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12 Dec. 56 - 25 Jan. 57

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Stavropoulos, C. A. (U.N. Legal Counsel)

- 1 letter
- 1 memo. ] to D.M.
- 1 letter to Perm. Represent. of Egypt to the U.N.

UNITED NATIONS  NATIONS UNIES

INTEROFFICE MEMORANDUM

TO: The Secretary-General

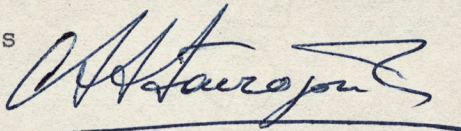
Date: 12 December 1956

FROM: C. A. Stavropoulos

FILE NO.: \_\_\_\_\_

SENDER'S TELEPHONE EXTENSION: \_\_\_\_\_

SUBJECT:



You asked me to examine whether the British had mined the Canal during the war. We found no report of any mining in the Canal by Allied Forces, although we suppose it is possible that some parts of the ports of access were mined apart from cleared channels in the normal course of defence. There is, however, no report on this aspect either.

On page 2 you will find an account of the action taken during the First and Second World Wars, which shows the difficulties of reconciling the terms of the Convention of 1888 with the facts of war. This is preceded by the relevant articles which can be summarized as follows:

Freedom of passage in times of war and in times of peace (Article I).

Right of Egypt to take measures which it might find necessary to take for securing the defence of Egypt and the maintenance of public order (Article X). But such measures should not interfere with the free use of the Canal (Article XI).

It is not surprising, therefore, that it is not always easy to reconcile, in time of war, practice with the letter of the foregoing articles.

DEFENSE RIGHTS IN RELATION TO THE SUEZ CANAL

The 1888 Convention

ARTICLE I

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

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

The Canal shall never be subjected to the exercise of the right of blockade.

ARTICLE IV

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

Vessels of war of belligerents shall not revictual or take in stores in the Canal and its ports of access, except in so far as may be strictly necessary. The transit of the aforesaid vessels through the Canal shall be effected with the least possible delay, in accordance with the Regulations in force, and without any other intermission than that resulting from the necessities of the service.

. . . . .

ARTICLE V

In time of war belligerent Powers shall not disembark nor embark within the Canal and its ports of access either troops, munitions, or materials of war. But in case of an accidental hindrance in the Canal, men may be embarked or disembarked at the ports of access by detachments not exceeding 1,000 men, with a corresponding amount of war material.

ARTICLE VII

The Powers shall not keep any vessel of war in the waters of the Canal (including Lake Timsah and the Bitter Lakes).

Nevertheless, they may station vessels of war in the ports of access of Port Said and Suez, the number of which shall not exceed two for each Power.

This right shall not be exercised by belligerents.

ARTICLE X

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

In case His Imperial Majesty the Sultan, or His Highness the Khedive, should find it necessary to avail themselves of the exceptions for which this Article provides, the Signatory Powers of the Declaration of London shall be notified thereof by the Imperial Ottoman Government.

It is likewise understood that the provisions of the four Articles aforesaid shall in no case occasion any obstacle to the measures which the Imperial Ottoman Government may think it necessary to take in order to insure by its own forces the defence of its other possessions situated on the eastern coast of the Red Sea.

ARTICLE XI

The measures which shall be taken in the cases provided for by Articles IX and X of the present Treaty shall not interfere with the free use of the Canal. In the same cases, the erection of permanent fortifications contrary to the provisions of Article VIII is prohibited.

Article VIII which is also referred to in Article X is the Article which empowers the agents in Egypt of the signatory powers to watch over the execution of the Convention.

The effect of the inter-relation of the preceding Articles of the 1888 Convention is a matter for interpretation.

ACTION TAKEN DURING THE FIRST AND SECOND WORLD WARS

According to Schonfield, the Suez Canal in World Affairs, the Egyptian Government by proclamation of August 5, 1914, ordered the Suez Canal cleared of enemy shipping. The purpose was to prevent vessels sinking themselves and blocking the Canal temporarily. Enemy vessels clung to the ports of access to the Canal in order to evade capture. They were given a free pass to leave but if they did not they were taken outside the three-mile limit to escape if they could. The Alexandria Prize Court held on September 30 that the Convention was not applicable to ships using the ports of access as neutral ports in which

to seclude themselves in order to defeat any right of capture. Schonfield says that the Allies exhibited a desire to operate the Convention so far as it was workable and no attempt was made to seize enemy shipping within the three-mile limit unless there was good reason to suspect the intention of some hostile act. Martial law was declared on November 2 and during the attack by Turkey on Egypt the Canal itself became the front line. On January 27, 1915, Maritime traffic through the Canal was suspended and the danger zone cleared. The Turkish attack did not develop before February 3. It was beaten off. From time to time thereafter Turkish detachments approached the Canal and at the end of June, 1915, one detachment planted a mine at the southern end of the Little Bitter Lake which was struck by the steamer Teresias. Shipping was only interrupted for half a day. The Canal was never in jeopardy for the rest of the war.

It should be remembered in relation to enemy shipping that rights of capture were presumably available outside the three-mile limit.

In the Second World War a state of siege was declared over the whole of the Canal area which nevertheless left the Canal Company in administrative control.

In August, 1940, an Italian air attack was made on Port Said and an attack on Suez at the end of September. German air attacks were made on and from January 30, 1941. These attacks consisted of dropping magnetic mines by parachute and a number of vessels were sunk in the Canal by this means. After the Greek campaign, mining appears to have been given up owing to the strength of the anti-aircraft defenses and the Canal terminal points harbor installations and convoys riding at anchor became the targets. Air attacks apparently continued on the Canal and the Canal Zone so long as Italy and Germany had the necessary air ascendancy.

There is no report in Schonfield of any allied mining of the Canal, although I suppose it is possible that some parts of the ports of access were mined apart from cleared channels in the normal course of defense. There is however no report on this aspect either.

Schonfield reports a rumor that if the Egyptian Delta were evacuated the Canal would be blocked by the British authorities. This seems to be a rumor which is not substantiated although the White House Papers of Harry Hopkins referred to it.

The American Journal of International Law in discussing practice during the two World Wars quotes from Schonfield.

An article by Hoskins in the American Journal of International Law for July 1943 has the following:

After November 5, 1914, all Egyptian Ports became belligerent ports and the British troops were stationed at strategic points on the Canal and the Channel was closed to nocturnal use by merchant vessels. There has been no general agreement among competent authorities as to the correctness of action taken by Great Britain or Egypt. The Convention was however given more than lip service.

In the Second World War all navigation through the Canal was taken over by the military authorities. Measures taken by the British authorities have served effectually, with the superior agent of the Canal Company, to maintain the Canal as an artery for commercial and naval vessels. The Canal has been bombed by Axis Forces and the present situation is not unlike that which developed during the First World War. It may be presumed that the British Government at the close of the present war will be able no less successfully than on the prior occasion to show that all measures taken during wartime have been in accordance with international conventions . . .

In the time available these are the only authorities which make any reference to the history of the acts taken in the Canal during the First and Second World Wars. Authorities other than these have been consulted but they deal only with a description of the legal aspects of the Canal regime.

UNITED NATIONS  EMERGENCY FORCE

File No. ....

25 January 1957

*My dear Secretary General,*

Before the American Ambassador left for the States he had a long talk with Nasser during which Nasser told him that if the discussions were direct between you and him, two days would be enough to arrive at results, while with Fawzy it would need a month's time. Yesterday, at Eng's, I met the Permanent Under-Secretary, Aziz. He said to me - although begging me never to use his name - that he felt that Fawzy and the President have become slightly out of touch, with the effect that Nasser knows very little about the exact atmosphere in New York and Fawzy knows even less about the exact atmosphere here. He told me that if we really want something to happen, Fawzy should return for a week here, or, better, you should come for one or two days. He even went so far as to suggest that if neither of the two can happen you should order me back to New York and I should return after two or three days to establish a direct link. I told him that I would inform you about that and he agreed on the condition that his name should not be quoted in any way. Personally, I believe that if things come to a head it will be necessary that you come here for a day or two.

I also had a long talk with the Indian Ambassador who, as you know, is very near to Nasser, both in his official capacity and individually.

The Secretary-General  
United Nations  
New York, N. Y.

He saw Nasser on Wednesday, that is, two days ago. Among other things they discussed the UNEF Agreement. Nasser asked him about Jurisdiction and the Indian Ambassador put it very strongly that the forces should be given full jurisdiction as they had in Korea. Nasser told him that he disagreed with a few words in the Agreement which seemed to put UNEF in a dominant position. The Indian Ambassador strongly suggested that this matter should be settled quickly. What is important is that at no time has Nasser connected the Agreement with the Israeli withdrawal and did not say that he was considering postponing the matter. This is peculiar because the information I gave you in yesterday's cable No. UNEFCA 26 came direct from Sabry through Reddy. He stated that the Deputy Foreign Minister was to call me and announce the postponement and that you had already or are about to be informed direct of that. The fact that the Deputy Foreign Minister has not yet called me may well mean that there is some controversy among the higher quarters as to the line to take. The Indian Ambassador considers it inconceivable that the Agreement should not be signed at this stage and he agrees with my argument that Egypt's position would be better in the eyes of the General Assembly if they signed the Agreement.

Regarding Aqaba. A few days ago I was asked by the Legal Adviser, Moussa, on behalf, as he said, of the Deputy Foreign Minister, Aziz, what the solution should be. I suggested that if they wanted a way out the best way would have been to allow the General Assembly to ask the International Court

of Justice for an advisory opinion and state that they would abide by the Court's opinion. I told him that in my opinion they would lose but that still that was the reasonable way for them to get out of trouble. He seemed to agree with me. Yesterday the Indian Ambassador told me that he made a similar suggestion to Nasser. He did not suggest an advisory opinion but he suggested that Egypt itself should submit the case to the Court. He said that Nasser said neither yes or no, but he was very receptive and that he seemed to like the idea. Mind you, the best and quickest way in my mind (it may take no more than six to eight months) is the advisory opinion. Such a request might or might not involve also the Suez Canal. The proposal might come from any Member of the United Nations but it should not come from the West; it should come either from Egypt, or from the Secretary-General with Egypt's approval, or from friendly delegations to Egypt. I would imagine that if Egypt were to agree they would do so with the proviso that in the meanwhile they would continue their policy of preventing Israeli shipping from reaching Elath. Incidentally, I also saw Gallad last night. He is the editor of one of the main newspapers here and is also supposed to be one of Nasser's friends. He said to me that Nasser has a terrible headache regarding the clearance of the Suez Canal. He can never stop it without hurting badly the Saudi Arabian King and the Saudi Arabian King would never allow such a thing to happen.

I hope that the above may be of interest to you. Please let me know whether you want anything else.

Looking forward to seeing you.

*Yours very sincerely*  
*Ch. H. G. G.*

C O P Y

12 December 1956

Sir,

You will recall that last Saturday we discussed the question of the tax exemption and other immunities to be applied to those engaged in the Suez Canal clearance operation. Having in mind your general agreement, I intend to propose in Cairo that there be included in the letter of the Secretary-General, at the end of the fourth paragraph, the following sentence:

"The property and persons engaged in the clearance operation (including the contractors, sub-contractors and their personnel) would, in view of their United Nations character, be covered by the Convention on Privileges and Immunities of the United Nations to which Egypt is a party."

I should appreciate it if you would also inform your Ministry in Cairo of this proposed addition.

Accept, Sir, the assurances of my highest consideration.

Constantin A. Stavropoulos  
Legal Counsel

The Permanent Representative of Egypt  
to the United Nations,  
900 Park Avenue,  
New York 21, N.Y.

UNITED NATIONS  NATIONS UNIES

INTEROFFICE MEMORANDUM

TO: The Secretary-General

Date: 7 December 1956

THROUGH:

FILE NO.: \_\_\_\_\_

FROM: The Legal Counsel

SUBJECT: Canal Clearance Agreement with Egypt

1. Attached you will find a copy of the draft letter to Egypt on arrangements for the clearance of the Suez Canal which you requested.

2. There is one question relating to the conclusion of this Agreement which I wish to call to your attention. Paragraph 2 of the draft letter states that you are acting "in accordance with the authority which has been granted to the Secretary-General by the General Assembly." There is, however, some ambiguity as to the extent of the authority already granted. The General Assembly in paragraph 3 of A/RES/411 authorized "the Secretary-General to proceed with . . . the negotiation of agreements so that the clearing operations may be speedily and effectively undertaken." (Underlining added). Moreover, in your report on arrangements for clearing the Suez Canal (A/3376) you state:

"At the present stage the Secretary-General is not prepared to indicate how the costs should be shared. He intends to revert to this question when the approximate costs have been estimated. He will at the proper stage of the negotiations request the necessary authority to conclude agreements concerning the operation."

3. It is therefore possible that a question might be raised whether the authority already granted was limited strictly to "negotiation" proper and did not extend to actual conclusion of the agreement. My own view is that the General Assembly did intend to give you sufficient authority to conclude the agreement with Egypt although it used the term "negotiation" rather than "conclusion". We arrived at a similar decision with respect to the agreement with Korea on the United Nations Memorial Cemetery in a situation in which the Assembly also used the word "negotiation." (Resolution 977(X)). I believe that the paragraph quoted from your report did not in context relate to the agreement with Egypt, but rather to financial agreements.

4. The foregoing represents my opinion based on the legal aspects. I believe that you are yourself in the best position to decide, from the political point of view, whether delegations might reach an opposite conclusion, and, therefore, whether you should request specific authority before signing the agreement.