

**FROM THE RIVER TO THE SEA: WATER CONFLICT
AND INTERNATIONAL LAW IN ISRAEL AND
PALESTINE**

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INTRODUCTION

For a territory subject to such deep and intransient political divisions, much of Israel and Palestine nevertheless flow into each other. Although there is a roughly demarcated border between the two nations, populations intermix, cultures bleed into each other, and natural resources and the landscape evolve without concern for political divides.¹ If you

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¹ The official border as designated by the United Nations in 1948 demarcates the territory agreed upon by Israel (although rejected by Palestine) to be divided between the two nations following Israel’s Independence War. See Oren Yiftachel, *Territory as the Kernel of the Nation: Space, Time*

drive along Route 6 early enough in the morning, you can witness the throngs of Palestinian day laborers just crossed over, waiting for buses to take them to work in Israel. Many, if not most, of the communities along the border on the Israeli side are Palestinian, whose lives often consist of constant travel into the West Bank for work, shopping, and relationships, and whose identities are not confined to one side of the border.² With the division of the West Bank into Areas A, B, and C, and the expansion of Israeli settlements, you can drive twenty minutes into what is legally designated as Palestine but appears for all intents and purposes to be Israel.³ This intermingling does not erase the substantial power differentials between the two nations—not least the fact that one is a formally recognized state with contiguous territory, and the other lacks universal recognition, is divided up piecemeal, and is subject to military occupation⁴—nor does it override the very real and painful divisions, political and otherwise, that are a source of ongoing conflict. However, it demonstrates how, despite the best efforts of governments and the international community, borders often give way to real life.

Water is as good an example of this as any. Unconcerned with manmade borders, water flows unheeded from the northern Golan Heights to the depths of the Jordan Valley; it lurks underneath the hills of the West Bank and travels undetected into central Israel; it hugs the western border of Israel and Gaza in the form of the Mediterranean Sea, and laps the shores of Israel, Jordan, and the West Bank as the mineral-rich Dead Sea.⁵ But despite, and in many cases because of its unwillingness to be confined by borders, water is a source of substantial conflict between Israel and

and Nationalism in Israel/Palestine, GEOPOLITICS 215, 226–27 (2002). However, the construction of Israel's border wall inside the "Green Line" means that in many places the actual border differs from the agreed upon one. In other places, the wall does not exist at all, and Palestinians move and live across it (for example the north-eastern Palestinian town of Barta'a). See AVRAM S. BORNSTEIN, *CROSSING THE GREEN LINE BETWEEN THE WEST BANK AND ISRAEL* (Cynthia Keppley Mahmood ed., 2022).

² Kali Robinson, *What to Know About the Arab Citizens of Israel*, COUNCIL ON FOREIGN RELS. (June 14, 2021, 3:36 PM), <https://www.cfr.org/background/what-know-about-arab-citizens-israel> [https://perma.cc/3PTP-6FXA].

³ Jonathan Kuttub, *Israel is Almost Done Absorbing Area C of the Occupied West Bank*, ARAB CTR. WASH. D.C. (Oct. 28, 2021), <https://arabcenterdc.org/resource/israel-is-almost-done-absorbing-area-c-of-the-occupied-west-bank/> [https://perma.cc/Q36M-DTTK].

⁴ Amnesty Int'l, *Israel and the Occupied Palestinian Territories* (2022), <https://www.amnestyusa.org/countries/israel-and-occupied-palestinian-territories/> [https://perma.cc/85G9-R4JF].

⁵ See discussion *infra* Part I.

Palestine.⁶ The arid climate exacerbates the need for water for agriculture, sanitation, and drinking, particularly for the Palestinians, whose economy is still disproportionately agriculture-dependent.⁷ Additionally, due to the interwoven nature of the landscape, water resources needed by one population inevitably originate from or flow through the territory of another. As such, control over water resources is both a major governance issue and, due to the unresolved nature of the conflict, also one that implicates varying aspects of international law. As the politically and militarily dominant nation,⁸ Israel retains majority control over the water resources available, which has significant human rights implications for the Palestinians.

Palestine struggles with both practical and legal obstacles to asserting its water rights. The ongoing occupation by Israel and mismanagement by its own government mean Palestinians live with varying and often unstable access to water.⁹ Conditions are dramatically different depending on locality, impacted by both levels of urban development and designation under the Oslo Accords divisions of Areas A, B, and C.¹⁰ Although Palestine has been under Israeli occupation since 1967, Israel refutes its identification as an occupying power and its associated responsibilities under the Geneva Conventions.¹¹ Furthermore, both Israel and the international community have insisted that questions such as water management and allocation will be resolved in a “permanent status agreement”—a theoretical two-state solution that drifts further and

⁶ Simone Klawitter, *Water as a Human Right: The Understanding of Water Rights in Palestine*, 23 INT’L J. WATER RES. DEV. 303, 304 (2007).

⁷ *Id.* at 303, 306.

⁸ Amnesty Int’l, *supra* note 4.

⁹ See Amnesty Int’l, *The Occupation of Water* (Nov. 29, 2017), <https://www.amnesty.org/en/latest/campaigns/2017/11/the-occupation-of-water/> [<https://perma.cc/8S4R-BGQA>].

¹⁰ See G.A. Res. A/48/486, Declaration of Principles on Interim Self-Government Arrangements (Oct. 11, 1993); G.A. Res. A/51/889, Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Sept. 28, 1995). The Oslo Accords of 1993 and 1995 resulted in the partition of the West Bank into Areas A, B, and C, with varying levels of Israeli control. Whilst the Palestinian Authority was entirely or partially responsible for Areas A and B, Israel retained majority control of Area C. Following the breakdown of the peace process and the failure of the Oslo Accords to lead to a permanent resolution, Israel began building settlements in Area C and slowly expanding its territorial reach. See Herbert C. Kelman, *The Israeli–Palestinian Peace Process and its Vicissitudes: Insights from Attitude Theory*, AM. PSYCH. 287, 292 (2007); see also Amnesty Int’l, *supra* note 9.

¹¹ David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94 INT’L REV. RED CROSS 207, 211–13 (2012).

further away.¹² As such, Palestinian water rights are conceptualized as something that will be guaranteed when a “peace agreement” is finally reached, contingent on the Palestinians acquiescing to all their historical demands, and agreeing to whatever international proposal *de jour* is on the table.¹³

In the meantime, Palestine remains without a sovereign state,¹⁴ which, among many other things, limits its ability to assert its water rights. As much of international law is state-centric and assigns rights and responsibilities to sovereign governments, Palestine’s lack of statehood undermines its ability to assert both territorial and water claims under international law.¹⁵

The occupation’s impact on Palestinian water access has not gone unnoticed by scholars. However, much of the literature has rested on the assumption of an eventual two-state solution, or at least discussed the conflict as a theoretically impermanent situation.¹⁶ The looming possibility of annexation,¹⁷ as demonstrated by the toing and froing of the Israeli and American governments on this policy during the past year, raises new questions with regards to both conflicts over water and Palestinian water rights.

Following the election of President Donald Trump, a new policy of the United States towards Israel emerged. The movement of the US Embassy from Tel Aviv to Jerusalem,¹⁸ while in many ways more a superficial than a practical gesture, signaled an acceptance by this administration of “facts on the ground” that the international community had previously either ignored or sought to actively counteract in the stated

¹² See ISR. WATER AUTH., *THE ISSUE OF WATER BETWEEN ISRAEL AND THE PALESTINIANS* 4 (2009).

¹³ See *id.*

¹⁴ Steven Kay & Joshua Kern, *The Statehood of Palestine and Its Effect on the Exercise of ICC Jurisdiction*, OPINIO JURIS (July 5, 2019), <http://opiniojuris.org/2019/07/05/the-statehood-of-palestine-and-its-effect-on-the-exercise-of-icc-jurisdiction> [https://perma.cc/2WFF-FQ55].

¹⁵ Ian J. Silverbrand, *Israeli-Palestinian Water Literature’s Misplaced Dependence upon Customary International Law*, 37 ENV’T L. 603, 624 (2007).

¹⁶ See e.g., Zayneb al-Shalalfeh, Fiona Napier & Eurig Scandrett, *Water Nakba in Palestine: Sustainable Dev. Goal 6 Versus Israeli Hydro-hegemony*, 23 LOC. ENV’T 117 (2018); HAIM GVRTZMAN, *THE ISRAELI-PALESTINIAN WATER CONFLICT: AN ISRAELI PERSPECTIVE*, at 1, (Mideast Sec. & Pol’y Stud. No. 94, 2012); Valentin Jeutner, *Water Claims of a Palestinian State Under the Principles of International Law*, 24 GEO. INT’L ENV’T L. REV. 367, 367 (2011); Klawitter, *supra* note 6.

¹⁷ See generally IAN S. LUSTICK, *PARADIGM LOST: FROM TWO-STATE SOLUTION TO ONE-STATE REALITY* (2019) (analyzing the Israeli-Palestinian conflict).

¹⁸ Paul Goldman & Alexander Smith, *Jerusalem embassy opens as U.S. tells Israel ‘you are not alone,’* NBC NEWS (May 14, 2018, 7:06 AM), <https://www.nbcnews.com/news/world/jerusalem-embassy-set-open-u-s-tells-israel-you-are-n873836> [https://perma.cc/BWT8-77C7].

hope of a two-state solution.¹⁹ Subsequently, the Trump Middle East Peace Plan produced a conceptual map of the West Bank that allocated significant chunks to Israel through its annexation of the Jordan Valley, in addition to the sections of the west border containing Israeli settlements traditionally allocated to Israel in previous US peace plans.²⁰

While this plan resulted in no substantive deal or negotiations and was widely rejected and mocked by the international community, Prime Minister Benjamin Netanyahu in fall 2019 announced a formal plan to annex the Jordan Valley.²¹ This plan was largely related to Netanyahu's own political dilemmas, struggling as he was to win an election, Israel's third in a twelve month period.²² This move, blatantly illegal²³ yet supported by both the US administration and Netanyahu's Likud party and supporters, demonstrates how the law is always subordinate to politics, and particularly concerning Israel and Palestine.²⁴

¹⁹ See Press Release, Secretary-General, Two-State Solution is Only Path for Palestinians, Israelis to Live in Peace, Secretary-General Tells International Media Seminar, U.N. Press Release SG/SM/20481 (Dec. 8, 2020), <https://www.un.org/press/en/2020/sgsm20481.doc.htm> [<https://perma.cc/FP89-UGMQ>].

²⁰ Dany Tirza, *Among the Maps: President Trump's Vision vs. an Israeli Proposal*, FIKRA F. (Aug. 14, 2020), <https://www.washingtoninstitute.org/policy-analysis/among-maps-president-trumps-vision-vs-israeli-proposal> [<https://perma.cc/8RHK-XB56>]; TRUMP WHITE HOUSE, PEACE TO PROSPERITY: A VISION TO IMPROVE THE LIVES OF THE PALESTINIAN AND ISRAELI PEOPLE (Jan. 2020), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/01/Peace-to-Prosperity-0120.pdf> [<https://perma.cc/MY67-EXPS>].

²¹ Yehuda Shaul, *Trump's Middle East Peace Plan Isn't New. It Plagiarized a 40-Year-Old Israeli Initiative*, FOREIGN POL'Y MAG. (Feb. 11, 2020, 1:55 PM), <https://foreignpolicy.com/2020/02/11/trump-middle-east-peace-plan-isnt-new-israeli-palestinian-droble/> [<https://perma.cc/284U-BGUC>]; Philip H. Gordon, *Trump's Lopsided Mideast Peace Plan*, COUNCIL ON FOREIGN RELS. (Jan. 28, 2020, 4:37 PM), <https://www.cfr.org/in-brief/trumps-lopsided-mideast-peace-plan> [<https://perma.cc/FMS5-JY3J>]; Amir Tibon, *How Trump's Mideast Plan Is Angering Both Annexationists and Peaceniks*, HAARETZ (Feb. 5, 2020), <https://www.haaretz.com/israel-news/.premium-how-trump-s-mideast-plan-is-angering-both-annexationists-and-peaceniks-1.8495612> [<https://perma.cc/SZFN-LYYA>]; *Israel PM Netanyahu vows to annex occupied Jordan Valley*, BBC (Sept. 10, 2019), <https://www.bbc.co.uk/news/world-middle-east-49655226> [<https://perma.cc/76F2-7A6H>].

²² *Israel will hold unprecedented third election in a year*, BBC (Dec. 12, 2019), <https://www.bbc.com/news/world-middle-east-50742232> [<https://perma.cc/H7VN-TET9>].

²³ Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention (IV)]; Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, T.I.A.S. 3365, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)]; S.C. Res. 497, ¶ 1 (Dec. 17, 1981); Amnesty Int'l, *Israel/OPT: 10 things you need to know about "annexation,"* (July 2, 2020), <https://www.amnesty.org/en/latest/news/2020/07/israelopt-10-things-you-need-to-know-about-annexation/> [<https://perma.cc/8VMX-TD9T>].

²⁴ James McAuley & Ruth Eglash, *Netanyahu offers West Bank annexation to right-wing voters ahead of cliffhanger election*, WASH. POST (Sept. 10, 2019), <https://www.washingtonpost.com/world/netanyahu-offers-west-bank-annexation-to-right-wing->

It may seem facetious to discuss what the legal implications of this annexation would be, particularly as the planned annexation was postponed indefinitely at the beginning of July 2020.²⁵ Additionally, the Biden administration is unlikely to wholeheartedly support annexation as the Trump administration would have been.²⁶ However, the political climate has still unalterably changed the past few years, with both US and Israeli norms shifting towards greater recognized Israeli control over the West Bank.²⁷ Additionally, Israel consistently makes moves on the ground that expand its own power and territory; it continues to raze large numbers of Palestinian communities that lack building permits, recognizes previously illegal outposts, and approves the construction of further settlement development.²⁸

Considering this context, scholars have argued that Israel has moved beyond the point of no return with regards to a two-state solution, and one state in some form seems inevitable.²⁹ Academia has a responsibility to respond to facts on the ground, particularly in a situation as politicized as Israel and Palestine, whereby adherence to traditional binary narratives so often neglects the complexities and contradictions in

voters-ahead-of-cliffhanger-election/2019/09/10/f9779366-d01f-11e9-a620-0a91656d7db6_story.html [https://perma.cc/2F9V-4HB6]; Daniel Estrin, *Netanyahu Plans To Annex Parts Of The West Bank. Many Israeli Settlers Want It All*, NAT'L PUB. RADIO (June 18, 2020, 12:03 PM), <https://www.npr.org/2020/06/18/878305307/netanyahu-plans-to-annex-parts-of-the-west-bank-many-israeli-settlers-want-it-all> [https://perma.cc/4Y7Y-FG3L]; Ed. Bd., *Annexing the West Bank Is a Brazen Violation of International Law*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/opinion/sunday/west-bank-israel-annex.html> [https://perma.cc/EZ3H-MQZ4].

²⁵ Steve Hendrix, *Israel's West Bank annexation stalls, for now, amid pandemic and political distractions*, WASH. POST (July 17, 2020), https://www.washingtonpost.com/world/middle_east/israels-west-bank-annexation-stalls-for-now-amid-pandemic-and-political-distractions/2020/07/16/31b7c2c8-c764-11ea-a825-8722004e4150_story.html [https://perma.cc/WTF5-X2CD].

²⁶ Laura Kelly, *Biden says he opposes Israel annexing territory*, THE HILL (May 19, 2020, 4:28 PM), <https://thehill.com/policy/international/498597-biden-says-he-opposes-israel-annexing-territory> [https://perma.cc/T7PW-Z75Q].

²⁷ Aaron David Miller, *Why Has the United States Said Israeli Settlements Are No Longer Illegal?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Nov. 18, 2019), <https://carnegieendowment.org/2019/11/18/why-has-united-states-said-israeli-settlements-are-no-longer-illegal-pub-80369> [https://perma.cc/AN9R-VHUB]; Naftali Bennett outlines one-state solution peace plan, JEWISH NEWS (Dec. 19, 2017, 12:55 PM), <https://www.jewishnews.co.uk/naftali-bennett-one-state-solution-peace-plan/> [https://perma.cc/G6SG-7NMK].

²⁸ *New roads pave way for massive growth of Israeli settlements*, THE INDEP. (Dec. 7, 2020, 6:18 AM), <https://www.independent.co.uk/news/new-roads-pave-way-for-massive-growth-of-israeli-settlements-west-bank-roads-palestinian-highways-israeli-b1767190.html> [https://perma.cc/6P53-98RC].

²⁹ See generally LUSTICK, *supra* note 17 (analyzing the Israeli-Palestinian conflict).

this region that are inherent to understanding it. Israel has indicated a desire to move at least partially towards recognized hegemony over part or all of the West Bank.³⁰ In practice, it already exists as the controlling power between the river and the sea. Academia can only be useful if it responds to these realities.

Annexation would have a significant impact on water resources for two primary reasons. Firstly, the Jordan Valley, the subject of the proposed annexation, is the site through which numerous water resources flow.³¹ The mountain aquifers in the West Bank are the main water source for both Israelis and Palestinians, and the eastern aquifer lies abutting the Dead Sea.³²

Secondly, it would further complicate the already fragmented international law situation within which Palestine sits. Without a recognized statehood of its own, Palestine faces limitations in the rights it can assert under international law. Much of the water law literature since Oslo has still expressed Palestinian rights through the framework of international water law, with the assumption that as Palestine was working *towards* being a state, it had at least some claim to these rights.³³ This assumption, always denied by Israel, is brought even more greatly into question by proposed annexation. Scholars have also interpreted Palestinian water rights through the lens of international humanitarian law (IHL), although this proposes problems in its lack of specificity regarding water rights and in Israel's denial of its responsibilities as an occupying power.³⁴ In the last decade, scholarship has increasingly looked to

³⁰ See JEWISH NEWS, *supra* note 27; see also Alona Farber, *Why Israel is stuck with Benjamin Netanyahu*, NEW STATESMAN (MAY 29, 2020), <https://www.newstatesman.com/uncategorized/2020/05/why-israel-stuck-benjamin-netanyahu> [<https://perma.cc/3YT6-6ET9>] (discussing Netanyahu's ongoing commitment to annexation); *Ayelet Shaked: Only a strong United Right will lead to Area C annexation*, MIDDLE E. MONITOR (Aug. 6, 2019), <https://www.middleeastmonitor.com/20190806-ayelet-shaked-only-a-strong-united-right-will-lead-to-area-c-annexation/> [<https://perma.cc/TR7M-H3RS>] (describing former Justice Minister Ayelet Shaked's partial annexation policy); *Yisrael Beiteinu*, JUST VISION (2022), <https://justvision.org/glossary/yisrael-beiteinu> [<https://perma.cc/TR7M-H3RS>] (explaining the right-wing Yisrael Beiteun's official annexation plan).

³¹ Tirza, *supra* note 20.

³² CTR. FOR ECON. & SOC. RTS., THE RIGHT TO WATER IN PALESTINE: A BACKGROUND, <https://www.cesr.org/sites/default/files/Palestine.RighttoWater.Factsheet.pdf> [<https://perma.cc/HM32-VNCF>] [hereinafter RIGHT TO WATER].

³³ See, e.g., Jeutner, *supra* note 16.

³⁴ See, e.g., Iain Scobbie, *Natural Resources and Belligerent Occupation: Perspectives from International Humanitarian and Human Rights Law*, in *INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN CONFLICT* 229, 230 (Susan M. Akram, Michael Dumper, Michael Lynk & Iain Scobbie eds., 2011).

international human rights law (IHRL) to assert Palestinian water claims,³⁵ although this too poses problems in its assumption of state-subject relations and equality between parties.³⁶

This Article seeks to examine what impact annexation in some form would have on water conflict in Israel and Palestine, based on the current understanding in law and scholarship of “water rights.” It will argue that annexation will deepen international law’s existing challenges to resolving the conflict over water resources between Israel and Palestine. Annexation would undermine the sovereignty Palestinians need for claims under international water law, and would force Palestinians to rely on claims of water rights that are not fully articulated or acknowledged in IHL or IHRL. Nonetheless, IHRL would provide the most promising framework considering the wealth of customary international law surrounding water rights and the prominence of water rights discourse in the human rights movements of recent years.

This Article will begin with an overview of water resources in Israel and Palestine, particularly focused on the complexities of the situation following the Oslo Accords. Part II discusses the three main approaches for how international legal scholars have dealt with Palestinian water rights so far and the limitations to each in the context of the permanent-temporary nature of Israel’s occupation. Part III will address the possibilities for how water rights and resources will be affected by annexation, taking into account the hurdles scholarship faces by the lack of information still available about proposed Israeli plans. Part IV will suggest legal and policy alternatives for navigating this new reality. This paper aims to move scholarship beyond being stuck in the paradigm of a two-state solution and consider the prospects for both water conflict and Palestinian rights in alternative frameworks.

I. WATER IN ISRAEL AND PALESTINE

A. RESOURCES IN DISPUTE

The main water resources in Israel/Palestine are the Jordan River, running down the eastern border, and four groundwater aquifer basins.³⁷

³⁵ See *infra* Part I.

³⁶ See, e.g., al-Shalalfeh et al., *supra* note 16; GVIRTZMAN, *supra* note 16; Jeutner, *supra* note 16; Klawitter, *supra* note 6.

³⁷ See RIGHT TO WATER, *supra* note 32.

The Jordan River, the main source of surface water in Israel and Palestine, is currently inaccessible to the Palestinians.³⁸ The four groundwater aquifers are shared between both parties; the three Mountain Aquifers, running across the West Bank, and the Coastal Aquifer, running through central Israel. The Mountain Aquifer resources are the most important source for Israel's national water system, according to the Israeli government.³⁹

*Figure 1. Water Resources Map of Israel and Palestine*⁴⁰



³⁸ Friends of the Earth Int'l, *Water Injustice in Palestine: A Limiting Factor for Social and Economic Development* 4 (2014), <https://www.foei.org/wp-content/uploads/2014/08/Water-injustice-in-Palestine.pdf> [https://perma.cc/K62D-T5MG].

³⁹ See *id.*

⁴⁰ *Surface Water*, PALESTINIAN ACAD. SOC'Y FOR STUDY OF INT'L AFFS., <https://passia.org/maps/view/70> [https://perma.cc/EY8A-R432] (last visited May 24, 2022).

B. HISTORICAL WATER MANAGEMENT BETWEEN ISRAEL AND PALESTINE

With Israel's takeover of the West Bank and Gaza following the Six-Day War in 1967, Israel assumed practical and legal control of Palestine's water resources.⁴¹ Practically, Israel now occupied all territory from the Jordan River to the Mediterranean Sea, meaning they had control over the two key regional water resources.⁴²

As part of the occupation, Israel began utilizing military law to assert control over the management of Palestine.⁴³ Military Order 158,⁴⁴ issued in November 1967, stated that Palestinians could not construct any new water installations without first obtaining an Israeli military permit. However, the permits were near impossible to obtain, substantially inhibiting Palestinian water development.⁴⁵

Beginning in the late 1960s, the construction of Israeli settlements in the West Bank had the dual effect of deepening Israeli occupation of Palestinian land but enhancing Palestinian water quality.⁴⁶ The settlements were connected to water infrastructure in Israel proper with pipelines which necessarily ran through the West Bank.⁴⁷ Therefore, Palestinian towns and villages along the pipelines were also connected, resulting in a significant amount of localities gaining access to running water.⁴⁸ However, the presence of settlers resulted in a substantial diversion of water resources away from Palestinians, contributing to a water crisis.⁴⁹

C. WATER IN THE POST-OSLO ERA

The current water situation in Palestine is emblematic of the failures of the Oslo Accords and the temporary-permanent situation the

⁴¹ See Amnesty Int'l, *supra* note 9.

⁴² See *id.*

⁴³ RIGHT TO WATER, *supra* note 32.

⁴⁴ JERUSALEM MEDIA & COMM'N CTR., ISRAELI MILITARY ORDERS IN THE OCCUPIED PALESTINIAN WEST BANK 1967 – 1992 22 (2d ed. 1995), http://www.jmcc.org/documents/JMCCIraeli_military_orders.pdf [https://perma.cc/2RB8-6CXQ].

⁴⁵ RIGHT TO WATER, *supra* note 32.

⁴⁶ See GVIRTZMAN, *supra* note 16, at 3–4.

⁴⁷ See *id.* at 4.

⁴⁸ See *id.*

⁴⁹ Comm. on the Exercise of the Inalienable Rts. of the Palestinian People, *Water Resources of the Occupied Palestinian Territory* (1992), <https://www.un.org/unispal/document/auto-insert-197919/> [https://perma.cc/29RH-7LQQ].

occupation word—and conflict—is now in.⁵⁰ The Oslo Accords were designed as a stepping stone towards complete Palestinian sovereignty over the West Bank and Gaza, and as such, divided territory and authority between Israel and the Palestinians.⁵¹ However, due to the failure to achieve a final status agreement, Palestine still remains caught in limbo, with no one government exerting complete authority over its territories.⁵² As such, Palestine suffers from both occupation under the Israeli army and governance failures from the Palestinian Authority (PA).⁵³

The Oslo Accords resulted in an Interim Agreement concerning water that is still in place today.⁵⁴ The agreement was designed for a period of five years, as the division and management of water resources were postponed until a final status agreement.⁵⁵ As such, the current agreement does not enable sufficient, long-term management of water resources and serves to maintain conflict and inequality over water access in Israel and Palestine.⁵⁶

The agreement stipulated initial control over water resources and quantities of water to be allocated to the different parties.⁵⁷ Israel retained full control over all water resources across its own territory and the Palestinian Territories. Water from the mountain aquifers in the West Bank would be split between the two parties; however, Israel receives 80 percent of the water available, whereas the Palestinians receive 20 percent.⁵⁸ Additionally, while Israel would be able to receive an unlimited

⁵⁰ Declaration of Principles on Interim Self-Government Arrangements, Isr.-PLO, art. VII (Sept. 13, 1993), 32 I.L.M. 1525 [hereinafter Oslo Accords].

⁵¹ *Id.* art. I.

⁵² Amos Harel, *Why the Oslo Peace Process Went Into Deep Freeze*, HAARETZ (Sept. 12, 2018), <https://www.haaretz.com/israel-news/oslo-accords-25-years/.premium-why-the-oslo-peace-process-went-into-deep-freeze-1.6463126> [<https://perma.cc/RZ75-7AKH>].

⁵³ ROSLYN BOATMAN & ALISON MARTIN, OXFAM INT'L, FROM FAILED TO FAIR: LEARNING FROM THE OSLO ACCORDS TO FOSTER A NEW RIGHTS-BASED APPROACH TO PEACE FOR PALESTINIANS AND ISRAELIS 9 (2019), <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620904/bp-failed-to-fair-oslo-accords-011119-en.pdf> [<https://perma.cc/ZL4E-RPCZ>].

⁵⁴ Jeutner, *supra* note 16, at 367.

⁵⁵ BOATMAN & MARTIN, *supra* note 53, at 4.

⁵⁶ Jeutner, *supra* note 16, at 386.

⁵⁷ Oslo Accords, *supra* note 50.

⁵⁸ *Id.* at 14. This is despite the fact that Israel's population at around nine million is only just over double Palestine's population of four million. *Israel Population (Live)*, WORLDOMETER, <https://www.worldometers.info/world-population/israel-population/> [<https://perma.cc/JC3M-RA8Z>]; *State of Palestine Population (Live)*, WORLDOMETER, <https://www.worldometers.info/world-population/state-of-palestine-population/> [<https://perma.cc/5A3V-H3P4>].

water supply, Palestinians had their supply fixed at 118 million cubic meters from existing drillings and another 70 to 80 million cubic meters from new drillings.⁵⁹ That Palestinians would extract this water from previously unused sources in the eastern basin of the Mountain Aquifer.⁶⁰

The Interim Agreement also led to the establishment of a Palestinian Water Administration Authority (PWAA),⁶¹ to manage water development as part of a coordinated Israeli-Palestinian process. However, Israel maintained control over the total flow and volume of water in Palestine;⁶² all water is still controlled and supplied by Israel's national water company, Mekorot.⁶³ As such, the PWAA has little actual power and is instead responsible for allocating the water supply determined by Israel.⁶⁴

In addition to being allocated significantly less water than their Israeli counterparts, the Palestinians also face water access problems through difficulties in extracting water. Technical difficulties, including unexpected failures in new drillings in the eastern mountain aquifer, mean Palestine currently extracts even less water than stipulated in the agreement.⁶⁵ Substantial population growth and obstacles posed by the Israeli occupation amplify these difficulties, including imposing lengthy delays and refraining from providing approval to projects.⁶⁶ It is estimated the Palestinians only receive 75 percent of their allocated water through extraction.⁶⁷

An inability by the Palestinians to extract the water allocated to them means they then must purchase water from Mekorot at a high price to meet their water needs.⁶⁸ According to Palestinian Water Authority

⁵⁹ *Water Crisis*, B'TSELEM (June 3, 2021), <https://www.btselem.org/water> [<https://perma.cc/9QAL-GMCZ>].

⁶⁰ WBG, *Securing Water for Development in West Bank and Gaza*, at 4, (2018), <https://documents1.worldbank.org/curated/en/736571530044615402/pdf/Securing-water-for-development-in-West-Bank-and-Gaza-sector-note.pdf> [<https://perma.cc/36MP-BFQS>].

⁶¹ Oslo Accords, *supra* note 50.

⁶² BOATMAN & MARTIN, *supra* note 53, at 17.

⁶³ RIGHT TO WATER, *supra* note 32.

⁶⁴ *Id.*

⁶⁵ B'TSELEM, *supra* note 59.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

figures, in 2015, the PA purchased an additional 63.8 million cubic meters from Mekorot for use in the West Bank.⁶⁹

Even when the required water has been obtained, the Palestinians face further difficulties in transferring and distributing water to their population. The poor condition of pipelines and water grids within Palestinian cities and villages means about 30 percent of water is lost to leakage.⁷⁰ This is exacerbated by Israeli refusal to approve PA proposals to repair the pipeline infrastructure, which runs through Area C.⁷¹

Furthermore, many Palestinian communities are not connected to the water grid at all.⁷² The severe restrictions on construction and development in Area C mean that communities located in this territory cannot hook up to the water grid.⁷³ Additionally, the lack of properly paved access roads raises costs for water transportation into the communities.⁷⁴ These communities total around 180 and contain around 30,000 people⁷⁵ (60,000 people live entirely in Area C, and 180,000 live at least in part in Area C).⁷⁶ Without a connection to pipelines, they are forced to purchase water from costly private tankers.⁷⁷

The combination of these factors has resulted in a chronic water shortage for Palestinians.⁷⁸ While the World Health Organization (WHO) recommends a minimum of 100 liters of water per capita per day (lcd), Palestinians in the West Bank consume on average sixty-two lcd for domestic uses.⁷⁹ Rapid population growth—at an average annual rate of 2.8 percent—means the domestic supply gap is only widening year on year and is estimated to be ninety-two million cubic meters by 2030.⁸⁰

Finally, the construction of Israeli settlements and the use of Palestinian land for habitation and business has also impacted Palestinian

⁶⁹ Elena Bruess, *HotSpots H2O: Water Scarcity in Palestinian Territories Puts Farming at Risk*, CIRCLE OF BLUE (Nov. 30, 2020), <https://www.circleofblue.org/2020/wef/hotspots-h2o-water-scarcity-in-palestinian-territories-puts-farming-at-risk/> [https://perma.cc/6RJ2-UCJA].

⁷⁰ RIGHT TO WATER, *supra* note 32.

⁷¹ B'TSELEM, *supra* note 59.

⁷² *Id.*

⁷³ *See id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *What is Area C?*, B'TSELEM (Nov. 3, 2013), https://reliefweb.int/sites/reliefweb.int/files/resources/b039tselem_-_what_is_area_c_-_2013-11-03.pdf [https://perma.cc/72CZ-PR3M].

⁷⁷ B'TSELEM, *supra* note 59.

⁷⁸ *See* WBG, *supra* note 60, at 1.

⁷⁹ *Id.* at 2.

⁸⁰ *Id.* at 3.

water access. For example, in the summertime, Mekorot cuts back on the quantities it supplies to some Palestinian communities in order to meet the higher seasonal demand in certain settlements.⁸¹ Actions by settlers themselves also result in the Israeli takeover of natural water resources allocated to Palestinians or the destruction of springs and cisterns that feed them.⁸²

Attempts to alleviate this situation through sustainable development goals of water management between Israel and Palestine have obscured inequality.⁸³ Attempts to fulfill rights in the framework of occupation have just cemented the dynamic that exists.⁸⁴ Rather than providing a path to sovereignty, the Oslo framework has legitimized Israeli control over water.⁸⁵

It is evident that water access remains a symptom of the Israel-Palestine conflict; however, it is also a driver. The concentration of water resources in the West Bank that provide water for both Israel and Palestine is at least one reason why Israel is reluctant to give up control of the Palestinian Territories. Doing so would mean putting Israeli water access in the hands of a perceived enemy and a likely fragile political agreement. By contrast, annexation would cement Israeli control over essential water resources.

II. WATER AND THE LAW: PALESTINE'S LEGAL LIMBO

Scholarship concerning water in Israel and Palestine can generally be grouped under three frameworks. First, international water law, which governs the rights and responsibilities of states to shared water resources.⁸⁶ Second, international humanitarian law, which dictates the responsibilities of a state carrying out military occupation and the rights of the occupied.⁸⁷ Finally, international human rights law, which enshrines a basic set of rights for all human beings and lays out the obligations of a state to fulfill those rights to those under its sovereignty.⁸⁸ While these are separate

⁸¹ B'TSELEM, *supra* note 59.

⁸² *Id.*

⁸³ See al-Shalalfeh et al., *supra* note 16, at 118.

⁸⁴ See *id.*

⁸⁵ *Id.* at 120.

⁸⁶ See, e.g., Silverbrand, *supra* note 15; Jeutner, *supra* note 16; al-Shalalfeh et al., *supra* note 16.

⁸⁷ See Scobbie, *supra* note 34, at 229.

⁸⁸ See, e.g., Mia Tamarin, *The Human(ised) Right to Water and its Limits: The Case of Israel-Palestine*, 6 INT'L J. WATER GOVERNANCE 135, 137–38 (2018); Klawitter, *supra* note 6.

doctrines, they are overlapping in many respects. Scholars have traditionally relied on international water law and international humanitarian law, approaching the topic from the perspective of balancing the rights and obligations of each party and resolving disputes between two sovereigns. However, in recent years scholars have begun to focus on an articulation of Palestinian water rights under international human rights law.⁸⁹

A. INTERNATIONAL WATER LAW

International water law governs relations between states concerning shared water.⁹⁰ In the case of Palestine, it can provide a framework for the management of the Jordan River and the Mountain and Coastal Aquifers, including the rights and responsibilities of both parties to these resources.

During the period around and after the Oslo Accords, scholars focused primarily on international water law as a means of identifying an appropriate division of water resources in the West Bank and the responsibilities of both Israel and Palestine with regard to their management.⁹¹ There are four general principles of international water law for resolving transboundary conflicts: absolute territorial sovereignty, absolute territorial integrity, community of property in water, and restricted territorial sovereignty.⁹² Scholars have particularly focused on restricted territorial sovereignty, under which all riparians to an international waterway have an equal right to access, and may not detrimentally interfere with other riparians' usage.⁹³

As well as permeating the literature, restricted territorial sovereignty has also influenced regional treaties. For example, this theory was also determinant in the 1993 Declaration of Principles, reached as part of Oslo Accord I, seen through language such as "equitable utilization of joint water resource."⁹⁴ However, the indications of a need for future cooperation between Israel and Palestine, based on the assumption of two states with equitable power balances, also led to the influence of the

⁸⁹ See, e.g., Tamarin, *supra* note 88, at 141.

⁹⁰ See AMANDA CAHILL-RIPLEY, *THE HUMAN RIGHT TO WATER AND ITS APPLICATION IN THE OCCUPIED PALESTINIAN TERRITORIES* 9 (Routledge 2011).

⁹¹ See Silverbrand, *supra* note 15, at 608.

⁹² *Id.* at 609.

⁹³ See *id.* at 610–11.

⁹⁴ Oslo Accords, *supra* note 50; see also Silverbrand, *supra* note 15, at 618.

absolute territorial integrity theory.⁹⁵ In this way, international water law played an outsized influence in negotiations over water as part of a peace agreement between Israel and Palestine.⁹⁶ This made sense at the time, with Palestinians articulating the importance of their riparian rights as a nation-state under international law, under the assumption that they were working towards becoming a nation-state.

However, as this did not subsequently emerge after the Oslo Accords, the role of international water law is limited, primarily because international law is designed to regulate relations between nations. For example, the Convention on the Law of the Non-Navigational Uses of International Watercourses speaks exclusively about international watercourses.⁹⁷ It defines such international watercourses as “parts of which are situated in different States.”⁹⁸ Additionally, the Helsinki Rules on the Uses of the Waters of International Rivers discuss the “use of water in an international drainage basin,” which means a “geographical area extending over two or more States.”⁹⁹ With Palestine continuing to lack formal, international recognition of its statehood, its claims under international water law are therefore hindered. Indeed, Israel has continuously used this legal argument to justify why it does not have to adhere to international water law concerning allocations of the West Bank Aquifer or Jordan River.¹⁰⁰ Scholarship has dealt with this, as mentioned, by focusing on the idea that Palestine will eventually *become* a state, and therefore Israel’s rejection of these principles is merely a diversion tactic.¹⁰¹ However, when faced with the very real possibility of political

⁹⁵ This theory holds that a state has the right and should expect the free flow of water from other territories and may not in turn restrict the flow of water through their territory to other states. World Wildlife Fund, *U.N. Watercourses Convention User’s Guide Fact Sheet Series: Number 10: Theories of Resource Allocation*, UN WATERCOURSES CONVENTION, <https://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-10-Theories-of-Resource-Allocation.pdf> [<https://perma.cc/X9U4-55YQ>].

⁹⁶ See Silverbrand, *supra* note 15, at 622.

⁹⁷ Convention on the Law of the Non-Navigational Uses of International Watercourses art. 2(b), May 21, 1997, 2999 U.N.T.S. 77.

⁹⁸ *Id.*

⁹⁹ Int’l L. Ass’n, *Helsinki Rules on the Uses of the Waters of International Rivers*, art. IV (Aug. 14–20, 1966), https://www.internationalwaterlaw.org/documents/intldocs/ILA/ILA-HelsinkiRules1966-as_amended.pdf [<https://perma.cc/2U7B-8HBV>].

¹⁰⁰ Silverbrand, *supra* note 15, at 624; see also Kevin Jon Heller, *Can Israel Cut Off Water and Power to Gaza?*, OPINIO JURIS (July 26, 2014), <http://opiniojuris.org/2014/07/26/can-israel-cut-water-power-gaza/> [<https://perma.cc/D2SM-SVBS>].

¹⁰¹ Silverbrand, *supra* note 15, at 624.

annexation, and an already existing de facto annexation, the utility of this approach only becomes more limited with time.

B. INTERNATIONAL HUMANITARIAN LAW

International humanitarian law (IHL) principles concerning occupation can help provide an understanding of the current Palestinian water rights situation. Under this law, an occupier is fundamentally not a sovereign but an *administrator* of the territory it occupies.¹⁰² Therefore, the occupier does not have the right to deplete the resources of this territory or use those resources to enrich itself; it may only do what is necessary to meet the requirements of the local population.¹⁰³

The law of occupation is set out by the Regulations annexed to 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, and by the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.¹⁰⁴ These provisions apply specifically to those involved in conflict or occupation and to both the occupier and the occupied.

IHL is limited with regard to water rights in that it only provides broad principles and not details specific enough to the Palestinian situation. This is particularly relevant to water law, as the right to water is not specifically elucidated by IHL.¹⁰⁵ In fact, natural resources as a whole are not specifically addressed, but are interpreted through statements governing the occupier's use of the occupant's property and economic assets.¹⁰⁶ As such, the constraints placed on an occupier's power with regard to natural resources are only rudimentary.

IHL also delineates a duty of non-discrimination, which scholars have interpreted as a means of articulating Palestinian water rights.¹⁰⁷ This provision holds that an occupier must treat populations under its control without any distinction based on race, nationality, etc.¹⁰⁸ Scholars have argued that Israel is in violation of this right, considering the unequal share

¹⁰² Scobbie, *supra* note 34, at 229.

¹⁰³ *Id.*

¹⁰⁴ See Hague Convention (IV), *supra* note 23; Geneva Convention (IV), *supra* note 23.

¹⁰⁵ See Scobbie, *supra* note 34, at 230.

¹⁰⁶ See *id.*

¹⁰⁷ *Id.* at 231.

¹⁰⁸ *Id.*

of water accorded to Palestinians in the West Bank in comparison to Israeli settlers in the West Bank and the residents of Israel.¹⁰⁹

However, despite this articulation of relevant rights and duties, IHL is significantly limited in this case based on arguments by Israel that it should not be held responsible under the law of occupation, as it argues it is not an occupying power.¹¹⁰ In the diffuseness of international law, power exerts itself and law becomes subordinate to politics, whereby Israel faces no legal repercussions from the international community.

C. INTERNATIONAL HUMAN RIGHTS LAW

Increasingly, scholars have looked to international human rights law (IHRL) to articulate Palestinian water rights claims.¹¹¹ Alongside the development of implicit water rights in international law and IHL, a more explicit right has developed in IHRL.¹¹²

The United States and Israel generally adhere to a traditional view that IHL and IHRL do not overlap, and have distinctive temporal and geographic applications, and therefore IHRL is not entirely applicable to a situation of armed conflict or military occupation. However, the international community has generally recognized the universality of IHRL principles. Scholars have used these principles interwoven with IHL to try and deepen our understanding of rights and duties with regard to water law and occupation.¹¹³

IHRL has three significant limitations. Firstly, while it articulates universal rights that are theoretically applicable to all, these rights are only upheld by nation-states.¹¹⁴ As such, the legal framework is limited to the relationship between state and subject.¹¹⁵ Secondly, and relatedly, there are no external enforcement mechanisms of IHRL, and as such nation-states are accountable to no one but themselves.¹¹⁶ There is no international court to administer human rights law; while the International Criminal Court has jurisdiction over the crimes of genocide, war crimes,

¹⁰⁹ See *id.*

¹¹⁰ See Kretzmer, *supra* note 11, at 209–10.

¹¹¹ See, e.g., Jeutner, *supra* note 16, at 368; Klawitter, *supra* note 6, at 304; Tamarin, *supra* note 88, at 135; CAHILL-RIPLEY, *supra* note 90, at 10.

¹¹² CAHILL-RIPLEY, *supra* note 90, at 10.

¹¹³ See generally Scobbie, *supra* note 34.

¹¹⁴ Tamarin, *supra* note 88, at 144.

¹¹⁵ See *id.*

¹¹⁶ *Id.* at 137.

and crimes against humanity,¹¹⁷ and regional courts such as the European Court of Human Rights enforce regional human rights law,¹¹⁸ there is no all-encompassing court for those suffering human rights abuses to seek when their state fails them. Finally, there is an absence of consensus on what rights to enforce, which further limits accountability.¹¹⁹ All three of these limitations have significant implications for Palestine. Nonetheless, IHRL provides a meaningful articulation of inalienable rights that are crucial for challenging state action on the international stage.

IHRL does not include the right to water as an explicit right, although it has been interpreted as one through the right to life and other similar provisions to which water is fundamental.¹²⁰ A right to water has been codified implicitly within binding international human rights instruments and expounded on explicitly within non-binding but nonetheless deeply influential IHRL commentary. The main binding legal sources are the International Covenant on Economic Social and Cultural Rights (ICESCR), Convention on the Rights of the Child (CRC), and Convention on the Elimination of All Form of Discrimination Against Women (CEDAW).¹²¹ The right to water can be found implicitly in the 1966 ICESCR, in Article 11, an adequate standard of living, and Article 12, the highest attainable standard of health.¹²² Additionally, both the CRC and CEDAW contains mentions of a right to clean and sufficient water.¹²³

There is also a substantial articulation of the right to water in non-binding human rights commentary and reports. The right to water has been stated explicitly in the General Comments (GC) expanding on the ICESCR.¹²⁴ The General Comment 14 lays out a right to water as part of

¹¹⁷ Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90.

¹¹⁸ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby art. 19, Nov. 5, 1994, 155 E.T.S. 1.

¹¹⁹ See generally Tamarin, *supra* note 88 (discussing shortcomings of enforcing water rights in international law).

¹²⁰ *Id.* at 138.

¹²¹ CAHILL-RIPLEY, *supra* note 90, at 21.

¹²² *Id.* at 15.

¹²³ *Id.* at 22.

¹²⁴ Comm. on Econ., Soc., & Cultural Rts., *General Comment No. 14 (2000) The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic Social and Cultural Rights)*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter *General Comment No. 14*]; Comm. on Econ., Soc., & Cultural Rts., *General Comment No. 15 (2002) The Right to Water (Arts. 11 and 12 of the International Covenant on Economic Social and Cultural Rights)*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter *General Comment No. 15*]; See also International Covenant on Economic, Social and Cultural Rights art. 16, Dec. 16, 1966, 993 U.N.T.S. 14531 (establishing that parties to the covenant are to conform with future reports on measures to carry out the monitoring function that are assigned in Part IV).

an inextricable link between water and health.¹²⁵ It delineates key substantive elements of the right to water: access, safety, sufficiency, and sanitation.¹²⁶ Additionally, it specifically prohibits the pollution of water or any attempts by states to restrict water access as a punitive measure.¹²⁷ More significant is GC 15, developed later specifically to address the right to water.¹²⁸ GC 15 states:

[The human right to water entitles everyone to] sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.¹²⁹

Although the General Comments are not binding,¹³⁰ they provide significant strength to the right to water through their expansive and detailed commentary on the rights and obligations of states and individuals in this area. Such substance limits the ability of states to avoid enforcing this right due to lack of clarity in international law, and enables greater pressure and accountability from human rights bodies.

Driven by developments in the binding, treaty-based UN human rights system, human rights bodies within the UN charter system have also provided a substantive articulation of the right to water. In 2005, a Special Rapporteur delivered a requested report to the Sub-Commission on the Promotion and Protection of Human Rights, detailing guidelines on the right to drinking water and sanitation, which were designed to assist governments in the implementation of this right.¹³¹ In 2007, the Office of the High Commissioner for Human Rights produced a detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments. This report led to the institution of an

¹²⁵ *General Comment No. 14*, *supra* note 124.

¹²⁶ *Id.*

¹²⁷ CAHILL-RIPLEY, *supra* note 90, at 16.

¹²⁸ *Id.* at 26.

¹²⁹ *General Comment No. 15*, *supra* note 124.

¹³⁰ Helen Keller & Leena Grover, *General Comments of the Human Rights Committee and Their Legitimacy*, in UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 116, 129 (Helen Keller & Geir Ulfstein eds., 2012).

¹³¹ U.N. Human Rts. Council, *Report of the United Nations High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation Under International Human Rights Instruments*, ¶ 5(e), U.N. Doc. A/HRC/6/3 (Aug. 16, 2007); CAHILL-RIPLEY, *supra* note 90, at 16.

Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation in 2008.¹³²

As such, it is clear that the right to water exists as a recognized right by human rights bodies in international human rights law. However, its lack of clear and explicit codification presents problems for its enforceability. Without clearly and thoroughly defined parameters in both theory and law, the right to water cannot be given full protection and status.¹³³

Despite strengthening the right to water, there are still limitations in IHRL's application to the Palestinian cause. IHRL is largely state-centric, structured around enforcing obligations on a government to its citizens or subjects.¹³⁴ Its goal is to strengthen the democracy of this state structure. This leads to several problems. Firstly, that inhibits international enforcement, which can boil down to pressure and public shaming from other states. Secondly, it assumes a certain level of equality and accountability between the government and the citizen. In the case of the Israeli occupation, the situation is unique in that its prolonged nature means Israel's duties as a "sovereign" are unclear.¹³⁵

Most significantly, IHRL's focus on equality does not take into account the political and legal situation of the occupation, whereby one party has no equal legal personality under the law and is politically less powerful in its ability to exert its water rights.¹³⁶ This power asymmetry means that legal battles along IHRL lines can be won more easily by the hegemon, in this case, Israel.¹³⁷ This lack of accountability is exacerbated by the fact that there is no universal enforcement mechanism for IHRL. Palestinians do not have an international court such as the European Court of Human Rights to sue for their water rights, and enforcement rests on international pressure and the advocacy actions of NGOs.¹³⁸

¹³² CAHILL-RIPLEY, *supra* note 90, at 17.

¹³³ *Id.* at 25.

¹³⁴ Tamarin, *supra* note 88, at 138.

¹³⁵ *Id.* at 145.

¹³⁶ *See id.* at 146–47.

¹³⁷ *Id.* at 136.

¹³⁸ *See, e.g.,* Amnesty Int'l, *Amnesty International Report 2020/21: The State of the World's Human Rights*, at 200–04 (2021); *see* Hum. Rts. Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution* (2021).

III. POSSIBILITIES FOR ANNEXATION

Taking the above into account, it is apparent that annexation would likely further exacerbate water conflict and limit Palestinian water access. By curtailing the Palestinians' ability to function as even a quasi-state, annexation would inhibit Palestinian water management in practice, as well as Palestine's claims to water access under international law that rely on statehood. A permanent move towards annexation would eradicate these completely. This, in turn, would likely drive further conflict, both over the water resources themselves and with the Israelis generally, as water scarcity has such a dramatic impact on Palestinian quality of life.

A. WATER SOVEREIGNTY

Annexation, as based on current Israeli political plans, past governmental statements, and the Trump plan, involves the isolation of large swathes of the West Bank, most significantly almost the entire Jordan Valley.¹³⁹ The West Bank would be cut off on its eastern side from the Jordan River in the north to the Dead Sea in the south, leaving only the "island" of Jericho to the Palestinian Authority (PA).¹⁴⁰

The implications of this would be multi-faceted. Palestine would be divided in such a way that it is cut off from multiple water resources. Much of Palestinian water comes from drilling in the Eastern Aquifer Basin, which runs along the southeastern border of the West Bank.¹⁴¹ Annexation of this area would therefore cut Palestinians off from an essential source of water, likely causing increased water shortages or forcing them to purchase even greater amounts of highly priced water from Mekorot. Additionally, annexation would cut Palestinians off from the Jordan River. Although Palestinians do not currently have access to the river as a national water source, this would further cement the impossibility of accessing it in the future.

Annexation would also likely negatively affect Palestinian infrastructure, as it would amplify existing factors that limit the

¹³⁹ Tirza, *supra* note 20; CONG. RSCH. SERV., R46433, ISRAEL'S POSSIBLE ANNEXATION OF WEST BANK AREAS: FREQUENTLY ASKED QUESTIONS 1 (2020); Oliver Holmes, *What Would Israel Annexing the West Bank Mean?*, THE GUARDIAN (June 9, 2020), <https://www.theguardian.com/world/2020/jun/09/what-would-israel-annexing-the-west-bank-mean> [https://perma.cc/URQ5-FNCL].

¹⁴⁰ See Tirza, *supra* note 20.

¹⁴¹ Klawitter, *supra* note 6, at 309.

Palestinians' ability to distribute water. As discussed above, Palestinians already struggle with ensuring their citizens have access to water due to a lack of territorial contiguity, which limits their ability to build and maintain both wells and water distribution pipes.¹⁴² Annexation would likely further hinder Palestinians' ability to repair damaged pipes if they run through the divided territory, as well as deepening delays from Israeli bureaucracy.

Additionally, Palestine would move even further away from having the full functions of a state. With the bifurcation of its territory, the PA would be unable to assert itself as a sovereign with regards to exercising control over its property, which is crucial for the practice of water management. Evidently, Palestine would also face difficulty asserting itself as a nation-state on the international stage, faced with a move that cuts away further at its territory and its independence.

Occupation already impacts Palestinian water governance, which hinders Palestinian water access, as has been discussed above. Annexation would remove the ability of Palestinians to govern in any sense because of their lack of sovereignty and a territorial whole, and it would provide a governance "gap," which would negatively impact Palestinian water access.

Annexation may also extend in some form to cover the whole of the West Bank. While there are no public plans to formally annex the entire territory, the deepening of the occupation is moving in that direction.¹⁴³ This has increasingly led scholars in the last decade to consider the situation as *de facto* annexation or to embrace the reality of a one-state solution already.¹⁴⁴

IV. LEGAL (AND OTHER) RECOURSES

The legal implications of annexation would likely deepen existing problems, namely the lack of a long-term solution for two sovereign states with equal footing and the infringements of Palestinian water rights as a human rights issue.

By further deepening the occupation through annexation, Palestine would remain in the status of a quasi-state without sovereign rights and claims under international law. Movement away from a two-

¹⁴² See *supra* Part I.

¹⁴³ See generally LUSTICK, *supra* note 17, at 9.

¹⁴⁴ See *id.*

state solution would undermine claims of scholars to adhere to international water law based on future assumptions of a Palestinian state. Israel would remain subject to obligations under IHRL; however, it is likely they would continue to deny the applicability of this framework based on past precedent.

Such a situation would also erode attempts towards long-term water management between the two parties. The existing agreements rest on an assumption of equal power between the Israeli and Palestinian administrations, enabling Palestinians to effectively manage water in their own territory. However, this equality does not exist in reality due to the dynamics of occupation. Annexation would only deepen the power imbalance between the two parties and hinder attempts at a fair and equitable agreement. It would also significantly damage the Palestinians' governance capabilities, particularly with regards to developing and maintaining infrastructure. Annexation would see a decrease in water access for the Palestinians unless the terms of the current interim agreement were substantially changed to account for the new context.

Left with this situation, the Palestinians' most viable way of asserting claims to equitable water access is through the human right to water. Articulating Palestinian water rights through the framework of international human rights law circumvents the uncertainty that ongoing occupation and deference to international peace agreements brings about. It roots Palestinian claims in a theoretical framework—that of inalienable human rights—which does not change with the whims of the international community around it. Even if denied a state or territorial sovereignty in the land they are inhabiting, Palestinians can assert their right to water through demands for equitable access and infrastructure development.

Nonetheless, a suggestion of this recourse cannot discount the earlier discussion about the inherent limitations of IHRL given its state-centric nature, nor can it ignore the reality that law is subordinate to politics. Palestinians have long raised human rights abuses by the Israelis in the international arena and used human rights discourse to articulate rights to self-determination and freedom from occupation, only to be shut down by global power players.¹⁴⁵

Additionally, Palestinians face problems with the articulation of their rights in this manner due to the fact that, as discussed earlier, the right

¹⁴⁵ See generally *The Question of Palestine: Vetoed Draft Resolutions*, U.N., <https://www.un.org/unispal/document-category/vetoed-draft-resolution/> [<https://perma.cc/BBA3-RQGS>] (archiving numerous draft resolutions rejected by the UN).

to water is not entirely clear nor agreed upon in international human rights law. Considering the obstacles that Palestinians face to articulating violations of rights that are universally or near-universally agreed upon, this would likely significantly undermine their arguments.

However, the subordination of law to politics could potentially be used to bolster Palestinian water rights claims by centering it in wider human rights discourse about water rights and environmental justice. The past few years have seen a bolder articulation of water as a human right by civil society activists, for example, the NoDAPL movement.¹⁴⁶ Furthermore, there is a growing trend in using litigation to assert human rights as a means of tackling environmental injustice. For example, plaintiffs in the *Juliana v. United States* case made the groundbreaking claim that the US government had violated the children's right to life, liberty, and the pursuit of happiness through affirmative actions causing climate change.¹⁴⁷ The slow but determined tidal change towards the articulation of environmental rights cannot be underestimated when it comes to the law, conflict, and environmental resources.

As a final note, if annexation in some form went ahead, and Israel became the full and official sovereign over at least part of Palestine, this could ironically open up new legal recourses for the Palestinians to assert water rights claims. With the extension of Israeli jurisdiction, Palestinians could have access to legal recourse in Israel's Supreme Court,¹⁴⁸ where they could demand equitable water rights under Israeli domestic law.

This possibility rests on a number of assumptions. Firstly, annexation would involve Israel extending its jurisdiction and the application of Israeli domestic law over parts of Palestine. Secondly, Palestinians would be treated as full and comparable citizens of Israel. Finally, Palestinians would be given access to Israeli courts. Even accounting for all of these assumptions, it is evident that Palestinians would face significant obstacles in the assertion of their rights when scholarship considers the Israeli Supreme Court's history with regard to both human rights claims from Palestinians in the Occupied Territory and

¹⁴⁶ The NoDAPL movement was a grassroots, indigenous-led resistance movement to the planned oil pipeline in North and South Dakota. *Standing Rock Sioux Tribe's Statement: Background on the Dakota Access Pipeline*, #NODAPL ARCHIVE – STANDING ROCK WATER PROTECTORS (Apr. 15, 2016), <https://www.nodaplarchive.com/standing-rock-background.html> [https://perma.cc/R658-5FXH].

¹⁴⁷ *Juliana v. United States*, 947 F.3d 1159, 1164 (9th Cir. 2020).

¹⁴⁸ See generally MICHAEL SFARD, *THE WALL AND THE GATE: ISRAEL, PALESTINE, AND THE LEGAL BATTLE FOR HUMAN RIGHTS* (Maya Johnston trans., 2018) (discussing eight major legal battles involving Palestinian human rights issues in Occupied Territories).

Palestinian citizens of Israel.¹⁴⁹ Such a discussion is beyond the scope of this Article, but it is an important issue to raise when considering the possible future of water law in disputed territory.

V. CONCLUSION

Analyzing the water conflict in Israel and Palestine raises two key thematic points. Firstly, the failure of the Oslo Accords has led to a situation of temporary-permanent occupation, whereby resolving key legal and governance questions is postponed to an undetermined date. As such, various fundamental Palestinian rights hang in the balance, violated or unfulfilled as a result of the occupation. Palestinians continually struggle in asserting water rights, as they operate within a framework still contingent on a final status agreement. Secondly, the right to water, while generally recognized in an abstract manner by the international community, needs significant further development and articulation in order to be used as a mechanism of accountability.

Scholarship in this area can be most useful if it tackles these two realities and seeks to come up with creative strategies anchored in facts on the ground that can resolve water conflict in Israel and Palestine or articulate demands for the fulfillment of water rights in a situation of ongoing uncertainty.

¹⁴⁹ *Id.* at 46.