THE ARAB CASE IN THE ARAB-ISRAELI CONFLICT OVER THE JORDAN WATERS

By

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INTRODUCTION

One of the most serious problems facing the Arab world to-day is the current conflict over the water of the Jordan river. Should we ignore the political aspects, we would be confronted with a very common situation: two parties, i.e. Israel and some Arab countries, are fighting over certain water rights, which, because of the relative aridity of the country, they consider vital to their existence. Water has often been, especially over the past century, a source of conflict and the subject of bitter controversies. One needs only to examine the various cases which were dealt with by international courts or by certain American federal courts to be convinced of it. In most cases, however, an equitable solution was arrived at.

The case before us presents certain original features : Overshadowing the multiple technical difficulties, lie the deep rooted political antagonisms and the crux of it all - a systematic refusal by the Arab states to recognise Israel's existence.

This is therefore, a purely theoretical study starting with several hypotheses. In the first place, we have had to assume for the sake of discussion that the state of Israel exists legally in the eyes of the Arabs, as it would be entirely impossible to apply international law to a non-existent entity.

Secondly, we have had to admit hypothetically that a state of war does not exist between Israel and the Arab countries, otherwise, only the laws of war would have been applicable between the two parties and not the international laws of peace which incorporate the laws pertaining to rivers.

Thirdly, we have not questioned the legality of the partition plan, but have based this study on the present frontiers as deliminated by the 1949 Armistice Agreements concluded between Israel and the various Arab countries.

It may therefore, be stated that the essence of this thesis, considering all the forementioned factors, aims at the examination of the principles which in general govern the apportionment of water between two contending parties as well as presenting the case for the utilization of the waters of the river Jordan as seen through Arab eyes and as affecting the rights of Arab regions contiguous to this river, as opposed to the arbitrary steps taken by Israel to usurp the use of such waters contrary to Arab basic rights and interests.

The main body of this paper consists of four chapters:

Chapter I deals with a geographical description of the Jordan river as well as with the problem of setting the present temporary frontiers.

Chapter II deals with the legal background to the conflict over the water of this river. Here an attempt is made to show how Israel's policy of mass immigration and land settlement has been incompatible with the limited capacities of the country. In the latter section, and always under this same chapter, a description of the steps taken by the United Nations to find a solution to the thorny problems of demarcation lines and armistice terms will be discussed. Again a clarification of the legal position and powers of some of the commissions and committees established by the United Nations and sent to the Holy Land, together with problems arising from the interpretation of certain provisions of the General Armistice Agreements as well as questions related to the refugees problems will be made.

Chapter III deals with the different plans which were made by Israel and the Arab states to utilize the waters of the Jordan river system and with their effect on the economy of the surrounding states.

Chapter IV attempts to lay out the legal principles which in general govern the use of waters held in common by various riparian countries.

Finally, and in a conclusion, Israel's present action to divert the waters of the Jordan river will be assessed in the light of the principles discussed above.

CHAPTER 1

PHYSICAL ASPECTS OF THE PROBLEM

A - Topograhy and Water Ratio:

The river Jordan lies in what geologists call a "Rift" or fault splitting a mountain mass into two. This Rift extends from the Gulf of Aqaba on the Red Sea to the mountains (1) of Lebanon and the Jordan course is almost due south within the Rift.

The Jordan valley is made up of two geographical areas:

a) The Upper Jordan: It extends from the foot of Mount Hermon to Lake Tiberias. The river originates at the confluence of four tributary streams - Nahr Bareighit which comes from Marejeyoun and is the smallest of them all, Nahr Leddan, more commonly known as Dan, Nah Hasbani and Nahr Banias. The Hasbani in Lebanon and Banias in Syria come from the slopes of Mount Hermon (Jabal el-Sheikh) about 2000 meters above sea level. The three main sources, Dan Banias and Hasbani join then at a distance of 35 kms. southwest of Mount Hermon to pour into lake Huleh which is about $5\frac{1}{2}$ kms long and three to five meters deep and lies just above sea level. A short distance below lake Huleh, the river enters a deep gorge 17 kms long and flows into lake Tiberias "a body of fresh water"a bout 166 square kms in area, a length from north to south of 21 kms and breadth at its greatest of 12 kms. Its level averages 210 meters below sea level and its depth is 42 to 48 meters. (2)

(1) H. A. Smith "The waters of the Jordan - A problem of International Water Control" International Affairs, vol. 25 (1949) p. 418.

(2) M. G. Ionides "Report on the Water Resources of Transjordan and their Development Incorporating a Report on Geology Soils and Minerals and Hydro-geological Correlation" by G. S. Blake (London Crown Agents for the colonies) p. 138.

b) The lower Jordan or Al Ghor :

From the southern extremity of lake Tiberias, the river emerges to be joined afterwards by the river Yarmuk. Hydroelectric works of the Palestine Electric corporation are situated at the junction of the Jordan and the Yarmuk to the south of the lake. Through these works, the combined stream flows into the Jordan valley proper. This part of the valley consists of a plain 104 kms. long and 6 to 45 kms wide, surrounded by hills. A distance of 320 kms is covered by the river because of its tortuous path. At a point half-way down between lake Tiberias and the Dead sea and to the north the Ghor opens into the Beisan plan, to the south into the plain of the valley of Jericho and of the Ghor Rama and Kufrein; south of this constriction, the river Zerqa joins the Jordan. (1)

At a point about 188kms south of its source, the Jordan river empties into the Dead sea which constitutes the final destination of the waters of the entire Jordan river system. It has a length of about 88 kms and a greatest width of 16 kms with a superficial area of 1,015 square kms. The level of its surface varies from season to season as the flow of the drainage varies, rising after the winter floods and falling during summer. The greatest depth of the sea is 401 m. (2) South of the Dead Sea, the Ghor continues for another 110 kms. then continues to slope to the south for the next 70 kms. where Aqabah is reached.

(1) Ibid. p. 139

(2) Ibid. p. 143

At this point it would be interesting to consider certain figures in terms of the drainage areas, water ratio, the climate and the salinity of the water to get a better perspective of the whole problem. The Jordan river system drains an area of about 17,300 square kms out of the total Dead sea basin of 40,650 square kms. (1)

As previously stated, the upper part of the valley has its water resources in the Hasbani, Banias and Dan streams whose average annual output amounts to 157 mcm, 157 mcm and 258 mcm respectively; the Jordan river's output at its outlet from lake Tiberias is 640 mcm per year. The water resources in the lower part of the valley are derived from the Jordan river along its course from lake Tiberias with an average annual output of 540 mcm and from the Yarmuk river near its junction with the Jordan river with an output of 475 mcm. To these resources must be added the output of side valleys which are estimated at 220 mcm and the output of internal side valleys in Israel with an output of 90 mcm. (2)

The figures will hence run as follows: (3)

RIVERS	Estimated Average Annual Flow MCM per Year
Dan River	258
Hasbani	157
Banias	157

(1) Charles T. Main Inc. The Unified Development of the Water Resources of the Jordan Valley Region - (Boston, Mass, 1953), p. 16

(2) Salim Lahoud "Development of Water Resources in the Arab countries" Middle East Business digest, vol. VIII, No. 111 (February, 1964) p. 7

(3) Main, op. cit. p. 7

RIVERS	Estimated Average Annual Flow MCM Per Year
Jordan River below lake Huleh	640
Jordan River at its outlet from Lake Tiberias	538
Yarmuk River near the junction with the Jordan river	475
Yarmuk river at Maqarin dam site	420
Jordan River at Allenby bridge	1250
Latteral valleys (eastern)	220
Latteral valleys (western) (1)	90

The general climate of this region can be classified within the Mediterranean type, having a rainy season from October to May, followed by a dry rainless summer. There are however certain variations when moving between the Mediterranean sea to the West and the arid Syrian desert to the East. The temperature ranges from a minimum of 30 °F and a maximum of 100° to 104° F. In the lower Jordan valley (the Ghor) by reason of its low elevation, the temperature ranges from 39° F to 112° F with a mean annual range of 73° F, thus having a hot summer and a mild winter with very rare frosts. (2)

As will be seen from the figure below, the rainfall distribution is relatively small, often torrential and very uneven, diminishing from north

(1) Salim Lahoud, op. cit. p. 7

(2) Ionides, op. cit. p. 13

to the south of the country as a whole. Thus going down the Jordan valley, the rainfall steadily diminishes and desertic conditions begin at the northern end of the Dead Sea.

DRAINAGE AREA	Area in Sq. Kms.	Average Annual Rainfall Mms (1)
Upper Jordan above Dan	740	1200
Upper Jordan above lake Huleh outlet	1400	1000
Upper Jordan above Yarmuk River	2740	782
Yarmuk River	7250	364
Jordan River above Allenby bridge	16730	435

For our purpose it will be enough to note the salinity of the following:

The Jordan River	20 milligrams per litre
Lake Tiberias	280 milligrams per litre
The Yarmuk River	88 milligrams per litre

(1) Main, op. cit. p. 14

B - Historical Survey of the Boundaries:

The first world war and post world war secret agreements were to a large extent responsible for the ensuing partition of the Middle East into spheres of interest for the benefit of the Western countries and particularly for Britain and France. There is no doubt about their concern in the Middle East for oil, railroads and strategic lines of communications. A detailed account of their respective policies is beyond the scope of this study. Certain elements which will help us clarify the demarcation of frontiers as were decided by the Franco-British agreements in 1922-23 and finally endorsed by the League of Nations will however be used.

The task of carving out a Middle Eastern sphere of influence for Britain was indeed an uneasy one. British diplomats were caught in a series of dilemmas based upon various pledges and promises made to the Arabs on the one hand (Mac-Mahon-Sharif Husein correspondence 14th July, 1915 - 10th March 1916), to the Zionist movement on the other hand (culminating in the Balfour declaration in 1917) and their overriding financial and strategic interests. The subsequent negotiations entered into with the French government aimed at reaching an agreement which would as far as possible square with their obligations.

The Sykes-Picot agreement signed by Great Britain and France in 1916 while remaining a dead letter, has a historical significance as it formed the background for the following undertakings. As far as the

territorial partition goes, France, in addition to a portion of southern Anatolia and the Mosul district took for herself the greater part of Syria including the Lebanon, northern Galilee with Safad, Hula and the Upper Jordan (Blue zone). Britain was to have full authority over an area including lower and central Iraq and the whole of the country between the Persian gulf and the area assigned to France. This in turn, included southern Transjordan and the Negev (Red zone).

A brown zone was formed as a result of a conflict of aims between the three powers over what is known as Palestine (1); France wanting to include it in her Syrian possession and Britain opposing such inclusion; it was finally decided to place it under a joint Franco-British-Russian condomium. This comprised an area bounded by a line drawn from Acre via the sea of Galilee, the Jordan and the Dead sea to Gaza (2). The Sykes-Picot agreement with its mutilation of Palestine into different zones was far from suitable to the Zionists. The latter required a territory which according to them ought to be bounded by the Mediterranean in the West, by the slopes of the Lebanon and the headwaters of the Jordan and the crest of Mount Hermon in the north, the Syrian desert in the east and an access to the Gulf of Aqabah in the south as well as the Al-Arish region of the Sinai in the south-west. What interests us is of course their northern and north-eastern territorial claims which as already stated included the

(1) George Antonius "The Arab Awakening, the Story of the Arab National Movement (London, Hamilton, 1938 - p. 246

(2) Frishwasser-Ra'anan - Frontiers of a Nation - a re-examination of the Forces which created the Palestine Mandate and determined its territorial shape (London, Batchworth Press, 1955), p. 96

the headwaters of the Jordan, the Litani river, the snows of Hermon, the Yarmuk and its tributaries and the Jabbok (these were included in the Blue Zone in the agreement)[1]. The establishment of a national home with all its implications, i.e. mass immigration and land settlement required the exploitation of Palestine's agricultural and industrial potential; these in turn depending obviously on water for irrigation and hydroelectric purposes. Their only hope was to receive concessions from the British who in 1918 were in control of the greatest part of the Ottoman Empire.

A system of Occupied Enemy Territory Administration (O. E. T. A.) differing to a great extent from the Sykes-Picot agreement, had been established under the leadership of General Allenby. Syria-Palestine had been divided into three zones and placed under separate and totally distinct administrations:

a) O. E. T. A. north comprising the Lebanon and the Syrian seaboard from Tyr to the confines of Cilicia was French (2)

b) O. E. T. A. east comprising the interior of Syria and Transjordan from Aqabah to Aleppo was administered by Faisal.

c) O. E. T. A. south comprising Palestine in approximately its present frontiers was British.

(1) Ibid. p. 90

(2) Antonius, op. cit. p. 279

A number of proposals coming from different American, Zionist, Arab, British and French sources were laid down at the Paris Peace Conference in 1919 regarding the future boundaries of Syria and Palestine. Thus the intelligence section of the American delegation to the conference recommended the establishment of a separate state of Palestine which would control its own source of power and irrigation on Mount Hermon in the East to the Jordan. The committee considered this setting as an indispensable condition towards future agricultural developments hoping that the Jews will have an opportunity for establishing a Jewish state.(1)

The Zionist organization in turn submitted a memorandum to the Supreme Council at the Peace Conference asking the mandatory power to appoint a commission (upon which the Jewish Council shall have representatives) with power to make a survey of the land and to schedule all lands that may be available for close settlement, intensive cultivation and public use. (2) The Jewish Council should in addition to that, receive in priority any concession for the development of natural resources.(3) Their full frontier claim asked for a line starting on the Mediterranean south of Sidon, running north-east to the slopes of Lebanon and including the greater part of the Litani and the whole of the Jordan catchment area

(1) J. C. Hurewitz - Diplomacy in the Near and Middle East - a Documentary Record (Princeton, Van Nostrand, 1956) p. 44

(2) Ibid, p. 49

(3) LLoyd George The Truth About The Paris Peace Conference (London Gollancz, 1938), p. 1158

up to its northernmost source near Rashaya. From there the frontier was to run along the northern watershed of the Yarmuk tributaries towards the Hejaz railway at a distance of some 20 kms. south of Damascus. At this point, the southern boundary ran parallel to and just west of the Hejaz railway to the Gulf of Aqabah; the frontier in the south-west was to be determined by negotiations with the Egyptian government. (1)

The Arabs were of course interested in preserving the territorial integrity and unity of the country as a whole. (2) This claim was acknowledged by the King-Crane Commission (3). A Lebanese delegation supported by the French approached the Peace Conference and demanded the creation of ' a Greater Lebanon' which would not include the independent Sanjak of Lebanon, but also the ports of Beirut and Tripoli, the Beka'a valley with the Jordan sources and the Phoenician coasts with the Litani and the ports of Sidon and Tyr. (4) As soon as the armistice was signed, the British Foreign Office presented a memorandum to the Eastern Committee of the War Cabinet stressing the great importance Britain attached at having the

(1) Frishwasser - Ra'anan, op. cit. p. 108 and see Index p. 1

(2) Resolution No. 8 of the General Syrian Congress at Damascus in July2, 1919 said:"We ask that there should be no seperation of the southern part of Syria, known as Palestine, nor of the littoral western zone which includes Lebanon for the Syrian country. We desire that the unity of the country should be guaranteed against partition under whatever circumstances. Hurewitz, op. cit, p 64

(3) Recommendations of the King-Crane Commission on Syria and Palestine 28 August, 1919 "We recommend in the first place that the unity of Syria be preserved. . . the country is very largely Arab in language, culture, traditions and customs, Ibid. p. 67

(4) Frishwasser - Ra'anan, op. cit., p. 109

sole control over Palestine. Lord Curzon came with certain propositions and a total rejection of the Sykes-Picot agreement which according to him had cut the country in an unscientific and arbitrary manner. Instead said he, they should recover for Palestine its old boundaries from Dan to Beersheba, (1) which included as regards the northern boundary, a line running from the coast to the Litani river and in an easterly direction to Banias and terminating in the interior at the ancient city of Dan. In addition to that, the Palestinian territory was to be extended eastwards to Transjordan and southwards to enable the Zionist to carry out their development plans unless the country would become a liability to the British Treasury. (2)

The Eastern Committee thus concluded its meeting by stating that every effort should be made at the Peace Conference to secure an equitable adjustment of the boundaries of Palestine in the north, east and south. (3) On various occasions, the British diplomats were approached by Zionist leaders who were anxious to achieve a strong frontier in the north and the northeast. Lord Balfour was thus led to write a memorandum proposing either the extension of the frontier to include the water resources of the upper Jordan and Litani rivers, or that Palestine should be granted the legal rights to use these waters. But again, the French claims could not be ignored and Lloyd George had to promise Clemenceau not to ask for anything more than the historic boundaries from Dan to Beersheba (The French were

(1) Lloyd George, op. cit. p. 1144

(2) Ibid and Frishwasser-Ra'anan, op. cit. p. 97

(3) Lloyd George, op. cit. p. 1155

opposing any concession other than the one which gave Mosul to the British before the calling of the Peace Conference).

An Anglo-French Conference assembled in London to discuss the Middle East whereby the French representative Berthelot in reply to Lloyd George's argument that Palestine would constitute a heavy burden without the sources of Hermon and the headwaters of the Jordan, said that the snows of Hermon dominated the town of Damascus and could not be excluded from Syria nor could the waters of the Litani which irrigated the most fertile regions of Syria. A cable sent by Judge Brandeis at the request of Weizmann recommended that the Jewish national home should include the Litani, the watersheds of the Hermon and the Hauran and Jaulan plains (1). Berthelot's answer was that Brandeis' idea was too extravagant to be considered for a single moment " What was a legitimate demand was that the Palestinians should have the use of the waters to the south of the Dan and that he was ready to make arrangements for the liberal use of other waters in Syria but that these rivers must remain under French sovereignty especially the Litani". (2) He stated furthermore that Palestine's historical frontiers have never exceeded the latitude of Lake Tiberias.

(1) Lloyd George, op. cit. p. 1179

(2) Ibid, p. 1180

The British, however, were much pressed to reach a final settlement on the question of boundaries as they and the French came into a close contact each and west of the Jordan river (1) (The San Remo Conference in April 1920 gave the British governdment the Mandates for Palestine and Mesopotamia and France the Mandate for Syria).

The 1922-23 Settlements :

It was finally decided that the Anglo-French boundary commission would be set up to trace the frontier on the spot. The final line was submitted in a report by the boundary commission early in February 1922 and was signed by the British and French Governments in March 1923, and approved during the 87th. session of the Council of the League of Nations.

The boundaries thus set, ran from Ras el Naqura in easterly direction along the watershed between the rivers flowing into the Jordan and into the Litani; to the north a part of the territory near Metulla and the Eastern sources of the Jordan were included in Palestine and the line was adjusted in such a way so as to avoid cutting across village lands. Between Banias and Lake Tiberias, the frontier was drawn south from Banias following the hill slopes just east of Hula and the Jordan to the point where the Jordan joins the sea of Galilee.

This left within Syria the triangular strip of territory in the Quneitra area and which had been given to Palestine by the Leygues government under the 1920 agreement.

(1) Frishwasser-Ra'anan, op. cit. p. 132

The frontier in the Lake Tiberias area followed the eastern shore of the lake at some distance inland so that the whole lake remained in Palestinian hands (1). (This was done to make customs inspection and navigation on the lake easier by including it wholly within the jurisdiction of Palestine but fishing and navigation rights of the inhabitants of Syria on the Jordan and lakes Huleh and Tiberias were safeguarded by the agreement). (2)

A strip of territory to the east of the lake as well as a triangular strip between the Jordan, the Yarmuk and the lake became part of Palestine. To the south of the lake, the territory was incorporated into Palestine and in the Yarmuk valley the line followed northerly to the Hejaz railway and the river as far as el-Hamma.

The boundary between Transjordan (offered to Feisal's brother Abdullah by the British Government) and Palestine though not accurately defined was recognised as running along the Jordan, the Dead Sea and the Wadi Araba. (3)

(1) Abraham Hirsh "River Boundaries in the Middle East" Revue de droit International pour le Moyen Orient, (Editions A. Pedone, Paris, 1951), p. 434

(2) Hirsh "Utilization of International Rivers in the Middle East" American Journal of International Law (vol. 50) p. 94

(3) Frishwasser-Ra'anan, op. cit. p. 140

The United Nations Partition Decision - 29 November, 1947

The boundaries of Palestine as defined above were to remain unaltered more than two decades (I have dealt at length with this first period in order to show the important role the problem of the water played in demarcating those frontiers). The next step in the territorial change occurred when the Labour Government, following the collapse in February 1947 of Britain's formal negotiations with the Arabs and informal talks with the Zionists, (1) decided to refer the Palestine problem to the United Nations General Assembly who on May 15 created the U.N. special committee on Palestine or UNSCOP and gave it " the widest powers to ascertain and record facts and to investigate all questions and issues relevant to the problem of Palestine and instruct it" to prepare a report... and submit such proposals as it may consider appropriate... not later than September 1, 1947".(2) Under the original plan submitted by UNSCOP's majority to the 2nd. regular session of the Assembly, 3,600 square miles were assigned to the Arab state and some 6.400 square miles to the Jewish state (3) which were to remain however, in economic union; a special international regime for the city of Jerusalem and its immediate environs was established. UNSCOP proposals were to some extent modified in the General Assembly who provided for an Arab state of 4.300 square miles and a Jewish state of 5.700

(1)Hurewitz, op. cit. p. 28
(2) Hurewitz, op. cit. p. 28
(3) L. Larry Leonard, The United Nations and Palestine International Conciliation (Carnegie endowment for international peace, 1949) p. 737

square miles; the proportion being in one case 45% and in the other 55%. (1)

The proposed Arab state was to include Western Galilee, the hill country of Samaria and Judea with the exclusion of the city of Jerusalem and the coastal plain from Isdud to the Egyptian frontier including the Arab enclave of Jaffa and the areas near Beersheba and the Negeb along the Egyptian border, i.e. the Gaza strip.

The proposed Jewish state was to include Eastern Galilee, the plains of Sharon and Esdraelon, most of the coastal plain and the whole of the Beersheba subdistrict which includes the Negeb. (2)

The three sections of the Arab state and the three sections of the Jewish state were linked together by two points of intersection, one situated south-east of Afula in the sub-district of Nazareth and the other north-east of El-Majdal on the sub-district of Gaza.

(1) Walter Eytan " The First Ten Years", A diplomatic History History of Israel (London), p. 4

(2) U.N. Special Committee on Palestine, Official Records of the 2nd. Session of the General Assembly (supplement No. 11, Lake Success, 1947), p. 53.

The Cease-Fire Situation :

The Palestine Arabs, nevertheless, supported by the Arab states, refused to accept the Assembly's resolutions and were determined to prevent its implementation by force. On the eve of the mandate's expi ry on May 14, 1948, the state of Israel was proclaimed. Seven Arab states, in answer to it, started their armed intervention in Palestine and the fighting was resumed, engaging the land, sea and air forces of both sides. The Security Council took up the matter and in order to terminate hostilities, adopted a resolution on May 29, 1948 (1), considered as the first truce resolution governing the Palestinian outbreaks. It did not come into full effect, however, until June 11, 1948. The subsequent efforts to prolong the truce beyond the originally intended four weeks were unsuccessful and on9 July, 1948 fighting was resumed. This led to an immediate calling into session of the Security Council which adopted a resolution establishing the second truce as of July 18, 1948.(2) The second truce resulted in the cessation of general hostilities in Palestine in spite of the fact that fighting did not come to an end at onee and for all concerned, but continued until the truce was replaced by the armistice agreements.

The new Israeli territorial claims were based on the military positions which she held on the eve of the signing of the Armistice Agreements. These included Acre, Lydda, Ramleh, Beersheba, Nazareth and the surrounding areas, thus adding 140 square miles to the area originally assigned

(1) See Appendix p. 2

(2) See Appendix p. 3

to be under the partition plan. (1)

The Armistice Agreements:

The resolution of 16 November, 1948, had as its objective to provide a transition from the present precarious truce, which it had enforced, to a permanent peace in Palestine. It is for this reason that it called upon the parties " directly involved in the conflict in Palestine... to seek agreement... by negotiations conducted either directly or through the acting mediator on Palestine with a view to the immediate establishment of the armistice including:

a) The delineation of permanent demarcation lines beyond which the armed forces of the respective parties shall not move.

b) such withdrawal and reduction of their armed forces as will ensure the maintenance of the armistice during the transition to permanent peace in Palestine.

Armistice negotiations opened up at Rhodes on 12th. January, 1949 and resulted in the signing of four general armistice agreements:

1.- Between the Hashemite Kingdom of Jordan and Israel on April 3, 1949. (2)

2.- Between Syria and Israel on July 20, 1949, (3)

3.- Between Egypt and Israel on February 24, 1949. (4)

4.- Between Lebanon and Israel on March 23, 1949. (5)

(1) Leonard, op. cit. p. 737
(2) Doc. S/1302/REV. 1-Security Council Official Records Special Supplement 1 Lake success 1949
(3) Doc. S/1353/REV. 1 Ibid. Supplement 2
(4) Doc. S/1264/REV. 1 Ibid. Supplement 3
(5) Doc. S/1296/REV. 1 Ibid. Supplement 4

The armistice lines were drawn in such a manner as to satisfy both demographic and strategical considerations. Three areas were thereby demilitarized in which no armed forces of either of the parties were allowed to enter into:

1.- The area comprising the village of El-Auja and its vicinity

2.- The small area comprising Government House in Jerusalem

3.- The third area and the most important one for our purpose was set up as a consequence of the Israel-Syria general armistice agreement. Here, it is essential to recapitulate briefly the reasons which called for the setting up of this particular demilitarised zone:some time after the termination of the Mandate of Palestine, a full-scale invasion took place and a large Syrian salient was formed on the Western side of the Jordan between lake Huleh and lake Tiberias. Such was the situation when the second truce in July 1948 entered into force, which stipulated that nor further military activity could take place. The armisitce negotiations opened in April and asked for the withdrawal of all military and civilian authorities from the area which would in consequence become demilitarized. (1)

The armistice demarcation line itself was to follow a line mid-way between the existing truce lines. Where the existing truce lines ran along the international boundary between Syria and Palestine, the armistice

(1) Shabtai Rosenne, Israel's Armistice Agreements with the Arab States; a Juridical Interpretation - (Tel-Aviv, Blumstein's Bookstore, 1951) p.53

demarcation line was to follow the boundary line. Where the armistice demarcation line did not correspond to the international boundary, the areas between the line and the boundary were, pending final settlement between the parties, established as a demilitarized zone from which the armed forces of both parties shall be totally excluded and in which no activities by military or paramilitary forces shall be permitted. This provision also applied to Ein Gev and Dardara sectors which were to form part of the Demilitarized Zone. (1)

Thus the territory occupied by Israel and reflected in the armistice agreements amounted to 7,000 square miles while the remaining 3,000 went to Transjordan with the exception of 125 square miles controlled by the Egyptians. (2)

Actual Political Boundaries of the Valley's Water Resources:

Following the signature of the armistice agreements, one can describe the political boundaries of the Jordan river and valley as follows: The headwaters of the Jordan river rise in Lebanon (Hasbani river) and Syria (The Banias river having its source in Syria and the Tel el-Qadi spring of the Dan river having its source in Syria.) These waters then unite in unite in Israel and flow through lake Huleh and lake Tiberias which happen to be both situated in the territory controlled by Israel but of which a part as we have already seen has been placed under the terms of the armistice agreements in the Demilitarized Zone.

(1) Doc. S/1353/REV. 1, article V, op. cit. p. 3

(2) Leonard, op. cit. p. 740

The Yarmuk river rises in Syria, flows through Arab territory for its entire length and forms the boundary between Syria and Jordan. Along its course of ten kilometres from the Yarmuk triangle to a point before its entry into the Jordan river at Jisr el-Majami eight kms. south of lake Tiberias, the Yarmuk forms the political boundary of Jordan and Israel. (1)

From lake Tiberias to the Dead Sea, the Jordan river's east bank is entirely Jordanian whereas the west bank is in Israeli controlled territory in the northern third and Jordanian in the lower two-thirds. The whole of the Dead Sea is Jordanian except for the south-west corner which is in Israeli controlled territory.

(1) Salim Lahoud, op. cit. p. 7

CHAPTER 2

LEGAL PERSPECTIVE

A - The Mandate under the League of Nations

The peculiar nature of the Mandate for Palestine came from the fact that its terms, in addition to the general principles of article 22 of the Convenant of the League of Nations, were governed by the obligation of the mandatory power, i.e. Great Britain, to put into effect the Balfour Declaration made in November 1917 and accepted by the Principle Allied Powers in favour of the establishment in Palestine of a "national home for the Jewish people it being clearly understood that nothing should be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine or the rights and political status enjoyed by Jews in any other country". (1) Thus the mandatory was to administer that country not simple on behalf of the population which is there but with a view to help the people who desire to go there. (2)

Three kinds of obligations, though not clear-cut could be discerned while analyzing the specific articles of the mandate, the most important of them being of course the one pertaining to the creation of the national home. The other two deal respectively with the relations of the mandatory to the territory whose guardianship it was assuming and with the League of Nations and its members (we shall not consider this last item.)

(1) League of Nations, Mandate for Palestine and Memorandum by the British Government Relating to its application to Transjordan (Geneva 1926), p. 1.

(2) The British Yearbook of International Law, (London, H. Frowde, Oxford University Press, 1921 - 22), p. 51.

A civil government under a British High Commissionner had since July 1920 replaced in Palestine the military administration of the so-called Occupied Enemy Territory. The Administration of Palestine, as it came to be known, functioned to a certain extent independently from the central administration of the mandatory and was entrusted with the task of executing the obligations resulting from the general principles of the mandate (1) as well as with certain local problems. In fact, it was the mandatory who had the full powers of legislation and administration (article 1), who was reponsible "for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home" (article 2), of maintaining the territorial integrity of Palestine (article 6) and of the equality of treatment (article 18). In addition to that, the mandatory was entrusted with the task of controlling the foreign affaris of Palestine (article 12) and of adhering on behalf of the administration of Palestine to any general international conventions "already existing or which may be concluded hereafter with the approval of the League of Nations "(article 19).

On the other hand, the Administration of Palestine was made responsible for facilitating Jewish immigration under suitable conditions (article 6), for enacting a nationality law ... providing for... the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine (article 7) for cooperating with the Jewish agency (article 4), for safeguarding the interests of the community in connection with the development of the country (article 11). Article 13 provided for the cooperation between the mandatory

(1) Abraham Baumkoller; Le Mandat sur la Palestine (Paris, Rousseau 1931)p. 76

and the Administration of Palestine as regards the Holy places and other religious buildings.

As regards the specific conditions for the establishment of the Jewish national home, article 6 of the Mandate says that "while ensuring that the rights and privileges of other sections of the population are not prejudiced, the administration of Palestine shall facilitate Jewish immigration under suitable conditions." The same article states furthermore and always subject to the conditions mentioned above that the administration of Palestine shall encourage in cooperation with the Jewish agency referred to in article 4, close settlement by Jews on the land including state lands and waste lands not required for public purposes.

Article 11 of the Mandate mentions that the administration of Palestine may arrange with the Jewish agency ... to construct or operate upon fair and equitable terms any public works, services and utilities and to develop any natural resources of the country in so far as these matters are not directly undertaken by the administration.

Article 25 inserted in August 1921, stipulated that the mandatory was entitled with the League Council's consent "to postpone or withhold application of the Jewish national home provisions from the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined." Great Britain called into being the Emirate of Transjordan and excluded the provisions relating to the Jewish National Home from this region.

These are the main provisions of the Mandate. Articles 2, 6 & 11 together with article 17, 1 (a) of the Palestine Order in Council[1] stand in sharp contrast with the others. We are interested above all in clarifying certain questions, the answers to which will help us in our subsequent discussion. These are:

1. - a) - What was the test laid down to measure the extent to which Jewish immigration and settlement on land could be accelerated or on the other hand restricted ?

   b) - To what extent, in the light of the reports of the various commissions sent to Palestine together with the British government's official declarations, was Jewish colonization (this broad term includes both immigration and land settlement) in accordance with the dual obligation of the mandatory power i.e. to see also that the rights and privileges of the population in Palestine was not thereby impaired ?

2. - Were there surplus cultivable areas? and to what extent could the water resources in Palestine be developed to increase the amount of cultivable land ?

(1) This article amended in 1923 contained a proviso stating that "no ordinance shall be promulgated... which shall tend to discriminate in any way between the inhabitants of Palestine on the ground of race, religion or language..." Palestine Royal Commission Report, (London, H.M. Stationery Office, 1937, p. 221

The answer to question 1.-a, was given by the 1922 White paper issued by the British government which stated inter-alia that while it is necessary that the Jewish community in Palestine should increase through immigration, the latter should be maintained within the absorptive capacity of the country... It is essential to ensure that the immigrants should not be a burden upon the people of Palestine as a whole and that they should not deprive any section of the present population of their employment..."(1)

This principle was accepted by the Zionist organisation in their letter of June 18, 1922 in these terms: The executive further observes that His Majesty's government also acknowledge as a corollary of this right that it is necessary that the Jews shall be able to increase their numbers in Palestine by immigration and understand from the statement of policy that the volume of such immigration is to be determined by the economic capacity of the country to absorb new arrivals. Whatever arrangements may be made in the regulation of such immigration, the executive confidently trusts that both His Majesty's government and the Administration of Palestine will be guided in this matter by the aforesaid principle." (2)

(1) Baumkoller, op. cit. p. 32

(2) Palestine Royal Commission Report, op. cit. p. 298

The economic absorptive capacity of the country became thus the only criterion.(1)

How the British government will apply it in its policy and how the Jews will try to interpret it so as to thwart the latter's efforts in implementine the mandate, we shall see very rapidly in reviewing the report of the Shaw commission, the two governmental reports issued simultaneously by the British in 1930 (i.e. the Hope-Simpson report and the 1930 White paper), the report of the French commission, the 1937 Peel report together with the 1945 Anglo-American committee of inquiry's Survey of Palestine.

The question which these various commissions had to answer was whether as a result of land purchases and immigration, the rights and privileges of the Arabs had been prejudiced.

The Shaw commission answered it by reporting that ..."In the meantime, the Palestine government is confronted with the prospect of repetitions of the situation now existing at Wadi el Hawareth and of further calls upon the police to carry out evictions of large bodies of cultivators

(1) The Peel commission whose report was issued by the British government 1937 made reservations and concluded that this criterion was inadequate for measuring immigration and land settlement. "If immigration under the existing mandate is thus to contine, its volume should not longer, inour view, bedetermined solely by "economic absorptive capacity". Amore serious weakness in this principle lies in its exclusiveness. It ignores all other than the economic factors in the situation (speaking generally the administration as far as immigration is concerned have taken no account of political, social or psychological considerations), Ibid, pp. 306 & 299

with no alternative land to which they can be moved or upon which they can settle. In the past, persons dispossessed have in many cases been absorbed in the neighbouring villages; we were however, told that this process, though it may have been possible 4 or five years ago, is no longer possible today'; the point of absorption has been reached. The plain facts of the case are, so we are advised, that there is no further land available which can be occupied by new immigrants without displacing the present population. We think that there can be no doubt that a continuation or still more an acceleration of a process which results in the creation of a large discontented and landless class is fraught with serious danger to the country... It is clear that further protection of the position of the present cultivators and some restriction on the alienation of land are inevitable. (1)

The 1930 White paper, while nominally endorsing the policy of the 1922 White paper, marked a definite change of outlook and answered the forementioned question in the affirmative.(2)

(1) Report of the Commission on the Palestine Disturbances of August 1929/1930 (London, H. M. Stationery Office 1930) pp. 123 & 124

(2) It appears that of the 86.980 rural Arab families in the villages, 29.4 per cent are landless, it is not known how many of these are families who previously cultivated and have since lost their land. This is one point among others upon which, at present, it is not possible to speak with greater precision, but which it will be hoped, be ascertained in the course of the census which is to be taken next year, Leonard Stein, the 1930 White paper. (London, The Jewish Agency for Palestine 1930), p. 54

The Jews on the other hand and in official declarations (1) were claiming against the White paper (2) that Jewish colonisation far from having been detrimental to the rights and privileges of other sections of the population, had on the contrary improved them. (3)

Sir John Hope Simpson in his report drew a distinction between the PICA colonisation and the one undertaken by the Zionist organisation. Thus while in the former case, friendly relations existed between Jew (4) and Arab, in the latter the effect of Jewish Colonization had been very intimately affected by the conditions upon which the various Jewish bodies held, sold and leased their land. Thus specific legal provisions contained in the constitutions of the Jewish agency stated that the title to the lands acquired were to be held as the inalienable property of the Jewish people and furthermore that agricultural colonization shall be based exclusively on Jewish labour (5)

(1) Chaim Weizmann, naissance d'Israel, p. 379

(2) paras. 26, 27, & 28 of the White paper refer respectively to certain irregularities in the admission of immigrants; that sufficient evidence has been adduced to lead to the conclusion that there is at present a serious degree of Arab unemployment and that there are grounds on which it can be "plausibly represented that this unemployment is largely due to exeessive Jewish immigration".

(3) Stein, op. cit. p. 18

(4) Hope Simpson, Report on Immigration, Land Settlement and Development, (London, H. M. Stationery office 1930, p. 51

(5) The same provisions were contained in the Keren-Kayemeth draft lease, the Keren-Hayesod agreements and the agreement for the Emek colonies.

The net result hence of the purchase of the land in Palestine by the Jewish national fund had been that land had been extraterritorialized in the sense that it ceased to be land from which the Arab could gain any advantage either now or at any time in the future. Not only could he never have hoped to lease or to cultivate it, but by the stringent provisions of the lease of the Jewish national fund, he was deprived for ever from employment on that land... It was for these reasons that Arabs discounted the professions of friendship and goodwill on the part of the Zionists in view of the policy which the Zionist organisation deliberately adopted. (1).

The Jewish policy was thus according to Hope- Simpson a clear breach of article 6 of the mandate. Against the much repeated Zionist argument that the Arab fellah is a useless cumberer of the land, who produced nothing from it and that the Jews being more capable were entitled to an optimum acquisition of land, the report stated that the motives advanced were totally unfounded. (3) (2)

(1) Hope-Simpson, op. cit. p. 54

(2) "It is clear however that of the land which remains with the government at the present time, the area is exceedingly small, with the exception of tracts which, until developed, are required in their entirety for the maintenance of the Arabs already in occupation. It cannot be argued that Arabs should be dispossessed in order that the land should be made available for Jewish settlement. That would amount to a distinct breach of the provisions of article 6 of the mandate" Hope-Simpson, op. cit. p. 56

(3) "The fellah is neither lazy nor unintelligent; he is a competent and capable agriculturalist and there is little doubt that were he to be given the chance of learning better methods and the capital which is necessary preliminary to their employment, he would rapidly improve his position", Ibid, p. 66

In line with the latter report, Mr. Lewis French was appointed in 1931 Director of Development and one of his first duties was to prepare a register of "landless" Arabs and to draw up a scheme for resettling them.

The Peel Commission whose report was issued by the British government in 1937 concluded that the heavy Jewish immigration in the years 1933/36 had been detrimental not only to the Arabs but likewise to the Jews.(1)

The 1939 White paper marked the culmination of efforts made by the British mandatory to define a workable solution of the burning question of Jewish immigration and land tenure.(2)

(1) " The heavy immigration in the years 1933/36 would seem to show that the Jews has been able to enlarge the economic absorptive capacity of the country for the Jews (the Jews were even trying to force this capacity by giving false estimates of available arable land-peel report, op. cit p. 235... the process can be continued for some time to come... But such an expansion of the economic absorptive capacity is calculated to lead to a development of the Jewish national home, which is not organic but is unnatural since it ignores one of the conditions of the environment of the Home, namely the hostile attitude of the inhabitants of Palestine, Palestine Royal Commission Report, op. cit. p. 300. The Royal Commission also reported that the Jews in their policy of creating an agricultural population have restricted the employment of Arab labour on lands held by them and that the Arab's lack of capital and education does not justify his being deprived of land, Ibid, p. 241 and 249

(2) a.- Jewish immigration during the next 5 years will be at a rate which, if economic absorptive capacity permits, will brin g the Jewish population up to approximately 1/3 of the total population of the country. Taking into account the expected natural increase of the Arab or Jewish populations and the numbers of illegal Jewish immigrants now in the country, this would allow of the admission as from the beginning of April this yearof some 75.000 immigrants over the next 5 years. These immigrants would subject to the criterion of economic absorptive capacity be admitted as follows:...
b.- The existing machinery for ascertaining economic absorptive capacity will be retained and the high commissioners will have the responsibility for deciding the limits of economic capacity. Before each periodic decision is taken, Jewish and Arab representatives will be consulted.
c.- After a period of 5 years, no further Jewish immigration will be permitted, unless the Arabs of Palestine are prepared to acquiesce in it.
d.- His Majesty's government are determined to check illegal immigration and further preventive measures are being adopted.....

Whereas the land area of Palestine presented greater opportunities for agriculture than regions lying to the East of it and gradually merging into the Arabian desert, still there was, as will be readily seen, very serious limitations to the full agricultural use of such lands; mainly due to the meagre rainfall, to centuries of misuse of the land, (1) and of the lack of available water in the form provided by rivers of considerable breadth and length.

The Shaw comission thus stated that in its opinion no further land could be available for new immigrants without displacing the present population. (2) The White paper likewise and as a result of its findings restricted immigration and limited the area which the development of the Jewish national home would have proceeded.

Meanwhile the Jews were trying to demonstrate that if Palestine did not have enough room for both Jews and Arabs, there should be no reasons why Transjordan would not be fully capable of absorbing those Arabs living in the hill countries and wanting to settle elsewhere (4). (3)

(1) ". . . No new system has been introduced, no new land code has been enacted. The Ottoman land code has been retained with all the difficulties involved in the various forms of ownership and tenure of land; several new laws have been passed to amend it; but it remains in essence the same complicated system, one which is not calculated to promote close settlement and intensive cultivation, Palestine Royal commission report op. cit. p. 227.

(2) Shaw commission report, op. cit. p. 123.

(3) Hope -Simpson had said "Even were the title of the government admitted and it is in many cases disputed, it would not be feasible to make these areas available for settlement in view of the impossibility of finding other land on which to settle the Arab cultivators. "Report, op. cit. p. 141

(4) Stein, op. cit. p. 41.

Furthermore and following the findings of the Shaw commission and of the 1930 White paper, Hope Simpson reported that available arable land was limited (1), but that it would be possible to save enough water (since irrigation water is wasted) to double the irrigable land through scientific management of irrigation. The Peel commission on the other hand, while recommending a partition plan involving an exchange of land and population similar to that which had taken place between Greece and Turkey in 1923, noted the lack of surplus cultivable land in Palestine (2) as a hindrance to its proposals and suggested an authoritative estimate of the practical possibilities of irrigation in the Jordan valley. It also stated that Britain would be ready in helping financing the proposed irrigation and development scheme and urged the establishment in Palestine of a partition department to deal with irrigation and development work and "such exchange operations as may follow on it". (3)

(1) See footnote (3) in the preceeding page.

(2) "... Whatever may be the cultivable area of Palestine... it is at least certain that it is limited and in a large measure already in use... An active policy of agricultural development must, even allowing for the utmost activity on the part of the govemment, take many years before its fulfilment can provide land for close settlement for both Jews and Arabs." Royal Commission Report, op. cit. p. 225

(3) The Commission recognised however, the difficulty of making an estimate of the area of land which could be irrigated on an economic basis, Ibid. p. 255

The Peel report resulted in the first hydrographic survey of the Jordan valley. M. G. Ionides' findings were presented to the Woodhead technical commission on Palestine sent by the colonial office to draw up a detailed plan for the Palestine scheme suggested in the Peel report. The commission after a four month investigation in Palestine decided however that partition was impracticable and the plan was abandonned by the British government. The Jewish Agency on the other hand and through a joint Palestine survey commission, still persisted in its efforts, making studies of land utilisation and use of water (2) to increasethe possibilities of Jewish colonization (in 1943, they had hired the services of the Assistant chief of the soil conservation of the United States: Walter Clay Lowdermilk.)

The survey of Palestine which was prepared in the winter of 1945 for the information of the Anglo-American committee of inquiry, touching upon the question of irrigation, noted the relative small supply of water in Palestine (3). stated that legislation necessary to regulate water rights had

(1) Mr. Ionides' report " the water resources of Transjordan and their development" while not taking Palestine into account, still and by implication seemed to negate the Zionist premise that Palestine "could support hundred of thousand millions of additional immigrants" Ionides, "The Disputed Waters of the Jordan" Middle East Journal, vol. VII, No. 2 (Spring 1953), p. 155

(2) "The use of water is the root of the whole question of the absorptive capacity of the country... a sound economy must be based on agriculture...inmost countries of the Middle East, agriculture means water...therefore the measure of what can be done in the way of development is the measure of the water supply to the country"Ionides, "The Prospect of Water Development in Palestine Transjordan. "Journal of the Royal Asian Society, vol. XXXIII, Nos. 3 & 4 (July October 1946), p. 271

(3) The flow of the Jordan is less than 3% of that of the Tigris or that of the Tennessee and not much more than 1% of the Nile.

not been enacted because of Zionist opposition and dismissed the Zionist claim justifying its program on grounds of technical superiority. (1)

From all what has been said above, one can see how the Zionist expansionist policy has been contrary to the conservative policy of the Colonial Office (2) as well as to the specific terms of the mandate.

(1) "The building of the Jewish economy has enjoyed the advantage of abundant capital, provided on such terms as to make economic return a secondary considertaion. The Arabs have had not such advantage.In principle we do not think it wise or appropriate that plans such as the project for a Jordan valley Authority, if judged technically sound, be undertaken by any private organization, even though that organization, as suggested by the Jewish agency, should give an assurance of Arab benefits and Arab participation in the management" Anglo-American committee of Inquiry; Report to the U.S. government and His Majesty's government in the U.K. (Washington 1946), p. 10

(2) "... Business-like and Judicial approach and its natural and characteristic caution conflicted at every turn with the dynamic and desperate insistent of the Zionist on mass immigration and development. The leaders of this movement where not talking about economist at all, even if they drew up elaborate schedules of costs. They were, as they say it, carrying out a vital mission and salvation "Georgina G. Stevens" Water and the Middle East". International conciliation 1956, p. 240 -(Carnegie Endowment for International Peace, New York 1956), p. 240

"A" mandates expressly recognized the possibility of their evolution to complete independence by providing that "on the termination of the mandate, the council of the League of Nations, shall use its influence to insure the fulfilment of financial obligations by the mandated territory and in the case of Palestine the security of the Holy Places (1). The method of such a termination was however neither specifically mentioned by article 22 of the Covenant of the League, nor by the specific terms of the Palestine mandate. Nevertheless, the mandate over Palestine with its multiple and inherent contradittions was officially terminated by the British government on May 15, 1948. A year before and on April 2, 1947, a U. K. delegation addressed a letter to the acting secretary-general of the United Nations requesting the Palestine question to be placed on the agenda of the next regular session of the General Assembly "in the hope that it can succeed where we have not. "(2) The letter also indicated that the U. K. would submit an account of its administration of the Palestine mandate to the General Assembly and would ask the latter to make recommendations under article 10 of the charter concerning the future government of Palestine.

(1) Quincy Wright, Sovereignty of the Mandates, American Journal of International Law (vol. 17, 1923), p. 700

(2) General Assembly, Official Records of the First Session of the General Assembly (vol. III) p. 183

B - The United Nations:

An exhaustive account of the debates which took place through the various United Nations agencies; The security council, the General Assembly, the Trusteeship council or the Economic and Social council will be far beyond our purpose. Similarly an account of the different plans set forth by the Arabs and Israelis for the utilization of the water resources of the Jordan river and its tributaries shall not be attempted here but will be reserved for a fuller discussion under chapter 3.

We are interested above all in clarifying the powers of some of the commissions and committees established by the United Nations and sent to the Holy Land, together with problems arising from the interpretation of certain provisions of the General Armistice agreements as well as questions related to the refugee problem.

1 - UNSCOP

The sole item on the agenda of the special session of the General Assembly called on by Great Britain was the one put forward by the latter country " consisting and instructing a special committee to prepare for the consideration of the question of Palestine at the second regular session ". The first committee was asked then to consider this item and devoted 12 meetings for this purpose.

The report of the first committee including its final resolution concerning the composition and terms of reference of the special committee on Palestine was discussed by the General Assembly as its 77th, 78th and 79th

plenary meetings and its recommendations finally adopted at the 79th. meeting on May 15, 1947 by a final vote (on the resolutions as a whole, after having voted each paragraph separately) of 45 to 7 with one abstention. (1)

Resolution 106(S-1) representing the final text constituting and instructing the United Nations special committee on Palestine to report on Palestine provided that it should consist of eleven members (excluding the 5 permanent members of that Security Council) which were given the widest powers to ascertain and record facts and to investigate all questions and issues relevant to the problem of Palestine. Furthermore the General Assembly requested the Security Council to enter into suitable arrangements with the proper authorities of any state in whose territory the special committee may wish to sit or to travel to provide necessary facilities and to assign appropriate staff for the special committee. (2)

UNSCOP came up with a partition plan which was finally adopted with the required 2/3 majority. The Arabs, who had through the Arab higher committee previously abstained from collaboration with the special committee now flatly rejected its plan. The United Kingdom on the other hand, while eager to solve the Palestinian problem refused to have."... the sole responsability for enforcing a situation which is not accepted by both parties and which

1. - UNSCOP Report to the General Assembly, United Nations Official Records of 2nd. Session of the General Assembly, (supplement No. 11, Lake Success 1947) p. 1

2- Ibid, p. 3

we cannot reconcile with our conscience." (1) The United States who had supported the partition plan also said that it was opposed to the use of force in implementing it.

The General Assembly thus found it impossible to enforce its decisions. In the meantime conditions in Palestine grew from bad to worse. At the request of the U.S., a special session of the General Assembly was called and sat from April 18 to May 14. A mediator for Palestine was appointed and had to be chosen in effect by a committee of the General Assembly composed of the representatives of China, France, the U.S.SR. the U.K. and the U.S. (as one can notice these were the 5 permanent members of the Security Council), to use his good offices with the local and community authorities in Palestine to arrange for the operation of common services necessary to the safety and well-being of the population, to assure the protection of the Holy Places, religious buildings and sites and to promote a peaceful adjustment of the future situation of Palestine. The mediator was also to cooperate with the truce commission for Palestine which was appointed by the Security Council in April 1948 (2) with the task of effecting the Security Council's resolution which had called upon all persons and organizations in Palestine to cease all violence and all military and paramilitary activities.

1-UNSCOP Report to the General Assembly, United Nations Official Records of the 2nd. Session of the General Assembly (supplement No. 11, Lake Success 1947) p. 3

2- Res. 186(S-20)

2 - UNTSO:

We have already seen the Arab reaction to the proclamation of the state of Israel and the ensuing truce appeals by the Security council. In what is known as the first truce of June 11, 1948, the members of the truce commission (composed of the Consuls-General in Jerusalem of Belgium, France and the U.S.) had to supply additional personnel and equipment and to act in concert with the mediator to carry out their functions. The chief of staff UNTSO was made responsible to and received instructions from and communicated with the Security Council. (1) Furthermore, the mediator and the truce commission arranged between themselves to limit the authority of the commission to Jerusalem. A renewal of hostilities and the failure of the Security Council to prolong the truce, led the Security Council to adopt a further resolution. It was thus stated that the situation in Palestine constituted a threat to the peace within the meaning of article 39 of the Charter and consequently the Security Council ordered as a provisional measure under article 40 of the charter a new cease-fire which had to take effect within 3 days and to remain in force for an indefinite duration, threatening that if ever one of the parties should be reluctant to observe the cease-fire, further measures would be imposed under article VII of the Charter. In addition, this resolution (July 15, 1948) redefined and increased the functions of the truce supervision organization in the following manner: The mediator was to supervise the observance of the truce to establish procedures for examining alleged breached of the truce since June 11, 1948 and to

(1) E. L. M. Burns, Between Arab and Israeli, pp. 295 and 296

deal with breaches so far as it is within his capacity to do so by appropriate local actions and requested to keep the Security Council currently informed concerning the operation of the truce and when necessary to take appropriate action.(1) The Security-General was also asked to provide the mediator with the necessary staff and facilities to assist in carrying out the functions assigned to him under the General Assembly's resolution of May 14 and under this resolution (2) the duties of UNTSO had mainly to do with the attempt to prevent arms and amunitions from coming into the country. The strength of the organization grew to about 3.000 officer observers and other ranks and civil staff attached to the organization were also augmented.(3)

The truce enteredinto force on July 18, 1948 and violations of it were frequent. In October, heavy fighting occurred between Egyptian and Israeli forces in the Negev. On October 19th., the Security Council adopted a resolution asking the interested parties to negotiate in view of arriving at a more permanent truce. This led to further resolutions being adopted on November 4 (covering the Egyptian front only) and on November 16 (a more general one) calling on the parties directly involved in the conflict of Palestine as a further provisional measure under article 40 of the Charter to seek agreement forthwith, by negotiations conducted either directly or through the acting mediator with a view to the immediate establishment of an armistice.(4)

(1) See appendix (second truce)

(2) See appendix for text of the second truce

(3) Burns, op. cit. p. 25

(4) Security Council Official Records, supplement for November 1948 (3rd. year Lake Success 1948)) p. 13

The Assembly in its resolution of December 11, 1948 called upon the "governments and authorities concerned to extend the scope of the negotiations provided for in the Security Council's resolution of November 16, 1948 and to seek agreement by negotiations. . .with a view to the final settlement of all questions outstanding between them" (1)

The armistice agreements, as we have already seen in the preceding chapter, were concluded in 1949. Immediately after that and on August 11, 1949, the Security Council passed an important resolution reaffirming the cease-fire order dealing with the end of the mediator's mission and asking the parties to ensure the observance of the Armistice agreements. Concerning the status of UNTSO, the following clause was added: The security council, "requests the secretary-general to arrange for the continued service of such of the personnel of the present truce supervision organization as may be required in observing and maintaining the cease-fire and as may be necessary in assisting the parties to the armistice agreements in the supervision of the application and observance of the terms of these agreements with particular regard to the desires of the parties as expressed in the relevant articles of the agreements.(2)

To what did this resolution amount in fact? The mediator being relieved of his functions, this meant that UNTSO was no longer subordinated to him, but became a subsidiary organ of the U.N. with its own well-defined functions(3).

(1) General Assembly Resolution 194 (III), see Appendix

(2) Louis M. Boomfield, Egypt, Israel and the Gulf of Aqabah in International Law (Toronto, Carswell, 1957), p.

(3) Burns, op. cit. p. 27

Thus the Chief of Staff was now responsible for reporting to the Security Council on the observance of the cease-fire order of July 15, 1948 which was still in force and UNTSO set its machinery available for assisting the supervision of the general armistice agreements through the Mixed Armistice Commission. (1)

3 - The United Nations Conciliation Commission and the Refugee Problem:

The Assembly in its resolution adopted on December 11, 1948 followed the mediator's recommendations calling for a conciliation commission to be established in order to achieve a final settlement of all questions outstanding between the parties to the conflict, the Arab governments and the Provisional government of Israel, (2) and created the conciliation commission for Palestine composed of three representatives nominated by the governments of the U.S. France and Turkey.

(1) The commission shall be empowered to employ observers who may be from the military organizations of the parties or from the military personnel of the UNTSO or from both in such number as may be considered essential to the performances of its functions. In the event, U.N. observers should be so employed, they shall remain under the command of the U.N. Chief of Staff of the truce supervision organization. Assignments of a general or special nature given to U.N. observers attached to the MAC shall be subject to approval by the U.N. Chief of Staff or his designated representative on the commissions whichever is serving as chairman, G.A.A. Armistice General agreements, Syria and Israel, op. cit. p. 5

(2) Folke Bernadotte, Progress Report of the United Nations Mediator on Palestine (Rhodes: September 16, 1948, Cmd. 7350, p. 9

Paragraph 2 of the resolution 194 (III) set 3 functions which the conciliation commission had to perform:(1)

a) to assume the functions given to the U. N. mediator on Palestine by resolution 186 (S-2)

b) to carry out specific functions and directives given to it by the present resolution in addition to directives given to it by the General Assembly and by the Security Council.

c) to undertake at the request of the Security Council all the functions assigned to the mediator or to the United Nations truce commission by resolution of the security council, so that the office of the mediator be terminated.

Of outstanding importance for us is paragraph 11 of the resolution concerning Arab refugees. The commission was to "facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the director of the United Nations relief for Palestine refugees and through him, with the appropriate organs and agencies of the United Nations (2)

The commission is classified as a subsidiary organ of the Assembly and is referred to as a political commission composed of states and appointed by a decision of the General Assembly. It is established for an indefinite period.(3)

(1) See text of resolution 194(III), paragraph 2 in Appendix

(2) Loc. cit.

(3) Fouad Said Hamzeh, International conciliation with special reference to the work of the United Nations cpnciliation commission for Palestine (The Hague: 1963) p. 99

The resolution provided in addition that the commission was not to merely a conciliatory organ but a " mediatory and executive body (1) and was to deal principally with Jerusalem, the Holy places and the refugees

The first meeting of the commission was held in Geneva on January 17, 1949 and it was agreed to establish official headquarters in Jerusalem. The commission then embarked on its task of conciliation as defined in paragraphs 4, 5 and 6 of the resolution and concentrated its efforts in bringing about a "rapprochement" between the parties concerned. Between February 12 and 25, the commission established contacts with the governments concerned through official visits. The Arab countries were prepared to cooperate with the commission on condition that they should not be asked to meet directly with Israelisand not to enter into general peace negotiations with Israel until the refugee question had been settled " at least in principle, maintaining that the acceptance by Israel of the right of the refugees, as expressed in the forementioned paragraph 11 to return to their homes, must beregarded as the condition sine qua non for the discussion of other questions". (2)

The Israelis on the other hand, refused to accept as a principle the injunction contained in paragraph 11, i.e. the right of the refugees to choose repatriation or compensation and refused to negotiate on any point separately and outside the framework of a general settlement. (3)

(1) Loc. cit.

(2) C.A.O.R.(V) General progress report and supplementary report of the United Nations conciliation commission for Palestine, 11December, 1948 to 23 October 1950, supplement No. 18 (A/1367/Rev. 1)New York';1951, p. 2

(3) Loc cit, op. cit. p. 1[illegible]

The commission decided to invite to invite the Arab states to hold meetings in Beirut on March 21, 1949 in order to " gain a clearer understanding of the views of the parties".(1) Here again the Arab states unanimously insisted on the absolute priority of the refugee question for both humanitarian and political reasons while Israel persisted in its refusal. (2) The Lausanne meeting and the signing of what came to be known as the Lausanne Protocol by both parties in May 12 " extending their exchanges of views to all problems covered by the General Assembly's resolutions (194 (III) and accepting the partition plan for Palestine (Resolution 181 (II) of November 29, 1947,) as the basis for discussion." The Protocol declared that " the United Nations conciliation commission for Palestine anxious to achieve as quickly as possible the objective of the General Assembly's resolution of December 11, 1948, regarding the refugees, the respect for their rights and the preservation of their property as well as territorial and other questions has proposed to the delegation of the Arab states and the delegation of Israel that the working document attached hereto be taken as the basis for discussions with the commission... The interested delegations have accepted this proposal with

(1) Hamzeh, op. cit. p. 104

(2) The Israelis felt that repatriation and compensation of those Arab refugees would prejudice its design to effect the"ingathering of all Jews into the Jewish state". Ben Gurion, stated that aside from a small number of refugees which could be repatriated the bulk of the refugees could be resettled in the Arab countries-G. A. O. R. CCP, First Progress Report, p. 12. As to those refugees waiting to return to the Jewish government stated that they could be resettled(hence concept of returning home was rejected) in the areas which could not affect the security interests of the Jewish state, i. e. that this resettlement should come within the scope of the Israeli economic development scheme. Michael Francher, United States Policy on Repatriation and Compensation of the Palestine Refugees with Particular Reference to United Nations Assistance to the Refugees , thesis(Beirut 1964) p. 125

the understanding that the exchanges of views which will be carried on by the commission with the two parties will bear upon the territorial adjustments necessary to the above indicated objectives. (1)

After the protocol was signed the Arab delegation proposed that the areas occupied by Israel outside the territory allotted to it by the partition plan should be recognised in principle as constituting Arab territory to which the refugees will return forthwith while the Israeli delegation proposed that its frontiers with Egypt and Lebanon " should be those which had existed between the mandated territory of Palestine and these two countries respectively, and with regard to Jordan, it proposed that the armistice line should be taken as a basis for negotiations". (2)

These proposals where however rejected by the parties concerned. During the second phase of the Lausanne negotiation, the Arab delegations stated their position on territorial questions and the Israelis agreed to discuss the refugee question first. The conciliation commission failed however in the initial effort to effect a solution to the refugee problem and at the subsequent Paris conference on September 13 did not have any more success. The Arab delegation pointed out among other things that the question of the war damages did not lie within the oommission's competence, that there could be no limitations on the return of the refugees and that the revision or amendment of the Armistice agreements must be based on certain principles: respect for U.N. resolutions and for the Lausanne protocol. While the Israeli delegation still maintained that " major considerations of security and of political and economic stability made the

(1) Hamzeh, op. cit. p. 105-106

(2) Hamzeh, op. cit. p. 106

the return of Arab refugees impossible." (1)

The Israelis also refused to admit the CCP's competence to deal with the armistice agreements (2), thus clinging to its traditional stand, based on the non-recognition of both the validity of the principles of the resolution and the authority of the commission (3)

Having thus noted its failure (4), the CCP resolved to continue its discussion in New York while remaining available to the concerned parties through their U.N. delegations.

(1) Hamzeh, p. 112, op. cit

(2) That the commission's move to enlarge the scope of the armistice agreements could not be accepted in their entirety, Hamzeh, op. cit. p. 112

(3) The commission expressed its inability to achieve any progress and concluded with the observation: the government of Israel is not prepared to implement the part of paragraph 11 of the G.A. resolution of 11 December, 1948 which resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, Ibid, p. 122

(4) The United Nations has now on its registration rolls1210. 170 Palestine Arab refugees, more than one million of these eligible for relief and services for the UNRWApR. United Nations Relief and Works Agency for Palestine Refugees and the Palestine Refugees in Facts and Figures: 1964 (Beirut , 1964)

4 - The Mixed Armistice Commission:

Under the General Armistice agreements, (1) a commission was set up which came to be known as the mixed armistice commission or MAC, and entrusted with the task of executing the provisions of the Agreements. This commission is composed of five members (in the case of the G. A. A. signed between Israel, Jordan, Syria and Lebanon respectively) and seven members (in the case of the G. A. A. signed between Egypt and Israel) of whom each party to this agreement had to designate 2 (and 3 in the case of Egypt and Israel), whose chairman (similar in all the G. A. A.'s) was the U. N. Chief of Staff of the truce supervision organization as a senior officer from the observer personnel of that organization whom he designates after consulting the parties. Generally speaking, decisions by this commission were to be based on the principle of unanimity and in the absence of this unanimity, decision had to be taken by a majority vote of the members of the commission present and voting (implying that both parties had to attend MAC meetings.) (2)

(1) We have already discussed the background events which lead up to the signing of the various armistice agreement with the preceding chapter.

(2) It was generally recognised that under the armistice agreement and the security council's resolutions both parties were obliged to attend all MAC meetings for these meetings were important and useful, Fred J. Khoury, Friction and conflict on the Israeli-Syrian frontier Middle East Journal (Winter - Spring 1963,) p. 18

The Armistice agreements provided that claims or complaints presented by either party shall be referred immediately to the MAC through its chairman and that the commission... shall take such action on all such claims or complaints by means of its observation and its investigation machinery as it may deem appropriate with a view to equitable and mutual satisfactory settlement. The members of the commission in addition to that were accorded such freedom of movement and access in the area covered by the agreement, as the commission may determine to be necessary provided that when such decisions are reached by majority vote, U.N. observers only shall be employed .(1) When interpretation of a particular provision of this agreement (other than the preamble and articles 1 and 2 were at issue, the commission's interpretation was made prevalent over any other one.

Neither United Nations Truce Supervision Organization nor Mixed Armistice Commission however functioned as intended. Israel was on various occasions either to flout their decisions, to oppose any enlargement and improvement of the capacities of the former organization (July-October 1954 and February 1956) or to withdraw from MAC (after the Scorpion Pass incident in 1964, when they claimed that they were dissatisfied with the chairman's decision and on October 3, 1956 following the Ramat Rahel incident).

(1)In fact, it was Israeli police who have been able to secure de facto control over large areas of the demilitarised zones and consequently the Israeli authorities have been able to stop or highly control the freedom of movement of the chairman and UNMO's in the demilitarised zones

Even before Israel boycotted the MAC, the quantity of complaints made it impossible to consider all of them. Hence it became much more practical to call emergency meetings when an incident was serious, i.e. involving loss of life on either side.

An attempt at explaining the Israeli attitude will show that in fact, there has been on both Arab and Israeli sides a resentment over the U.N. interference in the war. Both sides feel that this has worked to their respective disadvantage (1). In addition to that and more important is:

1. - the basic Israeli interpretation as to what are the actual objectives of truce supervision. The U.N. would prefer a continuous and almost daily control of every sector of the front whereas Israel contends that the UNMO's should intervene only when a breach of the truce has been committed and reported. This is a clash between the concept of preventive action, and the concept of punitive action. (2)

2. - Israel wishes to avoid admitting that the UNTSO, independently of a decision by MAC could have authority to observe the cease-fire as ordered by the security council on many occasions, and the case of the G.A.A. signed with Syria, the Israelis maintain that this bilateral agreement has superseded any U.N. authority, however, vague, as existed before.

(1) Paul Mohn, Problems of truce supervision, International concilitation No. 478 (Carnegie Endowment for Intenational Peace, New York February 1952), p. 84

(2) Mohn, op. cit. p. 61

3. - The Israelis maintain that only the chairman of the MAC and not the commissions as a whole has any power in the demilitarized zone. The Israelis have also tried to keep the chairman out of the demilitarised zone.

5 - The Demilitarized Zone :

In the Egyptian-Israeli and Syrian-Israeli armistice agreements, certain areas of Palestine were established as demilitarised zones and given a clearly defined special status. We are mainly concerned with the latter's provision, i.e. the Syrian-Israeli G.A.A. as the disputes which occurred over the waters of the Jordan river and which were discussed in the U.N. opposed these two countries.

We have already seen how the Syrians withdrew from areas it had won by " rights of conquest" in order that such areas become demilitarised.

The following are the main provisions of the Ar mistice agreement which will help clarify the positionsof the parties concerned.

1. - The principle that no military or political advantage should be gained under the truce ordered by the Security council is recognized (Art. II, part I)

2. - It is also recognized that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this agreement being dictated exclusively by military and not by political considerations. (Art. II, part 2)

3. - No military or para-military forces of either party shall commit military operations against the other party or cross the Armistice demarcation line. (art. III, part 2)

4. - In pursuance of the spirit of the security council resolution of 16 November 1948, the Armistice Demarcation Line and the Demilitarised zone have been defined with a view towards separating the armed forces of the two parties in such manner as to minimise the possibility of friction and incident while providing for the gradual restpration of normal civilian life in the area of demilitarised zone , without prejudice to the ultimate settlement (Art. V, part 2)

5. - Any advance by armed forces. . . of either party into any of the Demilitarized zones... shall constitute a flagrant violation of the agreement (Art. V, part 5 (b)).

6. - The Chairman of the Mixed Armistice Commission shall be empowered to authorise the return of the civilians to villages and settlement in the demilitarized zone and the employment of limited numbers of locally recruited civilian police in the zone for internal security purposes (Art. V, part 5 (a)).

7. - The execution of the provisions of this agreement shall be supervised by a Mixed Armistice Commission composed of five members of whom each party to this agreement shall designate two and whose chairman shall be the United Nations Chief of Staff of the Truce Supervision Organization or a senior officer ... designated by him (Art. VII, par. 1)

The question of the sovereignty of the demilitarized zone was the most important bone of contention between the two parties.

On March 7 1951, General Riley presented a memprandum to the MAC which in part stated that " the demilitarized zone created by the Armistice agreement was defined with a view toward separating the armed forces of both parties while providing for the gradual restoration of normal civilian life in the area of the demilitarized zone. The chairman of the MAC was charged with the responsibility of ensuring that the provisions of the Armistice agreements with respect to the demilitarized zone were implemented. It follows that neither party to the Armistice Agreement therefore enjoys rights of soverignty within the demilitarized zone (1).

Israel's attitude towards the Demilitarized zone has on various occasions sharply conflicted with the Syrian and more generally speaking Arab compliance with the terms of these agreements (i. e. no claims of sovereignty could be made over the demilitarized zone before final peace and territorial settlement is reached, this meaning for the Syrians that nothing should be done in the Demilitarized zone which would alter the military status quo of the zone without MAC's and the other party's consent: hence no unilateral act could be undertaken in the zone such as drainage hydroelectric and other projects).

(1) S/2049, section IV, para. 3

The Israelis thus claimed sovereignty over the areas in the Demilitarized zones subject only to the specific restrictions against military forces therein as mentioned in article V of the Armistice Agreement ";. . The acting foreign minister stated that Israel insisted upon the non-interference by Syria in the internal affairs of Israel. The acting foreign minister added that the government of Israel considered that the demilitarized zone was in Israeli territory. . . " (1)

Following from that, Israel maintains her rights to act in the Demilitarized zones and to execute development projects, including the diversion of the Jordan. In addition to that, Israel has proceeded, as opportunity offered, to encroach on the specific restrictions and so eventually to free herself, on various occasions from all of them, (2)

Thus the Israelis have sought to restrict the Chief of Staff's role to the military field. (3)

(1) Fayez A. Sayegh, Record of Israel at the U. N. (New York, Arab information centre, 1957), p. 37

(2) Burns, op. cit. p. 113

(3) "As long as the U. N. Chief of Staff operated within the limits of his terms of reference, his opinion on the question of military advantage was correct and inevitable, the venture however beyond military considerations into the fields not merely of political but of civilian legal relationships has produced results which contradict the armistice agreement itself. Note from Mr. Eban to the President of the S. C. on April 16 1951, Doc. S/2089, Rosenne, Israel Armistice, op. cit. p. 56

The Israelis also protested against the Chief of Staff's assertion that " any laws, regulations or ordinances in force prior to the Armistice Agreement which affected any areas included in the Demilitarized zone are null and void. (1)

The United Nations view on this subject tended on the whole to be much more consistent with the Syrian one, except that they have supported the Israeli contention that they (Israel) may initiate projects in the Demilitarized zone without receiving permission from the Syrians as long as those projects do not affect Arab lands. The Chairman has the authority also to decide whether or not these projects alter the military status quo and the U.N. in addition supported Dr. Bunche's statement which said inter-alia: " In the nature of the case, therefore, under the provisions of the General Armistice Agreement, neither party could validly claim to have a free hand in the Demilitarized zone over civilian activity, while military activity was totally excluded ". (2)

We have seen from what has been stated above the divergence of views between the parties as regards the interpretation of the Armistice Agreement (Israel did continue to make minor territorial adjustments in its favour by moving into the Demilitarized zones, i.e. Al-Auja incident,

(1) Rosene, op. cit. p. 59

(2) E.H. Hutchinson, violen t truce. A military observer looks at the Arab Israeli conflict 1951/55 (New York, Devin - Adair, 1956), p. 137, quoting from part of Major General Bennike's report to the Security council on 27.10.53

driving out Arab unhabitants in order to establish Jewish paramilitary agriculture settlement.

CHAPTER 3

THE PLANS TO DIVERT THE COURSE OF THE JORDAN RIVER AND ITS TRIBUTARIES

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In this section, we shall attempt to examine:

1.- Whether there have been any obligations binding on the riparian countries, a) by agreements concluded between the said mandatory power and other states or b) as a result of legislation enacted by the mandatory power and by the administration of Palestine or c) by concessions granted at the time of the mandate.

2.- What, if any, is the legal effect of partition on pre-existing obligations.

3.- What were the effects of these plans on Arab regional interests.

4.- Whether these plans resulted in agreements signed between the interested parties or not.

1.- Obligations under the Mandate:

a) International Conventions:

The conventions which were signed between the two mandatory powers i.e. Great Britain and France purported to protect the interests of both downstream and upstream areas. Thus as regards downstream areas, the Franco-British convention of December 23, 1920 stipulated that in the event any French plan for irrigation of Syria would "be of a nature to diminish in any considerable degree the waters of the Tigris and Euphrates at the point where they enter British Mesopotamia, a commission of experts was to be appointed to make preliminary study of the French Plan."

Another group of experts was to be appointed by the governments to "examine in common... the employment for the purposes of irrigation and the production of hydro-electric power, of the waters of the upper Jordan and Yarmuk and of their tributaries after satisfaction of the needs of the territories under the French mandate."

In this connection, the French were to give their representatives "the most liberal instructions for the employment of the surplus of these waters for the benefit of Palestine." (1)

It was also hinted at that it would be possible to erect in French territory installations for the benefit of Palestine.(2)

However no bi-national electric development took place there and neither of the two expert commissions seem ever to have been formed. Nevertheless, an agreement was reached on Feb. 3, 1922 which stated inter-alia that: "The government of Palestine or persons authorized by the said government shall have the right to build a dam to raise the level of the waters of the lakes Huleh and Tiberias above their normal levels on the conditions that they pay fair compensation to the owners and occupiers of the lands which will thus be flooded." (3)

(1) Abraham Hirsh, Utilization of International Rivers in the Middle East, American Journal of International Law (Vol 50, No. 1) p. 88

(2) The Palestine administration "shall defray the expenses of the construction of all canals, piers, dams of a similar nature, or measures taken with the object of reafforestation the management of forests to the extent to which the contemplated works are to benefit Palestine," Loc. cit.

(3) Hirsh, op. cit. p. 91

The protocol signed between France and the United Kingdom on October 31 1931 and concerning the Yarmuk boundary between Syria and Transjordan reaffirms the above-quoted provisions of the 1920 convention which referred to the Yarmuk and its tributaries.

As regards upstream areas, the Agreement of February 2, 1922 (which as we have seen delimited the frontiers of Palestine and placed all of lake Tiberias in Palestine territory), provided that "any existing rights over the use of the waters of the Jordan by the inhabitants of Syria shall be maintained unimpaired" and the inhabitants of Syria and Lebanon were given "the same fishing and navigation rights on lakesHuleh and Tiberias and on the river Jordan between the said lakes as the inhabitants of Palestine." (1)

Provisions were also made for the benefit of the French on lake Tiberias; they were given the right to establish a pier at Samakh, a village on the lake southern shore or to have joint use of the existing pier there as well as the right of the use of the railway station; goods transferred from the pier to the railway or vice-versa were excluded from customs.

Nothing was said however on boundary-rivers water utilization in this agreement. The agreement to facilitate good neighbourly relations between Palestine and Syria and Lebanon of February 2, 1926 amplified and made mutual the above rights in the following manner:

(1) Loc. cit.

All the inhabitants whether settled or semi-nomadic of both territories who, at the date of the signature of this agreement enjoy grazing, watering or cultivation rights, or own land on the one of the other side of the frontier shall continue to exercise their rights as in the past, they shall be entitled for this purpose to cross the frontier freely and without a passport....without paying.... any dues for grazing or watering or any other tax on account of passing the frontier and entering the neighbouring country....

All rights derived from local laws or custom concerning the use of the waters, streams, canals and lakes for the purpose of irrigation and supply of water to the inhabitants shall remain as at present.... the same rule shall apply to village rights over communal properties". (1)

The Syrian-Transjordan Boundary Protocol of October 31, 1931 contained similar provisions as above.

b) Municipal legislation: The Ottoman code or "Mejelle" of 1869 laid down the rule that all water courses, rivers, streams and channels of flowing water which do not entirely lie within land of absolute ownership (Mulk) of private individuals were public property. Thus since the ownership of all streams and lakes were considered as legally vested in the public, the right to take water could only be acquired by immemorial use. (2)

(1) Hirsh, op. cit. p. 91

(2) "Mejelle" considered that a continued use and only over a certain period did not give a right.

Also according to "Mejelle", underground water cannot be the "Mulk" property of any person. An owner of Mulk land can dig a well on his own property but cannot prevent an adjoining owner from digging a well even if it takes the water a ways from the first. (1)

This system remained in force for quite a long period. Later on however the interested parties tended to dispute the public ownership of springs and rivers and to treat water rights as if they were susceptible of absolute ownership. (2)

Partly in consequence of this, the government tried to introduce legislation to secure the best development of the water resources by controlling drainage and irrigation, deciding water rights, controlling surface water, studying and controlling the undergroung water table. (3)

(1) The general assumption was that a water right was attached to a definite piece of land and could not be sold separately. James B. Hays, T.V.A. on the Jordan, Proposals for Irrigation and Hydro-electric development in Palestine (Washington, Public Affairs, 1948) p. 19.-

(2) E.C. Willats, Some Geographical Factors in the Palestine Problem" Geographical Journal, vol. CVIII, (The Royal Geographical Society, London) p. 164

(3) "Surface water is now deemed to be vested in the government but so far the draft law for its control has not been enacted and owing to unfortunate Jewish opposition, the proposals for the study and control of underground resources have not proceeded very far." Loc. cit.

On December 16, 1944 and in the supplement No. 2 of the Palestine Gazette appeared certain Defense Regulations , made under article 3 of the Emergency Powers (colonial defense) Order in Council 1939 and the Emergency Powers (Defense) October 1939 pertaining to the distribution of water in controlled areas and which were to be established as and where needed. The object and reasons for setting up these regulations were based on " efforts to secure the beneficial and economic use of the water supplies of Palestine with a view to obtaining the maximum local production of food stuffs... handicapped by the absence of appropriate legislation". (1)

The provisions of these regulations were classified as follows: (2)

1.- Waterworks was defined " as including all rivers, streams, springs, lakes and parts thereof respectively and any other collections of still water and also works, structures and appliances construct ed or installed in connection with the procuring, storage, conveyance, supply, distribution, measurement or regulation of water.

2.- The High commissioner would establish controlled areas when necessary for the purpose of maintaing services and supplies essential to the life of the community. The water commissionner was given the duty of supervising and regulating the distribution and use of water in an economic manner. The water commissioner may specify the manner of distributing

(1) Hays, op. cit. p. 19

(2) Loc. cit.

the quantity allocated to each person and the land to which the water is deemed appartenant. He may revise the above from time to time, he may direct that the waters be opened for such periods as may appear to him to be requisite, may regulate the flow, may appoint persons to superintend regulation and distribution and ascertain and maintain records of water resources of the area.

3. -No person is allowed to sell, transfer, mortgage or otherwise dispose of any water in such a manner that the water is separated from the land without the approval of the commissioner.

4. - The water commissioner may grant a license to any person for the installation of a pump or other similar apparatus to draw water from any waterworks he may endorse such license with special conditions relating to drawing, conveyance, distribution or any other matter incidental thereto either at the time of issue or subsequently whenever the water commissioner may deem fit and the license shall comply with any conditions so imposed on him.

5. - A dissatisfied person may appeal to the High Commissioner by writing within one month, but the decision of the High Commissioner is final.

6. - The allocation of water made in any schedule deposited or license granted shall not confer any right to the water, nor shall any allocation or licensing be adduced by any court as evidence of the possession of any right or title save only such right as is necessary for the purpose of giving effect to the regulations/.

7.- The irrigation officer is empowered to enter works and land for the purpose of enforcing the regulations, including surveys, soil testing, establishment of water gages etc...

8.- Compensation for damages is provided for, but the rights of the concessionaire and those obtained from the Ottoman government are excepted

9.- Regulations for enforcement, listing offenses and penalties were also provided for.

However these regulations were referred to as a temporary solution to meet the immediate needs of the then present emergency. (1) They were to take effect as of November 16, 1944 and were to remain as long as the Emergency powers referred to in the title were in force.

C - Concessions

The Rutenberg concession was granted by the administration of Palestine for the exclusive right for 70 years of the production of hydro-electric power from all waters of the Jordan and Yarmuk rivers that came under jurisdiction of the High commissioner for Palestine or should thereafter be brought under his control. (2)

(1) "A bill proposed by the government in 1942 met with certain opposition on the ground that it interfered with private ownership of water rights." Hays, op. cit. p. 18.

(2) In effect the development of Transjordan's own land, nominally outside Jewish influence is controlled in a major aspect by the Rutenberg concession Co. Ionides, The prespective of water development in Palestine and Transjordan, Journal of the Royal Central Asian Society, (vol XXXIII), p 273.

The firm built a hydro-electric plant on the Yarmuk, storage control works on the Jordan at the outlet of lake Tiberias and a dam on the Jordan to divert the regulation flow of the river to the pool on the Yarmuk above the power house. (1)

A clause was inserted which gave Transjordan the right to take water from the Yarmuk in excess of the requirements of the corporation. (2)

The Huleh concession was granted by the Ottoman government for the reclamation of the Huleh lake and marshes to two Lebanese business-men. Very little was done however in the development of this concession. Following World War I, a Syro-Ottoman Agricultural company took over this concession without much result. In 1934 it was sold for £ 192.000 to the Palestine Land Development Company

The advantage of draining the 44 square miles of the Huleh basin had been apparent even to the Ottoman government: the area was malarial and its drainage would have eliminated this menace and at the same time redeemed rich farm lands.

The Palestine Potash Company was the holder of the concession for the production of chemicals from the Dead Sea.

2.- Legal Effect of Partition on Pre-existing Obligations:

The so-called succession of international persons has led to contradictory opinions among writers on International Law. Writers

(1) Hays, op.cit. p.21

(2) But point in fact, the answer always is that there is not any excess in water. Ionides, op.cit. p.276

agree in general to say that a succession of international persons "occurs when one or more international persons take the place of another international person in consequence of certain changes in the latter's condition"[1].

Succession can be either universal, i.e. when one international person is completely absorbed by another either through subjugation or through voluntary merger or again when a state breaks up into parts which either become separate international persons of their own or are annexed by surrounding international persons.

Succession can also be partial when for instance a part of the territory of an international person breaks off in a revolt and by winning its independence becomes itself an international person or when one international person acquires a part of the territory of another through cession or again when a full sovereign state loses part of its independence through entering into a federal state or coming under suzereinty or under a protectorate or when a hitherto not fully sovereign state becomes fully sovereign.

Not all the rights and duties disappear with the extinction of an international person. Some of them devolve actually and really upon an international person from its predecessor.

(1) L.F. Oppenheim, International Law, a treatise (8th ed. by H. Lauterpacht London, Longmans, 1952-55), vol. 1, p. 157.

In the case of Palestine, we are confronted with a state which broke up into fragments, parts of which merged into the Hashemite Kingdom of Jordan or administered as a separate Palestine entity by Egypt (the Gaza strip) and the other part has formed the new state of Israel. As a result Palestine ceased to exist as an International person.

What happens in this case to the international conventions which we have studied above ?

Whereas purely political treaties do not pass on the successor state, a genuine succession takes place however with regard to such international rights and duties of the extinct state as are locally connected with its lands, rivers, main roads, railways and the like. (1) These rights and duties are generally classified under the broad term of treaties creating servitudes or quasi-servitudes.

When the question was raised as to whether the interested parties were bound by the 1922, 1923 and 1926 agreements and this in September 1953 as the conflict over the Jordan waters flared up, General V. Bennike chief of staff of the UNTSO in Palestine expressed the view in a letter to the Security Council that the 1926 treaty's provisions continued to represent the pattern of rights to the Jordan waters. This also was indicated as the Syrian viewpoint by Mr. Farid Zeineddine. (2)

(1) Oppenheim, op.cit. p. 159 & 164

(2) U.N.S.C. 8th year, O.R. 636th meeting, pp. 3, 19 paras. 11 and 87.

The Israeli representative, Mr. Abba Eban, rejected this view and stated that Israel refused to consider itself bound by the obligations assumed by the government of Palestine concerning the Jordan river because Israel did not inherit the international treaties signed by the United Kingdom as mandatory power. The Israeli representative summed up his government's views in this regard as follows:

"That we should be bound in the context of Syria's attitude of belligerency and hostility to Israel to recognize a defunct treaty of good neighbourly relations between the United Kingdom and France is a thought of which the humourous possibilities are infinite". (1)

He then added on November 18, 1953 that Israel took a more or less similar view to the earlier 1922 (ratified in 1923) agreement, but stated that Israel "was willing extra-gratia to accept all the rights and obligations which would be incumbant upon it in this respect (with respect to the Jordan waters) if the earlier treaty were still valid." (2)

A similar question was raised when partition occurred between India and Pakistan i.e. it was to be determined whether the obligation to permit the continued flow of the eastern rivers into the territory of Pakistan was an obligation which normally survived a change of condition of the kind here referred to. One writer (3) replied by saying that the right

(1) Ibid. pp. 19 and 26

(2) Ibid. 639th meeting pp. 19 and 20 paras. 83 and 87

(3) The Eastern River Dispute Between India and Pakistan, World Today (Royal Institute of International Affairs, Oxford University Press, 1957) p. 541.

to draw on canal works and waterways for the purposes of irrigation and the generation of hydro-electric power and the correlative duty to permit the use of water for those purposes may be said to consitutute a classical example of an international servitude. He stated that if the present problem is viewed in the light of the existence of a servitude to allow such use, Pakistan's case in the eastern river dispute is immediately strengthened."

Hence and in conclusion one may fairly assume that these treaties, being of the kind described above and quite irrespective of the problem of recognition or non-recognition of the state of Israel as a legal entity, pass on the successor states. (1)

The problem is however different in the case of municipal legislation and concessions. As to the former, municipal law rights pass but since the successor state can always displace existing rights and titles by altering the former municipal law, the above-described ones cannot be considered binding any more on the parties.

The general weight of practice and opinion lies in the direction of holding that obligations under concessions and contracts are terminated upon changes of sovereignty resulting in the extinction of the predecessor state unless the successor state renews the concession.

(1) Anyway these treaties are couched in very general terms as they purport to guarantee the interests of both downstream and upstream riparians. Hence mentioning them as still binding does not affect in a substantial way our study and conclusions.

to draw on canal works and waterways for the purposes of irrigation and the generation of hydro-electric power and the correlative duty to permit the use of water for those purposes may be said to consitute a classical example of an international servitude. He stated that if the present problem is viewed in the light of the existence of a servitude to allow such use, Pakistan's case in the eastern river dispute is immediately strengthened."

Hence and in conclusion one may fairly assume that these treaties, being of the kind described above and quite irrespective of the problem of recognition or non-recognition of the state of Israel as a legal entity, pass on the successor states. (1)

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However every case must be studied on its merits and it is difficult to lay down a general principle. (1)

Thus for example, Protocol XII annexed to the treaty of Lausanne with Turkey in 1923 provided for the maintenance by succeeding states of pre-war concessions granted by Turkey. But this is a case of cession of territory and not of absorption of a state (Mavromatis Jerusalem concessions) and the survival of this concession was explicitely provided for in a treaty (the Lausanne one). Hence for our purpose, we shall rule out the view that these concessions are still binding on the Arab states.

(1) Oppenheim, op. cit. p. 162

3.- The plans to divert the course of the Jordan river and its tributaries and their effects on Arab regional interests.

When the Peel commission report recommending partition of Palestine was issued in 1937, the British government requested that a survey be conducted to determine how much land could be developed for possible resettlement of the Arabs left homeless by the partition. The Project was completed in 1939 under the auspices of the Director of development in Jordan, Mr. M.G. Ionides.

His conclusions, after proper investigation showed that the only way of providing any substantial new areas of land was by irrigation in the Jordan valley between lake Tiberias and the Dead Sea. The plan was to divert water from the Yarmuk river supplemented by a feeder canal from the south end of lake Tiberias, the lake itself acting as a reservoir to store up the winter flood waters... It was to irrigate 300,000 dunams (75.000 acres)disposing of a regular flow of 507 mcm. (1)

Although his plan was confined to the East bank (the limit of Transjordan's boundary), he concluded that it would be possible to carry water onto the West bank as well if necessary. (2)

(1) M.G. Ionides, The Disputed Waters of Jordan , Middle East Journal, vol. VII, No. 2 (Spring 1953) p. 155.

(2) Loc. cit.

The Zionists countered this move by obtaining the services of Dr. W.C. Lowdermilk a soil conservationist. In 1944 his book "Palestine land of Promise" was published and his ideas put forth. Starting from the premise that "the land of Israel was capable of support-
(1) ing and actually did support at least twice as many inhabitants as at present " (2), it was not difficult for him to draw an ambitious and extravagant plan (3) which included the following steps:

1.- The diversion of the sweet waters of the Jordan and its tributaries into open canals or closed conduits running around the slopes of the Jordan valley for the purpose of irrigating 300.000 acres of land. As this amount may exceed the area of irrigable land in the Jordan valley i.e. 155.000 acrea, he envisaged that surplus of water available will be taken out above the Huleh lake at above 600 feet above sea-level and will flow by gravity to provide for irrigation in the plains of Esdraelon, Beisan and possibly some small valleys of Galilee en route.

(1) The weakness of this argument is that the question as to how many people can be got into the country to-day depends on what you know of the country and not in the least on what happened in the past Ionides, "The Perspective of Water Development in Palestine and Transjordan, " op. cit. p. 75

(2) W.C. Lowdermilk, Palestine Land of Promise, (London , Gollancs, 1947) p. 24. "Further Study of the possibilities of what I shall call the Jordan Valley Authority of J.V.A. has convinced me that full utilization of the Jordan valley depression and adjoining drainage areas for reclamation and power will in time provide farms, industry and security for at least 4 million Jewish refugees from Europe in addition to the 1.800.000 Arabs and Jews already in Palestine and Transjordan," Ibid, p. 122.

(3) H. A. Smith, The Waters of the Jordan, A problem of Internation water control, International Affairs (vol. 25, 1944) p. 420

2. - The construction of a seventy-five mile system of tunnels and canals to channel Mediterranean water into the Dead Sea to compensate for the loss of diverted sweet waters of the Jordan and to exploit the difference in sea levels (700 feet) to produce electric power.

3. - The use of this electric power to exploit the rich chemical deposits in the Dead Sea.

Other items included water conservation, flood control, conservation of land, scientific grazing, reafforestation of lands, extraction of minerals from the Dead Sea, draining of lake Huleh, reclamation of the Negeb.

What were in fact the basic implications of such a scheme ?

1. - By facilitating the settlement of millions of Jews in Palestine Lowdermilk did not hesitate to suggest that individual Arab s who disliked living in an industrialized land could easily settle in the great alluvial plain of the Tigris and Euphrates valley where there is land enough for vast numbers of immigrants. (1)

(1) Lowdermilk, op. cit. p. 128

2. - He did not say explicitely that the water resources were scarce (1) but at the same time, he invisaged the possibility of drawing water supplies from adjacent countries. This in turn implies clearly (2):

a) The Zionist recognition of the inadequacy of Palestine's own capacity to absorb more immigrants (3)

b) That Syria and Transjordan, purely Arab States, should contribute water to support Jewish immigrants into Palestine. (4)

(1) If all the water of Palestine from whatever source, were wholly and more efficiently conserved and used, it would suffice to support a round million of agricultural inhabitants. Agricultural population based on figures given by the partition commission is about 50% all told. In 1938, there were about 700,000 directly engaged in Agriculture, in 1946, about 870,000 and in 1970 there will be about 1.270,000 who would normally be engaged in agriculture. Against this is my estimate of 1,000.000 as the absolute ceiling on which it is safe to work. By 1970, in other words, a quarter of a million agriculturists will be squeezed off the land even if all the available water in Palestine is fully utilized, Ionides, op. cit. p. 273

(2) The supply of water and water power could be further increased by the utilization of water resources which lie in areas adjacent to Palestine and which are now not being utilized, Lowdermilk, op. cit. p. 124

(3) If new immigrants are imported and put onto the land, it means inevitably that for every immigrant brought in and put on the land, one man of the existing population or his children will be squeezed off it. That conclusion seems to me to absolutely inescapable if you take Palestine according to the definition now given, i.e. the country within the present political boundaries of Palestine "Ionides, op. cit. p. 273

(4) Of these schemes the Anglo-American committee of inquiry has said that "their full success requires the willing cooperation of adjacent Arab states since they are not merely Palestinian projects " Loc. cit.

3. - The introduction of sea water into the Jordan valley would endanger and indeed damage the agricultural life in the valley itself. (1)

4. - The Arabs will be totally excluded from such a scheme since Lowdermilk envisaged to make the Jews custodians of the Holy Land, directors of the J.V.A. under the supervision of the United Nations and only Jewish labour would be utilized. (2)

5. - Half of the water would be used to irrigate land outside the Jordan valley andno guarantee is given that the amount of water he reserved for irrigating the Jordan valley would go to the Arabs.

Finally serious criticisms have been made against his optimistic intentions of developing the Negeb by wells (3) or by increasing the amount of water by afforestation or land terraces. (4)

(1) Lowdermilk, op. cit. p. 123

(2) Ibid, p. 124 " The state of the country points out to the conclusion that the only people who are developing Palestine are the Jews. " We have already seen from the study of previous reports the weakness of such arguments, Ionides in this connection says" The Arabs are in my experience very keen to develop... but the water is in the hands of the Palestine Electric Corporation, which will not release it for the Arabs... Whereas the various commissions investigated the problem came up against this one stumbling block:Partition oommission said that the chief difficulty about developing the waters of the Jordan for irrigation was the fact that all water supply is required by the Palestine Electric Corp. it is interesting to note that this difficlty does not appear to arise in the case of the Zionist sponsored J.V.A. Ionides, op. cit. p. 276

(3) "Anyone who suggests that the whole coastal plain could be irrigated by multiplying the number of wells is disregarding the fact that you must not take more than nature is putting in". Ibid. p. 275

(4) "There is no evidence that afforestation could do anything to increase rainfall to a practical extent" and as regards land terraces "although the feasibility is there, one must remember that one is dealing with very small margins." Loc. cit .

Lowdermilk's plan was later developed by James B. Hays in 1948 in his book "T.V.A. on the Jordan, proposals for irrigation and hydro-electric development in Palestine."

It would be needless to describe the steps which this plan undertook to accomplish since they are, with only minor exceptions, similar to the first one. The J.V.A. plan was too clearly designed to benefit the areas of Jewish settlement. (1), the Arab ones figuring as "residuary legatees".(2) Again, no policy of equitable apportionment among the countries who possessed riparian rights to the river was contemplated and this plan like the former envisioned the use of almost all the headwaters of the Jordan river outside of the river basin " leaving the greater part of the lower valley to become practically a desert." (3)

Most important of all, this scheme called for an unusual degree of discipline and cooperation among the users of water in the areas now inhabited by both Arabs and Jews. (4)

(1) "This report may be regarded as addressed to the provisional government of the new born state". Hays, op. cit. p. XVI in the forward.

(2) "The plan suggested in principle (stage 3) that half of the waters of the Yarmuk should be left to Transjordan but only as a subsequent stage in the scheme and for a dam to irrigate the lower valley lands near Jericho. However says Mr. Hays "The recovery of the remaining Jordan waters must await the completion of the previous irrigation works and diversions for the river, which will enable a more accurate determination of what is left in the Jordan". Ionides, op. cit. p. 157

(3) Smith, op. cit. p. 425

(4) Anglo-American committee of inquiry, Survey of Palestine-, vol. 1., (Washington 1946) p. 413.

Paritition as we have already seen took place: The Israeli state was awarded an area embracing the upper reaches of the Jordan in the north... and the opportunity was given her to carry out the basic concept of the Lodermilk-Hays project i.e. the irrigation of the coastal plain. (1) / In Addition to that she had secured possession of the southern outlet to lake Tiberias.

From 1948 onwards, a clear division of interests in the waters of the Jordan became apparent. Jewish aims became concentrated even more clearly in the coastal plain; Arab interests in the Jordan valley. (2) The two parties began to plan separately.

War and the multiple problems of its aftermarth overshadowed however all concerns of a lesser nature. The Arabs in particular devoted little attention to plans and problems of water. Nevetheless, a British firm of consulting engineers, Sir Murdoch Mac Donald & Partners who had been asked by the Government of Jordan to reexamine and improve the 1938 project, published their scheme in 1951.

(1) Hays, op.cit. p. XVI in the introduction.

(2) Ionides, op.cit. p. 158

In contrast to Israeli schemes which have envisaged the utilization of the Jordan waters outside the river valley in utter disregard of Arab natural and historic rights, this plan provided for the use of the waters within the watershed i. e. to irrigate both sides of the valley between lake Tiberias and the Dead Sea. (1)

Nevertheless this plan, starting on the premise that Arab-Jewish cooperation could be possible and thus providing for irrigating the whole floor of the valley, part Arab, part Jewish as well as storing the excess flood water of both the Jordan and the Yarmuk in the joint Israeli and Arab interests, proved to be unworkable.

On the other hand, the Zionists, who had not forgotten the munificent proposals and promises contained in the Lowdermilk - Hays schemes, proceeded to implement their own plans for the use and control of these water resources. These plans were going to be largely based on the aforementioned schemes.

Actual work started in 1951 and aimed at draining the Huleh marshes within the Demilitarized Zone, against the wishes of Syria, Arab land owners and the United Nations supervisors, to provide more agricultural land for Jewish settlers. Syria answered back by filing a complaint with the Security Council saying that the Israeli attempt was a clear violation of the General Armistice Agreements.

(1) "The general principle which to our mind has an undoubted moral and natural basis is that the waters in a catchment area should not be diverted outside the area unless the requirements of all those who use or genuinely intend to use the waters within the area have been satisfied." Loc. cit.

Israel denied the right of Mixed Armistice Commission and Syria to stop the project, stating that it enjoyed sovereign rights in the Demilitarized Zone and also that the project was legal being based upon the concession made to the Palestine Land Development Co. by the Mandatory Power.

The net result of it all was that on May 18, the Security Council passed a resolution (S/2152/Rev. 1) supporting the recommendations of the chief of staff UNTSO which he had stated as follows: (1)

1. - Israel had no sovereignty over the Demilitarized Zone nor did she have a free hand in civilian matters there.

2. - Israel should have consulted with the Mixed Armistice Commission chairman before starting any drainage project.

3. - Israel must abide by his (i.e. the Chief of Staff UNTSO) cease-work order.

4. - Syria's consent was not needed for the project and the latter would not alter the military status-quo.

5. - The project would be legal if it did not interfere with the restoration of normal life in the zone and if it did not affect the rights of those Arab with lands in the area involved.

(1) United Nations Official Records, Security Council
541st meeting, April 17, 1951 pp. 3 and ff.
542nd "
544th "

In fact, the Security Council's resolution failed to prevent Israeli's implementation of its plans[1] and Mixed Armistice Commission talks between the two countries were discontinued.

The drainage of lake Huleh constituted however only one step in a much more elaborate scheme. Thus on October 16, 1953, the Syrians who had discovered that Israel was engaged in constructing a canal (2, 4 kms of the Kinneret-Beisan canal) just below Jisr Banat Yacob in the Demilitarized Zone for diverting the waters of the Jordan river between lakes Huleh and Tiberias to provide power for an electricity generating station on the shore of lake Tiberias, (2) registered a formal complaint with the Security Council stating that Israel has started work on September 2, 1953 "to change the bed of the river Jordan in the central sector of the Demilitarized Zone."

(1) Israel suspended work in the zone, until and inspite of Syrian objections, the chief of staff authorized a resumption of work on lands in the Zone which were not Arab-owned and thus not subject of dispute. S.C. resolution 547th meeting, May 18, pp. 19 and ff.

(2) "Investigation showed the section to be much greater than what would be needed for the alleged purpose and later Israelis admitted to the engineers working with Johnston that it was intended to divert a considerable volume of water at Beit Netufa, when it would be piped partly through the Sharon plain and eventually to the Negeb". E.L.M. Burns, Between Arab and Israeli, p. 111.

General Bennike, who had at first considered the complaint and who had been entrusted with investigating the issue, based his decision on an examination of both completed and projected Israeli work in the light of article V para. 2 of the General Armistice Agreements and concluded that work must stop as long as agreement is not reached. (1)

In spite of that (2) and of Israel's disguised intentions to stop work, she in fact refused to abide by General Bennike's request and the work continued until the United States announced on October 20 the deferment of economic assistance funds because of her refusal to comply with General Bennike's decision to stop diversion. The economic sanction by the U.S. continued to operate through 1955 and 1956 to prevent the Israelis from taking matters in their own hands again and completing the canal diversion. (3)

(1) More specifically Bennike concluded that : a) Works so far performed in the D/zone has interfered with normal civilian life. b) that the construction of the projected canal was likely to do so (i.e. to interfere with normal civilian life) c) that the canal would alter the balance of military situation in the D/zone S/3122, Annex I

(2) Although the evaluation of the military effect of the canal upon which General Bennike based his decision might be contested, in my opinion it was absolutely right to halt the Israeli project; it was in effect a unilateral diversion of the waters of a river which Syria and Jordan also had rights" Burns , op. cit. p. 111

(3) According to the Israeli government "Work on the B'nat Yacob project outside the D/zone has continued in the interim. Completion of that section of the canal within the D/zone has been postponed pending the outcome of Mr. Eric Johnston's efforts to achieve agreement on a regional water program of which the B'nat Yacob project would be part; According to the state of Israel, weekly news bulletin May 28, 1956 and according to Israel's Economic review , June 28, 1956 one tunnel on the Jordan-Battauf canal at Jlabun has been completed and work has started on another. Work is continuing on the canal proper outside of the D/zone. Machinery for the Tabgha power plant has been ordered. Machined for the production of concrete 108 inch pipes for the main conduct will be installed in a "Mekoroth" factory this year. UNRWA, Bulletin of Economic development, no. 14, Special reports on Jordan, p. 100 quoting the above mentioned sources.

At about the same date i.e. in October 1953, Israel drew up a Seven Year plan for the utilization of the Jordan waters. This plan contemplated more than doubling of the water supply by 1961 i.e. from the actual 810 mcm in 1952-53 to an estimated 1730 mcm in 1960-61, so as to triple the area of irrigated land i.e. from 60.000 dunums to 180.000 dunums. The increase of 920 mcm in the water would come from the following sources: (1)

1.- Local and regional sources not involving waters of the Jordan river and its tributaries.	380 mcm
2.- Jordan river and its tributaries	540 mcm
a) Drainage and irrigation of the Huleh area	120 mcm
b) Net diversion from the Jordan river at Jisr Banat Yacov for irrigation southward to the Negeb	340 mcm
c) Diversion from lake Tiberias via the Kinneret-Beisan canal for irrigation southwards of Tiberias almost to Beisan	80 mcm
Total	920 mcm

The basic features of this plan were:

1.- A major portion of these waters (340 mcm) was to be diverted out of the Jordan watershed and carried through a canal to the Negeb desert. Under the Seven Year plan, diverrsion would begin shortly below Jist Banat Yacob and water would be conveyed by a canal for 14 kms to near the proposed Tabgha power plant where a part of the flow would be

(1) UNRWA report, op. cit. 96

diverted over a 250 meter fall into lake Tiberias to generate power. Most of the flow , however would be diverted westward to the Sahl Battauf (Beit Natufa) reservoir. The Tabgha plant will supply power to pump water from the canal into Sahl Battauf and from this point, the main conduct would lead the water to the Negeb. (1)

2. - Diversions from lake Tiberias (water was to be withdrawn from the Southwest corner of lake Tiberias through the Kinneret - Beisan cannal (part of which as we have seen would lie in the D/Zone) to irrigate southern Israel to the Beisan district) would have reduced the outflow from lake Tiberias downstream into the Jordan river from the present 538 mcm to 60 mcm per year (If there should be no diversion of Yarmuk water into Lake Tiberias).

However since the seven year plan map shows a diversion canal from the Yarmuk to lake Tiberias, it seems possible, that the plan contemplated some Yarmuk diversion into lake Tiberias under Israel's exclusive control. (2)

In the Summer of 1953, the pressing need for solving the Palestine refugee question prompted UNRWA to ask the U.S. government to have a study made for the development of the Jordan valley in conjunction with refugee resettlement. The T.V.A. (Tennessee Valley Authority) submitted the task to a Boston engineering firm and in August 1953,

(1) UNRWA report, op. cit. p. 97

(2) Ibid

Mr. Charles T. Main submitted his report entitled "The Unified development of the water resources of the Jordan valley". This report came to be known as the T.V.A. or Johnston plan. The T.V.A. plan served as the point of departure for the Johnston (Mr. Eric Johnston being President Eisenhower's special representative) negotiations with the Arab states and Israel beginning in the fall of 1953. Its recommendations were however considerably modified during subsequent negotiations. The T.V.A. plan started on the assumption that a broad plan for the effective and efficient use of the water resources of the Jordan valley i.e. within the watershed of the Jordan river system, emphasizing first irrigation and secondly the production of hydro-electric power, could be established without any regard to existing political boundaries or to the legal limitations involving water rights.(1)

The following constructional works were observed in this project:(2)

1.- Irrigation features

a) A dam on the upper course of the Hasbani to store and regulate the waters of that headwater stream

b) Diversion of the waters of the Bania, Dan and Hasbani rivers to a canal that will carry water for the irrigation of the Huleh basin and the areas of Hoshamar, Galilee, Yavneel valley and Jezreel valley (i.e. northern Israel south to the vicinity of Beisan).

(1) Charles T. Main, The Unified development of the water resources of the Jordan valley region (Boston 1953) p 3

(2) Main, op.cit. p. 5 & 6

c) Diversion of the Yarmuk waters to the Eastern Ghor canal and lake Tiberias for storage.

d) East and West Ghor canals, leading from lake Tiberias south towards the Dead Sea. They would irrigate 272,000 dunums in the West Ghor (183,000 dunums in Jordan and 89,000 in Israel) and 307.000 dunums in the East Ghor by gravity flow. (1)

e) Draining of the Huleh swamps so as to make this area available for irrigation and eliminate heavy water losses by evaporation and transpiration.

f) Construction of the necessary installations for the control of waters in the valley south of lake Tiberias.

g) Construction of the necessary work to provide for storage requirements by raising the water level of lake Tiberias by approximately two metres above its present maximum level. (2)

h) Construction of reservoirs to store rain waters coming from lateral valleys in accordance with detailed plans attached.

i) Exploitation of suitable water wells available in the Ghor and Yavneel valleys.

(1) Main, op.cit. p. 38 & 39

(2) "The use of the natural reservoir afforded by lake Tiberias, takes advantage of an asset already at hand" Mr. Gordon Clapp, Chairman of the Board of the T.V.A.

2. - Power Features:

a) Construction of a canal drawing its waters from the Hasbani Dam for the erection of a power station near "Tel Hai".

b) Production of electric power from the Yarmuk river by constructing a dam at Maqarin (1) and a power station near Adasiya.

The Johnston Plan called for the utilization of 1305 mcm of water within the Jordan watershed, of which 879 mcm, i.e. 67% would be for the Arab states and 426 mcm i.e. 33 % for Israel. This amount of water irrigate 90, 000 ha. distributed as follows:

Jordan	46, 000 ha
Syria	3, 000 ha
Israel	41, 000 ha

The Hasbani power feature would produce about 27, 000 kilowatts of power for the benefit of Israel and the power feature on the Yarmuk would 38, 000 kilowatts for the benefit of Jordan.

The cost of the whole project was estimated at 121 million dollars and it was expected that it would require 10 to 15 years to complete.(2)

(1) Although principally for power purposes this dam will provide some benefits to irrigation also T.V.A. plan, op. cit. p. 6

(2) UNRWA report, op. cit. p. 83

When the report was first published, it was received with hostility by Israel and the Arab states. Israel was displeased because:

1. -The report provided for use of the Jordan waters only within the river's watershed, thus making irrigation of the Negeb with those waters impossible;

2. - The report omitted the use of the Litani river in Lebanon;

3. - They believed that the T.V.A. Plan, by over estimating the amount of irrigable land in the lower Jordan valley, allocated too much water to Jordan.

The list of Arab objections to his plan is very long, but before stating them, one should remember that a year earlier, i.e. in 1952, The Jordanian Government was able to secure a plan for the "maximum development of the Jordan valley without involving international negotiations which might not be feasible at the present moment."(1) This plan which has come to be known as the Bunger plan was worked out jointly by experts in the Jordanian government and Mills E. Bunger (an engineer attached to the American Technical Cooperation Administration or Point Four in Amman). Its basic concept was the utilization of the Jordan and Yarmuk water for irrigation in the Jordan valley below lake Tiberias and of the Yarmuk waters for generating hydro-electric power. In that purpose

(1) Loc. cit.

a dam was to be built on the Yarmuk at Maqarin (1) as well as two power plants and two canals running from north to south on either side of the Jordan, the East Ghor canal and the West Ghor canal. The plan failed however, to be implemented. (2)

The existence of such a plan, (3) stood as a serious obstacle in Johnston's efforts to secure the good-will agreement of the Arabs.

Arab objection to the T.V.A. Plan were two fold:

1. - Technical ones:

a) They considered that the unified project gave Syria and Jordan too little water i.e. 879 mcm compared to the total amount of water coming from the Arab countries, i.e. 1054mcm which could be drawn from the following sources:

HASBANI	157 mcm
BANYAS	157 mcm
YARMUK	475 mcm
SMALL RIVERS	265 mcm

(1) A distinctive feature as one can notice since this plan provided for a more suitable place for storing Yarmuk waters other than lake Tiberias which was under the exclusive control of Israel.

(2) Syria and Jordan agreed on this plan and UNRWA hadinitially endorsed the project and agreed in March 1953 with the Jordanian Government to allocate 40 million dollars from the agency's rehabilitation funds for the Maqarin dam. Later on however the agency decided to withdraw her support. One reason given by UNRWA for this change of heart was that the project " might be rendered nugatory by other projects undertaken by other interests in the same watershed. "In fact it was the Israeli opposition to the Bunger Plan (which had not recognised Israel's claim to a share in the waters of the Yarmuk) which proved to be largely responsible for its failure, Edward Rizk, The Jordan Waters, Arab Outlook, vol. 2 Nos. 1, 2 & 3, (Arab information centre, London), p. 7

(3) It was quite natural that the Jordanians should prefer this all Jordanian projett.

b) Syria said that the storage of Yarmuk waters in lake Tiberias will make possible the conveyance of great amounts of water in the western canal to irrigate Israeli lands, while she, having in the river valley 6,800 ha of irrigable land in the plain of Hauran and additional irrigable surfaces between Maqarin and Adasiya will be able to irrigate only 3,000 ha from Yarmuk waters.

c) The Arabs contended that the diversion of the headwaters of the Jordan river and their transportation through a canal 120 km. long to the Galilee hills and Beisan will prevent them from irrigating lands situated directly near these rivers. In addition to that, they claimed that the bringing of these waters to the Battauf reservoir, would guarantee to Israel the possibility of storing the water in it and from there drive it to the Negeb.

d) Another technical feature of the Johnston proposals which the Arabs found objectionable was the proposed storage of the relatively sweet waters of the Yarmuk in lake Tiberias whose waters possessed a higher degree of salinity. This they claim has been immensely detrimental to agriculture in the lower Jordan valley, already suffering from salinity.

e) Elevation of lake Tiberias by 2 metres, they said, would influence the geography of the lake itself and would cause the flooding of certain holy places along its shore.

f) Storage of Yarmuk waters in the broad and shallow lake Tiberias would result, they assessed, in greater loss by evaporation (estimated at 300 mcm per year) than storage in a relatively narrower and deeper dam at Maqarin.

g) Jordan claimed that Israel could get advantage from the first step (i. e. utilizing all the water from the Banias, Dan and Hasbani) after three years, whereas Jordan will start to profit only after the 2nd and 3rd. steps were accomplished.

h) Jordan again complained that the construction of the power station at Tal Hai came as a 3rd. step in the project, whereas the production of current from the Maqarin dam for Jordan and Syria came only as a 4th. step.

i) Lebanon, in whose territory the Hasbani river springs and flows was not to use one drop of its waters as these were entirely allocated for irrigation in Israel. Likewise, Syria complained that her rights in the maximum use of the Banias waters in her territory were not fully recognized.

2.- Political ones:

a) It was contended that no scheme could be considered which would involve a departure from the policy of no peace with Israel (1).

(1) The Prime Minister, Fawzi el Mulki: "Jordan is fully prepared to continue to bear economic hardships rather than participate in any project with Israel either directly or indirectly". Don Perez, Development of the Jordan Valley Waters, Middle East Journal (Vol. IX, No. 4, 1955), p. 400.

b) The Main plan was branded as a political program for a solution of the Palestine problem in the guise of a purely technical report. It was also asserted that the proposal was merely a device to delude Arab refugees and trick them into giving up their rights to return to their homes in Palestine. (1)

All these objections, i. e. the technical and political ones, added to the strained relations which existed between Jordan and Israel upon Johnston's first visit to the Middle East (The Quibya border incident) led the Arabs (2) to reject intoto the proposals contained in the T.V.A. plan while Israel though not satisfied showed some interest in it.

However, in spite of these obstacles, Johnston having explained to the parties the nature of his proposals, (3) returned home with a promise from the countries concerned that they would study the plans

(1) Loc;cit.

(2) In Jordan, there was an inclination on the part of the Arab states "to throw out not only the plan but Johnston as well". Peretz, op. cit. p. 401

(3) In a talk he made over C.B.S. (Columbia Broadcasting System) radio on Dec. 1, 1953, Mr. Johnston described the objectives of his trip in the following words: "I did not go to the Middle East with a plan. What I had in my brief case was a proposal. This proposal was to urge the careful consideration of a concept, watershed... I did not ask or expect a "yes" or "no" answer from anyone in connection with these suggestions. On the contrary, I did not feel that a definite reply made before careful consideration had been given to the proposal would be "in order". Department of State Bulletin, 28 December, 1953, P. 892. Also in an address made at Cornell University on May 6, 1954, Mr. Johnston emphasized once more that what he presented to Israel and the Arab States "was not a plan" but a broad conception of what might be done, offered as a basis for discussion and negotiation. Department of State Bulletin, May 24, 1954, p. 790

and make counterproposals.

The Arabs presented their counterproposals to Mr. Johnston during his second trip to the Middle East early in 1954. The scheme prepared by the Arab technical committee of the Arab League differed considerably from the T.V.A. plan because of the Arab consideration that it was "impossible to use the project for the development and exploitation of the water resources of the Jordan river and its tributaries by ignoring the political boundaries between the riparian countries." (1)

Hence, under the "Arab plan" each and everyone of the riparian countries was guaranteed an equitable apportionment of water sufficient for the irrigation of all cultivable lands in the watershed of the Jordan complex. (2)

Under this plan the quantities of water and the irrigable surfaces were allocated in the following manner: (3)

Syria was allocated 132 mcm to irrigate 119,000 dunums

Jordan was allocated 975 mcm to irrigate 490,000 dunums

Israel was allocated 287 mcm to irrigate 234,000 dunums

Lebanon was allocated 35 mcm to irrigate 35,000 dunums

(1) Al Jami'a al 'Arabiyya, Al Mashru' al 'Arabi Listighlal Mawarid al-Miyah bihawd Nahr al Urdun was Rawafidihi (League of Arab States Seccretariat, Press and Information Department, Jan. 1964), p. 1

(2) Loc. cit.

(3) Rasha S. Khalidi, Hawl Tahwil Majra al Urdun, Al Ra'id al Arabi, vol. 43 (Kuwait, May 1964), p. 11.

The basic features of the Arab plan were:

1.- The utilization of the Yarmuk river for both irrigation and the generation of hydro-electric power.

2.- The utilization of the Jordan river and its tributaries north of lake Tiberias for irrigation and power generation.

3.- The utilization of the Jordan river and its tributaries south of lake Tiberias.

4.- The utilization of the waters of plains and wells.

Certain distinctive features can be singled out; these are:

1.- The plan allocated a higher proportion of water for the Arab states, i.e. 1142 mcm or 80% of the total amount, than to Israel i. e. 20 % of the total amount.

2.- The plan provided for the construction of a high dam on the Yarmuk for maximum storage with a little amount of water to be stored in lake Tiberias. This was mainly done to avoid the disadvantages which were found to result from storage in lake Tiberias and, which we have mentioned above i. e salinity, evaporation, Israeli control of the lake and the effect of the rise in the lake on the Holy features of the area.

3.- The plan provided for a Hasbani dam and power project in Lebanon to make possible the irrigation of Lebanese lands in the river valley.

4.- The plan also made possible the use of some of the water from the Banias for irrigation in Syria and in Jordan.

The Israeli counterproposals on the other hand, presented in May 1954 for purposes of negotiation with the Johnston mission offered a modification of the Seven-Year Plan but included some added features drawn up by Mr. John S. Cotton, an American engineer.

The plan was described by the Israeli minister of Agriculture as "a genuine regional plan, embracing all available resources in the Jordan watershed and part of the river waters which flow entirely in Lebanon". (1)

According to this plan the areas which were to be irrigated were the following: (2)

Israel	1.790.000 dunums
Syria	30.000 dunums
Lebanon	350.000 dunums
Jordan	430,000 dunums

And the plan provided for:

1. Diversion of all upper Jordan waters (Dan, Banias, Hasbani) for use in Israel, either in upper Israel or for conveyance to the Sahl Battauf reservoir for the Main conduct to the Negev. The amount of water taken would be: (3)

(1) UNRWA report, op.cit.p. 98 and Don Peretz, op.cit. p. 404: John S. Cotton had said "The Cotton plan is not limited to the Jordan-Yarmuk basin, since hydrographic boundaries have no real engineering meaning".

(2) Rizk, op. cit. p. 10

(3) Khalidi, op.cit. p. 12

240 mcm.	From the Banias, Dan and Hasbani rivers
400 mcm.	From the Litani river by tunnel to the Hasbani river, hence
740 mcm	would be conveyed through a canal to the Sahl Battauf reservoir to be distributed later on to the Negeb and the coastal plains
2) 200 mcm	From the Jordan waters, to be conveyed through a canal which would be constructed from Jisr Banat Yacov to the Sahl Battauf reservoir.
3) 100 mcm.	From lake Tiberias and indirectly from the Yarmuk, to be conveyed through a canal which would be constructed from lake Tiberias to Beisan.
4)	Storage of all the Yarmuk waters in lake Tiberias
1040 mcm.	Total
-400 mcm.	of what the plan claimed from the Litani
640 mcm. (1)	

(1) "Even without the Litani, Israel still claimed about 670 mcm annually from the Jordan- Yarmuk system. According to Israeli estimate that would be 40 to 50% of the available water and would comprise about 75% of the Jordan flow at the Banat Yacov bridge below lake Huleh, Peretz, op. cit. p. 406.

Thus, in contrast to the allotment to the riparian states of 1213 mcm of Jordan and Yarmuk waters under the Main plan, the Cotton plan provided for an allocation of 2.345 mcm; hence over 3 times as much water as allocated in the Main plan and 7 times as much as the amount called for in the Arab plan, the balance coming from the Litani river. (1)

Moreover, the amount of water on which allocations were made in the Cotton plan was according to the Israelis' "governed by actual experience with water consumption". This was as far as Lebanon, Syria and Jordan were concerned. In regard to Israel however, the Cotton plan advanced the view that the water allocated " is a surplus for which no beneficial use can be found in the other basin states. By contrast to those states, in the case of Israel, the amount of irrigable land, especially in the southern coastal plain and the Negeb, exceeds the available water supply". (2)

(1) The Cotton plan assumed the Litani flow to be 851 mcm annually, but Point Four investigations showed it to be only 701 mcm. Hence the Cotton plan would have left only 301 mcm of the Litani for Lebanese use, UNRWA report, op. cit. p. 98.
"In consequence, problems which loom large in the Main plan such as the difficulty of reconciling the allocation requests for the individual Basin states with actual availability of water within the basins become minor problems in the Cotton plan." Summary of the Israeli office of information quoted by Rizk, op. cit. p. 10.

(2) Loc. cit.

In support of their plan, the Israelis claimed also that the "major part of the flow of the Litani river has no irrigation outlet inside Lebanon". (1)

With these counterproposals, Mr. Johnston proceeded on his 2nd visit to the area in 1954. In attempting to find a compromise between the Arab and Cotton plans and his own plan, he ruled out the most expansive phases of the Cotton plan regarding the Litani which was considered wholly Lebanese river and the coastal diversion to the Negeb. As to the tormenting problem of storage in lake Tiberias, the Arab objection to it was taken into consideration. (2)

However two points of contention remained,

1.- The amount of water each state would receive.

2.- The degree of international supervision over a joint Arab-Israeli project particularly over water stored under Israeli control.

(1) In 1948, a survey was made by a British firm of consultants. Sir Alexander Gibb and partners stated that intensive cultivation of the Bekaa valley through which the Litani runs would reduce the waters of the lower Litani to an extent where they would require supplementation.
A report made in June 1954 by a team of U.S. bureau reclamation experts working for the foreign operations administration estimated that Lebanon could use about 80% of the Litani water, Peretz, op.cit. p. 406.
The Israelis were confounded by the results of this investigation. They still maintained however that a great deal of Litani water could be more efficiently used on the Israeli than on the Lebanese side of the border. The Israelis hope that Lebanon might be induced to give Litani water in exchange for power (drop into the Jordan valley is about 550 meters as compared with 150 meters between the western bend of the river and the coastal plain of Lebanon) Dana Adams Schmidt, Prospects for a solution of the Jordan fiver valley dispute, Middle Eastern Affairs Vol VI, no. 1. p. 10.

(2) Additional storage in the sea of Galilee to serve the lower Jordan valley was provided for.

As to the first, Israel argued that the Main and Arab plans over-estimated the amount of irrigable land and the amount of water per unit required for economic crop production in the Jordan Ghor. The disagreement resulted also at this stage from the lack of an accurate land and hydrological survey of this portion of the area. Consequently, a survey for this purpose was conducted by two U.S. firms (Michael Baker of Rochester Pennsylvania which made a land and soil analysis and the Harza Co. of Chicago which made a study of hydrological conditions during 1953 and 1954) in conjunction with UNRWA.

The Baker-Harza survey laid down two important conclusions:

1.- That all the waters of the Yarmuk could not be stored economically and efficiently in a Yarmuk storage reservoir and that use of lake Tiberias for full storage would be necessary.

2.- That while the irrigable land in Jordan was actually larger than previously assumed, the total need of water would be less owing to the nature of the soil. (1)

(1) Baker's classification of irrigable land increased to 514.000 dunums the area in the Jordan which could possibly be irrigated. This increase from the 490.000 estimated in the Main plan took into account slope, soil type, salinity and various other factors. The Baker report actually found about 530.000 dunums of arable or potentially arable land in the Jordanian sectors of the valley, but from this a deduction of 3% was made for non-crop uses such as canals, roads and buildings. Peretz, op. cit. p. 408

During Johnston's third visit to the Middle East, the parties expressed their reactions to the Baker-Harza report . Thus, the Arabs, while happy to accept the increased estimate of irrigable land which the report found in Jordan, were however displeased at the proposed decrease in water duties which lowered estimates of total water needs. On the other hand the Israelis wanted more water and continued to dispute the amount of irrigable land found by the said company and the 3% allowance for non-crop use.

When Johnston left the Middle-East he had succeeded in the following compromises:

Israel 1. - abandonned for the time being her demands for the Litani

2. - was prepared to permit minimum neutral supervision of the plan in operation

3. - it agreed provisionally to the use of lake Tiberias as a storage reservoir for a limited amount of surplus Yarmuk waters to be used in Jordan. (1)

The Arab technicians,

1. - agreed to use lake Tiberias as a partial storage reservoir

2. - agreed to work on an international plan.

(1) This acquiescence was however half-hearted, for the Israeli government had reason to suspect that the Battauf reservoir might leak and this development aroused the anxiety of Israeli water authorities who now feared that lake Tiberias would have to be used to compensate for its deficiencies. If such were the case, the limited capacity of the lake would not permit storage of both surplus Yarmuk waters and water which would be used for Israel's own development, Peretz, op. cit. p. 409.

At the conclusion of Mr. Johnston's fourth and final round of talks in September 1955, the issues which had to be settled were:

1. - The exact amount of water to be allocated to each state.

2. - The nature of an automatic system for releasing Jordan waters to the Arabs from lake Tiberias and Yarmuk water to the Israelis from the Adasiya diversion.

3. - The degree and nature of neutral supervision required to oversee operation of the river system.

A technical agreement was arrived at on October 21. The result of the discussions was not however a formal agreement on a single document but rather a series of recommendations on water allocations which "constituted a Unified development plan". The plan had been endorsed by technical representatives and they had submitted favourable recommendations to their governments.

The principle upon which the agreement was based was the assurance of sufficient water to meet the needs of all irrigable land within the Jordan valley. Once this condition has been met and the waters equitably divided, it was stipulated that the riparians could use their allocations wherever they wished. (1)

In addition to the Maqarin dam on the Yarmuk and lake Tiberias, the plan provided for a storage dam on the Hasbani river in Lebanon so as to insure that the water allocated to her could in face be made available.

(1) The same idea was given earlier by Ionides, "The disputed waters of Jordan, op. cit. p. 162

The final allocation of water was decided to be as follows: (1)

Lebanon would receive		35 mcm from the Hasbani
Syria	"	20 mcm from the Banias 22 mcm from the Jordan 90 mcm from the Yarmuk
		132 mcm
Jordan	"	377 mcm from the Yarmuk 100 mcm from the Jordan 243 mcm from side wadis of Jordan
		720 mcm
Israel	"	25 mcm from the Yarmuk 446 mcm from the Jordan (2)
		471 mcm

Certain stipulations were also made regarding the saline springs in lake Tiberias such that if and when they were channeled out of the lake, half of this diverted water would be shouldered by Jordan and it was also provided that an impartial body of water engineers would control the operation of the whole project. (3)

(1) Khalidi, op. cit. p. 10 and 11.

(2) Israel would receive the remainder of the Jordan waters after the other Arab parties had secured their allocations.

(3) None of the engineers would be a citizen of any of the countries participating in the plan to include any "Arab state", UN. Department of state Airgram, 31 October 1963.

However in spite of the technical progress arrived at, no agreement was reached (1) and the proposal was not ratified by the governments concerned. The failure of the Johnston mission was a tremendous asset in the hands of the Israelis. It gave them the opportunity to work on their own plans which obviously came much closer to their own interests.

Thus, the National Water Planning Board adopted in 1956 a Ten-year plan which incorporated with some modifications the Seven-Year plan discussed earlier.

The ten-year plan provided for:

1. - the utilization of an additional 900 mcm annually (over and above the 900 mcm already being utilized) by the end of 1966 at an estimated capital cost of IL 400 million ($220 million) to increase the amount of cultivable land from 880.000 dunums to 3 million dunums
2. - the Huleh project and the Kinneret-Beisan canal approximately as in the seven-year plan
3. - "the national water project" for diverting 500 mcm from the Jordan river at Jisr Banat Yacov (instead of the 340 mcm envisaged by the seven-year plan; hence an additional withdrawal of 160 mcm of Jordan river waters to Israel) to be conveyed by canal to Sahl Battauf reservoir and thence by the 108 inch main conduct to Faluja for the Negev.

(1) Syria voted to postpone the Arab decision; the Lebanese chamber of deputies urged the government to reject the T.V.A. plan and during Mr. Johnston's fourth visit, 60.000 Palestine Arab refugees in Hebron went on a hunger strike in protest of the project calling it "an imperialist-Jewish plot to usurp waters rightfully belonging to the Arabs."

4. - Only a modest storage of 150 mcm in Sahl Battauf (because of leakage which made it impossible to store 1.000 mcm there as originally assumed in the seven-year plan) and consequently the plan provided for a substantial storage in lake Tiberias(initially 250-300 mcm but possibly more later).

5. - the diversion of 30 mcm of the saline spring waters from the lake downstream into the Jordan river to avoid undue salinity in lake Tiberias that would result from the heavy upstream diversion of fresh water at Jisr Banat Yacov. (1)

Thus the amount of water which would be withdrawn from the Jordan river and its tributaries would be the following: (2)

Utilization of Huleh (completed in 1956)	100 mcm
Utilization of Kinneret-Beisan canal	70 mcm
Diversion of saline spring-water from lake Tiberias downstream into Jordan river	30 mcm
Diversion at Jisr Banat Yacov under National water project	500 mcm
Total diversion from lake Tiberias and Jordan river	700 mcm
Supply of Jordan river at lake Tiberias and above (as estimated in T.V.A. plan)	600 mcm
Amount needed from Yarmuk river to carry out the ten-year plan	100 mcm

(1) UNRWA report op. cit. p. 99

(2) Loc. cit. quoting the state of Israel government yearbook 5716/1955 pp. 365. & ff.

It would appear from the above-statistics that the ten-year plan cannot be achieved unless Israel is able to divert all the Jordan river water and intermediate water flowing into lake Tiberias and an additional 100 mcm of Yarmuk river water for Israeli use. (1) This would give Israel 56% (700 mcm) of the river's waters, leaving only 44% (540 mcm) for use by the three Arab states concerned. In the second place, the diversion of the saline-spring downstream into the river would provide a clear case of pollution: The saline content of the Jordan river being only 20 milligrams per litre as compared to 280 milligrams from lake Tiberias resulting from the existence of saline springs.

The ten-year plan was revised for the last time in 1961.(2) The Israelis, who initially had planned to carry out the diversion of the waters of the Jordan river through a canal at Jisr Banat Yacov and who were stopped in their action by the Security Council resolution in 1953, decided on an alternative scheme which would avoid work in the Demilitarized Zone. (3)

(1) UNRWA, report, op. cit. p. 99

(2) In March 1960, Mr. Ben Gurion announced formally Israel's intention to pump water directly from lake Tiberias rather than complete the disputed work in the Demilitarized Zone. New York Times, 19 March 1960.

(3) By pumping the water directly from lake Tiberias, the Israelis were able to put the problem in the following manner: Location i.e. in or out the Demilitarized Zone, rather than diversion itself constitutes the danger.

This scheme, called the "Tiberias-Negeb project", consisted of a conduit 65 miles long, with intermediate reservoirs, pumping and booster stations. The intake would be at the northwest corner of lake Tiberias and pumping would raise the water to the level of the counduit. The water will then flowwin a canal to a reservoir at Battauf through three tunnels under the Gallilee and Menasse hills, and through a 108 inch pipe-line to the headwaters of the Yarkon-Negeb project at Ras el Ain. Finally, from Ras el Ain, the water will be carried south in the two existing Yarkon-Negeb pipe-lines. At first, it was provided that one pump will provide the Negeb with 320 mcm of water. However, according to a report published in the "Times" of 30th. December, 1963, under the full plan, three pumps are expected to be used with a pumping capacity of 720 mcm per year.(1)

Israel in this new project hoped to:

1.-increase the volume of water used in her country from 1250 mcm in 1961 to 1850 mcm in 1970.

2.- Obtain an additional 600 mcm from the following sources:

a) 288 mcm from flood waters and streams inside Israel,

b) 12 mcm from underground waters inside Israel,

c) 300 mcm from the Jordan waters

3.- To increase the number of inhabitants to 3 million by 1970 and 4 million by 1980.

(1) Rizk, op. cit. p. 13

4. - Israel recognises that she had already used 185 mcm from the Jordan waters (hence this will make the amount of water which Israel intends to take from the river Jordan the following: 185 mcm + 300 mcm = 485 mcm or the same ratio as contained in the 7-year plan) and that she had already achieved the drainage of the Huleh marshes as well as the Kinneret-Beisan Canal. (1)

This in view of the Israeli determination (2) to carry out unilaterally and in total disregard of Arab rights, its plan for the diversion of the Jordan river waters out of the river's watershed to the Negeb, the technical committee of the Arab League decided in November 1960 upon certain measures:

1. - Completion of the East-Ghor canal and the storage of the Yarmuk waters in the river valley. (3)

2. - Diversion of the Banias river by canal for irrigating Syrian lands lying to the west and south of the river as far as the Yarmuk.

3. - Construction of a dam on the Hasbani in Lebanon and the diversion of the waters of this stream by tunnel to the Litani river for irrigation in southern Lebanon.

(1) Khalidi, op. cit., p. 13

(2) Levi Eshkol announced that Israel was pushing her Jordan project with all haste and hoped to have it completed by 1964, New York Times, Nov. 16, 1959

(3) The project is to irrigate 120.000 dunums, the length of the canal is 70 kms. and its cost estimated at 6 million dinars, the U.S. share of it being 4 million dinars.

4. - Installation of a pumping station on the Hasbani near the source of the Wazzani to raise its waters for irrigating the the nearby plateau in Lebanon and Syria.

The subject of Arab diversion of the Jordan's headwaters came up again on several occasions; early in 1963 when Syria "revealed that her army engineers had started work on a project to divert part of the Hasbani river and that they would initiate efforts to divert the Banias river by the end of the year in order to deprive Israel from utilizing the waters of the two tributaries and foil her plan to divert the waters of the river Jordan;" (1) and in January 1964, when the Arab head of states meeting in Cairo discussed the issue and decided to create an Arab Unified Command for an eventual military confrontation with Israel over the Jordan river.

Finally, the Arab heads of state meeting at the Summit Conference in Alexandria in September, 1964, approved the construction of a barrage on the Yarmuk river at Moukheiba with a view to diverting the waters of this river to irrigate Arab lands (2) and that the task of diverting the headwaters of the Jordan would be undertaken immediately.

(1) Khoury, op. cit. p. 33

(2) The cost of the barrage will amount to 10 million Egyptian pounds, the participation being 77% to be paid by the R.A.U. Kuwait, Saudi Arabia and Iraq and the remaining 23% to be paid by the other Arab countries. L'Orient, 12th. September, 1964, p. 6

4 - The Existence or non-existence of an Agreement

We have already touched upon this question while discussing the effect of these plans on Arab regional interests. As we have seen, the different plans put forth did not result in any agreement.

Certain conditions must be met before an international convention of the classical type could be signed between the contending parties. Summarized, very briefly, these include:

1. Certain common interests recognized as such by the parties to the dispute.
2. A certain degree of good faith and confidence in each other's intentions

These conditions lacking and the Arab unwillingness to recognize legally the existence of Israel (a further condition for an eventual agreement) have led the parties poles apart: Thus while the Israelis are actually engaged in their diversion scheme; the Arab threats to counteract the latter's move, with the exception of the East-Ghor project, have so far proved to be largely talk.

CHAPTER 4

THE LEGAL PRINCIPLES GOVERNING THE USE OF THE WATERS OF AN INTERNATIONAL RIVER

Dealing with the legal aspects of the Jordan river disputes, this section will attempt at finding out whether or not rules of law governing the use of international river waters exist (lex lata) or are in the process of being made (lege ferenda).

It will be purposeful to bear in mind that our interest in finding ruless of law will be strictly to a close examination of the different modes of water utilization excluding problems of navigation, because:

1) intrinsically the present dispute does not involve navigational rights;

2) it is doubtful whether we can call the Jordan river a navigable waterway in the sense given to qualify the regime of the Danube, Elbe, etc...

(The Jordan river with its tributaries is a closed basin. Within the body of international fluvial law, these closed basins must be considered as forming a distinct category)(1).

(1) Abraham M. Hirsh, Utilization of International Rivers in the Middle-East. American Journal of International Law, vol. 50, (published by the American Society of International Law, The Runford Press, Concord, N.H. 1956) p. 100

Until very recently, i.e. before World War I, international law had almost nothing to say on the subject under investigation. Rivers were important in so far as navigation and, to a lesser extent, floating and fishing were concerned. Rules were thus drafted and codified to satisfy these particular aims. As these uses do not, in a substantial way, alter the physical character of the river itself, (in the sense that they do not consume water) a state denying these rights (especially navigation and floating) to another state would do so by sheer egoism.(1) Problems arose, however, when the constant and increasing demand for more water, combined with technological progress, rendered feasible the maximum exploitation of the resources in water for hydroelectricity, irrigation, domestic and other purposes, and by the same token, alterations in the physical character of large areas. This time, conflicting interests were at stake and difficulties in solving disputes of this kind manifested themselves.

Juraj Andrassy, in presenting his report to the 9th Commission of the International Law Institute assembled at Neuchâtel in 1959, expressed the difficulty in finding out rules of law governing this subject in this manner: "Science and technique", said he, "can increase these resources in different ways (use of underground water, desalinisation of maritime water and reduction in water evaporation)". He proceeded then to explain that in perfecting one or the other of these methods, the relation between needs and available resources would be altered, justifying thus a revision in the reciprocal rights and obligations which were based on a state of things by now redundant, and making more

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(1) Institut de Droit International, Annuaire de l'Institut de Droit International, session de Madrid, 1911, Vol. 24 (Résolution de Madrid, pp. 365-367, Paris, 1928) p. 117.

difficult the task of reconciling conflicting interests, arbitrating between them and fixing general rules which are to govern international relations as regards the use of these water resources(1).

We do not deny the fact that future developments might change existing law (at least Mr. Andrassy admits that some rules of law pertaining to our subject exist) thus rendering our task premature, but we do not wish either to start where Fritz Berber's too far-fetched analysis led him, i.e. to a denial as to the existence of such laws(2). Rather, from our understanding of international law and basing our study on the available sources of law and their acceptance by the community of nations as such, we will try to deduce principles which will guide us in building up an Arab case in the dispute over the waters of the Jordan river.

International (non-maritime) waterways: a definition

Usually, rivers have been classified in two ways:

The first one bases its definition on the physical characteristics of rivers. Thus a classical expression of the above-mentioned one as adopted by the Vienna Congress (articles 1 and 2 of the 24 March 1815 ruling on the free navigation of rivers and articles 108 and 109 of the final act of June 9, 1815) distinguishes between national rivers (those entirely situated within the territory of one state) and international rivers, contiguous to, i.e. crossing, the territory of several states.

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(1) Juraj Andrassy "Rapport provisoire sur l'utilisation des eaux internationales non-maritimes", Annuaire de l'Institut de Droit International, session de Neuchâtel, 1959, p. 135.

(2) Fritz Berber, Rivers in International Law. (Translation, London-New York, 1959) p.

It should be borne in mind, however, that these texts referred only to navigable rivers. The expression (international rivers) had to await for the 1919-1920 peace treaties to be consecrated for the first time in anofficial text, but was replaced later on in the Barcelona Convention of 1921 by the expression "navigable waterways of international concern" ... The reason for such a change was the absurdity of this discrimination based on purely physical characteristics, excluding any reference to the economic importance of such rivers (some of the national rivers were more important economically than other international ones crossing more than one state).

Another distinction which always takes into consideration the physical aspects of rivers differentiates between rivers and their tributaries. Thus article 1, c of the Barcelona convention states that "tributaries ought to be considered as independent waterways"[1]. Similarly, Middle Eastern countries tended to treat the tributaries to their international rivers separately[2]. The 1909 treaty concluded between the United States and Canada also does not include in its definition of boundary waters, any tributaries flowing into lakes, rivers, canals ...[3].

A third way of defining rivers is based on their economic aspects. The various uses to which a river is submitted, Andrassy argues, tend to have repercussions on the most far-reaching portions of territory depending upon the

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(1) Comptes Rendus et Textes Relatifs à la Convention sur le Régime des Voies Navigables d'Intérêt International, Société des Nations (Barcelone Conference, 1921).

(2) Hirsh, op. cit. p. 100.

(3) Text of the Treaty, American Journal of International Law, vol. 4 (1910) pp. 239-249.

same fluvial system. One should hence abandon the classical concept of an international river and replace it by the criterion "international effects"[1], i.e. those effects which are felt beyond the international frontier. He assimilated further the tributary with the whole waterway by stating: "It is not possible to isolate a waterway according to its peculiar geographical identity and thus separate its tributaries even though these may belong entirely to the territory of one state[2].

Similarly, lakes have come progressively to be incorporated within the same regime as the one governing international rivers. Earlier writers on International Law did not consider the issue. Vattel, for example, distinguished between frontier lakes and lakes included in one state, but did not consider the case of a lake connected with a waterway system[3]. Hyde, on the contrary, recognised such a possibility, but applied it strictly to navigation[4]. The International Law Association at its session in Madrid in 1911 laid down, however, an article which stated that "the preceding rules are even applicable in the event when, from a lake situated in a territory, waterways run across the territory of another state or other state's territories".[5] Again, the more recent Pakistan-India (Indus) water treaty signed in 1960 defined

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(1) Andrassy, Op. cit. p. 214; same idea also given by Andrassy in "L'Utilisation des Bassins Fluviaux Internationaux", Revue Egyptienne de Droit International, vol. 16 (publiée par la Société Egyptienne de Droit International, Alexandria, The Society, 1960), p. 26.

(2) Loc. cit.

(3) Emer de Vattel, The Law of Nations and the Principles of Natural Law, (Washington, Carnegie Institute of Washington, 1916), p. 104

(4) Charles Cheney Hyde, International Law, Chiefly as Interpreted and Applied by the U.S., vol. 1 (3 vols., 2nd ed. Boston, Little Brown and Co., 1947) p. 579.

(5) Annuaire de l'Institut de Droit International, session de Madrid, op. cit. p. 1360.

the expression "connecting lake"; envisaging hence the possib ility of its submission to the same legal treatment as international waters[1].

Andrassy furthermore in his project for a resolution advances even the view that in applying such rules, one ought to take into consideration the big quantities of underground water which are tightly connected to surface waters (either by feeding such waters or by incurring alterations in case the surface water is used). His opinion is shared by several members[2] of the Institute, thus reinforcing the recent trend which views the river system as a physical unity[3] (in the absence of a legal and economic unity).

Andrassy's theory of international effects leads to another important classification, i.e. between the different uses to which all international waterways can be submitted. Louis Cavaré and Alexandre C. Kiss share his point of view in distinguishing between qualitative and quantitative changes:

1) Uses which do not alter either the quality or the quantity of water, i.e. watermills or hydroelectric power features which after making use of the water return it to the bed of the river.

2) Uses which consume a big quantity of water without returning it to its normal flow. Examples of such exhaustive uses are:

   a) irrigation,
   b) inundation. [4]

3) Qualitative changes, i.e. pollution[5].

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(1) Text of the Treaty, American Journal of International Law (1961), p. 803.

(2) Andrassy, op. cit. p. 220

(3) The concept of boundaries has similarly incurred many alterations, it has lost its meaning in so far as it stands as an obstacle to the use of the riches of a river. Louis Cavaré, Le Droit International Public Positif (Paris 1961) p. 787

(4) Alexandre C. Kiss cites many cases of quantitative changes occurring through inundation. L'Abus de Droit en Droit International (Paris 1953), p. 23

(5) Andrassy, op. cit. p. 223-224.

The three authors admit that a combination between these categories can happen, i.e. an upper riparian on a successive river, by storing the water might diminish the quantity of water which in normal circumstances would reach the lower riparian, thus inflicting a damage upon him.

Since in all these situations the particular problem concerns the relation of the territorial sovereign to a foreign state or its nationals by reason of conduct or occurrences taking place within the domain of the former,[1] international law intervenes to confirm such sovereign rights or to correct (sanction) its abuses.

The question pertaining to the utilisation of international rivers started really as an inquiry into the broader concept of territorial sovereignty, i.e. the power of a state over its territory and its limitations. Three theories have been advanced:

1) Laband's theory - the territory as an object of the state's power. Thus, an analogy was drawn between the owner of a good in private law and the state owning the territory, using and disposing of it in the way it pleases and hence admitting of no external limit to its will.

2) Jellinek's theory - the territory as a subject of the state's power. Here there is a total assimilation and confusion between the state and its territory.

3) Michoud's theory - the territory as a limit. The territory is not an object of the state's power, it constitutes only the circle within which this power can manifest itself. The territory hence plays a tremendous role because it sets a limit to the state's power. This latter

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(1) Hyde, op. cit. p. 640

theory is interesting in so far as it agrees with the modern theories limiting the power of the state (or at least does not contradict them). It is however inadequate to regulate economic relations. The present state of international relations and the rules which ought to govern them lead to a different conception of things[1].

Following this classification, 3 general principles concerning the right of a state to utilise the waters of an international river can be found in reviewing the various sources of law.

1) The principle of absolute territorial sovereignty:

A state can make free use of the waters flowing through its territory, but, following logically from this premise, it has no right whatsoever of demanding the continued free flow of water from other countries.

2) The principle of absolute territorial integrity:

A state has the right to demand the continuation of the natural flow of waters coming from other countries, but as a corollary, this state may not restrict the natural flow of water flowing through its territory into other countries.

3) The principle limiting the free usage of the waters:

a) can be extended and thus includes the idea of a community in the waters; it means, broadly speaking, that no state can dispose of the waters without the positive cooperation of the others.

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(1) Cavaré, op.cit. p.298

b) can be less extensive than the former and thus lead, though in varying degrees, to a restriction of both principles 1 and 2, mentioned above.

We shall keep this classification in mind in the arrangement of our source material.

The sources of law:

Article 38 of the statute of the International Court of Justice lists the following as sources of law[1]:

a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting states.

b) International custom, as evidence of a general practice accepted as law.

c) The general principles of law recognised by civilised nations.

d) Subject to the provisions of Article 59, Judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.

The answer to the question as to the existence of rules in international law governing the use of water being dependent on the interpretation placed upon the sources of international law, one should be cautious in accepting overall generalisations[2] and hence a brief discussion of the theoretical aspect of each source is essential.

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(1) Charter of the United Nations and Statute of the International Court of Justice (published by the United Nations, Department of Public Information, N.Y.)

(2) Kiss mades this very pertinent remark, according to him "it is very unfortunate that a complete and easily accessible documentation pertaining to this subject exist only in the U.S. ... thanks to the authority of such writers as Moore, Hyde, Hackworth, American conc epts can impose themselves everywhere. op. cit. p. 19.

1) Custom as a source of international law

Custom is the older and the original source of international law in particular as well as of law in general[1].

Oppenheim, whose definition is on the whole very similar to the ones given by other writers, states that wherever and as soon as a line of international conduct frequently adopted by states is considered legally obligatory or legally right, the rule which may be abstracted for such conduct is a rule of customary international law[2].

Customary rules crystallise from usages or practices which have evolved in approximately three sets of circumstances:

a) diplomatic relations between states

b) practice of international organisations

c) state laws, decisions of state courts and state military and administrative practices[3].

Manley O'Hudson is more explicit in setting the conditions which ought to prevail for a customary rule to be considered as such and he lists:

a) concordant practice by a number of states with reference to a type of situation falling within the domain of international relations.

b) continuation or repetition of the practice over a considerable portion of time.

c) conception that the practice is required by, or consistent with prevailing international law.

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(1) Oppenheim, op. cit. p. 25

(2) Ibid, p. 17

(3) J. B. Starke, An Introduction to International Law, (4th Ed. London Butterworth) p. 31-32

d) General acquiescence in the practice by other states[1].

The international court of Justice has in its turn laid down the following conditions: 1) frequency; 2) uniformity; 3) relative generality; 4) preciseness and 5) juristic content.[2]

Berber challenging the validity of customary law says that the latter, in the same way as treaty law, is based on the consent of those legally bound. States are only bound under customary law to the extent that their own state practice evidences such consent to be bound in law[3]. He states furthermore that a custom practised by other states, even when they regard it as a part of customary law, is not binding as customary law on a state either when it has not itself joined in the practice or when it has joined in the practice but without the intention to be legally bound[4].

Several authors would answer this objection by stating that the "opinio Juris sive necessitatis" (i.e. the state practice evidencing their consent to be bound in law) is not an essential element of custom; thus Sir John Williams states that in many cases "the rubicon which devides custom from law is crossed silently, unconsciously and without proclamation"[5].

But suppose now that a state says that it conforms to a usage on grounds of humanity or motives of comity (comitas gentium).

Obviously in this case, no Opinio Juris exists.[6]

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(1) Berber, op. cit. p. 47

(2) Ibid, p. 48

(3) Loc. Cit. quoting Anzilotti's Lehrbuch des Volkerrechts, vol. 1, p. 56

(4) Ibid, p. 49

(5) Starke, op. cit. p. 34

(6) See later on our discussion of the treaty between Portugal and South Africa where motives of humanity were involved.

Writers attach a great value to diplomatic precedents. Philimore attributes a particular importance to a stand taken by a government on a question involving international law because in his view, this particular government will not reject the principles invoked by it. Similarly, Lauterpacht says that one cannot deny the fact that in a community where the possibilities for creating law are limited, the attitude of its members must to a certain extent replace the source of law; he concludes that the actions undertaken by competent state organs must at least be considered as an evidence of what this state acknowledges to be international law(1). A. Fakhiri is also of the same opinion.(2) We will have the chance of discussing this issue at greater length under the title of "Municipal Courts' Decisions". Since the customary rules of international law are best evidenced in the other sources, we will turn immediately to the consideration of the various treaties which have been concluded with the definite purpose of regulating the use of international rivers.

2) Treaties as a source of law

Fritz Berber argues that the existence of a treaty is justified on any of the five following bases:(3)

1) as a remedy in a gap of law

2) as declaratory of a previously existing state of affairs

3) as generalisations from previously existing treaties

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(1) H. Lauterpacht, "Decisions of Municipal Courts as a source of International Law", British Yearbook of International Law, (London H. Frowde, Oxford University Press, 1929) p. 89

(2) A. Fakhiri, "International Law and the Property of Aliens", op. cit. p. 34 ans ff.

(3) Berber, op. cit. p. 132-134

4) as applicable to a certain period in time

5) as applicable to a certain region (hence, in both the latter cases, a treaty can have no universal application).

In addition to that, Berber excludes as evidence of a practice resulting in the formation of a customary law, all such treaties in which the parties obviously acted from particular and concrete political or other subjective motives and not from the "Opinio Juris sive necessitatis"[1].

How are we then going to determine whether this or that particular treaty is to become a source of law? One has of course to take into account the nature of each particular treaty. Writers on international law have distinguished between those treaties which are a direct source of international law (i.e. the law-making treaties which, if concluded by a great number of states, express their agreement to be bound by the provisions of this treaty in the future[2]) and those treaty-contracts which, because laying down specific obligations only between few (two or more) states concluding them, could lead to the formation of international law through the operation of the principles governing the development of customary rules.

Starke lists three sets of conditions which these treaty-contracts have to satisfy[3]:

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(1) Ibid., p.135

(2) James Leslie Brierly, The Law of Nations; An Introduction to the International Law of Peace (5th ed. Edited by Sir Humphrey Waldock, Oxford Clarendon Press, 1959) p.59

(3) Starke, op. cit. p.40

1) recurrence of treaties laying down a similar rule[1].

2) generalisation by subsequent independent acceptance or imitation of one particular rule in a treaty originally concluded between a limited number of parties.

3) crystallisation of a rule into law by an independent process of development; such effect being due to the special authority and solemnity possessed by this type of instrument.

A - Multilateral or law-making treaties

Multilateral conventions dealing with river problems from the point of view of their utilisation are few, compared with the number of bilateral ones. Since Andrassy argues that problems of water utilisation attract the attention of the international lawyer only when its exploitation undertaken in one state results in a damage to the other state, it is quite understandable that in view of the different economic needs and geographical settings of each particular state, international courts did not previously find the opportunity (and were generally reluctant) to impose similar duties on a great number of states. Thus the Geneva convention relating to the development of hydraulic power, signed on December 9, 1923, is the first example

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(1) "The fact that, in these treaties, similar problems are resolved in similar ways make of these treaties and negotiations persuasive evidence of law-creating international practice", W.L. Griffin, "The Use of Waters of International Drainage Basins under Customary International Law, American Journal of International Law (1959) p. 50.

"Moreover, the frequency with which treaties on the utilisation of boundary waters on modern state boundaries are concluded, indicates that the prohibition of the unrestricted diversion of water corresponds to a universal legal principle", Thalman cited by Berber, op. cit. p. 133.

of this kind. Article 1 grants states the power to carry out in their territory operations for the development of hydraulic power "within the limits of international law"[1].

This treaty was however ratified by a very small number of states and was practically never applied. The next important document is the declaration of the 7th conference of American States, adopted at Montevideo in 1933 (the U.S. making substantial reservations)[2]. The document started from the premise that since co-riparians have the right to exploit the part of the international river within their territory (article 2 para. 1), no alteration which may prove injurious to the margin of the other interested state may be done without its consent (article 2 para. 2). Works to be performed must be announced to co-riparians, who must reply, "within a period of 3 months" with or without observations.

In the former case, a mixed technical commission consisting of technical experts from both parties will pass judgment on the case. In case diplomatic channels and conciliatory awards are rejected, the disagreement, at the request of the interested parties, shall be submitted to arbitration. This convention marks a progress over the first one in so far as the exploitation of water for industrial and agricultural purposes is taken into account.

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(1) Haywood Green Hackworth, Digest of International Law, vol. 1 (Washington, U.S. Gov. Print. Off., 1940) p. 596.

(2) Documents, American Journal of International Law (1934) p. 59.

The interest shown by different organs of the United Nations concerning this question must be mentioned. The main emphasis, however, being put upon technical and financial cooperation (the legal aspects being only hinted at), no account of the work done by U.N. organs will be given.

B - Treaty contracts:

1- Three treaty contracts which basically upheld the principle of absolute territorial sovereignty, but later on agreed to apportion the water on the basis of equity are worth mentioning for our discussion.

a) United States-Mexico: Upper Rio Grande 1906

The United States and Mexico share the waters of the Rio Grande and Colorado rivers. Since the last decade of the 19th century, both countries have sought an equitable distribution of these waters and as a result a number of agreements were concluded.

In 1894 and 1895, Mexico protested against the diversion of the Rio Grande in the U.S. to the great damage and hardship of Mexican interests. This action was presented as a violation both of the principles of international law and of Article VII of the treaty of Guadelup-Hidalgo of February 2, 1848; Mexico claimed also inter-alia that a prior claim takes precedence in case of dispute.

Attorney General Harmon asked to give his opinion stated: "The question should be decided as one of policy only because, in my opinion, the rules, principles or precedents of international law impose no liability of obligation upon the U.S. ...".[1] He admitted however that this case was a new one.[2]

This opinion came to be universally equated with the doctrine of absolute sovereignty. The international boundary Commission charged with the task of investigating and reporting on the Rio Grande situation recommended the matter to be settled by a treaty dividing the use of the water equally. Matters were however delayed and it was not until May 21, 1906 that a treaty was concluded whereby the U.S. agreed to deliver to Mexico, in the bed of the river, 60,000 acre-feet annually in accordance with an annexed schedule without cost to Mexico[3]. Article V of this treaty made however an important reservation stating that the U.S. in entering into this treaty does not thereby concede, expressly or by implication, any legal basis for any claims heretofore asserted or which may be hereafter asserted

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(1) John Basset Moore, A Digest of International Law, vol. 1 (8 vols. Washington Government Printing Office, 1906) p. 654.

(2) Loc. cit.

(3) "The government of the U.S. is disposed to govern its action in the premises in accordance with the high principles of equity and with the friendly sentiments which should exist between good neighbours".

by reason of any losses incurred by the owners of land in Mexico due or alleged to be due to the diversion of the waters of the Rio Grande within the U.S., nor does the U.S. in any way concede the establishment of any general principle or precedent by the concluding of this treaty[1].

b) U.S.-Canada: Treaty of January 11, 1909

Diplomatic negotiations preceding the conclusion of this agreement took place between those two countries concerning the use or diversion of:

1) boundary waters
2) waters which are tributary (and entirely within the territory of one country to boundary waters)
3) waters of rivers flowing across the boundary.

Essentially, there were three disputes:

1) The diversion by the U.S. in northern Montana of the St. Mary river which naturally flows north into Canada (this flow being needed for irrigating Canadian lands).
2) The diversion by a Canadian irrigation Co. of the waters of the Milk river into Canadian territory thereby depriving Montana farmers and ranchers of water needed for their land.

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(1) Hackworth, op. cit. p. 584.

3) The diversion by an American power company into northern Minnesota of the waters of a tributary of American-Canadian boundary waters for power generation in the U.S. (1).

The International waterways commission was formed by the U.S. and Canada in 1905 for the consideration of water problems affecting the American-Canadian boundary region. A settlement was finally reached and incorporated in Article VI of the treaty signed by the U.S. and Great-Britain on January 11, 1909. We are here mainly concerned with the provisions of Article 2 which led to various and often contradictory interpretations. This article provided: (2)

"Each of the high contracting parties reserves to itself or to the several state governments on the one side and the Dominion or Provincial governments on the other, as the case may be subject to any treaty provision now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line, which in their natural channels would cross the boundary or into boundary waters, but it is agreed that any interference with or diversion from their natural channel of such

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(1) See the detailed account given by James Simsarian, "The Diversion of Waters affecting the U.S. and Canada", American Journal of International Law, vol. 32 (1938) pp. 488-518.

(2) Text in American Journal of International Law, vol. 4 (1910) Pp. 239-249.

waters on either side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto...

"It is understood however, that neither of the high contracting parties intend by the foregoing provisions to surrender any right which it may have to object to any interferences with or diversion of waters on the onde side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary."

Thus the first part of this principle affirming the absolute sovereignty of the U.S. on its territory is qualified by the latter paragraph which takes into account the possible damages and entitles the injured party to the legal remedies.

We can therefore, conclude that this treaty was not based on one theory of absolute territorial sovereignty (1) and hence it was a rejection of the Harmon doctrine. However, as in the previous case, the U.S. in concluding the treaty, had not acted as the result of any

(1) Statement by Mr. Turner, representing the U.S. Government at the 1920 session, cited by Marc Wolfrom, "L'Utilisation a des fins autres que la navigation des eaux des fleuves, lacs et canaux internationaux" (Paris, Pedone 1964), p. 84.

obligation of international law, but only out of international Comity[1].

c) Portugal and South-African Union:

The Treaty of July 1, 1926 on the Kunene river, provides for mutual advantage in the use of the waters of the river. However, Article 6 recites that the compromise granted by Portugal was done "on grounds of humanity". Portugal refused furthermore to recognise the practices referred in the preamble as traditional and it was clearly stated that if water is diverted for any other purpose than to suit the Ovamboland natives, compensation is to be made to the Portuguese government.

d) Another treaty which had at its origin the principle of unrestricted sovereignty is the one concluded by Austria and Bavaria immediately after World War I; Austria wanting to use the waters[2] feeding the Achensee to the disadvantage of Bavaria sought to act following the principle of territorial sovereignty as regards waterways crossing its territory. This claim was rejected by Bavaria and an agreement was reached. The agreement provided inter alia that ... "neither state enjoys exclusive rights over the total volume of the waters of contiguous waterways, but that, by virtue of general principles of law, each of them, apart from exceptions

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(1) Loc. cit. "I believe that within the strict law of nations, the U.S. might have monopolised all these waters without committing any offence against international law, if it had been deaf to the claims of a generous international comity. Yet inasmuch as the water flows from one country to another ... a just comity and a decent regard for the offices of good neighbourship ... "

(2) Case cited by Berber, op. cit. pp. 70 to 80.

arising from special legal circumstances may claim the right to exploit half the value of the water of the waterway in question."

e) A very interesting case which however contains contradictory statements is the treaty concluded between Yugoslavia and Austria in 1954, regarding the utilisation of the river Drave, where Austria is in the position of an upper riparian and Yugoslavia the lower.

During Hitler's annexation of Austria and occupation of Yugoslavia, several works were erected for the exploitation of water resources, but after the war, each one of these two countries found itself in possession of works harming the other country. Each party used the same arguments, contending that:

1) international law forbade the action which the other party undertook;

2) the measure which it undertook (or rather the situation created by the Germans) was not contrary to international law. This latter argument was incorporated in the 1954 treaty. But the recognition that rules of international law forbidding the use of one's territory to the detriment of another existed, was explicitly stated. (1)

(1) Ibid.

2- Principle restricting the free use by one state of an international waterway

The other treaties as previously stated will be classified according to their strict or more flexible adherence to the principle restricting the free use of an international waterway by one state. These treaties can be grouped as follows:

a) Treaties based on the idea of common ownership or treaties requiring the unconditional consent of the other state:

Fauchille mentions several treaties requiring the consent of the other riparian state for any change brought to the flow of a river. Thus, Article 30 of the Convention of Maestricht between Belgium and Luxembourg provides that no use, no innovation, or concession leading to a modification in the waterway can be granted without the consent of the two governments(1). Similar provisions can be found in Article 27 of 26 June 1816 convention between Belgium and Prussia, Article 10 of August 8, 1843 and Article 10 of June 11, 1892 conventions between Belgium and Holland.

Also specific provisions of the various peace treaties signed following World War I(2) stipulate that in default of any provisions to the contrary, when as the result of the delineation of a new frontier, the hydraulic system in a state (canalisation, drainage, control of inundations or similar matters) becomes

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(1) Paul Fauchille, Traité de Droit International Public, vol. 1, 2 vols. (Paris, Rousseau, 1921-26) p. 498.

(2) Loc. cit.

directly dependent on works executed within the territorial limits of another state, or when use is made on the territory of a state (in virtue of pre-war usage) of water to produce hydraulic power, this water coming from a source within the territory of another state, then it becomes incumbent upon both those states to come to an agreement in order to safeguard the rights and privileges acquired by each of them.

Other agreements to the same effect have been concluded, e.g. Treaty of May 15, 1902 between Great Britain and[1] Abyssinia[2] and the Afghanistan-U.S.S.R.[3] frontier agreement of June 13, 1946[4].

Berber states that continental European treaties seem to agree with each other in requiring the consent of the other riparian state for works likely to affect materially the flow of water in that state; he fails however to distinguish between those treaties where a consent is required for any alteration which is brought to the regime of a river, and those treaties which ask for the consent of the other party only when the proposed work is likely to alter in a substantial way its regime.

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(1) Berber, op. cit. p. 89

(2) Ibid., p. 90

(3) Ibid., p. 91

(4) Ibid., p. 102. This latter treaty provides that "the Afghan party shall not increase the quantity of water taken from the river Kushka in this area and shall observe the status-quo in this respect.

b) Treaties which ask for the consent of the other party only when the work is likely to inflict a serious damage on a state:

A classical example of such a consent given by most authors writing on this subject is the October 26, 1905 treaty of Karlstadt concluded between Norway and Sweden which in dissolving the Union between these two countries created a special status for common lakes and waterways (i.e. those which separate and cross the two states. Article 2 states:

"In accordance with the general principles of international law, it is understood that the works mentioned in Article 1 cannot be carried out in either state except with the consent of the other whenever such works, by affecting the waters in the other state, might result ... in substantial modifications of the water over a considerable area".(1)

Other texts expressing the same idea are found in the treaty of February 3, 1927 between Germany and Csechoslovakia,(2) the treaty of January 9, 1928 between Germany and Lithuania regarding the Maintenance and Administration of the Frontier Waterways,(3) the treaty between France and Italy relating to the River Roya and its tributaries(4) and the treaty concluded between Brazil and Uruguay of December 20, 1933(5).

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(1) Fauchille, op. cit. p. 499

(2) Berber, op. cit. p. 64

(3) Ibid., p. 69

(4) Ibid., p. 86

(5) Ibid., p. 108

Some of the treaties restricting the free use of a river by riparian states provide for a boundary commission to plan for mutually satisfactory utilisation of rivers of common interests. Abraham Hirsh lists a number of such treaties as evidenced[1] by Middle Eastern practice, e.g. Protocol of November 4, 1913, regarding the Turko-Persian boundary; the Persia-Russian S.F.S.R. treaty of friendship concluded in February 26, 1921, the Franco-Turkish final boundary delimitation protocol of May 3, 1930.

An important example of such boundary commission is the one set by Canada and the U.S. in the 1909 treaty. Other important treaties which are worth mentioning in this connection are the 1944 treaty betweenMexico and the U.S. providing for an international joint commission to make arrangements for the division of the waters of the Colorado river[2], as well as the treaty of Copenhagen of April 10, 1922, between Germany and Denmark[3].

Hirsh lists again treaties which provide for special commissions of an ad-hoc nature, e.g. the Franco-Turkish agreement of October 20, 1921, the December 23, 1920 treaty between France and Britain, the treaty of friendship between Iraq and Turkey of March 26, 1946 and the June 4, 1953 convention between Syria and the Hashemite Kingdom of Jordan for the exploitation of the waters of the Yarmuk river[4].

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(1) Hirsh, op.cit. pp. 94 to 100

(2) Berber, op.cit., p. 118. See also the article by W.E. Kenworthy "Joint Development of international waters". A.J.I.L. 1960 pp. 592-602.

(3) Ibid. p. 67

(4) United Nations Treaty Series, vol. 184 (1954) p.p. 28 and 77.

Treaties in favour of the apportionment of the waters of an international river could be further classified into two; those which uphold the idea of:

i) A geographical division of the waters:

The most commonly cited examples are the 1914 Franco-Italian treaty over the Roya river, the 1917 treaty between Portugal and Spain[1] over the waters of the Douro river[2], the agreement of March 14, 1925 and the one of February 16, 1927 regarding the Administration and the Traffic on the section of the Warthe forming the frontier between Germany and Poland.

A more recent example of this kind is the Indo-Pakistani treaty concluded in 1960[4].

ii) A quantitative division of the waters:

Under this heading, one can distinguish between those treaties which ask for an equal division of such waters between the respective countries and those treaties that ask for a proportional division. An example of a treaty of the first type is the August 11, 1957 treaty between the U.S.S.R. and Iran over the waters of the Atrak and Aras rivers[5], providing that each party will dispose of 50% of the waters, and the already mentioned treaty between Portugal and the South-African Union over the waters of the Kunene river[6].

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(1) Berber, op. cit. p. 86

(2) Ibid. p. 87-88

(3) Ibid. p. 65

(4) The Indus Water Treaty, American Journal of International Law (1961) pp. 800 and 77.

(5) Russian-Iranian Treaty of August 11, 1957 (relatif à l'irrigation de certaines parties de l'Azerbaïdian et du Turkménistan, l'utilisation des Eaux de l'Aras et de l'Atrak) Middle East Journal, (Spring 1959) pp. 193 and 195.

(6) Berber, op. cit. p. 93

Equally interesting are the April 10, 1922 treaty between Germany and Denmark[1] and the November 19, 1930 treaty between France and Switzerland[2] which provide again for an equal division of waters.

ii') Examples of treaties providing for a proportional division of waters are the agreement concluded between Syria and Jordan in 1953 (electricity generated by the main power plant is to be apportioned 75% to Syria and 25% to Jordan), the agreement concluded between the U.S. and Mexico in 1944 over the waters of the Rio Grande, Colorado and Tijuana rivers[3] and the more recent 1959 Nile settlement between the U.A.R. and Sudan.[4]

More specific treaties

i) Treaties which forbid the diversion of water into another watershed. An example of such a provision in a treaty is article 1 of the agreement of November 22, 1934 between Belgium and Great-Britain, concerning water rights on the boundary between Tanganyika and Ruanda Urundi stating that: "Water diverted from a part of a river or stream wholly within the Tanganyika Territory or Ruanda-Urundi shall be returned without substantial reduction to its natural bed at some point before such river or stream forms the common boundary between the two countries"[5].

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(1) Ibid. p. 68

(2) Ibid. p. 85

(3) Ibid. p. 118 to 122

(4) Wolfrom, op. cit. pp. 121 to 131.

(5) Berber, op. cit. p. 90

ii) Treaties forbidding the lowering in the level of lakes.

An example of such treaties is the treaty concluded between Russia and Estonia (Appendix 2 to article 16 of the Peace treaty between those two countries) which provides that the "articifial drawing of the waters of lakes Peipus and Paskow, to an extent involving the lowering by more than a foot of the mean level of waters of these lakes, and the measures proposed for raising that level, shall only be carried out in accordance with a special convention between Estonia and Russia"(1). Again, article 29 of the April 10, 1922 treaty between Denmark and Germany provides that ... the establishment nowof, or the extensive alteration of existing works on any of the watercourse mentioned in article 1, requires the authorization of the Frontier Water Commission applying the right c) of lowering or raising the level of the water especially the right of causing a permanent accumulation of water, by checking the flow of the stream(2).

iii) Treaties forbidding the change in the quality of the water (i.e. pollution). Examples of such treaties are the 1909 treaty between the U.S. and Canada, providing that the waters therein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property of the other(3).

Again, the treaty concluded between Denmark and Germany on April 10, 1922 and the one concluded between Belgium and Germany on November 10, 1929 categorically prohibit pollution(4).

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(1) Berber, op. cit. p. 89

(2) Cited by A. P. Lester "River Pollution in International Law", American Journal of International Law (1963) p. 840.

(3) Loc. cit.

(4) Berber, op. cit. p. 67 and 71 respectively.

3) The general principles of law recognised by civilised nations as a source of law.

Authors differ in their interpretation of the meaning and in their acceptance of the general applicability of this sentence. Article 38 para. 3 of the statute of the Permanent Court of International Justice by including this source to provide an additional basis for a decision in case the other sources should give it no assistance in deciding a case, apply the general principles of jurisprudence, in particular of private law, in so far as they are applicable to relations between states. Many tribunals and most of the writers have treated this provision as declaratory of existing law. Formal incorporation of that practice in the statute of the court amounts to an acceptance of what has been called the Grotian view, which, while giving due and on the whole decisive weight to the will of states as the authors of international law, does not divorce it from the legal experience and practice[1] of mankind generally. Even Berber finds it justifiable to regard the formula contained in the statute as corresponding to prevailing customary international law[2]. He, however, does not fail to impose what he thinks ought to be the limiting factors to a rapid incorporation of such principles into the sphere of international law. He states:[3]

1) Article 38 (1) (c) can only mean additional principles which must be inferred from other sources than treaties or customary law, that is from municipal law.

2) Legal rules of municipal law cannot as such be taken over into international law, but only general principles derived from such rules of law.

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(1) Oppenheim, op. cit. p. 31

(2) Berber, op. cit. p. 186

(3) [illegible] cit. p. 191-194

3) It does not suffice that such general principles are found in the national law of one or more states. It must be possible to demonstrate their existence in all or at least most of the main legal systems of the world.

4) Not all general principles which are consistently found in the main legal systems are helpful for international law, but only those which provide a solution to the problem.

5) General principles of law are more general, more abstract, more vague than rules of customary law; they are only principles which indicate the prescribed conduct in large, rough outlines and not in detailed, technical arrangements.

Starke maintains that these principles are to be applied by analogy and would thus be derived by selecting concepts common to all systems of municipal law(1).

What are these concepts, common to all systems of international law, which would help us to solve the problem before us? We now propose to examine some of these concepts.

A - The Principle of Good Neighbourliness:

Charles Rousseau states that one could assign three functions(2) to geographical neighbourhood. Contiguity can thus constitute:

1) either an obstacle to the exercise of sovereign rights by another state,

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(1) Starke, op. cit. p. 29

(2) Berber, op. cit. p. 215

2) or a preferential title given to another state, allowing it to exercise its territorial sovereignty,

3) or again an actual and effective title granted by a sovereign state to another sovereign state for the free exercise of its sovereignty over the former's territory.

Neighbourhood rights refer to those legal rules which determine what effects resulting from one territorial sovereign state ought to be tolerated by the other sovereign state or on the contrary, what are the effects which the latter sovereign state does not have to tolerate. (Notice the negative characters of such a principle). Neighbourhood rights exist in private law and Berber admits equally that restrictions arising from the fact of neighbourhood, on the absolutely free enjoyment of property, exist in all municipal systems of law and ought to exist for the maintenance[1] of public order, but because of the differences in the technical details of each particular case, he could not consider this principle as being part of the "general principles of law recognised by civilised nations".

Paul Gugenheim states that one could derive no legal consequence from[2] the fact that the international servitude is analogous to the servitude in private law and that these consequences must come from the content of this legal norm which establishes these duties of abstention and tolerance.

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(1) Charles Rousseau, "Droit International public approfondi", (Paris, Précis Dalloz, 1961) p. 159.

(2) Paul Gugenheim, Traité de droit international public, (Tome 1, Genève, 1953) p. 396.

It is submitted that the International Court of Justice has supported the view that good neighbourliness is a general principle of law in the following cases:

a) In the Corfou Channel case, the International Court of Justice said that a state is bound by the obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states[1].

b) In the Trail Smelter case,[2] the controversy occurred between two governments involving damage occurring in the territory of one of them (U.S.A.) and alleged to be done by an agency (the Trail Smelter) situated in the territory of the other (the Dominion of Canada). The Trail Smelter was asked by the Canadian Government to refrain from causing damage to the state of Washington in the future. The principle of good neighbourly relations was again invoked and the tribunal therefore found that the above decisions taken as a whole constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as the law of the U.S., no state has the right to the use of its territory in such a manner as to cause injury by noxious fumes in or to the territory of another or to the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

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(1) Ibid.

(2) Leslie C. Green, International law through the cases, (2nd ed. London, Stevens, 1959) p. 842 and ff.

The principle of good neighbourliness can also be derived from decisions of municipal courts. Here are instances when this principle has been enunciated:

A- Federal Courts

Two cases were decided by the Swiss Federal Court between the cantons of Solothurn and Aargau. The dispute concerned the danger to the territory of Solothurn because of target practice in the territory of Aargau. In its first decision, the court sided with Solothurn. Aargau promised however to make plans to improve its installations. In spite of this, Solothurn complained again to the tribunal, which in its second decision and after the proper investigations being done, found that Solothurn's request that all danger be averted was too excessive. Considering that normal precautions had been taken by Aargau, thus fulfilling its duties as a good neighbour, the Court dismissed the case[1].

The case known as the Donauversinkung case[2] opposed Wurttemberg and Prussia to Baden. Here again, the principle of neighbourhood rights and duties was invoked and recognised as forming part of the general principles of law in the sense of article 38 para. c. of the Permanent Court of International Justice. The German Staatsgerichschof (i.e. State Court of Justice) in June 18, 1927 stated: "Thus while a state is under a duty to abstain from altering the flow of the river to the detriment of its neighbours, it must not fail to do what civilised states nowadays do in regard to their rivers.

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(1) Dietrich Schindler: "The administration of Justice in the Swiss Federal Court in intercantonal disputes", The American Journal of International Law (1921), pp. 173-174.

(2) Mc-Nair Lauterpacht, Annual digest of public international law cases, London, Butterworth & Co., 1927-28) p. 128 and ff.

Qualifications ought to be made however in order to avoid quick generalisations. Mrs. Paul Bastid[1] thus says that the scope of such an obligation is not quite defined; Paul Guggenheim[2] also states that the doctrine is not unanimous as regards the characteristics of such an international servitude and Thalmann[3] that neighbourhood rights are of a very recent date and their existence admitted only in Europe and perhaps in North America.

Andrassy shares the latter's point of view,[4] but granted that this concept needs further elaboration and precision to provide a specific legal norm. This does not mean that its existence as a doctrine should not be taken into account in the elaboration of river law[5].

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(1) Mme. Paul Bastid, "Le territoire dans le droit international contemporain", (Paris, éd. Pédone, 1953-1954) p. 238.

(2) Guggenheim, op. cit. p. 397.

(3) Thalmann, Grundprinzipien der Modernen Zwichenstaatlichen Nachbarreck, vol. 1, 1951, cited by Berber, op. cit. p. 220.

(4) Andrassy, Journal Egyptien du droit international, op. cit. p. 35.

(5) A.P. Lester, "River pollution in international law", A.J.I.L. (1963), p. 847. Also: "It is evident that one reaches a certain empiricism based on what Sauser-Hall calls public utility, the sense of opportunity, the conscience of neighbourship and solidarity. It is in that direction that international law goes", Cavaré, op. cit. p. 785.

B- The abuse of rights

According to Oppenheim, the responsibility of a state may become involved as a result of an abuse of a right enjoyed by virtue of International Law.

This occurs when a state avails itself of its rights in an arbitrary manner and in such a way as to inflict upon another state an injury which cannot be justified by a legitimate consideration of its own advantage ..... 'The duty of the state not to interfere with the flow of a river to the detriment of other riparian states has its source in the same principle"(1). He adds nevertheless that the extent of the application of the still controversial doctrine of the prohibition of the abuse of rights is not at all certain, and that because of its recent origin in the literature and practice of international law, it must be left to international tribunals to apply and develop it by reference to individual situations.(2)

Lauterpacht goes even further than Oppenheim, in stating his complete adherence to the view that the principle of abuse of rights belongs to international law. The maxim "sic utere tuo ut alienum non laedas" (i.e. so do yourown as not to injure another's property), says he, is applicable to relations of states no less than to that of individuals. It underlies a substantial part of the law of torts in English law and the corresponding branches of other systems of law. It is one of those general principles of law recognised by civilised states which the Permanent Court is bound to apply by virtue of article 38 of its statute.(3)

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(1) Oppenheim, op.cit. p.345-346

(2) Ibid, p.347

(3) Ibid, p.346

The international law association mentions also the rule "sic utere etc..." as basic to the limitations on territorial sovereignty.(1)

Alexandre Kiss concludes to the existence of such a principle in international law in the full sense of the word(2). Berber on the other hand denies the existence of this principle as a general principle of law recognised by civilised nations and argues that the only rule which could be drawn ... as the common property of all civilised states would be that no one may exercise his rights in such a manner as to damage another when the causing of this damage is the purpose, the motive, perhaps the only motive for the exercise of such rights(3).

I think that a middle-course between those extremist theories ought to be followed. The principle sic utere ... Andrassy argues is too broad a formula, because it may sometimes happen that a state following its most legitimate interests, voluntary or involuntarily, causes a damage to the interests of another state(4). And Neumeyer in his "Beitrag zum internationalen Wasserrecht" says: "only a damage contrary to law is forbidden"(5) and seems hence to agree with A.P. Lester who states "the question is not whether a right can be abused and forfeited, but the circumstances under which such forfeiture will occur".

When could we say, then, that an abuse of rights occurs?(6)

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(1) Andrassy, op. cit. p. 34
(2) Kiss, op. cit. p. 190
(3) Berber, op. cit. p. 210
(4) Andrassy, op. cit. p. 34
(5) Loc. cit.
(6) Lester, op. cit. p. 834

Kiss states that three conditions must prevail for an abuse of right to exist.

1) In the exercise of its legitimate rights, state A undertakes an action

2) whose effects result in an interference in the competence of state B;

3) these damages inflicted on state B are greater than the advantages gained by state A.[1]

The principle of abuse of rights can be subjected to the same criticism as the former, i.e. it is to be taken into account in the guidance of international river law, but could not be spoken of as a legal norm.

C- Principles of Good Faith, equity and comity[2]

The pre-cited Lake-Lanoux dispute is a good example of a case where the principle of good faith was invoked. The tribunal thus stated that the upper state is under a duty according to the principles of good faith to take all conflicting interests into consideration.[3]

However, one may safely assume that these principles having not yet crystallised into legal norms, can only guide the jurist in his study of international law.

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(1) Kiss, op. cit. p. 185

(2) See our previous discussion of the cases which agreed to apportion water on the basis of equity and comity.

(3) American Journal of International Law, Award (1959) p. 170.

Municipal water laws:

From the vast number of municipal laws cited by Berber, only one principle can be deduced, i.e. the one which says that a state using the waters of an international river must take into consideration a similar right to the use of such waters by the other riparian country.(1)

4) Judicial decisions and the teachings of the most highly qualified publicists of the various countries as subsidiary means for the determination of rules of law:

A- International judicial decisions:

The Court of International Justice created in 1921 and replaced in 1946 by the International Court of Justice are said to have the necessary authority to give international judicial decisions. What is the weight of such decisions? Article 59 of the Permanent Court of International Justice states that the Court's decisions were to have "no binding force except between the parties and in respect of that particular case".(2) On the other hand, there are serious reasons to believe that precedents could be used for guidance as to law. Thus Oppenheim states: "In the absence of anything approaching the common law doctrine of judicial precedents, decisions of international tribunals are not a direct source of law in international adjudications, but exert in fact considerable influence as an impartial and well-considered statement of law by jurists of authority".(3)

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(1) Berber, op. cit. p. 254

(2) Starke, op. cit. p. 40

(3) Oppenheim, op. cit. p. 31

Two river disputes appeared before the Permanent Court:

1) Diversion of water from the river Meuse; On August 1, 1936, the Netherlands Government filed an application with the registry instituting a proceeding against Belgium with reference to the diversion of water from the river Meuse.

The Meuse is an international river (crossing both countries at some points and forming the boundary between them at other points). The Permanent Court had to interpret and apply a treaty concluded in May 12, 1863, by these two countries, the purpose of which was to settle permanently and definitely the regime governing diversions of water from the Meuse for the feeding of navigation canals and irrigation channels. The court basing its decision on the express terms of the treaty said: "As regards such canals, each of the two states is at liberty, in its own territory, to modify them, to enlarge them, to transform them, to fill them in and even to increase the volume of water in them from new sources, provided that the diversion of water of the treaty feeder and the volume of water to be discharged therefrom to maintain the normal level and flow in the Zuid-Willemsvaart is not affected"[1].

The court, however, upon finding that no one's rights were impaired and the level of the water maintained, dismissed both the Netherlands and Belgium submissions. Nevertheless, since the court was only concerned with the interpretation of one particular treaty, its decision was not based on rules of customary law and hence could not provide the example of a weighty precedent for our purpose.

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(1) Manley O'Hudson, "Diversion of water from the Meuse", American Journal of International Law, vol. 2 (1938) p. 5.

2) The International Commission of the River Oder: The Permanent Court had again to deal with questions concerning the River Oder, but only from the point of view of its navigational interests. This decision is therefore totally fruitless for our inquiry.

B- Arbitral Awards:

The following Arbitral awards, as well as municipal judicial decisions, are classified under the principle limiting to a certain extent the free usageof waters.

Doubt as to the ability of such arbitral awards to contribute to the growth of international law has often been raised. Arbitrators were harshly criticised on two grounds.

1- As being more or less negotiators

2- As rendering their decisions "ex aequo et buono" and not in accordance with judicial principles.

To these objections, Starke answers by saying that the main distinction between arbitration and judicial decision lies not in the principles which they respectively apply, but in the manner of selecting the judges, their security of tenure, their independence of the parties and the fact that the judicial tribunal is governed by a fixed body of rules of procedure instead of by ad-hoc rules for each case(1).

1) Afghanistan-Iran: Helmand river, 1872, 1901, 1951: Among the numerous river disputes which Afghanistan has, the dispute over the Helmand (Hirmand) river is by far the most serious and the one which gave rise to

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(1) Starke, op. cit. p. 44

several arbitral decisions. In 1870, the British government which was concerned with fixing the boundary between Persia and Afghanistan, and drew the boundary in such a way as to place the greater length of both banks of the river Helmand in Afghanistan. However, the delta area or rather a part of it, which constituted the area where the main irrigation was actually done, remained in Persia.

The earliest arbitral decision, widely known as the Goldschmid arbitral award, states inter-alia that "it is moreover to be well understood that no works are to be carried out on either side calculated to interfere with the requisite supply of water for irrigation on the banks of the Helmand"[1].

This award was accepted by both states; disagreement persisted however and led to another award known as "Mac-Mahon award" in 1905 to which both parties declined their submission[2]. Mac-Mahon provided that each country within its territory could make new canals or reopen old ones "provided that the supply of water requisite for irrigation on both sides is not diminished".

The dispute meanwhile flared up again, thus leading the U.S. to offer its good offices. This resulted in an agreement between the two countries upon a 3-member fact-finding commission. This neutral commission recommended inter-alia that: "the traditional beneficial uses which havebeen

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(1) Berber, op.cit. p.102

(2) Griffin says: "Although Persia and Afghanistan declined to accept the Mac-Mahon award, it is not without value as an advisory opinion", op.cit. A.J.I.L. (1959) p.60.

established in the Iranian and Afghan deltas, i.e. in Seistan and Chakhensur should be recognised and agreement should be reached that in normal years, the monthly requirements now established will not be depleted by new upstream uses[1] and that the rate of storage in the Kajakai reservoir should be so limited that the required normal flows to maintain existing uses in the delta are not depleted"[2].

The report was accepted by Afghanistan, but not by Iran, which has proceeded in the meantime with large construction works on the upper part of the Helmand river[3].

2) Ecuador-Peru: Zarumilla river, 1945: This award was given by the chancellery of Brazil states in the Ecuador-Peru dispute over the waters of the Zarumilla river in 1945, in which it was stated that "Peru undertakes within 3 years to divert a part of the Zarumilla river so that it may run in the old bed, so as to guarantee the necessary aid for the subsistence of the Ecuadorian population located along its banks, thus ensuring the condomonium over the waters in accordance with international practice"[4].

Here again, the award was given according to rules recognised as prevailing in international practice and bears great significance for the purpose of our own study.

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(1) Berber, op. cit. p. 103

(2) Griffin, op. cit. p. 60

(3) Clyde Eagleton, "International rivers", American Journal of International Law vol. 48 (1954), p. 288

(4) Griffin, op. cit. p. 61.

3) France-Spain: Lake Lanoux, 1957: A very recent and most significant international river issue, precisely because it evidences recent trends in the solution of water disputes is of course the Lake Lanoux controversy which arose in 1957 between France and Spain. At issue was the interpretation of a treaty (Treaty of Bayonne and Acte additionnel). However, since the attitude of both governments, their diplomatic notes and the arbitral award itself dealt with questions with which we are directly concerned, we will discuss this case at length.

The dispute revolves around France's unilateral diversion of water from lake Lanoux for Hydroelectric purposes, over a mountain drop into the Ariege river in France. Lake Lanoux's outlet (situated in the French Pyrenees) flows into the Carol river, which crosses into Spain and then joins the Serge river to generate power.

The questions which arose were the following:

1- Is France's action a) a violation of the treaty provisions mentioned above? or

b) a violation of Spain's interests?

2- Is Spain's consent a prerequisite for France's diversion of the river even though France agreed to adequately compensate Spain?

To begin with, it is worth mentioning that both states argued their case both in the light of the treaty provisions and under customary international law and also that the tribunal said that in interpreting the treaty, it would resort to customary international law(1).

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(1) Lake Lanoux award, American Journal of International Law (1957) p. 170 and ff.

The tribunal answered question 1-a) in this manner: The proposed diversion would not violate the treaty because in so doing France would not alter the amount of water of the Carol river. And answered question 1-b) by saying that France was only making use of its rights in carrying out the project entirely in France and that Spain had no right in asking for a development plan which would be based on her agricultural needs... If the French plans were abandoned, Spain could not ask that other works be done in France to benefit her selfish interests. Therefore Spain is only entitled to a reasonable protection from measures adopted by France and likely to affect its interests[1].

As to question 2, the tribunal stated that " ... international practice thus far does not permit us to go beyond the conclusion: 'The rule according to which states may utilise the hydraulic force of international watercourses only on condition that a prior agreement between the interested states cannot be established either as a custom or even less as a general principle of law"[2].

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(1) See also the Donauversinkung case, in which the court held that a state is under no legal duty to perform positive acts to the benefit of the other party, later on in our discussion.

The tribunal said explicitly: "As a matter of form, the upstream state has procedurally a right of initiative, it is not obliged to associate the downstream state in the elaboration of its projects. If, in the course of negotiations, the downstream state submits projects to it, the upstream must examine them, but it has the right to give preference to the solution contained in its own project, provided it takes into consideration, in a reasonable manner, the interests of the downstream state". Loc. cit.

(2) Loc. cit.

Briefly stated then, the following are the main conclusions of this arbitral award:

1- Public international law does not forbid a state from executing a project on its territory even though it has not received the prior consent of the other riparian state.

2- The state undertaking a project must see to it that all the interests which could be affected will be safeguarded.

3- The comparison and compromise between the various interests involved must be done in good faith.

C- Municipal Judicial Decisions:

Criticisms have also been voiced against analogies which would be too quickly drawn from municipal judicial decisions and applied into the sphere of international law.

Berber states that it is quite possible that municipal law becomes transformed into customary international law. However, he states that it should be demonstrated that the relevant rules of municipal law are actually followed in international relations with the "opinio necessitatis"(1).

Oppenheim states: "Decisions of municipal courts are not a source of law in the sense that they directly bind the state from whose court they emanate. But the cumulative effect of uniform decisions of the courts of the

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(1) Berber, op.cit. p.168

most important states is to afford evidence of international custom. Although courts are not organs of the state for expressing in a binding manner its views on foreign affairs, they are nevertheless organs of the state giving, as a rule, impartial expression to what they believe to be international law. For these reasons as well as for those stated with regard to international decisions, judgments of municipal tribunals are of considerable political importance for determining what is the correct rule of international law. This is now being increasingly recognised and periodical unofficial collections of decisions of both international and municipal courts are being published"(1).

Another very common criticism is the one that says that since member states of a union or a federation are not exactly in the position of sovereign states, they could not apply international law.

To this allegation, the Swiss federal court answers that the states belonging to the Helvetic Federation are sovereign states by virtue of article 3 of the Federal constitution, in consequence of which, rules of international law ought to be applied in disputes arising between them.(2)

The federal law of the Weimar republic contained also a similar provision. Thus article 19 of the constitution provided that the Staatsgerichsthof shall have jurisdiction in disputes of apublic character between German states.

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(1) Oppenheim, op. cit. p. 32.

(2) Ziegler vs. Schaffhausen, decision of October 5, 1905 and Aargau vs. Solothurn, Hackworth, op. cit. pp. 528-529.

Both parties assert the existence of obligations in the field of public law. Article 4 of the constitution says furthermore: " In so far as these states act as independent communities, their relations are governed by international law which this article recognises as forming part of the German federal law". (1) The U.S. supreme court also stated in the famous case which opposes Kansas and Colorado, "nor is our jurisdiction ousted even, if, because Kansas and Colorado are states sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal". (2) American federal practice is very consistent in applying rules of international law.

But, broadly speaking, one could safely assume that a legal decision applying or merely declaring a rule of customary international law, is acting according to currently recognised practices. Hence, one could not object to its being viewed as such, especially in cases pertaining to identical or almost identical interstate relations. (3)

(1) Lauterpacht, Annual digest of public international cases (1927-1928) pp. 128 and ff.

(2) Hackworth, op. cit. p. 582

(3) Andrassy, op. cit. p. 250

1 - American practice

a - Kansas vs Colorado, February 16, 1906, Kansas brought a suit to prevent Colorado from withholding water of the Arkansas river to her detriment. Kansas recognized the Common law rule as to riparian ownership, while Colorado upheld the doctrine of prior appropriation. The court finally decided that the upper state i.e. Colorado was not entitled to use the waters of the Arkansas as it chose regardless of the impairment of the right to the use of such waters in the lower state. However as it found that the actual diminution had little, if any, detriment to the whole body of the valley, the court hence decided that the rules of equality forbade interference with the existing withdrawals of water in Colorado (it equally decided that it could not apply the strict rules i.e. prior appropriation for which Colorado contended were not necessarily controlling in this case.) (1)

b - Wyoming vs. Colorado, A suit was brought in 1911 by the state of Wyoming against the state of Colorado and two Colorado corporations to prevent a proposed diversion in Colorado of part of the waters of the Laramie river - a non-navigeable interstate stream. Both Colorado and Wyoming are in an arid region where water from this river has already been diverted to meet their respective needs.

(1) Lauterpacht, Annual digest, op. cit. p. 169

When the suit was brought , two corporate defendants acting under the authority and permission of Colorado were proceeding to divert in that state a considerable portion of the waters of the river and to conduct it into another watershed, lying wholly in Colorado for use in irrigating lands more than 50 miles distant from the point of diversion. The topography and natural drainage were such that none of the water could return to the stream or even reach Wyoming. In bringing the bill, Wyoming contended that:

1.- Without her sanction, the waters of this interstate stream cannot rightfully be taken from its watershed and carried to another where she can never gain any benefit from them.

2.- Through many appropriations, prior in time and superior in right to the proposed Colorado diversion, Wyoming was entitled to use portion of the waters of this river for irrigation purposes and that proposed Colorado diversion will not leave in the stream sufficient water and satisfy these prior and superior appropriations and hence will inflict upon her a damage.

Colorado alleged that:

1.- It as a state can do whatever it wants with the water flowing within its territory regardless of the prejudice which might result to the other state.

2.- Wyoming is entitled to an equitable division of the waters of the river and contended that the proposed diversion together with all subsisting appropriations in Colorado do not exceed Wyoming's share of the waters.

3. - Following this diversion, there will be left in the river sufficient water to satisfy all appropriations in that state whose origin was prior in time to the effective action in Colorado.

It is interesting to note that the doctrine of prior appropriations was adopted by both states. Earlier settlers provided for this concept of prior appropriation meaning the acquisition of a continuing right to divert and use the water to the extent of one's appropriation but not beyond what was reasonably required and actually used. This was deemed a property right and dealt with and respected accordingly. As between different appropriations from the same stream, the one first in time was deemed superior in right and a completed appropriation was regarded as effective from the time the purpose to make it was definitely formed and actual work thereon was begun, provided the work was carried to completion with reasonable diligence. (1) Later on when the states were admitted into the union, this doctrine received further sanction in their constitution and statutes and their courts have been uniformly enforcing it. (2)

The court finally decided that the contention of Colorado that she as a state may rightfully divert and use as she may choose the water flowing within her boundaries in this interstate system, regardless of any prejudice that this may work to others having rights in the stream below her boundary cannot be maintained. The river, the court held, throughout its course in both states is but a single stream wherein each state has interests which would be respected by the other.

(1) Manley. O. Hudson, Cases/ and other Materials on International Law (St. Paul, West. 1929) p. 472.

(2) Hackworth, op. cit. p. 582

As to the problems of diversion into another watershed, the court decided that Wyoming's complaint was equally untenable because it was found that in neither state the right of appropriation depended on the place of use being within the same watershed. Diversions from one watershed to another are commonly made in both states and the practice is recognized by the decisions of their courts. The principle of such diversions being recognized in both states, its application to the interstate stream does not in itself afford a ground for complaint unless the practice in both be rejected in determining what, as between them, is reasonable and admissable to this stream.

As regards Colorado's objection to the doctrine of prior appropriation, as the basis for decision, the court found that on the contrary, the latter furnishes the only rightful and equitable basis. Proclaiming the doctrine that priority of appropriation gives superiority of right (since the rule was applied by both states) and finding that the senior appropriation in Wyoming was 272.500 acre-feet, out of an available supply of 288.000 acre-feet, there remained only 15,000 acre-feet which were subject to the junior appropriation in Colorado. The court therefore enjoined Colorado from diverting more than the last named amount of acre-feet a year from the Laramie river. (1)

(1) Hackworth, op. cit. p. 582

c- Connecticut vs. Massachussets, February 24, 1931 (1), Massachussets proposed to divert water from streams within her territory, the Ware and Swift rivers which are tributary to the Connecticut, a navigeable river flowing through Massachussets and then through the state of Connecticut. The diverted water was then to be conducted out of the Connecticut river watershed to the Boston district where it would be used for drinking and other domestic purposes. That district would be faced by a water shortage in the near future and the tributaries referred to were selected after elaborate research as the source of new supply, rather than sources in the eastern part of Massachussets which were polluted or liable to become so. Connecticut, submitting the case to the court, argued that under the common law in force in both states, each riparian owner had a vested right in the use of the flowing waters unimpaired as to quantity and that the taking of water by Massachussets infringed vested property rights in Connecticut and asked the court to follow the law enforced by each of the states within its own boundaries and grant an injunction against any diversion from the watersheds of the rivers in question. The matter was referred to a special master charged with investigating facts which were later on accepted by the court: These were the conclusions:

(1) American Journal of International Law (1932) (282 U.S. 660 - February 24, 1931).

1.- Connecticut had not established that she had sustained injury as a result of the diversions complained of. The court thus dismissed the bill of complaint without prejudice to Connecticut right to maintain a suit against Massachussets if substantial injury should be committed in the future. In the words of the court ".... this court would not exert its extraordinary power to control the conduct of one state at the request of another unless the threatened invasion of rights was of serious magnitude and was established by clear and convincing evidence: such circumstances were not present here". (1)

2.- Again, against Connecticut's argument, the court pointed out that while under the common law in force in both states "each riparian owner has a vested right in the use of the flowing waters and is entitled to have them flow as they were wont to, unimpaired as to quantity and uncontamined as to quality - the controversy is not necessarily to be determined by the common law of riparian rights which prevail in both states". (2)

3.- Finally the court decided to follow the same opinion which was rendered in the pre-cited case, i.e. Kansas vs. Colorado, that such disputes ought to be settled on a basis of equality (not a mathematical equality, but one based on principles of right and equity) (3).

(1) Lauterpacht, op. cit. p. 120

(2) American Journal of International Law (1932) op. cit. p. 163.

(3) Ibid, p. 169

The other cases dealt with by the Supreme Court will be very briefly stated:

d - Washington vs. Oregon, A suit was brought by Washington to obtain an apportionment between the two states of the waters of the Walla Walla river and its tributaries. Washington also alleged that Oregon was wrongly diverting the waters. In this case, the court, relying on the doctrine of prior appropriation as a basis for the division of the waters, said that this doctrine means beneficial use and not a stale or barren claim and maintained that only diligence and good faith would keep this principle alive. (1)

e - Nebraska vs. Wyoming, Nebraska accused Wyoming and Colorado of using the waters of the North Platte river in violation of the rule of priority of appropriation in force in all three states and depriving it from water to which it is equitabaly entitled. The court in this case applied the rule of equitable apportionment but rejected a strict application of the priority rule. (2)

f - Delaware river tributaries, In 1930 New Jersey brought a suit to enjoin a proposed diversion of waters in New York from tributaries of the Delaware river to the watershed of the Hudson river in order to increase

(1) Hackworth, op.cit. p. 583 & ff

(2) "apportionment calls for the exercise of an informal judgement on a consideration of many factors, priority of appropriation is the guiding principle, but physical and climatic conditions, the consumption use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as the benefits to downstream areas if a limitation is imposed on the former - these are all relevant factors, they are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made." Griffin, op.cit. p. 68

the water supply of the city of New York. As in the preceding case (Wyoming vs. Colorado) questions arose as to the application of international law. Against New Jersey's contention, the court rejected the idea of the strict application of common law rules and adopted instead the principle of equitable apportionment. As to the problem of withdrawing water from one watershed to another the court pointed out that "the removal of water to a different watershed obviously must be allowed at times unless states are to be deprived of the most beneficial uses on formal grounds ... a river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it." (1)

g - The Chicago Sanitary district case (2) The right of the Chicago sanitary district to divert the waters of the Great Lakes into a sanitary canal for sewage disposal purposes was contested not only by the Canadian government but also by several states of the Union affected by the diversion. The case also involved a question of competence i.e. which of the Congress or the Secretary of War (who had previously allowed a limited diversion of water to Chicago) is entitled to give his consent in this matter. At this point the only dispute which interests us is the one which occurred between Missouri and Illinois and was decided by the Supreme Court of the U, S. in 1906. (3)

(1) Hackwork, op. cit. p. 582
(2) See the contractory opinions given by J. W. Garner " The Chicago Sanitary District Case", American Journal of International Law, (October 1929) pp. 837 - 840 and by J. G. Dealey" The Chicago Drainage Canal and St. Lawrence development" American Journal of International Law, (April 1929) p. 307.
(3) Hudson, op. cit. p. 473 and FF.

Missouri claimed that the Mississipi river was being seriously polluted by the discharge of sewage from Chicago. The bill was dismissed upon the facts. The evidence, though acknowledging that a lowering in the lake level had occured had showed that the pollution was more than counterbalanced by the introduction of a large volume of pure water from lake Michigan. However the court stated expressly that it would have been prepared to grant an injunction if the evidence had disclosed a case of nuisance. The court also overruled a dumurrer by which the defendant state alleged that the case presented no justiciable controversy. (1)

2. - Swiss Federal practice

The Federal court rendered two decisions concerning disputes between two cantons over rivers which flow from one canton into another. a -Aargau vs. Zurich : January 12, 1878 . The canton of Zurich decided to construct a water power establishment under a concession granted by the government council of Zurich on November 16, 1872 as well as a pond at the Jonabach on its territory. As a result, the mills situated downstream on Aargovian territory suffered a prejudice in their water supply which could only be remedied by the construction of an auxiliary pond on Aargovian territory. Aargau protested against such action by Zurich and asked the court to invalidate this concession.

(1) H. A. Smith, "the Chicago Diversion," British Yearbook of International Law, vol 10 (1929) p. 152

The Federal court basing its decision on the principle of equality of the cantons (1) said that "since public waters extending over several cantons belong to these several cantons ... none of them may to the prejudice of the other take such measures upon its territory as the diversion of a river, or brook, construction of dams etc... as may make the exercise of the rights of sovereignty over the water impossible for the other cantons or which exclude the joint use thereof or amount to a violation of territory. (2)

The court nevetheless dismissed the action on the ground that Aargau's right to a reasonable share of the flow was not infringed because the Zurich statute provided for protection of downstream parties and for adequate compensation in case of injury.

b - Aargau vs. Solothurn, December 2, 1892, Solothurn asked the court whether she was entitled to exact a fee for granting (conceding)a right to water power, despite the fact that only the beginning of the canal lay in its territory while the continuation thereof together with the engines was situated in the territory of the canton of Aargau.

(1) Schindler, writing on this issue does not believe that such a principle was followed, rather says he, the federal court applied the relevant articles of the Zurich Hydraulic law as intercantonal law without admitting it, Schindler, op. cit. p. 169

(2) Ibid p. 170

The federal court answered the question in this manner :

"Only within limits, (which follow from the equality of the cantons) each canton is sovereign with respect to public waters situated in its territory as to the freedom or contract of the use of the water, as to the origin and juridical nature of special rights in the use of water and the burdens connected with such rights of use etc..." (Hence an affirmative answer).

3 - German Federal practice

The Donauversinkung case, June 18, 1927 (1) Of great interest is the case which we shall presently discuss because it provides a valuable indication of German practice in the sphere of international law at this time and makes express reference to the legal considerations which underlay the conclusion by Germany of the numerous treaties. (2)

The Danube is passing the Jura mountains between Braulingen and Hufigen (Baden) and Friedingen (Wurttemburg) loses during certain periods of the year a considerable part of its water in consequence of the water sinking under the bed of the river and flowing to the lower level of the lake of Constance and of the Rhine.

Wurttemburg asked the court for an injunction restraining Baden:

a) from undertaking works calculated to intensify " the sinking of the Danube" by forcing the stream of the water in the direction of the Aach.

(1) Ibid, p. 172

(2) Berber, op. cit. p. 178

b) to render possible, by removing the natural obstacles which accumulate in the bed and impede the flow of water.

Baden asked injunction against Wurttemberg, restraining it from constructing and maintaining works erected and operated with a view to prevent the natural flow of the waters of the Danube to the Aach.

Prussia being also riparian on this river (the river after leaving Baden and Wurttemberg crossed through Prussia), was injured by the escape of water from the Danube and thus sided with Wurttemberg against Baden.

The court held that modern international law restricts the application of the doctrine of territorial sovereignty by the principle "sic utere tuo..." and thus stated that there is a duty imposed on each state to abstain from injurious interference. Hence both Wurttemberg and Baden were held responsible under this principle and asked not to construct works calculated to interfere with the interests of the other riparian. The court stated furthermore, that the application of this principle must be weighed equitably against each other " one must consider not only the absolute injury caused to the neighbouring state but also the relation of the advantage gained by one to the injury caused to the other." (1)

(1) Lauterpacht, Annual Digest, op. cit. p. 130

The court also recognised the principle that a state is under no duty to regulate in the interest of another state the natural phenomenon affecting an international river subject however to one limitation that " it must not fail to do what civilized states nowadays do in regard to their rivers" (1) (a passive act becomes an unlawful action).

4. - Italian State Practice, Societe Energie Electrique du Littoral Mediterraneen vs. Compagnie Impresse Elletrische Liguri 1939

This case presents itself as a conflict between two companies, an Italian and a French one. At issue was the enforcement of a French judgement in Italy and a-priori this case should not be considered. However, an opinion of the court of Genoa is interesting, namely the one which says that " International Law recognizes the right on the part of every riparian state to enjoy as a participant of a kind of partnership created by the river, all the advantages deriving from it for the purpose of securing the welfare and the economic and civil progress of the nation (2) .... However, although a state in the exercise of its right of sovereignty may subject public rivers to whatever regime it deems best, it cannot disregard the international duty derived from that principle, not to impede or to destroy as a result of this regime, the opportunity of other states to avail themselves of the flow of the water for their own national needs. (3)

(1) Loc. cit

(2) Lauterpacht, op. cit. (1939-1940), p. 121

(3) Loc. cit.

5 - Indian Federal Practice : Sind vs. Punjab 1939, The dispute here concerns two Indian provinces.

In 1939, Sind brought a complaint under the government of India Act of 1935, on the ground that the existing and proposed diversion of the Indus system in Punjab would impair existing uses in Sind. A commission was appointed which set certain principles which she had found in studying practices in other countries and which were later accepted by the contending parties.

The principles were the following: (1)

1. - The most satisfactory settlement of disputes of this kind is by agreement, the parties adopting the same technical solution of each problem, as if they were a single community undivided by political and administrative frontiers (Madrid rules of 1911 and Geneva Convention of 1923, articles 4 and 5).

2. - If once there is such an agreement, that in itself furnishes the " law " governing the rights of the several parties until a new agreement is concluded (Judegement of the Permanent Court of International Justice 1937, Meuse dispute between Holland and Belgium).

3. - If there is no such agreement, the rights of the several provinces and states must be determined by applying the rules of "equitable apportionment," each unit setting a fair share of the water of the common river (American decisions).

(1) Griffin, op. cit, p. 69, quoting the Journal of the Society of Comparative Legislation, new series, vol. XVI, No. 35, p. 6 & 7.

4. - In the general interests of the entire community inhabiting dry, arid countries, priority may usually have to be given to an earlier irrigation project over a later one, i.e. " priority of appropriation gives superiority of right " (Wyoming vs. Colorado).

5. - For purposes of priority, the date of a project is not the date when survey is first commenced, but the date when the project reaches finality and there is a fixed and definite purpose to take it up and carry it through (Wyoming vs. Colorado and Connecticut vs. Massachussets).

6. - As between projects of different kinds for the use of water, a suitable order of precedence might be

i use for domestic and sanitary purposes

ii use for navigation

iii use for power and irrigation

With the growth of international judicial activity and of the practice of states, evidenced by widely accessible records and reports, it is natural that reliance on the authority of writers as evidence of international law should tend to diminish, for it is as evidence of the law and not as law-creating factor that the usefulness of teachings of writers has been occasionally admitted in judicial pronouncements. But inasmuch as a source of law is conceived as a factor influencing the judge in rendering his decision, the work of writers may continue to play a part in proportion to its intrinsic scientific value, its impartiality and its determination to scrutinize critically the practice of states by reference to legal principles. (1)

(1) Oppenheim, op. cit. p. 33

A- Private associations of International lawyers: Several organizations of this kind were interested in finding rules of law which ought to govern the utilization of international waters for purposes other than navigation.

1.- The Institut de droit international, at the request of Mr. Von Bar and Harburger, decided to put this issue for study on its agenda at its Paris meeting in 1910. It was not however until 1911 and at its Madrid session that the Institut adopted a declaration of principles which were preceded by a preamble. (1)

The preamble (2) states that the physical interdependence of riparians excludes the absolute autonomy of any one riparian in the use of a system of international waters (hence a clear rejection of the principle of absolute territorial sovereignty as well as of the principle of absolute territorial itegrity, but an adoption on the other hand of the Second principle...i.e. the one of the community in the waters.) This is furthermore evidenced by the provisions of article 1 of the declaration itself which states that when a stream forms the frontier of two states, neither of these states may without the consent of the other and without special and valid legal title make or allow individuals, corporations etc.. to make alteration therein detrimental to the bank of the other state, and that neither state may on its own territory utilize or allow the utilization of the water in such a way as seriously to interfere with its utilization

(1) Before the adoption of the final text, 8 of its members/ were asked to make observations on the first report presented by Mr. Von Ban only 2 of them i.e. the ones made by profs. Kaufmann and Engelhard were published in the Annuaire.

(2) The preamble was not put to vote. Annuaire de l''Institut de Droit International, session de Madrid, op. cit. p. 1360

by the other state or by individuals, corporations etc... thereof. (1) There is a similar position in article 2 which considers the case of a successive stream and article 3 which considers the case of hydraulic power utilization by one state and finally articles 4 and 5 which deal respectively with navigation (2) and pollution. Article 7 recommends the institutions of permanent commissions on a footing or equality (commission paritaire). Their role were to be basically an advisory one.

This declaration which as we have already stated, restricts the free use of international waters by one state to a considerable extent has been modified subsequently in the resolution adopted by this same Institut at its session at Salzburg in 1961. Thus in the preamble of the said resolution it is stated clearly that in the utilization of waters of interest to several states, each of them can obtain, by consultation, by plans established in common and by reciprocal concessions the advantage of more rational exploitation of a natural resource. (3) Thus it recognizes the existence of rules in international law to that effect and formulates certain recommendations.

(1) Ibid, pp. 1360 - 1361

(2) Loc. cit

(3) Resolution adopted by the Institut of International Law at its session at Salzburg (3- 12 September 1961). American Journal of International law, vol 56 (1962). pp. 737 - 738.
For a thorough discussion, we see the proceedings at Neuchatel, Annuaire de l'Institut de Droit International, session de Neuchatel vol. 48 & 1 (1959), p. 137 and ff.

Article 2 states that every state has the right to utilize waters which cross or border its territory subject to the following limitations imposed by international law and found in the subsequent articles.

1. - That this right is limited by the right of utilization of other states interested in the same watercourse or hydrographic basin.

2. - That in case of disagreement, settlement will take place on the basis of equity i.e. taking account of their particular needs and other pertinent circumstances .(1)

3. - That previous notice by one state of important works likely to affect materially the interest of the other state ought to be given(2) .

4. - That works must be stopped in conformity with good faith during the negotiations. (3)

5. - That in case the state objecting to the works or utilizations refuses to submit to arbitration or judicial settlement, the other state is considered free to go ahead.

6. - That common organs should be created for establishing plans of utilization, designed to facilitate their economic development as well as to prevent and settle disputes which might arise therefrom.

(1) Article 3 of the resolution.

(2) Articles 4 and 5 (note that the consent of the other party is not required).

(3) Article 7.

2 - The Inter-American Bar Association: At its conference in 1957, the association considered the principles of law governing systems of international waters and in the first place recognised that such general ppinciples formed an integral part of existing international law, (1)

The Association set the principle of restricted sovereignty in its mild form in this manner:

Article 1; stated that every state having under its juridiction a part of a system of international waters has the right to make use of the waters thereof in so far as such use does not affect adversely the equal rights of the states having under their jurisdiction other parts of the system... and

Article 2; stated that the benefits of the system ought to be shared taking into account, the right of each state to the maintenance of the status of its existing beneficial uses and to enjoy according to the relative needs of the respective states, the benefits of future development. The same article provides furthermore that in case of disagreement, the different states will submit their differences to an international or an arbitral court.

Article 3,states that no work likely to damage the other party might be undertaken without either an agreement with the state or states affected or with a decision of an international court or an arbitral commission.

(1) Text cited by Griffin, op.cit. p. 74

This Association has entrusted its Committee (Committee on uses of International Waters) with the task of continuing this study. Thus in February 22, 1959, this committee reviewing the problem of the further diversion of water from lake Michigan, in the Chicago sanitary district, adopted a resolution statting that no diversion is to be unilaterally affected without prior consultation with the other interested states or without having looked for a solution in agreement with the principles and procedures set by article 33 of the U.N.Charter.(1)

3- The International Law Association : At the 1954 Edinburgh Conference of the Association, a committee was formed and entrusted with the task of preparing a report on the use of the waters of international rivers for the coming conference which was to be held at Dubrovnik in 1956, Clyde Eagleton was appointed the Rapporteur. The report of the committee aroused a warm debate. Members from India and Israel moved adjourment for consideration of the subject but later on, withdrew their opposition and at the second session a resolution was unanimously adopted. (2) This association agreed that this resolution formed a sound basis upon which to study further the development of rules of international law with respect to international rivers. (3)

In the resolution adopted,the principle of restricted sovereignty was defined in the following manner:

(1) Andrassy, op. cit. p. 140

(2) International Law Association meeting at Dubrovnik - Yugoslavia (August 26 - September 2, 1956), American Journal of International Law, vol 51, (1957), p. 90.

(3) Loc. cit.

A state must exercise its rights over the waters of an international river within its jurisdiction (article 2)... with due consideration for its defects upon other riparian states (article 3)... and is responsible under international law for public or private acts producing changes in the existing regime of a river to the injury of another state, which it could have prevented with reasonable diligence (article 4)... in case it proposes new works... which might affect the other state... it must first consult with the former or in case this fails, the states will seek the advice of a technical commission (article 6).

Here again the principle of comparing and weighing the benefit accruing to one state against the injury done to another through a particular use of the water was adopted, subject to the following considerations:-

a - the right of each to a reasonable use of the water

b - the extent of the dependence of each state upon the waters of that river

c - the comparative social and economic gains accruing to each state and to the entire river community

d - pre-existent agreements among the states concerned

e - pre-existent appropriation of water by one state (article 5)

Again in this case, a cooperation with all the interested states was recommended (article 8).

In 1956, the adoption of general principles of law was opposed by a committee member who submitted a report maintaining that except in a few regions, there is no international legal restraint on what a state might

do to an international river within its territory whatever the effect is in a co-riparian state. The conference rejected this view and adopted the general principles state above. (1)

Increased interest in the subject was shown in instructions to the committee to broaden its membership to include all branches and to broaden its terms of reference to include navigation and artificial waterways. (2)

The 1958 report was drafted in terms of a "drainage basin" defined as an area within the territories of two or more states in which all the streams of flowing surface water, both natural and artificial drain a common watershed either to the sea or to a lake or to some inland place from which there is not apparent outlet to the sea.

The report of which a detailed account will not be given here, was partly accepted. The final resolution adopted in September 1958 at New York provided in article 1 that a system of rivers and lakes in a drainage basin must be considered as a whole (and not in parts) (3).

The other articles which provide for the same measures as those whichwere said to be adopted in the Dubrovnik resolution will not be stated here.

(1) Griffin, op. cit. p 90

(2) American Journal of International Law (1959), op. cit. p. 91

(3) See the very interesting discussion by Andrassy, session de Neuchatel, op. cit. pp. 164 to 168 in which states inter-alia that this principle cannot be considered as a binding rule of international law and could only be concieved as far as "lege ferenda".

In May 1960 and during this association's conference in Hamburg it was agreed to keep the New York resolution as it was (only the numerican order of the articles was changed). The Vienna conference in 1962 similarly kept the matters as they stood. (1)

B - The Teaching of Publicists

We have already mentioned the name of Attorney General Harmon who is said to be the earlier representative and upholder of the principles of abosolute territorial sovereignty. His famous statement was rendered in 1895. Mrs. Paul Bastid makes a very pertinent remark in this connection. (2) She states thus, that at the time Judge Harmon was giving his opinion, the problem of water utilization was a new one (If one reads attentively Harmon's declaration, one can find that he himself said that the problem with which he had to deal was a new one) (3) and that new developments have tended to alter completely this way of thinking.

Hyde in his text book on international law, although totally in agreement with the U.S. attitude displayed in the Rio Grande dispute (i.e. the one which upheld the principle of absolute territorial sovereignty) admits later on that the most recent developments in state practice seem to be on the point of turning away from this principle. (4)

(1) Wolfrom, op.cit. p. 28

(2) Madame Paul Bastid, Le Territoire dans le droit international contemporain (Paris 1953-54) p. 235.

(3) Moore, op.cit. p. 654

(4) Berber, op.cit. p. 17

There are still however some authors who maintain this point of view. Charles G. Fenwick writing in 1948 stated that is doubtful whether International law can be said to have recognized any servitude corresponding to that existing in civil and common law in the form of a right to the uninterrupted flow of a stream and rivers. According to Fenwick conscious of the possession of the traditional rights of sovereignty states in possession of the upper waters of the river have not recognized any general obligations to refrain from diverting its waters and thereby denying to the states in possession of the lower waters the benefit of its full flow. Such restrictions, says, he, as have been recognized have been in every case the result of treaty stipulations. He cites in this connection the dispute which occured in 1906 between Mexico and the U.S. (1)

Briggs writing in 1952 is of the same opinion. (2)

As to the those publicists who uphold the principle of absolute territorial integrity. A leading example is Oppenheim who states: " But the flow of a not-national, boundary and international rivers is not within the arbitrary power of one of the riparian states, for it is a rule of international law that no state is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of the neighbouring state..." (3)

(1) Charles G. Fenwick, International Law (3rd ed. rev & enl. New York) Appleton, 1948) p. 391.

(2) Herbert W. Briggs, The Law of Nations (London, Harrap 1952) p. 274

(3) Oppenheim, op. cit. p. 475

The following authors - Max Huber, Schenkel, Miss Reid and Fleischman are mentioned by Berber as being in favour of the principle of absolute territorial integrity.

The fact that Wolfrom lists Fauchille among the authors who uphold this principle seems to us to say the least astonishing. For if we read attentively his treaties on international law, Fauchille under the section "international rivers criticises both principles, (1) of absolute territorial sovereignty and absolute territorial integrity in the following terms :"Ni l'une ni l'autre de ces deux systeme ne nous paraissent acceptables. Le premier repose sur la regle que la propriete et la soverainete des Etats ont une caractere absolu: Or on le sait, rien n'est moins exact que cette regle ... le second systeme prete egalement a des critiques serieuses, le principe que nul ne doit leser les droits d'autrui ne doit pas necessairement avoir pour consequence d'empecher l'accomplissement de tout fait pouvant produire ce resultat. Son effet est uniquement d'obliger l'auteur d'un pareil fait a reparer le dommage qui en est resulte pour autrui. Les conclusions que le systeme tire de ce principe et qui logiquement s'en deduisent , ont le grave defaut d'admettre qu'une simple situation de fait peut donner naissance a un droit. (2)

(1) Wolfrom, op. cit. p 35

(2) Fauchille, op. cit. p. 448

But these authors as well as those who uphold the Harmon doctrine are very few compared to the great number of all these publicists who are of the opinion that territorial sovereignty as well as territorial integrity should be restricted with respect to the use of the waters of an international river (Berber himself cites a great number of such authors,[1] to which one could add almost all those who participated in the drafting of the Salzburg resolution in 1961, MM. Mules, Bastid, Quincy Wright etc...etc...) (2)

These authors in turn could be divided into two categories: those who are ,

1 - in favour of the idea of a community of property in the water: these are the earlier writers on international law such as Hugo Grotius, Kaufmann, Englehard.

2 - Those with more or less strong emphasis allow states to use the waters subject however to a legitimate consideration for the other state's interests. These writers form a majority. (3)

(1) Berber, op. cit. p. 22 to 44

(2) Annuaire de l'institut de droit international, session de Neuchatel (1959) op. cit. p. 270 to 318.

(3) Wolfrom, op. cit. pp. 35 to 40 and Berber, op. cit. pp. 25 to 44

Conclusion:

What conclusions are we to draw from this investigation into the sources of international law ? Can we conclude that rules of law governing the utilization of international rivers exist ?

a) if so, what are these rules ? and

b) if not, are there principles which are on their way of becoming legal norms and what are these principles which would guide the parties in adopting this or that stand ?

It seems to us that one can safely say that there exists (lex lata) only a very limited number of rules governing the use of international waterways of common interest and we would personally say that there exists only one such rule and certain corollaries which could be directly deduced from it.

But let us proceed by elimination.

The principle of absolute territorial sovereignty or the Harmon doctrine has no sound basis in international law. As we have previously seen, the various treaties which upheld this principle had to qualify it later on by appealing to equity and other general principles recognised by civilised nations (within the meaning of article 38 of the statute of the Permanent Court of International Justice) which in turn reject such a principle. Municipal and international courts as well as arbitral decisions and the writing of Jurists do not accept it either.

The principle of absolute territorial integrity can also be rejected as inapplicable in international law on the same grounds which have been stated above.

The rule of law which stands midway between these two extremes and seems to be upheld by the majority of writers and professional bodies admits that a state has the right to expoit the waters crossing or bordering its territory, but at the same time it will have to restrict it, because it is under obligations to respect the equal right of the other state to benefit from the same waters.

As a corollary from this rule, it will have to be admitted that no state has the right to use the waters of an international river in such a way as to cause an injury (pollution, inundation or deprivation) to the other state (this injury must be of course of a serious magnitude).

This rule and its corollary, we deem to be the only one which has a sound international law basis as evidenced by the treaties, international, municipal and arbitral courts decisions, writing of jurists and the general principles of law which have been studied.

Hence and turning now to the recommendations, one can say that because the preceding principles have not been accepted unanimously and by universal practice, one could only recommend:

1- That the consent of the other party be sought before a state undertakes a work likely to interfere with the former's interests.

2- That co-riparians should seek to reach a direct agreement on an equitable basis for sharing the benefits of an international stream.

3- That in case direct agreement is not reached, the state should resort to arbitration in order to reach a prompt and just solution in accordance with the pacific means envisaged in article 33 of the United Nations charter.

4- That in the absence of an agreement by direct or arbitral means being reached, a riparian is under a duty to refrain from making or allowing such changes pending agreement or any other solution[1].

5- The determination as to what is just and equitable must take into account :

a- previous agreements

b- judgements or awards

c- prior appropriations (this principle however is not to be applied too strictly as previously explained)

d- the extent to which each riparian depends upon the waters in question

e- the extent to which water can be more beneficially used in the watershed of the river before being taken out of it for uses elsewhere and the comparison of the economic and social gains accruing from the various possible uses of the waters in question to each riparian and to the entire area dependent upon the waters in question.[2]

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(1) William. L. Griffin, Memorandum of the U. S. department of State, 85th Congress, 2nd session, no. 118 pp. 90-91 (1958).

(2) Loc. cit.

CONCLUSION

Having so far undertaken to describe the various plans to exploit the waters of the Jordan river and its tributaries, we shall retain only the Israeli 1961 Jordan-Negeb which is actually being implemented to pass judgement on it in the light of both the General Armistice Agreements and the principles which were concretised in our previous chapters.

One of the principles brought forward by the Armistice Agreements (Article II of each of the General Armistice Agreements concluded between Israel on the one hand and Syria, Lebanon, Jordan and Egypt on the other) is that neither party shall draw any military or political benefit from the situation thus created to the detriment of the other party. The Israelis, by implementing their plan to draw the waters of the Jordan river from lake Tiberias to the Negeb are increasing their war potential and establishing fortifications on the perimeter of the projected settlement in the Negeb.

The question is greatly complicated by the fact that the Israeli government is straining all its sinews to bring into the country the utmost possible number of Jewish immigrants, and is using the Jordan river diversion to the Negeb as the keystone of its policy, thus making it possible for all these new immigrants to settle the arid Negeb and at the same time establish new settlement in other parts of Israel, as a result of which it will become utterly impossible for the Arab Palestinian refugees, at present numbering 1,250.000 to ever return to their former homes. All

this would alter the military and political balance established by the Armistice Agreements and therefore constitutes a breach thereof.

When we turn to study Israel's action in the light of the general principles of law governing riparian rights and obligations over certain waters contiguous to their territories, we will find first of all that Israel's position both as a lower and as an upper riparian on the Jordan river is a contradictory one. (1) For if it claims, that it, as a sovereign, has absolute control over the portions of the river traversing its territory, and in this case,pumps all the water it needs from lake Tiberias regardless of the detriment which inevitably would fall upon the Arab States, the latter can also claim that they, as absolute sovereigns, could rightfully divert the headwaters of the Jordan river, even if this action results in the total disruption of Israel's economy.

Furthermore, we have already seen that a river system should be regarded as a whole, both economically and geographically speaking, and that the damage which is caused in one section of it will cause these effects to be felt by the whole geographical unit. Hence, the fact that a connecting lake or a tributary to the river is situated within the territory

(1) A similar case occurred between Austria and Bavaria. The former state was claiming as an upper riparian, absolute control over the waters crossing its territory. But since it was also occupying the position of a lower riparian on the same river, it had to give Bavaria a fair share in the amount of those waters, unless it wanted to see her supply of water cut off.

of one sovereign state is totally irrelevant. This brings us to the conclusion that Israel's claim to rightfully divert water from lake Tiberias because this lake happens to be entirely within its occupied territory, can be dismissed.

There remains to us to assess the amount of damage Israel is or will in the future, inflict upon the Arabs by diverting the water from lake Tiberias and transporting it to the Negeb. However, before dealing with this problem, there will remain for us to consider the question of the Israeli's plan to use the water outside the watershed of the Jordan river i.e. transporting it to the Negeb. We had stated in our conclusions that there exists up till now no fixed and well established principle in international law forbidding the diversion of water of an international river from one watershed into another watershed rather, we had merely stated that it would be advisable and recommendable to see first that the needs of the people inhabiting the valley of the river are met before deciding to allocate the surplus water to satisfy the requirements of far-reaching regions. Hence, it seems logical to conclude therefrom that the Israeli action to divert the water into the Negeb is not condemnable per se, on condition however, that a previous equitable apportionment had been decided between the parties.

Furthermore, and against the Israeli argument that as long as its unilateral diversion remains unchallenged, it could claim that it is entitled to as much water of the Jordan river system as it is using actually prior to any claim by any other riparian state by virtue of the principle of

" prior appropriation", one can say that although a priority of use must be taken into account while allocating the respective shares of each river in the country to the waters of an international river, this could never constitute a final argument since another country although previously unable to exploit the waters of the river can always claim to possess an undisputed and legal right thereto.

As to the amount of damage the Arab countries are incurring, we have already stated that Israel initially intended to use only one pump which would provide the Negev with 320 mcm. of water. Considered in global terms, this amount a-priori does not seem to be excessive. However, when we think that these 320 mcm. of water are to be taken only from one point, i. e. from lake Tiberias, then it is clear that the Israelis are taking advantage of the headwaters of the Jordan river and depriving the Arab countries from their benefits. Seen in this perspective and not withstanding the future withdrawals, i. e. 720 mcm. of water per year by means of three pumps, it is not difficult to see the tremendous consequences which this diversion would have on the economy of the surrounding Arab regions.

The first country to incur a direct damage would, of course, be the Hashemite Kingdom of Jordan. It has been estimated that out of the river's annual flow of 538 mcm. at the outlet of lake Tiberias, there would remain only 60 mcm after Israel had taken what she claims to be her need for irrigating the Beisan and Negev areas. But even these 60mcm

would be totally unsuitable for agriculture since Israel hopes to divert southwards and hence directly in those remaining waters the saline springs pumped from the bottom of lake Tiberias.

Considering that the Hashemite Kingdom of Jordan is in need of developing the maximum amount of arable land to provide food and shelter to an ever increasing population constituted for the most part of poor and destituted villagers, the effect of the Israeli diversion would be to prevent approximately 70.000 dunams of cultivable land from being exploited and would deprive 50.000 farmers of their sole means of livelihood. (1)

As opposed to this, the East Ghor project which the Jordanian government has initiated in 1959 seems to be quite admissible under the principles discussed above. In the first place, this project intends to use the water within the Jordan valley, but secondly and more important for our discussion, the plan does not envisage to withdraw an excessive amount of water. At present the amount withdrawn represents only a small proportion 2 cm to 3cm/s which would lead to annual intake of 60 mcm to 90 mcm compared to the total flow of the river which is 475 mcm.

(1) Rizk, op. cit. p. 13

Moreover, Lebanon and Syria who are likewise entitled to an equitable share in the waters of this river will have to forfeit their rights thereto and thereby incur the repercussions on their respective economies.

Damages hence exist and would exist in the near future and since we have admitted as a general principle that a riparian country does not have the right by using the waters of an international river to cause a serious damage to the other riparian countries, Israel's action constitutes a wrong under International Law.

APPENDIX 1

The Zionist Organization's memorandum to the supreme council at the Peace Conference (1)

...The boundaries above outlined are what we consider essential to afford the necessary economic foundation for the country, Palestine of course must have its natural outlets to the seas, the control of its rivers and have its headwaters. The boundaries are sketched with the general economic needs and historical trends of the country in mind, factors which necessarily must be considered by the special commission in fixing the definite boundary lines .... The geographical area of Palestine contains a large and thriving population which could more easily bear the burdens of modern civilized government.

"The economic life of Palestine like that of every semi-arid country depends on the available water-supply. It is therefore of vital importance not only to secure all water resources already feeding the country but also to be able to conserve and control them at their source.

"The Hermon is Palestine's real "Father of Waters" and cannot be severed from it without striking at the very root of its economic life".

'The country is moreover entitled to some kind of international agreement in order that the headwaters of the Litani river may be fully utilized for its development as well as that of the Lebanon. On the other hand Haifa, the one Palestinian port on the Mediterranean which promises to become the commercial center of the entire country, might be made a free port through which the commerce of Lebanon and Arabia (Faisal's Kingdom) would pass on an equality with the commerce of Palestine.

"The fertile plains east of the Jordan, since the earliest Biblical days, have been linked economically and politically with the land west of the Jordan. A just regard for the economic needs of Palestine and Arabia demands that free access to the Hejaz railway throughout its entire length be accorded both governments.

(1) J.C. Hurewitz, Diplomacy in the Near and Middle East (1914-1956) p. 48.

" An intensive development of the agriculture and other opportunities of the Hauran and Transjordanian make it imperative that Palestine shall have access to the Red Sea and an opportunity of developing good harbour in the gulf of Aqabah. Aqabah, it may be recalled, was a part of Palestine in the days of Salomon. The ports developed in the gulf of Aqabah should be free ports through which the commerce of the hinterland may pass.

APPENDIX 2

Resolution of 29 May 1948 : First Truce

The Security Council

Desiring to bring about a cessation of hostilities in Palestine without prejudice to the rights, claims and position of either Arabs or Jews calls upon all governments and authorities concerned to order a cessation of all acts of armed force for a period of four weeks,

Calls upon all governments and authorities concerned to undertake that they will not introduce fighting personnels into Palestine, Egypt, Irak, Lebanon, Saudi-Arabia, Syria, Transjordan and Yemen during the cease-fire and calls upon all governments and authorities concerned, should men of military age be introduced into countries or territories under their control, to undertake not to mobilize or submit them to military training during the cease-fire,

Calls upon all governments and authorities concerned to refrain from importing or exporting war material into or to Palestine, Egypt, Irak, Lebanon, Saudi-Arabia, Syria, Transjordan and Yemen during the cease-fire.

Urges all governments and authorities concerned to take every possible precaution for the protection of the Holy places and of the city of Jerusalem, including access to all shrines and sanctuaries for the purpose of worship by those who have an established right to visit and worship at them,

Instructs the United Nations Mediator for Palestine in concert with the Truce commission to supervise the observance of the above provisions and decides that they shall be provided with a sufficient number of military observers,

Instructs the United Nations Mediator to make contact with all parties as soon as the cease-fire is in force with a view to carrying out his functions as determined by the General Assembly,

Calls upon all concerned to give the greatest possible assistance to the United Nations Mediator,

Instructs the United Nations Mediator to make a weekly report to the security council during the cease-fire,

Invited the member states of the Arab League and the Jewish and Arab authorities in Palestine to communicate their acceptance of this resolution to the Security Council not later than 6 p.m. New York standard time on 1 June 1948

Decides that if the present resolution is rejected by either party or by both, or if, having been accepted, it is subsequently repudiated or violated, the situation in Palestine will be considered with a view to action under Chapter VII of the charter

Calls upon all governments to take all possible steps to assist in the implementation of this resolution (1)

(1) Doc. S/801

APPENDIX 3

Resolution of 15 July 1948 : Second Truce

The Security Council

Taking into consideration that the provisional government of Israel has indicated its acceptance in principle of a prolongation of the truce in Palestine; that the states members of the Arab league have rejected successive appeals of the United Nations Mediator, and of the Security council in its resolution of 7 July 1948 for the prolongation of the truce in Palestine; and that there has consequently developed a renewal of hostilities in Palestine;

Determines the situation in Palestine constitutes a threat to the peace within the meaning of article 39 of the charter;

Orders the Governments and authorities concerned pursuant to article 40 of the Charter of the United Nations, to desist from further military action and to this end to issue cease-fire orders to their military and para-military forces, to take effect at a time to be determined by the Mediator but in any event not later than three days from the date of the adoption of this resolution;

Declares that failure by any of the governments or authorities concerned to comply with the preceding chapter of this resolution would demonstrate the existence of a breach of the peace within the meaning if Article 49 of the charter requiring immediate consideration by the Security Council with a view to such further action under chapter 7 of the charter as may be decided upon by the council;

Calls upon all governments and authorities concerned to continue to cooperate with the Mediator with a view to the maintenance of peace in Palestine in conformity with the resolution adopted by the Security Council on 29 May 1948;

Orders as a matter of special and urgent necessity an immediate and unconditional cease-fire in the city of Jerusalem to take effect twenty-four hours from the time of the adoption of this resolution and instructs the Truce commission to take any neccessary steps to make this cease-fire effective;

Instructs the Mediator to continue his efforts to bring about the demilitarization of the City of Jerusalem, without prejudice to the future political status of Jerusalem and to assure the protection of and access to the Holy places, religious buildings and sites in Palestine;

Instructs the Mediator to supervise the observance of the truce and to establish procedures for examining alleged breaches of the truce since 11 June 1948, authorizes him to deal with breaches so far as it is within his capacity to do so by appropriate local action, and requests him to keep the security council currently informed concerning the operation of the truce and when necessary to take appropriate action;

Decides that subject to further decision by the security council of the General Assembly, the truce shall remain in force, in accordance with the present Resolution and with that of May 1948, until a peaceful adjustment of the future situation of Palestine is reached;

Reiterates the appeal to the parties contained in the last paragraph of its resolution of 22 May and urges upon the parties that they continue conversations with the Mediator in a spirit of conciliation and mutual concession in order that all points under dispute may be settled peacefully;

Requests the Secretary- General to provide the Mediator with the necessary staff and facilities to assist in carrying out the functions assigned to him under the resolution of the General Assembly of 14 May and under this resolution ; and

Requests the Secretary-General to make appropriate arrangements to provide necessary funds to meet the obligations arising from this resolution (1)

(1) Doc. S/902

APPENDIX 4

Text of Resolution 194 (III)
The Palestine Question
Adopted by the General Assembly of the United Nations
on 11 December 1948

The General Assembly,

Having considered further the situation in Palestine,

1. Expresses its deep appreciation of the progress achieved through the good offices of the late United Nations Mediator in promoting a peacefull adjustment of the future situation of Palestine, for which cause he sacrified his life; and

Extends its thanks to the Acting Mediator and his staff for their continued efforts and devotion to duty in Palestine;

2. Establishes a Conciliation Commission consisting of three States Members of the United Nations which shall have the following function:

a) To assume, in so far as it considers necessary in existing circumstances the functions given to the United Nations Mediator on Palestine by resolution 186 (S-2) of the General Assembly of 14 May 1948;

b) To carry out the specific functions and directives given to it by the present resolution and such additional functions and directives as may be given to it by the General Assembly or by the Security Council;

c) To undertake, upon the request of the Security Council, any of the functions now assigned to the United Nations Mediator on Palestine or to the United Nations Truce Commission by resolutions of the Security Council with respect to all the remaining functions of the United Nations Mediator on Palestine under Security Council resolutions, the office of the Mediator shall be terminated;

3. Decides that a Committee of the Assembly, consisting of China, France, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America, shall present, before the end of the first part of the present session of the General Assembly, for the approval of the Assembly, a proposal concerning the names of the three States which will constitute the Conciliation Commission;

4. Requests the Commission to begin its functions at once, with a view to the establishment of contact between the parties themselves and the Commission at the earliest possible date;

5. Calls upon the Government and authorities concerned to extend the scope of the negotiations provided for in the Security Council's resolution of 16 November 1948 and to seek agreement by negotiations conducted either with the Conciliation Commission or directly, with a view to the final settlement of all questions outstanding between them;

6. Instructs the Conciliation Commission to take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them;

7. Resolves that the Holy Places - inclucing Nazareth - religious buildings and sites in Palestine should be protected and free access to them assured, in accordance with existing rights and historical practice; that arrangements to this end should be under effective United Nations supervision; that the United Nations Conciliation Commission, in presenting to the fourth regular session of the General Assembly its detailed proposals for a permanent international regime for the territory of Jerusalem, should include recommendations concerning the Holy Places in the rest of Palestine the Commission should call upon the political authorities of the areas concerned to give appropriate formal guarantees as to the protection of the Holy Places and access to them, and that these undertakings should be presented to the General Assemly for approval;

8. Resolves that, in view of its association with three world religions, the Jerusalem area, including the present municipality of Jerusalem plus the surrounding villages and towns, the most western, Ain Karim (including also the built - up area of Motsa); and the most northern, Shu'fat should be accorded special and separate treatment from the rest of Palestine and should be placed under effective United Nations control;

Requests the Security Council to take further steps to ensure the demilitarization of Jerusalem at the earliest possible date;

Instructs the Conciliation Commission to present to the fourth regular session of the General Assembly detailed proposals for a permanent international regime for the Jerusalem area which will provide for the maximum local autonomy for distinctive groups consistent with the special international status of the Jerusalem area;

The Conciliation Commission is authorized to appoint a United Nations representative, who shall cooperate with the local authorities with respect to the interim administration of the Jerusalem area;

9. Resolves that, pending agreement on more detailed arrangements among the Governments and authorities concerned, the freest possible access to Jerusalem by road, rail or air should be accorded to all inhabitants of Palestine;

Instructs the Conciliation Commission to report immediately to the Security Council, for appropriate action by that organ of any attempt by any party to impede such access;

10. Instructs the Conciliation Commission to seek arrangements among the Governments and authorities concerned which will facilitate the economic development of the area, including arrangements for access to ports and airfields and the use of transportation and communication facilities;

11. Resolves that the refugess wishing to return to their homes and live in peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible;

Instructs the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations;

12. Authorizes the Conciliation Commission to appoint such subsidiary bodies and to employ such technical experts, acting under its authority, as it may find necessary for the effective discharge of its functions and responsibilities under the present resolution;

The Conciliation Commission will have its official headquarters at Jerusalem. The authorities responsible for maintaining order in Jerusalem will be responsible for taking all measures necessary to ensure the security of the Commission. The Secretary-General will provide a limited number of guards for the protection of the staff and premises of the Commission;

13. Instructs the Conciliation Commission to render progress reports periodically to the Secretary-General for transmission to the Security Council and to the Members of the United Nations;

14. Calls upon all Governments and authorities concerned to cooperate with the Conciliation Commission and to take all possible steps to assist in the implementation of the present resolution;

15. Requests the Secretary-General to provide the necessary staff and facilities and to make appropriate arrangements to provide the necessary funds required in carrying out the terms of the present resolution.

Text of Resolution 302 (IV)
Assistance to Palestine Refugees
Adopted by the General Assembly of the United Nations
on 8 December 1949

The General Assembly,

Recalling its resolutions 212 (III) of 19 November 1948 and 194 (III) of 11 December 1948, affirming in particular the provisions of paragraph 11 of the latter resolution,

Having examined with appreciation the first interim report of the United Nations Economic Survey Mission for the Middle East (1) and the report of the Secretary- General on assistance to Palestine refugees (2)

1. Expresses its appreciation to the Governments which have generously responded to the appeal embodied in its resolution 212 (III) and appeal of the Secretary-General, to contribute in kind or in funds to the alleviation of the conditions of starvation and distress amongs the Palestine refugees;

2. Expresses also its gratitude to the International Committee of the Red Cross, to the League of Red Cross Societies and to the American Friends Service Committee for the contribution they have made to this humanitarian cause by discharging in the face of great difficulties, the responsibility they voluntarily assumed for the distribution of relief supplies and the general care of the refugees; and welcomes the assurance they have given the Secretary-General that they will continue their cooperation with the United Nations until the end of March 1950 on a mutually acceptable basis;

3. Commends the United Nations Internation Children's Emergency Fund for the Important contribution which it has made towards the United Nations programme of assistance; and commends those specialized agencies which have rendered assistance in their respective fields, in particular the World Health Organization, the United Nations Educational, Scientific and Cultural Organization and the International Refugee Organization;

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(1) Document A/1106.

(2) Documents A/1060 and A/1060/Add. 1.

4. Expresses its thanks to the numerous religous, charitable and humanitarian organizations which have materially assisted in bringing in relief to Palestine refugees;

5. Recognizes that, without prejudice to the provisions of paragraph 11 of the General Assembly resolution 194 (III) of 11 December 1948, continued assistance for the relief of the Palestine refugees is necessary to present conditions of peace and stability, and that constructive measures should be undertaken at an early date with a view to the termination of international assistance for relief;

6. Considers that, subject to the provisions of paragraph 9 (d) of the present resolution, the equivalent of approximately $33.7 million will be required for direct relief and works programmes for the period 1 January to 31 December 1950 of which the equivalent of $20.2 million is required for direct relief and $13.5 million for works programmes; that the equivalent of approximately $21.2 million will be required for works programmes from 1 January to 30 June 1951, all inclusive of administrative expenses; and that direct relief should be terminated not later than 31 December 1950 unless otherwise determined by the General Assembly at its fifth regular session;

7. Establishes the United Nations Relief and Works Agency for Palestine Refugees in the Near East:

(a) To carry out in collaboration with local governments the direct relief and works programmes as recommended by the Economic Survey Mission;

(b) To consult with the interested Near Eastern Governments concerning measures to be taken by them preparatory to the time when international assistance for relief and works projects is no longer available;

8. Establishes an Advisory Commission consisting of representatives of France, Turkey, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, with power to add not more than three additional members from contributing Governments, to advise and assist the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East in the execution of the programme; the Director and the Advisory Commission shall consult with each Near Eastern Government concerned in the selection, planning and execution of projects;

9. Requests the Secretary-General to appoint the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East in consultation with the Governments represented on the Advisory Commission:

(a) The Director shall be the chief executive officer of the United Nations Relief and Works Agency for Palestine Refugees in the Near East responsible to the General Assembly for the operation of the programme;

(b) The Director shall select and appoint his staff in accordance with general arrangements made in agreement with the Secretary-General, including such of the staff rules and regulations of the United Nations as the Director and the Secretary-General shall agree are applicable, and to the extent possible utilize the facilities and assistance of of the Secretary-General;

(c) The Director shall, in consultation with the Secretary-General and the Advisory Committee on Administration and Budgetary Questions, establish financial regulations for the United Nations Relief and Works Agency for Palestine refugees in the Near East;

(d) Subject to the financial regulations established pursuant to clause (c) of the present paragraph, the Director, in consultation w th the Advisory Commission, shall apportion available funds between direct relief and works projects in their discretion, in the event that the estimates in paragraph 6 require revision:

10. Requests the Director to convene the Advisory Commission at the earliest practicable date for the purpose of developing plans for the organization and administration of the programme, and of adopting rules or procedure;

11. Continues the United Nations Relief for Palestine Refugees as established under General Assembly resolution 212 (III) until 1 April 1950, or until such date thereafter as the transfer referred to in paragraph 12 is effected, and requests the Secretary-General in consultation with the operating agencies to continue the endeavour to reduce the numbers of rations by progressive stages in the light of the findings and recommendations of the Economic Survey Mission;

12. Instructs the Secretary-General to transfer to the United Nations Relief and Works Agency for Palestine Refugees in the Near East the assets and liabilities of the United Nations Relief for Palestine Refugees by 1 April, 1950, or at such date as may be agreed by him and the director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East;

13. Urges all Member of the United Nations and non-members to make voluntary contributions in funds or in kind to ensure that the amount of supplies and funds required is obtained for each period of the programme as set out in paragraph 6; contributions in funds as may be made in currencies other than the United States dollar in so far as the programme can be carried out in such currencies;

14. Authorizes the Secretary-General, in consultation with the Advisory Committee on Administrative and Budgetary Questions, to advance funds deemed to be available for this purpose and not exceeding $5 million from the Working Capital Fund to finance operations pursuant to the present resolution, such sum to be repaid not later than 31 December 1950 from the voluntary governmental contributions requested under paragraph 13 above;

15. Authorizes the Secretary-General, in consultation with the Advisory Committee on Administrative and Budgetary Questions, to negotiate with the International Refugee Organization for an interest-free loan in an amount not to exceed the equivalent of $2.8 million to finance the programme subject to mutually satisfactory conditions for repayment;

16. Authorizes the Secretary-General to continue the Special Fund established under General Assembly resolution 212 (III) and to make withdrawals there from for the operation of the United Nations Relief for Palestine Refugees and, upon the request of the Director, for the operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East;

17. Calls upon the Governments concerned to accord to the United Nations Relief and Works Agency for Palestine Refugees in the Near East the privileges, immunities, exemptions and facilities which have been granted to the United Nations Relief for Palestine Refugees, together with all other privileges, immunities, exemptions and facilities necessary for the fulfilment of its functions:

18. Urges the United Nations International Children's Emergency Fund, the Internation al Refugee Organization, the World Health Organization, the United Nations Educational, Seientific and Cultural Organizations, the Food and Agriculture Organization and other appropriate agencies and private groups and organizations, in consultation with the Director of the United Nations Relief and Works Agency for the Palestine Refugees in the Near East, to furnish assistance within the framework of the programme;

19. Requests the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East;

(a) To appoint a representative to attend the meeting of the technical Assistance Board as observer so that the technical assistance activities of the United Nations Relief and Works Agency for Palestine Refugees in the Near East may be co-ordinated with the technical assistance programmes of the United Nations and specialized agencies referred to in Economic and Social Council resolution 222 (IX) A of 15 August 1949;

(b) To place at the disposal of the Technical Assistance Board full information concerning any technical assistance work which may be done by the United Nations Relief and Works Agency for Palestine Refugees in the Near East, in order that it may be included in the reports submitted by the Technical Assistance Board to the Technical Assistance Committee of the Economic and Social Council;

20. Directs the United Nations Relief and Works Agency for Palestine Refugees in the Near East to consult with the United Nations Conciliation Commission for Palestine in the best interests of their respective tasks, with particular reference to paragraph 11 of General Assembly resolution 194 (III) of 11 December 1948;

21. Requests the Director to submit to the General Assembly of the United Nations an annual report on the work of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, including an audit of funds, and invites him to submit to the Secretary-General such other reports as the United Nations Relief and Works Agency for Palestine Refugees in the Near East may wish to bring to the attention of Members of the United Nations, or its appropirate organs;

22. Instructs the United Nations Conciliation Commission for Palestine to transmit the final report of the Economic Survey Mission, with such comments as it may wish to make, to the Secretary-General for transmission to the Members of the United Nations and to the United Nations Relief and Works Agency for Palestine Refugees in the Near East.

Table 7. Effect of Different Plans upon Flow of Jordan River (million cubic meters per year)(a)

	Present flow and assumed source(b)	TVA Plan, 1953	Arabs Plan Mar.1954: (revised-high dam)	Israeli Seven Year Plan, Oct.1953	Baker-Harza Plan 1955
1. Headwaters of Jordan R.	572 +	572	572	572	572
Hasbani R.	157 Lebanon	-284 Huleh, Ayelet, Galilee, Afula, for Israel	- 35 Hasbani, Lebanon: - 90 Huleh and Ayelet Israel(c)	-120 Huleh for Israel	
Dan (Liddani) R.	258 Syria				
Banias R.	157 Syria	- 2 evaporation Hasbani	- 20 Banias, Syria - 2 evaporation Hasbani		
2. Less evaporation at Huleh marshes	- 62	none; marshes drained	none; assumes marshes drained	none; marshes drained	none; marshes drained under Israeli Plan
3. Flow below L. Huleh	510	286	425	452	572
4. Flow below Jisr Banat Yacov	640	416	555	242	702
From above	510	286	425	452	572
From intermediate drainage area	130 Israel	130	130	130	130
				-340 Jisr Banat Yacov for Israel	
5. Outlet of L. Tiberias into Jordan R.	538	150	18	60	451
From above L. Tiberias	640	416	555	242	702
From intermediate areas	198 Israel	198	198	198	198
	-300 evaporation Tiberias	-300 evaporation Tiberias	-300 evaporation Tiberias	-300 evaporation Tiberias	-300 evaporation Tiberias
		- 37 Yarmuk triangle and W. Ghor for Israel	- 60 W. Ghor and Yarmuk triangle for Israel(d)	- 80 Kinneret-Beisan canal for Israel	-183 E. Ghor canal, Jordan
		-552 E and W. Ghor, Jordan	- 7 Boteha, Syria(e) -302 W. Ghor, Jordan		+ 34 diversion from Yarmuk(g)
		+425 assumed diversion from Yarmuk R.	-126 E. Ghor, Jordan + 60 Diversion from Yarmuk R.		

Source: UNRWA Bulletin, op.cit. p. 116

Table 7. (Continued)

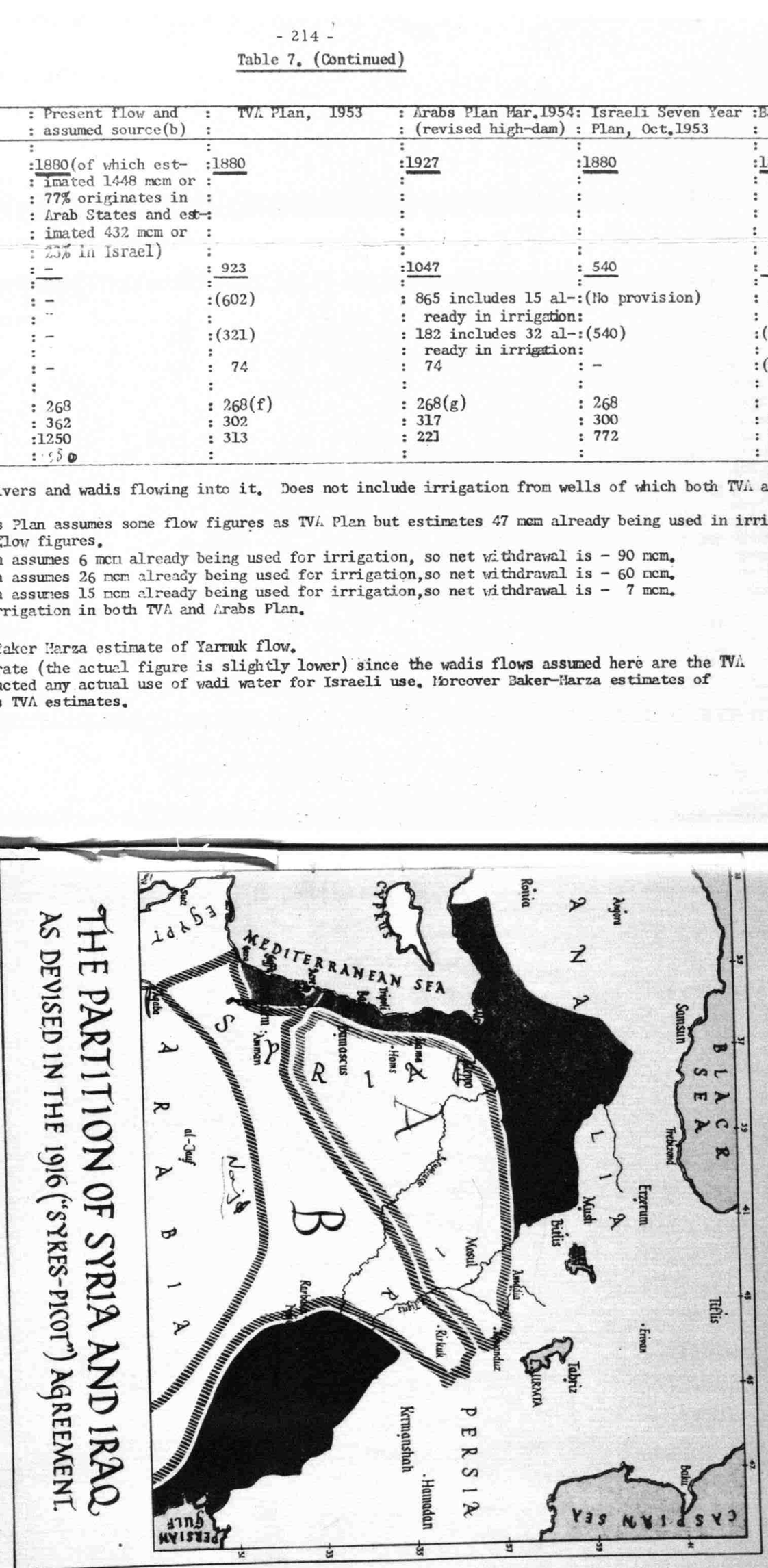
	Present flow and assumed source(b)	TVA Plan, 1953	Arabs Plan Mar.1954 (revised-high dam)	Israeli Seven Year Plan, Oct.1953	Baker-Harza Plan 1955
6. Jordan River below Yarmuk confluence	1013	150	58	535	451
From above	538	150	18	60	451
From Yarmuk R.	475 Jordan and Syria	475 Yarmuk less -425 assumed diversion into Tiberias - 50 Syria.	475 from Yarmuk less -270 from Yarmuk into E.Ghor canal, Jordan - 60 Yarmuk diverted into Tiberias for Jordan - 90 Yarmuk, Syria - 15 evaporation Maqarin.	475	467 - 34 Yarmuk water diverted into Tiberias -350 Yarmuk water into E.Ghor canal, Jordan - 52 Yarmuk water for Syria - 17 Yarmuk water for Israel - 14 Yarmuk evaporation and flood loss.
7. Entrance into Dead Sea	1250	313	221	772	729(i)
From Jordan R. above	1013	150	58	535	451
Perennial wadi flow above Allenby	232 (est.165 Jordan 67 Israel)	232	232	232	232
Perennial wadi flow below Allenby	36 Jordan	36	36	36	36
Wadi flood flow above Allenby:					
Possibly recoverable	74 (est.200 Jordan	74	74	74	74
Other	163 (37 Israel)	163	163	163	163
Less present irrigation use:					
Perennial wadis above Allenby	-232	-232	-232	-232	(-227 for irrigation in Jordan
Perennial wadis below Allenby	- 36	- 36	- 36	- 36	
Recovered flood flow for irrigation		- 74	- 74		

Source: UNRWA Bulletin, op.cit, p. 117-118

Table 7. (Continued)

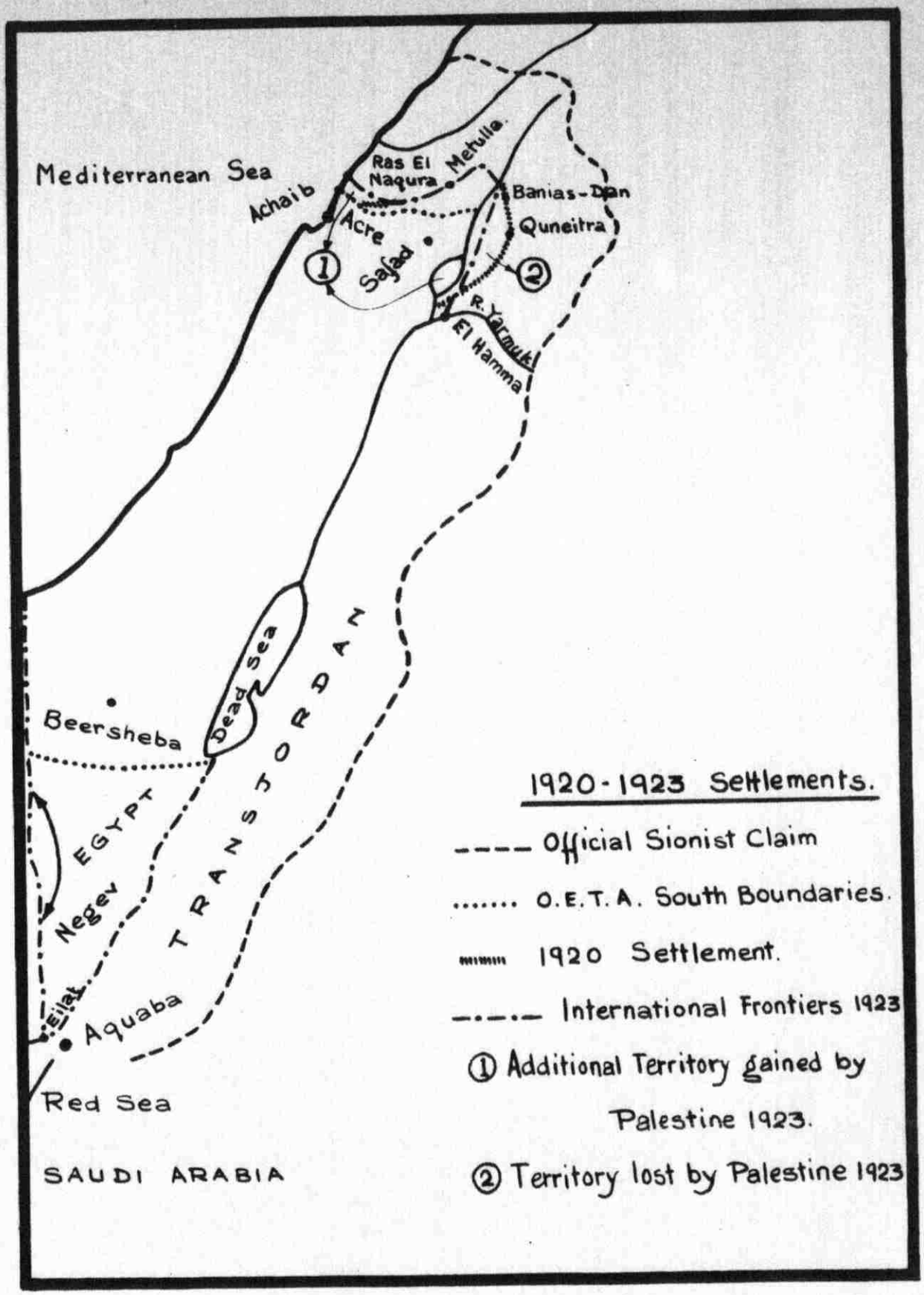
	Present flow and assumed source(b)	TVA Plan, 1953	Arabs Plan Mar.1954: (revised high-dam)	Israeli Seven Year Plan, Oct.1953	Baker-Harza Plan 1955
Distribution of Jordan Watershed	1880(of which estimated 1448 mcm or 77% originates in Arab States and estimated 432 mcm or 23% in Israel)	1880	1927	1880	1872(h)
Proposed new irrigation from River	–	923	1047	540	829
Arab States	–	(602)	865 includes 15 already in irrigation	(No provision)	602
Israel	–	(321)	182 includes 32 already in irrigation	(540)	(No provision)
Flood flow of wadis recovered for irrigation	–	74	74	–	(227 from Jordan wadis)
Present irrigation from wadis	268	268(f)	268(g)	268	
Evaporation	362	302	317	300	314
Flow into Dead Sea	1250	313	221	772	729(i)

(a) Refers to Jordan River and all rivers and wadis flowing into it. Does not include irrigation from wells of which both TVA and Arabs Plan envisage 40 mcm from wells.
(b) Present flow from TVA Plan. Arabs Plan assumes some flow figures as TVA Plan but estimates 47 mcm already being used in irrigation that are not taken account of in TVA flow figures.
(c) Actually – 96 mcm, but Arabs Plan assumes 6 mcm already being used for irrigation, so net withdrawal is – 90 mcm.
(d) Actually – 86 mcm, but Arabs Plan assumes 26 mcm already being used for irrigation, so net withdrawal is – 60 mcm.
(e) Actually – 22 mcm, but Arabs Plan assumes 15 mcm already being used for irrigation, so net withdrawal is – 7 mcm.
(f) Included in wadis utilized for irrigation in both TVA and Arabs Plan.
(g) Assuming Maqarin dam El 168 m.
(h) TVA figure less 8 mcm for lower Baker Harza estimate of Yarmuk flow.
(i) This figure is not strictly accurate (the actual figure is slightly lower) since the wadis flows assumed here are the TVA figures from which should be deducted any actual use of wadi water for Israeli use. Moreover Baker-Harza estimates of wadi flow are not exactly same as TVA estimates.



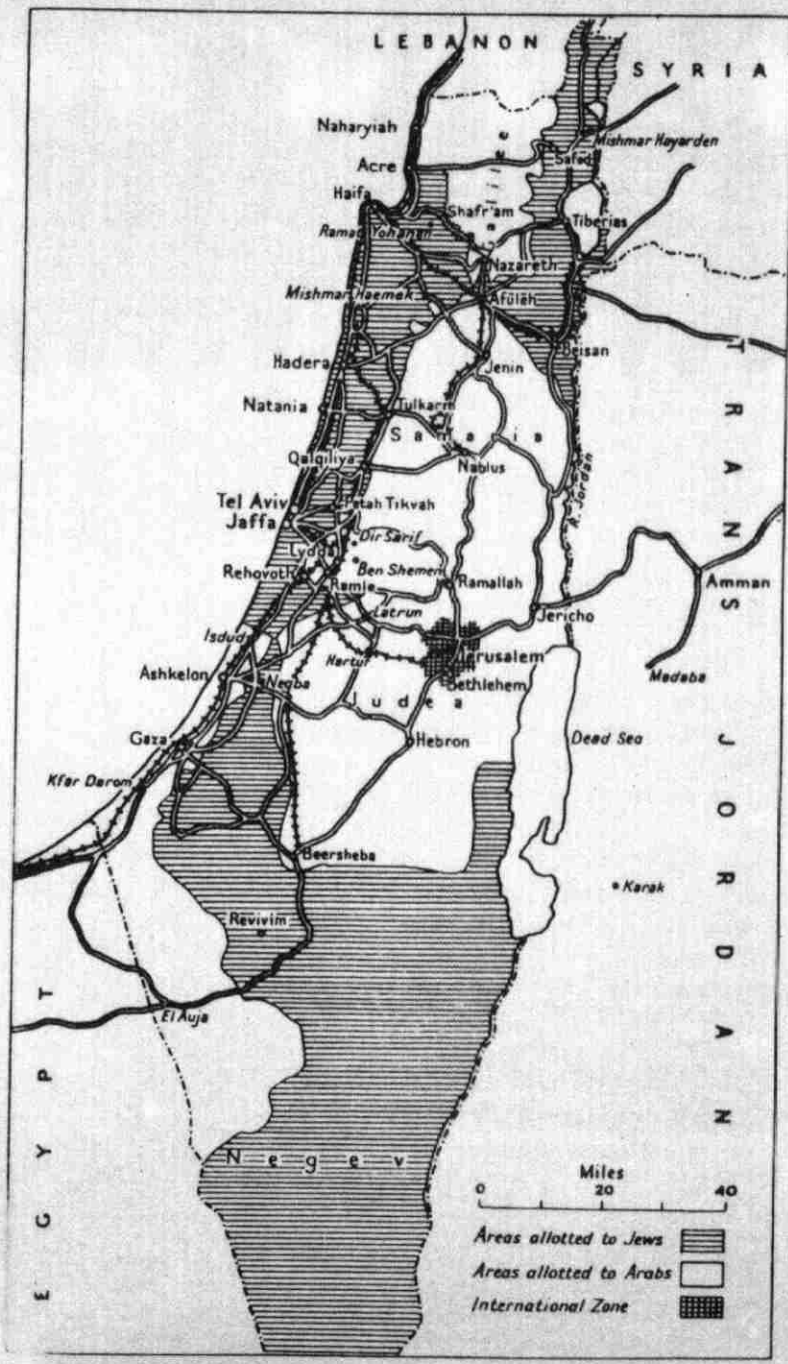
THE PARTITION OF SYRIA AND IRAQ AS DEVISED IN THE 1916 ("SYKES-PICOT") AGREEMENT.

Source: George Antonius, The Arab Awakening, p. 248



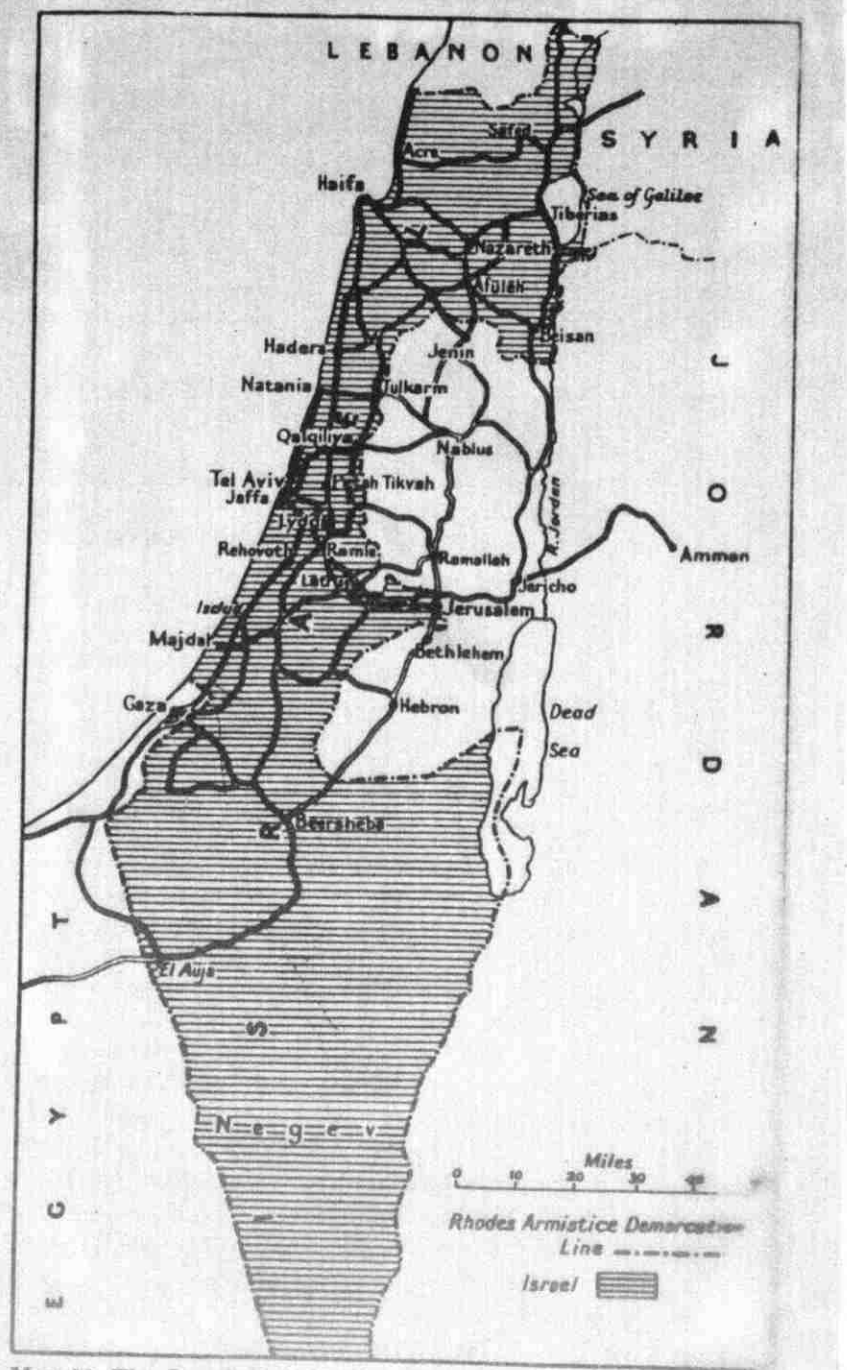
Source: Frischwasser - Ra'anan, Op.cit. p. 157.

Source: Jon and David Kimche, A Clash of Destinies, Praeger, p. 31



Map 1. The plan for the partition of Palestine approved by the U.N. Assembly on November 29th, 1947.

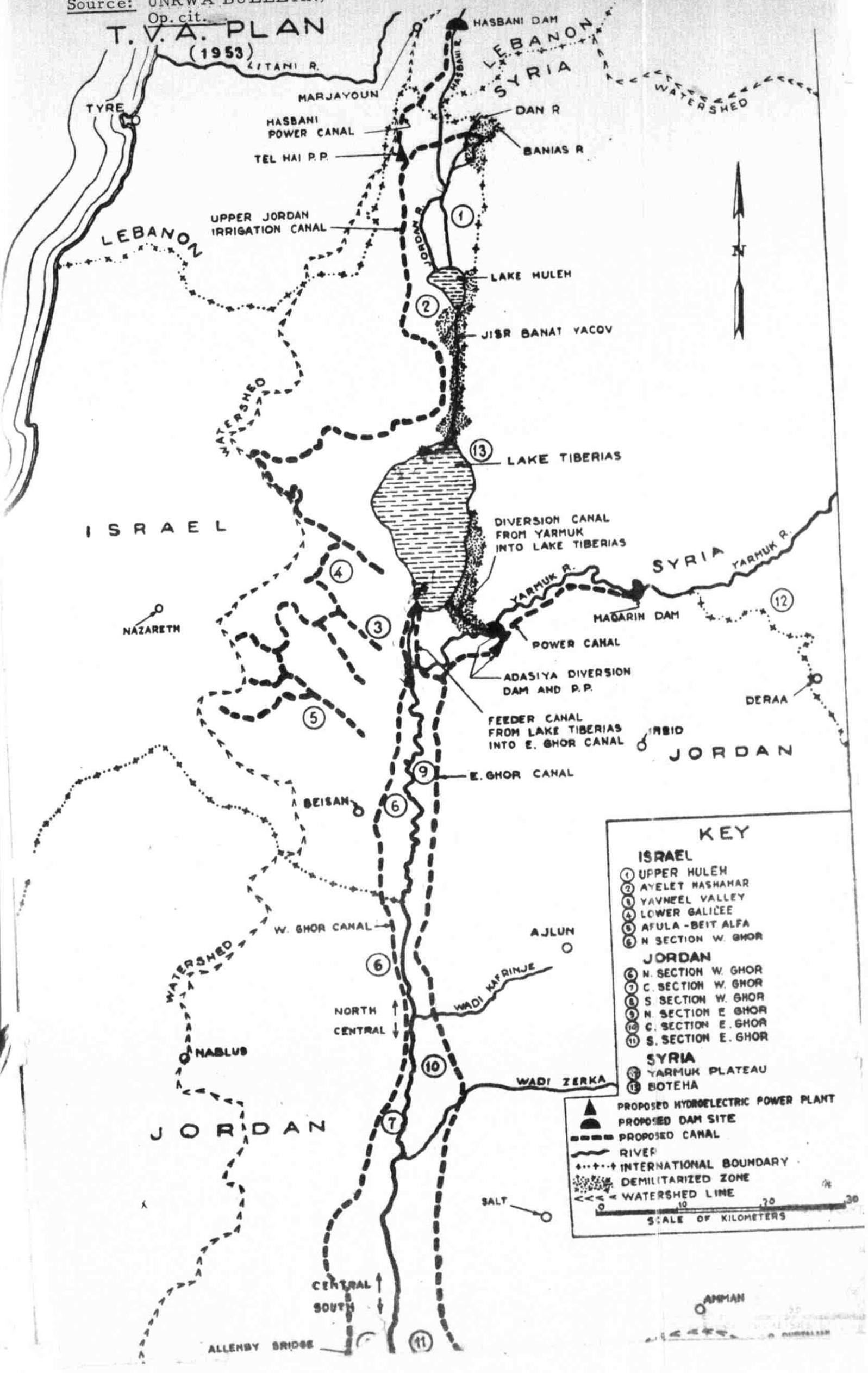
Source: Jon and David Kimche, A Clash of Destinies
Praeger, p. 264



Map 16. The Israel-Arab border after the Armistice Agreement

Source: UNRWA BULLETIN, Op. cit.

T.V.A. PLAN (1953)



Source: UNRWA BULLETIN, op. cit.

ARABS PLAN
MARCH 1954

MARJAYOUN
HASBANI DAM
HASBANI R.
CANAL
LITANI R.
LEBANON
EL GHAGAR POWER PLANT
DAN R.
BANIAS R.
TYRE
N
LEBANON
SYRIA
LAKE HULEH
IRRIGATION CANAL
JISR BANAT JACOB
SAFAD
JORDAN RIVER
ACRE
LAKE TIBERIAS
ISRAEL
DIVERSION CANAL FROM YARMUK TO TIBERIAS
YARMUK R.
YARMUK R.
NAZARETH
FEEDER CANAL FROM TIBERIAS TO E. GHOR CANAL
MZERIB
MAQARIN DAM
DERAA
ADASIYA DIVERSION DAM
BEISAN CANAL
JEZREEL
JORDAN
E. GHOR CANAL
BEISAN
JORDAN RIVER
SIPHON
WADI KAFRINJE
NORTH
CENTRAL
NABLUS
W. GHOR CANAL
WADI ZERKA
JORDAN
SALT
CENTRAL
SOUTH

KEY

LEBANON
(1) HASBANI BASIN

SYRIA
(2) BANIAS BASIN
(3) BOTEHA
(4) YARMUK PLATEAU

ISRAEL
(5) UPPER HULEH
(6) AYELET HASHAHAR
(7) YAVNEEL VALLEY
(8) YARMUK TRIANGLE

JORDAN
(9) WEST OF GHOR
(10) W. GHOR, NORTH
(11) W. GHOR, CENTRAL
(12) W. GHOR, SOUTH
(13) E. GHOR, NORTH
(14) E. GHOR, CENTRAL
(15) E. GHOR, SOUTH

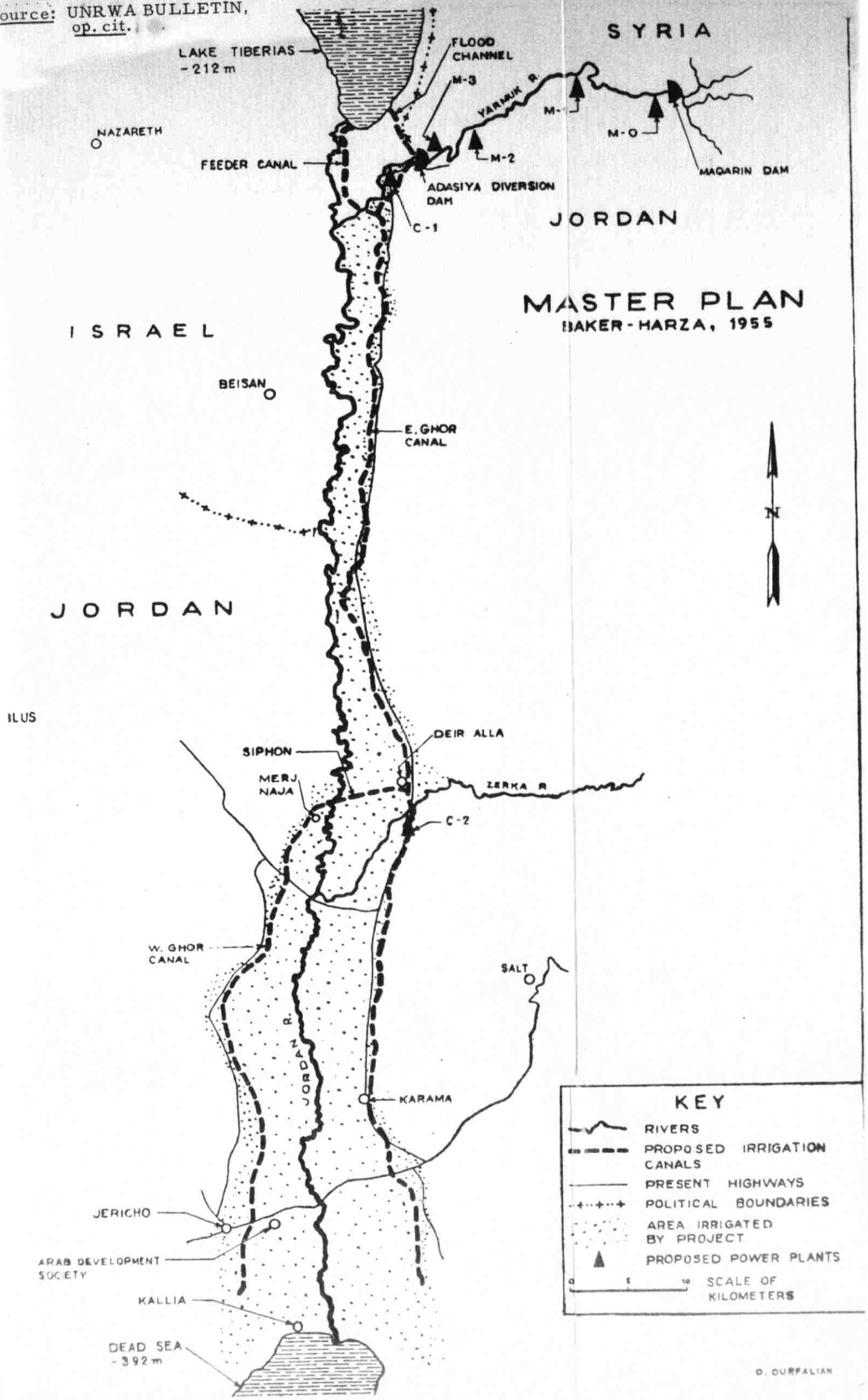
PROPOSED DAM SITE
PROPOSED POWER PLANT
PROPOSED CANAL
INTERNATIONAL BOUNDARY
DEMILITARIZED ZONE

0 10 20 30
SCALE OF KILOMETERS

O. DURFALIAN

Source: UNRWA BULLETIN, op. cit.

MASTER PLAN
BAKER-HARZA, 1955



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