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The Legal Status of Tiran and Sanafir Islands

Askar H. Enazy

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Introduction

On April 8, 2016, in the presence of Salman bin Abdulaziz Al Saud, the King of Saudi Arabia, and Abdel Fattah el-Sisi, the President of the Arab Republic of Egypt, at the latter's presidential palace of Al-Ittihadiyah in Cairo, Egypt's prime minister and the Saudi deputy crown prince cosigned the maritime boundary delimitation agreement between the two countries concerning the area along the Red Sea.¹ It quickly became known, in the media of both countries and beyond, as the "Tiran and Sanafir Accord," a reference to two uninhabited islands at the entrance of the Gulf of Aqaba that, though not mentioned by name in the text of the agreement, were recognized implicitly as constituting part of the Saudi territorial sea.

As stipulated in its articles, the boundary agreement would come into force only after being ratified by both contracting countries in accordance with their respective constitutional procedures.² This Saudi Arabia had done shortly thereafter.³ Egypt, on the other hand, has not, despite that the fact that more than one year had already passed since it placed its signature on the accord. The Egyptian cabinet did not approve the agreement until the end the year, on December 29, before referring it to the parliament, which has not yet set a date to debate it.⁴

Officially, the Egyptian government⁵ blamed the long delay in ratifying the maritime agreement on the ongoing legal challenges and appeals filed against it, culminating in the High Administrative Court ruling of January 16, 2016, which declared it null and void for allocating the "Egyptian" Tiran

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- (1) Text of the 2016 Saudi-Egyptian maritime boundary delimitation agreement in *Al-Youm Al-Sabi*, June 25, 2016, <http://www.youm7.com/2775222>.
 - (2) Article 3 of the agreement. Under the articles of Saudi Arabia's Basic Law (constitution), all executive, judicial and legislative powers are invested exclusively in the person of the king as head of state, government, the judiciary and legislature.
 - (3) *Okaz*, April 25, 2016; *Al-Riyadh*, May 2, 2016.
 - (4) *Al-Ahram*, December 29, 2016. In the case of Egypt, a constitutional separation of powers has existed in theory since 1952. In practice, however, all powers are, and have been, concentrated into the hands of the heads of state, almost all of whom are former military officers.
 - (5) "Talk of President Sisi with National Newspapers," *Al-Ahram*, October 16, 2016.

and Sanafir Islands to Saudi Arabia.⁶ However, there exist two fundamental problems with the official explanation of the delay. First, the same High Administrative Court—with the same presiding judge and the same members of the bench—had already refused to hear similar law suits filed against similar contemporaneous maritime boundary agreements with Cyprus and Greece on the grounds that, under the terms of constitution, treaty making was the exclusive prerogative of the president and parliament and, therefore, fell outside its jurisdiction.⁷ Egypt’s own prominent legal scholars on constitutional and international law deemed the administrative court’s ruling on Tiran and Sanafir Islands as procedurally and legally improper.⁸ Indeed, the decision nullifying the maritime agreement, had, in turn, been rendered void by another court.⁹ Second, exactly one month after the Egyptian court ruling voided the agreement, the Egyptian government on February 16, submitted a formal reservation under Article 298 of UNCLOS rejecting all optional provisions under the said article pertaining to the settlement mechanism for the maritime boundary dispute.¹⁰ This act by the Egyptian government would

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- (6) *Al-Youm Al-Sabi*, January 16, 2016; *Al-Ahram*, January 16, 2016.
- (7) Masrawy, December 20, 2016, <http://bit.ly/2r32VuL>; Innfrad, October 20, 2016, <http://bit.ly/2r0Zvb0>; SkyEgypt, January 17, 2017, <http://www.sky-eg.com/n136951>; *Rose Al-Yousef*, August 2016; Masrawy, August 28, 2016, <http://bit.ly/2pp95b1>.
- (8) Interview with judge Hamed al-Jamal, former president of the State Council, which encompasses the High Administrative Court, *Haqa'iq wa-Asrar with Mustafa Bakri* (Sada Al-Balad TV channel, January 19, 2017); interview with attorney Rafiq Sharif, vice president of state cases at the State Council, *Kull Youm with Amr Adib* (ONE TV, January 16, 2017); see also <http://bit.ly/2pp5eus> and <http://bit.ly/2pQOEKf>.
- (9) *Al-Shorouk*, April 2, 2017; *Al-Dostor*, April 2, 2017.
- (10) On February 16, 2016, exactly one month after an Egyptian court ruled the 2016 maritime agreement “null and void,” the Egyptian government registered a reservation with the UN Convention on the Law of the Sea (UNCLOS), which was recorded as follows: Egypt (upon ratification and 16 February 2017): Declaration under Article 298 “1. The Government of the Arab Republic of Egypt declares that, pursuant to article 298 paragraph 1 of the United Nation Convention on the Law of the Sea signed on 10 December 1982, it does not accept any of the procedures provided for in section 2 of part XV of the Convention with respect to all the categories of disputes specified in article 298, paragraph 1(a), (b) and (c) of the Convention. 2. This declaration shall be effective immediately.” “Settlement of Disputes Mechanism,” United Nations website last modified March 6, 2017; http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm. The UNCLOS was open for signature on December 10, 1982, and entered into force November 16, 1994, according to the UN Division for Ocean Affairs and the Law of the Sea. Egypt acceded to UNCLOS on August 26, 1983, and Saudi Arabia did so on April 24, 1996.

make it difficult for Saudi Arabia to unilaterally seek a third-party judicial or arbitral mechanism to settle a potential maritime dispute with Egypt arising from issues pertaining to the status of Tiran and Sanafir Islands in the future. Egypt's ultimate objective from such legal delaying tactics would appear to render the pending maritime agreement void by parliament or a plebiscite to prolong Egyptian control of the islands for as long as possible in order, perhaps, to maximize political and economic gains, or in the hope that Saudi Arabia will eventually agree to renegotiate a new maritime boundary agreement leading to a compromise whereby at least Tiran island, the more strategic and closer to Egyptian coast would be ceded to it.

The current Egyptian government apparently operates on the false premise that sovereignty over Tiran and Sanafir islands is still in dispute and that the 2016 maritime boundary delimitation agreement, once ratified in accordance with Egypt's municipal law, would finally settle their legal status as constituting integral part of Saudi territorial sea.

It, therefore, is the purpose of this study to show that Egypt has had recognized explicitly Saudi full sovereignty over the two islands in two separate, valid, written and binding international agreements concluded in 1990. The first was the 1988–90 exchange of letters between the Egyptian and Saudi foreign ministers, and the second was the Egyptian presidential decree 27 of 1990, deposited with the UN, which established Egypt's territorial sea, and which had placed Tiran and Sanafir islands outside Egypt's territorial jurisdiction. Separately and together, these two legal instruments constitute, under customary and conventional law, treaties establishing future rights and obligations on both Egypt and Saudi Arabia, including the permanent territorial settlement pertaining to the sovereignty over Tiran and Sanafir. The 2016 agreement has merely delimited the maritime boundary line between Egypt and Saudi Arabia along the Red Sea including the Gulf of Aqaba where the two islands are located, based on those two 1990 agreements as well as the relevant clauses of UNCLOS which both countries had acceded to. Thus, the current status and ultimate legal fate of the 2016 maritime boundary delimitation agreement

will have no legal bearing whatever on the status of Tiran and Sanafir islands, which had already been settled permanently in 1990.

As stipulated in its preamble, the 2016 agreement has adopted the maritime boundary median line recommended in the official minutes of the final session of the Egyptian-Saudi joint Maritime Boundary Committee¹¹ held in Cairo, on April 7, the eve of the signing of the agreement, and defined on the basis the geographical coordinates listed in the 1990 presidential Egyptian decree and 2010 Saudi royal decree establishing the two contracting states' respective territorial sea.¹² In turn, the median line recommended by the joint bilateral committee, and incorporated into the treaty, had been defined, by Egypt's "National Committee to Delimit Maritime Boundary"¹³ based, as it's stated in its official report, on the 1990 presidential decree and relevant clauses of the UNCLOS and agreed to, in a joint statement, with its Saudi counterpart committee on their last joint session on the eve of the signing the agreement.¹⁴

Indeed, the current Egyptian president and his cabinet, who negotiated and concluded the 2016 maritime agreement with Saudi Arabia, admitted as much soon after in a public forum.¹⁵ First, he and his senior cabinet members

(11) "Technical Procedures to Delimit Maritime Boundary in Accordance with the UNCLOS in the Red Sea and Gulf of Aqaba between the Arab Republic of Egypt and the Kingdom of Saudi Arabia," report by Egypt's National Committee to Delimit Maritime Boundary, 33 pages containing technical and legal documents, attached to letter from General Muhammad Fareed Hijazi, secretary general of ministry of defense to State Cases President, State Council, no.7/1/1/1, October 10, 2016, folder 3; "Geographical Coordinates of the Maritime Boundary Line between the Arab Republic of Egypt and the Kingdom of Saudi Arabia," statement issued by the Joint Saudi Egyptian Committee meeting, March 21–April 7, 2016, held in Cairo, one day before the official signing of the agreement, attached to letter from General Muhammad Fareed Hijazi, folder 6. The committee held 11 joint meetings in Riyadh and Cairo with its Saudi counterpart; the first meeting was convened in Riyadh on January 26–27, 2010, and the last in Cairo, on March 21–April 7, 2016, on the eve of signing the boundary agreement, attached to Letter from Gen Muhammad Fareed Hijazi, folder 2.

(12) "Geographical Coordinates of the Maritime Boundary Line." Saudi Arabia and Egypt became parties to UNCLOS; Saudi and Egyptian decrees deposited with the UN.

(13) "Technical Procedures to Delimit Maritime Boundary."

(14) "Technical Procedures to Delimit Maritime Boundary." The report indicated that presidential decree no. 27/90 and UNCLOS were the sole basis for deciding Egypt's maritime boundary delimitation procedures in the Red Sea and Mediterranean.

(15) "Details of President Sisi's Meeting with Representatives of Sectors of Society," *Al-Wafd, El-Watan*, April 13, 2016.

unequivocally mentioned Tiran and Sanafir, by name, as Saudi islands, based on the 1990 presidential decree and the 1988–90 exchange of letters. The median line stipulated in the 2016 maritime agreement, they asserted, was the same line recommended in the report of Egypt’s National Committee to Delimit the Maritime Boundary,¹⁶ which, in turn, was based on the 1990 presidential decree and agreed to, in a joint statement, with its Saudi counterparts on their last joint session on the eve of signing the agreement.¹⁷

Consequently, whether or not Egypt ultimately ratifies or rejects the 2016 maritime boundary delimitation agreement will have no legal bearing whatever on the status of Tiran and Sanafir Islands, which have formally been recognized by Egypt as Saudi islands since 1990. Under the contractual obligations stipulated in the terms of the 1979 peace treaty with Israel, Egypt could not then, and cannot now, with or without the 2016 agreement, transfer its control, however limited, of the islands to Saudi Arabia until and unless the latter formally and publicly accedes to the relevant peace and territorial provisions of the Egyptian-Israeli peace treaty.

Legal History of the Tiran-Sanafir Islands Dispute

For the purpose of this study, the legal point of reference of the question of sovereignty over the Tiran and Sanafir islands might be dated back to the creation of the British-imposed 1906 Turco-Egyptian “administrative” line, starting from Ras Taba, at the tip of the Gulf of Aqaba, and extending northward to Rafah, just south of Gaza, on the shores of the Mediterranean. As a result, the entire Sinai Peninsula had been allocated to the autonomous Khedivate of Egypt, a de jure Ottoman province and a de facto British protectorate since 1882, thus extending its territory eastward to the southern and western shores of the Gulf of Aqaba on the Red Sea. Prior to that, the eastern boundary of

(16) “Technical Procedures to Delimit the Maritime Boundary.”

(17) “Technical Procedures to Delimit the Maritime Boundary”; “Geographical Coordinates of the Maritime Boundary Line.”

Egypt had been delineated by a 1841 sultanic firman line running straight from Suez at the head of Gulf of Suez to Rafah.¹⁸ The middle and northern area of the Sinai Peninsula east of that line formed part of the *mutassarifyat* (governorate) of Jerusalem and part of the Ottoman *vilayet* of Syria. The southern section of the Sinai, extending from the tip of the Suez to the port of Aqaba, just east of Ras Taba, formed part of the *vilayet* of Hijaz. In the official English text of the 1906 agreement, the line had officially been designated as “a separating administrative line between the vilayet of Hejaz and Gouvernorate of Jerusalem and the Sinai Peninsula.”¹⁹ Thus the line marked an administrative, not a political, boundary between three adjacent provinces all of which were under the internationally recognized overall sovereignty of the Ottoman Empire. The agreement, as clearly stated in the text of its provisions, restricted itself exclusively to land boundary issues, with no reference to the maritime area in the Gulf of Aqaba. The 1923 Treaty of Lausanne,²⁰ in which Turkey formally relinquished all claims to Ottoman Arab provinces, confirmed the de jure emergence of two newly established Arab kingdoms flagging both sides of the northern Red Sea basin: the kingdom of Egypt, declared independent in 1922,²¹ and the kingdom of Hejaz, under Sharif Hussein,²² which became independent in 1919, upon joining the League of Nations.

Since then, the 1906 line became subsequently the de facto political boundary line that delineated Egypt’s eastern land and maritime border with the British-

(18) Gideon Biger, “The First Map of Modern Egypt: Mohammed Ali’s Firman and the Map of 1841,” *Middle Eastern Studies* 14 (1978): 325.

(19) Text of the agreement in E. B. H. Wade et al., *A Report of Delimitation on the Delimitation of the Turco-Egyptian Boundary between the Vilayet of Hejaz and the Peninsula of Sina (June–September, 1906)*, Survey Department Paper No. 4 (Cairo: National Printing Press, 1908), 3–4.

(20) Treaty of Peace with Turkey, and Other Instruments Signed at Lausanne on July 24, 1923, *Treaty Series* No. 16 (London: His Majesty’s Stationery Office, 1923; Cmd. 1929); Philip M. Brown, “From Sevres to Lausanne,” *American Journal of International Law* 18, no. 1 (1924): 113–16. It should be noted that in disposing of the Ottoman Arab provinces, the treaty did not include South Sinai since it was considered part of the independent Kingdom of Hejaz, whose territory was formed by the Ottoman vilayet of Hejaz by the League of Nations, as established by the 1919 Paris Peace Conference.

(21) Martin Sicker, *The Middle East in the Twentieth Century* (Westport, CT: Praeger, 2001), chapter 8, “The British Protectorate of Egypt,” 102–12.

(22) Randall Baker, *King Hussain and the Kingdom of Hejaz* (Cambridge: Oleander Press, 1980), 115.

mandated Palestine and Israel, and the sharifian Kingdom of Hejaz and its successor state, Saudi Arabia. Egypt's perceived claim of title to the Tiran and Sanafir islands was based principally on the argument that they constituted part of the Sinai Peninsula, which was allocated to it by the 1906 agreement, while that of Saudi Arabia was based on the counterargument that, having been part of the Ottoman vilayet of Hejaz and the Kingdom of Hejaz, Saudi Arabia, as the successor state, had inherited the legal title to the islands under intertemporal law.

The legal status of the 1906 line as an "administrative," rather than political, boundary line had casted doubt on Egyptian sovereignty over the Sinai Peninsula, and the southern part in particular. This question was raised later by the British government itself which, as the colonial power in Egypt, had imposed the line on both the Egyptian *khedive* and his overlord, the sultan of Turkey. Colonel Jennings - Bramley, the British officer the 1906 line was named after, and who was the principal negotiator and formulator of the line as well as the first governor of Sinai, had written, in the 1950s, a memorandum arguing that the 1906 line granted Egypt "temporary right to administer" that part of Sinai, which did not, however, "imply sovereignty" over it.²³ While remaining nominally an independent country since the lifting of the protectorate status in 1922, Egypt remained under effective British political control and military occupation until the overthrow of the monarchy in 1952. This was especially true in Sinai, where London maintained a special autonomous administrative status, separate from that of Egypt proper, west of the Suez Canal, which was directly governed by the British government via a British military governor.²⁴

(23) "Notes on Sinai by the Governor of Sinai, Colonel W. E. Jennings-Bramley," August 1, 1951; FO/371 PREM11/96-86940, November 19, 1951. In his memo on the legal status of South Sinai in 1951, Colonel Jennings-Bramley, who was the principal Anglo-Egyptian negotiator of the 1906 Taba-Rafah boundary line and British governor of Sinai, argued that the agreement granted British Egypt a temporary right to "administer" Sinai east of the 1841 line, a right that legally did not, and could not, lead to Egyptian sovereignty, especially over South Sinai.

(24) *Ibid.*, 2. Colonel Jennings-Bramley's successor as governor of Sinai, another British military officer, Major C. S. Jarvis, wrote in 1937 that although it should have kept the island of Tiran, "the Egyptian Government have never occupied it permanently nor established claims to it." C. S. Jarvis, "'Strategic Importance of Akaba—Value of the Arab Port as Harbour and Air Base,'" extract from *Morning Post*, September 28, 1937, in FO371/25-E5821/22/31, October 6, 1937.

On the other hand, Ibn Saud's Sultanate of Najd and its Dependencies had conquered and annexed the independent Kingdom of the Hejaz to form, in January 1926, the Kingdom of Hejaz and Sultanate (later Kingdom) of Najd and its Dependencies; renamed in 1932 the Kingdom of Saudi Arabia. The new dual Hejazi-Najdi kingdom was immediately recognized by almost all contemporary regional and world powers, including the USSR, Great Britain, France, Germany, Italy, and Persia, with the notable exception of the Kingdom of Egypt, which had consistently refused to recognize Najd's annexation of the Hejaz for various reasons, including fishing rights in the Red Sea as well as the "ownership" of the Tiran and Sanafir Islands.²⁵

1928 Tiran-Sanafir Incident

The simmering Egyptian-Hejazi maritime dispute, which was principally over Egyptian commercial fishing along the Red Sea, dated back to the early 1920s and had been capped by the British government, which exercised de facto power in both countries.

However, the Najdi annexation of the Hejaz led, for the first time, to the physical restraint of Egyptian's traditionally unhindered fishing in Hijazi territorial waters along the Red Sea, including the Gulf of Aqaba. One of the first, if not the first, recorded incident occurred in 1928, raising, perhaps for the first time, the Hejazi-Najdi (Saudi)-Egyptian dispute over "ownership of the Tiran-Sanafir islands," as reported by the Cairo correspondent of the British newspaper *Morning Star*.²⁶ British official sources recorded that the incident emanated from Hejazi-Najdi (Saudi) authorities forcibly ejecting the employees of Egypt's Bank Misr Fishing Company from the Tiran and Sanafir islands where it had attempted to establish a temporary fishing base.²⁷ In

(25) "The Kingdom of Saudi Arabia and the Kingdom of Egypt May–November 1936," *Liwa* [Journal of National Archives] 6, no. 11 (June 2014): 35; Madiha Darwish, *Al-Elaqat Al-Masriya Al-Saudiya (1924–1936)*, 177.

(26) Quoted in the Egyptian Arabic magazine *Al-Fatah*, no. 129 (January 3, 1929), 11.

(27) "Tiran and Sanafir Islands," FO371 (ES 1081/2), Confidential, February 27, 1957.

response to the incident, the Egyptian Ministry of War and Navy sent a letter to the Egyptian Foreign Ministry inquiring “if the two islands of Tiran and Sanafir . . . belong to the Egyptian kingdom and [stating that] if so, the coast guard would send a force to hoist the Egyptian flag on both.”²⁸ The foreign ministry replied on December 31, 1928, that “no record of the two islands exists in the files of the foreign ministry.”²⁹

This exchange of letters between the Egyptian government’s two most important agencies, which were responsible for the defense and protection of the land and maritime boundary of Egypt and the conduct of its foreign policy, shows Egypt had no prior presence in the two islands, let alone a claim to them; that it was not even aware of their existence before 1928. The Saudis, on the other hand, knew about them, and their ejection of Egyptian fishermen was an assertion of the Saudi claim to the title of the two islands, which the Egyptian government appeared, not only to accept, but also to acknowledge explicitly, as evidenced by subsequent events.

On June 6, 1934, the Egyptian foreign ministry sent a letter via its consulate in Jeddah, requesting the Saudi government to issue visas for members of a scientific team on the vessel *Mabahith* of the Egyptian (Cairo) University’s College of Sciences to conduct marine research in the “Arabian shores of the Red Sea” that would require a brief landing on “some Arabian islands [known] as Tiran and Sanafir.”³⁰

In a handwritten notation on the college’s request, a foreign ministry official noted that “these islands are located in the land of Hijaz of the Saudi-Hijazi

(28) Letter from the Egyptian minister of war and navy, Cairo, to the Egyptian foreign minister, Cairo, December 23, 1928 (no. 177/3/6; Foreign Ministry Archive Dept., no. 5329, file 115/1/5, December 24, 1928).

(29) Letter “with Respect to the Tiran and Sanafir Islands Located at the Gulf of Aqaba,” from the Egyptian foreign minister to the minister of war and navy, December 31, 1928 (no. 115/1/5).

(30) Letter regarding a “scientific trip to the shores of Arabia” from the foreign ministry, Cairo, to the Egyptian consulate, Jeddah, Saudi Arabia, June 6, 1934, requesting issuance of visas for the staff and crew of the research ship *Mabahith*, for a brief anchor at Tiran and Sanafir (no. 39/64.1); the request was delivered to the Saudi foreign ministry on June 18 (June 18, 1934; no. 179, file 66.32).

kingdom.”³¹ On August 17, 1934, the Saudi legation in Cairo informed the foreign minister that a visa request had been approved for the members of the research ship to conduct “geological study on the Arabian shores that would require a brief landing by the team on some Arabian islands, the Tiran and Sanafir.”³²

In 1936, British Petroleum Concessions Ltd. conducted a brief oil and mineral exploration in the maritime area where “Tiran island was also included in the map of the concession,” which was granted by the Saudi king.³³ The Egyptian government apparently did not register any protest against the British company’s maritime activities in the Tiran-Sanafir area. In the following year, the former British governor of Sinai, Major C. S. Jarvis, referring to Tiran Island, wrote that “the Egyptian Government have never occupied it permanently nor established claims to it.”³⁴

In the official nineteenth and early twentieth-century navigational charts of mercantile and naval powers like Britain and the United States, the two islands had generally been allocated on the eastern Arabian (as opposed to the western, Egyptian), side of the Red Sea.³⁵ European travelers also listed them as offshore islands of the eastern Arabian coast of the Gulf of Akaba. The famous Arabist traveler John Lewis Burckhardt wrote in 1822 that, though it was uninhabited, “Bedouins . . . come here [Tiran] from the

(31) Handwritten notation by Egyptian foreign ministry official on the letter from the minister of education, on behalf of Egyptian [Cairo] University’s College of Sciences, June 4, 1934.

(32) Letter from the head of the Saudi legation, Fawzan al-Sabiq, to the Egyptian foreign minister, August 17, 1934 (no. 3/17, file record 2531).

(33) “Status of Tiran Island” (FO 371/20815, E6048). Tiran Island was also included in the map of the concession that Petroleum Concessions Limited had acquired from King Ibn Saud: “Major Longrigg who negotiated the concession brought a map on 22 September meeting [and] he told me that ‘the islands were included in the concession’” (FO 371-E6028/1283/25); note by Rendel, September 23, 1936 (FO 371-E602930; September 24, 1936).

(34) Jarvis, “Strategic Importance of Akaba.”

(35) James R. Wellsted, *Travels in Arabia* (London: John Murray, 1838), 2:97, 107, 161, 164, 166; Wellsted, “Observations on the Coast of Arabia between Ras Mohammed and Jiddah” (paper read at the Royal Geographical Society at Bombay, March 14, 1836), 51; US Navy Hydrographic Office, *Red Sea and Gulf of Aden Pilot* (H.O. No. 157, 2nd ed., 1922), chapter 7, “East Shore of Red Sea,” 307–18; Alexander Melamid, “Political Geography of the Gulf of Aqaba,” *Annals of the Association of American Geographers* 47, no. 3 (September 1957): 236.

eastern coast, to fish for pearls, and remain several weeks, bringing their provision of water from on that coast.”³⁶ Locally, the mouth of the Gulf of Aqaba was known to the locals on both sides as being in “Bahr al-Hejaz” (the Hejaz Sea).³⁷ Apart from the World War II period, when the Red Sea and its strategic islands, including Tiran, were occupied by Allied British and American forces, the status of the two uninhabited islands remained generally unchanged until late 1949.

The 1950 Saudi-Egyptian Accord on Egyptian Occupation of Tiran and Sanafir

The UN General Assembly Resolution 181 of 1947 partitioned British-mandated Palestine into two states, one Jewish and one Arab, leading to the establishment of the state of Israel in 1948. The ensuing Arab-Israeli war reawakened Egyptian and Saudi interests in the Tiran-Sanafir region. It had also brought a third, albeit temporary claimant to the two islands: Israel. In March 1949, Israeli forces occupied the port of Umm Rashrash without a fight. The port, which had been allocated to Palestine by the partition plan, was located on the tip of the Gulf of Aqaba and nestled between Tran-Jordan’s port of Aqaba and Sinai’s Taba, the starting land point of the 1906 Turco-Egyptian boundary line. The Israelis renamed the town of Elath, and it became Israel’s port on the Gulf of Aqaba and its only passage to the Red Sea via the Straits of Tiran. Fearing that Israel might move westward to occupy the Egyptian Ras Taba, Egypt placed two artillery batteries on Ras Nasrani cape, which is on Nema Gulf on the Sinai coast. According to Ibrahim Mahmud Effendi, who at the time was the Egyptian naval officer in charge, the Egyptian navy was ordered to blockade the newly established Israeli port, but could not do so effectively without occupying Tiran Island, thus flanking the Straits of

(36) John Lewis Burckhardt, *Travels in Syria and the Holy Land* (London: John Murray, 1822), 531.

(37) Karl Baedeker, *Egypt: Handbook for Travellers, First Part: Lower Egypt and the Peninsula of Sinai* (London: Dulau and Co., 1895), map opposite p. 230.

Tiran from the east. Egyptian navy maps in his possession, he said, showed that the island, and also Sanafir, were “Saudi islands.”³⁸ Upon his report, the Egyptian Ministry of War and the Navy requested another clarification from the Egyptian Foreign Ministry regarding the status of the two islands as well as communication, if need be, with the Saudi government to arrange “lending or leasing” them to Egypt for military purposes. On December 14, 1949, the foreign ministry replied that, based on a December 3 letter from the ministry of finance, the “color of the mountainous surface of Tiran” in the latter’s survey map of Egypt was the same as that of southern Sinai, and therefore formed “part of Egyptian territory.”³⁹ Apparently, the Egyptian government did not take the finance ministry’s letter as sufficient legal evidence to unilaterally occupy the islands, for it soon established communications with the Saudi government to seek its prior agreement before taking such a step. King Farouk of Egypt, according to Mahmud Effendi, the Egyptian naval officer in charge of implementing the blockade, dispatched a delegation that included the king’s nephew, navy captain Ismael Shereen, to King Abdul Aziz of Saudi Arabia to request permission for the two islands to be “borrowed or leased for defensive purposes in the Gulf of Aqaba.”⁴⁰

While the Egyptian royal delegation sailed to Saudi Arabia, the Cairo newspaper *Al-Ahram* published, on January 12, 1950, a news item reported by the French press agency from Jerusalem, that an Israeli member of the Knesset had submitted a question to the government inquiring about a “barren, uninhabited” island named Tiran at the mouth of the Gulf of Aqaba, “with no flag of any country hoisted on it.”⁴¹ He suggested that Israeli forces should

(38) Interview with General Ibrahim Mahmoud Effendi, *Haqa’iq wa-Asrar with Mustafa Bakri* (Sada Al-Balad TV channel, April 28, 2016), <https://www.youtube.com/watch?v=xdkdydeTho8>.

(39) Letter (top secret) from the Egyptian foreign ministry to the ministry of war and navy about the finance ministry’s reply that Tiran and Sanafir islands were part of Egyptian territory, based on the latter’s map showing them having the same color as that of Egypt’s Sinai (no. 37/21/81 [26], February 16, 1950, Foreign Ministry Secret Archive, file 1645, February 26, 1950).

(40) Ibrahim Effendi interview.

(41) *Al-Ahram*, January 12, 1950.

at once occupy and claim the island as a preemptive measure to thwart any possible attempt by Egypt or Saudi Arabia, given that they were in a state of war, to use it as a staging post to blockade Israeli shipping passing through the Straits of Tiran.⁴² *Al-Ahram*'s report raised immediate alarms in Cairo and Jeddah, forcing both governments to take immediate action to prevent Tiran and Sanafir from suffering the fate of Um Rashrash. The arrival in the Saudi port of Jeddah of King Farouk's military delegation coincided with *Al-Ahram*'s article, which had already been telegraphed to King Ibn Saud by the Saudi legation (upgraded to embassy in 1952) in Cairo. Ibn Saud readily agreed to the Egyptian request to "loan" the islands to Egypt, "in the same manner of US Lend-Lease operations in the Middle East during WWII," according to Egyptian navy captain Mahmoud Effendi. The Saudi monarch, he asserted, had instructed his officials to "hand over the two the islands to our brother Farouk."⁴³ A British diplomatic dispatch from Saudi Arabia appeared to confirm the Egyptian approach and the Saudi assent to it. Upon inquiry from the British embassy in Jeddah, the Saudi deputy minister of foreign affairs had acknowledged "a friendly understanding between Saudi Arabia and Egypt on the occupation of these islands to keep out the Jews and that there was 'no accounting between friends.'⁴⁴ Commenting on the dispatch, the British diplomat added, "It is probable that the Saudis themselves consider that they still exercise sovereignty over the islands."⁴⁵

On January 17, 1950, the head of the Saudi legation was instructed to deliver an urgent secret telegram from King Ibn Saud to the Egyptian government that read in part:

"At the entrance of the Gulf of Aqaba, there exist two islands about which there had been negotiations between us of old. It's not important now if

(42) Ibid.

(43) Ibrahim Effendi interview.

(44) "Tiran and Sanafir Islands" (FO 371/127158, ES 1081/2, February 6, 1957).

(45) Ibid.

the two islands belong to us or to Egypt. What's important now is to take quick action to prevent the Jewish advance towards those two islands."⁴⁶

Whether or not prompted by *Al-Ahram's* report or as a response to King Farouk's approach, the content of Ibn Saud's telegram caused "a state of confusion" in the corridors of the Egyptian foreign ministry.⁴⁷ First, the letter officially acknowledged, for the first time, that a maritime boundary dispute existed between the countries with respect to the legal status of Tiran and Sanafir, and that it went back at least as far as the 1928 incident, shortly after both countries became independent states. Second, while the letter asserted the Saudi claim of sovereignty over the two islands, it suggested that talks to settle the question of their status be suspended for the time being, and that Egypt, as the preeminent Arab military power, be permitted to occupy them to prevent their annexation by Israel.

Based on the Saudi request, if not permission, the Egyptian Foreign Ministry's legal advisor recommended, and the Egyptian government immediately implemented, the following steps: placement of naval guns and hoisting of the Egyptian flag on both islands; immediate dispatch via formal communication channels of a diplomatic note to the Saudi government concerning the military measures already taken and asserting that such measures would not "contravene the sovereignty of the two islands";⁴⁸ similar diplomatic notes were sent to Great Britain and the United States informing them of the Egyptian military action.⁴⁹ Acting on instructions based on the Saudi-Egyptian accord, the Egyptian Ministry of War and the Navy moved to occupy Tiran and Sanafir.⁵⁰

(46) Telegram from King Abdul Aziz (Ibn Saud) to King Farouk via the head of the Saudi legation, Cairo, dated January 17, 1950 (Egyptian Foreign Ministry secret archive); quoted by Egyptian professor of history Jamal Shaqrah, expert advisor to Egypt's intergovernmental maritime boundary delimitation committee, who believes historical evidence supported the Saudi claim to the two islands in a TV interview, *Ala Masouliyati with Ahmad Musa* (Sada Al-Balad TV channel, part 2, April 10, 2016), https://www.youtube.com/watch?v=E_LxmC7plmA.

(47) Ibid.

(48) Ibid.

(49) Ibid.

(50) Memorandum from the Egyptian army chief of staff to the minister of war and navy, "On Exploration of Tiran island" (no. 1/s/h/7/48 [92], January 17, 1950).

It appointed captain Mahmud Effendi as commander of Gulf of Aqaba region, who said, under instructions, that he, along with his royal colleague “Captain Shereen”, sailed from their base at Ras Nasrani with two manned mobile guns to place on each island, thus becoming “the first Egyptian military persons to land on the two islands.”⁵¹

Significantly, the Egyptian Foreign Ministry kept the Saudi minister plenipotentiary in Cairo abreast of the measures taken, including occupation of the islands, in two meetings, on January 25 and 28.⁵² On January 30, the Saudi minister informed his king, Ibn Saud, of the action taken by the Egyptian government with respect to the islands in the following telegram:

“His Highness the foreign minister of Egypt has informed me that upon receipt of Your Majesty’s telegram regarding the two islands of Tiran and Sanafir, the Egyptian government proceeded at once to take the necessary measures to occupy the islands so as not [to let them] fall into non-Arab hands. The Egyptian government takes this opportunity to extend to Your Majesty its sincerest thanks for Your Majesty’s bringing this serious matter to its attention. It’s understood that [Egyptian] occupation has been completed or [is] about to be completed. If the [Egyptian] government did not inform us sooner [of the occupation] at the time, that’s because it wished to keep [the operation] secret as the Prophet had instructed us to conduct our affairs in secrecy. Now that the task has now been accomplished with the blessing of Allah, the minister asked me to see him today to inform me of the aforementioned measures. Needless to say, the issue of the two islands has become a matter between two brotherly kings, and the Egyptian government is ready to receive what you may deem fit in this regard.”⁵³

(51) Ibrahim Effendi interview.

(52) Shaqrah interview.

(53) Ibid.

This telegram, along with other, related telegrams exchanged between the two governments, shows that it was the Saudis who first brought to the attention of the Egyptians the potential Israeli threat to the two islands and requested their occupation by the former to prevent their annexation by the latter, and that Saudi Arabia regarded as them Saudi islands, a claim to which Egypt clearly appeared to acquiesce.

Under customary law, this 1950 exchange of diplomatic notes would together constitute one valid, binding international agreement establishing the future rights and obligations on the contracting parties involving Egyptian recognition of Saudi sovereignty over Tiran and Sanafir islands and their placement under Egypt's temporary administration for the sole purpose of defending them against a potential threat from a third party that Saudi Arabia could not militarily face.

Egypt thus occupied the islands of Tiran and Sanafir at the entrance of the Gulf of Aqaba, and with additional gun emplacements installed at Ras Nasrani, assumed control of the three-mile-wide strait, whereby a blockade was imposed on shipping to and from the Israeli port of Elath. Upon occupation of the Tiran and Sanafir islands, the Egyptian government sent two identical aide-mémoires to the U.S. and British governments, on January 28 and January 30, 1950, respectively. Great Britain was the dominant colonial power in Egypt itself and also in Transjordan, where it maintained a huge military presence, including bases in Sinai, at Suez and Al-Arish along the Gulf of Aqaba, and at the port of Aqaba in Transjordan; in addition, a British company's Saudi concession covered a maritime area that included Tiran itself. The United States, on the other hand, was the preeminent power in Saudi Arabia, where the concession of the U.S. multinational oil company Aramco covered Saudi territorial waters in the Gulf of Aqaba.

In its aide-mémoire of January 28, 1950, to the U.S. embassy in Cairo, the Egyptian Foreign Ministry explained the nature of its action. The first paragraph reads:

1. “Taking into consideration certain velleities which have manifested themselves recently on the part of Israel authorities on behalf of the islands Tiran and Sanafir in the Red Sea at the entrance of the Gulf of Aqaba, the Government of Egypt, acting in full accord with the Government of Saudi Arabia, has given orders to occupy effectively these two islands. This occupation is now an accomplished fact.”⁵⁴

In this paragraph Egypt acknowledged, implicitly at least, Saudi Arabia’s exclusive claim to the Tiran and Sanafir Islands. If Egypt had any claim to islands, the Egyptian government would not have needed to seek Saudi permission, nor inform third parties of its decision to occupy them, as it had done, for example, when it ordered the placement of naval guns at Ras Nasrani cape, just opposite Tiran.

However, the ambiguous wording of the second paragraph seemed to negate the content of the first with respect to the legal status of Tiran and Sanafir. It reads:

2. “In doing this Egypt wanted simply to confirm its right (as well as every possible right of the Kingdom of Saudi Arabia) in regard to the mentioned islands which by their geographical position are at least 3 marine miles off the Egyptian side of Sinai and 4 miles approximately off the opposite side of Saudi Arabia, all this in order to forestall any attempt on or possible violation of its rights.”⁵⁵

Here Egypt appeared to lay possible claim of title to the two islands as it sought to “confirm” its right, as opposed to the “possible” right of Saudi Arabia. The latter did not know for a long time of the nature of this secret aide-mémoire, which Egypt’s foreign minister had communicated to the U.S. ambassador in Cairo on the same day he was receiving the Saudi representative in person

(54) “Aide-mémoire from Egypt to the United States regarding Passage through the Straits of Tiran—28 January 1950,” *Foreign Relations of the United States of America*, vols. 1–2, 1947–1974, Washington, DC: Government Printing Office. Also at <http://www.mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook1/Pages/2%20Aide-memoire%20from%20Egypt%20to%20the%20United%20States%20reg.aspx>.

(55) Ibid.

to extend his government's gratitude for the Saudi agreement to lease its two islands to the more militarily powerful sister country to prevent their occupation by their common enemy, Israel. Nevertheless, paragraph 2 of the aide-mémoire delivered to the British and U.S. governments had, in effect, declared that henceforth a territorial dispute over the sovereignty of Tiran and Sanafir existed between Egypt and Saudi Arabia.

The emerging Egyptian claim to the islands had manifested in a few other incidents. On May 22, 1950, shortly after its occupation of the two islands, the Egyptian government instructed the Ministry of War and Navy to declare the waters of the Tiran and Sanafir off limits to the Saudi coast guard after "a Saudi motorized boat cruised by, south of Sanafir and Tiran islands."⁵⁶ Moreover, the Foreign Ministry lodged a protest with the Saudi government regarding the incident. The head of the Egyptian legation in Jeddah reported back that Yusuf Yasin, the Saudi royal court's head of the Political Department and Ibn Saud's most influential foreign policy advisor, had acknowledged the incident, and the two had provisionally agreed that the Egyptian navy "be permitted to approach ships hoisting the Saudi flag that appeared suspicious" found in the waters of the islands.⁵⁷

The 1954 Egyptian Claim to Tiran and Sanafir Islands

On February 15, 1954, the UN Security Council held a meeting to discuss the Israeli complaint against Egypt concerning, inter alia, its "interference with shipping proceeding to the Israeli port of Elath on the Gulf of Aqaba."⁵⁸ Responding to the comment of Abba Eban, the Israeli permanent representative,

(56) Letter from the Egyptian foreign ministry to the Egyptian ministry of war and navy, June 6, 1950 (doc. no. 879, Foreign Ministry Secret Archive [new], file 31, National Documents House, Cairo).

(57) Letter from the Egyptian legation, Jeddah, Saudi Arabia, to the foreign ministry, June 29, 1950 (doc. no. 878, Foreign Ministry Secret Archive [new], file 31, National Documents House, Cairo).

(58) UN Security Council Official Records (5/3168 and Add.1, 5/3179), 9th year, 659th meeting (February 15, 1954, New York), 1.

on Egypt's "sudden occupation of two, previously uninhabited" islands,⁵⁹ Mahmoud Azmi, Egypt's deputy permanent representative, retorted that the islands of Tiran and Sanafir "have in fact been occupied since 1906, and it is an established fact that from that time on they have been under Egyptian administration."⁶⁰ He continued to claim that in the 1950 agreement, Saudi Arabia had either acknowledged or, at least, formally ceded the islands to Egypt: "An agreement was concluded between Egypt and Saudi Arabia, confirming what would call, not the annexation, but the occupation of these islands and, what is more important, the recognition that they form an integral part of the territory of Egypt."⁶¹

The statement of Representative Azmi with respect to the two islands being part of Egyptian territory with Saudi consent deserves a commentary. First, in terms of legal value, Azmi's verbal statement did not represent the view of his government, in that it was not made under instructions, as in a form of an official written note to the Security Council or the UN secretary-general. Rather, it came in the form of a reaction to the Israeli representative's accusation. Indeed, Azmi had prefaced his response by stating that he was limiting himself to "a few observations," as it was not his "intention to submit a detailed reply to the Israel representative's statement."⁶² Second, Azmi's claim was not supported by the documentary evidence provided by his own government (with respect to the 1950 agreement as discussed above). Moreover, in his "observations," he says that the islands were under "Egyptian administration for technical reasons" since 1906, and not for legal reasons. In this, he inadvertently acknowledged the 1906 agreement granted Egypt administrative, not sovereign rights, over the whole of Sinai, let alone the two islands. Third, the 1950 agreement, as illustrated above, was, in essence, a written lease agreement whereby Saudi Arabia, as the lessor, had leased the islands to Egypt, the lessee, for the time required for the expressed

(59) Ibid., 18, para. 100.

(60) Ibid., 25, para. 133.

(61) Ibid.

(62) Ibid., 23, para. 122.

purpose of defending them against potential occupation by Israel, in which, incidentally, it had failed to thwart repeatedly. The 1950 agreement is similar to the lease Great Britain had concluded with China over the island of Hong Kong that was eventually returned to the latter in 1999. Finally, Saudi Arabia could not immediately reply as it did not become aware of Azmi's statement for a considerable period of time. As attendance at Security Council meetings is restricted to the 15 permanent members and rotating temporary members, others could not attend except by special invitation from the president of the Council. The latter invited the permanent representatives of Israel and Egypt to attend that specific session because the agenda topic concerned them directly, as it dealt with debating a formal complaint by Israel against Egypt.⁶³ One rotating member, however, was Lebanon, whose representative, Edward Rizk, sided with Egypt to display Arab solidarity against Israel. The French-speaking Lebanese representative persuaded the reluctant Mr. Ghaleb, Egypt's chief permanent representative, who had previously debated in English, to refute the Israeli argument about Egypt's "sudden" appearance on the islands. According to Egypt's own military intelligence sources, Rizk had drafted Egypt's own rebuttal in French, which Ghaleb handed over to his French-speaking deputy, Azmi, to deliver.⁶⁴ In any case, Azmi's statement turned out to be the first and only time that an Egyptian government official had laid a public claim of title to Tiran and Sanafir Islands.

Aftermath of the 1956 Suez Crisis: Egyptian Abandonment of the Claim to the Islands and Saudi Assertion of Its Sovereignty over Them

The Suez Crisis (October 1956–March 1957), known in the Arab world as the

(63) Ibid., 1–2, paras. 1, 2.

(64) Interview with retired general Mamdouh Imam, former deputy to the head of military intelligence and military member of the Egyptian intergovernmental national committee to delimit the maritime boundary of Egypt, *Ala Masouliyat with Ahmad Musa* (Sada Al-Balad TV channel, January 4, 2017).

Tripartite Aggression, was a surprise joint attack launched in early November by Britain and France on the Suez Canal Zone, which was triggered by Egypt's decision to nationalize the Anglo-French-owned and British-administered Suez Canal Company. The preplanned occupation was preceded a week earlier, in late October, by Israel's Kadesh Operation, which brought the Sinai Peninsula under Israeli occupation with the declared objective of lifting the Egyptian blockade of the Straits of Tiran, which had been in effect since 1950. To this effect, the Israeli forces occupied Sharm el-Sheikh, including Ras Nasrani, which overlooks the Straits from the west and the two islands of Tiran and Sanafir in the east. Egypt's two symbolic manned mobile gun placements on the islands were withdrawn well before the Israeli arrival. On November 6, 1956, the Israeli government announced that it had annexed Tiran; Israeli Prime Minister David Ben Gurion declared that the ancient "Jewish" island of Yotvat (Tiran) had now become part of modern Israel.⁶⁵ A new, third claimant to the contested islands had thus appeared on the scene. In abandoning the islands the moment the Israeli military advance commenced, two days earlier, Egypt had not only failed to show any semblance of attempt of resistance in order to defend the islands as stipulated in 1950 agreement, but also weakened substantially any potential claim of title to them.⁶⁶ Under international law, military occupation would not confer an automatic or potential claim of sovereignty over the occupied territory. Thus, neither Israeli nor Egyptian claims to the two islands had been recognized by any other state.⁶⁷ Under pressure from the United States and the USSR as well as UN Security Council resolutions, Israel, France, and Great Britain were ordered to withdraw their forces from the Suez Canal and Sinai, including the two islands, by March 1957. With the consent of Egypt, a UN emergency force,

(65) Tel Aviv telegram no. 718 of November 7, *Haaretz*, June 16, 2014.

(66) "Minutes by Mr. Pink—minutes by G. G. Fitzmaurice" (FO371/127158, February 26, 1957).

(67) Reply by the secretary of state for foreign affairs in answer to a parliamentary question on "which sovereign state is recognized by HMG [His Majesty's Government] as having sovereignty over the islands of Tiran and Sanafir in the Gulf of Aqaba, and whether any other state has laid official claim to sovereignty over the islands" (FO371/127158, February 27, 1957).

UNEF1. was deployed in Sharm el-Sheikh, a strip on the Egyptian Sinai coast overlooking the Straits of Tiran, to ensure that Israeli shipping lanes would stay open.⁶⁸

The UN secretary-general's report of January 24, 1957, and the UN General Assembly resolution of February 2 establishing UNEF1 stated that the international force should not be used in such a way as to "prejudge" the solution of "controversial" questions involving the settlement of the status of the islands of Tiran and Sanafir, which would be a matter for agreement between the countries concerned.⁶⁹

Although nominally covered by the UNEF1 mandate, no permanent international observation units were placed on Tiran and Sanafir, implying the UN did not recognize the islands as constituting part of the territory of Egypt or, for that matter Israel or Saudi Arabia. Egypt's short-lived presence on the islands ceased until 1982, as did further claims to sovereignty over the islands. By withdrawing its forces from Tiran and Sanafir Islands in March 1957, Israel had not only renounced its claim to, and annexation of, Tiran, its officials began to refer to the islands as Saudi.⁷⁰ The Egyptian government appeared to acquiesce not only to the Israeli view, but more significantly, to a series of public statements culminating in a formal letter to the UN issued by the Saudi government, which, in unambiguous terms, reasserted its full sovereignty, not only over the islands of Tiran and Sanafir, but also over the Straits of Tiran.

(68) Multinational Force and Observers, "Servants of Peace: Peacekeeping in Progress" (Rome, 1999), 11.

(69) Pitman's parliamentary question regarding the UN resolution of UNEF noninvolvement with Tiran (FO371/127158, February 27, 1957), referring to UN secretary-general's report of January 24 and the General Assembly resolution of February 2 that UNEF should not be used to settle claims to Tiran, available at <http://www.theyworkforyou.com/debates/?id=1957-05-13a.11.9>.

(70) "Memorandum of Conversation" between Abba Eban, Israeli foreign minister, and W. W. Rostow, under-secretary of state, Washington, DC, October 23, 1967, *Foreign Relations of the United States, 1964-1968*, vol. 19, *Arab-Israeli Crisis*, 932; see also US State Department, "Battle's Conversation with [Israeli] Harman ambassador," February 5, 1967 (National Archives and Records Administration, RG 59, Central Files 1967-69, POL 32-6TIRAN, Secret).

March–April 1957: Saudi Press Statement and Diplomatic Note Reasserting Saudi Sovereignty over Tiran and Sanafir

On the afternoon of March 15, 1957, shortly after the Israeli withdrawal from Tiran and Sanafir Islands, the government Radio Mecca broadcast an “official spokesman’s statement” on the status of the Gulf of Aqaba, which was issued by the Saudi Arabian Directorate General of Broadcasting, Press and Publications. Significantly, the same statement was broadcasted verbatim on the evening of the same day by the government-run Cairo Home Service Radio as well as the famed station, “Voice of the Arabs.”⁷¹ Referring specifically to Israeli recent military occupation of the Tiran Straits, the statement read: “About four months ago armed Israeli aircraft and ships attacked places inside Saudi territory at the mouth of the Gulf of Aqaba, at the time when the Israeli forces were occupying Sharm el-Shaikh which lies in Egyptian territory.”⁷² This was a crystal-clear, albeit implicit, reference to the Tiran and Sanafir islands as well as the Straits of Tiran as being part of Saudi territory, as distinguished from “Egyptian territory.” By asserting claim to a territory occupied by Israel, Saudi Arabia had also declared itself as a party to the ensuing Arab-Israeli conflict. The official statement explained that Article 10 of the 1888 Constantinople Convention regarded the Gulf of Aqaba as a “closed Arab Gulf lacking international character, thus its waters and land lying to the eastern shores of the Red Sea meant Hijaz where the Islamic Holy Places are situated.” It followed therefore that Saudi Arabia, as the sovereign power in Hijaz and the Custodian of the Holy Places, was entrusted with the task to “to guarantee freedom of passage for the convoys of Moslem pilgrims through the Gulf of Aqaba” by securing the routes lying within its sovereignty, which included the Tiran and Sanafir

(71) “Appendix: Saudi Arabia,” “B1: Statement on the Gulf of Aqaba,” Mecca Radio in Arabic, 18.00 GMT; Cairo in Arabic Home Service, 21.00 GMT; and “Voice of the Arabs,” 20.15 GMT, March 15, 1957; “Official Saudi Spokesman’s Statement, Broadcast by Cairo Radio,” March 15, 1957 (FO371/127158). The statement was published the next day, March 16, 1957, in Saudi newspapers (National Archives and Records Administration, RG 59, Central Files 684A86A/3-1837, telegram 203 from US embassy, Jidda, to Dept. of State, March 18, 1957).

(72) Ibid.

Islands and adjacent waters.⁷³ By broadcasting the Saudi official statement via its own government radio stations unchallenged, Egypt had implicitly consented to the Saudi territorial claim in the Gulf of Aqaba imbedded in the statement.

The Saudi government repeated its spokesman's statement in written form in a diplomatic note dated March 31 and circulated among the diplomatic missions of "friendly governments" in Jeddah.⁷⁴ Those included the United States, whose embassy received the note on April 8 and "considered [it] an official Saudi statement on the Gulf of Aqaba—asserted Saudi Arabian sovereignty over the islands of Tiran and Sanafir at the mouth of the Gulf of Aqaba."⁷⁵ It again argued that the Gulf was a "closed" bay, devoid of international character, with its entrance forming the Straits; that it constituted "Saudi Arabian territorial waters"; and that any attempt to internationalize it would be regarded as "an act in derogation of Saudi sovereignty and a threat to Saudi Arabia's territorial integrity."⁷⁶ Four days later the diplomatic note was reformulated in a more elaborate, detailed memorandum and formally deposited by the Saudi government with the UN secretary-general.

The April 1957 Memorandum on Saudi Arabia's "Legal and Historical Rights in the Straits of Tiran and the Gulf of Aqaba"

On April 12, 1957, Abdullah Al-Khayaal, the permanent UN representative of Saudi Arabia, delivered the following formal letter with a memorandum to the UN secretary-general to be distributed to member states as an official UN document. The letter read:

"Upon instructions of the Saudi Arabian Government, I have the honour to communicate through you to the United Nations and its Member

(73) Ibid.

(74) Telegram 232 from US embassy, Jidda, April 9, and telegram 606 from Jidda, April 9 (National Archives and Records Administration, RG 59, Central Files 974.7301/4-957).

(75) Ibid.

(76) Ibid.

States the attached memorandum registering the Saudi Arabian Government's legal and historical rights in the Straits of Tiran and the Gulf of Akaba. I beg to request that this memorandum be circulated by the Secretary-General to Member-States of the United Nations as a United Nations document."⁷⁷

In its memorandum, Saudi Arabia formally reasserted, in explicit terms, its full sovereignty, not only over the Tiran and Sanafir Islands, but also over the entire entrance of the Gulf of Aqaba, including Enterprise Passage, the only navigable lane in the channel. Due to the significant legal implications of the Saudi maritime claim, it may be worth quoting parts of the memorandum at some length:

6. "The island of Tiran is situated at the Gulf base, to the east of which lies the island of Sanafir. These two islands are Saudi Arabian. The only navigable passage to the Gulf, which lies between the Island of Tiran and the Sinai coast, is only within a few hundred metres from the shore. A third island to be found in the Gulf is the Egyptian Island of Pharoun . . .
7. The islands intercepting the Gulf entrance are Saudi Arabian, and the straits separating them are under the sovereignty and jurisdiction of the Kingdom of Saudi Arabia. Their waters are Saudi Arabian waters. The straits were and still are closed straits. The whole width of the Gulf entrance does not exceed 9 miles, which is 12 miles shorter than in those gulfs treated by international law as international waterways. Furthermore, the width of the straits separating the aforementioned Saudi Arabian Islands and the Egyptian shore facing them, does not exceed, in some places, more than half a mile.

(77) Letter from the permanent representative of Saudi Arabia, dated April 12, with attached "Memorandum Concerning Legal and Historical Rights of Saudi Arabia in Straits of Tiran and Gulf of Akaba" (A/3575, agenda item 66, *Proceedings of the General Assembly: First Emergency Special Session, Eleventh Session*, 1957), 1.

9. The Kingdom of Saudi Arabia, while putting these facts to the attention of the friendly Governments, expressed the great hope that they will be convinced of its points of view.”⁷⁸

The 1957 Saudi Arabian UN claim differed from Egypt’s verbal claim made by its deputy to the permanent representative, Azmi, in 1954 in one important legal aspect: The Egyptian claim came in the form a verbal rebuttal intended, admittedly, as consisting of mere “observations” rather than a formal reply to the Israeli representative’s argument, which was made during a Security Council meeting held to discuss a specific complaint made by the Israel against Egypt.

As had been the case with respect to the Saudi official spokesman’ statement” the previous month and the diplomatic note to the foreign missions in Jeddah, Egypt did not register any protest or reservation with the UN or otherwise issue any public statements specifically challenging Saudi Arabia’s claim.⁷⁹ On the contrary, the Egyptian government’s behavior in the aftermath of the 1957 crisis tended to confirm it as laid out in the Saudi memorandum to the UN.

The writings of Muhammad Hasanayn Haykal, Egyptian president Gamal Abdel Nasser’s influential confidant, the minister of information and a lifelong critic of Saudi Arabia, tended to support the Saudi claim to sovereignty over Tiran and Sanafir as well as the Straits of Tiran. at the entrance of the Gulf of Aqaba. He wrote that “according to available Egyptian documents,” Egypt’s policy after the 1957 crisis was to conduct its relations with the United States through Saudi Arabia as the middleman, a role King Saud had “enthusiastically” agreed to play for three reasons:

“Firstly Tiran and Sanafir which Egypt had utilized to intercept Israeli shipping in the Gulf are Saudi islands that were placed under Egyptian control according to a special arrangement between Cairo and Riyadh.

(78) Ibid., 3–4.

(79) Charles B. Selak, “A Consideration of the Legal Status of the Gulf of Aqaba,” *American Journal of International Law* 52, no. 4 (October 1958): 666.

Secondly, the Gulf of Aqaba in the Red Sea is the pilgrimage route to Holy Places [and] Saudi Arabia [is] responsible for their protection. Thirdly, the special relationship Saudi Arabia has with the U.S. grants her a leverage not available to others.”⁸⁰

In July 1957, the Egyptian government-controlled *Alakhbar* newspaper, run by Muhammad Haykal’s ministry, published a report on a meeting held between King Saud of Saudi Arabia and general Abdel Hakim Amer, Nasser’s deputy and minister of war, to discuss the “fortification of the two islands of Tiran and Sanafir that control the entrance of the Gulf of Aqaba and the Tiran Strait.” The report added: “The Kingdom of Saudi Arabia has loaned the two islands to Egypt eight years ago to prevent Israeli ships passing through the Gulf to Elath port. Israel had occupied the two islands during its aggression last autumn.”⁸¹ The Saudi government had declined the Egyptian proposal to militarize the islands for fear that such a step would trigger their reoccupation by Israel. Saudi Arabia, nonetheless, had missed an opportunity to manifest its legal claim of title by demonstrating an exercise of actual sovereignty over the islands by establishing nonmilitary state symbols, like a flag and civil maritime post, that were unlikely to have raised serious Egyptian or Israeli opposition. The two uninhabited islands remained unmanned until the outbreak of the Six Day (June) War of 1967.

The June 1967 War and Israeli Reoccupation of Tiran and Sanafir Islands

In 1958, both Saudi Arabia and Egypt, like most other countries, issued amended decrees extending their territorial waters to 12 nautical miles into the Red Sea, in the aftermath of the adoption of the Geneva Convention on the

(80) Muhammad Hasanayn Haykal, *Harb al-Thalathin Sanah: Sanawat al-Ghalayan* (Cairo: Dar Al-Shorouk, 1988), 91; he relied on his own firsthand information as a witness, having been a very close presidential advisor to Nasser, as well as on Nasser’s presidential papers at Manshiyat Al-Bakri archive at the presidential Abdin Palace.

(81) *Al-Akhbar* (Cairo), July 18, 1957.

Law of the Sea of 1958.⁸² Both decrees could not be applicable to the nine-mile-wide Gulf of Aqaba and was subsequently superseded by new laws in line with the 1982 UNCLOS.

In late 1966, Egypt and Syria signed a joint defensive pact directed against Israel. In May 1967, Egyptian President Nasser received reports from Soviet and Syrian sources of a massive Israeli military buildup on Syria's Golan Heights. On May 16, to ease pressure on its military ally, Egypt massed troops in a defensive position along its border with Israel. On May 18, Egypt formally requested the UN to withdraw all the UNEF1 forces positioned along the 1949 armistice line corresponding to the 1906 Taba-Rafah line, including Sharm el-Sheikh, overlooking the Straits of Tiran.⁸³ UNEF positions were taken over by Egyptian troops except, significantly, on Tiran and Sanafir Islands. On May 22, Nasser declared the Straits of Tiran closed to Israeli shipping,⁸⁴ and in response, Israel declared the Egyptian decision constituted a *causus belli*, an act justifying war.⁸⁵ On May 30, Jordan joined the Egyptian-Syrian defense pact. On the early morning of June 6, Israel launched a short surprise attack that ended in six days with the occupation of Egypt's Sinai, the Saudi-claimed islands of Tiran and Sanafir in the Gulf of Aqaba, Jordan's West Bank, including Jerusalem, and Syria's Golan Heights. The defeat of the Egyptian army for the third time since 1948 at the hands of the nascent state of Israel, was dismissed by Hayakal as a mere *Naksah* (setback).

In the events immediately leading up to the June 6 war, the Egyptian government had taken steps with respect to the Tiran and Sanafir Islands that tended to reconfirm their status as constituting part of Saudi territory. On May 20, soon after Egypt's expulsion of the UNEF forces, Nasser's principal secretary,

(82) Saudi Arabia, decree of February 16, 1958, establishing the Saudi territorial sea, which was followed the next day by the Egyptian territorial decree (February 17, 1958), establishing Egypt's territorial sea; "Law of the Sea."

(83) "Report by the UN Secretary General to the UN Security Council, May 19, 1967 (S/7896)," in UN Security Council, "Report by the Secretary-General" (Distr. General, S/7906, May 26, 1967), 1.

(84) *Ibid.*, 4, para. 10.

(85) *Ibid.*

Sami Sharaf, presented the president with a memorandum entitled “Israeli Shipping in the Gulf of Aqaba,” which had been prepared on his instruction by the foreign ministry. It stated that “the Egyptian government had agreed with the kingdom of Saudi Arabia for Egyptian forces to occupy the two islands of Sanafir and Tiran, the two islands that control the entrance to the Gulf of Aqaba.”⁸⁶ The memorandum was released by Huda Abdel Nasser, daughter of the late Egyptian president and head of the Nasser Foundation, which houses his presidential and other government papers. She wrote an article in Egypt’s preeminent government-owned *Al-Ahram* newspaper titled, “Let’s Be Fair: Tiran and Sanafir Are Saudi,” in which she said relevant documents in her father’s presidential papers affirmed Saudi Arabia’s legal claim to the islands.⁸⁷ Furthermore, the current Egyptian government issued a revealing statement in 2016 acknowledging that Egypt’s permanent representative to the UN had stated in a speech to the UN Security Council on May 27, 1967, that “Egypt has never attempted at any time to claim that sovereignty over those islands had been transferred to it. The farthest Egypt went was to reiterate that it took responsibility for their defense.”⁸⁸ Thus, in one stroke, Egypt’s UN permanent representative had nullified a counterclaim made by his predecessor in 1954.

Nevertheless, on May 28, few days after announcing the blockade of the Straits of Tiran, Nasser held a press conference in Cairo on the looming crisis, which was broadcast on radio and television. In response to the question of whether Egypt intended to reoccupy Tiran Island, the Egyptian president stated that not only Tiran or the Straits of Tiran belonged to Egypt, but also the entire Gulf of Aqaba: “the whole of the Gulf of Aqaba is an Egyptian territory, Tiran is an Egyptian island, [the] Sinai coast is an Egyptian territory, the straits that ships pass through

(86) Letter marked “Top Secret,” with attached “Memorandum on Israeli Shipping in the Gulf of Aqaba,” prepared by the office of the foreign minister for Sami Sharaf, secretary to the president for information, no. 2465/2, dated May 20, 1967, reprinted in Huda Abdul Nasser, “Let’s Be Fair: Tiran and Sanafir Are Saudi,” *Al-Ahram*, no. 47258, April 26, 2016.

(87) *Ibid.*

(88) “With the Supporting Documents, Tiran and Sanafir Belong to the Kingdom of Saudi Arabia,” statement by Council of Ministers, Information and Decision Support Center (IDSC), Cairo, April 13, 2026, available at <http://www.idsc.gov.eg/IDSC/News/View.aspx?ID=4269>.

[are] an Egyptian territory.”⁸⁹ Nasser’s comments, according to Sami Sharaf, his own principal private secretary, who was present at the conference, were intended for Arab audience. How could Nasser have justified closing the Gulf, Sharaf argued, had he said the Straits and Tiran were “not Egyptian”?⁹⁰ In any case, whatever the intention of Nasser’s public statement, it was negated the very next day in a government-sponsored public symposium. On May 29, the Egyptian Society of International Law held a conference in Cairo under the title, “Studies about the Question of the Gulf of Akaba and Tiran Strait,” in which participants and attendees included most of the senior government officials and prominent legal scholars.⁹¹ In its published deliberations, the seminar restated verbatim contents of the May 20 presidential memorandum asserting that “Egyptian authorities had agreed with Saudi authorities that Egyptian forces occupy Tiran and Sanafir islands which control the Gulf of Aqaba.”⁹²

In what seemed to be the first, and perhaps the only, time that Saudi Arabia attempted to demonstrate an exercise of actual sovereignty to assert its legal claim of title to the islands, King Faisal decided, before quickly backing off, to place a Saudi marine detachment there. On June 3, two days before the Israeli surprise attack, the Saudi army chief of staff, apparently accompanying a visiting Egyptian military delegation in the city of Tabuk, near the Gulf of Aqaba, sent a telegram to the Saudi defense minister informing him that the logistics had been taken care of to implement the latter’s instruction no. 153,

(89) “President Jamal Abdul Nasser Talks to Representatives of Arab and International Media in the Press Conference at Alzahra Hall,” *Misr Al-Jadidah*, May 28, 1967 (Jamal Abdul Nasser Foundation–Alexandria Library, Presidential Papers, Manshiyat Al-Bakri Archive at Abdin Palace), available at nasser.bibalex.org.

(90) Sami Sharaf, “What Abdul Nasser Meant When He Talked about Tiran and Sanafir,” *Al-Ahram*, April 17, 2016, <http://gate.ahram.org.eg/News/907588.aspx>; Sami Sharaf, video statement to Egypt’s official news agency, MENA, April 14, 2016, https://www.youtube.com/watch?v=WR_aQjuvBEE.

(91) The proceedings and findings were published in booklet form under the title “The Question of the Gulf of Aqaba and Tiran Strait” by the Egyptian Society of Political Economy and Legislation (later renamed the Egyptian Society of International Law), May 29, 1967, 38. The participants and attendees listed included Hasan Sabri Kholi, President Nasser’s special envoy, the secretary-general of the Arab League, the minister of justice, the president of the Supreme Judicial Council, the attorney general, the chancellors of Cairo University and other universities, the deans of law schools, the president of the Egyptian Society of International Law, and other prominent legal scholars.

(92) *Ibid.*

“to place a marine company on Tiran and Sanafir islands in the location once occupied by the Egyptians.”⁹³ A Saudi advance unit, apparently accompanied by Egyptian advisors, sailed from the Saudi shores to the islands to prepare for the arrival of the planned military detachment—an event that was unlikely to have gone unnoticed by the Israelis. The Egyptian government was apparently behind the Saudi plan, as a copy of the telegram that was referred to existed in Nasser’s presidential papers, which were made available to Haykal and later published in his books. Nasser, according to Haykal, welcomed the Saudi plan on grounds it would make “Saudi Arabia a partner in the closure of the Gulf of Aqaba,” thereby making it become entangled directly in the imminent war and all that this entailed.⁹⁴ In view of the highly anticipated Israeli attack on Egypt and likely Israeli reoccupation of the Saudi islands, at the last minute King Faisal rescinded his order to place the Saudi marine forces on the islands on June 4, the eve of the Israeli military strike.⁹⁵ A few hours later, Tiran and Sanafir Islands, along with Sinai Peninsula, were, for the second time, placed under direct, uninterrupted Israeli occupation, which lasted until 1982.

Starting almost as soon as the hostility ceased, Saudi Arabia had repeatedly protested, via the good offices of the United States, Israel’s occupation of Tiran and Sanafir and demanded the withdrawal of its forces. Referring to the Saudi-Egyptian advance unit that vacated the islands on the eve of the June war, Israel informed the United States that it had decided to occupy the islands because Saudi Arabia had “allowed Egyptians to occupy” Tiran prior to leaving “just before” the arrival of the Israeli forces.⁹⁶ The U.S. government, which consistently referred to the islands as Saudi territory, made several approaches to Tel Aviv throughout 1967 and 1968 to reach a settlement

(93) Telegram from Saudi army chief of staff to Saudi minister of defense in Haykal, *Harb al-Thalathin Sanah*, 769.

(94) *Ibid.*, 770.

(95) *Ibid.*

(96) Conversation between US Under-Secretary Rostow and Israeli ambassador Harman on December 21 (telegram 88486 from the Department of State to Tel Aviv, December 21, 1967, National Archives and Records Administration, RG59, Central Files 1967–69, POL 32-6TIRAN. Secret. Repeated to Jidda).

acceptable to both parties. The first approach was made on December 6, 1967, in a meeting at the U.S. State Department between Undersecretary Eugene Rostow and the Israeli ambassador Avraham Harman. The meeting laid the framework for the proposed compromise, whereby Israel would withdraw from the islands and Saudi Arabia would not occupy them.⁹⁷ In subsequent U.S.-Israeli communications, the Israeli prime minister expressed difficulty in contemplating a possible Israeli withdrawal from Tiran and Sanafir “in the absence of assurances regarding the consequences of this act for Israel.”⁹⁸

Encouraged by the Israeli response, the U.S. ambassador to Saudi Arabia, under instructions from Washington, D.C., pursued the question further in “a frank and detailed discussion” with King Faisal on January 13, 1968. The Saudi monarch’s opinion was crystal clear, as he reported:

“The King’s comments made clear: (a) that he regarded Tiran and Sanafir as constituting integral part of Saudi Arabia, that his government had granted concession covering the island of Tiran, and that Saudi Arabia had no plan to militarize Tiran or use it to impede freedom of navigation into Tiran Strait.”⁹⁹

The United States delivered Saudi assurances to Tel Aviv and asked that Israel consider withdrawing from “this portion of Saudi territory,” which would not incur “adverse consequences for Israel.”¹⁰⁰ In its reply on February 7, the Israeli government demanded that Saudi Arabia provide “a binding written undertaking” with the United States as the guarantor and that Tiran Island, in particular, would remain “permanently uninhabited.”¹⁰¹ Furthermore, it

(97) Telegram from State Department to Tel Aviv, repeated to Jidda, and USUN 82530, Subject: “Tiran Island” (National Archives and Records Administration, RG 59, Central Files 1967–69, POL 32-6TIRAN. Secret).

(98) Telegram from the Department of State to the Embassy in Israel, Washington, DC, January 17, 1968 (1930Z, National Archives and Records Administration, RG 59, Central Files 1967–69, POL 32-6TIRAN. Secret).

(99) Ibid.

(100) Ibid.

(101) Telegram from the Department of State to the Embassy in Israel, repeated to Jidda, January 17, 1968, available at <https://history.state.gov/historicaldocuments/frus1964-68v20/d47>, p. 2 of 2.

stressed the need for “absolute precision” in the Saudi assurances.¹⁰² The U.S. government found the Israeli response “very disappointing” as the conditions being demanded raised doubts that Israel had any intention of withdrawing from Tiran “unless forced out.” Hermann Eilts, the U.S. ambassador to Saudi Arabia, maintained that the Saudis could not agree to Israeli conditions.¹⁰³ Tiran could not be kept uninhabited, as it was part of the Red Sea maritime area covered in the concession granted to Aramco.¹⁰⁴ Moreover, Saudi Arabia, for political and religious reasons, could not enter, at the time, into a contractual relationship with Israel. While Saudi Arabia had, again, reasserted its claim to sovereignty over the two islands, a claim explicitly recognized by both the U.S. and Israeli governments, it nevertheless failed to make it public and formal, as it had forcefully done in 1957 in the aftermath of the Suez Crisis.¹⁰⁵ In any case, in September 1968, the Israeli government declared that the “necessity to ensure free passage through Tiran Straits” dictated that Israel would not withdraw from the islands “pending” a comprehensive Arab-Israeli peace settlement with Egypt and Saudi Arabia.¹⁰⁶

The Status of Tiran and Sanafir Islands in the Egyptian-Israeli Peace Treaty of 1979

Despite its utter defeat in 1967, Egypt, like Saudi Arabia, Syria, and Jordan, which had parts of their territories under Israeli occupation, had routinely rejected Israel’s land-for-peace overtures. After a failed attempt to regain its

(102) Telegram 111432 from the Department of State to Tel Aviv, February 7, 1968 (National Archives and Records Administration, RG 59, Central Files 1967–69, POL 32-6TIRAN).

(103) Ibid.

(104) Telegram 112564 from the Department of State to the Embassy in Israel, February 9, 1968 (0048Z, National Archives and Records Administration, RG 59, Central Files 1967-69, POL 32-6TIRAN, Secret).

(105) The Israeli press, however, reported in May 1968 that Israel had rejected the US request to “vacate the Saudi Tiran Islands”; Jewish Telegraph Agency, May 29, 1968.

(106) Telegram from the Department of State to the Embassy in Israel, September 11, 1968 (2148Z, National Archives and Records Administration, RG 59, Central Files 1967–69, POL 7 ISR. Secret).

territories militarily in the October War of 1973, Egypt became the first Arab country to eventually yield to Israeli conditions. Under American auspices, Egyptian-Israeli peace negotiations commenced in 1976 and concluded with the signing of the Camp David Accords on March 26, 1979, with the U.S. government as the sole guarantor of its provisions. Egypt recognized the state of Israel, ended the state of war, and agreed to establish normal relations. It also effectively recognized the international character of “the Strait of Tiran and the Gulf of Aqaba [as] international waterways opened to all nations for unimpeded and non-suspendable freedom of navigation and overflights.”¹⁰⁷ Egypt reaffirmed that the Straits of Tiran constituted an international strait in accordance with the legal regime in Part III of UNCLOS, without prejudice to “the legal status of waters” forming the Straits, upon ratification of UNCLOS on August 26, 1983.¹⁰⁸ Thus Egypt, in a departure from its previous position, had refrained from making an explicit claim to title of the Straits, let alone the two islands, including Enterprise Passage, the only navigable lane, which is close to the Egyptian coast and about four and half miles away from Tiran Island.

In return, Egypt had regained a certain amount of control, albeit restricted, over the Sinai Peninsula, which had been divided into three zones, A, B, and

(107) Article V, para. 2, of the 1979 peace treaty between Egypt and Israel, “Egypt and Israel: Treaty of Peace” (with annexes, maps, and agreed minutes), signed at Washington, DC, on March 26, 1979; United Nations, *Treaty Series* 1136, no. I-17813.

(108) Declarations by Egypt upon ratification of the UNCLOS, August 26, 1983, “Declarations or Statements upon UNCLOS Ratification, Oceans and Law of the Sea,” Division for Ocean Affairs and the Law of the Sea, Treaty Section of the Office of Legal Affairs of the United Nations. In reply, Saudi Arabia, which at the time did not ratify the UNLOS, distributed a circular at the UN on December 7, 1984, in which it reasserted its claim of “sovereignty over all its archipelagoes and islands listed” in an accompanied map that included Tiran and Sanafir in the Gulf of Aqaba. Significantly, as in the case of the Saudi formal note of 1957, Egypt did not challenge the latest claim of “its sovereignty over all its archipelagoes and islands as listed . . . concerning passage through the Strait of Tiran . . .,” available at untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterXXI/treaty6.asp.

Upon its ratification of the UNCLOS on April 24, 1996, its Declaration 1 states that “Saudi Arabia is not bound by any domestic legislation or by any declaration issued by other States upon signature or ratification” of UNCLOS and that it “in no way constitutes recognition of the maritime claims of any other State having signed or ratified the Convention, where such claims are . . . prejudicial to the sovereign rights and jurisdiction of the Kingdom in its maritime areas”; “Declarations or Statements upon UNCLOS Ratification, Oceans and Law of the Sea.”

C. Article 8 and provisions of Annex I limited Egypt's "exercise of its full sovereignty" to Zone A, which is adjacent to the Suez Canal, and severely restricted it with respect to the demilitarized zones B and C.¹⁰⁹ Saudi Arabia opposed the peace treaty and joined the so-called Arab Steadfastness Front, which had been formed by other Arab states that boycotted Egypt for going alone in pursuing a peace with Israel that was not based on UN Resolution 242 of 1967. The islands of Tiran and Sanafir were placed in Zone B, against the purported wish of Egypt, which wanted them left out of the deal as non-Egyptian territory. According to senior Egyptian diplomatic and military officials who had participated in the peace talks, the late Egyptian president, Muhammad Anwar el-Sadat, had asked the American and Israeli participants to exclude Tiran and Sanafir from the agenda of the negotiations since they were not part of occupied Egyptian territory. It was, they asserted, on the insistence of the Israeli delegation that the islands were included in the contractual relationship with Egypt, since the Saudis had consistently refused to enter into peace talks with Israel.¹¹⁰ A statement by the Israeli defense minister after meeting the Egyptian foreign minister in Cairo indicated that Egypt and Israel had reached an arrangement regarding Tiran and Sanafir that placed them within the demilitarized zone, B. "There is no problem," the Israeli defense minister replied when asked about the status of the two islands.¹¹¹ Israel's demand that the two islands be included within the peace settlement with Egypt came after Crown Prince Fahad of Saudi Arabia declared, in early January 1982, that Tiran and Sanafir Islands were part of Saudi territory and that the Saudi government would "ask Egypt for their return" after the

(109) Article 8 of the peace treaty; see also articles of Annex I, "Protocol Concerning the Withdrawal and Security Agreements."

(110) Statement by Sameh Shukri, Egypt's foreign minister, in a television interview with Amro Adib, *Al-Qahira Al-Yawm* (Orbit TV, Cairo, April 10, 2016); statement by Staff General Muhsin Hemdi, assistant to Egyptian defense minister Kamal Hasan Ali, member of the Egyptian negotiation side in the peace treaty negotiations, head of the information section of military intelligence and head of the Egyptian military committee supervising the Israeli withdrawal from Sinai and delineation of its eastern boundary line; *Haqa'iq wa-Asrar with Mustafa Bakri* (Sada Al-Balad TV channel, July 28, 2018).

(111) *New York Times*, January 18, 1982.

Israeli withdrawal scheduled for April of that year.¹¹² Saudi Arabia was not, and still is not, a signatory to the peace treaty, and in fact opposed it, and for that reason, Israel feared that Sadat, in an attempt to mend relations with the Saudis, might hand over the islands to them. Consequently, Israel warned Egypt against such a step. Referring to the 1956 and 1967 occupation of the islands as a result of Egyptian closure of the Straits of Tiran, Israel warned, “we have fought twice for navigation rights through the straits, we don’t want to have a third war.”¹¹³ Israeli insistence was apparently calculated to compel Saudi Arabia to eventually agree to become a party to the peace treaty if it ever hoped to regain the two islands. Israel viewed binding both Egypt and Saudi Arabia into the same commitments pertaining to the Gulf of Aqaba as a more effective strategy than holding on to the islands until, and if, Saudi Arabia should consent to reaching a separate peace settlement with Israel.

Accordingly, under the provisions of military Annex I to the treaty, Tiran and Sanafir islands were made part of the demilitarized and highly restricted zone B, covering southeastern Sinai under the control of a multinational force and observers (MFO) tasked with overseeing the implementations of the provisions of the peace treaty, after Israel completed its withdrawal, which was scheduled for April 1982. The MFO is not a UN peacekeeping force, nor is it sanctioned by the UN. It is led and financed by the United States, which is the treaty’s guarantor, as a force that will “observe and report” to ensure that both Egypt and Israel adhere to and implement the terms of the peace treaty.¹¹⁴

Article 2 of the treaty expressly recognized the 1906 Taba-Rafah line separating Sinai from the former territory of “mandated Palestine,” shown on the map in Annex 2, as constituting the “permanent, international boundary” between

(112) David Shipler, “Israel Asks Egyptians to Redraw Border a Bit,” *New York Times*, January 19, 1982; Abd al-Mun’im Dawoud, *Mushkilat al-Milahah al-Bahriyah fi al-Madayaq al-Dawliyah* (Alexandria: Munsha’at Al-Ma’arif, 1998), 148.

(113) Shipler, “Israel Asks Egyptians.”

(114) Annexed to the peace treaty is a US-Israeli memorandum in which the United States, as the guarantor of the terms of the treaty, pledged to “oppose, and if necessary vote against any action or resolution in the United Nations, which in its judgments adversely affects” its provisions.

Egypt and Israel.¹¹⁵ The map in Annex II shows Tiran and Sanafir Islands in a different color than used for the Egyptian territory in Sinai and the same as the color of Saudi Arabia. As will be explained later, in 1990 the Egyptian cabinet interpreted Article 2 and the map at Annex II to indicate that the two islands were outside the jurisdiction of Egypt and therefore declared them to be part of Saudi territory.

However, since Saudi Arabia still is not a signatory to the 1979 peace treaty, Egypt could not legally hand over the islands to the Saudis, even if it wanted to. The relevant provisions of the peace treaty placed Egypt under contractual obligations and severely restricted its ability to exercise actual sovereignty over Sinai as a whole and in the demilitarized zones B and C, covering eastern Sinai and the two islands, in particular. Egypt could absolve itself from the obligations mandated under the relevant provisions only by transferring them to Saudi Arabia through a trilateral arrangement whereby the latter acceded to the relevant provisions in the articles and protocols of the peace treaty.

Under the protocols of the treaty, Tiran and Sanafir Islands are placed under the control of a multinational forces (MNF) unit stationed on Tiran Island. As a rule, the land and shores of the two islands are off-limits to outsiders such as tourists, including Egyptian citizens, without prior permission obtained from MNF headquarters in the Israel port of Elath. On the recommendation of the UN Environmental Protection Agency that the unique coral ecosystem of the islands should be protected from the thriving tourist industry of fishing, diving, and snorkeling and from potential oil and mineral exploration, Egypt declared, in 1983, that the two islands are protected natural areas and, for this purpose, established a “civil police” force there. Administratively, the two islands came under the jurisdiction of South Sinai province.¹¹⁶

(115) Article 2 of the peace treaty.

(116) Order by the minister of the interior to establish a police station in Tiran, no. 422, dated March 21, *Al-Waqa'i' Al-Masriyah*, no. 67 (1982); Egyptian cabinet decision no. 96 of August 3, 1996, to declare Tiran and Sanafir Islands protected natural areas; *Al-Waqa'i' Al-Masriyah*, no. 171 (August 3, 1996).

These acts, though instituted under the restricted terms of the peace treaty and requiring prior official Israeli sanction, might be construed to constitute an Egyptian demonstration of an exercise, however limited, of actual sovereignty over the islands that could provide, in the long run, a legal basis for a claim to prescriptive title. As happened, however, Egypt chose not to place a claim following these acts, even when Saudi Arabia commenced a series of requests that Egypt “return” the “loaned” islands.

Because Saudi-Egyptian relations remained strained due to Saudi opposition to the peace treaty with Israel, Saudi Arabia initiated its first request in the post-peace treaty settlement for the return of the islands. In 1984, the King Khaled of Saudi Arabia approached Egyptian president Hosni Mubarak via the president of the Sudan to request that Egypt return the islands, since Israel’s withdrawal had now been completed. In his reply the Egyptian president, significantly, did not dispute the Saudi claim, and merely asked that this matter be postponed until after the Israeli withdrawal had been finalized. This was to occur after the arbitration court issued its decision on the pending Egyptian-Israeli dispute regarding the location of the 1906 Taba boundary marker, which was ultimately ruled in favor of Egypt in 1988. Incidentally, the judge representing Egypt in the Taba arbitration court was its most prominent legal scholar, and he had written back in 1967 that Tiran and Sanafir were decidedly Saudi islands.¹¹⁷

The 1988–1990 Egyptian-Saudi Exchange of Letters, the 1990 Egyptian Decree 27 Establishing the Egyptian Territorial Sea, and 2016 Statements by the Egyptian President and Cabinet Members

Shortly before the scheduled announcement by the Taba international arbitral court of its ruling on September 29, 1988,¹¹⁸ the Saudi government

(117) Hamed Sultan, *Mushkilat Khalij al-Aqabah: Muhadharat 1966–1967* (Cairo: Ma’had Al-Buhuth wa-l-Dirasat Al-Arabiyyah, 1967), 14; *Al-Qanun al-Dawli al-‘am Waqt al-Salam*, 5th ed. (Cairo, 1972), 595.

(118) United Nations, *Reports of International Arbitral Awards: Case Concerning the Location of Boundary Markers in Taba between Egypt and Israel 29 September 1988* (United Nations, 2006), 20:1–188.

moved earnestly to initiate direct formal communications with the Egyptian government with the sole purpose of Egypt “returning” the islands of Tiran and Sanafir, which the Saudis had “loaned” it in 1950. These contacts were contained principally in (1) two letters sent from the foreign minister of Saudi Arabia to his Egyptian counterpart on September 14, 1988, and August 6, 1989, and the Egyptian foreign minister’s reply on March 4, 1990, as authorized by decision of the Egyptian cabinet; (2) presidential decree 27, issued on January 9, 1990, establishing the straight baselines of Egyptian territorial waters, and (3) the 2016 public statements by the Egyptian president and cabinet members relative to the legal status of the two islands.

These documents constitute, under conventional and customary and law, a valid international agreement establishing territorial rights and obligations on the contracting state parties. All preceding Egyptian and Saudi claims, as well as any subsequent Egyptian claim, to the title of the Tiran and Sanafir Islands thus become legally irrelevant, including the status and fate of the April 2016 maritime agreement, which was yet to be ratified by Egypt.

The Saudi Letter of September 1988

On September 14, 1988, Prince Saud al Faisal, the Saudi Arabian minister of foreign affairs, wrote a letter to Esmat Abdul Meguid, Egypt’s deputy prime minister and minister of foreign affairs. The Saudi minister began his letter by referring to “the two islands of Sanafir and Tiran that belong to the kingdom of Saudi Arabia,” which are located at the mouth of the Gulf of Aqaba, and which the Saudi government had “agreed” to place “under Egyptian administration” in 1950 to defend them against an anticipated Israeli occupation.¹¹⁹ In the past, Saudi Arabia, he said, had refrained from requesting their return since they were intermittently under Israeli occupation. He reminded his Egyptian counterpart that when King Khalid had asked for their return, following Israeli withdrawal

(119) Letter from Prince Saud Al-Faisal, foreign minister of Saudi Arabia, to Dr. Esmat Abdel-Meguid, deputy prime minister and foreign minister of Egypt, September 14, 1988, 1–2.

from Sinai in 1982, President Mubarak had asked that Saudi Arabia wait until a complete Israeli withdrawal had been achieved with the settlement of the Taba boundary marker dispute, which was then pending before an arbitral court. The timing of the Saudi letter coincided with the arbitration court's announcement that it would deliver its ruling in two weeks, on September 29; it ruled in favor of Egypt.

Alluding to Egypt's contractual commitments and the legal regime of the islands under the articles and protocols of the 1979 peace treaty with Israel, Prince Saud assured the Egyptian minister that his government would look with favor on keeping them "under Egyptian administration until needed by Saudi Arabia."¹²⁰

The purpose of the Saudi letter was to reassert their claim to title, and, more important, obtain from Egypt a formal, written acknowledgment of Saudi sovereignty over the islands. The Saudis knew that Egypt, due to contractual commitments under the peace treaty, could not unilaterally transfer the islands to the Saudis or let them establish any form of presence on them. The Saudis also knew that, in order to "regain" control of the islands, they would have to absolve Egypt of its commitments by assuming those commitments themselves.

Days after sending the letter, the Saudi minister met his Egyptian counterpart in New York City while both were attending the UN General Assembly annual session. During their informal talk the Egyptian minister acknowledged verbally to his Saudi counterpart that Egypt recognized Tiran and Sanafir as Saudi islands.¹²¹

Pleased with the verbal assurance, the Saudi foreign minister had apparently asked, or at least expected that a written form of the acknowledgment would be incorporated into the written reply he was expecting for his letter. When almost a year had passed with no reply in sight, Prince Saud dispatched

(120) Ibid.

(121) Letter from Prince Saud Al-Faisal, to Dr. Esmat Abdel-Meguid, August 6, 1989.

another reminder, on August 6, 1989. After reminding him of his verbal acknowledgment of Tiran and Sanafir as Saudi islands during their New York meeting, he again, requested that the two “Saudi islands loaned” to Egypt be returned to Saudi Arabia, as the reasons for “lending” them had ceased to exist. He repeated the Saudis’ full awareness of Egypt’s contractual obligations pertaining to the restricted status of the islands and his government’s readiness to let them remain under “Egyptian administration” until “needed” by Saudi Arabia.¹²² As he did not expect an immediate reply, and perhaps hoping to force one, he concluded the letter with the following paragraph, which, for Saudi Arabia, constituted the *raison d’être* of the whole communication: “I agree with your Excellency and I would like to regard this letter of mine and the response by your Excellency [in New York] to the content of my letter as constituting an agreement between the kingdom of Saudi Arabia and the Arab Republic of Egypt on this matter.”¹²³ The Egyptian government had thus far been hesitant to reply in written form to the repeated Saudi requests. Expressing a private verbal pledge in a written form, or even in an oral public statement, could indeed be construed to form an international agreement creating rights and obligations on Egypt.

Shaky legal grounds to an Egyptian title to the islands, the Saudis’ persistent demands for their return, and economic and financial considerations¹²⁴ had eventually forced Egypt to act. It did so through the long awaited domestic law establishing Egypt’s territorial sea, which was enacted in a presidential decree issued in January 1990.

(122) *Ibid.*, 1–2.

(123) *Ibid.*, 2.

(124) It took critical economic and financial considerations to compel Egypt to respond in the manner sought by the Saudis. Saudi Arabia was, and still is, Egypt’s largest trade partner, with the balance heavily in the latter’s favor; it has also been Egypt’s largest donor of financial aid in the form of grants and loans that have low interest or are interest free, and are often turned into grants. Saudi Arabia is also home of an estimated 5 million Egyptians, the largest expatriate community outside Egypt, whose annual remittance constitutes the largest source of revenue, exceeding that of the tourism and the Suez Canal. Egypt has long sought to persuade the Saudi government to construct, and finance, a Saudi-Egyptian land bridge over the Gulf of Aqaba via Tiran Island.

The Egyptian 1990 Presidential Decree Establishing the Baselines of the Territorial Sea

On August 26, 1983, Egypt agreed to the UN Convention on the Law of the Sea (UNCLOS). Upon ratification, it made several declarations. On the passage through the Gulf of Aqaba, Egypt reaffirmed its recognition of the international character of the Straits of Tiran with implicit claim to title to, at least, its western waters. The declaration states that the provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba “come within the framework of the general regime of waters forming straits referred to in Part III of the Convention, wherein it is stipulated that the general regime shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the State bordering the strait.”¹²⁵

With respect to the territorial waters, Egypt declared that it will publish, “at the earliest opportunity, charts showing the baselines from which the breadth of its territorial sea in the Mediterranean Sea and in the Red Sea is measured, as well as the lines marking the outer limit of the territorial sea, in accordance with usual practice.”¹²⁶

A presidential decree issued on January 9, 1990, was signed into law as Egyptian Decree 27 on January 18, 1990, establishing the baselines of Egypt’s territorial sea.¹²⁷ The law decreed that the territorial sea of the “maritime areas coming under the sovereignty” of Egypt would be measured from the straight baselines along the entire coastline of Egypt in the Mediterranean and the Red Sea, including the Gulf of Aqaba.¹²⁸ It stipulated that geodic datum (Mercator projection) would be used to measure the coordinates

(125) Declarations by Egypt upon ratification of the UNCLOS.

(126) Ibid.

(127) Decree of the President of the Arab Republic of Egypt No. 27 (1990), “Concerning the Baselines of the Maritime Areas,” Arab Republic of Egypt, January 9, 1990, published in the *Official Gazetteer*, no. 3 (January 18, 1990); English text in “National Legislation, United Nations,” reproduced from *United Nations Law of the Sea Bulletin*, no. 16 (December 1990), 5–11.

(128) Ibid.

establishing the straight baselines “in accordance with the rules customarily followed in this regard.”¹²⁹ It also instructed that the presidential decree, along with the annexed official charts, be formally deposited with the office of the UN secretary-general.¹³⁰ This had duly been done in an official *note verbale* delivered on May 2, 1990, by Egypt’s permanent representative.¹³¹ As formal evidence of consent, Egypt has thus been bound irrevocably by the provisions of the UNCLOS.¹³²

In Annex 2-II, the chart lists the length of straight baselines Segments 1–32 along the Gulf of Aqaba.¹³³ Since there are no fringing islands in the Gulf of Aqaba, the only appropriate baseline is the low-water line. Base point 1 is situated at the land boundary terminus with Israel at the Taba marker, and Point 32 is on the coast of the Sinai opposite Tiran Island.¹³⁴ As a result, Tiran, along with Sanafir to the east, falls well outside the Egyptian territorial sea and firmly within Saudi territorial waters.

In the aftermath of the conclusion of the 2016 Saudi-Egyptian maritime boundary delimitation agreement, Sameh Shukri, the Egyptian foreign minister, claimed that, in a step deliberately calculated to leave Tiran and Sanafir to Saudi Arabia, Egypt had chosen to measure its baseline in the Gulf of Aqaba from a point on the coastline of mainland Sinai opposite Tiran, rather than

(129) Soon after Egypt deposited the law with the UN, the United States, on June 13, 1991, sent Protest Note 851 in response to Egypt’s law no. 27, stating that the straight baselines including locations along the Gulf of Aqaba were not drawn “in accordance with the customary rules of international law reflected in the 1982 United Nations on the Law of the Sea which Egypt has ratified”; US Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Sea*, no. 116: “Straight Baseline Claims: Albania and Egypt,” May 6, 1994, Annex 5, 23.

(130) Decree of the President of the Arab Republic of Egypt no. 27 (1990).

(131) *Note Verbale* from the Arab Republic of Egypt to the United Nations, May 2, 1990. Egypt’s permanent representative delivered a letter from Egypt’s deputy prime minister, Esmat Abdel-Meguid, to the UN secretary-general requesting that the attached be signed and entered into force and that presidential decree 27/90, with its annexed official charts, be deposited in line with Article 16 of the UNCLOS, 3.

(132) Arts. 16, 76, and 77, VCLT.

(133) Law no. 27, Annex 2-II: The Red Sea, Decree of the President of the Arab Republic of Egypt No. 27 (1990).

(134) US Department of State, *Limits in the Sea*, no. 116: “Straight Baseline Claims,” 10.

from the shorelines of Tiran itself.¹³⁵ In point of law, however, the provisions of the UNCLOS, such as Article 15, do not permit the baseline to be drawn from the shores of uninhabited islands such as Tiran and Sanafir.¹³⁶

Egyptian Cabinet: 1990 Official Minutes and the Decision Recognizing Saudi Sovereignty over Tiran and Sanafir Islands

The presidential decree instituting Egyptian law 27/90, which established the boundary lines of the territorial sea, had provided the legal basis for the Egyptian government to formulate, after a long delay, a formal reply to the repeated Saudi communications, assenting to the latter's request for a written, explicit recognition of the latter's claim of title to Tiran and Sanafir Islands.

On February 17, 1990, one month after the presidential decree signed into law 27/90, Mr. Abdul Meguid, the Egyptian deputy premier and foreign minister, sent a detailed top-secret memorandum to the Egyptian Prime Minister, Atef Sidqi, on the nature of the Saudi letters and a recommendation on how to reply to them based on the ministry's legal opinion.¹³⁷ The cabinet held a meeting the following month, on March 4, at which the main agenda was to debate and reach a decision with respect to the Saudi request regarding the two islands, as based on foreign ministry's February memorandum.¹³⁸ In his presentation, the foreign minister informed the meeting that he had received from his Saudi counterpart two letters in 'the past year, asking that the Egyptian side acknowledge Saudi Arabia's sovereignty over those two islands.'¹³⁹ The Saudi

(135) Shukri had said in 2016 that, in a step deliberately calculated to leave Tiran to Saudi Arabia, Egypt had chosen to measure its baseline in the Gulf of Aqaba from a point on the coast of mainland Sinai opposite to Tiran, rather than from the shoreline of Tiran Island; statement by Sameh Shukri.

(136) The provisions of the UNCLOS that Egypt had ratified do not permit the baseline to be drawn from the shores of uninhabited islands.

(137) Memorandum, top secret, from Dr. Esmat Abdel-Meguid to Dr. Atef Sidqi, no. 423, dated February 17, 1990, sent February 21, 1990.

(138) Minutes (top secret, not to be published) of the Egyptian Council of Ministers meeting held at the offices of the Council of Minister Headquarters, Cairo, on the afternoon of Sunday, March 4, 1990, presided over by the prime minister, Sidqi.

(139) Memorandum from Esmat Abdel-Meguid to Atef Sidqi, 1.

“point of view,” he said, was that the two islands formed part of Saudi territory and had been “loaned” to Egypt in 1950 to occupy to prevent their falling into the hands of their common enemy, Israel. The Saudi government, he added, recognized Egypt’s contractual obligations under the peace treaty with Israel and was prepared to let the two islands remain temporarily “under Egyptian administration” until circumstances permitted their return to Saudi Arabia.¹⁴⁰ In a 1988 New York meeting, he concurred with the Saudi view, verbally informing the Saudi minister that “the government of the Arab republic of Egypt recognizes the sovereignty of Saudi Arabia over the islands of Tiran and Sanafir, and that Egypt had in fact established its presence on them in 1950 so as to defend and provide security for them, and that Egypt did so with the blessing of Saudi Arabia.”¹⁴¹ However, he asserted that Egypt’s legal commitments under the terms of the peace treaty would prevent Egypt from handing over the two islands to Saudi Arabia. His Saudi counterpart readily assented and stated that his government was prepared to temporarily extend “Egyptian administration” of the islands until proper circumstances permitted their return.¹⁴²

Then, the Egyptian foreign minister told the cabinet that his ministry’s legal department had conducted a study on the status of the two islands, assisted by a prominent legal scholar, Mufeed Shihab, who was then head of the international law department at the law school of Cairo University.¹⁴³ He and Shihab agreed on the study’s finding pertaining to “a number of facts” regarding the status of the island, which he had presented in the memo submitted to the prime minister and the cabinet. First, as quoted from the cabinet minutes:

“It is an established fact that historically, the sovereignty over the two islands belonged to the kingdom of Saudi Arabia until 1950 when Egypt, in military confrontation with Israel, actually occupied them with the

(140) Ibid.

(141) Minutes of the Egyptian Council of Ministers.

(142) Ibid.

(143) Ibid.

agreement and blessing of Saudi Arabia, after it became apparent that Israel was interested in them.”¹⁴⁴

Second, the right to occupy the islands contained in a bilateral agreement to “administer” them did not convey Egyptian sovereignty, and Saudi Arabia did not “cede” them to Egypt. The finding asserted categorically that “Egypt has not claimed sovereignty over the islands at any time.”¹⁴⁵ In confirmation of the Saudi title to the islands, the memorandum referred to Article 2 and Annex II of the Egyptian-Israeli peace treaty pertaining to Egypt’s eastern boundary, which identified the two islands as being outside the territorial jurisdiction of Egypt.¹⁴⁶ The memo further asserted that the peace treaty and its protocols made no mention of the islands as being part of, or administered by Egypt.¹⁴⁷

In addition to this legal basis, in the meeting the foreign minister stressed Egypt’s desire to “seek strategic links” with Saudi Arabia in the economic and financial areas, which he hoped would be enshrined in “the construction of a bridge between Egypt and Saudi Arabia over the Gulf of Aqaba.” He informed the cabinet of the urgent need to “prepare a clear positive reply” to Saudi communications before the scheduled meeting of the Egyptian-Saudi Joint Committee in Riyadh at the end of the month.¹⁴⁸ Accordingly, he read a draft of the proposed reply, and asked that should it be approved, he be authorized to sign and deliver it to his Saudi counterpart.¹⁴⁹

In debating the issue, the cabinet emphasized the “positive” aspects of the draft reply, in that it contained “Egyptian acknowledgement that the two islands belonged to Saudi Arabia, and at the same time kept them under Egyptian administration until situations stabilize in the region.” It would also,

(144) Ibid.

(145) Ibid.

(146) Ibid. In the map referred to, the two islands were marked in a color identical to that of Saudi territory and different from that of the Egyptian Sinai coast. The memo further asserted that the peace treaty made no mention of the islands as being part of, or administered by, Egypt.

(147) Ibid.

(148) Ibid.

(149) Ibid.

the cabinet asserted, maintain the “cordial relations” with Saudi Arabia, as the two islands were to “play a principal role in constructing the land bridge project” between the two countries over the Gulf of Aqaba.¹⁵⁰

At the end of the meeting, the Egyptian Council of Ministers approved the draft reply and authorized Abdel-Meguid, the deputy prime minister and foreign minister, to sign and deliver the Egyptian government’s formal reply to the Saudi government. It further declared that the “public interest” dictated that the contents of Saudi letters as well as the Egyptian reply were “not to be made public” at the present time.¹⁵¹ The foreign minister added that he would deliver the reply in person to Prince Saud in the upcoming meeting, the following week, of the Arab League’s foreign ministers in Tunis, and would impress “verbally” on his Saudi counterpart the “importance of secrecy aspects” of these communications, as leaking them would give “Israel the opportunity to create trouble for Saudi Arabia that it did not want.”¹⁵² Making public these communications would imply a Saudi intention to follow in Egypt’s steps and enter into formal peace negotiations with Israel as the only possible route to legally establish its presence, however symbolic, on the islands of Tiran and Sanafir.

Egyptian Formal Letter of March 1990: Acknowledgment of Saudi full Sovereignty over Tiran and Sanafir Islands

After two years of waiting, the Saudi government received the formal reply it had long sought when, on March 10, 1990, the Egyptian foreign minister delivered a letter, which he had signed earlier, at the March 4 cabinet session, to the Saudi foreign minister during the meeting of the Arab League’s Arab foreign ministers in Tunis.¹⁵³ It was addressed to his “friend, his highness”

(150) Ibid.

(151) Ibid.

(152) Ibid.

(153) Ibid. The foreign minister signed the letter on the spot at the cabinet meeting as soon as the council approved it, and he informed the council that he would deliver the reply in person to his Saudi counterpart during their meeting in Tunis the following week.

Prince Saud, the Saudi foreign minister. Abdel-Meguid, wrote:

“Regarding your previous two letters sent to us on September 14, 1988, and on August 6, 1989, containing the position of the kingdom of Saudi Arabia on Tiran and Sanafir islands . . . where your highness mentioned the desire of the kingdom to have the two islands returned to it.”¹⁵⁴

He also referred to their 1988 New York talk, during which:

“I expressed that “we in Egypt have no opposition or reservation with regard to the sovereignty of the kingdom over those two islands except what may contravene Egypt’s regional and international commitments that prohibit the presence of military forces on them.”¹⁵⁵

In addition, he emphasized the Saudis’ “assurance that the ‘government of the kingdom of Saudi Arabia does not intend to create circumstances that may affect the approach adopted by her sister Egypt in the conduct of [her] foreign policy.’”¹⁵⁶

After his introduction, the Egyptian foreign minister then proceeded to state Egypt’s formal, unambiguous position on the legal status of Tiran and Sanafir Islands in three points:

- 1—“The government of the Arab Republic of Egypt acknowledges the sovereignty of the Kingdom of Saudi Arabia over the islands of Tiran and Sanafir, and that, in fact, Egyptian presence on these islands in 1950, had been for their protection and security, and that it had been done with the blessing of the Saudi kingdom.
- 2—In stating its position on the two islands, the government of Arab Republic of Egypt concentrates its attention on the necessity of not breaching Egypt’s regional and international commitments,

(154) Reply letter, dated March 4, 1990, from the Egyptian deputy prime minister and foreign minister to Prince Saud al-Faisal, Saudi foreign minister, dated March 4, 1990, 1.

(155) Ibid.

(156) Ibid.

in accordance with the international agreements it had concluded with respect to establishing peace in the region stipulating that no military forces would be placed on the islands where only civil police equipped with small lightly armed vessels patrol internal waters in the area. In addition, a multinational force is stationed in the area.

3—In light of circumstances pertaining to the two islands, the Arab Republic of Egypt asks its sister, the kingdom of Saudi Arabia, that the two islands continue to remain under Egyptian administration in a temporary capacity until the situation in the region stabilizes.”¹⁵⁷

Legal Status of Egyptian Presidential Decree 27/90, and the 1988–1990 Egyptian-Saudi Exchange of Letters under International Law

Under international law, the two letters of September 1988 and August 1989 sent by the Saudi foreign minister to his Egyptian counterpart, and the latter’s reply of March 4, 1990, together, constitute one international, binding legal agreement between Saudi Arabia and Egypt establishing future territorial rights and obligation on both countries in accordance with the conventional and customary treaty law, as codified in the Vienna Convention on the Law of Treaties (VCLT).¹⁵⁸ Likewise, Egypt’s presidential decree 27 of 1990, establishing the baselines of its territorial sea, which was deposited with the UN secretary-general in May 1990 in accordance with the relevant provisions of the UNCLOS, constitutes a binding multinational agreement establishing territorial rights and obligations on Egypt and its adjacent and riparian states in accordance with the conventional and customary treaty and maritime law

(157) Ibid.

(158) The Vienna Convention on the Law of Treaties (VCLT) was adopted on May 22, 1969, and opened for signature on May 23, 1969, by the United Nations Conference on the Law of Treaties; it entered into force on January 27, 1980. The text of the Final Act is included in Document A/CONF.39/11/Add.2. Full text in United Nations, *Treaty Series*, vol. 1155, chapter 23, “Law of Treaties,” 331.

as codified in the VCLT¹⁵⁹ and UNCLOS,¹⁶⁰ both of which Egypt and Saudi Arabia had acceded to.¹⁶¹

In its list of the principal sources of international law, the statute of the International Court of Justice (ICJ) accords first place to international conventions, namely, bilateral agreements or multilateral treaties, “whether general or particular, establishing rules expressly recognized by the contracting States.”¹⁶² The other sources, in hierarchical order, are international custom, general principles of law, judicial and arbitral decisions, and the works of prominent international law publicists and scholars.¹⁶³ The Vienna Convention on the Law of Treaties (VCLT) constitutes the principal authoritative source of treaty law.¹⁶⁴ It is generally recognized as the codification of preexisting rules governing international agreements that began with customary law (in other words, state practice).¹⁶⁵ The VCLT defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular destination.”¹⁶⁶

In fact, the VCLT’S article’s definition had been derived from the provisional draft of the International Law Commission, which defined the term “treaty” as:

(159) Egypt acceded to the VCLT on February 11, 1982, and Saudi Arabia acceded on April 14, 2003, “with a reservation regarding Article 66 so that the recourse to judgement or to arbitration should be preceded by agreement between the two parties concerned.”

(160) Egypt ratified the UNCLOS with declarations on August 26, 1983; Saudi Arabia ratified it with declarations on April 24, 1996; “Declarations or Statements upon UNCLOS Ratification, Oceans and Law of the Sea.”

(161) Ibid.

(162) Article 38 of the Statute of the International Court of Justice. The ICJ Statute, signed at San Francisco on June 26, 1945, is the principal judicial organ of the UN. For the full text, see International Court of Justice, *Charter of the United Nations, Statute and Rules of Court and Other Documents*, ICJ Act and Documents No. 4 (The Hague: United Nations, 1978), 61–81.

(163) Article 38 of the ICJ Statute.

(164) VCLT, Document A/CONF.39/11/Add.2, in United Nations, *Treaty Series*, vol. 1155, chapter 23, “Law of Treaties,” 331.

(165) Gerhard von Glahn, *Law among Nations: An Introduction to Public International Law*, 5th ed. (New York: Macmillan, 1986), 493; Louis Henkin et al., *International Law: Cases and Materials* (St. Paul, MN: West Publishing Co., 1980), 580.

(166) VCLT, Article 2(1)(a) and Article 31(3)(a).

“Any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minutes, memorandum of agreement, *modus vivendi* or any other appellation), concluded between two or more States or other subjects of international law and governed by international law.”¹⁶⁷

In addition, international judicial and arbitral court decisions had ruled that joint communiqués constitute an international agreement.¹⁶⁸ In short, no legal significance is attached to the different names of treaties (whether, for example, named an agreement, accord, exchange of letters of notes, minutes, communiqués, or any another term).¹⁶⁹

Thus, the Egyptian presidential decree 27/90, on one hand, and the aforementioned three exchanges of letters of 1988, 1989, and 1990 between the Saudi and Egyptian governments, on the other hand, separately meet the legal definition of a written, binding, international agreement creating future rights and obligations on both state parties, and registerable with the UN.¹⁷⁰ As stipulated in Article 4¹⁷¹, however, the two agreements are subject to the provisions of VCLT as conventional law, since they both were concluded in 1990 by two signatory state parties after the VCLT came into force on January 27, 1980.¹⁷² They would also arguably be subject to the relevant provisions of UNCLOS as customary law,

(167) International Law Commission, *International Yearbook*, 2:645; Ian Brownlie, *Principles of Public International Law*, 2nd ed. (Oxford: Clarendon Press, 1973), 583.

(168) In the Aegean Sea Continental Shelf Case (Greece v. Turkey), the ICJ stated that “the Court need only observe that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement”; *ICJ Reports* (1978), 36.

(169) *Ibid.*

(170) It can also be argued that Egyptian Cabinet minutes involving the decision authorizing the March 4, 1990, reply to the Saudi government constituted a separate valid international agreement establishing future obligations for Egypt and the territorial rights of another state, Saudi Arabia.

(171) Article 4 of VCLT states that its provisions apply “only to treaties which are concluded by states after the entry into force of the present Convention with regard to such states.”

(172) Egypt acceded to VCLT on February 11, 1982, and Saudi Arabia acceded to it on April 14, 2003, with “with a reservation regarding Article 66 so that the recourse to judgement or to arbitration should be preceded by agreement between the two parties concerned.”

since the latter came into force on November 16, 1994.¹⁷³ It follows that treaties concluded prior to 1980 (the date of the VCLT's entry into force), like the 1950 Saudi-Egyptian communications pertaining to the Egyptian occupation of Tiran and Sanafir Islands, are, as a matter of law, subject to customary international law as ultimately incorporated in the provisions of the VCLT.¹⁷⁴

As international agreements concluded by mutual consent creating rights and obligations on contracting parties, Egyptian presidential decree 27/90, which establishes the baselines for the territorial sea, and the 1988–90 Saudi-Egyptian exchange of letters on the status of Tiran and Sanafir become subject to the doctrine of *pacta sunt servanda*. As one of the fundamental general principles of law, treaties concluded by mutual consent of the contracting states create binding rights and obligations that must be carried out *pacta sunt servanda* (in good faith) by the parties concerned.¹⁷⁵ No judicial or arbitral tribunal has thus far rejected or questioned the validity of the doctrine.¹⁷⁶ Indeed, the VCLT enshrined the doctrine by name in Article 26, stipulating that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”¹⁷⁷ The sanctity of the principle of *pacta sunt servanda* is rooted, in part, in its inherent prejudice in favor of the validity of international agreements, especially those pertaining to peace and territorial settlement. The 1988–90 Egyptian-Saudi exchange of letters did establish a final territorial settlement in recognizing the full sovereignty of Saudi Arabia over the two islands, a legal settlement that had been further sanctioned by Egyptian presidential decree 27/90. When Saudi Arabia issued, in 2010, its royal decree establishing

(173) VCLT came into force on January 27, 1980, and UNCLOS came into force on November 16, 1994.

(174) Glahn, *Law among Nations*, 493; Henkin et al., *International Law*, 580.

(175) R. C. Krylov (1947, I), 429, translated from the original French text in Fariborz Nozari, *Unequal Treaties in International Law* (Stockholm: S-Byran Sundt & Co., 1971), 33, n. 2; also citing another view of the rule expressed by the Academy of Sciences of the USSR (p. 248): “International treaties must be observed *pacta sunt servanda*. This most important principle of international law expresses the attitude to law of all progressive mankind and is sanctified by many centuries of tradition.”

(176) *ICJ Reports* (1958), Advisory Opinion (Netherlands v. Sweden), 72; *ICJ Reports* (1962), Temple of Preah Vihear (Thailand v. Cambodia) Case, Merits, Judgment, 34.

(177) Article 26, “*Pacta sunt servanda*,” of the VCLT.

the baselines of its territorial sea and deposited them with the UN,¹⁷⁸ Egypt submitted a “declaration” simply stating that it would “deal” with the Saudi baseline coordinates along the Gulf of Aqaba (listed in Table 1) “in a manner that would not prejudice the position of Egypt in the ongoing negotiations with the Saudi side to delimit the maritime boundary between the two countries.”¹⁷⁹

The prominence and permanence of international agreements establishing peace and territorial settlement are such that the VCLT, in adopting the doctrine of *pacta sunt servanda*, expressly excludes the use of a customary law norm called *clausula rebus sic stantibus*, the rule of fundamental change of circumstances as grounds to terminate or withdraw from a treaty: “if the treaty establishes a boundary . . .”¹⁸⁰ The 1988–90 Saudi-Egyptian exchange of letters did establish the maritime boundary, as did the presidential decree with respect to the baselines along the Gulf of Aqaba, and thus Egypt could not use *rebus sic stantibus*, or for that matter any norm, as justification to unilaterally terminate, or otherwise declare void, the 1988–90 exchange of letters, nor it could withdraw from the UNCLOS after having formally deposited the instruments of notification with the UN secretary-general. In terms of the treaty formulation process, the 1988–90 exchange of letters was negotiated and concluded in accordance with the procedural requirements provided for in the relevant provisions of the VCLT.¹⁸¹

(178) Saudi Arabia issued lists of geographical coordinates of points defining baselines of Saudi Arabia “in the Red Sea, the Gulf of Aqaba and the Arabian Gulf,” as contained in Royal Decree M/4 on January 11, 2010, table no. 1, “Baseline in the Gulf of Aqaba and the Red Sea”; deposited with the UN secretariat-general on March 5, 2010, Division for Ocean and the Law of the Sea, Office of Legal Affairs, available at www.un.org/Deposits/los.

(179) Egypt’s “declaration,” submitted to the UN on September 15, 2010, pertaining to deposited geographical coordinates, stated, in Arabic, that “Egypt will deal with the baselines whose geographical coordinates are listed in Table 1 opposite Egyptian coast in the Red Sea and in a manner nonprejudiced to the position of Egypt in the ongoing negotiations with the Saudi side to delimit maritime boundary between the two countries” (letter from the permanent mission of the Arab Republic of Egypt to the office of the secretary-general of the UN, CHAN/600/10/ST); UN secretary-general, note to Egypt’s UN mission, note MZN.LOS.2010.77, regarding the deposited geographical coordinates of points submitted by Saudi Arabia on January 12, 2010.

(180) Article 62(2)(a) of the VCLT.

(181) I. M. Sinclair, “The Vienna Convention on the Law of Treaties” (1973), 27, cited in Henkin et al., *International Law*, 596.

The full power credentials of the persons who represented the Egyptian and Saudi states for the purpose of negotiating, concluding, signing and sealing the 1988-90 exchange of letters and presidential decree 27/90 were established *ex officio*.¹⁸² Article 7 of the VCLT considers the most senior officials of state, such as heads of state and government and foreign ministers, as *ex officio* invested, by virtue of their position, with the required authority.¹⁸³ The presidential decree 27/90 was signed and sealed by President Mubarak, president and head of the Egyptian state, and deposited with the UN by his head of government via the head of Egypt's UN mission. The 1988–90 exchange of letters was authorized, negotiated, concluded, and signed by the Egyptian cabinet, including the head of government and his deputy and foreign ministers as well as the Saudi foreign minister, who was acting on behalf of the Saudi government. In accordance with the provisions of Articles 11–17 of the VCLT, Egypt and Saudi Arabia had freely and reciprocally consented to these agreements and expressed their mutual consent to be bound by their provisions by signing and acceding to them.¹⁸⁴ Furthermore, these legal instruments were ratified in the international, not the national, sense. Conventional law, as embodied in the VCLT, gives precedent to ratification at the international level over municipal or domestic law. Article 46 provides that:

“A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”

Neither the 1988–90 exchange of letters nor the Egyptian cabinet decision, concluded under the 1971 constitution, stipulated prior or subsequent

(182) Articles 6 and 7 of the VCLT.

(183) Article 7 of the VCLT.

(184) Article 11 of the VCLT. The last sentence, referring to “any other means,” would include, for example, the exchange of unsigned *notes verbales* as a means of consent to a treaty; Henkin et al., *International Law*, 600.

“ratification” at the national level, and thus, the approval of domestic judicial bodies such the parliament was not required.¹⁸⁵ Under the relevant provisions of the VCLT, the “definitive signature” of the Saudi and Egyptian state representatives constituted formal ratification of the 1988–90 exchange of letters and its immediate entry into force.

Since their ratification, the Egyptian government has acted in a manner that would appear to enhance the object and purpose of the 1988–90 exchange of letters, as testified in the subsequent protracted negotiations with Saudi Arabia that led eventually to the conclusion (in April 2016) of a Saudi-Egyptian agreement on maritime boundary delimitation. Under conventional law, the 2016 maritime boundary accord, in point of law, formed a subsequent agreement to the 1988–90 exchange of letters, in that its provisions pertaining to the Gulf of Aqaba were formulated so as to be compatible with the object and purpose of the latter as a whole.

All international agreements, as defined under conventional and customary law, fall in the registerable category and, thus, are required to be registered under Article 2(1) of the UN Charter.¹⁸⁶ This may include all international arrangements operating within the sphere of international law in written form, and which in reality embody a binding commitment or future rights and obligations on the contracting state parties. The manner in which the instrument had been concluded and appellation attached to its name (treaty, accord, memorandum, exchange of letters, minutes, etc.) all are irrelevant.¹⁸⁷ While Egypt had formally deposited the presidential decree 20/90 with the UN secretary-general, it refrained, understandably perhaps, from seeking to register the 1988–90 exchange of letters with the UN, and instead decided, with Saudi consent, to keep their contents secret for a long time. In light of the Egyptian

(185) Article 14 of the VCLT.

(186) Article 102(1) of the UN Charter reads: “Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.”

(187) Geoffrey Marston, “United Kingdom Materials on International Law,” *British Yearbook of International Law* 1989, 641.

government's apparent reluctance to ratify the April 2016 maritime boundary delimitation agreement it had signed more than a year ago due to political and judicial factors pertaining to the Tiran and Sanafir Islands, it might be advisable for Saudi Arabia to register the 1988–90 exchange of letters as well as the 2016 maritime boundary agreement itself with the UN. By not doing so, Saudi Arabia could be debarred legally from using the exchange of letters as well as the 2016 maritime agreement as evidence before the ICJ should it decide to seek an international judicial ruling for the return of the islands. Article 102(2) of the UN Charter stipulates that “no party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph (1) of this Article may invoke that treaty or agreement before any organ of the United Nations.” Depositing these two instruments would also compel Egypt to react, thereby revealing its real intention with regard to the two islands, especially in view of its very recent “declaration . . . effective immediately,” submitted on February 16, 2017, under Article 298 of the UNCLOS, that “it does not accept any of the procedures provided for . . . with respect to all categories of disputes.”¹⁸⁸ This step would, as intended, hamper potential Saudi attempt to unilaterally to judicial or arbitral courts to settle future maritime dispute with Egypt.¹⁸⁹ On its part, Saudi Arabia further convoluted its position with its own reservation pertaining to dispute settlement provisions, which it had submitted upon its acceptance of the VCLT¹⁹⁰

The 1988–90 exchange of letters is a valid, binding treaty between Egypt and Saudi Arabia, which was negotiated, concluded, and ratified in accordance with the rules of their respective domestic treaty-making law as well as

(188) Declaration by Egypt under Article 298 of the UNCLOS, submitted on February 16, 2017: “1 . . . Egypt declares that . . . it does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes specified in article 298, paragraph 1(a), (b) and (c) of the Convention, 2. This declaration shall be effective immediately”; available at treaties.un.org.

(189) The Egyptian government removed this reservation shortly before President Sisi's visit to Saudi Arabia on April 23, 2017. Under the UNCLOS clauses, member-states could register, withdraw and reinstate declarations, reservations at any time upon ratification and thereafter.

(190) See the Saudi Arabian reservation to dispute settlement clauses of the VCLT disputes.

conventional and customary law. Under article 54(b) of the Vienna Convention of the Law of Treaties (VCLT), it can only be terminated through an explicit, formal declaration of abrogation by mutual consent of the Saudi and Egyptian governments as the contracting parties.

Neither contracting state party could release itself from its treaty obligations, especially in light of the fact that the 1988–90 exchange of letters disposes of territory. Even the cardinal legal principle of *rebus sic stantibus* cannot, under conventional and customary law, be applied as grounds to terminate agreements establishing a territorial boundary.¹⁹¹ Article 62(2)(a) of VCLT stipulates: “A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary.”¹⁹²

Egyptian Head of State, Head of Government, and Foreign Minister 2016 Public Statements Acknowledging Saudi Title to Tiran and Sanafir Islands

Historically, one of the most characteristics which a sovereign state alone enjoys is the prerogative to negotiate and conclude treaties through the authority of its representatives. The head of state, head of government, foreign ministers, and heads of diplomatic missions by virtue of their position, are accorded full power, *ex officio*. This fact has been recognized in Articles 6 and 7 of the VCLT. It is therefore not surprising that, under customary law, these representatives are held to statements they make in the sphere of international law. The principle of estoppel refers to holding a state to a statement or statements made verbally by its officials that would preclude it from denying them, even when they may not correspond with the real intention of that state.¹⁹³ This customary law principle is particularly relevant to cases

(191) Article 62 of the VCLT.

(192) Article 62(2)(a) of the VCLT.

(193) Brownlie, *Principles*, 165.

involving territorial disputes. It is based on good faith and consistency in interstate relations and constitutes an important evidence of state sovereignty. Norway lost Greenland, an area the size of Saudi Arabia and almost three times that of Egypt, to Denmark because of an “unintended” public statement by its foreign minister. In the famous Eastern Greenland Case, the Permanent Court of International Justice ruled that Norway, through oral statement by its foreign minister, had “debarred herself” (been estopped) from contesting Danish sovereignty over Greenland because it had conceded to Denmark’s sovereignty and promised, in effect, not to contest it by acceptance of binding “bilateral and multilateral agreements” reaffirming her recognition of the whole of Greenland as Danish territory.¹⁹⁴

On April 13, 2016, Egypt’s President Sisi, his prime minister, foreign minister, and defense minister, other senior cabinet members, and military and intelligence officers, as well as prominent scholars of law and history, held a public forum at the presidential palace of Al-Ittihadiyah that included various “sectors of Egyptian society.” Its proceedings were carried live on government and private television stations in Egypt and reported in detail in government-controlled newspapers and other outlets. The forum was intended to deflect public outcry in the country that the Egyptian government had “sold the Egyptian islands of Tiran and Sanafir” to Saudi Arabia in the maritime boundary delimitation agreement it had signed a week earlier in Cairo. In the four successive public speeches, the president, followed by his prime minister, foreign minister, and a legal scholar, all reasserted explicitly Saudi full sovereignty over the two islands of Tiran and Sanafir, based, they insisted, on undisputed historical facts and incontestable legal arguments, including, inter alia, the 1988–90 exchange of letters and presidential decree 27/90.¹⁹⁵

(194) Legal Status of Eastern Greenland (Norway v. Denmark), Judgment, 1933, P.C.I.J., Ser. A/B, no. 53, 68–69; Brownlie, *Principles*, 165.

(195) For a video segment of the April 13, 2016, presidential address to the forum, see <https://www.youtube.com/watch?v=x9T5fD2VCWw&feature=youtu.be>; see also video segments in *Haqaiiq wa-Asrar with Mustafa Bakri*, January 6, 2017.

President Sisi's Statement on the Tiran and Sanafir Islands

Flanked on both sides by his prime minister, foreign minister, and defense minister, the Egyptian president opened the meeting by assuring his audience that:

“We have not relinquished or ceded one grain of Egyptian sand to Saudi Arabia. There were security and political considerations that led Egypt to keep the islands, and now we have given them back to their rightful owner who has asked for their return. Delimitation of maritime boundaries is subject to the rules of international law, and in concluding the 2016 maritime boundary agreement with Saudi Arabia, Egypt, he insisted, has not swerved from the coordinates establishing the baselines points listed in the presidential decree of 1990 that had been registered with the UN.”¹⁹⁶

He added that in July 2014, he had commissioned a memorandum “on the status of the two islands,” to be prepared by the intergovernmental National Maritime Boundary Delimitation Committee, which was composed of representatives of relevant government departments such as the foreign and defense ministries and military intelligence services. Lifting a large folder, the president declared:

“I have with me in this folder the 2014 memorandum on the subject of the two islands, based on the secret archives of the foreign ministry, the defense ministry and the intelligence department. All the documents and information show that, from a legal and technical, not political, point of view, the islands are theirs [the Saudis’]. The decision was not taken impulsively or by one individual. I have asked all the [Egyptian] patriotic people in the military and intelligence and law who were involved with issue and still alive and brought them with me to this forum so that you may feel at ease with respect to the two islands.”

Following the president, the prime minister, Sharif Ismael, who had signed the boundary delimitation agreement on behalf of Egypt, made the following

(196) Ibid.

statement summing up the legal ground determining the Egyptian position on the two islands:

“The boundary agreement of which the two islands and Sanafir are part, was concluded in accordance with the United Nations Convention on the Law of the Sea, and Egypt is one the states that are signatory to it.¹⁹⁷ The 1906 agreement [Taba-Rafah line] is only a land boundary agreement that did not cover maritime area. In 1950, king Abdulaziz [of Saudi Arabia] asked the king of Egypt to protect Tiran and Sanafir. In January 1950, Egypt had informed the US and United Kingdom of this act. On April 12, 1957, Saudi Arabia addressed the UN reasserting its sovereignty over Tiran and Sanafir. In 1988 an exchange of letters was initiated between foreign minister Esmaat Abdul Meguid and Prince Saud al-Faysal and in 1990 the Council of Ministers approved a decision that the Egyptian government formally acknowledged that Tiran and Sanafir islands belong to Saudi Arabia. In his letter, Saud al-Fayasal stated the following, “these letters [that were] exchanged will constitute an agreement between Egypt and Saudi Arabia.” In 1990, a presidential decree defined the coordinates of the baselines establishing the territorial sea that were registered with the UN. The two countries [Egypt and Saudi Arabia] have agreed that the two islands will remain under Egyptian administration until the legal procedures to transfer their title to Saudi Arabia are completed.”¹⁹⁸

The foreign minister, Sameh Shukri, who is a lawyer by training, reiterated the points outlined in the statements by the president and Prime Minister. He further expanded on some of them. The 1990 presidential decree and the UNCLOS, he added, formed the reference source used by Egyptian maritime

(197) “Technical Procedures to Delimit the Maritime Boundary,” 1–2. The report states that the median line for the territorial sea of both states was decided in accordance with Article 15 of the UNCLOS, Annex D, which leaves Tiran and Sanafir to Saudi Arabia, outside Egyptian territory: “6. The Procedure of Boundary Delimitation between Egypt and Saudi Arabia and Legal Documents related to It,” 81 Map, Annex D, 9–10.

(198) Statement by prime minister Sharif Ismael to the forum, available at <https://www.youtube.com/watch?v=IfTQ6FscZGE>.

boundary delimitation committee to define the coordinates establishing the baselines along the Sinai coastline on the Gulf of Aqaba. On that basis, “the two islands became part of the Saudi territorial sea.” Egypt, he said, did not attempt to establish “baselines points on Tiran and Sanafir which proves that no Egyptian claim to them had existed.”¹⁹⁹

The last major presenter at the forum was Mufeed Shihab, Egypt’s most prominent living legal scholar and an expert on international law. He had cosigned the February 17, 1990, memorandum by Egypt’s late foreign minister, Abdel Meguid, that provided the legal basis of the Egyptian cabinet’s decision in March 1990 to recognize Saudi Arabia’s full sovereignty over the islands of Tiran and Sanafir. He was also one of the leading lawyers in the Taba Arbitration, which ruled in Egypt’s favor in 1988, allocating to it the Taba marker of the 1906 Taba-Rafah boundary line.

Shihab stated that “from all historical, geographic and legal evidence, it becomes clear that those two islands are Saudi.” Because of its military weakness, Saudi Arabia had asked Egypt to “administer” the two islands for the purpose of defending them. Under this arrangement, “sovereignty remained to the title holder and that is the kingdom [of Saudi Arabia].” This, he said, has been the “legal position from 1950 to this day.” Saudi Arabia did not, he insisted, cede its sovereignty over the islands to Egypt, and Egypt did not, and could not, acquire it through prescription. The Saudi demands for the return of the islands were:-

“continuous[;] “every now and then, they would send a letter [saying], ‘please give me back the two islands,’ and Egypt would reply, ‘okay, we acknowledge that they are yours, but please let me keep them temporarily due the present circumstances.’”

(199) Statement by Sameh Shukri to the forum, available at <https://www.youtube.com/watch?v=n6ZZ1FUedW4>. Shukri’s statement with respect to the reason of Egypt’s apparent voluntary restraint from establishing baseline points on Tiran, instead on the Sinai coastline, is misleading. The UNCLOS, which Egypt is party to, does not allow baseline points for fringed, uninhabited islands like Tiran and Sanafir.

Egypt, Shihab said, kept telling the Saudis, “I acknowledge your claim, I’m a mere manager of the islands.” Shihab then stated that the Egyptian foreign minister’s March 1990 letter to his Saudi counterpart constituted “an acknowledgment and recognition” by Egypt of the Saudi claim to the title to the islands. The letter, he said, was based on the finding of a committee established by the cabinet, which was composed of “legal experts, historians, geologists” who spent ‘long weeks’ researching the subject. He cosigned the foreign minister’s February 17 memo, which was based on a “legal opinion” that he himself had authored by virtue of his “long experience in my field of international boundaries.” He ended his presentation by asserting that the April 2016 maritime boundary delimitation agreement is “valid one hundred percent and public opinion should understand that.”²⁰⁰

In a potential arbitral or judicial tribunal court, the Egyptian state could be held to those public statements made verbally by its head, along with the head of government and the foreign minister, in one sitting, as well the statement issued and published on the cabinet’s official website. Under the doctrine of estoppel, which pertains to territorial dispute, Egypt had “estopped or debarred” itself from contesting the established Saudi claim to the islands and could not withdraw or deny such statements or even plead they did not reflect its real intention, as shown in Eastern Greenland Case. Moreover, a strong legal argument could be put forth that these verbal and published statements, separately and together, constitute, under conventional and customary law, valid, binding “unwritten” agreements establishing bilateral territorial rights and obligations on the issuing state, as declared by its most senior representatives, who are granted full power *ex officio* to conclude treaties.²⁰¹

(200) Mufeed Shihab presentation at the presidential forum, available at https://www.youtube.com/watch?v=IHO6ONX95_E.

(201) Article 1 of the VCLT restricts its definition of international agreements: “In written form, article 3 qualifies article 1 by stipulating that the limitation is to be without prejudice to the legal force of agreements ‘not in written form.’”

This highly publicized top government public forum was preceded on the day before by a formal statement from the government, which was published on the official website of the Egyptian Council of Ministers on April 12. The document, which was titled, “With Documents, the Two Islands of Tiran and Sanafir Belong to the Kingdom of Saudi Arabia,” listed several legal documents, some of which have been discussed in this article.²⁰²

In a supporting follow-up, the Egyptian Defense Ministry was instructed to organize and distribute videos of “a lecture on Tiran and Sanafir documented with historical, political, legal and technical evidence and proofs,” which was held on July 25, 2016, at its headquarters in Cairo.²⁰³ The participants, who included prominent legal, historical, and maritime experts as well as military and diplomatic officers, had argued forcefully that Egypt had no basis to claim title to the islands, which had clearly been proven to be Saudi. One Harvard law professor and staff member of the Egyptian Foreign Ministry’s Department of International Agreements summed up the issue by saying that if the case were to go before international arbitration, “it [would] not take more than five minutes for the judges to rule” in favor of Saudi Arabia²⁰⁴.

Conclusions and Recommendations

Saudi Arabia’s full sovereignty over the islands of Tiran and Sanafir had long explicitly been recognized by Egypt through two separate, valid and binding international agreements. The first was the 1988–90 exchange of letters between the Egyptian and Saudi foreign ministers, and the second was the Egyptian presidential decree 27 of 1990 (deposited with the UN),

(202) “With Documents, the Two Islands of Tiran and Sanafir Belong to the Kingdom of Saudi Arabia,” Information and Decision Support Center (IDSC), Council of Ministers, Cairo, Egypt, accessed on April 19, 2017, available at <http://www.idsc.gov.eg/IDSC/News/View.aspx?ID=4269>.

(203) “A lecture on Tiran and Sanafir Documented with Historical, Political, Legal and Technical Evidence and Proofs,” lecture organized by the Egyptian defense ministry on the status of the islands on July 25, 2016, available at <https://www.youtube.com/watch?v=B83Vj1PbxuI>.

(204) Ibid.

establishing Egypt's territorial sea, which had placed Tiran and Sanafir Islands outside the territorial jurisdiction of Egypt. Separately and together, these two legal instruments constitute, under customary and conventional law, treaties establishing future rights and obligations on both Egypt and Saudi Arabia, including the permanent territorial settlement pertaining to the sovereignty over Tiran and Sanafir. This has been legally enhanced by the 2016 public forum held by Egypt's head of state, head of government, and foreign minister who, separately and together, reconfirmed the undisputed Saudi sovereignty over the islands in question.

Consequently, neither Egyptian court ruling of January 16, 2017 declaring the two islands to be part of Egyptian territory, nor the current status and ultimate legal fate of the 2016 maritime boundary delimitation agreement will have any legal bearing whatever on the status of Saudi full sovereignty over Tiran and Sanafir islands that had been settled permanently in the 1990 two international agreements, and further reconfirmed officially in the 2016 public statements of the Egyptian president and his government. Thus, all claims and their supporting evidence by Egypt prior to and following the conclusion of the 1990 agreements become legally irrelevant.

The median line adopted in the 2016 maritime boundary delimitation agreement was defined principally by the 1990 Egyptian presidential decree establishing Egypt's territorial sea, which had already placed Tiran and Sanafir Islands outside its territorial jurisdiction; that action, in turn, was based on Article 15 of the UNCLOS, to which Egypt had acceded to 1983. However, for Saudi Arabia to exercise actual sovereignty over the two islands, by establishing its physical presence, it has first to absolve Egypt of its contractual obligations under the terms and protocols of the peace treaty with Israel by formally assuming Egyptian commitments through becoming a signatory to the treaty.

In view of the Egyptian high administrative court ruling on January 16, 2017, voiding the 2016 agreement, followed, on February 16, 2017, by the Egyptian government's formal reservation with UNCLOS rejecting all options of dispute

settlement mechanism, Saudi Arabia could initiate legal countermeasures. These should commence in the first instance with the registration of the 1988–90 exchange of letters, as constituting one international agreement, under the terms of the VCLT, in accordance with the relevant article of the UN Charter. The same action could also be taken with respect to the 2016 maritime agreement.²⁰⁵ Moreover, the Saudi government could also move to modify and update its current registered declarations and reservations pertaining to provisions of dispute settlement options in both the UNCLOS and the VCLT. Nevertheless, Saudi Arabia could, under the relevant clauses of both the UNCLOS and ICJ, unilaterally and without the consent of Egypt, submit a potential dispute to judicial and arbitral courts as the Philippines had done and won in July 2016, in its case against China over South China Sea islands before the International Tribunal for the Law of the Sea (ITLOS) that China refused to attend or recognize.²⁰⁶ In such an eventuality, Saudi Arabia, in seeking arbitration, should avoid, at all cost, a settlement by compromise that would inevitably lead to a concession on its part, i.e., conceding to Cairo, the strategic Tiran, the island nearer to Egyptian coast, while retaining the almost worthless Sanafir. Thus, the unconditional return of both islands, not who has sovereignty over them, should form the purpose and object of the statement of claim and its legal basis, that Saudi Arabia would be required to formulate and submit along with a written notification to any potential judicial or arbitral tribunal.

In addition, a group of private Saudi citizens could file a carefully prepared law suit with the high administrative court in Saudi Arabia to counter the one that was filed in Egypt by ‘a group of concerned private Egyptian citizens.’ Tiran and Sanafir Islands should also appear prominently on Saudi official and school maps, included in weather forecast, and introduced into history and geography textbooks as being an administrative subdistrict of the Saudi province of Tabuk since 1926, with all this may entail.

(205) As Saudi Arabia had recently done with respect to its 1974 boundary agreement with the UAE.

(206) “The South China Sea Arbitration Award of 12 July 2016,” PCA Case No. 2013-19, Registry: Permanent Court of Arbitration, July 12, 2016.

Appendix

A map showing the Egyptian-Saudi boundary median line in the Gulf of Aqaba, as drawn by Egypt's National Maritime Boundary Delimitation Committee, adopted by the Egyptian-Saudi Joint Boundary Delimitation Committee, and incorporated into the 2016 Egyptian-Saudi Maritime Boundary Delimitation Agreement of April 2016. Tiran and Sanafir Islands are located at the mouth of the Gulf. They can be seen to the right of the line and are well within the Saudi territorial sea.

Source: Ministry of Defense, Cairo, Egypt, "Report on the Technical Procedures to Delimit the Maritime Boundary in Accordance with the Provisions of the UNCLOS in the Red Sea and the Gulf of Aqaba between the Arab Republic of Egypt and the Kingdom of Saudi Arabia" (unpublished report), Annex D, 25.



About the Author

Dr. Askar Enazy is an independent researcher and author in international relations and international law. He holds a PhD in international relations from Cambridge University, and PhD in international law from Moscow State University of International Relations (MGIMO). He earned his master degree from McGill University, Canada, and his BA degree from the University of Maine, USA. One of his publications is “*The Long Road from Taif to Jeddah: Resolution of a Saudi-Yemeni Boundary Dispute*” (2006).

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P.O.Box 51049 Riyadh 11543 **Kingdom of Saudi Arabia**
Tel: (+966 11) 4652255 Ext: 8692 Fax: (+966 11) 4577611
E-mail: research@kfcris.com