THE AQABA DISPUTE

by

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ABSTRACT

This dissertation is an attempt to evaluate the maritime status of the Gulf of Aqaba and the Straits of Tiran, with particular reference to the Israeli assertion of a right of navigation and passage in these waters.

Chapter I outlines the geographical characteristics and early political history of the area, including the development of Arab littoral States subsequent to the dissolution of the Ottoman Empire. An examination is then made of Zionist activities in Palestine during the period of the Mandate, leading up to the emergence of Israel and the Arab-Israeli conflict. This section concludes with a consideration of the role and function of the United Nations in attempting to bring about a cessation of hostilities, and the occupation by Israel of territory abutting upon the Gulf.

Chapter II discusses the reciprocal rights and duties of States under general international law, and the obligations imposed by membership in the United Nations. The existence and consequences of war on the relations between States, along with the accepted method of terminating this condition of belligerency, are also considered. The situation established by the Egyptian-Israeli Armistice Agreement is then analyzed in the light of prior precedents and the usage of nations. Finally, an introduction is made to the concept of freedom of the seas and the

principles applicable to the delimitation of internal waters and the territorial zone from the high seas.

The following chapter relates the Israeli attempts to raise the issue of navigation before the Mixed Armistice Commission and the Security Council. The position of Egypt in these proceedings and the attitudes expressed by member States are reviewed, including the effect of the Security Council resolution of 1951 and the defeat of a similar measure in 1954. This section closes with an account of the Sinai invasion in late 1956, and the measures taken by the United Nations to accomplish the withdrawal of Israeli forces.

The final chapter contains a critical appraisal of Israel's presence in the Gulf, and notes that it is based, in the first instance, on a violation of specific decisions of the United Nations as well as a misconstruction of the armistice regime. The unrestricted freedom of navigation on the high seas is then distinguished from the right of innocent passage in territorial waters, which is always subject to the superior interests of the shore sovereign. Utilizing the territorial limits asserted by the littoral States, it is concluded that the main body of the Gulf and the Straits of Tiran constitute territorial waters, in which Israel has, at most, merely a claim to a qualified and limited privilege of passage. It is also observed that there has never been an authoritative determination of the legal issues raised, which may be effectively resolved only by the International Court of Justice.

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The opinions expressed herein do not represent the views of the Department of Army. I bear sole and complete responsibility for the validity and legal correctness of this analysis.

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CHAPTER I

THE EMERGENCE OF LITTORAL STATES

Geographical and Early History

Before discussing the various international legal ramifications of the dispute concerning the Gulf of Aqaba and the Straits of Tiran, that arose in the years following the termination of the British Mandate for Palestine and the emergence of the State of Israel, it will be helpful to review briefly the physical geography and political history of the area prior to that time. In this manner, the contentions of Israel, its methods and approach to the problem, will be viewed in a clearer light as opposed to the position taken by Egypt as the principal spokesman of the Arab States in the Middle East.

The Gulf of Aqaba, known as the Sinus Aelanticus of antiquity,[1] appears as a long, narrow, landlocked appendage branching off from the northern end of the Red Sea. Lying generally between the northwestern highlands of the Hijaz in the Arabian Peninsula and the eastern coast of the Sinai Peninsula, it protrudes diagonally into Arabia Petrae in a northeasterly direction from latitude 28 degrees to 29 degrees 33 minutes North, and from longitude 34 degrees 25 minutes to 35 degrees East from Greenwich.

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[1] L. M. Bloomfield, Egypt, Israel, and the Gulf of Aqaba, p. 1.

The body of the Gulf is approximately 95 nautical miles in length, and varies in width from less than three to slightly in excess of fourteen nautical miles in some places. The waters are quite deep, with the hundred fathom mark being reached rapidly going out from shore, and a depth of 1000 fathoms recorded in at least one location. Apart from an occassional wadi or mudflat, the coastline on either side rises abruptly to terminate in sharp mountain peaks, which reach altitudes of 3,000 to 6,000 feet.

At the southern end or mouth of the Gulf, and situated in mid-channel between Sinai and the Arabian Peninsula, lies the small coral-fringed island of Tiran. In close proximity thereto, and to the due east, is the smaller island of Sinafir. The main passage into the Gulf, which runs between Sinai and the island of Tiran, is known as the Enterprise Passage of the Straits of Tiran. Although two and one-half nautical miles wide, this gateway is further constricted by four reefs which leave an unobstructed navigable channel only some six hundred yards wide.[2] In addition to these natural hazards, there are sudden squalls which sweep the area from the mountains on either side.[3] Consequently, while the Straits are passable, they are extremely dangerous to navigate.

Regarding ownership of the Gulf of Aqaba and territorial claims to the surrounding lands, it may be observed initially that for several centuries the entire region comprised but a small portion of the Ottoman Empire. That the Gulf was not considered

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[2]British Admiralty Chart B.A. 756, May 23, 1952. See also U.S. Navy Hydrographic Office Chart H. O. 3640, August 25, 1958, based upon British surveys in 1917 and 1918.

[3]Bloomfield, op.cit.

of commercial or maritime importance is indicated by the fact that, during this period, there was no treaty pertaining to it concluded with any of the Great Powers, and a complete absence of development of any port facilities or routes of land communication adjacent to it. Remote, desolate, and scarcely populated except by a few nomadic Bedouin tribes or a sporadic fishing village of a few hundred souls along the coast, the area was truly a backroads of the Empire and constituted a virtual Ottoman lake.

World War I and the Period of the Mandate

Subsequent to World War I, the Ottoman Empire was dismembered and vast areas were set aside, under one guise or another, to the victors. As here pertinent, the mandated territories of Palestine and Transjordan were created with Great Britain filling the role as the mandatory power. In theory, at least, this arrangement was a sacred trust of humanity to ensure the future development and eventual independence of the peoples concerned, based on the cardinal principle of self-determination.[4] Let us now turn to the matter of littoral States and examine their territory abutting upon the Gulf.

In the case of Egypt, it had exercised authority over the Sinai Peninsula since the days of Mohammed Ali. With the British occupation in the late 19th century, and its primary interest centered in the Suez Canal as a vital line of communication to the British Empire and the India trade route, it was a simple

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[4]George Antonious, The Arab Awakening, pp. 351-352.

matter for Great Britain to declare a protectorate over Egypt in 1914.[5] Thus, we find that the secret treaties of World War I, such as the infamous Sykes-Picot Agreement,[6] did not affect the territorial boundaries of Egypt. On the other hand, such treaties did serve indirectly to confirm the easternmost boundary of the Sinai. Therefore, it is indisputable that the entire western coast of the Gulf, extending up as far as Bir Taba near the northern end, was part and parcel of the Egyptian province of Sinai. At this point the Sinai frontier turned inland in a northwesterly direction and extended to approximately Rafah on the Mediterranean Sea. When the protectorate was ended on February 28, 1922, by the unilateral declaration of Great Britain, Egypt was recognized as an independent sovereign State.[7]

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[5] J.C. Hurewitz, Diplomacy in the Near and Middle East, Vol. II, pp. 4-7.

[6] Ibid., pp. 18-22.

[7] Ibid., pp. 100-103. That the Sinai was regarded as part of Egypt by Great Britain is indicated by the following remarks of the British Under-Secretary for Foreign Affairs in the House of Commons on February 21, 1951: "The grant of the right to administer this territory was confirmed by a firman issued by the Sultan of Turkey to the Khedive Abbas of Egypt on 8 May 1892, and was later enshrined in Notes exchanged between His Majesty's Government and the Turkish Government in May 1906. The eastern frontier of Egypt was never explicitly defined after the First World War . . . . Egypt has, however, been in continuous occupation and possession of South Sinai ever since 1922. No Government has ever contested the fact that Egypt exercises effective sovereignty over this area . . ." Royal Institutes of International Affairs, Great Britain and Egypt, 1914-1951, Information Papers No. 19, p. 135.

The Mandate for Palestine was finally approved by the League of Nations on July 24, 1922, and the League Council declared it in effect as of September 29, 1923.[8] While the new territory of Transjordan was also covered by this same document, Article 25 contained a proviso giving the Mandatory Power the discretion of withholding the application of other Articles to "the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined".[9] Exercising this prerogative, the British Government had in fact presented a memorandum to the Council of the League on September 16, 1922, which defined the boundaries of Transjordan as comprising "all territory lying to the east of a line drawn from a point two miles west of the town of Aqaba on the Gulf of that name, up the center of the Wadi Araba, Dead Sea and River Jordan to its junction with the River Yarmuk . . ."[10] We may therefore conclude that the remaining portion of the mandated territory of Palestine, which contains the Negev, extended as far west as the Sinai frontier. On the east, it ran up to the mentioned boundary of Transjordan, following the defile of Wadi Araba as it winds its way down from the Dead Sea. Thus, the southern prong of Palestine abutted upon the Gulf with a shoreline of about six miles, ending at a point two miles west of the town of Aqaba on the extreme northern end of the Gulf. The southwestern tip of the territory of Transjordan obtained a similar frontage, which extended from the point two miles west of the town

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[8] Ibid., pp. 106-111.

[9] Ibid., p. 111.

[10] John Marlowe, The Seat of Pilate, pp. 275-276.

of Aqaba along the coast to approximately El Burj in the Arabian Peninsula. This portion of the Transjordan boundary was unchanged when Great Britain recognized it as a "fully independent state and His Highness the Emir as the sovereign thereof" in a treaty of alliance signed on March 22, 1946.[11]

With the exception of the two small tracts of shoreline just mentioned, both of which lay at the extreme northern end of the Gulf, the entire eastern shore was to become the territory of Ibn Saud. In early 1926 he was proclaimed King of the Hijaz, following his conquest of that region the previous year. By further consolidating his position, he was henceforth to dominate the history of the Arabian Peninsula.[12] Upon the conclusion of the Treaty of Jidda on May 20, 1927, Great Britain recognized the "complete and absolute independence of the dominions of His Majesty the King of the Hijaz and of Nejd and its dependencies".[13] Subsequently, it was renamed the Kingdom of Saudi Arabia following the union of Hijaz and Nejd.

Zionist Methods and the Plan for Partition

While the foregoing summary is by no means intended to convey a complete picture of the political history of the Gulf of Aqaba, it will suffice to illustrate the initial development of littoral States and their territorial interests in this body of water.

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[11] Raphael Patai, The Kingdom of Jordan, p. 45.

[12] Antonious, op. cit., pp. 336-337.

[13] Hurewitz, op. cit., pp. 149-150.

As noted, by 1947 all of the States had been recognized as fully independent sovereign entities - - with the glaring exception of Palestine. There the lofty ideals of self-determination and independence had been progressively lost sight of since the earliest days of the Mandate, while the seeds of political Zionism, cunningly sown under the disguise of a National Home for the Jews, had continued to grow.

In the intervening years up until and following World War II, the Zionists had effected intensive Jewish immigration into Palestine, with little regard for the legality or illegality of their program, over the repeatedly announced protests of the overwhelming Arab majority of the population. A score of Royal Commissions and other bodies had been sent to investigate, but a fair mutually agreeable solution had never been found. As acts of violence between Arabs and Jews increased, highly organized Zionist terrorist groups were to openly flout the authority of the Mandatory. Finally, in February 1947 the British Government, after the rejection of its provincial autonomy plan providing for the creation of a bi-national unitary State, announced that it intended to refer the whole Palestine problem to the United Nations.[14]

At this point it should be observed that the final responsibility for the administration of Palestine lay not with Great Britain but with the United Nations as the successor of the League of Nations. It may be said that the international character of the Mandate imposed the necessity of consulting that body. However, the

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[14]Marlowe, op. cit., pp. 218, 230.

territory of Palestine could hardly be considered as "property" of the United Nations, for it was held in trust, until it should either become independent or be otherwise disposed of by the duly expressed wishes of the majority of the inhabitants.[15] As we shall see, neither of these alternatives was to ever take place.

At the beginning of April 1947, the British Government requested the Secretary-General of the United Nations to place the "Question of Palestine" on the agenda of the General Assembly at its next regular annual session, and to summon a special session of the Assembly for the purpose of constituting a special committee to prepare for the consideration of this question at the subsequent regular session. Pursuant to this request, the General Assembly convened on April 28, 1947, and established a Special Committee on Palestine on May 15.[16]

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[15] Article 73 of the United Nations Charter provides pertinently: "Members of the United Nations which have or assume responsibility for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c. to further international peace and security."

U. S. Treaty Series, 993.

[16] Yearbook of the United Nations, 1946-47, pp. 276-278. The Committee was composed of representatives of Austria, Canada, Czechoslovakia, Guatemala, India, the Netherlands, Persia, Peru, Sweden, Uruguay, and Yugoslavia.

The Committee was instructed to "investigate all questions and issues relevant to the problem of Palestine" and to report to the Secretary-General not later than September 1.[17] These wide terms of reference, which implied that the problem of Palestine would be considered in conjunction with and not as an issue removed from the question of Jewish refugees, together with the known Zionist sympathies of at least two of the members, combined to persuade the Arabs to boycott the Committee.[18] An odd coincidence tended to confirm this belief. Simultaneous with the arrival of the Committee in Palestine at the end of May, the ship Exodus 1947, with some 4,500 illegal Jewish immigrants on board, was intercepted off the Mediterranean coast and escorted into Haifa. Although the "refugees" were not permitted to remain, a furor was raised when they were ultimately returned to Germany.[19] It may well be supposed that the Zionists had purposely staged the affair, for they certainly exploited to the fullest the propaganda value of the incident.

At the end of July 1947 the United Nations Committee left Palestine and submitted its report the end of the following month.[20] The report contained a minority proposal for the creation of a Federal State of Palestine, while the majority proposal recommended

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[17] Ibid., pp. 301-303.

[18] Marlowe, op. cit., p. 231. The representatives from Guatemala and Uruguay had openly expressed Zionist sympathies.

[19] Ibib., p. 232.

[20] Document A/364: United Nations Special Committee on Palestine - Report to the General Assembly. Subsequent references to United Nations material will be abbreviated to show only the document number. The symbol "A" denotes a document of the General Assembly, and the symbol "S" signifies the Security Council.

a plan of partition, creating separate Arab and Jewish States in economic union. As it finally emerged from an ad hoc Committee which considered the two reports, the partition plan with some slight modifications was recommended and transmitted, along with a Resolution, to the General Assembly. On November 29, 1947, after the usual intensive lobbying, the Resolution was voted on by the Assembly and carried by 33 votes to 13 with 10 abstentions, thereby providing the necessary two-thirds majority.[21]

By its terms, the Resolution recommended to the United Kingdom, as the Mandatory Power, and to all other Members of the United Nations, "the adoption and implementation with regard to the future government of Palestine, of the Plan of Partition with Economic Union". It also provided, inter alia, for the appointment of a Commission, and that the administration of Palestine should be progressively turned over to it by the Mandatory upon the withdrawal of its armed forces.[22] However, the Mandatory refused to comply. On December 11 the Colonial Secretary announced in the House of Commons that the Mandate would end on May 15 and the evacuation of British forces would be completed by August 1. He further stated the Mandate would not be relinquished piecemeal, and the United Nations Commission provided for in the Resolution would not be admitted to Palestine until fourteen days before the termination of the Mandate.[23]

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[21] Resolution 181 (II) A. See Yearbook of the United Nations, 1947-48, pp. 247-248.

[22] Ibid.

[23] Marlowe, op. cit., p. 242.

The boundaries proposed for the two respective States in the General Assembly Resolution followed no known precedent, disrupting the entire area into three irregular unconnected plots for the Arabs and a like number for the Jews, with a separate block for Jerusalem and Bethlehem. Whereas, in 1946 the Southern Negev had been proposed as an Arab region by the British Government's Provisional Autonomy Plan, it was now to be a part of the Jewish area.[24] Quite understandably, and following the example of the Mandatory, the Arabs rejected the proposal. It would also appear that the United States had grave doubts about the matter.

At the 253rd meeting of the Security Council on February 24, 1948, the United Nations Commission reported that the Resolution had become unworkable as a result of the attitude of the Mandatory Power. At that time the delegate of the United States expressed the view that the Security Council was not bound by, although it would give great weight to, the Assembly Resolution. On March 19, the United States delegate further informed the Security Council the United States Government was not prepared to take steps to implement partition, and proposed instead a temporary trusteeship.[25] On April 20, in a statement made before the 118th meeting of the First Committee of the General Assembly, the United States spokesman went so far as to announce it had been conclusively proven Resolution 181 (II) of the General Assembly could not be implemented by peaceful means. Under the circumstances, the United States

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[24]See the excellent maps contained in the previous reference at pages 236-237.

[25]J. C. Hurewitz, The Struggle for Palestine, p. 302.

believed that the Assembly should consider an alternative plan - - the establishment of a Temporary Trusteeship for Palestine.

While the United States plan of trusteeship was never adopted, the developments mentioned do elicit several relevant factors. The General Assembly Resolution was declared unworkable by the very United Nations body created to implement it, and the Mandatory Power had declined to accept this disposition of the problem. In other words, the scheme of partition was untenable, and in effect was abandoned as the authoritative solution to the problem. As large scale fighting had already broken out in Palestine, the matter of partition was deferred and all efforts were directed toward simply restoring the peace.

At the 283rd meeting of the Security Council on April 17, a new measure was adopted by that body which called on all persons and organizations in Palestine to immediately stop fighting, without prejudice to their rights, claims or positions.[26] This was followed on April 23, at the 287th meeting of the Security Council, by the establishment of a Truce Commission to assist the Secretary-General in supervising the implementation of the resolution of the Security Council just mentioned.[27] Let us consider, however, the events which were to follow.

The Arab-Israeli War

When the Mandate ended on May 15, full-scale hostilities commenced between the parties. By a telegram of that date, the

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[26] S/723.

[27] S/727.

Government of Egypt informed the Security Council Egyptian armed forces had started to enter Palestine "to establish security and order in place of the chaos and disorder which prevailed".[28] The next day, the King of Transjordan likewise informed the United Nations that Transjordanian forces had been "compelled to enter Palestine to protect unarmed Arabs against massacres".[29] They were joined by other Arab armies, which moved across the frontiers of Palestine in accordance with a pre-arranged plan to protect the interests of the Palestine Arabs.

Meanwhile, the Zionists had not been idle. On the afternoon of May 14, the Jewish State of Israel was proclaimed. Only eleven minutes after the proclamation of statehood, President Truman extended de facto recognition to Israel. Traditionally, the United States had been cautious in the recognition of new Governments, and this radical departure from the established practice serves to show the great success with which the Zionists had conducted their operations in the United States.[30] In fact, a Zionist supporter had been appointed special assistant for Palestine affairs to the American Secretary of State on April 28.[31] Perhaps this explains the unusual speed with which the United States acted. In any event, Israel now had a claim of existence. The question of its territory remained, and it was to adopt the expedient of force of arms.

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[28] S/743. [29] S/748.

[30] Alan R. Taylor, Prelude to Israel, p. 105.

[31] George E. Kirk, A Short History of the Middle East, p. 223.

In the United Nations, there had been significant developments before the actual end of the Mandate. At the request of the United States, a special session of the General Assembly had been called and the forum sat from April 16 to May 14. As a result of these deliberations, it was decided to appoint a Mediator for Palestine. His functions were to use his good offices with the local and community authorities in Palestine to arrange for the services necessary for the safety and well-being of the population, to assure the protection of the Holy Places, and in general to promote a peaceful adjustment of the future situation of Palestine. The Mediator was also to co-operate with the Truce Commission for Palestine, which the Security Council had established on April 23.

Count Folke Bernadotte was offered and accepted the post of United Nations Mediator and proceeded to take up his headquarters on the Island of Rhodes, taking with him as his chief assistant Dr. Ralph Bunche, who had been Secretary to the Special Committee on Palestine and principal author of the partition plan. The search for a peaceful solution continued despite the hostilities which were in progress.[32]

On May 29th, 1948, the Security Council passed a resolution calling on all combatants to agree to a four weeks truce.[33]

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[32] E.L.M. Burns, Between Arab and Israeli, pp. 23-24.

[33] S/801. This measure spoke of a desire to "bring about a cessation of hostilities in Palestine without prejudice to the rights, claims and position of either Arabs or Jews." It also called upon the Governments and authorities concerned to "undertake that they will not introduce fighting personnel into Palestine . . . during the cease fire," and "should men of military age be introduced . . not to mobilize or submit them to military training during the cease fire." The importation of war material was likewise banned.

The Mediator approached the parties concerned on June 1, and persuaded both sides to accept the proposal on June 11. Thus the first truce came into being, and was to run until July 9, 1948.[34] At the end of the first month's fighting the geographical position of the Arab armies on the whole was satisfactory, and the Negev was held by the Egyptian forces. However, the ultimate fate of the Negev was not yet determined.

One of the great injustices of the partition plan had been the award of the Negev to the Jews, as opposed to the earlier British plan to award the region to the Arabs of Palestine. In this area the population was still preponderantly Arab and, except in extremely remote history, it too had been always Arab. Perhaps if the Arab States had demanded the rectification of the border in the debate on the partition plan in the United Nations in October and November 1947, they might well have secured a modification of the proposed dividing line in this area. But the Arab idea of rejecting everything left the field clear to the Jews, and no criticism of the details of the plan was voiced at Lake Success.[35]

As soon as the truce had begun functioning in a satisfactory manner, the Mediator addressed himself to the task of finding an appropriate solution. His draft proposals, which were based on a considerable revision of the partition scheme, were revealed on June 28, 1948. The main feature of his plan was that the Arab areas of Palestine should be united to Jordan, which should

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[34] Benjamin Shwardan, Jordan a State of Tension, p. 259.

[35] John Bagot Glubb, A Soldier with the Arabs, p. 147.

then form an economic union with Israel, and each State retain control of its internal affairs. Attached to his proposals was an annex dealing with territorial matters, in which it was suggested that the Negev be included in Transjordan in return for which western Galilee should be Jewish. He further proposed that Jerusalem should be Arab, that Haifa be a free port and Lydda a free airport.[36] Count Bernadotte now returned to the matter of the truce. Both he and the Security Council urgently appealed to both parties to prolong it. However, their efforts were not successful and hostilities resumed.

Up to this point there had only been talk of imposing sanctions as provided in the Charter. Great Britain had opposed earlier proposals of this nature by the United States and Russia. However, it now agreed that an order to cease fire should be communicated to the combatants, accompanied by a threat of sanctions in the event of non-compliance.[37] A draft resolution to this effect, introduced by the United States member of the Security Council, was debated from July 13th to July 15th, at which time it was adopted.[38] It was left to the Mediator to set the time the

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[36] S/863. Ibid., p. 145. [37] Marlowe, op. cit., p. 258.

[38] S/902. This resolution provides pertinently that the Security Council: "Determines that the situation in Palestine constitutes a threat to the peace within the meaning of article 39 of the Charter; Orders the Governments and authorities concerned, pursuant to article 40 of the Charter, to desist from further military action" and "Decides that, subject to further decision by the Security Council or the General Assembly, the truce shall remain in force, in accordance with the present resolution and with that of 29 May 1948, until a peaceful adjustment of the future situation of Palestine is reached." It also urged upon the parties that they continue conversations with the Mediator in a spirit of conciliation and mutual concession in order that all points under dispute might be settled peacefully.

truce was to begin, and he arranged with the parties that it should come into effect on July 16 at Jerusalem and July 18 elsewhere. It is important to note that this Resolution set no definite date of expiration. By its terms, it was to continue for an indefinite period - - until a peaceful settlement of the future of Palestine should be reached. This second truce, supervised by a corps of United Nations observers, was still in force on September 16 when Count Bernadotte's peace plan was published.

This plan was a variant of the draft proposals made by him during the first truce, which had been communicated to the interested parties, but not published. It provided for a scheme of partition awarding the whole of Jerusalem and the Negev to Transjordan, and Western Galilee to Israel. Accordingly, and similar to the earlier proposals on which it was based, it was much less favorable to Israel than the original partition resolution. In the House of Commons the British Foreign Secretary proclaimed the recommendations of Count Bernadotte had the wholehearted and unqualified support of his Government, and that it would be best for all concerned if the plan were put into operation in its entirety. The measure also received the support of the United States Government, which commended it to the General Assembly. It thus had the distinction of being the only plan for Palestine since the Balfour Declaration which had secured the simultaneous support of both the British and the U. S. Governments.[39] The Israeli reaction was not long in manifesting itself.

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[39]Marlowe, op. cit., p. 259.

On September 17, the day after the publication of the Bernadotte recommendations, its author was assassinated in the Jewish sector of Jerusalem. The Mediator and a senior observer, Colonel Andre Serot of France, were part of a convoy returning from an inspection of a possible headquarters site. No one was armed, as they were escorted by an Israeli liaison officer and the Israeli Government was responsible for their protection. Suddenly, an Israeli jeep blocked the way, and three persons in Israeli uniforms accomplished their foul deed. Next day, the assailants, purportedly members of the Jewish terrorist group known as the Stern Gang, sent the following letter to the Press:

> "Although in our opinion all United Nations observors are members of foreign occupation forces, which have no right to be on our territory, the murder of the French Colonel Serot was due to a fatal mistake: our men thought that the officer sitting beside Count Bernadotte was the British agent and anti-Semite, General Lundstrom."[40]

A strongly worded protest from the personal representative of the Secretary-General[41] received an official apology from the Government of Israel,[42] which piously disclaimed any actual involvement in the affair. However, the fact that Israel had made no secret of its distrust of Bernadotte and the gross inadequacy of their security precautions could lead one to a different conclusion. The note from the Stern Gang echoed strangely familiar sentiments, and the excellent Israeli intelligence service was apparently unequal to the task of finding the murderers.[43] That the incident occurred only one day after the publication of the Mediator's peace plan, which was not as favorable to Israel,

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[40] Glubb, op. cit., p. 182. [41] S/1004.

[42] S/1005. [43] Burns, op. cit., p. 25.

could hardly be regarded as a mere coincidence. The pattern of violence was to be repeated on a much larger scale the following month - - the matter of territory was not yet to Israel's satisfaction. But, before this would occur, Israel was to benefit from another development.

There had been increasing friction among the Arab Governments since the beginning of the Arab-Israeli War. Matters came to a head on September 22, when the Arab League, led by Egypt and Syria, suddenly announced the formation of an "Arab Government of All Palestine". The members of the "Cabinet" proved to be nearly all supporters of the ex-Mufti. It was proclaimed that a "Constituent Assembly" would meet at Gaza on September 30 to pass a vote of confidence in this new government, despite the fact that it existed only on paper. This maneuver has been viewed as an Egyptian attempt to secure control over all Arab Palestine through a puppet government, while at the same time depriving Transjordan and its monarch of any authority in the country.[44] Perhaps some of the other Arab Governments were jealous of Transjordan being the principal beneficiary, territory wise, under the Bernadotte plan. In any event, the lack of unity occurred at a crucial moment, and King Abdullah refused to cooperate with this fictitious regime.

While the Arab States were engaged in quarreling with one another, the Jews had been steadily building up their armed forces. Manpower had poured into Israel since the second truce began, and arms were being received in quantity from behind the Iron Curtain.[45]

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[44] Glubb, op. cit., p. 190.

[45] Ibid., p. 191.

It was not long before the Jews were ready for their next move. For ten days prior to October 15th, the Israeli forces refused to allow the United Nations observers to approach their front against the Egyptians, where they concentrated some 15,000 men. Egypt at this stage was still in possession of the Negev from just above Beersheba down to the Gulf of Aqaba, and the second truce was still in full force and effect.

On October 15th, using a dispute with Egypt about the provisioning of the few beleagured Jewish settlements in the Negev as a pretext, Israeli forces violated the truce and launched the operation for which they had been preparing. The Israeli air force, utilizing its new aircraft recently smuggled in, opened a widespread offensive by bombing certain Egyptian bases and airfields. The Israeli ground forces began a two-pronged assault. In the north it liquidated the remains of Kawakji's Liberation Army and began the occupation of Galilee. In the south, an operation was conducted against the Egyptian forces, which were pushed back in the Negev to a point just south of Beersheba.[46]

The Security Council met in emergency session on October 19 and adopted a new cease-fire resolution, which went into effect on October 22.[47] This new resolution ordered both sides to withdraw to the positions they held prior to the breach of the truce on October 15, but Israel refused to comply. Two days later, new fighting broke out all along the northern frontier. On October 28,

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[46] Ibid., pp. 196-198.

[47] S/1045.

a cease-fire was issued by the United Nations Chief of Staff of the Truce Supervision Organization. However, not until November 1, after all of Galilee had been secured by the Israeli forces, did the fighting stop.[48] On October 29th the Security Council was to have voted on an Anglo-Chinese motion proposing the consideration of the imposition of sanctions if the parties did not comply with the order to withdraw. However, the voting was unexpectedly postponed, owing to an overnight change on the part of the United States delegation.[49] Whether this was to pacify the Jewish vote in the American Presidential election, only days away, can only be surmised. But, for the moment, Israel was able to defy the Security Council's orders.

The Acting Mediator was assigned the task of securing Israel's compliance. However, Dr. Bunche, taking extreme latitude with his instructions, negotiated a cease-fire under which the Israelis retained practically all the territory they had seized from the Egyptians.[50] Apart from giving Israel tactical control of most of the Negev, this approach was to cause a loss of confidence in the United Nations Organization. Instead of insisting on the strict compliance with the Security Council's resolution of July 15, it appeared that the only matter of interest was to stop the fighting. Consequently, when the formula of the Acting Mediator was adopted, it suggested that further aggression and defiance of the United Nations would be countenanced. Finally,

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[48] Shwardan, op. cit., p. 268.

[49] Glubb, op. cit., p. 210.

[50] Marlowe, op. cit., p. 260.

on November 4, 1948, the Security Council adopted a new resolution by a vote of 8-1, with 2 abstentions.[51] The operative part of this measure stated that the Security Council "Decides that, in order to eliminate the threat to peace in Palestine and to facilitate the transition from the present truce to permanent peace in Palestine, an armistice shall be established in all sectors of Palestine." This was indeed a far cry from holding Israel responsible for its aggression.

Meanwhile, the disunity among the Arabs had increased. With the exception of Transjordan, all other members of the Arab League had recognized the "All Palestine Government" of the ex-Mufti. It therefore did not come as a surprise when the resolution submitted in the Political Committee on November 18, based on the Bernadotte plan, could not muster the required vote to assure its passage. On December 1st the breach between Transjordan and the rest of the Arab League was completed when Abdullah was proclaimed King of Arab Palestine, which included the remaining portions of Palestine not held by the Israelis.[52]

On December 11, 1948, the General Assembly passed a resolution establishing a Conciliation Commission for Palestine, which superseded the Mediator's functions.[53] It appeared the United Nations had abandoned hope for an agreed settlement, and was content with armistice negotiations to facilitate the return of peace. After setting up the Conciliation Commission and outlining what it should do, Resolution 194 (III) continued:

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[51] S/1070

[52] Shwardan, op. cit., pp. 269-270.

[53] Resolution 194 (III).

"II. Resolves that the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return, and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible;

"Instructs the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations."

Thus, the United Nations now undertook the problem of Arab refugees and their repatriation, leaving Israel with its illgotten spoils rather than calling it to account for its actions. However, this was only to whet the appetite of Israel and invite it to commit further aggression.

Since the end of November, an increasing Israeli concentration was being built up south of the Dead Sea. This point was noted at a meeting between the commanders of the Arab Legion and the Israeli forces on November 30, at which the question of a cease-fire in Jerusalem was being discussed. Transjordan made it clear it did not want such a cease-fire if Israel was going to start a new campaign in the Negev, and the Israeli commander, Colonel Dayan, promised to try to stop such troop movements. However, to justify the situation the Israeli radio announced that these moves had been purely defensive - - "to meet Arab aggression". Considering that Transjordan then had no troops south of Amman, this excuse was hardly credible.[54]

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[54] Glubb, op. cit., p. 216.

The Collapse of Egypt

In early December, Egyptian forces attempted to relieve its beseiged garrison at Faluja, which had been isolated as a result of the Israeli drive into the Negev. It will be remembered that the Israelis utilized just such an excuse to explain their October 15th campaign. However, Israel now used different reasoning and, on December 22nd, launched a new drive which had as its object the destruction of Egyptian forces east of the Suez Canal. When Israeli forces had penetrated Egyptian territory in the Sinai it received a surprise. There was an implied threat of British intervention under the terms of the Anglo-Egyptian Treaty, which obligated Great Britain to defend Egyptian territory. Admittedly, the Egyptians had not invoked the Treaty, and Britain did not openly threaten Israel with war. But, in any event, the Israelis got the point and withdrew from the Sinai, preparing next for an attack on the Gaza strip. Before it got under way, the Egyptians had had enough and on January 8 they asked for and obtained a cease-fire.[55] This was to be followed by negotiations at Rhodes, under the auspices of the United Nations, which culminated in an armistice agreement being signed between Egypt and Israel on February 24, 1949.[56]

With the collapse of Egypt, the Transjordan forces had moved into positions in the Hebron area, and it had also occupied the southern tip of Palestine which connects Sinai to Transjordan

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[55] Marlowe, op. cit., p. 261.
[56] S/1264.

between the Dead Sea and the Gulf of Aqaba. It therefore was standing in the way of Israel obtaining an approach to the Gulf of Aqaba.[57] The next series of events were to clearly reveal the "peaceful" intentions of Israel.

Armistice Negotiations and the Israeli Approach to the Gulf

Meanwhile, King Abdullah, alarmed at the Israeli moves in the Negev, had invoked the protection of the Anglo-Transjordan Treaty. Britain had responded and, on January 8, 1949, landed troops at the town of Aqaba to prevent any possible moves against it.[58] However, this still left the Arab Legion holding the southern tip of the Negev, from the Gulf of Aqaba up to a point approximately 45 miles to the north. Matters remained in this posture until the middle of February, when Dr. Bunche invited Transjordan to send a delegation to Rhodes for the purpose of negotiating an armistice with Israel under the auspices of the United Nations.[59]

Transjordan replied by accepting the invitation, but before its delegation had proceeded to Rhodes there was an indication of Israeli troop movements north of the area held by the Arab Legion in the Negev. On February 25, a protest was filed with Dr. Bunche, who referred the matter to General Riley, Chief of Staff of the Truce Supervision Organization. General Riley replied that he had investigated the complaint, and no such Israeli troop movements had occurred.[60] Obviously, someone was mistaken, but the Transjordan

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[57] Glubb, op. cit., p. 229. [58] Marlowe, op. cit., p. 262.

[59] Glubb, op. cit., p. 227. [60] Ibid., p. 229.

delegation departed on its mission, arriving at Rhodes on February 28.

The negotiations at Rhodes were being conducted by Dr. Bunche, whose method of approach was that both sides should immediately sign cease-fire agreements for their whole fronts, and thereby ease the tension. The armistice agreement would then be negotiated in a less strained atmosphere. The draft agreement for cease-fire contained a provision stating that "no elements of the ground or air forces of either party would advance beyond or pass over the line now held." Transjordan signified its willingness to sign such an agreement, and requested the agreement include the Iraqi forces as well, in view of the imminent withdrawal of that army from Palestine. However, the Israelis stalled, whereupon the Transjordan delegation countered by offering to sign immediately for the Arab Legion only, with a proviso to extend the provisions to the Iraqi sector when its army withdrew.[61] While this discussion continued at Rhodes, ominous signs appeared in Palestine.

The Arab Legion detected Israeli troop concentrations north of its position in the southern Negev. The Transjordanian Government communicated this information to its delegation, and instructed it to inform Dr. Bunche of the situation immediately, including the location of the Arab Legion front lines. The reply received was to the effect that the Israelis denied any military movements in the area. However, this answer, while non-responsive, was difficult to reconcile with other facts. The United Nations

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[61] Ibid., p. 227.

observers in Transjordan indicated on March 2nd that they were aware of Israeli troop movements in the south, and furthermore, they had reported them to their immediate superiors, the United Nations observers in Haifa.[62] Once more it appeared that someone was mistaken, but there was now little doubt as to whom that party was.

On March 7, the Israeli intentions became evident. The force that the United Nations and the Israeli delegation had both denied existed, launched an attack on the Arab Legion positions. The Transjordan Government sent the following message to its delegation in Rhodes:

> "Inform Dr. Bunche as follows. Considerable force of Jewish jeeps and armoured cars supported by aircraft crossed our lines morning seventh March one kilo west of Bir ibn Auda. Situation will be extremely delicate unless Israel stops active military operations during negotiations."[63]

The next day another message was sent to the Rhodes delegation, this time in somewhat more emphatic terms:

> "Jewish forces are advancing on the Gulf of Aqaba in two columns. One column at Bir Melhan. Main column moving down Wadi Araba reached Mulaiha. Enemy forces estimated strong battalion group or brigade. Jewish aircraft active over whole area. Inform Dr. Bunche Transjordan Government deeply disturbed by these operations while both delegations are actually negotiating at Rhodes."[64]

The answer to these urgent appeals is almost unbelievable. On March 9, Dr. Bunche replied, asking for further details. The Transjordan Government, the same date, again contacted the delegation in Rhodes and informed it:

> "Military operations against Arab Legion in Wadi Araba continue. Israeli forces attacking Arab Legion positions. You will make strong protest forthwith to Dr. Bunche and ask him to stop Israeli attacks while negotiations are in progress."[65]

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[62] Ibid., p. 229. [63] Ibid., p. 229, 231.

[64] Ibid., p. 231. [65] Ibid.

Finally, on March 10th, the masquerade was over. After so many denials of troop movements in the south and the continued postponement of signing the cease-fire agreement, the Israeli delegation openly stated its purpose. They announced to the Transjordan delegation that, as the area south towards the Gulf of Aqaba had been allotted to them in the partition plan of 1947, Israeli forces would occupy it.[66] With a greatly superior force it was simple enough to accomplish, and on the evening of that day the Israelis reached their objective - - the Gulf of Aqaba. On March 11, the Israeli delegation readily signed the cease-fire agreement relating to the Arab Legion,[67] and by April 3rd the Israel-Jordan armistice agreement[68] had been concluded at Rhodes.[69] Thus ended the first phase of Israels's conquest. The coveted territory in the Negev had been seized. Its next move would be to seek some semblance of international respectability by gaining admission to the United Nations Organization.

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[66] Ibid.

[67] S/1284 and Corr. 1.

[68] S/1302 and Add. 1. and Corr. 1.

[69] Glubb, op. cit., pp. 232-237.

RED SEA

GULF OF 'AQABA

SURVEYED BY COMMR R. MORESBY AND LIEUT T. G. CARLESS R.N 1830-33

With additions and corrections from various Admiralty Surveys to 1940

The topography and the west shore of the Gulf are from the Survey of Egypt Maps to 1946

Work in hachure enlarged from earlier surveys

Bearings refer to the True Compass and are given from Seaward (thus-126° etc.)

All heights are expressed in feet above High Water Springs

For Abbreviations see Admiralty Chart 5011

SOUNDINGS IN FATHOMS
(Under Eleven in Fathoms and Feet.)

Natural Scale 1/[illegible] (at Lat. 28° 30' N.)

Projection - Mercator

CAUTION (1)

Mariners are warned that this chart is compiled mainly from old and imperfect surveys and should therefore be used with extreme caution.

CAUTION (2)

The relative positions of the coastline topography and off-lying islands between Ras Abu Seif and Rākāh are reported to differ considerably from the charted positions. Rākāh are reported to lie about 1 miles 340° from charted position.

Tidal Information and Chart Datum

Place	Heights above datum of soundings				Datum to which soundings are reduced and Remarks
	High Water		Low Water		
	Mean Springs	Mean Neaps	Mean Springs	Mean Neaps	
Sharm al Shaikh	4·0 feet	3·7 feet			
Tiran Island	4·0 "	3·7 "			F.P. below a benchmark set on the corral on the south side of a sandy bay to the SW of Tiran.
El Kura	3·6 "	3·3 "			
Shuaikha I.	3·6 "	3·3 "			W.P. 10 ins. below a B.M. on the wall of the N.W. Section of the Pier, or F.P. 10 ins. below a B.M. cut on the coping of the N. end of Charlton Pier, or F.P. 11 feet below the top of Eastern South cor. approximately Mean Low Water Springs (Summer level)
'Aqaba	3·6 "	3·3 "			

LEGEND:
AREA OF 'HIGH SEAS' USING A 6 MILE LIMIT OF TERRITORIAL WATERS

NAUTICAL MILES

CHAPTER II

THE RIGHTS AND DUTIES OF STATES

The Law of Nations and its Sources

As the question of membership in the United Nations Organization necessarily involves the application of several principles of international law, it will be helpful to first examine the nature and basis of this field of jurisprudence. In a general sense, it may be said that international law consists of that body of generally accepted rules of conduct and intercourse which are applied by and between civilized nations in their dealings with each other. It is a system that has developed with the progress of civilization and through the increasing realization by nations that their relations inter se, if not their existence, must be governed by and depend upon some fairly certain and reasonable standard.[1] This is implicit from the basic fact that a State, as an independent entity, does not live in a political or legal vacuum but as a component part of the world community of States.[2] It will therefore be sufficient, for the present purposes, to observe that such a system exists and is recognized as binding by those who create it and give it application.

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[1]Green Haywood Hackworth, Digest of International Law, Vol. I, p. 1.

[2]Herbert W. Briggs, The Law of Nations, p. 18.

The foregoing definition of international law also suggests the two principle sources of this body of law. There is the abundant precedent of prior conduct and usage of States which, when extended over a sufficient period of time, gives rise to a customary rule of law. On the other hand, the rights and obligations of States are set forth in treaties, conventions, and other agreements. These sources, as well as others, are expressly recognized by the United Nations Charter in the Statute of the International Court of Justice, which provides pertinently:

> "Article 38. 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[3]

The Concept of Recognition

It follows that this system of jurisprudence governs the relations between States, as distinguished from the conduct or behavior of individuals. Thus, we may inquire, when does a new State come into existence? There is one theory that the act of recognition is constitutive and "creates" the legal personality in international law. This leads to the conclusion that, prior

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[3]U.S. Treaty Series, op. cit.

to recognition, the unrecognized community does not legally exist vis-a-vis the recognizing State.[4] Conversely, another concept regards recognition as declaratory and, by acknowledging the full status of a hitherto indeterminate community, the recognizing State merely makes possible the regularizing of relations between them on the basis of international law.[5] In this latter theory the matter of statehood is considered a question of fact.

To further confuse the doctrinal controversy, there is no clear and uniform practice of States. It has been tersely observed that juridical theories of recognition logically deduced from jurisprudential concepts fail to explain the facts of State conduct, and inductions from the conduct of States have failed to provide a legally unambiguous theory of recognition.[6] We may, however, conclude that the admission to membership in the United Nations is tantamount to a "collective" recognition by the organized community of States.[7]

Requirements for Membership in the United Nations

The conditions under which States may be admitted to membership in the United Nations are set forth in the Charter. After defining the original members of the Organization, the requirements

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[4]Hersh Lauterpacht, Recognition in International Law, p. 44.

[5]James L. Brierly, The Law of Nations, 4th ed., p. 124.

[6]Briggs, "Recognition of States: Some Reflections on Doctrine and Practice," 43 A.J.I.L., pp. 113-121 at p. 121.

[7]Briggs, "Community Interest in the Emergence of New States: The Problem of Recognition," 1950 Proceedings, A.S.I.L. 169-181.

of successive applicants are indicated as follows:

> "Article 4. 1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
>
> "2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council." [8]

As to the conditions to be fulfilled, this article leaves little question. In the words of the International Court of Justice:

> "The requisite conditions are five in number: to be admitted to membership in the United Nations, an applicant must (1) be a State; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so." [9]

Keeping these points in mind, let us return to the question of Israel. It will be seen that efforts were being made toward procuring its admission in December 1948, even before the occupation of the southern Negev. The representative of the United States, referring to the pending application of the Provisional Government of Israel for membership stated, in part:

> "The consideration of the application requires an examination of . . . the question of whether Israel is a State duly qualified for membership.
>
> " . . . My Government considers that the State of Israel meets these Charter requirements.
>
> "The first question which may be raised in analyzing Article 4 of the Charter and its applicability to the membership of the State of Israel, is the question of whether Israel is a State, as that term is used in Article 4 of the Charter. It is common knowledge that, while there are traditional definitions of a State in international law, the term has been used in many different ways. We are all aware that, under the traditional

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[8] U. S. Treaty Series, op. cit.,

[9] Advisory Opinion of May 28th, 1948, I.C.J., Reports of Judgments, Advisory Opinions and Orders, 1948, p. 62.

> definition of a State in international law, all the great writers have pointed to four qualifications: first, there must be a people; second, there must be a territory; third, there must be a government; and, fourth, there must be capacity to enter into relations with other States of the world.
>
> " . . . The argument seems chiefly to arise in connexion with territory. One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers. We all know that, historically, many States have begun their existence with their frontiers unsettled. Let me take as one example my own country, the United States of America. Like the State of Israel in its origin, it had certain territory along the seacoast. It had various indeterminate claims to an extended territory westward. But, in the case of the United States, that land had not even been explored, and no one knew just where the American claims ended and where French and British and Spanish claims began. To the North, the exact delimitation of the frontier with the territories of Great Britain was not settled until many years later. And yet, I maintain that, in the light of history and in the light of the practice and acceptance by other States, the existence of the United States of America was not in question before its final boundaries were determined."[10]

It will be noticed that the above statement, while concluding that Israel meets the Charter requirements, failed to take cognizance of certain highly pertinent facts. The long trail of armed violence against the majority of the inhabitants, the brutal murder of the United Nation's Mediator, and the callous disregard for the cease-fire resolution of 15 July were neatly overlooked and ignored. Or perhaps that spokesman had utilized some form of logic, with which I am happily unacquainted, to consider this as the indicia of a "peace-loving" State. The comparison of the United States with Israel is indeed a poor one, for the Revolutionary War occurred almost two centuries earlier, when the development of international law was practically in its infancy. The rebellious colonies could

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[10] United Nations Security Council, Official Records, 3rd Year, No. 128 (383rd Meeting, December 2, 1948), p. 9.

hardly have been considered as violating any cease-fire resolution of a world peace organization, nor were they under a Mandate guaranteeing self-determination. Despite these obvious shortcomings, the State of Israel was nevertheless admitted to membership in the United Nations on May 11, 1949.[11]

It might be suggested that Israel, prior to its admission to the United Nations, was not bound by the principles of the Charter. However, this is taking the recognition theory to an unwarranted extreme. If we view the Charter as expressing and confirming the general body of international law, apart from the particular obligation of its Members, it is binding on all States - - even before their formal recognition. As Lauterpacht rightfully observes, "an unrecognized State cannot, in reliance on the formal logic of its non-recognition, claim the right to commit acts which if done by a recognized authority would constitute a violation of international law."[12] This conclusion is also buttressed by one of the Purposes and Principles contained in the Charter: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security."[13]

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[11]United Nations General Assembly Resolution 273 (III), May 11, 1949. Document A/900.

[12]Lauterpacht, op. cit., p. 53. See also Hans Kelsen, "General International Law and the Law of the United Nations," The United Nations, Ten Years' Legal Progress, pp. 1-13.

[13]Article 2, section 6.

The Objectives of the United Nations

With reference to the basic goals of the United Nations, in the Preamble to the Charter we notice that one of the fundamental objectives is "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." The general purposes of the Organization are then stated as follows:

> "Article 1. The Purposes of the United Nations are:
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."[14]

As to the principles governing the rights and duties of Member States, we find the following provisions:

> "Article 2. The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
> 1. The Organization is based on the principle of the sovereign equality of all its Members.
> 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

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[14] Article 1, sections 1 and 2.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter . . ." [15]

We thus observe all Members are specifically enjoined to keep the peace and adjust their differences in accordance with the principles of justice and international law. Ideally, if the foregoing principles were completely respected in good faith by all nations, no threat to world peace and international security would ever arise. However, the harsh realities of the modern world dictate that such is not the case, being more often the exception rather than the rule. The State of Israel, now a member of the United Nations, quietly turned its attention to the Gulf of Aqaba and began to establish a port at Eilat on the extreme southern tip of the Negev. In 1949 this settlement comprised but a few cement buildings, which were relics of the Palestine Police Force. It would eventually be declared a harbor on June 25, 1952, and then possess its own local authority and public services.[16] But, in the meantime, Israel would consolidate its position and assert its newly acquired "rights" in another area - - the Suez Canal.

The Palestine Dilemma Unsolved

It must be stressed that the acquisition of statehood by Israel and membership in the United Nations had not solved the problem of Palestine. The basic dispute over territory and

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[15] Article 2, sections 1-5.

[16] Bloomfield, op. cit., p. 4.

refugees still remained. Although the actual fighting had ceased with the conclusion of armistice agreements, no progress had been made on a final solution of the outstanding issues. Furthermore, and as will be discussed in more detail below, the rights and duties of States vary considerably in time of war as compared to a condition of peace. Accordingly, the situation which prevailed between the parties, based upon the existence of the armistice agreements, will bear further examination.

Truces and Armistices

By July 20, 1949, General Armistice Agreements had been successively signed between Israel and Egypt, Lebanon, Jordan, and Syria. The following day, the Acting Mediator submitted a final report[17] to the Security Council on the status of the armistice negotiations and the truce in Palestine. He observed that, as a result of the conclusion of armistice agreements between the mentioned parties, the military phase of the Palestine conflict had ended. In his opinion, each agreement incorporated what amounted to a "non-aggression" pact between the parties and provided for the withdrawal and reduction of forces, thereby fulfilling the Security Council resolution of November 16, 1948.[18] He concluded that the Security Council truce in Palestine, that is, the imposed truce which entered into effect on July 18, 1948, had thus been rendered obsolete and was replaced by effective armistice

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[17] S/1357

[18] S/1080. This resolution reaffirmed the previous measures concerning the establishment and implementation of the truce in Palestine, recalling particularly the resolution of 15 July 1948. Without prejudice to the action of the Acting Mediator under the resolution of 4 November 1948 (S/1070), it decided that an immediate armistice should be established in all sectors of

agreements voluntarily negotiated by the parties in the transition from truce to permanent peace.[19]

On August 4th the Acting Mediator appeared before the Security Council, and augmented his written report. While reiterating his earlier remarks, he now suggested that the Security Council might wish to reaffirm the injunction against a resort to military action as contained in the cease-fire order of the resolution of July 15th. He felt the remainder of the resolution should be considered henceforth as inapplicable, with the elimination of restrictions on importation and immigration, and that there should be free movement for legitimate shipping.[20]

The comments of the Acting Mediator do not furnish a clear answer to the conditions existing between the parties. As a matter of fact, this specific question was not raised. Only the progress of the transition from truce to armistice and compliance with the applicable resolutions of the Security Council was under review. Granted, he had referred to the armistices as a stage in the "transition" from truce to permanent peace, and volunteered his opinion that such agreements should replace the Security

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Palestine in order to eliminate the threat to the peace and facilitate the transition from truce to permanent peace. It therefore called upon the parties, as a further provisional measure, to seek agreement by negotiations with a view to the immediate establishment of the armistice including (1) delimitation of permanent armistice demarcation lines and (2) withdrawal and reduction of their armed forces as would ensure the maintenance of the armistice during the transition to permanent peace in Palestine. See Yearbook of the United Nations, 1948-49, pp. 182, 183.

[19] Ibid., p. 186. S/1357.

[20] United Nations Security Council, Official Records, 4th Year, (433rd Meeting, August 4, 1949), pp. 6-8.

Council cease-fire order of July 15th.[21] However, he then equivocated by suggesting that the Security Council "reaffirm" the provisions of this resolution relating to the use of military force. Therefore, he was primarily concerned with the effectiveness of the armistice agreements, and his other observations were based on the assumption that the parties would ultimately progress to a permanent peace and final settlement of all outstanding issues. Considered in this light, the remark that there should be free movement of legitimate shipping constitutes nothing more than an expression of hope on the acting Mediator's part, and certainly not binding on the parties or the Security Council. It would therefore appear that the parties were in some intermediate condition between war, in the sense of actual hostilities, and permanent peace.

The foregoing conclusion is at least partially supported by certain observations which the representative of Israel made at that time. He stated very plainly that "the Armistice Agreements are not peace treaties."[22] Regarding the views expressed by the Acting Mediator, the Israeli delegate added: "My government fully supports Mr. Bunche's conclusion that the truce period has been left behind and that the first phase of the transition to peace has been successfully accomplished . . . ."[23] (Emphasis supplied) He indicated that Israel would "take its stand" on the meticulous observance of the agreements already reached, which did not

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[21] S/902, op. cit.

[22] Security Council Official Records, op. cit., p. 13.

[23] Ibid., p. 14.

prejudice a final territorial settlement in Palestine. However, he did not limit his remarks to the matter of the transition from truce to ultimate peace. Instead, he shifted to a new subject, which was indicative of Israel's future demands. After pointing out that the parties should not engage in an arms-race, the Israeli spokesman injected the following:

> "On the other hand, it is clear that certain restrictions which arose out of a situation of actual war are no longer appropriate in the new circumstances. The Armistice Agreements call upon the Governments concerned to abstain from any 'war-like or hostile act'. It is self-evident that acts of armed force are clearly precluded; but it would seem equally obvious that artificial restrictions upon legitimate commerce and shipping should now be abandoned, for it would be difficult to prove that to deprive a neighbouring State of essential commodities which it obtains legitimately from abroad is not an 'act of hostility'. Therefore, it has been useful to hear the Acting Mediator's authoritative view that the present situation would justify the abandonment of acts of interception and blockade which, in so far as they had any legal basis, rested upon the assumption of official hostilities. I believe that this authoritative approach, if heeded by both parties, should solve many vexatious problems, including the practice of seizing cargoes of civilian commodities passing through Suez on their way to Israeli ports."[24]

It will not be necessary at this point to comment at any great length on the validity of the extraneous ideas propounded by the Israeli delegate. The intimation that any restrictions upon legitimate commerce are "artificial" is based on a false premise; it also makes the unwarranted assumption that all Israeli commercial activities are legitimate. The simple hope of the Acting Mediator for the restoration of normal shipping,

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[24] Ibid., p. 16.

after being further embellished and slightly distorted, emerged as an "authoritative" pronouncement on such highly legal matters as belligerent rights, blockade practices, and freedom of the seas. The Egyptian delegate did not bother to reply to this statement, nor did any of the other representatives present exhibit the slightest interest.

The Security Council Resolution of August 1949

At its 437th meeting on August 11, 1949, the Security Council adopted a new resolution,[25] which dealt with the armistice agreements and the further responsibility of the Acting Mediator. After noting with satisfaction the several armistice agreements concluded by means of negotiation in pursuance of its resolution of November 16, 1948, this measure provided that the Security Council:

> "Expresses the hope that the Governments and authorities concerned, having undertaken by means of the negotiations now being conducted by the Palestine Conciliation Commission, to fulfil the request of the General Assembly in its resolution of 11 December 1948 to extend the scope of the armistice negotiations and to seek agreement by negotiations conducted either with the Conciliation Commission or directly, will at an early date achieve agreement on the final settlement of all questions outstanding between them.
>
> "Finds that the Armistice Agreements constitute an important step toward the establishment of permanent peace in Palestine and considers that these Agreements supersede the truce provided for in the resolutions of the Security Council of 29 May and 15 July 1948;
>
> "Reaffirms, pending the final peace settlement, the order contained in its resolution of 15 July 1948 to the Governments and authorities concerned, pursuant to Article 40 of the Charter of the United Nations, to observe an unconditional cease-fire and, bearing in mind that the several Armistice Agreements include firm pledges against any

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[25] S/1376, II.

> further acts of hostility between the parties and also provides for their supervision by the parties themselves, relies upon the parties to ensure the continued application and observance of these agreements;
>
> "Decides that all functions assigned to the United Nation's Mediator on Palestine having been discharged, the Acting Mediator is relieved of any further responsibility under Security Council resolutions . . ." [26]

It will be noted that the above resolution is phrased in the terms of "hope" that future negotiations would lead to an agreed settlement of all issues, and that the Armistice Agreements constitute an "important step" toward the establishment of permanent peace. It therefore affirmed that there were other "steps" to be taken before peace would be achieved. Conspicuously absent was any comment on Israel's alleged right of access to the Suez Canal.

In addition to recognizing the armistice agreements as controlling the relations between the parties, this resolution effected certain changes. The Mediator was relieved of any further responsibility under previous resolutions of the Security Council, and the Truce Supervision Organization was no longer subordinated to him, but became a subsidiary organ of the United Nations with its own well-defined functions. Its machinery for supervising the cease-fire and the truce, which had been established under previous Security Council resolutions, was made available for assisting the supervision of the General Armistice Agreements through the Mixed Armistice Commissions set up therein.[27]

As noted, each of the armistice agreements provided that there should be a Mixed Armistice Commission to supervise the

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[26] Ibid.

[27] Burns, op. cit., pp. 26, 27.

working of the agreement.[28] The Commission is composed of an equal number of delegates from each party and presided over by the United Nations Chief of Staff of the Truce Supervision Organization, or a senior observer whom he might designate after consulting the parties. Complaints or claims by either party are referred to the said Commission, which then arranges for the investigation of the complaint by United Nations Military Observors in participation with representatives of either or both parties. After the facts are established the Commission is to meet and decide on such action "as it may deem appropriate with a view to equitable and mutually satisfactory settlement."[29] So much for the theoretical function of the Mixed Armistice Commission; let us now see how it was applied in practice.

The First Israeli Complaint

On September 16, 1950, Israel submitted a complaint[30] to the Security Council charging that Egypt had violated the Egyptian-Israeli armistice agreement through the maintenance of "blockade" practices inconsistent with the letter and spirit of that agreement. It was alleged that the "blockade" of shipping destined for Israeli ports involved not only an illegal attempt to undermine Israel's economy by force, but also the periodic molestation of the ships and vessels of member States lawfully

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[28] For example, Article X of the Egyptian-Israeli Armistice Agreement, op. cit. Also reproduced in Hurewitz, Diplomacy in the Near and Middle East, Vol II, pp. 299-304, at pp. 303 and 304.

[29] Ibid., Article X, section 7.

[30] S/1794.

traversing the Suez Canal. The representative of Israel referred to the previous "interpretation" of Dr. Bunche, and contended that the Egyptian action was a violation of the Charter, a violation of the Armistice Agreement, a general breach of international law, and a particular violation of the specific conventions relating to the Suez Canal.[31]

It will be noted from the foregoing that Israel was utilizing the question of an alleged breach of the armistice agreement as a device for raising other complex issues before the Security Council. Egypt made the point that the appropriate method of settling alleged violations of the armistice was before the Mixed Armistice Commission.[32] Accordingly, a joint draft resolution[33] was submitted by France, the United Kingdom, and the United States which recalled the resolution of August 11th, and reminded the parties that the provisions of the Armistice Agreements were binding upon them, consenting to the handling of such complaints according to the procedures established in the agreements. Israel also circulated a draft proposal,[34] which would have had the Security Council call upon Egypt to abandon blockade practices and to restore the free movement of shipping through the Suez Canal. However, in view of the joint draft resolution, the Israeli measure was not pressed for discussion.

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[31] Ibid., See Yearbook of the United Nations, 1950, p. 317.

[32] Ibid., p. 318.

[33] S/1899. [34] S/1900.

On November 17th, at the 524th meeting of the Security Council, the joint draft resolution, as revised,[35] was adopted by 9 votes to none, with two abstentions. In its final form, the resolution merely reminded the parties of their Charter obligations to settle their outstanding differences, and pointed out that the armistice agreements contemplated "the return to permanent peace in Palestine." They were further urged to take all such steps as would lead to the settlement of the issues between them.[36]

Up to this point, the matters of war and freedom of navigation had not been successfully raised by Israel. It had, however, accomplished a definite purpose - - to give publicity to its claim and generate some interest in the questions presented. In this respect, its boldness and determination must be admired. At subsequent proceedings in the United Nations Israel would seek to equate the restrictions on navigation to a "threat to the peace", thereby bringing it within the express jurisdiction of the Security Council. However, before examining these later developments, let us consider the condition of war under general international law and compare it with the pertinent provisions of the armistice convention concluded between the parties.

War: Its Course and Consequences

Historically, the concept of war in international law has been the subject of much discussion and many fine distinctions

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[35] S/1899, as revised, became S/1907 when adopted.

[36] Ibid.

have been made as to its various aspects. Of primary interest to us here is only the condition of war in its overall sense, that is, what it is and when it may be said to exist. War has been variously described as a contest by armed force, a state of fact, a means of self-help to secure the observance of substantive rights, and as a status or condition of armed hostility. The last definition of war as a status of belligerency appears to be more in accord with the practice of States, and allows the use of "war" and a "state of war" interchangeably.[37]

However, the term "war" signifies not merely the employment of force, but the existence of the legal condition of things in which rights are, or may be, prosecuted by force. Accordingly, when two nations declare war against each other, war exists, even though no force may as yet have been employed.[38] And, even in the absence of a declaration of war, the commencement of armed hostilities may be sufficient to evidence a state of war. In this latter situation, the absence of a declaration of war proves, presumably, only that no war is intended, not necessarily that no war exists.[39] Where actual hostilities are in progress, as one writer aptly observes, "the importance of intention as an element of the definition of war diminishes rapidly."[40] Similarly, another

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[37] Briggs, The Law of Nations, p. 972.

[38] John Bassett Moore, Digest of International Law, Vol VII, p. 153.

[39] Cf. Charles Cheney Hyde, International Law, Vol III, pp. 1693-1696.

[40] Clyde Eagleton, "The Attempt to Define War," International Conciliation, No. 291, June, 1933, p. 269.

well known authority concludes that if acts of force are sufficiently serious and long continued, then, "even if both sides disclaim any animus belligerendi and refuse to admit that a state of war has arisen between them," a legal presumption is nevertheless justified that the state of facts for which they are responsible is war.[41]

Assuming that a state of war exists, let us next review some of its consequences. It will be seen that not only as between the belligerents, but for their nationals and traders as well, rights, duties and liabilities are created, terminated and modified by the mere fact that a war exists. A similar result ensues as between the belligerents and neutral States, for war brings into play not only the rules of international law concerning the permissible means and limits of violence, but also a vast mass of rules concerning commerce and intercourse with belligerents.[42]

This "law of war" may be found in treaties, in the customs and practices of States which have gradually obtained universal recognition, and even from the general principles of justice applied by jurists and practiced by military courts.[43] In this respect, a United States Army publication contains the following comments:

> "Many of the rules of war have been set forth in treaties or conventions to which the United States and other nations are parties. These are commonly called the written rules or

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[41] Brierly, "International Law and Resort to Armed Force," 4 Cambridge Law Journal, 1932, p. 313.

[42] Julius Stone, Legal Controls of International Conflict, p. 304.

[43] Trial of the Nuremberg War Criminals, International Military Tribunal, 1947-49, Vol I, p. 221.

> laws of war . . . . Some of the rules of war have never yet been incorporated in any treaty or convention to which the United States is signatory. These are commonly called the unwritten rules or laws of war, although they are well defined by recognized authorities on international law and well established by the custom and usage of civilized nations . . . . The unwritten rules are binding upon all civilized nations . . . . The written rules are in large part but formal and specific applications of general principles of the unwritten rules."[44]

Thus, we see that there are both written and unwritten rules of war, and these apply quite independently of the question of whether there has been an illegal use of force. As one well known writer has stated:

> "it is a mistake to assume that acceptance of the concept of international police forces and their use against an 'outlaw', with its consequent abolition of the concept of 'war' in the legal sense, eliminates the necessity for the legal regulation of the rights and duties of those who are active participants in the struggle and of those who for geographical or other reasons are not called on to take an active part."[45]

In light of the foregoing, may we say that a state of war existed between Egypt and Israel? The General Armistice Agreement seems to scrupulously avoid the use of the term and refers generally to "the transition from the present truce to permanent peace" and "liquidation of armed conflict". However, one Article fails to maintain this terminology and supplies a most revealing clue. It provides for the exchange of prisoners of war and disposition of their property. It further provides that all such matters not regulated by the Armistice Agreement shall be decided "in accordance with the principles laid down in the International

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[44] U.S. Army Basic Field Manual, FM 27-10, Rules of Land Warfare, 1940, p. 1 et seq.

[45] Philip C. Jessup, A Modern Law of Nations, pp. 188-221.

Convention relating to the Treatment of Prisoners of War, signed at Geneva on 27 July 1929."[46] Considering the ferocity of some of the fighting and its duration over an extended period of time, it is believed it may safely be concluded that a state of war existed.

The Termination of War

The next matter for consideration is whether this state of war has been terminated. The Preamble to the Egyptian-Israeli Armistice Agreement recites that the parties are responding to the Security Council resolution of 16 November 1948, and "in order to facilitate the transition from the present truce to permanent peace in Palestine" have decided to enter into negotiations for an armistice. Article 1 begins "with a view to promoting the return to permanent peace in Palestine" and subsequently provides: "The establishment of an armistice between the armed forces of the two Parties is accepted as an indispensable step toward the liquidation of armed conflict and the restoration of peace in Palestine."[47] With specific reference to the implementation of the Security Council resolutions of 4 and 16 November 1948, the following principles and purposes were affirmed:

> "1. The principle that no military or political advantage should be gained under the truce ordered by the Security Council is recognized.
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> * * * * *
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> "3. . . . it is emphasized that it is not the purpose of this Agreement to establish, to recognize, to strengthen,

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[46] Article IX, Egyptian-Israeli Armistice Agreement, op.cit.

[47] Ibid., Article 1, section 4.

> or to weaken or nullify, in any way, any territorial, custodial or other rights, claims or interests which may be asserted by either Party in the area of Palestine . . . . The provisions of this Agreement are dictated exclusively by military considerations and are valid only for the period of the Armistice."[48]

Regarding the Armistice Demarcation Line established, it was expressly provided that it "is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to the rights, claims and position of either party. . . as regards ultimate settlement of the Palestine question."[49] One of the final Articles states that "no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question."[50]

Thus, it would seem clear that the armistice was regarded as only a step toward the restoration of peace, and certainly not the ultimate peace settlement. By its terms, the agreement was dictated purely by military considerations, and no military or political advantage was to be gained, or should it affect the positions of the parties in the ultimate settlement of the Palestine question. However, reserving judgment on this question for the present, let us briefly ascertain the function of an armistice in international law.

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[48] Ibid., Article IV, sections 1 and 3.

[49] Ibid., Article V, section 2.

[50] Ibid., Article XI.

It would appear that the general rule and practice of States has been that an armistice is merely a temporary suspension of hostilities, which may be resumed upon the expiration of the armistice period. The Hague Convention of 1907 contained the provision that "an armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time . . . ."[51] However, there is also an indication that general armistices may be regarded as a kind of "de facto" termination of war, that is later consummated and completed by a final treaty of peace.[52] Admittedly, the usual method of terminating war between belligerents is by peace treaty, but whether an armistice is intended to bring about only a cessation of hostilities or operate to terminate the war is a question of construction of the particular armistice agreement concerned.[53] As we shall see, there are widely divergent views on the interpretation of the Egyptian-Israeli Armistice Agreement.

Introduction to Freedom of the Seas

Another issue that was to arise in relation to the question of war and the exercise of belligerent rights is the matter of freedom of the seas. Accordingly, we might also consider the general principles of international law dealing with this proposition. First, to what waters does this so-called freedom pertain?

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[51] Chapter V, Article 36. See J. B. Scott, The Hague Conventions and Declarations of 1899 and 1907, p. 100.

[52] Stone, op. cit., p. 644.

[53] Ibid., pp. 640-641.

Nearly three-quarters of the surface of the earth is covered with water, mostly salt. However, of this vast water area of the globe, only a very small proportion falls within the national jurisdiction of the independent States comprising the world family of nations. The term "high seas" therefore refers to those waters which are outside of the exclusive control of any State or group of States, and hence not regarded as belonging to the territory of any of them. Until the ocean envelops the shores of a maritime State and constitutes its maritime belt, it is not a part of the domain of any territorial sovereign. Consequently, the broadest rights of unmolested navigation on the high seas are enjoyed by the ships of every flag.[54] As one emminent jurist has stated: "in conformity with the principle of the equality of independent States, all nations have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation . . . ."[55]

The Distinction Between Internal Waters and Territorial Waters

There are two other maritime divisions which should be defined, namely the "internal waters" and the "territorial waters" of a State. The term territorial waters in international law

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[54] H. A. Smith, The Law and Custom of the Sea, pp. 1, 6-7. See also Hyde, op. cit., Vol I, p. 751.

[55] Judge John Bassett Moore in his dissenting opinion in the case of the S.S. "Lotus", P.C.I.J., Ser. A, No. 10, (1927) p. 69.

generally comprises all waters encompassed in a zone extended seaward from a base line, usually the low water mark on shore, to the limit of sovereignty asserted by the shore State. All other waters, whether sea or fresh, that lie within the base line of territorial waters are regarded as internal waters, and this includes all rivers and lakes, the waters within ports, and certain other land-locked waters which will be mentioned later.

The common legal feature of all internal waters is that over them the State concerned has precisely the same sovereign authority as it has over its land territory. It may limit these rights by treaty, as when, for example, it concludes a commercial treaty giving foreign ships access to its ports or rivers. But the conclusion of any such treaty is in itself an act of sovereign power, and does not qualify the basic principle that in all internal waters the law of the land is supreme.

The territorial belt, like the area of internal waters, forms part of the national territory of the shore State and is subject to its legislation, but differs from the internal waters in that it is subject to an international "right of innocent passage" for all foreign merchant ships, at least in time of peace.[56]

With these principles in mind, let us now proceed with the further development of the dispute between Israel and Egypt before the Security Council.

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[56]Smith, op. cit., pp. 6-7.

CHAPTER III

THE ISSUE OF NAVIGATION

The Israeli Complaint of 1951

It has already been mentioned that Israel made two prior attempts to raise the question of Egyptian restrictions on navigation in the Suez Canal before the Security Council. Following the Security Council resolution of August 11, 1949, which failed to comment on this aspect of the situation, Israel brought the matter before the Egyptian-Israeli Mixed Armistice Commission as provided in the General Armistice Agreement. This resulted in a decision of August 29, 1949, which provided, in part, "the Mixed Armistice Commission thinks it has the right to demand that the Egyptian Government shall not interfere with the passage of goods to Israel through the Suez Canal."[1] Egypt, however, refused to comply with this determination of the Commission and, as was its right under the Armistice Agreement, appealed to the Special Committee set up thereunder.[2]

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[1]This decision is quoted in a report of March 21, 1951, from the Chief of Staff of the Truce Supervision Organization to the Secretary-General. (S/2047)

[2]Article X, section 4 provides: "Decisions of the Mixed Armistice Commission, to the extent possible, shall be based on the principle of unanimity. In the absence of unanimity, decisions shall be taken by a majority vote of the members of the Commission present and voting. On questions of principle, appeal shall lie to a Special Committee . . ."

Before the appeal had been finally heard by the Special Committee, Israel lodged its complaint of September 16, 1950,[3] with the Security Council. However, the resolution adopted on November 17, 1950,[4] also failed to comment on the question of navigation and the Security Council referred the complaint back to the Special Committee to be resolved within the framework of the armistice machinery. The Special Committee, composed of one representative from each of the parties concerned under the chairmanship of the Chief of Staff of the Truce Supervision Organization, resumed discussions on January 16, 1951. General William E. Riley the Chief of Staff, submitted an interim report[5] on the progress of the Special Committee on March 21, 1951. Finally, on June 12, 1951, the body reconvened to discuss the question of whether the Mixed Armistice Commission had the right to demand that Egypt should not interfere with the passage of goods to Israel through the Suez Canal.

In a decision reached the same date, the Special Committee reversed the earlier determination of August 29, 1949, and held it did not have the right to demand from the Egyptian Government that it cease such interference with the passage of goods to Israel. The Chief of Staff sought to explain his vote, contrary to the stand taken by Israel, in a message to the Secretary-General reporting the action of the Special Committee.[6] He indicated the action taken

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[3] S/1794.

[4] S/1907.

[5] S/2047, op. cit.

[6] S/2194. See Security Council Official Records, 6th Year, Supplement for 1 April - 30 June 1951, pp. 162-164.

by Egyptian customs authorities was considered an "aggressive action" in his opinion, however, it did not contravene the armistice agreement as this term was defined therein.[7] Similarly, he personally viewed the Egyptian action as a "hostile act", although it was not necessarily within the definition of this term as contained in the agreement.[8] The following additional comments, which he had conveyed to the parties, were included:

> ". . . If I had certain knowledge that it was being committed by the armed forces of Egypt . . . I would most firmly hold that this constituted a violation of article I paragraph 2, and article II, paragraph 2 of the General Armistice Agreement, and would uphold the contentions advanced by Israel. Lacking such knowledge, I see no way . . . of taking this course, even though I am convinced that the Egyptian action does not foster the objectives of the General Armistice Agreement.
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> "As Chief of Staff . . . I am forced to base my position in this matter on the specific provisions of the General Armistice Agreement signed by Egypt and Israel. I deliberately avoid, therefore, any consideration of the status of the Suez Canal or the rights of any party with regard to it.
>
> " . . . Either the Egyptian Government must, in the spirit of the General Armistice Agreement, relax the practice of interference with the passage of goods destined for Israel . . . or the question must be referred to some higher competent authority such as the Security Council or the International Court of Justice.
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> " . . . Because of the effect which such continued action will have on the implementation of the Armistice Agreement and the future operation of the Mixed Armistice Commission, I am compelled to direct a strong request to the Egyptian delegate to intercede with his Government

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[7] Article I, section 2 provides: "No aggressive action by the armed forces--land, sea, or air--of either Party shall be undertaken, planned, or threatened against the people of the armed forces of the other; it being understood that the use of the term 'planned' in this context has no bearing on normal staff planning as generally practiced in military organizations."

[8] Article II, section 2 provides: "No element of the land, sea or air military or para-military forces of either Party, including non-regular forces, shall commit any warlike or hostile acts against the military or para-military forces of the other Party, or against civilians in territory under the control of that Party . . ."

> to desist from the present practice . . . since such acts can only by construed as inconsistent with the spirit of the Armistice Agreement . . ."[9]

Not satisfied with this result, Israel lost no time in submitting a new complaint to the Security Council. In a letter dated July 11, 1951,[10] Israel requested the item "Restrictions imposed by Egypt on the passage of ships through the Suez Canal" be placed on the agenda for urgent discussion. It alleged that in contravention of international law, of the Suez Canal Convention and of the Egyptian-Israeli Armistice Agreement, Egypt had continued to detain, visit and search ships seeking to pass through the Canal on the grounds that their cargoes were destined for Israel. This practice, it charged, had been carried out for over two years, in defiance of the specific appeals and requests of the United Nation's representatives charged with the negotiation and implementation of the armistice agreement.

Referring again to the "authoritative ruling" of Dr. Bunche, Israel submitted that the resolution of August 11, 1949, called upon the parties to observe the armistice agreement and included firm pledges against further acts of hostility. Following the suggestion of General Riley, concerning reference of the question to some higher authority, it noted " . . . Israel now brings this question before the Security Council as a matter jeopardizing the Armistice Agreement and endangering the peace and security of the Middle East." It averred that the Egyptian action also adversely

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[9] S/2194, op. cit., pp. 163-164.

[10] S/2241. See Security Council Official Records, 6th year, Supplement for July, August and September 1951, pp. 9-10.

affected the economic life of the region, particularly its oil-refining capacity, and concluded, " . . . there is disquieting evidence that if the blockade practice is not checked at Suez it will become increasingly extended to other waters."[11]

It will be seen that the Israeli complaint largely followed the same approach as its earlier efforts. However, stripped of its verbal niceties, the basic question was still whether or not Egypt had violated the Armistice Agreement. As before, there was the tact of equating an alleged breach of the armistice to a danger to the peace and security of the Middle East. One aspect that was glossed over and avoided was that there had been a final determination by an appropriate body, which held that the Egyptian action did not constitute a violation of the armistice.[12] Let us now consider the points brought out in the debate of this item before the Security Council.

At its 549th meeting on July 26, 1951, the agenda was adopted and the Security Council began consideration of the Israeli complaint. The Israeli delegate advanced the proposition that when a ship of a maritime power pursued its innocent course with cargoes for Israel, and Egypt intervened to obstruct passage and remove the cargo, the result was not a lawful assertion of Egyptian sovereignty. He contended this was an unjustifiable

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[11] Ibid.

[12] Article X, section 4 further provides: " . . . On questions of principle, appeal shall lie to a Special Committee, . . . whose decisions on all such questions shall be final. If no appeal against a decision of the Commission is filed within one week from the date of said decision, that decision shall be taken as final . . ."

This would seem to indicate that the decision of the Commission, or the Special Committee in the event an appeal was taken, was completely dispositive of such a complaint.

arrogation of rights, constituting an unlawful encroachment on the sovereignty of the maritime Power concerned and of Israel as the State to which the cargo was consigned. He argued that any State had the right to send any ship with any cargo to Israel, and Egypt had no right to block the free intercourse between the sender and the recipient of such goods.[13]

It must be noted that the Israeli theory was based on the premise of innocent cargo, and the blockage of such intercourse by the removal of all cargo destined for Israel. This is hardly the same thing as visit, search and seizure of contraband items. The Israeli delegate also sought to distinguish this complaint from the previous disputes, saying " . . . this is not a complaint of limited topographical scope, similar to others which have arisen on various occasions within the context of the armistice system." He therefore depicted the situation as follows:

> " . . . This is a central international question. The freedom of the seas; fidelity to international convention; the legal integrity and moral and practical worth of the Egyptian-Israeli General Armistice Agreement; the authority of the United Nations officers under that Agreement; the free development of economic cooperation in the Middle East; the future of Egyptian-Israeli relations - - all these grave issues come within the wide perspective of this discussion."[14]

In reply, the Egyptian representative pointed out the final decision of the Mixed Armistice Commission was that it did not have the right to demand that Egypt refrain from the activity in question.

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[13] Security Council Official Records, 549th Meeting, July 26, 1951, p. 13.

[14] Ibid., p. 2.

Accordingly, any other remarks of the Chief of Staff, particularly those based on hypothetical assumptions, were obiter dicta and did not properly belong in the record. Regarding the exercise of belligerent rights of visit and search, it was submitted that under accepted principles of international law and prior precedent this was not inconsistent with a general armistice agreement. To support this conclusion, the Egyptian delegate cited the following excerpt from Oppenheim's 1944 edition of International Law:

> "Armistices or truces, in the wider sense of the term, are all agreements of belligerent forces for a temporary cessation of hostilities. They are in no wise to be compared with peace, and ought not to be called temporary peace, because the condition of war remains between the belligerents themselves, and between the belligerents and the neutrals, on all points beyond the mere cessation of hostilities. In spite of such cessation the right of visit and search over neutral merchantmen therefore remains intact."

He also noted the British Foreign Secretary, in a statement to the House of Commons on Middle East Affairs just the previous day, had considered the Arab States and Israel to be "still technically at war".[15]

Turning next to the Egyptian Royal Decree of February 9, 1950, that had been mentioned by the Israeli delegate, the Egyptian spokesman declared it applied only to contraband of war bound for Israel and defined as follows:

> "1. Arms, ammunition, explosives, their component parts and their accessories.
> "2. Chemical substances for military purposes, appliances and machines used for chemical warfare.

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[15] Ibid., pp. 6, 17.

"3. Fuel.
"4. Warships and military aircraft, their component parts and their accessories . . . .
"5. Tanks, armoured cars and armoured trains which are made for military purposes . . . .
"6. Gold, silver, means of payment, their component parts and their accessories, machines and materials for the manufacture or for the utilization of these articles."[16]

It was the Egyptian view that this decree was the culmination of a continuous process of relaxing the measures previously imposed by Egypt on the passage of war contraband in Suez and Port Said. Thus, it considered the accusation leveled at Egypt and the huge clamor made against it in this connection was by far out of proportion with the less than minimum restrictions imposed, and entirely unjustified by established international law and practice. It was also noted that on October 18th of the previous year Mr. Bevin had informed the House of Commons he was not aware of any cases in which the new Egyptian regulations had in practice led to delays.

To illustrate the actual passage of traffic, the Egyptian delegate supplied definite facts and figures.[17] He also mentioned that during 1950, a traffic increase could be observed in the latter part of the year as compared to the first part, in spite of the restrictions which Egypt felt impelled to impose. Under

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[16] Ibid., pp. 19-20. This and other so-called blockade laws are quoted and discussed in Bloomfield, op. cit., pp. 7-10.

[17] From 15 May 1948 to 24 February 1949, out of 8,009 merchantmen which arrived at Port Said, 548 were visited and only 71 were unloaded of contraband of war. During the same period, 282 ships reached Suez, and only two ships were visited, and none was even partly unloaded. In the following three months, 2,139 ships arrived at Port Said, 195 of them were visited and only 25 were partly unloaded. During the same period, 1,043 ships reached Suez, nine of them were visited and not one was unloaded. Security Council Official Records, 549th meeting, p. 20.

those circumstances, he declared it was obvious Egypt was not working against the freedom of navigation of the Suez Canal, but was merely exercising a fraction of its rights under an armistice. And, apart from these considerations, he submitted that Egypt always had the prerogative of exercising its right of self-preservation and self-defence, which was even recognized by the Charter.[18]

The British representative took the approach that hostilities were not in progress and had not been for two and a half years. He added, "it cannot even be maintained that Egypt is under any imminent threat of attack from Israel." Following this line of reasoning, he observed, "we must therefore conclude that the claim to exercise belligerent rights for the defense of Egypt cannot now be sustained and must be considered as an abuse of belligerent rights as these rights are recognized in international law."[19]

Although exercising considerable liberty with the alleged issues before the Security Council, the Israeli delegate would not concede that Israel was obliged to discuss any matter with Egypt except the restrictions on shipping passing through the Suez Canal. He asserted that the Egyptian practice of visiting and searching ships was the only breach in the Egyptian-Israeli Armistice Agreement. In his words, "except for that vast and gaping hole, the structure of that Agreement would be intact." Commenting further on the remarks of the British delegate as to hostilities, the Israeli spokesman declared, "nobody is shooting at Egypt and nobody will shoot at Egypt."[20]

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[18] Ibid., 550th meeting, August 1, 1951, p. 7.

[19] Ibid., p. 20.

[20] Ibid., 551st meeting, pp. 3-9.

We may observe at this point that Egypt was justifying its action as the exercise of the inherent right of self-defense and the normal rights of a belligerent still in a technical state of war. It submitted that nothing contained in the Suez Canal Convention altered or diminished such rights. Israel, on the other hand, argued that the Security Council must find there was no state of war and that the Egyptian action constituted an illegal interference with international commerce and shipping. Obviously, these arguments involve complex questions of law as well as an alleged "threat to the peace". Let us now examine the attitude of certain members of the Security Council in this regard.

The Attitudes of Member States

At the 552nd meeting on August 16, 1951, the British delegate stated the position of his Government as follows:

> " . . . As I said on 1 August, these legal issues are no doubt debatable, but I still do not consider that it is necessary for the Security Council to go into them. It is at least questionable whether the Security Council is really qualified to undertake the detailed legal study and analysis which would certainly be required if the Council were to attempt to make a legal finding. Nor do we feel . . . that it would be profitable to make such an attempt, since the view which the Council takes on this question should depend, in our opinion, on the actual situation as it exists rather than on any legal technicalities.
>
> " . . . The draft resolution does not attempt to say whether or not Egypt can technically claim to be entitled to belligerent rights. What the draft resolution does say is that, in the light of the Armistice Agreement and of what has taken place since it was signed, the maintenance of the present restrictions is unjustified and unreasonable and must be held to constitute an abuse of any rights which Egypt may claim to possess. If it could be shown that these measures are essential for the defence of Egypt, we might well be prepared to take a different view. But Egypt is not being attacked and is not under any imminent threat

> of attack, and we therefore cannot agree that these measures are necessary for the self-defence or self-preservation of Egypt."[21]

The United States attitude in support of the draft resolution was characterized as being guided by the desire to see one source of agitation in the Near East eliminated. Its spokesman added that the armistice agreement system, which stopped hostilities between Egypt and Israel, must be upheld and strengthened until such time as a permanent peace was reached. It was felt that in dropping the restrictions, Egypt could make a postive contribution to the relief of tension in the Near East. Without commenting directly on the legality of the Egyptian restrictions, the United States expressed the view that such action was "inconsistent" with the spirit and intent of the Armistice Agreement.[23]

The Brazilian delegate concluded that the measures taken by Egypt could not be considered as self-defence, since there was no evidence of an Israeli preparation for an armed attack against Egypt or any other neighbouring Arab countries. He also made the following profound analysis:

> "The specific question before us is only a flare-up of the existing antagonism between Israel and the Arab States, resulting from unsolved disputes between them. No real improvement in this situation can be expected while the main problems dividing Israel and the Arab States remain unsettled."[24]

However, not all the countries present were content to avoid the legal issues raised. The representative of China, in announcing the abstentions of his delegation, stated the

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[21] Ibid., 552nd meeting, pp. 2-3.

[22] S/2298.

[23] Security Council Official Records, 552nd meeting, p. 8.

[24] Ibid., p. 13.

draft resolution seemed to have assumed the validity of the claim that the measures adopted by Egypt were in violation of general international law and the provisions of the Suez Canal Convention and the Armistice Agreement. In this regard, he remarked, "that is a point yet to be proved. Armistice is the first step to peace, but that does not mean the termination of a state of war . . . ." The Indian delegate, coming even closer to the point, observed that the Security Council was not the most appropriate body for the adjudication of questions involving complicated legal issues. He added, "the draft resolution before us seeks to avoid the legal issues involved. My delegation feels that questions regarding the legal rights of the parties cannot be brushed aside as mere technicalities."[25]

The Egyptian spokesman also sought a realistic attitude. He admitted the freedom of international shipping and commerce was a good thing indeed, which must be respected and sustained. However, he noted, this was not a mere abstraction; it was part of international life as actually lived, an essential element of which is the safeguarding of the integrity and rights of States. In his view, the restrictions Egypt invoked within its own territory and the area of its sovereignty were only a limited and discreet expression of its rights. He also emphasized that, according to the fundamental principles and purposes laid down in the Charter, the adjustment or settlement of international disputes by the Security Council was required to be in conformity with the principles of justice and international law. Therefore,

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[25] Ibid., 553rd meeting, pp. 10, 29, 30.

any arbitrary resolution of the Council denying Egypt its belligerent rights would be an attempt to impose a political settlement on Egypt. In this respect, he reminded the representative of the United States of the latter's remarks at the 253rd meeting of the Security Council on February 24, 1948, to the effect:

> "While we are discussing the problem of Palestine, it is of primary importance to the future of the United Nations that the precedent to be established by the action taken in this case should be in full accord with the terms of the Charter under which we operate. The interpretation of the terms of the Charter given in the Palestine issue will seriously affect the future actions of the United Nations in other cases.
>
> "The Charter of the United Nations does not empower the Security Council to enforce a political settlement whether it is pursuant to a recommendation of the General Assembly or of the Security Council itself . . ."[26]

With the issues thus joined, the draft resolution[27] submitted by France, the United Kingdom, and the United States came up for voting at the 558th meeting on September 1, 1951. It was adopted by eight votes in favor, with three abstentions.[28] Let us now examine the provisions of this measure.

The Resolution of September 1, 1951

Paragraphs one and two recalled the resolutions of August 11, 1949, and November 17, 1950, and the respective statements therein concerning the parties pledges in the Armistice Agreements

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[26] Ibid., pp. 12, 23.

[27] S/2298/Rev. 1. After adoption the resolution was issued as a document under the symbol S/2322.

[28] Brazil, Ecuador, France, the Netherlands, Turkey, United Kingdom, U.S.A. and Yugoslavia were in favor, and China, India and the USSR abstained.

against further acts of hostility and the contemplated return of permanent peace in Palestine. The next paragraph noted the report of the Chief of Staff of the Truce Supervision Organization to the Security Council of June 12, 1951.[29] The remaining sections are worthy of being quoted in full, and provide as follows:

> "4. Further noting that the Chief of Staff of the Truce Supervision Organization recalled the statement of the senior Egyptian delegate in Rhodes on 13 January 1949, to the effect that his delegation was 'inspired with every spirit of cooperation, conciliation and a sincere desire to restore peace in Palestine', and that the Egyptian Government has not complied with the earnest plea of the Chief of Staff made to the Egyptian delegation on 12 June 1951, that it desist from the present practice of interfering with the passage through the Suez Canal of goods destined for Israel,
>
> "5. Considering that the armistice regime, which has been in existence for nearly two and a half years, is of a permanent character, neither party can reasonably assert that it is actively a belligerent or requires to exercise the right of visit, search, and seizure for any legitimate purposes of self-defence,
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> "6. Finds that the maintenance of the practice mentioned in paragraph 4 above is inconsistent with the objectives of a peaceful settlement between the parties and the establishment of a permanent peace in Palestine set forth in the Armistice Agreement;
>
> "7. Finds further that such practice is an abuse of the right of visit, search and seizure;
>
> "8. Further finds that that practice cannot in the prevailing circumstances be justified on the ground that it is necessary for self-defence;
>
> "9. And further noting that the restrictions on the passage of goods through the Suez Canal to Israel ports are denying to nations at no time connected with the conflict in Palestine valuable supplies required for their economic reconstruction, and that these restrictions

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[29] In the original text of S/2298 this paragraph read as follows: "Noting that the Chief of Staff of the Truce Supervision Organization in his report to the Security Council of 12 June 1951 considered interference with the passage through the Suez Canal of goods destined for Israel to be a hostile and aggressive act, and contrary to the spirit of the Armistice Agreement, the effective functioning of which is thereby jeopardized."

Except for this revision, the texts of S/2298 and S/2298/Rev. 1 are identical.

> together with sanctions applied by Egypt to certain ships which have visited Israel ports represent unjustified interference with the rights of nations to navigate the seas and to trade freely with one another, including the Arab States and Israel,
>
> "10. Calls upon Egypt to terminate the restrictions on the passage of international commercial shipping and goods through the Suez Canal wherever bound and to cease all interference with such shipping beyond that essential to the safety and shipping in the Canal itself and to the observance of the international conventions in force."

It will be seen that a large portion of this resolution incorporated the views of the Chief of Staff, which were based on hypothetical assumptions he was admittedly unqualified to make. The armistice regime was now deemed to be of a "permanent character", which apparently was to be suggestive of an actual return to permanent peace. However, this was not reconcilable with the express terms of the Agreement. The finding that the maintenance of such restrictions was "inconsistent" with the objectives of a peaceful settlement and the establishment of permanent peace evades the more basic question of the status existing between the parties. It appears, on the other hand, that visit, search and seizure was recognized as a right - - but the Egyptian practice was regarded as an "abuse" of it. It is also difficult to understand the connection between war contraband bound for Israel and the "valuable supplies" required by other nations for their economic reconstruction. And finally, as this resolution was directed against only Egypt, it would appear that the message from the Secretary-General of the Arab League[30]

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[30] S/2321. On August 31st, the Secretary-General of the Arab League transmitted, for the information of the Security Council, a resolution unanimously adopted by the Political Committee of the League concerning the restrictions imposed on the passage of ships through the Suez Canal. It stated, in part, that this question concerned not only Egypt but all the Arab States, and that, in taking these steps, Egypt was simply putting into effect the decisions already taken by the League Council for the protection of each of its Members.

had been wholly ignored. As we shall see, this resolution was not to be a solution of the problem. The Gulf of Aqaba was not expressly mentioned during these proceedings, unless it was included in the vague reference to "other waters" contained in the Israeli complaint. Let us now proceed to examine the subsequent and final Israeli complaint to the Security Council.

The Israeli Complaint of 1954

On January 28, 1954, Israel addressed a new complaint to the Security Council, and supplied an explanatory memorandum the following day.[31] Reiterating generally the matters contained in the previous complaint, it now added a new element - - the alleged interference by Egypt with shipping proceeding to the Israel port of Elath on the Gulf of Aqaba. After reviewing the situation concerning shipping through the Suez Canal since the Council last considered the matter in 1951, it charged the practices of the Egyptian Government had continued despite the Council's injunction and that the list of contraband items had recently been expanded to cover food and other commodities. It also alleged that the Egyptian Government had extended such regulations, whereby ships proceeding to the Israeli port of Elath became subject to search and seizure. However, this time Israel found itself charged with a violation of the armistice.

On February 3, 1954, Egypt asked for the Council's urgent consideration of its complaint against Israel regarding violations

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[31] S/3168/Add. 1.

of the Armistice Agreement in the Demilitarized Zone of El-Auja.[32] The following day, at its 657th meeting, the Security Council decided to include in its agenda both the Israeli and Egyptian complaints and to consider the two items consecutively.

At the 658th meeting on February 5th, Israel began to present its "new" case. It claimed that the "blockade" worked principally through the existence of the Egyptian regulations and their consequent deterrent effects, and only secondarily through actual assaults and confiscations. In the words of the Israeli delegate, "this - - the total annulment of these regulations - - is our minimal objective." He added, " . . . the release of any isolated ship or cargo is not of the slightest substantive interest to my Government and does not constitute any degree whatever of compliance by Egypt with the Security Council resolution of 1 September 1951." It was his contention that there had been no change in a pattern of regular confiscation and occasional release between the periods preceding and succeeding the 1951 resolution.[33]

The Israeli spokesman charged that the "interference" with shipping in the "Gulf of Elath" was conducted from the islands of Tiran and Sinafir, which were uninhabited until the Egyptian forces took up their position in 1949. Whereas the restrictions in the Suez Canal were applied by authority of the Egyptian Government, with the implied sanction of force if they were defied, it was alleged that such restrictions in the Gulf of Aqaba were enforced by the actual use of artillery and armed naval units. He also claimed there was no legal or generic difference between

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[32] S/3172.

[33] Security Council Official Records, 658th meeting, pp. 12, 14.

the character of these acts, and that both were covered by the Security Council resolution of September 1, 1951, and the General Armistice Agreement. The Israeli position was summarized as follows:

> " . . . the blockade practice at Elath is specifically ruled out, first by article II, paragraph 2, of the Armistice Agreement, forbidding any war-like or hostile acts; second by the interpretation of Mr. Bunche and General Riley that all acts of blockade are ruled out by the Armistice Agreement, and were so understood at Rhodes; third, by the Security Council's resolutions of 11 August, 1949 and 17 November 1950, forbidding any further hostile acts, whether at Suez or anywhere else - - for these injunctions by the Security Council were not limited in space - - and, finally, by the Security Council's resolution of 1 September 1951, which in its fifth paragraph disqualifies Egypt from exercising rights of visit, search and seizure in any waters on the grounds of active belligerency."[34]

It will be seen that this complaint followed the same general lines as the one submitted in 1951, and again raised the question of the exercise of belligerent rights. However, it now presented the question of the maritime status of the Straits of Tiran and the Gulf of Aqaba. Israel had referred to the former as an "international waterway" leading into the Gulf of Aqaba. As to the Gulf, Israel suggested any claim by Egypt, that it was merely exercising the rights of sovereignty in territorial waters, would be frivolous since there was no way to approach the northern shore without passing through the territorial waters of any or all of four countries. But, deferring this aspect for the present, let us return to the question of belligerent rights.[35]

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[34] Ibid., pp. 15-17.

[35] Ibid.,

As to Egypt's contention that a state of war existed, Israel reached the opposite conclusion, charging Egypt had never declared war against Israel or requested international recognition of such a declaration. Israel further submitted that the continuation or resumption of hostile acts was forbidden by the Armistice Agreement, and quoted the remarks of the Chief of Staff at a meeting of the Special Committee, to the effect:

> "Certainly there was no declaration of war; it was a question of acceptance or non-acceptance of the Security Council resolution of 1948 . . . certainly in their spirit and letter the Armistice Agreements had no thought of a resumption of hostilities . . . .
>
> "You may quote all the international authorities in the world on armistice agreements, but when you check your own Armistice Agreement you will find that it is almost unique in history. The parties themselves have evolved in this Armistice Agreement certain principles on which international jurists have yet to write books, and certainly this Armistice Agreement does not in any way, shape or form justify either party talking about the resumption of war . . . "[36]

Concerning Egypt's position that the restrictions were necessary for purposes of self-defence or self-preservation, the Israeli delegate contended the right of self-defence defined in article 51 of the Charter existed only when an armed attack had been carried out, and even then only until such time as the Security Council intervened. He observed that neither of these two conditions existed, and claimed Egypt had never been subjected to or threatened by an armed attack from Israel. It was his view that besides the integrity of the armistice system and the authority of the Security Council, which were both in "deadly hazard", there arose in this case the great principles of international law relating to free navigation, principles sanctioned by long usage

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[36] Ibid., pp. 18, 20.

in the past and never violated except at the risk of war. Accordingly, he urged the Security Council to bring about the immediate and total cessation of all belligerent practices and restrictions, both in the Suez Canal and in the Gulf of "Elath", to safeguard its own dignity by "rescueing its previously adopted resolution from contempt."[37]

Before considering the Egyptian reply, we may make certain preliminary observations regarding the Israeli position. It has been noted previously that a formal declaration of war is not required to establish a state of war. By the same token, recognition is unnecessary. As for the remarks of General Riley about the Armistice regime, such comments appear to be irrelevant and without merit. He himself admitted this particular armistice was "unique" and yet to be treated by international jurists. However, he then purported to easily interpret it. The Israeli concept of the right of self-defence under article 51 of the Charter is only one of several interpretations possible.[38]

In reply, the Egyptian delegate remarked that the subject of this complaint had been considered by the Security Council in 1951, at which time Egypt explained the reasons for its lawful actions. However, the legal aspects of the matter were avoided, and the resolution adopted was supported by some delegations in the belief it might promote the development of peaceful tendencies in

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[37] Ibid., pp. 21-23, 25.

[38] By referring to this right as "inherent", Article 51 would appear to incorporate a pre-existing customary or natural right. It has also been said that "this right under general international law is as vague as it is unquestioned, and as liable to abuse in its application as it is indispensable in the present phase of the international society." See Stone, op. cit., pp. 243-244.

the Middle East. Referring to the Egyptian complaint against Israel, he observed that there was a danger in the demilitarized zone which threatened Egypt's security. He added, "to defend its territory and its very existence, Egypt is entitled and compelled to take certain measures in the Suez Canal." He also answered the accusation that all ships passing through the Canal were subject to arbitrary arrest and search. Out of 32,047 ships passing through the Suez Canal since September 1, 1951, only 55 suspect ships had been inspected, or 0.17 per cent of the total traffic. Moreover, the monthly statistics of the Suez Canal Company concerning the number of ships and the Company's income offered a categorical denial of the allegation that Egypt was hindering the free use of the Canal, since those figures reflected a continual increase in both items. He stressed the fact that subsequent to the adoption of the Security Council resolution of September 1, 1951, neither ship nor cargo had been confiscated.[39]

Turning to the question of the Gulf of Aqaba, the Egyptian representative regarded its designation by Israel as the Gulf of "Elath" to be uncomplimentary to the intelligence of all organs of the United Nations. He did not deny that very reasonable measures were practiced in Egyptian territorial waters, but did question Israel's right to challenge the legal basis of such measures or to dispute the inherent right of self-preservation. The presence of Israel in the Gulf was described as follows:

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[39] Security Council Official Records, 658th meeting, pp. 26, 27, 30.

> " . . . The Israel armed forces having advanced to the Gulf of Aqaba only two weeks after the signing of the Egyptian-Israel General Armistice Agreement; having thereby, according to an official Israel statement, 'completed the control of the Negev'; having established a beachhead that developed into a military and naval base; having enveloped the Egyptian right flank - - now, with unsurpassed audacity, the Israel representative comes to the Security Council to enlist the cooperation of Egypt in maintaining, consolidating and victualling the Israel armed forces that advanced to the Red Sea a few days after the signature of the Armistice Agreement with Egypt.
>
> "Such an imposition could be made under the law of the jungle, but certainly not under international law or under the law of the United Nations."[40]

The Egyptian position on a state of war and the right to exercise belligerent rights was essentially the same as stated in 1951, and it submitted that nothing contained in the Charter changed the well recognized rules of international law relating to truces and armistices. Referring back to the Security Council's 380th meeting on November 15, 1948, being the debate which immediately preceded the adoption of the resolution calling for an armistice, the Egyptian spokesman recalled that there had been a discussion as to whether it should call for peace. The United States delegate, in opposition to the move to call for the establishment of a state of peace, had stated, "for our part, we do not feel that it is practicable to move immediately into that state . . . we do think that the intermadiate state of armistice is a feasible and necessary step on the way towards the final goal . . ." Thus, the resolution as well as the armistice agreement contemplated only a step in the transition from truce toward peace. Furthermore, the armistice agreement contained a specific provision recognizing the right to security and freedom from fear of attack. It was urged

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[40] Ibid., 659th meeting, p. 2.

that Egypt was therefore entitled to exercise the absolute minimum of its inherent rights on its own land and in its own territorial waters.[41]

Shipping in the Gulf

As to the flow of traffic in the Gulf of Aqaba, it was indicated that 267 ships have traversed the region since October 1951. Of these, 214 were British, 35 German, 5 American, 3 Norwegian, 3 Greek, 2 Syrian, and one each from Turkey, Panama, Pakistan, Italy and Denmark. The Egyptian delegate observed that although a considerable number of these ships carried cargoes destined for Israel, only three out of the entire number were actually visited and searched, and not one single consignment of cargo had been confiscated.

The Israeli assertion that the islands of Tiran and Sinafir had been uninhabited prior to 1949 was emphatically denied. The Egyptian representative noted that the records of the Second World War contain official evidence of Egyptian units using these two islands as part of the Egyptian defensive system during that conflict. He further pointed out that Egyptian detachments on these islands cooperated with the Egyptian air force and naval units entrusted at the time with the task of protecting Allied shipping in the Red Sea against submarine attack. In fact, these islands had been occupied by Egypt since 1906, when it was found necessary to delimit the frontiers between Egypt and the Ottoman Empire, and had since been under continuous Egyptian administration.[42]

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[41] Ibid., pp. 5-6.

[42] Ibid., pp. 10, 25.

Returning to the question of the maritime status of the Gulf and the Straits of Tiran, the Israeli position was stated as follows:

> "Now, it is clear that the Gulf of Aqaba is an international waterway in the sense that the territorial waters of at least four countries overlap within that Gulf; so that, if any one country were to assert the application of its sovereign rights in the territorial waters, we would, as I have said before, achieve a maritime jungle in the sense that any one of the four governments could use armed force against any shipping proceeding to any of the other three.
>
> "In brief, where a narrow waterway is the only junction between two parts of the high seas, then its international character has to be preserved, and no sovereign rights based upon the doctrine of territorial waters is inherent in any country from the viewpoint of holding up free maritime traffic."[43]

Although Egypt did not specifically discuss the entire Gulf, it did mention that in exercising the right of visit and search in the Straits of Tiran it was merely carrying out such measures in its own territorial waters. At one point the Egyptian delegate stated, "since it is not the purpose of our debate to establish the status of those waters, I shall confine myself to stating very briefly the principles of international law with respect to territorial waters . . . ." Thus, the Egyptian argument was mainly concerned with territorial waters and the exercise of sovereignty therein, including the defence and security of its nationals.[44] Let us now consider the action taken by the Security Council.

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[43] Ibid., pp. 18.

[44] Ibid., 661st meeting, p. 18.

The Defeat of the 1954 Proposal

At the 662nd meeting on March 23, 1954, the New Zealand delegate introduced a draft resolution,[45] which was directed primarily to the issue of non-compliance with the Council's 1951 resolution. He observed that the preservation of freedom of passage on the high seas and in recognized international waterways was a matter of profound concern. However, Egypt pointed out the Gulf of Aqaba had not been mentioned when the 1951 resolution was adopted, and it seemed somewhat irregular to link it with that measure. It was also noted that the draft resolution, like the 1951 action, failed to take into account the legal character of the dispute before the Council.[46]

The representative from Lebanon directed the Council's attention to another aspect of the situation. It had been estimated that the value of Arab properties seized by Israel was $12,000 million, which it still treated as enemy property. Therefore, to strike a balance Israel should be required to release such amount, and pressure should not be brought to bear on Egypt alone. It was his view that the draft resolution overlooked the sort of situation against which, and with respect to which, Egypt was reacting in all its actions.[47]

The delegate of the United States considered the basic issues to be the same as were discussed in 1951, and that the question

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[45] S/3188.

[46] Security Council Official Records, 662nd meeting, pp. 2, 12, 15.

[47] Ibid., pp. 19-20.

before the Security Council was one of compliance with a decision of the United Nations. Referring to paragraph 5 of the 1951 resolution, he believed this principle to be equally applicable to the Suez Canal or to any waters outside the Canal. The United Kingdom and Denmark concurred with this view.[48]

With all due respect to the Governments just mentioned, it must be noted that their position avoided any determination of the status of the Gulf and the Straits of Tiran, and attempted to deal only with the larger question of visit and search as a permissible means of self-defence. However, Egypt had stated other justifications for such measures, including the protection of its sovereignty and security. As we shall see, these points did not go undetected by other delegations.

The Chinese representative recalled that his delegation abstained in the 1951 voting, because it found the legal argumentation to be inconclusive, and after the present series of debates found itself in the same frame of mind. He added:

> "I do not advise the Council to prolong the legal phase of this debate. The Security Council, by its very nature, is not qualified to deal with the complicated legal issues such as are involved in the present dispute. Nevertheless, the Council cannot brush aside the legal issues as mere technicalities. Lacking a solid juridical base for its actions, the Security Council can, of course, turn to political considerations. Indeed, two years ago . . . the United Kingdom . . . advised the Council not to prolong the legal discussions and to approach the problem from the point of view of equity, justice, peace and security in the Near East. This shift from legal to political considerations has the full support of my delegation, but I doubt that the present draft resolution . . . has found the proper approach."[49]

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[48] Ibid., 663rd meeting, pp. 1, 2, 4, 6.

[49] Ibid., 664th meeting, March 29, 1954, p. 2.

The Soviet delegate observed that the draft resolution, though clearly purporting from its title to deal with the Palestine question, in fact contained nothing related to the settlement of it. It was his opinion that the provisions of the measure under consideration had no connection with an attempt to settle this more general question. He further clarified his remarks by stating:

> "I cannot, however, overlook the important fact that there is a direct connexion between the question now under consideration in the Council and the wider and more general question of relations between Israel and the Arab States, and Egypt in particular.
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> "It should . . . be clear that the unsettled state of this general question will inevitably and undoubtedly affect, and affect adversely, the situation with regard to commercial navigation, especially in those waters where the interests of adjacent States come into contact . . . "

He proposed it would be more correct to utilize the normal and generally accepted method of international law and the Charter, by appealing to both parties to take steps to settle their differences by means of direct negotiation. However, this approach had been ignored, and the unsatisfactory resolution adopted in 1951 would not furnish any more of a solution by being readopted in a new form.[50]

When the vote was taken on the New Zealand draft resolution, eight Members were in favor, Lebanon and the USSR were against, with China abstaining. As one of the opposing votes was cast by a permanent Member of the Security Council, the measure failed to be adopted. The New Zealand delegate, in explaining his vote, felt the draft resolution was very reasonable and added, "at its very heart was the reaffirmation of the resolution of 1951 . . . ." Conversely, the Lebanese spokesman explained, "I stated that it seemed to me to be one-sided, to ignore the basic issues involved,

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[50] Ibid., pp. 7, 8, 10.

to ask nothing of Israel, as though Israel had, in this whole situation, no responsibility and . . . nothing needed to be asked of it."[51]

We might pause to consider the effect of non-passage of the draft resolution. Since it was regarded by its sponsor as a reaffirmation of the 1951 resolution, was this tantamount to a repeal of the earlier measure? In the opinion of the Soviet delegate it apparently was, for he declared, "the resolution has been rejected and we have no resolution before us . . . ." Israel, however, not unexpectedly proclaimed that the law of the United Nations in the Suez Canal and the Gulf of Aqaba was not the draft resolution presented, but the unrepealed resolution adopted on 1 September 1951. Regarding the attitude of his Government, the Israeli delegate concluded by stating:

> ". . . If the choice is between a resolution acceptable to Arab interests and no resolution at all, the question whether there exist the basic conditions of judicial equity, in which Israel should have recourse to the Security Council, is bound to arise for serious considerations in any Governments mind . . . ."

Egypt, on the other hand, indicated it would of its own free will move towards tolerance.[52]

The Plan of Israel

During the following two years, there were several incidents between Israel and the Arab States, and the problem of Palestine remained unresolved. The next major move of Israel would take place in October 1956, and it would cast an entirely different light on matters. There were earlier premonitions of what Israel had in mind, that had a particular bearing on the course of relations

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[51] Ibid., pp. 12-13.

[52] Ibid., pp. 17, 21-23.

between Israel and the Arab States. During his 1955 election campaign, Mr. Ben-Gurion was quoted as promising at Beersheba on July 9th to bring water and youth from the north to the Negev. The water he referred to was no doubt the water from the Jordan River, a project which had aroused vigorous opposition from the Arabs. He also promised to assure the freedom of passage from Elath to Africa and Asia, by use of force if necessary. On April 25, 1956, he told the correspondent of the New York Times, "we can do it by air, by land, or by sea."[53] Conversely, his Foreign Minister was reported in the September 11 issue of the Jerusalem Post as having informed an American columnist, "for Israel to initiate a war against Egypt a change of Prime Minister, Foreign Minister, Knesset, and probably in the whole spirit of the country would be required."[54] The sincerity of the latter statement was to be dispelled the following month.

The Sinai Invasion

On October 27, 1956, it became publicly known that the Israeli forces were mobilizing. President Eisenhower dispatched an urgent message to Mr. Ben-Gurion requesting that he avoid anything which might endanger the peace, and sent a second message in stronger terms. However, Israel's decision had been made and the deployment of her forces for the invasion of the Sinai proceeded as planned. The following day, the Israeli Ministry of Foreign Affairs issued a statement explaining the reason for mobilization.

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[53] Burns, op. cit., pp. 82, 83, 111.

[54] Ibid., p. 165.

In order to conceal the plan to attack Egypt, it declared that reserves had been mustered because of fedayeen attacks and the recent military alliance between Egypt, Jordan, and Syria. This subterfuge served its purpose until the attack was actually launched.[55]

On October 29, Israeli forces invaded the Sinai and began a drive southward toward the Straits of Tiran and westward toward the Suez Canal. The following day, England and France issued a joint ultimatum to Egypt and Israel to halt the fighting and withdraw to positions ten miles from the Suez Canal. However, Egypt rejected this as an affront to its rights and dignity. President Eisenhower dispatched a personal message to Prime Minister Eden and Premier Mollet expressing the earnest hope that the controversy would be settled through the United Nations Organization by peaceful means.[56] However, this appeal went unheeded. It is unecessary to consider in detail all of the military events which followed. Suffice it to say that England and France joined in the affray and began the bombardment of all Egyptian airports, and the Israeli forces seized the Sinai Peninsula. Let us consider the remedial action taken by the United Nations.

Israel Before the United Nations

On October 31st the Security Council held an emergency session to consider a draft resolution[57] submitted by the United States, which noted the Israeli action was a violation of the armistice agreement and called upon Israel to immediately withdraw

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[55] Ibid., p. 177.

[56] Bloomfield, op. cit., pp. 144-145.

[57] S/3710. See Security Council Official Records, 749th meeting, p. 31.

its armed forces behind the established armistice lines. It also called for the withholding of military, economic or financial assistance to Israel so long as it had not complied therewith. However, this measure was opposed by Britain and France, both permanent members of the Security Council, and therefore defeated. A similar Soviet draft resolution[58] suffered the same fate. With the Security Council rendered powerless to act, an emergency session of the General Assembly was convened to deal with the problem under its "Uniting for Peace" resolution of 1950.[59]

On November 2, the General Assembly adopted a United States draft resolution[60] calling for an immediate cease-fire. It noted that Israel had penetrated deeply into Egyptian territory in violation of the armistice agreement, and that Britain and France were conducting military operations against Egyptian territory. The parties to the armistice agreement were urged to promptly withdraw all forces behind the armistice lines, and observe the provisions of the agreement. Two days later another resolution[61] was adopted, requesting the Secretary-General to formulate a plan for setting up, with the consent of the nations concerned, an emergency international United Nations force to secure and supervise the cessation of hostilities. That same day a second measure[62] was adopted, reaffirming the November 2 recommendation

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[58] S/3713/Rev. 1. Ibid., 750th meeting, p. 5.

[59] Resolution 377 (V), November 3, 1950. See Stone, op. cit., pp. 266-284.

[60] Resolution 997 (ES-1).

[61] Resolution 998 (ES-1).

[62] Resolution 999 (ES-1).

for a cease-fire and withdrawal of troops behind the armistice lines.

On November 5, the Secretary-General submitted his plan,[63] which was accepted in a resolution[64] adopted that date. It established a United Nations Command for an emergency international Force to secure and supervise the cessation of hostilities. On November 7, all of the previous resolutions were reaffirmed[65] and Israel, Britain and France were called upon once more to comply. The Anglo-French forces were withdrawn by December 22, leaving only the question of compliance by Israel. Let us now examine the position taken by the latter, particularly in the area of Sharm el Sheikh.

The General Assembly reiterated its demand for Israeli withdrawal in a resolution[66] adopted on November 24, 1956, but this went unheeded, and the problem continued to be discussed in the United Nations. At the 638th meeting of the General Assembly on January 17, 1957, the Australian delegate observed the resolution of November 24 was by its terms clear enough, but he was concerned as to whether, when it was passed, "sufficient consideration was given to all the material factors in reaching conclusions . . ." It was his view that merely ordering Israel to withdraw did not face "the reality of the situation." He also noted that, in his

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[63] A/3289.

[64] Resolution 1000 (ES-1). The formation of this force was completed by resolution 1001 (ES-1) adopted on November 7, 1956, and the title was subsequently changed to the United Nations Emergency Force.

[65] Resolution 1002 (ES-1).

[66] Resolution 1120 (XI).

opinion, the Gulf of Aqaba was a part of the high seas where the principle of freedom of maritime communication applied, and some interim provision should be made which would protect the claim of Israel until it should be determined by the Assembly, negotiation between the parties, or by the International Court of Justice. Thus, he suggested the positions to be evacuated by Israeli forces should be occupied by the United Nations Emergency Force, which would, during its occupation, ensure the status of the Gulf as an international waterway was safeguarded and respected.[67]

The Israeli delegate also sought to give the problem a special character, by alleging it touched "the question of Israel's security at its most sensitive point." He cautioned that a change in the existing situation, without simultaneous measures to prevent the renewal of belligerency, would lead to a certainty of tension and hostility. The situation was therefore depicted as follows:

> "The strip of territory in the Sharm el Sheikh area commands the entrance to the Gulf of Aqaba through the Straits of Tiran . . . . At a point in the Sharm el Sheikh area known as Ras Nusrani, Egypt set up gun emplacements six years ago for the sole purpose of preventing ships from sailing freely in the Gulf of Aqaba to and from the port of Elath . . . These guns have blockaded the Gulf of Aqaba for the past six years . . . with the sole aim of obstructing the free passage of commerce between two parts of the high seas.
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> " . . . on 3 November 1956, when Israel forces entered the Sharm el Sheikh area to assure Israel's self-defence against wanton belligerency, those guns were silenced. Today, for the first time, ships of all nations are free to move north and south through the Straits of Tiran to and from Elath . . .
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> " . . . having in recent weeks experienced the use of this open international waterway, Israel can surely not be asked to acquiesce in its ever being closed again. The development of the southern part of our country; the expansion of our port facilities at Elath; our right of free commerce

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[67] General Assembly Official Records, 638th meeting, pp. 881-884.

> with friendly nations in Africa and Asia; the vision of our country as a bridge between the traffic and ideas of the Eastern and Western worlds . . . all these great issues are bound up in the problem of ensuring free passage through the Gulf of Aqaba and the Straits of Tiran. The more this problem is contemplated, the bigger it becomes. It is an issue of broad international scope."

The solution proposed by Israel would have, in its opinion, simultaneously reconciled two objectives - - the withdrawal of Israeli forces and the guaranteeing of permanent freedom of navigation in the waterway. Accordingly, it suggested the function of the United Nations Emergency Force should be to ensure free navigation until a peace settlement had been achieved.[68]

We note at this point that Israel was attempting to justify its invasion on the grounds of self-defence and its security. While the only question was complying with the General Assembly resolution for the withdrawal of her forces from Egyptian territory, it sought to divert the discussion to the matter of free navigation and satisfy its demands in this regard as a condition of such compliance. However, this tactic was not to escape detection by other States.

The Columbian delegate, while observing Israel was entitled to clarification of its rights in the Gulf of Aqaba, stated this question could not be discussed "until the troops withdraw to the line laid down by the armistice, for might is never a valid source of right." He added that the use of force by Israel must not be allowed to strengthen its hand or to gain advantages for it when the matter was considered, and the unconditional withdrawal of Israeli forces was called for by the General Assembly resolution.

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[68] Ibid., pp. 887-888.

Furthermore, even if the Gulf of Aqaba was considered as an international waterway, international law recognizes coastal States have the right to special protections, which might interfere with passage. He concluded, under these circumstances, the use of the United Nations Forces proposed by Israel would not be a solution.[69]

The representative of Greece expressed the position of his Government in somewhat stronger terms, saying, in part:

> " . . . No one who had just violated international law and the Charter can take advantage of that law or appeal to it. Substantive questions should not be considered until the party concerned has again complied with accepted legal practice. When it has withdrawn its troops . . . Israel will be able to express its views . . . and the Assembly will listen . . . then, but not before."[70]

It will also be seen that the Israeli interpretation of self-defence and security was rather paradoxical. Whereas it had alleged fears of an Egyptian attack and was concerned over its security, the facts showed the Israel forces, strongly equipped for offensive action, invading Egyptian territory. This point was noted by the Romanian spokesman, who added:

> " . . . if any guarantees are to be given for peace and security in the Middle East, it is the State of Israel which must give them, in view of its grave responsibility for the aggression against Egypt; and the guarantee sina qua non is unconditional and immediate withdrawal behind the armistice lines. Anything else would be tantamount to condoning the aggression as justified, going back on decisions already adopted by the General Assembly, and awarding a prize to the aggressor . . ."[71]

Withdrawal from Sharm el Sheikh

By January 22, 1957, the Israeli forces had evacuated the Sinai Peninsula with the exception of the Sharm el Sheikh area.

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[69] Ibid., p. 892.

[70] Ibid., 640th meeting, p. 916.

[71] Ibid., p. 918.

Israel persisted in its demands for assurances as a condition of withdrawal from that region. The Secretary-General's report[72] of January 24 noted this situation, and indicated the United Nations could not condone a change of the status juris resulting from military action contrary to the provisions of the Charter. In his opinion a legal controversy existed as to the right of passage in those waters, and the Israeli military action and its consequences should not be elements influencing the solution.

At the 652nd meeting of the General Assembly on February 2, 1957, two resolutions were passed. The first[73] deplored the non-compliance of Israel to complete its withdrawal beyond the armistice lines and called upon her to do so without further delay. The second[74] recognized that withdrawal by Israel must be followed by action which would assure progress towards the creation of peaceful conditions. To accomplish this, Egypt and Israel were called upon to scrupulously observe the provisions of the armistice agreement. The Secretary-General was requested to take steps, after full withdrawal, to place the United Nations Emergency Force on the armistice line to assist in achieving situations conducive to the maintenance of peaceful conditions in the area.

On February 3, the Israeli Cabinet met and decided to reject the demands of the General Assembly resolutions of the preceding day, and stand by its previous position. In other words, Israel would not withdraw from Sharm el Sheikh until freedom of its

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[72] A/3512

[73] Resolution 1124 (XI).

[74] Resolution 1125 (XI).

shipping to pass through the Straits was guaranteed. Meanwhile, all the resources of Zionist influence in the United States were mobilized to induce the Government to give guarantees to Israel and abstain from sanctions against her.[75] It was not long before these efforts produced some results.

On February 11, 1957, the American Secretary of State submitted certain proposals to the Israeli Government. As to the Gulf of Aqaba region, it suggested that Israeli forces be withdrawn in accordance with the recommendations of the General Assembly. In return, the United States would use all its influence to establish the Straits of Tiran and the Gulf of Aqaba as an international waterway for the innocent passage of all nations, including Israel.[76] However, subsequent discussions between the two Governments were uneventful, and the United States considered supporting the imposition of sanctions.

In a television address[77] on February 20, President Eisenhower warned Israel that unless she complied with the withdrawal resolutions, the United Nations had no choice but to exert pressure. He intimated that the United States would support such a move. Finally, on March 1, the Government of Israel announced its plans for full and prompt withdrawal pursuant to the General Assembly resolution of February 2. However, the withdrawal was to be based on certain "assumptions", including the right of passage in the

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[75] Burns, op. cit., p. 248.

[76] Bloomfield, op. cit., p. 152.

[77] The complete text of President Eisenhower's message and the reply of Mr. Ben Gurion are reproduced in Bloomfield, op.cit., at pp. 204-216.

Gulf of Aqaba and the stationing of the United Nations Emergency Force at the Straits of Tiran to assure "non-belligerency".[78]

The United States delegate, who spoke immediately after the Israeli pronouncement, noted these assumptions but did not consider them as conditions of withdrawal. In his view, the Israeli declarations either restated what had already been said in the General Assembly or by the Secretary-General, or else were expectations which did not seem unreasonable in the light of previous decisions of the Assembly. He stated that the United States was prepared to exercise the right of free and innocent passage on behalf of vessels of United States registry, and to join with others to secure general recognition of this right.[79]

At this point, the status of the Gulf of Aqaba was commented upon by several States. The United States believed it comprehended "international waters" with a right of free and innocent passage, and this opinion was shared by such States as Britain and France. Iceland and Norway, while agreeing that the Gulf and Straits should be open for international navigation, stressed that any determination of the legal status of these waters should be dealt with only by a judicial body such as the International Court of Justice.[80] Thus, and as will be more fully discussed in the succeeding section, the exact status of the Gulf and Straits was not effectively resolved.

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[78] General Assembly Official Records, 666th meeting, pp. 1275-1276.

[79] Ibid., p. 1277.

[80] Ibid., pp. 1280, 1284-1319.

On March 8, 1957, the Secretary-General announced that United Nations Emergency Force troops had entered Sharm el Sheikh and the Israeli withdrawal was proceeding as planned. By March 12, the evacuation was completed and the Sinai campaign came to a close.

CHAPTER IV

CONCLUSION

The facts and events related above are by no means all inclusive, but they do elicit the progressive stages of the Aqaba dispute. To arrive at a conclusion as to the status of these waters, it is necessary to consider such developments in the light of accepted principles and practices of international law.

The Nature of the Israeli Claim

We may begin by placing the Israeli claim in its true perspective. It is obvious that the very presence of Israel on the Gulf of Aqaba was due to its military action contrary to the Security Council cease-fire order of July 15, 1948, and the truce resolution of November 16, 1948. The suspension of armed hostilities envisioned by the Egyptian-Israeli Armistice Agreement was likewise contravened. Thus, we find Israel seeking, in the first instance, to predicate some right based upon these transgressions.

Next, there is a concerted effort to misconstrue and misinterpret the Armistice Agreement. In unambiguous terms, the agreement specified that it was not to establish or recognize the territorial claims of either party in the area of Palestine.

Israel, however, pretends to assume that Elath is its territory and that it possesses the corresponding right of navigation in the adjacent waters. Israel also attempts to construe the armistice agreement as ending the state of war that arose, by a diversionary maneuver directed against the Egyptian practice of visit, search and seizure. But, this contention is refuted by long prior precedents of international law and the weight of juristic opinion.[1] The usual method of terminating war between belligerents is by a treaty of peace, and an armistice effects nothing but a suspension of hostilities.[2]

It must also be observed that there has never been an authoritative determination of the status existing between Egypt and Israel. The Security Council and the General Assembly have consistently avoided this and other legal issues involved, and dealt only with the more general considerations of world peace and security. Accordingly, the 1951 admonition of Egypt to refrain from exercising the right of visit and search must be viewed solely as a matter of political expediency. It does not, by any stretch of the imagination, supply a basis for the Israeli claim to territory on the Gulf of Aqaba or even purport to determine the legal rights of navigation therein. Having noted the essential fallaciousness of the assertions made by

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[1] L.F. Oppenheim, International Law - A Treatise, 7th Ed., ed. by H. Lauterpacht, Vol. II, pp. 546-547. Hyde, op. cit., Vol. III, p. 2390.

[2] A United States Federal Court has so held. Commercial Cable Co. v Burleson, 255 F. 99 (1919). See also C. John Colombos, The International Law of the Sea, pp. 689-690. The legal advisor of the Israeli Ministry for Foreign Affairs has stated that the Egyptian-Israeli Armistice Agreement was "the next and indispensable step in the restoration of permanent peace". Shabtai Rosenne, Israel's Armistice Agreements with the Arab States, p.26.

Israel, let us now turn to the question of the maritime status of the Gulf and the Straits of Tiran.

The Regime of International Waters

At the outset, a distinction should be made between "international" waters and "internationalized" waters. The term international waters normally denotes that portion of the world maritime areas which are regarded as the "high seas" and not within the territorial limits of any State. In this sense, a complete and unrestricted freedom of navigation exists for all nations. However, internal or national waters may sometimes be referred to as international, as, for example, when a river flows through the territory of two or more States or forms a boundary between two States. In this situation, the river is subject to the exclusive control of the territorial sovereigns and, in the absence of a special conventional regime between the riparian States, foreign ships do not have a right of navigation thereon.[3] Conversely, where a treaty or other convention has been adopted by such riparian States and passage granted, the stream may be said to have been "internationalized".[4] Therefore, the characterization of waters as international, solely because of a geographical connection with more than one State, does not

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[3] Oppenheim, International Law - A Treatise, 8th Ed., ed by H. Lauterpacht, Vol. I, pp. 464-466. William Edward Hall, Treatise on International Law, pp. 139-145. Hyde, op. cit., Vol. I, pp. 564-565.

[4] Hackworth, op. cit., Vol. I, pp. 596-610. Oppenheim, op. cit., pp. 465-466. Briggs, The Law of Nations, p. 274.

determine the question of passage or navigation by other nations.

During the nineteenth century, the right of navigation on so-called international rivers and canals evolved from a series of treaties concluded by the interested maritime nations.[5] In the case of the Suez Canal, nations were afforded a right of passage by the Constantinople Convention of 1888. However, this right is not a natural or customary right under general international law, but is derived from the provisions of the pertinent convention. It follows that the exercise of such passage must be in accordance with the terms and conditions attached thereto, and it therefore differs both in origin and degree from the free and unlimited intercourse enjoyed upon the high seas. Furthermore, as a treaty is the means by which States undertake obligations towards each other, the rights and duties so created are generally binding only upon the signatory parties.[6] It is certainly questionable whether Israel, not being a signatory to the Suez Canal Convention, has any status or legal right to demand such passage.

These observations also serve to illustrate that passage through the Suez Canal, as a privilege arising out of a treaty,

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[5]The more important treaties are discussed in the cases of Territorial Jurisdiction of the International Commission of the River Oder, P.C.I.J., Series A, No. 23 (1929), and Jurisdiction of the European Commission of the Danube Case, P.C.I.J., Series B, No. 14 (1927).

[6]Hyde, op. cit., Vol. II, p. 1466. Oppenheim, op. cit., pp. 925-926. In connection with the Hay-Pauncefote treaty between the United States and Great Britain, signed on November 18, 1901, providing that the Panama Canal should be free and open to vessels of all nations, the American Secretary of State has observed that nations not parties to the treaty have no rights under it. As a matter of practice the canal is normally open to all ships, but the United States does not admit this as a legal right except for the signatory powers. See Briggs, op. cit., p. 871, and Smith, op. cit., p. 34.

is completely irrelevant to the question of navigation in the Gulf of Aqaba and the Straits of Tiran, where no conventional regime exists. In addition, the Suez Canal has come to be regarded as a major commercial route through the long and continuous usage by the maritime nations. We find no similar situation with respect to the Gulf of Aqaba, for it was unused by maritime traffic prior to the Arab-Israeli War. Accordingly, the status of the Gulf and the Straits of Tiran, as well as the right of navigation therein, must be determined by reference to other principles of international law.

The Territorial Sea

Perhaps the most legitimate method of establishing the maritime status of the waters in the Gulf is by comparing the territorial limits asserted by the littoral States. By definition, the area of high seas does not encompass the zone of territorial waters. Admittedly, the precise width of the territorial zone is a matter yet to be resolved by the world family of nations.[7] A conference held under the auspices of the League of Nations in 1930 failed to reach agreement except upon the principle that the territorial sea is subject to the sovereignty of the coastal State.[8] A larger convocation, which

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[7]Hackworth, op. cit., pp. 623-645. Oppenheim, op. cit., p. 487.

[8]League of Nations, Acts of the Conference for the Codification of International Law, Vol.1, Plenary Meetings, 1930. See also Vol. 14, Annex 10, Report of the Second Committee: Territorial Sea, pp. 123-126.

was convened at Geneva in 1958 and attended by all the member States of the United Nations, was likewise unsuccessful in achieving any general agreement on the question.[9] However, this complication need not detain us and, for the purposes of this discussion, the delimitation of waters in the Gulf of Aqaba will be based upon the territorial limits claimed by the respective shore States.

We find that Jordan has consistently adhered to a three mile territorial limit. In a statement made to the International Law Commission in 1950 Israel voiced a similar claim,[10] but extended this limit to six nautical miles in 1955.[11] The territorial waters of Saudi Arabia were established at six nautical miles by a royal decree of May 28, 1949,[12] and Egypt fixed identical limits by its decree of January 14, 1951.[13] In 1958, both of the latter States increased the zone of their respective territorial seas to a width of twelve nautical miles.[14]

From the physical configuration of the Gulf of Aqaba, it will be immediately seen that the waters at the northern end are insufficient to satisfy the territorial limits claimed by the

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[9] United Nations Conference on the Law of the Sea. See Document A/CONF. 13/L.38. The text of the draft Convention is reproduced in Smith, op. cit., pp. 255-273.

[10] S. Whittemore Boggs, "National Claims in Adjacent Seas", Vol. 41, Geographical Review, pp. 185-209, at p. 194.

[11] The text of the Israeli proclamation of September 11, 1955, is contained in Vol. 50, A.J.I.L., p. 1001.

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[12] An English translation of this decree appears in Vol. 43, A.J.I.L., Supplement for 1949, at p. 154.

[13] Boggs, op. cit., p. 198.

[14] Smith, op. cit., pp. 283-284.

littoral States. Proceeding southward down the length of the Gulf, and utilizing first the six mile limit initially set by Egypt and Saudi Arabia, it will be observed that practically this whole maritime area falls within the territorial waters of these two sovereigns. There remains only an elongated strip, some twenty-five nautical miles long, scarcely exceeding two miles in width at its broadest point. This isolated unconnected segment lies in mid-stream, approximately equidistant from a line extended between Dahab in the Sinai and Maqna on the Saudi Arabian shore. However, if the twelve mile limit is used, the entire Gulf is fully enclosed. Therefore, even under the more conservative limits asserted, the main body of the Gulf is territorial waters and not a part of the high seas.

Next, let us turn to the Straits of Tiran, which lie at the mouth of the Gulf. In a physical sense, a strait merely signifies a passageway connecting two bodies of water. As in the case of a gulf, the same general rule of territorial limits is applied.[15] Thus, we may note that the Straits of Tiran are completely within the territorial waters of Egypt and Saudi Arabia, and do not constitute a portion of the high seas.

At this point, it may be observed that the full and unencumbered right of free navigation on the maritime area regarded as "high seas" has no valid application either to the Gulf of Aqaba or the Straits of Tiran. Accordingly, if a right of passage exists, it must be reconcilable with the territorial regime in these waters and be based upon some other rule of international law. This brings

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[15] League of Nations, Acts of the Conference, Vol. III, 1930. See also Vol. 16, p. 220. Colombos, op. cit., p. 169. Hyde, op. cit., pp. 487-489.

us to the so-called right of "innocent passage", which was established by maritime custom and the usage of nations.

The Right of Innocent Passage

A brief explanation of these terms will be helpful. The term "passage" connotes a continuous movement from one place to another, and does not imply any right to halt or use the right of way for any purpose other than that of transit. In a maritime context, it is simply the means by which vessels navigate the established sea routes for purposes of normal intercourse. Except where incidental to good seamanship or due to the forces of nature, there is no right of lying to, anchorage, or hovering, and it is the duty of every vessel to continue on her way. A ship that stops or hovers, for any other reason, ceases to be exercising the right of passage and automatically comes under the full and complete jurisdiction of the shore State.[16]

The term "innocent" must, of necessity, be interpreted with reference to the interests of the shore State. As an inherent sovereign right every State is entitled to take such measures in its own territory, whether land or water, as may be deemed necessary for the protection of its interests. Thus, a voyage ceases to be innocent if its purpose involves any violation of those interests. Even such matters as fishing or conducting scientific research in territorial waters are in law infringements of the legal rights of the shore State and, if

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[16] Smith, op. cit., p. 46.

engaged in by a vessel without formal permission of the sovereign, will forfeit the privilege conferred by the right of passage.[17]

As intimated by the foregoing discussion, the right of innocent passage may be said to apply in territorial waters. The extent of such passage is subject to certain conditions and qualifications, which, insofar as here pertinent, are primarily the interests of the littoral sovereign. There is also a further distinction made in one category of territorial waters, that is significant with respect to the particular action which may be taken by the coastal State. To consider the problem presented, let us examine the accepted rights of a littoral State.

Within the limits set by treaty and customary international law, the territorial sovereign may exercise its legislative, judicial and police powers over all persons, whether nationals or aliens, and their property within the national domain.[18] It is well established that the zone of territorial waters constitutes a part of the national domain, and includes also the air space above the territorial sea as well as the bed of the sea and the subsoil.[19] Accordingly, the sovereignty of the State extends to the realm of territorial waters, and the right of innocent passage must be exercised in accordance with all such requirements.

It is undisputed that every sovereign State has the inherent right of preserving its territorial integrity, including the

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[17] Ibid., p. 47.

[18] Moore, op. cit., Vol. II, p. 4. Hackworth, op. cit., Vol. II, p. 1. Hyde, op. cit., Vol. 1, p. 640.

[19] Colombos, op. cit., p. 67. Smith, op. cit., pp. 54-55. Hyde, op. cit., p. 439.

safety and welfare of its citizens. Whether this right is called "self-preservation" or by some other name, the effective result is the same. Thus, a coastal State has the prerogative of taking all steps deemed necessary to protect itself in its territorial sea against any act prejudicial to the security, public policy or fiscal interests of the State. The difficulty arises, not in ascertaining the rule, but in attempting to apply it between the interests of the littoral State and the navigation of territorial waters by foreign vessels.

In the words of one writer, so long as the conduct of the vessel is not essentially injurious to the safety and welfare of the coastal State, there would appear to be no reason to exclude it from the use of the marginal sea.[20] While no one would dispute the reasoning of this statement, it offers little assistance in determining the factual issue raised. Another approach has been to regard the right of innocent passage as a limitation on the sovereignty of the coastal State.[21] However, this tends to confuse the existence and effect of jurisdiction in territorial waters with the exercise thereof.[22]

It would appear that the governing principle of international law is the subjection of the foreign private vessel to the laws of the littoral sovereign, and not the immunity of such vessel from the local law.[23] The Supreme Court of the United States has

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[20] Ibid., p. 517.

[21] Martinus Willem Mouton, The Continental Shelf, p. 221.

[22] Hyde, op. cit., pp. 735-736, 749-751. Jessup, op. cit., pp. 191-192.

[23] Ibid.

accepted this view by holding, in part, as follows:

> "A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion . . . . "[24]

The problem therefore resolves itself to the issue of whether or not the passage is innocent. Traditionally, and without exception, this determination of fact is the sole bailiwick of the littoral State. It may also be observed that, so long as this decision is not purely arbitrary or in clear derogation of recognized principles of international law, the finding of the coastal State is conclusive and completely dispositive of the matter. It follows that once the passage loses its innocent nature, it need not be further tolerated or permitted by the territorial sovereign. Accordingly, we may conclude that the right of innocent passage is, in essence, a conditional and limited privilege, subject always to the superior rights of the local sovereign.[25]

Assuming that a passage is prima facie innocent, let us examine the permissible actions of the shore State. While the coastal sovereign should in general respect the exercise of the right, it is nevertheless entitled to make any reasonable regulation for the conduct of navigation in its territorial waters. It is recognized that the right of innocent passage may, under certain

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[24] Cunard v Mellon, 262 U.S. 100, 123-124 (1923).

[25] Hyde, op. cit., p. 747.

circumstances, be temporarily suspended. One such situation is where the coastal State deems it essential for the protection of its security.[26] In theory, this power of suspension is applicable to all territorial waters, with the possible exception of straits normally used for international navigation between two parts of the high seas. As to the latter category of waters, it is indicated that there should be no interruption of the right of innocent passage.[27]

This refinement of the general class of territorial waters was propounded at the 1930 Hague Conference, in an effort to codify the recognized customs of international maritime practices.[28] However, in order to qualify for the application of this principle, a strait must possess two essential qualifications. First, it

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[26]In the 1956 draft Articles on the Law of the Sea, the International Law Commission expressed the principle as follows: "Article 17.

"1. The coastal State may take the necessary steps in its territorial sea to protect itself against any act prejudicial to its security or to such other of its interests as it is authorized to protect under the present rules and other rules of international law.

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"3. 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 . . . . "

Document A/3159. The Commission's report is reproduced in Vol. 51, A.J.I.L., at pp. 154-256.

[27]Paragraph 4 of Article 17 in the 1956 International Law Commission draft provided "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". A/3159.

[28]League of Nations, Acts of the Conference, 1930, op. cit.

must be used for international navigation, and secondly, it must connect two parts of the high seas. The International Court of Justice confirmed this principle in 1949, and as to the status of a particular strait observed:

> "It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. . . ." [29]

It might be suggested that the right of passage in a so-called international strait is comparable with the unrestricted freedom of navigation on the high seas. But, any such construction is unwarranted and based on a false analogy. The basic delimitation of the high seas from the zone of territorial waters remains. The characterization of a strait as "international" does not transmute it into an area of the high seas, or detract from its primary status as territorial waters. This is amply supported by the fact that passage through the strait must always meet the requirement of innocence.[30]

What has been said up to this point, regarding the principle of innocent passage, relates only to a time of peace. It also presupposes that normal relations exist between the parties, governed by the usual considerations of mutual respect and friendly cooperation. A mere cursory examination of the record of Israel is sufficient to show that it fails to meet any of these conditions.

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[29] The Corfu Channel Case, I.C.J. Reports, 1949, pp. 4, 26.

[30] Cf. article 16, paragraph 4 of the 1958 draft Convention of the United Nations Conference, op. cit.

The Israeli Claim in Retrospect

As we have seen, Israel first attempted to secure passage through the Suez Canal by the device of an alleged armistice violation. Following the inconclusive 1951 resolution of the Security Council, it next distorted the true facts and misconstrued long established principles of international law. In the 1954 Israeli complaint, the scene was depicted as an immense challenge by Egypt to all the maritime nations of the world and a dire threat to international shipping. It was also contended that the Gulf of Aqaba and the Straits of Tiran were international waters, giving Israel the complete freedom of navigation. However, these spurious assertions are easily disproven by the facts.

The restrictions imposed by Egypt were applied solely to Israeli ships or contraband items bound for Israel. There was no complete "blockade" of shipping either in the Suez Canal or the Gulf and Straits of Tiran. The maritime traffic of other nations not only enjoyed the right of passage, but the volume of this traffic showed a constant increase. Thus, the issue was not one of international magnitude or interference with world shipping. If Israeli ships were not permitted a right of passage, this is a different matter and constitutes nothing more than a dispute between Egypt and Israel.

We have also observed the elaborate legal gymnastics employed by Israel to assert that no state of war existed, and that the Egyptian restrictions constituted an exercise of belligerent rights which was prohibited by the armistice agreement.

The conclusion that a war existed, under recognized principles of international law, has been reached previously and merits no further comment. It is similarly felt that the armistice agreement did not terminate this state of war. But, even assuming that the armistice did so operate, the Egyptian practice of visit and search is not necessarily precluded.

As a general rule, the right of visit and search is normally a belligerent right exercisable in time of war.[31] In its wartime context, the practice may be conducted anywhere, that is, in both territorial waters and on the high seas, and it may involve the confiscation of both vessel and cargo. Nevertheless, there are other situations which justify a somewhat milder version of the practice in time of peace. It is well recognized that a State may enforce its customs, immigration, and fiscal laws or sanitary regulations beyond the zone of territorial waters. In accomplishing this, the State may visit and search the suspected vessel, and use force if necessary.[32] It would be manifestly absurd to suppose that a State has any less authority, within its own territorial waters, for the protection of its security.

Among the justifications given by Egypt, concerning the exercise of visit and search in the Gulf of Aqaba and the Straits of Tiran, was the protection of its security and self-preservation in its own territorial waters. As we have just noted, a sounder or more valid legal basis can hardly be imagined. The bugaboo raised by Israel about confiscation proved to be groundless and a pure fabrication. The Egyptian statement that there had been no confiscation of vessel or cargo since 1951 was not rebutted,

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[31] D. W. Bowett, Self-Defence in International Law, p. 72.

[32] Ibid.

and therefore must be taken as the established fact. The Israeli declaration of peaceful intentions and good will was obviously only a momentary expression of faith, designed to suggest that there was no need for the measures taken by Egypt. However, later events clearly confirmed the soundness of the Egyptian precautions.

The Israeli claim that the Gulf of Aqaba and the Straits of Tiran are international waters, in the sense of being a part of the regime of the high seas, is equally ridiculous. If we use the six mile limit Israel herself asserts, the validity of which she is estopped from denying, the main body of the Gulf constitutes territorial waters. By the same token, the Straits of Tiran are similarly so. We may further observe that the Straits lack one of the essential requisites to be eligible for any special treatment. An "international" strait must connect two parts of the high seas, and the Straits of Tiran serve as a junction between only one part of the high seas, the Red Sea, and Egyptian or Saudi Arabian territorial waters.

Israel was no doubt aware that the Straits of Tiran did not come within the purview of the announced rule on international straits. This same definition was contained in article 17 of the International Law Commission's 1955 draft on the Regime of the Territorial Sea,[33] and repeated in its 1956 report and proposed Articles on the Law of the Sea.[34] At the insistence of Israel, the description of international straits was reworded at the 1958

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[33] A/2934.

[34] A/3159.

Geneva Conference to apply to such waterways connecting one part of the high seas and another part of the high seas or the territorial sea of a foreign State.[35] However, it is highly questionable whether this action is sufficient to legally amend the prior rule or modify pre-existing rights. And even should we assume that Tiran is an "international" strait, this does not alter the fact that passage through it must meet the test of innocence as determined by the territorial sovereign.

If there had ever been any semblance of a legitimate basis for Israel's claim to a right of navigation, it was thoroughly dispelled by the ultimate medium employed to secure it. The 1956 invasion of Egypt was a glaring violation of the basic pledge of all members of the United Nations to settle their disputes by peaceful means and refrain from the use of force against the territorial integrity of another State. Perhaps some of the naive delegates of certain nations, who had unwittingly supported the Israeli position, were brought back to their senses by the stark reality of armed aggression. In any event, the Israeli action was vigorously condemned, and it was very rightfully observed that no change in the status juris, resulting therefrom, could be countenanced.[36]

The justification offered by Israel for this extreme measure is rather ludicrous. Although claiming self-defence, it

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[35] Smith, op. cit., p. 260.

[36] General Assembly Official Records, 644th meeting, p. 972; 652nd meeting, p. 1086. See also the report of the Secretary-General, A/3512.

was Israel that had actually invaded the territory of another State. There was certainly no armed provocation, and nothing to indicate that an Egyptian attack was imminent. Yet, just two years previously, Israel had castigated the moderate practice of visit and search, based upon the self-preservation of Egypt in the latter's own territorial waters. It is quite obvious that the protection of Egyptian integrity can be no less important than the pretensions of Israel. Whereas Israel had decried the very existence of Egypt's right of security in the Straits of Tiran, by some incongruous process Mr. Ben-Gurion now deduced that the security of Israel extended into these waters.[37] This is a strange theory indeed, and its merits are fully apparent.

The Prospect of Settlement

The action taken by the United Nations and the entry of the United Nations Emergency Force can not be construed as determining the status of the Gulf and Straits or the right of navigation therein.[38] As noted, the attempt by Israel to impose such conditions on its withdrawal from the Sinai was signally unsuccessful. Furthermore, the opinions advanced by individual States as to these issues are of dubious worth. A careful reading of the remarks of the delegates reveals that most failed to distinguish between the right of innocent passage and the freedom

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[37] In his reply to President Eisenhower's message, Mr. Ben-Gurion stated that Israel "dare not unconditionally abandon the defence of her rights and her security in the Straits". Bloomfield, op. cit., p.212.

[38] General Assembly Resolutions 1124 (XI) and 1125 (XI) were devoted to securing the withdrawal of Israel and the maintenance of peaceful conditions in the area, respectively.

of navigation, and the term "international waters" was used to describe all maritime areas of any interest to more than one State.[39]

It is unquestioned that the appropriate forum to adjudicate these and other legal issues is the International Court of Justice.[40] Considering the Israeli attitude and its past performances, the prospects of some alternate mode of resolving the problem, such as through the usual diplomatic processes, appear extremely remote. Accordingly, until such time as the International Court may rule on the matter there can be no final or authoritative answer. Perhaps it may ultimately be realized that the Aqaba dispute is only one facet of the Palestine question, which is not likely to be solved on a piecemeal basis. However, when the eventual day of reckoning does arrive, the justice of the Arab cause will surely be vindicated.

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[39] General Assembly Official Records, 666th and 667th meetings.

[40] Article 92 of the United Nations Charter provides that the Court shall be the principal judicial organ of the United Nations, and Article 36 notes that as a general rule legal disputes should be referred to it. See Leland M. Goodrich and Edward Hambro, Charter of the United Nations, pp. 256-258, 476-477.

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