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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 1948.¹ 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 waters² when passing through the Strait of Tiran, and into the territorial waters of either Egypt, Jordan or Saudi Arabia when navigating through the Gulf.

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*.

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.²² 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 1950s²³ prompted a debate between Israel and the Arab states over the legal status of, and passage regime in, the Gulf of Aqaba.²⁴ The major forums for the presentation of Israeli and Arab views were the Security Council in 1954,²⁵ the International Law Commission in 1956,²⁶ 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 1956-57.²⁷ 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,²⁸ a body of water with the geography of the Gulf of Aqaba is non-territorial.²⁹ International law recognizes a gulf bordered by more than one littoral state as being part of the high seas.³⁰ 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. I L. OPPENHEIM, *INTERNATIONAL LAW* 508 (H. Lauterpacht ed. 8th ed. 1955) [hereinafter cited as I 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. I 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,³¹ such part of the high seas is "in time of peace and war open to vessels of all nations, including men-of-war."³²

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.³³ Under international law, internal waters are normally those areas of water that are immediately adjacent to a nation's coastlines.³⁴ 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.³⁵ A nation's legitimate claims to internal waters enables it to arbitrarily deny access to foreign ships.³⁶ No set criteria for denial of passage are adhered to by nations.³⁷

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.³⁸ 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.³⁹ In the latter instance, the enclosed waters do not constitute internal waters.⁴⁰ 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. I 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.⁴¹ 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.⁴² 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.⁴³

The Arab nations seized upon this exception to justify the denial of free passage by Israel through the Gulf.⁴⁴ The Saudi Arabian government justified Arab aggression in the Gulf area⁴⁵ toward ships trading with Israel by arguing that the Gulf of Aqaba constituted national, historic waters, having been under Arab domination for centuries.⁴⁶ Saudi Arabia thus attempted to reject any

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,⁴⁷ 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*⁴⁸ is the *Fonseca* case, decided in 1917.⁴⁹ 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.⁵⁰ 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.⁵¹ El Salvador complained that the Treaty violated, in this respect, its rights of common ownership in the Gulf of Fonseca.⁵²

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.⁵³ Spain's sovereign rights passed to the Federal Republic of Central America when the republics were emancipated.⁵⁴ El Salvador, Honduras and Nicaragua were the only three republics that used the water for fishing and other purposes.⁵⁵

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.⁵⁶

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.⁵⁷ The Court based its decision on several factors. First, El Salvador had demonstrated "immemorial" possession by establishing exclusive ownership by Spain and its successors.⁵⁸ Second, other nations had acquiesced in this peaceful and continuous ownership.⁵⁹ 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.⁶⁰ In addition, because of its geographical location, the nations relied on access to the Gulf of Fonseca for trade.⁶¹ 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."⁶²

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.⁶³ However, while the geography of the Gulf of Fonseca is similar to that of the Gulf of Aqaba,⁶⁴ the weight of authority tends to disregard the validity of Saudi Arabia's claims.⁶⁵ 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.⁶⁶ Historical data refute any suggestion that the littoral states used the Gulf to the exclusion of other nations.⁶⁷ In fact, the data demonstrate that, because of the Gulf's geographical and natural constraints, those states were precluded

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.⁶⁸ Furthermore, nations have not universally acquiesced in the notion of the Gulf as historic inland waters.⁶⁹

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.⁷⁰ However, no known agreement to this effect was ever reached by the Arab states,⁷¹ and the presence of Israel on the Gulf precludes, in the historical context of Arab-Israeli conflict, the possibility of a four-nation agreement.⁷²

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.⁷³

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.⁷⁴

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.⁷⁵ When Israel urged the Security Council in 1954 to condemn Egypt's aggression in the Gulf,⁷⁶ 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.⁷⁷ The Egyptian government argued that the Egyptian-Israeli General Armistice Agreement⁷⁸ had not legally ended the state of war between the two nations.⁷⁹ The Arabs renewed this argument during the eleventh session of the General Assembly.⁸⁰

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.).