תיק מס': י/189

ירושלים, יח' תשרי תשט"ו
18.10.1954.

SECRET

סודי

Opinion

In accordance with instructions, herewith my Opinion on various questions relating to water rights and related problems concerning the River Jordan. In the preparation of this Opinion, which deals with matters of principle at this stage and not with matters of detail, I have also enjoyed the benefit of an exchange of views with Mr. Pierre Sevette and Mr. L. Kopelmanas, of the Economic Commission for Europe, with Mr. Jerome Pintos, of the Economic Division of the United Nations Secretariat, and with Prof. Clyde Eagleton of New York University, who was rapporteur on the subject of "Diversion of Water in International Rivers" at the Edinburgh Conference of the International Law Association, which I attended.

1. International fluvial law, as it is usually called, has developed around the great navigable rivers of Europe. The main characteristics of these rivers are that they are navigable over all or part of their course, and that the rivers themselves pass through the territories of several States. This gives rise to conflicts of interests between the different riparian States, and also between the different interests desirous of exploiting the river system for social and economic purposes. In addition to their historical primary function of navigation, these

rivers have had, in the past, a secondary function in relation to agriculture (irrigation) and, in more modern times the growth of an industrial function (hydro-electric works) has been marked. These developments have increased the tensions besetting international river problems. The fluvial law, on the whole, is the creation of international treaties, and the complex treaty system of Europe, which has developed since the Congress of Vienna in 1815, has considerably limited the free development of a customary international law. However, the treaties themselves conform to an underlying philosophy, which has, for example, also inspired decisions of the United States Supreme Court in dealing with inter-State disputes on fluvial law.

The fluvial law has its origin in the necessity for reconciling the conflicting interests of the various riparian States. The general principle can be summarized as being that absolute rights of sovereignty must so be exercised as not to provoke damage to the legitimate interests of other sovereigntios. For, as the International Court pointed out in the Corfu Channel Case (merits), I.C.J. reports 1949, 4 at p. 22 "every State [is under the] obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." This is a general principle of modern international law. Its application to navigable rivers was expressed by the Permanent Court of International Justice in its Judgement of 10 September 1929 in the Case of the Territorial Jurisdiction of the River Oder Commission in the following paragraph:-

> The Court must... go back to the principles governing international fluvial law in general... When consideration is given to the manner in which States have regarded concrete situations arising out of the fact that a single waterway

> traverses or separates the territory of more than one State, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream States, but in that of a community of interest of riparian States. This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others. It is on this conception that international river law, as laid down by the Act of the Congress of Vienna of June 9th, 1815, and applied or developed by subsequent conventions, is undoubtedly based. P.I.C.J. Series A No. 23 at p.27.

In other words, the conception of the absolute sovereignty of States in subordinated by the law to the conception of the mutual inter-dependence of States sharing a common river. There is no reason why this principle should be restricted only to navigation. It applies to all forms of user, and in the long run conflicts of interests can only be solved by complicated international agreements, which ought to take into account all the legitimate interests concerned.

In the United States of America the general development of water law is not dissimilar. In so far as disputes arise between the states of the Union, these fall within the jurisdiction of the United States Supreme Court, which is supposed to resolve such disputes by application of international law (the states of the Union being regarded as sovereign states). Here the development of law by the Supreme Court has been less hampered by treaty provisions than it has been in Europe. On the other hand, most of the cases turn on circumstances of great particularity , which limits their value as precedents, except in a very general sense. For this reason, little of concrete value can be extracted from the decisions of the United States Supreme Court as a guide in

applying the general principles to the problems with which we are faced.

In the Far East, especially since the partition of India, new international disputes relating to water have emerged. The India-Pakistan dispute in particular has not yet reached a sufficient stage of crystallisation to enable it to be seen what legal principles were applied in order to reach a settlement.

A similar sociological background can be found in the few non-European river treaties, e.g. those relating to the Nile, Congo and Niger. In the absence of a local or regional custom to the contrary appropriate to the Middle East and binding on the States concerned, and subject to the terms of any international treaties or other binding instruments that may be applicable, it seems that the underlying approach discernible in the development of European and American fluvial law should guide us in ascertaining the legal principles applicable to Middle East rivers in general, and the Jordan in particular.

2. The main results of the developments of the last hundred years or so have been to disprove the validity of various theses formerly held regarding the general problem, but without substituting anything definite in their place. For example, the view that the upper riparian States might have preferential rights against the lower riparian States, or vice versa, can now be dismissed entirely. The same is true of the view that one type of user necessarily is to be preferred to some other type of user. On the other hand the problem is seen to be, how to find a solution which will reconcile all the conflicting interests, national and international: and as the International Court said in the passage already cited, this solution is to be sought in the idea of "a

community of interest" of the riparian States.

3. This confusion is further stimulated by the variety of international organizations dealing with river problems. For the different European rivers, various river commissions have been established by international agreement. Similarly in the United States, inter-state or supra-state Boards and Commissions have been established in order to regulate these problems. Characteristic of these treaties is that these boards - whose powers are sometimes quite wide - only operate in the implementive phase of agreements already reached. The development of the modern social tendencies finds expression in the growing interest displayed by international organizations in water problems. Of the different international organizations now operating, both the Food and Agricultural Organization and such a specialized concern as the World Meteorological Organization, have started occupying themselves with different aspects of water problems, while the International Bank for Reconstruction and Development, which has sometimes been asked to finance river projects, has also taken a hand - and indeed has now accumulated some experience in this type of work. More recently, the United Nations itself has manifested interest in international water problems. Attention is drawn to Resolution 533 (XVIII) adopted by the Economic and Social Council on 2 August 1954, which envisages a wide scheme of co-operation between the United Nations, Specialized Agencies, Regional Economic Commissions and the Technical Assistance Board in these matters. Suggestions have been heard that the time has come for the establishment of a Specialized Agency (under Articles 57 and 63 of the Charter of the United Nations) to assume over-all responsibility for all these questions.

4. The social tendencies, the emphasis on community of interest, and the rejection of the separatist consequences to which earlier notions based on sovereignty gave rise, have stimulated thought in the direction of a greater degree of international control over the use of water resources, This is the obvious consequence of the negative legal conclusions which are to be drawn from the experience of the last hundred years, and in terms of practical politics this means that sensitivity over questions of national sovereignty is not likely to meet with sympathetic response. The application of this line of thought to international river problems finds expression in the current phrase that allocation of water from a given international river has to be based on the principle of equitable distribution. However, it is to be emphasized that this conception - even though sometimes found in the decisions of the United States Supreme Court - is hardly one of legal significance. It means that the decision on the distribution of water is arrived at after balancing all the legitimate conflicting interests, political, economic and social, national and international, so as to produce a solution which is based on rough and ready justice though not necessarily on the basis of strict law. This task is one which, though not a legal function, can be performed by a court of law, but too much should not be read into the fact that the United States Supreme Court has been concerned quite a lot with this type of problem because of the special conditions arising from the Federal Constitution. In other parts of the world the law courts have not been particularly successful and it is to be noted that there has been no case before the International Court and no modern international arbitration of any importance in which the

Tribunal was asked to effect an allocation of water; all the river cases being concerned with the interpretation of existing agreements.

5. The consequence is that in fact the problem is entirely one for political negotiation. However, certain legal questions which may be of assistance in such negotiations need to be kept in mind:

(a) In the first place, it may be mentioned that, although it has been stated that the modern tendency is against allowing the conception of sovereignty to be an obstruction in the general development of an international regulation for disputed waters, the concept of sovereignty does not have to be completely ignored. In general the concept of sovereignty is powerful enough to prevent outside interference in the independent competence of any State, and as such it supplies a restrictive criterion for interpretation of agreements of this kind. But it may go further than this, to influence the negotiations themselves. In the particular aspect of non-interference in the domestic jurisdiction of a State, the concept of sovereignty prevents any outside body or other State from interfering in any matter which is not regulated by international treaty. The concept of sovereignty can also be judiciously used to influence various details of the agreement, particularly as to its implementation, and also the drafting of the treaty itself. This involves a delicate sense of value as to what is appropriate for international action and international treaty. For example, it might be agreed that the available waters should be divided between the States concerned in certain agreed proportions. That would be appropriate for international treaty. On the other hand

it should be made clear, both in negotiations and in the agreement, that how those States use the water allocated to them, and more particularly where they use it, is not an appropriate matter for international action provided of course that there is no question of pollution involved or other interference with the agreed rights of other States, such as a fundamental change in the chemical constitution of the water made available to the down-stream States. Again, the conception of sovereign equality can be used as an argument for insisting that the control machinery should fairly be divided among all the participating States. Experience with the U.N. observers illustrates importance of arranging this type of matter a priori and not leaving it to ad hoc settlement from time to time and in the heat of the moment. This refers particularly to the physical location of the water-masters (see para. 6 below), their checking officials, and the access of the parties to them.

(b) It is important to be precise about the parties to any proposed arrangement and to delimit clearly the role of third powers or international organizations both in the negotiating stage and in the implementative stage. Third power intervention in the Jordan question is today an accepted fact. On the one hand, all the States concerned have been engaged upon negotiations through the intermediary of representative of President Eisenhower. Furthermore, the three States directly concerned with the Jordan-Yarmuk complex, Israel, Jordan and Syria - had in some form or other invoked the jurisdiction of the Security Council since 1951.

In so far as the Security Council is concerned, as the

matter is more dormant for the time being, we can leave aside the question of its powers and competences for this matter. However, in so far as concerns Mr. Johnston, the position is not so simple. Our representatives should always keep clearly in mind the distinction between negotiating with him and negotiating through him, and in the latter event should try to keep clear the precise capacity in which he is acting, i.e. by using his good offices, acting as conciliator, etc. The difficulties of negotiations with or through Mr. Johnston, and their "twilight" atmosphere provoke the question, whether it would not be more advantageous to investigate the possibility of using some other international body such as the International Bank as the catalyst.

6. One of the unsolved problems of the international regulation of water diversions is that of actual control. The function of control is to prevent future disputes. More precisely, the object of the control is to ensure that the water is in fact divided in the proportions agreed upon, and that its user conforms to the conditions agreed upon. In so far as the first aspect is concerned, it is understood that there is in existence a device known as a "water-master". As I understand it, a water-master consists of some mechanical lock or gauge through which the water has to pass at the point of diversion and which records the quantity of water actually passing. This device is checked from time to time by an official. It is significant that Messrs Sevette and Kopelmanas, who are the two experts on European water law, are unable to furnish any information whatsoever as to how this device works and how the quantities of water are controlled. This leads me to think that there are no international precedents whatsoever for this type of international control and that,

if water-masters are in use, they are confined to certain limited areas in the United States. However, the absence of clear international guidance is not a serious obstacle to their introduction here if that should be agreed upon, and the problem of drafting appropriate provisions will present no insuperable problems provided there is clarity on the essential questions of principle that arise. However, let it be emphasised that the question whether to agree to this type of control, and the lengths to which it is to go, is a purely political one. There are, of course, many legal advantages in having a fairly clearly defined system of control, particularly where the main element is a mechanical device. However, before it is possible to reach any further conclusions, and more particularly before it is possible to prepare any concrete suggestions, it is necessary to know more about it, and about the attitude in principle of the Government. The following questions in particular require an answer:

(i) What is the precise mechanical device and where is it to be situated?

(ii) What is the frequency at which the gauges are to be read?

(iii) Who is responsible (a)for maintaining in working order, and (b)for reading, the gauges?

(iv) What is the competence of the gauge-reading authority vis-à-vis the governments concerned, in the event of a discrepancy between the water flowing through the gauge and the quantity agreed upon?

(v) What rights of access to the water-masters do the States directly concerned possess?

(vi) What guarantees are (a)required (b)conceded , against possible tampering by unauthorized

persons with the gauges?

7. In addition to control of quantities, which is the primary function of the water-master, there is also likely to arise the question of control of salinity. (That is the way Jordan put the question to the Security Council in 1951). If agreement is not reached as to the permissible change in the chemical composition of the water downstream, below Lake Kinnereth, then a potential cause of dispute in the future will exist. I have no information as to the scientific methods of testing the degree of salinity in a flowing stream and therefore am unable to compare them with the water-master. However, from the point of view of principle the same generic problems undoubtedly arise, and the views of the Government on this aspect require elucidation.

8. The present Opinion is based on the assumption that the waters of the Jordan-Yarmuk complex are to be divided and allocated for primarily agricultural purposes, and secondarily for hydro-electric purposes. It is understood that even if the planned hydro-electric station is to be erected, it will not involve any question of water on pollution, except to the extent that the extraction of a certain quantity of water by the projected hydro-electric works may induce a change in the chemical composition of the water downstream. That will obviously have to be part of the agreement. The present Opinion does not deal, therefore, with any other questions of fluvial law that might arise. However, it is pointed out that if the basis of an agreed diversion of water is that the water is to be used primarily for agricultural purposes, it would be difficult in later years to use that same water for

in ustrial purposes. At least it would then be arguable that such user would be in breach of faith.

[redacted]

Shabtai Rosenne
Legal Adviser