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Exploring the Limits of International Law relating to the Use of Force in Self-defence

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Abstract

In the new millenium, the scope and limits of the use of force in international relations are still the subject of strong debate. Some legal scholars and state representatives favour an expanded interpretation of the right of self-defence which includes so-called pre-emptive and anticipatory self-defence. The International Court of Justice recently dealt with a dispute involving the use of force, allegedly in self-defence, in the Case Concerning Oil Platforms (Iran v. United States). *This article explores the contribution of the judgment to international law on the use of force in self-defence. It discusses two issues: the relationship between self-defence and the protection of essential security interests of states, and the Court's analysis of the conditions for self-defence. We conclude that the ICJ has largely confirmed its existing jurisprudence in the field and avoided making any explicit, significant new contribution to the notion of self-defence. Nonetheless, we suggest that the Court's insistence on a narrow interpretation of certain conditions and silence on some controversial arguments advanced by the parties is prudent and more eloquent than words.*

1 Introduction: The Current Legal Debate over Self-defence

It is generally accepted that resort to force in self-defence is lawful under contemporary international law, but several doctrines have been advanced in recent decades as to the meaning and scope of this right. Most legal scholars agree that the right of self-defence is triggered by an armed attack inflicted on a state, for which another state is responsible, and that it is only permitted to repel the attack or to remove its

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consequences, such as ending an occupation. However, others have favoured an expanded interpretation of self-defence,[1] to include namely:

(i) pre-emptive strikes in the face of alarming military preparations 'to quell any possibility of future attack by another State, even where there is no reason to believe that an attack is planned and where no prior attack has occurred' (so-called pre-emptive, or preventive, self-defence)[2];
(ii) the use of force against troops, planes, vessels or installations in the event of threats likely to result in imminent attacks, particularly when the State resorting to force has already suffered an armed attack and fears that more attacks are being prepared (anticipatory self-defence); and
(iii) the use of force by a state whose territory or military assets are ostensibly the target of an attack *already launched* by another state, in order to halt the attack (interceptive self-defence).

Even assuming that force is only legal as a response to an armed attack, the question arises as to the duration of the armed response, that is, whether a state having been attacked is authorized only to use force to repulse the attack or whether the state is entitled also to use retaliatory force as a deterrent to future attacks coming from the same source.

The International Court of Justice (ICJ) recently dealt with a case involving the issue of self-defence. On 6 November 2003 the Court handed down a judgment on the *Case Concerning Oil Platforms* (Iran *v.* United States of America), in which the Court examined a dispute arising from 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 these 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 (the 1955 Treaty).

Although the ICJ's main task on the merits was to adjudicate on the breach of freedom of commerce and navigation between the parties, the Court dealt extensively with the question of whether United States' actions could be justified as lawful measures of self-defence. 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

[1] See generally L.F. Damrosch, L. Henkin, R. Crawford Pugh, O. Schachter, and H. Smit, *International Law. Cases and Materials* (2001), at 961–972; Darby, 'Self Defense in Public International Law: the Doctrine of Pre-emption and Its Discontents', in J. Brömer *et al.* (eds.), *Internationale Gemeinschaft und Menschenrechte, Festschrift für Georg Ress* (2005), at 29–34.

[2] Cf O'Connell, 'The Myth of Preemptive Self-Defence', paper prepared in conjunction with *The ASIL Presidential Task Force on Terrorism* (2002), at 2 (footnote 10). See also at 8–11.

> 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.[3]

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 by the United States of the obligations under Article X(1) of the Treaty regarding freedom of commerce between the territories of the parties and that the claim of the Islamic Republic of Iran for reparation also could not be upheld.[4]

This paper examines 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 the protection of essential security interests of the states, embodied in Article XX(1)(d) of the 1955 Treaty; and, secondly, the analysis of the conditions of self-defence in the present dispute. The study must be contextualized in the current political and scholarly debate over the conditions and limits of the use of force in international relations. Indeed, some of the controversial interpretations summarized above have been argued both by Iran and the United States during the proceedings. Although in principle the Court's judgments are binding only with respect to the particular case and the parties involved,[5] their impact and influence in state practice and judicial and arbitral decisions are well-known, so any statement made by the Court could become a landmark in the current debate on self-defence.

We do not review in the present paper the procedural and methodological issues raised by the Court's judgment of 2003. The reader may find divergent views on these, within the Judges' separate opinions.[6] However, before addressing the main topics of the paper, it is necessary to make some initial remarks about the jurisdiction of the Court, both in the preliminary and merits phases.[7]

[3] *Case concerning Oil Platforms* (Iran v United States of America) Judgment of 6 Nov. 2003, at para. 78 (emphasis added) www.icj-cij.org/icj.

[4] *Ibid.*, at para. 125(1).

[5] Art. 59 of the Statute of the International Court of Justice.

[6] Some Judges of the Court in the *Oil Platforms* case, Judgment of 6 Nov. 2003, consider that the first part of the *dispositif* violates the *non ultra petita* rule (see especially the *Separate Opinions of Judges Higgins, Buergenthal and Kooijmans*, at paras. 9–24, 27–35, and 4–10, respectively). 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*, at para. 6). Similarly, Judge Kooijmans observes that 'the first part of that paragraph [of the *dispositif*] is redundant: it introduces an *obiter dictum* into the operative part of a judgment' (*Separate Opinion of Judge Kooijmans*, at para. 33). In contrast, Judge Simma accepts, in his separate Opinion, 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*, at para. 6).

[7] See Gray, 'The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua', 14 *EJIL* (2003) 867; García Rico, 'La legítima defensa en el Derecho Internacional

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

A The Jurisdiction of the Court relating to the Use of Force

In its application instituting proceedings, Iran stated that on 19 October 1987 and 18 April 1998 certain oil platforms located on the Iranian continental shelf and belonging to the National Iranian Oil Company were attacked and destroyed by naval forces of the United States. Iran maintained that by proceeding in this manner the United States had breached its obligations to the Islamic Republic, *inter alia*, under Articles I and X(1) of the Treaty of 1955.[8] Iran further claimed that those actions had also breached the object and purpose of the Treaty and international law. Moreover, in its Memorial, Iran added that the United States had also breached Article IV(1).[9] The applicant invoked, as the basis for the Court's jurisdiction, Article XXI(2), which provides that:

> Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.[10]

The United States raised a preliminary objection to the jurisdiction of the Court pursuant to Article 79(1) of the Rules of the Court of 14 April 1978. The respondent's

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contemporáneo: ¿Algo nuevo bajo el sol tras la sentencia de la CIJ sobre el asunto de las plataformas petrolíferas?', 55 *Revista Española de Derecho Internacional* (2003) 819; 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; Bekker, 'ICJ Judgment regarding U.S. attack on Iranian Oil Installations during the Iran–Iraq War', 98 *AJIL* (2004) 550; Laursen, 'The Judgment by the International Court of Justice in the Oil Platforms Case', 73 *Nordic J Int'l L* (2004) 135; Symposium: Reflections on the ICJ's Oil Platforms Decision, 29 *Yale J Int'l L* (2004) 291.

[8] According to Art. I, '[t]here shall be firm and enduring peace and sincere friendship between the United States of America and Iran.' Art. X(1) states that '[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation'.

[9] Art. IV(1) reads as follows: '[e]ach High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.'

[10] This compromissory clause is similar to Art. XXIV of the 1956 Nicaragua–United States Treaty of Friendship, Commerce and Navigation invoked by Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States*), hereinafter the *Nicaragua* case ([1986] ICJ Rep 14). This treaty is an example of a 'friendship, commerce and navigation' treaty (FCN treaty) that the United States used to enter into with selected countries for bilateral trade purposes, but which in recent years has been discontinued in favour of another form of bilateral investment treaty (BIT), which typically does not include a compromissory clause providing for the Court's jurisdiction. (See Bekker, 'The World Court Finds that U.S. Attacks on Iranian Oil Platforms in 1987–1988 Were Not Justifiable as Self-Defense, but the United States Did Not Violate the Applicable Treaty with Iran', *ASIL Insights*, Nov. 2003).

main argument was that the Treaty of 1955 did not provide any basis for the jurisdiction of the Court because it did not apply to questions concerning the use of force.[11] In effect, according to the United States, Iran's claims raised issues relating to the use of force, and these issues did not fall within the ambit of the 1955 Treaty, a treaty dealing for the most part with commercial issues.[12] An additional argument to bar military matters from the Court's jurisdiction involved the applicability of Article XX(1) of the Treaty (the so-called 'exception clause'), which provides, in its relevant part, that:

> 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 interest.

The United States contended that this provision shows that the 1955 Treaty was not intended to cover matters relating to the 'essential security interests' of the parties.[13] Consequently, the task of the Court in the Preliminary Objection phase was to decide whether the dispute between the two states, with respect to 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 order to answer that question, the Court had to ascertain whether the violations of the treaty pleaded by Iran did or did not fall within its provisions and whether the dispute was one which the Court had jurisdiction *ratione materiae* to entertain, pursuant to Article XXI(2) of the Treaty.

In its judgment dated 12 December 1996 the Court rejected the preliminary objection of the United States and found that it had jurisdiction, on the basis of Article XXI(2), to entertain 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'.[14] As to the applicability of the Treaty of

[11] A similar argument was used by the USA in the *Nicaragua* case, *supra* note 10. The US' viewpoint was that the jurisdiction accorded by Art. 36(1), where included in American FCN treaties, would apply only to the explicit terms of the treaty. Certain subjects deemed to be of special domestic concern and, in particular, matters of military security were not part of the jurisdictional bargain. See Reisman, 'The Other Shoe Falls: The Future of Article 36(1) Jurisdiction in the Light of *Nicaragua*', 81 *AJIL* (1987) 166, at 171.

[12] In the US' opinion, '[a]lthough Iran seeks to characterize this case as one involving violations of the 1955 Treaty, it is clear from its Application and Memorial that Iran is attempting to use the Treaty in order to bring before the Court claims that the United States violated provisions of the United Nations Charter and principles of customary international law relating to the use of force by one State against another' (*Oil Platforms* case, Preliminary Objection, Judgment of 12 Dec. 1996 [1996] II ICJ Rep 803, Part III, Chapter I, at para. 3.01). The United States further noted that '[t]he 1955 Treaty is concerned with the commercial interests of the nationals of the two countries in the territories of the other party and with certain consular matters, not with the consequences of events such as those with which this case is concerned, involving hostile encounters between armed forces of the two Parties in the context of an ongoing armed conflict' (*ibid.*, Chapter II, at para. 3.14).

[13] *Ibid.*, at para. 3.37. The same argument was invoked by the USA in the *Nicaragua* case, *supra* note 10. However, in its judgment of 27 June 1986, the Court conceded that the effect of Art. XXI of the FCN Treaty is to reserve certain matters from the Court's jurisdiction, but held that the determination of whether a matter is excluded is not within the unilateral competence of the state party. It is to be decided by the Court: *ibid.*, at para. 222 and paras. 271 ff.

[14] *Case concerning Oil Platforms* (Iran v United States of America), Preliminary Objection, Judgment of 12 Dec. 1996 [1996] II ICJ Rep 803, at 820, para. 53.

1955 in the event of the use of force, the Court held that '[m]atters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955'.[15] Moreover, the Court confirmed the interpretation of the 'exception clause' stated in the *Nicaragua* case,[16] and took the view that Article XX(1)(d) 'does not restrict its jurisdiction in the present case, but is confined to affording the Parties a possible defence on the merits to be used should the occasion arise.'[17]

In summary, the Court's main task on the merits – as stated in Iran's final submissions – 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'.[18] However, the most voluminous part of the reasoning in the judgment 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 implies 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.

B Relationship between Article X(1) and Article XX(1)(d) of the 1955 Treaty

The criterion followed by the ICJ was that other provisions of the 1955 Treaty were only relevant in so far as they might affect the interpretation or application of Article X(1).[19] As we noted above, in its 1996 judgment, the Court ruled that Article XX(1)(d) was 'confined to affording the Parties a possible defence on the merits'.[20] The Court interpreted and applied that sub-paragraph inasmuch as such a defence was asserted by the United States.[21] In that respect, since the United States had relied on Article XX(1)(d) of the Treaty as determinative of the question of the existence of a breach of its obligations under Article X, the Court considered that:

[15] *Ibid.*, at 811, para. 21.

[16] According to the Court, the text of Art. XX(1)(d) of the Treaty, invoked by the US, 'could be interpreted as excluding certain measures from the actual scope of the Treaty and, consequently, as excluding the jurisdiction of the Court to test the lawfulness of such measures. It could also be understood as affording only a defence of the merits. The Court, in its Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), adopted the latter interpretation for the application of an identical clause included in the Treaty of Friendship, Commerce and Navigation concluded between the United States and Nicaragua on 21 January 1956 . . . The Court sees no reason to vary the conclusions it arrived at in 1986': *ibid.*, at 810, para. 20.

[17] *Ibid.*

[18] CR 2003/16, at para. 12.

[19] *Supra* note 3, at para. 31.

[20] *Ibid.*, at 811, at para. 20.

[21] *Supra* note 3, at para. 33.

> To uphold the claim of Iran, the Court must be satisfied both that the actions of the United States, complained of by Iran, infringed the freedom of commerce between the territories of the Parties guaranteed by Article X, paragraph 1, and that such actions were not justified to protect the essential security interests of the United States as contemplated by Article XX, paragraph 1(d).[22]

At this point of the reasoning the Court faced a problem of legal methodology, namely in which order the Court should examine these questions of interpretation and application of the Treaty. The first option was to analyse the question of the breach of Article X(1), considered a 'substantive provision' of the 1955 Treaty and a breach of which had been alleged by Iran in its claim, before turning to Article XX(1)(d) which provides for 'exceptions' to the substantive obligations contained in other articles. This was the order adopted by the Court in the *Nicaragua* case.[23]

Nevertheless, in the present case the Court decided to reverse the order of the analysis of these provisions because, in its opinion, the order in which the articles of the 1956 Treaty were dealt with in the *Nicaragua* case was not dictated by the economy of the Treaty.[24] It was rather an instance of the Court's freedom to select the ground upon which it bases its judgment.[25] In the Court's view, two particular considerations militated in favour of an examination of the application of Article XX(1)(d), before turning to Article X(1): first, the original dispute between the parties related to the legality of the actions of the United States, in the light of international law on the use of force; and second, that both parties agreed on the importance of the implications of the case in the field of the use of force, even though they drew opposite conclusions from this observation.[26]

However, this solution was not shared by all the Judges. Indeed, it was criticized by some of them.[27] In our view, this approach may have been motivated by the ICJ's desire to rule on the legality of the military actions of the United States in the light of international law on the use of force. We do not believe that by proceeding in this manner the Court exceeded its jurisdiction.[28] The Court should address all the

[22] *Ibid.*, at para. 35.

[23] *Supra* note 10, at 140, para. 280.

[24] Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua, signed at Managua on 21 Jan. 1956, 367 UNTS (1960) 4.

[25] Supra note 3, at para. 37. See also *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)* [1958] ICJ Rep 55, at 62.

[26] *Ibid.*

[27] In Judge Parra-Aranguren's opinion, in accordance with its judgment of 12 Dec. 1996, the Court should have considered Art. XX(1)(d) as a defence to be examined only in the event of its having previously established that the USA had violated its obligations under Art. X(1) of the Treaty. The task of the Court was to examine and determine whether this country had violated Art. X(1). Only if the Court had come to the conclusion that the USA had breached this provision would it have had jurisdiction to begin considering the defence advanced by the US to justify its military actions against Iran. Inasmuch as the Court found that it could not uphold Iran's submission that those military actions constituted a breach of the obligations of the USA under Art. X(1), it did not have jurisdiction to examine the defences advanced by the USA on the basis of Art. XX(1)(d): *Separate Opinion of Judge Parra-Aranguren, supra* note 3, at paras. 5, 13, and 14.

[28] This opinion is shared by Gattini, *supra* note 7, at 152.

contentions between the parties regardless of the order chosen. As Judge Higgins pointed out in her separate Opinion, 'in order to arrive at a final determination as to whether a treaty obligation has been breached, the Court will necessarily examine any justifications or defences offered by the Respondent on conduct that appears to infringe the rights of the Applicant', which is simply the reasoning on which the final conclusion is based.[29] Similarly, in the *Arrest Warrant* case, decided in 2002, the Court asserted that, '[w]hile the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning'.[30]

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

The question of the relationship between self-defence and Article XX(1)(d) of the 1955 Treaty was strongly disputed between the parties and amongst the Judges. As the Court explained, the matter was one of interpretation of the Treaty, in particular of Article XX(1)(d).[31] Specifically, the question before the Court 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 'essential security interests'; and, if so, whether the parties had contemplated, or assumed, a limitation that such use of force would have to comply with the conditions laid down by international law.[32] In short, the ICJ had to determine the will of the parties as expressed in the text of the 1955 Treaty.[33] To this end, the Court had to take into account the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties.

We should recall that in the *Nicaragua* judgment, the ICJ had interpreted an identical provision of a similar treaty. 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',[34] and stated some important criteria of interpretation to that 'exception clause': firstly, that the risk run by these 'essential security interests' must be 'reasonable';[35] secondly, that the measures taken must not merely tend to protect the essential security interests of the party taking them, but must be 'necessary' for that purpose;[36] and, thirdly, that whether a given measure is 'necessary' is not purely a question for the subjective judgment of the party.[37]

In spite of this judicial precedent, in the *Oil Platforms* case the Court focused solely on the 'standard of necessity' of the measures taken in so far as the use of force was

[29] *Separate Opinion of Judge Higgins, supra* note 3, at para. 7.

[30] Case concerning the *Arrest Warrant 11 of April 2000* (*Democratic Republic of the Congo v Belgium*), Judgment of 14 Feb. 2002 http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm, at 18–19, para. 43.

[31] *Supra* note 3, at para. 40.

[32] *Ibid.*

[33] Art. 36(2) of the Statute of the International Court of Justice.

[34] *Supra* note 3, at para. 224.

[35] *Ibid.*

[36] *Ibid*, at para. 282.

[37] *Ibid.*

concerned and took the view that the question whether the measures taken were 'necessary' overlaps with the question of their validity as acts of self-defence.[38] This approach has caused sharp controversy because some of the Judges believe that the Court has not interpreted correctly Article XX(1)(d) by reference to the rules on treaty interpretation.[39]

The Court found 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 Article will *necessarily* entail an assessment of the conditions of legitimate self-defence under international law.[40] With this proposition 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.[41] On the contrary, the Court was satisfied that its jurisdiction extended, 'where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, the provision of the Charter of the United Nations and customary international law'.[42] With this reasoning, the Court refused the Respondent's argument that Article XX(1)(d) of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force 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.[43] The reasons of the Court to support this approach were included in a controversial paragraph of the judgment:

> It is hardly consistent with Article I, to interpret Article XX, paragraph 1(d) to the effect that the 'measures' there contemplated could include even an unlawful use of force by one party against the other. Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account, 'any

[38] *Supra* note 3, at para. 43. Iran's principal line of argument was based precisely on equating the 'measures necessary to protect essential security interests' with 'self-defence'. It stated that '[t]here is one'standard of necessity' for the use of force in international relations; it is a Charter standard, and it is peremptory. Paragraph 1(d) should not be interpreted to adopt any different standard': CR 2003/8, at para. 30. The consequence of the application of this 'objective standard' by the Court should be that a peremptory norm of international law must be allowed peremptory effect at the level of the interpretation of any agreement governed by international law, including the 1955 Treaty. For these reasons, Art. XX(1)(d) could not be interpreted so as to create a defence of justification in relation to a use of force unlawful under the Charter because it would plainly exceed the requirements of self-defence (Iran's Reply, at para. 7.76).

[39] See the *Separate Opinions of Judges Higgins, Buergenthal and Kooijmans, supra* note 7, at paras. 40–54, 20–32, and 43–52, respectively. See also Berman, 'Treaty "Interpretation" in a Judicial Context', in: Symposium, *supra* note 7, at 315, 319.

[40] *Supra* note 3, at para. 40 (emphasis added).

[41] CR 2003/11, at para. 13.12.

[42] *Supra* note 3, at para. 42.

[43] *Ibid.*, at para. 41. The US applied the principle of *lex specialis*. It considered the 1955 Treaty as a 'self-contained regime', and therefore it understood that the notion of 'measures necessary to protect its essential security interests' under Art. XX of the 1955 Treaty was distinct from the notion of self-defence under the Charter: CR 2003/12, at paras. 17.20–17.21.

> relevant rules of international law applicable in the relations between the parties' (Article 31, paragraph 3 (c)).[44]

The first point of disagreement arises because of reference to Article I of the 1955 Treaty.[45] In this regard, Berman has pointed out that:

> To justify 'hardly consistent' one would have expected at the least some evidence derived directly from the accepted list of the basic and supplementary materials for treaty interpretation rather than a mere postulate emanating ex cathedra from the Court itself.[46]

He further argues that it is conceivable that two contracting states might wish to displace the general law in their mutual relations by way of a bilateral treaty, or they might wish to provide – which, in his opinion, seems to have been the case here – that certain eventualities would not represent breaches of their special treaty relationship, without any impact on the question whether such an eventuality might give rise to a separate claim under general international law, which would not have been displaced with respect to events not covered by the treaty.[47] This argument, which goes in line with the United States' contentions,[48] ignores the hierarchical status of certain norms such as the one in Article 2(4) of the United Nations Charter.[49] 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 *jus 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. In fact, it is hard to see how state parties to a treaty might displace a peremptory rule in their mutual relations in so far as *jus cogens* by definition is not dispositive, so it cannot be derogated.[50]

[44] *Ibid.*, at para. 41.

[45] See *supra* note 8. The Court found in 1996 that this provision 'is such as to throw light on the interpretation of the other Treaty provisions' (*supra* note 14, at 815, para. 31), quoted by the Court in its Judgment, *supra* note 3, at para. 41.

[46] Berman, *supra* note 7, at 320.

[47] *Ibid.*, at 319–320.

[48] The US interpreted that a measure may be 'necessary to protect the essential security interests' of a party even if the conditions placed on self-defence by international law are not met: *ibid.*, at paras. 17.27 and 18.2. In effect, to the US, nothing in Art. XX suggests that military action is ruled out as one possible means of protecting a party's essential security interests: *ibid.*, at para. 18.19. In the circumstances of this case, the US maintained that it had legitimately used armed force because of a need to protect its essential security interests when diplomatic and peaceful measures had failed ('as a last resort'), and when the use of force had proven to be 'reasonable and appropriate': *ibid.*, at para. 18.25). But, at the same time, the US tried to make clear that this does not mean that the 1955 Treaty authorizes it to violate the obligations arising from the Charter and general international law. What the US does argue is that the Court's jurisdiction is limited to violations of the provisions of the Treaty. The fact that this Treaty fails to prohibit certain actions does not imply that such actions are authorized by general international law: CR 2003/18, *supra* note 3, at para. 27.3.

[49] See 'Report of the Study Group of Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (under the title: 'Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules'), International Law of Commission, Fifty-Sixth session, doc. A/CN.4/L.663/Rev.1, at paras. 57–63.

[50] *Ibid.*, at para. 14, at 7.

As to the application of Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties in the present case, we understand that the scope and function of this rule of interpretation is not clear in the current context of general developments in international law.[51] As expressed by Judge Higgins, the Court failed to incorporate the totality of the substantive international law on the use of force, thereby ignoring that Article 31(3) requires the context to be taken into consideration, and the context is clearly that of an economic and commercial treaty.[52] These requirements were not established in the preliminary conclusions of the Study Group created by the International Law Commission in 2002. Quite to the contrary, the Group considered that Article 31(3)(c) points to certain rules that should be taken into account in carrying out the interpretation. This provision does not, however, indicate any particular way in which this interpretation should take place. In particular, there is no implication that those other rules should determine the interpretation. Thus, the various rules would have to be weighed against each other in a manner that is appropriate in the particular circumstances.[53] This is the first time that the Court has expressly used this rule of interpretation and it must be assessed as an action in favour of the unity of the international legal system.[54]

In summary, according to the Court, 'the legality of the action taken by the United States has to be judged by reference to Article XX, paragraph 1(d) of the Treaty, in the light of international law on the use of force in self-defence'.[55] This means that, since these measures 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 that the Court did not consider other possibilities. This statement might be read as implying a recognition that there is no other lawful possibility for a state to resort to force outside self-defence. Even though the Court's silences are difficult to appraise, in our opinion, the position taken by the ICJ might 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.[56] In our view, these later attacks would not

[51] See Reports of the International Law Commission on the Work of its Fifty-fifth and Fifty-sixth Sessions, on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', specifically the section entitled 'Discussion on Outline Concerning the Interpretation of Treaties in the Light of "Any Relevant Rules of International Law Applicable in Relations between the Parties" (Art. 31(3)(c) of the Vienna Convention on the Law of Treaties), in the Context of General Developments in International Law and Concerns of the International Community', *Official Records of the General Assembly*, doc. A/58/10, at paras. 415–435; doc. A/59/10, at paras. 345–351.

[52] *Separate Opinion of Judge Higgins, supra* note 3, at para. 46. See also Berman, *supra* note 7, at 320.

[53] Doc. A/59/10, *supra* note 51, at para. 349.

[54] See also *Separate Opinion of Judge Weeramantry* in Case concerning the *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* [1997] ICJ Rep 114, at 7, para. 114.

[55] *Ibid.*, at para. 44.

[56] See in this respect the *Separate Opinion of Judge Simma, supra* note 6, at paras. 12–13. See also Gattini, *supra* note 7, at 168–169; Laursen, *supra* note 7, at 155–160.

entitle the victim state to resort to armed force. In such cases, the victim should bring the attack to the attention of the Security Council under Chapter VII of the UN Charter.[57] 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,[58] in which the Commission strictly excluded from its concept of 'countermeasures' any such measures amounting to a threat or use of force.[59]

3 The Analysis of the Conditions of Self-defence by the Court

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. 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 *Nicaragua* case and confirmed in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.[60]

The Court started by focusing on the attack of 19 October 1987 on the Reshadat and Resalat complexes by four destroyers of the United States Navy, together with naval support craft and aircraft. The United States had immediately given notice of its action to the Security Council under Article 51 of the United Nations Charter,[61] claiming that it had been motivated by the firing, by Iranian forces from Iranian-occupied Iraqi territory, on 16 October 1987, of a Silkworm missile which struck the *Sea Isle City*, a United States flag vessel, in the territorial waters of Kuwait. The United States contended that this was 'the latest in a series of such missile attacks against United States flag and other non-belligerent vessels in Kuwaiti waters in pursuit of peaceful commerce' and that those actions were 'only the latest in a series of unlawful armed attacks by Iranian forces against the United States, including laying mines in international waters for the purpose of sinking or damaging United States flag ships, and firing on United States aircraft without provocation'.

[57] In fact, the Court was rather ambiguous in this regard in the *Nicaragua* case (*supra* note 10, at 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, supra* note 3, at para. 43).

[58] 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).

[59] Art. 50(1)(a).

[60] Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 66, paras. 40–44. See also: *Corfu Channel* Case (*United Kingdom v. Albania*) [1949] ICJ Rep 4.

[61] Letter from the US Permanent Representative of 19 Oct. 1987, S/19219; reproduced in para. 48 of the Judgment.

The United States maintained that it felt compelled under these circumstances to exercise 'the inherent right of self-defence 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'.[62]

To consider such actions a lawful use of force in self-defence, 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', 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'.[63]

Then the Court proceeded to examine the action against the Salman and Nasr complexes on 18 April 1988, which the United States claimed in its notification to the Security Council to be a lawful response in self-defence to severe damage caused to the USS *Samuel B. Roberts* on 14 April 1988 by a mine allegedly laid by Iran in international waters.[64] According to the United States, this was but the latest in a series of offensive attacks and provocations undertaken by Iranian naval forces against neutral shipping in the international waters of the Persian Gulf. Again the Court required the United States to show evidence that Iran was responsible for the laying of the mine that hit the military vessel;[65] and that the measures taken in self-defence were a necessary and proportional response to the attack suffered.[66]

The Court's analysis of the conditions of lawful resort to self-defence is in line with its *Nicaragua* judgment of 1986. While the Court restated its jurisprudence in this area, the *Oil Platforms* judgment extends it in a number of respects, although at the same time it has left a number of questions unanswered.

A *The Evaluation of the Existence of an Armed Attack*

The first point that the Court underlined was that, for the right of self-defence to be triggered, there must be a specific armed attack for which the state against whom the victim state reacts is responsible.[67] As leading scholars have pointed out, there exists a gap between the scope of Article 2(4) of the United Nations Charter and that of Article 51, which means that not every state affected by another state's unlawful use of force is entitled to respond to it with armed force.[68] Consequently, the first step in the

[62] *Ibid.* (emphasis added).

[63] At para. 51 of the 2003 *Oil Platforms* judgment, *supra* note 3.

[64] Letter from the US Permanent Representative of 18 Apr. 1988, S/19791; reproduced in para. 67 of the Judgment.

[65] Para. 71 of the 2003 *Oil Platforms* judgment, *supra* note 3.

[66] *Ibid.*, at paras. 76–77.

[67] The Court has recently stressed in this regard that, for the right of self-defence to be triggered, there must be an armed attack imputable to a foreign state (Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, of 9 July 2004, at para. 139).

[68] Randelzhofer, 'Article 51', in B. Simma *et al.*, *The Charter of the United Nations. A Commentary* (2002), vol. 1 at 790.

assessment of the lawfulness of measures allegedly taken in self-defence is to qualify the armed attack suffered. A major difficulty in this regard remains in the fact that there is not a generally accepted definition of armed attack.[69] In the *Nicaragua* case the Court drew a distinction between 'the most grave forms of the use of force (those constituting armed attacks) from other less grave forms'.[70] It gave some examples of the former, embracing the definition embodied in Article 3(g) of the Definition of Aggression annexed to General Assembly Resolution 3314(XXIX),[71] that is, the so-called indirect aggression, and declared that it was a customary law rule. To draw the line between armed attacks justifying resort to force in self-defence and the less grave forms, the Court followed the criteria of the scale and effects of the attacks.[72] In the *Oil Platforms* judgment, the Court expressly recalled this distinction when it required the United States to provide evidence of an armed attack.[73]

In the case of the missile attack on the *Sea Isle City*, together with the purported series of unlawful armed attacks by Iranian forces against United States shipping, the Court concluded that those attacks did not amount to an armed attack triggering self-defence. It found that the United States had not discharged the burden of proof that they were attributable to Iran.[74] The United States had also contended that the alleged pattern of Iranian use of force 'added to the gravity of the specific attacks, reinforced the necessity of action in self-defense, and helped to shape the appropriate response'.[75] The Court estimated that even taking cumulative account of all the incidents complained of, they did not seem to constitute an armed attack on the United States, of the kind that the Court had qualified as a 'most grave' form of the use of force in the *Nicaragua* case.[76]

Likewise, the Court considered that the evidence produced by the United States supporting its contention that Iran was responsible for the laying of the mine struck by the USS *Samuel B. Roberts* was 'highly suggestive, but not conclusive'.[77] Eventually the Court indicated that in view of all the circumstances, including the inconclusiveness of the evidence of Iran's responsibility for the mining of the USS *Samuel B. Roberts*, it was unable to hold that the attacks on the Salman and Nasr platforms had been shown to have been justifiably made in response to an 'armed attack' on the United States by Iran, in the form of the mining of the USS *Samuel B. Roberts*.[78]

[69] Nevertheless, in the 1986 *Nicaragua* judgment, the Court had affirmed quite optimistically that '[t]here appears now to be general agreement on the nature of acts which can be treated as constituting armed attacks': *supra* note 10, at para. 195.

[70] *Ibid.*, at para. 191.

[71] Definition of Aggression (GA Res. 3314 (XXIX), 14 Dec. 1974), Annex, GAOR 29th Sess. Supp. No. 31 (Vol. 1), A/9631.

[72] At para. 195 of the *Nicaragua* judgment, *supra* note 3.

[73] At paras. 51 and 71 of the 2003 judgment, *supra* note 3.

[74] *Ibid.*, at para. 61.

[75] *Ibid.*, at para. 62.

[76] *Ibid.*, at para. 64.

[77] *Ibid.*, at para. 71.

[78] *Ibid.*, at para. 72.

The explicit contributions to the content and scope of the notion of 'armed attack' made by the Court in this judgment are limited and of little relevance. In its reasoning, the Court did not elaborate on a number of contentions that the parties had submitted before it.

To start with, as indicated above, the Court reaffirmed that not every use of force does trigger the right of self-defence, and that an armed attack involves a significant amount of force, unlike less grave forms of the use of force.[79] Unfortunately, the Court did not take this opportunity to expound on this distinction. Particularly, the Court did not comment on the amount of minor uses of force required to reach the level of an armed attack, nor on their gravity.[80]

However, while analysing the case of the USS *Samuel B. Roberts*, it did make an interesting pronouncement, because it implied the possibility that *the mining of a single military vessel* might be sufficient to trigger the right of self-defence.[81] This assertion is in contrast with the letter of Article 3(d) of the above-mentioned Definition of Aggression, which lists among the acts which qualify as acts of aggression '[a]n attack by the armed forces of a State on the land, sea or air forces, marine and air fleets of another State'.[82] It may be asked whether an attack on a non-military vessel flying the flag of a state could qualify as an 'armed attack'. To rephrase, if the United States had discharged the burden of proof that Iran had been responsible for the attack on the *Sea Isle City*, a Kuwaiti-owned merchant ship reflagged to the United States, would this action have amounted to an 'armed attack'?

For Iran, an armed attack is a forcible action directed against a state.[83] Since merchant ships are not external manifestations of the flag state, military action against an individual merchant ship may be an infringement on the rights of the flag state, but does not constitute an armed attack against that state triggering its right of self-defence.[84] By contrast, the United States had claimed that an attack on a single merchant ship may be an armed attack for which the flag state has a right of self-defence.[85] The Court did not expressly respond to these arguments, but its judgment seems to have opened the door to the inclusion of the attacks on commercial vessels flying the flag of a state, when it mentions that 'the *Texaco Caribbean*, whatever its ownership, was not flying a United States flag, so that an attack on the vessel is not in itself to be equated with an attack on that State'.[86]

[79] For a critique, see Taft, 'Self-defence and the Oil Platforms Decision', in: Symposium, *supra* note 8, at 295, 300–302. See also Randelzhofer, *supra* note 68, at 791–792.

[80] Laursen, *supra* note 7, at 153–155.

[81] At para. 72 of the 2003 judgment, *supra* note 3.

[82] It was the Iranian contention that the word 'fleets' had been deliberately chosen in order to make clear that only massive acts of violence against the merchant shipping of a state, attacking whole fleets, would amount to an act of aggression: see Iran's Reply, *supra* note 3, at para. 7.38.

[83] Cf CR 2003/7, *supra* note 3, at 44, para. 49. See also *ibid.*, at 43, para. 46.

[84] Iran's Reply, *supra* note 3, at paras. 7.37–7.39.

[85] Cf CR 2003/12, *supra* note 3, at para. 18.44; see also United States's Rejoinder, *supra* note 3, at paras. 5.14–5.22.

[86] At para. 64 of the 2003 judgment, *supra* note 3.

In connection with this, Iran had contended that an 'armed attack' only occurs when the object actually hit is 'specifically targeted', and therefore the purported attacks could not be 'armed attacks' because the United States could have neither established that the *Sea Isle City* was specifically targeted nor could it have proven that the mine which hit the *Samuel B. Roberts* was of Iranian origin.[87] In response to this, the United States took the view that, in this case, the attacking state clearly intended to attack a category of targets in which the actual target was included.[88] Although again the Court avoided elaborating on the *element of intentional targeting* that Iran had put forward,[89] it seemed to endorse it in its reasoning to some extent, inasmuch as it said that:

> the *Sea Isle City* was in Kuwaiti waters at the time of the attack on it, and that a Silkworm missile fired from (it is alleged) more than 100 km away could not have been aimed at the specific vessel, but simply programmed to hit some target in Kuwaiti waters.[90]

Furthermore, referring to other minor incidents complained of by the United States, the Court argued that there was

> no evidence that the minelaying alleged to have been carried out by the *Iran Ajr*, at a time when Iran was at war with Iraq, was aimed specifically at the United States; and similarly it has not been established that the mine struck by the *Bridgeton* was laid with the specific intention of harming that ship, or other United States vessels.[91]

These statements might be read as implying a new requirement – the intent to hit a specific target – for an armed attack to exist. Such a requirement, as Taft has highlighted, is not supported by international law or practice and might have the effect of undermining the right of self-defence when the vessels or aircraft of a state are struck by an indiscriminate attack from another state.[92]

It follows that, whilst the Court has suggested some new aspects linked to the notion of armed attack, it has not clarified both the issue of the intensity and gravity of the use of force required by Article 51 of the United Nations Charter, as well as the question of whether actions against commercial vessels and aircraft can be equated with attacks on the state itself.[93]

Nevertheless, the major shortcomings are to be found in the concept of self-defence itself. An in-depth analysis of this concept gives rise to a number of legal and factual issues that the Court failed to address, namely

(i) The point in time at which forcible measures of self-defence may be taken. This is one of the most debated questions among international scholars. Is it only possible to adopt such measures in the face of an armed attack in progress; or also following a completed armed attack when the source of the threat has not

87 CR 2003/6, *supra* note 3, at paras. 21–55; CR 2003/7, *supra* note 3, at paras. 29–64.
88 United States' Rejoinder, *supra* note 3, at paras. 5.15 and 5.23.
89 CR 2003/7, *supra* note 3, at 44, para. 49.
90 At para. 64 of the 2003 judgment, *supra* note 3.
91 *Ibid.*
92 Taft, *supra* note 79, at 302–303.
93 See Randelzhofer, *supra* note 68, at 798, para. 26; Gattini, *supra* note 7, at 161, footnote 58.

been removed and convincing evidence exists that more attacks are planned, although not yet underway; or, finally, in the face of a general situation of threats and potential danger, understood as an accumulation of acts which, taken together, amount to an armed attack?

(ii) In connection to this, the question arises of determining at what point of time does the right to resort to self-defence come to an end.

Ultimately, these questions point to the issue of what is the aim and purpose of resorting to force as self-defence. Is the right to use force strictly limited to repelling an attack in progress and to reversing the consequences of the attack, or does this right also encompass measures needed to prevent additional enemy attacks following an initial attack? The first approach renders illegal any use of force after the completion of an armed attack. In this case, in order to prevent future attacks, the victim state should appeal to the Security Council under Chapter VII of the United Nations Charter. Conversely, the second approach tends to broaden the scope of self-defence in so far as it admits a reaction in self-defence once the attack is terminated, provided that the circumstances would reveal a threat of similar actions from the same source. Answering this question would allow us, in turn, to respond to other questions, namely:

(i) the meaning and scope of the condition of proportionality of the measures taken, that is, whether proportionality should be evaluated with respect to the attack already inflicted on the state or with respect to the target chosen in response to the attack suffered.

(ii) the question of the necessity of the forcible action and of the specific measures taken and, closely connected to this,

(iii) the question of the immediacy of the response, which serves to determine when measures taken in lawful self-defence become armed reprisals forbidden in international law.

As will be shown next, it is precisely because the Court overlooked the analysis of these issues that its judgment did not make the far-reaching contribution to international law on the use of force in self-defence – a missed opportunity in the current context when the meaning and scope of these rules are being challenged.

The parties to the proceedings held diametrically opposed views concerning the *aim or purpose of self-defence*. Iran took up a rather stringent notion of self-defence, arguing that self-defence is limited to actions to repel an attack while it is in progress, and that

> once an attack is over, as was the case here, there is no need to repel it, and any counter-force no longer constitutes self-defence. Instead it is an unlawful armed reprisal or a punitive action. The use of force in order to deter further attacks does not come within the definition of lawful self-defence, but constitutes unlawful pre-emptive action.[94]

Therefore, self-defence has solely a protective aim. By contrast, reprisals aim at retribution or punishment, functioning as a sanction against the wrong committed.[95]

[94] Iran's Reply, *supra* note 3, at para. 7.13(5).

[95] Iran's Memorial, *supra* note 3, at paras. 4.30 – 4.33.

The United States contended in turn that 'the right to use force in self-defence is not limited to repelling an attack while it is in progress. A State can also use force in self-defence to remove continuing threats to its future security.'[96] In line with this idea, as regards the qualification of the *armed attack*, the United States maintained two lines of argument:[97] on the one hand, it relied on the two specific incidents that led to the attacks on the platforms, purportedly in self-defence. On the other hand, the United States held that this case involved actions in self-defence due to the occurrence of repeated, specific armed attacks on United States vessels and during periods of persistent threats against this country, and that 'in a situation of armed attacks and the explicit threat of continuing armed attacks, Article 51 does not foreclose the victim State's right to take other necessary and proportionate measures in self-defence'.[98] The arguments advanced by the United States to justify its use of force included the need '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;[99] 'to prevent additional attacks' by Iran;[100] or as a reaction to a 'general situation of an armed attack'.[101] In short, the United States argued that:

> Iranian actions during the relevant period constituted a threat to essential security interests of the United States, inasmuch as the flow of maritime commerce in the Persian Gulf was threatened by Iran's repeated attacks on neutral vessels; that the lives of United States nationals were put at risk; that United States naval vessels were seriously impeded in their security duties; and that the United States Government and United States nationals suffered severe financial losses.[102]

Therefore, in the United States' view, there was a series of attacks against it amounting to a continuous armed attack and justifying the need to prevent further attacks.[103] Nonetheless, the United States did not endorse pre-emptive self-defence. It maintained that its action was taken in response to repeated armed attacks by Iranian forces on United States naval and commercial vessels.[104]

For its part, Iran focused on the two single incidents most prominently invoked by the United States, namely the missile attack on the *Sea Isle City* and the mining of the USS *Samuel B. Roberts*. It argued that '[e]ven if there were a general situation of hostile behaviour of Iran against the United States, which Iran denies and the United States cannot prove, this did not amount to an armed attack'.[105]

Eventually, the Court avoided the issue of the aim and purpose of the measures taken in self-defence. Nonetheless, it is remarkable that it only evaluated the

[96] United States' Counter Memorial, *supra* note 3, at para. 4.27.
[97] CR 2003/7, *supra* note 3, at 30, para. 3 ff.
[98] United States' Rejoinder, *supra* note 3, at para. 5.33.
[99] United States' Counter Memorial, *supra* note 3, at paras. 4.01 and 4.05.
[100] Case concerning Oil Platforms, *supra* note 3, at para. 49.
[101] United States' Counter Memorial, *supra* note 3, at para. 4.10; CR 2003/7, *supra* note 3, at para. 3.
[102] Case concerning Oil Platforms, *supra* note 3, at para. 49.
[103] CR 2003/7, *supra* note 3, at 31, para. 6.
[104] United States' Counter-Memorial, *supra* note 3, at para. 4.01, and United States' Rejoinder, *supra* note 3, at para. 5.35.
[105] Iran's Reply, *supra* note 3, at para. 7.13(3).

existence of an armed attack with regard to the actions presumably committed by Iran involving an actual use of force[106] and did not pronounce upon the contention of the 'general situation of an armed attack against the United States', nor did it endorse the United States' argument of the alleged need to prevent further attacks by Iran. Therefore, the Court has opted for a restrictive interpretation of the concept of armed attack.[107] This interpretation is in keeping with the nature of self-defence, which, as Judge Higgins put it, 'is that of an exceptional right which may only be exercised if no other means are available',[108] and thereby prevent abuses of self-defence.

B *The Conditions of Proportionality and Necessity*

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,[109] 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 *jus in bello*.[110] This condition had been proclaimed in its *Legality of Nuclear Weapons* Advisory Opinion:

> a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law'[111] [namely, the distinction between civilian and military targets].[112]

[106] The Court also dismissed the argument of the accumulation of acts giving rise to an armed attack because it evaluated each of the alleged attacks individually and concluded that '[e]ven taken cumulatively . . . these incidents do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, qualified as a 'most grave' form of the use of force': *supra* note 10, at para. 64 of the judgment.

[107] See: Momtaz, 'Did the Court Miss an Opportunity to Denounce the Erosion of the Principle Prohibiting the Use of Force?', in: Symposium, *supra* note 7, at 307, 313.

[108] R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (1963), at 5.

[109] Para. 76 of the judgment, *supra* note 3, at 245, para. 41, reads as follows: '[t]he 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*, 'The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law'; 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': *supra* note 10, at 94, para. 176.

[110] Paras. 51 and 74 of the judgment, *supra* note 3. In doing so, the Court has endorsed an argument accepted by both parties: in its notifications to the UN Security Council, the US had attempted to justify its view 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, *supra* note 000, at para. 4.46. Conversely, Iran attempted to prove that the platforms were commercial facilities and not military targets: CR 2003/6, *supra* note 3, at paras. 31–42.

[111] [1996] ICJ Rep 226, at para. 42.

[112] *Ibid.*, at para. 78.

In the present case, the Court held that there was no sufficient evidence supporting the United States' contentions that the oil platforms were military targets. It found that:

> In the case both of the attack on the *Sea Isle City* and the mining of the USS *Samuel B. Roberts*, the Court is not satisfied that the attacks on the platforms were necessary to respond to these incidents. In this connection, the Court notes that there is no evidence that the United States complained to Iran of the military activities of the platforms, in the same way as it complained repeatedly of minelaying and attacks on neutral shipping, which does not suggest that the targeting of the platforms was seen as a necessary act. The Court would also observe that in the case of the attack of 19 October 1987, the United States forces attacked the R-4 platform as a 'target of opportunity', not one previously identified as an appropriate military target (see paragraph 47 above).[113]

As suggested above, determining the aim and purpose of self-defence enables us to assess the conditions of proportionality and necessity. Regarding the requirement of *necessity*, the parties once again took opposing views. As Iran maintained that the purpose of self-defence was limited to repelling an attack in progress, its view on the concept of necessity was that:

> The principle of necessity means that only that use of force which is necessary in order to repel an attack constitutes lawful self-defence. If an armed attack is terminated, there is no further need to repel it. Thus, self-defence is limited to an 'on-the-spot reaction', i.e., the necessary, immediate response to an armed attack.[114]

Therefore, the condition of necessity is connected to the principle of immediacy:

> This is the principle of immediacy: it means that the employment of counter-force must be temporally interlocked with the armed attack triggering it. In the case of the invasion of another State's territory, in principle an attack still exists as long as the occupation continues. But in the cases of single armed attacks (as distinguished from a general situation of armed conflict), the attack is terminated when the incident is over. In such a case the subsequent use of counter-force constitutes a reprisal and not an exercise of self-defence. In the present case, both the attack on the Sea Isle City and that on the Samuel B. Roberts had terminated when the counter-force was exercised. Thus, the counter-force did not constitute an act of self-defence within the meaning of Article 51. It cannot, therefore, be justified under this provision.[115]

Hence, since the United States had allowed time to elapse before resorting to force, its actions would have acquired a retaliatory nature and should be considered armed reprisals, which are forbidden in contemporary international law.[116] In addition, for Iran, the principle of necessity implied that 'an action must at least be appropriate to achieve the purpose of protecting the attacked State',[117] and in this case 'the link between the destruction of the platforms and the two incidents [could not] be established'.[118]

[113] At para. 76 of the 2003 Judgment, *supra* note 3.
[114] Iran's Reply, *supra* note 3, at para. 7.47. See also: Iran's Memorial, *supra* note 3, at para. 4.32.
[115] Iran's Reply, *supra* note 3, at para. 7.47. See also: Iran's Memorial, *supra* note 3, at para. 4.31.
[116] Iran's Memorial, *supra* note 3, at paras. 4.81–4.82.
[117] CR 2003/7, *supra* note 3, at 47, para. 59.
[118] *Ibid.*, at para. 57.

However, the United States denied that self-defence demands an instant response to an armed attack[119] and stressed the need for a state that has been attacked to take the opportunity to investigate matters, not least to confirm that it has indeed been attacked, and by whom.[120] But we should not lose sight of the fact that the United States contended that this case involved 'actions in self-defence upon the occurrence of repeated, specific armed attacks on U.S. vessels and during periods of persistent threats against the United States'[121] and that in situations involving 'a campaign of unlawful attacks, there must be the right to act in self-defence through actions generally aimed at terminating further attacks and at restoring security, as by neutralizing the platforms used to launch attacks or to identify their targets'.[122]

As we know, the Court dismissed the United States' argument because the attacks on the platforms were not necessary responses to the attack on the *Sea Isle City* and the mining of the USS *Samuel B. Roberts*.[123] But it did not go as far as defining – by way of an *obiter dictum* – these attacks as armed reprisals,[124] that is, international wrongful acts for which the United States could be held responsible.[125] Aside from this, the Court did not take sides on any concept of the aim and purpose of self-defence nor did it expressly refer to the condition of immediacy. This omission is particularly surprising if we bear in mind that this condition had been alleged both by Iran and the United States.[126] Nevertheless, despite the United States' contention of the existence of a pattern of continuing armed attacks, or of a general situation of threat, the Court only evaluated the lawfulness of the use of force by the United States in relation to the alleged, specific attacks. It should be highlighted that the United States' argument

[119] United States' Counter Memorial, *supra* note 3, at para. 4.37.

[120] *Ibid.*, at para. 4.38.

[121] United States' Rejoinder, *supra* note 3, at para. 5.35.

[122] United States' Counter Memorial, *supra* note 3, at para. 4.41.

[123] Para. 76 of the 2003 Judgment, *supra* note 3.

[124] As Judge Elaraby pointed out in his *Dissenting Opinion*, '[i]f such use of force, as the Court held, was not exercised in self-defence then it would amount to armed reprisal': *supra* note 3, at para. 1.2.

[125] The Court was certainly not empowered to declare the US responsible for these actions, but it could at least have indicated that it was in breach of its obligations under the Charter and customary international law. As Judge Simma put it, 'since its 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': see: *Separate Opinion of Judge Simma, supra* note 3, at para. 6.

[126] United States' Counter Memorial, *supra* note 3, at Part IV, Chapter VI, paras. 4.36–4.44; Iran's Reply, *supra* note 3, at para. 7.51. The condition of immediacy had been mentioned by the Court in the 1986 *Nicaragua* judgment (*supra* note 10, at para. 237) as an element of the condition of necessity: '[o]n the question of necessity, the Court observes that the United States measures . . . cannot be said to correspond to a 'necessity' justifying the United States action against Nicaragua on the basis of assistance given by Nicaragua to the armed opposition in El Salvador. First, these measures were only taken, and began to produce effects, several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed . . . . Accordingly, it cannot be held that these activities were undertaken in the light of necessity'.

refers to the so-called anticipatory self-defence that the Court again avoided analysing, thereby endorsing a restrictive concept of self-defence. The Court also refrained from pronouncing on another aspect of the condition of necessity, according to which the victim state, before resorting to forcible self-defence, should ensure that there are no peaceful measures at its disposal to repel the aggression.[127]

Concerning the requirement of *proportionality*, 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':

> 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.[128]

Legal doctrine has indicated two possible interpretations of proportionality: it could be either measured against the size and scope of the aggression, or the actual needs of self-defence.[129] Following Roberto Ago's point of view, Iran maintained the second interpretation, and thus proportionality should be understood in terms of the measures taken to halt and repel the attack.[130] Therefore, the choice of the wrong target and the disproportionality of the measures taken would suggest that they were of the nature of armed reprisals rather than self-defence.[131] Nevertheless, the letter of paragraph 77 of the judgment ('[a]s a response to the mining . . . neither 'Operation Praying Mantis' as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded . . . as a proportionate use of force in self-defence') suggests that the Court has taken the view that there must be proportionality between the conduct constituting the armed attack and the response in self-defence.[132] In fact, the Court has followed the approach taken in the *Nicaragua* case, when it asserted that self-defence only warrants 'measures which are proportional to the armed attack and necessary to respond to it'.[133]

[127] García Rico, *supra* note 7, at 831. In its notifications to the Security Council, the US had even argued that diplomatic measures were not a viable means of deterring Iran from its attacks and that '[a]ccordingly, armed action in self-defense was the only option left to the United States to prevent additional Iranian attacks' (see paras. 48, 49, and 67 of the 2003 Judgment, *supra* note 3. See also: United States' Counter Memorial, *supra* note 3, at para. 4.23; United States' Rejoinder, *supra* note 3, at paras. 5.45–5.47). On Iran's view in this respect, see CR 2003/10, *supra* note 3, at 12, para. 8.

[128] Para. 77 of the 2003 Judgment, *supra* note 3.

[129] Iran's Memorial, *supra* note 3, at para. 4.21.

[130] Ago, 'Addendum to the Eighth Report on State Responsibility, A/CN.4/318, Add. 5–7', in *Yearbook of the International Law Commission* (1980), vol. 2, Part 1, at 51–70, paras. 82–124, at 69, para. 121.

[131] Iran's Memorial, *supra* note 3, at paras. 4.25–4.26, 4.34, and 4.38 ff.

[132] García Rico, *supra* note 7, at 832. In this issue, the Court has endorsed the US' interpretation that its actions should be 'proportional to Iran's armed attacks': United States' Counter-Memorial, *supra* note 3, at para. 4.01.

[133] *Supra* note 10, at 94, para. 176.

Curiously, in its oral pleadings, Iran changed its approach and maintained that 'proportionality of a counter-action means that it is not excessive', that 'it must, in other words be commensurate to the act triggering it, i.e., to the first use of force',[134] and argued that the damaged caused to the oil platforms was excessive in comparison to the damage caused to the American ships.[135] It also held that the selected installations were the wrong target as those platforms had nothing to do with any missile attacks or mining activities, and that the United States' attacks on three Iranian offshore oil platform complexes, including the launching of the Operation Praying Mantis, preparations for which had begun 10 months earlier, were a disproportionate response to the *Sea Isle City* and USS *Samuel B. Roberts* incidents. Iran tried to point to the fact that the measures taken by the United States were clearly designed and planned as a punitive action, or as armed reprisals, rather than self-defence.[136] In short, Iran maintained that:

> The conduct of the United States forces was not an exercise in self-defence. Nor were the platforms even the primary target. Their gratuitous and premeditated destruction had as its purpose the infliction of serious commercial damage on Iran – 'to teach Iran a lesson', as informed experts concluded. The damage caused was out of all proportion to the risk that the platforms posed to neutral shipping – a risk which . . . did not exist.[137]

In line with its conception of the aim of self-defence, in its submissions before the Court 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.'[138] Furthermore, it added that:

> However the requirement of proportionality is interpreted, such limited action cannot be considered disproportionate when taken in response to Iranian missile and mine attacks against United States flag oil tankers and United States warships. These Iranian attacks, if continued, threatened to cause far more economic damage and disruption, far more casualties – both military and civilian – and far greater risks to the peace of the region than the limited operations carried out by the United States forces against the platforms.[139]

Despite these contentions, the Court simply required the United States to show that 'its actions were necessary and proportional to the armed attack made on it',[140] thus evaluating the proportionality on the basis of the damages already inflicted on it.

[134] CR 2003/7, *supra* note 3, at 48, para. 61.

[135] *Ibid.*, at paras. 62–67.

[136] See: Iran's Memorial, *supra* note 3, at paras. 4.25–4.26, 4.50, 4.73, *inter alia*, and 4.81 ff.

[137] CR 2003/7, *supra* note 3, at 17, para. 28.

[138] CR 2003/18, *supra* note 3, at para. 28.17.

[139] CR 2003/12, *supra* note 3, at para. 18.59. See also: United States' Counter Memorial, *supra* note 3, at paras. 4.33–4.34 ('The gravity of those attacks was magnified by the history of unlawful and aggressive Iranian conduct and by Iran's clear hostility to the continued operation of U.S. vessels in the Gulf . . . Thus, U.S. authorities had to identify proportionate military actions that could help to restore the safety of U.S. vessels'), and Rejoinder, *supra* note 3, at paras. 5.48–5.50.

[140] Para. 51 of the 2003 judgment, *supra* note 3.

4 Conclusion

Despite the judgment's numerous shortcomings and ambiguities, the Court reaffirmed and outlined the conditions for the legitimate use of self-defence established in the *Nicaragua* case and in the *Legality of Nuclear Weapons* Advisory Opinion, namely, the existence of an armed attack; proportionality and necessity of the actions taken, and employment of force in self-defence against a military target. It also provided some guidance concerning the parameters of these conditions. Notably, the Court strengthened the condition of an armed attack, on the basis of treaty and customary law, thereby opting for a restrictive interpretation of the right of self-defence. Yet, the Court has not necessarily defined the limits of the use of force in exercising self-defence. For instance, the Court did not indicate whether customary international law permits pre-emptive self-defence. Indeed, this question was not raised during the case because both parties agreed on the need for an armed attack.[141] Nonetheless, the ICJ's insistence on the requirement of a specific armed attack was remarkable in the current context, where some states and international bodies have challenged the current restrictive conceptualization of self-defence and appear to promote the lawfulness of pre-emptive self-defence, even in the absence of armed attack.[142]

Likewise, the Court did not clarify the issue of anticipatory self-defence, that is, the use of force by a state which has already been the victim of an armed attack and learns that further attacks are planned.[143] In this regard, the question arises as to how to assess when the victim state loses the right to resort to self-defence against the state responsible for the attack; and the extent it is entitled to take action to remove military structures and neutralize sources of possible future attacks. In its oral pleadings before the Court, the United States drew a parallel between the present case and the circumstances of 11 September 2001.[144] It argued that if Iran's view of self-defence was applied to the attacks on 11 September, it 'would mean that the right to take action in self-defence would have ended once the hijacked aircraft had struck

[141] Similarly, in the Nicaragua judgment of 1986, the facts did not invite the Court to consider the possible lawfulness of a response to an imminent threat of an armed attack which has not yet taken place, and so the Court expressed no view on that issue: *supra* note 10, at paras. 35 and 194.

[142] See President Bush's Graduation Speech delivered at West Point, New York. 1 June 2002: 'our security will require all Americans . . . to be ready for preemptive action when necessary to defend our liberty and to defend our lives'. Likewise, the US National Security Strategy includes the following two goals: '[t]o strengthen alliances to defeat global terrorism and work to prevent attacks against us and our friends, and to prevent our enemies from threatening us, our allies, and our friends, with weapons of mass destruction': The White House, *The National Security Strategy of the United States of America*, 17 Sept. 2002. This document also affirms (at 4) that 'America will act against such emerging threats before they are fully formed. We cannot defend America and our friends by hoping for the best. So we must be prepared to defeat our enemies' plans, using the best intelligence and proceeding with deliberation.' See also European Union, *A Secure Europe in a Better World. European Security Strategy*, Brussels, 12 Dec. 2003, at 7 and 11.

[143] O'Connell, *supra* note 2, at 2 (footnote 10).

[144] CR 2003/15, *supra* note 3, at para. 18.51, and CR 2003/18, *supra* note 3, at paras. 28.14–28.15.

their targets'.[145] The day after these attacks, the United Nations Security Council passed unanimously a resolution which defined them as a 'threat to peace' and recognized the right of individual and collective self-defence;[146] thereby, broadening the traditional notion of self-defence.[147] In the *Oil Platforms* case, the Court refrained from analysing this interpretation of self-defence. Therefore, it avoided expressly endorsing or rejecting the position taken by the Security Council. However, it is remarkable that the approach followed by the ICJ in the present judgment was to strictly gauge the lawfulness of the United States' actions in the light of the individual armed attacks allegedly committed by Iran, and that it did not take into account the arguments relating to the 'series of attacks' against the United States vessels or the removal of 'persistent threats' to the security of this country.

While the Court has confirmed its existing jurisprudence in the field, it did not seize this opportunity to make any significant new contribution at a time when the parameters of the use of self-defence in international law has become particularly pertinent in international relations. Consequently, many questions remain unresolved concerning the meaning and scope of self-defence in contemporary international law. Given its leading role as the interpreter of international law, the ICJ has missed a golden opportunity to define how the use of force by states in self-defence can be evaluated as lawful in international law in the future. Indeed, the Court did not even take the opportunity to respond expressly, by way of *obiter dicta*, to the controversial interpretations of the requirements of self-defence advanced by the parties in their pleadings. Yet, it can be argued that its silence was its response. That is, the Court did

[145] *Ibid*., at para. 28.14. In justifying Operation 'Enduring Freedom' against in Afghanistan, the US and UK argued that the 11 Sept. 2001 attacks were part of a series of attacks on the US which began in 1993 with the first attack on the World Trade Center and that future attacks were probable. The Joint Resolution approved by the House and the Senate of the USA on 15 Sept. 2001 acknowledged that these attacks 'render it both necessary and appropriate that the United States exercise its right to self-defence', and authorizes the President of the United States 'to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks . . ., or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States'. One day after launching the military action in Afghanistan, the US' representative argued before the UN Security Council, on 7 Oct. 2001, that 'in response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States' .

[146] Resolution 1368 (2001) UN Doc. S/RES/1368 (2001). These references to the 'threat of peace' and 'the right of self-defence' were reaffirmed in the preamble to Resolution 1373 (2001) UN Doc. S/RES/1373 (2001), adopted by the Security Council on 28 Sept. 2001. These resolutions were endorsed by the NATO Council (Press Release 124 (2001)) and the Member States of the EU (Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, at 1), among others.

[147] See Cassese, 'Terrorism is Also Disrupting some Crucial Categories of International Law', 12 *EJIL* (2001) 997; Condorelli, 'Les attentats du 11 September et leur suites: Où va le Droit international?', 105 *Revue Générale de Droit International Public* (2001) 829; Corten and Dubuisson, 'Opération « liberté immuable »: une extension abusive du concept de légitime défense', 106 *Revue Générale de Droit International Public* (2002) 51; Schrijver, 'Responding to International Terrorism: Moving the Frontiers of International Law for 'Enduring Freedoms' [2001] *NILR* 271; González Vega, 'Los atentados del 11 de septiembre, la

not accept these controversial interpretations in making its determination, and confined itself to an evaluation of the US actions using a stringent conceptualization of self-defence. In light of this, the silences of the Court together with the confirmation of its existing jurisprudence may be the main contribution of this judgment to the international law on the use of force in self-defence.

operación "libertad duradera" y el derecho de legítima defensa', 58 *Revista Española de Derecho Internacional* (2001) 248; Bermejo García, 'El Derecho Internacional frente al terrorismo: ¿nuevas perspectivas tras los atentados del 11 de septiembre?' [2001] *Anuario de Derecho Internacional* 5; Ratner, 'Jus ad Bellum and Jus in Bello After September 11', 96 *AJIL* (2002); Charney, 'The Use of Force Against Terrorism and International Law', 95 *AJIL* (2001) 835; and Franck, 'Terrorism and the Right of Self-Defense', 95 *AJIL* (2001) 838.