



Palestinian Peace Coalition

Making Peace Our Horizon

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A Conceptual Framework for the Palestinian Negotiating Position on Water

Introduction

The rights and obligations of the Palestinians concerning their endogenous and shared watercourses are not yet agreed upon. The primary reason for this is Palestine's unique political status as an occupied land and the fact that since occupying the West Bank, including Jerusalem, and the Gaza Strip as a result of the Six-Day War of 1967, Israel has constantly refused to relinquish control of any of the occupied territory and its resource. Within the 1995 Interim Agreement between Israel and the PLO the water issue has been deferred to the final status negotiations alongside the refugees, borders, settlements and Jerusalem issues.

Given that the Palestinian side still believes in the necessity of regaining its sovereign rights over water, it is important to prepare all water related documents, files and scenarios. These must cover the legal, political, environmental and economical aspects relevant to water. Additionally, it is important to coordinate with the other negotiation committees especially those with direct relation to water including borders, refugees and settlements committees. Finally, the Palestinians must coordinate with all relevant neighbouring Arab Countries especially with regard to the waters of the Jordan River Basin (Jordan, Syria and Lebanon) for consultation, determination of a unified position, information exchange, and for establishing follow up committees for that purpose.

The objective of this paper is to ensure the Palestinian preparedness for the upcoming negotiations over water. To that end, this paper provides a summary on the water and water-related issues in Palestine. The paper introduces a framework for the Palestinian negotiating position over water. This framework includes the basic principles, the legal reference and the needed mechanisms for implementation.

Geography and General Water Situation

Palestine covers around 5719 km² of land plus 220 km² of water. It is located on the east coast of the Mediterranean Sea, west of Jordan and to the south of Lebanon. Israel on the other hand, covers a total, 20,330 km² of land plus 440 km² of water reflecting armistice or cease-fire agreements with Lebanon and Syria, and more recent peace treaties with Egypt and Jordan. The international boundaries between Israel and Palestine have never been settled. The Green Line refers to the boundary established in the General Armistice Agreement between Israel and Jordan on 3 April 1949.

The territory of the West Bank-the focus of this book- covers around 5572 km² divided as: 5352 km² of land and 220 km² of water. The water comprises half of the area of the Dead Sea, Huleh Lake, and Tabariyya Lake, which is also known as the Sea of Galilee. The West Bank is mostly composed of limestone hills having an average height of 700 to 900 m.

Palestine is characterized by limited surface and groundwater water resources. The main surface water system in the region is the Jordan River Basin which begins in three headwaters. The Hasbani River originates in Lebanon and has at least parts of its flow in Lebanon with an average flow of 138 mcm/yr. The Dan and Baniyas (Nahal Hermon in Israel) Rivers originate in the Golan Heights and both flow into the Jordan above Tabariyya Lake having average annual flows of 245 and 121 mcm respectively. It has an average annual flow of 1300 mcm. The Jordan River Basin is considered under international law as an international river with waters shared by; Israel, Jordan, Syria, Lebanon and the Palestine.

The groundwater system in Israel and Palestine is divided hydrologically into seven basins, each of which is subdivided into aquifers. The total annual renewable water from groundwater resources in both countries is 1454 mcm/yr, of which at least 679 mcm/yr derived from shared Aquifers.

The Mountain Aquifer system comprises three sub-aquifers: the North-eastern Mountain Aquifer Basin (NEMAB), the Western Mountain Aquifer Basin (WMAB) and the Eastern Mountain Aquifer Basin (EMAB). The former two aquifers form part of an international hydrologic system that is shared with Israel. The EMAB has a special status with regard to the Palestinians. Almost 90% of the EMAB lies almost entirely within the West Bank and is fed by recharge originating in the West Bank highlands. Accordingly and the for the Palestinians, this aquifer is considered endogenous and should not be part of any negotiations with Israel over water. However, and referring to internationally recognized classifications of transboundary aquifers, the EMAB is part of an international system- namely the Jordan River Basin. The EMAB is hydrologically connected with the Jordan River Basin in some area and it lies in the upstream portion of the rivers and feeds into the river. The status of this aquifer must be dealt with due attention and care especially when negotiating the Palestinian share in the waters of the Jordan River Basin.

The Gaza Strip depends primarily on groundwater for its water supply. This high dependence has led to excessive exploitation of the Gaza Aquifer which underlies the whole of the Gaza Strip. Studies indicate that 120-130 mcm/year is pumped from the Gaza Aquifer compared to 60 mcm of annual natural replenishment. Furthermore, and due to its proximity to the coast, the aquifer's fresh water has been increasingly replaced by the sea water. This together represents a serious threat to the present and future groundwater sustainability in Gaza.

Wadi Gaza, on the other hand, is the only form of runoff that exists in the Gaza Strip. The Wadi is 160 km long and 1.5-3.0 m depth in some areas. The Wadi is considered a transboundary watercourse with Israel; as it originates in Hebron Mountains in the West Bank, crosses the green line passing through Israel, then crosses the territory of the Gaza Strip to eventually reach its final destination; the Mediterranean Sea. Israel, which lies midway on this Wadi, has been constructing dams and water traps on the Wadi that resulted in the diminishing its runoff inside the territory of the Gaza Strip. Currently the Wadi has zero runoff and furthermore it became a waste disposal site and an environmental and health hazardous location.

Development Plans on the Jordan River Basin

Numerous plans were initiated and prepared for the development of the waters in the Jordan River Basin. The partial or whole approval of these plans by the various watercourse countries mainly depended on the political events. The most significant plan for the Palestinians is the Johnston plan which was presented in 1953. The Johnston plan is a mixture of many previous plans including the Lord-Hays, McDonald, Chas Main, and Bunger plans. Johnston plan disregards political boundaries and hinges on the philosophy that calls for transferring water where possible and bringing water to where its needed. This philosophy was inspired by Unified Plan that was developed by the Tennessee Valley Authority (TVA) which was prepared under the request of the United Nations Relief and Works Agency in 1953. The Johnston plan did not please the Arab countries and the Israelis as well. For the Arabs the plan was mainly rejected for the following reasons:

- The fact that the plan disregarded political boundaries
- Lebanon had no allocation under the plan;
- Most of the waters would be stored inside the Territory of Israel in Lake Tabariyya;
- It allocated 33% of the waters to Israel while the remaining 67% were allocated to the Arab countries;
- Their fears that approving this plan was an indirect recognition of Israel and that cooperation with her becomes inevitable.

These reasons were triggered by the media when the USA announced modifications to Johnston plan that maintains the status quo of Israel's control over the waters of the River Basin.

The "Arab Project Plan" came as a response to Johnston plan and it mainly emphasized that no plan could developed for the River Basin without giving due consideration to the political boundaries. The plan rejected storing the water in Tiberia and allocated 80% of the waters for the Arab countries and the remaining 20% for Israel. Furthermore, the plan proposed that 880,000 dunums (each 1 km² is 1000 dunums) would be irrigated, out of which 335,000 dunums are inside Israel. Finally, it was planned that hydroelectric power could be generated and divided in the same manner as water 80% to the Arab countries and 20% to Israel.

None of these plans were implemented and the Jordan River Basin remain to date a disputed international watercourse.

Israeli Water Policy and Practices: Impact on Palestine's Development

A great deal has already been written about the historical evolution , beginning in the early 1900's, of the Arab-Israeli water conflict, with the overwhelming majority of authors and researchers agreeing that water has always been considered an important strategic element in terms of the Israeli policies, plans and regional development. Many would state that the root of the Arab-Israeli water conflict can be traced back to the signing of the Sykes-Picot Agreement. Under this particular document, which divided the regions of the Middle East between British and French control, no direct mention was made of water rights. The Sykes-Picot Agreement would most certainly have left the watersheds in the region divided in a most convoluted manner; the Litani and Jordan headwaters just south of the Huleh region would have come under French control, while the Lake Tiberia would have been split into two, with one part coming under international control and the other under French control. The Yarmouk Valley, meanwhile, would have come under both British and French control, while the lower stem of the Jordan River would have found itself under international control on the West Bank and British control on the East Bank.

Throughout the 1930's and the 1940's, the West further manipulated the affairs of the Middle East in order to control the resources of the region and then to create a Jewish homeland in an area long considered central to Arab nationalism. However, despite having been promised a "national home" in the Balfour Declaration of 1917, the Zionists were displeased with the land and water resources granted to the Jews by the British in 1919 and consequently embarked on acquiring land as Israeli property in order to promote agricultural colonization based on Jewish labour. The following sections attempt to summarize how Israel's policies and plans were centred on the region's water resources, and what impact these policies have on the

status of and prospects for Palestine's development. This will be done with reference to three major periods in time: 1948-1967, 1967 to 1993 and finally the 1993 to the present.

Between 1948-1967

It is important to note when considering the Palestinian-Israeli water conflict that prior to the establishment of the State of Israel in 1948, a special UN Committee on Palestine provided evidence showing that Israelis owned only 7% of the land, whereas following the creation of the State of Israel, the percentage rose to 60%. Also noteworthy is the fact that following the establishment of the State, the main objective of the water plan was to divert as much water as possible outside the Jordan River Basin into a central conduit leading through the coastal plain up to the northern Negev. Since 1955, Israel was tapping into the WMAB. The National Water Carrier, which was first operated in 1964, was consequently the outcome of many years of planning, the first stages of which were implemented in 1948.

Between 1967-1992

Between 1967 and September 1992, the utilization of groundwater within the Occupied Palestinian Territories was governed solely by Israeli legislation and military orders. Today, it relies on the three aquifers comprising the Mountain Aquifer- which combined, provide approximately 40% of Israel's water supply. Of the total of some 679mcm/yr of water annually available from the Mountain Aquifer, Israel currently uses about 483 mcm/yr, while the Palestinians are limited to about 118 mcm/yr. It is estimated that another 78 mcm/yr may be available after further exploitation in the Eastern Aquifer. Due to the fact that the Palestinians have constantly been denied access to their share of the Jordan River waters and the massive imbalance in terms of current water-use rights, there is also a huge imbalance in terms of water consumption, with the Palestinian domestic per capita consumption of 35-80 l/day being far below the standard established by the World Health Organization (WHO), i.e., a minimum of 100 l/day, and the Israeli per capita consumption, which exceeds 300 l/day. Israel, it should be mentioned, has additional sources of fresh water since as well as the 600 mcm/yr of water from the Jordan River it is currently utilizing, it also has access to water originating from another five groundwater aquifers located within its territory. As to the Palestinians' access to water, up until 1995, only a very few drilling and extraction licenses were granted to enhance the supply within Palestinian communities, which meant that the natural increase in water demand due to population growth and industrial and agricultural expansion had to be satisfied from the wells that had already existed prior to the occupation.

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- On the water services level, the existing water supply networks in almost all the West Bank and Gaza Strip are old with some dating back to more than 50 years. During the last 34 years of occupation, no

planned maintenance or rehabilitation took place due to the limited financial and technical abilities of facilities of the local authorities that were in charge of water services. Additionally, Israel also gives permission to conduct maintenance work. This situation has led to high loss percentages through pipe leakage, as unaccounted for water reaches a value of 50% in some of the municipalities.

Finally, and most importantly, Israel during the past years has developed its technical, legal knowledge and capacity in the field of water resources management and regulations. The Palestinians on the other hand had limited opportunities to develop similar capacities. The range of military orders and restrictions imposed on the Palestinians concerning the development of the water resources contributed to the creation of a serious asymmetry between the Parties.

Between 1992-Present

After long years of struggle, the Palestinians and Israelis started their negotiations began formally in 1992. The aim of the Israeli-Palestinian negotiations within the current Middle East peace process was, among other things, to establish a Palestinian interim self-autonomy that not exceeding three years, leading to a permanent settlement to be based on UN Security Council Resolutions 242 and 338. The Government of the State of Israel and the Palestinian Liberation Organization (PLO), in September 1993, signed within the framework of the Middle East Peace Process, the “Declaration of Principles” (DOP). The DOP was the first initiative showing the willingness by both parties to put an end to the decades of confrontation. and to live in peaceful coexistence. The “Gaza-Jericho” Agreement was signed between the PLO and the State of Israel regarding the autonomous rule of the Palestinian Authority PA, in Jericho and the Gaza Strip on May 4, 1994.

In 1995, the Government of the State of Israel and the PLO, entered into an interim agreement on the West Bank and the Gaza Strip. Both Parties showed a desire for putting into effect the DOP. They also reaffirmed their recognition of mutual legitimate and political rights. The water issue was among the contentious issues that were delayed to the final status negotiations. Only temporary solutions were offered for the water crises in Palestine within the interim period. To date only minimum progress has been achieved to even fulfil the promised commitments. More discussion on this topic will be made at later stages in this thesis.

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- On 30 April 2003, the United States (US) presented the “road map” for peace in the Middle East to Israeli Prime Minister Ariel Sharon and newly confirmed Palestinian Prime Minister Mahmoud Abbas with the intention of solving the conflict between Israel and the Palestinians. Together with the European Union (EU), the UN, and Russia, the US defined the “road map” destination as “a final

and comprehensive settlement of the Israel-Palestinian conflict by 2005". The settlement, negotiated between the Parties, will, the Parties hoped, "result in the emergence of an independent, democratic, and viable Palestinian State living side by side in peace and security with Israel and its other neighbours."

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- During 2003, Israel commenced the construction of a 'separation fence' designed to cut the access of people in the Occupied Palestinian Territories. This fence, which follows the 1967 Green Line, cuts into Palestinian land by up to 6 kilometres in places - and restricts access by land owners from farming their land. On completion it will completely encircle the West Bank. West Bank and Gaza will not then be able to form a viable sovereign state.
- Challenges and Considerations

Asymmetry among the Parties

Asymmetry appears to be in the favour of Israel, and it exists at many levels and in different forms. The first level of asymmetry concerns the utilizations from the Mountain Aquifer. Whilst around 3 million Palestinians have access to 16% of the Mountain Aquifer's renewable waters, Israel, - besides all the other surface and groundwater resources available for its use - has control over the remaining 84% of these waters. The major challenge is how to achieve an equitable mutually beneficial arrangement for the Parties in conflict despite the current relations and inequity in the power structures.

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- Asymmetry of information and knowledge regarding the transboundary groundwater resources is another important problem. At the one end; it is an abundance of data and information on the Israeli side, and at the other, a paucity of data and information on the Palestinian side. By and large, the Palestinians were and are still recipients of data from the various Israeli or international organizations, due to the unilateral control over research and development in the field of hydrology water resources development. This fact is serious, and would require great efforts in order to verify existing information and reproduce national Palestinian figures and statistics.
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- The third level of asymmetry concerns the parties' interests in resolving the conflict. Israel, being the powerful party, does not appear to envision the benefits from achieving an equitable and reasonable solution based on the rules of international law. However, the Palestinians have failed so far in building confidence with the Israeli politicians and negotiators concerning their intentions towards the shared transboundary groundwater resources. The challenge is how to reach a balance between the parties' interests at the table of negotiations to ensure that the solutions pursued are equitable.

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- The level of development in the field of water infrastructure and services is far less developed in the Palestine Territories compared with Israel. After the establishment of the PA and especially after the take-over by the Palestinian Water Authority many projects have been implemented to construct new water networks or to rehabilitate existing ones. This is considered to be a time consuming task that requires commitments from the Palestinians and Israelis supported by the international community.

Parties' Emphasis on Positions

Earlier in this thesis the positions by Israel and the Palestinians regarding the water conflict were described. The Israeli position not to give up a drop of its existing uses and its persistent arguments concerning the need to develop new and additional water resources including desalinated water and reused wastewater, need serious reconsideration. The Palestinians, on the other hand, confirm their rights to permanent sovereignty over their natural resources and rely on the principles of international law as the basis for resolving the conflict.

Resistance to International Law

To date international law have had limited role in resolving the water conflict between Israel and Palestine. The existing inequitable utilization of the international watercourses –including transboundary groundwater - has been considered “*de facto*“ as establishing water rights and the “no harm” rule appears to be the overarching principle embraced by at least the Israeli negotiators. From this researcher’s perspective, it is established that Israel is unlikely to be ready for a binding agreement relating to transboundary groundwater on the basis of international law. This justifies their hesitance to conclude the issue of water in the 1995 Israeli-Palestinian Interim Agreement.

The resistance on the side of Israel to conclude a legally binding agreement on the Mountain Aquifer is linked to three main reasons: (i) the great dependence of Israel on its waters; (ii) Israel’s undeclared recognition that their current utilizations of the shared groundwater resources violate the principles and rules of international water law, (iii) any future legal arrangement that builds on the rules and principles of international law and relevant best practice threatens Israel’s absolute control over the shared groundwaters. As for the Palestinians, it is believed by this researcher that they have accepted the Interim arrangement on water for two main reasons. Firstly, given the transitional nature of these arrangements, the Palestinians expected that the final status negotiations will bring equitable solutions for them; secondly, the Interim Agreement is the only official document whereby Israel recognized the Palestinian water rights and therefore constituted - they hope - the real first step towards cooperation and agreement in the field of water. The realities proved that the signed agreements do not provide an adequate framework for the regulating the

relationship of parties as far as the Mountain Aquifer is concerned. The next section further elaborates on the question whether or not, in the context of the Mountain Aquifer, the signed treaties brought mutual benefits to the Parties.

Lack of Cooperation and Coordination

Coordination between Israel and Palestine on the transboundary groundwater resources has been absent so far because the magnitude of the problems has outpaced efforts for comprehensive management. In effect, during the period of occupation the Palestinians have had limited -if any- control over these resources. Any further delays in taking serious steps towards genuine co-operation will lead to a more deteriorated water situation and to inflation in the water crises, thus causing harm to the present and future generations and to the groundwater resources themselves. The current situation of no co-operation has widened the gap between the parties and deepened the mistrust in all matters and at all levels. As was shown in Chapter Two, the continuation of the *status quo* in relation to the imbalance in utilization and the uncoordinated management of transboundary groundwater are not in the interest of both parties.

Palestine's Water Institutions and Good Governance

The newly established Palestinian Water Authority (PWA, is empowered to regulate and manage all water resources of Palestine including transboundary water resources. The mandates of PWA are not fully achieved, and will not be, unless the sovereign rights of the Palestinians over the water resources are respected and recognized. The PWA is facing many obstacles in its efforts to rehabilitate, build and operate new systems and structures. There is a need for investment in the water sector. Building the water institutions together with the required infrastructure will require huge investments to accomplish. This need calls for a genuine commitment from the international community and Israel to help the establishment of strong institutions of comparable capacities to those in Israel in order to pave the way for co-operation although the Parties were expected to start cooperating in 1993, 1994 and 1995 when they signed three consecutive formal legal arrangements. Presently, the emphasis on positions rather than interests from both sides continues to intensify the problem and amplify the complexity of the water conflicts.

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The Parties' Position towards the Water Conflict

The Palestinian Position

Of relevance to the overall discussion with respect to the Israeli Palestinian water conflict, is the Palestinian position towards international law in solving the current conflict. This analysis is made to assess the willingness of the Palestinians to accept solutions that are based on the rules of international law. In 1964,

the PLO, the national liberation movement of the Palestinian people, was established by Arab heads of state. In 1988, the PLO accepted, in Algiers, in its Proclamation of Independence all UN Resolutions since 1967, whilst renouncing violence and recognizing Israel's right to exist. As a confirmation to the PLO's intentions the Proclamation states that:

“The State of Palestine proclaims its commitment to the principles and purposes of the United Nations, and to the Universal Declaration of Human Rights. It proclaims its commitment as well to the principles and policies of the Non-Aligned Movement. It further announces itself to be a peace-loving State, in adherence to the principles of peaceful co-existence. It will join with all states and peoples in order to assure a permanent peace based upon justice and the respect of rights so that humanity's potential for well-being may be assured, an earnest competition for excellence be maintained, and in which confidence in the future will eliminate fear for those who are just and for whom justice is the only recourse”

At the same time, the State of Palestine committed itself to the principles and purposes of the UN and to the Universal Declaration of Human Rights as well as to the principles and policies of the Non-Aligned Movement. Worthy of mention is the fact that the Proclamation states that the State of Palestine believes in the settlement of regional and international disputes by peaceful means, in accordance with the UN Charter and UN resolutions. The Palestinians have continuously considered the notion of permanent sovereignty over natural resources as the legal background for their claims to water rights. This will be discussed later in this chapter in the context analyzing the legal character of belligerent occupation and the impact of this occupation on the local population's sovereignty over natural resources.

Recently, the Palestinians declared their formal position from the water resources in a document entitled “Legal Framework of Permanent Status Negotiations: the Palestinian Water Rights”. This position builds on the spirit of international law, as it confirms that the first step for the Palestinians is to regain their territorial sovereignty over the water resources. The principle governing the future relation with Israel, as far as their shared water resources is concerned, is equitable and reasonable utilization. There is however, a confusion between the current status of “occupation” and the future of the independent “Palestinian State”.

The Israeli Position

In order to support their claims regarding the waters currently being utilized by Israel, Israeli legal experts have usually relied on the doctrine of “Prior Use” or “Historical Rights” when dealing with regional water resources. Moreover, they have persistently referred to all “existing uses” as non-negotiable and constantly raised the issue of the availability of “alternatives of comparable value” (desalination, wastewater reuse, and the importing of water from neighbouring countries) as a means to supply Palestinian needs. What this

means is that Israel's official position in terms of its water dispute with its Palestinian neighbours is based on its objection to sharing the available water resources in a fair and equitable manner, as has been revealed time and time again in the Israeli style of negotiating over the past seven years. In short, although Israel is prepared to discuss the need to meet some of the immediate Palestinian needs, it nevertheless does not appear to consider the water issue one as requiring a permanent solution.

- For proof of the official Israeli position regarding the water issue, one only has to consider the statement of the former Israeli Minister of Agriculture, who in December 1990 was quoted by the *Ma'ariv* newspaper as stating the following: "It is reality and need which created the Israeli control over the water resources; it would be impossible to give up a drop of water in the West Bank." As to the former Israeli Water Commissioner Meir Ben Meir, he has repeatedly declared the following positions: "(i) The Palestinians can solve their water problem though pursuing non-conventional sources or through purchasing from Israel; (ii) Although Israel is prepared to discuss allocations and rights pertaining to the uses of water with the Palestinians, it refuses to discuss sovereignty over the available resources; (iii) International Law does not apply in the case of the Palestinians since Palestine is not recognized as an independent state".

Significance of Signed Agreements: A Mutual Benefit?

The obligation to cooperate contained under the relevant regional treaties appears to serve mainly the objectives of the Israelis - namely protecting their existing uses. The Interim Agreement of 1995 provided a merely temporary solution for this eternally complicated conflict. The Agreement emphasizes the Israeli recognition of Palestinian water rights in the West Bank, but gives no definition of these rights. Only additional supplies to serve the urgent water needs were allocated for the Palestinians under Article 40; these are to be developed from the Eastern Aquifer Basin and any other agreed sources.

Furthermore, there is no agreement on the overarching legal principles that will govern the rights and obligations of both parties. The negotiations on these rights were postponed for the permanent status negotiations. According to the Interim Agreement these should have commenced in 1998, three years after the signing. However, to date, the unstable political environment within the region has hindered the commencement of any serious negotiations on water. If one compares the agreements with what has actually been achieved, there is a strong indication of the complexity of the situation and the inequality of the power structures that appears to favour the Israelis. The existing joint mechanisms and institutions - namely the Joint Water Committee- completely failed to fulfil their obligations. On a technical level, the essential projects for development were delayed, rejected or put on hold due to unjustified reasons.

Summary of the International Legal Reference and the Role of International Law

To date international law has had limited role in resolving the water conflict between Israel and Palestine. The existing inequitable utilization of the international watercourses –including transboundary groundwater - has been considered “*de facto*” as establishing water rights and the “no harm” rule appears to be the overarching principle embraced by at least the Israeli negotiators. From this researcher’s perspective, it is established that Israel is unlikely to be ready for a binding agreement relating to transboundary groundwater on the basis of international law. This justifies their hesitance to conclude the issue of water in the 1995 Israeli-Palestinian Interim Agreement. The resistance on the side of Israel to conclude a legally binding agreement on the Mountain Aquifer is linked to three main reasons: (i) the great dependence of Israel on its waters; (ii) Israel’s undeclared recognition that their current utilizations of the shared groundwater resources violate the principles and rules of international water law, (iii) any future legal arrangement that builds on the rules and principles of international law and relevant best practice threatens Israel’s absolute control over the shared groundwaters. As for the Palestinians, it is believed by this researcher that they have accepted the Interim arrangement on water for two main reasons. Firstly, given the transitional nature of these arrangements, the Palestinians expected that the final status negotiations will bring equitable solutions for them; secondly, the Interim Agreement is the only official document whereby Israel recognized the Palestinian water rights and therefore constituted - they hope - the real first step towards cooperation and agreement in the field of water. The realities proved that the signed agreements do not provide an adequate framework for the regulating the relationship of parties as far as the Mountain Aquifer is concerned.

States acknowledge in their practice that treaties and customary international law are two primary sources of international law. This has been confirmed in the Statute of the International Court of Justice. Furthermore the application of customary rules in national and international courts is a significant evidence for their obligatory nature.

Customary rules that have been codified in the Laws of War (IV Geneva Convention of 1949 and the associated Protocols and the Hague Regulations of 1907) constitute a basic reference for the Palestinian negotiating position over water. These conventions explicitly prohibits the occupying power from causing harm by depleting or polluting the resources of the occupied nation especially if these resources are basic and essential for life such as water. Also according to these laws, the Palestinian sovereignty over their natural resources has not been extinguished due to the Israeli occupation; it was simply not exercised. Finally, Israel has no ownership rights or sovereignty over the water resources in the Palestinian Occupied Territory, rather Israel has obligations to safeguard these resources. These obligations on the side of Israel

were reiterated in the numerous UN Resolutions which repeatedly confirmed the Palestinian inalienable rights and the permanent sovereignty over their resources. Additionally, these resolution confirm the Palestinian right to claim restitution as a result of exploitation loss or depletion or danger to their natural resources. If the latter is strictly proven impossible the Palestinian might raise the question of compensation that is proportional with the value of the loss or harm.

With regard to international watercourses, the customary international law principle "equitable and reasonable utilization" lies at the heart of international water law. This principle has been codified in many legal instrument the most significant of which is the UN Convention on the Law of Non-Navigational Uses on International Watercourses of 1997. This principle has a normative content which derive from the basic principle of "equality of States" and from the principle tat states do not enjoy absolute sovereignty over water in an international watercourse. The implications of this substantive principle are the evolution of obligatory procedural principles including cooperation, exchange of information, prior notification, consultation and negotiations.

Therefore, this substantive principle combined with the procedural rules offer adequate legal foundation for the Palestinians in connection with their legal entitlements from the international watercourses, or in their analysis of their rights and obligations in relation to the Jordan River Basin and the transboundary groundwater or with regard to the planned works/projects/development plans on these watercourses.

The Conceptual Framework for the Palestinian Negotiating Position over Water

International law offers numerous mechanisms for the amicable solutions in relation to international watercourses. The modern development of international water law is also an evidence of the increasing awareness at the international and national levels of the current water crisis and to the dangers of the irrational utilization of these resources.

The substantive and procedural rules which govern the utilization of international watercourses, whether surface or groundwater, were derived from the various sources of international law using an analytical framework that includes the scope and use of terms, substantive rules, procedural rules, institutional and dispute settlement mechanisms.

First: Scope and Use of Terms

There is consistency among the various sources of international law to treat connected surface and groundwater as a unitary whole of the hydrological cycle. Formal and informal international organization

such as the International Law Commission and the International Law Association respectively, encouraged the use of the "system" concept in order to emphasize the relationship between these resources and to take into consideration this interconnection in utilization and management. The term "International watercourse" was finally adopted in the 1997 UN Watercourses Convention and was defined to mean a system of surface and groundwater constituting by virtue of their physical relationship a unitary whole and normally flow into a common terminus. In the case of the Palestinians this definition applies equally to the Jordan River Basin and to the Mountain Aquifer.

Second: Substantive Rules

These are the basic principles and rules that govern States' relationship concerning internationally shared watercourses. The violation of these rules leads to a breach of international law with consequences for State in breach and Victim State. The law relating to State Responsibility govern these consequences.

Equitable and Reasonable Utilization in the various sources of international law there is a consensus that equitable and reasonable utilization is the basic principle that governs the utilization, development and protection of international watercourses. These sources also confirm that this rule is basic in customary international law and therefore binding to all States. The international debates within the ILC of the UN between 1970-1997 on the issue of equitable and reasonable utilization, culminated in the conclusion of articles 5 and 6 of the 1997 UN Watercourses Convention. Article 5 states:

“1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimum utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to co-operate in the protection and development thereof, as provided in the present articles”.

In addition to Article 5, the ILC included some guidelines on its application in Article 6. The latter includes a non-exhaustive list of factors to be taken into consideration when determining what is equitable and reasonable.

The No Harm Rule international water law as was codified in the 1997 UN Watercourses Convention gave primacy to the principle of equitable and reasonable utilization over the a harm rule. The Convention allows for significant harm to occur if it serves the objectives and needs of equitable and reasonable utilization. However, and in case of significant harm, States who are the cause of this harm must take all appropriate measures taking into account the rulings of Articles 5 and 6, and in consultation with the harmed State, to eliminate or mitigate this harm and to appropriately discuss the question of compensation.

Third: Procedural Rules

Procedural rules in any water agreement are key to its comprehensiveness. These rules offer the means and mechanisms through which the substantive rules are implemented. The differentiation between substantive and procedural rules are for pure analytical purposes and in order to understand the agreement and its

requirements. This differentiation does not imply that procedural rules are less binding than substantive ones. The various sources of law agree that the basic procedural rule in the case of international watercourses is *cooperation*, which entails exchange of information, negotiation, prior notification and consultation.

Fourth: Institutional Mechanisms

Most of the sources of international law encouraged the establishment of appropriate institutional mechanisms to facilitate the implementation of the approved legal arrangements. The final text of the 1997 UN Watercourses Convention did not include details on the type and structure of such institutions and sufficed by encouraging states to reach an agreement on this. Therefore, it is crucially important to learn lessons from State's practice in this regard, especially those which were successful models for cooperation.

Fifth: Dispute Settlement Mechanisms

These mechanisms were codified in many international legal instruments including the 1996 Helsinki Rules and the 1997 UN Watercourses Convention. These mechanisms could be modified and adapted to suit the specific requirements of individual international watercourses, though maintaining the spirit of the general principles of negotiation and consultation.

Negotiating Principles and Concepts

- 1. Concerning Sovereignty:** Land and water sovereignty should not be disconnected (Security Council Resolution 242). The borders that will be negotiated upon are those pre 1967 for both Gaza and West Bank, including East Jerusalem.
- 2. Concerning Palestinian Sovereignty over water resources:** the Palestinian have absolute sovereignty over the endogenous water resources that are not part of an international watercourse and a limited sovereignty over the international watercourses whereby the utilization of the latter is governed by the of the customary international law principle equitable and reasonable utilization.
- 3. Concerning the Israeli Historical Water Rights** There is no evidence in international law or in State Practice that supports the theory of historical rights to water as the equitable and reasonable utilization principle was considered the basic principle governing the utilization of international watercourses. Therefore the Palestinians refuse the Israeli claims relating to their historical rights to water. As for the
- 4. Concerning Existing Israeli Uses of International Watercourses** The Palestinian believes that the existing Israeli water uses are a violation to the principle of equitable and reasonable utilization and therefore are considered illegal and in need for reassessment in light of what is equitable and reasonable.

5. **Concerning the Development of Non-Conventional Water Sources** the Palestinians will not accept the negotiation over new and additional water resources prior the regaining of the Palestinian legal entitlements from the international watercourses.
6. **Concerning Compensation:** the Palestinians denounce all the Israeli water related practices during the years of occupation and accordingly consider them violation to international law. The Palestinians must be therefore compensated for all the harms encountered whether as a result of their deprivation from the equitable and reasonable utilization of the endogenous and international watercourses or as a result the various negative impacts on the economic sectors including agriculture, industry...etc.
7. **Concerning Refugees and Returnees:** According to international law and the UN Resolutions all refugees and returnees outside of Palestine have the right to return. Future water demands for the various uses should reflect that additional requirement.
8. **Concerning Settlements:** All settlements in the West Bank and the Gaza Strip are violating International Law (Security Council Res...). In terms of water use this means that the issue of financial compensation or compensation in kind of water use in the settlements since 1967 should be raised.
9. **Concerning International Watercourses:** All waters in international watercourses in Palestine are negotiable

Objectives and Requirements

1. To regain sovereignty and control over the water resources which originate within the borders of 1967 and are not classified as shared water resources. These resources include:
 - The Eastern Wadis of the West Bank;
 - All groundwater aquifers underlying the whole Gaza Strip;
 - All Surface water resources in the Gaza Strip.
2. The property of all water related infrastructure lying inside the area of the above mentioned basins becomes the property of the Palestinians.
3. An equitable and reasonable utilization from Wadi Gaza
4. An equitable and reasonable utilization from the Eastern (The waters of Eastern Aquifer namely the springs originating from it is hydrologically connected with the Jordan River Basin in some areas and it lies in the upstream portion of the rivers and feeds into the river. The status of this aquifer must be dealt with due attention and care especially when negotiating the Palestinian share in the waters of the Jordan River Basin.
5. An equitable and reasonable utilization of the Western and North-eastern Aquifers;
6. An equitable and reasonable utilization from the Jordan River Basin;

7. Right to access Tiberia Lake and to an equitable and reasonable utilization from its water;
8. Right to access the Dead Sea and the use of its natural resources and of all the benefits resulting from the development programs and projects;
9. Translation these entitlements and not to projects.

The Proposed Technical Support Teams

1. The Hydrological-Technical and Mapping Team

- Compiling information on all water resources in historical Palestine (Jordan River Basin, Western, North Eastern, Eastern Aquifer, Coastal Aquifer, Lake Tiberia and the Dead Sea.)
- Compiling data on the available water quantities and identify their uses and users;
- Reflecting these data on maps that illustrate the sources (Western, Eastern or North-eastern Aquifers) and means of each use (canal, well, pump, dams etc).
- Preparing maps, which show:
 - the interconnection between borders, land and water resources;
 - the existing situation in terms of resources and infrastructure including wastewater networks;
 - the hydrological valuable lands in terms of water diversion for the Palestinian side;
 - the “best- borders scenario”, for the future Palestinian states in terms of water diversion;
 - Possible scenarios of changing of the borders and the impact of changing of borders on the Palestinian water use in terms of amount to be taken and in legal terms.
 - “Maximum Withdrawal Border” in terms of water needs and diversion/pumping through the Palestinian side (in coordination with the borders negotiation team).

In coordination with the pollution and water quality team provide maps, which show:

- the different water resources, which show the pollution sources, the reason of pollution and the kind of pollution.
- the different water resources which show the short and long term ecological consequences of pollution and overuse. Create different Scenarios.
- the hydrologically sensitive areas to pollution.

In coordination with the Settlements Team

- Mapping of pollution from the settlements

- Preparing arguments that counter the Israeli ones concerning their claims that any future Palestinian development of the water resources will cause will cause harm to their existing uses. This could be complemented by providing legal evidences that proves their existing uses of international

watercourses illegal and technical evidences for future potential drilling sites that does not impact the Israeli legal existing utilizations.

2. The Socio-economic Team

1. assessment of the population currently using the resources and projections for the future population including the refugees and returnees (in coordination with the refugees team)
2. Assessment of quantities in terms of their uses (agriculture, industry, domestic...etc.) and an assessment of the future increase in demand;
3. Assess the value of compensation for all forms of damage and harm caused by the Israeli illegal utilization to the Palestinians.

3. Water quality and Pollution Team

1. Compiling all available data about the existing pollution, sewage systems etc in the different water resources (Jordan River Basin, Western, North Western, Eastern Aquifer, Coastal Aquifer, Lake Tiberia, Dead Sea.)
2. Compiling all data on the short term and long term environmental and ecological damage which could result from the overuse of groundwater and/or the decrease in the watercourse flow.
3. Possible protection zones which might be proposed from the Israeli side and might be of their hydrological interest, to check the possible sites according to their hydrological sensitive.
4. Propose measures to reduce pollution and overuse in technical terms and in legal terms (in coordination with the Legal Team).

4. Refugee/Returnee Water Team

- Compiling data on the number of refugees and returnees who might come back to Palestine or who are in Palestine in refugee camps.
- Compile information on their places of origin;
- Preparing scenarios on how much water would be needed to provide them with appropriate living standards for refugees inside and outside of Palestine;
- Preparing scenarios where the additional amount of water could developed from, where the refugees/returnees could be settled, which sites would be best for refugees in terms of water availability? Which projects would be needed to provide the refugees with water?

5. Settlement and water group

- Compiling data on the water use within the settlements;
- Assessment of the total utilizations since 1967 until the present.

- Assessment of the total utilization since the signing of the Oslo Accords;
- Assessment of the total utilization in the newly build settlements;
- Compiling data on the pollution caused by the settlements to the international watercourses demonstrating the points of pollution, the type of pollution and the impact of the pollution to the water resources and its quality

In coordination with the Legal and Socio-Economic Teams and for the purpose of compensation:

- Assessment in economic terms of the quantities of water used in the newly settlements;
- Assessment of the impact of settlements pollution on water quality;
- Assessment of the total quantities used in the settlement from 1967 until the signing of the DOP;
- Assessment of the impact of the water utilization in the settlements in terms of economic losses for farmers
- Assessment of the impact on the water quality from 1967-signing of the DOP.
- Create scenarios:
 - *If all settlements are maintained* how is that to be dealt with in terms of water uses? What implications does this scenario have on the Palestinian water utilization in terms of quantity in quality? How would the water utilization in these settlements regulated?
 - *If only parts of the settlements are maintained*, are there are locations of settlements which would of especial importance for the Palestinian side in terms of water resources; which settlements would therefore be most favourable to be removed) **IF** settlements or parts thereof remain, compensation for their water use should be requested in financial terms or – alternatively - a higher amount from other water resources?

6. Institutional Water Team

- Analysis of the existing institutions that were established in the Oslo Accords;
- Assessment of lessons learnt from the past experience;
- Analysis of Best State Practice in terms of Joint Water Institutions;
- Development of a Joint Israeli- Palestinian Institution for Groundwater Management and Protection of the Water resources.
- What would be the role of the PWA according to this Joint Institution?
- Development of a Dispute Settlement Mechanism.

7. Legal group

- To introduce the legal terms used in the context of international watercourses.
- To identify the scope and use of terms in the context of the Israeli Palestinian Context.
- To find legal argumentation in International Law concerning the question of compensation all forms of damages caused by the illegal water utilization by Israel.
- Analysis of the substantive and procedural rules that govern the utilization of international watercourses and how they should be implemented in the Palestinian Israeli context.
- Analysis of the institutional mechanisms needed from a legal perspective.
- Analysis of the dispute settlement mechanism from a legal perspective.
- Legal analysis of signed treaties and deduction of lessons learnt.
- Definition of the legal terms and language used by the Israeli side.

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