

Review of the Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)

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Abstract

This paper reviews the decision of the International Court of Justice (ICJ) in the Case concerning Oil Platforms (Islamic Republic of Iran v. the United States of America). The case arose from the United States of America's reprisal attacks on Iranian offshore oil facilities, following attacks on US protected vessels and warships. In this case, the ICJ considered international law principles on force, self-defence and award of reparation. This paper examines how ICJ utilised the opportunity to develop international law on these subject areas. This paper finds that the ICJ did not advance international law beyond existing knowledge on the subject matter under consideration based on doctrinal research methodology. The ICJ's shortcoming in this regard is that the question regarding the extent to which self-defence can be applied was left unanswered; the ICJ also failed to award reparation despite its finding of US unlawful use of force. This paper, therefore, called for a proactive ICJ in expanding the frontiers of international law.

Keywords: Oil Platforms Case; Reparation; Self-defence; Use of Force



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1.1 Introduction

The International Court of Justice (ICJ) is the world court established under the United Nations (UN) Charter and saddled with determining disputes arising between countries.⁶⁹⁴ ICJ jurisdiction to resolve a matter between parties is conferred on by the UN Charter, ICJ Statute, bilateral or multilateral treaties entered between contracting parties.⁶⁹⁵ In adjudicating cases between disputing parties, it has contributed to the development of international law principles over the years.⁶⁹⁶ Yet, the ICJ had the opportunity to contribute its quota towards developing international law in the *Case Concerning Oil Platforms (Islamic Republic of Iran v. the United States of America)*⁶⁹⁷ (Oil Platform Case).

The study seeks to review the ICJ decision in the Oil Platform Case. The objective is to determine how well ICJ has lived up to its expectation of developing international law through its decision in the case. Specifically, this shall be measured under the international law subject area of use of force, self-defense, and award of reparation. Thus, this work shall be divided into five parts. Part one is the introduction. Part two sets out the facts and other background information concerning the case. Part three of the work examines the decision ICJ. Part four is the comment section which looks at the international law implications of the ICJ decision. This part is sub-divided into two- use of force and self-defense, on the one hand, and award of reparation, on the other hand. Part five contains the concluding remarks of the work.

1.1 Background/Fact of the Case

The fact leading up to the case emanated from conflicts arising in the Persian Gulf between Iran and Iraq in the 80s. Several vessels traversing the regions were exposed to attacks from missile launches and submarine mines within that period. To protect its vessels, Kuwait reached a pact for the United States of America to reflag the formers' vessels and provide naval personnel to escort pass over the Persian Gulf. On the 16 days of October 1987, Sea Isle City, one of the

⁶⁹⁴Article 92 UN Charter.

⁶⁹⁵Eti Best Herbert, 'The Role of the International Court of Justice in Actualising Global Peace', (2021) 59 (1-4) Indian Journal of International Law 323, 334.

⁶⁹⁶Christian J Tams & Antonios Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development', (2010) 23 (4) Leiden Journal of International Law 781, 784.

⁶⁹⁷Judgment, ICJ Report 2003, 161.

reflagged tankers, was struck by a missile around a Kuwaiti harbour. The US accused Iran of masterminding the strike; hence on 19 October 1987, American forces launched an attack destroying the twin Reshadat and Resalat Iranian oil production facility located offshore. Again, an American warship known as USS Samuel B. Roberts was blown by a sea mine in the high sea, close to Bahrain on the 14th April 1988. In quick successive US naval forces simultaneously blew down the Nasr and Salman facilities, on the suspicion that the sea mine which destroyed its warship was laid by Iran. It was based on the US attacks on the oil platforms that Iran instituted an action against the US at the ICJ on 2nd November 1992.

Iran contends that the US destruction of the oil platforms amounts to a material breach of international law and several provisions of the Treaty of Amity, Economic Relations and Consular Rights (TAERCR) 1955, particularly Article X(1), which was signed with the US. The said Article X (1) captures the parties' obligation to ensure 'freedom of commerce and navigation between each other's territories. In reaction, pursuant to Article 79 (1) ICJ Rules, the US raised a preliminary objection wherein it canvassed that no provision of the Treaty offers grounds upon which ICJ can exercise jurisdiction on matters relating to the use of force. It would be recalled that in the *Nicaragua v United States*,⁶⁹⁸ wherein Nicaragua had instituted a suit against the US on the basis of Article XXIV Nicaragua–United States Treaty of Friendship, Commerce and Navigation 1956, the US also argued that the non-inclusion of issues of military security effectively robs the ICJ of the jurisdictional clothing to adjudicate on the matter.⁶⁹⁹ The US also instituted a counterclaim against Iran, wherein it was contended that the 1987-1988 Iran involvement in belligerent activities within the Persian Gulf, the laying of sea mines, and supposed Iranian attacks on its flag bearing vessel and naval warship amounted to a material breach of Article X(1). The claimant and counter-claimant prayed the court to order an award of reparation for the claim and counterclaim, respectively. Expectedly, both parties opposed the claim and counterclaim filed by the respective parties.

1.2 ICJ Decision on the Preliminary Objection and Case on the Merit

⁶⁹⁸*Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* [1986] ICJ Report 14, 91.

⁶⁹⁹William Michael Reisman, 'The Other Shoe Falls: The Future of Article 36(1) Jurisdiction in the Light of Nicaragua', (1987) 81 *American Journal of International Law* 166, 171.

The ICJ first addressed the preliminary objection raised by the US in its ruling of 12th December 1996. The court found that its jurisdiction to entertain the suit was derived from the provision of Article XXI (2) of TAERCRCR 1955, 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...” Since the Iranian claims were for the court to determine whether the US strike on the oil platforms constituted a breach of Article X (1) of the Treaty, it borders on interpretation or application of the treaty. Hence, ICJ is vested with the jurisdiction to determine the case.

Regarding the substantive claim, Iran contented that the US destruction of the oil platforms was an unlawful use of force and breach of international law. It was also argued that the oil platforms owned by the Iranian national oil company were commercial interests whose destruction has imposed economic and financial losses on the country, contrary to Article X (1) of the treaty. The US admitted to launching the attack on the Iranian oil platforms. However, the US defense was that the attack was an act of self-defense for the supposed Iranian attack on its vessel and warship. The US also founded its defense on a clause in Article XX (1) (d) of the treaty, which allows a signatory party to take “measures necessary to protect [its] essential security interests.”

By fourteen votes to two, the ICJ found that the US destruction of the Iranian facilities was not justifiable under Article XX (1) (d) of the treaty. The court further stated that it amounts to unlawful use of force in contravention of the foremost international customary law principle captured in Article 2 (4) of the UN Convention. Hence, the US argument of self-defense was discountenanced. The ICJ further determined whether the US action actually violated Iran's commercial or navigational rights. The court held that the platforms were not commercially viable as they had been rendered redundant by an earlier attack by Iraqi forces at the time of the destruction. The court also relied on the fact pursuant to Executive Order 12613; the US had ceased petroleum commercial engagement with Iran within that period. Despite the argument by Iran that so many resources had been thrown into the repairs of the facilities projected to resume production in October 1987, the court insisted that the US action does not constitute a breach of freedom of commerce; hence Iran's claim for reparation would fail.

Concerning the US counterclaim, the court held that the US did not tender concrete evidence for the court to conclude that an Iranian missile launched the attack on the US-flagged vessel. It could not also be proved that the mine which blew up the American warship was laid by Iran. Thus, by a vote of fifteen against one, it was held that Iran did not breach its obligations under Article X (1) of the treaty. Accordingly, the US claim for reparation was not granted.

1.3 Implication for the use of Force and Self-Defense

The main issue for determination before the ICJ in the Oil Platform case was to determine whether the parties' actions infringed on peaceful commercial and navigational rights. However, it would appear that the court delved deep into consideration of the issue of whether the actions of the US can be justified as an act of self-defense under international law.⁷⁰⁰ Since the question before the court was not for the determination of whether there was the use of force that would justify the action of the US as an act of self-defense, it went to no issue in determining the liability of US in the case, as the pronouncement on this point could best be described as an *obiter dictum* of non-binding effect.⁷⁰¹ Hence, it is irresistible to say that ICJ embarked on an exercise in futility, as far as the pronouncement on the use of force and self-defense are concerned.

Since judicial precedents do not bind international adjudicatory bodies,⁷⁰² it is still of jurisprudential value to examine the merit of ICJ's pronouncement of the issue of the use of force and self-defense. ICJ has had to address the question of the use of force and self-defense in international law. In the *Nicaragua Case*, the ICJ had established that self-defense would avail a state in the instance of "most grave forms of the use of force" as distinct from "other less grave forms".⁷⁰³ Apart from being a direct victim of the attack, necessity and proportionality conditions must also be satisfied.⁷⁰⁴

⁷⁰⁰Caroline E Foster, 'The Oil Platforms Case and the Use of Force in International Law', (2003) 7 Singapore Journal of International & Comparative Law 579, 586.

⁷⁰¹William H Taft, 'Self-Defense and the Oil Platforms Decision', (2004) 29 The Yale Journal of International Law 295, 295.

⁷⁰²See, Article 38 (1) (d) ICJ Statute; Mads Andenas & Johann Ruben Leiss, 'The Systemic Relevance of "Judicial Decisions" in Article 38 ICJ Statute', (2017) 77 Heidelberg Journal of International Law 907, 947.

⁷⁰³*Nicaragua Case* [1986] ICJ Report 14, 91.

⁷⁰⁴*ibid.* 103.

Also, an act of self-defense must be directed at a legitimate military target which will deter or disable further use of force by the assailant state. The ICJ believed that since the US warship was not the specific target of the seamline, it could not be said that there was an unlawful use of force by Iran that would warrant action by the US in self-defense. ICJ's position has been criticized because it amounts to tacit approval of the indiscriminate act of aggression on a state, provided it is not explicitly directed at a target,⁷⁰⁵ contrary to international law principles as captured in a host of international instruments.⁷⁰⁶ In the *Corfu Channel (United Kingdom v. Albania) (Merits)*,⁷⁰⁷ even the ICJ had long disapproved of indiscriminate attacks under extant international humanitarian law. On the other hand, it could also be argued that, should this standard be lowered, it would lower the irritability of the state to the minor incidence of force, thereby justifying flimsy reasons to resort to aggression as an act of self-defense.⁷⁰⁸ This portends putting international peace and security in dire jeopardy.

1.4 Award of Reparation

As noted earlier, the question set before the court was to determine whether the US destruction of its oil platforms breached the right to “freedom of commerce” in line with Article X Article X (1) of TAERCR 1955 and *international law*.⁷⁰⁹ Hence, having found that US are responsible for unlawful use of force against Iran, the court was tasked to determine whether that infringes upon “freedom of commerce” to ascertain if and what reparation was due to Iran. The court considered the determining factor was that as at the time of the attack, “commerce” was not actually ongoing. This appears to be a narrow interpretation of the clause “freedom of commerce.”⁷¹⁰ The term “freedom of commerce” does not depict a state of the affair but ability, potency, or tendency. Hence, any action that is likely to curb those qualities, whether in the present or future, should be interpreted as infringing on that right.

⁷⁰⁵Taft, *supra* note 8, 302.

⁷⁰⁶Article 3 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines 1907; Article 3(8) of the Amended Protocol II to the Convention on Certain Conventional Weapons 1996.

⁷⁰⁷[1949] ICJ 4, 22 (Apr. 9); see also, *Military and Paramilitary Activities*, [1986] ICJ Report 112, para. 215.

⁷⁰⁸Andrew Garwood-Gowers, ‘Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America): Did the ICJ Miss the Boat on the Law on the Use of Force?’, (2004) 5 Melbourne Journal of International Law 241, 249.

⁷⁰⁹Italics added for emphasis.

⁷¹⁰*Oil Platforms (Islamic Republic of Iran v US) (Preliminary Objections)*, [1996] ICJ Report 803, 819-820.

Consequently, the US destruction of the oil platform that was under repairs and set to return to its production capacity a few months from the attack is a breach of Iran's right to freedom of commerce that should warrant an award of reparation by the court. A better approach was adopted in ICJ's later decision involving the same parties,⁷¹¹ where it was found that US embargo placed on Iran had occasioned irretrievable adverse effect on Iranian commercial carriage of goods by air and supplies of food and drugs importation of such goods and services contrary to the provisions of Article X (1) and XX (1) (d) of TAERCRCR 1955.⁷¹² It is in view of this finding that the ICJ issued provisional measures in favour of Iran in 2018.

It is curious to note how ICJ would find the US responsible for employing unlawful force against Iran yet would not be liable to pay reparation thereto. It stands against the force of logic for ICJ to first find the US defense to be unacceptable against a substantive claim of Iran which was also found to be unmeritorious.⁷¹³ Even though the claim of Iran is found to be unsustainable by Article X (1) of TAERCRCR 1955 under which it had instituted the action, ICJ could still leverage on international (customary) law principles of use of force and self-defense to make an order for reparation in favour of Iran. Luckily international customary law principles are binding on all states. Hence, the argument of not being a signatory party thereof, as in the case of the international treaty, would not arise here. Since this it is an international obligation for a state to restrain from using aggression against another state, ICJ could rightly exercise jurisdiction on account of Article 36 (2) (d) ICJ Statutes, which enables it to determine "the nature or extent of the reparation to be made for the breach of an international obligation".

It is well-founded in international law that whereas the responsibility of a state in respect of a wrongful act over another state has been established, the offending is obliged to make complete reparation to the right its wrongful act.⁷¹⁴ As much as possible, the reparation should re-establish

⁷¹¹*Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of October 2018*, [2019] ICJ Report, 92.

⁷¹²Lawrence Hill-Cawthorne, 'The ICJ's Provisional Measures Order in Alleged Violations of the 1955 Treaty (Iran v United States)', EJIL:Talk! (October 3, 2018). <<https://www.ejiltalk.org/the-icjs-provisional-measures-order-in-alleged-violations-of-the-1955-treaty-iran-v-united-states/>> (accessed 17 April 2021).

⁷¹³Geoff Gordon, 'The Oil Platforms Opinion: An Elephant in the Eye of a Needle', (2009) 1 (2) Amsterdam Law Forum 132, 135.

⁷¹⁴See, *Gabcikovo-Nagymaros Project (Hungary/Czechoslovakia) Judgement* [1997] ICJ Reports, 81.

the victim back to the status quo before the internationally wrongful act was perpetrated.⁷¹⁵ In the Nicaragua Case, the ICJ had found the use of force by the US against the territorial integrity of Nicaragua to be a violation of Article 2 (4) of the UN Charter and customary international law, which would ordinarily entitle Nicaragua to reparation from America. By virtue of the ICJ recognition of the international customary law status of the principle of use of force, it, therefore, implies that, once a party to the suit before the court is found to have violated that principle, even though reparation is supported by the operational treaty for which that action was instituted, the court is duty-bound to make an order for reparation on the ground of breach of the core principle of international customary law.

1.5 Conclusion

This paper undertook a review of the ICJ decision in the Oil Platform Case. The value of the case in international law jurisprudence on the use of force and self-defense is adjudged unimpressive, as it only restates existing knowledge in the field, without more. One would expect the ICJ to seize the moment in expanding the frontiers of knowledge on this point by answering unanswered questions on this subject. For instance, the ICJ could have resolved the controversial issue of the extent to which self-defense can be applied in international law;⁷¹⁶ or pronounced the US armed attacks on Iran as acts of reprisals⁷¹⁷ that would warrant reparation in favour of Iran. In the words of Garwood-Gowers, the case depicts “a court struggling to balance its desire to discuss general international law on the use of force against the jurisdictional limits imposed on it by the nature of the proceedings.”⁷¹⁸

⁷¹⁵*Factory of Chorzow, Jurisdiction* (1927) PCIJ Series A, No. 9, 21.

⁷¹⁶Natalia Ochoa-Ruiz and Esther Salamanca-Aguado, ‘Exploring the Limits of International Law relating to the Use of Force in Self-defence’, (2005) 16 (3) *European Journal of International Law* 499, 523

⁷¹⁷*ibid.* 519.

⁷¹⁸Garwood-Gowers, *supra* note 15.