IN THE

INTERNATIONAL COURT OF JUSTICE

The Hague, Netherlands

UNITED ARAB REPUBLIC

v.

UNITED STATES OF AMERICA

MEMORIAL FOR UNITED STATES OF AMERICA

International Law Society
Duke Law School

Garrett E. Brown
William M. Piatt, IV

Agents for United
Arab Republic

Michael D. Rivel
James E. Dunlap
OF Counsel

IN THE

INTERNATIONAL COURT OF JUSTICE

The Hague, Netherlands

UNITED ARAB REPUBLIC

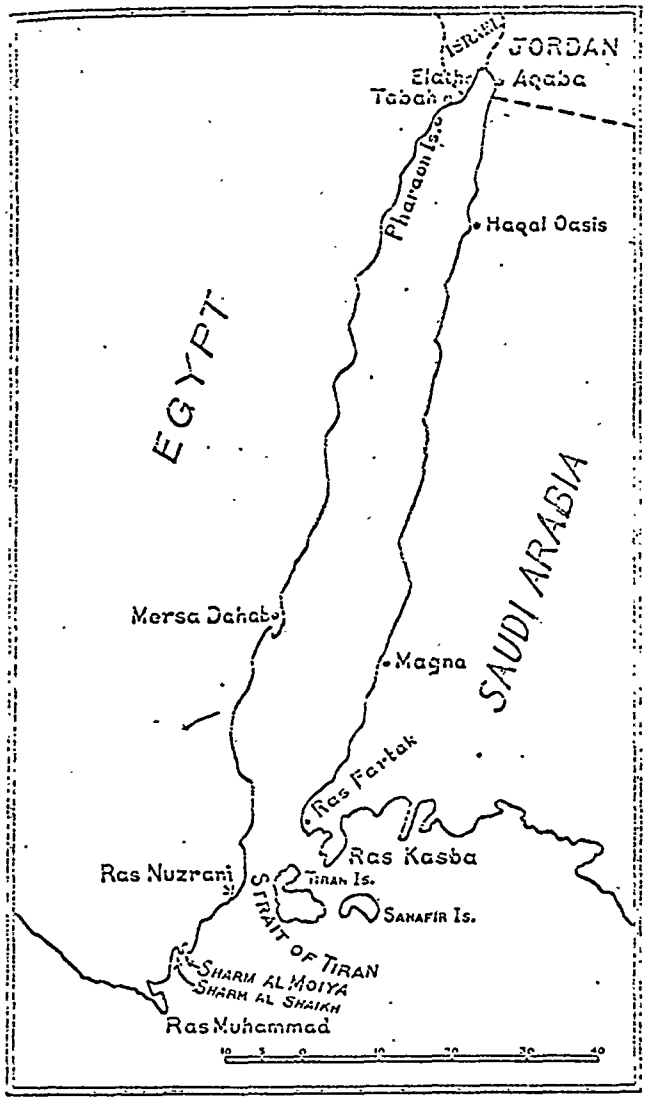
v.

UNITED STATES OF AMERICA

MEMORIAL FOR

UNITED STATES OF AMERICA

INDEX



THE GULF OF AQABA

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

JURISDICTION

The United States of America submits to the jurisdiction of the International Court of Justice for a decision on the merits as to the claim set forth by the United Arab Republic.

The Court has jurisdiction to hear and decide the dispute under Article 36, paras. 1 and 2, by consent of the parties.

STATEMENT OF FACTS

On May 22, 1967 President Nasser of the United Arab Republic (hereafter "Egypt") announced that his troops had occupied Sharm el Sheikh, "as an affirmation of our rights and our sovereignty over the Straits of Tiran." He claimed that the Straits are "Our Egyptian territorial waters," and asserted that he would "under no circumstances" allow Israeli shipping to pass through the Straits. The Straits provide the only access to the Israeli port of Elath.

Nasser attempted to justify his actions by claiming that ten days before, Israeli leaders had declared their intent to invade Syria and overthrow the government. Believing that Israeli troops were being massed on the Syrian border, he had consulted with the Damascus government and offered assistance in case of attack.

On May 24 Nasser ordered his Navy to intercept and turn back all Israeli ships and to inspect all others to determine whether they were bound for Elath.

On February 11, 1957 Secretary of State John Foster Dulles had stated the American position on the Gulf:

> ...the Gulf comprehends international waters... no nation has the right to prevent free and innocent passage in the Gulf and through the Straits giving access thereto....In the absence of some overriding decision to the contrary, as by the International Court of Justice, the United States ...is prepared to exercise the right of free and innocent passage and to join with others to receive general recognition of this right.

Israel now called upon the United States to honor its declaration.

Accordingly, the United States formally protested to Egypt. It reiterated the right of innocent passage and denied Egypt's right to intercept and inspect its vessels. When an initial exchange of notes failed to resolve the controversy, the United States sent a final note declaring its unilateral intention to exercise the right of innocent passage and warned Egypt against interference.

Thereafter an American merchant vessel asked the United States for a naval escort through the Straits to Elath. The vessel carried a cargo of grain and, in view of the situation was loathe to attempt passage without government support. On June 1, 1967 a Navy destroyer was dispatched to escort the vessel. The destroyer was ordered to maintain guns in the normal fore-and-aft positions with crews at action stations. If fired upon the destroyer was to return fire.

The two vessels were steaming through the Straits when, on June 2 they received radio instructions from the Egyptian coastal authorities to stand by for inspection. The vessels signalled their intention to proceed without inspection, whereupon three shots were

fired by the coastal batteries; one in front of the line, one over the line, and one short. The destroyer returned fire and silenced the offending battery, with the loss of five Egyptian soldiers. To avoid further hostilities both vessels reversed course and returned to the Red Sea.

All declarations and actions of the parties were reported to the United Nations, yet it was not requested to take action and did not do so.

QUESTIONS PRESENTED

Whether a nation may restrict innocent passage through international straits in time of peace, on her own sovereign prerogative.

Whether belligerent rights may be exercised after the conclusion of a general armistice and in the absence of hostilities.

Whether "innocent passage" relates to a ship's conduct or the consequences of her passage, objectively determined.

Whether rights of visit and search allow a belligerent to attack neutral shipping.

ARGUMENT

I. AMERICAN VESSELS HAD A RIGHT OF FREE AND INNOCENT PASSAGE THROUGH THE STRAITS OF TIRAN.

A. EGYPT HAD NO PREROGATIVE TO DENY INNOCENT PASSAGE THROUGH THE STRAITS OF TIRAN IN TIME OF PEACE.

Ships of one nation are entitled to pass through the territorial waters of another when the passage is a necessary concomitant of navigation on the high seas. This is the right of innocent passage, based upon "the most specific and unimpeachable axiom of the law of nations called primary rule or first principle, the spirit of which is self-evident and immutable to wit: every nation is free to travel to every other nation and to trade with it." H. GROTIUS, MARE LIBERUM 78 (Magoffis trans. 1916). The right is now codified in the Convention on the Territorial Sea and the Contiguous Zone (U.N. CONF. ON LAW OF THE SEA, [A/Conf. 13L 52 et seq.] Geneva, 1958, hereafter termed the "Geneva Convention"), "...the best consensus of present international opinion regarding the law of the sea." Selak, "A Consideration of the Legal Status of the Gulf of Aqaba", 52 AM. J. INT'L. L. 660, 685 (1948).

The right applies in straits regardless of whether they connect two areas of the high seas or the high seas with the territorial waters of a third state. Geneva Convention, Art. 16 para. 4. In adopting this provision the conferees rejected the Arab contention that the Corfu Case had extended innocent passage only to straits connecting two parts of the high seas. See 3 U.N. CONF. ON THE LAW OF THE SEA, OFF. REC. 96, para. 4 as quoted in Gross, "The Geneva Convention on the Law of the Sea and the Right of

Innocent Passage Through the Gulf of Aqaba", 53 AM. J. INT'L. L. 564, 588 (1959). The Netherlands delegate ... stated that this provision reflects existing international law. (Id., para. 16, Gross supra at 589.) There is ample support for his statement from the publicists. See L. OPPENHEIM, INTERNATIONAL LAW 460-61 (7th Ed. Lauterpacht, 1948).

The major maritime nations recognize that the right exists in the Tiran Strait. The representative of the Netherlands to the United Nations stated that the Strait should be "free, open, and unhindered" because it connects two parts of the high seas: that even if the strait is so narrow that it is regarded as territorial water of the littoral state, the right of free passage continues to exist, and the right of verification by the littoral state does not exist. 11 U.N. GAOR 1288 (1957). This theme was reiterated by France, Italy, Great Britain, Canada, Sweden, Denmark, Norway, Belgium, and the United States. Id. Egypt acknowledged that the right exists in the Straits. Aide Memoire to the United States, in 9 U.N. SCOR 19, 659th Meeting, Feb. 15, 1954. This recognition should be binding. Eastern Greenland Case (Denmark v. Norway) [1933] P.C.I.J. Ser. A/B, No. 53.

The right extends to warships in time of peace. Corfu Channel Case, [1949] I.C.J. 4, 67. See also L. OPPENHEIM, supra, 460-61. Therefore, both the American warship and the steamer were entitled to passage through the Tiran Straits on June 2, 1967.

Innocent passage cannot be suspended. The Geneva Convention provides:

> There shall be no suspension of the right of innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas or the territorial sea of a foreign state.
>
> Geneva Convention, Art. 16, para. 4.

As observed above, this article is declarative of existing law. The Corfu Case held that "unless otherwise prescribed in an international convention, there is no right for a coastal state to prohibit such passage through straits in time of peace." Corfu Channel Case, supra, at 67. See also the Harvard Convention in 23 AM. J. INT'L. L. SUPP. 244 (1929): "A strait which serves as a passage from one open sea to another ought not on principle to be closed." Judge Wellington Koo has pointed out that all rights of passage generally require a compromise between territorial sovereignty and freedom of navigation. In the words of Bykershoeck, "In the Law of nations, reason is sovereign." Case concerning Right of passage over Indian Territory, [1960] I.C.J. 6, 67. The Chicago convention illustrates his point relative to air passage, and the U.N. Charter as to passage over land. Convention on International Civil Aviation, Art. 5 opened for signature December 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591. UNITED NATIONS CHARTER, Article 43. In both instances, the sovereignty of the territorial state is upheld, yet passage cannot be subjected to the sovereign prerogative of the territorial state. See [1960] I.C.J. at 133-134 (Dissent of Fernandes, Judge).

The claim that the Gulf of Aqaba constitutes a mare clausum, a historic Arab bay, cannot defeat the right of innocent passage through the straits. It is factually untrue. The Memorandum on Historic Bays, U.N. Doc. A/Conf. B/1 (Sept. 20, 1957) makes no

mention of the Gulf. Three criteria -- immemorial possession, peaceful exercise of sovereignty, and acquiscence -- must be satisfied. Gulf of Fonseca case (El Salvador v. Nicaragua) 11 AM. J. INT'L. L. 674, 705 [1917]. Since the Turks controlled the land surrounding it for several centuries until 1917 the Arabs can lay no claim to immemorial possession. Moreover, no navigation was carried out in the Gulf until steam navigation because of the strong northerly winds. Melamid, "Legal Status of the Gulf of Aqaba", 53 AM. J. INT'L. L. 412 (1959). Food fish were not plentiful enough to justify fishing until after World War I. The first steam navigation was undertaken by the British during World War I and no further shipping took place until the 1930's. Arab pilgrims going to Mecca have even since that time chartered European vessels. Since Arab steamships are rare, almost all shipping takes place in European bottoms. Melamid, supra. The Arabs thus cannot claim peaceful and continuous dominion over the Gulf. Since most maritime nations objected to the Arabs' claim of sovereignty when it was first asserted by Saudi Arabia on March 17, 1957 (Note to the U.S. Government, printed in the Mecca newspaper Al-Bilad al-Sandiyah, quoted in Selak, supra at 676), the Arabs can claim no acquiescence by other states. See Anglo-Norwegian Fisheries Dispute, [1951] I.C.J. 116, 130. STROHL, THE INTERNATIONAL LAW OF BAYS 389-397 (1963).

Without an agreement among all coastal states that the Gulf constitutes a historic bay, no state may make the claim. 11 U.N. GAOR 1280, 1288 (1957). Selak, supra at 690. Whetton, "Legal

Aspects of the Egyptian Blockade of the Gulf of Aqaba", REV. EGYPT. DE DROIT INT'L. No. 4, 341 (1967). Israel's cooperation is essential to the Arabs' claim. The Palestine Partition of 1947 provided that Israel should occupy land on the coast. The Rhodes Armistice of February 24, 1949 which defined the western boundaries between Israel and Egypt recognized the demarcation line as running to the Gulf, (42 U.N.T.S. 251 [1949]) and recognized Israel's possession of the coastal territory (Id. Art. VIII, para. 4). The Jordanian Armistice of April 3, 1949 recognized that the eastern boundaries should conform to the present military positions of each party. Doc. S/1302/Rev. 1, SCOR Special Supplement, No. 1 at 3. Israel had already occupied the coast at Elath before April 3, as acknowledged in Article VII. Israel has a clear right to occupy Elath. As her agreement is necessary to establish the Gulf as a historic bay, her protest is sufficient to dispel the claim. Even if the Gulf is found to be a historic bay, however, Egypt has no right to regulate shipping destined for the ports of an equal co-owner.

B. SINCE EGYPT WAS NOT AT WAR SHE WAS NOT ENTITLED EITHER TO SUSPEND INNOCENT PASSAGE OR TO EXERCISE BELLIGERENT RIGHTS SO AS TO EFFECTIVELY DENY PASSAGE.

Judicial decisions by disinterested international tribunals have implied that, after conclusion of an armistice and cessation of hostilities, the state of war is dissolved. In the Advisory Opinion on Railway Traffic Between Lithuania and Poland [1932] P.C.I.J. Ser. C, No. 54, at 188 the Court assumed that Lithuania and Poland were at peace because of these very circumstances.

Lithuania's own courts reached the same conclusion in Re Zabita, 1935 DIGEST OF PUBLIC INTERNATIONAL LAW CASES 1929-1930, Case No. 288 at 491-92. In the Corfu Case, supra, the Court's decision necessitated a finding of peace between Greece and Albania, although the former had declared war on the latter. When specifying Albania's duty to warn neutral vessels of mines, the Court based its ruling on Albania's duty "to humanity," rather than on the Hague Convention of 1907 because that Convention only applied in wartime! [1949] I.C.J. at 22. Again, the Court posited its prohibition against Albania's denying innocent passage on a state of "peace"--even while acknowledging special circumstances! Id. at 29. Since a general armistice was in effect on June 2 and there had been no recent exercise of hostilities, Israel and Egypt were clearly at peace.

Three major multilateral treaty agreements of this century have denounced the state of war, per se. The League of Nations Covenant was so construed in no uncertain manner, by a Council resolution:

> The Council of the League of Nations declares that a state of war between two members of the League is incompatible with the spirit and the letter of the Covenant... 9 LEAGUE OF NATIONS OFF. J. 54 (1928).

The Kellogg-Briand Pact attempted to even outlaw war in 1929. Treaty for the Renunciation of War signed August 27, 1928, 46 Stat. 2343. Third, the United Nations Charter indicates that a state of war is no longer permissable. Article 51 allows the use of force only for "self-defense," and in case of "armed attack." The Preamble and Article 39 allow armed action to be taken only "in the

common interest," where necessary "to maintain or restore international peace and security." The Charter never uses the word "war" except in relation to hostilities begun before 1944. These three agreements indicate that, at the very least, peace is to be presumed when a general armistice has been concluded and hostilities suspended. The U.N. Security Council has not recognized a state of war between Egypt and Israel after the Rhodes Armistice. See Resolution of May 29, 1948, conceded in Conclusions du Gouvernement Egyptien au sujet des naivres neutres et la saisie des objets de Contrebands dans les Ports Egyptiens, 7 REV. EGYPT. DE DROIT INT'L. 235 (1951-52). Being contrary to the Charter, the state of war must be clearly proved. U.N. CHARTER, Art. 3-5. An armistice allowing resumption of hostilities would be repugnant to Article 103.

International law publicists have observed that it is entirely possible for war to be terminated today by a general armistice agreement. See J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT (1954), attributing this rule to Articles 39 and 51 of the U.N. Charter. Accord: LAW INSTITUTE, ACADEMY OF SCIENCE OF THE U.S.S.R. INTERNATIONAL LAW 434 (1957); Lachs, "La Nouvelle Fonction des Armistices Contemporains," in HOMMAGE D'UNE GENERATION DE JURISTES AU PRESIDENT BASDEVANT 315, 320-322 (1960).

That international custom and usage accepts this new rule is shown in that the majority of those major disputes arising since World War II have been concluded by general armistice alone. See, e.g., the Renville Truce Agreement ending the Netherlands-Indonesia

conflict, 1947-48 YEARBOOK OF THE U.N. 364, 376-377; Geneva Conference ending the Indochina hostilities, 1954 DOC. AMER. FOR. RELS. 283 (1955); Panmunjom Truce ending the Korean War, 47 AM. J. INT'L. L. SUPP. 186-87 (1953). Since World War II, there have been no less than ten major armistice agreements concluded by belligerents. Levie, "The Nature and Scope of the Armistice Agreement", 50 AM. J. INT'L. L. 880 (1956). In 1951 Egypt officially disclaimed the existence of a state of war in a telegram to the Security Council. 3 U.N. SCOR Doc. (S/743). Egypt is in no position to claim that war existed on June 2, 1967. Clearly, her claim that she is at war with Israel does not comport with modern practice.

Even if Egypt were at war with Israel, she is prohibited from exercising belligerent rights. The Rhodes Armistice agreement was still in force on June 2, 1967. By its terms the parties agreed "scrupulously" to respect "the injunction of the Security Council against the resort to military force in the settlement of the Palestine question"; Armistice Treaty Between Israel and Egypt, supra, Art. 1 para. 2. To refrain from "aggressive action by the armed forces of either party...against...the other," (Id.) and to abstain from "any warlike or hostile act against the military or paramilitary forces of the other party." Id., Art. II, para. 2. The terms of Articles I and II were not subject to revision by either party. The Armistice was clearly construed by the Security Council in its resolution of September 1, 1951:

> Since . the Armistice regime which has been in existence for nearly two and one 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." 6 U.N. SCOR 558th meeting 64 (S/2298 Rev. 1) (1951).

The Council had observed the preamble's statement that the Armistice was intended "to facilitate the transition from the present truce to more permanent peace." The Egyptian delegate himself called the armistice "...a non-aggression pact...a provisional settlement...with no time limit." Israel and the negotiators agreed. 5 U.N. GAOR Supp. No. 18, 30 (A/13671 Rev. 1) (1949). The rights of belligerency were clearly denied to both parties after this agreement. Egypt had no right to blockade Elath or to subject vessels passing through the straits to visit and search.

The alleged threat of invasion which Israel posed to Syria did not resuscitate belligerent rights. By its own terms (Art. 12, para. 2) the Armistice remained in force. Egypt's rights to instigate punitive measures were further limited by Article 51 of the U.N. Charter, noted supra. No armed attack had occurred. The Egypt-Syria Mutual defense agreement of 1967 only obligated Egypt to come to Syria's aid in the event of an actual attack. Moreover, if all who felt threatened could immediately attack without condemnation, the whole purpose of the United Nations would be lost. D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW (1958). Egypt even acted to prevent United Nations peacekeeping efforts by demanding the removal of U.N.E.F. 6 INT. LEGAL MAT'S., No. 3, 557-634 (May-June 1967).

Egypt was not entitled to suspend passage to Israeli shipping as an act of self-defense, executed in peacetime. There was neither

"a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation"; or a response involving nothing "unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it." J. BRIERLY, THE LAW OF NATIONS 405 (6th ed. Waldock 1963) citing the Caroline incident of 1837. See also 2 J. MOORE, INTERNATIONAL LAW 24-30 (1906). It is clear that there was no instant need to blockade Elath. Artillery trained on the Straits would be of dubious benefit to forestall invasion of Syria. These are basically offensive acts which produce only delayed results. The Litvinov-Politis Formula brands them as aggression. See L. BLOOMFIELD, EGYPT, ISRAEL, AND THE GULF OF AQABA IN INTERNATIONAL LAW 61-67 (1957). As noted supra, Egypt was neither entitled nor obliged to exercise self-defense for a third party (Syria). Moreover, while Egypt herself is the logical one to determine when self-defense is warranted, her decision may always be reviewed by law in light of all the circumstances. J. BRIERLY, supra, 507.

II. THE UNITED ARAB REPUBLIC WAS UNJUSTIFIED IN ATTEMPTING TO RESTRAIN THE UNITED STATES FROM EXERCISING HER RIGHTS OF PASSAGE.

A. THE UNITED STATES WAS ENTITLED TO EXERCISE HER RIGHT OF PASSAGE.

The action of the United States must be considered an affirmation of her rights in the face of an announced intention to prevent their exercise. This action must be distinquished from forcible self-help or intervention to obtain redress for rights already violated.

This distinction was drawn in the Corfu case. Both here, and in that case, there was negotiation between the coastal and maritime states, and the failure of negotiation was followed by the maritime states' attempt to exercise its right of passage. This Court said, in Corfu:

> The legality of this measure...cannot be disputed.... The 'mission' was designed to affirm a right which had been unjustly denied. The Government of the United Kingdom was not bound to abstain from exercising its right of passage .... ([1949] I.C.J. at 30.)

The Court's finding illustrates the principle that a state may affirm a right which has been unjustly denied, and is not bound to abstain from exercising it "although this may involve the risk of having to use force to ward off interference with its exercise." J. BRIERLY, supra p. 16 at 426-427. Thus, the action of the United States in dispatching the destroyer to escort the merchant vessel through the Strait of Tiran falls within the legalizing penumbra of the Corfu case.

B. THE PASSAGE OF THE AMERICAN SHIPS WAS INNOCENT.

Article 16 of the International Law Commission's draft of 1956 reiterated the existing law:

> Passage is innocent so long as the vessel does not use the territorial sea for committing any acts prejudicial to the security of the coastal state or contrary to the present rules, as to other rules of international law. (International Law Commission, Draft Convention on the Regime of the Territorial Sea, 50 AM. J. INT'L. 190 [1956].)

The final draft adopted by the Geneva Convention maintained the principle of inquiring into the nature of the vessel's conduct (see Geneva Convention, Art. 14, para. 4).

The Convention generally agreed that the test of "innocence" under existing law was "the manner in which the passage was carried out...." See remarks by the Danish representative in 3 Official Records, U.N. Conference on the Law of the Sea, first committee, 83, para. 27. Also U.N. Doc. A/Conf. 13/C. 1/L. 28/Rev. 1. Dr. Hyde indicated that it is the conduct of the ship which determines innocence. C. HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES, 277-278 (2d ed. 1945). The Corfu Case concluded at 30 that the British ships were engaged in innocent passage because they were not steaming in combat formation and their guns remained in fore-and-aft position. The political consequences of passage were irrelevant. See also I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 189 (1966); The Law of the Sea, Some Recent Developments, U.S. NAVAL WAR COLLEGE, INT'L. LAW STUDIES, 1959-1960 133 (1960); TAYLOR, TREATISE ON PUBLIC INTERNATIONAL LAW 280 (1901); LAWRENCE, THE PRINCIPLES OF INTERNATIONAL

LAW 184 (7th ed. 1923). The manner of passage obviously constituted no threat to Egyptian security. Even were the United States to concede that innocence is to be determined by the consequences of passage, Egypt can make no claim that the ships' passage threatened its own security either by affirming a right of passage or by shipping grain to Israel. Therefore, under either test, the passage was clearly innocent.

The Geneva Convention (Art. 14 § 4) clearly specifies that passage is presumed innocent until proved otherwise. "The text... clearly puts the burden on the coastal state to show that the passage itself...was prejudicial to the stated values of the coastal state." Gross, supra, at 582. It is impossible for the right of passage to remain a viable principle if a ship must prove its innocence before passage will be permitted. Since the right is subject only to regulation and not suspension, it is logical for international law to prescribe that the coastal state justify excluding a ship from passage. It is almost impossible for a ship to prove its innocence before it undertakes passage. The coastal state would not forego patrolling its straits merely on the strength of a captain's declaration, in any event. Requiring proof of innocent intent would cause delay and embarrassment to shipping and naval vessels as well.

Finally, "innocence" must meet a test of objective determination. Were the territorial state to be empowered to make an irrefutable determination of "innocence" the right of innocent passage would be worthless. In the Corfu Case, supra, the Court never dealt with Albania's claim to the right of unilateral

determination. It determined for itself whether passage was innocent on the basis of objective criteria, allowing the coastal state to render conclusive judgment only as to its security interests. The Geneva Convention agrees. The modification of Article 14 from the draft provisions of the International Law Commission was an attempt to avoid the subjectivity which characterized them. See statement by representative of the Soviet Union, 3 U.N. Conference on the Law of the Sea, OR 84, para. 38. "The First Committee appeared to be anxious to eliminate as far as possible any subjective tests which might restrict the traditional scope of innocent passage." Gross, supra, at 581. The final form of Article 14 allows no latitude for the coastal state to determine "innocence" by subjective criteria and no such permission is expressed or implied elsewhere in the Convention. The recognized publicists support this position. See I NYS, LE DROIT INTERNATIONAL 494 (1912), and BRUEL, INTERNATIONAL STRAITS 30 quoting Sir Horace Rumhold.

C. THE DECREES OF THE UNITED ARAB REPUBLIC CANNOT BE JUSTIFIED AS "REASONABLE REGULATIONS."

There is no question but that Nasser's statement of May 24 constituted a suspension of innocent passage. Even if characterized as a "regulation" of passage, however, Egypt's acts are illegal. The Corfu case allowed that Albania might prescribe regulations to insure that passage is "innocent" and posed no danger to other shipping. Yet the court concluded,

> Albania would have been justified in issuing regulations in respect of the passage of warships...but not in prohibiting such passage

or subjecting it to special authorization.
[1949] I.C.J. at 28.

Since Egypt's "regulations" are excessive relative to her immediate interests in navigational safety they are prohibited by the Corfu holding.

D. EVEN IF ENTITLED TO EXERCISE THE BELLIGERENT RIGHTS OF VISIT AND SEARCH, THE UNITED ARAB REPUBLIC ACTED CONTRARY TO LAW.

Egypt signalled both ships to stand by for inspection. In international law, the right of search never extends to neutral warships. See L. OPPENHEIM, op. cit., at 489, and J. COLOMBOS, INTERNATIONAL LAW OF THE SEA 693 (4th ed. 1959). W. MANNING, in COMMENTARIES ON THE LAW OF NATIONS (Amos ed. 1875) recounts at p. 455 how a dispute over the recognition of this principle was instrumental in the outbreak of the War of 1812 between England and the United States. Moreover, where a neutral merchant vessel is under convoy of a warship of its own nationality, the merchantman is also exempt from search. See Declaration of London, 1909 FOR. REL. 318, 330-331. The rule was observed throughout the First World War and has received the support of all major maritime nations. See J. MOORE, DIGEST OF INTERNATIONAL LAW, 492-493 (1906). Cf. GORDON, LA VISITE DES CONVOIS NEUTRES (1935). See, e.g., Article 34, German Prize Ordinance of 1939 quoted in J. COLOMBOS, op. cit., 697 N. 1. Egypt had no right to inspect either American vessel.

In addition, Egypt was unjustified in mounting a provocative attack upon the vessels. Had the ships offered armed resistance,

they might have been treated as enemy vessels and fired upon. J. COLOMBOS, op. cit., at 705. However, no such "armed resistance" was attempted. The vessels did not even attempt "flight", changing neither course nor speed. "Flight" would only have permitted Egypt to use force adequate to stop the vessels and may not be treated as resistance. BRITISH PRIZE MANUAL, § 145-146; 7 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 202 (1943). In practice, the custom is to fire two initial warning shots--two rounds of blanks. J. COLOMBOS, op. cit., at 701. Egypt never once displayed the customary moderation. Three shots of live ammunition were fired to range and bracket the ships. This attack was unjustifiable. See The St. Juan Baptista 5 c. Rob. 33, 35, 165 Eng. Rep. 681 (1803) and The Mentor, Edw. 207, 165 Eng. Rep. 1084 (1810).

Egypt's attempts to enforce the right of search are especially reprehensible considering the fact that international law absolutely prohibits the destruction of neutral vessels. See The Felicity 2 Dods. 381, 384, 165 Eng. Rep. 1520 (1819), The Actaeon 2 Dods. 48, 165 Eng. Rep. 1411 (1815), and Declaration of London, op. cit., Art. 48. See also prize regulations collected in 1925 U.S. NAVAL WAR COLLEGE, INT. LAW DOCS. 72-81, cited in G. Hackworth, op. cit., 466-67.

III. THE UNITED ARAB REPUBLIC HAS NO CLAIM FOR COMPENSATION ARISING FROM THE DESTRUCTION OF ITS COASTAL BATTERY AS THE UNITED STATES' RESPONSE TO SHELLFIRE CONSTITUTED JUSTIFIABLE SELF-DEFENSE.

Under the two criteria specified in the Caroline incident, supra, the American ships were clearly faced with an overt and unavoidable attack. There was no time for deliberation, as the fourth shot might have sunk a ship. Rather than serving as a warning the first three shots had bracketed the ships. Moreover, the force used by the destroyer was not excessive. The captain only destroyed the offending battery, and as soon as possible he turned and headed for the high seas to avoid further conflict. The destruction for which Egypt seeks compensation is clearly justified as necessary self-defense.

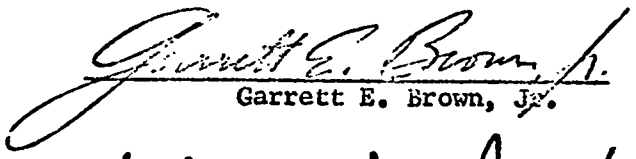
CONCLUSION

For the foregoing reasons, the United States respectfully submits that the Court find that:

1) Vessels of American registry, as well as its warships, were entitled to exercise free and innocent passage in the Tiran Straits on June 2, 1967, and that

2) Egypt has no claim of compensation for the destruction which was necessitated by her attack on the American vessels.

Respectfully submitted,



Garrett E. Brown, Jr.

William M. Piatt, IV

Of Counsel:

James W. Dunlap

Michael D. Rind

Agents for the United States
of America

TABLE OF AUTHORITIES

I. TREATIES AND CONVENTIONS

II. LEAGUE OF NATIONS DOCUMENTS

III. UNITED NATIONS DOCUMENTS

VI. PUBLICISTS - PERIODICALS

VII. MISCELLANEOUS