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## Oil Rights in the Gulf of Suez

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## OIL RIGHTS IN THE GULF OF SUEZ

International law recognizes that coastal nations have the right to exploit natural resources found in continental shelf areas beneath adjacent water bodies. In most situations the coastal nation entitled to this right is easily identified as the sovereign in actual control of the land immediately adjacent to the water body. However, the nation in physical control of such land may not be the sovereign thereof. In such a case, both the nation having actual control and the nation claiming sovereignty may assert the right to exploit natural resources in the adjacent continental shelf. Such a situation currently exists in the Gulf of Suez. When Israel invaded the Sinai in 1967 it acquired the possession but not the sovereignty of that territory. Now, both Egypt, as sovereign, and Israel, as occupant, claim the right to drill for oil in the adjacent continental shelf.

The Gulf of Suez is a semi-enclosed body of water which opens into the Red Sea at the south and narrows into the Suez Canal at the north. It is bordered on the east by the Sinai peninsula and on the west by the African mainland. The Gulf is at no point deeper than 100 fathoms, and its width never exceeds approximately 20 miles. The entire Gulf will therefore be classified and analyzed under continental shelf doctrine.

There are several significant oilfields in western Sinai and beneath the waters of the southern portion of the Gulf of Suez.<sup>1</sup> The major western Sinai oilfields, Abu Rudeis and Belayim, were producing oil even before the Israeli invasion in October, 1967. These fields were exploited by Israel from that time until they were returned to Egypt under the terms of the 1975 Sinai disengagement agreement. Nevertheless, Israel retains control over most of the Sinai, including the land which borders the southern portion of the Gulf of Suez. This area of the Gulf, which promises to have significant oil reserves, is the focal point of the current Egyptian-Israeli oil dispute.

Egypt is currently producing oil from Al Murgan, an offshore oilfield in the western half of the Gulf of Suez,<sup>2</sup> and reserves apparently extend into the eastern half of the Gulf as well.<sup>3</sup> In 1964 Egypt granted an exploration and development lease to the Gulf of Suez Petroleum Company (GUPCO), a corporation jointly formed by the Egyptian gov-

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1. TIME, Jan. 2, 1978, at 21. Egypt's proven reserves in western Sinai and beneath the Gulf of Suez total three billion barrels.

2. CHRISTIAN SCIENCE MONITOR, Feb. 16, 1977, at 3, col. 2.

3. *Id.* See also Washington Post, Feb. 14, 1977, § A, at 14, col. 4.

ernment oil company and AMOCO International.<sup>4</sup> The lease included areas beneath the eastern half of the Gulf of Suez which at the time of the lease were clearly within Egyptian control, but it was not until late in 1976, long after Israel had occupied the eastern shore of the Gulf, that GUPCO attempted to drill in the eastern portion of the Gulf.<sup>5</sup>

In the last year and a half, Israel has attempted to establish oil rights in the eastern half of that portion of the Gulf of Suez adjacent to Israeli occupied territory. To substantiate its claim, Israel has not allowed Egyptian oil companies to drill for oil in the eastern half of the Gulf. A dramatic episode occurred on September 2, 1976, when Israeli gunboats fired on buoys anchoring an AMOCO drilling rig which had been set up just across the midline of the Gulf.<sup>6</sup> The gunboats escorted the rig out of the "Israeli half" of the Gulf and have subsequently forbidden Egyptian oil companies any access to that portion of the Gulf.<sup>7</sup> Israel has further asserted its claim by drilling oil wells at a point off the Sinai coast near the town of Al Tur.<sup>8</sup>

The Gulf of Suez dispute is not unique.<sup>9</sup> All over the world there are coastal territories, particularly islands, which are occupied by nations with dubious claims to sovereignty.<sup>10</sup> All of these cases require a deter-

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4. The Egyptian government oil firm is the Egyptian General Petroleum Corporation. AMOCO is a subsidiary of Standard Oil Company of Indiana.

5. Washington Post, Feb. 14, 1977, § A, at 14, col. 4.

6. Washington Post, Sept. 8, 1976, § A, at 18, col. 1.

7. *Id.*

8. N.Y. Times, April 4, 1977, § 1, at 4, col. 3. N.Y. Times, Feb. 15, 1977, § 1, at 1, col. 1. Washington Post, Feb. 14, 1977, § A, at 14, col. 4.

9. There are a number of areas which are now, or soon may become, occupied by force in circumstances which will give rise to questions of continental shelf rights similar to those involved in the Gulf of Suez. One obvious area is the Gulf of Aqaba, which was divided between Saudi Arabia and Egypt prior to the Six Day War. The issue there now is whether Israel or Egypt has the right to drill in the western half of the Gulf. Another area where such a dispute may arise is Somalia, where Ethiopia could occupy Somalia's Indian Ocean coastline. Similarly, a dispute may arise over continental shelf rights in the Caribbean Sea if Guatemala should occupy portions of the Belize coastline. The most recent addition to this list is the continental shelf area adjacent to that portion of Southern Lebanon currently under Israeli occupation. See also examples given in note 10, *infra*.

10. See G. KNIGHT, THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS 275-281 (1978), and the material cited therein. Some islands which are currently the subject of such dispute are: Paracel Islands in the South China Sea (recently occupied by the People's Republic of China); the Spratly Islands, also in the South China Sea (claimed by the Republic of the Philippines and the People's Republic of China); Tao-yu-Tai (Sensaku) in the East China Sea (contested between the People's Republic of China, Taiwan, and Japan); Wai Islands in the Gulf of Thailand (occupied by Viet Nam and contested by Cambodia and Thailand); Aegean Islands in the Aegean Sea (subject to claims by Greece and Turkey); Beagle Channel Islands (subject to claims by Chile and Argentina).

mination of which nation is entitled to exploit the resources of the adjacent continental shelf.<sup>11</sup>

### *Continental Shelf*

Coastal nations claim the right to exploit resources beneath adjacent water bodies under two doctrines: the territorial sea<sup>12</sup> and the continental shelf.<sup>13</sup> All littoral states now claim sovereignty over a "territorial sea," a band of water (and the soil beneath it) adjacent to the coastline.<sup>14</sup> The breadth of the territorial sea has never been established by international treaty or convention, but current state practice indicates a consensus favoring a maximum limit of twelve miles.<sup>15</sup> Absent any internationally binding agreement, individual nations have independently determined the extent of their territorial seas.<sup>16</sup> Israel, for example, claims a territorial sea extending six miles from its coastline; Egypt claims a territorial sea of twelve miles.<sup>17</sup>

Israel and Egypt have not relied on territorial sea doctrine in substantiating their oil rights in the Gulf of Suez. In fact, Israel has asserted de facto control out to the midpoint of the Gulf, which at some points exceeds the six mile territorial sea claimed by Israel.<sup>18</sup> Accordingly, the rights of Israel and Egypt will be examined under the doctrine of the continental shelf. However, the ultimate issue would be the same under either the law of the territorial sea or the continental shelf—should Israel

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11. *Id.*

12. See Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, T.I.A.S. No. 5639 (effective September 10, 1964); U.N. Doc. A/Conf. 13/L 52 (1958), reprinted in 38 State Dept. Bull. 1111 (1958) [hereinafter cited as 1958 Convention on the Territorial Sea].

13. See Convention on the Continental Shelf, April 29, 1958, T.I.A.S. No. 5578 (effective June 10, 1964); U.N. Doc. A/Conf. 13/L 55 (1958), reprinted in 38 State Dept. Bull. 1121 (1958) [hereinafter cited as 1958 Convention on the Continental Shelf].

14. 1958 Convention on the Territorial Sea, art. 1: "The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea."

15. See 1958 Convention on the Territorial Sea, art. 3. The 12 mile limit has been used in the Informal Composite Negotiating Text, U.N. Doc. A/Conf. 62/Wp.10 (July 15, 1977).

16. See Gormley, *The Unilateral Extension of Territorial Waters*, 43 U. DET. L.J. 695 (1966).

17. *Limits in the Seas: National Claims to Maritime Jurisdiction*, No. 36 (3d rev. 1975), U.S. Dep't of State, Office of the Geographer, at 60-61, 102-03.

18. Israel has never directly claimed territorial sea rights in the Gulf of Suez, but such a declaration would probably be superfluous. Where a territorial sea does exist, it is treated as an appurtenance which exists by operation of law. See I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 124 (1966).

as occupant or Egypt as sovereign be allowed to exercise the rights of the coastal state in the adjacent seabed?

As a geological concept, the continental shelf denotes the extension of the continental land mass under the adjacent sea to a point at which it sharply drops off to greater depths.<sup>19</sup> However, the doctrine has an entirely different meaning when used in the context of international law.<sup>20</sup> The legal doctrine has only developed since World War II, but the basic concept of coastal state jurisdiction over the natural resources of the adjacent continental shelf is now well established.<sup>21</sup>

The first international codification of the legal regime of the continental shelf was the 1958 Convention on the Continental Shelf.<sup>22</sup> In defining the continental shelf, the Convention used the ambiguous concept of exploitability,<sup>23</sup> and the resulting confusion led to considerable criticism.<sup>24</sup> The Third United Nations Conference on the Law of the Sea is currently in the process of revising the 1958 Convention. The draft for the new articles, the Informal Composite Negotiating Text (ICNT), has proposed a new definition of the extent of the continental

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19. See Knight, *The Draft United Nations Convention on the International Seabed Area: Background, Description, and Some Preliminary Thoughts*, 8 SAN DIEGO L. REV. 459 (1971).

20. III H. LAUTERPACHT, INTERNATIONAL LAW 144 (E. Lauterpacht ed. 1977): "[P]roblems raised by the proclamations of the continental shelf cannot be resolved by reference to technical notions in the field of geography."

21. The legal doctrine of the continental shelf was first articulated in detail in 1945 by the "Truman Proclamation," Proclamation No. 2667, 3 C.F.R. § 67 (1945), in which the United States claimed the resources of the shelf as "appertaining to the United States, subject to its jurisdiction and control." Although the United States claim was limited to the natural resources of the seabed and subsoil, and expressly preserved the character of the water above the continental shelf as high seas, subsequent claims by other nations were not so restrained. See also G. MANGONE, THE UNITED NATIONS, INTERNATIONAL LAW, AND THE BED OF THE SEAS, OCEAN SERIES 303 (1972).

22. See note 13, *supra*. Both Israel and Egypt are parties to the 1958 Convention. The codification served a dual purpose of consolidating existing customary law and reforming legal rules which were no longer honored. See I H. LAUTERPACHT, INTERNATIONAL LAW 98 (E. Lauterpacht ed. 1970).

23. 1958 Convention on the Continental Shelf, art. 1: "For the purpose of these articles, the term 'continental shelf' is used as referring (a) to the seabed and subsoil area of the submarine areas adjacent to the coast, but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superadjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

24. See, e.g., Study Prepared by the Secretariat of the United Nations for the Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, U.N. Doc. A/AC 135/19, para. 24-26, June 21, 1968.

shelf.<sup>25</sup> It is uncertain what language will finally be adopted, but it seems clear that the entire basin of the Gulf of Suez would be included in any new definition of the continental shelf.

The 1958 Convention states that the "coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."<sup>26</sup> The ICNT adopts this exact language.<sup>27</sup> Unlike a territorial sea, the continental shelf area is not assimilated to the territory of the state; the coastal state is merely given certain rights in the continental shelf, and the water above it remains high seas.<sup>28</sup> The rights acquired in the continental shelf are exclusive<sup>29</sup> and exist by operation of law without any need for occupation or overt claim.<sup>30</sup>

Uncertainty still exists over the division of the continental shelf area beneath an enclosed or semi-enclosed body of water (such as the Gulf of Suez) which is bordered by more than one nation. The 1958 Convention favors a median line determination, dividing the continental shelf area along a line equidistant from the coastlines of the nations involved.<sup>31</sup> The ICNT proposes an "equitable" approach relying partly on the median line method and partly on other "relevant circumstances."<sup>32</sup> This argument was the central issue in the *North Sea Conti-*

25. Informal Composite Negotiating Text, U.N. Doc. A/Conf. 62/Wp.10, July 15, 1977, art. 76: "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." The I.C.N.T., prepared in 1977 by the United Nations Conference of the Law of the Sea, is the current draft for a revision of the 1958 Convention on the Continental Shelf.

26. 1958 Convention on the Continental Shelf, art. 2(1).

27. I.C.N.T., art. 77(1).

28. See, e.g., I. BROWNIE, *supra* note 18, at 223: "The term 'sovereignty' was deliberately avoided as it was feared that this term, redolent of territorial sovereignty and three dimensional control, would prejudice the status of high seas of the waters over the shelf."

29. 1958 Convention on the Continental Shelf, art. 2(2); I.C.N.T., art. 77(2).

30. 1958 Convention on the Continental Shelf, art. 2(3); I.C.N.T., art. 77(3); Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law I*, 31 BRIT. Y.B. INT'L L. 371, 372-73 (1954).

31. 1958 Convention on the Continental Shelf, art. 6(1): "Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the [median line, every point of which is equidistant from] the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."

32. I.C.N.T., art. 83(1): "The delimitation of the continental shelf between adjacent or

*mental Shelf Cases*<sup>33</sup> in which the International Court of Justice held that the equidistant approach was *not* a rule of customary international law even though it had been codified in the 1958 Convention.<sup>34</sup>

The continental shelf rights described in the 1958 Convention and the ICNT attach to the "coastal state,"<sup>35</sup> a term which remains undefined. Although Israel has never explicitly claimed sovereignty over the Sinai, it has remained in undisputed possession of large portions of the peninsula for over ten years. The central issue, therefore, is whether Israel's status makes her a "coastal state" entitled to exercise the rights recognized in the 1958 Convention and the ICNT, or whether Egypt remains the "coastal state" despite the Israeli occupation.

### *Belligerent Occupation*

In the language of international law, Israel is a belligerent occupant of much of the Sinai. Territory is considered occupied when it is "actually placed under the authority of the hostile army."<sup>36</sup> This status confers on Israel competence to administer the territory under its control and the duty to protect the inhabitants and their property.<sup>37</sup> This status does not depend on the legitimacy of the occupation and is granted merely to establish some kind of order out of the chaos which normally follows an invasion.<sup>38</sup>

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opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances."

33. *North Sea Continental Shelf Cases*, [1960] I.C.J. 3 (by International Court of Justice).

34. *Id.* The parties to those cases were not directly bound by the 1958 Convention on the Continental Shelf because Germany had never ratified it. The same result was reached in the North Sea arbitration between England and France last year. *Delimitation of the Continental Shelf*, International Court of Arbitration, United Kingdom and France (June 30, 1977).

35. 1958 Convention on the Continental Shelf, art. 2; I.C.N.T., art. 77.

36. Hague Convention No. IV Respecting the Laws and Customs of War on Land and annexed Regulations Respecting the Laws and Customs of War on Land, art. 42, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter cited as Hague Convention]. *See also* Dep't of Army, FM27-10, *The Law of Land Warfare*, paras. 351-431, at 138-158 (1956) [hereinafter cited as U.S. Rules of Land Warfare]. The Hague Convention required all nations ratifying the treaty to adopt regulations for their armed forces embodying the essential terms of the treaty. The U.S. Rules of Land Warfare represent the United States' compliance with the Hague Convention.

37. *See* Hague Convention, art. 43; U.S. Rules of Land Warfare, paras. 362-78, at 141-44. *See also* II L. OPPENHEIM, *INTERNATIONAL LAW* 436-38 (7th ed. H. Lauterpacht 1952).

38. *See, e.g.*, A. McNAIR AND A. WATTS, *THE LEGAL EFFECTS OF WAR* 371 (4th ed.

Belligerent occupation is to be differentiated from invasion and from subjugation or conquest. An invading power may push through enemy territory and then move on without ever having established that effective control necessary for occupation.<sup>39</sup> Occupation is usually preceded by invasion, but the invasion continues only as long as significant resistance remains.<sup>40</sup> Occupation may be distinguished by the fact that the occupying power establishes some type of provisional administration.<sup>41</sup>

Occupation is also fundamentally different from conquest, which implies that the occupying nation has acquired not only provisional control, but also the actual sovereignty of the occupied territory.<sup>42</sup> Israel has never made an explicit claim to sovereignty over the occupied territories in the Sinai, although some arguments have been put forward to justify such a claim.<sup>43</sup> It is generally recognized today that territory may not be annexed by the use of force,<sup>44</sup> but an exception to the rule has been suggested if the force was originally used in self defense.<sup>45</sup> The merits of such an argument have been greatly criticized.<sup>46</sup> Israel's rights will therefore be examined by treating Israel as a belligerent occupant

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1966): "The morality or immorality of the occupation is irrelevant. When territory is invaded and held, it must have some kind of government or there will be a state of chaos. The law of belligerent occupation is an attempt to substitute for chaos some kind of order, however harsh it may be."

39. *Id.* at 367-69; L. OPPENHEIM, *supra* note 37, at 434; Rules of Land Warfare, para. 352, at 138.

40. Rules of Land Warfare, para. 352, at 138.

41. *Id.*

42. *See* Rules of Land Warfare, para. 353, at 138; L. OPPENHEIM, *supra* note 37, at 432.

43. *See, e.g.*, Y. BLUM, *SECURE BOUNDARIES AND MIDDLE EAST PEACE* (1971).

44. *See, e.g.*, R. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 2 (1961): "No rule is clearer than the precept that no state may lawfully attempt to exercise its sovereignty within the territory of another." *See also* G. VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 31 (1957). Much of the discussion in this area is centered on article 2(4) of the U.N. Charter. *See* U.N. CHARTER art. 2(4).

45. This exception was most recently recognized by the United Nations in 1974. United Nations General Assembly Resolution No. 3314 (XXIX) art. 5(3), Dec. 14, 1974. 29 F.A., U.N. Doc. A/9631 (1974): "No territorial acquisition or special advantage *resulting from aggression* is lawful nor should it be recognized as such." (emphasis added). Egypt and the other Arabian states would have deleted the "resulting from aggression" language and reworded the text so that acquisition of territory by force would be unlawful even if it resulted from the exercise of force in self defense. *See* Stone, *Holes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT'L L. 224 (1977).

46. *See, e.g.*, H. CATTAN, *PALESTINE AND INTERNATIONAL LAW* (1973); Shihata, *Des-ignation Embargo of Arab Oil: Its Legality Under International Law*, 68 AM. J. INT'L L. 591 (1974).

and not as a sovereign.<sup>47</sup>

Egyptian authority in the Sinai has, of course, been diminished to the extent that Israel has acquired rights in that territory. Egypt remains the sovereign of the Sinai but has no present right to control it.<sup>48</sup> Nevertheless, the "legal title" to the entire Sinai is preserved in Egypt throughout the period in which Israel is in provisional control,<sup>49</sup> even if Israel should remain in control for many years.<sup>50</sup>

The occupied territory in the Sinai is therefore divided between Israel and Egypt on an abstract level. By the mere fact of occupation, Israel has acquired the right and duty to administer the territory so as to provide temporary order. However, the sovereignty or legal title of the territory remains with Egypt. Although such a division between control and sovereignty has existed in the past,<sup>51</sup> it has never before been necessary to determine which, if either, of the two nations involved is entitled to exploit the adjacent continental shelf.

The rights which a belligerent occupant may exercise over property in the occupied territory have not been well defined in international law. Most treaties containing provisions on belligerent occupation are understandably more concerned with the rights and obligations of individuals living in the occupied territory.<sup>52</sup> The only international treaty which has made a serious effort to delineate the public and private property rights involved is the Hague Convention of 1907.<sup>53</sup> Although neither

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47. If Israel had seized the Sinai with the intent of annexing it, then Israel's claim to Suez oil would rest not on the effects of the occupation but rather on the validity of Israel's claim of sovereignty. Even if Israel could establish a valid title to the Sinai, however, it is uncertain how the Gulf of Suez between "Israeli-Sinai" and Egypt would be divided. See notes 31-34, *supra*, and accompanying text. Egypt might persuasively argue that this is the sort of situation where the continental shelf area should *not* be divided along the median line.

48. See A. McNAIR AND A. WATTS, *THE LEGAL EFFECTS OF WAR* (1966) at 368: "The most important principle of law incident to belligerent occupation—one that was not established until the last century—is that occupation does not displace or transfer sovereignty." See also L. OPPENHEIM, *supra* note 37, at 437.

49. See Wheeler, *Governments de Facto*, 5 AM. J. INT'L L. 66 (1911). Egyptian sovereignty is *de jure* but not *de facto*.

50. Other instances where a nation preserved its legal title to territory during a period of enemy occupation include the restoration of pre-Napoleonic sovereigns in 1815, and preservation of Ethiopian sovereignty during the 1936 Italian annexation. Other examples are given in H. CATTAN, *PALESTINE AND INTERNATIONAL LAW* 108-09 (1973).

51. *Id.*

52. The most important of these treaties is the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3517, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

53. Hague Convention, *supra* note 36. The Hague Convention obligated the parties

Israel nor Egypt ratified the Hague Convention, the principles stated in that treaty are now firmly established as customary law.<sup>54</sup>

Articles 47, 52, 53 and 55 of the Hague Convention concern the treatment of property found in occupied territory.<sup>55</sup> These provisions give more protection to private property than to property owned by the enemy state. Thus, private property, except for "munitions-de-guerre," is immune from seizure, and even "munitions-de-guerre" must be returned or paid for after peace is restored.<sup>56</sup> Private property may be requisitioned in order to supply the army of occupation, but the occupant is obliged to pay for these supplies as soon as possible.<sup>57</sup>

Property found in the occupied territory and owned by the enemy state is given less, yet significant, protection under the Hague Convention. The treaty makes a distinction between public movable and immovable property<sup>58</sup> and allows the occupying power the right to seize all movable property of the enemy state "which may be used for military purposes."<sup>59</sup> With regard to public immovable property, however, the occupying state "shall be regarded only as administrator and usufructuary."<sup>60</sup>

The principles enunciated in the Hague Convention are still the most comprehensive expression of the rights and limitations associated with the status of belligerent occupant. However, the treaty was drafted before the legal concept of the continental shelf had become generally accepted and before technology had developed sufficiently to allow much offshore exploitation.<sup>61</sup> The provisions of the Hague Convention must therefore be interpreted in light of subsequent developments in the

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to adopt rules for their armies in accordance with the provisions of the treaty. The United States complied with this requirement by adopting the U.S. Rules of Land Warfare, *supra* note 36.

54. Cummings, *Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation*, 9 J. INT'L L. & ECON. 533, 539-540 (1974), and authority cited therein.

55. These articles roughly correspond to paragraphs 393-417 of the U.S. Rules of Land Warfare at 148-154.

56. Hague Convention, art. 53; U.S. Rules of Land Warfare, paras. 406, 410-11, at 152-53.

57. Hague Convention, art. 52-07; U.S. Rules of Land Warfare, paras. 409, 412-17, at 152-54.

58. Hague Convention, arts. 53, 55. See also L. OPPENHEIM, *supra* note 37, at 397.

59. Hague Convention, art. 53; U.S. Rules of Land Warfare, paras. 403-04, at 151-52.

60. Hague Convention, art. 55; U.S. Rules of Land Warfare, paras. 400-03, at 151.

61. The Ceylon Pearl Fisheries Ordinance of 1925, the precursor of the modern doctrine of the continental shelf, came years after the signing of the Hague Convention. See Cosford, *The Continental Shelf 1910-1945*, 4 MCGILL L.J. 245 (1958).

law of the continental shelf.<sup>62</sup>

### *Competing Claims in the Gulf of Suez*

As noted above, Israel and Egypt are claiming competing rights to exploit the eastern half of that portion of the Gulf of Suez which is adjacent to Israeli-occupied Sinai.<sup>63</sup> Israel has asserted its claim by forcibly evicting Egyptian-American interests and by drilling its own wells in the disputed area. Egypt has asserted its claim by criticizing the Israeli action, but has been unable or unwilling to stop it.

There are at least three possible ways to treat these competing claims:<sup>64</sup>

(1) Israel is the occupant of the adjacent territory and the "de facto" occupant of the disputed continental shelf area and should therefore be given exclusive exploitation rights.

(2) Egypt is the sovereign of the adjacent territory and the disputed continental shelf area should be treated as appurtenant to the sovereign.

(3) The rights of both nations are defective and should not be recognized for the duration of the occupation.

### *Israeli Rights*

The validity of Israeli oil rights in the Gulf should *not* depend on the legitimacy of the Sinai occupation itself.<sup>65</sup> If the rights granted to a

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62. It is arguable, however, that the provisions of the Hague Convention should apply directly to the facts of the instant case. Article 42 provides that the "occupation extends only to the territory where [the authority of the hostile army] has been established and can be recognized." Whether the continental shelf has been subjected to the authority of the Israeli forces could be treated as a question of fact, and Israel has apparently been successful in establishing military control over the disputed area of the gulf.

The title of the Hague Convention refers specifically to *land* warfare, but this in itself should not prohibit the application of the Hague Convention to continental shelf areas. It is obvious, however, that the continental shelf is not susceptible of the same sort of "occupation" as land areas.

63. See text at notes 2-9, *supra*.

64. There are, of course, many variations on each of these alternatives. The three alternatives discussed here are only representative of the possible approaches.

65. See text at note 39, *supra*. However, a contrary result was reached in the case of *N. V. de Bataafsche Petroleum Maatschappij v. The War Damage Comm'n* 23 I.L.R. 810 [hereinafter cited as *Bataafsche*] (Court of Appeal, Singapore 1956). In that case, Indonesian oil companies were allowed to recover compensation for oil seized by Japan during the occupation of Indonesia in World War II. The court held that Japan could claim no benefits under the Hague Convention as a belligerent occupant because Japan was found to have been an aggressor. Any seizure by an unlawful occupant was treated as pillage. This view was argued in the context of the Israeli occupation in Shihata, *Destination Em-*

belligerent occupant by the Hague Regulations were contingent on the legality of the occupation, then the nation whose land is being occupied would always claim that the occupation was unlawful and that the occupant could acquire no rights therein.<sup>66</sup> It is evident that most nations at war claim to be acting in self defense or in furtherance of some just cause.

Although the legitimacy of the occupation may be relevant in analyzing claims of territorial acquisition,<sup>67</sup> the laws regulating the "managerial" rights and duties of the belligerent occupant are based on different policy goals.<sup>68</sup> Legitimacy of occupation is relevant to acquisition of territory because an aggressor should not be allowed to profit from his unlawful act: *ex injuria ius non oritur*.<sup>69</sup> This principle is irrelevant to the application of the Hague Regulations, which are intended to provide some order and stability to the territory under enemy control regardless of whether the enemy's possession is the result of aggression or self defense.

There is some doubt whether the new Israeli drilling operation in

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*bargo of Arab Oil: Its Legality Under International Law*, 68 AM. J. INT'L L. 591, 601-02 (1974).

66. See Cummings, *Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation*, 9 J. INT'L L. & ECON. 533, 548-550 (1974).

67. See Gerson, *War, Conquered Territory, and Military Occupation in the Contemporary International Legal System*, 18 HARV. INT'L L.J. 525, 542-556 (1977) at 556: "It must be realized that the lawful-unlawful dichotomy has no application to the management sphere of occupation, but only to the acquisition of held territory, insofar as claims to potential acquisition of title by aggressor-occupants are not recognized." The legality of the Israeli occupation has, of course, been greatly debated. The focal point of this debate seems to have been the controversial Resolution 242. Res. No. 242, Nov. 22, 1967, U.N. Doc. S/PV 1382, at 36. The resolution seems to have been written with "deliberately preserved ambiguity." Y. BLUM, *SECURE BOUNDARIES AND MIDDLE EAST PEACE* 11 (1971). The resolution requires Israel to withdraw to "secure boundaries" in exchange for recognition of its right to exist. It is therefore uncertain whether Israel must withdraw all the way back to 1947 Armistice lines or only to what are determined to be "secure boundaries." Further, it is uncertain whether Israel must withdraw from the occupied territory prior to recognition by Arabian nations. Compare Rostow, *The Illegality of the Arab Attack on Israel of October 6, 1973*, 69 AM. J. INT'L L. 272 (1975) with Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 AM. J. INT'L L. 591 (1974).

68. See text at note 38, *supra*.

69. However, the significance of this principle is greatly limited by the fact that there is no real sanction to enforce it: "[I]nternational law can no more refuse to recognize that a finally successful conquest does change the title to territory than municipal law can change a regime brought about by a successful revolution." J. BRIERLY, *THE LAW OF NATIONS* 172-73 (1963).

the Gulf of Suez can be justified.<sup>70</sup> Oil in the ground is a public immovable,<sup>71</sup> and therefore, under the Hague Convention, Israel can only exercise the rights of a usufructuary over such property.<sup>72</sup> Although a usufructuary may exploit existing wells, it is generally accepted that new wells may not be drilled.<sup>73</sup> Thus, while Israel might have been justified in exploiting the existing Sinai oilfields of Abu Rudeis and Belayim,<sup>74</sup> the Hague Convention denies Israel, as a mere usufructuary, the right to drill new oilfields.<sup>75</sup>

If Israel has no right to drill new wells in the occupied territory itself, then it certainly has no right to drill new wells in the adjacent continental shelf. Israeli rights in the continental shelf derive from, and can in no event exceed, the rights which may be exercised in the adjacent

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70. *But see* Gerson, *Off-Shore Oil Exploration by a Belligerent Occupant: The Gulf of Suez Dispute*, 71 AM. J. INT'L L. 725 (1977).

71. *Bataafsche*, *supra* note 67, is the most important case interpreting the classification of oil as an immovable for purposes of article 55 of the Hague Convention.

72. Hague Convention, art. 55; U.S. Rules of Land Warfare, para. 400, at 151. *See also* I. BROWNIE, *supra* note 18, at 99; IV G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 387 (1943); L. OPPENHEIM, *supra* note 37, at 397, 403.

73. In civilian theory it is generally accepted that the usufructuary may not open new wells. French doctrine distinguishes "fruits" and "products." Fruits are things which are produced periodically by the corpus and may be removed without impairing its value. Products are things which are part of the principal thing and their removal will diminish its value. Oil is a product and may not be removed by a usufructuary. Louisiana courts have reached the same result under the "open mines" doctrine. A usufructuary may work mines which are open at the commencement but may not open new mines. *See* Yiannopoulos, *Rights of the Usufructuary: Louisiana and Comparative Law*, 27 LA. L. REV. 668 (1967). *See also* LA. CIV. CODE arts. 551-52; *Gueno v. Medienka*, 238 La. 1081, 117 So. 2d 817 (1960), noted in 20 LA. L. REV. 773 (1960).

There is, however, a contrary view. *See* Gerson, *Off-Shore Oil Exploration by a Belligerent Occupant: The Gulf of Suez Dispute*, 71 AM. J. INT'L L. 725 (1977). The "open mines" doctrine is founded on the principle that the usufructuary should not be allowed to "waste" the property subject to the usufruct. The cited article makes the persuasive argument that the value of the continental shelf area in question will actually be greatly enhanced by the opening of the new oil wells. There seem to be several problems with this argument. Although the value of the territory may be enhanced at first, this increased value would be overcome if Israel continued to occupy the Sinai for a sufficiently long period of time. Also, it is technologically possible to produce very large quantities of oil from a given field in a relatively short period of time, but only at the expense of efficiency. Therefore, genuine waste would result if Israeli producers were encouraged to exploit fully as many new fields as quickly as possible.

74. The large fields of Abu Rudeis and Belayim, on the eastern shore of the Sinai, were exploited by Israel following their seizure in the Six Day War. In 1975, these oilfields were returned to Egyptian control in the Second Sinai Disengagement Pact.

75. Cummings, *Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation*, 9 J. INT'L L. & ECON. 533, 559, 560 (1974).

land territory. A more difficult problem would have been presented if Israel had attempted to continue production from existing offshore wells.<sup>76</sup>

Israel is also unable to justify the opening of new oil wells under the "munitions-de-guerre" exception. Although an occupying army is permitted to seize public property which may be used for military purposes,<sup>77</sup> this rule should be limited to seizure of *movable* property which is susceptible of *direct* military use.<sup>78</sup> Moreover, the right to seize "munitions-de-guerre" would only justify seizure for military purposes, and the right would not exist after the cessation of the immediate hostilities.<sup>79</sup>

In opposition to these principles of international law are several important policy arguments which favor the Israeli claims to the disputed oil. Israel is in physical control of the territory closest to the oil and therefore, from a technological standpoint, is better situated to exploit the oilfields effectively. Israel is also apparently in control of the eastern half of the Gulf itself and therefore, from a military standpoint, is in a better position to protect the drilling operation. Finally, the valid goals to be accomplished by belligerent occupation are furthered by extending the rights of the occupant in this way. The products of the drilling maintain the occupation by helping to supply the occupying army, and the opening of new oilfields increases the coercive effect of the occupation by increasing the value of the occupied territory. These policy arguments should not, of course, alter the fact that current international law does not give Israel the right to drill new wells in the occupied territory. The rights of a belligerent occupant are not contingent on the morality of the occupant's cause or the economic and political benefits involved.

### *Egyptian Rights*

The fact that Israel should not be allowed to drill new wells in the disputed area does not imply that Egypt should be free to do so. Egypt's right to drill for oil derives from its status as sovereign over the adjacent

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76. In such a situation it would have been necessary to determine whether the occupant has the same rights in the continental shelf that it has on the adjacent land.

77. "Fuel" is specifically included within the definition of "munitions-de-guerre" in U.S. Rules of Land Warfare, para. 412, at 153. See also Hague Convention, art. 53.

78. See *Bataafsche*, *supra* note 65; Lauterpacht, *The Hague Regulations and the Seizure of Munitions de Guerre*, 32 BRIT. Y.B. INT'L L. 218 (1955).

79. *Id.*

territory.<sup>80</sup> Considerable support can be found for the argument that rights in the continental shelf adhere to the legal or de jure title.<sup>81</sup> But a strong argument also exists that, even if Egyptian sovereignty carries with it certain rights in the continental shelf, Israel is justified in preventing the exercise of such rights while the adjacent territory is still under its occupation.

Paragraph 376 of the United States Rules of Land Warfare recognizes the occupying power's right to "regulate commercial intercourse in the occupied territory" in furtherance of the purposes of the occupation.<sup>82</sup> In particular, the article notes that the occupant will "usually find it advisable to forbid intercourse between the occupied territory and the territory still in the possession of the enemy."<sup>83</sup> It is doubtful whether the Rules intended to include the adjacent continental shelf area within the meaning of "occupied territory," and it is also questionable whether "commercial intercourse" was meant to apply to the unilateral drilling operations of the Egyptian oil lessees. Nevertheless, the principle of the article seems to support the Israeli action in ejecting the GUPCO oil rig in 1976.

A related factor is control of the Gulf area itself. Although it is well established today that rights in the adjacent continental shelf appertain to the littoral state without any need for actual physical control,<sup>84</sup> it is arguable that control *should* be relevant where the ownership of the littoral territory is divided between a sovereign and an occupant. Although control is irrelevant under continental shelf doctrine because the shelf is treated as a natural prolongation of the state,<sup>85</sup> it may gain significance if two separate states have rights in the coastal territory.

The rights the Egyptian government has in the disputed Gulf area should be distinguished from the rights held by private interests under

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80. See notes 48-50, *supra*, and accompanying text.

81. A number of writers have defined continental shelf rights as appurtenant to the adjacent *sovereign*. See, e.g., I. BROWNLIE, *supra* note 18, at 111: "Sovereignty is not only used as a description of legal personality accompanied by independence but also as a reference to various types of rights, indefeasible except by special grant, in the patrimony of a sovereign state, for example the 'sovereign rights' a coastal state has over the resources of the continental shelf." J. WESTLAKE, *INTERNATIONAL LAW* 188 (2d ed. 1910): "Within that extent [*i.e.* the territorial sea], the water and its bed are territorial and the wealth of both is the property of the territorial *sovereign*." (emphasis added). *But see* G. MANGONE, *THE ELEMENTS OF INTERNATIONAL LAW* 16 (1967).

82. U.S. Rules of Land Warfare, para. 376, at 144.

83. *Id.*

84. I.C.N.T., art. 77(3).

85. I.C.N.T., art. 76.

Egyptian title.<sup>86</sup> GUPCO, the corporation owned jointly by the Egyptian government and AMOCO, was given the right to drill in parts of the Gulf prior to the Israeli occupation of the Sinai.<sup>87</sup> AMOCO might therefore argue that it acquired a property right which vested at the time the lease was granted. AMOCO's rights might be limited by Israel's need for security, but Israel would still be obliged to compensate AMOCO for its loss if there has been a seizure of private property even if the seizure was for a legitimate purpose.<sup>88</sup> As long as Israel merely prevents AMOCO from operating under its concession then there is no seizure, but if Israel itself drills into the leased area then a genuine seizure may occur.

There are several policy reasons for favoring Egyptian claims over Israeli claims in the disputed region. Egypt exercised both *de facto* and *de jure* sovereignty over all of the territory in question for many centuries prior to the Israeli occupation in 1967. To permit the recent occupant to exploit resources in territory historically belonging to Egypt will engender even greater hostility. Also, sanctioning occupation by allowing these benefits is undesirable. Whatever the merits of the Israeli occupation, it is clear that other nations have recently begun to "annex" islands and other territory primarily to acquire continental shelf rights. The Israeli use of the Gulf might therefore set a precedent for similar but less justifiable claims. Finally, if GUPCO is denied the right to exploit its lease, then the rights of the neutral concession holder, AMOCO, will be prejudiced.

#### *A Moratorium on Drilling*

Neither Israel nor Egypt is bound by a treaty obligation dictating rights in the disputed area of the Gulf of Suez, nor do accepted principles of international law provide a clear statement of Israeli or Egyptian rights. The Israeli occupation of the Sinai has certainly undermined Egyptian rights in the adjacent Gulf. At the same time, Egyptian sovereignty over the Sinai remains a limitation on Israel's use of the territory. Therefore, neither Israel nor Egypt should be deemed competent to drill in the disputed area until the *de facto* and *de jure* sovereignty of the adjacent territory are reunited in one nation.

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86. U.S. Rules of Land Warfare, paras. 394-412, at 149-153. In particular, note the treatment of property of "mixed ownership" described in paragraph 394. As to whether oil still in the ground is susceptible of private ownership while still in the ground, see *Bataafsche*, *supra* note 65.

87. See text accompanying notes 2-5, *supra*.

88. Hague Convention, art. 53; U.S. Rules of Land Warfare, para. 403, at 151.

Under this analysis, Israel was probably within its rights when, on September 2, 1976, it forcibly prevented GUPCO from exercising its 1964 lease rights in the eastern half of the Gulf. Although the AMOCO oil rig escorted by two Egyptian gunboats posed no serious threat to Israeli security when brought into position seven miles off the Sinai coast, Israel was probably justified in establishing a buffer area in which Egypt would not be allowed to operate. Israel will find it more difficult to justify its own drilling operations begun in 1977. Although from a political standpoint the new drilling operations might be a valuable bargaining tool in the Israeli-Egyptian peace negotiations, they seem totally without support under the general precepts of international law.

The policy arguments discussed above can for the most part be satisfied by suspending all drilling operations until title to the territory is reunited in one nation. However, it must be noted that the *most* important policy issue for both Israel and Egypt is the need for petroleum resources for their respective economies. This is, of course, essentially a political question, and not an issue which can be resolved by a moratorium on drilling.

In the absence of binding treaty obligations or enforceable sanctions, neither nation would likely be willing to submit to a moratorium. Even when treaty obligations and customary international law are absolutely clear, nations will generally comply only when they perceive compliance to be in their national interest. For the present, therefore, the nation with sufficient military power imposes its will. With the increased importance of offshore resources and the continuing instability of international boundaries, future treaties will need to address the problem of provisional control and exploitation of disputed continental shelf areas.

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