

# NOTES AND COMMENTS

## Legal Status of the Gulf of Aqaba and the Strait of Tiran: From Customary International Law to the 1979 Egyptian-Israeli Peace Treaty

### I. INTRODUCTION

The juridical status of the Gulf of Aqaba (the Gulf) and the Strait of Tiran (the Strait) has been a subject of heated controversy between the Arab nations and Israel since the establishment of Israel as a state in 1948.<sup>1</sup> The only means by which ships may reach the Israeli port of Elath, located on the northern tip of the Gulf, is through the Gulf. Therefore, Israel needs navigational rights through the Gulf and the Strait for access to its port as well as to the Red Sea. Ships proceeding to or from Israel's port of Elath must cross into Egypt's territorial waters<sup>2</sup> when passing through the Strait of Tiran, and into the territorial waters of either Egypt, Jordan or Saudi Arabia when navigating through the Gulf.

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1. In 1947, the U.N. General Assembly declared the end of the Palestine Mandate as of August 1, 1948, and approved the partition of Palestine into a Jewish state and an Arab state. Resolution Adopted on the Report of the Ad Hoc Committee on the Palestinian Question, 2 U.N. GAOR Res. at 131, U.N. Doc. A/516 (1947). Murphy, *To Bring To An End the State of War: The Egyptian-Israeli Peace Treaty*, 12 VAND. J. TRANSNAT'L L. 897, 901 (1979) [hereinafter cited as Murphy]. For a brief summary of the events leading to the termination of the Palestine Mandate, see *id.* at 899-902. See also Reich, Silverburg & Stein, *The Middle East Process: Sisyphus Reexamined*, 4 SUFFOLK TRANSNAT'L L.J. 17 (1980) [hereinafter cited as Reich, Silverburg & Stein].

2. The term "territorial waters" refers to that bank of waters off the coastline of a state over which the state may exercise sovereignty. Although a state may regulate activity in its territorial waters, it must accord to foreign vessels the right of innocent passage. LAPIDOTH, *FREEDOM OF NAVIGATION WITH SPECIAL REFERENCE TO INTERNATIONAL WATERWAYS IN THE MIDDLE EAST* 46 (1975) [hereinafter cited as LAPIDOTH]. Innocent passage is a concept which has had various definitions. The notion of innocent passage embodies a balancing of coastal and maritime states' interests. See M. McDOUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 184-87 (1962) [hereinafter cited as McDOUGAL & BURKE]. The coastal states have a legitimate interest in using their territorial waters as a buffer zone to protect against attack, as well as an interest in protecting their fishing grounds and natural resources. The concern of the maritime states is that restrictive use of territorial waters may impede their ability to use the oceans for transportation and communication. *Id.* at 174-79. As nations have increasingly relied on the use of oceans for transport, the concept of innocent passage has changed to accommodate the concerns of maritime and coastal states that their interests be protected. For a more detailed discussion of the changing definition of innocent passage, see notes 95-96 *infra* and accompanying text. See also discussion § III.B & § IV.A *infra*.

As part of the effort to provide a satisfactory definition of innocent passage, the nations of the world have also attempted, for several decades, to decide upon an acceptable mile limit for the width of the territorial sea. The controversy over the width of the territorial sea is discussed at note 31 *infra* and accompanying text; text accompanying notes 176-188 *infra*; note 239 *infra* and accompanying text; text accompanying notes 254-255 *infra*.

Israel relies on unrestricted access to the waterways for trade as well as for protection of its own security interests.<sup>3</sup>

Israel, therefore, has argued consistently for the most lenient characterization, under international law, of both waterways, in order to ensure the freedom of navigation necessary to protect its economic and political interests.<sup>4</sup> Conversely, the Arab nations bordering the Gulf of Aqaba and Strait of Tiran<sup>5</sup> have historically resisted Israel's characterization of these waters as international,<sup>6</sup> asserting Arab sovereignty over the Gulf of Aqaba.<sup>7</sup> This claim of sovereignty, if legitimate, would allow those Arab nations to regulate passage of ships at will.<sup>8</sup> The Arab states claimed that the combination of the asserted territorial nature of the

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3. "The importance of reliable communications to the maintenance of world peace and security has been clearly demonstrated by the events in the Middle East. . . . The Egyptians have denied the right of Israeli shipping or of ships with cargoes bound to or from Israel to pass through the Straits of Tiran and the Suez Canal on the grounds that a state of war continues to exist between Egypt and Israel. This has been a source of controversy and conflict." Grandison & Meyer, *International Straits, Global Communications, and the Evolving Law of the Sea*, 8 VAND. J. TRANSNAT'L L. 393, 425 n.96 (1975) [hereinafter cited as Grandison & Meyer]. Bloomfield states that the likelihood of armed conflict in the Gulf area would be greatly increased were Israel not assured of permanent freedom of navigation in the Gulf. L. BLOOMFIELD, *EGYPT, ISRAEL AND THE GULF OF AQABA IN INTERNATIONAL LAW* 78 (1957) [hereinafter cited as BLOOMFIELD]. The commercial importance of the Gulf of Aqaba increased as the Suez Canal became too congested to accommodate the large amount of oil transport traffic. *Id.* at 79. In addition, the Gulf can accommodate a greater amount of traffic than can the Suez Canal, being physically less constricted than the Canal. *Id.*

Grandison and Meyer discuss the political and economic consequences of restrictions on passage through straits in particular. They assert that curtailment of free straits passage will affect the world economy, through increases in freight rates and consequent increases in the price of commodities and mineral resources, as well as national strategic interests, through impairing the movement of military aircraft and navies. Grandison & Meyer, *supra*, at 412-19. O'Connell also comments on the importance of free passage through straits, from the viewpoint of the naval powers: "The legal status of the principal avenues of access between the world's seas is . . . an intrinsic element in the global balance of deterrence, in the maintenance of equilibrium in the Middle East and in the retention of the ability to intervene decisively when national interests dictate the deployment of sea power." D. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 98 (1975) [hereinafter cited as O'CONNELL].

4. See generally Gross, *The Geneva Conference on the Law of the Sea and the Right of Innocent Passage Through the Gulf of Aqaba*, 53 AM. J. INT'L L. 564, 566 (1959) [hereinafter cited as Gross]; Statement of Israeli Delegate Mrs. Meir, 11 U.N. GAOR (666th plen. mtg.) at 1275-76, U.N. Doc. A/PV. 666 (1957).

5. Those nations are Egypt, Saudi Arabia and Jordan.

6. The term "international waters" has no precise legal meaning in international law. LAPIDOTH, *supra* note 2, at 9. Although many delegates present at the eleventh session of the General Assembly stated that the Gulf of Aqaba and Strait of Tiran were "international waterways," they failed to provide specific legal criteria for this characterization that would distinguish an "international waterway" from waterways that are normally associated with more restrictive passage regimes. See § II.B.3 *infra*.

7. See generally LAPIDOTH, *supra* note 2, at 56-61; Selak, *A Consideration of the Legal Status of the Gulf of Aqaba*, 52 AM. J. INT'L L. 660, 676-81 (1958) [hereinafter cited as Selak]; Question considered by the First Emergency Special Session of the General Assembly from 1 to 10 November 1956, Memorandum Registering the Saudi Arabian Government's Legal and Historical Rights in the Straits of Tiran and the Gulf of Aqaba, 11 U.N. GAOR Annex 2 (Agenda Item 66) at 77 (mimeograph), U.N. Doc. A/3575 (1957) [hereinafter cited as Memorandum].

8. See McDUGAL & BURKE, *supra* note 2, at 29-30.

Strait of Tiran<sup>9</sup> and the national or historic status of the Gulf entitled them to monitor closely passage of ships through the Strait, as well.<sup>10</sup>

Additionally, the Arab nations claimed to be in a continuing state of war with Israel.<sup>11</sup> This claim bolstered their argument that navigation through the disputed area was legitimately regulable by the Arab states<sup>12</sup> in spite of Israeli protest. Until recently, none of the three Arab littoral states had demonstrated a willingness to resolve the Arab-Israeli dispute.<sup>13</sup> With the signing of the Egyptian-Israeli Peace Treaty in 1979,<sup>14</sup> Egyptian President Anwar El Sadat effectively acknowledged the termination of hostilities between Egypt and Israel,<sup>15</sup> thereby relinquishing the Egyptian government's claim to regulate navi-

9. Because of the geographical characteristics of the Strait, only one channel is practicably navigable. Selak, *supra* note 7, at 660. Assuming that Egypt legally owns the Sinai Peninsula, LAPIDOTH, *supra* note 2, at 53 n.146, this channel, located less than a mile from the Sinai Peninsula, is clearly part of Egypt's territorial waters. Merani & Sterling, *Legal Consideration of the Israeli-Egyptian Dispute Involving the Right of Innocent Passage Through the Straits of Tiran*, 11 IND. J. INT'L L. 411, 416 (1971) [hereinafter cited as Merani & Sterling].

10. LAPIDOTH, *supra* note 2, at 56.

11. See Letter of Mohammed Mahmoud Mahgoub, Commissioner General of the Arab Boycott of Israel, August 31, 1975, to National Association of Securities Dealers, Inc., HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON INTERSTATE AND FOREIGN COMM. 94TH CONG., 2D SESS., REPORT ON THE ARAB BOYCOTT AND AMERICAN BUSINESS 86 (Subcomm. Print 1976).

12. The ability of one nation to regulate passage through straits and territorial waters is, inter alia, dependent on whether the nation is at war. During times of peace, a nation must abide by the rules of custom or treaties, which generally restrict a nation's authority to suspend passage in its territorial waters. However, during times of war, a nation has greater leeway to suspend passage of ships through its waterways, especially if that nation is itself an active belligerent. Cf. 1 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 518 (2d ed. 1947) ("[A] State enjoys the right to prevent as well as regulate the passage through the marginal sea of a belligerent ship . . . . The right of so-called innocent passage vanishes whenever the conduct of a ship is harmful to the territorial sovereign.") [hereinafter cited as HYDE]. Although authorities do not agree on the extent to which a state of war changes peacetime rules of international law, one accepted theory is that the overriding security interest of a belligerent nation justifies the wilful suspension of foreign shipping. For a discussion of regulation of passage through international waterways in time of war and peace, see generally Baxter, *Passage of Ships Through International Waters in Time of War*, 31 BRIT. Y.B. INT'L L. 187, 192-208 (1954) [hereinafter cited as Baxter].

13. Serious Arab-Israeli conflict began with the competing demands for Palestine at the turn of the twentieth century. The Jews sought to establish a homeland in Palestine, while the Arabs sought to establish independent states in that area. During the 1920s and 1930s, in response to the Balfour Declaration which the Jews interpreted as favoring a Jewish national homeland, fighting broke out in Palestine. The hostility continued throughout the 1940s, even after Israel attained statehood. Both Israel and the Arab nations initiated fighting after 1948. Egypt blocked passage through the Suez Canal, and several years later, Israel launched an attack in the Sinai. For general background, see Murphy, *supra* note 1, at 899-907. See also D. BEN-GURION, ISRAEL: YEARS OF CHALLENGE (1963); R. DEVORE, THE ARAB-ISRAELI CONFLICT (1976); THE ARAB-ISRAELI CONFLICT: READINGS (J. MOORE ed. 1974).

14. Treaty of Peace, March 26, 1979, Egypt-Israel, reprinted in 18 I.L.M. 362 (1979) [hereinafter cited as Treaty of Peace].

15. International law recognizes that the signing of a Peace Treaty formally ends a state of war between the signatories. Oppenheim states that "unless the parties stipulate otherwise, the effect of a treaty of peace is that conditions remain as at the conclusion of peace" and "a treaty of peace is

gation as a belligerent<sup>16</sup> and ending the Arab states' solidarity on the issue. However, Jordan and Saudi Arabia, which did not participate in the negotiations leading to the signing of the Treaty,<sup>17</sup> evidenced no desire to change the position to which they had adhered prior to the Treaty's ratification.

This Comment traces the development of the problematic characterization of the Gulf of Aqaba and the Strait of Tiran, from customary international law to the Egyptian-Israeli Peace Treaty. The author concentrates on how the changing characterization affected the evolution of navigation regimes<sup>18</sup> for these waterways through the 1958 Convention on the Territorial Sea and the Contiguous Zone,<sup>19</sup> the proposed United Nations Law of the Sea Treaty,<sup>20</sup> and finally the Treaty of Peace between Egypt and Israel.<sup>21</sup> The discussion focuses, in conclusion, on the rights and duties of the signatories to the Egyptian-Israeli Peace Treaty, and potential problems raised by the fact that Jordan and Saudi Arabia,

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considered a final settlement of war." 2 L. OPPENHEIM, INTERNATIONAL LAW 611 (H. Lauterpacht ed. 7th ed. 1952) [hereinafter cited as 2 OPPENHEIM].

16. The signing of the Peace Treaty formally ended the state of war between Egypt and Israel, according to international law. *Id.* Therefore, the argument that Egypt could regulate passage through the waters as a belligerent was no longer supportable under general international law principles. For a full discussion, see § II.A.3 *infra*. Egypt also gave up any claim to the waters as national waters by recognizing that the Gulf and Strait were international waterways. Treaty of Peace, *supra* note 14, art. V.

17. U.S. President Jimmy Carter, while in the Middle East early in January 1978, was unable to persuade other Arab nations to participate with Egypt in negotiations for peace. Reich, Silverburg & Stein, *supra* note 1, at 31. After the parties concluded the Framework for Peace, Secretary of State Cyrus Vance again attempted, albeit unsuccessfully, to garner the support of Saudi Arabia and Jordan. *Id.* at 39.

The Arab nations reacted unfavorably to the signing of the Treaty of Peace, and whether Saudi Arabia or Jordan can be convinced in the near future to participate in further peace negotiations is questionable. Aviel, *Economic Implications of the Peace Treaty Between Egypt and Israel*, 12 CASE W. RES. J. INT'L L. 57, 61-62, 70 (1980).

18. The author has limited the scope of this Comment to the laws that regulate the passage of commercial vessels in times of peace. During a state of war, a belligerent nation may deny passage to foreign ships without violating peacetime laws for regulation of maritime passage. See HYDE, *supra* note 12, at 518. The Arab nations attempted to justify impediment to Israeli shipping, arguing that a state of war existed between the nations. See § II.A.3 *infra*. However, although authorities express different opinions on the effect of an Armistice Agreement, this Comment assumes that the Egyptian-Israeli General Armistice Agreement of 1949 ended a state of belligerency at least between the parties, and that, therefore, the parties were bound to respect peacetime law. See notes 78-89 *infra* and accompanying text.

In general, the passage regime for warships through straits is similar to the passage regime for merchant ships. However, the fact that warships are equipped to perform belligerent acts may enable the coastal state to more closely regulate warship passage through those waters. For a discussion of the passage of warships through straits in times of peace and in times of war, see Baxter, *supra* note 12. For a discussion of the law regarding passage of warships through territorial waters outside of straits, see McDougal & Burke, *supra* note 2, at 216-26.

19. Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as Convention on the Territorial Sea].

20. Informal Composite Negotiating Text, Official Records of the Third United Nations Conference on the Law of the Sea, Draft Convention on the Law of the Sea, U.N. Doc. A/CONF.62/WP.10/Rev. 3 (1980) [hereinafter cited as UNCLOS Draft Convention].

21. Treaty of Peace, *supra* note 14.

which did not sign the Peace Treaty, will be bound by a different scheme, embodied in either the 1958 Convention or the proposed Law of the Sea Treaty.

## II. THE GULF OF AQABA AND THE STRAIT OF TIRAN PRIOR TO THE 1958 TERRITORIAL SEA CONVENTION

### A. *The Gulf of Aqaba*

The Gulf of Aqaba, bordered by the states of Israel, Jordan, Saudi Arabia and Egypt, is approximately 100 miles in length. Its width varies from three miles at the narrowest point to seventeen miles at the widest point.<sup>22</sup> The only navigable entrance to the Gulf is the Strait of Tiran, which is located at the southern tip of the Gulf, between Tiran Island and the Sinai Peninsula. Two ports — Elath (Israel) and Aqaba (Jordan) — are located at the northern tip of the Gulf.

Several incidents of Arab hostility toward Israel in the Gulf and in the Suez Canal during the 1950s<sup>23</sup> prompted a debate between Israel and the Arab states over the legal status of, and passage regime in, the Gulf of Aqaba.<sup>24</sup> The major forums for the presentation of Israeli and Arab views were the Security Council in 1954,<sup>25</sup> the International Law Commission in 1956,<sup>26</sup> and the U.N. General

22. Selak, *supra* note 7, at 660. Kennedy states that the breadth of the Gulf at its widest point is 14½ miles. A Brief Geographical and Hydrographical Study of Bays and Estuaries, the Coasts of Which Belong to Different States, United Nations Conference on the Law of the Sea, U.N. Doc. A/CONF.13/15 (1957) [hereinafter cited as Kennedy]. The two and a half mile difference is not of critical importance in the context of the discussion which follows later in this Comment.

23. Over the course of several years, the Egyptian government persisted in impeding the passage of ships bound for the Israeli port of Elath. The Egyptians denied access to a British ship in 1951, and fired upon Danish, Greek, American, Italian and British ships in 1953, 1954 and 1955. BLOOMFIELD, *supra* note 3, at 11-12. From 1955 to 1958, as part of its blockade against Israel, the Egyptian government insisted that vessels bound for the Gulf of Aqaba secure a permit in anticipation of entering the Gulf. Merani & Sterling, *supra* note 9, at 414.

24. Gross, *supra* note 4, at 564.

25. *Id.*

In 1951, after learning that Egypt was restricting movement of Israeli bound ships through the Suez Canal, the U.N. Security Council passed a resolution calling upon Egypt to curtail what it considered to be acts of aggression, in contravention of the Egyptian-Israeli Armistice Agreement of 1949. Resolution on the Palestine Question Adopted at the 558th Meeting of the Security Council on 1 September 1951, 6 U.N. SCOR (558th mtg.) at 2, U.N. Doc. S/2322 (1951). In spite of the resolution, Egypt continued to restrict movement of ships through the Suez Canal and the Gulf of Aqaba. In 1954, the Israeli government raised the problem of Egypt's belligerent acts before the Security Council. Letter dated 28 January 1954 from the representative of Israel to the President of the Security Council, 9 U.N. SCOR Supp. (Jan.-Mar. 1954) at 1, U.N. Doc. S/3168 (1954). It urged the Security Council to act with reference to what the Israeli government considered a violation of the Security Council Resolution of September 1, 1951, the Egyptian-Israeli General Armistice Agreement of 1949, and international law (freedom of navigation). *Id.* at 1-3; BLOOMFIELD, *supra* note 3, at 41-47.

26. Gross, *supra* note 4, at 564. In 1947, the U.N. General Assembly established the International Law Commission. C. COLOMBOS, INTERNATIONAL LAW OF THE SEA 22 (6th ed. 1967) [hereinafter cited as COLOMBOS]. The purpose of the Commission was to study various problems of international law and, based on its study, recommend specific areas of international law that should be codified. *Id.* For

Assembly in 1956-57.<sup>27</sup> Throughout the 1950s, the Arab nations presented several arguments to support their legal right to regulate passage of ships through the Gulf, including: the theory of the Gulf as internal waters; the historic nature of the bay; and the existence of a state of war with Israel. Israel, with the support of other major world powers, countered that the Arab claims were not legally supportable, asserting a superior right to enjoy unimpeded access to the Gulf.

### 1. The Gulf of Aqaba as Internal Waters

Under customary international law,<sup>28</sup> a body of water with the geography of the Gulf of Aqaba is non-territorial.<sup>29</sup> International law recognizes a gulf bordered by more than one littoral state as being part of the high seas.<sup>30</sup> With the

information on the International Law Commission, see generally H. BRIGGS, *THE INTERNATIONAL LAW COMMISSION* (1965).

One of the studies which the Commission undertook involved the law of the high seas and territorial waters. COLOMBOS, *supra*, at 22. Pursuant to General Assembly Resolution 899 (IX), the Commission prepared, after eight sessions, a final report on the Law of the Sea. Report of the International Law Commission Covering the Work of its Eighth Session, 23 April-4 July 1956, 11 U.N. GAOR Supp. (No. 9) at 1, U.N. Doc. A/3159 (1956) [hereinafter cited as Report of the I.L.C., Eighth Session]. The Commission finalized its study in proposed articles concerning the law of the sea. The 1958 Geneva Conference on the Law of the Sea used the Commission's Draft Articles as its negotiating text. Slonim, *The Right of Innocent Passage and the 1958 Conference on the Law of the Sea*, 5 COLUM. J. TRANSNAT'L L. 96, 98 (1966) [hereinafter cited as Slonim].

27. Gross, *supra* note 4, at 564. In the fall of 1956, the Israeli government attacked Egyptian troops located in the Sinai Peninsula. BLOOMFIELD, *supra* note 3, at 144. Within one week, Israel had gained control of the Sinai and the Gulf of Aqaba, and had ended the blockade of Elath. *Id.* at 148. Although by late January 1957 Israel had withdrawn from the Sinai Peninsula pursuant to United Nations Resolutions calling for the withdrawal, the Israelis still retained control of the Sharm-el-Sheikh area of the Sinai. *Id.* at 151. In February of 1957, the United Nations passed a resolution calling for complete Israeli withdrawal from the Sinai. G.A. Res. 1124 (XI), 11 U.N. GAOR Annex 2 (Agenda Item 66) at 76, U.N. Doc. A/RES/460 (1957); G.A. Res. 1125 (XI), 11 U.N. GAOR Annex 2 (Agenda Item 66) at 76, U.N. Doc. A/RES/461 (1957); BLOOMFIELD, *supra* note 3, at 151. At the eleventh session of the General Assembly, the Israeli Minister for Foreign Affairs, Golda Meir, announced that Israel was prepared to withdraw completely from the Sinai Peninsula, on the condition that Egypt refrain from its acts of aggression in the Gulf of Aqaba, which the Israeli government considered an international waterway open to free and innocent passage. See 11 U.N. GAOR (666th plen. mtg.) at 1275, para. 1; 1276, para. 11, U.N. Doc. A/PV.666 (1957).

28. For purposes of this Comment, the term "customary international law" or "custom" refers to the body of international law that is not yet codified in treaty form. For a discussion of customary international law, see generally A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971) [hereinafter cited as D'AMATO].

29. 1 L. OPPENHEIM, *INTERNATIONAL LAW* 508 (H. Lauterpacht ed. 8th ed. 1955) [hereinafter cited as 1 OPPENHEIM]. The term "non-territorial" in this Comment refers to those waters which are not subject to the claims of any nation. These seas are open seas, or high seas. The term has significance in international law when used to define the extent to which a state can regulate the passage of foreign ships, i.e., the coastal state has no authority to restrict the passage of ships through seas outside of its territorial waters. COLOMBOS, *supra* note 26, at 47.

30. 1 OPPENHEIM, *supra* note 29, at 508. The open sea is beyond the territorial competence of any state. COLOMBOS, *supra* note 26, at 47.

exception of the territorial seas claimed legitimately by the bordering states,<sup>31</sup> such part of the high seas is "in time of peace and war open to vessels of all nations, including men-of-war."<sup>32</sup>

However, authorities recognize that under customary international law, a state whose borders surround a bay may claim complete sovereignty to the bay by asserting that the waters enclosed by its borders are internal waters.<sup>33</sup> Under international law, internal waters are normally those areas of water that are immediately adjacent to a nation's coastlines.<sup>34</sup> International law allows a single nation to claim a bay as its internal waters if the nation's borders totally encompass the water claimed, and if the nation's borders surround the entrance to those waters from an area of high seas.<sup>35</sup> A nation's legitimate claims to internal waters enables it to arbitrarily deny access to foreign ships.<sup>36</sup> No set criteria for denial of passage are adhered to by nations.<sup>37</sup>

Thus, one of the Arab nations' major justifications for interfering with shipping in the Gulf was that the Gulf constituted internal waters, which the Arabs could, therefore, freely regulate.<sup>38</sup> However, under customary international law, the Arab claim was not well-founded. The case of a bay surrounded by one state is distinguishable from that of a bay bordered by more than one nation.<sup>39</sup> In the latter instance, the enclosed waters do not constitute internal waters.<sup>40</sup> The Arabs attempted to overcome this distinction by arguing that all three littoral states came under one Arab nation. However, the fact that the peoples of the

31. Notwithstanding the principle of the freedom of the seas, there are certain portions of the sea along a State's coasts which are universally considered as a prolongation of its territory and over which its jurisdiction is recognized. . . . *Territorial waters* are those included within a definite maritime zone or belt adjacent to a State's territory.

COLOMBOS, *supra* note 26, at 87. Most states claimed a maximum breadth of three miles as the legal limit of the territorial sea. However, both Egypt and Saudi Arabia claimed six miles of territorial sea in the Gulf, and subsequently revised their claims to encompass an additional six miles each, thereby enlarging the breadth of their territorial seas to 12 miles. Gross, *Passage Through the Strait of Tiran and in the Gulf of Aqaba*, 33 LAW & CONTEMP. PROBS. 125, 141 (1968); LAPIDOTH, *supra* note 2, at 55; Alexander, *Indices of National Interest in the Oceans*, 1 OCEAN DEV. & INT'L L.J. 21, 44-45 (1973).

32. 1 OPPENHEIM, *supra* note 29, at 508-09.

33. See MCDUGAL & BURKE, *supra* note 2, at 92-93.

34. *Id.* at 89. The authors note that ports and "indentations of the coastline" are examples of internal waters. *Id.*

35. Commentary (2) to Draft Article 26, Report of the I.L.C., Eighth Session, *supra* note 26, at 23-24; LAPIDOTH, *supra* note 2, at 21.

36. See MCDUGAL & BURKE, *supra* note 2, at 73, 93, 305.

37. See *id.* at 155-57.

38. Statement of Saudi Arabian delegate Mr. Shukairy, 12 U.N. GAOR (697th plen. mtg.) at 233, para. 92, U.N. Doc. A/PV. 697 (1957).

39. COLOMBOS, *supra* note 26, at 191-92.

40. See *id.* Colombos states that gulfs which are bordered by more than one nation cannot be claimed as internal seas. Rather, each state may assert sovereignty over its territorial waters. The rule applies with respect to land-locked gulfs and to gulfs, surrounded by more than one state, which have an entrance to the high seas. *Id.*; LAPIDOTH, *supra* note 2, at 57.

three littoral Arab nations are all Muslims does not give single nation status to a group of three independent states.<sup>41</sup> Thus, they could not claim the single nation exception to characterize the Gulf as internal waters.

## 2. The Gulf of Aqaba as Historic Waters

The Arab nations posed an alternative argument to the internal waters concept: Even if the Gulf could not be defined as internal waters, because of the presence of more than one littoral state, the same result of total Arab sovereignty could be achieved if the Gulf were classified as a historic bay.<sup>42</sup> International law recognizes the historic character of a bay when the nations of the world acquiesce in the claimant nation's exclusive use of a body of water over a long period of time.<sup>43</sup>

The Arab nations seized upon this exception to justify the denial of free passage by Israel through the Gulf.<sup>44</sup> The Saudi Arabian government justified Arab aggression in the Gulf area<sup>45</sup> toward ships trading with Israel by arguing that the Gulf of Aqaba constituted national, historic waters, having been under Arab domination for centuries.<sup>46</sup> Saudi Arabia thus attempted to reject any

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41. LAPIDOTH, *supra* note 2, at 57.

42. Gross, *supra* note 4, at 566-67; LAPIDOTH, *supra* note 2, at 58.

Some claims to comprehensive authority over . . . [bays and gulfs] . . . rest not on any contention about the relative width or depth of the area enclosed but on historical title. Some bays have been asserted to be a part of internal waters, irrespective of the width of the entrance, on the ground that the coastal state has always so regarded such areas and other states have acquiesced in the claim.

JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 383-437 (1927), *cited in* McDUGAL & BURKE, *supra* note 2, at 312. As "historic" waters, the Arab nations could regulate passage as completely as they might had their claim under the internal waters theory been successful.

43. *Juridical Regime of Historic Waters, including Historic Bays*, prepared by the Secretariat, United Nations, Yearbook of the International Law Commission (1962), vol. 2, *cited in* COLOMBOS, *supra* note 26, at 181.

44. *See* note 42 *supra*.

45. *See* BLOOMFIELD, *supra* note 3, at 11-12; *see* MERANI & STERLING, *supra* note 9, at 414.

46. In a letter of April 12, 1957 to the Secretary-General of the United Nations, the Saudi Arabian permanent representative Abdullah Al-Khayyal set forth the claims of Saudi Arabia to the Gulf as historic, territorial waters.

The whole width of the Gulf entrance does not exceed 9 miles, which is 12 miles shorter than in those gulfs treated by international law as international waterways. . . . Furthermore, the territorial character of the Gulf, its waters, entrance and straits, was affirmed by the Treaty of Constantinople of 1888 concerning the Suez Canal . . . . The records of the negotiations leading to the said Treaty clearly reveal that the Gulf of Aqaba and its straits were intended to be excluded from the proposed freedom of international navigation in the Suez Canal, thus acknowledging that the waters of the Gulf, its entrance and straits, are territorial and implying no freedom of international navigation through them.

On the basis of the *status quo*, as well as on the principles of law, the Gulf of Aqaba cannot, therefore, be considered an open waterway.

Memorandum, *supra* note 7, at 4. Gross finds this assertion to have no basis, and finds that any argument that could be based on the Suez Canal Convention would be supportive of freedom of navigation. Gross, *supra* note 4, at 567-68.



possibility that the Gulf could be considered an international waterway. The Saudi representative to the U.N. General Assembly, Ahmad Shukairy, in a statement made during the twelfth session of the General Assembly,<sup>47</sup> argued that the Gulf of Aqaba, being a national inland waterway, was not governed by the normal international rules for passage of ships through bays and gulfs.

The basis for the Saudi Arabian characterization of the Gulf as *mare clausum*<sup>48</sup> is the *Fonseca* case, decided in 1917.<sup>49</sup> The *Fonseca* case arose out of a controversy between the Republic of El Salvador and the Republic of Nicaragua. The government of Nicaragua had entered into the Bryan-Chamorro Treaty with the United States.<sup>50</sup> Nicaragua, by one of the provisions of the Treaty, granted a portion of the Gulf of Fonseca to the United States for the establishment of a naval base.<sup>51</sup> El Salvador complained that the Treaty violated, in this respect, its rights of common ownership in the Gulf of Fonseca.<sup>52</sup>

The Salvadorian argument was premised on the contention that El Salvador, along with Honduras and Nicaragua, was one of the three joint owners of the Gulf of Fonseca. In support of the common ownership theory, El Salvador argued that, from the time of the discovery of the Gulf of Fonseca in the sixteenth century, Spain had exercised complete sovereignty over the water.<sup>53</sup> Spain's sovereign rights passed to the Federal Republic of Central America when the republics were emancipated.<sup>54</sup> El Salvador, Honduras and Nicaragua were the only three republics that used the water for fishing and other purposes.<sup>55</sup>

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During the twelfth session of the General Assembly that year, the Saudi Arabian government asserted that the Gulf was an historic gulf:

[T]he Gulf of Aqaba is of the category of historical gulfs that fall outside the sphere of international law. The Gulf is the historical route to the holy places in Mecca. Pilgrims from different Muslim countries have been streaming through the Gulf, year after year, for fourteen centuries. Ever since, the Gulf has been an exclusively Arab route under Arab sovereignty. It is due to this undisputed fact that not a single international authority makes any mention whatsoever of the Gulf as an international waterway open for international navigation.

Statement of Saudi Arabian delegate Mr. Shukairy, 12 U.N. GAOR (697th plen. mtg.) at 233, para. 93, U.N. Doc. A/PV.697 (1957). See also Selak, *supra* note 7, at 679-80. But see LAPIDOTH, *supra* note 2, at 58-61. Lapidoth disagrees and asserts that the argument has no substantive support in international law. *Id.* at 59-61.

47. Statement of Saudi Arabian delegate Mr. Shukairy, 12 U.N. GAOR (697th plen. mtg.) at 233, para. 93, U.N. Doc. A/PV.697 (1957).

48. *Mare clausum*, in international law, refers to closed seas. See I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 238 (3d ed. 1979).

49. *The Republic of El Salvador v. The Republic of Nicaragua*, 11 AM. J. INT'L L. 674 (Cent. Am. Ct. Just. 1917). The Gulf of Fonseca is bounded by the territories of Nicaragua, Honduras and El Salvador. The entrance, which is located between the mainland of El Salvador and the coast of Nicaragua, is less than ten miles in breadth. *Id.* at 678-80.

50. *Id.* at 674.

51. *Id.* at 675.

52. *Id.* at 677.

53. *Id.*

54. *Id.*

55. *Id.*

and, therefore, when the federation was dissolved, the three littoral states continued to own the waters in common.<sup>56</sup>

The Central American Court of Justice unanimously affirmed the argument of El Salvador and found that the Gulf was a historic bay having the characteristics of a closed sea.<sup>57</sup> The Court based its decision on several factors. First, El Salvador had demonstrated "immemorial" possession by establishing exclusive ownership by Spain and its successors.<sup>58</sup> Second, other nations had acquiesced in this peaceful and continuous ownership.<sup>59</sup> Third, the Court found that the strategic location of the Gulf of Fonseca on the Pacific coast of Central America was of paramount importance for the defense of the three countries.<sup>60</sup> In addition, because of its geographical location, the nations relied on access to the Gulf of Fonseca for trade.<sup>61</sup> Thus, the Court stated that it was an "indispensable necessity that those States should possess the Gulf as fully as required by those primordial interests and the interest of national defense."<sup>62</sup>

Arguably, the Gulf of Aqaba could be analogized, at least geographically, to the Gulf of Fonseca, and, thus, could be considered in the class of such "historic" gulfs.<sup>63</sup> However, while the geography of the Gulf of Fonseca is similar to that of the Gulf of Aqaba,<sup>64</sup> the weight of authority tends to disregard the validity of Saudi Arabia's claims.<sup>65</sup> Although Saudi Arabia, Egypt and Jordan may be successors of the Ottoman Empire, which controlled the Gulf from 1517 to 1918, the Ottoman Empire evidenced no peaceful and continuous possession of the Gulf.<sup>66</sup> Historical data refute any suggestion that the littoral states used the Gulf to the exclusion of other nations.<sup>67</sup> In fact, the data demonstrate that, because of the Gulf's geographical and natural constraints, those states were precluded

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56. *Id.*

57. *Id.* at 693.

58. *Id.* at 700.

59. *Id.* at 701.

60. *Id.* at 705.

61. *Id.* at 704-05.

62. *Id.* at 705.

63. Hammad, *The Right of Passage in the Gulf of Aqaba*, 15 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 118, 131-32 (1959).

64. Selak, *supra* note 7, at 692.

65. Gross, *Passage Through the Strait of Tiran and in the Gulf of Aqaba*, 33 LAW & CONTEMP. PROBS. 125, 127 (1968). See also Melamid, *Legal Status of the Gulf of Aqaba*, 53 AM. J. INT'L L. 412-13 (1959) [hereinafter cited as Melamid]. Melamid states that there has been an "absence of any defined sovereignty in the Gulf" and that "[r]esearch supports the view that navigation rights have definitely been established in the Gulf of Aqaba by nations other than the Arab States." *Id.* at 413.

66. See note 65 *supra*.

67. Melamid, *supra* note 65, at 413. For example, until 1950, few Arab ships had passed through the Gulf. On the other hand, in 1917 the British government began to supply its troops by use of the Gulf. *Id.* at 412-13.

from relying to any extent on regular use of the Gulf for commercial ventures.<sup>68</sup> Furthermore, nations have not universally acquiesced in the notion of the Gulf as historic inland waters.<sup>69</sup>

Although the criteria of the *Fonseca* decision were not met with respect to the Gulf of Aqaba, international law may uphold an agreement among bordering gulf states to characterize a gulf as a closed sea.<sup>70</sup> However, no known agreement to this effect was ever reached by the Arab states,<sup>71</sup> and the presence of Israel on the Gulf precludes, in the historical context of Arab-Israeli conflict, the possibility of a four-nation agreement.<sup>72</sup>

68. Because of the strong northerly winds, passage through the Gulf was extremely difficult until the invention of steam navigation. The British were the first, in 1917, to use steam navigation in the Gulf. Melamid, *supra* note 65, at 412.

69. Gross, *supra* note 4, at 570; LAPIDOTH, *supra* note 2, at 60.

70. See News Conference Statements by Secretary of State Dulles, February 19, 1957, U.S. Policy in the Middle East, 36 DEP'T ST. BULL. 400 (1957). Dulles stated that "[i]f the four littoral states which have boundaries upon the Gulf should all agree that it should be closed, then it could be closed." *Id.* at 404. Hyde has also stated that:

[w]hen the geographical relationship of a bay to the adjacent or enveloping land is such that the sovereign of the latter, if a single State, might not unlawfully claim the waters as a part of its territory, it is not apparent why a like privilege should be denied to two or more States to which such land belongs, at least if they are so agreed.

HYDE, *supra* note 12, at 475.

71. Merani & Sterling, *supra* note 9, at 423-24 n.30.

72. *But see id.* at 423. Merani and Sterling assert that Israel's presence on the Gulf may be illegitimate. If so, international practice may accord the *mare clausum* argument greater weight. One of Saudi Arabia's principal assertions was that Israel's presence on the Gulf was illegal. See Statement of Saudi Arabian delegate Mr. Shukairy, 12 U.N. GAOR (697th plen. mtg.) at 233, paras. 95-96, U.N. Doc. A/PV.697 (1957). Authorities have expressed different views on the subject.

After the General Assembly approved the partition of Palestine, thereby allowing Israel to establish itself as a nation, Israel advanced to the southern Negev and acquired the area of Bir Qattar. Jordan had controlled that part of the Negev, in which Elath was located, until the Israelis advanced into the area in 1949. Merani & Sterling, *supra* note 9, at 420. Although the U.N. partition resolution allocated that land to Israel, Israel's advance into the Negev occurred after the signing of the Egyptian-Israeli Armistice Agreement of 1949, which provided that neither party was to advance militarily beyond the positions held at the time the Agreement was signed. Egyptian-Israeli General Armistice Agreement, 4 U.N. SCOR Supp. (Spec. Supp. 3) art. IV, at 1, U.N. Doc. S/1264/Corr. 1 (1949) [hereinafter cited as General Armistice Agreement]; Merani & Sterling, *supra* note 9, at 421. Since Israel was not in possession of that territory prior to signing the Armistice Agreement, one argument was that its military occupation of the southern Negev was violative of the Agreement and thus illegal. Merani & Sterling, *supra* note 9, at 421. *But see* LAPIDOTH, *supra* note 2, at 64-65. Lapidoth states that the Armistice Agreement had no relevance to Israel's advance into the Negev, because only Jordan had troops located in the area. See also Selak, *supra* note 7, at 680.

Some writers argue that Israel's presence on the Gulf is illegal since military occupation of a belligerent will not establish, under international law, legal sovereignty to territory. Merani & Sterling, *supra* note 9, at 422-23. Wright states that the "boundaries of Israel remain undetermined." Wright, *Legal Aspects of the Middle East Situation*, 33 LAW & CONTEMP. PROBS. 5, 17 (1968). Expressing the contrary view, Lapidoth states that the argument of

lack of sovereignty . . . loses its relevance by the fact that . . . the coast of Eilat does not differ from any other part of Israel's territory. Despite the long refusal of the Arab States to conclude

Finally, the Arab nations, by their own conduct, have undermined the claim that the Gulf qualifies as an historic bay. All three Arab nations have claimed a limit of territorial sea. This claim is further evidence that the Arab nations themselves regard the Gulf as part of the high seas, rather than as part of the closed seas subject to their varying claims of territorial waters.<sup>73</sup>

Thus, the Saudi Arabian position, based on international legal standards, was weak. The Gulf was, under international legal concepts, part of the high seas, open to all nations for free passage in time of peace or war.<sup>74</sup>

### 3. Claim of a State of Belligerency

One additional problem arose in connection with passage of ships through the Gulf. The Arab nations, as an alternative to the Saudi Arabian *mare clausum* argument, contested Israel's right to navigate through their territorial waters on the grounds that a state of war still existed between Israel and the Arab nations.<sup>75</sup> When Israel urged the Security Council in 1954 to condemn Egypt's aggression in the Gulf,<sup>76</sup> the Egyptian government asserted that because of a continuing state of war between Egypt and Israel, Egypt was entitled to take measures to prevent the passage of belligerent ships.<sup>77</sup> The Egyptian government argued that the Egyptian-Israeli General Armistice Agreement<sup>78</sup> had not legally ended the state of war between the two nations.<sup>79</sup> The Arabs renewed this argument during the eleventh session of the General Assembly.<sup>80</sup>

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peace treaties with Israel and to recognize it, it cannot be denied that Israel exists as a sovereign State, that it has been recognized by the great majority of States.

LAPIDOTH, *supra* note 2, at 63-64.

73. Gross, *Passage Through the Strait of Tiran and in the Gulf of Aqaba*, 33 LAW & CONTEMP. PROBS. 125, 128 (1968). Israel also claims six miles of territorial sea. Alexander, *Indices of National Interest in the Oceans*, 1 OCEAN DEV. & INT'L L.J. 21, 43 (1973).

74. See text accompanying notes 28-32 *supra*.

75. LAPIDOTH, *supra* note 2, at 61-62; Selak, *supra* note 7, at 667-68.

76. Gross, *supra* note 4, at 564.

77. Letter dated 28 January 1954 from the representative of Israel to the President of the Security Council, 9 U.N. SCOR Supp. (Jan.-Mar. 1954), at 4, U.N. Doc. S/3168 (1954); Gross, *supra* note 4, at 565 n.7.

78. General Armistice Agreement, *supra* note 72. The parties agreed, with a "view to promoting the return of permanent peace in Palestine," to refrain from use of military force in Palestine, to observe the armistice demarcation lines provided for in the Agreement and to withdraw forces from designated areas. *Id.* arts. 1-6.

79. Mr. Azmi, representative of Egypt, quoted United States decisions and two international authorities for the proposition that an armistice agreement does not end a state of war. He stated that "[a]n armistice is a provisional suspension of hostilities formally agreed upon between belligerents. . . . An Armistice, an agreement between belligerents, has never been considered as putting an end to a state of war or as creating a state of peace." 9 U.N. SCOR (661st mtg.) at 9-15, U.N. Doc. S/PV.661 (1954).

80. Cf. 11 U.N. GAOR (666th plen. mtg.) at 1278, para. 36; 1280, para. 58, U.N. Doc. A/PV.666 (1957) (The United States delegation stated that once Israel had completed its withdrawal from the Sinai, there would be no basis for Egypt to assert belligerent rights, and the French delegate stated that none of the Gulf states could assert a state of war.).

Had the Arab nations successfully claimed an ongoing state of war with Israel, they would have had a legitimate legal basis to deny access to ships navigating toward the belligerent state of Israel. The rules of customary international law generally allow a littoral state to suspend passage of belligerent ships in order to protect itself.<sup>81</sup> As one writer has stated, it would be "altogether unrealistic to suppose that a belligerent littoral State is required to allow passage to enemy warships and other vessels bent on hostile missions. . . . The practices followed by States would seem to indicate that the recognition of any right of passage through international waterways for enemy warships when the littoral State is a belligerent would be altogether unthinkable."<sup>82</sup>

However, whether an armistice agreement ends a state of war is a disputed principal of international law. Some international experts agree that a state of war exists even subsequent to the signing of an armistice agreement.<sup>83</sup> Nevertheless, another supportable position with respect to the particular Egypt-Israel conflict is that "[n]o state of war existed or exists between Egypt and Israel by virtue of the fact that both are members of the United Nations Organization and such a war is . . . incompatible with the obligations and duties of member States."<sup>84</sup>

The opinions expressed by various nations before the General Assembly in 1957 seemed to further weaken the Arab position, since the majority sided with those theorists who would reject any contention of continuing Egypt-Israel war. The U.S. delegate, with whom the British representative concurred,<sup>85</sup> expressed the view that neither Israel nor Egypt could legally assert any belligerent rights.<sup>86</sup> The representative of France, Mr. Georges-Picot, affirmed the U.S. position by stating that no state of war existed among any of the Gulf states.<sup>87</sup> Furthermore, the Secretary-General as well, in his Report of January 24, 1957, endorsed the

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81. See H. SMITH, *THE LAW AND CUSTOM OF THE SEA* 48-49 (3d ed. 1959).

82. Baxter, *supra* note 12, at 202, 208.

83. Sir Hersch Lauterpacht stated that an armistice agreement does not end the condition of war which still exists between the belligerents. See generally 2 OPPENHEIM, *supra* note 15, at 546-51. See also Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT'L L. 880, 885-86 (1956). Levie argues that some writers have misconstrued the Security Council's resolution of September 1951, calling upon Egypt to lift its blockade at the Suez Canal. He contends that the Security Council was reacting to a potentially dangerous situation rather than attempting to fashion a new rule that an armistice agreement terminates a state of war. *Id.* at 886. See also Merani & Sterling, *supra* note 9, at 434.

84. BLOOMFIELD, *supra* note 3, at 164. Bloomfield interprets the text of the Armistice Agreement to signal "not merely . . . a temporary cessation of hostilities but rather as [a] firm and definite step . . . forward in the direction of permanent peace." *Id.* at 36.

85. 11 U.N. GAOR (667th plen. mtg.) at 1284, para. 14, U.N. Doc. A/PV.667 (1957).

86. 11 U.N. GAOR (666th plen. mtg.) at 1278, para. 36, U.N. Doc. A/PV.666 (1957). Mr. Lodge stated that "[o]nce Israel has completed its withdrawal [of the Sinai] in accordance with the resolutions of the General Assembly . . . there is no basis for either party to the Armistice Agreement to assert or exercise any belligerent rights." *Id.*

87. *Id.* at 1280, para. 60.

position of the Security Council, which had concurred in its resolution of September 1, 1951, "that since the Armistice régime, which has been in existence for nearly two and a half years, is of a permanent character, neither party can reasonably assert that it actively is a belligerent."<sup>88</sup> Most nations, with the exception of India,<sup>89</sup> implicitly or explicitly affirmed the U.S. position that the Egyptian-Israeli Armistice Agreement of 1949 precluded either signatory from claiming that it was an active belligerent.<sup>90</sup> Thus, a majority of nations supported the conclusion that the Arab states could claim no belligerent right to prevent Israeli passage through the Gulf.

#### 4. The Passage Regime Applicable to the Gulf of Aqaba at the End of 1957

If, as many nations and publicists recognized, the Gulf were an open sea,<sup>91</sup> and a state of belligerency were not legally supportable, ships proceeding through the Gulf of Aqaba should have theoretically enjoyed unrestricted movement through the waterways. Customary international law imposes no requirements other than that the maritime state conduct itself reasonably while passing through the high seas.<sup>92</sup> However, because of the narrow breadth of the Gulf, and the location of the navigable entrance,<sup>93</sup> any ships bound for the Israeli port of Elath must cross the territorial seas of one or all of the other littoral states.<sup>94</sup> Therefore, in reality, ships are bound to comport with the rules of innocent passage, the customary regime for passage through territorial waters.<sup>95</sup> The coastal state, according to the rules of innocent passage, has authority to impose restrictions on navigating ships for the protection of its security and maintenance of its well-being.<sup>96</sup>

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88. Report of the Secretary-General in pursuance of General Assembly Resolution 1123 (XI) of January 19, 1957, 11 U.N. GAOR Annex 2 (Agenda Item 66) at 47, 49, U.N. Doc. A/3512 (1957).

89. India claimed that the General Armistice Agreement of February 24, 1949 did not establish a state of peace: "My Government desires to state that an armistice is a condition of suspended war; it is not a condition of peace." 11 U.N. GAOR (665th plen. mtg.) at 1269, para. 46, U.N. Doc. A/PV.665 (1957).

90. Those nations expressly affirming the United States position were France, Great Britain, Italy, and New Zealand. India was the only nation that insisted that Egypt could still assert belligerent rights in the Gulf. 11 U.N. GAOR (666th Plen. mtg.) at 1280, para. 60 (France), U.N. Doc. A/PV.666 (1957); 11 U.N. GAOR (667th plen. mtg.) at 1284, para. 14 (Great Britain); 1287, para. 50 (Italy); 1292, para. 99 (New Zealand), U.N. Doc. A/PV.667 (1957).

91. See text accompanying note 30 & note 73 *supra*; see generally discussion in §§ II.A.1 & 2 *supra*.

92. LAPIDOTH, *supra* note 2, at 36.

93. See note 9 *supra*.

94. See McDUGAL & BURKE, *supra* note 2, at 175, who state that "neither Israel nor Jordan could reach the Red Sea via the Gulf of Aqaba without traversing the territorial seas claimed by Egypt or Saudi Arabia." This statement would be true even if Egypt and Saudi Arabia claimed six miles of territorial sea. *Id.* at n. 4.

95. See LAPIDOTH, *supra* note 2, at 46; see McDUGAL & BURKE, *supra* note 2, at 174-79, 184-87; see P. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 119-20 (1927).

96. See McDUGAL & BURKE, *supra* note 2, at 179-84.

Possibly recognizing that the Gulf was or could be totally encompassed in territorial sea,<sup>97</sup> Israel argued before the International Law Commission in 1956 for an innocent passage regime.<sup>98</sup> However, in essence, Israel asked for a regime that was almost indistinguishable from a high seas freedom of navigation regime.<sup>99</sup> Israel asserted that "the right of passage for the ships of all nations. . . is

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97. See Addendum to Comments by Governments on The Provisional Articles Concerning the Regime of the High Seas and the Draft Articles on the Regime of the Territorial Sea Adopted by the International Law Commission at its Seventh Session, 2 Y.B. INT'L L. COMM'N. 54-55, U.N. Doc. A/CN.4/99/Add.1 (1956) [hereinafter cited as Addendum]. Israel was concerned that the International Law Commission had not required that states recognize a breadth of only three miles of territorial sea. Israel stated that

the addition of [Article 3] . . . opens the way . . . to the creation of new disputes. Either the law does, or the law does not, present an absolute maximum for the breadth of the territorial sea. If it does, then the Commission must say so and indicate how it proposes to deal with the existing situation in which a great number of States are likely to be found to have a different limit.

*Id.* at 55. State practice recognized a three mile maximum breadth of territorial sea. As discussed in note 3 *supra*, both Saudi Arabia and Egypt claimed territorial seas of 12 miles in 1958. Heinzen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 597, 643 (1959) [hereinafter cited as Heinzen]. See also Moser, *A Survey of the Definition of International Straits and the Issue of "Status Mixtus,"* 3 ISR. L. REV. 50, 59 (1968) [hereinafter cited as Moser].

98. See Gross, *supra* note 4, at 572-73.

99. See *id.*

Innocent passage, the passage regime associated with territorial waters, is normally more restricted than freedom of navigation. See O'CONNELL, *supra* note 3, at 97. "Obviously, 'innocent passage,' under its most generous interpretation, is a much narrower doctrine than 'freedom of navigation.' Freedom of navigation . . . requires no characterization. . . . [I]t is what is done. Innocent passage, however, requires the coastal State to characterize the passage as appropriately innocent." Reisman, *The Regime of Straits and National Security: An Appraisal of International Law-Making*, 74 AM. J. INT'L L. 48, 65 (1980) [hereinafter cited as Reisman].

The term freedom of navigation is, as is much of the terminology associated with the law of the sea, a term that has changed over time with the evolution of maritime use of the oceans. Lapidoth mentions some historic uses of the term: freedom from "danger of pirates," "inviolability of private property at sea in time of war," "freedom of movement and trade" and "the right to enter foreign ports." LAPIDOTH, *supra* note 2, at 11-12. Although the specific definition may vary according to the particular political and historical context, generally the term is associated with the passage regime applicable to the high seas. Since the high seas are ocean areas which cannot be occupied by any state, ships passing through those areas are not bound by any national regulations. Freedom of navigation, also referred to as free transit or free passage, implies "liberty and equality of navigation." G. SMITH, *RESTRICTING THE CONCEPT OF FREE SEAS: MODERN MARITIME LAW RE-EVALUATED* 78 (1980) [hereinafter cited as SMITH]; COLOMBOS, *supra* note 26, at 65. Thus, Israel's words "absolutely unqualified" passage for ships, implied a regime closer to freedom of navigation than to innocent passage. See COLOMBOS, *supra* note 26, at 65-66. The concept of freedom of the high seas has also evolved to encompass the freedom to fish, to lay submarine cables and to fly over the high seas. *Id.*

However, although freedom of navigation implies the greatest latitude accorded a maritime nation on the ocean, the term is not absolute. A state's use of the high seas must be limited in the interest of other nations that wish to make use of the high seas. See LAPIDOTH, *supra* note 2, at 12. Some restrictions upon freedom of navigation may be necessary as use of the oceans becomes more widespread. Increased risk of pollution, and conflicts over use of sea-bed resources and fisheries, may dictate such restrictions. *Id.* McDougal and Burke state that "[i]n past practice, the freedom of the seas has meant that each state was free to use the oceans in accommodation with other uses, not that each state was given a license to engage in any activity irrespective of effects upon the interests of others." MCDUGAL & BURKE, *supra* note 2, at 81 (emphasis added). The authors criticize subsequent efforts to objectify the concept by formulating specific criteria by which freedom of the seas may be defined, without specifically providing for means

and must remain absolutely unqualified, and the littoral State or States have no right whatsoever, so long as the matter is not regulated by Convention, to hinder, hamper, impede or suspend the free passage of those ships." Israel also argued that "[t]he interests of the international community must here have absolute predominance over those of the littoral States whose territorial waters have to be traversed in making for a given harbour."<sup>100</sup> Although Israel was referring specifically to passage through the Strait of Tiran, its comments were indicative of the type of passage that Israel believed would be appropriate, to safeguard its interests, in the territorial sea of either the Strait or the Gulf.<sup>101</sup>

Israel pressed for this non-suspendable passage regime<sup>102</sup> before the International Law Commission in response to the Commission's adoption, at its seventh session in 1955, of provisional articles which were not completely beneficial to Israel.<sup>103</sup> The Commission had agreed on a non-suspendable innocent passage regime, but only for "straits normally used for international navigation between two parts of the high seas."<sup>104</sup> Although state practice had prohibited the suspension of innocent passage in the territorial sea,<sup>105</sup> the International Law Commission specified that a coastal state could suspend passage in its territorial sea, except in "straits normally used for international navigation between two parts of the high seas," if it deemed such passage prejudicial to its security.<sup>106</sup> In spite of Israeli challenge to the Commission's work, at the close of the eighth session, Israel had still not persuaded the Commission to accept the Israeli views. The

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to resolve conflicting interests of nations that wish to use the high seas for their own purposes. *Id.* at 82-86.

100. Addendum, *supra* note 97, at 56.

101. *See id.* at 59. Israel was concerned, when referring to the innocent passage regime the Commission had formulated, that the provision did not place emphasis upon freedom of transit. *Id.*

102. Innocent passage, the transit regime applicable to passage through a particular state's territorial waters, enables the coastal state to impose restrictions on passage. *See COLOMBOS, supra* note 26, at 132; *see* McDUGAL & BURKE, *supra* note 2, at 179-84. By arguing for a regime that would prohibit the coastal state from impeding in any way the passage of ships, Israel was substituting the term "non-suspendable innocent passage" for "free transit" or "freedom of navigation" which implied the absence of any state regulation. *See* note 99 *supra*.

103. Report of the International Law Commission Covering the Work of its Seventh Session, 2 May-8 July, 1955, 10 U.N. GAOR Supp. (No. 9) art. 18 (4) at 20, U.N. Doc. A/2934 (1955) [hereinafter cited as Report of I.L.C., Seventh Session].

104. *Id.*

105. The definition of innocent passage, like the definition of freedom of navigation, has changed. However, until the 1958 Geneva Convention, the practice of states had been to recognize the right of foreign merchant vessels to pass innocently and peacefully through their territorial waters, which included the right to stop and weigh anchor, if those acts were part of normal navigation. COLOMBOS, *supra* note 26, at 132-33. Although international law theorists advocated a coastal state's ability to restrict passage through its territorial waters, in practice ships routinely used the world's territorial waters without much threat of interference. McDUGAL & BURKE, *supra* note 2, at 214. A coastal state had the option to characterize the passage as innocent or non-innocent. *See* P. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 121-23 (1927).

106. Article 18 (3), Report of the I.L.C., Seventh Session, *supra* note 103, at 20.



Commission was unwilling to lay down a new rule for the Gulf of Aqaba and the Strait of Tiran, because it considered the conflict there to be unique.<sup>107</sup> The Commission refused to extend the non-suspendable innocent passage regime to govern a situation other than that of straits connecting two parts of the high seas.<sup>108</sup>

Subsequent to the Commission's work, the Secretary-General of the U.N. General Assembly, in 1957, recognized what were and continued to be the claims of various world powers: that the Gulf of Aqaba was an international waterway, through which innocent passage could not be suspended.<sup>109</sup> Pursuant to the

107. See Commentary (4) to Article 17, Report of the I.L.C., Eighth Session, *supra* note 26, at 20.

108. See *id.*

Two problems, from Israel's viewpoint, were inherent in the International Law Commission's definition of "innocent passage." First, the Commission failed to clearly and objectively define innocent passage. Article 15 of the International Law Commission's draft read: "Passage is innocent so long as the ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules, or to other rules of international law." Art. 15 (3), Report of the I.L.C., Eighth Session, *supra* note 26, at 6. Although the Commission did specify in its commentary to Article 15 some acts which would be considered "non-innocent" (e.g., "all matters relating to customs and to import, export and transit prohibitions," "questions relating to . . . health" and "laws relating to transport and navigation"), *id.* at 19, the Commission still left the term vague and subject to conflicting interpretations. McDUGAL & BURKE, *supra* note 2, at 249. Thus, a maritime nation could not be certain which acts would subject innocent passage to suspension while passing through the territorial sea of a coastal state. See *id.*

Second, the Commission's formulation of innocent passage had the effect of vesting discretion in the coastal state to determine whether passage was innocent or non-innocent. The Commission's commentary to Article 17 (Rights of protection of the coastal State) stated: "This article recognizes the right of the coastal State to verify the innocent character of the passage." Commentary (1) to Art. 17, Report of the I.L.C., Eighth Session, *supra* note 26, at 19. Israel was concerned, particularly with reference to straits passage, that the Commission's draft might give to a coastal state the authority to suspend passage whenever it felt that passage was not "innocent." See BLOOMFIELD, *supra* note 3, at 90-91. The vague notion of what might constitute innocent passage, combined with coastal authority to determine innocence, would leave a maritime state too much at the mercy of the coastal state's whims. See Robertson, *Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea*, 20 VA. J. INT'L L. 801, 809 (1980) [hereinafter cited as Robertson].

109. See Report by the Secretary-General in pursuant of General Assembly Resolution 1123 (XI) of January 19, 1957, 11 U.N. GAOR Annex 2 (Agenda Item 66) at 47, 49, U.N. Doc. A/3512 (1957). The Secretary-General's views were consistent with those expressed in February and March of that year by many nations. For example, in an aide memoire handed to Israeli Ambassador Eban on February 11, 1957, Secretary of State Dulles stated: "The U.S. believes the Gulf and access thereto comprehends international waters and that no nation has the right to prevent free and innocent passage in the Gulf and through the Straits giving access thereto." Text of aide memoire handed to Israeli Ambassador Abba Eban by Secretary of State Dulles, 36 DEP'T ST. BULL. 393 (1957). The French representative considered the Gulf to be international waters, in which no nation could prevent free and innocent passage. 11 U.N. GAOR (666th plen. mtg.) at 1280, para. 58, U.N. Doc. A/PV.666 (1957). The representatives from Great Britain, Italy, the Netherlands, New Zealand, Australia, Belgium, Norway, Sweden and Denmark concurred in that view at the 667th plenary meeting of the General Assembly. 11 U.N. GAOR (667th plen. mtg.) at 1284, paras. 12, 13 (Great Britain); 1287, para. 51 (Italy); 1288, paras. 56-61 (Netherlands); 1292, para. 103 (New Zealand); 1294, para. 124 (Australia); 1296, para. 139 (Belgium); 1300, para. 196 (Norway); 1303, paras. 224 (Sweden), 234 (Denmark), U.N. Doc. A/PV.667 (1957).

General Assembly Resolution of January 19, 1957,<sup>110</sup> he formulated a general rule allowing innocent passage through the Gulf and the Strait.<sup>111</sup> However, as the Secretary-General acknowledged, the extent of this right of passage remained unclarified.<sup>112</sup>

### B. Strait of Tiran

The Strait of Tiran is the only entrance to the Gulf of Aqaba, connecting the Gulf at the southern tip to the Red Sea. The two islands of Tiran and Sanafir lie in the waters of the Strait, with the larger, Tiran Island, separating the Strait into two entrances. Due to reefs, the only channel through which navigation is possible for large ships lies less than one mile from the Egyptian shores on the Sinai Peninsula.<sup>113</sup> Therefore, the navigable entrance to the Gulf is situated in Egyptian territorial waters.<sup>114</sup>

The regime for territorial straits prior to the 1958 Geneva Conference on the Law of the Sea<sup>115</sup> was incorporated in the regime of territorial waters. Under that earlier regime, maritime nations were entitled to innocent passage through territorial straits, unless the strait was the subject of an international convention providing for a specific regime or was used for international navigation.<sup>116</sup>

110. G.A. Res. 1123 (XI), 11 U.N. GAOR Annex 2 (Agenda Item 66) at 76, U.N. Doc. A/RES/453 (1957). That resolution requested the Secretary-General to "continue his efforts for securing the complete withdrawal of Israel" from the Sharm-el-Sheikh and Gaza areas.

111. Report by the Secretary-General in pursuance of General Assembly Resolution 1123 (XI) of January 19, 1957, 11 U.N. GAOR Annex 2 (Agenda Item 66) at 47, 49, U.N. Doc. A/3512 (1957).

112. *Id.* Various nations, including Colombia and India, argued for a state's rights to supervise passage through its territorial sea, in order to protect its own interests. 11 U.N. GAOR (667th plen. mtg.) at 1291, 1301, U.N. Doc. A/PV.667 (1957).

Unfortunately, political, rather than legal, considerations formed the basis of the characterization of the Gulf as "international"; hence, the participants at the meeting of the General Assembly made no contribution to formulating a legal definition of the right of passage in the Gulf. The context in which so many nations were willing to label the Gulf of Aqaba as "international" indicates that this characterization may have been more politically than legally motivated. The debated issue arose in connection with Israel's proposed withdrawal from the Sinai Peninsula. Since many nations awaited that event, their ready affirmation of the Gulf's international status may have been motivated by their effort to expedite Israel's withdrawal. The representative of Canada was troubled by the lack of legal basis in the characterization. Although he agreed that nations should respect free and innocent passage through the Gulf for political reasons, he emphasized that the participants of the General Assembly should be aware that their decision to label the Gulf "international" was not legally based. The participants, acting as a political body, could make a recommendation that there be no interference with passage in the Gulf, but only a legal body could decide the international legal aspects of that decision. Statement of Canadian delegate Mr. Pearson, 11 U.N. GAOR (667th plen. mtg.) at 1296, paras. 148-49, U.N. Doc. A/PV.667 (1957). See also Statement of Norwegian delegate Mr. Engen, *id.* at 1300, para. 196.

113. Merani & Sterling, *supra* note 9, at 415; Kennedy, *supra* note 22, at 31. This Comment assumes that the Sinai Peninsula is part of Egypt's territory. See LAPIDOTH, *supra* note 2, at 53 n. 146. However, some writers have expressed contrary views. See sources cited in *id.*

114. See note 9 *supra*.

115. Convention on the Territorial Sea, *supra* note 19.

116. See McDUGAL & BURKE, *supra* note 2, at 198-99. See also COLOMBOS, *supra* note 26, at 197.

Under either of the two exceptions, coastal states could not prohibit freedom of navigation.<sup>117</sup>

The first exception was inapplicable to the Gulf and Strait, since, before the 1958 Conference, no existing international agreement established standards for the regulation of passage through the waterways.<sup>118</sup> However, the second exception provided the rationale for the argument that maritime nations had the right to pass freely and completely unimpeded through the Strait of Tiran.

### 1. The Evolving Test for Determining the "Internationality" of a Strait

The concept of an "international" strait in international law is an amorphous idea, and is, therefore, susceptible of changing definition. "Internationalized," in 1958, was a term that had not yet acquired an established meaning, but which denoted the status of an area of water that had been dedicated by treaty to the public use of all or a large number of states.<sup>119</sup> However, as nations began to recognize the importance of straits use, the definition of an international strait came into question. Experts in the international community began to advocate the view that passage through straits should be free from coastal state interference.<sup>120</sup>

Until the middle of the twentieth century, international law generally considered a strait to have an international character only if it connected two parts of the high seas, even if the strait totally comprised territorial waters.<sup>121</sup> However, in a report prepared by international experts for the Fifth Assembly of the League of Nations a new element emerged. The report concluded that not only did an international strait have to connect two parts of the high seas, not including inland seas,<sup>122</sup> but, in addition, in the case of warships, the report included the new requirement that the strait be used for international navigation.<sup>123</sup>

In 1949, the International Court of Justice announced the standard for the

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117. See COLOMBOS, *supra* note 26, at 197.

118. See text accompanying notes 217-18 *infra* for conflicting views on whether Article 16(4) of the Convention on the Territorial Sea was specifically intended to cover this particular situation, i.e., the Strait of Tiran. Even if the Convention was so intended, the one provision does not approximate the type of international convention mentioned by international theorists as fulfilling this requirement, such as the Constantinople Treaty of 1888, which provides a specific passage regime through the Suez Canal, and the Montreux Convention, which sets guidelines for regulation of passage through the Straits of the Dardanelles.

119. See Moser, *supra* note 97, at 50-51.

120. McDUGAL & BURKE, *supra* note 2, at 199.

121. Grandison & Meyer, *supra* note 3, at 397; Moser, *supra* note 97, at 56.

122. Publication of the League of Nations, V, Legal Questions, V. 7, 252, cited in Moser, *supra* note 97, at 53 nn. 20-21.

123. *Id.* at 246, cited in Moser, *supra* note 97, at 53 n.22.

internationality of a strait, at least with reference to warships, in the decision of the *Corfu Channel* case.<sup>124</sup>

In that case, the Court decided a controversy between the United Kingdom and Albania. Specifically, the parties raised the issue of passage in reference to the incident of May 1946, when Albanian coastal batteries attacked British warships passing through the Corfu Channel, which lies partially in the territorial waters of Albania. Britain argued persuasively for a right of innocent passage through the strait. The Court, in an often quoted passage, held:

It is . . . generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.<sup>125</sup>

The Court found that ships used the channel for international navigation; the fact that the strait was not the primary route of access to the Aegean and Adriatic Seas was unimportant.<sup>126</sup> According to the Court's decision, as long as the strait was used for international navigation and connected two parts of the high seas, it had an "international" character.<sup>127</sup> However, although the Court recognized the importance of the waterway's use and of free maritime communication,<sup>128</sup> the fact that the channel connected two high seas was still a major determining factor in the decision that the coastal state could not prohibit innocent passage through the North Corfu Channel.

## 2. The "Internationality" Test Before the International Law Commission

Although the *Corfu Channel* case emphasized the overall "importance of freedom of transportation and communication" through the use of straits,<sup>129</sup> the Court's decision did not explicitly refer to passage of merchant vessels. There-

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124. *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4. Lapidoth states that the standard announced in the *Corfu Channel Case* was merely a restatement of customary international law. LAPIDOTH, *supra* note 2, at 39.

125. *Corfu Channel Case* at 28 (emphasis original).

126. *Id.*

127. See Lapidoth, *Passage Through the Strait of Bab Al-Mandeb*, 13 ISR. L. REV. 180, 184-85; see McDUGAL & BURKE, *supra* note 2, at 207. These authors emphasize the Court's use of geographical criteria as the test of internationality. *Id.* Compare R. BAXTER & J. TRISKA, *LAW OF INTERNATIONAL WATERWAYS* 9 (1964). The authors state that the Court emphasizes the practices of shipping rather than geographic necessities. *Id.* Grandison and Meyer analyze the case by pointing out that the Court's characterization of the channel as an international highway was one of the factors that shaped the outcome. Grandison & Meyer, *supra* note 3, at 397-99.

128. McDUGAL & BURKE, *supra* note 2, at 206.

129. *Id.* at 207.

fore, when the International Law Commission began to codify the law of the sea,<sup>130</sup> it found that the *Corfu Channel* standard failed to expressly apply to merchant ships. Furthermore, how frequently an "international" strait must be used for international navigation remained unclear. After working for seven years on its Law of the Sea Draft Articles,<sup>131</sup> the Commission made some progress in clarifying the law regarding passage through straits.

The Commission specifically noted that its final draft regarding innocent passage applied to merchant ships as well as to warships.<sup>132</sup> In addition, the Commission attempted to restrict the authority of coastal states over straits.<sup>133</sup> Article 17(4) of the Commission's provisions concerning the law of the sea stated: "There must be no suspension of the innocent passage of foreign ships through straits *normally used* for international navigation between two parts of the high seas."<sup>134</sup> Thus, under the Commission's formulation, navigators of merchant ships as well as warships had the right to expect a coastal state to respect their innocent passage during time of peace. The Commission also attempted to resolve the "use" criterion, left vague by the International Court of Justice, by providing that an international strait was one which was "normally" used for international navigation.<sup>135</sup> In these two respects, the Commission refined and expanded the *Corfu Channel* standard. By incorporating those more explicit changes into its report to the U.N. General Assembly, the Commission could be seen as having made progress beyond the *Corfu Channel* rule in defining more precisely the law of straits passage.

However, Article 17(4) of the Draft Articles still required that an international strait connect two parts of the high seas, and this formulation created a problem for Israel. Israel could not be certain that the Strait of Tiran would satisfy that test. Under the Commission's definition of an international strait, the Strait of Tiran could be considered international only if the two bodies of water it connected were high seas. Even if the Red Sea fell into that category, in 1956, whether the Gulf of Aqaba could be defined as high seas was questionable. The use of a geographical test for defining an international strait and attendant right of innocent passage created a problem because of the constantly changing limits of territorial sea claimed by littoral Gulf states.<sup>136</sup> This problem was especially apparent in the Gulf of Aqaba. Previous to 1949, the littoral states had claimed

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130. See note 26 *supra*.

131. The first session of the Commission took place in 1949; the last session, which produced the final Draft Articles, took place in 1956. Introduction, Report of the I.L.C., Eighth Session, *supra* note 26, at 1-2.

132. Commentary (1) to Section III, Report of the I.L.C., Eighth Session, *supra* note 26, at 18.

133. McDUGAL & BURKE, *supra* note 2, at 208.

134. Article 17(4), Report of the I.L.C., Eighth Session, *supra* note 26, at 6 (emphasis added).

135. See *id.*

136. See generally Heinzen, *supra* note 97, at 639-43 (Saudi Arabia and Egypt claimed enlarged territorial seas in 1958.).

three miles of territorial sea, leaving a belt of high seas in the middle of the Gulf which would thus give the Gulf the status of open or high seas. However, after Saudi Arabia and Egypt enlarged their territorial seas to six miles and twelve miles, respectively, encompassing the entire Gulf in territorial waters, the Gulf theoretically no longer had the status of high seas.<sup>137</sup> Thus, under the geographical test, the Strait would have lost its international character with the enlargement of the littoral states' territorial seas.

Another problem Israel would then encounter arose out of the Commission's attempt to qualify the "use" criterion of an international strait. The words "normally used for international navigation," which the Commission added to the *Corfu Channel* test, implied that if a strait were not in frequent use, passage could be more easily suspended. Since "normally" was a word without precise definition, Israel could not be assured that the Strait of Tiran satisfied this criterion.<sup>138</sup>

Unless the Strait of Tiran could satisfy both requirements, it would not qualify as an international strait, and the non-suspendable innocent passage regime for international straits set out by the Commission would be inapplicable.<sup>139</sup> Israel would be left without assurance of a right to unimpeded navigation through the Strait. Thus, during the eighth session of the International Law Commission, Israel urged the Commission to decide that every strait giving access to a port (referring to Elath) be considered international.<sup>140</sup> The Commission, however, failed to adopt the revised test proposed by Israel. The Commission concluded that its non-suspendable innocent passage regime was inapplicable to the Strait of Tiran<sup>141</sup> because the Strait of Tiran connected high seas with territorial sea, not with another part of the high seas.

### 3. Strait of Tiran as a Strait Giving Access to an "International" Waterway: The Eleventh Session of the United Nations General Assembly

One significant change that occurred during the meetings of the General Assembly from 1956 to 1957 was that many nations began to argue for a right of innocent passage through the Strait of Tiran based on their own interpretation that the Gulf of Aqaba was an international waterway.<sup>142</sup> The label "international

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137. See notes 30-31 and accompanying text, *supra*.

138. Cf. Slonim, *supra* note 26, at 113 n.68 ("The port of Eilath was not in 'normal' use prior to 1956 because of the threat posed by Egyptian coastal batteries at Sharm-el-Sheikh.").

139. See text accompanying notes 133-34 *supra*.

140. See generally Addendum, *supra* note 97, at 56 (Israel commented that ships passing through the Strait should enjoy unqualified passage rights.).

141. Cf. Commentary (4) to Art. 17(4), Report of the I.L.C., Eighth Session, *supra* note 26, at 20 (The Commission would not formulate a rule for the legal position of Straits forming part of the territorial sea of one or more States and constituting the sole means of access to the port of another State.).

142. See statements of delegates from France, Great Britain, Italy, the Netherlands, New Zealand, Australia, Belgium, Norway, Sweden and Denmark, 11 U.N. GAOR (666th plen. mtg.) at 1280, para. 58

waterways" for the Gulf may have been a substitute for high seas.<sup>143</sup> Alternatively, the term "international," as used in the General Assembly, may have been a political, rather than a legal, definition.<sup>144</sup>

Nevertheless, regardless of the imprecise terminology, many nations agreed with Israel that the Strait and Gulf should be considered "international" in character,<sup>145</sup> and that innocent passage should be extended to ships traversing the Strait.<sup>146</sup> The Secretary-General stated that innocent passage would apply in the Strait of Tiran, even though the extent of the passage had not been agreed upon.<sup>147</sup>

The delegate of the Netherlands was the only U.N. participant to offer a legal rationale for his concurrence in the rule that the Strait was an international waterway.<sup>148</sup>

(France), U.N. Doc. A/PV.666 (1957); 11 U.N. GAOR (667th plen. mtg.) at 1284, paras. 12, 13 (Great Britain); 1287, para. 51 (Italy); 1288, paras. 56-61 (Netherlands); 1292, para. 103 (New Zealand); 1294, para. 124 (Australia); 1296, para. 139 (Belgium); 1300, para. 196 (Norway); 1303, paras. 224 (Sweden), 234 (Denmark), U.N. Doc. A/PV.667 (1957).

143. The French representative, for example, stated that the French government considered the Gulf to be "international" by virtue of its breadth and the fact that it bordered four different nations; consequently, he believed that freedom of navigation should apply in the Strait giving access to the Gulf. 11 U.N. GAOR (666th plen. mtg.) at 1280, para. 58, U.N. Doc. A/PV.666 (1957). His statement suggests a possible attempt at a legal definition of the waterway. However, as of 1957, the international community used only the terminology of "high seas" and "territorial waters" to refer to innocent passage regimes for waterways. The term "international waterways" had no precise legal meaning. Thus, perhaps the French representative's language was imprecise.

144. For example, the Canadian delegate stated:

I am not now suggesting . . . that legal rights in those waters should be determined by the Assembly. . . . What I do suggest, however, is that, in order to maintain a situation of peace and quiet . . . the Assembly should recommend . . . as a political and not a legal act . . . that there should be no interference with the innocent passage of ships through the waters concerned.

11 U.N. GAOR (667th plen. mtg.) at 1296, para. 148, U.N. Doc. A/PV.667 (1957). The Norwegian delegate also stated: "[I]t is the view of the Government of Norway that these waters constitute an international waterway and that no State bordering on this waterway should undertake measures which would hamper the right of ships of any nation to innocent passage." However, he also stated that "[t]he question of determining the legal status of these waters is a different matter and should be dealt with only by a legal body." *Id.* at 1300, para. 196. According to the Corfu Channel case and the International Law Commission's Draft Article 17(4), which were the most recent indices of international law regarding international straits, a strait was international only if the bodies of water it connected were legally high seas. *See* text accompanying notes 127 & 134 *supra*. Therefore, the fact that the Norwegian representative would have deferred to a legal body to determine the legal status of the waters suggested that he based his characterization of the Strait on non-legal reasoning. *See also* note 112 *supra*.

145. *See* statements by delegates of the United States, France, Great Britain, Italy, the Netherlands, New Zealand, Australia, Belgium, Norway and Denmark, 11 U.N. GAOR (666th plen. mtg.) at 1277, para. 33 (United States); 1280, para. 58 (France), U.N. Doc. A/PV.666 (1957); 11 U.N. GAOR (667th plen. mtg.) at 1284, para. 13 (Great Britain); 1287, para. 51 (Italy); 1288, paras. 56-61 (Netherlands); 1292, para. 103 (New Zealand); 1294, para. 124 (Australia); 1296, para. 139 (Belgium); 1300, para. 196 (Norway); 1303, para. 234 (Denmark), U.N. Doc. A/PV.667 (1957).

146. *Id.*

147. Report by the Secretary-General on compliance with General Assembly resolutions calling for withdrawal of troops and other measures, 11 U.N. GAOR Annex 2 (Agenda Item 66) at 42, 44, U.N. Doc. A/3500 (1957).

148. 11 U.N. GAOR (667th plen. mtg.) at 1288, para. 57-61, U.N. Doc. A/PV.667 (1957).

First, inasmuch as the Gulf of Aqaba . . . has a width in excess of the three miles of territorial waters of the four littoral States on either side, it is, under the rules of international law, to be regarded as part of the open sea. Secondly, the Straits of Tiran consequently, in the legal sense, [are] straits connecting two open seas, normally used for international navigation. Thirdly, in regard to such straits, there is a right of free passage.<sup>149</sup>

Underlying the delegate's reasoning was the assumption that international law would accept only a three mile claim of territorial waters.<sup>150</sup> If the Gulf's littoral states could only claim three miles, then the Gulf would have the status of open sea because of the remaining marginal belt in the center.

Thus, before the 1958 Geneva Law of the Sea Conference, most nations considered the Strait of Tiran to be an international waterway, open to all foreign ships for innocent passage. However, the definition was still not legally satisfactory. It left unresolved the extent and exact definition of the innocent passage regime that would apply in the Strait and Gulf areas. Even the Netherlands delegate, who had legally justified his conclusion that the rules of innocent passage should govern passage of ships through the Strait, did not attempt to enumerate the criteria by which the innocent passage regime should be implemented.

### III. CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE

Pursuant to General Assembly Resolution 1105<sup>151</sup> the United Nations Conference on the Law of the Sea convened at Geneva in 1958.<sup>152</sup> Four Conventions emerged from the Conference: the Convention on the Territorial Sea and the Contiguous Zone;<sup>153</sup> the Convention on the High Seas;<sup>154</sup> the Convention on Fishing and Conservation of the Living Resources of the High Seas;<sup>155</sup> and the

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149. *Id.*

150. Heinzen, *supra* note 97, at 641.

151. G. A. Res. 1105 (XI), 11 U.N. GAOR Annex 2 (Agenda Item 53) at 87, U.N. Doc. A/RES/478 (1957). The General Assembly recommended that

an international conference of plenipotentiaries should be convoked to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.

*Id.* at para. 2.

152. *Id.* at para. 4.

153. Convention on the Territorial Sea, *supra* note 19. The treaty became effective on September 10, 1964, after having been ratified by 22 states.

154. Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

155. Convention on Fishing and Conservation of the Living Resources of the High Seas, April 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.



Convention on the Continental Shelf.<sup>156</sup> The Convention on the Territorial Sea and the Contiguous Zone (the Convention) is relevant for purposes of the following discussion.

While neither Saudi Arabia, Jordan nor Egypt signed the 1958 Convention, the Convention was significant because it codified customary international law. The Convention represented, as of 1958, "the best consensus of present international opinion regarding the law of the sea."<sup>157</sup> Therefore, although only Israel ratified the Convention,<sup>158</sup> the Arab nations would be bound as well to respect the rules of international law embodied in the Convention, which represented, at that time, the accepted practice of a majority of states.<sup>159</sup>

#### A. *The Convention in General*

The only provision of the Convention on the Territorial Sea and the Contiguous Zone that pertains to gulfs is Article 7, which refers to bays belonging to one

156. Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

157. Selak, *supra* note 7, at 685. *But see* Gross, *supra* note 4, at 593.

158. Israel ratified the Convention on the Territorial Sea on September 6, 1961. Status of Multilateral Conventions, signatures, ratifications, etc. received by the Secretary-General during the month of September 1961, Report No. 9 at iii, U.N. Doc. ST/LEG/3, Rev. 1 (1961).

159. *Cf.* SMITH, *supra* note 99, at 91 (the 1958 Law of the Sea Conference was essentially concerned with codifying existing law).

D'Amato states that a treaty "is a clear record of a binding international commitment that constitutes the 'practice of states' and hence is as much a record of customary behavior as any other state act or restraint." D'AMATO, *supra* note 28, at 104. He emphasizes that the provisions of a multilateral treaty are not necessarily, in themselves, binding on non-signatories. However, a multilateral treaty may give rise to general rules of custom, which are binding on all states. *Id.* at 106-07.

Certain types of treaties do not give rise to rules of custom. Included in that category are treaties "creating international régimes for the use of a waterway . . . [and] treaties providing for the navigation of international rivers or waterways." Waldock, Third Report on the Law of Treaties, Law of Treaties [Agenda Item 3], 2 Y.B. INT'L COMM'N. 27, U.N. Doc. A/CN.4/167 (1964). However, that definition is inapplicable to the Convention on the Territorial Sea. The Convention enunciates general principles applying to all, rather than to specific, waterways. Second, even if Article 16(4) of the Convention on the Territorial Sea, which allows for non-suspendable passage through straits connecting high seas with the territorial sea of a state, applies specifically to the Strait of Tiran, the purpose of the Convention was to codify the law of the sea. *See* G.A. Res. 1105 (XI), 11 U.N. GAOR Annex 2 (Agenda Item 53) at 87, U.N. Doc. A/RES/478 (1957); SMITH, *supra* note 99, at 91. Although the Convention does not explicitly state that it represents a codification of international law, Gross, *supra* note 4, at 593, the fact that 44 nations are parties to the Convention is evidence that the Convention represents accepted state practice. OFFICE OF THE LEGAL ADVISER, U.S. DEPT OF STATE, PUB. NO. 9136, TREATIES IN FORCE 311 (1981). Pharand notes that Canada, which did not ratify the Convention on the Territorial Sea, cannot argue that only customary international law regulates the rights of innocent passage in the Northwest Passage, since the Convention is "evidence of general international law." Pharand, *Innocent Passage in the Arctic*, 6 CAN. Y.B. INT'L L. 3, 58-59 (1968). D'Amato, as well, notes that there are several "areas of international law shaped largely by treaty" and cites to the Geneva Conventions on the Law of the Sea as having "a direct and immediate impact upon international law. In considering any problem arising since 1958, one can hardly avoid referring to the Geneva conventions, regardless of whether the interested parties have signed them." D'AMATO, *supra*, at 137. For a comprehensive discussion of the effect of treaties on customary international law, *see id.* at 103-66.

state.<sup>160</sup> It is inapplicable to the Gulf of Aqaba, since the Convention does not concentrate on the problem of bays or gulfs surrounded by more than one state. The two other possible classification alternatives for the Gulf, at the time of the Conference, were that of high seas, and that of territorial waters. Considering that the drafters of the International Law Commission's Draft Articles did not accept a high seas characterization for the Gulf of Aqaba, the Convention rules for the territorial sea must be applied to the Gulf of Aqaba.<sup>161</sup>

Controversy exists over whether the Convention rules regulate passage only in time of peace, or whether they apply, as well, in time of war. Since the International Law Commission's draft, which formed the basis for the Convention, was applicable only in time of peace,<sup>162</sup> authorities have suggested that the Convention only embodies peace-time law.<sup>163</sup> Alternatively, authorities have argued that the Convention's clear failure to adopt the International Law Commission's draft demonstrates that the drafters intended the Convention to govern passage regulation in times of both war and peace.<sup>164</sup> The distinction would, of course, only be important if the Arab states' claim of war status were valid.<sup>165</sup>

A second unresolved question is whether the Convention's innocent passage scheme applies to warships when used in the Gulf's territorial waters.<sup>166</sup> On its face, the Convention purports to formulate specific rules for merchant vessels and warships, but only after it sets out the general rules applicable to both.<sup>167</sup>

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160. Convention on the Territorial Sea, *supra* note 19, art. 7. The introductory sentence of Article 7 reads: "1. This article relates only to bays the coasts of which belong to a single State." *Id.*

161. Assuming that the Saudi Arabian claim to the Gulf as historic national waters were correct, the Convention rules on territorial sea would be inapplicable. See § II.A. 2 *supra*. Article 7 does not apply to historic bays. Convention on the Territorial Sea, *supra* note 19, art. 7(6).

162. Report of the I.L.C., Eighth Session, *supra* note 26, at 4.

163. Merani & Sterling, *supra* note 9, at 428. The authors further note that many writers have ignored the war/peace distinction. *Id.* at 429 n.43. However, an assumption that in times of war a coastal state, for its own protection, has greater latitude to regulate the passage of ships through its territorial waters would be reasonable. Even if the definition of "innocent" is more objective under the Convention on the Territorial Sea than under the rules of customary international law, Article 14 still gives the coastal state some leeway to characterize passage as innocent or non-innocent. Convention on the Territorial Sea, *supra* note 19, art. 14. Presumably, a coastal state, prohibited from discriminating against foreign ships by virtue of Article 16(3), *id.* art. 16(3), will suspend passage only truly prejudicial to its security. In such event, that state would probably have no difficulty in proving the threat. A reasonable interpretation of the Convention gives a coastal state the ability, even in time of war, to effectively regulate passage or suspension of ships in accordance with the rules of the Convention on the Territorial Sea.

164. Gross, *Passage Through the Strait of Tiran and in the Gulf of Aqaba*, 33 LAW & CONTEMP. PROBS. 125, 142 (1968).

165. See § II.A.3 *supra*.

166. Slonim, *supra* note 26, at 119; Przetacznik, *Freedom of Navigation Through Territorial Sea and International Straits*, 55 REVUE DE DROIT INTERNATIONAL DE SCIENCES DIPLOMATIQUES ET POLITIQUES 222, 228 (1977) [hereinafter cited as Przetacznik]. The territorial waters referred to here do not include straits, which the Convention on the Territorial Sea considers separately. Convention on the Territorial Sea, *supra* note 19, art. 16(4).

167. Convention on the Territorial Sea, *supra* note 19, arts. 14-17.

Sub-section A of Section III ("Right of Innocent Passage") is entitled "Rules applicable to all ships."<sup>168</sup> Sub-section B of Section III ("Rules applicable to merchant ships") outlines specifics after setting out a general scheme in Articles 14-17.<sup>169</sup> Sub-section D ("Rules applicable to warships")<sup>170</sup> gives the coastal state authority to request the warship to leave its waters for non-compliance with its general passage regulations.<sup>171</sup>

However, some writers argue that the Convention may be read differently, and urge that the innocent passage regime does not apply to warships.<sup>172</sup> This interpretation suggests that the Convention left unresolved the question of foreign warship passage through the territorial sea (excluding straits) in time of peace. A split of opinion also exists on whether the practice of states before the 1958 Conference would have supported the innocent passage of warships through the territorial sea. One view suggests that if the waters were necessary for international traffic, then passage of warships would be governed by the innocent passage regime.<sup>173</sup> The contrary position suggests that "[a]s to warships, the sound rule seems to be that they should not enjoy an absolute legal right to pass through a state's territorial waters."<sup>174</sup>

#### B. *The Gulf of Aqaba*

Although the Convention provides methods of delimiting the territorial sea in Articles 3, 4, 5, 6 and 8,<sup>175</sup> the participants at the 1958 Conference failed to

168. *Id.* at Section III, Sub-section A.

169. *See id.* at Section III, Sub-section B. Articles 18-20, which appear in Section III, Sub-section B deal primarily with tolls, and the criminal and civil jurisdiction of a coastal state.

170. *Id.* art. 23.

171. *Id.*

172. Przetacznik, *supra* note 166, at 228. The author asserts that one must resort to customary international law to answer the question. *Id.* Lapidoth also supports the view of Przetacznik and concludes that "the right of innocent passage of warships in ordinary territorial sea is controversial." LAPIDOTH, *Passage Through the Strait of Bab Al-Mandeb*, 13 ISR. L. REV. 180, 185 (1978).

173. COLOMBOS, *supra* note 26, at 133. The right seems to depend on the use of the waterway for international traffic. *See also* 1 OPPENHEIM, *supra* note 29, at 494. Oppenheim states that "it is now a customary rule of International Law that the right of passage through such parts of the maritime belt as form part of the highways for international traffic cannot be denied to foreign men-of-war." *Id.*

174. P. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 120 (1927). *See also* 1 E. BRÜEL, *INTERNATIONAL STRAITS* (1947). Brüel expresses the view of some theorists that, although warships do not have the right to pass freely through the territorial sea of a foreign state in time of peace, many states in practice do allow this passage. *See* Przetacznik, *supra* note 166, at 211, for a list of those who adhere to the opposing view. McDougal and Burke also note that a majority of participants at the Conference felt that warships should enjoy unrestricted access to territorial seas, provided they gave prior notification to the coastal state. McDUGAL & BURKE, *supra* note 2, at 220.

175. Convention on the Territorial Sea, *supra* note 19, arts. 3, 4, 5, 6, 8. This Comment does not discuss the methods of delimiting the territorial sea, for, as of February 1958, both Saudi Arabia and Egypt, as noted *supra* note 31, had claimed a breadth of territorial sea of 12 miles each. For a discussion of delimitation of baselines, see McDUGAL & BURKE, *supra* note 2, at 305-445, and sources cited in 4 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 207-343 (1965).

specify a definite limit of territorial sea that coastal nations can legitimately claim under the Convention.<sup>176</sup> Further, the Convention does not clarify the extent to which nations recognize claims of territorial sea in excess of three miles.<sup>177</sup> As a result of this failure, the status of the Arabs' claim of more than three miles<sup>178</sup> remained unresolved in 1958. Had nations uniformly considered the three mile limit a rule of international law, the argument of the Gulf as high seas might have been successful.<sup>179</sup> However, although state practice may have recognized claims to territorial sea of no more than three miles,<sup>180</sup> "[t]here was no general agreement . . . as to what the governing rule was."<sup>181</sup> The fact that many states had claimed more than three miles of territorial waters made it "difficult to urge that any territorial sea beyond three nautical miles and up to 12 [was] unlawful."<sup>182</sup> Thus, the premise that the Arab nations could encompass the entire Gulf in territorial sea by enlarging their claims<sup>183</sup> would be implicit in any legal argument about the Gulf.

Assuming that the Gulf of Aqaba consisted of territorial sea as recognized at the time of the Conference, the coastal state would be bound by the regime of innocent passage. The scheme of innocent passage is governed primarily by Section III, Articles 14-16 of the Convention.<sup>184</sup> Article 14(1) provides that "ships of all States . . . shall enjoy the right of innocent passage through the territorial sea."<sup>185</sup> Passage includes (1) "navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters,"<sup>186</sup> and (2) "stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress."<sup>187</sup>

Although the 1958 Convention thus provided for an innocent passage regime

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176. See Heinzen, *supra* note 97, at 651.

177. Heinzen states that all claims exceeding three miles in breadth at the time of the 1958 Conference were illegal. *Id.* However, Gross, referring to the United States' claim that the Gulf comprehended international waterways, contends that "the argument became a casualty when Egypt and Saudi Arabia extended their territorial sea from six to twelve miles." Gross, *Passage Through the Strait of Tiran and in the Gulf of Aqaba*, 33 LAW & CONTEMP. PROBS. 125, 141 (1968). Thus, even if international law would only honor a claim of three miles, Israel would have had to contend realistically with Saudi Arabia and Egypt.

178. See Gross, *Passage Through the Strait of Tiran and in the Gulf of Aqaba*, 33 LAW & CONTEMP. PROBS. 124, 141 (1968). See also § II.B.2 *supra*.

179. See text accompanying note 30 *supra*.

180. See text accompanying note 150 *supra*.

181. Heinzen, *supra* note 97, at 650.

182. Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77, 86 (1980) [hereinafter cited as Moore].

183. See note 177 *supra*.

184. Convention on the Territorial Sea, *supra* note 19, arts. 14-16.

185. *Id.* art. 14(1).

186. *Id.* art. 14(2).

187. *Id.* art. 14(3).

through the Gulf, innocent passage was not an established international law concept.<sup>188</sup> Innocent passage could best be defined in reference to a balancing of coastal and maritime states' interests.<sup>189</sup> Because those interests were vague and susceptible of subjectivity, coastal and maritime states, alike, would need some objective guidelines to ensure against arbitrary misconduct and imposition of restrictions. How the Convention resolves the problem of preserving the coastal state's right to protect itself, and, at the same time, allows the maximum freedom to navigating ships, is, thus, the critical question. One must read Articles 14, 15 and 16 together in order to understand how the Convention would affect the interests of both the coastal state and the maritime state.

Article 15 of the Convention states that "[t]he coastal State must not hamper innocent passage through the territorial sea."<sup>190</sup> The International Law Commission's definition of innocent passage had emphasized the acts of the ship in transit.<sup>191</sup> Under that definition, passage was innocent "so long as a ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State."<sup>192</sup> The Convention changed the terminology and the definition of innocent passage, in its adoption of Article 14(4), to read: "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State."<sup>193</sup> The rewording, although minor, produced a significant change in meaning.<sup>194</sup> Whereas under the International Law Commission's definition, specific acts committed by the ship in transit would determine innocence or non-innocence of passage,<sup>195</sup> the Convention emphasized the physical passage of the ship, rather than the ship's conduct, as the deciding factor in determining innocence or non-innocence.<sup>196</sup>

Whether this change benefitted the coastal or the maritime states is a debatable question. In the opinion of at least one authority, the Convention's definition of innocent passage applies a more objective standard than does the definition of the International Law Commission. According to this authority, the Convention's definition places the burden on the coastal state to prove non-innocence of the passage itself. Therefore, the coastal state has less discretion to suspend, at will, the passage of ships through its waters.<sup>197</sup> However, other authorities have argued that the definition's focus on the innocence of passage, rather than on the ship and its acts, allows the coastal state more freedom to characterize passage as

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188. See notes 2, 102, 105 *supra*.

189. See notes 2 & 105 *supra*.

190. Convention on the Territorial Sea, *supra* note 19, art. 15.

191. Commentary (3) to Article 15(3), Report of the I.L.C., Eighth Session, *supra* note 26, at 19.

192. *Id.* art. 15(3), at 6.

193. Convention on the Territorial Sea, *supra* note 19, art. 14(4).

194. McDUGAL & BURKE, *supra* note 2, at 258. See also Gross, *supra* note 4, at 582.

195. See text accompanying note 191 *supra*.

196. Compare Article 15(3), *supra* note 192 with Article 14(4), *supra* note 193.

197. Gross, *supra* note 4, at 582.

non-innocent. According to this view, without the words of the International Law Commission's draft ("a ship does not use the sea for committing any acts"),

Convention Article 14(4) no longer restricts coastal competence to prohibit passage to considerations arising from incidents occurring in the territorial sea. It is now open to the coastal state to take other factors into account, including, for example, the purpose of the projected passage, the cargo carried, and destination in a third state.<sup>198</sup>

This interpretation of the Convention's definition of innocent passage favors the interests of the coastal state, by allowing it to consider not only the acts of the ship, but also the nature of the cargo and the ship's destination in deciding whether to characterize the passage as innocent.<sup>199</sup> Thus, the coastal state may more easily suspend passage under Article 16(1) which stipulates that "[t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent."<sup>200</sup> As these conflicting interpretations indicate,<sup>201</sup> the Convention did not clarify the meaning of innocent passage.

An analysis of the background of Article 16(3) further highlights the concern of the Conference participants for a more objective definition of innocent passage. Article 16(3) of the Convention allows the coastal state to "suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security."<sup>202</sup> The Convention adopted this Article in response to the concern of several nations that the International Law Commission's draft allowed coastal states too much subjective discretion.<sup>203</sup> The International Law Commission's draft had provided: "The coastal State may suspend temporarily in definite areas of its territorial sea the exercise of the right of passage *if it should deem* such suspension essential for the protection of the rights referred to in paragraph 1."<sup>204</sup> With the adoption of the new Article 16(3) language, the Convention considerably limited the ability of the coastal state to arbitrarily prohibit passage that actually was

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198. Sorensen, "The Law of the Sea," *International Conciliation*, No. 520, 234 (Nov. 1958), cited in McDougal & Burke, *supra* note 2, at 258.

199. McDougal & Burke, *supra* note 2, at 258. The authors criticize Gross' interpretation for its lack of support. *Id.* at 258 n.221. See also Robertson, *supra* note 108, at 803.

200. Convention on the Territorial Sea, *supra* note 19, art. 16(1).

201. The explanation may be that the Third United Nations Conference on the Law of the Sea has gone to great lengths to define "innocent passage" in more objective terms. Thus, in comparison, the definition adopted by the Convention on the Territorial Sea was subjective.

202. Convention on the Territorial Sea, *supra* note 19, art. 16(3).

203. Gross, *supra* note 4, at 584-85. Britain, the Netherlands, Portugal and the United States were among the nations concerned with the lack of objectivity in the Commission's Draft. *Id.* Indonesia, the Soviet Union and India took the opposing view. *Id.* at 585.

204. Article 17(3), Report of the I.L.C., Eighth Session, *supra* note 26, at 6 (emphasis added).

innocent.<sup>205</sup> This new provision eliminated some of the subjective discretion given the coastal state under the International Law Commission's draft. Although similar concerns prompted the revision of Article 14(4),<sup>206</sup> the Conference may have reached the opposite result in its adoption of Article 14(4) of the Convention.<sup>207</sup>

### C. *Strait of Tiran*

One important distinction under the 1958 Convention between the regimes for regulation of passage in straits<sup>208</sup> and regulation of passage in the territorial sea is that the coastal state may not suspend innocent passage through straits, but may suspend passage through the territorial sea.<sup>209</sup> Saudi Arabia, in particular, protested the adoption<sup>210</sup> by the Conference of the new straits passage regime of Article 16(4). This Convention provision states: "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State."<sup>211</sup> Saudi Arabia made two main arguments. The first contention was that the addition of the words "or the territorial sea of a foreign State" seemed only to apply to the Strait of Tiran and the Gulf of Aqaba.<sup>212</sup> Ambassador Shukairi of Saudi Arabia argued that "the amended text no longer dealt with general principles of international law, but had been carefully tailored to promote the claims of one State."<sup>213</sup> Saudi Arabia further objected to the addition of the words because, as it argued, on the basis of the *Corfu Channel* case, the passage regime envisioned in Article 16(4) should have applied only to straits connecting two parts of the high seas.<sup>214</sup>

Second, several nations objected to the deletion of the word "normally" (before "used for international navigation") from the International Law Commission's draft on the ground that this approach had not been used in the *Corfu*

205. Cf. Slonim, *supra* note 26, at 103 ("The new draft removed the strictly subjective power of the coastal state, which might deem anything a threat to its security, and substituted an objective standard — allowing suspension of innocent passage only if such suspension is necessary for the protection of the state's security.").

206. Gross, *supra* note 4, at 583.

207. See text accompanying notes 190-200 *supra*.

208. Convention on the Territorial Sea, *supra* note 19, art. 16(4). Regulation of passage through straits is embodied in Article 16(4) of the Convention.

209. Convention on the Territorial Sea, *supra* note 19, art. 16(3). A coastal state may suspend passage through the territorial sea by virtue of Article 16(3) of the Convention. Lapidoth, *Passage Through the Strait of Bab Al-Mandeb*, 13 ISR. L. REV. 180, 185 (1978).

210. Gross, *supra* note 4, at 588.

211. Convention on the Territorial Sea, *supra* note 19, art. 16(4).

212. See U.N. Doc. A/CONF.13/C.1/L.71, March 28, 1958; Official Records, Vol. III, p. 96, para. 6, cited in Gross, *supra* note 4, at 589 n. 156.

213. *Id.*

214. Gross, *supra* note 4, at 588.

*Channel* case.<sup>215</sup> Furthermore, the deletion of "normally" would have restricted passage in straits not recognized as international waterways, i.e., those not ordinarily used for international navigation.<sup>216</sup>

In reference to the first contention, one authority agrees that the rule applied specifically to the Arab-Israeli situation, and states that the Convention made new law in Article 16(4).<sup>217</sup> However, other writers consider the addition merely a codification of custom, although one of these writers does acknowledge that "the affirmation of this principle . . . gave strong support to . . . the right of passage through the Strait of Tiran and the Gulf of Aqaba."<sup>218</sup>

In reference to the second contention, the deletion of the word "normally" did go "beyond the precedent established in the *Corfu Case*."<sup>219</sup> However, the language of the *Corfu Channel* case—"used for international navigation"—without the word "normally," arguably includes a qualifying concept also.<sup>220</sup>

#### IV. THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

In December 1973, after a U.N. General Assembly Resolution<sup>221</sup> calling for an updated Law of the Sea Conference, the Third United Nations Conference on the Law of the Sea (UNCLOS) was convened.<sup>222</sup> The second session in Caracas was the first substantive session.<sup>223</sup>

At the time of this writing, after nine sessions, UNCLOS participants are preparing to convene their final session.<sup>224</sup> The United States has agreed to rejoin the negotiations, after having examined, during the past year, the UNCLOS Draft Convention on the Law of the Sea (Draft Convention).<sup>225</sup> The next session of UNCLOS may not produce a final treaty. However, because UNCLOS, in the past few sessions, has made no substantial changes to the sections dealing with passage through straits and through the territorial sea,<sup>226</sup> au-

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215. *Id.* at 586.

216. *See id.*

217. Dean, *The Geneva Conference on the Law of the Sea: What was Accomplished*, 52 AM. J. INT'L L. 607, 621, 623 (1958).

218. Gross, *supra* note 4, at 589.

219. Merani & Sterling, *supra* note 9, at 427.

220. Gross, *supra* note 4, at 586-87.

221. G.A. Res. 3029A, 27 U.N. GAOR, Supp. (No. 30) 21-22, U.N. Doc. A/8730 (1973), *cited in* Robertson, *supra* note 108, at 817 n.79.

222. Robertson, *supra* note 108, at 817.

223. The first session in December 1973 was primarily procedural. *Id.* at 819.

224. U.S. to Return to Sea Parley at U.N., N.Y. Times, Feb. 2, 1982, at A3, col. 1.

225. *Id.* Last year, President Reagan announced that the United States would not participate in further negotiations until it had "carefully reexamined all the provisions in the complex draft code." *Id.* Mr. Reagan has announced that the United States will still propose changes in the provisions that address the deep sea mining area. *Id.*

226. These sections are Part II (Territorial Sea and Contiguous Zone) and Part III (Straits Used for International Navigation). The President of the Conference, in the Explanatory Memorandum, stated that the Informal Text was "like its predecessor . . . a negotiating text and not a negotiated text." Explanatory Memorandum, Informal Composite Negotiating Text, Official Records of the Third United Nations Conference on the Law of the Sea, U.N. Doc. A/CONF.62/WP.10/Rev.3/Add. 1 (1980).



thorities expect that when the Conference has finally ended, the participants will adopt these sections in the exact form that emerged from the ninth session.<sup>227</sup> The following discussion is, therefore, based on the text adopted by the ninth session of UNCLOS.<sup>228</sup>

All four Gulf states have participated in UNCLOS.<sup>229</sup> However, even if none of the four states actually ratify the final treaty, the text formulated by UNCLOS, as with the 1958 Convention, purports to codify custom.<sup>230</sup> Thus, this treaty will bind the littoral states as a rule of international law.<sup>231</sup>

The Third United Nations Conference on the Law of the Sea has been the subject of voluminous written commentaries in the past few years.<sup>232</sup> Based on the available literature, the author will limit the scope of this section to an analysis of Parts II and III of the Informal Text of the Draft Convention. That discussion will focus, in reference to passage of ships through the Strait and the Gulf, on an analysis of the UNCLOS Draft Convention's passage regime for gulfs and straits.

227. Robertson, *supra* note 108, at 801 n.3, 826. Even the United States has approved the Draft Convention provisions that refer to "free passage through the seas . . . and through narrower straits." U.S. to return to Sea Parley at U.N., N.Y. Times, Feb. 2, 1982, at A3, col. 2.

228. UNCLOS Draft Convention, *supra* note 20.

229. Delegations to the Third United Nations Conference on the Law of the Sea, Official Records of the Third United Nations Conference on the Law of the Sea, U.N. Doc. A/CONF.62/INF.12 at 14, 24, 27, 41 (1980).

230. See note 159 and accompanying text *supra*.

231. Referring to the seventh session, Oxman observed that "[i]ts texts are rapidly being assimilated into national legislation and are increasingly relied upon as guides to state practice and opinio juris". Oxman, *The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)*, 73 AM. J. INT'L L. 1, 38 (1979).

232. For an in-depth discussion of the Conference proceedings, see Robertson, *supra* note 108. See also Galligan, *Wrapping Up the UNCLOS III "Package": At Long Last the Final Clauses*, 20 VA. J. INT'L L. 347 (1980); Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)*, 74 AM. J. INT'L L. 1 (1980); Maduro, *Passage Through International Straits: The Prospects Emergence from the Third United Nations Conference on the Law of the Sea*, 12 J. MAR. L. & COM. 65 (1980); United Nations Conference on the Law of the Sea: Developments at the Resumed Ninth Session — *Draft Convention on the Law of the Sea*, U.N. Doc. A/CONF.62/WP.10/Rev. 3 (1980), 21 HARV. INT'L L.J. 802 (1980); Yankov, *The Law of the Sea Conference at the Crossroads*, 18 VA. J. INT'L L. 31 (1977); Amerasinghe, *Basic Principles Relating to the International Regime of the Oceans at the Caracas Session of the U.N. Law of the Sea Conference*, 6 J. MAR. L. & COM. 213 (1975); Gutteridge, *Beyond the Three Mile Limit: Recent Developments Affecting the Law of the Sea*, 14 VA. J. INT'L L. 195 (1974); Oxman & West, *Issues to be Resolved in the Second Substantive Session of the Third United Nations Conference on the Law of the Sea*, 14 COLUM. J. TRANSNAT'L. 87 (1975); Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 AM. J. INT'L L. 1 (1974); Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1 (1975); Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session*, 69 AM. J. INT'L L. 763 (1975); Conference Report, *The Third United Nations Law of the Sea Conference: The Caracas Session and its Aftermath*, 8 CASE W. RES. J. INT'L L. 13 (1976); and Conference Report, *The Third United Nations Law of the Sea Conference: The Current Status and the "Informal Single Negotiating Text"*, 8 CASE W. RES. J. INT'L L. 33 (1976).

### A. *The Gulf of Aqaba*

Part II of the UNCLOS Draft Convention provides a basic regime for passage through the territorial sea.<sup>233</sup> However, in its complexity, the Draft Convention also refers to bays and gulfs in Articles 10 and 122, respectively.<sup>234</sup>

Article 10, which "relates only to bays the coasts of which belong to a single State," does not apply to the Gulf of Aqaba, which is surrounded by four nations.<sup>235</sup> Article 122, which defines a semi-enclosed sea as "a gulf . . . surrounded by two or more States and connected to the open seas"<sup>236</sup> may initially appear to identify the Gulf of Aqaba. However, a semi-enclosed sea "must have an area of at least 50,000 square nautical miles and be a 'primary' sea."<sup>237</sup> The Gulf, with a length of approximately 100 miles and a width of no more than seventeen miles at its widest point, does not satisfy this requirement.<sup>238</sup>

Furthermore, the UNCLOS formalization of the twelve mile territorial sea limit<sup>239</sup> enables Egypt and Saudi Arabia to legitimately claim, under the Draft Convention, the entire width of the Gulf in territorial sea. Since the high seas regime of the UNCLOS Draft Convention does not apply to "parts of the sea . . . included . . . in the territorial sea . . . of a State,"<sup>240</sup> no parts of the Gulf, after twelve mile claims are made, can be governed by the high seas Articles. Thus, the Gulf is, most accurately, a territorial sea under the UNCLOS Draft Convention.

Like the 1958 Convention, the UNCLOS Draft Convention envisions an innocent passage regime for foreign ships passing through a state's territorial waters.

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233. UNCLOS Draft Convention, *supra* note 20, part II.

234. *Id.* arts. 10, 122.

235. *Id.* art. 10.

236. *Id.* art. 122.

For the purposes of this Convention, 'enclosed or semi-closed sea' means a gulf, basin, or sea surrounded by two or more States and connected to the open seas by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

*Id.* art. 122.

237. Alexander, *Regionalism and the Law of the Sea: The Case of Semi-enclosed Seas*, 2 OCEAN DEV. & INT'L L.J. 151, 155 (1974).

238. Alexander finds that, by this definition, 25 semi-enclosed seas exist in the world, but his list does not include the Gulf of Aqaba. *Id.* at 158-59. Even if the definition were to apply, Part IX of the UNCLOS Draft Convention seems to provide no specific regime for semi-enclosed seas.

239. UNCLOS Draft Convention, *supra* note 20, art. 3. That provision reads: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention." *Id.* In response to the urgings of coastal nations that the territorial sea limit be formally enlarged, the United States proposed to accept a 12 mile limit only if passage through international straits were liberalized. See Statement of John R. Stevenson made in Subcommittee II of the U.N. Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, U.S. Draft Articles on Territorial Sea, Straits, and Fisheries Submitted to U.N. Seabeds Committee, 65 DEP'T ST. BULL. 261, 262 (1971) [hereinafter cited as Statement of John R. Stevenson]. See also Robertson, *supra* note 108, at 810.

240. UNCLOS Draft Convention, *supra* note 20, art. 86.

Articles 17<sup>241</sup> and 18<sup>242</sup> provide that a ship may proceed expeditiously through a state's territorial waters in order to reach or to leave a port. The coastal state may still suspend non-innocent passage in its territorial sea.<sup>243</sup> However, the Draft Convention lists twelve specific criteria by which the coastal state may deem passage to be "prejudicial to [its] peace, good order or security," and thus non-innocent.<sup>244</sup> The listing of specific criteria objectifies the concept of innocent passage. Thus, the UNCLOS Draft Convention, by providing specific guidelines by which to evaluate the innocence or non-innocence of passage, represents an improvement from the 1958 Convention definition of innocent passage, at least from the perspective of the maritime states.<sup>245</sup> The guidelines primarily include acts which prejudice the defense of the coastal state or interfere with the coastal state's control over its natural resources.<sup>246</sup> Concentration on characterizing specified activities as non-innocent, rather than on the purpose or destination of the ship in transit, represents a significant step in restricting the coastal state's

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241. *Id.* art. 17. "Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea." *Id.*

242. *Id.* art. 18. Article 18 provides:

1. Passage means navigation through the territorial sea for the purpose of:
  - (a) Traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
  - (b) Proceeding to or from internal waters or a call at such roadstead or port facility.
2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

*Id.*

243. *Id.* art 25. Article 25 provides: "The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent." *Id.*

244. *Id.* art 19(1). "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." *Id.*

245. See text accompanying notes 190-200 *supra*.

246. UNCLOS Draft Convention, *supra* note 20, art. 19(2). Article 19(2) provides:

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State, if in the territorial sea it engages in any of the following activities:
  - (a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other matter in violation of the principles of international law embodied in the Charter of the United Nations;
  - (b) Any exercise or practice with weapons of any kind;
  - (c) Any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
  - (d) Any act of propaganda aimed at affecting the defence or security of the coastal State;
  - (e) The launching, landing or taking on board of any aircraft;
  - (f) The launching, landing or taking on board of any military device;
  - (g) The embarking or disembarking of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary regulations of the coastal State;
  - (h) Any act of wilful and serious pollution, contrary to this Convention;
  - (i) Any fishing activities;
  - (j) The carrying out of research or survey activities;
  - (k) Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
  - (l) Any activity not having a direct bearing on passage.

*Id.*

ability to prevent maritime passage at will.<sup>247</sup> In addition, the coastal state may not circumvent its duties by imposing "requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage."<sup>248</sup>

In order to balance the competing maritime and coastal state interests, Article 21 enables the coastal state to

adopt laws and regulations . . . in respect of . . . (a) The safety of navigation and the regulation of marine traffic; (b) The protection of navigational aids and facilities and other facilities or installations; (c) The protection of cables and pipelines; (d) The conservation of the living resources of the sea; (e) The prevention of infringement of the fisheries regulations of the coastal State; (f) The preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof; (g) marine scientific research and hydrographic surveys; [and,] (h) The prevention of infringement of the customs, fiscal, immigration or sanitary regulations of the coastal State.<sup>249</sup>

Article 21 safeguards the rights of the coastal state while also providing more objective measures to ensure that the coastal state will not deny passage arbitrarily. Article 25 also provides protection to the littoral state,<sup>250</sup> by stating that "[t]he coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises."<sup>251</sup>

#### B. *Strait of Tiran*

By the time UNCLOS was convened, passage through straits was such a critical concern of the major world powers that to detail a straits regime, more specific

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247. Robertson, *supra* note 108, at 830. Although Moore is not as emphatic as Robertson in his positive use of the word "objective," he nevertheless agrees that the "text makes some progress in defining innocent passage objectively." Moore, *supra* note 182, at 117. In contrast, Reisman argues that the text may authorize a coastal state to suspend passage on the ground that a maritime state is engaging in activities violative of the United Nations Charter, even if those activities do not necessarily prejudice the security of that coastal state. Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AM. J. INT'L L. 48, 61 (1980) [hereinafter cited as Reisman].

248. UNCLOS Draft Convention, *supra* note 20, art. 24(1). Article 24(1) provides:

The coastal state shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted under this Convention, the coastal State shall not:

- (a) Impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or
- (b) Discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.

*Id.*

249. *Id.* art. 21.

250. See Moore, *supra* note 182, at 102.

251. UNCLOS Draft Convention, *supra* note 20, art. 25(3).

than that of the 1958 Conference, which would be acceptable to maritime and strait states alike became necessary.<sup>252</sup> The result of UNCLOS was to relegate the regime of straits passage to a separate part of the proposed treaty, rather than to treat it, as did the 1958 Convention, in one cursory Article along with the provisions for passage through the territorial sea.<sup>253</sup>

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252. During the 1960s, world trade increased, resulting in an increased use of straits. Grandison & Meyer, *supra* note 3, at 403 n.41. Moore argues that the formulation of a comprehensive straits regime is

strongly in the interest of the entire community of nations. . . . Straits . . . serve as routes for the bulk of the world's shipping trade. . . . Unimpeded access through straits for commercial ships on a global basis may be as important as preservation of military transit rights. . . . [T]he United States, Japan, the nations of the European Economic Community, and many developing countries are critically dependent on supplies of oil that must initially move through one or more straits.

Moore, *supra* note 182, at 78-81. In recognition of the importance of straits passage, President Nixon, in his oceans-policy statement, announced that the United States would urge other nations to participate in the drafting of a new law of the sea treaty which would provide free transit through international straits. President's Statement on United States Ocean Policy, 6 Weekly Comp. of Pres. Doc. 677, 678 (May 25, 1970), cited in Robertson, *supra* note 108, at 806 n.21.

253. Under customary international law, an innocent passage regime is normally associated with passage through the territorial sea. See notes 2 & 102 *supra*. The same regime applies to straits which are either not subject to an international agreement or which connect two parts of the open seas. See text accompanying notes 116-117 *supra*. The Convention on the Territorial Sea and the Contiguous Zone attempted to articulate more specific principles for passage through straits by providing that innocent passage could not be suspended in straits joining either two parts of the high seas or the high seas with the territorial sea of another state. See text accompanying notes 211-214, 217-218 *supra*. However, the Convention on the Territorial Sea contained many problems, particularly since

'innocence' of passage, as well as threats to the 'peace, good order, or security' of a coastal state could not be measured by objective criteria. . . . Consequently, there was nothing in the 1958 Convention prohibiting a state from selectively restricting or denying passage on the basis of such criteria as character of cargo, vessel type and destination or flag.

Pirtle, *Transit Rights and U.S. Security Interests in International Straits: The "Straits Debate" Revisited*, 5 OCEAN DEV. & INT'L L.J. 477, 481 (1978) [hereinafter cited as Pirtle]. See text accompanying notes 198-201 *supra*.

Passage through straits is vital for most nations in the world. See note 252 and accompanying text *supra*; see Grandison & Meyer, *supra* note 3, at 412. The Security Council has formally recognized the "importance of communications through critical waterways to the maintenance of peace in the Middle East." Grandison & Meyer, *supra* note 3, at 425 n.96. It has affirmed "the necessity . . . [f]or guaranteeing freedom of navigation through international waterways in the area." S. C. Res. 242, 22 U.N. SCOR (1379th plen. mtg.) at 2, U.N. Doc. S/8247 (1967).

With the UNCLOS extension of the territorial sea limit to 12 miles, many straits heretofore having a belt of high seas in the center will now be totally encompassed in territorial sea. See Pirtle, *supra*, at 479. Without a revision of the straits passage regime, these straits would thus be governed by the ambiguous Article 16(4) innocent passage regime of the Convention on the Territorial Sea. That result would prove unsatisfactory, especially since nations now recognize that the importance of straits passage merits separate treatment. Territorial waters

are not usually indispensable routes for passage, as straits so frequently are, since it is possible to divert traffic around closed areas at the cost of some increase in the time and expense of a particular voyage. . . . [H]owever, the loss to the community from diversion around these closed areas of the territorial sea hardly approximates that involved in the closure of straits connecting high seas areas.

McDOUGAL & BURKE, *supra* note 2, at 190-91. Many participants at UNCLOS, in recognition of the importance of the straits issue, argued for a new and specific legal regime. See Grandison & Meyer, *supra* note 3, at 405-06, 409-11.

Before UNCLOS began, the United States expressed its fear that an extension of the territorial sea would inhibit passage through some of the world's most vital waterways.<sup>254</sup> Hence, the United States argued for freedom of navigation through straits as a precondition to acceptance of a treaty allowing a nine mile extension of the customary three mile territorial sea limit.<sup>255</sup>

Once the substantive sessions of UNCLOS began,<sup>256</sup> the coastal and maritime states expressed competing concerns in response to a freedom of navigation proposal. Coastal states feared that strict freedom of navigation would leave them little recourse to protect against pollution and threats to their national security.<sup>257</sup> The U.S. position represented the concerns of the maritime states: An extension of the breadth of the territorial sea would allow straits states to interfere with the right to navigate, and "would prejudice the economic, political, and military interests of states that [had] relied on use of straits in the past."<sup>258</sup>

During the 1972 meetings of the U.N. Sea-bed Committee,<sup>259</sup> the participants

Article 16 of the Convention on the Territorial Sea generally covers coastal competence to prevent non-innocent passage in the territorial sea and in internal waters. Convention on the Territorial Sea, *supra* note 19, art. 16. Part of Article 16 also covers straits passage. *Id.* art. 16(4). In contrast, the UNCLOS Draft Convention Part III, "Straits Used for International Navigation," is separate from Part II, "Territorial Sea and Contiguous Zone." UNCLOS Draft Convention, *supra* note 20, parts II, III. *See* Moore, *supra* note 182, at 90-94. Moore argues that the Convention on the Territorial Sea failed to distinguish between passage through the territorial sea and passage through straits, whereas UNCLOS has recognized this important distinction. *Id.* at 90.

254. *Cf.* Robertson, *supra* note 108, at 808-09 (The United States felt that "an 'adequate agreement' [for straits] required an absolute right of passage through 'international' straits as defined in the Territorial Sea Convention.").

255. Statement of John R. Stevenson *supra*, note 239, at 262. *See* Robertson, *supra* note 108 at 808-09.

256. *See* text accompanying note 222 *supra*.

257. Robertson, *supra* note 108, at 813; statement of Spanish representative before Subcommittee II of the Seabeds Committee, U.N. Doc. A/AC.138/SC.II/SR.42 at 53 (1972) and statement of Indonesian representative, U.N. Doc. A/AC.138/SC.II/SR.31 at 111 (1972), *cited in* Grandison & Meyer, *supra* note 3, at 407 n.53.

258. Grandison & Meyer, *supra* note 3, at 409-10. The latter usage argument was not particularly relevant to passage through the Strait of Tiran before 1956. Ships did not regularly use the Strait of Tiran before that time "because of the threat posed by Egyptian coastal batteries at Sharm-el-Sheikh." Slonim, *supra* note 26, at 113 n.68. After Israel withdrew from the Sinai, and the United Nations Emergency Force was stationed at the Strait, nations could use the Strait without fear of military interference, and thus with greater regularity. *Id.* However, even when the Strait came into normal use, the reliance argument had little merit with respect to the Strait of Tiran. Since the only navigable portion of the Strait is less than one mile from Egypt's coast on the Sinai Peninsula, an extension of the territorial seas to 12 miles would not affect prior users of Strait. *See* note 9 *supra*.

259. The United Nations Sea-bed Committee was the preparatory conference for the Third United Nations Conference on the Law of the Sea. Lynch, *The Nepal Proposal for a Common Heritage Fund: Panacea or Pipe Dream?*, 10 CAL. W. INT'L L.J. 25, 35 n.83 (1980). The U.N. General Assembly, by Resolution 2467, established this Committee (Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction) to study the "ways and means of promoting the [international] exploitation and use of the resources of" the sea-bed and ocean floor. G.A. Res. 2467 (XXIII), 23 GAOR Supp. (No. 18), U.N. Doc. A/7218 (1969). The General Assembly established an Ad Hoc Committee of 36 nations to engage in the study. G.A. Res. 2340 (XXII), 22 U.N. GAOR Supp. (No. 16) at 14, U.N. Doc. A/6716 (1967). For further discussion of the function of the Sea-bed Committee, *see* Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 AM. J. INT'L L. 1, 4, 8, 23 (1974); Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas*

had modified the U.S. proposal to cover transit passage.<sup>260</sup> Although this Committee left the U.S. proposal essentially intact,<sup>261</sup> the Committee replaced it with the British modification. The British transit passage proposal, a compromise between the total freedom of navigation and the innocent passage proposals, eventually served as the basis for the UNCLOS negotiating texts.<sup>262</sup>

### 1. The Text of the Draft Convention

Part III of the Draft Convention on the Law of the Sea refers only to straits used for international navigation, and consists of two major sections: transit passage (Articles 37-44)<sup>263</sup> and innocent passage (Article 45).<sup>264</sup> The incorporation of the transit passage regime for ships navigating through straits represents a major improvement for the maritime states over the regime established by the 1958 Convention.<sup>265</sup> Transit passage, referred to as "freedom of navigation,"<sup>266</sup> is more liberal than innocent passage in several respects. First, the new regime contains no requirement that passage be labelled innocent by the coastal state.<sup>267</sup> Second, Article 44 limits the authority of strait states to suspend transit passage.<sup>268</sup> Ships passing through straits must proceed without delay and must refrain from threats or use of force against the coastal state.<sup>269</sup> However, these

Session, 69 AM. J. INT'L L. 1, 3 (1975); Statements made in U.N. General Assembly Committee I by Senator Claiborne Pell and John R. Stevenson, 64 DEP'T ST. BULL. 150 (1971); Statement by John R. Stevenson made in Subcommittee II, 65 DEP'T ST. BULL. 261 (1971).

260. Robertson, *supra* note 108, at 815-16.

261. *See id.* at 816.

262. United Kingdom: Draft Articles on the Territorial Sea and Straits, 3 UNCLOS III Off. Rec., art. 1, U.N. Doc. A/CONF.62/C.21/L. 3 (1975), *cited in* Robertson, *supra* note 108, at 819 nn. 96-97.

263. UNCLOS Draft Convention, *supra* note 20, arts. 37-44.

264. *Id.* art. 45.

265. *See* § III. C *supra*.

266. UNCLOS Draft Convention, *supra* note 20, art. 38(2). "Transit passage is the exercise in accordance with this Part of . . . freedom of navigation." *Id.*

267. *Cf.* Maduro, *Passage Through International Straits: The Prospects Emerging from the Third United Nations Conference on the Law of the Sea*, 12 J. MAR. L. & COM. 65, 72 (1980) (vessels are not subject to any criterion of innocence under the transit passage regime) [hereinafter cited as Maduro].

268. UNCLOS Draft Convention, *supra* note 20, art. 44. "States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage." *Id.*

269. *Id.* art. 39(1). Article 39(1) provides:

Ships and aircraft, while exercising the right of transit passage, shall:

- (a) Proceed without delay through or over the strait;
- (b) Refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering straits, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (c) Refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;
- (d) Comply with other relevant provisions of this Part.

*Id.*

ships are subject to international regulations rather than an array of regulations that a coastal state may impose.<sup>270</sup>

Coastal states are protected by Article 40, which specifies that "foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits."<sup>271</sup> However, in contrast to the innocent passage regime, the transit passage regime allows the coastal state, according to Article 42,<sup>272</sup> to enact only four types of regulations:<sup>273</sup>

- (a) The safety of navigation and the regulation of marine traffic . . . ; (b) The prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait; (c) With respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear; (d) The taking on board or putting overboard of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary regulations of States bordering straits.<sup>274</sup>

The innocent passage regime of Article 45<sup>275</sup> applies to those straits excluded from transit passage,<sup>276</sup> and those straits that connect "an area of the high seas or an exclusive economic zone and the territorial sea of a foreign State."<sup>277</sup> The passage regime for straits governed by Article 45<sup>278</sup> is subject to the same regime that governs navigation through the territorial sea.<sup>279</sup>

## 2. The Draft Convention as Applied to the Strait of Tiran

The Strait of Tiran qualifies as a strait regulable by Part III of the Draft Convention because the Strait is used for international navigation.<sup>280</sup> Further-

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270. *Id.* art. 39(2). Article 39(2) provides: "Ships in transit shall: (a) Comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea; (b) Comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships."

*Id.*

271. *Id.* art. 40.

272. *Id.* art. 42.

273. *Id.* art. 42(1); Maduro, *supra* note 267, at 72; Moore, *supra* note 182, at 105.

274. UNCLOS Draft Convention, *supra* note 20, art. 42(1).

275. *Id.* art. 45.

276. *Id.* art. 45(1) (a). Straits excluded from transit passage are those that are "formed by an island of a State bordering the strait and its mainland . . . [where] . . . a high seas route or a route in an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island." *Id.* art. 38(1).

277. *Id.* art. 45(1)(b).

278. *Id.* art. 45.

279. *Id.* art. 45(1).

280. *Id.* Part III. The straits covered by Part III are "Straits used for international navigation." *Id.* See § II.B.3 *supra*.



more, the Strait of Tiran is not excluded under Article 36<sup>281</sup> as the Strait has but one way through which large ships can pass. The critical issue relates to which section of Part III regulates the Strait.

The Strait of Tiran is more likely regulable by the innocent passage regime than by the transit passage regime.<sup>282</sup> Since the transit passage regime applies where connected bodies of water are high seas,<sup>283</sup> the main issue with respect to the Strait of Tiran is whether the Gulf of Aqaba qualifies as high seas under the Draft Convention. That the Strait of Tiran links two parts of the high seas as stated in Article 37,<sup>284</sup> especially with the extension of the territorial sea limit under the Draft Convention,<sup>285</sup> is questionable. As discussed in connection with the 1958 Convention,<sup>286</sup> many nations characterized the Gulf as an international waterway, but other nations contested that characterization. Under the UNCLOS Draft Convention, the Gulf does not qualify as high seas.<sup>287</sup> The Draft Convention provides that the high seas regime is inapplicable to any state's territorial seas.<sup>288</sup> With the entire Gulf claimed under the Draft Convention as territorial sea,<sup>289</sup> the Strait does not connect two parts of the high seas.<sup>290</sup>

Under the Draft Convention, therefore, the innocent passage regime will apply to the Strait of Tiran, which connects an area of the high seas (Red Sea) with the territorial sea of a foreign state (Jordan or Israel).<sup>291</sup> Although the innocent passage regime under the Draft Convention affords a maritime state less freedom to proceed unimpeded through a strait,<sup>292</sup> and innocent passage through the Strait of Tiran is non-suspendable under the Draft Convention as it is under the 1958 Convention,<sup>293</sup> maritime states have, nonetheless, improved

281. UNCLOS Draft Convention, *supra* note 20, art. 36. Article 36 provides: "This Part does not apply to a strait used for international navigation if a high seas route or a route through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists through the strait." *Id.* See also Robertson, *supra* note 108, at 827-28.

282. See Moore, *supra* note 182, at 111-12.

283. UNCLOS Draft Convention, *supra* note 20, art. 37.

284. *Id.*

285. *Id.* art. 3.

286. See § II.B.3 & note 109 *supra*.

287. UNCLOS Draft Convention, *supra* note 20, art. 86. Section 1 of Part VII (High Seas) provides that "this Part appl[ies] to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State." *Id.* (emphasis added). Thus, all of the Gulf would, under UNCLOS, fall in the territorial sea of one of the littoral states.

288. *Id.*

289. See *id.* art. 3.

290. See O'CONNELL, *supra* note 3, at 111.

291. UNCLOS Draft Convention, *supra* note 20, art. 45(1)(b). Article 45(1)(b) provides: "The régime of innocent passage, in accordance with section 3 of Part II, shall apply in straits used for international navigation: . . .

(b) Between an area of the high seas or an exclusive economic zone and the territorial sea of a foreign State."

*Id.* See also LAPIDOTH, *supra* note 2, at 55.

292. See text accompanying notes 266-70 *supra*.

293. UNCLOS Draft Convention, *supra* note 20, art. 45(2). Article 45(2) provides: "There shall be no suspension of innocent passage through such straits." *Id.* Compare Article 16(4) of the 1958 Convention,

their positions with respect to the 1958 Convention.<sup>294</sup> For example, under the UNCLOS innocent passage regime, Israel is assured of objective criteria<sup>295</sup> to evaluate passage through the territorial sea. Thus, an Arab characterization of passage as non-innocent would be less likely.

#### V. THE EGYPTIAN-ISRAELI PEACE TREATY

On March 26, 1979, Anwar El Sadat and Menachem Begin, after months of negotiation, signed the Treaty of Peace between the State of Israel and the Arab Republic of Egypt<sup>296</sup> (Peace Treaty). Although the parties' treatment of area waterways was not one of the major issues of discussion during the negotiations,<sup>297</sup> such treatment is nevertheless an integral part of the establishment of any long-lasting peace between Egypt and Israel.<sup>298</sup> The United States has also affirmed the necessity of open waterways to the achievement of peace in the Middle East. Alfred L. Atherton Jr., in his address before the Atlanta Foreign Policy Conference on U.S. Interests in the Middle East expressed the U.S. position prior to the signing of the Peace Treaty: "Peace . . . means open borders, normal commerce and tourism, diplomatic relations and a range of official and unofficial contacts, *free navigation through waterways*, and an end to all boycotts."<sup>299</sup>

Accordingly, Article V(2) of the Peace Treaty states that

[t]he Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight. The Parties

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which reads: "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State." Convention on The Territorial Sea, *supra* note 19, art. 16(4).

294. Robertson, *supra* note 108, at 836.

295. The regime of innocent passage for straits is governed by Part II, Section III. UNCLOS Draft Convention, *supra* note 20, art. 45(1). Section III of Part II lists specific acts by which the coastal State can characterize passage as non-innocent. *Id.* art. 19(2).

296. Treaty of Peace, *supra* note 14.

297. The discussions centered most frequently on the problem of Israel's withdrawal from the West Bank and the Gaza Strip, and the resolution of the Palestinian problem. For an account of the events leading to the signing of the Peace Treaty, and the problems the parties encountered, see generally Bassiouni, *An Analysis of Egyptian Peace Policy Toward Israel: From Resolution 242 (1967) to the 1979 Peace Treaty*, 12 CASE W. RES. J. INT'L L. 3 (1980) [hereinafter cited as Bassiouni]; Murphy, *supra* note 1; Reich, Silverburg & Stein, *supra* note 1.

298. Preamble, Treaty of Peace, *supra* note 14. The Preamble to the Peace Treaty states that the parties "[c]onvinced of the urgent necessity of the establishment of a just, comprehensive and lasting peace . . . [a]gree to the following provisions." *Id.*

299. Statement by Alfred L. Atherton, Jr. (Ambassador at Large with special responsibility for Middle East peace negotiations), Middle East: A Status Report on the Peace Process, BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 2014, DEPARTMENT OF STATE BULLETIN 43 (May 1978) (emphasis added).

will respect each other's right to navigation and overflight for access to either country through the Strait of Tiran and the Gulf of Aqaba.<sup>300</sup>

This provision is not peculiar to the Peace Treaty. Article V(2) is based on Security Council Resolution 242,<sup>301</sup> which recognized the necessity "for guaranteeing freedom of navigation through international waterways in the area."<sup>302</sup>

The language of Article V is unambiguous on its face. The combination of the words "international waterways,"<sup>303</sup> "unimpeded"<sup>304</sup> and, in particular, "non-suspendable freedom of navigation"<sup>305</sup> supports the conclusion that at least the parties will place no restrictions on the innocent passage of merchant ships through the Strait of Tiran and through the territorial waters claimed by Egypt and Israel in the Gulf.<sup>306</sup> The language repeatedly emphasizes free navigation and rejects any possibility that ships moving through the area will be subject to various regulations that the coastal states may impose. In this sense, the parties clearly departed from the ambiguous regime found in the Convention on the Territorial Sea and the Contiguous Zone, as well as from the UNCLOS Draft Convention. The language indicates a desire by Egypt and Israel to affirm a passage regime that approximates the traditional freedom of navigation.<sup>307</sup>

Should the UNCLOS Draft Convention be finalized in treaty form, a conflict may arise between the passage regime of the UNCLOS Draft Convention and that provided for in the Peace Treaty. Israel and Egypt are both participants of the Third United Nations Conference on the Law of the Sea.<sup>308</sup> Because the notions of transit passage and innocent passage are more restrictive than the broader Peace Treaty Article V freedom of navigation,<sup>309</sup> the issue of which treaty would prevail in the event of conflict arises. To resolve this issue, one must first look to the texts of the two treaties to ascertain whether any specific provisions, therein, resolve the possible conflict.

Article 35 of the Draft Convention is relevant to this issue. It states that "[n]othing in this Part [Straits Used for International Navigation] shall affect

300. Treaty of Peace, *supra* note 14, art. V.

301. Murphy, *supra* note 1, at 919.

302. S.C. Res. 242, 22 U.N. SCOR (1379th plen. mtg.) at 2, U.N. Doc. S/8247 (1967).

303. Treaty of Peace, *supra* note 14, art. V(2).

304. *Id.*

305. *Id.*

306. See Reisman, *supra* note 99, at 76.

307. As Reisman states:

With this sort of formula, tortured, casuistic interpretations are not necessary. . . . The waterways are characterized as 'international' and any hint of a territorial competence . . . is repeatedly excluded; there is no 'right of transit' characterizable by the coastal state, but instead and only the traditional freedom of navigation, and that right may not be impeded or suspended.

*Id.*

308. See note 229 *supra*.

309. See text accompanying note 262 & § IV.B.1 *supra*.

. . . (c) The legal régime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits."<sup>310</sup> This qualification is inapplicable to the regime of the Peace Treaty because the drafters intended the provision to refer particularly to those regimes established for the Danish Straits, the Turkish Straits and the Strait of Magellan.<sup>311</sup> Moreover, the Peace Treaty is not a longstanding international convention.

The language of Article VI of the Peace Treaty initially appears to provide an answer to the question. Articles VI(2),<sup>312</sup> VI(4)<sup>313</sup> and VI(5)<sup>314</sup> expressly state that, subject to Article 103 of the United Nations Charter, if the obligations of the parties to the Peace Treaty conflict with their obligations under another treaty, the obligations undertaken under the Peace Treaty will prevail. However, reliance on these provisions to clarify ambiguities may be misplaced. The hierarchy expressed in Article VI relates to the question of Egypt's present and future commitments to the other Arab nations, primarily Syria and Jordan.<sup>315</sup>

An examination of the relevant portions of the Vienna Convention on the Law of Treaties<sup>316</sup> (Vienna Convention) may, in the absence of specific provisions in either the UNCLOS Draft Convention or the Peace Treaty, provide an answer to the question of conflicting obligations. Although the Vienna Convention has not yet entered into force,<sup>317</sup> the international legal community regards the principles of that Convention to be authoritative in treaty interpretation.<sup>318</sup>

Article 30 of the Vienna Convention,<sup>319</sup> the general conflict resolution rule for

310. UNCLOS Draft Convention, *supra* note 20, art. 35.

311. Moore, *supra* note 182, at 114.

312. Treaty of Peace, *supra* note 14, art. VI(2). "The Parties undertake to fulfill in good faith their obligations under this Treaty, without regard to action or inaction of any other party and independently of any instrument external to this Treaty." *Id.*

313. *Id.* art. VI(4). "The Parties undertake not to enter into any obligation in conflict with this Treaty." *Id.*

314. *Id.* art. VI(5). "Subject to Article 103 of the United Nations Charter, in the event of a conflict between the obligations of the Parties under the present Treaty and any of their other obligations, the obligations under this Treaty will be binding and implemented." *Id.*

315. Reich, Silverburg & Stein, *supra* note 1, at 39-41. *See also* Bassiouni, *supra* note 297, at 20. However, as Murphy comments, the Agreed Minutes to Article VI add further confusion by stating "there is no assertion that this Treaty prevails over other Treaties or agreements or that other Treaties or agreements prevail over this Treaty." Murphy, *supra* note 1, at 923.

316. Convention on the Law of Treaties, Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (United Nations Publication, Sales No.: E. 70. V.5) p. 289, *cited in* 2 Y. B. INT'L L. COMM. 340 n.226 (1971); U.N. Doc. A/CONF.39/27 (1969) [hereinafter cited as Vienna Convention].

317. Gamble, *Multilateral Treaties: The Significance of the Name of the Instrument*, 10 CAL. W. INT'L L.J. 1, 8 (1980).

318. *Id.*

319. Vienna Convention, *supra* note 316, art. 30. "When all parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty." *Id.*

treaties relating to the same subject matter, purportedly covers this controversy. Article 30 provides that where two treaties apply to the same subject matter, the earlier treaty will apply only to the extent that its provisions are not incompatible with the later treaty.<sup>320</sup>

The Peace Treaty provides for a more lenient passage regime than does the proposed UNCLOS Treaty. Thus, for example, a ship engaged in fishing activities while passing through the Gulf might be allowed to proceed under the Peace Treaty non-suspendable freedom of navigation regime, yet be denied passage under the UNCLOS Draft Convention.<sup>321</sup> The passage provisions of the Peace Treaty and those of the UNCLOS Draft Convention may thus be incompatible if maritime activities considered prejudicial under the UNCLOS regime would not justify denial of passage under the Peace Treaty regime.

A strict application of Article 30 to the provisions of the earlier Peace Treaty<sup>322</sup> would render the Peace Treaty provisions ineffective to the extent that they allowed greater navigational freedom through the waters than did the UNCLOS Draft Convention. However, strict application of Article 30 could produce the anomalous result of nullifying Article V(2) of the Peace Treaty. If the freedom of navigation regime in the Peace Treaty, implying greater rights in the parties to navigate through the waterways,<sup>323</sup> were overridden by the transit passage and innocent passage regimes of the Draft Convention, the rights of the parties to the Peace Treaty would be subordinate to the more restrictive rights of the UNCLOS Draft Convention.<sup>324</sup> Article V would, thus, lose its intended meaning of guaranteeing "unimpeded and non-suspendable freedom of navigation."<sup>325</sup>

Through the use of an alternative construction of compatibility, one may avoid the unintended result that occurs where Article 30 is applied to strike the "incompatible" provisions of the Peace Treaty. That construction would recognize "the mere fact that there [is] a difference between the provisions of a later treaty and those of an earlier treaty [does] not necessarily mean that there [exists] an incompatibility within the meaning of [Article 30] . . . [M]aintenance in force of the provisions of the earlier treaty might be justified by circumstances or by the intention of the parties."<sup>326</sup> The intention of the parties, which must be given

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320. *Id.*

321. Compare Treaty of Peace, *supra* note 14, art. V(2) with UNCLOS Draft Convention, *supra* note 20, art. 19(2)(i).

322. I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 68 (1973) [hereinafter cited as SINCLAIR]. "[I]n determining which treaty is the 'earlier' and which the 'later', the relevant date is that of the adoption of the text." *Id.*

323. See text accompanying notes 262, 303-307 *supra*.

324. See note 262 & 307 and accompanying text, *supra*.

325. Treaty of Peace, *supra* note 14, art. V(2).

326. Statement of Ambassador Yasseen, United Nations Conference on the Law of Treaties, *Official Records, Second Session*, (A/Conf. 39/11 Add. 1), 91st meeting, quoted in SINCLAIR, *supra* note 322, at 67 n.38.

effect in treaty interpretation, is ascertained from "their intention as expressed in the words used by them in the light of the surrounding circumstances."<sup>327</sup> Under that analysis, the Peace Treaty guarantee of freedom of navigation would remain unaffected by the UNCLOS Draft Convention.

The Peace Treaty attempts to incorporate those guidelines which the parties considered essential to achievement of an overall peace between Egypt and Israel. A reasonable approach to the problem would recognize this goal. The parties' affirmation of free navigation is one of the components which will implement and maintain the peace. If a prime component of the peace objective is the agreement that the named waterways should be kept open for freedom of navigation, then this provision should not be overridden. The express intention of the parties should prevail, thus leaving the UNCLOS Draft Convention regime, which gives less freedom to the coastal and maritime states, in a subordinate position.

Another means to avoid the result that application of Article 30 might produce is through strict construction of the expression "relating to the same subject matter."<sup>328</sup> Article 30 "will not cover cases where a general treaty impinges indirectly on the content of a particular provision of an earlier treaty."<sup>329</sup> Thus, the general UNCLOS provisions relating to passage regimes for all straits and gulfs would not, under this analysis, affect the specific Peace Treaty passage regime for the Strait of Tiran and Gulf of Aqaba.

Finally, if Israel or Egypt were to act in defiance of Article V of the Peace Treaty, on the assumption that the UNCLOS Draft Convention regime were superior, such an act would violate Article 18 of the Vienna Convention. Article 18 provides that "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty . . . ."<sup>330</sup> Thus, if the regime established in Article V is essential for preservation of peace between Egypt and Israel, the parties must be bound to observe that principle over any other that may tend to distort the meaning of freedom of navigation.

Jordan and Saudi Arabia have yet to affirm the principle of free navigation through the Gulf. Neither nation has evidenced a desire to participate in peace negotiations between Israel and Egypt. Neither is bound by the Peace Treaty, according to Article 34 of the Vienna Convention.<sup>331</sup> Thus, their rights and

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327. L. McNair, *LAW OF TREATIES* 365 (1961), *cited in* SINCLAIR, *supra* note 322, at 71.

328. SINCLAIR, *supra* note 322, at 68.

329. *Id.*

330. Vienna Convention, *supra* note 316, art. 18. Although, as the title (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) suggests, Article 18 specifically applies prior to a treaty's entry into force, an assumption that the principle applies equally to treaties which have already entered into force is fair. This assumption is especially accurate when Article 18 is read in conjunction with Article 26, which states: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." *Id.* art. 26.

331. Vienna Convention, *supra* note 316, art. 34. "A treaty does not create either obligations or rights for a third State without its consent." *Id.*

duties will be governed by either the prospective UNCLOS Treaty, or the 1958 Convention, under which Jordan and Saudi Arabia still may seek to closely regulate maritime traffic in their territorial waters.

Furthermore, were Saudi Arabia and Jordan to adhere to the claim of continuing belligerency with Israel, they might be justified, under international law,<sup>332</sup> in exercising their wartime authority to prevent passage of ships through their territorial waters in the Gulf.<sup>333</sup>

## VI. CONCLUSION

Prior to the 1958 Geneva Conference on the Law of the Sea, the international community had refused to accept the argument that the Gulf was an historic or inland sea. Further, most major world powers agreed that a state of belligerency no longer legally existed between Israel and the Arab nations. Yet, the collective members of the United Nations, characterizing the Gulf as an international waterway and reaffirming a right of innocent passage through the Gulf, made little progress in delineating the respective rights and duties of coastal and maritime states under the innocent passage regime. Most nations also agreed that the innocent passage regime should apply as well to the Strait of Tiran, but were unable to agree upon the exact definition of the innocent passage regime.

The 1958 Geneva Conference on the Law of the Sea, in adopting the Convention on the Territorial Sea and the Contiguous Zone, attempted to balance the interests of the maritime and coastal states by providing a more concrete definition of innocent passage. However, even that definition was not entirely satisfactory, since the Conference was unable to reach a completely objective definition of the innocent passage regime. Whether the adoption of the straits article represented new rule-making in international law is uncertain. Nevertheless, the Conference did continue the trend of codifying the often conflicting doctrines of the law of the sea.

The Draft Convention that has emerged from the Third United Nations Conference on the Law of the Sea evidences a significant concern that a more precise balance between the interests of the coastal and the maritime states be achieved. That balance is the product of the UNCLOS participants' struggle to provide a more comprehensive passage regime for gulf and strait waters. The Draft Convention delineates more clearly the rights and duties of maritime and coastal states by providing specific criteria by which to regulate passage through territorial waters and straits. Under the UNCLOS Draft Convention passage regime, Israel may be more insulated from purely politically motivated impositions placed on shipping bound for or coming from Elath. The innocent passage regime, which is probably applicable to both the Gulf and the Strait, comes closer

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332. The UNCLOS Draft Convention does not state that its provisions apply in time of war.

333. See § II.A.3 *supra*.

to achieving the freedom of navigation for which Israel has fought. However, that regime does not guarantee totally unimpeded access to the Red Sea or Gulf of Aqaba, since the coastal states can still regulate passage to some extent. In turn, the change enables the Arab nations to validly claim the twelve mile breadth of territorial sea, and affords those nations protection in areas of the Gulf which were previously not recognized in international law as legitimate parts of their territorial waters. At the same time, however, some dissatisfaction could arise from the restrictions placed on coastal state characterization of innocent passage.

The fact that Egypt, Israel and other nations consider free navigation vital to the preservation of peace in the Middle East clearly demonstrates the necessity of guaranteeing all nations free and unimpeded passage through the Strait of Tiran and the Gulf of Aqaba. This Comment has focused on the interplay of political and legal forces, which have often competed to reach strained and conflicting conclusions regarding the rights and duties of maritime and coastal states with respect to these waterways. A binding legal agreement between all four littoral nations is necessary for a satisfactory resolution of the Gulf's status, and the status of the Strait. Until that time, the rights and duties of the nations bordering the Gulf will be governed by differing regimes, and the status of the Gulf in particular will be defined by political, rather than legal, considerations.

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