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THE *OIL PLATFORMS* CASE AND THE USE OF FORCE IN INTERNATIONAL LAW

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I. INTRODUCTION

This brief article reports on the decision of the International Court of Justice on 6 November 2003 in the *Case Concerning Oil Platforms (Islamic Republic of Iran v United States)*.[1] The *Oil Platforms* dispute related to events that took place in the Iran-Iraq war from 1980 to 1988. In the time that it has taken for proceedings to reach the stage where judgment on the merits of the case could be delivered, there has been high-profile United States (US) and US-led activity in Asia and the Middle East. This note does not set out to establish a legal case either against or in defence of US action in Afghanistan or Iraq. At the same time, the judgment in *Oil Platforms* does draw attention to the continued operation of international law and international judicial machinery in relation to the body of law most directly at issue at least in relation to the US invasion of Afghanistan: international law on the use of force in self-defence.[2]

The prohibition on the use of force under international law is found both in customary international law and in the UN Charter (Article 2(4)), but under neither does this prohibition extend to a use of force in a State's exercise of the right of self-defence. The established criteria for the exercise of the right of self-defence include requirements that the force used must be necessary to repel the armed attack and must be proportionate to this need. The existence of the right of self-defence in customary international law was clearly recognized in the *Case Concerning Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*.[3] The right is also

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1 General List No 90.

2 On 7 October 2001 the US President invoked the inherent right of self-defence and ordered the US armed forces to initiate action in self-defence in Afghanistan.

3 General List No 70, Judgment of the Court of 27 June 1986, *infra*.

clearly protected in the UN Charter, with Article 51 carving out from Article 2(4) a recognition of States' inherent right to act in individual and collective self defence 'if an armed attack occurs' against a Member of the United Nations. Under Chapter VII of the UN Charter force may also be used to preserve or restore international peace and security in accordance with decisions of the UN Security Council.[4]

Among contemporary issues in the law on the use of force are whether the use of force for the purposes of humanitarian intervention may be legally justifiable and questions associated with whether pre-emptive self-defence may be legally justifiable. Neither issue arose in the *Oil Platforms* case. However, it is clear that acts of transnational terrorism conducted by non-State actors armed with modern technology raise new challenges in relation to the law on self-defence, including in relation to the permissibility of pre-emptive campaigns in self-defence, and these problems in the law on the use of force need to be addressed from a perspective that seeks both to maintain the strengths of applicable contemporary law and to develop this law appropriately to meet the challenges that now confront it. The judgment of the International Court of Justice in *Oil Platforms* makes a start, by reinforcing basic elements of the law as it presently exists.

The 1986 decision of the International Court of Justice against the US in the *Nicaragua* case[5] is the Court's most significant previous case with a bearing on issues associated with the legality of the use of force in self defence, and will undoubtedly come to the front of many minds in considering the outcomes in the *Oil Platforms* case. In *Nicaragua*, it will be recalled, the Court rejected US arguments that US support for military and paramilitary activities in and against Nicaragua could be justified on a basis of collective self-defence. These activities included certain activity of the *contras* in Nicaragua, including specified attacks, secret mine-laying, and a trade embargo imposed by the US against Nicaragua. The Court found the United States was in breach *inter alia* of its obligations under customary international law not to intervene in the affairs of another State, not to violate the sovereignty of another State, not to interrupt peaceful maritime commerce and not to use force against another State. The US had also violated bilateral obligations to Nicaragua under a 1956 Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua. In the *Nicaragua* case the US chose not to appear before the Court during proceedings on the merits of the case.

4 In distinction to the situation as regards Afghanistan, questions of how to interpret applicable Security Council resolutions are central to the legality of US-led action in Iraq.

5 *Supra*, note 3.

The Court's jurisdiction was founded on the United States' 1946 declaration of acceptance of the Court's jurisdiction under Article 36(2) of the Statute of the Court, as well as on the bilateral 1956 Treaty.

A. *The Claims of the Parties in the* Oil Platforms *Case*

The judgment of the International Court of Justice in the *Oil Platforms* case revolved around the issue of the legality of the use of force in relation to two specific identified attacks against Iranian oil platforms by the US during the Iran-Iraq War. The US asserted that on both occasions it was acting in self-defence. The US argued that the Iranian platforms were being used for military purposes, including surveillance of US vessels. During the period from 1984–1988 in particular, known as the Tanker-War, numerous commercial and military vessels flying various flags were attacked in the Persian Gulf by aircraft, helicopters, and missiles, by warships and by use of mines.[6] A Lloyds Maritime Information Service list referred to 546 incidents, more than 200 of these being attributed by Lloyds to the Iranian military.[7] Iran attributed responsibility for certain incidents to Iraq, however, denying US allegations that Iran was responsible for them.

The relationship between the US and Iran was at a low ebb at this time. The Iran-Iraq war and related events took place in the period following the Islamic Revolution in Iran in 1979. Diplomatic relations between Iran and the US had been severed during the revolution, when the American Embassy in Tehran was occupied by revolutionaries who held American hostages for an extended period of time.[8] Iran's new government had accused the US of over-involvement in the government of Iran during the previous regime, and considered the Security Council's failure to respond strongly to Iraq's invasion of Iran in September 1980 was due to anti-Iranian bias in the Council.[9]

The first attack in question in the *Oil Platforms* case took place on 19 October 1987, when the US navy attacked Iran's Reshadat and Resalat complexes and destroyed one oil platform and severely damaged another. In relation to this first attack the US claimed to be acting in self-defence following a missile attack three days earlier on the *Sea Isle City*, a Kuwaiti tanker that, like a number of other vessels, had been reflagged to the United States in an attempt better to ensure its

6 Judgment of the Court, para 23.
7 Counter-Memorial of the United States, Exhibit 9, referred to in the Separate Opinion of Judge Kooijmans, para 11.
8 See the Court's Judgment of 24 May 1980 in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*.
9 Judgment of the Court, para 23ff; Separate Opinion of Judge Kooijmans, para 5ff.

protection. The second US attack complained of by Iran took place on 18 April 1988, when the US navy attacked and severely damaged Iran's Nasr and Salman complexes, almost completely destroying the Nasr complex. In relation to this second attack the US claimed to be acting in self-defence after a US warship, the *USS Samuel B. Roberts*, struck a mine in international waters near Bahrain. On both occasions the US notified the United Nations Security Council of its actions in accordance with Article 51 of the Charter of the United Nations.

In its Application in the *Oil Platforms* case the Government of the Islamic Republic of Iran rested its claims on the 1955 Treaty of Amity, Economic Relations and Consular Rights between the US and Iran (the Treaty), as well as on broader international law. The jurisdiction of the International Court of Justice was founded on Article XXI(2) of the Treaty.[10] Article I of the Treaty provided that "there shall be firm and enduring peace and sincere friendship between the United States of America and Iran". Article X(1) of the Treaty provided that there should be freedom of commerce and navigation between the parties' territories:

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

Iran requested the Court to find that "in attacking and destroying the oil platforms referred to in the Application on 19 October 1987 and 18 April 1988, the United States breached its obligations to the Islamic Republic, *inter alia*, under Articles I and X(1) of the Treaty of Amity and international law"; that the United States' "patently hostile and threatening attitude towards the Islamic Republic" breached the object and purpose of the Treaty of Amity, including Articles I and X(1), and international law; and that the United States was under an obligation to make reparations to the Islamic Republic for the violation of its international legal obligations.

The US denied that it had breached its obligations to Iran under Article X(1), and asserted that its actions were necessary to protect its national security and fell within Article XX (1)(d) of the Treaty of Amity:

> "The present Treaty shall not preclude the application of measures: . . .
>
> (d) necessary to fulfill 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."

10 See the Court's Order of 12 December 1996.

In an unsuccessful counter-claim the US also sought reparations, alleging that Iran had breached its obligations to the United States under Article X of the 1955 Treaty by attacking vessels, laying mines in the Gulf and otherwise engaging in military actions from 1987 to 1988 that were dangerous and detrimental to maritime commerce and navigation.

B. *The Controversial Approach Taken by the International Court of Justice in the* Oil Platforms *Case*

The approach taken by the International Court of Justice in the *Oil Platforms* case was controversial. In respect of Iran's claim, the Court decided to address the question of whether the US attacks on Iranian oil platforms fell within Article XX(1)(d), before moving on to consider whether there had been a breach of Article X(1) as requested by Iran. In examining the application of Article XX(1)(d) the Court decided to focus on whether US recourse to force had been consistent with international law on self-defence. The Court reasoned that even a provision protecting national security interests could not have been intended to sanction the use of force inconsistently with relevant international law. The Court proceeded to find that the US had exceeded the boundaries of international law on the use of force, and this disposed of the US claim that it was protected by Article XX(1)(d). Some forty paragraphs were dedicated to consideration of this question of US compliance with international law on self-defence, including specific findings on the proportionality and necessity of the US attacks at issue. In this way the issue of the illegality of the US use of force became a main focus of the case,[11] eclipsing the question of whether military actions in the Tanker War had illegally interfered with peaceful commerce and navigation.

Specifically, the Court found that the US had failed to produce sufficient evidence to prove that there had been an "armed attack" on the United States by Iran in the case of the attacks on the *Sea Isle City*[12] and the *Samuel B. Roberts*.[13] The possibility remained that it was Iraq that had fired the missile striking the *Sea Isle City*. Similarly, the evidence was not conclusive as to whether Iran had laid the mine struck by the *Samuel B. Roberts*. The Court considered that there was insufficient evidence supporting US assertions that Iran's oil platforms were used for significant military purposes, including the US assertion that the movement of the *Sea Isle City* had been monitored from

11 See also the formulation of the *dispositif*, below.
12 Judgment of the Court, para 61.
13 Judgment of the Court, para 72.

the Reshadat platform. The Court noted that of the two platforms damaged in the US attack on the Reshadat and Resalat complexes the US admitted to attacking the destroyed platform only as a "target of opportunity".[14] The Court also found against US contentions that the attacks, even if they had constituted "armed attacks" on Iran by the US, could be regarded as having been "necessary" responses to the attacks on the two American vessels in terms of both the law on self-defence and the provisions of Article XX(1)(d) of the Treaty of Amity.[15] While the US attack on the Reshadat and Resalat complexes might have been considered proportionate if it had been found to be necessary, the Court made clear its view that the US attack on the Salman and Nasr platforms could not be regarded as meeting the criterion of proportionality. Although the *Samuel B. Roberts* had been severely damaged it had not been sunk and there had been no loss of life.[16] The Court concluded that as the US attacks on the Iranian oil platform were not consistent with these requirements of international law on self-defence they could not be found to fall within the protection of Article XX(1)(d) of the Treaty of Amity.

Only at this point did the Court turn to the question of whether the US had actually breached Article X(1) of the Treaty of Amity by interfering with the freedom of commerce and navigation between the territories of the two parties. Here its analysis was relatively brief and direct. The Court found that Iran had failed to establish that the US had breached Article X(1) on the occasion of either of the attacks at issue. In respect of the first US attack, on the Reshadat and Resalat platforms, the Court reached this conclusion primarily on the basis that these platforms had been put out of commission by earlier Iraqi attacks and were not producing oil at the time.[17] Therefore there was no interference with commerce in oil. In respect of the second US attack, on the Salman and Nasr platforms, the Court's reasoning was that the US had already stopped all direct oil imports from Iran under an embargo imposed by Executive Order.[18] Therefore, no interference with commerce in oil had resulted from this second attack. The Court emphasised that Article X(1) applied only to protect freedom of commerce and navigation *between the territories of the two parties*, and its protection did not extend to indirect commerce in oil that continued despite the embargo via the territories of third parties. Accordingly, neither of the US attacks on the Iranian Oil Platforms was found to

14 Judgment of the Court, para 76.
15 Judgment of the Court, para 76.
16 Judgment of the Court, para 77.
17 Judgment of the Court, para 92ff.
18 Judgment of the Court, para 94ff.

have interfered with freedom of commerce in oil. The US counterclaim against Iran likewise failed because none of the affected vessels was engaged in commerce or navigation between the territories of the two parties.

In its *dispositif* at the end of its judgment, the Court stated that, by fourteen votes to two, it:

> *Finds* 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**; *finds* further that the Court cannot however uphold the submission of the Islamic Republic of Iran that those actions constitute a breach of the obligations 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. (*emphasis added*)

Several judges criticized the prominence given in the judgment to the application of international law on self-defence, and particularly the inclusion in the Court's *dispositif* of a finding on Article XX(1)(d). They did not consider the finding on Article XX(1)(d) merited a place in the Court's *dispositif*. They emphasized that the crux of the Court's decision was embodied in the finding that the US had not breached Article X(1) of the Treaty of Amity. Accordingly, the Court's finding that US actions were not consistent with the law on the use of force were *obiter dicta*. Furthermore, under the Court's 1996 decision on jurisdiction[19] it had been clear only that the Court had jurisdiction deriving from the Treaty of Amity to give judgment on the parties' compliance with their obligations under that Treaty, in particular Article X(1) of the Treaty. The dissenting judges therefore considered that the Court's approach to its consideration of the merits of the case reversed the 1996 decision on jurisdiction, or that the judgment it had rendered on the merits might lack a jurisdictional foundation.[20]

The Court did not seek to justify its approach, observing only at the relevant section of its judgment that the issues of self-defence

19 *Supra*, note 5.

20 Separate Opinion of Judge Higgins, para 54; Separate Opinion of Judge Buergenthal, para 3ff; Separate Opinion of Judge Parra-Aranguren, para 14; Separate Opinion of Judge Kooijmans, para 52.

on which the original dispute focused raised matters "of the highest importance to all members of the international community".[21] It was true that since the inception of proceedings great energy had been focused on the question of whether the US attacks were consistent with international law on the use of force, especially the law of self-defence. Some members of the Court therefore praised the majority judgment for the direct attention it paid to the "real dispute" between the parties on the use of force by the US.[22] The views of the dissenting judges have some strength, however. Although the "real dispute" or the "original dispute" between the parties might have centred on the legitimacy of the US attacks, it is certainly arguable that the legal dispute arising in the first instance was whether there had been an interference with commerce or navigation between their territories.[23] Indeed, on one view the Court let pass an opportunity for more lengthy engagement with significant questions associated with the effects of armed conflict on trade and commercial activity.[24]

C. *Comment*

Regardless of these criticisms, the *Oil Platforms* case reminds us that, provided they have jurisdiction, international judicial bodies, as in the *Nicaragua* case, will adjudicate legal claims concerning the illegal use of force. Current proceedings illustrating the point further include the cases against NATO States lodged before the International Court in 1999 by the Federal Republic of Yugoslavia.[25] Yugoslavia has complained about destruction of both military and civilian facilities attacked in the air strikes launched in the Federal Republic of Yugoslavia by plane, helicopter, and cruise missile. Yugoslavia refers to civilian deaths and injuries and to the damage incurred to bridges,

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21 Judgment of the Court, paras 37–38.

22 See the Declaration of Judge Ranjeva, Vice-President of the Court.

23 Separate Opinion of Judge Higgins, paras 22 and 49; Separate Opinion of Judge Buergenthal, para 30; Separate Opinion of Judge Owada, para 12.

24 Judge Higgins notes that "the Court reduces to nil the legal interest in what was happening to oil commerce generally during the "Tanker War". Separate Opinion of Judge Higgins para 51.

25 Legality of Use of Force (Serbia and Montenegro v. Belgium) General List No 105; Legality of Use of Force (Serbia and Montenegro v. Canada) General List No 106; Legality of Use of Force (Serbia and Montenegro v. France) General List No 107; Legality of Use of Force (Serbia and Montenegro v. Germany) General List No 108; Legality of Use of Force (Serbia and Montenegro v. Italy) General List No 109; Legality of Use of Force (Serbia and Montenegro v. Netherlands) General List No 110; Legality of Use of Force (Serbia and Montenegro v. Portugal) General List No 111; Legality of Use of Force (Yugoslavia v. Spain) General List No 112; Legality of Use of Force (Serbia and Montenegro v. United Kingdom) General List No 113; Legality of Use of Force (Yugoslavia v. United States of America) General List No 114.

roads, railways, water supply facilities, industry and trade, agriculture, hospitals, schools, communications and cultural sites. Although objections to jurisdiction have been upheld in two cases (those cases taken against Spain and against the US), hearings on jurisdiction are still pending in the other eight cases (against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal and the UK). Reference might also be made to the proceedings pending in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*.[26] In this case Bosnia and Herzegovina has alleged that through its acts in the 1990s Yugoslavia violated not only the law on the use of force, but also the Genocide Convention. The International Court of Justice granted, and subsequently reaffirmed, provisional measures in this case in 1996.[27] The Court has since rejected Yugoslavia's preliminary objections on the question of jurisdiction,[28] and proceedings on the merits are pending.

Of similar relevance are the proceedings in the case *Armed Activities on the Territory of the Congo v (Democratic Republic of the Congo v Uganda)*.[29] The Court's order for provisional measures in this case on 4 July 2000 noted it was not disputed that Ugandan forces were present in the territory of the Democratic Republic of the Congo (formerly Zaire) or that massacres and other atrocities that had been committed, raising serious humanitarian concerns, and noted also that fighting had caused a large number of civilian casualties and substantial material damage.

In considering the role played by international courts and tribunals in relation to the law on the use of force the thoughts of Sir Hersch Lauterpacht may be recalled. For Lauterpacht, the ideal form for government between States was international federalism.[30] In the birth of the United Nations he saw an opportunity for the establishment of an international organization that might function as a central legislature,

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26 General List No 91.

27 Order of the Court of 16 April 1993; Order of the Court of 13 September 1993.

28 Judgment of the Court of 11 July 1996. See also *Application for Revision of the Judgment of 11 July 1996* in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) Preliminary Objections* Judgment of the Court of 3 February 2003.

29 General List No 116. Hearings in the case against Uganda were due to open on 10 November 2003 but have been postponed by agreement of the parties to allow diplomatic negotiations to proceed in a calmer atmosphere. Parallel proceedings against Rwanda and Burundi were discontinued, but in 2002 the Democratic Republic lodged a new application against Rwanda. A hearing on jurisdiction and admissibility is pending.

30 Martti Koskenniemi, "Lauterpacht: the Victorian Tradition in International Law" in *The Gentle Civilizer of Nations: through the Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2002) 353.

in which all States would be obliged to participate, adopting binding decisions on subjects of international concern and endowed with the power to ensure compliance with these decisions. The establishment of this international legislature would ideally have been accompanied by the creation of a system for compulsory binding settlement of disputes.[31] These and similar if less ambitious hopes, shared by many, have been disappointed many times, but Lauterpacht's pragmatic and creative perspective as to the part that might be played by international adjudication in developing an international legal order continues to stand.

While the future of Afghanistan, of Iraq, and of the Middle East gradually unfolds in the coming months and years, assessments of US actions against the standards of international law will surely continue to be discussed. The world is presently confronting new challenges in the law on the use of force, amidst the controversies generated by US activity since 11 September 2001. For now, the broader point is that the decision in the *Oil Platforms* case, alongside other cases, underlines that States' military activities will be assessed against the standards of international law even as certain difficult elements of those standards may be under discussion, such as the permissibility of anticipatory and pre-emptive self-defence. The real value of the judgment in the *Oil Platforms* case is the contribution it may make, consistent with principles of legality, to anchoring discussion in the law on self-defence to a starting point well within existing law on the use of force, particularly the basic principles of necessity and proportionality.

31 Koskenniemi, *ibid.*, 391. Lauterpacht's interest in the significance of the international judicial function formed the basis for two of his six books: *The Function of Law in the International Community*, published in 1933, and *The Development of International Law by the International Court*, published in 1958.