CLOSURE OF THE SUEZ CANAL TO ISRAELI SHIPPING

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INTRODUCTION

The Arab-Israeli war of June 1967 has again raised the question as to whether Egypt can lawfully close the Suez Canal to Israeli shipping. Israel, since its establishment, has repeatedly demanded the same right of free passage accorded to other nations, but Egypt has insisted on denying her such a right despite resolutions of the United Nations Security Council calling on Egypt to terminate the restrictions imposed on the passage of Israeli shipping and goods through the Suez Canal.[1] The six-day war gave Israel the opportunity to demand again the opening of the Canal to her shipping;[2] but President Nasir, in his speech on November 24, 1967, two days after the Security Council's resolution 242 had been adopted, calling for withdrawal from occupied territory and termination of belligerency, declared in no uncertain terms that "we shall never allow Israeli ships, whatever the cost, to pass through the Suez Canal."[3] Israel's demand and Nasir's rejection call for a reconsideration of the question in the light of the new circumstances brought about by the June war and the Security Council's resolution of November 22, 1967. It is not my purpose to review the arguments of the two parties relative to the conditions preceding the June war, except in so far as they relate to the conditions after the war, since they have been thoroughly scrutinized by a number of scholars from the two opposing viewpoints.[4] In order to examine the legal aspect of the closure of the Canal specifically to Israeli shipping, I propose to deal with the question under three heedings: (1) the fundamental principles governing the present legal status of the Suez Canal; (2) Israel's claim to the right of free passage; (3) Egypt's right to control of the Canal.

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[1] The most important resolution was, of course, S.C. Res. 95 (1951). It cited S.C. Res. 73 (1949) and other resolutions and acts calling for the cessation of hostile acts and the resolution of outstanding issues between the parties.

[2] *See* Abba Eban's speech at the Emergency Session of the General Assembly of the United Nations on June 19, 1967, U.N. Doc. A/PV.1526 (1967) and subsequent declarations.

[3] For full text of the speech, see *al-Ahram*, Cairo, Nov. 25, 1967. See also N.Y. Times, Nov. 24, 1967, at 13, col. 1.

[4] Two books might be cited which deal with the divergent views in detail: B. AVRAM, THE EVOLUTION OF THE SUEZ CANAL STATUS FROM 1869 UP TO 1956 (1958), and J. OBIETA, THE INTERNATIONAL STATUS OF THE SUEZ CANAL (1960).

I

FUNDAMENTAL PRINCIPLES GOVERNING THE LEGAL STATUS OF THE SUEZ CANAL

When the Suez Canal was opened in 1869, Egypt had not yet attained independence. Its territory was part of the Ottoman Empire. The Khedive of Egypt, one of the Sultan's principal governors, had no power to act in entering into agreements relating to foreign affairs without the approval of the Sultan. Thus, the acts of concession issued by the Khedive in 1854, 1856, and 1866, granting the right to connect the Mediterranean and the Red Seas by a canal and to operate it, had to be ratified by the Sultan's firman (decree), issued on March 19, 1866, in order to be valid under the Ottoman law in force in Egypt.[5] However, no rights were derived from the concession by any third party nor was any surrender of the Sultan's sovereignty over the Canal ever intended. On the contrary, the acts of concession stressed Egypt's right to supervise the Canal, to enforce law and public order, and to occupy any point on the borders of the Canal whenever this was deemed necessary for the defense of the country, as a manifestation of sovereignty over the territory of the Canal. But the intent of throwing open the Canal to the free navigation of all nations without distinction of flag was made abundantly clear.

Nor was the Sultan's sovereignty over the Canal's territory restricted by the provisions of the Convention regulating the use of the Canal signed in Constantinople on October 29, 1888. The Convention of 1888 aimed at confirming the practices that had developed concerning free navigation for all nations, but no surrender of any sovereign rights was ever contemplated. For if the Sultan had given away any of his sovereign rights, he would have committed an act of servitude in derogation of his sovereignty over Egypt. The first principle governing the present status of the Suez Canal is, therefore, the principle of territorial sovereignty which was recognized by the signatories of the Convention of 1888. But to the manner in which the rights of sovereignty were to be exercised, we shall return later.

Next to the principle of territorial sovereignty is the principle that the Suez Canal is an "international waterway." This "internationality" was the product of a voluntary act on the part of the Ottoman Sultan in an effort to extend the benefits of free passage through the Canal to all nations without qualifying his sovereign rights. Even before the construction of the Canal was completed, the intent was, both in

[5] The concession, concluded with a private company, did not imply an international obligation on Egypt's behalf and could have been signed by the Khedive without the approval of the Sultan in accordance with the firman of appointment of the Khedive of 1841. But since the concession contained an obligation assumed by the two parties toward each other affecting third parties in their undertaking that they would not discriminate against other parties, and Article 14 of the 1866 concession provided that the canal and its ports would always be open as a neutral passage, the Sultan's approval became necessary. In the concession of 1866, it was stipulated that the Sultan's ratification was necessary. For texts of the acts of concession and the firmans of ratification, *see* U.S. DEP'T OF STATE, PUB. NO. 6392, THE SUEZ CANAL PROBLEM: A DOCUMENTARY PUBLICATION 1-16 (1956); B. BOUTROS-GHALI, LE CANAL DE SUEZ, 1854-1957: CHRONOLOGIE DOCUMENT 10 (1958); 1 J. HUREWITZ, DIPLOMACY IN THE NEAR AND MIDDLE EAST 146-49 (1956).

the acts of concession as well as in unilateral declarations, to grant the right of free navigation to all nations. Article 14 of the Concession of 1856 reads:

> We solemnly declare, for ourselves and our successors, subject to ratification by His Imperial Majesty the Sultan, that the great maritime canal from Suez to Pelusium and the ports belonging to it shall be open forever, as neutral passages, to every merchant vessel crossing from one sea to the other, without any distinction, exclusion, or preference with respect to persons or nationalities, in consideration of the payment of the fees, and compliance with the regulations established by the universal company, the concession-holder, for the use of the said canal and its appurtenances.[6]

In this, as well as in other relevant declarations of unilateral nature, the purpose was to assure the company and all nations that the canal would always be open to free navigation. Notwithstanding these declarations, as one Israeli writer stated, "[t]he passage of ships was not a right but a privilege granted by the Ottoman Empire to other nations."[7] It is also questionable that a right was established by the Sultan's declaration made at a conference held in Constantinople, in 1873, to deal with technical matters, in which he said:

> It is understood that no modification, for the future, of the conditions for the passage through the Canal shall be permitted, whether in regard to the navigation toll or the dues for towage, anchorage, pilotage, etc., except with the consent of the Sublime Porte, which will not take any decision on the subject without previously coming to an understanding with the principal Powers interested therein.[8]

Some writers have argued, on the analogy of the *Eastern Greenland Case,* that the unilateral declaration of a Foreign Minister on behalf of his country, would be "binding upon the country to which the Minister belongs."[9] Such a declaration was, in that case, held by the Permanent Court of International Justice to be binding on the country making it. The so-called "Ihlen doctrine" may or may not be accepted, but it is of no great significance to our discussion, since an internationally binding act had been accepted by the Ottoman Porte in 1888 which established beyond any doubt the international character of the Suez Canal.

In the preamble of the Constantinople Convention[10] (October 29, 1888), the nine signatory Powers[11] stated that their intention was to establish "a definitive system intended to guarantee, at all times and to all the Powers, the free use of the Suez Maritime Canal, and thus to complete the system under which the navigation of

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[6] THE SUEZ CANAL PROBLEM, *supra* note 5, at 7; B. BOUTROS-GHALI, *supra* note 5, at 6; and 1 J. HUREWITZ, *supra* note 5, at 148.

[7] B. AVRAM, *supra* note 4, at 31.

[8] Great Britain, *Parliamentary Papers,* Commercial 19, C. 1075, at 319.

[9] [1933] P.C.I.J., ser. A/B, No. 53, at 21, 71.

[10] For English text of the Convention, *see* Great Britain, *Parliamentary Papers,* Commercial, No. 2, Suez Canal, C. 5623 (1889); THE SUEZ CANAL PROBLEM, *supra* note 5, at 16-20; B. BOUTROS-GHALI, *supra* note 5, at 16; 1 J. HUREWITZ, *supra* note 5, at 202-05.

[11] They were Great Britain, Austria-Hungary, France, Germany, Italy, The Netherlands, Russia, Spain, and Turkey.

this Canal had been placed by the Firman of His Imperial Majesty the Sultan, dated February 22, 1866 . . . ."

Moreover, the preamble indicates the principle of "internationality" as having evolved from the inception of the Canal and that the Convention was to "complete" the legal status envisioned in early declarations. As a legal obligation, however, it is Article 1, specifying free navigation to all nations, which established the principle of internationality to include freedom of passage in time of war and peace. Article 1 reads: "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."

In order to insure "free navigation," it was realized that a "guarantee," as stated in the preamble, was necessary. To achieve such a guarantee, the signatories provided, under Article 2, that: "They undertake not to interfere in any way with security of that Canal and its branches, the working of which shall not be the object of any attempt at obstruction."

This "security" of the Canal was to be guaranteed by the acceptance of another principle, already stated in earlier declarations, that the Canal would be neutral, although the term *neutrality* is not used in the text of the Convention. Article 4 reads:

> The Maritime Canal remaining open in time of war as a free passage . . . , no right of war, act of hostility or act having for its purpose to interfere with the free navigation of the Canal, shall be committed in the Canal and its ports . . . even though the Ottoman Empire should be one of the belligerent Powers.

All other acts on the part of belligerent Powers were forbidden in the Canal and its ports. Moreover, the Canal, as Article 1 further states, "shall never be submitted to the exercise of the right of blockade." The legal consequence of these stipulations is that the Canal, in time of war, shall be excluded from the area of warfare.[12] Thus, the neutrality of the Suez Canal, even if the Ottoman Empire were one of the belligerent Powers, is the third principle governing the present legal status of the Canal. Various terms have been used to characterize this neutral regime, from "inviolability" to "neutralization," but this should be distinguished from the neutralization of states.[13]

The three principles of territorial sovereignty, internationality, and neutrality

[12] This means that the neutral zone should be excluded from the region where war can lawfully be prepared or waged.

[13] *See* J. OBIETA, *supra* note 4, at 68-69. Colombos, however, held a different point of view on the Canal's neutrality. He said: ". . . the Suez Canal is not neutralized in the proper sense of the term, since neutrality does not admit the passage of belligerent forces across a territory . . . . It is only subject to a particular regime for the purpose of withdrawing it from all acts of hostility within its waters and protecting it from any damage or any attempt to close it to the detriment of the World's navigation." C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 175 (4th ed. 1961).

have been assessed differently by various writers. Some, stressing internationality and neutrality, have maintained that sovereignty was restricted by the Convention of 1888 which imposed a "perpetual servitude" over Egypt in the area of the Suez Canal.[14] Others, rejecting the imposition of an international servitude, stressed the overriding principle of territorial sovereignty and recognize neither an international character for the Canal nor an implied neutrality in its zone.[15] The latter position has been maintained by writers who either tried to defend Egypt's position on the closure of the Canal against Israel or pushed to the extreme the doctrine of territorial sovereignty in the relationship among states. On the other hand, the writers who argued the case of Israel's claim to free passage have stressed Egypt's international obligations under the Convention of 1888 without qualifications. A third position, however, may be maintained in which Egypt's contractual obligations may be respected without compromising the doctrine of sovereignty. This is the position taken in this paper.

II

ISRAEL'S CLAIM TO THE RIGHT OF FREE PASSAGE THROUGH THE SUEZ CANAL

Since its establishment more than two decades ago, Israel has repeatedly demanded the same right of free passage through the Suez Canal enjoyed by other nations, and has claimed that Egypt's closure of the Canal to its shipping had been done in violation of the general principles of international law, of the Convention of 1888, and of the Armistice Agreement of 1949. Let us examine Israel's complaints from these three legal angles.

Under the general principles of international law, according to Israel, all nations possess the right to navigate freely on the high seas, through international waterways that connect high seas, and through international rivers. This right, according to Israel, is "a cornerstone" of international law, and, therefore, cannot be denied to her as one of the members of the international community.

In the specific case of the Suez Canal, the right of free passage, clearly stated in the Constantinople Convention of 1888, was, in this area, to be enjoyed by all nations without distinction of flag. Israel, as one of the nations presumably included under the general term "without distinction of flag," was therefore entitled to enjoy the same right as other nations, but Egypt is alleged to have denied Israel such right in violation of the general principle of international law and of her obligations under the Convention of 1888.

Moreover, Egypt's restrictive measures, according to Israel, constitute an act of war in the Canal waters contrary to Articles 1 and 4 of the Convention of 1888, on

[14] *See* B. AVRAM, *supra* note 4, at 48-50.

[15] *See* Huang, *Some International and Legal Aspects of the Suez Canal Question*, 51 AM. J. INT'L L. 300-03 (1957).

the ground that Egypt possessed no right to take defensive measures in the Canal Zone.[16] Egypt proceeded to act on the assumption that she was at war with Israel, but this assumption was not justified, according to Israel, because no state—other than the Arab states—recognized such a state of war to have existed. On the contrary, the United Nations had on more than one occasion called on Egypt to open the Suez Canal presumably on the assumption that Egypt and Israel, as peace-loving members of that Organization, can no longer remain at war with one another. If they had ever been at war, as the Arab states held, such a state of war must be superseded by membership in the United Nations.[17]

Finally, the Armistice Agreement between Egypt and Israel (February 24, 1949)[18] has prohibited hostile acts. According to Israel, not only war in the military sense, but also the state of war between her and Egypt had been terminated. As stated by an Israeli jurist, the Agreement was intended to achieve four aims:

1. To facilitate the transition from the present truce to permanent peace and bring all hostilities to an end.

2. To fulfill the obligation of the Security Council to act with respect to threats to the peace, breaches of the peace and acts of aggression.

3. To delineate permanent demarcation lines beyond which the armed forces of the respective parties should not move.

4. To provide for the withdrawal and reduction of armed forces in order to insure the maintenance of the armistice during the transition to permanent peace.[19]

These aims, intended to establish eventual peace between Egypt and Israel, have been endorsed by the United Nations resolutions of 1949 and of 1951, which explicitly called upon Egypt to open the Suez Canal. Egypt's refusal to open the Canal, according to Israel, was a violation of both the Armistice Agreement and the United Nations Security Council resolutions of 1949 and 1951.[20]

Egypt, however, has refused to accept the charge that she has denied Israel's right of free passage in violation of international law. Israel has put forth a claim to free passage under international law on the ground that the Suez Canal—like any other strait—is an international waterway and, therefore, according to her, should be open to free navigation. But should the Suez Canal, even if regarded as an international waterway, be treated as other waterways, like straits, and, therefore, as subject to the same rules of international law? Straits, as "natural" waterways provided

[16] 9 U.N. SCOR, 658th meeting 1-25 (1954). *See also* B. AVRAM, *supra* note 4, at 119-21.

[17] This viewpoint is based on the assumption that members of the United Nations are peace-loving members and therefore no one can be at war with another member without violating the Charter of this organization. *See* H. KELSEN, THE LAW AND THE UNITED NATIONS 69 (1950); AND L.M. BLOOMFIELD, EGYPT, ISRAEL AND THE GULF OF AQABA IN INTERNATIONAL LAW 164 (1957).

[18] 42 U.N.T.S. 251, no. 654. *See also* 2 J. HUREWITZ, *supra* note 5, at 299-304.

[19] S. ROSENNE, ISRAEL'S ARMISTICE AGREEMENTS WITH THE ARAB STATES 33 (1951).

[20] *See* note 1 *supra*. For an interpretation of these views, *see* Gross, *Passage Through the Suez Canal of Israel-Bound Cargo and Israel Ships*, 51 AM. J. INT'L L. 530-68 (1957).

by nature, have existed from time immemorial and, therefore, the free passage enjoyed by all nations must be distinguished from free passage through canals which have been artificially constructed. Before a canal is opened, its territory must be under the control of some state sovereignty. Canals must, therefore, fall in a different category from straits, because they are artificial waterways opened by the express or tacit approval of the sovereign power and, *ipso jure*, the consent of the sovereign power must be first obtained. If the sovereign grants free passage by an express declaration or by an obligation under a treaty or an international agreement, it is the legal obligation undertaken by the sovereign which entitles other nations to enjoy free passage, rather than the geographical analogy with natural waterways.[21]

In the case of the Suez Canal, it was the Convention of 1888 rather than the general principles of international law that granted the right of free passage to other nations. If Israel possesses any right to enjoy free passage through the canal, such right must be derived from the aggregate right granted to other nations and not by an analogy with natural waterways which nations ordinarily enjoy under international law.

The Convention of 1888 merely confirmed the right of free passage already recognized by the Ottoman Porte before 1888 and the powers that signed this convention acquired such rights both in time of peace and war. At the time of signature, other nations were invited to adhere to the Convention, but failed to do so. With regard to non-signatory states, the question whether the Convention is obligatory on them is an open one. Israel may be said to fall in a different category of non-signatory states. As a successor state, would she not, like Egypt, be entitled to special rights?

There is no question that Egypt, already mentioned in the Convention, was granted special rights as the country immediately connected with the canal, and certain obligations were imposed on her.[22] Egypt, according to the general principles of international law, must also accept the obligations already undertaken on her behalf by the former sovereign power. Moreover, Egypt has formally declared its acceptance of the obligations under the Convention of 1888 after independence on more than one occasion.[23]

[21] "Unlike international rivers and straits, which are natural waterways, international canals are artificially constructed. This essentially differentiating factor has been overlooked by a number of writers who, misled by the similarity of regimes to which both international canals as well as rivers and straits are subject, have tried to find, by an analogy to the latter, a geographical or physical criterion which would serve to define an international canal."
J. OBIETA, *supra* note 4, at 24.

[22] *See* Articles 8, 9, 10, and 14 of the Convention of 1888. *Cf. supra* note 11.

[23] From 1938 in formal statements concerning the Canal following the declaration of independence to 1954, the year of signature of the treaty with Britain for evacuation of the Canal Zone. *See, e.g.*, letter from Mustafa al Sadik Bey to Lord Perth, April 16, 1938, 195 L.N.T.S. 108 (1939); Agreement between . . . Egypt and the . . . United Kingdom, October 19, 1954, 210 U.N.T.S. 1 (1955); Letter from the Minister for Foreign Affairs to Egypt to the Secretary-General . . . 24 April 1957, 12 U.N. SCOR, Supp. April-June 1957, at 8, 9, U.N. Doc. S/3818/Add. 1 (1957); statement by Egyptian Representative in Security Council, 2 U.N. SCOR 1756 (1947).

Unlike Egypt, however, Israel falls in a special category. First, she has not adhered to the Convention of 1888, which has an accession clause, and therefore may enjoy the right of free passage in time of peace like other non-signatory states to whom the right of free passage was granted before 1888, but not the right of free passage in time of war which was granted under the Convention of that year. Second, if Israel may be considered to have adhered tacitly, she must have acquired not only the right to enjoy the right of free passage, but also the obligations of the Convention. Such obligations, for instance, require that the Canal must remain neutral and not involved in the area in which war is lawfully waged, and that the Canal should not be subject to blockade. Obviously Israel has neither declared her acceptance of such obligations nor, since she carried her military operations to its very eastern bank, has she respected the neutralization of the Suez Canal.[24] Third, Egypt's territory has become the subject of an Israeli attack in 1967, which raises the question of Egypt's right to take defensive measures irrespective of whether Israel possesses the right of free passage or not. This latter point, so significantly affecting the status of the Canal, deserves to be treated separately in the following section, concerned with Egypt's right to control the Canal.

It follows from our foregoing argument that if Israel were not involved in a war with Egypt—a war in which Egypt closed the Canal as a defensive measure—Israel would be entitled to the right of free passage. There can be no doubt that Israel's attack on Egyptian territory on June 5, 1967, presumably to settle a dispute by force rather than by peaceful methods as provided by the Charter of the United Nations, was an act of war which justified Egypt's position concerning the security of the Suez Canal, since, as noted above, Israel was not entitled to enjoy the same rights and obligations as a signatory of the Convention of 1888. As a third party beneficiary, a right concerning which jurists are not all in agreement,[25] Israel might claim to enjoy certain rights to use the Canal. But in a war which Israel initiated, and in which it attacked the territorial Zone of the Canal, Egypt would be empowered to close the Canal in self-defense, no less by general law than by the very provisions of the Convention of 1888 which obligate Egypt to take measures to prohibit any state from conducting war in the Canal Zone.[26]

A controversy has raged among several writers as to whether a state of war existed between Egypt and Israel before June 5, 1967. Those who defend Israel's right to free passage through the Canal hold that belligerency between the two states created by the Palestine war of 1948-49 was terminated by the Armistice

[24] Although Israel did not reach the Canal Zone in the invasion of Sinai in 1956, in the June war she reached and asserted control over the eastern bank of the Canal in violation of Articles 1 and 4 of the Convention. See notes 11 and 12 *supra*.

[25] *See* LORD MCNAIR, LAW OF TREATIES 309-21 (1961); HARVARD RESEARCH IN INTERNATIONAL LAW: LAW OF TREATIES 924 (J. Garner ed. 1935).

[26] In practice this seems to have been the position maintained by the Ottoman Porte and later Egypt since 1888. See J. OBIETA, *supra* note 4, at 79-87.

Agreement of February 28, 1949.[27] Moreover, the Security Council resolution of September 1, 1951, calling upon Egypt to open the Canal to Israeli shipping on the ground that hostilities had been terminated by the armistice of 1949, was asserted by some to be binding on Egypt. Egypt, according to those who supported this viewpoint, has violated the Convention of 1888 and ignored the resolution of the Security Council.[28] Those who hold an opposing viewpoint argue that the Armistice Agreement of 1949 did not terminate the state of war, since an armistice puts an end to fighting but does not establish peace. Only a peace treaty can terminate the state of war and establish peace.[29] Moreover, the Security Council resolution, based on the assumption that the intent of the Armistice Agreement was to establish peace, cannot be regarded as binding on Egypt without her consent, because the resolution was recommendatory and not mandatory in nature.[30]

The controversy between these opposing viewpoints is deemed outside the scope of this paper, which deals with the problem of the closure of the Suez Canal in the circumstances created by the war of 1967. Even if a state of war had not existed before June 5, 1967, Egypt's decision to keep the Canal closed to Israeli shipping after the June war would be justified by the measures necessary for self-defense against sudden attack on the ground that the closure of the Canal against a non-signatory to the Convention falls within Egypt's sovereign rights.

Finally, it may be asked to what extent Egypt's obligations under the Convention of 1888 have restricted her sovereign rights over the Canal? This raises the question of Egypt's right to control the Canal, which falls under the third heading of our discussion.

III

EGYPT'S RIGHT TO CONTROL OF THE CANAL

The control of the Suez Canal raises the question of the relevance of territorial sovereignty to the status of the Canal and to what extent it was restricted by an international agreement. As already stated, the internationality of the Canal may be regarded as a balancing principle between the doctrine of sovereignty and the binding obligations of an international agreement. It is in the light of this balance that Egypt's right of the control of the Canal should be assessed.

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[27] *See* S. ROSENNE, *supra* note 19, at 82.

[28] *See* B. AVRAM, *supra* note 4, at 119.

[29] For a summary of the Egyptian point of view, *see id.* at 122-27.

[30] For a discussion on the nature of the U.N. resolution, *see* Halderman, *Some International Constitutional Aspects of the Palestine Case*, in this symposium, p. 78. Colonel Howard S. Levie makes the following remarks on the Security Council resolution of 1951:

> "It is considered more likely that the Security Council's action was based upon a desire to bring to an end a situation fraught with potential danger to peace than that it was attempting to change a long established rule of international law. By now it has surely become fairly obvious that the Israeli-Arab General Armistice Agreements did not create even a *de facto* termination of the war between those states."

Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT'L L. 880, 886 (1956). *See* 2 L. OPPENHEIM, INTERNATIONAL LAW 546-51 (7th ed. H. Lauterpacht 1952).

Admitting her obligations under the Convention of 1888, Egypt has held that she has not violated Article 1 concerning "free passage" through the Canal, because the measures taken in time of war were "reasonable and necessary measures" for defense purposes, as the Egyptian Prize Court of Alexandria states.[31] It might be argued that even "reasonable" and "necessary" measures might be restricted by the Convention of 1888, since Articles 10 and 11 prohibited Egypt from actions, even for the defense of her territory, because they might interfere with the free use of the Canal. It is also argued that, as held by the World Court in the *Wimbledon* case,[32] the Canal should remain permanently free as an international waterway.

Egypt's insistence on her right to close the Canal against Israeli shipping in time of war has naturally raised the question as to whether she can close the Canal during war against any other nations including signatory powers. This seems to be different from closing the Canal against a country that had attacked Egyptian territory, including the Canal Zone. It was in the exercise of her inherent right of self-defense that Egypt denied free passage to Israel.[33] Such a situation seems either to have been taken for granted by the Convention of 1888, because it falls within the rights of sovereignty, or left undecided. Egypt's actions might, however, be justified even if the Convention is held binding upon it to grant free passage to all nations, including Israel, on the ground of the internationality of the Canal. Any such obligation would necessarily entail the reciprocal obligation on the part of Israel to respect the neutrality of the Canal and the territorial sovereignty of Egypt. It cannot be claimed that Egypt is bound by the Convention *in toto* regardless of whether Israel accepts the obligations imposed on the nine signatory powers. Such a rule would clearly be imposing an international servitude over Egypt in order to grant to Israel the right of free passage in time of peace and war and denying Egypt the right of self-defense in case of an attack on her territory. If we take this position, the purposes of the Convention would be inconsistent with the general principles of international law which recognize Egypt's right to repudiate restrictive measures on her sovereignty imposed without her consent. Nor would the Ottoman Porte have agreed to sign the Convention and acquiesce in such a servitude, because it had consistently declared before 1888 that its control over the Canal was not to be restricted by throwing the Canal's doors open to other nations.[34]

A balancing view of the principle of internationality seems to restrict Egypt's right to close the Canal in time of peace against any nation including Israel if Egypt's security were not involved. So long as Israel insists on a right of free passage under the Convention of 1888 by threatening Egypt's security, Israel seems to pursue a

[31] The Flying Trader, [1950] Ann. Dig. 440, 446-47 (No. 149) (Prize Court of Alexandria), 7 REV. EGYPTIENNE DE DROIT INTERNATIONAL 127 (1951).

[32] [1923] P.C.I.J., ser. A, No. 1.

[33] *See* Baxter, *Passage of Ships Through International Waterways in Time of War*, 31 BRIT. YB. INT'L L. 208 (1954).

[34] *See* J. OBIETA, *supra* note 4, at 78-87.

contradictory legal position by invoking one article of the Convention (Article 1) while denying Egypt's right to invoke another (Article 10).[35]

In 1956, when Egypt nationalized the Suez Canal, the Security Council passed a six-point resolution on October 13, 1956, in which it was affirmed that any settlement of the Suez Canal question should, *inter alia*, meet the following requirements: (1) free and open transit through the Canal, and (2) respect for Egypt's sovereignty.[36]

This resolution seems to embody the balancing principle of internationality by proposing to grant freedom of navigation without compromising Egypt's sovereignty. Thus, the balancing principle of internationality must be considered with due respect to Egypt's sovereignty. The principle of internationality would cease to be a balancing principle if Egypt were to be denied the right to close the Canal, as a measure of self-defense, in case of an attack. Israel can claim the right to be a beneficiary of the principle of internationality if she ceases to present a threat to Egypt's security, one of her sovereign rights.

CONCLUSION

From the time of the nationalization of the Canal, Egypt has not only reiterated her affirmation of the binding obligations of the Convention of 1888 and her respect of the principle of free navigation, but also declared that any dispute or disagreements which may arise in respect of that Convention would be settled in accordance with the Charter of the United Nations, and that any differences that may arise concerning the interpretation of that Convention would be referred to the International Court of Justice. In a letter dated July 18, 1957, addressed to the Secretary-General of the United Nations, Egypt accepted the compulsory jurisdiction of the International Court in all legal disputes that may arise from the application of the Convention of 1888.[37] Since Egypt has accepted the compulsory jurisdiction of the International Court on all legal disputes relating to the Suez Canal, Israel's claim to the right of free passage through the Canal might well be an appropriate case to be brought to the International Court for adjudication and might be regarded as an example for solving other Arab-Israeli issues on the basis of law and justice rather than force or diplomatic pressures.[38]

[35] Article 10, paragraph 1, of the Convention of 1888 provides:

"Similarly, the provisions of Articles IV, V, VII, and VIII shall not stand in the way of any measures which His Majesty the Sultan and His Highness the Khedive in the name of His Imperial Majesty, and within the limits of the Firmans granted, might find it necessary to take to assure by their own forces the defence of Egypt and the maintenance of public order."

Supra note 11.

[36] S.C. Res. 118.

[37] [1956-1957] I.C.J.Y.B. 213-14, 241. *Cf.* U.N. Doc. S/3818/Add. 1, *supra* note 23.

[38] One of the states which supported Security Council resolution 95 (1951), calling on Egypt to open the Suez to Israeli shipping, might either voluntarily or upon Israel's request refer the Suez Canal dispute to the International Court of Justice in accordance with article 36, para. 1, of the statute of that Court. Article 36, paragraph 1, provides: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."