

## CASE NOTES

### CASE CONCERNING OIL PLATFORMS (ISLAMIC REPUBLIC OF IRAN V UNITED STATES OF AMERICA)\*

#### DID THE ICJ MISS THE BOAT ON THE LAW ON THE USE OF FORCE?

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##### I INTRODUCTION

On 6 November 2003 the International Court of Justice delivered its judgment on the merits in the *Case concerning Oil Platforms (Islamic Republic of Iran v United States of America)*.<sup>1</sup> The decision, handed down more than 10 years after Iran initiated proceedings, brought to a close a series of disputes between Iran and the US.<sup>2</sup> Arising out of the US attacks on Iranian oil platforms in the Persian Gulf during the 1980–88 Iran–Iraq war, this unusual case came before the ICJ as a question of alleged breaches of a 'freedom of commerce' provision in a bilateral trade agreement between the US and Iran, rather than as a dispute over the use of force under general international law.<sup>3</sup> However, it did offer the Court an opportunity to comment on the law of self-defence at a time when the *Charter of the United Nations* framework on the use of force was under significant

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\* *Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* [6 November 2003] ICJ <<http://www.icj-cij.org>> at 1 May 2004.

<sup>1</sup> *Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* [6 November 2003] ICJ <<http://www.icj-cij.org>> at 1 May 2004 ('*Oil Platforms Case*').

<sup>2</sup> See *United States Diplomatic and Consular Staff in Tehran (United States v Iran) (Merits)* [1980] ICJ Rep 3. Another case filed by Iran against the US was settled; see *Case concerning the Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)* [1996] ICJ Rep 9 (discontinued 22 February 1996). For more on disputes between the US and Iran, see Michael Koehler, 'Note and Comment: Two Nations, a Treaty, and the World Court: An Analysis of United States–Iranian Relations under the *Treaty of Amity* before the International Court of Justice' (2000) 18 *Wisconsin International Law Journal* 287.

<sup>3</sup> Pieter Bekker, American Society of International Law Insights, *The World Court Finds that US Attacks on Iranian Oil Platforms in 1987–1988 Were Not Justifiable as Self-Defense, but the United States Did Not Violate the Applicable Treaty with Iran* (2003) [1] <<http://www.asil.org/insights/insigh119.htm>> at 1 May 2004.

pressure as a result of military action in Kosovo, Afghanistan and, most recently, Iraq.<sup>4</sup>

The *Oil Platforms Case* involved a claim by Iran and a counterclaim by the US. Iran claimed that by destroying Iranian oil platforms, the US breached its obligations under the *Treaty of Amity, Economic Relations and Consular Rights*<sup>5</sup> regarding 'freedom of commerce' between the territories of the two States.<sup>6</sup> The US counterclaim contended that Iranian attacks on naval and commercial vessels in the Persian Gulf constituted a breach of the *Treaty's* provisions on 'freedom of commerce' and 'freedom of navigation'. In its judgment on the merits, the ICJ rejected both Iran's claim and the US counterclaim. Adopting a narrow view of the notion of 'freedom of commerce', the Court ruled, by 14 votes to two,<sup>7</sup> that although the US attacks were not justified under a separate provision<sup>8</sup> of the *Treaty* as 'measures necessary to protect the essential security interests',<sup>9</sup> they did not violate the *Treaty*. The Court also rejected the US counterclaim by 15 votes to one.<sup>10</sup>

This case note examines the ICJ's judgment on the merits in the *Oil Platforms Case*, with an emphasis on its implications for international law on the use of force. Part II outlines the facts of the case and reviews earlier proceedings. Part III provides an overview of the Court's ruling on Iran's claim and on the US counterclaim. Part IV explores in more detail three aspects of the judgment. The first and major focus is on the significance of this case for the law of self-defence. While the *Oil Platforms* decision confirms the traditional requirements of self-defence, this case note suggests that the Court did not go far enough in its discussion, and thus missed an opportunity to comment on and clarify other aspects of the law of self-defence. The second area examined is the Court's interpretation of the 'freedom of commerce' provision in the bilateral treaty between the US and Iran. It is suggested that the Court adopted an overly narrow and formalistic approach to this issue. The third and final area discussed

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<sup>4</sup> Note that the ICJ's comments on the law on the use of force are, strictly speaking, obiter dicta. See generally *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, 103 ('*Nicaragua Case*').

<sup>5</sup> Opened for signature 15 August 1955, US-Iran, 8 UST 899 (entered into force 16 June 1957) ('the *Treaty*').

<sup>6</sup> This bilateral trade agreement was signed in 1955 when the two States enjoyed friendly relations. Following the 1979 revolution in Iran, and the hostage crisis in Tehran, relations between the US and Iran became fractured and diplomatic relations were severed. However, the *Treaty* remained in existence.

<sup>7</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [125] <<http://www.icj-cij.org>> at 1 May 2004 (President Shi, Vice-President Ranjeva, Judges Guillaume, Koroma, Vereschetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal, Owada, Simma, Tomka and Judge ad hoc Rigaux; Judges Al-Khasawneh and Elaraby dissenting).

<sup>8</sup> Article XX(1)(d) of the *Treaty* provides that:

The present Treaty shall not preclude the application of measures ...

(d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or *necessary to protect its essential security interests* [(emphasis added)].

<sup>9</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [78] <<http://www.icj-cij.org>> at 1 May 2004.

<sup>10</sup> *Ibid* [125] (President Shi, Vice-President Ranjeva, Judges Guillaume, Koroma, Vereschetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka and Judge ad hoc Rigaux; Judge Simma dissenting).

is the Court's judicial methodology. Three aspects in particular are noteworthy: the phrasing of the *dispositif*, the Court's decision to examine the 'defence' question *before* determining whether there had been a breach of the 'freedom of commerce' provision, and its focus on the law of self-defence rather than the terms of the *Treaty* provision in ruling on that 'defence'.<sup>11</sup>

## II FACTS AND EARLIER PROCEEDINGS

The *Oil Platforms Case* arose out of a series of military incidents in the Persian Gulf in 1987 and 1988.<sup>12</sup> At that time Iran and Iraq were engaged in an armed conflict that had begun in 1980 with Iraq's invasion of Iran. From 1984 onwards, the conflict spread to the shipping routes of the Persian Gulf after both States began laying mines and attacking oil tankers travelling through the area. This 'Tanker War', as it became known, caused significant disruption to shipping, forcing commercial vessels to be re-flagged<sup>13</sup> to other States or to be escorted through the area by warships.<sup>14</sup>

The US military action against Iranian oil platforms — which formed the basis of Iran's claim — was triggered by two specific attacks on shipping. The first occurred on 16 October 1987 when the *Sea Isle City*, a Kuwaiti oil tanker re-flagged to the US, was struck by a missile near Kuwait Harbour.<sup>15</sup> Blaming Iran for the incident, the US responded on 19 October 1987 by attacking two Iranian offshore oil platforms, the Reshadat and Resalat complexes. The US claimed to be acting in self-defence.<sup>16</sup> The second incident occurred on 14 April 1988 when the US frigate, *Samuel B Roberts*, was damaged by a mine in international waters near Bahrain.<sup>17</sup> The US again attributed responsibility for the attack to Iran, and again claimed self-defence as a justification for attacking the Salman and Nasr oil platforms four days later.<sup>18</sup>

On 2 November 1992 Iran filed an application in the ICJ against the US over the destruction of the oil platforms. Its application was based not on general international law on the use of force — as the US lack of consent to jurisdiction

<sup>11</sup> The 'defence' question concerned art XX(1)(d) of the *Treaty*, reproduced above n 8: see *Oil Platforms Case (Merits)* [6 November 2003] ICJ [32]–[49] <<http://www.icj-cij.org>> at 1 May 2004.

<sup>12</sup> For a more detailed account of the factual background see *Oil Platforms Case (Merits)* [6 November 2003] ICJ [23]–[26] <<http://www.icj-cij.org>> at 1 May 2004.

<sup>13</sup> 'Re-flagging' involves giving a new registered nationality to a ship (or aircraft).

<sup>14</sup> For more on events in the Gulf during the Iran–Iraq war see Christine Gray, 'The British Position in Regard to the Gulf Conflict' (1988) 37 *International and Comparative Law Quarterly* 420; Christine Gray, 'The British Position with Regard to the Gulf Conflict (Iran–Iraq): Part 2' (1991) 40 *International and Comparative Law Quarterly* 464. See also *Oil Platforms Case (Merits)* [6 November 2003] ICJ [23]–[24] <<http://www.icj-cij.org>> at 1 May 2004.

<sup>15</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [25] <<http://www.icj-cij.org>> at 1 May 2004.

<sup>16</sup> *Ibid* [25]–[26], [48]. The US reported its actions to the UN Security Council as self-defence. See *Letter from the Permanent Representative of the United States to the United Nations addressed to the President of the Security Council*, UN Doc S/19219 (19 October 1987).

<sup>17</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [25] <<http://www.icj-cij.org>> at 1 May 2004.

<sup>18</sup> *Ibid* [65]–[67]. The US again reported its actions to the UN Security Council as self-defence. See *Letter from the Acting Permanent Representative of the United States to the United Nations addressed to the President of the Security Council*, UN Doc S/19791 (18 April 1988).

would have prevented the Court from proceeding on that ground — but rather on the *Treaty*.<sup>19</sup> Article XXI(2) of the *Treaty* contained a compromissory clause that Iran relied on as the basis of the Court's jurisdiction. This clause provided for disputes concerning the 'interpretation or application of the present Treaty' to be submitted to the ICJ if they could not be resolved through other peaceful means.<sup>20</sup> Iran claimed that the US action in destroying the oil platforms constituted a breach of three *Treaty* provisions, including art X(1), which stated that '[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation'.<sup>21</sup>

On 16 December 1993 the US filed preliminary objections to Iran's application, arguing that the ICJ lacked jurisdiction, primarily because the *Treaty* had no application to matters involving the use of force.<sup>22</sup> This was rejected by the ICJ in its judgment on preliminary objections of 12 December 1996. The Court ruled that '[m]atters relating to the use of force are ... not *per se* excluded from the reach of the Treaty of 1955'.<sup>23</sup> Further, the Court found that there was a dispute between the US and Iran as to the 'interpretation and application' of art X(1) of the *Treaty* and that this dispute fell within the scope of the compromissory clause. As a result the Court concluded that it had jurisdiction to hear Iran's claim.<sup>24</sup>

On 23 June 1997 the US filed a counterclaim alleging that Iran had also breached art X(1) of the *Treaty* by attacking and disrupting shipping in the Persian Gulf during 1987 and 1988. Iran objected to the counterclaim, arguing that it broadened the scope of the dispute and therefore did not satisfy the requirements of art 80(1) of the *Rules of the International Court of Justice*.<sup>25</sup>

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<sup>19</sup> The ICJ's jurisdiction is, of course, dependent on the consent of the States involved in the dispute. See *Statute of the International Court of Justice* art 36. See also *Oil Platforms Case (Merits)* [6 November 2003] ICJ [42] <<http://www.icj-cij.org>> at 1 May 2004.

<sup>20</sup> Article XXI(2) of the *Treaty* provides that

[a]ny 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.

<sup>21</sup> The other two provisions of the *Treaty* that Iran claimed had been breached by the US were art I (peace and friendship between the two States) and art IV(1) (fair and equitable treatment of nationals and companies). The Court rejected Iran's arguments on these two provisions: see *Oil Platforms (Islamic Republic of Iran v US) (Preliminary Objections)* [1996] ICJ Rep 803, 812–16. See also Peter Bekker, 'International Decisions: Oil Platforms (Iran v United States)' (1997) 91 *American Journal of International Law* 518; Christine Gray, 'The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua' (2003) 14 *European Journal of International Law* 867, 872–4.

<sup>22</sup> *Oil Platforms (Islamic Republic of Iran v US) (Preliminary Objections)* [1996] ICJ Rep 803, 810–12.

<sup>23</sup> *Ibid* 811–12. Vice-President Schwebel and Judge Oda dissented on this point.

<sup>24</sup> *Ibid* 820.

<sup>25</sup> Adopted 14 April 1978 (commenced operation 1 July 1978). See *Oil Platforms (Islamic Republic of Iran v US) (Counterclaim Order, 10 March 1998)* [1998] ICJ Rep 190, 205–7. For a discussion of the ICJ's ruling on the admissibility of the US counterclaim see Peter Bekker, 'Application of the *Convention on the Prevention and Punishment of the Crime of Genocide/Oil Platforms*' (1998) 92 *American Journal of International Law* 508.

However, the Court dismissed Iran's objection and added the US counterclaim to the main proceedings brought by Iran.<sup>26</sup>

### III THE JUDGMENT ON THE MERITS

On 6 November 2003 the ICJ delivered its judgment on the merits of Iran's claim and the US counterclaim. The Court's ruling and reasoning on each claim will be considered in turn.

#### A *Iran's Claim*

In order to uphold Iran's claim that the US attacks on Iranian oil platforms violated art X(1) of the *Treaty*, the ICJ needed to be satisfied of two matters: first, that the US actions infringed art X(1) of the *Treaty*, and second, that this conduct was not excused by art XX(1)(d) as a measure 'necessary to protect [the US] essential security interests'.<sup>27</sup> If, as the US argued, its actions were held to fall within art XX(1)(d) of the *Treaty* this would act as a 'defence on the merits' and Iran's claim would fail.<sup>28</sup>

One of the Court's initial tasks was to decide the order in which it would deal with the two issues raised by Iran's claim. The Court decided that because the use of force was at the heart of the 'original dispute' it was appropriate to begin by asking whether the US actions were justified under art XX(1)(d) of the *Treaty*.<sup>29</sup> This was a surprising departure from the more common approach utilised by courts, which is to first examine the question of breach and then, if necessary, move on to consider any 'defences' that would excuse that breach.<sup>30</sup>

Having decided to deal first with the US 'defence' under art XX(1)(d) of the *Treaty*, the ICJ considered the relationship between this provision and the general law of self-defence. It found that '[t]he application of the relevant rules of international law relating to [the use of force] ... forms an integral part of the task of interpretation entrusted to the court by Article XXI, paragraph 2, of the 1955 Treaty',<sup>31</sup> and that its jurisdiction under art XXI(2) of the *Treaty* extended to consideration of the law on the use of force in so far as it was relevant to interpreting art XX(1)(d).<sup>32</sup> Thus, the Court's task was to examine whether the US attacks on Iranian oil platforms satisfied the criteria set down in art XX(1)(d) of the *Treaty*, 'as interpreted by reference to the relevant rules of international law'.<sup>33</sup>

<sup>26</sup> *Oil Platforms (Islamic Republic of Iran v US) (Counterclaim Order, 10 March 1998)* [1998] ICJ Rep 190, 205–7. The Court found that the US counterclaim did meet the requirements of art 80 as it was directly connected to Iran's claim in fact and in law: at 205.

<sup>27</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [35] <<http://www.icj-cij.org>> at 1 May 2004.

<sup>28</sup> *Ibid* [33]–[37].

<sup>29</sup> *Ibid* [36]–[37].

<sup>30</sup> This decision to examine the 'defence' before determining that there was a breach of art X(1) was criticised by a number of judges in separate and dissenting opinions. See Part IV(C) of this case note for further discussion.

<sup>31</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [41] <<http://www.icj-cij.org>> at 1 May 2004.

<sup>32</sup> *Ibid* [41]–[45]. The Court rejected the US argument that jurisdiction was limited to considering the criteria of art XX(1)(d) and therefore broader issues of the law on the use of force could not be addressed.

<sup>33</sup> *Ibid* [45].

The Court's analysis of the US attacks concentrated heavily on the requirements of the law of self-defence, rather than on the terms of art XX(1)(d) of the *Treaty*. It reaffirmed that the right of individual self-defence is dependent on a state being the victim of an armed attack,<sup>34</sup> and also that the force used in self-defence must be necessary and proportionate.<sup>35</sup>

In relation to the first of the US attacks — on the Reshadat and Resalat oil platforms on 19 October 1987 — the Court held that these actions could not be justified under art XX(1)(d) of the *Treaty* as 'measures necessary to protect ... essential security interests'.<sup>36</sup> It concluded that the US had failed to establish that Iran was responsible for the missile attack on the oil tanker *Sea Isle City*, which the US had claimed was an armed attack triggering its right to respond with force in self-defence.<sup>37</sup> The Court also examined the hypothetical question of whether, assuming that the *Sea Isle City* attack and other incidents were attributable to Iran, those actions were serious enough to constitute an armed attack against the US.<sup>38</sup> Confirming that the notion of an armed attack is limited to 'the most grave forms of the use of force', the Court concluded that 'even taken cumulatively ... these incidents do not seem to the Court to constitute an armed attack on the United States'.<sup>39</sup>

The Court also held that the second US attack — on the Salman and Nasr oil platforms on 18 April 1988 — was not a measure 'necessary to protect [the US] essential security interests'.<sup>40</sup> Again, it found that the US had not provided conclusive evidence of Iran's responsibility for the mining of the *Samuel B Roberts*.<sup>41</sup> Whilst the Court conceded that a single mine attack might be capable of triggering the right of self-defence, it concluded that in the present circumstances the mining of the *Samuel B Roberts* did not amount to an armed attack.<sup>42</sup> As a result, the US did not have the right to respond with force in self-defence.<sup>43</sup>

The Court then assessed the necessity and proportionality<sup>44</sup> of the US attacks on the oil platforms.<sup>45</sup> It concluded that neither of the attacks was a necessary

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<sup>34</sup> Ibid [57].

<sup>35</sup> Ibid [43], [57], [73]–[74].

<sup>36</sup> Ibid [64], [73]–[78].

<sup>37</sup> Ibid [60]. Establishing the facts was particularly difficult in this case, given that both Iran and Iraq were involved in laying mines and attacking and disrupting shipping in the Gulf.

<sup>38</sup> The gravity requirement in the notion of 'armed attack' sets the point at which a state is permitted to respond with force.

<sup>39</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [64] <<http://www.icj-cij.org>> at 1 May 2004.

<sup>40</sup> Ibid [78].

<sup>41</sup> Ibid [71]–[72].

<sup>42</sup> Ibid [72].

<sup>43</sup> The Court did not discuss what action the US could take in response to attacks falling short of an armed attack. See Part IV(A) of this case note for further discussion.

<sup>44</sup> *Nicaragua Case* [1986] ICJ Rep 14, 103.

<sup>45</sup> Note that the Court's assessment of the necessity and proportionality of the US attacks proceeded on the hypothetical basis that the US *did* have the right to respond with force in self-defence. The Court did not, in fact, need to apply the criteria of necessity and proportionality in order to reach its conclusion on the question of self-defence. This is because the Court had already determined that the US had not suffered an armed attack triggering its right of self-defence: *Oil Platforms Case (Merits)* [6 November 2003] ICJ [64], [72] <<http://www.icj-cij.org>> at 1 May 2004.

response to the incidents involving the *Sea Isle City* and the *Samuel B Roberts* because the platforms were not legitimate military targets.<sup>46</sup> On the requirement of proportionality, the Court found that the first attack of 19 October 1987 might have been considered proportionate if it had been found to be necessary.<sup>47</sup> In relation to the second US attack, the Court noted that this formed part of a broader US military operation entitled ‘Operation Praying Mantis’, which involved targeting Iranian warships and aircraft. It held that ‘neither “Operation Praying Mantis” as a whole, nor even that part of it that destroyed the *Salman* and *Nasr* platforms, can be regarded, in the circumstances of the case, as a proportionate use of force’<sup>48</sup> in response to the damage caused by the mining of the *Samuel B Roberts*. Thus, the ICJ concluded that the US actions against Iranian oil platforms did not qualify as self-defence and therefore were not justified under art XX(1)(d) of the *Treaty*. Consequently the ‘defence’ advanced by the US on this ground failed.

Having disposed of the ‘defence’ the Court turned to the question of whether the attacks on the oil platforms amounted to a breach of the US obligations to Iran under art X(1) of the *Treaty*, which provided that ‘between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation’. Iran’s contention was that the attacks

impeded the normal functioning of the oil platforms and that they even resulted in the complete interruption of the platforms’ activities, ... thus preventing gravely *ab ovo* the possibility for Iran to enjoy freedom of commerce as guaranteed by ... that Article.<sup>49</sup>

The Court’s task, therefore, was to determine the meaning and scope of this ‘freedom of commerce’ guarantee. Having previously adopted a relatively wide view of the term ‘commerce’ in its 1996 judgment,<sup>50</sup> the Court proceeded to narrow the scope of the expression ‘freedom of commerce’, by drawing a number of distinctions. After distinguishing between commerce in general and commerce between the territories of Iran and the US, actual and potential commerce, and direct and indirect commerce, the Court concluded that in this context ‘freedom of commerce’ only protected the oil platforms to the extent that they contributed to actual, direct oil exports between the territories of Iran and the US.<sup>51</sup> The Court found that at the time of the attacks the oil platforms were not involved in direct commerce in oil exports between Iran and the US because the platforms were inoperative, and in any case direct oil exports had been suspended by a US embargo.<sup>52</sup> Therefore the US attacks did not interfere with

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<sup>46</sup> Ibid [73]–[76]. The Court appeared to place significant weight on the US admission that one of the platforms was a ‘target of opportunity’, rather than one previously identified as a military target.

<sup>47</sup> Ibid [77].

<sup>48</sup> Ibid.

<sup>49</sup> Ibid [79].

<sup>50</sup> *Oil Platforms (Islamic Republic of Iran v US) (Preliminary Objections)* [1996] ICJ Rep 803, 817–19.

<sup>51</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [90]–[98] <<http://www.icj-cij.org>> at 1 May 2004.

<sup>52</sup> Ibid [93]–[96], [98].

'freedom of commerce' as protected by art X(1) of the *Treaty*.<sup>53</sup> As a result, the Court rejected Iran's claim.<sup>54</sup>

### B *The US Counterclaim*

The US sought a declaration from the ICJ 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 ... Iran, ... Iran breached its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty.<sup>55</sup>

Although the Court had ruled in 1998 that it had jurisdiction to hear the counterclaim, it nevertheless allowed Iran a second opportunity to raise objections to jurisdiction and admissibility.<sup>56</sup> After rejecting those objections the Court turned to the merits of the counterclaim, stating that to succeed the US had to prove first, that there was an infringement of 'freedom of commerce' or 'freedom of navigation' between the territories of the two States, and second, that the conduct impairing those freedoms was attributable to Iran.<sup>57</sup>

On the first requirement, the US submitted that art X(1) of the *Treaty* had been breached by a number of attacks on individual vessels, or in the alternative, by the fact that those attacks as a whole created an unsafe shipping environment in the Gulf.<sup>58</sup> The Court examined each of Iran's alleged attacks and concluded that none of the vessels damaged was engaged in commerce or navigation between the territories of Iran and the US. Therefore, none of these incidents amounted to a breach of art X(1) of the *Treaty*.<sup>59</sup> The Court also rejected the US 'generic' claim that by making the Gulf unsafe for shipping Iran had infringed 'freedom of commerce' or 'freedom of navigation', finding that once the specific claims had failed, so too did the 'generic' claim.<sup>60</sup> On these grounds the Court dismissed the US counterclaim.<sup>61</sup>

## IV COMMENT

### A *The Law on the Use of Force*

Much of the Court's judgment on the merits in the *Oil Platforms Case* focuses on the law on the use of force, despite the fact that the legality of the US action

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<sup>53</sup> Ibid.

<sup>54</sup> Ibid [99].

<sup>55</sup> Ibid [51].

<sup>56</sup> Ibid [103]–[118]. Allowing Iran this 'second bite at the cherry' may have been an implicit acknowledgment by the Court that its 1998 order failed to address a number of jurisdictional issues raised by both parties at that stage of the proceedings. For more on the 1998 order see Bekker, above n 25, 512–13.

<sup>57</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [119] <<http://www.icj-cij.org>> at 1 May 2004.

<sup>58</sup> Ibid [119]–[122].

<sup>59</sup> Ibid [121].

<sup>60</sup> Ibid [123].

<sup>61</sup> Ibid [124].

was not being directly assessed against the *jus ad bellum*.<sup>62</sup> As a result, the Court's pronouncements on the use of force are, strictly speaking, obiter dicta. Nevertheless, the judgment contains several important statements on this area of law. These include confirmation of the criteria for the use of force in self-defence — namely that an armed attack is a prerequisite, and that force used in self-defence must be necessary and proportionate.<sup>63</sup> More significantly, in determining whether the US had suffered an armed attack the Court applied the high threshold test from the *Nicaragua Case*. This test limits the notion of 'armed attack' to 'the most grave forms of the use of force'.<sup>64</sup> In other words, not all uses of force are serious enough to constitute an armed attack triggering a state's right of self-defence.<sup>65</sup> This was precisely the situation in the *Oil Platforms Case*, where the attacks on the *Sea Isle City* and the *Samuel B Roberts* were not considered sufficiently grave to amount to armed attacks against the US. As a result, the US did not have the right to respond with force in self-defence.

The Court's confirmation of the test in the *Nicaragua Case* for an armed attack is significant because it maintains the high threshold at which a state's right of self-defence is triggered. In the past some states have stretched the meaning of 'armed attack' in an attempt to claim that relatively minor attacks amounted to an armed attack triggering their right to respond in self-defence. Two such examples in the context of responses to terrorism are the US 1993 missile attack on Iraq in response to a foiled assassination attempt (the alleged 'armed attack') on former President George H Bush whilst visiting Kuwait, and Israel's 1985 attack on the Palestinian Liberation Organisation's headquarters in Tunisia in response to a series of terrorist attacks, the most serious of which was the killing of three Israelis in Cyprus. Neither of these alleged 'armed attacks' was serious enough to reach the high threshold for an armed attack.<sup>66</sup> A lowering of this threshold would mean that less serious uses of force qualify as armed attacks triggering self-defence, thereby giving states the right to respond with force in a greater range of circumstances. The effect of this change would be a

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<sup>62</sup> This emphasis on the law on the use of force was criticised by several judges. See, eg, *Oil Platforms Case (Merits)* [6 November 2003] ICJ [44]–[52] (Separate Opinion of Judge Higgins); [23]–[24] (Separate Opinion of Judge Kooijmans); [20]–[32] (Separate Opinion of Judge Buergenthal); [32]–[40] (Separate Opinion of Judge Owada) <<http://www.icj-cij.org>> at 1 May 2004. Part IV(C) of this case note discusses the Court's methodology, including the decision to focus on the criteria for self-defence when examining the US 'defence'.

<sup>63</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [51] <<http://www.icj-cij.org>> at 1 May 2004. Note that the Court did not discuss the issue of anticipatory or pre-emptive self-defence.

<sup>64</sup> *Nicaragua Case* [1986] ICJ Rep 14, 91. According to the ICJ in the *Nicaragua Case*, the gravity of a particular use of force is judged according to its 'scale and effects': [1986] ICJ Rep 14, 103.

<sup>65</sup> Note that the test in the *Nicaragua Case* has been criticised for setting the threshold for an armed attack at too high a level, thereby giving a green light to low-intensity conflict. See W Michael Reisman, 'Allocating Competences to Use Coercion in the Post Cold War World: Practices, Conditions, and Prospects', in Lori Damrosch and David Scheffer (eds), *Law and Force in the New International Order* (1991) 26, 39–40.

<sup>66</sup> For more on terrorist attacks as 'armed attacks' see Sean Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the *UN Charter*' (2002) 43 *Harvard International Law Journal* 41; Carsten Stahn, 'Terrorist Attacks as "Armed Attack": The Right to Self-Defense, Article 51(½) of the *UN Charter*, and International Terrorism' (2003) 27(2) *Fletcher Forum of World Affairs* 35.

broadening of the scope of self-defence and a concomitant weakening of the general prohibition on the use of force. Clearly, this would not be in line with the objectives of the *UN Charter*. It is therefore fortunate that in the *Oil Platforms Case* the ICJ confirmed that the high threshold test remains the applicable standard.

Whilst the Court's judgment in the *Oil Platforms Case* confirms the basic rules governing self-defence, several judges felt that the Court did not go far enough in its discussion of this vital area of international law. In his dissenting opinion, Judge Elaraby was disappointed that the Court 'refrained from exploring refinements and progressive development of the existing doctrine' of self-defence.<sup>67</sup> Judge Simma's separate opinion was also highly critical of the Court's treatment of the law on the use of force. He lamented the 'half-heartedness' and 'inappropriate self-restraint' with which it dealt with this area.<sup>68</sup> In particular, Judge Simma found it 'regrettable' that the Court's judgment made no reference at all to the prohibition on the use of force contained in art 2(4) of the *UN Charter*.<sup>69</sup> In his view, this failure to emphasise the primacy of the *UN Charter* framework

could unfortunately ... be understood as a most unwelcome downgrading of the relevance and importance of the rules of the United Nations Charter on the use of force ... precisely at a time when the effectiveness of these rules is being challenged to breaking point.<sup>70</sup>

Indeed there is some validity in these criticisms. Leaving aside jurisdictional questions,<sup>71</sup> once the Court had chosen to base its reasoning on the law of self-defence it should, at the very least, have reaffirmed in strong terms the core elements of the law concerning the use of force, such as art 2(4) of the *UN Charter* and the distinction between lawful self-defence and unlawful reprisal action.<sup>72</sup> In addition, the Court ought to have taken the opportunity to discuss and clarify some of the contested aspects of the law of self-defence. One such issue that the Court could and should have considered is whether a state has any right to use force in response to an attack that falls short of an 'armed attack'. Having found that the use of force against the US did not amount to an armed attack triggering the right of self-defence, it would have been appropriate for the Court to discuss the permissible responses open to the US. In its 1986 judgment in the *Nicaragua Case* the ICJ suggested that in such circumstances a state was

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<sup>67</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [1.2] (Dissenting Opinion of Judge Elaraby) <<http://www.icj-cij.org>> at 1 May 2004.

<sup>68</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [6] (Separate Opinion of Judge Simma) <<http://www.icj-cij.org>> at 1 May 2004.

<sup>69</sup> *Ibid* [6]–[8].

<sup>70</sup> *Ibid* [8].

<sup>71</sup> Jurisdictional questions relating to the Court's consideration of the law on the use of force are discussed in Part IV(C) of this case note.

<sup>72</sup> Reprisals are distinguished from self-defence on the basis that they involve the use of force for retaliatory or punitive rather than defensive purposes. Reprisals are unlawful. See *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res 2625, UN GAOR, 25<sup>th</sup> sess, 1883<sup>rd</sup> plen mtg, UN Doc A/RES/2625 (24 October 1970). This Declaration includes the statement that 'States have a duty to refrain from acts of reprisal involving use of force': at [1].

permitted to respond with ‘proportionate countermeasures’,<sup>73</sup> although it did not specify whether such measures could include the use of force. Regrettably, the Court’s judgment in the *Oil Platforms Case* fails to address this important issue.<sup>74</sup> In this sense, it represents a missed opportunity for the ICJ.<sup>75</sup>

The Court’s judgment does, however, contain one notable contribution to the progressive development of the law on the use of force. This is the Court’s acceptance of the ‘cumulative effect’ approach to determining whether a state has suffered an ‘armed attack’. This approach assesses the overall or cumulative effect of a series of attacks rather than testing each separate attack against the threshold for an ‘armed attack’. While the Court in the *Nicaragua Case* hinted that it recognised the ‘cumulative effect’ argument,<sup>76</sup> the *Oil Platforms* judgment provides the first clear indication that the Court accepts the validity of this approach.<sup>77</sup> This development is significant because the ‘cumulative effect’ approach means that a wider range of attacks may now constitute an ‘armed attack’. This does not necessarily equate to a lowering of the high threshold enunciated in the *Nicaragua Case*, as the cumulative effect of a series of attacks must still reach this threshold of gravity. However, it does mean that the range of circumstances in which a state is permitted to respond with force in self-defence may now be broader. In particular, recognition of the ‘cumulative effect’ approach is likely to be relevant for states seeking to use force in response to relatively minor but persistent terrorist attacks.

### B *The Meaning of ‘Freedom of Commerce’*

The Court’s judgment in the *Oil Platforms Case* includes detailed consideration of the ‘freedom of commerce’ guarantee in art X(1) of the *Treaty*. By confining this guarantee to actual direct commerce between the territories of the relevant parties, the Court limited the scope of the *Treaty*’s protection of ‘freedom of commerce’. This interpretation was criticised for being narrow and overly formalistic by the two dissenting judges (Judges Al-Khasawneh and Elaraby) as well as by Judge Simma in his separate opinion.<sup>78</sup> These criticisms, which are valid, relate to two of the distinctions drawn by the Court.

<sup>73</sup> *Nicaragua Case* [1986] ICJ Rep 14, 127.

<sup>74</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ <<http://www.icj-cij.org>> at 1 May 2004. This failure was noted by Judges Higgins and Simma: see *Oil Platforms Case (Merits)* [6 November 2003] ICJ [43] (Separate Opinion of Judge Higgins) <<http://www.icj-cij.org>> at 1 May 2004; [12]–[13] (Separate Opinion of Judge Simma). Judge Simma makes an interesting distinction between ‘full-scale self-defence’ (triggered by an armed attack) and ‘proportionate countermeasures’ (triggered by an attack falling short of an armed attack); the latter permitting limited military force: at [13] (Separate Opinion of Judge Simma).

<sup>75</sup> This view is shared by Judges Simma and Elaraby. See *Oil Platforms Case (Merits)* [6 November 2003] ICJ [6] (Separate Opinion of Judge Simma); [1.2] (Dissenting Opinion of Judge Elaraby) <<http://www.icj-cij.org>> at 1 May 2004.

<sup>76</sup> *Nicaragua Case* [1986] ICJ Rep 14, 119–20.

<sup>77</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [64] <<http://www.icj-cij.org>> at 1 May 2004. The Court stated there that ‘the question is whether that attack, either in itself or in combination with the rest of “the series ... of attacks” cited by the United States can be categorized as an “armed attack”’ (emphasis added).

<sup>78</sup> See *Oil Platforms Case (Merits)* [6 November 2003] ICJ [3]–[6] (Dissenting Opinion of Judge Al-Khasawneh); [2.1]–[2.4] (Dissenting Opinion of Judge Elaraby); [17]–[34] (Separate Opinion of Judge Simma) <<http://www.icj-cij.org>> at 1 May 2004.

The first concerns the Court's finding that 'freedom of commerce' only covers direct commerce — indirect commerce involving intermediaries or third parties is not protected. This narrow interpretation seems to be at odds with a separate provision in art VIII of the *Treaty* which refers to 'products of the other High Contracting Party, from whatever place and by whatever type of carrier ... by whatever route'.<sup>79</sup> The wording of this provision strongly suggests that the *Treaty* was intended to apply to indirect as well as direct commerce, and thus a broader interpretation of the expression 'freedom of commerce' should have been adopted. Furthermore, limiting the protection to direct commerce ignores the fact that foreign intermediaries are often involved in interstate commercial transactions.<sup>80</sup> In Judge Simma's view, the Court's narrow interpretation 'render[s] the inter-State "commerce" protected under the Treaty a prey to private manipulations'.<sup>81</sup>

The second criticism relates to the Court's finding that only actual or current commerce, not potential or future commerce, is protected. Again, the Court adopted a particularly narrow interpretation here, one which depends entirely on whether commerce was occurring at a particular place at a precise time. This exclusion of potential or future commerce does not sit comfortably next to the Court's 1996 statement that the *Treaty* 'does not strictly speaking protect "commerce" but "freedom of commerce" ... [and] any act which would impede that "freedom" is thereby prohibited'.<sup>82</sup> Considering another of the Court's 1996 findings, that 'commerce' includes 'not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce',<sup>83</sup> it is surprising that in 2003 the Court adopted such a restrictive view of the scope of art X(1) of the *Treaty*. A preferable view perhaps, is that this provision was intended to protect the 'freedom to engage in commerce, whether or not there was actually any commerce going on at the time of the violation'.<sup>84</sup>

### C Judicial Methodology

The judicial methodology adopted by the Court in the *Oil Platforms Case* was controversial, prompting several judges to deliver separate opinions criticising the Court's approach.<sup>85</sup> Three aspects in particular were contentious. The first was the phrasing of the *dispositif*. Given that Iran had only requested a substantive finding on art X(1) ('freedom of commerce'), the Court's inclusion in the *dispositif* of its conclusion on art XX(1)(d) of the *Treaty* appears to be a breach of the *non ultra petita* rule. This rule prevents the Court from making

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<sup>79</sup> (Emphasis added). Article VIII of the *Treaty* is a most favoured nation clause covering products of one party that reach the territory of the other party, whether directly or indirectly.

<sup>80</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [29] (Separate Opinion of Judge Simma) <<http://www.icj-cij.org>> at 1 May 2004.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Oil Platforms (Islamic Republic of Iran v US) (Preliminary Objections)* [1996] ICJ Rep 803, 819–20 (emphasis in original).

<sup>83</sup> *Ibid.* 819.

<sup>84</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [3]–[6] (Separate Opinion of Judge Simma) <<http://www.icj-cij.org>> at 1 May 2004 (emphasis in original).

<sup>85</sup> Including Judges Higgins, Parra-Aranguren, Kooijmans, Buergenthal, and Owada. See *Oil Platforms Case (Merits)* [6 November 2003] ICJ <<http://www.icj-cij.org>> at 1 May 2004.

specific determinations in its *dispositif* on issues that the parties have not asked it to rule on.<sup>86</sup> In the words of Judge Kooijmans, '[t]he first part of that paragraph [on art XX(1)(d)] is redundant: it introduces an *obiter dictum* into the operative part of the judgment'.<sup>87</sup>

The second unusual feature of the Court's methodology was its decision to examine the US 'defence' under art XX(1)(d) *before* determining whether its conduct amounted to a breach of art X(1) of the *Treaty*. While the Court was indeed free to choose the order in which to proceed — as noted by Judge Kooijmans in his separate opinion — it would have been logical to first examine whether there was a breach.<sup>88</sup> If and only if the Court concluded that there was a breach, should it then have considered the 'defence'. On a practical level, the Court would have saved itself considerable time and effort if it had examined art X(1) of the *Treaty* first, because Iran's claim would have failed at that stage and thus, there would have been no need to consider the 'defence' question.<sup>89</sup> However, the Court seemed intent on placing the use of force at the centre of its analysis. In order to do so it had to deal with the 'defence' under art XX(1)(d) of the *Treaty* first.

The third controversial aspect of the Court's methodology was its approach to the 'defence' question. After stating that 'the matter is one of interpretation of the Treaty, and in particular of Article XX, paragraph 1 (*d*)',<sup>90</sup> the Court then overlooked the terms of that provision and focused almost exclusively on the requirements of self-defence under international law. Put simply, the Court said one thing but did another. Several judges were highly critical of the Court's broad approach to the 'defence' question, with Judge Higgins maintaining that 'all sight of the text of Article XX, paragraph 1 (*d*), [was] lost'.<sup>91</sup> According to Judges Higgins, Buergenthal and Owada, the effect of the Court's focus on self-defence was to reintroduce consideration of general international law on the use of force; an area which in 1996 it had held was outside its jurisdiction.<sup>92</sup>

As well as expressing doubts over the Court's competence to deal with the law of self-defence, Judges Higgins and Owada questioned whether the *Oil Platforms Case* provided an appropriate context for the Court to discuss this highly complex and controversial area of international law.<sup>93</sup> They pointed to the fact that self-defence was not the main focus of the parties' submissions in this

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<sup>86</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [9]–[24] (Separate Opinion of Judge Higgins); [6]–[10] (Separate Opinion of Judge Buergenthal) <<http://www.icj-cij.org>> at 1 May 2004.

<sup>87</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [33] (Separate Opinion of Judge Kooijmans) <<http://www.icj-cij.org>> at 1 May 2004.

<sup>88</sup> *Ibid* [18].

<sup>89</sup> *Ibid* [29].

<sup>90</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [40] <<http://www.icj-cij.org>> at 1 May 2004.

<sup>91</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [49] (Separate Opinion of Judge Higgins); [20]–[32] (Separate Opinion of Judge Buergenthal); [29]–[34] (Separate Opinion of Judge Owada) <<http://www.icj-cij.org>> at 1 May 2004.

<sup>92</sup> *Oil Platforms (Islamic Republic of Iran v US) (Preliminary Objections)* [1996] ICJ Rep 803. See also *Oil Platforms Case (Merits)* [6 November 2003] ICJ [52] (Separate Opinion of Judge Higgins); [32] (Separate Opinion of Judge Buergenthal); [13] (Separate Opinion of Judge Owada) <<http://www.icj-cij.org>> at 1 May 2004.

<sup>93</sup> *Oil Platforms Case (Merits)* [6 November 2003] ICJ [26] (Separate Opinion of Judge Higgins); [40] (Separate Opinion of Judge Owada) <<http://www.icj-cij.org>> at 1 May 2004.

case and that the factual circumstances surrounding the US military action were extremely difficult to determine.<sup>94</sup> Although Judges Higgins and Owada's concerns are understandable, it would have been artificial for the Court to ignore the law of self-defence when these important rules were pertinent to the circumstances of the case. In addition, a failure by the Court to refer to the law on the use of force might have sent the dangerous message that this crucial area of international law has become somehow less important today. The Court was right to discuss the law of self-defence. However, as suggested earlier, it should have examined this area more comprehensively and more purposefully than it did.

## V CONCLUDING REMARKS

The ICJ's judgment on the merits in the *Oil Platforms Case* reveals a Court struggling to balance its desire to discuss general international law on the use of force against the jurisdictional limits imposed on it by the nature of the proceedings. Ultimately, the Court has chosen an unsatisfactory middle ground in which it pays lip-service to its jurisdictional constraints, but then proceeds anyway to carry out an incomplete analysis of the law of self-defence. This approach leaves the Court open to criticism from two fronts: on the one hand, from the perspective that jurisdictional limits mean the law on the use of force had no place at all in the Court's judgment, and, on the other, from the point of view that the Court did not go far enough in its discussion of the right of self-defence.

The Court's judgment does, however, contain a limited number of significant statements on the law on the use of force. Firstly, it reaffirms the basic requirements of self-defence, including the need for an armed attack and the criteria of necessity and proportionality. Secondly, it confirms that the high threshold test for an armed attack used in the *Nicaragua Case* remains the applicable standard for determining when a state's right of self-defence is triggered. Thirdly, the judgment indicates that the Court accepts the 'cumulative effect' approach to assessing whether this threshold for an armed attack has been reached.

On the whole, the ICJ's judgment in the *Oil Platforms Case* is a disappointment. At a time when the international community would have benefited greatly from a strong reaffirmation of the fundamental rules governing the use of force, the Court has delivered a tentative and incomplete assessment of this vital aspect of the international legal framework. It is hoped that the ICJ will

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<sup>94</sup> Ibid.

be bolder and more comprehensive in its treatment of the *jus ad bellum* when dealing with future cases involving the use of force.<sup>95</sup>

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<sup>95</sup> There are a number of cases concerning the use of force on the Court's current docket. These include cases brought by Serbia and Montenegro against North Atlantic Treaty Organisation member States over the 1999 military action against Yugoslavia. See, eg, *Legality of Use of Force (Serbia and Montenegro v Belgium) (Provisional Measures)* [1999] ICJ Rep 124; *Legality of Use of Force (Serbia and Montenegro v Canada) (Provisional Measures)* [1999] ICJ Rep 259; *Legality of Use of Force (Serbia and Montenegro v France) (Provisional Measures)* [1999] ICJ Rep 363; *Legality of Use of Force (Serbia and Montenegro v Germany) (Provisional Measures)* [1999] ICJ Rep 422; *Legality of Use of Force (Serbia and Montenegro v Italy) (Provisional Measures)* [1999] ICJ Rep 481; *Legality of Use of Force (Serbia and Montenegro v Netherlands) (Provisional Measures)* [1999] ICJ Rep 542; *Legality of Use of Force (Serbia and Montenegro v Portugal) (Provisional Measures)* [1999] ICJ Rep 656; *Legality of Use of Force (Serbia and Montenegro v Spain) (Provisional Measures)* [1999] ICJ Rep 761; *Legality of Use of Force (Serbia and Montenegro v United Kingdom) (Provisional Measures)* [1999] ICJ Rep 826; *Legality of Use of Force (Serbia and Montenegro v US) (Provisional Measures)* [1999] ICJ Rep 916.

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