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Self-Defense and the *Oil Platforms* Decision

William H. Taft, IV[†]

I. INTRODUCTION

On November 6, 2003, the International Court of Justice issued its decision in *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*.¹ In this case, Iran claimed that the United States had breached the “freedom of commerce” provision in the 1955 Treaty of Amity, Economic Relations and Consular Rights between the two countries by taking military action against Iranian offshore oil platforms in 1987 and 1988. The Court properly rejected this claim, finding that the U.S. actions against the oil platforms did not disrupt commerce between the territories of Iran and the United States.

Despite rejecting Iran’s claim, the Court devoted a substantial portion of its opinion to a consideration of whether the U.S. actions against the oil platforms qualified as self-defense under international law. The Court’s statements concerning this issue were unnecessary to resolve the case and thus, in our domestic legal system, would be considered non-binding *dicta*. In addition, many of the statements were made in passing and in vague terms, without significant reference to state practice, legal precedent, or scholarly commentary, making it difficult to assess their implications.

The Court’s statements nevertheless merit comment. The right of States to defend themselves from armed attacks is essential to their national security. Among other things, it allows States to deter armed attacks that would otherwise occur and to discourage further armed attacks. The United States is concerned that the Court’s opinion might be read as suggesting limitations on the right of self-defense that are unsupported by international law and practice and that would undermine, rather than strengthen, international peace and security.

This contribution focuses only on the self-defense issues addressed by the Court and does not consider other issues relating to the international law of self-defense, such as the legality of anticipatory or preemptive uses of

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1. *Oil Platforms (Iran v. U.S.) (Merits)*, 2003 I.C.J. (Nov. 6), <http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm>. All references to *Oil Platforms* are to the merits phase of the case unless otherwise specified.

force. Nor does the contribution address other aspects of the Court's opinion, including its treatment of the burden of proof and its conclusion that the security exception in the 1955 Treaty implicitly encompassed general principles of self-defense.

II. BACKGROUND

As the Court explained in its opinion, the events underlying the *Oil Platforms* case occurred during what became known as the "Tanker War," which was part of the 1980-1988 war between Iran and Iraq.² During the Tanker War, Iran and Iraq attacked numerous military and commercial vessels of varying nationalities in the Persian Gulf, including vessels from neutral countries such as Kuwait. The result, as the Court noted, was that "neutral shipping in the Persian Gulf was caused considerable inconvenience and loss, and grave damage."³ These attacks were repeatedly condemned by the U.N. Security Council, and were the subject of a series of complaints by the United States and other neutral countries.⁴

In response to the attacks, Kuwait asked several nations, including the United States, to re-flag Kuwaiti vessels in order to ensure their protection. The United States subsequently placed eleven Kuwaiti vessels under U.S. registry, and began in 1987 to provide naval escorts to all U.S.-flagged vessels operating in the Gulf. A number of other neutral countries took similar action to protect international shipping in the Gulf.⁵

Despite these efforts, numerous neutral ships, including re-flagged Kuwaiti vessels and U.S. naval escort vessels, were attacked during 1987 and 1988.⁶ Two specific attacks were of particular relevance to the *Oil Platforms* case. On October 16, 1987, the Kuwaiti oil tanker, *Sea Isle City*, which had been re-flagged to the United States, was hit by a missile while in Kuwaiti waters. The missile attack injured six crew members and damaged the ship.⁷ Three days later, after concluding that Iran was responsible for the missile attack,⁸ U.S. naval forces, in an effort to prevent further attacks, took action against two Iranian offshore oil platform complexes that it had determined

2. See *id.* paras. 23-24.

3. *Id.* para. 44.

4. Thus, for example, the U.N. Security Council adopted a resolution in 1984 responding to a letter from the representatives of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates "complaining against Iranian attacks on commercial ships en route to and from the ports of Kuwait and Saudi Arabia." The Security Council stated that "these attacks constitute a threat to the safety and stability of the area and have serious implications for international peace and security," and demanded "that such attacks cease forthwith." S.C. Res. 552, U.N. SCOR, 39th Sess., 2546th mtg., U.N. Doc. S/RES/552 (1984). The Security Council further condemned attacks on neutral shipping in the Gulf in resolutions adopted in 1986 and 1987. See S.C. Res. 582, U.N. SCOR, 41st Sess., 2666th mtg., U.N. Doc. S/RES/582 (1986); S.C. Res. 598, U.N. SCOR, 42d Sess., 2750th mtg., U.N. Doc. S/RES/598 (1987).

5. See *Oil Platforms*, para. 24.

6. See *id.*

7. See *id.* para. 52.

8. This conclusion was supported by extensive evidence, including satellite imagery showing missile sites under Iranian control in the area where the missile originated, eyewitness accounts of similar missile launchings from this area, and analysis of missile fragments from the earlier missile launchings. See *id.* paras. 53, 58.

were being used for offensive military purposes. Before taking action against the platforms, the United States gave the personnel at the facilities notice and time to evacuate.⁹ That same day, the United States sent a letter to the U.N. Security Council, pursuant to Article 51 of the U.N. Charter, informing the Council that the United States had acted in self-defense. The letter described the U.S. actions against the oil platforms, the Iranian attacks that had led to the actions (including the missile attack on the *Sea Isle City*), and the various ways in which Iran had been using the oil platforms for offensive military purposes.¹⁰

Subsequently, on April 14, 1988, the U.S. naval vessel USS *Samuel B. Roberts* was struck by a mine in international waters near Bahrain while returning from an escort mission.¹¹ The mining of the ship injured ten U.S. sailors and damaged the ship.¹² Several days later, after concluding that Iran was responsible for the mine attack,¹³ U.S. naval forces, in an effort to prevent further attacks, took action against two Iranian offshore oil platform complexes. Once again, the United States gave the personnel at the facilities advance notice and time to evacuate, and once again it submitted a letter to the Security Council informing the Council of what had happened and explaining that the United States had acted in self-defense.¹⁴

In November 1992, Iran initiated the *Oil Platforms* case against the United States. In its application to the Court, Iran claimed that the United States had violated several provisions of a 1955 Treaty of Amity, Economic Relations and Consular Rights between the two countries, as well as general international law, by taking military action against the oil platforms. In a preliminary judgment entered in December 1996, the Court determined that it had jurisdiction to hear the case, but only with respect to Iran's claim that the United States had violated Article X, paragraph 1, of the 1955 treaty, which states that, "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."¹⁵

After receiving extensive written submissions, and hearing oral arguments, the Court issued a final judgment in the case in November 2003. As the Court noted, its task was "to determine whether or not there have been

9. See *id.* para. 67 (quoting U.S. statement that "[a]ll feasible measures have been taken to minimize the risk of civilian damage or casualties . . .").

10. See *id.*; *Letter Dated 19 October 1987 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/19219 (1987).

11. See *Oil Platforms*, para. 69.

12. See *id.* para. 67.

13. The U.S. conclusion was again supported by a variety of types of evidence, including Iran's general practice of using mines, the discovery of an Iranian vessel in the process of laying mines, the existence of other mines in the same area bearing Iranian serial numbers, statements by Iranian military leaders, and the conclusions of the international shipping community. See *id.* paras. 63, 69, 71.

14. See *id.* paras. 66-67; *Letter Dated 18 April 1988 from the Acting Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/19791 (1988).

15. See *Oil Platforms* (Iran v. U.S.) (Preliminary Objections), 1996 I.C.J. 803 (Dec. 12). The United States subsequently filed a counter-claim against Iran, arguing that Iran's military actions in the Gulf had disrupted commerce in violation of Article X of the 1955 treaty.

breaches of the 1955 Treaty."¹⁶ In that regard, the Court held that the United States had not violated Article X, paragraph 1, of the 1955 treaty by taking actions against the Iranian oil platforms because, as the United States had argued, these actions did not interfere with commerce between the two countries.¹⁷ Although this conclusion was sufficient to dispose of Iran's claim, the Court nevertheless decided to express its views about another argument that the United States had made in response to the claim. The United States had argued that, even if the U.S. actions against the oil platforms had interfered with freedom of commerce between the parties, the actions did not violate the treaty because they were measures "necessary to protect its national security interests," as allowed for by Article XX, paragraph 1(d), of the treaty. In addressing this issue, the Court stated that this provision would not allow for a use of force that was not permitted under general international law.¹⁸

The Court then proceeded to consider whether the U.S. actions against the Iranian oil platforms constituted self-defense under the United Nations Charter and customary international law. It concluded that they did not. In explaining its decision to address the self-defense issue despite the fact that it was rejecting Iran's claim, the Court noted the "importance of the implications of the case in the field of the use of force."¹⁹ Five of the judges on the Court, however, expressly raised concerns about the majority's decision to address this issue.²⁰

III. ANALYSIS

The U.N. Charter restricts the use of force by States to resolve international disputes.²¹ It also expressly recognizes, however, the "inherent right" of States to use force in self-defense.²² As the Charter's drafting history makes clear, "The use of arms in legitimate self-defense remains admitted and unimpaired."²³ Although the U.N. Security Council plays an important role in addressing threats to international peace, it is often unable to deter or put an end to the use of force. The right of States to act individually and collectively in self-defense, therefore, remains a central pillar of international peace and security.²⁴

The Court's statements in the *Oil Platforms* case concerning self-defense, although unnecessary to resolve the case and part of a judgment that is binding only with respect to the particular dispute and the particular parties, might be read as suggesting a number of limitations on the right of self-

16. *Oil Platforms*, para. 21.

17. *See id.* paras. 98-99.

18. *See id.* paras. 39-42.

19. *Id.* para. 38.

20. *See Oil Platforms* (separate opinions of Judges Buergenthal, Higgins, Parra-Aranguren, Kooijmans, and Owada).

21. U.N. CHARTER art. 2, para. 4.

22. *Id.* art. 51.

23. *Report of Rapporteur of Committee 1 to Commission I, (June 13)*, 6 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 446, 459 (1945).

24. *See generally* D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 184-99 (1958).

defense. In particular, there is language in the opinion that might be read to suggest:

- that an attack involving the use of deadly force by a State's regular armed forces on civilian or military targets is not an "armed attack" triggering the right of self-defense unless the attack reaches some unspecified level of gravity;
- that an attack must have been carried out with the intention of harming a specific State before that State can respond in self-defense;
- that self-defense may be directed only against targets of the attacking State that have been the subject of specific prior complaints by the defending State; and
- that measures taken in self-defense must be proportional to the particular attack immediately preceding the defensive measures rather than proportional to the overall threat being addressed.

As explained below, international law and practice do not support these limitations on the right of self-defense. Furthermore, such limitations would undermine the ability of States to deter aggression and would therefore have the unfortunate effect of encouraging, rather than discouraging, the use of force. The United States presumes that the Court did not intend to suggest these limitations.

A. *Definition of "Armed Attack"*

Article 51 of the U.N. Charter recognizes that each State has the "inherent right of individual or collective self-defense if an armed attack occurs."²⁵ In explaining its resort to self-defense in this case, the United States presented evidence of a series of attacks by Iran, including the launching of the missile that hit the U.S.-flagged vessel, *Sea Isle City*, as well as, in the Court's words, "the mining of the United States-flagged *Bridgeton* on 24 July 1987; the mining of the United States-owned *Texaco Caribbean* on 10 August 1987; and firing on United States navy helicopters by Iranian gunboats, and from the Reshadat oil platform, on 8 October 1987."²⁶ After considering this evidence, the Court concluded that, even "[o]n the hypothesis that all the incidents complained of [by the United States] are attributable to Iran,"²⁷ they did not trigger a right of self-defense because they did not constitute an "armed attack." In reaching this conclusion, the Court made statements that might be read as suggesting that the attacks were required to reach some unspecified level of gravity before they would qualify as armed attacks. The Court also made statements that might be read as suggesting that, in order to qualify as armed attacks against the United States, the Iranian attacks had to be aimed specifically at U.S. vessels. Neither proposition is correct as a matter

25. U.N. CHARTER art. 51; *see also* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 244, para. 38 (July 8) ("In Article 51, the Charter recognizes the inherent right of individual or collective self-defence if an armed attack occurs.").

26. *Oil Platforms*, para. 63.

27. *Id.* para. 64.

of international law, however, and the United States does not interpret the opinion as relying on them.

1. *Gravity of Attack*

In concluding that the actions by Iran did not constitute an armed attack, the Court stated that "it is necessary to distinguish 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.'"²⁸ The Court also stated that "[e]ven taken cumulatively, and reserving . . . the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States."²⁹ The Court similarly concluded that, although it would "not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence,'" it was "unable to hold" that the mine attack in this case constituted an armed attack.³⁰

The Court made these statements in passing and in the context of highly factual discussions, so it is unclear what effect the Court intended them to have. These statements might be read to suggest that uses of deadly force by a State's regular armed forces, such as the attacks by Iran at issue in this case, do not qualify as an armed attack unless they reach a certain level of gravity. Such a proposition, however, would be inconsistent with well-settled principles of international law. As noted above, the United Nations Charter specifically recognizes a right to defend against an "armed attack," and it contains no suggestion that only certain armed attacks qualify. Nor do collective self-defense treaties referring to "armed attack" suggest any gravity requirement.³¹ The gravity of an attack may affect the proper scope of the defensive use of force (that is, its proportionality, an issue discussed below), but it is not relevant to determining whether there is a right of self-defense in the first instance.³²

A requirement that an attack reach a certain level of gravity before triggering a right of self-defense would make the use of force more rather than less likely, because it would encourage States to engage in a series of small-

28. *Id.* para. 51 (quoting *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.) 1986 I.C.J. 14, 101, para. 191 (June 27)).

29. *Id.* para. 64.

30. *Id.* para. 72.

31. *See, e.g.,* North Atlantic Treaty, Apr. 4, 1949, arts. 5, 6, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246-47; Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3, 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 95.

32. *See, e.g.,* YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 176 (3d ed. 2001) ("There is certainly no cause to remove small-scale armed attacks from the spectrum of armed attacks."); ROSALYN HIGGINS, *PROBLEMS AND PROGRESS: INTERNATIONAL LAW AND HOW WE USE IT* 251 (1994) ("Is the question of *level* of violence by regular forces not really an issue of *proportionality*, rather than a question of determining what is 'an armed attack'?"); Dieter Fleck, *Rules of Engagement for Maritime Forces and the Limitation of the Use of Force Under the UN Charter*, 31 GERMAN Y.B. INT'L L. 165, 177 (1988) ("Armed attacks cannot logically be divided into such attacks to which response may lawfully be made in exercise of the inherent right of self-defence and other such attacks where self-defence should not be permissible."); John Lawrence Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT'L L. 135, 139 (1987) ("[T]he plain language of Article 51 . . . in no way limits itself to especially large, direct or important armed attacks.").

scale military attacks, in the hope that they could do so without being subject to defensive responses. Moreover, if States were required to wait until attacks reached a high level of gravity before responding with force, their eventual response would likely be much greater, making it more difficult to prevent disputes from escalating into full-scale military conflicts.

In discussing the gravity of attack issue, the Court relied on statements it had made in its 1986 decision in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*.³³ In that decision, the Court distinguished “the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.”³⁴ In applying that distinction, the Court in *Nicaragua* observed that “armed attack” includes

not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” (*inter alia*) an actual armed attack conducted by regular forces, “or its substantial involvement therein.”³⁵

The Court also stated that “armed attack” includes “the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.”³⁶ By contrast, the Court concluded that the concept of armed attack does not apply to “mere assistance to rebels in the form of the provision of weapons or logistical or other support.”³⁷

When read in context, these statements by the Court in the *Nicaragua* case are focused on the distinction between direct uses of force by a State’s regular armed forces and indirect uses of force, such as the use of force through the sending of armed bands or through the supply of weapons.³⁸ The

33. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* (Merits), 1986 I.C.J. 14 (June 27). The United States has in the past expressed concern about the Court’s reasoning in the *Nicaragua* case, and the discussion here is not intended to imply any change of position in that regard. The point is simply that, even on its own terms, that decision would not support a “gravity” requirement in the context of the *Oil Platforms* case.

34. *Id.* 1986 I.C.J. at 101, para. 191.

35. *Id.* 1986 I.C.J. at 103, para. 195 (quoting the U.N. General Assembly’s 1974 Definition of Aggression). The General Assembly resolution quoted by the Court purported to define “act of aggression,” a concept relating to the Security Council’s authority under Article 39 of the U.N. Charter, not Article 51’s concept of “armed attack.” Moreover, the provisions of the resolution that are addressed to direct attacks by a nation’s regular armed forces contain no gravity requirement. See, e.g., G.A. Res. 3314 (XXIX), Annex, art. 3(b), U.N. GAOR, 29th Sess., Supp. No. 31, at 142, 143, U.N. Doc. A/9631 (1974) (stating that “[b]ombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State” qualifies as an act of aggression); *id.* art. 3(d) (defining act of aggression to include “[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State”).

36. *Military and Paramilitary Activities*, 1986 I.C.J. at 103, para. 195.

37. *Id.* Although not relevant to the *Oil Platforms* case, the limitations on self-defense suggested by the Court in *Nicaragua* are problematic in a number of respects. See, e.g., Hargrove, *supra* note 32; Abraham D. Sofaer, *International Law and the Use of Force*, 82 AM. SOC’Y INT’L L. PROC. 420 (1988); *Military and Paramilitary Activities*, 1986 I.C.J. at 259 (dissenting opinion of Judge Schwebel).

38. See also IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 278-79 (1963) (distinguishing between direct attacks by a State’s regular armed forces and “[s]poradic operations by armed bands”); HIGGINS, *supra* note 32, at 250-51 (noting that the discussion in

gravity of an attack, these statements suggest, is relevant only in determining whether non-conventional or indirect uses of force qualify as "an actual armed attack conducted by regular forces." Other than with its reference to a "frontier incident" (presumably an isolated instance in which border forces may be acting without authority), the Court was not suggesting that a particular level of gravity is required before a direct attack, involving the use of deadly force by a State's regular armed forces, will qualify as an armed attack. There is certainly nothing in the Court's discussion in *Nicaragua* implying that missile and mine attacks on naval and commercial vessels are anything less than an armed attack.

In sum, there is no support in international law or practice for the suggestion that missile and mine attacks carried out by a State's regular armed forces on civilian or military targets of another State do not trigger a right of self-defense. For its part, if the United States is attacked with deadly force by the military personnel of another State, it reserves its inherent right preserved by the U.N. Charter to defend itself and its citizens.

2. *Specific Intent of the Attacking State*

In concluding that the United States had not been subjected to an armed attack, the Court referred to a purported lack of evidence that Iran, in launching the missile that hit the *Sea Isle City* and in mining international waters, had specifically intended to hit U.S. targets. Importantly, the Court did not suggest that the hostile actions by Iran were accidental, or that Iran could not have expected its actions to harm the United States. Instead, the Court simply noted that the missile that hit the *Sea Isle City* had been fired from such a distance that it could not have been aimed at a specific vessel, but rather was "simply programmed to hit some target in Kuwaiti waters."³⁹ As for the mining of shipping lanes known to be used by U.S. vessels, the Court noted that there was "no evidence that the minelaying . . . was aimed specifically at the United States" or that the mine that struck the USS *Bridgeton* "was laid with the specific intention of harming that ship, or other United States vessels."⁴⁰

The Court's statements might be read to suggest that military attacks on a State or its vessels do not trigger a right of self-defense as long as the attacks are not aimed specifically at the particular State or its vessels but rather are carried out indiscriminately. Such a proposition, however, is not supported by international law, and it would undermine, rather than maintain, international peace and security. States have a right of self-defense so that they can protect their national security and deter attacks against them, concerns that are implicated just as much when States are subjected to indiscriminate attacks as when they are subjected to targeted attacks.

Nicaragua was focused on the distinction between direct armed attacks and indirect armed attacks and suggesting that the level of force used by regular armed forces is relevant to the issue of proportionality, not to whether there has been an armed attack).

39. *Oil Platforms*, para. 64.

40. *Id.*

A requirement of specific intent would also encourage intentionally indiscriminate attacks, since no victim would have the right to defend against them. International law, however, does not give such favorable treatment to indiscriminate attacks. Indeed, a number of international agreements expressly prohibit indiscriminate attacks even in situations in which the use of force in question would otherwise be lawful. For example, Article 51(4) of the First Additional Protocol to the Geneva Conventions expressly prohibits indiscriminate attacks.⁴¹ In the specific context of minelaying, Article 3 of the 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines provides that, "When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping."⁴² In addition, Article 3(8) of the Amended Protocol II to the Convention on Certain Conventional Weapons and Article 3(3) of the initial Protocol II to the Convention contain prohibitions on indiscriminate attacks using mines that are covered by those protocols.⁴³ The International Court of Justice has itself emphasized the prohibition on indiscriminate attacks in prior decisions as an important principle of international humanitarian law.⁴⁴ In light of the disfavored treatment of indiscriminate attacks in international law, to suggest that such attacks have special immunity from the right of self-defense cannot be correct.

The United States accepts—as it believes all responsible States do—the need under international law to observe the principle of distinction in the use of force. If another State violates this principle and attacks the United States by unlawfully using indiscriminate force, the United States, like any State, is legally entitled to defend itself and its citizens.

B. *Necessity and Proportionality*

To constitute legitimate self-defense under customary international law, it is generally understood that the defending State's actions must be both "necessary" and "proportional."⁴⁵ The Court's articulation of these requirements in the *Oil Platforms* decision, however, might be read to suggest

41. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 51(4), 1125 U.N.T.S. 3, 26.

42. Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague No. VIII), Oct. 18, 1907, art. 3, 36 Stat. 2332.

43. See Protocol [II] on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Appendix C, Oct. 10, 1980, art. 3(3), U.N. Doc. A/CONF.95/15 (1980) (entered into force with respect to the United States Sept. 24, 1995), *reprinted in* 19 I.L.M. 1529; *id.* as amended May 3, 1996, art. 3(8), 35 I.L.M. 1206, 1210 (1996).

44. See *Corfu Channel* (U.K. v. Alb.) (Merits), 1949 I.C.J. 4, 22 (Apr. 9); *Military and Paramilitary Activities*, 1986 I.C.J. at 112, para. 215; see also SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 117, para. 42(b) (Louise Doswald-Beck ed., 1995) (noting that States are "forbidden to employ methods of warfare which . . . are indiscriminate, in that . . . they are not, or cannot be, directed against a specific military objective").

45. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 245, para. 41; *Military and Paramilitary Activities*, 1986 I.C.J. at 94, para. 176; OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 152-55 (1991).

limitations that are neither consistent with state practice nor supported by the relevant authorities.

1. *Necessity and Prior Complaints*

The Court stated that it was "not satisfied that the attacks on the platforms were necessary to respond to" the Iranian attacks.⁴⁶ It noted, in this connection, that "there is no evidence that the United States complained to Iran of the military activities of the platforms . . . which does not suggest that the targeting of the platforms was seen as a necessary act."⁴⁷ Although the import of this language is unclear, it might be read to suggest that self-defense may be directed only against targets that have been the subject of specific prior complaints by the defending State. There is, however, no basis for such a requirement in either international law or practice.

The condition of "necessity," rather, requires that no reasonable alternative means of redress are available.⁴⁸ In the *Oil Platforms* case, the United States presented evidence that it had been subjected to a series of ongoing attacks, and that it had repeatedly complained to both Iran and the Security Council about these attacks.⁴⁹ The Court noted that the United States had "complained repeatedly of minelaying and attacks on neutral shipping."⁵⁰ Moreover, the Court did not dispute that the United States was unable to dissuade Iran from conducting such attacks by means not involving the use of force. It follows that resort to force was necessary in order to protect the United States from such attacks.

An additional requirement whereby a defending State would have to specifically complain about particular targets would be impractical and would substantially undermine the right of self-defense. When responding in self-defense to an armed attack, there will often be insufficient time in which to make complaints about potential targets. More significantly, it would be unrealistic to require a nation that is engaged in self-defense to signal precise targeting information to the attacker and thereby allow the attacker either to remove its military resources in order to undermine the effectiveness of the defensive use of force or, worse, to reinforce the target. In this case, the United States did give Iran brief notice before taking actions against the oil platforms, so that personnel could be evacuated and the loss of life minimized. While it may be appropriate in particular situations to provide some notice as part of an effort to reduce casualties, there is no requirement in international law that a State lodge complaints about the use of particular facilities by an attacker in order to meet the necessity requirements that apply where an attacker cannot reasonably be persuaded, by means short of the use of force, to cease its armed attacks.

46. *Oil Platforms*, para. 76.

47. *Id.*

48. See, e.g., DINSTEIN, *supra* note 32, at 184; Oscar Schachter, *The Right of States To Use Armed Force*, 82 MICH. L. REV. 1620, 1635 (1984).

49. See *Oil Platforms*, paras. 63, 76, 120. Because the United States and Iran did not have diplomatic relations at the time, U.S. complaints to Iran were transmitted through Switzerland.

50. *Id.* para. 76.

The United States consistently takes all reasonable steps to respond to and deter armed attacks without resort to the use of force. Where response by force is needed, however, there is, except in rare instances,⁵¹ no legal requirement that the State that initiated an armed attack be informed of the particular target that will be the object of the responsive use of force.

2. *Proportionality*

The Court also concluded that the U.S. actions against the oil platforms after the mine attack on the USS *Samuel B. Roberts* were not proportional.⁵² The Court's opinion might be read to suggest that the use of force by the United States was problematic simply because it was greater in degree than the mine attack on the USS *Samuel B. Roberts*. The Court referred, for example, 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."⁵³

There is no requirement in international law that a State exercising its right of self-defense must use the same degree or type of force used by the attacking State in its most recent attack. Rather, the proportionality of the measures taken in self-defense is to be judged according to the nature of the threat being addressed. As Judge Roberto Ago explained, "What matters [with respect to proportionality] is the result to be achieved by the 'defensive' action, and not the forms, substance and strength of the action itself. . . . Its lawfulness cannot be measured except by its capacity for achieving the desired result."⁵⁴ In this case, the defensive objective was to defeat and deter armed attacks by Iran and thereby protect U.S. ships against the ongoing threats posed by Iranian actions in the Gulf.

A proper assessment of the proportionality of a defensive use of force would require looking not only at the immediately preceding armed attack, but also at whether it was part of an ongoing series of attacks, what steps were already taken to deter future attacks, and what force could reasonably be judged to be needed to successfully deter future attacks.⁵⁵ The United States

51. In certain rare cases, international law specifies that notice must be given to a specific enemy target prior to an attack that is otherwise justified. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 19, 6 U.S.T. 3516, 3530, 75 U.N.T.S. 287, 300 (civilian hospitals). These rare examples only confirm the lack of a notice requirement for other facilities being used for offensive military purposes, such as, in this case, oil platforms.

52. *See Oil Platforms*, para. 77.

53. *Id.*

54. Roberto Ago, *Addendum to the Eighth Report on State Responsibility*, II-1 Y.B. INT'L L. COMMISSION 13, 69 (1980), U.N. Doc. A/CN.4/318/ADD.5-7; *see also* SCHACHTER, *supra* note 45, at 153 ("Acts done in self-defense must not exceed in manner or aim *the necessity provoking them.*") (emphasis added); SAN REMO MANUAL, *supra* note 44, at 76 (principles of necessity and proportionality "do not require that a State which is attacked use only the degree and kind of force that has been used against it but that the force employed by the State acting in self-defence be proportionate to what is required for the achievement of legitimate objectives of self-defence," which include "repelling the attack, recovering territory which had been lost as a result of the armed attack and restoring its security against repetition of the armed attack").

55. *See, e.g.*, SCHACHTER, *supra* note 45, at 154 ("[The use of force may be justified] when [a] State has good reason to expect a series of attacks from the same source and such retaliation serves a deterrent or protective action."); Ago, *supra* note 54, at 69-70 ("If, for example, a State suffers a series

will continue to follow this approach in assessing what measures to take when responding to an armed attack.

IV. CONCLUSION

In *Oil Platforms*, the Court's opinion addressed at substantial length issues concerning the law of self-defense, even though it was not necessary to resolve these issues in order to decide the case. This excursion is regrettable as a matter of form. Even more regrettable, however, is the fact that there are statements in the Court's opinion that might be read to suggest new and unsupported limitations on the ability of States to defend themselves from armed attacks. Such limitations would substantially and dangerously enlarge the ability of States to undertake armed attacks without fear that these attacks will be defended against.

It is well established in international law and practice that: attacks by a State's regular armed forces involving the use of deadly force need not rise to a certain level of gravity before they trigger the right of self-defense; the right of self-defense applies to indiscriminate as well as targeted attacks; a State taking action in self-defense need not first complain about the targets against which it is taking action; and the proportionality of an act of self-defense is to be measured in light of the overall threat being addressed. In these circumstances, the United States cannot assume that the Court intended general statements that were unnecessary to the Court's decision to be read to contradict these long settled principles. The United States, for its part, will continue to follow what it understands to be a correct interpretation of international law on these points.

of successive and different acts of armed attack from another State, the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks.").