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The State of Israel and the Convention on the Law of the Sea – the Current State

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Introduction

For over a decade now, various events in the marine domain in our region, not necessarily related one to another, repeatedly focus our attention on this arena. A partial list would include these, for example: The discovery of gas deposits in Israel's Exclusive Economic Zone and the question of their development; the delimitation of the maritime border between Israel and Lebanon; the tension with Turkey over the "blockade" of Gaza and the question of maritime zones with Libya; the joint gas pipeline from the Eastern Mediterranean to Europe; the pollution of Israel's shores with tar, etc. In this context, the question of Israel's status and its rights from the perspective of the Law of the Sea is raised.

A closed seminar was held on March 8, 2021, at the Maritime Policy & Strategy Research Center, attended by experts and policymakers in Israel on the question of: Pros and Cons of Israel's Joining the Convention on the Law of the Sea.[1] In view of what was said there, this article seeks to present the main insights on the issue of Israel's non-signature of the Convention on the Law of the Sea in 1982, and to examine whether, and to what extent, the political and economic developments within the international and regional system this past decade justify revisiting the pros and cons of Israel's joining the Convention.

First, we will present the background of the signing of the Convention on the Law of the Sea in 1982. We shall then present the main reasons why Israel did not join the Convention: (1) The status that was given to the PLO and the fear of the appearance of recognition of the PLO had Israel signed it; (2) The diminished rights of passage in the Straits of Tiran; (3) Restriction of military vessels' ability to conduct searches on the high seas; (4) Obligation to submit to international arbitration in case of an unresolved maritime dispute; (5) The USA's non-signing of the Convention. For each one of these reasons, I shall present the current status. In the article's conclusion I shall present several forward-looking recommendations, to the extent that they

[1] The seminar was held under the Chatham House Rule, i.e., the names of the participants and their affiliations cannot be made public, however anything said there can be used. This paper constitutes its author's interpretation of what was said in the seminar. Any error or misunderstanding are his sole responsibility.

relate to the continued debate on Israel's position regarding its signing up to the Convention.

The main argument of the paper is that it is worth evaluating the prevailing claim that Israel has no reason to join the Convention on the Law of the Sea at the present time, since it enjoys all its rights due to the very fact that it accepts the Convention as customary international law and on the other hand it is not subjected to its inherent pitfalls. The changes in the Eastern Mediterranean and Israel's current status allow it to take an initiative which will enable it to deal successfully with challenges in the maritime domain, while not necessarily taking risks. Under these circumstances the Convention on the Law of the Sea can serve as a lever, rather than a hinderance, which Israel can use to advance its objectives.

The Background for the Creation of the Convention on the Law of the Sea

International conventions are the main legislative tool of international law. They are the main means for creating norms, commitments and institutions.[2] The normative basis empowering the conventions, and which motivates countries to join them is the fundamental customary rule according to which agreements have to be honored (Pacta sunt servanda). Thus countries, including Israel, create a contract which reflects the convergence of their interests, and in which they assume upon themselves legal duties and acquire entitlements for themselves, which create mechanisms enabling cooperation between them. In today's era of global international law, this tool institutes a political discourse of rights and duties. It reflects both on domestic law within countries and on the interrelationships between them.[3]

The overriding goal of the Convention on the Law of the Sea is to regulate geographically, peacefully, and fairly, the use and exploitation of the world's largest and most important natural resource.[4] The laws of the sea were among the first to develop as customary international law and among the first to begin to take form through codification.[5] In this sense, this is a European process, since Europe was the leader concerning the ability to use the high seas through large ships and

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2 See: Orna Ben-Naftali and Yuval Shany *International Law between War and Peace* 367–373 (2006) [Hebrew] (hereinafter: Ben-Naftali and Shany)

3 See: Ben-Naftali and Shany, ibid, footnote 2, p. 19.

4 See: United Nations Convention on the Law of the Sea, signed 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397 (1982) (hereinafter: Convention on the Law of the Sea).

5 See: Sarah Weiss Maudi, "Laws of the sea," *International Law* 525, 525 (third issue, Robbie Sabel and Yael Ronen editors, 2016 [Hebrew] (hereinafter: Weiss Maudi) [Hebrew]

suitable instrumentation, and it was also Europe that created the realization of the importance of a military naval force.[6] After hundreds of years in which the maritime customs developed, the First United Nations conference on the Law of Sea (UNCLOS I) took place in 1958 in Geneva with 86 countries attending. The conference formed four conventions which, from this point onwards, became the normative basis for the Law of the Sea: the Conventions on the Territorial Sea and Contiguous Zone; the Convention on the High Seas; the Convention on the Continental Shelf, and the Convention on Fishing and Conservation of the Living Resources of the High Seas. There was an intention to create another Convention on the Compulsory Settlement of Disputes arising from the Convention on the Law of the Sea, however this one never reached fruition. Israel signed and ratified the first three conventions and they came into effect in 1961. The last convention was signed but never ratified.[7]

The third conference on the Law of Sea was between 1973 and 1982. It consisted of 11 rounds of talks over 585 days. It took place alternatingly in three countries.[8] Israel was an active participant in all these deliberations. The Convention was opened for signing on December 10 1982 at Montego Bay in Jamaica. The Convention came into force on November 16, 1994 – one year after the sixtieth country ratified it. Until today the Convention has been ratified by 168 countries and organizations.[9] In the eastern Mediterranean region, Lebanon, Egypt and Cyprus have signed and ratified the Convention. Israel, Syria, and Turkey, however, have not. Nevertheless, Israel accepts the customary guidelines of the Convention on the Law of the Sea, including the guidelines regarding the maritime zones.[10]

The reasons Israel did not join the Convention on the Law of the Sea

In the course of the seminar, it became clear that at the basis of Israel's abstention from joining the Convention were several reasons not necessarily related to one another, but which ultimately drove the decision on this issue. Following is a review of the five main reasons for Israel's decision not to sign and their meaning today.

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6 See: Donald R. Rothwell & Tim Stephens, THE INTERNATIONAL LAW OF THE SEA (2016) (hereinafter: Rothwell & Stephens), p. 1.

7 See: Weiss Maudi, footnote 5, p. 526.

8 The second conference on the Law of Sea took place in 1960 and failed to achieve any results. It is not relevant to this article.

9 See: United Nations convention on the law of the sea (table of signatures and ratifications)

10 See: Attorney General, Opinion of the Deputy Attorney General regarding the Law Applicable in Marine Areas, January 15 2013 (clause 37) [Hebrew].

1. The PLO's signing of the Convention

The Ministry of Foreign Affairs documents from 1982 reveal that the most important reason for Israel not to sign the Convention was the fact that a decision was made at the convention, enabling national liberation organizations to join, thereby obtaining observer status in the institutions which would be set up due to the Convention. This effectively paved the way for the PLO to join the Convention and Israel was keen to prevent the appearance that by its signing the Convention it was granting recognition to the organization and accepting its membership.[11] The documents reveal division of opinions among the professionals, but ultimately – and considering that this took place while the First Lebanon War was being fought – the decision was made not to sign.

The situation today: In 1993, Israel and the PLO signed the Oslo Accords, in which Israel recognized the latter as the legal, legitimate representative of the Palestinian people, and the Palestinian Authority was established. Various subsequent agreements were signed with the Authority. In other words, the current situation is that the reason which validated the 1982 decision has become meaningless. Moreover, in September 2019 the Palestinian Authority deposited its declaration regarding its maritime zones offshore Gaza at the UN, in accordance with the Convention on the Law of the Sea.[12] This means that the Palestinian Authority is using the Convention for political and economic advancement of issues it regards as important. At the same time, Israel is not a party to the Convention and is not taking any measures whatsoever in the maritime domain, which relate to consolidating its hold on that domain, at least not in any way related to the Law of the Sea.

2. Navigation through the Straits of Tiran

The 1958 Convention on the Territorial Sea and Contiguous Zone states that navigation in the straits would be open to all for "Innocent Passage".[13] However, in practice the

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11 See for example: Lydia Shukrun, Manager of the Department of Israeli Law and Law of the Sea, to Alon, August 15, 1982, Subject: Law of the Sea, Straits of Gibraltar, Israel State Archive, File MFA-5873/10 [Hebrew]; and Shabtai Rosen to Rubinstein, November 3, 1982, Subject: Law of the Sea – the Final Draft, Israel State Archive, File MFA-5873/12 [Hebrew].

12 See: Declaration of the State of Palestine regarding its maritime boundaries in accordance with the United Nations Convention of Law of the Sea. State of Palestine Ministry of Foreign Affairs and Expatriates.

13 See: Convention on the Territorial Sea and Contiguous Zone (1958), Clause 16(4); and also: ICJ-Corfu Channel case, Judgment – (1949). This regime was created and specified de facto in the ruling by the international Court of Justice on the Corfu affair back in 1949.

blocking of the Straits of Tiran by Egypt was one of the main reasons for the outbreak of the Sinai War in 1956 (which preceded the creation of the Convention) and also for the Six-Day War in 1967. And so, the 1979 peace treaty between Israel and Egypt specifies that navigating in the Straits of Tiran would be "freedom of navigation" ("unimpeded and non-suspendable freedom of navigation and overflight"), like on the high seas. In other words, the parties understood the sensitivity of this issue and upgraded the regime as it exists in the Convention from "Innocent Passage" to "Freedom of Navigation".[14]

Three years later, in 1982, the Convention on the Law of the Sea downgraded the right of passage through the Straits of Tiran from the outset it specified a new regime in the straits, named Transit Passage, which allows for passage without an option to remain, when the strait connects between high seas or an Exclusive Economic Zone and other high seas or another Exclusive Economic Zone.[15] The problem was that the Straits of Tiran do not fit this definition. They connect between high seas (the Red Sea) and territorial waters of other countries (Saudi Arabia and Egypt, in the Gulf of Eilat), and therefore it is not possible to benefit from the rights to "Transit Passage", and rather, one must make do with an "Innocent Passage" regime, which is prevalent in straits of this kind.[16] According to the Convention on the Law of the Sea, "Innocent Passage" can be suspended for various reasons (technical or safety).[17] Various documents of that time indicate that the reason for Israel's objection to the Convention on the Law of the Sea was the downgrading of the level of passage regime in the Straits of Tiran.[18] The concern was of the possibility of suspension and control over all passes through the strait en route to or from Israel. This was in view of the bitter experiences of 1956 and 1967 and, in practical terms, that the straits might once again be blocked to navigation.

The situation today: In the peace treaty with Egypt, whose signing had preceded the Convention, the navigation regime in the straits was settled and was upgraded to "Freedom of Navigation". There is broad agreement among scholars that the peace agreement takes precedence over the Convention, being a preceding and specific

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14 See: Peace Treaty Between the State of Israel and the Arab Republic of Egypt of March 26, 1979, in clause 5(2).

15 See: Convention on the Law of the Sea, footnote 4, in clauses 37–44.

16 See: Convention on the Law of the Sea, footnote 4, in clause 45(1)(b).

17 See: Convention on the Law of the Sea, footnote 4, in clause 19(2).

18 See for example: By: Arieh Rona, Manager, Administration of Shipping and Ports, to Minister of Transportation, Mr. Yisrael Kessar, on January 2, 1996, Subject: State of Israel's joining the Convention on the Law of the Sea, Israel State Archives, file GL-40248/23.

agreement. However, in 2016 Egypt and Saudi Arabia signed an agreement in which, inter alia, the islands of Tiran and Sanafir were returned to the sovereignty of the latter, effectively conceding half of the Straits of Tiran along with it. Saudi Arabia (currently) recognizes neither Israel nor the peace treaty signed between Israel and Egypt. Neither does it accept (at least not officially) the change in the navigation regime in the straits. Therefore, as far as Israel is concerned, there is a concern today that following the agreement between Egypt and Saudi Arabia, and in view of the Convention on the Law of the Sea, it would be possible once again to block at least half of the passage through the straits.[19] It is likely that the solution for this issue lies in a negotiated settlement between all the parties, not necessarily in accordance with the Convention on the Law of the Sea.

3. Prohibition on searching ships on the high seas

Another reason for Israel's non-signature to the Convention on the Law of the Sea was potential exposure to prosecution in international forums due to military activities on the high seas. The Convention allows for "visits" by navy vessels to civilian ships on the high seas, however not under the authority of an organized multinational force, only if these are suspected of piracy, slave trade, illegal broadcasting or questions of nationality or flag.[20] The Convention does not recognize anti-terrorism as grounds for enforcement by means of warships on the High Seas – a practice Israel has engaged in over many years of its war against terror.

The situation today: The past decade is characterized, from the security perspective, as a time of a low intensity conflict. This type of warfare is characterized by "under the radar" activities, with a high degree of deniability. In addition, it is clear that a large proportion of the activity during this period is done via proxies. It is possible that the terrorist activity that characterized the preceding decades (for example the attempt to smuggle weapons in 2002 on board the *Karine A*) is less relevant. Therefore, perhaps, in the current reality, this consideration is less significant. Furthermore, it is possible that the risk in this respect can be hedged by adding an exception clause when signing up to the Convention (see below).

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19 See: Benny Spanier, "The Transfer of the Tiran and Sanafir Islands to Saudi Arabia and Freedom of Navigation in the Straits of Tiran – an Unsolved Story", in Shaul Chorev and Ehud Gonen (eds.), *Maritime Strategic Evaluation for Israel 2017/18* (Haifa: Maritime Policy & Strategy Research Center, University of Haifa, 2018), pp. 147–155.

20 See: Convention on the Law of the Sea, footnote 4, in clause 110; and also: Rothwell & Stephens, footnote 6, pp. 175–176.

4. Mandatory arbitration

Article 9(1) of the Convention on Fishing and Conservation of the Living Resources of the High Seas from 1958 specified, for the first time in maritime law, a mechanism of mandatory arbitration.[21] In case of disagreement between parties, the dispute would be referred to a committee consisting of five members, unless the parties agree on some other proceeding for resolving the dispute. This is almost certainly the reason why Israel never ratified that convention.

Chapter XV of the Convention on the Law of the Sea of 1982 is dedicated to dispute settlement. Clause 279 specifies the duty of the countries to resolve differences through peaceful means.[22] It states that if the parties fail to settle the dispute between themselves, the section in the Convention concerning mandatory arbitration – the second part of Chapter XV – would be enacted.[23] And indeed, clause 287 specifies all of the possible ways for resolving the potential disputes (the various forums) and the countries are invited, when signing on to the Convention, to choose their preferred options. As a rule, the Convention on the Law of the Sea does not permit reservations or abstention from mandatory arbitration, except in two main cases cited in clause 298: in disputes concerning the delimitation of maritime borders (298(1)(a)(I); and disputes on military issues (298(1)(b)).[24]

From what some of the experts in the seminar said, one could deduce that the option of mandatory arbitration within the Convention on the Law of the Sea is the main reason, today, for Israel's not joining the Convention. Israel wants to prevent the possibility of being "dragged" into litigation in front of international forums regarding its activities on the high seas and disputes concerning these activities.

The situation today: Israel's problematic failure in the delimitation of the land border affair regarding Taba in 1988 considerably cemented its conviction against litigation in front of international forums.[25] In terms of the Convention on the Law of the Sea, nowadays, one can list several significant issues which could form grounds for

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21 See: Convention on Fishing and Conservation of the Living Resources of the High Seas (1958), clause 9(1).

22 See: Convention on the Law of the Sea, footnote 4, in clause 279.

23 See: Convention on the Law of the Sea, footnote 4, in clause 281(1).

24 See: Convention on the Law of the Sea, footnote 4, in clause 298; see also: Rothwell & Stephens, footnote 6, pp. 491–494. There is one more case in which a reservation is acceptable, and this concerns Security Council decisions to exercise its authority over the dispute. For more details

25 See: Robbie Sabel "The Attempts to Negotiate a Compromise Solution to the Taba Dispute", *Bar Ilan Law Studies* 14, 507,517–518 (1997) [Hebrew]

mandatory litigation in such forums: the dispute over the maritime border between Israel and Lebanon; the maritime boundary around Gaza with the Palestinian Authority (whenever that time comes); the right of passage in the Straits of Tiran, in particular within the zone controlled by Saudi Arabia; the restrictions on navigation and entry to the Gaza Strip by sea; the cross-border offshore reserves (especially in the Lebanon area) and, as mentioned, the issue of conducting searches on suspicious vessels on the high seas.

There is a measure of scope for dealing with the mandatory arbitration issue. An initial quantitative examination shows that as of today, 41 countries have attached provisos to one of the abovementioned issues or to both of them. This means about 25% of the countries which are party to the Convention, and therefore this is not a negligible occurrence. It means, on the one hand, that an international practice is being installed, whereby countries join a convention but reserve the right to defend their interests in certain aspects. On the other hand, there is a phenomenon by which international forums take upon themselves authorities transcending the letter of the convention, and refuse to accept those provisos. This is the case in the South China Sea – China's claims; and also in the case of the Strait of Kerch between the Sea of Azov and the Black Sea – Russia's claims.

The experts at the seminar drew an ambiguous picture, which can be assessed in various ways. On the one hand, some claimed that there is no reason to join the Convention since Israel accepts it as customary international law, does not benefit from it, and avoids the risk of being "dragged" into international forums. On the other hand, some claimed that joining would enable hedging the existing disputes and would provide Israel with a normative leverage against its adversaries, which would enable it to progress efficiently toward resolving the existing disputes.

5. The United States' abstention from joining the Convention on the Law of the Sea

From reading documents in the Ministry of Foreign Affairs' archive it appears that the United States' decision not to join the Convention, due to its own considerations, also had an influence on the Israeli decision.[26] The opinions in the seminar were divided over how much the United States' position influenced Israel's decision.

The situation today: Joe Biden's entry into the White House in early 2021, the return of the United States to the Paris Accords on Climate Change and other agreements, as well as the general trend of international cooperation, indicate a change in the

[26] See for example: "The Steering Committee for the Interministerial Advisory Committee on the Maritime Issue", 16.6.1982. Israel State Archives, file MFA 5873/10.

United States' approach. It is difficult to predict whether this change will apply also to the Convention on the Law of the Sea and whether the United States will be joining it. On this matter the opinions of the experts at the Seminar were divided and it appears that it is not possible to get a clear, unequivocal picture. At the same time, one can presume that should the United States join the Convention, this will be a significant component in Israel's considerations as to whether to join this move.

Forward-Looking Recommendations

1. It is worth evaluating, through academic research, the claim that at present Israel has no reason to join the Convention on the Law of the Sea, since on the one hand, it enjoys all the rights in the Convention due to the fact that it accepts the Convention as customary law, while on the other hand, it is not subjected to its inherent pitfalls. The study should examine the challenges Israel faces in the maritime arena and, in each one, would weigh the advantages and disadvantages in joining the Convention. Even if it may seem, at one time or another, that the balance is shifting in one direction or the other, the situation in our region and in the international arena is changing and the balance of power needs to be revisited from time to time.
2. The declaration by the Palestinian Authority of the maritime zones in the Gaza region challenges the State of Israel, Egypt and Cyprus. As far as Israel is concerned, the declaration is a challenge to the settling of this area in future negotiations (whenever they occur). Israel ought to push forward its own Maritime Regions Law, in which it will declare its own boundaries, including in this region.
3. Concerning half of the Straits of Tiran, which are under Saudi sovereignty, there is a question as to the navigation regime as it appears in the Convention. This issue will need to be discussed with Saudi Arabia, if and when a dialog will take place between the parties. Experts should prepare the groundwork for this dialog, or for an attempt to resolve the issue through indirect means. Past experience has shown that it is better to reach an early, agreed solution before it is too late.
4. It is advisable to conduct an empirical academic study at the international level that would examine the issue of provisos countries install under clause 298 of the Convention (delimitation of boundaries and military activity). It should ask whether this mechanism does indeed provide countries protection against intervention of international forums in local conflicts and disputes and to what extent this can be relied on. Such a study can confirm or dispel the claim that there are mechanisms within the Convention which provide sufficient protection against mandatory arbitration, thereby influencing Israel's decision on this issue.

5. The proper professional levels should conduct a dialog with the United States on the question of its position toward joining the Convention on the Law of the Sea. This dialog ought to provide clarity as to whether a change in their attitude can be expected regarding joining the Convention, and what would their position be should Israel decide to join without them.