyer Puntervold, 15 January 1997, and attachments, Exhibit 11. Exhibits 1-179 were filed with the Counter-Memorial and Exhibits 180-261 are attached to this Rejoinder.

Rostam, Sassan, and Sirri – that Iran had used in its attacks on U.S. and other neutral shipping in the Gulf.

1.04 Iran bears sole responsibility for its illegal armed attacks on U.S. shipping and it cannot complain of the U.S. actions in self-defense that resulted from them.

1.05 The evidence of Iran's illegal actions is clear. It was well-established within the international shipping community that Iran was attacking U.S. and other neutral shipping, and that Iran used its oil platforms in these attacks. Eyewitness accounts of Iran's illegal actions make these facts undeniable. Shipping companies took costly steps to avoid Iran's attacks. Nations from around the world protested Iran's attacks and sent military ships to the Gulf to protect neutral shipping from those attacks. The United Nations Security Council, the Arab League, and the Gulf Cooperation Council condemned Iran's attacks.

1.06 Iran asks this Court not to believe this international consensus and the substantial evidence demonstrating Iran's wrongdoing. Instead, Iran offers this Court a series of unsupported conjectures, many of which are demonstrably false, in an effort to cast doubt on its responsibility for its attacks on neutral shipping. As this Rejoinder will demonstrate, Iran's efforts to escape the consequences of its illegal actions are simply not credible. But Iran has compounded its credibility problem by making assertions about factual matters at issue in this case that fail to withstand even casual scrutiny. Indeed, some of Iran's statements raise questions as to whether any serious efforts were made to ascertain their truthfulness. A few particularly glaring examples, discussed in more detail below, illustrate the point:

- Iran categorically denied the existence of Iranian-controlled missile launching sites on the Faw peninsula[3], only to be forced to abandon this denial when confronted with photographic evidence showing an active cruise missile staging facility in Iranian controlled territory in the Faw area[4].

- Iran has asserted the existence of an Iraqi controlled missile site at a location on the Faw peninsula[5], when photographic evidence clearly indicates that no such site existed at that location at that time[6].

- Iran has denied that it laid mines in international waters in the Gulf[7], when photographic evidence and eyewitness accounts document the *Iran Ajr* in the act of laying mines in international waters at the time it was captured by U.S. forces[8].

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[3] Iran's Memorial, 8 June 1993 (hereinafter "Memorial"), para. 4.74 ("There was, in fact, no Iranian missile-site in the Fao peninsula ... ") In a number of instances Iran has adopted different spellings of certain proper nouns than those used by the United States in its Counter-Memorial. In this Rejoinder, the United States will continue to use the spellings adopted in the Counter-Memorial.

[4] Reply and Defence to Counter-Claim, 10 March 1999 (hereinafter "Reply"), para. 4.19.

[5] *Ibid.*, para. 4.29.

[6] *Infra*, para. 1.55.

[7] Reply, paras. 5.20-5.21.

[8] Counter-Memorial, paras. 1.40-1.47.

1.07 Disregarding this Court's prior decisions[9], Iran has pleaded with the Court to ignore various statements made by its officials admitting Iran's illegal actions, arguing that the Court should not deem such statements to be reliable because they were made in time of war "necessarily with political and other considerations in mind[10]." In fact, the false, misleading, and incredible nature of many of the assertions in Iran's pleadings suggests that the Court should view Iran's other representations in this case as being of a similar character.

1.08 Iran also attempts to use these proceedings to assign blame for the whole of the Iran-Iraq War. Iran seems to suggest that fault for its deliberate decision to target neutral shipping properly rests, *inter alia*, with Iraq (for being Iran's enemy in the war and attacking

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[9] *See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (hereinafter *"Nicaragua"*), *Merits, Judgment, I.C.J. Reports 1986*, para. 64 ("The Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission."); Keith Highet, "Evidence, the Court, and the Nicaragua Case," 81 *American Journal of International* Law p. 37 (1987) ("This method was applied to statements made by President Reagan and by Secretary of State Shultz, for the United States; and by President Ortega, for Nicaragua. In addition, the quotation (by the press) of 'United States administration sources' assisted in establishing the Court's conclusions that the United States was responsible for mining the Nicaraguan harbors and, among other similar facts, that the CIA was responsible for production of a psychological warfare manual"). *See also Velásquez Rodríguez Case*, Inter-American Court of Human Rights (Judgment of 29 July 1988), para. 146, *reprinted in* T. Buergenthal, R. Norris & D. Shelton, *Protecting Human Rights in the Americas* p. 257 (3rd ed. 1990) ("Many of the press clippings offered by the Commission cannot be considered as documentary evidence as such. However, many of them contain public and well-known facts which, as such do not require proof; others are of evidentiary value, as has been recognized in international jurisprudence . . . insofar as they textually reproduce public statements, especially those of high-ranking members of the Armed Forces, of the Government, or even of the Supreme Court of Honduras . . .").

[10] Reply, para. 2.43.

Iranian shipping); Kuwait, Saudi Arabia, and the United States (for being sympathetic with Iraq during the war); and the international community as a whole (for failing to condemn and stop various Iraqi actions against Iran)[11].

1.09 These assertions raise issues that are outside this Court's jurisdiction and have no relevance to this case. Iran never declared that the United States was a belligerent in its war with Iraq. Rather, this case is about Iran's illegal armed attacks on neutral U.S. shipping and the United States lawful actions in response to those attacks. Iran's efforts to vindicate its account of the Iran-Iraq War are beyond the scope of these proceedings, and this Court should ignore them.

1.10 Ultimately, this Court must set aside Iran's various diversionary tactics and false assertions and focus on the central facts on which this case turns. Iran systematically attacked U.S. and other neutral shipping and it used its oil platforms in these attacks. Iran bears sole responsibility for these actions, and cannot complain about the limited actions taken by the United States both in self-defense and to protect essential U.S. security interests.

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[11] Iran observes in its Reply that Kuwait has apologized to Iran for its support for Iraq during the Iran-Iraq War. *See* Reply, para. 2.26. U.S. Secretary of State Madeleine Albright said that "aspects of U.S. policy towards Iraq, during its conflict with Iran appear now to have been regrettably shortsighted, especially in light of our subsequent experiences with Saddam Hussein." Madeleine K. Albright, Remarks before the American-Iranian Council, 17 March 2000. While such statements may be of diplomatic or historical interest, they shed no light on the specific facts or legal issues raised by this case.

CHAPTER I

IRAN ATTACKED U.S. AND OTHER NEUTRAL SHIPPING IN THE GULF AND USED ITS OIL PLATFORMS IN THESE ATTACKS

Section 1. Iran Systematically and Deliberately Attacked U.S. and Other Neutral Shipping

1.11 An analysis of this case must begin with the undisputed fact that Iran systematically and deliberately attacked U.S. and other neutral shipping in the Gulf during the Iran-Iraq War. In its Counter-Memorial, the United States demonstrated that:

- Iran attacked over 200 merchant ships from 31 neutral countries between 1984 and 1988[12].
- At least 63 people were killed in these attacks; at least 99 more were injured[13].
- Iran attacked neutral shipping generally; it did not limit its attacks to ships carrying war materiel nor to ships refusing to submit to visit-and-search[14].
- U.S. ships which Iran attacked included *Bridgeton, Sungari, Sea Isle City, Lucy, Esso Freeport, Diane, Esso Demetia,* and *USS Samuel B. Roberts*[15].
- The International Association of Tanker Owners (hereinafter "Intertanko"), the General Council of British Shipping, *Lloyd's Weekly Casualty Reporting Service, Lloyd's List, Jane's Defence Weekly*, and other publications reported extensively on Iran's attacks on neutral shipping and warned vessels to take appropriate

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[12] *See* Counter-Memorial, para. 1.04.

[13] *Ibid.*; Statement of Capt. Christian Feyer Puntervold, 15 January 1997, and attachments, Exhibit 11.

[14] *See* Counter-Memorial, para. 1.07.

[15] *See* Counter-Memorial, paras. 1.61-1.62, 6.08; *see also infra,* Part VI.

precautionary measures to avoid Iran's attacks[16].

- Shipping companies took costly steps, including changing routes, sailing only at night, and loading their vessels at less than full capacity, to avoid traveling near Iranian offshore oil platforms because it was known that Iran used these platforms in its attacks on neutral shipping[17].

- Iran's attacks on neutral shipping drew widespread diplomatic protests and condemnation from, among others, the UN Security Council[18], the Arab League[19], the

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[16] Counter-Memorial, paras. 1.01-1.08. This Court has previously relied on reports contained in authoritative accounts by major maritime organizations. *See, e.g., Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, para. 77 (relying on *Lloyd's List* and *Shipping Gazette*).

[17] *See* Statement of Colin Eglington, former General Superintendent Operations Kuwait Oil Tanker Company, Exhibit 31; Statement of Thomas R. Moore, President, Chevron Shipping Company LLC (hereinafter "Chevron Statement"), Exhibit 180.

[18] *See* Resolution 552, United Nations Security Council (2546th meeting, 1 June 1984), *reprinted in* United Nations Document S/RES/552, (1984), Exhibit 27, ("Having considered the letter dated 21 May 1984 from the representatives of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates complaining against Iranian attacks on commercial ships en route to and from the ports of Kuwait and Saudi Arabia" the Security Council "condemn[ed] these recent attacks on commercial ships en route to and from the ports of Kuwait and Saudi Arabia").

[19] *See* Statement of Mr. Chedli Klibi, Secretary-General of the League of Arab States, to the United Nations Security Council, 25 May 1984, United Nations Document S/PV.2541, pp. 36-37, Exhibit 181 ("Navigation in the international waters of the Arab Gulf has in fact been thwarted by acts of aggression by the Iranian Air Force, which has attacked tankers belonging to two Arab States on the Gulf, Members of the United Nations, that is, Kuwait and the Kingdom of Saudi Arabia ... [T]hose acts, for which Iran is responsible, are acts of aggression against the sovereignty, security and integrity of the territorial waters of Saudi Arabia and Kuwait in violation of the norms of good-neighbourliness, the United Nations Charter and the Convention on the Law of the Sea."; Arab League, Text of Communique from Amman Summit, 11 November 1987, 27 *International Legal Materials*, p. 1651, Exhibit 182 ("The leaders. . . voiced their indignation at the Iranian regime's intransigence, provocations and threats to the Arab Gulf States. . . The leaders reviewed developments in the Gulf region and the dangerous results of the Iranian threats, provocations and aggressions. . . . The Conference affirmed its support of Kuwait in all the measures it adopted to protect its territories and waters and safeguard its stability. The Conference expressed its support of Kuwait in confronting the threats and aggressions of the Iranian regime.")

Gulf Cooperation Council[20], the United Kingdom[21], Kuwait[22], Bahrain, Oman, Qatar,

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[20] *See* Gulf Cooperation Council, Ministerial Statement on Iran's attacks on Tankers, 17 May 1984, *reprinted in British Broadcasting Company*, 19 May 1984. Exhibit 183 ("The GCC Ministerial Council held an extraordinary meeting today . . . and reviewed recent developments in the region, represented in Iran's aggression against shipping to and from the ports of the GCC member countries ... They also reviewed the threats those attacks posed to the vital interests of the GCC member-countries and the violation of international law and of the UN Charter that they entailed, as well as the infringement of the law of the sea and the resultant heightening of tension in the area. The Ministerial Council recalled the decision taken by the Supreme Council to regard any aggression against one member-country as aggression against them all and, in line with that attitude, the Council expressed its denunciation of those attacks").

[21] *See* Letter dated 22 September 1987 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, United Nations Document S/19147, Exhibit 184, "The British Government have clear evidence that the *Gentle Breeze* was fired on by one or more Iranian naval vessels at the position 2750N and 4948E. . . . This attack was clearly premeditated and totally unprovoked, and hence wholly unjustified. The *Gentle Breeze* posed no conceivable threat to the interests of the Islamic Republic of Iran. The attack was in clear violation of principles of freedom of navigation, and of international law, in particular Security Council Resolution 598 (1987) of 20 July 1987. The British Government reserves the right to claim compensation from the Iranian Government for any damage or expenses caused by the attack on the *Gentle Breeze*, or any other such attacks. My Government have demanded an immediate explanation of this outrage and an apology for it, together with an assurance from the Government of the Islamic Republic of Iran that such deliberate, unprovoked and wholly unjustified attacks on unarmed British merchant vessels will not be repeated."; "British Protest," *The Times(London)*, 27 January 1987, Exhibit 185 ("The Foreign Office yesterday summoned the Iranian charge d'affaires, Mr Akhumzadeh Basti. . .to deliver a 'vigorous protest' to Iran over an attack on Friday against a British merchant ship in the Gulf").

[22] *See* Letter dated 1 September 1987 from the Permanent Representative of Kuwait to the United Nations Addressed to the Secretary-General, United Nations Document S/19093, Exhibit 186 (reporting on Iranian attacks on Kuwaiti shipping and stating, "While deploring Iran's continued acts of piracy by its navy against Kuwaiti vessels, Kuwait draws the attention to the threat that these Iranian practices pose not only to the navigation in the high-seas of the Arabian Gulf but also to the territorial waters of neutral States."); Letter dated 15 October 1987 from the Permanent Representative of Kuwait to the United Nations Addressed to the Secretary-General, United Nations Document S/19210, Exhibit 187 (reporting on Iranian attacks on Kuwaiti shipping and stating "Further to our previous correspondence with you concerning the attacks launched by Iran against Kuwait, we would like to inform you that Iran has persisted in its hostile acts against Kuwait in disregard of international laws and resolutions"); Letter dated 16 October 1987 from the Permanent Representative of Kuwait to the United Nations Addressed to the Secretary-General, United Nations Document S/19215, Exhibit 188 (reporting on Iranian attacks on Kuwaiti shipping).

Saudi Arabia, the United Arab Emirates[23], Egypt[24], Jordan[25], France[26], the Soviet

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[23] *See* Letter dated 21 May 1984 from the Representatives of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates Addressed to the President of the Security Council, United Nations Document S/16574, Exhibit 189 ("Upon instructions from our Governments, we have the honour to request an urgent meeting of the Security Council to consider the Iranian aggressions on the freedom of navigation to and from the ports of our countries. Such aggressions constitute a threat to the stability and security of the area and have serious implications to international peace and security"). *See also* "Saudis Break Diplomatic Ties with Iran, Citing Mecca Riots and Gulf Raids," *The New York Times*, 27 April 1988, p. A10, Exhibit 190 (Saudi announcement of break in relations with Iran "cited Iranian threats against navigation in the gulf").

[24] *See* Letter dated 26 October 1987 from the Permanent Representative of Egypt to the United Nations Addressed to the Secretary-General, United Nations Document A/42/687, S/19232, Exhibit 191 ("The Arab Republic of Egypt condemns with utmost vigour the act of aggression just committed against the fraternal State of Kuwait" by Iran); Letter dated 28 July 1988 from the Permanent Representative of Egypt to the United Nations Addressed to the Secretary-General, United Nations Document A/43/494, S/20072, Exhibit 192 (reporting on Iranian attack on Egyptian shipping).

[25] *See* Statement of Mr. Salah, Representative of Jordan, to the UN Security Council, 25 May 1984, United Nations Document S/PV.2542, pp. 3, 4-5, 11, Exhibit 193, ("Iran's raids on Saudi and Kuwaiti tankers, as well as its attack on civilian shipping in international waters, constitute a grave development in the Gulf region. This gravity is reflected in two aspects: first, the illegality and illegitimacy of those attacks; secondly, the political consequences of their continuation. . . . [I]t is incumbent upon this Council promptly to condemn these actions, which represent a grave threat to the sovereignty, independence and welfare of the States of the region, as well as to regional and international peace and security").

[26] *See* "Iranian Gunboats Fire on French Ship," *The Times (London)*, 14 July 1987, p. 7, Exhibit 194 ("France has ordered its Charge d'Affaires in Tehran to demand an explanation for the attack. The envoy has been told to warn Iran that France will 'exercise all its rights following this grave affair'").

Union[27], Italy[28], Japan[29], Norway[30], Greece[31], Turkey[32], Djibouti[33], Morocco[34],

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[27] *See* "Iran Faces Prospect of Isolation by East and West," *The Times (London)*, 12 May 1987, Exhibit 195 (". . .the Soviet news agency has condemned as an act of piracy the gunboat attack on a Soviet freighter traveling from Kuwait last week for which shipping agents in the Gulf blame Iran").

[28] *See* "20 Ships Hit in Gulf in Six Days, Raising Fears of Maritime Nations," *The New York Times*, 4 September 1987, Exhibit 196 ("The Italian Foreign Ministry summoned the Iranian Ambassador in Rome and sent instructions to its Ambassador in Teheren [sic] to deliver 'the strongest protest' to the Iranian authorities" over an Iranian attack on the Italian containership *Jolly Rubino*).

[29] *See* "Japan Protests to Iran Over its Suspected Attacks on Vessels," *Japan Economic Newswire*, 2 October 1987, Exhibit 197 ("Japan lodged a strong protest to Iran Friday over what is believed to be Iranian attacks on two Japanese tankers in the Persian Gulf Wednesday. Takashi Onda, Director General of the Foreign Ministry's Middle Eastern and African Affairs Bureau, said he made the protest to Ali Asghar Farshchi, Charge d'Affaires at the Iranian Embassy in Tokyo at his Ministry").

[30] *See* Government of Norway, cable reporting protest to Iranian authorities, 10 February 1988, Exhibit 198 (hereinafter "Norway Cable"); "Norway Tells Iran It Will Not Tolerate Gulf Ship Strikes," *Reuters*, 24 December 1987, Exhibit 23 ("Norway told Iran on Thursday it would not tolerate attacks on its tankers in the Persian Gulf, the Norwegian news agency reported. An official protest note was handed to the Iranian charge d'affaires in Oslo following two recent attacks on Norwegian ships, the agency said").

[31] *See* "Greece Lodges Formal Protest with Iran on Shipping Attacks," *Platt's Oilgram News*, 22 December 1987, p. 2, Exhibit 199 ("Greece delivered a sharp protest to Iran's Ambassador to Athens over repeated Iranian attacks on Greek merchant ships in the Gulf (on 11/13)").

[32] *See* "Turkey Sticks to its Guns Over Iranian Attack on Atlas 1 Tanker," *Platt's Oilgram News*, 19 March 1986, p. 3, Exhibit 200 ("The Iranian government hasn't replied to Turkey's protest of an Iranian attack on one of its tankers March 2, a Turkish Foreign Ministry spokesman said today (on 3/4). . . .The day of the attack, Turkey called the Iranian charge d'affaires to Ankara and told him Turkey would 'reserve the right to demand indemnity'").

[33] *See* Statement of Mr. Farah Dirir, Representative of Djibouti, to the UN Security Council, 30 May 1984, United Nations Document S/PV.2545, pp. 3, 5, Exhibit 201 (". . . my delegation urges the Security Council to consider with more intent the legitimacy and gravity of the complaint of the Gulf States with regard to the aggression of the Iranian war machine against oil tankers and other commercial vessels sailing to and from the Arab Gulf countries that are not and have never been in a state of war with Iran").

[34] *See* Statement of Mr. Mrani Zentar, Representative of Morocco, to the UN Security Council, 29 May 1984, United Nations Document S/PV.2543, pp. 9-10, 12-13, Exhibit 202 ("The Republic of Iran has thus perpetrated undeclared acts of war against countries which are parties to no conflict and which have not been

Sudan[35], and Yemen[36].

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involved in any way in the hostilities between Iraq and Iran. Furthermore, the Iranian aggressive action, which according to the Iranian authorities themselves can be expected to continue, is aimed at disrupting navigation in international waters in the Arab Gulf, paralyzing commercial and other forms of traffic in the region and creating new difficulties for the world economy. This threatens not only many developed countries but also a great number of third-world countries, which are beset by numerous economic problems and are sorely tested by the high cost of energy. . . . Iran's acts of aggression are wanton, unprovoked and unjustifiable and are contrary to international law").

[35] *See* Statement of Mr. Birido, Representative of Sudan, to the UN Security Council, 25 May 1984, United Nations Document S/PV.2542, pp. 17, 18, 21, Exhibit 193 ("The Iranian act of aggression against the Kuwaiti and Saudi Arabian oil tankers clearly threatens the sovereignty, independence and territorial integrity of the States of the region. It is also a flagrant threat to the freedom of navigation in international waters and waterways leading to and from the ports of all the Gulf coastal States. . . . We call upon Iran to desist from aggression, to respect the sovereignty of the States of the region, their territorial integrity, their waterways, ports and economic installations, to fulfill the obligations of good-neighbourliness and to comply with the principles of the United Nations Charter and international law").

[36] *See* Statement of Mr. Sallam, Representative of the Arab Republic of Yemen, to the UN Security Council, 25 May 1984, United Nations Document S/PV.2541, pp. 24, 26, Exhibit 181 (". . . the delegation of Yemen considers that the acts of aggression committed by Iranian aircraft against Saudi and Kuwaiti tankers in territorial waters and international navigation channels, far from areas that have been declared as zones of hostility, should be denounced and their persistence condemned, since they are aimed against tankers belonging to two States that are not party to the conflict - something which heightens tension in the region and constitutes a new threat to the peace, security and stability of those States and of the world at large").

1.12 In short, Iran's attacks on neutral shipping were widespread, well documented, and of great concern within the international shipping community. Consistent with its past practice, the Court may take judicial notice of the extensive public record establishing Iran's responsibility for attacks on neutral shipping[37]. Iran has not attempted to deny these facts in its pleadings before this Court. Its failure to do so should lead this Court to conclude that Iran's responsibility for attacks on neutral shipping has been proven[38].

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[37] *See United States Diplomatic and Consular Staff in Tehran, (United States of America v. Iran,) Judgment, I.C.J. Reports 1980,* paras. 12-13 (finding allegations of fact by the United States regarding the seizure of the embassy and hostages as well founded, given that they are matters of public knowledge which have received extensive coverage in the world press); Keith Highet, "Evidence, the Court, and the Nicaragua Case," 81 *American Journal of International Law* p. 39 (1987) (With reference to the paragraphs cited immediately above: "This comment is useful in analyzing the role played by judicial notice and the observation of 'current events' by the judges. In the position of the International Court, this is a necessary, if not an inevitable, step in accumulating the factual evidence upon which determinations as to international responsibility can proceed to be founded"); *Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, para. 63 ("although it is perfectly proper that press information should not be treated in itself as evidence for judicial purposes, public knowledge of a fact may nevertheless be established by means of these sources of information, and the Court can attach a certain amount of weight to such public knowledge"); Mojtaba Kazazi, *Burden of Proof and Related Issues,* p. 174 (1996) ("the concept of judicial notice itself is undoubtedly admitted in international procedure and is applied by different tribunals including the International Court of Justice").

[38] *See* Keith Highet, "Evidence, the Court, and the Nicaragua Case," 81 *American Journal of International Law* pp. 33-34 (1987) ("Traditionally, the Court has operated in important areas of factual conclusions by an informed process of inference. The inferential method may be 'negative,' in that it seeks to conclude about a state of affairs because of a failure to deny or rebut it. Thus, what is not denied may well be accepted: for example overflights by U.S. military aircraft in the Nicaragua case . . . . The inferential process may also be 'affirmative'; it may engage the responsibility of a state on the presumption that the state must have intended the likely or reasonably foreseeable consequences of an earlier statement or action"); Mojtaba Kazazi, *Burden of Proof and Related Issues,* p. 371 (1996) ("The rule of *actori incumbit probatio* is affected by the operation of presumptions in the sense that, in the process of evaluating evidence, the tribunal takes account of any presumptions applicable in favour of the party that carries the burden of proof and not refuted by the other party. Generally speaking, presumptions affect the burden of proof insofar as they create *prima facie* evidence or proof in favour of the party that

1.13 Indeed, during the war, Iran acknowledged that it maintained an illegal campaign of attacks against neutral shipping. For example, in February 1988, Norway's Ambassador to Iran protested Iranian attacks on Norwegian shipping to Hossein Sheikholeslam, Iran's Deputy Foreign Minister. The Norwegian Ambassador noted that the Norwegian ships had been engaged "in legal traffic between neutral harbors" at the time Iran attacked them[39].

1.14 In response to this protest, Deputy Foreign Minister Sheikholeslam acknowledged both Iran's responsibility for the attacks in question and that Iran maintained an illegal policy of attacking neutral shipping in the Gulf. According to the Norwegian Ambassador's reporting cable on his conversation with Deputy Foreign Minister Sheikholeslam:

> "Sheikholeslam did not deny that Iran indeed was responsible for the attacks on *Happy Kari, Berge Big, Igloo Espoo,* and *Petrobulk Ruler*. He said he regretted that Norwegian ships had been targeted in such attacks, and added that Iran's purpose was not to harm Norwegian shipping. It was the cargo these ships were carrying that was the real target. Sheikholeslam stressed that Iran was determined to continue attacking - whenever possible - all ships carrying cargo to or from docks in Saudi Arabia or Kuwait. When I argued that these are flagrant violations of international law, he somewhat arrogantly responded that he was fully aware of that. Sheikholeslam mentioned that the Iranian Navy had been instructed to seek to avoid loss of human lives during the attack[40]."

1.15 Iran's practice of attacking neutral shipping, and Iran's specific targeting of U.S. shipping, was further confirmed in April 1988 by Commodore Mohammad Hoseyn

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benefits from them. This results in the shifting of the burden of evidence from one party to the other").

[39] Norway Cable, Exhibit 198.

[40] *Ibid.*

Malekzadegan, Commander of the Iranian Navy, who acknowledged the existence of "a wholehearted task by the 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 missiles[41]. . . ."

1.16 Against this background, there can be no doubt of Iran's responsibility for attacks on U.S. and other neutral shipping.

Section 2. Iran Used its Oil Platforms in its Attacks on U.S. and Other Neutral Shipping

1.17 The evidence is also clear that Iran used its oil platforms in its attacks on U.S. and other neutral shipping. Indeed, the plans and communications of Iran's Navy, as well as numerous eyewitness reports, make it impossible for Iran credibly to deny its military use of the platforms. Iran's only response to this evidence is to suggest to the Court that there were limits to the military role that the oil platforms played. Iran's response in no way refutes the substantial body of direct evidence demonstrating Iran's use of the platforms in its attacks on U.S. and other neutral shipping.

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[41] "Radio Phone-In Program With Defense Officials," *Foreign Broadcast Information Service*, 14 April 1988, p. 53, Exhibit 13 (emphasis added). This Court should view such statements by senior Iranian Government officials as particularly probative since they constitute admissions against Iran's interest. *See supra,* note 9.

A. The Iranian Exclusion Zone And The Channel For Neutral Shipping

1.18 As a matter of context, it is important to understand that, during the Iran-Iraq War, neutral shipping was required to travel along a route that passed close to the Rostam, Sassan, and Sirri platform complexes. This necessity arose from Iran's declaration of an exclusion zone along its coast in the Gulf which rendered off limits the routes to the north of the platforms that commercial shipping had followed prior to the war. Routes to the extreme south of the platforms were not viable because shallower water there created risks that fully loaded tankers would run aground[42]. As a result of Iran's exclusion zone, the route U.S. tankers took through the Gulf carried them fewer than 15 nautical miles from the Sirri and Rostam platforms, and fewer than 30 nautical miles from Sassan[43]. The evidence is clear that Iran seized on this circumstance to incorporate the platforms into its military command structure and to use the platforms in its attacks on U.S. and other neutral shipping in the Gulf.

B. The Iranian Navy's Own Documents Confirm Iran's Use Of The Platforms To Collect And Disseminate Military Intelligence On The Movements Of Foreign Shipping In The Gulf

1.19 Documents issued by the Iranian Navy establish conclusively that Iran used its oil platforms as part of its military apparatus, by means of which it attacked neutral shipping. This

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[42] *See* Statement of Colin Eglington, para. 10, Exhibit 31.

[43] *See* Counter-Memorial Map 1.2.

evidence includes a document entitled "Joint Sea Coast 1 Combat Group (Operations) Sea Coast 1 Operations Plan Ghadir" (hereinafter "Operations Plan")[44]. U.S. forces took possession of the Operations Plan when they boarded the *Iran Ajr* after witnessing its crew laying mines in the Gulf. The United States immediately treated the document as highly classified and has not previously disclosed its possession of the document. In light of Iran's position in its Reply, the United States has taken the extraordinary step of declassifying this document to permit its use in this case.

1.20 The Operations Plan is marked "TOP SECRET" in Farsi and indicates that it is copy 32 of 50 copies of the document in existence. A register in the front of the Operations Plan indicates that the document was updated regularly, and that it had been updated on 24 June 1987, just over three months prior to the seizure of the *Iran Ajr*. The Operations Plan describes the organization and responsibilities of the Iranian forces that make up the Sea-Coast 1 Combat Group, contains information gathered by Iranian intelligence about the posture and intentions of the forces of other countries present in the Gulf, and contains operational plans that the Sea-Coast 1 Combat Group should have been prepared to carry out if ordered to do so.

1.21 The Operations Plan and other Iranian Navy documents and communications which the United States submitted with its Counter-Memorial demonstrate conclusively that the Rostam, Sassan, and Sirri platform complexes were an integral part of Iran's military operations

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[44] Islamic Republic of Iran Naval Forces, Joint Sea-Coast 1 Combat Group (Operations) Sea-Coast 1 Operations Plan Ghadir, Exhibit 203.

structure, and that Iran used the platforms in its conduct of military operations, which included Iran's attacks on neutral shipping in the Gulf. Specifically:

- Iran deployed military observations posts "on the oil platforms in the southern parts of the Persian Gulf" - including on Rostam, Sassan, and Sirri - "in order to gather information about the enemy's air and sea traffic and destroy its craft[45]." These posts included military observers whose "goal" was "[t]he 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)[46]."

- The Reshadat (Rostam) and Nasr (Sirri) platforms are listed in the Operations Plan's Combat Organization Annex as "1st Naval District Naval Facilities". This listing also specifically refers to Rostam as a "radar site" and to Sirri as a "temporary radar site[47]".

- The Operations Plan's Intelligence Annex states that "Oil platforms subordinate to the Sea-Coast 1 Combat Group are to report the following information as soon as it is received: any movement of foreign vessels near the oil platforms[48]. . . ." The platforms' broad order to report on "any movement of foreign vessels near the platforms" contrasts with other orders elsewhere in the Operations Plan that relate only to "movements or activities of enemy vessels[49]". Clearly the mandate of the platforms extended to reporting on the movements of neutral commercial shipping.

- The Operations Plan states that the 1st Naval District Installations Command, which includes the Rostam and Sirri platforms, is charged with the tasks of "conduct[ing] visual

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[45] Islamic Republic of Iran Armed Forces, Fleet, 1st Naval District ((Intelligence)), Instructions for the Deployment of Observers in the Persian Gulf, p. 3, Exhibit 115.

[46] Annex G (Communications), p. 9, Exhibit 115.

[47] Islamic Republic of Iran Naval Forces, Joint Sea-Coast 1 Combat Group (Operations) Sea-Coast 1 Operations Plan Ghadir, p. 20, Exhibit 203.

[48] *Ibid.*, pp. 23-24.

[49] *Compare* Instructions to Oil Platforms, *ibid.*, *with* "Requests from Adjacent Units," *ibid.*, pp. 24-25.

and radar surface and air surveillance for the 1st Naval District" and "be[ing] prepared to conduct joint operations with the ships and the marine brigade[50]."

- Outgoing messages found on the Rostam platform report on the composition, location, movements, and speed of shipping convoys traveling in the Gulf. These include a message reporting on the movements of a U.S. escorted convoy of ships that included *Sea Isle City*[51]. These messages confirm that, consistent with Iran's military plans, Iran in fact used the oil platforms to monitor shipping traveling in the Gulf and to communicate that information to other elements of the Iranian military.

- Messages from the Rostam platform found aboard *Iran Ajr* confirm that Iran used its oil platforms to transmit information directly to ships of the Iranian Navy, including those engaged in minelaying[52].

1.22 As noted above, the location of Iran's exclusion zone in the Gulf required neutral shipping to travel a course close to the Rostam, Sassan, and Sirri platform complexes. These platforms were thus ideally placed to carry out their orders to report on the locations and movements of foreign shipping. The platforms played the additional role of communicating this information to Sirri and Lavan Islands for further dissemination to other elements of the Iranian Navy, as well as directly to Iranian naval vessels conducting operations in the Gulf. Reports as to the location, course, and speed of ships including *Sea Isle City* allowed Iran to target these

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[50] *Ibid.*, p. 14.

[51] *See* Selected Messages from Archive of Incoming Messages, Rostam Oil Platform, Exhibit 119; *infra,* paras. 1.43-1.45

[52] *See* Translations of the Selected Paper-Tape Messages Sent From, and Received by the *Iran Ajr*, Tapes 1, 16, and 21, Exhibit 71.

ships with missiles and mines as part of its illegal campaign of attacking neutral shipping in the Gulf.

C. The International Shipping Community Was Aware Of Iran's Use Of Its Oil Platforms In Its Attacks On U.S. And Other Neutral Shipping

1.23 As the United States demonstrated in its Counter-Memorial, the international shipping community was well aware that Iran was using its oil platforms in its attacks on U.S. and other neutral shipping. Specifically, the United States demonstrated that:

- During the Iran-Iraq War, Iranian forces attacked 45-50 ships within 50 nautical miles of the Rostam platform; 35-40 ships within 50 nautical miles of the Sassan platform; and 35-40 ships within 50 nautical miles of the Sirri platform[53].

- Members of the crews of neutral commercial vessels attacked by Iran witnessed Iran using its oil platforms to launch its armed attacks[54]. These eyewitness reports included:

    - An eyewitness account by a crew member of the Norwegian ship *Berge King* that "he saw two helicopters on the Iranian off-shore installation, Rostam Island. One of them lifted and attacked, but the missile fell harmlessly into the sea. The other helicopter lifted when the first one returned to the installation and fired a misile [sic] which landed in the air conditioning room without exploding[55]."

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[53] *See* Counter-Memorial, para. 1.91 and Rejoinder Map 1. Some of the ships attacked were within the range of more than one of the platforms.

[54] This Court has previously found highly probative evidence that came from disinterested witnesses. *See Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, para. 69 ("In the general practice of courts, two forms of testimony which are regarded as prima facie of superior credibility are, first the evidence of a disinterested witness - one who is not a party to the proceedings and stands to gain or lose nothing from its outcome - and secondly so much of the evidence of a party as is against its own interest").

[55] *See* "Tanker Safety Circular Letter No. 54," *Intertanko*, 16 April 1986, para. 3, Exhibit 17.

- An eyewitness account by the Captain of the Panamanian ship *Stelios* that he saw the helicopter that launched a missile attack on *Stelios* take off from Rostam Island[56].

- An eyewitness account by a crew member of the French ship *Chaumont* that he 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 métres. 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 base[57]."

- In addition to these specific eyewitness accounts, numerous independent shipping sources, on the basis of data compiled from a number of sources, reported that Iran was using its oil platforms to launch attacks on neutral shipping. These reports include:

  - A report by Intertanko stating that "[a]t least 14 ships are reported to have been attacked from this installation called Rostam Island, located about 100 km from the Iranian shore line[58]." This same information was also reported by *Jane's Defence Weekly*[59].

  - A report by the General Council of British Shipping stating that "[r]eports indicate that the Iranians are now also using helicopters operated from their oil platforms in the Rostram [sic] Field (25.50N 52.53E), Sassan Field (25.30N 53.08E) and

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[56] *See ibid.*

[57] *See* Protest of Capt. M. Faury, 5 March 1986, Exhibit 110 (the eyewitness 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 50 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").

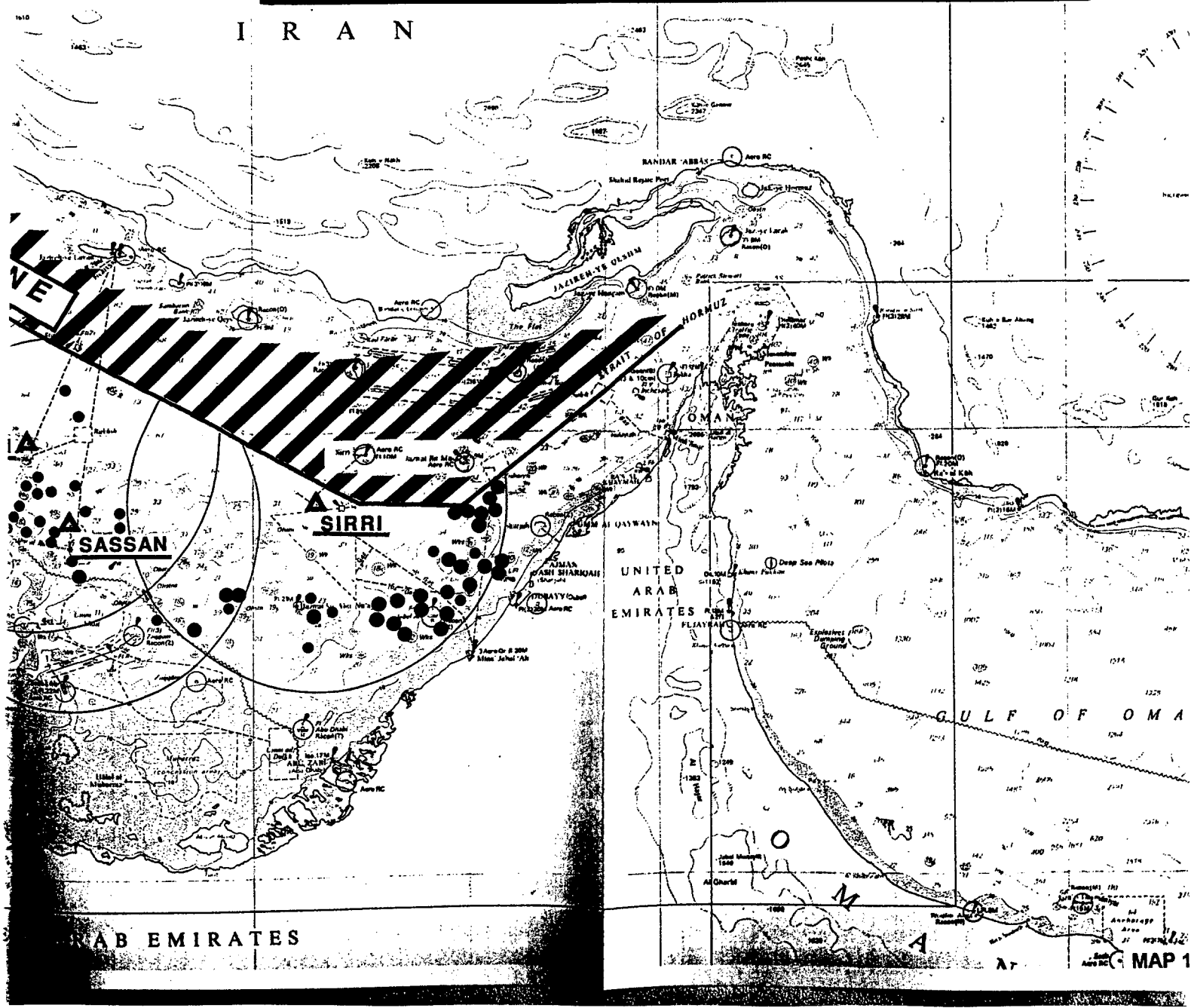
[58] "Tanker Safety Circular Letter No. 54," *Intertanko*, 16 April 1986, para. 3, Exhibit 17.

[59] *See* "Iran Mounts Air Strikes from Oil Platform," *Jane's Defence Weekly*, 26 April 1986, Exhibit 109. As noted *supra*, note 54, this Court has viewed as probative reports by major maritime organizations.

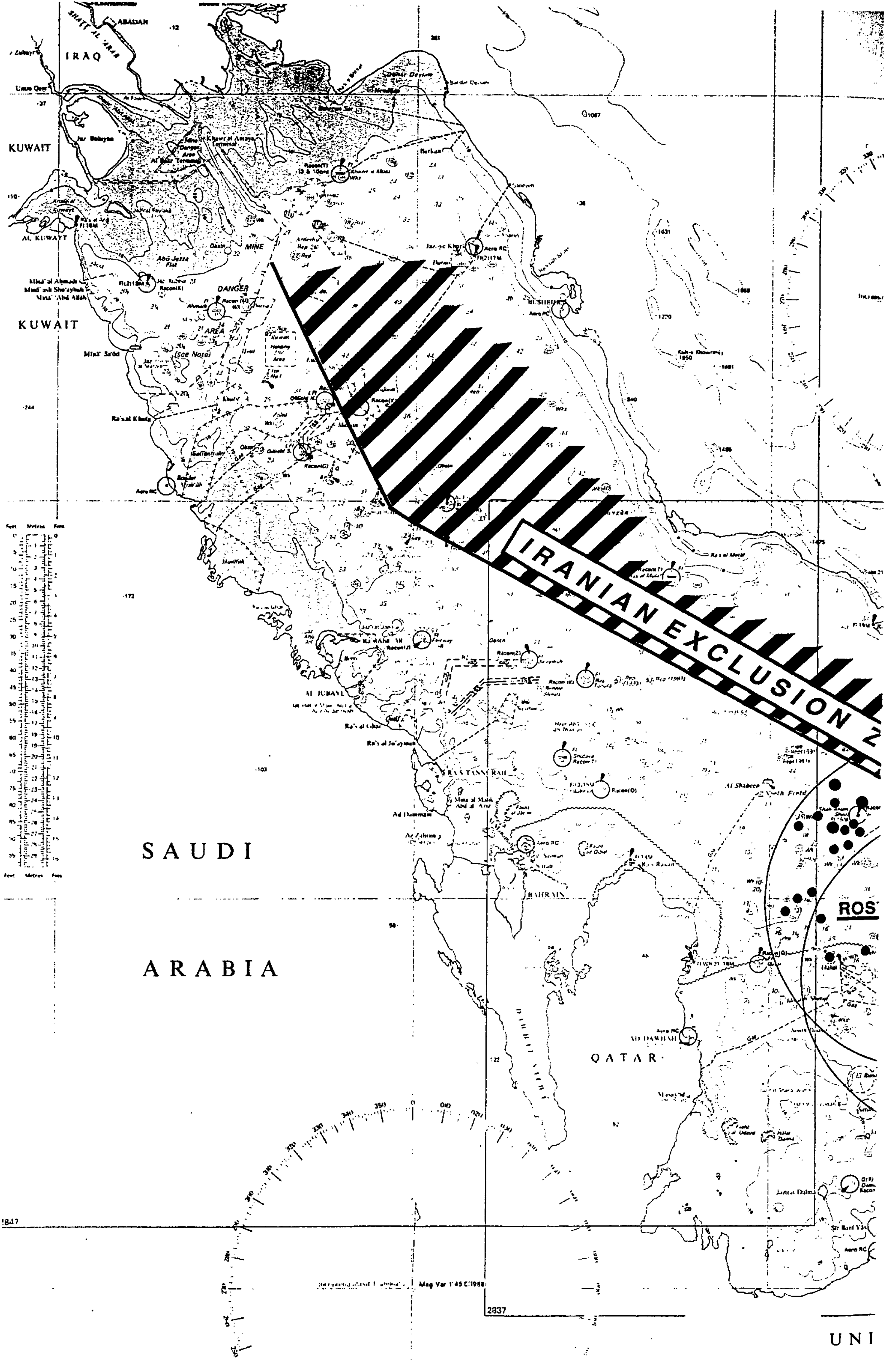
SECTION OF BRITISH ADMIRALTY CHART #2858
GULF OF OMAN TO SHATT AL 'ARAB

CHART DEPICTS:

1. **IRANIAN EXCLUSION ZONE**
2. **IRANIAN OIL PLATFORMS WITH 50 NAUTICAL MILE RANGE ARCS**
3. **IRANIAN ATTACKS ON MERCHANT SHIPPING**
   - **HELICOPTER ATTACKS**
   - **REVOLUTIONARY GUARD SMALL BOAT ATTACKS**
   - **IRANIAN AIR FORCE ATTACKS**
   - **IRANIAN NAVY ATTACKS**



MAP 1



IRAQ
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SAUDI
ARABIA
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IRANIAN EXCLUSION Z
DANGER AREA (see Note)
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more recently from Abu Musa Island (25°53N 55°02E)" in connection with attacks on commercial shipping[60].

- A report by *International Defense Review* stating that "to extend their range and time on station, Iranian helicopter pilots make use of forward operating bases. These have been known to include the disused Rostam oil production platform in the central Gulf[61] . . . ."

- A report by *Lloyd's List* stating that "Iranian attacks this year have come from helicopters often acting alone and based on rigs near the Sirri and Fateh oil terminals[62]."

- An additional report by *Lloyd's List* stating that "[o]ther recent Iranian raids have been launched from a helicopter pad on a disused oil rig at Rostam Island, midway between Iran and Qatar - and possibly a similar structure on the nearby Sassan oil field[63]."

- Reports by the Norwegian Shipowners' Association to shipping companies and merchant shipping organizations indicating that "Iranian forces were using the Rostam, Sirri and Sassan platforms for military purposes - specifically, to launch small boat and helicopter attacks on neutral shipping during the period 1985-1988[64]."

- Shipping companies took costly steps to avoid traveling near the platforms because they were aware of and concerned about Iran's use of the platforms to attack neutral

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[60] "Iran/Iraq: The Situation in the Gulf, Guidance Notes for Shipping," *General Council of British Shipping*, 30 May 1986, p. 14, Exhibit 104.

[61] "Gulf War Intensifies," *International Defense Review*, March 1987, Exhibit 14.

[62] "How Gulf Shipping Toll is Mounting," *Lloyd's List*, 7 August 1986, Exhibit 108.

[63] "Iran Sets Up New Tanker Attack Base," *Lloyd's List*, 14 May 1986, Exhibit 108.

[64] Statement of Capt. Christian Feyer Puntervold, 15 January 1997, Exhibit 11.

shipping[65].

1.24 In sum, it was well-established within the international shipping community that Iran used its oil platforms in its attacks on U.S. and other neutral shipping. Iran's actions were observed by numerous eyewitnesses and widely reported by shipping industry sources. Shipping companies, at great expense, took necessary precautionary measures in response. Documents from the Iranian Navy confirm the military role of the platforms. This vast body of evidence makes it impossible for Iran credibly to deny its use of the platforms in its attacks on U.S. and other neutral shipping.

D. Iran's Assertions About The Character Of The Platforms Do Not Refute The Evidence Of Their Use In Its Attacks On U.S. And Other Neutral Shipping

1.25 Faced with the vast body of evidence establishing its use of the oil platforms for attacks on U.S. and other neutral shipping, Iran offers little direct response. Indeed, Iran has specifically acknowledged several of the facts establishing the military role of the platforms:

- Iran acknowledges that it stationed 12 soldiers and a petty officer on the Rostam platform, about 12 soldiers on the Sassan platform, and up to 15 naval personnel on

[65] *See* Statement of Colin Eglington, para. 10, Exhibit 31 ("Because of our concerns about Iran's platforms, we charted new routes that would take our vessels much further south where they would be least expected – into as shallow water as we could given the ships' 'draft' between 18 and 22 metres. We wanted to keep the vessels as far away from Iran and its oil platforms as possible. Navigation of these routes would have been difficult and dangerous in any case, but was made more so by the lack of surveys of the area we were to navigate. Obviously, the change in routes and additional waiting time increased KOTC's costs again tremendously"); *see also* Chevron Statement, Exhibit 180.

the Sirri platform[66].

- Iran further acknowledges that these military personnel used communications equipment on the platforms to communicate with naval bases at Lavan and Sirri Islands[67].

- In the specific case of the Rostam platform, Iran acknowledges that documents found aboard the Iranian military vessel *Iran Ajr* demonstrate that Rostam was used to relay messages to the *Iran Ajr*, and that documents found on Rostam show that Rostam "was part of a communications network of stations[68]".

Notably, though Iran has attempted to cast doubt on the evidence against it, it has not categorically denied that it launched attacks on neutral shipping from the platforms.

1.26 Because Iran cannot refute the evidence establishing that it used the oil platforms to attack neutral shipping, it has limited itself to making a series of assertions that fail to respond to the case against it. Iran asserts that there were limits to the military role that the platforms were capable of playing, but none of these asserted limits is inconsistent with the military role that, as the evidence demonstrates, the platforms actually played. Iran also asserts that it had ways of attacking neutral shipping without using the platforms, but the existence of such alternative means again is in no way inconsistent with the military role that the platforms actually played. Put simply, none of Iran's assertions refutes the evidence, that Iran in fact used its oil platforms to attack neutral shipping.

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[66] *See* Reply, paras. 3.47, 3.63.

[67] *See ibid.*, para. 3.41.

[68] *See ibid.*, paras. 3.47-3.48, 3.63.

1. The Platforms Did Not Require Technologically Advanced Equipment to Perform Their Military Role

1.27 Iran's Reply devotes much space to explaining that Rostam, Sassan, and Sirri were not equipped with advanced radar and communications equipment. Iran's suggestion appears to be that such advanced equipment was necessary for the platforms to perform military functions. This suggestion is wrong. The personnel and equipment which Iran acknowledges were stationed on the platforms were sufficient for Iran to use the platforms in connection with its military operations. And the evidence outlined above establishes that Iran, in fact, did use the platforms for military purposes.

(a) Radar

1.28 Iran acknowledges that the Rostam platform was equipped with a Decca navigation surface radar with a range of up to 48 nautical miles[69]. While Iran observes that the radar is of the same type used by yachts and commercial vessels, Iran has not responded to evidence indicating that it used this radar to support its military operations.

1.29 The United States has demonstrated that Iran attacked between 45 and 50 ships within 50 nautical miles of the Rostam platform[70]. Each of these attacks occurred within the

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[69] *See ibid.*, para. 3.35.

[70] *See* Counter-Memorial, para. 1.91 and Map 1.

range of the Decca radar aboard Rostam acknowledged by Iran. Iran's use of the radar in connection with military activities is further indicated by documents from Iran's own military, which indicate that the Rostam platform was a "radar site" and that the Sirri platform was a "temporary radar site[71]". Moreover, according to the Iranian military's Instructions for the Deployment of Observers in the Persian Gulf, Iran's purpose for placing military observers on Rostam, Sassan, and Sirri platforms was ". . . to gather information about the enemy's air and sea traffic and destroy its craft" and to provide for "the immediate exchange of intelligence from the oil platforms to Sirri and Lavan using the radios of observers on the platforms[72]". Iran's assertion that the radar aboard Rostam was not sophisticated does not rebut the evidence indicating that Iran used the radar for military purposes; nor does it respond to the evidence that Iran's military used the Sirri platform as a temporary radar site.

(b) Communications equipment

1.30 Iran also acknowledges that each of the platforms was equipped with communications equipment[73]. Iran's observation that commercial oil platforms would ordinarily

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[71] Islamic Republic of Iran Naval Forces, Joint Sea-Coast 1 Combat Group (Operations) Sea-Coast 1 Operations Plan Ghadir, p. 20, Exhibit 203.

[72] Islamic Republic of Iran Armed Forces, Fleet, 1st Naval District ((Intelligence)), Instructions for the Deployment of Observers in the Persian Gulf, p. 9, Exhibit 115.

[73] *Reply,* para 3.41 (indicating that Nasr (Sirri) was equipped with a VHF radio and a multi-channel sailor radio; that Reshadat (Rostam) was equipped with a telephone link and a short-range sailor radar; and that Salman (Sassan) was equipped with a telephone link and a radio room).

be expected to be equipped with communications equipment again fails to address the evidence that Iran used this communications equipment for military purposes.

1.31 Iran's Reply acknowledges that military observers on the platforms used the platforms' equipment to communicate with Iranian naval bases on Sirri and Lavan Islands[74]. The evidence also shows that the platforms transmitted messages directly to the Iranian mine-laying ship *Iran Ajr*[75]. And Iran's own documents clearly state that Iran's goal in placing military observers on the platforms was "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)[76]." Again, Iran has offered no substantive response to this evidence.

(c) Helicopter landing pads

1.32 Iran acknowledges that each of the platforms contained a pad from which helicopters could take off and land[77]. Iran observes, however, that helicopter pads "were

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[74] *See ibid.* ("The military personnel used NIOC's radios to communicate with Lavan and Sirri Island bases").

[75] *See* Translations of the Selected Paper-Tape Messages Sent From, and Received by the *Iran Ajr*, Tapes 1, 16, and 21, Exhibit 71.

[76] Islamic Republic of Iran Armed Forces, Fleet, 1st Naval District ((Intelligence)), Instructions for the Deployment of Observers in the Persian Gulf, Annex G (Communications), p. 9, Exhibit 115.

[77] *See* Reply, para. 3.42 ("In order to allow for the transport of NIOC personnel, spare parts and provisions to and from the platforms, each complex had a helicopter pad for NIOC's Bell and Alouette helicopters").

perfectly ordinary facilities that could be found on virtually any offshore oil platform[78]".

1.33 Iran's assertions as to the "ordinary" character of the helicopter pads does not refute the evidence that Iran used the helicopter pads for military purposes. As the United States demonstrated in paragraph 1.23 above, eyewitnesses observed Iranian military helicopters lifting off from the oil platforms and proceeding to launch attacks on neutral shipping. Iran's only response to the evidence that it used the Rostam platform to launch an attack on the French ship *Chaumont* comes from a person who was not present at the time of the attack and who has offered the Court nothing more than conjecture and speculation to support his view[79]. Iran has offered no substantive response at all to the eyewitness testimony of its use of Rostam to launch attacks on *Berge King* and *Stelios*[80].

2. The Military Equipment Iran Placed on the Platforms Could be Used Offensively as Well as Defensively

1.34 Iran also seeks to blunt the force of the evidence demonstrating the military role played by the platforms by asserting that the platforms' role in Iran's military communications structure was solely defensive in nature. According to Iran, the presence of military personnel

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[78] *Ibid.*

[79] *See* Statement of Mohsen Salehin,, Reply, Vol. VI, para. 7 (basing assertions about the *Chaumont* attack on review of the Protest of Capt. M. Faury, but not on any firsthand knowledge of the incident).

[80] *See supra,* para. 1.23.

and equipment on the platforms "was commensurate only with the need to defend the platforms, and was not designed for offensive use[81]." But military observers, radar, and communications equipment are not inherently defensive in nature. Any system capable of gathering and transmitting information for use in defensive military operations can as easily be used to facilitate offensive military operations. As the evidence demonstrates, Iran used the equipment stationed on the platforms to gather information about the location of neutral shipping, to transmit this information to other elements of the Iranian Navy, and to launch helicopters which carried out attacks on neutral shipping.

[81] Reply, para. 3.33.

CHAPTER II

IRAN OPPOSED THE INTERNATIONAL COMMUNITY'S EFFORTS TO PROTECT NEUTRAL SHIPPING FROM IRANIAN ATTACKS

Section 1. The International Response to Iran's Attacks on Neutral Shipping

1.35 As discussed above, Iran's illegal attacks on neutral shipping were well-established, and of great concern, throughout the international shipping community. In addition to making numerous diplomatic protests as detailed above, the international community further demonstrated its opposition to Iran's attacks by mobilizing efforts to protect neutral shipping traveling through the Gulf. Iran responded to these efforts with a new set of illegal attacks specifically targeted against the international community's efforts to protect neutral shipping in the Gulf.

A. REFLAGGING

1.36 As discussed in the Counter-Memorial and Part VI below, in response to a request by the Government of Kuwait, the United States and the United Kingdom reflagged a number of Kuwaiti vessels in an effort to deter further Iranian attacks against them. Four ships of the Kuwait Oil Tanker Company (hereinafter "KOTC") were flagged under United Kingdom registry and eleven KOTC ships were flagged under U.S. registry. To similar effect, the Soviet Union provided four Soviet ships on a charter basis to KOTC.

B. NAVAL ESCORTS AND MINESWEEPERS

1.37 In order to ensure that neutral vessels would be able to transit the Gulf safely, France, the United Kingdom, Italy, Belgium, the Netherlands and the Soviet Union sent combat ships and/or minesweepers to the Gulf. The United States also sent military ships to protect neutral shipping as part of Operation Earnest Will. The total force sent to the Gulf by the international community numbered over 70 vessels[82].

1.38 These efforts of the international community to protect neutral shipping in the Gulf demonstrated its united opposition to Iran's illegal attacks and its determination to maintain freedom of navigation in international waters and ensure the unimpeded flow of oil through the Gulf.

Section 2. Iran's Opposition to Efforts to Protect Neutral Shipping

1.39 Iran began attacking the international community's reflagging and escort operations immediately upon their establishment. As the United States demonstrated in its Counter-Memorial:

- Iran attacked with a mine the Soviet oil tanker *Marshal Chuykov* on its first mission as a charter vessel for the Kuwait Oil Tanker Company on 16 May 1987[83]. According to *Jane's Defence Weekly*, shipping officials at the time concluded that the attack was

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[82] *See* Anthony H. Cordesman and Abraham R. Wagner, *The Lessons of Modern Warfare, Volume II: The Iran-Iraq War*, p. 317 (1990), Exhibit 204.

[83] *See* Counter-Memorial, para. 1.19.

part of an intensified Iranian mining campaign "aimed at disrupting plans for the US and Soviet navies to start escorting convoys of vessels to protect them from Iranian surface and air attack[84]."

- Iran attacked with a mine the U.S. flagged vessel *Bridgeton*, which was part of the first convoy of U.S. Navy escorted merchant vessels on 24 July 1987.

1.40 Iranian officials publicly announced their plans to target the international efforts to protect neutral shipping in the Gulf. Shortly after the attack on *Marshal Chuykov*, Iran's Ambassador to the United Nations, Said Rajaie-Khorassani, stated: "if my country has the intention of attacking a Kuwaiti tanker, it will continue with that policy, regardless of whose flag it is carrying[85]." Similarly, on the day of the attack on the *Bridgeton*, Ali Akbar Hashami Rafsanjani, Speaker of Iran's Majlis, praised the attack, saying:

> "Well, in truth these are God's angels that descend and do what is necessary at the appropriate time. . . . We have said that our plan is clear. We have stated: 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 operation[86]?"

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[84] "Iranians in Minelaying Campaign Against Kuwait," *Jane's Defence Weekly*, 27 June 1987, p. 1344, Exhibit 35.

[85] "Weinberger Warns Against Attacks in Gulf; Iran Threatens," *United Press International*, 25 May 1987, Exhibit 41.

[86] "Hashemi-Rafsanjani Political Sermon," *Foreign Broadcast Information Service*, 24 July 1987, Exhibit 50. As noted before, this Court should view such statements by senior Iranian officials as particularly

1.41 Iran's policy was thus clear. Iran would attack "whenever possible[87]" vessels involved in transporting Kuwaiti or Saudi oil through the Gulf, regardless of their nationality or their status as neutrals. Iran would also attack vessels involved in efforts to protect the right of neutral shipping to travel through the Gulf. Pursuant to this policy, Iran followed its attacks on *Marshal Chuykov* and *Bridgeton* with additional attacks on U.S. shipping in the Gulf. Among other attacks on U.S. shipping, these attacks included Iran's 16 October 1987 missile attack on the U.S. flagged oil tanker *Sea Isle City* and Iran's 14 April 1988 mine attack on the U.S. warship *USS Samuel B. Roberts*, which was returning to Bahrain after escorting a convoy of U.S. flagged merchant vessels.

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probative since they constitute admissions against Iran's interest. *See supra,* note 9.

[87] Norway Cable, Exhibit 198.

CHAPTER III

IRAN IS RESPONSIBLE FOR THE ATTACK ON *SEA ISLE CITY*

Section 1. The Evidence Demonstrates Iran's Responsibility for the Attack on *Sea Isle City*

1.42 The United States demonstrated in its Counter-Memorial that Iran is responsible for the 16 October 1987 attack on the U.S. flagged oil tanker *Sea Isle City*. Specifically, the U.S. Counter-Memorial showed that:

- Eyewitnesses observed the missile that hit *Sea Isle City* coming from Iranian-controlled territory in the Faw area. The missile was easily identifiable because of its bright plume, low altitude, and relatively low speed of flight[88].

- Satellite imagery taken just four hours after the attack shows that Iran maintained in the Faw area an active cruise missile staging facility[89].

- In the weeks prior to the attack on *Sea Isle City*, eyewitnesses observed the launching of four similar missile attacks from Iranian-controlled territory in the Faw area. These missiles bore the same visual signatures of the missile that hit *Sea Isle City*: bright plume, low altitude, and relatively low speed of flight[90].

- Fragments recovered from one of these missiles demonstrated it to be a Chinese-manufactured HY-2 missile of the type used by Iran during the Iran-Iraq War[91].

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[88] Counter-Memorial, paras. 1.63, 1.70.

[89] *See ibid.*, para. 1.75.

[90] *See ibid.*, para. 1.70.

[91] *See ibid.*, paras. 1.71-1.73.

Fragments collected from a missile launched from Iranian-controlled territory in the Faw area on 21 January 1987 yielded the same conclusion[92].

- One of the missiles Iran fired from the Faw area landed south of Mina Abdullah, over 100 kilometers from the Faw area, thus clearly demonstrating that Iran's HY-2 missile had sufficient range to reach *Sea Isle City*, which was located less than 100 kilometers from the Faw area when it was attacked[93].

- Iran's President Ali Khameini announced Iran's intention to attack U.S. targets in the Gulf fewer than three months earlier, saying "They had better leave the region, otherwise we shall strike them so hard they will regret what they have done[94]."

- Lloyd's Maritime Information Service, the General Council of British Shipping, *Jane's Intelligence Review* and other authoritative public sources concluded what this evidence makes abundantly clear: Iran is responsible for the missile attack on *Sea Isle City*[95].

Particularly in light of Iran's exclusive control of the territory in the Faw area from which the missile that hit *Sea Isle City* was fired, this evidence fully satisfies the burden of establishing that Iran is responsible for the attack on *Sea Isle City*[96].

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[92] *See ibid.*

[93] *See ibid.*, para. 1.59.

[94] *Ibid,* para. 1.31.

[95] *See ibid.*, para. 1.66.

[96] *See Corfu Channel Case, (United Kingdom v. Albania), Merits (*hereinafter *"Corfu Channel"), Judgment, I.C.J. Reports 1949*, p.18 (in discussing Albania's exclusive control over the waters in which mines were laid, the Court found that "the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion"); Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996,*

Section 2. Iran Used the Rostam Platform to Monitor and Report on the Movements of *Sea Isle City*

1.43 The evidence also conclusively demonstrates that Iran used the Rostam platform to monitor and report on the movements of *Sea Isle City*. As noted above, U.S. tankers traveling through the Gulf were required to pass fewer than 15 nautical miles from the Rostam platform because the Iranian exclusion zone rendered off limits routes north of Iran's offshore oil platforms that commercial shipping had followed prior to the war. The Rostam platform, which Iran acknowledges contained a surface search radar with a range of 48 nautical miles, was thus ideally placed to monitor the movements of U.S. tankers traveling through the Gulf.

1.44 When *Sea Isle City* passed by the Rostam platform as part of a U.S. escorted convoy, the Rostam platform monitored and reported on its movements. On 8 August 1987, the Rostam platform transmitted the following report:

> "2. THE CONVOY AT 172327 WAS SEEN ON RADAR 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

Volume III, pp.1089-90 (3d ed. 1997) ("The underlying theory may be stated as being that, in given circumstances (which the substantive law defines), it is sufficient for the applicant State to establish the condition of fact the result of which will be a presumption, rebuttable by the respondent State, that the respondent is liable in law. Furthermore, the presumption may be established by reasonable inferences. In international law this doctrine is developed in connection with responsibility for acts occurring on a State's territory: the circumstances in which inferential proof is admitted are determined by the material law, and the effect is not so much to shift the burden of proof as to lay upon the respondent what may be regarded as a burden of negative proof").

335 DEGREES, DISTANCE 21 MILES FROM THE PLATFORM AND THEIR COURSE AND SPEED IS 285 DEGREES, 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.

SIGNED: WARRANT OFFICER 3 ?KARIMI?[illegible][97]"

1.45 The composition and location of the convoy reported coincide with the composition and route of a U.S.-led escort mission conducted as part of Operation Earnest Will. Earnest Will Mission 003 left the Gulf of Oman on 8 August 1987 at 0249 hours. It consisted of six ships: three tankers - *Gas King, Ocean City*, and *Sea Isle City* - and three escort ships, the *USS Crommelin*, the *USS Jarrett*, and the *USS Kidd.* The ship's deck log from the *USS Crommelin* shows that it made radar landfall on the Shah Allum Shoal Racon in the vicinity of the Rostam platform at 0356 on 9 August 1987[98]. This log entry is consistent with the report of the convoy's location issued by the Rostam platform, and leaves no doubt that Iran used the Rostam platform to monitor and report on the movements of *Sea Isle City*. This information is depicted in Map 2.

1.46 On 11 October 1987, *Sea Isle City* was again part of a convoy as part of Operation Earnest Will. Between 10 p.m. and 11 p.m. on that date, *Sea Isle City* again passed within 15

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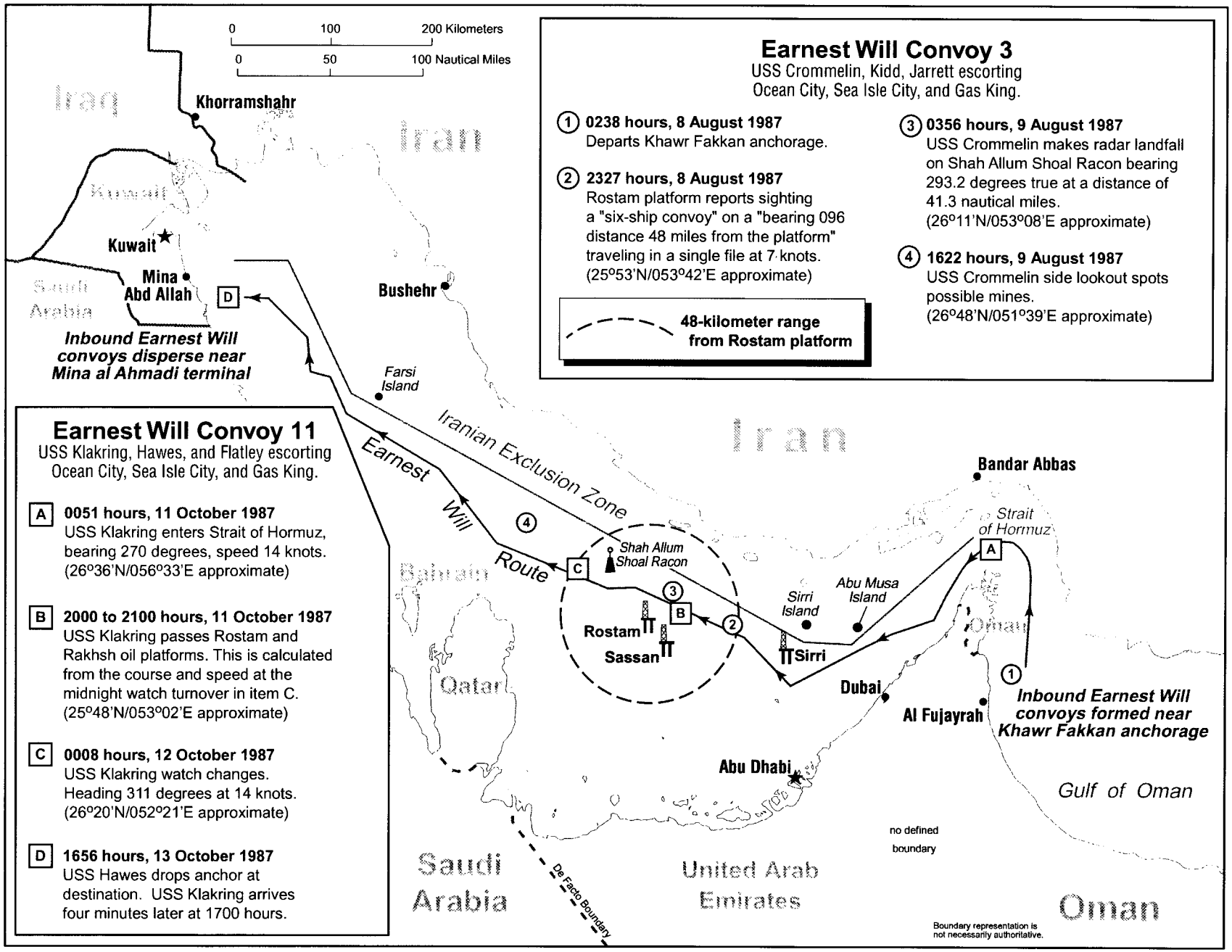
[97] Selected Messages from Archive of Incoming Messages, Rostam Oil Platform, Exhibit 119.

[98] *See USS Crommelin*, Deck Log, commencing 0000, 01 August 1987 and ending 2400, 31 August 1987, Exhibit 205.


0 100 200 Kilometers
0 50 100 Nautical Miles
Earnest Will Convoy 3
USS Crommelin, Kidd, Jarrett escorting
Ocean City, Sea Isle City, and Gas King.
1 0238 hours, 8 August 1987
Departs Khawr Fakkan anchorage.
2 2327 hours, 8 August 1987
Rostam platform reports sighting a "six-ship convoy" on a "bearing 096 distance 48 miles from the platform" traveling in a single file at 7 knots.
(25°53'N/053°42'E approximate)
3 0356 hours, 9 August 1987
USS Crommelin makes radar landfall on Shah Allum Shoal Racon bearing 293.2 degrees true at a distance of 41.3 nautical miles.
(26°11'N/053°08'E approximate)
4 1622 hours, 9 August 1987
USS Crommelin side lookout spots possible mines.
(26°48'N/051°39'E approximate)
48-kilometer range from Rostam platform
Earnest Will Convoy 11
USS Klakring, Hawes, and Flatley escorting
Ocean City, Sea Isle City, and Gas King.
A 0051 hours, 11 October 1987
USS Klakring enters Strait of Hormuz, bearing 270 degrees, speed 14 knots.
(26°36'N/056°33'E approximate)
B 2000 to 2100 hours, 11 October 1987
USS Klakring passes Rostam and Rakhsh oil platforms. This is calculated from the course and speed at the midnight watch turnover in item C.
(25°48'N/053°02'E approximate)
C 0008 hours, 12 October 1987
USS Klakring watch changes. Heading 311 degrees at 14 knots.
(26°20'N/052°21'E approximate)
D 1656 hours, 13 October 1987
USS Hawes drops anchor at destination. USS Klakring arrives four minutes later at 1700 hours.
Iraq
Khorramshahr
Iran
Kuwait
Kuwait
Mina Abd Allah
D
Saudi Arabia
Inbound Earnest Will convoys disperse near Mina al Ahmadi terminal
Bushehr
Farsi Island
Iranian Exclusion Zone
Earnest Will Route
4
Iran
Bandar Abbas
Strait of Hormuz
A
Shah Allum Shoal Racon
C
Bahrain
3
B
2
Sirri Island
Abu Musa Island
Rostam
Sassan
Sirri
Oman
Qatar
Dubai
1
Inbound Earnest Will convoys formed near Khawr Fakkan anchorage
Al Fujayrah
Abu Dhabi
Gulf of Oman
no defined boundary
Saudi Arabia
United Arab Emirates
Oman
De Facto Boundary
Boundary representation is not necessarily authoritative.

MAP 2

nautical miles of the Rostam platform, and was again exposed to monitoring from Rostam[99]. Five days later, at the end of this voyage, Iran launched a missile attack against *Sea Isle City.*

Section 3. Iran's Pattern of Missile Launches from the Faw Area is Consistent with its Acknowledged Policy of Targeting Kuwait's Oil Trade

1.47 The missile that hit *Sea Isle City* was one of a series of missiles launched by Iran from the Faw area during 1987[100]. Each of these missile launches was in the direction of Kuwait's oil loading terminal at Al-Ahmadi Sea Island. The day before Iran attacked *Sea Isle City*, it launched a missile from the Faw area that hit the U.S. owned tanker *Sungari*, which was anchored south of Al-Ahmadi and near the location where *Sea Isle City* was hit. In September 1987, Iran launched three missiles in the same general direction: one on September 2 that landed in the water northeast of Faylakah Island; one on September 4 that landed south of Mina Abdullah; and one on September 5 that landed in Kuwait Bay. Iran also launched two missiles from the Faw area in January 1987, both of which landed near Faylakah Island.

1.48 These missile launches are consistent with Iran's acknowledged policy of attacking ships carrying Kuwaiti cargo[101]. By firing missiles in the direction of the Al-Ahmadi Sea Island

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[99] *See USS Klackring*, Deck Log, commencing 0431, 10 October 1987 and ending 2400, 14 October 1987, Exhibit 206.

[100] *See* Counter-Memorial, paras. 1.54-1.62.

[101] *See* Norway Cable, Exhibit 198; Statement of Thomas Flamminio, Aerospace Engineer, U.S. Department of Defense, Exhibit 207.

Terminal, Iran could hope to prevent ships from traveling to and from the terminal, and thereby disrupt Kuwait's oil trade. In light of Iran's desire to disrupt this trade, Iran had a clear incentive to launch missile attacks directed toward Al-Ahmadi.

Section 4. Iran's Efforts to Deny its Responsibility are Inconsistent and Incredible

1.49 In its desperation to deny its responsibility for the *Sea Isle City* attack in spite of this substantial body of evidence, Iran has offered this Court an ever-shifting set of assertions, apparently unconstrained by any concern for their veracity. None of Iran's various accounts of the attack is credible.

A. Iran's Shifting Story On The Existence Of Missile Sites In The Faw Area

1.50 Iran began by asserting that it could not have been responsible for the *Sea Isle City* attack because it did not maintain missile sites on the Faw Peninsula. Iran's assertion was categorical and without reservation:

> "The true explanation is that the missile was never fired by Iran! *There was, in fact, no Iranian missile-site in the Fao peninsula* which the United States could have attacked. Iran's own conclusion is that the missile was fired by Iraq, from motives no more devious than the Iraqi attack on the U.S.S. Stark, or the hundreds of attacks on vessels, including Kuwaiti vessels, by Iraqi aircraft and Iraqi Silkworm missiles during the previous five years[102]."

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[102] Memorial, para. 4.74 (emphasis added).

1.51 Without any explanation, Iran has now abandoned this untruthful position completely. Confronted with satellite imagery demonstrating Iranian control of an active cruise missile staging facility in the Faw area[103], Iran now acknowledges that it captured three missile sites in the Faw area in early 1986. Iran's Reply states, in direct contradiction to its earlier representation to this Court, that

> ". . .it is true that Iran captured three Iraqi missile sites on the Fao peninsula as part of its counter-offensive during the course of 1986. These sites contained concrete shelters and fixed launching pads for Iraqi missiles[104]."

Iran adds, however, that because "all access roads to the missile sites were totally destroyed", these sites "became useless and remained inoperative during all the time that Faw was under Iranian control."[105] This assertion is also completely false; U.S. satellite imagery taken on 16 October 1987 - the day of the attack on *Sea Isle City* - shows vehicles operating on the roads leading to one of the Iranian missile sites on the Faw peninsula and in the vicinity of the site itself[106]. Iran's missile sites were intact, accessible, and capable of firing missiles like the one that hit *Sea Isle City*.

1.52 Iran also suggests that the imagery of Iranian missile staging areas that the United

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[103] *See* U.S. reconnaissance satellite photographs, Exhibit 94.

[104] Reply, para. 4.19. *See also* Statement of Mohammad Youssefi, Reply Vol. VI, para.14.

[105] *See* Statement of Mohammad Youssefi, Reply Vol. VI, para. 15.

[106] *See* U.S. overhead imagery of the Faw area (hereinafter "Imagery"), Exhibit 208, image 5.

States submitted with its Counter-Memorial is insufficient to demonstrate that Iran maintained missile launching sites in the Faw area[107] (although, as noted above, Iran now acknowledges that it did maintain such sites). To remove any doubt on this point, the United States is submitting with this Rejoinder additional imagery showing the existence of four HY-2 missile sites on Iranian-controlled territory in the Faw area[108]. During oral proceedings on the merits, the United States will present expert testimony to explain and confirm to the Court the substance of this evidence and the other overhead imagery that the United States has introduced in this case.

B. Iraq Did Not Maintain A Missile Launching Site In The Faw Area At The Time Of The Attack On *Sea Isle City*

1.53 Faced with the loss of its chief defense with respect to the *Sea Isle City* attack, Iran has invented a new one in its Reply. Iran now asserts that, in addition to the Iranian-controlled missile sites in the Faw area (the existence of which Iran had previously denied), Iraq retained control over an additional site in the vicinity. Iran asserts that Iraq could have used this site to launch the attack on *Sea Isle City*. As was the case with Iran's last assertion, U.S. satellite imagery demonstrates that this assertion is completely false; no such Iraqi site existed at the time of the attack on *Sea Isle City*.

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[107] *See* Reply, paras. 4.21-4.24; Statement of Colonel Mahmood Farshadfar, Iran Reply Vol VI., para. 3.

[108] Imagery, Exhibit 208, images 2-11.

1.54 Iran has provided the Court an undated photograph montage which it asserts was taken "before the capture of the Faw Peninsula" showing the existence of an additional missile site in the Faw area apart from those controlled by Iran[109]. The Statement of Mohammad Youssefi states that this additional missile site was located at coordinates 300012N-481705E on the front part of the Faw Peninsula[110].

1.55 U.S. satellite imagery taken between 5 May 1987 and 13 November 1987 demonstrates that no missile site existed at that time anywhere in the vicinity of the location specified by Iran[111]. Overhead imagery confirms that a missile site was constructed near that location, at coordinates 295806N-0481955E around April 1989, but no such site was there in October 1987[112].

1.56 Like Iran's previous assertions, Iran's assertion that an Iraqi-controlled missile site in the Faw area could have been the source of the attack on *Sea Isle City* is clearly and demonstrably false. Only Iran possessed missile launching sites in the Faw area at the time of the attack on *Sea Isle City*, and thus only Iran could have launched an attack from the Faw.

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[109] Statement of Mohammed Youssefi, Reply Vol. VI, para. 8.

[110] *See ibid.*, para. 9.

[111] Imagery, Exhibit 208, images 9-12.

[112] Imagery, Exhibit 208, image 13. Overhead imagery first disclosed the construction of a missile site at this location in April 1989; the image of this site contained in image 13 was taken in October 1994.

C. IRAQ COULD NOT HAVE ATTACKED *SEA ISLE CITY* USING A MISSILE THAT TRAVELED ALONG A CIRCUITOUS PATH

1.57 Iran attempts to create doubts as to its responsibility for the *Sea Isle City* attack by offering this Court the unsustainable theory that Iraq attacked *Sea Isle City* using a missile that traveled along a circuitous route (rather than in a straight line). Iran argues that such a missile would conceal the location from which it had been fired, making a missile fired from Iraqi-controlled territory appear as if it had been fired from Iranian-controlled territory. According to Iran's Reply, ". . . it was entirely possible for a missile targeting Kuwait's harbour to be launched from the remaining Iraqi site in the vicinity of Fao and to be programmed so as to fly over both Bubiyan and Faylakah Islands en route to its destination[113]." Once again, Iran's theory is clearly and demonstrably wrong.

1.58 First, Iran's theory is based on an Iraqi missile being fired "from the remaining Iraqi site in the vicinity of the Fao". As the United States has conclusively demonstrated, no such Iraqi site existed at the time of the attack on *Sea Isle City*. Thus, Iraq was not in a position to fire the missile that hit *Sea Isle City* even if the missile were able to travel in a circuitous route.

1.59 Second, the missile that hit *Sea Isle City* was not equipped with a guidance system capable of guiding the missile along a circuitous route. Iran's expert, Jean Francois Briand, asserts that Iraq could have fired an HY-2 missile from the alleged "fourth site" and programmed it to execute a turn near the tip of Faylakah Island that would have allowed the missile to assume

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[113] Reply, para. 4.51.

a course consistent with that of the missile that hit *Sea Isle City*[114]. Mr. Briand's statement is incorrect.

1.60 As explained in the Statement of Mark Pitt, the guidance system of the HY-2 directs the missile in a straight line until a timer activates the missile's seeker and the seeker begins to search for targets. The seeker searches for targets by using a radar beam to scan an area 12 degrees to the right and left of the seeker's center. The seeker then locks onto the first object of suitable size it finds within this area and within the 17 km range of the seeker's radar, and guides the missile on a course to hit that target[115].

1.61 This system does not allow the missile to be programmed to turn at a particular time as asserted by Mr. Briand. Had the missile begun to execute a turn near the tip of Faylakah Island, as Mr. Briand asserts, it would have only done so because its seeker had already been activated and had locked onto a target toward which the seeker was directing the missile. Such a target would need to be within 17 km of the tip of Faylakah Island, because this is the maximum range of the missile's seeker. The location where the *Sea Isle City* was hit was about 60 km from the tip of Faylakah Island, making it impossible for the missile at that location to select *Sea Isle City* as a target[116].

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[114] *See* Rapport de M. Jean Francois Briand at para. 2.09 and accompanying map, Reply, Vol. VI.

[115] Statement of Mark Pitt, Senior Missile Analyst, Australian Defence Intelligence Organisation, paras. 4-5, Exhibit 209.

[116] *See ibid,* para. 11.

1.62 As illustrated in Exhibit 210[117], Iran's missile sites in the Faw area were oriented to aim missiles directly toward Kuwait Harbor, where *Sea Isle City* was anchored when it was hit. As demonstrated above, the HY-2 missile that hit *Sea Isle City* was capable of following only a direct path toward its target. Only Iran was in a position to launch this missile.

D. THE MISSILE THAT HIT *SEA ISLE CITY* WAS NOT LAUNCHED FROM THE AIR OR SEA

1.63 In a further effort to divert the Court's attention from the evidence establishing its responsibility for the attack on *Sea Isle City*, Iran invites the Court to speculate that the missile that hit *Sea Isle City* could have been launched by Iraq from the air or sea. Beyond observing that Iraq operated both an air force and a navy at the time of the attack on *Sea Isle City*, Iran has offered the Court no evidence to support an air or sea launch theory. As the United States demonstrated in its Counter-Memorial, the physical evidence collected from the series of missile attacks from the Faw area in 1987 is inconsistent with Iran's speculation that the missile that hit *Sea Isle City* could have been launched from the air or sea[118]. On the contrary, that evidence serves to confirm that the missile was launched by Iran from land in the Faw area.

1.64 In sum, Iran's response to the evidence demonstrating its responsibility for the attack on *Sea Isle City* amounts to little more than a series of unsupported and frivolous attempts

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[117] *See* Reference Map, Exhibit 210.

[118] *See* Counter-Memorial, paras. 1.71-1.73.

to escape responsibility by blaming Iraq. As the evidence presented by the United States has demonstrated, Iran's various conjectures about Iraqi responsibility simply are not credible. Indeed, Iran's abandonment of its previous representations, and the United States' systematic disproving of Iran's new assertions and theories, show that Iran's pleadings have provided the Court nothing on these points on which the Court may rely.

* * *

1.65 In the period following Iran's attack on *Sea Isle City*, Iran continued to attack U.S. and other neutral shipping in the Gulf. According to Lloyd's Maritime Information Service, Iran was responsible for attacks on no fewer than 57 neutral vessels in the Gulf between 16 October 1987 (the date of Iran's attack on *Sea Isle City*) and 14 April 1988 (the date of Iran's attack on the *USS Samuel B. Roberts*)[119]. These attacks included the 15 November 1987 attack on the U.S. owned tanker *Lucy*, the 16 November 1987 attack on the U.S. owned tanker *Esso Freeport*, and the 7 February 1988 attack on the U.S. owned tanker *Diane*[120]. There was thus no break in Iran's attacks in the period following the attack on *Sea Isle City;* rather these attacks continued unabated.

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[119] *See* "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," *Lloyd's Maritime Information Service,* Exhibit 9.

[120] *See infra,* Part VI.

CHAPTER IV

IRAN IS RESPONSIBLE FOR THE ATTACK ON THE *USS SAMUEL B. ROBERTS*

Section 1. The Evidence Demonstrates Iran's Responsibility for the Attack on the *USS Samuel B. Roberts*

1.66 The United States demonstrated in its Counter-Memorial that Iran is responsible for the 14 April 1988 attack on the U.S warship *USS Samuel B. Roberts*. Specifically, the U.S. Counter-Memorial showed that:

- *USS Samuel B. Roberts* hit a mine while sailing near the Shah Allum Shoal in the central Gulf[121].

- The day after the attack, U.S. Navy divers discovered two additional mines in the same vicinity. The mines were moored to anchors and not encrusted with marine growth, indicating that they had been laid recently[122].

- The two mines bore serial numbers whose format matched serial numbers found on mines aboard the *Iran Ajr* in September 1987 and two other Iranian mines discovered in 1987[123].

- Three days after the attack, mine-clearing forces from Belgium and the Netherlands found additional mines in the vicinity which also bore Iranian serial numbers[124].

- On the day of the attack on the *USS Samuel B. Roberts*, the Commander of the Iranian Navy, Commodore Mohammad Hoseyn Malekzadegan, acknowledged that the Iranian Navy had been engaged in "a wholehearted task . . . over the past year, comprising

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[121] *See* Counter-Memorial, para. 1.105.

[122] *See ibid.*, para. 1.106.

[123] *See ibid.*

[124] *See ibid.*, para. 1.107.

indirect blows in particular to the U.S. fleet, affecting both its warships and its merchant vessels, with mines or missiles[125]. . ."

1.67 Put simply, the evidence gathered by U.S., Belgian, and Dutch sources shows conclusively that Iran laid a minefield in the central Gulf shortly before the *USS Samuel B. Roberts* hit one of these mines while transiting the area. Iran's responsibility for the attack on the *USS Samuel B. Roberts* is clear.

Section 2. Iran's Denial of Responsibility for Mining is Refuted by the Evidence and Conclusions of the International Shipping Community

1.68 In spite of this evidence, Iran persists in its denial of its responsibility for the mine attack on the *USS Samuel B. Roberts*. Indeed, Iran asserts to this Court that it was not responsible for any mine attacks on neutral shipping during the Iran-Iraq War. According to Iran's Reply "the only mines laid by Iran were laid in the Khor Abdullah channel north of Bubiyan Island. These mines were laid for defensive purposes to prevent Iraq from using this waterway to attack Iranian positions. Such mines had no effect on commercial shipping[126]."

1.69 Yet once again, Iran's denials are simply not credible. The evidence compiled by the international shipping community shows not only that Iran was responsible for the attack on the *USS Samuel B. Roberts*, but that Iran made a general practice of using mines to attack neutral

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[125] *Ibid,* para. 1.112.

[126] Reply, para. 5.25.

shipping in the Gulf[127]. In addition to the evidence collected by U.S., Belgian, and Dutch sources noted above in connection with Iran's mine attack on the *USS Samuel B. Roberts*, this evidence includes:

- The discovery by U.S. forces of the *Iran Ajr* in the act of laying mines in the central Gulf on 21 September 1987 and evidence that the *Iran Ajr* maintained communications with Iran's offshore oil platforms[128].

- The discovery by a joint Kuwait-United States team of a mine bearing Iran's distinctive serial numbers and exhibiting other features of Iranian mines from waters off of Al-Ahmadi in the northern Gulf in June 1987[129]. Neutral vessels that struck mines in this area included the Russian flagged tanker *Marshal Chuykov* (16 May 1987), the Liberian flagged *Primrose* (27 May 1987), the Greek flagged tanker *Ethnic* (9 June 1987), and the Liberian flagged tanker *Stena Explorer* (19 June 1987)[130].

- The discovery by United Kingdom minesweeping forces of mines bearing Iran's distinctive serial numbers and exhibiting other features of Iranian mines from waters off the coast of Fujayrah, near the entrance to the Gulf, in October 1987[131]. Neutral vessels that struck mines in this area included the Panamanian flagged tanker *Texaco Caribbean* (which was carrying U.S. owned Iranian crude at the time of the attack[132])

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[127] On the view of the Court that evidence from disinterested witnesses is of prima facie superior credibility, see *supra,* note 54.

[128] *See* Counter-Memorial, paras. 1.40-1.47.

[129] *See* Statement of Kuwait Naval Force Officials Regarding the Mining of Waters Near Al-Ahmadi Port During the Iran-Iraq War, 21 May 1987, Exhibit 34; Naval Technical Intelligence Center, Foreign Material Exploitation Memorandum Report, "Cluster Gin," May 1988, Exhibit 38; Statement of Donald Jones, 3 May 1997, Exhibit 37.

[130] *See* Statement of Kuwait Naval Force Officials, para. 6, Exhibit 34.

[131] *See* United Kingdom Ministry of Defence, "Mine Clearance Operations Off Fujayrah By HM Ships - 21 September to 25 October 1987," Exhibit 53; Statement of Donald Jones, 3 May 1997, Exhibit 37.

[132] *See* Statement of Robert O. Phillips, Senior Counsel, Texaco, Inc., 27 February 2001, (hereinafter "Texaco Statement"), Exhibit 211.

(10 August 1987) and *Anita*, a UAE registered motor supply vessel (15 August 1987)[133].

- The 21 August 1987 statement by then-Iranian Majlis Speaker Ali Akbar Hashemi-Rafsanjani that "if we intend to plant mines, well then, O 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 means[134]."

- The conclusions of Intertanko[135], Lloyd's Maritime Information Service[136], *Jane's Intelligence Review*[137], and the General Council of British Shipping[138] that Iran was responsible for mine attacks on neutral shipping in the Gulf.

1.70 Iran's attack on the *USS Samuel B. Roberts* was thus consistent with its well-known practice of using mines to threaten and attack neutral shipping in the Gulf. As noted above, Iran's attacks were of great concern to the entire international shipping community, and led the

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

[134] *See* "Majlis Speaker's Prayer Sermon Views Gulf Events," *Foreign Broadcast Information Service,* 21 August 1987, Exhibit 55.

[135] *See* "Iran/Iraq Conflict, The Tanker War - No End?" *International Association of Independent Tanker Owners,* June 1988, p. 25, Exhibit 1 (describing Iranian minelaying activities, including the attacks on *Marshal Chuykov* and *Texaco Caribbean*, as part of discussion of Iran's methods of assaults on shipping).

[136] *See* Statement of Norman Hooke, Assistant Manager of Data Services, Lloyd's Maritime Information Service, 15 May 1997 (hereinafter "Statement of Norman Hooke"), para. 22, Exhibit 10 (". . . Iran used a variety of methods to assault ships" including "contact mines laid in shipping channels").

[137] *See* Ted Hooton, "The Tanker War in the Gulf 1984-1988," *Jane's Intelligence Review*, May 1992, p. 220, Exhibit 4 (describing Iranian minelaying activities, including the attacks on *Bridgeton, Anita*, and *USS Samuel B. Roberts* in discussion of the Iranian mining threat in the Gulf).

[138] *See* "Iran/Iraq: The Situation in the Gulf, Guidance Notes for Shipping," *General Council of British Shipping*, February 1988, p. 30, Exhibit 2 (reporting on Iranian mining activities, including in the Mina Al Ahamadi deepwater channel and off the coast of Fujairah).

United States, the United Kingdom, the Netherlands, Belgium, France, Italy, and the Soviet Union to dispatch minesweeping vessels to the Gulf in an effort to protect neutral shipping from Iranian mines. In light of this evidence, and the international community's actions in response to it, Iran's denial of its responsibility for the mining simply cannot be taken seriously.

Section 3. Iraq is not Responsible for the Attack on the *USS Samuel B. Roberts*

1.71 As it did in the case of the *Sea Isle City* attack, Iran attempts to escape its responsibility for the attack on the *USS Samuel B. Roberts* by inviting the Court to speculate that Iraq could somehow have been responsible for the attack. As the United States observed in its Counter-Memorial, Iraq could not, and did not, lay mines in the central Gulf where the attack on the *USS Samuel B. Roberts* occurred[139]. Iran's only response to this fact is the fanciful hypothesis that the mine that hit the *USS Samuel B. Roberts* "probably floated down from the war zone in the north - very possibly from the Shatt Al Arab or from the entrance to the port of Bandar Khomeini, where Iraq was known to have laid mines[140]." Iran does not explain why it is reasonable to assume that the *USS Samuel B. Roberts* was hit by a floating mine when two additional anchored Iranian mines were found in the vicinity immediately following the attack. Moreover, Iran's own expert indicates that Iraq's use of moored contact mines similar to those

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[139] *See* Counter-Memorial, paras. 1.109-1.111.

[140] *See* Reply, para. 5.15.

used by Iran "was not known before the 1990-91 Persian Gulf conflict", suggesting that Iraq did not use such mines during the Iran-Iraq War at all[141]. Yet again, Iran's representations to this Court are disingenuous and cannot be taken seriously.

[141] *See* Rapport de M. Jacques Fournial, paras. 1.3, 1.11, Reply, Vol. VI. (". . . après l'invasion du Koweït en août 1990, l'Irak fit en usage intensif de la mine russe MYAM de septembre à décembre 1990 pour bloquer les routes maritimes desservant les portes et les plates-formes pétrolières koweïteienes"; "Les Irakiens ont développé la mine LUGM qui est aussi une mine à orin dérivée de la M-08. Cette mine était inconnue avant le conflit du golfe Persique de 1990-1991").

CHAPTER V

THE UNITED STATES TOOK LIMITED, LAWFUL DEFENSIVE MEASURES AGAINST IRANIAN OFFSHORE OIL PLATFORMS IN RESPONSE TO IRAN'S ATTACKS ON *SEA ISLE CITY* AND *USS SAMUEL B. ROBERTS*

1.72 As the United States explained in its Counter-Memorial, in response to Iran's attacks against *Sea Isle City* and *USS Samuel B. Roberts*, the United States took limited, lawful measures in self-defense against the Rostam, Sirri, and Sassan oil platform complexes[142]. The United States took these actions as a last resort, only after repeated diplomatic efforts failed to persuade Iran to stop its illegal attacks on U.S. and other neutral shipping[143]. In each instance, the limited objective of the United States action was to reduce or eliminate Iran's ability to use its oil platforms to attack U.S. shipping.[144]. In each instance, the United States provided advance warnings in English and Farsi to personnel on the platforms that the platforms would be attacked, and allowed time for those personnel to depart[145]. In each instance, the United States promptly reported its action in self-defense to the UN Security Council in accordance with Article 51 of the UN Charter[146].

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[142] *See* Counter-Memorial, paras. 1.99-1.102, 1.121-1.127.

[143] *See ibid,* paras. 1.22-1.24, 1.39, 1.47; *infra,* paras. 4.07-4.11, 4.17.

[144] *See ibid.*, paras. 1.99, 1.121.

[145] *See ibid.*, paras. 1.100, 1.122-1.123.

[146] *See ibid.*, paras. 1.102, 1.127.

1.73 In addition, in each instance the United States' actions against the platforms were directed against the platforms' ability to launch attacks against neutral shipping; the actions were restrained and were not designed to inflict economic damage, as Iran alleges. The United States actions involved firing artillery shells at, and placing explosive charges on, the "topsides" of the platforms[147] – that is, the portions of the platforms above the waterline on which Iranian military personnel and equipment could be stationed. The United States' actions did not target the "jackets" of the platforms – that is, the portions of the platforms below the waterline including the foundation on which the topside of the platform rests.

1.74 Nor did these actions target the undersea pipelines used to transport oil produced on the platforms to Sirri and Lavan Islands for processing and ultimate sale to export customers. These pipelines function independently from the production portions of the platforms, and could continue to be used to transport petroleum from other operating platforms even after damage to the jackets of platforms to which they were connected[148].

1.75 Iran's argument that the United States' defensive actions were "designed to cause maximum economic damage to Iran[149]" thus fails to withstand even casual scrutiny. Had the United States' objective been to cause the economic damage, it would have directed its actions

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[147] Statement of Commander Marc Thomas, paras. 9-11, Exhibit 61.

[148] Statement of Edward O. Price, former Corporate Vice-President for Exploration and Development, Arabian American Oil Company (hereinafter "Statement of Edward O. Price"), Exhibit 212.

[149] Reply, para 4.74 *et seq.*

against the jackets of the platforms and the undersea pipelines used to transport oil from the platforms to Lavan and Sirri Islands, rather than targeting only the topsides of the platforms. Moreover, had the United States wished to inflict economic damage on Iran, it would have chosen targets other than the Rostam and Sassan platforms, which were producing no oil at the time of the U.S. actions, and the Sirri platform, which was producing a relatively small amount of oil at the time of the U.S. action against it. As Vice Admiral Anthony Less, then Commander, Joint Task Force Middle East noted:

> "[W]e did not generate military options for the purpose 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 Island. But we did not even consider doing so, because our aim was to address Iran's threat to our forces and neutral shipping flying the U.S. flag[150]."

The U.S. actions appeared to have some deterrent effect on attacks against U.S. shipping. As noted by Rear Admiral Harold Bernsen, following the U.S. actions against the Rostam platform complex "Iranian attacks on neutral shipping in the vicinity of Rostam decreased dramatically, indicating that our intelligence about Rostam had been correct[151]."

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[150] Statement of Vice Admiral Anthony Less, para. 9, Exhibit 48.

[151] Statement of Rear Admiral Harold Bernsen, para. 29, Exhibit 43.

PART II

THE COURT SHOULD DENY IRAN THE RELIEF IT SEEKS BECAUSE OF IRAN'S OWN ILLEGAL CONDUCT

INTRODUCTION

2.01 Iran's attacks on U.S. and other neutral shipping in the Gulf violated not only the 1955 Treaty but also other principles of international law relating to the illegal use of force. Iran used its oil platforms in its attacks on merchant vessels and disrupted shipping in the Gulf, leading the United States to take defensive measures to protect U.S. shipping. Yet, despite these manifestly illegal actions, Iran has the temerity to ask this Court for relief from damage to these same oil platforms.

2.02 This Court should deny Iran the relief it seeks because of Iran's illegal conduct, with respect both to the 1955 Treaty and to its other obligations under international law. Three related principles support this result. First, a party that acts improperly with respect to the subject matter of a dispute is not entitled to relief. Second, a party that has itself violated obligations identical to those that are the basis for its Application is not entitled to relief. Finally, an Applicant is not entitled to relief when the actions it complains of were the result of its own illegal conduct. Consistent with each of these principles, the Court should deny Iran the relief it seeks.

CHAPTER I

THE COURT SHOULD DENY RELIEF TO IRAN BECAUSE IRAN ACTED IMPROPERLY WITH RESPECT TO THE SUBJECT MATTER OF THE DISPUTE

2.03 Iran comes before this Court with unclean hands: it seeks relief for damage to the very oil platforms it had used illegally to attack U.S. and other neutral shipping in the Gulf. This Court should deny Iran this relief, for a tribunal should "refus[e] relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper[152]".

2.04 Several opinions of members of this Court support the principle that a party cannot benefit from its own wrong: *nullus commodum capere de sua injuria propria.* Judge Read's dissenting opinion in *Interpretation of Peace Treaties* states that, "'in any proceedings which recognised the principles of justice', no government would be allowed to raise an objection which would 'let such a government profit from its own wrong'[153]." Judge Ajibola drew the same conclusion in his separate opinion in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, noting: "that [an] applicant 'must come with clean hands'.[154]" To the same effect, Judge Anzilotti stated in *Legal Status of Eastern Greenland* that

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[152] *The Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70, separate opinion of Judge Hudson* p. 77, *quoting* 13 Halsbury's Laws of England, p. 87 (2nd ed. 1934).

[153] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* p. 151 (1953), *quoting Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, dissenting opinion of Judge Read*, p. 244.

[154] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order, I.C.J. Reports 1993, separate opinion, of Judge Ajibola* 13 September 1993, p. 395.

"an unlawful action cannot serve as the basis for an action at law[155]." These authorities confirm the proposition that a State cannot act wrongfully in relation to the subject matter of a dispute and then obtain redress from the other party through an international tribunal[156].

2.05 Having committed manifestly illegal armed attacks on U.S. and other neutral shipping in the Gulf, Iran comes before this Court, grossly misrepresenting the facts of the case, and asks for relief for damage to its oil platforms in alleged violation of the 1955 Treaty. Yet Iran used these very oil platforms - the subject matter of its application- in its attacks on U.S. shipping in contravention of the same provision of the 1955 Treaty as well as other international law obligations. Moreover, Iran was fully aware that its policy of attacking neutral shipping in

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[155] *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53, dissenting opinion of Judge Anzilotti,* p. 95. *See also Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993, separate opinion of Judge Shahabuddeen* , p. 195 ("When Courts are required to apply such standards as . . . clean hands . . . , then judgment cannot turn on logical formulations and deductions, but must include a decision as to what justice requires in the context of the instant case. . . . They are predicated on fact-value complexes, not on mere facts" (citations omitted).

[156] Parties appearing before this Court have also relied on this principle. *See Legality of Use of Force (Yugoslavia v. France), Request for the Indication of Provisional Measures,* 10 May 1999, Translation of CR/99/17, p. 9 (France arguing that "a party which employs bad faith and artifice may not derive any gain or benefit therefrom"); *Legality of Use of Force (Yugoslavia v. United Kingdom), Request for the Indication of Provisional Measures,* 11 May 1999, CR/99/23, p. 9 (United Kingdom asserting relevance of whether party seeking Court's assistance comes with clean hands). Moreover, in the opinions cited above, the treatment of the "clean hands" issue is plainly contrary to the litany of objections to the applicability of the doctrine suggested by Iran: the doctrine's applicability was not limited to the admissibility stage of the proceedings (Reply, para. 8.13); it was not implemented by "other institutions" but in its own right (Reply, para. 8.24); and it was not applied solely in the context of diplomatic protection (Reply, para. 8.11). In any case, the argument that the clean hands doctrine is applicable "only" to diplomatic protection claims entirely misses the point. This Court's jurisprudence makes clear that when a State decides to espouse a claim of its national, his claim becomes the claim of the State. *See, e.g., Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76,* p. 16.

the Gulf was illegal, having admitted as much to the Norwegian ambassador[157]. Because of its illegal activity and unclean hands, Iran is precluded from obtaining relief in this case. Should the Court find that Iran, in bringing its claim before the Court, has disregarded the principle of good faith, the same result should obtain[158].

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[157] *See* Norway Cable, Exhibit 198; *see also supra,* paras. 1.13-1.14.

[158] *See Land and Maritime Boundary between Cameroon and Nigeria, I.C.J. Reports 1998*, p. 296 ("the principle of good faith is a well-established principle of international law").

CHAPTER II

THE COURT SHOULD DENY RELIEF TO IRAN BECAUSE IRAN ITSELF VIOLATED OBLIGATIONS IDENTICAL TO THOSE THAT ARE THE BASIS FOR ITS APPLICATION

2.06 Iran seeks relief from this Court for alleged violations of obligations under Article X, paragraph 1 of the 1955 Treaty, the very same obligations that Iran had itself violated previously in a gross and systematic manner. The jurisprudence of this Court and its predecessor in cases where reciprocal obligations exist dictate that Iran should be denied the relief it requests.

2.07 In *Diversion of Water from the Meuse*, the Permanent Court held that Belgium could not be ordered to discontinue its use of a lock while the Netherlands continued a similar activity. Noting that the Belgian conduct of which the Netherlands complained was similar to the Netherlands' own conduct in similar circumstances, the Court "[found] it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past[159]". Judge Hudson, writing separately, explained that "where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party[160]".

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[159] *Diversion of Water from the Meuse, Judgment,* 1937, *P.C.I.J., Series A/B, No. 70*, p. 25.

[160] *Ibid., separate opinion of Judge Hudson* ,p. 77.

2.08 Vice-President Alfaro applied the reasoning behind the *Meuse* case to *Temple of Preah Vihear* in his separate opinion:

> "[I]n the Meuse case (1937), it was held that, where two States were bound by the same treaty obligations, State A could not complain of an act by State B of which it itself had set an example in the past. Nor indeed may a State, while denying that a certain treaty is applicable to the case, contend at the same time that the other party in regard to the matter in dispute has not complied with certain provisions of that treaty[161]."

Thus, in *Preah Vihear,* Vice-President Alfaro supported the denial of relief where mutual, identical obligations had been violated. Even more importantly, he made clear that a State cannot invoke a treaty with respect to the acts of another party, while simultaneously denying the treaty's application to its own acts[162].

2.09 Here, Iran repeatedly and systematically violated the 1955 Treaty through its attacks on U.S. shipping in the Gulf, giving rise to U.S. actions in self-defense. Just as the Netherlands in the *Meuse* case could not obtain relief for violations of a mutual obligation that it had breached, so Iran cannot be permitted to do so here. Iran cannot apply the 1955 Treaty selectively and one-sidedly: the Treaty obligations are mutual and reciprocal and govern Iran's actions as well as those of the United States. Iran cannot invoke that instrument against the

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[161] *Temple of Preah Vihear, Merits, I.C.J. Reports 1962, separate opinion of Vice President Alfaro,* p. 50.

[162] *See also Legality of Use of Force (Yugoslavia v. Germany), Request for the Indication of Provisional Measures, 11 May 1999,* CR/99/18, para. 1.6 (Germany arguing that Yugoslavia itself was accused of violating Genocide Convention and had unclean hands, and had thus not invoked the Court's provisional measures jurisdiction in good faith).

United States while claiming that it does not apply to the series of related illegal Iranian actions. Iran cannot therefore obtain relief since it itself had "set an example in the past[163]".

[163] *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70,* p. 25.

CHAPTER III

THE COURT SHOULD DENY RELIEF TO IRAN BECAUSE THE UNITED STATES ACTIONS WERE TAKEN IN SELF-DEFENSE AS A RESULT OF IRAN'S OWN ILLEGAL CONDUCT

2.10 Iran's illegal attacks on U.S. and other neutral shipping in the Gulf, in which it used its oil platforms, prompted the United States to respond in self-defense against those oil platforms. Iran persisted in its illegal attacks with full knowledge that it was acting in violation of international law[164]. It should now be denied relief for the necessary consequences of its own actions.

2.11 This Court has held that, even in instances where a party may have acted wrongfully, a victim of such actions may be barred from receiving relief where the wrongful actions resulted from the victim's own wrongful conduct. In *Gabcikovo-Nagymaros Project*, the Court found that it could not "overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior wrongful conduct[165]." In other words, "Hungary, by its own conduct, had prejudiced its right to terminate the Treaty[166]."

2.12 To support its holding in *Gabcikovo-Nagymaros Project* that Hungary should be

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[164] *See* Norway Cable, Exhibit 198.

[165] *Gabcikovo-Nagymaros Project, Judgment, I.C.J. Reports 1997,* p. 67, para. 110.

[166] *Ibid.*

denied relief for the consequences of its own actions, the Court relied on the Permanent Court's holding in *Factory at Chorzów*, quoting the following:

> "It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him[167]."

Both *Gabcikovo-Nagymaros Project* and *Factory at Chorzów* demonstrate that international law will not permit one party to object to actions which were undertaken in direct response to its own conduct[168].

2.13 In his dissent in the *Nicaragua* case, Judge Schwebel argued that Nicaragua's illegal

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[167] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 31. Contrary to Iran's assertions in its Reply, the International Law Commission's Draft Articles on State Responsibility already subsume this *Factory at Chorzów* principle: *exceptio inadimplenti contractus*. According to the Special Rapporteur, it is open to the Commission to take the view that this principle - "recognized by a respectable body of international authority and opinion" - is "sufficiently covered" by article 38 adopted on first reading. Third report on State responsibility, United Nations Document A/CN.4/507/Add.3, paras. 365-366. (This article 38 (article 33 in the second reading text) states: "The applicable rules of international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this Part." United Nations Document A/51/10, p. 139 (first reading draft); United Nations Document A/55/10, p. 132 (second reading draft).) In any case, *Gabcikovo-Nagymaros Project* demonstrates the continuing applicability of the principle.

[168] While several judges who dissented from, as well as some of those who concurred in, the Court's opinion expressed disagreement with the Court's factual conclusion on the issue of causation, none disagreed with the principle expressed. *See, e.g., Gabcikovo-Nagymaros Project, Judgment, I.C.J. Reports 1997, separate opinion of Judge Bedjaoui*, p. 134, para. 51; *separate opinion of Judge Koroma*, p. 151-152 (quoting extensively from Judge Hudson's separate opinion in the *Meuse* case); *dissenting opinion of Judge Ranjeva*, p. 170 (question was whether absent Hungary's first act of unlawfulness, subsequent wrongs would have occurred); *dissenting opinion of Judge Fleischhauer*, p. 212 (general rule not in doubt, merely application to case).

conduct should have barred it from complaining about corresponding illegalities, "especially because, if these were illegalities, they were consequential on or were embarked upon in order to counter Nicaragua's own illegality[169]. . ." The Court did not need to address this principle in *Nicaragua* because it concluded that the factual predicate for its application was not present[170] .

2.14 Here, Iran attacked U.S. and other neutral shipping in the Gulf, thereby breaching the 1955 Treaty. In direct response, the United States took actions in self-defense against the oil platforms. Were it not for Iran's illegal attacks, the United States would not have taken the actions of which Iran complains[171].

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[169] *Nicaragua, Merits, Judgment, I.C.J. Reports 1986, dissenting opinion of Judge Schwebel,* para. 394. *See also* G. Fitzmaurice, "The General Principles of International Law," 92 *Collected Courses, Academy of International Law*, The Hague p. 119 (1957-II) ("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 provoked by it").

[170] Parties have made similar arguments before this Court. *See Legality of Use of Force (Yugoslavia v. Netherlands), Request for the Indication of Provisional Measures,* 11 May 1999, CR/99/20, pp. 9-10 (Netherlands arguing that the Court should deny Yugoslavia's request for the indication of provisional measures because Yugoslavia's criminal conduct made NATO's military operations necessary); *Legality of Use of Force (Yugoslavia v. Canada), Request for the Indication of Provisional Measures,* 10 May 1999, United Nations Document CR/99/16, para. 39 (Canada arguing that "[a] party should not be granted relief by the Court if its need for such relief is the consequence of its own grave and systematic breaches of international law"); *Legality of Use of Force (Yugoslavia v. Portugal), Request for the Indication of Provisional Measures,* 11 May 1999, *United Nations Document* CR/99/21, para. 3.1.4 (Portugal arguing that "facts that are at the origin of the request for Provisional measures have been caused by the illicit conduct" of Yugoslavia and therefore Yugoslavia's request for provisional measures is "not legitimate").

[171] Iran's claim that "the 'clean hands' concept cannot *per se* be considered and invoked as a 'circumstance precluding wrongfulness'" (Reply, para. 8.19) not only is incorrect, but it also contravenes Iran's own practice before international tribunals. In fact, Iran has relied on the clean hands doctrine to defend itself against claims of wrongfulness. In *Mohtadi v. Iran*, for example, Iran "raise[d] the international law doctrines of estoppel, clean hands and abuse of rights as reasons why the claim should be dismissed . . . ." *Mohtadi v. Islamic Republic of Iran*, (award 573-271-3), (1997), para. 34. And in *Karubian v. Iran*, "Respondent argue[d] . . . by principles of clean hands, estoppel, good faith and abuse

of rights which operate in international law." *Karubian v. Islamic Republic of Iran*, (award 569-419-2), (1996), para. 148. That the Tribunal decided these particular cases on other grounds does not detract from the fact that Iran invoked the clean hands doctrine as a defense before an international tribunal.

Iran's assertions regarding the unclean hands of the United States are entirely without merit. In the concluding paragraphs of its discussion of the clean hands doctrine, Iran requests the Court to declare that the United States does not have "clean hands" in the present case and "therefore is precluded from having locus standi in judicio both on its defence and on its counterclaim". Reply, paras. 8.33-34. Insofar as this assertion would apply to prevent the Court from entertaining the United States defense, it appears to state the jurisprudentially novel theory that the Court cannot "entertain" the defense of a state accused of a wrongful act. Not surprisingly, no authority is cited for this proposition. To the extent that Iran makes this assertion to prevent the Court from entertaining the counter-claim, Iran does not begin to make a case that the United States committed any illegal conduct. Through its reference to U.S. failure to comply with its bilateral obligations under the 1955 Treaty, Iran appears to be trying to make the argument that the clean hands doctrine would bar the United States from bringing a claim with respect to Iran's wrongful conduct because of actions it took subsequent and in response to such conduct. No authority is cited for this proposition either. Finally, it is necessary to address Iran's contention that "the filing by the United States - and the provisional acceptance by the Court of a counter-claim founded on the same facts as those which are adduced to support the 'clean hands' defence, results in the legal irrelevance of that defence." Reply, para. 8.26. No authority is cited for this proposition, with the exception of a misplaced reference to Judge Anzilotti's dissenting opinion in *Diversion of Water from the Meuse*, which does not address the "legal irrelevance" of the clean hands defense in such a circumstance. Reply, note 31.

PART III

THE UNITED STATES DID NOT VIOLATE ARTICLE X(1) OF THE 1955 TREATY BECAUSE THE ATTACKS ON THE PLATFORMS DID NOT AFFECT "COMMERCE" THAT WAS "BETWEEN THE TERRITORIES" OF IRAN AND THE UNITED STATES

INTRODUCTION

3.01 Iran's sole remaining claim against the United States rests on Article X, paragraph 1, of the 1955 Treaty. Article X, paragraph 1, states, in its entirety, that:

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

3.02 In order for Iran to sustain its burden of proving that the United States violated Article X, paragraph 1, Iran must initially prove to the satisfaction of this Court two central points. First, Iran must prove that the extraction of crude oil at the three oil platforms constituted "commerce" within the meaning of Article X, paragraph 1. As discussed below, the term "commerce" in this provision - when read in the context of the remainder of Article X and of the 1955 Treaty as a whole, and in light of its negotiating history - is directed at regulation of maritime commerce, not commerce in a general sense. These platforms did not serve as ports nor were they otherwise engaged in maritime commerce. Further, even if the Court were to consider the meaning of "commerce" in a general sense, that term does not encompass the extraction of crude oil. Second, even if the Court were to conclude that such extraction of crude oil constituted "commerce" within the meaning of Article X, paragraph 1, Iran must prove that

this commerce was "between the territories of the two High Contracting Parties." As discussed below, at the times relevant to this case, these platforms were not engaged in commerce between the territories of the Parties, because, in one case, the affected platform was not in operation at the time of the U.S. action against it, and, in the other, the U.S. embargo precluded any production from the affected platforms from being exported to the United States. Consequently, Iran cannot sustain its burden of establishing that the United States hindered "commerce" that was "between" Iran and the United States[172].

3.03 This Court's consideration of the scope of Article X, paragraph 1, formed a substantial part of its 1996 Judgment. Notwithstanding Iran's efforts to argue that the Court has

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[172] Iran now has the burden of producing sufficient evidence to prove that the U.S. attacks on the platforms actually impeded commerce or freedom of commerce between Iran and the United States, in accordance with the well-known maxim *actori incumbit onus probandi* (the burden of proof rests on the party advancing a proposition) *See Nicaragua, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 41, para. 101 ("Ultimately, . . . it is the litigant seeking to establish a fact who bears the burden of proving it . . . ."); Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996, Volume III*, p. 1083 (3d ed. 1997) ("Generally, in application of the principle *actori incumbit probatio* the Court will formally require the party putting forward a claim to establish the elements of fact and of law on which the decision in its favour might be given."); Durward V. Sandifer, *Evidence Before International Tribunals*, p.127 (rev. ed. 1975) ("The broad basic rule of burden of proof adopted, in general, by international tribunals resembles the civil law rule and may be simply stated: that the burden of proof rests upon him who asserts the affirmative of a proposition that if not substantiated will result in a decision adverse to his contention. This burden may rest on the defendant, if there be a defendant, equally with the plaintiff, as the former may incur the burden of substantiating any proposition he asserts in answer to the allegations of the plaintiff."); Mojtaba Kazazi, *Burden of Proof and Related Issues*, pp. 29-30, 75-95, 369 (1996) (surveying P.C.I.J. and I.C.J jurisprudence to find that the Court generally requires the party claiming a fact to prove it, and otherwise deciding to the detriment of the party on that issue; concluding that this "is a principle which is generally recognized and accepted in different legal systems and in international law").

conclusively determined that the U.S. actions constituted a violation of Article X, paragraph 1, however, that point remains undecided by the Court, unproven by Iran, and unsustainable as a matter of law and fact. This Part first addresses why the Court's 1996 Judgment is not determinative of whether Iran's extraction of oil at these platforms constitutes "commerce" within the meaning of Article X, paragraph 1, and then proceeds to address the proper interpretation of "commerce" and "between the territories" as applied to the facts of this case. Lastly it concludes that, whatever the proper interpretation of Article X, paragraph 1, Iran has not and cannot establish facts sufficient to prove that U.S. actions violated Article X, paragraph 1.

CHAPTER I

THE COURT'S 1996 JUDGMENT DID NOT DECIDE WHETHER THE EXTRACTION OF CRUDE OIL AT THE IRANIAN PLATFORMS CONSTITUTES "COMMERCE" WITHIN THE MEANING OF THE 1955 TREATY

3.04 The Court found in its 1996 Judgment that:

> "there exists between the Parties a dispute as to the interpretation and the application of Article X, paragraph 1, of the Treaty of 1955; that this dispute falls within the scope of the compromissory clause in Article XXI, paragraph 2, of the Treaty; and that as a consequence the Court has jurisdiction to entertain this dispute[173]."

3.05 Iran seeks to argue that this Court's consideration of the scope of Article X, paragraph 1, in its 1996 Judgment conclusively determined that the extraction of crude oil at the platforms constitutes "commerce" within the meaning of Article X, paragraph 1. Indeed, Iran apparently wishes to rely on the Court's Judgment to construct a broad interpretation of "commerce" under Article X, paragraph 1, one that encompasses all Iranian economic activities of any kind, however attenuated and unproven the connection of the activity may be to foreign commerce, let alone to commerce with the United States. The Court's Judgment does not lend itself, however, to such distortion. The Court satisfied itself that, for purposes of determining its jurisdiction, there was a valid legal and factual dispute between the Parties over the interpretation of Article X, paragraph 1. The Court's Judgment makes clear that it did not decide that the U.S.

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[173] *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* (hereinafter "*Oil Platforms*"), *Preliminary Objection, Judgment, I.C.J. Reports 1996*, para. 53.

actions against the oil platforms actually impeded freedom of commerce between the territories of the Parties. Instead, the Court decided only that the U.S. actions were "capable of having" an "adverse effect" upon the "freedom of commerce . . . guaranteed by Article X, paragraph 1[174]".

3.06 With full pleadings by the Parties on the legal and factual issues giving rise to the dispute now before it, the Court is in a position to consider on the merits the interpretation of "commerce" in Article X, paragraph 1. As will be discussed in the next chapter, the Court should read the term "commerce" in Article X, paragraph 1, as suggested by its immediate context, to mean maritime commerce between the States. Since the extraction of oil at these platforms was not a part of maritime commerce between the two States, Iran's claim must fail.

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[174] *Ibid.* at para. 51.

CHAPTER II

THE EXTRACTION OF CRUDE OIL AT THE IRANIAN PLATFORMS IS NOT "COMMERCE" WITHIN THE MEANING OF ARTICLE X(1) OF THE 1955 TREATY

Section 1. The Term "Commerce" in Article X(1) Refers to "Maritime Commerce"

A. THE CONTEXT OF ARTICLE X(1) SHOWS THAT IT RELATES TO MARITIME AFFAIRS

3.07 Like any treaty provision, the words of Article X, paragraph 1, must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms . . . in their context and in light of [the treaty's] object and purpose[175]". They are not to be read in isolation, but in harmony with the other provisions of the treaty, and in a way that gives effect to the treaty's broad goals. Both the immediate context of the term "commerce" in Article X, and the broader context of the 1955 Treaty as a whole make clear that its ordinary meaning, in this case, must be understood as *maritime* commerce, and, perhaps, certain ancillary activities integrally related to such commerce.

3.08 A close reading of the text of Article X shows that each of its several provisions relates to maritime affairs. Article X reads in full:

> "1. Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.

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[175] Vienna Convention on the Law of Treaties, Article 31, 1155 UNTS 331. The Court has determined that Article 31 is reflective of customary law. *See, e.g., Case Concerning Kasiliki/Sedudu Island (Botswana* v. *Namibia), Judgment*, 13 December 1999, *I.C.J. Reports 1999*, para. 18.

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 terms "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."

3.09 The full text of Article X thus creates a detailed, inter-connected system for non-discriminatory access to ports and for other commercial shipping matters. Its various parts combine to create the overall structure of the Article, and must be read in relation to one another.

3.10 Thus, for example, the formulation "commerce and navigation" used in paragraph 1 is repeated in paragraph 3 in the context of non-discriminatory treatment of vessels. It is clear in the third paragraph that the reference is to maritime commerce[176]. It would be incongruous to construe the words "commerce and navigation" in paragraph 1 in a manner that so exceeds their plain scope in paragraph 3, in the absence of any indication that a broader scope was intended by the Parties.

3.11 In its comprehensiveness and detail, Article X resembles other articles of the 1955 Treaty, which establish well-elaborated systems of rules to regulate particular areas of trade, investment and economic relations. Nothing in the text of Article X, paragraph 1, or in the remaining text of Article X in its entirety, supports an interpretation of paragraph 1 which would establish it as a sweeping guarantee by each Party with respect to any action that might impair any aspect of the economic activity, real or potential, of the other Party. To the contrary, the Treaty's structure, detail and precision show that, had the Parties intended to create such a guarantee, they would have pursued it far more explicitly and in greater detail elsewhere in the Treaty.

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[176] In her separate opinion in the Court's *Oil Platforms* 1996 *Judgment*, Judge Higgins noted that: "[I]n the context of the paragraphs that follow in Article X itself, it does seem to me that the commerce there referred to is maritime commerce or - as in the *Oscar Chinn* case - commerce integral to, closely associated with, or ancillary to maritime commerce." *I.C.J. Reports 1996*, para. 40, p. 859, *separate opinion of Judge Higgins.*

3.12 It is also of relevance that, as noted by the Court in its 1996 Judgment[177], other provisions of the 1955 Treaty address aspects of commerce other than those covered in Article X. This reinforces the conclusion that the term "commerce" in Article X, paragraph 1, was intended to be read in relation to the rest of Article X, but not as establishing a rule of general application. The 1955 Treaty references "commerce" or "commercial activities", for example, in Articles II (entry and basic personal rights), VII (exchange controls), and XI (state trading). In each case, the specific, detailed provisions set forth in these Articles would be either unnecessary or inconsistent with the broad reading of Article X, paragraph 1, embraced by Iran. The treatment of other commercial issues in separate provisions throughout the 1955 Treaty confirms that Article X, paragraph 1, was intended by the Parties to have a narrower meaning, informed by the remainder of Article X.

B. The History Of Article X(1) Reinforces Its Maritime Character

3.13 The Parties plainly differ on the interpretation of Article X, paragraph 1. To the extent that this difference reflects ambiguity or obscurity of the paragraph, the Court may wish to have recourse to the preparatory work of the 1955 Treaty, as suggested by the principle codified in Article 32 of the Vienna Convention on the Law of Treaties. Article 32 provides, in relevant part, that:

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[177] *Oil Platforms, Judgment, I.C.J. Reports 1996*, paras. 41 and 42.

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31[178]. . . ."

In this case, the history of the 1955 Treaty and its negotiating record demonstrate that Article X was designed to consolidate all of the Treaty's provisions on shipping into a single article aimed generally at preventing discriminatory treatment of vessels and cargoes[179].

3.14 Both Iran and the Court have recognized that treaties of "friendship, commerce and navigation" (hereinafter, "FCN") like the 1955 Treaty cannot be read in isolation[180]. The 1955 Treaty is part of an extensive system of U.S. bilateral treaties designed, *inter alia*, to promote and protect certain economic activities.

3.15 Generally, these treaties contain common language, with only limited variations as required to address particular situations. Thus, negotiating history and practice under one treaty can be critical to properly interpreting and applying another. Accordingly, both Iran (in its oral arguments) and the Court have referred in this case to the negotiating history of other treaties in construing the meaning of the 1955 Treaty[181].

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[178] Vienna Convention on the Law of Treaties, Article 32, 1155 UNTS 31.

[179] *See* Charles H. Sullivan, *Department of State Standard Draft (Analysis and Background), Treaty of Friendship, Commerce and Navigation*, p. 283 (hereinafter "*Sullivan Study*"), Exhibit 213.

[180] *See, e.g.*, Memorial, paras. 3.27-3.28; *Oil Platforms, Judgment, I.C.J. Reports 1996*, para. 29. Iran's numerous citations to the Court's judgment in the *Nicaragua* case, also signal its recognition that other treaties of the type under consideration here are relevant to this case.

[181] *See, e.g., Oil Platforms, Preliminary Objection,* 20 September 1996, CR/96/15, p. 43, para. 8; *I.C.J. Reports 1996*, p. 814, para. 29.

3.16 A comprehensive study of the "modern" post-World War II FCN treaties (including the 1955 Treaty), prepared by one of their principal architects and negotiators, explicitly addresses the maritime character of Article X. Charles Sullivan for many years headed the U.S. State Department office that negotiated such treaties. In his analysis of the standard form for these treaties, Mr. Sullivan explained the standard navigation article (from which Article X, paragraph 1, does not deviate):

> "The crucial element in Article XIX [renumbered as Article X in the 1955 Treaty with Iran] is that it relates to the treatment of vessels and to the treatment of their cargoes. It is not concerned with the treatment of the enterprises which own the vessels and the cargoes. *That treatment is stipulated in other provisions of the treaty*. . . .
>
> Article XIX has two essential objectives. One is to prevent discrimination based on the vessel. . . .
>
> The other major objective is to prevent discrimination based upon cargo and made effective by cargo preference laws[182]. . . ."

Yet the interpretation of the provision here sought by Iran would extend the reach of the provision precisely to "the treatment of enterprises which own the vessels and the cargoes"; in this case, to an enterprise that owned oil platforms, which may or may not have been in operation. If in operation, such platforms would have been engaged in the extraction of crude oil from the seabed in circumstances in which that crude oil, potentially, may ultimately have been

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[182] *Sullivan Study,* p.284 (emphasis added), Exhibit 213.

cargo in maritime commerce. Thus Iran's interpretation is at a substantial distance beyond the treatment of vessels and their cargoes that was intended for Article X, paragraph 1.

3.17 The history of the 1955 Treaty confirms that Paragraph 1 deals with navigation and bears upon commercial activity only insofar as it relates incidentally to navigation. A 22 June 1954, Department of State cable proposing a Treaty of Friendship, Commerce and Navigation with Iran described the draft Treaty as "essentially an adaptation of the standard provisions" with the inclusion of "such provisions to meet special situations in that country [Iran] as may be deemed necessary. These would probably include a comprehensive navigation article[183]." This "comprehensive navigational article" was the provision that became Article X.

3.18 Another U.S. Department of State cable, dated 23 July1954, was similar. It stated that "in view of the present, and the presumably greater, future interests of Iran as a maritime state, it has been thought appropriate to propose the navigation provisions of the standard FCN treaty[184]. . . ." Thus, the text that became Article X clearly was solely a "navigation" provision that was included in the 1955 Treaty precisely because of Iran's then-present and anticipated future significance as a maritime State.

3.19 As negotiations on the 1955 Treaty progressed, discussions on Article X emphasized the desirability of non-discriminatory treatment of shipping. Thus, the U.S. Department of State

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[183] Cable from Secretary Dulles to American Embassy Tehran, 22 June 1954, p.3, Exhibit 215.

[184] Cable from State Department to American Embassy Tehran, 23 July 1954, Enclosed Memorandum, p.3., Exhibit 216.

in November 1954 advocated inclusion of Article X on the ground that "[the] interests [of] international commerce [are] served best by [a] policy permitting free competition [for] vessels [of] all countries for carriage [of] commercial cargoes"[185].

3.20 Similarly, the U.S. Senate reflected the general U. S. understanding of Article X as regulating maritime matters when it gave advice and consent to ratification of the 1955 Treaty. The Senate Report discussing the "Commercial Treaties with Iran, Nicaragua, and the Netherlands," describes Article X as bearing upon navigation: "Article X details the rights of vessels flying the flag of either party in the ports of the other and in general provides national and most-favored-nation treatment, except for coastwise, inland, and fishing traffic[186]."

3.21 With respect to Article X, paragraph 1, Mr. Sullivan's description of the standard FCN treaty maritime article is definitive:

> "This provision is in the nature of a declaration of principle rather than having a definite legal rule. It is considered as having special relevance to seaborne traffic. It is in traditional terminology, probably directed against mercantilist restrictions of the kind commonplace in the Nineteenth Century[187]."

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[185] Cable from Department of State to American Embassy Tehran, 3 November 1954, p.2., Exhibit 217.

[186] Senate Report, 84th Cong., 2d Sess., "Commercial Treaties with Iran, Nicaragua, and the Netherlands," 9 July 1956, p. 3, Exhibit 218.

[187] *Sullivan Study,* p. 287, Exhibit 213.

In its Counter-Memorial, the United States emphasized the declaratory nature of Article X, paragraph 1[188]; it maintains its views on this subject.

3.22 Worldwide practice under the FCN treaties confirms the maritime scope of Article X. In 1981, the U.S. Department of State conducted a study of specific incidents involving the interpretation and application of U.S. FCN treaties since World War II[189]. That study found thirteen cases involving disputes concerning provisions comparable to Article X of the Iran-U.S. Amity Treaty. None raised claims outside the sphere of navigation and shipping[190]. The experience of the Iran-U.S. Claims Tribunal suggests the same conclusion, in that none of the hundreds of cases filed there involving breach of contract or loss of commercial property has been decided on the basis of Article X, paragraph 1, of the 1955 Treaty.

3.23 Thus, both textual and historical analysis of Article X, paragraph 1 show that the term "commerce" as used therein has a limited scope, related to the maritime character of the article as a whole. It does not, and was never intended to, expand the scope of the provision to make it a comprehensive regime for the promotion and protection of every form of economic

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[188] Counter-Memorial, paras. 2.06-2.15. *See also* Draft Treaty of Friendship, Commerce and Navigation Between the United States of America and the Republic of Portugal (annotated version), May 1949, Annotation at Article XIX(2), Exhibit 214.

[189] Ronny E. Jones, *State Department Practices Under U.S. Treaties of Friendship, Commerce, and Navigation,* August 1981, pp. 172-188, Exhibit 219. A copy of this document is being deposited in the Registry.

[190] *Ibid.* The disputes involved, *inter alia*, flag requirements for shipping in certain sea lanes, restrictions limiting a State's commercial shipping to ships flying that State's flag, and allegations that one State was granting priority treatment to ships of its former colonial power.

activity that might exist in the territory of each Party. Iran's failure to demonstrate any interference by the United States with maritime commerce between Iran and the United States is thus fatal to Iran's claim in this proceeding.

Section 2. Even a Broad Interpretation of the Term "Commerce" Would Not Sustain Iran's Interpretation

3.24 Even if the Court were to conclude at the merits stage that the term "commerce" reaches a broader category of activities than the maritime commerce the United States believes is the appropriate scope of the term as used in Article X, paragraph 1, the term does not possess the scope that Iran seeks to give it. Iran argues that the "juridical" definition of "commerce" includes "not only the functions of sale and purchase, but also any ancillary activities that are intrinsically linked to commerce, *in particular the activities of production, transport, storage or improvement of the raw material*[191]". Iran's authority in support of this effort to broaden dramatically the scope of Article X, paragraph 1, is, however, unpersuasive.

3.25 To make its case, Iran offers quotations from a few carefully selected cases from U.S. jurisprudence, as well as a relatively small universe of doctrinal authorities who appear, at least from the brief quotations offered without context by Iran, to espouse a broad definition of the term "commerce". Iran thus seeks to persuade the Court that "commerce," as it is used in Article X, paragraph 1 of the 1955 Treaty, was intended to cover oil extraction activities several

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[191] Reply, para. 6.58.

steps removed from the maritime commerce that the United States and Iran sought to promote through this provision. In addition, by casually equating the term "commerce" with other terms, such as "industry" and "trade", and then citing to the Court's reference to the *Oscar Chinn* case[192], Iran seeks to constrain the Court's further consideration of this issue, suggesting that the Court's statements about possible interpretations of the term amounted to an "express ruling on this point[193]". Iran's approach is in error. The authorities that Iran cites do not support the conclusions for which it argues.

A. THE *OSCAR CHINN* CASE

3.26 Iran relies in part on the Permanent Court of International Justice's Judgment in the *Oscar Chinn* case[194], a case also referred to by this Court in its 1996 Judgment[195]. The language quoted by Iran and the Court speaks of "freedom of trade," and links it to a right "to engage in any commercial activity, [including] industry, and in particular the transport business[196]". The context in which the Permanent Court made this statement, however, is critical to understanding its meaning. The Permanent Court itself acknowledged that the context was critical: it defined

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[192] Reply, paras. 6.28-6.31.

[193] Reply, para. 6.30.

[194] Reply, paras. 6.28 and 6.36.

[195] *Oil Platforms, Judgment, I.C.J. Reports 1996*, para. 48.

[196] *Ibid, citing* the *Oscar Chinn* case, *1934 P.C.I.J., Series A/B, No. 63,* p. 65.

"freedom of trade, *as established by the Convention*[197]". It did not deliver a comprehensive definition of "freedom of trade" applicable in all circumstances.

3.27 The Convention of Saint-Germain of 10 September 1919 (successor instrument to the General Act of Berlin of 26 February 1885 and the Act and Declaration of Brussels of 2 July 1890), at issue in *Oscar Chinn,* was more comprehensive than the 1955 Treaty, providing for "complete commercial equality" between the nationals of the Parties and those of Members of the League of Nations[198]. Given this scope, the Permanent Court took an expansive view of the concept of "freedom of trade," encompassing the right to "engage in any commercial activity[199]". The 1955 Treaty, and specifically Article X thereof, is significantly more modest in both its goals and means.

3.28 Moreover, the Permanent Court expressly acknowledged the significance of fluvial transport on the Congo River to the accomplishment of the overall objectives of the international regime for the Congo Basin: "in the first place is to be noted the peculiar importance of fluvial transport for the whole economic organization of the colony[200]". The factual context of the present case is not analogous[201].

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[197] *Oscar Chinn* case, *1934 P.C.I.J., Series A/B, No. 63, p. 84.* (Emphasis added).

[198] *Ibid.*, p. 79.

[199] *Ibid.*, p. 84.

[200] *Ibid.*, p. 78.

[201] In her separate opinion in the preliminary objection phase of this case, Judge Higgins noted that: "the fluvial transportation industry was an integral part of the trade envisaged under Article 5 of the Saint-

3.29 *Oscar Chinn* is of only limited relevance, therefore, for the purpose of determining the appropriate scope of Article X, paragraph 1, of the 1955 Treaty. Nothing in the Permanent Court's decision supports the applicability of the Court's interpretation of the Convention of Saint - Germain in that case to the wholly distinct legal and factual context in this proceeding.

B. DEFINITIONS

3.30 Iran relies on definitions from several sources in support of its attempt to expand the meaning of "commerce", as used in Article X, paragraph 1. Even when taken out of its Treaty context, however, the term does not possess, in general legal usage, the breadth attributed to it by Iran.

3.31 As an initial matter, it should be observed that the listing of definitions in a variety of languages, without any effort to provide context[202] and without any indication that such definitions were relevant to the drafting of Article X, paragraph 1, (which, as shown above, contained the identical text of the relevant provision of the model U.S. FCN treaties in use at the

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Germain Convention in a way that oil production is not an integral part of what was envisaged under Article X of the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States." *I.C.J. Reports 1996*, p. 860, para. 47, *separate opinion of Judge Higgins.*

[202] Thus Iran provides a lengthy quotation from Baron Nolde's course at the Hague Academy, from the chapter entitled "Les Tarifs Douaniers Conventionnels" but omits his specific discussion of FCN treaties: "On remarque dans ce traite la disposition sur la liberte du commerce: le droit des marchands de venir et de sejourner dans le pays et d'y amener leurs marchandises. Cette formule constituera jusqu'a nos jours la base fondamentale des toutes les conventions commerciales." Nolde, B., "Droit et technique des traites de commerce,"*Collected Courses of the Hague Academy of International Law, Vol. 3* (1924-II), pp. 301-02.

time of the negotiation of the 1955 Treaty), may be of limited value to the Court. It should also be noted, however, that even the general Anglo-American understanding of the term "commerce" presents a much more limited concept of commerce than that suggested by Iran. For example, the 1951 edition of *Stroud's Judicial Dictionary of Words and Phrases* states that "Commerce is traffick, trade, or merchandize, in buying and selling of goods[203]". This definition is in turn consistent with a 1916 precursor in *Wharton's Law Lexicon*:

> **"Commerce**. . . , the intercourse of nations in each other's produce and manufactures, in which the superfluities of one are given for those of another, and then re-exchanged with other nations for mutual wants. Commerce relates to our dealings with foreign nations, colonies, etc.; trade, to mutual dealings at home[204]."

3.32 Even some of the definitions cited by Iran do not extend so far as to bring within their scope the activities that Iran has suggested are included within the concept. Thus, for example, Iran cites the definitions of "commerce" in *Black's Law Dictionary* and in West's *Guide to American Law*[205], both of which begin by referring to the exchange of goods, products, and personal property, but include references to the transportation of goods and the so-called "instrumentalities" of commerce. Neither, however, supports the proposition that Iran must establish in order for it to prevail in its claim with respect to Article X, paragraph 1: that

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[203] F. Stroud, *Stroud's Judicial Dictionary of Words and Phrases,* 3rd ed. 1951, Exhibit 220.

[204] E.A. Wurtzburg, *Wharton's Law Lexicon*, 12th ed. 1916, Exhibit 221.

[205] *See* Reply, para. 6.36, fn 52, *citing* the Court's reference to *Black's Law Dictionary*, 1990 ed., p. 269. Iran originally cited this provision in its Memorial. *See also* Reply, para. 6.26, *citing The Guide to American Law, Everyone's Legal Encyclopedia, Vol. 3,* p.54.

"commerce" in the context of that provision includes the potential extraction of crude oil from the seabed by the nationals of one Party within the territory of that Party.

C. UNITED STATES "COMMERCE CLAUSE" JURISPRUDENCE

3.33 Iran's lengthy discussion of United States "Commerce Clause" jurisprudence is unpersuasive, both as a matter of treaty interpretation, as to which it is largely irrelevant, and as a matter of U. S. constitutional law, as to which it is incomplete and misleading. First, standard rules of treaty interpretation do not call for resorting to one Party's specialized constitutional doctrines to interpret the language of a treaty, particularly where, as here, there is no evidence that negotiators sought to import such doctrines into the treaty. Second, decisions by the U.S. Supreme Court on whether Congress has authority under the U. S. Constitution to regulate certain activities in the United States on the grounds that they involve commerce among our several states, as distinct from such authority resting exclusively with our state governments, have no direct bearing on the issue of international commerce between the United States and another State, such as Iran[206]. Finally, with respect to U.S. constitutional law in this area, it must be observed that such law has evolved over time and continues to evolve, and, were this Court to

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[206] Thus, even in the *Daniel Ball* case cited by Iran, the critical question was not what constituted "commerce" *per se*, but rather whether the vessel concerned was "engaged in commerce *between the States*" (emphasis added). It is in this connection that the U.S. Supreme Court reached its conclusion that "whenever a commodity has begun to move as an article of trade *from one State to another*, commerce in that commodity *between the States* has commenced." Reply, para. 6.23, *citing* (with different emphasis) *The Daniel Ball*, 77 U.S. (10 Wall.) p. 557, 19 L.Ed. p. 999 (1871).

conclude, as Iran apparently suggests, that Article X, paragraph 1, is to be interpreted with reference to this U.S. constitutional doctrine, it would lead to confusion and indeterminacy with respect to the meaning of the provision.

3.34 In any event, and as Iran itself has recognized, U.S. "Commerce Clause" jurisprudence simply cannot be construed to include oil extraction activities such as those engaged in by the oil platforms within the meaning of the term "commerce". The *E.C. Knight* case cited by Iran[207] – which, it must be noted, ruled sugar *refining* (not to mention the prior stage activities of sugar *cultivation* or *harvesting*) outside the scope of the Commerce Clause – itself indicates the level of the U.S. Supreme Court's resistance to such a broad interpretation.

3.35 In addition, a number of cases concerning the oil and coal mining sectors in particular only serve to reaffirm the U.S. Supreme Court's distinction between production and commerce. In *Champlin Refining Co. v. Corporation Commission of Oklahoma*[208], for example, the U.S. Supreme Court found that oil regulations adopted by the state of Oklahoma did not violate the Commerce Clause because they applied "only to production and not to sales or transportation of crude oil or its products[209]." The regulations prohibited any petroleum production processes that created waste. The Court held that: "Such production is essentially a

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[207] Reply, para. 6.23.

[208] *Champlin Refining Co. v. Corporation Commission of Oklahoma,* 286 U.S. 210 (1932), Exhibit 222.

[209] *Ibid,* p. 235.

mining operation, and therefore is not a part of interstate commerce, even though the product obtained is intended to be and in fact is immediately shipped in such commerce[210]".

3. 36 In a second mining case, the U.S. Supreme Court held that production and commerce are "two distinct and separate activities," even if the product will become part of interstate commerce, and, secondly and more specifically, that extraction of a mineral (coal) was not part of commerce[211].

Section 3. "Freedom of Commerce" Within the Meaning of the 1955 Treaty also Does not Include the Oil Extraction Activities of the Platforms

3.37 It is evident that Iran's attempt to expand the reach of Article X, paragraph 1, by interpreting the broad statement that "there shall be freedom of commerce" into a sweeping guarantee by each Party of the other Party's full range of economic activity within its own territory cannot be sustained. Such an interpretation would necessarily constitute an undertaking by each Party to refrain from all actions that could create any type of economic impediment on

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[210] *Ibid.*

[211] *Carter v. Carter Coal Co.*, 298 U.S. pp. 303-04 (1936), Exhibit 223, ("Mining brings the subject-matter of commerce into existence. Commerce disposes of it."). *See also Northern Natural Gas Co. v. State Corp. Commission of Kansas*, 372 U.S. p. 94 (1963), Exhibit 224, (noting that "our cases have consistently recognized a significant distinction, which bears directly upon the constitutional consequences, between conservation measures aimed directly at interstate *purchasers* and wholesales for resale, and those aimed at *producers and production*" (emphasis added)).

the other Party. Iran has conceded, however, that actions such as import duties or port fees[212] are accepted elements of international practice. Moreover, a sweeping interpretation of "freedom of commerce" could even be read to suggest not only an obligation to refrain from all actions that might have a negative consequence on the economy of the other Party, but to create an affirmative requirement to remove or remedy obstacles – such as third party attacks on ships carrying goods between the United States and Iran – that might interfere with trade between the Parties, or even an affirmative duty to take actions in the territory of the other Party that would ultimately promote the development of trade between the Parties.

3.38 Iran's reliance on the Court's statements in the *Nicaragua* case is equally ill-founded. As this Court is aware, Article XIX, paragraph 1, of the 1956 United States-Nicaragua Treaty of Friendship, Commerce, and Navigation (hereinafter "Nicaragua Treaty") is substantively identical to Article X, paragraph 1, of the 1955 Treaty[213]. Nicaragua argued in that case that the United States had violated Article XIX of the U.S.-Nicaragua Treaty by a variety of actions: mining and attacking Nicaraguan ports and port installations; attacking facilities associated with those ports and the fueling of vessels that sailed to and from those ports; and

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[212] Reply, paras. 6.11-6.13.

[213] Article XIX, paragraph 1, of the Nicaragua Treaty states: "Between the territories of the two Parties there shall be freedom of commerce and navigation." Treaty of Friendship, Commerce and Navigation, signed 21 January 1956, entered into force 24 May 1958, 367 UNTS 3.

imposing the embargo[214]. The Court found the United States in violation of the "commerce and navigation" provision only with respect to the mining of the ports and the embargo, treating the other acts as violations of customary international law[215]. The critical point for this purpose is that the Court appears to have limited its findings with respect to the "commerce and navigation" provision to those actions related to maritime commerce: for example, the attacks on ports, port facilities, and the embargo. In this case, no such actions are at issue.

3.39 Iran also relies, in this regard, on the absence of a specific finding by the Court that "the oil in the terminal that was attacked was intended to reach directly the territory of the United States" or that "the ships that were sunk or that avoided stopping at mined Nicaraguan ports were carrying on commerce between the territories of the two Parties at that precise moment[216]". But Iran reads far too much into the Court's silence.

3.40 First, the Court in the *Nicaragua* case did not require specific proof that trade between the United States and Nicaragua had been affected by U.S. actions because, at the time of concern to the Court, there was no dispute that such trade was taking place - particularly in the oil sector[217]. In addition, it must be recalled that, in *Nicaragua*, there was no question that

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[214] *Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, paras. 278-279.

[215] *Ibid.*

[216] Reply, para. 6.50.

[217] Counter-Memorial, paras. 2.28-2.32.

"freedom of navigation" between the two States had been impeded, in that the Court found that the actions of the United States involved attacks on and the mining of port facilities that precluded such navigation between the States. Thus the Court, which grouped together by cross-reference many of the U.S. actions in finding the violation of the comparable provision[218], was not - as it would have to be in order to find a violation in this case - forced to rely on an overbroad interpretation of the term "commerce." By contrast, as the United States demonstrates below, in this case there was no commerce between the United States and Iran in oil from these platforms in the relevant period, and the platforms were not in any sense engaged in or supporting commercial navigation. Consequently, the Court in this case must specifically determine that "commerce" existed "between the territories" of Iran and the United States within the meaning of Article X, paragraph 1.

[218] *Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, paras. 292(7), (11).

CHAPTER III

DURING THE RELEVANT PERIOD, IRANIAN OIL FROM THE PLATFORMS WAS NOT PART OF "COMMERCE" "BETWEEN THE TERRITORIES" OF IRAN AND THE UNITED STATES, AS REQUIRED UNDER ARTICLE X(1) OF THE 1955 TREATY

3.41 Whatever the interpretation of Article X, paragraph 1, of the 1955 Treaty as discussed in Chapter II above, Iran has not established any of the facts to support a conclusion that a violation of that provision, attributable to the United States, has occurred. For the reasons discussed below, the United States submits that Iran not established any such facts and that it cannot do so.

Section 1. The Oil Platforms Were Not Engaged in Maritime Commerce

3.42 Iran does not even attempt to argue that the activity of extracting crude oil from the seabed constitutes maritime commerce. This is appropriate, given that the platforms were not ships, nor were they ports. Moreover, as Iran itself admits, the platforms were not designed to accommodate tankers for the purpose of loading crude oil for export[219]. Thus, Iran appears to have conceded that if, as the United States contends, the term "commerce" as it is used in Article X, paragraph 1, is properly understood to mean maritime commerce, and, perhaps, certain

[219] *See* Reply, para. 6.61.

ancillary activities integrally related to such commerce, the attacks on the oil platforms do not come within the reach of the 1955 Treaty.

Section 2. The Oil Platforms Were Not Engaged in "Commerce" Even Under an Interpretation of the Term Not Limited to Maritime Commerce

3.43 Even if the term "commerce" is considered outside the context of its placement in the article on maritime commerce, Iran's activities with respect to the oil platforms do not provide a basis on which to conclude that the platforms were engaged in commerce within the meaning of the 1955 Treaty.

A. The Function Of Iran's Oil Platforms Did Not Include The Production Of Crude Oil In A Form Capable Of Being Exported, And Thus Did Not Involve Commerce

3.44 As Iran acknowledges, the oil extracted by its offshore platforms was not in a form capable of being exported when it came onto the platforms[220]. Rather, gas, hydrogen sulfide, and water had to be separated from the oil before it could be safely exported. Prior to this separation, the oil was unstable and highly flammable, and thus extremely dangerous to load onto tankers for export[221]. There is no active market for export of, or trade in, oil that contains the levels of gas,

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[220] *See* Reply, paras. 3.7-3.10.

[221] Statement of Edward O. Price, para. 14, Exhibit 212.

hydrogen sulfide, and water that the oil produced by Iran's platforms contained prior to the completion of the separation process.

3.45 Iran's Reply makes clear that the oil and gas separation process occurred in two stages: one stage occurred on the platforms themselves; the second stage occurred on Lavan or Sirri Island after the oil had been transported there by subsea pipeline. According to Iran,

> "After the crude oil produced from the Reshadat/Resalat [Rostam] fields and Salman [Sassan], which had undergone an initial separation process on the platforms, had been pumped by undersea pipe-line to Lavan Island, further processing took place in order to separate more gas and water. . . . A similar process occurred for crude oil produced on the Nasr [Sirri] platform, although in that case crude oil went via Sirri Island[222]."

3.46 It is thus clear that the process of producing crude oil capable of export was not completed on Iran's oil platforms, but instead was completed only after secondary separation took place on Lavan and Sirri Islands. Damage to Iran's oil platforms, accordingly, did not affect a product that was itself in commerce.

3.47 It must also be considered with respect to the platforms' role as "production" facilities, that - as Iran has admitted[223] - of those platforms against which the United States took military actions, only Sirri appears to have been engaged in "production" at the time of the U.S. actions. The other platforms were undergoing repairs and were not engaged in "production" at the time of the U.S. actions.

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[222] *Ibid,* para. 3.10.

[223] Reply, paras. 3.13 and 3.14.

3.48 With respect to the Sirri platform, which apparently had not been damaged by Iraqi attacks prior to the U.S. action, any crude oil extraction taking place there at the time of the U.S. action would have resulted in crude oil that was not a product capable of being exported and not in commerce, as described above.

B. Neither The Platforms Nor The Pipelines Possessed A Transport Function Within The Meaning Of "Commerce" In Article X(1)

3.49 As noted in Part I, the U.S. actions against the platforms were directed at the "topsides" of the platforms and not their "jackets" below the waterline. Thus, it cannot be assumed or merely asserted that in damaging the platforms, the United States damaged the pipelines or precluded their use in transporting oil from other platforms.

3.50 Moreover, as discussed above[224], while the platforms at issue in this case were connected to undersea pipelines, the pipelines themselves could have continued to operate independently of the platforms, to the extent that they were also connected to another platform or other source of product. Thus, the transportation function of the pipelines was independent of the extraction function carried out by the platforms.

3.51 Even had the associated undersea pipelines been damaged, however, such damage would have had no effect on Iran's ability to transport finished products to market. The undersea pipelines transported unfinished crude oil from a preliminary stage in its production

[224] *See supra*, para. 1.74.

process to a subsequent stage in its production process. Such transportation between production phases does not constitute commerce within the meaning of Article X, paragraph 1.

C. Oil/Gas Separation On The Platforms Does Not Constitute The Improvement Of A Good Within The Meaning Of "Commerce" Under Article X(1)

3.52 Iran also argues that, to the extent the oil platforms at issue in this case had facilities for the separation of oil and gas, they were involved in an improvement function which falls within an expanded definition of commerce. First, the United States reiterates that an improvement function in the manufacturing process does not properly fall within the definition of commerce for purposes of Article X, paragraph 1, of the 1955 Treaty. In addition, however, it must be noted that the separation function at issue in this case is of a particularly preliminary nature and could have been easily substituted for by Iran. As explained above[225], the separation on the platforms was a first stage of processing that took place before the crude was transferred onshore to Lavan and Sirri Islands, where a further stage of separation was necessary in order to permit the oil to be loaded safely onto tankers for export. Thus, the separation that took place on the platforms constituted a preliminary step in the handling of the crude oil extracted from the seabed, not a commercial process by which the oil was improved within even an expanded meaning of commerce in Article X, paragraph 1[226]. Indeed, when damage to the Sirri D central

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[225] Statement of Edward O. Price, para. 14-15, Exhibit 212.

[226] *Ibid.*

platform made it impossible for it to perform initial processing of oil produced in the Sirri C and D and Nosrat oilfields, it would have been possible for all processing of the oil from those fields to have taken place on Sirri Island, demonstrating that the role played by the Sirri D central platform was not essential to the production and export of oil from these fields[227].

Section 3. The Activities of Iran's Oil Platforms Did Not Relate to Commerce "Between the Territories" of Iran and the United States

3.53 Article X, paragraph 1, does not provide that there shall be freedom of "commerce" generally but, rather, that there shall be freedom of commerce "between the territories of the two High Contracting Parties." Consequently, in order to carry its burden of proving a violation of this provision, Iran must show not just that the extraction of oil at the three platforms is properly characterized as "commerce" within the meaning of Article X, paragraph 1, but also that such commerce was "between" Iran and the United States. To that end, Iran has alleged that the U.S. actions against Iran's oil platforms prevented Iran from engaging in commerce with the territory of the United States. Iran's theory seems to be that, had its oil platforms not been damaged by the United States, Iran would have been able to sell greater volumes of oil to customers located in the United States than it actually sold to such customers in light of the damage to the platforms.

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[227] *Ibid.*, para. 18.

3.54 Iran's theory does not withstand scrutiny. As described below, U.S. actions against Iran's oil platforms did not prevent Iran from selling oil produced by the oil platforms to customers in the United States. The U.S. action of 19 October 1987, was directed solely at a platform that was not in operation. The U.S. embargo against Iranian origin oil, in effect from 29 October 1987, thereafter prevented Iran from selling to the United States. Iran's sales of oil to customers located in Western Europe, which Iran attempts to characterize as commerce with the United States, are entirely irrelevant to this case. Moreover, even had Iran been able to export oil to the United States, it was constrained by its OPEC quotas and maintained excess capacity throughout the relevant period; there is nothing to suggest that, had the platforms been available, Iran would have produced more oil for sale to customers in the United States.

A. The U.S. Embargo Prevented Iran From Exporting Oil From The Platforms To Customers In The United States During The Relevant Time Period

3.55 As the United States explained in its Counter-Memorial, it is plain that the U.S. military actions against Iran's oil platforms had no effect on Iran's ability to engage in oil commerce with the United States.

3.56 The Rostam platform complex was not producing any oil at the time of the U.S. actions against it on 19 October 1987. Iran acknowledges this fact[228]. Because the Rostam

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[228] *See* Reply, para. 3.13 ("The Reshadat R-7 platform had been attacked by Iraq on 16 October 1986, resulting in the stoppage of production not only from R-7 itself, but also from the Reshadat R-4 and R-3 platforms and the Resalat platform. . . . While a second attack by Iraq on the Reshadat complex had occurred on 15 July 1987 and caused certain setbacks to the reconstruction work, it was anticipated that

platform complex was not producing any oil at the time, any damage suffered by the platform complex had no impact on the volume of oil Iran was then able to sell to the United States. The situation after the U.S. actions was exactly the same as that before: Iran sold no oil to the United States from the Rostam platform complex.

3.57 The possibility that the Rostam platform complex may have been returned to production sooner in the absence of the U.S. action is of no consequence in this context because ten days after the actions against the Rostam platform complex, the United States banned the import of Iranian origin oil, thus preventing any further purchases of oil from Iran's oil platforms – or from any other Iranian source – by customers located in the United States. Again, Iran concedes this fact: in its words, "the sanctions adopted under Executive Order No. 12613 on 29 October 1987 effectively put an end to any imports of Iranian crude oil into the United States[229]".

3.58 Like Rostam, Sassan was not in operation at the time of the U.S. action against it. While Sirri appears to have been in operation at the time of the U.S. actions in April 1988, these actions occurred long after the ban by the United States on the import of Iranian oil.

3.59 As a result of the embargo, the effect of which Iran has conceded,[230] any damage

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crude oil production from the Reshadat and Resalat fields would resume by the end of October 1987.").

[229] Reply, para. 3.22.

[230] Iran has submitted to the Court a statement of Mr. Syed-Hossein Hosseini, which purports to provide evidence "of contracts concluded with American oil companies for the export of Iranian oil to the United States both before and after the US attacks on Iranian oil platforms." Hosseini Statement, para. 16, Reply, Volume III. There is no dispute that Iran exported oil to the United States both before the U.S. embargo went into effect and after the embargo was lifted. However, Mr. Hosseini does not, and indeed

done to Iran's oil platforms by U.S. actions was irrelevant to Iran's ability to export oil to customers located in the United States[231]. Even if the platforms had suffered no damage and produced at full capacity, Iran would have remained unable to sell any oil to customers located in the United States because the embargo prohibited such sales. Iran has not alleged that the U.S. embargo violated the 1955 Treaty.

B. Iran's Assertions About U.S. Purchases Of Petroleum Products From Western Europe Are Irrelevant

3.60 Iran attempts to blur these simple facts by offering the Court irrelevant evidence of purchases by customers in the United States of refined petroleum products from Western Europe.

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cannot, show that Iran exported oil to the territory of the United States in the period of time during which the U.S. embargo was in effect, which covers all periods of time relevant to this case.

All of the documents Mr. Hosseini refers to in his statement relate to sales of petroleum that took place before the imposition of the U.S. embargo, or after its lifting, or to transactions with no connection to the territory of the United States. None of these documents show that Iran continued to export oil to the territory of the United States during the period in which the U.S. embargo was in effect, or that Iran would have been able to export oil from the platforms to the territory of the United States if the attacks on the platforms had not occurred. It is perhaps for this reason that Iran makes no reference to this portion of Mr. Hosseini's statement in the text of its Reply. To avoid any misunderstanding on the Court's part, however, the document attached at Exhibit 225 outlines in detail the documents attached to Mr. Hosseini's statement and demonstrates their irrelevance to this case.

[231] Iran has not asserted that, absent the U.S. actions on 19 October 1987, the Rostam plarform complex would have begun producing oil again before the imposition of the U.S embargo on 29 October 1987. Iran has asserted generally that "it was anticipated that crude oil production from the Reshadat and Resalat fields would resume by the end of October 1987" (Reply, para 3.13), but it has provided no evidence in the form of contemporaneous records of its repair efforts or of its imminent preparations to resume production from the platforms to support this assertion or to demonstrate that production from the platforms would have resumed prior to 29 October 1987.

In so doing, Iran attempts to suggest that transactions for the sale of refined petroleum products between buyers in the United States and sellers in Western Europe somehow constitute commerce between the territories of Iran and the United States. Iran's theory is absurd and must be rejected.

1. The Odell Report Describes Iranian Oil Sales to Western Europe, Not to the United States

3.61 Iran's theory is based chiefly on a report prepared by Professor Peter Odell. This Report does not discuss sales of petroleum or petroleum products from the territory of Iran to the territory of the United States. In fact, Professor Odell concedes that the U.S. embargo "completely destroyed Iran's trade with the United States", making such sales impossible[232].

3.62 Instead, Professor Odell's Report is devoted to explaining how Iran compensated for its inability to sell oil to the territory of the United States by selling increased volumes of oil to buyers in Western Europe. According to Professor Odell, in light of the U.S. embargo, "the only option left open for Iran in an effort to sustain its exports was to send additional crude oil to Europe for conversion to products within the complexity of the European downstream oil system and then sell these products to the US[233]".

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[232] Report of Professor Peter Odell (hereinafter "Odell Report"), p. 19, Reply, Vol. III.

[233] *Ibid.*, p. 20. Professor Odell observes in this regard that the annual volume of oil Iran sold to countries in Western Europe increased by 70 percent between 1986 and 1988. Odell Report, p. 10, Reply, Vol. III.

3.63 Notably, Professor Odell does not, and indeed cannot, assert that Iran played any relevant role in the sale of petroleum products from Western Europe to the United States to which he refers in the passage cited immediately above. Professor Odell later characterizes these transactions as "indirect trade" between Iran and the United States. But his use of the word "indirect" serves only to emphasize that these sales did not amount to transactions between the territories of Iran and the United States. Customers in the United States bought refined petroleum products from, and engaged in commerce with, sellers in Western Europe, not with sellers in the territory of Iran.

2. Iran's Oil Sales to Western Europe Had No Connection with the Territory of the United States

(a) Transactions between U.S. buyers and Western European sellers had no connection with the territory of Iran

3.64 Iran attaches legal significance to its sale of crude oil from the territory of Iran to refineries in the territories of countries in Western Europe. These transactions are irrelevant, however. The territory of the United States had no connection with these transactions.

3.65 Similarly, the transactions by which Professor Odell observes that the United States purchased refined petroleum products from Western Europe had no connection with the territory of Iran. These transactions were between sellers located in Western Europe and buyers located in the United States. The products in question did not transit Iran's territory on their way to the

United States. Iran did not regulate or tax the transactions. Iran had no legal rights or obligations arising from these transactions. Nor did Iran derive any financial benefit as a result of these transactions.

(b) The goods the United States bought from Western Europe constituted different products than those Iran sold to Western Europe

3.66 That sales of petroleum products between Western Europe and the United States did not give rise to commerce with Iran is further demonstrated by the fact that the products purchased by U.S. buyers were not the same products as those Iran sold to its Western European customers. Iran sold its crude oil to buyers in Western Europe. U.S. purchasers bought refined petroleum products from Western Europe, not crude oil. The oil refining process transforms crude oil into a new product with different uses and higher value. Far from being mere middlemen facilitating an otherwise prohibited exchange between Iran and the United States, Western European refiners created from raw materials the product being exchanged. Iran's only role was providing an input into the production process. Indeed, it would not necessarily have been clear to the purchasers of the refined products whether, or to what extent, Iranian crude was incorporated in the refined products. To borrow an analogy from Professor Odell, Iran's claim of responsibility for the production and sale of Western European refined petroleum products is akin to a wheat farmer claiming responsibility for the baking and sale of a loaf of bread.

3.67 That crude oil and refined petroleum products are fundamentally different goods is reflected in their treatment under national trade regulation regimes. As a first matter, crude oil and petroleum products are classified as different products under the tariff schedules of all major trading nations. The World Customs Organization's Harmonized Commodity Description and Coding System distinguishes between, and gives different classification headings to, crude oil and a range of petroleum products derived from crude oil, including topped crudes, petroleum spirit, white spirit, kerosene, gas-oils, fuel oils, spindle-oils and lubricating oils, and white oils[234]. These differences in classification of crude oil and petroleum products derived from crude oil reflect the fact that characteristics and uses of crude oil are different from those of petroleum products.

3.68 Second, under the trade regulation regimes of major trading States, refined petroleum products are deemed to originate in the territory of the country where the refining took place, not that of the country that provided the crude oil from which the products were refined[235].

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[234] *See* World Customs Organization Harmonized Commodity Description and Coding System Headings 27.09 and 27.10 and explanatory notes thereto, Exhibit 226.

[235] *See* European Union, Council Regulation (EEC) 3576/92 "on the definition of the concept of 'originating products' applicable to certain mineral products and to certain products of the chemical or allied industries, within the framework of the preferential tariff arrangements granted by the Community to third countries", 1992 O.J. (L 364), arts. 1(b), (3) and annex, Exhibit 227 (place of origin of product manufactured from other products is the place where "the materials concerned have been sufficiently worked or processed"; operations of refining crude oil carrying tariff classification 2709 into refined petroleum products carrying tariff classifications 2710 to 2712 represents sufficient working or processing to confer origin. Refined products are thus deemed to originate in the place of refining, not the place of origin of the crude oil from which they were refined); United States of America, Code of Federal Regulations, Volume 19, Sections 102.11(a)(3), 102.20, Exhibit 228 (change in a product resulting in change in its tariff classification confers origin; change in a product to tariff classification

This reflects the fact that the process of creating petroleum products substantially transforms crude oil into a separate article with different functions and uses. The defining characteristic of refined petroleum products is that they are refined, not that they are made from crude oil.

3.69 A similar situation obtained at the time of the negotiation of the 1955 Treaty. For example, the standard put forth by the International Chamber of Commerce in 1937, and again in 1949, determined the origin of a good processed in more than one country based on:

> "the country in which the last manufacturing process has taken place, provided that the process is economically justified and important. An "important manufacturing process" shall be one which effects a substantial change in the nature of the product[236]."

3.70 It should be noted that the broad reading of Article X, paragraph 1, suggested by Iran would, in this regard, create such wide indeterminacy with respect to the interpretation and the application of the 1955 Treaty as to make it virtually impossible to determine whether a particular activity is taking place under the umbrella of the Treaty or outside it[237].

3.71 Such an interpretation would also create innumerable conflicts with international business law: no one involved in the day-to-day practice of international business transactions - not the shippers, or the carriers, or the banks, or the insurers, or the brokers - would regard the

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2710 from any other tariff classification confers origin. Refined products are thus deemed to originate in the place of refining, not the place of origin of the crude oil from which they were refined).

[236] Harry C. Hawkins, *Commercial Treaties and Agreements: Principle and Practice* p. 50 (1951), Exhibit 229.

[237] *See* Reply, paras. 3.17-3.30.

shipment of Iranian crude oil to Europe for refining as a commercial transaction between Iran and the United States, even if the petroleum products were for ultimate sale to the United States and it were possible to trace the Iranian crude to a particular refined product[238].

C. DAMAGE TO THE PLATFORMS HAD NO EFFECT ON THE AMOUNT OF OIL IRAN PRODUCED

3.72 Even if the U.S. embargo on Iranian origin oil had not prevented Iran from selling its oil to customers in the United States, any damage to Iran's oil platforms resulting from U.S. actions would still have had no effect on the volume of Iran's sales of oil to customers located in the United States. This is because, even in light of damage to the platforms, Iran possessed production capacity that exceeded its Organization of Petroleum Exporting Countries (hereinafter

[238] The United States notes that shipments of crude oil from Iran to Europe for refinement, possibly followed by the sale of some of the refined oil to the United States, would not be regarded under the treaties or customary practices regulating international business transactions as constituting a commercial transaction between Iran and the United States. Whether viewed from the perspective of a contract for the sale of goods under conventions such as the UN Convention on the Contracts for the International Sale of Goods (CISG), 19 *International Legal Materials*, p. 668 (1980) (to which the United States and approximately 57 other States are party), or as a contract for the carriage of a good by sea under the International Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, 120 LNTS 155 (to which both Iran and the United States are party), or from the perspective of how such an activity would be financed through use of a letter of credit subject to the widely-used International Chamber of Commerce's Uniform Code of Practices (UCP), none of these sources of law would regard the commercial transaction to be one from Iran to the United States. Further, insurers view the sale of crude oil and the sale of refined petroleum products as separate transactions, each insurable separately. A decision by this Court that such an attenuated flow of trade constitutes a single commercial transaction between Iran and the United States would run counter to contemporary understandings in the international business community.

"OPEC") quota and maintained its excess production capacity in the period following the U.S. actions.

3.73 As a member of OPEC, Iran's oil production levels are regulated by OPEC, and generally are not to exceed production quotas established by OPEC. While the oil production levels of OPEC members may slightly exceed or fall short of their production quotas in particular months, OPEC members are not to exceed their production quotas over the long term.

3.74 In spite of damage to its oil platforms resulting from U.S. actions, Iran continued to meet its OPEC quota throughout the period following the U.S. actions[239]. Moreover, throughout this period, Iran had the capacity to produce more oil than it actually did, even taking into account its inability to use the Rostam, Sassan, and Sirri platforms to produce oil. In December 1987, following the U.S. actions against the Rostam platform complex, Iran's Oil Minister, Gholamreza Aghazadeh, stated that Iran was one of five OPEC member countries "with excess production capacity" and "a substantial potential for higher production" over the then-existing OPEC production quotas[240]. Nearly three years later, in September 1990, Aghazadeh confirmed the continuing character of its excess capacity: "[a]s to when we plan to increase our oil production, we have the capacity to increase our oil by 500,000 barrels. However we do not

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[239] Statement of Edward O. Price, para. 6, Exhibit 212.

[240] "Iran's Gholamreza Aghazadeh", *Middle East Economic Survey*, 21/28 December 1987, p. D17, attached to Statement of Edward O. Price as Annex C, Exhibit 212.

consider the present to be the right time for this course[241]."

3.75 Given Iran's excess production capacity during this period, there is no basis for concluding that Iran would have produced more oil had its oil platforms not been damaged.

* * *

3.76 In this Part, the United States has demonstrated that Iran cannot sustain its burden of proving that the United States violated Article X, paragraph 1. First, Iran has failed to prove that the extraction of the crude oil from three oil platforms constituted "commerce" within the meaning of this provision. The term "commerce" in Article X, paragraph - when read in the context of the 1955 Treaty as a whole and in light of its negotiating history - is directed at regulation of maritime commerce, not commerce in a general sense. These platforms did not serve as ports nor were they otherwise engaged in maritime commerce. Further, even if the Court were to consider the meaning of "commerce" in a general sense, that term does not encompass the extraction of crude oil. Second, even if the Court were to conclude that such extraction of crude oil constitutes "commerce" within the meaning of Article X, paragraph 1, Iran has failed to prove that this commerce was "between the territories of the two High Contracting Parties." At the times relevant to this case, Iran's oil platforms were either not in operation or could not ship oil to the United States due to the U.S. embargo. Consequently, Iran has failed to sustain its

[241] Statement of Edward O. Price, Annex D, Exhibit 212.

burden of establishing that the United States hindered "commerce" that was "between" Iran and the United States. In light of Iran's failure, the Court should find that the United States did not breach its obligations to Iran under Article X, paragraph 1, and that the claims of Iran are accordingly dismissed.

PART IV

ARTICLE XX(1)(d) OF THE 1955 TREATY EXCLUDES FROM ITS OPERATION AND APPLICATION THE U.S. ACTIONS AGAINST THE OIL PLATFORMS

INTRODUCTION

4.01 The Counter-Memorial demonstrated that U.S. measures against Iran's illegal attacks fell squarely within the "essential security interests" exception of Article XX, paragraph 1(d), which provides:

> "1. The present Treaty shall not preclude the application of measures: . . .
> (d) . . . necessary . . . to protect [a party's] essential security interests."

U.S. actions were not prohibited by the 1955 Treaty because they were necessary to protect the United States essential security interests." We reemphasize here that the plain language of the provision, earlier discussions of similar language by the Court, and the provision's history and context all show that the U.S. measures were not prohibited by the Treaty[242].

4.02 Iran's Reply, however, fails to appreciate that the exception created by Article XX, paragraph 1(d) (the "Exceptions Clause") is integral to the proper operation of the Treaty. The provision confirms that the Treaty is designed to regulate aspects of an economic relationship between Iran and the United States, not measures applied to protect a Party's essential security interests. It neither authorizes nor disallows any particular measure that is necessary to protect a Party's essential security interest. It simply removes such measures from the scope, operation

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[242] *See* Counter-Memorial, paras. 3.01-3.41.

and application of the Treaty. Therefore, the issue before the Court is not, as Iran would have it, whether the U.S. actions were prohibited by general international law (though Part V demonstrates that U.S. actions surely were consistent with the law related to the use of force in self-defense). If the Court agrees that the U.S. actions fall within the scope of the Exceptions Clause, then the Court would not need to go further and examine whether U.S. actions meet the altogether different requirements of the law of self-defense. Such a decision, which need not address the fundamental rules associated with international peace and security, is contemplated by the Treaty. Iran, by arguing that Article XX, paragraph 1(d) has no effect other than to provide a mechanism by which the lawfulness of a Party's measures necessary to protect its essential security interest can be assessed pursuant to "general international law", reads out of the Treaty a crucial provision on the basis of which it was concluded[243].

4.03. In this Part, the United States first demonstrates that U.S. actions at issue in this case were necessary to protect its essential security interests and therefore were not prohibited by the Treaty. The United States contrasts its position on Article XX, paragraph 1(d) with Iran's position, illustrating Iran's attempt to eviscerate the provision in clear violation of the fundamental canon of treaty interpretation, the principle of effectiveness (i.e., that provisions

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[243] Reply, para.7.71 (". . . paragraph (1)(d) must be interpreted in the light of general international law . . .. Nor can it be interpreted so as to allow that party to act in a way which is wholly unjustified under the normal rules for maintaining friendly relations between States").

should be given effect rather than rendered nullities)[244]. The United States then establishes that the Exceptions Clause provides a wide area of latitude for a Party to apply measures "necessary to protect its essential security interests[245]." In doing so, the United States shows that the Court should afford the Party invoking Article XX, paragraph 1(d) an appropriate measure of discretion in determining when circumstances pose a threat to its essential security interests and what means are necessary to protect them.

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[244] Iran seeks to turn the principle of "effectiveness" to its own benefit in its Reply. *See* Reply, para. 7.75.

[245] *See also* Counter-Memorial, paras. 3.23-3.38 (examining the history of Article XX(1)(d)'s development and context).

CHAPTER I

THE UNITED STATES ACTIONS WERE "NECESSARY . . . TO PROTECT ITS ESSENTIAL SECURITY INTERESTS"

Section 1. The Ordinary Meaning of Article XX(1)(d)

4.04 As the Counter-Memorial demonstrated, the U.S. actions at issue in this case are clearly excluded from the application of the Treaty because, according to Article XX, paragraph 1(d) of the Treaty, they were "measures . . . necessary . . . to protect its essential security interests[246]." As a result of this provision, obligations under the Treaty do not apply to measures falling within the exception. Article XX, paragraph 1(d) is designed to provide a complete defense to any claim involving obligations under the Treaty in respect of such measures. 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[247]," the application of the Exceptions Clause will include the following aspects:

- "Measures" include a broad range of actions, from actions involving the use of force to economic and administrative policies and any other "plan or course of action intended to attain some object[248]." Iran's attempt to limit "measures" under the Treaty to "regulatory" or

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[246] Counter-Memorial, para. 3.03 *et.seq.*

[247] Vienna Convention on the Law of Treaties, Article 31(1), 1155 UNTS 331.

[248] Counter-Memorial, para. 3.06, *quoting The Oxford English Dictionary*, p. 528 (2d. ed. 1989).

"administrative" actions[249] finds no support in the language of the Treaty or its negotiating record. As the Court in *Nicaragua* noted, "[I]t is difficult to deny that self-defence against an armed attack corresponds to measures necessary to protect essential security interests[250]."

- "Essential security interests" are those interests that materially and substantially affect a State. As "essential" interests, they are important rather than limited or marginal in nature. As "security" interests, they refer in a broad sense to the "safety or safeguarding of the interests of a State . . . against danger" and a "freedom from risk or danger[251]." The Court in *Nicaragua* noted that "the concept of essential security interests certainly extends beyond the concept of armed attack[252]."

- "Necessary" measures are those that are required in order to "achieve a certain result or effect", evaluated in light of the circumstances reigning at the time[253].

4.05 The U.S. actions at issue in this case clearly meet the standard set out in Article XX, paragraph 1(d). Iran's actions threatened essential security interests of the United States: the

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[249] Reply, para. 7.73.

[250] *Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, para. 224.

[251] Counter-Memorial, para. 3.08-09, *quoting The American Heritage Dictionary of the English Language*, p. 1117 (3d ed. 1992).

[252] *Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, para. 224.

[253] Counter-Memorial, para. 3.07, *quoting The American Heritage Dictionary of the English Language*, p. 1117 (3d ed. 1992).

integrity of U.S. merchant and military vessels, the safety of U.S. citizens and military personnel and their cargo, the uninterrupted flow of maritime commerce (in particular, oil commerce) in the Gulf, and the freedom of navigation in the Gulf.

4.06 It bears emphasizing the substantial differences in the evidence available to the Court in this case as compared to the evidence available in *Nicaragua.* In this case, as the evidence overwhelmingly demonstrates, U.S. activities invoked as falling under the Exceptions Clause were, "at the time they were taken, measures necessary to protect its essential security interests[254]." By contrast, the Court suggested in *Nicaragua* that it could not find U.S. actions in that case to be necessary to protect U.S. essential security interests largely because confirming evidence was not available to it. For instance, the Court did not find that the mining of Nicaraguan harbors and attacks on ports and oil installations were necessary in light of "the whole situation . . . *so far as the Court is informed of it*[255]." In connection with the trade embargo, the Court stated, "[S]ince no evidence at all is available to show how Nicaraguan policies had in fact become a threat to 'essential security interests' . . . the Court is unable to find that the embargo was 'necessary' to protect those interests[256]." The substantial record in this case

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[254] *Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, para. 281.

[255] *Ibid.*, para. 282 (emphasis added).

[256] *Ibid.*

demonstrates quite a contrary situation, namely, that the facts fall squarely and definitely within the parameters of Article XX, paragraph 1(d).

Section 2. Iran Threatened "Essential Security Interests" of the United States and the U.S. Actions to Protect Such Interests Were Necessary

4.07 The evidence makes clear both that Iran's attacks on U.S. and other neutral shipping in the Gulf threatened essential U.S. security interests and that the actions taken by the United States were necessary to protect them. The United States repeatedly communicated to Iran, both publicly and privately, that the security of neutral commerce and navigation in the Gulf was among the most significant and vital interests of the United States, emphasizing that it would take necessary steps to protect this "essential security interest". Iran's decision to persist in its attacks, and to rebuke all efforts by the United States to resolve Iran's threats through diplomatic means, left the United States no option to protect its essential security interests other than its actions against Iran's oil platforms.

4.08 Even before Iran's first attack on U.S. shipping, the United States advised Iran that its attacks on neutral shipping in the Gulf threatened essential security interests of the United States. Public and private clarifications of U.S. concern included:

- A diplomatic note to Iran dated 23 May 1987 urging Iran not to take provocative steps or "to increase the danger to neutral international shipping," and stating, "As the Islamic Republic of Iran is aware, the U.S. has long been committed to the principle

of free navigation and to keeping open the Strait of Hormuz for the free flow of oil[257]."

- A 29 May 1987 public statement by President Reagan in which he explained that "the vital interests of the American people . . . are at stake in the Persian Gulf" and that economic dislocation that would "[shake] our economy to its foundations" could result "if Iran was allowed to block the free passage of neutral shipping" in the Gulf[258].

- A 15 June 1987 public statement by U.S. Secretary of Defense Caspar Weinberger, in which he stated that "The unimpeded flow of oil through the Gulf is critical to the economic health of the western world, and we have an important stake in non-belligerent freedom of navigation there; we have a vital economic stake in seeing that this supply of oil continues, given Western reliance upon Gulf oil imports, the overwhelming proportion of world oil reserves held by the Gulf countries, and the deep and growing interdependence of Western economies[259]."

4.09 When these efforts to persuade Iran to end its attacks on neutral shipping failed, the United States took additional steps to communicate to Iran the threat that its actions posed to essential U.S. security interests and to protect those interests. These steps included:

- The decision in July 1987 to reflag Kuwaiti tankers under United States registry. The United States was joined in this effort by the United Kingdom and the Soviet Union.

- The July 1987 launching of Operation Earnest Will to provide military escorts for U.S. shipping in the Gulf. Other States that sent military vessels to the Gulf to protect

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[257] United States Department of State document entitled "Message to Iran," 23 May 1987, Exhibit 39.

[258] "Vital U.S. Interests in the Persian Gulf," Statement by President Reagan, 29 May 1987, Exhibit 230.

[259] Caspar W. Weinberger, A Report to the Congress on Security Arrangements in the Persian Gulf, 15 June 1987, p. 2, Exhibit 231.

neutral shipping included Belgium, France, Italy, the Netherlands, the Soviet Union, and the United Kingdom[260].

- An 18 July 1987 diplomatic communication to Iran, in which the United States informed Iran of the efforts it planned to take to protect neutral shipping and stated, "[t]he Government of the United States regards as unacceptable any act which threatens our naval units or any U.S. flag shipping. The Government of Iran should be fully aware that the United States will take all appropriate measures to protect and defend all U.S. flag ships against attack from the Silkworm or any other weapon or weapons system . . . The Government of the United States takes this opportunity to express its expectation that the Government of the Islamic Republic of Iran and its Armed forces will exercise responsibility and restraint, in keeping with the laws of nations, with regard to the lives and property of the United States and other states not involved in the conflict[261]."

4.10 Again, the U.S. efforts failed to deter Iran's attacks that threatened essential U.S. security interests. On 24 July 1987, six days after the U.S. message to Iran, Iran attacked with a mine the U.S. flagged vessel *Bridgeton.* The United States responded by continuing its diplomatic efforts to persuade Iran to cease its attacks. On 31 August 1987, the United States transmitted another message to the Government of Iran. The message noted that:

> "As the Government of Iran knows, the United States has closely followed and takes very seriously the placing of mines in the Persian Gulf and Gulf of Oman or other waters where they threaten U.S. ships . . . The use of mines against neutral ships or generally to disrupt or threaten navigation in international waters or territorial waters of other countries is a clear, dangerous violation of international law. . . . [I]f Iran or forces responsible to it should lay . . . mines so as to endanger U.S. military or commercial

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[260] *See supra,* para 1.37.

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

vessels, the U.S. Government would consider this an extremely dangerous escalation and a direct military threat[262]."

4.11 Yet again, U.S. diplomatic efforts failed to persuade Iran to end its attacks on U.S. and other neutral shipping that threatened essential U.S. security interests. On 16 October 1987, Iran launched a missile attack against the U.S. flagged vessel *Sea Isle City*, the day after it launched a similar missile attack against the U.S. owned tanker *Sungari*. In the months following these attacks, Iran launched further attacks against the U.S. owned tanker *Lucy* (15 November 1987), the U.S. owned tanker *Esso Freeport* (16 November 1987), the U.S. owned tanker *Diane* (7 February 1988), the *USS Samuel B. Roberts* (14 April 1988); the U.S. owned tanker *Esso Demetia* (11 June 1988).

4.12 The evidence further demonstrates that Iran employed its oil platforms in its attacks on U.S. and other neutral shipping. As described in Part I, the platforms contributed to attacks on neutral shipping by, for instance, monitoring the movements of convoys with radar and transmitting information about their movements with communications equipment. Measures to render the platforms incapable of contributing to further attacks on U.S. shipping were thus necessary. In the case of Rostam, for instance, Iranian attacks on neutral shipping in the immediate area dramatically decreased following U.S. actions against the platform.

4.13 In contrast to the evidence reviewed by the Court in *Nicaragua*, the evidence before the Court in this case overwhelmingly demonstrates that, at the time the U.S. measures against

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[262] "Message for the Government of Iran," U.S. Department of State, Exhibit 56.

the oil platforms were taken, they were necessary to protect U.S. essential security interests[263]. Iran's attacks threatened the U.S. interest in the freedom and security of neutral commerce and navigation in the Gulf, and the U.S. interest in protecting the safety and security of U.S. nationals, shipping, and property. The United States emphasized repeatedly the great importance it attached to these interests, both publicly and through diplomatic correspondence with Iran.

4.14 Iran's attacks on neutral shipping disrupted freedom of navigation in the Gulf, making it dangerous and significantly more costly for U.S. and other neutral shipping to travel in the Gulf, and impeding the free flow of oil from the Gulf. Iran's attacks also violated the safety and security of U.S. citizens and their property. For example, ten U.S. sailors suffered physical injuries in Iran's mine attack on the *USS Samuel B. Roberts*[264]. Six members of the crew of *Sea Isle City* suffered significant injuries as a result of Iran's missile attack; the ship's captain, John Joseph Hunt, was permanently blinded and suffered a fractured skull and many broken bones, and a second seaman was also blinded[265]. Both *Sea Isle City* and the *USS Samuel B. Roberts* suffered extensive damage as a result of Iran's attacks; the United States incurred almost $50 million in costs associated with the rescue, transport and repair of the *USS Samuel B. Roberts*

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[263] *Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, para. 282 (". . . no evidence at all is available to show how Nicaraguan policies had in fact become a threat to 'essential security interests' in May 1985").

[264] *See* Counter-Memorial, para. 1.105.

[265] *Ibid.*, para. 1.65.

following the Iranian attack[266]. Iran's attacks caused serious personal injuries and substantial damage to U.S. personnel, shipping and cargo.

4.15 Many other countries' security interests were also threatened by Iran's actions. Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates stated in a letter to the UN Secretary General that "Iranian aggressions on the freedom of navigation to and from the ports of our countries . . . constitute a threat to the stability and security of the area and have serious implications for international peace and security[267]." The UN Security Council responded to this letter with Resolution 552, which provides, in part:

> "The Security Council,
>
> Having considered the letter dated 21 May 1984 from the representatives of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates (S/16574) complaining against Iranian attacks on commercial ships en route to and from the ports of Kuwait and Saudi Arabia,
>
> . . . . . .
>
> 4. Condemns these recent attacks on commercial ships en route to and from the ports of Kuwait and Saudi Arabia[268]".

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[266] *Ibid.*, para. 1.105.

[267] *See* Letter dated 21 May 1984 from the Representatives of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates Addressed to the President of the Security Council, United Nations Document S/16574, Exhibit 189.

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

In June 1987, the United States, Canada, the United Kingdom, France, Italy, Germany, and Japan adopted a statement in which they "reaffirm[ed] that the principle of freedom of navigation in the gulf is of paramount importance for us and for others and must be upheld. The free flow of oil and other traffic through the Strait of Hormuz must continue unimpeded[269]." Iranian attacks drew additional diplomatic protests and condemnation from, among others, the Arab League, Kuwait, Bahrain, Oman, Qatar, Saudi Arabia, the United Arab Emirates, Egypt, Jordan, the Soviet Union, Norway, Greece, Turkey, Djibouti, Morocco, Sudan, and the Yemen Arab Republic[270]. Some States, including Belgium, France, Italy, the Netherlands, the Soviet Union, and the United Kingdom, deployed warships to the Gulf in response to Iran's attacks[271].

4.16 The facts also fully demonstrate that the U.S. measures were *necessary* to protect essential security interests of the United States at the time they were taken. Indeed, Iran presented the United States no peaceful alternative to action in self-defense.

4.17 Iran consistently ignored the repeated diplomatic efforts of the United States and the UN Security Council to persuade it to end its armed attacks against U.S. and other neutral shipping in the Gulf. The United States continued its diplomatic efforts even after Iran launched its first armed attack on a U.S. ship, *Bridgeton*, in July 1987. When, in October 1987, Iran

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[269] G-7 Statement on Iran-Iraq War and Freedom of Navigation in the Gulf, 9 June 1987, Exhibit 232.

[270] *See supra*, Part I, para. 1.11 and accompanying notes.

[271] *See supra,* para. 1.37.

attacked *Sea Isle City*, it became clear that further diplomatic efforts to protect essential U.S. security interests would not be effective. Peaceful means to protect essential U.S. security interests had been exhausted or had proven to be futile. Iran's continuing attacks on U.S. shipping in the period following the attack on *Sea Isle City*, culminating in its April 1988 attack on the *USS Samuel B. Roberts*, served to further emphasize that additional diplomatic efforts would not bring Iran's attacks to an end. As a result, the actions taken by the United States were, according to the language of *Nicaragua*, "not merely useful but necessary" for the protection of its essential security interests[272].

4.18 In summary, Iran has given the Court no basis to doubt the fundamental importance the United States appropriately attached (and continues to attach) to the security of U.S. citizens and property and freedom of commerce and navigation in the Gulf. The United States clearly conveyed to Iran the importance of these interests, both in words and in actions, including the reflagging Kuwaiti vessels and escorting U.S. flagged ships. Iran's failure to respond to U.S. diplomatic messages except by illegal use of force highlights the necessity of the U.S. actions to protect its essential security interests.

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[272] *Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, para. 224.

Section 3. Iran's Interpretation of Article XX(1)(d) Deprives it of Meaning, Contrary to Basic Principles of Treaty Law

4.19 The United States has shown that Article XX, paragraph 1(d) is an integral provision in the Treaty scheme. The extensive negotiating history presented in the Counter-Memorial demonstrates that the provision was an essential part of the Treaty, designed to ensure that neither party would be precluded from applying measures necessary to protect its essential security interests[273]. The Treaty regulates the economic relationship between its parties. It does not regulate the use of force, a matter left to the UN Charter and the law of self-defense. Nothing in the negotiating history supports an interpretation that would provide it with such a role. As noted above, the Exceptions Clause neither authorizes nor disallows any particular conduct with regard to the use of force in self-defense. It simply removes measures necessary to protect a party's essential security interests from the scope, operation and application of the treaty.

4.20 Yet Iran attempts to diminish the importance of, and the ordinary meaning that should be given to, the Exceptions Clause, ultimately arguing that "Article XX(1)(d) has no additional exempting authority, over and above the provisions of the Charter, so far as the use of force is concerned[274]." Iran contends that Article XX, paragraph 1(d) has no effect outside the law of self-defense and use of force under the UN Charter, since the latter is a "sufficient"

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[273] *See* Counter-Memorial, paras. 3.23-3.38.

[274] Reply, para. 7.77.

statement of the law covering "the same sphere of reference as paragraph (1)(d)[275]." Iran's position renders the Exceptions Clause meaningless. The language and the purpose of the Treaty are different than the Charter. Self-defense and measures to protect essential security interests are not identical. Indeed, the Court recognized in *Nicaragua* the autonomous purpose of the Exceptions Clause, noting that self-defense is "part of the wider category of measures qualified" in the Exceptions Clause[276].

4.21 Iran's argument is contrary to the fundamental principle of the law of treaties that treaty provisions are to be given effect and not lead to unreasonable results[277]. The Court has previously supported the principle of effectiveness, and its validity here has been confirmed by Iran's use of it in this case[278]. The Court recently expressed its approval of "one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness[279]." The Court, in the *Corfu Channel* Case, said, "It

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[275] Reply, para. 7.72.

[276] *Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, para. 224.

[277] *Cf.* Article 32, Vienna Convention on the Law of Treaties.

[278] It argues that if Article XX, paragraph 1(d) were to be interpreted to allow conduct conflicting with the Charter rules on use of force, it would be void for conflict with a *jus cogens* norm, and because of the inseparability rule in Article 44(5) of the Vienna Convention on the Law of Treaties, the treaty as a whole would be void. (Thus, Iran itself invokes the effectiveness principle.) Reply, para. 7.75.

[279] *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad), I.C.J. Reports* 1994 p. 4, para. 51. The Court cited additional cases in support of the principle of effectiveness as well.

would be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a Special Agreement should be devoid of purpose or effect[280]."

The International Law Commission considered the principle embodied in the principle of good faith in Article 31(1) of the Vienna Convention and stated:

> "When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted[281]."

Iran asks the Court to adopt an interpretation of Article XX, paragraph 1(d) that "does not enable the treaty to have appropriate effects."

4.22 Iran's argument is even less persuasive when considered within the context of Article 103 of the UN Charter. Article 103 provides:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail[282]."

Accordingly, Article XX, paragraph 1(d) would be totally ineffective if it were designed to derogate from the principles of the Charter, and it would be totally unnecessary if it were designed merely to restate those principles. Thus, Iran's argument that the Exceptions Clause

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[280] *Corfu Channel, I.C.J. Reports 1949*, p. 24.

[281] *1966 Year Book of the International Law Commission,* Vol. II, p. 219. *See also* Ian Sinclair, *The Vienna Convention on the Law of Treaties,* p. 118 (2nd ed. 1984).

[282] Article 103, UN Charter.

merely preserves UN Charter obligations renders Article XX, paragraph (1)(d) unnecessary and superfluous - that is to say, it deprives it of effectiveness.

4.23 The assertion that the Exceptions Clause should be given a restricted interpretation is, moreover, contrary to the Vienna Convention on the Law of Treaties. Article XX, paragraph 1(d), like all the other provisions of the Treaty, "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose[283]." Relying on the jurisprudence of this Court, Jennings and Watts state that "interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain, or of applying a rule of interpretation so as to produce a result contrary to the letter or spirit of the treaty's text[284]." In rejecting an Iranian claim for restrictive interpretation in a recent case before it, the Iran-U.S. Claims Tribunal observed: "To the extent, if any, that the rule of restrictive interpretation has any role to play in the interpretation of treaties today, the Tribunal finds that it is certainly not applicable in cases where, as here, a treaty provision is clear and unambiguous[285]." The same is true in this case, where Article XX, paragraph 1(d) is clear and unambiguous[286].

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[283] Article 31(1), Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[284] *Oppenheim's International Law,* pp. 1271-72 (9th ed., Sir Robert Jennings & Sir Arthur Watts eds. 1992).

[285] Iran-U.S. Claims Tribunal, Case A/28, (Dec 130-A-28-FT) (2000) para. 67 .

[286] Iran's claim for a restricted interpretation amounts in effect to a suggestion that Article XX(1)(d) should be given a special meaning. Article 31(4) of the Vienna Convention is instructive. It provides

that a "special meaning shall be given to a term if it is established that the parties so intended." 1155 UNTS 331. Of course, Iran has failed to show that the parties have intended that Article XX(1)(d) be read narrowly. The burden of establishing a special meaning rests on the party contending for a special meaning. *See Oppenheim's International Law,* p. 1272 note 10 (9th ed., Sir Robert Jennings & Sir Arthur Watts eds. 1992); *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, para. 116 ("It is for Morocco to demonstrate convincingly the use of the term with that special meaning").

CHAPTER II

THE COURT SHOULD ALLOW THE PARTY INVOKING ARTICLE XX(1)(d) A MEASURE OF DISCRETION IN ITS APPLICATION

Section 1. Sound Legal Principles Support According a Measure of Discretion to the Party Invoking Article XX(1)(d)

4.24 Even under the most rigorous scrutiny, U.S. actions against the oil platforms fell squarely within the terms of the Exceptions Clause. While the Court should carefully review the facts presented, a Party should be recognized to have a wide area of discretion in the application of measures to protect its essential security interests. The U.S. delegation made such a point to the German delegation in the negotiation of a similar Treaty prior to conclusion of the 1955 Treaty. It noted "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 issue[287]." Yet Iran argues that the interpretation and application of Article XX, paragraph 1(d) is *solely* a question for the Court to answer, denying any role for a State to determine whether a particular situation compels "the application of measures . . . necessary . . . to protect its essential security interests[288]." Iran's argument is untenable. Article

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[287] *See* Counter-Memorial, para. 3.33.

[288] Reply, para. 7.69.

XX, paragraph 1(d) demands a more balanced view, allocating primary responsibility to the State taking the necessary measures[289].

4.25 A measure of discretion should be afforded a Party's good faith application of measures to protect its essential security interests, a principle that follows logically from both legal and practical perspectives. Professor Schachter has cogently explained the jurisprudential basis for discretion in this kind of situation:

> "Although an argument can be made that such concepts as national defence do not lend themselves to legal determinations, it would be more appropriate to consider the question as one that involves determining the margin of discretion left to the government concerned in applying the concept. Thus it would be possible for a judicial tribunal to determine that a particular activity was clearly so far removed from self-defence as to fall outside of the intent of the expression used in the instrument. To deny even that possibility to the Court would run counter to the underlying premise of a legal treaty as imposing some limit on discretion of the party to the agreement. On the other hand, it must be acknowledged that in many cases a term such as 'national defence' allows a very wide margin of appreciation and a court would be exceedingly cautious to avoid imposing its own interpretation on whether a particular act is in the national defence of the State concerned[290]."

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[289] Shabtai Rosenne refers to the principle of good faith in a way most relevant to this case:

> "[The] primary function, and perhaps [the] sole function [of good faith] is, as a matter of positive law, to allow the decision-making authorities a fair degree of freedom of action in interpreting and applying the terms of the treaty-obligation in a concrete case. In the first instance, the decision-making authorities will be the parties themselves. . . . " Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986,* pp. 176-77 (1989).

[290] Oscar Schachter, *International Law in Theory and Practice,* pp. 221-22 (1991). From a different but analogous perspective, Professor Cheng said that it follows "from the general presumption of good faith that abuses of right cannot be presumed." Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* p. 136 (1953).

4.26 Article XX, paragraph 1(d) presents a clear case in which "a very wide margin of appreciation" should be recognized for the Party invoking it in good faith. The purpose of Article XX, paragraph 1(d) is, after all, to exclude measures necessary to protect essential security interests from the purview of an economic treaty. Moreover, the key terms of Article XX, paragraph (1)(d) - "necessary" and "essential security interests" - are well-understood to have broad meanings not easily susceptible to judicial scrutiny[291]. It is therefore unsurprising that Iran has failed to show that U.S. actions were outside the scope of the Exceptions Clause[292].

4.27 Instead, Iran engages in an attack on the good faith of the United States, making arguments that are irrelevant to the United States claim that, in the face of attacks against it, it was necessary to take measures to protect its essential security interests[293]. In a situation such as that resulting from Iran's attacks in the Gulf, only the State attacked can determine whether its

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[291] *See* Counter-Memorial, paras. 3.03 - 3.09 (examining the meaning of the terms found in Article XX(1)(d)).

[292] All Iran says is that, if the flow of oil was such an interest of the United States, it was "more vital to Iran," Reply, para. 7.84, and that because the U.S. did not attack Iraq, the U.S. is discredited. Reply, para. 7.85. With respect to the other interests cited by the United States, Iran without any basis suggests that the U.S. cites these in bad faith. Reply, para. 7.87. Again, Iran fails to provide the Court with any framework to review "essential security interests."

[293] *See* Reply, paras. 7.92-7.95. Among Iran's more outlandish claims is, "If the United States' dominant concern was the safety of its own ships, why did it not respond by way of self-defence when the *Stark* was hit with significant damage and loss of life?" Reply, para. 7.94. As Iran knows, soon after the attack on the *Stark* Iraq accepted responsibility and offered to make reparation to the United States. Is Iran arguing that the United States still retained a right of self-defense in such a situation? We doubt that to be the case, but Iran's frivolous attitude toward the facts of this case underscores its inability to respond with principles to the U.S. argument that the Court may determine that the Exceptions Clause applies in this case.

essential security interests are threatened and what specific measures are necessary to protect them. Once the State concerned has shown that it found itself compelled to act in a situation of illegal use of force and attacks against it, the Court should allow an appropriate measure of discretion and wide area of latitude to the State's assessment of necessity. The Court should review the actions of a party on the basis of all of the circumstances governing at the time.

4.28 Moreover, the negotiating history of Article XX, paragraph 1(d) demonstrates that discretion is to be afforded the party invoking the provision. The Counter-Memorial thoroughly examined the history of the Exceptions Clause, pointing out that the United States consistently explained to other treaty partners and the U.S. Senate, decades before this case arose, that exceptions clauses in treaties of friendship, commerce and navigation left "a wide area of discretion to both parties in order to allow for necessary action over an indefinite future[294]." At the very least, it allowed each Party discretion to take necessary action to protect its essential security interests.

Section 2. Discretion is an Established Judicial Principle

4.29 As demonstrated above, the United States took measures that it considered necessary to protect its essential security interests. If the Court reaches this issue as the result of a finding that the United States took action incompatible with Article X of the Treaty, the Court's review should nonetheless be extremely sensitive to the circumstances governing at the time

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[294] *See* Counter-Memorial, para. 3.32; Dispatch No. 2254 from Germany, Exhibit 150.

those actions were taken, in particular the ongoing threat to U.S. essential security interests posed by Iranian attacks.

4.30 The United States reemphasizes that it is not asking the Court to abstain from reviewing this case. On the contrary, it requests that the Court recognize an appropriate measure of discretion of the United States in the course of its review. Such discretion forms a part, for example, of the jurisprudence of the European Court of Human Rights. The well-established European doctrine on the "margin of appreciation" supports the U.S. argument in favor of an assessment of U.S. actions in light of the facts reigning at the time[295]. As the European Court noted in *Ireland v. United Kingdom*:

> "By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. . . . [T]he Court must arrive at its decision in the light, *not of a purely retrospective examination of the efficacy of those measures, but of the conditions and circumstances reigning when they were originally taken and subsequently applied*[296]."

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[295] Professor J.G. Merrills has said that "[t]he underlying idea [for the margin of appreciation] is a simple one: that in respect of many matters the Convention leaves the Contracting Parties an area of discretion . . . ." J.G. Merrills, *The Development of International Law by the European Court of Human Rights,* p. 151 (1993). Judge MacDonald writes that the justification for this margin of appreciation is that the state "by reason of its direct and continuous contacts with the needs of the moment, is in the best position to determine whether the derogation is 'strictly required.'" Ronald St. John MacDonald "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights", *International Law at the Time of its Codification: Essays in Honour of Robert Ago,* pp. 187, 193 (1987). A very thorough review of the doctrine may be found in Ronald St. John Macdonald, "The Margin of Appreciation," in *The European System for the Protection of Human Rights* p. 83 (Ronald St. John Macdonald et al., eds. 1993).

[296] *Ireland v. United Kingdom*, paras. 207, 214 (emphasis added), European Court of Human Rights, 13 December 1977.

4.31 The European Court's examination of the actions of member States may be instructive. There, rather than substituting its own assessment of what actions were required at the time they were taken, the Court acknowledges the discretion of member States. As Prof. Merrills summarizes it in the context of the European Court:

> "[O]nly a measure which was 'manifestly without reasonable foundation' could be overturned at Strasbourg and, provided the legislature remained within its margin of appreciation, it was 'not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised another way[297]'".

Iran has provided the Court with no basis on which to conclude that U.S. actions fall outside the scope of the Exceptions Clause. In the face of Iran's attacks by mines and missiles, the United States out of necessity took necessary action against the oil platforms to protect its essential security interests. Under the circumstances, the Court should acknowledge a Party's discretion to take measures necessary to protect its essential security interests.

Section 3. The *Nicaragua* Judgment Supports the Principle of Discretion of the Party Invoking Article XX(1)(d)

4.32 The Court in *Nicaragua* expressed a readiness to acknowledge a party's discretion when it invokes the exception of Article XX, paragraph 1(d), noting that "whether a measure is necessary to protect the essential security interests of a party is not . . . *purely* a question for the

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[297] J.G. Merrills, *The Development of International Law by the European Court of Human Rights* p. 157 (1993) (quoting from the *Mellacher* case, 169 European Court of Human Rights (ser. A), para. 53).

subjective judgment of the party[298]." The Court recognized that such a determination required judgment by the party invoking the provision; otherwise the word "purely" would be surplussage. The appropriate reading of the Court's assessment is that Article XX, paragraph 1(d) requires parties to ensure that actions they take are consistent with their treaty obligations or excepted from the treaty's operation.

4.33 Iran, to the contrary, argues that the Court "held that the interpretation and application of that exclusion was a matter for the Court, and that the invoking State had no right of 'auto-interpretation' with respect to that provision[299]." Iran misreads the basic point of the Court, for the paragraph cited by Iran merely affirms the Court's jurisdiction to determine whether the Exceptions Clause excludes particular actions in a given case. The Court noted, in part:

> "This article [the Exceptions Clause] cannot be interpreted as removing the present dispute *as to the scope of the Treaty from the Court's jurisdiction*. . . . [The Exceptions Clause] defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article *from the jurisdiction of the Court*[300] . . ."

The Court compares the Exceptions Clause to the language found in the GATT exception to illustrate a case where it would lack jurisdiction to decide the issue. In the section cited by Iran,

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[298] *Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, para. 282 (emphasis added).

[299] Reply, para. 7.69(a).

[300] *Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, para. 222 (emphasis added).

the Court says nothing about the degree of latitude granted to a party invoking the "essential security interests" exception.

4.34 Notwithstanding Iran's efforts to argue otherwise, *Nicaragua* did not lay out purely objective criteria by which invocations of Article XX, paragraph 1(d) may be evaluated. In fact, the Court laid out no specific test outside the general approach that it would "assess whether the risk run by these 'essential security interests' is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but 'necessary[301].'" Even this general approach suggests discretion of the Party invoking the Exceptions Clause, as it suggests looking at the basis for a Party's invocation of the provision.

4.35 As noted above, the Court in *Nicaragua* reviewed Article XX, paragraph 1(d) on the basis of the specific facts at issue in that case. It examined, for instance, whether the party invoking the provision made contemporaneous statements supporting its claim before the Court that its measures were focused on "essential security interests[302]." Similarly, it queried whether the State produced evidence showing that it believed its measures to be necessary at the time they were taken[303]. Nowhere does *Nicaragua* suggest that a 'purely objective' standard was applied.

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[301] *Ibid.*, para. 224.

[302] *Ibid.*, para. 281.

[303] *Ibid.*, para. 282.

Far from it, the Court appeared to contemplate that a Party would exercise discretion in the application of measures necessary to protect its essential security interests.

CHAPTER III

THE APPLICATION OF ARTICLE XX(1)(d) WOULD OBVIATE ANY NEED TO RESOLVE QUESTIONS RELATED TO THE LAW OF SELF-DEFENSE

4.36 If the Court finds that the U.S. measures against the oil platforms were necessary to protect its essential security interests, there will be no further need for the Court to examine issues related to the law of self-defense. The United States believes that it was precisely the function of Article XX, paragraph 1(d) to exclude from the operation of the Treaty those measures, including the use of force, that a Party may be compelled to take to protect its essential security interests. The Court has embraced this position in the past:

> "[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[304]."

The United States wishes to re-emphasize that the Court's finding that Article XX, paragraph (1)(d) excludes the measures at issue in this case from the reach of the Treaty "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[305]."

4.37 In this respect, the United States agrees with Judge Koroma's separate opinion in the recent judgment of the Court in the *Case Concerning the Aerial Incident of 10 August 1999*

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[304] *Ibid.*, para. 224 (referring to the Exceptions Clause in the Treaty at issue in that case).

[305] Counter-Memorial, para. 3.40.

(Pakistan v. India). Pakistan, Judge Koroma pointed out, contended that that case involved violations of the UN Charter and customary and conventional international law, thereby rendering the dispute justiciable. Judge Koroma concisely expressed the flaw in such reasoning, in language that applies as much to this case as to the one to which Judge Koroma was speaking:

> "Thus formulated, there can be no doubt that the acts complained of by Pakistan, and their consequences, raise legal issues involving a conflict of the rights and obligations of the Parties, a conflict capable of being settled by applying international law, which the Court, as a court of law, would have been entitled to do were it competent to do so (Article 38 of the Statute).
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> However, it is to be observed that it is one thing whether a matter before the Court is justiciable and quite another whether that matter is properly before the Court for it to be entitled to exercise its jurisdiction. In this regard, whether the Court should perform its judicial function in a given dispute or whether it should adjudicate such a dispute on its merits depends entirely on the consent of the parties, which they must have given prior to the institution of the proceedings or in the course of the proceedings themselves.
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> In other words, the issue whether there is a conflict of legal rights and obligations between parties to a dispute and the application of international law (justiciability) is different from whether the Court has been vested with the necessary authority by the parties to a dispute to apply and interpret the law in relation to that dispute. The Court is forbidden by its Statute and jurisprudence from exercising its jurisdiction in a case in which the parties have not given their consent. . . . As Judge Lachs stated in another case which came before the Court, such judgment should not be seen as an abdication of the Court's function, but rather a reflection of the system within which the Court is called upon to render justice[306]."

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[306] *Case Concerning the Aerial Incident of 10 August 1999 (Pakistan v. India) (Jurisdiction), separate opinion of Judge Koroma*, 21 June 2000.

PART V

U.S. ACTIONS AGAINST THE OIL PLATFORMS WERE LEGITIMATE ACTIONS IN SELF-DEFENSE UNDER ARTICLE 51 OF THE UN CHARTER

INTRODUCTION

5.01 The United States demonstrated in the previous part of this Rejoinder and in its Counter-Memorial that its actions against the oil platforms fall squarely within the exception from the Treaty's operation provided by Article XX, paragraph 1(d). Consequently, it is unnecessary for the Court to proceed to an examination of whether the U.S. actions also were consistent with the applicable rules on the use of force in self-defense.

5.02 In the event that the Court were to find that the U.S. actions do not fall within the scope of Article XX, paragraph 1(d), then the United States submits that such actions were not wrongful since they were necessary and appropriate actions in self-defense. According to its Memorial, Iran agrees with this customary rule[307]. The draft of the International Law Commission's articles on state responsibility reflects customary law on this point:

> "The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations[308]."

Any actions of the United States deemed to be incompatible with Article X of the Treaty would not be wrongful by the operation of this principle of customary international law.

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[307] *See* Memorial, para. 4.11.

[308] Article 22, Draft articles on State responsibility, Report of the International Law Commission on the work of its 52d session, 2000, Doc. A/55/10, p. 129.

5.03 As the U.S. Counter-Memorial demonstrated, U.S. actions met the substantive and procedural requirements of Article 51 of the UN Charter: The United States responded in a limited, restrained way to Iranian armed attacks on its ships, after which such actions were reported immediately to the Security Council. The actions taken in self-defense were necessary for the defense of U.S. shipping and proportionate to the Iranian attacks. As the U.S. actions were aimed at defending and protecting U.S. shipping, rather than punishing Iran for its illegal attacks on U.S. and other neutral shipping, these actions fall well outside any reasonable definition of reprisals.

5.04 In this Rejoinder, the United States further demonstrates that its actions in self-defense against the oil platforms were fully consistent with Article 51. Following this introductory chapter, the United States shows that (1) each of Iran's armed attacks on U.S. vessels was an "armed attack" under Article 51 of the Charter, initiating the U.S. right to take action in self-defense; (2) the U.S. actions were necessary in order to defend U.S. ships against Iranian attacks; and (3) the U.S. actions were proportionate responses in self-defense to Iran's attacks.

5.05 The self-defense issues presented in this case raise matters of the highest importance to all members of the international community. As President Guillaume recently declared in a different case:

> "Le droit de légitime défense proclamé par la Charte des Nations Unies est qualifié par celle-ci de droit naturel. L'article 51 de la Charte ajoute qu'aucune disposition de la Charte ne porte atteinte à ce droit. Il en est de même à fortiori du droit coutumier ou du

> droit conventionnel. Cette solution s'explique aisément, car tout système de droit, quel qu'il soit, ne saurait priver l'un de ses sujets du droit de deféndre sa propre existence en assurant la sauvegarde de ses intérêts vitaux[309]."

In a similar vein, it has been submitted that the right to self-defense is, like the general prohibition on the use of force, a "peremptory rule" of international law[310].

5.06 The "inherent right of individual or collective self-defense" remains today a pillar of international security and world order, a right preserved and unimpaired by the Charter and confirmed by State practice. It scarcely needs to be said that, if the Court finds it necessary to pass upon the issues of self-defense presented by Iran in the present case, the ramifications for international security must be carefully considered. In the present state of international relations, the right of self-defense serves a vital function in deterring and suppressing international violence and lawlessness, especially on the high seas. Iran's call for artificial and unreasonable limitations on the right of self-defense not only would have significant implications for every State's ability to defend itself against armed attacks (including by naval mines and over-the-horizon missiles) but also would embolden would-be aggressors to manipulate such rules to their own benefit. To the extent that international law seeks to regulate a wide range of illegitimate

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[309] "The right of self-defense proclaimed by the Charter of the United Nations is characterized by the Charter as natural law. But Article 51 adds that nothing in the Charter shall impair this right. The same applies *a fortiori* to customary law or treaty law. This conclusion is easily explained, for no system of law, whatever it may be, could deprive one of its subjects of the right to defend its own existence and safeguard its vital interests." *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* of 8 July 1996, *separate opinion of President Guillaume, I.C.J. Reports 1996*, p. 290.

[310] *See* "Report of the International Law Commission on the work of its thirty-second session, 'State Responsibility,'" *1980 Year Book of the International Law Commission*, vol. II, part II, p. 58.

uses of force, such as Iran's continuing armed attacks, it must allow for necessary and proportionate self-defense against such attacks. Otherwise, the law will lack legitimacy and will not function to preserve international peace and security.

5.07 In this light, the United States must underscore at the outset the artificial and sweeping nature of Iran's claims. As both parties agree in this case, the law of self-defense consists of essentially two sets of rules - those governing the initiation of the right of self-defense, and those establishing how force in self-defense may be employed. Iran seeks to render the law meaningless on both counts. Because Iran's particular method of sneak attacks on neutral vessels left States with practically no opportunity to bring a halt to a specific attack while it was occurring, Iran's legal contentions would serve to immunize such attacks from responses in self-defense. Iran challenges the Court to confirm Iran's claim that in a situation of continuing armed attacks, through the use of unmarked naval mines and over-the-horizon missiles, a target State may not act in self-defense. Iran's claim has no merit. Article 51 cannot lead to the self-serving result propounded by Iran, whereby self-defense would rarely if ever be available to a State even "if an armed attack occurs".

CHAPTER I

IRAN'S ARMED ATTACKS ON U.S. VESSELS GAVE RISE TO THE RIGHT OF THE UNITED STATES TO TAKE ACTION IN SELF-DEFENSE UNDER ARTICLE 51

5.08 The full picture of Iran's pattern of illegal attacks on U.S. and other neutral ships, including the attacks on *Bridgeton, Sea Isle City*, and the *USS Samuel B. Roberts* underscores the vital security interests at stake for the United States and the ongoing threat Iran posed to the United States, which are directly relevant to a legal assessment of the measures taken by the United States in self-defense[311]. Examination of Iran's pattern of attacking U.S. and other neutral shipping demonstrates that the specific Iranian missile and mine attacks at issue were "armed attacks" on the United States under Article 51 and that the U.S. response met all applicable rules governing the exercise of the right of self-defense.

5.09 The persistent threat of Iran's attacks cannot be overstated. Between 1984 and 1988, Iran employed force against neutral commercial shipping transiting the Gulf, particularly those ships calling upon ports in Kuwait and Saudi Arabia[312]. Iran acknowledged that it did so[313]. Iran laid mines in international waters throughout this period, and on 21 September 1987, the United States apprehended an Iranian vessel, the *Iran Ajr*, in the act of laying mines on the high

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[311] *See* Counter-Memorial, paras. 4.08-10 (discussing the requirement that self-defense must be assessed on the basis of all of the circumstances surrounding the use of self-defensive force).

[312] *See* Counter-Memorial, paras. 1.01-1.78; *see also supra*, Part I.

[313] Norway cable, Exhibit 198.

seas. Iranian gunboats and armed helicopters launched regular attacks on neutral shipping from the oil platforms. Iran did not limit its attacks to ships carrying war materiel or to ships refusing Iranian search-and-visit requests. Iran launched missiles against neutral targets in Kuwaiti territorial waters, where large numbers of neutral oil tankers could be found in transit to or from Kuwait, throughout 1987. The United States has presented conclusive evidence of Iran's strategy of attacks on U.S. and other neutral shipping during the period at issue in this case, and has shown that the international community regarded Iranian attacks as a serious threat to international security[314].

5.10 Neither should the gravity of Iran's attacks be minimized. Iran's attacks against the freedom of commerce and navigation in the Gulf were aimed at neutral States to endanger their security interests and to force them to cease any economic relationship with Iraq. While Iran's expert comments irrelevantly that Iran's attacks "accounted for far less damage than those mounted by Iraq," even he cannot avoid the conclusion that Iran's attacks "could be explained as an effort to put pressure on those countries" having an economic relationship with Iraq[315]. Iran's discussion of neutrality during the Gulf War can best be understood in this light as an attempt to justify its attacks on neutral shipping, including U.S. vessels[316]. Such a contention has no legal

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[314] *See, e.g.,* Counter-Memorial, paras. 1.09-13; *supra,* para. 1.11.

[315] Freedman Report, Reply, Volume II, p. 14. Freedman's single citation for such information is a periodical dated 1985, well before the substantial increase in Iranian attacks in 1987.

[316] *See* Reply, paras. 2.27-2.41, 7.4-7.12 (especially para. 7.9, where Iran discusses an alleged, but unsubstantiated, "extraordinary change of trade patterns to the advantage of Iraq" during the Gulf War).

effect on this case; indeed, Iran has no legally valid justification or excuse for its illegal uses of force.

Section 1. The "Armed Attack" Requirement of Article 51 of the UN Charter

5.11 Given the factual background in this case, substantiated in the U.S. pleadings, the U.S. actions in self-defense fall neatly into the scheme of Article 51 of the UN Charter. Article 51 of the UN Charter safeguards the customary law 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 and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security[317]."

The first fifteen words of Article 51 assure Members of the United Nations that the Charter does not diminish their security but preserves the customary international law of self-defense[318]. The

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Iran continues to present irrelevant and diverting arguments related to the Iran-Iraq War of 1980-1988. Iran's purpose here is unclear, since the United States was clearly a neutral with respect to that conflict. Iran's attacks on U.S. ships were armed attacks, triggering the right of self-defense under Article 51. Iran's discursive arguments regarding the conduct of neutrals during the Iran-Iraq War cannot alter the fact that Iran's armed attacks necessitated the U.S. resort to self-defense.

[317] Article 51, UN Charter.

[318] *See, e.g.,* 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 on 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.") *See also Nicaragua, Merits, Judgment, I.C.J. Reports 1986,* para. 194 ("With regard to the characteristics governing the right of self-defence, since the Parties consider the existence of this right to

expansive phrase ("Nothing . . . shall impair") carries a reassuring quality, without the restrictiveness pleaded by Iran[319]. The negotiating history of the Charter demonstrates further that Article 51, which was not proposed as part of the original Charter draft prepared at Dumbarton Oaks, was developed specifically to reassure States, particularly those involved in collective security arrangements, that the Charter would not adversely affect their right to defend themselves[320].

5.12 The right of self-defense is available to a State "if an armed attack occurs" against it. Article 51 says nothing further about the requirement of an "armed attack." Whether an armed attack occurs must be evaluated on a case-by-case basis, looking at the totality of the circumstances governing at the time[321]. The responsibility to determine the occurrence of an

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be established as a matter of customary international law, they have concentrated on the conditions governing its use"); Yoram Dinstein, *War, Aggression and Self-Defence,* p.182 (1994).

[319] Reply, para. 7.13(1) (". . . the right of self-defence as recognized by Article 51 has to be restrictively interpreted").

[320] *See* United Nations Conference on International Organization, *Documents*, Vol. VI, p. 459 (noting that under Article 2(4) of the Charter, "[t]he use of arms in legitimate self-defence remains admitted and unimpaired."). *See also* Stephen M. Schwebel, "Aggression, Intervention, and Self-Defense in Modern International Law," in *Justice in International Law*, p. 581 (1994) ("The purpose of Article 51 was not to restrict the right of self-defense but to ensure that regional organizations could act in self-defense under the Charter despite the operation of the [Security Council] veto").

[321] It is recognized that the totality of the circumstances must be examined in cases involving questions concerning the use of force. *See, e.g., Corfu Channel, I.C.J. Reports 1949*, p. 31 ("Having regard, however, to *all the circumstances of the case*, as described above, the Court is unable to characterize these measures taken by the United Kingdom authorities as a violation of Albania's sovereignty.") (emphasis added).

armed attack rests with the victim State, since by its very nature an "armed attack" requires the victim State to evaluate the threat to its security and the actions it must take to defend itself[322]. The Security Council retains its responsibility to maintain international peace and security, a role recognized in the context of Article 51's preservation of the right of self-defense. As with the standards under Article XX, paragraph 1(d) of the Treaty, any review should account for the victim State's assessment of the overall situation at the time it took action in self-defense.

5.13 All of the elements of self-defense - the occurrence of an "armed attack" as well as the requirements of necessity and proportionality in the exercise of the right of self-defense - must therefore be evaluated in light of the governing circumstances, and information available to the victim of an armed attack, at the time the measures were taken. As one leading commentator has written: "The invocation of the right of self-defence must be weighed on the basis of the information available (and reasonably interpreted) at the moment of action, without the benefit of *post factum* wisdom[323]." Any assessment must take account of all of the circumstances

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[322] *See* Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations*, p. 205 (1963) ("Temporarily, then, a state must be judge in its own cause."). This follows logically and also from the language of Article 51. If Article 51 was meant to be evaluated solely by a third party, it should have been appropriately worded to reflect such an intention. Such an intention is belied by the preservation of the right of self-defense "until the Security Council has taken measures. . . ."

[323] Yoram Dinstein, *War, Aggression and Self-Defence*, pp. 182, 191 (1994). *See also* Myres McDougal and Florentino Feliciano, *Law and Minimum World Public Order*, p. 218 (1961); Counter-Memorial, paras. 4.08-10.

surrounding the actions taken in self-defense. Such an assessment demonstrates that Iran's actions were "armed attacks" on the United States within the meaning of Article 51.

Section 2. Iran's Armed Attack on *Sea Isle City*

A. Iran's Attack on *Sea Isle City* Was An "Armed Attack" Under Article 51

5.14 On the morning of 16 October 1987, Iran launched its second missile attack in two days, its seventh in just over a month, striking the U.S. flagged *Sea Isle City* soon after entering Kuwait harbor. The ship's captain and a seaman were permanently blinded, others were seriously injured, and the ship itself was extensively damaged[324]. Yet Iran seeks to present its missile attack on *Sea Isle City* as if it were an act of nature, one to be completely isolated from Iran's overall strategy of attacking neutral shipping[325]. While it is difficult to imagine how such an elementary fact as a missile attack can be claimed "not [to] amount to an armed attack[326]," this is precisely what Iran argues.

5.15 Iran invites the Court to characterize the missile attack on *Sea Isle City* as not amounting to an "armed attack" triggering the right of self-defense under Article 51. It argues that missile attacks on single merchant ships do not amount to "armed attacks" on the ships' flag

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[324] *See* Letter from Capt. Turki al Turki, General Superintendent, KOTC, Exhibit 89.

[325] *See* Reply, para. 7.33 ("In the case of the *Sea Isle City*, the only clearly established fact is that it was hit by a missile."). *See also* Reply, paras. 7.19, 7.30-33.

[326] Reply, para. 7.36.

State; that an "armed attack" only occurs when the object actually hit is "specifically targeted"; and that an attack on a ship, and thus its flag State, in a third State's territorial waters does not amount to an "armed attack" upon the flag State but only upon the territorial State. Each of Iran's positions is specious.

B. Iran's Contention That A Missile Attack On A Single Merchant Ship Is, As A Rule, Not An "Armed Attack" Is Unavailing In Law And Dangerous In Practice

1. Small-Scale Attacks Can Be "Armed Attacks"

5.16 Article 51 of the UN Charter contains no qualifications regarding the size of "armed attacks": its plain language is that the right of self-defense is subject to the occurrence of an armed attack. The scale of the attack is at issue, in most cases, not in the legal characterization as an "armed attack" but rather in an examination of the proportionality of the actions taken in self-defense[327]. A massive illegal use of force might require one kind of response in self-defense, a small illegal use of force another. In either case, however, the question would not be whether the precipitating use of force was an "armed attack" for the purposes of Article 51 but whether the response met the customary international law requirements of necessity and proportionality[328]. In

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[327] In *Nicaragua*, the Court, for instance, was concerned with whether certain kinds of non-forcible activities - such as "assistance to rebels in the form of the provision of weapons or logistical or other support", *Nicaragua, Judgment*, para.195 - could be characterized as "armed attacks", not with whether the scale of such activities prevented them from being characterized as "armed attacks".

[328] *See* Yoram Dinstein, *War, Aggression and Self-Defence*, pp. 182, 192 (1994). ("An armed attack, justifying self-defence as a response under Article 51, need not take the shape of a massive military operation .... The criteria [discussed in the *Nicaragua* case] of 'scale and effects' ... are of immense

any event, Iranian attacks were unquestionably lethal, dangerous and serious, inflicting extremely serious damage to the ships attacked, leaving at least 63 people dead and 99 wounded.

5.17 Iran contends that only "massive" attacks on a State's marine fleet amount to armed attacks under Article 51[329]. Such a rule has no basis in the law of self-defense. Moreover, its adoption would only lead to confusion in the law. For instance, if "small attacks" are not "armed attacks", at what point along the continuum from small-to-large do attacks merit characterization as "armed" under Article 51? At what point would several small attacks, spread across time, become "armed attacks"? In other words, at what point along the continuum would a State's "inherent right" of self-defense vest?

5.18 Such questions underscore the difficulty of applying a restrictive interpretation to Article 51. Article 51 requires not rigid rules but a contextual, case-by-case approach, examining all of the circumstances surrounding the "armed attack" and the action taken in self-defense.

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practical import. But they are relevant in appraising whether a counter-action taken in self-defense, in response to an armed attack, is legitimate. They do not affect the determination whether an armed attack has occurred. In reality, there is no cause to remove small-scale armed attacks from the spectrum of armed attacks.").

[329] *See* Reply, para. 7.38 (". . . only massive acts of violence against the merchant shipping of a State, attacking whole fleets, would amount to an act of aggression.").

2. Iran's Attack On A Single Merchant Ship Was An "Armed Attack" On The United States

5.19 Iran argues that an attack against an individual merchant ship "may be an infringement of the rights of the flag State, but it does not constitute an armed attack[330]. . . ." Iran argues that the evaluation whether an armed attack occurred must be "asked and answered . . . only for each single incident which occurred[331]." It wants the Court to examine the facts of this case in individual compartments, to look at each tree but not the forest. Yet Iran's argument would not only immunize its own attacks, it would license all manner of small, recurrent but deadly uses of force; if accepted, it would provide a right for any attacking State freely to conduct sneak attacks beyond the reach of any viable legal regime of self-defense. The fundamental inadequacy of this conclusion is obvious, but Iran attempts to support its claim by relying on the UN General Assembly's Definition of Aggression[332]. Yet the Definition of Aggression cannot hold the weight Iran assigns it, for the Definition does not purport to define *armed attacks*; the Definition concerns only the question what constitutes *aggression*. Thus, Iran's arguments are inapposite to the situation before the Court in this case.

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[330] Reply, paras. 7.37-41.

[331] Reply, para. 7.22.

[332] Reply, paras. 7.37-7.41. *See* United Nations Special Committee on the Question of Defining Aggression, *reprinted in* 13 *International Legal Materials* p. 713.

5.20 Article 3(d) of the Definition defines as an act of aggression "an attack by the armed forces of a State on the land, sea or air forces, marine and air fleets of another State." It does not define an "armed attack" but an "act of aggression". Aggression carries political, legal and moral implications which do not necessarily apply to all forms of armed attacks. As Iran itself goes to pains to point out, "armed attack" and uses of force contrary to Article 2(4) of the Charter are not identical[333], a principle of distinction equally at issue here. Article 6 of the Definition, moreover, states:

> "Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter including its provisions concerning cases in which the use of force is lawful."

Commenting upon the Definition of Aggression and Article 51, one scholar found that:

> "The question whether an attack upon a merchant ship can constitute an armed attack upon the flag state for the purposes of Article 51 must therefore be answered by interpreting Article 51 in the light of the relevant practice, of which the Definition is only a part. There is no indication that Article 51, which does no more than preserve a right described as 'inherent', was intended to deprive states of the right to use force to protect their merchant ships when those vessels were the victims of unlawful attacks by the forces of other states[334]."

In other words, a determination that an attack on a merchant ship is an armed attack under Article 51 calls not for application of the Definition of Aggression but for an evaluation of the totality of

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[333] Reply, para. 7.17.

[334] Christopher Greenwood, *Comments*, in *The Gulf War of 1980-1988,* pp. 213, 214 (Ige F. Dekker & Harry H.G. Post, eds.).

the circumstances at the time of Iran's attack, just as would be required in evaluating any armed attack[335].

5.21 In any event, Iran itself considered its attacks on individual vessels to be directed against the U.S. fleet. The commander of Iran's Navy at the time, Commodore Mohammad Hoseyn Malekzadegan, referred to the attacks on neutral shipping as "indirect blows in particular *to the U.S. fleet*, affecting both its warships and its merchant vessels, with mines or missiles[336] . . . ." Iran's acknowledgment of the motive and nature of its attacks supports the proposition that such attacks must be considered "armed attacks" to which the victim State may respond in self-defense. Iran's argument would enable a State to escape responsibility for individual armed attacks even where such attacks are part of a broader assault.

5.22 In light of the above, Iran's attack on *Sea Isle City* was clearly an "armed attack" for the purposes of Article 51. The attack involved the firing of a missile against a neutral ship, resulting in serious injury and substantial damage. As part of a series of attacks on U.S. and other neutral shipping, the attack on *Sea Isle City* was evidence of Iran's plan to harm seriously

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[335] Even assuming *arguendo* that Article 3(d) of the Definition can shed light on the meaning of "armed attack", it cannot mean that only attacks on the entire fleet of a State trigger the right of self-defense under Article 51. In defining the threshold for aggression, the Definition employs the expression "marine and air fleets," a term undoubtedly not drafted to mean the *entire* fleet of a State. In practice, it is doubtful that even very widespread attacks will comprise the entire fleet of a State. Something considerably less must surely initiate the right of a State to defend itself under Article 51 if that right is not to be nullified.

[336] "Radio Phone-In Program with Defense Officials," *Foreign Broadcast Information Service,* 14 April 1988 (emphasis added) Exhibit 13.

U.S. personnel, vessels and property. The attack was part of Iran's acknowledged plan to attack – whenever possible – all ships, regardless of nationality or neutral status, carrying cargo to or from Kuwait or Saudi Arabia[337]. It was not merely an individual attack on a merchant ship but one part of a widespread, deliberate effort to undermine the security of U.S. shipping in the Gulf through the use of armed force[338]. Iran's more than 200 attacks on 31 nations' vessels outside its exclusion zone, on the high seas and in Gulf State territorial waters, were aimed at strangling the free flow of commerce and navigation in the Gulf. These attacks on neutral shipping were condemned by the international community, which underscored the importance all attach to freedom of navigation.

C. Iran's Argument That A Vessel Must Be "Specifically Targeted" To Amount To An "Armed Attack" Is Spurious

5.23 Iran argues that the missile attack could not be an "armed attack" because "there is no evidence that the *Sea Isle City* was specifically targeted[339]." No law supports such an assertion, especially in a situation where, as in this case, the attacking State clearly intends to attack a category of targets in which the actual target is included. Indeed, the unprecedented implications of Iran's argument cannot be overstated. It would be akin to arguing that an

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[337] Norway Cable, Exhibit 198.

[338] *See* "Hashemi-Rafsanjani Political Sermon," *Foreign Broadcast Information Service,* 24 July 1987, Exhibit 50.

[339] Reply, para. 7.36.

artillery barrage against a city is not an armed attack because it is not aimed at any specific identifiable target[340]. Applied to a domestic legal setting, it is akin to allowing a criminal to shoot into a crowd, killing and injuring individuals, but elude responsibility because he did not intend to hit a particular victim. In the international setting, it would give *carte blanche* to powers with such capabilities to launch missiles from remote locations, without any justification in law, and deny responsibility, claiming that they did not intend to hit any specific target. International law, as is the case with municipal law, cannot accept such an approach. As a matter of principle, the law does not, and could not, countenance a principle by which indiscriminate attacks were immunized while targeted attacks were the subject of responsibility.

D. IT MAKES NO DIFFERENCE THAT *SEA ISLE CITY* WAS ATTACKED IN KUWAITI TERRITORIAL WATERS

5.24 Iran argues that the attack against a foreign-flag ship "in a foreign port [is] not an armed attack" against the flag State[341]. Again, it offers no support for such a claim, and no logical or legal basis exists on its behalf. If one concludes that an attack on a particular vessel amounts to an "armed attack" under Article 51, there is no reason why that vessel's location

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[340] Iran's attacks were also objectionable under the law of armed conflict, which prohibits indiscriminate attacks. *See, e.g.*, Article 52. 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 UNTS (hereinafter "Additional Protocol I"). The United States is not a party to Additional Protocol I, though it considers certain of its provisions reflective of customary international law.

[341] Reply, para. 7.36. *See also* Reply, para. 7.40.

changes the characterization. Moreover, there can be little doubt that, depending on the circumstances, a missile attack on a U.S. flagged ship in Kuwaiti waters could amount not only to an armed attack on the United States but also on Kuwait. Yet according to Iran's reasoning, if the U.S. Pacific Fleet had been attacked not in Pearl Harbor but while visiting a neutral port, no armed attack against the United States would have taken place.

Section 3. Iran Committed an Armed Attack Against the *USS Samuel B. Roberts*

5.25 Iran labors against the substantial weight of evidence and logic to argue that its mine attack on the *USS Samuel B. Roberts* did not constitute an "armed attack" under Article 51[342]. The evidence presented by the United States in its Counter-Memorial and in this Rejoinder overwhelmingly proves that it was an Iranian-laid mine that struck the *USS Samuel B. Roberts*[343].

5.26 In light of the facts and the surrounding circumstances, it is clear that Iran's mining of the *USS Samuel B. Roberts* was an armed attack under Article 51, initiating the U.S. right to take action in self-defense. There can be no dispute that attacks on warships are to be treated just like any attack on an instrumentality of the State - that is, as an attack on the State itself[344]. Yet Iran again raises specious grounds to argue that its attacks involving naval mines did not amount

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[342] Reply, paras. 7.42-43.

[343] *See* Counter-Memorial, paras. 1.19-1.47, 1.105-1.112; *supra*, paras. 1.66-1.71.

[344] *See, e.g.*, Oscar Schachter, *International Law in Theory and Practice*, p. 152 (1991). ("When an attack occurs against a State (and I would include in that category attacks against State instrumentalities such as warships, planes and embassies) armed force may be used to repel the attack").

to "armed attacks" under Article 51. Iran's first contention is that the minelaying could only be an armed attack "if the mine had been laid specifically for the purpose of hitting U.S. warships[345] . . ." This claim hardly needs to be considered, because what Iran requests from the Court is essentially a finding that *the targeting of warships is unlawful but indiscriminate minelaying is lawful*. The *Corfu Channel* Case underlined the grave nature of mining neutral waters, referring to such actions as "serious outrages[346]." Moreover, Iran's view would turn the law of armed conflict, which prohibits indiscriminate attacks, on its head. Indiscriminate minelaying is illegal whether undertaken in time of armed conflict or peace. Indeed, as this Court held in the *Corfu Channel* Case, the prohibition against indiscriminate use of force is "even more exacting in peace than in war[347]." The points made with respect to Iran's claim that a missile attack must specifically target a particular object in order to constitute an "armed attack" apply in the situation of minelaying as well. In any event, the evidence in this case overwhelmingly demonstrates Iran's intention to attack U.S. vessels.

5.27 Second, Iran makes the novel claim that, because naval mines are lawful weapons,

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[345] Reply, para. 7.42. *See also* Reply, para. 7.34 (". . . at the very least the mine-laying would have had to be specifically directed against a U.S. target" to amount to an armed attack).

[346] *Corfu Channel, I.C.J. Reports 1949*, p. 35.

[347] *Ibid.* p. 22; *Nicaragua, Judgment, I.C.J, Reports 1986*, para. 215.

their use is subject only to certain precautionary restrictions[348]. A lawful weapon surely can be employed to conduct an unlawful armed attack. Iran cannot credibly claim that its attack on *USS Samuel B. Roberts* was lawful because of its war with Iraq. Thus, Iran's statement that "laying mines in international waters *during an armed conflict* is not illegal *per se*[349]" has no relevance to the issues before the Court in this case, where the issue involves attacks outside a declared war zone against a neutral State not participating in an armed conflict. The fact is that Iran laid mines in international waters against *neutral shipping*[350].

5.28 It bears noting further that Iran's mining of neutral waters was an extremely serious matter. In the *Corfu Channel* Case, the Court referred to Albania's responsibility to notify "shipping in general" of the existence of minefields in its waters, an obligation based not only on the law applicable in armed conflict but on "certain general and well-recognized principles, namely: elementary considerations of humanity . . . the principle of freedom of maritime communication[351] . . ." The Court stated in *Nicaragua* that:

> "in peacetime for one State to lay mines in the internal or territorial waters of another is an unlawful act; but in addition, if a State lays mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or

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[348] Reply, paras. 7.42-7.43.

[349] Reply, para. 7.42.

[350] *See supra,* para. 1.66-1.70 for a description of Iran's mining practices.

[351] *Corfu Channel, I.C.J. Reports 1949*, p. 22.

> notification whatsoever . . . it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907[352]."

Iran's purposeful effort to undermine the security of U.S. and other neutral shipping in the Gulf while avoiding responsibility for its actions surely stands in violation of those same "elementary considerations". The Court's condemnations of illegal mining underscore the serious nature of Iran's armed attacks.

5.29 In any event, Iran did not observe even the most basic precautionary measures required under international law, such as those pertaining to warning and notification of naval minefields. For almost a century, because of the extreme hazards posed by naval mines, international law has placed clear limits on their use. Iran ignored these rules with lethal results. In this light, Iran's claim that the mine attack on the *USS Samuel B. Roberts* does not amount to an "armed attack" for purposes of Article 51 takes on an even more egregious quality. It should be rejected by the Court.

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[352] *Nicaragua, Judgment, I.C.J. Reports 1986,* para. 215.

CHAPTER II

THE U.S. ACTIONS TO DEFEND ITSELF MET ALL APPLICABLE RULES CONCERNING THE USE OF FORCE IN SELF-DEFENSE

Section 1. The Elements of Legitimate Self-Defense

5.30 The U.S. actions against the oil platforms satisfied all of the elements of self-defense required by international law. There is no disagreement in this case that the exercise of the right of self-defense is subject to two basic requirements: necessity and proportionality. The Court has repeatedly held that necessity and proportionality are principles of customary international law, both of which apply to actions taken in self-defense under Article 51 of the UN Charter[353].

5.31 The United States also complied with Article 51's requirement that a State taking measures in self-defense immediately report them to the Security Council[354]. As the Court noted in the *Nicaragua* case, compliance with such requirement is not a "condition of the lawfulness of the use of force in self-defence," but when self-defense is put forward as a justification for certain

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[353] *See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para. 41; *Nicaragua, Merits, Judgment, I.C.J, Reports 1986,* para. 176. *See also* Counter-Memorial, paras. 4.21-4.22.

[354] *See* Letter dated 19 October 1987 from the U.S. Permanent. Representative to the United Nations to the President of the Security Council, United Nations Document S/19219, Exhibit 100; Letter dated 18 April 1988 from the Acting U.S. Permanent Representative to the President of the Security Council, United Nations Document S/19791, Exhibit 130.

action, "it is to be expected that the conditions of the Charter should be respected[355]." The failure to report to the Security Council "may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defense[356]." Conversely, the existence of a clear, contemporaneous and reasoned report laying out the bases for the measures taken in self-defense is an important factor in examining whether the State's actions were in compliance with the rules of self-defense.

Section 2. The U.S. Responses in Self-Defense Were Necessary

5.32 The United States has presented to the Court a clear picture of Iran's efforts to undermine the security of U.S. and other neutral State shipping in 1987 and 1988. Iran's methods, brought to light by the voluminous evidence in this case, were designed to elude responsibility and evade responses in self-defense: missile attacks, minelaying, helicopter gunboat attacks, among others. Iran relied upon the victim States' perceived inability to defend themselves immediately against such methods. As Majlis Speaker Hashemi-Rafsanjani himself acknowledged: "[o]f course, we will not claim responsibility for anything, for it is an invisible shot that is being fired[357]."

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[355] *Nicaragua, Judgment, I.C.J, Reports 1986,* para. 200.

[356] *Ibid.*

[357] *See* "Iran warning as *Bridgeton* begins loading," *Lloyd's List*, 1 August 1987, Exhibit 50.

5.33 Iran's arguments are, without exception, designed to fit neatly into its stealthy, one-by-one method of attack. Thus, Iran's contention that "[o]nly reaction to an existing, ongoing attack constitutes self-defense[358]" not only adds a new condition to the customary requirements of self-defense. It is also another of Iran's ploys to avoid responsibility for its special brand of sneak attacks on neutral shipping, since the Iranian attacks at issue in this case occurred - started, ended, caused damage and casualties - in but an instant, leaving no opportunity to the victim State to respond during that brief moment. Similarly, Iran's suggestion that only action taken against "a missile launching site" or "mine-laying boats" would be legitimate cannot withstand scrutiny[359]. Article 51 cannot be read to require such constricting results, which would surely encourage aggressors to carry out attacks in such a manner. In a situation of armed attacks and the explicit threat of continuing armed attacks, Article 51 does not foreclose the victim State's right to take other necessary and proportionate measures in self-defense.

5.34 Contrary to its assertions, Iran's unrelenting attacks necessarily influenced two aspects of the U.S. actions: the timing of the U.S. responses and the choice of the oil platforms as targets.

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[358] Reply, para. 7.57.

[359] *Ibid*, para. 7.58.

A. IRAN'S COVERT, SURPRISE ATTACKS SHAPED THE TIMING OF THE RESPONSES TAKEN BY THE UNITED STATES AGAINST THE OIL PLATFORMS

5.35 Iran continues to argue, as it did in its Memorial, that only an "instant and overwhelming necessity" could justify a State's resort to action in self-defense[360]. To sustain this argument, Iran relies on its characterization of the U.S. actions as "anticipatory[361]". The principle of "instant" necessity, however, has no relevance to this case, as the United States has previously demonstrated and will presently explain[362]. Most importantly, Iran purposely attempts to obscure the fact that this case involves actions in self-defense upon the occurrence of repeated, specific armed attacks on U.S. vessels and during periods of persistent threats against the United States. These were not cases of "anticipatory" self-defense in the sense expressed by the *Caroline* case, on which Iran heavily relies[363]. In fact, Iran's reliance on the *Caroline* is notable, inasmuch as that case involved only a single attack while this case involves a continuing pattern of attacks on

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[360] *Ibid*, para. 7.59.

[361] *Ibid*, paras. 7.51-7.61 ("Illegality of anticipatory self-defence or forceful deterrence," *see especially* para. 7.53: "The United States has failed to give any proof that this restrictive customary law standard for anticipatory self-defence has been replaced by any more permissive rule.") .

[362] *See* Counter-Memorial, paras. 4.37- 4.44. *See also* Myres McDougal and Florentino Feliciano, *The International Law of War: Transnational Coercion and World Public Order,* p. 217 (1994); John Basset Moore, II *Digest of International Law*, pp. 409-414 (1906); Robert Jennings, "The Caroline and McLeod Cases," 32 *American Journal of International Law,* p. 82 (1938); Martin Rogoff and Edward Collins, "The *Caroline* Incident and the Development of International Law," 16 *Brooklyn Journal of International Law,* p. 493 (1990).

[363] *See* Reply, para. 7.57 ("Only such anticipatory self-defence as is legitimised under the *Caroline* formula can be considered lawful.")

U.S. ships. Moreover, *Caroline* is inapplicable since it involved an anticipatory use of force, whereas here the United States acted following actual armed attacks on U.S. ships.

5.36 As with the general requirement that actions in self-defense must be evaluated under the totality of the circumstances, the requirement of timeliness "should not be taken too literally and without due regard to the circumstances of the particular case[364]." As Judge Higgins has suggested, a State "not able to engage immediately in action to defend itself" may nonetheless be able to take "action in self-defence[365]." 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, while still timely, defensive action. 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 be discovered only through careful investigation. 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 incapacitation will have the necessary effect and yet not pose disproportionate

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[364] P. Malanczuk, "Countermeasures and Self-Defence As Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility" in *United Nations Codification of State Responsibility,* pp. 197, 254 (M. Spinedi and B. Simma, eds.) (1987). Malanczuk also warns against "a dogmatic approach misunderstanding the true sense of the requirement of 'immediacy.'"

[365] Rosalyn Higgins, *Problems and Process,* p. 241 (1994).

risks of collateral damage and casualties. Requiring instantaneous response could dramatically increase the risk of disproportionate damage. Such care and deliberation in the exercise of prompt 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 Ago noted in considering a similar type of situation:

> "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 whole[366]."

Surely the Charter does not require "instant" response where, in light of the situation as a whole, considered deliberation would be warranted.

5.37 In the case of both the Iranian attacks on *Sea Isle City* and the *USS Samuel B. Roberts*, approximately eighty hours separated the Iranian attacks and the U.S. actions in self-defense against the oil platforms. It should be recalled as well that Iran had already foreclosed any peaceful, diplomatic avenues to bring its armed attacks to a halt. During the eighty hours of deliberation, U.S. decision-makers needed to ascertain responsibility for the attack, identify targets actions against which would defeat and deter ongoing attacks, and formulate proportionate measures so as not to cause excessive damage to civilian objects or civilians[367]. This relatively short period of time provided U.S. military and political leaders with confidence

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[366] *See* Robert Ago, Addendum to the eighth report on State responsibility, *Yearbook of the International Law Commission 1980* (Vol. II, Part 1), Doc. A/CN.4/Ser.A/1980/Add.1 (part 2), Exhibit 161.

[367] *See* Counter-Memorial, para. 1.79 *et.seq.*

that the steps they were taking to defend U.S. vessels were both necessary and proportionate to the ongoing Iranian armed attacks and the continuing threat to U.S. security. Under the circumstances, the amount of time that passed between Iran's "armed attacks" and the U.S. actions in self-defense was certainly prudent and reasonable and, therefore, well within the parameters of the rules related to the exercise of self-defense.

5.38 In considering the timing of the U.S. responses in self-defense, the Court may also take into account that, throughout the period during which Iran conducted its armed campaign against neutral States, Iran was in continuing breach of its international obligations related to the use of force. Even Iran's Deputy Foreign Minister acknowledged the illegal nature of Iran's attacks[368].

B. The Oil Platforms Were Lawful Targets

5.39 The United States selected the oil platforms as targets in order to defend U.S. vessels effectively against the Iranian mine and missile attacks. The United States has demonstrated the role of the oil platforms in the attacks on U.S. and other neutral vessels in the Persian Gulf. As the Counter-Memorial summarized their role, the oil platforms:

> "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[369]."

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[368] Norway Cable, Exhibit 198.

[369] Counter-Memorial, para. 4.30.

Part I of this Rejoinder has fully responded to Iran's attempts to mislead the Court regarding the functions served by the oil platforms in the Iranian attacks on U.S. and other neutral vessels[370]. The command, control, communications and intelligence functions of the oil platforms, for instance, enabled Iran to carry out its attacks, as they offered Iran the opportunity to track and identify neutral shipping passing closely by them in international waters[371].

5.40 The oil platforms were therefore military objectives, legitimate targets of a U.S. response in self-defense. Instructive in this respect is the definition of a "military objective" in the 1977 Additional Protocol I to the Geneva Conventions on the Protection of the Victims of War. Article 52(2) of Additional Protocol I provides, in part:

> ". . . [m]ilitary objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage[372]."

This definition of a military objective, in particular its focus on the overall circumstances concerning the particular object, parallels the law of self-defense generally. In the case of the oil platforms, the evidence in this case demonstrates that Iran made special use of the oil platforms for command, control, communications, and intelligence purposes, taking into account their

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[370] *See supra,* paras. 1.17-1.34.

[371] Selected Messages from Archive of Incoming Messages, Rostam Oil Platform, Exhibit 119.

[372] Article 52(2), Additional Protocol I. The United States believes that the definition set forth in Article 52(2) reflects customary international law.

locations adjacent to international shipping routes. Equally important, the destruction of the oil platforms' capability to carry out such functions offered a definite military advantage under the circumstances. Thus, there were very specific and compelling reasons for treating the oil platforms as military objects[373].

5.41 Iran challenges the substantial evidence presented by the United States concerning the communications, reconaissance and other military functions undertaken by the oil platforms. Yet Iran seems to concede that the oil platforms' employment of radar and communications equipment, for instance, would cause the platforms to be characterized as military objectives[374].

5.42 The substantial evidence of the military use of the platforms for hostile purposes against neutral shipping proves that the platforms were lawful targets under the law of self-defense. In the case of the response to the attack on *Sea Isle City*, the evidence demonstrates that Rostam contributed to the identification of the targets available to Iranian missiles[375]. Rostam, for instance, relayed messages concerning the presence of convoys heading toward Kuwait harbor[376]. Not only did the platform maintain a surface radar site for military purposes, but it

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[373] It may be noted, additionally, that oil facilities are commonly accepted as legitimate military objectives for the purpose of the law of armed conflict.

[374] Reply, para. 7.59 (in which Iran challenges the assertion of a presence on Rostam of a radar set, but does not challenge the point that the presence and use of a radar set for military purposes would constitute a threat to neutral shipping). Neither does Iran contest the legal significance of the admitted fact that military personnel were stationed on the platforms.

[375] *See* Counter-Memorial, paras. 1.84-1.98 and *supra*, paras. 1.43-1.46.

[376] Selected Messages from Archive of Incoming Messages, Rostam Oil Platform, Exhibit 119.

served as the station for a contingent of military personnel and as a base for helicopter units employed in identifying, targeting and attacking neutral vessels[377].

5.43 Similarly, the Sassan and Sirri platforms helped other components of the Iranian military identify shipping patterns and specific ships and launch attacks on neutral vessels. Reliable sources reported on the use of both Sassan and Sirri in its attacks, including the use of surface radar and helicopter launch facilities and the capability to harbor small gunboats[378].

5.44 With respect to the attacks on *Sea Isle City* and *USS Samuel B. Roberts*, Iran suggests that the only lawful targets of responses in self-defense would be "a missile-launching site" in the former case and "mine-laying boats" in the latter[379]. The United States showed previously that targeting such sites would have been impractical and posed greater risk to civilians, and could have expanded the level of conflict between the United States and Iran[380]. Yet Iran's suggestion misconstrues and attempts unreasonably to narrow the law of self-defense. The consequence of Iran's argument would be that, in a situation where an attacker eludes an instant response, no response in self-defense would be available. Iran cites Professor Schachter's statement that "'defensive retaliation' may be justified when a State has good reason to expect a

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[377] *See supra,* paras. 1.27-1.33.

[378] *See* para. 1.23.

[379] Reply, para. 7.58.

[380] *See* Counter-Memorial, para. 4.34.

series of attacks from the same source and such retaliation serves as a deterrent or protective action[381]." Surely Professor Schachter was not suggesting that "the same source" of an attack be construed narrowly to refer only to particular sites, instrumentalities, personnel or weapons involved in the last stages of an attack. The "same source" must refer to the entity responsible for the armed attack at issue. Indeed, Professor Schachter himself said, "[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 source[382]." Otherwise, a clever attacker could always ensure that the "source" of its attack could be difficult to detect or futile to attempt to incapacitate. Moreover, the defender's legitimate goal is to defend itself against further attacks, not necessarily to respond to the particular attacking site, instrumentality, personnel or weapons. Yet Iran suggests that the "same source" could only refer to the specific launching site or mine-laying boats, a conclusion not suggested by Professor Schachter's discussion nor from the logic of self-defense. If selecting a different particular target will be more likely to achieve the goal of self-defense as well as satisfy the requirements of necessity and proportionality, there is nothing in the law that would require the victim State to choose a less effective option in self-defense.

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[381] Reply, para. 7.58, *quoting* Oscar Schachter, *International Law in Theory and Practice,* p. 154 (1991).

[382] Oscar Schachter, *International Law in Theory and Practice,* p. 154 (1991) (emphasis added).

C. THERE WERE NO PEACEFUL ALTERNATIVES

5.45 In the face of the attacks on *Sea Isle City* and *USS Samuel B. Roberts* and other U.S. shipping, the U.S. measures against the oil platforms were necessary actions in self-defense to defeat and deter Iranian attacks, as no peaceful alternative was available to the United States. As Professor Schachter has written, "force should not be considered necessary until peaceful measures have been found wanting or when they clearly would be futile[383]." Iran itself does not challenge the U.S. position that "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*[384]."

5.46 The United States has advised the Court of numerous diplomatic efforts it, other countries, and the Security Council made to urge restraint upon Iran, all of which failed. One example is emblematic of Iran's position: As the United States and Iran did not have diplomatic relations at the time (nor do they today), U.S. messages to Iran were transmitted through the U.S. protecting power, Switzerland. Following Iranian mining incidents in the spring of 1987, the United States urged restraint upon Iran and expressed the hope that tensions could "be resolved rather than lead to further difficulties[385]." Indeed, the United States exercised extreme restraint

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[383] *Ibid.*

[384] Counter-Memorial, para. 4.23.

[385] *See* "Message to Iran," United States Department of State, 23 May 1987, Exhibit 39.

by refraining from the use of force in self-defense following the attack on *Bridgeton* in July of 1987. Iran's public response to such calls for restraint came shortly thereafter, when Iran's Ambassador to the United Nations announced on U.S. television, "if my country has the intention of attacking a Kuwaiti tanker, it will continue with that policy, regardless of whose flag it is carrying[386]."

5.47 Iran challenges the U.S. comparison of the response of Iraq, following its mistaken, single missile attack on the *USS Stark*, for which it expressed regret and paid compensation, with the behavior of Iran, which in the face of substantial evidence now denies responsibility before the Court for its many attacks[387]. The issue, of course, is quite simple: Did Iran's behavior suggest that non-forcible measures would restore the security of U.S. and other neutral vessels in the Persian Gulf? Iran's denials of responsibility were (and remain) not credible. They contradict evidence concerning Iran's use of force as a political tool against neutral States and reinforced the view of the United States that peaceful alternatives were not available.

Section 3. The U.S. Actions in Self-Defense Were Proportionate

5.48 In taking action that was carefully calibrated to achieve the objective of defeating and deterring Iranian attacks, the United States met the requirements of proportionality. Iran has

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[386] *See* Counter-Memorial, para.1.23. *See also* "Weinberger warns against attacks in Gulf; Iran threatens," *United Press International*, 25 May 1987, Exhibit 41.

[387] Reply, paras. 7.46-7.47.

broadened its claims in this case by asserting that the assessment of proportionality must take into account not just the actions of the United States at issue in this case (that is, those against the oil platforms), but also the economic sanctions imposed by the United States shortly after the attack on *Sea Isle City*, various confrontations with Iran in April 1988, and "a major Iraqi offensive on the Fao peninsula[388]." These events have nothing to do with an assessment of the proportionality of the U.S. actions in self-defense following the attacks on *Sea Isle City* and the *USS Samuel B. Roberts*.

5.49 The United States and Iran seem to agree that Judge Ago's discussion of proportionality in self-defense presents the appropriate standard for evaluating such measures. As Judge Ago said, "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 result[389]." In the case at hand, the desired result was to defeat and deter armed attacks by Iran and thereby protect U.S. ships against the ongoing situation of threats posed by Iranian actions in the Gulf[390].

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[388] Reply, para. 7.63.

[389] 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, Exhibit 161.

[390] *See generally* 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), Exhibit 99; 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.

5.50 Even under Iran's misconstruction of the law, U.S. actions met the proportionality requirement. Iran's attacks were grave, employing deadly weapons, inflicting serious personal injuries and extensive damage to U.S. ships. They were part of a strategy of attacks against neutral States exercising their rights of freedom of navigation and commerce in the Gulf and evidenced a continuing threat of further attacks against U.S. and other neutral vessels. In light of the threat posed by Iran's illegal attacks, which were designed to elude effective responses, the United States adopted measures that were likely to defeat and deter Iran's attacks; U.S. measures had no broader aim.

5.51 Moreover, U.S. measures were unlikely to cause excessive damage to non-military objectives or to lead to wider conflagration in the region. The targets chosen were important links in Iran's effort to undermine U.S. and other neutrals' security in the region. They contained limited civilian personnel and infrastructure, were far from population centers, and presented minimal risk of civilian casualties. The damage to the oil platforms removed the military threat they posed, but did not destroy them altogether. In sum, it is clear that the U.S. actions were proportionate responses in self-defense to the Iranian armed attacks and continuing threat of hostile action.

CHAPTER III

CONCLUSION: THE U.S. ACTIONS AGAINST THE PLATFORMS COMPLIED WITH THE RULES OF SELF-DEFENSE AND CANNOT BE CHARACTERIZED AS REPRISALS

5.52 This Part of the U.S. Rejoinder has demonstrated that U.S. actions at issue in this case satisfied all of the requirements of lawful self-defense under Article 51 of the UN Charter and customary international law. The actions responded to Iranian "armed attacks" in a necessary and proportionate way.

5.53 The rules on self-defense are, moreover, principally designed to distinguish lawful actions of a State to defend itself from illegal reprisals. A reprisal, as Iran suggests, consists of action designed for punitive purposes[391]. As Judge Higgins noted in a discussion of reprisals, "[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-defense[392]." Iran attempts to portray U.S. actions as reprisals, but the evidence presented to the Court shows that U.S. actions were not designed for purposes of punishment. On the contrary, the United States has shown with substantial evidence that its actions were taken in self-defense, to defeat and deter continuing Iranian armed attacks on U.S. vessels in the Gulf.

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[391] Reply, paras. 7.47-7.49.

[392] Rosalyn Higgins, *Problems and Process,* p. 241 (1994).

5.54 Indeed, Iran's argument collapses when subjected to the slightest scrutiny. It argues that the actions of the United States were "attacks on Iran's economy which had been planned for a long time and for which the incidents only furnished a desired pretext[393]." To be sure, the U.S. actions required some preplanning, as the dangerous situation in the Gulf had been presented by Iran throughout 1987. But the UN Charter does not preclude contingency planning for responding to possible armed attacks. U.S. actions may have had some marginal collateral impact upon Iran's economy, but the impact was clearly proportionate in light of Iran's armed attacks and continuing threat. By using the platforms for military operations, Iran transformed them into military objectives subject to attack by the United States. The United States cannot be held responsible for economic harm that may have ensued.

5.55 Had the United States intended to "send Iran a message" by damaging its economy, why would it choose the oil platforms when it could have chosen to cause far more damage to Iran's economy? Instead of selecting central economic targets of Iran's oil economy, the United States identified military installations contributing to Iran's strategy of attacks on U.S. and other neutral shipping. To the extent that Iran's economy suffered any damaged in the course of U.S. actions in self-defense, Iran itself bears the responsibility, for it located such installations on otherwise civilian oil platforms. It could not thereby immunize itself from responses in self-defense.

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[393] Reply, para. 7.50.

5.56 Even if the Court found that the United States also wanted to "send Iran a message" at the same time it took action in self-defense, the U.S. actions would not consequently be invalidated. In the *Nicaragua* judgment, in response to Nicaragua's claims that the U.S. reference to collective self-defense was mere "pretext" to attack Nicaragua, the Court rejected just such a contention:

> "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-defence[394]."

Iran, however, has failed to prove its allegation that U.S. actions were aimed at economic retaliation or any other form of punishment for Iran's illegal attacks.

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[394] *Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, para. 127.

PART VI

COUNTER-CLAIM

INTRODUCTION

6.01 With its 1997 Counter-Memorial, the United States filed a counter-claim against the Government of Iran for violation of Article X of the 1955 Treaty. In its 1998 Order, the Court found that the counter-claim "is admissible as such and forms part of the current proceeding[395]." Iran submitted with its 1999 Reply a defense to the counter-claim. This Part responds to Iran's arguments therein.

6.02 As a preliminary matter, the United States respectfully requests the Court to note the striking inconsistencies between Iran's arguments regarding the interpretation of the 1955 Treaty with respect to its own claim and its arguments with regard to the counter-claim. For example, in connection with its claim, Iran argues that it does not need to prove that U.S. actions impeded commerce or navigation taking place between the Parties at the time of the attacks[396]; whereas in its defense to the counter-claim it states that the United States must prove that each ship was engaged in commerce or navigation between Iran and the United States at the time of the Iranian attack[397]. Similarly, with respect to its own claim, Iran argues that Article X,

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[395] *Oil Platforms, Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, para. 46.

[396] Reply, paras. 6.44 - 6.57.

[397] Reply, paras. 10.1 -10.44.

paragraph 1 "prohibits any action that might prevent or impede commerce in any way whatsoever[398]," while in its Reply it insists that a U.S. military vessel engaged in escorting U.S. merchant commercial vessels has nothing to do with U.S. commercial interests[399]. With respect to its own claim, Iran contends that Iranian crude oil extracted at certain oil platforms, co-mingled with other Iranian products, shipped to the Mediterranean and northwest Europe, off-loaded and co-mingled with other crude oil, transformed at a refinery into refined petroleum products, and then loaded onto a vessel that may or may not go to the United States, is deemed to constitute "oil commerce between Iran and the United States," sufficient to bring the attacks on three specific oil platforms within the purview of Article X, paragraph 1[400]. Yet, in connection with the counter-claim, despite Iran's admission that "[t]here was substantial commerce between the two States during the relevant period," Iran argues that the counter-claim fails because the United States has allegedly not established that specific Iranian attacks or specific Iranian mines harmed specific vessels carrying specific products directly between the two States[401].

6.03 As described in Part III above, the United States submits that Iran's interpretation of Article X, paragraph 1, is unsustainably broad, and that the United States did not breach that provision in its attacks on the oil platforms. The United States further submits that, even under

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[398] Reply, para. 6.41.

[399] Reply, paras. 10.37-10.38.

[400] Reply, paras. 3.22-3.30.

[401] Reply, para. 11.5.

its appropriately narrow interpretation of the provision advanced in Part III, Iran violated Article X, paragraph 1, in respect of its ongoing military actions in 1987-1988 that impeded "freedom of commerce and navigation" between the United States and Iran within the meaning of that provision. To the extent that the Court adopts Iran's broad interpretation of Article X, paragraph 1, of course, such an interpretation would require a finding for the United States with respect to this counter-claim.

6.04 This Part first will review the facts giving rise to the counter-claim and supporting the U.S. claim for damage done to U.S. flagged and U.S. owned vessels, as well as to U.S. owned cargo and U.S. personnel. Next, it will show that Iran violated Article X, paragraph 1, both under its own interpretation of that provision as described in its Reply and under the appropriately more narrow interpretation of that provision as informed by Article X, paragraph 5. It will then refute defenses advanced by Iran with respect to its illegal conduct. Finally, it will preview the discussion of damages caused by Iran's breach, which is reserved to be discussed more fully in the future.

CHAPTER I

IRAN'S ILLEGAL ATTACKS ON NEUTRAL SHIPPING

6.05 As described more completely in the Counter-Memorial[402] and above, Iran attacked over 200 vessels from 31 neutral countries during the period 1984-1988[403]. Among the vessels attacked were three U.S. flagged vessels, at least six foreign flagged, U.S. owned, vessels and a significant number of U.S. operated vessels[404]. Some of the vessels attacked were carrying U.S. owned cargo[405].

6.06 The Iranian attacks on some of these vessels over the course of just one year are described below in chronological order.

- On the morning of 24 July 1987, the U.S flagged steam tanker *Bridgeton* struck a mine laid by Iran while it was en route from Europoort, Netherlands, via Fujairah Anchorage,

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[402] Counter-Memorial, paras. 1.1 - 1.127.

[403] "Vessels Reported to Have Been Attacked and Damaged Due to Acts of Hostility by the Iraqis and the Iranians in the Gulf Area Since May 1981", *Lloyd's Maritime Information Services*, Exhibit 9.

[404] *See* Map 3; The U.S. reserves the right to further develop all pertinent facts and arguments regarding U.S. operated vessels. Iran attacked numerous U.S. operated vessels. For example, *Grand Wisdom*, attacked by Iranian frigates on 7 November 1987, was managed by Teekay Shipping of Long Beach, California, *see* "Gunboat attacks Gulf shuttle tanker," *Lloyd's List*, 7 November 1987, Exhibit 233; *Stena Concordia*, attacked by an Iranian frigate 27 June 1987 and 22 December 1987, and *Stena Explorer*, which struck an Iranian mine 19 June 1987, were managed by Universe Tankships, incorporated in Delaware. *See* deck logs of *Stena Concordia* from 22 December 1987 and 23 December 1987, Exhibit 233; deck log of *Stena Explorer* from 19 June 1988, Exhibit 233.

[405] Texaco Statement, Exhibit 211; *Esso Demetia* bills of lading and invoices, Statement of John P. Glennon, (hereinafter "Exxon statement"), Exhibit 234.

United Arab Emirates to Mina al Ahmadi, Kuwait[406]. When the ship struck the mine, there was a "heavy explosion forward followed by heavy shock wave and vibration throughout the ship," as described by the Master's contemporaneous notes in the deck log[407]. The blast left a gaping hole in the vessel's hull, necessitating 150 tons of steel repairs[408].

- On 10 August 1987, an Iranian mine blew a one-meter wide hole in the Panamanian owned, U.S. bareboat chartered, Panamanian flagged *Texaco Caribbean*[409]. The force of the explosion blew a hole in the vessel's side shell plating above and below the water line, causing oil to spill into the sea. As a result of the shell plate damage, the vessel took on a five-degree list to the starboard side[410]. When she was hit, *Texaco Caribbean* was laden with a cargo of Iranian light crude being carried from Larak Island Terminal, Iran to Rotterdam, Netherlands, 8000 tons, or approximately 57,000 barrels, of which spilled into the Gulf of Oman[411]. The crude oil was owned by Texaco, Inc.[412].

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[406] Statement of Norman Hooke, Exhibit 10; "Mined tanker prompts U.S. Navy review," *Lloyd's List,* 25 July 1987, Exhibit 235.

[407] Kuwait Oil Tanker Company letter, Exhibit 45.

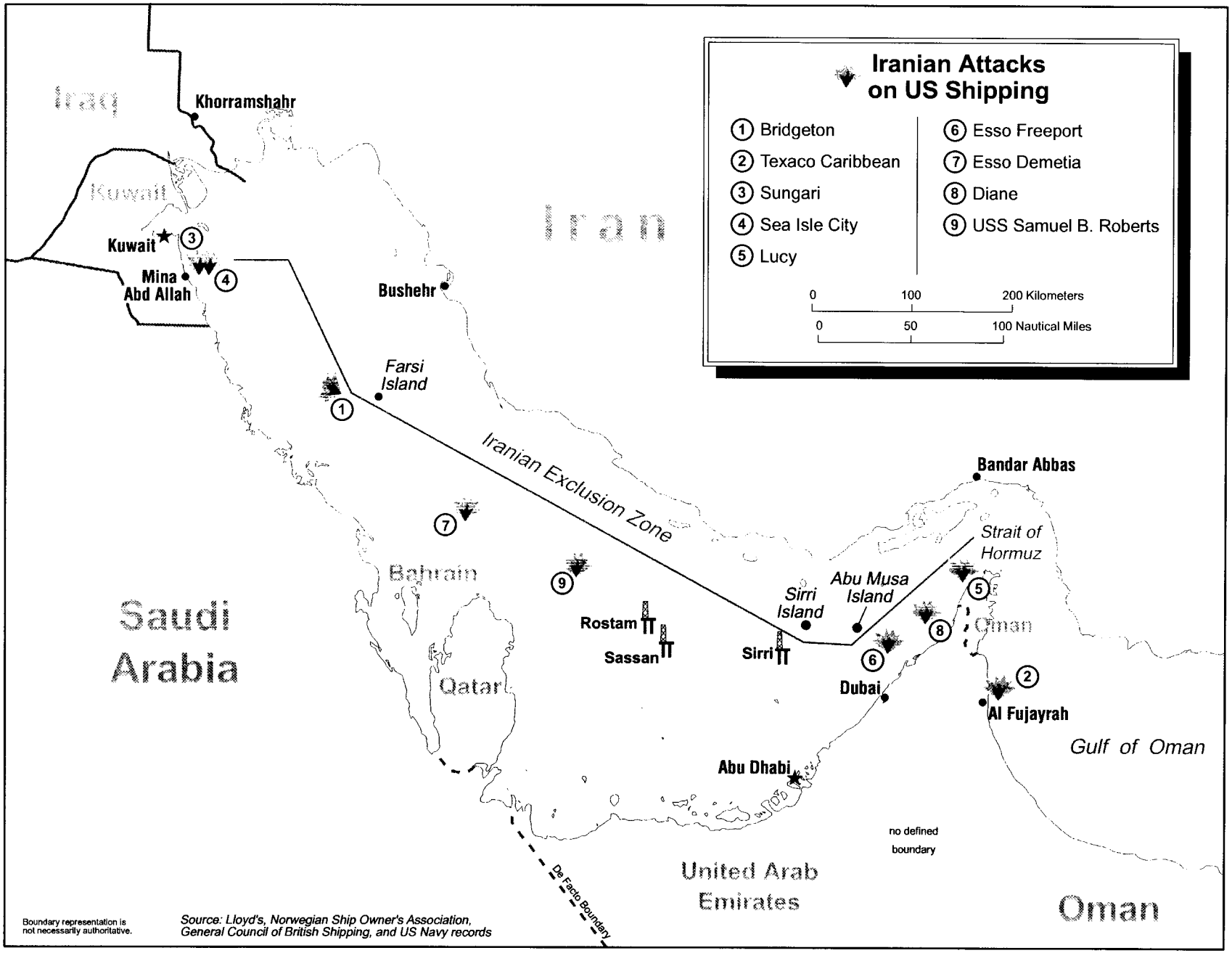
[408] *Ibid.*; *See also* Counter-Memorial map 1.6.

[409] Texaco Inc. is incorporated in Delaware, U.S.A. Based on information received after the filing of the Counter-Memorial, the United States now asserts that *Texaco Caribbean* was not owned by Texaco, Inc. but instead was chartered under a bareboat charter arrangement. Under the bareboat charter arrangement, the vessel was delivered to a wholly owned subsidiary of Texaco Inc. without crew and Texaco was responsible for the operation of the vessel including its crewing, provisioning and repair. Texaco Statement, paras. 1, 3, Exhibit 211; "Tanker Hits Mine at Gateway to the Gulf," *Lloyd's List*, 11 August 1987, Exhibit 236; "Iranian Influence Mines Add to Threat in Gulf," *Jane's Defense Weekly,* 22 August 1987, Exhibit 236.

[410] Excerpts from Statement of General and Particular Damage and P and I Claim for *Texaco Caribbean,* Exhibit 169.

[411] Texaco Statement, para. 4, Exhibit 211; Statement of Norman Hooke, 27 February 2001 (hereinafter "Lloyd's Statement"), Exhibit 240; "Tanker Hits Mine at Gateway to the Gulf,"*Lloyd's List,* 11 August 1987, Exhibit 236.

[412] Texaco Statement, para. 4, Exhibit 211.


Iranian Attacks on US Shipping
1 Bridgeton
2 Texaco Caribbean
3 Sungari
4 Sea Isle City
5 Lucy
6 Esso Freeport
7 Esso Demetia
8 Diane
9 USS Samuel B. Roberts
0 100 200 Kilometers
0 50 100 Nautical Miles
Iraq
Khorramshahr
Kuwait
Kuwait
Mina Abd Allah
Iran
Bushehr
Farsi Island
Iranian Exclusion Zone
Bandar Abbas
Strait of Hormuz
Bahrain
Saudi Arabia
Rostam
Sassan
Sirri
Sirri Island
Abu Musa Island
Oman
Qatar
Dubai
Al Fujayrah
Gulf of Oman
Abu Dhabi
no defined boundary
United Arab Emirates
Oman
De Facto Boundary
Boundary representation is not necessarily authoritative.
Source: Lloyd's, Norwegian Ship Owner's Association, General Council of British Shipping, and US Navy records

MAP 3

- On the morning of 15 October 1987, the U.S owned, Liberian flagged *Sungari* was struck by an Iranian missile in its No.1 starboard tank[413]. According to the Master's contemporaneous notes in the deck log, the missile caused:

> "[a] massive explosion and instantaneous release of blazing crude oil on to sea. Shortly afterwards the flames had completely engulfed the port bow and entire starboard side and were spreading rapidly. The crew deemed it prudent to abandon ship leaving the 2nd mate and Oiler to jump overboard and swim for the boat[414]."

Sungari was hit while at anchor 10 miles off Mina al Ahmadi, Kuwait, partially loaded with crude oil[415]. It was disposed for scrap in April 1988[416].

- One day later, on 16 October 1987, U.S. flagged motor tanker *Sea Isle City* was struck by an Iranian cruise missile while near Mina al Ahmadi[417]. The missile struck a large pump room ventilator on the starboard side and proceeded into the accommodation block and the engine room. The explosion caused extensive damage to the bridge; the Captain and his personnel on the bridge were injured by flying glass from the bridge windows[418]. The

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[413] The *Sungari* was owned by OMI Sungari Transport Inc. incorporated in Delaware, U.S.A., Statement of Fredric S. London (hereinafter "OMI Statement"), Exhibit 237; OMI Certificate of Incorporation and *Sungari* Certificate of Ownership and Encumbrance, Exhibit 237; Statement of Norman Hooke, para. 26, Exhibit 10; "Tanker is Hit in Iranian Missile Attack off Kuwait." *Lloyd's List*, 16 October 1987, Exhibit 238; Statement of Norman Hooke, para. 26, Exhibit 10; *Reuters and United Press International wire reports*, 15 October 1987, *reprinted in Lloyd's Weekly Casualty Report Services*, Exhibit 87; Counter-Memorial illustration 1.11; "Attack on US - registered Kuwaiti Tanker: Iranian President's Comments," *BBC Summary of World Broadcasts,* 17 October 1987, Exhibit 238.

[414] *Sungari* deck log from 15 October 1987, Exhibit 239.

[415] Lloyd's Statement, para. 6, Exhibit 240.

[416] OMI Statement, Exhibit 237.

[417] Lloyd's Statement, para. 7, Exhibit 240; Statement of Norman Hooke, Exhibit 10; Letter from Kuwait Oil Tanker Company, Exhibit 89; *Sea Isle City* Registration documents, Exhibit 159; "Kuwait Lashes Iran Over Tanker Attack," *Lloyd's List*, 17 October 1987, Exhibit 241.

[418] Statement of Norman Hooke, para. 27, Exhibit 10; Letter from Kuwait Oil Tanker Company, Exhibit 89; *see also* Counter-Memorial Illustration 1.11.

Captain and one crew member were blinded by the attack and five other crew members were seriously wounded[419].

- On 15 November 1987 the U.S owned, Liberian flagged motor tanker *Lucy* was attacked by fast Iranian patrol boats off Al Khasab, northern Oman, en route to Ras Tanura, Saudi Arabia from Oita, Japan[420]. The vessel sustained damage to her starboard engine room and lost power[421]. The Master of *Lucy* entered in his deck log the following contemporaneous account of the attack:

> "0800 Gentle breeze. Fine but cloudy and sea slight.
> 0825 Iranian warship requested on ch.16 ship's identification. Ship complied immediately.
> 0830 Vessel attacked and fire[d] upon from 3 boats at 26-19n, 056-07.5e.
> 0836 Same from 2 boats. Vessel lost power and drifted[422]".

- The following day, 16 November 1987, the U.S owned, Bahamian flagged steam tanker *Esso Freeport* was attacked by rocket-propelled grenades launched from Iranian gunboats, which fired approximately eight rockets, five of which struck the vessel[423].

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[419] Statement of Captain Hunt, Exhibit 88; Letter from Kuwait Oil Tanker Company, Exhibit 89.

[420] *Lucy* was owned by a wholly owned subsidiary of Overseas Shipholding Group Inc (OSG), incorporated in Delaware, U.S.A., *Lucy* Certificates of Registry and Ownership and Encumbrance, OSG Annual Report list of Wholly-Owned Subsidiaries, Exhibit 242; Lloyd's Statement, Exhibit 240.

[421] Excerpts from Statement of General and Particular Average on Motor Vessel *Lucy*, Exhibit 170. *See also* "Iranian Assault Craft Attack Three Vessels," *Lloyd's List*,17 November 1987, Exhibit 243; *Manchester Guardian Weekly*, 22 November 1987, Exhibit 243.

[422] Excerpts from Statement of General and Particular Average on Motor Vessel *Lucy*, Exhibit 170. *See also* "New Iran hit and run tactic," *Lloyd's List*, 26 October 1987,(describing Iranian tactic of making "friendly" contact with ship and then moments later attacking it), Exhibit 244.

[423] *Esso Freeport* was owned by a wholly owned subsidiary of Exxon Corporation, now Exxon Mobil Corporation, incorporated in New Jersey, U.S.A., Exxon statement, Exhibit 234. *See also* "Iranian Assault Craft Attack Three Vessels,", *Lloyd's List,* 17 November 1987 Exhibit 243; "Three more vessels attacked by Iranian speedboat," *The Xinhua General Overseas News Service*, 16 November 1987, Exhibit 246; "Two tankers attacked in Gulf," *TASS*, 16 November 1987, Exhibit 246.

Esso Freeport was fully loaded with a cargo of crude oil, en route from Ras Tanura, Saudi Arabia to the Louisiana Offshore Oil Pipeline (LOOP) Terminal, U.S. Gulf[424].

- In the early hours of 7 February 1988, the U.S owned, Liberian flagged motor tanker *Diane* was attacked by an Iranian frigate while loaded with crude oil from Ras Tanura, Saudi Arabia en route to Japan[425]. Iran requested identification from *Diane* before attacking her, as contemporaneously reported by the Master:

> "0145 Iranian war ship requested on V.H.F. identification and type of vessel, Ship comply immediate, position 25°51N 055°41E.
> 0215 Iranian war ship attacked vessel position 25°49N, 055°40E
> 0245 Stopped attack & warship departed
> 0300 Sustained damage to hull, decks, steering gear, electrical inst., piping, flooding, compartments, equipment, fire & smoke damage[426]."

The Iranian gunboat attacked *Diane* with cannon and small arms fire, causing extensive damage[427].

- On 14 April 1988, while returning to Bahrain after escorting a convoy of U.S. flagged merchant vessels, the *USS Samuel B. Roberts* struck a mine laid by Iranian forces near the

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[424] Internal Exxon transmissions, Exhibit 245; Lloyd's Statement, para. 10, Exhibit 240; "Gunboats Attack U.S. Tanker," *Foreign Broadcast Information Service*, 16 November 1987, Exhibit 15 attached to U.S. Preliminary Objection, 16 December 1993.

[425] *Diane* was owned by a wholly owned subsidiary of Overseas Shipholding Group Inc (OSG), incorporated in Delaware, U.S.A., *Diane* Certificates of Registry and Ownership and Encumbrance, OSG Annual Report, Exhibit 242; Lloyd's Statement, Exhibit 240 ; "*U.S.-owned* tanker attacked in Gulf," *Lloyd's List*, 8 February 1988, Exhibit 247; "Liberian-Registered Tanker is Attacked in the Gulf," *TASS*, 7 February 1988, Exhibit 247; "Iranian Gunboat Attacks Tanker in Gulf," *The Xinhua General Overseas News Service*, 7 February 1988, Exhibit 247.

[426] *Diane* deck log from 7 February 1988, Exhibit 248.

[427] *See* Excerpts from Statement of General and Particular Average on Motor Vessel *Diane*, Exhibit 171.

Shah Allum Shoal. The mine blew a hole in the ship's hull, causing flooding in her engine-room and severe damage. Ten U.S. sailors were injured in the explosion[428].

- On 11 June 1988, the U.S owned, British flagged steam tanker *Esso Demetia* was attacked by two Iranian speedboats[429]. The vessel was hit by at least eight rockets, five of which penetrated her hull. One rocket penetrated the No. 6 port cargo tank, causing a significant fire which destroyed the port life boat and davits and damaged the bridge wing, the engine room superstructure and deck areas to the stern. *Esso Demetia* was carrying a load of crude oil from Saudi Arabia when she was attacked, 1200 light tons of which were lost into the Gulf. The crude oil was owned by Exxon Corporation, now Exxon Mobil Corporation[430]. As a result of the attack and the damage to the cargo tanks, *Esso Demetia* was unable to lift cargo for Mitsubishi, as had been previously contracted[431]. The damage to the hull caused 450 long tons of fuel to spill into the Gulf[432].

6.07 Iran's responsibility for the attacks listed above was confirmed by an analysis done by the internationally recognized Lloyd's Maritime Information Services (LMIS)[433]. LMIS drew

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[428] Q and A on *USS Samuel B. Roberts* Repair, Exhibit 120; Post Overhaul Analysis Report on the *USS Samuel B. Roberts* Repair, Exhibit 121. *See also* Counter-Memorial, paras. 1.105-1.112.

[429] *Esso Demetia* was owned by a wholly owned subsidiary of Exxon Corporation, now Exxon Mobil Corporation, incorporated in New Jersey, U.S.A., Exxon statement, Exhibit 234; Statement of General Average on *Esso Demetia*, Exhibit 249.

[430] Statement of General Average on *Esso Demetia*, Exhibit 249; Exxon Statement, Exhibit 234; Certificate of *Esso Demetia* cargo oil and fuel loss, Exhibit 249; "Iran Resumes Attacks," *Lloyd's List*, 13 June 1988, Exhibit 250; "U.K. Protest to Iran," *Financial Times*, 14 June 1988, Exhibit 250.

[431] Exxon cable, 13 June 1988, Exhibit 249.

[432] Exxon bills of lading and invoices for *Esso Demetia*, Exhibit 234; Exxon Statement, Exhibit 234; Statement of General Average on *Esso Demetia*, Exhibit 249; Certification of *Esso Demetia* cargo oil and fuel loss, Exhibit 249.

[433] "Vessels Reported to Have Been Attacked and Damaged Due to Acts of Hostility by the Iraqis and the Iranians in the Gulf Area Since May 1981," *Lloyd's Maritime Information Services*, Exhibit 9.

on data collected by the Casualty Department of Lloyd's of London Press Ltd. (LLP) during the period in question[434]. The Casualty Department of LLP monitored the Tanker War closely, obtaining comprehensive information concerning attacks on shipping from a variety of sources, including the 1,800 Lloyd's Agencies and sub-agencies in ports throughout the world, news agencies, ship owners, ship managers, ship brokers and insurers[435]. The information received was checked by the LLP Casualty Department to confirm its validity. LMIS collects this data for the use of worldwide clients which include, but are not limited to, maritime solicitors, ship owners, ship managers, insurance companies, ship builders, ship repairers, ship brokers, charter brokers, shippers and forwarders, port authorities, oil companies, governments, banks and marine consultants[436].

6.08 United States shipping companies and managers of U.S. flagged ships were forced to take extraordinary and expensive measures to reduce the risk of harm to their vessels from Iranian attack during this period[437]. A network was established among U.S. shipping companies, the U.S. Navy and the British Navy through which information was shared about Iranian movements[438]. Ship owners took extraordinary precautions to reduce the danger to their vessels;

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[434] Statement of Norman Hooke, para. 20, Exhibit 10.

[435] *Ibid.*, paras. 1, 18.

[436] *Ibid.*, para. 19; Lloyd's Statement, para. 2, Exhibit 240.

[437] Chevron Statement, Exhibit 180; Statement of Colin Eglington, Exhibit 31.

[438] Chevron Statement, para. 5, Exhibit 180.

such precautions included traveling at night, steering vessels into shallow waters, water-washing oil tanks to reduce combustibility, and implementing shuttling convoys so that only ships under military escort would travel in the Gulf[439].

6.09 Iran's attacks on neutral shipping during this period significantly increased the cost of doing business in the Gulf for U.S. companies. Among these increased costs were hull and cargo war risk insurance rates, expense of delayed vessels, double salaries for crew members and installation of Kevlar shields and other safety equipment[440].

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[439] Chevron Statement, Exhibit 180; Statement of Colin Eglington, Exhibit 31.

[440] *Ibid.*

CHAPTER II

IRAN VIOLATED ITS FREEDOM OF COMMERCE AND NAVIGATION OBLIGATIONS UNDER ARTICLE X(1) OF THE 1955 TREATY

Section 1. Iran Violated Article X(1) Because Its Attacks on U.S. Shipping Impeded Protected Commerce and Navigation

A. There Was Substantial Maritime Commerce And Navigation Between Iran And The United States

6.10 Article X, paragraph 1, ensures "freedom of commerce and navigation[441]." As conceded by Iran in its Reply, there was substantial commerce, including maritime commerce, and navigation between the two States during the relevant period[442]. In 1987, the United States imported $1,667,500,000 in goods from Iran, $1,452,111,521 of which traveled by sea-going vessel.[443] Iran exported an average of 252,000 barrels of crude oil per day to the United States in 1987[444]. The United States exported $54,100,000 in goods to Iran in 1987, $35,215,695 of which

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[441] These freedoms are tightly interconnected and should be considered together. In *Corfu Channel*, the Court explained that "freedom of navigation flows from freedom of trade. . . ." *Corfu Channel, I.C.J. Reports 1949,* p. 98. It is improper for Iran, when faced with a counter-claim that arises under the same provision of the Treaty as its original claim, to conveniently read certain words out of that Treaty.

[442] Reply, para. 11.5.

[443] 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.

[444] OPEC 1989 Annual Statistical Bulletin, Exhibit 251. Iran exported an average of 68,500 barrels of crude oil per day to the United States in 1985 and an average of 87,800 barrels of crude oil per day to the United States in 1986.

traveled by sea-going vessel[445]. In 1988, the United States imported $8,925,015 in goods from Iran, $3,302,698 of which traveled by sea-going vessel[446]. The United States exported $73,018,226 in goods to Iran, $62,797,701 of which traveled by sea-going vessel[447]. As will be shown in the following sections, Iran's concerted attacks on U.S. shipping impeded this maritime commerce and navigation.

B. Iran Created Conditions That Were Dangerous And Detrimental To U.S. Maritime Commerce And Navigation

6.11 As Iran argued in its Reply, the obligations of the Parties under Article X, paragraph 1, include the obligation not to create dangerous and detrimental conditions for the maritime commerce and navigation of the other Party[448]. In its 1998 Order on the counter-claim, this Court specifically recognized the possibility that the creation of dangerous and detrimental conditions for commerce and navigation could constitute a violation of the provision[449]. Iran,

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[445] 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.

[446] U.S. General Imports, World Area and Country of Origin by Schedule A Commodity Groupings, 1988 December and Annual Report (1989), p. 653, Exhibit 140.

[447] U.S. General Exports: World Area and Country of Origin by Schedule E Commodity Groupings, 1988 December and Annual Report (1990), p. 789, Exhibit 165.

[448] Reply, paras. 6.1 - 6.74.

[449] "Whereas the counter-claim presented by the United States alleges attacks on shipping, the laying of mines, and other military actions said to be 'dangerous and detrimental to maritime commerce'; whereas such facts are capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty as interpreted by the Court; and whereas the Court has jurisdiction to entertain the United States counter-

accordingly, violated its obligations under Article X, paragraph 1, by taking actions which created dangerous and detrimental conditions for U.S. shipping engaged in maritime commerce and navigation between Iran and the United States[450]. Chapter I of this Part listed a series of such actions taking place during a single year during the relevant period.

6.12 As noted above, as a result of such actions, United States shipping companies were forced to take extraordinary and expensive measures to reduce the risk of attack by Iranian forces. For example, because of the threat of Iranian attack in the northern areas of the Gulf, U.S. owned and U.S. flagged ships were forced to direct their vessels into areas of higher navigational risk, including the shallow waters in the South[451]. One former shipping company official has stated: "[w]e wanted to keep the vessels as far away from Iran and its oil platforms as possible[452]."

6.13 Threat of Iranian attack also delayed U.S. ships' voyages through the Gulf, at significant cost. The President of Chevron Shipping Company[453] has stated that, in normal

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claim in so far as the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1." *Oil Platforms, Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, para. 36.

[450] Chevron Shipping has stated that they imported an average of 10,000,000 barrels of oil per month into the U.S. from the Gulf during the Tanker War. Chevron Statement, para. 3, Exhibit 180.

[451] Statement of Colin Eglington, paras. 10, 17, Exhibit 31; Chevron Statement, para. 14, Exhibit 180.

[452] Statement of Colin Eglington, para. 10, Exhibit 31.

[453] Chevron Shipping Company, a Nevada U.S.A. corporation was a wholly-owned American subsidiary of Chevron Corporation, a Delaware, U.S.A. corporation during the Tanker War. Chevron Shipping Company merged into Chevron Shipping LLC, a Delaware, U.S.A. limited liability company in 1998.

conditions, its tankers would travel the passage from the Straits of Hormuz to Ras Tanura, Saudi Arabia without stopping, in one and a half days of steaming time, using routes that would keep them in deep water in the middle of the waterway[454]. During the relevant period, however, Chevron would often anchor vessels twice en route, in order to avoid daylight passage and to allow management to assess the potential for attack[455]. Such additional days result in significant additional costs, given that such tankers cost between $30,000 and $40,000 per day to operate and that each day also increases the cost of capital employed. In this regard, because a barrel of oil at that time cost about $25, the amount of capital employed with respect to a cargo of crude oil on a very large crude carrier (VLCC) was about $50,000,000, and on an ultra large crude carrier (ULCC) about $75,000,000[456].

6.14 U.S. shipping companies also took extraordinary measures to protect their crews. Because traveling in the area was so dangerous at that time, Chevron, for example, gave each crew member the option of disembarking before his or her ship entered the area. Chevron also purchased additional life insurance policies for its crews. Both Chevron and KOTC paid war

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Chevron Statement, para. 1, Exhibit 180.

[454] Chevron Statement, paras. 4, 15, Exhibit 180.

[455] Statement of Colin Eglingon, paras. 7, 9, 13 and 17, Exhibit 31; U.S. ship owners had to purchase night binoculars to increase safety of navigation at night. Chevron Statement, para. 9, Exhibit 180.

[456] Chevron Statement, para.15, Exhibit 180.

zone bonuses[457]. Chevron Shipping Company President Thomas R. Moore described the extensive measures taken by Chevron to protect its crews while in transit in the Gulf:

> "Once the ship entered the Gulf, Chevron curtailed all maintenance operations and required all crewmembers to confine their activities to the ship's house (the area containing the bridge, living areas and control rooms). On vessels the size of these tankers, crew members normally perform maintenance activities throughout the vessel's voyage. During the most dangerous parts of the transit in the war zone, all non-essential work was curtailed and all crewmembers were required to congregate on the tanker's bridge as this was thought to be the safest place. Chevron installed Kevlar screens on the bridge to protect the Helmsman from possible shrapnel and glass shards. . .
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> "To facilitate a rapid evacuation of the ship should that become necessary, the lifeboats were ready to lower at all times. The lifeboats were uncovered and unstrapped, and loaded with navigational charts and other material specifically designed to allow the boats to navigate and communicate in the Gulf[458]."

6.15 Under normal conditions, tanker Masters receive instructions concerning the pick-up and delivery of their cargo and it is for the Master to decide on a safe route for his or her vessel. During the relevant period, however, the threat of attack was so severe that Chevron management issued explicit instructions to Masters concerning the appropriate route[459]. These instructions were based on the most recent reports from the U.S. Navy and other sources with respect to Iranian military activity against neutral shipping[460].

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[457] Chevron provided 100% bonus pay for crew members during the time they were in the Gulf. Chevron Statement, para. 7, Exhibit 180; Statement of Colin Eglingon, para. 8, Exhibit 31.

[458] Chevron Statement, paras. 9-10, Exhibit 180.

[459] Chevron Oil Company telegram, Exhibit 111.

[460] Chevron Statement, para. 6, Exhibit 180.

6.16 Iran's attacks on neutral shipping also resulted in a dramatic increase in the cost of the war risk insurance borne by U.S. companies. From 1 January 1987 to 1 January 1988, for example, the cost of hull war risk insurance rose by 500% for vessels calling at ports in Kuwait. During the same period, for vessels calling at Bandar Abbas, the cost of such insurance rose by 400%. Hull war risk insurance rates increased by 200% for vessels traveling to Saudi Arabia, Qatar, United Arab Emirates, Bahrain, Hormuz and Larak Island over the same period[461]. Lloyd's Underwriters' Association increased war risk insurance premiums in specific response to the mining of *Texaco Caribbean* and the Iranian cruise missile attacks on *Sungari* and the *Sea Isle City*[462]. Additionally cargo war risks insurance rates for vessels traveling to certain Iranian ports increased 50% in the days immediately following the mining of *Texaco Caribbean*[463].

C. Iran Impeded U.S. Activities Ancillary To Maritime Commerce

6.17 The *USS Samuel B. Roberts* and other U.S. Navy vessels were called into service to escort U.S. flagged vessels in the Gulf and protect them from Iranian attack. As the former U.S. Navy Commander of the Middle East Force stated: "[t]he purpose of [Operation] Earnest Will

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[461] "Shipping Runs the Gulf Gauntlet," 8 January 1988, *Lloyd's List,* Exhibit 252.

[462] "Waiting Gulf Ships to Pay War Premium," *Lloyd's List,*12 August 1987, Exhibit 253; "Tehran Strikes Revenge Blow at US: Missile Attack Seen as Retaliation to Oil Platform's Destruction," *The Guardian,* 23 October 1987, Exhibit 253.

[463] "Cargo Rates Rise for Gulf War Risk Areas," *Lloyd's List,*15 August 1987, Exhibit 254.

was to preserve the freedom of commerce and navigation of U.S. flagged vessels in the region and to protect such vessels from attack[464]." The threat of attack from Iran was so severe during this period, that had it not been for the escort provided by the U.S. Navy, the U.S. flagged vessels could not have engaged in commerce and navigation in the area. In mining the shipping lane known to be used by convoys of U.S. Navy and U.S. flagged merchant vessels engaged in commerce and navigation in the region, and launching the mine attack on the *USS Samuel B. Roberts*, Iran thus impeded an ancillary activity supporting the protected commerce of U.S. flagged vessels.

D. THIS COURT'S DECISION IN THE *NICARAGUA* CASE FURTHER SUPPORTS A FINDING THAT IRAN'S ACTIONS IMPEDED COMMERCE AND NAVIGATION

6.18 This Court's ruling in *Nicaragua* further supports a finding that Iran violated Article X, paragraph 1, specifically by laying mines in neutral shipping lanes frequented by U.S. vessels. This Court held in *Nicaragua* that the United States had contravened its obligations under the Nicaragua Treaty by lending financial and military support to Nicaragua's insurgent paramilitary *contra* forces. Although the Court considered a number of aspects of U.S. support for the *contras*, the relevant aspect of its decision for purposes of this counter-claim concerns its treatment of mines placed by the United States in Nicaraguan internal waters and Nicaragua's

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[464] *See* Statement of Rear Admiral Harold Bernsen, Exhibit 43; Statement of General George Crist, Exhibit 44.

territorial sea[465]. The Court found that these mines caused extensive damage to both Nicaraguan and neutral ships, destroying or damaging twelve vessels or fishing boats of various nationalities, killing fourteen people, and wounding two others[466]. The Court held that by placing mines in Nicaragua's harbors, the United States had unequivocally contravened its obligations under the Nicaragua Treaty: "[w]here the vessels of one State enjoy a right of access to ports of another State, if that right of access is hindered by the laying of mines, this constitutes an infringement of the freedoms of communications and of maritime commerce[467]." In this regard, the Court found that "the United States [had acted] in manifest contradiction with the freedom of navigation and commerce" guaranteed by the Nicaragua Treaty[468].

6.19 The facts found by this Court with respect to the United States' actions in Nicaragua in 1983-1984 and Iran's actions in the Gulf during the relevant period are strikingly similar. This Court found that without notice, the United States had placed mines in waters critical to commerce and navigation between Nicaragua and the United States, causing extensive damage to

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[465] In its application, Nicaragua accused the United States of engaging in a practice of small-scale mining of Nicaraguan waters and ports in early 1984. *Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, paras. 76-80. The Court found that the United States failed to give notice of the mining to any parties, including neutral third parties. ("It does not appear that the United States Government itself issued any warning or notification to other States of the existence and location of the mines") *Ibid.*, para. 77; ("neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines. . . .") *Ibid.*, para. 80.

[466] *Ibid.*, para. 76.

[467] *Ibid.*, para. 253.

[468] *Ibid.*, para. 278.

Nicaragua and creating dangerous conditions that impeded commerce and navigation by both U.S. and neutral shipping. Here, likewise without notice, Iran placed mines in Gulf waters, causing extensive damage to U. S. and neutral shipping and creating dangerous conditions that impeded commerce and navigation.

E. Volume Of Trade Is Not The Correct Measurement Of Whether Commerce And Navigation Was Impeded

6.20 Iran has suggested that the increase in imports of Iranian crude oil to the United States in 1987 undercuts the validity of the assertion that commerce and navigation were impeded during that period[469]. In fact, as demonstrated above, Iranian attacks on commerce and navigation are well-documented. The fact that U.S. ship owners and companies engaged in dangerous and expensive practices that permitted trade to continue, despite Iran's clear efforts to impede it, cannot excuse Iran's illegal conduct. The volume of trade between the parties is not determinative of the existence of impediments and obstacles to commerce and navigation.

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[469] Reply, para. 9.2.

F. THE MEANING OF "BETWEEN THE TERRITORIES OF THE TWO HIGH CONTRACTING PARTIES" IN ARTICLE X(1)

6.21 Iran argued in its Reply that a Party claiming a violation of Article X, paragraph 1 does not need to show that the other Party's actions impeded specific commerce or navigation occurring between the Parties at the precise time of the attacks[470]. As Iran stated in support of its own claim:

> "It is clear that this provision [X(1)] would be violated if the free circulation of goods between the territories of the two countries were hindered by obstacles of any kind, including the destruction of facilities designed for that purpose, regardless of the question of whether such facilities were actually participating in commercial activities between the Parties at the precise time of the attacks[471]."

As demonstrated above, there was an on-going stream of maritime commerce and navigation between the United States and Iran.

6.22 Iran has relied on *Nicaragua* in asserting that it is not required to demonstrate that the alleged illegal acts of the United States impeded specific commerce between Iran and the United States. Iran has noted that: "[N]owhere in the 1986 Judgment did the Court concern itself with verifying whether specific commercial activities were taking place between the territories of Nicaragua and the United States at the moment of the U.S. attacks[472]." A review of Nicaragua's Memorial and oral pleadings reveals that counsel for Nicaragua did not present the

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[470] Reply, paras. 6.44 - 6.57.

[471] Reply, para. 6.48.

[472] Reply, para. 6.50.

Court with evidence that, *inter alia*, the mining of the Nicaraguan harbor impeded specific commerce between the United States and Nicaragua. Instead Nicaragua presented evidence that its imports and exports were negatively effected by the mining, without reference to whether goods were coming from or going to the United States[473]. The United States has argued in Part III that the circumstances present in the *Nicaragua* case allowed the Court to find a violation of the Nicaragua Treaty even without evidence that the attacks at issue prevented specific commercial activities between Nicaragua and the United States. Those circumstances were that there was no dispute between the parties as to the existence of trade between them passing through the relevant ports, and that the attacks were against port and port facilities such that the Court could conclude that freedom of commerce and navigation between the two States was clearly impeded. Those circumstances are not present with respect to the Court's consideration of whether the U.S. actions against Iran's oil platforms constitute a violation of Article X, paragraph 1, as discussed in Part III. However, the United States submits that the same circumstances present in *Nicaragua* are present in this case with respect to Iran's attacks on U.S. shipping. Unlike the situation of the platforms in Iran's claim, there is no dispute between Iran and the United States regarding the existence of general maritime commerce between the parties during the relevant period. Further, the United States submits that Iran's attacks, particularly its laying of mines, violates Iran's obligation to ensure freedom of commerce and navigation

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[473] *See e.g. Nicaragua, Jurisdiction,* CR/84/8, 25 April 1984, pp.33-35.

between Iran and the United States. In light of these circumstances, the Court, consistent with its approach in *Nicaragua*, need not find that the Iranian attacks affected specific shipments of goods between the two countries.

6.23 Even should the Court find that the United States must show that the Iranian attacks affected specific shipments between the two States, it is clear that Iran's illegal conduct violated Article X, paragraph 1. For example, *Texaco Caribbean* was loaded with U.S. owned Iranian crude oil when it struck an Iranian mine[474]. In addition, ships engaged in maritime commerce between Iran and the United States incurred additional costs, with respect to such items as hull insurance, as a result of Iran's activities, even when those activities were not directed specifically against them.

[474] Texaco Statement, Exhibit 211; Lloyd's Statement, para. 5, Exhibit 240.

Section 2. Iran Violated the Freedoms Guaranteed Under Article X(1), as Informed by Article X(5)

6.24 While the Court appears to have narrowed the scope of the counter-claim[475], it is appropriate to consider the other provisions of Article X in assessing the scope to be accorded Article X, paragraph 1[476]. All of Article X is of interest when considering the breadth of freedoms protected by Article X, paragraph 1 and Article X, paragraph 5, is of particular interest in this regard.

6.25 Article X, paragraph 5, provides that U.S. ships in distress shall be permitted to take refuge in the nearest Iranian port or haven and shall receive friendly treatment and assistance from Iran[477]. It thus places specific obligations on Iran to treat U.S. ships in distress in a friendly and helpful manner, and places an implicit obligation on Iran not to affirmatively place U.S. ships in distress. It is an understatement to observe that Iran did not treat U.S. ships in such a manner and, in fact, caused and exacerbated their distress. U.S. shipping companies were so apprehensive of the threat of Iranian attack that they would not have considered seeking safe

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[475] *But cf.* This Court found that the counter-claim "is admissible as such and forms part of the current proceedings." *Oil Platforms,Counter-Claim, Order of 10 March 1998, I.C.J. Reports*, para. 46.

[476] Judge Higgins explicitly recognized an interpretation of Article X, paragraph 1 that would encompass other provisions of Article X when she stated: "It may thus be that while Article X, paragraph 1, is the sole basis of jurisdiction identified by the Court, paragraphs 2 to 6 still have relevance to the task of ascertaining the freedoms guaranteed under paragraph 1." *Oil Platforms,Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 218, *separate opinion of Judge Higgins.*

[477] Article X(5) states: "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."

harbor in Iran. An official of Chevron Shipping Company has stated that it: "considered ports in the United Arab Emirates as its only ports of refuge in the Gulf. Since Iranian forces appeared to be the main threat to Chevron vessels, Chevron could not have looked to them for a safe harbor[478]."

6.26 Rather than meeting U.S. vessels in distress with friendly treatment and assistance as required by Article X, paragraph 5, the evidence is clear that Iran targeted U.S. vessels, as described in Part I above. The former General Superintendent of Operations for the Gulf with the KOTC, who operated its U.S. flagged vessels, stated that the "Iranians had placed a pattern of moored mines across the route that they perceived the convoy would take. . . . We believed Iran wanted to strike the convoy of U.S. flagged KOTC vessels and U.S. warships. . . . Only Iran would have known when the convoy was passing and only Iran could have placed the mines in time[479]."

6.27 As the U.S. flagged *Bridgeton* prepared to lift her cargo at the end of July 1987, Iranian President Ali Khameini warned the United States to pull its forces out of the "dangerous whirlpool" of the Gulf[480]. Khameini said "[t]hey had better leave the region, otherwise we shall

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[478] Chevron Statement, para.13, Exhibit 180.

[479] Statement of Colin Eglington, para. 19, Exhibit 31.

[480] "Iran warning as 'Bridgeton' begins loading," *Lloyd's List,* 1 August 1987, Exhibit 51.

strike them so hard they will regret what they have done[481]." News of the U.S. flagged *Bridgeton* hitting an Iranian mine was conveyed to the congregation of the Islamic Council by Hashemi-Rafsanjani[482]. It was reported that that the news received a vigorous response and that the congregation, shouting "death to the United States", expressed their hatred for global arrogance and United States intervention in the region[483]. As noted above, Hashemi-Rafsanjani praised the attack with reference to "God's angels" doing "what is necessary at the appropriate time" with an "invisible shot" against Iraq's partners[484]."

6.28 Iran similarly targeted other U.S. ships, including the *USS Samuel B. Roberts*[485]. As noted above, on the day of the attack on the *USS Samuel B. Roberts*, the Commander of the Iranian Navy, Commodore Mohammed Hoseyn Malekzadegan, acknowledged that the Iranian Navy had been engaged in "a wholehearted task. . . 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 missiles. . . .[486]" Iran violated its general obligation under Article X, paragraph 1 to ensure

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[481] *Ibid.*

[482] "Hashemi-Rafsanjani Political Sermon," *Foreign Broadcast Information Service*, 24 July 1987, Exhibit 50.

[483] *Ibid.*

[484] *Ibid.*

[485] *See* Counter-Memorial, paras. 1.105 - 1.112.

[486] Counter-Memorial, para. 1.112

"freedom of commerce and navigation" between the United States and Iran by placing U.S. vessels in distress through repeated attacks[487]. That Iran's general obligation encompasses an obligation not to place vessels in distress is clear when Article X, paragraph 1 is viewed within the context of Article X as a whole, and specifically through reference to Article X, paragraph 5.

[487] *See* Statement of Rear Admiral Harold Bernsen, Exhibit 43; Statement of General George B. Crist, Exhibit 44 (describing the U.S. Navy and U.S. Marine Corps perception of the Iranian threat to U.S. flagged and U.S. merchant vessels).

Section 3. The U.S. Reflagging was Proper

6.29 Iran's continued effort to discredit the U.S. flagging of Kuwaiti tankers under U.S. Registry must be rejected. At Kuwait's request, the United States flagged eleven Kuwaiti vessels under U.S. registry[488]. The flagging procedure for these vessels was consistent with international law and applicable United States and Kuwaiti law[489]. The flagging of these vessels did not affect their neutral status and the vessels did not carry war materiel or call at either Iraqi or Iranian ports. Under international law, a State may confer its nationality on a ship by registering the ship, authorizing it to fly its flag, issuing papers documenting the ship's nationality and thus establishing a "genuine link" between the ship and its flag State. As described in the Counter-Memorial, all of these elements were met by the United States when it flagged the Kuwaiti tankers[490].

6.30 First, consistent with existing U.S. laws and regulations, the ships were properly registered and issued certificates of documentation[491]. Second, the U.S. had a "genuine link"

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[488] *See* "The Tanker War- No End," p.6, *Intertanko*, Exhibit 1; Statement of Colin Eglington, para. 17, Exhibit 31.

[489] *See* Myron H. Nordquist and Margaret G. Wachenfeld, "Legal Aspects of Reflagging Kuwaiti Tankers and Laying of Mines in the Persian Gulf," 31 *German Year Book of International Law*, p. 139 (1988); George K. Walker, *The Tanker War, 1980-88: Law and Policy,* International Law Studies, Volume 74 Naval War College, Newport, Rhode Island, pp. 60, 304-5, 388 (2000).

[490] *See* Counter-Memorial, paras.1.14-1.18; paras. 4.13-4.18.

[491] For example, *see Sea Isle City's* U.S. registration documents, Exhibit 159.

with the vessels. The applicable international law on nationality of ships is codified in two international conventions, the 1958 Convention on the High Seas and the 1982 UN Convention on the Law of the Sea[492]. The United States is a party to the first, but not the second Convention; Iran is not a party to either. Both Conventions provide that in determining whether a genuine link exists, it is critical whether the State exercises jurisdiction and control over administrative, technical and social matters with respect to the vessels[493]. Beyond this basic definition, States have broad discretion in determining whether a genuine link exists. For example, the recent *Saiga*[494] decision delivered by the International Tribunal for the Law of the Sea reiterates the doctrine that a vessel is of the nationality of its flag, and that each State has the power to determine its criteria for allowing vessels to fly its flag. In *Saiga*, the dispute involved a Cypriot owned, Scottish managed, Swiss chartered tanker flying the flag of Saint Vincent and the Grenadines. The Tribunal permitted Saint Vincent and the Grenadines to bring the claim. The Tribunal also stressed that notwithstanding the "genuine link" language, the framers of the 1958

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[492] 1958 Convention on the High Seas, 13 UST 2312, TIAS 5200, 450 UNTS 82, Exhibit 156; 1982 UN Convention on the Law of the Sea, 1185 UNTS, entered into force 16 November 1994, Exhibit 156.

[493] Article 5 of the 1958 Convention states "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." 13 UST 2312, TIAS 5200, 450 UNTS 82. Article 91(1) of the 1982 Convention states "There must exist a genuine link between the State and the ship"; and Article 94(1): "Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." United Nations Document A/CONF.62/122.

[494] *M/V "Saiga" (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea) (1999), *reported in* 38 *International Legal Materials*, p. 1323 (1999).

Convention on the High Seas explicitly rejected proposed language mandating that such a link be a prerequisite for the recognition of a vessel's nationality by other States[495]. Similarly, the 1986 UN Ship Registration Convention, which was designed to tighten the conditions for granting nationality, continues to provide States with "a considerable degree of discretion as to how it ensures links between itself and its ships are genuine[496]."

6.31 U. S. law provides that once a vessel meets U.S. domestic law registration requirements, a genuine link between the U.S. and the vessel has been formed and the vessel is allowed to fly the U.S. flag[497]. The reflagged Kuwaiti vessels met all of the U.S. registration requirements in effect at that time, and therefore were properly permitted to fly the U.S. flag[498]. Requirements imposed by the United States prior to registration, for example, included a determination that the vessels were designed, constructed and equipped to ensure safe

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[495] *Ibid.*, 1343. *See also* Shabtai Rosenne, "The International Tribunal for the Law of the Sea: Survey for 1999," *The International Journal of Marine and Coastal Law*, Vol. 15, No.4. pp. 443, 454-55 (2000).

[496] The 1986 UN Ship Registration Convention was adopted by the United Nations Conference on Trade and Development but has not entered into force. 26 *International Legal Materials,* p.1229.

[497] The U. S. Supreme Court stated in *Lauritzen v. Larsen*, 345 U.S. p. 584 (1953), Exhibit 256 : "Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state."

[498] Iran's assertion that the U.S. relied on a "loophole" in the registration requirements must be rejected. *See National Marine Engineers' Beneficial Association v. Burnley* 684 Federal Supplement p. 6 (D.D.C. 1988), (finding that U.S. did comply with U.S. manning requirements for the eleven reflagged Kuwaiti tankers), Exhibit 257.

operation[499]; and that they employed a U.S. captain and a proper number of appropriately trained crew[500]. Following appropriate procedures, the United States determined that it was proper to register the Kuwaiti tankers, thus establishing a "genuine link" between the United States and the Kuwaiti tankers. Iran's claims that this flagging was improper must be rejected.

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[499] *See* Title 46, United States Code, Section 3306, Exhibit 158; Title 46, United States Code, Section 12110(d), Exhibit 158; Title 46, United States Code, Sections 8101-8103, Exhibit 158.

[500] *Ibid.*

Section 4. The U.S. Claim for U.S. Ships is Proper

6.32 Iran expressly recognizes that vessels flying the Iranian or U.S. flag as well as those flying a flag other than Iranian or U.S. are protected by the freedoms established in Article X, paragraph 1[501]. The United States agrees. However, Iran asserts that the issue of nationality of the vessels is "plainly relevant to the question of any right the United States may have to espouse a claim."[502] In this section, the United States submits, first, that the counter-claim is not dependent on an espousal of claims held by U.S. nationals and that the United States therefore has the right to bring this claim for breach of the 1955 Treaty without such espousal, and in its own right. Second, and in the alternative, the United States submits that it is espousing the claim for the U.S. shipping on behalf of the U.S. corporations who owned the vessels. Under either theory, the U.S. claim for the vessels in question is clearly admissible[503]. In the circumstances there was no possibility for the owners to exhaust any remedies in Iran.

6.33 Some of the vessels attacked by Iran were not under U.S. flag, but were either owned by U.S. nationals or their cargo was owned by U.S. nationals. For example, the *Sungari*, *Lucy*, *Diane*, *Esso Freeport* and *Esso Demetia* were each owned by U.S. corporations when they

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[501] Thus Iran stated: "It is true that there can be commerce 'between the territories of the High Contracting Parties' in foreign vessels (i.e., vessels which are neither Iranian nor United States). Thus the nationality of the ship or other mode of transport is not decisive for this purpose." Reply, para. 10.1 (1).

[502] *Ibid.*

[503] Iran's challenge to the admissibility of the counter-claim based on Article XXI must also be rejected. *Oil Platforms, Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, paras. 5-6, 46.

were attacked by Iran[504]. The *Texaco Caribbean* was bareboat chartered by a U.S. corporation and was carrying U.S. owned cargo when it was attacked[505].

6.34 The United States submits that this counter-claim is not dependent on an espousal of claims held by U.S. nationals. The United States itself has directly suffered by Iran's breach of its Article X, paragraph 1 treaty obligations. That injury is akin to the injury suffered in *Nicaragua* by Nicaragua, where this Court found that by laying mines that interfered in maritime commerce and navigation, the United States had violated its obligations to Nicaragua under a comparable treaty to that now before this Court. In *Nicaragua* the Court did not insist that Nicaragua establish that it had espoused claims of its affected nationals, nor insist that Nicaragua undertake steps typically associated with the espousal of claims, such as the exhaustion of local remedies in the United States. While many of the Iranian attacks were against vessels that were not flying a U.S. flag, that fact does not preclude the United States from asserting that it has directly suffered injury by Iran's failure to abide by a treaty that protects U.S. owned vessels and U.S. cargo. To the extent that the Court is concerned about whether the flag States of those vessels wish the United States to advance such claims, the United States has submitted evidence showing that the flag State for each of the non-U.S. flagged, U.S. owned or U.S. operated vessels

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[504] Exxon Statement, Exhibit 234, *Lucy* and *Diane* certificates of Registry and of Ownership and Encumbrance, Exhibit 242; Certificate of Ownership and Encumbrance, Exhibit 237.

[505] Texaco Statement, para. 2, Exhibit 211.

has confirmed that it has no objection to the presentation by the United States of such claim[506]. This confirmation is significant, for where the Court 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 respected[507].

6.35 It is well-established that a State has the right to protect a vessel in which its nationals have an ownership interest, even when the vessel is sailing under a foreign flag[508]. For example, in the case of the *Alliance*[509], the Arbitral Commission adjudicating claims of the United States against Venezuela, held that because the Dominican flagged vessel was owned by a U.S. citizen, the vessel could appropriately be protected by the United States. Similarly, the *I'm Alone* case concerned the sinking of an U.S. owned British ship of Canadian registry by the U.S. Coast Guard[510]. Canada claimed damages from the United States based upon the ship's nationality. The Commissioners appointed under a 1924 Convention between the United States and Great Britain found that although *I'm Alone* was a British ship of Canadian registry, it was

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[506] *See* Diplomatic Notes from the United Kingdom, the Commonwealth of the Bahamas and Panama, Exhibit 179; Diplomatic Note from Liberia, Exhibit 258.

[507] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970,* paras. 85-103.

[508] *See generally* A.D. Watts, "The Protection of Merchant Ships," 33 *British Year Book of International Law,* p. 52 (1957).

[509] *Alliance*, Arbitral Commission of 1903, Green Haywood Hackworth, 2 *Digest of International Law,* p. 757 (1941).

[510] *Claim of the British Ship "I'm Alone" v. United States*, 3 R.I.A.A p. 1609 (1935).

de facto owned, controlled and, at the critical times, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States. On that basis, the United States was not required to pay any compensation to Canada or Great Britain for the loss of the ship or the cargo notwithstanding the ship's Canadian registry[511].

6.36 Iran's suggestion that because the U.S. Navy provided protection only to U.S. flagged ships, the United States is limited to bringing claims with respect to U.S. flagged ships, is unfounded[512]. The standard used by the U.S. military in determining those ships for which to provide protection has no legal or logical bearing on the rights of the United States to bring a claim with respect to damage to U.S. owned ships. Indeed, the United States could bring such a claim even had the U.S. Navy provided no protection to any vessels. U.S. shipping companies were also in close contact with the U.S. Navy's Central Command in Tampa, Florida, to exchange intelligence about Iran's hostile activities in the region. Chevron Shipping Company's International Ports and Navigation Department was typically in touch with the Central Command two or three times a day[513].

6.37 The United States has a further interest in such U.S. owned vessels because it may need to call upon them in times of national emergency. U.S. law provides that whenever the

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[511] *Ibid.*

[512] Reply, para. 10.1.

[513] Chevron Statement, para. 5, Exhibit 180.

President of the United States proclaims that the security or the national defense makes it advisable, or during any national emergency declared by proclamation of the President, it is lawful for the Secretary of Transportation to requisition or purchase certain U.S. owned vessels or other watercraft[514]. The owner is not paid any consequential damages arising from a taking or use of property under this authority[515]. As participants in the U.S. war risk insurance program, neither the Bahamas, Panama nor Liberia have laws or regulations that would restrict the ability of the U.S. government to call on vessels owned by U.S. citizens flying the flags of those States[516]. Accordingly, the United States may act on its own behalf in bringing this counter-claim against Iran with respect to Iran's violations of Article X, paragraph 1, of the 1955 Treaty.

6.38 If the Court should find that the United States cannot advance its entire counter-claim without espousing the claims of its nationals, then the U.S. submits that it is espousing the claims of the U.S. corporations that owned the vessels attacked by Iran. *Sungari*, *Lucy*, *Diane*, *Esso Freeport* and *Esso Demetia* were all owned by U.S. corporations when they were attacked by Iran[517]. The *Texaco Caribbean* was bareboat chartered by an U.S. corporation at the time it

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[514] Title 46, United States Code App., Section 1242 (a), Exhibit 259.

[515] *Ibid.*

[516] Title 46, United States Code App., Section 1282, Exhibit 260.

[517] Exxon Statement, Exhibit 234; *Sungari* certificate of Ownership and Registration, Exhibit 237; *Diane* and *Lucy* Certificates of Registry and of Ownership and Encumbrance, Exhibit 242.

was attacked, causing U.S. owned cargo to spill into the Gulf[518]. No exhaustion of local remedies is required given the circumstances in Iran during the relevant period, during which Iran consistently demonstrated its hostility towards U.S. interests and the impossibility that a U.S. corporation could receive a fair hearing there[519]. Iran's violation of international law by breaching the obligations of Article X, paragraph 1, of the 1955 Treaty with respect to each of the vessels in question is well-documented. The U.S. fully reserves its right to further develop all pertinent facts and arguments.

Section 5. Iran's Reservation under Article XX (1)(d)

6.39 In the final chapter of its Reply, Iran reserved the right to assert that it was entitled by virtue of Article XX, paragraph 1(d) of the 1955 Treaty to take actions against U.S. and

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[518] Texaco Statement, Exhibit 211.

[519] The issue of exhaustion of local remedies relates to the admissibility of a claim. This Court has already found in its Order of 1998 that the counter-claim "is admissible as such and forms a part of the current proceedings." *Oil Platforms (Counter-Claim)* 1998 Order, para. 46. Further, Iran has now filed a "Defence to counter-claim," not objections to its admissibility. Nevertheless, the United States notes that were Iran allowed to pursue an argument that the relevant U.S. nationals should have exhausted local remedies in Iran, Iran would be required to show that such remedies were available and would have been effective. As was stated in the *Ambatielos Arbitration*, 12 R.I.A.A. p. 119 (1956), "to contend successfully that the international proceedings are inadmissible, the defendant State must prove the existence, in its system of internal law, of remedies which have not been used." Further, such remedies must be effective, meaning that they would result in an independent and impartial judgment capable of leading to meaningful relief to a successful claimant. *See Finnish Ships Arbitration*, 3 R.I.A.A. p. 1479 (1934). In light of the hostility of Iran to the United States, as well-documented by this Court in *U.S. Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980,* there can be little doubt that no effective, available remedies for U.S. nationals existed in the courts of Iran.

neutral shipping to protect its essential security interests[520]. Iran has not, however, developed its argument in this regard.

6.40 As demonstrated above, the United States agrees that Article XX, paragraph 1(d) provides a measure of discretion for a party to apply measures "necessary to protect its essential security interests." Accordingly, the United States accepts that Article XX, paragraph 1(d) may provide a defense to Iran's violations of Article X, paragraph 1, in the same manner and to the same extent that it provides a defense to the United States with respect to U.S. actions against the oil platforms.

[520] Reply, paras. 12.2-12.3.

CHAPTER III

IRAN HAS NOT DEMONSTRATED A VALID DEFENSE TO THE COUNTER-CLAIM

6.41 In Part IV, chapter 9, of its Reply, Iran has offered defenses for its illegal conduct. None is well-founded. This Chapter will demonstrate that Iran's actions were not justified under international law. It will conclude by noting that the quantification of U.S. damages will be the subject of a subsequent proceeding.

Section 1. Iran's Actions Were Not Justified Under International Law

6.42 As stated in the counter-claim, Iran's attacks on U.S. and other neutral shipping had no justification under any provision of international law[521]. Iran's attacks were not lawful measures of self-defense taken in conformity with the Charter. Consequently, the wrongfulness of Iran's actions at issue in this case is not precluded, according to the customary rule of state responsibility expressed in Article 22 of the International Law Commission's draft articles on the subject. Iran also violated multiple provisions of the law of armed conflict. Iran responds in its Reply with a bold, unsupportable assertion:

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[521] *See, e.g.*, Counter-Memorial, paras. 6.19-6.23; Article 22, draft articles on state responsibility, Report of the International Law Commission on the work of its 52d session, 2000, Doc. A/55/10, p. 129.

> "Third States, owing a duty under general international law of strict neutrality towards a State defending itself against aggression, *cannot expect the same levels of freedom and security as would be the case in peace*[522]."

Similarly, Iran states:

> "In relation to the general situation facing it in the Persian Gulf, Iran was entitled to take all appropriate measures in self-defense. In that context *some impact on the freedom of trade and commerce was inevitable* and cannot be held to breach the Treaty[523]."

Iran thus seeks from this Court a decision absolving it of responsibility for its attacks because of its war with Iraq. Iran asks the Court to ignore its attacks on neutral shipping because of the "inevitability" of such attacks in the context of the Iran-Iraq War. Both propositions offend basic principles of international law. They illustrate the illogic of Iran's claims before this Court and should be rejected.

A. IRAN HAS NOT DEMONSTRATED A VALID CLAIM OF SELF-DEFENSE WITH RESPECT TO U.S. AND OTHER NEUTRAL VESSELS

6.43 Iran has long claimed to have used force in self-defense against Iraq consistent with the UN Charter. Yet any defenses that Iran acted in legitimate self-defense in its war with Iraq, or engaged in legitimate military operations in connection with its war with Iraq, however valid,

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[522] Reply, para.11.2 (emphasis added).

[523] Reply, para. 12.2 (emphasis added). In claiming the protection of the Exceptions Clause if the Court finds in the United States favor, Iran adds, "Iran was defending itself against aggression . . . ." Reply, para.12.3.

are not relevant to its assertions that "[t]hird States . . . cannot expect the same levels of freedom and security as would be the case in peace[524]." Iran has failed to show, for instance, that its attacks on neutral vessels amounted to necessary and proportionate responses in self-defense to Iraqi behavior. Indeed, Iran can adduce no legitimate military purpose for attacking any of the over two hundred neutral ships damaged or destroyed during the period in question.

6.44 Instead, Iran suggests that a generalized atmosphere of regional hostility generated by its war with Iraq provided it with a basis for attacking specific, peaceful, neutral shipping in the Gulf. It does not identify any neutral vessel as providing Iraq with a military advantage, nor does it show any evidence of such vessels attacking Iran in any way. At the very most, the hostility pervasive in the Gulf at the time may have provided Iran with a rationale to resort to visit and search of neutral vessels not accompanied by a neutral warship for the sole purpose of determining whether war materiel was being delivered to Iraq[525]. No such rationale is suggested.

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[524] Reply, para 11.2.

[525] The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (ed. Louise Doswald-Beck, 1995), acknowledges that neutral vessels are subject to visit and search by belligerents, and paragraph 120, restates the customary exceptions as follows:
A neutral merchant vessel is exempt from the exercise of the right of visit and search if it meets the following conditions:
(a) it is bound for a neutral port;
(b) it is under the convoy of an accompanying neutral warship of the same nationality or a neutral warship of a State with which the flag State of the merchant vessel has concluded an agreement providing for such convoy;
(c) the flag State of the neutral warship warrants that the neutral merchant vessel is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status; *and*
(d) the commander of the neutral warship provides, if requested by the commander of an intercepting belligerent warship or military aircraft, all information as to the character of the merchant vessel and its cargo as could otherwise be obtained by visit and search.

Instead, Iran suggests that a third State's mere economic relationship with Iraq and presence in the shipping lane, rather than the supply of military contraband, would justify attacks by Iran on that State[526]. Iran's claim has no basis in international law generally and the law of neutrality in particular[527]. As one scholar noted shortly after the Iran-Iraq War:

> "Regarding Iranian attacks on neutral shipping, consensus exists that these attacks -- most of which took place outside any proclaimed exclusion zone -- could not be justified even under the most liberal interpretation of international law[528]."

B. Iran's Actions Violated The Law Of Armed Conflict

6.45 Iran's attacks on U.S. and other neutral ships violated basic rules of the law of armed conflict[529].

6.46 *Iran targeted civilian objects.* All but one of the vessels for which the United States seeks damages in its counter-claim were merchant vessels that cannot be characterized as military objectives under the law of armed conflict. They did not "make an effective contribution to military action" and their "total or partial destruction, capture, or neutralization, in

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[526] *See* Reply, para. 11.5 (". . . an aggressor is just as much assisted by money as it is by munitions") .

[527] Economic relations - aside from trade in war materiel - are not prohibited under the law of neutrality, nor does they compromise the neutral status of ships not carrying war materiel. For the leading texts on the law of neutrality, *see* Counter-Memorial, paras. 6.21-6.22.

[528] Boleslaw Adam Boczek, "The Law of Maritime Warfare and Neutrality in the Gulf War," in *The Persian Gulf War: Lessons for Strategy, Law, and Diplomacy*, pp. 173, 185 (ed., Chrisopher C. Joyner, 1990).

[529] *See* Counter-Memorial, paras. 6.19-6.24.

the circumstances ruling at the time, [did not] offer a definite military advantage" to Iran[530]. Iran thus violated one of the central principles of the law of armed conflict prohibiting the targeting of non-military objectives. As stated in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea:*

> "Attacks shall be limited strictly to military objectives. Merchant vessels and civil aircraft are civilian objects unless they are military objectives in accordance with the principles and rules set forth in this document[531]."

There is no question about the centrality of this principle in the law of armed conflict. As this Court noted in the *Nuclear Weapons Advisory Opinion*,

> "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 attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets[532]."

Iran, in clear violation of the fundamental principles reaffirmed by this Court, attacked civilian vessels, damaging civilian property and, more seriously, killing and injuring civilians.

6.47 Specific rules govern attacks on merchant vessels on the high seas. The *San Remo Manual* sets out the customary rules as follows:

> "Merchant vessels flying the flag of neutral States may not be attacked unless they:

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[530] Additional Protocol I, Article 52(2).

[531] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (ed. Louise Doswald-Beck, 1995), para. 41, p. 15.

[532] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para. 78.

(a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;

(b) engage in belligerent acts on behalf of the enemy;

(c) act as auxiliaries to the enemy's armed forces;

(d) are incorporated into or assist the enemy's intelligence system;

(e) sail under convoy of enemy war ships or military aircraft; *or*

(f) otherwise make an effective contribution to the enemy's military action, e.g., by carrying military materials, and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions[533]."

Iran makes no claim that its attacks satisfied any of these criteria. It simply had no legitimate basis on which to attack neutral merchant vessels.

6.48 It is of course true that damage and injury to civilians may result from the conduct of military operations. The customary rule of proportionality is stated in Article 51(5)(b) of Additional Protocol I of the 1949 Geneva Conventions, where it is prohibited to conduct "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete

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[533] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (ed. Louise Doswald-Beck, 1995), para. 67, pp. 21-22.

and direct military advantage anticipated[534]." Iran's attacks were not only disproportionate: it clearly directed its attacks against civilian objectives, in contravention of the law of armed conflict.

6.49 Customary international law specifically addresses the use of naval mines against civilian objects. Generally speaking, the law prohibits making civilian objects the object of attack[535]" The *San Remo Manual* restates the law applicable in armed conflict:

> "The laying of armed mines or the arming of pre-laid mines must be notified unless the mines can only detonate against vessels which are military objectives[536]."

Iran did not notify that it had laid armed mines on the high seas. Nor did it employ mines that can only be directed against military objectives. Rather, the evidence conclusively shows that Iran directed its mines against neutral vessels individually and in convoys, without notifying the shipping community or neutral states that it had laid the mines.

6.50 *Failure of notification or warning.* The element of notice or warning is widely considered essential to the lawful use of naval mines. This Court has twice recognized that notification of the presence of naval mines in waters traversed by vessels with a right of passage

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[534] *See also San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (ed. Louise Doswald-Beck, 1995), para. 46(d).

[535] Additional Protocol I, Article 52(1).

[536] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (ed. Louise Doswald-Beck, 1995), para. 83.

derives from "elementary considerations of humanity[537] . . . ." The 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines, widely recognized as reflecting principles of customary international law, recognizes that States laying naval mines must notify their presence to ship owners and Governments[538]. Iran failed to notify any neutral vessels or governments of the presence of these mines.

6.51 By failing to notify neutral ships and States, Iran guaranteed that it would also violate the principle that "minelaying States shall pay due regard to the legitimate uses of the high seas by, *inter alia,* providing safe alternative routes for shipping of neutral States[539]." Since Iran's method of warfare was designed to target neutral shipping, Iran blithely disregarded the legitimate uses of the high seas.

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[537] *Corfu Channel, I.C.J. Reports 1949*, p. 22. *See also Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, para. 215 (noting that where a State lays mines in 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 mines).

[538] *See* Articles 3 and 4, Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, *reprinted in* Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War*, pp. 105-6. One scholar notes that customary law "restrictions on the use of naval mines include that the general location of minefields must be notified to all States, belligerent as well as neutral, with as little delay as possible, any such delay being related solely to the safety of the minelaying vehicles and not to the achievement of military objectives, so that any vessel which wishes to avoid the mined waters may do so with safety." James J. Busuttil, *Naval Weapons Systems and the Contemporary Law of War* p. 78 (1998).

[539] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (ed. Louise Doswald-Beck, 1995), para. 88.

Section 2. Damages Will Be the Subject of a Subsequent Proceeding

6.52 Just as Iran requested in its Memorial[540], the U.S. requested in its initial presentation of this counter-claim that issues relating to reparation be considered in a subsequent proceeding[541]. The United States is, however, in a position to suggest to the Court some measure of the scope of injuries incurred as a direct result of Iran's breach of its treaty obligations. For example, the United States incurred approximately $50 million in costs associated with the rescue, transport and repair of the *USS Samuel B. Roberts* following Iran's attack on it[542]. The United States also incurred significant costs in deploying additional forces to the Gulf to protect maritime commerce by escorting vessels, clearing minefields and other activities[543]. In addition to such costs incurred directly by the U.S. Government, the United States will also be seeking reparation for harm done to U.S. flagged and U.S. owned vessels and to U.S. cargo and U.S. personnel. Additional costs and supporting evidence will be presented at the appropriate time.

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[540] Memorial, para. 5.20.

[541] *See* Counter-Memorial, para. 6.26.

[542] Q and A on *USS Samuel B. Roberts* Repair, 21 September 1988, Exhibit 120; Post Overhaul Analysis Report on the *USS Samuel B. Roberts* Repair, 21 August 1990, Exhibit 121.

[543] *See e.g.* United States General Accounting Office, *Burden Sharing: Allied Protection of Ships in the Persian Gulf, in 1987 and 1988,* September 1990, pp. 1-13, Exhibit 261. This Report was to have been included as Exhibit 32 of the Counter-Memorial, but was inadvertently omitted.

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, paragraph 1, of the 1955 Treaty 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, the United States requests that the Court adjudge and declare:

1. Rejecting all submissions to the contrary, that, in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to maritime commerce, the Islamic Republic of Iran breached its obligations to the United States under Article X of the1955 Treaty, and

2. That the Islamic Republic of Iran is accordingly under an obligation to make full reparation to the United States for its breach of the 1955 Treaty in a form and amount to be determined by the Court at a subsequent stage of the proceeding.

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 March 2001.

James H. Thessin
Agent of the United States
Of America

TABLE OF EXHIBITS

For ease of reference to all documents submitted by the United States in this case, the exhibits listed below are numbered continuously with those previously submitted by the United States, and begin with number 180.

180. Statement of Thomas R. Moore, 26 January 2001.

181. United Nations Security Council, Provisional Verbatim Record of the 2541st Meeting, 25 May 1984, United Nations Document S/PV.2541.

182. Arab League, Text of Communique From Amman Summit, 11 November 1987, 27 International Legal Materials 1651 (1984).

183. Gulf Cooperation Council, Ministerial Statement, 17 May 1984, *reprinted in BBC Summary of World Broadcasts*, 19 May 1984.

184. Letter Dated 22 September 1987 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, United Nations Document S/19147.

185. "British Protest", *The Times (London)*, 27 January 1987.

186. Letter Dated 1 September 1987 from the Permanent Representative of Kuwait to the United Nations Addressed to the Secretary-General, United Nations Document S/19093.

187. Letter Dated 15 October 1987 from the Permanent Representative of Kuwait to the United Nations Addressed to the Secretary-General, United Nations Document S/19210.

188. Letter Dated 16 October 1987 from the Permanent Representative of Kuwait to the United Nations Addressed to the Secretary-General, United Nations Document S/19215.

189. Letter Dated 21 May 1984 from the Representatives of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates Addressed to the President of the Security Council, United Nations Document S/16574.

190. "Saudis Break Diplomatic Ties with Iran, Citing Mecca Riots and Gulf Raids", *The New York Times*, 27 April 1988.

191. Letter Dated 26 October 1987 from the Permanent Representative of Egypt to the United Nations Addressed to the Secretary-General, United Nations Document A/42/687, S/19232.

192. Letter Dated 28 July 1988 from the Permanent Representative of Egypt to the United Nations Addressed to the Secretary-General, United Nations Document A/43/494, S/20072.

193. United Nations Security Council, Provisional Verbatim Record of the 2542nd Meeting, 25 May 1984, United Nations Document S/PV.2542.

194. "Iranian Gunboats Fire on French Ship", *The Times (London)*, 14 July 1987.

195. "Iran faces prospect of isolation by East and West", *The Times (London)*, 2 May 1987.

196. 20 Ships Hit in Gulf in Six Days, Raising Fears of Maritime Nations", *The New York Times*, 4 September 1987.

197. "Japan Protests to Iran Over its Suspected Attacks on Vessels", *Japan Economic Newswire*, 2 October 1987.

198. Government of Norway, Cable reporting protest to Iranian authorities, 10 February 1988.

199. "Greece Lodges Formal Protest with Iran on Shipping Attacks", *Platt's Oilgram News*, 22 December 1987.

200. "Turkey Sticks to its Guns Over Iranian Attack on Atlas 1 Tanker", *Platt's Oilgram News*, 19 March 1986.

201. United Nations Security Council, Provisional Verbatim Record of the 2545th Meeting, 30 May 1984, United Nations Document S/PV.2545.

202. United Nations Security Council, Provisional Verbatim Record of the 2543rd Meeting, 29 May 1984, United Nations Document S/PV.2543.

203. Islamic Republic of Iran Naval Forces, Joint Sea Coast 1 Combat Group (Operations) Sea Coast 1 Operations Plan Ghadir.

204. Anthony H. Cordesman and Abraham R. Wagner, *The Lessons of Modern Warfare, Volume II: The Iran-Iraq War* (1990).

205. *USS Crommelin*, Deck Log Book, commencing 0000, 01 August 1987 and ending 2400, 31 August 1987.

206. *USS Klackring*, Deck Log Book, commencing 0431, 10 October 1987 and ending 2400, 14 October 1987.

207. Statement of Thomas Flamminio, 7 March 2001.

208. U.S. overhead imagery of the Faw area, dates as indicated on images.

209. Statement of Mark Pitt, 1 March 2001.

210. Reference Map from Statement of Mr. Mohammad Youssefi (Iran's Reply, Volume VI), annotated by the United States to indicate correct orientation of missile sites.

211. Statement of Robert O. Phillips, 27 February 2001.

212. Statement of Edward O. Price, 2 March 2001.

213. Charles H. Sullivan, *Department of State Standard Draft (Analysis and Background), Treaty of Friendship, Commerce and Navigation.*

214. Draft Treaty of Friendship, Commerce and Navigation Between the United States of America and the Republic of Portugal (annotated version), May 1949.

215. Cable from Secretary Dulles to American Embassy Tehran, 22 June 1954.

216. Cable from State Department to American Embassy Tehran, 23 July 1954.

217. Cable from Department of State to American Embassy Tehran, 3 November 1954.

218. Senate Report, 84th Cong., 2d Sess., "Commercial Treaties with Iran, Nicaragua, and the Netherlands," 9 July 1956.

219. Ronny E. Jones, *State Department Practices Under U.S. Treaties of Friendship, Commerce, and Navigation,* August 1981.

220. F. Stroud, *Stroud's Judicial Dictionary of Words and Phrases*, 3rd ed. 1951.

221. E.A. Wurtzburg, *Wharton's Law Lexicon*, 12th Ed. 1916.

222. *Champlin Refining Corp. v. Corporation Commission of Oklahoma,* 286 U.S. 210 (1932).

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