

IN THE
INTERNATIONAL COURT OF JUSTICE
The Hague, Netherlands

UNITED ARAB REPUBLIC

v.

UNITED STATES OF AMERICA

MEMORIAL FOR
UNITED ARAB REPUBLIC

International Law Society
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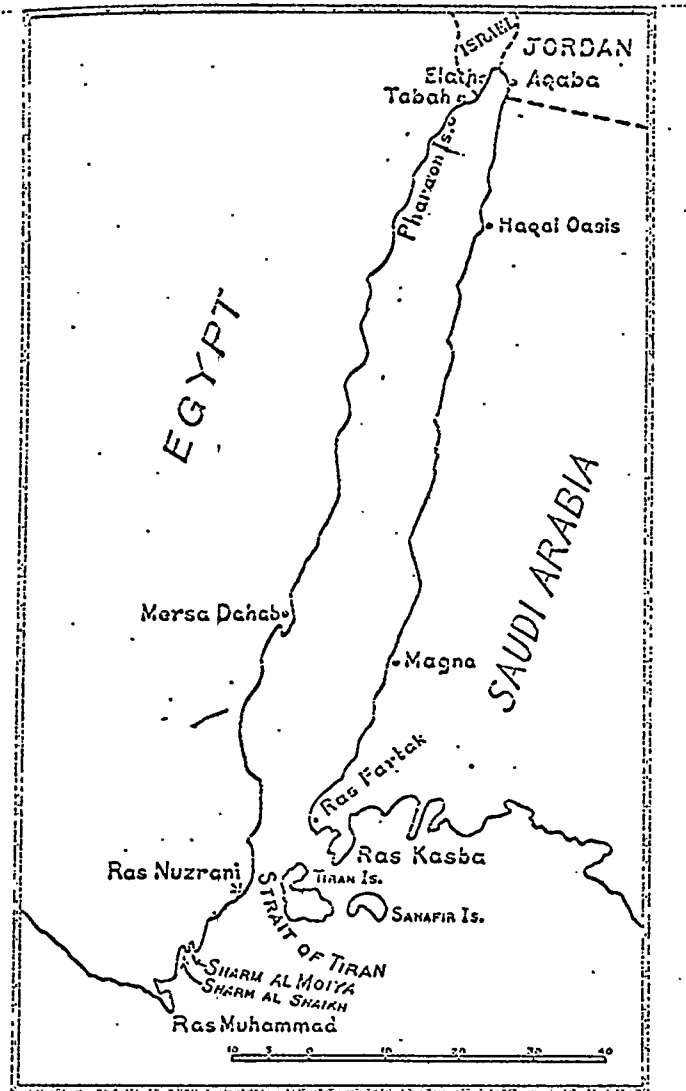
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THE GULF OF AQABA

Source: 52 AM. J. INT'L L. 660, 661 (1958)

JURISDICTION

Applicant, the government of the United Arab Republic, and respondent, the government of the United States of America, have voluntarily referred the following dispute to this Court according to Article 36(1) of the Statute of the International Court of Justice, to be decided in accord with the function of the Court as set out in Article 38(1).

STATEMENT OF FACTS

In May of 1967, the conflict in the Middle East was sharply escalated. On May 12, the leaders of Israel stated that "Israeli commanders ... would carry out military operations against Syria in order to occupy Damascus and overthrow the Syrian Government." On May 13 the United Arab Republic (hereinafter "Egypt") received information that Israel was concentrating sizeable armed forces on the Syrian border. As Egypt had agreed to aid Syria in case of attack, and as the security of the two countries is closely related, the threatened invasion of Syria would inevitably have led to conflict with Egypt.

Accordingly, President Nasser of Egypt acted to forestall, or at least minimize, the anticipated aggression. On May 22 he announced that Egyptian forces had occupied Sharm el Sheik, an outpost overlooking the Straits of Tiran. He declared that, as the Straits "...constitute our Egyptian territorial waters," and were under Egyptian sovereignty, Israeli ships would not be allowed to

pass through them. On May 24 Egypt stated that its Navy had been ordered to intercept and turn back any Israeli ships attempting to pass, and to inspect other ships desiring passage to determine whether or not they were carrying cargoes to Israel.

Following these announcements, Israel urged the United States to assert its alleged rights of free and innocent passage through the Straits in accord with an aide Memoire of February 11, 1957. At that time, Secretary of State John Foster Dulles had assured Israeli Ambassador Abba Eban that the U.S. believed that the Gulf of Aqaba constitutes international waters and that no nation has the right to prevent innocent passage through the Straits of Tiran. He pledged that the United States was itself prepared to assert that right, absent an "overriding legal decision to the contrary."

In accord with Israel's request, therefore, the U.S. made a formal protest to Egypt. Despite an exchange of notes, the United States maintained its intention to unilaterally assert its claim and warned Egypt not to interfere. Despite the mention of an "overriding legal decision", she made no offer to submit the long-standing dispute to this Court for legal adjudication on the merits, or to arbitration. Nor was United Nations action requested.

Instead, the United States dispatched a destroyer to escort an American merchant vessel through the Straits. The U.S. has admitted that the ship's cargo was grain and her destination the Israeli port of Elath. The captain was directed to keep the crew at action stations and return any fire.

While the ships were steaming through the Straits on June 2, the Egyptian authorities radioed an order to stand by for inspection pursuant to the declaration of May 24. Upon refusal, the coastal battery fired three warning shots, one to each side of, and one dead ahead, of the ships' way. The warship opened fire, destroying the battery and killing five soldiers. The vessels then reversed course and returned to the Red Sea.

QUESTIONS PRESENTED

Whether a neutral has a right to deny an existing state of war and thus ship contraband to a belligerent who threatens renewed hostilities in violation of an armistice.

Whether a nation may attempt passage through the waters of another nation who considers herself at war and has a good faith fear for her security, without complying with the latter's well-known requirement of inspection.

Whether such a nation may then resist enforcement of this regulation by gunfire without liability for damages, where she could determine her rights by peaceful means.

ARGUMENT

- I. THE UNITED STATES IS RESPONSIBLE FOR DAMAGES TO THE UNITED ARAB REPUBLIC FOR THE LOSS OF LIFE AND PROPERTY CAUSED BY THE ATTACK OF HER DESTROYER UNLESS THE ATTACK IS JUSTIFIED UNDER INTERNATIONAL LAW.

The United Arab Republic seeks damages for the destruction and loss of life caused by the attack upon her coastal batteries by a U.S. warship pursuant to official orders. Under the established rules of international law, a sovereign whose instrumentality causes injury to the citizens and property of another sovereign must make full reparations for the damage done, unless her act is justified under international law. Corfu Channel Case, [1949] I.C.J. 4. Moreover, negligence or mistake is no defense. U.S.S. Panay incident, 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 687-688 (1944). Thus, in the absence of justification, the U.S. is liable whether the attack was intended to open the Straits to Israeli shipping or whether it resulted from mere negligence or honest mistake in failing to perceive accurately the true intentions of the Egyptian authorities.

II. THE ATTACK WAS ILLEGAL AND WITHOUT JUSTIFICATION UNDER INTERNATIONAL LAW

A. THE UNITED STATES HAD NO RIGHT TO PASS THROUGH THE STRAITS OF TIRAN WITHOUT THE CONSENT OF THE UNITED ARAB REPUBLIC.

1. DUE TO THE EXISTING STATE OF WAR BETWEEN ISRAEL AND THE ARAB STATES, THE UNITED ARAB REPUBLIC HAD THE NECESSARY RIGHT TO VISIT AND SEARCH NEUTRAL SHIPS FOR CONTRABAND.

Under international law the existence of a state of war gives rise to a belligerent right to visit and search neutral shipping for the purpose of capturing contraband aiding the enemy's war effort. J. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 689 (4th rev. ed. 1959). A state of war existed between Egypt and Israel when the U.S. sought to force passage through the Straits. The bitter armed conflict in Palestine in 1948 was serious enough to warrant Security Council action under Chapter VII of the Charter. International law recognizes that a state of war may exist without a formal declaration. 3 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 602 (2d ed. 1945); New York Insurance Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946). Non-recognition of the opposing belligerent is also irrelevant, for

[w]henever a State lacking the legal qualification to make war nevertheless actually makes war, it is a belligerent, the contention is real war, and all the rules of International Law respecting warfare apply to it. 2 L. OPPENHEIM, INTERNATIONAL LAW 249 (7th ed. Lauterpacht 1952).

Thus, it is clear that a state of war existed prior to the Egyptian-Israeli Armistice. The United States recognized the existence of this state of war and of Egypt's consequent exercise of

3 U.N. SCOR No. 72 at 41 (1948);
the right of visit and search. /9 U.N. SCOR 661st meeting 13 (1954).
Egypt's Law on the Seizure of Contraband, as amended Nov. 1953,
included food stuffs as contraband, in accord with modern practice.
See J. Trappe, On the Jurisdiction of the Egyptian Prize Court
1948-1960, 16 REV. EGYPT. DE DROIT INT'L 60 (1960).

a. THE RHODES ARMISTICE DID NOT TERMINATE THIS RIGHT.

The existing state of war was not terminated by the
Egyptian-Israeli General Armistice Agreement signed at Rhodes on
February 24, 1949. 42 U.N.T.S. 251 (hereinafter the Rhodes Ar-
mistice), since armistice agreements

. . . are in no wise to be compared with peace,
. . . because the condition of war remains between
the belligerents themselves, and between the
belligerents and neutrals, on all points beyond
the mere cessation of the hostilities.

...
Everybody agrees that belligerents during an
armistice may, outside the line where the forces
face each other, do everything and anything they
like regarding defense and preparation of offence
... 2 L. OPPENHEIM, supra, 546-47, 551; accord
M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 589
(1959).

U.S. practice recognizes that an armistice is not a partial or
temporary peace and merely terminates hostilities. Military: U.S.
ARMY, THE LAW OF LAND WARFARE (Field Manual FM 27-10 para. 479 et
seq. 1956); diplomatic: 3 C. HYDE, supra § 646; judicial: Ludecke
v. Watkins, 335 U.S. 160 (1948); see also Kahn v. Anderson, 255 U.S.
1, 9 (1920).

The reason for this is clear. An armistice which has not
been followed by an actual peace treaty indicates less than normal

peaceful relations between parties. This is clearly the situation at hand. During this uneasy period before "...a peaceful settlement between the parties is achieved..." (Rhodes Armistice, Art. 12, para. 2), resupply of a belligerent can lead to a sudden armed attack. This "permanent" treaty has been breached before. Visitation is the only practical way to determine if a vessel is abusing her neutrality by carrying contraband.

The Armistice itself states its purpose as "...promoting the return to permanent peace..." (Art. 1) and that it "... shall remain in force until a peaceful settlement is achieved..." (Art. 12, para. 2). It thus recognizes that a state of peace did not exist between the parties, and that the armistice would not change this relationship.

Far from proclaiming a state of peace, the agreement is to last only until a "peaceful settlement is achieved." No treaty or other settlement has yet been reached. On the contrary, Israel has refused for over a decade even to participate in the Mixed Armistice Commission, established to supervise compliance with the Armistice. Baxter, The Definition of War, 16 REV. EGYPT. DE DROIT INT'L 1, 5, n. 15; Rhodes Armistice, Art. 10. Instead, she has committed flagrant violations, especially of Article 2 ("No military or paramilitary forces of either party shall commit any warlike or hostile act...or shall advance beyond...the armistice demarcation line..."), e.g., Wright, Intervention, 1956, 51 AM. J. INT'L L. 257 at 257-58, 266. As Col. Levie, Chief of the International Affairs Division of the U.S. Army's legal department states, "[b]y now it has surely

become fairly obvious that the Arab-Israeli General Armistice Agreements did not create even a de facto termination of the war...." Levie, The Nature and Scope of the Armistice Agreement, 50 AM. J. INT'L L. 880, 886 (1956).

Since an armistice does not affect the existing state of war, the right of visitation remains intact, unless the belligerents expressly agree to prohibit it. J. COLOMBOS, supra 689-90; 2 L. OPPENHEIM, supra 848-49. This agreement contains no express prohibition of visitation. Current practice as indicated by other recent armistices shows that denial of the right must be explicit. H. Levie, supra 886; e.g., Military Armistice in Korea, July 27, 1953, [1954] 4 U.S.T. 234, T.I.A.S. No. 2782, para. 15.

Even if visitation of neutrals could be denied merely by implication, this was not done. As "...the exercise of the right ...is not an act of warfare..." (2 L. OPPENHEIM, supra 848), it is not a hostile act prohibited by the Armistice. Rhodes Armistice, Art. 2. Rather, inspection for contraband would seem to be in accord with the provision that "[t]he right of each party to its security and freedom from fear of attack shall be fully respected." Rhodes Armistice, Art. 1, para. 3.

The Mixed Armistice Commission, charged with supervising and interpreting the treaty, found no prohibition of visitation. 6 U.N. SCOR, Supp. Apr.-June 1951, at 162-64, U.N. Doc. S/2194 (1951). Neither the Security Council nor the Secretary-General has claimed that Egypt does not have the right of search under the Armistice. H. Levie, supra 886; Report of the Secretary-General,

Jan. 15, 1957, 11 U.N. GAOR, Annexes, Agenda Item No. 66, at 49, U.N. Doc. A/3512. Furthermore, the dispute as to the existence and nature of the right is a legal one (see authority cited infra, p. 18), and thus, should be decided not by the Council but by this Court according to generally accepted principles of international law. U.N. CHARTER, Art. 36, para. 3. As noted above, these principles allow visitation during an armistice. Moreover, a coastal state's need to search neutral ships passing through even an international waterway outweighs the neutral's right to unimpeded passage. R. Baxter, Passage of Ships Through International Waterways In Time of War, 31 BRIT. Y.B. INT'L L. 187, 208 (1954).

b. A NEUTRAL MUST SUBMIT TO VISITATION AND MAY
NEITHER RESIST NOR FLEE.

When the United States sought to force passage through the Straits of Tiran, she had knowledge of the state of relations between Israel and Egypt, and of the latter's exercise of the belligerent right of visit and search within her territorial waters. The right was properly asserted by the radio and by gun; but although this order to halt was acknowledged, it was not heeded.

There was no justification for this refusal. The U.S. merchantman, as a neutral, was not entitled to resist visit and search. J. COLOMBOS, supra 705. Her failure to stop after notice would justify the use of force to compel her to do so. 2 L. OPPENHEIM, supra § 419. Indeed, according to the U.S. Navy's LAW OF

NAVAL WARFARE, sec. 501(b)(2) (U.S. Naval War College, International Law Studies, 1955), this flight characterizes her as an enemy vessel. However, Egypt followed this radio notice with the customary three warning shots. J. COLOMBOS, supra § 880, 2 L. OPPENHEIM, supra § 419. Clearly the U.S. had no right to ignore the order, much less to respond by attacking the battery.

2. EGYPT'S REGULATION, A PROPER EXERCISE OF SOVEREIGNTY, WOULD BE EQUALLY VALID IN PEACETIME.

a. UNITED STATES SHIPS HAVE NO RIGHT TO PASS THROUGH THE STRAITS.

Historically, the Gulf of Aqaba is an Arab sea. "There are certain bodies of water to which individual states by general acquiescence or long usage have acquired absolute title." 1 C. HYDE, INTERNATIONAL LAW 468 (2d ed. 1945); H. BRIGGS, THE LAW OF NATIONS 288 (2d ed. 1952). This acquiescence is usually tacit as title is based on prescription. H. SMITH, THE LAW AND CUSTOM OF THE SEA 14 (3d ed. 1959). Since these waters are treated as internal (Anglo-Norwegian Fisheries Dispute, [1951] I.C.J. 116, 130), there is no right of innocent passage. H. SMITH, supra 7.

The Gulf of Aqaba has always been surrounded by Arab territory. Historians have even referred to it as the "Arab Gulf." M. Hammad, The Right of Passage in the Gulf of Aqaba, 15 REV. EGYPT. DE DROIT INT'L 118-28 (1959). Since the breakup of the Ottoman Empire, the three Arab states which succeeded to its frontage on the Gulf also succeeded to its claim (albeit jointly) to territorial sovereignty over the Gulf. Id. at 128-31. It is no less

a historic bay because there is more than one littoral state adjoining it, for a historic bay may be held in common. Gulf of Fonseca Case, 11 AM. J. INT'L L. 677 (1917) (Central American Court of Justice, 1917).

In 1957, U.S. Secretary of State Dulles admitted that the littoral states could close the Gulf. U.S. DEP'T STATE, UNITED STATES POLICY IN THE MIDDLE EAST, 299 (Dep't State Pub. 6505 [1958]). This statement is binding on the U.S. Legal Status of Eastern Greenland, [1933] P.C.I.J., ser. A/B, No. 53 ("Ihlen Declaration"). Thus, the Arab states on the Gulf are justified in treating it as closed, unless Israel is a littoral state with sovereignty on the Gulf. Joint communique of the Kings of Jordan and Saudi Arabia, June 13, 1957. Cited in C. Selak, A Consideration of the Legal Status of the Gulf of Aqaba, 52 AM. J. INT'L L. 660, 678 (1958).

Israel seized the lands bordering the Gulf at Elath by force in violation of the truce with Jordan, the armistice with Egypt and three Security Council resolutions. M. Hammad, supra 145-47. Her continued presence there is mere military occupation, insufficient to confer sovereignty. 2 L. OPPENHEIM, supra 433. She may not base any claim of sovereignty on the Palestine Partition Plan of 1947, for she has never complied with it. 11 U.N. GAOR 1203 (1957); 12 U.N. GAOR 233 (1957).

Furthermore, that plan, a mere recommendation (Statement of U.S. Representative, 3 U.N. SCOR 253d meeting 265 [1948]; of Canadian Representative, Id. 385th meeting 24 [1948]), has been ignored by the Security Council in resolutions refusing to sanction

Israeli occupation. M. Hammad, supra 145-46. Thus, the Arab states may treat the Gulf as closed.

b. IN TIME OF EMERGENCY, EGYPT MAY SUSPEND PASSAGE THROUGH THE STRAITS.

When the U.S. vessels entered the Straits, they were within the territorial jurisdiction of Egypt, whose territorial sea extends for six miles from her coast. Decree of Jan. 15, 1951, [1951] Al Waqayih al-Misriyah (Official Journal) No. 6. This is twice the width of the Straits. L. BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW 143 (1964). Egypt's sovereignty in these waters is the same as over any other part of her territory. Report of the International Law Commission to the General Assembly, Jan. 27, 1956, [1956] 2 Y.B. INT'L L. COMM'N 265, Art. 1, para.(1), U.N. Doc. A/3159 (1956); *Cunard v. Mellon*, 262 U.S. 100 (1923). U.S. practice recognizes this jurisdiction as "exclusive and absolute," subject only to the right of innocent passage. Memorandum prepared by Bernard G. Heinzen, Attorney Adviser, Office of the Legal Adviser, Department of State, Jan. 1958, US/CLS/LEG/1, at 2-4 as partially set forth in 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 2-3 (1965).

This right may be suspended in the territorial sea if necessary to the security of the coastal state. 1 C. HYDE, INTERNATIONAL LAW CHIEFLY AS APPLIED AND INTERPRETED BY THE UNITED STATES 277-78 (2d ed. 1945). This necessity existed.

The United States has admitted the good faith of Egypt's belief that an attack on her ally, Syria, was imminent. This fear was reasonable when, after Israel's warlike declaration, Egypt was

notified that troops were massing on the border. Egypt's past experience indicated that she would herself be a major target of the expected Israeli attack. Acting on this belief, Egypt sought to prevent war material from reaching Israel. Grain is a necessary and well known component of a nation's military reserves; this is recognized by its treatment as contraband. J. COLOMBOS, supra §§ 776, 79. Any measures which a state may take to protect itself, and its vital interests "...within its own domain, are generally regarded as the mere exercise of the right of political independence." I C. HYDE, supra 237.

The action, vital to Egypt's security, was also proper self-defense against the threatened attack. She need not be a "sitting duck" for Israeli aggression. M. McDougal, The Soviet-Cuban Quarantine and Self-Defense, 57 AM. J. INT'L L. 597, 601 (editorial, 1963). The U.S. may not in good faith deny Egypt's treaty obligation to defend Syria, as she undertook military operations on behalf of Lebanon claiming neither treaty obligation with, nor armed attack against that nation. R. Higgins, The Legal Limits to the Use of Force by Sovereign States: United Nations Practice, 37 BRIT. Y.B. INT'L L. 269, 307 (1961).

Necessity and proportionality of response are for Egypt to decide, subject to later review if she abuses this right. I. Brownlie, The Use of Force in Self-Defense, 37 BRIT. Y.B. INT'L L. 183, 209 (1961); D. BOWETT, SELF DEFENSE IN INTERNATIONAL LAW (1958). Here, in the face of clear need, Egypt merely sought to ascertain if the goods passing through her waters would add to her peril.

This response was hardly excessive.

While customary international law prohibits suspension of passage through straits used for international navigation between two parts of the high seas (Corfu Channel Case, supra), there are no high seas in the Gulf. Egypt's six-mile territorial sea (supra, p. 12) and Saudi Arabia's twelve-mile one (N.Y. Times, Jan. 19, 1958 at 50, col. 7) overlap, as the Gulf at its widest is but 17 miles. C. Selak, A Consideration of the Legal Status of the Gulf of Aqaba, 52 AM. J. INT'L L. 660 (1958).

The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (open for signature Apr. 29, 1958, U.N. Doc. A/Conf. 13/L. 52 [1958], hereinafter 1958 Convention) did not represent existing law in extending the above exception to a strait connecting the high sea and the territorial sea of a foreign state. Art. 16, para. 4. Rather, the statement was politically motivated, and, as the American representative noted "...clearly applied to the Israeli-Arab controversy...." A. Dean, Geneva Conference On Law Of The Sea, 52 AM. J. INT'L L. 607, 623 (1958). It was inserted "...by a narrow vote -- a majority of one, if abstentions are disregarded. ..." R. BAXTER, THE LAW OF INTERNATIONAL WATERWAYS, 162 (1964); 3 U.N. CONF. ON THE LAW OF THE SEA, OFFICIAL RECORD 100, U.N. Doc. A/Conf/13/39.

The draft convention had stated existing law, (Report of The International Law Comm'n, Report, 11 U.N. GAOR Supp. No. 9, Art. 17, para. 4, U.N. Doc. A/3159 [1958]), expressly refraining from the consideration of the "...legal position of straits forming

part of the territorial sea of one or more States and constituting the sole means of access to a port of another State", (Id., para. [4]) since "the question sounded far more like a case for the International Court of Justice than a matter on which the Commission should enunciate a general rule". A. Dean, supra. Clearly, Article 16, paragraph 4 was not a recognized part of customary law, but rather "...a new rule..." (Id.), and thus not binding on Egypt without her ratification.

Thus even if a ship carrying supplies to a state which threatens war can be considered innocent, and mere inspection considered a denial of passage, it would have been proper for Egypt to suspend such passage as a necessary measure to protect her security.

c. PASSAGE PREJUDICIAL TO HER SECURITY MAY ALWAYS BE PROHIBITED.

Even if Egypt could not suspend innocent passage, there is no right to passage prejudicial to the coastal state's peace and security. Such a passage is clearly not innocent.

The word 'innocent' is to be interpreted with reference to the interests of the shore State The international right of passage in no way diminishes the inherent right of every state to take such measures in its own territory, ... as it may judge to be necessary for the protection of its own interests, and a voyage ceases to be 'innocent' if its purpose involves any violation of those interests.
H. SMITH, supra 47.

Even under the 1958 Convention, Egypt's actions were proper, since it allows the coastal state to take the necessary

steps in its territorial sea to prevent passage which is prejudicial to its peace, good order or security. Art. 16, para. 1; Art. 14, para. 4. A passage that aids an enemy or potential enemy and increases her ability to endanger national peace, good order, and security by carrying strategic material to that enemy is not innocent. The destination and cargo of this ship genuinely prejudiced Egypt's security; therefore, she may forbid it. M. Sorenson, The Law of the Sea, 1958 INT'L CONCILIATION, No. 520 at 234; M. MCDUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 258 (1962). Further, Professor McDougal says "the [Geneva] Conference wished to accord the coastal state a substantial measure of discretion in determining the interest which might justify prevention of passage..." Id. 262.

It ill befits the U.S. to challenge this Egyptian regulation in view of her own recent assertion and practice of the right of visit and search in time of peace, with force authorized to secure compliance. PRES. PROC. 3504, 27 Fed. Reg. 10401, 47 DEP'T STATE BULL. 918 (1962). This "quarantine" was not even conducted in her own territorial waters. To deny that Egypt has such a right also would violate the principle of sovereign equality. U.N. CHARTER Art. 2, para. 1.

Moreover, a warship's right of innocent passage is not unrestricted (S. Slonim, The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea, 5 COLUM. J. OF TRANSNAT'L L. 96, 119-20 [1966]), and for noncompliance with coastal regulations, she can be required to leave. 1958 Convention, Art. 23.

d. ALL SHIPS PASSING THROUGH EGYPTIAN WATERS MUST COMPLY WITH HER REGULATIONS.

Egypt does not seek to deny passage to United States ships, but only to regulate this passage to conform with her security. Article 17 of the 1958 Convention says foreign ships "shall comply" with the laws and regulations of the coastal state, particularly those dealing with transport, as here. This right to regulate exists even where passage may not be prohibited. See Corfu Channel Case, supra 29, where this court found a right to regulate. In Corfu, as here, the coastal states did not maintain normal relations, and a state of war was asserted.

President Nassar did not say that he would exclude U.S. merchant ships, only that they would be inspected to determine cargo and destination. This was necessary to determine if the passage were innocent. The U.A.R., having jurisdiction over the vessel, could enforce this regulation by forcing her into port and fining her officers. M. MCDUGAL & W. BURKE, supra 260 (1962). The regulation was clearly reasonable in view of the Israeli threat and of Egypt's good faith belief of an impending invasion of her ally, which would involve Egypt in open hostilities with Israel. The burden of inspection is slight compared with the threat to Egypt's security in this time of rising tensions.

B. THE UNITED STATES HAD NO RIGHT TO PERFECT HER CLAIM BY FORCE OF ARMS.

The U.S. had a duty to seek adjudication.

...[T]he first and foremost restriction imposed by international law upon a state is that -- failing the existence of a permissive rule to the contrary -- it may not exercise its power in any form in the territory of another state; ... Case of the S.S. "Lotus," [1927] P.C.I.J., ser. A, No. 9 at 18.

Since "[r]estrictions upon the independence of a state cannot...be presumed," (Id.) the U.S. had the burden of proving that the law restricted Egypt's sovereignty over her territorial waters.

Egypt is and has been willing to have her legal rights determined by this Court. She has always insisted this was a legal dispute. 6 U.N. SCOR 553d meeting 15 (1951). Many who have considered the matter have agreed. Mixed Armistice Commission: 6 U.N. SCOR Supp. Apr.-June 1951, at 162-64, U.N. Doc. S/2194 (1951); International Law Commission, supra p. 15 ; Secretary-General: 11 U.N. GAOR, Annexes, Agenda Item No. 66, at Norway: 49, U.N. Doc. A/3512;/Id. 666th meeting 1300, para. 196; Canada: Id. 1296, para. 148. The U.S. herself has called this "...a highly complicated question of international law..." (Secretary of State Dulles, press conference, 36 DEP'T STATE BULL. 432 [1957]), admitted that "[t]here is a certain amount of plausibility from the standpoint of international law, perhaps, to...[the Arab] claims," and concluded "[p]erhaps in the end this matter will have to be settled by...the International Court...." Dulles Press Conf. of

July 16, 1957, 37 DEP'T STATE BULL., 232 (1957). in 4 M. WHITEMAN, supra 471. In the past she had informed her shipping to comply with the regulations and report any denial of innocent passage to diplomatic authorities. U.S. Notice to Mariners No. 44, U.S. Navy Hydrographic Office, Oct. 29, 1955; Circular Notice to Shippers of Procedures for Passage into Gulf of Aqaba, June 5, 1957, 36 DEP'T STATE BULL. 112-13. Both in 4 M. WHITEMAN, supra 468-69.

Thus, it is inconceivable why the U.S., knowing of the tense situation caused by the Israeli threat, chose to precipitate a crisis by gunboat diplomacy. This violated her obligations under the Charter, (Arts. 2, 4, 33, 37.) which she has recognized in past disputes. Yugoslavian incident, 15 DEP'T STATE BULL. 417-19 (1946).

Such action is not sanctioned by this Court's decision in Corfu, supra. I. Brownlie, supra at 266. Nor was there a right of self-defense. In time of war, a neutral must stop without resistance. Even in peacetime self-defense requires that there be an instant, overwhelming necessity leaving no choice of means nor time for deliberation, and that the response not be unreasonable or excessive. Statement of U.S. Secretary of State Webster regarding the incident of the Steamer Caroline (1837), J. BRIERLY, THE LAW OF NATIONS 405 (6th ed. 1963); 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 409 (1906). Three warning shots were fired. The ships, being in radio contact with the authorities, could have ascertained their nature. The crisis could have been averted either by signalling that the cargo ship would submit to inspection

or that it would leave. Egypt had no quarrel with the vessels themselves, and either measure would have secured their safety. Thus, there was no instant, overwhelming necessity. Neither was the response reasonable. The warship's orders were to return any fire. Nothing was said of the nature of the fire. Thus to three mere warning shots far wide of the vessels, the warship responded by destroying the battery and killing five soldiers. Such an act is unjustified as a measure of self-defense.

CONCLUSION

For the foregoing reasons, the government of the United Arab Republic respectfully submits that the Court should find that the United States of America is internationally responsible to the United Arab Republic for the losses caused by her unjustified attack.

Respectfully submitted,

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TABLE OF AUTHORITIES

1. Treaties and Conventions

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