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Did the Court Miss an Opportunity To Denounce the Erosion of the Principle Prohibiting the Use of Force?

Djamchid Momtaz[†]

I. INTRODUCTION

The United States never disputed that the attacks undertaken on October 19, 1987, and April 18, 1988, against the oil platforms situated on the continental shelf of Iran in the Persian Gulf came within the international law on the use of force. In effect, in the letters addressed to the U.N. Security Council following the attacks, the United States affirmed that its conduct was framed by the law of self-defense pursuant to Article 51 of the U.N. Charter. The first attack, which led to the destruction of the *Reshadat* complex, was, evidently, undertaken in response to the firing of a missile, imputed to Iran, which had hit the *Sea Isle City*, an American-flagged oil tanker then in the territorial waters of Kuwait. The second series of attacks launched against the *Nasr* and *Salman* oil installations were, according to the United States, undertaken in response to the collision of an American warship in international waters, the *Samuel B. Roberts*, with a mine which, again according to the United States, had been laid by Iran.¹

It was only afterwards during the process of written pleadings in front of the International Court of Justice (ICJ) that the United States, in its counter-memorial, introduced a link between the claim of self-defense and the Treaty of Amity, Economic Relations and Consular Rights signed on August 15, 1955 between the United States and Iran—the arbitration clause on which the jurisdiction of the Court was based. The United States relied upon, in effect, the exception clause of Article XX, paragraph 1(d) of the Treaty in order to justify these attacks as necessary measures for the protection of their essential security interests. While affirming that the Treaty does not release the parties, in their relations, from the obligations prescribed by international law as far as

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1. *Letter Dated 18 April 1988 from the Acting Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/19791 (1988); *Letter Dated 19 October 1987 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/19219 (1987).

the use of force is concerned, the United States nonetheless refused the Court's competence to assess the lawfulness of its actions on that basis. According to the United States, the jurisdiction of the Court could go only so far as Article XX permitted, meaning the Court was obligated to limit itself to evaluating the contested action solely against the criteria set out by the provisions of that Article.² The Court rejected this argument, ruling in favor of the interpretation of Article XX in light of the international law relating to resort to the use of force, and demonstrating the Court's will to seize the opportunity to rule once again upon the content of the law of self-defense.

II. THE INTERPRETATION OF THE EXCEPTION CLAUSE OF THE 1955 TREATY WITH REGARD TO THE INTERNATIONAL LAW OF THE USE OF FORCE

It is not necessarily for states themselves to assess their legal status vis-à-vis other states. This opinion was suggested by the United States-France arbitral tribunal in its December 9, 1978 decision in the case concerning the Air Services Agreement,³ and taken up by the ICJ in its June 27, 1986 ruling in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*.⁴ According to the Court, there is no rule in customary international law permitting one state to exercise the right of self-defense against the alleged aggressor "on the basis of its own assessment of the situation."⁵ In the present case, the Court thus had to convince itself that the measures taken by the United States—that is to say the destruction of the Iranian oil platforms—were well within the provisions of Article XX of the Treaty in order to be considered necessary to the protection of essential U.S. security interests. In order to do this, the Court of course had to determine the meaning and the scope of those provisions before applying them to these concrete cases, leading it to say that, "the matter is one of interpretation of the Treaty."⁶

To carry out this task, the Court believed that it was necessary to apply "the general rules of treaty interpretation as reflected in the 1969 Vienna Convention on the Law of Treaties."⁷ The Court was particularly focused on Article 31, paragraph 3(c) of the Vienna Convention, which in setting forth the rules specifies that a treaty must be interpreted by taking into account, together with the context, "any relevant rules of international law applicable in the relations between the parties."⁸ The Court reached the conclusion that the provisions of the 1955 Treaty were not to be interpreted, as the United States claimed, in a manner independent from the rules of international law relating

2. Oil Platforms (Iran v. U.S.) (Merits), 2003 I.C.J. para. 39 (Nov. 6), <http://www.icj-cij.org/icjwww/idecisions.htm>.

3. Case Concerning the Air Services Agreement of 27 March 1946 Between the United States of America and France, 18 R.I.A.A. 417, 443, paras. 81-83.

4. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

5. *Id.* at 103, para. 195.

6. *Oil Platforms*, para. 40.

7. *Id.* para. 41.

8. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(3)(c), U.N. Doc. A/Conf. 39/27, 1155 U.N.T.S. 331, 340 (1980).

to the use of force—that is to say, “the provisions of the Charter of the United Nations and customary international law.”⁹

As a result, in order for the United States to be able to justify its resort to the use of force—which led to the destruction of the Iranian oil platforms—on the basis of the pertinent provisions of Article XX of the Treaty, it was necessary to establish that the United States was entitled to exercise its right of self-defense. According to the Court, the United States needed

to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such nature as to be qualified as “armed attacks” within the meaning of the expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force.¹⁰

The United States also needed to 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 an attack in the exercise of self-defence.”¹¹ The specific rules to which the Court was referring and which are not mentioned in Article 51 of the U.N. Charter are those which the Court had already restated on previous occasions. In its decision in the *Nicaragua* case, the Court had effectively declared that the rule whereby “self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it” was well-established in the customary international law of armed conflict.¹² As for the rule according to which the attack must be directed only against a military target, this comes from the principle described by the Court in its 1996 Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons*, of “[t]he cardinal principles contained in the texts constituting the fabric of humanitarian law.”¹³ With the customary nature of these rules no longer the subject of any controversy, the Court did not find it necessary to recall them in the *Oil Platforms* case.

In the matter of the attack against the *Sea Isle City*, the Court concluded that the United States did not meet the burden of proof incumbent upon it and did not demonstrate the existence of an armed attack against it.¹⁴ The Court could have stopped there and not taken up the question of whether a missile attack against a commercial vessel could constitute, as such, an armed attack authorizing the exercise of the right of self-defense. Nonetheless, the Court chose to examine this question. This decision is only justified by the will of the Court to pronounce once again upon the content of the right of self-defense and to denounce by these means any extensive interpretation of self-defense.

Returning to the distinction made by the Court in the *Nicaragua* case between the most grave forms of the use of force (those constituting an armed attack) and other less grave forms,¹⁵ the Court found that the attack on the *Sea*

9. *Oil Platforms*, para. 42.

10. *Id.* para. 51.

11. *Id.* para. 51.

12. *Military and Paramilitary Activities*, 1986 I.C.J. at 94, para. 176.

13. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 257, para. 78 (July 8).

14. *Oil Platforms*, para. 61.

15. *Military and Paramilitary Activities*, 1986 I.C.J. at 101, para. 191.

Isle City fell into the latter category.¹⁶ On the other hand, in the case of the attack on the *Samuel B. Roberts*, while raising “the inconclusiveness of the evidence of Iran’s responsibility for the mining of the USS *Samuel B. Roberts*,” the Court did not exclude the possibility that the mining of a single military vessel might qualify as an armed attack.¹⁷ Nonetheless, the Court was careful to specify that given the fact that the crew of the warship suffered no loss of life and despite the serious structural damage caused by the attack, the destruction of the Iranian oil platforms in response to that attack could not be regarded as a proportionate use of force in self-defense.¹⁸ These details are important because they help to define the contours of the right of self-defense and to reduce the risk of unnecessarily eroding the principle which prohibits resort to the use of force and which is a central preoccupation of the international community.

Ultimately, the Court concluded that the actions carried out by the American forces against the oil platforms of Iran could not be regarded as measures necessary to the protection of essential U.S. security interests. According to the Court, they constituted “recourse to armed force not qualifying, under international law on the question, as acts of self-defence.”¹⁹ The Court refused, however, to take up in its decision, the violation by the United States of the rule prohibiting recourse to the use of force—more specifically that of Article 2(4) of the U.N. Charter—as law applicable to the relations between the United States and Iran. The holding thus reflects the motivation underlying the Court’s decision in the sense that it reflects the Court’s willingness only to declare the actions carried out by the United States as not justified on the basis of the exceptions contained in the 1955 Treaty “as interpreted in the light of international law on the use of force,”²⁰ omitting any allusion to the right of self-defense to which the Court nonetheless referred in the grounds for the decision.

III. CONTROVERSY OVER THE COURT’S REFUSAL TO TAKE UP THE VIOLATION OF ARTICLE 2(4) OF THE U.N. CHARTER

The refusal of the Court to take up the United States’ violation of Article 2(4) of the U.N. Charter and to integrate the law of self-defense into the law of the U.N. Charter is in this way a “*distanciation*”²¹ [distancing] of the links between the grounds and the holding of the decision did not fail to provoke the reaction of certain judges. Judge Rigaux, the ad hoc judge designated by Iran, underlines in his separate opinion that it is incumbent upon the principal judicial organ of the United Nations to seize the opportunity offered to it by

16. *Oil Platforms Judgment*, § 64.

17. *Id.* para. 72.

18. *Id.* para. 77.

19. *Id.* para. 78.

20. *Id.* para. 125.

21. This expression comes from Professor Georges Abi-Saab. See Georges Abi-Saab, *Cours général de droit international public* [General Course on Public International Law], 207 RECUEIL DES COURS DE L’ACADEMIE DE LA HAYE 269 (1987).

the case to reaffirm the restrictive force of Article 2(4) of the U.N. Charter.²² Judge Simma, in his separate opinion, voluntarily admits that the Court, in declaring the actions carried out by the United States as not recognizable as acts of self-defense with respect to the international law on the use of force, recognizes implicitly that such actions violated Article 2(4) of the U.N. Charter. Nonetheless, the fact remains, according to Judge Simma, that the Court should have declared unambiguously that such actions violated the rules prohibiting the use of force as they are represented by the U.N. Charter and customary international law of war.²³ Finally, Judge Elaraby, in his dissenting opinion, asks why the Court, in the holding rendered in the present case, does not refer itself—as it did in its decision of June 27, 1986 in the *Nicaragua* case—to the violation of the United States of its obligations under customary international law not to use force against another State. Judge Elaraby goes further than his colleagues in that he regrets that the Court did not take up the fact that the use of force against the oil platforms was a violation of the sovereignty of Iran,²⁴ an act that clearly qualifies for armed retaliation. One can only praise such a position. In its decision of June 27, 1986, the Court established the closely linked relationship between the principle of respect for state sovereignty and that of the prohibition of the use of force and non-intervention.²⁶ The prohibition on the use of force is—when all is said and done—the only guarantee of the sovereignty of states.

All these observations are fully justified and based on the concern born from the multiplication of situations where states resort to the use of armed force in reaction to actions which—while not constituting armed attacks—are nonetheless unlawful under international law. A firm and unambiguous condemnation of the actions carried out by the United States in violation of Article 2(4) of the U.N. Charter from the principal judicial organ of the United Nations would indisputably have had the effect of restoring the image of the rule prohibiting recourse to force, sadly misused over the course of recent years.

Does the Court's refusal to address the violation of the prohibition on the use of force result from some absence of courage within the institution? Is this a matter of a delicate question which cuts too close to one of the parties to the disagreement—that is to say, the United States? If that was the case, the Court could hardly have avoided any reference to that question in its holding in the decision, as Judge Higgins suggested in her separate opinion.²⁷ She estimated, following the example of Judges Buergenthal, Kooijmans, Owada, and Parra-Aranguren, that the Court had not been concerned with that question. Indeed, Iran, in its Application Instituting Proceedings, and then, subsequently, during the written and oral pleadings, requested that the Court adjudge and declare that the United States, in destroying the oil platforms, had

22. *Oil Platforms* (separate opinion of Judge ad hoc Rigaux), para. 33.

23. *Oil Platforms* (separate opinion of Judge Simma), para. 7.

24. *Oil Platforms* (dissenting opinion of Judge Elaraby), para. 1.2.

26. *Military and Paramilitary Activities*, 1986 I.C.J. at 111, para. 212.

27. *Oil Platforms* (separate opinion of Judge Higgins), para. 15.

violated its obligations under Article X, paragraph 1 of the 1955 Treaty. That provision read: "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."²⁸ The Court could certainly have accorded priority to the examination of this question, and, then, having established that there was no existing commerce between the territories of the two parties at the time of the attacks on the oil platforms—the conclusion at which the Court arrived²⁹—been content to declare only that said provision of the Treaty had not been violated.

The Court, however, chose not to sidestep. As the principal judicial body of the United Nations, it was clearly difficult for the Court to do so on a question as fundamental as the prohibition on the use of force in international relations, consecrated by Article 2(4) of the U.N. Charter. This is why the Court decided to rule on the question of the lawfulness of the U.S. resort to the use of force against Iran, which is to the Court's credit. In the opinion of the Court, in order to do justice to Iran's claim, it was necessary to be convinced at the same time that the U.S. actions of which Iran has complained were not justified by the necessity of protecting essential U.S. security interests. The problem of the sequence in which to examine the two questions posed to the Court³⁰ was thus finally decided in favor of prioritizing examination of the question on the lawfulness of the actions undertaken against the oil platforms.

The Court justified its choice on the basis of the positions taken by the United States in the course of the proceedings. For the United States, to the extent it felt that the sequence in which the question were to be tackled was left to the Court's discretion,³¹ there was no pressing reason why the question with respect to the violation of the freedom of commerce had to be examined first. Furthermore, the United States itself recognized in its rejoinder that aspects of the case at hand touched on self-defense, raising questions of the greatest importance for the entirety of the international community. The two parties acknowledged that the case was far from not having any impact on the matter of the use of force.³²

It was in this way that the Court found itself competent to examine, with regard to the international law on the use of force, the lawfulness of the actions undertaken by the United States against the Iranian oil platforms in order to protect its essential security interests. The examination of this question was undertaken—as the Court took care to point out at two points in its explanation of the decision—all the while taking account of the jurisdiction that Article XX of the 1955 Treaty conferred on the Court.³³ This is why the relevant holding of the decision is content to find only that the actions of the United States could not be considered justifiable pursuant to the exemption provisions as interpreted in light of international law. The refusal of the Court

28. *Oil Platforms*, paras. 22, 27-30.

29. *Id.* para. 98.

30. *Id.* para. 23.

31. *Id.* para. 36.

32. *Id.* para. 38.

33. *Id.* paras. 39, 42.

to underline the violation by the United States of the prohibition against the use of force as contained in Article 2(4) of the U.N. Charter has nothing to do with any lack of daring or courage on the part of the Court, but rather results from the fact of the limited jurisdiction conferred upon the Court by the parties. The lawfulness of the actions undertaken by the United States must therefore be assessed uniquely according to the criteria set forth by the exemption clause of the Treaty as interpreted in light of the international law on the use of force.

IV. CONCLUSION

It is true that the Court tried hard to deal with the parties. The Court refused to accept the Iranian demands for reparations after having concluded that the attacks undertaken by the United States did not reach the freedom of commerce in oil between the territories of the two States, all while declaring at the same time that the American actions could not be regarded as justified as measures necessary for the protection of vital U.S. security interests. The fact remains that the Court—in specifying in the decision's holding that the exemptions upon which the United States sought to justify its attacks had to be interpreted in light of the international law on the use of force—acted in its capacity as “general guardian of legality” within the international community in its entirety.³⁴ Hope remains that this decision—the reasoning of which declares without ambiguity and in completely clear terms a preference for a restrictive interpretation of the law of self-defense that limits its exercise to cases in which a State is faced with an armed attack—will contribute to putting a halt to the trivialization of the unlawful use of force in international relations.

34. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.) (Order of 14 April 1992), 1992 I.C.J. 114, 138 (Apr. 14) (separate opinion of Judge Lachs).

