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SOME ASPECTS OF THE ROLE OF LAW IN INTERNATIONAL POLITICAL CRISES:

A CASE STUDY OF SUEZ 1956 AND OF CUBA 1962

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To my parents

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TABLE OF CONTENTS

ABSTRACT

The study undertakes to analyze some aspects of the role of law in conflict issues. Two international political crises are used as case studies. After a brief historical overview, the analysis focuses on a) the legal arguments advanced in the course of the crises by the States concerned; and b) some of the forces at work affecting the policy-making processes of those States. Finally, against that background, the paper suggests eleven ways in which law may play a significant role in conflict issues, and makes references to instances and aspects of the crises previously examined which bear out those roles.

The paper concludes a) that law is seen to have played several roles; b) that the impact of some of these roles has been significant; c) that law is a force per se; d) that it is necessary, in the light of the study, to espouse an appropriately broad conception of international law in order to understand the nature of its roles and the channels through which they are effected.

CHAPTER I

INTRODUCTION

The history of mankind has been scarred, since time immemorial, by the destructiveness of violent conflict. Throughout history peoples of all races and creeds have experienced the most horrible manifestations and consequences of human conflict. Man has managed to inflict upon fellow man death and destruction, untold pain, misery, deprivation and humiliation time after time, in a drift of seeming inevitability and with a magnitude and intensity that had seemed each time previously unimaginable.

While conflict per se, channelled into peaceful forms of expression and action, may be a catalyst and an engine of change oriented toward constructive aims, unfortunately the record of history shows destruction and war to be far more common outcomes. Texts and newspapers brim with accounts of countless forms and degrees of past and present conflict at all levels and between all kinds of groups: racial, social and religious; community, intra-state and inter-state; from university riots to world wars.

Violent conflict and its most extreme form -- war -- is inimical to growth, freedom and justice. Indeed, to paraphrase Jefferson, it is inimical to one of the most fundamental of human rights: the pursuit of happiness. The search for a better society for

man where these values could flourish -- whether in the polis or the nation-state, withering-away-of-the-state or world community -- has occupied the thought and existence of some of the most powerful minds in history. No human endeavour can be truly, globally significant if it does not have it as its ultimate end to contribute to the amelioration of the human condition. Yet, in spite of this, no achievement in Engineering or in Chemistry, no breakthrough in Medicine or in Physics, no advances in Sociology or Psychology, no new light shed by the Humanities, or contribution of Law, Economics or Political Science can be meaningful or even relevant if the human race is to be obliterated by a thermonuclear world war. World peace, like one's own health, is the most fundamental point of departure.

Conflict may be defined as "a critical state of tension occasioned by the presence of mutually incompatible tendencies within an organismic whole the functional continuity or structural integrity of which is thereby threatened."[1] Clearly, conflict does not arise by spontaneous combustion, nor do its violent and destructive forms originate in a vacuum. Nearly always the etiology of conflict is to be understood in complex, deeply-seated processes of interaction of multiple forces. Thus, in its familiar dysfunctional form,[2] conflict is a complex and dynamic phenomenon,

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[1]Kurt Singer, "The Resolution of Conflict," Social Research, 16 (1949), 230.

[2]For a discussion of both the dysfunctional and functional effects of conflict, see Lewis Coser, The Functions of Social Conflict (Glencoe, Ill.: The Free Press, 1956); Georg Simmel, Conflict, trans. Kurt Woeff (Glencoe, Ill.: The Free Press, 1955.)

with the characteristic of threatening, and the potentiality of undermining, the very underpinnings (and hence the viability) of a community, society, region, area, sub-system or even system.

An international system may be conceived as "a pattern of relations between the basic units of world politics, which is characterized by the scope of the objectives pursued by those units and of the tasks performed among them, as well as by the means used in order to achieve those goals and perform those tasks. This pattern is largely determined by the structure of the world, the nature of the forces which operate across or within the major units, and the capabilities, pattern of power, and political culture of those units."[3]

The present international system, characterized as it is by its loose bi-polar or perhaps even tri-polar[4] configuration, is marked by the competition of each leading bloc member for the expansion of its own geopolitical sphere of influence and by a large number of uncommitted or "non-aligned" states. Under such a system each leading bloc member has an obvious interest in "interference," which may be either direct or indirect, blatant or subtle, political, economic, or military, or any combination of these. This

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[3]Stanley H. Hoffmann, "International Systems and International Law," World Politics, 14 (1961), 207. This definition seems more satisfactory because it incorporates both systemic and sub-systemic perspectives.

[4]China presents some typological difficulties. Because of its posture of "non-alignment" on some issues, because of the function and role it plays in its diplomatic relations vis-à-vis both the United States and the Soviet Union, because of the ideological underpinnings of its social, political and economic

struggle, epitomized by the tensions of the Cold War era but certainly still present and inherent in the dynamics of the system today, goes on against the backdrop of mounting conventional and nuclear arm arsenals. Hence, whatever stability[5] the present system may be thought to have -- rather than "stability" as such perhaps it would be more appropriate to think of a certain stasis -- in large measure it is due to the realities of the so-called balance of terror.

The problems and dangers implicit in an international system of this sort have been compounded by and enmeshed with the decolonization process and a vast and far-reaching technological revolution. Great destabilizing, conflict-creating forces have been at play, in their most intensive and dynamic way, in the past thirty years. The fall of empires and the birth of new states, the race for industrial power and better standards of living, the gap between rich and poor, the trend of ever-rising expectations, among others, have meant a discontented, searching, restless, often angry Third World.

All developing countries, without exception, have suffered to varying extents from one form or another of "growth pains." Their economic and social development often has been marred and retarded by one or more of such ills as inequalities of income distribution, inappropriate patterns of industrial,

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system, and because of its largesse, it could be seen, systemically, as a "pole" in itself.

[5]Systemically, stability may be thought of as "the probability that the system retains all of its essential characteristics; that no single nation [-state] becomes dominant; that most of its members continue to survive; and that large-scale war does not occur;" sub-systematically, it may be defined as "the probability

agricultural and financial development, deficient infrastructure, unfavourable terms of trade, shortage of capital, hunger, illiteracy, disease -- to name just a few of the many difficulties. Their political development has been beset at times by new, unstable political structures and by volatile leaders. Further potentialities for instability have been created by the spread in the Third World of nuclear technology for destructive use.[6]

With the advent of nuclear weapons, mankind has reached a watershed. No longer can it afford to stake the maintenance of peace on concerts that play out of tune (as Metternich's often did) or on "great experiments" that fail. The world community today more than ever before is sitting on a powder keg. The international system as it stands sees an increasingly dissatisfied Third World loudly voicing its needs and demands, forcefully pressing for change, while caught in the vice of the harsh, hegemonic realities of the Super Power struggle. Few areas of the world are "depoliticized;" indeed, the constellation of forces at work in the system is replicated in the implications behind virtually every new focus of trouble. Such an international system, it is submitted, is by definition inherently conflictual.

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of ... [the] continued political independence and territorial integrity [of nation-states] without any significant probability of becoming engaged in a 'war for survival'." (Karl W. Deutsch and J. David Singer, "Multipolar Power Systems and International Stability," World Politics, 16 [1964], 390-391.)

[6]To wit: Argentina, India, Brazil, Pakistan. Conflicting reports exist concerning the stage of development of a nuclear bomb in these States; some deny that they are in the process of developing one.

Yet many have been the efforts to work toward an improved context for the relations between the units of the system. For centuries man has striven to formalize patterns, invent schemes, refine methods, devise structures that would improve efficacy and efficiency in the many types of intercourse between the units of the system. Many of these endeavours had either stability, balance, order or peace as either their aim or their operational axis.

Indeed, efforts toward the prevention or resolution of conflict can be traced much further back in time than may be commonly assumed. Ancient Western and some Eastern civilizations sought to develop better methods for conducting relations among units of these systems by evolving early versions of diplomacy, law and international organization. This is apparent, for example, in the Greek city-states, where alliances, truces, commercial treaties, and conferences were highly developed, as were standards of arbitration, the treatment of aliens and the conduct of war.[7] International law and organization have since then changed, grown, adapted and developed through the passage of time, the thought of men, the tumblings of history, the changing size and nature of the units of the system.

The present international system, characterized at once by inherently conflictual forces, intense dynamics of change and the potentiality for global destruction, sees the need for the orderly and

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[7]Linda B. Miller, ed., Dynamics of World Politics: Studies in the Resolution of Conflict (Englewood Cliffs, N.J.: Prentice Hall, 1968), p. 4.

peaceful conduct of the relations between states as greater than ever. The prevention, management and resolution of conflict have become literally vital. The need for a working system of authoritative rules for world order -- always important -- has assumed obvious urgency.

In light of such a scenario many questions come to mind. How can the key dynamics of conflict be isolated and understood in order to lay solid foundations for building a more stable, less conflictual, viable international system ? How is one to analyze, understand and ultimately assess the effectiveness of existing methods and structures ? Since international law is one of these, what role has it played in the face of conflict ? What has it contributed and in what ways ? Through what channels ? To what extent ?

The possible perspectives from which to attack this vast and complex matter range horizontally across many fields of study, and vertically through many possible levels of analysis. In turn, within each discipline and through the various possible levels of focus, there may be several aims toward which the analytical efforts may be directed.

Purpose and approach

The focus of this enquiry concentrates on that development or sets of events on the continuum of conflict known as a crisis. An international crisis can be conceived as "a set of rapidly unfolding events which raises the impact of destabilizing forces in the general international system or any of its subsystems substantially above "normal" (i.e. average) levels and increases the likelihood of violence

occurring in the system."[8] Such an exclusively systemic perspective, however, while usefully stressing the destabilizing impact on the system, virtually ignores the very sui generis characteristics of crises and their effects on the decision-making unit. An understanding of crises and of the processes by which decision-makers deal with them must take into account, it is submitted, also sub-systemic dimensions. A more complete view thus would take into account that a crisis is also "a situation that 1) threatens high-priority goals of the decision-making unit, 2) restricts the amount of time available for response before the decision is transformed, and 3) surprises the members of the decision-making unit by its occurrence."[9]

The chief purpose of this paper is to examine and to assess the role that international law may play in international political crises. It seems most helpful to conceive of law as

> the conjunction of patterns of authority and patterns of control. Authority refers to expectations that an action is consistent with community beliefs about permissible decisions, decision-makers, and procedures.... Control refers to the degree to which community practices actually conform to expectations of authority or are sanctioned for deviation.[10]

It has been suggested that crises are

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[8]Oran R. Young, The Intermediaries: Third Parties in International Crisis (Princeton: Princeton University Press, 1967), p. 10.

[9]Charles F. Hermann, "International Crisis as a Situational Variable," in James N. Rosenau, ed., International Politics and Foreign Policy: A Reader in Research and Theory, revised edition (New York: The Free Press, 1969), p. 414.

[10]John Norton Moore, Law and the Indo-China War

> hardly representative of international behavior [for the fact that] they involved violations of law, or serious allegations of violation, ipso facto, gives them special character;[11]

and that

> [i]t is the hardest test of international law, perhaps an unfair test, to ask whether and how it affected the decisions and acts of men who saw themselves as grappling with issues of national survival.[12]

These are legitimate observations. But the fact remains that in the present international system there is no room for complacency, and while the demands made on international law today are greater than ever, its vital task remains the moderation of state behavior in the interests of peaceful coexistence. As such, an assessment of its role during crises seems of commanding relevance.

Two case studies are examined: the Suez crisis of 1956 and the Cuban missile crisis of 1962. The enquiry will be approached from two different angles. At first, policy outcomes will be viewed from the legal perspective. Thus the analysis will focus on the international law invoked during the crises, the legal elements of the policies, the extent to which recourse to legal argument was sought, the channels through which these actions were pursued. Second,

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(Princeton: Princeton University Press, 1972), p. 12.

[11]Louis Henkin, How Nations Behave: Law and Foreign Policy (London: Pall Mall Press, 1968), p. 179. Hereinafter referred to as: Henkin, Nations.

[12]Abram Chayes, The Cuban Missile Crisis. International Crises and the Role of Law (London: Oxford University Press, 1974), p. 1.

policy outcomes will be analyzed from the political perspective, with both systemic and sub-systemic levels considered.

These two levels of analysis, of course, represent a major difference in approaches to the study of international politics.[13] However, the dichotomization is made here only in the interests of organization and analytical clarity. The author's approach follows the view that

> a systemic treatment of actor objectives ... cannot help but [sic] straddle the fence by considering both levels of analysis in conjunction. While it is possible to evaluate the internal and external determinants of goal formulation in separate analytical operations, the synthetic quality of socio-political objectives, which rests co-equally on both the systemic and sub-systemic level, vitiates their analytically disjointed treatment. One cannot talk about goals without recognizing value preferences of the actors. At the same time the analyst must at least implicitly consider the external environment of the actor.[14]

Therefore, in a sense, one should look at this analytical process in "reverse". That is, while analyzing the given subject under enquiry -- whether through a "macro" or "micro" lens -- one should not lose sight of the fact that "levels" or "focuses," like theory itself, are useful but imperfect tools of analytical and organizational convenience. Thus "sytemic" and "sub-systemic" are in fact only focuses which tend to overcompartmentalize

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[13]For an excellent treatment of this question see J. David Singer, "The Level-of-Analysis Problem in International Relations," in Rosenau, pp. 20-29.

the totality of an actually global, cumulative process. As Hanrieder notes, "the process of goal formulation necessarily draws on both a systemic and sub-systemic frame of reference, an actor's objective represents, in effect, a cumulative proposition."[15] In short, the most compelling reason for this approach "is the fact that this is precisely what the actors do themselves."[16]

Third, after having considered, on the one hand, the legal arguments advanced by the States concerned (chapter three), and on the other hand, some of the political and other forces that influenced their policy outputs (chapter four), the analysis will turn to an examination of the role played by law (chapter five.)

The purpose here, however, is not meticulously to x-ray each case study with a view to identifying each and every instance where the law is seen to have had an impact. Although in chapter five the examination of the several roles of law makes references to the crises, it is not intended to be exhaustive, and the reader may find in the studies yet other instances of the roles of law that have been suggested here. Thus the studies are seen rather more as devices which, providing the relatively firm ground of empiricism, serve as a heuristic springboard

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[14]Wolfram F. Hanrieder, "Actor Objectives and International Systems," Journal of Politics, 27 (1965), 112.

[15]Ibid., p. 116.

[16]Ibid., p. 115.

for an enquiry on the manifold potentialities of law for the prevention, management and resolution of conflict.[17]

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[17] In light of the dearth of available sources on the policy-making processes of the Soviet Union during the crises, this paper shall not deal with the determinants and aims of the foreign policy of that State.

CHAPTER II

THE CRISES: A BRIEF OVERVIEW OF THE BACKGROUND AND OF THE EVENTS

Suez 1956

Setting and background of the Suez Canal: a sketch

The Compagnie Universelle du Canal Maritime de Suez (Universal Company of the Suez Maritime Canal) was established pursuant to concessions by the Viceroy of Egypt in 1854 and 1856 and was responsible for the management, maintenance and expansion of the Canal. The status of the Canal, which was completed in 1869, was established in a Convention of 1866 concluded between the Viceroy and the Company and ratified by Egypt's formal sovereign, the Sultan of Turkey. It was decided that these concessions were to last ninety-nine years (i.e. until 1968) from the completion of the Canal, at which time the Egyptian government would take over and acquire control of the facility. The Company was to be compensated for equipment and moveable property only.

The 1856 Concessions provided, inter alia, that the Canal and its ports

> shall be open for ever, as neutral passages, to every other 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... (Art. 14)[1]

It further stated that the Company "may not, in any case, give to any vessel, company, or private party any advantage not given to other vessels, companies, or private parties on the same terms."(Art. 15.) Article 18 granted Egypt fifteen per cent of the net profits.

The 1866 Convention provided under Article 16 that:

> In as much as the [Company] ... is Egyptian, it is governed by the laws and customs of the country; however, as regards its constitution as a corporation and the relations of its partners with one another, it is, by a special Convention, governed by the laws which, in France, govern joint stock companies. It is agreed that all disputes in this connection shall be settled in France... Disputes in Egypt between the Company and private individuals, whatever their nationality, shall be settled by the local courts... . Any disputes that may arise between the Egyptian government and the Company shall also be submitted to the local courts and settled according to the laws of the country.[2]

The building of the Canal, however, had led Egypt to borrow 400 million francs (about $ 80 million at that time) and this debt, among others, was largely responsible for bankruptcy in 1876. Thus in 1875 Egypt sold its forty-four per cent holding to the British Government and in 1880 its right to fifteen per cent in royalties went to a French investment syndicate.[3]

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[1]Act of Concession of the Viceroy of Egypt, and Terms and Conditions for the Construction and Operation of the Suez Maritime Canal and Appurtenances. Signed at Alexandria, 5 January 1856, trans. United States Department of State, The Suez Canal Problem: July 26 - September 22, 1956 (Washington, D.C.: U.S. Government Printing Office, 1956), p. 7.

Questions pertaining to the use of the Canal by warships during wartime were soon to arise. While no incidents occurred during the Franco-German War of 1870 or the conflict between Russia and Turkey of 1877, the importance of settling the status of the Canal in this respect had become obvious. After years of negotiation agreement was reached in the Convention of 1888, which remains today the document that governs the status of the Canal.

Article 1 of the Convention provides that the "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." In Article 2 "[t]he High Contracting Parties ... undertake not to interfere in any way with security of that Canal and its branches" and they agree "that 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."(Art. 4.) Article 9 further provides that " [t]he Egyptian Government shall ... take the necessary measures for enforcing the execution of the Convention."[4]

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[2]Convention between the Viceroy of Egypt and the Compagnie Universelle du Canal Maritime de Suez. Signed at Cairo, 22 February 1866, in ibid., p. 15. Hereinafter referred to as "1866 Convention."

[3]Kennett Love, Suez: The Twice-Fought War (New York, Toronto: McGraw Hill, 1969), p. 156.

[4]Convention between Great Britain, Austria - Hungary, France, Germany, Italy, the Netherlands, Russia, Spain and Turkey, Respecting the Free Navigation of the Suez Maritime Canal. Signed at Constantinople, 29 October 1888, in Department of State, p. 17, p. 19. Hereinafter referred to as "1888 Convention."

The Canal had shifted the focus of British interest in the Middle East from Constantinople to Egypt.[5] By 1875, it will be recalled, the United Kingdom owned forty-four per cent of the Company shares and by 1882 it had stationed troops in Egypt to ensure physical control of the Canal. In 1914 the United Kingdom unilaterally declared Egypt its protectorate and by 1922, having granted independence to Egypt, it assumed responsibility for the defence of its territory and of the Canal. This situation was formalized in 1936 by a new treaty whereby the United Kingdom would keep troops in the Canal Zone until such time when Egypt could defend it itself.

In 1948, during the Arab-Israeli war, Egypt through its search-and-seizure tactics effectively closed the Canal to Israeli ships and to all Israeli-bound cargo. It continued to follow this policy also after the 1949 Armistice, on the grounds that a state of war still existed.

In May 1950 the United States, the United Kingdom and France signed the Tripartite Declaration. This document, which was not a treaty and had no binding power, inter alia expressed the Big Three's opposition to the use or threat of force by the Middle Eastern States, stated their intention to act immediately to prevent the violation of the 1949 armistice lines,[6] and to take common counsel in the event of such a violation, and further, it established their agreement to balance any supply of arms to the two sides.[7]

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[5] Love, pp. 167-168.

[6] Ibid; p. 70.

[7] Hugh Thomas, The Suez Affair (London: Weidenfeld and Nicolson, 1967), pp. 13-14.

In 1951 the Security Council of the United Nations called for a resumption of free navigation in the area for Israeli ships and cargo, but it met with Egypt's rejection. A similar attempt by the same body in 1954 was blocked by the Soviet Union, though Egypt proceeded to relax somewhat its restrictions.

In October of the same year the United Kingdom signed a treaty with Egypt providing for the former's withdrawal of all its troops by June 1956.[8] Under this treaty the United Kingdom was allowed to return its military forces in the case of armed attack by a power (other than Israel) on any member of the Arab League or Turkey (Article 4). Under Article 8 the Parties reaffirmed that the Canal was "an integral part of Egypt" and "express[ed] the determination to uphold the Convention [of 1888] guaranteeing the freedom of navigation of the Canal." Dynamics of change were already present in this scenario, however. As late as June 1956 the Egyptian Government seemed to accept the due continuance of the Concession until 1968, but were not contemplating its extension beyond that date.[9]

Britain had had a long association with the Middle East, through times both of war and peace, beginning with the gradual collapse of the Turkish Empire. Its commercial interests, in particular, were significant. The area was a key source of oil for Britain and for Western Europe. The military base at

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[8]Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Egyptian Government Regarding the Suez Canal Base. Signed at Cairo, 19 October 1954, in Department of State, pp. 21-22. Hereinafter referred to as "1954 Agreement."

[9]Robert R. Bowie, Suez 1956, International Crises and the Role of Law (London: Oxford University Press, 1974), p. 6.

Ismailia, in Egypt, was an important outpost, which even after it was vacated in 1956 was kept in operational readiness and held £40-50 million worth of stores.[10] Then, of course, there was the Canal.

In the four years between 1951 and 1955, total tonnage passing through the canal rose almost fifty per cent, exceeding 207 million tons in 1955, with more than 87 million tons moving from south to north. Some 67 million tons were Middle East oil, which provided about one half of Europe's oil needs, with the United Kingdom receiving 20.5 million tons, France 12.1 million tons, Italy and the Netherlands 7.3 million each. Oil for the United States amounted to 8.6 million tons. Agricultural products and minerals and metals also flowed north through the Canal. The southbound traffic included large quantities of manufactured machinery, metal products, railway equipment, etc.[11]

The Nationalization of the Canal Company

Colonel Gamal Abdel Nasser had been brought to the presidency of Egypt by the officers' coup that had overthrown King Farouk in 1952, and had gained a central position in Middle East politics. The year 1955 is considered a turning point in Israeli-Egyptian relations.[12] In February of that year Israel launched an unusually destructive raid in the Egyptian village of Gaza. Nasser, who had been canvassing for arms in the United States for some time, intensified his efforts and requested $ 27 million worth of arms to that country.[13]

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[10] Thomas, p. 32.

[11] D.C. Watt, Britain and the Suez Canal: The Background (London: R.I.I.A., 1956), pp. 9, 13-14, 20-21.

[12] Love, chap. 4; Bowie, p. 10.

[13] Thomas, p. 14.

His request was turned down. In order to counter Israeli raids effectively, Nasser needed guerilla-type forces. He thus proceeded to recruit Palestinian Arabs to organize fedayeen[14] retaliatory units, which went into action in August of that year and at the outset apparently numbered about 700 men.[15]

In June 1955, after a final, unsuccessful appeal for arms to the United States, Egypt began negotiations with the Soviet Union. Secret deliveries of arms began in July and orders were placed for Stalin tanks, MiG's and Ilyushins, and Czech rifles.[16] The Russo-Egyptian arms Agreement was made public on 27 September. On 19 October Egypt announced the establishment of a joint Egyptian-Syrian military command.

These developments alarmed Israel, which became ever more determined to wage "preventive war." In October Israel's Minister of Defence and nation-builder, David Ben-Gurion, instructed the Chief of Staff of the Army, General Moshe Dayan, "among other things ... to be prepared to capture the Straits of Tiran ... in order to ensure freedom of shipping through the Gulf of Akaba and the Red Sea."[17]

In December 1955 the United States and Britain, together with the International Bank for Reconstruction and Development (I.B.R.D.), offered to help finance the foreign exchange costs of Nasser's ambitious project,

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[14]This Muslim word refers to those, among the faithful, willing to sacrifice everything for their cause. (Love, p. 84.)

[15]Ibid; p. 86.

[16]Thomas, p. 15.

[17]Moshe Dayan, Diary of the Sinai Campaign (London Weidenfeld and Nicolson, 1966), p. 12.

the construction of the High Dam on the Nile, near Aswan.[18] The cost of the project, the largest of its kind in history, was to be $ 13 billion and required twelve to fifteen years for completion.[19] The extent of financing initially under consideration included loans and grants of $ 56 million from the United States, $ 14 million from the United Kingdom and $ 200 million from the I.B.R.D. Egypt was to provide $ 800 million or more.[20] Negotiations continued for several months, as Nasser found unacceptable the budgetary controls and safeguards that the I.B.R.D. included as terms of the deal.

In May Nasser recognized Communist China. One month later the Soviet Foreign Minister, Shepilov, who was in Egypt during the celebrations for the British withdrawal of troops, appeared amidst a large display of arms from Communist countries.[21]

During this period United States President Eisenhower and his Secretary of State, John Foster Dulles, began to reassess the Aswan deal under a different light. Eventually they decided against it. More than one factor seems to have contributed to this decision, taken as it was against the background of several recent developments. There had been Egypt's

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[18]It bears clarifying that the Aswan High Dam, or simply the High Dam, should not be confused with the Aswan Dam (a frequent misnomer.) The latter is a much smaller structure, built by the British at the turn of the century. (Love, p. 300.)

[19]Bowie, p. 11.

[20]Ibid.

[21]Thomas, p. 22.

recognition of Red China, the arms deal with the Soviet Union, signs of intensified relations with countries of the Communist Bloc,[22] Nasser's unrelenting "counter-proposals" to I.B.R.D. terms and the inherently very risky nature of such a large financial venture, particularly in the light of doubts about the future solvency of Egypt.[23] Not least, there were domestic political questions of seeking large appropriations from the Senate during an election year, in the face of strongly opposing lobbies[24] and "in the critical climate towards neutralism then prevalent in Washington."[25] It has been suggested that some of these explanations "prove groundless" and that "all the available evidence points to Nasser's recognition of Red China as the event that beclouded Dulles's thinking about Nasser."[26]

Whatever the crucial reason(s), the final American statement came on 19 July, 1956. Secretary Dulles then notified the Egyptian Ambassador in Washington, Ahmed Hussein, that the loan was cancelled. In Britain, Sir Anthony Eden's government had reached a similar decision, apparently about the same time.[27]

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[22] Terence Robertson, Crisis: The Inside Story of the Suez Conspiracy (London: Hutchinson, 1965), p. 55.

[23] Bowie, p. 12; Thomas, p. 22; Robertson, pp. 66-67.

[24] The Zionist and cotton lobbies were firmly opposed to the High Dam project (Love, p. 305); Bowie, p. 30; Anthony Nutting, No End of a Lesson: The Story of Suez (London: Constable, 1967), p. 44.

[25] Anthony Eden, The Memoirs of the Rt. Hon. Sir Anthony Eden: Full Circle (London: Cassell, 1960), p. 422.

[26] Love, p. 315, p. 326.

[27] "[T]he Government came to the conclusion that they could not go on with a project likely to be increasingly onerous in finance and unsatisfactory in practice." (Eden, p. 421.)

Their announcement came two days later. Nasser, who at the time was at Brioni, Yugoslavia, with Tito and Nehru, was deeply offended by the American action.

On 26 July, 1956, one week after the cancellation of the loan, Nasser proceeded to nationalize the Suez Canal Company in the course of a fiery, emotional three-hour speech at Alexandria. This action, meant to "achieve true sovereignty, true dignity and true pride" for Egypt, was clearly linked by Nasser in his speech with the objective of collecting Canal dues for financing the High Dam project.[28]

Nasser's decree issued Law No. 285 of 1956 on the "Nationalization of the Universal Company of the Suez Maritime Canal."[29] Through this instrument Egypt took over all assets, rights and obligations of the Company, dissolved its administrative organs (Art. 1) and created "[a]n independent organization endowed with juristic personality and annexed to the Ministry of Commerce, ... [to] take over the management of the Suez Canal Transit Service" (Art. 2). Compensation for Company shareholders was provided for at "the value of the shares shown in the closing quotations of the Paris Stock Exchange" on the preceding day, payable after Egypt had "taken delivery of all the assets and properties of the nationalized company" (Art. 1). Further, Article 4 stipulated that all Company employees were required to continue working; stiff penalties for violations of these provisions were set out in Article 5.

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[28]Speech by President Nasser, Alexandria, July 26, trans. American Embassy at Cairo, in Department of State, pp. 28-29.

[29]In ibid., pp. 30-32, trans. American Embassy at Cairo.

Developments following the nationalization

In April of 1955 Churchill resigned from the office of Prime Minister and Anthony Eden took over. Aged fifty-eight, no other man in British politics at that time could have brought with him a more impressive record as a diplomat and negotiator. Eden enjoyed great authority and respect. Indeed, he could dominate and dictate to his Cabinet more than even Churchill had ever done and "in foreign affairs his word was law."[30] Eden was very much a man of his times: he represented and for many he embodied British imperial glories and aspirations, and the unwillingness to accept the gradual but inevitable sunset of Empire. Yet the realities of international politics made him "acutely conscious and resentful of decline," especially in relation to the United States.[31]

British reaction to the nationalization was one of anger, great shock and grave concern. Slightly less than a quarter of British imports came through the canal;[32] a third of the ships passing through it were British.[33] In 1956 the unhindered operation of the waterway still remained crucial for the free flow of oil and shipping. Indeed, most of Britain's oil (and half of that used by Europe) came through the Canal.[34] Bismarck had called the Canal "the world's neck,"[35] and for the United Kingdom it remained a veritable "lifeline." Consequently, "the Egyptian" -- Eden had said -- "could not be allowed to have his thumb on our windpipe."[36]

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[30] Thomas, p. 34.

[31] Ibid., p. 36; see also Robertson, p. 79, p. 81.

[32] President of Board of Trade on first nine months of 1956 (Parliamentary Debates [Commons], 5th Series, vol. 560, col. 1112), in Thomas, p. 31.

[33] Times (London), 27, 28 July 1956, in Thomas, p. 36; Eden, p. 426.

Thus on 27 July an *ad hoc* Cabinet committee, known as the "Suez Committee," was set up to deal with the crisis. Its members were: Eden; Lloyd, the Foreign Secretary; MacMillan, the Chancellor; Lennox-Boyd, Colonial Secretary; Salisbury, Lord President; Kilmuir; Thorneycroft, President of the Board of Trade; and Watkinson, Monckton and Home, who often attended.[37] Following a meeting that morning, Eden came to the conclusion that Britain's

> essential interests in this area must be safeguarded, if necessary by military action, and that the needful preparations must be made. Failure to keep the canal international would inevitably lead to the loss one by one of all our interests and assets in the Middle East, and even if her Majesty's government had to act alone they could not stop short of using force to protect their position. This was our recorded opinion.[38]

That evening he sent President Eisenhower a telegram echoing that opinion:

> my cabinet colleages and Chiefs of Staff ... are all agreed that we cannot afford to allow Nasser to sieze control of the canal in this way ... . My colleagues and I are convinced that we must be ready, in the last resort, to use force to bring Nasser to his senses ... I have this morning instructed our Chiefs of Staff to prepare a military plan accordingly.[39]

This was not sabre-rattling, as events would in time confirm.

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[34] Thomas, p. 11.

[35] In Love, p. 361.

[36] Eden, p. 426; Thomas, p. 31.

[37] Thomas, pp. 40-41.

[38] Eden, p. 426.

[39] *Ibid.*, pp.427-428.

In France the government was headed by Prime Minister Guy Mollet, who had been elected with Radical support in January of that year. A former hero of the Resistance, he had been Secretary of the French Socialist Party since 1946.

French reaction to the nationalization also was one of shock and indignation. Aside from the implications for oil supplies and shipping, the canal in many ways was part of French life. France had conceived and built it, the very headquarters of the Compagnie were in Paris and French shareholders were in the majority.[40] Moreover, for French public opinion Nasser and the Algerian rebels were inextricably linked and as such, he was regarded as a public enemy.[41]

American reaction stemmed from a different economic, political and psychological environment. Only fifteen per cent of American imports came through the Canal and American investment in it was negligible. Further, while the alternative route to Europe around the Cape was two-thirds longer, it was only two-fifths longer to North America.[42] Moreover, it was election year in the United States and Dwight D. Eisenhower was standing for re-election as the "Prince of Peace."

On 31 July the President answered Eden's telegram in a letter where he conveyed his "personal conviction, as well as that of my associates as to the unwisdom even of contemplating the use of ... force at

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[40]About 48 per cent of the French oil supply came through the Canal; some 80,000 French investors held about half the shares of the Canal Company (Bowie, p. 26.)

[41]Ibid.

[42]Ibid,, p. 49.

[43]Dwight D. Eisenhower, The White House Years: Waging Peace, 1956-1961 (London: Heinemann, 1966), pp. 664-665.

this moment ... I hope you will consent to reviewing this matter once more in its broadest aspects."[43]

The Eighteen-Power proposal

On 31 July the United Kingdom, France and the United States met in London to discuss the recent events. At the Conference Dulles sympathized with Eden (Nasser must be made "to disgorge" he had said)[44] but strongly discouraged the use of force. By the close of the talks the Big Three agreed to meet in London again on 16 August for a conference where the twenty-four concerned maritime powers (including Egypt) would be invited.

However, apparently on this same day the British Cabinet had formulated a major decision: "while a negotiated settlement should be sought, force would be used if negotiations failed within a measurable time."[45] Similar action on the French side appears to have been taken about this time.

At the second London Conference eighteen out of twenty-two countries (Egypt refused to attend) supported a scheme for a board of user nations. This Eighteen-Power Proposal, as it came to be known, had the full backing of Dulles, and sought a new convention based on the following arrangement:

1. A Suez Canal Board, composed of the users and Egypt, with authority to manage and develop the Canal.
2. An Arbitral Commission to settle disputes.

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[44]Eden, p. 437.

[45]Thomas, p. 55.

3. Effective sanctions for any violation of the governing Convention of 1888.[46]

The Eighteen (who represented over ninety per cent of Canal traffic)[47] appointed a committee headed by Sir Robert Menzies, the Prime Minister of Australia. Menzies was entrusted the mandate of explaining to Nasser the purposes and objectives of the proposal and of finding out if he would be willing to negotiate a convention on the basis of it. Nasser rejected the proposal, asserting that operation by an international board would remove the Canal from Egyptian control and usurp Egyptian sovereignty. He let it be known, however, that he was willing to assure freedom of navigation by revising and reaffirming the Convention of 1888 and to conclude binding agreements regarding tolls and the development of the Canal.

Anglo-French military preparations

Anglo-French military preparations had by now gone far: for instance , three British aircraft carriers and vessels of the French fleet were on their way to the East Mediterranean.[48] A joint team of Anglo-French military planners[49] had been appointed, with instructions to "be prepared to mount joint operations against Egypt to restore the Suez Canal to international control." The operation was given the code name "Musketeer." The military and organizational

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[46] Bowie, p. 39.

[47] Ibid., p. 40.

[48] Thomas, p. 65.

[49] General Sir Charles Keightley, Supreme Commander; Vice-Admiral Barjot, Deputy Supreme Commander.

problems were immense and were described by the Chiefs of Staff as being harder than "Overlord" in Normandy in 1944.[50] Moreover, Britain was revealed to be in an appalling state of military unreadiness and no action could have been taken before at least six weeks.[51]

The Suez Canal Users' Association

To introduce an alternative proposal, on 4 September Dulles suggested the formation of a Suez Canal Users' Association (S.C.U.A.). Its rationale lay in the idea that since the Convention of 1888 entitled the user States to avail themselves of the Canal, they could come together to form a "co-operative" to exercise their rights under the Convention. Organized in such a group, they could operate the Canal and represent the users vis-à-vis Egypt.

The details of the S.C.U.A. plan reached London on 10 September. Two days later Eden presented Dulles's idea before Parliament, implying that the plan would be backed by force if necessary. The same day the United Kingdom and France brought the Suez dispute to the attention of the Security Council. In their letter the two Powers suggested that Egypt's rejection of the Eighteen-Power Proposal constituted an "aggravation of the situation which, if allowed to continue, would constitute a manifest danger to peace and security."[52]

The following day Dulles provided Eden's anti-climax. In a Press conference he stressed that the envisaged Users' Association would seek co-operation with

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[50] Ibid., p. 66-68.

[51] Robertson, p. 76.

[52] U.N. SCOR, 11th Year, Supplement for July, August and September, 1956, Doc. S/3645, 12 September 1956, pp. 28-29.

Egypt within the ambit of the 1888 Convention, that it sought to impose no regime on Egypt and that, were that country to prevent passage, the United States would divert its ships around the Cape and would not use force. Thus in the eyes of Britain and France Dulles had effectively removed any "teeth" from the plan. This episode further aggravated the existing antipathy between Eden and Dulles.

On 15 September Nasser denounced S.C.U.A. in a speech decrying imperialism and foreign domination. The following day Nasser triumphantly operated the Canal with his own Egyptian pilots, aided by newly recruited foreign trainees. Two-hundred and fifty-four ships were passed within a week:[53] Nasser had demonstrated that, claims to the contrary, Company pilots were not indispensable and that Egypt was fully capable of assuring freedom of navigation as required by the terms of the 1888 Convention.

From 19 to 22 September the Eighteen States met for the second London Conference. While consensus existed on the desirability of S.C.U.A., the meeting produced no concrete results, as it was unable to resolve the existing divergences.

On 23 September Eden and Mollet referred the Suez dispute to the Security Council. In their draft resolution they

1) Asserted the necessity for safeguards for the users' rights under the Convention of 1888;
2) endorsed the Eighteen-Power Proposal as a suitable solution;

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[53] Love, pp. 422-424; Thomas, pp. 82-83.

3) urged Egypt to negotiate a system for the Canal on that basis;

4) urged Egypt to co-operate with S.C.U.A. pending permanent settlement.[54]

Israeli military preparations

Meantime in Israel, Ben-Gurion for nearly one year had been nurturing the idea of waging preventive war on Egypt. Israel had been receiving arms from France possibly since early August and had known of Operation Musketeer as early as 1 September.[55] Apparently Ben-Gurion, who was again the Prime Minister, had already been told that if he wanted full support from France, Israel would have to attack Egypt at a set date. The date was to be close to 6 November, the day of the American elections, so that the United States would not be able to react.[56]

The Six Principles

On 5 October the Security Council considered the Suez dispute and the Anglo-French Draft Resolution. Talks continued in private session from 9 to 12 October. During this period the British, French and Egyptian Foreign Ministers (Lloyd, Pineau and Fawzi, respectively) also discussed the matter privately, with Secretary-General Dag Hammarskjold present at the meetings. Certain points of agreement emerged from the talks which, distilled by Lloyd, were formulated by Hammarskjold as six principles which should be the basis for a settlement. They were as follows:

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[54]U.N. SCOR, 11th Year, 734th Meeting, 26 September 1956, pp. 1-22, in Bowie, p. 47.

[55]Ibid., p. 86.

[56]Ibid., p. 87.

a) There should be free and open transit through the canal without discrimination, overt or covert-- this covers both political and technical aspects;

b) The sovereignty of Egypt should be respected;

c) The operation of the Canal should be insulated from the politics of any country;

d) The manner of fixing tolls and charges should be decided by agreement between Egypt and the users;

e) A fair proportion of dues should be allotted to development;

f) In case of disputes, unresolved affairs between the Universal Maritime 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.[57]

The parties adjourned with the understanding that they would meet in Geneva later in the month.

On 13 October the Security Council entertained the revised Anglo-French Draft Resolution, which in its first section espoused the Six Principles but was followed by a second section seemingly oblivious of the private talks and of the common ground that had emerged. It seemed designed to alienate the Egyptians. It insisted upon the Eighteen-Power Proposal (which had long been rejected by Nasser), it noted Egypt's failure to submit "sufficiently precise proposals to meet the requirements" (i.e. the Six Principles) and prompted co-operation with S.C.U.A. (which also was known to be unacceptable to Nasser.)[58] The Security Council unanimously adopted the first section of the Resolution but the second, approved nine

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[57] U.N. SCOR, 11th Year, Supplement for October, November and December 1956, Doc. S/3671, 13 October 1956, pp. 19-20.

[58] Ibid., Doc. S/3675, 13 October 1956, pp. 47-48.

to two, was vetoed by the Soviet Union.

The Sèvres accord

On 16 October Eden and Mollet met in Paris and, following to previous conversations, apparently decided to mount their military operation jointly with Israel.[59] On 23 October Mollet and Ben-Gurion met secretly at Sèvres, a suburb of Paris, to confirm the Franco-Israeli side of the plan. It included French naval protection of the Israeli coast, French aerial cover of Israeli cities and French parachute drops of food and supplies to the advancing Israeli forces.[60] They were joined that evening by the British representative.[61] Sometime between 24 and 25 October they concluded the *entente*, the outcome of which was:

- Israel would attack on 29 October;
- Israel would advance as if to threaten the Canal;
- Great Britain and France, feigning to act with the purpose of protecting the Canal and separating the combatants, would issue an ultimatum to Israel and Egypt, urging them to withdraw to within ten miles from the Canal, and requesting Egypt to accept temporary occupation of Canal sites by Britain and France;
- Israel would accept the ultimatum;
- Egypt, predictably, would reject it and thus provide Britain and France with the *casus belli* to bomb Egypt and destroy its air force;
- France would veto any resolution in the Security Council that would brand Israel an aggressor;
- Britain and France would begin to land forces on 6 November, the day of the American elections.[62]

The British Cabinet approved the plan on 25 October.

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[59] Thomas, pp. 106-107; Robertson, p. 150; Love, pp. 452-453.

[60] Thomas, p. 113.

[61] Apparently it was Selwyn Lloyd, the Foreign Secretary (*ibid.*)

Resort to force

In the afternoon of 29 October the Israelis attacked: 395 paratroops dropped at Mitla Pass and began their offensive, creating a military threat to the Canal, as required by the agreement.[63] Twenty-four hours later Britain and France sent ultimatums to the Israeli and Egyptian Ambassadors, with the message that had been agreed upon at Sèvres. Israel, of course, accepted the ultimatum; Egypt, as predicted, refused it.

The Security Council was called in emergency session to consider the Israeli attack and to vote on a United States Draft Resolution calling for Israel's withdrawal and for all States to refrain from the use of force. Though supported by seven votes to two, with two abstentions, the Resolution was vetoed by the United Kingdom and France.

In the early morning hours of 31 October General Keightley gave the orders for the Anglo-French armada to set off from Malta, Algiers and Southampton toward its Port Said objective. At dusk on the same day 240 allied aircraft began their forty-eight hour offensive against Egyptian airfields.[64]

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[62] Bowie, p. 59; Love, pp. 464-466; Thomas, pp. 113-114; Robertson, pp. 155-162.

[63] Dayan, p. 77. For an account of the military operations see, inter alia, Dayan; Andre Beaufre, The Suez Expedition: 1956 (New York: Praeger, 1969); Samuel L.A. Marshall, Sinai Victory (New York: Morrow, 1958).

[64] Ibid., p. 99.

In order to block the Canal, Nasser ordered ships filled with concrete to be sunk in it, and in view of the expected sea-borne invasion, he decided to withdraw his troops from Sinai and concentrate defenses around Cairo.[65] On the night between 31 October and 1 November the Israelis took Gaza and captured thousands of prisoners.[66]

The United Nations and the creation of the Emergency Force.

Deadlocked over the Anglo-French veto, the Security Council decided to invoke the Uniting for Peace Resolution and thus transfer the Suez problem to the General Assembly.[67] On 1 November the United States presented its Draft Resolution to the Assembly, calling for, inter alia, an immediate cease fire.[68] It was approved by sixty-four votes to five, the United Kingdom and France abstaining.

Subsequent to the vote, Lester Bowles Pearson, Canadian Minister for External Affairs, proceeded to explain Canada's abstention. He stressed the necessity for "action, not only to end the fighting but to make the peace." Finally, he advanced a proposal requesting that the Secretary-General be authorized "to make arrangements with Member States for a United Nations force large enough to keep these borders at peace while a political settlement is being worked out."[69]

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[65]Thomas, p. 130.

[66]Ibid., p. 132.

[67]U.N. SCOR, 11th Year, Supplement for October, November and December 1956, Doc. S/3721, 31 October 1956, pp. 116-117.

[68]U.N. GAOR, First Emergency Special Session, 561st Meeting, 1 November 1956, Doc. A/3256. The Draft Resolution became General Assembly Resolution (ES-1) 2 November 1956.

Lester Pearson's proposal was the germ of what was to become the United Nations Emergency Force (U.N.E.F.). In the event, Pearson managed to persuade an understandably skeptical Hammarskjold of the workability of the suggestion. On 3 November Pearson presented a Draft Resolution requesting the Secretary-General to submit a plan within forty-eight hours for the establishment of an international emergency force "with the consent of the nations concerned" in order to "secure and supervise the cessation of hostilities in accordance with all the terms" of Resolution 997 (ES-1). The Assembly adopted it by a vote of fifty-seven to naught, with nineteen abstentions, and became Resolution 998 (ES-1).

On 4 November, while Egyptian airfields were under heavy attack,[70] the Assembly had approved Resolution 1000 which established U.N.E.F. and excluded from participation in it any of the Permanent Members of the Security Council. However, the war seemed to be gathering, and not losing, momentum: at dawn on 5 November 600 British and 487 French paratroops were dropped outside Port.Said.[71]

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[69] U.N. GAOR, First Emergency Special Session, 562nd Meeting, 1 November 1956.

[70] The level of activity was high: aircraft were taking off and landing at the Cyprus staging base at a rate of one per minute, and one every two or three minutes on the carriers (Thomas, p. 135.)

[71] Ibid., p. 14.

The situation was thus becoming more and more pressing, the latest developments underscoring the immediate need of a working force. Pearson and Hammarskjold, aided by the Secretary-General's assistants Cordier and Bunche, began to work feverishly in order to define U.N.E.F.'s mandate before the arrival of the sea-borne invasion. Early on 6 November Hammarskjold could finally cable the terms of reference for U.N.E.F. The key provisions were:

1. The force was by no means an enforcement body.
2. Host-country consent was a conditio sine qua non.
3. The force was to be politically neutral and not a diplomatic instrument to enhance the bargaining position of the invading Powers.[72]

When the Secretary-General's cable arrived, however, the armada already was off Port Said (the French landed at Port Fuad.) Both these objectives were captured in the course of the day.

The cease fire

However, at noon on 6 November, in the face of mounting economic sanctions as well as international and domestic political pressures, Prime Minister Eden capitulated. The French followed suit, having decided that they would not carry on alone. Thus the United Kingdom and France notified the Secretary-General that their forces would cease fire at midnight GMT. That day British patrols had reached as far as Fayid, twenty-five miles short of Suez, but the main force remained seventy-five miles away from Suez when the Government

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[72] As set out in the Secretary-General's Second and Final Report to the General Assembly pursuant to Resolution 998.

ordered the cease fire.[73] On the night of 6 November the Anglo-French forces halted.

On 7 November the General Assembly approved Hammarskjold's guidelines for U.N.E.F. General E.L.M. Burns of Canada was appointed Commander of the Force.

Many difficulties loomed ahead, however. Nasser, concerned about Egypt's sovereignty, was fearful that U.N.E.F. might become an Anglo-French instrument to internationalize the Canal, or that the Force would in fact take the place and role of the invading Powers. The United Kingdom and France, on the other hand, were reluctant to let go of their grip on the occupied area before a policy on the administration of the Canal that was suitable to them, could be reached.

Neither Eisenhower nor Hammarskjold, however, shared this view and approach, as they both felt that any policy should be worked out after a restoration of the status quo ante. Finally, Britain and France yielded to the increasing pressures and agreed to withdraw. This was achieved only after Pearson and Hammarskjold devised a scheme of a series of conditional and interlocking commitments that effectively broke the impasse that had developed.

On 3 November the Secretary- General received Notes from the United Kingdom and France announcing their decision to withdraw completely (token withdrawals had taken place earlier.) Accordingly General Burns was instructed to oversee the evacuation, which was completed by 22 December, 1956. Clearance operations of the Canal were undertaken immediately and were complete by 8 April, 1957.

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[73]Thomas, p. 144.

When the Israelis had stopped fighting on 4 November they controlled most of the Sinai Peninsula, the Gaza Strip and the entrance to the Gulf of Aqaba. Predictably, Israel was not inclined easily to relinquish these areas, which were of enormous strategic importance.[74] Gaza afforded Israel control over the fedayeen bases, and control of Sharm el-Sheikh and the Straits of Tiran made it possible for shipping to transit the Gulf of Aqaba (with its port at Eilat) via the shorter route by way of the Persian Gulf, thus bypassing the Suez Canal.

The question of Israel's withdrawal soon reached a deadlock. Israel demanded that U.N.E.F. guarantee freedom of navigation and an end to fedayeen raids. Hammarskjold persevered in his approach of return to the status quo ante as a precondition to negotiation. After considerable discussion by the Assembly and the diplomatic efforts of the Secretary-General, after four months of negotiation a common ground was found. The General Assembly passed Resolution 1125 (XI) which effectively asserted Hammarskjold's approach that only a return to the Armistice lines could be conducive to a Middle East environment in which peace could be built. United Nations forces were assigned the supervision of the Armistice boundaries. Eventually, and particularly in the face of pressure from the United States, Israel yielded, withdrawing on 7 March, 1957. U.N.E.F.'s takeover, under General Burns, was complete by 8 March.

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[74] See chapter four.

Epilogue

In the following days Hammarskjold worked out with Nasser a modus vivendi in order for U.N.E.F to remain in Gaza and at the Gulf of Aqaba without the presence of Egyptian troops. After further negotiations, on 24 April, 1957 Egypt communicated to the Secretary-General the framework for the administration and operation of the Canal. In its Declaration Egypt stated:

1. Egypt repeated its resolve to "respect the terms and spirit of the Constantinople Convention of 1888."
2. Tolls would be fixed at the Company level, and would not be increased (by more than one per cent a year) except by agreement or arbitration.
3. "The Canal would be operated ... by the autonomous Suez Canal Authority established by the Government of Egypt on 26 July 1956." Egypt would welcome co-operation between the Authority and representatives of shipping and trade.
4. Egypt proposed international arbitration of complaints of discrimination or other violations of the Canal code.
5. Disputes over the meaning of the Constantinople Convention of 1888 would be referred to the International Court of Justice. Egypt would accept compulsory jurisdiction of the Court under Article 36 of its statute.
6. The Canal would be maintained and developed according to the programme previously established by the Company. Twenty-five per cent of the gross receipts of the Canal would be deposited in a fund to be used to develop the Canal.
7. Changes in the regulations could be challenged and submitted to an international arbitral tribunal.[75]

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[75]U.N. GAOR, Supplements, 12th Session, 1-4, Doc. A/3574, 24 April 1957 (Bowie, p. 97.)

Cuba 1962

During the months of July and August of 1962, United States intelligence reports noted a sharp increase in maritime traffic between the Soviet Union and Cuba. Many Soviet ships had unloaded in Cuba large cargoes of transportation, electronic and construction equipment. These reports also suggested that some 3,000 to 5,000 Soviet military technicians had arrived to the island.[76] On 29 August an American U-2 aircraft had produced photographic evidence that surface-to-air missiles (SAM's) had been installed on the island.

On 2 September the Soviet Union announced that it had been supplying Cuba with armaments and technicians, following requests for aid from that country. On 4 September Nikita S. Khrushchev, Chairman of the Soviet Council of Ministers and First Secretary of the Communist Party, sent his Ambassador in Washington, Anatoly F. Dobrynin, to call on Attorney General Robert Kennedy. During the meeting the Attorney General expressed American concern about the extent of the arms build-up in Cuba. Dobrynin replied that this military build-up was not of any significance, that no ground-to-ground missiles or other offensive weapons would have been placed in Cuba and that Chairman

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[76] Elie Abel, The Missiles of October: The Story of the Cuban Misslie Crisis 1962 (London:MacGibbon & Kee, 1966), p. 20.

Khrushchev did not wish politically to embarrass the American President, particularly during the period prior to an election.

Following this meeting, President John F. Kennedy issued a statement warning the Soviet Union against introducing offensive ground-to-ground missiles into Cuba, indicating the grave consequences that would arise from such an action. On 7 September Kennedy requested -- and obtained -- Congressional authorization to call up 150,000 reserve troops. On 11 September the Kremlin reiterated its assurances, asserting that it did not intend "to shift its weapons for the repulsion of agression, for a retaliatory blow, to any other country, for instance Cuba."[77]

On the morning of 16 October President Kennedy called an extraordinary meeting of certain [illegible] ministers and advisers to consider a new disturbing development. At the meeting, representatives from the Central Intelligence Agency (C.I.A.) proceeded to introduce new photographic evidence showing that offensive missile sites were being constructed in Cuba. The startling news, in direct clash with the recent Soviet reassurances, had most alarming implications for American security, and the officials immediately began discussions. This group, which later came to be known as the Executive Committee of the National Security Council (or "Ex-Comm"), had the following members, nearly all of whom met regularly during the course of the crisis:

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[77] Ibid., p. 23.

President John F. Kennedy	
Robert Kennedy	: Attorney General
Dean Rusk	: Secretary of State
Robert McNamara	: Secretary of Defense
John McCone	: Director of the C.I.A.
Douglas Dillon	: Secretary of the Treasury
McGeorge Bundy	: Presidential Adviser on national-security affairs
Theodore C. Sorensen	: Presidential counsel
George Ball	: Under Secretary of State
General Maxwell Taylor	: Chairman of the Joint Chiefs of Staff
Edward Martin	: Assistant Secretary of State for Latin America
Llewellyn Thompson	: Adviser on Russian Affairs
Roswell Gilpatric	: Deputy Secretary of Defense
Paul Nitze	: Assistant Secretary of Defense

Charles Bohlen occupied Llewellyn Thompson's position for the first day; intermittently, the following also were present at various meetings:

Vice-President Lyndon B. Johnson	
Adlai Stevenson	: Ambassador to the United Nations
Kenneth O'Donnell	: Special Assistant to the President
Donald Wilson	: Deputy Director of the United States Information Agency (U.S.I.A.)[78]

In meetings held later that day, the group began to discuss the entire spectrum of possible alternatives. President Kennedy made two preliminary decisions. One was to order an increase in the number of U-2 photo-reconnaissance flights over Cuba; the other was not to disclose these developments at this time.

On Wednesday 17 October the United States Intelligence Board reported that about twenty-eight

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[78]Robert F. Kennedy, Thirteen Days: The Cuban Missile Crisis October 1962 (London: Macmillan, 1969), pp. 34-35. Former Secretary of State Dean Acheson also attended several meetings.

launch pads were under construction on the island, with two types of missiles being evident. One type was the MRBM (Medium Range Ballistic Missile), with a 1,000-mile range, and the other was the IRBM (Intermediate Range Ballistic Missile), with a range of 2,200 miles. Logically, these could not be expected to be used without nuclear warheads. It was estimated that, considering both types of missiles, the Soviets were developing in Cuba an effective capability for delivering in any one salvo about forty nuclear warheads to places as far West as Wyoming and Montana.[79] Analysis of the photographs showed that they were being aimed at certain American cities and thus about eighty million people could be killed in one strike.[80] Furthermore, intelligence estimates suggested that they could be operational within a week.[81]

That day the members of the Ex-Comm considered and assessed several alternative courses of action or "tracks":

> Track "A" called for inaction at this time.
>
> Track "B" envisaged sending an envoy to Khrushchev to negotiate privately the withdrawal of the missiles.
>
> Track "C" suggested acting through the Security Council of the United Nations.
>
> Track "D" called for an embargo on military materiél to Cuba, to be effected by means of a naval blockade.
>
> Track "E" consisted of a surprise air attack with the aim of destroying the missile emplacements.

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[79] Abel, p. 58.

[80] Kennedy, p. 39

[81] Ibid.

Track "F" was a full-scale invasion of the island.[82]

Deliberations continued through the day, assessing the pros and cons of each course.

On Thursday 18 October, following to arrangements made long before these developments, President Kennedy received Andrei Gromyko, the Soviet Foreign Minister. In reply to the President's statements of grave concern about the military build-up in Cuba (Kennedy did not make mention of the recent discoveries) Gromyko said that there was no reason for the United States to be anxious about Cuba. The sole objective of the Soviet Union, he said, was "to give bread to Cuba, in order to prevent hunger in that country," and that the military help being provided amounted to technicians and defensive armaments.[83] The President asserted that there should be no misunderstanding about the American position, and proceeded to read aloud his warning statement of 4 September. The Soviet Foregin Minister reiterated his assurances, repeating that the United States should not be concerned.

The discussions of the Ex-Comm that day began to show the emergence of two basic positions among its members. One group advocated the blockade, stressing its advantage as a gradual course that gave the Soviets time to reconsider without cornering them into an irretrievably belligerent position, and avoided running the risk of triggering a rash reaction from the impulsive

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[82] Abel, pp. 59-62. Graham T. Allison, Essence of Decision: Explaining the Cuban Missile Crisis (Boston: Little, Brown, 1971), pp. 58-61.

[83] Ibid., p. 45.

Khrushchev. Thus it would be possible to "maintain the options," while always preserving the possibility of escalating to more drastic measures, if necessary.

The other group favoured an air-strike, arguing that the blockade, not affecting the missiles themselves, was not conclusive, and not stern enough for dealing with the Soviet Union. Further, they maintained, the blockade in the event might be more dangerous, introducing the possibility of naval skirmishes in attempts to enforce it, and thus opening the way for escalation into full war. Accordingly, both groups decided to prepare an outline of the necessary steps that each course of action envisaged, and both recommendations were submitted to the President.

The blockade plan included an outline of the legal basis of such an action, an agenda for a meeting of the Organization of American States (O.A.S.), recommendations pertaining to action before the United Nations, military procedures for stopping ships and the circumstances in which force would be used. The air-strike plan outlined the areas to be attacked, a defense for this action before the United Nations, ways of securing the support of Latin American countries, and a statement to Khrushchev warning him against taking retaliatory action in the Caribbean, Berlin or anywhere else.[84] Concurrently, to ensure the feasibility of military action in case this course were to be chosen, Secretary of Defense McNamara had given orders to begin the deployment of men, aircraft and ammunition. The military could be ready for an attack by Tuesday, 23 October.[85]

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[84] Ibid., pp. 48-49.

[85] Ibid., pp. 40-41.

Discussions continued throughout Friday. On Saturday 20 October United States armed forces across the world were put on alert. By that day the President had reached a decision in favour of the blockade. On Sunday 21 October Kennedy conferred with the military experts, reviewing one more time the air-strike alternative. On this occasion the Commander in Chief of the Tactical Air Command, General Walter C. Sweeney, Jr., informed him that while an air strike could destroy ninety per cent of the targets, it was not possible to guarantee one-hundred per cent effectiveness.[86] This further buttressed Kennedy's decision for the blockade.

The decision taken, Kennedy proceeded to inform allied countries: close friend British Ambassador Ormsby-Gore was told personally; former Secretary of State Dean Acheson was sent to brief France's De Gaulle; Ambassador Walter Dowling was asked to visit West Germany's Adenauer; former Ambassador to Canada Livingston Merchant went to brief that country's Prime Minister, John Diefenbaker. Leaders of other states would be notified through American diplomatic posts abroad.

On Monday 22 October newspapers reported that the United States faced a serious crisis and that a speech would be given by the President that evening. That day Kennedy met with Congressional leaders, informing them of the situation and the policy. The President also formally established the policy-making group that had been meeting to deal with the crisis, as the Executive Committee of the National Security Council, "for the purpose of effective conduct of the executive branch in the present crisis."[87]

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[86] Ibid., p. 51; Abel, p. 95.

[87] Kennedy, p. 56.

By now the military were undertaking full preparations. The Joint Chiefs of Staff issued the pertinent directives to the Atlantic Fleet to organize the blockade. The Navy deployed 180 ships in the Caribbean, including carriers, cruisers, destroyers and support ships. The Strategic Air Command ordered its B-52 bomber force into the air and dispersed its B-47 bomber force to civilian airports; 156 ICBM's (Inter Continental Ballistic Missile) were placed at readiness. The First Armored Division moved from Texas into Georgia, and five other Army divisions were put on alert.[88]

One hour before Kennedy's speech to the nation, Secretary of State Dean Rusk met with Soviet Ambassador Dobrynin to inform him of the impending action and to give him a copy of the President's speech, which would announce the American position. In his televised speech, Kennedy outlined the current situation and stated the policy that the United States Government would follow. The initial steps would be:

1. To impose a "quarantine[89] on all offensive military equipment under shipment to Cuba;"
2. to increase surveillance of Cuba;
3. to regard any nuclear missile launched from Cuba against any nation in the Western Hemisphere as an attack by the Soviet Union on the United States, requiring a full retaliatory response upon the Soviet Union;"

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[88]Abel, pp. 107-108; Kennedy, p. 55.

[89]Following the advice of Abram J. Chayes and Leonard C. Meeker, respectively Legal Adviser and Deputy Legal Adviser to the Secretary of State, the term "defensive quarantine" was adopted in lieu of "blockade." It was felt that the latter "carried ugly, warlike overtones." (Abel, p. 108.)

4. the reinforcement of the United States military base at Guantanamo and the evacuation of the dependents of military personnel there;
5. to call for "an immediate meeting of the Organ of Consultation under the Organization of American States, to consider the threat to hemispheric security and to invoke articles 6 and 8 of the Rio Treaty[90] in support of all necessary action;"
6. to call for an emergency meeting of the Security Council and to submit a draft resolution "for the prompt dismantling of all offensive weapons in Cuba, under the supervision of U.N. observers;"
7. finally, to "call upon Chairman Khrushchev to halt and eliminate this clandestine, reckless and provocative threat to world peace ..."[91]

The following day, Tuesday 23 October, the Organization of American States voted on the American Resolution calling for the establishment of the quarantine, and approved it by nineteen votes to naught, with one abstention. The Security Council also began consideration of the Cuban problem. That evening Kennedy signed the proclamation establishing the quarantine, which he based also on the authority of the recently passed O.A.S. Resolution, pursuant to Articles 6 and 8 of the Rio Treaty.[92]

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[90] The Inter-American Treaty of Reciprocal Assistance of 2 September, 1947.

[91] U.S. President, Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba, October 22, 1962, in U.S. President, Public Papers of the Presidents of the United States (Washington D.C.: Office of the Federal Register, National Archives and Records Service, 1962-), John F. Kennedy, 1963, pp. 806-809. Hereinafter referred to as Public Papers: Kennedy-1962.

[92] U.S. President, Proclamation, "Interdiction of the Delivery of Offensive Weapons to Cuba," no. 3504, October 23, 1962, in ibid., pp. 809-811.

On Wednesday 24 October nineteen ships of the Second Fleet took up positions along an arc extending 500 miles seaward from Cape Maysi, Cuba.[93] That morning twenty-five Soviet ships were reported to be directed toward Cuba. The six ships nearest the quarantine line, however, either stopped or turned back. Other ships followed suit later in the day. That day U Thant, Acting Secretary General of the United Nations, sent identical letters to Kennedy and Khrushchev appealing for "the voluntary suspension of all arms shipments to Cuba and also the voluntary suspension of the quarantine measures applied."[94]

The next day, Thursday 25 October, The Soviet Union tanker Bucharest approached the quarantine line but it was allowed to pass; later similar action was taken with the East German passenger ship Voelkerfreund. After much consultation, the Ex-Comm had reached the decision that, in order to minimize the risk of a confrontation at sea, the first ship to be boarded and searched preferably should belong to a neutral state.

The Security Council met again, in an atmosphere of great tension, and United States Ambassador Adlai Stevenson proceeded openly to challenge the Soviet Ambassador, Valerian Zorin. Zorin evasively refused to admit or deny the existence of offensive weapons in Cuba, whereupon Stevenson revealed with dramatic effect before the Council the photographic evidence of the sites.[95]

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[93] Abel, p. 131.

[94] "A statement by U Thant to the United Nations Security Council and his Correspondence with President Kennedy and Chairman Khrushchev: October 24, 1962," in Kennedy, Appendix 4, pp. 149-160.

[95] See p. 120, infra.

On Friday 26 October the American destroyers Joseph P. Kennedy, Jr. and John R. Pierce intercepted the freighter Marucla. The Marucla had been carefully selected as a neutral ship, being Panamanian-owned and of Lebanese registry, operating under Soviet charter. It was boarded and searched without incidents. No military equipment was found and it was allowed to proceed.

In Washington, Soviet Embassy official Aleksander S. Fomin, reputed to be the head of Soviet intelligence operations (KGB) in the United States, approached John Scali, State Department correspondent for the American Broadcasting Company (ABC), in order to convey a message.[96] He indicated that a solution to the crisis could be found if the United States pursued the matter on these terms:

"1) The Soviet Union would agree to dismantle and remove the offensive missiles in Cuba;

2) It would allow United Nations inspection to supervise and verify the removal;

3) The Soviet government would pledge not to reintroduce missiles, ever, to Cuba; and

4) In return, the United States would pledge publicly not to invade Cuba."[97]

At Fomin's request, Scali relayed this proposal to the State Department.

At six o'clock that evening word arrived from Khrushchev, in a long, emotional letter. He stated that the Soviet Union harboured no belligerent intentions

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[96] Roger Hilsman, To Move a Nation: The Politics of Foreign Policy in the Administration of John F. Kennedy (Garden City, N.Y.: Doubleday, 1967), p. 217; Abel, p. 164; Kennedy, p. 90.

[97] Hilsman, p. 217; also Kennedy, p. 90.

and that it fully understood the devastating aftermath that a war would bring. He proposed that the Soviet Union would stop its shipments of arms to Cuba and would withdraw those already there if the United States would reciprocate by lifting the blockade and by pledging not to invade Cuba.[98]

It was thought that perhaps Fomin's overture (which, albeit unorthodox, was taken seriously) and Khrushchev's letter should be viewed together, as a proposed basis for a settlement. After long deliberations, the Ex-Comm adjourned and requested a group of State Department analysts to study both communications and to submit an analysis by morning.

The following day, Saturday 27 October, a second missive from Khrushchev arrived. Unlike the previous one, which bore all the characteristics of the Chairman's own style, this letter was very formal and clearly was the product of a bureaucracy, probably the Foreign Office of the Kremlin. Adopting a new stance, he requested the removal of American Jupiter missiles in Turkey as a quid pro quo for the withdrawal of Soviet missiles in Cuba.

On the same day news arrived that Major Rudolf Anderson, Jr. had been shot down with his U-2 aircraft and killed, by a Soviet-Cuban missile, during a photo-reconnaissance mission over the island. The implications of this development added a new dimension to the situation. An air strike seemed now more than ever before, the only

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[98]Kennedy, pp. 88-90. This letter has not been declassified in its entirety; a compilation incorporating both quotations from the original and paraphrases is provided in Allison, pp. 221-223.

effective alternative. President Kennedy, however, reconsidered (much to the dismay of the Pentagon) and after long hours of deliberations the Ex-Comm decided to follow Robert Kennedy's suggestion to ignore the second Khrushchev letter and to respond to the ensemble of the proposals of his first letter and of the terms conveyed by Fomin through John Scali. The letter, despatched that evening, sought an agreement on the basis of the following terms:

1. Soviet removal of "weapons systems from Cuba under appropriate United Nations observation and supervision;"
2. A Soviet undertaking "to halt the further introduction of such weapons systems into Cuba;"
3. American removal of quarantine measures;
4. American assurances against an invasion of Cuba;[99]

That same evening Robert Kennedy met with Ambassador Dobrynin to ensure that there was no misunderstanding about the American position. The Attorney General pointed out to him that Major Anderson's death was a most serious turn of events, that time was running out and the United States was now prepared to take military action. If the Soviet Union would not give a commitment by tomorrow to remove the missiles -- he said -- the United States would do so.[100]

On Sunday, 28 October, Moscow Radio announced Khrushchev's reply: "The Soviet Government ... has given a new order to dismantle the arms which you described as offensive, and to crate and return them to the Soviet

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[99] Kennedy, pp. 100-102.

[100] Ibid., pp. 104-106.

Union."[101]

Eventually all missiles, as well as other contentious military equipment, were removed, and supervision of the withdrawal was carried out by air and sea.

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[101]"Correspondence between Chairman Khrushchev and President Kennedy: October 28, 1962," in Kennedy, pp. 173-180.

CHAPTER III

CRISIS AND FOREIGN POLICY: THE LEGAL ARGUMENTS

Probably the Suez and Cuban crises can most realistically and usefully be thought of as events fundamentally political in their essence. Yet, even a cursory examination of the developments will reveal the great extent to which the parties explained and justified both their positions and actions within the framework of the law. Moreover, while the legal arguments in their basic form were apparent at the early stages, in the Suez case, for example, they were progressively refined and buttressed during the course of the crisis. Indeed, sometimes subtle differences in approach or emphasis emerged even between States that shared a largely common ground of position and purpose. In the Suez crisis, for instance, it is possible to discern, in spite of the maze of rhetoric, not only reference to specific legal documents, but also underlying general principles of international law, and indeed a substantial body of legal arguments emerges. The Cuban crisis, for several reasons, saw the United States legal position basically centered around two articles of one treaty, save perhaps for passing references to the United Nations Charter. As Abram Chayes has noted, the "legal approach of the United States did not, on the whole, seek to identify rules or norms of conduct and to analyze these by the familiar techniques of legal reasoning to show that they were or

were not applicable to the situation."[1]

An examination of the arguments raises manifold interesting questions both of a legal and political nature. As the purpose of this paper is to examine some aspects of the role of law in foreign policy-making during crises, and not to appraise the legality per se of the issues, no attempt will be made to assess the validity of the legal arguments or the legality of certain actions (e.g. the nationalization of the Suez Canal Company, the resort to force, or the blockade of Cuba,) Thus what follows is the skeleton of the legal arguments and positions presented during the two crises. It is hoped that it will provide one of the terms in that interaction-of-law-with-politics equation the analysis of which is the object of this enquiry.

If the disputes under study had been entertained by an international judicial body, probably there would exist a more explicit and thorough body of documentation on the precise locus standi of each party at a given time for a given action. This not being the case, the legal arguments had to be distilled from conference documents and from the statements of the participants before national and international forums. Thus such historical "landmarks" in the unfolding of the events also serve as "legal landmarks" in the sense that they provide key reference points upon which to focus the examination.

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[1] The Cuban Missile Crisis, International Crises and the Role of Law (London: Oxford University Press, 1974), p. 85.

Tripartite London Talks: Tripartite Statement, 2 August, 1956

The statement issued by the United States, the United Kingdom and France at the conclusion of their London talks was the first formal international articulation of their legal views of the Suez question at that particular time.[2] The following was their position and the grounds for their arguments:

1. The Suez Canal Company was an "international agency" as it had "always had an international character, in terms of its shareholders, Directors and operating personnel" as well as the international purpose of its functions.
2. The Suez Canal was an "international waterway" owing to its
   a. "international character," flowing from
      i. its very international scope of operation;
      ii. Article 8 of the 1954 Agreement, which recognized the facility as "a waterway economically, commercially and strategically of international importance."
   b. "international purpose" as "established by the 1888 Convention."
3. The nationalization of the Company was unlawful *ab initio* because, while the right to nationalize *per se* was not questioned,[3] it was felt that this was "far more than a simple act of nationalization," as it involved "the arbitrary and unilateral seizure by one nation of an international agency." This was further

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[2]Three-Power London Talks: Tripartite Statement, August 2, 1956, in Department of State, pp. 34-36.

[3]This was expressly stated. Further, in his memoirs President Dwight D. Eisenhower recalls:

"the waterway, although a property of the Canal

aggravated by the fact that "it avowedly was made for the purpose of enabling the Government of Egypt to make the Canal serve the purely national purposes of the Egyptian Government."

4. The nationalization of the Company effectively violated the 1888 Convention because, "having regard to all the attendant circumstances, [it] threaten [ed] the freedom and security of the Canal as guaranteed by the Convention of 1888."

Company, lay completely with Egyptian territory and under Egyptian sovereignty. The inherent right of any sovereign nation to exercise the power of eminent domain within its own territory could scarcely be doubted, provided that just compensation were paid to the owners of the property so expropriated." (The White House Years: Waging Peace, 1956-1961 [London: Heinemann, 1966], p. 39.)

In his speech before the House of Commons Prime Minister Anthony Eden did not question Egypt's right to nationalize, and the leader of the opposition, Hugh Gaitskell, stated:

"we certainly do not say that the act of nationalization in itself is wrong. Nor would we say that the act of nationalizing a foreign-owned company was necessarily wrong, provided that the compensation was reasonable and fair." (Great Britain, Parliament, Parliamentary Debates [Commons], 5th Series, 557 [1955-56], 1610.) Hereinafter, referred to as Debates, (Commons).

Statement by President Nasser rejecting invitation to the London Conference, 12 August, 1956

When the Tripartite Powers decided to call a second London Conference, Egypt was one of the concerned States to be invited. President Nasser's statement rejecting that invitation contained, inter alia, Egypt's view of its legal position and the arguments.[4]

A. On the Company.

1. Under Paragraph 16 of the 1866 Convention, the Company was Egyptian.

2. "The British Government, in a power of attorney submitted by its representatives to the Mixed Court of Cassation in Alexandria in 1939, said the Suez Canal Company is a legal body recognized by Egyptian internal law and cannot be otherwise, and it is definitely subject to Egyptian laws."

3. The Company "cannot be at the same time Egyptian and non-Egyptian or an Egyptian and an international company, as this is contrary to the principles of law ... There is no legal document whatsoever to show that an Egyptian limited company, subject to Egyptian laws, is at the same time an international agency entrusted with the maintenance of navigation in the Canal."

B. On the Canal.

1. Preamble of the 1888 Convention:[5] it aimed to guarantee the free use of the Canal by all countries in accordance with Article 1

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[4]Statement by President Nasser Rejecting Invitation to the London Conference, August 12, 1956, unofficial translation, in Department of State, pp. 47-52.

[5]The relevant part states: [The High Contracting Parties] , being desirous of establishing, by a Conventional Act, 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

of the same document.[6] (The point, by implication, is that the Preamble did not seek to internationalize the Canal.)

2. Article 13 of the 1888 Convention:[7] "it clearly stated that none of the obligations in this agreement in any way affects the sovereign rights of the Egyptian Government."

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the system under which the navigation of this Canal has been placed by the Firman of His Imperial Majesty the Sultan, dated February 22, 1866 (2 Zilkadé 1282), and sanctioning the Concessions of His Highness the Khedive," in Department of State, pp. 16-20. Emphasis added.

[6] See p.15, supra.

[7] Article 13 reads:
"Aside from the obligations expressly provided for by the clauses of the present Treaty, the sovereign rights of His Imperial Majesty the Sultan and the rights and immunities of His Highness the Khedive based on the Firmans are in no way affected," in Department of State, p. 19.

3. Article 14 of the 1888 Convention[8]: it "shows that there is no relation whatsoever between the 1888 agreement and the Suez Canal Company, as it shows that the obligations arising from the present agreement are not bound by the period for which the concession granted to the Suez Canal Company runs." Tripartite charges that the nationalization jeopardizes the freedom and safety of the canal as guaranteed by the 1888 Convention, thus are "untrue and unfounded," for "there is no relation whatsoever between the ... Company and the 1888 agreement concerning the freedom of navigation through the canal."[9]

4. Article 8 of the 1954 Agreement: "which clearly said that the Canal is an inseparable part of Egypt."[10]

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[8]Article 14 reads:
"The High Contracting Parties agree that the engagements resulting from the present Treaty shall not be limited by the duration of the Acts of Concession of the Universal Suez Canal Company," in Department of State, p. 20.

[9]In other words, according to this argument the Convention of 1888 was not being violated just because the Concession was ended. The Concessions would have expired in 1968, yet the validity of the provisions of the 1888 Convention would have continued. Why then -- the argument would run -- would it constitute a violation of the 1888 Convention to end the Concessions earlier ? Thus it would follow that the two are not linked.

[10]The wording of the agreement reads: "an integral part of Egypt." See p. 17, supra.

The Twenty-Two Power London Conference: 16-23 August, 1956

At the Twenty-Two Power London Conference the Big Three restated their positions.[11] While the basic rationale for their arguments could be found in their statement of 2 August, some differences in emphasis emerged, and their respective views became hinged each on a different focal concept.

The United States

The United States, in particular, refined its stance and, though still advancing the "international character" argument, it based its position on the "system" argument. Thus it still asserted that "the Suez Canal and its operations had been indelibly stamped with an international character" and that it had been "built under international auspices with international capital and for international purposes."[12] But the main *locus standi* of its argument lay in the Preamble of the 1888 Convention,[13] which referred to the "system" which this instrument had "completed." This meant, in the words of the American representative, that the Concession of 1866 "ha[d] been by reference incorporated into and made

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[11] The 22-Power London Conference, August 16-23, 1956, in Department of State, pp. 55-293.

[12] Document SUEZ/56/V/2 and amendments, in *ibid*, p. 73.

[13] For the relevant part of the text, see n.5, *supra*.

part of what is called the definite system set up by the 1888 Treaty," and that "Egyptian sovereignty is, and always has been, and always will be under the 1888 Treaty, qualified by that Treaty, which makes the Canal an international and not an Egyptian waterway."[14] Therefore, according to this view the cancellation of the Concessions (viz. the nationalization) constituted a breach of treaty, because it was in violation of the "internationalizing" provisions of the 1888 Convention, which prevented the nationalization of an international public utility.[15]

The United Kingdom

The United Kingdom subscribed to similar arguments, and also maintained that there existed a case of limitations on Egypt's sovereignty. The British representative said that although he understood "the emotional appeal roused by the unconditional assertion of sovereignty," also there was at the conference a "common ground ... that there must be some restraint."[16]

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[14] Document SUEZ/56/V/2 and amendments, in Department of State, p. 73, p. 78.

[15] For a legal assessment of this argument and of other legal issues raised by the Suez affair, see, for example, Thomas T.F. Huang, "Some International and Legal Aspects of the Suez Canal Question," AJIL, 51 (1957), 277-307; and essays by A.L. Goodhart and Quincy Wright, in Philip W. Thayer, ed. Tensions in the Middle East (Baltimore: The Johns Hopkins Press; London: Oxford University Press, 1958.)

[16] Document SUEZ/56/V/7 and amendments, in Department of State, pp. 235-6.

Authority for this view was found in the Convention of 1888 which was said to contain "limitations upon Egyptian sovereignty" and in the 1954 Agreement, whereby "the present Egyptian Government confirmed its agreement to such limitations upon their sovereignty."[17]

However, the British position was based on one fundamental concept -- the "international character" thesis -- other arguments buttressing it and remaining subsidiary to it. The British representative stated:

> I maintain, and my Government maintains, that the Egyptian Government action [sic] in this particular case was a breach of international law in view of its arbitrary nature, the international character, the purposes and functions of the company, and the period and special character of its concession. This view is confirmed, I would maintain, by the language of the important preambular paragraph of the Suez Canal Convention of 1888.[18]

Thus for the United Kingdom the Preamble and its reference to the "system" simply confirmed, rather than established,[19] the international character of the Company, which was manifest in its very history, nature and scope.

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[17] Ibid., p. 235.

[18] Ibid., pp. 233-4.

[19] In a speech in the House of Lords the eminent international lawyer Lord McNair said, of the Suez Canal Company:

> "One thing one can say with certainty is that it is not a purely Egyptian company. It has been held by the Mixed Court of Appeal of Egypt to be partly Egyptian and partly French and it is understood that certain competent Continental lawyers have expressed the opinion that it possesses an international status or character .... I should like to stress, in particular, ... the Preamble to

France

The French argument, while based largely on the "international character" concept, stressed the fact that both Company and Canal had certain inherent unusual features which accorded them a sui generis status. The French representative said, inter alia:

> the Suez Canal is an international public service ... [and the Company has a] very particular status ... The Company is set up within the framework of Egyptian law, French law and international law. [I]n addition to the international aspect of the company, the Canal was built according to the rules of an international scientific commission; it was always managed by an international management committee. It was financed by bonds published in five languages, in eight international places, including New York and St. Petersburg. These are abnormal characteristics for a company which one might hold to be Egyptian and only Egyptian. The company therefore has a very special status which the Egyptian Government incidentally has itself recognized.[20]

The French representative then proceeded to quote from a long list of Egyptian court rulings and other instances suggesting that "the Company is Egyptian owing to the seat of its activities, but it is world-wide through its objects."[21]

> the Canal Convention of 1888, because there is one expression in that Preamble which seems to me to indicate very clearly the international character of this company ... That Premable seems to me to be one of the crucial documents which throw light upon this very complex affair." (Great Britain, Parliament, Parliamentary Debates [Lords] , 5th series, 199 1955-56 , 657-8.) Hereinafter referred to as Debates (Lords). However, see pp. 74-75, infra.

[20]Document SUEZ/56/V/3 and amendments, in Department of State, pp. 87-88.

[21]Ibid; see also speech by French Foreign Minister Pineau before the French Legislative Assembly, France, Journal officiel (Débats parlementaires), 4 August, 1956, 3863-73.

Security Council: 5-13 October, 1956.

On 5 October the Security Council met to consider the Anglo-French draft resolution and the Egyptian complaints. For the first time in the crisis the parties presented their cases before the United Nations. The arguments were now further refined and clearly presented.

The United Kingdom and France

The United Kingdom took the lead in presenting the Anglo-French view. The foundation of its argument was the familiar concept that the Company was, and had always been, inherently international. This view was thus articulated again, in detail, and this time a historical perspective was added.[22] Three main arguments were offered to corroborate this thesis. They were:

1. "International character."[23] Substantiated by:
   i. The fact that the name of the Company was qualified by the word "Universal;"
   ii. the Company's "substantive ownership, the provision of capital, its senior personnel and its operation and management."

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[22]The British representative said: "The idea of internationalization in the strict sense -- a concept well known to us today -- was a comparatively novel proposition in the nineteenth century. The idea of an undertaking run by an international organization or entity made up of Member Governments was foreign to nineteenth-century thought. But the same object could be and was achieved by other means, such as the operation by a company possesed of an international character like the Universal Suez Canal Company. This was in effect the nineteenth century way of doing what

2. "System."[24] Substantiated by:

   i. Re-occurrence of the concept of "freedom of passage" throughout the 1888 Convention, which "indicate[d] the existence of a system by which the enjoyment of these rights, and their effective application in practice, would be secured and guaranteed."

   ii. The Preamble of the 1888 Convention.[25]

   iii. The Concessions that preceded the 1888 Convention, which also were "guarantees of free and non-discriminatory passage."

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today we should do by means of an inter-governmental international regime." (U.N. SCOR, 11th Year, 735th Meeting, 5 October, 1956, p. 4.)

[23] Argument set out above, p. 63.

[24] Argument set out above, pp. 61-62.

[25] In connection with the alleged meaning of the wording of the Preamble, the British representative said that

> "As a matter of accepted legal principle, if one instrument is entered into expressly in order to 'complete the system' established by a previous instrument, it must be a necessary basis of the later instrument, and implicit in it, that the system in question will continue, at any rate for the period for which that system was originally established. (U.N. SCOR, 11th Year, 735th Meeting, 5 October, 1956, pp. 5-6), emphasis added.

3. Turkish Declaration of 1873, which was "a clear recognition and confirmation, in an international instrument, of the interest of the user countries not merely in passage as such but in the conditions of operation of the Canal."[26]

Egypt

The argument that Egypt presented before the Security Council on 8 October was based on three basic premisses:

1. Egypt had a right, under international law, to nationalize the Company.

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[26]U.N. SCOR, 11th Year, 735th Meeting, 5 October, 1956, p. 5. This was "a declaration made by the Turkish Government as suzerain over Egypt -- and therefore binding upon Egypt -- attached to the report of the Commission on International Tonnage and Suez Canal Dues which met at Constantinople in 1873," ibid. Turkey had declared

> 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 this subject without previously coming to an understanding with the principal Powers interested therein. (Emphasis added.) Text in Society of Comparative Legislation, The Suez Canal - A Selection of Documents (1956), p. 45, in Lawrence Scheinman and David Wilkinson, eds., International Law and Political Crisis: An Analytic Casebook (Boston: Little, Brown, 1968), p. 103.

2. The Company was Egyptian.

3. The 1888 Convention and the 1866 Concessions were not linked.

Defending the first point, the Egyptian representative said:

> In nationalizing this Company, the Egyptian Government exercised one of its recognized prerogatives as a sovereign and independent State. The right of every sovereign State to nationalize undertakings in its territory for purposes of national economy and development is at present an established principle in international law, which finds expression in the practice of States and which is sanctioned by jurisprudence both national and international.[27]

In addition to custom and practice in international law, he also pointed out that "[t]he United Nations ha[d] recognized the importance of the right of nationalization" and quoted the relevant part of General Assembly Resolution 626 (VII) of 21 December, 1952.[28]

In presenting the second pillar of Egypt's thesis, its delegate resorted to three lines of

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[27] U.N. SCOR, 11th Year, 736th Meeting, p. 5.

[28] Which states, inter alia, that

> "the right of peoples freely to use and exploit their national wealth and resources is inherent in their sovereignty and is in accordance with the purposes and principles of the Charter of the United Nations."

The Assembly further recommended

> "all Member States to refrain from acts, direct or indirect, designed to impede the exercise of sovereignty of any State over its natural resources."

argument. First, he invoked Article 16 of the 1866 Convention.[29] Second, he pointed out that the British Government had itself recognized the fact that the Company was Egyptian and had defended this view before the Mixed Courts in Egypt; he then proceeded to quote from the relevant document.[30] Moreover, he added that this view also had been taken by the Mixed Courts of Egypt in cases before them, in 1925, 1931 amd 1942. Third, and with respect to the name of the Company, he asserted that "the term 'universal' ha[d] no precise legal connotation. It indicated the character of its activity and did not have any bearing on its legal status."[31]

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[29] See p. 14, supra.

[30] The memorandum submitted by the agent of the British Government to the Mixed Court of Appeals of Alexandria in 1939 is worth quoting in extenso. It stated:

> "The Suez Canal Company is a legal person in accordance with Egyptian law. Its nationality and character are solely Egyptian. It is therefore subject to Egyptian laws. It is true that the Company is given the name of 'The Universal Company of the Suez Maritime Canal.' This appellation, however, has no legal significance, and no legal effects can be derived from the mere designation of the Company. There is no doubt that this designation cannot deprive the Company of its Egyptian nationality. The Company is Egyptian in accordance with the established general principles of law, and in particular with the principles of private international law and the provisions of the Company's organic law. It is Egyptian because it is granted a concession which has for its object Egyptian public assets and because its legal principal centre is in Egypt. It would be a legal anomaly to consider the Company at one and the same time Egyptian and non-Egyptian, i.e., universal. Such definition contradicts the general principles of law." (In U.N. SCOR, 11th Year, 736th Meeting, pp. 5-6.)

[31] U.N. SCOR, 11th Year, 736th Meeting, p. 6.

The third part of Egypt's argument sought to refute the "system" thesis as submitted by the Three Powers. The basis of the Egyptian argument lay in the interpretation of the phrase in the Preamble of the 1888 Convention: "and thus to complete the system." The Egyptian representative pointed out that the 1888 Convention had established a definite system to guarantee the free use of the Canal for all powers at all times. It had completed the system of concessions of 1856 by introducing provisions pertaining to freedom of passage in time of war and peace and by prescribing certain obligations upon the contracting parties. Thus the Convention had "completed" the system in the sense that from an incomplete system it had made a complete one. But this did not mean that it had thereby co-opted under its internationalizing effect the time-bound arrangement of concessions of the 1856 document. The delegate stated:

> The fact that the Convention takes note of the existence of a concession does not deprive that act of concession of its internal character and does not invest it with the international character of a treaty. It is a reference which does not alter the juridical nature of the act of concession.[32]

The authority for this argument lay in the travaux préparatoires.[33]

Security Council: 30 October, 1956

In the wake of Israel's attack the Security

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[32] Ibid., p. 7

[33] In connection with this argument, the Egyptian delegate stated that "[t]his becomes clear when one reads the records of the conference which led to the 1888 Convention." (Ibid.) On this point see Huang, n. 15, supra.

Council was called in emergency session and met on 30 October. At the United Nations Israel articulated its position and sought to justify its resort to force; the United Kingdom and France also presented their position and their justification for intervention.

Israel

Israel's explanation for its action was based on three grounds:

1. The fedayeen raids;
2. the blockade of Israeli shipping by Egypt;
3. Egypt's general intent to eliminate Israel.[34]

Thus this was the rationale for the action. Legally, Israel based its overall case on Article 51 of the United nations Charter, which states, inter alia:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Israel maintained that the continual raids by the fedayeen amounted to an armed attack within the scope of Article 51.[35] Its delegate asked:

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[34] U.N. Doc. S/3575; statement by the Israeli representative before the Security Council, 30 October, 1956, U.N. SCOR, 11th Year, 749th Meeting, pp. 8-18. See also address by Israeli Prime Minister Ben-Gurion before the Knesset, 3 March, 1957, in New York Times, 4 March, 1957; Quincy Wright, "Intervention, 1956," AJIL, 51 (1957), 271.

[35] Wolfgang Friedmann and Lawrence A. Collins, "The Suez Canal Crisis of 1956." in Scheinman and Wilkinson, p. 112.

> Can anyone say that this long and uninterrupted series of encroachments did not constitute in its totality the essence and the reality of an armed attack ?[36]

Further, in connection with the attack, its representative pointed out that there had been evidence of renewed Egyptian activity to carry out aggression against Israel. Israel thus stated before the General Assembly that it "ha[d] been forced to interpret Article 51 of the Charter as furnishing both a legal and a moral basis for such defensive action."[37] As Friedmann and Collins have noted, "Israel in effect was arguing for an interpretation of Article 51 which allowed the right of preventive or anticipatory self-defense."[38]

The United Kingdom and France

The United Kingdom and France endeavoured to justify their ultimatum and their resort to force on the basis of their "police action" thesis. In its arguments the United Kingdom also made passing reference to the doctrine of "protection of nationals and of property," but this contention was advanced principally before the domestic forum.

Basically, the "police action" thesis stressed the impotence of the Security Council in that it was "frustrated" by the "persistent misuse of the veto," it could not "act immediately" and had no "military arm."[39]

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[36] U.N. GAOR, 1st Emergency Special Session, 562nd Meeting, p. 23.

[37] Ibid.

[38] P. 112.

[39] See statement by Selwyn Lloyd, British Foreign

The British delegate said:

> It seems to me that for the moment there is no action that the Security Council can constructively take which would contribute to the twin objectives of stopping the fighting and safeguarding free passage through the Canal.[40]

This position presumably found its legal basis in two concepts. One would be a form of the doctrine rebus sic stantibus: the Security Council had been intended to function in a certain way with a certain aim -- the aims of restoring the peace remained, but its ineffectiveness in carrying out its functions constituted a change of circumstances. Under the sanctity of this principle, therefore, the United Kingdom and France could resort to self-help under international law.[41] The legal rationale for the second concept apparently lay in an interpretation of Articles 2(4) and 51 of the Charter.[42] Article 2(4) states:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

According to this view, therefore, the United Kingdom and France had taken appropriate "police action" in order to restore order and peace. The Charter forbade the use of force, but only when it was inconsistent with the purposes of the United Nations and the two

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Secretary, before the House of Commons on 30 October, 1956 in Debates (Commons), 558 (1955-56), 1377-78; and statement by Sir Pierson Dixon, United Kingdom representative to the United Nations, in U.N. SCOR, 11th Year, 749th Meeting, p. 5.

[40] U.N. SCOR, 11th Year, 749th Meeting, p. 5. The United kingdom and France justified on this basis their veto of the United States Draft Resolution (see p. 33, supra.)

Powers had acted on behalf of the Organization and in the interests of many of its Members.[43]

However, a few weeks earlier Lord McNair, eminent jurist and President of the International Court of Justice, had expressed a very different view before the House of Lords. He said, inter alia:

> [A] s a lawyer, I find difficulty in reconciling the whole of the Government's recent action with the existing rules of law governing the threat to use armed force. I have been puzzled by the massing and display of armed force in the Eastern Mediterranean that we have witnessed during the past five or six weeks.

He then proceeded to discuss the "complete transformation in the attitude of the law towards resort to armed force" that had taken place in the past fifty years. In his long exegesis McNair quoted from and discussed the relevance of such documents as the Covenant of the League of Nations, the Kellogg-Briand Pact of 1928, the Charter of the United Nations as well as the decision of the International Court of Justice in the Corfu Channel case. Concluding, he said, inter alia:

> I am unable to see the legal justification of the threat or use of armed force by Great Britain against Egypt in order to impose a solution of this dispute ... I attach so much importance to the maintenance by this country of its leadership as an exponent of the rule of law that I feel that I should be failing in my duty as a Member

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[41] Friedmann and Collins, p. 115.

[42] See also statement by Selwyn Lloyd before the House of Commons, in Debates (Commons), 558 (1955-56), 1565-68.

[43] Friedmann and Collins, p. 115.

of your Lordship's House, if I did not present these remarks for your consideration.[44]

[44] Debates (Lords), 199 (1955-56), 659-63.

Cuba 1962

The position of the United States in the face of the discovery of the military build-up in Cuba was first made public in President Kennedy's televised speech of 22 October, 1962.[45] The presence of offensive weapons on the island was then said to constitute "an explicit threat to the peace and security of all the Americas" and to be "in flagrant and deliberate defiance" of the following:

1. The Rio Treaty of 1947;
2. the traditions of the United States and of the hemisphere;
3. the joint resolution of the 87th United States Congress;
4. the Charter of the United Nations;
5. American public warnings of 4 and 13 September, 1962, to the Soviet Union.[46]

Kennedy pointed out[47] that the United States would call emergency meetings of the Security Council of the United Nations and of the Organ of Consultation of the Organization of American States (O.A.S.). He said that at the O.A.S. the United States would invoke Articles 6 and 8 of the Rio Treaty "in support of all necessary action" and in connection with this he indicated that regional security arrangements (such as the O.A.S.) were allowed for in the United Nations Charter.[48] Article 6 reads as follows:

> If the inviolability or the integrity of the territory or the sovereignty or political

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[45] See pp. 47-48, supra.

[46] U.S. President, Radio and Television Report ... in Public Papers: Kennedy - 1962, p. 806.

[47] See p. 48, supra.

> independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defence and for the maintenance of the peace and security of the Continent.

Article 8 provides for the kinds of action permissible under Article 6:

> For the purposes of this Treaty, the measures on which the Organ of Consultation may agree will comprise one or more of the following: recall of chiefs of diplomatic missions; breaking of diplomatic relations; partial or complete interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic, and radio-telephonic or radiotelegraphic communications; and use of armed force.[49]

It should be noted that from the outset the American argument invoked Article 6, which deals with "aggression which is not an armed attack," and not Article 3 of the same Treaty, which contemplates armed attack. To invoke Article 3 would have meant to construe the Cuban situation as "armed attack." Action would then have had to be justified under Article 51 of the United Nations Charter, thus necessarily taking the argument down the path of the doctrine either of "anticipatory self-defense" or "inherent right of self-defense."[50] For several reasons the United States eschewed this line of

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[48] U.S. President, Radio and Television Report ... in Public Papers: Kennedy - 1962, p. 808.

[49] Inter-American Treaty of Reciprocal Assistance, 2 September, 1947, 21 U.N.T.S.

[50] Cf. legal arguments of Israel at the Security Council in 1956, pp. 70-72, supra.

argument.[51]

The Resolution of the O.A.S. of 23 October, 1962 called for "the immediate dismantling and withdrawal from Cuba" of all offensive weapons and recommended Member States to ensure that Cuba could not receive military materiél.[52]

It based its authority on the scope and certain provisions of the Rio Treaty and also made reference to a previous O.A.S. Resolution and other statements. In the preamble it quoted that part of the Rio Treaty which "recognize[d] the obligation of the American Republics to provide for effective

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[51] See Chayes, pp. 62-66 and "Draft Memorandum of the Legal Adviser Dated 9/29/62 on Legal Issues Involved in OAS Surveillance Overflights of Cuba," Appendix II, in ibid; also "Department of State Memorandum: Legal Basis for the Quarantine of Cuba," Appendix III, in ibid.

See also: M.S. McDougal, "The Soviet-Cuban Quarantine and Self-Defense," AJIL, 57 (1963), 597-604; C.G. Fenwick, "The Quarantine Against Cuba: Legal or Illegal ?," ibid., 588-92; B. MacChesney, "Some Comments on the 'Quarantine' of Cuba," ibid., 592-97; C.Q. Christol and C.R. Davis, "Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba." ibid., 525-45.

[52] Resolution of the Organ of Consultation, OEO/ Ser. G/II/c-a-463 (1962).

reciprocal assistance to meet armed attacks against any American State in order to deal with threats of aggression against any of them." The Resolution was based chiefly on Articles 6 and 8 of the Rio Treaty. Further, it stated that in accordance with Article 54 of the Charter of the United Nations, the Member States would inform the Security Council of this Resolution.[53] In paragraph two it recommended that

> the member States, in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the continent.[54]

President Kennedy's Proclamation of 23 October, 1952[55] stated in its preamble that as a result of the establishment of offensive weapons in Cuba, "the peace of the world and the security of the United States and of all American States ...[were] endangered" and proceeded to provide the two grounds on which the Proclamation established the quarantine:

> WHEREAS by a Joint Resolution passed by the Congress of the United States and approved on October 3, 1962, it was declared that the United States is determined to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending,

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[53] Ibid.

[54] Ibid.

[55] U.S. President, Proclamation, "Interdiction of the Delivery of Offensive Weapons to Cuba," no. 3504, October 23, 1962, in Public Papers: Kennedy -1962, pp. 809-10.

> by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere, and to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States.

Its second basis was international in source and character:

> WHEREAS the Organ of Consultation of the American Republics Meeting in Washington on October 23, 1962, recommended that the Member States, in accordance with Articles six and eight of the Inter-American Treaty of Reciprocal Assistance take all measures ... [v. O.A.S. Resolution.]

The President proceeded to proclaim the interdiction of the delivery of offensive weapons to Cuba "in accordance with the aforementioned resolutions of the United States Congress and of the Organ of Consultation of the American Republics."[56]

At the Security Council United States Ambassador Adlai Stevenson said:

> No twisting of logic, no distortion of words can disguise the plain, obvious and compelling common-sense conclusion that the installation of nuclear weapons by stealth, the installation of weapons of mass destruction in Cuba poses a dangerous threat to peace, a threat which contravenes paragraph 4 of Article 2 of the Charter.[57]

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[56] Ibid.

[57] U.N. SCOR, 17th Year, 1025th Meeting, 25 October, 1962, p. 5.

CHAPTER IV

CRISIS AND FOREIGN POLICY: THE POLICY-MAKING PERSPECTIVE

Suez 1956

Egypt

Probably the immediate aim of Nasser's nationalization of the Suez Canal Company was to secure a new source of financing for the Aswan High Dam project. But there were other benefits to be reaped from pursuing that policy. For one, it served as a means to retaliate against the West for the refusal of the Aswan loan, particularly in light of what Nasser later referred to as the "insulting attitude with which the refusal was declared."[1]

The nationalization also provided a forceful, tangible statement of Egyptian independence. Internationally, and particularly vis-à-vis the West, the act sought to assert not only the sovereignty of Egypt but also its ideals and aspirations: Egypt was an Arab Power to be contended with. Regionally and domestically the policy constituted a powerful move that sought to enhance and further entrench Nasser's prestige and influence. Nasser was at the very centre of his own

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[1] In Anthony Moncrieff, ed., Suez Ten Years After (London: British Broadcasting Corporation, 1967), p. 42.

visionary Pan-Arabic scheme and this policy, by exploiting Egyptian nationalism and the xenophobic sentiment prevalent in the Middle East as a whole, could be instrumental in expanding his sphere of influence.[2]

In the aftermath of the nationalization Egypt's foreign policy seemed to be characterized by the pursuit of two general aims: a) to retain the gains that the nationalization had accrued both to Egypt and to Nasser as a leader and b) at the same time to avert severe sanctions and perhaps even resort to force by the Powers. Egypt's objectives thus translated into a policy of steadfastly refusing to accept any plan that would in one way or another remove Company or Canal from Egyptian control, and to pursue this course in an essentially conciliatory manner.[3] Instrumental to this course also was to demonstrate that Egypt could operate the Canal safely and to reassure users and "world opinion" at-large to this effect.[4]

The United Kingdom

British foreign policy in the Suez crisis appears to have been characterized by two principal aims: a) to remove the Canal from Egyptian control[5]

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[2]Bowie, p. 15.

[3]For example, on 28 July, 1956 Nasser gave assurances that Canal traffic would continue unhampered; on 31 July Egypt officially declared that the nationalization would not affect Egypt's intentions to meet its international obligations. On both 12 August and 9 September, in response to the diplomatic efforts of the user States, Nasser stated his willingness to consider ways and means of reaching a new modus vivendi between Egypt and the user States concerning

and b) to undermine or even overthrow Nasser.[6] These aims were perceived to be interlinked. The stated objective of Operation Musketeer[7] did not specify any political aims but it seems clear that "the fall of Nasser was assumed by the politicians, probably before the Armies reached Cairo."[8]

An examination of some of the forces that affected British foreign policy-making in the Suez crisis contributes to a fuller understanding of the policies that were pursued and their aims. Great Britain had had a long history of involvement and influence in the Middle East and its national interests at-large in the area were still very substantial.[9] In this scenario, Nasser's Egypt was perceived as an undesirable influence and as a threat. The expansion of Egyptian and Pan-Arab nationalism was seen as undermining the British position in the region and,

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the Canal. See p. 27, supra. Bowie, pp. 15-17.

[4]Bowie, p. 100.

[5]Bowie, pp. 21-22 and George F.G. Stanley, "Failure at Suez," International Journal (C.I.I.A.), 12, (1956-57), 91.

[6]Bowie, pp. 21-22; Robertson, p. 108, p. 167; Raymond Aron, "Suez, Budapest e l'ONU," Tempo presente: informazione e discussione, No. 2 (1957), 9.

[7]See p. 27, supra.

[8]Thomas, p. 68; see also statement by French Foreign Minister Pineau, p.91 , infra; Aron: "Probabilmente il successo esigeva la caduta del colonnello Nasser." (p. 9.)

[9]See pp. 16-18, supra; Love, Part One, particularly Chapter Six; et passim; Friedmann and Collins, pp. 92-93.

further, as introducing the possibility of Egyptian control of the oil flow.[10] As Terence Robertson has pointed out,

> Eden and Lloyd, Mollet and Pineau ... looked upon the crisis as yet another stage in a carefully calculated program of revilement, insult, and castigation aimed at destroying their rights in the area, destroying their friends, and eventually culminating in an attempt to strangle their economic lives by depriving them of oil.[11]

Of Britain's immediate national interests in the Middle East the Canal -- "lifeline of empire" -- probably was the single most important one.[12] In one coup Nasser had gained control of three features implicit in the operation of the Canal which were of the highest importance to its users and particularly to Britain. First and foremost he could control the traffic through the canal: the free flow of vital oil and trade were at stake. Second, by managing the operation of the Canal Egypt could recruit its own pilots, and there were doubts about the skill and reliability of these.[13] Third, there were misgivings about the future expansion of Canal facilities -- and particularly in light of Nasser's intentions to use Canal revenues for financing the High Dam project.[14]

At the level of domestic politics it is apparent that the policy-making unit -- and particularly Eden himself -- was the object of rather intense and persistent pressures.

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[10] Bowie, p. 18.

[11] p. 80.

[12] See p. 18, supra; see also Watt; Stanley, p. 91.

[13] Such apprehensions proved unfounded. In September Nasser demonstrated that the safe and efficient operation of the Canal was not the preserve of an elite

In spite of the prestige that Eden enjoyed, taking over Churchill's mantle had not been easy. To the Conservatives his Government appeared weak and there were signs that his popularity had slumped.[15] The British withdrawal of troops from Egypt had been decried by the extreme Right of the Tory Party (the so-called "Suez Group") as a "scuttle" and Eden was regarded as the man responsible for it.[16] The views of this right-wing group "involved an uninhibited commitment to the forceful assertion of British authority in the Middle East" and their importance, as Epstein has pointed out, "was greater than its fringe status might suggest."[17] Moreover, Eden had been under fire both by the Tories as a whole and by the Press for being weak, indecisive, vacillating.[18] These criticisms of his leadership, coming as they did from several quarters, added further pressures on Eden to take a hard-line stance.

Personal perceptions of Nasser seem to have played a considerable role in the policy-makers'

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corps of Company pilots; see p. 29, supra and Robertson, p. 180.

[14]The two had been linked by Nasser in his nationalization speech of 26 July, 1956.

[15]Thomas, p. 36.

[16]Robertson, p. 38; Bowie, p. 19; Thomas, p. 36 and Leon D. Epstein, British Politics in the Suez Crisis (London and Dunmow: Pall Mall Press, 1964), chapter four.

[17]P. 17.

[18]Love, pp. 205-6. Robertson, pp. 38-39; Thomas, p. 36; Nutting, pp. 22-23.

assessment of the situation. Nearly every account of the crisis has noted this point.[19] It appears that Eden and most of his Cabinet perceived Nasser as an upstart troublemaker, a demagogue bent on making Britain bite the dust in the Middle East -- a "malicious swine,"[20] as Churchill had put it. What is more, he was perceived as a new Hitler or Mussolini, as having similar aspirations and intentions -- and with these analogies also came memories of Munich and of "appeasement."[21]

Yet, while similar attitudes were shared to one extent or another by the Opposition,[22] by the Press,[23] and by the Head of the Foreign Office,[24] there was a singularly acute and most personal dimension to Eden's dislike of Nasser. As Foreign Secretary since 1952 and as Prime Minister since April, 1955, Eden had witnessed the gradual decline, setback after setback, of British influence in the Middle East, and in the process his antipathy for the dictator had grown only greater and more bitter.

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[19] Including Thomas, Epstein, Nutting, Herman Finer, Dulles Over Suez: The Theory and Practice of His Diplomacy (London: Heinemann, 1964), and also Geoffrey McDermott, The Eden Legacy and the Decline of British Diplomacy (London: Leslie Frewin, 1969).

[20] In Thomas, p. 37.

[21] Robertson, p. 48; Bowie, pp. 20-21; Thomas, p. 38.

[22] See, for example, speech by Hugh Gaitskell, leader of the Opposition, in Debates (Commons), 557 (1955-56), 1609-17.

[23] Bowie, pp. 19-20.

[24] Viz. Sir Ivone Kirkpatrick; see Robertson, pp. 88-89.

Eden's intense personal dislike of Nasser had given him a certain "one-way only" outlook. Indeed, he had

> decided that the world was not big enough to hold both him and Nasser. The 'Egyptian dictator' had to be eliminated somehow or other.[25]

An instance of this perspective occurs in an exchange between Eden and Minister of State for Foreign Affairs Anthony Nutting, in March, 1956, after the latter had submitted to the Prime Minister a policy memorandum suggesting ways of strengthening the British position in the Middle East without further alienating Nasser. Eden, irate, asked:

> But what's all this nonsense about isolating Nasser or 'neutralising' him, as you call it ? I want him destroyed, can't you understand ? I want him removed ...

When Nutting replied that at the moment there were no alternatives, and that removing Nasser would only result in anarchy in Egypt, Eden shouted:

> But I don't want an alternative, [a]nd I don't give a damn if there's anarchy and chaos in Egypt.[26]

Yet another important aspect which probably is underestimated is Eden's state of health at the time. Long since problematical, his health had been deteriorating gradually but steadily.[27] He had had a duodenal ulcer in 1945. In 1953 he had undergone surgery for the removal of a stone in his bile duct. Two

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[25] Nutting, p. 18.

[26] Ibid., pp. 33-34.

[27] Robertson, p. 13.

more operations followed; finally he was left with a plastic join in the duct -- apparently the cause of recurrent fevers.[28] Repeated surgery and a malfunctioning liver had not failed to take their toll and had left Eden an impatient, strong-tempered, physically debilitated man.[29] In his book Nutting writes of Eden's "metamorphosis" and wonders about the extent to which it "was due to sickness and to the poison from the damaged bile-duct, which was eating away at his whole system."[30] On this matter, Kennett Love points out that "[c]ontemporary medical articles on cases similar to Eden's say that the endemic effect of the body poisons on the judgement is literally intoxicating."[31] Furthermore, it appears that by July, 1956 he was "taking many pills" and by the time the Suez crisis became acute he is reported to have told an adviser that he was practically living on Benzedrine.[32] A leading member of the Cabinet told Kennett Love: "You must realize in writing about Suez that Eden was reliving 1938; he saw England as being slack in the face of a dictator. And he was sick. Remember that."[33]

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[28]Thomas, p. 35; Love, p. 206; Nutting, p. 26.

[29]Thomas, p. 35; Love, pp. 306-7; Robertson, p. 13.

[30]P. 33.

[31]P. 214.

[32]Thomas, p. 35. This may hold implications concerning personality change, behavior and judgement, Benzedrine is the proprietary name for Amphetamine Sulphate. This drug is known to have a "marked stimulant effect on the central nervous system, particularly the cerebral cortex and the respiratory and vasomotor centres. It causes a lessening of fatigue, an increase in mental activity, an elevation of mood and a general feeling of well-being. However, its indiscriminate use in attempts to increase capacity for work, or to overcome fatigue is undesirable.

France

The foreign policy of France in the Suez crisis reflected the following principal aims:

a. To defeat the rebels in Algeria;

b. to remove the Canal from Egyptian control;

c. to undermine or even depose Nasser.

Contraindications include, inter alia, use by "patients with anxiety, hyperexcitability or restlessness." Large doses may give rise to, inter alia, fatigue, mental depression, fever, disorientation, aggressive behavior, hallucinations. (A. Wade, et al. Martindale: The Extra Pharmacopoeia, 27th Ed. [London: The Pharmaceutical Press, 1977] , pp. 305-7.)

Toxic effects resulting from overdosage include inter alia, hyperactive reflexes, tenseness, irritability, weakness, insomnia, fever, and sometimes euphoria. Confusion, assaultiveness, anxiety, panic states, inter alia, also occur. The toxic dose varies widely. (L.S. Goodman and A. Gilman, The Pharmacological Basis of Therapeutics, 5th ed. New York, Toronto, [London: MacMillan, 1975] , pp. 498-9.) Persons dependent on amphetamine are prone to, inter alia, accidents and aggressive antisocial behavior. "In a psychiatric personality evaluation 88% of 60 adolescent users of amphetamines showed evidence of disorganized thinking, bizarre thoughts, and internal conflicts, compared with 9% of 24 controls." (R. Brook, et al., Br. J. Addict. Alcohol. 69 [1974] , 61, in Wade.)

In connection with Eden's health problems, see also W.H.J. Summerskill, et al., "Neuropsychiatric Syndrome Associated with Hepatic Cirrhosis and an extensive Portal Collateral Circulation," Quarterly Journal of Medicine, New Series, 25, No. 98 (1956), 245-66.

For a political scientist's enquiry on the effects of stress in crisis decision-making, see Ole R. Holsti, Crisis, Escalation, War (Montreal and London: McGill-Queen's University Press, 1972); and Thomas C. Wiegele, "Decision-Making in an International Crisis: Some Biological Factors," International Studies Quarterly, 17, No. 3 (September, 1973), 295-335.

[33]P. 623; see also Finer, pp. 424-25.

Some of these aims were, or at least were perceived to be, interlinked.

Historically, France had withstood a series of humiliating defeats: 1940, Indochina, Morocco, Tunisia.[34] It appears that in 1956 French policy-makers, acting against this historical and psychological background, were inclined to take strong and decisive action in order to assert France's interests and to vindicate its prestige.

French policy-makers too were disturbed by Pan-Arabic ambitions and, like their British counterparts, saw in Nasser a potential Hitler.[35] In his memoirs Eisenhower later wrote that the French Government "took an even more emotional view than the British" by comparing "Nasser's action to the seizure of the Rhineland by Hitler two decades earlier."[36]

By 1956 the two principal interests of France in the region were the Suez Canal and Algeria. The importance of the Canal to France has been discussed earlier, and there can be no doubt that much was at stake. However, as Robert Bowie points out, while "the Canal takeover jeopardized substantial French economic interests, ... deep antagonism to Nasser was the prime factor in French policy.[37]

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[34] Bowie, p. 26.

[35] Thomas, p. 48; Bowie, p. 26. French Foreign Minister Pineau, however, did not share this view (see Thomas, p. 20.)

[36] P. 36.

[37] P. 26; see Friedmann and Collins, p. 93.

This antagonism, in turn, was rooted in the Algerian problem. The revolutionary war in Algeria continued to be a major problem for France and winning it was for Mollet -- as it had been for his two predecessors -- one of the highest desiderata.[38] As a result, there was open emnity between France and the Arab countries and in particular with Egypt, as it was believed that money, arms and encouragement behind the Algerian rebels came from Cairo.[39] Hence for the French policy-makers Nasser and the Canal were an inextricable part of the Algerian problem and its solution thus was perceived to be largely dependent upon the establishment of a new regime in Egypt. "We get the Canal; Nasser goes," Pineau had said. "Why waste time on a protracted campaign to capture Alexandria and Cairo first?"[40] According to Halvarde Lange, then Norway's Foreign Minister, Mollet had said:

> We want international control of the Suez, of course, [b]ut more important, we think it desirable that a defeat should be inflicted upon Nasser which will result in his disappearance so that other Arab States will have a chance of withdrawing from Egyptian hegemony.[41]

Another factor which -- it is rather clear -- affected France's policy during the crisis was French sympathy toward Israel and its cause. Mollet's socialist Government, in particular, shared these feelings and, moreover, found in Israel a natural ally against Egypt. Unlike Great Britain, France had few friends

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[38] Thomas, p. 47; Bowie, p. 26; Friedmann and Collins, p. 93.

[39] Ibid.

[40] In Robertson, p. 10¾.

[41] In ibid., p. 121.

to lose in the Middle East and North Africa and thus was scarcely hesitant about the idea of collusion with Israel against Nasser.[42]

The United States

The policy pursued by the United States in the Suez crisis appears to have been, no less that of Great Britain and France, the outcome of manifold determinants and aims. But from the outset American policy was seen to pursue a different course from that of its two allies, stemming as it did from a foreign policy-making unit operating -- both from systemic and sub-systemic points of view -- under a constellation of forces that was (or was perceived to be) different. Its principal aims were:

a. To resolve the dispute by peaceful means; to prevent resort to force;

b. to pursue a policy of containment: namely, check Soviet expansionism;

c. to avoid a confrontation with the Soviet Union;

d. to avoid or minimize the possibility that the Soviet Union capitalize on the situation for the enhancement and expansion of its prestige and influence;

e. to avoid disaffecting the United Kingdom and France;

f. to avoid offending the sensitivities of, and thereby possibly alienating, the Afro-Asian States.[43]

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[42] Bowie, p. 27.

[43] For a discussion of some of these policy aims see, for example: Bowie, pp. 29-34 and chapter four, section two; Finer, chapter eighteen *et passim*; Friedmann and Collins; Aron; Percy E. Corbett, "Power and Law at Suez," International Journal, (C.I.I.A.), 12 (1956-57), 2-12; essays by A. Wolfers, E. Hula,

In the context of the American global policy of "containment" it was a most important concern of the United States to keep the influence of the Soviet bloc in the Middle East to a minimum. At the same time it was essential to avoid a clash with the Soviet Union.[44] Thus, according to Finer, Dulles not only "was abjectly intimidated by the seething passions of the Afro-Asian nations," but also "was motivated by overt and covert panic before Russian power."[45]

The Canal too was important for the United States, but in less direct ways. While the free flow of oil and commerce[46] through it was a significant consideration for the United States, it was not

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H. Morgenthau, in A. Wolfers, ed., Alliance Policy in the Cold War (Baltimore: Johns Hopkins Press, 1959.)

[44]Bowie, p. 65; Finer, p. 495.

[45]Finer, p. 495. However, it bears pointing out that his Dulles Over Suez, while a useful and enlightening work, is also a passionately scathing attack on Dulles and as such, the narative seems driven by a passion which often makes the analysis less objective or careful than might be desirable (or, indeed, expected.) The following is but one example:"the Suez issue was not colonialism, even if it suited Dulles to pretend that it was while he was abandoning them [Britain and France]. The Suez conflict was due to the rapacious violation of treaties for reasons of Egyptian national grandeur." (p. 493.)

[46]Only fifteen per cent of American imports came through the Canal and American investment in it was negligible. Further, while the alternative route to Europe around the Cape was two-thirds longer, it was only two-fifths longer to North America (Thomas, p. 45.)

crucial.[47] The importance of the waterway lay largely in, first, heavy Anglo-French dependence on the free flow of oil, which had clear implications for the security, stability and economic health of those NATO countries, as well as that of Western Europe. Second, there was concern about the impact that internationalizing the Canal might have on the status of that other American interest, the Panama Canal.

Israel

Israel's decision to resort to force was the result of several factors and reflected certain fairly distinct policy aims. Among the principal factors was Egypt's policy of blocking the free navigation of Israeli ships in the area, which continued in spite of Israel's denunciations before the Security Council.[48] Egypt controlled not only the Suez Canal but also Sharm el-Sheikh and the Straits of Tiran, access to which made it possible for shipping to transit the Gulf of Aqaba (with its Israeli port at Eilat) via the shorter route by way of the Persian Gulf, thus by-passing the Suez Canal. As a result, Egypt's policy was forcing shipping to and from Israel to take the longer route around the Cape to East Africa or Asia.[49]

Another important factor was the continuing destructiveness of the fedayeen raids which, in spite of Israeli reprisals, had been taking a harsh toll and showed no signs of abating. Indeed, Nasser and other

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[47] Bowie, p. 29.

[48] See pp.16-17, supra.

[49] Bowie, p. 54.

Arab leaders did not fail to let it be known that their aim was to obliterate Israel.[50] Furthermore, Egypt had begun a substantial program of rearmament, marked by the arms deal of September, 1955 with the Soviet Union,[51] which only aggravated growing Israeli fears of an attack by Egypt.

Israel's principal policy aims thus evolved to the following:

a. To destroy the fedayeen bases;
b. to free the Gulf of Aqaba for Israeli shipping;
c. to tarnish Egyptian military prestige before Egypt could organize further militarily.[52]

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[50] Aron, p. 9; Bowie, p. 54.

[51] See pp. 19-20, supra.

[52] Thomas, p. 85. Bowie, pp. 54-56; Dayan, p. 12.; U.N. GAOR, 1st Emergency Special Session, 562nd Meeting, p. 23.

Cuba 1962

The dearth of available information concerning the shaping of Soviet policy leading to and during the Cuban missile crisis makes it exceedingly difficult to discern with any sense of certainty the determinants and aims of that policy. The basic question of why were the missiles deployed, for instance, remains yet to be answered satisfactorily. No doubt multiple forces must have had an impact on the shaping of Soviet policy and its objectives, and indeed these have been explored elsewhere.[53] Their examination here would be well beyond the limitations of scope and length of this paper but it is possible nevertheless briefly to consider certain factors that may have been dominant in influencing the thrust of Soviet policy.

The Soviet Union

It seems safe to suggest that military and political objectives played a considerable role in determining the Soviet decision to deploy the missiles, particularly when it is understood in the context of Cold War politics and of a Soviet military strategic position by then known to be inferior to the American.[54]

Thus the Soviet move may have sought to redress the nuclear balance -- if at least temporarily -- by attempting either to improve its strategic posture or indeed to achieve missile power parity with the United States by doubling its missile capability.[55] It must be remembered that there is no evidence whatsoever to

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[53]See Allison.

[54]See A. Horelick, "The Cuban Missile Crisis: An Analysis of Soviet Calculations and Behavior," World Politics, 16 (1964), 374-75; Henkin, Nations, pp. 219-22.

[55]Allison, pp. 53-54.

suggest that the build-up, had it not been discovered, would not have continued.

This course offered value-maximizing possibilities: the performance of missiles, especially in terms of accuracy, is improved by proximity; proximity also enabled the MRBM's and IRBM's to defeat, in effect, the United States Ballistic Missile Early Warning System (BMEWS) and thus to provide a first-strike capability against a considerable part of American nuclear striking power.[56] While this approach would not solve the long-run Soviet problem of strategic inferiority, it would certainly improve its position far more quickly and cheaply than the gradual expansion of the ICBM arsenal. The Cuban deployment could not be a substitute for a strategic position founded on a substantial ICBM force, but it would provide an interim stopgap alternative. The trade-offs, in light of, on the one hand, the "serious Soviet resource constraint,"[57] and on the other hand, a Soviet military and political position world-wide that needed bolstering,[58] must have appeared most favorable.

Politically, this move could also afford considerable benefits. As Horelick has noted,

> since at least the second half of 1961 ... the forward momentum of the Soviet Union in international affairs had largely exhausted itself without yielding the gains which the Soviet leaders had anticipated ...

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[56] Ibid., p. 54.

[57] Ibid, and p. 243.

[58] Horelick, pp. 372-77.

> These expectations had been fed by mounting evidence of the growing military, scientific, technological, and economic power of the Soviet Union vis-à-vis the West. Some of this evidence was real enough, but much of it, particularly in the realm of strategic power, was illusory. In the framework of the cold war, precisely this realm was central ... At the same time, the unity of the Communist camp was being shattered by the escalating conflict between its two most powerful members. Indeed, the Chinese Communist attack on Khrushchev centered precisely on the unfavorable trend in the cold war which the Chinese attributed to Khrushchev's faulty and overcautious leadership.[59]

Thus in one stroke the Soviet Union could undermine the credibility of the United States globally; it would consolidate its relationship with China and with the Communist camp as a whole;[60] it would make a powerful statement about the defense of Cuba in the aftermath of the Bay of Pigs affair and by the same token provide an example of Soviet credibility and dependability to an attentively onlooking Third World.[61] An impact would be made not only on the strategic situation but on the global psychological environment as well. As Horelick, probably correctly, has pointed out,

> [i]t is most unlikely that the Soviet leaders drew up a precise blueprint or detailed timetable for exploitation of the improved military-political position they would have attained had the Cuban venture been successful. But they probably anticipated that the emplacement of strategic missiles in Cuba and their acceptance by the United States would contribute in some degree to the solution of a whole range of military-political problems confronting the Soviet Union

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[59] Pp. 376-77.

[60] See Arthur M. Schlesinger Jr., A Thousand Days: John F. Kennedy in the White House (Boston: Houghton Mifflin, 1965), p. 811; Allison, pp. 50-51.

[61] Any assessment of Soviet perceptions of risk in this venture should take into account Khrushchev's opinion of Kennedy, possibly dating to their Vienna

and would alter the environment of the cold war in such a manner as to promote new opportunities for political gain whose nature could not be precisely foreseen.[62]

The United States

Certain considerations appear to have played a central role in influencing the response of the United States to the discovery of the missiles. Inter alia, these were:

a. To avoid touching off a major confrontation with the Soviet Union, possibly a nuclear war;

b. to maintain in its immediate environment a level of military threat that it regarded as acceptable;[63]

c. to avoid humiliating the Soviet Union;[64]

d. to avert a possible reflex reaction from the Soviet Union, particularly from the impulsive Khrushchev.

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meeting, as a young and weak leader, This only added to his belief that the American people, as he had told the poet Robert Frost, were "too liberal to fight." (Schlesinger, pp. 796, 821.)

[62] P. 377.

[63] Although the majority of Ex-Comm members believed that the missiles constituted an unacceptable threat, at the outset a minority believed that they did not alter the balance of power. They later abandoned this position. (Kennedy, p. 36; Dean Acheson, "Dean Acheson's Version of Robert Kennedy's Version of the Cuban Missile Affair," Esquire, February, 1969, p. 76. Hereinafter referred to as: Acheson, "Version."

[64] Retrospectively, President Kennedy stated: "Above all, while defending our own vital interests, nuclear powers must avert those confrontations which bring an adversary to the choice of either a humiliating defeat or a nuclear war. To adopt that kind of course in the nuclear age would be evidence only of the bankruptcy of our policy -- or of a collective death wish for the world." (New York Times, June 11, 1963, in Allison, p. 61; see also Kennedy, pp. 122, 125.)

The blockade appeared to maximize those values and offered several advantages over other possible courses of action:

a. As a compromise between inaction and attack, it could achieve the maximum possible impact of "communication" without striking;[65]

b. it shifted the onus of choice on Khrushchev: the United States had borne the burden of considering an attack and had opted against it;[66]

c. the proximity of the area afforded complete control of the blockade and hence a higher likelihood of effectiveness;[67]

d. it minimized humiliation to the Soviets;

e. it gave the Soviets time to consider the situation, thus averting a reflex reaction;[68]

f. it did not preclude other subsequent courses of action, including "escalation" -- in other words, in McNamara's phrase, it "maintained the options."

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[65]Theodore C. Sorensen, Kennedy (New York: Harper and Row, 1965), p. 688; Allison, p. 61.

[66]Ibid. Of course, by placing the ball in Khrushchev's court and awaiting a response, a certain amount of control was being relinquished. However, a deadline for further action had been established.

[67]Ibid.

[68]The other side of this coin was, of course, that the blockade gave the Soviets time to complete the installation of the missiles and once this happened "Cuba would become" -- in Dean Acheson's words -- "a combination of porcupine and cobra." ("Version," p. 77.)

CHAPTER V

ASPECTS OF THE ROLE OF LAW IN INTERNATIONAL POLITICAL CRISES

Much of the misunderstanding about the dynamics of international law and of its role in the management of conflict issues probably stems from a view of international law that is either too rigid or limited or erroneous altogether. The deliberate or subconscious identification of international law with domestic law has led to many misguided analogies and to a consequent fractional or myopic view of its actual role and potential in the conduct of inter-state relations. Otherwise brilliant scholarship of various schools from Austin to Kelsen, Stone, Corbett, Carr, DeVisscher, Kennan, Morgenthau and even Kissinger and Brzezinski in different ways has perceived international law, essentially, as a body of commands, a hierarchical set of rules. Thus it could only be expected that any analysis of the role of international law that proceeds on such premisses is bound to juxtapose, on the one hand, what is perceived as an idealistic, abstruse, even naive set of rules conceived in and dictated by juristic minds; and on the other hand, the vision of a Machiavellian statesman making decisions exclusively in the light of considerations of power, influence and "national interest." As one commentator has noted, too often law has been perceived as

> a frozen cake of doctrine designed only to protect interests in statu quo, ... [or as]

> an artificial judicial proceeding, isolated from power processes.[1]

George Kennan articulated his view of the role of law in what is now a well-known passage:

> I see the most serious fault of our [American] past policy formulation to lie in something that I might call the legalistic-moralistic approach to international problems. This approach runs like a red skein through our foreign policy of the last fifty years. It has in it something of the old emphasis on arbitration treaties, something of the Hague Conferences and schemes for universal disarmament, something of the more ambitious American concept of the role of international law, something of the League of Nations and the United Nations, something of the Kellogg Pact, something of the idea of a universal "Article 51" pact, something of the belief in World Law and World Government. But it is none of these, entirely. Let me try to describe it.
>
> It is the belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints. This belief undoubtedly represents in part an attempt to transpose the Anglo-Saxon concept of individual law into the international field and to make it applicable to governments as it is applicable here at home to individuals.[2]

Dean Acheson, lawyer and noted diplomat, made the following statement before the 1963 Annual Meeting of the American Society of International Law:

> I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, position and prestige of the United States had been challenged by another state; and law simply

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[1] Myres S. McDougal, "Law and Power," AJIL, 46 (1952), 111.

[2] American Diplomacy, 1900-1950 (Chicago: Chicago University Press, 1951), p. 95; see also his Realities of American Foreign Policy (Princeton: Princeton University Press, 1954 and 1966.)

> does not deal with such questions of ultimate power -- power that comes close to the sources of sovereignty.[3]

These views of the law, which have elicited several insightful rejoinders elsewhere,[4] not only are shared by a group in the scholarly community, but, regrettably, are rampant amongst the public at-large.

It is not the purpose of this paper to address itself in piecemeal, ad hoc fashion to the various limited or misguided conceptions of the role of the law in international society, and particularly in the management of conflict issues. Rather, it is hoped that by examining some of what are in fact the many facets of international law, by suggesting an appropriately broader view of its functions, the reader may be better able to assess the nature of the role of law vis-à-vis the problem of international conflict, and some of the channels and levels through which it is effected.

The following scheme, by no means exhaustive, suggests three principal ways in which law may play a role in the management of conflict issues between the states.

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[3] American Society of International Law, 1963 Proceedings, "Remarks of the Honorable Dean Acheson," pp. 13-14. Hereinafter referred to as: Acheson, "Remarks."

[4] See, among others, Richard A. Falk, "Law, Lawyers, and the Conduct of American Foreign Relations," Yale Law Journal, 78 (1969), 919-34; Hardy Cross Dillard, "Some Aspects of Law and Diplomacy," Hague Academy Recueil des Cours, 91 (1957), 449-551. Myres S. McDougal, "Law and Power," AJIL, 46 (1952), 102-114.

A. Law as a Force in Policy-Making

1. Constraint

2. Foreign policy tool

3. Justification

B. Law as International Organization

1. Institutional forces

2. Institutional framework

3. Law institutionalized

4. Forum

5. Legal actor

C. Law as a Framework of Procedure and Expectations

1. Communication

2. Predictability

3. Instruments

A. Law as a Force in Policy-Making

1. Constraint

As a constraint, law may affect the policy-making process in at least two ways: it provides a) norms and rules, and b) a choice of alternatives. As Louis Henkin has pointed out, "law is not generally designed to keep individuals from doing what they are eager to do. Much of law, and the most successful part, is a codification of existing mores."[5] The norms and rules of international law largely reflect a legitimate consensus of mores and, as such, provide a natural incentive for compliance. It is essential to understand that a legal system provides rules *for* human behavior, "and not merely the transcription of empirical rules *of* human behavior."[6] The process of policy-making may thus be oriented within certain normative parameters, and policy alternatives assessed on a compliance-violation spectrum.[7]

The existence of law, of course, can hardly be expected to influence the policy-maker who is bent on a violative course of action, regardless of costs or sanctions. Nowhere is this more evident than at Suez, where intense historical, political, economic as well as idiosyncratic[8] dynamics affected policy at

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[5] *Nations*, p. 89.

[6] Stanley Hoffmann, "International Law and the Control of Force," in Karl W. Deutsch and Stanley Hoffmann, eds. *The Relevance of International Law* (Cambridge, Mass.: Schenkman, 1968), pp. 21-22.

[7] See Henkin, *Nations*, chapter three, and Chayes pp. 101-2.

the expense of legal considerations. Yet, in spite of the law's failure to deter resort to force and in spite of powerful opposing dynamics, international law was reasserted at Suez, as will be apparent in the aftermath of any global lego-political analysis of the crises. Further, the fact that Nasser undertook to provide compensation for the nationalization of the Company should neither be overlooked nor taken for granted. The same can be said for his assurances to guarantee freedom of passage through the Canal.

In the Cuban crisis mechanisms of legal constraint had a number of effects. In the weeks prior to the crisis extensive legal memoranda prepared by the Departments of Justice, State and Defense all espoused and articulated rules of international law, indicating inter alia, that the emplacement of missiles in Cuba by the Soviets did not constitute an armed attack warranting the use of force for self-defense.[9]

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[8]Among idiosyncratic dynamics consider, for example, Eden's strong personal dislike of Nasser and his state of health; Khrushchev's views on Kennedy.

[9]Chayes, pp. 17-24.

As it was shown earlier, the policy-makers facing the Cuban crisis entertained a number of alternative policies; eventually the choice was narrowed down to two courses of action. There are sufficient indications to suggest that law had an influence in this process of opting for a course which, within the range of realistically available and politically viable alternatives, was in fact the least discordant with international law. Dean Acheson, his views on the role of law notwithstanding, had this to say:

> [I]n the action taken in the Cuban quarantine, one can see the influence of accepted legal principles. These principles are procedural devices designed to reduce the severity of a possible clash. These devices cause wise delay before drastic action, create a "cooling off" period, permit the consideration of others' views.[10]

The constraint of accepted norms also was seen to have its effect. In Thirteen Days Robert Kennedy recalled instances of this process:

> With some trepidation, I argued that, whatever validity the military and political arguments were for an attack in preference to a blockade, America's traditions and history would not permit such a course of action. Whatever military reasons he [Dean Acheson] and others could marshal, they were nevertheless, in the last analysis, advocating a surprise attack by a very large nation against a very small one. This, I said, could not be undertaken by the U.S. if we were to maintain our moral position at home and around the globe. Our struggle against Communism throughout the world was far more than physical survival -- it had as its essence our heritage and ideals, and these we must not destroy.
>
> We spent more time on this moral question during the first five days than on any other single

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[10]Acheson, "Remarks," p. 14.

> matter ... We struggled and fought with one another and with our consciences for it was a question that deeply troubled us all.[11]

These perceptions were later corroborated by Robert McNamara:

> [Robert Kennedy] opposed a massive surprise attack by a large country on a small country because he believed such an attack to be inhuman, contrary to our traditions and ideals, and an act of brutality for which the world would never forgive us;[12]

and by Douglas Dillon:

> What changed my mind was Bobby Kennedy's argument that we ought to be true to ourselves as Americans, that surprise attack was not in our tradition. Frankly these considerations had not occurred to me until Bobby raised them so eloquently.[13]

It might well be argued, of course, that the norm being espoused was a moral one and not a legal one. Analytically, it is true, the distinction between "law" and "morality" is not only valid but important to maintain: "Law proceeds on the basis of precedent, practice, and appeals to authority, morality on the basis of appeals to conscience."[14] However, analysis -- it must be remembered -- separates a whole into its fundamental elements or constituent parts,[15] and in this pursuit the analyst seeks to come to a better understanding of the parts which he has dissected. But all the while he should not lose sight

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[11] Kennedy, p. 42-43.

[12] "Foreword," in Kennedy, p. 20.

[13] In Abel, p. 78.

[14] Moore, p. 12. For an insightful discussion of this question see H.L.A. Hart, The Concept of Law (Oxford: Clarendon Press, 1961.)

of the interrelatedness of each part, particularly when dealing with values -- moral, legal or otherwise -- that have been inherent in the synthetic process of socialization and that were not incorporated in the value structure of a decision-maker, for instance, in any such disjointed, compartmentalized fashion. Is one to believe, for example, that moral considerations, whether explicit or implicit, were not central in the minds of the men who framed the Charter ? Did they dichotomize law and morality when distilling Article 2(4) ? Indeed, as Abram Chayes has aptly pointed out, "legal norm and moral precept are two expressions of the same deep human imperative."[16]

2. Foreign policy tool

Law may also constitute an effective tool of foreign policy and thus contribute to the incorporation of legal norms and rules in the conduct of inter-state relations. It may serve this function in several ways and three are suggested here: a) protection of a position; b) enhancement of position; and c) mobilization of international support.[17]

From a strategic point of view generally foreign policy-makers address the dual question of advancing their state's interests as well as preventing other international actors (for example, states,

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[15] The Merriam-Webster Thesaurus, 1980 ed., s.v. "analysis."

[16] P. 40.

[17] Stanley Hoffmann, "Introduction," in Scheinman and Wilkinson, pp. xiii-xiv.

international institutions, non-governmental organizations, terrorist groups) from impinging upon those interests. Thus strategy may be seen to include two aspects: "an offensive component -- the design for making gains -- and a defensive component -- the design for preventing losses."[18] Accordingly, international law, far from being the rigid code of rules detached from power processes that is described by some, can be used effectively by policy-makers for the pursuit of strategic (or even tactical) objectives for the legitimate protection or enhancement of their state's position.

Further, policy-makers may wish or need to buttress their state's position by mobilizing international support for their cause or given policy. That position will be articulated within the normative, substantive and procedural framework of international law. Thus they may draw the focal attention of "world opinion" to their situation, and if it is more or less legitimately founded, they may well be able to secure a measure of international backing. Doubtless, this process may be very valuable indeed for the smaller, less influential states.

It will be noticed that these processes raise the question of what constitutes "legitimate" behavior or policy aims, and of "who" is to assess them -- in other words, whether law can be used to legitimize violative policy. This question is discussed below, in connection with the "justification" role of

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[18] John P. Lovell, Foreign Policy in Perspective: Strategy, Adaptation, Decision Making (Hinsdale, Illinois: Dryden Press, 1970), pp. 66-67.

international law.

In the Suez crisis Egypt was able to defend its position by preserving control of both Company and Canal, in spite of several strongly opposing pressures. From the examination of its legal position and arguments above, it will be recalled that it made skilful and extensive use of the law and it will be remembered also that its right to nationalize the Company under international law was not questioned in any quarters, including the United Kingdom and France. Through the law of the Charter Nasser also could further defend Egypt's position by denouncing several Anglo-French actions, such as blocking funds, withholding tolls, mobilizing armed forces and withdrawing pilots and not least, of course, any intention to resort to force.[19]

From the point of view of his offensive (as opposed to defensive) strategic aims he succeeded in enhancing his and Egypt's position both politically and economically. While the legality of the nationalization, taking into account all the attendant circumstances, may still be open to question, it is nevertheless apparent that legal considerations contributed at least to keeping Egyptian policy within certain guidelines. Again, this moderating effect of the law must be assessed in the light of the powerful political and economic (among others) considerations that shaped Egyptian policy aims. Nasser also made good use of Egypt's legal arguments to mobilize world

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[19]Bowie, p. 100.

opinion and especially vis-à-vis an attentively listening Third World. This function was maximized in the face of the allied resort to force.

The United Kingdom and France, on the other hand, could not hope to achieve their objectives in conformity with the law. They chose to violate the law, and then sought to justify and to legitimize their action but, in spite of the elaborate legal arguments advanced, they were unable to establish an acceptable legal case. Israel, similarly, was at pains to establish a satisfactory legal case for its action.

In the Cuban crisis the United States also sought to protect, by resort to legal means (viz. norms, processes, institutions), what it perceived to be a threatened status quo; through these means it also succeeded in mobilizing a substantial measure of international support. On the significance of these processes, Dean Acheson said:

> The importance of the Organization of American States was also procedural, and emphasized the desirability of collective action, thus creating a common denominator of action. Some of these desirable consequences are familiar to us in the domestic industrial area.[20]

3. Justification

In foreign policy law may also play a role as justification for action or inaction. To visualize this role as the mere "wrapping ... [of] policies in the mantle of legal rectitude"[21] is to miss the point

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[20] "Remarks," p. 14.

[21] William P. Gerberding, "International Law and the Cuban Missile Crisis," in Scheinman and Wilkinson, p. 176.

and to reveal a regrettably typical unfamiliarity with the dynamics and functions of law in the international community. The justification function of law operates in at least three ways,[22] regardless of whether policy-makers pursue it bona or mala fide. First, and indirectly, the expectation in the international community of a statement, explanation and justification of the given policy of another state creates a strong stimulus to justify action or inaction, and as Henkin has noted, the "need to justify, surely, helps keep governments from actions that cannot be justified."[23] Second, and indirectly, failure to justify warrants, elicits, legitimizes and focuses condemnation or disapproval on the defaulting state. Third, and directly, justification provides a check, a process whereby the international community is able to assess the legality of action through the sift of the fairly objective and recognized corpus of international legal norms and rules. The mesh of the sift, it may be argued, is far too broad and nearly any action, even though violative, may be so skilfully dressed up in pious legal rhetoric that it will pass the test. In fact, this is not brought out by several international events or by the case studies examined here.

John Norton Moore, for example, has noted that the invasion of Czechoslovakia by the Soviet Union,

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[22]For an excellent treatment of this role of the law, see Chayes, chapter four, and Henkin, Nations, pp. 5, 40, 223-36; see also Hans A. Linde, "Comment," in Thomas Ehrlich, Cyprus 1958-1967. International Crises and the Role of Law (London: Oxford University Press, 1974), p. 144.

[23]"Comment," in Chayes, p. 150.

> though a paradigm of unsanctioned action in the traditional sense, was achieved only at a real and perhaps intolerably high cost to Soviet leadership in the communist and third-world nations. The cost was not merely attributable to immediate self-interest or moral revulsion but was in significant measure a product of violation of fundamental community expectations concerning the authoritiveness of such unilateral acts.[24]

Indeed, the so-called "Brezhnev Doctrine"[25] has not been accepted as legitimate. On disapproval by default, Abram Chayes has pointed out that the failure on the part of the United States "to issue a legal opinion at the time of the Cambodian invasion in May 1970 became a significant ground of attack on the propriety of that action."[26] In the Suez case, as it was shown earlier, the United Kingdom, France and Israel all presented fairly sophisticated arguments to justify their policies, and yet they were unsuccessful in twisting the law to justify their actions. In the Cuban crisis the justification function served useful and important purposes, which have been brilliantly discussed elsewhere.[27] Nevertheless, the following quotation from Sorensen is worth noting; he reports that Llewellyn Thompson, American Adviser on Russian Affairs and member of the Ex-Comm,

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[24] P. 18.

[25] For a statement of which by Pravda see "Sovereignty and International Duties of Socialist Countries," New York Times, September 27, 1968, p. 27, col. 1.

[26] P. 42.

[27] See n. 22, supra.

> had emphasized the fundamental importance of obtaining OAS endorsement of the quarantine ... Thompson's interest was the added legal justification such endorsement would give to the quarantine under international and maritime law as well as the U.N. Charter. That was important, he said, not only to our maritime allies but to legalistic-minded decision-makers in the Kremlin.[28]

B. Law as International Organization

1. Institutional forces

Law plays also a very important role in the management of conflict issues, in numerous ways, in the form of international organization. Undoubtedly law is part of the very essence of international organizations, and is enmeshed in the very processes and outputs that make those bodies politically relevant and consequential international entities. Law is an inherent part of thoses institutional forces. As Chayes has noted, "[i]nternational organizations are at once product and source of international law. They are created by agreement among the members, and agreement among states is the most widely acknowledged and unchallengeable basis of international law."[29] To be sure, this does not only mean that they are law-making entities, but also that they have legitimizing powers -- the significance of which would be apparent to any second-year student of political science or European law. The outputs (e.g. recommendations) of their processes, crystallized in legal terms and often espousing the norms provided by the law, often emerge from political battles and have force because they

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[28] P. 706.

[29] P. 69.

mirror a political consensus.

2. Institutional framework

As part of international organization, law provides a valuable institutional framework. In this role law provides an outlet where states may channel conflict, a formal setting where they may be able to air their grievances vis-à-vis another state, and a regulated and fairly sophisticated set of structures where states may seek to negotiate a consensus.

3. Law institutionalized

The functioning of international organizations also shows that law is institutionalized. An international organization may not only crystallize and legitimize consensual values authoritatively, but it may also, in propitious circumstances, allocate them. Law contributes to this process. While foreign policy outputs may be largely politically determined, usually they are articulated via legal norms and procedures, in a forum wherein they are processed by utilizing legal concepts and procedures, and are channelled and accomodated within the given organization's terms of a) jursidiction (e.g. the General Assembly and its role in the creation of U.N.E.F.; the regional jurisdiction of the O.A.S. under the Rio Treaty and the United Nations Charter); b) structure (e.g. the effective alternative of the General Assembly to a deadlocked Security Council, made possible by the Uniting for Peace Resolution), and c) potential for action (e.g. the role of the Secretary General in the Suez crisis; the creation and development of U.N.E.F.)[30]

4. Forum

International organizations may be a forum per se. Thus aside from performing various politico-legal functions, an international organization may be a means for states to internationalize an issue and to attract the critical eye of "world opinion." As such, it can prove to be an effective way of mobilizing other governments and the public at-large.

5. Legal actor

International organizations may also be legal actors in their own right. As such they have "some power to create legal relations and alter the legal setting."[31] This may operate in three ways: from the point of view of policy-makers they are a force (if potentially so) to be contended with, and to be included in the constellation of forces in the international system. From the point of view of the development of international law, being also a source of law, they have an impact on the international politico-legal system and affect state behavior in this way. From the systemic perspective, they are actors which have the potential of affecting the system with more autonomy than might be assumed (see, among other possible examples, the role of the United Nations in the Congo, 1960-1965.)[32]

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[30]Hans A. Linde has pointed out that "the law of the organization inescapably frames the terms of debate over the forum's jurisdiction, over its internal procedures, over its potential for action." (p. 144.)

[31]Chayes, p. 104.

[32]See, for example, Georges Abi-Saab, The United Nations Operation in the Congo 1960-64. International Crises and the Role of Law (Oxford: Oxford University Press, 1978.)

Although no extensive attempt is made here systematically to retrieve from the case studies the many instances where the various roles of international law are seen to occur, a few illustrative examples come to mind. In the Suez case, the need for legal control and international organization was manifest, for example, in the many proposals to establish an international agency. The Tripartite Talks, the London Conference and the S.C.U.A. scheme all were diplomatic efforts that relied upon law, that sought to reach an agreement that would be made operational and institutional under the aegis of an international body governed by law. As Henkin has indicated,

> in the conduct of foreign policy, law and diplomacy are not alternatives, either in purpose or in means. Diplomacy is "flexible," but its purpose is often to achieve "inflexibility," i.e. stability, credibility, confidence. And the law (e.g. international agreement) is one of diplomacy's most important instruments.[33]

A foremost illustration of several of the roles of law-as-international-organization (legitimizing processes, "institutional framework," "law institutionalized," "forum," and "legal actor") is provided by the genesis, development, definition of mandate and of legal status, and implementation of the United Nations Emergency Force. Indeed, it would be exceedingly difficult to visualize the evolution and management of U.N.E.F. in the absence of international law (viz. norms, processes, institutions.)

A cursory glance at the Egyptian Declaration of 24 April, 1957,[34] which set out the terms of

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[33] Nations, p. 258.

[34] See p.39, supra.

administration and operation of the Canal, will readily reveal acceptance and use of international law: Egypt asserted its intention to abide by the terms and spirit of an international agreement and changes in the status quo of the Canal or violations would be dealt with by agreement or by reference to an international arbitral tribunal. Significantly, Egypt further accepted compulsory jurisdiction of the International Court of Justice under Article 36 of its statute, for the purposes of referring disputes over the meaning of the 1888 Convention.

Many of the roles of law-as-international-organization that were outlined above also can be seen to have been influential in the Cuban crisis. For example, the O.A.S. resolution, the output of a legal structure and of politico-legal processes, enjoyed the legitimacy and consequence of a wide political consensus, of a mandate:

> We [the United States] were able to establish a firm legal foundation for our action under the O.A.S. Charter, and our position around the world was greatly strengthened when the Organization of American States unanimously supported the recommendation for a quarantine. Thus the Soviet Union and Cuba faced the united action of the whole Western Hemisphere[35] ....
>
> It was the vote of the Organization of American States that gave a legal basis for the quarantine.... It had a major psychological and practical effect on the Russians and changed our position from that of an outlaw acting in violation of international law into a country acting in accordance with twenty allies legally protecting their position.[36]

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[35] Kennedy, p. 54.

[36] Ibid., p. 119.

In its function as a forum, the United Nations provided a "world stage" both legitimate and highly visible. The issues and the available photographic evidence pertaining to the Cuban crisis were dramatically brought to the public eye and effectively internationalized. The tense exchange between Stevenson and Zorin at the Security Council is an example:

> [Stevenson] Do you Ambassador Zorin, deny that the USSR has placed and is placing medium and intermediate-range missiles and sites in Cuba ? Yes or no ? Do not wait for the interpretation. Yes or no ?
>
> [Zorin] I am not in an American court of law, and therefore do not wish to answer a question put to me in the manner of a prosecuting counsel. You will receive the answer in due course in my capacity as representative of the Soviet Union.
>
> [Stevenson] You are in the courtroom of world opinion right now, and you can answer "Yes" or "No". You have denied that they exist -- and I want to know whether I have understood you correctly.
>
> [Zorin] Please continue your statement, Mr. Stevenson. You will receive the answer in due course.
>
> [Stevenson] I am prepared to wait until Hell freezes over, if that is your decision. I am also prepared to present the [photographic] evidence in this room.... If you will indulge me for a moment, we will set up an easel here in the back of the room where I hope it will be visible to everyone.[37]

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[37] U.N. SCOR, 17th Year, 1025th Meeting, pp. 11-12.

C. Law as a Framework of Procedure and Expectations

1. Communication

Law may serve as a means of communication in at least three ways. It may provide a "language"[38] per se, that helps states communicate to other international actors (be they states, institutions, non-governmental organizations or other non-state actors) attitudes, beliefs, positions, intentions, norms, procedures, approval, disapproval or dissatisfaction through a more precise, legitimate, common medium. It may also be an "institutional device for communicating to the policy-makers of various states a consensus on the nature of the international system."[39] Further, it may provide a framework of reference of more or less consensual, legitimate norms by which state behavior can be assessed relatively objectively. The Charter of the United Nations is a prime example of the latter two roles. As Oscar Schachter has pointed out,

> in most cases affecting peace and security or questions of colonialism or acute matters of human rights, charges will be made by the complaining states that Charter obligations have been violated. The evident reason for this is that the behavior of a state cannot easily be challenged on the grounds of "policy." For, unless it can be shown that a course of conduct involves a departure from legal obligations, the matter will normally be regarded as within the discretion of the state or, in Charter language, within the "sovereign" rights or domestic jurisdiction.[40]

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[38] Roger Fisher, Basic Negotiating Strategy: International Conflict for Beginners (London: Allen Lane The Penguin Press, 1971), p. 139.

2. Predictability

In conjunction with its "communication" role, law may also provide a certain common ground of predictability. Thus states, by formulating their policies in the light of, and acting within, an international system of more or less shared expectations, claims and procedures, may be in a position to expect the responses of other states to fall within a range of predictability. The author will hasten to add, however, that this role (which is in fact one of the most basic and central to a smoothly-working international legal system) remains relatively weak as an effective feature of the international legal system today or as a reliable tool of foreign policy for conflict issues.

In fact, it seems to the writer that the principal failure of international law at Suez lay precisely in this realm. Notwithstanding the other several determinants, as suggested in chapter four, that may have contributed to the Anglo-French decision to resort to force, it is here submitted that if Anglo-French policy-makers had perceived the future post-nationalization policy of Egypt to fall within the lawful range of predictability, they may well have refrained from the use of force. In other words, if the United Kingdom and France had been reasonably confident that, for example, freedom of navigation through the Canal would not have been jeopardized in

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[39] William D. Coplin, "International Law and Assumptions About the State System," World Politics, 17 (1964-65), 617.

[40] Oscar Schachter, "The Quasi-Judicial Rôle of the Security Council and the General Assembly," AJIL, 58 (1964), 962.

the future, that Nasser would have observed the law, they might have acted differently. This view, however, must be tempered by the very strong politico-economic and idiosyncratic forces that were rather clearly at play in the considerations and perceptions of policy-makers both in the United Kingdom and France. Similarly weighty considerations, it has been shown, influenced Israel (though for other reasons and with different objectives.) It seems highly unlikely, however, that Israel would have attacked without at least the support of France.

Needless to say, this is not to suggest that the law did not play a substantial role at Suez, or that it failed irredeemably. While the "predictability" facet of the role of law in conflict issues remains weak overall, as it has been shown above international law effectively and successively affected the course of events in the Suez and Cuban crises in many ways -- even in the face of very strong opposing political dynamics. However, not infrequently one hears the following sort of myopic, syllogistic formulation to assess the role of law:

1. Law proscribes the use of force;
2. force was used in situation "X;"
3. therefore, law failed.

Although this simple formulation may appear overdrawn, it is the essence of the sort of thinking that is source of misunderstanding of the role of law in international conflict.

Abram Chayes has wittily and appropriately portrayed the stereotype of the role of law in policy-making that seems to be envisaged by all too many observers, pointing out that in the Cuban Missile

crisis law operated as a constraint indirectly,

> and not directly in the sense that the President, or anyone else, turned to his lawyer and said, 'I am disposed to do thus-and-so, which I think to be in the best interests of the country, but if you tell me it would be illegal, I won't do it.'[41]

3. Instruments

In providing various instruments, international law plays one of its most ancient roles and fulfils one of the most fundamental needs for the orderly conduct of inter-state relations. The international agreement, for example, and the inherent principle of pacta sunt servanda, make the "art of the possible" in fact, the art of the viable. As Henkin has noted,

> [t]his principle makes international relations possible. The mass of a nation's foreign relations involve innumerable agreements of different degrees of formality.... The diplomat hardly thinks of these arrangements and understandings as involving law. He does assume that, if agreement is reached, it will probably be observed; if he did not, he would not bother to seek agreement.[42]

Further, international law provides many and differentiated international institutions, claims commissions, courts, arbitral tribunals, mediators, conciliators -- all entities that have contributed to the more effective prevention, management and resolution of international and intranational conflict.

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[41] P. 35.

[42] Nations, p. 20.

Some Concluding Notes

This paper has sought to explore some of the roles that law may play in international political crises. Two case studies were considered. The analysis focused on two aspects: the legal arguments and the context of forces within which the crises occurred and were managed. Against that background, an assessment of the role of law was attempted and several roles have been suggested.

This study has considered eleven different ways in which law may "make a difference" in conflict issues. Several other roles could be explored, including its valuable functions at the pre-conflict and post-conflict stages. Clearly, not all of these roles are at present either equally or fully developed in the international community. Some, perhaps, may be inherently more valuable than others in conflict issues. It may also be the case that, perhaps, there exists a correlation between the type of crisis (according to, for example, level of threat, level of awareness, decision time)[43] and certain roles of international law, bringing to bear on the susceptibility of the former to the effective function of the latter.

It is always difficult comfortably to speak of "conclusions," particularly in the social sciences. That feeling is all the more justified in the case of an enquiry of great limitations of size and scope, such as the present one. Nevertheless, a few

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[43]See, for example, Charles F. Hermann, "International Crisis as a Situational Variable," in

considerations may be in order.

First, it has been shown that in the case studies the States concerned went to great lengths to articulate their policies within the common framework of the law. The examination has observed that relatively elaborate, sophisticated and differentiated legal arguments were evolved and advanced through the various stages of a given crisis. On the other hand -- and it is essential to bear in mind this aspect when assessing the role played by law -- the examination also has observed that the crises evolved in (and to a certain extent, because of) a context of intense political, economic, historical, idiosyncratic and other forces. It is imperative that any assessment of the role played by law take into account these dynamics. This is not because in the context of such overwhelming forces the role of law automatically should be expected to be insignificant (which, it has been shown, is not the case), but because the fuller understanding of, and the formation of expectations pertaining to, the nature and extent of its role should be nurtured within the realities of that context. The "existence" of international law cannot, and should not be expected to, wish those dynamics away.

To isolate those dynamics, first, to attempt to understand them, second, and to come to terms with their influence, third, is a necessary process in order to form expectations of the role of law that are neither unrealistic nor downgraded. Having taken that course,

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Rosenau, pp. 409-21.

the analyst will have transcended the primitive, static view of international law as a set of commands, as a "frozen cake of doctrine isolated from power processes" which policy-makers can disregard, and will have moved to a view of international law as one more "reality" with which policy-makers must contend.

But even that view is short-sighted. It seems to the author that it is very misleading to think of international law exclusively as one more of several alternatives which a policy-maker has to consider. (However, even at that level, it has been shown, it is more accurate to think in terms of a spectrum of compliance and violation than to think in black-and-white terms.) Law not only is one "consideration" which policy-makers recognize from among many other politico-economic considerations and which they, sooner or later, may have to take into account, but is also a force in its own right. Thus law may be not only one of several important elements in policy-making processes, but also may be a force per se (for example as international organization, or as a sociological force), often outwith the realm of direct and complete influence of policy-makers.

What is essential, in the author's view, is that a fuller understanding of the potentialities of law in conflict issues, and of the avenues through which these may be realized, calls for a conception of law sufficiently broad to enable the analyst to transcend erroneously static and narrow views, and to appreciate that the relevance of those patterns of authority and control lies well beyond any set of international thou-shalt-not's.

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