INTERNATIONAL LAW CONFERENCE

The Law School and the American Society of International Law were joint sponsors of a Conference on International Law and the Middle East Crisis; the Conference was held on the Quadrangles in April. The papers which follow were delivered at that Conference.

The Middle East Crisis and Developments in International Law

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I have been asked to talk this afternoon about developments in international law related to the Middle East crisis of the last few months, particularly as those developments are connected with the actions of the United Nations. This is a rather large order when we consider the number and range of legal questions which have emerged from events in the Middle East and which have in a number of instances come before the United Nations. It is also necessary to include, here, constitutional developments in the United Nations Organization itself, following on these Middle Eastern events. My purpose is primarily to raise questions, knowing that answers are difficult to reach, if attainable at all.

A catalogue of major legal issues might run as follows:

Was Egypt's nationalization of the Suez Canal valid, and what legal effects are to be attributed to it?

How were the military operations against Egypt by Israel, France, and Great Britain to be characterized, and what measures were to be taken in consequence?

Was the obstruction of the Suez Canal and of the flow of oil through international pipelines justified?

Does Egypt have valid claims for war damages against Israel, France, and Great Britain? Do the decrees providing for Egyptianization of foreign business enterprises in Egypt give rise to justifiable international claims?

What are the rights of navigation in such waterways as the Suez Canal, the Strait of Tiran, and the Gulf of 'Aqaba?

NATIONALIZATION OF THE SUEZ CANAL

In talking about the Middle East crisis, a convenient point of beginning is the nationalization of the Suez Canal by Egypt last July. Was the action lawful and valid? Did the compensation offered by Egypt meet the requirements of international law? Would the nationalization be accorded extraterritorial effect as to assets of the Suez Canal Company outside Egypt? Are shippers paying tolls to Egypt protected from lawsuits which might be brought by the company for the same tolls? Professor Olmstead has already given us a comprehensive view of the various legal questions raised by the Suez nationalization, so I shall refer here only briefly to certain aspects which have particularly concerned the United States government.

On the question of validity, the argument has been made that the Suez Canal is an international public utility to

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Nationalization of Property: The Suez Canal Company Case

By Cecil Olmstead
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During the post-World War II decade rising economic and social demands of peoples in some of the less-developed areas of the world have sometimes manifested themselves in governmental taking of foreign-owned enterprises. In some of these quarters the belief persists that governmental operation of enterprise will accelerate economic and social development. These takings, variously termed "nationalizations," "expropriations," or "confiscations," have been legally rationalized as being exercises of sovereignty or acts of state.

Because of the contemporary interest of both capital-exporting and capital-importing countries in foreign investment of a private nature, examination of the legal and policy problems raised by nationalizations and similar takings of foreign-owned holdings appears desirable. A principal focal point to be developed is the legal effect of governmental takings of properties and other interests operated by foreign enterprise pursuant to a valid agreement between the government and such enterprise.

The history of governmental takings seems to be as long as recordation. Early takings of private property did not typically present international problems, for in the usual case the property was locally owned and the sovereign took it through the exercise of eminent domain. The doctrine of eminent domain developed in an era when international investment was of little or no consequence and, therefore, did not affect foreign interests. Furthermore, the practice of eminent domain, at this early date, was limited in scope and subject matter, and the character of the sovereign was indeed that of a personal sovereign frequently accorded a measure of divine right. Even a sovereign in this historic sense, however, was limited in the exercise of eminent domain to a taking for a public purpose. Such a purpose in this sense was one designed to accomplish a governmental, as distinguished from a proprietary, purpose. Normally, the validity of the taking was predicated upon the payment of fair compensation to the owner.

The first significant nationalizations of the twentieth century were those decreed by the Russian Socialist Federated Soviet Republic following the revolution in 1917. In important respects the Russian Communist takings were unique and marked a departure from prior practice of other

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which the ordinary rules concerning nationalization do not apply. The history and provisions of the Constantinople Convention of 1888 have been cited as a basis for the proposition that the Canal was immunized by treaty from nationalization. So far as the United States government is concerned, it has reserved its position on this question and indicated its disposition to try to work out a practical solution of the Canal problem which would protect the interests of all concerned.

International discussions prior to the outbreak of hostilities last fall were looking toward the conclusion of an agreement which would settle both the question of compensation and the commitments regarding future operation of the Canal. Following Egypt's rejection of proposals worked out at London by a group of user nations, the United Nations Security Council on October 13, 1956, adopted a resolution—with the concurrence of Egypt—which set forth six agreed requirements for a settlement governing the Suez Canal. These requirements were as follows:

1. there should be free and open transit through the Canal without discrimination, overt or covert—this covers both political and technical aspects;
2. the sovereignty of Egypt should be respected;
3. the operation of the Canal should be insulated from the politics of any country;
4. the manner of fixing tolls and charges should be decided by agreement between Egypt and the users;
5. a fair proportion of the dues should be allotted to development;

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states. The Soviet policy was to place all means of production and significant holdings of capital in the hands of the state as an instrument for carrying out certain political, economic, and social theories. These early Soviet confiscations have served as the pattern for industry-wide takings designed to alter the economic and political bases of those countries that have come under Communist control since World War II.

Before the revolution, foreign capital invested in Russia amounted to more than two billion rubles. This was completely lost, and all private ownership of property in the Soviet Union was abolished. The Soviet government offered no compensation to foreigners or to Russians. This action was accomplished by force, and, once the government proved that it was able to survive, there was little that could be done through peaceful means to obtain redress. Attempts were made by Russian nationals in the courts of the United States and Britain to recover their confiscated property which the Soviet government had sold to persons who transported it to other forums. While there was some early division of decision on the question of whether or not the Soviet government obtained title, once that government had received recognition by the states in which litigation arose, the Soviet confiscations were brought under the magic mantle of the "acts of state" doctrine, and all lived happily ever after.

The second major nationalization of this century occurred in Mexico. By the end of the dictatorship of Díaz in

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David Goocher, chairman of the Chicago Bar Association Committee on International Law, opens the afternoon session of the Conference on International Law and the Middle East Crisis. Seated, from left to right: Professor Cecil Olney of New York University Law School, Ralf Bengston of the World Bank, and Leonard Meeker of the State Department.

Professor Nicholas deB. Katzenbach (center), who was in charge of the International Law Conference, talking with speakers Cecil Olney, New York University School of Law (left), and Leonard Meeker, U.S. Department of State (right).
(6) in case of disputes, unresolved affairs between the Suez Canal Company and the Egyptian Government should be settled by arbitration with suitable terms of reference and suitable provisions for the payment of sums found to be due; . . .

Secretary-General Hammarskjöld undertook to pursue the negotiations which he had begun earlier with Britain, France, and Egypt in order to reach a formal agreement. On October 24 he sent a letter to the Egyptian foreign minister elaborating a plan based on the six requirements. On November 2 Egypt addressed a reply which accepted the principal features of Mr. Hammarskjöld’s plan. Then there was a several months’ hiatus in the negotiations. In recent weeks the exchanges with Egypt have been renewed, with the United States participating actively. It remains to be seen what kind of permanent regime for the Canal will emerge and what kinds of machinery and remedies will be available for the settlement of any differences regarding its operation.

THE HOSTILITIES

The process of negotiating a Suez Canal settlement was interrupted at the end of October, 1956, by the outbreak of hostilities, which were certainly not unrelated to the Canal problem. These hostilities were a radical deviation from the path of peaceful settlement.

Israel sought to justify its attack on the ground that Egypt had repeatedly violated the armistice agreement and that there was no other way to safeguard Israel’s security. Raids across the armistice lines from Egyptian-controlled territory inflicted serious and continuing harassment. On the day following the Israeli invasion, Britain and France delivered ultimatums to both Israel and Egypt and announced that they would land forces in Egypt to protect the Suez Canal. President Eisenhower, on October 31, stated that these actions by the three countries against Egypt could scarcely be reconciled with the purposes and principles of the United Nations.

The Security Council was prevented by British and French vetoes from acting to deal with the situation. Now, for the first time, an emergency special session of the General Assembly was summoned under the “Uniting for Peace” resolution. It met on the evening of November 1, a little more than twenty-four hours after it had been called.

The General Assembly, at its meetings during the emergency special session and later during its eleventh regular session, took three kinds of action. First, it called for a cessation of hostilities and withdrawal of armed forces from positions occupied after the fighting broke out; this the Assembly did on a number of occasions before the withdrawals were finally completed. Second, the General Assembly established a United Nations Emergency Force to secure and supervise the cessation of hostilities. Finally, the Assembly provided for the taking of various measures designed to prevent a recurrence of old conflicts and armistice violations once the withdrawal of forces had been completed.

We should note that the General Assembly’s resolutions calling for cease-fire and withdrawal were recommendations and not binding decisions, such as the Security Council could make under Chapter 7 of the Charter. Yet these calls of the Assembly were heeded—and heeded with relative promptness by Britain and France.

Early in November, before any withdrawals occurred, the Soviet Union proposed the use of Soviet, as well as United States, armed forces to aid in the defense of Egypt. At once the United States declared its opposition to the introduction of Soviet or any other military forces into the Middle East except under United Nations mandate. It further stated that any such move would be directly contrary to the General Assembly’s resolution of November 2 and would violate the Charter—meaning Article 2, paragraph 4, which bans the use of armed force in any manner inconsistent with the purposes of the United Nations. The United Nations was then dealing actively with the situation through a General Assembly cease-fire resolution, through efforts by the Secretary-General to secure compliance with it, and through the setting-up of machinery to police the cease-fire.

To secure and supervise the cessation of hostilities, the General Assembly established the United Nations Emergency Force. This was an innovation in international life. Like the United Nations forces in Korea, this new force was composed of units contributed by member states. But the similarity largely stopped there. The Assembly placed the force under the command of an individual officer chosen by it—Canadian General Edson L. M. Burns. Costs of the force were to be financed from the United Nations budget and contributions of non-participating countries (like the United States) as well as by the countries supplying troops.

The mission of this force was laid down in a series of reports prepared by the Secretary-General at the Assembly’s request and then approved by the Assembly. The Secretary-General, in consultation with an advisory committee of United Nations members, was to play an important part in governing the employment of the United Nations Emergency Force. This force, unlike the United Nations military units in Korea, was not to be a combatant force. But, as an international agency to supervise the cease-fire, it should be free from the frustrations of the Neutral Nations Supervisory Commission in Korea, whose operation has been largely stalled by the veto power of its Communist members.

Let us turn now to the arrangements made by the General Assembly to bring about final withdrawal by Israel and prevent a return of the very unsatisfactory state of affairs that existed before hostilities began. On January 24 the Secretary-General submitted a report proposing a number of measures. Among them were the stationing of the United
Nations Emergency Force in the Gaza strip and on both sides of the armistice line and the stationing of this force at the Strait of Tiran. This strait leads from the head of the Red Sea into the Gulf of Aqaba. The gulf lies just to the east of the Sinai Peninsula, and at its north end are two ports: Aqaba in Jordan and Elat in Israel.

The report of the Secretary-General also recalled a Security Council resolution of 1951 declaring that there was no basis for Egypt's claim and exercise of belligerent rights against Israel in view of the armistice agreement. For several years Egypt had denied passage to Israeli commerce through the Suez Canal and had blocked Israeli access to the Gulf of Aqaba at the Strait of Tiran.

On February 2 the General Assembly voted that the measures proposed by the Secretary-General should be taken. On the same day the Assembly called for the last time upon Israel to complete the withdrawal of its forces behind the armistice line. Israel, however, remained unwilling to withdraw from Gaza and from the coast bordering the Straight of Tiran.

Subsequently, the United States stated its view, in a memorandum to the Israeli government, that the Gulf of Aqaba comprehended international waters and that there was a right of free and innocent passage in the gulf and through the strait giving access to it. On February 22 Mr. Hammarskjöld reported Egyptian agreement that the United Nations' take-over in Gaza should be "exclusive" during an initial period, despite Egypt's right of occupancy under the armistice agreement, and that the United Nations should continue to have a substantial role after this period. On February 25 he indicated in a memorandum given to the Assembly that the United Nations Emergency Force would not be withdrawn from the Strait of Tiran without prior notice to the Advisory Committee, which in turn could decide whether the General Assembly ought to be consulted.

On March 1, following discussions with France and the United States, Israel announced in the General Assembly that it would complete the withdrawal of its armed forces in accordance with the Assembly's resolutions and on the basis of stated assumptions and expectations regarding control of Gaza and access to the Gulf of Aqaba. In a letter to the prime minister of Israel on March 2 President Eisenhower expressed the view that it was reasonable to entertain hopes and expectations such as those voiced by the Israeli and other delegations in the Assembly.

Thus the last withdrawals were completed on the basis of a quite complicated set of de facto arrangements arrived at through the efforts of several governments, the United Nations Secretary-General, and the processes of the General Assembly.

Perhaps mention should be made here of the point that the United Nations Emergency Force entered Egyptian territory with the consent of Egypt. I believe it would be wrong to say, as some have asserted, that a United Nations force organized and directed by the General Assembly can enter territory only with the sovereign's consent. Here, however, consent was given, and this was done in an agreement stating that the force should remain "until its task is completed." This would seem to mean that Egypt is not at liberty, unilaterally, to decide that the force shall leave when Egypt so desires. It is for the United Nations also to decide when the mission of the United Nations Emergency Force is accomplished, or that for other reasons the force should be withdrawn. We may expect that the Secretary-General would consult the Advisory Committee before withdrawing the force and that the Assembly—now in recess—might well be reconvened to consider any such question.

Obstruction of the Suez Canal

We have now looked at some of the principal legal problems arising during the Middle East crisis. I should perhaps mention a few others. There is, for example, the obstruction of the Suez Canal. After hostilities began last fall, a large number of vessels were sunk in the Canal, and a bridge over it was demolished. These actions, according to available information, were taken by Egypt. Assuming the correctness of that information, were they permissible under the Constantinople Convention of 1888?

Article I of the treaty provides:

The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

Consequently, the High Contracting Parties agree not in any way to interfere with the free use of the Canal, in time of war as in time of peace.

Article IV states:
The Maritime Canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article 1 of the present Treaty, the High Contracting Parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal and its ports of access, as well as within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers.

Article IX gave the Turkish and Egyptian authorities the right to take measures "for securing by their own forces the defense of Egypt and the maintenance of public order." But Article XI specified that these measures "shall not interfere with the free use of the Canal."

Was Egypt, therefore, entitled to block the Canal? Is Egypt liable to maritime nations for the losses they have suffered in consequence? Is Egypt liable for losses resulting from its action in slowing down the process of clearing the Canal after that was undertaken by the United Nations at Egypt's request? These are questions which do not seem likely to receive direct answers in any international judicial proceedings.

In connection with the clearing of the Canal, it is worth noting that the United Nations undertook the job upon a request from Egypt. The United Nations then solicited and obtained advances of funds to defray the cost of clearing. The United States advanced $5,000,000 out of a total of approximately $12,000,000. The question remains unsolved as to how these advances will be repaid.

Then there is the question of "war damages" which Egypt has talked of claiming. Egyptian spokesmen have charged Israel, France, and Britain with liability for loss of life and property occurring in Egypt during the hostilities. Egyptian representatives at the United Nations circulated a proposal in December, 1956, to have the Secretary-General make a survey of damage.

It should be evident, in connection with any proposal to settle claims for war damages, that there are many other claims—such as those relating to nationalization of the Suez Canal, to loss and damage caused by raids across the armistice lines, to destroyed pipelines, to the "Egyptianization" decrees, and perhaps to economic losses from closure of the Canal. It would be only just that all these should be adjudicated together if ever there is to be litigation.

There seems to be a possibility of adjudication concerning transit through the Canal and passage through the Strait of Tiran and Gulf of Aqaba. Israel has indicated its intention to attempt such transit and passage for Israeli commerce, while indications of continuing opposition have come from Egypt and Saudi Arabia. Submission to the International Court of Justice has been suggested.

CONCLUSION

As we look back over the events of the Middle East crisis, we may observe that governments have focused attention upon substantive questions of international law and upon legal—as distinct from forcible—means of dealing with them. There has been emphasis on solution of problems within a framework of law, with reliance on the Charter of the United Nations and the operation of its organs.

What significance is discernible here? First, I suppose it may be said that governments have employed the discourse of international law because they thought it relevant to the problems and useful in public presentation of their positions. In other words, international law was considered enough of a reality that they must reckon with it.

A second point to be noted is that international debate and consideration of legal questions can produce developments in the body of international law. A consensus may emerge where there were not generally agreed views before or where the field had not previously been plowed. This process has perhaps taken place to some extent during the Middle East crisis.

How has the law operated during the Middle East crisis? We might look, for example, at the withdrawal of British and French, and ultimately Israeli, forces. In the General Assembly debate a preponderance of opinion was marshaled in support of the law of the Charter and given expression in the Assembly's resolutions calling for cease-fire and withdrawal. Behind these resolutions lay the threat of United Nations sanctions, which are open to the Assembly under Articles 10 and 11 of the Charter and are contemplated by the "Uniting for Peace" resolution. Israel, France, and Britain were subjected by other countries to strong pressures to comply with the Assembly's call—various and divergent as might have been the aims of those other countries.

In a situation of great peril, because of the possibility of a spreading of the conflict, the nations in effect agreed to apply the law of the Charter. This did not result from the direct application of definitive rules by an international agency endowed with governmental power as we know it in domestic law. Much negotiation was involved, both inside and outside the United Nations, as to the means of applying the basic proposition that military forces should be withdrawn behind the armistice lines. This was done in order to take account of legitimate concerns and interests on both sides regarding security and legal rights. In the end, common ground was reached, and the law had pragmatic effect.

The forum of the United Nations and the good offices of the Secretary-General proved a valuable catalyst in the process. We should note here, from the constitutional point of view, that the office and functions of the Secretary-General have developed considerably in scope and influence during the last few months. It is possible that the principal judicial organ of the United Nations, the International Court of Justice, will have an increased role to play in the future.

United Nations rules and processes for dealing with international conflicts tend toward the elimination of the use
of armed force. This is surely a development to be welcomed. Once again the comparison with Korea suggests itself. In the Middle East, as in Korea, there has been no effective military victory for either side. An armistice is once again in effect. The question remains how this uneasy situation can be stabilized and progress be made toward a durable settlement.

There is a pressing need for the community of nations to find, develop, and employ effective means to make just and viable settlements of the problems to which force was once applied as the solvent. Unless this is done, we cannot be confident that the ground seemingly won will be held—that the world's hold on peace is secure. Gropping efforts toward peace with justice are discernible in the arrangements made by the United Nations to try to establish peaceful conditions between Israel and Egypt. We shall have to wait longer to judge the outcome—whether it holds real hope because the nations of the world are determined that their common efforts shall succeed or whether some new beginnings must be made.

The web of history is slowly woven.

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1911 (1877-1911) all the land in Mexico was owned by some one thousand powerful families. Article 27 of the 1917 constitution laid the foundation for agrarian reform and the expropriation of foreign-held land and oil interests. It gave only Mexicans, or foreigners who were by special agreement to be treated as Mexicans without recourse to their own governments, the right to acquire ownership in or exploit Mexican natural resources. The constitution further provided for expropriation of private property for reasons of public utility. Confiscations were forbidden. In 1923 the United States accepted compensation in the form of federal bonds for certain lands, and a commission was set up to adjudicate claims, though it never settled any. By 1938 the Mexican government had “nationalized” moderate-sized holdings estimated by their United States owners to be worth ten million dollars. Three million dollars was finally paid by Mexico to satisfy these claims.

Parallel to the land questions, though handled separately and raising different legal problems, was the expropriation of oil rights that had been granted to various foreign companies prior to 1919. At that time the owner of the surface had right to the subsurface minerals. Article 27 vested the nation with all the subsurface rights, but it was held not to be retroactive in effect. Mexican tried to restrict the length of time that the foreign concessions could run to fifty years by requiring that the concessions be confirmed by concessions which would be granted by the Mexican government. Long diplomatic correspondence followed, and the law was finally declared unconstitutional in certain parts in 1927. A new law was passed whereby the concessions were to be confirmed by “issuing,” not “granting,” confirmatory concessions without limitation of time. The question then seemed settled for some years, until 1936, when President Cárdenas had carried the agrarian reform near completion and turned his attention to other matters. On March 18, 1938, the Labor Board declared all oil-company labor contracts canceled, and President Cárdenas signed the expropriation decree expropriating the foreign oil companies' interests in Mexico.

The expropriation had its immediate origin in a labor controversy but was really an expression of the second objective of the Mexican revolution, the “Mexicanization of industry.” The expropriation of oil, unlike the expropriation of land, did not affect Mexican and foreigner equally, as only the foreign oil interests were nationalized. The United States recognized the right of Mexico to expropriate the oil resources but, as in the land question, demanded that prompt and just payment be made. Mexico had argued in the land question that all the foreigner could ask was equality of treatment with the national but admitted liability to compensate. The issue was finally resolved in a similar fashion to the land question.

It is significant to note that, so far as the oil expropriations were concerned, Mexico breached valid concession agreements with oil companies in this and other countries. But, recognizing a "sovereign" power in Mexico to terminate the agreements, the United States government pressed only for compensation and did not question the basic abrogation of contractual obligations by the government.