

The Human(ised) Right to Water and its limits: the case of Israel-Palestine.

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Abstract

International Human Rights Law (IHRL) is often touted as a champion of justice. My research questions this proposition by analysing the discursive and legal implications of IHRL's application within a greater system of international law and in context of the Israeli-Palestinian water conflict. The research analyses provisions offered under the Human Right (HR) to water in light of other relevant bodies of international law and finds that Palestinian water rights are further limited. IHRL, based on humanised needs, facilitates a legally-compliant threshold that is used by hydro-hegemony to *limit* rights and legitimise breaches. The call for equal water rights, envisioned through the lens of the State, thereby compromises collective water rights and results in abstract rights-balancing that distort the imbalance of occupied people. Moreover, with HR the role of agriculture in water consumption is overlooked and thus water rights are further limited. The research therefore highlights the issue of sovereignty over resources and demonstrates some problems relating to international legal fragmentation. Lastly, in order to analyse the power that underlies law, the research examines the Israeli- Palestinian negotiations process and finds that legal claims are "knocked off the table". Thus it concludes that HR discourses and international legal structures become part of the problem rather than the solution and should be deployed with awareness of their limitations.

Keywords: the human right to water; legal fragmentation, Israeli- Palestinian conflict.

1. Introduction

International Human Rights Law (IHRL) is a body of international law claimed by activists, scholars and civil society members who seek justice against many forms of oppression around the world. This research aims to challenge the position of IHRL as a champion of justice by analysing the discursive implications of its application in the context of a greater system of international law. The research specifically questions the proposition that the notion of a Human Right (HR) to water enhances water rights protection when it is used to support claims in international conflicts, and therefore applied along others international laws that govern war and water. It finds that instead IHRL often serves a strong tool

for hydro-hegemony - those actors who in the water context maintain power and dominate processes and outcomes - to *limit* water rights.

There are several issues that arise in the deployment of abstract rights, which consequently lead to further limiting legal claims. Specifically in the case of water, HR language that protects a certain level of human water *needs*, consequently projects the protection of a 'humanitarian minimum' required. By so doing, the HR discourse facilitates a legally-compliant minimal threshold, as indeed standardised by the World Health Organisation at 20 litres a day per capita. However, such threshold, it is argued, is used by hydro-hegemony to maintain a water supply level at (just) above humanitarian crisis. Additionally, IHRL is based on the notion of equal rights to all, derived from the premise of their humanity. The significance of the abstract nature of HR in the context of water conflicts is that IHRL de-contextualises legal claims from the very situation that necessitates their invocation, that is, conflict. Legally, this means abstracting rights from the laws of war as well as 'equating' what are in the international legal system fundamentally imbalanced rights.

Moreover, *vis-à-vis* the HR to water, the role of agriculture in water consumption is overlooked; in this way water rights are again further distorted. In turn, through this individual right which is envisioned through the lens of the State, whilst applied to a situation of war and occupation, the issue of sovereignty is brought to the surface. That is to say, the question on the role of the administration of both the services of water supplies domestically and the management of water resources nationally, gives rise to the issue of the sovereignty over that water. In this way, collective water rights – what could be understood as self-determination over one's natural resources – are compromised. As a result, it is suggested that by and large water rights are further limited rather than further protected with the deployment of IHRL.

The research begins with a brief overview of IHRL provisions and follows with the international legal bodies relevant to water conflicts, scoped in relation to the Israeli-Palestinian case; International Water Law (IWL) and International Humanitarian Law (IHL). It then examines the above tensions and the role of HR discourses in the Israeli-Palestinian conflict. Attention is given to the role of IHRL in the process of water negotiations in order to understand legal outcomes in light of the political process. Specifically in this case study, the Declaration of Principles on Interim Self-Government Arrangements (DOP) signed between Israel and the PLO in 1993-5 (also known as the Oslo peace process) as well as current legal positions are analysed, in an effort to expose the law's underlying hegemonic character. Notable power asymmetry means legal battles are won by the hydro-hegemon who can "knock them off the table" (Bateh, 2014) and thus the law is used as a tool for achieving political goals. Thus for water, as this research seeks to demonstrate, IHRL discourses and international legal structures become part of the problem rather than the solution they aim to be.

2. Methodology

The choice of Israel-Palestine as a case study is due to the unique character of Palestine as a semi-state (having achieved a non-member state observer status in the UN) under

Israeli occupation, whereby its legal position as an equal actor in the international playing field remains limited and gives rise to questions regarding with whom do legal duties rest for the fulfilment of water rights. Since this paper hopes to shed light on the tensions that arise with the deployment of IHRL in context of conflict, the case is one where the use of HR had been explicitly called upon and where the tensions with sovereignty are most apparent. Finally, the case of Palestine's occupation is one where larger issues of legal fragmentation and challenges in applicability of water law can be more clearly exposed.

Water rights for the purpose of this investigation are understood as both agricultural and for domestic consumption. The focus on water rights in Palestine has predominantly been around the household use in order to meet social needs of individuals (Amnesty International, 2009; B'tselem, 1998; Cahill-Ripley, 2011; Isaac & Shuval, 1994), only consequently discussing agricultural requirements. The imperative to protect the human need for water is not being challenged here. However, it is highlighted that agriculture is **the** prime consumer of water (about 90% of all water use) reflecting the 'big water', or 'food-water' (Allan, 2011). Moreover, in weaker economies, such as the case of Palestine, it is often vital for people's individual livelihoods as well as for national economy (Freijjat, 2003; Nasser, 2003; Tmeizeh, 2004).

This research examines primary legal sources on the HR to water; the legal positions of Israel and of the Palestinian Authority (PA) and secondary literature on water rights generally and in Israel-Palestine. In analysing the application of IHRL as (one) body of international law, the research reviews IHRL's premise against and along other water law regimes, and therefore its consequent implications in the greater international legal system. The research assumes the following:

- The existence of the HR to water as recognised by the United Nations General Assembly (UNGA, 2010) or derived from the Rights to Food, Adequate Standard of Living, Housing and Health (ICESCR, 1966). The extent of the HR to water is not discussed, rather the discursive implication of it in the context of its international legal framework.
- The applicability of IHRL in times of war and specifically to occupation, including the Occupied Palestinian Territories, principally following the determination on the matter by the International Court of Justice Advisory Opinion (2004) and the European Court of Human Rights (ECHR, 2011).
- The applicability of IHRL rule-specific obligations in Palestine (as they are de-facto denied by Israel).
- That law and politics are inseparable and underlined by power (Miéville, 2004).

3. A Human Rights regime

IHRL is a body of international law that extends rights to individuals to be enforced by states that have the obligation to *protect*, *respect* and *fulfil* those rights (Crawford, 2012). The human rights regime is underscored by key treaties, to which the majority of UN member states are party. Where an "Optional Protocol" to a treaty has been ratified by states,

individuals are able to bring a complaint against a state party alleging a violation of treaty rights to the relevant ‘treaty body’ (Biglino & Golay, 2013). However, as a result of issues of implementation related also to their state-centric character, rights are often unenforceable, and implementation rests on pressure from third party states through sanctions and shaming (Gopalan & Fuller, 2014).

The HR to water is not expressly recognised in the key treaties; however there is growing recognition of the right by both the international community and authoritative human rights bodies which represent the foundation for which human rights arguments and language is rooted. In 2010, the HR to water right was formally recognized by the UN General Assembly, constituting soft law. The prime authority for the human right to water can be found in General Comment 15, adopted in 2002 by the UN Committee on Economic, Social and Cultural Rights (CESCR, 2003). General Comment 15 most significantly provides that “the human right to water is indispensable for leading a life in human dignity. It is a *prerequisite for the realization of other human rights*” (emphasis added). Although General Comment 15 is not legally binding, the instrument nevertheless provides an authoritative avenue for the HR to water through other, legally binding human rights. Specifically, General Comment 15 argues that the right to water is binding under the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) under the right to an adequate standard of living (article 11) and the right to health (article 12). In examining such legal paradigms, the discursive effects of the HR to water will be analysed below.

In addition, the HR to water has also been considered an extraterritorial right, applied outside the territories of a state, including in situations of occupations. Thus, although human rights apply only to a state and its citizens, General Comment 15 nevertheless provides that a state should not deprive another state of its capacity to guarantee the right to water of its residents (see also Coomans, 2011) and furthermore, that it is obliged to protect this right where it has effective control. The extraterritorial application of IHRL is an ongoing debate which is not the focus of analysis in this paper (see Cahill-Ripley, 2010 for more on the HR to water in particular). Nonetheless, it is important to note that activists and scholars alike explicitly deploy the HR to water in order to reinforce water rights claims in the context of international water conflicts. This implies the need to understand the role of IHRL if merely as a discursive tool for achieving water justice.

4. Parallel streams never converge (unless diverted)

Having given an overview of the legal paradigm for IHRL in relation to the HR to water, the following sections will briefly introduce the broader legal framework that applies to the Israeli-Palestinian case study. The two additional bodies of law that will be reviewed are IWL, the international legal mechanism governing transboundary water management, and IHL, the body of law governing laws of war and occupation. These legal regimes and their water rights provisions are scoped in relation to the case study; in this way they provide an insight to larger issues of international legal fragmentation and the tensions that arise when IHRL as a body of law is applied along others.

4.1. IWL

IWL can be understood similarly to IHRL, where the individual right of a human is extrapolated to the prime (international) legal personality: the state. Like her, the state has its own right to water and each is presumed a balanced affair mostly prescribed in ‘peace-time’. IWL as a notion has discursive parallels to IHRL that result in similar implications of applying different bodies of international law that often contradict.

The two key principles for international watercourse management are the ‘obligation not to cause significant harm’ and the equitable-share principles. They are based on the Helsinki Rules on the Uses of the Waters of International Rivers (1966) and on the Convention on the Law of Non-Navigational Uses of the International Watercourses (UN Watercourses Convention, 1997). The equitable-share principle is a guideline drawing on non-exhaustive factors which are deliberately ambiguous and abstract (Wolf, 1998). Claims over different aspects of the principle are to be negotiated, the process itself being an obligation. The elements are set out as such in order that they fit into different contexts. In Israeli-Palestinian negotiations, claims generally take or hold the following form:

1. **Current/prior-use.** Based on this criterion, Israel calculates 83% of the mountain aquifer due to abstraction levels from 1950’s (B’tselem, 1998) and persistently claims it to justify distribution (Isaac & Shuval, 1994). Further, Israeli scholars claim that prior-use should be prioritised over potential use (Benvenisti, 1996).
2. **Natural characteristic.** On this basis, Palestinians calculate 80-90% of the Mountain Aquifer as it rests under West Bank territory. Israel objects this position on the grounds that this would exacerbate its water scarcity protected under this framework (Water Authority, State of Israel, 2009).
3. **Social/economic needs.** Israel claims that only when the prioritised household needs are met, water shall be allocated to economic purposes (*ibid*).
4. **Access to alternatives.** National claims should be balanced such that if one sovereign can access alternative water resources- through importing, treatment of sewage, desalination or more (all of which are available to Israel) - it should compromise claims from the shared resource (B’tselem, 1998).

Additionally, the prevention of harm provides that deliberate harmful action against another riparian is unlawful and if any harm is inflicted it must be compensated for. This element holds the potential to compensate for damage caused to Palestine through the occupation. However, for this to take place compensation should be ‘calculated’ separate of, and with greater weight to the principle of equitable-share. In close look, Article 7(2) of the UN Watercourses Convention provides that riparian states ‘*take all measures . . . where appropriate, to discuss the question of compensation*’ (emphasis added). Not only is the obligation minimal, not resting any actual actions upon those who cause harm, but as this case demonstrates it can also result in overlooking current wrongs. Since direct harm is already taking place, it is striking that water negotiations compromise rights, whereby the perquisite of negotiations and “good faith” are already in violation. This framework, it is argued, undermines its own legal underpinning.

4.2. IHL

IHL is broadly understood to be the regime of international law governing wars, seeking to regulate the violence exercised by parties in international belligerent conflict. This is predominantly described in the Fourth Geneva Convention (IVGC) and the Fourth Hague Regulations (The Hague). IHL directly regulates the situation of occupation which in itself therefore is not illegal; however IHL generally limits the power exercised by the occupying forces. With regards to water rights, the law of occupation is particularly set to safeguard the needs of the occupied population under a special category of 'protected persons'. Additionally, it seeks to protect property rights as captured in the 'usufruct principle'. This protection includes limiting the use of local resources by the occupying power for its own benefit.

Water under international law is understood as both private and public properties and each is governed by different rules; although water's 'type' is debated (Cassese, 1992). Under The Hague Article 43 the occupying force has the duty to respect and preserve existing laws in the occupied territories. In Palestine, water wells are generally considered private property under both IHL and Jordanian law (Abouali, 1998; Dichter, 1994) even if owned by municipalities (Koek, 2013), but water resources are generally considered immovable public property (Cassese, 1992; Dichter, 1994; Scobbie, 1997). Nonetheless, through military orders, Israel declares them state property (Dichter, 1994). As a result, the theory and practice present a legal trap. In the West Bank de-facto, Israel's military administration applies its orders, de-jure given effect through the DOP (1995).

The prohibition on the destruction of property not for a military objective under the IVGC (Article 53) is central to property protection. Intended to be a temporary administrator, an occupying force is subject to both enjoyments of and restrictions on the exploitation of natural resources as public properties. Though it may use local resources, the occupying force is restricted from depleting their wealth, especially for the force's own economic benefit (Cassese, 1992). Further, according to the Hague convention it '*must safeguard the capital of these properties*' (Article 55). Israel has been unlawfully depleting water through over-abstraction since Israel's sole use exceeds what experts deem sustainable for natural recharge (Elmusa, 1997; Lein, 2000; Tmeizeh, 2004). Thus, this provision serves as a Palestinian water right claim whereby Israel is required to compensate for any resources it uses during its military rule, once peace is achieved.

IHL does not specify a HR to water of an occupied people. Water is explicitly only mentioned on an individual (human) basis in the IVGC in regards to Detainees (International Committee of the Red Cross, 1949 Articles 85, 89, 127) and in the Third Geneva Convention (III GC) in regards to Prisoners of War (Articles 20, 26, 46). This in theory may be reinforced by the duties to ensure livelihood and adequate living in Article 55 of the IVGC which protects above all the occupied civilian population. It holds that resources such as foodstuff may only be requisitioned '*for use by the occupation forces and administration personnel*' unless the populations' needs are accounted for and requisition is done for the populations' benefit. Under this provision, any new well-construction for Israel's (or Israeli

settlement) use is illegal, as it is not used by Palestinians (El-Hindi, 2000). Moreover, the occupying force bears a fundamental duty to ensure the protected persons' humanitarian well being.

The First Additional Protocol of the Geneva Conventions prohibits attacking or destroying objects that are indispensable to the survival of the civilian population (1977). This offers an angle to protect the collective right to water for livelihood. Israel refuses to sign these provisions and is a 'persistent-objector' to them. Under international law, founded on state consent, this means that Israel is not legally obliged to uphold them in spite them being customary law (therefore otherwise legally binding). Therefore IHL holds most remit regarding water claims against Israel as an occupying power, vis-à-vis Palestine's water resources.

5. HUMAN(-ised) water rights

Scholars often seek to project the right to water as a human-need, undoubtedly reinforced by IHRL language. Thus they derive the right to water from the right to life. In Palestine, local activists in the struggle for water justice also often highlight this explicit link in their campaigns; *water for life* (Koppelman & Alshalalfeh, 2012). This notion is also understood here as a 'humanitarian-minimum' that seeks to protect the right to water on the basis of its vitality for life and a 'human(-ised)' basic necessity. This notion has several implications that relate to the discursive effects that the use of a human necessity have on rights protection.

That is to say, the focus on achieving basic water needs may result in reinforcing a hydro-hegemon's position to merely meet a humanitarian threshold of water supplies. By maintaining a certain minimal level, the HR to water would seemingly not be in breach. This in turn allows hydro-hegemons to sustain a certain level of water provisions that rely on survival and basic life requirements, which are nonetheless legally compliant. This projection through HR is significant because it can not only theoretically be used by those in power to facilitate a certain low water supply. It is also apparent in the Israeli position on water provisions for Palestine, which 'only recognizes minimal drinking needs' (Shuval & Dwiek, 2004, p. 3).

Scholars often understand water to be part of the provision for foodstuff (Cahill-Ripley, 2011), whereby water rights are derived from the HR to foodstuff as a basic necessity for the fulfilment of the latter. The right to food, closely related to adequate water supply, has specifically been conceived to protect a humanitarian level required for sustaining life. In this sense it reinforces the notion of water requirements for basic human necessities. Additionally, as the protection of the HR to food is in particular at risk in situations of the conflict and wars, it is of paramount importance to understand its implications under occupation.

Accordingly, in Gaza, Israel's 'economic warfare' as the ongoing closure and restriction on movement of goods and people means that it is the buying-power of Palestinians that is the cause for malnutrition and hunger, rather than lack of supply (Gross & Feldman, 2015). Thus, the HR to food has had major discursive implications for the protection of rights in

the Gaza strip that arguably comply with international law, but nonetheless stand at the verge of a humanitarian crisis (ibid). Although the implications of this cannot be discussed here at large, it is important to note the similar logic of the application of the HR to water, framed around minimal human consumption needs. It is suggested that in a similar way to that described above, a humanitarian-threshold is maintained such that ‘adequacy’ is met through food-water (Allan, 2011; Elmusa 1997), while less visible processes of deprivation and dispossession are underway.

Moreover, the use of the HR to life in the protection of water rights focuses on the domestic freshwater needs of the individual that thus may overlook the role of water in agriculture, and the role of agriculture in society and in sustaining life. Often this focus results in a denial of any agricultural water rights as it raises the issue of sovereignty over water resources (ECHR, 2011). These implications are apparent in Israel’s position that maintained the HR to water on a humanitarian, albeit debatable, ‘threshold’, and in turn significantly limited water rights claims for agriculture. Scholars demonstrate how through IHRL Israel projects a ‘humanitarian minimum’ to Palestinian water rights that relate to water as a human-need, whilst agriculture is blocked (Dichter, 1994). Simultaneously, the discussion around *its* agricultural needs is framed as ‘water security’ (Isaac, 1993; Scheumann & Schiffler, 1998). The notion of water security raises many further issues relating to the security paradigm itself, which are beyond the discussions in this paper, but it further highlights the problematic in the application of IHRL in context of occupation. That is, in relation to a balance made against an occupying force’s military objectives and security concerns governed under IHL (as further elaborated in section eight).

The human need for water is not being contested here, but it is suggested that such approach overall hinders rights, as it allows Israel to maintain a low water supply, whilst also undermining Palestinian collective rights over their water resources. In turn, the HR approach discursively promotes Israeli legal claims (Benvenisti, 1996). In its discussion on needs and allocation (Shuval & Dwiek, 2004), Israel retains sovereignty over water resources (Isaac, 2005), and guarantees that Palestine does **not** (Daibes-Murad, 2003). as the above review of the international legal framework demonstrates, provisions for the HR to water are often both limited and limiting. Significantly, there emerges a legal distinction between collective rights over water as a resource and rights as a human-need, even though in advocacy these are mostly bundled-up. IHRL protects solely the rights of individuals to water, framed through state-provisions and hence by virtue overlooks water resource management.

6. Equal rights

Undeniably, the non-discrimination duty is a fundamental HR provision, making rights ‘Universal’ (ICESCR, 1966). The ICCPR provides that states must extend HR protection to “all individuals within its territory and subject to its jurisdiction” (ICCPR, 1966). Equality, however, is not without its politics. It may seem undemocratic to challenge the notion of equal rights, more so in a paper that seeks to address water justice in a case as extreme of

discrimination as in that of Palestine. Nonetheless, the issue of equality raises several implications in situations of occupation, as the imbalanced status of individuals is abstracted from its context. Consequently, Palestinians lose their special category as ‘protected persons’, which were intended to guarantee that occupied populations are safeguarded.

Equality of HR applications relies on the premise that rights ‘be exercised without discrimination’ (B’tselem, 1998) based on the virtue of one’s humanity, in turn emphasising a ‘balancing’ exercise. Many HR scholars, advocates and organisations deploy the notion of equality in their campaigns for water justice generally, and in Palestine particularly. For example, a report by the Israeli HR NGO B’tselem calls for fairer distribution of water in the West Bank (1998). Similarly, Human Rights Watch (2010) merges obligations and balances Palestinian rights with settlers’: “*The creation of water infrastructure to service Jewish settlers . . . is discriminatory . . . unjustified by any reasonable security concern or other necessity (severe water shortages . . . also violates Israel’s obligations as an occupying power to ensure the welfare of the occupied population)*”. Through the provision for health and the requirement of non-discrimination as explicitly stated in the ICESCR Article 2, Lubell (2005) concludes that: ‘*[non-discrimination] may therefore be relevant to situations such as those in which a civilian population from the Occupying Power is living in the occupied territory (e.g. the Israeli settlers) . . .*’. Finally, this is also illustrated in the UN Concluding Observations of the Human Rights Committee 2010: that ‘*The State party should ensure that all residents of the West Bank have equal access to water*’.

Most advocates and scholars emphasise the discriminatory basis of water provisions as fundamentally illegal under international law. However, HR provisions effectively abstract protection of other fundamental rights of an occupied people that seek to address precisely the unequal balance in which they lay. This issue in turn brings rise to the gap in and arguably need to prioritise legal claims, relating to the issue of fragmentation of international law (further elaborated in section eight). Consequently, this HR discourse reinforces the assessment of Palestinians rights vis-à-vis those of settlers’, despite their vitally different status within the territories.

This balancing exercise based on non-discrimination was also undertaken by the Israeli High Court of Justice, outside the water context. In *Hass v. Commander of the IDF forces in the West Bank* (2004), as Gross shows, the court finds the Military Commander having “*to maintain their [settlers’] security and their HR as part of the humanitarian dimension of the military force in belligerent occupation*”, explicitly determining that settlers are part of the local population (Gross, 2007). Thus the notion of equal protection has real discursive implications that consequently limit the rights of Palestinians under Israeli courts. As a result, the legitimisation of the settlement project itself is also a direct product of the legal-merging exercise.

Note for example the case of Jerusalem, formally annexed under *Israeli Basic Law: Jerusalem: Capital of Israel*, which can illustrate this issue most clearly. By calling for Israel to apply its services equally to the entire city, advocacy for adequate water services in East Jerusalem directly legitimises the annexation of this territory as part of Israel, despite it being presumably politically undesirable, illegal and internationally unrecognised.

The aim here is not to contest the (urgent) need for water provisions in Jerusalem, rather to point to the tensions of using HR language in the context of conflict, occupation and territorial annexation. The equality application abstracts from fundamental international legal provisions and distorts the imbalance which is embedded in the structures of other international legal regimes. It is suggested here that this results in deprivation of Palestinian water rights more broadly.

Above all, contextualising HR to a given situation is vital for appreciating the role of policies in undermining capacity for water-management of non-hegemon. In the case of Palestine, this is important not least because it directly restricts Palestinian water use, but also restricts Palestinian water claims (El-Hindi, 2000). The implication is similar to that in Gross's discussion on *Hass*, demonstrating 'the legal workings of the occupation' (2007). The High Court of Justice in *Hass* notes that Palestinian properties that are to be destroyed are also 'deserted'; this supposedly eases the gravity of the violation (ibid). Similarly, the lack of use by Palestinians of their water alleviates the dispossession by Israel under IHRL. As the petitioners argue, the properties were abandoned by their residents following the declaration of the area as closed military-zone, and assumingly therefore abandoned. Read in this way, it is apparent that IHRL in its very core, humanised sense, is limiting the ability to protect rights.

7. Sovereign rights

If water as a resource is considered property of the state (Niehuss, 2005) then the state, like the property owner, is granted maximum protection of its property. That is how resources are understood in international law. In his analysis Miéville's (2004) shows that the rule of law precisely emerges to regulate this property protection. Thus, the right of self-determination as practicing one's sovereignty is the fulfilment of property rights protection (Scobbie, 1997). Conversely, the practice of sovereignty in the way of management of resources can be seen as a way to claim that property.

The HR to water is generally understood as discursively enhancing state provisions for water (Office of the Higher Commissioner for Human Rights [OHCHR], 2010), emphasising the role of the sovereign in delivering this right. Further, the HR to water applies as a long-term provision that is related to the material structures of water services themselves (Mollinga, 2009). This is because the HR to water is conceived of as a state's obligation 'to respect, protect and fulfil' (OHCHR, 2010, p. 27) the **provision** of water. Specifically, to fulfil: to facilitate the right through infrastructure, preservation of resources and promotion of education (Koek, 2013).

Conversely, the notion is understood through the 'participatory approach' whereby individuals become actors in decision-making. As a developmental policy, this framework assumes the context of democracies, where supposedly HR can be upheld, and thus they can "strengthen states' accountability for the delivery of services" (OHCHR, 2010, pp.15–16; 33). That rights are being envisioned in this way in the context of states with regards to their own subject may have implications for power and hegemony that are beyond the scope of

this paper. However when HR provisions are applied alongside other provisions in a situation of occupation, such tensions as conflicting legal principles arise, and perhaps more crucially, breaching of fundamental international legal rights.

The issue of sovereignty and state provisions is demonstrated in the right to food and adequate standard of living (ICESCR, 1966). Both the UN General Assembly (OHCHR, 2010; Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, 2011) and advocates derive the right to water from the above rights, for anyone under **the state's control** (B'tselem, 1998). Once again the delivery of the HR to water then is conceived of through the lens of a sovereign. However, such framework when applied to occupation is problematic. It on the one hand reinforces state sovereignty and the role and responsibility of the state, and by so doing it limits, on the other hand, the ability to uphold and protect rights as an international body of law. Furthermore, the laws of occupation which were originally envisioned as short-term prohibit changes to local infrastructure (Hague, 1907, Article 43). This distinction highlights the gap in duties between legal regimes the implication of which is blurring claims of sovereignty.

The nature of the Israeli occupation of Palestine's water is unique: it is prolonged and it is an occupation of a co-riparian. Thus, the legal obligations of Israel as a sovereign are blurred. One scholar found that IHRL is reinforcing IWL insofar as it enhances the state's legal accountability for water services (Tanzi, 2010). This requires state responsibility and action which is non-discriminatory as far as state practice goes (Salman & McInerney-Lankford, 2004) and underlines the tensions in granting Israel the role as a *de facto* sovereign in the Occupied Palestinian Territories - plainly against its duty as an occupying state. Conversely, Palestinian water viability is integral to Palestine's statehood (Phillips et al., 2007); indeed, the latter is dependent on the former.

However, if ending the occupation is the solution for Palestinian water rights, as suggested by activists and scholars (Cahill-Ripley, 2011) one can beg the question: what if not much changes 'on the ground'? That is to say, pre-1967 Israel used these water resources through diversion of springs and groundwater abstraction (Water Authority, The State of Israel, 2009) without the occupation. Thus, if Palestine gained independence, would this guarantee control over its water? The notion of exercising sovereignty over resources is therefore vital. One significant result in gaining independence would be attaining a formal 'equal' legal personality under international law.

8. Fragmented rights

The International Court of Justice discussing the applicability of laws of war and IHRL in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the occupied Palestinian Territories (2004) emphasised that the International Covenant on Civil and Political Rights (ICCPR) '*does not cease in times of war.*' Thus in its Advisory, the ICCPR co-applies IHRL in a complementary way, although remains ambiguous as to which rights fall under which law. The exercise of a parallel application of IHRL along IHL is explicitly promoted by scholars in the case of Palestine, in order to: "... *provide the optimum*

protection of the right, through reinforcing provisions . . . as well as allowing for interpretation of one set of laws in the light of the other". An integrated application, Cahill-Ripley argues, is *'the key realisation of the right to water during occupation'* (2011, p. 111). (See also Scobbie, 2011). Thus, advocates insert the human element of water-needs *onto* laws of occupation, which *"emphasizes [that] access to water is a human-right"*, discussing *"the disproportionate usage of water by the Israeli military and settlers"* (Samer, 2011).

The Human Rights Water report submitted to the UN Inquiry for Lebanon derives the right to water from the HR to housing and health (Alston, Hunt, Kälin, & Kothari; UNHRC, 2006). Specifically, it states that the destruction of homes leads to a denial of *'elements of the right to the highest attainable standard of health, including access to water'*, that are *'essential elements of the right to adequate housing'* (ibid, p. 15). HR advocates for Palestinian water right also derive the right to water from the right to health, seeking to protect adequate treatment of polluted water (B'tselem, 1998). One scholar undertakes a rule-specific analysis (Vite, 2008) asserting that in occupations the right to housing, reinforced by IHRL provides maximum protection as it is non-derogable *'regardless of circumstances'* (ECHR, 2011).

At times, these different bodies are contradictory and conflicting, revealing gaps between the two bodies (for example, derogation of rights is more permissible under IHL as it relates to security concerns). At others, they lead to different conclusions as regards to violations of rights. This perpetuates depriving the Palestinians from their protection as occupied people and legitimises legal breaches; *"From a balance between security and the rights of the local population as envisaged in IHL (vertical balancing), the HCJ [High Court of Justice] moves to a horizontal balancing between the rights of different individuals"* (Gross, 2007).

The issue of derogation of rights brings to the surface tensions that arise in the application of IHRL to conflict, where the prioritisation of one body of law over the other demonstrates a gap in what is a fragmented international legal structure. Though some scholars find that fragmentation offers opportunities for the development of legal reinforcement (Droege, 2007), many scholars also highlight that this gap often leads to overlapping, conflicting rights and misinterpretation (see Pulkowski, 2014). Others such as Farnum, Hawkins, & Tamarin (2017) propose that fragmentation as a structural feature often leads to maintaining the upper hand of hydro-hegemon. In the case of Palestine, through fragmentation the status quo is sustained, as it allows certain laws to be applied or denied by Israel.

To illustrate, note the International Court of Justice's Advisory Opinion on the legality of the Israeli wall (2004). The court evokes the Special Rapporteur on the Right to Food of the UN Commission on Human Rights observations stating that the wall will *" . . . effectively annex most of the western aquifer system (which provides 51 per cent of the West Bank's water resources."* The construction of the Israeli wall is considered a serious breach of international law for two major reasons, specified in the UN Charter of 1945: the breach of the non-derogable right of self-determination and the unlawful annexation of territory. Vis-à-vis the wall, Palestinian water reflects an overarching struggle for self-determination, i.e. exercising sovereignty over natural resources. Conversely, the right over water resources is derived from this notion: permanent Palestinian sovereignty over its natural resources is a core element of *'substantive self-determination'* (Drew, 1997, 2001). However, as a result

of the application of IHRL, the right of self-determination and the illegal annexation of land are all abstracted and legitimised, consequently having a limiting outcome on Palestinian water rights. As a result, IHRL covers the duties of Israel as an occupier and distorts the imbalance that is preserved under the laws of occupation.

Even further, the application of IHRL, which assumes relations between sovereigns, leads to the merging of peace and war, of norm and exception. Gross (2007) suggests that when HRL is applied in situations of occupation, whilst it would 'normally' be applied in democracies for a localised violation, may lead to legitimisation of rights' denial. This idea could be extrapolated to the international level; the 'norm' being international peace, where democracies cooperate and uphold international law, and rights denial assumed an exception (although in occupations this is mostly the case) (ibid).

9. The political legality

The Israeli-Palestinian Oslo agreement sets out 'stages' for the peace process, leaving all core issues to the permanent-status stage of negotiations, which includes the issue of water. The DOP (1995) established the Joint Water Commission (JWC) through which Israel maintains its power, where military orders are given effect. This is done through several structural power asymmetries.

Firstly, the requirement to reach decisions by consensus in effect gives Israel a veto power over Palestinian water sector development (World Bank, 2009; Zeitoun, 2008). Since the DOP (1995) applies only to the West Bank, the PA does not have the same veto power over Israel proper (Selby, 2013). Furthermore, the veto power that the PA can employ over Israeli water development in the West Bank is ineffective, as often the PA are coerced into agreements that fulfil short-term needs such as sewage treatment, at the cost of long-term interests (Hareuveni, 2009; Selby, 2013). Even after JWC's approval has been gained, the PA must also seek Israeli Civil Authority approval (Selby, 2013; World Bank, 2009). Under this structure, the PA must exhaust more bureaucratic processes than Israel, as Israeli planning policy supports settlement development, whilst actively aiming to restrict Palestinian development (Bimkom, 2008). In this way, Israel can unilaterally develop infrastructure with little interference, whilst unilateral development is not open to the PA. Moreover, limited Palestinian resources are further drained through efforts to gain approval, exacerbated by international donor refusal to fund development in Palestine without approval from the JWC (Selby, 2013).

Critical legal scholars demonstrate that the DOP limits substantive Palestinian self-determination right, seeking to protect the process of self-determination as the outcome of the people's collective decision, and not as a result of a peace process (Drew, 1997). The abandonment of rights through negotiations (ibid) is notable in Israel's position regarding water. For example, the Israeli Water Authority concludes that '*it would be most beneficial to both Palestinians and Israelis to focus their efforts on pragmatic rather than legal solutions*' (Water Authority, State of Israel, 2009).

As Allan (2011) argues, law is fundamentally subordinate to politics and the examination of hydro-hegemony theory reveals that the terms of water cooperation are almost always

reflective of the agenda set by a hydro-hegemon (Selby, 2003; Zeitoun, 2011; Zeitoun & Warner, 2006). This was also the case in recent water negotiations between Israel and the PA, where Palestinian negotiators reported to have had all their legal attempts result in vein against the hegemony of both Israel and Jordan (Bateh, 2014). Palestinian legal claims, though adequately developed, were “knocked-off” the table’ (Bateh, 2014). This raises the imperative to strategically weigh allocation of material and other resources into legal elaborations as a counter hegemonic action. Scholars who promote IHRL for water protection highlight that the DOP (1995) recognises the Palestinian collective right over their resources, but not individual HR to water (Cahill-Ripley, 2011). However, the HR “*does not place any corresponding duties on those who are to be conferred with this right*” (Salman & McInerney-Lankford, 2004). Following, under the DOP framework, Palestinian water rights are left to be defined in nature and extent (Cahill-Ripley, 2011) by both Palestine and Israel.

Similarly to the human equality discourse described in section six, the DOP, based on international water law, obliges cooperation based on sovereignty (Daibes-Murad, 2003). As IHRL leads to a balancing exercise of the rights of a Palestinian against her settler counterpart – as if equal, and by so doing legitimising the existence of a settler- so too the international legal framework balances the rights of one riparian against the other. It de-contextualises the conflict and calls for terms to be negotiated and subsequently legitimises illegal water abstractions. For example, a World Bank report (2009) on Palestinian water sector development finds that in practice ‘fundamental asymmetries’ mean that the JWC does not function as a joint institution. Nevertheless, this is a structural barrier. That is to say, the very foundations of the JWC are unequal, maintaining Israel’s upper hand under occupation. Thus a significant structural limitation is exposed in the need to uphold rights’ discourse.

This framework hinders the PA’s ability to reinstate water infrastructure (Isaac, 1999) where the JWC maintains the status-quo (Abouali, 1996; Amnesty International, 2009; Attili, 2004; B’tselem, 1998; Cahill-Ripley, 2011; Daibes-Murad, 2003), leading some scholars to highlight the breach of the laws of occupation as the approval of the settlements project (Selby, 2013). Beyond barriers and underdevelopment of the water sector in the Palestine (World Bank, 2009), it overlooks the power that Israel exercises for the advancement of settlements. Through its military administration Israel dictates the applicability or not of certain laws. It is hence the very structure of international law that allows the parallel application of and ambiguity regarding different bodies of law and their interpretation, left for the discretion of Judges, or worse, military commanders.

10. Conclusion

This research embarks with an analysis of IHRL provisions for water, challenging that the HR to water improves the safeguarding of water rights. The research turns to examine the application of IHRL in the context of occupation and as part of its broader structure of international law. Specifically, the research aims to understand the implications of the (‘humanised’) discursive use of the HR to water to address Palestine’s water rights in light

of other relevant legal regimes. Through a review of the existing literature, advocacy and legal practice in regards to Palestinian water rights, the research finds that IHRL is mostly applied along IWL and IHL, supposedly complementing them in spite of their vastly different purpose; IWL is the framework to govern transboundary water interaction and as a paradigm implies equal relations between parties sharing a water resource. IHL regulates armed conflict and occupation and restricts the occupying forces' use of occupied resources. As a result, individual water rights and collective water resource rights are referred to interchangeably, in this way mostly overlooking the role of agriculture. The research attempts to shed light on the tensions that arise in the application of IHRL with different rules as the fragmentation of international law and the interchange of water as a human need and a resource.

The international legal system suffers from many shortcomings that include issues of applicability and enforceability. Above all, however, the multi-application of different bodies of law demonstrates the indeterminacy of law itself; out of which only power prevails (Miéville, 2004). Whilst laws themselves can be sound and clear, they are left to the interpretation of 'legal experts'. Some scholars find the ambiguity of the interpretation of law to be "a necessary weakness of international law" (Isaac, 1993), nonetheless it is the law's very hegemonic nature. IHRL which is centred on the basic humanised need for water abstracts persons from any given situation, as *equals* insofar as their legal personality is concerned. This premise of equality also applies in the case of IWL whereby the presumption of an equal playing field is embedded. However, through the very notion of equality, fundamental rights are abstracted, breached and in turn legitimised; overall worsening the possibilities for legal redress.

Since law is utilised for achieving one's political end, the legal framework itself should be challenged as regards to its role in conflict. Put differently, can real constraints such as the occupation that rest upon non-hegemony as Palestine be overcome, all the while when the framework promotes a structural imbalance? By its nature and abstract virtue, the IHRL regime de-contextualises any existing inequality, and therefore cannot enhance water rights. The research therefore suggests that when a watercourse is controlled by an enemy or occupying power, or when it is itself used as a means for warfare (Stein, 2012), HR provisions may be more dangerous than those who call for them appreciate. Scholars, advocates, campaigners; HR means may be limiting their ends.

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