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Destruction of Property (on an International Scale): The Recent Oil Platforms Case and the International Court of Justice's Inconsistent Commentary on the Use of Force by the United States

Stewart M. Young

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Cover Page Footnote

International Law; Commercial Law; Law

Destruction of Property (on an International Scale): The Recent *Oil Platforms* Case and the International Court of Justice's Inconsistent Commentary on the Use of Force by the United States*

Stewart M. Young[†]

ABSTRACT

This Article examines the recently decided *Oil Platforms* case announced by the International Court of Justice (ICJ). It remarks on the internal inconsistencies and problems associated with the Court's holding. The ICJ's holding inconsistently applies the traditional "use of force" doctrine as applied in other cases decided by the Court, thereby providing evidence of other factors at work in the Court's decision. Indeed, an analysis of the holding, along with an examination of the several separate opinions, exhibits the ICJ's desire to reprimand the United States for its current actions in Iraq and its fundamental misunderstanding of the "proper" use of force. This Article also contributes to the scholarship on the developing role of the ICJ and provides commentary on international tribunals playing a quasi-political role in international affairs.

* The Social Science Research Network (SSRN) placed this Article on its "Top Ten List" of papers authored by young scholars, as of July 10, 2004.

† Law Clerk, Hon. Jay S. Bybee, U.S. Court of Appeals, Ninth Circuit, 2004-2005. J.D., Stanford University Law School, 2004; M.A., Waseda University, 2002; B.A., Princeton University, 2000. I am greatly indebted to Michael Matheson, Sean Murphy, and Allen Weiner for their generous advice and insight, to Thomas Grey and Barbara Fried for their invaluable comments and conversations in the Legal Studies Colloquium, and to Michael Young for everything else. All errors are not attributable to any of those mentioned above, and are solely my responsibility.

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I. Introduction

In the fall of 2003, the ICJ¹ decided the *Oil Platforms* case,² a highly contentious, eleven year-old case relating to the use of force, self-defense, and the permissibility of retaliation measures. In this case, the Court examined the legality of both the military actions taken by the government of Iran and the American military responses to those actions.³ The gravamen of Iran's complaint to the ICJ was that U.S. forces shelled two off-shore Iranian oil platforms, destroying them both on October 19, 1987,⁴ and then attacked an additional offshore oil complex on April 18, 1988.⁵ The United States countered that Iran had been using the oil platforms as a base from which to launch missiles against American vessels legitimately sailing in international waters.⁶ The Iranian complaint, filed on November 2, 1992, four years after the attacks, claimed a dispute "arising out of attack [on] and destruction of three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company . . . on 19 October 1987 and 18 April 1988, respectively."⁷ The United States responded and, from 1992 to

¹ The International Court of Justice will be referred to as "the Court" or "the ICJ" throughout this paper.

² *Oil Platforms* (Iran v. U.S.), (Judgment of Nov. 6, 2003), available at http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106.PDF (last visited Oct. 27, 2004). The ICJ had already made a determination on its jurisdiction to hear the case, which is often referred to as one of the other "decisions" of the ICJ in the *Oil Platforms* case. *Oil Platforms* (Iran v. U.S.), 1996 I.C.J. 803 (Nov. 12) (Preliminary Objection Judgment), available at http://www.icj-cij.org/icjwww/idocket/iop/iop_isummaries/iop_isummary_19961212.htm (last visited Oct. 27, 2004) [hereinafter Preliminary Objection Judgment].

³ *Oil Platforms*, *supra* note 2.

⁴ 45 CONG. Q. WEEKLY REP. 2597 (1987); see also Patrick D. Robbins, *The War Powers Resolution After Fifteen Years: A Reassessment*, 38 AM. U. L. REV. 141, 168-69 (1988) (discussing some of the events setting the destruction of the oil platforms into motion).

⁵ Press Release 2003/38, I.C.J., *Oil Platforms* (Iran v. U.S.), Decision of the Court (Nov. 6, 2003), available at http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipresscom2003-38_op_20031106.htm (last visited Oct. 27, 2004).

⁶ *Oil Platforms* (Iran v. U.S.) (Preliminary Objections of the United States, Annex I), at http://www.icj-cij.org/icjwww/idocket/iop/ioppleadings/iop_ipleadings_19931216_preobj_us_05.pdf (Dec. 12, 1993).

⁷ Preliminary Objection Judgment, *supra* note 2, at 804. Most of the litigation by the Iranian government was driven by the National Iranian Oil Company, which had a

2003, the parties filed numerous motions and pleadings before the Court. The case was finally argued in February 2003 and decided in October 2003.⁸

The Court's ultimate decision is highly important not only for the apparent limits it places on the doctrine of self-defense, the use of force, and the role of treaties in defusing military relations between countries, but, perhaps, even more important for the significant procedural advances the Court made in this decision. For the first time in the Court's history, the ICJ entertained the use of counterclaims by both parties in the pleadings, leading other countries, such as Yugoslavia, to file their own counterclaims in their respective unrelated ICJ litigation.⁹ Now, the Court has issued "orders . . . on the standards by which counterclaims could proceed before the [International] Court,"¹⁰ a development that will undoubtedly change the structure and nature of litigation before the ICJ in virtually every case to come before it in the future.

Part II of this Article discusses the recent international legal scholarship regarding the U.S. invasion in Iraq, its legitimacy under international law, and how that invasion may have shaped the Court's decision. Part III discusses the events that led up to the litigation before the International Court of Justice. Part IV examines the Court's decision, including the arguments advanced by the parties and the Court's responses to those arguments.¹¹ Finally, Part V of this Article will argue that the ICJ's decision in *Oil Platforms* was an attempt by the Court to comment on the U.S. invasion in Iraq and, without the U.S. invasion, it is likely that the Court's holding would have been more favorable to the United

stake in the case because it wanted compensation for the damage to its oil platforms. Interview with Allen S. Weiner, Professor, Stanford Law School (previously Legal Counselor, U.S. Embassy, The Hague), in Palo Alto, Cal. (Jan. 21, 2004).

⁸ *Oil Platforms* (Iran v. U.S). (Summary of the Judgment of Nov. 6, 2003), at http://www.icj-cij.org/icjwww/idocket/iop/iop_isummaries/iop_isummary_20031106.htm [hereinafter Summary of the Judgment of Nov. 6, 2003].

⁹ Sean Murphy, *Amplifying the World Court's Jurisdiction Through Counter-Claims and Third-Party Intervention*, 33 GEO. WASH. INT'L L. REV. 5, 10 (2000).

¹⁰ *Id.*

¹¹ At the time this work was written, there were no articles or notes explaining the *Oil Platforms* decision. Therefore, this work will describe the decision in detail as part of the commentary on the case.

States. This Article argues that the ICJ is inevitably and inescapably a politically aware institution within the international community, one that is still searching for its proper role and identity within the world community, and one that necessarily takes into account the current circumstances and recent actions of the international community when making its decisions. In the Conclusion, this Article argues that even if the Court does not make its decisions based exclusively on the historically accepted four sources of international law,¹² the existence of a Court as a semi-political actor that reacts to the actions of states on the world stage is still of considerable benefit to the international community.

II. Commentaries on the “Use of Force” and the *Oil Platforms* Case

Over the past century, international law regarding the use of force by states has developed significantly, with perhaps the most radical transformation engendered by the United Nations Charter.¹³ As early as 1837, the United States engaged in dialogue with other nations on the proper use of force and legal self-defensive measures under international law.¹⁴ These dialogues

¹² Article 38(1) of the International Court of Justice Statute states the “most authoritative sources of international law” used by the I.C.J. when deciding cases:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38(1) (1945), *available at* <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm> (last visited Oct. 20, 2004), *reprinted in* THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 19-20 (2002) [hereinafter ICJ Statute].

¹³ LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 920 (4th ed. 2001).

¹⁴ The *Caroline* incident is one of the earliest examples of two states trying to negotiate the minefield that is “self-defense” under the use of force doctrine in international law. *See* CHARLES CHENEY HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 239 (1945) (describing the *Caroline* incident, in which Canadian subjects attacked a ship that Great Britain claimed was

played a role in articulating the requirements of "necessity" and "proportionality,"¹⁵ now well established as two bedrock principles in determining the proper use of force by one state against another.¹⁶ The 1945 United Nations Charter also explicitly recognized the right of self-defense,¹⁷ but did not add much clarity or specification to the two aforementioned key principles, leaving, as one noted international law scholar remarked, "[a] degree of uncertainty or indeterminacy that inheres in the proclaimed legal limits" for self-defense.¹⁸ Therefore, the challenge for international legal scholars, governments, and especially the ICJ, is to interpret the evidence and incidents leading to a country's use of force in a manner that reduces to the greatest extent possible this uncertainty and indeterminacy.

This challenge becomes more acute and pressing as modern methods of attacking a country beget modern methods of responding to such attacks.¹⁹ With the advent of easier weapon

helping an insurgent movement in Canada); see also Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT'L L. 209, 214-20 (2003) (describing the *Caroline* incident in detail and making a case for the preemptive strike on Iraq under the auspices of the *Caroline* incident).

¹⁵ HYDE, *supra* note 14, at 239. "[E]xceptions growing out of the great law on self-defense do exist, [but] those exceptions should be confined to cases in which the 'necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'" *Id.* (quoting Daniel Webster's letter to Lord Ashburton on Aug. 6, 1842). Webster also included a proportionality requirement in a previous letter during the *Caroline* incident: "[i]t will be for [the British government] to show, also, that the local authorities of Canada . . . did nothing unreasonable or excessive . . ." DAMROSCH ET AL., *supra* note 13, at 923 (quoting Daniel Webster's letter to Lord Fox on Apr. 24, 1841).

¹⁶ See, e.g., Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 540-43 (1999); W. Michael Reisman, *The Raid on Baghdad: Some Reflections on Its Lawfulness and Implications*, 5 EUR. J. INT'L L. 120, 125 (1994).

¹⁷ U.N. CHARTER art. 51 (stating "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . .").

¹⁸ OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 141 (1991). Schachter states, "[s]ome indeterminacy results from the key standards of necessity and proportionality, concepts that leave ample room for diverse opinions in particular cases. Other sources of uncertainty can be traced to differing interpretations of the events that would permit forcible defensive action." *Id.*

¹⁹ See Karen DeYoung & Colm Lynch, *Bush Abandons Bid to Win U.N. Backing for War*, WASH. POST, Mar. 18, 2003, at A16 (examining President Bush's attempt at

delivery systems and the development of such programs as theater missile defense, the question of how to defend one's country has become paramount in recent years. In this regard, scholars particularly debate the legitimacy of the U.S. invasion of Iraq under international law.²⁰ Moreover, the diversity of opinion among scholars regarding the U.S. invasion of Iraq exhibits the extraordinary difficulty of coming to a clear consensus on the use of force under international law.²¹ Indeed, in the words of one scholar, "these controversial issues indicate that the rules of self-defense fall far short of a code of conduct that would provide precise 'hard law' for many cases likely to arise."²²

Despite this lack of a code of conduct, however, a majority of scholars have concluded that the unilateral action by the United States in Iraq, without formal authorization from the United Nations Security Council, violated customary international law and the use of force doctrine.²³ Among the most serious

obtaining U.N. backing for an invasion of Iraq); Peter Slevin, *Legality of War is a Matter of Debate*, WASH. POST, Mar. 18, 2003, at A16 (discussing many scholars' take on whether U.S. actions in invading Iraq are legal).

²⁰ See, e.g., Christine Gray, *From Unity to Polarization: International Law and the Use of Force Against Iraq*, 13 EUR. J. INT'L L. 1 (2002); Anne-Marie Slaughter, *Accused of Irrelevance and Deeply Divided Over Iraq, the United Nations Has Never Mattered More*, WASH. POST, Mar. 2, 2003, at B1; Symposium, 'A War against Terrorism': What Role for International Law? U.S. and European Perspectives, 14 EUR. J. INT'L L. 209 (2003); Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576 (2003); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563 (2003); see also Erik J. Woodhouse, *Two Paths Diverging: The Use of Force in International Law After Iraq* 12 (Jan. 23, 2003) (unpublished manuscript, on file with Stanford Journal of International Law) (commenting on the divergent opinions regarding the legal use of force in Iraq and arguing that the U.N. needs to clarify the precedent set by the U.S. invasion).

²¹ See *supra* note 20 and the sources cited therein.

²² SCHACHTER, *supra* note 18, at 141.

²³ Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT'L L. 227, 240 (2003) ("[R]ecourse to a Security Council mandate is the only acceptable solution, both as a matter of law and policy . . ."); Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq*, 97 AM. J. INT'L L. 621, 628 (2003) ("In terms of the global . . . interest, there was a case for regime change in Iraq . . . [b]ut outside the framework of the United Nations, the change could not be accomplished in a way that would be widely perceived as legitimate."); Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 616 (2003) ("[T]he invasion of Iraq is more accurately seen as a repudiation of the central decision-making premise of the [U.N.] Charter system . . .").

arguments lodged against this U.S. action is that "the United States government has articulated a doctrine of pre-emption whose parameters are uncertain and that is potentially very broad in scope."²⁴

It is against this backdrop of both the U.S. invasion of Iraq and the emerging scholarly attacks on that invasion that the ICJ decided the *Oil Platforms* case. While the Court did not explicitly reference the invasion or expressly base its decision on the scholarly commentary criticizing the invasion, one cannot help but conclude that these developments underlined the decision.

This Article argues that in the *Oil Platforms* case, the ICJ recognized that the U.S. invasion of Iraq, if it were to be considered a legitimate example of general practice accepted by law, would significantly expand the notion of the appropriate use of force under international law, especially as a matter of preemptory self-defense. To combat this expansion, the Court decided the *Oil Platforms* case in a manner designed to curtail this possible expansion of the use of force doctrine and to prevent other nations from taking any legal comfort in the actions of the United States.²⁵ Many commentators and scholars have commented on the actions of the United States in Iraq.²⁶ The *Oil Platforms* case became a tool for the ICJ to comment on the appropriate use of force doctrine in international law, to discipline the United States for its actions, and to establish with more certainty its own role in defining international law, even in relation to notions of self-defense. In the final analysis, whatever the precise doctrinal legacy of this decision, this judicial reprimand of U.S. actions in Iraq establishes the Court's institutional importance and legacy.

²⁴ Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 635 (2003) (footnote omitted).

²⁵ It is understood that the Court, much like a government entity, is not monolithic and is made up of a number of actors with a number of views. The Court did not act in complete unison when it made its decision (see *infra* Part V for a parsing of the different statements by the ICJ justices in the decision), and, therefore, the decision likely captures the views of several members of the Court, but not all. The views of the majority, however, are important in terms of analyzing how the ICJ deemed the U.S. actions inappropriate within the use of force context, while the separate opinions issued by several justices along with the judgment are important in explaining the thoughts and concerns of certain justices on the Court.

²⁶ See *supra* notes 20-24 and accompanying text.

Of course, the *Oil Platforms* holding does not elucidate all aspects of the doctrine of self-defense that could profitably be developed as a matter of international law. But the Court has addressed other parts of this issue in years past, and these cases will continue to play an important role in determining the legality of certain activities. Of primary importance among these cases is the ICJ's 1986 holding in the *Military and Paramilitary Activities* case.²⁷ By citing the *Military and Paramilitary Activities* case in its *Oil Platforms* decision, the Court apparently considered the depth of the discussion in that case to be useful and relevant, because its discussion of the precise contours of self-defense in the *Oil Platforms* case is far less detailed and comprehensive than its discussion in the *Military and Paramilitary Activities* case.²⁸ But interestingly, the analysis in the *Oil Platforms* case extensively addresses the merits of certain claims and defenses, without actually deciding those claims, before holding that neither party's claims were valid under the Treaty of Amity of 1956.²⁹ Indeed, this anomaly is recognized by members of the Court.³⁰ Since ruling on defenses asserted by the United States was unnecessary in light of the Court's initial decision regarding Iran's claim, the

²⁷ *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), available at http://www.icj-cij.org/icjwww/icasess/inus/inus_ijudgment/inus_ijudgment_19860627.pdf (last visited Oct. 20, 2004); see also Richard Falk, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 106, 106 (1987) (stating "[this decision is a] fascinating attempt through judicial inquiry to assess convincingly the relevance of law to an ongoing armed conflict . . . it leads the Court to pronounce specifically upon the core issue of when force can permissibly be used in international relations, as well as the contours of a claimed right of collective self-defense in the setting of interventions and civil strife").

²⁸ One can note the differences in the opinions (both dealing with complex issues) of the *Oil Platforms* case and the *Military and Paramilitary Activities* case by the differing length of the opinions. *Oil Platforms* is a 55 page decision. *Oil Platforms*, *supra* note 2. *Military and Paramilitary Activities* is a 137 page opinion. *Military and Paramilitary Activities*, *supra* note 27.

²⁹ See *Oil Platforms*, *supra* note 2, at paras. 31-64.

³⁰ See, e.g., *Oil Platforms* (Iran v. U.S.) (separate opinion of Judge Owada), paras. 29-40 (stating that once the Court came to the conclusion that the Iranian claims against the United States were not justified, the Court should not have gone into the defensive arguments offered by the United States), at http://www.icj-cij.org/icjwww/idoctet/iop/iopjudgment/iop_ijudgment_20031106_owada.PDF (Nov. 6, 2003) [hereinafter *Separate Opinion by Judge Owada*]. In the interest of disclosure, Judge Owada was my professor and an advisor, teaching international law during the my M.A. program at Waseda University in Tokyo, Japan from 2000-2001.

determination to do so exhibits the Court's passion to rebuke the United States. The Court's discussion, which can charitably be described only as dicta (and less charitably as detour and frolic), is best understood as an attempt to narrow the use of force doctrine in international law, thereby impeding other countries from entertaining thoughts similar to those of the United States.

III. Events Leading Up to the Conflict in the ICJ

A. General Iranian-U.S. Relations

Since the fall of the Shah of Iran in 1979 and the seizure of the U.S. Embassy and the hundreds of personnel within it, Iranian-U.S. relations have unquestionably been strained.³¹ Subsequent disputes between the United States and Iran, including U.S. support for Iraq's hostilities against Iran³² and the U.S. Navy's destruction of an Iranian Air Airbus 300 passenger plane, killing its passengers and crew,³³ obviously did not improve relations. Interestingly, however, neither country has renounced the Treaty of Amity, Economic Relations, and Consular Rights (Treaty of Amity)³⁴ which continued in force without any interruption between the two countries, and which figured prominently in Iran's subsequent claim against the United States.³⁵ Somewhat

³¹ Michael Koehler, *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*, 18 WIS. INT'L L.J. 287, 287 (2000); see U.S. DEP'T OF STATE, BACKGROUND NOTE: IRAN (discussing the serious relations issues between the United States and Iran), at <http://www.state.gov/r/pa/ei/bgn/5314.htm#relations> (last modified Aug. 2004).

³² See Michael Dobbs, *U.S. Had Key Role in Buildup of Iraq*, WASH. POST, Dec. 30, 2002, at A1 (discussing the links between the Reagan administration in the buildup of Iraqi arms during the Iran-Iraq war).

³³ See Aerial Incident of 3 July 1988 (Iran v. U.S.), 1996 I.C.J. 9 (Feb. 22). Although the pleadings were entered with the ICJ, this case was eventually settled. *U.S. and Iran Settle Financial Claims*, WASH. POST, Feb. 23, 1996, at A23.

³⁴ Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, U.S.-Iran, T.I.A.S. No. 3853, available at <http://www.irvl.net/iran-treaty.htm> [hereinafter Treaty of Amity].

³⁵ The Treaty of Amity is part of a series of treaties "generically referred to as Friendship, Commerce and Navigation Treaties negotiated between the United States and other sovereign nations." Koehler, *supra* note 31, at 288. Neither party expressed an intention to terminate the Treaty of Amity prior to the time that the *Oil Platforms* case was brought to the ICJ, although the United States did announce its intention to sever

surprisingly, the United States and Iran interacted peacefully through the U.S.-Iran Claims Tribunal,³⁶ which was established after the Islamic revolution and the resolution of the hostage crisis³⁷ and was designed to satisfy the claims each country and their nationals had against the other.³⁸ Thus, up until the point that the United States attacked Iranian oil platforms in the Persian Gulf, the two countries encountered each other on a myriad of fronts, some amicable, but more often antagonistic.

B. Events Leading to the Destruction of the Oil Platforms

The United States alleged in its pleadings that Iraqi provocations initially led to its decision to destroy three Iranian oil platforms in the Persian Gulf.³⁹ According to the United States, this provocation had its origins in the eight year Iraq-Iran war.⁴⁰ As that conflict progressed, Iranian forces began to threaten not only American interests in the Gulf, but also the oil operations of states not involved in the conflict.⁴¹ In the face of persistent Iranian threats and attacks, the Reagan administration agreed in March of 1986 to re-register a certain number of Kuwaiti oil tankers under the U.S. flag and to provide a U.S. Navy escort in

subsequent commercial relations with Iran in 1987. See Exec. Order No. 12,613, 55 Fed. Reg. 41,940 (Oct. 30, 1987) (declaring an embargo on most Iranian-produced goods), available at <http://www.ustreas.gov/offices/eotffc/ofac/legal/EO12613.pdf> (last visited Oct. 27, 2004).

³⁶ For a general discussion of the U.S.-Iran Claims Tribunal, see Schandor S. Badaruddin, *Choice of Law Decisions in the Iran-U.S. Claims Tribunal*, 4 EMORY INT'L L. REV. 157, 157-84 (1990).

³⁷ IRAN-UNITED STATES CLAIMS TRIBUNAL, BACKGROUND INFORMATION: IRAN-UNITED STATES CLAIMS TRIBUNAL, at <http://www.iusct.org/background-english.html> (last visited Oct. 20, 2004).

³⁸ See IRAN-UNITED STATES CLAIMS TRIBUNAL, LIST OF AWARDS AND DECISIONS (showing numerous awards beginning in 1982 and continuing through 2001), at <http://www.iusct.org/lists-eng.html> (last visited Oct. 20, 2004).

³⁹ *Oil Platforms*, *supra* note 2, para. 24.

⁴⁰ *Id.*

⁴¹ These threats to nations not involved in the conflict were evidenced by the Kuwaiti request for relief from both the American and Soviet governments. See H.R. REP. NO. 100-106, at 1-3 (1987) (discussing the background of the Kuwaiti reflagging operation and stating that, prior to the reflagging, Kuwaiti ships came under constant fire of Iranian missiles once shipping came under attack by both sides in 1984).

the Persian Gulf.⁴² As U.S. naval vessels patrolled the Gulf to ensure the safety of oil tankers and other commercial vessels, five specific events occurred that led to the U.S. attack on Iranian oil platforms. First, on May 17, 1987, an Iraqi Mirage F-1 fighter plane attacked the *U.S.S. Stark* in an alleged accident and killed thirty-seven sailors with the firing of two Exocet missiles.⁴³ Second, on July 24, 1987, the *U.S.S. Bridgeton*, a reflagged Kuwaiti tanker, struck a mine in the Persian Gulf while being escorted by the U.S. Navy.⁴⁴ Third, on September 21, 1987, U.S. gunships spotted an Iranian naval vessel laying mines in the Gulf and engaged the ship in a fire fight.⁴⁵ Fourth, on October 8, 1987, U.S. helicopters, on patrol in the Gulf, engaged four Iranian patrol boats, resulting in the sinking of one of those boats.⁴⁶ Finally, on October 16, 1987, an allegedly Iranian-based silkworm missile hit one of the reflagged Kuwaiti tankers.⁴⁷

On April 11, 1988, in an effort to retaliate and prevent further attacks from being launched from other oil platforms, the U.S. Navy attacked two oil platforms in the Reshadat complex.⁴⁸ Three days later, another U.S. warship struck a mine in international waters.⁴⁹ Thereafter, on April 18, 1988, combined U.S. naval forces attacked and destroyed additional Iranian offshore oil complexes.⁵⁰ Four years after these events, and after failed diplomatic negotiations, Iran filed an application to initiate

⁴² See 45 CONG. Q. WEEKLY REP. 2597 (1987) (discussing the safety of Kuwaiti oil tankers and calling for providing protection to those tankers); see also S. REP. NO. 100-102, at 2-3 (1987) (discussing the plan of a U.S. Navy escort for the reflagged Kuwaiti oil tankers).

⁴³ See 45 CONG. Q. WEEKLY REP. 2597 (1987) (reporting the *Stark* incident and stating that this incident caused Congressional members to conclude that there was a significant risk of armed conflict that merited consultations between the President and Congress under the War Powers Act).

⁴⁴ Robbins, *supra* note 4, at 168.

⁴⁵ 45 CONG. Q. WEEKLY REP. 2597 (1987). This fire fight resulted in the deaths of three Iranian soldiers and wounded twenty-six others who were aboard the *Iran Ayr*. *Id.*

⁴⁶ *Id.*; see Robbins, *supra* note 4, at 168.

⁴⁷ Robbins, *supra* note 4, at 168-69; see Summary of the Judgment of November 6, 2003, *supra* note 8, at para. 25.

⁴⁸ *Oil Platforms*, *supra* note 2, para. 25.

⁴⁹ *Id.* para. 26. The warship hit by the mine was the *U.S.S. Samuel B. Roberts*. *Id.*

⁵⁰ *Id.*

proceedings within the ICJ on November 2, 1992.⁵¹

IV. The ICJ Procedure and Holding in the *Oil Platforms* Case

A. *The Initial Filing and Jurisdictional Concerns*

In its pleadings before the ICJ, Iran contended that the acts undertaken by the United States in April of 1988 constituted a “fundamental breach of the various provisions” of the Treaty of Amity, Economic Relations and Consular Rights (Treaty of Amity), which, it claimed, had determined the bilateral relationship between Iran and the United States since its signing in 1955.⁵² The application invoked the Court’s jurisdiction under Article XXI, Paragraph 2, of the Treaty of Amity.⁵³ Upon notification to the United States of the application entered in the ICJ, the Court invited both parties to file a Memorial and Counter-Memorial to the application within the time limits for filing.⁵⁴

The United States initially objected to the jurisdiction of the Court on the grounds that the case did not involve a dispute concerning the interpretation or application of the Treaty of Amity.⁵⁵ After conducting hearings on the U.S. objection, the ICJ confirmed its jurisdiction and rejected the preliminary objection.⁵⁶ Upon receiving notice of denial of the preliminary objection, the United States filed a Counter-Memorial, which included a

⁵¹ See *Oil Platforms* (U.S. v. Iran) (Application Instituting Proceedings) (describing procedures which the Iranian government attempted to negotiate the dispute and seek compensation between July and August of 1992), at <http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm> (Nov. 2, 1992) [hereinafter *Application Instituting Proceedings*].

⁵² *Id.* § 1.

⁵³ *Oil Platforms*, *supra* note 2, para. 1.

⁵⁴ *Id.* paras. 2-5. Iran requested an extension of time limits for its Memorial until June 8, 1993, and the United States also received an extension for the filing of the Counter-Memorial until Dec. 16, 1993. *Id.* para. 4. The ICJ Statute detailed the procedures the Court would follow in allowing extensions, the filing of memorials and counter-memorials, as well as the procedures for allowing parties to raise preliminary objections to the jurisdiction of the Court during the proceeding. See ICJ Statute, *supra* note 12, arts. 40(2), 79(1).

⁵⁵ See *Oil Platforms* (Iran v. U.S.) (Preliminary Objection Submitted by the United States), at http://www.icj-cij.org/icjwww/idocket/iop/ioppleadings/iop_ipleadings_19931216_preobj_us_02.pdf (Dec. 16, 1993).

⁵⁶ *Oil Platforms*, *supra* note 2, paras. 7-8.

counterclaim against the government of Iran.⁵⁷ Iran, in turn, vehemently opposed the admissibility of the counterclaim filed by the United States, arguing that such claims were not permitted under the rules of the Court.⁵⁸ The ICJ, for the first time in its history, held that a counterclaim would be admissible within the proceedings and, accordingly, allowed the government of Iran to reply to the U.S. counterclaim and the United States to, in turn, submit a rejoinder.⁵⁹ After various extensions, both countries filed their respective orders, and the ICJ scheduled oral arguments on the merits to begin on February 17, 2003.⁶⁰ Subsequently, the ICJ heard oral arguments from the governments of Iran and the United States in February and March of 2003.⁶¹ Eight months later, the Court presented its findings as the Judgment of November 6, 2003.⁶²

B. The Judgment of November 6, 2003

In the final analysis, the Court managed to deny the claims of both nations and enter a judgment that seemed to allow both parties to claim victory to some degree. First, the Court held that the actions of the United States against Iranian oil installations could not be justified under Article XX(1)(d) of the Treaty of Amity.⁶³ At the same time, it also held that the U.S. attacks did

⁵⁷ *Id.* paras. 9-10. The counterclaim alleged that Iran's actions in the Gulf during 1987-88 precipitated the retaliations by the United States and that "Iran's actions . . . involved mining and other attacks on U.S.-flag or U.S.-owned vessels." *Id.*

⁵⁸ *Id.* paras. 10-11. Iran argued that under Art. 80 of the ICJ Statute, the counterclaim articulated by the United States did not meet the formal requirements and should not be considered by the Court. *Id.* The Court allowed written submissions from both parties on the admissibility of the U.S. counterclaim, allowing both sides to detail their written observations on their respective positions. *Id.*

⁵⁹ *Id.* paras. 11-12; *see also* Murphy, *supra* note 9, at 9-10 (stating that "counterclaims were not major components of the cases before the P.C.I.J. [Permanent Court of International Justice] and I.C.J. up until 1997").

⁶⁰ *Oil Platforms*, *supra* note 2, paras. 13-14.

⁶¹ *Id.* para. 17.

⁶² Summary of the Judgment of Nov. 6, 2003, *supra* note 8.

⁶³ *Oil Platforms*, *supra* note 2, para. 78. Article XX(1)(d) of the Treaty of Amity reads: "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." Treaty of Amity, *supra* note 34, art. XX(1)(d).

not constitute a violation of obligations to Iran under Article X(1) of the Treaty of Amity.⁶⁴ Commentators, and specifically the Legal Advisor for the U.S. Department of State, stated that the decision of the ICJ was consistent with U.S. arguments regarding the level of fault of the United States.⁶⁵ Iran was less pleased with the decision, as Iranian officials alleged the ICJ ruling was politically motivated and full of contradictions.⁶⁶ Indeed, Iran went so far as to deem the ruling “unjustifiable,” asserting that the Court ignored the egregious actions of the United States due to political reasons.⁶⁷ Despite these comments, the Iranians welcomed the dismissal of the U.S. counterclaims.⁶⁸

1. The Initial Look at the Counterclaims

In its decision, the Court took the claims in reverse order, dealing first with the counterclaims of the United States against Iran.⁶⁹ There was some logic to this order, as the United States implored “the Court [to] dismiss Iran’s claim and refuse it the relief it seeks because of Iran’s allegedly unlawful conduct.”⁷⁰ The United States based its argument on three related principles, all variations of the “clean hands” doctrine.⁷¹ First, it argued that because Iran committed illegal armed attacks on U.S.-flagged shipping and other neutral shipping in the Gulf, Iran had acted “improperly with respect to the subject-matter of a dispute” and could not receive the relief that it sought.⁷² Second, the United

⁶⁴ *Oil Platforms*, *supra* note 2, para. 99. Article X(1) of the Treaty of Amity reads: “Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.” Treaty of Amity, *supra* note 34, art. X(1).

⁶⁵ See *World Court: U.S. Wrong to Hit Platforms*, GUARDIAN UNLIMITED, Nov. 7, 2003 (quoting U.S. Dept. of State Legal Advisor William H. Taft who said that “[w]e didn’t bring the case, Iran brought the case, and the court sent them home empty-handed”).

⁶⁶ See *Iranian Spokesman Says ICJ Ruling on US Attacks “Political,”* BBC MONITORING INTERNATIONAL REPORTS, Nov. 8, 2003.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Oil Platforms*, *supra* note 2, para. 30.

⁷⁰ *Id.* para. 27.

⁷¹ See *id.* para. 28.

⁷² *Id.* para. 27. Generally this is known as the “unclean hands” defense. See *id.* para. 28. The allegation was essentially that Iran had misrepresented the facts of the case

States contended that Iran itself violated obligations that were identical to Iran's application to the Court against the United States and, therefore, the application was not entitled to relief.⁷³ Finally, the United States asserted that Iran's complaints were the result of its own wrongful conduct and should be rejected because a petitioner could not receive relief when the "actions it complains of were the result of its own wrongful conduct."⁷⁴ In sum, the United States asked the Court to "make a finding that the United States measures against the platforms were the consequence of Iran's own unlawful uses of force."⁷⁵ The ICJ concluded that in order to make this finding it would have to investigate Iranian and U.S. actions during the period in question to rule on both the U.S. counterclaim and the Iranian claim.⁷⁶ The Court next turned to examine the jurisdictional issues present in the case between Iran and the United States.

2. *Investigating the Jurisdictional Issues*

The Court next examined the jurisdictional issues raised by both the United States and Iran, specifically whether the ICJ possessed the relevant jurisdiction to adjudicate on the interpretation or application of the Treaty.⁷⁷ The United States contended that although Article XXI(2) of the Treaty gave the ICJ jurisdiction for disputes between Iran and the United States under the Treaty,⁷⁸ U.S. actions against Iran were consistent with the wording of Article XX(1)(d) of the Treaty and, therefore, not subject to the jurisdiction of the Court.⁷⁹ The United States

when presenting them to the Court. *See id.*

⁷³ *See id.* para. 27.

⁷⁴ *Id.*

⁷⁵ *Id.* para. 29.

⁷⁶ *See id.*

⁷⁷ *Id.* para. 31.

⁷⁸ Treaty of Amity, *supra* note 34, art. XXI(2). Article XX(1)(d) reads as follows: "The present Treaty shall not preclude the application of measures . . . (d) necessary to fulfill the obligations of the High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests." *Id.*

⁷⁹ *Oil Platforms*, *supra* note 2, paras. 31-32; *see also* Treaty of Amity, *supra* note 34, art. XX(1)(d) (stating "[t]he present Treaty shall not preclude the application of measures . . . (d) necessary to fulfill the obligations of a High Contracting Party for the

contended that even if its actions were a breach of Article X(1) of the Treaty,⁸⁰ those actions were necessary to protect its essential security interest as defined under Article XX(1)(d) and, thus, did not constitute a breach of the Treaty.⁸¹ In looking at security interest claims by the United States, the Court first examined the precise breaches of the Treaty alleged by both Iran and the United States to determine whether those breaches would be excused as exceptions under Article XXI of the Treaty.⁸²

3. *The Underlying Self-Defense Argument*

The United States based much of its argument on the general doctrine of self-defense under international law,⁸³ arguing that its “actions were not wrongful since they were necessary and appropriate actions in self-defense.”⁸⁴ The United States also highlighted that the ICJ’s reaction to its defense in the proceedings was extremely important to the world community, since the Court’s ruling would have serious implications for the future development of the doctrine of use of force in international law.⁸⁵

The United States and Iran differed in their interpretations of the doctrine of self-defense and the exception for essential security under Article XX(1)(d) of the Treaty.⁸⁶ In deciding this issue, the Court relied heavily on its previous ruling in *Military and*

maintenance or restoration of international peace and security, or necessary to protect its essential security interests”).

⁸⁰ Treaty of Amity, *supra* note 34, art. X(1) (stating “[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation”).

⁸¹ *Oil Platforms*, *supra* note 2, para. 32.

⁸² *See id.* para. 35.

⁸³ *See generally* DAMROSCH ET AL., *supra* note 13, at 955-73 (focusing the discussion on such topics as anticipatory self-defense, armed attacks, customary international law, necessity, nuclear weapons, proportionality, protection of nationals, terrorism, traditional law, and the U.N. Charter).

⁸⁴ *Oil Platforms*, *supra* note 2, para. 37.

⁸⁵ *Id.* (stating “[t]he self-defense issues presented in this case raise matters of the highest importance to all members of the international community . . . and both Parties are agreed as to the importance of the implications of the case in the field of the use of force . . .”).

⁸⁶ *See Oil Platforms (Iran v. U.S.)* (Reply and Defense to Counter-Claim Submitted by the Republic of Iran), at http://www.icj-cij.org/icjwww/idocket/iop/ioppleadings/iop_iplleadings_19990310_reply_ir_03.pdf (Mar. 10, 1999).

Paramilitary Activities.⁸⁷ In that case, the government of Nicaragua brought a claim against the United States for covert military operations in and around Nicaragua, claiming that the United States was unlawfully carrying out military operations against its government.⁸⁸ The United States countered that it was engaged in collective self-defense, and was, therefore, within its defensive rights to engage in activities to protect itself and other nations.⁸⁹ The Court rejected the U.S. claim of collective self-defense and held that the United States had acted "in breach of its obligation under customary international law not to use force against another State."⁹⁰ In the *Military and Paramilitary Activities* case, the Court emphasized limits on the acceptable parameters of self-defense under international law, stating that an attack is deemed lawful only when in "observance of the criteria of the necessity and the proportionality of the measures taken in self-defence."⁹¹ The Court stated that it would apply the same requirements of necessity and proportionality that were used in the *Military and Paramilitary Activities* case in its decision in the *Oil Platforms* case.⁹²

4. *Reevaluating Jurisdiction Under the Self-Defense Claim*

The Court in *Oil Platforms* considered its jurisdiction under Article XXI(2) of the Treaty of Amity to decide whatever question might arise in the application or interpretation of the U.S. defense claim utilizing its own interpretation of Article XX(1)(d).⁹³ The Court questioned whether a party would be justified in taking measures it considered necessary for protecting its essential

⁸⁷ See, e.g., *Oil Platforms*, *supra* note 2, paras. 51, 60.

⁸⁸ *Military and Paramilitary Activities*, *supra* note 27, paras. 20-23. Nicaragua claimed that the United States acted in violation of Article 2, paragraph 4, of the United Nations Charter and of the customary international law obligation to refrain from the threat or use of force, that its actions amounted to intervention in the internal affairs of Nicaragua, . . . and that it violated the sovereignty of Nicaragua. *Id.* para. 23.

⁸⁹ *Id.* para. 24.

⁹⁰ *Id.* para. 292.

⁹¹ *Id.* para. 194.

⁹² *Oil Platforms*, *supra* note 2, para. 39.

⁹³ *Id.* paras. 21-26.

security interests, especially questioning whether such ‘necessary’ measures related to the validity of those measures as acts of self-defense.⁹⁴ In order to decide this question, the ICJ invoked language from the *Military and Paramilitary Activities* case, stating that “the interpretation and application of [Article XX(1)(d)] will necessarily entail an assessment of the conditions of legitimate self-defence under international law.”⁹⁵ The Court then proceeded to examine the conditions stated by both the United States and Iran in determining whether the “essential security interest” exception of the Treaty of Amity applied to the U.S. defense in *Oil Platforms*.⁹⁶ It stated that it would examine the claim by the United States within its understanding of the “principle of the prohibition in international law of the use of force, and the qualification to it constituted by the right of self-defence.”⁹⁷

C. Looking at Specifics in the Self-Defense Exception

The Court first examined the October 19, 1987 U.S. attack on the Reshadat oil complex.⁹⁸ At the time of the attack, the Reshadat complex linked twenty-seven oil wells through three drilling and production platforms, but was not producing oil due to a previous attack by the Iraqi government.⁹⁹ On October 19, 1987, four U.S. Navy destroyers approached the Reshadat complex and, after warning Iranian personnel to leave the area, shelled one of the platforms.¹⁰⁰ These destroyers then began an unplanned attack on another platform that was deemed a “target of opportunity” by the U.S. Navy.¹⁰¹ Immediately thereafter, the United States

⁹⁴ *Id.* paras. 31-78.

⁹⁵ *Id.* para. 40.

⁹⁶ See *id.* paras. 46-72 (examining the attacks on the Reshadat platform, and the Nasr and Salman platforms).

⁹⁷ *Id.* para. 43. Additionally, the United States did not deny that its actions against the Iranian oil platforms constituted the use of armed force. See *id.* para. 45.

⁹⁸ *Id.* para. 46.

⁹⁹ *Id.*

¹⁰⁰ *Id.* para. 47.

¹⁰¹ *Id.* The original plan called for attacking the R-7 Reshadat oil platform (there were three in the area, identified as R-3, R-4, and R-7). *Id.* The R-4 platform was that “target of opportunity” and was “severely damaged,” while the R-7 platform was “almost completely destroyed.” *Id.* Because of these attacks, Iran claimed that oil

delivered a letter to the Security Council of the United Nations pursuant to U.N. Charter Article 51,¹⁰² stating that the United States had taken measures to exercise its inherent right of self-defense under international law.¹⁰³

In the *Oil Platforms* case, the United States argued that it had an inherent right of self-defense due to Iranian attacks on commercial shipping channels.¹⁰⁴ In response, the Court stated that the United States must show:

that attacks had been made upon [the United States] for which Iran was responsible; and that those attacks were of such a nature as to be qualified as 'armed attacks' within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force.¹⁰⁵

In addition, the Court demanded that the United States show "that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence."¹⁰⁶ In sum, the ICJ required the United States to shoulder the burden of proving that an armed attack took place, that Iran was responsible, and that the steps the United States took in response were necessary and proportional to the provocation and taken upon legitimate military targets.

1. Evidence Surrounding the October 19, 1987 Attack

The Court ultimately held that the United States had not met

production from these platforms could not be re-started for several years. *Id.*

¹⁰² U.N. CHARTER art. 51 ("Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council . . .").

¹⁰³ *Oil Platforms*, *supra* note 2, para. 48; *see also* Letter from U.S. Permanent Representative of Oct. 19, 1987, U.N. SCOR, 48th Sess., U.N. Doc. S/19219 (stating "[i]n accordance with Article 51 of the Charter of the United Nations . . . United States forces have exercised the inherent right of self-defense under international law by taking defensive action in response to attacks by the Islamic Republic of Iran against United States vessels in the Persian Gulf").

¹⁰⁴ *Oil Platforms*, *supra* note 2, para. 48.

¹⁰⁵ *Id.* para. 51. The Court relied on the *Military and Paramilitary Activities* case as stating the necessity of an "armed attack" on the party claiming self-defense and the importance of proof of the origin of the attack. *Id.*

¹⁰⁶ *Id.*

its burden of proof.¹⁰⁷ The United States offered various types of proof to attribute the October 16, 1987 attack on the U.S.-flagged *Sea Isle City* to Iranian forces, but to no avail.¹⁰⁸ The United States offered satellite or aerial reconnaissance images showing alleged missile sites under Iranian control, expert analysis of the missile fragments, and testimony on the type of missile that hit the U.S.-flagged oil tanker.¹⁰⁹ The United States also offered the testimony of two Kuwaiti security officers stationed near the launching site who claimed that they witnessed the launching of missiles from an Iranian-controlled area.¹¹⁰ One officer also claimed to have personally observed the path of the missile that hit the *Sea Isle City*.¹¹¹

In response, Iran challenged the validity and reliability of the U.S. evidence.¹¹² Concerning the U.S. claims about Iranian missiles, Iran argued that there were no operational missile sites located in the area where the missile launch supposedly occurred¹¹³ and that Iraq may have launched the missile in order to internationalize the conflict.¹¹⁴ Iran responded to the testimony of the Kuwaiti security officers by pointing out that their testimony was over ten years old and that, in any event, it contained discrepancies between the English and Arabic texts of the statements provided to the ICJ.¹¹⁵

Based on the evidence presented by the United States and Iran, the Court determined that “a conflict of evidence” existed¹¹⁶ and,

¹⁰⁷ *Id.* para. 61 (stating “[i]n short, the Court has examined with great care the evidence and arguments presented on each side, and finds that the evidence indicative of Iranian responsibility for the attack . . . is not sufficient to support the contentions of the United States”).

¹⁰⁸ *Id.* paras. 53, 61.

¹⁰⁹ *Id.* para. 53.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See id.*

¹¹³ *Id.* para. 54. Additionally, Iran argued that the satellite images of the Iranian-controlled area were not clear and that the sites in the pictures did not resemble a normal missile launching site. *Id.*

¹¹⁴ *Id.* para. 55.

¹¹⁵ *Id.* para. 58.

¹¹⁶ *Id.* para. 59. The Court remarked on the overwhelming evidence but stated that “[t]here is, however, no direct evidence at all of the type of missile that struck the *Sea*

in light of this "serious deficiency in the evidence," it could not find evidence "sufficient to support the contentions of the United States" regarding the October 19, 1987 incident.¹¹⁷ Thus, the Court rejected the U.S. claim that the incidents leading up to the October 19, 1987 attacks constituted an armed attack of the "most grave form of the use of force," and, therefore, under the reasoning of the *Military and Paramilitary Activities* case, the United States stepped outside the bounds of self-defense under international law.¹¹⁸

2. Evidence Surrounding the April 18, 1988 Attack

The Court then analyzed the April 18, 1988 attacks by the United States on two oil platforms,¹¹⁹ noting the existence of linkages between certain actions by Iran and the United States' right to exercise self-defense.¹²⁰ With respect to the Iranian Salman complex, two U.S. destroyers and a supply ship first warned Iranian personnel and then called in an attack from numerous ships, warplanes and helicopters.¹²¹ Shortly thereafter, three warships and several helicopters destroyed the Nasr complex.¹²² That same day, the U.N. Security Council received a letter from the Permanent Representative of the United States to the U.N. stating again, in a virtually identical recitation to its previous missive, that the United States was exercising its inherent right of self-defense "by taking defensive actions in response to an attack" by Iran.¹²³ This letter described how a mine had struck the

Isle City; the evidence as to the nature of other missiles fired at Kuwaiti territory at this period is suggestive, but no more." *Id.*

¹¹⁷ *Id.* paras. 61, 64. The Court did note, however, that the attack on the *Sea Isle City* was not the only incident relied upon by the United States as a response to an "armed attack" and discussed numerous incidents alleged by the United States. *Id.* paras. 62-63.

¹¹⁸ *Id.* para. 64.

¹¹⁹ *Id.* para. 65.

¹²⁰ *Id.* paras. 67-68.

¹²¹ *Id.* paras. 65-66.

¹²² *Id.* para. 66.

¹²³ *Id.* para. 67; see also Letter from U.S. Permanent Representative of Apr. 18, 1988, U.N. SCOR, 49th Sess., U.N. Doc. S/19791.

In accordance with Article 51 of the Charter of the United Nations . . . United States forces have exercised their inherent right of self-defence under

U.S.S. Samuel B. Roberts in international waters four days earlier and that the United States had conclusive evidence that this mine was manufactured in Iran.¹²⁴ In addition to the destruction of the platforms, however, this time the United States also attacked Iranian ships in an operation called "Operation Praying Mantis."¹²⁵ The United States asserted these ships were also legitimate military targets.¹²⁶

Again, the ICJ examined the proof offered by the United States against Iran for the *U.S.S. Samuel B. Roberts* attack.¹²⁷ Iran claimed that it laid mines purely for defensive purposes, away from main shipping lanes, and that the mine in question may have been laid by Iraq.¹²⁸ The United States claimed that Iranian mine laying activities were much more extensive than those suggested by Iran's pleadings.¹²⁹ In addition, the United States offered evidence that moored mines found in the same area as the attack on the *U.S.S. Samuel B. Roberts* bore serial numbers matching other Iranian mines.¹³⁰

The Court found this evidence to be "highly suggestive, but not conclusive,"¹³¹ and noted that there were no additional justifications cited for the April 18th attack.¹³² Because the lone mine was the only incident claimed as justification for the destruction of the Nasr and Salman platforms, the Court first examined whether such an incident could suffice to justify an

international law by taking defensive action in response to an attack by the Islamic Republic of Iran against a United States naval vessel in international waters of the Persian Gulf. *Id.*

¹²⁴ *Oil Platforms*, *supra* note 2, para. 67.

¹²⁵ *Id.* para. 68.

¹²⁶ *Id.* Damage done to the military targets included destruction of two Iranian frigates and other naval vessels and aircraft of Iranian registry. *Id.*; see also David F. Winkler, *Operation Praying Mantis Blows a Hole in Iranian Navy*, NAVY LEAGUE OF THE U.S. (Sept. 2003) (describing Operation Praying Mantis), at http://www.navyleague.org/sea_power/sep_03_45.php (last visited Oct. 27, 2004).

¹²⁷ Summary of the Judgment of Nov. 6, 2003, *supra* note 8.

¹²⁸ *Oil Platforms*, *supra* note 2, paras. 70-71.

¹²⁹ *Id.*

¹³⁰ *Id.* para. 71. These other Iranian mines were found by the United States when it boarded the mine laying vessel *Iran Ajr* in a previous incident. *Id.* paras. 63, 71.

¹³¹ *Id.* para. 71

¹³² *Id.* para. 72.

action for self-defense.¹³³ It then concluded, again, that the evidence against Iran was inconclusive and it was, therefore, unable to deem this action a justifiable response by the United States.¹³⁴

3. *Necessity and Proportionality in Self-Defense*

The ICJ then dealt with the criteria of necessity and proportionality as elements in international law relating to self-defense.¹³⁵ The United States claimed that “[a] measure of discretion should be afforded to a party’s good faith application of measures to protect its essential security interests” in determining whether an armed response in self-defense is in fact “necessary.”¹³⁶ The Court noted that Iran conceded certain U.S. security interests were reasonable, such as ensuring the safety of U.S. vessels and crew and ensuring the unimpeded flow of commercial shipping in the Gulf, but that Iran’s concessions did not extend to the destruction of the oil platforms.¹³⁷ The ICJ also noted that the “necessity” requirement under international law was “strict and objective,” excluding any room for discretion or a good faith defense by a party.¹³⁸

The ICJ’s holding in the *Military and Paramilitary Activities* case deeply informed the Court’s analysis of the necessity and proportional criteria.¹³⁹ A central component of these criteria is “the nature of the target of the force used avowedly in self-

¹³³ *Id.*

¹³⁴ *Id.* In reaching this conclusion, the Court reasoned:

The Court 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-defence’ . . . the Court is unable to hold that the attacks on the Salman and Nasr platforms have been shown to have been justifiably made in response to an ‘armed attack’ on the United States by Iran . . . ” *Id.*

¹³⁵ Summary of the Judgment of Nov. 6, 2003, *supra* note 8.

¹³⁶ *Oil Platforms*, *supra* note 2, para. 73.

¹³⁷ *Id.*

¹³⁸ *Id.* “The Court does not however have to decide whether the United States interpretation . . . is correct, since the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any ‘measure of discretion.’ ” *Id.*

¹³⁹ *Id.* para. 74.

defence,”¹⁴⁰ which, in this case, consisted of the destruction of the Reshadat, Nasr, and Salman oil platforms, several Iranian frigates, and other Iranian vessels and aircraft.¹⁴¹ Citing both *Military and Paramilitary Activities* and *Legality of the Threat or Use of Nuclear Weapons*,¹⁴² the Court stated that the necessary and proportional prongs for the self-defense exception to the use of force were “rule[s] well established in customary international law.”¹⁴³ Because the Court was not satisfied that the attacks on the platforms were necessary to respond to the incidents claimed by the United States, it felt that the U.S. claim of using self-defense actions in response to an Iranian armed attack was difficult to maintain.¹⁴⁴ The United States argued that the Iranian platforms constituted legitimate targets for military action and that Iran used the platforms as a military communications link and a staging area for attacks on neutral shipping.¹⁴⁵ The United States attempted to show the military nature of the oil platform targets by producing expert analysis of the circumstances surrounding the attacks, documents found on the Reshadat complex and aboard the *Iran Ajr* vessel, and testimony by members of the international community allegedly aware of the oil platform’s military use.¹⁴⁶ The Court conceded that the United States offered considerable evidence for the military nature of the Reshadat platform, but it questioned the adequacy of proof regarding the Nasr and Salman platforms.¹⁴⁷

Iran, on the other hand, claimed that the military personnel and equipment on the platforms were merely defensive and necessary to repel possible future Iraqi attacks.¹⁴⁸ Additionally, Iran argued that the documents produced by the United States were

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Legality of the Threat or Use of Nuclear Weapons*, 1996-1 I.C.J. 226, 245 (July 8) (Advisory Opinion).

¹⁴³ *Oil Platforms*, *supra* note 2, para 76.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* para. 74.

¹⁴⁶ *Id.* paras. 63, 74.

¹⁴⁷ *Id.* paras. 66, 74. These complexes were not boarded due to the unsafe conditions and secondary explosions caused by the initial U.S. attacks. *Id.* para. 66.

¹⁴⁸ *See id.* para. 75.

mistranslated and read out of their proper context and that testimony by the United States was speculative and vague as to the platforms' use.¹⁴⁹ The ICJ concluded the evidence produced by the United States was not sufficient to establish a military purpose for or presence on the Reshadat platform.¹⁵⁰ The finding that the United States did not first complain to Iran about the military activities of the platforms was an additional factor in determining that the targeting of the platforms was not a necessary act of self-defense.¹⁵¹ Hence, the Court was unable to hold "that the attacks made on the platforms could have been justified as acts of self-defence."¹⁵² Thus, the Court concluded that U.S. reprisals following the alleged Iranian attacks on the *Sea Isle City* and the mining of the *U.S.S. Samuel B. Roberts* were not a "necessary" response by the United States.¹⁵³

Turning to the proportionality requirement, the Court held that the retaliation for the attack on the *Sea Isle City* was proportionate, but, since the attack was not "necessary," it was not a legal exercise of force.¹⁵⁴ The Court paused longer on the proportionality of the April 1988 attacks. It first examined whether destroying an oil platform was a proportionate response to mining a naval vessel.¹⁵⁵ Although not completely ruling out the possibility in future cases, the Court concluded that the U.S. bombing campaign in response to the mining of a single U.S. warship was a disproportionate use of self-defensive force under customary international law.¹⁵⁶

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* para. 76.

¹⁵¹ *See id.*

¹⁵² *Id.* para. 76. The Court ignored the U.S. claims regarding the Salman and Nasr platforms because the United States did not offer any evidence comparable to the evidence offered on the Reshadat oil platform's military nature. *Id.* para. 76.

¹⁵³ *Id.*

¹⁵⁴ *Id.* para. 77.

¹⁵⁵ *Id.*

¹⁵⁶ *See id.* The Court stated:

[T]he Court cannot assess in isolation the proportionality of that action to the attack to which it was said to be a response; . . . the whole operation, which involved, *inter alia*, the destruction of two Iranian frigates and a number of other naval vessels and aircraft . . . [can not] be regarded, in the circumstances of this case, as a proportionate use of force in self-defense.

Without conclusively determining what factors might create necessity and proportionality, the Court held that the United States did not act in accordance with its right to self-defense.¹⁵⁷ Therefore, the Court concluded that the attacks on the Iranian oil platforms in October 1987 and April 1988 were not justified under Article XX(1)(d) of the Treaty of Amity as “measures necessary to protect the essential security interests of the United States.”¹⁵⁸ Because the U.S. reprisals did not qualify as acts of self-defense under international law, the ICJ held that these actions did “not fall within the category of measures contemplated, upon its correct interpretation, by [Article XX(1)(d)] of the Treaty [of Amity].”¹⁵⁹

D. Judgment on Iran’s Claims

Following the conclusion that the United States could not rely on Article XX(1)(d) of the Treaty of Amity as a defense against the Iranian claims, the Court then examined Iran’s claim against the United States under Article X(1) of the Treaty of Amity.¹⁶⁰ Iran contended that the U.S. attacks on the Reshadat, Nasr, and Salman oil platforms constituted a breach of U.S. treaty obligations.¹⁶¹ Iran claimed that since the U.S. attacks focused on commercial oil-producing facilities that would subsequently export oil to the United States, the attacks prevented the freedom of commerce between the two nations, in violation of the Treaty of Amity.¹⁶² To evaluate Iran’s claims, the Court first examined whether commerce did in fact exist between the two nations in relation to the particular oil platforms and then examined whether the U.S. attacks impeded that commerce.¹⁶³

Id.

¹⁵⁷ *See id.* para. 78.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* para. 79.

¹⁶¹ *See Oil Platforms (Iran v. U.S.)* (Iranian Pleadings), 88-91, at http://www.icj-cij.org/icjwww/idocket/iop/ioppleadings/iop_ipleadings_19930608_memoria_ir_03.pdf (June 8, 1993) [hereinafter Iranian Pleadings].

¹⁶² *See Oil Platforms*, *supra* note 2, para. 79.

¹⁶³ *See id.* paras. 79-99.

1. *Commercial Aspects of the Oil Platforms*

The Court first determined whether only oil exports between the United States and Iran were relevant to the proceedings.¹⁶⁴ At the preliminary objection stage, the Court noted that it was difficult to discern "if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil."¹⁶⁵ In its pleadings, Iran sought to show that oil, whether produced, processed by, transported from, or stored on the platforms, was to some degree exported to the United States and, therefore, part of the stream of commerce between the two countries.¹⁶⁶ The United States, on the other hand, claimed that the platforms were not engaged in producing goods for export to the United States, and that its attacks did not destroy any oil that otherwise would have been shipped to the United States.¹⁶⁷

Since the U.S. attacks did not damage the platform's subsea lines used to transport oil for storage at nearby islands, the Court held that there was not "prima facie interference with the transport of goods mainly destined for export."¹⁶⁸ Despite arguments by the United States that its attacks on commercial oil platforms were limited to the extent necessary so as to not breach the Treaty of Amity, the Court held that Article X(1) of the Treaty of Amity applied to the "protection of freedom of commerce . . . [and] the platforms attacked by the United States, and the attacks thus impeded Iran's freedom of commerce."¹⁶⁹ An integral part of the Court's analysis, however, was whether the U.S. actions actually interfered with freedom of commerce between the two countries under the Treaty of Amity.¹⁷⁰

¹⁶⁴ See *id.* para. 82. The United States also tried to question whether the oil platforms were even within the "territory" of Iran for the purpose of the Treaty of Amity, but the Court dismissed this argument as untenable. *Id.*

¹⁶⁵ Preliminary Objection Judgment, *supra* note 2, paras. 50-51.

¹⁶⁶ *Oil Platforms*, *supra* note 2, para. 84; Iranian Pleadings, *supra* note 161, at 88-89.

¹⁶⁷ *Oil Platforms*, *supra* note 2, para. 87.

¹⁶⁸ *Id.* para. 88.

¹⁶⁹ *Id.* para. 89.

¹⁷⁰ See *id.* According to the Court decision, Article X(1) applied to the oil platforms as part of the freedom of commerce of that Treaty, but the real question for analysis was whether the attacks *actually* impeded the freedom of commerce between the two parties. *Id.*

2. *U.S. Counter-Argument Against Commerce*

The United States initially argued that the attacks did not affect commerce between the two nations. First, the United States claimed that the attack on the Reshadat platform did not affect commerce between the two countries because it occurred while the platform was under repair after an Iraqi attack, and thus, not producing oil.¹⁷¹ Therefore, according to the United States, the platform was “not engaged in, or contributing to, commerce between the territories of the Parties.”¹⁷² Second, the United States claimed that the attack on the Salman and Nasr platforms did not directly affect commerce between the contracting parties because the United States banned most Iranian imports after October 29, 1987.¹⁷³ Executive Order 12,613 prohibited imports into the United States of almost all Iranian goods, including oil.¹⁷⁴ Thus, the United States reasoned that after the relevant date there was no actual commerce between the two nations.¹⁷⁵ In light of these facts, the ICJ acknowledged that Iran’s arguments regarding continued commerce between the two parties appeared remote.¹⁷⁶

3. *Iran’s Argument Regarding Commerce*

In response, Iran asserted that the Executive Order violated the Treaty of Amity and that the U.S. argument was circular.¹⁷⁷ In other words, Iran accused the United States of justifying its violation of the Treaty of Amity with a previous violation of the same treaty, the previous violation itself illegally impeding

¹⁷¹ See *id.* para. 90.

¹⁷² *Id.* Iran claimed that production would resume on Oct. 24, 1987 (five days after the attack), but the Court did not possess information about whether the repairs were on schedule. *Id.* para. 93. Additionally, Iran did not bring any evidence showing that if there had not been an attack on the Reshadat platform, production would have commenced and constituted commerce between the United States and Iran. *Id.*

¹⁷³ *Id.*

¹⁷⁴ Exec. Order No. 12,613, 55 Fed. Reg. 41,940 (Oct. 30, 1987) (stating “[e]xcept as otherwise provided in regulations issued pursuant to this Order, no goods or services of Iranian origin may be imported into the United States, including its territories and possessions, after the effective date of this Order”), available at <http://www.ustreas.gov/offices/eotffc/ofac/legal/eo/12613.pdf>.

¹⁷⁵ *Oil Platforms*, *supra* note 2, para. 93.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* para. 94.

commerce. Since Iran did not formally put these questions regarding the legality of the embargo to the Court, the ICJ held that it had not heard full arguments on Iran's assertions.¹⁷⁸ Accordingly, the Court only examined the actual effects of the embargo by the United States.¹⁷⁹

Iran next argued that the question of whether the embargo impeded actual commerce between the two states rested on whether indirect commerce continued after the Executive Order.¹⁸⁰ Even after the Order, Iran sold oil to refineries and commercial interests in Western Europe and Asia, which, in turn, sold finished products to the United States.¹⁸¹ Iran claimed that their oil still entered the United States through these commercial transactions and that some of the oil from the oil platforms in question could have entered this stream of commerce if the United States had not destroyed the platforms.¹⁸² The Court rejected this argument, holding that the transactions were "not 'commerce' between Iran and the United States, but rather 'commerce' between Iran and an intermediate purchaser; and 'commerce' between an intermediate seller and the United States."¹⁸³ The Court held that without an ongoing financial interest in the actual oil goods that were exchanged between the third party and the United States, the Iranian sale of oil to third party countries did not constitute commerce between Iran and the United States.¹⁸⁴ Thus, the Court

¹⁷⁸ *Id.* Whether the embargo constituted a breach of the Treaty of Amity is an intriguing issue. A deeper investigation potentially leads one to believe that the U.S. actions were in breach of the Treaty of Amity, and one can only speculate upon the reasons why the Iranian government did not actually include that charge in its pleadings. It has been remarked that because the National Iranian Oil Company led the litigation in the ICJ, the Iranian government did not present a formal claim against the embargo in order to focus the litigation on the oil platforms damage, rather than the breach caused by the embargo. Interview with Allen S. Weiner, *supra* note 7. Some speculation has been made that Iran did not include the embargo as part of the ICJ case because they have chosen to argue this in the Case A/30 before the Iran-U.S. Claims Tribunal instead. *Id.*

¹⁷⁹ See *Oil Platforms*, *supra* note 2, para. 94.

¹⁸⁰ *Id.* paras. 96-97.

¹⁸¹ *Id.*

¹⁸² *Id.* para. 95. Iran produced an expert report showing an increase in oil exports from Western European refineries to the United States, thereby claiming that Iranian oil continued to reach the United States after the signing of the Executive Order. *Id.*

¹⁸³ *Id.* para. 97.

¹⁸⁴ *Id.*

rejected Iran's claim against the United States for breach of obligations under Article X(1) of the Treaty of Amity, and it also denied the Iranian claim for reparations for the oil platforms.¹⁸⁵

E. Judging the U.S. Counterclaims

After denying Iran's claim for reparations, the Court then analyzed the counterclaim by the United States against the government of Iran.¹⁸⁶ The United States alleged that Iran, through its military, impaired its freedom of commerce and freedom of navigation.¹⁸⁷ The Court first examined ten alleged attacks by Iran on U.S. vessels, starting on July 24, 1987 and ending on June 11, 1988.¹⁸⁸ The Court held that none of the vessels that were attacked were "engaged in commerce or navigation 'between the territories of the two High Contracting Parties.'"¹⁸⁹ Hence, the Court rejected the U.S. counterclaims regarding all of those attacks.

The Court next examined the generic claim made by the United States that Iran "made the Gulf unsafe" through an amalgamation of "attacks on United States and other vessels, laying mines and otherwise engaging in military actions in the Persian Gulf."¹⁹⁰ To succeed on this claim, the Court held that the United States needed to demonstrate that Iran's actions created "an actual impediment" to commerce or navigation between the two countries.¹⁹¹ Because none of the specific incidents, nor the claim, actually involved interference with navigation or commerce under

¹⁸⁵ *Id.* paras. 98-99.

¹⁸⁶ *See id.* paras. 101-124.

¹⁸⁷ *See id.* paras. 101, 119. Iran lodged numerous objections to the U.S. counterclaim, specifically that the counterclaim broadened the subject matter of the claim beyond the original submissions to the Court. *Id.* para. 103. Iran also argued that the counterclaim was presented without prior diplomatic negotiation (and therefore was not in accordance with Article XXI(2) of the Treaty of Amity), that the U.S. counterclaim was on behalf of third party states, and that the Court did not have jurisdiction over counterclaims alleging a violation of the freedom of navigation. *Id.* paras. 105-110. The Court ultimately decided that it could not uphold these objections of Iran. *Id.* paras. 107, 109, 111, 115, 118.

¹⁸⁸ *Id.* para. 120.

¹⁸⁹ *Id.* para. 121.

¹⁹⁰ *Id.* para. 122.

¹⁹¹ *Id.* para. 123.

the Treaty of Amity, the Court denied the counterclaims of the United States.¹⁹²

It is intriguing that the ICJ did not engage in the same analysis of the U.S. counterclaims as it did with the earlier Iranian claims. Regarding the Iranian claim, the ICJ went straight to the Article X analysis.¹⁹³ It did not do so with the U.S. counterclaim, however.¹⁹⁴ In addition, with the U.S. counterclaims, the Court did not conduct an Article XX(1) use of force analysis, but instead engaged in a very different mode of analysis than that used to decide the Iranian claims.¹⁹⁵ As will be discussed below, this Article alleges that the Court's analysis regarding the U.S. counterclaims differed precisely because of the Court's desire to comment on recent U.S. actions in other countries.¹⁹⁶ The differing treatment of the virtually identical claims made by the United States and Iran demonstrates that the ICJ's decision was partly political commentary, rather than a judgment deriving exclusively from principles of international law.

F. The Final Judgment

At the end of the fifty-five page decision, the sixteen judges of the ICJ voted on the specific claims of both the Iranian and U.S. governments. The judges denied the claims of each country.¹⁹⁷ In a fourteen to two vote, the ICJ found that the actions of the United States against the Iranian oil platforms were not justifiable "measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1(d), of the [Treaty of Amity]."¹⁹⁸ In this vote, however, the Court also found that the actions of the United States claimed to be a breach of Article X(1) by Iran did not constitute a breach of the Treaty of

¹⁹² *Id.* paras. 123-24.

¹⁹³ *See supra* Part IV.D.

¹⁹⁴ *See supra* notes 188-192 and accompanying text.

¹⁹⁵ *Compare supra* Part IV.C (discussing the ICJ's analysis of the U.S. self-defense argument to the Iranian claims) *with supra* Part IV.E (discussing the ICJ's analysis of the U.S. counterclaims).

¹⁹⁶ *See infra* Part V.A-C.

¹⁹⁷ Summary of Judgment of Nov. 6, 2003, *supra* note 8.

¹⁹⁸ *Oil Platforms*, *supra* note 2, para. 125. The judgment specifically notes that it interprets this in the light of international law on the use of force. *Id.*

Amity and, therefore, reparations for Iran would not be upheld.¹⁹⁹ Additionally, by a fifteen to one vote, the Court rejected the counterclaim by the United States against Iran for breach of obligations of the Treaty of Amity and held that no reparations were due the United States either.²⁰⁰ In Part V, this work will turn to the inconsistencies and problems with this judgment, suggesting a possible rationale behind the Court's unsettling decision.

V. The ICJ's Commentary on Current U.S. Actions and Further Examination of the *Oil Platforms* Case

The *Oil Platforms* decision represents an interesting case study regarding the role of exogenous political considerations in the analysis and decisions of the ICJ. Indeed, the analysis of this decision reveals that ICJ judges arguably played a political role in this controversy. This Article contends that the desire of the majority of the Court to comment on recent U.S. actions in Afghanistan and Iraq colored the ICJ's decision.²⁰¹ In addition, the Court's failure to analyze either the "necessity" or "proportionality" prongs of the use of force in self-defense doctrine²⁰² raises legitimate questions regarding contributions of the ICJ to the development of a coherent, predictable set of international rules that are capable of truly governing the behavior of countries in the international arena. Rather than develop a coherent doctrinal justification for its decision, the Court succumbed to the temptation to "send a message" on the appropriate use of force to the United States and to comment on recent U.S. actions in Afghanistan and Iraq.²⁰³

A. The Court's Decision on Article XX(1)(d) Defenses

The ICJ decision denied both Iran's claims against the United

¹⁹⁹ *Id.* The dissenting votes were by Judges Al-Khasawneh and Elaraby. *Id.*

²⁰⁰ *Id.* para. 125. The lone dissenting vote was by Judge Simma. *Id.*

²⁰¹ *Cf.* *Oil Platforms* (Iran v. U.S.). (separate opinion of Judge Buerghenthal), paras. 11-19, (commenting on the lack of jurisdiction of the Court to rule on the Article XX(1)(d) defense claim by the United States once the Court held that the United States had not violated Article X(1) of the Treaty of Amity), at http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106_buerghentha.pdf (Nov. 6, 2003) [hereinafter Separate Opinion of Judge Buerghenthal].

²⁰² *See supra* Part IV.C.3.

²⁰³ Separate Opinion of Judge Buerghenthal, *supra* note 201, para. 19.

States and the U.S. claims against Iran for breach of Article X(1) of the Treaty of Amity.²⁰⁴ Although the Court held in a fourteen to two judgment that the U.S. actions were justifiable measures necessary to protect essential security interests,²⁰⁵ several separate opinions by judges on the ICJ exhibit misgivings with that decision. Some members of the Court appear to have recognized that the Court should have first analyzed Iran's claim regarding the U.S. breach of Article X(1) prior to analyzing the Article XX(1)(d) defense claim brought by the United States.²⁰⁶ For example, Judge Thomas Buergenthal, in his separate opinion, highlighted the extraneous nature of the intermediate judgments made by the Court and noted the flaws in the Court's reasoning on Article XX(1)(d).²⁰⁷ He correctly asserted that this portion of the decision does not belong in the judgment.²⁰⁸ After all, once the Court concluded that the United States did not violate Article X(1), the Court then lacked the jurisdiction to interpret Article XX(1)(d).²⁰⁹ Judge Owada also observed that the Court first analyzed the Article XX(1)(d) issue prior to deciding the heart of Iran's claims against the United States, but, logically speaking, the order should have been reversed.²¹⁰ Judge Higgins noted that the Court's

²⁰⁴ *Oil Platforms*, *supra* note 2, para. 125.

²⁰⁵ *Id.*

²⁰⁶ Separate Opinion of Judge Buergenthal, *supra* note 201, paras. 2-3, 19; Separate Opinion by Judge Owada, *supra* note 30, para. 3; *Oil Platforms* (Iran v. U.S.) (separate opinion of Judge Higgins), para. 2, at http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106_higgins.PDF (Nov. 6, 2003) [hereinafter Separate Opinion of Judge Higgins]. Judges Kooijmans and Parra-Aranguren also note their distaste with deciding the Article XX(1) issue when the Court denied Iran's claims under Article X(1). See *Oil Platforms* (Iran v. U.S.) (separate opinion of Judge Kooijmans), paras. 17-18, at http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106_kooijmans.PDF (Nov. 6, 2003) [hereinafter Separate Opinion of Judge Kooijmans]; *Oil Platforms* (Iran v. U.S.) (separate opinion of Judge Parra-Aranguren), para. 14, at http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106_parra.PDF (Nov. 6, 2003) [hereinafter Separate Opinion of Judge Parra-Aranguren].

²⁰⁷ Separate Opinion of Judge Buergenthal, *supra* note 201, paras. 2-3.

²⁰⁸ *Id.*

²⁰⁹ *Id.* para. 19.

²¹⁰ Separate Opinion of Judge Owada, *supra* note 30, para. 3 (stating "I am of the view that the natural and correct order in which the Court should proceed with claims . . . would have to deal first of all with the issue of whether the actions of the United States . . . in fact constituted a violation of the obligations . . . under Article X(1) . . .").

judgment on the Article XX(1)(d) issue was disconcerting and that the Court's reasoning and methodology on the issue was "problematic."²¹¹

Challenging these opinions, however, Judge Simma defended the Court, asserting that issues relating to the U.S. use of force "are at the heart of this case" and, thus, the approach the Court took was the proper one.²¹² In addition, Judge Koroma wrote in his Declaration that the Court was bound to rule on the Article XX(1)(d) issue and that the principles that it used were consistent with general customary international law.²¹³

The arguments of Judges Burgenthal, Owada, and Higgins are logically sound, in contrast to the arguments of their colleagues on the Court. By any standard, "the protection of essential security interests" issue becomes irrelevant once the Court found no breach of Article X(1) by the United States.

There are several plausible explanations for why these judges expressed concern regarding the reasoning underlying the judgment, but still, nevertheless, voted overwhelmingly in favor of it. First, historically, there has been a strong push by the Presidents of the ICJ to fashion large majorities for the Court's judgments.²¹⁴ Even if judges disagree with certain aspects of a ruling, they are strongly encouraged to vote favorably if the outcome is agreeable.²¹⁵ This is thought to increase the legitimacy of the Court as an institution and to strengthen the force of the

²¹¹ Separate Opinion of Judge Higgins, *supra* note 206, para. 2.

²¹² Oil Platforms (Iran v. U.S.). (separate opinion of Judge Simma), preface, at http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106_simma.PDF (Nov. 6, 2003) [hereinafter Separate Opinion of Judge Simma].

²¹³ Oil Platforms (Iran v. U.S.). (declaration by Judge Koroma), 1, at http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106_koroma.PDF (Nov. 6, 2003) [hereinafter Declaration by Judge Koroma].

²¹⁴ Interview with Allen S. Weiner, *supra* note 7. Looking at judgments over the past couple of years, this assertion appears to be correct: a judgment of 10-3 in the Genocide case between Bosnia and Serbia (2001), judgments ranging from 15-1 to 10-6 in the Arrest Warrant cases between the Congo and Belgium (2000), and judgments from unanimous to 13-2 in the LeGrand case between Germany and the United States (1999). See Contentious Cases Before the International Court of Justice (listing cases over the past two decades and the votes for those cases), <http://www.icj-cij.org/icjwww/idecisions.htm> (last visited Oct. 20, 2004).

²¹⁵ Interview with Allen S. Weiner, *supra* note 7.

legal rules articulated by the Court.²¹⁶

Second, the majority of the judges in this case may well have desired to make a statement on the use of force doctrine in light of the recent events relating to the U.S. invasion of Iraq. It is not likely any country will be able to challenge U.S. actions directly in the ICJ. Hence, the *Oil Platforms* case was one of the few opportunities for the ICJ to express its displeasure with the U.S. interpretation of the use of force doctrine. Indeed, ICJ holdings are not used as precedent in future Court cases, at least not in the way that U.S. lawyers understand the principle of *stare decisis*, but the Court's decisions do aid in the development of customary international law.²¹⁷ In this situation, the Court played an active role in defining the proper use of force by rebuking the United States for engaging in what many international legal scholars would likely consider a legally proper use of force, even while the Court denied Iran's claims.

Without looking at working drafts of the ICJ decision or being privy to their internal discussions, one can only speculate as to what the members of the Court thought while trying to craft the decision in *Oil Platforms*.²¹⁸ Nevertheless, at least five of the fourteen judges expressed some concern or reservations regarding the Court's reasoning.²¹⁹ This, coupled with the obvious incongruity of the Court's logic, suggests that the decision may well have been at least in part politically motivated. The fact that the Court did not actually need to decide the U.S. essential security interest defense gives credence to the theory that the rationale of *Oil Platforms* was not solely related to events in 1987 and 1988. Although a large majority concurred in the denial of

²¹⁶ *Id.*

²¹⁷ The Statute of the International Court of Justice defines its sources of international law in Article 38, which lists "judicial decisions and the teachings of the most highly qualified publicists of the various nations" as part of the international law it uses in making its decisions. ICJ Statute, *supra* note 12, art. 38(1)(d).

²¹⁸ One professor has speculated that it would be interesting to see these actual drafts in order to see how they were changed in order to get the judges to agree to a 14-2 opinion. Interview with Allen S. Weiner, *supra* note 7.

²¹⁹ See Separate Opinion of Judge Buergenthal, *supra* note 201, paras. 2-3; Separate Opinion of Judge Owada, *supra* note 30, para. 3; Separate Opinion of Judge Higgins, *supra* note 206, para. 2; Separate Opinion of Judge Kooyjman, *supra* note 206, paras. 17-18; Separate Opinion of Judge Parra-Aranguren, *supra* note 206, para. 14.

Iran's claims and the U.S. defenses to those claims, over one-third of that majority took issue with major portions of the reasoning of the decision.²²⁰

B. A Noted "Lack of Evidence" and Operational Concerns

The Court ruled that the evidence presented by the United States concerning the events leading up to its attack on the oil platforms was not sufficient to support the "essential security interest" argument.²²¹ Despite voluminous evidence regarding Iranian actions, mining activities, missile launches, and a three-page description of ten separate alleged attacks, the Court still concluded that the United States had not offered conclusive evidence of an Iranian attack.²²² The decision does not provide countries with a logical framework for protecting their "essential security interests." "Highly suggestive, but not conclusive, evidence"²²³ is something that lawyers might be able to parse with enough time and money, but it does not provide adequate guidance to the commander of a naval vessel or a military head. The Court's decision, while resolving the immediate dispute, makes little headway towards creating more defined terms and practicable precedents within international law.

This failing was not lost on a substantial number of the judges.²²⁴ According to Judge Owada, there was an "asymmetry in the production of evidence" before the Court, especially since the U.S. actions were general public knowledge, whereas the alleged Iranian attacks were not.²²⁵ Because of this asymmetry and the acknowledged difficulties in securing reliable evidence, Judge Owada urged the Court to further examine the evidence prior to holding on a use of force violation by the United States.²²⁶ As a

²²⁰ See *supra* note 219 and the sources cited therein.

²²¹ *Oil Platforms*, *supra* note 2, para. 78.

²²² *Id.* paras. 61, 71.

²²³ *Id.* para. 71 (stating "[t]he evidence is highly suggestive, but not conclusive").

²²⁴ Separate Opinion of Judge Buergenthal, *supra* note 201, paras. 33-47; Separate Opinion of Judge Owada, *supra* note 30, paras. 41, 46, 48-52.

²²⁵ Separate Opinion of Judge Owada, *supra* note 30, paras. 41-46.

²²⁶ *Id.* para. 44. Judge Owada states:

[I]t would only be on the basis of such ascertained full facts that the Court could assess in a conclusive manner whether the alleged actions of the United States

corollary to this assertion of asymmetry in evidence, Judge Owada implored the Court to act as a fact-finder and to take a more proactive stance in the administration of justice.²²⁷ In his separate opinion, Judge Buergenthal echoed Judge Owada's concerns, remarking on the Court's flawed application of the standards of evidence to the detriment of the United States.²²⁸ These separate opinions exhibit a profound disquiet, yet both judges reaffirmed their support of the overall holding of *Oil Platforms*. The *Oil Platforms* decision can thus be seen, at least in part, as an occasion on the part of some of the judges to comment on recent U.S. actions, despite the fact that certain parts of the reasoning and the actual holding alarm a minority of the judges.

This case also makes clear, however, that the ICJ as an institution is not as well-equipped to deal with fact-intensive cases. The ICJ, as a court of both plenary first jurisdiction and final appellate jurisdiction, is well-suited to decide matters of law.²²⁹ Without the institutions and evidentiary rules that characterize most national and state courts, however, the ICJ is not well-equipped to decide cases that involve large amounts of purely factual evidence. Indeed, this case suggests that the ICJ should work to develop stronger rules of evidence and mechanisms for resolving evidentiary issues. Both Judges Owada and Buergenthal give support to the contention that the *Oil Platforms* holding

met the conditions prescribed by the provisions of Article XX, paragraph 1(d), including, as relevant, the rules of general international law on the use of force. This, I submit, the Court has not done. In order to do that, in my view, the Court would have had to go deeper into ascertaining the facts surrounding the case.

Id.

²²⁷ *Id.* para. 52. Judge Owada states:

I should have liked to see the Court engage in a much more in-depth examination of this difficult problem of ascertaining the facts of the case . . . through various powers and procedural means available to the Court . . . including those relating to the questions of the burden of proof and the standard of proof

Id.

²²⁸ Separate Opinion of Judge Buergenthal, *supra* note 201, para. 46 (stating "[b]y failing to differentiate between the requirements of that Article and those of international law on the use of force, the Court erroneously fails to examine important evidence presented by the United States in justification of the measures it took against Iran").

²²⁹ ICJ Statute, *supra* note 12, arts. 36, 60.

would have been more favorable to the United States if the Court possessed a greater capacity to resolve factual disputes.²³⁰

The Court's holding that the U.S.-presented evidence was "highly suggestive, but not conclusory"²³¹ also demonstrates the enormous discretion lodged in the Court when it is analyzing factual evidence.²³² This very leeway is precisely what enabled the Court to hold against the U.S. Article XX(1)(d) essential security interest defense, thereby allowing the ICJ an opportunity to reprimand the current U.S. use of force against other nations.²³³ The ICJ's virtually untrammeld freedom to determine its own use of the evidence is a boon to those judges who desire to opine on matters extraneous to the issues immediately at hand.²³⁴ Though all decisions before the Court are binding only between the parties before the Court and only on the actual case before the Court,²³⁵ the ICJ's holding in *Oil Platforms* appears to be an attempt to allow judges to counsel the United States and other nations considering using force against any nation, especially when those judges might disagree as a policy matter.

²³⁰ See *supra* notes 225-28 and accompanying text.

²³¹ *Oil Platforms*, *supra* note 2, para. 71.

²³² ICJ Statute, *supra* note 12, arts. 44, 48, 52. Only Articles 44, 48, and 52 of the ICJ Statute deal with evidentiary issues, and none of these articles set up any type of evidentiary rules for the use of evidence, burden of proof, or procurement of evidence. *Id.* For example, Article 48 states "[the Court] make all arrangements connected with the taking of evidence." *Id.* art. 48. Article 52 states "[a]fter the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents." *Id.* art. 52.

²³³ *Oil Platforms*, *supra* note 2, para. 78.

²³⁴ It has been commented "that the standard of proof the Court applied was very high – perhaps even a requirement of 'conclusive' proof, an extremely high standard." John R. Cook, *Current Development: The 2003 Judicial Activity of the International Court of Justice*, 98 AM. J. INT'L L. 309, 311 (2004). The Court's actions "leave the impression that the Court did not pay particular regard to the cumulative weight of evidence . . . [and] suggests that items of evidence were individually assessed and individually dismissed as insufficient to show attribution, without reference to cumulative weight." *Id.* Indeed, if one were to review closely the actual evidence placed before the Court in the written pleadings, one might come away wondering if one could ever prove lawful self-defense before the Court, as it appears that the justices are not willing to make even the smallest connections in the inevitable gaps in evidentiary proof.

²³⁵ ICJ Statute, *supra* note 12, art. 59.

C. The Court's Holding on the "Necessity" and "Proportionality" Defenses

The Court's analysis of the "necessity" and "proportionality" prongs of the self-defense doctrine may be largely a device to allow some judges an opportunity to make policy pronouncements that are untethered to basic international legal principles. The opinion of the Court on these issues is highly conclusory, rather than specific.²³⁶ The Court only asserts that these aspects of self-defense are part of the rule of customary international law and that it is "not satisfied" that these requirements have been proven.²³⁷ Rather than explaining the precise factors involved in deciding whether the two prongs are fulfilled, the Court simply asserts its conclusion with virtually no legal or factual analysis.²³⁸ For a Court that is charged with aiding the development of international law,²³⁹ it appears highly counterintuitive, indeed inappropriate, for the Court to fail to articulate the reasons for its holding on certain issues that are of extreme importance to the case and to the international community at large.

The *Oil Platforms* holding on the use of force claim is opaque, as the Court does not explain why it is not satisfied with the defenses presented by the United States. The use of force doctrine within international law is one of the most complicated and confusing legal doctrines states face,²⁴⁰ and it is important for the Court to clarify that doctrine. If the Court evaluated the "necessity and proportionality" defenses in terms of the evidence offered in this case, the Court would have had to explain its precise reasons for not upholding the U.S. defense. To put it another way, if the Court's reasoning against the U.S. use of force defense was factually developed and legally sound, then the Court would have expanded on and published those reasons. Legally sound reasoning would have considerably aided the international community in its understanding of the limits of self-defense. But the ICJ did not expand upon or publish its reasoning. The lack of

²³⁶ *Oil Platforms*, *supra* note 2, paras. 76-77.

²³⁷ *Id.* para. 76.

²³⁸ *See id.* paras. 76-77.

²³⁹ *See* ICJ Statute, *supra* note 12, art. 38.

²⁴⁰ SCHACTER, *supra* note 18, at 141.

reasoning and clarity in the ICJ decision on “necessity” and “proportionality” supports the view that the Court’s holding was intended, at least in some measure, as a comment on the current U.S. use of force in Iraq and Afghanistan rather than on its actual use of force in 1987 and 1988.

D. Raising Questions About the ICJ and Its Role in the International Community

The *Oil Platforms* case raises questions about the current scope and future reach of the International Court of Justice. The lack of evidence and the procedural issues raised by several judges supports a conclusion that the *Oil Platforms* Court attempted to decide something relevant to the world scene but not within its immediate jurisdictional mandate. Several judges in the decision argue that the Court’s holding extended beyond the original question the Court was asked to rule upon,²⁴¹ while other judges remarked that the Court stayed within its jurisdictional limits.²⁴² The split on this issue, even among the judges themselves, raises serious concerns for the international community. If the *Oil Platforms* Court is able to extend its jurisdiction on certain matters by unilaterally deeming them appropriate to the case at hand, it is only a matter of time before the Court extends the holdings of other cases. Such overreaching may considerably damage the Court’s legitimacy and should be of great concern to all who value its role as an international law-making institution.

Overreaching by the ICJ may also raise concerns within the international community about other international tribunals. The Court’s possible extension of the subject matter of the *Oil Platforms* claim is fuel for advocates arguing against the advisability of international tribunals. The Court’s extension of the holding in this case may also increase anxiety in countries that usually support the rule of law and avail themselves of the jurisdiction of the ICJ and other international tribunals. Indeed, this concern over the extension of jurisdiction and subject matter is one of the arguments made by the United States for not supporting some international tribunals such as the International Criminal

²⁴¹ See *supra* notes 206-11 and accompanying text.

²⁴² See Declaration of Judge Koroma, *supra* 213; Separate Opinion of Judge Simma, *supra* note 212, para. 3-4.

Court.²⁴³ There is a legitimate concern that such tribunals will become more politically motivated instead of abiding by and advancing the rule of law.

Additionally, in terms of the fact-finding issue discussed above in Part V.B., the international community might also need to rethink what cases should be brought to the ICJ. If the cases are highly fact specific and turn largely on the resolution of complicated factual matters, rather than on questions of law, it might behoove parties to seek and develop other methods of adjudication. Several of the judges in the *Oil Platforms* case remarked on this phenomenon, opining that the ICJ should establish higher evidentiary standards and develop clearer evidentiary rules.²⁴⁴ If the ICJ is to continue to hear contentious cases and act as a fact-finder of first instance for international disputes, the Court must improve its rules on evidence and presentation of facts. For the moment, however, parties should be aware of these limitations and should act accordingly. Indeed, the Court's legacy as a fact-finder should not be viewed as strongly as its legacy as a interpreter of treaties and arbitor of customary international law.

VI. Conclusion

The ICJ's decision in the *Oil Platforms* case raises many questions regarding the proper use of force in self-defense, the appropriate interpretation of certain treaty provisions, and the precise contours of the doctrine of self-defense. The holding itself denies both parties' claims and leaves each country without the reparations they sought. But, when one analyzes the decision more closely, a number of concerns with the Court's holding arise. The recent circumstances of the U.S. invasion in Afghanistan and Iraq likely had a serious effect on the Court's decision. The "lack of evidence" noted by the Court bolsters the conclusion that the Court's holding in *Oil Platforms* may have been more politically, rather than legally, motivated. The Court's lack of explanation

²⁴³ See Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 STAN. L. REV. 1633, 1635 (2003) (discussing the Bush Administration's opposition to the ICC); Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2082 (2003) (discussing the Bush Administration's decision to "unsign" the Treaty promulgating the ICC).

²⁴⁴ See *supra* Part V.B.

and reasoning for its ruling on the “necessity” and “proportionality” prongs of the U.S. self-defense claim also suggests that the Court might have been motivated to reprimand the United States for its current activities as opposed to its past actions that were before the Court.

Of course, as an impartial institution set up to adjudicate disputes between nations, the ICJ’s position in the international community is constantly changing as it decides more cases and establishes its own jurisprudence. But the *Oil Platforms* case raises serious concerns about whether the Court is adequately equipped to undertake the role to which it appears to aspire. If the Court desires to expand its role, it must overhaul evidentiary rules and establish burden of proof requirements. The case also raises questions as to the proper role of the ICJ in determining certain international legal principles, such as the appropriate use of force doctrine and self-defense exceptions. In terms of explaining relevant rules on the appropriate use of force and self-defense, the *Oil Platforms* case does not offer much guidance for states or scholars. When viewed as a commentary on current U.S. actions involving use of force and a reprimand against the United States, the *Oil Platforms* case is highly instructive about how the ICJ views itself, its legacy, and its future.