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Interpreting Self-Defense Restrictively: The World Court in the Oil Platforms Case

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Abstract: The judgment in the *Oil Platforms* case between Iran and the United States is the third decision by the International Court of Justice in a series that restrictively interprets the international law on the use of force. The article provides an overview of the case and comments in detail on the parties' arguments and the Court's findings on the right to self-defense, essential security interests and related evidentiary issues. The case is seen as a remarkable statement of the world court emphasizing the limits of the use of force and the role of the UN Charter at a time when the traditional law on self-defense is challenged by political events and legal writing.

Keywords: International Court of Justice, use of force, self-defense, circumstantial evidence, Iran-Iraq war

Discussions on the lawfulness of pre-emptive strikes as included in the US National Security Strategy of September 2002 and on the legality of the Iraq war in spring 2003 have seriously challenged the law on self-defense as reflected in Article 51 of the UN Charter.[1] Pressed to take a position, the United Nations recently stated in the Report of the High-level Panel on Threats, Challenges and Change that »we do not favour the rewriting or reinterpretation of Article 51«.[2] The Panel recommended that States who have good arguments for preventive military action should discuss their case in the Security Council which could authorize such action if it chooses to.[3] But does this statement express the current international law on self-defense?

When determining existing international law, the jurisprudence of the International Court of Justice is of particular relevance. The Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* demonstrates that highly politicized questions of international law are from time to time submitted to the principal judicial organ of the United Nations for non-binding decision. Despite some calls to do so, the General Assembly did not, however, request the Court to provide an advisory opinion on the legal aspects of the Iraq war whereby the Court could have addressed the issue whether the limits of lawful use of force as set by the UN Charter may be interpreted loosely.[4]

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1 See for example: A.D. Sofaer, 'On the Necessity of Preemption', 14 *European Journal of International Law* (2003), pp. 209-227; M. Bothe, 'Terrorism and the Legality of Pre-emptive Force', *ibid*., pp. 227-240; M. Byers, 'Preemptive Self-defense: Hegemony, Equality and Strategies of Legal Change', 11 *The Journal of Political Philosophy* (2003), pp. 171-190; T. Bruha, 'Irak-Krieg und Vereinte Nationen', 41 *Archiv des Völkerrechts* (2003), pp. 295-313; D. Thürer, 'Irak-Krise: Anstoß zu einem Neuüberdenken der völkerrechtlichen Quellenlehre?', *ibid*., pp. 314-326; M.J. Glennon, 'Why the Security Council Failed', *Foreign Affairs*, May/June 2003; Secretary-General Kofi Annan's Address to the General Assembly, 23 Sept. 2003, <www.un.org/webcast/ga/58/statements/sg2eng030923.htm>

2 Report of the High-level Panel on Threats, Challenges and Change, 'A more secure world: Our shared responsibility', 2 December 2004, UN Doc. A/59/565, para. 192.

3 Ibid., para. 190.

4 See for example: C. Weeramantry, 'Internationaler Gerichtshof kann sehr rasch handeln', *Frankfurter Rundschau*, 26 March 2003; *also*: 'Iraq War Illegal', *Sunday Observer*, 23 March 2003.

For the present debate on the law of the use of force and the role of the UN Charter in this respect, the Court's judgment of 6 November 2003 in the case concerning *Oil Platforms* between the Islamic Republic of Iran and the United States of America is of great interest nevertheless. The case concerned the Iranian claim for reparation from the United States for attacking and destroying three offshore oil production complexes owned by the Iranian National Oil Company in 1987 and 1988. The claim was met by a US counter-claim seeking reparation from Iran for allegedly attacking vessels and otherwise engaging in military activities during the Iran-Iraq war to the detriment of the United States.

Shortly before the beginning of the Iraq war, the Court was seized with a parallel discussion relating to the admissibility of armed force and related evidentiary issues. Indeed, only two weeks after Secretary of State Colin Powell presented his case against Iraq with satellite imagery before the Security Council on 5 February 2003, similar pictures were produced by the United States in the public sittings in the *Oil Platforms* case to show Iranian missile sites in support of the US defense arguments and counter-claims. That the Court did pronounce on the right to self-defense although it was not obliged to do so from a technical legal perspective, as will be discussed below, indicates that its judgment in the *Oil Platforms* case is intended to contribute to the present debate concerning the law on the use of force.

The judgment on the merits in the *Oil Platforms* case is the third decision by the Court in a series that extensively deals with the international law on the use of force and especially with the right to self-defense. With the present decision, the Court confirmed its restrictive approach regarding the limits of the lawful unilateral use of force already contained in its jurisprudence in the case concerning *Military and Paramilitary Activities in and against Nicaragua* and in the Advisory Opinion on the *Threat or Use of Nuclear Weapons*.[5]

In the following sections, I will begin with a brief overview of the facts, the main arguments by the parties and the judgment. I will then review in detail the parties' contentions concerning the right to self-defense and related issues of evidence and contrast them with the respective findings of the Court. Finally, I will make some remarks on the significance of this judgment for the law on self-defense and how it relates to the ongoing debate on a potential re-definition of the existing international law on the use of force.

1. Factual Background

The background of the dispute is the so called »Tanker War« in the Persian Gulf, which was part of the armed conflict between Iran and Iraq from 1980 to 1988 following the invasion of Iran by Iraqi forces.[6] As a reaction to the Iraqi invasion, Iran imposed a blockade of the Iraqi coast and established a defense exclusion zone around its coast. In return, Iraq set up a prohibited war zone and later a total exclusive zone in the northern part of the Gulf. The establishment of these zones seriously hampered international shipping by assigning navigational corridors, increasing interception and search, and in the case of the Iraqi zone, prohibiting all shipping. In 1984, Iraq had begun to attack tankers carrying Iranian oil in an effort to cut off Iran from its main revenue. In the course of the Tanker War, numerous commercial and military vessels of various nationalities were attacked by aircraft, helicopters, missiles, warships or mines while both Iraqi and Iranian naval forces were operating in the Gulf. Iran denied, however, responsibility for any incidents except those involving vessels refusing an orderly request for stop and search. It emphasized that its involvement in the Persian Gulf had an exclusively defensive character, reacting to the Iraqi aggression which, it alleged, was supported diplomatically, politically, economically and militarily by some formally neutral States, including Kuwait, Saudi Arabia and the United States.

Besides the damage and loss relating to the attacked ships, the situation caused great inconvenience and costs to the international shipping community which sought to ensure security in various ways. In 1986, Kuwait, which was particularly concerned about alleged Iranian attacks against its merchant vessels, requested the United States and other States to reflag some of its ships and to provide protection through military escort during their passage through the Persian Gulf. These measures did not, however, prevent that tankers and escorting warships continued to be attacked or struck mines until the end of the conflict.

Two incidents are central to this case. On 16 October 1987, the *Sea Isle City*, a Kuwaiti tanker reflagged to the United States, was hit by a missile while anchoring close to Kuwait's harbor. Three days later, the United States alleging Iranian responsibility for the missile attack and asserting to be acting in self-defense, launched a naval attack against two Iranian offshore oil production facilities, the Reshadat (»Rostam«) and Resalat (»Rakhsh«) complexes. The second incident related to the US warship *Samuel B. Roberts,* which struck a mine in international waters near Bahrain on 14 April 1988 after completion of an escort mission. On the assumption that the mine was of Iranian origin, the United States attacked and destroyed the Salman (»Sassan«) and Nasr (»Sirri«) complexes, claiming self-defense four days after the incident. Following previous Iraqi attacks in 1986, nearly all complexes had been under repair. According to Iran, however, production was about to restart at the time of the US attacks. As a consequence of the attacks, most of the oil platforms were completely destroyed and normal production levels could not be resumed until 1993.

5 Also: J. Kammerhofer, 'Oil's Well that Ends Well? Critical Comments on the Merits Judgment in the Oil Platforms Case', 17 *Leiden Journal of International Law* (2004), pp. 706-707.

6 On the Tanker War: M.S. Navias and E.R. Hooton, *Tanker Wars: The Assault on Merchant Shipping During the Iran-Iraq Conflict, 1980-1988* (I.B. Tauris Publishers, London, New York, 1996); E.R. Wang, 'The Iran-Iraq War Revisited: Some Reflections on the Role of International Law', XXXII *The Canadian Yearbook of International Law* (1994), pp. 83-103; A. de Guttry and N. Ronzitti (eds.), *The Iran-Iraq War (1980-1988) and the Law of Naval Warfare* (Grotius Publications, Cambridge, 1993).

2. Jurisdiction and Claims

Iran claimed damages for the loss arising from the destruction of the oil platforms. As the United States had terminated its unilateral declaration of acceptance of compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court, Iran could not directly base its claim on a violation of the international law relating to the use of force. The only possible basis of jurisdiction for Iran was the dispute settlement clause of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the parties (hereinafter referred to as the »1955 Treaty«).[7] Iran therefore claimed that the destruction of the platforms was a violation of the freedom of commerce as stipulated in Article X, paragraph 1, of the 1955 Treaty,[8] similar to Nicaragua's invoking of the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua (hereinafter referred to as the »1956 Treaty«) – a treaty whose relevant provisions are substantially identical to those of the 1955 Treaty. As in the *Nicaragua* case, the parties' dispute concerned both the general international law on self-defense as well as issues of treaty interpretation. However, in contradistinction to the *Nicaragua* case, where the Court's jurisdiction was not only founded on the dispute settlement clause of the 1956 Treaty but also on unilateral declarations under Article 36, paragraph 2, of the Court's Statute, the 1955 Treaty was the sole jurisdictional base in the *Oil Platforms* case. During the hearings, Iran requested the Court to adjudge and declare »that in attacking and destroying on 19 October 1987 and 18 April 1988 the oil platforms referred to in Iran's Application, the United States breached its obligations to Iran under Article X, paragraph 1, of the Treaty of Amity, and that the United States bears responsibility for the attacks«. The form and amount of reparation was to be determined at a subsequent stage of the proceedings.

The United States requested the Court to adjudge and declare that it did not breach its obligations under the 1955 Treaty and that the Iranian claims be dismissed. It maintained that it had not violated the Treaty as there was no commerce between the territories of the parties at the relevant period of time. Further, the United States contended, that it had only destroyed the platforms to defend its essential security interests in accordance with Article XX, paragraph 1 (d), of the 1955 Treaty. This paragraph states that the Treaty shall not preclude the application of measures necessary to protect the essential security interests of a High Contracting Party. The United States saw its essential security interests affected by the alleged Iranian missile and mining attacks against US and other neutral shipping threatening the free flow of maritime commerce between the Gulf States and the rest of the world. In addition, the United States maintained to have made use of its inherent right to self-defense in response to the specific incidents involving the *Sea Isle City* and the *Samuel B. Roberts*, and more generally to a series of alleged Iranian attacks amounting to an armed attack in a general sense. The following sections consider these issues in greater detail.

The United States also made a counter-claim requesting the Court to adjudge and declare that, »in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran«, Iran itself violated Article X, paragraph 1, of the 1955 Treaty and would accordingly be obliged to make full reparation.[9] On the one hand, the counter-claim related to ten individual ships having suffered attacks allegedly committed by Iran. On the other hand, the United States claimed that Iran had violated the freedom of commerce and the freedom of navigation as provided in the 1955 Treaty in general by making the Gulf unsafe through the sum of attacks against United States and other neutral shipping, laying mines and conducting other military activities. Iran requested the Court to dismiss the counter-claim and submitted several objections to the Court's jurisdiction and admissibility. It also contended that all vessels except one, in respect of which the counter-claim was inadmissible because it did not fly a US flag, were not engaged in commerce or navigation between the territories of the parties. As regards the generic claim, Iran submitted that the United States had not discharged its burden of proof that there was any actual interference with commerce or navigation between Iran and the United States.

3. The Judgment

The Court dismissed both claim and counter-claim on the grounds that there was no treaty-protected commerce and navigation between the territories of the parties that the respective actions could have violated. It nevertheless addressed the US defense relating to essential security interests and used it as an argumentative bridge to examine issues of self-defense. With fourteen to two votes, the Court found in its operative paragraph relating to the Iranian claim »that the actions of the United States of America against Iranian oil platforms on 19 October 1987 and 18 April 1988 cannot be justified as measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1 (d), of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, as interpreted in the light of international law on the use of force«. It was only then that the Court pronounced on the claimed treaty violation and found »further that the Court cannot however uphold the submission of the Islamic Republic of Iran that those actions constitute a breach of the United States of America under Article X, paragraph 1, of that Treaty, regarding freedom of commerce between the territories of the parties, and that, accordingly, the claim of the Islamic Republic of Iran for reparation also cannot be upheld.[10]

7 Article XXI, paragraph 2, reads : »Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.«

8 When instituting proceedings in November 1992, Iran had claimed that the US action constituted a fundamental violation of various provisions of the 1955 Treaty and of international law. Following preliminary objections by the United States to the Court's jurisdiction, the Court decided by judgment of 12 December 1996 that it only had jurisdiction for claims made by Iran under Article X, paragraph 1, of the Treaty.

9 By order of 10 March 1998, the Court had found the counter-claim admissible as such and forming part of the current proceedings. *See:* <http://212.153.43.18/icjwww/idocket/iop/iopframe.htm>

10 Judgment, para. 125.

This finding is puzzling for a number of reasons, a fact that was also criticized by several Judges and commentators.[11] That the Court dismissed the US defense for the alleged treaty violation before it concluded on an actual violation of the 1955 Treaty,[12] not only reversed the normal order of examination but also failed to observe considerations of judgment economy. In strictly legal terms, the finding on Article XX, paragraph 1 (d), of the Treaty and the law on self-defense was not necessary, given that the Court denied a violation of the freedom of commerce pursuant to Article X, paragraph 1, of the Treaty. For this reason, the finding practically constitutes an *obiter dictum* by which the Court expressed an argument that was not a ground for the decision. In international judicial proceedings, it is unusual to include an *obiter dictum* on a defense in the *dispositif*, and even more so in the same operative paragraph as a finding on treaty violation covering a completely different subject matter. Moreover, by including a finding on the failed US defense argument, some Judges claimed that the Court had violated the *ne ultra petita* rule by pronouncing on something that had not been requested in the Iranian submissions.

The Court thus actively seized the opportunity to say something on the general international law on the use of force. Only this can explain why significant parts of the judgment deal with issues that were not strictly necessary for the outcome of the case from a technical legal perspective. In the following sections, I will review the respective contentions of the parties in fact and law on this point and contrast them with the corresponding findings of the Court.

4. The Relationship between Essential Security Interests and Self-defense

At the time of the attacks, the United States had justified the destruction of the platforms with self-defense according to Article 51 of the UN Charter.[13] In the proceedings before the Court, however, it primarily based its arguments on Article XX, paragraph 1 (d), of the 1955 Treaty. It argued that its actions were justified to protect its essential security interests which had been adversely affected by the alleged Iranian attacks on United States and other neutral shipping in the Gulf. While the United States upheld that its attacks were covered by lawful self-defense, it maintained that »it is not necessary for the Court to rule on this point in the present case, given that United States actions fell within Article XX and were therefore not precluded by the Treaty in any event«.[14] The 1955 Treaty would constitute a self-contained regime excluding the application of general international law and Article XX would be a *lex specialis* to the principle of self-defense. The Court's separate consideration of essential security interests and self-defense in the *Nicaragua* case would show that in the present case the Court lacked jurisdiction to examine self-defense, as it only had jurisdiction on the basis of the 1955 Treaty unlike in the *Nicaragua* case with its two-fold jurisdictional basis as explained above.[15]

Iran contended that the US approach would be inconsistent with the purpose of the 1955 Treaty,[16] as it allowed that the protection of essential security interests could cover the use of force unlawful under general international law. Article XX of the 1955 Treaty, even if it was a *lex specialis*, could not circumvent peremptory rules of international law relating to the unilateral use of force. Any justification for the US attacks on the grounds of the 1955 Treaty would have to be preceded by an examination of the principle of self-defense under the general international law on State responsibility.[17] In support of this contention, Iran cited Judge Sir Robert Jennings' statement on the relationship between essential security interests and self-defense in the *Nicaragua* case that, the corresponding »Article XXI [of the 1956 Treaty] cannot have contemplated a measure that cannot, under general international law, be justified even as being part of an operation in legitimate self-defense.«[18] Further, Iran pointed out that in the *Nicaragua* case, the Court had placed particular emphasis on the justification of US action provided at the time of the attack, and that the Court's interpretation of the 1956 Treaty had indeed been preceded by a detailed examination of the law on self-defense.[19]

In its consideration of the US justification, the Court followed the order of defense arguments proposed by the United States but essentially applied the logic of the Iranian contentions. The Court began with examining whether the United States had lawfully protected its essential security interests according to Article XX, paragraph 1 (d), of the 1955 Treaty, but then quickly turned to issues of self-defense under general international law.[20] The Court confirmed its jurisprudence in the *Nicaragua* case where it had stated that actions taken in self-defense might be considered as part of the wider category of measures necessary to protect the essential security interests pursuant to the identical provision Article XXI of the 1956 Treaty between the United States and Nicaragua. In the Court's dictum, this approach supports the view that the interpretation and application of Article XX, paragraph 1 (d), of the 1955 Treaty, invoked to justify actions involving the use of armed force, would »necessarily entail an assessment of the conditions of legitimate self-defense under international

11 Separate Opinions of Judge Higgins, paras. 8-28; Judge Parra-Aranguren, paras. 1-14; Judge Kooijmans, paras. 17-35; Judge Al-Khasawneh, paras. 1-2; Judge Buergenthal, paras. 4-19; Judge Owada, paras. 2-16 and 29; see also: D. Raab, 'Armed Attack after the Oil Platforms Case', 17 *Leiden Journal of International Law* (2004), pp. 719-735; J.A. Green, 'The Oil Platforms Case: An Error in Judgment?', 9 *Journal of Conflict & Security Law* (2004), pp. 357-386; H. Rishikof, 'When Naked Came the Doctrine of »Self-Defense«: What is the Proper Role of the International Court of Justice in Use of Force Cases?', 29 *The Yale Journal of International Law* (2004), pp. 331-342.

12 For the Court's reasoning *see*: Judgment, paras. 35-38.

13 Article 51 reads: »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.«

14 Verbatim Record, CR 2003/10, p. 53. Verbatim Records are available on the Court's webpage at: http://212.153.43.18/icjwww/idocket/iop/iopframe.htm.

15 Verbatim Record, CR 12/2003, pp. 18-27.

16 Article I of the 1955 Treaty states that »There shall be firm and enduring peace and sincere friendship between the United States of America and Iran.«

17 Verbatim Record, 2003/7, pp. 51-52.

18 Verbatim Record, 2003/8, p. 16.

19 Verbatim Record, 2003/8, p. 17; 2003/16, p. 14.

20 See critical observations in: Separate Opinion of Judge Higgings, paras. 40-59; Judge Kooijmans, paras. 21-28; Judge Owada, paras. 31-41.

law«.[21] The Court followed the Iranian argument that it would be inconsistent with the purpose of the 1955 Treaty to foster firm and enduring peace and sincere friendship between the parties, if Article XX, paragraph 1 (d), could be interpreted to tolerate an unlawful use of force of one party against the other. Citing Article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties, according to which »any relevant rules of international law applicable in the relations between the parties« shall be taken into account for the interpretation of a treaty, it found that Article XX could not have been intended to operate wholly independently of the relevant rules of international law on the use of force but that the application of the latter forms an integral part of interpreting the 1955 Treaty. While recognizing that it had only jurisdiction so far as conferred by the consent of the parties, the Court was nevertheless satisfied that its jurisdiction to decide on the interpretation or application of Article XX, paragraph 1 (d), extends, where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force by reference to international law applicable to this question.[22] The Court also stated that the question whether the US measures were necessary to protect its essential security interests overlaps with the question of their validity as acts of self-defense.[23] After an examination of the law on self-defense, the Court concluded that the US actions would not be justified as necessary pursuant to Article XX, paragraph 1 (d), of the 1955 Treaty »since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defense, and thus did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty.«[24] The Court thus clarified that, as a principle, a treaty regime that allows for certain protective measures cannot depart from the general international law on the use of force.[25]

In respect of the conditions for lawful individual self-defense, the Court pointed to its jurisprudence in the *Nicaragua* case and stated that the United States would have to show that it was victim of an armed attack for which Iran was responsible. In this context, the United States would be required to distinguish »the most grave forms of the use of force (those constituting an armed attack) from other less grave forms«.[26] The Court also reaffirmed the principles of necessity and proportionality and required that the platforms were a legitimate target open to attack in the exercise of self-defense.[27]

5. Evidentiary Issues

In its argumentation on general international law on the use of force, the United States had justified the destruction of the platforms with self-defense as a response to the specific incidents involving the *Sea Isle City* and the *Samuel B. Roberts* and, more generally, as responding to a series of alleged Iranian attacks against US and other neutral shipping.

5.1 Missile attack on the Sea Isle City

With respect to the *Sea Isle City*, the United States claimed that it had been the victim of an armed attack when Iran allegedly fired a missile at the ship that lay anchored in Kuwait's territorial sea. The United States alleged that the missile was a land-launched HY-2 (or Silkworm) missile shot from a distance of about 95 km from the Fao peninsula close to the Iraqi-Iranian border. In support of its claim, it produced various types of evidence. The most prominent was satellite imagery of several missile sites on the Fao peninsula, which were allegedly under Iranian control at the time of the attack. These images were complemented by a detailed expert analysis.[28] In addition, the United States produced an expert statement analyzing missile fragments found in similar incidents in 1987, as well as the testimony of two Kuwaiti officers reporting that missiles had been launched from Iranian-held territory in the Fao area in 1987. One officer also claimed to have seen the path of the specific missile that hit the *Sea Isle City*.[29] The United States found that it had thereby discharged its burden of proof, in particular as the missile site was allegedly located in an area under exclusive Iranian control. Referring to the Court's jurisprudence in the *Corfu Channel* case, the United States argued that, similar to the United Kingdom with respect to alleged Albanian mine-laying in its territorial sea, also the United States »should be allowed a more liberal recourse to inferences of fact and circumstantial evidence« with respect to Iranian missile launching.[30]

Iran countered that the United States could not rely on the looser evidentiary standards set by the *Corfu Channel* case.[31] The sophisticated US surveillance technology and potential physical evidence of missile fragments should have enabled the United States to produce direct evidence which it did not. Further, Iran argued, unlike in the *Corfu Channel* case where there was certainty about the type of mine and location of explosion, the exact type of missile and the location from where it was fired remained unclear in this case. Iran contended that the United States had not sufficiently proven that the missile was Iranian. In particular, it claimed that the US satellite imagery was inconclusive. Iran further declared that the missile sites it acknowledged to have occupied in 1986 were inoperable throughout the occupation period, as the area was subject to fierce fighting. Moreover, Iran argued, the testimony of the Kuwaiti officers was partly inconsistent and based on hearsay ten years after the attack.[32] Instead, it suggested with reference to previous incidents that Iraq allegedly fired the missile motivated by its interest to internationalize the conflict through attacking neutral vessels in the Gulf.[33] According to Iran,

21 Judgment, para. 40; Buergenthal, paras. 20-32, rejecting the Court's jurisdiction relating to self-defence.
22 Judgment, paras. 41-42.
23 Judgment, para. 43.
24 Judgment, para. 78.
25 See also: A. Orakhelashvili, 'Current Developments: Oil Platforms (*Islamic Republic of Iran v. United States of America*), Merits, Judgment of 6 November 2003', 53 *International and Comparative Law Quarterly* (2004), pp. 757-759.
26 *I.C.J. Reports 1986*, p. 101, para. 191.
27 Judgment, para. 51.
28 Verbatim Record, CR 2003/9, pp. 44-53.
29 Verbatim Record, CR 2003/9, pp. 40-42.
30 Rejoinder, para. 1.42; see also: *I.C.J. Reports* 1949, p. 18.
31 Verbatim Record, CR 2003/6, p. 57.
32 Verbatim Record, CR 2003/6, pp. 58-62.
33 Verbatim Record, CR 2003/6, pp. 64-65.

Iraq possessed modified Silkworm missiles that substantially exceeded the standard range of 95 km and could have been fired from Iraqi missile sites located further west in the Fao area. Contrary to the US statement,[34] such missiles could have taken a turn during their flight leading witnesses to misjudge their point of origin.[35]

5.2 Mine-laying and the Samuel B. Roberts

The United States also claimed it responded in self-defense to a second individual attack, namely the mining of the *Samuel B. Roberts*. In this context, the parties disputed whether the mine that hit the vessel was of Iranian origin, as the United States asserted, or rather laid by Iraq, as suggested by Iran. The United States referred to reports of international shipping information services according to which it was generally known that Iran was undertaking a systematic mine-laying campaign against neutral shipping, a policy also announced by senior Iranian officials. That the *Samuel B. Roberts* was indeed hit by an Iranian mine could be assumed, according to the United States, as several Iranian mines had been discovered in the vicinity a few days after the attack and as the Iranian vessel *Iran Ajr* was caught in the process of mine-laying a few days earlier.[36] Iran, on the other hand, pointed to its general interest in keeping the Gulf open to neutral shipping as its oil trade, unlike Iraq's, was completely dependent on shipping. It further contended that the United States had not discharged its burden of proof that Iran had laid the mine to hit the *Samuel B. Roberts*.[37] Iran claimed to have laid mines only for defensive purposes in the northern part of the Gulf. Contrary to the US contention that the mine in question was necessarily a moored mine,[38] Iran suggested that it could also have floated down from the war zone in the North, instead of having been anchored in the international waters where the *Samuel B. Roberts* was hit. Further, it argued that the United States was mistaken about the *Iran Ajr* incident, as the vessel would merely have transported mines.[39]

Both parties referred to the Court's findings in the *Corfu Channel* case relating to matters of evidence to support their contentions. The United States stressed that in that case the Court had not determined that Albania itself had laid the mines only because the United Kingdom had not furnished any evidence in support of that assertion. With respect to the question whether Iran laid the mine that hit the *Samuel B. Roberts*, the United States argued that it produced much more evidence than the United Kingdom at the time. Therefore, the Court should make a direct finding concerning the Iranian origin of the mine which it was not prepared to do as regards the alleged Albanian origin in the *Corfu Channel* case.[40] Iran, on the other hand, claimed that the Court had only confirmed Albanian responsibility for the mine-laying on the basis of circumstantial evidence in connection with the existence of an Albanian minefield discovered in the vicinity, because there was certainty about the exact type of the mine. This, however, was not the case in respect to the mining incident involving the *Samuel B. Roberts,* Iran held.[41]

5.3 The Court's findings

After »having examined with great care the evidence and arguments presented on each side«, the Court found »that the evidence indicative of Iranian responsibility for the attack on the *Sea Isle City* is not sufficient to support the contentions of the United States«.[42] At the outset, it noted that the United States had not produced any direct evidence, such as recovered fragments of the type of missile that hit the vessel. With respect to the presented satellite imagery and corresponding expert evidence aiming to show that the missile was fired from Iranian-held territory in the Fao area, the Court found that the images were not »sufficiently clear« to establish the point despite the expert reports offered by both parties. The Court did not rely on the witness evidence provided by the United States either. It objected to the fact that the testimony of the Kuwaiti officer was given ten years after the incident, and that his statement was inconclusive concerning the launching and collision point of the missile and that it contains some discrepancy between the English and Arabic text.[43] As regards the possible range of Silkworm missiles and their capacity to take turns, the Court avoided any decision on the parties' dispute. Instead, it pointed again at the lack of direct evidence as to the general type of missile that hit the *Sea Isle City* and deemed the US evidence on the nature of other missiles fired at Kuwaiti territory at the time »suggestive, but no more«.[44] The Court also dismissed as sufficient evidence a general statement of the Iranian President some time before the incident that threatened to attack the United States if the latter continued to be involved in the conflict. Finally, the Court observed that the assumptions by international shipping services as to Iranian responsibility for the attack were secondary evidence that did not disclose the original source of information. In this context, it cited its finding in the *Nicaragua* case according to which »such reports, however numerous, will in such case have no greater value as evidence than the original source«.[45]

With much less explanation, the Court found that the United States had not discharged its burden of proof in respect of the mining attack against the *Samuel B. Roberts*.[46] It simply noted that mines had been laid at that period by both Iran and Iraq. This fact would make evidence of Iranian mine-laying in other instances inconclusive as to Iran's alleged responsibility for the particular mine that the *Samuel B. Roberts* struck. The discovery of moored mines in the same area with serial numbers matching other Iranian mines, particularly those found on the *Iran Ajr*, would be »highly suggestive, but not conclusive.«

34 Verbatim Record, CR 2003/9, p. 43.
35 Verbatim Record, CR 2003/6, p. 59; Reply, p. 73.
36 Verbatim Record, CR 2003/9, pp. 26-36.
37 Verbatim Record, CR 2003/7, pp. 18-20.
38 Verbatim Record, CR 2003/17, pp. 15-16.
39 Verbatim Record, CR 2003/15, pp. 34-38.
40 Verbatim Record, CR 2003/13, pp. 25-26.
41 Verbatim Record, CR 2003/15, p. 57.
42 Judgment, para. 61.
43 Judgment, para. 58.
44 Judgment, para. 59.
45 Judgment, para. 60.
46 Judgment, para. 71.

It is noteworthy that the Court in general dismissed without much reasoning the evidence prepared with great care to justify the US attacks. Several Judges deplored that the Court had not spelt out in further detail its standard of proof for the evidence submitted despite the fact that the outcome of the case depended to a large extent on evidentiary questions.[47] The judgment does not provide much guidance with respect to the parties' contentions relating to the standards of proof set by the *Corfu Channel* case. Further, it reveals a certain tendency to shun in-depth examination particularly of the technical evidence submitted by the parties. With respect to the missile attack on the *Sea Isle City*, the Court was not explicit whether it allowed a more liberal recourse to circumstantial evidence, for example concerning the missile-launching site, on the grounds that one party had exclusive control over the area in question.[48] Moreover, when examining the offered evidence, the Court refrained from any detailed finding on the evidentiary value of satellite imagery despite its elaborate presentation and supplementary expert information by the United States. Instead, it mainly focussed on the witness evidence which it rejected. Similarly, the Court avoided an in-depth examination of the evidence relating to the technical characteristics of the missile by pointing at the lack of any direct evidence for the type of missile that hit the *Sea Isle City*. In case of the *Samuel B. Roberts* incident, the Court primarily focused on the concurrent Iraqi and Iranian mining of international waters in the Gulf. Although a minefield was discovered shortly after the mining incident in the present case as in the *Corfu Channel* case, the Court came to a different conclusion concerning the alleged Iranian mine-laying than with respect to the Albanian responsibility for mining. While the Court did not provide any explanation for its reasoning, an important difference may explain the difference: In the latter case, the British ship struck a mine in Albania's territorial sea over which Albania had exclusive control, whereas the *Samuel B. Roberts* incident took place in international waters. After the Court concluded that mines were laid by both belligerents in the Gulf and that therefore evidence of other Iranian mine-laying operations was not conclusive as to Iranian responsibility for the *Samuel B. Roberts* incident, the Court did not find it necessary anymore to examine in detail the circumstantial evidence offered by the United States. As a consequence, it remains unclear what relevance the Court attaches to the existence of a minefield that has been discovered around the same time of the incident and can be attributed to the concerned State.

6. Armed Attack and Individual Incidents

Besides factual issues, the parties disputed the legal requirements for lawful self-defense. The first issue was whether an attack against an individual merchant vessel can constitute an »armed attack« in the sense of Article 51 of the UN Charter against the flag State. Iran denied this on the grounds that a such an attack would not be directed against that State.[49] If military action occurs outside a State's territory, Iran maintained, the attacked object must be an external manifestation of that State to make it a victim State entitled to self-defense. According to Iran, this would be the case with armed forces or warships, but not with a commercial ship. In support, it referred to Article 3 (d) of the General Assembly resolution 3314 concerning the Definition of Aggression on which the Court had relied in the *Nicaragua* case as an expression of customary international law in determining whether Nicaragua had committed an armed attack triggering the right to self-defense.[50] Iran further argued that, given that the *Sea Isle City* was hit in Kuwait's territorial waters, Kuwait but not the United States as flag State could possibly be considered as the victim of an armed attack. As a consequence, the United States could neither claim to have acted in individual, nor collective self-defense as Kuwait had not requested the United States to do so. The United States, on the other hand, contended that the flag State and the State whose territory was violated have a concurrent right to exercise their right to self-defense.[51] Further, it held that attacks against individual commercial ships could trigger the right to self-defense, since they would belong to the external manifestations of a State similar to embassies.[52]

The second contentious point concerned the question whether Article 51 of the Charter requires an armed attack that is specifically targeted against a particular State. Pointing at the generally restrictive approach of the Charter with respect to exceptions to the prohibition of the use of force, Iran affirmed this. It could not be said that the attacks on the *Sea Isle City* and the *Samuel B. Roberts* had been directed against the United States, as neither vessel had been specifically targeted. According to Iran, a missile shot from a distance of about 100 km into Kuwait City's harbor could not have been able to distinguish between a US and another State's flag. The only State that could claim to be attacked would be Kuwait but not the United States.[53] Iran also denied that there was a specific mining attack against the *Samuel B. Roberts*. Mining in armed conflict, it pointed out, was subject to certain precautions prescribed by the *ius in bello*. If restrictions on the use of mines were not respected by one of the belligerents, this would not mean that the mining in question constituted an armed attack against the State whose ship happened to hit one of the mines. In other words, a violation of the *ius in bello* through unlawful mining would be irrelevant with respect to the question of whether the alleged mining constituted an armed attack in accordance with the *ius ad bellum*.[54] Iran stated that the situation might be different in case of targeted mine-laying. But it said that the United States had only produced indirect evidence as to the alleged Iranian origin of the mine but nothing to demonstrate that the mine-laying was specifically directed against the *Samuel B. Roberts*.[55] The United States rejected the requirement of a specifically targeted armed attack against a particular vessel. It stressed that it would be impossible for the law of self-defense not to apply to situations in which highly dangerous weapons

47 Separate Opinion of Judge Higgins, paras. 30-39; Judge Buergenthal, para. 41; Judge Owada, paras. 47-52.
48 But Orakhelashvili seems to draw such conclusion (see note 25above), pp. 759-760.
49 Verbatim Records, CR 2003/7, pp. 43-45.
50 *I.C.J. Reports 1986*, p. 93, para. 195.
51 Verbatim Record, CR 2003/18, pp. 25-27.
52 Rejoinder, para. 5.20.
53 Verbatim Record, CR 2003/15, p. 56.
54 Verbatim Record, CR 2003/7, p. 45.
55 Verbatim Record, CR 2003/15, pp. 57-58.

such as missiles or mines are used indiscriminately.[56] Otherwise, the United States contended, the right to self-defense was being interpreted too restrictively and victim States protected insufficiently.[57]

Despite the parties' detailed contentions, the Court did not clearly pronounce on the applicable criteria for the existence of an armed attack in accordance with Article 51 of the UN Charter. This was criticized by several Judges who called the Court's manner of dealing with the issue half-hearted and a missed opportunity.[58] The judgment nevertheless contains some hints that an armed attack needs to be specifically targeted against a State.[59] By noting that the missile that hit the *Sea Isle City* was fired from a distance of more than 100 km and only programmed to hit some target in the Kuwaiti waters, the Court expressed that it took seriously the Iranian argument requiring a specifically targeted attack. Similarly, with respect to the question whether mining can constitute an armed attack, the Court did consider the fact that it had not been established that alleged mine-laying of the *Iran Ajr* »was aimed specifically at the United States«, and that the mine that hit the *Bridgton*, one of the damaged US ships on which the counter-claim was based, »was laid with the specific intention to harm that ship, or other United States vessels«.[60]

With respect to the controversial issue whether the right to self-defense can be triggered by an attack against an individual vessel, however, the Court remained ambiguous, if not contradictory. In two instances, the judgment contains statements which could possibly be interpreted to relate to this issue. Firstly, the Court's finding in paragraph 72 that it »does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defense'« could be viewed to have tacitly excluded attacks against individual commercial vessels from the scope of self-defense, even if the Court did not refer to the General Assembly's definition of aggression. Secondly, the Court's observation in paragraph 64 that »the *Texaco Caribbean,* whatever its ownership, was not flying a United States flag, so that an attack on the vessel is not in itself to be equated with an attack on that State« could be read in such way that the Court in general does consider the possibility that an attack against a single commercial ship may constitute an armed attack against the flag State. As the interpretations of these findings are contradictory, however, it appears that the Court did not intend to comment at all on the question whether forcible action against individual merchant vessels may constitute an armed attack against the flag State. Instead, it seems that the Court rejected the claim for armed attacks in connection with the two incidents on narrow grounds, *i.e.,* by pointing at the lack of sufficient evidence and by denying that the attacks were specifically targeted.

56 Rejoinder, p.157; Verbatim Record, CR 2003/12, p. 48.
57 Verbatim Records, CR 2003/18, p. 26.
58 Separate Opinion of Judge Simma, para. 6; Judge Elraby, para. 1.2; Judge Al-Khasawneh, para. 10.
59 Judgment, paras. 64 and 72; compare also Raab's conclusions on a 'mental element' (see note 11 above) p. 728.
60 Judgment, para. 64.

7. Continuous Armed Attack

In addition to the specific incidents involving the *Sea Isle City* and the *Samuel B. Roberts,* the United States claimed that, by launching a systematic campaign with mines, missiles and other weaponry against US and other neutral shipping in the Persian Gulf, Iran had committed a series of attacks amounting to an armed attack in a more general and continuous sense exceeding the scope of the individual incidents. Being strategically located, the platforms would have played a central role as military support facilities in this pattern of attacks.[61] In support of its contentions, the United States cited reports of international shipping information services and documents seized from the Iranian mine-laying vessel *Iran Ajr*.

Iran objected to this argumentation on factual and legal grounds. In terms of facts, it held that the United States had not sufficiently proven that it had been the victim of a series of Iranian armed attacks, as the US argumentation was merely based on general allegations and unsubstantiated reports.[62] Further, most of the mentioned incidents, with the exception of the *Samuel B. Roberts* and, possibly, two reflagged Kuwaiti vessels including the *Sea Isle City,* did not involve US flagged vessels and thus could not be taken to contribute to a continuous armed attack against the United States.

In terms of law, Iran argued that Article 51 of the Charter has to be interpreted restrictively. Therefore, the concept of a continuous armed attack comprised of several smaller-scale incidents was an invalid legal construction and each incident would have to be considered on its own merits.[63] In line with the Court's jurisprudence in the *Nicaragua* case,[64] individual attacks that do not reach a certain threshold of force, as, according to Iran, missile or mine attacks against single vessels, could not be added up to amount to one big armed attack triggering the right to self-defense. Similarly, individual attacks that *per se* have been terminated could not be linked together to construe an ongoing armed attack required to respond in self-defense. Referring to the practice of the Security Council in the Arab-Israeli conflict,[65] Iran maintained that the law of self-defense requires that military action is in principle a direct response to a specific ongoing armed attack in contrast to the state of war where force could be used in a less restrictive way.[66] The US justification based on the concept of a continuous armed attack, Iran contended, would violate these requirements and thereby unduly undermine the general prohibition of the use of force prescribed by the UN Charter. The United States, on the other hand, asserted that the Iranian argumentation was too restrictive. It argued that, either individually or in their entirety, small-scale attacks could constitute armed attacks according to Article 51 of the Charter. Having to look at each incident individually would provide a right for any attacking State freely to conduct sneak attacks beyond the reach of any viable legal regime of self-defense.[67]

61 Verbatim Record, 2003/10, pp. 37-41.
62 Verbatim Record, CR 2003/7, pp. 30-33.
63 Reply and Defence to counter-claim, para. 7.15 ; Verbatim Record, CR 2003/7, pp. 35-40.
64 *I.C.J. Reports 1986*, p. 101, para. 191.
65 Security Council resolutions 228 (1966), 248 (1968), 256 (1968), 265 (1969), 270 (1969), 332 (1973).
66 Reply, paras. 7.23-24 ; Verbatim Record, CR 2003/7, p. 39.
67 Rejoinder, para. 5.19; Verbatim Record, CR 2003/7, p. 51.

Notwithstanding the significance of the issue, the Court did not comment on the parties' legal arguments concerning the concept of a continuous armed attack but dismissed the US argumentation on factual grounds. The Court examined the different incidents individually and emphasized that »Even taken cumulatively, … these incidents do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, qualified as a 'most grave' form of the use of force« that, in contrast to »other less grave forms«, would constitute an armed attack.[68] Thereby, the Court avoided setting a precedent that links individual small-scale attacks together which thereby reach the threshold for the use of force required for an armed attack in the sense of Article 51 of the Charter.[69]

8. Necessity

With reference to the Court's jurisprudence in the Advisory Opinion on the *Threat or Use of Nuclear Weapons* and in the *Nicaragua* case,[70] Iran submitted that self-defense only covers measures necessary to respond to an ongoing armed attack. Iran cited Professor Ago's statement on the principle of necessity in his Report to the International Law Commission's draft articles on State responsibility, according to which »the reason for stressing that action taken in self-defense must be necessary is that the State attacked … must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force.«[71] It would follow from this that, according to Iran, lawful defensive action must be an on-the-spot reaction aimed at protection against an armed attack that has not yet been terminated. Otherwise, the forceful action would not constitute self-defense but unlawful retaliation.[72] In case of the *Sea Isle City* and the *Samuel B. Roberts* incidents, Iran held that both attacks had already been terminated when the United States destroyed the platforms several days after the incidents.

The United States objected to this reasoning and contended that the right to self-defense was of no use, if it was limited to repel an ongoing armed attack. If this were to be the case, the attacked State would not have any possibility to prevent missile or mining attacks. Further, the United States submitted that the requirement of an on-the-spot reaction without a moment of deliberation would either make the right to self-defense impotent or risk escalating the conflict, as the defendant State was precluded from any reasonable attempt to determine the responsibility for the attack, whether any peaceful alternatives to the use of force remain, and what risks of collateral civilian casualties exist.[73] In addition, the United States claimed that State practice, in particular the developments following the attacks on 11 September 2001, confirmed the less restrictive US interpretation on self-defense.[74] The Security Council had declared the attacks against the World Trade Center a threat to the peace although they had ended already. Thereby, the United States argued, the Council had acknowledged the need for protection against the continuing threat by terrorist attacks which could not have been achieved with non-forceful measures. Iran rebutted that the terrorist attacks against the World Trade Center could not be compared with the small-scale missile and mining incidents in the Gulf, in particular also because the involvement of the Security Council would make a difference.[75]

The second main argument of the parties relating to the principle of necessity concerned the question whether the United States had chosen the platforms as a legitimate target in response to the alleged Iranian missile and mining attacks. Iran denied this and claimed that the platforms did not have anything to do with the attacks on the *Sea Isle City* and the *Samuel B. Roberts*. The law on self-defense, Iran argued, would require that the military action is directly related to the armed attack requiring a direct and immediate link between the defense and the attack.[76] Had the United States really intended to respond to the *Sea Isle City* and *Samuel B. Roberts* incidents as it claimed, it should have targeted the missile sites or the mine-laying boats as the source of the attacks, but not the platforms which were located several hundred miles away. Instead, Iran alleged that the United States did not destroy the platforms in self-defense but to inflict as much economic damage on Iran as possible. This conclusion was to be drawn, according to Iran, because the United States had destroyed the Salman and Nasr complexes in the course of a large military offensive against Iranian forces in the Gulf coordinated with a major Iraqi offensive in the North, the so-called »Operation Praying Mantis« conceived ten months ago.[77] Further, because the United States had destroyed the Reshadat R-4 platform as a target of opportunity not included in the original operations plan.[78]

The United States countered that the destruction of the platforms was necessary to defend its security interests in the Gulf and to stop further Iranian attacks against US and other neutral shipping. With respect to the Iranian same source argument, it held that this would relate to the attacking State in general, not the specific site from which the armed attack was started.[79] In determining how best to respond to an armed attack, the United States objected to the Iranian contention that the existence of an armed attack has to be established solely on the basis of objective criteria.[80] Instead, it argued that the victim State has to evaluate all elements of self-defense, i.e., the existence of an armed attack as well as the requirements

68 Judgment, paras. 51 and 64. On proportionate counter-measures against small-scale attacks: Separate Opinion of Judge Simma, para. 12.
69 Note that some commentators concluded that the Court accepted the 'accumulation of events' theory in principle: Raab (see note 11 above), p. 732; Green, *ibid.*, p. 381; A. Laursen, 'The Judgment by the International Court of Justice in the Oil Platforms Case', 73 *Nordic Journal of International Law* (2004), p.160. In the present author's opinion, the Court's language should, however, be interpreted more neutrally.
70 *I.C.J. Reports 1996* (I), p. 245, para. 41; *I.C.J. Reports 1986*, p. 84, para. 176.
71 R. Ago, *Addendum to the Eighth Report on State Responsibility*, *YILC* 1980 (II), p. 69, para. 120.
72 Verbatim Record, CR 2003/15, p. 58.
73 Verbatim Record, CR 2003/12, pp. 49-50.
74 Verbatim Record, CR 2003/12, p. 49; CR 2003/18, p. 29.
75 Verbatim Record, CR 2003/15, p. 59.
76 Verbatim Record, CR 2003/7, p. 46.
77 Verbatim Record, CR 2003/7, pp. 10-17.
78 Reply and Defence to counter-claim, paras. 4.74-83.
79 Rejoinder, para. 5.44.
80 Reply and Defence to counter-claim, para. 7.15; Verbatim Record, CR 2003/7, pp. 36-37.

of necessity and proportionality, on a case-by-case basis in the light of all governing circumstances and information available.[81] In line with this reasoning, the United States maintained that it had deliberately targeted the platforms as a necessary and proportionate response to the alleged Iranian attacks. Eyewitness accounts, reports of international shipping information services and documents seized from the *Iran Ajr* would demonstrate, the United States argued, that the platforms were in reality not used for commercial but for military activities by providing landing pads for helicopter attacks and serving as a communications, monitoring and reporting facilities integrated into the Iranian Navy.[82]

Iran, on the other hand, denied that the platforms had been used for offensive militarypurposes. It claimed that only a very small military presence had been stationed on the platforms with the sole function to defend the exposed offshore installations against Iraqi attacks. According to Iran, the US material did not prove anything exceeding normal defensive actions to be expected at the time of war, in particular no concrete link between any support activity on the platforms and any of the alleged attacks against US and other neutral shipping.[83]

Similar to its approach relating to the requirement of an armed attack, the Court was reluctant to engage in much of the parties' legal argumentation on the principle of necessity but rejected the US contentions primarily on factual grounds. The Court did, however, follow the Iranian argument relating to the margin of appreciation by the victim State for the existence of an armed attack when it re-emphasized that »the requirement of international law that measures taken avowedly in self-defense must have been necessary for that purpose is strict and objective, leaving no room for any 'measure of discretion'«.[84] Besides, the Court referred to its jurisprudence in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons and the Nicaragua* case and concluded that, in as far as nature of the target is concerned, it was »not sufficiently convinced that the evidence available supports the contentions of the United States as to the significance of the military presence and activity on the … oil platforms«. As regards the *Sea Isle City* and *Samuel B. Roberts*, the Court was »not satisfied that the attacks on the platforms were necessary to respond to these incidents«.[85] In this context, the Court placed particular importance to the fact that the United States had not previously »complained to Iran of the military activities of the platforms, in the same way as it complained repeatedly of minelaying and attacks on neutral shipping, which does not suggest that the targeting of the platforms was seen as a necessary act« and that the Reshadat R-4 platform had been attacked as a target of opportunity. By merely confirming its previous jurisprudence and mainly focusing on factual issues, the Court refrained from further developing criteria for determining which action can be considered as necessary self-defense. Instead, it found that »The conditions for the exercise of the right of self-defence are well settled.«[86]

81 Rejoinder, paras. 5.12-13.
82 Verbatim Record, 2003/10, pp. 37-47.
83 Verbatim Record, CR 2003/7, pp. 21-26.
84 Judgment, para. 73.
85 Judgment, para. 76.
86 *Ibid.*

9. Proportionality

Iran also maintained that the US action violated the principle of proportionality. The *Sea Isle City* and the *Samuel B. Roberts* had only been damaged with six and respectively ten persons injured and an estimated cost of repair of about USD 50 million. In contrast thereto, the platforms had been completely destroyed, their productive capacity was lost for several years and a serious blow given to the already war-strained Iranian economy. According to Iran, the US action had been excessive.[87] The United States, on the other hand, contended that its actions were proportionate.[88] It stated that the question of excessiveness would have to be judged in the light of what the defensive action was supposed to achieve. The fact that the Iranian attacks against US and other neutral shipping would have significantly decreased after the destruction of the platforms would prove the United States right. Moreover, had the alleged Iranian attacks been allowed to continue, the economic damage and disruption and the risk to the peace in the region would have been far greater than what was caused by the limited US action.

The Court held that the US attacks on the Reshadat and Resalat platforms could have been deemed proportionate if the conditions for lawful self-defense had been met. But in respect of the destruction of the Salman and Nasr platforms, the Court clearly stated: »As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither 'Operation Praying Mantis' as a whole, nor even that part of it that destroyed the … platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defense.«[89] Once more, like with the previous requirements, it is apparent that the Court focused on facts rather than standards that further elaborate the principle of proportionality.

10. Final Remarks

The judgment in the *Oil Platforms* case is a remarkable statement by the principal judicial organ of the United Nations emphasizing the limits to the use of force and the role of the UN Charter at a time when the traditional law on self-defense is being challenged by political events and legal writing. Even if its operative paragraphs also indicate the Judges' difficulties in reaching consensus, considerations of *Rechtspolitik* nevertheless seem to have guided their deliberations and acceptance of serious procedural irregularities which otherwise would not have passed.[90]

It is true that the Court did not pronounce in full clarity on the legal requirements for lawful self-defense and thus failed to further develop its previous jurisprudence on the issue. However, the Court did follow a restrictive approach to the

87 Verbatim Record, CR 2003/7, pp. 48-49.
88 Verbatim Record, CR 2003/12, pp. 51-52.
89 Judgment, para. 77.
90 Compare: Separate Opinion of Judge Simma, intro. and paras. 5-6; Judge Al-Khasawneh, para. 8.

unilateral use of force and did not confirm any of the US arguments interpreting the law on self-defense more loosely. Not only emphasized the Court that the general international law on the use of force cannot be circumvented by treaty provisions allowing for measures to protect the security interests of States. It also re-affirmed the principles of necessity and proportionality and clarified that a State must base its decision to respond in self-defense to an armed attack on strict and objective criteria. Furthermore, the Court dealt with the requirement of an existing armed attack in a restrictive way. On the one hand, it set the standard of proof to be met for the assumption of an armed attack in the absence of direct evidence very high. By rejecting the circumstantial evidence submitted with great elaboration by the United States, the Court made it very difficult for a State to claim facts that could give rise to the use of lawful force but, because of their nature, can hardly be proven with direct evidence, such as launching, production or storage sites of modern weapons technology in another State's territory. Certainly, the Court did not deem the offered satellite and other photographic evidence to be sufficiently strong evidence to cause a change of onus of proof to the effect that the alleged attacker had to prove the negative, *i.e.*, its innocence**.** On the other hand, the Court refrained from setting a precedent that embraces the concept of a continuous armed attack that allows a response in self-defense to a series of small-scale attacks without being specifically linked to the individual incidents. It thereby avoided that the requirement of an ongoing armed attack is unduly stretched and the general prohibition of the use of force undermined.

Of course, the judgment only has binding force *inter partes*. But States as scholars do tend to quote judgments of the Court as authoritative decisions. With its judgment in the *Oil Platforms* case, the Court has nevertheless clarified that it continues to interpret the existing international law on the use of force restrictively in spite of the debate on its transformation through the recent military interventions in the Middle East and corresponding claims in favor of the doctrine of pre-emptive strikes.

Commentators' views on the judgment have been diverse. For those who welcomed the decision, the Court acted as the »'general guardian of legality' within the international community in its entirety.«[91] Despite the problematic methodology, they maintained that the judgment strengthened international law and they hoped that it would help to end the current trivialization of the unlawful use of force in international relations.[92] More criticial voices argued that the Court's political approach had undermined its legitimacy and created uncertainty as to the role of international adjudication.[93] In their view, the Court had spelt out legally unsupported limitations on the right to self-defense without developing positive criteria to be used to counter pin-prick attacks in the maritime context or threats posed by terrorism and weapons of mass destruction. Such limitations would undermine states' ability to deter aggression and thereby encourage, rather than discourage, the use of force. In the view of these writers, the judgment did not increase the Court's appeal to states.[94]

The criticism is not new that the international legal system cannot always be enforced, especially against powerful States. However, it seems that States who want to use force in lawful self-defense continue to face the choice between either having to conform to a restrictive approach including strict standards for the appreciation of evidence, or to risk condemnation by the Court. The recent revelations concerning the lack of sufficient evidence relating to weapons of mass destruction in pre-war Iraq highlight the necessity of maintaining a tight stance towards the use of force.

91 D. Momtaz, 'Did the Court Miss an Opportunity To Denounce the Erosion of the Principle Prohibiting the Use of Force?', 29 *The Yale Journal of International Law* (2004), p. 313.

92 Momtaz, *ibid*., Kammerhofer (see note 5 above), p. 717; Laursen (see note 69 above); Orakhelashvili (see note 25 above), p. 761.

93 Raab (see note 11 above) pp. 733-734); Green draws a similar conclusion although he also finds it desirable in many ways that the Court re-affirmed the prominence of the principle of the non-use of force, ibid., pp. 385-386).

94 Raab, *ibid*., p. 724 and 735; W.H. Taft, IV, 'Self-Defense and the Oil Platforms Decision', 29 *The Yale Journal of International Law* (2004), p. 299.