

Symposium: Reflections on the ICJ's *Oil Platforms* Decision

Foreword

While debates over *jus ad bellum*—the principles governing the lawfulness of states' resort to the use of force—have raged for centuries, state action in the latter part of the twentieth century and the early twenty-first century has raised important new questions, challenging what many states and international law commentators formerly viewed as established public international law on the use of force. For example, the 1990s witnessed an important evolution in the justification for the resort to use of force in the Balkans, where massive human rights violations formed the basis for armed interventions by coalitions of states. Indeed, even in the face of seemingly contradictory procedural requirements in the U.N. Charter that required U.N. Security Council action before force could be applied in Serbia, when the Council became deadlocked, a coalition of states nevertheless decided to intervene, provoking a firestorm of argument in international legal circles over the legality of such interventions. A similar controversy developed around the 2003 U.S. invasion and occupation of Iraq, which coincided with the Bush administration's announcement of a new doctrine of pre-emptive force, justified in certain circumstances by reasons of national security.

It was in the context of this invasion that the International Court of Justice released its November 6, 2003, decision on the merits in *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*. In this case, the Court was asked to adjudicate a dispute between Iran and the United States over the legality of those states' use of force against each other in the Persian Gulf in 1987-88. The source of the dispute was a missile strike on a Kuwaiti oil tanker which had been re-flagged as a U.S. vessel in order to provide protection for such vessels during the Iran-Iraq "Tanker War." This strike was followed by a U.S. naval warship striking a sea mine in international waters—a mine that evidence indicated had been laid by Iran. After each incident, the United States responded with armed attacks against Iranian offshore oil platforms in the Persian Gulf and asserted its inherent right to self-defense as codified in Article 51 of the U.N. Charter. In November 1992, Iran initiated an action in the ICJ, claiming that the U.S. strikes against Iranian oil platforms violated numerous provisions of international law.

The Court ultimately decided the case on the narrow question of whether the United States had breached the 1955 Treaty of Amity, Economic Relations and Consular Rights between the two countries which provided for "freedom of commerce and navigation" between the two countries, and which provided

the basis for the Court's jurisdiction over the matter. Although the Court found that there were no breaches of the Treaty, its opinion extensively discussed the actions of Iran and the United States in the context of general international law on the use of force and self-defense, and arguably circumscribed considerably the doctrine of self-defense. Consequently, this opinion is controversial both in the *process* in which it arrives at its conclusion, including the question of which issues needed to be resolved in order to arrive at a treaty-based answer, as well as the *substance* of that conclusion. Such controversy is only enhanced by the numerous concurring and dissenting opinions filed in the case.

This symposium addresses the controversy surrounding the *Oil Platforms* decision by providing a forum for leading practitioners and scholars of international law, including the counsel for both parties in the case, to analyze and critique the opinion, as well as to comment on its future implications. The symposium begins with a contribution from the Agent for the United States in the *Oil Platforms* case, the Legal Adviser of the U.S. Department of State. In his piece, *Self-Defense and the Oil Platforms Decision*, William H. Taft, IV argues that the portions of the *Oil Platforms* decision which could be read to suggest new limitations on the right of self-defense are unsupported by prior international law and practice, and cannot have been intended to alter such law and practice. As he details the portions of the opinion that run counter to applications of self-defense in international law, Taft stresses that many of the Court's statements reflect positions that ultimately would undermine, rather than strengthen, international peace and security.

Counsel for Iran in the *Oil Platforms* case, Professor Djamchid Momtaz, explains in his contribution, *Did the Court Miss an Opportunity To Denounce the Erosion of the Principle Prohibiting the Use of Force?*, that the ICJ could have more clearly set the boundaries for the use of force by basing its decision on more than the 1955 Treaty alone. Momtaz conflicts with Taft on the point of the Court's intent, arguing that the ICJ intended to promote a "restrictive interpretation of the law of self-defense." He nevertheless argues that the Court's opinion might have gone farther in protecting the general prohibition on the use of force in international law by finding the United States in violation of Article 2(4) of the U.N. Charter. The opportunity, according to Momtaz, was neither missed nor fully realized.

Sir Frank Berman, Q.C., critiques the method of analysis and treaty interpretation used by the Court in the *Oil Platforms* case in his contribution, *Treaty "Interpretation" in a Judicial Context*. Berman examines the way in which the Court went about interpreting the 1955 Treaty, considering the interaction between the relevant Treaty articles. Berman argues that the Court's analysis suffers from circular logic, and ultimately arrives at a result that the type of treaty interpretation required by this case cannot logically generate. Moreover, he offers an alternative approach to treaty interpretation that he contends should have been applied in the case, and that would have led to a more defensible result.

In *Protecting International Shipping Channels During Hostilities and the Oil Platforms Case: Actio Popularis Revisited?*, Dr. Pieter Bekker asks whether the U.S. counter-claim in the case could be considered, as Iran had suggested, an inadmissible *actio popularis*—a legal action vindicating a public interest. Such actions are generally inadmissible because specific harms to a state ordinarily must be demonstrated before an international legal claim may be maintained. Bekker concludes that while the U.S. counter-claim did not fall within the category of an *actio popularis*, fears of expanding the doctrine may be allayed by locating actions by states which threaten international shipping channels within the realm of “acts of aggression” for the purposes of the doctrine. Such acts would then fall within one of the few exceptions to the *actio popularis* prohibition, thus permitting states to bring such claims on behalf of the public interest.

Finally, Professor Harvey Rishikof examines the case from a structural perspective in his contribution, *When Naked Came the Doctrine of “Self-Defense”: What Is the Proper Role of the International Court of Justice in Use of Force Cases?* Rishikof argues that the ICJ’s treaty interpretation in the *Oil Platforms* case was unreasonable, and that such an opinion can only be explained through a political analysis of the context leading up to the decision. Ultimately, Rishikof questions whether the ICJ is suited to deciding such cases, and whether states will react in meaningful ways to such decisions.

