The Contribution of the ICJ Judgment of 6 November 2003 in the *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* to International Law on the Use of Force in Self-defence

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1. Jurisdiction of the Court relating to the Use of Force

On 6 November 2003 the International Court of Justice handed out a judgment on the Case Concerning Oil Platforms (Iran *v.* United States of America) in which the Court dealt with a dispute arising out of the attack on and destruction of three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, by several warships of the United States Navy on 19 October 1987 and 18 April 1988, respectively. The applicant invoked, as the sole basis for the Court's jurisdiction, the compromissory clause included in Article XXI(2) of a bilateral Treaty between both countries, namely, the Treaty of Amity, Economic Relations and Consular Rights, which was signed in Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter, 'the 1955 Treaty').
In the Preliminary Objection phase the task of the Court was to decide whether the dispute between the two States over the lawfulness of the actions carried out by the United States against the Iranian platforms was a dispute 'as to the interpretation or application of the Treaty of 1955'. In a judgment dated 12 December 1996, the Court rejected the preliminary objection of the United States according to which the 1955 Treaty did not provide any basis for the jurisdiction of the Court and found that it had jurisdiction, on the basis of Article XXI(2) of the 1955 Treaty, to entertain solely the claims made by Iran under Article X(1) of that Treaty, which provides that

> [b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.[1]

In relation to the applicability of the 1955 Treaty in the event of the use of force, the Court took the view that '[m]atters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955,'[2] and that Article XX(1)(d) did not restrict its jurisdiction to the present case, but was confined to affording the Parties a possible defence on the merits to be used should the occasion arise.[3]

In summary, the Court's main task on the merits – as stated in the final submissions of Iran – was to ascertain whether 'in attacking and destroying on 19 October 1987 and 18 April 1988 the oil platforms referred to in Iran's Application, the United States breached its obligations to Iran under Article X, paragraph 1, of the Treaty of Amity.'[4] However, the most voluminous part of the reasoning deals with the question of whether the United States' actions could qualify as acts of self-defence and thus as measures necessary to protect its essential security interests under Article XX(1)(d). In the controversial paragraphs 36 and 37 of the judgment, the Court decided to examine the application of this provision before turning to Article X(1). This means

[1] ICJ Reports (1996-II), at 820, para. 53.
[2] Ibid, at 811, para. 21.
[3] Ibid, at 810, para. 20.
[4] CR 2003/16, para. 12.

that the Court examined an exception to an alleged breach of the Treaty before ascertaining whether there had been a breach of the Treaty as such.

Eventually, the Court concluded that:

> the actions carried out by United States forces against Iranian oil installations on 19 October 1987 and 18 April 1988 cannot be justified, under Article XX, paragraph 1(d), of the 1955 Treaty, *as being measures necessary* to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defence, and thus did not fall within the *category of measures contemplated*, upon its *correct interpretation*, by that provision of the Treaty[5].

This conclusion is included in the first part of the *dispositif* of the judgment. In the second part, the Court found that those actions did not constitute a breach of the obligations of the United States under Article X(1) of the Treaty, regarding freedom of commerce between the territories of the parties, and that, accordingly, the claim of the Islamic Republic of Iran for reparation could also not be upheld.[6]

We do not intend to address here the procedural and methodological issues raised by this judgment.[7] This brief presentation is confined to assessing the contribution of the judgment to international law on the use of force in self-defence, focusing on two topics: firstly, the relationship between self-defence and Article XX(1)(d) of the Treaty, and secondly, the analysis of the conditions of self-defence in the present dispute.

2. Relationship between Self-defence and Article XX(1)(d) of the 1955 Treaty

[5] Judgment of 6 November 2003, para. 78 (emphasis added).

[6] Ibid, para. 125(1).

[7] Some Judges of the Court considered that the first part of the *dispositif* violates the *non ultra petita* rule (see especially: *Separate Opinion of Judge Higgins*, paras. 9-24; *Separate Opinion of Judge Kooijmans*, paras. 27-35, and *Separate Opinion of Judge Buergenthal*, paras. 4-10). In Judge Buergenthal's view, 'the *non ultra petita* rule prevents the Court from making a specific finding in its *dispositif* that the challenged action, while not a violation of Article X, paragraph 1, is nevertheless not justified under Article XX, paragraph 1 (d), when the Parties in their submission did not request such a finding with regard to that Article, which they did not do in this case (*Separate Opinion of Judge Buergenthal*, para. 6). Similarly, Judge Kooijmans observes that 'the first part of [the *dispositif*] is redundant: it introduces an *obiter dictum* into the operative part of a judgment' (*Separate Opinion of Judge Kooijmans*, para. 33). In contrast, Judge Simma accepts that, 'since [the Court's] jurisdiction is limited to the bases furnished by the 1955 Treaty, it would not have been possible for the Court to go as far as stating in the *dispositif* of its judgment that, since the United States attacks on the oil platforms involved a use of armed force that cannot be justified as self-defence, these attacks must not only, for reasons of their own, be found not to have been necessary to protect the essential security interests of the United States within the meaning of Article XX of the Treaty; they must also be found in breach of Article 2(4) of the United Nations Charter. What the Court could have done, without neglecting any jurisdictional bounds as I see them, is to restate the backbone of the Charter law on use of force by way of strong, unequivocal *obiter dicta*' (*Separate Opinion of Judge Simma*, para. 6).

Concerning the first topic, in the Court's opinion the question was whether the use of armed force had ever been envisaged in the 1955 Treaty as a 'measure' which might be 'necessary' for the protection of the 'essential security interests' of either party; and if so, whether the parties had contemplated, or assumed, a limitation that such use would have to comply with the conditions laid down by international law.[8] In the 1986 *Nicaragua* judgment, the Court had interpreted an identical provision of a similar treaty but did not settle that issue. In that case, the Court simply said that an action taken in self-defence might be considered as part of the wider category of measures qualified in Article XXI as 'necessary to protect' the 'essential security interests' of a party,[9] and added some criteria of interpretation to that exception: firstly, that the risk run by these 'essential security interests' must be 'reasonable';[10] secondly, that the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be 'necessary' for that purpose;[11] thirdly, that whether a given measure is 'necessary' is not purely a question for the subjective judgment of the party.[12]

In the Oil Platforms case, the Court focused mainly on the 'standard of necessity' of the measures taken, in so far as the use of force was concerned, and accepted Iran's principal line of argument, namely that, when Article XX(1)(d) is invoked to justify actions involving the use of armed force allegedly in self-defence, the interpretation and application of that provision would necessarily entail an assessment of the conditions of legitimate self-defence under international law.[13]

Following this approach the Court rejected the United States' argument that the Court's jurisdiction was limited, pursuant to Article XXI(2) of the 1955 Treaty, to the interpretation and application of that Treaty, and did not extend to the legality of the United States' actions under other rules of international law, namely, the rules of general international law or the Charter. The Court referred to the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, particularly, Article 31(3)(c), according to which interpretation must take into account any relevant rules of international law applicable in the relations between the parties. Consequently, the Court concluded that Article XX(1)(d) of the 1955 Treaty was not intended to operate wholly independently of the relevant rules of international law on the use of force,[14] so as to be capable of being successfully invoked, even in the limited context of a claim of a breach of the Treaty, in relation to an unlawful use of force.[15]

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[8] Judgment of 6 November 2003, para. 40.

[9] Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), ICJ Reports (1986), para. 224.

[10] Ibid.

[11] Ibid, para. 282.

[12] Ibid.

[13] Judgment of 6 November 2003, para. 40.

[14] According to Judge Simma, '[i]f these general rules of international law are of a peremptory nature, as they undeniable are in this case, then the principle of interpretation just mentioned turns into a legally insurmountable limit to permissible treaty interpretation'. He further criticizes that this is the only time in the part of the judgment dealing with the United States' attacks that the United Nations Charter is expressly mentioned (*Separate Opinion of Judge Simma*, paras. 8-9).

[15] Para. 41 of the 2003 judgment. Some Judges have criticized this part of the reasoning because they understand that the Court has not interpreted correctly Article XX(1)(d) by reference to the rules on treaty interpretation (*Separate Opinion of Judge Higgins*, para. 49), and that it has

Therefore, according to the Court, the legality of the action taken by the United States has to be judged by reference to Article XX(1)(d) of the Treaty, in the light of international law on the use of force in self-defence.[16]

What is our assessment of the judgment on this point? We believe that the Court's interpretation is correct. We share Iran's opinion that there is one 'objective standard of necessity' for the use of force in international relations, namely, the Charter standard, which is peremptory. Since the measures taken by the United States had involved the use of force, the Court in its judgment had to evaluate their lawfulness as actions taken in self-defence against a prior armed attack.

It should be observed in this respect that the Court did not consider other legal possibilities for the use of force. It is not self-evident if this attitude implies a recognition that there is no other lawful possibility for a State to resort to force outside self-defence. However, it seems clear that the position taken by the Court will have an impact on the doctrinal debate between those scholars arguing that the only permissible use of force is self-defence within the meaning of Article 51 of the United Nations Charter, and those advocating the legality of resorting to forcible, proportionate countermeasures in the face of a smaller-scale use of force, that is, an attack which does not reach the threshold of Article 51. In our view, these later attacks would not entitle the victim State to resort to armed force.[17] In such cases, the victim should bring the attack to the attention of the Security Council under Chapter VII of the UN Charter.[18] This analysis is in line with Articles 49-54 of the ILC's text on the Responsibility of States for Internationally Wrongful Acts, adopted in 2001,[19] in which the Commission strictly excluded from its concept of 'countermeasures' any such measures amounting to a threat or use of force.[20]

Furthermore, we believe that the Court should have used two additional arguments in its reasoning to support the interpretation of Article XX(1)(d) in the light of international law on the use of force in self-defence. Firstly, the Court should have recalled Article 103 of the United

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improperly transformed the case into a dispute relating to the use of force under international law rather than one calling for the interpretation and application of a bilateral Treaty on commerce in relation to which the Court's jurisdiction was confined (*Separate Opinion of Judge Buergenthal*, para. 32).

[16] Judgment of 6 November 2003, para. 44.

[17] See in this respect the *Separate Opinion of Judge Simma*, paras. 12-13. See also: A. Gattini, 'La Legittima Difesa nel Nuovo Secolo: La Sentenza della Corte Internazionale di Giustizia nell'affare delle Piattaforme Petrolifere', 87 *Rivista Italiana di Diritto Internazionale* (2004), 147, at 168-169.

[18] In fact, the Court was rather ambiguous in this regard in the *Nicaragua* case [see ICJ Reports (1986), paras. 211-249]. In Judge Higgins' opinion, '[w]hether the Court envisaged only non-forceful countermeasures is, for the moment, a matter of conjecture. That, too, is not addressed in the present judgment. The Court simply moves on from the Court's 1986 statement that a necessary measure to protect essential security interests could be action taken in self-defence to the rather different determination that an armed attack on a State, allowing of the right of self-defence, must have occurred before any military acts can be regarded as measures under Article XX, paragraph 1 (d). But some stepping stones are surely needed to go from one proposition to the other' (*Separate Opinion of Judge Higgins*, para. 43).

[19] International Law Commission, Report on the Work of its Fifty-Third Session, Official Records of the General Assembly, Fifty-Sixth Session, Supplement No.10 (A/56/10).

[20] Article 50(1)(a).

Nations Charter, which provides that 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. Consequently, the parties to a Treaty cannot discard the provisions of the Charter when interpreting or applying that Treaty. Secondly, the Court should have referred to the hierarchical status of certain norms, such as the one in Article 2(4) of the United Nations Charter. It is well known that under Article 53 of the Vienna Convention on the Law of Treaties, a provision of a treaty which conflicts with a *ius cogens* rule is void. This rigorous provision in turn generates a stringent principle of interpretation, so that any provision of a treaty has to be interpreted, if at all possible, so as not to conflict with such a rule.

3. The Analysis of the Conditions of Self-defence

In the Oil Platforms judgment the Court addressed the lawfulness of the unilateral actions taken by the United States on the oil platforms in order to assess if these attacks were justified as acts of legitimate self-defence in response to what the United States had regarded as armed attacks by Iran.[21] To this end, the Court analysed whether the United States had met the conditions under which it is permissible for a State to resort to force in self-defence. In doing so, the Court restated to a large extent its own doctrine on this matter established in the 1986 *Nicaragua* judgment and confirmed in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.[22] In effect, in the *Oil Platforms* case the Court required the United States 'to show that attacks had been made upon it 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', and that these '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.'[23] The main landmarks of the judgment are the following:

(a) To start with, it is worthy of notice that the Court only evaluated *the existence of an armed attack* with regard to the actions presumably committed by Iran involving an actual use of force, and did not take into account the argument advanced by the United States that there was a series of attacks against it amounting to a *continous armed attack* and justifying the need to prevent further attacks.[24] Following this approach, force had to be used to 'restore the security' of United States vessels and their crews by eliminating facilities used by Iran to conduct or support unlawful armed attacks against them;[25] 'to prevent additional attacks' by Iran;[26] and as a reaction to a 'general situation of an armed attack'.[27] Thus the Court has opted for a restrictive interpretation of the concept of armed attack which seems to exclude the so-called 'anticipatory' self-defence, and thereby prevent abuses of self-defence.

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[21] Indeed the United States had even given notice of its action to the Security Council under Article 51 of the United Nations Charter.

[22] See: Legality of the threat or use of nuclear weapons, ICJ Reports (1996-I), paras. 40-44. See also: Corfu Channel Case (United Kingdom v. Albania), ICJ Reports (1949).

[23] Judgment of 6 November 2003, para. 51.

[24] CR 2003/7, at 31, para. 6.

[25] United States' Counter Memorial, 23 June 1997 (paras. 4.01 and 4.05).

[26] Judgment of 6 November 2003, para. 49.

[27] United States' Counter Memorial, para. 4.10; CR 2003/7, para. 3.

(b) Whilst the Court did not determine Iran's responsibility for the alleged actions against American shipping, it did examine the requirements of proportionality and necessity concerning the United States' actions. It stressed the character of customary law rule for both requirements,[28] and added a new aspect linked to them – that the target of the attack in self-defence should be *a military target*, which should be qualified according to the *ius in bello*.[29]

Regarding the condition of *necessity*, the Court held that there was no sufficient evidence supporting the United States' contentions that the oil platforms were military targets, which did not suggest that their targeting had been a necessary act.[30] Once again, the Court did not expressly respond to the United States' contention that a State can use force in self-defence to remove continuing threats to its future security,[31] but did not retain it, because it simply denied that the attacks on the platforms were necessary to respond to the actual attacks, that is, the attack on the *Sea Isle City* and the mining of the USS *Samuel B. Roberts*.[32]

Concerning the requirement of *proportionality*, in its oral pleadings the United States had evaluated the proportionality of its actions in regard to 'not only that the consequences of the United States actions were not in excess of what was necessary to deter or stop Iranian attacks, but also that the damage caused by United States' actions was not excessive in relation to the loss of United States life and property that would have resulted if Iran had continued those attacks.'[33] Despite these submissions, the Court required the United States to show that 'its actions were necessary and proportional to the armed attack made on it',[34] thus evaluating the proportionality on the basis of the damages already inflicted on it. Eventually, the Court noted that if the United States' response to the missile attack had been shown to be necessary, it might have been considered proportionate. But the same would not apply for the United States' response to the mining of the USS *Samuel B. Roberts* because it had been executed as part of a more extensive operation entitled 'Operation Praying Mantis':

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[28] Para. 76 of the judgment reads as follows: 'The conditions for the exercise of the right of self-defence are well settled: as the Court observed in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, '[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law' [ICJ Reports (1996-I), at 245, para. 41]); and in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court referred to a specific rule 'whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it' as 'a rule well established in customary international law' [ICJ Reports (1986), at 94, para. 176].'

[29] Paras. 51 and 74 of the 2003 judgment. In doing so, the Court has endorsed an argument accepted by both parties. In its notifications to the United Nations Security Council, the United States had attempted to justify that the oil platforms were military targets; furthermore, in its Counter Memorial, it argued that 'the U.S. attacks on the platforms satisfied all other applicable requirements of the law of armed conflict' (United States' Counter Memorial, para. 4.46). Conversely, Iran attempted to prove that the platforms were commercial facilities and not military targets (CR 2003/6, paras. 31-42).

[30] Para. 76 of the 2003 Judgment.

[31] United States' Counter Memorial, para. 4.27; Iran's Reply, para. 7.51.

[32] It should be noticed that the United States had assimilated the action on the oil platforms to the response to Afghanistan after the attacks of 11 September 2001 (CR 2003/12, para. 18.51; CR 2003/15, para. 16).

[33] CR 2003/18, para. 28.17.

[34] Judgment of 6 November 2003, para. 51.

> As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither 'Operation Praying Mantis' as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.[35]

4. Final Remarks

In spite of the disagreement among the Judges, it is remarkable that the Court decided to analyse the issue of self-defence. But it is to be wondered why the Court did not take the opportunity to confirm in clearer, more forceful terms the requirements and the boundaries of self-defence in contemporary international law, at a time when the conditions for the use of force are hotly debated among States and legal scholars. Particularly, the Court could have expressly responded, by way of *obiter dicta*, to a number of controversial interpretations of the requirements of self-defence which had been advanced by the parties in their pleadings. Nonetheless, the Court has somehow responded to these arguments, in so far as it has not accepted such controversial interpretations to decide on the dispute, and has evaluated the United States' actions using a rather narrow conception of self-defence. Probably, to address such issues the Court was limited by the divergent views of the Judges as to the scope of its jurisdiction in the present case.

[35] Ibid, para. 77.