

# MARITIME STRATEGIC EVALUATION FOR ISRAEL 2017/18

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## The Transfer of the Tiran and Sanafir Islands to Saudi Arabia and Freedom of Navigation in the Straits of Tiran – an Unsolved Story<sup>1</sup>

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### Introduction

Straits and gulfs are sensitive places that present challenges in a location where geography, trade and politics meet.<sup>2</sup> The Straits of Tiran are located at the southern end of the Gulf of Eilat and serve as an essential waterway for all ships making their ways to the port of Eilat and Aqaba. Therefore a blockade of the Straits constitutes a serious threat to the State of Israel and was part of the reason for the outbreak of the Sinai War in October 1956 and the Six Day War in June 1967.<sup>3</sup> As a result of these two wars, Israel captured the Straits of Tiran, including the islands of Tiran and Sanafir. In both cases, Israel withdrew from the Straits some time later after signing agreements and understandings regarding freedom of navigation through them.

Freedom of navigation in straits and gulfs has developed and changed over the years from the perspective of international law (herein: the Law of the Sea). In this context, the freedom of navigation in the Straits of Tiran has been studied intensively and there is an expansive literature on the subject. However, the lion's share of the research is concerned with the period up to just after the peace agreement with Egypt in 1979.<sup>4</sup> An article published within the framework of the Heikin Chair for Geostrategy presented

- 1 This essay is part of the article: "Fifty years since the Six Day War: Freedom of navigation in the Straits of Tiran from the Law of the Sea perspective – an unsolved story", published by the Heiken Chair for Geostrategy (herein: the "article"). [Hebrew]
- 2 See Yoel Goginski, Galia Lindenstrauss, Yehonatan Shecter, "'Bottlenecks' and the vulnerability of the straits in the Middle East", *Strategic Affairs* 14(2) 73, 82 (2011). [Hebrew]
- 3 See Shaul Shai, "The battle over the Straits of Tiran – the Yarkon Operation", *Sixty Year since the Sinai War – A Collection of Articles* 13, 13 (Shai Shaul ed., 2016) (herein: Shai). [Hebrew]
- 4 See, among others: Sara Weiss Moadi, "Laws of the Sea", *International Law* 525 (Cybil Rubi and Ronen Yael, eds, 2016) (herein: Weiss Moadi); Ruth Lapidot (Eshelbecher) "Freedom of passage in the Straits of Tiran", *Hapraklit – Jubilee Book* 224 (Arnona Gavrieli and Migal Duetch eds., 5754) (herein: Lapidot); Eithan Barak, "Between Reality and Secrecy: Israel's Freedom of Navigation through the Straits of Tiran, 1956 – 1967", 16(4) *Middle East Journal* 657 (2007) (herein: Barak); Ann Ellen Danseyar, *Legal Status of the Gulf of Aqaba and the Strait of Tiran: From Customary International Law to the 1979 Egyptian-Israeli Peace Treaty*, 5 B. C. Int'l Comp. & L. Rev. 127 (1982) (herein: Danseyar); L.M. Bloomfield, "Egypt, Israel and the Gulf of Aqaba" in *International Law* (1957) (herein: Bloomfield); Leo Gross, "Passage Through the Strait of Tiran and in the Gulf of Aqaba", 33 *Law & Contemp. Probs.* 125 (1968) (herein: Gross 1968); Ruth Lapidot, "The Strait of Tiran, The Gulf of Aqaba, and the 1979 Treaty of Peace Between Egypt and Israel", 77 *Am. J. Int'l L.* 84 (1983) (herein: Lapidot 1983); Lapidot Ruth, *Freedom of Navigation, With Special Reference to International Waterways in the Middle East* (1975) (herein: Lapidot 1975); Shabtai Rosenne, "The Strait of Tiran and the Gulf of Aqaba" (1957) (herein: Rosenne); Mohamed El Baradei, "The Egyptian-Israeli Peace Treaty and Access to the Gulf of Aqaba: A New Legal Regime", 76 *Am. J.*

a geopolitical and legal survey of freedom of navigation in the Straits of Tiran over the years. In what follows, we present part of that article which explains the significance of the transfer of the Tiran and Sanafir islands to Saudi Arabia in 2016 as it relates to freedom of navigation in the Straits from the viewpoint of the Law of the Sea.

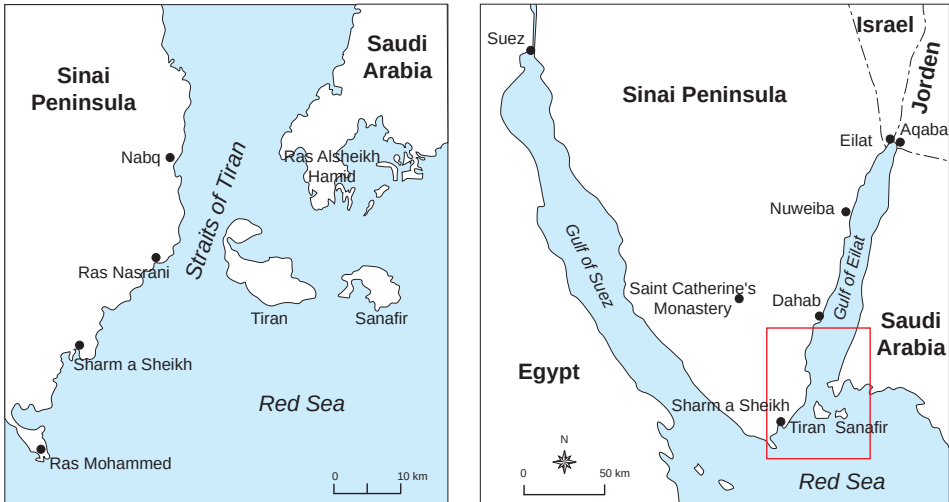


Figure 1. Map of the Straits of Tiran and the Sinai Peninsula

### The transfer of the Tiran and Sanafir islands to Saudi Arabia and the Freedom of Navigation in the Straits of Tiran

Towards the end of 1949 and following the ceasefire between Israel and Egypt, the latter began to take an interest in the importance of the Straits and the islands near them. At that time, an agreement was signed between Egypt and Saudi Arabia,<sup>5</sup> according to which Egypt was allowed to station military equipment on the island in order to protect them from being captured by Israel. The agreement was never fully disclosed, as far as is known.<sup>6</sup>

In 1982, during the withdrawal of Israel from the Sinai Peninsula, Saudi Arabia claimed ownership of the Tiran and Sanafir islands. This can be seen in statements by the

*Int'l L.* 532 (1982) (herein: El Baradei); Leo J. Bouchez, "The Regime of Bays in International Law" (1964) (herein: Bouchez); see also: Ali A. El-Hakim, *The Middle Eastern States and the Law of the Sea* (1979) (herein: El Hakim).

5 See Bloomfield, footnote 4 above, on page 8; see El-Hakim, footnote 4 on page 136.

6 See Rosenne, footnote 4 above, on page 22. Among other things, artillery was deployed on Ras Nasrani; see El-Hakim, footnote 4 above, p. 137.

former Israeli Ambassador to Egypt.<sup>7</sup> According to him, Mubarak asked the Saudis not to bring up the matter at that time in order not to endanger the completion of the Israeli withdrawal; however, the Saudis continued to put pressure on Egypt, which led to a presidential order published by President Mubarak in 1990 that specified the coordinates of the maritime boundaries of Egypt in the Mediterranean and the Red Sea and these did not include the Tiran and Sanafir islands. At the request of the Saudis, the document was submitted to the UN.<sup>8</sup>

On April 8<sup>th</sup> 2016, during the visit of the King of Saudi Arabia to Egypt, Egypt and Saudi Arabia signed an agreement demarcating the maritime boundary between the two states. The agreement specified that the Tiran and Sanafir islands would be transferred to the Saudis. It also included significant economic assistance from Saudi Arabia to Egypt, estimated at \$22 billion, including the construction of a bridge between Saudi Arabia and Egypt across the islands and connecting to the Sinai Peninsula.<sup>9</sup> According to reports in the El Ahran newspaper, Egypt notified Israel of the signing and it was also reported that Israel was notified of the intention of the Saudis to respect the agreements between Israel and Egypt and not to make any military use of the islands.<sup>10</sup> On August 17<sup>th</sup> 2017, El Ahran reported that the agreement between Egypt and Saudi Arabia includes maritime maps according to which the islands are located within the territory of Saudi Arabia. The document that was published also includes an exchange of letters between Saudi Arabia and Egypt and between Egypt and Israel which promise continued freedom of navigation for Israel in the Straits of Tiran.<sup>11</sup> Israeli Defense Minister Moshe Yaalon admitted that Israel had confirmed and even signed on its consent to the transfer of the islands.<sup>12</sup>

In the announcement by the Egyptian government, it was stated that the signing marks the end of a six-year process that included eleven meetings. On December 29<sup>th</sup> 2016, the Egyptian Council of Ministers approved the agreement subject to the approval of the Parliament. According to the agreement, Saudi Arabia would control the Tiran and

7 See Zvi Mazal, "The transfer of Tiran and Sanafir to Saudi Arabia – a violation of the peace agreement with Egypt?" (April 14, 2016); and also "The Transfer of Tiran and Sanafir to Saudi Arabian sovereignty" (August 24, 2017), *Blog – The Jerusalem Center for Public Affairs*, <http://jcpa.org.il/author/zvi/> (herein: Mazal) (last accessed November 2017). [Hebrew]

8 See Baselines of the maritime areas - Decree of the President of the Arab Republic of Egypt No. 27 (1990) Concerning the baselines of the maritime areas of the Arab Republic of Egypt, 9 January 1990, <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/EGY.htm> (accessed in November 2017).

9 See the Washington Institute, <http://www.washingtoninstitute.org/policy-analysis/view/the-israeli-angle-to-the-saudi-egyptian-island-deal>, (last accessed November 2017).

10 See Jacky Huri and Gili Cohen, "The gift of al Sisi to the King of Saudi Arabia: the Tiran and Sanafir islands in the Red Sea", *Haaretz*, April 11, 2016. [Hebrew] According to the article, Jordan was also informed of the signing.

11 See Mazal, footnote 7.

12 See Shai, footnote 3 above, pp. 13-14. It should be mentioned that it was not reported whether the consent is part of the records of the agreement.

Sanafir islands which had been under Egyptian control until then.<sup>13</sup> On January 2<sup>nd</sup> 2017, the Parliament's Constitution Committee announced that it would hold a discussion of the agreement.<sup>14</sup>

The agreement met widespread opposition in Egypt and therefore a group of lawyers filed suits in the Administrative Court to have it cancelled. Their main claim was that Tiran and Sanafir have always been under Egyptian sovereignty and that the Egyptian constitution prohibits the handing over of any Egyptian land. It was also claimed in the suit that public officials who violate the Constitution are committing a criminal act.<sup>15</sup> The Supreme Administrative Court that discussed the State's appeal of the verdict of the Administrative Court accepted the claims and rejected the government's appeal. During the discussion, representatives of the government provided new evidence supporting the position of the State that the islands are not part of Egypt and that they were received from Saudi Arabia as islands that still belong to Saudi Arabia.<sup>16</sup> It was reported that the government possesses a letter from 1957 in which Saudi Arabia demands the islands and a British book was presented which places the islands in the territory of Saudi Arabia. As mentioned, the court did not accept the position of the State and ruled that the islands cannot be transferred to Saudi Arabia and that doing so is in violation of the Egyptian Constitution. However, the Court of Urgent Matters ruled on April 2<sup>nd</sup> 2017 that the agreement is legal and can be implemented.<sup>17</sup> Thus, the court cancelled the decision of the Supreme Administrative Court and opened the way for the approval of the agreement by the Parliament with an absolute majority in June 2017 and its subsequent approval by the President of Egypt.<sup>18</sup>

This essay does not examine the verdicts of the Egyptian courts and will assume that the islands are now lawfully under Saudi sovereignty. We are interested in the questions that are brought up by the transfer of the islands from the viewpoint of the Law of the Sea.

On April 24<sup>th</sup> 1996, Saudi Arabia ratified the 1982 Convention on the Law of the Sea (herein: the 1982 Convention). On this date, it submitted detailed Declarations and

13 See <http://www.dailynewsegypt.com/2016/12/29/cabinet-approves-red-sea-lands-demarcation-sends-bill-parliament> (last accessed June 2017).

14 See <http://www.dailynewsegypt.com/2017/01/02/demarcation-agreement-will-discussed-full-transparency-parliaments-judicial-committee> (last accessed June 2017).

15 See <http://www.dailynewsegypt.com/2016/12/30/sending-red-sea-islands-agreement-parliament-violation-malek-adly/> "The Arab Republic of Egypt is a sovereign state, united and indivisible, where nothing is dispensable, and its system is democratic republic based on citizenship and the rule of law...." (last accessed June 2017).

16 See <http://www.dailynewsegypt.com/2016/12/19/administrative-court-postpones-red-sea-island-deals-final-verdict-16-january/> December 19, 2016 (last accessed June 2017).

17 See: Aljazeera <http://www.aljazeera.com/news/2017/04/egypt-court-voids-block-islands-transfer-saudis-170402132102057.html> April 4, 2017 (last accessed June 2017).

18 See Mazal, footnote 7 above; and see also <http://www.bbc.com/news/world-middle-east-40278568> (last accessed June 2017).

Statements regarding the Convention and this included the Saudi reservations regarding a number of points.<sup>19</sup> It is worth dwelling on what is stated in the declaration.

The first reservation declares that Saudi Arabia is not obligated by, committed to or bound by any demand regarding maritime territory handed over to it by other countries at the time they signed the Convention.<sup>20</sup> The exact intention of the Saudi reservation and also whether it relates to the Egyptian declaration regarding the consistency between the peace agreement and the Convention is unclear.<sup>21</sup> From the reservation's language, it appears that the Saudis want to disassociate themselves from any agreement that it is not a party to and which is related to rights to its maritime territory. The second Saudi reservation supports this understanding and states explicitly that Saudi Arabia does not accept any agreement that infringes on its maritime rights.<sup>22</sup>

In 1957, Saudi Arabia declared that the Gulf of Eilat is an internal sea (within a country's territory), along whose shores dwell only the Arab nation. This meant that they do not recognize the State of Israel as a country that borders on the shores of the Gulf of Eilat.<sup>23</sup> It has not abandoned this position until today. An echo of this position can be found in the third reservation in which Saudi Arabia relates to paragraphs 122 and 123 of the Convention on the Law of the Sea which discusses an enclosed or a semi-enclosed

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19 See Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331: in paragraph 2(d): "'Reservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State". See also Yoram Dinstein, *International Conventions* (1974), pp. 41-50.

20 See Oceans & Law of the Sea United Nations, Declarations and Statements, Upon ratification [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#Saudi](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Saudi) (last accessed June 2017)(herein: Declarations and Statements), Saudi Arabia, in paragraph 1: "The Government of the Kingdom of Saudi Arabia is not bound by any domestic legislation or by any declaration issued by other States upon signature or ratification of this Convention. The Kingdom reserves the right to state its position concerning all such legislation or declarations at the appropriate time. In particular, the Kingdom's ratification of the Convention in no way constitutes recognition of the maritime claims of any other State having signed or ratified the Convention, where such claims are inconsistent with the provisions of the Convention on the Law of the Sea and prejudicial to the sovereign rights and jurisdiction of the Kingdom in its maritime areas."

21 In 1983, when Egypt signed the Convention on the Law of the Sea of 1982, it attached a declaration that the provisions regarding passage in the Straits of Tiran and the Gulf of Aqaba (this is how it appears in the original), which are included in the peace agreement with Israel, are consistent with the norm set down in the Convention regarding the Straits.

22 See Declarations and Statements, footnote 20 above, paragraph 2: "The Government of the Kingdom of Saudi Arabia is not bound by any international treaty or agreement which contains provisions that are inconsistent with the Convention on the Law of the Sea and prejudicial to the sovereign rights and jurisdiction of the Kingdom in its maritime areas."

23 See A/3500 G.A.O.R., 11th Session, 15 January 1957, 233, the speech of the Saudi representative to the General Assembly of the UN: "...I turn now to the question of the Gulf of Aqaba. Basically, this is not an international question. I bring it to the attention of the General Assembly only to disprove its international character. The facts are simple to state. The Gulf of Aqaba is a national inland waterway, subject to absolute Arab sovereignty..."

sea.<sup>24</sup> Paragraph 123 states that the countries along the coasts of such a sea must cooperate but Saudi Arabia makes clear in the reservation that it will only cooperate with countries that are signed on the Convention.<sup>25</sup> Out of all of its many maritime neighbors only Israel is not signed on the Convention.

In the fifth reservation, Saudi Arabia states that it does not recognize the right of innocent passage through its territorial waters as long there are alternative routes.<sup>26</sup> This is consistent with what it is stated in paragraph 38(1). Therefore, it appears that Saudi Arabia will not prevent Israel from passage through its territorial waters in the Straits of Tiran since there is essentially no alternative water passage. In the last reservation, Saudi Arabia states that it will act according to Saudi law and will enforce these laws in the areas under its maritime sovereignty.<sup>27</sup>

## Discussion

Prior to the discussion, it is necessary to mention that it was not possible to examine the original agreements (as opposed to what was reported in the press) between Israel, Egypt, Saudi Arabia and the US regarding the transfer of the islands.

Saudi Arabia has borders with a large number of countries, including maritime borders. This is true in the case of Kuwait, Bahrein, Qatar, the United Arab Emirates, Yemen and Jordan. With other countries it shares a common gulf, which is the case for Iran, Eritrea, Sudan, Egypt and Israel. It appears that this is how the large number of declarations, reservations and clarifications that it sought to include when ratifying the 1982 Convention is to be understood. For Saudi Arabia, the Convention on the Law of the Sea is a highly important matter. It is also worth remembering that Saudi Arabia's maritime borders are all located in complex areas from the maritime and geopolitical viewpoints. In other words, according to the Saudi government, the fact that its shores are located along these gulfs and straits required making the clarifications that it did. As a result, it appears

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24 See United Nation Convention on the Law of the Sea dates December 10<sup>th</sup> 1982, 1833 U.N.T.S.3 (herein: the 1982 Convention): "enclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal states."

25 See Declarations and Statements, footnote 20 above, Saudi Arabia, in paragraph 3: "The Government of the Kingdom of Saudi Arabia considers that application of the provisions of Part IX of the Convention concerning the cooperation of States bordering enclosed or semi-enclosed areas is subject to the acceptance of the Convention by all States concerned."

26 Ibid., Saudi Arabia, in paragraph 5: "The Government of the Kingdom of Saudi Arabia considers that innocent passage does not apply to its territorial sea where there is a route to the high seas or an exclusive economic zone which is equally suitable as regards navigational and hydrographic features."

27 Ibid., Saudi Arabia, in paragraph 7: "The Kingdom of Saudi Arabia shall issue its internal procedures for the maritime areas subject to its sovereignty and jurisdiction, so as to affirm the sovereign rights and jurisdiction and guarantee the interests of the Kingdom in those areas."

that in the matter of the transfer of the islands Saudi Arabia is attempting to preserve its maritime borders and its sovereignty. From the perspective of the 1982 Convention, Saudi is not recognizing agreements that were not signed by it. The implication is that, from its point of view, the peace agreement between Israel and Egypt does not apply to the islands from the point in time that they were returned to its sovereignty.

Egypt and Israel, by signing the peace agreement, adopted a very expansive regime of passage relative to what is stated in the 1982 Convention; however, the islands were essentially not under the sovereignty of Egypt at the time of the signing of the agreement. And even if they were, the islands transferred to Saudi sovereignty in 2016. Saudi Arabia has declared, in the aforementioned second reservation, that it is not bound by any agreement that contravenes the 1982 Convention or its sovereignty. The agreement with Egypt is not consistent with the Convention because it is overly broad and in Saudi Arabia's opinion, it violates its right to the islands and straits in Saudi territorial waters. It appears therefore that in this situation Saudi Arabia can claim that paragraph 311 of the Convention (which gives priority to an agreement between countries over the Convention to the extent that it does not infringe on the right of a third country) is not fulfilled with respect to the peace agreement infringing on their sovereignty and therefore Saudi Arabia is not bound by it.

With respect to the Straits, the Convention describes the case of the Straits of Tiran, i.e. a passage from the open sea/an economic zone (the Red Sea) to the territorial waters of the various countries in the Gulf of Eilat by way of a narrow passage.<sup>28</sup> According to the Convention, the countries with shores on a semi-enclosed sea are to determine among themselves the policy of rights and obligations.<sup>29</sup> Saudi Arabia conditions its necessary cooperation on the signing of the Convention by all of the countries with shores on the sea. Thus, since Israel is not signed on the Convention, essentially there is no possibility of a resolution in the matter of passage through the Gulf of Eilat and the Straits of Tiran.

The full article discusses the fact that the restrictions on passage through the Straits of Tiran due to a state of war that were put in place by Egypt (in 1957 and 1967) are not consistent with the UN Charter due to the termination of the state of war between Israel and Egypt according to the 1949 ceasefire agreement. The situation with respect to Saudi Arabia is different. It never recognized Israel and at least from the point of view of international law, it is still in a state of war with Israel.<sup>30</sup> In the seventh reservation of Saudi Arabia, which is appended to the acceptance of the 1982 Convention, it is specified that Saudi Arabia's maritime territory is subject to its laws. Paragraph 30 of

28 See the 1982 Convention, footnote 24 above, paragraph 122: "For the purposes of this Convention, "enclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States."

29 Ibid., paragraph 123.

30 See Lapidot, 1983, footnote 4 above, p. 102.



the 1982 Convention discusses the passage of warships through the territorial waters of a country.<sup>31</sup> Passage through the Straits of Tiran requires passing through the coastal waters of Saudi Arabia, at least partially. Since Saudi Arabia is not bound by the peace agreement it can in theory enforce its laws and paragraph 30 of the Convention and prevent the passage of Israeli warships through the Straits of Tiran in order to protect itself.<sup>32</sup> However, in this situation it is possible to claim that there is a right of innocent passage for warships based on the Corfu verdict.<sup>33</sup> Nonetheless, it appears that at this point maritime law makes it possible to act against Israel and to at least hinder passage through the straits.

## Conclusion

This essay demonstrates that since the founding of the State of Israel the Straits of Tiran have been a source of friction between Israel, Egypt and Saudi Arabia. Over the years, both the geopolitical situation in the region and the Law of the Sea have changed. In the case of the former, partial agreements were signed between Israel and Egypt in 1949, 1956 and 1967, until in 1979 a peace agreement was signed between the two countries. This contract brought to an end the struggle over freedom of navigation in the Straits of Tiran between the two countries. From the viewpoint of the Law of the Sea, the issue of passage through the Straits went through a process of consolidation from customary law to the Geneva Convention of 1958 and was reinforced by the 1982 Convention. These two processes determined the situation in the region and created certainty and security with respect to passage through the Straits of Tiran. Moreover, the peace agreement is fully valid even after the 1982 Convention.

The transfer of the Tiran and Sanafir islands to Saudi Arabia can and is changing the situation. The return of the islands to Saudi Arabia raises major questions from the

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31 See the 1982 Convention, footnote 24 above, paragraph 123: "If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately."

32 See El Baradei, footnote 4 above. In El Baradei's opinion, Saudi Arabia can claim that the peace agreement included freedom of passage, not freedom of navigation. In his opinion, it can—in the name of the peace agreement that all of the sides are bound by and according to the limited interpretation—prevent the passage of warships or ships that threaten peace.

33 See *The Corfu Channel Case (Merits) (United Kingdom vs. Albania)* ICJ. Reports, 1949, 3–4. In this affair, a claim was made by Britain against Albania regarding the channel between Albania and the Greek island of Corfu. The suit concerned the fact that two British warships were damaged on October 22<sup>nd</sup> 1946 in the Corfu Channel by sea mines and 45 British sailors were killed. The claim was made that the mines were placed by Albania. The court was asked to rule on the interpretation of innocent passage. Albania claimed that it has the authority to determine right of passage in the channel. Among other things, the court was asked to decide whether the passage of two warships had infringed on the sovereignty of Albania. The court ruled that in times of peace warships have the right of innocent passage in international straits. The court thus formalized and expanded the meaning of innocent free passage. See also: Lapidoth 1975, footnote 4 above, on p. 39

viewpoint of the Law of the Sea, at least with respect to Saudi territory. Even if according to media reports Saudi Arabia has committed itself to respecting the agreements, it is not bound by the peace agreement since it is not a party to it, at least according to international law. Israel is not signed on the 1982 Convention and therefore Saudi Arabia does not view itself as bound to grant it rights based on the Convention. Moreover, Saudi Arabia does not recognize the State of Israel and there is a state of war between the countries.

It appears possible—at least from the viewpoint of the Law of the Sea—that the situation could again deteriorate to a point where Saudi Arabia may deny the right of passage through the Straits along the length of its coast to Israeli ships and ships making their way to or from Israel. Without an explicit agreement between Israel and Saudi Arabia, it may be that we are again exposed to a threat to freedom of navigation in the Straits. In this sense, the existing situation—fifty years after the Six Day War—is an unsolved story.