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DECLARATION OF JUDGE *AD HOC* MOMTAZ

[Translation]

Security Council resolution 2231 (2015) — Binding effect of the obligations imposed by resolution 2231 (2015) on United Nations Member States — Iran has complied with its commitments under the JCPOA — Unlawfulness of the extraterritorial measures taken by the United States in international law — Sanctions with extraterritorial effect do not fall within the provisions of Article XX, paragraph 1 (d) *of the Treaty of Amity, Economic Relations, and Consular Rights of 15 August 1955 — Mission of the Court as the principal judicial organ of the United Nations in the maintenance of international peace and security.*

1. I voted in favour of the three provisional measures indicated by the Court in the operative part of the Order. However, I fear that the first two provisional measures are not sufficient to protect the rights of Iran as a matter of urgency or to avoid irreparable prejudice being caused to those rights.

2. In point (1) (iii) of paragraph 102, the operative part of the Order, the Court has limited the scope of the first provisional measure to "spare parts, equipment and maintenance services necessary for civil aircraft safety". In my opinion, this measure does not enable Iran to ensure the safety of its civil aviation, and thus to avoid irreparable prejudice being caused to its rights under the Treaty of Amity. As the Court recalled in paragraph 81 of its Order, Iran's fleet of aircraft is one of the oldest in the world. Iran asserted as much during the oral proceedings and this was not contested. The first provisional measure should also have applied to the purchase of aircraft and to the orders which have already been placed by Iran and which are subject to the sanctions reimposed by the United States. I regret that this was not included in the operative part of the Order.

3. As regards the second provisional measure, and in view of the secondary, extraterritorial sanctions of the United States (Order, paras. 74 and 83), it would have been desirable for the Court to request that the United States refrain from taking any measures aimed at discouraging the companies and nationals of third States from maintaining trade relations with Iran, in particular to enable Iran to purchase new civil aircraft.

4. While I agree with the reasoning set out in the Court's Order, I nevertheless believe it necessary to examine three questions on which the Court did not rule — at least not at this stage of the proceedings. In my view, these questions are particularly important since the purpose of provisional measures is to prevent the aggravation of a dispute and to protect the rights of the disputing parties pending a decision by the Court on the merits. Moreover, these questions are central to the Court's role as the principal judicial organ of the United Nations, as well as its role in protecting and promoting the purposes and principles of the Charter, including in maintaining international peace and security.

1. The obligations of United Nations Member States under Security Council resolution 2231 (2015)

5. In paragraph 18 of its Order, the Court takes note of Security Council resolution 2231 (2015), but does not elucidate its legal consequences. This resolution, which was adopted unanimously, is part of the factual context in which the dispute submitted to the Court under the Treaty of Amity arose. Although this dispute does not concern the United States'

compliance with resolution 2231 (2015) or its withdrawal from the Joint Comprehensive Plan of Action (hereinafter the "JCPOA" or the "Plan"), it could have been avoided had the United States adhered to its commitments under resolution 2231 (2015).

6. Resolution 2231 (2015) does not expressly refer to Chapter VII of the Charter of the United Nations. Nonetheless, the reference in the resolution's preamble to Article 25 of the Charter, and the ten references in its operative part to Article 41, part of Chapter VII of the Charter, prove that it imposes obligations on Member States. The resolution endorsed the JCPOA in its entirety. Regardless of the legal status of the Plan as such, in particular whether it is a binding instrument for the States which concluded it, what is important here is to ascertain whether and to what extent resolution 2231 (2015) imposes binding obligations on all Member States of the Organization, including the United States.

7. First, the Court has had occasion to state the following on the binding effect of resolutions adopted by the Security Council:

> "112. It would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it . . .
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> 113. . . . Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.
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> 114. It has also been contended that the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal duty on any State nor to affect legally any right of any State. The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 52-53, paras. 112-114).

8. As a general rule, therefore, the binding effect of Security Council decisions is not limited to those taken under the provisions of Chapter VII (see also, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 192, para. 134). Thus, ascertaining whether a Security Council resolution is binding requires an analysis of the terms used therein, the discussions which led to its adoption and the provisions of the Charter it cites, with a view to determining whether the Security Council intended to establish an obligation for Member States (see, for example, *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 104, para. 32). While the rules on treaty interpretation

embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, "the interpretation of Security Council resolutions also require[s] that other factors be taken into account" (*Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 442, para. 94). Thus:

> "The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions." (*Ibid*.)

9. One must therefore examine the language, the object and purpose, and the context of resolution 2231 (2015) to determine its legal effect. As has been recalled, the resolution's preamble provides that "Member States are obligated under Article 25 of the Charter of the United Nations to accept and carry out the Security Council's decisions". In that same preamble, the Security Council made repeated references to the importance of the JCPOA, which "marks a fundamental shift in [the] consideration" of the Iranian nuclear issue, the culmination of diplomatic efforts in the area of non-proliferation which falls squarely within the competence of the Security Council. It also invited all States to co-operate with Iran and underscored the importance of the role of the International Atomic Energy Agency (IAEA) in implementing and monitoring the commitments contained in the Plan and approved in the resolution, with the Security Council, as emphasized by its permanent members following the adoption of the resolution, guaranteeing its implementation.

10. If the true intention of Security Council was in fact simply to take note of the JCPOA, it could have done so, as it usually does, without appending the entire text of that lengthy instrument to the resolution. Yet that was not the intention with resolution 2231 (2015), in which the Security Council "*[e]ndorses* the JCPOA and *urges* its full implementation on the timetable established [there]in". It is absolutely clear from the opening of the resolution's operative part, immediately preceded by a reference in its preamble to Article 25 of the Charter, that the Security Council intended to establish binding obligations for all Member States, including the United States.

11. An examination of the operative part of the resolution confirms its binding nature. The vast majority of its provisions are preceded by an express reference to Article 41, part of Chapter VII of the Charter. This includes paragraphs 7 to 9, 11 to 13, 16 and 21 to 23. In paragraph 7, for example, the Security Council, "acting under Article 41 of the Charter", decided to lift the sanctions contained in its previous resolutions on the Iranian nuclear issue, i.e. resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010) and 2224 (2015). Other provisions of resolution 2231 (2015), which are not preceded by an express reference to Article 41 of the Charter, are nonetheless binding on the United Nations Member States in so far as they were adopted in accordance with the purposes and principles of the Charter and the provisions of Article 25. As the Court has recalled,

> "when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those [non-permanent] members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 116).

Last but not least, most of the provisions in resolution 2231 (2015) are addressed to the United Nations Member States. It follows that, in endorsing the JCPOA, resolution 2231 (2015) established binding obligations for all Member States, including the United States.

12. Finally, and although the present proceedings are at a preliminary stage, it is worth examining the validity of the arguments put forward by the United States to justify "the re-imposition of all sanctions that had previously been lifted or waived in connection with the plan" and resolution 2231 (2015). In a Memorandum dated 8 May 2018, the President of the United States observed that "Iran has publicly declared it would deny the International Atomic Energy Agency (IAEA) access to military sites", and that, in 2016, Iran "twice violated the JCPOA's heavy-water stockpile limits" (Order, para. 20). In reality, however, since 16 January 2016, the IAEA has verified and monitored Iran's compliance with its nuclear-related commitments under the JCPOA, a mandate conferred on it by resolution 2231 (2015). In its quarterly reports, the IAEA has confirmed Iran's adherence to its commitments.

13. One need only refer to the IAEA's 2018 reports to refute the justifications put forward by the United States. First, on the question of access to the sites in Iran, the IAEA has stated that "[t]he Agency has continued to evaluate Iran's declarations under the Additional Protocol, and has conducted complementary accesses under the Additional Protocol to all the sites and locations in Iran which it needed to visit" (*Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015)*, doc. GOV/2018/7 of 23 Feb. 2018, para. 23). In its latest report published on 30 August 2018, the IAEA once again confirmed that it had accessed all the sites and locations in Iran which it needed to visit, and further observed that "[t]imely and proactive cooperation by Iran in providing such access facilitates implementation of the Additional Protocol and enhances confidence" (*Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015)*, doc. GOV/2018/33 of 30 Aug. 2018, para. 24). Moreover, in its report of 25 May 2018, just a few weeks after the statement by the President of the United States announcing the decision to reimpose and aggravate the economic sanctions which had been lifted under the JCPOA, the IAEA confirmed that Iran was continuing to co-operate with the Agency and to comply with its commitments, including on access to the sites (*Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015)*, doc. GOV/2018/24 of 25 May 2018, para. 23). The 30 August 2018 report was also very clear on the subject of heavy-water stockpile limits: during the three-month reporting period, Iran had no more than 130 metric tonnes of heavy water, and was thus within the limits set out in paragraph 14 of Annex I to the JCPOA. Regarding Iran's compliance with that commitment in 2016, an examination of the IAEA's reports from that time is again enlightening:

> "2. . . . on 8 November 2016, the Agency verified that Iran's stock of heavy water had reached 130.1 metric tonnes and, in a letter received by the Agency on 9 November 2016, Iran informed the Agency of 'Iran's plan to make preparation for transfer of 5 metric tons of its nuclear grade heavy water' out of Iran.
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> 3. On 12 November 2016, Iran informed the Agency of its decision to make preparations to transfer an additional six metric tonnes of nuclear grade heavy water out of Iran. On 12 and 13 November 2016, the Agency verified and sealed 11 metric tonnes of nuclear grade heavy water that Iran was preparing for transfer out of Iran.
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> 4. On 21 November 2016, Iran informed the Agency that the 11 metric tonnes of nuclear grade heavy water had been shipped out of Iran on 19 November 2016.

> 5. On 6 December 2016, the Agency verified the quantity of 11 metric tonnes of the nuclear grade heavy water at its destination outside Iran. This transfer of heavy water out of Iran brings Iran's stock of heavy water to below 130 tonnes." (*Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015)*, doc. GOV/INF/2016/13 of 6 Dec. 2016)

14. Finally, it should be noted that since the United States announced its intention to withdraw from the JCPOA and to reimpose its unilateral sanctions, the European Union (EU) has not only confirmed Iran's compliance with its commitments, but also called for resolution 2231 (2015) to be respected, having taken the necessary measures in EU law to protect the rights of EU companies doing legitimate business with Iran:

> "The lifting of nuclear-related sanctions is an essential part of the deal — it aims at having a positive impact not only on trade and economic relations with Iran, but most importantly on the lives of the Iranian people. We are determined to protect European economic operators engaged in legitimate business with Iran, in accordance with EU law and with UN Security Council resolution 2231. This is why the European Union's updated Blocking Statute enters into force on 7 August to protect EU companies doing legitimate business with Iran from the impact of US extra-territorial sanctions." ("Joint statement on the re-imposition of US sanctions due to its withdrawal from the Joint Comprehensive Plan of Action (JCPOA)", Brussels, 6 Aug. 2018, available online on the EU's official website[1].)

2. The unlawfulness of extraterritorial measures adopted by the United States

15. In my opinion, the secondary sanctions announced by the United States on 8 May, for implementation on 6 August and 4 November 2018, also have an extraterritorial scope in that they target nationals and companies of third States continuing to maintain economic relations with Iran. Those sanctions are illegal under international law.

16. First, one must examine the lawfulness of those measures in the light of the principles of the Charter of the United Nations, before considering their compliance with World Trade Organization (WTO) law, which may be regarded as a *lex specialis*. Next, I am not satisfied that the extraterritorial sanctions in question can fall within the scope of Article XX, paragraph 1 *(d)*, of the Treaty of Amity, even prima facie. Nor can they be justified in the light of other similar exceptions in international law, such as that contained in Article XXI of the General Agreement on Tariffs and Trade (GATT).

17. Turning to the first issue, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court analysed the 1956 Treaty of Friendship, Commerce and Navigation concluded between Nicaragua and the United States, which was modelled on the 1955 Treaty of Amity at issue in this case, observing that:

> "in view of the generally accepted formulations, the principle [of non-intervention] forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one

[1] https://eeas.europa.eu/headquarters/headquarters-homepage/49141/joint-statement-re-imposition-us-sanctions-due-its-withdrawal-joint-comprehensive-plan-action_en.

> bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones." (*Merits, Judgment, I.C.J. Reports 1986*, p. 108, para. 205).

18. The principle of non-intervention is one of the corollaries of the sovereign equality of States (*ibid*., para. 202). Indeed, it is its first natural consequence. The adoption of such unilateral measures, which openly seek to constrain, dissuade and discourage potentially all third States, their nationals and companies from maintaining trade relations with the primary target of those sanctions, constitutes a violation of the principle of non-intervention enshrined in General Assembly resolution 2625 (XXV). The Court has already had occasion to note the customary status of that principle:

> "The Court has also emphasized the importance to be attached, in other respects, . . . to General Assembly resolution 2625 (XXV) . . . Texts like these, in relation to which the Court has pointed to the *customary content* of certain provisions such as the principles of the non-use of force and *non-intervention*, envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies; the United States not only voiced no objection to their adoption, but took an active part in bringing it about." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 133, para. 264; emphasis added.)

19. The unilateral measures taken by the United States against Iran seek strongly to discourage any State and its nationals, and any foreign financial institutions, from maintaining relations with Iran. Indeed, they are similar to the measures imposed by acts of US domestic legislation adopted in 1996, such as the Helms-Burton Act (against Cuba) and the D'Amato-Kennedy Act (against Iran and Libya). As in this case, the scope and effects of the provisions contained in those acts were extraterritorial and led to the adoption of anti-boycott laws by Canada and the EU, whose businesses and nationals were affected (in Canada: the Foreign Extraterritorial Measures Act (FEMA), *Revised Statutes of Canada (RSC)*, Chap. F-29 (1985), amended on 9 Oct. 1996, *RSC*, Chap. 28, reprinted in *International Legal Materials (ILM)*, Vol. 36, Issue 1, p. 111 (1997); in the EU: Council Regulation (EC) No. 2271/96 of 22 Nov. 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, *Official Journal* (L. 309), p. 1, reprinted in *ILM*, Vol. 36, Issue 1, p. 125 (1997)).

20. The aforementioned Helms-Burton Act was also the subject of a long series of General Assembly resolutions[2], the terms of which are very clear. The General Assembly reaffirmed, "among other principles, the sovereign equality of States, *non-intervention and non-interference in their internal affairs and freedom of international trade* and navigation, which are also enshrined in many international legal instruments", and expressed

> "[c]oncer[n] about the continued promulgation and application by Member States of laws and regulations, such as that promulgated on 12 March 1996 known as 'the

[2] See the United Nations General Assembly resolutions concerning the "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba", adopted since 1992: resolutions 47/19 (1992), 48/16 (1993), 49/9 (1994), 50/10 (1995) and 51/17 (1996); 52/10 (1997), 53/4 (1998), 54/21 (1999), 55/20 (2000), 56/9 (2001), 57/11 (2002), 58/7 (2003), 59/11 (2004), 60/12 (2005), 61/11 (2006), 62/3 (2007), 63/7 (2008), 64/6 (2009), 65/6 (2010), 66/6 (2011), 67/4 (2012), 68/8 (2013), 69/5 (2014), 70/5 (2015), 71/5 (2016) and 72/4 (2017).

> Helms-Burton Act', *the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation*" (General Assembly resolution 72/4 of 1 Nov. 2017, preamble; emphasis added).

It

> "[r]eiterate[d] its call upon all States to refrain from promulgating and applying laws and measures of the kind referred to in the preamble to the present resolution, in conformity with their obligations under the Charter of the United Nations and international law, which, *inter alia*, reaffirm the freedom of trade and navigation" (*ibid*., para. 2).

The terms of paragraph 2 are reproduced verbatim in the numerous other resolutions adopted by the General Assembly since 1993, and could easily apply to the sanctions against the nationals and companies of third States set out in sections 2, 3, 5 and 6 of US Executive Order 13846, dated 6 August 2018, reimposing "certain sanctions with respect to Iran [and its nationals]". Juxtaposing the régime of extraterritorial sanctions in question with the above-mentioned jurisprudence of the Court, it is my view that those sanctions serve as a constraint that aims to influence directly the choice of sovereign States in formulating their external relations, which constitutes a violation of the fundamental principle of non-intervention, as enshrined in the Charter of the United Nations.

21. General Assembly resolutions, officially recommendations, may have a normative character through their "content and the conditions of [their] adoption" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 254-255, para. 70). Moreover, "a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule" (*ibid*.). As noted by the Court, "it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 50, para. 105).

22. In addition to the Charter of the United Nations, there may also be doubts as to the compliance of the United States' extraterritorial sanctions with WTO law. First, it is to be noted that Iran is not a member of the WTO; it has had observer status since 26 May 2005. Therefore, while it cannot be said that there has been a breach of WTO law by the United States against Iran, the possibility remains that the measures in question could violate WTO law vis-à-vis any third party and member of that organization maintaining trade relations with Iran. Furthermore, the EU has already voiced its opposition to the sanctions and stated that it would protect European institutions and economic operators by adopting blocking statutes against the United States. It should be added that in today's global economy, it is no longer possible to regard international and economic relations as a group of bilateral dealings. The international economic system is a network and the deterioration of relations between A and B will inevitably have repercussions for all participants. In the WTO system, there is no difference between participant and trading partner. Thus, when State A imposes sanctions against State B with an extraterritorial effect which serves to dissuade State C from trading with State B, and when State C refuses to comply and falls victim to the régime of sanctions, but State D decides to adhere to the régime imposed by A, there is a difference in the way States C and D are treated. This could constitute a violation of the most-favoured-nation principle set out in Article I of GATT. The measures in question also have the effect of curbing the EU's freedom to export to Iran and to import products of Iranian origin. As a result, they may also lead to a violation of Article XI of GATT, which provides for the general elimination of quantitative restrictions.

23. Several measures adopted by US Executive Order 13846 may be described as "secondary boycott measures" intended to target economic actors having trade relations with Iranian nationals or companies, Iran itself being the subject of a primary boycott. Yet the fact that a State imposes restrictions on its nationals or legal entities as part of its foreign policy does not mean, *a contrario*, that it can act without any territorial or personal ties, or prohibit relations between third States.

24. Lastly, it is important to consider whether and to what extent the extraterritorial sanctions of the United States fall within the scope of Article XX, paragraph 1 *(d)*, of the Treaty of Amity. According to that provision, the Treaty

> "shall not preclude the application of measures . . . necessary to fulfil 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".

In its Judgment on the preliminary objection in the *Oil Platforms* case, the Court noted that "the Treaty of 1955 contains no provision expressly excluding certain matters from the jurisdiction of the Court" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 811, para. 20). The Court then confirmed that Article XX, paragraph 1 *(d)*, of the Treaty of Amity does not bar the Court's jurisdiction, but rather "is confined to affording the Parties a possible defence on the merits" (*ibid.*, p. 811, para. 20). The question whether the sanctions fall within the scope of that provision must be considered from two perspectives. First, one must examine whether the measures directly targeting Iran constitute an exception authorized by Article XX, paragraph 1 *(d)*, of the Treaty of Amity, before determining whether the "secondary boycott" measures directed against third States may be covered by the same provision.

25. Article XX opens with the phrase: "The present Treaty shall not preclude". It is, therefore, a "non-prejudice clause", listing the actions which, by their nature, are exceptions which will not upset the operation of the Treaty should one of the parties have recourse to them. As an exception, this provision must be the subject of a restrictive interpretation. Article XX, paragraph 1 *(d)*, naturally splits into two parts. Under the first part, measures "necessary to fulfill . . . obligations . . . for the maintenance or restoration of international peace and security" are permitted. Such measures may be adopted only with the authorization of the Security Council, which has primary responsibility for the maintenance of international peace and security under Article 24 of the Charter, or, in the case of self-defence, with its subsequent consent. The second part authorizes the adoption of measures "necessary to protect [the] essential security interests [of the High Contracting Party]". This second part may appear to be a more general exception, but in my opinion it must be interpreted in an even more restrictive manner. As the Court recalled in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, "whether a measure is necessary to protect the essential security interests of a party is not . . . purely a question for the subjective judgment of the party" (*Merits, Judgment, I.C.J. Reports 1986*, p. 141, para. 282.). States are entitled to provide for their security and the protection of their essential interests within the limits defined by international law.

26. The question to what extent the United States may make use of the exception provided for by Article XX, paragraph 1 *(d)*, of the Treaty of Amity is closely linked to the possibility of recourse to the security exception set out in Article XXI of GATT. If we juxtapose the two provisions, it is apparent that, under Article XXI of GATT, the General Agreement is not to be construed "to prevent any contracting party from taking any action *which it considers necessary* for the protection of its essential security interests" (emphasis added), while Article XX, paragraph 1 *(d)*, of the Treaty of Amity merely speaks of "measures . . . necessary". In the case

concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court said the following of a similar clause:

> "That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it 'considers necessary for the protection of its essential security interests', in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of 'necessary' measures, not of those considered by a party to be such" (*Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222).

27. In the absence of an interpretation of this provision by the WTO's Dispute Settlement or Appellate Body, particular importance must be attributed to the way in which Article XX, paragraph 1 *(d)*, of the Treaty of Amity is worded compared with Article XXI of GATT. As has just been shown, the Court's jurisprudence confirms that interpretation of the text, which places the emphasis on the term "necessity", in its objective sense, and not the "measures . . . considered by [the] part[ies] to be [necessary]".

28. For all these reasons, I am of the opinion that the unilateral measures taken by the United States against the nationals and companies of third States do not comply prima facie with the principle of non-intervention or WTO law, and that the United States cannot make use of the exceptions provided by Article XX, paragraph 1 *(d)*, of the Treaty of Amity or by Article XXI of GATT.

3. The public order mission of the Court

29. Finally, the dispute in this case not only risks affecting the entire economy, banks and finance, civil aviation security and the humanitarian needs of the Iranian population, it also poses a threat to peace and security in the region. In point (3) of the operative part (Order, para. 102), the Court indicated a provisional measure calling on both Parties to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve". This, however, is not sufficient.

30. The heightened tensions between the Parties pose a serious threat to international peace and security. In my opinion, it would have been desirable for the Court to go further. In the hope of achieving a conciliatory climate, the Court, as the principal judicial organ of the United Nations, had a duty immediately to request that the Parties respect their obligations under the Charter of the United Nations and general international law. This power "flows from its responsibility for the safeguarding of international law and from major considerations of public order" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, dissenting opinion of Judge Vereshchetin, p. 209). In so doing, the Court is acting "as an organization functioning within the framework of the United Nations and pursuing the common aim of peace" (*ibid*., dissenting opinion of Judge Weeramantry, p. 198).

31. Under the terms of Article 24 of the Charter, the Security Council has primary responsibility for the maintenance of international peace and security, but it does not have

exclusive responsibility. As the Court has recalled on a number of occasions, "[t]he Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 435, para. 95).

32. In practice, the Court and the Security Council have on several occasions been seised of the same dispute posing a threat to international peace and security. This was true of the case concerning the *Aegean Sea Continental Shelf*. Since the Security Council, by its resolution 395 (1976), had already asked the Parties to that dispute "to do everything in their power to reduce the present tensions in the area so that the negotiating process may be facilitated" and called on them "to resume direct negotiations over their differences", the Court did not consider it necessary to indicate provisional measures in its Order, and simply reminded the Parties of the need to comply with that resolution (*Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 12, para. 38).

33. In his separate opinion appended to that Order, Judge Lachs declared that the Court should "readily seize the opportunity of reminding the member States concerned in a dispute referred to it of certain obligations deriving from general international law or flowing from the Charter" (*ibid*., separate opinion of Judge Lachs, p. 20). He further observed that "[t]he pronouncements of the Council did not dispense the Court, an independent judicial organ, from expressing its own view on the serious situation in the disputed area". According to Judge Lachs, the Court, in so doing,

> "does not . . . arrogate any powers excluded by its Statute when, otherwise than by adjudication, it assists, facilitates or contributes to the peaceful settlement of disputes between States, if offered the occasion at any stage of the proceedings" (*ibid*.).

This is all the more relevant when, as is the case here, there is no Security Council resolution. In other words, when the Security Council has not had occasion to urge the parties to respect their obligations under the Charter and general international law, it falls to the Court to do so, and to fulfil its role in the maintenance of international peace and security.

34. This lacuna in the Court's Order is all the more striking since Article I of the Treaty of Amity provides that "[t]here shall be firm and enduring peace" between the two contracting parties (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 813, para. 27), some of whose rights were judged plausible prima facie and at imminent risk of irreparable prejudice (Order, paras. 70 and 91). The Court has also had occasion in its jurisprudence to remind the parties, at the provisional measures stage, of their obligations under the Charter, and it is difficult to see why that approach was not taken here. For example, in the case concerning *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)*, the Court reminded the Parties that:

> "the Charter of the United Nations imposes an obligation on all Member States of the United Nations to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations; whereas the Court further recalls that United Nations Member States are also obliged to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered; and whereas both Parties are obliged, by the

Charter and general international law, to respect these fundamental principles of international law" (*Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 554, para. 66).

35. In the words of Robert Kolb, "[t]he principal aim of establishing a court of justice is to contribute to the peaceful resolution of disputes, i.e. to ensure that tensions are diminished and that the dispute is directed towards a rational means of settlement" (R. Kolb, *La Cour international de Justice*, Paris, Pedone, 2013, p. 636 *[translation by the Registry]*). In my view, provisional measures are intended to ease tensions between the parties and to preserve the utility of the proceedings. In indicating provisional measures, the Court cannot lose sight of the fact that it is exercising its exceptional power both to protect the rights of the parties and the integrity of its judicial function, and to safeguard the fundamental nature of its remit to act in the public interest (*ibid*., p. 637).

36. In conclusion, it would have been desirable for the Court to have directly called on the Parties to respect their obligations under the Charter, including the obligations deriving from resolution 2231 (2015) and general international law, not only to avoid an aggravation of the situation but to re-establish and preserve international peace and security in the region.

(Signed) Djamchid MOMTAZ.