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Protecting International Shipping Channels During Hostilities and the *Oil Platforms* Case: *Actio Popularis* Revisited?

Pieter H.F. Bekker†

I. INTRODUCTION

The *Oil Platforms* case between Iran and the United States was the first proceeding in the history of the International Court of Justice (ICJ) in which the applicant relied exclusively on a compromissory clause contained in a bilateral treaty to establish jurisdiction. This restriction mostly affected the U.S. counter-claim.¹

This contribution will focus on the question whether the counter-claim might be considered, as Iran implied, an example of the inadmissible exercise of an *actio popularis*, or a "right resident in any member of a community to take legal action in vindication of a public interest.—in this case, ensuring safe shipping conditions in the Persian Gulf, an international shipping channel. It is recalled that in the *South West Africa* cases, the Court stated that contemporary international law does not recognize "the equivalent of an 'actio popularis.'"² Four years later, however, the Court explained that a fundamental distinction must be made between a state’s obligations arising vis-à-vis another state and its obligations towards the international community as a whole, which by their very nature and importance are the concern of all states, who can be held to have a legal interest in their protection.⁴ As examples of these obligations *erga omnes* the Court mentioned acts of aggression, genocide, slavery, and racial discrimination. While the Court has failed to clarify whether every state has the right of espousal with regard to such obligations, denying the equivalent of an *actio popularis* in these areas

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¹ The counter-claim was held admissible by the Court’s Order of March 10, 1998. See Oil Platforms (Iran. v. U.S.) (Counter-claim), 1998 I.C.J. 190, 206, para. 46 (Mar. 10). The vote was 15-1, with Judge ad hoc Rigaux, appointed by Iran, dissenting.


³ Id.

could frustrate their effective protection. The possibility for any state to complain about unlawful conduct in these areas can be critical, especially where the state having a direct interest is either unable or unwilling to complain against the injuring state.

*Oil Platforms* is not the only case evidencing an increased interest in the *actio popularis* doctrine. In the recent *LaGrand* case between Germany and the United States, in which Germany advanced claims both in its own right and through the exercise of diplomatic protection in the interest of German nationals, Germany also appeared to rely on the *actio popularis* doctrine by stating that it was pursuing its claims "not only for the sake of the citizens of [Germany and the United States], but for the benefit of human beings worldwide."5 Germany failed, however, to evoke a pronouncement from the ICJ that a human right to consular notification exists in international law or that an *actio popularis* is acceptable in that context. This recent interest warrants a closer examination of the doctrine in the context of Iran's objection in this latest case.

II. THE U.S. COUNTER-CLAIM AND IRAN'S OBJECTION

The counter-claim, as formulated in the U.S. Counter-Memorial, requested the Court to adjudge and declare that "in attacking vessels, laying mines in the Gulf and otherwise engaging in military actions in 1987-88 that were dangerous and detrimental to maritime commerce, the Islamic Republic of Iran breached its obligations to the United States under Article X of the 1955 Treaty" of Amity, Economic Relations and Consular Rights6 for which it owed full reparation to the United States.7 The general references to military actions "that were dangerous and detrimental to maritime commerce" and to "vessels" might easily be mistaken for indicia of an *actio popularis*. It must be kept in mind, however, that the United States was pursuing its counter-claim against Iran in its own right as a party to, and in the specific context of a direct violation of the rights of the United States under, the 1955 Treaty with Iran, and not by way of diplomatic protection relating to U.S. or alien shipping interests, whether private or sovereign. The United States did not claim compensation for harm done to specific vessels.8

Recognizing the territorial limitation imposed by the sole basis of jurisdiction governing its counter-claim,9 the United States subsequently

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7. *Oil Platforms* (Iran v. U.S.) (Merits), I.C.J., paras. 19, 101 (Nov. 6, 2003), http://www.icj-cij.org/icjwww/idecisions.htm. All references to *Oil Platforms* are to the merits phase of the case unless otherwise specified. See also *Oil Platforms* (Counter-claim) 1998 I.C.J. at 204, para. 36.

8. The case also did not involve the exercise of any kind of functional protection by the United States, such as where a state brings a claim in respect of the crew or owners of a ship who do not have its nationality. Therefore, no issues of nationality or "genuine link," which feature in diplomatic protection cases, were involved.

9. See *Oil Platforms*, para. 110.
modified its counter-claim to read that “in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran, the Islamic Republic of Iran breached its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty.”  This modification proved critical from the perspective of shielding the counter-claim against Iran’s objections.

In contrast to the background pertaining to the U.S. attacks giving rise to Iran’s principal claim against the United States, the United States was understood to be bringing both a specific and a generic counter-claim by relying on a number of attacks on U.S. and non-U.S. flag vessels allegedly carried out by Iran. Whereas the specific claim focused on individual attacks, the generic variant alleged that “as a result of the cumulation of attacks on United States and other vessels, laying mines and otherwise engaging in military actions in the Persian Gulf, Iran made the Gulf unsafe,” thereby breaching its obligation respecting freedom of commerce and navigation which the United States should have enjoyed under Article X, paragraph 1 of the 1955 Treaty.

Iran maintained that the Court should not deal with the merits of the counter-claim inter alia because the United States, in relying on incidents involving vessels not flying the U.S. flag, lacked standing to submit a claim on behalf of third states or of foreign entities that were not parties to this proceeding. Iran thereby implied that the counter-claim, or at least parts of it, constituted an inadmissible actio popularis. The “public interest” that the United States could be said to vindicate by its “generic” counter-claim was to ensure safe shipping conditions for all in the Gulf.

The Court rejected Iran’s objection, not by labeling the U.S. counter-claim an inadmissible actio popularis, but because in its view the counter-claim “simply requests the Court to adjudge and declare that the alleged actions of Iran breached its obligations to the United States, without mention of any third States.” According to the Court, its limited role was to consider whether the alleged Iranian actions infringed freedoms guaranteed to the United States under Article X, paragraph 1 of the Treaty.

10. Id. para. 111 (emphasis in original).
11. The U.S. attacks on the Iranian oil platforms that triggered this case occurred after two specific attacks on shipping in the Gulf. On October 16, 1987, the Kuwaiti tanker Sea Isle City, which had been re-flagged to the U.S., was hit by a missile near Kuwait harbor. Claiming that Iranian oil platforms were used as a staging facility for attacks by Iranian forces against shipping in the Gulf, the U.S. attacked and destroyed two Iranian offshore oil production installations in the Reshadat complex three days later. On April 14, 1988, the U.S. frigate Samuel B. Roberts struck a mine in international waters near Bahrain. Five days later, the United States attacked and destroyed the Nasr and Salman platforms belonging to the National Iranian Oil Company. The Court’s Judgment of November 6, 2003, concluded, however, that the attacks against Iranian oil installations carried out by U.S. forces did not fall within the category of measures justified by the Iran-U.S. Treaty.
12. See Oil Platforms (separate opinion of Judge Simma), para. 38.
14. Id. para. 108.
15. Id. para. 109.
The Court's heavy reliance on the claim as formulated by the applicant and its focus on the absence of any reference to third states is unconvincing: without mentioning third-party interests, a claimant can still be considered to exercise an inadmissible *actio popularis* in fact. The facts surrounding a claim should be closely examined in determining whether this is the case. Is the context giving rise to the claim one of aggression, genocide, slavery, or racial discrimination? In whose interest is the applicant really claiming? If the interest essentially is that of a third state and/or its nationals, or if the interest is only tangentially the applicant's, there is much to be said for dismissing the claim as an inadmissible *actio popularis*, especially if it clearly is made outside the four accepted areas.

III. THE COURT'S TREATMENT OF THE PROOF OFFERED BY THE UNITED STATES

In order to succeed on its counter-claim, the United States was held to prove two things. First, it had to demonstrate that its freedom of commerce or of navigation "between the territories of the High Contracting Parties" to the 1955 Treaty was actually infringed. Second, it had to prove that the acts which allegedly impaired one or both of those freedoms were attributable to Iran.

The specific incidents to which the United States referred in support of its modified counter-claim involved vessels flying the flag, not only of the United States but also, and primarily, of the Bahamas, Liberia, Panama, the United Arab Emirates, and the United Kingdom.¹⁶

As regards U.S. flag vessels, the Court pointed out that the 1955 Treaty protects only vessels that are engaged in commerce or navigation between the territories of the United States and Iran, and not freedom of navigation in general.¹⁷

The first of three incidents involving a U.S. flag vessel concerned a mine attack on a steam tanker in an international shipping channel while en route from The Netherlands to Kuwait. Therefore, this vessel was not engaged in commerce or navigation between the United States and Iran. The second incident involved a missile attack on the *Sea Isle City.* While this vessel was flying the U.S. flag, it was proceeding from its anchorage to a Kuwaiti oil loading terminal and, therefore, was not engaged in commerce or navigation between the U.S. and Iran. The third incident involved a mine attack on the U.S. frigate *Samuel B. Roberts.* As a warship, this vessel by its nature was excluded from the protection of Article X, paragraph 1 of the Treaty.

Six of the seven other incidents invoked by the United States involved vessels that were flying the flag of non-U.S. states and were either owned by U.S. corporations (five) or subject to a U.S. bareboat-charter (one). One of the vessels involved had no U.S. connection whatsoever.

One of two incidents involving mine attacks concerned a tanker carrying Iranian light crude from Iran to The Netherlands. This vessel was flying the flag of Panama while being operated under a U.S. bareboat-charter. The Court

¹⁶. *Id.* para. 120.

¹⁷. *Id.* para. 119.
concluded that the vessel was not engaged in commerce or navigation between the United States and Iran, because the process of indirect commerce in Iranian oil through Western European refineries was outside the ambit of the Treaty and the vessel's destination was not a U.S. port.\textsuperscript{18} The second mine attack targeted the supply vessel \textit{Anita} flying the flag of the United Arab Emirates and supplying vessels in anchorage, so that this incident also did not concern a vessel engaged in commerce or navigation between the United States and Iran.

Two further incidents involved gunboat attacks targeting two U.S.-owned vessels. The first attack concerned a Liberian-flagged motor tanker en route to Saudi Arabia from Japan. The second attack targeted a Bahamian-flagged steam tanker en route from Saudi Arabia to the United States. Based solely on their itineraries, both vessels were found to lack the protection of the Treaty.

Another incident involved a missile attack against a Liberian-flagged, U.S.-owned vessel anchored 10 miles off a Kuwaiti terminal. The Court noted that the vessel was not engaged in commerce or navigation between the United States and Iran. It came to the same conclusion with regard to a frigate attack targeting a Liberian-flagged, U.S.-owned motor tanker carrying a load of Saudi Arabian crude oil from Bahrain and the United Arab Emirates to Japan. Finally, the Court concluded the same with regard to speedboat attacks on a British-flagged, U.S.-owned steam tanker carrying a Saudi Arabian cargo to Qatar and Singapore.

The Court considered that, in the circumstances of this case, a generic claim of breach of Article X, paragraph 1 of the Treaty could not be sustained independently of the specific incidents whereby Iran was alleged to have made the Gulf unsafe. Because none of the incidents individually involved any interference with the commerce and navigation protected by the 1955 Treaty, they did not accomplish this effect cumulatively. With regard to the "generic" counter-claim, the Court pointed out that the fact alone that Iran allegedly made the Gulf unsafe was not sufficient for the Court to decide that Iran had breached Article X, paragraph 1 of the Treaty. This required a showing, failing in this case, of "an actual impediment to commerce or navigation \textit{between} the territories of the United States and Iran."\textsuperscript{19}

In light of the Court's conclusion that none of the vessels described by the United States as being damaged by Iran's actions was engaged in commerce or navigation between the territories of the parties to the 1955 Treaty, the entire counter-claim failed on the first condition, and the Court did not need to address the issue of attribution of the alleged attacks.\textsuperscript{20}

IV. THE RELEVANCE OF THE JUDGMENT FOR \textit{ACTIO POPULARIS} CLAIMS

The Court's statements concerning the U.S. counter-claim indicate that, had the incidents invoked by the United States involved vessels navigating

\textsuperscript{18} Id. para. 97.
\textsuperscript{19} Id. para. 123 (emphasis in original).
\textsuperscript{20} Id. para. 124.
between U.S. and Iranian ports and otherwise falling within the protection of the 1955 Treaty, the Court might have accepted incidents targeting non-U.S. vessels, either individually or cumulatively, as triggering violations under Article X, paragraph 1 of the Treaty. The decision thus offers a rare hint that the Court might accept that a state may claim through what is the functional equivalent of an actio popularis in the areas identified in *Barcelona Traction* as obligations *erga omnes* that all states can be held to have a legal interest in protecting.

If, and only if, the United States had lacked an interest of its own in protecting shipping in the Gulf—because there were no attacks on vessels flying the U.S. flag or having another U.S. connection—an actio popularis scenario would have arisen. It is unlikely that the Court would have entertained such a claim here, given that the alleged Iranian attacks in the Court’s view did not rise to the requisite level of an aggression (the only applicable area identified in *Barcelona Traction*)—unless it had accepted the actual or attempted sinking of oil tankers in an international shipping channel as “environmental aggression.” The example of the United Nations Compensation Commission, which has awarded damages for environmental aggression by Iraq during the first Gulf War, suggests that this concept is a part of contemporary international law, and may be enforced by claimants having a legal interest.

In the end, the Court’s apparent willingness in principle to consider incidents involving non-U.S. flag vessels merely was a function of the limited basis of jurisdiction underlying the U.S. counter-claim, involving allegations of direct violations of rights enjoyed by the United States under a bilateral treaty. Consequently, it would be a mistake to read too much into the Court’s reasoning concerning the counter-claim.

V. CONCLUSION

While the incidents on which the United States relied in support of its counter-claim might have been outside the ambit of the narrow basis of jurisdiction governing the counter-claim, in the circumstances of this case it would be wrong to characterize either the U.S. counter-claim as an

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21. Judge Simma argues in his separate opinion that the Court’s approach in this case is at odds with the approach it followed in its 1986 Judgment in the *Nicaragua* case. *Oil Platforms* (separate opinion of Judge Simma), paras. 40-41. In the latter case, the Court followed a generic approach rather than analyzing each incident in detail. He points out that, notwithstanding the fact that the relevant provisions of the Nicaragua-U.S. and Iran-U.S. treaties are virtually identical, as acknowledged by the Court (*Oil Platforms*, para. 107), the Court in 1986 did not consider it necessary to establish whether the particular vessels harmed by mines were flying the Nicaraguan flag, and whether the vessels concerned were transporting cargo between the territories of the United States and Nicaragua. As Judge Simma acknowledges, however, *Nicaragua* involved determinations of breaches, not only of a bilateral treaty, as in *Oil Platforms*, but also of general international law. Moreover, unlike the U.S. counter-claim in *Oil Platforms*, the incidents of which Nicaragua complained were not limited to destruction of or damage to vessels by mining, but involved a host of other incidents and attacks not related to shipping.

22. Indeed, Judge Simma described the reasons for the dismissal of the generic counter-claim as “plainly inadequate.” *Oil Platforms* (separate opinion of Judge Simma), para. 35. In his view, “such short shrift thus given to the generic counter-claim can be explained as the Court’s reaction to the somewhat unpersuasive way in which it was pleaded” by the United States. *Id.* para. 36.
inadmissible actio popularis or the Court’s decision as one revisiting that doctrine. To characterize the counter-claim in this way would be justified only if the United States had relied solely on the incident involving the Anita (a supply vessel that was flying the flag of the United Arab Emirates, was not U.S.-owned, and was not en route between ports in Iran and the United States), if there had been no attacks on vessels flying the U.S. flag or having another U.S. connection and being engaged in Iran-U.S. commerce, and if the United States had not brought the counter-claim in its own right under the applicable bilateral treaty protecting commerce and navigation between the two parties. The United States arguably had a legal interest of its own in seeking to protect the safety of the Gulf, an international shipping channel used also for Iran-U.S. commerce covered by a treaty guaranteeing to the United States the right of freedom of commerce and navigation.

Absent further guidance from the Court as to whether any state has the right of espousal to protect obligations erga omnes, it remains the rule that “except in extraordinary circumstances, a State may not extend its protection to or espouse claims of non-nationals,”23 just as it may not espouse those of the community-at-large. Those circumstances in the context of the actio popularis doctrine remain limited to acts of aggression, genocide, slavery, and racial discrimination. Expanding these areas might run the risk of opening the floodgates, which explains why the Court skirted the issue raised by Iran. But this concern is unwarranted if environmental aggression is considered as included within “acts of aggression” for purposes of the actio popularis doctrine.

In the current state of affairs, regardless of whether a right of espousal is recognized, a claim should be dismissed as an inadmissible actio popularis if it clearly is made outside the four areas accepted in Barcelona Traction and if the legal interest that the claimant state in fact is seeking to protect is exclusively that of third states or of private interests not having the claimant’s nationality.
