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 SUZ 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

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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 sovereignty 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;

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

David Gooder, 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 Olmstead of New York University Law School, Rolf Bengston of the World Bank, and Leonard Meeker of the State Department.
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. Groping 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.

Olmstead—

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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. Mexico 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.
The next act of the play was the action by the Iranian government in 1951 in nationalizing the oil industry in Iran. This was of a pattern similar to that of the Egyptian taking of the Suez Canal Company. The Anglo-Iranian Oil Company operated the oil industry in Iran pursuant to a valid and unexpired agreement with the government when the Iranian parliament enacted legislation nationalizing the company. Offers of the company to arbitrate the dispute under terms of the agreement were refused on the ground that Iran, as a nation, had a sovereign right to nationalize properties within its territories. Britain strongly contended that by this action Iran was breaking a binding contractual obligation and appealed to the International Court of Justice, which, after issuing a temporary restraining order, decided in 1952 that it lacked jurisdiction.

The jurisdiction of the court depended on the declarations made by the parties under Article 36(2) of its statute. The court was of the opinion, as Iran argued, that the compulsory jurisdiction attached only to disputes arising out of conventions or treaties accepted by Iran after the signing of the declaration. The British argued that disputes arising out of "situations or facts" prior to the declaration were within the compulsory jurisdiction, since they based jurisdiction on certain treaties accepted by Iran before 1932.

The Anglo-Iranian case involved many of the facts and circumstances that characterize the principal problem of contemporary concern. Iran, a country with a valuable and perhaps essential natural resource, had contracted with a Western company for the operation of the oil industry within its territory. The company made substantial investments of capital and technique in the development of Iran and its oil fields. Motivated by nationalist xenophobia and demands for accelerated proceeds from the principal enterprise in the country, the Iranian government took the foreign-owned enterprise as an act within its "sovereignty." The near-bankruptcy of Iran, only prevented by extraordinary aid measures of the United States during the period between nationalization and settlement of the dispute, indicates the dependence of such countries upon the technical skill and capital resources of the more-developed countries of the West.

The announced nationalization of the Universal Suez Maritime Canal Company in July, 1956, posed legal, economic, and policy problems that raise all the issues connected with investments pursuant to agreements between business organizations in countries of more-developed economic systems and governments of less-developed countries. President Nasser declared that stockholders of the company would be compensated at the prevailing price of the stock on the Paris Bourse on the day preceding nationalization.

Nationalization of the company closely followed United States and British withdrawal of earlier offers to help Egypt build the high dam at Aswān on the Nile. In his speech announcing the nationalization, Nasser declared the revenues from canal transit would be used by Egypt for construction of the Aswān dam. This announced purpose was obviously to accelerate the economic development of Egypt. However, there were also apparent political overtones. To maintain his position of prestige in the Arab world and twister of the lion's tail, it was essential that Colonel Nasser undertake spectacular action following withdrawal of the Aswān Dam offer.

The original concession for the construction of the Suez Canal was granted by the viceroy of Egypt to Ferdinand de Lesseps, a Frenchman, in 1854. He was directed to organize a company to build the Canal. Use of the Canal commenced in 1869, and the term of the concession was for ninety-nine years from that date, at the end of which it was to revert to Egypt upon indemnification of the company. The distribution of net profits was divided 15 per cent to the Egyptian government, 75 per cent to the company, and 10 per cent to the founders.

The Convention of 1869, between the viceroy and the company, under which the Canal was operated, provided that the company was Egyptian and was to be governed by the laws and customs of Egypt. On the other hand, as regards its constitution as a corporation and the relations of its partners with one another, it is governed by the laws of France that govern joint-stock companies. Disputes between Egypt and the company were placed under the jurisdiction of the Egyptian courts.

In 1888 the principal maritime states using the Canal entered into the Constantinople Convention concerning free navigation in the Suez Canal. The states party agreed that the Canal shall always be free and open in time of war as in time of peace to both commercial and naval vessels without distinction as to flag. This convention takes note of the earlier concession to the Canal Company, but the duration of the former was not limited by the ninety-nine-year term of the latter. When this convention came into force, Egypt was under Ottoman suzerainty and not a party, but, later, after obtaining its independence, Egypt affirmed adherence to it. At the time of nationalization the concession had some twelve years of its term to run, and there is no indication that the Canal Company had not faithfully performed its obligations under the concession.

Abrogation of the contractual agreement with the Suez Canal Company presents the legal question of the right of a state under international law to breach its contracts with foreign persons or with local entities owned by foreign individuals. The latter case presents no problem, as corporate veils are frequently lifted to determine the real parties in interest.

The position advanced by spokesmen for Egypt is that the Suez Canal is within its territory and that the taking of property by the territorial sovereign, even though foreign owned, is a valid exercise of jurisdiction by the sovereign, particularly as compensation is offered. Several arguments have been advanced in opposition to
the validity of the nationalization. It is contended that the concession to the Suez Canal Company is a part of the Constantinople Convention and that, therefore, the abrogation of the concession is a violation of a treaty—a recognized breach of international law. Egypt has sought to separate the convention from the concession, contending that none of the obligations affects its sovereignty but that it will abide by the terms of the convention. It is difficult to find an incorporation of the concession by the convention even though it refers to it and in the preamble speaks of the completion of "the system under which the navigation of this canal has been placed." To buttress this position, claims are made that the spirit of the convention negates ownership and control by any one nation. An attempted incorporation by reference would undoubtedly fail because of the indefiniteness of the reference and because the ultimate reversion of the Canal to Egypt rebuts any inference against ownership and operation by any one country.

In the case of the Suez Canal a strong argument can be along the line that it is a unique international public utility of vital concern to the world community and, therefore, beyond the capacity of any single state's jurisdiction to nationalize. Perhaps, in the case of Suez this is a valid characterization. Certainly the doctrine of eminent domain—that is, a taking for a public purpose by a sovereign—would not apply where the public interest is that of the world community and, hence, not properly to be determined by any one state—even the territorial sovereign.

Valid objection can be taken to the proposed measure of compensation—the market value of the stock on the day prior to nationalization. The traditional doctrine runs that a state may nationalize the property of foreigners provided it makes "adequate, effective and prompt compensation," and unfortunately this has usually been acceptable to the United States Department of State as a validating principle. Assuming the validity of this formula, the price of the stock does not appear necessarily to constitute adequate compensation. Measure of damages rules under both common and civil law systems are designed to compensate the injured party for his losses under the broken contract—and this does not mean upon a quantum meruit basis. Therefore, payment for all properties taken plus future lost profits would represent adequate compensation. Of course, prompt payment of such a measure is far beyond the financial capabilities of Egypt. Furthermore, if full damages were paid by the nationalizing state to the victim of the expropriation, there could be no financial gain to the state and no incentive to nationalize.

While of importance, I submit that these arguments do not reach the policy and legal heart of the problems raised by the nationalization of foreign-held enterprise operated pursuant to a contractual agreement with the government of the host state.

An announced major policy objective of the government of the United States, of the United Nations, and of the less-developed countries of the world has been to stimulate and encourage the flow of private capital for purposes of industrial development from developed to underdeveloped countries. A necessary condition for fulfillment of this objective is the creation of confidence on the part of potential investors. Arbitrary abrogation of contracts by governments seeking to benefit from foreign investment does not establish an appropriate climate for investment.

The basic premise upon which rests the theory that states may disregard their agreements with individuals is the antiquated notion that only states are subjects of international law and that individuals are mere objects. This is no longer factually correct, as Philip Jessup has so well demonstrated in his recent *Transnational Law*. Furthermore, to assert that these nationalizations of foreign enterprise are only exercises of eminent domain by the sovereign and subject to its finding of public interest is a serious confusion of the rule and the facts to which it is applied. The doctrine of eminent domain has always been limited to a taking for a public purpose, defined as a governmental as distinguished from a proprietary purpose. A sovereign, at the time of the formulation of the concept of eminent domain, was an absolute one sometimes identified with a divine being. While a limited right of eminent domain is recognized, it should not be extended to include takings of all types of property by governments that have by agreement undertaken to respect certain foreign interests.

Beyond this is the duty of any party to perform its obligations under a valid contractual agreement. Notwithstanding the Holmesian homily that a party to a contract has the option of performance or nonperformance, it appears that breach of a contract is not legally sanctioned conduct but is legally condemned, and the law seeks to place the injured party in the position he would have been in had the other party performed—this contains an obvious element of sanction. This reasoning has long been applied, under the maxim *pacta sunt servanda*, to agreements between states, and states have enforced it between their nationals. It seems incongruous for the states of the world community not to apply this same standard to their own agreements with individuals.

The binding effect of a state's agreements upon it should not be viewed as a restriction or limitation upon its sovereignty, but, on the other hand, the entry into, and performance of, contractual obligations is in reality an exercise of a sovereign personality.

In today's world community that is characterized by interdependence rather than independence nineteenth-century concepts of sovereignty and nationalism must give way to concepts of state responsibility and co-operation for the well-being of all. It is essential that countries of the West, particularly the United States, and underdeveloped areas establish *nousus operundis* for trade and investment. A cornerstone of this pattern must be the sanctity of contracts between states and individuals.