COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES PLATES-FORMES PÉTROLIÈRES

(RÉPUBLIQUE ISLAMIQUE D'IRAN c. ÉTATS-UNIS D'AMÉRIQUE)

EXCEPTION PRÉLIMINAIRE

ARRÊT DU 12 DÉCEMBRE 1996

1996

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING OIL PLATFORMS

(ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA)

PRELIMINARY OBJECTION

JUDGMENT OF 12 DECEMBER 1996

SEPARATE OPINION OF JUDGE RANJEVA

[Translation]

I voted in favour of the Judgment for two reasons:

— on the legal basis of the proceedings: the solution adopted by the Court is the only possible one. It was necessary and sufficient that one of the grounds relied upon by the Respondent in its preliminary objection should be dismissed to ensure that the jurisdiction of the Court was founded.
— on the structure of the operative paragraph: by adjudicating, in one single paragraph, on the fate reserved for the claim filed by the Applicant, the Judgment respects the distinction which must be drawn between the preliminary objection *stricto sensu* on the one hand, in other words, the incidental claim submitted by the Respondent with a view to having the principal claim set aside and, on the other hand, the grounds set out in support of the preliminary objection. But the structure adopted for operative paragraph 55 of the Judgment will facilitate an understanding of the various decisions which are part of it.

However, the reference to Article X of the 1955 Treaty (see I below) can be criticized owing to the legal problems associated with a danger of possible confusion in interpreting the Judgment in relation to the Court's title of jurisdiction (II); owing also to the actual relations between preliminary objections and the merits (III); and owing to the question of prejudging the issue in an interlocutory judgment (IV).

I. Reference to Article X of the 1955 Treaty

The reader may be somewhat confused by the operative paragraph of the Judgment. For both the operative paragraph and the structure of the reasoning can be interpreted as founding the jurisdiction of the Court on the provisions of Article X, paragraph 1, of the 1955 Treaty, taken in isolation. The Court rejects or accepts the objection on the basis of its interpretation of Articles I, IV and X relied on. In quite rightly raising the question whether the dispute before the Court fell within the provisions of the compromissory clause, did the Court not go beyond the subject-matter *stricto sensu* of the incidental proceedings? This question raises the problem of the Court's actual title of jurisdiction.

II. The Court's Title of Jurisdiction

In this case, the Court's title of jurisdiction is the compromissory clause, whose terms present no problems of interpretation. *Ratione materiae,* the compromissory clause refers *expressis verbis* to disputes whose subject-matter is "the interpretation of the application" of the 1955 Treaty. The Court was therefore quite justified in not accepting the concepts of a reasonable link, a condition which the Respondent sought to argue. The case-law on this subject is consistent.

However, by questioning whether the dispute submitted to it fell within the provisions of the compromissory clause, the Court transposed the method it followed in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*. Yet did it not go beyond the subject-matter of the preliminary objection proceedings, by raising the problem of the distinction between questions falling within the consideration of the merits of the claim and questions which needed to be resolved at the present stage of the proceedings?

III. Objections Regarding Jurisdiction and Matters of Substance

As a rule, it is the scope and purpose of preliminary objections that are considered, not their intrinsic definition, for it is not easy to distinguish between these preliminary matters and those relating to the merits when a specific case is concerned. What counts is not to engage in theorizing but to display sound practical sense: to settle the problems regarding jurisdiction and to ensure that the defences on the merits of the parties in contention are not adversely affected. A comparison between this Judgment and the one in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* raises the question of the scope of the analysis of the legal grounds derived from the Treaty Articles which the Applicant claims have been breached. Indeed, there would appear to be differences which need to be considered even though the situations of law and of fact are neither identical nor transposable.

With all due respect to the Court, it must be observed that it has wrongly applied the decision in the genocide case. The difference between the two cases resides in the fact that, in the present one, the compromissory clause defined *ratione materiae* the jurisdiction of the Court: a dispute relating to the interpretation or application of the Treaty. In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, the objection regarding jurisdiction *ratione materiae* related to the applicability of the Convention to a particular type of act: genocide committed by a State. The applicability of the compromissory clause was thus rendered subordinate by the reply to a preliminary question con-

cerning the scope of application of the 1948 Convention. In our case, although the necessary condition was met, it nevertheless seemed inadequate in the eyes of the Court.

That the Parties put forward conflicting propositions is not in itself sufficient to establish the existence of a dispute; the Court must not limit itself to a passive interpretation of its judicial function, contenting itself with taking note of the divergence of views as such. It must establish the plausibility of each of them in relation to the benchmark provisions which are the text of the Treaty and its Articles. The Court's task was to verify and establish which of the arguments seemed admissible. In other words, it is not a matter, at the preliminary objections stage, of stating that the propositions are true or false from the legal standpoint, but of analysing them to ensure there is nothing absurd about them, or nothing contrary to the legal norm of positive law. The requirements of logic and the need for realism associated with the juridical and judicial interpretation suggest that, when the elements of fact and of law are considered under the terms of paragraphs 2, 5 and 6 of Article 79 of the Rules of Court, the propositions should be classified according to their degree of probability or possibility. But owing to the consensual nature of the basis of the Court's jurisdiction, it imposes a particular constraint upon its own action: between the possible and the probable, it must opt for the latter; the subjective aspect of the idea of possibility confers a lesser degree of assent upon this modality as compared with the modality of probability. This requirement is *de rigueur*: where the jurisdiction of the Court is concerned, the rule of the strict interpretation of consent is unbending.

Yet this is not to say that the implementation of these principles is easy. The equipollent quality of the respective arguments of the Parties provides the Court with only very limited scope for ascertaining whether the arguments have been met. The difficulty resides in the fact that, in incidental proceedings relating to the raising of a preliminary objection and despite the flexibility characterizing the provisions of Article 79 of the Rules of Court, the Respondent has no interest in the case being judged on the merits or even simply discussed prior to the delivery of a decision on jurisdiction. The foregoing means that due consideration must be given to the idea that the legal settlement of disputes, just like the exercise by the Court of its jurisdiction, are exceptional. The idea of lack of jurisdiction would, in a way, seem to be previous to the idea of jurisdiction. As has been pointed out many times, legal settlement is no more than a substitute for diplomatic settlement, so that the argument of lack of jurisdiction in principle would be the confirmation of the true place which the judicial institution is recognized to possess. But by making itself regard as suspect the propositions serving as the basis for invoking its jurisdiction, the Court, at the preliminary proceedings stage, weighs up these arguments, jettisoning, in the sphere of the possible, what has not been proved and retaining only the framework of the probable within which the judicial body is circumscribed. By acting thus, the Court is per-

forming its jurisdictional function to the full as well as ensuring that there is full and effective consent to its jurisdiction.

Unless the objection relates to the *compétence de la compétence*, as in the genocide case, or is an objection of a general nature like the one raised in the present case, the conclusion the Court may reach is limited to an affirmative or negative response to the objection at the risk of prejudging the case. In 1972, the possibility of an objection without an exclusively preliminary character was construed restrictively, not to say in a highly exceptional manner.

IV. Prejudging the Issue in the Present Case

In the present case, the upshot of the application of these methodological principles was that the issue was prejudged in a manner likely to jeopardize the ensuing proceedings when the Judgment proceeded to consider the Articles of the 1955 Treaty of Amity, Economic Relations and Consular Rights. Article I was interpreted to the detriment of the exegesis. The solution of continuity embodied by the formalization, in Article I, of the obligations of friendship and peace, was not adequately evaluated at its true worth. On the contrary, the Court favoured a reference to the ideas which the practices of States have of the object of treaties of friendship, commerce and navigation. While Iran's maximalist interpretation cannot be accepted, it is nevertheless hard to find in it nothing but exhortatory principles, whereas the exceptional innovation of the 1955 Treaty resides precisely in the transfer of these concepts of peace and friendship from the domain of preambles to the corpus of the rules of positive treaty law. While for psycho-political reasons the idea of a positive obligation of peace or friendship may seem irrelevant, the idea of commerce in the Judgment does not warrant such a restrictive interpretation of the Treaty's introductory article, restrictive to the point of not even stating the existence of a negative obligation of conduct inherent in the requirements of friendship and peace.

On the other hand, despite the assertion that the purpose of Article I was to illuminate an understanding of the other Treaty provisions, it is to be deplored that Article IV should have been interpreted in an analytical context, that is to say, autonomously. In fact, prima facie, the treatment referred to in the Article concerned contemplates that of aliens in the classical context of international law, in other words, the conditions governing the enjoyment of rights by aliens. But the combined effects of excluding any territorial reference and of the provisions of Article I raise the problem of the validity of the interpretation adopted by the Judgment of the concept of treatment. It is beyond doubt that, in itself, the idea of treatment frequently refers to essentially formal considerations; they relate to the formalization, in legislative or regulatory acts, of the manner in which a State performs its obligations to its partner with respect to the latter's nationals and enterprises. Yet is one wholly justified

in deeming that Article IV excluded from the scope of its application the actual, intentional conduct of the contracting parties with respect to enterprises under the authority of the other party? Among other meanings in common parlance, treatment denotes an attack on and the destruction of a military objective (*Dictionnaire Robert*, for example). Moreover, in making a negative determination on whether the actions involving the destruction of the oil platforms were covered by Article IV, the Judgment excludes the applicability of this provision to types of conduct consisting in treating an enterprise as a hostage within an overall context of hostile relations between the parties to the 1955 Convention. Only a consideration of the merits of the case can provide a reply to this.

Lastly, since Article X, paragraph I, was adopted as the basis of the jurisdiction of the Court and owing to the provisions of Article 80 of the Rules of Court relating to counter-claims, a question arises regarding all the rights of the United States of America: how can the link of connexity be established between freedom of commerce and navigation and a possible claim for reparations for the destruction of warships?

These considerations linked to requirements of judicial prudence lay down the limitations of the subject-matter of the preliminary proceedings with a view to avoiding any risk of prejudging the issue. There must be a clear and definite break between the subject-matter of the preliminary objection under Article 79 of the Rules of Court and what is termed the basis of jurisdiction. The objection relates only to the jurisdiction of the Court or to admissibility, whereas what is designated as the basis of jurisdiction covers the arguments set forth in support of the claim. This being so, the interpretation of the "bases of jurisdiction" does not affect the rights of the parties if it is limited to meeting arguments on the sole ground of the plausibility of the theses contended in relation to the problems inherent in the terms of the provisions, whose violation is relied upon by the claimant. The reference to Article X of the Treaty in the second paragraph of the operative part of the Treaty therefore appears to merit criticism.

(Signed) Raymond RANJEVA.