

When Naked Came the Doctrine of “Self-Defense”: What Is the Proper Role of the International Court of Justice in Use of Force Cases?

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I. INTRODUCTION

In the unique novel set in South Florida, *Naked Came the Manatee*, thirteen talented authors created a “literary game of telephone” whereby each wrote a chapter and then passed it on to the next contributor, who did his best to craft a plot line.¹ The result was a novel of “wildly fluctuating styles and more crazy plot curves than a daytime drama, but thanks to these . . . masters of the craft, this roller coaster of a book is almost as much fun to read as it obviously was to write.”² After reading the recent opinions of the fifteen judges from the International Court of Justice in the *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*,³ one cannot help but believe the Court has just issued its legal version of “Naked Came the Doctrine of Self-Defense.” The masters of the craft of legal writing have combined fluctuating legal styles, jurisprudential plot turns, and creative avoidances with tortured analysis to produce a roller coaster of an opinion

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1. See CARL HIAASEN ET AL., *NAKED CAME THE MANATEE* (1996). The creative ploy was borrowed from a trashy “noir novel,” *Naked Came the Stranger*, by Penelope Ashe, which in reality was a pseudonym representing a collaboration of twenty-four journalists. See PENELOPE ASHE, *NAKED CAME THE STRANGER* (1969).

2. *Editorial Review—Naked Came the Manatee*, Amazon.com, at www.amazon.com (last visited June 12, 2004).

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

with more separate and dissenting opinions than the original novel, now set in the Hague.

Under international law and the Vienna Convention on the Law of Treaties, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁴ To do otherwise, in the words of the Vienna Convention, would result in an interpretation that would be "manifestly absurd or unreasonable."⁵ The International Court of Justice, by violating the basic principles of statutory interpretation of the Convention, has managed to produce an opinion that is *both* absurd *and* unreasonable in *Oil Platforms*, which arose from the Persian Gulf Tanker War of 1980-1988.

Or in the words of some of the judges: the Court has "followed a formalistic and disconnected approach in its reasoning";⁶ has demonstrated "half-heartedness"⁷ in dealing with questions; has followed an "unnecessarily convoluted and questionable way";⁸ or the "structure of the Judgment is not in keeping either with what would be expected of the Court or with the Court's usual practice. It is not well balanced, does not sufficiently reflect the factual context of the case and is not a transparent, well-defined reply . . .";⁹ or, finally, "elements of the Court's reasoning and methodology seem to me to be problematic."¹⁰ No one, including the judges, appeared content with the result.

II. THE INTERNATIONAL SETTING FOR THE CASE: THE LEGAL CONTEXT

Briefly, the Tanker War directly involved two incidents that triggered a United States military response for the purpose of the case. On October 16, 1987, a missile hit the "reflagged" Kuwaiti tanker, *Sea Isle City*. Three days later, in response, the United States attacked and destroyed the *Reshadat* and *Resalat* oil platform complexes. On April 14, 1988, the warship *USS Samuel B. Roberts* struck a mine in international waters near Bahrain. Five days later the United States, asserting self-defense, struck and destroyed the *Nasr* and *Salman* complexes.¹¹ Iran sued the United States for this action on the basis of the 1955 Treaty of Amity, Economic Relations and Consular Rights.¹² In its counter-claim and defense, the United States pled that under Article XX,

4. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331, 340 (1980).

5. *Id.* art. 32(b), 1155 U.N.T.S. at 340.

6. *Oil Platforms* (dissenting opinion of Judge Al-Khasawneh), para. 6. For this judge, however, both the Iranian claim and the United States counter-claim should have been admitted, *see id.* para. 7.

7. *Oil Platforms* (separate opinion of Judge Simma), para. 6.

8. *Oil Platforms* (separate opinion of Judge Owada), para. 2.

9. *Oil Platforms* (separate opinion of Judge Kooijmans), para. 2.

10. *Oil Platforms* (separate opinion of Judge Higgins), para. 2.

11. *Oil Platforms*, para. 25.

12. The court rejected the proposition that general provisions in Article I of the 1955 Treaty granted jurisdiction of a violation, but held that Article XXI, paragraph 2 of the Treaty granted jurisdiction and that Article X, paragraph 1, which states that "[b]etween the territories of the Two High Contracting Parties there shall be freedom of commerce and navigation," may have been violated. *See id.* para. 31.

paragraph 1(d) of the Treaty, it had exercised its right of protecting its essential security interests.¹³

The Court rejected the U.S. claim of self-defense and clearly stated the burden the United States was to carry: "The United States must also show that its 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."¹⁴ On one level the facts of the United States' use of force are not in dispute, although the Court as a fact finder concluded that the United States had not carried "the burden of proof of the existence of an armed attack by Iran on the United States, in the form of the missile attack on the *Sea Isle City*."¹⁵ While on the question of whether the USS *Samuel B. Roberts* was struck by a mine laid by Iran, the Court held that the "evidence is highly suggestive, but not conclusive."¹⁶

As a consequence of this analysis, the Court concluded that the attacks on the platforms had not been shown to be justifiable in response to an "armed attack" on the United States by Iran, nor had the United States demonstrated the significance of the military presence and activity on the oil platforms.¹⁷ On the issues of "proportionality and necessity, the Court found that the April response was not proportional in the context since it also was part of a larger military operation, "Operation Praying Mantis," whereby two frigates and a number of other naval vessels and aircraft were destroyed. The Court could not "close its eyes to the scale" of the military operation.¹⁸

However, there was no violation of Article X, paragraph 1 (the "freedom of commerce") by the United States because Executive Order 12613, an embargo signed on October 29, 1987, prohibiting the import of Iranian goods and services of Iranian origin, had ended trade.¹⁹ In a judicial sleight of hand, the Court reasoned that since an embargo was in force, no commerce was taking place, so *ipso facto* there was no freedom of commerce to infringe upon—thus no reparations when *Salmon* and *Nasr* were destroyed.²⁰ Moreover, since the platforms at *Reshadat* and *Resalat* had been previously attacked by Iraq, there was nothing to damage with respect to trade. In a similar *legerdemain*, the Court dismissed the Iranian procedural objections to the U.S. counter-claim,²¹ and then denied the claim by holding that to recover, the United States had to prove "that the vessels which were attacked were engaged in commerce or navigation between the territories of the United

13. The relevant section of Article XX, paragraph 1(d) states that the Treaty shall not preclude the application of measures "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 interests." *Id.* para. 32.

14. *Id.* para. 51.

15. *Id.* para. 61.

16. *Id.* para. 71.

17. *Id.* paras. 72, 76.

18. *Id.* para. 77.

19. *Id.* para. 90. The Court noted with surprise that, because Iran made no formal submission or claim that the embargo was itself a violation of Article X, it was waived, although the Court had concerns, and Iran continued to argue that the United States' invocation of Article XX was not justified, *id.* para. 94.

20. *Id.* para. 98.

21. *Id.* paras. 103-18.

States and Iran.”²² The Court then listed ten incidents and, under a strict definition of “engaged in commerce or navigation between the territories,” rejected them all.²³ So, there was no violation of the Treaty by either party, yet the Court felt compelled to engage in a long analysis on “direct versus indirect” commerce, and a new analysis on “self-defense,” “proportionality,” “necessity,” and the role of the Court to interpret economic treaties in the light of Articles 2(4) and 51 of the U.N. Charter. This tortured legal route then results in a flurry of separate opinions, concurrences, and dissents. Next case!

There are a number of ways to think about and analyze the significance of this case. One is to review closely the analysis of the majority opinion and dissect its logic on the issues of: (a) the manner in which “accountability” for the attacks on the United States ships take place—how the fact finding for liability is inconclusive and how one judge attempts to introduce the concept of “market share liability” and finds comparative jurisprudence from X, Y, and Z countries to justify the introduction of a new international norm; (b) “commercial activity,” the concept of third party economic relations, and the legalistic manner by which the concept of “embargo” was “nuanced,” meaning that the treaty provisions were not triggered; or (c) the legitimate use of the international concept of “self defense” under Article 51 of the U.N. Charter, given the current debate over the U.S. doctrine announced in the current National Security Strategy of “preemption” versus “prevention.”²⁴ The last approach would focus the debate on the legal terms of “necessity,” “immediacy,” and “proportionality,” as well as “rules of armed conflict.” The discussion would help determine whether an arbitration was called for before force was legitimately used or whether the attack was too attenuated in relation to the acts of alleged aggression perpetrated by the Iranians. These discussions would not only be significant in and of themselves, but would also cast light on issues that will become increasingly important to the international community as the United States continues to prosecute the global war on terrorism.

22. *Id.* para. 119.

23. *Id.* para. 120.

24. See THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), <http://www.cdi.org/national-security-strategy>. Section V, “Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction,” states:

We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends. . . .

. . . .
The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

Id. at 14-15.

III. THE INTERNATIONAL SETTING FOR THE CASE: THE POLITICAL CONTEXT

In the final analysis, any of the legal approaches described above would be plausible and could constitute a fascinating law review article. I prefer, however, to place the case in the broader context of international law and international politics. Raymond Aron, in his classic work on international relations, *Peace and War*, stipulated that in the international arena ultimately only three regimes of power among nations were possible: equilibrium (balance of power,) hegemony, and empire.²⁵ A balance of power occurs when competing states, as in the Cold War, create a peace by counter-balance in order to avert the danger of power becoming unevenly distributed.²⁶ In a period of hegemonic power, order is usually established and maintained, by a single dominant power in conjunction with and in cooperation with other powers.²⁷ The imperial state, however, “reserves to itself the monopoly of legitimate violence.”²⁸

These three regimes evaluate the legitimate projection of force inside the international system somewhat differently. A “balance of power” regime might under certain circumstances foster a regime of international law and norms, *jus cogens*, adjudicated by a United Nations and an International Court of Justice. Such a system would, like a domestic court system of adjudication, use objective versus subjective standards to determine when the use of force was a legitimate act of self-defense. In a system where “hegemony” rules, however, how the hegemon acts, and then how the hegemon responds to the use of such an international court as it establishes its own definition of legitimate use of power, simultaneously affects the efficacy of the international adjudicative system and how the allies of the hegemon view its behavior. Naturally, where one has established an “empire,” the final arbiter of the legitimacy of the justification for a projection of force (whether as an act of self-defense or for imperial interests) is the internal imperial legislature or internal legitimizing political organ. To paraphrase Billy Budd, “Empire is what Empires do.” In short, before one understands the significance of the use of force under a self-defense logic, it is paramount to understand under which international regime one is laboring. Why should we care about these distinctions among the three regimes: balance of power, hegemony, and empire? These distinctions are important because each regime establishes different norms for legitimizing the use of force and for how alliances and international institutions are established and maintained. Great powers act and legitimize their actions differently under the three regimes and the consequences are profound for the process of international stability and order.

25. RAYMOND ARON, *PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS* 151 (Transactions Publishers 2003) (1962).

26. There are a variety of “balance of power” variants as “balance of threat regimes.” The point for the argument is the requirement of one state to have to negotiate its view rather than just impose it. See THE PENGUIN DICTIONARY OF INTERNATIONAL RELATIONS 41-44 (1998); Michael Mastanduno, *Preserving the Unipolar Moment: Realist Theories and U.S. Grand Strategy After the Cold War*, INT’L SECURITY, Spring 1997, at 49.

27. See ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 31 (1984).

28. ARON, *supra* note 25.

Empires are usually only constrained by internal forces while hegemonic and balance of power regimes are more concerned with external forces and international norms and institutions. In all cases alliances are formed, but the center of gravity of the alliances is different. The *Oil Platforms* case highlights these issues.

In this “grand strategy political context,” the first decision of note in the Tanker War self-defense question is the decision by the United States, and supporting allies, to “reflag” the Kuwaiti oil tankers.²⁹ Why the policy choice to “reflag?” By 1986 the number of ships being attacked by both belligerents (Iran and Iraq) was on the rise.³⁰ Increasingly, countries such as Japan, Sweden, and Norway refused to call on Kuwait. Kuwait, believing that its shipping was being targeted by Iran, requested the United States to register eleven of its oil and gas tankers under the American flag. In agreeing to the request, President Ronald Reagan stated the clear and essential U.S. interest in the Persian Gulf by referencing the Carter Administration policy in the 1970s, when oil and gas shortages reigned:

I'm determined that our national economy will never again be held captive, that we will not return to the days of gas lines, shortages and economic dislocation, and international humiliation. Mark this point well: The use of sea lanes of the Persian Gulf will not be dictated by the Iranians. These lanes will not be controlled by the Soviet Union. The Persian Gulf will remain open to navigation by the nations of the world.³¹

Ironically, given future events in the Gulf, the United States had chosen to support Iraq over Iran at this juncture of Gulf War politics. In light of international politics, the most significant point was that the United States had stated that the lanes would remain open, and by reflagging the ships, the flow of tankers would become a direct interest of the United States. Any attack on a U.S. reflagged ship would become an attack on the United States.

International Relations theorist Robert Art, in his latest work to define a grand strategy for America, argues that there are six nonpartisan principal national interests of the United States: (1) prevent an attack on the American homeland; (2) prevent great-power war and security competition in Eurasia; (3) preserve access to reasonably priced and secure oil; (4) preserve open international order; (5) foster the spread of democracy, respect human rights, and prevent genocide; and (6) protect the global environment.³² The Persian Gulf Tanker War involved at least two vital principal interests—the flow of oil and international order. Once the United States made the decision to reflag

29. In addition to the United States, the United Kingdom and the Soviet Union were also requested to reflag Kuwaiti tankers. Belgium, France, Italy, and the Netherlands sent warships to the Gulf to protect shipping. *Oil Platforms*, para. 24. See also JOHN W. PARTIN, U.S. SPECIAL OPERATIONS COMMAND HISTORY AND RESEARCH OFFICE, SPECIAL OPERATIONS FORCES IN OPERATION EARNEST WILL/PRIME CHANCE I (1998).

30. The total number of ships attacked rose from 111 in 1986 to 181 in 1987. See PARTIN, *supra* note 29, at 5.

31. Statement by President Ronald Reagan, May 19, 1987, *quoted in id.* at 6. As Partin points out, the irony at the time was that Iraq had attacked more ships than Iran and that in May 1987, Iraqi aircraft hit the USS *Stark* with two missiles and killed thirty-seven U.S. sailors. *Id.* at 6 n.12.

32. ROBERT J. ART, A GRAND STRATEGY FOR AMERICA 7 (2003).

the Kuwaiti tankers, the United States had signaled to the international community that it would now shape the environment of how the Tanker War would proceed. The projection of U.S. force was now on the international table, and the United States would not be "indifferent" on the issue of the flow of oil in the Gulf.³³

In retrospect, the only question, once the decision to reflag was made by the United States, was if and when one of its ships was attacked, under what process or theory would the U.S. decision to project force be questioned by the world community? Note that this decision was done as an imperial act. The international organs were basically silent on the issue of shipping channel disruption and did not authorize an appropriate institutional response.³⁴ Rather than forming an alternative alliance, or new forum, to establish a "coalition of the willing" of the Great Powers and affected powers as a hegemon, the United States in its role as sole guarantor of the system acted alone with its client states to make clear that the shipping lanes would remain open.³⁵ To the surprise of many, the organ for adjudication became the International Court of Justice, after the fact. How did the issue of the use of force arise before the International Court of Justice? How did a court envisioned primarily to handle boundary and territorial disputes become the arbiter for the resolution of collective security and self-defense issues? How else could the imperial power be disciplined in the international context, or "hauled into court," for allegedly breaking international law in the face of international institutional silence on whether or not force could be used once reflagging made the possibility inevitable?

IV. THE INTERNATIONAL SETTING FOR THE CASE: THE NICARAGUA CONTEXT

In part the answer is that this case, and a score of others raising the question of the use of force before the International Court of Justice, are the progeny of *Military and Paramilitary Activities in and Against Nicaragua*.³⁶

33. *Id.* at 223.

34. While it is true there were a number of U.N. Security Council Resolutions on the issue of "The Situation Between Iran and Iraq," clear guidance never was issued. Although Resolution 552 is directly on point and demanded that Iranian attacks on commercial ships "cease forthwith," the Council only promises to revisit the issue in the event of non-compliance to "consider effective measures" to ensure the freedom of navigation. S.C. Res. 552, U.N. SCOR, 39th Sess., 2546th mtg., U.N. Doc. S/RES/552 (1984). As the subsequent Resolutions 582 and 598 reveal, although the Council was "deeply concerned" and "deploring" of the hostilities surrounding the problem of disruption to neutral shipping in the Gulf, no action was stipulated or authorized. 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). Though an argument could be made that the Security Council did recognize that disruptions were taking place, the Council never specifically authorized an appropriate response to this particular international problem although it recognized that "these attacks constitute a threat to the safety and stability of the area and have serious implications for international peace and security." S.C. Res. 552, *supra*. See also William H. Taft, IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 296 n.4 (2004).

35. The concept of acting on behalf of the "public interest community" or "*actio popularis*" is discussed in Pieter H.F. Bekker, *Protecting International Shipping Channels During Hostilities and the Oil Platforms Case: Actio Popularis Revisited*, 29 YALE J. INT'L L. 323 (2004).

36. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J.

At the time of the *Nicaragua* case, the United States had assisted the armed opposition (the "Contras") to the Nicaraguan government and was sued by the government of Nicaragua in the International Court of Justice and accused of violating Article 2(4) of the U.N. Charter, customary international law, the Charter of the Organization of the American States, the national sovereignty of Nicaragua, and the provisions of the 1956 Treaty of Friendship, Commerce, and Navigation.³⁷ The private trade treaty between the United States and Nicaragua became the basis of jurisdiction, similar to the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, which forms the basis of jurisdiction for the *Oil Platforms* decision.

In the original *Nicaragua* case, the United States asserted a number of arguments: (a) the need for other indispensable parties (El Salvador, Honduras, and Costa Rica) to be part of the case; (b) the position that the appropriate exclusive international organ to determine unlawful use of armed force and interpretations of Article 51 for self-defense was the U.N. Security Council; (c) the right of collective self-defense in responding to the requests of El Salvador, Honduras, and Costa Rica for assistance against armed aggression under the terms of the 1947 Inter-American Treaty of Reciprocal Assistance and the use of regional organs to resolve the issues in dispute; and (d) the view that in "ongoing" armed conflicts the tribunal lacked the resources and means to establish evidence and that the resolution of the issues should be by a political process.³⁸ When the International Court of Justice rejected these defenses, the United States, in a dramatic show of procedural force, withdrew from the proceedings. This act of withdrawal ironically was the appropriate response of a hegemon. The rejection of jurisdiction outside that of the Security Council was the way the United States signaled to the other Great Powers of the United Nations, who possess veto power in the Council, that there was a significant problem in allowing the Court to become a legitimate forum for such a review. Despite the absence of the United States as a party, the Court concluded that under its definition of an "armed attack" under Article 2(4) of the U.N. Charter, Nicaragua's actions did not constitute an "armed attack," although it was an "unlawful use of force."³⁹ The Court, in reaching its decision, rejected numerous allegations against Nicaragua, including the position that the alleged support of Nicaragua to the rebels in El Salvador (the supply of arms and training) was an act of aggression warranting an attack. Under the Court's interpretation, therefore, the United States could not validly claim a right of collective self-defense. When Nicaragua requested the Security Council to enforce the Court's order for reparations, the United States exercised its veto right and vetoed subsequent attempts. Faced with this impasse, Nicaragua proceeded to the General

14 (June 27).

37. See Andrew Coleman, *The International Court of Justice and Highly Political Matters*, 4 MELBOURNE J. INT'L L. 29, 43-49 (2003) for an elegant summary of the issues.

38. For a summary of the defenses, see Christine Gray, *The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force After Nicaragua*, 14 EUR. J. INT'L L. 867, 870-871 (2003).

39. See *Military and Paramilitary Activities*, 1986 I.C.J. at 123, para. 238; Coleman, *supra* note 37, at 47. Needless to say the United States withdrawal and the Court's conclusion sparked much commentary and debate. Coleman, *supra* note 37, at 47-49.

Assembly of the United Nations and requested a resolution calling for compliance with the Court order. The resolution eventually passed on November 3, 1986, by ninety-three for, three opposed (United States, El Salvador, and Israel) and forty-three abstaining.⁴⁰

V. THE INTERNATIONAL SETTING FOR THE CASE: THE UNITED NATIONS CONTEXT

What is one to conclude from this tale of “use of force,” “self-defense” and the International Court of Justice? First, by asserting jurisdiction through the mechanism of “private” trade treaties often enacted to promote harmonious economic relations—and then using them as vehicles to adjudicate the proper “use of force”—the International Court of Justice is developing the concept of “shared sovereignty” among nations. By this process, objective tests of the proper use of “self-defense” will become the international *jus cogens* rather than a subjective test applied by a hegemon or imperial power. At a moment in time in which the United States possesses unparalleled military power, there clearly is no balance of power in the military arena. Through the creative use of economic treaties—an arena where there exists a greater sense of multipolarity—bilateral trade treaties are being employed through the International Court of Justice to generate legal norms of restraint on U.S. military sovereignty. Economic legal power is being employed to cabin military use—the doctrine of realism reversed. But “shared sovereignty” must be a doctrine that first is based on a political foundation; only then can a legal framework be established.

What is of note is the contrasting behavior of the United States in *Nicaragua* and *Oil Platforms*. Whereas in the first case the United States withdrew, by the time of the second suit, the United States counter-claimed. By counter-claiming, the United States *de jure* recognized the jurisdictional power of the Court and *de facto* legitimized the practice of using these commercial clauses as a vehicle to adjudicate “use of force” claims.

From the vantage point of a small or weak state actor, such a strategic approach is an ingenious and shrewd use of international jurisdiction through the economic treaties negotiated in the late 1940s and 1950s as the new international economic order was being established. Primarily bilateral private trade treaties for economic interests are being metamorphosed into international “clubs” to combat the projection of military force and foster restraint. Thus when a plea is rejected by the Security Council, the Court is ready, willing, and able to provide a forum for the claim.⁴¹ This approach raises the fundamental question of the function and role of the Court in the Charter framework. As has been noted by students of the Charter, when it comes to the power of the Court and the other organs of the Charter, there is no equivalent statement of power relations as there is for the Security Council

40. G.A. Res. 41/31, U.N. GAOR, 53d mtg., para. 1, U.N. Doc. A/RES/41/31 (1986); Coleman, *supra* note 37, at 63 n.208.

41. Gray, *supra* note 38, at 881.

and the General Assembly in Article 12.⁴² Can there be judicial review of Security Council positions since the Court has maintained there is no doctrine of separation of powers?⁴³

The Court carved out a role for opining on the right of self-defense as a matter of customary international law in an Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*.⁴⁴ For one school of judges, the Court is "the principal judicial organ participating in the objectives of the maintenance of international peace and security."⁴⁵ For another school of judges, cases over the proper use of force are essentially political matters of negotiation and should be left to the Security Council, General Assembly and the Secretary-General. Law and politics are joined in this debate as the Court assumes the role of arbiter of the use of force and becomes the fact finder. In *Oil Platforms*, the Court as fact finder made determinations as to who and where the missile came from and who was responsible for the mine based on pleadings. The more general issue of maintaining the flow of oil from the Gulf for reasons of international order, however, was not before the Court.

VI. CONCLUSION

Intriguingly, the international jurisprudential architecture is being established in parallel with the power the Charter has reserved to the Security Council. In this way, the evolving international norms outside and beyond the veto power of the Security Council correspond to the power that has been vested in the International Criminal Court.⁴⁶ New centers of power within the international framework of the United Nations are being developed that are generating new norms for the adjudication of armed conflict. In effect, a new nascent institutional reorganization is taking place, raising the question: what is the appropriate role for each organ of the United Nations?

42. *Id.* at 898. Article 12 reads as follows:

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.
2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately [if] the Security Council ceases to deal with such matters.

U.N. CHARTER art. 12.

43. See Gray, *supra* note 38, at 898.

44. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8).

45. Gray, *supra* note 38, at 897. For example, in the separate opinion of Judge Simma in *Oil Platforms*, he flatly states that he has voted in favor in the first part of the Judgment because he "consider[s] it of utmost importance, and a matter of principle, for the Court to pronounce itself on questions of the threat or use of force in international relations whenever it is given the opportunity to do so." *Oil Platforms* (separate opinion of Judge Simma), para. 5.

46. Under the Rome Statute of the International Criminal Court, the Security Council does not have the power to veto investigations, and this neutering of the Council is one of the reasons why the United States opposes ratifying the statute. See Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, <http://www.un.org/law/icc/statute/rome.htm>.

The *Oil Platforms* case raises this question acutely, suggesting that the naked “manatee” of the role of international law in the context of the use of force and self-defense has clearly surfaced. The United States, in its role as an actor in a balance of power system, hegemonic system, or imperial system, has staked out its position on the use of force and self-defense, and has expanded its view of national interest in a world fraught with terrorism. The cacophony of international legal voices and international legal centers, when enforcement of judgments is lacking, undermines the power and legitimacy of the law. But what if the Court had spoken in one voice—would that have been an “international legal norm founding moment?” Perhaps, if the opinion of the judges truly would have represented a cross-section of great and significant powers. Such “unanimity of voice” would have placed the United States on notice that as a hegemon it was losing legitimacy with its allies and becoming an imperial power—establishing and enforcing bilateral treaties based on force and not international norms. This position would have been reinforced if the Security Council, excepting a U.S. veto, passed a resolution to sanction the United States for its actions. Ignoring such universal, worldwide condemnation would have sharpened the distinction between hegemon on one hand, and an imperial power acting unilaterally based on internal legitimacy on the other. Yet one is still left with the question of why the United Nations would have allowed the Tanker War to continue against third parties, preferring to remain on the sideline? Without internationally sanctioned action what is the fate of political order in the international regime?

Interestingly, in the immediate wake of September 11, 2001, the Security Council, with the French representative chairing the Council, unanimously passed Resolution 1368 condemning the terrorist acts and expressing its “readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.”⁴⁷ This was the type of leadership in international law the founders of the United Nations had envisioned for the Council. Moreover, a few weeks later, again the Security Council acted by adopting Resolution 1373, one of the most wide-ranging resolutions preventing, criminalizing, and advocating the suppression of any financial support of terrorism.⁴⁸ Where was the Council in the Tanker War?⁴⁹

The algorithm of political power in the *Oil Platforms* case is as follows: oil is an indispensable commodity; open sea lanes in the Persian Gulf are indispensable pathways; the United States, because it has the power and the Security Council was silent, took appropriate military action to make it clear

47. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., para. 5, U.N. Doc. S/RES/1368 (2001).

48. See Press Release, U.N. Security Council, Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution (Sept. 28, 2001), U.N. Doc. SC/7158 (2001), at <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>.

49. As was noted by Judge Kooijmans, only in 1987 did the Security Council determine that there was a breach of the peace and adopt a resolution under Chapter VII. *Oil Platforms* (separate opinion of Judge Kooijmans), para. 8. Nor did the Security Council attribute specific violations to either of the warring parties.

to all parties that the oil and oil tankers would continue to flow for the benefit of the international community.

This was a political, international order issue—so why had the Security Council not made a declaration to such effect and acted to defend it? Why has this become the purview of the International Court of Justice? The United States used an economy of force in an effort to minimize casualties to achieve its objective. Targeting strategic property related to the issue at hand—oil platforms, the sources of revenue for the regime. The United States took such action at the behest of neutral states being adversely affected by the attacks. This was a political decision that used appropriate force proportionally to achieve the objective. Today would the United States, faced with a similar problem in the Gulf, react differently in the face of the current findings in the case on self-defense? I think not. Would the Security Council faced with a similar problem in the Gulf, react differently in the face of the current findings in the case on self-defense? I think not.

The United States, if attacked once again, would nakedly assert its right to self-defense as the guarantor of international order. Would it be wrong, as a matter of international law as interpreted by the International Court of Justice; the Security Council; the latest “coalition of the willing”; or the Congress of the United States? Ultimately the case raises the following question: in a world where international legal norms are being debated over fundamental questions regarding the “use of force,” should we not, as internationalists (regardless of the regime we are under), be exploring ways to confront this issue as an international political question of the first order? What are to be the new “burdens of proof” required before force can be used against a state or non-state actor under the principles of *jus ad bellum*, and proportionality under *jus in bello*? Is the concept of “self-defense” different in a world where state actors are not the only entities that can inflict devastating damage? If we do not have this discussion, and continue to jerry-rig jurisdictions in fora not established for such issues, or if we use fora where international law has no sway—whither the manatee of international law?