
Approaches to the Legal Aspects of the Conflict on Water Rights in Palestine/Israel

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Abstract

Law can play a positive role in the resolution of water disputes between the Israelis and Palestinians. While International Law relating to water resources is not fully developed, it does indicate a proper procedure for resolving these issues and it does have a number of specific provisions which relate to the water situation which ought to be respected as a first step towards the complex process of resolution contemplated in the developing law on the subject.

1. Introduction

The conflict between Palestinians and Israelis, and to a lesser degree the conflict between Israel and the Arab Countries, has centered around the issue of land and water. As the parties move towards substantive discussions of a possible resolution of the conflict, it is important to understand the specific details of the problem involved and to obtain a proper handle on methods of its resolution. The academic and scientific community has a primary obligation in this regard since the alternative

leaves the situation in the hands of others who are guided either by the logic of power or the passions of political partisanship.

For the purpose of legal analysis, three major clusters of issues regarding water resources in the Occupied Palestinian Territories can be delineated:

1. The first relates to water resources that originate and are discharged completely in the Palestinian Occupied Territories. The most obvious example of this sort is the Eastern aquifer resulting from rains falling East of the hydrological line that crosses the West Bank towards the Ghor Valley.
2. The second relates to the riparian waters which feed into the Jordan river. These resources are shared by the Occupied Territories as a unit together with Jordan, the State of Israel and Syria. Despite the absence of clear precision, there are sufficient guidelines in international law as it pertains to surface riparian rights that can and should fully govern the allocation and distribution of the waters of the Jordan river among Israel, the Palestinians and other parties as will be shown below.
3. The third problem pertains to water resources resulting from rainfall in other areas which falls West and North West of the hydrological line and which feed two main aquifers that are shared with the State of Israel. The vast majority (about 80%) of the waters in these aquifers originate in the West Bank catchment area [\(1\)](#), and the aquifer itself flows and actually straddles the border between the two areas with the majority of it found in the West Bank and Occupied Territories.

The International Law pertaining to underground aquifers is less clear and specific as to the required allocation of water resources between two areas which share the same underground aquifer, and the simple analogy from surface waters of rivers flowing into a lake is scientifically unsound since ground waters are far more complex.

Another problem under this classification relates to the harmful effect of Israeli drilling just off the borders of the Gaza Strip in raising the water table to harmful levels.

A further complication to a strictly legal analysis arises from the existence of exclusive Jewish settlements in the Occupied Territories. These are individuals and communities that have been illegally implanted into the Occupied Territories contrary to the provisions of international law. While relatively small in numbers, these exclusive enclaves in fact utilize the water resources of the Occupied Territories massively for their own use. Judging by Israeli figures alone, the settlers in the Occupied West Bank and Gaza use approximately 90 million cubic meters per year out of exclusively Palestinian water resources as compared to about 200 million cubic meters allocated for the indigenous Palestinian population [\(2\)](#). While maintaining the necessary scientific skepticism about these figures, it must be acknowledged that the settlers thus constitute a major and not insignificant consumer of water in the Occupied Palestinian Territory which must be reckoned with.

A further complication arises from the absence of a clear legal entity entitled to represent the Palestinian people in International Law. The Palestinian Occupied Territories are not yet a state, and Palestinian water rights at present are dealt with

more under the principles relating to belligerent occupation than the principles governing the allocation of water resources among contiguous riparian states. This distinction, while most relevant for the present and past practices, is only a formal problem for any forward - looking analysis that wishes to consider future utilization and water allocations between Israelis and Palestinians.

2. The Question of Data

The first task of neutral and objective academicians in this sphere is to delineate the parameters of the problem as objectively as possible and to obtain the factual data on the water situation in all its aspects. This does not only mean outlining the climatic and topographic nature of the area but also the water resources available, their location, movement, quality and origin. Detailed facts must be obtained as to the location of the aquifers, the geological nature of the ground in which they are located, the direction of their movement, the degree of salinity and the purity of the water. There also must be data which permit a reasonable assessment of the actual consumption, as well as potential requirements, needs and priorities of the different peoples in the area. One of the first requirements of the Helsinki Rules, described below, is the free sharing of such information [\(3\)](#).

In the case of the conflict at hand, there is a major problem that has not been dealt with sufficiently. Detailed information does exist both in Israel and the Palestinian Occupied Territory because the Israeli authorities have investigated the problem thoroughly, have undertaken exhaustive and continuous research and have accomplished centralized control over all the water resources which are heavily regulated. They occasionally dig exploration wells at great costs to determine the quality and quantity of subterranean water resources at different locations and have a myriad of legal and administrative units monitoring and regulating water use. This thorough regime of regulation and control was also implemented in the Palestinian Occupied Territory where the Israelis have placed meters on existing wells to determine and control with great precision and specificity the exact amount of use [\(4\)](#). This regime resulted in a very high level of centralization and control as well as sufficient data to permit short and long term planning on a grand scale.

Yet this regulation has also been combined with an obsessive level of secrecy. Information pertaining to water is considered in Israel as sensitive as the movement of troops and as such must pass the rigorous censorship before figures are released [\(5\)](#). Even the relatively robust Hebrew press has strict standing orders to submit any water - related articles to the censor before publication. Israeli academics acknowledge that certain information is not available to them either [\(6\)](#). In point of fact, throughout my research in this area. Almost no data is available pertaining to Israel and the West Bank that was not specifically released by Israeli official sources. A close analysis of the figures reflects some glaring inconsistencies, and the figures only represent summary conclusions and do not provide a verifiable break down. There is no access allowed to primary data and all academicians must rely on the official highly censored version of the facts [\(7\)](#).

No international or even independent academic Israeli verification exists. Yet despite this, the scientific community has shown a pointed absence of scientific curiosity and

skepticism and has tended to accept the official Israeli figures at face value. In this , I believe the academic community is remiss.

This is all the more disturbing, since tools exist, such as satellite surveillance to obtain more reliable data, or at least broad verification of facts. In the absence of sharing full information, the entire discussion becomes either meaningless, or directed by partisan Israeli interests and perspectives. Having outlined the types of problems that may arise in the three major areas of water use and conflict between Palestinians and Israelis, it would be helpful to discuss the different approaches to dealing with these problems from a strictly legal point of view.

3. First approach; Pure power and lawlessness

This approach is facilitated by the ongoing hostilities and the absence of peaceful negotiations and agreements. It is also further enhanced by the absence of international mechanisms for the enforcement of international law and its obligations and a proper forum in which such issues can be litigated. To a lesser degree, this approach is also aided by the lack of precision and clarity as to some of the provisions of international law as they pertain to shared water resources and allocation, particularly of subterranean waters. Even where there is a clear principle relating to riparian rights, few scholars and even fewer precedents exist to accept such a principle as binding where subterranean waters are concerned. Even where there is a clear principle relating to surface water rights, few scholars, and fewer precedents exist to accept the application of such a principle where subterranean waters are concerned.

Under this approach, each party or country grabs whatever water resources are within its military reach and exercises its military and political leverage to impose its interests and to deny others, particularly its enemies, of what would be their rightful share of the water resources. This approach includes not only utilizing exclusively available water resources without care for the consequence to other individuals or groups or the quality or quantity of water that is left to them after exhausting one's own needs; but it also includes forcibly capturing, diverting and controlling water resources that falls within the territory of others. It also includes the use of military power to destroy wells and water works prepared by others and using force or threat of force to prevent others from digging wells or utilizing their own resources, or imposing their own restriction on their use of water.

While many nations and peoples can be accused of acting according to this approach, Israel as the dominant military power in the area has been the most flagrant practitioner of this approach and has used it with respect to the Palestinian and other Arab territory and population under its control as well as with Jordan, Syria and Lebanon. In the 60's, Israeli Prime Minister Levi Eshkol publicly announced that any attempt by the Syrians to utilize their water resources in a way that would reduce the flow into Israel, would constitute a *causus beli*. On other occasions, Israel used its military power to physically destroy Jordanian and Lebanese waterworks in the Yarmouk and Jordan rivers. Even before 1967, Israeli soldiers conducting cross-border raids into then Jordanian-held territory in the West Bank always took care to destroy water wells, thereby insuring continued flow of water Westward towards their own territory. The claim that this, or even that 1948 border gives Israelis, through prior use, a valid claim over Palestinian rights in the water of the aquifer that were

utilized before 1967 begs the question. Palestinians have always asserted their historical rights to all of Palestine and their rejection of the Zionist Conquest of their homeland. Acceptance of Resolutions 242 and 338 does not include a renunciation of their legitimate rights in Palestine water resources in what is now Israel. Such rights, together with other thorny issues need to be negotiated and settled within the framework of political agreements - not by sheer force and imposition de facto of one side's will upon the other.

In a primitive and small attempt of the same kind, the Palestinian Resistance Movement (Fateh) initiated its own military operations against Israel by attacking and attempting to blow up one of the Israeli water works on January 1, 1965. Perhaps this was symbolic of the use of the first approach to the water question as merely any object for the exercise of power and influence unrelated to international law and principles.

Unfortunately, this approach has never lacked for professional academicians who provide some scholarly justifications to what is otherwise a lawless approach of selfish interests. Some of the advocates of the "Prior use" theory often turn out to be mere post facto apologists for the users of the brute power approach by attempting to give legitimacy and justification to clearly illegal practices as if such a theory could grant retroactive legitimacy to what is otherwise clearly illegitimate acquisition of water use through force.

4. Second approach; Strict compliance with international law

While international law has its lacunae, particularly where it pertains to shared subterranean aquifers, there are none the less sufficient explicit provisions of international law that impact the current situation and which are worthy of support for their implementation. While academicians usually are powerless to impose or enforce provisions of international law, they have the obligation to place their moral weight and authority in favor of accepting and implementing already existing provisions in relevant international law, as well as developing it in helpful directions.

Those who insist on developing and extrapolating a new principle of law will do well to first insist on strict compliance with already existing accepted principles of law.

As it pertains to the water disputes between Israelis and Palestinians, there are several broad concepts of international law that are applicable both to the existing situation and past practices of the parties; and as guidelines for future allocations of water resources. The first and most obvious principles are the provisions of international law pertaining to Israel's conduct in the Occupied Territories. These include Articles 52, 53 and 55 of the Hague Regulations of 1907; the Fourth Geneva Convention of 1949, and particularly Article 54 of Protocol 1 of that Convention, and numerous resolutions of the General Assembly and the Security Council of the United Nations which specifically address Israel's conduct in the Occupied Territories.

It is the universal opinion of the international community, which is also supported by the highest Israeli legal body, the Supreme Court, that the status of Israel in the

Occupied Territories is that of a "belligerent occupier" ([8](#)). The Laws of belligerent occupation are found in their most comprehensive form both in the Hague conventions and more specifically in the Geneva conventions and their protocols. The State of Israel accepts the application of the Hague convention as part of customary international law but has employed a variety of legal arguments to avoid the application of the more detailed Geneva conventions which Israel has signed.

No international legal authority outside Israel accepts any of the Israeli attempts to avoid the applications of the Geneva conventions and Israel itself claims that it is in fact applying de facto these conventions. It avoids the de jure application through the following devices:

a. The Israeli high court has claimed that these conventions are not customary, but treaty law which have not been specifically incorporated into the Israeli legal system by Knesset ratification. Therefore as a domestic court, it is not empowered to enforce them even though Israel may have been signatory and therefore obligated under international law to obey them.

b. The argument is made that the Geneva conventions are only applicable to territories that have been captured from another recognized sovereign. Here Israelis argue that only two countries, England and Pakistan have ever recognized Jordanian sovereignty over the West Bank, and therefore, given the doubt over Jordanian sovereignty in the West Bank and Gaza, Israel is not obliged to respect the applicability of the Geneva Conventions.

No international authority accepts this argument because even assuming that there is any question about Jordanian sovereignty in the West Bank, the issue is irrelevant since the protection of the Geneva Conventions is extended to every population that falls under the control of a government other than their own during time of belligerency (Article 3) and it is irrelevant who the previous sovereign or controller was. The argument is also disingenuous since Israel never bothered to respect the Geneva Convention in the Golan Heights, whose previous Syrian sovereignty was never disputed.

c. Some Israeli politicians have argued that land captured in a defensive war is exempted from the application of the Geneva Conventions, which only apply to territory captured by offensive operations. Apart from the absence of universal agreement as to whether the '67 war was defensive or offensive, the issue is again totally irrelevant since the Geneva Conventions make no such distinction but only apply the regime of belligerent occupancy to a situation that follows on the heels of hostilities.

At any rate, as it pertains to water resources the conceptual and philosophical basis of belligerent occupation, whether under the Hague or the Geneva conventions is the same: The occupying power acts as a usufruct or trustee over the occupied territories until such a time a peace treaty resolves the issues in dispute and the territory is returned to its proper sovereign. Both the Hague and Geneva conventions attempt a delicate balance between the military needs of the occupying army and the rights of the occupied civilian population, prohibiting the alteration of the status quo except within limited boundaries.

The occupying forces are restricted in their exercise of authority to issues required by their security and the maintenance of public order. They are prevented from altering the existing legal and administrative structure in the occupied territories and their use of the resources is equally restricted.

One element that determines the degree of restriction on the use of resources is largely governed by whether these resources are movable and immovable resources. Movable resources, particularly those with military application such as means of transportation can be confiscated and used by the occupying powers under certain conditions, provided the use is for the military forces themselves, and that proper compensation is paid. Use of immovable resources is even further restricted. The issue of whether subterranean water sources are movable or unmovable property therefore becomes significant.

The precedents and international opinion has held on more than one occasion that subterranean oil resources are to be included as immovable resources and not movable ones. Several international cases related to oil resources in the Philippines and more recently in the Sinai Peninsula pointed in this direction and held that it is not permitted for an belligerent occupation to utilize previously untapped subterranean oil fields, and that to the extent that it is necessary to utilize one of these resources for the military use of the occupation forces, it needs to be compensated, and it cannot be depleted [\(9\)](#).

The principle of usufruct is well known principle by which the occupation trustees can utilize the replenishable fruits of existing resources (trees, timber, etc.) without exhausting the principal source or depleting it to the point where it will become unusable upon the return of the territory to its former or proper status.

Israeli water policy in the Palestinian Occupied Territory has been clearly violative of these principles. Israel altered the existing water laws by passing military orders 89 and 157 giving it complete and full control over these resources including the metering of existing wells and the prevention of granting necessary permits for Arab water works including the improvement of existing wells or the digging of new ones. More dangerously, Israel used this regulatory power to confiscate, divert and utilize the existing water resources not of the benefit of the existing population, or for its military use, but to pump the water to Israel itself and to provide for its civilian settlers. No compensation was paid or offered for the acquisition of these water rights.

A second major violation was the introduction into the Occupied Territories of Israel's own population in the form of exclusive Jewish settlements. Here international public legal opinion is unanimous. With no exception, not even the United States, the world community has condemned the building of civilian Jewish settlements as illegal and contrary to international law. The Geneva conventions clearly prohibit such activities as well as resolutions of the United Nations Security Council and General Assembly. Therefore, the use of any of the water resources of the Occupied Territories by the Israeli settlers is patently illegal and void and it is very clear that such illegal use cannot give rights to future water rights under any conceivable settlement.

A third violation is the expropriation of a portion of the water rights attributable to Palestinian "absentees" and the transference of those water rights and allocations to Jewish settlers or to Israel itself.

In all the above cases, Israel has been acting in its own interests as a full though undeclared sovereign in the Occupied Territories, rather than as a trustee and usufruct acting for the public order or the interest of the local population, or for the needs of its military forces.

Looking forward to the future and away from these previous and existing violations, one can look to international law for some guidance for the proper allocation of shared water rights between a new Palestinian entity and the State of Israel. Here the controversial legal issue only relates to the shared water resources on the western part of the West Bank. Under existing international principles, the water which falls on the West Bank and is discharged there is fully the sovereign property and entitlement of that territory. International law is not sufficiently clear, however, on the allocations of water resources which fall or begin in one territory but eventually make their way through subterranean channels into a shared aquifer. Movement seems to be away from a strict sovereignty approach, but even a limited sovereignty approach would still guarantee Palestinians in a West Bank State or entity entitlement to substantial portions of the water resources originating in their territory, and which can be utilized by them, were it not for the enforced restrictions. The forcible exploitation of these resources by the Israeli authorities, does not create for them rights therein, nor does the enforced low utilization of these resources by the Palestinians negate their legal rights to their fair share of such resources.

5. The Third Approach: Equitable distribution

A third and most constructive approach to this conflict is built on seeking agreements based, not on brute force, nor on sovereign rights held in an adversarial zero-sum context, but in a reasonable attempt to arrive at a fair and equitable solution. Such an approach is increasingly gaining acceptance, and is reflected in the practice of states in a number of disputes. It is becoming codified as a result of the painstaking efforts of the International Law Association, under the name of the Helsinki Principles. These principles have not yet been fully adopted into binding legal obligations and norms, although they are most useful as tools for furthering the prospects of negotiated agreements between contenders for shared resources without the danger of being down in legalistic disputes over contentious texts and controversial political stands. This approach, by contrast is more pragmatic and result - oriented.

Closely related to this approach are the proposals to resolve the conflict by "enlarging the pie" ' that is by importing or creating new water resources from outside the Area, rather than facing the difficult task of making choices, and determinations between differing claims.

The principles outlining this approach are found in the Salzburg resolutions of 1961, entitled The Utilization of Non- Maritime International Waters, adopted by the Institute of International Law, and The Helsinki Rules of 1966 on the Uses of the Waters of International Rivers, developed by the International Law Association.

Article #3 of the Salzburg Resolution states that disagreements will be resolved 'on the basis of equity, taking particular account of the respective needs, as well as other pertinent circumstances". Article 4 requires that no state utilize its water sources in a way which "seriously affect" the possibility of utilizing the same sources by other states".

Article 4 of Helsinki states that " each state is entitled within its territory, to reasonable and equitable share in the beneficial uses of the waters of an international drainage basin". This right comes with the proviso that it does not cause "significant" or "substantial" harm to others, either in terms of the quantity or quality of water left over for the use of other, usually downstream users.

One problem with this approach is that it leaves vast room for interpretation, and opposing claims as to what are "equitable", "reasonable share", "needs" of each party, the potential needs? What constitutes "significant or substantial" harm? What level of development is permitted given a limited resource? Who will be permitted access to easily available sweet water, and who must contend with the expense and uncertainty of importing water from afar or of desalinating brackish or sea water or altering agricultural practices to utilize reclaimed sewage?

In the context of the Israeli Palestinian conflict over water rights, the appeal to equity, and proportionality must avoid the following pitfalls:

1. That this approach be used to negate water rights clearly established under existing legal standards such as the rightful share of surface waters and other riparian rights.
2. Giving weight to the "rights" or entitlements of Jewish settlers in the occupied territories, whose very presence is illegal.
3. Accepting a false symmetry in assessing potential needs, and population growth between returnees, and refugees returning to their families and homes after a forced exile, and between Zionists making "alila" for ideological or other reasons.
4. Taking as a yardstick the present level of water consumption by Palestinians, when such figures have been artificially frozen at 1967 levels, by force and coercion, and even reduced by drilling deeper Israeli wells next to Arab springs.
5. Taking as a yardstick the present level of water utilization by Israelis, to the extent that that level of use resulted from mining Palestinian sources, and illegally overpumping shared aquifers while prohibiting Palestinians from normal utilization.
6. Neglecting to provide Palestinians compensation for the decades of illegal exploitation of their resources, which is also a form of "affirmative action" to enable them to compensate for past deprivations.
7. Granting legitimacy to previous violations by accepting a "prior use" approach.

It must be noted here that if Equity and Equitable principles are followed, no weight or recognition can be given to advantage obtained by illegitimate means . Equity requires clean hands, and water usage arrived at by coercion and force of arms does not give rise to any "equitable " claims.

6. Conclusion

There are sufficient principles for resolving water issues between Israelis and Palestinians; but they must be applied in a legal and equitable fashion. Otherwise, they will degenerate into a scholarly and judicial cloak for naked aggression and justification for the lawless domination of the strong over the weak. The inevitable outcome of such neglect of Palestinian rights would be undermining the possibility of wider regional cooperation on water, and ultimately the absence of security and stability.

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