

The Case for National Control

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I have been asked to suggest for the purposes of this discussion some of the considerations which favor national control of the Suez Canal. Despite Mr. Laylin's eloquent presentation of the opposing point of view, there are two sides to the question. Both deserve to be taken into account in any analysis of an admittedly difficult and delicate situation.

At the outset let me define what I mean by "national control" in this context. By that term I mean effective control and jurisdiction over the Canal and its operation by a single state—the United Arab Republic, or, as it is easier to call it for present purposes, Egypt. Let me make two points clear about this definition. First, national control in this sense has nothing to do with governmental versus private ownership or operation. That question, involving among other things the nationalization of the Suez Canal Company a decade ago, is a different problem from the one we are discussing today. Second, the existence of national control in this sense does not mean that Egypt is free from international obligations relating to the Canal. I shall come back to this point later.

In examining the case for national control, let us note first some of the positive factors favoring *national* control and then some of the difficulties attaching to *international* control. Perhaps thereby we can arrive at an assessment of whether international control really is a satisfactory and practical answer to this problem.

In the first place, the Suez Canal legally is entirely within Egyptian territory. No international instrument relating to the Canal casts any doubt on this. This is not the situation of an international river or of many international straits, where there may be several riparian states. The basic rule of international law is that a place or an activity within a state is subject to the sovereignty, the national control, of that state. This is elementary. But in a world still organized primarily on the basis of nation states, the rule is of fundamental importance. Derogations from territorial sovereignty are exceptional in a world so organized, for they cut across the normal patterns of state responsibility. Being anomalous, they are not readily created and tend to be difficult to maintain. Certainly the burden

of justifying any departure from the norm of national control must rest on those who seek it.

National control of the Canal is thus in accord with the normal rule of law. It is also in accord with psychological and practical realities. Psychologically, in any country, resentment tends to arise when foreign control is imposed on functions which are normally within the province of the territorial sovereign. This is true no matter how admirable or disinterested the motives for such control may be. I need only mention the difficulties over American bases abroad or with Panama over the Canal Zone there. And I think it is fair to say that this is particularly true of Egypt, which has had a long history of subjection to external controls over its finances, its judiciary, its defense, and other aspects of its national life. Conversely, national pride in an operation under national control can be a spur to good performance. Most people will concede, I think, that the actual operation of the Suez Canal during the past 10 years by the Egyptian authorities not only surpassed all expectations in its technical competence but also superior in many respects to that of the old Canal Company.

On the practical side, the establishment of a canal regime not subject to the territorial sovereign means a division of authority and responsibility. Friction, evasion, non-cooperation are the likely products of such a situation. All add up to loss of efficiency. Any textbook on management will document this point. It needs no elaboration except to note that the technical difficulties become compounded by the political and emotional factors. The practical problems of reconciling conflicts of jurisdiction are bad enough: when these frictions are exacerbated by the feelings of resentment I have mentioned, the situation soon becomes not only unworkable but potentially explosive. Hence I suggest that undivided authority over the canal area and the canal operation is essential in principle to its efficient and orderly management on a permanent basis; and that as a practical matter, in the context of all the circumstances, there is in the Suez situation no adequate substitute in the long run for the territorial sovereign as the holder of this authority.

Let us now turn to look more closely at an international regime for the Canal. Is it the panacea which it is sometimes said to be for the problems which undoubtedly exist? Is it a practical answer for even some of them?

We should note at the outset that it is possible to conceive of

several different types of international regime, ranging from mere advice or oversight by an international body, through agencies with some powers of control, up to a complete operating organization with quasi-governmental authority. In order to focus the discussion, I propose to talk in terms of the latter—of an international agency charged with the conduct of the entire Canal enterprise. This, as I understand it, is substantially what Mr. Laylin suggests. I agree with him that no less complete form could hope to accomplish the objectives which the supporters of an international regime set as their goals.

An international regime, or perhaps better an international administration, for the Suez Canal would, it is said, assure technical efficiency in its operation, freedom of transit, equality of treatment, and—in that well-worn phrase—“insulation from politics.” The phrase is a catchy one; but it reminds me of Judge Manley Hudson’s warning, “Never coin a quotable phrase: it will come back to haunt you.” The Judge was himself a notable violator of his own precept.

As to the first of these points, I would think it obvious that there is nothing inherently more efficient about international organizations. They may or may not be. But certainly the obstacles of language, personnel, unclear lines of authority and responsibility, competing national interests within the group, and so on, are high hurdles to overcome. In this particular case, I doubt very much if an international agency would be, at the technical level, any more efficient in operating and improving the Canal than the Egyptian regime has been. Indeed, it would very likely be less so. This opinion is supported, I think, by the record of experience with international administration in the past. Such administrations in general have shown no striking competence, nor have they proved durable over any protracted period. Examples are the international city of Tangier; Danzig and the Saar under the League of Nations; the abortive Free City of Trieste created under the Italian peace treaty of 1947. The international river commissions of Europe have done useful work, but they have had very limited operating responsibilities. And their situation is different from Suez: there the interests of upper and lower riparian states have had to be reconciled, and limited international arrangements were reciprocally beneficial. Yet even in the river commissions the record has been one of chronic conflict.¹

¹ Baxter, *The Law of International Waterways*, pp. 96-106, 126-129 (1964). I am much indebted throughout to this able study. See also Brownlie, *Public International Law*, pp. 238-239 (1966).

Freedom of transit and equality of treatment are related matters and can be taken up together. As Professor Baxter has pointed out, freedom of transit has two aspects: a legal right to passage, and the physical capability of passage—*i.e.*, a waterway so constructed and operated as to make passage possible in fact. Both elements must exist to make freedom of transit a reality.² I have no doubt that under the Constantinople Convention of 1888,³ as recognized and reaffirmed in the Egyptian Declaration of 1957,⁴ there is a general international right to freedom of transit and equality of treatment in the Suez Canal. This right has not been denied or abridged save in exceptional circumstances: those arising in connection with the two World Wars (when Britain was the dominant power in the area)⁵ and those arising in connection with the Arab-Israeli hostilities of the last two decades. In these situations the Canal has in fact been denied to the shipping or cargoes of one or more states. The arguments as to the legality of these actions turn in large part on the weight to be given, in the circumstances of each case, to Article 10 of the 1888 Convention, which relates to measures for the defense of Egypt.

This controversy, I suggest, lies outside the scope of the present discussion. The point is that freedom of transit and equality of treatment have not been limited except in these instances by the territorial sovereign; and there is no reason to think that the result would have been any different had the Canal been under an international administration. It will be recalled that despite the international character which the old Canal Company used to claim for itself, freedom of transit was effectively abridged during its regime at the time of both World Wars. It is also illuminating to note that the old International Commission for the Turkish Straits, which had only certain supervisory duties, was abolished under the Montreux Convention of 1936 and its functions transferred to Turkey, the territorial sovereign.⁶ The conclusion seems inevitable that regardless of the form of regime for the Suez Canal, defense considerations must prevail, because the Canal by its very situation lies athwart Egypt's lines

² Baxter, *op. cit.*, p. 149.

³ 79 *British and Foreign State Papers*, pp. 18-22; English translation in U.S. Department of State, *The Suez Canal Problem*, pp. 16-20 (1956).

⁴ U.N. Document A/3576 (24 April 1957); 51 *American Journal of International Law* 673-675 (1957).

⁵ Wilson, *The Suez Canal*, pp. 138-143 (2d ed., 1939); Schonfield, *The Suez Canal in World Affairs*, pp. 69-74, 100-111 (1952).

⁶ Art. 24. 7 Hudson, *International Legislation*, p. 386.

of communication to its eastern territories, which it is indisputably entitled to defend if it can.

This brings us to the contention that an international regime for the Canal will furnish it with "insulation from politics." I submit that in relation to the Suez Canal this phrase is nonsense. It can no more be insulated from politics in any profound sense than any other facility or resource of world-wide importance: the world's oil, or wheat, or the Strait of Gibraltar, or the great oceans themselves. Even apart from the Canal, the isthmus of Suez is one of the world's great strategic foci, a point where tremendous competing interests of many kinds come face to face in a narrow compass. The proof is in the history. I do not see that any international regime that could conceivably be established under present conditions could insulate the Canal in any meaningful way from these forces once they are on the march.

On the contrary, I suggest that an international regime may well give rise to additional hazards. The conflict of interests within an international administration might further impair efficiency of operation. Problems over tolls, finances, and revenues might multiply. The loss of a profit motive could destroy incentives to improvement and enlargement. But of more concern, perhaps, than any of these could be the relationship of the international canal agency to the United Nations and to United Nations politics. The agency almost of necessity would have to be in some kind of formal relationship to the United Nations, whether as a "subsidiary organ" or "specialized agency" or even as a "trust territory" administration. The UN, as we know, is a highly political body. The political decisions, or lack of decisions, emanating from it might well affect the management policies of the international canal administration. Considering the present composition of the Security Council and particularly the General Assembly, with their occasional habit of adopting resolutions of questionable merit, who can say what pressures the canal regime might be subjected to? And in another direction, Americans and Panamanians might consider the possible repercussions on the Panama Canal of some United Nations action on canals in general.

In concluding this brief review of a large subject, let me recur for a moment to a point I mentioned at the beginning: national control does not mean the disregard of international obligations. With respect to the Suez Canal, these obligations exist, in my opinion, both under customary international law and as a result of conventional

undertakings binding on Egypt—specifically, in particular, the 1888 Convention and the 1957 Declaration. I agree in general with Professor Baxter that there is a body of international canal law applicable, *inter alia*, to Suez.⁷ This law requires, among other things, freedom of transit and equality of treatment, subject to overriding needs of national security. This means that Egypt has a duty to operate the Suez Canal in conformity with these obligations. The international community is correspondingly entitled to rely on such a canal. But this is all.⁸ From the international legal standpoint, the rights of the international community are the same whether the canal regime is national or international. International administration can give it nothing more. If this is the situation, there is no benefit to be derived from international control and no jurisdiction for its establishment.

My final comment relates specifically to the Arab-Israeli situation, for this is the crux of the immediate problem. Whether or not Egypt's obligations regarding the Canal comprehend Israel depends on the view taken of Egypt's security requirements, and the significance of Article 10 of the 1888 Convention. Yet this situation has had consequences for the Canal operation which have affected not only the parties directly concerned but also the neutral commerce of the world. The supporters of international control seek in all sincerity to prevent the continuance of the difficulties thus created. But for the reasons I have sought to suggest, it seems to me extremely doubtful whether an international regime can successfully resolve these difficulties in any permanent way. Indeed, I think it doubtful whether it is as promising an approach as national control subject to international obligations. The difficulties over the Canal are only one aspect of one of the most complex and bitter international situations of our time. To deal only with the Canal is to treat a symptom and not the cause. Let us not delude ourselves as to where the real problems are in that part of the world.

Questions and Answers

QUESTIONER:

I think there was a third position which both speakers left out and which does not recognize that Israel is now sitting on one bank

⁷ Baxter, *op. cit.*, pp. 340-341.

⁸ See Obieta, *International Status of the Suez Canal*, pp. 107-108 (1960); 1 O'Connell, *International Law*, pp. 641-642 (1965).

of the Suez Canal, and if Mr. Young believes that Israel will go back from that bank, I believe that he is referring to gunboat philosophy of international law which I believe has gone out a long time ago. There's another situation which both speakers seem to overlook. And that is the passageway between Denmark and Sweden, Malmo and Elsinor. Denmark and Sweden were once one country. They were separated, and what prevented the passageway between Denmark and Sweden? Just the fact that you could fire a cannon ball three miles, and nothing else. That was the control they had. Whether you agree to nationalization in the Suez Canal, or whether you agree to an international form of control, you must agree that every country in the world and every person in the world should have the right of passage on an equal basis. And there are other situations which have come up—I'm thinking now of, for example, the Truman Doctrine, which said that a country is entitled to half the land, half the land underneath the water from its coastline. 1946 Truman Doctrine. Yet right here on the islands of Hawaii, you have a situation where the air space between and among the islands is federal, the water space is partially federal and partially state. You have a barge company which goes among the islands regulated by the state and not the federal government, an airline which is regulated by the federal government; and I submit that any position that we adopt with regard to the Suez Canal or the Panama Canal will also affect all the waterways between and among the states. And I would like to know how both speakers can answer the question as to which country and which people shall have access, regardless of whether they are in peace or at war with each other? How this will be taken care of by the proposal has not been answered to my satisfaction.

MODERATOR:

Which one wants to comment first? Mr. Laylin?

LAYLIN:

I don't have an answer.

YOUNG:

I would only say that as long as the world is in its present state of organization, there is a recognized place in international law for national security interests, and this, of course, is what Egypt rests a large part of its case on. I don't know anything more I can say about this.

QUESTIONER:

Well, would you then stop Russian ships from traveling in the waterways here among the islands?

MODERATOR:

Mr. Laylin?

LAYLIN:

I think there is one point that is very closely related to this. Particularizing with Egypt, it's too bad that this point isn't applicable there. Norway and Denmark are shipping countries. They want to use the canal. So, it's in their own interest to treat others the way they want to be treated. Unfortunately, the Egyptians do not have a merchant marine that wants to go through Israeli waters. There are no pat answers to any of these questions.

MODERATOR:

Who else has questions?

MALCOLM WILKEY, NEW YORK:

As I gather from the discussion of the two participants, prior to any trouble arising in the navigation of the Suez Canal the net result of national or international control would be the same. And then during the trouble, such as the recent fighting, it would be equally impossible for navigation or utilization of the canal. So it seems to narrow down to which type of control would be most effective in preventing trouble arising, and then, which type of control would insure the restoration of normalcy after any trouble does arise. And I suggest that to evaluate it on that basis, we might look to see whether international control will prevent it or go some distance to help prevent this trouble arising, and now if we have an international body in control of the Suez Canal, would service be resumed more rapidly than it is being at the present time?

MODERATOR:

Any comment from Mr. Laylin?

LAYLIN:

Well, in reading about the recent conflict, I've been interested in one theory that Nasser was greatly embarrassed by the fact that U Thant drew the United Nations troops out of that strip. He had hoped that he could answer the goading from Syria by saying, "Well, I have told him to withdraw them, but I can't make them do it." Now, by the same token, I do think that international control does

make it more difficult for countries that are at odds with one another to have their own way. And that's one part which I think your excellent presentation did not cover, and that is, the very having of that power is an embarrassment to the person who has it.

MODERATOR:

Thank you. Any other comments on this question? Mr. Hynning?

HYNNING:

I would like to ask a question of Dick Young. He dismissed the idea of an autonomous, corporate body for reasons given by Professor Baxter, and I don't think he enumerated what these reasons were. I certainly see all kinds of difficulty in trying to operate an international canal or an international public authority of some kind under the direct supervision of the General Assembly—this vast proliferation of nation votes—unless we adopt Mr. Severeid's rule or some other self-denying ordinance. But, I do think, however, that we have a very conspicuous example of success, namely the World Bank, which doesn't pay too much heed to the General Assembly of the U.N.; as a matter of fact, some of you may know it is now engaged in a major legal controversy with the General Assembly over the effect of resolutions that are passed by these large majorities, affecting loans to South Africa and Portugal. The Bank doesn't pay too much attention to them. Mr. Baxter, I mean, Dick Young, I wish you would tell us why you are dismissing the analogy of the World Bank for this kind of international authority?

YOUNG:

I think perhaps I should make my understanding of Professor Baxter's ideas clearer. I'm not sure that I did, judging by your question. He dismissed in particular a form of organization which would have been a subsidiary organ of the General Assembly—something like the International Law Commission, or the commission on human rights.

HYNNING:

That was not John's . . .

YOUNG:

That was not his proposal. That proposal is a proposal for a specialized agency, which is what the World Bank is; and I agree that this is the most attractive form of international regime. I don't see, however, that an international Suez Canal Corporation would necessarily have the success that the World Bank has, though I have nothing

but admiration for the World Bank. I suppose that among a number of reasons, the most important is that the World Bank has something that everyone wants—money—and it doesn't have to live with a territorial sovereign, which has in a sense the ultimate say over the corpus of the corporation. So I am not at all sure that the analogy is a sound one. But I do agree that if we're going to have an international regime, that's the best kind to have.

HYNNING:

I would just like to point out that I think John used the word "autonomous" rather than "specialized agency." "Specialized agency" can include something like UNESCO or some other thing of that character, which is quite different in operation from the World Bank.

YOUNG:

They're all specialized agencies . . .

HYNNING:

Yes.

LAYLIN:

Dick's calling the World Bank a specialized agency hasn't impaired its autonomy.

HYNNING:

No, that's true. If, of course, its existence came into legal being before the U.N. did, and derives its authority from an independent charter. Well, I think if you refer to it as a specialized agency, you might not have the emphasis, at least to my mind, that you gave me in using the word "autonomous." I think it would be terrible to have this under the direct control of the General Assembly.

MODERATOR:

Question in the rear?

EDWARD FINCH, NEW YORK:

We've been talking international geopolitics here, really. Now let's assume for a moment that this international corporation, this autonomous, international corporation, could be a viable entity. Where does the world of geoeconomics come into it? Would it favor such an entity, or would it not? Would either of the speakers like to comment on the possible economic implications if a proposal such as this autonomous authority were further advanced and sought to be implemented through United Nations channels, or otherwise. The economic aspects.

MODERATOR:

Who wants to comment first? Mr. Laylin?

LAYLIN:

It's your proposal. I'm not quite certain that I understand what you mean by geoeconomics.

FINCH:

Well, the money from the canal—could it be used for an international police force, for example?

LAYLIN:

Oh, gracious! You mean, for other purposes?

FINCH:

No, to enforce peace in the area.

LAYLIN:

Oh, certainly. Yes, that would be part of this—policing.

FINCH:

And free passage?

LAYLIN:

When it came to protecting it from an on-site attack, and you would have to bring in troops from the outside. I wouldn't maintain an army there. And if you have a world-wide conflagration, whether it's national or international control, I agree entirely with Mr. Young. You can't guarantee anything against that. Returning to the question of Mr. Wilkey, the important point is, which is the more likely to induce the settlement that is essential if either national or international control is to work. My position is that international control itself can help to bring about a settlement of the other disputes. Now on the economics, I would assume that everybody would be in favor of making it possible for the trade routes to continue as they have in the past. And India can ship and import through the canal; and Italy can get its oil through the canal—Italy is the one that's suffering most, I understand, from the closing of the canal; it has to go way around Africa and then down the Mediterranean. So the geoeconomics would remain the same, if we understand the same thing by that word.

MODERATOR:

Somebody else over here has a question. All right, sir?

HARRY INMAN:

I would like to direct a question to either one of the gentlemen. Has there been any thought of another means of transporting the oil across this area, in other words, by pipeline?

LAYLIN:

Yes, the Israelis have announced that they have spent five or six million already, in establishing a line that will have its head, will start at the head of the Gulf of Aqaba, and then will discharge oil into the Mediterranean. And they think that that could be commercially competitive with the canal.

INMAN:

Would that be owned by Egypt?

LAYLIN:

Israel.

INMAN:

Oh, this is Israel.

LAYLIN:

Yes, this would be entirely Israeli territory. The territory that they had before the 5-day war. This assumes that the Aqaba Straits. . . .

MODERATOR:

This is a fascinating discussion. I'm wondering, though, if we're not going to have to bring it to a close pretty soon. Now you have another comment, sir?

QUESTIONER:

I have another question. Mr. Young, will you still maintain your position of national control if another power were able to obtain control of both sides of the canal? Other than Egypt or the United Arab Republic. Would you still be in favor of your position—I'm thinking now of possibly a great power unfriendly to the United States, such as Red China?

YOUNG:

Oh, I think the answer to that is that the legal principles in time of peace certainly are the same. Now what the policy decisions might be regarding adverse possession by an unfriendly power is something else again. That's not a legal question at all.

MODERATOR:

I hate to cut this off, but I know of our other engagements and responsibilities, and it's been a very interesting and fascinating discussion. I think we owe these three gentlemen a real hand.