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# The Straits of Tiran: Innocent Passage or an Endless War?

Robert J. Eckert

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# THE STRAITS OF TIRAN: INNOCENT PASSAGE OR AN ENDLESS WAR?

ROBERT J. ECKERT\*

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## I. INTRODUCTION

Since Israel now occupies the Sinai peninsula as a result of the June War of 1967, it would seem, at first glance, that the question of passage through the Straits of Tiran is settled. That is hardly the case. Israel occupied the Sinai after the 1956 conflict,<sup>1</sup> and even the subsequent ten-year period of United Nations occupation did not prevent the United Arab Republic from blockading the Straits in 1967.<sup>2</sup> One might think, then, that the solution is for Israel to remain in control of the Sinai.

Despite popular sentiment, however, and the feeling that perhaps Israel has earned a right to enlarged territory, her occupation of the Sinai is illegal.<sup>3</sup> Israel has expressed a willingness to withdraw from the peninsula but only on the condition that a permanent settlement is made with the Arab states, one that would include the settlement of the question of passage of Israeli shipping.<sup>4</sup> Israel's withdrawal in 1957 had been conditioned on a guarantee of freedom of passage,<sup>5</sup> but the states never entered into any permanent agreement. It is now clear that Israel will not withdraw until something greater than a guarantee is offered. It seems, therefore, that there will be, for the first time, a legal determination of the issue of passage through the Straits of Tiran. There is thus a great need to review the factual and legal issues that will be involved in any such determination.

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\* Executive Editor, *University of Miami Law Review*; Student Instructor for Freshman Research and Writing.

1. *The Arab Israeli Military Confrontation*, XI ORBIS 331 (1967).

2. C. Marshall, *Reflections on the Middle East*, XI ORBIS 343, 355 (1967).

3. See U.N. CHARTER art. 2, para. 4.

4. *The Arab Israeli Military Confrontation*, XI ORBIS 331, 332 (1967).

5. *Id.* at 331.

## II. HISTORICAL BACKGROUND

After the creation of the state of Israel in 1948, war broke out in the Middle East.<sup>6</sup> The active hostilities of that war were terminated by the Rhodes Armistice.<sup>7</sup> After the signing of the Rhodes agreement, Israel occupied Elath, her only outlet to the Gulf of Aqaba.<sup>8</sup> Egypt considered that occupation illegal.<sup>9</sup> It has been pointed out, however, that Jordan rather than Egypt occupied Elath before Israel, and that Israel's occupation of the city was prior to the signing of an armistice with Jordan, and therefore not in violation of any existing armistice.<sup>10</sup>

War broke out again in 1956, but subsequent events brought the Rhodes Armistice back into existence.<sup>11</sup> After 1957, United Nations forces remained in control of the Sinai with the consent of the United Arab Republic and Israel until May of 1967, when Nasser withdrew his country's consent and established measures against Israeli shipping.<sup>12</sup> It is the legality of these measures that is in question.

### III. THE RHODES ARMISTICE: TIME OF WAR OR TIME OF PEACE?

#### A. *The Blockade of Israeli Shipping*

There seems little question that the absolute blockade of Israeli shipping<sup>13</sup> was illegal because a blockade established after the signing of an armistice is considered an act of war and therefore illegal under principles of international law.<sup>14</sup> The United Arab Republic made no specification as to particular items that would not be permitted to be shipped; thus, there can be no justification of the measures established against Israel itself as an exercise of belligerent rights. As to neutral ships, however, the measures established were the blockading of strategic goods bound for Israel.<sup>15</sup> These measures could be justified as an exercise of a legitimate belligerent right, if such a right existed under the Rhodes Armistice.<sup>16</sup>

#### B. *The Belligerent Right of Visit and Search*

The right of a belligerent to visit and search neutral merchantmen during a time of war is now axiomatic in international law. Oppenheim

6. Selak, *A Consideration of the Legal Status of the Gulf of Aqaba*, 52 AM. J. INT'L L. 660, 667 (1958).

7. Egyptian-Israeli General Armistice Agreement, Signed at Rhodes, Feb. 24, 1949, 42 U.N.T.S. 252, 155 B.F.S.P. 331 (1949).

8. *The Trouble About Aqaba*, XI-XII EGYPTIAN ECON. & POL. REV. (Feb., 1957).

9. *Id.*

10. See note 6 *supra*.

11. See W. O'Brien, *International Law and the Outbreak of War in the Middle East*, XI ORBIS 692 (1967); J. BRIERLY, *THE LAW OF NATIONS* 398-402 (6th ed., H. Waldock, 1963).

12. See note 2 *supra*.

13. *Id.*

14. See II H. ROLIN, *LE DROIT MODERNE DE LA GUERRE* 805 (1920).

15. See note 2 *supra*.

16. II OPPENHEIM, *INTERNATIONAL LAW* 848 (7th ed., H. Lauterpacht, 1952).

states that this right has "long been universally recognized . . ." <sup>17</sup> It is clear, then, that the United Arab Republic had a right of visit and search, though she did not exercise it, during the period of active hostilities surrounding the creation of the state of Israel in 1948. In 1949, those active hostilities were temporarily ended by the Armistice signed at Rhodes. <sup>18</sup>

Whether the measures asserted by the United Arab Republic as to neutral ships were legal depends on whether the Rhodes Armistice terminated the state of war and, consequently, belligerent rights.

### C. *Traditional Armistice Law*

The significance of an armistice in international law is explained by Oppenheim thus:

[Armistices] are in no wise to be compared to peace . . . because the condition of war remains between the belligerents themselves, and between belligerents and neutrals, on all points beyond the mere cessation of hostilities . . . the right of visit and search over neutral merchantmen therefore remains intact . . . <sup>19</sup>

Colonel Howard S. Levie, Chief of the International Affairs Division of the JAG, U.S. Department of the Army, emphasized that "it may be stated as a positive rule that an armistice agreement does not terminate the state of war . . ." <sup>20</sup>

The courts of major world powers have recognized that an armistice does not end a state of war. The Supreme Court of the United States did so in *Kahn v. Anderson*. <sup>21</sup> A British court upheld the capturing of a ship during an armistice and thereby recognized that the agreement did not end the state of war. <sup>22</sup> A French court sentenced a journalist to death before a firing squad for "communicating with the enemy." The court rejected the defense that an armistice ends a state of war, and found that the Germans constituted "the enemy" under the statute despite the existence of an armistice. <sup>23</sup> In his editorial comments on that case, H. Lauterpacht said that it is "in full conformity" with international law that an armistice leaves a state of war in existence "with all its juridical consequences." <sup>24</sup>

17. *Id.*

18. *See* note 7 *supra*.

19. II OPPENHEIM, INTERNATIONAL LAW 546 (7th ed., 1952, H. Lauterpacht).

20. Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT'L L. 880, 884 (1956).

21. 255 U.S. 1 (1921).

22. *The Rannveig*, 1 A. C. 97; 3 B & C. P. C. 1013 (1922), *commented on in* II OPPENHEIM, INTERNATIONAL LAW 849 n.1 (7th ed., 1952, H. Lauterpacht).

23. *In re Suarez*, [1944] Ann. Dig. 412 (France, Court of Cassation, Case No. 140).

24. *Id.* at 413.

#### D. *The Rhodes Armistice, a United Nations Armistice*

Great significance has been attached to the fact that the Rhodes Armistice was signed under United Nations auspices, and much argument has been made, as will be shown, that such an armistice is a break from traditional practice and, therefore, from traditional law. The argument is that such an armistice terminates belligerent rights.

It should be noted first that even prior to the formation of the United Nations, many wars were legally terminated by a cessation of hostilities; the nations entered into peaceful relations without expressly making peace.<sup>25</sup> A cessation of hostilities legally established peace in the following wars: France—Spain (1720); Sweden—Poland (1716); France—Mexico (1867); Russia—Persia (1801); Spain—Chile 1867).<sup>26</sup> Therefore, precedent was established for the legal termination of war through armistices, and Oppenheim has said that such cessation of hostilities may be treated "as synonymous with the cessation of war . . . ."<sup>27</sup>

Traditionally, armistices were totally the products of bargaining countries; they were analogous to contracts. The Rhodes Armistice, on the other hand, was imposed from above; that is, it was administered by the United Nations, and both parties accepted it. The European legal scholar, R. Monaco, has emphasized that it is necessary to organize an administrative body to control the relations of the parties to an armistice during the armistice period.<sup>28</sup> Since the parties to the Rhodes Armistice recognized the United Nations as the administrative body, a strong argument can be made that official U. N. pronouncements are binding on both parties, at least until, by declaration of war, either party should renounce the agreement, or other agreements of peace would be entered into. The significance of United Nations administration is thus apparent.

In attempting to regulate the relations between the United Arab Republic and Israel, the United Nations Security Council, in a 1951 resolution, interpreted the Rhodes Armistice to have terminated belligerent rights. The resolution said, in part:

Considering that since 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 [and] search . . . .<sup>29</sup>

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25. P. COBBETT, *CASES ON INTERNATIONAL LAW*, 293 (5th ed., W. Walker, 1937); Tansil, *Termination of War by Mere Cessation of Hostilities*, 38 L.Q. REV. 26 (1922); Note, *Judicial Determination of the End of the War*, 47 COLUM. L. REV. 255, 257 (1947).

26. II OPPENHEIM, *INTERNATIONAL LAW*, 598 (7th ed., H. Lauterpacht, 1952).

27. *Id.*, at 597.

28. R. MONACO, *Les Conventions entre Belligerents*, 78 RECUEIL DES COURS 277, 343 (1949).

29. [1951] U.N.Y.B. 299, U.N. Doc. S/2322 (1951).

Many arguments have been raised to say that this resolution is not determinative of the question of the United Arab Republic's rights in the Straits of Tiran. First, such an interpretation of the Armistice seems contrary to the express terms of the agreement itself. Article I(4) provides that the agreement is a "step . . . towards . . . the restoration of peace in Palestine."<sup>30</sup> This language indicates that the parties did not intend the agreement to end the state of war and bring in a time, and therefore the law, of peace. Furthermore, in a time of peace, a warship has the right of innocent passage through territorial waters of a coastal state.<sup>31</sup> The fact that the parties to the Rhodes Armistice expressly denied each other that right in Article II (2) further indicates that they did not intend to end the state of war or to give up their belligerent rights. On the other hand, it could be argued that such an express provision shows that the parties had to bargain for belligerent rights, and the fact that no provision grants the United Arab Republic the right of visit and search shows that the United Arab Republic either failed to bargain for it, or did so and lost.

Secondly, a strong argument is raised that the United Nations is without the power to make a legal determination of the United Arab Republic's right to visit and search in the Straits of Tiran. It is argued that Security Council resolutions are at best recommendations and do not create law.<sup>32</sup> The functions of the Security Council include submitting reports,<sup>33</sup> formulating plans for submission to the General Assembly,<sup>34</sup> investigating disputes,<sup>35</sup> and recommending solutions.<sup>36</sup> That recommendations do not create law is seen in the following quotation from Goodrich and Hambro: "it was made clear in the discussions at San Francisco, as it should be apparent from the wording of the Charter, that such recommendations have no binding force."<sup>37</sup> The noted French authority, M. Cassin spoke of the United Nations as "un 'pont' vers la coopération, et non une fin."<sup>38</sup> And finally, Colonel Levie frankly recognized the political nature of the 1951 resolution and concluded that it was not likely that the Security Council was "attempting to change a long established rule of international law [*i.e.*, that an armistice does not end a state of war.]"<sup>39</sup>

30. Egyptian-Israeli General Armistice Agreement, *Signed at Rhodes*, Feb. 24, 1949, 42 U.N.T.S. 252, 155 B.F.S.P. 331 (1949).

31. The Corfu Channel Case (United Kingdom—Albania) [1941] I.C.J. 4; Convention on the Territorial Sea and the Contiguous Zone, *Signed at Geneva*, 1958, ART. 23, U.N. Doc. A/CONF. 13/L. 52.

32. U.N. CHARTER art. 24 para. 3.

33. *Id.* art. 26.

34. *Id.* art. 33.

35. *Id.* art. 34.

36. *Id.* art. 36.

37. L. GOODRICH and E. HAMBRO, CHARTER OF THE UNITED NATIONS 122 (1946).

38. The phrase literally means "it is a bridge toward cooperation and not the end." Coidan, *Le Sixième Colloque De Droit Spatial*, IX ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 1255 (1963).

39. Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT'L L. 880, 886 (1956).

This argument, though at first convincing, fails for two reasons. As explained above, the United Nations was accepted by both parties as the administrative body of the Armistice; its decisions are binding as long as the armistice period continues. It is clear that Israel has no legal obligation to withdraw from the Sinai if the Armistice period is not to be reinstated. With its reinstatement the 1951 resolution should again take effect. The second reason why the resolution is binding is that it was made pursuant to article 39, of chapter VII of the United Nations Charter. The significance of such a decision is seen in the following words of Lauterpacht: "The decisions of the Security Council made under Chapter VII of the Charter for the purpose of maintaining international peace and security are binding upon all members of the United Nations."<sup>40</sup> Probably the best argument that the United Arab Republic could make against the 1951 resolution is that it was made in regard to the Suez, not the Straits of Tiran. Furthermore, the argument is, such a resolution *cannot* be applied to the Straits because the United Nations Charter provides that legal issues involved in a dispute shall be determined by the International Court of Justice before a resolution can be made.<sup>41</sup> The legal status of the Suez Canal, which connects two parts of the high seas, was settled by treaty.<sup>42</sup> But as to the status of the Straits of Tiran, there is a legal dispute<sup>43</sup> which will necessarily affect the United Arab Republic's rights in those waters. No resolution can be made or applied until that dispute is settled.

Furthermore, limitations placed upon Egypt's rights to the Suez cannot be freely applied to her rights in the Straits of Tiran because the signatories of the Constantinople Convention recognized expressly in article X that the internationalizing of the Suez was in no way to prejudice Egypt's rights of defense in the Red Sea area.<sup>44</sup>

Then, the crucial question of the status of the Gulf of Aqaba as it affects the status of the Straits of Tiran must be settled. If the Gulf and the Straits are such that international passage can legally be suspended, obviously the United Arab Republic's measures were legal. If, on the other hand, the status of these waters is such that passage shall be granted according to principles of international law, the measures taken by the United Arab Republic must be within those granted a coastal state under principles of international law.

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40. H. LAUTERPACHT, *Rules of Warfare in an Unlawful War*, in *LAW AND POLITICS IN THE WORLD COMMUNITY* 89 (A. Lipsky ed. 1953).

41. U.N. CHARTER art. 36 para. 3.

42. Convention signed at Constantinople (1888), LXXIX B.F.S.P. 18 (1887-1888).

43. See Selak, *A Consideration of the Legal Status of the Gulf of Aqaba*, 52 AM. J. INT'L L. 660 (1958).

44. See note 42 ART. X, *supra*.

#### IV. THE STRAITS OF TIRAN: INNOCENT PASSAGE DURING A TIME OF PEACE?

##### A. *Elath*

It has been pointed out that the United Arab Republic does not recognize Israel's claims to Elath.<sup>45</sup> Though a discussion of historical claims and boundary disputes is beyond the scope of this comment, it does not seem likely that, in the light of events subsequent to 1949, Israel will be required by international law to give up Elath. Even if she were found not to have a legal right to Elath, however, she would still claim the right of innocent passage along with other sea-faring nations, though it is obvious that her interest in the Gulf for fishing and trading reasons would probably be rather small.

##### B. *Mare Clausum and Other Historical Claims*

The United Arab Republic's assertion of a right to suspend the passage of strategic cargoes bound for Israel would be justified if the Gulf of Aqaba were an Arab inland sea (*mare clausum*), or an historic bay. Saudi Arabia has advanced this argument in support of Arab claims of sovereignty over the Gulf.<sup>46</sup> Such an argument is, however, faulty.

Alexander Melamid, a Fellow of the Royal Geographical Society, states that "[r]esearch supports the view that navigation rights have definitely been established in the Gulf of Aqaba by nations other than the Arab states."<sup>47</sup> He points out that the prevalence of strong northerly winds rendered navigation in the Gulf extremely difficult and that such navigation was rare before the advent of steam navigation. The first steam vessels to use the Gulf were British, and the first and *all* subsequent surveys of the Gulf are British. France claimed the Isle de Graye, lying in the Gulf, as early as 1115 A.D.<sup>48</sup> Arab claims of the use of the Gulf as an historical path for Moslem pilgrims are equally unfounded. Melamid notes that "[d]ue to the existence of motorable tracks in the Sinai Peninsula, Egypt makes virtually no use of the Gulf."<sup>49</sup>

In the case of *San Salvador v. Nicaragua*<sup>50</sup> the International Court of the Central American Republics held that the Bay of Fonseca was an "historical bay" because *all* of the littoral states had given it such a character for a period of several hundred years.<sup>51</sup> In the Gulf of Aqaba, "no formal closed-sea claim appears ever to have been made until that asserted

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45. See notes 8-10 *supra*.

46. R. BAXTER, *THE LAW OF INTERNATIONAL WATERWAYS* 162 (1964).

47. A. Melamid, *Legal Status of the Gulf of Aqaba*, 53 AM. J. INT'L L. 412 (1959).

48. *Id.*

49. *Id.*

50. 11 A.J. 693, 700-717 (1917).

51. *Id.*



by the Saudi Arabian government early in 1957."<sup>52</sup> Prior to this claim, the Gulf had been declared international in character by the general body of the world nations.<sup>53</sup> On January 15, 1957, prior to the Saudi Arabian claim, the United Nations Secretary General stated to the General Assembly that "the international significance of the Gulf of Aqaba may be considered to justify the right of innocent passage through the Straits of Tiran and the Gulf in accordance with recognized rules of International law."<sup>54</sup> In addition, if Israel's claim to Elath be upheld, Israel was a littoral state at the time the Saudi Arabian claim was made, and, therefore, *all* the littoral states have not claimed the Gulf to be a *mare clausum*, or historic bay.

### C: *Aqaba: A Slice of High Seas?*

Every major convention on the law of the territorial sea since the 1930 Convention at the Hague has recognized the right of innocent passage through straits connecting two parts of the high seas.<sup>55</sup> This right is reiterated in article 18(4) of the 1956 International Law Commission Report on the Territorial Sea. The Article states: "There must be no suspension of the innocent passage of foreign vessels through straits normally used for international navigation between two parts of the high seas."<sup>56</sup> It is clear then, that if the Gulf of Aqaba contains high seas, the Straits of Tiran, which connect Aqaba to the Red Sea, connect two parts of the high seas, and there can be no suspension of innocent passage through them.

The Gulf is over one hundred miles long and is seventeen miles wide at its broadest point.<sup>57</sup> In 1957, each of the four littoral states claimed a territorial sea extending six miles from its shoreline.<sup>58</sup> These claims left an area or a "slice," about five miles wide in the center of the Gulf which could properly be termed "high seas."<sup>59</sup> Thus, in 1957, Tiran connected two parts of the high seas, and innocent passage could not have been suspended through it.

52. See note 35 at 692 *supra*.

53. 11 U.N. GAOR 1287-1288 (1957).

54. 11 U.N. GAOR, Annexes, Agenda Item No. 66 para. 14, U.N. Doc. A/3500 (1957).

55. 1930 Hague Conference Draft on the Legal Status of the Territorial Sea; 1956 Int'l Law Comm'n Report on the Territorial Sea, 10 U.N. GAOR Supp. 9, U.N. Doc. A/2934 (1956); Convention on the Territorial Sea and the Contiguous Zone, *Signed at Geneva*, April 29, 1958, U.N. Doc. A/CONF. 13/L.52 (1958).

56. Int'l Law Comm'n Report, art. 18(4), 10 U.N. GAOR Supp. 9, U.N. Doc. A/2934 (1956).

57. Selak, *A Consideration of the Legal Status of the Gulf of Aqaba*, 52 AM. J. INT'L L. 660, 667 (1958).

58. Decree No. 6/4/5/3711, May 28, 1949, Umm al-Qura (Mecca), May 29, 1949, I U.N.L.S. 89 (1951) (Saudi Arabia); Decree of Jan. 15, 1951, 78 al-Waqayih al-Misriyoh 6, I U.N.L.S. 307 (1951) (Egypt); Fisheries Act No. 25 of December 2, 1943, U.N.L.S. 552 (1957) (Jordan); Territorial Waters Decree of 24 Elul 5715 (Sept. 11, 1955), U.N. Doc. A/CN.4/95/Add. 1, p. 16 (1956) (Israel).

59. I OPPENHEIM, INTERNATIONAL LAW 487 (8th ed., H. Lauterpacht 1955).

In 1958, both Saudi Arabia and the United Arab Republic extended their territorial seas to a width of twelve miles each.<sup>60</sup> The validity of these claims has not yet been determined; however, if they are upheld, the area of high seas within Aqaba would become a part of the territorial seas of Saudi Arabia and the United Arab Republic, and the entire character of the Gulf would be altered. It does not seem, however, that such claims will be upheld.

In the *Norwegian Fisheries* case in 1951, the International Court of Justice stated: "The delimitation of sea areas has always had an international aspect; it cannot be dependent merely upon the will of the coastal state . . . the validity of the delimitation with regard to other states depends upon international law."<sup>61</sup> The court then held that a coastal state may not extend its territorial sea if such extension is prejudicial to the rights of another sea-faring nation.<sup>62</sup> Clearly, the extensions are prejudicial to Israel in that they would exempt the Straits of Tiran from the rule of international law which forbids the suspension of innocent passage through straits connecting two parts of the high seas.<sup>63</sup>

It should be made clear that the above rule regards the suspension of *innocent* passage. There is little dispute that if the passage is not innocent, it can be suspended.<sup>64</sup> Under the Geneva Convention, a broad definition is given to "innocent passage," namely passage which is "not prejudicial to the peace, good order, or security of the coastal state."<sup>65</sup> The International Law Commission, which codified principles of international law, and whose draft was the basis of the Geneva Convention, restricted non-innocent passage to cases where the ship was actually committing acts against the coastal state.<sup>66</sup> Even under the broad Geneva definition, however, the carriage of cargo to Israel during a time of peace under a United Nations armistice, could not be said to be prejudicial. For such carriage to be prejudicial, a state of war would have to exist.<sup>67</sup>

The legality of the United Arab Republic's measures, then, clearly depends on the existence of a state of war, during which passage would be prejudicial, or on the right to suspend innocent passage during a time of peace. It was shown, as to the latter, that no such right exists if the Gulf of Aqaba contains a "slice of high seas."

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60. Saudi Arabian Decree No. 33 defining the Territorial Waters of the Kingdom (Feb. 16, 1958), U.N. Doc. ST/LEG/SER.B/8 (1959); Presidential Decree of Feb. 17, 1958, No. 180, reported in 14 *REVUE EGYPTIENNE DE DROIT INTERNATIONAL* 406-407 (1958) (U.A.R.).

61. *Norwegian Fisheries Case* (United Kingdom-Norway) [1951] I.C.J. 116.

62. *Id.*, at 118.

63. See notes 55 and 56 *supra*.

64. Convention on the Territorial Sea and the Contiguous Zone, *Signed at Geneva*, April 29, 1958, ART. 16(1), U.N. Doc. A/CONF. 13/L.52.

65. *Id.*, ART. 14(4).

66. Int'l Law Comm'n Report, art. 17(1), 11 U.N. GAOR Supp. 9, U.N. Doc. A/3159 (1956).

67. See discussion under III, pp. 874-78 *supra*.

#### D. *Innocent Passage to Territorial Seas?*

Article 16(4) of the Geneva Convention on the Territorial Sea and the Contiguous Zone<sup>68</sup> extended the rule regarding none-suspension of innocent passage through straits connecting two parts of the high seas<sup>69</sup> to include non-suspension even when the straits connect one part of the high seas to the territorial sea of a foreign state. The United Arab Republic, however, was not a party to that convention<sup>70</sup> and cannot be bound by such a provision unless it is an expression of a general principle of international law. Leo Gross points out that there is authority that it is not.<sup>71</sup> Such an argument is supported by the express purpose of the Convention itself, namely to consider "not only . . . the legal but also . . . the technical, biological, economic and political aspects of the problem."<sup>72</sup> Article 16(4) is one of the very few provisions that differ from the provisions of the International Law Commission draft, the express purpose of which was to codify existing principles of customary international law.<sup>73</sup> Therefore, it seems that article 16(4) is an expression of the policy of the signatory nations rather than a rule of international law.

The conclusion is clear. If Aqaba is comprised only of the territorial waters of the coastal states,<sup>74</sup> no rule of international law prevents the suspension of innocent passage through the Straits of Tiran and the United Arab Republic's measure were legal.

#### E. *The Right to Regulate Passage*

International law gives the coastal state the right to regulate passage through its territorial waters.<sup>75</sup> Thus an argument could be made that a right of visit and search is justified as a regulatory right of the coastal state. This argument fails, however, because the burden is on the coastal state to show that such a measure is reasonable and customary, and research reveals that regulatory rights include measures such as merely the requirement of prior notification.<sup>76</sup> Visit, search, and seizure is a belligerent act, not a peace-time regulatory right.<sup>77</sup>

68. Convention on the Territorial Sea and the Contiguous Zone, *Signed at Geneva*, April 29, 1958, U.N. Doc. A/CONF. 13/L.52.

69. See notes 55 and 56 *supra*.

70. Convention on the Territorial Sea and the Contiguous Zone, *Signed at Geneva*, April 29, 1958, U.N. Doc. A/CONF. 13/L. 52.

71. Gross, *The Geneva Conference on the Law of the Sea and the Right of Innocent Passage Through the Gulf of Aqaba*, 53 AM. J. INT'L L. 564, 593 (1959).

72. G.A. RES. 1105 (XI), 2 U.N. GAOR 2265 (1957).

73. International Law Comm'n Report, 4 U.N. GAOR Supp. 10, at 1, U.N. Doc. A/925 (1949).

74. See discussion pp. 880-81 *supra*.

75. Convention on the Territorial Sea and the Contiguous Zone, *Signed at Geneva*, April 29, 1958, ART. 14(4), U.N. Doc. A/CONF. 13/L. 52; see also dicta in the Corfu Channel Case (United Kingdom-Albania) [1949] I.C.J. 4, 29-30.

76. E. HAMBRO, IV-A THE CASE LAW OF THE INTERNATIONAL COURT OF JUSTICE 249-250 (1960).

77. See note 17 *supra*.

F. *Estoppel*

The legality of the United Arab Republic's measures in the Straits becomes doubtful in the face of a guarantee that she made through her United Nations representative in 1957, when she occupied the islands of Tiran and Sanafir. Egypt said that passage in the Straits would "remain free as in the past. . . ."<sup>78</sup>

The common law concept of estoppel had its roots in a broader concept which still exists in international law, *viz.*, *venire contra factum proprium non valet*.<sup>79</sup> Under this doctrine, reliance by other nations is not even required. Simply stated, the doctrine precludes a state from denying the existence of any right which that state has previously recognized "by its representation, its declaration, its conduct, or its silence. . . ."<sup>80</sup> This doctrine is perhaps restrained by the doctrine of *rebus sic stantibus*, or "changed circumstances."<sup>81</sup> The latter is applied only in exceptional circumstances and usually in regard to treaty obligations, however.<sup>82</sup> In the absence of exceptional circumstances, such as Israel's renouncing the Rhodes Armistice, the United Arab Republic should be bound by her 1957 guarantee of free passage in the Straits of Tiran. Apparently there were no exceptional circumstances.<sup>83</sup>

## V. CONCLUSION

Israel, then, will not withdraw from the Sinai unless there is a guarantee that there will be a settlement of, *inter alia*, her rights of passage in the Straits of Tiran. This review of the legal considerations that will go into any settlement shows the great complexity of the question. It does seem, however, that the international interest at stake in the Gulf of Aqaba will lead the International Court of Justice to find that innocent passage does exist through the Straits during a time of peace. On the other hand, it seems equally clear that the coastal state—whether it is the United Arab Republic or Israel—will have a belligerent right of visit, search, and seizure and the right to suspend passage that is not innocent during a time of war. The choice is clear: a permanent peace settlement and innocent passage, or an endless war.

78. 36 DEP'T STATE BULL. 389 (1957).

79. "To go against one's own act is not valid." The International Court of Justice applied the doctrine in Temple of Preah Vihear (Cambodia-Thailand) [1962] I.C.J. 40.

80. E. HAMBRO, IV-B THE CASE LAW OF THE INTERNATIONAL COURT OF JUSTICE 851 (1966).

81. See discussion in *Treaties for the Protection of Minorities* 36, 71, U.N. Doc. E/CN.4/367 (1950). Literally translated, *rebus sic stantibus* means "at this point of affairs."

82. *Id.*

83. Factual accounts relate the United Arab Republic's measures as unilateral and describe no provocative act by Israel; see, e.g., notes 2 and 4 *supra*.