



LAW update



READER'S queries



Your Advocate



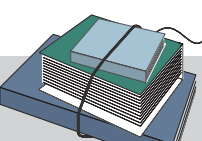
This week your advocate is M. Moazzam Husain of the Supreme Court of Bangladesh. His professional interests include civil law, criminal law and constitutional law. Send your queries to the Law Desk, The Daily Star. A panel of lawyers will address your problems.

Q: I would appreciate if you kindly let me know how to distribute the property left by my parents. We are two brothers and three sisters. My younger brother died before the death of my father and mother leaving behind two daughters moreover his wife got married again. I have a son and a daughter. I look forward to your kind advice how to settle our properties and money left by my parents according to Muslim Law.

Sheikh Rahman, On E-mail

Your Advocate: Before the Muslim Family Laws Ordinance, 1961, came into force the offspring of the predeceased sons or daughters did not inherit any property of their grandparents. Section 4 of the Ordinance for the first time laid down laws creating hereditary rights of the children of the predeceased sons and daughters. You have not mentioned the time of your parents' death. Attendant facts and circumstances suggest that they have died much after 1961 and the Ordinance of 1961 applies to your case. Presuming that the law applies to your case the persons who stands out as heirs of your late parents are their one son (you), three daughters and two grand daughters, that is two daughters of their predeceased son. Law does not create any hereditary right to the wife of a predeceased son more so she has taken a second husband therefore she stands excluded. As for your sons and daughters, they are excluded by you as far as their grand parent's property is concerned. Section 4 of the Muslim Family Laws Ordinance, 1961, says - 'in the event of death of any son or daughter of the propositus before opening of succession the children of such son or daughter shall receive per stripes a share equivalent to the share which such son or daughter would have received, if alive.' Therefore, for convenience first distribute the entire property of your parents among your three sisters, late brother, as if he is alive and you. As in Muslim law son always takes double the share of the daughter you and your brother take 2/7 each and your sisters take 1/7 each. Under the Muslim law daughters cannot inherit the entire estate of their father in usual situation. Daughters irrespective of their numbers, take a maximum of 2/3rd of the same in absence of son. The two daughters of your deceased brother, therefore, will take a total of 2/3rd equally from the share of their late father and the rest 1/3rd will go to you and your sisters again at the ratio of 2:1 as full brother and sisters of the deceased brother.

LAW lexicon



Partnership
A business organization in which two or more persons carry on a business together. Partners are each fully liable for all the debts of the enterprise but they also share the profits exclusively. Many states have laws which regulate partnerships and may, for example, require some form of registration and allow partnership agreements. One of the basic advantages of partnerships is that they tend to allow business losses to be deducted from personal income for tax purposes (see also limited partner).

Par value shares
Shares issued by a company which have a minimum price. Shares which are without par value or "non par value shares" are shares which may be sold at whatever price the company's board of directors decides.

Patent
An exclusive privilege granted to an inventor to make, use or sale an invention for a set number of years (eg. in Canada, 17 years). Normally, no one company can retain a monopoly over a product or service because this is considered to be economically harmful to society. But as a financial incentive to potential inventors, the state grants a temporary monopoly to that inventor through the issuance of a patent.

Paternity
Being a father. "Paternity suits" are launched when a man denies paternity of a child born out of wedlock. New technology of DNA testing can establish paternity thus obliging the father to provide child support.

Payee
The person to whom payment is addressed or given. In family law, the term usually refers to the person who receives or to whom support or maintenance is owed. In commercial law, the term refers to the person to whom a bill of exchange is made payable. On a regular check, the space preceded with the words "pay to the order of" identifies the payee.

Payor
The person who is making the payment(s). Again, in the context of family law, the word would typically refer to the person to a support or maintenance debtor. In commercial law, the word refers to the person who makes the payment on a check or bill of exchange.

Pedophile
A person afflicted with "pedophilia", a sexual perversion in which children are preferred as sexual partner.

Pen register
An electronic surveillance device which attaches to a phone line and which registers every number dialed from a specific telephone. This surveillance device is not as effective as wire-tapping.

Corresponding Law Desk
Please send your mails, queries, and opinions to: post - Law Desk, The Daily Star, 19 Karwan Bazar, Dhaka-1215; telephone 8124944, 8124955, 8124966; fax 8125155, 8126154; email dslawdesk@yahoo.co.uk

Judgement of the ICJ
U.S. attacks on Iranian oil platforms were not justifiable as self defence

PIETER H.F. BEKKER

On November 6, 2003, the International Court of Justice (ICJ), the principal judicial organ of the United Nations located in The Hague, The Netherlands, ruled, by 14 votes to two, that a series of retaliatory attacks by the US Navy against certain Iranian oil platforms in the Persian Gulf in 1987 and 1988, although constituting an unlawful use of force, did not violate a 1955 commerce treaty between the US and Iran since the attacks did not adversely affect freedom of commerce between the territories of the parties. The judges from Egypt and Jordan dissented. The ICJ also rejected, by 15 votes to one, the US counterclaim seeking a finding of Iran's liability for interfering with the freedoms of commerce and navigation in the Gulf by attacking ships through missiles and mines.

The judgement, which comes at a time when the requirements for the use of force are hotly debated among UN member states, includes important statements regarding the legal limits on the use of force, including the criteria of necessity and proportionality.



Historical background

On September 22, 1980, Iraqi military forces invaded Iran, triggering a war that lasted almost eight years. Although the war was initially limited to a land war between Iran and Iraq, it spread to the Persian Gulf in 1984 when Iraq began attacking oil tankers on their way to and from Iranian ports, in an attempt to disrupt Iran's oil exports. This resulted in the so-called Tanker War, which ended with the general ceasefire in August 1988. During the Tanker War, Iran retaliated against Iraqi attacks by attacking and mining mostly neutral-flag ships coming from or destined for ports in Kuwait and Saudi Arabia, in disregard of the rules on neutral shipping and naval warfare. More than a third of the 550 or so attacks reportedly were attributable to Iran's military forces. Iran publicly blamed the US for its support of Iraq.

The US attacks on the Iranian oil platforms that are at the centre of this case occurred after two specific attacks on shipping in the Gulf. On October 16, 1987, the Kuwaiti tanker Sea Isle City, which had been re-flagged to the US, was hit by a missile near Kuwait harbour. Asserting that Iranian oil platforms were used as a staging facility for attacks by Iranian forces against shipping in the Gulf, the US attacked and destroyed two Iranian offshore oil production installations in the Reshadat complex three days later. On April 14, 1988, the US frigate Samuel B. Roberts struck a mine in international waters near Bahrain. Five days later, the US attacked and destroyed the Nasr and Salman platforms belonging to the National Iranian Oil Company.

In 1955, when relations between Iran and the US were friendly, the two countries concluded a "Treaty of Amity, Economic Relations and Consular Rights" (the "Treaty") Article X of the Treaty guarantees the freedom of commerce and of navigation between the territories of the two nations. After the seizure of the US Embassy in Tehran by Iranian students in November 1979, including the taking of American hostages, relations between Iran and the US deteriorated up to a point where diplomatic relations were severed. The two countries did not, however, terminate the Treaty.

The hostages crisis prompted the US to institute proceedings against Iran before the ICJ, relying in part on the Treaty. Iran refused to participate in the pro-

ceedings in the Hostages Case, so that the case proceeded in its absence. The US complaint resulted in a 1980 judgement in which the ICJ held Iran responsible for violating a series of obligations under international conventions in force between the two countries, including the Treaty, as well as rules of general international law (especially those regarding the treatment of diplomatic and consular representatives).

The Oil Platforms Case before the Court

On November 2, 1992, Iran brought an Application before the ICJ against the US in which it complained of the US attacks on its oil platforms. Although Iran had denied in connection with the 1979-1980 Hostages Case that the Treaty was still in force and neither party had made any mention of the Treaty at the time of the impugned actions, the Application relied on the compromissory clause included in Article XXI of the Treaty as the sole basis of jurisdiction. The Treaty is an example of a "friendship, commerce and navigation" treaty ("FCN" treaty) that the US used to enter into with selected countries for bilateral trade purposes, but which in recent years has been discontinued in favour of a more modern form of bilateral investment treaty ("BIT"). The US has concluded dozens of BITs with mostly developing nations. BITs typically do not include a compromissory clause providing for ICJ jurisdiction, but select World Bank or other arbitration as the dispute resolution mechanism.

The US filed preliminary objections seeking the immediate dismissal of the case in December 1993. Its principal contention was that the Treaty did not apply to questions concerning the use of force in self-defence. The ICJ rejected the US preliminary objections in its judgement of December 12, 1996, finding that the destruction of the Iranian oil platforms was capable of having an adverse effect upon the freedom of commerce guaranteed by Article X(1) of the Treaty and that its unlawfulness could be evaluated in relation to that particular paragraph 4. Consequently, a dispute that arose out of the use of force ended up before the ICJ as a case turning on the alleged violation of the freedom of commerce guaranteed in a bilateral treaty.

The Court's main task on the merits was to ascertain whether the US by destroying Iranian oil platforms on two occasions, violated its obligation under Article X(1) of the Treaty concerning freedom of commerce between the territories of the two countries. The Court decided to examine first whether the action taken by the US was a measure necessary to protect its essential security interests in the sense of Article XX(1)(d) of the Treaty 5. The Court felt justified in taking this approach because the US had relied on this provision as determinative of the question of the existence of a breach of its obligations under Article X(1). In its 1996 judgement, the Court held that

Article XX is not an exoneration clause barring the ICJ from assessing the lawfulness of measures taken to protect a party's essential security interests, but it may afford a possible defence on the merits. For this reason, the November 6 decision deals extensively with the question whether the US actions could qualify as self-defence under international law and hence as measures necessary to protect its essential security interests. These issues were held to be overlapping.

The US argued that a missile attack on and the mining of ships flying its flag, together with other Iranian acts endangering neutral shipping in the Gulf, constituted a threat to its essential security interests within the meaning of Article XX(1)(d) of the Treaty. The Court concluded, however, that the US had not submitted convincing evidence that the missile attack on the Sea Isle City in 1987 could be attributed to Iran. With regard to the April 1988 attacks on the Nasr and Salman platforms, the Court noted that these attacks, unlike the one that took place the previous year, were not an isolated operation directed at the oil platforms but formed part of a much more extensive US military action code-named "Operation Praying Mantis." In view of all the circumstances and the evidence submitted by the US, the Court found that, although the mining of a single military vessel might suffice to trigger the inherent right of self-defence, the mining of the USS Samuel B. Roberts was insufficient in itself to amount to an "armed attack" on the US by Iran justifying US action in self-defence. The Court concluded that the evidence of Iran's responsibility for mining the USS Samuel B. Roberts was inconclusive.

Confirming the applicability of the international law criteria of necessity and

proportionality in relation to the use of force in alleged self-defence, the Court was not satisfied that the US attacks of 1987-1988 were necessary to respond to the shipping incidents in the Gulf and constituted a proportionate use of force in self-defence. On the issue of necessity, the Court placed the burden on the United States to show that the attacks on its vessels "were of such a nature as to be qualified as 'armed attacks' within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force." (Paragraph 51 of the Judgement). This formulation could have implications for future claims of a right of anticipatory or pre-emptive self-defence insofar as it indicates that an armed attack is a prerequisite to the right of self-defence under Article 51 of the Charter and under customary international law. On the other hand, it should be noted that the Court was only responding to a US argument to the effect that armed attacks (the missile attack in 1987 and the mine in 1988) had already occurred against it. Consequently, the Court was not faced with an issue of anticipatory or pre-emptive self-defence.

On the issue of proportionality, the Court noted that if the US response to the 1987 missile attack on the Sea Isle City had been shown to be necessary, it might have been considered proportionate. But the same could not be said for the US response to the 1988 mining of the USS Samuel B. Roberts because it was part of the more extensive "Operation Praying Mantis" which involved not only the attack on the oil platforms, but also the destruction of two Iranian frigates and a number of other naval vessels and aircraft (Paragraph 77 of the Judgement). The Court concluded that the attacks against Iranian oil installations carried out by US forces in 1987-1988 could not be justified, under Article XX(1)(d) of the Treaty, as being necessary to protect the essential security interests of the US, and did not fall within the category of measures contemplated by that provision.

The remaining question to be decided was whether the US actions complained of by Iran had the potential to affect "freedom of commerce" as guaranteed by Article X(1) of the Treaty. The Court considered that where a state destroys another state's means of production and transport of goods destined for export, or means ancillary or pertaining to such production or transport, there is in principle an interference with the freedom of international commerce. It added, however, that it does not follow that any interference with such activities involves an impact on the freedom of commerce "between the territories" of Iran and the US, as Article X(1) requires. In other words, commerce must involve direct trading (here, in oil) between Iran and the US and does not encompass indirect commerce involving intermediaries.

The evidence showed that at the time of the first US attack in October 1987, the targeted oil platforms were under repair and inoperative, i.e., were not producing oil. When the US attacked the other platforms in April 1988, a US embargo on oil and services of Iranian origin was in place. Based on this evidence, the Court concluded that there was at the time of each of the US attacks no commerce between the territories of Iran and the US in respect of oil produced by the targeted oil platforms, so that the US actions against the platforms could not be said to have infringed the freedom of commerce in oil within the meaning of Article X(1) of the Treaty. Consequently, the ICJ rejected Iran's submissions and its claim for reparation.

The ICJ also rejected the US counterclaim. The US had requested the Court to adjudge and declare that, in attacking vessels in the Persian Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of Iran and the US, Iran had breached its obligations to the US under Article X(1) of the Treaty and must make full reparation to the US. In the Court's view, to succeed on its counterclaim, the US had to prove two things. First, it had to demonstrate that its freedom of commerce or of navigation "between the territories of the High Contracting Parties" to the Treaty was actually infringed. Second, it had to prove that the acts which allegedly impaired one or both of those freedoms were attributable to Iran.

The Court concluded that none of the vessels described by the US as being damaged by the Iranian attacks of which the US complained was engaged in commerce or navigation "between the territories of the High Contracting Parties" to the Treaty. Consequently, the U.S. counterclaim failed on the first requirement, and the Court did not need to address the contested issues of attribution of the alleged Iranian attacks.

This latest decision concludes a series of cases against the United States. On September 10, 2003, Libya's case against the US arising from the aftermath of the crash of PanAm flight 103 over Lockerbie, Scotland, was discontinued and removed from the ICJ's General List of cases. The case had been pending for more than a decade. An earlier case between Iran and the US arising out of the shooting down by the USS Vincennes of an Iranian

Airbus over the Gulf on July 3, 1988, was settled and discontinued on February 22, 1996, after having been pending for almost seven years. One case against the US, which was brought by Mexico earlier this year and involves issues of consular notification in connection with certain Mexican nationals on "death row" in US prisons, is still pending before the ICJ.

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LAWSCAPE



Over a century ago, a British judge was late for court so he hailed a cab and told the driver to take him to the Royal Courts of Justice. "Where are they," asked the driver. "You mean to say that you don't know where the law courts are?" asked the judge incredulously. "Oh! The law courts," replied the driver. "But you said the courts of justice."

In an action being argued before a judge, a lawyer addressed the jury for a very long time. At one point, the judge could not help himself but to remark: "Sir, you've said that before." "Have I, my Lord?" replied the lawyer. "I'm very sorry. I quite forgot." "That's ok," replied the judge. "I forgive you as it was a very long time ago."

Many years ago, when the death penalty by hanging was still in vogue, a doctor was giving evidence before a judge who had already heard contrary evidence from other doctors. The judge asked the doctor if he was sure of his testimony in light of the evidence from the other doctors. "I am quite certain, my lord," said the doctor. "Doctors sometimes make mistakes," said the judge. "Lawyers do too, my lord," came the retort from the witness. "Ahh, but doctors' mistakes are buried," answered the judge. "That is true, my lord, but lawyers' mistakes frequently swing!"

One judge became frustrated with a lawyer's arguments and he pointed to one of his ears and then to the other and said: "what you are saying is just going in one ear and out the other." "My lord," replied the lawyer, "I do not doubt it. What is there to prevent it?"

"Your lordship," pleaded a witness. "You may or may not believe me but I have told the truth. I have been wedded to truth since infancy." "Yes," replied the judge, "But how long have you been a widower."

The word "Devil's Advocate" actually comes from Canon Law. In the Vatican, when arguments are being presented to have a person declared a saint, the Church appoints an official to find flaws in this evidence. This official is called the "Devil's Advocate" and has come to mean a person who espouses a cause just for the sake of argument.

LAW letter

Is it equality before law?

Contempt of court seems to be one of the hottest issue of the country at this moment. Two very high Govt. officials have been charged with contempt of court in the last one month- the Inspector General of Police (IGP) and the District and Sessions judge of Feni. In both the cases, the high court issued suo moto rule against the accused. According to the newspapers, the contempt charge against the IGP was brought for making some comment about the high court and a former additional judge. The Feni District judge has been charged because he did not meet with a judge of the high court while he was in Feni on a visit. In both the cases, the accused appeared in the court in person and sought 'unconditional apology'. I don't know what will ultimately happen with the cases, but this two cases raised some questions. So far I know, there is no law in our country defining 'contempt of court' So, what are the basis for drawing 'contempt of court' charges? Often we see contempt charge being issued against newspaper editors and reporters. Few month ago, editor of four leading daily newspaper of the country were charged with contempt of court. They were not allowed to sit in the courtroom during the proceeding. But the IG of police was allowed to do so. What should we imagine form this ?

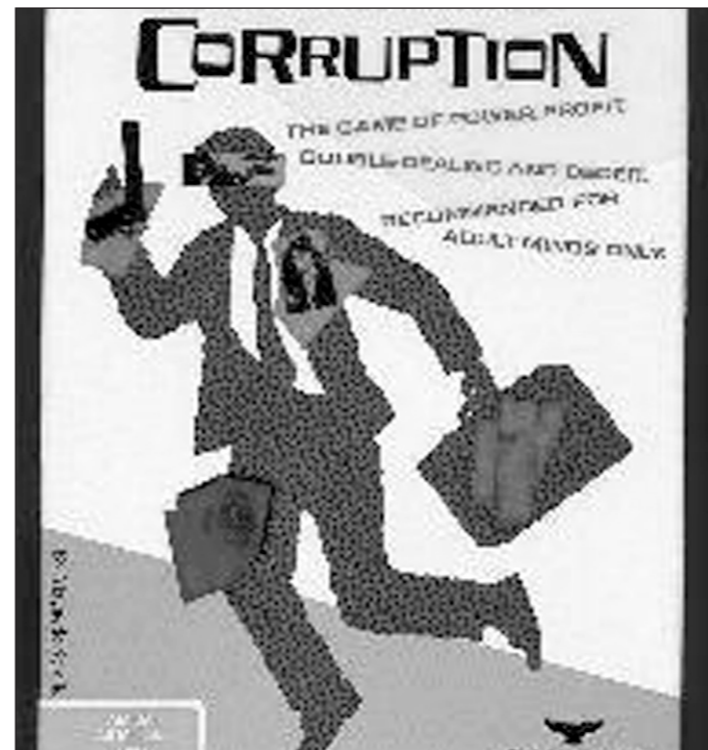
The Constitution says that all citizens are equal before law and are entitled to equal protection of law. It is evident from the above two cases? We are citizens of a democratic country where freedom of expression is guaranteed by Constitution. We need a comprehensive law on contempt of court immediately.

Taslima Ahmed Kakoli,
Govt. Staff Quarter, Shahjahanpur, Dhaka.

Waiting for an anti-graft body

Setting up an Independent Anti-Corruption Commission was one of the main agenda of the election manifesto of the present BNP led four party coalition government. The present government has already completed 2 years of its five year term. The government is saying that it is committed to fulfil all its election pledges. Do they really mean it?

The government set up a committee regarding the Anti-Corruption Commission. The Committee made recommendation for the Commission including its formation, function etc. The committee recommended that two ministers would be member of the six member commission which was subjected to widespread and vehement criticism. There are specific allegation of corruption against the concerned minister and those are now



pending in the court of law. It is not very hard to imagine how independent the commission would be when its members are charged with corruption. Government introduced a bill in the parliament in this connection which was withdrawn later. The bill has been again hold back for three months. This creates doubt as to the sincerity of the

govt in this regard. We do not want an independent (!) commission of this type. Please set up an 'Independent Anti-Corruption Commission' which will work independently, not for fulfilling election promise only. **Mahmudul Hasan,** Monipuripara, Farmgate, Dhaka.