

Amanda Jane Cahill. LL.M. BA (Hons)

**The Human Right to Water
and its
Application in the Occupied Palestinian Territories**

Submitted for the degree of Ph.D
June 2007

Lancaster University

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Abstract

A human right to water has been determined at the international level. However, the legal status of this right and its normative content are unclear. This thesis discusses the development of the concept of a legal human right to water and examines its present codification under international human rights law, in particular under the UN Committee on Economic, Social and Cultural Rights General Comment 15. Subsequently the scope and core content of the right are analysed, highlighting the limitations in provision and identifying other problematic elements. Furthermore, the correlative obligations concerning the right to water are discussed within the wider context of legal obligations and economic, social and cultural rights and strengths and weaknesses considered.

The second part of the thesis applies the legal basis for a human right to water to a particular context to better understand the implications of the ambiguous legal status of the right. The case study used is the Palestinians' right to water in the Occupied Palestinian Territories. Therefore, due to the ongoing occupation, in addition to investigation of applicable human rights law, the relevant international humanitarian law providing for a right to water is also examined. In addition, provisions for a right to water in applicable domestic and bilateral law are evaluated. Subsequently, the enjoyment of the right to water 'on the ground' is investigated through a small-scale qualitative research project based in the southern West Bank. Using a violations approach and focusing on core obligations, interview material was gathered. The findings illustrate that there are violations of the right to water under both human rights law and humanitarian law.

Finally in conclusion the thesis addresses what can be done to improve the enjoyment of the right both specifically in relation to the case study and more broadly. There are several mechanisms by which the right to water could be strengthened in terms of implementation through improving existing codification and through more effective remedies at both international and domestic levels.

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Acknowledgements

Acknowledgements and thanks go to:

The Economic and Social Research Council for my scholarship which gave me the funding to complete this study

My supervisor and inspiration Prof.S.I.Skogly

My researcher, translator and friend Basema Bashir and colleagues at the Palestinian Hydrology Group, without whom the case study would not have been possible

The UN CESCR, in particular Prof. Eibe Riedel

Malcolm Langford and fellow staff at COHRE

Prof. G. Nonneman

The staff and postgraduate students in the Law School, especially Eileen Jones, Angela Turner, Emilie Secker and Dr. Stephen Riley

My parents for putting up with my endless years as a student

This thesis is dedicated to Tim and Fergus, who keep me sane, help me remember the important things in life, always believe in me and my capabilities and who give me unconditional love, support and affection.

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Abbreviations

CRC	Convention on the Rights of the Child
CEDAW	Convention on the Elimination of all types of Discrimination against Women
COHRE	Centre on Housing Rights and Evictions
FAO	Food and Agriculture Organisation
FIAN	Food First Information Network
GA	General Assembly
GC	General Comment
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Commission of the Red Cross
ILC	International Law Commission
PA	Palestinian Authority
PHG	Palestinian Hydrology Group
PWA	Palestinian Water Authority
SC	Security Council
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNRWA	United Nations Relief and Works Agency

WaSH

Water, Sanitation and Hygiene Monitoring Project

WHO

World Health Organisation

Introduction

*'Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity [...] Over one billion persons lack access to a basic water supply, while several billion do not have access to adequate sanitation, which is the primary cause of water contamination and diseases linked to water. The continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty. States parties have to adopt effective measures to realize, without discrimination, the right to water.'*¹

General Introduction

Previously, there has been little attention as to whether there is a specific human right to water,² although there have been several attempts in the last 10-15 years to address this issue.³ For example, during the drafting of the UN Convention on Non-Navigational Watercourses 1997, a discussion on the right to water took place. Unfortunately there was much disagreement and no provision regarding the right could be agreed upon. More recently however, the right to water has received more favourable attention and with water being an ever-scarcer resource this is a timely moment for such a development.

¹ UN Committee on Economic, Social and Cultural Rights, General Comment 15, 20/01/03, (29th session, Nov 2002) The Right to Water (Arts 11 and 12 of the Covenant), E/C.12/2002/11, para.1. Hereinafter referred to as GC 15.

² Alvarez. I. J, 'The Right to Water as a Human Right' in Piccolotti and Taillent (eds) Linking Human Rights and the Environment, University of Arizona Press: USA, 2003, p.2.

³ Noted by Eibe Riedel, Committee Expert and Rapporteur on the Right to Water for the CESCR, Statement on Day of General Discussion, UN CESCR 29th Session, Nov 2002, Geneva.

But, why a *human right* to water? Why is a human rights approach to water necessary? Despite international and environmental law concerning water and development initiatives such as the UN Year of Freshwater 2003, many people still do not have access to clean, safe and sufficient water. The World Health Organisation⁴ estimates that 1.1 billion people do not have access to an improved water supply that is likely able to provide at least 20 litres of safe water per person a day and 2.4 billion people are estimated to be without sanitation.⁵ This statistic alone illustrates the scale of the problem and justifies a new approach to alleviate the suffering of those who have to live without sufficient clean and safe water supply.

Previous approaches have been based upon either non-binding declarations or initiatives that although based upon good intentions, have no legal enforcement or no traditional state-to-state mechanisms under international law. The advantage of utilising the human rights approach is that the vertical relationship of human rights law i.e. between the state and the individual means that the right to water is applicable to everyone within that state. This includes specific attention and protection being given to the most marginalised in society: vulnerable groups such as women, children, refugees and displaced people and other minorities and to those living in poverty. The human right to water transforms water *needs* into water *rights*. Human rights represent legal entitlements with corresponding obligations, which make this approach qualitatively different from a needs or charity-based approach. As Scanlon

⁴ Hereafter referred to as WHO.

⁵ World Health Organisation, The Global Water Supply and Sanitation Assessment 2000, WHO: Geneva: 2000, p.1; World Health Organisation, The Right to Water, WHO: Geneva, January 2003, p.7.

et al note, 'by making water a human right, it could not be taken away from the people.'⁶

1. The Research Question - Aims, Objective and Rationale behind the thesis

In this thesis I address the opportunities that the human rights approach to water raises for the protection and empowerment of individuals and for collective groups, experiencing problems in satisfying their water needs. Although the right to water has been seen as an integral element of other economic and social rights, including the rights to food, health and housing,⁷ the lack of a specific codification of the right to water appears to represent a gap in human rights provisions. This research analyses the current status of the right to water and examines how it can be developed as an independent right. The importance of water as a right in itself and as a precondition for fulfilment of other human rights, such as the right to food, health and the right to life merits further academic study in this field.

Moreover, I examine the reality of the enjoyment of the human right to water on the ground: That is to understand how the legal right is operationalised in a particular situation. Having reviewed the literature and current media, it seems there is significant attention upon water rights in areas of underdevelopment and arid regions such as India and Africa. There is also material on indigenous people's water rights and environmental degradation due to water scarcity.⁸ Furthermore, there is an

⁶ Scanlon. J, Cassar. A and Nemes. N 'Water as a Human Right?' Paper for the 7th International Conference on Environmental Law, 'Water and the Web of Life', Sao Paulo, Brazil, June 2-5 2003, p.18.

⁷ GC 15, para.3. For details see forthcoming discussion on history of the concept of the right to water, p.14.

⁸ It is important to note the difference between 'water rights' and the human right to water. The human right to water is a distinct legal entitlement with correlative obligations under international human rights law. 'Water rights' can be defined as 'secure property rights over [a] natural resource' and is a term used to define entitlements to water on the basis of local custom, traditional practices and at times

emerging field of literature and research discussing privatisation of water and its effects. However, there seems to be little research concerning a human right to water, particularly an individual right to water during times of conflict. Although much is documented concerning water as the source of conflict and approaches in international law and politics to resolving water disputes⁹, none of these discussions encompass the effects of such disputes upon the realisation of the human right to water upon the individual and communities living in the conflict situation. Therefore, I examine the application of the human right to water within conflict and occupation. Consequently, I address the issue of interaction between human rights provisions and humanitarian law within such conflicts.

The key aim behind this research is to investigate and evaluate how a human rights approach could empower the most vulnerable in society, those suffering from discrimination, to realise access to sufficient and clean water. The research question was three-fold: Firstly, to establish whether there is a human right to water and to determine the legal status of such a right. This includes establishing the relative provisions and determining the normative content of the right to water and its correlative obligations under international human rights law.

Secondly, to apply the legal norms of the right to a case study in order to evaluate the legal protection offered. This takes the form of an investigation of water problems faced by the Palestinians living in the Occupied Palestinian Territories¹⁰ of the West

entitlements under local laws. Water rights are often discussed in light of localised conflict over water uses and resulting problems such as pollution. Moreover, they are usually operational at community level, rather than individually. For further reading see Randolph Bruns. B and Meinzen-Dick. R,(eds) Negotiating Water Rights, London: ITDG Publishing, 2000, pp.23-41.

⁹ See Chapter 3, p.154, note 495.

¹⁰ Hereinafter referred to as the OPTs.

Bank, through application of the right to water using a violations approach.¹¹ This will include ascertaining whether there exists a right to water within a situation of occupation and conflict under international humanitarian law, as well as international human rights law.

The reasoning behind the choice of case study is a result of several interests and concerns: The water aspect of the conflict between the Israelis and Palestinians is much publicised and constitutes a major element of the Oslo Peace Accords,¹² being important enough to be designated an issue to be dealt with under the Final Status Negotiations.¹³ Nevertheless, water remains a highly contentious issue between the conflict parties. Furthermore, human rights abuses in the area are also widely reported but the focus is usually on massive scale violations, such as the 2002 Israeli incursions into Palestinian refugee camps. Considering these two elements of the ongoing occupation and conflict and the emerging human right to water, I examine whether the application of a human rights approach to the water issue can provide benefit to those living within the conflict situation in any way. Concurrently, I highlight the water problems faced by those within this conflict, drawing attention to the enjoyment or lack of enjoyment of economic and social rights on an ongoing basis, rather than focusing on periodic large scale violations. In addition, by using the case of the OPTs, I can investigate the right to water under the parallel application of both international human rights law and humanitarian law, thus allowing a consideration of the provisions under both doctrines of law.

¹¹ For further information on the violations approach see pp.12-14 and Chapter 4, Section 4.2, pp.264-266.

¹² See discussion on Article 40 of the Interim Agreement, Chapter 3, Section 3.7, p.191.

¹³ The Final Status Negotiations are provided for under the terms of the Oslo Accords and constitute the mechanism for the negotiations of difficult and significant topics as determined by the two parties. One of the topics for discussion is water. Others include the status and control of Jerusalem and the Jewish settlements in the West Bank. See further details p.191.

In the third and final part of the thesis, to conclude, I evaluate the provisions for the right to water in light of the applied research to establish recommendations on how to strengthen and further the development of the right to water in terms of legal status and enhancement of protection on the ground.

There are several factors and issues that this thesis does not attempt to encompass. Generally, I do not attempt to evaluate monitoring mechanisms for the progressive realisation of the right to water, such as indicators and benchmarks, as these are based upon complex long-term data gathering and are subjective to each specific state context. Furthermore, I do not examine domestic remedies and enforcement mechanisms, with the exception of those regarding the case study, again because these are subjective to each state and too large in scope to consider sufficiently within this research project.

In relation to the case study, I do not discuss the broader political questions concerning resolution of the Israeli-Palestinian conflict. As a highly contentious and complex matter it requires highly detailed research in the area of international relations and political science, which is not the focus of this thesis. Rather I have narrowed the discussion down to those issues relevant to the right to water through a human rights approach. Hence the focus is one of international and other applicable law concerning a human right to water and its application within the occupation.

Furthermore, although I have dealt with the legal situation regarding water throughout the OPTs, I do not discuss legal provisions specific to Gaza¹⁴ but focus on the West Bank. This is because my empirical research study is limited to a focus upon the West Bank and although Gaza and the West Bank share many of the same troubles due to the water crisis, Gaza also has its own unique problems: Firstly, due to its reliance on the Coastal Aquifer, which is in danger of becoming unusable, as its levels of water are dangerously scarce and saturated with salt, as a result of overuse and contamination.¹⁵ This raises the issue of water treatments such as desalination plants. Secondly, the recent withdrawal by Israeli forces from the territory of Gaza has led to an unclear legal situation, the consequences of which are yet to be determined. Therefore, these problems justify an independent research study of their own, which falls outside the scope of the present thesis.

2. Theoretical Perspective and Methodology

From a theoretical perspective the starting point for this research is the concept of universal human rights. The universal nature of human rights is taken as valid and the basis for the international legal framework of the United Nations is the legal enshrinement in international law of these rights under the Universal Declaration of Human Rights 1948¹⁶ and the two Covenants: the International Covenant on Civil and Political Rights 1966¹⁷ and the International Covenant on Economic, Social and

¹⁴ Such as relevant military orders and laws remaining from the Egyptian system.

¹⁵ See Lonergan, S and Brooks, D, 'A Deficit in Gaza' in Watershed: The Role of Fresh Water in the Israeli-Palestinian Conflict, Ottawa: International Development Research Centre (IDRC), 1994, pp.134-137; Palestinian Hydrology Group (Hereinafter referred to as PHG), Water for Life – Israeli Assault on Palestinian Water, Sanitation and Hygiene During the Intifada, WaSH Monitoring Report 2004, PHG: Ramallah, 2004, p.18; Center for Economic and Social Rights and PHG, Thirsting for Justice – Israeli Violations of the Human Right to Water in the Occupied Palestinian Territories, Parallel Report to the UN CESCR, May 2003, pp.35-36; Selby, J, Water, Power and Politics in the Middle East: The Other Israeli-Palestinian Conflict, London: IB Tauris, 2003, p.25.

¹⁶ Hereinafter referred to as UDHR.

¹⁷ Hereinafter referred to as ICCPR.

Cultural Rights 1966.¹⁸ This basis is accepted unequivocally and forms the initial starting point from which legal assessment begins.

In addition, I have chosen a multi-method approach to carry out my research, using both semi-structured interviews in the field and legal methodology. This research framework is an unusual choice but reflects an area of socio-legal studies which is expanding. The Socio-Legal Studies Association¹⁹ state that ‘what binds the socio-legal community is an approach to the study of legal phenomena which is multi or inter-disciplinary in its approach. Our theoretical perspectives and methodologies are informed by research undertaken in many other disciplines. Traditionally socio-legal scholars have bridged the divide between law and sociology, social policy, and economics. But there is increasing interest in law and disciplines within the field of humanities.’²⁰ The reasons why I chose a multi-method approach are several fold: I wanted to combine a legal analysis of the right to water, with a qualitative case study which actually investigated what this legal right meant for people on the ground. I thus can draw conclusions as to how the right to water is enjoyed or violated and how the right can be strengthened in terms of implementation.

The thesis itself is written moving from the macro level: a general legal analysis regarding the right to water, to a micro level; a substantive case study on a particular situation, in my case, the human right to water in the OPTs.²¹ One subsequent

¹⁸ Hereinafter referred to as ICESCR.

¹⁹ Hereinafter referred to as SLSA.

²⁰ SLSA, ‘What is the Socio-Legal Studies Association?’ <http://www.ukc.ac.uk/slsa/index.htm#top>, 20/03/03.

²¹ See Hammersley. M and Atkinson. P, Ethnography, Principles in Practice, London: Tavistock Publications, 1983, p.204, for a discussion of macro and micro research types.

limitation raised against the validity of such a study is that it only focuses on one case and as such that the findings are not representative of the particular issue being analysed. However, I do not make universal claims concerning violations of the right to water. Rather, I consider individuals' water problems faced within a particular social situation, that of the OPTs, by application of a universal framework – that of the human right to water. This provides an opportunity to assess this particular legal framework, to evaluate its provisions and the protections it offers. Subsequently, this evaluation of how the law works on the ground will be useful for highlighting what problems exist more broadly with the framework of the right. Furthermore, this will enable me to make recommendations as to how legal provisions for the right to water can be strengthened for application in other situations, both of a similar context of occupation and conflict and more generally.

The macro analysis involves legal analysis of provisions concerning the right to water under international human rights law instruments and enables me to draw conclusions regarding the legal basis and status of the right to water, as well as determining its normative content.²² In the micro-analysis, by supplementing the empirical study with other examples of the enjoyment or violation of the right to water, based on textual evidence from the field and similar situations, problems with the legal codification and substantive content can be explicated. The combination of this multi-method approach avoids the risks of using a single-method. i.e. reliance on a particular kind of data, leading to a narrow focus and/or limited conclusions. The possible alternatives

²² Documentary research consists of analysis of both legal texts: international and regional treaties, bilateral agreements and constitutional and domestic law; standards set by international bodies e.g. declarations, General Comments and non-legal texts: Books, Journal articles, NGO and IGO reports, Press releases and other media reports including Newspaper reports and Government publications. For further reading on documentary research see Denscombe. M, The Good Research Guide, Buckingham: OUP, 1998, p.158, 159.

were to base my research upon textual analysis alone or statistical analysis, neither of which would provide a viable picture of the status and enjoyment of the human right to water within the OPTs.²³ The particular strength of qualitative research is the ability to focus on actual practice, to see how interactions and social phenomena [including legal provisions] are enacted.²⁴ Consequently, this framework offers the optimum approach for studying the enjoyment of the right to water in this case.

In addition, due to the political nature of the situation, data is open to political manipulation by all parties to the conflict and the advantage of gathering primary data allows me to make claims regarding validity, whilst I acknowledge my influence in creating the research. I would argue then, that a multi-method framework is an effective way to deal with questions of validity. By combining semi-structured interviews from the field, legal analysis of human rights instruments and cross-disciplinary literature review I have a unique and in-depth basis on which to assess the current effectiveness of the legal human right to water in a situation of occupation and make some general observations and recommendations for more effective provision regarding the right to water for the Palestinians and more generally.

In terms of methodology my project follows a well established approach moving from the macro and more general, to the micro and more specific analysis of a case study. It is divided into three sections, which set the current context and outline the current legal and political framework, moving on to discussing problems and practice and concluding with recommendations and future developments. A cross-discipline study

²³ Textual sources serve as an essential basis for beginning research but very little is written on the human right to water particularly on the human right to water in the OPTs.

²⁴ Silverman D, Doing Qualitative Research – A Practical Handbook, London: Sage, 2000, p.283.

that includes research methods based in the social sciences and legal analysis, these methods work well together by moving from legal analysis and textual analysis to the more specific qualitative research. This structure allows for a logical flow of argument and a clear theoretical framework.

The multi-method approach used to carry out the research has been inspired by my background in the social sciences and by methods used effectively in human rights advocacy work.²⁵ A three-pronged approach is taken, beginning with a critical literature review of the key texts pertaining to economic, social and cultural rights and of relevant commentaries, both legal and political, regarding more specific material on the right to water. I analyse a key aspect of human rights theory: the theory of obligations. Moreover, I undertake a more specific analysis of legal sources in relation to the right to water, which involves examining and evaluating the current provisions for the right to water within primary sources of international human rights law, inclusive of both legally binding and non-binding documents, textual analysis of secondary texts relating to the subject and discussions with professionals involved in drafting legal provisions.

Secondly, prior to the design and commencement of the case study, due to the situation of occupation within the OPTs further examination of legal provision for the right to water is required, in this case under international humanitarian law, applicable domestic law and under bilateral treaties. Furthermore, the complex legal situation also needs to be assessed and reviewed by way of analysis of the said provisions and

²⁵ For example see the Center for Economic and Social Rights, 'A New Approach to Monitoring and Advocating for Economic and Social Rights' at About Us, Methodology, Center for Economic and Social Rights: Brooklyn, at <http://www.Center for Economic and Social Rights.org/> accessed 06/11/06, pp.1-3, at p.2.

through review of secondary texts relating to the occupation, the law applicable and the water situation. Once the law applicable in the context is determined, the knowledge and information collected enables the design of an empirical research project, consisting of semi-structured interviews based around a set interview schedule. This is the basis for the gathering of individual testimonies to assess the enjoyment of the right to water on the ground in a particular case – that of Palestinians living in the southern West Bank.²⁶

In terms of analysis of data, the evidence collected is assessed and evaluated using the violations approach, thus enabling an evaluation of current human rights protection of the right to water, as applicable in these cases. Progressive realisation is difficult to monitor and requires complex data gathering from both the current period and tracing trends over time. It also requires context specific data relating to a state's level of development and available resources. Thus it is difficult to evaluate state compliance with their obligations through measurement against these criteria,²⁷ especially over a limited period of research. Therefore, an effective alternative approach for this study has been chosen: the violations model of assessment coupled with an evaluation of compliance with core obligations is appropriate.²⁸

²⁶ It should be noted that although this empirical study is based on data from domestic and personal use in the home, shortage of water is not just prevalent in Palestinian homes but also in public amenities such as hospitals and schools. Although this research does not cover these public places, evidence has been collected from other studies that illustrates that not even public institutions are supplied with adequate water. For example, there is a school in Hebron where all cleaning has stopped due to the water shortages. Furthermore, no water supply is available for consumption on the premises so children have to bring bottled water from home, if possible. See Oxfam International Briefing Paper 28, Forgotten Villages – Struggling to survive under closure in the West Bank, Oxfam International, September 2002, p.27.

²⁷ See Chapman, A and Russell, S, Violations of the Right to Education - Background Paper submitted by the American Association for the Advancement of Science on the UN CESCR Day of General Discussion: Right to Education, 30th Nov 1998, E/C.12/1998/19, para.6-11.

²⁸ That is not to say that the progressive realisation approach is not valid but is a complementary approach more suited to long-term research.

Furthermore, it can be argued that, ‘The identification of violations in order to end and rectify abuses constitutes a higher priority than does promoting progressive realisation. The monitoring of human rights is not an academic exercise: it is intended to be a means of reducing the human suffering that result from serious violations of international standards.’²⁹ As such, using the violations approach to assess the enjoyment of the right to water, offers a means by which to assist the Palestinians in realising their water rights in the immediate period whilst political solutions to the conflict are ongoing or absent.

More widely, the identification of violations as a means to identify and end abuses may offer a more effective way of conceptualising the substantive content of economic and social rights than abstract philosophical and legal models. As Chapman argues, ‘The fundamental purpose for acknowledging basic rights is to prevent or eliminate the degree of vulnerability that leaves people at the mercy of others.’³⁰ ‘One fundamental purpose served by acknowledging basic rights...[is]... that we “take the victims side” and the side of potential victims. The honouring of basic rights is an active alliance with those who would otherwise be helpless against natural and social forces too strong for them.’³¹ Moreover, methods based on qualitative data can give detailed insights to conditions which statistics and quantitative data can only indicate.

²⁹ Chapman. A, ‘A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights’ in Human Rights Quarterly, Vol.18, No.1, Feb 1996, pp.23-66 at p.37.

³⁰ Chapman, 1996, p.37.

³¹ Shue. H, Basic Rights: Subsistence, Affluence, and US Foreign Policy, Princeton University Press: New Jersey, 1980, p.33.

A crucial point concerning the methodology implored in this thesis is that by combining qualitative method with a violations approach to the analysis of the findings, the information gathered can inform the researcher not only of the nature of the violations that have taken place but also give indications as to *why* they have taken place and in what social and political conditions. This can then enable prediction of what further violations may take place and their nature, thus helping to take action to prevent further violations. By identifying conditions which require improvement and change, there is a chance to assist in preventing continued or new violations. This approach to researching human rights is justified in that it may offer a mechanism for prevention and prediction, in addition to identifying violations for reparation and remedy.

3. The History of the Development of the Concept of a Human Right to Water

A right to water has been recognised in a wide range of international documents, including international, regional and bilateral treaties and soft law, binding and non-binding provisions under international law, international environmental law, international humanitarian law, development standards and declarations³² and other reports and announcements, such as political statements, peace agreements and the work of NGOs and international organisations such as the World Bank and UN Agencies, UNICEF, WHO to mention a few. Although the focus for the fundamental basis for a human right to water is under international human rights law, which is discussed in Chapter 1, the context for such a right is traceable through an

³² For example *inter alia*, Geneva Conventions Common Article 3. Additional Protocol I, Article 54 and Additional Protocol II, Article 14, UN Standard Minimum Rules for the Treatment of Prisoners 1955 Article 20, UN Convention on Non-Navigational Watercourses 1997, UN Millennium Declaration and the Millennium Development Goal Number 7, Sept 2000.

examination of the background and history of the development of the right through the various approaches to water as noted above.³³

(i) Water as a resource amongst States – The International Law Approach

Water has been the subject of conflict and cooperation and legal agreements to govern such situations for hundreds of years. Water has served as boundary markers between communities; as a vital component of military strategy; as an important economic factor for regions; as a means of transport and also as facilitating communication between otherwise independent peoples.³⁴

In terms of international law pertaining to water, there is evidence of a wealth of historical legal agreements concerning water. Early agreements focussed on the use of water for navigational purposes, such as the Act of the Congress of Vienna 1815 ‘which established the principle of priority and freedom of navigation for all states sharing a river, on a reciprocal basis.’³⁵ Another example can be seen in one of the earliest known water treaties, the ‘Treaty of Limits between France and the Netherlands’, 28 March 1820 regarding use of the Rhine.³⁶

³³ The provisions under international human rights law and humanitarian law are not discussed in detail here as they are analysed in Chapters 1 and 3.

³⁴ For an example of the importance of water to ancient civilisations see Hellenic Ministry of Culture, *On Water in Byzantium*, Athens: Hellenic Ministry of Culture, 2000.

³⁵ Centre for Studies and Research in International Law and International Relations, Hague Academy of International Law, *Water Resources and International Law 2001*, Martinus Nijhoff: Hague, 2002, pp. 63-120 at p.76.

³⁶ See the Transboundary Freshwater Dispute Database, Oregon State University at <http://www.transboundarywaters.orst.edu/> for a comprehensive list of bilateral, multilateral treaties concerning water. See also the Food and Agriculture Organisation of the UN (FAO), Legal Office, ‘Waterlex’ Database which contains a ‘full text of treaties and agreements, bi-lateral and multi-lateral, concluded by sovereign countries in regard to the development and management of rivers and lakes, and/or of groundwater resources, which form an international boundary line or which are bisected by such boundary line,’ at <http://faolex.fao.org/waterlex/index.htm>

As industrialisation brought new modes of transport, the primacy of navigational uses of water declined and agreements developed, mostly taking the form of bilateral or trilateral treaties between states governing the sharing of common water resources such as rivers or basins.³⁷ This approach of cooperation and sharing of common water resources used is now encompassed in international law governing the use of water. However, one of the complexities with existing international water law is that it is an intricate system of codification based upon different categories of water resources. e.g. transboundary surface water, groundwater and confined groundwater or aquifers. This has resulted in several international water treaties based on differing types of water and water use.

The evolution of the international system began with the International Law Association³⁸ Helsinki Rules on the Uses of Waters and International Rivers 1966, which were drafted and adopted to assist states in governance of shared transboundary groundwater. In 1986 the ILA attempted to widen the scope of these rules to include confined transboundary groundwater, which had been previously omitted under the original rules. Through the adoption of four articles, known as the Seoul Rules on International Groundwater, they attempted to address this gap in provision.³⁹ However, in parallel to the work of the ILA, a group of specialists in transboundary groundwater proposed the Bellagio Draft Treaty 1989⁴⁰ which constituted a response to the weaknesses of previous rules in dealing with international confined aquifers.

³⁷ Rivers and lakes were also used as boundaries between communities. See Centre for Studies and Research in International Law and International Relations, 2002, pp.77-81.

³⁸ Hereinafter referred to as the ILA.

³⁹ See Centre for Studies and Research in International Law and International Relations, 2002, p.88.

⁴⁰ See Hayton. R and Utton. A, 'Transboundary Groundwaters: The Bellagio Draft Treaty' in Natural Resources Journal, International Transboundary Resources Center, Vol.29, Summer 1989, pp.668-722.

The subsequent International Law Commission⁴¹ 1994 Draft Articles used some of the definitions from this document⁴² and went on to become the basis for the UN Watercourses Convention but significantly, the Convention did not include the proposed articles on transboundary confined aquifers.⁴³ As a response the ILC have recently established a ‘Shared Natural Resources’ programme and have appointed a Special Rapporteur to examine *inter alia* confined transboundary groundwaters, and ‘to provide a better understanding of what constituted confined transboundary groundwaters.’⁴⁴ Whilst noting that the problem of shared natural resources had first been dealt with by the ILC during its codification of the law of the non-navigational uses of international watercourses, the Special Rapporteur considered that a separate study was warranted due to the importance of confined groundwaters in many parts of the world.⁴⁵

Although many of these rules constituted non-binding documents, they were essential to the evolution of the ‘most important development in the history of international water law’:⁴⁶ the legally binding UN Convention on the Law of the Non-Navigational Uses of International Watercourses 1997. Moreover, they can also be seen as initiating another international treaty, based on the application of these rules to date

⁴¹ Hereinafter referred to as ILC. Established in 1948, the International Law Commission's mandate is the progressive development and codification of international law, in accordance with article 13(1)(a) of the Charter of the United Nations. See <http://www.un.org/law/ilc/>

⁴² Such as the definition of watercourses.

⁴³ At the time, the Commission decided to exclude confined groundwaters unrelated to surface waters from the topic. See Diabes-Murad, F, A New Legal Framework for Managing the World's Shared Groundwaters - A Case Study from the Middle East, IWA: London, 2005, pp.75-77.

⁴⁴ See ILC, Fifty-fourth Session (29 April to 7 June and 22 July to 16 August 2002), 2727th meeting, 30 May 2002.

⁴⁵ In 2005, the Special Rapporteur proposed a complete set of 25 draft articles for an instrument on the law of transboundary confined aquifers. See Chusei Yamada, Special Rapporteur, Third report on shared natural resources: transboundary groundwaters, International Law Commission, Fifty-seventh session, Geneva, 2 May-3 June and 4 July-5 August 2005, UN General Assembly, A/CN.4/551. Also see Corr.1 and Add.1.

⁴⁶ Centre for Studies and Research in International Law and International Relations, 2002, p.82.

and the forthcoming findings and research of the Special Rapporteur on shared resources.⁴⁷

In terms of the development of a human right to water, none of these documents address the issue of an individual's right to water. Rather they provide for water at the level of the state. However the 1997 Convention does focus upon certain principles that can be applied in some cases to a human rights perspective, such as the obligation not to cause significant harm⁴⁸ and obligations of equitable and reasonable utilization and participation in Article 5⁴⁹ and the related Article 6 'Factors relevant to equitable and reasonable utilization'. The latter includes taking into account 'The social and economic needs of the watercourse States concerned'⁵⁰ and 'The population dependent on the watercourse in each watercourse State'.⁵¹

Furthermore, Article 10. 2 is significant in that it prioritises water for human needs over other uses: 'In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to Articles 5 to 7, with special regard being given to the requirements of vital human needs.'⁵² This provision can be seen as compatible with the human right to water.

⁴⁷ For a detailed examination of transboundary groundwater law see Daibes-Murad, F, 2005, pp.64-126.

⁴⁸ Article 7, UN Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997.

⁴⁹ Article 5, UN Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997.

⁵⁰ Article 6(b), UN Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997.

⁵¹ Article 6(c), UN Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997.

⁵² Original footnote: The Statement of Understanding issued by States negotiating the Convention stated that 'In determining 'vital human needs', special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation.'

The other substantive treaty governing the use of water is the UN Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992⁵³ and the Protocol on Water and Health 1999.⁵⁴ The Convention in itself does not deal with the right to water as such but principles which are related, such as equitable use of water resources, prohibition of pollution and quality control. However, its Protocol on Water and Health has been seen as enabling the right to water through its application. For example, most recently in January 2007, at the 1st meeting of the State Parties to the Protocol, a roundtable discussion was convened by UNECE, WHO and OHCHR on the right to water and the Protocol with the aim of identifying the commonalities and differences in approaches and how each area of expertise could cooperate to identify a common understanding of what the human right to water means and to make access to clean and sufficient water a reality.⁵⁵

The Protocol itself addresses water for basic human needs rather than as a right but does incorporate special protection for vulnerable groups.⁵⁶ Although it refers to the term ‘drinking water’ it defines drinking water as water for all domestic purposes including food preparation and personal hygiene.⁵⁷ Sanitation is also provided for,

⁵³ UN Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992. Entry into force 6 Oct 1996, Ratified by 35 parties to date including the European Community.

⁵⁴ Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 June 1999, MP.WAT/2000/1, EUR/ICP/EHCO 020205/8Fin.

⁵⁵ Roundtable convened by UNECE, WHO and OHCHR, ‘The Human Right to Water and the Protocol on Water and Health: making access to water a reality’, 18 January 2007 at the 1st Meeting of the Parties to the Protocol on Water and Health, Geneva, 17-19 January 2007.

⁵⁶ See Preamble to the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 June 1999.

⁵⁷ See Article 2 (2), Protocol on Water and Health 1999.

with a comprehensive definition.⁵⁸ Within Article 4, 2(a) the Protocol states that parties shall take all appropriate measures for the purposes of ensuring ‘adequate supplies of wholesome drinking water’. If we take the term drinking water as defined, this provision is consistent with the right to water as defined in GC 15. However, it does not mention access to water and only deals with quality and sufficiency aspects. On the contrary, the Protocol does make provision for adequate sanitation, within Article 4, 2 (b) and this is a beneficial and positive provisions in terms of substantive elements of the right to water.

Further provisions include common principles such as that of sustainable use of water resources⁵⁹ and information access⁶⁰ but these principles are to be viewed as guidance and are not formulated as legal obligations to be fulfilled. The concept of water as constituting a right with entitlements is explicitly noted, but this is limited to within the framework of ‘private law and public law’⁶¹ and not as an independent human right under international human rights law.

Unfortunately, under Article 6, 1 the Protocol talks of pursuance of the aims of ‘Access to drinking water for everyone’⁶² and ‘Provision of sanitation for everyone’.⁶³ The crucial weakness here is that it codifies the right to water as an aim rather than an entitlement with corresponding obligations. This weakens the provision contained within the Protocol and reduces the right to water to an aspiration, rather than an

⁵⁸ See Article 2 (8), Protocol on Water and Health 1999.

⁵⁹ Article 5(d), Protocol on Water and Health 1999.

⁶⁰ Article 5(i), Protocol on Water and Health 1999.

⁶¹ See Article 5(m), Protocol on Water and Health 1999.

⁶² Article 6, 1(a), Protocol on Water and Health 1999.

⁶³ Article 6, 1(b), Protocol on Water and Health 1999.

immediate and core human right to be realised. Furthermore, the final declaration adopted by the Parties to the 1st meeting reiterates this weak language, stating that water is a need and implying it is not a human right: [the Parties] ‘Consider that water is a primary human need and that water and sanitation are basic social services...’⁶⁴ In addition it states that Parties will ‘confirm our commitment [under the Protocol] to achieving the internationally agreed goals [...] including access to safe drinking water.’⁶⁵ In conclusion then, ‘access to safe water’ is relegated to the status of a need and realisation of a goal rather than a right requiring legal obligations.

Overall, the approach taken under international law regarding water has been one of governance of water use between co-riparian states⁶⁶ or multilateral treaties governing water use between common water resources, such as river basins. In addition however, in parallel with these developments under international law, a right to water could be seen as emerging under the doctrine of international humanitarian law and under international human rights law itself. As the UN World Water Assessment Programme World Water Development Report 2, notes, the Geneva Conventions and Additional Protocols (1949-1977) can be seen as the first explicit and implicit provisions for the right in international law.⁶⁷ Although these treaties have not always been recognised as containing ‘rights’ as such (including a right to water) it is now widely accepted that they provide for human rights of individuals as well as defining

⁶⁴ UN Economic Commission for Europe and World Health Organisation, Meeting of the Parties to the Protocol on Water and Health to the Convention on the Protection and use of Transboundary Watercourses and International Lakes, First Meeting, Geneva, 17-19 January 2007, Draft Declaration of the First Meeting of the Parties, ECE/MP.WH/2007/L.6, EUR/06/5069385/18, para.3.

⁶⁵ UN Economic Commission for Europe and World Health Organisation, 17-19 January 2007, para.2.

⁶⁶ Meaning states that own territory either side of the banks of a watercourse, such as a river.

⁶⁷ See UN World Water Assessment Programme, World Water Development Report 2 - Water a shared responsibility, UNESCO/Berghahn: Paris and New York, 2006, p.383, Table 11.3 The Right to Water Timeline.

rules governing state actions in times of conflict.⁶⁸ Furthermore, with the adoption in 1966 of the ICESCR, provision for a human right to water was codified implicitly within Article 11 - an adequate standard of living and Article 12 - the highest attainable standard of health.⁶⁹

These provisions mark the beginning of the evolution of the concept of water as a human right within modern international law and the concurrent development of the concept under these three strands of international law has culminated most recently in the provisions within GC 15 and recent development declarations. These documents are evidence of the convergence of the approach taken under these strands of international law resulting in a comprehensive complementary framework encompassing water as an environmental resource and from both a development and a human rights perspective.

(ii) Environmental and Development Approaches to Water - International Declarations and Resolutions

In addition to the legal framework under international law, another complementary approach to water has been emerging through the area of environmental and development policy. This is not a new development but has expanded as an approach to water in recent years as concern regarding the environment and poverty has become more common in the light of globalisation. Furthermore, the incorporation of a human rights approach to development activity and policy has furthered the

⁶⁸ See further detailed discussion concerning the particular provisions under the Geneva Conventions for a right to water and their implications in Chapter 3.

⁶⁹ As well as being explicitly codified in later international human rights instruments, discussed in Chapter 1.

convergence and complementarity between the ‘legal’ field of international human rights and international development. With the advent of ‘ethical foreign policy’ states have also had to become much more aware of their activities and policies in regard to the basic living conditions of people in other states, thus concern to meet basic human needs is firmly on the international agenda.

Within the provisions themselves there is an emergence of the idea of the sustainable use of water resources in addition to the right to an adequate standard of living as a part of sustainable development. For example, the Stockholm Declaration of the UN Conference on the Human Environment 1972, states that man has the fundamental right to adequate conditions of life⁷⁰ and that man has a responsibility to safeguard the natural resources of the earth (including water) for the benefit of present and future generations.⁷¹ A further example can be seen in the UNDP New Delhi Statement 1990⁷² which notes that, ‘Safe water and proper means of waste disposal are essential for environmental sustainability and better human health, and must be at the centre of integrated water resources management...’⁷³

⁷⁰ Principle 1, Stockholm Declaration, UN Conference on the Human Environment, 1972.

⁷¹ Principle 2, Stockholm Declaration, UN Conference on the Human Environment, 1972.

⁷² The New Delhi Statement is an appeal to nations for concerted action to enable people to obtain safe drinking water and environmental sanitation. ‘The Statement was adopted by 600 participants from 115 countries at the Global Consultation on Safe Water and Sanitation for the 1990s held in New Delhi, from 10 to 14 September 1990. Organized by the United Nations Development Programme and hosted by the Government of India, the Consultation was co-sponsored by the UN Steering Committee for The International Drinking Water Supply and Sanitation Decade and by the Water Supply and Sanitation Collaborative Council.’ See

http://www.bdix.net/sdnbd_org/world_env_day/2003/water_year/documents/newdelhi.pdf

⁷³ Principle No. 1: The Environment and Health, UNDP New Delhi Statement, 14 September 1990, New Delhi, India.

Subsequently, a meeting of experts took place in Ireland which resulted in the drafting and adoption of the Dublin Principles 1992.⁷⁴ This statement provided recommendations for urgent action programmes concerning water and sustainable development, to be presented to world leaders assembled at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in June 1992. It contained two notable provisions. The first, a guiding principle, recognised water as an economic good, but states that within this principle, ‘it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price.’⁷⁵ Furthermore, within its programme of action it recommends the provision of water for basic human needs as an aspect of poverty alleviation.⁷⁶ It also notes the vulnerability and special needs of those in rural areas emphasising the need for provision of access to potable water supply for rural areas.⁷⁷

The recommendations contained within this statement reflect a human right to water but disappointingly, the following Rio Declaration 1992 contains no provisions regarding the right to water, only notes that human beings are entitled to ‘a healthy and productive life’ as a part of sustainable development.⁷⁸

The inconsistency between development declarations is evident if we then look at the UN Conference on Environment and Development, Agenda 21, also adopted in

⁷⁴ Otherwise known as the Dublin Statement on Water and Sustainable Development 1992, from the International Conference on Water and the Environment (ICWE), Dublin, Ireland, 26-31 January 1992. The conference was attended by 500 participants, including government-designated experts from 100 states and representatives from 80 international, intergovernmental and non-governmental organizations.

⁷⁵ Principle 4, Dublin Principles 1992.

⁷⁶ Action Agenda, Alleviation of poverty and disease, Dublin Principles 1992.

⁷⁷ Action Agenda, Agricultural production and rural water supply, Dublin Principles 1992.

⁷⁸ Principle 1, Rio Declaration 1992.

1992.⁷⁹ Conversely, this document reiterated the approach of earlier declarations, noting the achievements of the Mar del Plata Declaration 1977 adopted by the United Nations Water Conference, where there is explicit reference to the right to drinking water: ‘...all peoples, whatever their stage of their stage of development and social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.’⁸⁰ Although the Mar del Plata Declaration is not a legally binding document, it is significant in that it provides explicit recognition of water as a human right,⁸¹ as well as water being a basic need to be fulfilled.

Furthermore, Agenda 21 notes that despite the subsequent launching in 1981 of the International Drinking Water Supply and Sanitation Decade, with the target of the Decade being to provide safe drinking-water and sanitation to underserved urban and rural areas by 1990, ‘even the unprecedented progress achieved during the Decade was not enough.’⁸² As such, the aim of the Agenda was to continue to put pressure upon States to ‘make certain that adequate supplies of water of good quality are maintained for the entire population of this planet...’⁸³

To this end, Agenda 21 views safe and sufficient water as essential for human development, improving health, alleviating poverty and maintaining sustainable

⁷⁹ UN Conference on Environment and Development, Agenda 21, 1992. Hereinafter referred to as Agenda 21.

⁸⁰ Preamble, Mar del Plata Declaration 1977, United Nations Water Conference.

⁸¹ Although it actually limits the provision to drinking water it does state that there must be sufficient water for meeting basic needs. Thus the term used is not as limited as it would seem as it seems to encompass water for meeting all basic needs, not just consumption.

⁸² Chapter 18.47, Agenda 21, UN Conference on Environment and Development.

⁸³ Chapter 18.2, Agenda 21.

ecosystems.⁸⁴ It states that ‘priority has to be given to the satisfaction of basic needs and the safeguarding of ecosystems.’⁸⁵ In this way, the Agenda reflects the content of the human right to water by prioritising water for personal and domestic use, even though it does not recognise a human right to water per se.

This was followed *inter alia* by the Report of the UN International Conference on Population and Development, Cairo, 1994⁸⁶ where a human beings right to an adequate standard of living, ‘including adequate food, clothing, housing, **water** and **sanitation**’ is provided for under Principle 2. This furthered the conception of the right to water as an integral part of the ICESCR1966, Article 11.

Finally in 2000 the World Summit on Sustainable Development United Nations Millennium Declaration⁸⁷ and Millennium Development Goals⁸⁸ and the subsequent Johannesburg Plan of Implementation of the World Summit on Sustainable Development 2002, has ensured that water and sanitation are a part of the current development agenda. The Declaration itself contains general principles and values regarding respect for human rights and protection of the vulnerable⁸⁹, as well as respect for nature, in line with sustainable development.⁹⁰ More specifically however, it states that parties will resolve, ‘To halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of

⁸⁴ See Chapter 18, Agenda 21.

⁸⁵ Chapter 18.8, Agenda 21.

⁸⁶ Cairo, 5-13 September 1994.

⁸⁷ United Nations Millennium Declaration 2000, General Assembly resolution 55/2 of 8 September 2000. Here in after referred to as the Millennium Declaration.

⁸⁸ Here in after referred to as MDGs.

⁸⁹ See Millennium Declaration, Section I. Values and Principles, para.4; Section V. Human Rights, Democracy and Good Governance and Section VI. Protecting the Vulnerable.

⁹⁰ Millennium Declaration, Section I. Values and Principles, para.6 and Section IV. Protecting our Common Environment.

people who suffer from hunger and, by the same date, to halve the proportion of people who are unable to reach or to afford safe drinking water.’⁹¹ Furthermore, ‘To stop the unsustainable exploitation of water resources by developing water management strategies at the regional, national and local levels, which promote both equitable access and adequate supplies.’⁹² The subsequent adopted 8 MDGs include this target on water within Goal 7 - Ensure Environmental Sustainability: ‘Halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation’.⁹³ Moreover, the succeeding Johannesburg Plan of Implementation 2002 proposes, ‘a programme of actions, with financial and technical assistance, to achieve the Millennium Development Goal on safe drinking water. In this respect, they reiterate the target as outlined in the Millennium Declaration.’⁹⁴

The framework for this target in all of these documents is not one of a human right to water but rather views clean and sufficient water and adequate sanitation as necessary pre-conditions to achieve the objective of environmental sustainability and sustainable development. Although the Summit and the Declaration have received a high profile within the media and civil society, they do not enshrine any provision which clearly

⁹¹ Millennium Declaration, Section III Development and Poverty Eradication, para.19.

⁹² Millennium Declaration, Section IV Protecting our Common Environment, para.23. See also para.21 and 22 on sustainable development.

⁹³ MDG 7, Target on water and sanitation. Unfortunately, the latest report on progress towards achieving these goals notes that ‘World targets for safe drinking water are in sight, but coverage remains spotty in rural areas’ and as half of developing country populations still lack basic sanitation, the world is unlikely to reach this target. See UN, The Millennium Development Goals Report 2006, United Nations: New York, 2006, pp.18-19.

⁹⁴ Johannesburg Plan of Implementation of the World Summit on Sustainable Development 2002, para.25. The programme of actions outlined includes *inter alia* measures to mobilize international and domestic financial resources at all levels and support capacity-building for water and sanitation infrastructure and services development including supporting the special needs of the poor and women; Facilitate access to public information and participation, including by women; support implementation of Chapter 18 Agenda 21; prevention of pollution including sanitation provision; promotion of sustainable water use and establishing at the national level monitoring systems, national indicators and effective legal frameworks. Furthermore, para.26(c) notes priority of water use for the satisfaction of basic human needs. See also paras. 24-29 on water management.

and unequivocally states that access to clean and sufficient water and adequate sanitation is a human right and not just a worthy aspiration or charitable need to be fulfilled. Despite this, one positive aspect of the environmental perspective on water is that it often contains provision for individual responsibility for sustainable and equitable use of water, not just state responsibility. However, environmental policy does not have the mechanisms to provide for legal obligations in order to ensure that persons adhere to these principles. This is where a human rights approach is strong. In GC 15 the principles of sustainable use by states is incorporated,⁹⁵ although there is no provision for responsible use by individuals. This may be because the focus of the approach is on realising the right rather than individual management of the water, once the right is realised.

In sum, however, despite the fact that none of these development declarations and statements constitute legally binding documents with corresponding legal obligations they do serve to raise the profile of the human right to water and to firmly place the issue on the international agenda. Furthermore, owing to the high profile given to water by development organisations and agencies and the related international pressure put upon states, the right to water has now been recognised by several political bodies including the European community and individual state governments.⁹⁶ For example the UK Government recently recognised the right to

⁹⁵ See GC 15, paras. 7, 11, 26, 28 and 34.

⁹⁶ For example, the government of Belgium has recognised the right to water in its Constitution and implemented it through regional legislation. See Ouvry, B, 'Access to Water as a Basic Human Right: Different ways to fulfil this vital commitment- The Case of Belgium and its Regions', Paper at the Roundtable convened by UNECE, WHO and OHCHR, 'The Human Right to Water and the Protocol on Water and Health: making access to water a reality', 18 January 2007 at the 1st Meeting of the Parties to the Protocol on Water and Health, Geneva, 17-19 January 2007.

water in a statement by the Minister for the Department for International Development.⁹⁷

Moreover, cumulatively, all of these soft law declarations have played a part in increasing the pressure states and international bodies are subject to and as such these declarations have an important role in promoting water as a basic human right. Furthermore, the importance of soft law should not be underestimated, as soft law serves to contribute to the creation of custom, interprets existing laws and encourages the adoption of hard law.⁹⁸ In addition, the proliferation of material within the development field, as well as an emerging right to development have resulted in a gathering of momentum behind a call for realisation of economic and social rights in general, with many more relevant mandates by human rights NGOs and within the UN human rights system itself.⁹⁹ Conversely, it is because of the lack of legal obligations that the enshrinement of the human right to water within legal mechanisms of international law is essential to realise the right and hold states accountable for their actions or omissions.

(iii) The Work of the UN Human Rights Bodies and the Right to Water

The UN Committee for Economic, Social and Cultural Rights¹⁰⁰ has carried out the most work on developing the concept of the right to water, within soft law. It has

⁹⁷ See Dept for International Development Press Release, 'UK recognises the right to water as Hilary Benn launches call for Global Action Plan to solve water crisis', 9 November 2006 at <http://www.dfid.gov.uk/news/files/pressreleases/human-dev-report06.asp>

⁹⁸ The ICJ noted in the Nuclear Weapons Advisory Opinion (1996) that the Stockholm and Rio Declarations had helped to create legal obligations upon states. For a discussion of the benefits and disadvantages of soft environmental law and its significance see Bell, S and McGillivray, D, Environmental Law (6th ed), Oxford University Press, 2006, Chapter 6 International Law and Environmental Protection, pp. 143-179 at pp.153-159.

⁹⁹ See discussion of the work of UN bodies concerning the right to water below.

¹⁰⁰ Hereinafter referred to as the CESCR.

drafted and adopted several standards and guidelines, which refer to the right to water, including *inter alia*, several General Comments, the first of which to explicitly mention water was the CESCR General Comment 4 The right to adequate housing¹⁰¹ under paragraph 8(b) Availability of services, materials, facilities and infrastructure, which states:

An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.¹⁰²

The concept of water contained however is limited to access to safe drinking water, rather than encompassing sufficient water for all domestic uses. The provision frames drinking water as a resource and necessary service for adequate housing rather than as an independent right, which is not surprising given that the General Comment is concerned with the right to adequate housing.¹⁰³

In the subsequent CESCR General Comment 5 Persons with disabilities,¹⁰⁴ paragraph 1, the importance of the provision of basic needs for those with disabilities is highlighted and provision of water is explicitly listed as a basic need which must be provided for under any national programme. This provision is contained within the

¹⁰¹ CESCR General Comment 4 The right to adequate housing, 13/12/91 (Sixth Session, 1991).

¹⁰² CESCR General Comment 4, 13/12/91, para.8 (b).

¹⁰³ The link between housing, health and water had been made in previous declarations such as the Istanbul Declaration on Human Settlements, UN Habitat II, 1996, para. 129, which notes that lack of access to safe water and sanitation can cause health problems and prohibits pollution of water sources (para.136 (b)).

¹⁰⁴ CESCR General Comment 5 Persons with disabilities, 09/12/94, (Eleventh session, 1994).

context of the discrimination persons with disabilities often face in the enjoyment of the ‘full range of economic, social and cultural rights recognized in the Covenant.’ Unfortunately, within paragraph 33 which deals with Article 11, the right to an adequate standard of living, there is no further explicit reference to water and water can only be implied from the general term ‘other basic material needs’ or as part of the rights to food or housing as listed.¹⁰⁵

Within the CESCR General Comment 6 The economic, social and cultural rights of older persons, access to adequate water is enshrined as a part of Article 11 the right to an adequate standard of living.¹⁰⁶ The provision reiterates Principle 1 of the United Nations Principles for Older Persons 1991, which states ‘Older persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help.’¹⁰⁷ In this guideline water is addressed in terms of access and sufficiency but not in terms of safety. However, it is also the first occasion where water is explicitly noted as a part of Article 11, in a standard of the Committee.

The next relevant General Comment to be drafted by the Committee was General Comment 12 The right to adequate food.¹⁰⁸ Although seen as one of the most important explicitly listed rights in relation to water, it is notable that it does not refer

¹⁰⁵ This provision has since been expanded and codified in the recently adopted UN Convention on Persons with Disabilities, 13 Dec 2006 (open for signature 30 March 2007) Article 28 Adequate Standard of Living. See also Chapter 1, p.51, note 175.

¹⁰⁶ CESCR General Comment No. 6 The economic, social and cultural rights of older persons, 08/12/95, (Thirteenth session, 1995), para. 32.

¹⁰⁷ Principle 1 (para.1), United Nations Principles for Older Persons, 1991, GA Resolution 46/91 46th session, 74th Plenary 16 Dec 1991.

¹⁰⁸ CESCR General Comment 12, (Twentieth session, 26 April-14 May 1999) The right to adequate food (Art.11), 12/05/99, E/C.12/1999/5. Hereinafter referred to as GC 12.

to a right to water at all. In view of the commonly held perception that a right to water was an integral part of the right to food, or that water could be conceived of as ‘liquid food’, it seems surprising that such an important aspect of human survival was absent from this standard. This was even more remarkable in light of the previous documents which had explicitly noted the link between food and water. For example the Rome Declaration on World Food Security 1996, states that sustainable food security is a priority requiring ‘equitable and equal access to productive resources such as [...] water...’¹⁰⁹ Conversely however, it could be that as water was viewed as an integral part of food that separate explicit references to water were not necessary. In practice however, this does not ensure that all aspects of a right to water are provided for.¹¹⁰

The subsequent General Comment of the committee, General Comment 13 The right to education¹¹¹ refers back to the previous wording seen in General Comment 4 on housing: Paragraph 6(a) emphasises the need for provision of ‘safe drinking water’ in educational institutions. Interestingly, the focus of provision is on the safety aspect of the water and is limited to drinking water. No mention of sufficiency is made, as in previous General Comments. However, notable is the requirement for ‘sanitation facilities’ which can be seen as an integral part of the right to water. It is also similar in provision to that of GC4 as it frames water as one of a number of resources and services necessary for the realisation of a right.

¹⁰⁹ Rome Declaration on World Food Security 1996, Objective 2.1, para.19.

¹¹⁰ For further discussion on the right to water and the right to food see Chapter 1, Section 1.4 (ii), p.73.

¹¹¹ CESCR General Comment 13 The right to education (Art.13), 08/12/99, E/C.12/1999/10, 8 December 1999.

Conversely, the final standard to be drafted and adopted prior to GC 15 on water, General Comment 14 *The right to the highest attainable standard of health*,¹¹² is both thorough and unequivocal in its provisions concerning the right to water and its importance within the realisation of the right to health.

The inextricable linkage between health and water had already been noted, prior to the drafting of GC 14, in previous documents concerning the right to health, for example within the Declaration of Alma-Ata 1978.¹¹³ Within paragraph I ‘The Conference strongly reaffirms that health, which is a state of complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity, is a fundamental human right’...whose realization requires the action of many other social and economic sectors in addition to the health sector.’ Water can be viewed as one of these sectors and this requirement is made explicit within paragraph VII (3) which calls for ‘an adequate supply of safe water and basic sanitation...’ as a part of essential primary health care.

This approach to safe and sufficient water as a requirement for the realisation of the right to health was echoed in the GC 14 on health. Water is conceived of as one of the necessary ‘underlying determinants of health’. Furthermore, it is the first General Comment to encompass all key substantive elements of the right to water: access, safety and sufficiency, as well as encompassing provision concerning sanitation, also as an underlying determinant of health.¹¹⁴ In addition to several provisions noting the

¹¹² CESCR General Comment 14 *The right to the highest attainable standard of health*, 11/08/2000, E/C.12/2000/4. Hereinafter referred to as GC 14.

¹¹³ Declaration of Alma-Ata, WHO/UNICEF International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978.

¹¹⁴ See GC 14, 11/08/2000, para.11.

need for accessible, safe and sufficient water,¹¹⁵ paragraph 34 prohibits the pollution of water and significantly, prohibits States ‘from limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law.’ This provision is also indicative of the growing complementarity of human rights law and humanitarian law, which is reflected further in GC 15.

Through tracing the history of the concept of water as a human right in the guidelines and reports of the CESCR, it is evident that there is inconsistency with regard to the concept and although water is mentioned in particular in the General Comments of the CESCR, it is to a greater and lesser extent and with differing focus and frameworks for reference. Despite these early references to water, the standards have only provided brief and succinct provisions regarding water and none have explicitly noted water as an independent right rather than a constitutive or derivative right. As such, although they offer little clarification as to the normative content of the right to water and its correlative obligations, they can be viewed as an indication of the development of the concept of an independent human right to water over time and in the context of ever-increasing water problems at local and global levels and wider concern regarding human poverty and lack of development. The advent of the GC 15 and its significance for the international protection of a human right to water is discussed in detail in Chapter 1; suffice to say here that it is a principal and imperative development of the concept and its legal standing.

Most recently, developments within the treaty based UN human rights system have been followed up by human rights bodies within the UN Charter system. In 2002 a

¹¹⁵ See GC 14, para. 12(a), 12(b), 12(d) and 15. For further discussion on the right to health and the right to water see Chapter 1, Section 1.4 (i), p.70.

UN Special Rapporteur was appointed by the Human Rights Commission to study the relationship between the enjoyment of economic and social rights and the promotion of the realisation of the right to drinking water supply and sanitation and to submit reports to the Sub-Commission on the Promotion and Protection of Human Rights.¹¹⁶ At its fifty-sixth session the Sub-Commission requested the Special Rapporteur to prepare a set of draft guidelines for the realisation of the right to drinking water and sanitation,¹¹⁷ which were subsequently submitted in 2005.¹¹⁸ Although it is stated in the introduction, para.3 that the term ‘right to water’ will be used for the sake of consistency with UN CESCR GC 15, the language used is inconsistent. For example, the term ‘drinking water supply’ is used when discussing improving access to water.¹¹⁹ This is disappointing as it does not reinforce the concept of the human right to water as water for all domestic use as contained in the General Comment and allows the content of the right to be open to misinterpretation on the part of state parties. Despite this however, in terms of provision it does encompass many of the substantive elements of the content of the human right to water, for example, quality, accessibility and importantly, sanitation provision.

The aim of the document is different to that of the General Comment: it is not giving definition to or expanding on a particular provision in a treaty but ‘is intended to assist government policy makers, international agencies and members of civil society

¹¹⁶ See Commission on Human Rights Decision 2002/105, 22 April 2002 (Forty-ninth meeting).

¹¹⁷ See Sub-Commission on the Promotion and Protection of Human Rights, Decision 2004/107, 9 August 2004 (Fifty-Sixth session).

¹¹⁸ Sub-Commission on the Promotion and Protection of Human Rights, Draft Guidelines for the Realisation of the Right to Drinking Water and Sanitation, 11 July 2005, Report of the Special Rapporteur, El Hadji Guisse. E/CN.4/Sub.2/2005/25.

¹¹⁹ See Sub-Commission on the Promotion and Protection of Human Rights, Report of the Special Rapporteur, 2005, para.5 and Introduction, para.2.

[...] to implement the right to drinking water and sanitation.¹²⁰ The strength of the guidelines is that the approach is one, which incorporates several existing approaches to water: as a human right and as an environmental concern and common good.

Taking note of these guidelines, as well as GC 15 and other declarations and resolutions adopted by the UN, the newly formed Human Rights Council have requested that the OHCHR conduct ‘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...’.¹²¹ The subsequent report is to be submitted to the sixth session of the Council in September 2007. This most recent development to date has put the issue of the human right to water on the agenda of another human rights body and to a wider audience, which must be beneficial in terms of understanding the right and realisation of the right.

(iv) Regional and Domestic Legal Sources for a right to water

In addition to the soft law provisions discussed above and the hard law treaty provisions noted to be discussed forthwith, there are also regional and national provisions concerning the right to water.¹²² Of the three regional systems in existence, all have some provision for a human right to water. Under the African system within the African (Banjul) Charter of Human and People’s Rights 1981, the provision for the right to water is only implicit, being provided for under Article 16 as an element

¹²⁰ Sub-Commission on the Promotion and Protection of Human Rights, Report of the Special Rapporteur, 2005, Introduction, para.2.

¹²¹ Human Rights Council, Decision 2/104 Human rights and access to water, 31st meeting, 27 November 2006 (Second Session).

¹²² I have included a summary of regional provisions, as none are directly relevant to the forthcoming case study area. However, a comprehensive list of regional provisions concerning the right to water can be found at the Centre on Housing Rights and Evictions (COHRE), Legal Resources for the Right to Water – International and National Standards, Sources Series No.8, Geneva: COHRE, 2003.

of the right to health and under Article 24 as pre condition necessary for ‘the right to a general satisfactory environment favourable to their development.’¹²³

Positively, the African Charter on the Rights and Welfare of the Child 1990 makes explicit provision for a right to water under Article 14 on the right to health and health services, which specifies under paragraph 2(c) that state parties must ‘ensure the provision of adequate nutrition and safe drinking water.’ While this provision is limited to ‘drinking water’ only and does not explicitly provide for a right to water for all basic needs, this may be an issue of language and the interpretation of the African Commission and Court will be crucial.

Within the American system, the provisions are only of implicit nature, again being an element of the right to health or right to a healthy environment.¹²⁴ However, water can also be seen as a part of the right to food as provided for in Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador,” 1988, Article 12 on the right to food.

European human rights instruments also contain implicit provisions for a right to water.¹²⁵ Additionally, the Council of Europe have recently adopted a specific treaty

¹²³ See also Article 22, right to development.

¹²⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights Protocol of San Salvador 1988, Article 10 Right to Health and Article 11 Right to a Healthy Environment including *inter alia* a right to have access to basic public services and the non-treaty provision of the American Declaration Of The Rights And Duties Of Man 1948, Article XI Health and Article XXIII Housing.

¹²⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Article 2 Right to Life and the European Social Charter 1961 and Revised European Social Charter 1996, Article 11 Health, Article 13 Right to Social and medical assistance and Article 31 The right to housing.

concerning management of water resources,¹²⁶ which encompasses the human right to water in explicit provisions. In particular, paragraph 5 of The European Charter on Water Resources 2001¹²⁷ states,

Everyone has the right to a sufficient quantity of water for his or her basic needs [...] International human rights instruments recognise the fundamental right of all human beings to be free from hunger and to an adequate standard of living for themselves and their families [...] It is quite clear that these two requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene...¹²⁸

In addition to these hard law provisions political statements have been made by both the Council of Europe and the European Parliament successively in 2001 and 2002, recognising the human right to water.¹²⁹

The unequivocal provision of the treaty, alongside the political statements, can be seen as a reflection of the progression in policy and increase in interest regarding water resources as effecting human development and the environment. Moreover it is part of the subsequent development of the right to water within this context.

¹²⁶ This is in addition to numerous European directives concerning various aspects of water. Further details see Bell. S and McGillivray. D, 2006, Chapter 7 The European Community and the Environment, pp. 180-234.

¹²⁷ Council of Europe, European Charter on Water Resources 2001, adopted by the Committee of Ministers, 17 October 2001, at the 769th meeting of the Ministers' Deputies, CO-DBP (2001) 8, [CO-P/documents/codbp2001/08e].

¹²⁸ Also notable in relation to a right to water are para.16, public access to information on the state of water resources; para.17, the right to take an active part in planning and decision-making procedures concerning water and para. 19, concerning payment for the supply of water, without prejudice to the right to water to meet basic needs.

¹²⁹ UN World Water Assessment Programme, 2006, p.383, Table 11.3 The Right to Water Timeline. See also Council of Europe Parliamentary Assembly, Recommendation 1731 (2006) and the Declaration of European Local and Regional Authorities on Water of the European Municipalities and Regions, Dec 2005, Vienna.

Overall, despite the often implicit nature of the regional system provisions concerning the right to water, under these instruments several cases concerning violations of the right have been tabled, for example, before the African Commission and the Inter-American system.¹³⁰ This has led to a developing jurisprudence regarding the right.¹³¹

In particular reference to the forthcoming case study, the Middle East region has no regional provision for a right to water, as there is no regional human rights system in place. However, there are efforts to address this, such as the initiative of the League of Arab States¹³² Arab Charter on Human Rights 2004,¹³³ which does contain provisions pertaining to economic and social rights. The original Charter of March 1994 was recently revised and modernised to bring it in line with international instruments.¹³⁴ The new instrument provides for a right to water under Article 39(b) 'Health', which establishes measures to be taken by states including the provision of safe drinking water for all and proper sanitation systems.¹³⁵ There is also implicit provision under Article 38 'Adequate standard of living'.¹³⁶ However, at present this treaty has not entered into force and its current status remains unclear.¹³⁷ Moreover, there is no

¹³⁰ See *OMCT et al v. Zaïre*, Communications 25/89, 47/90, 56/91 and 100/93; *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96, both before the African Commission on Human Rights. Also, *Menores Comunidad Paynemil s/accion de amparo*, Expte. 311-CA-1997. Sala II. Cámara de Apelaciones en lo Civil, Neuquen, Argentina, 19 May, 1997. See COHRE, 2003, pp.111-114 and Picolotti, R, 'The Right To Safe Drinking Water As A Human Right' in Housing and ESC Law Rights Quarterly, COHRE, Vol.2, No.1, April 2005, pp.1-5, for details of other Argentinean cases.

¹³¹ See Chapter 5 for further discussion concerning jurisprudence and the right to water.

¹³² Otherwise known as the Arab League. Their aim is to strengthen ties, coordinate policies and promote common interests. Palestine has been a member since the PLO was admitted in 1976. Jordan, Egypt and Lebanon are others significant regional members.

¹³³ Adopted by the Arab Standing Committee for Human Rights, 5-14 January 2004.

¹³⁴ The original treaty had several omissions in terms of modern human rights standards and has not entered into force due to lack of ratifications.

¹³⁵ Article 39 (b) Points 5 and 6 respectively.

¹³⁶ See also Article 2 self-determination over natural resources.

¹³⁷ The Charter requires seven ratifications to enter into force (Article 48). As of June 2005, Jordan and Tunisia had ratified the treaty and seven additional states have signed, including Palestine. See Rishmawi, M, 'The Revised Arab Charter on Human Rights: A Step Forward?' in Human Rights Law Review, Vol.5, No.3, 2005, pp.361-376, at p.2 of Westlaw text version.

regional enforcement or complaints mechanism for monitoring implementation of the rights contained within the Charter.¹³⁸

Furthermore, the Cairo Declaration on Human Rights in Islam 1990¹³⁹ could also be seen as applicable as many of the states in the region, including Palestine are member states of the Organisation of the Islamic Conference who adopted the declaration.¹⁴⁰

Provision for a right to water is implicit under Article 17 concerning a clean environment, access to public and social amenities and the right to a decent living.¹⁴¹

However, the rights contained in this declaration are subject to interpretation under the Islamic Shari'ah,¹⁴² which limits them to a certain idea of rights based on one faith alone. As many of the occupants of Palestine are Christian and not Muslim this is not ideal in provision. In addition the provisions are non-binding and not subject to legal obligation.

There are also provisions for a human right to water under many States' constitutions and within the domestic national law of several states.¹⁴³ The GC 15 calls for recognition of the right to water under 'national political and legal systems, preferably by way of legislative implementation.'¹⁴⁴ A number of States have already provided

¹³⁸ The Secretary General and the Council of the Arab League did propose that an Arab Court of Justice be established with competence over human rights issues, however there was lack of support from the member states and the proposal was not adopted. See Rishmawi. M, 2005, p.1 (Westlaw text version).

¹³⁹ Adopted at the Nineteenth Islamic Conference of Member States of the Organization of the Islamic Conference (Foreign Ministers) Cairo, 5 August 1990.

¹⁴⁰ Palestine is a member state having joined in 1969. Other members include regional neighbours Jordan, Egypt and Lebanon (since 1969).

¹⁴¹ Article 17 (a), (b) and (c).

¹⁴² See Article 25 which states that 'The Islamic Shari'ah is the only source of reference for the explanation or clarification to any of the articles of this Declaration.'

¹⁴³ Provisions under domestic and constitutional law relevant to the case study are discussed in detail within Chapter 3.

¹⁴⁴ See GC 15, para. 26.

for this explicit right under their Constitutional law¹⁴⁵ and several have subsequently enshrined these obligations under national legislation,¹⁴⁶ for example, South Africa.¹⁴⁷ Furthermore, cases concerning the right to water have been brought before various national courts under constitutional and national law, with positive outcomes.¹⁴⁸

(v) The Work of International Organisations and NGOs

Finally, the work completed by international, regional and national legal systems, human rights bodies, environmental organisations and international law bodies has been enhanced and complemented by the work of other international organisations such as NGOs and specific agencies of the UN, all with the aim of resolving water problems. Too numerous to list in entirety, they include *inter alia*, UNEP, UNDP, WHO, UNICEF, UNESCO's World Water Assessment Programme, World Bank, Oxfam, WaterAid, the International Water Tribunal,¹⁴⁹ the World Water Council¹⁵⁰ and the Water Supply and Sanitation Collaborative Council.¹⁵¹

¹⁴⁵ 17 states to date have Constitutions that include provisions for one or more element of the right to water, some being comprehensive. For a detailed list of these provisions see COHRE, 2003, pp.45-51.

¹⁴⁶ Venezuela and South Africa have codified the right to water following sources in their Constitutions and 7 states have directly legislated for a right to water without Constitutional sources. European Directive 2000/60/EC also has the legal effect of national law and provides for protection of water sources. For full details see COHRE, 2003, pp. 52-80.

¹⁴⁷ For example South Africa have explicitly and comprehensively enshrined the right to water within Articles 27 (1)(b) of their constitution and have enacted legislation under constitutional provision Article 27 (2) to enforce these provisions in the South Africa Water Services Act 108 (1997) and the South Africa National Water Act 36 (1998).

¹⁴⁸ For further details and discussion regarding remedy see Chapter 5, Conclusion.

¹⁴⁹ An independent body set up to consider disputes over water, The tribunal's decisions' carry no legal weight, but put moral and political pressure on defendants. For further details see Second International Water Tribunal 1992, Declaration of Amsterdam, International Water Tribunal / International Books: Utrecht, Netherlands, 1992; Second International Water Tribunal 1992, The Case Books- Management, International Water Tribunal / International Books: Utrecht, Netherlands, 1994.

¹⁵⁰ The World Water Council has a program on the human right to water and are establishing a database of case studies concerning the right. See www.worldwatercouncil.org

¹⁵¹ The Water Supply and Sanitation Collaborative Council (WSSCC) was set up in 1990 by virtue of a United Nations General Assembly resolution to maintain the momentum of the International Decade for Drinking Water Supply and Sanitation in the 1980s (pursuant to General Assembly Resolution 35/1980, para.1 which commits member states 'to bring about a substantial improvement in the standards and levels of services in drinking water supply and sanitation by the year 1990') and to enhance collaboration among developing and developed countries. In 2001, the WSSCC launched the

4. Concluding Remarks

In conclusion, the work of all these organisations constitutes a vast body of knowledge and literature on water issues, from a great many perspectives. Much of this has contributed to the development of the concept of a human right to water and has resulted in situating the human right to water in the context in which it now finds itself. However, as is evident from the overview of the history of the right, the concept of the right as an independent right is relatively new and requires further study.

Through the examination of the previous provisions for the right to water under soft law sources including the development of the concept through the General Comments of the CESCR and development and environmental approaches and the treaty provisions under international law, regional human rights law and domestic law, it is evident how the legal status of the right has evolved from its initial conception as a constitutive and derivative right, as an element of the right to health or food, to its current status - where it is deemed an independent right.¹⁵² It is also evident that the content and scope of the right to water has broadened to include water for all domestic and personal use, rather than a limited concept of water for drinking alone.

5. Chapter Overview

The first chapter determines the present position of an international human right to water and reviews the current international human rights legal framework for the

‘WASH’ campaign (Water, Sanitation and Hygiene) – a global advocacy effort involving all partners and supporters of the Council. See <http://www.wash-cc.org/>.

¹⁵² This will be further discussed in Chapter 1.

right. The fundamental provisions under these instruments are examined in detail including those with explicit provisions such as the Convention on the Rights of the Child 1989¹⁵³ and the Convention on the Elimination of all forms of Discrimination against Women 1979¹⁵⁴ and the implicit provisions found in the ICESCR. Furthermore, the most recent and important development of consequence concerning the human right to water: The CESCR drafting and adoption of the GC 15 on the right to water, is evaluated and ensuing questions regarding the normative content of the right, its scope and core content are raised.

Subsequently, there is a need to locate the right to water within the wider context of the field of economic, social and cultural rights. Hence Chapter 2 offers an overview of this area of rights through a focus on obligations under international provisions for economic and social rights. The importance of obligations is evident, as they constitute the mechanism by which human rights are enabled. There can be no right (entitlement) without a corresponding obligation (duty) and this chapter illustrates the basis for this approach. Furthermore, it then examines in detail obligations correlative to the right to water as provided for under GC 15 and the ICESCR and under the other key human rights instruments.

The second section of the thesis assesses the right to water in the context of a case study: the OPTs of the West Bank. Chapter 3 offers an overview of the current water situation outlining the history of the conflict in brief. Subsequently, before the *de facto* implementation of the right can be investigated, the legal basis for the right in this particular situation must be ascertained. As such, this chapter offers an analysis of

¹⁵³ Hereinafter referred to as the CRC.

¹⁵⁴ Hereinafter referred to as the CEDAW.

the legal provisions concerning the right to water that are applicable to the OPTs. Because of the nature of the territory as one of occupation by the state of Israel, the *lex specialis* or law seen as particularly applicable is international humanitarian law. Therefore the provisions for the right to water under this body of law are reviewed and the interaction between humanitarian law and human rights law investigated. Moreover provisions under the civil-military administration are considered as part of an examination of applicable domestic law. Furthermore, the bilateral agreements between Israel and the OPTs, commonly known as the Oslo Accords, are examined as a basis for a human right to water.

After establishing the legal basis for the human right to water within the context of the West Bank, Chapter 4 presents the case study: a small scale research project undertaken by the author. The material presented is gathered from 45 semi-structured interviews which took place in the Southern West Bank and which are based around several key elements of the right to water: Availability, Accessibility and Safety; Non-Discrimination and Protection of Vulnerable Groups. Using a violations approach the data is examined in order to establish whether violations of the right have taken and are taking place and to determine the nature of such violations. In conclusion, ideas are offered as to how remedy can be achieved for these violations and what can be done to offer better protection of the right on the ground.

In the fifth and concluding chapter we combine the specific and the general to consider where to go from here? In this third and final section of the thesis, having examined the right to water at a *de jure* level and *de facto* level, I discuss what the wider implications of the case study findings are, as well as making recommendations

for what can be done to strengthen the right legally in terms of its status and codification; what can be done to enhance implementation and improve enjoyment of the right and what remedy can be found for violations of the right, both specifically in the OPTs and in a general context.

Finally, there are several appendices, which require a note of explanation: Appendix 1 is a sample interview schedule. This is the final version which was drafted after several pilot schedules in consultation with the interviewer. Appendix 2 consists of relevant geographical maps for the case study: Map A is a general map showing the area consisting of the OPTs and Israel. Map B shows the main aquifers within the geographical region. Map C illustrates the surveyed communities within the West Bank from which the interviewees were drawn for the case study and any relevant surrounding features, such as Israeli settlements and by-pass roads.

Chapter 1

The Human Right to Water - A Right of Unique Status

Determining the Normative Content of the Right to Water

Introduction

This chapter will evaluate the current legal basis for the right to water under the main relevant international human rights instruments: the ICESCR,¹⁵⁵ CRC¹⁵⁶ and CEDAW.¹⁵⁷ Furthermore, I will examine the difficulties concerning the right's status within current international human rights codification.

I will then discuss the most significant recent development in standard setting within international human rights law regarding water: The CESCR GC 15 The right to water, based upon Articles 11 and 12 of the ICESCR.¹⁵⁸ This standard sets guidelines regarding the normative content of the right,¹⁵⁹ as well as detailing the correlative obligations of state parties.¹⁶⁰ The analysis will focus upon the content of the right and will include an examination of the link between the normative content of the right to water and its relationship to related economic, social and cultural rights.

¹⁵⁵ Adopted 16 December 1966, entry into force 3rd Jan 1976. Ratified by 153 states (5 signatories remaining) as of 1st May 2007.

¹⁵⁶ Adopted 20th November 1989, entry into force 2nd September 1990. Ratified by 192 state parties (2 signatories remaining) as of 1st May 2007.

¹⁵⁷ Adopted 18th December 1979, entry into force 3rd September. Ratified by 183 state parties (1 signatory remaining) as of 1st May 2007.

¹⁵⁸ CESCR, GC 15, 20/01/03.

¹⁵⁹ GC 15, paras. 10-16.

¹⁶⁰ GC 15, paras. 17-38 and para. 60.

Through an evaluation of the GC 15, weaknesses within the content of the standard, such as sanitation provision, will be highlighted. In addition, the subsequent problems these gaps and overlaps raise will be assessed in terms of their effect upon the clarification of the scope and core content of the right to water and the difficulties concerning the right's status within current international human rights law.

Finally, I will make some concluding remarks and recommendations regarding how best to move forward from the current situation: By recognising a coherent core and scope of the right to water, which takes account of its relationship to directly related economic and social rights. This will be the first step in clarifying its status as a fully independent right with correlative obligations under international human rights law.

1.1 Current Provisions: The Legal Basis of the Right to Water under International Human Rights Law

As noted previously, the right to water has been recognised in a wide range of international human rights documents, including treaties, declarations and other standards,¹⁶¹ although the explicit codification of water as an independent human right is limited to the CEDAW and the CRC. Therefore, in the main treaty provision concerning the right to water has been based upon implicit provisions, such as those contained within the ICESCR. Within the International Bill of Human Rights¹⁶² there is no mention of water. However, it is possible that if the framers of the International Bill of Rights had realised that water was to be such a scarce resource in the future,

¹⁶¹ See Introduction.

¹⁶² A term used for the UDHR 1948 and the two Human Rights Covenants 1966.

they would have explicitly codified the right within these instruments.¹⁶³ As such, with the exception of the two relatively recent conventions noted above, the right to water has been recognised implicitly, that is under articles that refer to directly related rights contained within the ICESCR 1966, such as an adequate standard of living, food and health.¹⁶⁴ Despite the lack of explicit wording concerning water, the CESCR has interpreted Article 11 on an adequate standard of living and Article 12 on health as including water implicitly. Article 11(1) states:

The State Parties to the present Covenant recognize the right of everyone to an **adequate standard of living** for himself and his family, including **adequate food, clothing and housing** and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

It is against this provision that the Committee drafted and adopted the GC 15 on the Human Right to Water, which will be examined shortly.

It may also be argued that the ICCPR¹⁶⁵ implicitly provides for a right to water under Article 6 (1), the right to life. Conversely however, it has been contended that to include the right to water is too broad an interpretation of the right to life itself.¹⁶⁶ In addition, common article 1(2) of ICCPR and ICESCR 1966 provides that ‘in no case

¹⁶³ Gleick, P, ‘The Human Right to Water’, in Water Policy, Vol 1, No.5, 1999, pp.487-503 at p.501.

¹⁶⁴ See Danieli et al in Gleick, 1999, p.492.

¹⁶⁵ Adopted on 16th December 1966, entry into force 23rd March 1976. Ratified by 156 state parties (6 signatories remaining) as of 1st May 2007.

¹⁶⁶ See Y. Dinstein, ‘The Right to Life, Physical Integrity and Liberty’ in L. Henkin (ed) The International Bill of Rights – The Covenant on Civil and Political Rights, New York: Colombia University Press, 1981, pp.114 -137 at p.115. See further discussion, p.75.

may a people be deprived of its own means of subsistence' which must, for survival, include water.

Furthermore, the UDHR 1948 can be seen to implicitly include a right to water under several provisions including *inter alia*, Article 3 the right to life and security and Article 25 the right to a standard of living adequate for the health, and well-being of himself and his family.¹⁶⁷ Moreover other explicit rights guaranteed by both the Covenants and the UDHR, cannot be guaranteed without water.¹⁶⁸

Finally an implicit right to water can be found under Article 5 (e) of the International Convention on the Elimination of All Forms of Racial Discrimination 1966,¹⁶⁹ which guarantees the right of everyone, without distinction to the enjoyment of economic, social and cultural rights, in particular, the right to social services (including water services) and housing (which to be considered adequate must ensure availability of clean and sufficient water).

In more recent treaties however, the right to water has been explicitly worded in provisions, although it remains a part of provisions concerning other substantive human rights, rather than a substantive right in its own sense. The two human rights instruments that include these explicit provisions are the CEDAW 1979 and the CRC 1989.

¹⁶⁷ This may be significant as part if not all of the UDHR constitutes customary international law. See further discussion Chapter 2, p.106.

¹⁶⁸ Gleick, 1999, p.490.

¹⁶⁹ Hereinafter referred to as CERD. Adopted on 21st December 1965, entry into force 4th January 1969. Ratified by 170 state parties (6 signatories remaining) as of 1st May 2007.

Article 24, paragraph 2, of the CRC requires States parties to combat disease and malnutrition ‘through the provision of adequate nutritious foods and clean drinking-water’. Even though this provision constitutes an explicit codification of the right to water, it is far from comprehensive. The CRC’s provision relates only to certain aspects of water: that of quality and quantity.¹⁷⁰ It does not provide for the accessibility dimension of water. Furthermore, the provision is framed in relation to the right to health, rather than as an independent right to water. Alvarez notes, ‘Within this context, water is seen as part of the measures needed to ensure the right to health. Nevertheless, it is important to highlight that the article makes some distinction between food and water, assuming that the right to water is not the same subject as the right to food’.¹⁷¹ This framing of the right to water as different from the right to food or health, but not an entirely separate and independent right is a concept that arises throughout current human rights provisions concerning the right to water. Consequently, this blurring of boundaries with related rights is problematic and will be examined within this chapter.¹⁷²

The provision under the CEDAW 1979, frames the right to water within the right to an adequate standard of living, as in the ICESCR. However, it has the notable addition of the explicit inclusion of water supply and sanitation:

State parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men

¹⁷⁰ Otherwise known as availability within GC 15. It does not include accessibility of water.

¹⁷¹ Alvarez in Piccolotti and Tailent, 2003, p.5.

¹⁷² See Problems and Gaps in Provision 1, p.65.

and women, that they participate in and benefit from rural development and, in particular, shall ensure to women the right: [...]

(h) To enjoy adequate living conditions, particularly in relation to housing, **sanitation**, electricity and **water supply**, transport and communication.¹⁷³

Unfortunately, this provision is in relation to women in rural areas alone. As such it is narrow in its application and excludes many women living in urban areas who have a problem with accessing clean and sufficient water.

In sum, the provisions noted above constitute the present legal codification of the human right to water¹⁷⁴ and it is clear that there are several problems with the current codification of the right. Although international human rights and international law bodies have concluded that a right to water already constitutes an integral part of recognised human rights provisions,¹⁷⁵ it is evident that the right to water as codified within these instruments ‘remains imperfectly defined.’¹⁷⁶ Lack of explicit wording under the ICESCR has subsequently led to a lack of clarity as to the right’s status and content. Furthermore, only partial aspects of the right to water are recognised within the CRC and CEDAW. Thus, current provisions regarding the right are not fully comprehensive and require clarification in some manner. Consequently, the right to

¹⁷³ CEDAW, Article 14 (h).

¹⁷⁴ Most recently the right to water has been further codified in the UN Convention on Persons with Disabilities 2006 (UNGA A/61/611 6 Dec 2006) generally under Article 28 Adequate Standard of Living and explicitly in para.2 (a) equal access to clean water services but this treaty is not yet in force, having opened for signature in March 2007.

¹⁷⁵ See Introduction for sources. In addition see European Council on Environmental Law Madeira Declaration, April 1999, in Smets, H, ‘The Right to Water as a Human Right’, Environmental Policy and Law Vol. 30, Issue 5, 2000, pp.248 –251 at p.248 and Reidel, E, Statement on Day of General Discussion on the General Comment on the Right to Water, UN CESCR 29TH Session, Nov 2002.

¹⁷⁶ Scanlon et al, 2003, p.18.

water holds a ‘unique status’ within international human rights law. This unique status arises from water not being explicitly listed within the ICESCR.

However, despite the lack of clarity with regard to the formal codification of the right to water, recent developments in treaty law do illustrate an increased concern about access to sufficient and safe water. Moreover, a right to water has been established as a derivative right i.e. reliant on the right to water’s relationship to other economic and social rights and a moral obligation has been established. Thus notwithstanding this background of uncertain status, violations of the right to water by states have been determined.¹⁷⁷ Because of these increasing violations and due to increased attention on access to safe and sufficient water and sanitation, for example with the UN Year of Freshwater 2003 and the UN World Summit for Sustainable Development, taking place in Johannesburg, South Africa,¹⁷⁸ the Committee on Economic, Social and Cultural Rights decided to draft and adopt a General Comment specifically on the right to water. This would offer guidance to assist states in realising their obligations correlative to the right by clarifying the right’s content and setting standards of application. This culminated in November 2002 with the adoption of the GC 15.¹⁷⁹

¹⁷⁷ GC 15, paragraph 5 notes that the right to water has been consistently addressed by the Committee during its consideration of States parties’ reports, including identification of violations. For example, see the CESCR Concluding Observations on Second Periodic State Report of Israel 23/05/2003, paragraph 25 and further examples listed at p.69, note 236.

¹⁷⁸ Hereafter referred to as WSSD, which took place from 26th August – 4th September 2002.

¹⁷⁹ It is interesting to note that during the process of drafting and adoption of the GC 15, the CESCR met with several international organisations, non-governmental organisations and individuals for a day of general discussion, followed by several days of meetings, both open and closed. In all there were 130 amendments to the original draft General Comment. These were submitted by committee members, as well as by non-governmental organisations, international agencies, academics and UN Special Rapporteurs. It was also a timely event, as it was the UN Year of Freshwater and the UN World Summit for Sustainable Development (WSSD) had just taken place in Johannesburg, South Africa.

1.2. Drafting and Determining the GC 15

As stated formerly, the purpose of the GC 15 is to clarify the normative content of the right as well as setting standards and guidelines for state parties to the Covenant to realise their obligations. The first step was to establish what the scope of the right to water entailed. As Gleick points out, ‘A right to water cannot imply a right to an unlimited amount of water’,¹⁸⁰ as this is unsustainable both practically and environmentally. The normative content of the right to water as set out in GC 15 initially defines the entitlements given under the right to water:

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.¹⁸¹

These entitlements contained in GC 15, paragraph 2 determine the key values of safety, accessibility, sufficiency and affordability. In addition the provision prioritises water uses. This may appear straightforward; however, these key principles need to be examined in order to elucidate what they mean practically for the normative content of the right. Within the detailed provisions of paragraph 12, the three principles of availability, quality and accessibility¹⁸² contain the substantive standards regarding the content of the right to water. They set out the minimum essential level of water necessary for meeting the core obligations. i.e. water for basic needs, as well

¹⁸⁰ Gleick, 1999, p.494.

¹⁸¹ GC 15, paragraph 2.

¹⁸² Regarding GC 15, the original draft listed headings: ‘sufficient, safe, affordable and accessible’ which differed to those in other GC’s. To ensure continuity and clarity of standards these were adapted and resulted in the 3 principles of availability, quality and accessibility, in line with those listed in GC 14.

as setting standards for safety and cleanliness of water and ensuring equal access, both physical and economic.

Firstly, in regard to availability, we need to define what constitutes sufficient water. In the original draft GC 15,¹⁸³ paragraph 8 detailed the minimum standard of water as a defined numerical level that was acceptable.¹⁸⁴ However, it was pointed out that this numerical level could and would change over time. Therefore, it was agreed that the GC 15 should state sufficiency in terms of the current applicable WHO guidelines so as to ensure relevance over time:

While the adequacy of water required for the right to water may vary according to different conditions, the following factors apply in all circumstances [...] The quantity of water available for each person should correspond to World Health Organization (WHO) guidelines.¹⁸⁵

However, sufficient water alone is not enough to ensure a human right to water. Safe water is also required and it is true that many people, who do receive this basic water requirement or more, are not receiving clean, safe water but water which is contaminated.¹⁸⁶ Hence the GC 15, paragraph 12 (b) provides that:

¹⁸³ UN Committee on Economic, Social and Cultural Rights, DRAFT GC No.15 (Future 29th session, 11-29 Nov 2002, Agenda Item 3). The Right to Water (Arts 11 and 12 of the Covenant). Future E/C.12/2002/11. 29th July 2002.

¹⁸⁴ This being '50 litres or the minimum essential level, approximately 20 litres' per person. Gleick argues for a 'Basic Water Requirement', which covers four basic needs; 5 litres for drinking water, 10 litres for cooking and food hygiene, 15 for bathing and washing and 20 litres for sanitation needs. This amounts to a total of 50 litres per person, per day. He maintains that this limit is irrespective of climate, level of development and technology and culture. See Gleick, P, 'Basic water requirements for human activities: meeting basic needs', Water International, Vol 21, 1996, pp 83-92 at p.88. Also Gleick, 1999, p.496 and Scanlon et al, 2003, pp.24-25.

¹⁸⁵ GC 15, paragraph 12 (a). Original footnote omitted.

¹⁸⁶ An example of this is evident in case studies from India, where villagers receive sufficient amounts of water but the water itself is contaminated with arsenic. This has led to arsenic poisoning amongst 200,000 of the population in Bengal and 70 million in Bangladesh. See Shiva, V, Water Wars. London: Pluto Press, 2002, p.114. See also, Nath, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th Session, November 2002, Geneva; Smith, A,

The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health.¹⁸⁷ Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use.

Finally, the third principle that is a constituent element of the normative content is accessibility. As the GC 15 states, accessibility has four overlapping dimensions: (i) Physical accessibility, (ii) Economic accessibility, (iii) Non-discrimination and (iv) Information accessibility. The general paragraph 12 (c) states, 'Water and water facilities and services have to be accessible to *everyone* without discrimination, within the jurisdiction of the State party.'¹⁸⁸

In terms of physical accessibility the GC focuses upon physical safety and security and this is important for those people living within conflict zones¹⁸⁹, such as the Occupied Territories in Israel/Palestine. Regarding economic accessibility, water, and water facilities and services, must be affordable for all.¹⁹⁰ Information accessibility covers the right to receive and distribute information concerning water issues.¹⁹¹ Scanlon et al develop this dimension further, in a discussion that examines the procedural rights relating to the human right to water. Procedural rights are important because they 'enable the enforcement of substantive rights.'¹⁹² The core procedural

Lingas. E and Rahman. M, 'Contamination of Drinking-Water by Arsenic in Bangladesh: A Public Health Emergency', *Bulletin of the WHO*, Vol. 78, No.9, 2000, pp.1093-1103 For a general reference regarding arsenic poisoning see www.who.int/water_sanitation_health/Arsenic/arsenic.htm

¹⁸⁷ Original footnote omitted.

¹⁸⁸ GC 15, paragraph 12 (c). It is also imperative to note here, the 'special topics of broad application', paragraphs 13 and 14, which impart the obligations of states regarding non-discrimination and vulnerable groups concerning the right to water. See section on p.56.

¹⁸⁹ GC 15, paragraph 12 (c) (i).

¹⁹⁰ GC 15, paragraph 12 (c) (ii).

¹⁹¹ GC 15, paragraph 12 (c) (iv).

¹⁹² Scanlon et al, 2003, p.25.

rights that accompany the right to water are, according to Scanlon et al: The right of individuals to information concerning the states activities regarding water,¹⁹³ the right of individuals to participate in decision-making concerning water,¹⁹⁴ the right of individuals to recourse and the right to fair and just administrative action.¹⁹⁵ It is worth highlighting here that these rights are all deemed civil and political rights and are necessary for the realisation of the right to water.

Finally in relation to the normative content, the GC highlights both the positive and negative aspects of the right to water:

The right to water contains both **freedoms and entitlements**. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.¹⁹⁶

This framework of positive and negative aspects is also reflected within the section concerning obligations.¹⁹⁷

Regarding ‘Special Topics of Broad Application’, non-discrimination is exceptional as it is applicable to aspects of accessibility as well as the other key elements of the

¹⁹³ ICCPR, Article 19.

¹⁹⁴ ICCPR, Article 19, 21 and 25.

¹⁹⁵ ICCPR, Article 14.

¹⁹⁶ GC 15, paragraph 10, my emphasis added.

¹⁹⁷ GC 15, paras.17-38. See Chapter 2 for a detailed discussion of obligations as provided for under GC 15.

right to water. Paragraph 12(c) (iii) states: ‘Water and water facilities and services must be accessible to all, including the most vulnerable or marginalised sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.’

Paragraph 12 and paragraphs 13 and 14 contain general clauses concerning non-discrimination and relate closely to the provisions regarding vulnerable groups. These provisions detail measures to ensure equal access to water for those groups and individuals at risk of discrimination. Paragraph 13 proscribes any discrimination in line with the provisions of the ICESCR, which ‘has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water.’ Paragraph 12 of General Comment 3¹⁹⁸ is referred to: ‘even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.’ This protection is reiterated within paragraph 15 which determines that state parties have a ‘special obligation’ to provide water to those who do not have the sufficient means.

The GC also recognises that access to water resources may be limited by covert discrimination:

States parties should take steps to remove de facto discrimination on prohibited grounds, where individuals and groups are deprived of the means or entitlements necessary for achieving the right to water. States parties should ensure that the allocation of water resources, and investments in water,

¹⁹⁸ UN CESCR, General Comment No.3. 14/12/90. (Fifth session, 1990) The nature of States parties obligations (Art. 2, para. 1 of the Covenant), paragraph 12.

facilitate access to water for all members of society. **Inappropriate resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population.**¹⁹⁹

An example of this inappropriate resource allocation can be seen in the OPTs where Palestinian villages although connected to the mains, have limited water supply, whereas Israeli settlements in the same area have full mains connections from the Israeli water service provider Mekorot and increased supply of water during the summer²⁰⁰ (which is used *inter alia* for luxury uses such as swimming pools and lawn sprinklers). Further illustration of discriminatory investment in water services is evident in the case of Cochabamba, Bolivia, where the state owned water service was sold to a private company in response to conditions imposed by the World Bank in order to guarantee a loan to refinance water services.²⁰¹ This resulted in a rise in cost to the population that proved impossible for the poor of the city to afford.²⁰²

Significantly, the human rights NGO World Organisation for the Prevention of Torture,²⁰³ has argued that the removal of de facto discrimination, as provided for in paragraph 14, ‘along with the necessity to give special assistance to individuals and

¹⁹⁹ GC 15, paragraph 14, my emphasis.

²⁰⁰ B’Tselem, Thirsty for a Solution – the Water Crisis in the Occupied Territories and Its Resolution in the Final Status Agreement, Jerusalem: B’Tselem, July 2000, p.4 and pp.43-44, available from Publications, Water Crisis, www.btselem.org. See also Chapter 4.

²⁰¹ Barlow. M and Clarke. T, Blue Gold – The Battle Against Corporate Theft of the World’s Water, London: Earthscan, 2002, p.154.

²⁰² Barlow and Clarke, 2002, p.155.

²⁰³ Hereafter referred to as OMCT.

groups traditionally facing difficulties in exercising the right to water implicitly recognises the concept of affirmative action policies or special measures.²⁰⁴

Moreover, OMCT argue that this may be problematic because the non-discrimination principle, as interpreted by international trade law, could put restraints upon a state's ability to implement affirmative action policies, which are aimed at ensuring de facto equality of the enjoyment of the right to water.²⁰⁵ This is evident in the case outlined above regarding the World Bank and the city of Cochabamba, Bolivia. Here, the city's authorities were forbidden under conditions demanded by the World Bank to use any of the refinance loans to subsidise the poor.²⁰⁶ This would seem to contradict the special protection measures as provided for in paragraph 16 regarding vulnerable groups, as well as the general non-discrimination provision.

Paragraph 16 notes the requirements of states regarding these specific vulnerable groups and the right to water.²⁰⁷ Brought in line with GC 14, the paragraph includes provision for women, children and indigenous peoples. Moreover GC 15 also includes explicit provision concerning refugees and internally displaced peoples,²⁰⁸ as a vulnerable group, which GC 14 does not. This illustrates a deficiency within GC 14, as refugees and IDPs are only provided for specifically within the clause relating to international obligations, paragraph 40, which states an obligation to provide disaster relief in times of emergency. It is evident that this gap in provision has been rectified

²⁰⁴ World Organisation for the Prevention of Torture (OMCT), 'The Realisation of the Right to Water and the liberalisation of Trade in Services: Challenges, Implications for a General Comment and Recommendations', Submission to the ICESCR Day of General Discussion on the Draft General Comment on the Right to Water, November 22nd 2002, p.5.

²⁰⁵ World Organisation for the Prevention of Torture (OMCT), 2002, p.6.

²⁰⁶ Barlow and Clarke, 2002, p.155.

²⁰⁷ See overleaf.

²⁰⁸ Hereinafter referred to as IDPs.

within GC 15, perhaps due to the nature of ‘water’ being seen as an immediate and fundamental need for the survival of refugees.

These special protection provisions are especially necessary in relation to the right to water, as it is the poor and children that are mostly burdened with water related disease. Furthermore, gender issues are raised in relation to women and girls and water related labour, including resulting educational problems and the existence of cultural values and practices related to water that discriminate against women.²⁰⁹

In particular, several vulnerable groups are given special protection under specific provisions. State parties must take steps to ensure that these groups are protected. Firstly, the rural and urban poor: It is evident that the poor have the least access to adequate water and sanitation, little finance to pay for water, poor housing and as such an increased risk of poor hygiene leading to poor health. Under paragraph 16 (c) states must ensure that the poor both in rural and urban settlements have access to properly maintained water facilities. This provision includes informal settlements and homeless people. This provision is further extended under paragraph 16(e) to cover ‘nomadic and traveller communities when stationary at both traditional and designated halting sites’. In addition, ‘Access to traditional water sources in rural areas should be protected from unlawful encroachment and pollution.’ It also notes that ‘No household should be denied the right to water on the grounds of their housing or land status.’ An example of this can be seen in Israel, where the ‘illegal status’ of dwellings is used as a reason for denying water to traditional Arab homes in Arab

²⁰⁹ Bartram. J, Representative of WHO, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th Session, November 2002, Geneva.

Bedouin villages not recognised by the Israeli Authorities.²¹⁰ As such they are denied access and connection to the mains water supply.²¹¹

In relation to women, paragraph 16(a) asserts that women should not be excluded from decision-making processes concerning water resources. This point refers to a deeper problem concerning the central role women have in both agricultural production and domestic water use. In relationship to the decision-making process, the UN Food and Agriculture Organisation hold that, ‘women account for the majority of the developing world’s farmers and as such need fair and equitable access to water, land and water management systems’.²¹² Moreover, paragraph 16(a) notes ‘the disproportionate burden women bear in the collection of water should be alleviated.’ The issue of water related labour and women is noted by Nath, ‘Women and female children spend 30-40% of their calorie intake on collecting water.’²¹³ This also effects the education of female children, as globally, 50 million primary school aged girls do not attend school as a result of collecting water and firewood or through inadequate sanitation and water provision in educational establishments.²¹⁴

²¹⁰ The Regional Council for the Palestinian Bedouin of the Unrecognised Villages, Negev, Israel, ‘The Bedouin Unrecognised villages in the Negev’ available at www.arabhra.org and the Association of Forty - The association for the recognition of the Arab Unrecognised Villages in Israel, Home page general statement, available at <http://www.assoc40.org> Last accessed 24th April 2007.

²¹¹ The Regional Council for the Palestinian Bedouin of the Unrecognised Villages, April 2007. Also, Adalah - The Legal Centre for Arab Minority Rights in Israel, ‘The Right to Water: No Access to Clean Water in the Unrecognised Villages of the Naqab’ in Land and Housing Rights – Palestinian Citizens of Israel, Report for the UN CESCR, May 2003, p.5.

²¹² Food and Agriculture Organisation of the UN, ‘Draft General Comment No 15(2002), The Right to Water (Articles 11 and 12 of the ICESCR)’ Written Contribution to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th Session, November 22nd 2002, p.2. Hereinafter referred to as the FAO.

²¹³ Nath, Day of General Discussion, November 2002. WHO also note that households spend 26% of their time fetching water and that it is women who perform this duty: ‘This work prevents women [and girls] from spending time on more productive work [...] or on education.’ WHO, The Right to Water Geneva: WHO, 2003, p.25.

²¹⁴ WHO, 2003, p.25.

Concerning children, in addition to tackling the gender problems noted above, states must ensure that, ‘Children are not prevented from enjoying their human rights due to the lack of adequate water in educational institutions and households...Provision of adequate water to educational institutions currently without adequate drinking water should be addressed as a matter of urgency.’²¹⁵ Special protection for children is essential, as children are particularly vulnerable to water disease, having less body mass than adults which means that ‘a water borne chemical may be dangerous for a child at a concentration that is relatively harmless for an adult.’²¹⁶ This provision supports the more specific, explicit protection provided for in the CRC.²¹⁷

As regards indigenous peoples, paragraph 16(d) protects their ancestral lands from ‘encroachment and unlawful pollution’, as well as providing that ‘States should provide resources for indigenous peoples to design, deliver and control their access to water.’ This provision is in keeping with the idea that the General Comment should promote community and traditional water systems that are sustainable.²¹⁸

Significantly paragraph 16 (f) details the right to water as it applies in particular to refugees and internally displaced peoples, confirming that these groups as well as asylum-seekers, should ‘have access to adequate water whether they stay in camps or in urban and rural areas [...and] should be granted the right to water on the same conditions as granted to nationals.’

²¹⁵ GC 15, paragraph 16 (b).

²¹⁶ WHO, 2003, p.26.

²¹⁷ See p.50.

²¹⁸ Kothari. M, UN Special Rapporteur on the Right to Housing, Oral Submission to Day of General Discussion on the General Comment on the Right to Water, CESCR 29th Session, November 2002, Geneva; WHO, 2003, p.27.

These special provisions regarding vulnerable groups are comprehensive and are a welcome standard that applies to those who need special protection. Furthermore, they constitute an extension in provision from previous General Comments, such as GC 14 on the right to health and GC 12 on the right to food.²¹⁹

Moreover, paragraph 16 (h) covers groups facing difficulties with physical access to water, such as victims of natural disasters and persons living in disaster-prone areas. However, it does not include protection for those who have problems accessing water due to danger from occupying forces or security measures which infringe on their access to water sources. Further provision could have been included within paragraph 16 (h) stating that states must ensure that, ‘Groups facing difficulties with physical access to water such as, “ *Those living within occupied territories and or within conflict areas, where accessing water may endanger their lives*” are provided with safe and sufficient water.’ This small inclusion would have ensured protection for one of the most vulnerable groups who lack access to clean and sufficient water.

Finally, it should be noted that paragraph 16(g) relating to prisoners and detainees, overlaps with provisions under International Humanitarian Law.²²⁰ The said paragraph refers to the ‘requirements of international humanitarian law’, thus recognising provisions for the human right to water within this area of international law.²²¹

²¹⁹ Although GC 14 and GC 12, do mention refugees it is only within the context of humanitarian aid under international obligations. See GC 14, paragraph 40 and 65 and GC 12, paragraph 38.

²²⁰ For a discussion of provisions under international humanitarian law see Chapter 3, Section 3.3, p.167.

²²¹ See forthcoming Chapters 3 and 4.

1.3. Evaluating the General Comment

Overall, at an initial reading of the General Comment it appears comprehensive and extensive in its provisions. It defines the normative content of the right in general terms,²²² establishes core obligations regarding the right,²²³ highlights special broad topics of application,²²⁴ including dealing with vulnerable groups and sets out guidelines for state parties for equitable water management and national water strategies and plans.²²⁵ However, despite these extensive accomplishments, there remain several problems and gaps within the GC 15.

Firstly, it does establish a relationship between closely related rights and the right to water, but it does not explore these relationships. It does not explicitly state that the right to water is an independent right and this is crucial in light of the confusion within current codification and its subsequent effect upon the normative content of the right.²²⁶ Secondly and consequently, it does not define the scope or core content²²⁷ of the right to water with much specificity, but rather defines the core obligations correlative to the right. Again, defining a scope and core content itself is crucial in terms of establishing definite normative content, obligations and for effective implementation of the right. Finally, it does not comprehensively encompass

²²² GC 15, paras.10-16.

²²³ GC 15, paras.17-38.

²²⁴ GC 15, paragraphs 12-16. See previous discussion p.59.

²²⁵ GC 15, paragraphs 37(f), 46 –54.

²²⁶ Although GC 15 implies the independence of the right to water, it is not explicitly stated as such. Another example of the unclear legal status can be seen in the Sub-Commission on the Promotion and Protection of Human Rights, Economic, Social and Cultural Rights, Liberalisation of trade in services and human rights - Report of the High Commissioner, E/CN.4/Sub.2/2002/9 (25/06/02), paragraph 49 where water has been expressed as an independent right, although subsequently within other paragraphs, it only refers to water as an element of the right to health, thus undermining the independent status previously noted.

²²⁷ The concept of a core approach to economic and social rights is accepted for the purposes of this study. However, the justification for a core approach in interpreting these rights has been questioned, for example in the South African Constitutional Court. For a critical examination of the background for the minimum core approach adopted by the CESCR, see Bilchitz, D, Poverty and Fundamental Rights – The Justification and Enforcement of Socio-Economic Rights, Oxford: Oxford University Press, 2007, pp.178-234.

development and environmental approaches to water but limits itself to a ‘cautious minimal legal approach’.²²⁸

Each of these problems needs to be discussed in detail in order to establish how best to address these issues.

1.4 Problems and Gaps in Provision 1: The Relationship between the Right to Water and Related Rights

Concerning the linkage with other rights, GC 15 holds that:

[...] The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) and the rights to adequate housing and adequate food (art. 11, para. 1). The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.²²⁹

This relationship between related rights and the right to water needs to be investigated and the parameters of each established to define the scope and core content of the right to water and to ensure effective implementation of the right through clarity of provisions. Part of the problem lies in the concept of an independent right to water, which is uncertain at present. This is because it is deemed an inherent part of the ICESCR Article 11, but is not overtly stated within the Article itself. Similarly, under Article 25 of the UDHR, the right to water is not listed in its own right. Gleick argues that these specific provisions however were not intended to be all inclusive, rather

²²⁸ Riedel, E., Committee Expert and Rapporteur on the Right to Water for the CESCR, Discussion, Geneva, Nov 21st 2002.

²²⁹ GC 15, paragraph 3. Footnotes in original omitted.

indicative of the ‘component elements of the right to an adequate standard of living.’²³⁰

The CESCR made a clear statement within the GC 15, that the list of rights specified under Article 11 is not intended to be exhaustive, indicated by the use of the word “including”, and that ‘The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living.’²³¹

However, to my knowledge, water is the only right under Article 11 recognised in a General Comment by the Committee, to date, which is not explicitly listed in the text of the article. Reference to water is also absent from the provisions under Article 12 on the right to the highest attainable standard of health. Consequently, as the wording ‘water’ is not explicitly stated within Article 11 or 12, a state could argue that they were not aware of the right to water or that the legal existence of the said right is questionable.

It has been suggested that the drafters of the International Bill of Rights may have believed water to be so fundamental that it did not need to be explicitly codified, being, ‘as fundamental as air’.²³² However, this lack of explicit codification may have caused not only confusion for state parties regarding the right but also reinforced a lack of focus upon the right and fulfilling obligations in relation to that right. This

²³⁰ Gleick, 1999, p.490.

²³¹ GC 15, para.3. See also Riedel, ‘Article 11 on an adequate standard of living uses the wording ‘including ...’. The words listed are not all encompassing but indicative of rights to be included [and as such include the right to water].’ Oral submission, Adoption of the General Comment on the Right to Water, CESCR 29th Session, Nov 2002, Geneva.

²³² Gleick, 1999, p.491.

could be a contributing factor to the violations of the right to water that have taken place.²³³

As a result of the lack of explicit wording within current provisions contained in international human rights instruments, the right to water is not explicitly recognised as an independent right. This results in the right to water holding a ‘unique status’ within international human rights law, as it clearly exists as a crucial element of Article 11, even though it is not explicitly worded within the provision. Despite the CESCR GC 15 on the right to water and explicit but limited wording in both the CRC and the CEDAW, water can thus be viewed as a derivative right.²³⁴ A derivative right is a right deriving from other related or ‘dependent’ rights. As regards the right to water such related or dependent rights include *inter alia* the right to health, food, housing, education and the right to life. Moreover, the right to water can be viewed as a constitutive right – that is a right which is necessary for the fulfilment of other related rights. Thus the right to water has been seen as both a constitutive element of related rights and as an element derived from these rights.

The resulting ill-defined status causes confusion as to the scope and core content of the right to water, thus raising problems concerning its justiciability and implementation. Because of the question as to the independence of the right and subsequently its normative content, it could be difficult to establish whether violations are of the right to water itself, or first and foremost violations of other related rights.

²³³ For example, see the concluding observations of the CESCR regarding the Second Periodic State Report of Israel 23/05/03, paragraph 25.

²³⁴ Gleick, 1999, pp.492-493.

Are violations of the right to water always in relation to another right or can the right to water be violated independently of these related rights? In response, as water is a crucial element of the rights provided for in Article 11 of the ICESCR, it can be argued that the right still exists in international human rights law with a ‘unique status’ - somewhere between that of a derivative / constitutive right and an independent right.

As mentioned previously, where water is explicitly stated within the CRC and CEDAW, it is only in relation to certain aspects of the right, for example, in relation to safety with regard to health. Such relationships between water and other elements of the right to an adequate standard of living and right to health, are explicitly identified within GC 15 but the nature of these relationships are not determined: ‘Water is required for a range of different purposes, besides personal and domestic uses, to realise many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health).’²³⁵

The Committee notes in paragraph 6 of GC 15 the requirement of water to realise these other related rights, but does not state that the realisation of the right to water is necessary for fulfilment of these related rights. In fact, water is mentioned in general terms only. As such, this paragraph would seem to imply that water, although required to fulfil certain other rights, is not an independent right but a constitutive / derivative

²³⁵ GC 15, paragraph 6. Original footnote omitted.

right: a necessary and inherent element of the rights to health and housing, but not a fully developed autonomous right.²³⁶

If water is seen as derived from the right to health, housing and food, then only certain aspects of the right to water will be protected and implemented. Existing substantive rights offer only a narrow scope of protection for individuals suffering from water pollution or deprivation of sufficient clean water. Under the current human rights regime, such situations or actions cannot by themselves constitute a violation of the right to water in itself, but need to be linked to other rights. This could leave human rights bodies ‘on the shaky ground of creatively extending rights’.²³⁷ However, this view of the right to water as a derivative right reflected within paragraph 6 would seem to contradict the position taken by the CESCR in drafting and adopting the GC 15 in the first place. Because there is a General Comment on the right to water, it is presumed that it constitutes an independent human right. Furthermore, the Committee have consistently addressed the enjoyment of the right to water when considering states parties reports.²³⁸

In sum, according to Article 11 and the GC 15, the right to water is seen as a guarantee necessary for an adequate standard of living and as inextricably linked to

²³⁶ Although, this represents a progression from the original draft text that reflected solely upon the dependency of the right to water upon other related rights contained in *inter alia* Article 11 and Article 12: ‘Enjoyment of the right to drinking [sic] water is dependent upon the realisation of other human rights, particularly to the rights to housing, health, work, social security and education ...’, CESCR, Draft GC No.15, 2002, Paragraph 6.

²³⁷ Eaton, J, ‘The Nigerian Tragedy’, in Boston University International Law Journal, Vol.15, 1997, pp.261-307 at p.296. Eaton discusses this in relation to environmental rights.

²³⁸ GC 15,para.5. For examples see CESCR Second Periodic State Report of New Zealand E/1990/6/Add.33, p417-418; CESCR Concluding Observations on Second Periodic State Report of New Zealand E/1990/6/Add.33, 23/05/2003, paragraph 9; CESCR Summary Record of the 34th Meeting of Poland and CESCR, 19/11/02, paragraph 58 and CESCR Concluding Observations regarding Second Periodic State Report of Israel,23/05/03, paragraph 25.

food, housing and health. However, the GC 15 does not explicitly determine the independence of the right to water as an autonomous right, but rather implies its independence²³⁹ and does not detail the nature of the links between related rights. Nevertheless, the relationship of the right to water to certain other civil and political rights such as the right to life has been indicated.²⁴⁰ Despite this and even though GC 15 does represent legal standards under the authority of the CESCR, the status of the right to water would seem to be contradictory both within the document itself and within international human rights law in general. This results in the right to water being of ‘unique status’ – in a situation between a constitutive / derivative right and an independent right, a status that requires clarification.

In the search for clarity regarding the content of the right, the relationship between the rights contained within Article 11 and Article 12 need to be examined in turn. The purpose of which is to determine where those rights end and begin and where the right to water ends and begins and to establish the nature of the overlap. I will focus my examination upon those rights directly dependent on water, in particular the rights to health and food, and the right to life. I will also briefly discuss other related rights of housing, education and development.

(i) The Right to Health

The right to health may be viewed as the most obvious already codified right with an inextricable link to the right to water, despite the fact that Article 12 of the Covenant does not explicitly refer to water. Toebes notes in her work on the right to health that

²³⁹ GC 15, paras.3, 4 and 5.

²⁴⁰ GC 15, para.3.

water is included within the core content of the right to health and it is obvious that clean and sufficient water is an essential prerequisite for health.²⁴¹ Dr Bartram argues:

The right to water is inextricably linked to the right to the “highest attainable standard of health”, [as] ‘lack of access to safe water limits the effective achievement of the right to health. There are 3.4 million deaths per year related to water disease and water diseases are in the top ten risk factors for death. The biggest problem is that of drinking water; 1.1 billion (UNICEF/WHO figures) people lack access to a protected source of clean water. The numbers who lack access in their homes is even higher [...]The right to water is also related to the right to a clean environment, work, culture and food but has a profound link to health.’²⁴²

It is therefore clear that the right to health cannot be guaranteed without accessible, affordable, adequate and safe water. This is recognised in General Comment 14 The highest attainable standard of health,²⁴³ where the need for available, accessible and safe drinking water is reiterated in several paragraphs,²⁴⁴ including within the obligations set out for state parties, both as an obligation to fulfil,²⁴⁵ as a core obligation²⁴⁶ and as an aspect of international obligations.²⁴⁷

²⁴¹ Toebes, B, The Right to Health as a Human Right in International Law, London: Hart/Intersentia, 1999, p.284.

²⁴² Bartram, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, Nov 2002.

²⁴³ CESCR, GC 14, 11/08/2000.

²⁴⁴ See GC 14, para.12(a), 12(b), 12(d) and 15.

²⁴⁵ GC 14, para.36.

²⁴⁶ GC 14, para.43(c).

²⁴⁷ GC 14, para.40.

Furthermore, the inclusion of the concepts of accessibility and quality (safety) are notable as they are aspects common to both General Comment 14 and 15 and as such, the format used in GC 14 can be seen as very influential on the drafting of GC 15 on the right to water.

Despite these comprehensive provisions, GC 14 does not explicitly note that water constitutes an independent human right and water remains conceived of as a constitutive and derivative element of the right to health alone. It is also notable that it refers to 'drinking water', which can be interpreted as limiting the provisions to water for human consumption and not water for other domestic uses such as food preparation and personal hygiene. However, GC 14 was instrumental in both indicating a format for the forthcoming General Comment on the right to water and in raising the profile and highlighting the importance of water as fundamental to the realisation of related economic and social rights.

Evidently, the enjoyment of the right to health is dependent upon realisation of elements of the right to water. However, the right to water can be realised alone, leaving other elements of the right to health lacking. For example, one can have safe, sufficient and accessible water but suffer poor health as a result of poor nutritional intake or a poor environment. As such violations of the right to health can take place independently of violations of the right to water. Thus, the right to water must constitute an independent right.

It is also true that violations of the right to water can take place independently of violations of the right to health,²⁴⁸ although more often than not there is a ‘consequential effect’, an interdependence. For instance, if water is unclean it violates the safety aspect of the right to water, which, may also lead to water carried disease resulting in a violation of the right to health. Thus although the two rights are inextricably linked, they can both be deemed independent rights. Consequently the right to water should not only be viewed as a derivative right arising from the right to health, but as constituting a separate independent right which can be violated together with or separately from the right to health.

(ii) The Right to Food

Water has also been seen as an integral part of the right to food, both as a requirement for food production and as food in itself. The UN FAO used World Food Day 2002²⁴⁹ to highlight the importance of water for food production by focusing on the theme ‘Water: source of food security’.²⁵⁰ Water has even been conceived of as ‘liquid food’.²⁵¹ Jean Ziegler, UN Special Rapporteur on the Right to Food, stated that water should be viewed in this way for the purposes of drafting the General Comment and raised concerns that access to safe and sufficient water was only covered by the General Comment in relation to domestic use.²⁵² He argued that there was a need to address access to irrigation water, as this is essential to fulfil the right to food

²⁴⁸ For example, accessibility to water may be difficult and discriminatory but the individual’s health may not be affected.

²⁴⁹ 16th Oct 2002.

²⁵⁰ FAO, Written contribution to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th Session, November 22nd 2002.

²⁵¹ Ziegler, J, UN Special Rapporteur on the Right to Food, Day of General Discussion on the General Comment on the Right to Water, CESCR 29th Session, November 2002, Geneva.

²⁵² Ziegler, November 2002 (Ziegler was referring to the initial draft GC, where the term used was ‘drinking water’ limiting the right to water for that purpose alone).

production.²⁵³ El –Hadj Guisse, Special Rapporteur on the Right to Water for the Sub-Commission on Human Rights, also noted that, ‘One of the greatest challenges to come is the increase in food demand and therefore the need for water becomes even more pressing. For example, to grow 1 kg of wheat requires 1,400 litres of water.’²⁵⁴ The above two points highlight the differing demands for water, which can result in conflicting priorities of water use. As a consequence defining the scope and core content of the human right to water in relation to food is extremely difficult. GC 15 deals with this issue in paragraph 7, ‘Water and Covenant rights’ which states:

The Committee notes the importance of ensuring sustainable access to water resources for agriculture to realise the right to adequate food (see General Comment No.12 (1999). Attention should be given to ensuring that disadvantaged and marginalised farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology. Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not “be deprived of its means of subsistence”, States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.²⁵⁵

It is clear that water for agriculture and food production is crucial and should not be excluded from GC 15. However, it is also evident that the majority of concerns and violations relating to this issue could be raised under the right to food primarily and not the right to water. As such, the right to water relating to water for irrigation and

²⁵³ Ziegler, November 2002.

²⁵⁴ El –Hadj Guisse –Special Rapporteur on the Right to Water for the Sub-Commission on Human Rights, Day of General Discussion on the General Comment on the Right to Water, CESCR 29th Session, November 2002, Geneva.

²⁵⁵ Original footnotes omitted.

agriculture other than that for essential foodstuffs, should be seen as a part of the scope of the right to water but not part of its core content.²⁵⁶

Conversely, the right to water within agrarian societies may require special consideration and result in an exception to this interpretation of the scope and core content.²⁵⁷ The FAO argue, ‘The role of water for traditional livelihoods and the specific situation of pastoralists and people in societies where livestock is of overarching importance should be considered as a separate issue. In these contexts a sharp differentiation and different prioritisation of water for human consumption and of water for food production does not reflect the peculiarities of pastoral systems.’²⁵⁸

As Alvarez notes,²⁵⁹ codification of the right to water within the CRC makes a distinction between water and food. This lends support to the argument that the right to water, although previously conceived of as an integral part of food, (one would presume because it is consumed for survival in the same manner as food) should be recognised separately to the right to food. This would allow optimum realisation and effective implementation of both rights.²⁶⁰

(iii) The Right to Life

²⁵⁶ For further details regarding the core content see forthcoming Section 1.5 at p.85.

²⁵⁷ See discussion on pp.90-91.

²⁵⁸ FAO, 2002, p.3.

²⁵⁹ Alvarez, 2003, p.6.

²⁶⁰ Furthermore, Alvarez notes that the UN Standard Minimum Rules for the Treatment of Prisoners 1955, Article 20 ‘Food’, has two separate paragraphs; Paragraph (1) on Food and (2) which deals specifically with water. ‘It is interesting to note that although the right to drinking water is located under the title of food, it is construed in a paragraph different to that dealing with the right to food. This could be another manifestation of the fact that it is not quite clear whether the right to water is comprised in the right to food, part of the right to health or a right by itself.’ See Alvarez, 2003, p.6.

Significantly, the right to water can be seen as an integral part of the right to life, as contained in Article 6 of the ICCPR 1966. The right to life is widely recognised as being the most fundamental human right.²⁶¹ As such, the scope and content of the right has been the subject of intense debate and these discussions as to the nature of the substantive content of this right are well documented.²⁶² In response, the UN Human Rights Committee in their General Comment 6 on Article 6 the Right to life,²⁶³ argue that the ‘right to life has been too often narrowly interpreted’ and state that the right to life should be interpreted widely to include threats to health and actions to ‘reduce infant mortality and increase life expectancy especially in adopting measures to eliminate malnutrition and epidemics.’²⁶⁴

Although water is not explicitly noted, measures to reduce infant mortality and eliminate malnutrition must include provision of access to safe and sufficient water supply. Importantly, the inclusion of water as an element of the right to life allows for the inclusion of the right to water as related to a civil and political right under the ICCPR 1966 and the relevant mechanisms for complaints.

However, there is still opposition to this interpretation of the right to life. Dinstein argues, ‘The human right to life per se is a civil right and does not guarantee any

²⁶¹ Under international law the right to life is enshrined within the UDHR 1948 and the 1966 Covenants. As such it has been seen as the supreme right, which constitutes customary international law. See Tomuschat, C, Human Rights – Between Idealism and Realism Oxford: OUP, 2003, p.35; McGoldrick, D, The Human Rights Committee – Its Role in the development of the International Covenant on Civil and Political Rights Oxford: Clarendon Press (1991), para 1.36, p.21; Y. Dinstein, in L. Henkin, 1981, pp.114-137. However, it can be argued that only certain aspects of the right to life fall within the scope of *jus cogens* and *erga omnes*, as taking of life may be lawful in certain circumstances, for example during combat in an armed conflict. See Tomuschat, C, 2003, p.35.

²⁶² For example, *inter alia* see Tomuschat, 2003; McGoldrick 1991; Joseph, S, Schultz, J and Castan, M; The International Covenant on Civil and Political Rights – Cases, Materials and Commentary Oxford: OUP, 2000, Chapter 8 -The Right to Life Article 6, pp.109-138.

²⁶³ UN Human Rights Committee (hereinafter referred to as HRC), (CCPR), GC No.6. 30/04/82. (Sixteenth session, 1982) The right to life (Art.6).

²⁶⁴ HRC, GC 6, paragraph 5. Also see Alvarez, 2003, p.4.

person against death from famine or cold or lack of medical attention.²⁶⁵ In contrast, it could be argued that such a narrow interpretation of the right to life results in the provision being vacuous. Article 6 (1) protects the individual against the ‘arbitrary deprivation of life’²⁶⁶ and as such not only gives protection against any active taking of life but also ensues a duty upon states to ensure access to the means of survival,²⁶⁷ i.e. food, water and other basic needs.

Even if one does not agree with the broad interpretation of the HRC,²⁶⁸ it cannot be denied that life cannot be realised without sufficient water for survival. As Scanlon et al note, the right to life must ‘nevertheless require the inclusion of the protection against arbitrary and intentional denial of access to sufficient water because this is one of the most fundamental resources necessary to sustain life.’²⁶⁹ If water is needed to sustain life, then surely it follows that the right to water is an element of the right to life. However, this does not mean that the right to life is an element of the right of water. If this were to be the case, we would be overlapping the boundaries and elements of these individual rights so much, as to make their normative content confusing and dilute their meaning as independent rights. Water is an element of the right to life and a case could be brought under the right to life, claiming violations of the right to water, which, subsequently resulted in a violation of the right to life. However, even if water is viewed as an independent right, it is unlikely that a case would be brought under the right to water, as due to the fundamental nature of the right

²⁶⁵ Dinstein in McCaffrey, S.C., ‘A Human Right to Water: Domestic and International Implications’ in Georgetown International Environmental Law Review, Vol V, Issue 1, 1992, pp.1-24 at p.9.

²⁶⁶ ICCPR, Article 6 (1).

²⁶⁷ Trindade in McCaffrey, 1992, p.10.

²⁶⁸ Joseph et al, point out that despite the acceptance of this socio-economic element of the right to life by the HRC, no breach of these positive elements has yet been found in Optional Protocol cases (2000, p.137). However, in contrast, in the HRC’s consideration of State reports, members have considered what positive measures have been adopted dealing with this socio-economic element, for example, measures to reduce maternal and infant mortality. See McGoldrick, 1991, p.329.

²⁶⁹ Scanlon et al, 2003, p.5.

to life it would take primacy. Hence, the right to water and the right to life are related but not in an equal reciprocal relationship. The right to water for survival must then be included in the core content of the right to water, as it is fundamental to life. If the theory of Toebes²⁷⁰ is followed, then the right to life must be excluded from both the scope and core of the right to water, as it is an explicit right protected in its own provision within the ICCPR.

Significantly, as the right to life is enshrined within the ICCPR rather than the ICESCR this could have implications for the justiciability of the right to water at the international level, due to the individual complaints procedures under the HRC:²⁷¹ The advantage of this being that a case of violations of the right to water could be brought to petition under the right to life article, through the individual complaints mechanism of the HRC. This is currently not possible under the ICESCR and the CESCR. As such, this relationship between the right to life and the right to water could prove useful in terms of implementing the right until a formal individual complaints procedure is introduced under CESCR by way of the Optional Protocol.²⁷² Moreover, the right to life is enshrined in constitutional and national laws and as such cases concerning the right to water can be brought under such provisions. For

²⁷⁰ Toebes argues that elements of the right to health not contained within the explicit treaty provision for health i.e. Article 12, do not belong to the scope of the right, as they are protected under other related rights (1999, p.259, p.284). If we follow this same line of thinking regarding the right to water, then any element not included within Article 11 or 12 must be excluded, such as the right to life. However, this theory raises a further complication, as there is no explicit treaty provision for the right to water per se. As such, this theory would surmise that the right to water itself is not a part of the scope or core content of the right to an adequate standard of living, Article 11 or Article 12 right to health.

²⁷¹ See Alvarez, 2003, p.9.

²⁷² The Human Rights Council adopted Resolution 2006/3 in June 2006, extending the mandate for the established Working Group to draft such an Optional Protocol for the ICESCR. See further discussion in Chapter 5, p.331.

example, in India cases have been brought concerning pollution of water under right to life provisions contained in Article 21 of the Indian Constitution.²⁷³

Alvarez argues that the differing relations between related rights and the right to water could also have an effect upon the obligations correlative to the right to water.²⁷⁴ He believes that the obligations are unclear and are different depending upon whether the right is seen as an element of the right to health and food or the right to life or as an independent right.²⁷⁵ 'The principal importance of the distinction on whether the right to water is part of the right to life or of the right to health or the right to food is, the difference resulting to states obligations related to this right, and therefore, the different methods enforcing it.'²⁷⁶

Alvarez asserts that, if the right to water is interpreted as an element of the right to life and is therefore provided for by Article 6 of the ICCPR, the obligations are immediate. However, if the right to water is viewed as an element of the right to food or health or even an independent right, it is therefore provided for under Article 11 and 12 of the ICESCR and as such the obligations are not immediate but subject to Article 2 which provides for 'progressive realisation'. The conclusion being that the 'differing approaches to state obligations under the two Covenants seem odd... [and that] it seems questionable whether all of the rights under the ICESCR are appropriate

²⁷³ See COHRE, 2003, pp.115-117. Also regarding violations of the right to water in India see FIAN International (Food First Information and Action Network), Identifying and Addressing Violations of the Human Right to Water Applying the Human Rights Approach, Brot für die Welt: Stuttgart, 2005, pp.10-11. For further discussion of national and constitutional law and the right to water see Chapter 5, p.336.

²⁷⁴ Alvarez, 2003, p.7. It can also be argued that this could have an effect upon the scope and core content of the right.

²⁷⁵ Alvarez, 2003, p.7.

²⁷⁶ Alvarez, 2003, p.2.

for progressive implementation, as certain rights under the Covenant are fundamental, such as the right to food and water'.²⁷⁷ Alvarez then continues to suggest that the obligations for governments regarding those 'fundamental' economic and social rights 'approach the level of obligations under the ICCPR. For these reasons, it could be affirmed that water is a basic human right that states have the immediate obligation to promote, protect and to fulfil.'²⁷⁸

This argument would seem to imply to two-tier level of rights, with civil and political rights as first level rights and economic and social rights secondary rights, with secondary obligations. This is an outdated conception of rights and correlative obligations that the majority of the human rights community has moved well beyond. Alvarez does not take into account the substantial work of the CESCR, Special Rapporteurs and NGOs. These bodies have not only interpreted Article 2 of the ICESCR clearly but have also defined the concept of 'core obligations' that must be met immediately, regardless of the level of development and using all available resources.²⁷⁹ In addition, the General Comments relating to individual substantive rights, such as GC 12, GC 14 and GC 15, all define and clarify core obligations that must be met immediately. Alvarez's interpretation does not take the violations approach into account either, as the immediacy of some of the obligations related to the right to water becomes clear through such an approach.

²⁷⁷ Alvarez, 2003, p.8; McCaffrey, 1992, p.13.

²⁷⁸ Alvarez, 2003, p.8; McCaffrey, 1992, p.15.

²⁷⁹ See CESCR General Comment.3, 14/12/90, para.10.

It is evident that clear guidelines and standards exist detailing the nature of obligations regarding economic and social rights, as well as for many individual substantive rights and that these core obligations are just as binding, immediate and of the equivalent level to those under the ICCPR. Whilst it is true that obligations concerning the right to water can be interpreted as different depending on which right you see them as deriving from, this is only the case if the right to water is not viewed as being an independent right with correlative obligations.²⁸⁰ This illustrates the need for clarification of the right to water in terms of legal status and the scope and core content.

(iv) Other related rights: Housing, Education, Healthy Environment and Development.

Finally, it should be noted that the right to water is relevant for the enjoyment of several other related rights, including the rights to housing, education, a healthy environment and development. The right to water as connected with the right to housing is well documented.²⁸¹ The Committee in their General Comment 4 The right to adequate housing, note that the right to adequate housing can not be interpreted as merely shelter over one's head but must be understood comprehensively; 'the right to live somewhere in security, peace and dignity'.²⁸² This must include access to services, materials, facilities and infrastructure:

²⁸⁰ For a detailed discussion of the obligations correlative to the right to water see Chapter 2, Section 2.4, p.129.

²⁸¹ For example see CESCR GC 4 The Right to Adequate Housing, 13/12/91; GC 15, El Hadji Guisse, Special Rapporteur on the Right to Water for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Realisation of Economic Social and Cultural Rights. The right of access of everyone to drinking water supply and sanitation services, Working Paper, E/CN.4/Sub.2/1998/7 10 June 1998, para 22 and generally the work of the Centre on Housing Rights and Evictions, Geneva, including their right to water programme, at www.cohre.org

²⁸² CESCR GC 4 ,para.7.

An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.²⁸³

This link between the right to housing and right to water is reiterated within GC 15, highlighting the inextricable nature of the link²⁸⁴ and further noting the importance of housing status affecting water access for vulnerable groups²⁸⁵ and in relation to sanitation.²⁸⁶ Moreover, the Special Rapporteur on the Right to Housing, Miloon Kothari, has elaborated on the linkage between violations of the right to housing and violations of the right to water.²⁸⁷ Evidently, violations of the right to housing can result in violations of the right to water and vice versa, as water supply/connections and the home are often interdependent.

The right to education is also affected by and affects the right to water. As El –Hadj Guisse noted in his speech; ‘The right to education is [also] affected, especially in developing countries. Water collection by girls and women leads to a lack of

²⁸³ CESCR General Comment 4, para.8(b).

²⁸⁴ GC 15, para.3.

²⁸⁵ GC 15, para.16(c).

²⁸⁶ GC 15, para.29.

²⁸⁷ Kothari. M, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, E/CN.4/2003/5 3 March 2003, paras.39-46. See also other annual reports of the Special Rapporteur on Housing, E/CN.4/2001/51, 25 January 2001, para.62; E/CN.4/2006/41, 14 March 2006; E/CN.4/2005/48, 3 March 2005 and Report of visit to the Occupied Palestinian Territories, 5-10th Jan 2002, E/CN.4/2003/5/Add.1, 10th June 2002, para. 65-73 detailing violations of the right to water.

schooling and more boys in school than girls.’²⁸⁸ It is also true that girls cannot and will not attend schools if there is not adequate sanitation provision and many women are forced to wait until after dark to defecate as cultural practices deem their sanitary practices to be forbidden when at risk of being seen. This subjects women to danger of attack and rape, as well as contributing to health problems.²⁸⁹ It is therefore clear that the right to education is closely related to the right to water. Violations relating to lack of or disrupted education due to poor sanitation facilities and /or collection of water could be covered in the most part by the principle of accessibility, within the core content of the right to water and under the provisions for non-discrimination, as noted within the section on vulnerable groups. One key concern raised here, is that certain potential violations of the right to education and water are due to the relationship between water for drinking and domestic use but also sanitation. As will be discussed later²⁹⁰ it is in the field of sanitation that the substantive provisions of the General Comment are lacking.

Lastly, the important role of development and environmental approaches to water in the evolution of a legal human right to water has been noted previously²⁹¹ and it is evident that the human rights to a healthy environment and to development are closely

²⁸⁸ Guisse, UN Special Rapporteur on the Right to Water for the Sub-Commission on Human Rights, Oral submission to the Day of General Discussion, UN CESCR 29th Session, Nov 2002, Geneva; Kothari, Oral submission, Day of General Discussion on the General Comment on the Right to Water, Nov 2002. It can be concluded that inadequacy of drinking water infrastructure ‘is an obstacle to the eradication of illiteracy’ and to the enjoyment of the right to education at elementary level. See El Hadji Guisse, Special Rapporteur on the Right to Water for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Realisation of Economic Social and Cultural Rights, ‘The right of access of everyone to drinking water supply and sanitation services’, Working Paper, E/CN.4/Sub.2/1998/7 10 June 1998, paragraph 23.

²⁸⁹ Langford. M, Coordinator of the Right to Water Programme at the Centre on Housing Rights and Evictions (hereinafter known as COHRE), Oral Submission at the Day of General Discussion on the General Comment on the Right to Water, UN CESCR 29th Session, November 2002, Geneva; WHO, 2003, p.25.

²⁹⁰ See p.91.

²⁹¹ See Introduction, Section 3 (ii), p.22.

related to the right to water. The relationship between these rights is one of consequential effect. For example, agricultural practices could result in pesticides or other toxic substances polluting the environment and subsequently getting into the water. Thus the right to a healthy environment and the right to water have been violated. If there then follows a situation where there is unequal access to any clean, unpolluted water, subsequent health problems could arise, resulting in unequal access to development. Thus the right to development is also violated.²⁹² These issues are partly addressed through GC 15 section on non-discrimination.²⁹³ However, the relationship between the environment and the right to water needs to be examined in more detail, if we are to establish whether environmental concerns such as sustainability of water resources should be an element of the human right to water as contained within the core content of the right or within the scope alone.²⁹⁴

In sum, water as necessary for survival will effect the enjoyment of many human rights, but some rights are more clearly related being effected to a lesser or greater degree by the enjoyment of the right.

1.5 Problems and Gaps in Provision 2: Defining the Scope and Core Content of the Right to Water

As has been ascertained, despite comprehensive guidelines within GC 15 regarding the normative content of the right to water, the General Comment does not attempt to define which elements of the normative content of the right to water are core, i.e.

²⁹² A similar scenario was also put forward by El –Hadj Guisse, Oral Submission to the Day of General Discussion on the Right to Water, Nov 2002.

²⁹³ See GC 15, paragraph 16.

²⁹⁴ See forthcoming discussion p.95.

those that are essential elements of the right and which elements are part of the wider scope of the right but not as essential.²⁹⁵

(i) Core content of the right

The difficulty with defining the core content of the right to water was raised by Chapman. The difficulty arises from a conflict between elements of the right, which leads to conflicting claims for water as a priority. Chapman held that GC 15 should address this and interestingly argued that the core obligations mechanism could address this issue.²⁹⁶ In Chapman's view then, core obligations would have a direct correlation with the core content of the right to water. The GC does note the core minimum obligations correlative to the right to water, but are these necessarily the same as the core content of the right?²⁹⁷ In theory, the core elements of a right should have directly correlative core obligations. Otherwise this may signify a gap in the provisions of the right. Hence, if we study the core obligations, which are defined within the General Comment,²⁹⁸ we should then be able to identify the core content of the right. This exercise should also indicate any gaps in provision within the guidelines of GC 15.

Ms. Franco of Food First Information and Action Network International, also noted,

'The core content of the right [to water] is not defined in the General Comment. This

²⁹⁵ See Toebes, 1999, Chapter V for a discussion of the concepts of a scope and core element of a human right, pp.243-289.

²⁹⁶ Chapman. A, Representative of the American Association for the Advancement of Science, Oral submission, Day of General Discussion on the General Comment on the Right to Water, UN CESCR 29th Session, Nov 2002, Geneva.

²⁹⁷ It would seem that at times the Committee has discussed one term and in other instances the other. For example in GC 12 on the Right to Food, para. 8, the term and concept used is 'core content', whereas in GC 14 on the Right to Health, para. 43, the term and concept employed is 'core obligations' and there is no explicit mention of a 'core content' within the document.

²⁹⁸ See Chapter 2, Section 2.4 (vi), p.143.

needs to be addressed as in the General Comment on the right to food'.²⁹⁹ Similarly, GC 14 The right to the highest attainable standard of health only mentions the concept of core and scope under 'core obligations' and makes no reference to the core and scope of the right itself. This model has been continued with GC 15. This point was reiterated in the FIAN written submission to the Committee, which argued, 'Within General Comment¹² the Committee introduced the concept of the core content. In the original draft GC 15 on the 'Right to Drinking Water' [sic], the concept of the core content is not fully applied.'³⁰⁰ For example, FIAN notes that within Paragraph 8 of the original draft, the minimum essential level of water is defined as 20 litres whereas in paragraphs 28 and 29 the level is defined as 'water indispensable for the prevention of dehydration and disease.' FIAN's view was that another paragraph should be added defining the core content of the right to drinking water and following the structure of previous General Comments. In the final draft the core content is still not defined in such terms but the minimum essential level is identified within GC 15 paragraph 12 (a) thus:

The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene. The quantity of water available for each person should correspond to World Health Organization (WHO) guidelines. Some individuals and groups may also require additional water due to health, climate, and work conditions.³⁰¹

²⁹⁹ Franco. M, Food First Information and Action Network (Hereinafter referred to as FIAN), Oral submission, Day of General Discussion on the Right to Water, UN CESCR 29th Session, November 2002, Geneva.

³⁰⁰ FIAN, Written Submission to the Day of General Discussion on the General Comment on the Right to Water, UN CESCR 29th Session, November 22nd 2002, Geneva, p.2.

³⁰¹ GC 15, paragraph 12 (a) Availability. See also p. 54. Original footnotes omitted.

We can assume then, that water for personal and domestic uses must be an element of the core content of the right to water. In addition GC 15 paragraph 6 states:

Water is required for a range of different purposes, besides personal and domestic uses, to realise many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, **priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease**, as well as water required to meet the core obligations of each of the Covenant rights.³⁰²

This clearly states that priority of water uses should go to water for survival and basic needs.³⁰³ This concept of 'survival water' is also evident within international humanitarian law,³⁰⁴ where the term 'sufficient water' is used in the main.³⁰⁵ This would seem to support the role of water as an element of the right to life. Thus, the core content of the right would certainly include water for survival as a bare

³⁰² Original footnote omitted. Paragraph 6, my emphasis.

³⁰³ Chapman also concluded that 'water for survival has to take precedence over production of food for non-essential foodstuffs' (Oral Submission to the CESCR Day of General Discussion, 2002). See also McCaffrey in Gleick, 1999, p.489.

³⁰⁴ See further details of provisions under international humanitarian law see Chapter 3, Section 3.3, p.167.

³⁰⁵ Although it should be noted that certain provisions within international humanitarian law state that sufficient water must consist of water required to maintain good health. For example, Geneva Convention (III) relative to the Treatment of Prisoners of War, 1949, Article 46: 'The Detaining Power shall supply prisoners of war during transfer with sufficient food and drinking water to keep them in good health...'. However, during high intensity conflict water resources are often scarce or under limitation. As such, water for survival must take priority.

minimum, even during times of conflict. However, would a core content based upon a ‘survival’ model necessarily include sufficient water to keep one healthy, for example, free from mild dehydration? It can be argued that this would require more than just water for survival, rather a ‘basic needs’ model. Gleick argues that studies of human needs of water and development research regarding sustainability have led to the conclusion that ‘a human right to water should only apply to basic needs for drinking, cooking and fundamental domestic uses.’³⁰⁶ This would result in the core content of the right being based upon a basic needs model rather than a very limited ‘survival’ model.

Conversely, Dr Bartram argues that water for household use and work are interdependent and that as such it is not possible to prioritise water uses such as drinking water, rather only conclude that the right to water encompasses water necessary for survival and dignity.³⁰⁷ If the core content of the right to water is as Bartram envisages, it could be conceptualised thus: If we take the water necessary for survival and multiply this very basic provision by the three principles of quality, quantity and accessibility, we have water for basic needs. i.e. water that ensures survival with an acceptable level of health, through quantity and safety but also maintains human personal dignity through meeting hygiene needs, independence and equal access.³⁰⁸

³⁰⁶ Gleick, 1999, p.8.

³⁰⁷ Bartram, Oral Submission to the Day of General Discussion on the Right to Water, Nov 2002.

³⁰⁸ See Fig.1.1

***SURVIVAL WATER x the 3 principles of QUALITY, QUANTITY AND
ACCESSIBILITY = BASIC NEEDS WATER MODEL***

Fig.1.1³⁰⁹

Younis raises the question as to whether the division of water into these categories is useful for clarifying the human right to water; ‘Water is a natural resource. Do we say the right to water means water for drinking and sanitation only or water for other uses? The General Comment may devise the issue where as it was something seen as indivisible before.’³¹⁰ By attempting to identify the scope and core of the right are we prioritising water uses when in practical terms it cannot be done so? It is true, for example that if there is no water for growing essential foodstuffs this will lead to food shortages and thus the right to food will be violated and people will suffer from malnutrition and in the worst cases, starve. However, without water for drinking, death would be even more imminent. Therefore, surely the right to water for survival must take precedence.³¹¹ As Riedel states, ‘Survival rights are core elements and these will take precedence.’³¹² However, it is disappointing that this clear statement was not enshrined within the GC 15 by outlining the core elements of the right within a categorical framework of the scope and core content. The purpose of identifying a core and further scope of a right is to identify which elements of the right are most

³⁰⁹ This ‘basic needs’ model for water serves as a minimum standard for the right to water and does not imply that the right to water is merely a need, rather like any other human right it is an entitlement.

³¹⁰ Younis, Representative of the World Bank, Oral Submission, Day of General Discussion on the General Comment on the Right to Water, CESCR 29th Session, Nov 2002, Geneva.

³¹¹ It is important to also to note that the former scenario results in a violation of the right to food primarily and water secondly. Again then, this illustrates that the right to water should address elements where it is the right to water that would be violated primarily and not those already protected under other related rights.

³¹² Riedel, E, Committee Expert and Rapporteur on the Right to Water for the Committee on Economic, Social and Cultural Rights, Statement on Day of General Discussion on the General Comment on the Right to Water, CESCR 29th Session, November 2002, Geneva.

essential. These therefore can then be translated in core obligations for state parties. As such, water for survival and dignity, in other words, basic needs, is evidently the most essential primary element of the core content of the right to water.

(ii) Scope of the right

The scope of the right should include all elements of the right, which are not considered core, as well as the core content itself. This by no means implies that the wider scope is not important and should not be realised by state parties, but rather that it is of a lesser priority in realisation than the core elements. As argued previously, if core obligations and the core content are directly correlative, there should be no element included in the wider scope alone that is provided for under core obligations, as these elements should be a part of the core content. Neither should elements be included which, are more easily derived from and justiciable under any other related economic and social right.³¹³ In the case of the right to water, establishing priorities for water use is difficult, especially in areas of water scarcity. However, it is essential if we are to determine a *de facto* right to water. The varying priorities of water use have been analysed in order to determine the core elements of the right to water. Similarly the same must be done with the overall scope of the right in mind. These elements, together, constitute the substantive content of the right. Issues that arise concerning the scope of the right to water include water for agriculture and food production, sanitation, water for industry, equitable and fair water management and sustainability with regard to the environment.

³¹³ See Toebes, 1999, p.259 and p.284.

Langford questioned whether the right to water should be extended beyond household uses to include water for food production and cultural uses.³¹⁴ He gave the example of Ethiopia where water is essential for livestock and farming crops. Lack of water has led to famine as 80% of water use is for agriculture. As such there is competing uses for scarce water. This point was also raised by the FAO, who also argued that the content of the right to water for agriculture be further clarified, especially accounting for increasing water scarcity.³¹⁵ In the opinion of the FAO ‘Without sufficient water for food production, food security cannot be achieved.’³¹⁶ However, they also note that water is a limited resource. As such, ‘The sheer volume of water needed for agriculture may necessitate more limitations on its use than for drinking water, which in the FAO’s opinion, should not be compromised by other uses.’³¹⁷

Evidently, water for agriculture is very important but if seen as an element within the core, it could be to the detriment of survival or basic needs water. As such it should be advocated that water for agriculture (except for in special cases of an agrarian society, where water for agriculture would be within the core of the right to water)³¹⁸ is an element within the scope of the right to water. This should also be in line with the framework of overlapping rights, as it is a core element of the right to food.

³¹⁴ Langford, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, Nov 2002. Texier, Member of the CESCR for France also argued that water for agriculture as it relates to Article 11 (2) a, the right to food and irrigation should be included in the scope of the right to water (Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, Nov 2002).

³¹⁵ Food and Agriculture Organisation of the UN (FAO), ‘Draft General Comment No 15(2002), The Right to Water (Articles 11 and 12 of the ICESCR)’. Contribution to the UN CESCR Day of General Discussion on the Draft General Comment on the Right to Water. November 22nd 2002, p.2.

³¹⁶ FAO, November 22nd 2002, p.2.

³¹⁷ FAO, November 22nd 2002, p.2.

³¹⁸ See GC 15, para. 7, regarding water for agriculture.

In addition to water for agriculture, the issue of sanitation was widely discussed and deliberated at the Day of General Discussion on GC 15. Questions were raised whether sanitation should be included within the scope of the GC 15, and whether it should actually comprise an element within the core of the right. One Member of the Committee, Mr Texier, noted that there was a ‘need to extend the scope of the GC to include definitely sanitation [...] Therefore the scope of the right to water should be broader than that in the draft GC.’³¹⁹ Chapman also held that:

The GC should be broadened to encompass the right to water including water for cooking, washing and sanitation. The current draft³²⁰ does not address sanitation adequately. Safety is part of the normative content of the right to water but safety is not possible without sanitation. There is a need to broaden the scope of the right to water and broaden the core of the right to water. Health, agriculture and fishing should be within the broader scope but then the GC 15 should address the core elements in more detail.³²¹

The question raised is whether provision of adequate sanitation can be separated from realisation of the right to water? Practically, is it possible to have a clean and safe water supply without adequate sanitation? Bartram, convincingly argues that, ‘WSSD 2002 millennium development target is to halve the number of people who do not have access to sanitation. Sanitation is a prerequisite to clean drinking water and you

³¹⁹ Texier, Member of the CESCR for France, Oral submission, Day of General Discussion on the General Comment on the Right to Water, UN CESCR 29th Session, November 2002, Geneva.

³²⁰ Refers to the first draft GC 15, July 2002.

³²¹ Chapman, .Oral submission, Day of General Discussion on the General Comment on the Right to Water, Nov 2002.

cannot have clean water without sanitation.’³²² In addition, Kothari argued that sanitation needed to be addressed more comprehensively within the General Comment. He pointed out that the subsistence clause of the ICESCR³²³ is often forgotten noting that the ‘continuous improvements in living conditions’ that it provides for cannot be realised without clean water and sanitation.³²⁴ This view was reiterated by Langford, who used the words of Ghandi to make his point: ‘Sanitation is more important than independence. Sanitation is fundamental to personal dignity and for personal and community health, to prevent contamination and disease.’³²⁵

The above statements were expressed in response to the original draft GC 15 within which, paragraph 6 dealt with sanitation very briefly. However, this provision within the first draft was subsequently removed from the final adopted General Comment and replaced with the phrase ‘The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation...’³²⁶ When questioned about the issue, Eibe Riedel stated that the problem with including sanitation within the GC 15 was that it was too large an issue and that the General Comment was already very long. He also questioned whether sanitation would need to be included as a whole, wet and dry sanitation or just elements of sanitation.³²⁷ Moss agreed on the basis that it would be very difficult to keep the General Comment practical and as simple as possible if sanitation were

³²² Bartram, Oral submission, Day of General Discussion on the General Comment on the Right to Water, Nov 2002.

³²³ ICESCR, Article 1, para. (2).

³²⁴ Kothari, Oral submission, Day of General Discussion on the General Comment on the Right to Water, Nov 2002.

³²⁵ Langford, Oral submission, Day of General Discussion on the General Comment on the Right to Water, Nov 2002.

³²⁶ GC 15, para.12 (a).

³²⁷ Riedel, Oral submission, Day of General Discussion on the General Comment on the Right to Water, Nov 2002.

included.³²⁸ However, one can question what the use of a simple General Comment is, if it is not comprehensive enough to ensure adequate standards regarding obligations and content, in order to assist state parties to realise that human right.

Moreover, in support of such an integrated approach, sanitation is an integral part of the approaches to realisation of clean water incorporated in the MDGs³²⁹ and other environmental declarations, such as the Stockholm Declaration,³³⁰ as well as being incorporated in the provisions regarding adequate standard of living of both the CRC and CEDAW.³³¹

Within the final adopted GC 15, sanitation is included,³³² ‘somewhat briefly’,³³³ but it could be argued that the provision is inadequate. The provision should be much more comprehensive and inclusive and reflect the inextricable link between clean and safe water and sanitation. There also appears to be a discrepancy between the normative content of the right, which does not detail sanitation and the core obligations of the right, which, include sanitation at 37 (i) but only in relation to disease control. Solutions to this gap in the provision, other than explicit codification of the right to water including sanitation, include the possibility of a separate GC being drafted and adopted to address sanitation as a separate issue, due to its complexity and

³²⁸ Moss, J, Representative of Suez (French water company), Oral submission, Day of General Discussion on the General Comment on the Right to Water, UN CESCR 29th Session, November 2002, Geneva.

³²⁹ Specifically MDG 7.

³³⁰ See Introduction, p.23.

³³¹ CRC, Article 24, CEDAW, Article 14(h). Also see discussion of relevant articles p.50.

³³² See GC 15 paras.12 (a), 29 and 37(i).

³³³ Riedel, Statement on the Day of General Discussion on the General Comment on the Right to Water, Nov 2002.

importance. This could then be used alongside GC 15 and as such the two would complement each other.

When the final draft was presented and adopted the approach taken in regard to the scope and core content of the right was to focus upon 'essential water'. As Riedel, argued 'The focus of the General Comment is on 'essential water', survival and the essential minimum of the human right to water. This is a legal approach, minimal and cautious.'³³⁴ Finally then, the approach taken was to advocate that water for survival and basic needs constitutes the core elements of the right to water, although not explicitly stated as 'core elements'. This would appear in line with the provisions for the right to water as advocated within international humanitarian law, where water for survival is provided for within several articles of the Geneva Conventions.³³⁵ Moreover water for agriculture is included in terms of that essential for survival but not for trade and industry.

1.6 Problems and Gaps in Provision 3: The Scope and Core of the Right to Water in relation to Sustainability and the Environment

Finally the issue of water management and sustainability in relation to the scope and core of the right to water needs to be examined, as it affects the debate surrounding the definition of the scope and core content of the right. For example, does the core content of the right to water also include the protection of water for basic needs for future generations? In other words, does the core content of the right include essential

³³⁴ Riedel, Statement on the Day of General Discussion on the General Comment on the Right to Water, Nov 2002.

³³⁵ See Chapter 3, Section 3.3, p.167.

water for the immediate and present only, i.e. immediate social needs alone, or should it include an element of ecological sustainability as well? This question of the right to water and the environment has not been dealt with under environmental law. In fact as Riedel stated ‘In the context of environmental law, the human right to water was seen as superficial and was not looked at.’³³⁶ Thus it is left to human rights law and the GC 15 to clarify this issue. Chapman advocated making the GC 15 clearer and more detailed with regard to sustainability and the environment, but did not state whether she considered it to be a part of the core substantive content.³³⁷ Paragraph 11 of GC 15 states:

The **elements** of the right to water must be *adequate for human dignity*, life and health, in accordance with articles 11, paragraph 1, and 12. The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. **Water should be treated as a social and cultural good**, and not primarily as an economic good. The manner of the realisation of the right to water must also be **sustainable**, ensuring that the right can be realised for present and future generations.³³⁸

Although this paragraph emphasises water as a social and cultural good and not an environmental good, it does state that the manner of realisation of the right to water must be sustainable. Scanlon et al argues that in reality,

³³⁶ Riedel, Statement on the Day of General Discussion on the General Comment on the Right to Water, Nov 2002.

³³⁷ Chapman, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, Nov 2002.

³³⁸ My bold emphasis. GC 15, paragraph 11. Footnote in original. For a definition of sustainability, see the Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 1992, Declaration on Environment and Development, principles 1, 8, 9, 10, 12 and 15; and Agenda 21, in particular principles 5.3, 7.27, 7.28, 7.35, 7.39, 7.41, 18.3, 18.8, 18.35, 18.40, 18.48, 18.50, 18.59 and 18.68.

Water is looked upon as a social and environmental resource. The term right to water does not only refer to the rights of people but also to the needs of the environment with regard to river basins, lakes, aquifers, oceans and ecosystems surrounding watercourses. Realistically a right to water cannot be secured without this broader respect. A failure to recognise water as an environmental resource may jeopardise the rights-based approach, which views water primarily as a social resource. If we are to consider the maintenance of good quality water of adequate access and supply, we need to look at how this is to be achieved beyond the provision of safe drinking water and sanitation. Maintaining a safe water supply means that overall river basin management, agricultural practice and other works are important if we are to meaningfully strengthen and uphold any right to water.³³⁹

This can be viewed as an argument that sustainable water management is part of the core content of the right to water, as it is needed to ensure maintenance of survival water. Can we say then, that there are two essential elements of the right to water: water for basic needs and sustainability of water resources? This model would be supported by the conception of water within environmental declarations such as Agenda 21 (1992) which states, 'In developing and using water resources, priority has to be given to the satisfaction of basic needs and the safeguarding of ecosystems.'³⁴⁰

However, in contrast, it can be argued that sustainability should be part of the scope of the right but not the core content, as the core elements are those that are essential to

³³⁹ Scanlon et al, 2003, p.22.

³⁴⁰ UN Agenda 21, 1992, Chapter 18.8. See discussion in Introduction, p.24.

the enjoyment of the right by the people in the immediate. Although this may seem a short-sighted view, in terms of practicality and implementation of the right, surely priority has to be given to elements of the right to water that alleviate immediate human suffering, with survival and dignity being core. That is not to say that sustainability is not an indispensable element of the right to water, rather it should be an essential element of the wider scope of the right, which can be implemented progressively. The question of how to balance immediate needs with sustainable use is one that requires further thought and it does perhaps add strength to the argument for a new water treaty, which combines these environmental aspects with the human rights aspects.³⁴¹ As Scanlon states, the ‘question of how environmental norms relates to any future right to water will require serious consideration.’³⁴² Hence the need for much more collaboration between environmental, development and human rights professionals is clear.

Evidently, sustainability is a part of the normative content of the right, although whether a part of the core or the scope is debateable. Even if an element of the broader scope only, there is clearly an obligation upon states to take into account sustainability within their water management and water strategy. Intergenerational equity means:

Sufficient water should be obtained in a sustainable manner so that the right can be realised for present and future generations... Beyond the immediacy of a human right to water, there is also a need to consider this human right in its temporal aspect, that is, to bear in mind not only the human rights of present

³⁴¹ See Chapter 5, p.334, for further discussion of this idea.

³⁴² Scanlon et al, 2003, p.23.

generations, but also to ensure that the human rights of future generations are not compromised.³⁴³

1.7 Clarifying the Core Content and Wider Scope of the Right to Water

Having examined each of the issues in turn, it is evident that at present there is no indisputable legal definition as to what the scope and core content of the right entails. Defining the scope and core content of the right to water is a difficult task; nevertheless, I have conceived of and illustrated both the core content and the wider scope of the right within Fig.1.2.³⁴⁴ The core content covers water for basic needs inclusive of safe and sufficient drinking water and water for food preparation and for hygiene needs.

³⁴³ Scanlon et al, 2003, p.25. See also GC 15, para.11.

³⁴⁴ Within this diagram, the complexity of the concept of the scope and core content of the right to water may seem to be represented in an oversimplified manner, but it constitutes an attempt to devise a practical framework with which to work.

The Normative Content of the Right to Water

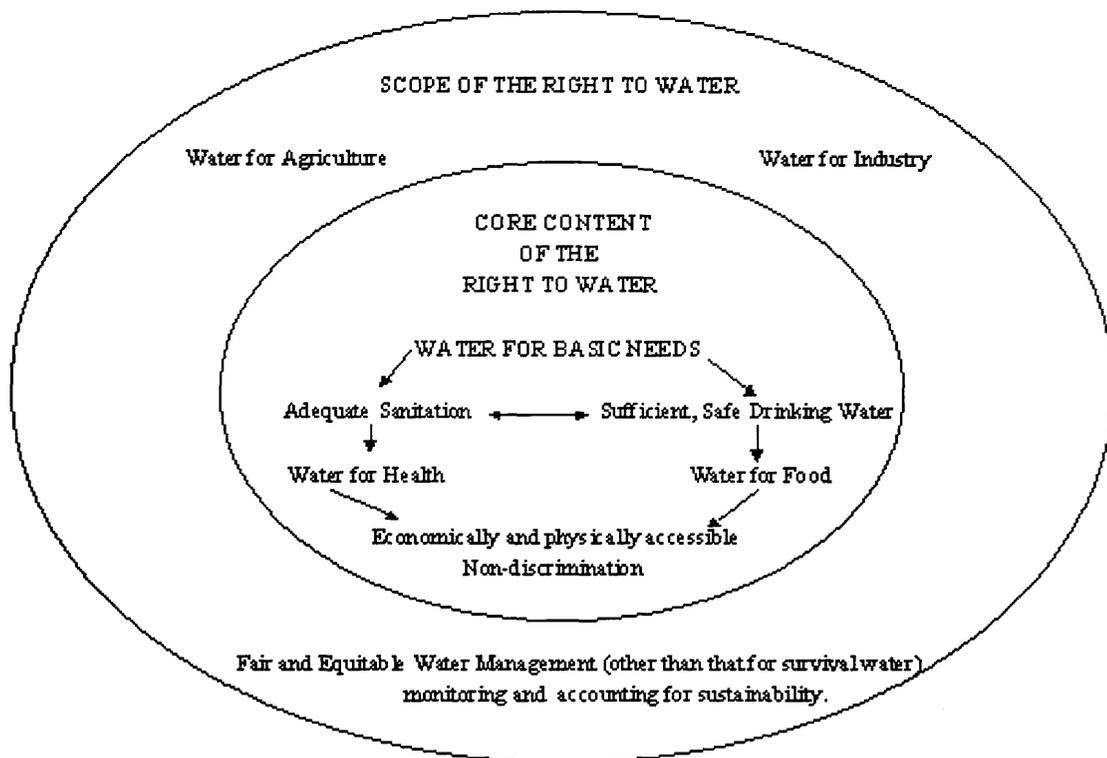


Fig. 1.2

In addition, this water must be economically and physically accessible for all in a manner consistent with human dignity. Special consideration should be taken to ensure that this is applied to all vulnerable groups. Significantly, sanitation has been included within the core elements of the right and it is in this field that the General Comment is most lacking.

Within GC 15 core obligations listed include all the elements that fall within my conception of the core content of the right to water³⁴⁵ and some that do not.³⁴⁶ Interestingly, sanitation is included under core obligations, paragraph 37(i) illustrating its importance, despite the issue not being detailed within the normative

³⁴⁵ See Fig. 1.2 above.

³⁴⁶ See discussion below.

content of the General Comment itself.³⁴⁷ An obligation of result it provides that state parties must 'ensure access to adequate sanitation'.

Subsequent discrepancy between the core / scope of the right and core obligations is evident when the issue of equitable and sustainable water service provision and management is considered. I have included sustainable water management under the scope but not the core of the right, as it can be argued that the immediate survival and basic needs of a population must take priority over the needs of future generations. Obviously equitable water management is required as part of the core obligation to realise non-discrimination regarding accessibility and affordability of water for core uses but ideally, water strategies will account for both realisation of immediate needs, as well as sustainability for the future.

Furthermore, notably, under the GC 15, equitable water management is included within the core obligations listed under paragraph 37 (e), (f) and (g). Although briefly provided for within the non-discrimination clause of the normative content of the right, there is a clear disparity regarding water management, between my interpretation of what constitutes the core content of the right and the core obligations within GC 15. These core obligations listed within GC 15 include several obligations of conduct regarding water management and this then raises the important question of whether conditions necessary to fulfil the core content of a right are part of the core content of the right itself or rather only part of the obligation. Perhaps, equitable water services and management should be deemed a part of the core content of the right and the sustainability component part of the scope of the right. This would also

³⁴⁷ Although sanitation is briefly mentioned in paragraph 12 (a), it is only further elaborated on under Obligations, para.29. See previous discussion p.91.

mean that in contradiction to the argument that core obligations and the core content of a right are necessarily directly correlative, some conditions related to how to implement core elements of the right to water are a part of the core obligations alone. Nevertheless, both the issue of sanitation and that of water management reveal a discrepancy between the core content of the right and the core obligations listed.³⁴⁸ This inconsistency needs to be addressed with some urgency, for the GC 15 to be implemented in practice without any loopholes.

1.8 Concluding Remarks

International human rights and international law bodies have concluded that a right to water already constitutes an integral part of recognised human rights provisions.³⁴⁹ However, the gaps left as a consequence of lack of explicit wording regarding water within the ICESCR and only partial aspects of the right to water being recognised within the CRC and CEDAW, have resulted in the right to water holding a ‘unique status’ within international human rights law.

Furthermore, it is clear that the understanding of the right to water remains problematic, despite recent developments. Although GC 15 constitutes clear guidelines concerning most aspects of the right to water, it is lacking clarity in certain areas. Although the Committee Rapporteur on the right to water advocated ‘a minimal

³⁴⁸ Bilchitz notes that the ‘minimum core approach has not been sufficiently well developed’ and that this had led to misunderstandings as to its function and content. Bilchitz, D, ‘Developing the Minimum Core Approach to Socio-Economic Rights’. Paper given at the Association of Human Rights Institutes Annual Conference, Essex University, UK, 19-21 September 2003, p.1 As such this may have consequences when trying to establish the core content and core obligations regarding a specific right, such as the right to water.

³⁴⁹ See Introduction for sources.

and cautious approach³⁵⁰ with regard to the drafting of provisions concerning the right (which may seem sensible), if the resulting provision is not comprehensive and as such not effective, a broader approach is needed.

Notably, the scope and core content of the right remain ill defined. Additional clarification of the normative content is required to strengthen the right and this can be done by defining a clear scope and core content of the right. If the scope and core content of the right had been explicitly stated within the GC, it would have been less ambiguous and legally stronger in argument.

Riedel states that ‘The General Comment focuses upon water for drinking, hygiene and domestic uses but also covers briefly water for subsistence farming and agriculture as it is essential for survival’.³⁵¹ Nonetheless, one major gap in provision is evident, namely sanitation. The lack of comprehensive provision concerning sanitation represents a *de jure* gap in content and standards. Furthermore, lack of adequate sanitation is a *de facto* threat to realisation of the right to water in reality. Sanitation is central to the right to water, a core element, without which the right to water cannot be fully implemented in practice. For this reason, sanitation should be included within the core content of the right to water and not only the wider scope.

Subsequently how the substantive content of the right relates to other economic and social rights continues to be equivocal. Therefore there is a need to define the relationship between the right to water and directly related rights, such as the rights to

³⁵⁰Riedel, E., Committee Expert and Rapporteur on the Right to Water for the CESCR, Discussion, Geneva, Nov 21st 2002.

³⁵¹Riedel, Statement on the Day of General Discussion on the General Comment on the Right to Water, Nov 2002.

health and food and the right to life. Moreover, in order to determine the scope and core of the right to water it is imperative that these relationships are clarified. Until this is done, the right to water is always in danger of being deemed a derivative right and not a right of independent status. By recognising the right to water as an independent right but only establishing it as a right deriving from other related right, such as food and health, the independence of the right is jeopardised. As Scanlon et al note, 'Lifting the right to water from the shadow of other associated human rights could be seen as awarding it long overdue standing to be considered as a self-standing right.'³⁵²

The final question to be addressed is what to do next in terms of clarification of the right's status within codified international human rights law. In light of the above evidence, it is clear that the status of the right to water remains undetermined. As the arguments presented show, the status of the right continues to be ambiguous and the GC 15 has not sufficiently clarified this issue. How best can we develop the right to ensure its status as an independent right? In order to establish if and when violations of the right to water have occurred and to ensure it is viewed as an independent right with correlative obligations, it can be argued that there is a need to explicitly codify the right. How best to do this remains the question.³⁵³

³⁵² Scanlon et al, 2003, p.18.

³⁵³ I address this issue in Chapter 5.

Chapter 2

Obligations

Concerning the Right to Water under International Human Rights Law

Introduction

Having considered the legal standing of the right to water and the normative content of the right, this chapter aims to locate the right to water within the wider context of economic and social rights, through an investigation of the duties State parties to the Covenant, and others, hold to realise economic and social rights and in particular, the right to water. What does realisation of economic and social rights actually entail for states and individuals? What constitutes obligations under international human rights law? This chapter will examine the nature and extent of obligations of state actors both generally under the ICESCR and specifically in establishing responsibility for realisation of the right to water.

The reasoning behind this focus on obligations is that they are imperative to the realisation of human rights. It is important to understand that 'A proclamation of a right is not the fulfilment of a right, anymore than an airplane schedule is a flight. A proclamation may or may not be an initial step toward the fulfilment of the rights listed. It is frequently the substitute of the promise in the place of the fulfilment.'³⁵⁴ As such, the issue of obligations is crucial to the reality of the enjoyment of all human rights and therefore, to the enjoyment of the right to water. Obligations constitute a

³⁵⁴ Shue.H, Basic Rights, Subsistence, Affluence and US Foreign Policy, Guildford; Princeton University Press, 1980, p.15.

sound legal duty for states parties to adhere to and a mechanism for state compliance, thus helping to enforce the right practically on the ground.

Initially, I will investigate the legal basis for obligations. Economic and social rights³⁵⁵ have in the past been seen as ‘secondary rights’³⁵⁶ and as rights whose realisation entails only positive actions by the obligation holder. As such obligations relating to these rights have been more controversial than those concerning civil and political rights. This false distinction between these rights and their corresponding obligations will be deconstructed to illustrate that both civil and political rights and economic and social rights entail both positive and negative obligations. Moreover, the development and acceptance of the tripartite typology of obligations for economic and social rights is examined as the major acting framework used as the working basis for obligations within the UN system of international human rights law and beyond.

Moving from the more general to the specific, the particular provisions for obligations under the ICESCR are then studied and the problems raised by the nature of these provisions, for example, the concepts of progressive realisation and determination of maximum available resources, are analysed. Furthermore the concept of core obligations and obligations of result and conduct are considered, as key components of the current obligations framework of the Covenant.

Subsequently, I explore the specific obligations correlative to the right to water. Here, I concentrate on the provisions within the UN Committee on Economic, Social and

³⁵⁵ Please note where I refer to economic and social rights, I mean economic, social and cultural rights in full but have used the accepted abbreviation for ease.

³⁵⁶ See Eide in Eide. A, Krause. K and Rosas. A, (eds) Economic, Social and Cultural Rights. 2nd revised edition, London: Martinus Nijhoff, 2001, p.4.

Cultural Rights GC 15, as it provides the only clarification of obligations in relation to this right and is a relatively new development. I will analyse the nature and substantive content of the provisions and evaluate the obligations in terms of their comprehensiveness and effectiveness for holding states parties accountable. This necessarily includes highlighting both positive inclusions and possible weaknesses in provision.

2.1 Legal Foundations for Obligations

The legal concept of human rights is based upon the theory of universal human rights as moral and legal entitlements and duties, as envisaged in the universal bill of human rights: ‘All human beings are born free and equal in dignity and rights.’³⁵⁷ I believe that the legal conception of human rights pertains to a demand to have an existing moral right recognised. ‘A right provides the rational basis for a justified demand. If a person has a particular right, the demand that the enjoyment of the substance of the right be socially guaranteed is justified by good reasons and the guarantees ought, therefore, to be provided.’³⁵⁸ The development of legal obligations can be seen as commencing from the ‘four freedoms’ speech of US President Roosevelt, culminating in the originally non-binding UDHR 1948. It is now widely accepted that part, if not all of the UDHR is considered customary international law³⁵⁹ and as such has legally binding obligations upon states. However, determining whether it does constitute custom has been viewed as problematic, owing to the foundations of the relationship that human rights law is based upon, namely a vertical relationship between the

³⁵⁷ Article 1, UDHR.. See also Preamble UDHR, ICCPR and ICESCR.

³⁵⁸ Shue, 1980, p.13.

³⁵⁹ Steiner. H and Alston. P, International Human Rights In Context – Law, Politics and Morals. 2nd Edition. Oxford: OUP, 2000, p.143.

individual and the state, as oppose to a state to state horizontal relationship.³⁶⁰ As such, state practice regarding human rights had been seen as difficult to determine.³⁶¹ Despite this, evidence that favours the argument that the UDHR does constitute customary international law includes, incorporation of international human rights as contained in the UDHR into national constitutions and laws, frequent references to the UDHR by the UN and other international bodies and governments, decisions by national courts referring to the Declaration and ‘a dictum of the International Court of Justice that obligations *erga omnes* in international law include those derived from the principles concerning the basic rights of the human person.’³⁶² Even if one does not agree with these arguments, as Eide notes, ‘The UDHR imposes at least a moral obligation, if not more, on all states to seek to realise social and economic rights.’³⁶³

The legal conception of obligations within international human rights law is based upon the paired concept of an entitlement and its correlative duty. States have human rights obligations under the UDHR, as mentioned and also under the UN Charter 1945. However, human rights have been divided into two subcategories: civil and political rights and economic, social and cultural rights. For many years this has been the accepted framework for human rights, despite the UDHR making no distinction between the two. The origins of such a framework can be seen as deriving from the decision to divide the rights contained within the UDHR into two separate legally binding covenants. The result was the following two covenants: the ICCPR 1966 and the ICESCR 1966. This controversial decision to divide the rights into two ‘sets’ of

³⁶⁰ Rosas, A, ‘State Sovereignty and Human Rights: Towards a Global Constitutional Project’ in *Political Studies*, XLIII, pp.61-63 at p.62.

³⁶¹ Steiner and Alston, 2000, p.143.

³⁶² Steiner and Alston, 2000, p.228. The dictum is from the ICJ Barcelona Traction Light and Power Company Limited Case (Belgium vs Spain) ICJ Reports 1970, 3.

³⁶³ Eide in Eide et al, 2001, p.22.

rights was taken for several reasons, including arguments that civil and political rights and economic and social rights were of an inherently different nature and as such, required separate instruments and that the former were justiciable, whereas the later were more political and not easily justiciable.³⁶⁴ One demand for dual covenants came from the USA, who declared, ‘all economic, social and cultural rights, no matter how vital their fulfilment, as less genuine rights with less binding duties.’³⁶⁵ Thus economic and social rights were seen as either merely ‘aspirations’ with no legal basis or ‘secondary rights’ to be realised once civil and political rights had been realised. From this division of rights, we can see a parallel division of obligations, in the concept of positive and negative obligations. In the past, civil and political rights have been seen to encompass only negative obligations.³⁶⁶ Negative meaning that in order to fulfil the enjoyment of the right, the obligations holder has only to respect that right and refrain from action that would impede upon the individual’s enjoyment of that right. Thus these rights were seen to be ‘easier’ and less of a burden to commit to. In contrast, economic and social rights were seen to ensue correlative positive obligations that require action by the obligation holder, to provide in order for individuals to enjoy that right.³⁶⁷ It was feared that those with the duty to honour the right would find the obligations too great a burden. Hence, the USA’s demand as noted above. However as Eide notes, ‘Fundamental to a realistic understanding of state obligations is that the individual is the active subject of all economic and social development, as stated in the UN Declaration on the Right to Development, Article

³⁶⁴ Annotations on the Text of the Draft International Covenants on Human Rights, UN Doc. A/2929 (1955), p.7. For further examination of the reasoning behind the division of the rights as provided for in the UDHR see, Eide in Eide et al 2001, pp.9-12; Craven, 1995, pp.16-21; Arambulo. K, Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights - Theoretical and Procedural Aspects, Oxford; Intersentia, Hart, 1999, pp.15-18 and Steiner and Alston, 2000, pp.242-245.

³⁶⁵ Shue, 1980, p.6.

³⁶⁶ Eide in Eide et al, 2001, pp.23-24.

³⁶⁷ Eide in Eide et al, 2001, pp.23-24.

2.³⁶⁸ The individual is expected whenever possible, through his or her own efforts and by use of own resources, to find ways to ensure the satisfaction of his or her own needs.’³⁶⁹ As such, the individual has a personal obligation and responsibility for the enjoyment of their own economic and social rights. This responsibility upon the individual is often missing in analyses of obligations regarding economic and social rights and thus ensures that the burden upon the state is argued as larger than is actually the case.

This false dichotomy of rights does not reflect the reality of the enjoyment or violations of human rights. One example that illustrates this point is the well-documented case of the human rights violations carried out by the Nigerian government against the Ogoni Peoples of Nigeria. The Ogoni were initially protesting that because their lands were being taken from them to be used for oil extraction, their right to food and housing (Article 11 of the ICESCR) were being violated. In turn, when the people of Ogoni held protests, the authorities violated *inter alia* their right to freedom of expression, right to liberty and security and their right to life,³⁷⁰ by breaking up the protest by force, shooting and killing participants and destroying their village by burning down property.³⁷¹ Hence initial violations of economic and social rights resulted in further violations of civil and political rights. This example highlights the interdependence of civil and political and economic and social rights. It

³⁶⁸ Original footnote omitted. Footnote added; UN Declaration on the Right to Development, Article 2 reads, in part, (1) ‘The human person is the central subject of development and should be the active participant.’ (2) ‘All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms, as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being.’

³⁶⁹ Eide in Eide et al, 2001, p.23.

³⁷⁰ Articles 19, 9 and 6 of the ICCPR.

³⁷¹ For the full details of this case see Human Rights Watch, Nigeria, The Ogoni Crisis. A Case-Study of Military Repression in Southeastern Nigeria, Vol. 7, No. 5, July 1995.

is evident then, that personal dignity cannot be upheld if vital aspects of basic economic and social rights are violated. Personal dignity is reliant upon the enjoyment of these rights, as the enjoyment of these rights affects the enjoyment of liberty and security. As such, if obligations regarding economic and social rights are not met, then meeting the obligations regarding liberty and security (seen as civil and political rights) is also difficult.

It is also clear that this dualistic concept of civil and political rights with correlative negative obligations and economic and social rights with positive obligations is further flawed. If we look at an example, the obligations regarding the right to a fair trial (Article 14 of ICCPR), entails provision that the obligation holder, in this case the state, is to provide a functional and fair legal and judicial system. Thus, it entails a positive obligation on behalf of the duty holder. Likewise, the right to health as contained in Article 12 ICESCR, provides an obligation on the part of the duty holder to refrain from actions that would be detrimental to the individual's health, for example, to refrain from coercive medical procedures or refrain from denying or limiting equal access for all persons, to preventive, curative and palliative health services.³⁷² Hence, this economic and social right ensues a negative obligation. It is evident then, that both sets of rights ensue both types of correlative duties / obligations and to divide obligations as described is to ascribe to a key misconception concerning human rights.³⁷³

³⁷² CESCR, GC 14, para.34.

³⁷³ Shue (1980, p.55) also dismisses this once popular thesis that ESCR's entail only positive obligations and argues that both civil and political rights and economic, social and cultural rights entail obligations that are both positive and negative. See also Skogly, S, 'Extra-national Obligations towards economic and social rights', A Working Paper for the International Council of Human Rights Policy, July 2001, p.4.

So, who holds these obligations? Under international human rights law, the state is seen as the main obligation holder, correlative to the entitlements of any individual within their sovereign territory. It is important to note that the individual does not have to be a citizen of the state, only to be within state borders. The state can be seen as the main obligation holder, as it is the state that execute law and order in the modern world system and the state that enters into the international treaties. As such, it falls to the state to protect its people. Within this context then, as John Stuart Mill wrote, 'To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of.'³⁷⁴ As Skogly notes, this does not mean that the state is the only obligation holder³⁷⁵ and the obligations of other actors are becoming ever more significant. Previously, provisions concerning human rights obligations have focused in the main, upon the state. This focus has, in turn, led to new concerns over whether conceptions of obligations are sufficiently comprehensive in light of globalisation and trans-national trade.³⁷⁶

2.2 The Tripartite Typology of Obligations

Whoever the obligation holder is, it is evident that the distinction lies not between rights but between types of obligations correlative to those rights.³⁷⁷ It is true that some obligations can be fulfilled through refraining from action and that other

³⁷⁴ Mill, John Stuart 'Utilitarianism' in On Liberty and Other Essays, Oxford World Classics, Oxford; OUP, 1991 (1861), p.189.

³⁷⁵ Skogly, S, The Human Rights Obligations of the World Bank and International Monetary Fund, London; Cavendish Publishing, 2001, p.44.

³⁷⁶ Skogly, 2001, p.29 and pp.33-34.

³⁷⁷ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1997, para.6 (Hereinafter referred to as the Maastricht Guidelines). On the 10th anniversary of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, a group of more than thirty experts met in Maastricht from 22-26 January 1997 at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands). 'The objective of this meeting was to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies.' See Introduction to the Maastricht Guidelines.

obligations require an action by the duty holder. Shue developed this conception of obligations into a framework consisting of a tripartite scheme of obligations. He claims that for every right there exist three types of duties: Duties to avoid, duties to protect and duties to aid and concludes that ‘every basic right entails duties of all three types.’³⁷⁸ ‘Duties to avoid require merely that one refrains from making an unnecessary gain for oneself by a means that is destructive for others.’³⁷⁹ In terms of human rights law, this translates as the state having an obligation to avoid and refrain from actions that are harmful and impede on an individual’s human right. Shue argues that if this obligation was fulfilled completely at all times, then the duty to protect would not be required.³⁸⁰ This may be true if we consider the state as the only actor. However, within contemporary human rights obligations, this duty to protect is interpreted as also including a state’s obligation to protect the individual from the actions of third parties.³⁸¹ As such, if the state respected human rights at all times, it would not have to protect the individual from actions by itself, though, it would still need to protect the individual from interference by third parties. Hence the obligation to protect would still be required. Shue also argues that a reliance on the duty to protect, rather than avoid, could result in a ‘police state’, where immense power would be required. This kind of power would also enable a state to have immense power to deprive.³⁸² However, surely this dangerous situation should not occur, as long as the obligation to avoid is fulfilled.

³⁷⁸ Shue, 1980, pp.52-53.

³⁷⁹ Shue, 1980, p.55.

³⁸⁰ The duty to protect, as Shue views it, is a secondary duty of enforcing the primary duty of avoidance.

³⁸¹ Maastricht Guidelines, para.6.

³⁸² Shue, 1980, p.61.

In terms of the obligation to aid, Shue views this obligation as a duty to alleviate suffering of individuals. The term 'aid' in Shue's view acknowledges and stresses the fact that the individuals have suffered because of failures by the state to realise its duties to avoid and protect. Owing to this view, Shue argues that to replace the term 'aid' with the term 'fulfil' as used in the contemporary tripartite model of obligations utilised by the human rights community, might give the impression that the state is in fact going beyond their duties rather than having to compensate for previous failures.³⁸³ However, the later term has now become accepted into the human rights framework. The current system of three levels of obligations ensures that the state must realise obligations under *all* three levels and as such the above argument has proved unfounded. It is impossible however, to guarantee all human rights for all people, at all times. Consequently, the tripartite system of obligations Shue conceives of, including the right to respect, protect and aid (or fulfil), is imperative in order to guarantee the optimum and most comprehensive human rights enjoyment.

This tripartite model of obligations was later to be updated and expanded upon by Asbjørn Eide, at the time, Special Rapporteur on the Right to Food for the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.³⁸⁴ In clarifying the obligations of states regarding the right to food, Eide maintains that states have three levels of obligations: an obligation to respect, to protect and to fulfil.³⁸⁵ This tripartite framework of three levels of obligations has been broadened in its application and scope and is now the accepted typology for obligations relative to

³⁸³ Shue in Arambulo, 1999, pp.122-123.

³⁸⁴ See Eide, A. Report for the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 'The New International Economic Order and the Promotion of Human Rights – The Right to Adequate Food as a Human Right.' 7th July 1987. E/CN.4/Sub.2/1987/23.

³⁸⁵ Eide in Eide et al, 2001, p.23.

all human rights.³⁸⁶ The acceptance of this tripartite model is also evidenced by its consistent use by the CESCR.³⁸⁷

Considering each type of obligation in turn, the obligation to respect can be defined as the respect for individual resources and freedom to take action and use resources, alone or collectively, in association with others, to satisfy their own needs.³⁸⁸ The state is required to refrain from any action that would impede or deny the individual their rights, by actively interfering or depriving of resources necessary for rights fulfilment. The second level of obligation is the obligation to protect. It has been argued that this is the most important aspect of state obligations, as it is the state that has the power to implement law and order and as such protect the individuals within its borders.³⁸⁹ This means protection from *inter alia* actions of powerful actors and protection against unethical behaviour by private actors, whether corporate or individual, which threaten the enjoyment of individuals rights. It also includes an obligation to protect individuals, within the state's jurisdiction, from hazards.³⁹⁰ For example, the state must protect individuals from corporate interference (or any third party interference) with their water supply which results in the denial of water to a certain sector of people. The state must also protect the individual's right to water by

³⁸⁶ See Eide in Eide et al, 2001, p.23; Arambulo, 1999, p.121, 126, 168; Craven, 1995, p.109; Maastricht Guidelines 1997 and the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights 1988 (Hereinafter referred to as the Limburg Principles). The Principles were drafted by a group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America) and met in Maastricht on 2-6 June 1986 to consider the nature and scope of the obligations of States parties to the International Covenant on Economic, Social and Cultural Rights, the consideration of States parties Reports by the newly constituted ECOSOC Committee on Economic, Social and Cultural Rights, and international co-operation under Part IV of the Covenant. See Introduction to the Limburg Principles.

³⁸⁷ For example see GC 12 Right to Food, GC 13 Right to Education, GC 14 Right to Health and GC 15 Right to Water.

³⁸⁸ Eide in Eide et al, 2001, p.23.

³⁸⁹ Eide in Eide et al, 2001, p.24.

³⁹⁰ Eide in Eide et al, 2001, p.24.

ensuring that environmental pollution (a hazard) does not occur on a level that would threaten health.

Finally the third level of obligation is the obligation to fulfil. This can be interpreted as encompassing two aspects: to facilitate and to directly provide.³⁹¹ It requires ‘the state to take necessary measures to ensure the satisfaction of the needs of the individual that cannot be secured by the personal efforts of that individual.’³⁹² This includes not just direct provision but facilitating the environment for individuals to realise the right independently with the assistance of the state in creating the conditions that make this possible.

The state as the obligation holder ensues all these three levels of obligations and evidently they are all related. For example, in an initial situation, the obligation to fulfil may require a state to intervene and provide extensively. However, in turn this may then lead to a progression in the realisation of the rights and as such a situation develops where the state subsequently is only required to realise their obligation to respect. It must also be noted though that this can work in the opposite way, where both the obligation to respect and the obligations to protect have not been realised, resulting in the state having to focus upon compliance with the obligation to fulfil. These three levels of obligations exist for all human rights and as such the obligations contained within specific international human rights instruments require that this typology be applied to the rights and correlative duties provided for within them. In addition to general obligations as laid out in Article 2 of the ICESCR 1966, each of the substantive rights contained within the Covenant ensues correlative obligations.

³⁹¹ See Eide, A, 7th July 1987; Eide in Eide et al, 2001, p.24.

³⁹² Craven, 1995, p.109.

With this in mind, I now wish to examine the general obligations as provided for by the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966.

2.3 Legal obligations specific to the International Covenant on Economic, Social and Cultural Rights

As the main international instrument that codifies economic and social rights, the key article relating to obligations under the ICESCR is imperative to the understanding of the nature of obligations for states parties to this treaty. Article 2 (1) states:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The above article can be seen as critical to the realisation of the Covenant in its entirety, as it describes the obligations incumbent upon state parties in the realisation and enjoyment of the rights contained within the instrument. The interpretation and wording of this article has been controversial and much debated,³⁹³ although to a certain extent obligations have been clarified by the work of the CESCR. Within their General Comments specifically regarding obligations³⁹⁴ and those that are right

³⁹³ See Craven 1995, pp.106-152; Eide in Eide et al, 2001, pp. 26-28; Arambulo, 1999, pp.78-80 and 153-155; Steiner and Alston, 2000, p.246 and Toebes, 1999, p.294.

³⁹⁴ See UN CESCR, General Comment 3 (Fifth session, 1990) The nature of States parties obligations (Art. 2, para. 1 of the Covenant), 14/12/90.

specific³⁹⁵ and through recommendations made in relation to state reports the Committee have developed a comprehensive legal interpretation of state obligations. In addition the Limburg Principles³⁹⁶ and the Maastricht Guidelines constitute significant documents regarding the interpretation and understanding of obligations and economic, social and cultural rights. In the CESCR General Comment 3 regarding the nature of states parties' obligations, Paragraph 1, the committee states:

Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result [...] While the Covenant provides for progressive realisation and acknowledges the constraints due to the limits of available resources, it also imposes various obligations, which are of immediate effect.³⁹⁷

These immediate obligations include two principles that are of particular importance in understanding the nature of States parties' obligations. The first principle requires that rights are exercised without discrimination³⁹⁸ and is particularly relevant to the question of vulnerable groups. As Eide states, 'State obligations are intended to

³⁹⁵ The CESCR have passed 18 General Comments in total between Feb 1989 and April 2007.

³⁹⁶ The Limburg Principles identify the nature and scope of state obligations, the role of the implementing mechanism, the CESCR and guidelines for state reporting. Lawyers and scholars have also sought to examine and interpret state parties' obligations. For example see Arambulo, 1999; Eide in Eide et al 2001, pp.22-28 and Craven, 1995, pp.106-150.

³⁹⁷ CESCR, GC 3, para. 1.

³⁹⁸ GC3, para.1 and provisions under right specific General Comments of the CESCR. Also see the Human Rights Committee, GC18 Non-Discrimination, 1989, CCPR/C/21/Rev.1/Add.1 and GC28 Equality of Rights Between Men and Women, 2000, CCPR/C/21/Rev.1/Add.10.

supplement personal efforts whenever needed',³⁹⁹ for example, when a person or group of persons is disadvantaged, discriminated against or particularly vulnerable. This includes *inter alia*, women, children and refugees.

The second principle concerns core obligations and is related to the concept of the core content of the right, as I have discussed in Chapter 1. The article provides that 'steps' must be taken immediately towards fulfilment of obligations and the core obligations must be realised at once.⁴⁰⁰ The wording of Article 2(1) and the phrase used in relation to state obligations of 'progressive realisation' determines the approach permissible by states in realising the obligations external to the core obligations but necessary to the enjoyment of the full rights as contained in the Covenant.

(i) Progressive Realisation

'While the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.'⁴⁰¹ However, this phrase has been problematic in that states have used it to postpone their obligations *ad infinitum*.⁴⁰² This question of 'progressive realisation' of rights has been misinterpreted in the past and seen as a weakness in the provisions of the Covenant. However, the Committee clearly states that the term relates to a conception of progress over time and dynamic movement towards full enjoyment of

³⁹⁹ Eide in Eide et al, 2001, p.140.

⁴⁰⁰ GC 3, para. 1.

⁴⁰¹ GC 3, para. 2.

⁴⁰² Toebe, 1999, p.294.

those rights. It does not mean that states may disregard or be static, or even retrogressive in fulfilling their obligations. In fact, states must justify any deliberately retrogressive measures. ‘The concept of progressive realisation constitutes a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time [...] The fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content.’⁴⁰³ Furthermore, the concept of ‘progressive realisation’ cannot limit compliance with the core obligations by states. Despite this classification however, I would argue that the phrase remains a tool for states to argue their non-compliance with obligations regarding other elements of economic and social rights, outside of the core elements of the right but remaining within the scope of the right.

An additional problem this raises in terms of obligations is the fact that no state has actually ever achieved full realisation of economic and social rights and as such no clear understanding of the ‘ultimate result’ has been achieved.⁴⁰⁴ It can be argued that the ultimate result is evidently the enjoyment of those human rights contained within the Covenant by everyone in that state. Although, it is true to say that this can be seen as a utopian vision, this does not mean it is not a worthwhile aim and it does constitute the ultimate goal of human rights. At present, not all human rights can be guaranteed to all people, all of the time. Thus there is always room for improvement. This complexity is reflected by the Committee who state that the term ‘progressive realisation’ is a ‘necessary flexibility device’ and reflects the realities of the real world including the difficulties involved for any country in ensuring full realisation of

⁴⁰³ GC 3, para. 9.

⁴⁰⁴ Craven, 1995, p.129.

these rights.’⁴⁰⁵ They also emphasise that the ‘phrase must be read in the light of the overall objective of the Covenant which is to establish clear obligations for States parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.’⁴⁰⁶

It is interesting though that, as Eide notes, the CRC, ‘which includes many economic and social rights and corresponding state obligations does not contain the qualifying clause “progressive realisation”.’⁴⁰⁷ Under the CRC, the obligations arise immediately, only qualified by the phrase “within their means”. This shows that what differentiates economic, social and cultural rights from civil and political rights is only the question of the availability of means, when such are required; the obligations are otherwise as immediate as are those relating to civil and political rights.’⁴⁰⁸ However, I would argue that the differences between the wording of the CRC and the ICESCR could also be a consequence of the drafting process of the CRC, which occurred at a much later date than that of the ICESCR and within a political context where obligations regarding economic and social rights were less controversial. In addition, the drafters of the CRC had the benefit of hindsight regarding the problematic interpretation of the said phrase and had an increased understanding and interpretation of economic and social rights.

⁴⁰⁵ GC 3, para. 9.

⁴⁰⁶ GC 3, para. 9.

⁴⁰⁷ Eide in Eide et al, 2001, p.22.

⁴⁰⁸ Eide in Eide et al, 2001, p.22.

(ii) Maximum Available Resources – The Concept of a Minimum Threshold and Core Obligations

State obligations are also further complicated by the fact that certain rights constitute dynamic standards and change over time. This is particularly true of economic and social rights. Thus, the concept of a ‘minimum threshold’, the second principle of core obligations and the debate regarding the availability of resources have been instrumental in assisting with this problem and it is to a discussion of these that I now turn.

The CESCR take into account the economic situation of the specific state when establishing whether it has met its obligations regarding the Covenant. As Craven notes, ‘It has thus resorted to the use of national benchmarks as an initial indicator of state compliance with the obligations in the convention.’⁴⁰⁹ These indicators are examined against what has been deemed the ‘minimum threshold’ for that state. The state must also be seen to fulfil the ‘core minimum obligations’ regarding a particular right. The ‘core content’ approach discussed in Chapter 1 is designed to define essential elements of a right and consequently the minimum obligations needed to prevent a violation of that right.⁴¹⁰ The difference between the minimum threshold approach and the core content approach is that core content of a right is universal in application and applicable to every state equally, whereas the minimum threshold is state specific and represents the minimum level under which the specific right’s standard must not fall, determined within that particular state. Minimum threshold is therefore inextricably linked to the concept of benchmarks and national indicators introduced in order that states have clear goals for how to move beyond core

⁴⁰⁹ Craven, 1995, p.136.

⁴¹⁰ Arambulo, 1999, p.130.

obligations to achieve full realisation regarding the substantive and procedural obligations of that right.⁴¹¹

In terms of the 'core obligations' correlative to a right, the right-specific General Comments have accomplished much in terms of establishing which elements of the substance of a right require immediate implementation (core elements) and which remain part of the scope of the right, but are not as essential so can be implemented progressively.⁴¹² The CESCR state that core obligations must be fulfilled regardless of resource availability, 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.'⁴¹³ However, it would seem to be somewhat contradictory in that they then state,

It must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its

⁴¹¹ I do not discuss in detail national implementation and the use of benchmarks and indicators. However, it is important to note that these concepts are elements of a required framework of obligations and monitoring for realisation of the right to water. For further reading on indicators and benchmarks see Roaf, V, Khalfan, A and Langford, M, Centre on Housing Rights and Evictions, Monitoring Implementation of the Right to Water: A Framework for Developing Indicators, Global Issue Paper No. 14, Berlin: Heinrich Böll Foundation, Brot für die Welt and the Centre on Housing Rights and Evictions, 2005; Hunt, Paul, UN Special Rapporteur on the Right to Health, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, E/CN.4/2006/48, 3 March 2006, paras.22-61, pp.7-15; Arambulo, 1999, p.351; Office of the High Commissioner for Human Rights (OHCHR) (a), Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water., A Background Paper to the World Summit on Sustainable Development, Johannesburg, September 2002, p.16; Office of the High Commissioner for Human Rights (OHCHR) (b), Draft Guidelines; A Human Rights Approach to Poverty Reduction Strategies, September 2002, p.14 and Tomasevski, K, in Eide et al, 2001, pp.531-551. See also Chapter 5.

⁴¹² For an example of this see GC 14, paras. 43 and 44 and GC 15, para.37. For further examination of core obligations and health see Toebes, 1999, Chapter IV, pp.291-339. Regarding core obligations and water see forthcoming discussion, p. 129.

⁴¹³ GC 3, para.10.

minimum core obligations, to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.⁴¹⁴

It is the Committee's view that "available resources" include both national and international resources. This is stated in GC No. 3, paragraph 13, 'The Committee notes that the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international co-operation and assistance.'⁴¹⁵ Under Article 2(1) a state party has an obligation to seek international assistance if it is short of resources.⁴¹⁶ If it does not meet its core obligations, it must prove that it could not fulfil them despite attempting to obtain international assistance.⁴¹⁷ However, as Craven argues the scope and obligatory nature for states to respond to such a request is not clear.⁴¹⁸ Despite lack of clarity, the Committee conclude that economic recession, poverty or problems with debt repayment or structural adjustment 'although to be considered, cannot exempt a state from its obligations under the Covenant'⁴¹⁹ and have recommended in the past that states attempt to divide existing resources more equitably and work on the basis of equality.⁴²⁰ Bueno de Mesquita argues that international obligations are legally binding upon state parties, as international assistance and co-operation is a provision

⁴¹⁴ GC 3, para.10.

⁴¹⁵ GC 3, para.13.

⁴¹⁶ Under Article 2(1) States parties undertake 'to take steps, individually and through international assistance and co-operation, especially economic and technical...'

⁴¹⁷ GC3, para.3.

⁴¹⁸ Craven, 1995, p.145.

⁴¹⁹ Craven, 1995, p.138.

⁴²⁰ Craven, 1995, p.138.

within the ICESCR. Therefore, states agree to be bound by this provision upon ratification of the treaty.⁴²¹ Although these obligations have traditionally been seen as exerted in relation to the home territory of a state, the text of Article 2 (1) clearly implies that extra-territorial obligations are required of states.⁴²² This has been conceptualised by Skogly,⁴²³ by way of the concept of ‘diagonal obligations’ between a state and individuals subject to the jurisdiction of a third state (to be differentiated from the traditional vertical model of human rights obligations).

Article 23 of the Covenant and the Committee’s General Comment 2 International Technical Assistance Measures,⁴²⁴ clarifies the type and nature of assistance to be given but does not clarify the nature and scope of state obligations regarding international assistance. In addition to the obligations to implement the substance of the rights contained in the ICESCR, states are also bound by procedural obligations. This include *inter alia* the duty to file a report to the CESCR at regular intervals determined by the Committee, stating the current situation regarding those rights in that particular state during the said period.⁴²⁵ These reports should summarise the monitoring procedures that are taking place and an evaluation of the actual situation, as well as details of how vulnerable groups are affected and national statistics that are linked to national indicators and benchmarks. In their General Comment 3, paragraph

⁴²¹ Bueno de Mesquita. J, ‘International Covenant on Economic, Social and Cultural Rights: International Obligations,’ A Working Paper, 2002. Essex University Human Rights Centre, UK, 2002, p.10. In addition international assistance should be exercised within the principle of non-discrimination and as such, response should be on a basis of need. See Bueno de Mesquita, 2002, p.12; Limburg Principles 1988, para. 31.

⁴²² Bueno de Mesquita, 2002, p.12.

⁴²³ Skogly. S, ‘The Obligation of International Assistance and Co-operation in the International Covenant on Economic, Social and Cultural Rights’, in Bergsmo. M, (ed) Human Rights and Criminal Justice for the Downtrodden – Essays in Honour of Asbjorn Eide, Martinus Nijhoff: Lieden, 2003, pp.403-420.

⁴²⁴ UN CESCR General Comment 2, International technical assistance measures (Art. 22), (Fourth session, 1990), 02/02/90.

⁴²⁵ For details of state reporting procedures see Arambulo, 1999, pp.35-39 and 44-49.

11, the Committee emphasise, ‘The obligations to monitor the extent of the realisation, or more especially of the non-realisation, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints’.⁴²⁶ It remains unclear then, as to whether a state is *prima facie* in violation of its obligations if it does not meet its core obligations due to lack of resources, or not. Craven argues that, ‘There is no way of reading the General Comment as anything other than contradictory upon this point.’⁴²⁷

The General Comment on the right to food, paragraph 17, articulates:

Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. In determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State party to comply. Should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. This follows from Article 2.1 of the Covenant, which obliges a State party to take the necessary steps to the maximum of its available resources, as previously pointed out by the Committee in its General Comment 3, paragraph 10. A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is

⁴²⁶ GC 3, para.11.

⁴²⁷ Craven, 1995, p.143.

the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.⁴²⁸

It would seem there remains some ambiguity concerning maximum available resources and determination of violations. Is it the case that if the state does prove it used all available resources but still did not realise its core obligations then it is not in violation of the right? The Maastricht Guidelines 1998, paragraph 10, clearly state, ‘Resource scarcity does not relieve states of certain minimum obligations in respect of economic, social and cultural rights’⁴²⁹ and further General Comments have helped to interpret this issue. For example General Comment 14 on the right to health, paragraph 47, clearly declares, ‘A State which is unwilling to use the maximum of its available resources for the realisation of the right to health is in violation of its obligations under article 12. If resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above. **It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable.**’⁴³⁰

Evidently, there remains an element of contradiction regarding this issue and between the provisions contained within General Comments. However, the Committee is unequivocal in later General Comments, that core obligations must be realised by the

⁴²⁸ GC 12, para.17.

⁴²⁹ Maastricht Guidelines, para.10.

⁴³⁰ GC 14, para.47 (my emphasis added).

state, using all available resources, including international assistance. Despite this provision, further attention needs to be given to this issue by the Committee, for example, a General Comment could be drafted and adopted clarifying the nature and scope of international obligations under the ICESCR.⁴³¹

(iii) Obligations of result and conduct

The basic provisions of the ICESCR were drafted in the form of obligations of result rather than obligations of conduct. As Craven states, ‘An obligation of conduct as understood by the International Law Commission is one where an organ of the state is obliged to undertake a specific course of conduct, whether through an act or omission, which represents a goal in itself.’⁴³² An obligation of result, in contrast, ‘requires a state to achieve a particular result through a course of conduct the form of which is left to the state’s discretion.’⁴³³ In other words, the Covenant consists mainly of rights that should be realised but the methods used to achieve them are not specified. There are some exceptions within the provisions however, for example the right to food Article 11(2) (a) which states,

The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take individually and through international co-operation, the measures, including specific programmes, which are needed: to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing

⁴³¹ Bueno De Mesquita also advocates that the Committee should encourage other UN committees to discuss this issue and address it within their discourse with states (2002, p.13).

⁴³² Craven, 1995, p.107.

⁴³³ Craven, 1995, p.107.

or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources.

The General Comments of the CESCR have also resulted in further guidelines for states as to how to fulfil these obligations.⁴³⁴ Although they do not constitute obligations of conduct in themselves, they develop and clarify obligations as well as setting standards and providing examples of good practice to assist state and non-state actors in realising their obligations. It is also evident that the differences between these two types of obligations are not as clear-cut as it seems. Craven highlights this point and notes that obligations of result often contain indicators on how to realise the result, as obligations of conduct often imply an end result.⁴³⁵ Often, as in Article 12 on the right to health, examples are given as to how to achieve realisation and enjoyment of the right in the paragraphs following the initial paragraph setting out the substance of the right.⁴³⁶ As Craven argues, ‘to conceive of the Covenant as merely imposing obligations of result is to deprive it of any serious content. As the terms of Article 2(1) make clear, namely the full realisation of the rights, only has to be achieved in a progressive manner. If states had total discretion as to the means employed to that end, there would be little basis upon which to judge whether or not they were acting in good faith.’⁴³⁷ Therefore in addition to the general obligations as

⁴³⁴ For example, see CESCR GC 12, the Right to Food and GC 15, the Right to Water which both contain obligations of conduct.

⁴³⁵ Craven, 1995, p.107.

⁴³⁶ For example Article 12 on the right to health states in paragraph 1, ‘The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’ This is followed by paragraph 2, which lists steps to be taken to achieve realisation of the right: ‘(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.’

⁴³⁷ Craven, 1995, p.107.

provided in this article, it is necessary to examine the substantive content of each right provided for on an individual basis and the elements within it, when determining its correlative obligations.

2. 4 Obligations Correlative to the Right to Water

This brings me to my subsequent analysis of the obligations correlative to the right to water. As established in Chapter 1, the main provisions for a right to water are under Article 11 and Article 12 of the ICESCR 1966. Having determined that it is a right of unclear legal status and in light of the examination of the scope and core content of the right, it is important to assess the correlative legal obligations concerning the right, as determined in GC 15. The outcome of such an examination is twofold: Firstly, the strengths and weaknesses in obligations can be highlighted and the problems in terms of duties and responsibility for realisation of the right identified. Moreover, the legal standing of the right may be strengthened by the existence of comprehensive legal obligations ensuring responsibility for implementation of the right.

In GC 15, the Committee sought to compose an authoritative legal interpretation of the right to water that would *inter alia* explicitly state the correlative obligations therefore assisting state parties in fulfilling their duties to realise the right at the national level. As such, the provisions concerning state obligations are crucial in implementation of the right. It is compliance with obligations that is monitored by the

Committee and therefore the nature and extend of these obligations must be assessed in order to identify violations of the right in practice.

Firstly, GC 15 reiterates Article 2 of the ICESCR 1966 concerning general legal obligations including the progressive realisation of the right.⁴³⁸ As such, the general criticisms of the nature of obligations under the Covenant, as discussed previously, are also relevant to this aspect of obligations concerning the specific right to water as provided for under Article 11 and 12 of the Covenant. However, the provision then notes the immediate obligations to be undertaken, including a guarantee of exercising the principle of non-discrimination in realising the right and provision reinforcing that deliberate and concrete steps towards realisation must be taken.⁴³⁹ Moreover, retrogressive measures must be accounted for with states carrying the burden of proof for such measures.⁴⁴⁰

(i) Specific Obligations to Respect, Protect and Fulfil

The following table⁴⁴¹ illustrates state obligations correlative to the right to water, as provided for in GC 15, based upon the tripartite typology framework. This enables us to see that the said right ensues obligations of all three levels.

In terms of the obligation to respect, paragraph 21 declares; ‘The obligation to *respect* requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to water...’. The provision then lists examples of prohibited

⁴³⁸ GC 15, para.17.

⁴³⁹ GC 15, para.17.

⁴⁴⁰ GC 15, para.19.

⁴⁴¹ Table 2.1, p.132.

activities and practices that would be in breach of this obligation.⁴⁴² One strong provision within this section is the significant link it makes with obligations for a right to water under international humanitarian law. Paragraph 21 declares that states must refrain from limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts.⁴⁴³

Furthermore paragraph 22 states: ‘The Committee notes that during armed conflicts, emergency situations and natural disasters, the right to water embraces those obligations by which States parties are bound under international humanitarian law.’⁴⁴⁴ The clause then reiterates elements of provision from instruments of humanitarian law such as the Geneva Conventions and notes an obligation to protect objects ‘indispensable for survival of the civilian population’, including drinking water supplies and water installations and an obligation to ensure that civilians have access to adequate water.⁴⁴⁵

⁴⁴² For example; refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons.

⁴⁴³ The phrase ‘limiting access’ is a beneficial inclusion, as oppose to the wording ‘destroying’ as violations are often more subtle than direct attacks on the water system, such as in Palestine where water is diverted to other sources or deliberately polluted. See Chapters 3 and 4 for further discussion.

⁴⁴⁴ Footnote omitted.

⁴⁴⁵ For example see arts. 54 and 56, Additional Protocol I to the Geneva Conventions (1977), Article 54, Additional Protocol II (1977), Article 20 and 46 of the third Geneva Convention of 12 August 1949, and Common Article 3 of the Geneva Conventions of 12 August 1949. See further discussion in Chapter 3.

Table 2.1

Tripartite Scheme of State Obligations relating to Water & Sanitation⁴⁴⁶

	WATER AND SANITATION
RESPECT	<p>Respect for equal access for all to safe, sufficient and affordable water and adequate sanitation</p> <p>No interference with existing provision for water and sanitation</p> <p>No interference with the provision of information on water and sanitation.</p>
PROTECT	<p>Adoption of national legislation and other measures noted in the GC 15, to ensure adequate access to safe, sufficient and affordable water and also adequate sanitation provided by the state or third parties.</p> <p>Existing provisions for water and sanitation from interference by third parties.</p>
FULFIL	<p>Provision of safe, sufficient, accessible and affordable water for all and adequate sanitation.</p> <p>Provision of information regarding water and sanitation.</p> <p>Provision of a national water plan, monitoring and use of indicators and benchmarks to assess the enjoyment of the right to water.</p>

A. Cahill.

⁴⁴⁶ For a similar assessment of obligations correlative to the right to health see Toebes, 1999, p.315.

This explicit provision further develops the interrelationship between these two areas of international law. Although humanitarian law is mentioned under paragraph 34 of the GC 14 on the highest attainable standard of health, the provisions under GC 15 are more comprehensive, reflecting the parallel application of the two doctrines that has evolved in recent years. By acknowledging the complementary obligations under the two different areas of law, the opportunity for protection of the human right to water is increased for those in a conflict situation whose right is being threatened or violated.⁴⁴⁷

Obligations to protect are noted under paragraphs 23 and 24 and declare a clear obligation for the state to protect against interference with the enjoyment of the right to water by third parties. This obligation includes the *inter alia* preventing them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water and the establishment of an effective regulatory system and adoption of legislative measures to govern water management and prevent abuses and misconduct by third parties.⁴⁴⁸ This provision is significant, in that it differs from previous General Comments by imposing concrete obligations of conduct relating to how the state should protect against the actions and policies of non-state actors.⁴⁴⁹

⁴⁴⁷ For further detail of the interrelationship of human rights law and humanitarian law generally see the conclusions of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons* (Request by the General Assembly), ICJ Reports (1996) p. 226, paragraph 25. For further discussion of international humanitarian law and the right to water see Chapter 3.

⁴⁴⁸ In relation to the forthcoming case study, this is interesting in that Israel as the state exercising control has the responsibility to protect Palestinians in the West Bank from the actions of local water service providers, such as the municipality. This is difficult in the situation of occupation as the responsibility for water is shared across the occupying power and the government of the occupied population. Israel should protect against interference by the local provider but they claim they have no jurisdiction. For further discussion of this issue see Chapters 3 and 4.

⁴⁴⁹ Whereas previous provisions focus in the main on obligations of result, for example, in the CESCR GC 14 on the right to health.

The obligations to fulfil contained within GC 15 are comprehensive and include both general provision in paragraph 25 to facilitate, promote and provide (which can be interpreted as assistance, education and provision), as well as more specific obligations regarding water and importantly sanitation in paragraphs 26-29. Particularly positive aspects of these obligations include ensuring water is affordable and measures to achieve this,⁴⁵⁰ recognition of the right to water under domestic political and legal systems,⁴⁵¹ and adoption of policies and programmes to ensure sustainable use of water to ensure water for future generations.⁴⁵² This final obligation is significant as it encompasses environmental and development approaches to water⁴⁵³ and lists examples of measures that could be taken to fulfil this duty.

Moreover, it is notable that these paragraphs consist very much of obligations of conduct and include many suggestions for how to achieve the main obligation of result: safe, sufficient, accessible, and affordable water for all.

The final paragraph under the section on obligations to fulfil concerns sanitation provision:

Ensuring that everyone has access to adequate sanitation is not only fundamental for human dignity and privacy, but is one of the principal

⁴⁵⁰ GC 15, para.27.

⁴⁵¹ GC 15, para.26.

⁴⁵² GC 15, para.28.

⁴⁵³ This reflects the synergy between the human rights approach and development approaches to water, noted in the Introduction. The achievements in the development field concerning water are acknowledged further in the General Comment in various references to the Johannesburg Plan of Implementation of the 2002 World Summit on Sustainable Development, Dublin Principles and the Rio Declaration and Agenda 21.

mechanisms for protecting the quality of drinking water supplies and resources. In accordance with the rights to health and adequate housing (see General Comments No. 4 (1991) and 14 (2000)) States parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.⁴⁵⁴

This provision is weak in terms of concrete immediate obligations for the state to adhere to. It includes sanitation as fundamental for human dignity and notes the special protections required by women and children, but then provides that states only have an obligation to ‘progressively extend’ sanitation services. As such, it gives the impression that sanitation provision is not a core element necessary to fulfil the right to water.⁴⁵⁵ Furthermore this provision seems to contradict the inclusion of sanitation within the core obligations, as one of the ‘measures to prevent, treat and control diseases linked to water...’⁴⁵⁶ The Committee state that sanitation is one of the key mechanisms for protecting water quality and it is extremely difficult to realise the right to water in its entirety without adequate sanitation. Thus, even if the obligation was limited in the previous General Comments listed, the obligation should be of an immediate nature, thus confirming adequate sanitation a core obligation under GC 15.⁴⁵⁷

⁴⁵⁴ GC 15, para.29. Original footnote omitted.

⁴⁵⁵ See previous discussion Chapter 1, pp.92-94 and p.100.

⁴⁵⁶ GC 15, para.37(i).

⁴⁵⁷ See further discussion regarding core obligations and the right to water p.143.

(ii) Domestic Implementation

The importance of domestic implementation in the realisation of the right to water is unambiguous owing to the detailed provisions set out in GC 15. Under obligations to fulfil, paragraph 26, requires that states ‘accord sufficient recognition of the right to water within their national and political systems, preferably by way of legislative implementation’ as well as adopting a ‘national water strategy and plan of action’ for realisation of the right. The facilitation of improved and sustainable access to water for those especially vulnerable⁴⁵⁸ is also provided for.

These obligations are expanded on further within Section V Implementation at the national level.⁴⁵⁹ Paragraphs 47-49 outline what such a national water strategy should entail, including *inter alia* the setting of benchmarks and indicators for monitoring the enjoyment of the right to water, establishing accountability and respect for the principles of non-discrimination and peoples’ participation. Paragraph 50 deals with providing guidance as to what legislative measures should be included within a legal framework for implementation of the right, while paragraphs 52-54 expand the obligations regarding indicators and benchmarks.⁴⁶⁰ Worthy of note is paragraph 53 which states that indicators should not only address all the different components of the right to water but also ‘cover all persons residing in the State party’s territorial jurisdiction or under their control.’⁴⁶¹ This sentiment has not been overtly stated in previous General Comments and reflects several current issues in the field of economic and social rights: the first being the expansion of obligations to include

⁴⁵⁸ Those in rural areas and deprived urban areas.

⁴⁵⁹ GC 15, paras. 45-59.

⁴⁶⁰ For further details of obligations and appropriate indicators and benchmarks for measuring realisation of the right to water see Roaf et al, March 2005.

⁴⁶¹ GC 15, para.53.

extra-territorial duties and secondly, the reaffirmation of an occupying power's responsibility for human rights obligations over the occupied population both under international humanitarian law and under international human rights law.⁴⁶²

Finally, paragraphs 55-59 concern remedies and accountability. Significantly, paragraph 56 contains an obligation that applies to both a state party or a third party and maintains that before any action is taken interfering with an individual's right to water, their capacity to pay for water must be taken into account and crucially, 'Under no circumstances shall an individual be deprived of the minimum essential level of water.' This strongly worded obligation ensures that no water provider, be it a state or third party can deny an individual water for basic needs, on any basis.

In sum, although the obligations regarding national implementation contained in GC 15 follow an established outline seen in previous General Comments,⁴⁶³ these provisions also illustrate a further evolution in the field of obligations. This development, which was initially evident in the GC 14 on the right to health, is that they provide detailed obligations of conduct on how to implement the right at state level, thus attaching greater gravity and responsibility to implementation at domestic level.

⁴⁶² For example, the state of Israel refuse to report on the Palestinian populations' enjoyment of economic and social rights within the OPTs, as they refute that they hold obligations to do so. However, they do report on the enjoyment of rights by Israeli settlers in the West Bank. See Chapter 3 for further discussion of this issue.

⁴⁶³ Such as GC 14 on the right to health and GC 12 on the right to food.

(iii) International Obligations

Concerning international obligations the General Comment is unambiguous and follows the framework of provisions, as set out in previous General Comments.⁴⁶⁴ Paragraph 30 requires that state parties recognise, ‘the essential role of international co-operation and assistance and take joint and separate action to achieve the full realisation of the right to water’, as listed in Article 2 of the Covenant.⁴⁶⁵ In addition, paragraph 31 provides that states have a duty to respect the right to water in other countries. Furthermore paragraph 33 extends this obligation to include ensuring that their own individuals and companies refrain from actions which would result in violations of the right in other countries. This provision is important as it extends state obligations to include extra-territorial duties.

This provision reflects the development of obligations from the classic conception of obligations as being limited to state actions or omissions within national territory, to a conception of obligations as encompassing activities taken by the state or by its citizens beyond state borders. This development is critical as it manifests the contemporary globalised system of states’ activities: transnational trade, international cooperation, aid and development and increased communications and travel. As a consequence, the current legal framework of obligations may need to be extended or amended, resulting in a different model to the present traditional foundation for international human rights law, which holds the state as the primary duty holder.⁴⁶⁶

⁴⁶⁴ For example see GC 14, para.38.

⁴⁶⁵ This approach of international cooperation with the aim of realising access to safe and sufficient water is parallel to the approach taken under Water Convention Protocol on Water and Health, as discussed in the Introduction, p.19.

⁴⁶⁶ This recent and emerging debate on extra-territorial human rights obligations is an important issue, but one which lies outside of the scope of this current work. For further reading on the issue see Skogly, S, Beyond National Borders: States’ Human Rights Obligations in International Cooperation.

In the case of the right to water it is particularly pertinent as geographically water resources are often shared between states' territories and the actions of a neighbouring state or its citizens can have consequent effects upon individuals' right to water in another state.⁴⁶⁷ Furthermore, in the case of an occupation, even if the occupying force denies holding human rights obligations towards the individuals in that territory, they cannot deny that they have, at the very least, extra-territorial human rights obligations.⁴⁶⁸

Paragraph 32 refers to water as an instrument of political and economic pressure and notes the relationship between economic sanctions and respect for economic and social rights. This provision also highlights the relevance of obligations concerning the right to water under humanitarian law, as it reinforces the position taken under the Geneva Conventions that water should not be used as a tactic in conflict. This is especially relevant to situations such as the Israeli /Palestinian conflict, where water is a political issue.⁴⁶⁹

Intersentia: Oxford/Antwerp, 2006; Coomans. F and Kamminga. M, (eds), Extraterritorial Application of Human Rights Treaties, Antwerp: Intersentia, 2004; Skogly. S and Gibney. M, 'Transnational Human Rights Obligations' in Human Rights Quarterly, Vol.24, No.3, August 2002, pp.781-798; Vandenhoe. W, 'Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy' in Nordic Journal of International Law, forthcoming 2007 (on file with author as an earlier version presented at the Centre for Transboundary Legal Development, Tillburg University, 14th Dec 2005); Vandenhoe. W, 'Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?' Paper presented at the International Interdisciplinary Conference on Children's Rights, Ghent, Belgium, 18th May 2006.

⁴⁶⁷ Moreover, Skogly has noted that under norms of environmental law, including international law pertaining to water the concept of transboundary responsibility for actions is established and accepted and that principles such as prohibition of harm within any entity under a state's control could easily be translated to extra territorial human rights obligations. See Skogly, 2006, pp.49-55.

⁴⁶⁸ See Skogly, 2006, pp.198-201 on occupation and extra-territorial obligations. For further discussion of occupation and human rights obligations see Chapter 3.

⁴⁶⁹ See Chapters 3 and 4 for a detailed analysis of water within the Israeli / Palestinian conflict.

(iv) International assistance

The question of obligations in relation to international assistance is addressed in paragraph 34 which provides that States should facilitate realisation of the right to water in other countries through provision of water resources and financial and technical assistance. Furthermore they must provide necessary aid when required, although both these obligations are dependent on the availability of resources.⁴⁷⁰ 'In disaster relief and emergency assistance, including assistance to refugees and displaced persons, priority should be given to Covenant rights, including the provision of adequate water.'⁴⁷¹

The priority given to assistance for ensuring economic and social rights is overt and represents a new approach from previous General Comments. For example, although General Comment 14, paragraph 40 notes that states have a responsibility to cooperate in providing disaster relief, this is framed in terms of humanitarian assistance and does not explicitly acknowledge the precedence of ensuring Covenant rights, including water, as paragraph 34 does. This provision is also important as it acknowledges the particular responsibility of economically developed states parties in assisting the poorer developing states and states involved in emergency situations, including assisting refugees and others involved in conflict with realisation of the right to water.

Paragraph 35 relates to international and regional agreements and their impact upon the right to water, noting that the right to water should be given due attention in international agreements and that implementation of other international and regional

⁴⁷⁰ See previous discussion p.121.

⁴⁷¹ GC 15, para.34.

agreements should not adversely impact upon the right to water. This is particularly interesting in terms of the effect the obligation may have on the implementation of regional or bilateral agreements concerned with water. For example, the Interim Agreement, which addresses the issue of water between Israel and Palestine under Article 40, has to be seen to be having a positive effect upon the enjoyment of the right to water or at least not a negative effect.⁴⁷²

In addition the provision concerning trade agreements is also worthy of note: ‘Agreements concerning trade liberalisation should not curtail or inhibit a country’s capacity to ensure the full realisation of the right to water.’⁴⁷³ Again, this could be seen as reflecting the concern over the possible negative impacts of privatisation of water services under these agreements, for example as seen in Cochabamba, Bolivia.⁴⁷⁴ However, it firmly places the responsibility for these agreements upon the state itself and not upon the third party. Moreover, the issue of privatisation is not given explicit recognition in this paragraph, whereas General Comment 14 declares categorically the duties of states, ‘to ensure that privatisation of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services.’⁴⁷⁵ This strongly worded unambiguous provision is lacking from GC 15.

Finally in terms of international obligations, states are required to take into account the right to water when acting as members of international organisations, including

⁴⁷² See Chapter 3, Section 3.7 p.191, for an in depth discussion of this instrument and its effect on the right to water in the OPTs.

⁴⁷³ GC 15, para.35.

⁴⁷⁴ See Barlowe. M and Clarke. T, Blue Gold. The Battle Against Corporate Theft of the World’s Water. London: Earthscan, 2002, pp.185-187, 154-156 and 203.

⁴⁷⁵ GC 14, para. 35.

members of international financial institutions such as the International Monetary Fund and World Bank.⁴⁷⁶

(v) Obligations of Actors other than States

Regarding the obligations of non-state actors and the right to water, the General Comment is limited and summarises their duties as an obligation to ‘cooperate effectively with States parties’⁴⁷⁷ in relation to implementation of the right at national level. It also states that financial institutions should ‘take into account’ the right to water in their policies and projects.⁴⁷⁸ Lastly, in relation to the work of organisations concerned with disaster relief and humanitarian assistance, the Committee note that there is an obligation to give priority to the provision of aid and management of water facilities to those most vulnerable members of the population.⁴⁷⁹

Unfortunately, the wording of this provision in terms of concrete obligations is vague, using terms such as ‘take into account’ and ‘promote’ rather than explicitly stating that non-state actors have obligations to respect or protect the right to water.⁴⁸⁰ This imprecise wording allows a broad interpretation of what these actors must actually do in terms of their responses and actions affecting the right. At the Day of General Discussion on the GC 15, there was much disagreement and discussion as to how far the Committee should and could go regarding provision for non-state obligations and many committee members and representatives of NGOs felt that this adopted

⁴⁷⁶ GC 15, para.36.

⁴⁷⁷ GC 15, para.60.

⁴⁷⁸ GC 15, para.60.

⁴⁷⁹ GC 15, para.60.

⁴⁸⁰ In GC 14, vague wording was also used. In paragraph 64, regarding the obligations of the World Bank and International Monetary Fund, it notes that they should ‘pay greater attention to the protection of the right to health in their lending policies...’

provision is not comprehensive enough.⁴⁸¹ In my own comments submitted to the Special Rapporteur on the right to water, I advocated changing the wording of the paragraph from, ‘The international financial institutions, notably the IMF and the World Bank should **take into account** the right to water in their lending policies, credit agreements, structural adjustment programmes and other development projects so that the enjoyment of the right to water is promoted’⁴⁸² to, ‘The IMF...should **ensure** that their lending policies, credit agreements, structural adjustment programmes and other development projects, **do not interfere with or threaten the enjoyment of the right to water.**’⁴⁸³

In conclusion, the provisions regarding the obligations of non-state actors are limited. However, at least the provisions of paragraph 60 provide a direct, if very minimal obligation upon non-state actors, although the nature of the obligation remains unclear.

(vi) Core Obligations

The crucial concept of core obligations has been noted in Chapter 1. The core legal obligations of states are those that are immediate and non-derogable. Paragraph 37 reiterates the concept of core obligations as contained in General Comment 3 and further states that ‘at least a number of core obligations in relation to the right to water

⁴⁸¹ See FIAN, 2002, p.3 and World Organisation against Torture (OMCT), 2002, pp.10-11.

⁴⁸² Final adopted version of GC 15, para.60.

⁴⁸³ Author’s comments for submission to the CESCR Special Rapporteur on the right to water, regarding the Draft General Comment of the Right to Water, Oct 2002 (my emphasis added). FIAN also advocated a change in wording, replacing the phrase ‘take into account’ with ‘should respect access to drinking water and assist states in the protection and fulfilment of access to water.’ See FIAN, 2002, p.3. For further discussion of the debate regarding the nature of obligations of international financial organisations see Skogly, 2001.

can be identified, which are of immediate effect.’⁴⁸⁴ There are nine core obligations, including *inter alia* the substantive obligation to (1), ‘ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses,’⁴⁸⁵ (a basic needs model for water provision) and (2), ensuring access to safe and sufficient water on a non-discriminatory basis.⁴⁸⁶

Further core obligations include: (3) Ensuring physical access to water;⁴⁸⁷ (4) Ensuring personal security when accessing water;⁴⁸⁸ (5) Equitable distribution of all water services;⁴⁸⁹ (6) Adoption and implementation of a national water strategy and plan of action;⁴⁹⁰ (7) Monitoring of progress and realization of the right to water;⁴⁹¹ (8) Special protection for vulnerable groups, including low-cost water programs⁴⁹² and finally, (9) to take measures to prevent disease linked to water, ‘in particular, ensuring access to adequate sanitation’.⁴⁹³ This final obligation is notable as it includes access to adequate sanitation in relation to health and quality of water, even though sanitation is not deemed a key substantive element (part of the core content as determined by the author) of the right to water.⁴⁹⁴ As noted previously, under paragraph 29 of obligations to fulfill, the Committee asserts that in relation to sanitation, States parties only have an obligation to ‘progressively extend safe sanitation services’ not to ensure adequate sanitation. This would seem contradictory and contributes further to the confusion as to whether ensuring adequate sanitation

⁴⁸⁴ GC 15, para.37.

⁴⁸⁵ Para.37(a).

⁴⁸⁶ Para.37(b).

⁴⁸⁷ Para.37 (c).

⁴⁸⁸ Para.37 (d).

⁴⁸⁹ Para.37 (e).

⁴⁹⁰ Para.37 (f).

⁴⁹¹ Para.37 (g).

⁴⁹² Para.37 (h).

⁴⁹³ Para.37 (i).

⁴⁹⁴ See analysis Chapter 1, pp.92-94 and p.100.

constitutes a core obligation of the right to water or not, especially as the other core obligations correlate with substantive elements of the right within the core normative content or encompass core principles, such as non-discrimination.⁴⁹⁵

Finally, under paragraph 38, in a strongly worded clause following the core obligations, the Committee emphasises that States parties and other actors who are able to assist, should provide international assistance to less developed states. This is not a core obligation in itself but rather a provision to stress the importance of international assistance in enabling developing countries to meet their core obligations.

2.5 Concluding Remarks

Historically the debates regarding the nature of obligations correlative to economic, social and cultural rights have, to a large extent, concerned the distinction between positive and negative obligations, and how this relates to the difference between civil and political rights on the one hand and economic, social and cultural rights on the other. This concept of obligations as positive or negative has its foundations in the idea that economic and social rights were not rights at all, but vague aims for states to help eliminate poverty and need. However, rights are indivisible and interdependent, as conceived of in the UDHR. As such, both types of rights ensue both types of obligations. It is a misconception that to realise economic and social rights requires only positive obligations and as such necessarily results in great economic and political burden. As Eide notes, 'Economic and social rights...can in many cases best be safeguarded through non-interference by the state with the freedom and use of

⁴⁹⁵ See discussion in Chapter 1, p.85, on the correlation between the core content and core obligations of the right to water.

resources possessed by the individuals.⁴⁹⁶ It is also true to say that although obligations of conduct and result exist, the divisions between them are not always clearly defined. They are not independent of each other and may overlap in terms of realisation of rights. As such, the usefulness of such a distinction is limited and questionable.

A most significant development concerning the establishment of a legal framework for human rights obligations has been the conception of the tripartite typology of obligations. The tripartite typology of obligations, to respect, protect and fulfil, is firmly accepted and encompassed into international human rights law. It is notable and in some ways ironic, that this generally accepted tripartite typology of obligations, which now applies to all human rights, is a product of the examination and analysis of basic subsistence rights, an element of economic and social rights which were for so long seen as secondary and of lesser obligations than civil and political rights. In theory, it is essential for the guarantee of any right that either the duty to respect or the duty to protect be completely realised, but in practice, 'it is essential to insist upon the fulfilment of both, because complete reliance on either one alone is not feasible, and in the case of duties to protect, almost certainly not desirable.'⁴⁹⁷ It is also the case that the obligation to fulfil is often the only obligation given widespread attention. This occurs because the obligation to fulfil usually comes into force when the other obligations (to respect and protect) have been neglected and thus rights have already been violated. Human rights violations make headline news, whereas compliance and realisation of rights does not.

⁴⁹⁶ Eide in Eide et al, 2001, p.25.

⁴⁹⁷ Shue, 1980, p.61.

Therefore the existence of this typology of obligations has provided a focus to ensure human rights are given attention and focus in a preventative capacity, rather than just dealing with the results of violations it is too late to prevent. Furthermore, they comprise a crucial mechanism for ‘making state parties’ compliance with the ICESCR comprehensible, realistic and therefore feasible for these state parties.’⁴⁹⁸

Concerning obligations under the Covenant, states parties must comply with obligations on all three levels contained within this typology: respect, protect and fulfil. However, as noted there are certain problems regarding the interpretation of clauses within Article 2(1), such as the meaning of ‘progressive realisation’, ‘taking steps’ and the limitation regarding ‘maximum available resources’, all of which affect obligations under the ICESCR. Although Craven argues that Article 2(1), ‘is a fairly unsatisfactory article, with its convoluted phraseology in which clauses and sub-clause are combined together in an almost intractable manner, making it virtually impossible to determine the precise nature of the obligations’,⁴⁹⁹ the work of the Committee and other documents such as the Limburg Principles 1988 and Maastricht Guidelines have made significant developments in the clarification of what state obligations entail and have established definite and accepted interpretations of the clauses contained within the article. In conclusion, these clauses cannot be interpreted as a limitation upon state obligations. It is clear is that the obligations correlative to economic, social and cultural rights cannot be ignored or derogated to secondary status any longer, but require either immediate realisation , as in the case of core

⁴⁹⁸ Arambulo, 1999, p.129.

⁴⁹⁹ Craven, 1995, p.151.

obligations or require that state parties must 'take steps' forward in implementation of the rights contained.

The clarification and implementation of state parties' obligations are crucial to the enjoyment of economic and social human rights in reality. Obligations need to be clear and attainable. Therefore, the concept of core obligations is imperative to the immediate implementation of the core content of the right. Core obligations serve as guidance to state parties as to what they are required to commit to as a minimum and immediately. However, as I have pointed out, more work is needed in order to clarify the situation regarding the use of available resources and whether failure to meet the core obligations because of limited resources, for example by a developing country, constitutes a violation of rights and breach of obligations or not.

This also highlights the importance of obligations pertaining to international assistance. If richer, more developed states do not have an obligation to assist those poorer states in realising their obligations, they may continue to thrive to the detriment of economic and social human rights in those poorer states. I would agree with Craven who argues that, by holding the poorer state to be in violation, 'this approach may obscure the fact that much of the responsibility for poverty and deprivation in the world lies with the developed states' approach to international trade and the economic order. In that sense, responsibility should be placed upon the international community and not merely confined to the victim state.'⁵⁰⁰

⁵⁰⁰ Craven, 1995, p.144.

In sum, further research is required pertaining to states parties' international obligations and their responsibility for the enjoyment of economic and social rights outside their national borders. In the minimum, states have a duty to respect economic and social rights in third states.⁵⁰¹

On the subject of obligations correlative to the right to water, the detailed provisions contained within the GC 15 comprise a substantial document, which provides in the main, clear and comprehensive guidance to states parties, concerning their obligations for realising the right. The obligations correlative to this right include comprehensive tripartite typology obligations to respect, protect and fulfil the right to water but also incorporate recent developments regarding obligations such as extra-territorial duties of states. Further strengths include the connections made with environmental and development approaches to water and extensive provisions detailing domestic implementation.

However, there are several weaknesses within the obligations presented, in addition to the problems common to economic and social rights under the Covenant in general (e.g. progressive realisation, maximum available resources). Provision concerning obligations of non-state actors is scant and limited. Furthermore, lack of definition regarding whether provision of adequate sanitation is a core obligation under the right to water or a progressive obligation, as part of the wider scope of the right causes confusion both legally in ascertaining whether a state is in breach of its obligations

⁵⁰¹ See Vandenhoe, forthcoming 2007; Vandenhoe, May 2006.

and practically in terms of prioritising resources for implementation of the right to water.

Nevertheless, overall the General Comment offers a comprehensive overview of the requirements for states in realising their duties under the ICESCR in regard to the right to water. In addition, although the General Comment is a clarification of obligations under the Covenant, it is also helpful in determining obligations correlative to the right to water as provided for in other international instruments, such as the CRC and CEDAW. When ascertaining the nature of obligations correlative to the right to water under the provisions within these other instruments, the requirements within the General Comment can be drawn upon for guidance and clarification of core obligations, as a minimum.

To conclude, the legal framework regarding human rights obligations has evolved greatly and debate continues within the field on how to develop obligations theory and practice further, to meet the challenges posed by continuing global actions of states and non-state actors, including addressing the increased power and role of private actors as affecting rights enjoyment, extra-territorial actions by state powers and to account for differences between developed and developing states. This is the context in which the realisation of the right to water is located. Evidently, the obligations correlative to economic and social rights, including the right to water, must be unambiguous and achievable, to ensure that these rights are fully realised and where they are not, that those who have breached their obligations are held accountable. In the words of Peter Gleick, ‘The day when all people have access to

their basic water needs remains I am afraid, far off. But, it is closer today, because of this work, than it ever has been.⁵⁰²

But, what of the actual enjoyment of the right to water on the ground? Having examined both the normative content of the right to water and the obligations for states parties to the relevant provisions, I will now turn to the second section of the thesis and will apply the general legal basis and knowledge from the last two chapters to a specific context: The application and enjoyment of the right to water in the OPTs (West Bank).

⁵⁰² Gleick, Dec 5th 2002, personal email to the committee and others engaged in the drafting and adoption of the GC 15 on the right to water. (Dr. Peter Gleick is the Director of the Pacific Institute for Studies in Development, Environment and Security, California, USA).

Chapter 3

The Right to Water in the Occupied Palestinian Territories (West Bank)

Part I - The Legal Basis

Introduction

The conflict between Israel and Palestine and the occupation of the Palestinian Territories by Israel, is a conflict that has been widely documented and discussed in politics and international relations, current affairs and the media and in academia, as well as by human rights organisations. However, although attention is given to massive human rights violations, such as the military incursions into various West Bank Palestinian towns and refugee camps in 2003, little prominence is given by any of these bodies to highlighting the everyday threats to and violations of economic and social rights within the OPTs.

The following chapter will evaluate the status of legal protection of the right to water within the OPTs of the West Bank. Firstly, I will examine the relevant legal provisions to which both parties, Israel and the Palestinian Authority, are bound: international provisions, bilateral agreements and national law. Consequently, I will assess the levels of protection they offer in regard to a human right to water, by evaluating the content and nature of these provisions.

Many have addressed the legal arguments pertaining to the conflict, including *inter alia* assessments of the legal status of the OPTs and of the legal status of the conflict

itself. i.e. whether an international or non-international conflict.⁵⁰³ However, it is not the objective of this chapter or thesis to discuss each particular legal perspective, rather to state my starting point from which this analysis begins. Moreover, these arguments pertaining to the status of the conflict or to which laws are applicable within the occupied territories are relevant to this discussion; only in so far that the various provisions applicable provide for a right to water and depending on your viewpoint the said provisions may differ. Notwithstanding this point, it is arguable that a human right to water exists under many of the legal provisions concerning Israel and the OPTs. Subsequently, Israel can be held to have obligations relating to this right whether as a party to international human rights treaties, under bilateral agreements with the Palestinian Authority, under domestic law and as the occupying power under international humanitarian law. Furthermore, it could be argued that if Israel's perspective on the applicability of the Geneva Conventions (i.e. that they are not applicable in the OPTs) is upheld, Israel still has extra-territorial obligations resulting from its ratification of international human rights treaties.⁵⁰⁴

In addition, it can be claimed that the Palestinian Authority also has obligations regarding human rights within the territories. However, the nature and level of these obligations are unclear, both generally and specifically in relation to the right to water. It may be that they are on a parallel with those of private companies, i.e. as a third party service provider at a local level. They may however be more extensive. These questions concerning obligations will be addressed as a part of the legal review

⁵⁰³ See, Benevisti. E, The International Law of Occupation, Princeton USA: Princeton University Press, 1993; Scobbie. I, 'Natural Resources and Belligerent Occupation: Mutation through Permanent Sovereignty' pp 253-260, in Bowen, 1997, pp 221-290; Watson. G, The Oslo Accords – International Law and the Israeli-Palestinian Peace Agreements, Oxford: Oxford University Press, 2000, pp.136-142.

⁵⁰⁴ For a detailed discussion of the extra-territorial human rights obligations of states, see Skogly, 2006.

and within a detailed analysis of the human rights provisions therein. Subsequently, I will examine the specific provisions relevant to a right to water and discuss the correlative obligations resulting from them for both parties.

It should also be noted, that many have dealt with the issue of the water conflict between the Israelis and the Palestinians, particularly from the approach of international law and environmental law. However, little, if any, research, to my knowledge, has been conducted or published assessing the water crisis from a human rights perspective. Consequently, I do not address questions of international law and international relations, such as the international water law and state practice regarding boundaries and aquifers or questions of water conflict in the region, as many authors have dealt with these issues.⁵⁰⁵ Rather, I wish to enhance the debate by focusing on the micro-level; the local; the 'on-the-ground' reality of the water crisis. This study of the enjoyment or lack of enjoyment of a human right to water will emphasize the unique benefits, in terms of potential empowerment, of the state-individual relationship of human rights law, as oppose to state-state mechanisms. I firmly believe in the validity of an international law and environmental law approach as having its place in resolution of the overall Israeli-Palestinian conflict and in its merits for finding a solution to the water crisis at the regional level and within the realm of international relations and significantly, in terms of sustainable management of the joint aquifers and regional water sources. However, a human rights approach to the water crisis can give the Palestinians agency within the interim period, until the

⁵⁰⁵ For example see Allan, J.A, The Middle East water question: hydro-politics and the global economy, London: I B Tauris, 2001; Daibes-Murad, F, A New Legal Framework for Managing the World's Shared Groundwaters - A Case-study from the Middle East, Water Policy Series, London: International Water Association, 2005; Selby, 2003; Lonergan and Brooks, 1994; Trottier. J, Hydropolitics, Jerusalem: Palestinian Academic Society for the Study of International Affairs (PASSIA), 1999.

conflict is resolved and the occupation has ended. There is a need for immediate action and individual redress and as such a human rights approach may be optimal. This constitutes the starting point for my overall thesis and for the methodology employed within the research study, as detailed in Chapter 4.

3.1 Background to the Israeli-Palestinian Conflict

(i) History

Before the legal questions can be addressed it is necessary to provide an overview of the Israeli-Palestinian conflict, to explain how the current occupation and water situation arose. The history of the Israeli-Palestinian conflict is a complex and lengthy one and has created a multitude of viewpoints. It is not within the scope of this thesis to present all these views, nor to undertake a detailed historical review.⁵⁰⁶ Rather I will provide a summary of the key events which have affected the legal status of the territories and their role in creating the current water crisis.

The creation of the State of Israel took place in 1948 in the aftermath of World War II and massive Jewish immigration, mainly from Europe. Prior to the establishment of Israel, Palestine was one of the former Ottoman Arab territories placed under mandate of the British in 1922, under the mandates system of the League of Nations.⁵⁰⁷ The Mandate had as one of its key objectives the implementation of the Balfour Declaration: This declaration signed by the British Government in 1917 expressed

⁵⁰⁶ For a summary historical introduction of the region and the conflict see Sluglett. P and Farouk-Sluglett. M, (eds) The Times guide to the Middle East : the Arab world and its neighbours (2nd ed), London : Times Books, 1993. For further reading see Smith. C.D, Palestine and the Arab-Israeli Conflict – A History with Documents, Bedford/St Martins: Boston, 5th ed, 2004; Cleveland. W, A History of the Modern Middle East (3rd ed), Boulder, Colorado: Westview Press, 2004; Gerner. D and Schwedler. J, (eds), Understanding the Contemporary Middle East (2nd ed), Boulder, Colorado: Lynne Rienner Publishers, 2004; Fawcett. L, (ed), International Relations of the Middle East, Oxford: Oxford University Press, 2005; Shlam. A, The Iron Wall – Israel and the Arab World, London: Penguin, 2000.

⁵⁰⁷ See Article 22, Covenant of the League of Nations 1919. Entry into force Jan 20th 1920.

support for the establishment of a 'national home' for Jewish people within Palestine.⁵⁰⁸ However, the British had also promised the Arab population an independent state in return for help to defeat the Ottoman Empire during World War I. These were mutually incompatible promises on behalf of the British and with both parties demanding independence the result was violence and unrest. Consequently, in 1947 the British Mandate was handed over to the UN.

The UN proposed the partition of Palestine into two independent states: a Palestinian Arab state and a Jewish state.⁵⁰⁹ However, this was not to happen, as the Jewish area pre-empted the agreement and proclaimed its independence as Israel, expanding the agreed borders by force and encompassing 77% of the land of Palestine, including much of Jerusalem. In the process, over half of the Palestinian population fled or were expelled.⁵¹⁰

Subsequently, the remaining non-Israeli territory was occupied and administered by Egypt (Gaza) and Jordan (West Bank), thus preventing the establishment of a Palestinian state. In 1967 Israel occupied this remaining territory in the Six Day War, resulting in the further displacement of half a million Palestinians. Despite UN Security Council resolution 242, 22 November 1967 calling on Israel to withdraw from the territories it had occupied, Israel continue to occupy the majority of this area in 2007.

⁵⁰⁸ UN Department for Political Affairs, 'History of the Question of Palestine' at Situation in the Middle East, Question of Palestine, Overview, www.un.org, UN: Last accessed April 2007.

⁵⁰⁹ Jerusalem was to be internationalised. See UN Security Council Resolution 181(II) 29 November 1947.

⁵¹⁰ UN Department for Political Affairs, 'History of the Question of Palestine', April 2007.

The first uprising or ‘Intifada’⁵¹¹ of the Palestinian people against the Israeli occupation began in 1987 and the Israeli forces responded with force, resulting in the escalation of violence, massive civilian deaths and injuries.⁵¹² These events were to spur on international efforts for a peace plan and give rise to the Madrid Peace Conference, 30 October 1991 and subsequent negotiations resulting in the Oslo Accords: the Declaration of Principles on Interim Self-Government Arrangements 1993⁵¹³ and the Interim Agreement on Implementation of the Declaration of Principles 1995.⁵¹⁴ This later agreement provides much of the legal basis for water use and management within the OPTs, whilst the territories remain under occupation, but postpones the issue of water ownership for the final status talks.⁵¹⁵ The Interim Agreement also provides for the establishment of the self-governing body, the Palestinian National Authority⁵¹⁶ and self-rule in designated areas. The next stage of the Oslo plan was to hold Final Status Negotiations to determine the terms and institutions to finalise two independent states. However, the negotiations were delayed by a change in the Israeli leadership.⁵¹⁷ In 2000, when talks resumed the parties failed to reach agreement. In addition a controversial visit in September 2000 by Ariel

⁵¹¹ ‘Intifada’ from the Arabic verb ‘to shake off’. The common Palestinian (and international) term for ‘uprising’. 1st Intifada began 7 Dec 1987, 2nd Intifada, 29th September 2000. See Arab Association for Human Rights et al, Compilation of Economic, Social and Cultural Rights Conditions of the Indigenous Palestinian People under Israel’s Jurisdiction and Effective Control, Parallel Report jointly submitted to the UN Committee on Economic, Social and Cultural Rights, 30th session, Geneva, 9 May 2003, Key of Terms pertaining to Israel/Palestine (i).

⁵¹² UN Department for Political Affairs, ‘History of the Question of Palestine’, April 2007.

⁵¹³ Declaration of Principles on Interim Self-Government Arrangements 1993 (Oslo I), Israel - Palestine Liberation Organisation, 13th September 1993. Hereinafter known as the Declaration of Principles.

⁵¹⁴ Interim Agreement on Implementation of the Declaration of Principles 1995 (Oslo II), Israel - Palestine Liberation Organisation 28th September 1995. Hereinafter known as the Interim Agreement.

⁵¹⁵ See Section 3.7, p.191 for further details of the Interim Agreement.

⁵¹⁶ Hereinafter known as the PA.

⁵¹⁷ Israeli PM Yitzhak Rabin was assassinated and replaced with Benjamin Netanyahu who opposed the peace process. Only in 1999 when Ehud Barak was elected in did the negotiations recommence. For a good summary of events see Bell, C, Peace Agreements and Human Rights, Oxford: OUP, 2000, pp.69-117.

Sharon, then Chairman of the Israeli Likud Party,⁵¹⁸ to the holy site of Al-Haram Al-Sharif (Temple Mount) caused widespread anger amongst the Palestinians. The combination of events ultimately resulted in violence and the commencement of a second Intifada. This put an end to the peace process in practical terms.

In 2002 and 2003 the Israelis mounted incursions into various refugee camps in the West Bank in response to renewed attacks by Palestinian militants. These military incursions resulted in massive violations of human rights resulting in loss of life and severe injury, destruction of homes and public buildings such as schools and hospitals and infrastructure such as water pipelines and electricity networks.⁵¹⁹ Limited freedom of movement and curfews meant restrictions on work and access to land, agriculture and water resources. The incursions therefore further exacerbated poor living conditions including causing problems accessing clean and sufficient water.⁵²⁰

To exacerbate the situation, in 2000 Israel approved plans to build a 'barrier' and began construction of the 'Security Wall'⁵²¹ in 2002.⁵²² The 'Wall' is of huge detriment to the lives of Palestinians living within the West Bank, as it prevents people from accessing their land and subsequently their foodstuffs and water sources, or the land and water sources are requisitioned and appropriated, resulting in the

⁵¹⁸ Elected as Prime Minister of Israel in February 2001.

⁵¹⁹ B'Tselem, Operation Defensive Shield: Soldiers' Testimonies, Palestinian Testimonies, July 2002; B'Tselem, Civilians Under Siege: Restrictions on Freedom of Movement as Collective Punishment, January 2001; Human Rights Watch, Israel, the Occupied West Bank and Gaza Strip, and the Palestinian Authority Territories - Jenin: IDF Military Operations, May 2002, Vol. 14, no. 3 (e).

⁵²⁰ These incursions were often mentioned by the interviewees, in my case study see Chapter 4, pp.282-285.

⁵²¹ The term used by the Israeli state, but, also known as the Separation Wall or Barrier.

⁵²² The current status of the Wall's construction is that 51% (362km) of the wall is completed, 13% (88km) is under construction and 36% (253km) remains planned. See UN Office for Coordination of Humanitarian Affairs – Occupied Palestinian Territories (OCHA), Preliminary Analysis of the Humanitarian Implications of the April 2006 Barrier Projections, Update 5, 7th July 2006, pp.2-3.

denial of means to make a living.⁵²³ In addition Palestinians are prevented from going to work and school and from accessing healthcare.⁵²⁴ In the worst cases families have been separated on two different sides of the barrier.⁵²⁵ This has resulted in widespread violations of economic and social rights⁵²⁶ including violations of the right to water.⁵²⁷

The completed phases of the Wall have already impeded the access of Palestinians to ‘vital water, sanitation and hygiene services’.⁵²⁸ In certain areas the Wall has blocked storm water drainage, resulting in flooding damaging housing and crops and causing a threat to health.⁵²⁹ Moreover, the completion of the Wall will result in Israel’s territorial superiority over the Western Aquifer.⁵³⁰

Several legal bodies have considered the legality of this barrier and/or the negative consequences of the wall upon the enjoyment of human rights by the Palestinians within the OPTs of the West Bank. The ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory⁵³¹ sought to ascertain whether the construction of the Wall had violated the rules and

⁵²³ International Commission of Jurists, Israel’s Separation Barrier – Challenges to the rule of law and human rights, ICJ: Geneva, July 6th 2004, p.48.

⁵²⁴ UN Office for Coordination of Humanitarian Affairs – Occupied Palestinian Territories (OCHA), The Humanitarian Impact of the West Bank Barrier on Palestinian Communities, March 2005, p.6 and pp.8-31.

⁵²⁵ UN Office for Coordination of Humanitarian Affairs – Occupied Palestinian Territories (OCHA), March 2005, p.11.

⁵²⁶ Including the rights to housing, health, work, freedom of movement, family life and education. For further details see the International Commission of Jurists, July 6th 2004, p.45 and pp 47-49.

⁵²⁷ International Commission of Jurists, July 6th 2004, p.45 and pp.47-49; PHG, 2004, pp.72-85.

⁵²⁸ PHG, Water for Life 2005 – Continued Israeli Assault on Palestinian Water, Sanitation and Hygiene During the Intifada, PHG: Ramallah, 2005, p.73.

⁵²⁹ PHG, 2005, p.77.

⁵³⁰ PHG, 2005, p.70; PHG, 2004, pp.72-85.

⁵³¹ International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9th July 2004. Hereinafter referred to as ICJ Wall Opinion.

principles of international human rights and humanitarian law.⁵³² In conclusion they found that the construction of the Wall and its associated regime is illegal as it violates the Palestinians' freedom of movement, right to work, to health, to education and to an adequate standard of living, as well as breaching obligations under international humanitarian law.⁵³³ The Israeli High Court of Justice responded that they did not accept the findings of the ICJ, firstly, on the principle that they had no jurisdiction to consider a case, as it was a matter for Israel and they did not give their consent for such an international opinion and secondly, as the opinion was based on inaccurate facts and lack of information. They further stated that the Wall should not have been considered as a whole but rather each particular section considered on its own merits.⁵³⁴

Despite their rejection of the ICJ's opinion, the Israeli High Court decided in the case of Beit Sourik⁵³⁵ that the impact of the Wall upon the humanitarian needs of the Palestinian village must be taken into account when planning the route of the fence.⁵³⁶ They noted that according to the principle of proportionality, security considerations must be balanced with the 'rights and needs and interests of the local population'.⁵³⁷ This resulted in the rerouting of this particular section of the Wall,⁵³⁸ as they ruled that the effects of the Wall upon the Palestinians, in this case, were indeed

⁵³² ICJ Wall Opinion, para.114.

⁵³³ ICJ Wall Opinion, paras.123-137. See also discussion, pp.203-204; 208-209; 212.

⁵³⁴ Israeli High Court of Justice Statement, 23rd February 2005. See summary at State of Israel, Ministry of Defence, Israel's Security Fence, News Briefs, 'Israel's response to the ICJ advisory opinion on the Security Fence' 28/02/2005, www.seamzone.mod.gov.il

⁵³⁵ *Beit Sourik Village Council v. Government of Israel and the Commander of the IDF Forces in the West Bank*, H.C.2056/04. Hereinafter referred to as Beit Sourik case.

⁵³⁶ Beit Sourik case, para.44.

⁵³⁷ Beit Sourik case, para.34.

⁵³⁸ Decided by the Government of Israel, 20 February 2005.

disproportionate.⁵³⁹ However, in a further case, *Alfei Menashe*,⁵⁴⁰ the court ruled that Israel has a right to build the security fence beyond the Green Line⁵⁴¹ in order to protect Israeli settlements and Israeli citizens,⁵⁴² even if Palestinian communities were disproportionately affected. Although they ordered a review of the current route, they implied that the security needs of the Israeli settlers were of a higher priority than the needs of the Palestinian communities affected by the Wall's construction.⁵⁴³ To date, 3 petitioners are still pursuing their cases before the court.⁵⁴⁴

Despite further re routing of the Wall⁵⁴⁵ no publicly available research has been conducted by the Israeli government to measure the impact of the Wall on Palestinian communities affected.⁵⁴⁶ Only 20% of the Wall runs along the Green Line. Consequently, if completed to the current planned route 60,500 Palestinians in 42 villages will reside in 'closed areas'; that is areas between the Green Line and the

⁵³⁹ Beit Sourik case, paras.60-62.

⁵⁴⁰ *Mara'abe, Ahmed, Shuahani, Udah, Udah, Udah and The Association for Civil Rights in Israel v. The Prime Minister of Israel, The Minister of Defence, The Commander of IDF Forces in the Judea and Samaria Area, The Separation Fence Authority, The Alfei Menashe Local Council*, H.C.J.7957/04. Hereinafter referred to as 'Alfei Menashe' case.

⁵⁴¹ The 1949 Armistice Line between Israel and Jordan and recognised border between Israel and the OPTs.

⁵⁴² 'Alfei Menashe' case, para.112. Also paras.100-101. See also State of Israel, Ministry of Defence, Israel's Security Fence, News Briefs, 'The Supreme Court and the ICJ' 15/09/2005.

⁵⁴³ See *Alfei Menashe* case. For an analysis of the rulings of the Israeli High Court in relation to the Wall and international law see Lynk. M, 'Down By Law: The High Court of Israel, International Law and the Separation Wall' in *Journal of Palestine Studies*, Vol XXXV, No.1, Autumn 2005, pp.6-24. For further information on the opinion of the Israeli court see the State of Israel, Ministry of Defence, Israel's Security Fence, Execution Aspects,

<http://www.seamzone.mod.gov.il/Pages/ENG/execution.htm> Last updated 31-01-07.

⁵⁴⁴ As of the 03/01/ 2007, 39 petitions concerning the Security Fence are still pending to be examined by the Supreme Court, 28 of them consist of objections to the planned route of the Security Fence, including the 3 concerning the already existing fence in the area of Alfei Menashe. 2 other petitions deal with crossings: the Lamed Hei (Jaba) Crossing and the Ramot Crossing and 9 other petitions refer to humanitarian issues. To date, in total, 102 petitions have been dealt with by the Supreme Court.' See website of the State of Israel, Ministry of Defence, Israel's Security Fence, News Briefs, Status Report-Legal aspects of the Security Fence, Last updated 03/01/2007,

<http://www.seamzone.mod.gov.il/Pages/ENG/news.htm#news49>

⁵⁴⁵ Decided by the Government of Israel, 30th April 2006. For details of changes see State of Israel, Ministry of Defence, Israel's Security Fence, News Briefs, 'Revised route of Security Fence' 30/04/2006, Last updated 03/01/2007, <http://www.seamzone.mod.gov.il/Pages/ENG/news.htm>

⁵⁴⁶ UN Office for Coordination of Humanitarian Affairs, 7th July 2006, p.3.

Wall,⁵⁴⁷ the effects of which are likely to be negative upon the enjoyment of economic and social rights. Specifically in relation to the effects of the construction of the security wall, the CESCR have noted that it ‘allegedly would infringe upon the surface area of the occupied territories which would limit or even impede access by Palestinian individuals and communities to land and water resources.’⁵⁴⁸ Moreover, the International Commission of Jurists state that the construction of the Wall is based on a policy that ‘equates to a deliberately retrogressive measure in the implementation of the ICESCR’.⁵⁴⁹

In response to the continuing escalation of violence and international pressure to take action the ‘Quartet’⁵⁵⁰ devised the ‘Roadmap’ for peace in the Middle East.⁵⁵¹ The Roadmap itself consists of a three-part plan for peace calling on parties to adhere to previous Security Council Resolutions.⁵⁵² However, despite calling for peace the Roadmap is vague in terms of how to achieve peace. It does not mention human rights standards nor any specific human rights. In terms of specific provisions relating to the water crisis, the roadmap refers only to ‘a revival of multi-lateral engagement on issues, including regional water resources...’⁵⁵³ The issue of water is otherwise absent from provisions, as are human rights principles. Moreover, the Roadmap does not constitute a legally binding document, as it is not formulated as a treaty, but is a

⁵⁴⁷ In areas where the Wall is already constructed these residents require permits to pass through a gate in the barrier and permits to continue to reside in their homes. See UN Office for Coordination of Humanitarian Affairs, March 2005, pp.33-38; UN Office for Coordination of Humanitarian Affairs, 7th July 2006, p.1 (Figures as of 1st May 2006).

⁵⁴⁸ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, 23/05/2003, E/C.12/1/Add.90, para.24.

⁵⁴⁹ International Commission of Jurists, July 6th 2004, p.48.

⁵⁵⁰ The Quartet is composed of the United States, the European Union, Russia and the United Nations.

⁵⁵¹ Quartet (US, UN, EU and Russia) A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, 30 April 2003, submitted by George Bush to the Israelis and Palestinians on 30th April 2003.

⁵⁵² Specifically noting resolutions 242 (1967), 338 (1973), 1397 (2002) and 1515 (2003).

⁵⁵³ A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, 30 April 2003, Phase II: Transition, para.3.

peace initiative by the international community. Therefore the legal provisions of the Oslo Accords remain binding.⁵⁵⁴

Despite this initiative, the overt violence of the Israeli Forces towards civilians in the incursions noted only served to increase hostilities. The consequence was a complete breakdown and ‘stalling’ of the peace process under the ‘Roadmap’ initiative and continuation of the stalemate under Oslo. Furthermore, the international community contributed to the failure of the process by presenting a weak plan with few concrete measures for implementation. Containing no human rights guarantees and with no references to obligations under humanitarian or human rights law, it offers little by way of protection or substance to enforce any ‘peace’.⁵⁵⁵

Most recently the death of long term Palestinian Liberation Organisation⁵⁵⁶ leader, Yasser Arafat and the subsequent election of Hamas⁵⁵⁷ in the ‘free and fair’ elections of 2006,⁵⁵⁸ has had and will continue to have consequences for the water situation in the OPTs, primarily because of the international response to their election, which has been a negative one. In reaction to the election result the Quartet issued a statement demanding that Hamas renounce violence and recognise the state of Israel’s right to exist through recognition of previous bilateral agreements. i.e. Oslo I and II and the

⁵⁵⁴ For further discussion of the binding nature of Oslo and the provisions contained see Section 3.7, p.191.

⁵⁵⁵ For a critique of the roadmap see Human Rights Watch ‘The Roadmap: Repeating Oslo’s Human Rights Mistakes’, Background Briefing Paper, January 1st 2005.

⁵⁵⁶ The representatives of the Palestinian people hereafter referred to as the PLO.

⁵⁵⁷ Hamas is the abbreviation for ‘Harakat al-Islamiyyah’, which translates as the Islamic Resistance Movement. Hamas was founded in 1988 as an offshoot of the Egyptian based Muslim Brotherhood (founded in 1928).

⁵⁵⁸ The elections were deemed free and fair by the Quartet in its statement of 9 May 2006.

Roadmap.⁵⁵⁹ The USA stated that there could be ‘No negotiations with ‘terrorists’ and Israel refused to acknowledge the Hamas government as legitimate.⁵⁶⁰

In the immediate months after the elections, the EU and USA withdrew aid, stating they would not fund terrorism but ultimately imposing economic sanctions upon the Palestinian people. The effects have been wide ranging and have resulted in a deepening of poverty and worsening living conditions for ordinary Palestinians.⁵⁶¹

Although the international community and individual state or group of states should adhere in all circumstances to the guidelines within the CESCR General Comment 8

The relationship between economic sanctions and respect for economic and social rights,⁵⁶² their actions have had a detrimental effect upon the enjoyment of economic and social rights within the OPTs, including the right to water.

Eventually, in response to the growing humanitarian crisis, some aid has been resumed through ‘a temporary international mechanism’,⁵⁶³ through the office of the Palestinian President Mahmoud Abbas, as he is a representative of the PLO and not a member of Hamas.

3.2 Water in the West Bank

⁵⁵⁹ See Quartet at UN website, www.un.org Situation in the Middle East, Quartet, Statements: 9 May 2006, 26 Jan 2006, 30 Jan 2006, 17 June 2006.

⁵⁶⁰ See BBC, ‘Israel gets cautious US backing’, News article at BBC News website, Middle East, Wednesday, 24 May 2006; Weber Tim, ‘Davos grapples with Hamas fallout’, News article at BBC News website Middle East, Friday, 27 January 2006, 16:41 GMT.

⁵⁶¹ UNRWA, Prolonged Crisis in the Occupied Palestinian Territory: Recent Socio-Economic Impacts of the New Phase on Refugees and Non-refugees, UNRWA: Gaza, November 2006, p.I. Further details see pp.29-44.

⁵⁶² CESCR, General Comment 8, 12/12/97 (Seventeenth session, 1997) The relationship between economic sanctions and respect for economic and social rights, E/C.12/1997/8.

⁵⁶³ See Quartet statement, 17 June 2006.

The consequence for the water situation as a result of the current occupation is severe. Although the climate in the region is arid or semi-arid, there are many renewable water resources, especially in the elevated mountainous areas of the West Bank.⁵⁶⁴ However, when Israel occupied the West Bank and Gaza in 1967 they took control of all the water resources previously controlled and owned by the Palestinians under Jordanian, Egyptian, Ottoman and British Mandate law. The Israelis imposed military orders preventing the Palestinian population from accessing water resources through the drilling of wells and pumping stations and restricting the amount of water supplied to them. Thus Israel now controls, manages and sells the water to the Palestinians.⁵⁶⁵ Despite the establishment of the Palestinian Water Authority⁵⁶⁶ under the Interim Agreement,⁵⁶⁷ it can only operate with limitations due to continued Israeli control over water resources. Although it has passed a water law and consolidated the legal framework, the PWA remains constrained financially and politically. In sum,

The PWA cannot deliver in the absence of full sovereignty and control over its water resources...The PWA cannot manage and administer what it does not have. It will not be able to manage the increased demand so long as it has no role in managing and sharing the supply.⁵⁶⁸

⁵⁶⁴ See Map B appendices; PHG, 2004, p.16; UN Environment Programme (Hereinafter referred to as UNEP) Desk Study on the Environment in the Occupied Palestinian Territories, Geneva: UNEP, January 2003, pp.12-16.

⁵⁶⁵ Hussein Hiba, The Palestinian Water Authority: Developments And Challenges Involving The Legal Framework And Capacity Of The PWA, Paper Presented to the International Israeli-Palestinian Water Conference, October 10-14 2004, Antalia, Turkey, p.1.

⁵⁶⁶ Here in after known as the PWA.

⁵⁶⁷ PWA established in 1995 by Presidential Decree No.5/1995, following the provisions of Article 40 of the Interim Agreement 1995. Law No.2/1996 defines its objectives, functions and responsibilities, giving the PWA the mandate to manage water resources, execute water policy, establish, supervise and monitor water projects, and to initiate coordination and cooperation between the stakeholders in the water sector. Presidential Decree No.66/1997 establishes the internal regulations of the Palestinian Water Authority and the rules of procedures and Article 7 of the Palestine Water Law No.3/2002 defines the tasks and responsibilities of PWA and provides further legal basis for the water authority including granting it legal personality. For further information see Hussein Hiba, October 10-14 2004.

⁵⁶⁸ Hussein Hiba, October 10-14 2004, pp.13-14.

Although Israel cooperates in certain water-related matters, Israeli policies ensure that Israeli settlers and Israel proper have priority in water use and allocation. 'As a consequence a man-made water crisis undermines the living conditions of the Palestinian people.'⁵⁶⁹

Obviously this water crisis and acute violent events in the OPTs have a direct impact on the enjoyment of the human right to water for the Palestinian people. However, little attention is focused upon the nature of the crisis for those subject to it, in their everyday lives. Problems faced by Palestinians on a daily basis include insufficient water supply, poor water quality and restricted access to water, both physical and economic.⁵⁷⁰ Subsequently, these problems can lead to water related disease and poor health and hygiene, restrictions on work, housing problems and family and community stress resulting in conflict and exacerbation of poverty.⁵⁷¹ Furthermore, these problems are compounded by lack of water infrastructure, poor condition of the water network, poor sanitation and waste management and resource and service mismanagement at local, as well as national level.

The current daily amount of water deemed sufficient for drinking and personal use, by the World Health Organisation, is an optimum access of 100 l/c/d,⁵⁷² 50 l/c/d as an

⁵⁶⁹ UN Department for Political Affairs, 'History of the Question of Palestine', April 2007.

⁵⁷⁰ See *inter alia* PHG, 2004; B'Tselem, July 2000; B'Tselem, Not Even A Drop – The Water Crisis in Palestinian Villages Without a Water Network, B'Tselem: Jerusalem, July 2001; B'Tselem, Disputed Waters – Israel's Responsibility for the Water Shortage in the Occupied Territories, B'Tselem: Jerusalem, September 1998; Kothari. M, UN Special Rapporteur on the right to Adequate Housing, Report of visit to the Occupied Palestinian Territories, 5-10th Jan 2002, E/CN.4/2003/5/Add.1, 10th June 2002.

⁵⁷¹ See *inter alia* PHG, 2004; B'Tselem, July 2000; B'Tselem, July 2001; B'Tselem, September 1998.

⁵⁷² l/c/d meaning litres per capita (person), per day.

intermediate level and 20 l/c/d/ as a very minimum basic supply for drinking only.⁵⁷³

This is compared with the average daily amount of water used by a Palestinian of between 50 and 70 l/c/d at best⁵⁷⁴ and as little as 7 l/c/d in some cases.⁵⁷⁵ Interestingly the Palestinian Hydrology Group WaSH Project, found the average water use of Palestinians in the West Bank to be 85 l/c/d but significantly, that is for all uses including agriculture and livestock, as well as for domestic use. This is well below the WHO recommended amounts.⁵⁷⁶ Moreover, the average domestic daily use of water for an Israeli is 350 l/c/d excluding water for other uses.⁵⁷⁷ These basic figures alone indicate the scale and nature of the problem faced.⁵⁷⁸

It is with these fundamental problems in mind that the legal protection for a right to water in the OPTs and the resulting obligations to ensure such a right are reviewed.

3.3. International Humanitarian Law applicable to the Occupied Palestinian Territories (West Bank)

The question of whether international humanitarian law contains provisions of a human rights nature has been a topic of recent debate. In addition, questions as to whether international human rights instruments are themselves applicable in times of conflict have also been the focus of discussion.⁵⁷⁹ What is certain is that international

⁵⁷³ See Bartram, J and Howard, G, 'Domestic water quantity, service level and health: what should be the goal for water and health sectors', Geneva: WHO, 2003, (WHO/SDE/WSH/03.02). See also Gleick, 1996, pp. 83-92 and WHO, 2003, pp. 12-18.

⁵⁷⁴ PASSIA, Special Bulletin, Water: The Blue Gold of the Middle East, July 2002, p.6.

⁵⁷⁵ See PHG, 2004, p.6. See Chapter 4 for the daily averages according to my research study.

⁵⁷⁶ PHG, 2004, p.23.

⁵⁷⁷ PHG, 2004, p.23. Also PASSIA, July 2002, p.6.

⁵⁷⁸ For comparison, the average domestic water consumption in the UK is 140 – 150 l/c/d according to the UK Office of Water Services (OFWAT), Security of supply, leakage and the efficient use of water, 2004-05 report, UK Crown, October 2005, Table 12 and 13, p.49.

⁵⁷⁹ The question of the applicability of human rights law within conflict is dealt with in Section.3.8, p. 201.

humanitarian law contains provisions concerning the protection of civilians and water, which obligate those parties to the treaties and that many of these provisions correlate, in essence, with provisions concerning the right to water under international human rights law. The provisions relevant to the Israeli-Palestinian conflict need to be examined in detail, in order to establish the level of protection afforded to those in the OPTs and in order to determine the content of each specific provision.

3.4 The Geneva Conventions 1949

A number of treaties compose what is commonly seen as the principle modern instruments of international humanitarian law.⁵⁸⁰ Generally known as the abbreviated ‘Geneva Conventions’,⁵⁸¹ they were drafted as a response to the terrible events of WWII, including the changing nature of warfare. As such, they encompassed the differing rules needed to govern modern war and focused not only upon legally defining the laws of war for combatants, but, crucially, also upon the protection of civilians affected by war. To date, these Conventions have been ratified by 194 states.⁵⁸² In addition to the four conventions, two additional protocols were adopted in 1977: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and

⁵⁸⁰ The Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; The Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

⁵⁸¹ Hereinafter referred to as the Geneva Conventions.

⁵⁸² Correct as of 01 May 2007.

relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1977.⁵⁸³ These have been ratified by 167 states⁵⁸⁴ and 163 states respectively.⁵⁸⁵

As well as governing the laws of warfare and weaponry and protecting civilians, the Geneva Conventions contain the norms of law regarding belligerent occupation,⁵⁸⁶ in particular within Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.⁵⁸⁷ In terms of content, the Geneva Conventions provide protection for those under occupation and also provide legal guidelines for the occupation force on measures that can be taken to maintain control of the area. They operate on the premise that the occupying force has the predominant power and as such, those under occupation require international protection.⁵⁸⁸

Significantly, the rights contained within the Geneva Conventions, in relation to belligerent occupation, are incumbent upon the individuals protected as members of the occupied population. As such, in this respect, the Convention embodies a human rights character rather than one of international law between states.⁵⁸⁹ Despite this human rights nature, I would argue that these provisions cannot be seen as individual human rights in the legal sense, as there is no individual entitlement provided for and

⁵⁸³ Hereafter referred to as the Additional Protocols I and II, 1977.

⁵⁸⁴ With 5 signatories remaining. Correct as of 01 May 2007.

⁵⁸⁵ With 4 signatories remaining. Correct as of 01 May 2007.

⁵⁸⁶ Belligerent occupation is defined as enemy territory captured by an invading force and under the control and administration of that occupant. The occupant must exercise effective control of the area. See Regulations annexed to 1907 Hague Convention IV respecting the Laws and Customs of War on Land, Article 42, 43; See also Roberts. A, 'What is Military Occupation?', British Yearbook of International Law, 55, LV, Oxford: Clarendon Press, 1984, p.261; Green. L, The Contemporary Law of Armed Conflict, 2nd ed, Manchester University Press, 2000, pp.256-267; Scobbie. I, in Bowen, 1997, pp. 253-260 at pp. 223-228; Benevisti. E, 1993.

⁵⁸⁷ The Regulations annexed to 1907 Hague Convention IV respecting the Laws and Customs of War on Land, predate the Geneva Conventions and contained the norms concerning occupation within Article 42 and 43. See discussion Section 3.6, p.188.

⁵⁸⁸ See Quigley. J, 'The PLO Israeli Interim Arrangements and the Geneva Civilians Convention', in Bowen, 1997, pp.25-46 at p.26.

⁵⁸⁹ See Quigley in Bowen, 1997, p.26.

no individual right to redress. Rather these provisions constitute protective rules incumbent upon individuals but imposed by the Geneva Conventions upon the states in question. They have an obligation to protect the citizens of the other party involved, rather than their own citizens.⁵⁹⁰

However, as Rowe notes, the nature of the formulation of the Geneva Conventions v. human rights treaties is not the important issue. Rather, it is the provisions for implementation and remedy that make a difference on the ground. As such, an analysis based upon the distinction between how the rights are formulated in each case is not satisfactory.⁵⁹¹ The conventions include rules, which, if breached, could result in a violation of that right under both the Geneva Conventions and the corresponding human right under international human rights law. How an individual can respond to such a violation is the key matter.

(i) The applicability of the Geneva Conventions 1949, to the OPTs

The applicability of Geneva Conventions 1949 to the Israeli- Palestinian conflict must be determined in order to establish which provisions govern the conflict. Israel has ratified all four of the Geneva Conventions I –IV,⁵⁹² although it is not a party to the Additional Protocols I and II 1977. Consequently, the Geneva Conventions are applicable to the conflict as Israel is a State Party, although Israel disputes this fact.

⁵⁹⁰ Furthermore, this can be seen as in line with the notion of extra-territorial human rights obligations, where a state is responsible for its actions outside of its borders, which effect human rights enjoyment of the people in that territory, including those under occupation. See Skogly. S, 2006, p.201.

⁵⁹¹ Rowe. P, The Impact of Human Rights Law on Armed Forces, Cambridge University Press: Cambridge, 2006, p.122.

⁵⁹² Signed by Israel, 8th Dec 1949, ratified 06/07/1951.

The position of the Israeli government is that they do not apply in this case⁵⁹³ and they cite Common Article 2:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.⁵⁹⁴

Israel interprets this to mean that Article 2 only applies to those areas over which the party holds 'good title'. The Israeli government argues that the Palestinian Authority does not hold such 'good title', as the OPTs were not administered by a Palestinian state prior to the Israeli occupation of 1967 but rather were administered by Jordan

⁵⁹³ See CESCR Second Periodic State Report of Israel – Considered May 2003, E/1990/6/Add.32, 16 October 2001, para.5. Also [verbatim], Additional information submitted by States parties to the Covenant following the consideration of their reports by the Committee on Economic, Social and Cultural Rights, Addendum, ISRAEL, [20 April 2001], E/1989/5/Add.1414 May 2001, para.2; Human Rights Committee, Second Periodic Report Israel, [20 November 2001], CCPR/C/ISR/2001/24, December 2001, para.8. For secondary sources outlining the official Israeli view see, Quigley in Bowen, 1997, p.29; International Commission of Jurists, The Civilian Judicial System in the West Bank and Gaza: Present and Future, International Commission of Jurists / The Centre for the Independence of Judges and Lawyers: Geneva, June 1994, p.26; Roberts, A, 'Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988' pp.44-49 in Playfair, E (ed), International Law and the Administration of Occupied Territories, Oxford: Clarendon Press, 1992, pp.25-85; Blum, Y, 'The missing reversioner: reflections on the status of Judea and Samaria', 3 Israel Law Review 279, 1968, pp.281-294.

⁵⁹⁴ Common Article 2, Geneva Conventions 1949.

(West Bank) and Egypt (Gaza) respectively.⁵⁹⁵ Thus Israel argues they administer the territory as *terra nullius*.⁵⁹⁶

However, this view is universally rejected by international bodies and individual states, as well as under international jurisprudence of the International Court of Justice.⁵⁹⁷ Israel is a High Contracting Party to the Geneva Conventions and Common Article 1 states that these apply in all circumstances. In addition, as noted, Common Article 2 states their application in all cases of declared war or other armed conflict, including situations of occupation. It is consequently taken that the Geneva Conventions do apply to the OPTs and that Israel is bound by their obligations as a party to the Conventions.

Furthermore, having established the applicability of the Geneva Conventions within the OPTs, due to Israel's ratification status, it is significant to note that these instruments are viewed as the most authoritative treaties governing international

⁵⁹⁵ It should be noted that both Jordan and Egypt are High Contracting Parties to the Geneva Conventions.

⁵⁹⁶ Letter from the Head of the International Law Section of the Israeli Advocate General's Office to the ICJ, 6th Feb 1998 in International Commission of Jurists, 1994, p.26.

⁵⁹⁷ For material stating the application of the Geneva Conventions and a rejection of the Israeli view see the International Court of Justice (ICJ), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9th July 2004, para.101; UN Security Council Resolutions 237(14th June 1967), 465 (1st March 1980), 681 (1990); General Assembly Resolutions 2443 (19th December 1968), International Committee of the Red Cross, numerous official statements including *inter alia*, 'Conference of High Contracting Parties to the Fourth Geneva Convention, Statement by the International Committee of the Red Cross, Geneva', Official Statement, 5th December 2001, para.2; 'Israel and the occupied / autonomous territories: ICRC urges respect for international humanitarian law', ICRC News 04/116, 1st October 2004; 'Israel and the occupied and autonomous Palestinian territories: Deliberate attacks on civilians must stop', Press Release 03/63, 10th September 2003. All at ICRC Website, <http://www.icrc.org/web/eng/siteeng0.nsf/html/israel!Open> The ICRC worldwide\Middle East and North Africa\Israel, Key Documents, Israel and the occupied/autonomous territories: ICRC statements - List of statements made by the ICRC since 2000 regarding the humanitarian situation in the region, Official Statement, 1st January 2006. Secondary sources include Ben-Naftali, O and Shany, Y, 'Living in Denial: The Application of Human Rights in the Occupied Territories' Israel Law Review, Vol.37, No.1, 2003-2004, pp.17-118 at p.23; International Commission of Jurists, 1994, pp.26-27; Roberts in Playfair, 1992, p.52 and Al Haq, A Human Rights Assessment of the Declaration of Principles on Interim Self-Government Arrangements for Palestinians, Al Haq: Ramallah, 1993, pp.9-10.

humanitarian law and as such, are considered customary international law.⁵⁹⁸

Therefore, Israel is bound by the treaties, not only as a state party, but also due to the rules contained within being customary international law.

Moreover, in a recent study on customary international humanitarian law, the ICRC found that many of the rules contained within the Additional Protocols constituted customary international law, in addition to the conventions themselves.⁵⁹⁹

Subsequently, Israel is also bound by the norms of the Additional Protocols that represent customary rules of international humanitarian law, despite not being a party to them.⁶⁰⁰

In relation to the nature of the Israeli-Palestinian conflict, the situation is not one of short-term high – intensity warfare (although it has taken on this nature for periods) but rather a situation of belligerent occupation by one power over another. Therefore, the law of occupation is especially applicable, as an integral part of the Geneva Conventions, in particular Geneva Convention IV and Additional Protocol I.⁶⁰¹

⁵⁹⁸ See International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8th July 1996, para. 79 – 82; Report Of The Secretary-General Pursuant To Paragraph 2 Of Security Council Resolution 808 (1993), 3 May 1993, (S/25704), Regarding The Establishment Of The International Criminal Tribunal for the former Yugoslavia, Article 1 Competence of the International Tribunal, para.35; Henckaerts. JM and Doswald-Beck. L, ICRC International Customary Humanitarian Law, Volume 1 Rules, Cambridge University Press: Cambridge,2005, p.(xxx); Henckaerts (2005), p187; Green. L, 2000, p.57; Roberts. A and Guelff. R, 2000, pp.8, 68 and 196; Quigley in Bowen, 1997, p.26.

⁵⁹⁹ See generally, Henckaerts. JM and Doswald-Beck. L, 2005; Henckaerts, 2005, p.187 and Green, 2000, p.51.

⁶⁰⁰ See discussion p.175.

⁶⁰¹ Authors who discuss the applicability of the law of occupation to the Occupied Palestinian Territories include *inter alia* Benevisti. E, 1993; Watson, 2000, pp.136-142; Scobbie. I, 'Natural Resources and Belligerent Occupation: Mutation through Permanent Sovereignty' in Bowen, 1997, pp. 221-290; Roberts in Playfair, 1992, pp.25-85 at pp. 44-49.

(ii) Palestinian Obligations under International Humanitarian Law

It is worth noting here the position of the Palestinian Authority in relation to obligations under international humanitarian law. The first question raised is that of whether they can be seen to have any obligations, as they are not a state party to the Geneva Conventions. Secondly, it is the state of Israel who has effective control⁶⁰² of the territory under which the Palestinian Authority operate and as such, Israel who have an obligation to enforce the Conventions. Despite this,

On 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter from the Permanent Observer of Palestine to the United Nations Office at Geneva informing the Swiss Federal Council "that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto". On 13 September 1989, the Swiss Federal Council informed the States that it was not in a position to decide whether the letter constituted an instrument of accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine".⁶⁰³

⁶⁰² There is some debate as to what 'effective control' actually entails. Does it require that a military force be present or can it refer to a military civil administration? Does it include control of air and sea space or just land borders? Does it require control of the entire territory or can it be over partial areas? Several cases consider this issue, for example see *Bankovic and Others v. Belgium and 16 other Contracting states*, Application no. 52207/99, Eur.Ct.H.R.(2001); *Loizidou v. Turkey*, Eur.Ct.H.R. (1995) *Prelim Objections* and Eur.Ct.H.R. (1996) *Judgement on Merits* and most recently *Al Skeini v Secretary of State for Defence*, UK High Court of Justice, 2004 EWHC 2911 (QB) and the Court of Appeal, 2005, EWCA Civ 1609.

⁶⁰³ See 'States party to the Geneva Conventions and their Additional Protocols Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977', International Committee of the Red Cross website, site last updated 12th April 2005, at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/\\$File/Conventions%20de%20Geneve%20e%20Protocoles%20additionnels%20ENG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/$File/Conventions%20de%20Geneve%20e%20Protocoles%20additionnels%20ENG.pdf). Accessed 29 March 06.

It is admirable that the Palestinian Authority wish to commit to these laws and fundamental standards and as many of them do constitute custom, it can be argued that they are bound under custom.⁶⁰⁴ However, it is clear that it is the state party of Israel who have overarching obligations legally to ensure that international humanitarian law is adhered to within the territory, which they occupy.

3.5 Provisions under the Geneva Conventions concerning the right to water applicable to the OPTs

Protections for the right to water are contained within several provisions of the Geneva Conventions,⁶⁰⁵ with the most extensive provisions concerning civilians contained within the Additional Protocols.⁶⁰⁶ Unfortunately, as noted above, Israel is not a party to these protocols, but a certain number of these provisions that contain a water element can be viewed as within the rules of customary international humanitarian law. For example, Protocol I, Article 54(2) Prohibition of attacks on objects indispensable to the survival of the civilian population and Article 54(1) Prohibition of starvation, are considered rules constituting custom. Likewise, under Protocol II, the mirror provisions covering these rules can be found under Article 14 and also amount to custom.⁶⁰⁷ Thus, Israel is bound by these rules, even though they are not a party to the protocols.

⁶⁰⁴ See discussion on the possibility of this on p.211.

⁶⁰⁵ *Inter alia* Geneva Convention (III) relative to the Treatment of Prisoners of War, 1949, Articles 20, 26, 46, 51; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 1949, Articles 36, 49, 76, 89, 91, 100 and 127.

⁶⁰⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977, Articles 54, 55, 69 and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1977, Articles 14 and 18 (2).

⁶⁰⁷ See Henckaerts. JM and Doswald-Beck. L, 2005, p.189-191. Also Henckaerts, 2005, pp. 187-193.

The provisions protecting civilian persons' right to water are comprehensive within these articles. Article 54 (2) states:

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

This provision contains explicit recognition of a right to water in that it protects water supply and access to water, as well as protecting a wider right to food and sustenance and civilian persons' means of survival. It is notable that all forms of damage have been covered: direct attack or destruction, removal or any action that renders the object useless.

Under Article 54 (1) starvation of civilians as a method of warfare is prohibited.⁶⁰⁸

This provision contains an implicit right to water, as withholding water would be a primary element of starvation. Furthermore, under Article 54 3(b) it does qualify what starvation entails, including, *inter alia* inadequate water.

This provision is reiterated in the Rome Statute of the International Criminal Court and if starvation as a weapon is extreme and part of a wider campaign of destruction

⁶⁰⁸ Article 54 (1), 'Protection of objects indispensable to the survival of the civilian population', Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 1977.

then it can constitute a war crime or crime against humanity.⁶⁰⁹ Moreover, Skogly argues that severe violations of economic and social rights, such as the deliberate withholding of food and water causing starvation, should be seen as a part of crimes against humanity.⁶¹⁰ However, in much more subtle situations where there is covert discrimination of food or water resources resulting in poverty and hunger then it may be possible to claim a breach under these provisions as contained within humanitarian law.⁶¹¹

Overall, these provisions are significant, as they explicitly take account of specific water infrastructure and access and a wider right to water and food for survival.⁶¹² Crucially as noted previously, these provisions containing a water element are custom and therefore binding upon Israel. Moreover, the prohibition of starvation as a method of warfare is in essence, a slightly different provision to the others included within the Geneva Conventions, as it relates not just to the protection of non-combatants or prisoners of war, but has its roots in the older tradition of the laws of war i.e. those rules governing methods and means of warfare,⁶¹³ which Israel accept as governing the occupied territories. As such, they are very important as a basis for establishing violations of the human right to water.⁶¹⁴

⁶⁰⁹ See Rome Statute of the International Criminal Court 1988, Articles 7, 1(b) and 2(b) and 8, 2(b)(xxv). It is worth noting here that Israel is not a party to the Rome Statute of the International Criminal Court 1998 (see discussion p.178).

⁶¹⁰ See Skogly, S, 'Crimes Against Humanity – Revisited: Is There a Role for Economic and Social Rights?' International Journal of Human Rights, Vol.5, No.1, Frank Cass: London, Spring 2001, pp.58-80.

⁶¹¹ For further reading see Green L, 2000, pp.142-144. Also, Provost, R, 'Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait' in Colombia Journal of Transnational Law, 1992, 30, pp.577-632.

⁶¹² Under Protocol II, Article 14, these two provisions are combined to give similar protection of a right to water.

⁶¹³ See prohibition of poison and poisoning within the Hague Regulations 1907, Article 23(a).

⁶¹⁴ It is also notable that the rules contained within Article 54 are contained within the Israeli Military Manuals confirming state practice and a national legal basis for this provision. See Israel Manual on the Laws of War in the Battlefield, Military Advocate General HQ, Military School, 1998, p.22, p.88,

Another provision that has its basis in the laws of war, rather than humanitarian concerns, is Article 55(1) of Protocol 1 concerning environmental damage due to means of warfare. Although not explicit in mentioning water it can be interpreted as including prohibition of means of warfare which could pollute the water supply directly, or through pollution of the land and it is notable that it refers to the health and survival of the population, humanitarian concerns that are key elements of the right to water:

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare, which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.⁶¹⁵

As noted previously, the prohibition of starvation as a weapon has most recently been enshrined within the Rome Statute of the International Criminal Court,⁶¹⁶ under Article 8 (2)(b)(xxv) prohibition of intentional starvation by attacks on objects indispensable to the survival of the civilian population and Article 7 (2)(b) prohibition of deprivation of access to food causing extermination. These articles reaffirm the provisions found within the Geneva Conventions and Additional Protocol I Article 54

p.137, p.213. See also Henckaerts. JM and Doswald-Beck. L, 2005, Vol. I, p.188, p.190 and Vol. II, p.4201. Regarding prohibition of attacks on objects essential for survival of civilians, exceptions, see Israel Manual on the Laws of War in the Battlefield, 1998, p.316. Also see Henckaerts. JM and Doswald-Beck. L, 2005, Vol. I, p.192.

⁶¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 Article 55(1).

⁶¹⁶ 17 July 1998, entry into force 1 July 2002.

(1) and (2) and Additional Protocol II Article 14. Article 7, 2 (b) states that a crime against humanity includes, ‘the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population’. However, to constitute a crime against humanity the deprivation of food or water must be part of a systematic or sustained attack resulting in death.⁶¹⁷ Therefore, for cases of a lesser nature where deprivation of water caused ill health but not death, this provision could not be invoked.

In contrast, deprivation of water as starvation could be provided for under Article 7, 1(h) Persecution, as although this paragraph does not include explicit reference to food, ‘severe deprivation of fundamental rights’ could include the right to water. However, any violations would be conditional ‘by reason of the identity of the group or collectivity.’⁶¹⁸ Despite this, significantly, this provision could take account of deprivation of water, which results in lesser degrees of harm than necessary for extermination i.e. not just that which results in death.

This is also true of violations of the right to water under Article 8, ‘War Crimes’, which, again, prohibits starvation of civilians as a method of warfare, including impeding relief supplies and attacks upon civilian objects, which could include for example water installations.⁶¹⁹

However, whereas to constitute a crime against humanity warfare does not necessarily have to be taking place, for Article 8 to apply, starvation by deprivation of water and

⁶¹⁷ Article 7, 1 (b), Rome Statute of the ICC 1988.

⁶¹⁸ Article 7, 2 (g) Rome Statute of the ICC, 1988.

⁶¹⁹ See Article 8, 2 Rome Statute of the ICC, 1988.

or destroying civilian objects such as water installations must be part of a nexus of warfare. The intent has to be that the perpetrators were aware of Geneva Conventions and failed to abide by or violated purposefully the provisions. This does include however, situations of occupation as provided for under Geneva Convention IV and Additional Protocols I and II. Furthermore, deprivation of water could be a part of genocide as provided for under Article 6. This would entail 'Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.'⁶²⁰ As such deprivation of water would have to be part of wider campaign to deny basic needs for survival, with intent to destroy a particular group in the whole or in part. An example of such a policy is illustrated by the conflict in Bosnia Herzegovina.⁶²¹

In the main, the provisions relating to a right to water contained within the Rome Statute reaffirm basic premises that can be seen in international humanitarian law, for example prohibition of starvation as a means of warfare and deprivation of objects indispensable to civilians' survival, but the important difference being that these violations can now be tried in court. Consequently, the provisions within the Rome Statute represent a significant development in terms of stricter enforcement and remedy for breaches of international humanitarian law and hence the right to water during conflict. As Rosas and Sandvik-Nylund note: 'The obligations of parties to conflicts and third states relating to humanitarian assistance could be underlined by a

⁶²⁰ Article 6 (c), Rome Statute ICC, 1988.

⁶²¹ Security Council Resolution 819 (1993), para.8 required that humanitarian assistance be delivered without impediment to all areas of Bosnia and Herzegovina. However, these relief supplies were prevented from getting through. The UN Mission set up pursuant to this resolution reported that 'Impediments to the delivery of humanitarian assistance constitute a serious violation of international humanitarian law' and that impediments of such kind together with cutting of electricity and water supplies 'have put into effect a slow motion process of genocide.' UN Security Council Mission to Bosnia Herzegovina, Report of the Security Council Mission set up pursuant to Resolution 819 (1993), UN doc. S/25700, 30 April 1993, p.6, para 19. See also Rosas. A and Sandvik-Nylund. M, 'Armed Conflicts' in Eide et al, 2001, pp.407-421 at p.418.

more vigorous emphasis on the notion of criminal responsibility.⁶²² This would now seem to be operational to a degree. However, the provisions regarding water are conditional on certain criteria, for example, group identity. Moreover, the threshold for establishing a breach is very high. As such, the provisions under the Geneva Conventions may be more useful for establishing day-to-day violations of a right to water.

Specifically in regard to Israel and the OPTs, despite signing the Rome Statute on 31 Dec 2000, Israel ultimately voted against the Statute.⁶²³ Following signature, the Government of Israel sent a communication to the UN Secretary-General, stating that Israel had no intention of ratifying the statute and ‘Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty.’⁶²⁴ Furthermore, at a recent conference, Israeli human rights NGOs analysed the trigger mechanisms for the ICC to have jurisdiction and noted that with regard to Israel, as of today only the Security Council would be in a position to refer a case of a crime committed on Israeli territory or by an Israeli citizen.⁶²⁵ However, significantly, in theory Israel is bound by these provisions relating to prohibition of starvation and destruction of civilian objects, as they

⁶²² Rosas. A and Sandvik-Nylund in Eide. A et al, 2001, pp.407-421 at p.417.

⁶²³ On July 17th 1998, Israel voted against the Rome Statute along with six other states: United States, China, Iraq, Libya, Qatar and Yemen.

⁶²⁴ Rome Statute of the International Criminal Court, Rome, 17 July 1998, Israel, Note 3, submitted on August 28th 2002. See UN website, International Law, ICC, Ratification status of the Rome Statute, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp#N3>. Last updated, 19 Dec 2003. Accessed 20th June 06.

⁶²⁵ Participants also criticised the signature by Shimon Perez and John Bolton on August 4th 2002 of a reciprocal bilateral immunity agreement that forbids the surrender of American or Israeli nationals to the ICC, without the consent of the national’s government. See International Federation for Human Rights (FIDH) ‘Prominent Israeli Human Rights Organizations Met Last Week To Discuss The International Criminal Court’, Posted Wednesday 14 June 2006, at Israel & Occupied Palestinian Territories, http://www.fidh.org/article.php3?id_article=3402. Accessed 14 June 2006.

constitute customary rules of international humanitarian law, accepted by Israel under the Hague Convention 1907 and binding as custom under the Geneva Conventions and Additional Protocols.

In addition to the provisions within the Additional Protocols, there are applicable provisions within the Geneva Conventions themselves, under which Israel are obligated, as they have ratified the Conventions. Under Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 1949 (GC IV), Article 55 protecting maintenance of food supplies and Articles 23, 59, 60, 61 and 62, all concerning relief schemes, are applicable to the civilian population of the OPTs in general.⁶²⁶

Article 55 is a broad provision detailing the obligations on the part of the occupying power, in this case Israel, to protect a right to food and as a consequence an implicit protection of water:⁶²⁷

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation

⁶²⁶ Other articles within Geneva Convention (IV) are applicable to relief and specific groups, for example internees. See Articles, 108, 109, 110 and 111. See also Article 89 regarding drinking water and internees and Article 85 concerning water for sanitation and hygiene of internees.

⁶²⁷ The connection between the right to water and the right to food is acknowledged in CESCR GC 15. See previous discussion, Chapter 1.

forces and administration personnel, and then only if the requirements of the civilian population have been taken into account...

The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.⁶²⁸

This article expands greatly the obligations of the occupying power to help ensure the basic needs of the population are met. Under Article 43 of the Hague Regulations, the provision spoke only of a responsibility to maintain public order and safety.⁶²⁹ It is also interesting to note that there is also an obligation here, on the part of the protecting power, to monitor the food situation within the occupied territory, 'except where temporary restrictions are made necessary by imperative military requirements'. This would seem to indicate a monitoring mechanism to ensure that this protection is being upheld, or at least to be aware if it is breached and take action. However, in practice the concept of a 'Protecting Power' is problematic and has only been used twice since WWII: during the Suez conflict 1956 and Goa 1961.

The 'sister' article to Article 55 is Article 69 of Additional Protocol I Basic Needs in Occupied Territories. This article extends further the obligation upon the Occupying Power to include provision of 'clothing, bedding, means of shelter and other supplies essential to the survival of the civilian population of the occupied territory.' This article is more comprehensive and detailed and can also be considered custom as it

⁶²⁸ The concept of a Protecting Power is provided for in the Geneva Convention IV Article 9, Common Article 8 of other three Geneva Conventions and Article 5 of Additional Protocol I 1977. It is a mechanism by which an elected representative, whether state or the ICRC becomes an independent mediator and monitor between two states in conflict. See Benevisti. E, 1993, pp.204 – 207, for an examination of this provision. Also Pictet. J, 1958, pp.80-92.

⁶²⁹ See Pictet. J, (ed) Commentary on the IV Geneva Convention, ICRC: Geneva, 1958.

reiterates the basic customary rules of international law as contained in Article 54 and 55 discussed.⁶³⁰ As such it provides some basis for a right to water, at least for survival.

The remaining articles listed refer more specifically to the obligation to ensure relief consignments of food, which must include water as an essential foodstuff for survival. The majority of these provisions make reference to the general term 'relief consignments' or 'relief schemes' but subsequently specify foodstuffs and other elements required for basic needs, such as clothing and medical supplies. Article 59 states that the occupying power must agree to these consignments 'facilitate them by all the means at its disposal' and importantly, allow them free passage to the occupied population.⁶³¹

In addition to these broad provisions, Article 23 of Geneva Convention (IV) is more specific and is especially concerned with vulnerable groups:

Each High Contracting Party ... shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.⁶³²

⁶³⁰ Henckaerts. JM and Doswald-Beck. L, 2005, pp.186-200 at p.193.

⁶³¹ See Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 1949, Article 59. The Geneva Convention (IV), Article 60, also provides that the occupying State may not divert relief consignments from the purposes for which they are intended, except in cases of urgent necessity, in the interests of the civilian population and with the consent of the Protecting State. Article 62 provides for the sending of individual relief consignments, 'subject to imperative reasons of security.'

⁶³² Geneva Convention (IV) Article 23. A similar provision is included in Additional Protocol I in Article 70 (1) Relief Actions, but there is no correlative provision concerning vulnerable groups under Additional Protocol II.

It is worth noting that although none of these provisions explicitly detail water, it is interpreted that water is an element of food or foodstuffs, as it is the most essential foodstuff for survival. Thus implicitly these provisions protect the occupied populations' right to water, as an essential foodstuff. This implicit recognition can be seen as similar to the provisions for water under the majority of international human rights law⁶³³ and is not ideal, as it leaves much room for interpretation within legal definitions of a breach of the conventions. It is also notable that the nature of such a right to food, with the inclusion of water, is not detailed. Nowhere does it explain how much food or water is adequate and what the quality of these foodstuffs should be. Some guidance can be taken here from other provisions under humanitarian law,⁶³⁴ which seem to indicate a threshold of protection at the level of 'survival' rights⁶³⁵ and as this is the only guidance available, one can only assume that this very basic level of enjoyment is the level of protection for civilians under humanitarian law. This may seem reasonable in the midst of high-intensity conflict, but under occupation where 'semi-normality' is the daily situation, more extensive protection is required.

Conversely an exception to this level of provision lies under Geneva Convention III, regarding prisoners of war and Geneva Convention IV concerning internees. Here the provisions concerning water would seem to advocate a higher level of provision for this specific group, based on sufficiency to maintain good health. For example, Article 46, paragraph 3, states that prisoners of war should be supplied with

⁶³³ With the exception of the CRC and CEDAW (see Chapter 1).

⁶³⁴ For example Article 54 and 69 of Additional Protocol I discussed. Also Geneva Convention III, Article 20; Additional Protocol II, Article 14.

⁶³⁵ See previous discussion of survival rights and how the concept of survival water might relate to the scope and core of a human right to water in Chapter 1.

‘sufficient food and drinking water to keep them in good health’.⁶³⁶ This basic needs approach however is not evident in the wider provisions relating to civilians generally.

Therefore, although Israel can be seen to have obligations to protect the occupied civilians’ water essential for survival, under humanitarian law the level of protection for civilians not also within a specific protected group, is minimal and the legal basis for a right to water concerns itself with a very basic level of sufficiency and limited provision regarding access.

In addition to the more specific provisions noted, Israel can also be seen to have obligations relative to water, arising from broad ranging articles such as Geneva Conventions Common Article 3, both as a state party and under customary rules of international humanitarian law.⁶³⁷ Common Article 3 states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances

⁶³⁶ Geneva Convention III, Article 46, para.3. Also see Geneva Convention III Article 26. Similarly see Geneva Convention IV in regard to internees, Article 89 and Article 127.

⁶³⁷ For determination of Common Article 3 as custom see ICJ Case concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*), Merits, Judgement, 27 June 1986, ICJ Reports 1986 p114, para.218. Accessed at <http://www.icj-cij.org/icjwww/icasess/inus/inusframe.htm>. Also Henckaerts. JM and Doswald-Beck. L, 2005, pp.306-308.

be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria...

This article thus applies in all cases of conflict and serves as a basic minimum protection under all circumstances. As Gutteridge noted at the time of drafting, Article 3 contains many aspects that should ensure observance of certain fundamental human rights.⁶³⁸ It would be possible to argue that provision of water is an element of humane treatment and that for example, if water is withheld it could constitute torture. This would be analogous with the prohibition of withholding food as a punishment and would constitute both a breach of Common Article 3 and the human right to water.⁶³⁹

An example of the applicability of Common Article 3 can be seen in the Final Report of the Commission of Experts on events in Rwanda in 1994, established by the Security Council Resolution 935 (1994) 1st July. The Commission were required to examine and give conclusions as to evidence of grave violations of humanitarian law within Rwanda. Their final report stated a number of violations under Common Article 3, including *inter alia* rights of internees and detainees to food, water and

⁶³⁸ Gutteridge quoted in Meron. T, 'The humanization of humanitarian law' in American Journal of International Law, Vol. 94, Issue 2, 2000, pp. 239-278, at p.246. See also Gutteridge. J, 'The Geneva Conventions of 1949, British Yearbook of International Law, 1949, pp.294, 300.

⁶³⁹ Under Article 11 of the ICESCR and the Convention Against Torture and other Cruel, Inhuman or Degrading Punishment or Treatment 1984 (Hereinafter referred to as CAT); For prohibition of torture see *inter alia* Geneva Convention I Article 50, Geneva Convention II Article 12, Geneva Convention IV Article 32, Additional Protocol I Article 75; For prohibition of collective punishment see Hague Regulations Article 50, Geneva Convention IV Article 33, Additional Protocol I Article 75; For prohibition of starvation as a weapon see Article 54 Protocol I and Article 14 Protocol II and the Rome Statute Article 7 (2) (b) and Article 8 (2)(b) (xxv).

health care, the right to receive relief and guarantees for the protection of civilian objects indispensable to the survival of the civilian population.⁶⁴⁰

This opinion is promising, however, it is evident that it would be very difficult to establish a breach of this provision in relation to everyday violations of the right to water for the general population, as this would be more difficult to prove and as the term ‘treated humanely’ is so non-specific.

Ultimately, in cases where other provisions are contested, especially in cases of low thresholds of applicability and situations where the nature and status of conflicts are challenged, Common Article 3 provides essential minimal protection of human rights and as such Israel is obligated under its provision. In terms of establishing a right to water though, other more specific provisions are more useful, if they can be applied.

3.6 Hague Regulations 1907

Prior to the drafting and adoption of the Geneva Conventions, the Regulations annexed to 1907 Hague Convention IV respecting the Laws and Customs of War on Land⁶⁴¹ were used as the main instrument of the laws of war and are deemed custom, even today.⁶⁴² The Hague Regulations are significant in that they are the only instrument of international humanitarian law that Israel deems applicable to the OPTs,

⁶⁴⁰ UN Security Council, Commission of Experts on events in Rwanda, Final Report of the Commission of Experts on events in Rwanda established pursuant to Security Council resolution 935(1994), S/1994/1405, Annex, 9 December 1994, para.115-118, 122, 123. Also see Rosas and Sandvik-Nylund, 2001, p.419.

⁶⁴¹ Hereafter referred to as the Hague Regulations.

⁶⁴² International Military Tribunal of Nuremberg, Judgement, 30th September and 1st October 1946, p.65; Report Of The Secretary-General Pursuant To Paragraph 2 Of Security Council Resolution 808 (1993), 3 May 1993, (S/25704), Regarding The Establishment Of The International Criminal Tribunal for the former Yugoslavia, Article 1 Competence of the International Tribunal, para.35. Henckaerts. JM and Doswald-Beck. L, 2005, p. (xxx); Green. L, 2000, p.34; Roberts. A and Guelff, 2000, p.8 and 68.

not as a state party to them, but as they constitute customary international law. Subsequently, when discussing their obligations under international humanitarian law within their national legal structures, it is these laws that they refer to, for example within the Supreme Court of Israel.⁶⁴³ However, if Israel adheres to these laws because they are customary rules, then it must also be bound by all other customary rules of international law. Therefore, the Geneva Conventions and aspects of the Additional Protocols, as well as certain human rights provisions must also be binding upon Israel.

Notwithstanding this point, the Hague Regulations contain little that could be considered as providing a specific right to water. This is probably due to the fact they were drafted as an instrument to govern the laws of warfare, for those fighting, i.e. combatants, rather than as an instrument to protect civilians involved within conflict. This can be seen partly as a consequence of the period in which they were drafted, when the nature of war was very different to the modern conception of warfare. At the time they were drawn up, the conduct of hostilities would have been limited to combatants of the forces and use of tactics that involved widespread threat or injury to civilians would have been highly irregular.

However, there are several broader foundations contained within the Hague Regulations where a right to water could be invoked. Firstly, under the concept of

⁶⁴³ Cases where Israel have referred to the Hague Regulations as the legal basis for its conduct in the Occupied Palestinian Territories can be found within several judgements of the Supreme Court of Israel including *inter alia*: Ayyoub v. Minister of Defence (Beit El case) 1979, HC 606/78, 610/78, PD33 [2] 113; A Teachers Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region, HC 393/82, PD37 [4] 785, 793. See Quity. M, 'The Application of International Law in the Occupied Territories as Reflected in the Judgements of the High Court of Justice in Israel' in Playfair, 1992, pp.87 – 124.

starvation as a weapon contained within Article 23 and restated and expanded upon within Additional Protocol I Article 54, as previously discussed. Secondly, under the general ‘laws of humanity’ concept, provided for within the Martens Clause. This clause constitutes the oldest surviving and most widely accepted provision of customary humanitarian law relating to humane treatment, and originates in the preamble of the 1899 Hague Convention II and 1907 Hague Convention IV. It can be seen as epitomising the humanitarian dimension of the ‘laws of war’ and in a similar manner to that of the more recent Common Article 3 of the Geneva Conventions,⁶⁴⁴ the clause states:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.⁶⁴⁵

However, as the Geneva Conventions and many rules contained within the Additional Protocols are now deemed custom and furthermore contain stronger provisions for a right to water, it is unlikely that this clause would be used as a basis for establishing violations of the said right. Conversely, the very strength of the Martens clause lies in its broad application and unquestionable status as customary international law.⁶⁴⁶

⁶⁴⁴ See previous discussion p.186.

⁶⁴⁵ Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 and Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 (Hague Regs 1907), Martens Clause, Preamble, para.8.

⁶⁴⁶ See Scobbie in Bowen, 1997, pp.221-290, at pp.246-249, for an interesting analysis of the Martens Clause and its relevance to sovereignty over natural resources in cases of occupation. Also see Meron.

In addition, there is some argument that under Articles 55 and 56 of the Hague Regulations, water as a natural resource of a territory, can be seen as an element of requisitioned property. As such, the occupying power is limited in how they utilise these natural resources. Depending on the limitations imposed, this provision could be used as a basis for establishing a breach of Palestinian water rights.⁶⁴⁷

3.7 The Bilateral Oslo Accords

On September 13th 1993 the PLO and Israel signed the Declaration of Principles on Interim Self-Government Arrangements (Oslo I) thus signalling what was thought to be a breakthrough in the peace process, at the height of first Intifada. This document set out principles and a timetable for the establishment of self-governing Palestinian authority for the temporary period until 'permanent status' negotiations took place.⁶⁴⁸

In relation to water, the Declaration of Principles stated the intention for cooperation between the two parties in the field of water, through the establishment of a committee on Israeli-Palestinian Economic Cooperation,⁶⁴⁹ which should focus, among other things, on the following:

T, 'The Martens Clause, Principles of Humanity and Dictates of Public Conscience' in *AJIL*, Vol.94, No.1, January 2000, pp.78-89.

⁶⁴⁷ See B'Tselem, 2000, p.15. Also, Scobbie in Bowen, 1997, pp.221-290.

⁶⁴⁸ See Article I, Aim Of The Negotiations; 'The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council (the "Council"), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338.'

⁶⁴⁹ See Article XI Israeli-Palestinian Cooperation In Economic Fields, 'Recognizing the mutual benefit of cooperation in promoting the development of the West Bank, the Gaza Strip and Israel, upon the entry into force of this Declaration of Principles, an Israeli-Palestinian Economic Cooperation

Cooperation in the field of water, including a Water Development Program prepared by experts from both sides, which will also specify the mode of cooperation in the management of water resources in the West Bank and Gaza Strip, and will include proposals for studies and plans on water rights of each party, as well as on the equitable utilization of joint water resources for implementation in and beyond the interim period.⁶⁵⁰

The committee was also charged with the establishment of an 'environmental protection plan'.⁶⁵¹ Other articles of relevance include, Article IV detailing jurisdiction, Article V regarding the Permanent Status Negotiations, Article VI concerned with the Transfer of Powers, including *inter alia* education, culture, health, social welfare. All areas closely related to certain economic, social and cultural rights. Article VII set out the terms for the Interim Agreement (Oslo II).⁶⁵²

Subsequently, September 28th 1995 signalled the signing of this Israeli Palestinian Interim Agreement on the West Bank and Gaza Strip (Oslo II). This agreement superseded previous agreements, with the exception of the Declaration of Principles and set out the powers and structure of the Palestinian Council,⁶⁵³ elections for the said body and commitments to the permanent status negotiations on the part of both

Committee will be established in order to develop and implement in a cooperative manner the programs identified in the protocols attached as Annex iii and Annex iv'.

⁶⁵⁰ Annex III Protocol On Israeli-Palestinian Cooperation in Economic and Development Programs.

⁶⁵¹ Annex III Protocol On Israeli-Palestinian Cooperation in Economic and Development Programs.

⁶⁵² Several additional agreements followed: The Gaza-Jericho Agreement - The Agreement on Preparatory Transfer of Powers and Responsibilities, signed at Erez on August 29, 1994 and the Cairo Agreement - Protocol on Further Transfer of Powers and Responsibilities, signed at Cairo on August 27, 1995. Both these agreements were superseded by Oslo II (see Oslo II Preamble para.2), although, it states that all previous agreements are superseded, Oslo I is not superseded in that Oslo II puts into practice the principles laid out in Oslo I. For further discussion regarding this point and the legal status of the Oslo Accords, see Watson, G, The Oslo Accords – International Law and the Israeli-Palestinian Peace Agreements. Oxford: OUP, 2000.

⁶⁵³ The Interim Agreement refers to the Palestinian Authority as 'Palestinian Council' and is not to be confused with the Palestinian National Council of the PLO.

parties. As well as establishing authority for the Palestinians in the majority of West Bank towns,⁶⁵⁴ the Interim Agreement establishes the infrastructure and mechanisms to implement the principles stated in the Declaration of Principles.

(i) The Interim Agreement - Provisions regarding human rights

In relation to human rights the Interim Agreement includes a broad provision, Article XIX, Human Rights and the Rule of Law, which states:

Israel and the [Palestinian] Council shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally accepted norms and principles of human rights and the rule of law.

However, there is no reference to international human rights treaties, nor is there any detail of obligations held by either party. Moreover, despite the fact that the article would imply recognition of the humanitarian principles contained within the Geneva Conventions, the agreement does not mention these conventions either. This is not surprising, as Israel continue to refute the applicability of either system of law within the OPTs. Furthermore, they do not mention the belligerent occupation status of the territories.⁶⁵⁵

In fact many have argued that the advent of the Oslo Accords and interim period following the Interim Agreement has resulted in a worsening of economic and social

⁶⁵⁴ The Interim Agreement established 3 areas / zones within the West Bank: A, B, C with A being an area governed by the PA who have total authority, B being an area with joint authority between Israel and PA and area C remaining in total Israeli control.

⁶⁵⁵ Quigley, in Bowen, 1997, p.31; Center for Economic and Social Rights, Applying Economic and Social Rights in Palestine, Palestinian Project Series 3, Jan 2000, New York/ Gaza: Center for Economic and Social Rights, p.7.

conditions for the Palestinians under occupation rather than offering hope. As the Center for Economic and Social Rights note, violations of economic and social rights have increased. They conclude:

Under the Oslo process, Palestinians have suffered systematic abuse of the full range of their human rights. The extraordinary poverty in Palestine – a clear indication of economic, social and cultural rights violations results from deliberate policy decisions undertaken by governments and agencies taken within the Oslo framework.⁶⁵⁶

(ii) The Interim Agreement - Provisions regarding water

In relation to water, however, the agreement is more detailed and has provisions for several elements of water management within the territories. The central article detailing water is Article 40 Water and Sewage. The initial paragraph of this article provides a basis for Palestinian water rights within the West Bank, although it does not state this as a human right to water:

Israel recognises the Palestinian water rights in the West Bank. These will be negotiated in the permanent status negotiations and settled in the Permanent Status Agreement relating to the various water resources.⁶⁵⁷

Although, the Israeli State acknowledge the water rights of the Palestinian people, the provision is not drafted in terms of an individual human right to water, but implies admission of a collective right of the Palestinians as a people, to some degree of usage

⁶⁵⁶ See also Center for Economic and Social Rights, Jan 2000, p.8, p.11. See also B'Tselem, 2000, pp.68-69.

⁶⁵⁷ Interim Agreement, Article 40 Water and Sewage, Principles, para.1.

of water from within the West Bank geographical territory, and arguably some ownership and control of these water sources. Unfortunately, the nature and extent of these rights are to be defined in the permanent status negotiations, which to date, have not taken place and it remains to be seen if they will, especially as Oslo Accords may be seen to have been superseded by the Quartet's Roadmap for Peace.⁶⁵⁸ However, the later document does not constitute a legal agreement⁶⁵⁹ and has no detail regarding water. As such, the Interim Agreement remains the authoritative bilateral agreement between the two parties, covering water.

In light of the 'hold' put on definition of Palestinian water rights by Oslo II, several principles and mechanisms have been circumscribed in order to 'to coordinate the management of water and sewage resources and systems in the West Bank during the interim period'.⁶⁶⁰ The following principles are listed:

Maintaining existing quantities of utilization from the resources, taking into consideration the quantities of additional water for the Palestinians from the Eastern Aquifer and other agreed sources in the West Bank as detailed in this Article[...] Preventing the deterioration of water quality in water resources; Using the water resources in a manner, which will ensure sustainable use in the future, in quantity and quality; Adjusting the utilization of the resources according to variable climatological and hydrological conditions; Taking all necessary measures to prevent any harm to water resources, including those utilized by the other side; Treating, reusing or properly disposing of all domestic, urban, industrial, and agricultural sewage; Existing water and

⁶⁵⁸ Quartet, 30 April 2003.

⁶⁵⁹ See Human Rights Watch 'The Roadmap: Repeating Oslo's Human Rights Mistakes', Background Briefing Paper, Jan 1st 2005, at Human Rights Watch, Middle East/N. Africa, at <http://www.hrw.org/mideast/is-ot-pa.php> Accessed May 5th 2006.

⁶⁶⁰ Interim Agreement, Article 40 Water and Sewage, Principles, para. 2.

sewage systems shall be operated, maintained and developed in a coordinated manner, as set out in this Article; Each side shall take all necessary measures to prevent any harm to the water and sewage systems in their respective areas; Each side shall ensure that the provisions of this Article are applied to all resources and systems, including those privately owned or operated, in their respective areas.⁶⁶¹

These principles would seem to be comprehensive and in line with human rights law regarding a human right to water. However, on closer inspection it can be argued that certain principles listed are incompatible with each other. For example, the first principle states that existing quantities of water utilization from the resources will be maintained. Following principles state that water resources will be used in a sustainable manner, thus preventing deterioration of water quality in water resources. It is already clear that water resources within Israel-Palestine are not being managed and utilised at a sustainable rate⁶⁶² and damage to the water quality is already evident, for example in Gaza.⁶⁶³ As such, these clauses are in conflict with one another and are already subject to breach on the ground. If water continues to be utilised at the current rate, sustainability is not possible.

The article also details the transfer of authority and states that the Palestinians, ...shall assume, powers and responsibilities in the sphere of water and sewage in the West Bank related solely to Palestinians, that are currently held by the military government and its Civil Administration, except for the issues that

⁶⁶¹ Interim Agreement, Article 40 Water and Sewage, Principles, para. 2.

⁶⁶² Scarpa, D, 'Hydropolitics in recent Israeli-Palestinian relations' in Hydrology: Science and Practice for the 21st Century, Vol. II, London: British Hydrological Society, 2004, pp.147-152 at p.149.

⁶⁶³ For further reading on the unsustainable use of existing water sources see Scarpa, 2004; Lonergan and Brooks, 1994, pp.105-120; UNEP, January 2003, pp34-40.

will be negotiated in the permanent status negotiations, in accordance with the provisions of this Article.

It is made clear within this provision that this does not entitle the Palestinians to ownership of either the water resource itself or related infrastructure, as this comes under the issues to be addressed in the permanent status negotiations.

Furthermore, despite other detailed provisions set out regarding additional water for Palestinian use during the interim period, establishment of a Joint Water Committee,⁶⁶⁴ establishment of a Supervision and Enforcement Mechanism: the Joint Supervision and Enforcement Teams (JSET)⁶⁶⁵ and fields for joint cooperation,⁶⁶⁶ the transfer of authority to the PA is in reality lacking. For example under, Article 40 provisions establishing the JWC, Israeli can veto any new water project if they disagree with it, through the 'consensus' clause of the JWC or through the Civil Administration.⁶⁶⁷

⁶⁶⁴ Interim Agreement, Article 40 Water and Sewage, The Joint Water Committee, 'In order to implement their undertakings under this Article, the two sides will establish, upon the signing of this Agreement, a permanent Joint Water Committee (JWC) for the interim period...The function of the JWC shall be to deal with all water and sewage related issues in the West Bank....'. Detailed responsibilities and obligations of the JWC for the implementation of its functions are set out in Schedule 8 of Interim Agreement.

⁶⁶⁵ The JSET structure, role, and mode of operation are detailed in Schedule 9 of Interim Agreement.

⁶⁶⁶ Including *inter alia*, water-related technology transfer, research and development, training, setting of standards; in the development of mechanisms for dealing with water-related and sewage-related natural and man-made emergencies and extreme conditions, and in the exchange of available relevant water and sewage data.

⁶⁶⁷ See Interim Agreement, Article 40 Water and Sewage, The Joint Water Committee: 'The JWC shall be comprised of an equal number of representatives from each side. All decisions of the JWC shall be reached by consensus, including the agenda, its procedures and other matters.' Also see B'Tselem, 2000, p.5. For an in depth analysis of the covert Israeli domination over water issues, inherent within the Interim Agreement, see Selby, 2003, Chapter 4 'Dressing up Domination as Co-operation', pp.95-118.

Contained within this same paragraph on mutual cooperation are provisions relating to sustainable use of water and the environment.⁶⁶⁸ These provisions can be seen as a reiteration of the guarantees listed in Article 12 Environmental Protection, and although they are comprehensive, in reality deterioration of the water quality is already an issue due to unsustainable extraction.⁶⁶⁹ In addition, these clauses contain elements on a parallel with those contained in the human right to water, such as the provision to protect the quality of water from pollution or contamination. However, they do not contain any direct provision for an explicit right to water, but rather approach the water issue from a general environmental perspective.

Overall, the Oslo Agreements offer little by way of human rights guarantees and although they do detail interim measures to be undertaken regarding water, the crucial questions concerning ownership and control have been assigned to the permanent status negotiations, resulting in a ‘freeze’ on Palestinian water rights, according to this agreement. This combination of a ‘freeze’ upon the water rights of the Palestinians and the maintenance of the status quo regarding water use and management between the Israel and the OPTs has resulted in further deterioration of the water crisis since the advent of Oslo period to the present situation. As Selby notes, ‘It is mistaken, to suggest that Oslo II in any way transformed, reconfigured or converted the responsibilities of either the Israelis or Palestinians in managing these [water] supplies.’⁶⁷⁰ Furthermore, as Quigley notes, this aspect of the Interim Agreement can

⁶⁶⁸ Interim Agreement, Article 40 Water and Sewage, Mutual Cooperation: ‘Each side shall take all necessary measures to prevent any harm, pollution, or deterioration of water quality of the water resources; Each side shall take all necessary measures for the physical protection of the water and sewage systems in their respective areas; Each side shall take all necessary measures to prevent any pollution or contamination of the water and sewage systems, including those of the other side; Each side shall reimburse the other for any unauthorized use of or sabotage to water and sewage systems situated in the areas under its responsibility which serve the other side.’

⁶⁶⁹ See Scarpa, 2004.

⁶⁷⁰ Selby, 2003, p.107.

be seen to be in breach of provisions under the Geneva Convention IV, as are other certain aspects of the agreement.⁶⁷¹

These inconsistencies between the Oslo Accords and the Geneva Convention IV are due to the conflict between Article 47 of the later which forbids the occupying power to enter into any agreement with the agreed representatives of the occupied population which would relieve the occupying force of any of its obligations under the Geneva Convention IV⁶⁷² and provisions within the Interim Agreement, under Article 40 which defer agreement on the water rights and sanction the status quo of the situation, thus maintaining Israel's dominance in the water sector.

Therefore, as Quigley argues, Israel may be in breach of its obligations under the Geneva Conventions IV if it adheres to the provisions within the Oslo Accords that relinquish any of the rights of the occupied population contained within it.⁶⁷³ This would seem to be the case not just in relation to water rights but also in relation to the status of Jerusalem, the enforcement of military orders and the policy on settlements.⁶⁷⁴ Moreover, the latter two issues have consequences for the enjoyment of the right to water, for the Palestinians under occupation.

The question has also been raised as to which body of law takes precedence and the subsequent effects upon human rights. In these cases of conflict between the

⁶⁷¹ Quigley, in Bowen, 1997, p.36.

⁶⁷² This is to protect those under occupation from a corrupt or coercive regime who might work with the occupiers thus giving them potentially, total control and relinquishing certain human rights for the occupied population.

⁶⁷³ Quigley, in Bowen, 1997, p.36.

⁶⁷⁴ Regarding settlements Article 8, Declaration of Principles and Articles 12 and 17, Interim Agreement are inconsistent with Article 49, Geneva Convention IV, which holds that settlements by the occupying force are illegal under international humanitarian law.

provisions as set out in Oslo II and the provisions within the Geneva Convention IV, international humanitarian law must take precedence, as it is the Geneva Conventions which are deemed customary international law and as such the Geneva Conventions which contain the fundamental standards of humanity that must be adhered to at all times by states.⁶⁷⁵ The Geneva Conventions have a higher legal standing than the bilateral agreement of the Oslo Accords for this reason. As such, Oslo II cannot be said to alter the status of the OPTs under the Fourth Geneva Convention.⁶⁷⁶ Consequently, the Palestinian people within the occupied territories do have a right to water, which is protected under the Geneva Conventions irrespective of any inconsistency under the Interim Agreement. Equally, under international human rights law this is also the case.

3.8 International Human Rights Law applicable to the OPTs

Israel is party to many international human rights treaties,⁶⁷⁷ including those with the most comprehensive provisions concerning the right to water.⁶⁷⁸ It is notable however, that they have not ratified many of the additional protocols relating to certain treaties such as the CRC and ICCPR.⁶⁷⁹ This may be an indication of the current view of human rights held by the Israeli state and also of their reluctance to

⁶⁷⁵ Al Haq, 1993, p.18.

⁶⁷⁶ Scobbie in Bowen, 1997, pp.221-290 at p.259.

⁶⁷⁷ *Inter alia*, ICCPR, Signed 19/12/66, Ratification 03/10/91; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Hereinafter referred to as CAT) Signed 22/10/86, Ratification 03/10/91; CERD, Signed 07/03/66, Ratification 03/01/79 and CRC Optional Protocol children in Armed Conflict, Signed 14/11/01, Ratification 18/07/05, Entry Into Force 17/08/05. Data taken from UNHCHR Website, Documents, Treaty Body Database, Ratification's and Reservations, 01 May 2007.

⁶⁷⁸ These include the ICESCR, Signed 19/12/66, Ratification 03/10/91; CEDAW, Signed 17/07/80, Ratification 03/10/91, and the CRC, Signed 03/07/90, Ratification 03/10/91.

⁶⁷⁹ For instance, ICCPR Optional Protocol I and II; CAT Optional Protocol; CEDAW Optional Protocol (all no action taken) and the CRC Optional Protocol II Sale of Children, which Israel have signed (14/11/2001) but not ratified to date (01 may 2007).

accept that they are bound under these treaties, to fulfil their obligations, not only within the state of Israel proper but also within the OPTs.

Table 3.1

Status of Ratification of International Human Rights Law Treaties by the State of Israel

(As of 01 May 2007)

<i>Treaty</i>	<i>Status of Ratification</i>		
	No Action	Signed	Ratified
ICCPR			X
ICCPR Op Pro I	X		
ICCPR Op Pro II	X		
ICESCR			X
CRC			X
CRC Op Pro I			X
CRC Op Pro II		X	
CEDAW			X
CEDAW Op Pro	X		
CERD			X
CAT			X
CAT Op Pro	X		

Therefore, although Israel is a state party to the main international human rights instruments, Israel continues to question the application of these provisions to the OPTs.⁶⁸⁰ Firstly, Israel engages in the general question of whether human rights treaties are applicable in times of conflict, including occupation. Subsequently, the more specific question arises as to who is responsible for the enjoyment of human rights within the OPTs: the State of Israel or the Palestinian Authority?

(i) Problems of Application I: Are human rights applicable in times of conflict?

The International Court of Justice has set precedence in determining whether international human rights law is applicable in times of conflict. In their Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, they advised on the applicability of the ICCPR in times of war: ‘...The protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency...’⁶⁸¹

This view is also taken by the Human Rights Committee, who state:

The Committee has noted the State party's position that the Covenant does not apply beyond its own territory, notably in the West Bank and in Gaza,

⁶⁸⁰ For Israel's position see CESCR Second Periodic State Report of Israel, Considered May 2003, E/1990/6/Add.32, 16 October 2001, para.5, para.6. Also [verbatim] Additional information submitted by States parties to the Covenant following the consideration of their reports by the Committee on Economic, Social and Cultural Rights, Addendum, ISRAEL, [20 April 2001], E/1989/5/Add.1414 May 2001, para.2, para.3; Human Rights Committee, Second Periodic Report Israel, [20 November 2001], CCPR/C/ISR/2001/2, 4th December 2001, para.8; International Commission of Jurists, 1994, p.29, note 37.

⁶⁸¹ International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8th July 1996, ICJ Reports 1996, p.240, para.25.

especially as long as there is a situation of armed conflict in these areas. The Committee reiterates the view, previously spelled out in paragraph 10 of its concluding observations on Israel's initial report that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including article 4 which covers situations of public emergency which threaten the life of the nation. Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law[...] The State party should reconsider its position and to include in its third periodic report all relevant information regarding the application of the Covenant in the Occupied Territories resulting from its activities therein.⁶⁸²

Furthermore, in their Advisory Opinion, 9th July 2004, on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the ICJ stated: 'More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of

⁶⁸² Concluding observations of the Human Rights Committee: Israel. CCPR/CO/78/ISR, 21st August 2003, para.11. Original footnote omitted. See also Concluding observations of the Human Rights Committee: Israel. CCPR/C/79/Add.93, 18th August 1998, para.10.

provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights...'⁶⁸³

Thus the ICJ advised that the application of human rights in times of conflict is not limited to the civil and political rights contained within the ICCPR, but also encompasses the rights contained within all international human rights conventions, including economic and social rights. This view has also been confirmed many times by international bodies and state practice.⁶⁸⁴

In this regard, the State of Israel is in complete disagreement with wider international opinion, including judicial opinion, claiming that the law of human rights does not apply during any situation of armed conflict. Rather they claim that the law of armed conflict (international humanitarian law) is the sole body of law which applies. In their state report to the CESCR, Israel asserts this position:

...Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction. This position is based on the well-established distinction between human rights and humanitarian law under international law. Accordingly, in Israel's view, the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights.⁶⁸⁵

⁶⁸³ ICJ Wall Opinion, 9th July 2004, para.106.

⁶⁸⁴ Primary sources include: Human Rights in Armed Conflicts, Resolution XXIII adopted by the International Conference on Human Rights. Teheran, 12 May 1968; Respect for Human Rights in Armed Conflicts, Resolution 2444 (XXIII) of the United Nations General Assembly, 19 December 1968). For secondary sources see *inter alia*: Henckaerts, JM and Doswald-Beck, L, 2005, pp.299-306 at p.299; Henckaerts, 2005, p195; International Commission of Jurists, 1994, p.28; Rowe, 2006,p.120; Skogly, 2006, p.169 and p.199.

⁶⁸⁵ CESCR Second Periodic State Report of Israel – Considered May 2003, E/1990/6/Add.32, 16 October 2001, para.5. Also [verbatim] Additional information submitted by States parties to the

In response to these claims, the government of Israel has received much criticism. The Committee itself noted its concern regarding Israel's position⁶⁸⁶ and has rejected outright their assertion that human rights do not apply in situations of armed conflict:

The Committee rejects the State party's assertion regarding the distinction between human rights and humanitarian law under international law to support its argument that the Committee's mandate "cannot relate to events in the Gaza Strip and West Bank". The Committee reminds the State party that even during armed conflict, fundamental human rights must be respected and that basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law and are also prescribed by international humanitarian law.⁶⁸⁷

The Committee therefore point out that not only do they reject Israel's claim that only the law of armed conflict applies, but that even if this was the case, Israel has human rights obligations under international humanitarian law.

Ultimately, if Israel's position regarding the application of both international humanitarian law and international human rights law is accepted, it renders the Palestinian people virtually without any legal protection whilst under occupation. Not only is international human rights law deemed inapplicable but the application of humanitarian law is severely limited as well.

Covenant following the consideration of their reports by the Committee on Economic, Social and Cultural Rights, Addendum, ISRAEL, [20 April 2001], E/1989/5/Add.1414 May 2001, para.2.

⁶⁸⁶ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel. 23/05/2003, E/C.12/1/Add.90, para.15.

⁶⁸⁷ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, 31/08/2001, E/C.12/1/Add.69, para 12.

(ii) Problems of Application II: Israel's denial of their human rights treaty obligations in the OPTs

As a consequence of Israel's position that human rights law does not apply to situations of armed conflict, they reject any notion of having human rights obligations in relation to the OPTs. Their basis for this opinion rests not only on their rejection of the application of human rights to conflict situations but also on the argument that the territories are not under their jurisdiction.⁶⁸⁸

Israel claims that it is the Palestinian Authority that has jurisdiction over the OPTs, as under the terms of the Oslo Accords, they have responsibility for civil matters within most of the West Bank area. Subsequently, Israel asserts that it is the Palestinian Authority who has responsibility for implementation of the rights contained within the ICESCR and who carry the obligations correlative to those rights, 'pursuant to the Israeli-Palestinian Interim Agreement of 1995'. Israel claim that under this agreement the 'overwhelming majority of powers and responsibilities in all civil spheres (including economic, social and cultural) [...] have been transferred to the Palestinian Council, which [...] is directly responsible and accountable vis a vis the entire Palestinian population of the West Bank[...] with regard to such issues.'⁶⁸⁹ Therefore,

⁶⁸⁸ CESCR Second Periodic State Report of Israel – Considered May 2003, E/1990/6/Add.32, 16 October 2001, para.5. Also [verbatim] Additional information submitted by States parties to the Covenant following the consideration of their reports by the Committee on Economic, Social and Cultural Rights, Addendum, ISRAEL, [20 April 2001], E/1989/5/Add.1414 May 2001, para.2; Human Rights Committee, Second Periodic Report Israel, [20 November 2001], CCPR/C/ISR/2001/24, December 2001, para.8; International Commission of Jurists, 1994, p.26.

⁶⁸⁹ CESCR Second Periodic State Report of Israel – Considered May 2003, E/1990/6/Add.32, 16 October 2001, para.6. Also [verbatim] Additional information submitted by States parties to the Covenant following the consideration of their reports by the Committee on Economic, Social and Cultural Rights, Addendum, ISRAEL, [20 April 2001], E/1989/5/Add.14 , 14 May 2001, para.3.

due to the ‘jurisdiction of the Palestinian Council [...], Israel cannot be internationally responsible for ensuring the rights under the ICESCR in these areas.’⁶⁹⁰ Furthermore, the state of Israel also declares this to be the case concerning application of the ICCPR, quoting verbatim the above position.⁶⁹¹

Although the Palestinian Authority (Council) is the elected body of the Palestinian population living under occupation, it does not constitute a government of a sovereign state and therefore, they cannot become a State Party to the Covenants. However, the Israeli government do not see this as problematic and assert that, ‘The fact that the Palestinian Council does not represent a State does not, in itself, preclude its responsibility in the sphere of human rights protection.’ They further claim that under Article XIX of the Interim Agreement ‘the Palestinians have taken it upon themselves to exercise their powers and responsibilities “with due regard to internationally accepted norms and principles of human rights and the rule of law”’.⁶⁹²

Whilst it is true that the Palestinian Authority have agreed to be bound by the principles of human rights law, they are not however the principal obligations holders in respect of these rights.⁶⁹³ Ultimately, it is the Israeli government who are the State

⁶⁹⁰ CESCR Second Periodic State Report of Israel, 16 October 2001, para.6. Also [verbatim] Additional information to the Committee on Economic, Social and Cultural Rights, Addendum, ISRAEL, 14 May 2001, para.3.

⁶⁹¹ See Human Rights Committee, Second Periodic Report Israel, [20 November 2001], CCPR/C/ISR/2001/24, December 2001, para.8.

⁶⁹² CESCR Second Periodic State Report of Israel – Considered May 2003, E/1990/6/Add.32, 16 October 2001, para.7. Also [verbatim] Additional information submitted by States parties to the Covenant following the consideration of their reports by the Committee on Economic, Social and Cultural Rights, Addendum, ISRAEL, [20 April 2001], E/1989/5/Add.1414 May 2001, para.4; Human Rights Committee, Second Periodic Report Israel, [20 November 2001], CCPR/C/ISR/2001/24, December 2001, para.8.

⁶⁹³ The Palestinian Authority may have human rights obligations as a third party .See discussion p.173 and p.209.

Party to the Covenants and it is the state of Israel who holds 'effective control' over the territories in question. As such, it is the state of Israel that is legally obligated to ensure enjoyment of human rights. Several bodies have concluded that this is indeed the case: As noted previously, both the Committee on Economic, Social and Cultural Rights and the Human Rights Committee have stated this opinion.⁶⁹⁴ In addition, in a significant legal opinion, the International Court of Justice in considering the extra-territorial obligations of human rights treaties within their Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory⁶⁹⁵ concluded that both the ICCPR and the ICESCR were applicable to the territories. In relation to the ICCPR, the Court noted that under Article 2 of the treaty, the provision covers not only individuals within the state's territory, but also those individuals outside the national territory, but subject to the state's jurisdiction.⁶⁹⁶ Moreover, the Court found that the practice of the Human Rights Committee was consistent with this view.⁶⁹⁷ Concerning the ICESCR, the ICJ observed that 'although the treaty does not contain any provision on its scope of application,⁶⁹⁸ nevertheless, this cannot be interpreted as excluding areas where a state exercises extra-territorial jurisdiction'.⁶⁹⁹ As such, the Court held that Israel was responsible for their implementation as State Party to the Covenants and as the occupying power exercising effective control:

⁶⁹⁴ In its concluding observations, the Human Rights Committee pointed to 'the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein', in CCPR/C/79/Add.93, para. 10. Furthermore they state, 'in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law,' in CCPR/CO/78/ISR, para.11. See also CESCR Concluding Observations to Israel, E/C.12/1/Add.90, para.15 and 31.

⁶⁹⁵ ICJ Wall Opinion, 9th July 2004, para.107-109.

⁶⁹⁶ ICJ Wall Opinion, 9th July 2004, para.107-109.

⁶⁹⁷ See ICJ Wall Opinion, 9th July 2004, para.107-109.

⁶⁹⁸ Unlike the ICCPR, Article 4.

⁶⁹⁹ ICJ Wall Opinion, 9th July 2004, para. 112.

...The territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.⁷⁰⁰

It is interesting to note that the ICJ acknowledge that the Palestinian Authority have some responsibility in the implementation of rights, where they have capability in that area. In a step further, the Center for Economic and Social Rights, argues that the Palestinian Authority have full human rights obligations in Areas A under the Oslo Accords, where authority has been passed to the Palestinians.⁷⁰¹

However, the problem with this view is that even though the PA has ‘responsibility’ for these areas, they are still in reality under the control of Israel in many aspects which affect the capacity of the PA to implement economic and social rights, including the supply of water. Therefore, although they may have obligations to respect human rights in regard to certain civil rights, for example the activities of the Palestinian police force, in respect of other rights such as the right to water and food, Israel still maintains control of supply of imported resources, through control of the borders and can restrict access to or maintenance of food and water supplies from

⁷⁰⁰ ICJ Wall Opinion, 9th July 2004, para. 112.

⁷⁰¹ Center for Economic and Social Rights, 2000, pp.8-9; p.12, note 23; p.13, note 30.

within the OPTs. As such, the Palestinian Authority can only hold a moral obligation and/or legal obligations at the level of third party obligations, as they do not have the control over the necessary means to implement such rights.

In addition, as noted, Israel argue that the Palestinian Authority is responsible for the enjoyment of all human rights within the OPTs in all areas, under the terms of the Interim Agreement, Article XIX, which states that international human rights norms must be adhered to. According to Hunt, these norms must include the provisions within the International Bill of Rights. Consequently, 'in this indirect way the Palestinian authorities have obligations [as do Israel] in respect of [economic], social [and cultural] rights enshrined in the ICESCR', even though they are not a party to the Covenants.⁷⁰²

Conversely, this 'indirectness' is the key to understanding the status of the PA obligations. The said article of the Interim Agreement states that the PA must 'adhere' to these norms, which implies respect for human rights in their activities but not a legal obligation to fulfil these rights. Thus, although the PA may have a moral obligation and may have a legal obligation to respect, as contained in the bilateral agreement, it is evident that the nature and level of Palestinian obligations is unclear.

The human rights obligations of the PA, regarding economic and social rights of the Palestinians in the West Bank as a whole, may draw parallels with those of service

⁷⁰² Hunt. Paul, 'Economic and Social Rights: Issues of Implementation', in Bowen, 1997, pp 201-220 at p.201.

providers in the private sector,⁷⁰³ in the main, at a level of a duty to respect. In Areas A, where they have control of the police they may be of a higher level and include an additional duty to protect. Overall however they cannot have a duty to fulfil, as they do not have the means to do so.⁷⁰⁴ Neither are they in a position to become bound by the legal instruments governing these international standards as they are not a Member State of the UN.⁷⁰⁵

One further possibility is that the PA may hold obligations under customary international law, based upon their practice, for example, as an entity recognised by some other states as a 'state', as party to the legally binding Oslo Accords with the aforementioned human rights provision and through their letter to the Swiss government stating their intent to be bound by the provisions of the IV Geneva Convention.⁷⁰⁶

Ultimately, the indistinct status of the territory of 'Palestine' has caused implications for the legal obligations regarding human rights that the PA holds. As long as the question over whether Palestine constitutes a state or not continues, the legal

⁷⁰³ See De Feyter.K and Gomez Isa.F, Privatisation and Human Rights in the Age of Globalisation, Antwerp: Intersentia, 2005, for details of third party obligations of service providers including water authorities.

⁷⁰⁴ For an interesting theory of obligations based upon capacity to act rather than subjectivity see Clapham. A, Human Rights Obligations of Non-State Actors, Oxford: OUP, 2006, pp.70-73.

⁷⁰⁵ Following the PLO Proclamation of the State of Palestine on 15 Dec 1988, the UN General Assembly passed resolution A/RES/32/177, 15 Dec 1988 recognising the proclamation and stating that 'Palestine' be used in place of the designation 'PLO' when referring to the entity within the UN system. However they have not accepted Palestine as a member state of the UN but have established a Permanent Observer Mission at the UN and granted them Observer status. See General Assembly resolution A/RES/52/250, 13 July 1998. In addition the WHO and UNESCO, have all deferred consideration of admission of Palestine to their membership due to the unclear legal status (WHO A42/VR/10 and UNESCO Resolution of the Executive 132EX/31 29 Sept 1989; UNESCO Resolution of the Commission I 33C/24, 13 Sept 2005). Moreover, the Swiss government acting as the Depository for the Geneva Conventions have deferred a decision as to whether Palestine can legally accede to the Conventions on the same basis.

⁷⁰⁶ See previous note pp.174-175. This is a subject which requires further research, outside of the scope of this thesis.

obligations concerning the human rights of the Palestinian government will remain ambiguous.⁷⁰⁷ At present, the PA can only act as the elected body of an occupied people and territory and is thus limited in its capacity to act. Therefore, it is the occupiers, the state of Israel, who hold the full legal obligations with regard to economic and social rights under international human rights law.

In addition to the application of the ICESCR in the OPTs, in accordance with the ICJ opinion, it would seem logical that other international human rights instruments that Israel are a state party to, will also apply to the Occupied Palestinian Territories. Subsequently, the ICJ also advised that the Convention on the Rights of the Child⁷⁰⁸ was also applicable, under the provision of Article 2, which states: 'States Parties shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction...' They concluded: 'That Convention is therefore applicable within the Occupied Palestinian Territory.'⁷⁰⁹

Significantly, the legal importance of the ICJ opinion cannot be overlooked, as it clearly indicates within a justiciable system that Israel hold obligations, which they can be found in breach of. Thus it has enhanced the legal standing of the international opinion v. Israel and ultimately, the result being that persons violated will be able to

⁷⁰⁷ Following the PLO Proclamation of the State of Palestine in 1988, several states officially recognised the State of Palestine at least *de jure*. However, certain states did not including the UK, France, Australia and USA. The current position of the UK is that they recognise the right of the Palestinian peoples to establish an independent sovereign state. See UK government, Foreign and Commonwealth Office website, Country Profiles, OPTs, Last updated 02 April 2007, www.fco.gov.uk For further reading on the issue of the statehood of Palestine see Boyle, F, 'The Creation of the State of Palestine', *EJIL*, Vol.1, 1990, pp.301-306; Crawford, J, 'The Creation of the State of Palestine: Too Much Too Soon?' *EJIL*, Vol.1, 1990, pp.307-313.

⁷⁰⁸ UN Convention on the Rights of the Child, 20 November 1989, hereafter known as CRC.

⁷⁰⁹ ICJ Wall Opinion, 9th July 2004, para.113.

make a stronger case in their favour within a national court system or through international remedy mechanisms.⁷¹⁰

Finally, it should also be noted that substantial parts of the Universal Declaration of Human Rights 1948 bind Israel, as many of the provisions within the declaration are considered customary international law.⁷¹¹ As such Israel have obligations to respect, protect and fulfil the human rights of all those living within all areas under their jurisdiction. In relation to the right to water, Article 25 Adequate Standard of Living could be invoked as customary law.⁷¹²

3.9 The Enjoyment of Economic and Social Rights within Israel and the OPTs

Having ascertained the applicability of international human rights instruments in conflict situations and having established that Israel is responsible for the realisation of human rights within the OPTs, a close examination of their compliance with their obligations under these treaties is warranted. This will allow us to assess the status of the enjoyment of economic and social rights within the state of Israel and within the OPTs, which they occupy, where they exercise 'effective control'. In particular, the enjoyment of the right to water can be evaluated.

⁷¹⁰ See Chapter 5 for further discussion regarding remedy.

⁷¹¹ It is argued that the UDHR as a whole or certain substantive provisions within the UDHR constitute custom for several reasons: As it interprets the human rights provisions of the UN Charter, especially Articles 55 and 56; as there is overwhelming evidence of state practice with the requisite *opinio juris*; through reaffirmation by the UN General Assembly and reference to and incorporation into international treaties and finally as several rights contained within the Declaration are seen as having the character of *jus cogens*. See Rehman, J. International Human Rights Law –A Practical Approach, Harlow: Longman Pearson Education, 2003, pp.53-61; Meron, T, Human Rights and Humanitarian Norms as Customary Law, Oxford: Clarendon Press, 1989, pp.79-135; Alfredsson, G and Eide, A (eds) The Universal Declaration of Human Rights: A Common Standard of Achievement, Hague: Kluwer Law International, 1999; McDougal, M, Lasswell, H and Chen, L, Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity, London: Yale University Press, 1980, p.64; Al Haq, 1993, p.9; International Commission of Jurists, 1994, p.28.

⁷¹² See Chapter 1, p.49.

As established by examination of state reports presented to the CESCR, it is evident that Israel refuses to recognise the application of the ICESCR to the occupied territories as under their jurisdiction. They do not believe they have any obligations concerning the population within the said territories and base this belief on several arguments: Firstly, as discussed previously, Israel holds that the law of human rights does not apply owing to a situation of armed conflict. As such they claim that only international humanitarian law is applicable.⁷¹³ Secondly, they claim that it is the Palestinian Authority who has responsibility for implementation of economic and social rights within the OPTs. Owing to their position and beliefs the State of Israel refuses to report on the Palestinian population within the OPTs, despite several requests from the Committee: ‘The Committee further reiterates its regret at the State party's refusal to report on the occupied territories.’⁷¹⁴ Within their most recent observations, the Committee stated:

The Committee deeply regrets the refusal of the State party to provide in its second periodic report additional information on the living conditions of population groups other than Israeli settlers in the occupied territories as requested in its 2001 concluding observations. The Committee continues to be gravely concerned about the deplorable living conditions of the Palestinians in the occupied territories, who - as a result of the continuing occupation and subsequent measures of closures, extended curfews, roadblocks and security checkpoints - suffer from impingement of their enjoyment of economic, social

⁷¹³ See previous discussion p.204.

⁷¹⁴ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel. 23/05/2003, E/C.12/1/Add.90, para.15. Original footnote omitted. See also Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, 31/08/2001, E/C.12/1/Add.69, para 11.

and cultural rights enshrined in the Covenant, in particular access to work, land, water, health care, education and food.⁷¹⁵

This refusal to report on the enjoyment of rights in the territories makes an assessment of the enjoyment of economic and social rights by the Palestinian population difficult. However, owing to parallel reports by non-governmental organisations with special consultative status with the United Nations, information is available, if limited and some evaluation can be made. As is evident from the above paragraph, the CESCR are concerned that violations of economic and social rights within the territories are taking place and there are several reasons for this: The main factor noted by the Committee, which impedes the implementation of the rights contained within the ICESCR, is the continued emphasis placed upon security measures by the Israeli government⁷¹⁶. Interestingly, it notes that this impediment has been not just within the occupied territories but also within Israel itself and that the increased security concerns in recent years have worsened the situation.⁷¹⁷

However, the Committee does not see these security concerns as justification for Israel to derogate from their obligations under the Covenant including not reporting on the situation in the OPTs. Consequently, it has stated strongly that although it recognises that Israel has ‘serious security concerns’, these must be ‘balanced with its

⁷¹⁵ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel. 23/05/2003, E/C.12/1/Add.90, para.19.

⁷¹⁶ See Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel. 23/05/2003, E/C.12/1/Add.90, para.11 and Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, 04/12/1998, E/C.12/1/Add.27, para.7.

⁷¹⁷ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel. 23/05/2003, E/C.12/1/Add.90, para.11.

efforts to comply with its obligations under international human rights law,⁷¹⁸ including realisation of economic and social rights.⁷¹⁹

More specifically,

The Committee urges the State party to ensure that any security measure it adopts does not disproportionately limit or impede the enjoyment of economic, social and cultural rights enshrined in the Covenant, in particular access to land and water resources by Palestinians, and that adequate restitution and compensation are provided to those who have incurred damage to and loss of property and lands as a result of these security measures.⁷²⁰

It is notable here that the CESCR explicitly refers to the right to water, as well as right to housing and land (which provides food and work) as the particular rights most affected by security measures. Of these security measures, the CESCR particularly criticise the Israeli policy of closures, which, restricts the movement of both Palestinian population and goods and has a detrimental effect on the health and well-being of Palestinians, preventing them from working and earning an income and denying access to resources including water and food. This results in an exacerbation of poverty and malnutrition.⁷²¹

⁷¹⁸ Concluding Observations of the CESCR: Israel, 23/05/2003, E/C.12/1/Add.90, para. 31

⁷¹⁹ The Committee also reaffirms its view that Israel's obligations under the Covenant apply to all territories and populations under its effective control and that 'basic economic, social and cultural rights, as part of the minimum standards of human rights, are guaranteed' even in a situation of armed conflict (under customary international law, international humanitarian law, and under the Covenant). Thus they request that in its next periodic report, Israel provide more extensive information on the enjoyment of the rights enshrined in the Covenant by all those living in the OPTs. Concluding Observations of the CESCR: Israel, 23/05/2003, para. 31.

⁷²⁰ Concluding Observations of the CESCR: Israel, 23/05/2003, para.40.

⁷²¹ See Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel. 04/12/1998, E/C.12/1/Add.27, para.18.

Furthermore, although not initially obvious as directly relevant, the concluding observations concerning Israel's state report to the Human Rights Committee⁷²² also note the severe limitations on the right to freedom of movement for Palestinians living within the OPTs, in particular noting the 'wide-ranging restrictions' due to the Separation Wall, which 'disrupt access to healthcare [...] and access to water.'⁷²³ While the HRC 'acknowledge the seriousness of the State party's security concerns' they consider the restrictions incompatible with the ICCPR, Article 12 and state that Israel should respect the right to freedom of movement and stop construction of the Wall within the Occupied Territories.⁷²⁴

Significantly, this section of the report demonstrates the interdependence of civil and political and economic and social rights. Furthermore it illustrates that the HRC recognise the threat to the right to water as a direct consequence of a violation of the right to freedom of movement, thus recognising the right to water as within the scope of certain civil and political rights.

In conclusion, the state of Israel's security policy can be seen as a major factor impeding the enjoyment of economic and social rights (and certain civil and political rights), in the OPTs and in Israel proper. Security measures taken by Israel can be seen to have detrimental effects on the right to water, health, work and food.

⁷²² Hereinafter referred to as HRC.

⁷²³ Concluding observations of the Human Rights Committee: Israel. CCPR/CO/78/ISR, 21st August 2003, para. 19.

⁷²⁴ Concluding observations of the HRC: Israel, 21st August 2003, para. 19.

Moreover, the Committee conclude that closures have resulted in ‘widespread violations of [their] economic, social and cultural rights’.⁷²⁵

(i) Enjoyment and Implementation of the Right to Water

As noted previously, particular worries are noted concerning the right to water within the observations of the CESCR, on several occasions. This is despite the absence of explicit reporting on the right to water within Israel’s state reports. However, Israel does report on aspects of the right to water but these are framed within Article 12-health and Article 11-adequate standard of living.⁷²⁶ Moreover, as noted previously the information given relates only to Israel itself (within the Green Line) and does not contain information on the Palestinian population in the Occupied Territories. As such, the reports give a substantially misleading picture of the enjoyment of the right within the area under Israel’s control. For example, Israel’s initial state report to the CESCR states that 99.8% of households enjoy mains supply water to their homes,⁷²⁷ but this figure does not include any Palestinians living within the West Bank, only Israeli settlers living in illegal Israeli settlements in the territory.⁷²⁸ Israel also reports on the safety aspect of the right to water, under Article 12 Right to Health, but again,

⁷²⁵ Concluding Observations of the CESCR: Israel, E/C.12/1/Add.27, 4th December 1998, para.17.

⁷²⁶ See CESCR Initial State Report of Israel, E/1990/5/Add.39 (3), 20 January 1998, para. 571, 572, 573; CESCR Second Periodic Report of Israel, E/1990/6/Add.32, 16th October 2001, para. 345, 346, 420, 423.

⁷²⁷ See CESCR Initial State Report of Israel, 20 January 1998, para.563. See also Initial State Report of Israel to the Committee on The Rights of The Child [20 February 2001], CRC/C/8/Add.44, para. 835.

⁷²⁸ The Israeli settlements within the OPTs are illegal under the Geneva Convention IV, Article 49. Also see numerous General Assembly resolutions including *inter alia*, 61/118 (2006); 60/106 (2005); 59/123 (2004); 32/5 (1977).and several Security Council Resolutions including *inter alia*, 446 and 452 (1979); 465 (1980). Also see the ICJ Wall Opinion, para.120; Kothari, M, UN Special Rapporteur on the right to Adequate Housing, Report of visit to the Occupied Palestinian Territories, 5-10th Jan 2002, E/CN.4/2003/5/Add.1, 10th June 2002, para.35; Concluding Observations of the CESCR: Israel, 04/12/1998, E/C.12/1/Add.27, para.24 and para.41.

this is limited to an evaluation of water within Israel only and Israeli settlements in the West Bank and Gaza but not Palestinian areas.⁷²⁹

Despite the absence of data on the Palestinian population of the occupied territories, the Committee continue to push Israel to recognise their obligations regarding the right to water of all the Palestinians in the territories.⁷³⁰ Furthermore they note that even if the Palestinian Authority has obligations correlative to the enjoyment of economic and social rights, in relation to water, it is the Israeli state who control water resources and as such, the Israelis who must have the obligations regarding the right to water for Palestinians in the occupied territories:

The Committee is particularly concerned about limited access to and distribution and availability of water for Palestinians in the occupied territories, as a result of inequitable management, extraction and distribution of shared water resources, which are predominantly under Israeli control.⁷³¹

This observation by the Committee takes account of the fact that despite being the local service provider, in many cases, the Palestinian Water Authority does not render effective control over service delivery, as they have to purchase water from the Israeli water company, Mekorot. This is in addition to the larger macro-level political dispute over ownership and utilisation of trans-boundary groundwater resources in the region.⁷³²

⁷²⁹ See CESCR Initial State Report of Israel, 20 January 1998, para.571, 572, 573.

⁷³⁰ See Concluding Observations of the CESCR: Israel, 04/12/1998, para.32; Concluding Observations of the CESCR: Israel, 23/05/2003, E/C.12/1/Add.90, para.35, 41.

⁷³¹ Concluding Observations of the CESCR: Israel, 23/05/2003, para.25.

⁷³² For an in depth analysis of the conflict over trans-boundary groundwater resources, see Daibes-Murad, 2005.

In addition, water is distributed inequitably, with settlers in the territories receiving far more water per capita than their Palestinian counterparts:

The Committee also notes with concern that while the Government annually diverts millions of cubic metres of water from the West Bank's Eastern Aquifer Basin, the annual per capita consumption allocation for Palestinians is only 125 cubic metres while settlers are allocated 1,000 cubic metres per capita.⁷³³

In conclusion the Committee calls upon Israel to stop the building of illegal Jewish settlements in the territories and the bypass roads that connect them and to cease the expropriation of natural resources, including water, belonging to the OPTs⁷³⁴ and

...strongly urges the State party to take immediate steps to ensure equitable access to and distribution of water to all populations living in the occupied territories, and in particular to ensure that all parties concerned participate fully and equally in the process of water management, extraction and distribution. In that connection, the Committee refers the State party to its General Comment No. 15 on the right to water.⁷³⁵

Interestingly, Israel also reports on the safety aspect of the right to water under the reporting obligations of the ICCPR 1966, within their initial and second periodic state report to the HRC, Article 6 Right to Life and Article 26 Equality before the Law.⁷³⁶

⁷³³ Concluding Observations of the CESCR: Israel, 04/12/1998, para.24.

⁷³⁴ See Concluding Observations of the CESCR: Israel, 04/12/1998, para.24 and para.41.

⁷³⁵ Concluding Observations of the CESCR: Israel, 23/05/2003, para.41.

⁷³⁶ See Human Rights Committee, Second Periodic Report Israel, [20 November 2001], CCPR/C/ISR/2001/2, 4th December 2001, para.79, 282; Human Rights Committee, Initial report of States parties due in 1993: Israel, 09/04/98, CCPR/C/81/Add.13, para.132.

This could be significant in terms of determining violations and may have implications for the justiciability of the right within a complaints and court system.⁷³⁷

Under Article 6, the information however is framed in terms of environmental policy, concerning water quality in rivers and reservoirs⁷³⁸ and environmental pollution issues.⁷³⁹ Although these contain admirable efforts regarding *inter alia* reuse of wastewater due to water scarcity, an individual human right to water is not referred to implicitly or explicitly. Again, the report is limited to the situation and measures to be taken only within the Israeli settlements in the OPTs and within Israel proper.

Similarly under the state reporting mechanism of the Committee on the Rights of the Child, Israel have submitted information concerning both water quality and access, with particular reference in the latter case to the Bedouin population of Israel proper.⁷⁴⁰ This information is misleading however. For example, Israel claim, ‘Virtually every home (99.8%) in Israel is connected to the country’s central water network.’⁷⁴¹ However, this does not include homes that are not recognised as ‘legal dwellings’ by the Israeli government, which excludes therefore many Arab and Bedouin residences.⁷⁴² Furthermore, it does not include any Palestinian homes in the

⁷³⁷ See Chapter 1 for analysis of human right to water as an element of the right to life.

⁷³⁸ See HRC, Second Periodic Report Israel, 4 December 2001, para.79.

⁷³⁹ HRC, Initial report of States parties due in 1993: Israel, 09/04/98, para.132.

⁷⁴⁰ See the Initial State Report of Israel to the Committee on the Rights of the Child, CRC/C/8/Add.44, 27th February 2002, para. 834 – 837.

⁷⁴¹ Initial State Report of Israel to the Committee on the Rights of the Child, 27th February 2002, para. 835.

⁷⁴² See Initial State Report of Israel to the Committee on the Rights of the Child, 27th February 2002, para.896, stating the position of Bedouin residences as illegal and therefore, excluded from the data in the report. For a discussion of the law pertaining to the illegality of Bedouin residences see Arab Association for Human Rights et al, Compilation of Economic, Social and Cultural Rights Conditions of the Indigenous Palestinian People under Israel’s Jurisdiction and Effective Control, Parallel Report jointly submitted to the UN Committee on Economic, Social and Cultural Rights, 30th session, Geneva, 9 May 2003, Article 11 Right to an Adequate Standard of Living, Point 17 and 18.

OPTs. This was noted by the Committee on the Rights of the Child in their Concluding Observations: ‘...Given the responsibility of the State party for the implementation of the Convention in the occupied Palestinian territories, the Committee deeply regrets the lack of any information about the situation of children in the occupied Palestinian territories...’⁷⁴³

In relation to the right to water, it is disappointing that the Committee does not explicitly call for information regarding enjoyment of the said right. Indeed, the right to water is only commented on twice: Firstly under CRC, Article 27, Adequate Standard of Living, in regard to the prohibition of the destruction of the water infrastructure under the Geneva Conventions:

The Committee is deeply concerned at the large-scale demolition of houses and infrastructure in the occupied Palestinian territories, which constitutes a serious violation of the right to an adequate standard of living for children in those territories. The Committee recommends, with reference to international humanitarian law, notably the Geneva Convention relative to the Protection of Civilian Persons in Time of War, that the State party fully comply with the rules of distinction (between civilians and combatants) and proportionality (of attacks that cause excessive harm to civilians) and thus refrain from the demolition of civilian infrastructure, including homes, water supplies and other utilities. It further recommends that the State party provide the victims of

⁷⁴³ Concluding Observations of the Committee on the Rights of the Child: Israel, 09/10/2002, CRC/C/15/Add.195, Thirty-first session, para.2.

such demolitions with support for the rebuilding of their houses and with adequate compensation.⁷⁴⁴

Although it is a positive move that reference is made to water under the rules of international humanitarian law, and within the remit of a human rights treaty monitoring body, it is disappointing that the violations are framed within a right to an adequate standard of living and not as independent and explicit violations of the human right to water. However, this recommendation furthers the argument that both international human rights law and international humanitarian law are interlinked and applicable concurrently in times of conflict.

Secondly, water quality is mentioned under Article 6 concerning the right to life and Article 24 regarding the right to health. However, again this is only in relation to Israel proper. Although, the Committee note the difficulty in implementing the CRC in the context of violence, both in Israel and the OPTs,⁷⁴⁵ they do call attention to the effect of Israel's security policies upon the health of children in the territories, especially the policy of closure which, is exacerbating malnutrition by means of artificially high prices for basic foodstuffs (including water) and lack of access to resources.⁷⁴⁶

In relation to Israel's compliance with the right to water as contained in the CEDAW, under the state reporting system of the CEDAW the state of Israel submitted initial

⁷⁴⁴ Concluding Observations of the Committee on the Rights of the Child: Israel, 09/10/2002, CRC/C/15/Add.195, Thirty-first session, para.50 and 51.

⁷⁴⁵ See Concluding Observations of the Committee on the Rights of the Child: Israel, 09/10/2002, para.4.

⁷⁴⁶ See Concluding Observations of the Committee on the Rights of the Child: Israel, 09/10/2002, para.44.

and second periodic reports in 1997.⁷⁴⁷ Within these reports there is no mention of the right to water, either explicitly as an independent right or as part of the right to an adequate standard of living for rural women under Article 14 of the Convention. Furthermore, there is no mention of the status of women's rights and level of enjoyment of these human rights within the OPTs. Neither is there any justification offered by the state party for not reporting on these territories.

Although the Committee does recommend that, 'The Government of Israel should ensure that the Convention was implemented throughout the territory under its jurisdiction',⁷⁴⁸ they do not mention the issue again and do not explicitly ask the state party why they have not reported on the rights of women within the occupied territories where Israel have effective control. Moreover, in their final suggestions and recommendations, the Committee does not even mention the fact that Israel has completely ignored the rights of women within the OPTs and do not request that Israel addresses the issue in their next report.⁷⁴⁹ The position taken by CEDAW is inconsistent with the views stated by the other treaty monitoring bodies, as evident from the previous discussion. Furthermore, it is unacceptable that the Committee do not challenge Israel's ommittance and consequent breach of obligations, both on a moral and legal basis.

In relation to the right to water specifically, it is extremely disappointing that the right is not mentioned, in relation to Israel or the OPTs, in the country reports to CEDAW.

⁷⁴⁷ See Report of the State of Israel on the CEDAW, CEDAW/C/ISR/1-2, 8th April 1997.

⁷⁴⁸ Report of the Committee on the Elimination of Discrimination against Women (Sixteenth and seventeenth sessions), General Assembly Official Records, Fifty-second Session Supplement No.38 (A/52/38/Rev.1), 1997, para.170.

⁷⁴⁹ See Report of the Committee on the Elimination of Discrimination against Women, 1997, para.182.

Likewise the respective Committee's concluding observations do not include reference to the right, despite the treaty, which it monitors, being one of only two human rights treaties with explicit reference to water.

(ii) Enjoyment of Economic and Social Rights within Israel - A Comparison

An examination of the enjoyment of economic and social rights within Israel proper may indicate patterns or problems relevant to the enjoyment of these rights within the OPTs as well. In fact, the parallels between the enjoyment of these rights across the whole territory under Israel's jurisdiction and control has been noted by the Arab Association for Human Rights et al, in their report to the CESCR, where they report on several of the rights contained in a joint manner.⁷⁵⁰

Within the state of Israel itself, the enjoyment of economic and social rights is also not without difficulty. The main issue is one of discrimination and non-Jewish citizens, especially Arab and Bedouin communities, are greatly disadvantaged in terms of enjoyment of economic and social rights. This discrimination is evident in the continuing lower standard of living of Israeli Arabs as a result of, *inter alia*, higher unemployment rates, lack of access to housing, water, electricity and health care and a lower level of education. 'In this regard, the Committee expresses its concern that the State party's domestic legal order does not enshrine the general principles of equality and non-discrimination.'⁷⁵¹

⁷⁵⁰ See Arab Association for Human Rights et al, 9 May 2003.

⁷⁵¹ Concluding Observations of the CESCR: Israel, 23/05/2003, E/C.12/1/Add.90, para.16. Original footnote omitted.

Furthermore, those suffering from discrimination within Israel are subject to a lack of enjoyment of several fundamental economic and social rights as a result of this discrimination including *inter alia* the right to housing, health and the right to water. Most vulnerable are Arab citizens of Israel, Black Jewish immigrants, such as Ethiopian Jews and the Bedouins, as it is these communities that often live in villages pronounced ‘illegal’ by the Israeli authorities.⁷⁵² This then has a knock on effect in terms of access to basic services:

The Committee further urges the State party to recognize all existing Bedouin villages, their property rights and their right to basic services, in particular water, and to desist from the destruction and damaging of agricultural crops and fields, including in unrecognised villages...⁷⁵³

It can be concluded then, that the experience of non-Jewish communities within Israel proper, in relation to the enjoyment of the rights to water and certain other economic, social and cultural rights, is parallel to that of the Palestinian communities in the occupied territories. Although the specific difficulties faced by each respective community and individuals may vary, common elements are evident.

3.10 A Right to Water under Palestinian Domestic Law?

(i) The Complexity of the System

Within the area of Palestine,⁷⁵⁴ there existed a complex set of laws resulting from various occupations and rule of the territories over time.⁷⁵⁵ Ottoman rule and then the

⁷⁵² Concluding Observations of the CESCR: Israel, 23/05/2003, para.27.

⁷⁵³ Concluding Observations of the CESCR: Israel, 23/05/2003, para.43.

⁷⁵⁴ This covered the area now known as, Israel and the Occupied Palestinian Territories, excluding the Golan Heights.

British Mandate over the country led to a mixed system of law where some Ottoman Law was retained alongside the introduction of a complicated English Legal System.⁷⁵⁶ After the partition of the country by UN Resolution 181 in Nov 1947 bringing an end to the British Mandate and the subsequent declaration of the state of Israel, the remaining area of the West Bank was taken under Jordanian control (with Gaza administered by Egypt). This left the occupied territories with different legal systems.⁷⁵⁷

The contemporary situation is that the Occupied Territory of the West Bank has a legal system that contains elements of Ottoman, British and Jordanian (Continental) law, in addition to Palestinian law⁷⁵⁸ and Israeli military law (and Israeli domestic law within the illegal Jewish settlements). It can be argued that these elements cannot be viewed as comprising one complex system, rather it can be said there are several systems operating concurrently and with little agreement as to which system takes precedence within the law. Marks notes that in its best form it can be interpreted as a 'Hotchpotch' of law and in its worst form as the 'absence of any real law'.⁷⁵⁹

⁷⁵⁵ See Husseini Hiba, October 10-14 2004, pp.2-3.

⁷⁵⁶ International Commission of Jurists, 1994, pp. 11-14.

⁷⁵⁷ International Commission of Jurists, 1994, pp. 11-14; Marks, in Bowen, 1997, p.169. Also, Birzeit University Institute of Law, 'Overview of the Legal System in Palestine' at <http://lawcenter.birzeit.edu/overview.html> Accessed 21.02.06.

⁷⁵⁸ In addition to formally codified Palestinian Law, it is worth noting the existence of the Penal Codes introduced by the Palestinian Liberation Organisation (PLO). These 'Penal Codes', although not formally codified or incorporated into local law, still exist and their mechanisms are used, one example being the security courts of the Palestinian police. These codes are repressive and have resulted in human rights violations and abuses of the most severe nature, including torture and inhuman treatment and loss of life. These laws however can be seen as concerned with issues relating to civil and political rights and do not infringe directly upon the enjoyment of economic and social rights. For further details see Human Rights Watch Middle East, Human Rights under the Palestinian Authority, HRW, October 3, 1997.

⁷⁵⁹ Marks. S, 'Domestic Application of International Human Rights Standards' in Bowen, 1997, pp.169-200 at p.172.

Needless to say, that the legal system requires detailed examination and evaluation, which is beyond the scope of the current thesis. Suffice to note that until the Palestinian Authority undertake a long-term review and codification of carefully drafted legal standards, this confusing set of laws will continue to be applied in the interim period. Marks notes that the continued application of these laws, ‘does not augur well for the future government of an eventual Palestinian state.’⁷⁶⁰ However, it is unlikely and unrealistic to expect that the Palestinian Authority will take action or can take action when they do not have complete control of their territory or resources. Furthermore, this situation is now made even more complex, in light of the current political situation.⁷⁶¹

In relation to water, this complex system has also left its mark and ‘present water administration and regulations in Palestine, which are stipulated in the Water Law are derived from Islamic water law principles⁷⁶² together with concepts and interpretations which have been imposed on pre-existing regulations, local uses and customs.’⁷⁶³

Furthermore, this confusion and complexity, as well as lack of legal authority, has consequences for the codification and enjoyment of human rights within the OPTs. The following review of national laws relevant to economic and social human rights, illustrates the poor legal standing of human rights within the Palestinian system in

⁷⁶⁰ Marks in Bowen, 1997, p.170.

⁷⁶¹ See discussion Section 3.1, p.163.

⁷⁶² The Shari’a (Islamic Religious Law) provides in principle that water is God's property and as such it is free for all. Ownership can take place upon effective possession. There are two primary rights of use: drinking to satisfy thirst of man and animals and irrigation for foodstuffs. Payment for water use is questionable, although in practice payment is made. For further discussion of water management in Islam see Faruqi, N, et al, Water Management in Islam, UN University Press: Paris, 2001.

⁷⁶³ See Husseini Hiba, October 10-14 2004, p.6. For an interesting review of the historical development of water law in the Occupied Palestinian Territories see this article.

general and in relation to the human right to water, a complete absence of any specific provisions.

(ii) The Palestinian Legislative Council⁷⁶⁴

The Palestinian Legislative Council is the sub-body of the Palestinian Authority charged with the authority to draft and adopt laws concerning those areas, which the Palestinian Authority is deemed to hold jurisdiction, under the terms of the Interim Agreement.⁷⁶⁵ However, significantly, the PLC can be seen as quasi-legal in that they do not have the authority to amend or repeal any existing laws and must seek the approval of the Israeli element of the JWC to pass any new laws in regard to water. This constitutes a severe constraint upon their legal authority of the Palestinians and ultimately ensures Israeli control of the occupied territories despite the appearance of Palestinian jurisdiction.⁷⁶⁶

In terms of specific human rights law, the PLC has passed no specific human rights law or laws specific to individual substantive rights. However, they have passed the Palestinian Basic Law 2003, which contains some human rights provisions. In relation to water, in conjunction with the Palestinian Water Authority,⁷⁶⁷ the PLC drafted and adopted the Palestinian Water Law No.3/2002.⁷⁶⁸ These two sources constitute the

⁷⁶⁴ Hereinafter known as the PLC.

⁷⁶⁵ For the legal basis of the PLC see Interim Agreement, Article 3. Provision for jurisdiction of the PLC is provided for under Article 17 of Interim Agreement and for powers of the PLC see Article 18, Interim Agreement. It should be noted that the PLC hold no official powers in regard to international relations or international law. This task falls to the Palestinian National Council of the PLO.

⁷⁶⁶ See Article 18, Interim Agreement. Also see Selby, 2003, p.100.

⁷⁶⁷ Hereinafter known as the PWA.

⁷⁶⁸ In addition, there are certain laws, which can be seen as related indirectly to the human right to water, such as the Public Health Law, No. (20), Chapter 7, Article 45 and Article 42 (Signed by the PLC 27/12/2004, ratified and published 23/04/2005). Also, the Natural Resources Law No. (1), 1999.

most likely possible basis for a right to water under the Palestinian domestic legal system of the OPTs of the West Bank.

(iii) The Palestinian Basic Law 2003 (Constitution)

The first of these sources, the Palestinian Basic Law of 2002, Amended 2003,⁷⁶⁹ is seen as the basis for a Palestinian Constitution if and when they become a sovereign state. The Basic Law covers such areas as Constitutional principles, Executive, Judicial and Legislative Authority and Public Rights and Freedoms, the latter containing the minimal provisions relating to human rights, including some economic and social rights.

In the initial drafts of the law, the provisions concerning adherence to international human rights standards, including the ICESCR, were strong:

Palestine recognises and respects the fundamental human rights and freedoms prescribed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination the Convention against Torture and other Cruel Inhuman or Degrading Treatment and Punished and other Conventions and Covenants which secure such rights and freedoms. Palestinian authorities shall adhere to the said international agreements.⁷⁷⁰

⁷⁶⁹ The Basic Law was ratified on 29 May 2002, by the PLC and entered into force on 1 June 2002, amended in 2003. Available at <http://www.miftah.org>, last accessed 22/02/06.

⁷⁷⁰ Chapter Two, (1) Fundamental rights and freedoms, Article 8, Draft Basic Law for the National Authority in the Transitional Period (4th draft), 11th December 1995, (JMCC, occasional document series no. 5, pp.26, February 1996 at <http://www.jmcc.org/research/series/basic2.html> accessed on 28th Feb 2006).

This draft also catered for and provided for specific rights, whilst utilising the language and principles of international treaties. Those provided for included, *inter alia*, Article 9 Right to life, Article 10 non-discrimination, Article 11, freedom from torture or cruel and degrading treatment, Article 24 work and Article 25 the right to education.⁷⁷¹

The adherence to international instruments evident in this draft however, is not evident in the adopted, ratified bill of 2002 and current amended version of 2003. Provision is much less specific and therefore weaker in content. It now only states the intention to 'become a party to regional and international declarations and covenants that protect human rights.'⁷⁷² Article 10 (1) states, 'Basic human rights and liberties shall be protected and respected.' Thus, the provision entails only a very broad reference to human rights and does not reflect the original draft provision that specified fundamental international human rights treaties.

Conversely, as the Palestinian Authority in its present form cannot become a party to the Covenants, as it does not constitute a sovereign state, this provision may reflect a more realistic interpretation of international law and of what they can be responsible for as a legal entity in this context. i.e. they can only state their intention to become a state party and to adhere to the principles in their own undertakings as the transitional authority.

⁷⁷¹ See discussion by Hunt in Bowen, 1997, p.202; Marks in Bowen, 1997, p.171 and International Commission of Jurists, 1994, p.85 and p.95.

⁷⁷² Palestinian Basic Law 2003, Article, 10 (2).

Moreover, the Basic Law 2003 contains certain fundamental principles of human rights law, such as the principle of non-discrimination provided for in Article 9: ‘Palestinians shall be equal before the law and the judiciary, without distinction based upon race, sex, colour, religion, political views or disability.’⁷⁷³ It also provides for certain specific rights: Articles 11 – 22 deal with civil and political rights. There are also provisions relating to specific economic and social rights: *inter alia* Article 23 Housing, Article 24 Education and Article 25 Work. However, there is no provision for the right to health, right to food or right to water. One positive aspect is the provision under Article 33, which deals with the right to a clean environment. This can be interpreted broadly as encompassing an element of the human right to water, that of quality and provision and protection of satisfactory environmental health. This clause also incorporates a strong notion of sustainability in relation to the environment: ‘The enjoyment of a balanced and clean environment is a human right. The preservation and protection of the Palestinian environment from pollution for the sake of present and future generations is a national duty.’⁷⁷⁴ Despite this positive provision however, there is no clear basis for the core and scope of the human right to water in its entirety and in its current form, the Palestinian Basic Law 2003 has no specific provision that could be used to establish a national human right to water.⁷⁷⁵

In sum, even though the Palestinian Basic Law 2003 could legally be adopted as the Constitution of an independent Palestinian state, in relation to human rights law, further detailed specific legislation would be required to incorporate adequately general human rights principles and standards and provision for specific human rights, into

⁷⁷³ Palestinian Basic Law 2003, Article 9.

⁷⁷⁴ Palestinian Basic Law 2003, Article 33.

⁷⁷⁵ Nor any element of a right to health or food either.

domestic law.⁷⁷⁶ More specifically, additional provisions need to be adopted in order to provide for a right to water, as well as other economic and social rights.

(iv) Palestinian Water Law No.3/2002

The second possible source for a right to water is under the Palestinian Water Law No.3/2002. Enacted on 18 February 2002, the law encompasses the whole water sector. It aims to develop and manage the water resources, to increase capacity, to improve quality, to preserve, and to protect against pollution and depletion.⁷⁷⁷ As its leading principle the law states that all water resources in Palestine are considered public property.⁷⁷⁸ By deeming water as publicly owned and managed by the PWA on behalf of the public for the public good, it has legally eliminated the concept of private ownership of water.⁷⁷⁹

This concept of water as a public good is in line with the CESCR GC 15, however, unfortunately, none of the provisions contained within the Water Law 2002 refer to a human right to water, rather the focus is upon management of water resources and the legal basis for the water authority. Despite the PLC and the PWA⁷⁸⁰ having undertaken this action to unify and standardise the laws governing the water sector, the water rights of the Palestinian people are not legally recognised explicitly within the Palestinian Water Law No.3/2002, either collectively or as an individual human right. This illustrates a gap in provision, which must be addressed if the right to water

⁷⁷⁶ See Marks in Bowen, 1997, p.172.

⁷⁷⁷ Hussein Hiba, October 10-14 2004, p.7.

⁷⁷⁸ Palestinian Water Law No.3/2002, Article 3.

⁷⁷⁹ Hussein Hiba, October 10-14 2004, p.8.

⁷⁸⁰ See Chapter 4 for a discussion of the relevant bodies within the water sector in the Occupied Palestinian Territories. Also for an examination of the institutional and legal capacity of the Palestinian Water Authority see Hussein Hiba, October 10-14 2004.

is to be implemented at national level, although securing water rights for the Palestinian people has been recognised as a priority for the PWA,⁷⁸¹ in the future, it is difficult to see how the PWA can move to secure the right to water when they have no national legal basis for their claim and have no control over water resources.

3.11 A Right to Water under Israeli Domestic Law?

In addition to Palestinian law and Jordanian law (which was in place prior to the occupation by Israel), it can be argued that the domestic law of Israel is applicable within the occupied territory. This line of argument follows from the jurisdiction Israel have over the territory, although it is not a part of the state of Israel per se. Israel deny the applicability of state law to the OPTs and claim that Israeli Law is applicable only in the illegal Israeli settlements of the West Bank and only to Israeli citizens. The arrangements regarding jurisdiction within the Oslo Accords would seem to endorse this view. Furthermore, even where the area is under total Israeli control (Areas C) only the law of the military civil administration would apply.⁷⁸² Despite this, it is worth noting the human rights provisions under Israeli law, for several reasons: Firstly, the enjoyment of human rights within the state of Israel proper could indicate issues of concern for human rights enjoyment in the OPTs. Secondly, due to the unclear legal status of the territories all legal rules with possible implications should be considered, especially as Israeli law applies to Israeli citizens living in the illegal Jewish settlements, within the OPTs.

⁷⁸¹ See Hussein Hiba, October 10-14 2004, p.13.

⁷⁸² This is because Israel has not officially annexed the West Bank and therefore it is not legally a part of the state of Israel, rather occupied territory. A such the international law of occupation applies (international humanitarian law).

(i) The Basic Laws of Israel

The only human rights provision under Israeli national law is to be found within the Basic Laws of Israel. There are 11 Basic Laws in existence⁷⁸³ that comprise unique laws dealing with "constitutional" subjects such as the basic structure of government and state bodies including the army and judiciary. These Basic Laws are components of 'a Constitution in the making' according to the Israeli Government.⁷⁸⁴ They claim to encompass fundamental human rights, within the Basic Laws: Human Dignity and Liberty, Freedom of Occupation, and Freedom of Religion (draft proposal).⁷⁸⁵ Of these, the central basic law concerned with human rights is that of the Basic Law: Human Dignity and Liberty (1992).⁷⁸⁶ Article 1 identifies the principles underlying the law⁷⁸⁷ and Article 1 (a) sets out the purpose of the law: 'to protect human dignity and liberty'.⁷⁸⁸ Articles 2-7 deal with civil and political rights including *inter alia*, right to life, privacy, property and liberty.⁷⁸⁹ The remaining articles deal with application of the law, reservations and permissible derogations.⁷⁹⁰

Unfortunately, there is no codification of any economic and social human rights. This may be due to the fact that the Knesset was unsuccessful in its endeavours to enact the

⁷⁸³ The Existing Basic Laws: The Knesset (1958); Israel Lands as Basic Law: The People's Lands (1960); The President of the State (1964); The State Economy (1975); The Army (1976); Jerusalem, the Capital of Israel (1980); The Judiciary (1984); The State Comptroller (1988); Human Dignity and Liberty (1992); The Government (2001) and Freedom of Occupation (1994). From Israeli Knesset, Law, Basic Laws, at http://www.knesset.gov.il/description/eng/eng_mimshal_yesod2.htm

⁷⁸⁴ HRC Initial State Report of Israel, 09/04/98, CCPR/C/81/Add.13, para.33.

⁷⁸⁵ The author is unable to ascertain at this present time, the current status of this draft law.

⁷⁸⁶ Passed by the Knesset on the 17th March 1992, (12th Adar Bet, 5752) and amended on 9th March, 1994, (21st Adar, 5754).

⁷⁸⁷ Basic Law: Human Dignity and Liberty including Amendment, Article 1. Basic principles: 'Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.'

⁷⁸⁸ Basic Law: Human Dignity and Liberty including Amendment, 1(a). Purpose: 'The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.'

⁷⁹⁰ Basic Law: Human Dignity and Liberty including Amendment, para.8 – 12.

'Basic Law: Human Rights' in its entirety, due to the opposition of some religious parties to certain provisions.⁷⁹¹ In addition, a separate draft basic law on social rights was prepared following Israel's ratification of the ICESCR.⁷⁹² However, in their concluding observations the CESCR noted that the basic law did not meet the requirements of Israel's obligations under the Covenant.⁷⁹³ Subsequently, it was never to pass through the Knesset at all and the Israeli government stated:

The draft 'Basic Law: Social Rights' is no longer pending in the Knesset. The future of such legislation is not clear. However, the rights protected by the Covenant are a part of the ongoing public debate in Israel and appear in regular curricula of law faculties. Moreover, economic, social and cultural rights are increasingly recognized as constitutional rights in Israeli jurisprudence...⁷⁹⁴

Overall, the current provision for human rights is very weak and is concerned solely with civil and political rights. Economic and social rights are not encompassed, with the exception of the right to work, provided for in the separate limited provision, 'Basic Law: Freedom of Occupation'. This basic law together with the Basic Law: Human Dignity currently encompasses the limited human rights provisions of the national laws.⁷⁹⁵ Therefore, there is currently no provision within Israeli

⁷⁹¹ Ultimately, a compromise was reached where those sections of the law on which there are no basic differences of opinion were enacted. This resulted in the civil and political focused Basic Laws: Human Dignity and Liberty and the Basic Law: Freedom of Occupation. See 'Basic Laws – Constitution and Human Rights' at [The Israel Religious Action Centre, Documents, Basic Laws, http://www.irac.org/article_e.asp?artid=148](http://www.irac.org/article_e.asp?artid=148) 20th Aug 2004.

⁷⁹² See HRC Initial State Report of Israel, 09/04/98, para.35 and para.40.

⁷⁹³ See Concluding Observations of the CESCR: Israel, 04/12/98, para.9.

⁷⁹⁴ Additional Information submitted by State Party of Israel following consideration of their report by the CESCR, E/1989/5/Add.14, 14 May 2001, para.32.

⁷⁹⁵ In addition it has been argued that the Israeli Declaration of Independence 14 May 1948, constitutes a basis for fundamental human rights protection, for example, regarding non-discrimination: 'Israel's Declaration of Independence, drawing on the Universal Declaration of Human Rights, provides that

Constitutional law for a human right to water or for any substantive economic and social right with the exception of a right to work.⁷⁹⁶

(ii) Israeli Water Law 1959

Concerning water in general, although again, not encompassing a human right to water is the Israeli Water Law 1959. This law again only applies to Israel proper and settlements and establishes a framework for the control, management and protection of the regional water resources Israel claim to own. In regards to water rights, the law is in parallel with that of the Palestinian Water Law No.3 / 2002 and sees water as public property.⁷⁹⁷ On the question of an individual's right to water, the law states: 'Every person is entitled to receive and use water, subject to the provisions of this law'.⁷⁹⁸ As such, water is not viewed as a human right but as a state controlled resource that an individual is entitled to on conditions of usage according to the said Water Law. These uses include domestic, agricultural and industrial use and public service use.⁷⁹⁹

This provision can be viewed as a basis for a right to water, although not based upon human rights law but rather domestic law and this basis has been utilised in certain

"[t]he State of Israel will maintain equal social and political rights for all citizens, irrespective of religion, race or sex". Although the Declaration, strictly speaking, lacks binding constitutional force, the Supreme Court has relied on it... to establish the right to equality before the law as "the life breath of our entire constitutional regime" (H.C.J. 98/169, Bergman v. Minister of Finance, 24(1) P.D. 693, 698), and to make that right enforceable in the courts.' HRC, Initial State Report of Israel. 09/04/98, para. 824.

⁷⁹⁶ Consequently the only possibility for redress from a violation of the right to water would be under the right to life as detailed in Article 2 of the Basic Law: Human Dignity and Liberty.

⁷⁹⁷ Israel Water Law 1959, Section 1, Article 1.

⁷⁹⁸ Israel Water Law 1959, Section 1, Article 3.

⁷⁹⁹ See Israel Water Law 1959, Section 1, Article 6 'Linking of a private person's right to water to purpose'. This article lists five uses for which a person has a right to water.

cases before the Israeli Supreme Court to argue a right to water.⁸⁰⁰ However, as the said articles within the Water Law 1959 are not formulated as a human right to water, the scope of such provision is open to question. Conversely though, there are further provisions covering pollution and water quality, sustainability and mechanisms for complaints, which provide comprehensive elements of the right to water.

Israel would seem therefore to have a comprehensive water law with some basis for a right to water including redress. However, as applicable to Israel proper only, Palestinians cannot benefit from this provision, other than if there are precedents set which can be applied in the case of violations within the OPTs. It is also imperative to note that the Water Law itself is based upon an inequitable usage of regional resources and appropriation of Palestinian water assets.

(iii) Israeli Case Law Regarding the Right to Water

Despite the lack of provision under Israeli Constitutional Law for a human right to water, as previously noted, there have been two cases at the Supreme Court of Israel regarding the right to water. These cases have been based upon the Water Law 1959 and may have set some interesting precedence concerning water rights in the region, including possessing consequential effects for water rights within the OPTs.

The first case at the Supreme Court of Israel is *Adalah - The Legal Centre for Arab Minority Rights in Israel*,⁸⁰¹ on behalf of 767 Palestinian Bedouin Citizens of Israel v.

⁸⁰⁰ See discussion below.

⁸⁰¹ Hereafter referred to as *Adalah*.

Gov of Israel, 2004, *The Right to Water in the Unrecognised Villages in the Naqab*,⁸⁰² relates directly to a right to water within the national territory of Israel proper. Although this case is regarding Arabs within Israel proper, many parallels can be drawn between the water situation in the unrecognised communities of Bedouin Arabs living in the Naqab (Negev) desert and the water conditions within the West Bank, as well as the treatment of these people under Israeli law.⁸⁰³

In the initial case the petitioners held that ‘the [Israeli] State maintained a policy of denying clean and accessible water to thousands of residents of the unrecognized villages.’⁸⁰⁴ Due to their status under Israeli law as ‘illegal settlements’ these villages were not connected to the mains pipelines and ‘most residents of these villages obtain water via improvised, plastic hose hook-ups or unhygienic metal containers, which are used to transport the water from a single water point located on main roads quite far from their homes, a lengthy and expensive process. The water sources are

⁸⁰² H.C. 3586/01, *The Regional Council for the Unrecognised Villages in the Naqab, et. al. v. The Minister of National Infrastructure, et. al.*, See Adalah, ‘Adalah Appeals Water Commissioner's Refusal to Provide Water Access for Hundreds of Arab Bedouin Living in Unrecognised Villages in the Naqab’, News Update 27th April 2005, at www.Adalah.org. For further information regarding this case and the background to the claimed illegality of the villages see also Center for Economic and Social Rights and PHG, May 2003, pp.39-40; Regional Council of Unrecognised Villages in the Negev, Beersheva, Israel at The Arab Association for Human Rights, Nazareth – Israel, <http://www.arabhra.org> and The Association of Forty, a local NGO working to bring water to these villages, <http://www.assoc40.org/>.

⁸⁰³ For details of the conditions faced by Bedouins in Israel see Initial State Report of Israel to the UN Committee on the Rights of the Child, CRC/C/8/Add.44, 27th February 2002, para. 834– 837; UN CESCR: Israel, Initial State Report of Israel, E/1990/5/Add.39 (3), 20 January 1998, para.563, 592, 593; UN CESCR: Israel, Second Periodic State Report of Israel – Considered May 2003, E/1990/6/Add.32, 16 October 2001, para.343-351, 420, 423; UN CESCR: Israel, Additional information submitted by States parties to the Covenant following the consideration of their reports by the Committee on Economic, Social and Cultural Rights, Addendum, Israel, E/1989/5/Add.14, 14th May 2001, para. 94-100; UN HRC, Initial State Report of Israel, 09/04/98, CCPR/C/81/Add.13; UN HRC, Second Periodic Report Israel, CCPR/C/ISR/2001/2, 4th December 2001; Concluding Observations of the CESCR: Israel. 23/05/2003, E/C.12/1/Add.90, para.16, 27, 43 and Arab Association for Human Rights et al, 9 May 2003, Article 11 Right to an Adequate Standard of Living.

⁸⁰⁴ Center for Economic and Social Rights and PHG, May 2003, p.40.

contaminated by animals, insects, military waste and food waste.⁸⁰⁵ Due to the contaminated water residents had reported health problems including dysentery, intestinal infections and dehydration.⁸⁰⁶

In the first instance Israel maintained that as illegal dwellings these communities were not entitled to connection to the water network. However as a result of the filing of the petition, an inter-ministerial Water Committee was formed in Oct 2001 to examine the water situation in the villages. After consideration of the case, central water access points were added to five of the seven villages. The Supreme Court then dismissed the petition and the Israeli state claimed there was no further case to answer. However, as Adalah point out, this resulted in a situation no different in essence to that which preceded the petition; water still has to be collected from a central point and transported distances in unhygienic containers. Moreover, the source remains at high risk of contamination.⁸⁰⁷ To date, Adalah has filed several motions and appeals on behalf of these communities, the most recent being on 20 April 2005, when they filed an appeal to the Haifa District Court (sitting as a Water Tribunal) against the decisions of the Water Commissioner.⁸⁰⁸

The refusal to grant connection to the mains water network or even provide water points in all of the villages violates the villagers' human right to water, as well as the

⁸⁰⁵ Center for Economic and Social Rights and PHG, May 2003, p.40.

⁸⁰⁶ Adalah, 2003, p.5.

⁸⁰⁷ Adalah, 2003, p.5

⁸⁰⁸ See D.C.H. Appeal 609/05, *Abdallah Abu Msaed, et. al. v. Water Commissioner* (Haifa District Court) at Adalah, 2003, p.5. Israel has made no response to date.

related human right health.⁸⁰⁹ It also discriminates against them on the basis of their nationality and it is notable that, ‘while thousands of Arab Bedouin citizens of Israel living in the unrecognised villages are deprived of adequate access to water, individual Jewish families living on vast ranches in the Naqab are promptly provided with water access, often prior to obtaining planning permission for their dwellings.’⁸¹⁰

In contrast, significantly, the Israeli Supreme Court has stated recognition of a human right to water in a case before it, sitting as the Water Commission. They concluded that, ‘The right to water is a substantive right... [It] does not have to be created by statute necessarily, but can be grounded on other foundations, such as agreement, custom or any other manner.’⁸¹¹ This decision has implications for anyone claiming a violation of their right to water within Israel proper but also within the OPTs. It sets precedence for recognition of the right as a part of bilateral agreements or customary international law and as such further substantiates claims under international humanitarian law and international human rights law. Conversely, despite this recognition before the law, it would seem clear that at present, Israel will attempt to carry out the very minimum in terms of their obligations towards Arab Bedouins and Palestinians concerning their human right to clean and sufficient accessible water, even when there is affirmation of blatant discrimination on the ground and within the

⁸⁰⁹ Adalah argue that the Water Commissioner's decisions violate the villagers' rights to water, health and dignity under both Israeli domestic law (Water Law 1959) and international human rights law (Articles 11 and 12 of the ICESCR).

⁸¹⁰ Adalah – The Legal Centre for Arab Minority Rights In Israel, ‘Adalah Appeals Water Commissioner's Refusal to Provide Water Access for Hundreds of Arab Bedouin Living in Unrecognised Villages in the Naqab’, News Update 27th April 2005, at www.Adalah.org. This discrimination is noted in Concluding Observations of the CESCR: Israel, 23/05/2003, para. 27.

⁸¹¹ Civ.App. 535/89 *Water Commissioner v. Perlmutter et al*, Piskei Din 56 (5) 695-696, in B'Tselem, 2000, p.14.

relevant policies. Subsequently, this has negative implications for how the right to water of Palestinians living within the actual OPTs are realised.

(iv) Israeli Military Orders

As has been established, owing to the legal opinions and system of the Israeli state (and international law regarding occupation) that the Palestinians living within the OPTs are not subject to Israeli national law; rather they are subject to the laws of the Israeli Military Civil Administration, known as Military Orders.⁸¹² The confusion noted over the status of various laws and legal systems within the territories is further exacerbated by the decree of these military orders.⁸¹³ Regarded as valid law by the Israeli military and administration and backed up through the Israeli court system,⁸¹⁴ these military orders have, 'effectively displaced the law previously in force on many issues.'⁸¹⁵

One of these issues is that of water. Several of these military orders have displaced previous laws regarding water and have had a far-reaching negative impact on the Palestinians' enjoyment of their right to water. The first military law to be passed which was to be the basis for all further military orders regarding restriction of Palestinians' water rights was Proclamation No.2/1967. Passed after the 1967 war, it declared all water resources in the territory as state property.⁸¹⁶ Military Order 92, 15 August 1967, followed. This order reiterated the declaration and formally transferred all administrative, executive, judicial and monitoring authorities from the various

⁸¹² However, Israeli settlers living in illegal settlements within the OPTs are subject to Israeli national law and therefore the protections contained within.

⁸¹³ See Marks in Bowen, 1997, p.173; Al Haq, 1993, p.15.

⁸¹⁴ See Quigley, in Bowen, 1997, p.40.

⁸¹⁵ Shehadeh and Kuttab, *The West Bank and the Rule of Law* 1980, pp.101-106.

⁸¹⁶ Hussein Hiba, October 10-14 2004, p.5.

governors, municipalities and village councils to an Israeli official, appointed by the military governor, thus giving the Israeli government complete authority over water management and resources in the occupied Palestinian territories.⁸¹⁷

Military Order 158 of 19th November 1967 adjusts the Jordanian Water Monitoring Law No.31, 1953. Under Article 4 (A) of this order, it states that it shall not be permissible for any person to set up, or to assemble, or to possess, or to operate a water installation unless he/she has obtained a license from the area military commander. Furthermore, the commander may, at his/her discretion, refuse to grant license without giving reason, and may amend or make conditional any permit. He/she also has the authority to cancel permits at any time. It is also stipulated that this official's decisions cannot be appealed against.⁸¹⁸

This military order severely curtailed the Palestinians' right to water and denied them access to sources as well as preventing storage of water by preventing construction of water tanks and cisterns, thus negatively impacting access to water as well as sufficiency and quality of water. Since the passing of this military order, nearly 40 years ago, only 23 new wells have been permitted in the OPTs.⁸¹⁹

⁸¹⁷ See PHG, 2004, p.12; Euro-Mediterranean Information System on the Water sector, Countries, Palestine, Institutions, <http://www.emwis-ps.org/institutions.htm> last accessed June 10th 2006 and Center For Economic And Social Rights, 2003, p.12.

⁸¹⁸ See PHG, 2004, p.13; Euro-Mediterranean Information System on the Water sector Countries, Palestine, Institutions, <http://www.emwis-ps.org/institutions.htm> and Center For Economic And Social Rights, 2003, p.12.

⁸¹⁹ See PHG, 2004, p.13; Euro-Mediterranean Information System on the Water sector, Countries, Palestine, Institutions, <http://www.emwis-ps.org/institutions.htm> and Center For Economic And Social Rights, 2003, p.12.

Finally, Military Order 291 of 19 December 1968, pronounced all prior settlements of disputes regarding water invalid, hereby increasing the already considerable jurisdiction of Israeli Military Administration.⁸²⁰ This order refers to the Jordanian law No. 40 of 1952 on land and water and Israel argue that the military order merely authorizes the military commander to enforce it. However it has been argued that this order has effectively suspended the provisions of the above-mentioned Jordanian law on the settlement of disputes of law and water rights.⁸²¹

The cumulative effect of all of the above military orders, as well as others imposing pumping quotas,⁸²² has been the seizure of total control by the Israeli government over Palestinian water resources. This in turn has had a hugely detrimental effect upon the enjoyment of the right to water in the OPTs. For example, if the water supplied is insufficient or of poor quality, the Palestinians cannot take action to access different sources. In addition, indirectly, other military orders relating to land use and access, agriculture, issues of planning law for housing, building of bypass roads and settlements and most recently, the Separation Wall, have all had a harmful effect on the Palestinians' right to water.⁸²³

Significantly, under the rules of international humanitarian law, specifically the Geneva Convention IV laws of occupation, Article 64 and Hague Regulations Article

⁸²⁰ See PHG, 2004, p.13; Euro-Mediterranean Information System on the Water sector, Countries, Palestine, Institutions, <http://www.emwis-ps.org/institutions.htm> and Center For Economic And Social Rights, 2003, p.12.

⁸²¹ Euro-Mediterranean Information System on the Water sector, Countries, Palestine, Institutions, <http://www.emwis-ps.org/institutions.htm>

⁸²² For example Military Orders in 1975, 1986, see PHG, 2004, p.13,

⁸²³ For example MO 58, July 23rd 1967 defining 'absentee property' leading to the confiscation of Palestinian wells. See PHG, 2004, p.12. For a discussion of the wide ranging impact of such measures see Chapter 4 Case Study.

43, an occupying power is only allowed to amend existing law within that occupied territory for essential reasons of public order and safety.⁸²⁴ It is evident that the above military orders do not respect the laws of the territory and have far wider reaching effects than supplying the administration with necessary water or maintaining the safety of the population. As such Military Order 92, Military Order 158 and Military Order 291 are not consistent with the rights and obligations of an occupying power and can be seen as illegal according to international humanitarian law and human rights law.⁸²⁵ As Israel has breached Article 64 and has altered the legal system within the West Bank and Gaza beyond recognition and for its own benefit, it can be argued that ‘The maintenance in force of many of the military orders constitutes a violation of the Geneva Civilians Convention,’⁸²⁶ and the Hague Regulations.⁸²⁷ Additionally, as Israel has breached Article 64 and adopted excessive new laws, Israel has ‘effective control’ of the territory and as such this confirms the widely held view that Israel has human rights obligations in the OPTs.

Moreover, under Oslo I, Article 9 requires bilateral agreement to terminate any military orders already in force. As such the Palestinian Authority implicitly recognises the validity of these orders and renounce their right to abrogate from them without agreement by the Israelis. Thus, despite the protection contained within the Geneva Convention IV, the Israeli Military Civil Administration has managed to implement numerous military orders resulting in a discriminatory system of law, which far benefits the Israeli state and its citizens.

⁸²⁴ Geneva Convention (IV) Article 64.

⁸²⁵ PHG, 2004, p.13; Euro-Mediterranean Information System on the Water sector, Countries, Palestine, Institutions, <http://www.emwis-ps.org/institutions.htm> .

⁸²⁶ Quigley, in Bowen, 1997, p.41.

⁸²⁷ Kothari, M, 2002, para.16. For an analysis as to the legality of specific military orders in relation to Article 43, Hague Regulations see Scobbie in Bowen, 1997, pp.221-290 at p.260-268.

In conclusion, in regard to economic and social human rights the impact of these military orders on the enjoyment of certain rights has been immense. Most notably, the Palestinians' right to work, food, housing, and health and of course their right to water have all been severely curtailed. Moreover, the implementation of these orders have resulted in violations on a frequent basis.⁸²⁸

3.12 Concluding Remarks

Regarding international humanitarian law, it is evident that there is a basic level of protection afforded to civilians concerning water under the Geneva Conventions. However, many of the provisions are without detail as to the specific nature of the protection listed. Furthermore, the level of protection provided for is minimal, constituting water essential for survival or in the case of specific groups, such as prisoners, at a level of basic needs. Consequently, the threshold that would need to be breached in order to establish a violation of this protection is extremely high and could only be enabled when violations are of an extremely serious nature where, it could be proved that one's right to life is endangered. As the ICRC note,

By its very nature and purpose, humanitarian law cannot be applied to the whole issue of water resources, which are regulated in principle by national and international agreements initially destined for peacetime. In humanitarian law, the protection of persons entails the protection of objects, and all the rules briefly mentioned are intended above all to serve the humanitarian interest of protected persons. Though their scope may seem limited, full compliance with the relevant provisions is nonetheless prerequisite for the protection of objects

⁸²⁸ See further discussion, Chapter 4 Case Study.

indispensable to the survival of the civilian population. Water is of paramount importance, and water resources and installations intended for civilian use must be kept clear of military operations, or else entire populations will suffer.⁸²⁹

That the provisions under international humanitarian law are limited in their scope does not detract from their importance in the protection of basic water for survival of civilians during conflict. However, the key to realisation of the right to water during occupation is the parallel application of both these rules and those under international human rights law. This is noted by the CESCR in GC 15:

The Committee notes that during armed conflicts, emergency situations and natural disasters, the right to water embraces those obligations by which States parties are bound under international humanitarian law. This includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies [...] and ensuring that civilians, internees and prisoners have access to adequate water.⁸³⁰

In addition to international law, the signing of the Oslo Accords although seen as a political breakthrough in the peace process has done little to further human rights protection within the occupied territories. Moreover, certain provisions can be seen as in conflict with the protections guaranteed under the Geneva Conventions. As such, it is imperative that the Oslo Accords be 'construed in light of the Convention and in the

⁸²⁹ 'Water and War' Resolution 2, 'Protection of the civilian population in periods of armed conflict', para. F (c), Report of the 26th International Conference of the Red Cross and Red Crescent, 15th September 1995. At ICRC website, 'Water and War', posted 1st January 1996, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JMRV>

⁸³⁰ GC 15, para.22. Original footnote omitted.

case of conflict the Convention governs.’⁸³¹ Despite this, in regard to specific clauses relating to water, next to international human rights law, the bilateral agreement Oslo II, would seem to offer the only provisions of any credence stipulating a Palestinian right to water. Under Article 40 of Oslo II, the Israeli state recognises the water rights of the Palestinian people. Nevertheless, the term ‘water rights’ is a generic and communal term and cannot be seen to be the same as recognition of an individual human right to water. Rather, I would argue the term ‘water rights’ implies recognition of a collective right of the Palestinians as a people, to usage, ownership and control of their water sources (sources from which equitable use can be determined under international water law). Significantly, it does imply that a Palestinian ‘peoples’ right to water exists and this can be viewed as an integral part of the right to self-determination, under Common Article 1 (2) of the ICCPR and ICESCR 1966.⁸³² The question remains as to whether the scope of this provision can be seen as incorporating the full scope and core content of the human right to water. However, the said article can be seen as a possible basis for a human right to water.⁸³³ In light of the current impasse regarding the permanent status negotiations, this human rights element of Article 40 may offer an existing basis to add support for determining a right to water for Palestinians.

An evaluation of non-international sources of law has shown that the domestic systems of law, both from within the OPTs and Israeli sources have no direct provision regarding a right to water. Furthermore they have very limited provisions concerning human rights in general, especially economic and social rights. The

⁸³¹ Quigley, in Bowen, 1997, p.46.

⁸³² See B’Tselem, 2000, p.14. Also, Al Haq, 1993, pp.7-8.

⁸³³ As is the case under Common Article 1(2) of the ICCPR and ICESCR. See also B’Tselem, 2000, p.14.

provisions within both the Israeli Basic Laws and the Palestinian Constitution (Basic Law) are generalised and broad statements of human rights principles, although it should be noted that the Palestinian Constitution is much more in line with international human rights instruments in terms of language and content than the Israeli law. Despite this, it would be extremely difficult to establish any breach of these provisions, as they do not detail any specific human rights, including the right to water. This problem in the OPTs is compounded by the complicated web of ‘concurrent legal systems’, resulting in confusion and lack of redress mechanisms,⁸³⁴ and the implementation of Israeli Military Orders, effectively overriding existing laws concerning water.

Although a right to water has been recognised within Israel by the Supreme Court, it is disappointing that to date no petition or case within the domestic legal system of Israel has been successful in holding Israel responsible for violations of the right to water within Israel itself, despite the Israel Water Law 1959 on which the cases were based. Overall, much stronger codification is necessary under domestic law applicable within Israel and under Palestinian law in the OPTs, if the right to water is to be implemented effectively.

In terms of monitoring the current level of enjoyment of the right to water within the OPTs, it must be remembered that all the state reports of Israel to each respective treaty monitoring body, only contain information concerning the Israeli population within the OPTs and citizens of Israel ‘proper’. As such, the enjoyment of all human

⁸³⁴ With the success of Hamas in the government elections of 2006, it remains to be seen what action the new government will take in regard to the legal system implemented in the territories. As such, the consequences for national human rights legislation are unclear. See previous discussion Section 3.1, p.163.

rights for Palestinians within the territories is threatened, as it is difficult to monitor the situation. In particular the enjoyment of the right to water within the OPTs is severely under reported and the overall situation is subject to distortion, due to the submission of information based solely upon Israeli settlers.⁸³⁵

Thus, treaty monitoring bodies must continue to pressurise Israel to comply with their monitoring obligations. The CESCR have strongly condemned Israel's refusal to report on the economic, social and cultural rights in the occupied territories.⁸³⁶ However, other treaty monitoring bodies are not so robust in their recommendations. The difference in emphasis and importance assigned to the issue of rights enjoyment in the OPTs and the reporting obligations of Israel is notable between the various treaty bodies. This is evident in the minimal attention given under certain committee reports and the tone of language used: The CESCR applies strongly worded phrases and raises the issue several times, as does the HRC. The CRC also tackle the issue to a lesser extent, however the CEDAW do not mention the occupation and in reference to the obligations of Israel to report on the territories, the language used is weak. CEDAW do not highlight that Israel are in breach of their obligations by not reporting on the whole territory within their jurisdiction. It is also notable that the Committee on the Elimination of Racial Discrimination in considering the initial report of Israel

⁸³⁵ Although information on the enjoyment of economic and social rights by Palestinians is available to the Committee by means of the special consultative status non-governmental organisations, who submit concurrent reports alongside the state reports. In this way, as a minimum, the status of enjoyment of economic and social rights, inclusive of the right to water can be evaluated, whilst continuing to pressurise Israel to adhere to its responsibilities under the Covenant, thus ensuring full compliance with its reporting obligations.

⁸³⁶ For the future, the Committee has requested that Israel submits its third periodic report by 30 June 2008. However, it remains to be seen as to whether they will include any data or information on the Palestinian population of the occupied territories. At present, it does not look likely. Similarly the Committee on Civil and Political Rights have also requested that Israel report on the Occupied Palestinian Territories as part of their obligations under the ICCPR. The next report is due in 2007. This also reinforces the extra-territorial nature of obligations under this Covenant, despite arguments regarding Article 4, derogations in times of national emergencies.

to the Committee on the Elimination of Racial Discrimination,⁸³⁷ Committee members were split as to whether Israel should report on the situation in the OPTs as some members felt it might legitimise the Israeli occupation,⁸³⁸ though, they have since brought their stance in line with that of the HRC and CESCR and state, 'Israel is accountable for implementation of the Convention, including the reporting obligation, in all areas over which it exercises effective control.'⁸³⁹

Overall the other Committees do not follow the vigorous approach taken by the CESCR and HRC. Consistency in reporting and position is required and much more pressure needs to be put on the state of Israel, by the other treaty bodies, if Israel is to comply with their human rights obligations within the OPTs, under all the relevant international human rights instruments.

In terms of reporting on the status and enjoyment of the right to water, as with other rights, Israel only report on the right to water within Israel itself and this is limited to references to water under the right to health and adequate standard of living, Articles 12 and 11 of the ICESCR respectively, Article 24 and 27 of the CRC and under the ICCPR Article 6 the right to life and Article 26 the right to equality before the law.⁸⁴⁰

The reporting under Article 6 however is significant in that it may have implications

⁸³⁷ Report of the Committee on the Elimination of Racial Discrimination (CERD), G.A.O.R. Off Rec., 36th Sess., Supp. No.18 (A/36/88)(1981) 37-38.

⁸³⁸ Ben-Naftali. O and Shany. Y, 'Living in Denial: The Application of Human Rights in the Occupied Territories' *Israel Law Review*, Vol.37, No.1, 2003-2004, pp.17-118 at p.21, note 7.

⁸³⁹ Concluding observations of the Committee on the Elimination of Racial Discrimination: Israel, CERD/C/304/Add.45, 30 March 1998, para.12.

⁸⁴⁰ Moreover, it should be noted that the enjoyment of economic and social rights, within Israel itself is subject to discrimination. This is evident in all state reports of the said party as, all committees note the disadvantage of non-Jewish citizens, in particular the Bedouin communities. This is especially poignant in relation to the right to water under Articles 11 and 12.

for the justiciability of the right to water, although this would have to entail a severe violation of the right to water.

As with observations and recommendations raised relating to the reporting on rights in general within the OPTs, it is the CSECR that refer to the right to water most frequently and with most importance in their concluding observations. The Committee on the Rights of the Child do not explicitly make recommendations regarding the right to water and the Committee on the Elimination of Discrimination All Women do not refer to it whatsoever. This can be seen as a reflection of the importance assigned to the right to water within the ICESCR and one would expect that the main treaty body concerned with economic and social rights would be at the forefront of monitoring the right to water. However, it is disappointing that the other committees with jurisdiction over the right to water as contained in their respective treaties have not taken the opportunity to further the enjoyment of this right within their reporting mechanisms. This is especially pertinent as they CRC and CEDAW contain the only explicit inclusion of the right to water in international human rights instruments.⁸⁴¹

To conclude, having reviewed and assessed the various systems of law applicable within the OPTs, it is evident that there is little codification of the human right to water outside of applicable international human rights law, although international humanitarian law does contain some basic provisions concerning water. As such, the optimum protection of such a right is under the various instruments concerned with

⁸⁴¹ Although this could partly be due to the time that reports were submitted. i.e. pre GC 15, which highlighted the right as independent and enabled states parties to obtain a better understanding of their obligations correlative to it.

economic and social human rights, in particular the ICESCR, in conjunction with the relevant provisions under international humanitarian law. This combination offers the optimum coverage for realisation of the right within the OPTs. For example, for serious breaches resulting in a threat to human life, due to military activity, international humanitarian law would be the *lex specialis* in this case. Conversely, it is human rights law that should act as the *lex specialis* during most breaches within the context of occupation, as the daily existence under conditions of occupation resembles more closely a peacetime situation than conditions of war.⁸⁴² Moreover, concurrently, the provisions contained within the Interim Agreement should also be taken into consideration, depending on the nature of the breach of the right, especially as it contains detailed provisions regarding the water infrastructure in the West Bank and sets out responsibilities for both parties in this regard. However, the limitations of this presently ‘frozen’ agreement cannot be overlooked.⁸⁴³

⁸⁴² In relation to the Israeli-Palestinian conflict, this conclusion is especially pertinent as the Israeli view is that international humanitarian law alone is applicable to these territories and then only certain aspects of it. The traditional view of which body of law is primarily applicable in the territories has not been international human rights law but international humanitarian law and it is only within recent years that the applicability of human rights law in times of conflict has been generally accepted. For further reading on the question of the *lex specialis* principle in the context of armed conflict and occupation see *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, ICJ Reports 2005, paras.216-220, 345(3); ICJ *Wall Opinion*, 2004, para.106; ICJ *Nuclear Weapons Opinion*, 1996,para.25. In *Congo v. Uganda* the ICJ determined independent violations of human rights law during armed conflict without applying the *lex specialis* of humanitarian law. See also Kalin, W, Alston, P, Kothari, M, Hunt, P, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”, Mission to Lebanon and Israel (7-14 September 2006), A/HRC/2/7, 2 Oct 2006, para.16 including notes. Supporting the view that the *lex specialis* in times of long-term occupation should be human rights law, with regard to economic and social rights, see Lubell, N, ‘Challenges in applying human rights law to armed conflict’ in International Review of the Red Cross, Vol.87, No.860, December 2005, pp.737- 754.

⁸⁴³ Although the Oslo Accords can be seen as ‘frozen’ in practical terms, the legal status of the Interim Agreement remains unchanged as there has been no subsequent legal agreement between the two parties and no formal rejection of the agreement by Hamas since being elected. Furthermore, the PLO remain representative by way of the Palestinian President Mahmoud Abbas.

It is also certain that Israel is responsible under these agreements as the occupying power and as the state party to the treaties. The continuing denial of their obligations within the OPTs must be addressed by other state parties to both the ICESCR and the Geneva Conventions as part of their international obligations under the treaties. Notably, under international humanitarian law, the international community carries an obligation to ensure that Israel complies with its international obligations to protect those within its occupied territory (jurisdiction). Under Common Article 1 of the Geneva Conventions and Additional Protocols, state parties agree to ensure respect for the Conventions and Protocol I 'in all circumstances.'⁸⁴⁴ As Pictet notes, this provision means that 'The contracting parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.'⁸⁴⁵ Therefore, it is also the responsibility of the international community to take action to ensure that Israel respect, protect and fulfil their obligations correlative to the human right to water under international humanitarian law. Under international human rights law, other state parties are obliged to assist Israel in realising this right, under the ICESCR Article 2.⁸⁴⁶

In terms of the obligations afforded to the Palestinians, although the Palestinian Authority can be seen as having a moral obligation and in some areas, third party obligations, as well as being obligated under the Oslo Accords and or under custom, ultimately they are only the transitional administration of an occupied people and land

⁸⁴⁴ Geneva Conventions I-IV and Additional Protocols I Common Article 1.

⁸⁴⁵ Pictet, J, 1958, p.16.

⁸⁴⁶ Also see Chapter 2, Obligations.

and therefore under the ‘effective control’ of the occupying force –Israel. As such, it is Israel who holds the full legal obligations to realise the right to water.

As a final point, if the right to water is to be respected, protected and provided for within a long-term occupation situation, it would seem essential to apply international human rights law. The application of the detailed provisions contained within these instruments, is imperative if we are to establish violations of the right and to seek redress for them. Having established the legal basis for a right to water within the OPTs, the remaining uncertainty is the reality of the enjoyment of the right on the ground. Despite the lack of information within state reports, regarding the OPTs it is clear from the parallel reports submitted to the CESCR⁸⁴⁷ and the reports of other UN bodies⁸⁴⁸ that there are severe breaches of economic and social rights, including the right to water. In fact, the CESCR have denounced Israel’s ‘continuing gross violations of economic, social and cultural rights’,⁸⁴⁹ noting especially the policy of closures preventing the access of Palestinians to food, healthcare, work and water.

Ultimately, the implementation of Israeli occupation and its policies such as closures and curfews effects the enjoyment of the Palestinians’ right to water in the OPTs. The following chapter assess these effects through a case study in the West Bank, where the occurrence and nature of violations of the right to water are examined.

⁸⁴⁷ Arab Association for Human Rights et al, May 2003; Center for Economic and Social Rights and PHG, May 2003.

⁸⁴⁸ See *inter alia* Kothari, 10th June 2002, para. 65-73 detailing violations of the right to water and generally regarding violations of the right to an adequate standard of living.

⁸⁴⁹ Concluding Observations of the CESCR: Israel, 31/08/2001, E/C.12/1/Add.69, para. 13:

Chapter 4

The Right to Water in the Occupied Palestinian Territories (West Bank)

Part II - A Case Study in the Southern West Bank

Introduction

The following chapter will evaluate the various forms of violations of the right to water within the West Bank in the OPTs. Having examined the relevant legal provisions to which both parties are bound in the previous chapter, I will now investigate evidence gathered from the field, to assess the threats to and violations of the human right to water.

To gain insight into the water situation facing most Palestinians in the West Bank, it was decided to carry out a small scale-research project. Although, the water situation is well documented at a general and political macro level,⁸⁵⁰ the problems Palestinians face on a daily basis is not as evident in the literature.⁸⁵¹ Therefore, the rationale behind this project was threefold: Firstly to disclose and investigate the everyday problems Palestinians face in regard to access to clean and sufficient water. Secondly, to examine these problems through the application of the framework of the human right to water, something that has not been carried out previously, to the best of my

⁸⁵⁰ See Allan, 2001; Daibes-Murad, 2005; Lonergan and Brooks, 1994; Trottier, 1999.

⁸⁵¹ Notable exceptions include the PHG Water and Sanitation Hygiene Monitoring Project and its reports, PHG, 2004 and 2005; the Center for Economic and Social Rights and PHG, May 2003; several reports by local NGO B'Tselem, July 2000, July 2001 and September 1998 and Selby, J, Water, Power and Politics in the Middle East: The Other Israeli-Palestinian Conflict, London: IB Tauris, 2003, Chapter 8, pp.171-181.

knowledge. Subsequently, this would then allow analysis to establish whether violations of the right to water had occurred and / or are ongoing.

4.1 Empirical Study - Design and Methods⁸⁵²

Having decided to undertake an empirical study with the above aims in mind, the methods for undertaking the project had to be chosen. In terms of practicality, the security situation in the West Bank presented a challenge as to which methods could be used, in terms of access and ethics. This decision was taken on the basis of several factors: Firstly which methods best suited the information I was trying to get and secondly, which, methods would work on a practical level, taking into consideration, cost, time, access and safety for potential interviewees and myself. I had already decided that the study would be a qualitative one, as the objective was to build up evidence for specific individual or group cases concerning violations of the right to water. Therefore, my preferred methods were case studies based upon interviews and observation (having already undertaken relevant legal and textual analysis) with the general Palestinian public, rather than ‘experts’ in the field or water organisations such as the PWA.⁸⁵³

It became clear that an ethnography including observation was not a practical option, due to the security situation and financial and time constraints.⁸⁵⁴ Therefore, semi structured interviews were the method chosen, to enable the gathering of key

⁸⁵² For a presentation of the overall methodology used in this thesis see the Introduction, Section 2, pp.7-14.

⁸⁵³ See discussion on sampling, p.259.

⁸⁵⁴ Funding was a factor to be considered and as the security situation in the West Bank was so serious, the UK Foreign and Commonwealth Office advised against travel to the region. This meant that that there was a restriction placed upon grants for fieldwork, by the Economic and Social Research Council funding my research. Therefore, they would not provide travel or fieldwork expenses for research in the territory, as it was considered too dangerous.

information required to make a case under the human right to water and to allow comparisons to be made across the interviews in regard to essential information such as water sufficiency, safety and access. Unstructured interviews would not have allowed this and may have resulted in a lack of certain relevant key information. Therefore, certain questions were structured on an interview schedule and were asked orally.⁸⁵⁵ These set questions were designed in light of the legal basis for the right to water and upon review of the relevant literature. The resulting framework was based around the three key substantive elements of the right to water as outlined in GC 15: availability, quality and access.⁸⁵⁶ A mixture of closed and open-ended questions was used⁸⁵⁷ and further personal testimonies were encouraged, in order to gain a comprehensive detailed picture of their situation. This meant that both factual information questions and questions relating to beliefs, views and opinions were included.⁸⁵⁸

Several versions of the interview schedule were drafted in consultation with the interviewer and in light of initial pilot studies. This resulted in the addition of questions,⁸⁵⁹ and changes to the format of certain questions, to enable a clearer understanding of the enquiry and to ensure key information to be obtained a list of

⁸⁵⁵ See appendices for the final interview schedule.

⁸⁵⁶ See discussion Chapter 1.

⁸⁵⁷ Lightly structured inquiry methods can be problematic, as they rely on spontaneous understanding i.e. what is on their minds at the time. Therefore 'open-ended questions tend to get incomplete responses. Thus, the method of inquiry incorporated both spontaneous (open) and receptive (closed) questions. This enabled key points to be obtained and confirmed with the receptive and further exploration of the topic with the open method. This also allows for easier comparison within the larger group. See Knight.P.T, Small-scale Research: Pragmatic Inquiry in Social Science and the Caring Professions, London: Sage, 2001, pp.52-53.

⁸⁵⁸ See Denscombe, 1998, p.89.

⁸⁵⁹ For example, what type of dwelling do you live in? : house, flat, temporary shelter, other (please specify) was added to the question 'I live in the area of'.

instructions on techniques for getting the best results were also sent to the interviewer, including the use of prompts, probes and checks.⁸⁶⁰

The sample to be selected posed another query. The size and type of sample again was dependent upon access, time and the level of detail required for the data to be useful and representative. In terms of sample size, it was decided that 45 interviews be undertaken. This was small enough to enable detailed information to be gathered at individual and family level and allow case studies to be established based upon in depth analysis of the material.⁸⁶¹ The sample was to be selected from people who met two different criteria – firstly they had to be Palestinian and secondly they had to live in the West Bank.⁸⁶² This sample was then divided into three sub-categories based upon type of human settlement: urban towns, rural villages and refugee camps. This was so that a picture of water use could be gained across the three main types of community within the West Bank and could be compared with each other for analysis. 15 interviews would take place within each type of Palestinian settlement for fair distribution.⁸⁶³ Otherwise the interviewees were to be selected at random. Concerning selecting which areas to study, a determined geographical area was chosen. Through discussions with the potential interviewer in the West Bank the location was decided upon as the southern West Bank. This geographical area was chosen for several

⁸⁶⁰ For example the interviewer was to probe yes /no answers if appropriate, to gain further information and to probe any inconsistencies to see what they revealed. The interviewer was to write the prompt or probe on the notes if possible and to add their thoughts on each interview – impressions, interesting points, non-verbal communications and observations, in order to gain a fuller understanding of the interviewee. For further discussion of the use of prompts see Denscombe, 1998, p.125; Knight, 2001, p.61, Table 3.2.

⁸⁶¹ See Denscombe, 1998, p.24, regarding small-scale sampling for narrower coverage giving in-depth material.

⁸⁶² This method is known as ‘theoretical sampling’. For further details of this method see Knight, 2001, p.121 and Denscombe, 1998, p.15.

⁸⁶³ This method is known as ‘stratified’ sampling – choosing equal numbers of certain groups or types of people. See Knight, 2001, p.122.

reasons and was a deliberate selection: Firstly, it was accessible to the interviewer, although this was very difficult at times; secondly it had human settlements of all three types and thirdly it suffers from some of the worst water problems in the West Bank as a whole.⁸⁶⁴

The following evidence was assembled as a result of 45 semi-structured interviews and personal testimonies gathered from across the southern West Bank during 2004.⁸⁶⁵ As stated previously, the range of communities involved includes the three main types of Palestinian settlements within the West Bank,⁸⁶⁶ with 15 interviews being carried out in each.

For the research the individuals and families were selected randomly and were met for the first time. The interviews were carried out on a one to one basis, with supporting testimonies being given at times by other members of the same family who were available during the interview. The interviews were carried out in the home of interviewee, when it was possible to enter.⁸⁶⁷ Otherwise, they were conducted in the street or in the workplaces of the interviewees.

The interviews took between 30 to 45 minutes, depending on how the discussion went and the level of detail given by the person providing the information. As I could not travel to the area myself, due to the security concerns and consequent lack of funding, a male Palestinian, who has lived in the area for all his life, conducted the interviews.

⁸⁶⁴ Discussed via email conversations with PHG staff in 2004.

⁸⁶⁵ The project was carried out over a time period of 12 months from initial structuring of the questions to completion of data analysis including asking of follow-up questions and analysis.

⁸⁶⁶ Urban, rural and refugee camps.

⁸⁶⁷ Since the interviewer was a male, sometimes it was difficult to enter a house if no other men were present. See ethics section, p.262.

He has experienced the water problems and other difficulties facing the interviewees first hand. In addition, he is a professional researcher with knowledge and experience of both social science data collection and the water sector in the West Bank. As an 'insider' or 'gatekeeper', he represented part of the social group interviewed and as such it is likely that he gained access to information that may have not been obtainable to an outsider like myself, especially as a non-Palestinian female.⁸⁶⁸ Enlisting a local interviewer also solved the problem of me gaining physical access to the communities, which was highly problematic due to the security policies of closures and checkpoints and lack of freedom of movement. Furthermore, I would have to have passed through Israel proper initially and may have been refused entry. The use of a local interviewer also allowed the discussions to be conducted in Arabic, for clarity and easiness, written up in the field and later translated into English. Although this means there is some room for discrepancies, the translations were as accurate as possible and any queries were double-checked with the interviewer, interviewee and translator.

Completed translated interviews were forwarded to me via email.⁸⁶⁹ Following the initial analysis, queries and further questions were then returned to the interviewer for follow-up. This often involved a return visit to the interviewee. This resulted in data, which was analysed fully, and queries that were followed up in full detail.

⁸⁶⁸ For further reading on the concept of gatekeepers see, Hammersley and Atkinson, 1983, pp.64-65. For further discussion regarding access, ethics and the interviewer's effect on the data obtained see Denscombe, 1998, p.116, p.134; Knight, 2001, pp.54-55; Silverman, 2000, pp.198-209.

⁸⁶⁹ Use of email technology was crucial to the success of the research, as the postal service from the OPTs is unreliable and many items 'disappear' in the system regularly.

Concerning ethics, during the process of designing the research project, several professional codes of practice were consulted and used as a basis for good practice in both the research design and the practical interview technique as well as for the analysis and publication of the subsequent data.⁸⁷⁰ In terms of ethical practice, there were several issues to consider: the cultural and religious codes of the interviewees, the ongoing occupation and related security measures and the personal wishes of the interviewees concerning anonymity and confidentiality.

As the majority of the population of the southern West Bank are Muslim, the interviewer had to adhere to Islamic cultural and religious codes. For example, as he was male, at times he could not enter the house to conduct the interview as only women were present. In these instances interviews were carried out in public areas such as the street outside or communal areas, such as the markets.

In addition, due to the security situation and the continuing occupation, there was an even greater need for ensuring anonymity and confidentiality with all interviewees' material.⁸⁷¹

The result is a small scale in-depth study, which makes no claims for generalisation to other particular situations, but it does present testimony, much of which corroborates

⁸⁷⁰ The codes consulted include the ESRC 'Research Ethics and Confidentiality' at <http://www.esrc.ac.uk/esrccontent/researchfunding/sec22.asp>; Socio-Legal Studies Association, 'First Restatement of Research Ethics', at http://www.ukc.ac.uk/slsa/download/ethics_drft.pdf; British International Studies Association (BISA) 'Guidelines for Good Professional Conduct' (draft) at <http://www.bisa.ac.uk/code.htm>; Association of Social Anthropologists of the UK & the Commonwealth 'Ethical Guidelines for Good Research Practice' at <http://www.les1.man.ac.uk/asa/ethics.htm>; Lancaster University Ethics Committee, 'Unpacking the Moral Maze: Ethical Guidelines for Social Science Researchers' at <http://www.lancaster.ac.uk/fss/resources/ethics/> and the Social Research Association 'Ethical Guidelines' at <http://www.the-sra.org.uk/documents/pdfs/ethics03.pdf>

⁸⁷¹ See discussion re ethics: disclosure and harm in Knight, 2001, pp.169 –172.

data from wider research studies,⁸⁷² to support a legal case claiming violations of the right to water by Israel against Palestinian individuals and communities. Furthermore, it acts as a useful assessment of how the law of the human right to water can be applied to such a situation and how effective a human rights approach can be in alleviating water problems of the Palestinians and others living under occupation.⁸⁷³

4.2 Analysis of Findings: Establishing Violations of the Right to Water using the Violations Approach⁸⁷⁴

The violations approach to the analysis of the evidence is particularly useful for several reasons: Firstly, in relation to the right to water, it has not been widely used other than by local NGOs. Secondly and significantly, it is easier to assess whether violations of the right have taken place by using violations themselves as the starting point for assessment rather than measuring progressive realisation of the right, which is complicated and involves gathering of data which is often not available, is complex to assess and is often inexact.⁸⁷⁵ The violations approach also reflects the reality of the enjoyment of the right in practice, in any given situation and can be used as an

⁸⁷² For example, quantitative research on a large scale has been undertaken by other organisations in the fields, such as the PHG (funding from the Humanitarian Aid Department of the European Commission (ECHO), Oxfam-GB, in Coordination With the Palestinian Water Authority), Water Sanitation and Hygiene Monitoring Project (WaSH), which covers 615 out of the 708 communities in the West Bank and Gaza Strip areas and carries out water surveys at community level. This project uses data quantitative data, illustrating the broader, more wide ranging bigger picture throughout the OPTs. The first phase was carried out from June 2002 – March 2003. For further details and full statistical data see Palestine Water for Life Campaign at <http://www.phg.org> and PHG, 2004. See also UNEP, 2003.

⁸⁷³ For another example of violations of economic and social rights under occupation see Kälin, W (ed), Human Rights in Times of Occupation: The case of Kuwait, Berne: Stampfli for Law Books in Europe, 1994.

⁸⁷⁴ See Introduction, pp.12-14, regarding methodology and the violations approach.

⁸⁷⁵ Chapman, 1996, pp.23-66 at p.23, p. 31, p.33. Also, Chapman and Russell, 1998, para.6-11.

effective tool in the monitoring of a state's compliance with its core obligations.⁸⁷⁶ Furthermore, the gathering of personal testimonies and the subsequent analysis based upon violations reflects people's everyday experiences. Although no statistical conclusions can be asserted given the small scale of the project, the testimonies gathered can be seen as indicative of the nature of violations taking place more widely across the OPTs, since much of the evidence collected corresponds with broader and larger scale socio-economic research in the region.⁸⁷⁷

The questions to be used to form the framework for the analysis of violations were, as stated previously, framed around the three key substantive elements of the human right to water as listed in GC 15: Quality, Availability and Accessibility. These shaped the interview schedule for the gathering of data from the individuals, as well as establishing the basis for cross-thematic analysis across the three types of settlements: rural, urban and refugee camps. Furthermore, once the analysis of data began, it was clear that there were other additional variables, which could be used for establishing violations of the right to water. These included related human rights, in particular the right to health, housing, food and work (both agriculture and industry), vulnerable groups, discrimination, issues directly related to conflict, violence and occupation and under humanitarian law, employment – related to socio-economic status and management and ownership of water resources. Statements concerning wider political factors and broader ideas of human rights were also helpful in establishing an idea of the perceived human rights enjoyment of those interviewed.

⁸⁷⁶ In fact, a violations approach has been adopted, in part, by the Committee on Economic, Social and Cultural rights in their consideration of state compliance under the reporting procedure to the ICESCR. In their concluding remarks the Committee make recommendations based upon an assessment of violations and 'concerns'. See also Chapman, 1996, p.36, 46.

⁸⁷⁷ See those listed at note 873, p.264.

The testimonies of interviewees together with their responses to structured questions around these themes resulted in an in depth picture illustrating the situation of the right to water on the ground.

4.3 The Nature of the Violations

The main problems encountered by the interviewees are problems of insufficient water, difficult access to water, both physical and economic and reliance on water of poor quality. Subsequent difficulties encountered as a result of these problems include poor health, illness and disease; lack of food and poor diet; poor housing; lack of work and lack of education. Of the three types of community questioned, it is evident that people living in rural areas suffer with the worst problems in relation to all aspects of the right to water. Camps are the next in line, in terms of problems with water quality and sufficiency and as expected, urban areas have the least problems, although problems with sufficiency affect all communities.

In addition, because of the military occupation many of the interviewees faced physical danger when trying to access water, due to violent behaviour by Israeli settlers or from direct targeting by the military and military incursions. The effect of occupation upon access to water was also evident especially due to military policies of curfews and closures. Furthermore, the effects of the occupation upon access to water are felt across all the Palestinian communities.

But how do these problems translate into actual violations of the right to water? There are several important factors to consider when determining whether Israel is in violation of their obligations concerning the right to water in the West Bank: Firstly,

do they have overall responsibility for the realisation of the right in this territory? Have they used all available resources? Have they allowed the situation in the OPTs to stagnate and or have they taken retrogressive measures? Subsequently, is their non-compliance with their obligations deliberate? Guidance can be taken from the GC 15 itself, as well as from CESCR General Comment 3 on the nature of States parties' obligations⁸⁷⁸, the Limburg Principles and the Maastricht Guidelines.⁸⁷⁹

In Chapter 3, it has already been established that Israel is responsible for the enjoyment of human rights within the OPTs, as the occupying power under the Geneva Conventions and as a party to both the ICCPR and ICESCR.⁸⁸⁰ In addition, concerning violations, the Maastricht Guidelines provide that,

Under circumstances of alien domination, deprivations of economic, social and cultural rights may be imputable to the conduct of the State exercising effective control over the territory in question. This is true under conditions of colonialism, other forms of alien domination and military occupation. The dominating or occupying power bears responsibility for violations of economic, social and cultural rights. There are also circumstances in which States acting in concert violate economic, social and cultural rights.⁸⁸¹

⁸⁷⁸ CESCR General Comment 3, 1990, particularly para.9 progressive realisation, para.10 core obligations and maximum resources.

⁸⁷⁹ See previous discussion on obligations, Chapter 2.

⁸⁸⁰ See Chapter 3, Section 3.4 (i), p.170 and Section 3.8 (i) and (ii), p.200.

⁸⁸¹ Maastricht Guidelines 1997, 'Alien domination or occupation' para.17. See also International Court of Justice (ICJ), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9th July 2004, para.102-113 on responsibility of Israel for human rights in the OPTs.

Therefore that Israel holds the responsibility for the enjoyment of the right to water as contained both in international humanitarian law and human rights law is clear.

However, in order to be in breach of their obligations concerning the right to water, Israel must be deliberate in their actions or omissions and as such, any inability to comply must be ruled out: ‘In determining which actions or omissions amount to a violation of the right to water, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations in relation to the right to water.’⁸⁸²

As noted in Chapter 3, Israel have argued that they cannot comply with obligations to realise the right to water in the OPTs because they do not have full control of the area and due to the delivery of water by local service providers. However, the Palestinian Water Authority have no control over what water resources they receive and have no autonomy in developing infrastructure, due to the full veto right of the Israeli members of the Joint Water Committee.⁸⁸³ Israel does control all regional water resources and all borders. As such Israel has effective control of the water sector and as previously noted, has deliberately implemented policies which discriminate between Israelis, both within the OPTs and within Israel proper and Palestinians in the OPTs.⁸⁸⁴

Moreover, the fact that Israeli settlements within the West Bank are supplied with adequate safe water supply illustrates that the water is available but supplied by Israel

⁸⁸² GC 15, para.41. See also the Maastricht Guidelines para.13 *Inability to comply* and para.11 *State policies* which clarifies what constitutes a violation.

⁸⁸³ See provisions under Article 40 Interim Agreement, Chapter 3, Section 3.7, p.191.

⁸⁸⁴ See Chapter 3, Section 3.9, p.213 on compliance under ICESCR.

on an inequitable basis. Thus, Israel cannot argue that they are unable to comply with their obligations through resource constraints. Even if resources are scarce Israel must ensure that they comply with their minimum core obligations under the ICESCR.⁸⁸⁵ As such, scarcity of water is no excuse for the state of Israel to deny the Palestinians of the occupied territories a minimum essential level of the right to water.⁸⁸⁶ This is especially true when Israelis consume between four and five times the amount of water that Palestinians consume.⁸⁸⁷ Furthermore, Israeli settlers within the West Bank consume 6 times the amount of water than their neighbouring Palestinians.⁸⁸⁸ Therefore, it is evident that the policy and practice of Israel in regard to violations of the right to water for Palestinians in the OPTs is deliberate in its planning and actions. As the GC 15 notes, 'A State which is unwilling to use the maximum of its available resources for the realization of the right to water is in violation of its obligations under the Covenant.'⁸⁸⁹

Having established that Israel are both responsible and deliberate in their actions and policy, the nature of the violations of the right to water collected need to be examined. Violations can occur due to the deliberate action of a state or other entities insufficiently regulated by States – commission,⁸⁹⁰ or through the neglect of a state to carry out an action or policy – omission.⁸⁹¹ Moreover, violations of core obligations

⁸⁸⁵ See Maastricht Guidelines 1997, para.10, '...as established by Limburg Principles 25-28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.' See also GC 15, para.41.

⁸⁸⁶ Although water is scarce throughout the whole Middle East region, the Palestinian water problem is related to political and economic factors and is limited as a direct result of the occupation.

⁸⁸⁷ B'Tselem, July 2000, p.4; PHG, 2004, p.23.

⁸⁸⁸ PHG, 2004, p.32.

⁸⁸⁹ GC 15, para.41.

⁸⁹⁰ GC 15, para.42; Maastricht Guidelines 1997, para.14.

⁸⁹¹ GC 15, para.43; Maastricht Guidelines 1997, para.15.

are prohibited and non-compliance cannot be justified under any circumstances, as core obligations are non-derogable.⁸⁹² The Maastricht Guidelines provide:

Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [...] Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, [including water] of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, violating the Covenant’. Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.⁸⁹³

In relation to specific violations of the right to water, testimonies illustrate violations of the three key substantive elements of the right to water: availability, accessibility and quality, are commonplace amongst those interviewed. The following testimonies document these violations, within this framework.

(i) Violations of Core Obligations in relation to Availability of Water

The core obligation concerning water availability is: ‘To ensure access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent disease.’⁸⁹⁴ However, many of the interviewees despite

⁸⁹² GC 15, para.40.

⁸⁹³ Maastricht Guidelines 1997, para.9.

⁸⁹⁴ GC 15, para.37(a).

claiming to have enough water for personal consumption⁸⁹⁵ did not have a service level of sufficiency which allowed for personal and domestic hygiene, according to WHO guidelines.⁸⁹⁶ From the 45 interviews, 28 reported a supply level equal to the WHO recognised daily amount for basic domestic use.⁸⁹⁷ However, this level of supply although assuring water for consumption and allowing for some hand washing and basic food hygiene, does not allow for bathing or for laundry. This level of supply carries high health concerns.⁸⁹⁸ As such, it cannot be viewed as fulfilling the minimum essential level of water needed to comply with the core obligation above. Only 11 families were supplied with water above the recommended daily amount for basic needs.⁸⁹⁹ Moreover and significantly, this service level of supply could not be guaranteed and many of these families were subject to variable supply based upon seasonal disconnections and shortages, hence reducing their supply and making them more susceptible to health concerns than would normally be the case if the supply were constant. Despite the seemingly acceptable level of water supply the variable nature of the supply has a negative consequence for the health of those concerned. Hence, the obligation in relation to availability is not being met.

⁸⁹⁵ Of the 45 interviews carried out, 24 interviewees maintained that they had sufficient water for personal and domestic use. Interestingly, of these 24, some interviewees viewed their supply as adequate, even if it was at a basic level according to the WHO guidelines, where as others with the same level of supply felt their water was insufficient. Interviewees claimed they had sufficient water even when access to supply was cut off for several days a week or month during the summer or if reliant on tanker water or rain water rather than mains supply. As such it was useful to apply the WHO guidelines when assessing objectively the sufficiency question.

⁸⁹⁶ See Bartram, J and Howard, G, Domestic Water Quantity Service Level and Health Geneva: WHO, 2003.

⁸⁹⁷ This being a minimum water supply of 20 l/c/d. See Bartram and Howard 2003, Executive Summary, Table S1.

⁸⁹⁸ Bartram and Howard, 2003, Executive Summary, Table S1.

⁸⁹⁹ This intermediate level is 50 l/c/d/ minimum and assures consumption, basic personal and food hygiene and some possibility of bathing and laundry. This level of supply carries low health concerns. Bartram and Howard, 2003, Executive Summary, Table S1.

The special situation of rural families is also evident. 6 families testified that they had to share their limited water supply not only amongst the family for domestic use, but also with their livestock and/or for agriculture. Although impossible to quantify exactly how much was utilised by the family and how much by the animals, it is clear that the level of supply is well below the amount deemed sufficient to ensure basic needs are met.⁹⁰⁰ For example, Interviewee 19 reported 50m³ per month on average, to be shared between 19 people and 120 heads of livestock. If shared between people alone this would only amount to 88 l/c/d, not accounting for the livestock. Consequently, with livestock taken into consideration the supply must be at a basic level of subsistence, if that. Furthermore, this supply is via a communal tap within the community and sources are even more limited during the summer.

Likewise, Interviewee 18 reported not having sufficient water for domestic use, not even for drinking. Their average water supply was 60m³ per month to be shared between 34 people and 300 heads of livestock. Again, without accounting for the livestock this only leaves 59 l/c/d. The result is at best a basic level of supply, at worst a supply below even this basic level. In terms of access, they have no mains supply and gain their water from a local spring, rainwater and in the summer, expensive tanker water.

⁹⁰⁰ Even if the water they could access was split half and half between them and the animals, this would still put them below the level needed for basic domestic use.

Table 4.1
Sufficiency Analysis using WHO guidelines

Level of Water Supply	Urban Cases	Rural Cases	Refugee Camp Cases
Basic supply 20 l/c/d Consumption assured Hand washing and Basic Food hygiene possible No laundry or bathing High health concerns	11	8	9
Intermediate supply 50 l/c/d Consumption, basic personal hygiene and food hygiene assured. Laundry and bathing possible. Low health concerns	4	1	6
Optimum supply 100 l/c/d All domestic needs met Very low health concerns	0	0	0
Supply level unquantified Supply shared with livestock – l/c/d not available		6	

None of the interviewees received the optimum level of water supply recommended by WHO for ensuring all domestic needs are met.⁹⁰¹ Significantly, none of the

⁹⁰¹ Optimum water supply for domestic use is recommended to be 100 l/c/d. See Bartram and Howard, 2003, Executive Summary, Table S1.

families reported a guaranteed constant level of water supply and all were subject to shortage of supply, mainly due to problems of access, both physical and economic and due to seasonal fluctuations at source, discrimination in supply and effects from occupation such as incursions and closures. These disconnections and seasonal variations in supply coupled with quality issues suggest that the high level of health concerns due to the basic service level is increased further to very high health concerns for over 50% of the interviewee families. If the 6 families who share their water with their livestock are included, then the figure is over 66 % of those interviewed.

When divided into geographical areas, it was those Palestinians living in rural areas, which suffered with the most limited consumption, particularly as it was these families who shared their water supply with their livestock. Hence figures for personal domestic use were unascertainable. Furthermore, they did not have access to a mains water network in their homes, although limited access to mains water network was a contributing factor to the insufficient supply of water across both rural and urban communities studied.⁹⁰² In sum, of the 45 interviewees, 11 had no mains supply. Moreover, even those with mains water in urban communities suffered predominantly from mains network decrease in supply or complete stoppage of supply, as they were most reliant on this water source rather than water from cisterns or springs.

In their report 'Thirsting for Justice', the Center for Economic and Social Rights found that 'In the OPT, many households lack both sufficient and continuous access

⁹⁰² For a detailed analysis of access to water see p.279.

to water, especially since at least 15% of the population is not covered by a water network'.⁹⁰³ Moreover, 'Israeli actions severely reduce the availability of water for many of these communities as those who are connected to the mains network are 'subjected to the whims of the Israeli water [carrier] company, Mekorot.'⁹⁰⁴

This study found that the service level of supply was at its poorest during the summer months (from June to October inclusively) when demand for water was higher and supplies from source were less, due to reduction in supply from the water company, as Israeli settlements are given priority.⁹⁰⁵ 39 of the 45 interviewees complained of a seasonal shortage of water, due to insufficient mains water, absence of water collected in cisterns due to lack of rain and drying up of springs and wells. This often meant having to supplement sources with expensive tanker water. Interviewee 9 states, 'In summer time, water coming from the water network is completely cut off and nothing is supplied to the community. Therefore, we are obliged to buy water from tankers with an average supply of about 25-30 l/c/d and at a high price compared to water from the water network.'

Reasons noted for lack of mains water during this summer period, included limited supply of water from source and the poor water network leading to leakage and dirt blocking pipes etc: 'During summer time, the quantity [of water] is not more than 20 l/c/d. The network supply is repeatedly cut-off and to buy water from the tankers is expensive...This is due to limited supply of water from source, the poor water network which is old and needs rehabilitation and the distribution system adopted by the municipality [who] in distributing the water quantities is not distributing the water

⁹⁰³ Center for Economic and Social Rights and PHG, May 2003, p.26.

⁹⁰⁴ Center for Economic and Social Rights and PHG, May 2003, p.4.

⁹⁰⁵ A point reiterated in personal discussions with Basema Bashir of the PHG, March 2007.

fairly.’⁹⁰⁶ The interviewee worries about sustainability of water sources for his children and future generations: ‘I do not expect the water network to be rehabilitated even in the very near future.’⁹⁰⁷

Furthermore, discrimination in supply between Palestinian communities and those of Israeli settlements was clear. Discrimination on the part of the Israeli water company Mekorot was noted in several instances as the cause of limited water supply, as it is claimed that the amount of water allocated to the Palestinians by the Israeli water company is much smaller than that allocated to the Israeli settlers and to Israel proper. Interviewee 38 felt there was discrimination concerning water in the West Bank, ‘Some areas get limited quantity of water because they are continually cut off from the water supply in the network and others get all the needed water. Settlers in particular get more water than they need.’ Interviewee 37 also believed there was discrimination against the Palestinians, ‘During summer the mains supply is cut off for approx 10 days in every month. This is due to limited supply from the water company...because of discrimination. They give more water to settlers...Israelis control all resources and they take the lion’s share of water.’

In addition, it has been noted that whilst settlements have lawns and flowerbeds with sprinklers and swimming pools, nearby Palestinian communities do not have enough water for basic needs.⁹⁰⁸ Several interviewees also offered this opinion: ‘Israelis in

⁹⁰⁶ Interview 10.

⁹⁰⁷ Interview 10.

⁹⁰⁸ Abdul Rahman Tamini –Director of the PHG in the Guardian 31st May 1991, quoted in Ward. C, Reflected in Water – A Crisis of Social Responsibility, Cassell: London, 1997, p.111. Also the Palestinian Academic Society for the Study of International Affairs (PASSIA), July 2002, p.5; PHG, 2004, p.32.

general and settlers in particular consume much more water than we do. I personally think that Israeli chickens are respected much more than us: They are provided with large quantities of water, quantities that are not available for us as human beings. This is in addition to the water quantities [they] use for agriculture and flowers in the settlements’;⁹⁰⁹ ‘Israelis and settlers get much more water than we get, especially the settlers. Whereas settlers close to us get a great amount of water and they are able to use it for different kinds of agriculture and growing flowers, we barely get the needed water for drinking’;⁹¹⁰ ‘Settlers get more water than we do. In Karmel, [...] we see them using so much water for [cleaning] their cars and in the houses [lawns], for chickens in their farms, at the same time that we face clear shortage in water supply.’⁹¹¹

In total 40 of the 45 interviewees felt that they were discriminated against by Israel in the allocation of water supplied to the West Bank and many noted the particular discrepancies between Palestinian communities and Israeli settlements in the area.

Discrimination on the part of the municipality was also reported. Interviewees claimed that the municipality, who acts as the local service provider in some cases, would discriminate in the way in which they supplied Palestinian communities. For example, Interviewee 37 states, ‘There is also discrimination on the Palestinian side, since cities usually get more water than villages and camps’ and Interviewee 36 believes that ‘the local distribution of water by Palestinians is not fair.’ Furthermore, Interviewee 7 claims that local officials are corrupt and influential people get more water than ‘ordinary folk’. ‘This is also due to the better housing and better quality

⁹⁰⁹ Interview 23.

⁹¹⁰ Interview 22.

⁹¹¹ Interview 17.

water networks in those areas where they live.’ This belief that the local municipality discriminated between Palestinian areas was widespread.⁹¹² This highlights the responsibility that the Palestinian Authority has itself in realising the right to water for those living in the West Bank. However, the authorities can only distribute the water that is available to them from Israel. As such it is a very difficult job to ensure that everyone has sufficient water, if the water authority to not receive enough water in the first place. Moreover, with no autonomy over development of the water infrastructure, it is impossible for the Palestinians to control distribution fully and to maintain the water network. Despite these limitations the authorities have a duty to ensure that distribution in supply is equitable as far as is possible,⁹¹³ but ultimately the legal obligation must lie with Israel as the occupying power exercising control over the water sector.⁹¹⁴

Finally, settler interference was noted as a reason for insufficient water supply.⁹¹⁵ This can be in the form of preventing Palestinian access to sources; filling points and cisterns or through the control of the mains network valves.⁹¹⁶

As well as having subsequent effects upon the health and well-being of those Palestinians with insufficient water, lack of water supply also results in stress within

⁹¹² See also Interview 14 regarding Hebron municipality, ‘There is inequality in water accessibility between Palestinians and Israelis (more to Israelis) and an absence of active water legislation and law enforcement in this regard. Also there is mismanagement of water resources in Hebron district by Hebron municipality (priority is given to Hebron city at the expense of country side).’ See also Interview.16 regarding inequity in Dura city municipality.

⁹¹³ Under the core obligation of non-discrimination.

⁹¹⁴ See previous discussion regarding Palestinian Authority obligations in Chapter 3, Section 3.4 (ii), p.173 and Section 3.8(ii) at p.209.

⁹¹⁵ More widely, it has been noted that Palestinians’ water consumption has been limited even further during the current Intifada, due to water shut-offs caused in many cases by settler interference with mains supply networks. See Center for Economic and Social Rights, 2003, p.26.

⁹¹⁶ See further discussion, p.286.

Palestinian communities. For example, camp families suffer from limited mains access due to intermittent supply specifically dependent upon their location within the refugee camps. Those living uphill have problems receiving their water due to lack of pressure in the mains network. This means that many families, who could afford to, purchased a water pump to help push the water delivery through the system. Those who could not afford a pump therefore did not receive any water or could only access very limited amounts of water. The same was true of the families who lived at the top of the hill as all the water was being used by those further down hill:

During the summer water supply through the network is less. This is due to limited supply from source. Also needs are higher in the summer. Water is supplied for one or two days a week and then cut off for a week...Some families use small pumps to get water from the network and this affects [minimises or stops] the supply to other families that do not have a pump.⁹¹⁷

Furthermore those families who do have a limited supply of water do not want to share the water that they do have. Interviewee 39: 'During summer water is cut off often and therefore supplied quantity is very limited [...Therefore] there is not so much cooperation between people [to share what water there is]'. Interviewee 40 said shortage of water causes problems for his family and for the community, 'This causes fights between members of the same family, between families, and even between neighbourhoods.' Significantly, these interviewees all lived in refugee camps, which are subject to overcrowding and poor housing conditions, another factor causing

⁹¹⁷ Interviewee 38. See also Interviewee 39, 'Some areas on the uphill of the camp do not get enough quantity of water [due to poor pressure in the network]. On the other hand, some families' use pumps to take a larger quantity of water from the network and this affects supply to other families [minimises or stops supply].'

stress. However, these testimonies illustrate the stress caused by lack of water and highlight the link between the right to water and right to housing.

Overall, the findings from the interviews were supportive of wider evidence presented within other studies. For example, according to the WaSH Monitoring Project of the PHG, communities are suffering from a severe water shortage: 36% (225) of the 632 surveyed have a per capita consumption of less than 50 l/c/d. Furthermore, water for all domestic uses (including domestic agriculture, livestock, and losses) was less than or equal to 30 l/c/d in 43 communities, which represents about 7% percent of those surveyed. In only 16% (100) communities was the per capita water consumption at the WHO minimum optimum level for good health.⁹¹⁸ Moreover, ‘since the start of the current Intifada in September 2000, Mekorot has been continuously reducing water quantities being supplied to Palestinian communities and in some cases these supplies have been completely halted.’⁹¹⁹

In sum, through an assessment of the data gathered from the testimonies / interviews, it is clear that the core obligation in relation to availability of water is being violated by Israel’s policy and actions.

(ii) Violations of Core Obligations in relation to Access to Water

Concerning accessibility there are several core obligations including *inter alia*: ‘To ensure the right of access to water and water facilities and services on a non-

⁹¹⁸ PHG, 2005, p.18.

⁹¹⁹ PHG, 2005, p.21.

discriminatory basis, especially for disadvantaged or marginalized groups’;⁹²⁰ ‘To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets; to avoid prohibitive waiting times; and that are at a reasonable distance from the household’⁹²¹ and ‘To ensure personal security is not threatened when having to physically access to water.’⁹²²

If we focus on the physical dimension of accessibility, it is clear from the interviews that many interviewees faced problems with accessing sufficient, safe and regular water. As noted previously mains water supply, when available, is not constant in many cases. Moreover, several interviewees do not have a connection to the mains network⁹²³ and so face additional problems of securing a safe and adequate source. Interviewees reported reliance on a variety of sources other than mains networks and often used a mixture of sources depending on the season, distance and availability and the security situation.

Accessibility was firmly demarcated along community lines. Rural communities had the worst access with only 7 of the 15 interviewees having access within their homes. Camp families had the best access in terms of mains connections in the home. However, the supply was intermittent and dependent upon location. Therefore, urban communities had the best access to mains water, but in turn this meant that when mains water was not available they were the worst affected, as they were reliant on the mains supply for the majority of their water. During the summer these

⁹²⁰ GC 15, para.37 (b).

⁹²¹ GC 15, para.37 (c).

⁹²² GC 15, para.37 (d).

⁹²³ See discussion p.273.

interviewees stated that mains water was unavailable for much of the time.⁹²⁴ This has increased the reliance on alternative sources, including rainwater collected in roof tanks or cisterns and purchase of tanker water, both sources open to contamination and often difficult to access due to security measures.⁹²⁵ Furthermore interviewees living in rural areas and camps reported use of these sources, as well as wells, springs (often seasonal) and communal taps. Likewise, these sources are also subject to increased risk of contamination.

In addition to problems relating to access to clean and sufficient sources of water, physical security is also an issue for interviewees. The threats to physical security reported were twofold: Firstly from the actions of the Israeli Defence Forces (or IDF) and secondly from Israeli settler intimidation and violence. Distance and time affected the sources used and with these limitations upon freedom of movement, collecting water from sources far away or difficult to get to was a time consuming and often dangerous task.

The security policies of the IDF often result in denial of access to water for Palestinians in the West Bank, as measures such as roadblocks and mobile checkpoints, closures and curfews limit their freedom of movement. These measures also threaten physical life and limit access to alternative sources of water by preventing water getting to the people who need it. Several interviewees reported

⁹²⁴ See examples under availability section, pp.269-279.

⁹²⁵ See examples under quality section, pp.292-296.

occupation forces blocking access to water through the prevention of movement of water tankers.⁹²⁶ Interviewee 9:

During April and May 2002, the tankers were completely prohibited from moving to transport water to the community. This was in addition to the destruction of the water network (main lines) by the Israeli forces...Water tankers were forbidden from moving during curfew [and] the municipality was not allowed to rehabilitate the destructed water network.

Likewise, in Interview 11 it was stated:

Water tankers were stopped and sometimes prohibited from transporting water to the community [...] Checkpoints were at Al Fawwar intersection and at Halhul bridge [...] the worst situation was in the summer of 2003. [Also] for 40 days in March and April 2002, during the Israeli incursions, tankers were completely prohibited from moving due to curfew.⁹²⁷

Furthermore, during incursions refugee camps were completely closed to all vehicles resulting in water tankers being prohibited from entering the camp. During this time interviewees reported that the tanker drivers would try to use other secondary dirt roads (very difficult terrain) to deliver the water - a very dangerous task.⁹²⁸

In addition to the prevention of tankers from delivering water to Palestinian communities, confiscation of water tankers was also reported. For example, during

⁹²⁶ For wider documentation of the impact of closures and checkpoints on water tankers see PHG, 2004, pp.44-53 and PHG, 2005, pp.50-53. Additionally, see B'Tselem, July 2001, p.6; Center for Economic and Social Rights, 2003, p.29.

⁹²⁷ See also Interviews, 16; 20; 21.

⁹²⁸ See Interview 32. Also see Interview 31.

2004, the Israeli Forces annexed a tanker (3.5 m³) that one interviewee uses for water transport (it is pulled by a tractor). This was in a place very close to his house where he cultivates and sows the land, for subsistence. They took the tankers and subsequently he was not able to transport the required water.⁹²⁹ Similarly, Interviewee 20 stated, ‘‘Last September, one [water] tanker was confiscated for more than two weeks, at the Israeli checkpoint that is close to us. Many tankers were forced to go back to where they came from’.

Even if one could argue that in emergency situations such as during a ‘necessary’ incursion, water is provided in tankers, this is not a sustainable source or solution. Tanker water is relatively expensive for many. Moreover, there is no dignity or independence in having to wait for water to be delivered. A fundamental element of the right to water is that it is realised with the dignity of the human being intact. Hence, this element of the right to water is not being fulfilled. Furthermore in addition to the reliance on tanker water as human rights problem due to non sustainable access, there is a ‘double negative effect’ as the Israeli forces have actively interfered with the provision of such water, thus violating the obligation to respect.

Moreover, access was also prevented by direct attacks upon the personal security of interviewees by Israeli Defence Force soldiers shooting at roof tanks and at those trying to collect water from these tanks, wells and cisterns or even neighbours’ houses.⁹³⁰ Interviewee 4 obtained 20% of their water supply from rainwater collected in their neighbour’s cistern, 300m and 5 minutes walk away. This water was collected by a male child on foot. After the death of 12 Israeli soldiers in Hebron, incursions,

⁹²⁹ Interview 16.

⁹³⁰ For additional examples see Interviews 19 and 20.

curfew, search and arrest, followed. During this time they suffered a 4 month disconnection from mains water (in November 02). Access to water from other sources was also difficult and the ability to get water from the neighbour's cistern was affected, as it was too dangerous to go outside. This situation resulted in their 12 year old son being injured by a rubber bullet in the leg, whilst going to collect water from the neighbour's cistern. They maintain that an Israeli soldier fired the shot.

Interviewee 6 also reports being shot at: He went to collect water from his neighbour's cistern and when he was pouring the water into his roof tank, a bullet hit the tank and he narrowly escaped injury or death. The bullet caused a hole in the tank, making it unusable. The targeting of roof tanks is also documented:

During 2001 Israeli forces shot our roof tanks and water was cut off for a complete week... We tried to fix the tanks on the roof, but Israeli forces fired on us and we had to come down since our lives were in danger. We called UNRWA and they helped in fixing the roof tanks and getting back water supply... [Also], during the first period of the Intifada, Israeli soldiers in the military base near Rachel's Tomb used to target the roof tanks in the camp and damages were great. UNRWA used to help in fixing them. About one and a half years ago this stopped and the situation is better now.

In addition, reports were made of shooting by the IDF at water tankers, their drivers and at tractors pulling water tanks: 'During the Israeli incursion in April 2002, while I

was transporting water to my house, with a tanker pulled by a tractor, the driver and I were shot at by Israeli soldiers. They damaged the wheels of the tractor'.⁹³¹

Furthermore, during high-intensity violence such as Israeli incursions, direct attacks on the water infrastructure are common and well documented outside of this study.⁹³² For example, the CESR state, 'During the current Intifada, the destruction of Palestinian water infrastructure has led to a decrease in accessible water supplies for Palestinians. In some cases, this destruction has left whole communities with no access to water for extended periods of time.'⁹³³ Attacks of this nature were widely reported by interviewees, most especially occurring during Israeli incursions into Palestinian areas. For example, incursions and high intensity fighting in camps caused damage to mains water pipes: 'Israeli bulldozers damaged some of the main and secondary water lines during the 2002 incursion, which continued for 20 days. In addition, during the years 2002 and 2003, curfew was imposed on the camp on several occasions, which affected the supply of water (especially during summertime), as tankers could not travel.'⁹³⁴ Furthermore, personal safety was endangered during these curfews (when trying to collect water), 'During curfew times, when I needed to get water from the mosque or from neighbours, this was very risky.'⁹³⁵

Damage from incursions was not limited to refugee camps either. For example, see the case of rural interviewee 28: 'During the April 2002 incursion, the main [water]

⁹³¹ Interview 21. See also Interview 18: 'The filling point is very close to the Israeli Military base in Khashm Al Daraj. They shot towards me several times'.

⁹³² For example, PHG, 2004, pp.54-59; UNEP, 2003, p.52, p.56 and p.57 Table 5.1.

⁹³³ Center for Economic and Social Rights, 2003, p.29.

⁹³⁴ Interview 31. See also Interview 32, similar testimony.

⁹³⁵ Interview 31.

lines were damaged by the Israeli bulldozers, and we were not able to fix it for 40 days. For these 40 days we did not have water from the water network.’ During this time they accessed water from cisterns or other nearby alternative sources.

In addition to the threats to physical security due to the actions of the IDF, interviewees reported intimidation, threatening behaviour and violence from Israeli settlers, when they were trying to collect water. Often communal water points are located near to a bypass road or settlement fence, which makes access to these points dangerous for Palestinians. For example, Interviewee 25 did not have safe access to water: ‘I was attacked several times by Israeli soldiers and by settlers, while trying to get the needed quantity of water.’ These attacks mostly happen on bypass road No. 60, whilst driving the tractors and tankers to collect the water from the filling point. ‘One time, during the current situation, on the way to Qiriat Arba’ to get water, settlers were waiting for me. I had to call the Israeli soldiers to take them out of my way. If I had not called the soldiers, the settlers would probably have hurt me’. Settlers and the IDF have also denied him access: ‘Since the start of the current Intifada, to the present day, we have been denied access to water on several occasions. A year and a half ago, after the killing of several settlers in the area, we were denied access to sources of water by preventing access through the main road for almost a month.’

Similarly Interviewee 23 lives in Um Al Khair, Hebron governate, which is very close to Karmel settlement. The house is only separated from the eastern side of the settlement by a fence. He has an Israeli order to demolish his house, which must be evacuated by 23-12-2004. This has been issued as the Israeli government deem this an

illegal dwelling - an unlicensed building.⁹³⁶ They get 90% of their water from a Mekorot filling point, approx 300m from home, but it is not within safe physical reach, 'since the filling point is very close to the settlement and if we need water at night it is not safe to get as we are threatened by settlers who are very close'.

Moreover the threat of violence alone prevents the Palestinians families from access to water. Interviewee 23 continues: 'If settlers are near the water point, [we] the Bedouins will leave to avoid confrontations with them or not go to collect water in the first place.' Likewise, Interviewee 20 states that the threat of violence and harassment prevents them from safe access to water:

The place where we live is not safe. In 2003, Israeli Forces and settlers attacked many tankers, whilst transporting water to the community and using the bypass, on their way to Yatta [...]10 cisterns are controlled by settlers in Susiya settlement and since 2000, they will not allow us to use these cisterns...Settlers try to prohibit us from using many cisterns in the area.

Interviewee 22 also told of settlers preventing access to cisterns and wells:

Settlers have annexed several dunums⁹³⁷ from our land, including several cisterns that are in these areas. We are not able to reach these wells and cisterns at all, as we are not able to access the annexed land. We feel that our lives are under threat all the time and every year settlers are getting closer to our community and are getting more of our land and more of our cisterns.⁹³⁸

⁹³⁶ This house has since been demolished (information gained March 2007).

⁹³⁷ A dunum is a measure of land used in Palestine with 1 dunam equal to a quarter of an acre (1000 square meters). See PHG, 2004, p.89.

⁹³⁸ Also Interview 21: 'Getting water during summertime is not safe because of harassments from Israeli soldiers and also because of settlers, especially from the neighbouring settlement...Since we live very close to a settlement in the south-eastern part of Hebron, water from tankers was prohibited from

Furthermore, in certain cases, due to the proximity of the water point to the settlements, settlers are able to tamper with water valves diverting the supply resulting in either cutting off supply to the Palestinian villages or greatly diminishing the supply available to them. Interviewee 17: ‘Settlers from a neighbouring settlement, (Pnei Hever settlement) cut off the water supply to the [Bedouin] community in 2001 for two continuous years. The water supply was reconnected via a different settlement, Karmel, in 2003.’ Mekorot did not take any action against the settlers for cutting the supply or action to reinstate the supply to the Bedouin community; Interviewee 19 states, ‘The settlers who live in Karmel settlement, cut off the water supply to us for about two years, starting in 2001. They control the main valve that provides the water supply to us’. The supply was finally reinstated to the Bedouin’s communal tap in 2003.⁹³⁹

The economic dimension of accessibility was also a problem for the majority of the families interviewed. High unemployment and increasing poverty due to closures and curfews has resulted in hugely inflated costs for tanker water and inability to pay for mains water: Many of the interviewees said they had not paid their water bills, because of lack of ability to pay. Interviewees 34, 36 and 45 said they did not pay for water because they cannot afford the bills, due to the very bad economic situation.

reaching us by IDF soldiers and settlers, for one or two days at a time during the current situation. This [has] happened several times. The IDF prevented tankers from passing through checkpoints into our community and tankers were also attacked by [the] settlers.’ Interviewee 21 believes that his right to water is being violated because they do not get enough clean water to satisfy their needs and when they try to create new water resources these are destroyed by both Israeli forces and settlers, ‘Several cisterns that we built were damaged under the pretext of being unlicensed wells and we are not allowed to build any cisterns to collect water.’ See also Interviews 18 and 19.

⁹³⁹ Interviewee 23 also reported that settlers control the valves to the water network and so prevent them [the Bedouin family] from getting their fair share of the water supply.

Similarly Interviewee 38 states, 'We are unable to pay because of the current situation and we owe the authority so much money.' These interviewees noted that despite inability to pay for the water they used, this did not limit the amount of water they consumed, as this was limited anyway due to insufficient access and supply. In addition the translator noted that in general, it is the Palestinian Water Authority (PWA) that is suffering from the problem of non-payment and there is no way to force people to pay during the current difficult situation. At the same time, they cannot cut off the water supply to these people during this time of hardship. Notably, Mekorot gets its money from Palestinian taxes, but the local councils are unable to get all the money owed from people to pay the PWA.

The overall deterioration of the economic situation within the OPTs has had a lasting effect upon people's ability to pay for goods and services, exacerbating poverty.⁹⁴⁰ The World Bank notes that during the current Intifada, some 47% of Palestinians live in poverty (according to World Bank estimates) and 16% of the population live in subsistence poverty.⁹⁴¹ Moreover, unemployment has increased due to incursions and a block on workers entering Israel,⁹⁴² as the occupation measures taken by the Israeli government have meant that many Palestinians who once worked within Israel proper can no longer go to work and many who have employment within the OPTs cannot get to work due to closures.⁹⁴³ Furthermore, some Palestinian workers are not in

⁹⁴⁰ World Bank, Four Years- Intifada, Closures and Palestinian Economic Crisis – An Assessment, World Bank, October 2004, pp. 29-59; UNRWA, Prolonged Crisis in the Occupied Palestinian Territory: Recent Socio-Economic Impacts of the New Phase on Refugees and Non-refugees, UNRWA: Gaza, November 2006, pp.29-44.

⁹⁴¹ World Bank, 2004, p.30 and p.32 (where poverty is defined as less than US\$2.3 per person per day and subsistence poverty as less than US\$1.6 per person per day. For further details pp.31-32).

⁹⁴² World Bank, 2004, pp.13-14.

⁹⁴³ For a detailed analysis of the economic crisis and consequent poverty see World Bank, 2004, p1-3 and 39-41; UNRWA, 2006, p.14, 27-28.

receipt of wages for their work.⁹⁴⁴ All of these factors contribute to a situation where many of the interviewees were unable to pay for mains water if connected and unable to purchase adequate amounts of water from other sources. Thus, economic accessibility to sufficient safe water is threatened, if not impossible. The CESR conclude, 'Palestinians' economic accessibility to water is being diminished both from a general increase in poverty and unemployment, as well as a rise in the price of both piped and tanker water. Since the start of the second Intifada, poverty among Palestinians has trebled to 60%, unemployment has risen to half the population, and the price of tanker water, on which so many rely, has risen by an average of 82%. Even in communities with piped water, high rates of inability to pay water bills (up to 100%) have been recorded. The poverty, unemployment, and inflation of water prices are a direct result of Israeli policies of occupation, closure, and discrimination between Israelis and Palestinians.'⁹⁴⁵

The source of the water has a bearing on the cost – tanker water was the most expensive, due to the difficulties in transporting it.⁹⁴⁶ Many interviewees talked of the rise in the cost of tanker water due to the dangers faced by drivers in transporting it and the physical difficulty in accessing roads to Palestinian communities.⁹⁴⁷

Furthermore the cost of tanker water limited the amount of water people consumed, as

⁹⁴⁴ See Jane Flanagan in Nablus, ' Hamas sanctions squeeze the life out of West Bank', The Telegraph, 07 May 2006; Chris McGreal in Jerusalem, 'UN calls for massive rise in Palestinian aid' The Guardian, Thursday June 1, 2006; David Gow in Brussels and Chris McGreal in Jerusalem, 'EU plans to go it alone with aid for Palestinians', The Guardian, Monday May 8, 2006; Donald Macintyre in Gaza 'Emergency aid may be too little, too late for Palestinians trying to survive a crisis', The Independent, 11 May 2006.

⁹⁴⁵ Center for Economic and Social Rights, 2003, p.5, (poverty is defined in this instance as personal average daily consumption of less than US\$ 2, based on the definition in the World Bank report, Two Years of Intifada, Closures and Palestinian Economic Crisis-An Assessment, March 5, 2003, p.3.

⁹⁴⁶ Oxfam reports that the price of tanker water has risen sharply due to use of alternative difficult routes, which increase transportation time and therefore costs. In 11 localities interviewed, the local authorities reported an average increase of 82 percent in the price of tanker water. See Oxfam, September 2002, p.26.

⁹⁴⁷ See previous examples cited, p.283, including note 927.

they could only purchase minimal amounts. Interviewee 23 states that he pays 20 NIS per m³ for tanker water, which is not affordable for the family and limits the amount of water purchased and used. It also causes problems for the family: 'It is a financial burden and I have fought with my children several times in order to make them use water wisely. This [water] problem makes me, and the rest of my family, nervous (stressed) all the time'.⁹⁴⁸ Additionally, even piped water has become increasingly difficult to afford. The PHG reports that 'In the cases of communities that are provided with water through a network, the high percentage of families in almost all of these surveyed communities that cannot afford to pay their water bills has, in many cases, reached 100%'.⁹⁴⁹

Notably, in the case of Hebron municipality, a scheme had been introduced to try and make the piped water more accessible for those with limited economic means. Two families reported being eligible and party to a subsidised water supply that had been introduced for residents of the Old City of Hebron, apparently to encourage citizens to stay in that part of the city.⁹⁵⁰

Finally, interviewees reported discrimination in relation to both physical and economic access to water. Notable was the claim by several families that water was distributed inequitably on the part of the local Palestinian municipality or service provider. Claims that wealthy and influential members of the Palestinian communities

⁹⁴⁸ See Interview 25 for a similar testimony (they also pay 20 NIS/m³ for tanker water which they find is not affordable and limits use of water): 'The family is nervous all the time because of the lack of water and worry that we have to use it wisely. In addition, getting the needed quantity of water is something which is not safe or easy to do and this causes a real problem to us'.

⁹⁴⁹ PHG, Background, Unemployment, at www.phg.org/campaigns. Further information concerning pricing for water in the West Bank see Palestinian Independent Commission for Citizens Rights, Concerning Price Discrepancy for Water in the Palestinian National Authority Areas, PICCR: Ramallah, Special Report Series (20), March 2003.

⁹⁵⁰ See Interviews 1 and 2.

received priority in water allocation, as well as greater amount of water were made by interviewees, for example Interviewee 1 noted that more water is supplied to influential Palestinians, such as the area where the town mayor and other dignitaries live e.g. Wadi Attufah.⁹⁵¹ Furthermore, many interviewees noted that whilst they do not have access to sufficient water, Israeli settlers within the West Bank had sufficient water and mains access with constant supply all year round.⁹⁵²

In sum, Israel is in violation of all the core obligations concerning both the physical and economic dimensions of access to water. Furthermore, the dangers presented to the physical security of the interviewees through the collection of water are considerable and threaten human life in cases. As such, the actions of the IDF and Israeli settlers present a breach of international humanitarian law,⁹⁵³ in addition to a violation of the human right to water.⁹⁵⁴

(iii) Violations of Core Obligations in relation to Water Quality

Concerning specific violations of the right to water, the final key substantive element to be discussed is that of water quality. The core obligations concerning water quality provide that water must be ‘sufficient and safe for personal and domestic uses to prevent disease’.⁹⁵⁵ The related core obligation ‘To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation’⁹⁵⁶ is also relevant.

⁹⁵¹ See examples cited pp.277-278, including note 913.

⁹⁵² See examples cited pp.276-277.

⁹⁵³ See forthcoming discussion, Section 4.5, pp.310-312.

⁹⁵⁴ These actions can also be seen as a threat to their right to life under Article 6 ICCPR.

⁹⁵⁵ GC 15, para.37(a).

⁹⁵⁶ GC 15, para.37(i).

As noted previously, both in terms of sufficiency and access, water supply to the Palestinian people interviewed is inadequate. These factors alone mean increased health risks for these families. However, this risk is increased further by the fact that much of the water available to them is of poor quality and in some cases contaminated. Of the 45 interviews carried out, 25 reported a problem with the quality of the water they received. In terms of human settlements, the rural areas were most affected followed by the camps and then urban areas. This correlates with the source of the water, with urban areas having the most network connections and therefore less reliance on other sources.

The problems ranged from water that is dirty in appearance to water contaminated with sewage and water with 'moving creatures' in it. Also, the source of the water had a bearing on the quality of the water. Tanker water was the most cited as polluted or dirty as often the tankers were not clean before the water was collected. Roof tanks and cisterns were also problematic as they often were open to the air and ground and as such collected residues and dirt as well as pollutants contained within the rainwater or groundwater. Cases of pollution of water from these sources have been reported when supplies for water purification and tank cleaning could not be delivered due to closures.⁹⁵⁷ This scenario is also evident in the case studies. For example, Interviewee 10 believed that the quality of their water is poor and said it was not clean to sight or acceptable in taste, colour or smell. They believe it to be contaminated because, 'When you look at it, it does not look clear. I sometimes see larva and moving things in the water, especially the water from cisterns. Water used from the cisterns is not

⁹⁵⁷ For example in the case of the village of Mughrayeh, rainwater cisterns and wells were not cleaned or chlorinated because supplies could not be delivered from Ramallah. See Oxfam, 2002, p.27.

treated or chlorinated and we expect it to be contaminated from the roof and the atmosphere.’

The water supplied via the mains was the cleanest although again this depended on how often the supply was cut off, as it often sat sedentary in rusting pipes causing discolouration and a metallic taste: ‘Rust is always seen and found in the water coming from the old pipes.’⁹⁵⁸ In some cases interviewees were unsure whether their water supply was actually contaminated but felt it was because it looked dirty or smelt and tasted bad. Others were convinced it was contaminated and state that they had suffered health problems due to this.⁹⁵⁹

Interviewee 15 relies on rainwater collected in a cistern for 60% of their water and purchases tanker water for 30% of their supply. The final 10% is from the network. He believes the water is contaminated:

It is contaminated because of the existence of small worms and dirt in it, especially when we get it from cistern. The collected rainfall is not always clean, we don't use any chlorine methods and the water networks are rusty and unclean because of long cuts in water supply. Also, because of the unavailability of a wastewater network in the city of Dura and the dependence on cesspits there is an increased risk of contamination from wastewater.

It has been documented that water is commonly open to contamination from sewage, open waste water and other pollutants due to the poor water network infrastructure, lack of maintenance causing water pipes and sanitation systems to be in a state of

⁹⁵⁸ Interview 10.

⁹⁵⁹ See examples cited under Section 4.3 (iv), pp.297-303.

poor repair and / or deliberate damage and destruction of pipelines and water tanks by Israeli forces actions: 'Israeli occupation and closure have compromised the quality of water available to Palestinians. Israeli military incursions have destroyed critical water treatment infrastructure. Closure has delayed or prevented repair to aging or damaged water and sanitation systems as well as the proper disposal of sewage and solid waste, leading to contamination of water sources. With the start of the second Intifada, Israel halted all construction projects of much needed sewage treatment plants, further exacerbating the decline in water quality.'⁹⁶⁰ In addition, cases of deliberate contamination including deliberate contamination by IDF soldiers⁹⁶¹ and dumping of industrial waste into Palestinian water sources have been documented.⁹⁶²

Overall, 'The destruction of drinking water sources and infrastructure, as well as the decline in incomes, has forced Palestinians to turn to water sources of lesser quality to fulfil their domestic needs.'⁹⁶³ For example, interviewee 19 states that although he knows the quality of the water available is poor, 'It is the only available water and despite everything we use it...We are not sure what the quality of it is, as it is not tested', but they believe it to be contaminated: 'The water normally has a colour (red tinge or white cloudy), the network is old and rusty, cisterns are usually not clean, since the water collected is rainwater and on the ground and could be polluted. No chlorination is used to disinfect the water.'

On the whole, based on evidence from this study and more widely, water supplied to the West Bank Palestinian communities is not 'sufficient and safe for personal and

⁹⁶⁰ Center for Economic and Social Rights, 2003,p.5, p.32.

⁹⁶¹ For example see, B'Tselem, July 2001, p.9.

⁹⁶² PHG, 2004, p.65; UNEP, 2003, pp.76-87.

⁹⁶³ Center for Economic and Social Rights, 2003, p.5.

domestic use⁹⁶⁴ and access to adequate sanitation⁹⁶⁵ is not enjoyed by many. Moreover, Israeli policies have led to the deterioration of water quality and to the contamination of water whether deliberate or as a result of occupation policies restricting freedom of movement. In conclusion, the evidence points to a violation on the part of Israel, of the obligation to ensure safe quality of water is available for everyone to enjoy. Furthermore, measures to control and treat disease once present have not been taken and in fact, Palestinians' access to healthcare has also declined in the current Intifada.

(iv) Violations related to the lack of safe and accessible water: Health and Sanitation

The lack of mains network and the existence of only intermittent mains water supply, result in a reliance on unsafe water sources. The information gathered from this project indicates that those without mains supply of water are most at risk of health problems, as they have increased exposure to unclean water sources and dirty collection points, resulting in a higher risk of contamination. Moreover, they are more likely to suffer from water shortage leading to poor hygiene practices. As such, lack of physical and economic access is a major contributing factor in health problems related to water supply. Furthermore, the poor quality of much of the water consumed and used by the interviewees and by Palestinians throughout the West Bank, has far-reaching consequences for the health of the Palestinians in these communities. Bartram notes that it is a combination of lack of access to water and use of unsafe quality water that causes the most health problems, rather than the limited supply of

⁹⁶⁴ GC 15, para.37(a).

⁹⁶⁵ GC 15, para.37(i).

water.⁹⁶⁶ Moreover, the policy of closures results in the stagnation of waste and with little means to dispose of sewage and other health hazards, environmental risks of contamination of water are high. Because of these factors, related violations of the right to health are prevalent.⁹⁶⁷

Problems suffered are a result of several factors: consumption of contaminated or poor quality water, poor personal and environmental hygiene due to lack of access to water and insufficient water and inadequate sanitation. The consequences include *inter alia* intestinal and worm related illnesses, skin disease, infectious diseases and pneumonia.⁹⁶⁸ Interviewees in this study reported a range of health problems as a result of water related factors, particularly skin diseases and stomach complaints. Significantly, those especially affected by health problems were the young and women. Children are particularly vulnerable and in several of my case studies the families reported that their children suffered with skin diseases, asthma and stomach infections causing diarrhoea and vomiting. For example, Interviewee 11 believes his water is contaminated, as it smells bad and although the turbidity is clear it has moving things [creatures] in it. The children suffer from diarrhoea and stomach bugs due to [the] contaminated water and lack of hygiene due to water shortage: ‘The children are sick all the time and I have to take them for treatment. Although their illness is not serious, this is another economical and psychological burden.’ He adds that his 10 yr old girl is particularly vulnerable and suffers from stomach pains all the time. ‘Treatment at a doctor’s or health centre can cost between 10 and 15 US \$.’

⁹⁶⁶ Bartram and Howard, 2003, p.23 and pp.27-28.

⁹⁶⁷ For evidence of wider violations of the right to health related to water within the OPTs, see Center for Economic and Social Rights, 2003, pp.27-28; Oxfam, 2003, pp.27-28.

⁹⁶⁸ See UNICEF, Progress for Children - A Report Card on Water and Sanitation, No.5, UNICEF: New York, September 2006, p.4.

Interviewee 19 states:

One of my children, who is 4 years old, has asthma and he is still suffering from it [due to poor hygiene]. The children have diarrhoea and stomach problems most of the time. The shortage of water availability is affecting the hygiene situation in our house and we are not able to clean properly and continuously [...] In particular, our children and babies are suffering from the shortage in water quantities. Sometimes, but not always, we boil the water for babies as a preventative measure.

Many interviewees reported their children suffering from upset stomach, vomiting, diarrhoea and amoebic dysentery due to poor water quality.⁹⁶⁹ Furthermore, lack of water was reported as responsible for exacerbating existing allergies such as asthma and skin problems.⁹⁷⁰ In certain cases, the vulnerability of babies and children caused the families to take measures to try and prevent illness: The baby girl in the family is particularly vulnerable due to the water problems, ‘Some times I have to buy bottled water for her or boil the needed water.’⁹⁷¹ Although, interviewees testified that low income often meant they could not afford chlorine tablets or other water treatment measures:

[The] quality of the water is poor – dirty to sight and it tastes and smells bad. Rainwater from the cistern is contaminated due to the dusty air and unclean roof cistern. Also the tanker water is not clean at times as the tankers

⁹⁶⁹ See *inter alia*, Interviews, 4, 5, 10 and 25.

⁹⁷⁰ See *inter alia*, Interviews, 4 and 5.

⁹⁷¹ Interview 10.

themselves are unclean. We don't use chlorine tablets or any water treatment measures because of difficult financial conditions – low income.⁹⁷²

More severe health problems were also reported.⁹⁷³ Significantly in several cases from camp communities, interviewees reported their children suffering from amoebic infection which in serious cases they suspected had caused brain abscesses or similar. They believe this is caused by the contamination of the mains water supply from the open waste water in the camp. Interviewee 31 states that his children suffer from stomach bugs, diarrhoea and vomiting and stomach cramps. In addition, 'One of my children was affected with a serious disease in the head and the doctor assured us that it was related to the water (when the doctor examined the water he confirmed that the water was polluted). My child stayed in the hospital for ten days.' Likewise Interviewee 32 reported that one of her children had 'a serious disease in the head and had to stay in the hospital for two weeks (It causes a very bad fever) ...Several people in the neighbourhood were infected with the same disease in the head and everybody thinks it is related to the water.'⁹⁷⁴ Her family also suffer from stomach bugs and cramps, diarrhoea and amoeba.

Notably, both these families lived in Al'Aroub refugee camp, which has been documented within the WaSH report as liable to contamination of water due to open

⁹⁷² Interview 5. Similarly, Interviewee 25 states, 'Cisterns are not cleaned properly, and therefore, when we reach the bottom of the cistern we get water of dirty colour that tastes bad. No treatment or disinfection of the water takes place...Children are sick most of the time because of the unclean water. They always have stomach problems and throw up, but thank god they do not have any serious diseases'.

⁹⁷³ For example, kidney failure was noted as a common illness within the community due to use of polluted water from cisterns. See interview 9 where the Interviewee is a pharmacist. Also see Interviewee 28 reports kidney stones and Interviewee 37 kidney problems.

⁹⁷⁴ No further details were available to confirm the cause.

sewage channels.⁹⁷⁵ The contamination of water for consumption with wastewater is also documented in other camps, for example Al Duheisha camp, Bethlehem: ‘Sometimes it [water] has been polluted when it has been mixed with wastewater that flows in the camp.’ The interviewees say they usually notice a change in the taste and colour of the water when this happens. They suffer from stomach bugs causing, cramps, diarrhoea and vomiting and note that their children are particularly vulnerable and often ill.⁹⁷⁶

Rural interviewees also reported amoebic infection. For example, in Interview 26 the interviewee states that all the children have amoeba infection, as does the male head of the family. They are taking treatment for it, but the children and baby are particularly vulnerable, ‘We are forced to boil the water or buy bottled water to avoid illness.’ Even in urban areas, children were susceptible to illness from poor hygiene and contamination. Interviewee 15: ‘My children always suffer from the existence of germs, diarrhoea and stomach upset due to contamination. I have to take at least one of them to doctor each month. This leads to further deterioration of my economic situation.’

These testimonies illustrate the necessity for special measures to protect the right to water of vulnerable groups. Additionally, the importance of adequate sanitation as imperative to the realisation of the right to clean and sufficient water is evident. The connection between safe quality water and adequate sanitation is inextricable for the realisation of the right to water and elements of the right to health. Although

⁹⁷⁵ PHG, data on Al’Aroub community, 2003/2004 database, www.phg.org/campaign maps, tables and queries, Al Aroub community, community ID: 502530.

⁹⁷⁶ Interview 38. See also Interview 39.

sanitation was not specifically discussed during the interviews, as illustrated by the above testimonies, many interviewees did report problems with sanitation and waste disposal affecting their water supply. This only serves to reinforce the link between adequate, safe and accessible water and the provision of adequate sanitation. It is also worth noting that many of those interviewed lived in housing conditions and communities that were not adequate materially and were overcrowded. The consequence of these conditions is further hygiene problems and higher risk of disease.⁹⁷⁷ Changes in hygiene practices were noted in response to water shortage and inaccessibility: Interviewee 11 had taken the flush off his toilet to save water and B'Tselem reports that in the summer some [Palestinian] residents are only able to take one or two showers a week, which they take using a bucket, and that some residents improvise toilets outside, usually just a hole, to save water.⁹⁷⁸ Subsequently, these changes in hygiene practices due to lack of water availability, have led to violations of the right to health.⁹⁷⁹

Supporting evidence for these findings can be found in several larger scale studies including Oxfam's 'Forgotten Villages'⁹⁸⁰ and the PHG's WaSH Monitoring Project.⁹⁸¹ Oxfam reported that four out of ten households they interviewed reported an increase in the incidence of diarrhoea, due to use of unclean water from irrigation channels, and the last drops of water from cisterns. This meant scraping the bottom of cisterns where pathogens accumulate.⁹⁸² The PHG reported that the prevalence of

⁹⁷⁷ For example, Palestinian children living in overcrowded conditions suffer a higher rate of parasitic infections due to contamination of the environment. See Giacaman.R, Life and Health in Three Palestinian Villages, London: Icatha Press, 1988, p.131.

⁹⁷⁸ B'Tselem, July 2001, p.7.

⁹⁷⁹ Center for Economic and Social Rights, 2003, p.27.

⁹⁸⁰ Oxfam, 2002.

⁹⁸¹ PHG, 2004; 2005.

⁹⁸² Oxfam, 2002, p.27.

water-related diseases in Palestinian communities they surveyed was at least 41% (and many cases remain unreported due to the difficulties in gaining medical treatment).⁹⁸³

In conclusion, ‘The decline in the amount of water and the quality of water used by Palestinians has also led to violations of the right to health as poverty and the destruction and deterioration of infrastructure has forced communities to turn toward water sources of lesser quality.’⁹⁸⁴ Therefore, Israel is in breach of their obligations not only under the right to water but also under the related right to health as contained in Article 12, ICESCR.

(v) Violations of the principle of non-discrimination

In addition to the specific violations of the substantive content of the right to water, there is evidence of violations of the core obligation of non-discrimination in relation to the right of access to safe and sufficient water and in the distribution of water services. The GC provides that the right to water is enjoyed without discrimination and

proscribes any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which

⁹⁸³ In some cases the figure was even higher, for example in Rantis in Ramllah Governate the percentage of the population infected with water-related diseases was 64%. See PHG, 2004, pp.64-66.

⁹⁸⁴ Center for Economic and Social Rights, 2003, p.5.

has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water.⁹⁸⁵

It is clear that on a general basis among the interviewees, access to water is limited because of who they are. As evident from the discussion above, as members of a population under occupation they are discriminated against in relation to access to water,⁹⁸⁶ service level provision of water by the Israeli state and water company Mekorot and in terms of the quality of water available. Specifically interviewees talked of discrimination between themselves and Israeli settlers and discrimination between the Palestinians living in the OPTs and population of Israel itself.⁹⁸⁷

This discrimination has been noted more widely:

[The] Israeli policies ... apply to Palestinians but not to Jewish settlers living in the OPT, and therefore constitute blatant discrimination in terms of the right to water. The deliberate confiscation of resources from the Palestinian inhabitants of the OPT for use by Israeli Jewish citizens inside Israel and illegal Jewish settlers in the OPT, the differential prices that these populations pay for water, and the blatant non-recognition of the water needs of the Palestinians in the OPT (such as lack of water planning or investment in infrastructure) all provide further evidence of Israel's discriminatory policies.⁹⁸⁸

⁹⁸⁵ GC 15, para.13. See also para 14, 37(b) and 37(e).

⁹⁸⁶ See accessibility section, p.280.

⁹⁸⁷ For example see Case 1 who claimed that more water was supplied to settlements and also continuous supply of water. Also see previous examples cited pp.275-277, including note 900.

⁹⁸⁸ Center for Economic and Social Rights, 2003, p.23.

Furthermore, the GC 15 provides that the state must ‘ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups.’⁹⁸⁹ Obviously Israel is in breach of this provision. Concerning such vulnerable groups, the General Comment notes that, ‘States have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities’.⁹⁹⁰ Moreover, states ‘should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees.’⁹⁹¹

As noted previously, the negative health effects of the Israeli water policies and actions are greatest among the Palestinian interviewees’ children.⁹⁹² Overall, 17 of the interviewees stated that their children suffered health problems because of lack of water or limited access to water or through consumption of contaminated water. Palestinian children have been reported to suffer from diseases caused by contaminated water and poor sanitation, the major killers being gastroenteritis, summer diarrhoea, respiratory diseases and malnutrition.⁹⁹³ Furthermore, malnutrition in Palestinian children has been linked to a lack of access to piped water.⁹⁹⁴

⁹⁸⁹ GC 15, para.37 (b).

⁹⁹⁰ GC 15, para.15.

⁹⁹¹ GC 15, para. 16.

⁹⁹² See p.297.

⁹⁹³ Union of Palestinian Medical Relief Committees (UPMRC), quoted in Young, E, ‘A Feminist Politics of Health Care: The Case of Palestinian Women under Israeli Occupation, 1979-82’, in Mayer, T, (ed) *Women and the Israeli Occupation (The Politics of Change)*, 1994, pp.179-198 at p.181.

⁹⁹⁴ A study at Birzeit University found a 41% rate of malnutrition in three Palestinian villages studied and the lack of piped water was a major cause. ‘Children from households with no running water had the highest rate of malnutrition.’ Moreover, internal toilets made the matter worse due to the lack of water to sustain their working order and maintain sanitary conditions. See Giacaman, 1988, pp.125-126.

Another vulnerable group disproportionately affected by the water problems outlined are women. Although this was not reflected within the interviews carried out in this study, this may have been because the majority of the interviews were carried out with the male head of the households. Certain aspects were reported, such as the responsibility women and female children had for collection of water: Family 19 got 5% of their water from rainwater gathered in a communal ground cistern. The women and girls of the community collect the water from the cistern on foot. It usually takes them about 2 hours to collect the water. Sometimes they use animals to transport water to the community. 'As you know, we are Bedouins and live by raising livestock that consume a lot of water, which we have to bring from other places. During summer time, women have to walk more than 3 Kilometres to get the needed water [from the communal cisterns].' Similarly, interviewees 18 and 20 stated that the women and girls are responsible for collecting water from communal cisterns and from a local spring, on foot (taking a minimum of 30 minutes).

However, in one case male members of the family collected the water: In this case, the family are dependent upon rainwater collected in communal cisterns for 70% of their supply and tanker water for 30%. They travel 2km within the boundaries of their own community to communal cisterns and 6km to Al Samou' community and 12km to Yatta community to the filling point for tankers.⁹⁹⁵ It may be that water was always collected by tractor or tanker (driven by the men) or it could be due to the dangers faced in collecting the water, that the men undertook this job.⁹⁹⁶ It would seem

⁹⁹⁵ Interview 22.

⁹⁹⁶ As in this case (No.22) the Interviewee reported threats to physical security: Sometimes the only available access to wells is through secondary dirt roads. These roads are often closed by settlers, who

however, that this case is an exception though and that the responsibility for collection of water usually falls to the women of the family.

This disproportionate burden women bear in collection of water and the associated problem of children being deprived of schooling due to water collection are noted in the GC 15.⁹⁹⁷ Furthermore, Giacaman's study of Palestinian women in the West Bank offers supporting evidence illustrating the role of Palestinian women in collecting water. For example, it details the case of a young woman whose husband is in prison and who is suffering hardship as her family own no arable land and she cannot afford sufficient food or water. Her mother in law takes charge of the family life due to the indigenous kinship structure and sends the woman to collect water for four to five hours a day. Her daughter accompanies her to help and thus she starts to miss school. This results in physical (carrying water long distances) and emotional stress for both the woman and child.⁹⁹⁸

Moreover, under the effects of the occupation and denial of access to resources and healthcare,⁹⁹⁹ women carry the responsibility for teaching children how to manage limited water and for caring for children disproportionately affected by water related disease, under unsanitary conditions.¹⁰⁰⁰ The particular impact of water shortage on

prevent us [the Palestinians] from passing through to collect the required water. 'Israeli soldiers at checkpoints stopped us for more than an hour whilst we were trying to get water to our house. This was in 2003. The soldiers were pointing their guns at us all the time we were stopped'.

⁹⁹⁷ GC 15, para.16 (a) and (b).

⁹⁹⁸ See Giacaman, 1988, pp.80-81.

⁹⁹⁹ See Cervenak. C, 'Promoting Inequality: Gender-Based Discrimination in UNRWA's Approach to Palestinian Refugee Status', Human Rights Quarterly, Vol. 16, No.2. pp. 300-361, May 1994. Also, Charlesworth. H, 'International Human Rights Law: Prospects and Problems for Palestinian Women', in Bowen, 1997, pp. 79-91 at p.89.

¹⁰⁰⁰ For a discussion of Palestinian women and water see Young, in Mayer, 1994, pp.179-198; Giacaman, 1988; Chinkin. C, 'The Potential and Pitfalls of the Right to Self-Determination for Women' in Bowen, 1997, pp 93-117 and Kuttab. E and Bargouti. R, The Impact Of Armed Conflict On Palestinian Women, Study prepared for the United Nations Development Fund for Women and the

Palestinian women in the OPTs has been studied. For example, in a *Discussion Paper on The Integration of Gender into Oxfam GB Jerusalem's Water Programme*, Oxfam noted that,

In most homes women are the water managers and are thus responsible for obtaining water, cleaning it when necessary and making decisions about water use. Women are therefore bearing the increased cost of tankered water, which requires them to engage in income generating activities for the first time or sell off jewellery and possessions. Many women are forced to borrow money and are incurring increasing debts. Women also must bear the increased time needed to provide water for the household as they travel longer distances to access water from springs and spend more time filtering and boiling the spring water which is of a lower quality. Finally, women are making the decisions on how to use increasingly limited water supplies. In some areas this has resulted in bathing children less. Often women's small scale production activities suffer - they may have to sell land and livestock to purchase water, or have to sell off livestock when they can no longer afford to give them water to drink.¹⁰⁰¹

Furthermore, women are economising on essential food and water, in an effort to make money go further, thus exacerbating existing poverty and worsening the health of women and children in particular.¹⁰⁰² This illustrates clearly the knock on effects

United Nations Development Programme/Programme of Assistance to the Palestinian People, April 2002.

¹⁰⁰¹ Oxfam quoted in Center For Economic And Social Rights, 2003, p.28. Also, Oxfam, 2002, pp.11-13.

¹⁰⁰² Oxfam, 2002, pp.11-13.

and interrelated problems that Palestinian women living under occupation face when their right to water is violated.

4.4 The Right to Water and the Right to Self-determination over Natural Resources

Finally, one unexpected and significant finding from the interviews was the widely held view that realisation of the right to water was not possible for the Palestinians in the West Bank, without ownership and control of both the water resources and the land. Consequently, many of the interviewees felt that until the occupation ends and the Palestinians have control over their borders and territory, their human rights cannot be fulfilled. Clearly, self-determination is important to the people interviewed and their lack of self-determination is seen as an obstacle to the realisation of all their human rights. Furthermore, it clearly illustrates the link between the right to water and the right to self-determination over land and natural resources.¹⁰⁰³ Moreover, it begs the question of whether the Palestinian right to water can be realised without self-determination.¹⁰⁰⁴ However, that is not to say that measures cannot be taken to improve their situation immediately, rather that the full scope and core of the right to water cannot be a reality without control and management of the water resources and

¹⁰⁰³ For further reading on occupation and permanent sovereignty over natural resources, see: Scobbie in Bowen, 1997, pp. 221-290. Also see UN General Assembly Resolution A/RES/60/183, 'Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources', 31 January 2006; UN Economic and Social Council, Resolution 2005/51, 'Economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and the Arab population in the occupied Syrian Golan,' E/2005/SR.40, 27 July 2005.

¹⁰⁰⁴ The question of what form self-determination should take is outside of the scope of this thesis and obviously open to debate. Further reading on self-determination see Summers. J, Peoples and International Law – How Nationalism and Self-Determination Shape a Contemporary Law of Nations, London: Martinus Nijhoff, forthcoming 2007; Summers. J, 'The Right to Self-Determination and Nationalism in International Law' in International Journal on Minority and Group Rights, Vol.12, No.4, 2005, pp.325-354 and on self-determination in the OPTs see Bowen. Stephen, (ed) Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories, Martinus Nijhoff / Kluwer Law International: London, 1997.

as such freedom from occupation. In fact, conversely, the lack of self-determination over resources highlights the need to take optimum action to ensure that at a very minimum the core of the right to water is implemented without delay.

4.5 Violations of the Right to Water under International Humanitarian Law

It is important to note that due to the existence of the occupation, the violations of the right to water documented can also be viewed in many cases as breaches of applicable international humanitarian law, as discussed in Chapter 3. The correlation between the provisions under international humanitarian law and the provisions under international human rights law, concerning the right to water are noted by the UN CESCR in GC 15 who state that ‘during armed conflicts, emergency situations and natural disasters, the right to water embraces those obligations by which States parties are bound under international humanitarian law [...] ensuring that civilians, [...] have access to adequate water.’¹⁰⁰⁵

Violations of water availability and accessibility are correlative to a breach of Article 55 to ensure adequate food supplies to the occupied population. Furthermore, under the said article the occupying power (Israel) is limited to utilizing the resources of the occupied area for military necessity and then only if the needs of the occupied population have been taken into account. Clearly the drilling of wells in the OPT to supply water to the Israeli settlements and the inequitable supply of mains water to these settlements, at the expense of water supply to the Palestinian communities, contravene international humanitarian law.

¹⁰⁰⁵ GC 15, para.22. Original footnote omitted.

In particular, deliberate attacks upon both those trying to access water and upon the water infrastructure are in breach of Additional Protocol Article 54(2) which prohibits attacks on, destruction or removal of, or rendering useless, drinking water installations and supplies for any motive.¹⁰⁰⁶ Evidently, this provision has been breached regularly, as interviewees have reported damage to and destruction of water tankers, cisterns, wells and pipelines. Furthermore the security policies of closure and curfew have further prevented water access and prevented free passage of relief and aid including water. This is in contravention of Articles 23, 59, 60, 61 and 62 under Geneva Convention IV.¹⁰⁰⁷

Israel justifies their policies of occupation including expropriation, closure and military attacks as necessary for 'security'.¹⁰⁰⁸ However, in his visit to the OPTs in August 2002, the UN Special Rapporteur to the OPT reported, 'It is necessary to ask whether the measures resorted to by Israel, particularly curfews and closures, always serve a security need. Often they appear so disproportionate, so remote from the interests of security, that one is led to ask whether they are not in part designed to punish, humiliate and subjugate the Palestinian people. Israel's legitimate security needs must be balanced against the legitimate humanitarian needs of the Palestinian people [...] it appears that there is no such balance. Human rights have been sacrificed to security.'¹⁰⁰⁹

¹⁰⁰⁶ See also Geneva Convention IV, Article 53.

¹⁰⁰⁷ See Chapter 3, Section 3.5, p.175.

¹⁰⁰⁸ Center For Economic And Social Rights, 2003, p.5.

¹⁰⁰⁹ Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, A/57/366/Add.1, 16 September 2002, para.4.

Finally, the principle of non-discrimination is enshrined in humanitarian law as well as international human rights law. Article 27 of the Fourth Geneva Convention of 1949, prohibits discrimination between the civilian population and citizens of the occupying power, particularly on the grounds of ‘race, religion or political opinion.’ It is clear both from the evidence of the interviews and more widely documented data¹⁰¹⁰ that Israel continues to discriminate on the basis of national identity, religion and ethnicity in terms of the provision of and access to water services.

4.6 Concluding Remarks

The aim of this case study was to examine ongoing and unique water problems faced by Palestinians living in the OPTs. Moreover I wanted to establish whether these problems constituted violations of the right to water and what the nature of such violations might be. Furthermore, the methodology employed involved using a violations approach to analysis of the findings alongside a framework of core obligations as laid out in the GC 15. The usefulness of this design proved successful and data gathered from interviews is informative and in-depth but allows for comparison due to the semi-structured questions used.

Subsequently, having analysed and presented the interview material gathered in the field, it is evident that violations of all substantive elements of the right to water have taken place amongst the interviewees in this study. The testimonies gathered illustrate problems in terms of realisation of the substantive elements of the right to water as

¹⁰¹⁰ For example see See B’Tselem, September 1998, p.18, citing records from the Water Departments of Hebron and Bethlehem showing that Mekorot supplied these Palestinian towns with half as much water during the summer than in the winter, because of increased water needs of Israelis and settlers.

well as raising issues of discrimination and highlighting vulnerable groups, who most often bear the brunt of the violations, in particular Palestinian women and children. There is also evidence of related rights being under threat including most prominently the right to health.

As previously noted, to establish that Israel are responsible for these violations of the Palestinians right to water, Israel's state policy and practice must be shown to be in breach of their obligations concerning the right to water under the ICESCR, particularly their core obligations, which cannot be derogated from at any time. The evidence presented from the case study testimonies clearly demonstrates that this is the case.

Table 4.2 overleaf¹⁰¹¹ summarises the nature of the violations documented, in relation to the relevant core obligations. If we look at the table, it is evident that Israel has not complied with its core obligations in these individual cases, in relation to availability, accessibility and quality of water, water strategy and management or in relation to those concerning the wider principles of non-discrimination and help for vulnerable groups.

In terms of the distribution of the violations reported, they take place across all the types of communities involved in the research. Most families are subject to violations of one of more elements of the right to water but it is evident that sufficiency of supply remains a particular problem for all communities, rural, camps and urban. These findings illustrate that violations of the right to water are not confined to

¹⁰¹¹ See pp.314-315.

underdeveloped rural areas or the overcrowded living conditions of camps but are widespread.

Even in family homes with mains connections the limited supply they receive results in further detrimental effects. Although the effects of limited supply are felt most deeply during the summer months, this is because needs are necessarily greater and there is little rain water or spring water to rely on.

Discrimination in distribution of water between Palestinians and Israeli settlers was frequently reported. In addition discrimination was noted between Palestinians and Israelis in Israel itself. Notably, interviewees also complained of discrimination within Palestinian communities, citing that Palestinians in wealthier areas received more water. There was a strong feeling amongst the interviewees that discrimination was at the core of their water problems and not scarcity of water itself.

The interviewees that reported the most widespread violations of the right were those families living in rural villages, due to lack of mains access and the subsequent associated problems, such as reliance on poor quality sources causing danger to health. However, many families across all three types of communities reported health problems, again due to reliance on non-mains water, either through consumption of contaminated water from tankers and cisterns or through poor hygiene due to limited water. These problems are compounded by inadequate sanitation provision including contamination of water by open cesspits and sewers. This is especially a problem within the refugee camps.

Table 4.2

Violations in relation to Core Obligations of the Right to Water

Key Element	Core Obligation	How violated / breached (case study evidence)
Availability	To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;	Availability threatened at all times, Supply sufficient for most Interviewees' personal consumption but not for maintaining adequate health and hygiene
Physical Accessibility	<p>To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets; to avoid prohibitive waiting times; and that are at a reasonable distance from the household;</p> <p>To ensure personal security is not threatened when having to physically access to water;</p> <p>To ensure equitable distribution of all available water facilities and services</p>	<p>Interviewees often do not have safe physical access to water due to closures and curfews and incursions; lack of mains network and intermittent mains supply; access limited to unsafe communal sources</p> <p>Water is not distributed equitably between Palestinian communities and Israeli communities</p>
Economic Accessibility	To adopt relatively low-cost targeted water programs to protect vulnerable and marginalized groups	Many interviewees rely on expensive tanker water, especially during the summer

Key Element	Core Obligation	How violated / breached (using case study evidence)
Quality	To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease; To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation;	Interviewees rely on communal sources of untreated water: rainwater, dirty water from tanks, springs, communal filling points, wells and open cisterns During incursions and closures waste cannot be removed. There is inadequate sanitation due to lack of water
Non-discrimination and Vulnerable groups	To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;	Israeli settlers are favoured over Palestinian communities. No special measures for Palestinian children in schools. Women and children suffer the most as home makers and water collectors
Water Strategy and Management	To adopt and implement a national water strategy and plan of action addressing the whole population... the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups	No existing plan or strategy that includes the OPTs, as Israel administers the OPTs and Israel separately. Therefore they do not account for the Palestinians in their water plans, even though Israel control all water sources

In addition, it is evident that in some circumstances, the problems encountered and reported in these interviews constitute breaches of international humanitarian law as well as violations of the right to water under international human rights law. This is especially true of those violations reported as a result of actions by the Israeli Defence Forces, Israeli settlers and as a result of occupation policies, such as closures, curfews

and incursions. The significance of the fact that both doctrines of law can be used as a basis for establishing violations will be further discussed in the concluding chapter. However, it is important to note that this body of law bears particular importance to the Palestinians interviewed as the application of these provisions under humanitarian law are unequivocal.

Significantly, the study found that many interviewees held the view that their right to water could not be realised without self-determination over both water resources and land. The interviewees felt strongly about this issue and as such it is clear that wider political solutions to the overall conflict need to be found in order that the full scope of the right is implemented. Meanwhile, a rights-based approach can assist in the enjoyment of the minimum core elements of the right thus alleviating some of the most serious problems. Although realisation of the core content of the right to water cannot be seen as a long-term solution to the Israeli violations of the Palestinians' right to water, it is a way to ensure immediate and fundamental measures are implemented to alleviate suffering and prevent further violations in the interim period, in the absence of a political solution and end to the occupation.

In sum, Israel has failed to implement the minimum standard of the right [to water] 'which is within its powers to meet.'¹⁰¹² Therefore, a case could be brought against Israel for violations of the Palestinians right to water, both as individual cases and/or as a collective group or community.¹⁰¹³ However, the question remains as to where

¹⁰¹² Maastricht Guidelines 1997, para.15 (i).

¹⁰¹³ A case could be established on a group or communal basis, as in the precedent set by the case of the unrecognised Arab villages in the Naqab v Israel for access to water (H.C. 3586/01, The Regional Council for the Unrecognised Villages in the Naqab, et. al. v. The Minister of National Infrastructure,

remedy can be sought. This is a crucial and substantial issue of which the scope and depth cannot be given full justice within the limits of the current thesis. Suffice to say that as established in Chapter 3 there currently exist no domestic legal provisions that provide for a human right to water under domestic law applicable to the Palestinians within the OPTs. As such, this must constitute the starting point for any strengthening of implementation of the right at domestic level. The Palestinian Water Law and / or the Constitution could be amended. However, to give optimum human rights protection, some extensive human rights legislation needs to be adopted, encompassing the protections provided for in the international covenants. Unfortunately, without an end to the occupation and the subsequent realisation of an independent Palestinian state, it is difficult to envisage any real progress or improvement in the domestic legal system.

Furthermore, internationally, Israel must be pressurised to comply with their immediate obligations and must be held accountable for their violations under international law, whether that be humanitarian law or human rights law. Although international human rights law offers protection for the Palestinians in all these cases, the parallel application of humanitarian law is crucial in ensuring that there are no gaps in provision and especially for breaches as a result of military actions.

Limited remedy can be found through the continuation of monitoring and reporting through the CESCR which is crucial to assessing the threats to and violations of the

et. al). Despite this case being brought under Israeli law, it offers supporting evidence of Israel's discrimination regarding a right to water and guidance on how to go about building a case, although mechanisms of international human rights and humanitarian law would be the only applicable provisions.

right to water in the OPTs and more widely all economic and social rights.¹⁰¹⁴ Moreover the reports and work of other UN bodies¹⁰¹⁵ continue to be imperative in maintaining a picture of the human rights situation in the OPTs.

To conclude, it seems that something is lacking in the protection of the right to water in the West Bank, as this case study has clearly illustrated. What remains to be established is whether this lack of protection is a consequence of the particular context or whether there are wider implications for the right to water in other contexts. The concluding chapter addresses these questions.

¹⁰¹⁴ Further discussion of the strengthening of international mechanisms for the right to water in general can be seen in the concluding chapter.

¹⁰¹⁵ Such as, the General Assembly, other UN human rights bodies and Special Rapporteurs, UNRWA, UNEP and UNDP and NGOs.

Chapter 5

Where do we go from here?

Conclusions and Recommendations for developing the Right to Water

5.1. Answering the Research Questions – Some Concluding Remarks

International human rights bodies have concluded that a right to water already constitutes an integral part of recognised human rights provisions. However, despite the existence of a human right to water, as this thesis has made clear, the nature of the provisions concerning the right are in the main implicit and at worst ambiguous. As a consequence of the lack of explicit codification regarding the right to water within the ICESCR (and limited provision within the CRC and CEDAW) the status of the right in international human rights law is uncertain and amounts to a gap in human rights provisions. Furthermore, this lack of clarity regarding the right is compounded by its relationship with other economic and social rights, of which it has been seen as a constitutive element, such as health, housing and food. Paradoxically, as has been illustrated, the right to water can be viewed as a derivative right – an element of these economic and social rights.

As a result of an analysis of the status of the right, it has also become evident that the normative content of the right is problematic. Despite recent developments, in particular the adoption of GC 15, the scope and core content of the right to water are poorly defined and there exist weaknesses in provision, for example, in relation to sanitation. On the other hand, in spite of these limitations, GC 15 has developed the

legal standing of right to water and contains a workable framework for the general substantive content.

The particular strength of GC 15 is in the provisions for states parties' obligations. The analysis of these provisions and the wider context in which they have developed has illustrated that states parties' obligations concerning the right to water are comprehensive, incorporating the accepted tripartite typology of obligations and providing clear guidance for state parties. The provisions successfully incorporate extensive obligations regarding domestic implementation. Furthermore other approaches to water from development and environmental fields are also encompassed within several obligations. In addition, a further strength of the GC is the inclusion of recent developments in the understanding of the breadth of obligations as duties to be bound by, not just within national borders but extra-territorially. Conversely, the lack of detailed obligations concerning non-state parties is a weakness to be addressed.

It has been argued in this thesis that to assess the effectiveness of the legal provisions for the right to water at the international level, these legal norms had to be applied to a case study, to evaluate the protection they offer in a particular context. The case study in the OPTs (West Bank) necessarily involved examining provisions for a right to water under international humanitarian law, as the body of law applicable to a situation of occupation, in addition to those provisions determined under international human rights law.

It is clear from this examination that there is a right to water under humanitarian law, in particular the Geneva Conventions and their Additional Protocols and that these provisions relate either to specific groups of people, for example prisoners of war, or provide for a basic level of protection afforded to civilians generally. These latter provisions are limited to essential aspects of the right required for survival. The content of the provisions is therefore necessarily limited; however, these provisions are imperative as they provide protection for the core elements of the right to water. In addition many provisions can be applied as customary rules of international law and as such their application is unequivocal and cannot be derogated from. Furthermore, it has been established that this is especially important in relation to the specific context of the Israeli - Palestinian conflict, as Israel deny their responsibility for application of international human rights standards to the OPTs.

Unfortunately, the threshold that would need to be breached in order to establish a violation of many of these provisions is high and could only be enabled when violations are of an extremely serious nature where, it could be proved that one's right to life is endangered through military actions.

The analysis of the bilateral peace agreements between Israel and the PLO showed that the water rights of the Palestinian people are collectively acknowledged within Article 40 of Interim Agreement. Under this provision, the Israeli state recognises the water rights of the Palestinian people. However, as highlighted, 'water rights' is a generic term and cannot be seen to be the same as recognition of an individual human right to water.¹⁰¹⁶ Significantly, it does recognise a collective right to water of the

¹⁰¹⁶ See Introduction, p.3, note 8.

Palestinians as a people and although the scope of this provision cannot be seen as including the substantive content of the human right to water, it is a supportive legal clause for a claim to such a right, if and when the final status negotiations take place.

More specifically concerning the domestic law applicable to the right to water in the case study, the research has revealed that under the complex and varying national laws there are no provisions for a human right to water and limited provisions concerning economic and social rights generally. Provisions under both the Palestinian and Israeli basic laws amount to general proclamations of human rights standards and neither system provides specifically for the right to water. In addition the complexity of the system results in ineffectiveness and lack of legal redress. This is further compounded by the imposition of the Israeli Civil Military Administration laws (Israeli Military Orders), which effectively override pre-existing laws concerning water. In sum, on assessment the domestic legal system has little to offer regarding protection of a right to water for Palestinians in the OPTs.

The remaining critical task of the thesis was to apply the legal norms concerning the right to water to a case study in the OPTs to assess the enjoyment of the right 'on the ground'. As specified this was carried out using a violations and core obligations approach. The findings have provided detailed information concerning the ongoing lack of enjoyment of the right within the sampled Palestinian communities of the West Bank. Violations of all core elements of the right to water have been established, with discrimination as central to the violations reported and vulnerable groups including women, children and the Bedouin tribes being particularly affected. Threats to the enjoyment of related rights, was also evident, in particular lack of enjoyment of

the right to health. The pertinent question remains, why have these violations' taken place? Is it as a result of weak legal provisions concerning the right, or as a consequence of occupation measures?

5.2 Conclusions and Recommendations concerning the Right to Water in the OPTs (West Bank)

In conclusion I would argue that it is as a result of both of these things. In theory a case could be brought against Israel for violations of the Palestinians right to water, both as individual cases and/or as a collective group or community. However, the provisions regarding the right are non-existent at domestic level and due to the occupation the enforceability of international provisions is very difficult. The right exists in theory but is not realised in practice: As several interviewees said, the right seems to exist only on paper.¹⁰¹⁷

The primary concern then is what can be done to remedy the current situation with regards to the right to water and in the absence of a political solution to the conflict. There are several steps which can be taken to improve the conditions: Concrete measures must be taken immediately to implement the core elements of the right to water. In relation to availability, Israel must ensure continuous supply of sufficient water to Palestinian communities connected to the water network, including supply to municipalities for local management. They must stop discrimination in supply and quantity of water received between Palestinians and Jewish settlers and take action against any settlers who tamper with existing water sources. Settlers should also be

¹⁰¹⁷ Interviews 5, 22, 25 and 36.

prevented from threatening or attacking Palestinians trying to access water, thus allowing them safe access.

In relation to accessibility, Israeli forces must cease all attacks on water infrastructure, and building demolitions, which result in damage to the water infrastructure (wells, pumps, pipelines and roof-tanks and cisterns). Any attempt to injure or kill Palestinians collecting water must cease. Freedom of movement and immediate access must be given to those supplying water tankers and to those trying to carry out repairs to water infrastructure. Water must be affordable to all Palestinians. Therefore there must be an end to the policy of closures, enabling freedom of movement for people and goods and therefore aiding economic development, giving access to employment and services, thus lowering costs and increasing economic assets.

Concerning water quality, Israel must ensure that deliberate contamination of Palestinian water supplies, both by settlers and Israeli forces and by industrial dumping of waste is stopped. Israel must also ensure supply as listed under availability as shortage of water causes poor hygiene, causing potential for contamination of water. Furthermore, this would end reliance on poor quality sources. Maintenance and repairs of the water infrastructure must be allowed to take place to prevent contamination and adequate sanitation must be ensured. Waste disposal must not interfere with water supplies.

In addition to these immediate practical measures, Israel must be held to account for their actions or omissions concerning enjoyment of the right under both international human rights law and humanitarian law, using established mechanisms for remedy.

Under human rights law, treaty monitoring bodies must continue to pressurise Israel to comply with their monitoring obligations and include information concerning all areas under their jurisdiction and effective control, as well as all sectors of society. As noted in Chapter 3, the CESCR have strongly condemned Israel's refusal to report on the economic, social and cultural rights in the occupied territories. However, there is a need for a more vigorous approach to be taken by other committees both in regard to Israel but also concerning compliance with the right to water generally under the relevant treaty provisions.

Furthermore, there is a responsibility on the part of other states parties to the ICESCR and to the Geneva Conventions and Additional Protocols, to address the continuing denial of Israel to comply with their obligations to realise the enjoyment of the right to water under both treaties. As a part of their international obligations under the ICESCR Article 2, other state parties are obliged to assist Israel in realising this right. Furthermore, under Common Article 1 of the Geneva Conventions and Additional Protocols, the international community have an obligation to ensure that Israel complies with its obligations under the treaty. Similarly, states within the Middle East region, with appropriate international assistance could work to strengthen provisions and remedies under a regional human rights mechanism such as the Arab Charter on Human Rights 2004.¹⁰¹⁸

The work of local and international NGOs is also imperative in assisting individuals and groups in seeking remedy for violations of the right to water through whatever means are possible. Advocates are essential to document and report violations, as well

¹⁰¹⁸ See Introduction, p.39 regarding this treaty and related procedure.

as offering advice and assistance to those who are victims of violations of the right to water.¹⁰¹⁹

Actions are also required on the part of the Palestinian Authority. As the recognised government of the Palestinian people they have a moral obligation to do whatever is within their means to realise the right to water for their people, including *inter alia* ensuring equitable distribution, as far as is possible, of whatever water is available. Codification of the right to water is necessary at domestic level if the right to water is to be implemented effectively. With this in mind, assistance and advice should be offered to the PA on how to develop and strengthen their legal system, to increase human rights protection in the OPTs and with a view to independence.¹⁰²⁰

Furthermore, as an integral part of the development of the domestic legal provisions for a right to water, the limited but useful provision pertaining to water rights under Article 40 of the Oslo II agreement should be considered (as well as Article 40 in its entirety). It may be that this clause allows for possible renegotiation of water provisions contained in the Interim Agreement overall, as part of the final status agreement or completely new provisions under a new government. New negotiations

¹⁰¹⁹ How best to seek remedy is discussed further under general recommendations, Section 5.3, p.327.

¹⁰²⁰ In 1998 the PA with the help of international governments, created a Negotiations Support Unit (as a part of the Negotiations Affairs Department) including a Legal & Policy Department, which has three objectives: to strengthen and refine existing Palestinian negotiation positions; to develop new positions where no policy previously existed and to contribute to interim initiatives intended either to lead Palestine and Israel out of the current political crisis and towards resumption of permanent status negotiations or to minimize the damage inflicted by continuing Israeli actions on the likelihood of a fair and sustainable outcome to permanent status negotiations. The Department provides advice on the permanent status issues (security, settlements, Jerusalem, refugees, borders and water), as well as other issues (economic relations, compensation, agriculture, tourism, health, transport, energy, telecommunications and archaeology).

See http://www.nad-plo.org/view_area_page.php?view=nav_about-us

At the current time the author was unable to clarify whether there were any plans regarding human rights provisions for water.

may also offer an opportunity for the Palestinians to codify the human right to water within a bilateral agreement to be subsequently enshrined within domestic law.

In the long-term, the key event necessary for the realisation of the full scope of the right to water in the OPTs is an end to the occupation by Israel and self-determination over water resources and land for the Palestinian people. Ending the occupation is the first step to enabling optimum realisation of all human rights.¹⁰²¹ Only then can the Palestinian Authority begin to build infrastructure and foster a social and legal environment which positively embraces international human rights standards.

5.3 Wider conclusions and recommendations

Overall, the application of a rights-based approach to the water problems of the Palestinians has succeeded in bringing a new perspective to the conflict. However, what are the lessons for the wider application of the right to water in other contexts?

This question is an issue which requires more research and merits further study. There are though several insights which can be gained from this research:

There is a need to clarify the legal status of the right to water by clearly defining the scope and core content and through determining how the substantive content of the right relates to other related economic and social rights. In the interim, the right to water is always subject to being deemed a constitutive and or derivative right and not a fully independent human right to be realised. Core obligations need to be elucidated to avoid confusion and gaps in provision. Furthermore, there is a need to address the existing gap in provision to ensure adequate sanitation. Adequate sanitation is an

¹⁰²¹ For an interesting discussion on human rights post occupation see Alnajjar, G, 'Human Rights in a Crisis Situation: The Case of Kuwait after Occupation' in *HRQ*, Vol.23, No.1, 2001, pp.188-209.

essential prerequisite without which the right to water cannot be fully realised. For this reason, sanitation should be included within the core content of the right to water, with correlative core obligations. In addition the development and strengthening of obligations of non-state actors concerning the right to water demands attention, although this is a part of a wider debate and evolution within obligations correlative to economic and social rights.

To enable the above actions to take place, the question that must be answered is how best to strengthen the existing provisions and mechanisms and how to further develop the right's status within international human rights law? In the first instance existing mechanisms for legal remedy can be developed. Within international law the definition of what constitutes remedy is more flexible and broad than in domestic law and refers to mechanisms other than courts. If there is a procedure and end result then it can be viewed as a remedy. For example state reporting and concluding observations under a treaty monitoring body can be seen as a remedy. Therefore, at international level, treaty monitoring bodies, in particular the CESCR, but also the CRC and CEDAW and newly formed Committee on Rights of Persons with Disabilities, should continue monitoring of violations through the state parties reporting mechanism (inclusive of NGO reports) and the production of concluding observations (use of violations approach). Further they should ensure that the right to water is included in reports in a comprehensive manner.

In addition the indicators and benchmarks system used by the CESCR should continue as a means to measure progressive realisation of the wider scope of the right to water. Further research concerning the development of indicators to measure

implementation of the right to water has shown that more extensive use of qualitative data which assesses national laws, policy environment and institutions can be especially useful as a basis for human rights indicators.¹⁰²²

Similarly, the Special Rapporteur on the right to health has noted the usefulness of a human rights based approach to indicators: that is using existing indicators for a particular right but disaggregating the data to show any discrimination and supplementing this data with other indicators essential to human rights, for example those which monitor participation and accountability.¹⁰²³ Both these approaches illustrate that by expanding the focus of indicators and moving away from a narrow concern with statistical data, detailed and more useful information can be obtained, resulting in a clearer picture of the enjoyment of the right in a particular context.

Secondly, under Special Procedures there should be continued pressure from Thematic and Country Rapporteurs by means of research comprising reports, country visits and promotion of the right to water internationally. There has also been a call to expand current measures under special procedures to include creation of a mandate for a UN Special Rapporteur on the Right to Water.¹⁰²⁴ This call has resulted in a decision by the Human Rights Council to mandate the OHCHR to undertake a 'detailed study on the scope and content of the relevant human rights obligations

¹⁰²² See Roaf, Khalfan and Langford, 2005.

¹⁰²³ Hunt, 3 March 2006, paras.22-61, pp.7-15.

¹⁰²⁴ An international group of NGOs at the World Water Forum in Mexico 2006 called for a formal declaration/resolution by the HR Council and the appointment of a Special Rapporteur on the right to water.

related to equitable access to safe drinking water and sanitation under international human rights instruments', to be submitted in Sept 2007.¹⁰²⁵

Initiatives could be taken which increase possibilities for protection of the right to water through expansion of those bodies eligible to become parties to new treaties with relevant provisions (extending obligations to non-state entities). For example, the newly adopted UN Convention and Optional Protocol on the Rights of Persons with Disabilities 2006¹⁰²⁶ which provides for a right to water under Article 28 Adequate Standard of Living is open for signature and ratification by non-state parties. However, these non-state parties are limited to 'regional integration organisations' under Article 44.¹⁰²⁷ Despite this limitation clause, the treaty may set precedence for ratification of other new treaties by non-state actors of organisational type, such as the Organisation of Arab States or by an international administration as in Hong Kong or Kosovo, or even perhaps an elected body such as the Palestinian Authority. This would then allow the parties to be bound by the provisions and obligations regarding the right and allow them access to the monitoring and complaints mechanisms.¹⁰²⁸

An interesting related development is the acceptance of reports for consideration by human rights treaty monitoring bodies from non-state bodies. For example, the HRC

¹⁰²⁵ See UN Human Rights Council Decision 2/104, Human Rights and access to water, 27 Nov 2006, 31st meeting.

¹⁰²⁶ UNGA A/61/611, 6 Dec 2006. Open for signature at UNHQ 30 March 2007.

¹⁰²⁷ For example the EU intends to sign and was part of an ad hoc committee established to draft the convention. (GA Resolution 56/168, 19 Dec 2001).

¹⁰²⁸ See Article 34 state parties reporting and Optional Protocol providing for an individual complaints procedure. Notably, if the PA were to become a party to the ICESCR it may have negative consequences for the enjoyment of rights, as Israel would be relieved of any obligations under the Covenant regarding the territories over which they occupy and would remain the occupying force with power and effective control. Therefore, in the case of the OPTs it may be more beneficial for the PA to submit a parallel report to the CESCR, similar to those of NGOs.

considered a report by the UN interim administration in Kosovo, UNMIK¹⁰²⁹ and also by the Special Administrative Region of the Peoples Republic of China on Hong Kong.¹⁰³⁰ Therefore in practice the CESCR could consider a report on the OPTs by the Palestinian Authority, even if in theory they are not a party to the Covenant.¹⁰³¹ Again, this would enable non-state parties' access to remedy for violations of the right to water.¹⁰³²

In terms of new developments at international level for increasing the status and protections for the right to water, there are several options open to investigation: An Optional Protocol for a complaints procedure under the ICESCR is currently being considered and the previously established working group has recently had its mandate extended by the Human Rights Council, in order to elaborate and draft the Optional Protocol, taking into account all views expressed during the working group sessions and subsequently using this first draft as a basis for further negotiations.¹⁰³³ This protocol could enable individual and collective complaints and include an inquiry procedure for gross and/or systematic violations.¹⁰³⁴ Thus it would strengthen procedure for redress when violations of the right to water, as well as other economic

¹⁰²⁹ UNMIK was established under Sec Council Res 1244, 1999. See UNMIK Report, CCPR/C/UNK/1 13 March 2006 and Concluding Observations of the HRC, CCPR/C/UNK/CO/1, 14 Aug 2006.

¹⁰³⁰ See report, CCPR/C/HKG/2005/2, 3 March 2005 and Concluding Observations of the CCPR, CCPR/C/HKG/CO/2, 21 April 2006.

¹⁰³¹ The UNMIK administration had authority by means of Security Council resolution. This may be one way in which authority could be given to a body to report under the CESCR, for example in case of a Palestinian administration to report.

¹⁰³² This would also allow them to submit a complaint to the committee under the new optional protocol even if not a legal party to the covenant.

¹⁰³³ See Human Rights Council Resolution 2006/3 Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights, 21st meeting, 29 June 2006.

¹⁰³⁴ For further details regarding the proposed form and content of the optional protocol see Commission on Human Rights, Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its Third session, E/CN.4/2006/47, 14th March 2006; Commission on Human Rights, Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its First session, E/CN.4/2004/44, 15th March 2004; Arambulo, 1999.

and social rights under the Covenant, have occurred. The disadvantage with this mechanism however, is that ratification of the protocol would be optional. As Riedel notes, there is a need to balance the objective of universal ratification and the integrity of the Covenant.¹⁰³⁵ Moreover, ratification by states parties would be seen as mutually beneficial and in discussions of the working group most states parties would seem to be in favour of adopting some form of the protocol.

There has also been an argument for completely new provisions at international level, to explicitly codify the right under a new 'Water Treaty' encompassing several approaches – water as a human right, water under humanitarian law, water as a development goal and water as provided for under international environmental law.¹⁰³⁶ Although it would be unusual for an entire treaty to be dedicated to codifying one particular (economic and social) right, the CAT has demonstrated that this approach can be utilised successfully. Furthermore, water is the subject of several international treaties, all with varying approaches and focuses to water, thus a new water treaty would complement these existing provisions. Moreover, by incorporating the various approaches that have developed over time, it would be comprehensive covering water from many angles to provide optimum protection and provision.

Moving away from measures to be taken at international level, a key method to improve the realisation of the right to water generally is implementation at domestic

¹⁰³⁵ Commission on Human Rights, Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its Third session, 2006, para.40.

¹⁰³⁶ See Green Cross International, the International Secretariat for Water and the Maghreb-Machrek Alliance for Water, Fundamental Principles For A Framework Convention On The Right To Water, May 2005, at <http://www.watertreaty.org/convention.php> accessed 11 Nov 2006; Friends of the Right to Water, Key Principles for an International Treaty on the Right to Water, Draft Work in Progress for Consultation and Revision, Friends of the Right to Water (including COHRE, FIAN and Brot für die Welt), 14 April 2005.

level. It is evident from the case study undertaken that despite provisions for the right to water under international human rights law, these provisions are difficult to enforce without supporting domestic legislation. By enshrining the right to water within national law, people gain access to remedies under a judicial system and states are held accountable for their actions or omissions.

As noted in the introductory chapter, several states have enshrined a right to water within their national law, either within their constitution or as part of domestic legislation. This has led to the developing jurisprudence of the right within national courts, often with positive outcomes and effective remedy. For example three cases have been tabled in South Africa, two concerning unlawful disconnections of water supply and one in relation to the right to housing. These have been brought under both the Constitution and the National Water Services Act.¹⁰³⁷ Cases have been heard in Argentina and Brazil under *inter alia* constitutional sources, although neither constitution contains an explicit provision for the right to water. In the case of Argentina, the court also referred to the water provisions of the CRC.¹⁰³⁸ In the Brazilian case, the vulnerability of the petitioners was central to the outcome of the case.¹⁰³⁹ Significantly, cases have also been brought under the right to life, as

¹⁰³⁷ See *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council, High Court of South Africa* (Witwatersrand Local Division), Case No: 01/12312, 2001; *Highveldridge Residents Concerned Party v. Highveldridge Transitional Local Council and Others*, Transvaal Provincial Division, Case No. 28521/2001, 17 May 2002 and *Government of the Republic of South Africa and others v. Grootboom and others*, 2001 (1) SA 46 (CC), South African Constitutional Court. For a discussion of these cases see COHRE, 2003, pp. 117-126; Kok. A and Langford. M, 'The Right to Water', in Brand. D and Heyns. C, (eds) *Socio-Economic Rights in South Africa*, Pretoria: Pretoria University Law Press, 2005, pp.191-208 at p.203.

¹⁰³⁸ *Valentina Norte Colony, Defensoría de Menores N° 3 c/Poder Ejecutivo Municipal s/acción de amparo*. Expte. 46-99. Acuerdo 5 del Tribunal Superior de Justicia. Neuquen, Argentina, 2nd March 1999. See COHRE, 2003, pp.113.

¹⁰³⁹ Bill of Review 0208625-3, Special Jurisdiction Appellate Court, Paraná, Brazil. See COHRE, 2003, p.115.

contained in Article 21 of the Indian Constitution.¹⁰⁴⁰ In India, the courts have considered many aspects of economic and social rights as within their jurisdiction.

In all cases listed the decision was found in favour of the petitioners and their right to water. This illustrates the strength of domestic implementation in realising the right to water and consequently helping to eradicate conditions of poverty and empowering those living in such situations.

Furthermore, a database of legal cases relating to the right to water could be established which, would act as a central mechanism for building up a picture of jurisprudence concerning the right, as this remains disparate and in its infancy.¹⁰⁴¹

In relation to the right to water in times of conflict, there is a need to continue and develop further research investigating the parallel application of human rights law and international humanitarian law in conflict situations of all kinds.¹⁰⁴² However, there is a particular need for detailed examination of the law as it applies to occupation. There is very little information available concerning economic and social rights enjoyment under occupation and case material is limited to the occupation of Kuwait by Iraq¹⁰⁴³ and the Israeli Palestinian case.¹⁰⁴⁴ What is evident both from this research

¹⁰⁴⁰ See various cases, COHRE, 2003, pp.115-117; FIAN, 2005, pp.10-11.

¹⁰⁴¹ This idea was tabled in relation to all economic and social rights by Michael Windfuhr (Brot für die Welt) at the IntHRON Launch Day, 18 Jan 2006, Lancaster.

¹⁰⁴² Most recently see the UN study by UN Special Rapporteurs following the war in Lebanon in 2006, which deals with the relationship between these two areas of law in the context of *inter alia* economic and social rights during conflict: Kalin et al, 2006. Also on the need to move beyond the acceptance of the application of human rights in times of armed conflict and focus on the challenges in the parallel application of human rights law and humanitarian law see Lubell, 2005.

¹⁰⁴³ See Kalin, W, Human Rights in Times of Occupation: The Case Of Kuwait, Law Books In Europe, 1994. Also regarding economic and social rights during conflict see Kalin et al, 2006.

¹⁰⁴⁴ In regard to the recent occupation of Iraq by American and British forces, there is very little material available to date on the enjoyment of economic and social rights. However, limited brief reports are emerging from the field, for example the Government of Iraq/UNICEF 2007-2010 Country

and from that of Kalin in regard to Kuwait is ‘the great importance of [economic and] social rights in times of occupation as frequent and deliberate violations of these rights constitutes part of the oppression of the local population.’¹⁰⁴⁵ Furthermore, this research has illustrated that the application of international humanitarian law is not enough to ensure protection of the right to water and related economic and social rights under occupation and that the more comprehensive provision for the human right to water contained within international human rights law is required in order to ensure protection of the right.

Conversely, despite the fact that provisions under international humanitarian law are limited in their scope, this does not detract from their importance in the protection of basic water for survival of civilians during occupation. Hence, the key to realisation of the right to water during occupation is the parallel application of both sets of provisions under these doctrines, those under international human rights law and those under international humanitarian law. Furthermore, as Kalin notes, ‘the case of occupied Kuwait, has evidenced that a cumulative application of human rights and humanitarian law is both feasible and meaningful.’¹⁰⁴⁶ This system will provide the optimum protection of the right, through reinforcing provisions under humanitarian law through human rights law and vice versa, as well as allowing for interpretation of

Programme Action Plan states that only 32% of Iraqis have access to drinking water (in UN Assistance Mission for Iraq, Human Rights Report, 1 January -31 March 2007, p.20). WHO also note that 70% of Iraqis lack access to regular clean water and 80% lack adequate sanitation (in WHO, ‘Violence threatens health in Iraq’, Press Release, 17 April 2007. See also ICRC, Civilians Without Protection, The ever-worsening humanitarian crisis in Iraq, 11th April 2007, p.11; UNICEF, ‘Lack of safe water endangers the health of Baghdad’s most deprived children’, Press Release, 21 March 2007.

¹⁰⁴⁵ Kalin, W, 1994, p.17. For details of violations of economic and social rights in occupied Kuwait see Report on the situation of human rights in Kuwait under Iraqi occupation, prepared by Mr Walter Kalin, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1991/67, 16 January 1992, E/CN.4/1992/26, para.185-235, pp.49-58.

¹⁰⁴⁶ Kalin, W, 1994, p.27; Kalin et al, 2006, para. 16 ; Lubell, 2005, p.737-738 and p.752.

one set of laws in light of the other.¹⁰⁴⁷ In addition, to ensure continuing integrated application of these two areas of law, adoption of hard law combining both approaches would be beneficial. For example, this ‘convergence’ approach has already been recognised in the Turku Declaration or Declaration of Minimum Humanitarian Standards.¹⁰⁴⁸

In terms of remedy under international humanitarian law, there is no mechanism by which individual complaints can be heard. Remedy for breaches of international humanitarian law is in the form of state v state compensation. This process is lengthy and would do little to alleviate the immediate suffering of those whose right to water had been violated. Neither would it strengthen the protection of their rights in the longer term. Hence the redress offered under humanitarian law is more suited to settlement when the ongoing occupation has ceased, perhaps as part of a peace deal.¹⁰⁴⁹ Consequently, for the interviewees in this study it holds little hope for remedy of the situation in relation to their right to water at present. Therefore, the importance of the application of provisions under human rights law cannot be

¹⁰⁴⁷ Kalin, W, 1994, p.27.

¹⁰⁴⁸ Adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, in Turku/Åbo, Finland, 30 November-2 December 1990. This approach was called for in light of the perceived deficiencies with the two fields of law to protect individuals adequately and resulted in the drafting of new norms including provisions prohibiting deliberate deprivation of access to food, drinking water and medicine, as well as requiring that adequate shelter, hygiene, health safety and nutrition to displaced populations. However, in regard to the right to water it encompasses only brief provisions relating to drinking water. For further information regarding the provisions and approach of the Turku Declaration see Rosas, A and Sandvik-Nylund, M, ‘Armed Conflicts’ Chapter 22 in Eide et al, 2001, pp.407-421; Provost, R, International Human Rights and Humanitarian Law, Cambridge: Cambridge University Press, 2002; Meron, T, ‘On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument’ in American Journal of International Law, 1983, 77, pp.589-606; Meron, T, Human Rights in Internal Strife: Their International Protection, Cambridge: CUP, 1987, p.28 and UN Secretary General, SG Report on Minimum Humanitarian Standards, E/CN.4/1998/97.

¹⁰⁴⁹ For example see the duty of Iraq to compensate victims of human rights violations from the occupation of Kuwait, through the UN Compensation Fund and Commission, under Security Council Resolution 687, 3 April 1991. See also Resolution 674, 29 Oct 1990, stressing Iraq’s liability.

overstated as it also offers the potential for individual redress for violations of the right.

Finally in relation to the limitations of this thesis, this research was focused upon the right to water of civilians under occupation. Further clarification of the right to water of all those within the context of conflict is required. This wider research would examine the right to water as it pertains to prisoners of war, combatants and other groups as well as studying a variety of conflicts of high intensity and of an international and non-international nature.

To conclude, the evolution of thinking about water problems has resulted in various approaches to tackling issues of water shortage and lack of access to clean and sufficient water. From international water law, to development and environmental perspectives, all of these ideas, whether embodied in hard law or soft law have assisted in the promotion of the idea that water should be available for all human beings at a level to sustain life and ensure human dignity. The particular benefit of the human rights approach to water and sanitation is its capacity for empowering individuals and communities, particularly for the most vulnerable in society, as the demand for fulfilment of their water needs become legal entitlements. Furthermore the legal framework it provides allows for redress for breaches of these obligations. As such, the recent focus upon a human right to water is an important and significant development.

However, although much has already been achieved in the codification and standards produced concerning the human right to water, this study has clearly determined that

the current provisions for the right to water are insufficient. This issue requires further research to promote the legal standing of the right as an independent right and ensure the most comprehensive provisions are codified within the law. In addition, much can be done to improve the current situation by implementing advances in remedy for economic and social rights as a whole. There is a need for further research, both academic and by those in practice but there are tangible measures that can be taken now to ensure accessible, safe and sufficient water for all.

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Appendix

1

Interview Schedule

Water Use in the West Bank and the Human Right to Water

A Research Study

By

Amanda Cahill. BA (Hons), PGCE, LLM.

Interview Schedule for Individuals

Many thanks for agreeing to participate in this research study and thank you for your time.

Please answer all questions as fully as possible, giving details and experiences in full wherever possible

All responses will be anonymous and treated with the up most confidentiality.

Thank you

Please return to:

**Amanda Cahill,
Lancaster University Law School,
Lonsdale College,
Lancaster LA1 4YL,
UK**

**Or email to
a.cahill@lancaster.ac.uk**

Interview Schedule for Individuals

General Information

Please tick the applicable:

I live in a

Camp

Rural village

Urban area (Large town / city)

I live in the area of: (Please state name of camp, village or town and area)

(NB. Type of dwelling and time taken for interview was also noted following conversation with the researcher)

Please state the number of people in your household:

Adult –male:

Adult – female:

Child – male:

Child –female:

Baby – male:

Baby –female:

Elderly – male:

Elderly – female:

Relevant Additional Information:

Part I – Everyday Water Use

Availability

1. Do you have sufficient water for personal use?

(Personal hygiene, sanitation)

2. Do you have sufficient water for domestic use?

(Food preparation, household hygiene)

3. a) Do you have sufficient water for drinking?

b) If not, does this cause you and / or your family health problems? Dehydration, thirst etc. If your answer is yes, explain any problems you do suffer with.

4. How much water do you use daily? (Please specify in litres and state how many people this has to be shared between). Alternatively state amount of water in litres per person.

5. a) Does your water supply vary according to the time of year / seasons?

b) If so, when and how?

6. Do you worry about sustainability of water sources for your children and future generations?

Quality

1. Is the water that you get clean [to sight]?

2. Is the water you get acceptable in colour, taste and smell for personal use?

3. a) Is the water you get free from contamination?

b) If not, do you know how it is contaminated and at what point it becomes contaminated?

Accessibility

1. Is the same water equally accessible to everyone where you live?

2. Is the water you get within safe physical reach?

3. Is your water from: (Please tick all those applicable)

A mains tap in your home

A communal tap where you live

A tap outside of your village / camp/ town

Groundwater from a spring, stream, river, lake – specify which and how far away and whether seasonal

Groundwater from a well – specify where and distance away and whether seasonal

Rainwater collected in a roof-tank

Tanker water (purchased)

Bottled water (purchased)

Other – please specify

If you use a combination of sources please list to what extent you are reliant on each source.

4. How far do you have to go to access water? Please state in Kilometres and how long it takes to get there.

5. Who collects the water for your family? (Please tick all those applicable)

Women

Female Children

Male children

Men

6. How do you collect your water if you have to travel to get it? On foot, by cart, by car?

7. Is your access to water ever denied by: (Please tick all those applicable and state how often it happens). If you can give any examples with dates please do.

Checkpoints

Roadblocks

Incursions and high intensity fighting

Curfew

7. a) Is your personal safety ever endangered due to collecting water?

b) If yes, how and why?

8. a) If you have mains water supply in your home, are you ever disconnected from the mains water supply?

b) If yes, how often and do you know why?

9. a) Do you have to pay for water?

b) If so, how much? (per litre)

10. Is this affordable to you?

11. Does this price limit the amount of water you can purchase and use?

12. a) Do you feel that lack of water or limited access to water or contaminated water causes you and your family any problems?

b) If so, what are these problems and how do you think they might be remedied?

13. Do you or your family, suffer from any health problems due to lack of water or poor quality water?

14. Is anyone in your family particularly vulnerable due to water problems? For example babies, older people?

15. Please tell me any particular experiences, views and stories regarding water that you would like to share.

Part II – A Human Right to Water

1. a) Do you think there is discrimination concerning water in the West Bank?

b) If yes, please state how and why?

2. Have you heard of human rights?

3. Did you know that there is a human right within international law to safe and sufficient water?

4. What do you understand by this?

5. Do you think that human rights law can help to realise your water needs?

6. Do you think it would it make a difference if the human right to water was a part of national law as well as international law?

7. a) Do you think your right to water is being threatened or violated?

b) If so how?

Many thanks for your time and effort

Appendix

2

Maps

West Bank and Gaza



Legend

— International Boundary	— Road
- - - Armistice Demarcation Line	☪ Lake & Sea
- · - · Boundary of former Palestine Mandate	● Town and District

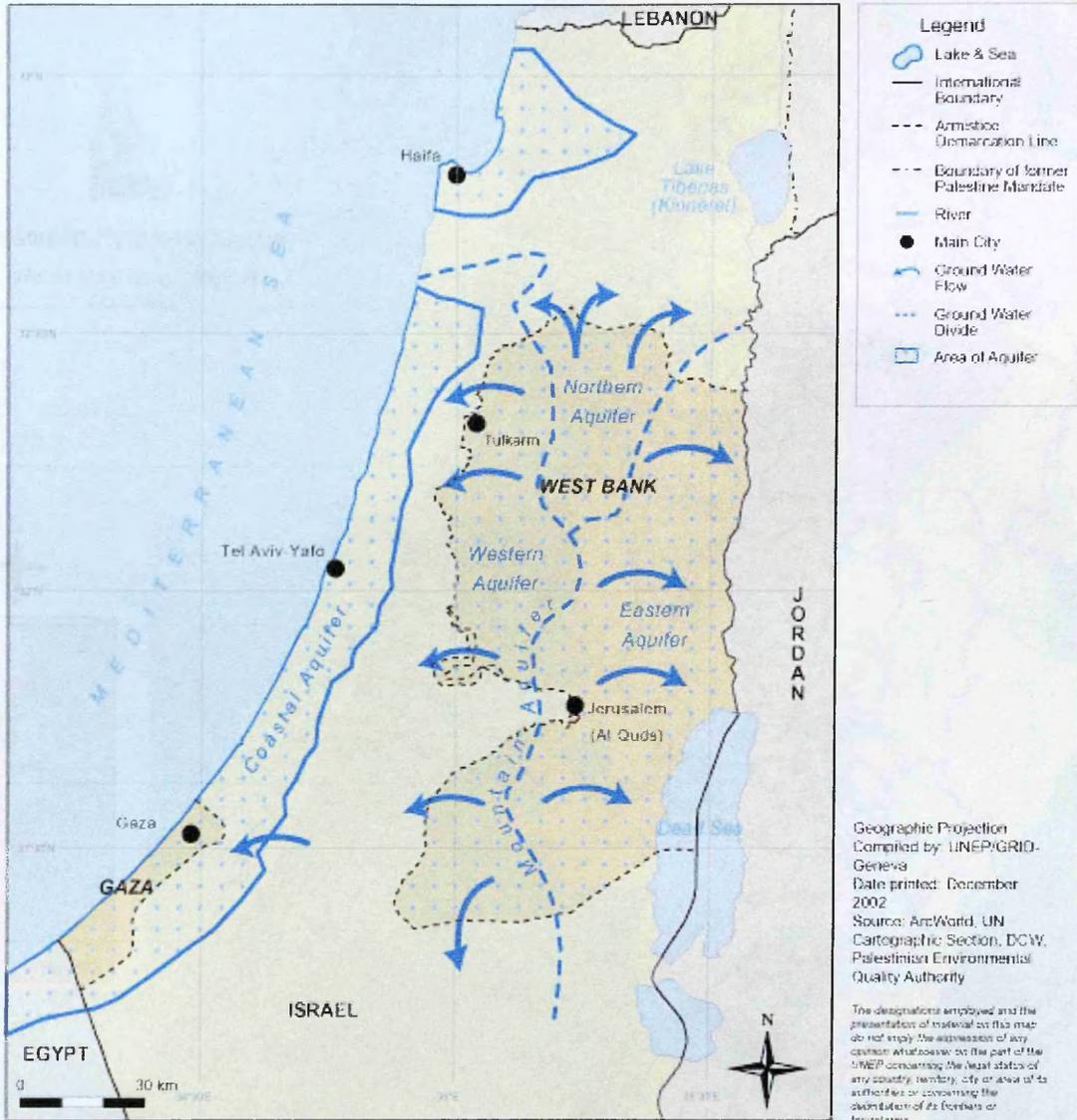
Geographic Projection
Compiled by: UNEP/CRIID-Geneva
Date printed: December 2002
Source: ArcWorld, UN Cartographic Section, DCW

The designations employed and the presentation of material on this map do not imply the expression of any opinion whatsoever on the part of the UNEP concerning the legal status of any country, territory, city or area or its authorities or concerning the delineation of its frontiers or boundaries.

Map A

(Reproduced from UNEP, see details above)

Mountain and Coastal Aquifers



Map B

(Reproduced from UNEP, see details above)

Map C Sample Communities



Palestinian Hydrology Group
 WaSH Monitoring Program
 April 2007



LEGEND

Sample Communities:	● Urban	▣ Rural	▲ Camp
∩ Separation wall	∩ Bypass Roads	● Israeli well	□ North Eastern Basin
■ Coastal Basin	■ Jordan Basin	□ Western Basin	□ Eastern Basin
■ Dead Sea Basin	■ Kinneret Basin	■ Negev Basin	■ Karmel Basin