

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

Amanda Cahill-Ripley



Routledge Research in Human Rights Law

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The Human Right to Water and its Application in the Occupied Palestinian Territories provides an overview and examination of the human right to water as determined under international human rights law. This is a highly topical issue, with the UN General Assembly having passed a resolution which declares access to clean water and sanitation a human right (New York, 28 July 2010), the recent appointment of the UN Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, and movement within the NGO community for an international water treaty. Amanda Cahill-Ripley analyses the current legal status, substantive content and obligations correlative to the right, and examines the relationship between other economic, social and cultural rights related to the right to water.

The book goes on to look more specifically at the application of the human right to water in the Occupied Palestinian Territories. Using innovative methodology, Cahill-Ripley combines legal analysis with a qualitative social science empirical case study to explore the enjoyment of the right 'on the ground'. The wider implications of the case study findings are then considered, looking at what can be done to strengthen the right legally in terms of its status and codification, and what remedy can be found for violations of the right, both specifically in the Occupied Palestinian Territories and in a more general context.

The book will be of interest to students, academics and practitioners within the fields of international human rights law and international humanitarian law, as well as those concerned with international relations and conflict resolution within Israel/Palestine and the wider Middle East region.

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To my boys
Tim, Fergus and Joe

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Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCPR	UN Human Rights Committee
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	UN Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
COHRE	Centre on Housing Rights and Evictions
CRPD	Convention on the Rights of Persons with Disabilities
FAO	UN Food and Agriculture Organisation
FIAN	Food First Information Network
GC	General Comment
HRC	Human Rights Council (UN)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDP	internally displaced peoples
IDF	Israeli Defence Forces
IMF	International Monetary Fund
JWC	Joint Water Committee
MDG	Millennium Development Goal
NAD	Negotiations Affairs Department
NGO	Non-governmental organisation
NSU	Negotiations Support Unit
OCHA	UN Office for Coordination of Humanitarian Affairs – occupied Palestinian Territory
OFWAT	Office of Water Services (UK)
OHCHR	Office of the High Commissioner for Human Rights
OMCT	World Organisation for the Prevention of Torture
OPTs	Occupied Palestinian Territories

PA	Palestinian Authority
PASSIA	Palestinian Academic Society for the Study of International Affairs
PHG	Palestinian Hydrology Group
PLC	Palestinian Legislative Council
PLO	Palestinian Liberation Organisation
PWA	Palestinian Water Authority
TIM	Temporary International Mechanism
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNECE	UN Economic Commission for Europe
UNEP	United Nations Environment Programme
UNRWA	United Nations Relief and Works Agency
WaSH	Water, Sanitation and Hygiene Monitoring Project
WHO	World Health Organization

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Introduction

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

(UN Committee on Economic, Social and Cultural Rights, General Comment 15, para 1)

Previously, there has been little attention paid as to whether there is a specific human right to water,¹ although there have been several attempts in the last 10–15 years to address this issue.² For example, during the drafting of the UN Convention on Non-Navigational Watercourses 1997, a discussion on the right to water took place. Unfortunately, no agreement could be reached as to the nature of such a right. More recently, however, the right to water has received more favourable attention and with water being an ever-scarcer resource this is a timely moment for such progress.

The main development and impetus for further interest in the right has been the drafting and adoption by the UN Committee on Economic, Social and Cultural Rights of General Comment 15, *The Right to Water*.³ Since the advent of this standard, academics and practitioners as well as state institutions have paid increasing consideration to this right. However, despite steps forward, further

1 Alvarez, JJ, 'The Right to Water as a Human Right', in Piccolotti, R and Taillent, JD (eds), *Linking Human Rights and the Environment*, 2003, Tucson, AZ: University of Arizona Press, p 2.

2 Noted by Riedel, E, Committee Expert and Rapporteur on the Right to Water for the CESCR, Statement on the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

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

2 Introduction

research regarding the legal status, scope and application of the right is limited. This book aims to address the current gap in academic literature on the human right to water. The book provides a legal analysis of the right to water, combined with a qualitative case study which investigates and evaluates enjoyment of the right by people 'on the ground'.

But, why a *human right* to water? Why is a human rights approach to water necessary? Despite international and environmental law concerning water and development initiatives such as the UN Year of Freshwater 2003 and the World Summit on Sustainable Development United Nations Millennium Declaration and Millennium Development Goals, many people still do not have access to clean, safe and sufficient water. The World Health Organization⁴ estimates that 1.1 billion people do not have available sources of clean drinking water and over 1 billion people lack access to an improved basic level of water supply that is able to provide at least 20 litres of safe water per person a day.⁵ The most recent figures illustrate that eight years on, 884 million are still without access to an improved water supply.⁶ Furthermore, 2.6 billion people do not have access to improved sanitation.⁷ These statistics alone illustrate the scale of the problem and justifies consideration of a new approach to alleviate the suffering of those who have to live without sufficient clean and safe water supply.

Previous approaches have been based upon either non-binding declarations or initiatives that although based upon good intentions, have no legal enforcement or on traditional state-to-state mechanisms under international law. The advantage of utilising the human rights approach is that the vertical relationship of human rights law – that is, between the state and the individual means that the right to water is applicable to everyone within that state. This includes specific attention and protection being given to the most marginalised in society: vulnerable groups such as women, children, refugees and displaced people and other minorities and to those living in poverty. The human right to water transforms water *needs* into water *rights*. Human rights represent legal entitlements with corresponding obligations, which make this approach qualitatively different from a needs or charity-based approach. As Scanlon et al note, 'by making water a human right, it could not be taken away from the people'.⁸

This book addresses the opportunities that the human rights approach to water raises for the protection and empowerment of individuals and for collective groups, experiencing problems in satisfying their water needs. Although the right to water has been seen as an integral element of other economic and social rights, including

4 Hereinafter referred to as the WHO.

5 WHO, *The Global Water Supply and Sanitation Assessment 2000*, 2000, Geneva: WHO, p 1; WHO, *The Right to Water*, January 2003, Geneva: WHO, pp 7 and 12.

6 WHO and UNICEF, *Progress on Sanitation and Drinking Water: 2010 Update*, 2010, Geneva: WHO/UNICEF, p 8.

7 Ibid, p 6.

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

the rights to food, health and housing,⁹ the lack of a specific codification of the right to water appears to represent a gap in human rights provisions. This research analyses the current status of the right to water and examines how it can be developed as an independent right. The importance of water as a right in itself and as a precondition for fulfilment of other human rights, such as the right to food, health and the right to life merits further academic study in this field.

The book also utilises an empirical research case study to explore the reality of the enjoyment of the human right to water ‘on the ground’ – that is to understand how the legal right is ‘operationalised’ in a particular situation. Having reviewed the literature and current media, it seems there is significant attention upon water rights in areas of underdevelopment and arid regions such as India and Africa. There is also material on indigenous peoples’ water rights and environmental degradation due to water scarcity.¹⁰ Furthermore, there is an emerging body of work discussing the privatisation of water services and its effects. However, there seems to be little research concerning the human right to water in practice, and in particular a right to water during times of conflict. Although much is documented concerning water as a source of conflict and approaches in international law and international relations to resolving water disputes, none of these discussions encompasses the effects of such disputes upon access to safe and sufficient water (the realisation of the human right to water) on individuals and communities living in the conflict situation. Therefore, I chose to examine the application of the legal framework of the human right to water within the context of the Occupied Palestinian Territories¹¹ of the West Bank.

The reasoning behind the choice of case study is a result of several concerns: the water aspect of the conflict between the Israelis and Palestinians is much publicised and constitutes a major element for consideration under the Oslo Peace Accords, being important enough to be designated an issue to be dealt with under the Final Status Negotiations.¹² Water remains a highly contentious issue between the conflict parties. As such, I wanted to investigate whether a human rights approach to the water issue will be of benefit to those living within a conflict situation. In addition, human rights abuses in the area are also widely reported but the focus is usually on large scale violations, such as the 2002/2003 Israeli incursions into Palestinian

9 GC 15, para 3.

10 It is important to note the difference between ‘water rights’ and the human right to water. The human right to water is a distinct legal entitlement with correlative obligations under international human rights law. ‘Water rights’ can be defined as ‘secure property rights over [a] natural resource’ and is a term used to define entitlements to water on the basis of local custom, traditional practices and at times entitlements under local laws. Water rights are often discussed in light of localised conflict over water uses and resulting problems such as pollution. Moreover, they are usually operational at community level, rather than individually. For further reading, see Randolph Bruns, B and Meinzen-Dick, R (eds), *Negotiating Water Rights*, 2000, London: ITDG Publishing, pp 23–41.

11 Hereinafter referred to as OPTs.

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

refugee camps and the recent war in Gaza (2008), and not on everyday life under occupation. By utilising a violations approach and assessing enjoyment of the right to water by individuals in their daily routines, I highlight the water problems faced by Palestinians living in the West Bank, drawing attention to the lack of enjoyment of economic and social rights on an ongoing basis, rather than focussing on periodic large-scale violations.

Furthermore, resolution of the Israeli–Palestinian conflict requires a multi-faceted approach and consideration of many other factors that are outside the scope of this book. Therefore, wider political questions are addressed when necessary, but the book has a primarily legal approach focussing on international and other applicable law concerning a human right to water and its application within the OPTs. Also, in relation to the case study, although I have dealt with the international legal provisions applicable throughout the OPTs, I do not discuss domestic legal provisions specific to Gaza.¹³ This is because my empirical research study is limited to the West Bank and although Gaza and the West Bank share many of the same troubles due to the water crisis, Gaza also has its own unique problems: firstly, due to its reliance on the Coastal Aquifer, which is in danger of becoming unusable, as its levels of water are dangerously scarce and saturated with salt, as a result of overuse and contamination.¹⁴ This raises the issue of water treatments such as desalination plants.

Secondly, the recent conflict and subsequent closure of Gaza by Israel has led to unprecedented levels of poverty and violations of economic and social rights, the full consequences of which are still to be determined.¹⁵ As such, the continuing crisis in Gaza including the water problems requires independent research which falls outside the scope of this book.

In terms of analysis of data gathered in the case study, the evidence collected was assessed and evaluated using the violations approach. Progressive realisation is difficult to monitor and requires complex data gathering from both the current period and tracing trends over time. It also requires context-specific data relating to a state's level of development and available resources. Thus it is difficult to

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

14 See Lonergan, S and Brooks, D, 'A Deficit in Gaza', in *Watershed: The Role of Fresh Water in the Israeli–Palestinian Conflict*, 1994, Ottawa: International Development Research Centre, pp 134–7; Palestinian Hydrology Group (hereinafter referred to as the PHG), *Water for Life – Israeli Assault on Palestinian Water, Sanitation and Hygiene During the Intifada, WaSH Monitoring Report 2004*, 2004, Ramallah: PHG, p 18; Center for Economic and Social Rights and PHG, *Thirsting for Justice – Israeli Violations of the Human Right to Water in the Occupied Palestinian Territories, Parallel Report to the CESCR*, May 2003, pp 35–6; Selby, J, *Water, Power and Politics in the Middle East: The Other Israeli–Palestinian Conflict*, 2003, London: IB Tauris, p 25.

15 See, *inter alia*, Human Rights Council (hereinafter referred to as the HRC), Human Rights in Palestine and Other Occupied Arab Territories, *Report of the UN Fact-Finding Mission on the Gaza Conflict*, A/HRC/12/48, 25 September 2009; Amnesty International UK and others, *Failing Gaza: No rebuilding, no recovery, no more excuses. A report one year after Operation Cast Lead*, December 2009, Amnesty International UK and others; International Committee of the Red Cross (hereinafter referred to as ICRC), *Gaza: 1.5 million people trapped in despair*, Report, June 2009, Geneva: ICRC; ICRC, 'Israel and the occupied territories: violence claims more lives as blockade continues to stifle Gaza, Operational update', 29 April 2010.

evaluate state compliance with its obligations through measurement against these criteria,¹⁶ especially over a limited period of research. Therefore, the violations model of assessment coupled with an evaluation of compliance with core obligations was an appropriate and an effective alternative approach for this study.¹⁷

Furthermore, it can be argued that ‘The identification of violations in order to end and rectify abuses constitutes a higher priority than does promoting progressive realisation. The monitoring of human rights is not an academic exercise: it is intended to be a means of reducing the human suffering that results from serious violations of international standards’.¹⁸ As such, using the violations approach to assess the enjoyment of the right to water offers a means by which to assist the Palestinians in realising their water rights in the immediate period whilst political solutions to the conflict are ongoing or absent.

More widely, the identification of violations as a means to identify and end abuses may offer a more effective way of conceptualising the substantive content of economic and social rights than abstract philosophical and legal models. As Chapman argues, ‘The fundamental purpose for acknowledging basic rights is to prevent or eliminate the degree of vulnerability that leaves people at the mercy of others’.¹⁹ ‘One fundamental purpose served by acknowledging basic rights [is] . . . that we “take the victims side” and the side of potential victims. The honouring of basic rights is an active alliance with those who would otherwise be helpless against natural and social forces too strong for them’.²⁰ Moreover, methods based on qualitative data can give detailed insights to conditions which statistics and quantitative data can only indicate. By combining qualitative methods with a violations approach to the analysis of the findings, the information gathered can inform the researcher not only of the nature of the violations that have taken place but also give indications as to *why* they have taken place and in what social and political conditions. This can then enable prediction of what further violations may take place and their nature, thus helping to take action to prevent further violations. By identifying conditions which require improvement and change, there is a chance to assist in preventing continued or new violations. This approach to researching human rights is justified in that it may offer a mechanism for prevention and prediction, in addition to identifying violations for reparation and remedy.

The book has three distinct sections: the first section examines the legal status and normative content of the right to water, including establishing the relative sources and provisions for such a right and determining the substantive content of the right to water and its correlative obligations. Chapter 1 examines the historical

16 See Chapman, A and Russell, S, ‘Violations of the Right to Education’, Background Paper submitted by the American Association for the Advancement of Science on the CESCR Day of General Discussion: Right to Education, 30 November 1998, E/C.12/1998/19, paras 6–11.

17 That is not to say that the progressive realisation approach is not valid but is an approach more suited to long-term assessment and monitoring of implementation at state level.

18 Chapman, A, ‘A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights’, (1996) 18(1) *Human Rights Quarterly* 23–66, at 37.

19 Ibid.

20 Shue, H, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 1980, Princeton, NJ: Princeton University Press, p 33.

background to the development of the concept of a human right to water within legal and policy fields, prior to the landmark adoption of GC 15 by the CESCRR. Various approaches to dealing with ensuring accessible, safe and sufficient water to all are examined: international law, international development policy and the previous work of international and regional human rights bodies, all of which have contributed to the current codification and debate within international human rights law. Chapter 2 reviews the current international human rights legal framework for the right to water: provisions under the International Covenant on Economic, Social and Cultural Rights,²¹ the Convention on the Rights of the Child 1989,²² the Convention on the Elimination of all forms of Discrimination against Women 1979²³ and the International Covenant on Civil and Political Rights²⁴ in order to determine the current status of the human right to water under international human rights law. Subsequently, I examine and evaluate the CESCRR GC 15 to establish the normative content of the right and identify and strengths and weaknesses in provision. Further, the idea of a defined scope and core content are explored as well as the relationship between the right to water and other related human rights.

Chapter 3 provides an overview and analysis of the correlative obligations as set out in GC 15 including tripartite obligations and core obligations. It also addresses issues concerning the nature of general obligations under the ICESCRR, as well as considering new developments in international human rights law such as extra-territorial obligations in relation to the right to water.

The second section applies these legal norms to a particular context – that of the OPTs. Chapter 4 begins with a brief overview of both the history of the conflict and of the current water situation in the OPTs. It then offers an analysis of the international legal provisions concerning the right to water that are applicable to the OPTs. Because of the nature of the territory as occupied by the state of Israel, the *lex specialis* or law seen as particularly applicable is international humanitarian law. Therefore the provisions relevant to the right to water under this body of law are reviewed and the interaction between humanitarian law and human rights law investigated.

Chapter 5 continues the legal analysis but at a national and bilateral level and considers the provisions for a right to water under the bilateral agreements between Israel and the OPTs, commonly known as the Oslo Accords, and under applicable domestic law of Palestine and Israel. I then draw some conclusions as to which systems of law offer the most effective legal basis for the right to water in the context of the OPTs.

The enjoyment of the right to water ‘on the ground’ is assessed in Chapter 6, in which I apply the legal basis for the human right to water to a case study within the West Bank: a small-scale empirical research project. This takes the form of an

21 Hereinafter referred to as the ICESCRR.

22 Hereinafter referred to as the CRC.

23 Hereinafter referred to as the CEDAW.

24 Hereinafter referred to as the ICCPR.

investigation of water problems faced by the Palestinians living in the West Bank. The material presented is gathered from 45 semi-structured interviews which took place in the southern West Bank and which are based around questions related to the key elements of the right to water: availability, accessibility and safety; non-discrimination and protection of vulnerable groups. Using a violations approach, the data is analysed in order to assess compliance with core obligations, to establish whether violations of the right have taken place and to determine the nature of such violations.

In the third and final part of the book, I evaluate the provisions for the right to water in light of the applied research and establish recommendations on how to strengthen and further the development of the right to water. In the concluding chapter (Chapter 7), I begin by making recommendations regarding practical measures to be taken to improve enjoyment of the right to water in the OPTs as well as what can be done in terms of remedy and redress for established violations. The protections available for the right to water in the context of conflict and occupation are also evaluated, taking into consideration the rules of international humanitarian law and the parallel application of both international humanitarian law and international human rights law. Wider conclusions and recommendations are then drawn for the right to water generally, focussing on clarification of legal status and further codification, addressing gaps and weaknesses in provision and improving and advancing remedy and access to remedies at international and national level. Recent positive developments are discussed such as the new optional protocol to the ICESCR and increasing jurisprudence at national and regional level.

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

1 The historical legal and political context of the right to water

A right to water has been recognised in a wide range of legal and political documents, including international, regional and bilateral treaties and soft law, binding and non-binding provisions under international law, international environmental law, international humanitarian law, development standards and declarations and other reports and announcements such as political statements, peace agreements and the work of non-governmental organisations²⁵ and international organisations such as the World Bank and UN Agencies, UNICEF and the WHO to mention a few. Although the focus for the fundamental basis for a human right to water is under international human rights law, the historical legal and political development of the right is traceable through an examination of the various approaches taken to deal with water issues. Prior to the adoption of the CESCR GC 15, the concept of water as a human right evolved under three areas of law: international law, international humanitarian law and international human rights law. Further, the idea of safe and sufficient water as a human right has also developed within the field of international and sustainable development policy.

International law and water

Water has been the subject of conflict and cooperation and legal agreements to govern such situations for hundreds of years. Water has served as boundary markers between communities; as a vital component of military strategy; as an important economic factor for regions; as a means of transport and also as facilitating communication between otherwise independent peoples.²⁶

In terms of international law pertaining to water, there is evidence of a wealth of historical legal agreements concerning water. Early agreements focussed on the use of water for navigational purposes, such as the Act of the Congress of Vienna 1815 ‘which established the principle of priority and freedom of navigation for all states sharing a river, on a reciprocal basis’.²⁷ Another example can be seen in one

25 Hereinafter referred to as NGOs.

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

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

of the earliest known water treaties, the 'Treaty of Limits between France and the Netherlands', 28 March 1820 regarding use of the Rhine.²⁸

As industrialisation brought new modes of transport, the primacy of navigational uses of water declined and agreements developed, mostly taking the form of bilateral or trilateral treaties between states governing the sharing of common water resources such as rivers or basins.²⁹ This approach of cooperation and sharing of common water resources used is now encompassed in international law governing the use of water. However, one of the complexities with existing international water law is that it is an intricate system of codification based upon different categories of water resources, for example transboundary surface water, groundwater and confined groundwater or aquifers. This has resulted in several international water treaties based on differing types of water and water use.³⁰

In terms of the development of a human right to water, none of these standards or treaties addresses the issue of an individual's right to water. Rather, they provide for water at the level of the state. However, certain treaties such as the legally binding UN Convention on the Law of the Non-Navigational Uses of International Watercourses 1997 do contain certain principles that can be seen as compatible with a human rights perspective, such as the obligation not to cause significant harm³¹ and obligations of equitable and reasonable utilisation and participation in Articles 5 and 6. The latter includes taking into account 'the social and economic needs of the watercourse States concerned'³² and 'the population dependent on the watercourse in each watercourse State'.³³ Furthermore, Article 10.2 is significant in that it prioritises water for human needs over other uses: 'In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to Articles 5 to 7, with special regard being given to the requirements of vital human needs'.³⁴ This provision can be seen as harmonious with the human right to water.

28 For a comprehensive list of bilateral, multilateral treaties concerning water, see the Transboundary Freshwater Dispute Database, Oregon State University, at www.transboundarywaters.orst.edu/ (accessed 1 June 2010). See also the UN Food and Agriculture Organisation, Legal Office, 'Waterlex' Database, which contains a 'full text of treaties and agreements, bilateral and multilateral, concluded by sovereign countries in regard to the development and management of rivers and lakes, and/or of groundwater resources, which form an international boundary line or which are bisected by such boundary line', at www.waterlex.fao.org (accessed 1 June 2010).

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

30 E.g. International Law Association Helsinki Rules on the Uses of Waters and International Rivers 1966; International Law Commission 1994 Draft Articles; UN Convention on the Law of the Non-Navigational Uses of International Watercourses 1997. See Hayton, R and Utton, A, 'Transboundary Groundwaters: The Bellagio Draft Treaty', (1989) 29(Summer) *Natural Resources Journal* 668–722 (International Transboundary Resources Center); Diabes-Murad, F, *A New Legal Framework for Managing the World's Shared Groundwaters: A Case Study from the Middle East*, 2005, London: IWA; Chusei, Y, Special Rapporteur, *Third Report on Shared Natural Resources: Transboundary Groundwaters*, International Law Commission, 57th session, Geneva, 2 May–3 June and 4 July–5 August 2005, UN General Assembly, A/CN.4/551. Also see Corr 1 and Add 1.

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

32 Ibid, Art 6(b).

33 Ibid, Art 6(c).

34 Original footnote: The Statement of Understanding issued by States negotiating the Convention stated that 'In determining "vital human needs", special attention is to be paid to providing

Another example can be seen in the UN Economic Commission for Europe, Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992³⁵ and the Protocol on Water and Health 1999.³⁶ The Convention in itself does not deal with the right to water as such but includes principles which are related, such as equitable use of water resources, prohibition of pollution and quality control. Moreover, its Protocol on Water and Health has been seen as enabling the right to water through its application.³⁷ For example, Article 4, 2(a) states that parties shall take all appropriate measures for the purposes of ensuring 'adequate supplies of wholesome drinking water'.³⁸ The Protocol also incorporates special protection for vulnerable groups,³⁹ comprehensive provision for adequate sanitation⁴⁰ as well as including common principles such as that of sustainable use of water resources⁴¹ and information access.⁴²

In parallel with these developments under international law, a right to water could be seen as emerging under the doctrine of international humanitarian law and under international human rights law itself. As the UN World Water Assessment Programme *World Water Development, Report 2*, notes, the Geneva Conventions and Additional Protocols (1949–77) can be seen as the first explicit and implicit provisions for the right in international law.⁴³ Although these treaties have not always been recognised as containing 'rights' as such (including a right to water), it is now widely accepted that they provide for protection of rights of individuals as well as defining rules governing state actions in times of conflict.

sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation'.

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

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

37 In January 2007, at the first meeting of the state parties to the Protocol, a round-table discussion was convened by the UN Economic Commission for Europe (hereinafter referred to as the UNECE), WHO and Office of the High Commissioner for Human Rights (hereinafter referred to as the OHCHR) on the right to water and the Protocol with the aim of identifying the commonalities and differences in approaches and how each area of expertise could cooperate to identify a common understanding of what the human right to water means and to make access to clean and sufficient water a reality. See Round-table convened by UNECE, WHO and OHCHR, 'The Human Right to Water and the Protocol on Water and Health: Making Access to Water a Reality', 18 January 2007 at the 1st Meeting of the Parties to the Protocol on Water and Health, Geneva, 17–19 January 2007.

38 Although it refers to the term 'drinking water' the Protocol defines drinking water as water for all domestic purposes including food preparation and personal hygiene. Thus this provision is consistent with the right to water as defined in GC 15.

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

40 See Protocol on Water and Health 1999, Arts 2(2), 2(8), 4, 2(b).

41 Ibid, Art 5(d).

42 Ibid, Art 5(i).

43 See UN World Water Assessment Programme, *World Water Development Report 2: Water a Shared Responsibility*, 2006, Paris and New York: UNESCO/Berghahn, p 383, Table 11.3.

Development approaches to water

Concurrent with the development of the right to water in these legal fields, another complementary approach to the realisation of safe and adequate water for all has been emerging in environmental and development policy, including in multilateral declarations. This is not a new occurrence but has been utilised more widely and in greater detail in recent years due to increasing concern regarding the environment and poverty eradication. Furthermore, the incorporation of a human rights approach to development activity and policy has furthered the convergence and complementarity between the 'legal' field of international human rights and international development. With the advent of 'ethical foreign policy', states have also had to become much more aware of their activities and policies in regard to the basic living conditions of people in other states; thus concern to meet basic human needs is firmly on the international agenda.

Integral to sustainable development is the emergence of two central ideas: the right to an adequate standard of living and sustainable use of water resources (as an element of basic needs). For example, the Stockholm Declaration of the UN Conference on the Human Environment 1972 states that man has the fundamental right to adequate conditions of life⁴⁴ and that man has a responsibility to safeguard the natural resources of the earth (including water) for the benefit of present and future generations.⁴⁵ A further example can be seen in the United Nations Development Programme New Delhi Statement 1990⁴⁶ which notes that 'Safe water and proper means of waste disposal are essential for environmental sustainability and better human health, and must be at the centre of integrated water resources management . . .'.⁴⁷

Subsequently, a meeting of experts took place in Ireland which resulted in the drafting and adoption of the Dublin Principles 1992.⁴⁸ This statement provided recommendations for urgent action programmes concerning water and sustainable development, to be presented to world leaders assembled at the UN Conference on Environment and Development⁴⁹ in Rio de Janeiro in June 1992. It contained

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

45 Ibid, Principle 2.

46 The New Delhi Statement is an appeal to nations for concerted action to enable people to obtain safe drinking water and environmental sanitation. The Statement was adopted by 600 participants from 115 countries at the Global Consultation on Safe Water and Sanitation for the 1990s held in New Delhi, 10–14 September 1990. The United Nations Development Programme is hereinafter referred to as the UNDP. Organised by the UNDP and hosted by the Government of India, the Consultation was co-sponsored by the UN Steering Committee for The International Drinking Water Supply and Sanitation Decade and by the Water Supply and Sanitation Collaborative Council. See www.bdx.net/sdnbd_org/world_env_day/2003/water_year/documents/newdelhi.pdf (accessed 1 June 2010).

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

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

49 Hereinafter referred to as the UNCED.

two notable provisions. The first, a guiding principle, recognised water as an economic good, but states that within this principle, 'it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price'.⁵⁰ Furthermore, within its programme of action it recommends the provision of water for basic human needs as an aspect of poverty alleviation.⁵¹ It also notes the vulnerability and special needs of those in rural areas emphasising the need for provision of access to a potable water supply for rural areas.⁵²

The recommendations contained within the Dublin Principles expressly recognised a human right to water. However, the subsequent UNCED, Rio Declaration 1992 deferred express recognition of such a right noting only that human beings are entitled to 'a healthy and productive life' as a part of sustainable development.⁵³

The inconsistency between development declarations is evident if the UNCED, Agenda 21, also adopted in 1992, is considered.⁵⁴ Conversely, this document reiterated the approach of earlier declarations, noting the achievements of the Mar del Plata Declaration 1977 adopted by the UN Water Conference, where there is explicit reference to the right to drinking water: 'all peoples, whatever their stage of their stage of development and social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs'.⁵⁵ Although the Mar del Plata Declaration is not a legally binding document, it is significant in that it provides explicit recognition of water as a human right and as a basic need.⁵⁶

Furthermore, Agenda 21 notes that despite the subsequent launching in 1981 of the International Drinking Water Supply and Sanitation Decade, with the target of the Decade being to provide safe drinking water and sanitation to underserved urban and rural areas by 1990, 'even the unprecedented progress achieved during the Decade was not enough'.⁵⁷ As such, the aim of the Agenda was to continue to put pressure upon states to 'make certain that adequate supplies of water of good quality are maintained for the entire population of this planet'.⁵⁸

To this end, Agenda 21 views safe and sufficient water as essential for human development, improving health, alleviating poverty and maintaining sustainable ecosystems. It states that 'priority has to be given to the satisfaction of basic needs and the safeguarding of ecosystems'.⁵⁹ In this way, the Agenda reflects the content of the human right to water by prioritising water for personal and domestic use, even though it does not recognise a human right to water per se.

50 Dublin Principles 1992, Principle 4.

51 Ibid, Action Agenda, Alleviation of poverty and disease.

52 Ibid, Action Agenda, Agricultural production and rural water supply.

53 Rio Declaration 1992, Principle 1.

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

55 Mar del Plata Declaration 1977, UN Water Conference, Preamble.

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

57 Agenda 21, Chapter 18.47.

58 Ibid, Chapter 18.2.

59 Ibid, Chapter 18.8.

This was followed, *inter alia*, by the Report of the UN International Conference on Population and Development, Cairo, 1994⁶⁰ where a human being's right to an adequate standard of living, 'including adequate food, clothing, housing, water and sanitation' is provided for under Principle 2. This broad definition of the right to an adequate standard of living reflects the current conception of the right to water as an integral part of ICESCR, Article 11.

Finally in 2000 the World Summit on Sustainable Development United Nations Millennium Declaration⁶¹ and Millennium Development Goals⁶² and the subsequent Johannesburg Plan of Implementation of the World Summit on Sustainable Development 2002, has ensured that water and sanitation are a part of the current development agenda. The Declaration itself contains general principles and values regarding respect for human rights and protection of the vulnerable,⁶³ as well as respect for nature, in line with sustainable development.⁶⁴ More specifically, however, it states that parties will resolve: 'To halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people who suffer from hunger and, by the same date, to halve the proportion of people who are unable to reach or to afford safe drinking water',⁶⁵ and furthermore, 'to stop the unsustainable exploitation of water resources by developing water management strategies at the regional, national and local levels, which promote both equitable access and adequate supplies'.⁶⁶ The subsequently adopted eight MDGs include this target on water within Goal 7 – Ensure Environmental Sustainability: 'Halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation'.⁶⁷ Moreover, the succeeding Johannesburg Plan of Implementation 2002 proposes, 'a programme of actions, with financial and technical assistance, to achieve the Millennium Development Goal on safe drinking water'. In this respect, they reiterate the target as outlined in the Millennium Declaration.⁶⁸

60 Cairo, 5–13 September 1994.

61 UN Millennium Declaration 2000, General Assembly Resolution 55/2 of 8 September 2000. Hereinafter referred to as the Millennium Declaration.

62 Hereinafter referred to as MDGs.

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

64 Ibid, Section I, Values and Principles, para 6; and Section IV, Protecting our Common Environment.

65 Ibid, Section III, Development and Poverty Eradication, para 19.

66 Ibid, Section IV, Protecting our Common Environment, para 23. See also paras 21 and 22 on sustainable development.

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

68 Johannesburg Plan of Implementation of the World Summit on Sustainable Development 2002, para 25. The programme of actions outlined includes, *inter alia*, measures to mobilise international and domestic financial resources at all levels and support capacity-building for water and sanitation infrastructure and services development including supporting the special needs of the poor and women; facilitate access to public information and participation, including by women; support implementation of Agenda 21, Chapter 18; prevention of pollution including

The framework for this target in all of these documents is not one of a human right to water but rather views clean and sufficient water and adequate sanitation as necessary pre-conditions to achieve the objective of ending poverty, specifically to ensure environmental sustainability and sustainable development. Although the Summit and the Declaration have received a high profile within the media and civil society, they do not enshrine any provision which clearly and unequivocally states that access to clean and sufficient water and adequate sanitation is a human right and not just a worthy aspiration or charitable need to be fulfilled. Notwithstanding this point, there has been some argument that many of the MDGs including the water target of Goal 7 now constitute customary international law amongst the international community of states. Consequently, it is arguable that the right to water could be seen as enshrined within such customary rules.⁶⁹

In sum, however, despite the fact that none of these development declarations and statements constitutes legally binding documents with corresponding legal obligations, they do serve to raise the profile of the human right to water and to firmly place the issue on the international agenda. Furthermore, owing to the high profile given to water by development organisations and agencies and the related international pressure put upon states, a right to water has now been recognised by several political bodies including the European community and individual state governments.⁷⁰ For example, the UK government recently recognised the right to water in a statement by the Minister for the Department for International Development.⁷¹

Moreover, cumulatively, all of these soft law declarations have played a part in increasing the pressure upon states and other regional and international bodies to recognise and promote the idea of water as a basic human right. The importance

sanitation provision; promotion of sustainable water use and establishing at the national level monitoring systems, national indicators and effective legal frameworks. Furthermore, para 26(c) notes priority of water use for the satisfaction of basic human needs. See also paras 24–9 on water management.

69 See Alston, P, 'A Human Rights Perspective on the Millennium Development Goals', Paper prepared as a contribution to the work of the UN Millennium Project Task Force on Poverty and Economic Development, Geneva, 14–18 November 2005, paras 35–42; Alston, P, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals', (2005) 27(3) *Human Rights Quarterly* 755–829; Nakani, G, Page, J and Judge, L, 'Human Rights and Poverty Reduction Strategies: Moving Towards Convergence?', in Alston, P and Robinson, M (eds), *Human Rights and Development: Towards Mutual Reinforcement*, 2005, Oxford: Oxford University Press, pp 475–97.

70 E.g. the government of Belgium has recognised the right to water in its Constitution and implemented it through regional legislation. See Ouvry, B, 'Access to Water as a Basic Human Right: Different Ways to Fulfil this Vital Commitment: The Case of Belgium and its Regions', Paper at the Roundtable convened by UNECE, WHO and OHCHR, 'The Human Right to Water and the Protocol on Water and Health: Making Access to Water a Reality', 18 January 2007 at the 1st Meeting of the Parties to the Protocol on Water and Health, Geneva, 17–19 January 2007.

71 See Department for International Development Press Release, 'UK recognises the right to water as Hilary Benn launches call for Global Action Plan to solve water crisis', 9 November 2006, at www.dfid.gov.uk/news/files/pressreleases/human-dev-report06.asp (accessed 1 June 2010). For further discussion, see Cahill, A, 'Protecting Rights in the Face of Scarcity: The Right to Water', in Gibney, M and Sigrun, S (eds), *Universal Human Rights and Extraterritorial Obligations*, 2010, Philadelphia, PA: University of Pennsylvania Press.

of soft law should not be underestimated, as soft law serves to contribute to the creation of custom, interprets existing laws and encourages the adoption of hard law.⁷² In addition, the proliferation of material within the development field as well as the emerging right to development have resulted in a gathering of momentum behind a call for the realisation of economic and social rights in general, with many more relevant mandates by human rights NGOs and within the UN human rights system itself.

International and regional human rights bodies

In relation to developments within the field of international human rights law, with the adoption in 1966 of the ICESCR, provision for a human right to water was codified implicitly within Article 11, an adequate standard of living, and Article 12, the highest attainable standard of health. The CESCR has been responsible for much of the soft law which has advanced the idea of the right to water, most especially within their General Comments, several of which refer to the right to water as an element of the right to an adequate standard of living or under related rights such as health.⁷³

Two General Comments are particularly notable. General Comment 12, *The Right to Adequate Food*,⁷⁴ although seen as one of the most important rights in relation to water, is notable in that it does not expressly refer to a right to water. In view of the commonly held perception that a right to water was an integral part of the right to food, or that water could be conceived of as 'liquid food', it seems surprising that such an important aspect of human survival was not explicitly recognised in this standard. This was even more remarkable in light of previous documents which had explicitly noted the link between food and water, for example the Rome Declaration on World Food Security 1996 which states that sustainable food security is a priority requiring 'equitable and equal access to productive resources such as . . . water'.⁷⁵ Conversely, however, it could be that as water was viewed as an integral part of food that separate explicit references to water were not deemed necessary. In practice, however, this does not ensure that all aspects of a right to water are provided for.

The most comprehensive and important standard in relation to the right to water prior to the adoption of GC 15 is General Comment 14, *The Right to the Highest*

72 The International Court of Justice (hereinafter referred to as the ICJ) noted in the Nuclear Weapons Advisory Opinion (1996) that the Stockholm and Rio Declarations had helped to create legal obligations upon states. For a discussion of the benefits and disadvantages of soft environmental law and its significance, see Bell, S and McGillivray, D, *Environmental Law*, 6th edn, 2006, Oxford: Oxford University Press, Ch 6, pp 143–79, at 153–9.

73 CESCR, General Comment 4, 13/12/91 (6th session, 1991), *The Right to Adequate Housing*, para 8(b); CESCR, General Comment 5, 09/12/94 (11th session, 1994), *Persons with Disabilities*, para 1; CESCR, General Comment 6, 08/12/95 (13th session, 1995), *The Economic, Social and Cultural Rights of Older Persons*, para 32; CESCR, General Comment 13, 08/12/99, *The Right to Education* (Art 13), E/C.12/1999/10, 8 December 1999, para 6 (a).

74 CESCR, General Comment 12, 12/05/99 (20th session, 26 April–14 May 1999), *The Right to Adequate Food* (Art 11), E/C.12/1999/5. Hereinafter referred to as GC 12.

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

Attainable Standard of Health.⁷⁶ GC 14 is both thorough and unequivocal in its provisions concerning the right to water and its importance within the realisation of the right to health. The inextricable linkage between health and water had already been noted, prior to the drafting of GC 14, in previous documents concerning the right to health, for example, within the Declaration of Alma-Ata 1978, where an adequate supply of safe water and basic sanitation is stated as a part of essential primary health care and as necessary for realisation of the right to health.⁷⁷

This approach to safe and sufficient water as a requirement for the realisation of the right to health was echoed in GC 14. Water is conceived of as one of the necessary 'underlying determinants of health'. Furthermore, it is the first General Comment to encompass all key substantive elements of the right to water: access, safety and sufficiency, as well as encompassing provision concerning sanitation, also as an underlying determinant of health.⁷⁸ In addition to several provisions noting the need for accessible, safe and sufficient water,⁷⁹ paragraph 34 prohibits the pollution of water and significantly, prohibits states 'from limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law'. This provision is also indicative of the growing complementarity of human rights law and humanitarian law, which is reflected further in GC 15.

Most recently, developments within the treaty-based UN human rights system have been followed up by human rights bodies within the UN Charter system. In 2002 a UN Special Rapporteur was appointed by the Human Rights Commission to study the relationship between the enjoyment of economic and social rights and the promotion of the realisation of the right to drinking water supply and sanitation and to submit reports to the Sub-Commission on the Promotion and Protection of Human Rights.⁸⁰ At its 56th session, the Sub-Commission requested the Special Rapporteur to prepare a set of draft guidelines for the realisation of the right to drinking water and sanitation,⁸¹ which were subsequently submitted in 2005.⁸² The guidelines are 'intended to assist government policy makers, international agencies and members of civil society . . . to implement the right to drinking water and sanitation'.⁸³ The strength of the guidelines is that the framework is one which incorporates several existing approaches to water: as a human right and as an environmental concern and common good.

76 CESCR, General Comment 14, 11/08/2000, The Right to the Highest Attainable Standard of Health, E/C.12/2000/4. Hereinafter referred to as GC 14.

77 Declaration of Alma-Ata, WHO/UNICEF International Conference on Primary Health Care, Alma-Ata, USSR, 6–12 September 1978, paras I and VII (3).

78 See GC 14, para 11.

79 Ibid, paras 12(a), 12(b), 12(d) and 15.

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

81 See Sub-Commission on the Promotion and Protection of Human Rights, Decision 2004/107, 9 August 2004 (56th session).

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

83 Ibid, para 2.

Furthermore, taking note of these guidelines and the adoption of GC 15, the HRC requested that the Office of the High Commissioner for Human Rights⁸⁴ conduct 'a detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments' which was submitted in September 2007.⁸⁵ Subsequently, an 'Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation' was appointed in September 2008.⁸⁶ This recent development has put the issue of the human right to water firmly on the agenda of a Charter-based human rights body and to a wider audience, which must be beneficial in terms of understanding the right and realisation of the right.

There have also been developments in international human rights law at a regional level resulting in all three regional systems in existence having some provision for a human right to water. Under the African system, within the African (Banjul) Charter of Human and People's Rights 1981, the provision for the right to water is implicit, being provided for under Article 16 as an element of the right to health and under Article 24 as a precondition necessary for 'the right to a general satisfactory environment favourable to their development'.⁸⁷ Positively, the African Charter on the Rights and Welfare of the Child 1990 makes express provision for a right to water as an element of the right to health.⁸⁸

Within the American system, under the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights Protocol of San Salvador 1988 and under the American Declaration of the Rights and Duties of Man 1948, the provisions are of an implicit nature, with the right to water constituting an element of the rights to health, a healthy environment, housing and food.⁸⁹

The most extensive provisions are under the European system. Implicit provisions for a right to water can be found under European human rights instruments.⁹⁰ Additionally, the Council of Europe has recently adopted a specific treaty concerning management of water resources,⁹¹ which encompasses the human right

84 Hereinafter referred to as the OHCHR.

85 HRC, Decision 2/104, Human rights and access to water, 31st meeting, 27 November 2006.

86 See Ch 7 for further discussion.

87 See also Art 22, right to development.

88 See Art 14, para 2(c).

89 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights Protocol of San Salvador 1988, Art 10, Health, and Art 11, Right to a Healthy Environment, including, *inter alia*, a right to have access to basic public services; Art 12, Right to Food. See also the American Declaration of the Rights and Duties of Man 1948, Art XI, Health, and Art XXIII, Housing.

90 European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 2, Right to Life, and European Social Charter 1961 and Revised European Social Charter 1996, Art 11, Health, Art 13, Right to Social and Medical Assistance, and Art 31, The Right to Housing.

91 This is in addition to numerous European directives concerning various aspects of water. For further details, see Bell and McGillivray, 2006, Ch 7, pp 180–234.

to water in explicit provisions. In particular, The European Charter on Water Resources 2001,⁹² paragraph 5 states:

Everyone has the right to a sufficient quantity of water for his or her basic needs . . . International human rights instruments recognise the fundamental right of all human beings to be free from hunger and to an adequate standard of living for themselves and their families . . . It is quite clear that these two requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene . . .⁹³

In addition to these hard law provisions, political statements have been made by both the Council of Europe and the European Parliament successively in 2001 and 2002, recognising the human right to water.⁹⁴ The unequivocal provision of the treaty, alongside the political statements, can be seen as a reflection of the expanding interest regarding availability and access to water resources as affecting human development and poverty alleviation and is indicative of progression in policy concerning water within this context.

In particular reference to the forthcoming case study, the Middle East region has no operational regional human rights system in place and therefore has no regional provision for a right to water. However, there are efforts to address this, such as the initiative of the League of Arab States:⁹⁵ the Arab Charter on Human Rights 2004.⁹⁶ The original Charter of March 1994 was recently revised and modernised to bring it in line with international instruments and does contain provisions pertaining to economic and social rights.⁹⁷ The new instrument provides for a right to water under Article 39(b) Health, which establishes measures to be taken by states including the provision of safe drinking water for all and proper sanitation systems.⁹⁸ There is also implicit provision under Article 38 Adequate Standard of Living.⁹⁹ This treaty entered into force 15 March 2008 and has been

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

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

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

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

96 Adopted by the Arab Standing Committee for Human Rights, 5–14 January 2004.

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

98 See Art 39(b), Points 5 and 6 respectively.

99 See also Art 2, Self-determination over Natural Resources.

ratified by seven Arab states including the OPTs.¹⁰⁰ However, at present there is no periodic reporting mechanism for monitoring implementation of the rights contained within the Charter or a complaints mechanism to seek remedy.¹⁰¹

Furthermore, the Cairo Declaration on Human Rights in Islam 1990¹⁰² could also be seen as applicable as many of the states in the region, including Palestine, are member states of the Organisation of the Islamic Conference who adopted the declaration.¹⁰³ Provision for a right to water is implicit under Article 17 concerning a clean environment, access to public and social amenities and the right to a decent living.¹⁰⁴ However, the rights contained in this declaration are subject to interpretation under the Islamic Shari'ah,¹⁰⁵ which limits them to a certain idea of rights-based on one faith alone. In addition, the provisions are not legally binding.

There are also provisions for a human right to water under many states' constitutions and within the domestic national law of several states. A number of states have already provided for this explicit right under their constitutional law and several have subsequently enshrined these obligations under national legislation. Some of these provisions pre-date the CESCRC GC 15 which calls for recognition of the right to water under 'national political and legal systems, preferably by way of legislative implementation'.¹⁰⁶ Others were adopted post-GC 15 and can be seen as a part of the added impetus and progress as a consequence of the standard. Consequently, cases concerning the right to water have been brought before various national courts under constitutional and national law, with positive outcomes.¹⁰⁷

Finally, the advances made within legal and development fields has been enhanced and complemented by the work of international governmental organisations and NGOs all with the aim of ensuring accessible, safe and sufficient water for all and resolution of water problems.¹⁰⁸

100 The Charter required seven ratifications to enter into force (Art 48). As of June 2005, Algeria, Bahrain, Jordan, the Occupied Palestinian Territories, the Syrian Arab Republic, Tunisia and the United Arab Emirates had ratified the treaty. (Reprinted in (2005) 12 *Int'l Hum Rts Rep* 893.)

101 The Secretary General and the Council of the Arab League did propose that an Arab Court of Justice be established with competence over human rights issues; however, there was lack of support from the member states and the proposal was not adopted. See Rishmawi, M, 'The Revised Arab Charter on Human Rights: A Step Forward?', (2005) 5(3) *Human Rights Law Review* 361–76, at 1 (Westlaw text version).

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

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

104 See Art 17(a)–(c).

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

106 See GC 15, para 26.

107 For further discussion of case law, see Ch 7.

108 E.g. United Nations Environment Programme (hereinafter referred to as the UNEP), UNDP, WHO, UNICEF, UNESCO's World Water Assessment Programme, World Bank, Oxfam, WaterAid, the International Water Tribunal, the World Water Council and the Water Supply and Sanitation Collaborative Council.

Concluding remarks

In conclusion, the work of all these organisations constitutes a vast body of knowledge and literature on water issues, from a great many perspectives. Much of this has contributed to the development of the concept of a human right to water as an economic and social right recognised under international human rights law. However, as is evident from the overview of the history of the right, the concept of the right as an independent human right is relatively new and requires further consideration and clarification.

Through the examination of the historical, political and legal background for the right to water, it is evident how the legal status of the right has evolved from its initial conception as a basic need, as an element of other related economic and social rights, to its current position under international human rights law. Through tracing the history of the concept of safe, accessible and sufficient water as a human entitlement it is evident that water has been viewed with varying degrees of importance and with differing focus and frameworks for reference. The legal human rights standards pre-GC 15 have provided some indication as to the importance of a right to water for the realisation of related economic and social rights and in some cases have included express succinct provisions concerning water. As such, although they offer little clarification as to the full scope and normative content of the right to water and its correlative obligations, they can be viewed as an indication of the development of the concept of an independent human right to water over time. In the context of ever-increasing water problems at local and global levels and wider concern regarding human poverty and lack of development, the advent of GC 15 provides a principal and imperative advancement of the concept and its legal standing and is significant for the international protection of a human right to water. Therefore, Chapter 2 examines sources for the right to water under international human rights law in detail, including an appraisal of GC 15, in order to assess the legal standing, scope and normative content of the human right to water.

2 The human right to water – legal status and normative content

This chapter will examine the legal basis for the human right to water as a substantive right within the right to an adequate standard of living and as an integral element of other economic and social rights, such as the right to health. The first part of the chapter will focus on relevant sources under international human rights treaties and will examine existing provisions at international level. In the second part of the chapter, I will examine the CESCRC GC 15, based upon ICESCR, Articles 11 and 12.¹⁰⁹ This authoritative interpretation of the content and obligations concerning the right to water has been crucial to the current understanding of the right within international human rights law and in assisting states parties and other actors in realising the normative content of the right,¹¹⁰ and their correlative obligations.¹¹¹ Therefore, this document requires analysis as, despite the fact it does not constitute a legally binding document in itself, it has had a significant impact on the understanding and status of the right at both international and national level.

The analysis of GC 15 will centre on the content of the right and will include an examination of the link between the normative content of the right to water and its relationship to related economic, social and cultural rights. Finally, I will make some suggestions for defining a scope and core of the right. Through this analysis I will illustrate and examine the difficulties concerning the right's status within current international human rights law.

Legal sources for the right to water under international human rights law

As noted previously, the right to water has been recognised in a wide range of international human rights documents, including treaties, declarations and other standards, but the main binding legal sources under international human rights law consist of the ICESCR,¹¹² CRC¹¹³ and CEDAW.¹¹⁴

109 GC 15.

110 Ibid, paras 10–16.

111 Ibid, paras 17–38 and 60.

112 Adopted 16 December 1966, entry into force 3 January 1976, ratified by 160 states (69 signatories) as of 20 January 2010.

The central treaty that has been recognised as containing a right to water has been the ICESCR, which contains provisions for the right to water under Article 11, Adequate Standard of Living, and Article 12, Health. Under these provisions the right to water has been recognised implicitly: under Article 11 as a right within the entitlement to an adequate standard of living, which encompasses several individual rights within its ‘umbrella’ provision, for example, *inter alia* the right to food and housing, and under Article 12 as an element of the right to the highest attainable standard of health.¹¹³

The rationale behind the Committee’s interpretation of Article 11 as including a legal right to water is upon the basis of the open-ended wording of the provision:

The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.¹¹⁴

The CESCR notes that the list of rights included within the provision is not intended to be exhaustive, rather simply illustrative of the ‘catalogue of guarantees essential for securing an adequate standard of living’.¹¹⁵ Therefore the term ‘including’ can be said to encompass other comparable rights that are not specifically listed.¹¹⁶ It is against this provision and that of a derived right under Article 12, Health, that the Committee drafted and adopted the GC 15, which will be examined shortly.

In addition to this central provision, the right has been explicitly recognised within two more recent human rights instruments, the CEDAW and the CRC. In both of these treaties there is mention of a right to clean and sufficient water, although these provisions are part of articles which concern other substantive human rights, rather than a provision specifically codifying a right to water.

Under the CRC, Article 27, Adequate Standard of Living, a right to water can be inferred from this implicit provision similar to that under ICESCR, Article 11.

113 Adopted 20 November 1989, entry into force 2 September 1990, ratified by 193 state parties (140 signatories) as of 20 January 2010.

114 Adopted 18 December 1979, entry into force 3 September 1981, ratified by 186 state parties (98 signatories) as of 20 January 2010.

115 See general sources on the basis for the right to water: Golay, C, *The Right to Water Critical Report No. 6*, October 2009, Geneva: CETIM (Centre Europe Tiers Monde) Human Rights Programme; Tully, S, ‘A Human Right to Access Water? A Critique of General Comment No. 15’, (2005) 23(1) *Netherlands Quarterly of Human Rights* 35–63; McCaffrey, S, C, ‘The Human Right to Water Revisited’, in Brown Weiss, E, Boisson DeChazournes, L and Bernasconi-Osterwalder, N, *Water and International Economic Law*, 2004, Oxford: Oxford University Press; and Danieli et al, in Gleick, P, ‘The Human Right to Water’, (1999) 1(5) *Water Policy* 487–503, at 492.

116 ICESCR, Art 11(1).

117 GC 15, para 3.

118 Langford, M, ‘The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?’, (2005) 21(2) *Water Resources Development* 273–82, at 275.

In addition, Article 24, paragraph 2, requires states parties to combat disease and malnutrition ‘through the provision of adequate nutritious foods and clean drinking-water’. Even though this provision constitutes an explicit reference to aspects of the right to water, it is not a specific and comprehensive provision concerning the right to water. The provision under Article 24 only relates to water for drinking and not for other purposes. In addition, it states an obligation upon states parties to provide drinking water that is of sufficient quality and quantity,¹¹⁹ but it does not include provisions related to access to water. In this instance, the right to clean and sufficient drinking water is integral to the right to health, rather than an element of an independent right to water. Alvarez notes, ‘Within this context, water is seen as part of the measures needed to ensure the right to health. Nevertheless, it is important to highlight that the article makes some distinction between food and water, assuming that the right to water is not the same subject as the right to food’.¹²⁰ This framing of the right to water as different from the right to food or health, but not an entirely separate and independent right is a concept that arises throughout current human rights provisions concerning the right to water. This blurring of boundaries with related rights could be potentially problematic for the implementation and justiciability of the right – a question I shall return to.

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

State parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: . . .

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication.¹²¹

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

Despite these explicit references to water being limited in their content or scope they do represent the first explicit legal codification and explicit legal recognition of a right to water and corresponding obligations of some kind. Although not codified as a separate provision the relatively recent conventions, the CRC and the CEDAW, have explicitly recognised the importance of water and this may be seen as a reflection of the times and the increasing international significance attached to provision of safe and sufficient water for all.

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

120 Alvarez, 2003, p 5.

121 CEDAW, Art 14(h).

There are several other international human rights instruments that can be said to contain implicit recognition of a right to water or certain elements of such a right: the Universal Declaration of Human Rights 1948¹²² can be seen to implicitly include a right to water under several provisions including, *inter alia*, Article 25, the right to a standard of living adequate for the health, and well-being of himself and his family, and Article 3, the right to life and security.¹²³ Similarly, International Convention on the Elimination of All Forms of Racial Discrimination 1966, Article 5(e),¹²⁴ guarantees the right of everyone, without distinction to the enjoyment of economic, social and cultural rights, including, *inter alia*, the right to housing, social services and public health services (which to be considered adequate should include water services and ensure availability of clean and sufficient water).

In addition, common Article 1(2) of the ICCPR and the ICESCR provides that 'in no case may a people be deprived of its own means of subsistence' which must, for survival, include water sources.

Most recently, the right to water has been further codified in the UN Convention on Persons with Disabilities 2006,¹²⁵ both as a right under Article 28, Adequate Standard of Living, and with explicit recognition in paragraph 2(a), equal access to clean water services.

Finally and significantly, it can be argued that the ICCPR¹²⁶ implicitly provides for a right to water under Article 6(1), the Right to Life. Conversely, it has been contended that to include the right to water within this absolute right is too broad an interpretation of the right to life itself,¹²⁷ a point of discussion to which I will return.

In sum, the provisions noted above constitute the present legal basis at international level for the human right to water. On reflection, it may seem to

122 Hereinafter referred to as the UDHR.

123 This may be significant as substantive provisions within the UDHR are considered customary international law for several reasons: it interprets the human rights provisions of the UN Charter, especially Arts 55 and 56; there is overwhelming evidence of state practice with the requisite *opinio juris*; through reaffirmation by the UN General Assembly and reference to and incorporation into international treaties and finally as several rights contained within the Declaration are seen as having the character of *jus cogens*. See Rehman, J, *International Human Rights Law: A Practical Approach*, 2003, Harlow: Longman Pearson Education, pp 53–61; Meron, T, *Human Rights and Humanitarian Norms as Customary Law*, 1989, Oxford: Clarendon Press, pp 79–135; Alfredsson, G and Eide, A (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, 1999, The Hague: Kluwer Law International; McDougal, M, Lasswell, H and Chen, L, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity*, 1980, London: Yale University Press, p 64; Al Haq, *A Human Rights Assessment of the Declaration of Principles on Interim Self-Government Arrangements for Palestinians*, 1993, Ramallah: Al Haq, West Bank Affiliate of the International Commission of Jurists, p 9; and International Commission of Jurists, *Israel's Separation Barrier: Challenges to the Rule of Law and Human Rights*, 6 July 2004, Geneva: International Commission of Jurists, p 28.

124 Hereinafter referred to as CERD. Adopted on 21 December 1965, entry into force 4 January 1969, ratified by 173 state parties (85 signatories) as of 20 January 2010.

125 Adopted on 13 December 2006, entry into force 3 May 2008, ratified by 77 state parties (144 signatories) as of 20 January 2010.

126 Adopted on 16 December 1966, entry into force 23 March 1976, ratified by 165 state parties (72 signatories) as of 20 January 2010.

127 See Dinstein, Y, 'The Right to Life, Physical Integrity and Liberty', in Henkin, L (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights*, 1981, New York, NY: Colombia University Press, pp 114–37, at 115.

constitute a glaring omission on the part of the drafters of the ICESCR that a human right to water was not explicitly provided for within the Covenant or in fact, within the entirety of the International Bill of Human Rights.¹²⁸ However, at the time of the drafting process the global water problems could not have been foreseen and it is possible that if the framers of the International Bill of Rights had realised that water was to be such a scarce resource in the future, they would have explicitly codified the right within these instruments.¹²⁹ Despite this lack of explicit codification, a right to water has been established under international human rights law, in particular under ICESCR Article 11. Although initially this may seem to constitute a questionable legal basis, the 'illustrative catalogue' of rights in Article 11 could be seen as a strength as it allows for a broad interpretation of the provision, encompassing elements of the right to an adequate standard of living, which emerge as significant issues as a result of societal change and development.¹³⁰

However, it is also clear that current recognition of the right is problematic. Although international human rights and international law bodies have concluded that a right to water already constitutes an integral part of recognised human rights provisions,¹³¹ it is evident that the right to water as codified within these instruments 'remains imperfectly defined'.¹³² Lack of explicit specific provision under the ICESCR and other major human rights treaties has subsequently led to a lack of clarity as to the right's legal basis. Thus, further theoretical development and legal clarification of the human rights framework in relation to this right is required in order that such a fundamental right be given full legal protection and status, as at present the right to water holds an ambiguous status within international human rights law.

There is no doubt however, that the existence of GC 15 has strengthened the legal standing of the right, even though it is not legally binding in itself, and it is important to understand the motivation behind the actions of the Committee in drafting and adopting the General Comment. Prior to its adoption increasing violations of a right to water by states parties had been determined by the CESCR.¹³³ With these in mind and in the context of increased attention on access to safe and

128 A term used for the UDHR and the two human rights Covenants – the ICCPR and the ICESCR.

129 Gleick, 1999, p 501.

130 E.g. there is a question as to whether sanitation should be recognised as an independent right under Art 11 and there are calls for a General Comment on the right to sanitation.

131 Reidel, E, Statement on the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002.

132 Scanlon, J, Cassar, A and Nemes, N, 'Water as a Human Right?', Paper for the 7th International Conference on Environmental Law, Water and the Web of Life, Sao Paulo, Brazil, 2–5 June 2003, p 18; see also McCaffrey in Brown Weiss, 2004, p 1.

133 GC 15, para 5 notes that the right to water has been consistently addressed by the Committee during its consideration of states parties' reports, including identification of major concerns. E.g. see CESCR, *Concluding Observations, the Second Periodic Report of Jamaica*, E/C.12/1/Add.75, 30 November 2001, para 15; CESCR, *Second Periodic State Report of New Zealand*, E/1990/6/Add.33, pp 417–18; CESCR, *Concluding Observations on Second Periodic State Report of New Zealand*, E/1990/6/Add.33, 23 May 2003, para 9; CESCR, *Summary Record of the 34th Meeting of Poland and CESCR*, 19 November 2002, para 58.

sufficient water and sanitation in development circles, the Committee decided to draft and adopt this General Comment specifically to address the right to water, the purpose of which was to provide interpretation of the right as contained within the Covenant. This would include guidance for states parties in realising their obligations correlative to the normative content of the right. Following a process which included the Committee consulting several international organisations, NGOs and individuals on a day of general discussion, followed by several days of meetings, both open and closed, the said General Comment was adopted in November 2002.¹³⁴

As stated previously, the Committee derived the legal basis for the right to water from Article 11 of the Covenant and also as an element of Article 12, Health. With this legal basis established and justified as noted previously, the next step was to establish the normative content and correlative obligations of the right. The information/standards presented below are based upon the outcome and provisions of GC 15.

The normative content of the right to water

In order to determine the normative content of the right to water, it is easier to establish what the scope of the right to water does not include. As Gleick points out, 'A right to water cannot imply a right to an unlimited amount of water',¹³⁵ as this is unsustainable both practically and environmentally. It also removes the *raison d'être* for the existence of such a right as the underlying principle is to ensure sufficient and safe water for everyone. The parameters decided upon are set out in GC 15 and define the general entitlement as a right of everyone to:

[The human right to water entitles everyone to] sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.¹³⁶

This provision presents the key principles of safety, accessibility, sufficiency and affordability. In addition, it determines priorities for water use. This may appear straightforward; however, these key principles need to be examined in order to elucidate what they mean practically for the normative content of the right. Within the detailed provisions of paragraph 12, the three principles of availability, quality and accessibility¹³⁷ contain the substantive standards regarding the content of the

134 In all, there were 130 amendments to the original draft General Comment. These were submitted by committee members, as well as by NGOs, international agencies, academics and UN Special Rapporteurs.

135 Gleick, 1999, p 494.

136 GC 15, para 2.

137 Regarding GC 15, the original draft listed headings: 'sufficient, safe, affordable and accessible' which differed to those in other General Comments. To ensure continuity and clarity of standards these were adapted and resulted in the three principles of availability, quality and accessibility, in line with those listed in GC 14.

right to water. They set out the minimum essential level of water necessary for meeting the core obligations – that is, water for basic needs – as well as setting standards for safety and cleanliness of water and ensuring equal access, both physical and economic.

Firstly, in regard to availability, we need to define what constitutes sufficient water. In the original draft GC 15,¹³⁸ paragraph 8 detailed the minimum standard of water as a defined numerical level that was acceptable.¹³⁹ However, it was pointed out that this numerical level could and would change over time. Therefore, it was agreed that the GC 15 should state sufficiency in terms of the current applicable WHO guidelines so as to ensure relevance over time:

While the adequacy of water required for the right to water may vary according to different conditions, the following factors apply in all circumstances . . . The quantity of water available for each person should correspond to World Health Organization (WHO) guidelines.¹⁴⁰

However, sufficient water alone is not enough to ensure a human right to water. Safe water is also required and it is true that many people, who do receive this basic water requirement or more, are not receiving clean, safe water but water which is contaminated.¹⁴¹ Hence the GC 15, paragraph 12(b) provides that:

The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health.¹⁴² Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use.

Finally, the third principle that is a constituent and necessary element of the normative content is accessibility. The general paragraph 12(c) states, 'Water and

138 UN CESCR, DRAFT GC No 15 (Future 29th session, 11–29 November 2002, Agenda Item 3), *The Right to Water (Arts 11 and 12 of the Covenant)*, Future, E/C.12/2002/11, 29 July 2002.

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

140 GC 15, para 12 (a). Original footnote omitted.

141 An example of this is evident in case studies from India, where villagers receive sufficient amounts of water but the water itself is contaminated with arsenic. This has led to arsenic poisoning amongst 200,000 of the population in Bengal and 70 million in Bangladesh. See Shiva, V, *Water Wars*, 2002, London: Pluto Press, p 114. See also Nath, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva; Smith, A, Lingas, E and Rahman, M, 'Contamination of Drinking-Water by Arsenic in Bangladesh: A Public Health Emergency', (2000) 78(9) *Bulletin of the WHO* 1093–103. For a general reference regarding arsenic poisoning, see www.who.int/water_sanitation_health/dwq/arsenic/en (accessed 1 June 2010).

142 Original footnote omitted.

water facilities and services have to be accessible to *everyone* without discrimination, within the jurisdiction of the State party'.¹⁴³ Specifically, it states that accessibility has four overlapping dimensions: (i) physical accessibility, (ii) economic accessibility, (iii) non-discrimination and (iv) information accessibility. In terms of physical accessibility, the General Comment focuses upon physical safety and security and this is important for those people living within conflict situations and for the vulnerable, such as children.¹⁴⁴ Regarding economic accessibility, water, and water facilities and services, must be affordable for all.¹⁴⁵ Information accessibility covers the right to receive and distribute information concerning water issues.¹⁴⁶ Scanlon et al develop this dimension further, in a discussion that examines the procedural rights relating to the human right to water. Procedural rights are important because they 'enable the enforcement of substantive rights'.¹⁴⁷ The core procedural rights that accompany the right to water are, according to Scanlon et al: the right of individuals to information concerning the states activities regarding water,¹⁴⁸ the right of individuals to participate in decision-making concerning water,¹⁴⁹ the right of individuals to recourse and the right to fair and just administrative action.¹⁵⁰ It is worth highlighting here that some of these rights are deemed civil and political rights but are still necessary for the realisation of the right to water.

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

The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.¹⁵¹

This framework of positive and negative aspects is also reflected within the section concerning obligations.¹⁵²

Regarding 'Special Topics of Broad Application', provisions concerning non-discrimination and equality and special protections for vulnerable groups are provided for in paragraphs 13–16. These provisions detail measures to ensure equal access to water for those groups and individuals at risk of discrimination. Paragraph 13 proscribes any discrimination in line with the provisions of the ICESCR, which

143 GC 15, para 12(c).

144 Ibid, para 12(c)(i).

145 Ibid, para 12(c)(ii).

146 Ibid, para 12(c)(iv).

147 Scanlon et al, 2003, p 25.

148 ICCPR, Art 19.

149 Ibid, Arts 19, 21 and 25.

150 Ibid, Art 14.

151 GC 15, para 10.

152 Ibid, paras 17–38.

‘has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water’.¹⁵³ The CESCR also recalls General Comment 3, paragraph 12, stating ‘even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes’.¹⁵⁴ This protection is reiterated within paragraph 15 which determines that state parties have a ‘special obligation’ to provide water to those who do not have the sufficient means.

Paragraph 14 also provides an obligation on states parties to remove *de facto* discrimination for individuals and groups, for example, in the allocation of water resources. This clause also recognises that this discrimination may be covert:

States parties should take steps to remove *de facto* discrimination on prohibited grounds, where individuals and groups are deprived of the means or entitlements necessary for achieving the right to water. States parties should ensure that the allocation of water resources, and investments in water, facilitate access to water for all members of society. Inappropriate resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population.¹⁵⁵

An example of inappropriate resource allocation can be seen in the OPTs where Palestinian villages although connected to the mains, have limited water supply, whereas Israeli settlements in the same area have full mains connections from the Israeli water service provider Mekorot and increased supply of water during the summer (of which some is used, *inter alia*, for luxury uses such as swimming pools and lawn sprinklers).¹⁵⁶ Further illustration of discriminatory investment in water services is evident in the case of Cochabamba, Bolivia, where the state-owned water service was sold to a private company in response to conditions imposed by the World Bank in order to guarantee a loan to refinance water services.¹⁵⁷ This resulted in a rise in cost to the population that proved impossible for the poor of the city to afford.¹⁵⁸

Significantly, the human rights NGO World Organisation for the Prevention of Torture¹⁵⁹ has argued that the removal of *de facto* discrimination, as provided for

153 Including on the grounds of ‘race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status’.

154 CESCR, General Comment 3, 14/12/90 (5th session, 1990), The Nature of States Parties Obligations (Art 2, para 1 of the Covenant), para 12. Hereinafter referred to as GC 3.

155 GC 15, para 14.

156 B’Tselem, *Thirsty for a Solution: The Water Crisis in the Occupied Territories and Its Resolution in the Final Status Agreement*, July 2000, Jerusalem: B’Tselem – The Israeli Information Centre for Human Rights in the Occupied Territories, pp 4 and 43–4, at www.btselem.org (accessed 1 June 2010).

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

158 *Ibid*, p 155.

159 Hereafter referred to as the OMCT.

in paragraph 14, 'along with the necessity to give special assistance to individuals and groups traditionally facing difficulties in exercising the right to water implicitly recognises the concept of affirmative action policies or special measures'.¹⁶⁰

Moreover, the OMCT argues that this may be problematic because the non-discrimination principle, as interpreted by international trade law, could put restraints upon a state's ability to implement affirmative action policies, which are aimed at ensuring *de facto* equality of the enjoyment of the right to water.¹⁶¹ This is evident in the case outlined above regarding the World Bank and the city of Cochabamba, Bolivia. Here, the city's authorities were forbidden under conditions demanded by the World Bank to use any of the refinance loans to subsidise the poor.¹⁶² This would seem to contradict the principle of non-discrimination as enshrined in GC 15 as well as the special protection measures provided for vulnerable groups.

Paragraph 16 notes the requirements of states regarding specific vulnerable groups and the right to water. Similar to GC 14, the paragraph includes provision for women, children and indigenous peoples. Moreover, GC 15 also includes express provision for further vulnerable groups such as refugees and internally displaced peoples.¹⁶³ Paragraph 16(f) requires that these groups as well as asylum seekers, should 'have access to adequate water whether they stay in camps or in urban and rural areas . . . [and] should be granted the right to water on the same conditions as granted to nationals'. This provision represents an advance in terms of protection for this specific vulnerable group and may reflect the importance of a minimal essential level of water as an immediate and fundamental need for the survival of refugees and IDPs.

Moreover, several other vulnerable groups are given special protection under specific provisions. States parties must take steps to ensure that these groups are protected. In relation to women, paragraph 16(a) asserts that women should not be excluded from decision-making processes concerning water resources. This point refers to a deeper problem concerning the central role women have in both agricultural production and domestic water use. In relationship to the decision-making process, the UN Food and Agriculture Organisation holds that 'women account for the majority of the developing world's farmers and as such need fair and equitable access to water, land and water management systems'.¹⁶⁴ Moreover, paragraph 16(a) notes 'the disproportionate burden women bear in the collection of water should be alleviated'. The issue of water-related labour and women is

160 OMCT, 'The Realisation of the Right to Water and the Liberalisation of Trade in Services: Challenges, Implications for a General Comment and Recommendations', Written Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva, p 5.

161 *Ibid*, p 6.

162 Barlowe, M and Clarke, T, *Blue Gold: The Battle against Corporate Theft of the World's Water*, 2002, London: Earthscan, p 155.

163 Hereinafter referred to as IDPs.

164 UN Food and Agriculture Organisation (hereinafter referred to as the FAO), 'Draft General Comment No 15 (2002), The Right to Water (Arts 11 and 12 of the ICESCR)', Written Contribution to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, November 2002, Geneva, p 2.

noted by Nath: 'Women and female children spend 30–40% of their calorie intake on collecting water'.¹⁶⁵ This also effects the education of female children, as globally, 50 million primary school-aged girls do not attend school as a result of collecting water and firewood or through inadequate sanitation and water provision in educational establishments.¹⁶⁶

Concerning children, in addition to tackling the gender problems noted above, states must ensure that 'Children are not prevented from enjoying their human rights due to the lack of adequate water in educational institutions and households . . . Provision of adequate water to educational institutions currently without adequate drinking water should be addressed as a matter of urgency'.¹⁶⁷ Special protection for children is essential, as children are particularly vulnerable to water disease, having less body mass than adults which means that 'a water borne chemical may be dangerous for a child at a concentration that is relatively harmless for an adult'.¹⁶⁸ This provision supports the more specific, explicit protection provided for in the CRC.

The poor are also disproportionately affected in terms of lack of enjoyment of the right to water. It is evident that the poor have the least access to adequate water and sanitation, little finance to pay for water, poor housing and as such an increased risk of poor hygiene leading to poor health. Under paragraph 16(c), states must ensure that the poor both in rural and urban settlements have access to properly maintained water facilities. This provision includes informal settlements and homeless people. This provision is further extended under paragraph 16(e) to cover 'nomadic and traveller communities when stationary at both traditional and designated halting sites'. In addition, 'Access to traditional water sources in rural areas should be protected from unlawful encroachment and pollution'. It also notes that 'No household should be denied the right to water on the grounds of their housing or land status'. An example of this can be seen in Israel, where the 'illegal status' of dwellings is used as a reason for denying water to traditional Arab homes in Arab Bedouin villages not recognised by the Israeli authorities.¹⁶⁹ As such, they are denied access and connection to the mains water supply.¹⁷⁰

165 Nath, Oral Submission to the Day of General Discussion on the General Comment to the Right to Water, CESCR 29th session, 22 November 2002. The WHO also notes that households spend 26% of their time fetching water and that it is women who perform this duty: 'This work prevents women [and girls] from spending time on more productive work . . . or on education'. WHO, 2003, p 25.

166 Ibid, p 25.

167 GC 15, para 16(b).

168 WHO, 2003, p 26.

169 The Regional Council for the Palestinian Bedouin of the Unrecognised Villages, Negev, Israel, 'The Bedouin Unrecognised Villages in the Negev', at www.arabhra.org (accessed 17 May 2010); and the Association of Forty – The association for the recognition of the Arab Unrecognised Villages in Israel, 'Israel Uses Water as a Weapon against the Arabs of the Naqab (Negev)', at www.assoc40.org (accessed 17 May 2010).

170 The Regional Council for the Palestinian Bedouin of the Unrecognised Villages, April 2007. Also, Adalah – The Legal Centre for Arab Minority Rights in Israel, 'The Right to Water: No Access to Clean Water in the Unrecognised Villages of the Naqab', in *Land and Housing Rights: Palestinian Citizens of Israel*, Report for the CESCR, May 2003, p 5, at www.Adalah.org/eng/intladvocacy/CESCR-land.pdf (accessed 1 June 2010).

These special protection measures are especially necessary in relation to the right to water, as it is the poor and children that are mostly burdened with water-related disease. Furthermore, gender issues are raised in relation to women and girls and water-related labour, including resulting educational problems and the existence of cultural values and practices related to water that discriminate against women.¹⁷¹

As regards indigenous peoples, paragraph 16(d) protects their ancestral lands from ‘encroachment and unlawful pollution’, as well as providing that ‘States should provide resources for indigenous peoples to design, deliver and control their access to water’. This provision is in keeping with the idea that the General Comment should promote community and traditional water systems that are sustainable.¹⁷²

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

Finally, it should be noted that paragraph 16(g) relating to prisoners and detainees, overlaps with provisions under international humanitarian law. The said paragraph refers to the ‘requirements of international humanitarian law’, thus recognising provisions for the human right to water within this area of international law.¹⁷³

These special provisions regarding vulnerable groups are comprehensive. Furthermore, they constitute an extension in provision from previous General Comments, such as GC 14 on the right to health and GC 12 on the right to food.¹⁷⁴

Overall, the General Comment is comprehensive and detailed in its provisions. It identifies the normative content of the right in general terms, defines key principles¹⁷⁵ and establishes core obligations regarding the right.¹⁷⁶ Furthermore, GC 15 highlights special broad topics of application,¹⁷⁷ including dealing with vulnerable groups and sets out guidelines for state parties for equitable water

171 Bartram, J, Representative of WHO, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

172 Kothari, M, UN Special Rapporteur on the Right to Housing, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva; WHO, 2003, p 27.

173 For a discussion of provisions under international humanitarian law, see Ch 4.

174 E.g. GC 14 and GC 12 do mention protection for refugees but it is only within the context of humanitarian aid under international obligations. See GC 14, paras 40 and 65, and GC 12, para 38.

175 GC 15, paras 10–16.

176 Ibid, paras 17–38.

177 Ibid, paras 12–16.

management and national water strategies and plans.¹⁷⁸ Guidelines are also provided for states parties concerning domestic implementation of the right.¹⁷⁹ However, despite these extensive accomplishments, there are several issues raised by the formulation of GC 15, which could have implications for the right at an operational level.

Firstly, GC 15 does note the relationship between closely related rights and the right to water, but it does not explore these relationships. Further, it does not explicitly state that the right to water is an independent right, although this can be inferred from both the provisions within and the very existence of the General Comment. However, in light of the confusion caused by the lack of express codification this could be problematic.¹⁸⁰ Another critique of GC 15 is that it does not define the scope or core content of the right to water but defines the normative content generally and specifies core obligations correlative to the right.¹⁸¹ Again, this framework may or may not be problematic at a practical level but it is an issue which requires some examination and discussion as it could have implications for effective implementation of the right.

Finally, it does not comprehensively encompass environmental approaches to water but limits itself to a 'cautious minimal legal approach'.¹⁸² This can be viewed as a positive outcome as it ensures that a human rights approach to water takes priority. Conversely, however, there is an argument that environmental approaches to water must be considered in order to make the human right to water sustainable for future generations. Each of these issues needs to be discussed in order to establish how best to address these questions.

Related rights and the right to water

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

The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) and the rights to adequate housing

178 Ibid, paras 37(f), 46–54.

179 Ibid, paras 45–59.

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

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

182 Riedel, E, Committee Expert and Rapporteur on the Right to Water for the CESCR, Personal Discussion, 21 November 2002, Geneva.

and adequate food (art. 11, para. 1). The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.¹⁸³

The relationship between the right to water and the rights to housing and food is easily established, as these other rights constitute another entitlement guaranteed under Article 11, the right to an adequate standard of living. Therefore, all these rights are constitutive elements of the more general right to an adequate standard of living. As Bilchitz notes, rights can be of differing levels of specificity¹⁸⁴ and this is not problematic in itself. However, the difference between these rights and the right to water is their express codification in the text of Article 11. Although to my knowledge, water is the only right under Article 11 recognised in a General Comment by the Committee, to date, which is not explicitly listed in the text of the article, it is feasible to assume that other rights could be derived and recognised as self-standing rights under this provision, for example, a right to adequate sanitation. This does not detract, however, from the fact that there remains a difference in terms of strict legal codification that may affect the legal standing of the right and have consequences for states parties' compliance with obligations in this respect.

Reference to water is also absent from the provisions under Article 12 on the right to the highest attainable standard of health. This lack of explicit codification may cause confusion for state parties regarding the right and has also resulted in a lack of focus upon the right in the past. Consequently, the problem with the current framework is that, as the wording 'water' is not explicitly stated within Article 11 or Article 12, a state could argue that they do not recognise a legal right to water as codified under these articles and as such have no specific legal duties derived from Articles 11 and 12 in respect of the right to water. This could be a contributing factor to the violations of the right to water that have taken place.¹⁸⁵

As a result of the lack of explicit wording within current provisions contained in international human rights instruments, the right to water is not explicitly recognised as an independent right. This results in the right to water holding an ambiguous status within international human rights law, as it clearly exists as a crucial element of Article 11, even though it is not explicitly worded within the provision. The right can thus be viewed as a derivative right.¹⁸⁶ A derivative right is a right deriving from another related right, that is the right to an adequate standard of living. Moreover, the right to water can also be viewed as a constitutive right – meaning that certain elements of the right to water may need to be realised in order for the realisation of related rights. For example, *inter alia*, the right to health, food, housing, education and the right to life. Thus the right to water has been seen as both a constitutive element of related rights and as a derivative right under Article 11.

183 GC 15, para 3. Footnotes in original omitted.

184 Bilchitz, 2007, p 91.

185 See fn 133.

186 Gleick, 1999, pp 492–3.

The question of whether a right can be seen as a self-standing or independent right even though derived from a more general right, such as the right to an adequate standard of living, is an interesting one. Practice would support the argument that such a right can be independent as, for example, the rights to food and right to housing have been recognised and accepted as self-standing economic and social rights. Notwithstanding this, the difference between these other rights and the right to water remains the formers' express codification in the treaty.

The practical effects of this difference remain to be assessed as the implementation and jurisprudence concerning the right to water develops over time. In addition to the problem of states' recognition of the right and their corresponding obligations, another potential problem may be foreseen arising as a consequence of this ill-defined status. Because of the question as to the independence of the right and subsequently its normative content, it could be difficult to establish whether violations are of the right to water itself, or first and foremost violations of other related rights. Are violations of the right to water always in relation to another right or can the right to water be violated independently of these related rights? If we accept the independence of the right to water, then the latter is true. This would be in line with the obligations set out in GC 15. However, if a state refuses to recognise the legal basis for the right to water, violations would have to be determined on the basis of breaches of the right to health or other express rights recognised under Article 11 Adequate Standard of Living (that is, water as an element of housing or food) or other related rights.

In sum, according to Article 11 and the GC 15, the right to water is seen as a guarantee necessary for an adequate standard of living and is inextricably linked to other entitlements under this article – the rights to food and housing, as well as Article 12, the right to health. Despite the fact that GC 15 does not explicitly express the independence of the right to water as an autonomous right, it does imply its independence in its provisions,¹⁸⁷ and by its very existence. Furthermore, the Committee has consistently addressed the enjoyment of the right to water under Articles 11 and 12 when considering states parties' reports.¹⁸⁸

The General Comment does not explore in detail the nature of the links between the right to water and related rights but this is not the function of a General Comment and, for the purpose of setting legal standards and guidelines for the right to water, the recognition of the interdependency between these rights is a starting point. However, in the search for clarity regarding the normative content of the right to water, it is necessary to examine further the overlaps and boundaries between the right to water and the other rights contained within Articles 11 and 12 and other related rights such as the right to life. The relationship of the right to water to certain other civil and political rights such as the right to life and right to freedom from torture, cruel, inhuman and degrading treatment has been recognised.¹⁸⁹ The purpose of this exercise is to determine the scope of each right

187 GC 15, paras 3–5.

188 See fn 133.

189 GC 15, para 3.

and to establish the nature of any overlaps. I will focus my examination upon those rights inextricably linked to water: those fellow guarantees under Article 11 – the right to food and housing; the right to health under Article 12 and the right to life under Article 6 of the ICCPR.

The right to food

Water has also been seen as an integral part of the right to food, both as a requirement for food production and as food in itself. The FAO used World Food Day 2002¹⁹⁰ to highlight the importance of water for food production by focussing on the theme ‘Water: source of food security’.¹⁹¹ Water has even been conceived of as ‘liquid food’.¹⁹² Jean Ziegler, UN Special Rapporteur on the Right to Food, stated that water should be viewed in this way for the purposes of drafting the General Comment and raised concerns that access to safe and sufficient water was only covered by the General Comment in relation to domestic use.¹⁹³ He argued that there was a need to address access to irrigation water, as this is essential to fulfil the right to food production.¹⁹⁴ El Hadji Guisse, Special Rapporteur on the Right to Water for the Sub-Commission on Human Rights, also noted that ‘One of the greatest challenges to come is the increase in food demand and therefore the need for water becomes even more pressing. For example, to grow 1 kg of wheat requires 1,400 litres of water’.¹⁹⁵ The above two points highlight the differing demands for water, which can result in conflicting priorities of water use. As a consequence defining the core content of the human right to water in relation to food is extremely difficult. GC 15 deals with this issue in paragraphs 6 and 7 the latter of which states:

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

190 16 October 2002.

191 FAO, Written Contribution to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, November 2002, Geneva.

192 Ziegler, J, UN Special Rapporteur on the Right to Food, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

193 Ibid. Ziegler was referring to the initial draft GC, where the term used was ‘drinking water’ limiting the right to water for that purpose alone.

194 Ibid.

195 El Hadji Guisse, Special Rapporteur on the Right to Water for the Sub-Commission on Human Rights, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.¹⁹⁶

It is clear that sufficient water is crucial for agriculture and food production. However, the priority for determining the core content of the right to water has to be given to water for personal and domestic uses. 'Priority should also be given to the water resources required to prevent starvation and disease'.¹⁹⁷ As such, the right to water relating to water for irrigation and agriculture other than that for essential foodstuffs, should be seen as a part of the scope of the right to water but not part of its core content.

Conversely, the right to water within agrarian societies may require special consideration and result in an exception to this interpretation of the scope and core content. The FAO argues 'The role of water for traditional livelihoods and the specific situation of pastoralists and people in societies where livestock is of overarching importance should be considered as a separate issue. In these contexts a sharp differentiation and different prioritisation of water for human consumption and of water for food production does not reflect the peculiarities of pastoral systems'.¹⁹⁸ That realisation of the right to food is dependent upon sufficient water is evident. However, there is a clear distinction between water for food production as part of the right to food and a self-standing right to water in its entirety. Alvarez notes that CRC, Article 24 makes a distinction between water and food.¹⁹⁹ This lends further support to the argument that although previously conceived of as an integral part of food (one would presume because consumption is necessary for survival in the same manner as food as because water is needed to produce food), water must be recognised as a separate right. There is clearly interdependence between the right to food and the right to water but this link should not be confused with water as an element of the right to food. In the past the focus has been on the latter, whereas the current thinking conceives of the right to water as self-standing and derived from Article 11, as is the right to food.

The right to housing

The right to water as connected with the right to housing is well documented.²⁰⁰ The CESCR in its General Comment 4, The Right to Adequate Housing, notes that the right to adequate housing cannot be interpreted as merely shelter over

196 Original footnotes omitted.

197 GC 15, para 6.

198 FAO, 2002, p 3.

199 Alvarez, 2003, p 6.

200 E.g. see CESCR GC 4, The Right to Adequate Housing, 13/12/91; El Hadji Guisse, Special Rapporteur on the Right to Water for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'The Realisation of Economic Social and Cultural Rights: The Right of Access of Everyone to Drinking Water Supply and Sanitation Services', Working Paper, E/CN.4/Sub.2/1998/7, 10 June 1998, para 22; and generally the work of the Centre on Housing Rights and Evictions (hereinafter referred to as the COHRE), Geneva, including its right to water programme, at www.cohre.org (accessed 1 June 2010).

one's head but must be understood comprehensively: 'the right to live somewhere in security, peace and dignity'.²⁰¹ This must include access to services, materials, facilities and infrastructure:

An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.²⁰²

This link between the right to housing and right to water is reiterated within GC 15, highlighting the inextricable nature of the link²⁰³ and further noting the importance of housing status affecting water access for vulnerable groups²⁰⁴ and in relation to sanitation.²⁰⁵ Moreover, the Special Rapporteur on the Right to Housing, Miloon Kothari, has elaborated on the linkage between violations of the right to housing and violations of the right to water.²⁰⁶ Evidently, violations of the right to housing can result in violations of the right to water and vice versa, as water supply/connections and the adequacy of the home environment are often interdependent.

The right to health

The right to health is the most widely recognised codified right, outside Article 11, with an inextricable link to the right to water, despite the fact that Article 12 of the Covenant does not explicitly refer to water. Toebe's notes in her work on the right to health that water is included within the core content of the right to health and it is obvious that clean and sufficient water is an essential prerequisite for health.²⁰⁷ Bartram argues:

The right to water is inextricably linked to the right to the highest attainable standard of health, [as] lack of access to safe water limits the effective achievement of the right to health. There are 3.4 million deaths per year related to water disease and water diseases are in the top ten risk factors for death. The

201 GC 4, para 7.

202 Ibid, para 8(b).

203 GC 15, para 3.

204 Ibid, para 16(c).

205 Ibid, para 29.

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

207 Toebe's, B, *The Right to Health as a Human Right in International Law*, 1999, London: Hart/Intersentia, p 284.

biggest problem is that of drinking water; 1.1 billion (UNICEF/WHO figures) people lack access to a protected source of clean water. The numbers who lack access in their homes is even higher. . . . The right to water . . . has a profound link to health.²⁰⁸

These statistics illustrate that the right to health cannot be guaranteed without accessible, affordable, adequate and safe water. This is recognised in GC 14, where the need for available, accessible and safe drinking water is reiterated in several paragraphs,²⁰⁹ including within the obligations set out for state parties, both as an obligation to fulfil,²¹⁰ as a core obligation²¹¹ and as an aspect of international obligations.²¹² Furthermore, the inclusion of the concepts of accessibility and quality (safety) are notable as they are aspects common to both GC 14 and GC 15 and as such, the format used in GC 14 can be seen as very influential on the drafting of GC 15 on the right to water.

GC 14 does not explicitly express a right to water as a self-standing right, rather safe and accessible water is conceived of as an ‘underlying determinant of health’, a necessary precondition for realisation of the right to health. It is notable that it emphasises the importance of ‘drinking water’,²¹³ although other provisions use the wording ‘safe and potable water’ and do not specify the actual use. With the use of the broader definition of water in the majority of provisions, GC 14 can be seen to include water for all personal and domestic use as it affects health.

In terms of overlap of rights, evidently, the enjoyment of the right to health is dependent upon realisation of elements of the right to water. However, the right to health can be violated whilst the right to water is enjoyed. For example, one can have safe, sufficient and accessible water but suffer poor health as a result of poor nutritional intake. Such violations of the right to health can therefore take place independently of violations of the right to water and vice versa.²¹⁴ Thus, the right to water must constitute an independent right under Article 11, as well as being integral to Article 12.

It is also true that violations of the right to water and the right to health often take place concurrently – more often than not there is a ‘consequential effect’, an interdependence. For instance, if water is dirty and polluted it breaches the quality principle of the right to water, This water may also lead to water-borne diseases, thus resulting in a violation of the right to health and the right to water.

In sum, the two rights are inextricably linked and have overlapping boundaries in respect of violations and content. However, they can both be deemed self-standing

208 Bartram, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

209 GC 14, paras 4, 11, 12(a), 12(b), 12(d), and 15.

210 Ibid, para 36.

211 Ibid, para 43(c).

212 Ibid, para 40.

213 Ibid, paras 12(a) and 36.

214 E.g. accessibility to water may be difficult and discriminatory but the individual’s health may not be affected.

rights, health as expressly codified under Article 12 and water as derived from Article 11. Significantly, GC 14 was useful in both indicating a format for the forthcoming General Comment on the right to water and in raising the profile and highlighting the importance of water as fundamental to the realisation of related economic and social rights.

The right to life

Significantly, the right to water can be seen as an integral part of the right to life, as contained in ICCPR, Article 6. The right to life is widely recognised as being the most fundamental human right.²¹⁵ As such, the scope and content of the right has been the subject of intense debate and these discussions as to the nature of the substantive content of this right are well documented.²¹⁶ In response, the UN Human Rights Committee in its General Comment 6 on Article 6 the Right to Life,²¹⁷ argues that the 'right to life has been too often narrowly interpreted' and states that the right to life should be interpreted widely to include threats to health and actions to 'reduce infant mortality and increase life expectancy especially in adopting measures to eliminate malnutrition and epidemics'.²¹⁸

Although water is not explicitly noted, measures to reduce infant mortality and eliminate malnutrition include provision of access to safe and sufficient water supply. Inclusion of water as an element of the right to life recognises the fundamental fact that safe and sufficient water is necessary for survival. Moreover, the inclusion of the right to water as an element of a civil and political right under the ICCPR is evidence of the indivisibility and interdependence of rights, in particular between economic and social rights and civil and political rights.

However, there is opposition to this broad interpretation of the right to life. Dinstein argues, 'The human right to life per se is a civil right and does not guarantee any person against death from famine or cold or lack of medical attention'.²¹⁹ In contrast, I would argue that such a narrow interpretation of the right to life results in the provision being vacuous. For example, an individual would be protected against murder by the state but not from death by deliberate starvation.

215 Under international law, the right to life is enshrined within the UDHR and the 1966 Covenants. As such it has been seen as the supreme right, which constitutes customary international law. See Tomuschat, C, *Human Rights: Between Idealism and Realism*, 2003, Oxford: Oxford University Press, p 35; McGoldrick, D, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, 1991, Oxford: Clarendon Press, para 1.36, p 21; Dinstein, in Henkin, 1981, pp 114–37. However, it can be argued that only certain aspects of the right to life fall within the scope of *jus cogens* and *erga omnes*, as taking of life may be lawful in certain circumstances, e.g. during combat in an armed conflict. See Tomuschat, 2003, p 35.

216 E.g. *inter alia*, see Tomuschat, 2003; McGoldrick, 1991; Joseph, S, Schultz, J and Castan, M, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2000, Oxford: Oxford University Press, Chapter 8, pp 109–38.

217 UN Human Rights Committee, General Comment 6, 30/04/82 (16th session, 1982), The Right to Life (Art 6). UN Human Rights Committee hereinafter referred to as the CCPR.

218 GC 6, para 5. Also see Alvarez, 2003, p 4.

219 Dinstein, Y, in McCaffrey, SC, 'A Human Right to Water: Domestic and International Implications', (1992) V(1) *Georgetown International Environmental Law Review* 1–24, at 9.

Article 6 (1) protects the individual against the ‘arbitrary deprivation of life’²²⁰ and as such not only gives protection against any active taking of life but also ensues a duty upon states to ensure access to the means of survival,²²¹ that is food, water and other basic needs.

Even if one does not agree with the broad interpretation of the CCPR,²²² it cannot be denied that life cannot be realised without sufficient water for survival. As Scanlon *et al* note, the right to life must ‘[nevertheless] require the inclusion of the protection against arbitrary and intentional denial of access to sufficient water because this is one of the most fundamental resources necessary to sustain life’.²²³ If water is needed to sustain life, then it must follow that the right to water is an element of the right to life.

Significantly, as the right to life is enshrined within the ICCPR rather than the ICESCR, this can broaden access to remedies for grave violations of the right to water at the international level, for example, under the individual complaints procedures of the CCPR.²²⁴ Moreover, the right to life is enshrined in constitutional and national laws allowing cases concerning the right to water to be brought to court or commission based on such provisions. For example, in India cases have been heard concerning pollution of water for consumption as a threat to the enjoyment of the right to life as contained in Article 21 of the Indian Constitution.²²⁵ Clearly the link between the right to life and the right to water is inextricable and this is supported by the interpretation of the right to life in the emerging jurisprudence of the Indian Supreme Court.

Overall, the right to water will affect the enjoyment of many human rights, including, *inter alia*, the rights to education,²²⁶ and the right to development,²²⁷ but some rights are more closely related – being affected to a greater degree due to their nature. This is especially true of those rights also derived from the right to an

220 ICCPR, Art 6 (1).

221 McCaffrey, 1992, p 10.

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

223 Scanlon *et al*, 2003, p 5.

224 Although there is now an Optional Protocol to the ICESCR which includes an individual complaints mechanism, it is not yet in force. See further discussion in Ch 7.

225 See *Subhash Kumar v State of Bihar*, AIR 1991 SC420, Supreme Court of India. Summary at COHRE, 2003, p 115. Also regarding violations of the right to water in India, see FIAN International (Food First Information and Action Network), *Identifying and Addressing Violations of the Human Right to Water Applying the Human Rights Approach*, 2005, Stuttgart: Brot für die Welt, pp 10–11. For further discussion, see Ch 7.

226 The right to education is affected by the right to water, especially in developing countries: water collection by girls and women leads to a lack of schooling and inadequate drinking water infrastructure and sanitation ‘is an obstacle to the eradication of illiteracy’ and to the enjoyment of the right to education at elementary level. See El Hadji Guisse, E/CN.4/Sub.2/1998/7, 10 June 1998, para 23.

227 A fact recognised by El –Hadji Guisse, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

adequate standard of living under Article 11 and to the right to health under Article 12. Due to the inextricable link between these rights they will often be violated in unison and as a consequence of the same action or omission. This does not detract from their self-standing status and individual substantive content.

Defining the core content

GC 15 provides comprehensive guidelines that delineate the normative content of the right to water. However, the General Comment does not define which elements of the normative content of the right to water are core – that is, those that are essential elements of the right and which elements are part of the wider scope of the right but not as essential.²²⁸ Rather, the General Comment uses the formulation of core obligations. Hypothetically, this should not be problematic as the theory of obligations requires that obligations are correlative to the entitlements. Therefore, by defining the core obligations, the core content of the right should be easily identified.²²⁹ Nonetheless, it is worth noting that in the past the CESCR has expressly used the concept of the ‘core content’ as a framework for the General Comment on the Right to Food (GC 12).²³⁰ But, in subsequent General Comments the Committee refers to ‘core obligations’.²³¹ This model was continued in GC 15, to the disappointment of some NGOs.²³² This inconsistency raises the question of whether the two concepts are interchangeable and directly correlative or whether there is a difference in substantive content rather than just a difference in emphasis.²³³

One more practical difficulty with defining the core content of the right to water arises from conflicting claims for water uses as a priority. In this respect GC 15, paragraph 6 states:

Water is required for a range of different purposes, besides personal and domestic uses, to realise many of the Covenant rights. For instance, water is

228 See Toebes, 1999, Ch V for a discussion of the concepts of a scope and core element of a human right, pp 243–89.

229 Chapman advocated using the core obligations mechanism as a way to define the core content. See American Association for the Advancement of Science, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

230 This point was reiterated in the FIAN written submission to the Committee, which argued, ‘Within General Comment 12 the Committee introduced the concept of the core content. In the original draft GC 15 on the “Right to Drinking Water” [sic], the concept of the core content is not fully applied’. See FIAN, Written Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, November 2002, Geneva, p 2.

231 E.g. GC 14, The Right to the Highest Attainable Standard of Health.

232 FIAN’s view was that a paragraph should have been added to GC 15 defining the core content of the right to water and following the structure of previous GC 12: FIAN, Oral submission to the Day of General Discussion on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

233 In terms of GC 15, the Committee set out the ‘core minimum obligations’ correlative to the right to water, but are these necessarily the same as the core content of the right? See further discussion of this point in Bilchitz, 2007, p 183.

necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.²³⁴

Further the ‘minimum essential level’ for this personal use is identified within paragraph 12(a):

The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene. The quantity of water available for each person should correspond to World Health Organization (WHO) guidelines. Some individuals and groups may also require additional water due to health, climate, and work conditions.²³⁵

We can assume then, that although the core content is not defined within such an express framework, it must include water for personal and domestic uses. Moreover, GC 15, paragraph 6 clearly states that priority of water uses should go to water for survival and basic needs.²³⁶ This concept of ‘survival water’ is also evident within international humanitarian law,²³⁷ where the term ‘sufficient water’ is used in the main.²³⁸ This would seem to support the role of water as an element of the right to life. Thus, the core content of the right would certainly include water for survival as a bare minimum, even during times of conflict. However, would a core content based upon a ‘survival’ model necessarily include sufficient water to keep one healthy, for example, free from mild dehydration? It can be argued that this would require more than just water for survival, rather a ‘basic needs’ model. Gleick argues that studies of human needs of water and development research regarding sustainability have led to the conclusion that ‘a human right to water should [only] apply to basic needs for drinking, cooking and fundamental domestic uses’.²³⁹ This

234 GC 15, para 6. Original footnote omitted.

235 Ibid, para 12(a), availability. Original footnotes omitted.

236 Chapman also concluded that ‘water for survival has to take precedence over production of food for non-essential foodstuffs’: Oral Submission to the Day of General Discussion on the General Comment to the Right to Water, CESCR 29th session, November 2002, Geneva; see also McCaffrey, in Gleick, 1999, p 489.

237 For further details of provisions under international humanitarian law, see Ch 4.

238 Although it should be noted that certain provisions within international humanitarian law state that sufficient water must consist of water required to maintain good health. E.g. Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Art 46: ‘The Detaining Power shall supply prisoners of war during transfer with sufficient food and drinking water to keep them in good health . . .’.

239 Gleick, 1999, p 8.

would result in the core content of the right being based upon a basic needs model rather than a very limited 'survival' model.

Conversely, Bartram argues that water for household use and work are inter-dependent and that as such it is not possible to prioritise water uses such as drinking water, rather only to conclude that the right to water encompasses water necessary for survival and dignity.²⁴⁰ If the core content of the right to water is as Bartram envisages, it could be conceptualised thus: if we take the water necessary for survival and add to this very basic provision the three principles of quality of water, sufficient quantity of water and accessibility to water, the result is water for basic needs. That is, water that ensures survival with an acceptable level of health, through quantity and safety but also maintains human personal dignity through meeting hygiene needs, independence and equal access. This conception of a basic needs model is represented in Figure 2.1

SURVIVAL WATER + the three principles of QUALITY, QUANTITY and ACCESSIBILITY = BASIC NEEDS WATER MODEL²⁴¹

Figure 2.1 Basic needs model as a basis for the core content of the right to water

Younis raises the question as to whether the division of water into these categories is useful for clarifying the human right to water, 'Water is a natural resource. Do we say the right to water means water for drinking and sanitation only or water for other uses? The General Comment may devise the issue where as it was something seen as indivisible before'.²⁴² By attempting to identify the scope and core of the right are we prioritising water uses when in practical terms it cannot be done so? It is true, for example that if there is no water for growing essential foodstuffs this will lead to food shortages and thus the right to food will be violated and people will suffer from malnutrition and in the worst cases, starve. However, without water for drinking, death would be even more imminent. Therefore, surely the right to water for survival must take priority. As Riedel states, 'Survival rights are core elements and these will take precedence'.²⁴³ However, it is disappointing that this clear statement was not enshrined within the GC 15 by outlining the core elements of the right within a categorical framework of the scope and core content. The purpose of identifying a core and further scope of a right is to identify which

240 Bartram, Oral Submission to the Day of General Discussion on the General Comment to the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

241 The term 'basic needs' serves in this context to describe the minimum essential level for the right to water and does not imply that the right to water is merely a need. As with any other human right it is a legal entitlement.

242 Younis, Representative of the World Bank, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

243 Riedel, E, Statement on the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

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

Defining the wider scope

The scope of the right should include the core content of the right as well as all the other elements of the right, which are not considered core. This by no means implies that the wider scope is not important and should not be realised by state parties, but rather that it includes elements that do not have to be realised immediately but can be progressively realised. As argued previously, if core obligations and the core content are directly correlative, there should be no element included in the wider scope alone that is provided for under core obligations, as these elements should be a part of the core content. Neither should elements be included which are more easily derived from and justiciable under any other related economic and social right.²⁴⁴ In the case of the right to water, establishing priorities for water use is difficult, especially in areas of water scarcity. However, it is essential if we are to determine a *de facto* right to water. The varying priorities of water use have been analysed in order to determine the core elements of the right to water. Similarly, the same must be done with the overall scope of the right in mind. Issues that arise concerning the scope of the right to water include water for agriculture and food production, sanitation, water for industry, equitable and fair water management and sustainability of water sources.

During the drafting of GC 15, Langford questioned whether the right to water should be extended beyond household uses to include water for food production and cultural uses.²⁴⁵ He gave the example of Ethiopia where water is essential for livestock and farming crops. Lack of water has led to famine as 80 per cent of water use is for agriculture. As such, there are competing uses for scarce water. This point was also raised by the FAO, which argued that the content of the right to water for agriculture be further clarified, especially accounting for increasing water scarcity.²⁴⁶ In the opinion of the FAO, 'Without sufficient water for food production, food security cannot be achieved'.²⁴⁷ However, it also notes that water is a limited resource. As such, 'The sheer volume of water needed for agriculture may

244 See Toebes, 1999, pp 259 and 284.

245 Langford, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva. Texier, Member of the CESCR for France also argued that water for agriculture as it relates to Art 11(2)a, the right to food and irrigation should be included in the scope of the right to water. See Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

246 FAO, 'Draft General Comment No 15 (2002), The Right to Water (Arts 11 and 12 of the ICESCR)', Written Contribution to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva, p 2.

247 Ibid, p 2.

necessitate more limitations on its use than for drinking water, which in the FAO's opinion, should not be compromised by other uses'.²⁴⁸

Evidently, water for agriculture is very important but if seen as an element within the core, it could be to the detriment of water for survival or basic needs. Therefore, water for personal and domestic use must take priority over water for agriculture, with the exception of water required for food production to prevent starvation. Moreover, states must provide adequate access to water for subsistence farming, in line with provisions to realise the right to food under Article 11.²⁴⁹ Further, the particular circumstances faced by agrarian societies require further subjective consideration.

In addition to water for agriculture, the issue of sanitation was widely discussed and deliberated at the Day of General Discussion on GC 15. Questions were raised whether sanitation should be included within the scope of the GC 15, and whether it should actually comprise an element within the core of the right. One Member of the Committee, Mr Texier, argued there was a 'need to extend the scope of the GC to include sanitation, therefore broadening the scope of the right to water than that provided in the draft GC'.²⁵⁰ Chapman also held that the General Comment be broadened to encompass the right to water for sanitation as the draft²⁵¹ did not address sanitation adequately, 'Safety is part of the normative content of the right to water but safety is not possible without sanitation. There is a need to broaden the scope of the right to water and broaden the core of the right to water'.²⁵²

The question raised is whether realisation of the right to water is possible without provision of adequate sanitation? Practically, is it possible to have a clean and safe water supply without adequate sanitation? Bartram convincingly argued that, 'WSSD 2002 millennium development target is to halve the number of people who do not have access to sanitation. Sanitation is a prerequisite to clean drinking water and you cannot have clean water without sanitation'.²⁵³ In addition, Kothari argued that sanitation needed to be addressed more comprehensively within the General Comment. He pointed out that the subsistence clause of the ICESCR²⁵⁴ is often forgotten noting that the 'continuous improvements in living conditions' that it provides for cannot be realised without clean water and sanitation.²⁵⁵ This view was reiterated by Langford, who used the words of Ghandi to make his point: 'Sanitation is more important than independence. Sanitation is fundamental to

248 Ibid.

249 GC 15, para 7.

250 Texier, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

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

252 Chapman, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

253 Bartram, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

254 ICESCR, Art 1, para (2).

255 Kothari, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

personal dignity and for personal and community health, to prevent contamination and disease'.²⁵⁶

The above statements were expressed in response to the original draft GC 15 within which paragraph 6 dealt with sanitation very briefly. However, this provision within the first draft was subsequently removed from the final adopted General Comment and replaced with the words 'The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation . . .'.²⁵⁷ When questioned about the issue, Eibe Riedel stated that the problem with including sanitation within the GC 15 was that it was too large an issue and that the General Comment was already very long. He also questioned whether sanitation would need to be included as a whole, wet and dry sanitation or just elements of sanitation.²⁵⁸ Moss also noted that it would be very difficult to keep the General Comment practical if sanitation were included.²⁵⁹

Within the adopted final version of GC 15, the importance of sanitation to the realisation of the right to water is acknowledged by the Committee in the opening paragraph of the General Comment where it is noted that lack of access to adequate sanitation 'is the primary cause of water contamination and diseases linked to water'.²⁶⁰ However, the substantive provision within the General Comment is limited to water supply for personal sanitation.²⁶¹ In terms of recognising obligations, the GC 15 requires that states parties 'progressively extend safe sanitation services', taking into account the needs of vulnerable groups.²⁶² Moreover and significantly, GC 15 includes sanitation as a core obligation under paragraph 37 stating that states parties must 'take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation'.²⁶³

This provision within the core obligations of the General Comment would appear to raise a discrepancy between the defined normative content of the right to water, which does not include detailed provisions on sanitation and the core obligations of the right. For the purposes of the standard the term 'adequate sanitation' is probably suffice. However, the 'somewhat brief',²⁶⁴ provision concerning sanitation is a weakness of the General Comment for although it does reflect the inextricable link between clean and safe water and sanitation it does not define what is meant by 'adequate sanitation' sufficiently. A General Comment

256 Langford, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

257 GC 15, para 12 (a).

258 Riedel, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

259 Moss, J, Representative of Suez (French water company), Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

260 GC 15, para 1. Original footnote omitted.

261 GC 15 defines personal sanitation as disposal of human excreta.

262 GC 15, para 29.

263 GC 15, para 37(i).

264 Riedel, Statement on the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

needs to be comprehensive in terms of setting out obligations and measures required by states to ensure realisation of the right, one of which is the requirement of adequate sanitation, even if the inclusion of this issue is complex. Further, the integrated approach to water and sanitation is evident in the MDGs where sanitation is an integral part of the measures for realisation of clean water²⁶⁵ and in other environmental declarations, such as the Stockholm Declaration,²⁶⁶ as well as being incorporated in the provisions regarding adequate standard of living in both the CRC and CEDAW.²⁶⁷

Notwithstanding adequate sanitation as integral to the realisation of the right to water, it is also true that the requirement of adequate sanitation is of such significance that it could necessitate the drafting and adoption of a general comment of its own. This would address the complexity of the topic. This could then be used alongside GC 15 and as such the two would complement each other. Furthermore, adequate sanitation could also be developed and viewed as a self-standing right under Article 11, in a similar way to the right to water.²⁶⁸

In conclusion, the approach taken in defining the normative content for GC 15 was to focus upon 'essential water', limiting itself to a 'legal approach, minimal and cautious'.²⁶⁹ Water for basic needs constitutes the core content of the right to water, although not explicitly stated as such.²⁷⁰ Moreover, water for agriculture is included in terms of that essential for food for survival. The wider scope of the right also includes water for other purposes such as for agricultural trade and industry.

Sustainable water use and intergenerational obligations

The incorporation of environmental approaches to water within a human rights framework has not been addressed sufficiently.²⁷¹ The issue of sustainable use of water sources in relation to the human right to water needs to be examined, as it affects the debate surrounding the definition of the scope and core content of the

265 Specifically MDG 7.

266 See Ch 1.

267 CRC, Art 24, CEDAW, Art 14(h). Also see discussion of relevant articles at p 50.

268 See the discussion in Ch 7.

269 Riedel, Statement on the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

270 This would appear in line with the provisions for the right to water as advocated within international humanitarian law, where water for survival is provided for within several articles of the Geneva Conventions.

271 However, since the adoption of GC 15 attempts have been made to rectify this and increasing attention has been paid to the interface between a human rights approach to water and environmental approaches to water. E.g. see Mandate of the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, 'Climate Change and the Human Rights to Water and Sanitation Position Paper', Geneva: OHCHR, 2009; Ling-Yee Huang, 'Not Just Another Drop in the Human Rights Bucket: The Legal Significance of a Codified Human Right to Water', (2008) 20(3) *Florida Journal of International Law* 353–70, at 358; Shelton, D, 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?', (2006) 25(1) *Denver Journal of International Law and Policy* 129–71, at 151–3; and Hiskes, RP, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*, 2009, Cambridge: Cambridge University Press.

right. For example, does the core content of the right to water also include the use of water in an ecologically sustainable manner? Specifically, does the core content of the right include essential water for the immediate populace only or should it include an intergenerational obligation to ensure minimum essential water for future generations?

In the past, the question of a human right to water and the environment has not been dealt with under environmental law. In fact as Riedel stated, '[Previously] in the context of environmental law, the human right to water was seen as superficial and was not looked at'.²⁷² Due to the lack of clarity on this issue the Committee felt it was important to address questions of sustainability within GC 15. During the drafting process, Chapman critiqued the provisions regarding sustainability and environment stating that they needed to be more detailed and required clarity as to their meaning.²⁷³ The resulting adopted paragraph 11 of GC 15 states:

The elements of the right to water must be *adequate* for human dignity, life and health, in accordance with articles 11, paragraph 1, and 12. The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Water should be treated as a social and cultural good, and not primarily as an economic good. The manner of the realisation of the right to water must also be sustainable, ensuring that the right can be realised for present and future generations.²⁷⁴

This paragraph emphasises water as a 'social and cultural good', which can be equated with the concept of water as a public good or commons. This later concept is common to environmental approaches to water and in environmental law. Thus the approach taken in GC 15 reflects the idea that it is the responsibility of everyone to use water in a sustainable way as water belongs to everyone.

The Committee also states unequivocally that the right to water be realised in a sustainable way and therefore that there is an intergenerational obligation on states to ensure water for future populations as well as the current generation. Scanlon *et al* argue that the scope of the right to water should be broader in order to realise this goal of sustainability:

Water is looked upon as a social and environmental resource. The term right to water does not only refer to the rights of people but also to the needs of the environment with regard to river basins, lakes, aquifers, oceans and ecosystems

272 Riedel, Statement on the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

273 Chapman, Oral Submission to the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

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

surrounding watercourses. Realistically a right to water cannot be secured without this broader respect. A failure to recognise water as an environmental resource may jeopardise the rights-based approach, which views water primarily as a social resource. If we are to consider the maintenance of good quality water of adequate access and supply, we need to look at how this is to be achieved beyond the provision of safe drinking water and sanitation. Maintaining a safe water supply means that overall river basin management, agricultural practice and other works are important if we are to meaningfully strengthen and uphold any right to water.²⁷⁵

The argument of Scanlon *et al* emphasises the need for effective and environmentally aware water management as a measure to ensure maintenance of basic needs water. As such, sustainability of water resources for basic needs can be seen as part of the core content of the right to water, thus there are two essential elements of the right to water: water for basic needs and sustainability use and management of water resources. This model would be supported by the conception of water within environmental declarations such as Agenda 21 (1992) which states, 'In developing and using water resources, priority has to be given to the satisfaction of basic needs and the safeguarding of ecosystems'.²⁷⁶

Conversely, it can be argued that sustainability should be part of the scope of the right but not the core content, as the core content contains only the elements of the right necessary to be realised in the immediate (as provided for under core obligations). Although this may seem a short-sighted view, in terms of practicality and implementation of the right, surely priority has to be given to ensuring water to alleviate immediate human suffering and for realising basic needs. This is especially true when water is scarce. That is not to say that sustainability is not an indispensable element of the right to water, rather it should be a part of the wider scope of the right, which states parties can implement progressively. The problem with this line of argument is that if water is used in a manner which is not sustainable, even if it is for realising immediate and basic needs, then eventually there will be no water to manage sustainably in the future. Therefore, the difficult question of how to balance immediate needs with sustainable use is one that requires further thought and it does perhaps add strength to the argument for a new water treaty, which combines these environmental aspects with the human rights aspects.²⁷⁷ As Scanlon states, the 'question of how environmental norms relates to any future right to water will require serious consideration'.²⁷⁸ Hence the need for much more collaboration between environmental lawyers and practitioners, water management specialists and human rights professionals is clear.

Evidently, what we can ascertain is that sustainable use of water sources is a part of the normative content of the right and there is clearly an obligation upon states

275 Scanlon *et al*, 2003, p 22.

276 Agenda 21, Ch 18.8.

277 See Ch 7 for further discussion of this idea.

278 Scanlon *et al*, 2003, p 23.

to take into account sustainability within their water management and water strategy. Intergenerational equity means:

Sufficient water should be obtained in a sustainable manner so that the right can be realised for present and future generations . . . Beyond the immediacy of a human right to water, there is also a need to consider this human right in its temporal aspect, that is, to bear in mind not only the human rights of present generations, but also to ensure that the human rights of future generations are not compromised.²⁷⁹

Clarifying the core and scope of the right to water

Having examined each of the issues in turn, it is evident that at present there is no express definition of the scope and core content of the right to water. The normative content is defined in general terms and core obligations are defined but the Committee does not use the concept of scope and core content in GC 15.

Defining such a scope and core content of the right to water is a difficult task and it can be argued that the method used by the Committee of defining core obligations will suffice. By emphasising core obligations, the emphasis is on the actions or refrain necessary to implement the right. Also, dividing the normative content into these two spheres raises problems, as seen with the example of sustainability. Moreover, on a practical level does it serve any purpose, as long as core obligations are established?

Notwithstanding this point, a theoretical examination of this model is preferable, in order to clarify ideas and understanding of the right and to highlight any possible problems or gaps in provision. Therefore, I have conceived of the core content and the wider scope of the right thus: the core content covers water for basic needs inclusive of safe and sufficient drinking water and water for food preparation and for hygiene needs, as well as water for subsistence farming to prevent starvation, where appropriate.

In addition, this water must be economically and physically accessible for all in a manner consistent with human dignity. Special consideration should be taken to ensure that this is applied to all vulnerable groups. Significantly, sanitation is included within the core content of the right and it is in this field that further legal developments are required as the General Comment is limited in its provisions on this issue.

In terms of correlation between the core obligations as defined in GC 15 and my conception of the core content of the right, all of the core content has correlative core obligations. Interestingly, this includes sanitation despite the limited nature of its provision within the normative content of the General Comment itself.²⁸⁰ Further, there are several core obligations which relate to water service provision

279 Ibid, p 25. See also GC 15, para 11.

280 Although sanitation is briefly mentioned in para 12(a), it is only further elaborated on under Obligations, para 29.

and management, which I have included as part of both the core and scope of the right. This particular issue highlights the complexity of devising a scope and core from the overall normative content and it may well be that certain elements of rights cannot be defined in such terms. Further, as noted previously, a focus on core obligations may be more beneficial for implementation of the right as it is obligations that 'operationalise' the content of a right by requiring refrain or actions.

These core obligations listed within GC 15 include several obligations of conduct regarding water management and this then raises the important question of whether measures necessary to realise the core content of a right are part of the core content of the right itself or rather only part of the obligation. For example, is equitable water management part of the core content of the right to water or rather a measure required to realise basic needs water? This would also mean that in contradiction to the argument that core obligations and the core content of a right are necessarily directly correlative; some duties related to how to implement the substantive content of the right to water are a part of the core obligations alone. This highlights the need for clarification of the minimum core approach. Bilchitz notes that the 'minimum core approach has not been sufficiently well developed' and that this had led to misunderstandings as to its function and content.²⁸¹ As such, this may have consequences when trying to establish the core content and core obligations regarding a specific right, such as the right to water. Although this inconsistency is at a theoretical and normative setting level, it may have consequent effects upon implementation of the particular right.

Concluding remarks

International human rights and international law bodies have concluded that a right to water already constitutes an integral part of recognised human rights provisions. However, the gap left as a consequence of lack of explicit wording regarding water within ICESCR, Article 11 or Article 12 and only partial aspects of a right to water being recognised within the CRC and CEDAW have resulted in the right to water holding an ambiguous status within international human rights law.

Notably, the scope and core content of the right are not expressly defined in these terms. However, the normative content is clear and the focus upon core obligations overcomes the need to clarify the content in this way. Riedel states that 'The General Comment focuses upon water for drinking, hygiene and domestic uses but also covers briefly water for subsistence farming and agriculture as it is essential for survival'.²⁸² Nonetheless, one limitation in provision is evident, namely sanitation. The lack of comprehensive provision concerning sanitation represents

281 Bilchitz, D, 'Developing the Minimum Core Approach to Socio-Economic Rights', Paper given at the Association of Human Rights Institutes Annual Conference, Essex University, UK, 19–21 September 2003, p 1.

282 Riedel, Statement on the Day of General Discussion on the General Comment on the Right to Water, CESCR 29th session, 22 November 2002, Geneva.

a *de jure* gap in content and standards. Furthermore, lack of adequate sanitation is a *de facto* threat to realisation of the right to water in reality. For this reason, further consideration should have been given to providing more detailed substantive content on what adequate sanitation encompassed within GC 15.

Also, how the right to water relates to other economic and social rights derived from Article 11 and also outside Article 11 requires further attention. There is a need to clarify the legal standing of the right to water as a self-standing independent right under the ‘umbrella’ right to an adequate standard of living and as equivalent to the other rights explicitly expressed within Article 11. At present, although equally derived from Article 11, the legal relationship between these explicitly codified rights and the implicit right to water remains equivocal. Moreover, if another human right were to be derived from Article 11, for example, a right to adequate sanitation, using the same reasoning that was used to legally establish the right to water, this would lend support to the argument that implicit rights under Article 11 were still fully independent and of full legal standing with corresponding legal obligations.

Until further development such as explicit legal codification, the right to water is always in danger of non-recognition as a legal right by states or as being deemed a composite element of another related right, such as food or health, rather than a right in itself. As Scanlon *et al* note, ‘Lifting the right to water from the shadow of other associated human rights could be seen as awarding it long overdue standing to be considered as a self-standing right’.²⁸³ Further, the consequence of this should be to make the right more easily justiciable and prevent states from denying their obligations in this respect.

Despite this lack of explicit codification, in the years since the adoption of the GC 15, concerns regarding accessible, safe and sufficient water for all have received much greater attention within the human rights framework. The drafting and adoption of this General Comment was the beginning of this process and first substantial legal development of the right. As a result of this standard and the subsequent focus it created, although the right to water has no definitive status, it is arguable that an internationally recognised legal human right to water is emerging, if not fully accepted and established under international human rights law.

283 Scanlon *et al*, 2003, p 18.

3 Obligations correlative to the right to water

Having considered the legal standing of the right to water and the normative content of the right, the next logical step is to examine the nature and extent of obligations of states parties regarding the right. This will necessarily entail consideration of specific obligations correlative to the right to water as detailed within GC 15, as well as brief reflection on how more general obligations under the ICESCR affect the right.

Obligations are important because they are imperative to the realisation of human rights. The legal conception of obligations within international human rights law is based upon the paired concept of an entitlement and its correlative duty. It is important to understand that ‘A proclamation of a right is not the fulfilment of a right, anymore than an airplane schedule is a flight. A proclamation may or may not be an initial step toward the fulfilment of the rights listed. It is frequently the substitute of the promise in the place of the fulfilment’.²⁸⁴ As such, the concept of legal obligations is crucial to the reality of the enjoyment of all human rights and therefore, to the realisation of the right to water. Obligations constitute a sound legal duty for states parties to adhere to and a mechanism for state compliance, thus helping to enforce the right practically on the ground.

In GC 15, the Committee sought to compose an authoritative legal interpretation of the right to water that would, *inter alia*, explicitly state the correlative obligations therefore assisting state parties in fulfilling their duties to realise the right at the national level. As such, the provisions concerning state obligations are crucial for implementation of the right, as it is against these obligations that the CESCR monitors state compliance and identifies good practices and violations of the right. As such, I will consider the core obligations of states parties as provided for in GC 15, as well as examining provisions regarding international obligations, extra-territorial obligations and the obligations of non-state actors.

General obligations and the right to water

Any obligations correlative to the right to water should also be interpreted in the context of the general obligations as provided under the ICESCR, as the

284 Shue, H, *Basic Rights, Subsistence, Affluence and US Foreign Policy*, 1980, Princeton, NJ: Princeton University Press, p 15.

international instrument that codifies Articles 11 and 12 and provides the legal basis for GC 15. The key article relating to obligations under the ICESCR is Article 2(1). Interpretation of this provision has been imperative to the understanding of the nature of obligations for states parties to this treaty. Article 2(1) states:

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

To a certain extent some of the issues concerning obligations have been clarified by the work of the CESCR²⁸⁵ and others.²⁸⁶ However, the interpretation and wording of this article has been controversial and much debated,²⁸⁷ with questions raised about the nature of the concept of progressive realisation, as well as determining what is meant by ‘maximum available resources’²⁸⁸ and the extent of the obligation of international assistance. Article 2(1) enshrines the concept of ‘progressive realisation’ and therefore determines the approach permissible by states in realising those obligations which are necessary to the enjoyment of the full scope of the rights contained in the Covenant but which are in addition to the immediate core obligations. Although ‘progressive realisation’ of rights has, in the past, been misinterpreted and seen as a weakness in the provisions of the Covenant, the Committee is clear that ‘progressive realisation’ is a ‘necessary flexibility device’ and reflects ‘the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights’.²⁸⁹ Progressive realisation relates to a conception of progress over time and dynamic movement towards full enjoyment of

285 See GC 3. Concerning right-specific obligations and obligations relating to principles see other thematic general comments of the CESCR, 20 to date (excluding GC 3) from February 1989 and December 2009.

286 E.g. see the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights 1988 (hereinafter referred to as the Limburg Principles) which identify the nature and scope of state obligations under the ICESCR. Lawyers and scholars have also sought to examine and interpret states parties’ obligations. E.g. see Arambulo, K, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects*, 1999, Oxford: Hart Intersentia; Eide, in Eide, A, Krause, K and Rosas, A (eds), *Economic, Social and Cultural Rights*, 2nd rev edn, 2001, London: Martinus Nijhoff, pp 22–8; and Craven, M, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, 1995, Oxford: Clarendon Press, pp 106–50.

287 See Craven, 1995, pp 106–52; Eide, in Eide *et al*, 2001, pp 26–8; Arambulo, 1999, pp 78–80 and 153–5; Steiner, H and Alston, P, *International Human Rights in Context: Law, Politics and Morals*, 2nd edn, 2000, Oxford: Oxford University Press, p 246; and Toebe, B, *The Right to Health as a Human Right in International Law*, 1999, London: Hart Intersentia, p 294.

288 See Skogly, S, ‘The Requirement of Using the “Maximum of Available Resources” for Human Rights Realisation: A Question of Quality as Well as Quantity?’, Paper on file with author, May 2010; and Robertson, RE, ‘Measuring State Compliance with the Obligation to Devote the “Maximum of Available Resources” to Realizing Economic, Social and Cultural Rights’, (1994) 16(4) *Human Rights Quarterly* 693–714.

289 GC 3, para 9.

those rights. It does not mean that states may disregard, be static or retrogressive in fulfilling their obligations. In fact, states must justify any deliberately retrogressive measures. The Committee also emphasises that the 'phrase must be read in the light of the overall objective of the Covenant which is to establish clear obligations for States parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal'.²⁹⁰

One particular development in this regard has been the use of the concept of core obligations, which has contributed significantly to the clarification of states parties' obligations within the wider context of progressive realisation and is crucial in the implementation of economic and social rights under the Covenant. In CESCR GC 3, paragraph 1 (the nature of states parties' obligations), the committee states:

Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result . . . While the Covenant provides for progressive realisation and acknowledges the constraints due to the limits of available resources, it also imposes various obligations, which are of immediate effect.²⁹¹

These 'various obligations' include an obligation on states to comply with the requirement that rights are exercised without discrimination²⁹² and compliance with specific core obligations correlative to the particular right. The CESCR states that core obligations must be fulfilled regardless of resource availability, 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party'.²⁹³ However, previously there has been some question over whether a state party is in breach of its obligations if the minimum essential level is not met due to resource constraints. The Committee states:

Even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.²⁹⁴

290 Ibid, para 9.

291 Ibid, para 1.

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

293 GC 3, para 10.

294 Ibid, para 11.

Further, there must be a minimum core entitlements and obligations otherwise the Covenant would be largely deprived of its own *raison d'être*. As such, the minimum core must act as 'an absolute minimum entitlement, in the absence of which a state party is considered to be in violation of its obligations'.²⁹⁵

The CESCR also takes into account the economic situation of the specific state when establishing whether it has met its general obligations regarding the Covenant. As Craven notes, 'It has thus resorted to the use of national benchmarks as an initial indicator of state compliance with the obligations in the convention'.²⁹⁶ These indicators are examined against what has been deemed the 'minimum threshold' for that state. The state must also be seen to fulfil the 'core minimum obligations' regarding a particular right. The difference between the minimum threshold and the core obligations is that core obligations are universal and applicable to all state parties without differentiation. The minimum threshold is state specific and represents the base level within that particular state under which the specific right's standard must not fall, in order to comply with the core obligations and endeavour to improve upon. Minimum threshold is therefore inextricably linked to the concept of benchmarks and national indicators introduced in order that states have clear goals for how to comply with and move beyond the core obligations to achieve maximum realisation of that right.²⁹⁷ Moreover, the issue of international assistance is interconnected as in determining whether a state has made use of all available resources, it must demonstrate that as well as utilising all national resources, it has also sought international resources through requesting international assistance and cooperation.²⁹⁸

295 Alston, P, 'Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights', (1987) 9 *Human Rights Quarterly* 332–81 at 353.

296 Craven, 1995, p 136.

297 I do not discuss in detail national implementation and the use of benchmarks and indicators. However, it is important to note that these concepts are elements of a required framework of obligations and monitoring for realisation of the right to water. For further reading on indicators and benchmarks, see Roaf, V, Khalfan, A and Langford, M, 'Centre on Housing Rights and Evictions, Monitoring Implementation of the Right to Water: A Framework for Developing Indicators', Global Issue Paper No 14, Berlin: Heinrich Böll Foundation, Brot für die Welt and COHRE, 2005; Hunt, Paul, UN Special Rapporteur on the Right to Health, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, E/CN.4/2006/48, 3 March 2006, paras 22–61, pp 7–15; Arambulo, 1999, p 351; OHCHR, 'Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water', Background Paper to the World Summit on Sustainable Development, Johannesburg, September 2002, p 16; OHCHR, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, September 2002, p 14; and Tomasevski, in Eide *et al*, 2001, pp 531–51.

298 See GC 3, paras 10 and 13; Limburg Principles 1988, para 31; CESCR, General Comment 2, 02/02/90 (4th session, 1990), International Technical Assistance Measures (Art 22), (4th session, 1990), 02/02/90; Bueno de Mesquita, J, 'International Covenant on Economic, Social and Cultural Rights: International Obligations', A Working Paper, 2002, Essex University Human Rights Centre, p 10; and Skogly, S, 'The Obligation of International Assistance and Co-operation in the International Covenant on Economic, Social and Cultural Rights', in Bergsmo, M (ed), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjorn Eide*, 2003, Lieden: Martinus Nijhoff: Lieden, pp 403–20.

Tripartite obligations and the right to water

In terms of obligations specific to the right to water, GC 15 reflects the nature and formulation of general legal obligations under the Covenant, as applicable to the right. In addition, the General Comment outlines specific obligations correlative to the right to water that follow the tripartite typology of obligations as conceived of by Shue²⁹⁹ and later Eide.³⁰⁰ This tripartite model of three levels of obligations: respect, protect and fulfil is the accepted typology for obligations relative to all human rights.³⁰¹ The acceptance of this tripartite model is also evidenced by its consistent use by the CESCR.³⁰²

Respect

The obligation to respect can be defined as the respect for individual resources and freedom to take action and use resources, alone or collectively, in association with others, to satisfy their own needs.³⁰³ The state is required to refrain from any action that would impede or deny the individual their rights, by actively interfering or depriving of resources necessary for rights fulfilment.

In terms of the right to water, 'The obligation to *respect* requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to water'.³⁰⁴ The provision then lists examples of prohibited activities and practices that the state must refrain from, for example:

refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons; and limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law.³⁰⁵

One strong provision within this section is the significant link made with obligations for a right to water under international humanitarian law. The phrase 'limiting access' is a beneficial inclusion, as in addition to the destruction of the water infrastructure and direct attacks upon water sources, access to water is often denied

299 Shue, 1980.

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

301 See Eide, in Eide *et al*, 2001, p 23; Arambulo, 1999, pp 121, 126 and 168; Craven, 1995, p 109; the Maastricht Guidelines 1997; and the Limburg Principles 1988.

302 E.g. see GC 12, Right to Food, GC 13, Right to Education, GC 14, Right to Health and GC 15, Right to Water.

303 Eide, in Eide *et al*, 2001, p 23.

304 GC 15, para 21.

305 Ibid, para 21.

through more subtle indirect means, such as deliberate pollution or lack of physical access due to personal danger from hostilities. Furthermore, paragraph 22 states that during armed conflicts and emergency situations, ‘the right to water embraces those obligations by which States parties are bound under international humanitarian law, including protection of objects “indispensable for survival of the civilian population”, including drinking water supplies and water installations and an obligation to ensure that civilians have access to adequate water’. The Committee notes relevant instruments of humanitarian law including, *inter alia*, the Geneva Conventions.³⁰⁶

This explicit provision further develops the interrelationship between these two areas of international law. Although humanitarian law is mentioned under GC 14, paragraph 34 (the highest attainable standard of health), the provisions under GC 15 are more comprehensive, reflecting the parallel application of the two doctrines that has evolved in recent years. By acknowledging the complementary obligations under the two different areas of law, the opportunity for protection of the human right to water is increased for those in a conflict situation whose right is being threatened or violated.³⁰⁷

Protect

It has been argued that this is the most important aspect of state obligations, as it is the state that has the power to implement law and order and as such protect the individuals within its borders.³⁰⁸ This means protection from, *inter alia*, actions of powerful actors and protection against unethical behaviour by private actors, whether corporate or individual, which threaten the enjoyment of individuals rights. It also includes an obligation to protect individuals, within the state’s jurisdiction, from hazards.³⁰⁹

Obligations to protect are noted under GC 15, paragraphs 23 and 24 and declare a clear obligation for the state to protect against interference with the enjoyment of the right to water by third parties. This obligation includes, *inter alia*, preventing them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water and the establishment of an effective regulatory system and adoption of legislative measures to govern water management and prevent abuses and misconduct by third parties. This provision is significant, in that it differs from previous General Comments by imposing concrete obligations of conduct relating to how the state should protect against the actions and policies of non-state actors.³¹⁰

306 E.g. see Additional Protocol I to the Geneva Conventions (1977), Arts 54 and 56; Additional Protocol II (1977), Art 54; third Geneva Convention of 12 August 1949, Arts 20 and 46; and Geneva Conventions of 12 August 1949, Common Art 3. See further discussion in Ch 4.

307 For further detail of the interrelationship of human rights law and humanitarian law generally, see the conclusions of the ICJ in ‘Legality of the Threat or Use of Nuclear Weapons (Request by the General Assembly)’, (1996) *ICJ Reports* 226, para 25. For further discussion of international humanitarian law and the right to water, see Ch 4.

308 Eide, in Eide *et al*, 2001, p 24.

309 Ibid, p 24.

310 Whereas previous provisions focus in the main on obligations of result, e.g. in GC 14 on the right to health.

Examples of state obligations to protect the right to water could include: protection of individuals from corporate interference (or any third party interference) with their water supply which results in the denial of water to a certain sector of people and ensuring that environmental pollution (a hazard) does not occur on a level that would threaten health.

Fulfil

The obligation to fulfil can be interpreted as encompassing two aspects: to facilitate and to directly provide.³¹¹ It requires ‘the state to take necessary measures to ensure the satisfaction of the needs of the individual that cannot be secured by the personal efforts of that individual’.³¹² This includes not just direct provision but facilitating the environment for individuals to realise the right independently with the assistance of the state in creating the conditions that make this possible.

The obligations to fulfil contained within GC 15 are comprehensive and include both general definitions of the obligation to fulfil in paragraph 25; to facilitate, promote and provide (which can be interpreted as assistance, education and provision), as well as more specific obligations regarding water provision³¹³ and importantly sanitation.³¹⁴ Particularly positive aspects of these obligations include ensuring water is affordable and measures to achieve this,³¹⁵ recognition of the right to water under domestic political and legal systems,³¹⁶ and adoption of policies and programmes to ensure sustainable use of water to ensure water for future generations.³¹⁷ This final obligation noted is significant as it encompasses an inter-generational obligation and reflects environmental and development approaches to water.³¹⁸ Moreover, the provision lists examples of measures that could be taken to fulfil this duty and it is notable that these paragraphs consist very much of obligations of conduct and include several suggestions for how to achieve the main obligation of the result: safe, sufficient, accessible and affordable water for all.

Of further note is the emphasis given to obligations concerning domestic implementation. The importance of domestic implementation in the realisation of the right to water is unequivocal and the GC 15 sets out detailed provisions to this effect. Under obligations to fulfil, paragraph 26 requires that states ‘accord sufficient recognition of the right to water within their national and political systems, preferably by way of legislative implementation’ as well as adopting a ‘national

311 See Eide, A, 7 July 1987; and Eide, in Eide *et al.* 2001, p 24.

312 Craven, 1995, p 109.

313 GC 15, paras 26–29.

314 Ibid, para 29.

315 Ibid, para 27.

316 Ibid, para 26.

317 Ibid, para 28.

318 This reflects the synergy between the human rights approach and development approaches to water, noted in Ch 1. The achievements in the development field concerning water are acknowledged further in the General Comment in various references to the Johannesburg Plan of Implementation of the 2002 World Summit on Sustainable Development, Dublin Principles and the Rio Declaration and Agenda 21.

water strategy and plan of action' for realisation of the right. The facilitation of improved and sustainable access to water for those especially vulnerable³¹⁹ is also provided for.

These obligations are expanded on further within Section V Implementation at the national level.³²⁰ Paragraphs 47–49 outline what such a national water strategy should entail, including, *inter alia*, the setting of benchmarks and indicators for monitoring the enjoyment of the right to water, establishing accountability and respect for the principles of non-discrimination and peoples' participation.

Paragraph 50 deals with providing guidance as to what legislative measures should be included within a legal framework for implementation of the right, while paragraphs 52–54 expand the obligations regarding indicators and benchmarks.³²¹ Worthy of note is paragraph 53, which states that indicators should not only address all the different components of the right to water but also 'cover all persons residing in the State party's territorial jurisdiction or under their control'.³²² This duty has not been overtly stated in previous General Comments and this provision can be seen to reflect the expansion of obligations to include extra-territorial duties – a current area of development within the field of economic and social rights and, secondly, to reaffirm an occupying power's responsibility for human rights obligations over an occupied population both under international humanitarian law and under international human rights law.

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

In sum, although the obligations regarding national implementation contained in GC 15 follow an established outline seen in previous General Comments,³²³ these provisions also illustrate a further evolution in the field of obligations. This development, which was initially evident in the GC 14 on the right to health, is that they provide detailed obligations of conduct on how to implement the right at state level, thus attaching greater gravity and responsibility to implementation at domestic level.

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

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

319 Those in rural areas and deprived urban areas.

320 GC 15, paras 45–59.

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

322 GC 15, para 53.

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

for protecting the quality of drinking water supplies and resources. In accordance with the rights to health and adequate housing (see General Comments No. 4 (1991) and 14 (2000)) States parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.³²⁴

This provision is weak in terms of concrete immediate obligations for the state to adhere to. It states that adequate sanitation is fundamental for human dignity and notes the special protections required by women and children, but then provides that states parties only have an obligation to ‘progressively extend’ sanitation services, rather than an immediate obligation to ensure provision of adequate sanitation. As such, it gives the impression that adequate sanitation provision is not necessary to realise the minimum essential level of the right to water. Furthermore this provision seems to contradict the inclusion of sanitation within the core obligations, as one of the ‘measures to prevent, treat and control diseases linked to water . . .’³²⁵ Consequently, the obligation to fulfil in relation to sanitation is ambiguous and requires clarification.

Table 3.1 illustrates state obligations correlative to the right to water, as provided for in GC 15, based upon the tripartite typology framework. This enables us to see that the said right ensues obligations of all three levels.

Table 3.1 Tripartite scheme of state obligations – right to water

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

324 GC 15, para 29. Original footnote omitted.

325 Ibid, para 37 (i).

International obligations/extra-territorial obligations

Concerning international obligations the General Comment adapts the three levels of obligations (respect, protect and fulfil) to reflect an international perspective resulting in extra-territorial and international duties outlined in the section on International Obligations. These paragraphs are comprehensive and follow the framework for international provisions, as set out in previous General Comments.³²⁶ Moreover, the legal commitment required by states parties to extra-territorial obligations is emphasised by the explicit recognition of the extra-territorial element of states parties duties present in these detailed and strongly worded provisions (paragraphs 31–36).

Paragraph 30 sets out the general obligation of international assistance and requires that ‘state parties recognise the essential role of international co-operation and assistance and take joint and separate action to achieve the full realisation of the right to water’. This provision reflects the general obligation for international cooperation as listed in Article 2 of the Covenant.

Paragraph 31 provides that states have a duty to respect the right to water in other countries. In relation to the extra-territorial obligation to respect, paragraph 31 provides that states have a duty to respect the enjoyment of the right to water in other countries by refraining ‘from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries’. Furthermore, ‘Any activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction’.³²⁷ Moreover, I would argue that this provision should be interpreted to include not only refraining from actual actions and activities which are detrimental to the enjoyment of the right to water but also encompass an obligation to refrain from formulating and implementing policies which ‘can be foreseen as having negative effects’ upon the right to water.³²⁸

In terms of an obligation to protect in the context of international activities, paragraph 33 requires the state to ensure that its own individuals and companies refrain from actions which would result in violations of the right in other countries. Moreover, the General Comment stresses that ‘Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law’.³²⁹

This provision is significant in that many companies now have branches and operations outside the state of origin. Therefore, these entities need to be regulated to ensure they do not violate the right to water of the citizens in these third states through their indirect or direct policy or practice. Specific examples include mining companies, soft drinks companies, damming and engineering companies, all of

326 E.g. GC 14, paras 38–42.

327 GC 15, para 31, original footnote omitted.

328 See Ziegler, J, *Report of the Special Rapporteur on the Right to Food*, E/CN.4/2005/47, 24 January 2005, para 51, where he makes this argument in respect to the right to food.

329 GC 15, para 33.

which can negatively impact on the local population's right to water through pollution, lack of access and/or insufficiency.³³⁰

Generally, these provisions are important as they extend state obligations to include responsibility on the part of states parties for actions or omissions which take place outside national borders, thus establishing extra-territorial duties. This provision reflects the development of human rights law concerning obligations from the classic legal conception of human rights obligations as being limited to state actions or omissions within national territory, to a broadening of obligations to encompass activities taken by the state or by its citizens beyond state borders.³³¹ This development is critical as it manifests the contemporary globalised system of states' activities: transnational trade, international cooperation, aid and development and increased communications and travel. In the case of the right to water it is particularly pertinent as geographically water resources are often shared between states' territories and the actions of a neighbouring state or its citizens can have consequent effects upon individuals' right to water in another state.³³² Furthermore, in the case of an occupation, even if the occupying force denies holding human rights obligations towards the individuals in that territory, they cannot deny that they have, at the very least, extra-territorial human rights obligations.³³³

In further provision for obligation to respect, paragraph 32 requires that states parties should refrain from imposing embargoes, sanctions or similar measures

330 E.g. see FIAN/Brot für die Welt, *Identifying and Addressing Violations of the Human Right to Water Applying the Human Rights Approach*, 2006, Stuttgart: Brot für die Welt (Bread for the World), pp 10–13; FIAN, 'Peru: Water Contamination by Oil Company Pluspetrol S.a. in the Area of the Indigenous Communities, at Cases, Urgent Actions', at www.fian.org (accessed 28 January 2008); FIAN, 'Ecuador: Planned Dam Threatens Peasants' Access to Land and River Water, at Cases, Urgent Actions', at www.fian.org (accessed 28 January 2008); Shiva, V, *Water Wars*, 2002, London: Pluto Press; and UK House of Commons International Development Committee, *Sanitation and Water*, 6th Report of Session 2006–07, Volume 1, HC 126-I, 26 April 2007, London: The Stationery Office Limited, p 50, para 35 and pp 47–48, paras 126 and 127.

331 For further reading on the extra-territorial obligations and the right to water, see Cahill, A, 'Protecting Rights in the Face of Scarcity: The Right to Water', in Gibney, M and Skogly, S (eds), *Universal Human Rights and Extraterritorial Obligations*, 2010, Philadelphia, PA: University of Pennsylvania Press, pp 194–216. On extra-territorial obligations generally, see Gibney and Skogly, 2010; Skogly, S, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, 2006, Oxford/Antwerp: Intersentia; Coomans, F and Kamminga, M (eds), *Extraterritorial Application of Human Rights Treaties*, 2004, Antwerp: Intersentia; Skogly, S and Gibney, M, 'Transnational Human Rights Obligations', (2002) 24(3) *Human Rights Quarterly* 781–98; Vandenhoe, W, 'Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy', (2007) 76(1) *Nordic Journal of International Law* 73–100 (on file with author as an earlier version presented at the Centre for Transboundary Legal Development, Tillburg University, 14 December 2005); and Vandenhoe, W, 'Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?', (2009) 17 *International Journal of Children's Rights* 23–63.

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

333 See Skogly, 2006, pp 198–201 on occupation and extra-territorial obligations. For further discussion of occupation and human rights obligations, see Ch 4.

which prevent the supply of water or interfere with goods and services necessary for securing the right to water.³³⁴ The CESCR recalls its position on the relationship between economic sanctions and respect for economic and social rights as noted in General Comment 8,³³⁵ in which the Committee notes how sanctions can jeopardise the availability of clean drinking water and disrupt adequate sanitation³³⁶ and that provision for repairs to infrastructure essential to provide clean water should be a humanitarian exemption under any sanctions regime.³³⁷

Importantly, this provision highlights the relevance of an extra-territorial aspect of states parties' obligations concerning the right to water, as an issue to be considered within a state's foreign policy actions, not just as part of international development or assistance but also as an aspect of political, security and military actions.³³⁸ Further, the provision also reflects duties concerning water under humanitarian law, as it reinforces the position taken under the Geneva Conventions that denial of water should not be used as a weapon or punishment in conflict situations.

The obligation to fulfil is seen as the most controversial in relation to international obligations as it could be interpreted as an obligation to provide for a third state's population.³³⁹ Obviously this interpretation is unrealistic and undermines the continuing obligation to fulfil held primarily by the domestic government in question. Therefore, it has been argued that the obligation to fulfil in its extra-territorial aspect must be limited to a duty to facilitate or to 'support the fulfilment' of a right by the domestic state.³⁴⁰ Practically, this would seem appropriate, as a third state cannot interfere with domestic policy without cooperation from that state. Realistically, a state party cannot be expected to fulfil the right to water in a foreign state if the domestic government of that state is not taking action itself to fulfil its obligations.

In GC 15, paragraph 34, this obligation to fulfil (or support fulfilment) is framed in terms of international assistance and cooperation:

Depending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required. In disaster relief and emergency assistance, including assistance to refugees and displaced persons, priority should be given to Covenant rights, including the provision of adequate water. International assistance should be provided in a manner that is consistent with the Covenant and other human

334 GC 15, para 32, original footnote omitted.

335 CESCR, General Comment 8, 12/12/97 (17th session, 1997), *The Relationship between Economic Sanctions and Respect for Economic and Social Rights*, E/C.12/1997/8. Hereinafter referred to as GC 8.

336 Ibid, para 3.

337 Ibid, paras 4–5.

338 See Dugard, J., *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, 2006, para 70.

339 Coomans, in Coomans and Kamminga, 2004, p 195; and Skogly, 2006, p 71.

340 Ziegler, 2005, para 47.

rights standards, and sustainable and culturally appropriate. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.³⁴¹

This provision expressly stating that priority should be given to assistance for ensuring economic and social rights represents a new approach from previous General Comments. For example, although GC 14, paragraph 40 notes that states have a responsibility to cooperate in providing disaster relief, this is framed in terms of humanitarian assistance and does not explicitly acknowledge the precedence of ensuring Covenant rights. The clause in GC 15 explicitly acknowledges the link between provision of humanitarian assistance and realisation of economic and social rights in an emergency situation. As such, GC 15 reinforces the complementary approach by those working in humanitarian and human rights fields. Further, this provision is also important as it acknowledges the particular responsibility of economically developed states parties in assisting the poorer developing states and states facing emergency situations realise the right to water.³⁴²

If richer, more developed states do not have an obligation to assist those poorer states in realising their obligations, they may continue to thrive to the detriment of economic and social human rights in those poorer states. By holding the poorer state to be in violation, without examining the aspect of international assistance, 'the fact may be obscured that "much of the responsibility for poverty and deprivation in the world lies with the developed states" approach to international trade and the economic order. In that sense, responsibility should be placed upon the international community and not merely confined to the victim state'.³⁴³ As such, the application of specific extra-territorial obligations offer a framework in which the legal duties of states parties pertaining to international assistance and the right to water can be understood and complied with, thus allowing for implementation of the right to water without discrimination across national borders. The focus on extra-territorial obligations highlights the crucial importance of legal recognition of the states parties obligations pertaining to international assistance, rather than as additional aims or optional practice.

In terms of facilitating the right to water at international level, paragraph 35 requires that the right to water should be given due attention in international agreements and that implementation of other international and regional agreements should not adversely impact upon the right to water. This is particularly interesting in terms of the effect the obligation may have on the implementation of regional or bilateral agreements which may affect access to, or quality and sufficiency of water.³⁴⁴

341 GC 15, para 34.

342 Craven, 1995, p 150; Skogly, 2006, pp 83–98; GC 15, para 34; and GC 3, paras 13 and 14.

343 Craven, 1995, p 144.

344 E.g. member states of the EU have an obligation to ensure their actions as part of the EU do not negatively impact upon the enjoyment of the right to water in a third state. See UK House of Commons International Development Committee, *Development Assistance and the Occupied Palestinian Territories*, 4th Report of Session 2006–07, HC 114-I, House of Commons, 31 January

In addition, concerning trade agreements in particular paragraph 35 states: 'Agreements concerning trade liberalisation should not curtail or inhibit a country's capacity to ensure the full realisation of the right to water'.³⁴⁵ This provision can be seen as reflecting the concern over the possible negative impacts of privatisation of water services under these agreements, for example, as seen with WTO General Agreement on Trade in Services agreements.³⁴⁶ However, it firmly places the responsibility for these agreements upon the state itself and not upon the third party. Moreover, the topical issue of privatisation of water services was purposely excluded from the General Comment as it was deemed contentious and no consensus could be found as to what stance the Committee should take. Provision therefore is limited to an obligation on the part of states parties to adhere to the principle of equity and ensure water is affordable for everyone,³⁴⁷ as well as an obligation to prevent third parties from compromising equal, affordable and physical access to sufficient, safe and acceptable water.³⁴⁸

Finally, in terms of international obligations, states are required to take into account the right to water when acting as members of international organisations, including members of international financial institutions such as the International Monetary Fund³⁴⁹ and World Bank.³⁵⁰ However, the wording here could be stronger to strengthen this aspect of extra-territorial obligations, requiring state parties to refrain from any actions as members of these organisations which could be seen to have a negative impact upon enjoyment of the right to water in third states.³⁵¹

Obligations of non-state actors

Regarding the obligations of non-state actors and the right to water, the General Comment is limited and summarises their duties as an obligation to 'cooperate effectively with States parties . . . in relation to implementation of the right at national level'.³⁵² In addition, the international financial institutions, especially the IMF and World Bank, are required to 'take into account' the right to water in their lending policies, structural adjustment policies and development projects.³⁵³ In

2007, London: The Stationery Office; and UK House of Commons International Development Committee, *Development Assistance and the Occupied Palestinian Territories: Government Response to the Committee's Fourth Report of Session 2006–07*, 5th Special Report of Session, HC 430, House of Commons, 29 March 2007, London: The Stationery Office, pp 3–4 regarding the right to water and obligations under the EU–Israel Association Agreement.

345 GC 15, para 35.

346 Mitlin, D, 'GATS and Water Services: The Implications for Low-income Households in the South', (2008) (1) *Progress in Development Studies* 31–44. One example of negative effects upon the right to water due to privatisation of water services is the 'water wars' in Cochabamba, Bolivia. See Barlow and Clarke, 2002, pp 185–87, 154–56 and 203.

347 GC 15, para 27.

348 Ibid, para 24.

349 Hereinafter referred to as the IMF.

350 Ibid, para 36.

351 See Ziegler, 2005, para 52 in relation to food.

352 GC 15, para 60.

353 Ibid, para 60.

relation to the work of organisations concerned with disaster relief and humanitarian assistance, the Committee notes that there is an obligation to give priority to the provision of aid and management of water facilities to those most vulnerable members of the population.³⁵⁴

Unfortunately, the wording of this provision in terms of concrete obligations is vague, using terms such as ‘take into account’ and ‘promote’ rather than explicitly stating that non-state actors have obligations to respect or protect the right to water. This imprecise wording allows a broad interpretation of what these actors must actually do in terms of their responses and actions affecting the right. At the Day of General Discussion on the GC 15, there was much disagreement and discussion as to how far the Committee should and could go regarding provision for non-state obligations, and some committee members and representatives of NGOs felt that this adopted provision was not comprehensive enough.³⁵⁵

Whilst it remains the case that states are parties to the Covenant and therefore are the primary duty holders, the wording of the provision could still be stronger thus encouraging a minimal obligation on the part of international organisations and other non-state actors to respect the right to water in their activities. For example, a more forceful provision could have read, ‘The IMF . . . should ensure that their lending policies, credit agreements, structural adjustment programmes and other development projects, do not interfere with or threaten the enjoyment of the right to water’.³⁵⁶

In conclusion, the provisions regarding the obligations of non-state actors are limited, although this does reflect the current legal framework in which states are the primary duty holders under the ICESCR. However, the provisions of paragraph 60 provide a minimal obligation upon non-state actors, although the precise nature of the obligation remains unclear.

Core obligations

The relationship between the core content of the right to water and core obligations as the mechanism by which to implement the right has been discussed previously (in relation to the normative content). This focus on obligations as the key to implementation is clear within GC 15 which emphasises the imposition on states parties of immediate and core obligations: ‘While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect’.³⁵⁷ Immediate obligations to be undertaken include a guarantee of exercising

354 Ibid, para 60.

355 See FIAN, 2002, p 3; and OMCT, 2002, pp 10–11.

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

357 GC 15, para 17.

the principle of non-discrimination in realising the right and a duty to take deliberate and concrete steps towards full realisation of the right.³⁵⁸ Moreover, retrogressive measures taken in relation to the right to water must be accounted for and be duly justified with states carrying the burden of proof for such measures.³⁵⁹ As such, core obligations are imperative to realisation of the right to water and are central to the framework of GC 15. These obligations provide the basis for states to realise those elements of the right to water that take priority: the core legal obligations of states parties that are immediate and non-derogable.

Paragraph 37 affirms that ‘a number of core obligations in relation to the right to water can be identified, which are of immediate effect’.³⁶⁰ There are nine core obligations listed, including, *inter alia*, the substantive obligation to (a) ‘ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses’ (a basic needs model for water provision), and (b) ensuring access to safe and sufficient water on a non-discriminatory basis. Further core obligations include: (c) ensuring physical access to water; (d) ensuring personal security when accessing water; (e) equitable distribution of all water services; (f) adoption and implementation of a national water strategy and plan of action; (g) monitoring of progress and realisation of the right to water; (h) special protection for vulnerable groups, including low-cost water programs; and, finally, (i) to take measures to prevent disease linked to water, ‘in particular, ensuring access to adequate sanitation’.³⁶¹ Further, under paragraph 38, in a strongly worded clause following the core obligations, the Committee emphasises that states parties and other actors who are able to assist, should provide international assistance to less developed states to realise the right to water. This is not expressly noted as a core obligation in itself but rather a provision to stress the importance of international assistance in enabling developing countries to fulfil their core obligations.

The core obligations listed in GC 15 are comprehensive and form the substantive basis for states to implement the most essential elements of the right to water at national level. Furthermore, when read in conjunction with the other obligations pertaining to international assistance and domestic implementation, states parties have a clearly defined framework from which to progressively realise all aspects of the right, as well as an obligation to cooperate internationally to this end.

Concluding remarks

On the subject of obligations correlative to the right to water, the detailed provisions contained within the GC 15 comprise a substantial document, which provides in the main, clear and comprehensive guidance to states parties, concerning their obligations for realising the right. The obligations correlative to this right include comprehensive tripartite typology obligations to respect, protect and fulfil the right

358 Ibid, paras 17 and 18.

359 Ibid, para 19.

360 Ibid, para 37.

361 Ibid, para 37(a)–(i).

to water but also incorporate recent developments regarding obligations such as extra-territorial duties of states. Further, strengths include the connections made with environmental and development approaches to water and extensive provisions detailing domestic implementation.

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

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

Having examined the legal sources and normative content of the right to water, as well as the relevant obligations for states parties, I will now apply this legal framework to a specific context: the OPTs (West Bank).

4 The right to water in the Occupied Palestinian Territories (West Bank)

Part I – International legal sources

The conflict between Israel and Palestine and the occupation of the Palestinian Territories by Israel is a conflict that has been widely documented and discussed in politics and international relations, current affairs and the media and in academia, as well as by human rights organisations. However, although attention is given to massive human rights violations, such as the military incursions into various West Bank Palestinian towns and refugee camps in 2002/2003, little prominence is given by many of these bodies to highlighting the everyday threats to and violations of economic and social rights within the OPTs.

This chapter will examine the international legal provisions for the right to water applicable specifically to the OPTs of the West Bank. This will involve studying both applicable international human rights law and international humanitarian law due to the status of the West Bank as occupied territory under the Geneva Conventions. I will also briefly examine the arguments concerning the application of human rights law in conflict situations and the particular view of the state of Israel regarding its obligations in the OPTs under both international human rights law and humanitarian law. Subsequently, I will assess the levels of protection these provisions offer in regard to the human right to water of Palestinians living in the West Bank, by evaluating the nature and content of these provisions.

Many have addressed the legal arguments pertaining to the conflict, including, *inter alia*, assessments of the legal status of the OPTs and of the legal status of the conflict itself – that is, whether an international or non-international conflict.³⁶² However, it is not the objective of this chapter to discuss each particular legal perspective, rather to state the starting point from which this analysis begins: an acceptance of the joint application of both international human rights and humanitarian law to the OPTs. Moreover, these arguments pertaining to the status of the conflict do not have ‘major substantive consequences for the international

362 See Benvenisti, E., *The International Law of Occupation*, 2nd edn, Princeton, NJ: Princeton University Press, 2004; Scobbie, I., ‘Natural Resources and Belligerent Occupation: Mutation through Permanent Sovereignty’, in Bowen, S (ed), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories*, 1997, London: Martinus Nijhoff/Kluwer Law International, pp 221–90, at 253–60; and Watson, G., *The Oslo Accords: International Law and the Israeli–Palestinian Peace Agreements*, 2000, Oxford: Oxford University Press, pp 136–42.

humanitarian law obligations of a State that is a party to an armed conflict³⁶³ as many of the rules of humanitarian law constitute customary international law and are present within both the Geneva Conventions and the Additional Protocols as well as sources which predate the 1949 Geneva Conventions. As such, it is arguable that a human right to water exists under many of the legal provisions applicable to the OPTs regardless of the status of the conflict.

Subsequently, Israel can be held to have obligations relating to this right as the occupying power under international humanitarian law and also a party to international human rights treaties. Furthermore, it could be argued that if Israel's perspective on the applicability of the ICESCR to the OPTs is upheld (that is, that Israel is not responsible for its application outside Israel state territory), then Israel still has in the minimum extra-territorial obligations resulting from its ratification of international human rights treaties.

The Palestinian Authority³⁶⁴ also has obligations under both systems of law regarding human rights within the territories. However, in regard to the ICESCR the nature and level of these obligations are unclear, both generally and specifically in relation to the right to water. It may be that they are on a parallel with those of private companies; that is, as a third party service provider at a local level they may have an obligation to respect the right to water. They may, however, be more extensive. Under international humanitarian law, the focus of the discussion is on the obligations of the Israeli state as the occupying power. However, the PA has indicated its adherence to the 1949 Geneva Conventions despite not being party to them. These questions concerning obligations will be addressed as a part of the legal review and within a detailed analysis of the human rights provisions therein.

It should also be noted that many have dealt with the issue of the water conflict between the Israelis and the Palestinians, particularly from the approach of international law and environmental law. However, little research, to my knowledge, has been conducted or published assessing the water crisis from a human rights perspective. Consequently, I do not address questions of international law and international relations, such as the international water law and state practice regarding boundaries and aquifers or questions of water conflict in the region, as many authors have dealt with these issues.³⁶⁵ Rather, I wish to enhance the debate by focussing on the micro-level; the individual; the local; the 'on-the-ground' reality of the water crisis. This study of the enjoyment or lack of enjoyment of a human

363 Scheinin, M, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Mission to Israel, Including Visit to Occupied Palestinian Territory*, 16 November 2007, A/HRC/6/17/Add.4, para 7.

364 Hereinafter known as the PA.

365 E.g. see Allan, JA, *The Middle East Water Question: Hydro-politics and the Global Economy*, 2001, London: IB Tauris; Daibes-Murad, F, *A New Legal Framework for Managing the World's Shared Groundwaters: A Case-study from the Middle East*, Water Policy Series, 2005, London: International Water Association; Selby, J, *Water, Power and Politics in the Middle East: The Other Israeli-Palestinian Conflict*, 2003, London: IB Tauris; Lonergan, S and Brooks, D, *Watershed: The Role of Fresh Water in the Israeli-Palestinian Conflict*, 1994, Ottawa: International Development Research Centre; and Trotter, J, *Hydropolitics*, 1999, Jerusalem: Palestinian Academic Society for the Study of International Affairs (hereinafter referred to as the PASSIA).

right to water will emphasise the unique benefits, in terms of potential empowerment, of the state–individual relationship of human rights law, as oppose to state–state mechanisms. I firmly believe in the validity of an international law and environmental law approach as having its place in resolution of the overall Israeli–Palestinian conflict and in its merits for finding a solution to the water crisis at the regional level and in terms of sustainable management of the joint aquifers and regional water sources. However, a human rights approach to the water crisis is equally important as it can give the Palestinians agency within the interim period, until the conflict is resolved and the occupation has ended. There is a need for immediate action and individual redress and, as such, a human rights approach may be optimal. Notwithstanding this point, the full realisation of the right to water will be limited by the continuing occupation by Israel. The Palestinians require a functioning independent sovereign state with full institutional capacity and operational infrastructure in order to fully implement the right to water (and all human rights). Despite this, the human rights approach offers another mechanism to support the Palestinians and ensures their water needs are viewed as legal entitlements both at international and national levels.

Background to the Israeli–Palestinian conflict

Before the legal questions can be addressed it is necessary to provide an overview of the Israeli–Palestinian conflict, to explain how the current occupation and water situation arose. The history of the Israeli–Palestinian conflict is a complex and lengthy one and has created a multitude of viewpoints. It is not within the scope of this book to present all these views, nor to undertake a detailed historical review.³⁶⁶ Rather, I will provide a summary of the key events which have affected the legal status of the territories and their role in creating the current water crisis.

The creation of the State of Israel took place in 1948 in the aftermath of the Second World War and massive Jewish immigration, mainly from Europe. Prior to the establishment of Israel, Palestine was one of the former Ottoman Arab territories placed under mandate of the British in 1922, under the mandates system of the League of Nations.³⁶⁷ The Mandate had as one of its key objectives the implementation of the Balfour Declaration. This declaration, signed by the British government in 1917, expressed support for the establishment of a ‘national home’ for Jewish people within Palestine.³⁶⁸ However, the British had also promised the

366 For further reading on the Middle East and the Israeli–Palestinian conflict, see Smith, CD, *Palestine and the Arab–Israeli Conflict: A History with Documents*, 7th edn, 2010, New York, NY: Bedford/St Martins; Tessler, MA, *A History of the Israeli–Palestinian Conflict*, 2nd edn, Indiana Series in Middle East Studies, 2009, Bloomington, IN: Indiana University Press; Cleveland, W, *A History of the Modern Middle East*, 4th rev edn, 2009, Boulder, CO: Westview Press; Gerner, D and Schwedler, J (eds), *Understanding the Contemporary Middle East*, 3rd edn, 2008, Boulder, CO: Lynne Rienner Publishers; and Fawcett, L (ed), *International Relations of the Middle East*, 2nd edn, 2009, Oxford: Oxford University Press.

367 See Covenant of the League of Nations 1919, Art 22, entry into force 20 January 1920.

368 UN Department for Political Affairs, ‘History of the Palestine Question, Peace and Security, Question of Palestine, Overview’, at www.un.org (accessed February 2010).

Arab population an independent state in return for help to defeat the Ottoman Empire during the First World War. These were mutually incompatible promises on behalf of the British and with both parties demanding independence the result was violence and unrest. Consequently, in 1947 the British Mandate was handed over to the UN.

The UN proposed the partition of Palestine into two independent states: a Palestinian Arab state and a Jewish state.³⁶⁹ However, this was not to happen, as the Jewish area pre-empted the agreement and proclaimed its independence as Israel, expanding the agreed borders by force and encompassing 77 per cent of the land of Palestine, including much of Jerusalem. In the process, over half of the Palestinian population fled or were expelled.³⁷⁰

Subsequently, the remaining non-Israeli territory was occupied and administered by Egypt (Gaza) and Jordan (West Bank), thus preventing the establishment of a Palestinian state. In 1967, Israel occupied this remaining territory in the Six Day War, resulting in the further displacement of half a million Palestinians. Despite UN Security Council resolution 242 (22 November 1967) calling on Israel to withdraw from the territories it had occupied, Israel continues to occupy this area in 2010.

The first uprising or 'Intifada'³⁷¹ of the Palestinian people against the Israeli occupation began in 1987 and the Israeli forces responded with force, resulting in the escalation of violence, massive civilian deaths and injuries.³⁷² These events were to spur on international efforts for a peace plan and give rise to the Madrid Peace Conference, 30 October 1991 and subsequent negotiations resulting in the Oslo Accords: the Declaration of Principles on Interim Self-Government Arrangements 1993³⁷³ and the Interim Agreement on Implementation of the Declaration of Principles 1995.³⁷⁴ The Interim Agreement provides for the establishment of the self-governing body, the PA and self-rule in designated areas. This agreement also provides much of the legal basis for water use and management within the OPTs, whilst the territories remain under occupation, but postpones the issue of water ownership for the final status talks. The next stage of the Oslo Accords was to hold Final Status Negotiations to determine the terms and institutions to finalise two independent states. However, the negotiations were delayed by a change in the

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

370 UN Department for Political Affairs, 2007.

371 'Intifada' from the Arabic verb 'to shake off', the common Palestinian (and international) term for 'uprising'. The first Intifada began on 7 December 1987; the second Intifada began on 29 September 2000. See Arab Association for Human Rights *et al*, *Compilation of Economic, Social and Cultural Rights Conditions of the Indigenous Palestinian People under Israel's Jurisdiction and Effective Control, Parallel Report Jointly Submitted to the CESCR*, 30th session, Geneva, 9 May 2003, Key of Terms pertaining to Israel/Palestine (i).

372 UN Department for Political Affairs, 2007.

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

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

Israeli leadership.³⁷⁵ In 2000, when talks resumed, the parties failed to reach agreement. In addition, a controversial visit in September 2000 by Ariel Sharon, then Chairman of the Israeli Likud Party,³⁷⁶ to the holy site of Al-Haram Al-Sharif (Temple Mount) caused widespread anger amongst the Palestinians. The combination of events ultimately resulted in violence and the commencement of a second Intifada. This stalled the peace process in practical terms.

The situation was further exacerbated when in 2000 Israel approved plans to build a 'barrier' as part of its counterterrorism policy and began construction of a 'security fence' in 2002 – 'the Wall'. The current status of the Wall's construction is that 58 per cent is completed, 10 per cent is under construction and 31.5 per cent remains planned.³⁷⁷ Further, the barrier does not follow the Green Line³⁷⁸ but is largely located within the West Bank itself, with 'fingers' extending deep into Palestinian territory.³⁷⁹

The Wall is of huge detriment to the lives of Palestinians living within the West Bank, as it prevents or restricts people from accessing their land and subsequently their foodstuffs and water sources, or the land and water sources are requisitioned and appropriated, resulting in the denial of means to make a living.³⁸⁰ In addition, due to restrictions in access (for example, closures and a complex permits system), Palestinians face difficulties in travelling to and from places of work, school and university and from accessing health care.³⁸¹ The permit regime also threatens the integrity of family units³⁸² and in the worst cases families have been separated on two different sides of the barrier.³⁸³ This has resulted in widespread violations of economic and social rights,³⁸⁴ including violations of the right to water.³⁸⁵

The completed phases of the Wall have already impeded the access of Palestinians to 'vital water, sanitation and hygiene services'.³⁸⁶ In certain areas, the

375 Israeli PM Yitzhak Rabin was assassinated and succeeded by Benjamin Netanyahu who opposed the peace process. Only in 1999 when Ehud Barak was elected did the negotiations recommence. For a good summary of events, see Bell, C, *Peace Agreements and Human Rights*, 2000, Oxford: Oxford University Press, pp 69–117.

376 Elected as Prime Minister of Israel in February 2001.

377 See UN Office for the Coordination of Humanitarian Affairs – occupied Palestinian Territory (hereinafter referred to as the OCHA), *Five Years after the International Court of Justice Advisory Opinion: a Summary of the Humanitarian Impact of the Barrier*, July 2009, East Jerusalem: OCHA, p 4.

378 The 1949 Armistice Line between Israel and Jordan and recognised border between Israel and the OPTs.

379 Scheinin, 2007, para 32.

380 International Commission of Jurists, *Israel's Separation Barrier: Challenges to the Rule of Law and Human Rights*, 6 July 2004, Geneva: International Commission of Jurists, p 48.

381 OCHA, 2009, p 12; and Scheinin, 2007, paras 39–41. See also OCHA, *The Humanitarian Impact of the West Bank Barrier on Palestinian Communities*, March 2005, pp 6 and 8–31.

382 Scheinin, 2007, para 42.

383 OCHA, March 2005, p 11.

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

385 Ibid, pp 45 and 47–49; and PHG, –2004, pp 72–85.

386 PHG, *Water for Life 2005: Continued Israeli Assault on Palestinian Water, Sanitation and Hygiene during the Intifada*, 2005, Ramallah: PHG, p 73. Also, Oxfam International, *Five Years of Illegality: Time to Dismantle the Wall and Respect the Rights of Palestinians*, Report, July 2009, Oxford: Oxfam International, pp 22–5.

Wall has blocked storm water drainage, resulting in flooding damaging housing and crops and causing a threat to health.³⁸⁷ Moreover, the completion of the Wall will prevent Palestinians from access to some of the best water sources in the West Bank (the Western Aquifer) and result in Israel's territorial superiority over the Western Aquifer.³⁸⁸

Several legal bodies have considered the legality of this barrier and/or the negative consequences of the Wall upon the enjoyment of human rights by the Palestinians within the OPTs of the West Bank. The ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory³⁸⁹ sought to ascertain whether the construction of the Wall had violated the rules and principles of international human rights and humanitarian law.³⁹⁰ In conclusion, it found that the construction of the Wall and its associated regime is illegal as it violates the Palestinians' freedom of movement, right to work, to health, to education and to an adequate standard of living, as well as breaching obligations under international humanitarian law.³⁹¹ The Israeli High Court of Justice responded that it did not accept the findings of the ICJ, firstly on the principle that the ICJ had no jurisdiction to consider a case, as it was a matter for Israel and it did not give its consent for such an international opinion; and, secondly, as the opinion was based on inaccurate facts and lack of information. The Israeli High Court further stated that the Wall should not be considered as a whole but rather each particular section considered on its own merits, on the principle of proportionality.³⁹²

For example, in the case of *Beit Sourik Village Council v Government of Israel and the Commander of the IDF Forces in the West Bank*,³⁹³ the Israeli High Court decided that the impact of the Wall upon the humanitarian needs of the Palestinian village must be taken into account when planning the route of the fence.³⁹⁴ It noted that according to the principle of proportionality, security considerations must be balanced with the 'rights and needs and interests of the local population'.³⁹⁵ This resulted in the re-routing of this particular section of the Wall,³⁹⁶ as it ruled that the effects of the Wall upon the Palestinians, in this case, were indeed disproportionate.³⁹⁷ However, in a further case, *Mara'abe and others v The Prime Minister of*

387 PHG, 2005, p 77.

388 Amnesty International, *Troubled Waters: Palestinians Denied Fair Access to Water*, 2009, London: Amnesty International Publications, pp 46–55; PHG, 2005, p 70; and PHG, 2004, pp 72–85.

389 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004. Hereinafter referred to as ICJ Wall Opinion.

390 ICJ Wall Opinion, para 114.

391 Ibid, paras 123–37.

392 Israeli High Court of Justice, Statement, 23 February 2005, see summary at 'State of Israel, Ministry of Defence, Israel's Security Fence, News Briefs, Israel's Response to the ICJ Advisory Opinion on the Security Fence', at www.seamzone.mod.gov.il (accessed 28 February 2005).

393 *Beit Sourik Village Council v Government of Israel and the Commander of the IDF Forces in the West Bank*, HC 2056/04. Hereinafter referred to as *Beit Sourik*.

394 *Beit Sourik*, para 44.

395 Ibid, para 34.

396 Decided by the Government of Israel, 20 February 2005.

397 *Beit Sourik*, paras 60–62.

Israel and others,³⁹⁸ the court held that Israel has a right to build the security fence beyond the Green Line in order to protect Israeli settlements and Israeli citizens,³⁹⁹ even if Palestinian communities were disproportionately affected. Although the court ordered a review of the current route, it implied that the security needs of the Israeli settlers were of a higher priority than the needs of the Palestinian communities affected by the Wall's construction.⁴⁰⁰ To date, three petitioners are still pursuing their cases before the court.⁴⁰¹

Despite further re-routing of the Wall,⁴⁰² no publicly available research has been conducted by the Israeli government to measure the impact of the Wall on Palestinian communities affected.⁴⁰³ When completed, 85 per cent of the Wall will be inside the Palestinian Territories and only 15 per cent in Israel.⁴⁰⁴ As a consequence of the current route, as of July 2009, 10,000 Palestinians are located in 'closed areas'; that is, areas between the Green Line and the Wall.⁴⁰⁵ Moreover, if completed as planned, approximately 35,000 West Bank Palestinians will be living in closed enclaves (in addition to the majority of Palestinian resident of East Jerusalem),⁴⁰⁶ which is likely to have a negative impact upon the enjoyment of economic and social rights. Specifically in relation to the effects of the construction of the security Wall, the CESCR has noted that it 'allegedly would infringe upon the surface area of the occupied territories which would limit or even impede access by Palestinian individuals and communities to land and water resources'.⁴⁰⁷ Moreover, the International Commission of Jurists states that the construction of the Wall is based on a policy that 'equates to a deliberately retrogressive measure in the implementation of the ICESCR'.⁴⁰⁸

398 *Mara'abe, Ahmed, Shuahani, Udah, Udah, Udah and The Association for Civil Rights in Israel v The Prime Minister of Israel, The Minister of Defence, The Commander of IDF Forces in the Judea and Samaria Area, The Separation Fence Authority, The Alfei Menashe Local Council*, HCJ 7957/04 (2005). Hereinafter referred to as *Alfei Menashe*.

399 Ibid, para 112; also paras 100–1. See also State of Israel, Ministry of Defence, Israel's Security Fence, News Briefs, 'The Supreme Court and the ICJ', 15 September 2005.

400 See *Alfei Menashe*. For an analysis of the rulings of the Israeli High Court in relation to the Wall and international law, see Lynk, M, 'Down by Law: The High Court of Israel, International Law and the Separation Wall' (2005) XXXV(1) *Journal of Palestine Studies* 6–24. For further information on the opinion of the Israeli court, see the State of Israel, Ministry of Defence, 'Israel's Security Fence, Execution Aspects', at www.seamzone.mod.gov.il/Pages/ENG/execution.htm (accessed 16 February 2010), last updated 31 January 2007.

401 As of 3 January 2007, 39 petitions concerning the Wall are still pending to be examined by the Supreme Court: 28 of them consist of objections to the planned route of the Security Fence, including the three concerning the already existing fence in the area of *Alfei Menashe*; two other petitions deal with crossings: the Lamed Hei (Jaba) Crossing and the Ramot Crossing; and nine other petitions refer to humanitarian issues. To date, in total, 102 petitions have been dealt with by the Supreme Court, see www.seamzone.mod.gov.il/Pages/ENG/news.htm#news49 (accessed 16 February 2010), last updated 5 January 2007.

402 Decided by the Government of Israel, 30 April 2006. For details of changes, see www.seamzone.mod.gov.il/Pages/ENG/news.htm (accessed 16 February 2010), last updated 5 January 2007.

403 OCHA, 7 July 2006, p 3.

404 OCHA, 2009, p 9.

405 In closed areas, residents require permits to access the wider West Bank through checkpoints and gates in the Wall and permits to continue to reside in their homes. See OCHA, 2009, p 16.

406 OCHA, 2009, p 18.

407 CESCR, *Concluding Observations: Israel*, E/C.12/1/Add.90, 23 May 2003, para 24.

408 International Commission of Jurists, 6 July 2004, p 48.

In addition to the building of the Wall, in 2002 and 2003 the Israelis mounted incursions into various refugee camps in the West Bank in response to renewed attacks by Palestinian militants. These military incursions resulted in massive violations of human rights resulting in loss of life and severe injury, destruction of homes and public buildings, such as schools and hospitals, and infrastructure, such as water pipelines and electricity networks.⁴⁰⁹ Limited freedom of movement and curfews meant restrictions on work and access to land, agriculture and water resources. The incursions therefore further exacerbated poor living conditions including causing problems accessing clean and sufficient water.⁴¹⁰

In response to the continuing escalation of violence and international pressure to take action the 'Quartet'⁴¹¹ devised the 'Roadmap' for peace in the Middle East.⁴¹² The Roadmap itself consists of a three-part plan for peace calling on parties to adhere to previous Security Council Resolutions.⁴¹³ However, despite calling for peace the Roadmap is vague in terms of how to achieve peace. It does not mention human rights standards or any specific human rights. In terms of specific provisions relating to the water crisis, the Roadmap refers only to 'a revival of multi-lateral engagement on issues, including regional water resources'.⁴¹⁴ The issue of water is otherwise absent from provisions, as are human rights principles. Moreover, the Roadmap does not constitute a legally binding document, as it is not formulated as a treaty, but is a peace initiative by the international community. Therefore, the legal provisions of the Oslo Accords remain binding.⁴¹⁵

Despite this initiative, the overt violence of the Israeli Forces towards civilians in the incursions noted only served to increase hostilities. The consequence was a complete breakdown and 'stalling' of the peace process under the Roadmap initiative and continuation of the stalemate under Oslo. Furthermore, the international community contributed to the failure of the process by presenting a weak plan with few concrete measures for implementation. Containing no human rights guarantees and with no references to obligations under humanitarian or human rights law, it offers little by way of protection or substance to enforce any 'peace'.⁴¹⁶

409 B'Tselem, *Operation Defensive Shield: Soldiers' Testimonies, Palestinian Testimonies*, July 2002, Jerusalem: B'Tselem – The Israeli Information Centre for Human Rights in the Occupied Territories; B'Tselem, *Civilians Under Siege: Restrictions on Freedom of Movement as Collective Punishment*, January 2001, Jerusalem: B'Tselem – The Israeli Information Centre for Human Rights in the Occupied Territories; and Human Rights Watch, 'Israel, the Occupied West Bank and Gaza Strip, and the Palestinian Authority Territories – Jenin: IDF Military Operations', (2002) 14(3)(e) *Human Rights Watch*.

410 These incursions were often mentioned by the interviewees in the case study, see Ch 6.

411 The Quartet is composed of the United States, the European Union, Russia and the UN.

412 Quartet (US, UN, EU and Russia), *A Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict*, 30 April 2003, submitted by George Bush to the Israelis and Palestinians on 30 April 2003.

413 Specifically noting resolutions 242 (1967), 338 (1973), 1397 (2002) and 1515 (2003).

414 Roadmap, 30 April 2003, Phase II: Transition, para 3.

415 For further discussion of the Oslo Accords and the provisions contained therein, see Ch 5.

416 For a critique of the Roadmap, see Human Rights Watch, 'The Roadmap: Repeating Oslo's Human Rights Mistakes', Background Briefing Paper, 1 January 2005, at www.hrw.org/mideast/is-ot-pa.php (accessed 5 May 2006).

More recently, the death of long-term Palestinian Liberation Organisation⁴¹⁷ leader, Yasser Arafat in November 2004 and the subsequent election of Hamas⁴¹⁸ in the 'free and fair' elections of 2006,⁴¹⁹ has had and will continue to have consequences for the water situation in the OPTs, primarily because of the international response to the election of Hamas, which has been a negative one. In reaction to the election result, the Quartet issued a statement demanding that Hamas renounce violence and recognise the state of Israel's right to exist through recognition of previous bilateral agreements; that is, the Declaration of Principles, the Interim Agreement and the Roadmap.⁴²⁰ The United States stated that there could be 'No negotiations with "terrorists"' and Israel refused to acknowledge the Hamas government as legitimate.⁴²¹

In the immediate months after the elections, the European Union and the United States withdrew aid, stating that future assistance was conditional against the new government commitment to the conditions noted above. However, this effectively imposed economic sanctions upon the Palestinian people. The effects have been wide-ranging and have resulted in a deepening of poverty and worsening living conditions for ordinary Palestinians.⁴²² Although the international community and individual states parties or group of states should adhere in all circumstances to the guidelines within GC 8 on the relationship between economic sanctions and respect for economic and social rights,⁴²³ their actions have had a detrimental effect upon the enjoyment of economic and social rights within the OPTs, including the right to water.

Eventually, in response to the growing humanitarian crisis, aid was resumed through a temporary international mechanism.⁴²⁴ This mechanism was established by the European Commission at the request of the Quartet to facilitate needs based assistance to the Palestinian people whilst omitting dealings with Hamas. The TIM functioned through the office of the Palestinian President Mahmoud Abbas⁴²⁵ (as

417 The representatives of the Palestinian people hereinafter referred to as the PLO.

418 Hamas is the abbreviation for 'Harakat al-Islamiyyah', which translates as the Islamic Resistance Movement. Hamas was founded in 1988 as an offshoot of the Egyptian-based Muslim Brotherhood (founded in 1928).

419 The elections were deemed free and fair by the Quartet in its statement of 9 May 2006.

420 See Quartet, 'Situation in the Middle East, Quartet, Statements: 9 May 2006, 26 Jan 2006, 30 Jan 2006, 17 June 2006', at www.un.org (accessed 1 June 2010).

421 See BBC, 'Israel gets cautious US backing', news article at BBC News website, Middle East, Wednesday, 24 May 2006; Weber, T, 'Davos grapples with Hamas fallout', news article at BBC News website, Middle East, Friday, 27 January 2006, 16:41 GMT.

422 Oxfam International, 'Poverty in Palestine: The Human Cost of the Financial Boycott', Oxfam Briefing Note, April 2007; United Nations Relief and Works Agency (hereinafter referred to as the UNRWA), *Prolonged Crisis in the Occupied Palestinian Territory: Recent Socio-economic Impacts of the New Phase on Refugees and Non-refugees*, November 2006, Gaza: UNRWA, pp 1 and 29–44.

423 GC 8.

424 See Quartet statement, 17 June 2006. Temporary international mechanism hereinafter referred to as TIM. For a critical assessment of the TIM, see Oxfam International, April 2007.

425 On 15 January 2005, Mahmoud Abbas was elected as President of the PLO and in Palestinian Legislative Council (hereinafter referred to as the PLC) elections on 25 January 2006, Hamas took 74 out of 132 seats. The formation of Unity government between Hamas and other groups members of the PLO (inc Fatah) followed. However, after political polarisation and prolonged

he is a representative of the PLO and not a member of Hamas) and was operational from 2006 until March 2008, when it was phased out and replaced by PEGASE, which works in the same manner but 'covers a wider range of activities [than the TIM] and lasting three years, the same period as the Palestinian Reform and Development Plan'.⁴²⁶ Despite this new mechanism, in terms of the enjoyment of economic and social rights, general living standards continue to decline across all the occupied territories, especially in Gaza due to the recent war and subsequent closure of borders.⁴²⁷

Water situation in the West Bank

The consequence for the water situation as a result of the current occupation is severe. Although the climate in the region is arid or semi-arid, there are many renewable water resources, especially in the elevated mountainous areas of the West Bank.⁴²⁸ However, when Israel occupied the West Bank and Gaza in 1967 they took control of all the water resources previously controlled and owned by the Palestinians under Jordanian, Egyptian, Ottoman and British Mandate law. The Israelis imposed military orders preventing the Palestinian population from accessing water resources through the drilling of wells and pumping stations and restricting the amount of water supplied to them. Thus Israel now controls, manages and sells the water to the Palestinians.⁴²⁹ Despite the establishment of the Palestinian Water Authority⁴³⁰ under the Interim Agreement,⁴³¹ it can only operate with limitations due to continued Israeli control over water resources. Although it has passed a water law and consolidated the legal framework, the PWA remains constrained financially and politically. In sum:

violence between Hamas and Fatah, Hamas took control of Gaza by force and Abbas dissolved the Unity government. To date, Hamas has been in control of Gaza and the PLO in control of the West Bank. The current political situation is complex and constantly changing. To date, elections scheduled for 2010 in which it was hoped a new unified government could be formed have been postponed indefinitely.

426 European Commission, 'European Commission Launches PEGASE: A New Mechanism to Support the Palestinian People', at www.eu-n.europa.eu/articles/en/article_7681_en.htm (accessed 28 January 2008).

427 UNDP, *Human Development Report 2009/10 Investing in Human Security for a Future State*, 2010, New York, NY: UNDP; Amnesty, 2009, pp 56–62; see other sources, fn 15.

428 See Appendix 2, Map B; PHG, 2004, p 16; UNEP, *Desk Study on the Environment in the Occupied Palestinian Territories*, January 2003, Geneva: UNEP, pp 12–16.

429 Hussein Hiba, 'The Palestinian Water Authority: Developments and Challenges Involving the Legal Framework and Capacity of the PWA', Paper presented to the International Israeli–Palestinian Water Conference, 10–14 October 2004, Antalya, Turkey, p 1.

430 Hereinafter known as the PWA.

431 The PWA was established in 1995 by Presidential Decree No 5/1995, following the provisions of Interim Agreement 1995, Art 40. Law No 2/1996 defines its objectives, functions and responsibilities, giving the PWA the mandate to manage water resources, execute water policy, establish, supervise and monitor water projects, and to initiate coordination and cooperation between the stakeholders in the water sector. Presidential Decree No 66/1997 establishes the internal regulations of the PWA and the rules of procedures, and Palestine Water Law No 3/2002, Art 7 defines the tasks and responsibilities of the PWA and provides further legal basis for the water authority including granting it legal personality. For further information, see Hussein Hiba, 10–14 October 2004.

The PWA cannot deliver in the absence of full sovereignty and control over its water resources . . . The PWA cannot manage and administer what it does not have. It will not be able to manage the increased demand so long as it has no role in managing and sharing the supply.⁴³²

Although Israel cooperates in certain water-related matters, Israeli policies ensure that Israeli settlers and Israel proper have priority in water use and allocation. 'As a consequence a man-made water crisis undermines the living conditions of the Palestinian people'.⁴³³

Obviously this water crisis and acute violent events in the OPTs have a direct impact on the enjoyment of the human right to water for the Palestinian people. However, little attention is focussed upon the nature of the crisis for those subject to it, in their everyday lives. Problems faced by Palestinians on a daily basis include insufficient water supply, poor water quality and restricted access to water, both physical and economic.⁴³⁴ Subsequently, these problems can lead to water related disease and poor health and hygiene, restrictions on work, housing problems and family and community stress resulting in conflict and exacerbation of poverty.⁴³⁵ Furthermore, these problems are compounded by lack of water infrastructure, poor condition of the water network, poor sanitation and waste management and resource and service mismanagement at local, as well as national level.

The current daily amount of water deemed sufficient for drinking and personal use, by the WHO, is an optimum access of 100 l/c/d,⁴³⁶ 50 l/c/d as an intermediate level and 20 l/c/d/as a very minimum basic supply for drinking only.⁴³⁷ This is compared with the average daily amount of water used by a Palestinian of 50 l/c/d⁴³⁸ and as little as 10 l/c/d in some cases.⁴³⁹ This is well below the WHO recommended amounts. Moreover, the least amount recommended by the WHO for emergency response is 7.5–15 l/c/d as a minimum level to avoid

432 Hussein Hiba, 10–14 October 2004, pp 13–14. For details of the limitations on the Palestinian water sector, see World Bank, *West Bank and Gaza Assessment of Restrictions on Palestinian Water Sector Development*, April 2009, Washington DC: World Bank.

433 UN Department for Political Affairs, *Question of Palestine, Issues, Water*, at www.un.org (16 February 2010).

434 See, *inter alia*, Amnesty, 2009; World Bank, April 2009; PHG, 2004; B'Tselem, July 2000; B'Tselem, *Not Even a Drop: The Water Crisis in Palestinian Villages Without a Water Network*, July 2001, Jerusalem: B'Tselem; B'Tselem, *Disputed Waters: Israel's Responsibility for the Water Shortage in the Occupied Territories*, September 1998, Jerusalem: B'Tselem; and Kothari, M, UN Special Rapporteur on the right to Adequate Housing, *Report of Visit to the Occupied Palestinian Territories, 5–10th Jan 2002*, E/CN.4/2003/5/Add.1, 10 June 2002.

435 See, *inter alia*, PHG, 2004; B'Tselem, July 2000; B'Tselem, July 2001; and B'Tselem, September 1998.

436 l/c/d meaning litres per capita (person), per day.

437 See Bartram, J and Howard, G, *Domestic Water Quantity, Service Level and Health: What Should Be the Goal for Water and Health Sectors*, 2003, Geneva: WHO (WHO/SDE/WSH/03.02). See also Gleick, 1996; and WHO, 2003, pp 12–18.

438 World Bank, April 2009, p 17, para 48; Previously, average daily consumption was estimated at 50–70 l/c/d. See PASSIA, *Special Bulletin, Water: The Blue Gold of the Middle East*, July 2002, Jerusalem: PASSIA, p 6.

439 World Bank, April 2009, p 17, para 49.

epidemics.⁴⁴⁰ This means that some areas of the West Bank Palestinians have water access comparable to those living in disaster areas. The disparity with Israeli consumption per capita is also significant: the average domestic daily consumption of water for an Israeli is 300 l/c/d⁴⁴¹ and the 450,000 Israeli settlers in the West Bank use more water than the entire population of 2.3 million.⁴⁴² These basic figures alone indicate the scale and nature of the problem faced.⁴⁴³ It is with these fundamental problems in mind that the legal protection for a right to water in the OPTs and the resulting obligations to ensure such a right are reviewed.

International human rights law applicable to the OPTs

Israel is party to many international human rights treaties (see Table 4.1),⁴⁴⁴ including those with the most comprehensive provisions concerning the right to water.⁴⁴⁵ It is notable, however, that it has not ratified several of the additional protocols relating to enforcement of certain treaties such as the CAT and ICCPR.⁴⁴⁶ This may be an indication of the current view of human rights held by the Israeli state and also of its reluctance to accept that it is bound under these treaties, to fulfil its obligations, not only within the state of Israel proper but also within the OPTs. Moreover, although Israel is a state party to the main international human rights instruments, Israel continues to question the application of these provisions to the OPTs.⁴⁴⁷ Firstly, Israel denies the applicability of human rights treaties in times of

440 Sphere Project, *Sphere Humanitarian Charter and Minimum Standards in Disaster Response Handbook*, 2004, Geneva: Sphere Project, Ch 2, pp 63–64, at www.sphereproject.org/ (accessed 1 June 2010).

441 Amnesty, 2009, p 3.

442 Ibid, p 4.

443 For comparison, the average domestic water consumption in the UK is 140–50 l/c/d according to the UK Office of Water Services (hereinafter referred to as OFWAT), *Security of Supply 2006–07 Report: OFWAT – Protecting Consumers, Promoting Value and Safeguarding the Future*, October 2007, Birmingham: OFWAT, Table 5, p 14.

444 *Inter alia*, the ICCPR, signed 19 December 1966, ratified 3 October 1991; the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the CAT), signed 22 October 1986, ratified 3 October 1991; the CERD, signed 7 March 1966, ratified 3 January 1979. See www.ohchr.org (accessed 22 February 2010).

445 These include the ICESCR, signed 19 December 1966, ratified 3 October 1991; the CEDAW, signed 17 July 1980, ratified 3 October 1991; and the CRC, signed 3 July 1990, ratified 3 October 1991.

446 E.g. ICCPR Optional Protocols I and II; CAT Optional Protocol; CEDAW Optional Protocol (no action taken as of February 2010).

447 For Israel's position, see CESCR, *Second Periodic State Report of Israel, Considered May 2003*, E/1990/6/Add.32, 16 October 2001, paras 5 and 6 (hereinafter referred to as CESCR, Second Periodic State Report of Israel, 2001). Also (verbatim), *Additional Information Submitted by States Parties to the Covenant following the Consideration of their Reports by the Committee on Economic, Social and Cultural Rights, Addendum, ISRAEL, [20 April 2001]*, E/1989/5/Add.1414, May 2001, paras 2 and 3 (hereinafter referred to as Additional Information Addendum, Israel, 2001); Human Rights Committee, *Second Periodic Report Israel [20 November 2001]*, CCPR/C/ISR/2001/2, 4 December 2001, para 8; International Commission of Jurists/Centre for the Independence of Judges and Lawyers, *The Civilian Judicial System in the West Bank and Gaza: Present and Future*, June 1994, Geneva: International Commission of Jurists/Centre for the Independence of Judges and Lawyers, p 29, n 37.

Table 4.1 Status of ratification of international human rights law treaties by the state of Israel (as of 16 February 2010)

<i>Treaty</i>	<i>Status of ratification</i>		
	<i>No action</i>	<i>Signed</i>	<i>Ratified</i>
ICCPR			X
ICCPR Op Pro I	X		
ICCPR Op Pro – DP	X		
ICESCR			X
ICESCR Op Pro	X		
CRC			X
CRC Op Pro – AC			X
CRC Op Pro – SC			X
CEDAW			X
CEDAW Op Pro	X		
CERD			X
CAT			X
CAT Op Pro	X		
CRPD		X	
CRPD Op Pro	X		

conflict, including occupation. Secondly, Israel asserts that it is not responsible for the enjoyment of human rights within the OPTs: rather the obligations are held by the PA.

Concerning the question whether human rights are applicable during periods of conflict and occupation, the ICJ has set precedence in determining that international human rights law is applicable in times of conflict. In its Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, it advised on the applicability of the ICCPR in times of war: ‘The protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency . . .’⁴⁴⁸

This view is also taken by the CCPR, which states:

The Committee has noted the State party’s position that the Covenant does not apply beyond its own territory, notably in the West Bank and in Gaza, especially as long as there is a situation of armed conflict in these areas. The Committee reiterates the view, previously spelled out in paragraph 10 of its concluding observations on Israel’s initial report that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including article 4 which covers situations of public emergency which threaten the life of the nation. Nor does

⁴⁴⁸ ICJ, ‘Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8th July 1996’, (1996) *ICJ Reports* 240, para 25.

the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law . . . The State party should reconsider its position and to include in its third periodic report all relevant information regarding the application of the Covenant in the Occupied Territories resulting from its activities therein.⁴⁴⁹

Furthermore, in its Advisory Opinion, 9 July 2004, on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the ICJ stated: 'More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights . . .'⁴⁵⁰

Thus the ICJ advised that the application of human rights in times of conflict is not limited to the civil and political rights contained within the ICCPR, but also encompasses the rights contained within all international human rights conventions, including economic and social rights. This view has also been confirmed many times by international bodies and legal scholars.⁴⁵¹

In this regard, the state of Israel is in complete disagreement with wider international opinion, including judicial opinion, claiming that the law of human rights does not apply during any situation of armed conflict. Rather, it claims that the law of armed conflict (international humanitarian law) is the sole body of law which applies. In its state report to the CESCR, Israel asserts this position:

Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction. This position is

449 *Concluding Observations of the Human Rights Committee: Israel*, CCPR/CO/78/ISR, 21 August 2003, para 11. Original footnote omitted. See also *Concluding Observations of the Human Rights Committee: Israel*, CCPR/C/79/Add.93, 18 August 1998, para 10.

450 ICJ Wall Opinion, para 106.

451 Primary sources include: Human Rights in Armed Conflicts, Resolution XXIII adopted by the International Conference on Human Rights, Teheran, 12 May 1968; Respect for Human Rights in Armed Conflicts, Resolution 2444 (XXIII) of the UN General Assembly, 19 December 1968). For secondary sources see, *inter alia*, Ssenyonjo, M, *Economic, Social and Cultural Rights in International Law*, 2009, Oxford: Hart Publishing, pp 39–42; Henckaerts, JM and Doswald-Beck, L, *Customary International Humanitarian Law*, Volume 1: *Rules*, 2005, Cambridge: Cambridge University Press and ICRC, pp 299–306, at 299; Henckaerts, J-M, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict', (2005) 87(857) *International Review of the Red Cross* 195; International Commission of Jurists, 1994, p 28; Rowe, P, *The Impact of Human Rights Law on Armed Forces*, 2006, Cambridge: Cambridge University Press, 2006, p 120; and Skogly, 2006, pp 169 and 199.

based on the well-established distinction between human rights and humanitarian law under international law. Accordingly, in Israel's view, the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights.⁴⁵²

In response to these claims, the government of Israel has received much criticism. The Committee itself noted its concern regarding Israel's position⁴⁵³ and has rejected outright their assertion that human rights do not apply in situations of armed conflict:

The Committee rejects the State party's assertion regarding the distinction between human rights and humanitarian law under international law to support its argument that the Committee's mandate 'cannot relate to events in the Gaza Strip and West Bank'. The Committee reminds the State party that even during armed conflict, fundamental human rights must be respected and that basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law and are also prescribed by international humanitarian law.⁴⁵⁴

The Committee therefore points out that not only does it reject Israel's claim that only the law of armed conflict applies, but that even if this was the case, Israel has human rights obligations under international humanitarian law.

Ultimately, if Israel's position regarding the application of both international humanitarian law and international human rights law is accepted, it renders the Palestinian people virtually without any legal protection whilst under occupation. Not only is international human rights law deemed inapplicable but the application of humanitarian law is severely limited as well.

As a consequence of Israel's position that human rights law does not apply to situations of armed conflict, it rejects any notion of having human rights obligations in relation to the OPTs. Its basis for this opinion rests not only on its rejection of the application of human rights to conflict situations but also on the argument that the territories are not under its jurisdiction.⁴⁵⁵

Israel claims that it is the PA that has jurisdiction over the OPTs, as under the terms of the Oslo Accords, it has responsibility for civil matters within most of the West Bank area.⁴⁵⁶ Subsequently, Israel asserts that it is the PA which has

452 CESCR, Second Periodic State Report of Israel, 2001, para 5. Also (verbatim), Additional Information Addendum, Israel, 2001, para 2.

453 CESCR, *Concluding Observations: Israel*, E/C.12/1/Add.90, 23 May 2003, para 15.

454 CESCR, *Concluding Observations: Israel*, E/C.12/1/Add.69, 31 August 2001, para 12.

455 CESCR, Second Periodic State Report of Israel, 2001, para 5; and Additional Information Addendum, Israel, 2001, para 2; Human Rights Committee, *Second Periodic Report Israel [20 November 2001]*, CCPR/C/ISR/2001/24, December 2001, para 8; and International Commission of Jurists, 1994, p 26.

456 Areas A and B under the terms of the Interim Agreement.

responsibility for implementation of the rights contained within the ICESCR and which carries the obligations correlative to those rights, 'pursuant to the Israeli–Palestinian Interim Agreement of 1995'. Israel claims that under this agreement the 'overwhelming majority of powers and responsibilities in all civil spheres (including economic, social and cultural) . . . have been transferred to the Palestinian Council, which . . . is directly responsible and accountable vis a vis the entire Palestinian population of the West Bank . . . with regard to such issues'.⁴⁵⁷ Therefore, due to the 'jurisdiction of the Palestinian Council . . . , Israel cannot be internationally responsible for ensuring the rights under the ICESCR in these areas'.⁴⁵⁸ Furthermore, the state of Israel also declares this to be the case concerning application of the ICCPR, quoting verbatim the above position.⁴⁵⁹

Although the PA (Council) is the elected body of the Palestinian population living under occupation, it does not constitute a government of a sovereign state and therefore, it cannot become a state party to the Covenants. However, the Israeli government does not see this as problematic and asserts that 'The fact that the Palestinian Council does not represent a State does not, in itself, preclude its responsibility in the sphere of human rights protection'. It further claims that under Interim Agreement, Article XIX, 'the Palestinians have taken it upon themselves to exercise their powers and responsibilities "with due regard to internationally accepted norms and principles of human rights and the rule of law"'.⁴⁶⁰

Whilst it is true that the PA has agreed to be bound by the principles of human rights law, it is not however the principal obligations holder in respect of these rights.⁴⁶¹ Ultimately, it is the Israeli government which is the state party to the Covenants and it is the state of Israel which holds 'effective control' over the territories in question. As such, it is the state of Israel that is legally obligated to ensure enjoyment of human rights. Several bodies have concluded that this is indeed the case. As noted previously, both the CESCR and the CCPR have stated this opinion.⁴⁶² In addition, in a significant legal opinion, the ICJ in considering the extra-territorial obligations of human rights treaties within its Advisory Opinion on

457 CESCR, Second Periodic State Report of Israel, 2001, para 6; and Additional Information Addendum, Israel, 2001, para 3.

458 CESCR, Second Periodic State Report of Israel, 2001, para 6; and Additional Information Addendum, Israel, 2001, para 3.

459 Human Rights Committee, *Second Periodic Report Israel [20 November 2001]*, CCPR/C/ISR/2001/24, December 2001, para 8.

460 CESCR, Second Periodic State Report of Israel, 2001, para 7; Additional Information Addendum, Israel, 2001, para 4; and Human Rights Committee, *Second Periodic Report Israel [20 November 2001]*, CCPR/C/ISR/2001/24, December 2001, para 8.

461 The PA may have human rights obligations as a third party. See forthcoming discussion.

462 In its concluding observations, the Human Rights Committee pointed to 'the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein', in CCPR/C/79/Add.93, para 10. Furthermore it states, 'in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law', in CCPR/CO/78/ISR, para 11. See also CESCR, *Concluding Observations: Israel*, E/C.12/1/Add.90, paras 15 and 31.

the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory⁴⁶³ concluded that both the ICCPR and the ICESCR were applicable to the territories and that Israel held obligations in this respect. In relation to the ICCPR, the Court noted that under Article 2 the treaty is applicable to not only to individuals within the state's territory, but also those individuals outside the national territory, but subject to the state's jurisdiction.⁴⁶⁴ Moreover, the Court found that the practice of the CCPR was consistent with this view.⁴⁶⁵ Concerning the ICESCR, the ICJ observed that 'although the treaty does not contain any provision on its scope of application,⁴⁶⁶ nevertheless, this cannot be interpreted as excluding areas where a state exercises extra-territorial jurisdiction'.⁴⁶⁷ As such, the Court held that Israel was responsible for its implementation as state party to the Covenants and as the occupying power exercising effective control:

The territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.⁴⁶⁸

It is interesting to note that the ICJ acknowledges that the PA has some responsibility in the implementation of rights, where it has capacity to do so. In a step further, the Center for Economic and Social Rights argues that the PA has full human rights obligations in Areas A under the Oslo Accords, where full civil and military authority has been passed to the Palestinians.⁴⁶⁹

However, the problem with this view is that even though the PA has 'responsibility' for these areas, it is still in reality subject to the control of Israel in many aspects which affect the capacity of the PA to implement economic and social rights, including, *inter alia*, the supply of water. Therefore, although it may have obligations to respect human rights in regard to certain civil rights, for example, the activities of the Palestinian police force, in respect of other rights, such as the right to water and food, Israel still maintains control of supplies of imported resources, through control of the borders and can restrict access to or maintenance of food and water supplies from within the OPTs. As such, the PA can only hold a moral obligation and/or legal obligations at the level of third-party obligations, as it does not have the control over the necessary means to implement such rights.

463 ICJ Wall Opinion, paras 107–9.

464 Ibid, paras 107–9.

465 Ibid, paras 107–9.

466 Unlike the ICCPR, Art 4.

467 ICJ Wall Opinion, para 112.

468 Ibid, para 112.

469 Center for Economic and Social Rights, *Applying Economic and Social Rights in Palestine*, January 2000, New York, NY/Gaza: Center for Economic and Social Rights, pp 8–9, 12, fn 23 and 13, fn 30.

In addition, as noted, Israel argues that the PA is responsible for the enjoyment of all human rights within the OPTs in all areas, under the terms of Interim Agreement, Article XIX, which states that international human rights norms must be adhered to. According to Hunt, these norms must include the provisions within the International Bill of Rights. Consequently, 'in this indirect way the Palestinian authorities have obligations [as do Israel] in respect of [economic], social [and cultural] rights enshrined in the ICESCR', even though they are not a party to the Covenants.⁴⁷⁰

Conversely, this 'indirectness' is the key to understanding the status of the PA obligations. The said article of the Interim Agreement states that the PA must 'adhere' to these norms, which implies respect for human rights in its activities but not a legal obligation to fulfil these rights. Thus, although the PA may have a moral obligation and may have a legal obligation to respect, as contained in the bilateral agreement, it is evident that the nature and level of Palestinian obligations is unclear.

The human rights obligations of the PA, regarding the economic and social rights of the Palestinians in the West Bank as a whole, may draw parallels with those of service providers in the private sector,⁴⁷¹ in the main, at a level of a duty to respect. In Areas A, where it has civil and military control, for example, control of the police, it may be of a higher level and include an additional duty to protect. Where the PA has some capacity to control and distribute resources, it may have a duty to fulfil/facilitate within its limited capabilities. However, it cannot be held responsible at international level for realisation of economic, social and cultural rights, as it does not have the means to do so.⁴⁷² Neither is it in a position to become bound by the legal instruments governing these international standards as it is not a member state of the UN.⁴⁷³

One further possibility is that the PA may hold obligations under customary international law, based upon its practice, for example, as an entity recognised by

470 Hunt, P, 'Economic and Social Rights: Issues of Implementation', in Bowen, 1997, pp 201–20 at 201.

471 See De Feyter, K and Gomez Isa, F, *Privatisation and Human Rights in the Age of Globalisation*, 2005, Antwerp: Intersentia, for details of third-party obligations of service providers including water authorities.

472 For an interesting theory of obligations based upon capacity to act rather than subjectivity, see Clapham, A, *Human Rights Obligations of Non-State Actors*, 2006, Oxford: Oxford University Press, pp 70–3. Economic, social and cultural rights hereinafter referred to as ESCRs.

473 Following the PLO Proclamation of the State of Palestine on 15 December 1988, the UN General Assembly passed Resolution A/RES/32/177, 15 December 1988 recognising the proclamation and stating that 'Palestine' be used in place of the designation 'PLO' when referring to the entity within the UN system. However, it has not accepted Palestine as a member state of the UN but has established a Permanent Observer Mission at the UN and granted them Observer status. See General Assembly Resolution A/RES/52/250, 13 July 1998. In addition, the WHO and UNESCO have all deferred consideration of admission of Palestine to their membership due to the unclear legal status (WHO A42/VR/10 and UNESCO Resolution of the Executive 132EX/31, 29 September 1989; UNESCO Resolution of the Commission I 33C/24, 13 September 2005). Moreover, the Swiss government acting as the Depository for the Geneva Conventions has deferred a decision as to whether Palestine can legally accede to the Conventions on the same basis.

some other states as a 'state', as party to the legally binding Oslo Accords (which contain some human rights provision) and on the basis of the Palestinian Basic Law 2003 (Amended 2005) and through its letter to the Swiss government stating its intent to be bound by the provisions of the Geneva Convention IV.

Ultimately, the indistinct status of the territory of 'Palestine' and the continuing occupation has implications for the legal obligations that the PA can hold. Until the OPTs constitute a sovereign state of Palestine, the legal obligations concerning the human rights of the Palestinian government will remain ambiguous.⁴⁷⁴ At present, the PA can only act as the elected body of an occupied people and territory and is thus limited in its capacity to act. Therefore, it is the occupiers, the state of Israel, which hold the full legal obligations with regard to economic and social rights under international human rights law.

In addition to the application of the ICESCR in the OPTs, in accordance with the ICJ opinion, it would seem logical that other international human rights instruments to which Israel is a state party, will also apply to the OPTs. Subsequently, the ICJ also advised that the CRC was also applicable, under the provision of Article 2, which states: 'States Parties shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction . . .' It concluded: 'That Convention is therefore applicable within the Occupied Palestinian Territory'.⁴⁷⁵ The legal importance of the ICJ opinion cannot be overlooked, as it clearly indicates within a justiciable system that Israel hold obligations, which it can be found in breach of.

Finally, it should also be noted that substantial parts of the UDHR bind Israel, as many of the provisions within the declaration are considered customary international law.⁴⁷⁶ As such, Israel has obligations to respect, protect and fulfil the human rights of all those living within all areas under its jurisdiction. In relation to the right to water, Article 25, Adequate Standard of Living, could be invoked as customary law.

Enjoyment of economic and social rights within the OPTs and Israel

Having ascertained the applicability of international human rights instruments in conflict situations and having established that Israel is responsible for the realisation of human rights within the OPTs, a close examination of its compliance with its

474 Following the PLO Proclamation of the State of Palestine in 1988, several states officially recognised the state of Palestine at least *de jure*. However, certain states did not including the UK, France, Australia and the United States. The current position of the UK is that it recognises the right of the Palestinian people to establish an independent sovereign state. See UK government, 'Travel and Living Abroad, Country Profiles, OPTs', at www.fco.gov.uk (accessed 16 February 2010), last updated 3 February 2010. For further reading on the issue of the statehood of Palestine, see Boyle, F, 'The Creation of the State of Palestine', (1990) 1 *EJIL* 301–6; and Crawford, J, 'The Creation of the State of Palestine: Too Much Too Soon?', (1990) 1 *EJIL* 307–13.

475 ICJ Wall Opinion, para 113.

476 See fn 123.

obligations under these treaties is warranted. This will allow us to assess the status of the enjoyment of economic and social rights within the state of Israel and within the OPTs, which it occupies, where it exercises 'effective control'. In particular, the enjoyment of the right to water can be investigated.

As established, Israel refuses to recognise that the application of the ICESCR to the occupied territories is within its jurisdiction and claims that it is the PA which has responsibility for implementation of economic and social rights within the OPTs. Further, it claims it has no obligations in this respect due to its position that the law of human rights does not apply to situations of armed conflict. Owing to its position within its periodic state reports to the CESC, Israel does not include any data on the enjoyment of economic and social rights by the Palestinian population within the OPTs. This is despite several requests from the Committee: 'The Committee further reiterates its regret at the State party's refusal to report on the occupied territories'.⁴⁷⁷ Within its most recent observations, the Committee stated:

The Committee deeply regrets the refusal of the State party to provide in its second periodic report additional information on the living conditions of population groups other than Israeli settlers in the occupied territories as requested in its 2001 concluding observations. The Committee continues to be gravely concerned about the deplorable living conditions of the Palestinians in the occupied territories, who – as a result of the continuing occupation and subsequent measures of closures, extended curfews, roadblocks and security checkpoints – suffer from impingement of their enjoyment of economic, social and cultural rights enshrined in the Covenant, in particular access to work, land, water, health care, education and food.⁴⁷⁸

Moreover, in the latest state report to the Committee, Israel does not attempt to justify or explain its position. In fact, there is no reference to the OPTs, nor is there any data included from the OPTs, other than that from Israeli settlers who are included in the population of Israel proper.⁴⁷⁹

This refusal to report on the enjoyment of rights in the territories makes an assessment of the enjoyment of economic and social rights by the Palestinian population difficult. However, owing to parallel reports by NGOs with special consultative status with the UN, information is available, if limited and some evaluation can be made. As is evident from the above paragraph, the CESC is concerned that violations of economic and social rights within the territories are taking place and there are several reasons for this. The main factor noted by the Committee, which impedes the implementation of the rights contained within the

477 CESC, *Concluding Observations: Israel*, E/C.12/1/Add.90, 23 May 2003, para 15. Original footnote omitted. See also CESC, *Concluding Observations: Israel*, E/C.12/1/Add.69, 31 August 2001, para 11.

478 CESC, *Concluding Observations: Israel*, 23 May 2003, para 19.

479 See Israel (State of) Ministry of Justice and Ministry of Foreign Affairs, Third Periodic Report Concerning the Implementation of the ICESCR 2008 (Advance Unedited Version), E/C.12/ISR/3.

ICESCR, is the continued emphasis placed upon security measures by the Israeli government.⁴⁸⁰ Interestingly, it notes that this impediment has been not just within the occupied territories but also within Israel itself and that the increased security concerns in recent years have worsened the situation.⁴⁸¹

However, the Committee does not see these security concerns as justification for Israel to derogate from its obligations under the Covenant including not reporting on the situation in the OPTs. Consequently, it has stated strongly that although it recognises that Israel has 'serious security concerns', these must be 'balanced with its efforts to comply with its obligations under international human rights law'⁴⁸² including realisation of economic and social rights.⁴⁸³

More specifically:

The Committee urges the State party to ensure that any security measure it adopts does not disproportionately limit or impede the enjoyment of economic, social and cultural rights enshrined in the Covenant, in particular access to land and water resources by Palestinians, and that adequate restitution and compensation are provided to those who have incurred damage to and loss of property and lands as a result of these security measures.⁴⁸⁴

It is notable here that the CESCR explicitly refers to the right to water, as well as the right to housing and to land (which provides food and work) as the particular rights most affected by security measures. Of these security measures, the CESCR particularly criticises the Israeli policy of closures, which restricts the movement of both Palestinian population and goods and has a detrimental effect on the health and well-being of Palestinians, preventing them from working and earning an income and denying access to resources including water and food. This results in an exacerbation of poverty and malnutrition.⁴⁸⁵

Furthermore, although not initially obvious as directly relevant, the concluding observations concerning Israel's state report to the CCPR⁴⁸⁶ also note the severe limitations on the right to freedom of movement for Palestinians living within the OPTs, in particular noting the 'wide-ranging restrictions' due to the separation Wall, which 'disrupt access to healthcare . . . and access to water'.⁴⁸⁷ While the

480 See CESCR, *Concluding Observations: Israel*, 23 May 2003, para 11, and CESCR, *Concluding Observations: Israel*, E/C.12/1/Add.27, 4 December 1998, para 7.

481 CESCR, *Concluding Observations: Israel*, 23 May 2003, para 11.

482 Ibid, para 31

483 The Committee also reaffirms its view that Israel's obligations under the Covenant apply to all territories and populations under its effective control and that 'basic economic, social and cultural rights, as part of the minimum standards of human rights, are guaranteed' even in a situation of armed conflict (under customary international law, international humanitarian law and under the Covenant). Thus it requests that in its next periodic report, Israel provides more extensive information on the enjoyment of the rights enshrined in the Covenant by all those living in the OPTs. Ibid, para 31.

484 Ibid, para 40.

485 See CESCR, *Concluding Observations: Israel*, 4 December 1998, para 18.

486 Hereinafter referred to as the CCPR.

487 CCPR, *Concluding observations: Israel*, CCPR/CO/78/ISR, 21 August 2003, para 19.

CCPR 'acknowledge the seriousness of the State party's security concerns', it considers the restrictions incompatible with ICCPR, Article 12 and states that Israel should respect the right to freedom of movement and stop construction of the Wall within the OPTs.⁴⁸⁸

Significantly, this section of the report demonstrates the interdependence of civil and political and economic and social rights. Furthermore, it illustrates that the CCPR recognises the threat to the right to water as a direct consequence of a violation of the right to freedom of movement, thus recognising the right to water as within the scope of certain civil and political rights.

Overall, Israel's security policy can be seen as a major factor impeding the enjoyment of economic and social rights (and certain civil and political rights) in the OPTs and in Israel proper. Security measures taken by Israel can be seen to have detrimental effects on the right to water, health, work and food. Moreover, the Committee concludes that closures have resulted in 'widespread violations of [their] economic, social and cultural rights'.⁴⁸⁹

Regarding enjoyment of the right to water, specific concerns are noted within the observations of the CESCR, on several occasions. This is despite the absence of explicit reporting on the right to water within Israel's state reports. Israel does report on aspects of the right to water but these are framed within Article 11, Adequate Standard of Living, and Article 12, Health.⁴⁹⁰ Moreover, as noted previously, the information given relates only to the population in Israel proper (within the Green Line) and Israeli settlers and does not contain information on the Palestinian population in the OPTs. As such, the reports give a substantially misleading picture of the enjoyment of the right within the area under Israel's control. For example, Israel's initial state report to the CESCR states that 99.8 per cent of households enjoy mains supply water to their homes,⁴⁹¹ but this figure does not include any Palestinians living within the West Bank, only Israeli settlers living in illegal Israeli settlements in the territory.⁴⁹² Israel also reports on the measures taken concerning accessibility and sufficiency of the right to water, under Article 12, Right to Health, but again, this is limited to an evaluation of the situation of Bedouin populations within Israel only.⁴⁹³

488 Ibid, para 19.

489 CESCR, *Concluding Observations: Israel*, E/C.12/1/Add.27, 4 December 1998, para 17.

490 See Israel, *Third Periodic Report 2008*, E/C.12/ISR/3, paras 434, 435, 466, 469, 521, 522 and 530; CESCR, *Initial State Report of Israel*, E/1990/5/Add.39 (3), 20 January 1998, paras 571, 572 and 573; and CESCR, *Second Periodic Report of Israel, 2001*, paras 345, 346, 420 and 423.

491 See CESCR, *Initial State Report of Israel*, 20 January 1998, para 563. See also *Initial State Report of Israel to the Committee on The Rights of The Child* [20 February 2001], CRC/C/8/Add.44, para 835.

492 The Israeli settlements within the OPTs are illegal under Geneva Convention IV, Art 49. Also see numerous General Assembly resolutions including, *inter alia*, 61/118 (2006), 60/106 (2005), 59/123 (2004), and 32/5 (1977); and several Security Council resolutions including, *inter alia*, 446 and 452 (1979), and 465 (1980). Also see the ICJ Wall Opinion, para 120; Kothari, E/CN.4/2003/5/Add.1, 10 June 2002, para 35; and CESCR, *Concluding Observations: Israel*, E/C.12/1/Add.27, 4 December 1998, paras 24 and 41.

493 See Israel, *Third Periodic Report 2008*, paras 520–22; CESCR, *Initial State Report of Israel*, 20 January 1998, paras 571, 572 and 573.

Despite the absence of data on the Palestinian population of the occupied territories, the Committee continues to pressurise Israel to recognise its obligations regarding the right to water of the Palestinians in the territories.⁴⁹⁴ Furthermore, it notes the control of water resources by Israel:

The Committee is particularly concerned about limited access to and distribution and availability of water for Palestinians in the occupied territories, as a result of inequitable management, extraction and distribution of shared water resources, which are predominantly under Israeli control.⁴⁹⁵

This observation by the Committee takes account of the fact that in many cases the local service providers, the PWA and local municipalities do not render effective control over service delivery, as they have to purchase water from the Israeli state water company, Mekorot. Thus, ultimately, the Israeli state has the responsibility and duties to realise the right to water within the OPTs. Moreover, the realisation of the individual human right to water is inextricably linked to resolution of the larger macro-level political dispute over water ownership and inequitable utilisation of transboundary groundwater resources in the region.⁴⁹⁶

In addition, water is distributed inequitably, with settlers in the territories receiving far more water per capita than their Palestinian counterparts:

The Committee also notes with concern that while the Government annually diverts millions of cubic metres of water from the West Bank's Eastern Aquifer Basin, the annual per capita consumption allocation for Palestinians is only 125 cubic metres while settlers are allocated 1,000 cubic metres per capita.⁴⁹⁷

In conclusion, the Committee calls upon Israel to stop the building of illegal Jewish settlements in the territories and the bypass roads that connect them and to cease the expropriation of natural resources, including water, belonging to the OPTs.⁴⁹⁸ The Committee:

strongly urges the State party to take immediate steps to ensure equitable access to and distribution of water to all populations living in the occupied territories, and in particular to ensure that all parties concerned participate fully and equally in the process of water management, extraction and distribution. In that connection, the Committee refers the State party to its General Comment No. 15 on the right to water.⁴⁹⁹

494 See CESCR, *Concluding Observations: Israel*, 4 December 1998, para 32; and CESCR, *Concluding Observations: Israel*, 23 May 2003, paras 35 and 41.

495 CESCR, *Concluding Observations: Israel*, 23 May 2003, para 25.

496 For an in-depth analysis of the restrictions on the Palestinian water sector and the dominance of Israel in abstraction of water see World Bank, April 2009; Amnesty, 2009.

497 CESCR, *Concluding Observations: Israel*, 4 December 1998, para 24. See also OCHA, *Humanitarian Impact on the Palestinians of Israeli Settlements and other Infrastructure in the West Bank*, July 2007, East Jerusalem: OCHA, p 114; Amnesty, 2009, p 45.

498 See CESCR, *Concluding Observations: Israel*, 4 December 1998, paras 24 and 41.

499 CESCR, *Concluding Observations: Israel*, 23 May 2003, para 41.

Interestingly, Israel also reports on the safety aspect of the right to water under the reporting obligations of the ICCPR, within its initial and second periodic state reports to the HRC, Article 6, Right to Life and Article 26, Equality before the Law.⁵⁰⁰ This could be significant in terms of determining violations and may have implications for the justiciability of the right within a complaints and court system.⁵⁰¹

Similarly, under the state-reporting mechanism of the Committee on the Rights of the Child, Israel has submitted information concerning both water quality and access to water, under Article 6 concerning the right to life and Article 24 regarding the right to health.⁵⁰² This information is misleading, however. For example, Israel claims, 'Virtually every home (99.8%) in Israel is connected to the country's central water network'.⁵⁰³ However, this does not include homes that are not recognised as 'legal dwellings' by the Israeli government, which excludes therefore many Arab and Bedouin residences.⁵⁰⁴ Furthermore, it does not include any Palestinian homes in the OPTs. This omission was noted by the Committee on the Rights of the Child in its Concluding Observations: 'Given the responsibility of the State party for the implementation of the Convention in the occupied Palestinian territories, the Committee deeply regrets the lack of any information about the situation of children in the occupied Palestinian territories . . .'⁵⁰⁵

In relation to the right to water, it is disappointing that the Committee does not explicitly note the absence of information regarding enjoyment of the said right and does not call for specific data on the right for future reports. However, the Committee on the Rights of the Child notes concern regarding enjoyment of the right to an adequate standard of living (including water) and expressly refers to water in regard to the prohibition of the destruction of the water infrastructure under the Geneva Conventions:

The Committee is deeply concerned at the large-scale demolition of houses and infrastructure in the occupied Palestinian territories, which constitutes a serious violation of the right to an adequate standard of living for children in

500 See CCPR, *Second Periodic Report Israel*, [20 November 2001], CCPR/C/ISR/2001/2, 4 December 2001, paras 79 and 282; and CCPR, *Initial Report of States Parties Due in 1993: Israel*, CCPR/C/81/Add.13, 9 April 1998, para 132.

501 See Ch 2 for analysis of human right to water as an element of the right to life.

502 Art 12 is in particular reference to the Bedouin population of Israel. See the *Initial State Report of Israel to the Committee on the Rights of the Child*, CRC/C/8/Add.44, 27 February 2002, paras 834–37.

503 *Ibid*, para 835.

504 *Ibid*, para 896, stating the position of Bedouin residences as illegal and therefore, excluded from the data in the report. For a discussion of the law pertaining to the illegality of Bedouin residences, see Arab Association for Human Rights *et al*, *Compilation of Economic, Social and Cultural Rights Conditions of the Indigenous Palestinian People under Israel's Jurisdiction and Effective Control*, Parallel Report jointly submitted to the UN Committee on Economic, Social and Cultural Rights, 30th Session, Geneva, 9 May 2003, Art 11 Right to an Adequate Standard of Living, Points 17 and 18.

505 Committee on the Rights of the Child, *Concluding Observations: Israel*, CRC/C/15/Add.195, 9 October 2002, 31st session, para 2.

those territories. The Committee recommends, with reference to international humanitarian law, notably the Geneva Convention relative to the Protection of Civilian Persons in Time of War, that the State party fully comply with the rules of distinction (between civilians and combatants) and proportionality (of attacks that cause excessive harm to civilians) and thus refrain from the demolition of civilian infrastructure, including homes, water supplies and other utilities . . .⁵⁰⁶

The recognition of the importance of water supplies to an adequate standard of living and as central to the protection of civilians under the Geneva Convention IV is a positive development. Furthermore, that reference is made to water under the rules of international humanitarian law by a human rights treaty monitoring body further supports the argument that both international human rights law and international humanitarian law are interlinked and applicable concurrently in times of conflict.

The Committee further notes the difficulty in implementing the CRC in the context of violence, both in Israel and the OPTs,⁵⁰⁷ and calls attention to the effect of Israel's security policies upon the health of children in the occupied territories, especially the policy of closure which is exacerbating malnutrition by means of artificially high prices for basic foodstuffs (including water) and lack of access to resources.⁵⁰⁸

It is notable that under the CRC Optional Protocol on Children in Armed Conflict, within Israel's initial report to the Committee, it also limits its reporting to children within Israel only and does not include any information regarding Palestinian children in the OPTs.⁵⁰⁹

In relation to Israel's compliance with the right to water as contained in the CEDAW, under the state reporting system of the CEDAW the state of Israel has submitted five periodic reports over the period 1997–2009.⁵¹⁰ Within these reports there is no mention of the right to water, either explicitly as an independent right or as part of the right to an adequate standard of living for rural women under Article 14 of the Convention. Furthermore, there is no mention of the status of women's rights and level of enjoyment of these human rights within the OPTs. Neither is there any justification offered by the state party for not reporting on these territories.

506 Ibid, paras 50 and 51.

507 Ibid, para 4.

508 Ibid, para 44.

509 See Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 8(1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Initial Reports of States Parties Due in 2007*, Israel/CRC/C/OPAC/ISR/1, 15 April 2009.

510 See, *inter alia*, *Report of the State of Israel on the CEDAW*, CEDAW/C/ISR/1-2, 8 April 1997; UN Committee on the Elimination of Discrimination against Women, *Third Periodic Report of the State of Israel on the CEDAW*, CEDAW/C/ISR/3, 16 Nov 2001; UN Committee on the Elimination of Discrimination against Women, *Fifth Periodic Report of the State of Israel on the CEDAW*, CEDAW/C/ISR/5, 21 October 2009.

In its concluding observations following Israel's third periodic report, the Committee reiterates its initial concerns and recommendations that 'The Government of Israel should ensure that the Convention was implemented throughout the territory under its jurisdiction'.⁵¹¹ Further, it requires that Israel report on the enjoyment of women's rights by women in the OPTs⁵¹² and notes its concern regarding Israel's policies on security and their effects upon the health and welfare of Palestinian women.⁵¹³

In relation to the right to water specifically, it is regrettable that the right is not expressly recognised or reported on in Israel's periodic reports to the CEDAW. Likewise, it is disappointing that the respective Committee's concluding observations do not include reference to the right, especially as water is explicitly noted within the CEDAW. However, the progressively stronger line taken (by the Committee) with Israel over its reporting commitments and obligations generally in the OPTs is a welcome development.

Overall, the refusal of Israel to report on the enjoyment of economic and social rights within the OPTs is a breach of its obligations under the ICESCR. In addition, the information presented within its state reports to the Committee is misleading in its nature as the statistics and other data do not account for the Palestinian population of these territories but do include Israeli settlers living in the OPTs.

International humanitarian law applicable to the OPTs (West Bank)

In the context of the OPTs, the protection and realisation of economic and social rights are only possible through the joint application of international human rights law and international humanitarian law, the latter being the law applicable in times of conflict or belligerent occupation. The question of whether international humanitarian law contains provisions of a human rights nature has been a topic of recent debate. What is certain is that international humanitarian law contains provisions concerning the protection of civilians and water and that many of these provisions draw a parallel with provisions concerning the right to water under international human rights law. The provisions relevant to civilians and the Israeli–Palestinian conflict need to be examined in detail, in order to establish the level of protection of the right to water afforded to those in the OPTs and substantive content of these provisions.

511 UN Committee on the Elimination of Discrimination against Women, *Concluding Observations: Israel*, CEDAW/C/ISR/CO/3, June 2005, paras 15 and 16. Also see Report of the Committee on the Elimination of Discrimination against Women (16th and 17th sessions), General Assembly Official Records, 52nd Session Supplement No 38 (A/52/38/Rev.1), 1997, para 170.

512 See UN Committee on the Elimination of Discrimination against Women, *Concluding Observations: Israel*, paras 23 and 24.

513 *Ibid*, paras 37, 38 (checkpoints), 33 and 34 (family reunification).

1949 Geneva Conventions and their applicability to the OPTs

A number of treaties compose what is commonly seen as the principle modern instruments of international humanitarian law.⁵¹⁴ Generally known as the abbreviated 'Geneva Conventions',⁵¹⁵ they were drafted as a response to the terrible events of the Second World War, including the changing nature of warfare. As such, they encompassed the differing rules needed to govern modern war and focussed not only upon legally defining the laws of war for combatants, but, crucially, also upon the protection of civilians affected by war. To date, these Conventions have been ratified by 194 states.⁵¹⁶ In addition to the four conventions, two additional protocols were adopted in 1977: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1977.⁵¹⁷ These have been ratified by 169 states⁵¹⁸ and 165 states respectively.⁵¹⁹ In 2005, a further Additional Protocol was adopted relating to the Adoption of an Additional Distinctive Emblem (Protocol III).⁵²⁰

As well as governing the laws of warfare and weaponry and protecting civilians, the Geneva Conventions contain the norms of law regarding belligerent occupation,⁵²¹ in particular within Geneva Convention IV.⁵²² In terms of content, the Geneva Conventions provide protection for those under occupation and also provide legal guidelines for the occupation force on measures that can be taken to maintain control of the area. They operate on the premise that the occupying force

514 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 (hereinafter referred to as the Geneva Convention I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949 (hereinafter referred to as the Geneva Convention II); Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (hereinafter referred to as the Geneva Convention III); and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (hereinafter referred to as the Geneva Convention IV).

515 Hereinafter referred to as the Geneva Conventions.

516 As of 22 February 2010.

517 Hereafter referred to as the Additional Protocols I and II, 1977.

518 Five signatories (as of 22 February 2010).

519 Four signatories (as of 22 February 2010).

520 Ratified by 52 states, including Israel, with 38 signatories (as of 22 February 2010).

521 Belligerent occupation is defined as enemy territory captured by an invading force and under the control and administration of that occupant. The occupant must exercise effective control of the area. See Regulations annexed to 1907 Hague Convention IV respecting the Laws and Customs of War on Land: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (hereinafter referred to as the Hague Regulations), Arts 42 and 43; see also Roberts, A, 'What is Military Occupation?', in *British Yearbook of International Law*, 55, LV, 1984, Oxford: Clarendon Press, p 261; Green, L, *The Contemporary Law of Armed Conflict*, 2nd edn, 2000, Manchester: Manchester University Press, pp 256–67; Scobbie, I, in Bowen, 1997, pp 253–60, at 223–8; and Benvenisti, 2004.

522 The Hague Regulations pre-date the Geneva Conventions and contained the norms concerning occupation within Arts 42 and 43. See *Provisions relative to the right to water under the Hague Regulations*, p. 109.

has the predominant power and as such, those under occupation require international protection.⁵²³

Significantly, the rights contained within the Geneva Conventions, in relation to belligerent occupation, are incumbent upon the individuals protected as members of the occupied population. As such, in this respect, the Conventions embody a human rights character rather than one of international law between states.⁵²⁴ Despite this human rights nature, I would argue that these provisions cannot be seen as individual human rights in the legal sense, as there is no individual entitlement provided for and no individual right to redress. Rather, it would seem that rights are held by particular groups of individuals.⁵²⁵ The relevant provisions constitute protective rules incumbent upon these individuals but imposed by the Geneva Conventions upon the states in question. The state has an obligation to protect the citizens of the other party involved, rather than its own citizens.⁵²⁶ As such, the Conventions include rules which, if breached, could result in a violation of the Geneva Conventions and the corresponding human right under international human rights law.

The 1949 Geneva Conventions are applicable to the Israeli–Palestinian conflict as Israel has ratified all four of the Geneva Conventions I–IV,⁵²⁷ although it is not a party to the Additional Protocols I and II 1977. Despite ratifying these instruments Israel disputes their *de jure* application to the OPTs stating that the Geneva Conventions do not apply in this case.⁵²⁸ As legal basis for their position they cite Common Article 2:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

523 See Quigley, J, 'The PLO Israeli Interim Arrangements and the Geneva Civilians Convention', in Bowen, 1997, pp 25–46, at 26.

524 Ibid, p 26.

525 Rowe, 2006, p 122.

526 Furthermore, this can be seen as in line with the notion of extra-territorial human rights obligations, where a state is responsible for its actions outside its borders, which affect human rights enjoyment of the people in that territory, including those under occupation. See Skogly, 2006, p 201.

527 Signed by Israel, 8 December 1949, ratified 6 July 1951.

528 See CESCR, *Second Periodic State Report of Israel, 2001*, para 5; Additional Information Addendum, Israel, 2001, para 2; Human Rights Committee, *Second Periodic Report Israel, [20 November 2001]*, CCPR/C/ISR/2001/24, December 2001, para 8. For secondary sources outlining the official Israeli view, see Quigley, in Bowen, 1997, p 29; International Commission of Jurists, June 1994, p 26; Roberts, A, 'Prolonged Military Occupation: The Israeli-Occupied Territories 1967–1988', in Playfair, E (ed), *International Law and the Administration of Occupied Territories*, 1992, Oxford: Clarendon Press, pp 44–9; and Blum, Y, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria', (1968) 3 *Israel Law Review* 279, at 281–94.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.⁵²⁹

Israel interprets this provision as denoting that Article 2 only applies to those areas over which the respective party holds 'good title'. The Israeli government argues that the PA does not hold such 'good title', as the OPTs were not administered by a Palestinian state prior to the Israeli occupation of 1967 but rather were administered by Jordan (West Bank) and Egypt (Gaza) respectively.⁵³⁰ Thus Israel argues it administers the territory as *terra nullius*.⁵³¹

However, this view is universally rejected by international bodies and individual states, as well as under international jurisprudence of the ICJ.⁵³² Israel is a High Contracting Party to the Geneva Conventions and Common Article 1 states that these apply in all circumstances. In addition, as noted, Common Article 2 states their application in all cases of declared war or other armed conflict, including situations of occupation. It is consequently taken that the Geneva Conventions do apply to the OPTs and that Israel is bound by its obligations as a party to the Conventions.

Furthermore, these instruments are viewed as the most authoritative treaties governing international humanitarian law. As such, many of the rules contained within the Conventions and Protocols are considered customary international law.⁵³³ Therefore, Israel is bound by the treaties, not only as a state party, but also due to the rules contained being deemed custom.

529 1949 Geneva Conventions, Common Art 2.

530 It should be noted that both Jordan and Egypt are High Contracting Parties to the Geneva Conventions.

531 Letter from the Head of the International Law Section of the Israeli Advocate General's Office to the ICJ, 6 February 1998, in *International Commission of Jurists*, 1994, p 26.

532 For material stating the application of the Geneva Conventions and a rejection of the Israeli view, see the ICJ Wall Opinion, para 101; UN Security Council Resolutions 237 (14 June 1967), 465 (1 March 1980), and 681 (1990); General Assembly Resolutions 2443 (19 December 1968); ICRC, numerous official statements including, *inter alia*, Conference of High Contracting Parties to the Fourth Geneva Convention, Statement by the ICRC, Geneva, Official Statement, 5 December 2001, para 2; Israel and the occupied/autonomous territories: 'ICRC urges respect for international humanitarian law', ICRC News 04/116, 1 October 2004; ICRC, Israel and the occupied and autonomous Palestinian territories: 'Deliberate attacks on civilians must stop', Press Release 03/63, 10 September 2003, all at www.icrc.org/web/eng/siteeng0.nsf/html/israel!Open (accessed 1 January 2006). The ICRC worldwide/Middle East and North Africa/Israel, Key Documents, Israel and the occupied/autonomous territories: ICRC statements – List of statements made by the ICRC since 2000 regarding the humanitarian situation in the region. Secondary sources include Ben-Naftali, O and Shany, Y, 'Living in Denial: The Application of Human Rights in the Occupied Territories', (2003–2004) 37(1) *Israel Law Review* 17–118, at 23; *International Commission of Jurists*, 1994, pp 26–7; Roberts, in Playfair, 1992, p 52; and Al Haq, 1993, pp 9–10.

533 See ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, paras 79–82; *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, 3 May 1993, (S/25704), *Regarding the Establishment of the International Criminal Tribunal for the former*

Moreover, in a recent study on customary international humanitarian law, the ICRC found that many of the rules contained within the Additional Protocols constituted customary international law, in addition to the conventions themselves.⁵³⁴ Subsequently, Israel is also bound by the norms of the Additional Protocols that represent customary rules of international humanitarian law, despite not being a party to them.

In relation to the nature of the Israeli–Palestinian conflict, the situation is not one of short-term high-intensity warfare (although it has taken on this nature for periods) but rather a situation of belligerent occupation by one power over another. Therefore, the law of occupation is especially applicable, as an integral part of the Geneva Conventions, in particular Geneva Convention IV and Additional Protocol I.⁵³⁵

It is worth noting here the position of the PA in relation to obligations under international humanitarian law. The first question raised is that of whether they can be seen to have any obligations, as they are not a state party to the Geneva Conventions. Secondly, it is the state of Israel which has effective control⁵³⁶ of the territory under which the PA operates and as such, Israel which has an obligation to enforce the Conventions. Despite this:

On 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter from the Permanent Observer of Palestine to the United Nations Office at Geneva informing the Swiss Federal Council ‘that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto’. On 13 September 1989, the Swiss Federal Council informed the States that it was not in a position to decide whether the letter constituted an instrument of accession, ‘due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine’.⁵³⁷

Yugoslavia, Article 1 Competence of the International Tribunal, para 35; Henckaerts and Doswald-Beck, 2005, p xxx; Henckaerts, 2005, p 187; Green, 2000, p 57; Roberts, A and Guelff, R, *Documents on the Laws of War*, 3rd edn, 2000, Oxford: Oxford University Press, pp 8, 68 and 196; and Quigley, in Bowen, 1997, p 26.

534 See generally, Henckaerts and Doswald-Beck, 2005; Henckaerts, 2005, p 187; and Green, 2000, p 51.

535 Authors who discuss the applicability of the law of occupation to the Occupied Palestinian Territories include, *inter alia*, Benvenisti, 2004; Watson, 2000, pp 136–42; Scobbie, I, ‘Natural Resources and Belligerent Occupation: Mutation through Permanent Sovereignty’, in Bowen, 1997, pp 221–90; and Roberts, in Playfair, 1992, pp 25–85, at 44–9.

536 There is some debate as to what ‘effective control’ actually entails. Does it require that a military force be present or can it refer to a military civil administration? Does it include control of air and sea space or just land borders? Does it require control of the entire territory or can it be over partial areas? Several cases consider this issue, e.g. see *Banković and others v Belgium and 16 other Contracting States*, Application no 52207/99, ECtHR (2001); *Loizidou v Turkey*, ECtHR (1995) Prelim Objections, and ECtHR (1996) Judgment on Merits; and most recently *Al Skeini v Secretary of State for Defence*, UK High Court of Justice, [2004] EWHC 2911 (QB), and the Court of Appeal, [2005] EWCA Civ 1609.

537 See ICRC, ‘State Parties to the Following International Humanitarian Law and Other Related Treaties’, 10 May 2010, at [www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) (accessed 10 May 2010).

It is admirable that the PA wishes to commit to these laws and fundamental standards and, as many of them constitute custom, it can be argued that it is bound under custom. However, it is clear that it is the state party of Israel which has overarching obligations legally to ensure that international humanitarian law is adhered to within the territory that it occupies.

Provisions relative to the right to water under the Geneva Conventions

Protections for the right to water are contained within several provisions of the Geneva Conventions,⁵³⁸ with the most extensive provisions concerning civilians contained within the Additional Protocols.⁵³⁹ Under Geneva Convention IV, Article 55 protecting maintenance of food supplies and Articles 23, 59, 60, 61 and 62, all concerning relief schemes, are applicable to the civilian population of the OPTs in general.⁵⁴⁰

Article 55 is a broad provision detailing the obligations on the part of the occupying power, in this case Israel, to protect a right to food and as a consequence an implicit protection of water:

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account . . .

The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.⁵⁴¹

538 *Inter alia*, Geneva Convention III, Arts 20, 26, 46 and 51; and Geneva Convention IV, Arts 36, 49, 76, 89, 91, 100 and 127.

539 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977, Arts 54, 55 and 69, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1977, Arts 14 and 18(2).

540 Other articles within Geneva Convention IV are applicable to relief and specific groups, e.g. internees. See Arts 108, 109, 110 and 111. See also Art 89 regarding drinking water and internees, and Art 85 concerning water for sanitation and hygiene of internees.

541 The concept of a Protecting Power is provided for in Geneva Convention IV, Art 9, Common Art 8 of other three Geneva Conventions, and Additional Protocol I 1977, Art 5. It is a mechanism by which an elected representative, whether state or the ICRC becomes an independent mediator and monitor between two states in conflict. See Benvenisti, E., *The International Law of Occupation*, 1st edn, 1993, Princeton, NJ: Princeton University Press, pp 204–7, for an examination of this provision. Also Pictet, J (ed), *Commentary on the IV Geneva Convention*, 1958, Geneva: ICRC, pp 80–92.

This article expands greatly the obligations of the occupying power to help ensure the basic needs of the population are met. Under Hague Regulations, Article 43, the parallel provision spoke only of a responsibility to maintain public order and safety.⁵⁴² It is also interesting to note that there is also an obligation here, on the part of the protecting power, to monitor the food situation within the occupied territory, 'except where temporary restrictions are made necessary by imperative military requirements'. This would seem to indicate a monitoring mechanism to ensure that this protection is being upheld, or at least to be aware if it is breached and take action. However, in practice the concept of a 'Protecting Power' is problematic and has only been used twice since the Second World War: during the Suez conflict 1956 and Goa 1961.

The 'sister' article to Article 55 is Additional Protocol I Basic Needs in Occupied Territories, Article 69. This article extends further the obligation upon the Occupying Power to include provision of 'clothing, bedding, means of shelter and other supplies essential to the survival of the civilian population of the occupied territory'. This article is more comprehensive and detailed and can also be considered custom as it reiterates the basic customary rules of international law as contained in Articles 54 and 55, already discussed.⁵⁴³ As such, it provides a basis for a right to a basic minimal level of water for survival.

The remaining articles listed refer more specifically to the obligation to ensure relief consignments of food, which must include water as an essential foodstuff for survival. The majority of these provisions make reference to the general term 'relief consignments' or 'relief schemes' but subsequently specify foodstuffs and other elements required for basic needs, such as clothing and medical supplies. Article 59 states that the occupying power must agree to these consignments 'facilitate them by all the means at its disposal' and importantly, allow them free passage to the occupied population.⁵⁴⁴

In addition to these broad provisions, Geneva Convention IV, Article 23 is more specific and is especially concerned with vulnerable groups:

Each High Contracting Party . . . shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.⁵⁴⁵

It is worth noting that although none of these provisions explicitly detail water, it is interpreted that water is an element of food or foodstuffs, as it is the most essential

542 Ibid.

543 Henckaerts and Doswald-Beck, 2005, pp 186–200, at 193.

544 See Geneva Convention IV, Art 59. Geneva Convention IV, Art 60, also provides that the occupying state may not divert relief consignments from the purposes for which they are intended, except in cases of urgent necessity, in the interests of the civilian population and with the consent of the protecting state. Art 62 provides for the sending of individual relief consignments, 'subject to imperative reasons of security'.

545 Geneva Convention IV, Art 23. A similar provision is included in Additional Protocol I in Art 70 (1), Relief Actions, but there is no correlative provision concerning vulnerable groups under Additional Protocol II.

foodstuff for survival. Thus implicitly these provisions protect the occupied populations' right to water, as an essential foodstuff. This implicit recognition can be seen as similar to the provisions for water under the ICESCR and is not ideal as it leaves much room for interpretation of what essential foodstuffs actually comprise. The substance and nature of such a right is not detailed. It does not provide guidance as to how much food or water is necessary and what the quality of these foodstuffs should be. Conversely, this lack of definition may be advantageous as a right to water could be determined as an element of such a broad general provision. Furthermore, some guidance can be taken here from other provisions under humanitarian law,⁵⁴⁶ which seem to indicate a threshold of protection at the level of 'survival' rights⁵⁴⁷ and as this is the only guidance available, one can only assume that this very basic level of enjoyment is the level of protection for civilians under humanitarian law. This may seem reasonable in the midst of high-intensity conflict, but under occupation where 'semi-normality' is the daily situation, more extensive protection is required.

Conversely, an exception to this level of provision lies under Geneva Convention III, regarding prisoners of war and Geneva Convention IV concerning internees. Here the provisions concerning water would seem to advocate a higher level of provision for this specific group, based on sufficiency to maintain good health. For example, Article 46, paragraph 3, states that prisoners of war should be supplied with 'sufficient food and drinking water to keep them in good health'.⁵⁴⁸ This basic needs approach however is not evident in the wider provisions relating to civilians generally.

Therefore, although Israel can be seen to have obligations to protect the occupied civilians' water essential for survival, under humanitarian law the level of protection for civilians not also within a specific protected (vulnerable) group, is minimal and the legal basis for a right to water concerns itself with a very basic level of sufficiency and limited provision regarding access.

In addition to the more specific provisions noted, Israel can also be seen to have obligations relative to water, arising from broad ranging articles such as Geneva Conventions, Common Article 3, both as a state party and under customary rules of international humanitarian law.⁵⁴⁹ Common Article 3 states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

546 E.g. Additional Protocol I, Arts 54 and 69, already discussed. Also Geneva Convention III, Art 20; Additional Protocol II, Art 14.

547 See previous discussion of survival water in Ch 2.

548 Geneva Convention III, Art 46, para 3. Also see Geneva Convention III, Art 26. Similarly, see Geneva Convention IV in regard to internees, Arts 89 and 127.

549 For determination of Common Art 3 as custom, see ICJ case, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits, Judgment, 27 June 1986, (1986) *ICJ Reports* 114, para 218. Also Henckaerts and Doswald-Beck, 2005, pp 306–8.

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria . . .

This article thus applies in all cases of conflict and serves as a basic minimum protection under all circumstances. As Gutteridge noted at the time of drafting, Article 3 contains many aspects that should ensure observance of certain fundamental human rights.⁵⁵⁰ It would be possible to argue that provision of water is an element of humane treatment and that for example, if water is withheld it could constitute torture. This would be analogous with the prohibition of withholding food as a punishment and would constitute both a breach of Common Article 3 and the human right to water.⁵⁵¹

An example of the applicability of Common Article 3 can be seen in the Final Report of the Commission of Experts on events in Rwanda in 1994, established by the Security Council Resolution 935 (1994), 1 July. The Commission was required to examine and give conclusions as to evidence of grave violations of humanitarian law within Rwanda. Its final report stated a number of violations under Common Article 3, including, *inter alia*, rights of internees and detainees to food, water and health care; the right to receive relief; and guarantees for the protection of civilian objects indispensable to the survival of the civilian population.⁵⁵²

This opinion is promising, however, it is evident that it would be very difficult to establish a breach of this provision in relation to everyday violations of the right to water for the general population, as this would be more difficult to prove and as the term 'treated humanely' is so non-specific.

Ultimately, in cases where other provisions are contested, especially in cases of low thresholds of applicability and situations where the nature and status of conflicts are challenged, Common Article 3 provides essential minimal protection of human rights and as such Israel is obligated under its provision. In terms of establishing a right to water, however, other more specific provisions are more useful, if they can be applied.

550 Gutteridge, in Meron, T, 'The Humanization of Humanitarian Law', (2000) 94(2) *American Journal of International Law* 239–78, at 246. See also Gutteridge, J, 'The Geneva Conventions of 1949', in *British Yearbook of International Law*, 1949, Oxford: Clarendon Press, pp 294 and 300.

551 Under ICESCR, Art 11 and the CAT; for prohibition of torture see, *inter alia*, Geneva Convention I, Art 50, Geneva Convention II, Art 12, Geneva Convention IV, Art 32, Additional Protocol I, Art 75; for prohibition of collective punishment, see Hague Regulations, Art 50, Geneva Convention IV, Art 33, Additional Protocol I, Art 75; for prohibition of starvation as a weapon, see Protocol I, Art 54 and Protocol II, Art 14 and Rome Statute of the International Criminal Court 1988, Arts 7(2)(b) and 8 (2)(b)(xxv). Hereinafter referred to as the Rome Statute 1988.

552 UN Security Council, Commission of Experts on events in Rwanda, *Final Report of the Commission of Experts on Events in Rwanda Established Pursuant to Security Council Resolution 935(1994)*, S/1994/1405, Annex, 9 December 1994, paras 115–18, 122 and 123. Also see Rosas, A and Sandvik-Nylund, M, 'Armed Conflicts', in Eide, A *et al*, 2001, pp 407–21, at 419.

In addition to the provisions within the Geneva Conventions, there are applicable provisions within the Additional Protocols. Unfortunately, as noted above, Israel is not a party to the Additional Protocols, but a certain number of these provisions that contain a water element can be viewed as within the rules of customary international humanitarian law. For example, Protocol I, Article 54(2), Prohibition of Attacks on Objects Indispensable to the Survival of the Civilian Population, and Article 54(1), Prohibition of Starvation, are considered rules constituting custom. Likewise, under Protocol II, the mirror provisions covering these rules can be found under Article 14 and also amount to custom.⁵⁵³ Thus, Israel is obligated under these rules, even though it is not a party to the protocols.⁵⁵⁴

The provisions protecting civilian persons' right to water are comprehensive within these articles. Article 54 (2) states:

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

This provision contains explicit recognition of a right to water in that it protects water supply and access to water, as well as protecting a wider right to food and sustenance and civilian persons' means of survival. It is notable that all forms of damage have been covered: direct attack or destruction, removal or any action that renders the object useless.

Under Article 54(1), starvation of civilians as a method of warfare is prohibited.⁵⁵⁵ This provision contains an implicit right to water, as withholding water would be a primary element of starvation. Furthermore, Article 54(3)(b) qualifies what starvation entails, including, *inter alia* inadequate water.

This provision is reiterated in the Rome Statute of the International Criminal Court 1988 and if starvation as a weapon is extreme and part of a wider campaign of destruction then it can constitute a war crime or crime against humanity.⁵⁵⁶ Moreover, Skogly argues that severe violations of economic and social rights, such as the deliberate withholding of food and water causing starvation, should be seen as a part of crimes against humanity.⁵⁵⁷ However, in much more subtle situations where there is covert discrimination of food or water resources resulting in poverty

553 See Henckaerts and Doswald-Beck, 2005, pp 189–91. Also Henckaerts, 2005, pp 187–93.

554 See Scheinin, 2007, para 7.

555 Additional Protocol I, Art 54(1), 'Protection of Objects Indispensable to the Survival of the Civilian Population'.

556 See Rome Statute 1988, Arts 7(1)(b), (2)(b) and 8(2)(b)(xxv).

557 See Skogly, S, 'Crimes Against Humanity – Revisited: Is there a Role for Economic and Social Rights?', (2001) 5(1) *International Journal of Human Rights* 58–80.

and hunger then it may be possible to claim a breach under these provisions as contained within humanitarian law.⁵⁵⁸

Overall, these provisions are significant, as they explicitly take account of specific water infrastructure and access and a wider right to water and food for survival.⁵⁵⁹ Crucially, as noted previously, these provisions containing a water element are custom and therefore binding upon Israel. Moreover, the prohibition of starvation as a method of warfare is in essence, a slightly different provision to the others included within the Geneva Conventions, as it relates not just to the protection of non-combatants or prisoners of war, but has its roots in the older tradition of the laws of war; that is, those rules governing methods and means of warfare,⁵⁶⁰ which Israel accepts as governing the occupied territories. As such, they are very important as a basis for establishing violations of the human right to water.⁵⁶¹

Another provision that has its basis in the laws of war, rather than humanitarian concerns, is Protocol I, Article 55(1) concerning environmental damage due to means of warfare. Although not explicit in mentioning water it can be interpreted as including prohibition of means of warfare which could pollute the water supply directly, or through pollution of the land and it is notable that it refers to the health and survival of the population, humanitarian concerns that are key elements of the right to water:

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare, which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.⁵⁶²

Provisions relative to the right to water under the Rome Statute 1988

As noted previously, the prohibition of starvation as a weapon has most recently been enshrined within the Rome Statute 1988,⁵⁶³ under Article 8(2)(b)(xxv), Prohibition of Intentional Starvation by Attacks on Objects Indispensable to the

558 For further reading, see Green, 2000, pp 142–44. Also, Provost, R, 'Starvation as a Weapon: Legal Implications of the United Nations Food Blockade against Iraq and Kuwait', (1992) 30 *Colombia Journal of Transnational Law* 577–632.

559 Under Protocol II, Art 14, these two provisions are combined to give similar protection of a right to water.

560 See prohibition of poison and poisoning within Hague Regulations 1907, Art 23(a).

561 It is also notable that the rules contained within Art 54 are contained within the Israeli Military Manuals confirming state practice and a national legal basis for this provision. See Israel Military Advocate General, *Manual on the Laws of War in the Battlefield*, 1998, Military Advocate General HQ, Military School, pp 22, 88, 137 and 213. See also Henckaerts and Doswald-Beck, 2005, Vol I, pp 188 and 190, and Vol II, p 4201. Regarding prohibition of attacks on objects essential for survival of civilians, exceptions, see *Manual on the Laws of War in the Battlefield*, 1998, p 316. Also see Henckaerts and Doswald-Beck, 2005, Vol I, p 192.

562 Protocol I, Art 55(1).

563 17 July 1998, entry into force 1 July 2002: 139 signatories, 111 parties as of 17 May 2010.

Survival of the Civilian Population, and Article 7 (2)(b), Prohibition of Deprivation of Access to Food Causing Extermination. These articles reaffirm the provisions found within the Geneva Conventions and Additional Protocol I, Article 54(1) and (2) and Additional Protocol II, Article 14. Article 7(2)(b) states that a crime against humanity includes, 'the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population'. However, to constitute a crime against humanity the deprivation of food or water must be part of a systematic or sustained attack resulting in death.⁵⁶⁴ Therefore, for cases of a lesser nature where deprivation of water caused ill health but not death, this provision could not be invoked.

In contrast, deprivation of water as starvation could be provided for under Article 7(1)(h), Persecution, as although this paragraph does not include explicit reference to food, 'severe deprivation of fundamental rights' could include the right to water. However, any violations would be conditional 'by reason of the identity of the group or collectivity'.⁵⁶⁵ Despite this, significantly, this provision could take account of deprivation of water, which results in lesser degrees of harm than necessary for extermination; that is, not just that which results in death.

This is also true of violations of the right to water under Article 8, 'War Crimes', which, again, prohibits starvation of civilians as a method of warfare, including impeding relief supplies and attacks upon civilian objects, which could include, for example, water installations.⁵⁶⁶

However, whereas to constitute a crime against humanity warfare does not necessarily have to be taking place, for Article 8 to apply, starvation by deprivation of water and or destroying civilian objects such as water installations must be part of a nexus of warfare. The intent has to be that the perpetrators were aware of Geneva Conventions and failed to abide by or violated purposefully the provisions. This does include, however, situations of occupation as provided for under Geneva Convention IV and Additional Protocols I and II. Furthermore, deprivation of water could be a part of genocide as provided for under Article 6. This would entail 'Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.⁵⁶⁷ As such, deprivation of water would have to be part of wider campaign to deny basic needs for survival, with intent to destroy a particular group in the whole or in part. An example of such a policy is illustrated by the conflict in Bosnia Herzegovina.⁵⁶⁸

564 Rome Statute 1988, Art 7(1)(b).

565 Ibid, Art 7(2)(g).

566 Ibid, Art 8(2).

567 Ibid, Art 6(c).

568 Security Council Resolution 819 (1993), para 8 required that humanitarian assistance be delivered without impediment to all areas of Bosnia and Herzegovina. However, these relief supplies were prevented from getting through. The UN Mission set up pursuant to this resolution reported that 'Impediments to the delivery of humanitarian assistance constitute a serious violation of international humanitarian law' and that impediments of such kind together with cutting of electricity and water supplies 'have put into effect a slow motion process of genocide'. UN Security Council Mission to Bosnia Herzegovina, *Report of the Security Council Mission Set Up Pursuant to Resolution 819 (1993)*, UN doc S/25700, 30 April 1993, p 6, para 19. See also Rosas and Sandvik-Nylund, in Eide *et al*, 2001, pp 407–21, at 418.

In the main, the provisions relating to a right to water contained within the Rome Statute 1988 reaffirm basic premises that can be seen in international humanitarian law, for example prohibition of starvation as a means of warfare and deprivation of objects indispensable to civilians' survival, but the important difference being that these violations can now be tried in court. Consequently, the provisions within the Rome Statute 1988 represent a significant development in terms of stricter enforcement and remedy for breaches of international humanitarian law and hence the right to water during conflict. As Rosas and Sandvik-Nylund note: 'The obligations of parties to conflicts and third states relating to humanitarian assistance could be underlined by a more vigorous emphasis on the notion of criminal responsibility'.⁵⁶⁹ This would now seem to be operational to a degree. However, the provisions regarding water are conditional on certain criteria, for example, group identity. Moreover, the threshold for establishing a breach is very high. As such, the provisions under the Geneva Conventions may be more useful for establishing day-to-day violations of a right to water.

Specifically in regard to Israel, despite signing the Rome Statute 1988 on 31 December 2000, Israel ultimately voted against the Statute. Following signature, the government of Israel sent a communication to the UN Secretary-General, stating that Israel had no intention of ratifying the statute and 'Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty'.⁵⁷⁰ Furthermore, at a recent conference, Israeli human rights NGOs analysed the trigger mechanisms for the International Criminal Court to have jurisdiction and noted that with regard to Israel, at present only the Security Council would be in a position to refer a case of a crime committed on Israeli territory or by an Israeli citizen.⁵⁷¹ Setting aside the Rome Statute 1988, Israel is bound by the provisions relating to prohibition of starvation and destruction of civilian objects, as customary rules of international humanitarian law, accepted by Israel under the Geneva Conventions and Additional Protocols and the Hague Convention 1907.

569 Rosas and Sandvik-Nylund, in Eide. *A et al*, 2001, pp 407–21, at 417.

570 Rome Statute 1988, Israel, Note 3, submitted on 28 August 2002. See UN Treaty Collection, Chapter XVIII Penal Matters, Rome Statute, at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtidsg_no=XVIII-10&chapter=18&lang=en (accessed 17 May 2010).

Israel had previously voted against the Rome Statute 1988 along with six other states: the United States, China, Iraq, Libya, Qatar and Yemen. See UN Press Release L/ROM/22, 17 July 1998 (UN Diplomatic Conference).

571 Participants also criticised the signature by Shimon Perez and John Bolton on 4 August 2002 of a reciprocal bilateral immunity agreement that forbids the surrender of American or Israeli nationals to the International Criminal Court, without the consent of the national's government. See International Federation for Human Rights, 'Prominent Israeli Human Rights Organizations Met Last Week to Discuss the International Criminal Court', 14 June 2006, at www.fidh.org/article.php3?id_article=3402 (accessed 14 June 2006).

Provisions relative to the right to water under the Hague Regulations

Prior to the drafting and adoption of the Geneva Conventions, the Hague Regulations were used as the main instrument of the laws of war and are deemed customary international law.⁵⁷² The Hague Regulations are significant in that they are the only instrument of international humanitarian law that Israel deems applicable *de jure* to the OPTs as customary international law. Subsequently, when discussing their obligations under international humanitarian law within their national legal structures, it is these laws that they refer to, for example, within the Supreme Court of Israel.⁵⁷³ However, if Israel adheres to these laws because they are customary rules, then it must also be bound by all other customary rules of international law. Therefore, the Geneva Conventions and aspects of the Additional Protocols, as well as certain human rights provisions must also be binding upon Israel.

Notwithstanding this point, the Hague Regulations contain little that could be considered as providing a specific right to water. This is probably due to the fact they were drafted as an instrument to govern the laws of warfare, for those fighting; that is, as rules for combatants, rather than as an instrument to protect civilians involved within conflict. This can be seen partly as a consequence of the period in which they were drafted, when the nature of war was very different to the modern conception of warfare. At the time they were drawn up, the conduct of hostilities would usually have been limited to combatants of the forces and use of tactics that involved widespread threat or injury to civilians would have been highly irregular.

However, there are several broader foundations contained within the Hague Regulations where a right to water could be invoked: firstly, under the concept of starvation as a weapon contained within Article 23 and restated and expanded upon within Additional Protocol I, Article 54, as previously discussed; secondly, under the general 'laws of humanity' concept, provided for within the Martens clause. This clause constitutes the oldest surviving and most widely accepted provision of customary humanitarian law relating to humane treatment, and originates in the preamble of the 1899 Hague Convention II and 1907 Hague Convention IV. It can be seen as epitomising the humanitarian dimension of the 'laws of war' and in a similar manner to that of the more recent Common Article 3 of the Geneva Conventions, the clause states:

572 International Military Tribunal of Nuremberg, Judgement, 30 September and 1 October 1946, p 65; *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, 3 May 1993, (S/25704), *Regarding the Establishment of the International Criminal Tribunal for the former Yugoslavia, Article 1 Competence of the International Tribunal*, para 35. Henckaerts and Doswald-Beck, 2005, p xxx; Green, 2000, p 34; Roberts and Guelff, 2000, pp 8 and 68.

573 Cases where Israel has referred to the Hague Regulations as the legal basis for its conduct in the OPTs can be found within several judgments of the Supreme Court of Israel including, *inter alia*: *Ayyoub v Minister of Defence (Beit El case)* 1979, HC 606/78, 610/78, PD33 [2] 113; and *A Teachers Housing Cooperative Society v The Military Commander of the Judea and Samaria Region*, HC 393/82, PD37 [4] 785, 793. See Qutty, M, 'The Application of International Law in the Occupied Territories as Reflected in the Judgements of the High Court of Justice in Israel', Playfair, E (ed), *International Law and the Administration of Occupied Territories*, 1992, Oxford: Clarendon Press, pp 87–124.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.⁵⁷⁴

However, as the Geneva Conventions and many rules contained within the Additional Protocols are now deemed custom and, furthermore, contain stronger provisions for a right to water, it is unlikely that this clause would be used as a basis for establishing violations of the said right. Conversely, the very strength of the Martens clause lies in its broad application and unquestionable status as customary international law.⁵⁷⁵

In addition, there is some argument that under Hague Regulations, Articles 55 and 56, water as a natural resource of a territory can be seen as an element of requisitioned property. As such, the occupying power is limited in how it utilises these natural resources. Depending on the limitations imposed, this provision could be used as a basis for establishing a breach of Palestinian water rights.⁵⁷⁶

Concluding remarks

Having reviewed the international sources of law for a human right to water within the OPTs, it is evident that a combination of international human rights law and international humanitarian law provide the optimum protection of the right in the current circumstances.

Regarding international humanitarian law, it is evident that there is a basic level of protection afforded to civilians concerning water under the Geneva Conventions. However, many of the provisions are without detail as to the specific nature of the protection listed. Furthermore, the level of protection provided for is minimal, constituting water essential for survival or in the case of specific groups, such as prisoners, at a level of basic needs. Consequently, the threshold that would need to be breached in order to establish a violation of this protection is extremely high and could only be enabled when violations are of an extremely serious nature where, it could be proved that one's right to life is endangered (grave breaches). As the ICRC notes:

574 Hague Convention II with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 29 July 1899; Hague Convention IV respecting the Laws and Customs of War on Land and its Annex: the Hague Regulations; Martens clause, Preamble, para 8.

575 See Scobbie, in Bowen, 1997, pp 221–90, at 246–49, for an interesting analysis of the Martens clause and its relevance to sovereignty over natural resources in cases of occupation. Also see Meron, T, 'The Martens Clause, Principles of Humanity and Dictates of Public Conscience', (2000) 94(1) *AJIL* 78–89.

576 See B'Tselem, July 2000, p 15. Also, Scobbie, in Bowen, 1997, pp 221–90.

By its very nature and purpose, humanitarian law cannot be applied to the whole issue of water resources, which are regulated in principle by national and international agreements initially destined for peacetime. In humanitarian law, the protection of persons entails the protection of objects, and all the rules briefly mentioned are intended above all to serve the humanitarian interest of protected persons. Though their scope may seem limited, full compliance with the relevant provisions is nonetheless prerequisite for the protection of objects indispensable to the survival of the civilian population. Water is of paramount importance, and water resources and installations intended for civilian use must be kept clear of military operations, or else entire populations will suffer.⁵⁷⁷

That the provisions under international humanitarian law are limited in their scope does not detract from their importance in the protection of basic water for survival of civilians during conflict. However, the key to realisation of the right to water during occupation is the parallel application of both these rules and those under international human rights law. This is noted by the CESCR in GC 15:

The Committee notes that during armed conflicts, emergency situations and natural disasters, the right to water embraces those obligations by which States parties are bound under international humanitarian law. This includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies . . . and ensuring that civilians, internees and prisoners have access to adequate water.⁵⁷⁸

In terms of monitoring the current level of enjoyment of the right to water within the OPTs, it must be remembered that all the state reports of Israel to each respective treaty monitoring body only contain information concerning the Israeli population within the OPTs and citizens of Israel 'proper'. As such, the enjoyment of all human rights for Palestinians within the territories is threatened, as it is difficult to monitor the situation. In particular, the enjoyment of the right to water within the OPTs is severely under reported and the overall situation is subject to distortion, due to the submission of information based solely upon information and data from Israel proper and West Bank settlements. Information on the enjoyment of economic and social rights by Palestinians is available to the Committee by means of the special consultative status NGOs, which submit concurrent reports alongside the state reports. In this way, the status of enjoyment of economic and social rights, inclusive of the right to water can be evaluated, albeit in a limited manner.

577 ICRC, 'Water and War' Resolution 2, 'Protection of the civilian population in periods of armed conflict', para F(c), extract from: *Report of the 26th International Conference of the Red Cross and Red Crescent*, 15 September 1995, at www.icrc.org/Web/Eng/siteeng0.nsf/html/57JMRV (accessed 1 June 2010).

578 GC 15, para 22. Original footnote omitted.

The CESCR has strongly condemned Israel's refusal to report on the economic, social and cultural rights in the occupied territories and continues to pressurise Israel to adhere to its responsibilities under the Covenant, including full compliance with its reporting obligations.⁵⁷⁹ However, other treaty monitoring bodies are not so robust in their recommendations. Thus, all treaty monitoring bodies must continue to pressurise Israel to comply with its monitoring obligations.

It is also certain that Israel is responsible under these agreements as the occupying power and as the state party to the treaties. The continuing denial of its obligations within the OPTs must be addressed by other state parties to both the ICESCR and the Geneva Conventions as part of its international obligations under the treaties. Notably, under international humanitarian law, the international community carries an obligation to ensure that Israel complies with its international obligations to protect those within its occupied territory (jurisdiction). Under Common Article 1 of the Geneva Conventions and Additional Protocols, state parties agree to ensure respect for the Conventions and Protocol I 'in all circumstances'.⁵⁸⁰ As Pictet notes, this provision means that 'The contracting parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally'.⁵⁸¹ Therefore, it is also the responsibility of the international community to take action to ensure that Israel respects, protects and fulfils its obligations correlative to rules which encompass protections for a right to water under international humanitarian law. Under international human rights law, other state parties are obliged to assist Israel in realising this right, under the ICESCR, Article 2.

In terms of the obligations afforded to the PA, it can be seen as having a moral obligation and could have legal obligations arising from customary international law. Further, in areas where it has responsibility for civilian administration the PA may have more extensive legal obligations although the scope of these remains unclear. Ultimately, the PA is limited in its capacity to act due to the occupation by Israel. As such, it is Israel which holds the full legal obligations to realise the right to water, until such time as the PA becomes the recognised government of a sovereign Palestinian state.

In addition to obligations under international law, the Palestinians and the Israeli government are subject to the relevant provisions under domestic and bilateral law. In Chapter 5, I examine the bilateral peace agreements known as the Oslo Accords

579 Israel's third periodic report to the CESCR was due to be considered in a pre-session working group in November 2010. The advance version of the state report does not contain any information on the Palestinian population of the occupied territories. See Israel (State of) Ministry of Justice and Ministry of Foreign Affairs, *Third Periodic Report Concerning the Implementation of the ICESCR 2008 (Advance Unedited Version)*, E/C.12/ISR/3. Previously, the CCPR also requested that Israel report on the OPTs as part of its obligations under the ICCPR. The most recent periodic report of Israel to the CCPR also does not contain any information on the Palestinian population of the OPTs. See CCPR/C/ISR/3, 21 November 2008.

580 Geneva Conventions I–IV and Additional Protocols I, Common Art 1.

581 Pictet, 1958, p 16.

as well as the relevant domestic legal provisions under both Palestinian and Israeli national law in order to assess if there is any basis for a right to water at national level. Moreover, I draw some overall conclusions as to which bodies of law provide the most comprehensive protection and provision for the right within the context of the OPTs.

5 The right to water in the Occupied Palestinian Territories (West Bank)

Part II – Bilateral and domestic legal sources

The international sources of law for a human right to water are evident. However, there are two other areas of the law which are significant in determining a legal basis for the right within the context of the OPTs: the bilateral agreements between Israel and the PLO, commonly known as the Oslo Accords and relevant national law. The Oslo Accords form the current legally binding agreement for peace and a two-state solution between Israel and the Palestinians. The political background to these agreements is noted in Chapter 4. Subsequently, the specific legal provisions contained within the Oslo Accords concerning water and human rights require examination.

Secondly, relevant national law is assessed. The domestic law applicable to the OPTs is complex and varies depending on the particular geographical area of the territories. This chapter examines Palestinian national law and appropriate Israeli law that is applicable to the OPTs of the West Bank.

Israel has obligations under both the bilateral agreements with the PA and under the law of the Israeli Civil Administration, otherwise known as Military Orders. Israel has imposed numerous Military Orders which affect enjoyment of the right to water as well as displacing Palestinian law regarding water. In addition, the question of the obligations of the Palestinian authority is addressed. The PA has obligations under the terms of the Interim Agreement and may have obligations under Palestinian law, however the scope of these is unclear.

Bilateral agreements – the Oslo Accords

On 13 September 1993, the PLO and Israel signed the Declaration of Principles thus signalling what was thought to be a breakthrough in the peace process, at the height of the first Intifada. This document set out principles and a timetable for the establishment of self-governing Palestinian authority for the temporary period until ‘permanent status’ negotiations took place.⁵⁸²

⁵⁸² See Art I, Aim of the Negotiations; ‘The aim of the Israeli–Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council (the “Council”), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338’.

In relation to water, the Declaration of Principles stated the intention for cooperation between the two parties in the field of water, through the establishment of a committee on Israeli–Palestinian Economic Cooperation,⁵⁸³ which should focus, among other things, on the following:

Cooperation in the field of water, including a Water Development Program prepared by experts from both sides, which will also specify the mode of cooperation in the management of water resources in the West Bank and Gaza Strip, and will include proposals for studies and plans on water rights of each party, as well as on the equitable utilization of joint water resources for implementation in and beyond the interim period.⁵⁸⁴

The committee was also charged with the establishment of an ‘environmental protection plan’.⁵⁸⁵ Other articles of relevance include, Article IV detailing jurisdiction, Article V regarding the Permanent Status Negotiations, Article VI concerned with the Transfer of Powers, including *inter alia* education, culture, health, social welfare – all areas closely related to certain economic, social and cultural rights. Article VII set out the terms for the Interim Agreement.⁵⁸⁶

This agreement was signed on 28 September 1995 and superseded previous agreements, with the exception of the Declaration of Principles and set out the powers and structure of the Palestinian Council,⁵⁸⁷ elections for the said body and commitments to the permanent status negotiations on the part of both parties. As well as establishing authority for the Palestinians in the majority of West Bank towns,⁵⁸⁸ the Interim Agreement establishes the infrastructure and mechanisms to implement the principles stated in the Declaration of Principles.

In relation to human rights, the Interim Agreement includes a broad provision, Article XIX, Human Rights and the Rule of Law, which states:

583 See Art XI, Israeli–Palestinian Cooperation in Economic Fields: ‘Recognizing the mutual benefit of cooperation in promoting the development of the West Bank, the Gaza Strip and Israel, upon the entry into force of this Declaration of Principles, an Israeli–Palestinian Economic Cooperation Committee will be established in order to develop and implement in a cooperative manner the programs identified in the protocols attached as Annex iii and Annex iv’.

584 Annex III Protocol on Israeli–Palestinian Cooperation in Economic and Development Programs.

585 Ibid.

586 Several additional agreements followed: The Gaza–Jericho Agreement – The Agreement on Preparatory Transfer of Powers and Responsibilities, signed at Erez on 29 August 1994, and the Cairo Agreement – Protocol on Further Transfer of Powers and Responsibilities, signed at Cairo on 27 August 1995. Both these agreements were superseded by the Interim Agreement (see Interim Agreement, Preamble, para 2), although it states that all previous agreements are superseded, the Declaration of Principles is not superseded in that the Interim Agreement puts into practice the principles laid out in the Declaration of Principles. For further discussion regarding this point and the legal status of the Oslo Accords, see Watson, G, *The Oslo Accords: International Law and the Israeli–Palestinian Peace Agreements*, 2000, Oxford: Oxford University Press.

587 The Interim Agreement refers to the PA as ‘Palestinian Council’ and is not to be confused with the Palestinian National Council of the PLO.

588 The Interim Agreement established three areas/zones within the West Bank: A, B and C, with A being an area governed by the PA which has full civil and military authority, area B being jointly administered between Israel and the PA, and area C remaining under full civil and military control of Israel.

Israel and the [Palestinian] Council shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally accepted norms and principles of human rights and the rule of law.

However, there is no reference to international human rights treaties, nor is there any detail of obligations held by either party. Moreover, despite the fact that the article would imply recognition of the humanitarian principles contained within the Geneva Conventions, the agreement does not mention these conventions either. This is not surprising, as Israel continues to refute the applicability of either system of law within the OPTs. Furthermore, the Interim Agreement does not mention the belligerent occupation status of the territories.⁵⁸⁹

In fact, many have argued that the advent of the Oslo Accords and the interim period following the Interim Agreement have resulted in a worsening of economic and social conditions for the Palestinians under occupation rather than offering hope. As the Center for Economic and Social Rights notes, violations of economic and social rights have increased. It concludes:

Under the Oslo process, Palestinians have suffered systematic abuse of the full range of their human rights. The extraordinary poverty in Palestine – a clear indication of economic, social and cultural rights violations results from deliberate policy decisions undertaken by governments and agencies taken within the Oslo framework.⁵⁹⁰

In relation to water, however, the agreement is more detailed and has provisions for several elements of water management within the territories. The central article detailing water is Article 40, Water and Sewage. The initial paragraph of this article provides a basis for Palestinian water rights within the West Bank, although it does not state this as a human right to water:

Israel recognises the Palestinian water rights in the West Bank. These will be negotiated in the permanent status negotiations and settled in the Permanent Status Agreement relating to the various water resources.⁵⁹¹

Although, the Israeli state acknowledges the water rights of the Palestinian people, the provision is not drafted in terms of an individual human right to water, but implies admission of a collective right of the Palestinians as a people, to some degree of usage of water from within the West Bank geographical territory, and arguably some ownership and control of these water sources. Unfortunately, the nature and

589 Quigley, in Bowen, 1997, p 31; Center for Economic and Social Rights, *Applying Economic and Social Rights in Palestine*, Palestinian Project Series 3, January 2000, New York, NY/Gaza: Center for Economic and Social Rights, p 7.

590 See Center for Economic and Social Rights, January 2000, pp 8 and 11. See also B'Tselem, July 2000, pp 68–69.

591 Interim Agreement, Article 40, Water and Sewage, Principles, para 1.

extent of these rights are to be defined in the permanent status negotiations, which to date, have not taken place.

In light of the 'hold' put on definition of Palestinian water rights by the Interim Agreement, several principles and mechanisms have been circumscribed in order to 'to coordinate the management of water and sewage resources and systems in the West Bank during the interim period'.⁵⁹² The following principles are listed:

Maintaining existing quantities of utilization from the resources, taking into consideration the quantities of additional water for the Palestinians from the Eastern Aquifer and other agreed sources in the West Bank as detailed in this Article . . . Preventing the deterioration of water quality in water resources; Using the water resources in a manner, which will ensure sustainable use in the future, in quantity and quality; Adjusting the utilization of the resources according to variable climatological and hydrological conditions; Taking all necessary measures to prevent any harm to water resources, including those utilized by the other side; Treating, reusing or properly disposing of all domestic, urban, industrial, and agricultural sewage; Existing water and sewage systems shall be operated, maintained and developed in a coordinated manner, as set out in this Article; Each side shall take all necessary measures to prevent any harm to the water and sewage systems in their respective areas; Each side shall ensure that the provisions of this Article are applied to all resources and systems, including those privately owned or operated, in their respective areas.⁵⁹³

These principles would seem to be comprehensive and in line with human rights law regarding a human right to water. However, on closer inspection it can be argued that certain principles listed are incompatible with each other. For example, the first principle states that existing quantities of water utilisation from the resources will be maintained. Following principles state that water resources will be used in a sustainable manner, thus preventing deterioration of water quality in water resources. It is already clear that water resources within Israel–Palestine are not being managed and utilised at a sustainable rate⁵⁹⁴ and damage to the water quality is already evident, for example, in Gaza.⁵⁹⁵ As such, these clauses are in conflict with one another and are already subject to breach on the ground. If water continues to be utilised at the current rate, sustainability is not possible.

The article also details the transfer of authority and states that the Palestinians:

shall assume, powers and responsibilities in the sphere of water and sewage in the West Bank related solely to Palestinians, that are currently held by the

592 Ibid, para 2.

593 Ibid, para 2.

594 Scarpa, D, 'Hydropolitics in Recent Israeli–Palestinian Relations', in *Hydrology: Science and Practice for the 21st Century*, Vol II, 2004, London: British Hydrological Society, pp 147–52, at 149.

595 For further reading on the unsustainable use of existing water sources, see Scarpa, 2004; Lonergan and Brooks, 1994, pp 105–20; and UNEP, January 2003, pp 34–40.

military government and its Civil Administration, except for the issues that will be negotiated in the permanent status negotiations, in accordance with the provisions of this Article.⁵⁹⁶

It is made clear within this provision that this does not entitle the Palestinians to ownership of either the water resource itself or related infrastructure, as this comes under the issues to be addressed in the permanent status negotiations.

Furthermore, despite other detailed provisions regarding additional water for Palestinian use during the interim period, establishment of a Joint Water Committee,⁵⁹⁷ establishment of a Supervision and Enforcement Mechanism (the Joint Supervision and Enforcement Teams)⁵⁹⁸ and fields for joint cooperation,⁵⁹⁹ the transfer of authority to the PA is in reality lacking. For example, under Article 40 provisions establishing the JWC, Israel can veto any new water project if it disagrees with it, through the 'consensus' clause of the JWC or through the Civil Administration.⁶⁰⁰ In a recent assessment of the restrictions on development of the water sector in the West Bank, the World Bank noted that the JWC has served as major constraint upon water resource management and that it does not function as a joint institution due to 'fundamental asymmetries – of power, of capacity, of information and of interest' enshrined in Article 40.⁶⁰¹

Contained within this same provision on mutual cooperation are provisions relating to sustainable use of water and the environment.⁶⁰² These provisions can be seen as a reiteration of the guarantees listed in Article 12, Environmental

596 Interim Agreement, Art 40.

597 Hereinafter referred to as the JWC. Interim Agreement, Art 40, Water and Sewage, states, 'In order to implement their undertakings under this Article, the two sides will establish, upon the signing of this Agreement, a permanent Joint Water Committee (JWC) for the interim period . . . The function of the JWC shall be to deal with all water and sewage related issues in the West Bank'. Detailed responsibilities and obligations of the JWC for the implementation of its functions are set out in Interim Agreement, Sch 8.

598 Known as JSET. The JSET structure, role, and mode of operation are detailed in Interim Agreement, Sch 9.

599 Including, *inter alia*, water-related technology transfer, research and development, training, setting of standards; in the development of mechanisms for dealing with water-related and sewage-related natural and man-made emergencies and extreme conditions, and in the exchange of available relevant water and sewage data.

600 Interim Agreement, Art 40, Water and Sewage, states, 'The JWC shall be comprised of an equal number of representatives from each side. All decisions of the JWC shall be reached by consensus, including the agenda, its procedures and other matters'. Also see B'Tselem, July 2000, p 5. For an in-depth analysis of the covert Israeli domination over water issues, inherent within the Interim Agreement, see Selby, J, *Water, Power and Politics in the Middle East: The Other Israeli-Palestinian Conflict*, 2003, London: IB Tauris, Ch 4, pp 95–118; and World Bank, April 2009.

601 World Bank, April 2009, pp 47–53, at 51. Also Amnesty International, 2009, p 28.

602 Interim Agreement, Art 40, Water and Sewage, Mutual Cooperation: 'Each side shall take all necessary measures to prevent any harm, pollution, or deterioration of water quality of the water resources; Each side shall take all necessary measures for the physical protection of the water and sewage systems in their respective areas; Each side shall take all necessary measures to prevent any pollution or contamination of the water and sewage systems, including those of the other side; Each side shall reimburse the other for any unauthorized use of or sabotage to water and sewage systems situated in the areas under its responsibility which serve the other side'.

Protection, and although they are comprehensive, in reality deterioration of the water quality is already an issue due to unsustainable extraction.⁶⁰³ In addition, these clauses contain elements on a parallel with those contained in the human right to water, such as the provision to protect the quality of water from pollution or contamination. However, they do not contain any direct provision for an explicit right to water, but rather approach the water issue from a general environmental perspective.

Overall, the Oslo Accords offer little by way of human rights guarantees and although they do detail interim measures to be undertaken regarding water, the crucial questions concerning ownership and control have been assigned to the permanent status negotiations, resulting in a 'freeze' on Palestinian water rights, according to this agreement. This combination of a 'freeze' upon the water rights of the Palestinians and the maintenance of the status quo regarding water use and management between the Israel and the OPTs has resulted in further deterioration of the water crisis since the advent of Oslo period to the present situation. As Selby notes, 'It is mistaken, to suggest that Oslo II in any way transformed, reconfigured or converted the responsibilities of either the Israelis or Palestinians in managing these [water] supplies'.⁶⁰⁴

Furthermore, Quigley notes this aspect of the Interim Agreement can be seen to be in breach of provisions under the Geneva Convention IV, as are other certain aspects of the agreement.⁶⁰⁵ These inconsistencies between the Oslo Accords and the Geneva Convention IV are due to the conflict between Article 47 of the latter, which forbids the occupying power to enter into any agreement with the agreed representatives of the occupied population which would relieve the occupying force of any of its obligations under the Geneva Convention IV⁶⁰⁶ and provisions within the Interim Agreement, under Article 40 which defer agreement on the water rights and sanction the status quo of the situation, thus maintaining Israel's dominance in the water sector.

Therefore, as Quigley argues, Israel may be in breach of its obligations under the Geneva Convention IV if it adheres to the provisions within the Oslo Accords that relinquish any of the rights of the occupied population contained within it.⁶⁰⁷ This would seem to be the case not just in relation to water rights but also in relation to the status of Jerusalem, the enforcement of military orders and the policy on settlements.⁶⁰⁸ Moreover, the latter two issues have consequences for the enjoyment of the right to water, for the Palestinians under occupation.

603 See Scarpa, 2004.

604 Selby, 2003, p 107.

605 Quigley, in Bowen, 1997, p 36.

606 This is to protect those under occupation from a corrupt or coercive regime who might work with the occupiers thus giving them potentially, total control and relinquishing certain human rights for the occupied population.

607 Quigley, in Bowen, 1997, p 36.

608 Regarding settlements, Declaration of Principles, Art 8, and Interim Agreement, Arts 12 and 17 are inconsistent with Geneva Convention IV, Art 49, which holds that settlements by the occupying force are illegal under international humanitarian law.

The question has also been raised as to which body of law takes precedence and the subsequent effects upon human rights. In these cases of conflict between the provisions as set out in the Interim Agreement and the provisions within the Geneva Convention IV, international humanitarian law must take precedence, as it is the Geneva Conventions which are deemed customary international law and as such the Geneva Conventions which contain the fundamental standards of humanity that must be adhered to at all times by states.⁶⁰⁹ The Geneva Conventions have a higher legal standing than the bilateral agreement of the Oslo Accords for this reason. As such, the Interim Agreement cannot be said to alter the status of the OPTs under the Geneva Convention IV.⁶¹⁰ Consequently, the Palestinian people within the occupied territories do have a right to water, which is protected under the Geneva Conventions irrespective of any inconsistency under the Interim Agreement. Equally, under international human rights law this is also the case.

There is also a question as to whether the more recent peace initiative, the Quartet's Roadmap for Peace⁶¹¹ supersedes the Oslo Accords. The Roadmap attempted to restart the stalled peace process. However, the Roadmap does not constitute a legal agreement⁶¹² and has no substantive content regarding water or human rights. The Roadmap only requires that both parties participate in an international conference to 'revive multilateral engagement' on issues including water resources. As such, the Interim Agreement remains the authoritative bilateral legal agreement between the two parties, setting out terms for a two-state solution to the conflict, including resolving the issue of water resource ownership and management.

Palestinian national law

The OPTs of the West Bank has a legal system that contains elements of Ottoman, British and Jordanian (Continental) law, in addition to Palestinian law⁶¹³ and Israeli military law (and Israeli civil law within the illegal Jewish settlements). The complexity of the system results from various occupations and rule of the territories over time.⁶¹⁴ Ottoman rule and then the British Mandate over the country led to a mixed system of law where some Ottoman Law was retained alongside the

609 Al Haq, 1993, p 18.

610 Scobbie, in Bowen, 1997, pp 221–90, at 259.

611 Quartet, 30 April 2003.

612 See Human Rights Watch, 1 January 2005.

613 In addition to formally codified Palestinian Law, it is worth noting the existence of the Penal Codes introduced by the PLO. These 'Penal Codes', although not formally codified or incorporated into local law, still exist and their mechanisms are used, one example being the security courts of the Palestinian police. These codes are repressive and have resulted in human rights violations and abuses of the most severe nature, including torture and inhuman treatment and loss of life. These laws, however, can be seen as concerned with issues relating to civil and political rights and do not infringe directly upon the enjoyment of economic and social rights. For further details see Human Rights Watch, *Middle East, Human Rights under the Palestinian Authority*, 3 October 1996, New York, NY: Human Rights Watch.

614 See Hussein Hiba, 10–14 October 2004, pp 2–3.

introduction of a complicated English Legal System.⁶¹⁵ After the partition of the country by UN Resolution 181 in November 1947 bringing an end to the British Mandate and the subsequent declaration of the state of Israel, the remaining area of the West Bank was taken under Jordanian control (with Gaza administered by Egypt). This has left different areas of the OPTs with varying legal systems.⁶¹⁶ These elements of law cannot be viewed as comprising one complex system; rather it can be said there are several systems operating concurrently and with little agreement as to which system takes precedence within the law. Marks notes that in its best form it can be interpreted as a 'Hotchpotch' of law and in its worst form as the 'absence of any real law'.⁶¹⁷

Notwithstanding this fact, the provisions of the Interim Agreement established key institutions as a basis for a legal system. The PLC is the sub-body of the PA charged with the authority to draft and adopt laws concerning those areas in which the PA is deemed to hold jurisdiction, under the terms of the Interim Agreement.⁶¹⁸ However, the PLC is limited from operating as a free and independent legal body, due to the terms of the Interim Agreement which limits its jurisdiction. It does not have the authority to amend or repeal any existing laws and must seek the agreement of the Israeli members of the Joint Legal Committee, or in the case of new laws concerning water, the JWC, to adopt any new laws. Further, the functioning of these bodies themselves is often suspended or under threat due to political instability both between Israel and the PA and more recently between the Palestinian parties, Hamas and Fatah. These difficulties ensure that the legal authority of the PLC is severely constrained. Moreover, at times, the implementation of the current laws can be limited due to this lack of effective functioning of the legal infrastructure. The result is that ultimately Israel remains in control of the occupied territories despite the appearance of Palestinian jurisdiction.⁶¹⁹

Despite the significant limitations upon the legal infrastructure, there are legal standards in place with relevance. In terms of human rights provisions there are certain key areas of the law that are clearly relevant. The work of the PLC on drafting and adoption of a Palestinian Basic Law 2002 (amended 2003, 2005) forms the framework for the constitution of any future Palestinian state. As such, the provisions within are of fundamental importance. Thus although the PLC has not passed any general human rights laws or laws particular to individual substantive

615 International Commission of Jurists/Centre for the Independence of Judges and Lawyers, June 1994, pp 11–14.

616 Ibid, pp 11–14; Marks, in Bowen, 1997, p 169. Also, Birzeit University Institute of Law, 'Overview of the Legal System in Palestine', at <http://lawcenter.birzeit.edu/overview.html> (accessed 21 February 2006).

617 Marks, S, 'Domestic Application of International Human Rights Standards', in Bowen, 1997, pp 169–200, at 172.

618 For the legal basis of the PLC, see Interim Agreement, Art 3. Provision for jurisdiction of the PLC is provided for under Interim Agreement, Art 17; and for powers of the PLC, see Interim Agreement, Art 18. It should be noted that the PLC holds no official powers in regard to international relations or international law. This task falls to the Palestinian National Council of the PLO.

619 See Interim Agreement, Art 18. Also see Selby, 2003, p 100.

rights, the Palestinian Basic Law contains some pertinent human rights provisions. In addition, in relation to water, in conjunction with the PWA, the PLC drafted and adopted the Palestinian Water Law No 3/2002.⁶²⁰ The Palestinian Water Law is of significance as it regulates the whole water sector including stipulating principles for ownership of water resources and water management within the OPTs.

Palestinian Basic Law 2003 (Constitution)

The first of these sources, the Palestinian Basic Law 2003, which replaced the Basic Law 2002, further amended in 2005⁶²¹ and serves as the basis for a Palestinian Constitution for any future sovereign state. The Basic Law covers such areas as constitutional principles, executive, judicial and legislative authority and public rights and freedoms, the latter containing the minimal provisions relating to human rights, including some economic and social rights.

In the initial drafts of the law, the provisions concerning adherence to international human rights standards, including the ICESCR, were strong:

Palestine recognises and respects the fundamental human rights and freedoms prescribed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and other Cruel Inhuman or Degrading Treatment and Punishment and other Conventions and Covenants which secure such rights and freedoms. Palestinian authorities shall adhere to the said international agreements.⁶²²

This draft also catered for and provided for specific rights, whilst utilising the language and principles of international treaties. Those provided for included, *inter alia*, Article 9, Right to Life, Article 10, Non-discrimination, Article 11, Freedom from Torture or Cruel and Degrading Treatment, Article 24, Work and Article 25, the Right to Education.⁶²³

The adherence to international instruments evident in this draft, however, is not evident in the adopted, ratified bill of 2002 and current amended version of 2003.

620 In addition, there are certain laws, which can be seen as related indirectly to the human right to water, such as the Public Health Law, No (20), Chapter 7, Arts 45 and 42 (Signed by the PLC 27 December 2004, Ratified and published 23 April 2005). Also, the Natural Resources Law No (1), 1999.

621 The Basic Law was ratified on 29 May 2002 by the PLC, entered into force on 1 June 2002, and was amended in 2003 and 2005, see www.palestinianbasiclaws.org and www.miftah.org, Treaties and Agreements (accessed 1 March 2010).

622 Chapter Two, (I) Fundamental rights and freedoms, Art 8, Draft Basic Law for the National Authority in the Transitional Period (4th draft), 11 December 1995, (JMCC, occasional document series no 5), p 26, February 1996, at www.jmcc.org/research/series/basic2.html (accessed 28 February 2006).

623 See discussion by Hunt, in Bowen, 1997, p 202; Marks, in Bowen, 1997, p 171 and International Commission of Jurists, 1994, pp 85 and 95.

Provision is much less specific and therefore weaker in content. It now states the intention to 'become a party to regional and international declarations and covenants that protect human rights'.⁶²⁴ Article 10(1) states, 'Basic human rights and liberties shall be protected and respected'. Thus, the provision entails only a very broad reference to human rights and does not reflect the original draft provision that specified particular and fundamental international human rights treaties.

Conversely, as the PA in its present form cannot become a party to the Covenants, as the OPTs do not constitute a sovereign state, this provision may reflect a more realistic interpretation of international law and of what it can be responsible for as a legal entity in this context; that is, it can only state its intention to become a state party and to adhere to the principles in its own undertakings as the transitional authority.

Moreover, the Basic Law 2003 contains certain fundamental principles of human rights law, such as the principle of non-discrimination provided for in Article 9: 'Palestinians shall be equal before the law and the judiciary, without distinction based upon race, sex, colour, religion, political views or disability'.⁶²⁵ It also provides for certain specific rights: Articles 11–22 deal with civil and political rights. There are also provisions relating to specific economic and social rights: *inter alia*, Article 23, Housing, Article 24, Education and Article 25, Work. However, there is no provision for the right to health, right to food or right to water. One positive aspect is the provision under Article 33, which deals with the right to a clean environment. This can be interpreted broadly as encompassing an element of the human right to water, that of quality and provision and protection of satisfactory environmental health. This clause also incorporates a strong notion of sustainability in relation to the environment: 'The enjoyment of a balanced and clean environment is a human right. The preservation and protection of the Palestinian environment from pollution for the sake of present and future generations is a national duty'.⁶²⁶ Despite this positive provision, however, there is no clear basis for the core and scope of the human right to water in its entirety and, in its current form, the Palestinian Basic Law 2003 has no specific provision that could be used to establish a national human right to water.⁶²⁷

In sum, even though the Palestinian Basic Law 2003 could legally be adopted as the Constitution of an independent Palestinian state, in relation to human rights law, further detailed specific legislation would be required to incorporate adequately general human rights principles and standards and provision for specific human rights, into domestic law.⁶²⁸ More specifically, additional provisions need to be adopted in order to provide for a right to water, as well as other economic and social rights.

624 Palestinian Basic Law 2003, Art 10(2).

625 Ibid, Art 9.

626 Ibid, Art 33.

627 Nor any element of a right to health or food either.

628 See Marks in Bowen, 1997, p 172.

Palestinian Water Law No 3/2002

The second possible source for a right to water is under the Palestinian Water Law No 3/2002. Enacted on 18 February 2002, the law encompasses the whole water sector. It aims to develop and manage the water resources, to increase capacity, to improve quality, to preserve, and to protect against pollution and depletion.⁶²⁹

The current Water Law comprises regulations derived from Islamic water law principles⁶³⁰ together with various concepts which have been imposed on pre-existing regulations, including incorporation of local customs concerning water use.⁶³¹ However, as its leading principle the law states that all water resources in Palestine are considered public property.⁶³² By deeming water as publicly owned and managed by the PWA on behalf of the public for the public good, it has legally eliminated the concept of private ownership of water.⁶³³

This concept of water as a public good is in line with CESC, GC 15. However, unfortunately, none of the provisions contained within the Water Law 2002 refer to a human right to water; rather the focus is upon management of water resources and the legal basis for the water authority. Despite the PLC and the PWA having undertaken this action to unify and standardise the laws governing the water sector, the water rights of the Palestinian people are not legally recognised explicitly within the Palestinian Water Law No 3/2002, either collectively or as an individual human right. This illustrates a gap in provision, which must be addressed if the right to water is to be implemented at national level. Although securing water rights for the Palestinian people has been recognised as a priority for the PWA,⁶³⁴ further action is required by the relevant institutions to codify the human right to water, possibly as an amendment to the Water Law.

Israeli domestic law

Israeli national (civil) law does not apply to the OPTs because Israel has not officially annexed the West Bank (or Gaza) and therefore it is not legally a part of the state of Israel; rather it has the legal status of occupied territory. As such the international law of occupation applies (international humanitarian law). In addition, Israel applies Military Orders, the law of the Israeli Civil Administration to the OPTs. Under the arrangements for jurisdiction within the Oslo Accords, where the area is under full civil and military control by Israel (Areas C) only the

629 Husseini Hiba, 2004, p 7.

630 The Shari'a (Islamic Religious Law) provides in principle that water is God's property and as such it is free for all. Ownership can take place upon effective possession. There are two primary rights of use: drinking to satisfy thirst of man and animals, and irrigation for foodstuffs. Payment for water use is questionable, although in practice payment is made. For further discussion of water management in Islam, see Faruqi, N *et al*, *Water Management in Islam*, 2001, Paris: UN University Press.

631 See Husseini Hiba, 2004, p 6.

632 Palestinian Water Law No 3/2002, Art 3.

633 Husseini Hiba, 2004, p 8.

634 Ibid, p 13.

law of the civil administration applies, displacing all other laws with the exception of international standards. Further, despite the fact that the OPTs are not legally a part of the state of Israel, Israeli civil law is applied *de facto* to Israeli citizens resident in the illegal Israeli settlements of the West Bank. This ensures that Israeli settlers are protected under extensive Israeli civil laws, often resulting in preferential access to remedies and an established and functioning legal system whilst Palestinians living in the West Bank do not have such access.

Therefore, in addition to considering Military Orders applicable in the West bank, I also take into account the human rights provisions under Israeli law, for several reasons: firstly, to provide a comparison with legal provisions under Palestinian law, indicating the differential between the standards enjoyed by Israeli settlers in the West Bank and Palestinians in the West Bank; secondly, these legal rules could have possible implications if Israel were to annex the OPTs. As such, Israeli standards should be considered.

Basic laws of Israel

The only human rights provision under Israeli national law is to be found within the Basic Laws of Israel. There are 11 Basic Laws in existence⁶³⁵ that comprise unique laws dealing with 'constitutional' subjects such as the basic structure of government and state bodies including the army and judiciary. These Basic Laws are components of 'a Constitution in the making' according to the Israeli government.⁶³⁶ They claim to encompass fundamental human rights, within the Basic Laws: Human Dignity and Liberty, Freedom of Occupation, and Freedom of Religion (draft proposal).⁶³⁷ Of these, the central basic law concerned with human rights is that of the Basic Law: Human Dignity and Liberty (1992).⁶³⁸ Article 1 identifies the principles underlying the law⁶³⁹ and Article 1(a) sets out the purpose of the law: 'to protect human dignity and liberty'.⁶⁴⁰ Articles 2–7 deal with civil and political rights including, *inter alia*, right to life, privacy, property and liberty.

635 The Existing Basic Laws: The Knesset (1958); Israel Lands as Basic Law: The People's Lands (1960); The President of the State (1964); The State Economy (1975); The Army (1976); Jerusalem, the Capital of Israel (1980); The Judiciary (1984); The State Comptroller (1988); Human Dignity and Liberty (1992); The Government (2001) and Freedom of Occupation (1994). From Israeli Knesset, Law, Basic Laws, at www.knesset.gov.il/description/eng/eng_mimshal_yesod2.htm (accessed 1 June 2010).

636 CCPR, *Initial State Report of Israel*, CCPR/C/81/Add.13, 9 April 1998, para 33.

637 The author is unable to ascertain at this present time, the current status of this draft law.

638 Passed by the Knesset on 17 March 1992 (12th Adar Bet, 5752) and amended on 9 March 1994 (21st Adar, 5754).

639 Basic Law: Human Dignity and Liberty including Amendment, Art 1. Basic principles:

Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.

640 Basic Law: Human Dignity and Liberty including Amendment, 1(a). Purpose: 'The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state'.

The remaining articles deal with application of the law, reservations and permissible derogations.⁶⁴¹

Unfortunately, there is no codification of economic and social human rights. This may be due to the fact that the Knesset was unsuccessful in its endeavours to enact the 'Basic Law: Human Rights' in its entirety, due to the opposition of some religious parties to certain provisions.⁶⁴² In addition, a separate draft basic law on social rights was prepared following Israel's ratification of the ICESCR.⁶⁴³ However, in its concluding observations the CESCR noted that the basic law did not meet the requirements of Israel's obligations under the Covenant.⁶⁴⁴ Subsequently, it was never to pass through the Knesset at all and the Israeli government stated:

The draft 'Basic Law: Social Rights' is no longer pending in the Knesset. The future of such legislation is not clear. However, the rights protected by the Covenant are a part of the ongoing public debate in Israel and appear in regular curricula of law faculties. Moreover, economic, social and cultural rights are increasingly recognized as constitutional rights in Israeli jurisprudence . . .⁶⁴⁵

Overall, the current provision for human rights is very weak and is concerned solely with civil and political rights. Economic and social rights are not encompassed, with the exception of the right to work, provided for in the separate limited provision, 'Basic Law: Freedom of Occupation'. This basic law together with the Basic Law: Human Dignity currently encompasses the limited human rights provisions of the national laws.⁶⁴⁶ Therefore, there is currently no provision within Israeli basic laws for a human right to water or for any substantive economic and social right with the exception of a right to work.⁶⁴⁷

641 Basic Law: Human Dignity and Liberty including Amendment, paras 8–12.

642 Ultimately, a compromise was reached where those sections of the law on which there are no basic differences of opinion were enacted. This resulted in the civil and political focussed Basic Laws: Human Dignity and Liberty and the Basic Law: Freedom of Occupation. See 'Basic Laws: Constitution and Human Rights, Documents, Basic Laws', at www.irac.org/article_e.asp?artid=148 (accessed 20 August 2004).

643 See CCPR, *Initial State Report of Israel*, 9 April 1998, paras 35 and 40.

644 See CESCR, *Concluding Observations: Israel*, 4 December 1998, para 9.

645 Additional Information submitted by State Party of Israel following consideration of their report by the CESCR, E/1989/5/Add.14, 14 May 2001, para 32.

646 In addition, it has been argued that the Israeli Declaration of Independence 14 May 1948 constitutes a basis for fundamental human rights protection, e.g. regarding non-discrimination: 'Israel's Declaration of Independence, drawing on the Universal Declaration of Human Rights, provides that "[t]he State of Israel will maintain equal social and political rights for all citizens, irrespective of religion, race or sex". Although the Declaration, strictly speaking, lacks binding constitutional force, the Supreme Court has relied on it . . . to establish the right to equality before the law as "the life breath of our entire constitutional regime" (H.C.J. 98/169, *Bergman v. Minister of Finance*, 24(1) P.D. 693, 698), and to make that right enforceable in the courts'. CCPR, *Initial State Report of Israel*, 9 April 1998, para 824.

647 Consequently, the only possibility for redress from a violation of the right to water would be under the right to life as detailed in Basic Law: Human Dignity and Liberty, Art 2.

Israeli Water Law 1959

Concerning water in general, although not encompassing a human right to water is the Israeli Water Law 1959. This law applies to Israel proper (and in practice is applied to West Bank settlements) and establishes a framework for the control, management and protection of the regional water resources Israel claims to own. In regard to water rights, the law is in parallel with that of the Palestinian Water Law No 3/2002 and sees water as public property.⁶⁴⁸ On the question of an individual's right to water, the law states: 'Every person is entitled to receive and use water, subject to the provisions of this law'.⁶⁴⁹ As such, water is not viewed as a human right but as a state-controlled resource that an individual is entitled to on conditions of usage according to the said Water Law. These uses include domestic, agricultural and industrial use and public service use.⁶⁵⁰

This provision can be viewed as a basis for a right to water, although not based upon human rights law and has been utilised in certain cases before the Israeli Supreme Court to argue a right to water.⁶⁵¹ However, as the said articles within the Water Law 1959 are not formulated as a human right to water, the scope of such provision is open to question. Conversely, however, there are further provisions covering pollution and water quality, sustainability and mechanisms for complaints, which provide comprehensive elements of the right to water.

Israel would seem, therefore, to have a comprehensive water law with some basis for a right to water including redress. However, as applicable to Israel proper only, Palestinians cannot benefit from this provision, other than if there are precedents set which can be applied in the case of violations within the OPTs. Moreover, the application *de facto* to Israeli settlers in West Bank illegal settlements assures that settlers are provided with a strong legal framework to realise their water rights, as well as ensured optimum water supply and full access to water, whilst Palestinian neighbours have restricted access to and minimal supply of water. It is also imperative to note that the Water Law itself is based upon an inequitable usage of regional resources and appropriation of Palestinian water assets.

Israeli case law regarding the right to water

Despite the lack of provision under Israeli constitutional law for a human right to water there have been two cases at the Supreme Court of Israel regarding the right to water. These cases were based on the Water Law 1959 and may have set some interesting precedents concerning water rights in the region, including possessing consequential effects for water rights within the OPTs.

The first case at the Supreme Court of Israel, *The Regional Council for the Unrecognised Villages in the Naqab and others v The Minister of National Infrastructure and*

648 Israel Water Law 1959, Section 1, Art 1.

649 Ibid, Section 1, Art 3.

650 Ibid, Section 1, Art 6 'Linking of a Private Person's Right to Water to Purpose'. This article lists five uses for which a person has a right to water.

651 See discussion below.

others (2004) concerned the right to water of Bedouin citizens of Israel living in unrecognised villages in the Naqab.⁶⁵² Although this case is regarding Arabs within Israel proper, many parallels can be drawn between the water situation in the unrecognised communities of Bedouin Arabs living in the Naqab (Negev) desert and the water conditions within the West Bank, as well as the treatment of these people under Israeli law.⁶⁵³

In the initial case the petitioners held that ‘the [Israeli] State maintained a policy of denying clean and accessible water to thousands of residents of the unrecognized villages’.⁶⁵⁴ Due to their status under Israeli law as ‘illegal settlements’ these villages were not connected to the mains pipelines and ‘most residents of these villages obtain water via improvised, plastic hose hook-ups or unhygienic metal containers, which are used to transport the water from a single water point located on main roads quite far from their homes, a lengthy and expensive process. The water sources are contaminated by animals, insects, military waste and food waste’.⁶⁵⁵ Due to the contaminated water, residents had reported health problems including dysentery, intestinal infections and dehydration.⁶⁵⁶

In the first instance, Israel maintained that as illegal dwellings these communities were not entitled to connection to the water network. However, as a result of the filing of the petition, an inter-ministerial Water Committee was formed in October 2001 to examine the water situation in the villages. Following consideration of the case, central water access points were added to five of the seven villages. The Supreme Court then dismissed the petition and the Israeli state claimed there was no further case to answer.⁶⁵⁷ However, as Adalah points out, this resulted in a

652 *The Regional Council for the Unrecognised Villages in the Naqab and others v The Minister of National Infrastructure and others* HC 3586/01. See Adalah – The Legal Centre for Arab Minority Rights in Israel, ‘Adalah Appeals Water Commissioner’s Refusal to Provide Water Access for Hundreds of Arab Bedouin Living in Unrecognised Villages in the Naqab’, News Update, 27 April 2005, at www.adalah.org/eng/pressreleases2005.php (accessed 1 June 2010). For further information regarding this case and the background to the claimed illegality of the villages, see also Center for Economic and Social Rights and PHG, May 2003, pp 39–40; ‘Regional Council of Unrecognised Villages in the Negev, Beersheva, Israel’, and ‘The Association of Forty, a local NGO working to bring water to these villages’, at www.assoc40.org/ (accessed 1 June 2010).

653 For details of the conditions faced by Bedouins in Israel, see *Initial State Report of Israel to the UN Committee on the Rights of the Child*, CRC/C/8/Add.44, 27 February 2002, paras 834–7; CESCR, *Israel, Initial State Report of Israel*, E/1990/5/Add.39 (3), 20 January 1998, paras 563, 592 and 593; CESCR, *Second Periodic State Report of Israel*, 2001, paras 343–51, 420 and 423; CESCR, *Israel, Additional Information Submitted by States Parties to the Covenant Following the Consideration of their Reports by the Committee on Economic, Social and Cultural Rights, Addendum, Israel*, E/1989/5/Add.14, 14 May 2001, paras 94–100; UN CCPR, *Initial State Report of Israel*, CCPR/C/81/Add.13, 9 April 1998; UN CCPR, *Second Periodic Report Israel*, CCPR/C/ISR/2001/2, 4 December 2001; CESCR, *Concluding Observations: Israel*, E/C.12/1/Add.90, 23 May 2003, paras 16, 27 and 43; and Arab Association for Human Rights *et al*, *Compilation of Economic, Social and Cultural Rights Conditions of the Indigenous Palestinian People under Israel’s Jurisdiction and Effective Control*, Parallel Report jointly submitted to the UN Committee on Economic, Social and Cultural Rights, 30th session, Geneva, 9 May 2003, Art 11 Right to an Adequate Standard of Living.

654 Center for Economic and Social Rights and PHG, May 2003, p 40.

655 *Ibid*.

656 Adalah, May 2003, p 5.

657 Decision, 16 February 2003.

situation no different in essence to that which preceded the petition; water still has to be collected from a central point and transported distances in unhygienic containers. Moreover, the source remains at high risk of contamination.⁶⁵⁸ To date, Adalah has filed two motions in an attempt to gain additional water points on behalf of these communities. The first request was partially successful and resulted in some further water points. The second request has received no response to date.⁶⁵⁹

The refusal to grant connection to the mains water network or even provide water points in all of the villages violates the villagers' human right to water, as well as the related human right to health.⁶⁶⁰ It also discriminates against them on the basis of their nationality and it is notable that, 'while thousands of Arab Bedouin citizens of Israel living in the unrecognised villages are deprived of adequate access to water, individual Jewish families living on vast ranches in the Naqab are promptly provided with water access, often prior to obtaining planning permission for their dwellings'.⁶⁶¹

Most recently in November 2006 Adalah filed an appeal against a ruling delivered by the Haifa District Court (sitting as a Water Tribunal) that upheld previous decisions of the Water Commissioner not to provide water to these villagers. This appeal is pending.⁶⁶²

In contrast, significantly, the Israeli Supreme Court has stated recognition of a human right to water in a case before it, sitting as the Water Commission. It concluded that, 'The right to water is a substantive right . . . [It] does not have to be created by statute necessarily, but can be grounded on other foundations, such as agreement, custom or any other manner'.⁶⁶³ This decision has implications for anyone claiming a violation of their right to water within Israel proper but also within the OPTs. It sets precedence for recognition of the right as a part of bilateral agreements or customary international law and as such further substantiates claims under international humanitarian law and international human rights law. Conversely, despite this recognition before the law, it would seem clear that at present, Israel will attempt to carry out the very minimum in terms of its obligations towards Arab Bedouins and Palestinians concerning their human right to clean and sufficient accessible water, even when there is affirmation of blatant discrimination on the ground and within the relevant policies. Subsequently, this has negative implications as to how the right to water of Palestinians living within the actual OPTs is realised.

658 Adalah, May 2003, p 5

659 Motions to Water Committee, April 2003 and September 2003.

660 Adalah argues that the Water Commissioner's decisions violate the villagers' rights to water, health and dignity under both Israeli domestic law (Water Law 1959) and international human rights law (ICESCR, Arts 11 and 12).

661 Adalah, 27 April 2005. This discrimination is noted in CESCR, *Concluding Observations: Israel*, 23 May 2003, para 27.

662 See Haifa District Court, CA (Civil Appeal) 9535/06, *Abdullah Abu Musa'ed and others v Water Commissioner (Haifa District Court) and Israel Lands Administration*, 11/2006.

663 CA (Civil Appeal) 535/89, *Water Commissioner v Perlmutter and others*, Piskei Din 56 (5) 695–6, in B'Tselem, July 2000, p 14.

Israeli Military Orders

As stated, Palestinians living within the OPTs are not subject to Israeli national law; rather they are subject to the laws of the Israeli Civil Administration, known as Military Orders. The confusion noted over the status of various laws and legal systems within the territories is further exacerbated by the decree of these military orders.⁶⁶⁴ Regarded as valid law by the Israeli military and administration and backed up through the Israeli court system,⁶⁶⁵ these military orders have 'effectively displaced the law previously in force on many issues'.⁶⁶⁶

One of these issues is that of water. Several of these military orders have displaced previous laws regarding water and have had a far-reaching negative impact on the Palestinians' enjoyment of their right to water. The first military law to be passed which was to be the basis for all further military orders regarding restriction of Palestinians' water rights was Proclamation No 2/1967. Passed after the 1967 war, it declared all water resources in the territory as state property.⁶⁶⁷ Military Order 92, 15 August 1967, followed. This order reiterated the declaration and formally transferred all administrative, executive, judicial and monitoring authorities from the various governors, municipalities and village councils to an Israeli official, appointed by the military governor, thus giving the Israeli government complete authority over water management and resources in the OPTs.⁶⁶⁸

Military Order 158 of 19 November 1967 adjusts the Jordanian Water Monitoring Law No 31, 1953. Under Article 4(A) of this order, it states that it shall not be permissible for any person to set up, or to assemble, or to possess or to operate a water installation unless he/she has obtained a licence from the area military commander. Furthermore, the commander may, at his/her discretion, refuse to grant licence without giving reason, and may amend or make conditional any permit. He/she also has the authority to cancel permits at any time. It is also stipulated that this official's decisions cannot be appealed against.⁶⁶⁹

This Military Order severely curtailed the Palestinians' right to water and denied them access to sources as well as preventing storage of water by preventing construction of water tanks and cisterns, thus negatively impacting access to water as well as sufficiency and quality of water. Since the passing of this Military Order, nearly 40 years ago, only 23 new wells have been permitted in the OPTs.⁶⁷⁰

664 See Marks, in Bowen, 1997, p 173; Al Haq, 1993, p 15.

665 See Quigley, in Bowen, 1997, p 40.

666 Shehadeh, R and Kuttat, J, *The West Bank and the Rule of Law*, 1980, Geneva: International Commission of Jurists and Law in the Service of Man, pp 101–6.

667 Hussein Hiba, 2004, p 5.

668 See PHG, 2004, p 12; 'Euro-Mediterranean Information System on the Water Sector, Countries, Palestine, Institutions', at www.emwis-ps.org/institutions.htm (accessed 10 June 2006) (hereinafter referred to as EMWIS), and Center for Economic and Social Rights and PHG, May 2003, p 12.

669 See PHG, 2004, p 13; *ibid*, EMWIS; and Center for Economic and Social Rights and PHG, May 2003, p 12.

670 See PHG, 2004, p 13; *ibid*, EMWIS; and Center for Economic and Social Rights and PHG, May 2003, p 12.

Finally, Military Order 291 of 19 December 1968 pronounced all prior settlements of disputes regarding water invalid, thereby increasing the already considerable jurisdiction of Israeli Civil Administration.⁶⁷¹ This order refers to the Jordanian law No 40 of 1952 on land and water and Israel argues that the military order merely authorises the military commander to enforce it. However, it has been argued that this order has effectively suspended the provisions of the above-mentioned Jordanian law on the settlement of disputes of law and water rights.⁶⁷²

The cumulative effect of all of the above Military Orders, as well as others imposing pumping quotas,⁶⁷³ has been the seizure of total control by the Israeli government over Palestinian water resources. This in turn has had a hugely detrimental effect upon the enjoyment of the right to water in the OPTs. For example, if the water supplied is insufficient or of poor quality, the Palestinians cannot take action to access different sources. In addition, indirectly, other military orders relating to land use and access, agriculture, issues of planning law for housing, building of bypass roads and settlements and most recently, the separation Wall, have all had a harmful effect on the Palestinians' right to water.⁶⁷⁴

Significantly, under the rules of international humanitarian law, specifically the Geneva Convention IV laws of occupation, Article 64, and Hague Regulations, Article 43, an occupying power is only allowed to amend existing law within that occupied territory for essential reasons of public order and safety.⁶⁷⁵ It is evident that the above military orders do not respect the laws of the territory and have far wider-reaching effects than supplying the administration with necessary water or maintaining the safety of the population. As such, Military Orders 92, 158 and 291 are not consistent with the rights and obligations of an occupying power and can be seen as illegal according to international humanitarian law and human rights law.⁶⁷⁶ As Israel has breached Article 64 and has altered the legal system within the West Bank and Gaza beyond recognition and for its own benefit, it can be argued that 'The maintenance in force of many of the military orders constitutes a violation of the Geneva Civilian Convention',⁶⁷⁷ and the Hague Regulations.⁶⁷⁸ Additionally, as Israel has breached Article 64 and adopted excessive new laws, Israel has 'effective control' of the territory and as such this confirms the widely held view that Israel has human rights obligations in the OPTs.

671 See PHG, 2004, p 13; *ibid*, EMWIS and Center for Economic and Social Rights and PHG, May 2003, p 12.

672 *Ibid*, EMWIS

673 E.g. Military Orders in 1975 and 1986, see PHG, 2004, p 13.

674 E.g. Military Order 58, 23 July 1967 defining 'absentee property' leading to the confiscation of Palestinian wells. See PHG, 2004, p 12. For further discussion, see World Bank, April 2009, pp 53–56; and Amnesty International, 2009, pp 11–15.

675 Geneva Convention IV, Art 64.

676 PHG, 2004, p 13; *op. cit.*, EMWIS.

677 Quigley, in Bowen, 1997, p 41.

678 Kothari, E/CN.4/2003/5/Add.1, 10 June 2002, para 16. For an analysis as to the legality of specific Military Orders in relation to Hague Regulations, Art 43, see Scobbie, in Bowen, 1997, pp 221–90, at 260–68.

Moreover, under the Declaration of Principles, Article 9 requires bilateral agreement to terminate any military orders already in force. As such, the PA implicitly recognises the validity of these orders and renounces its right to abrogate from them without agreement by the Israelis. Thus, despite the protection contained within the Geneva Convention IV, the Israeli Civil Administration has managed to implement numerous military orders resulting in a discriminatory system of law, which far benefits the Israeli state and its citizens.

In conclusion, in regard to economic and social human rights the impact of these Military Orders on the enjoyment of certain rights has been immense. Most notably, the Palestinians' right to work, food, housing and health and, of course, their right to water have all been severely curtailed. Moreover, the implementation of these orders has resulted in violations on a frequent basis.

Concluding remarks

An evaluation of non-international sources of law has shown that both the bilateral Oslo Accords and the domestic systems of law, both from within the OPTs and Israeli sources have no direct provision for a human right to water. Furthermore, both systems of law have limited provisions concerning human rights in general, especially economic and social rights.

In terms of bilateral agreements between Israel and Palestine, the signing of the Oslo Accords although seen as a political breakthrough in the peace process has done little to further human rights protection within the occupied territories. Moreover, certain provisions can be seen as in conflict with the protections guaranteed under the Geneva Conventions. As such, it is imperative that the Oslo Accords be 'construed in light of the Convention and in the case of conflict the Convention governs'.⁶⁷⁹

Despite this, specific provisions relating to water, within the Interim Agreement, offer a basis for stipulating a Palestinian right to water. Under Article 40, the Israeli state recognises the water rights of the Palestinian people. However, the term 'water rights' is a generic and communal term and cannot be equated with legal explicit recognition of an individual human right to water. Rather, I would argue the term 'water rights' implies recognition of a collective right of the Palestinians as a people, to usage, ownership and control of their water sources (sources from which equitable use can be determined under international water law). Nevertheless, although Article 40 does not expressly include a human right to water it does offer scope to interpret the clause as including such a right due to the broad terminology used. In light of the current impasse regarding the permanent status negotiations, this 'rights' element of Article 40 may offer an existing legal basis for determining a right to water for the Palestinians if and when the final status negotiations take place. In addition, Article 40 also implies that a Palestinian 'peoples' right to water

679 Quigley, in Bowen, 1997, p 46.

exists and this can be viewed as an integral part of the right to self-determination, under Common Article 1(2) of the ICCPR and ICESCR.⁶⁸⁰

In relation to the domestic law applicable to the OPTs, the human rights provisions within both the Israeli Basic Laws and the Palestinian Constitution (Basic Law) are generalised and broad statements of human rights principles, although it should be noted that the Palestinian Constitution is much more in line with international human rights instruments in terms of language and content than the Israeli law. Despite this, it would be extremely difficult to establish any breach of these provisions, as they do not detail any substantive economic and social rights (including the right to water). This lack of provision within domestic legal sources in the OPTs is problematic and is further compounded by the complicated web of 'concurrent legal systems' in place and by the limited functioning of the legal bodies. This confusion and complexity, as well as lack of legal authority, has had an impact upon the codification and enjoyment of human rights within the OPTs. The review of national laws relevant to economic and social human rights illustrates the weak legal provision for human rights within the Palestinian system in general and the absence of any specific provision for the human right to water. The result is confusion, lack of accountability and a lack of redress mechanisms.

At present, the Palestinian Basic Law 2003 and Palestinian Water Law No 3 are the two legal sources which constitute the most legitimate and likely possible basis for a right to water under the domestic legal system of the West Bank. However, the current legal system requires further reform and development of infrastructure in order to function as the basis for a democratic Palestinian state. The PA needs to undertake a detailed review and examination of the current legal system in order to then codify clear legal standards and implement and operate a workable legal system. However, it is unrealistic to expect that the PA can take extensive action when it does not have full control of its territory or infrastructure, institutions and resources.⁶⁸¹

In the interim period, the PLC is continuing to revise and enhance the Palestinian Basic Law as the foundation for a future state Constitution. Provisions for the human right to water should be incorporated into the Water Law. Further, the Basic Law should be amended and developed to include the right to water (and other specific human rights). This development and adoption of legal standards will support the PA in securing control over water resources.

Moreover, much of the legal preparatory work can be carried out in the interim period before final settlement negotiations take place. The Negotiations Affairs Department⁶⁸² and the Negotiations Support Unit⁶⁸³ have a key role in supporting this work. Set up in 1998 the NSU (as a part of the PLO NAD) was created to assist the PA in facilitating the Interim Agreement and the interim period through

680 See B'Tselem, July 2000, p 14; and Al Haq, 1993, pp 7–8.

681 For assessment of the PA lack of institutional capacity and its effects on the water sector, see World Bank, April 2009, pp 56–60.

682 Hereinafter referred to as the NAD.

683 Hereinafter referred to as the NSU.

supporting work on legal and policy issues to establish a framework for the permanent status negotiations and final settlement. The NSU has three objectives:

to strengthen and refine existing Palestinian negotiation positions; to develop new positions where no policy previously existed and to contribute to interim initiatives intended either to lead Palestine and Israel out of the current political crisis and towards resumption of permanent status negotiations or to minimize the damage inflicted by continuing Israeli actions on the likelihood of a fair and sustainable outcome to permanent status negotiations.⁶⁸⁴

The Legal and Policy Department of the NSU provides advice on the permanent status issues including water, as well as other issues such as health and agriculture.

In terms of the human right to water, it was not possible to get clarification of whether there were any plans regarding codification of the human right to water. In a recent publication, the NAD expressly recognises the human right to water but does not elaborate further on any plans for incorporation of such a right in any future negotiations or subsequent legislation. Neither does the PWA note the human right to water in its assessment of current water needs.⁶⁸⁵ The Palestinian position is that 'the attainment of water rights is crucial for a viable two state solution to the conflict'.⁶⁸⁶ However, the overall framework for the Palestinian position on water rights is based upon international law and international humanitarian law, rather than human rights provisions.⁶⁸⁷ Although the government makes a general statement regarding incorporation of international human rights standards as foundational principles for the Palestinian state, it does not detail how these will be enshrined in the law. Positively, it lists one of the highest priorities of the government will be to finalise an ongoing review of the Palestinian legal system resulting in unification and modernisation of the legal framework.⁶⁸⁸

There is also a need for international assistance in this respect. For example, the World Bank funded a project reviewing the judicial system in the OPTs with the aim of strengthening the legal infrastructure for state building.⁶⁸⁹

As regards Israeli law, despite the comprehensive Israeli Water Law 1959 and the fact that the right to water has been recognised within Israel by the Supreme Court, it is disappointing that to date no petition or case within the domestic legal

684 See PLO NAD, 'About Us', at www.nad-plo.org/view_area_page.php?view=nav_about-us (accessed 11 June 2010).

685 PWA, *The Palestinian Water and Wastewater Sectors: Basic Needs and Development Ongoing and Proposed Projects by Governates*, October 2009, Ramallah: PWA.

686 PLO NAD, *Negotiations Primer*, December 2009, Ramallah: NSU, pp 28–30, at 29.

687 PWA, *Legal Framework of Permanent Status Negotiations on Palestinian Water Rights*, Legal Report 2003/V1, 11 August 2009.

688 Palestinian National Authority, *Palestine: Ending the Occupation, Establishing the State, Program of the Thirteenth Government*, August 2009, pp 5–6 and 13.

689 World Bank, 'West Bank and Gaza-Legal Development Project, Project ID XOPA47111, June 1997–December 2003', at www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187283&siteName=WDS&entityID=000090341_20040702103131 (accessed 21 May 2010).

system of Israel has been successful in holding Israel responsible for violations of the right to water within Israel itself. Significantly, the implementation of Israeli Military Orders effectively overrides existing laws concerning water in the West Bank and are of detrimental effect to the enjoyment of the right to water by the Palestinians. The negative impact of these orders upon the right to water will only be stopped when the occupation ends and Palestinian law is implemented. Further, removal of the illegal Israeli settlements is required to end the discriminatory system of protecting Israeli settlers' right to water under the domestic law of Israel, outside Israel's borders, to the detriment of Palestinians living in the West Bank.

To conclude, I have reviewed and assessed the various systems of law applicable within the OPTs – international sources in Chapter 5 and domestic and bilateral laws in this chapter. It is evident that at present there is little codification of the human right to water outside applicable international human rights law, although international humanitarian law does contain some basic provisions concerning water. As such, the optimum protection of such a right is under the various instruments concerned with economic and social human rights, in particular the ICESCR, in conjunction with the relevant provisions under international humanitarian law. This combination offers the optimum coverage for realisation of the right within the OPTs at this current time. For example, for serious breaches resulting in a threat to human life, due to military activity, international humanitarian law would be the *lex specialis* in this case. Conversely, it is human rights law that should act as the *lex specialis* during most breaches within the context of occupation, as the daily existence under conditions of occupation resembles more closely a peacetime situation than conditions of war.⁶⁹⁰

Moreover, the requirements contained within the Interim Agreement should also be taken into consideration, as it contains detailed provisions regarding the water infrastructure in the West Bank and sets out legal responsibilities for both parties in this regard. Despite, the limitations of this presently 'frozen' agreement there may be potential to include provision for a human right to water within the

690 In relation to the Israeli–Palestinian conflict, this conclusion is especially pertinent as the Israeli view is that international humanitarian law alone is applicable to these territories and then only certain aspects of it. The traditional view of which body of law is primarily applicable in the territories has not been international human rights law but international humanitarian law, and it is only within recent years that the applicability of human rights law in times of conflict has been generally accepted. For further reading on the question of the *lex specialis* principle in the context of armed conflict and occupation, see *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, (2005) *ICJ Reports*, paras 216–20 and 345(3); ICJ Wall Opinion, para 106; and ICJ Nuclear Weapons Opinion, 1996, para 25. In *Congo v Uganda*, the ICJ determined independent violations of human rights law during armed conflict without applying the *lex specialis* of humanitarian law. See also Kalin, W, Alston, P, Kothari, M and Hunt, P, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council', Mission to Lebanon and Israel (7–14 September 2006)*, A/HRC/2/7, 2 October 2006, para 16 including notes. Supporting the view that the *lex specialis* in times of long-term occupation should be human rights law, with regard to economic and social rights, see Lubell, N, 'Challenges in Applying Human Rights Law to Armed Conflict', (2005) 87(860) *International Review of the Red Cross* 737–54.

permanent status negotiations and any consequent future legal bilateral legal agreement.⁶⁹¹

The domestic sources of law applicable, although promising, require further development in terms of substantive content. Further, the institutional capacity to implement any national standards is lacking and access to remedy at local level is therefore lacking. In the absence of political agreement and solution of the conflict, it is crucial that the institutions of the PA are supported and assisted in preparing comprehensive legal rules concerning not just the human right to water but all human rights standards.

As a final point, it has been established that if the right to water is to be respected, protected and provided for within the current long-term occupation, it is essential to apply international human rights law. The application of the detailed provisions contained within these instruments, is imperative if we are to determine violations of the right and to seek redress for them. Having established the legal basis for a right to water within the OPTs, the remaining uncertainty is the reality of the enjoyment of the right on the ground. Despite the lack of information within state reports regarding the OPTs, it is clear from the parallel reports submitted to the CESCR⁶⁹² and the reports of other UN bodies⁶⁹³ that there are severe breaches of economic and social rights, including the right to water. In fact, the CESCR has denounced Israel's 'continuing gross violations of economic, social and cultural rights',⁶⁹⁴ noting especially the policy of closures preventing the access of Palestinians to food, health care, work and water.

Ultimately, the implementation of the Israeli occupation and its 'security' policies of closures and curfews and the separation Wall affect the enjoyment of the Palestinians' right to water in the OPTs. The following chapter assesses these effects through a case study in the West Bank, where the occurrence and nature of violations of the right to water are examined.

691 Although the Oslo Accords can be seen as 'frozen' in practical terms, the legal status of the Interim Agreement remains unchanged as there has been no subsequent legal agreement between the two parties and no formal rejection of the agreement by Hamas since being elected. Furthermore, the PLO remains the official representative of the Palestinian people.

692 Arab Association for Human Rights *et al*, May 2003; Center for Economic and Social Rights and PHG, May 2003.

693 See, *inter alia*, Kothari, E/CN.4/2003/5/Add.1, 10 June 2002, paras 65–73, detailing violations of the right to water and generally regarding violations of the right to an adequate standard of living.

694 CESCR, *Concluding Observations: Israel*, E/C.12/1/Add.69, 31 May 2001, para 13.

6 The right to water in the Occupied Palestinian Territories (West Bank)

Part III – A case study in the Southern West Bank

Having examined the legal provisions for a right to water to which both parties are bound, this chapter examines the right to water ‘on the ground’ and investigates various alleged violations of the right to water within the OPTs – West Bank. Using primary evidence gathered from the field, I assess the enjoyment of the human right to water, based upon the application of the legal provisions under international human rights law and international humanitarian law.

To gain insight into the enjoyment of the right to water situation by Palestinians in the West Bank, I decided to carry out a small scale-research project. Although, the water situation is well documented at a general and political macro level,⁶⁹⁵ the problems Palestinians face on a daily basis is not as evident in the literature.⁶⁹⁶ Therefore, the rationale behind this project was threefold: firstly to disclose and investigate the everyday problems Palestinians face in regard to access to clean and sufficient water; secondly, to examine these problems through the application of the framework of the human right to water, something that has not been carried out previously, to the best of my knowledge; subsequently, this would then allow analysis to establish whether violations of the right to water had occurred and/or are ongoing.

Empirical study – design and methods

Having decided to undertake an empirical study with the above aims in mind, the methods for undertaking the project had to be chosen. In terms of practicality, the security situation in the West Bank presented a challenge as to which methods could be used, in terms of access and ethics. This decision was taken on the basis of several factors: firstly, which methods best suited the information I was trying to get; and,

695 See Allan, 2001; Daibes-Murad, 2005; Lonergan and Brooks, 1994; Trotter, 1999; and Selby, 2003.

696 Notable exceptions include Amnesty International, 2009; PHG Water and Sanitation Hygiene Monitoring Project and its reports: PHG, 2004; PHG, 2005; PHG, *Water for Life – The Dilemma of Development under Occupation: The Obstacles to Achieving the Millennium Development Goals and Water Rights in the Occupied Palestinian Territory*, *WaSH Monitoring Programme*, 2006, Ramallah: PHG; Center for Economic and Social Rights and PHG, May 2003; several reports by local NGO B’Tselem: July 2000 and July 2001; and Selby, 2003, Ch 8, pp 171–81.

secondly, which methods would work on a practical level, taking into consideration, cost, time, access and safety for potential interviewees and myself. I had already decided that the study would be a qualitative one, as the objective was to build up evidence for specific individual or group cases concerning violations of the right to water. Therefore, my preferred methods were case studies based upon interviews and observation with the general Palestinian public, rather than 'experts' in the field or water organisations such as the PWA.

It became clear that an ethnography including observation was not a practical option, due to the security situation and financial and time constraints. Therefore, semi-structured interviews was the method chosen, to enable the gathering of key information required to establish a case using the international legal provisions for the human right to water and to allow comparisons to be made across the interviews in regard to essential information such as water sufficiency, safety and access. Unstructured interviews would not have allowed this and may have resulted in a lack of certain relevant key information. Therefore, certain questions were structured on an interview schedule and were asked orally.⁶⁹⁷ These set questions were designed in light of the legal basis for the right to water and upon review of the relevant literature. The resulting framework was based around the three key substantive elements of the right to water as outlined in GC 15: availability, quality and access. A mixture of closed and open-ended questions was used⁶⁹⁸ and further personal testimonies were encouraged, in order to gain a comprehensive detailed picture of the situation of the interviewees. This meant that both factual information questions and questions relating to beliefs, views and opinions were included.⁶⁹⁹

Several versions of the interview schedule were drafted in consultation with the interviewer and in light of initial pilot studies. This resulted in the addition of questions,⁷⁰⁰ and changes to the format of certain questions, to enable a clearer understanding of the enquiry and to ensure key information to be obtained. A list of instructions and techniques for getting the best results (such as the use of prompts, probes and checks) was also sent to the interviewer.⁷⁰¹

697 See Appendix 1 for the final interview schedule.

698 Lightly structured inquiry methods can be problematic, as they rely on spontaneous understanding, i.e. what is on the interviewee's mind at the time. Therefore open-ended questions tend to get incomplete responses. Thus, the method of inquiry incorporated both spontaneous (open) and receptive (closed) questions. This enabled key points to be obtained and confirmed with the receptive and further exploration of the topic with the open method. This also allows for easier comparison within the larger group. See Knight, PT, *Small-scale Research: Pragmatic Inquiry in Social Science and the Caring Professions*, 2001, London: Sage, pp 52–53.

699 See Denscombe, M, *The Good Research Guide*, 1998, Buckingham: Open University Press, p 89.

700 E.g. what type of dwelling do you live in?: house, flat, temporary shelter, other (please specify) was added to the question 'I live in the area of'.

701 E.g. the interviewer was to probe yes/no answers if appropriate, to gain further information and to probe any inconsistencies to see what they revealed. The interviewer was to write the prompt or probe on the notes if possible and to add their thoughts on each interview – impressions, interesting points, non-verbal communications and observations, in order to gain a fuller understanding of the interviewee. For further discussion of the use of prompts, see Denscombe, 1998, p 125; and Knight, 2001, p 61, Table 3.2.

The sample to be selected posed another query. The size and type of sample was, again, dependent upon access, time and the level of detail required for the data to be useful and representative. In terms of sample size, it was decided that 45 interviews be undertaken. This was small enough to enable detailed information to be gathered at individual and family level and allow case studies to be established based upon in-depth analysis of the material.⁷⁰² The sample was to be selected from people who met two different criteria – firstly, they had to be Palestinian and, secondly, they had to live in the West Bank.⁷⁰³ This sample was then divided into three sub-categories based upon type of human settlement: urban towns, rural villages and refugee camps. This was so that a picture of water use could be gained across the three main types of community within the West Bank and could be compared with each other for analysis. Fifteen interviews would take place within each type of Palestinian settlement for fair distribution.⁷⁰⁴ A specific geographical area was selected on the basis of discussions with the locally based interviewer in the West Bank. The southern West Bank was chosen for several reasons: firstly, it suffers from some of the worst water problems in the West Bank as a whole; secondly, it had human settlements of all three types; and, thirdly, it was accessible to the interviewer (although access was difficult at times).⁷⁰⁵

The following evidence was assembled as a result of 45 semi-structured interviews and personal testimonies gathered from across the southern West Bank during 2004.⁷⁰⁶ For the research the individuals and families were selected randomly and were not known to the interviewer. The interviews were carried out on a one-to-one basis, with supporting testimonies being given at times by other members of the same family who were available during the interview. The interviews were carried out in the home of the interviewee, when possible. Otherwise, they were conducted in the street or in the workplaces of the interviewees.⁷⁰⁷ The interviews took between 30 to 45 minutes, depending on how the discussion went and the level of detail given by the person providing the information. As I could not conduct the interviews myself, a male Palestinian, local to the area conducted the interviews. He has experienced the water problems and related difficulties facing the interviewees first hand. In addition, he is a professional researcher with knowledge and experience of both social science data collection and the water sector in the West Bank. As an ‘insider’ or ‘gatekeeper’, he represented part of the social group interviewed and as such it is likely that he gained access to information

702 See Denscombe, 1998, p 24, regarding small-scale sampling for narrower coverage giving in-depth material.

703 This method is known as ‘theoretical sampling’. For further details of this method see Knight, 2001, p 121; and Denscombe, 1998, p 15.

704 This method is known as ‘stratified’ sampling – choosing equal numbers of certain groups or types of people. See *ibid*, p 122.

705 Ascertained in email conversations with PHG staff in 2004.

706 The project was carried out over a time period of 12 months from the initial structuring of the questions to the completion of the data analysis, including asking follow-up questions and analysis.

707 Since the interviewer was a male, sometimes it was not culturally acceptable to enter a house if no other men were present.

that may have not been obtainable to an outsider like myself, especially as a non-Palestinian female.⁷⁰⁸ Enlisting a local interviewer also solved the problem of me gaining physical access to the communities, which was highly problematic due to the security policies of closures and checkpoints and lack of freedom of movement. The use of a local interviewer also allowed the discussions to be conducted in Arabic, for clarity and easiness, written up in the field and later translated into English. Although this means there is some room for discrepancies, the translations were as accurate as possible and any queries were double-checked with the interviewer, interviewee and translator. Following my initial analysis of complete translated interviews, queries and further questions were then returned to the interviewer for follow-up. This often involved a return visit to the interviewee. This resulted in data which was analysed fully, and queries that were followed up in full detail.

Concerning ethics, during the process of designing the research project, several professional codes of practice were consulted and used as a basis for good practice in both the research design and the practical interview technique as well as for the analysis and publication of the subsequent data.⁷⁰⁹ In terms of ethical practice, there were several issues to consider: the cultural and religious codes of the interviewees, the ongoing occupation and related security measures and the personal wishes of the interviewees concerning anonymity and confidentiality.

As the majority of the population of the southern West Bank are Muslim, the interviewer had to adhere to Islamic cultural and religious codes. For example, as he was male, at times he could not enter the house to conduct the interview as only women were present. In these instances, interviews were carried out in public areas such as the street outside or communal areas, such as the markets. In addition, due to the security situation and the continuing occupation, there was an even greater need for ensuring anonymity and confidentiality with all interviewees' material.⁷¹⁰

The result is a small scale in-depth study, which makes no claims for generalisation to other particular situations, but it does present testimony, much of which

708 For further reading on the concept of gatekeepers, see Hammersley, M and Atkinson, P, *Ethnography, Principles in Practice*, 1983, London: Tavistock Publications, pp 64–5. For further discussion regarding access, ethics and the interviewer's effect on the data obtained, see Denscombe, 1998, pp 116 and 134; Knight, 2001, pp 54–55; and Silverman, D, *Doing Qualitative Research: A Practical Handbook*, 2000, London: Sage, pp 198–209.

709 The codes consulted include the ESRC, 'Research Ethics and Confidentiality', at www.esrc.ac.uk/esrccontent/researchfunding/sec22.asp (accessed March 2004); Socio-Legal Studies Association, 'First Restatement of Research Ethics', at www.ukc.ac.uk/slsa/download/ethics_drft.pdf (accessed March 2004); British International Studies Association, 'Guidelines for Good Professional Conduct' (draft), at www.bisa.ac.uk/code.htm (accessed March 2004); Association of Social Anthropologists of the UK & the Commonwealth, 'Ethical Guidelines for Good Research Practice', at www.les1.man.ac.uk/asa/ethics.htm (accessed March 2004); Lancaster University Ethics Committee, 'Unpacking the Moral Maze: Ethical Guidelines for Social Science Researchers', at www.lancaster.ac.uk/fss/resources/ethics/ (accessed March 2004); and the Social Research Association, 'Ethical Guidelines', at www.the-sra.org.uk/documents/pdfs/ethics03.pdf (accessed March 2004).

710 See discussion regarding ethics, disclosure and harm in Knight, 2001, pp 169–72.

corroborates data from wider research studies, both quantitative and qualitative, to support a legal case claiming violations of the right to water by Israel against Palestinian individuals and communities.⁷¹¹ Furthermore, it acts as a useful assessment of how the law of the human right to water can be applied to such a situation and how effective a human rights approach can be in alleviating water problems of the Palestinians and others living under occupation.⁷¹²

Analysis of findings – establishing violations of the right to water using the violations approach

The violations approach to the analysis of the evidence is particularly useful for several reasons. Firstly, in relation to the right to water, it has not been widely used other than by local NGOs. Secondly, and significantly, in this context, it is practical to assess whether violations of the right have taken place by using violations themselves as the starting point for assessment rather than measuring progressive realisation of the right, which is complicated and involves gathering of data which is often not available, is complex to assess and is often inexact.⁷¹³ That is not to say that progressive realisation is not imperative for overall implementation of the full scope of the right; rather that progressive realisation requires long-term measurement over a considerable period of time. As such, it was not suitable for a small-scale individual research project with time and financial constraints.

The violations approach is also preferable as it reflects the reality of the enjoyment of the right in practice, in any given situation and can be used as an effective tool in the monitoring of a state's compliance with its core obligations.⁷¹⁴ Furthermore, the gathering of personal testimonies and the subsequent analysis based upon violations reflects people's everyday experiences. Although no statistical conclusions can be asserted given the small scale of the project, the testimonies gathered can be seen as indicative of the nature of violations taking place more

711 E.g. quantitative research on a large scale has been undertaken by other organisations in the fields, such as the PHG Water Sanitation and Hygiene Monitoring Project (hereinafter referred to as the WaSH), which covered 615 out of the 708 communities in the West Bank and Gaza Strip areas and carried out water surveys at community level. For further details and full statistical data, see Palestine Water for Life Campaign, at www.phg.org (accessed 4 May 2007); and PHG, 2004. See also UNEP, January 2003.

712 For another example of violations of economic and social rights under occupation, see Kälén, W (ed), *Human Rights in Times of Occupation: The Case of Kuwait*, 1994, Berne: Stampfli for Law Books in Europe.

713 Chapman, A, 'A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights', (1996) 18(1) *Human Rights Quarterly* 23–66, at 23, 31 and 33; Chapman, A and Russell, S, 'Violations of the Right to Education', Background paper submitted by the American Association for the Advancement of Science on the CESCR Day of General Discussion: Right to Education, 30 November 1998, E/C.12/1998/19, paras 6–11.

714 In fact, a violations approach has been adopted, in part, by the CESCR in its consideration of state compliance under the reporting procedure to the ICESCR. In its concluding remarks the Committee makes recommendations based upon an assessment of violations and 'concerns'. See also Chapman, 1996, pp 36 and 46.

widely across the OPTs, since much of the evidence collected corresponds with broader and larger scale socio-economic research in the region.⁷¹⁵

The questions used to form the framework for the analysis of violations were, as stated previously, framed around the three key substantive elements of the human right to water as listed in GC 15: quality, availability and accessibility. These shaped the interview schedule for the gathering of data from the individuals, as well as establishing the basis for cross-thematic analysis across the three types of settlements: rural, urban and refugee camps. Furthermore, once the analysis of data began, it was clear that there were other additional variables, which could be used for establishing violations of the right to water. These included related human rights, in particular the right to health, housing, food and work (both agriculture and industry), vulnerable groups, discrimination, issues directly related to conflict, violence and occupation and under humanitarian law, employment – related to socio-economic status and management and ownership of water resources. Statements concerning wider political factors and broader ideas of human rights were also helpful in establishing an idea of the perceived human rights enjoyment of those interviewed. The testimonies of interviewees together with their responses to structured questions around these themes resulted in an in-depth picture illustrating the situation of the right to water on the ground.

Nature of the violations

The main problems encountered by the interviewees are problems of insufficient water, difficult access to water, both physical and economic and reliance on water of poor quality. Subsequent difficulties encountered as a result of these problems include poor health, illness and disease; lack of food and poor diet; poor housing; lack of work and lack of education. Of the three types of community questioned, it is evident that people living in rural areas suffer with the worst problems in relation to all aspects of the right to water. Camps are the next in line, in terms of problems with water quality and sufficiency and, as expected, urban areas have the least problems, although problems with sufficiency affect all communities.

In addition, because of the military occupation many of the interviewees faced physical danger when trying to access water, due to violent behaviour by Israeli settlers or from direct targeting by the military and military incursions. The effect of occupation upon access to water was also evident especially due to military policies of curfews and closures. Furthermore, the effects of the occupation upon access to water are felt across all the Palestinian communities.

But how do these problems translate into actual violations of the right to water? There are several important factors to consider when determining whether Israel is in violation of its obligations concerning the right to water in the West Bank. Firstly, does it have overall responsibility for the realisation of the right in this

715 E.g. see, *inter alia*, Amnesty International, 2009; World Bank, *Four Years: Intifada, Closures and Palestinian Economic Crisis – An Assessment*, October 2004, Washington DC: World Bank; UNDP, 2010; PHG, 2004; PHG 2005; and PHG 2006.

territory? Has it used all available resources? Has it allowed the situation in the OPTs to stagnate and or has it taken retrogressive measures? Subsequently, is its non-compliance with its obligations deliberate? Guidance can be taken from the GC 15 itself, as well as from GC 3 on the nature of states parties' obligations,⁷¹⁶ the Limburg Principles and the Maastricht Guidelines.

It has already been established that Israel is responsible for the enjoyment of human rights within the OPTs, as the occupying power under the Geneva Conventions and as a party to both the ICCPR and ICESCR. In addition, concerning violations, the Maastricht Guidelines provide that:

Under circumstances of alien domination, deprivations of economic, social and cultural rights may be imputable to the conduct of the State exercising effective control over the territory in question. This is true under conditions of colonialism, other forms of alien domination and military occupation. The dominating or occupying power bears responsibility for violations of economic, social and cultural rights. There are also circumstances in which States acting in concert violate economic, social and cultural rights.⁷¹⁷

Therefore, that Israel holds the responsibility for the enjoyment of the right to water as contained both in international humanitarian law and human rights law is clear. However, in order to be in breach of its obligations concerning the right to water, Israel must be deliberate in its actions or omissions and as such, any inability to comply must be ruled out: 'In determining which actions or omissions amount to a violation of the right to water, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations in relation to the right to water'.⁷¹⁸

As noted previously, Israel has argued that it cannot comply with obligations to realise the right to water in the OPTs because it does not have full control of the area and due to the delivery of water by local service providers. However, the PWA has no control over what water resources it receives and has no autonomy in developing infrastructure, due to the full veto right of the Israeli members of the JWC.⁷¹⁹ Israel does control all regional water resources and all borders. As such, Israel has effective control of the water sector and as previously noted, has deliberately implemented policies which discriminate between Israelis, both within the OPTs and within Israel proper and Palestinians in the OPTs.

Moreover, the fact that Israeli settlements within the West Bank are supplied with adequate safe water supply illustrates that the water is available but supplied

716 GC 3, particularly para 9 progressive realisation, and para 10 core obligations and maximum resources.

717 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1997, 'Alien Domination or Occupation', para 17. See also ICJ Wall Opinion, paras 102–13 on responsibility of Israel for human rights in the OPTs.

718 GC 15, para 41. See also the Maastricht Guidelines, para 13, Inability to Comply, and para 11, State Policies, which clarifies what constitutes a violation.

719 See provisions under Interim Agreement, Art 40; and World Bank, April 2009.

by Israel on an inequitable basis. Thus, Israel cannot argue that it is unable to comply with its obligations through resource constraints. Even if resources are scarce, Israel must ensure that it complies with its minimum core obligations under the ICESCR.⁷²⁰ As such, scarcity of water is no excuse for the state of Israel to deny the Palestinians of the occupied territories a minimum essential level of the right to water.⁷²¹ This is especially true when Israelis consume between four and five times the amount of water that Palestinians consume.⁷²² Furthermore, Israeli settlers within the West Bank consume an average nine times the amount of water than their neighbouring Palestinians.⁷²³ Therefore, it is evident that the policy and practice of Israel in regard to violations of the right to water for Palestinians in the OPTs is deliberate in its planning and actions. As the GC 15 notes, 'A State which is unwilling to use the maximum of its available resources for the realization of the right to water is in violation of its obligations under the Covenant'.⁷²⁴

Having established that Israel is both responsible and deliberate in its actions and policy, the nature of the violations of the right to water collected need to be examined. Violations can occur due to the deliberate action of a state or other entities insufficiently regulated by states – commission,⁷²⁵ or through the neglect of a state to carry out an action or policy – omission.⁷²⁶ Moreover, violations of core obligations are prohibited and non-compliance cannot be justified under any circumstances, as core obligations are non-derogable.⁷²⁷ The Maastricht Guidelines provide:

Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights . . . Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, [including water] of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, violating the Covenant'. Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.⁷²⁸

720 See Maastricht Guidelines 1997, para 10, 'as established by Limburg Principles 25–28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights'. See also GC 15, para 41.

721 Although water is scarce throughout the whole Middle East region, the Palestinian water problem is related to political and economic factors and is limited as a direct result of the occupation.

722 OCHA, *Humanitarian Impact on the Palestinians of Israeli Settlements and other Infrastructure in the West Bank*, July 2007, East Jerusalem: OCHA, p 114; B'Tselem, July 2000, p 4; and PHG, 2004, p 23.

723 UNDP, 2010, p 49. See also UNDP, *Beyond Scarcity: Power, Poverty and the Global Water Crisis – Human Development Report*, 2006, New York, NY: UNDP.

724 GC 15, para 41.

725 Ibid, para 42; Maastricht Guidelines, para 14.

726 GC 15, para 43; Maastricht Guidelines, para 15.

727 GC 15, para 40.

728 Maastricht Guidelines, para 9. (Original footnote omitted).

In relation to specific violations of the right to water, testimonies illustrate violations of the three key substantive elements of the right to water: availability, accessibility and quality, are commonplace amongst those interviewed. The following testimonies document these violations, within this framework.

Violations of core obligations – availability of water

The core obligation concerning water availability is: ‘To ensure access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent disease’.⁷²⁹ However, many of the interviewees despite claiming to have enough water for personal consumption⁷³⁰ did not have a service level of sufficiency which allowed for personal and domestic hygiene, according to WHO guidelines.⁷³¹ From the 45 interviews, 28 reported a supply level equal to the WHO recognised daily amount for basic domestic use.⁷³² However, this level of supply although assuring water for consumption and allowing for some hand washing and basic food hygiene, does not allow for bathing or for laundry. This level of supply carries high health concerns.⁷³³ As such, it cannot be viewed as fulfilling the minimum essential level of water needed to comply with the core obligation above. Only 11 families were supplied with water above the recommended daily amount for basic needs.⁷³⁴ Moreover and significantly, this service level of supply could not be guaranteed and many of these families were subject to variable supply based upon seasonal disconnections and shortages, hence reducing their supply and making them more susceptible to health concerns than would normally be the case if the supply were constant. Despite the seemingly acceptable level of water supply, the variable nature of the supply has a negative consequence for the health of those concerned. Hence, the obligation in relation to availability is not being met. Table 6.1 provides an overview of the level of available water supply in relation to the interviewees and their location.

The special situation of rural families is also evident. Six families testified that they had to share their limited water supply not only amongst the family for domestic use, but also with their livestock and/or for agriculture. Although it was

729 GC 15, para 37(a).

730 Of the 45 interviews carried out, 24 interviewees maintained that they had sufficient water for personal and domestic use. Interestingly, of these 24, some interviewees viewed their supply as adequate, even if it was at a basic level according to the WHO guidelines, whereas others with the same level of supply felt their water was insufficient. Interviewees stated they had sufficient water even when access to supply was cut off for several days a week or month during the summer or if reliant on tanker water or rain water rather than mains supply. As such, it was useful to apply the WHO guidelines when assessing objectively the sufficiency question.

731 See Bartram, J and Howard, G, *Domestic Water Quantity Service Level and Health*, 2003, Geneva: WHO.

732 This being a minimum water supply of 20 l/c/d. See *ibid*, Executive Summary, Table S1.

733 *Ibid*, Executive Summary, Table S1.

734 This intermediate level is 50 l/c/d/minimum and assures consumption, basic personal and food hygiene and some possibility of bathing and laundry. This level of supply carries low health concerns. *Ibid*, Executive Summary, Table S1.

Table 6.1 Sufficiency analysis using WHO guidelines

<i>Level of water supply</i>	<i>Urban cases</i>	<i>Rural cases</i>	<i>Refugee camp cases</i>
Basic supply 20 l/c/d			
Consumption assured			
Hand washing and basic food hygiene possible	11	8	9
No laundry or bathing			
High health concerns			
Intermediate supply 50 l/c/d			
Consumption, basic personal hygiene and food hygiene assured	4	1	6
Laundry and bathing possible			
Low health concerns			
Optimum supply 100 l/c/d			
All domestic needs met			
Very low health concerns	0	0	0
Supply level unquantified		6	
Supply shared with livestock – l/c/d not available			

not possible to quantify exactly how much was utilised by the family and how much by the animals, it is clear that the level of supply is well below the amount deemed sufficient to ensure basic needs are met.⁷³⁵ For example, Interviewee 19 reported 50m³ per month on average, to be shared between 19 people and 120 heads of livestock. If shared between people alone this would only amount to 88 l/c/d, not accounting for the livestock. Consequently, with livestock taken into consideration the supply is likely to be at a basic level of subsistence, if that. Furthermore, this supply is via a communal tap within the community and sources are even more limited during the summer.

Likewise, Interviewee 18 reported not having sufficient water for domestic use, not even for drinking. Their average water supply was 60m³ per month to be shared between 34 people and 300 heads of livestock. Again, without accounting for the livestock this only leaves 59 l/c/d. The result is at best an intermediate level of supply, at worst a supply of basic level or below. In terms of access, they have no mains supply and gain their water from a local spring, rainwater and, in the summer, expensive tanker water.

None of the interviewees received the optimum level of water supply recommended by WHO for ensuring all domestic needs are met.⁷³⁶ Significantly, none of the families reported a guaranteed constant level of water supply and all were

735 Even if the water they could access was split half and half between them and the animals, this would still put them below the level needed for basic domestic use.

736 Optimum water supply for domestic use is recommended to be 100 l/c/d. See Bartram and Howard, 2003, Executive Summary, Table S1.

subject to shortage of supply, mainly due to problems of access, both physical and economic and due to seasonal fluctuations at source, discrimination in supply and effects from occupation such as incursions and closures. These disconnections and seasonal variations in supply coupled with quality issues suggest that the high level of health concerns due to the basic service level is increased further to very high health concerns for over 50 per cent of the interviewee families. If the six families who share their water with their livestock are included, then the figure is over 66 per cent of those interviewed.

When divided into geographical areas, it was those Palestinians living in rural areas, who suffered with the most limited consumption, particularly as it was these families who shared their water supply with their livestock. Hence figures for personal domestic use were unascertainable. Furthermore, they did not have access to a mains water network in their homes, although limited access to mains water network was a contributing factor to the insufficient supply of water across both rural and urban communities studied. In sum, of the 45 interviewees, 11 had no mains supply. Moreover, even those with mains water in urban communities suffered predominantly from mains network decrease in supply or complete stoppage of supply, as they were most reliant on this water source rather than water from cisterns or springs.

In its report *Thirsting for Justice*, the Center for Economic and Social Rights found that 'In the OPT, many households lack both sufficient and continuous access to water, especially since at least 15% of the population is not covered by a water network'.⁷³⁷ Moreover, 'Israeli actions severely reduce the availability of water for many of these communities as those who are connected to the mains network are 'subjected to the whims of the Israeli water [carrier] company, Mekorot'.⁷³⁸

This study found that the service level of supply was at its poorest during the summer months (from June to October inclusively) when demand for water was higher and supplies from source were less, due to reduction in supply from the water company, as Israeli settlements are given priority.⁷³⁹ Thirty-nine of the 45 interviewees complained of a seasonal shortage of water, due to insufficient mains water, absence of water collected in cisterns due to lack of rain and drying up of springs and wells. This often meant having to supplement sources with expensive tanker water. Interviewee 9 states, 'In summer time, water coming from the water network is completely cut off and nothing is supplied to the community. Therefore, we are obliged to buy water from tankers with an average supply of about 25–30 l/c/d and at a high price compared to water from the water network'.

Reasons noted for lack of mains water during this summer period included limited supply of water from source and the poor water network leading to leakage and dirt blocking pipes. etc: 'During summer time, the quantity [of water] is not

737 Center for Economic and Social Rights/PHG, May 2003, p 26. More recent reports estimate the number to be 10 per cent. See World Bank, April 2009, p v.

738 Center for Economic and Social Rights/PHG, May 2003, p 4.

739 A point reiterated in personal discussions with Basema Bashir of the PHG in March 2007. See also PHG, 2006, p 47.

more than 20 l/c/d. The network supply is repeatedly cut-off and to buy water from the tankers is expensive . . . This is due to limited supply of water from source, the poor water network which is old and needs rehabilitation and the distribution system adopted by the municipality [who] in distributing the water quantities is not distributing the water fairly'.⁷⁴⁰ The interviewee worries about sustainability of water sources for his children and future generations: 'I do not expect the water network to be rehabilitated even in the very near future'.⁷⁴¹

Furthermore, discrimination in supply between Palestinian communities and those of Israeli settlements was clear. Discrimination on the part of the Israeli water company Mekorot was noted in several instances as the cause of limited water supply, as it was noted that the amount of water allocated to the Palestinians by the Israeli water company was much smaller than that allocated to the Israeli settlers and to Israel proper. Interviewee 38 felt there was discrimination concerning water in the West Bank, 'Some areas get limited quantity of water because they are continually cut off from the water supply in the network and others get all the needed water. Settlers in particular get more water than they need'. Interviewee 37 also believed there was discrimination against the Palestinians, 'During summer the mains supply is cut off for approx 10 days in every month. This is due to limited supply from the water company . . . because of discrimination. They give more water to settlers . . . Israelis control all resources and they take the lion's share of water'.

In addition, it has been noted that whilst settlements have large areas of irrigated agricultural land, flowerbeds and lawns with sprinklers and swimming pools, nearby Palestinian communities do not have enough water for basic needs.⁷⁴² Several interviewees also offered this opinion: 'Israelis in general and settlers in particular consume much more water than we do. I personally think that Israeli chickens are respected much more than us: they are provided with large quantities of water, quantities that are not available for us as human beings. This is in addition to the water quantities [they] use for agriculture and flowers in the settlements';⁷⁴³ 'Israelis and settlers get much more water than we get, especially the settlers. Whereas settlers close to us get a great amount of water and they are able to use it for different kinds of agriculture and growing flowers, we barely get the needed water for drinking';⁷⁴⁴ 'Settlers get more water than we do. In Karmel, . . . we see them using so much water for [cleaning] their cars and in the houses [lawns], for chickens in their farms, at the same time that we face clear shortage in water supply'.⁷⁴⁵

In total, 40 of the 45 interviewees felt that they were discriminated against by Israel in the allocation of water supplied to the West Bank and many noted the

740 Interviewee 10.

741 Ibid.

742 Amnesty International, 2009, pp 45 and 66; OCHA, 2007, p 114; Abdul Rahman Tamini – Director of the PHG, *Guardian*, 31 May 1991, quoted in Ward, C, *Reflected in Water: A Crisis of Social Responsibility*, 1997, London: Cassell, p 111. Also PASSIA, July 2002, p 5; PHG, 2004, p 32.

743 Interviewee 23.

744 Interviewee 22.

745 Interviewee 17.

particular discrepancies between Palestinian communities and Israeli settlements in the area.⁷⁴⁶

Discrimination on the part of the municipality was also reported. Interviewees claimed that the municipality, which acts as the local service provider in some cases, would discriminate in the way in which it supplied Palestinian communities. For example, Interviewee 37 states, 'There is also discrimination on the Palestinian side, since cities usually get more water than villages and camps', and Interviewee 36 believes that 'the local distribution of water by Palestinians is not fair'. Furthermore, Interviewee 7 claims that local officials are corrupt and influential people get more water than 'ordinary folk'. 'This is also due to the better housing and better quality water networks in those areas where they live'. This belief that the local municipality discriminated between Palestinian areas was widespread.⁷⁴⁷ This highlights the responsibility that the PA has itself in realising the right to water for those living in the West Bank. However, the authorities can only distribute the water that is available to them from Israel. As such, it is a very difficult job to ensure that everyone has sufficient water, if the water authority does not receive enough water in the first place. Moreover, with no autonomy over development of the water infrastructure, it is impossible for the Palestinians to control distribution fully and to maintain the water network. Despite these limitations the authorities have a duty to ensure that distribution in supply is equitable as far as is possible,⁷⁴⁸ but ultimately the legal obligation must lie with Israel as the occupying power exercising control over the water sector.

Finally, settler interference was noted as a reason for insufficient water supply.⁷⁴⁹ This can be in the form of preventing Palestinian access to sources, filling points and cisterns or through the control of the mains network valves. In certain cases, due to the proximity of the water point to the settlements, settlers are able to tamper with water valves diverting the supply resulting in either cutting off supply to the Palestinian villages or greatly diminishing the supply available to them. Interviewee 17: 'Settlers from a neighbouring settlement (Pnei Hever settlement) cut off the water supply to the [Bedouin] community in 2001 for two continuous years. The water supply was reconnected via a different settlement, Karmel, in 2003'. Mekorot did not take any action against the settlers for cutting the supply or action to reinstate the supply to the Bedouin community; Interviewee 19 states, 'The settlers who live in Karmel settlement, cut off the water supply to us for about two years, starting in 2001. They control the main valve that provides the water

746 See UNDP, 2010, p 49.

747 See also Interviewee 14 regarding Hebron municipality, 'There is inequality in water accessibility between Palestinians and Israelis (more to Israelis) and an absence of active water legislation and law enforcement in this regard. Also there is mismanagement of water resources in Hebron district by Hebron municipality (priority is given to Hebron city at the expense of countryside)'. See also Interviewee 16 regarding inequity in Dura city municipality.

748 Under the core obligation of non-discrimination.

749 More widely noted by Amnesty, 2009, pp 45–46 and 62–65; and Center for Economic and Social Rights and PHG, May 2003, p 26.

supply to us'. The supply was finally reinstated to the Bedouin's communal tap in 2003.⁷⁵⁰

As well as having subsequent effects upon the health and well-being of those Palestinians with insufficient water, lack of water supply also results in stress within Palestinian communities. For example, camp families suffer from limited mains access due to intermittent supply specifically dependent upon their location within the refugee camps. Those living uphill have problems receiving their water due to lack of pressure in the mains network. This means that many families, who could afford to, purchased a water pump to help push the water delivery through the system. Those who could not afford a pump therefore did not receive any water or could only access very limited amounts of water. The same was true of the families who lived at the top of the hill as all the water was being used by those further down hill:

During the summer water supply through the network is less. This is due to limited supply from source. Also needs are higher in the summer. Water is supplied for one or two days a week and then cut off for a week . . . Some families use small pumps to get water from the network and this affects [minimises or stops] the supply to other families that do not have a pump.⁷⁵¹

Furthermore those families who do have a limited supply of water do not want to share the water that they do have. Interviewee 39: 'During summer water is cut off often and therefore supplied quantity is very limited . . . [Therefore] there is not so much cooperation between people [to share what water there is]'. Interviewee 40 said shortage of water causes problems for his family and for the community, 'This causes fights between members of the same family, between families, and even between neighbourhoods'. Significantly, these interviewees all lived in refugee camps, which are subject to overcrowding and poor housing conditions, another factor causing stress. However, these testimonies illustrate the stress caused by lack of water and highlight the link between the right to water and right to housing.

Overall, the findings from the interviews were supportive of wider evidence presented within other studies. For example, according to the WaSH of the PHG, communities are suffering from a severe water shortage: 36 per cent (225) of the 632 surveyed have a per capita consumption of less than 50 l/c/d. Furthermore, water for all domestic uses (including domestic agriculture, livestock, and losses) was less than or equal to 30 l/c/d in 43 communities, which represents about 7 per cent of those surveyed. In only 16 per cent (100) was the per capita water consumption at the WHO minimum optimum level for good health.⁷⁵² In sum,

750 Interviewee 23 also reported that settlers control the valves to the water network and so prevent them (the Bedouin family) from getting their fair share of the water supply.

751 Interviewee 38. See also Interviewee 39, 'Some areas on the uphill of the camp do not get enough quantity of water [due to poor pressure in the network]. On the other hand, some families' use pumps to take a larger quantity of water from the network and this affects supply to other families [minimises or stops supply]'.

752 PHG, 2005, p 18.

through an assessment of the data gathered from the testimonies/interviews, it is clear that the core obligation in relation to availability of water is being violated by Israel's policy and actions.

Violations of core obligations – access to water

Concerning accessibility there are several core obligations including, *inter alia*: 'To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups';⁷⁵³ 'To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets; to avoid prohibitive waiting times; and that are at a reasonable distance from the household';⁷⁵⁴ and 'To ensure personal security is not threatened when having to physically access to water'.⁷⁵⁵

If we focus on the physical dimension of accessibility, it is clear from the interviews that many interviewees faced problems with accessing sufficient, safe and regular water. As noted previously mains water supply, when available, is not constant in many cases. Moreover, several interviewees do not have a connection to the mains network and so face additional problems of securing a safe and adequate source. Interviewees reported reliance on a variety of sources other than mains networks and often used a mixture of sources depending on the season, distance and availability and the security situation.

Accessibility was firmly demarcated along community lines. Rural communities had the worst access with only seven of the 15 interviewees having access within their homes. Camp families had the best access in terms of mains connections in the home. However, the supply was intermittent and dependent upon location. Therefore, urban communities had the best access to mains water, but in turn this meant that when mains water was not available they were the worst affected, as they were reliant on the mains supply for the majority of their water. During the summer these interviewees stated that mains water was unavailable for much of the time.⁷⁵⁶ This has increased the reliance on alternative sources, including rainwater collected in roof tanks or cisterns and purchase of tanker water, both sources open to contamination and often difficult to access due to security measures.⁷⁵⁷ Furthermore, interviewees living in rural areas and camps reported use of these sources, as well as wells, springs (often seasonal) and communal taps. Likewise, these sources are also subject to increased risk of contamination.

In addition to problems relating to access to clean and sufficient sources of water, physical security is also an issue for interviewees. The threats to physical security reported were twofold: firstly, from the actions of the Israeli Defence Forces⁷⁵⁸ and,

753 GC 15, para 37(b).

754 Ibid, para 37(c).

755 Ibid, para 37(d).

756 E.g. see availability section.

757 E.g. see quality section.

758 Hereinafter referred to as the IDF.

secondly, from Israeli settler intimidation and violence. Distance and time affected the sources used and with these limitations upon freedom of movement, collecting water from sources far away or difficult to get to was a time consuming and often dangerous task.

The security policies of the IDF often result in denial of access to water for Palestinians in the West Bank, as measures such as roadblocks and mobile checkpoints, closures and curfews limit their freedom of movement. These measures also threaten physical life and limit access to alternative sources of water by preventing water getting to the people who need it. Several interviewees reported occupation forces blocking access to water through the prevention of movement of water tankers.⁷⁵⁹ Interviewee 9:

During April and May 2002, the tankers were completely prohibited from moving to transport water to the community. This was in addition to the destruction of the water network (main lines) by the Israeli forces . . . Water tankers were forbidden from moving during curfew [and] the municipality was not allowed to rehabilitate the destructed water network.

Likewise, in Interview 11 it was stated:

Water tankers were stopped and sometimes prohibited from transporting water to the community . . . Checkpoints were at Al Fawwar intersection and at Halhul bridge . . . the worst situation was in the summer of 2003. [Also] for 40 days in March and April 2002, during the Israeli incursions, tankers were completely prohibited from moving due to curfew.⁷⁶⁰

Furthermore, during incursions refugee camps were completely closed to all vehicles resulting in water tankers being prohibited from entering the camp. During this time interviewees reported that the tanker drivers would try to use other secondary dirt roads (very difficult terrain) to deliver the water – a very dangerous task.⁷⁶¹

In addition to the prevention of tankers from delivering water to Palestinian communities, confiscation of water tankers was also reported. For example, during 2004, the Israeli Forces annexed a tanker (3.5 m³) that one interviewee uses for water transport (it is pulled by a tractor). This was in a place very close to his house where he cultivates and sows the land, for subsistence. They took the tankers and subsequently he was not able to transport the required water.⁷⁶² Similarly,

759 For wider documentation of the impact of closures and checkpoints on water tankers, see PHG, 2006, pp 36–37; Amnesty International, 2009, pp 52–5 and 40; PHG, 2004, pp 44–53; PHG, 2005, pp 50–53; B'Tselem, July 2001, p 6; and Center for Economic and Social Rights and PHG, May 2003, p 29.

760 Also Interviewees, 16, 20 and 21.

761 Interviewee 32. Also Interviewee 31.

762 Interviewee 16.

Interviewee 20 stated, 'Last September, one [water] tanker was confiscated for more than two weeks, at the Israeli checkpoint that is close to us. Many tankers were forced to go back to where they came from'.

Even if one could argue that in emergency situations such as during a 'necessary' incursion, water is provided in tankers, this is not a sustainable source or solution. Tanker water is relatively expensive for many. Moreover, there is no dignity or independence in having to wait for water to be delivered. A fundamental element of the right to water is that it is realised with the dignity of the human being intact. Hence, this element of the right to water is not being fulfilled. Furthermore, in addition to the reliance on tanker water as a human rights problem due to non-sustainable access, there is a 'double negative effect' as the Israeli forces have actively interfered with the provision of such water, thus violating the obligation of respect.

Moreover, access was also prevented by direct attacks upon the personal security of interviewees by IDF soldiers shooting at roof tanks and at those trying to collect water from these tanks, wells and cisterns or even neighbours' houses.⁷⁶³ Interviewee 4 obtained 20 per cent of their water supply from rainwater collected in their neighbour's cistern, 300m and five minutes walk away. This water was collected by a male child on foot. After the death of 12 Israeli soldiers in Hebron, incursions, curfew, search and arrest followed. During this time they suffered a four-month disconnection from mains water (in November 2002). Access to water from other sources was also difficult and the ability to get water from the neighbour's cistern was affected, as it was too dangerous to go outside. This situation resulted in their 12-year-old son being injured by a rubber bullet in the leg, whilst going to collect water from the neighbour's cistern. They maintain that an Israeli soldier fired the shot.

Interviewee 6 also reports being shot at: he went to collect water from his neighbour's cistern and when he was pouring the water into his roof tank, a bullet hit the tank and he narrowly escaped injury or death. The bullet caused a hole in the tank, making it unusable. The targeting of roof tanks is also documented:

During 2001 Israeli forces shot our roof tanks and water was cut off for a complete week . . . We tried to fix the tanks on the roof, but Israeli forces fired on us and we had to come down since our lives were in danger. We called UNRWA and they helped in fixing the roof tanks and getting back water supply . . . [Also], during the first period of the Intifada, Israeli soldiers in the military base near Rachel's Tomb used to target the roof tanks in the camp and damages were great. UNRWA used to help in fixing them. About one and a half years ago this stopped and the situation is better now.

In addition, reports were made of shooting by the IDF at water tankers, their drivers and at tractors pulling water tanks: 'During the Israeli incursion in April 2002,

763 Also Interviewees 19 and 20.

while I was transporting water to my house, with a tanker pulled by a tractor, the driver and I were shot at by Israeli soldiers. They damaged the wheels of the tractor'.⁷⁶⁴

Furthermore, during high-intensity violence such as Israeli incursions, direct attacks on the water infrastructure are common and well documented outside of this study.⁷⁶⁵ For example, the Center for Economic and Social Rights states, 'During the current Intifada, the destruction of Palestinian water infrastructure has led to a decrease in accessible water supplies for Palestinians. In some cases, this destruction has left whole communities with no access to water for extended periods of time'.⁷⁶⁶ Attacks of this nature were widely reported by interviewees, most especially occurring during Israeli incursions into Palestinian areas. For example, incursions and high-intensity fighting in camps caused damage to mains water pipes: 'Israeli bulldozers damaged some of the main and secondary water lines during the 2002 incursion, which continued for 20 days. In addition, during the years 2002 and 2003, curfew was imposed on the camp on several occasions, which affected the supply of water (especially during summertime), as tankers could not travel'.⁷⁶⁷ Furthermore, personal safety was endangered during these curfews (when trying to collect water): 'During curfew times, when I needed to get water from the mosque or from neighbours, this was very risky'.⁷⁶⁸

Damage from incursions was not limited to refugee camps either. For example, see the case of rural Interviewee 28: 'During the April 2002 incursion, the main [water] lines were damaged by the Israeli bulldozers, and we were not able to fix it for 40 days. For these 40 days we did not have water from the water network'. During this time they accessed water from cisterns or other nearby alternative sources.

In addition to the threats to physical security due to the actions of the IDF, interviewees reported intimidation, threatening behaviour and violence from Israeli settlers, when they were trying to collect water. Often communal water points are located near to a bypass road or settlement fence, which makes access to these points dangerous for Palestinians. For example, Interviewee 25 did not have safe access to water: 'I was attacked several times by Israeli soldiers and by settlers, while trying to get the needed quantity of water'. These attacks mostly happen on bypass road No 60, whilst driving the tractors and tankers to collect the water from the filling point. 'One time, during the current situation, on the way to Qiriat Arba' to get water, settlers were waiting for me. I had to call the Israeli soldiers to take them out of my way. If I had not called the soldiers, the settlers would probably have hurt me'. The IDF have also denied him access: 'Since the start of the current

764 Interviewee 21. Also Interviewee 18: 'The filling point is very close to the Israeli Military base in Khashm Al Daraj. They shot towards me several times'.

765 E.g. Amnesty, 2009, pp 56–62; PHG, 2004, pp 54–59; and UNEP, 2003, pp 52, 56 and 57, Table 5.1.

766 Center for Economic and Social Rights and PHG, May 2003, p 29.

767 Interviewee 31. Also Interviewee 32 for a similar testimony.

768 Interviewee 31.

Intifada, to the present day, we have been denied access to water on several occasions. A year and a half ago, after the killing of several settlers in the area, we were denied access to sources of water by being prevented access through the main road for almost a month’.

Similarly, Interviewee 23 lives in Um Al Khair, Hebron governate, which is very close to Karmel settlement. The house is only separated from the eastern side of the settlement by a fence. At the time of the interview, he had an Israeli order to demolish his house, which was due to be evacuated by 23 December 2004. This was issued as the Israeli government deemed the house an illegal dwelling – an unlicensed building.⁷⁶⁹ His family get 90 per cent of their water from a Mekorot filling point, approximately 300m from home, but it is not within safe physical reach, ‘since the filling point is very close to the settlement and if we need water at night it is not safe to get as we are threatened by settlers who are very close’.

Moreover, the threat of violence alone prevents the Palestinian families from gaining access to water. Interviewee 23 continues: ‘If settlers are near the water point, [we] the Bedouins will leave to avoid confrontations with them or not go to collect water in the first place’. Likewise, Interviewee 20 states that the threat of violence and harassment prevents them from gaining safe access to water:

The place where we live is not safe. In 2003, Israeli Forces and settlers attacked many tankers, whilst transporting water to the community and using the bypass, on their way to Yatta . . . 10 cisterns are controlled by settlers in Susiya settlement and since 2000, they will not allow us to use these cisterns . . . Settlers try to prohibit us from using many cisterns in the area.

Interviewee 22 also told of settlers preventing access to cisterns and wells:

Settlers have annexed several dunums⁷⁷⁰ from our land, including several cisterns that are in these areas. We are not able to reach these wells and cisterns at all, as we are not able to access the annexed land. We feel that our lives are under threat all the time and every year settlers are getting closer to our community and are getting more of our land and more of our cisterns.⁷⁷¹

769 This house has since been demolished (information gained March 2007).

770 A dunum is a measure of land used in Palestine with 1 dunam equal to a quarter of an acre (1,000 m²). See PHG, 2004, p 89.

771 Also Interviewee 21: ‘Getting water during summertime is not safe because of harassments from Israeli soldiers and also because of settlers, especially from the neighbouring settlement . . . Since we live very close to a settlement in the south-eastern part of Hebron, water from tankers was prohibited from reaching us by IDF soldiers and settlers, for one or two days at a time during the current situation. This [has] happened several times. The IDF prevented tankers from passing through checkpoints into our community and tankers were also attacked by [the] settlers’. Interviewee 21 believes that his right to water is being violated because they do not get enough clean water to satisfy their needs and when they try to create new water resources these are destroyed by both Israeli forces and settlers: ‘Several cisterns that we built were damaged under the pretext of being unlicensed wells and we are not allowed to build any cisterns to collect water’. See also Interviewees 18 and 19.

The economic dimension of accessibility was also a problem for the majority of the families interviewed. High unemployment and increasing poverty due to closures and curfews has resulted in hugely inflated costs for tanker water and inability to pay for mains water: Many of the interviewees said they had not paid their water bills, because of lack of ability to pay. Interviewees 34, 36 and 45 said they did not pay for water because they cannot afford the bills, due to the very bad economic situation. Similarly Interviewee 38 states, 'We are unable to pay because of the current situation and we owe the authority so much money'. These interviewees noted that despite inability to pay for the water they used, this did not limit the amount of water they consumed, as this was limited anyway due to insufficient access and supply. In addition the local translator (and member of PHG) noted that, in general, it is the PWA that is suffering from the problem of non-payment and that it is unable to force people to pay during the current poor economic situation. At the same time the PWA cannot cut off the water supply to these people during this time of hardship. Notably, Mekorot gets its money from Palestinian taxes, but the local councils are unable to get all the money owed from people to pay the PWA.

The overall deterioration of the economic situation within the OPTs has had a lasting effect upon people's ability to pay for goods and services, exacerbating poverty.⁷⁷² The UNRWA notes that recent figures illustrate that 57.2 per cent of Palestinians live in poverty and 46.3 per cent live in deep poverty.⁷⁷³ Even accounting for food aid, 19 per cent of Palestinians in the West Bank remain below the poverty line.⁷⁷⁴ Moreover, unemployment has increased due to incursions and a block on workers entering Israel,⁷⁷⁵ as the occupation measures taken by the Israeli government have meant that many Palestinians who once worked within Israel proper can no longer go to work and many who have employment within the OPTs cannot get to work due to closures.⁷⁷⁶ Furthermore, some Palestinian workers are not in receipt of wages for their work.⁷⁷⁷ All of these factors contribute

772 World Bank, October 2004, pp 29–59; and UNRWA, November 2006, pp 29–44.

773 Based on household income and averages for the OPTs as a whole and where the official and deep poverty lines for a six-person household (two adults and four children) in the OPTs were established at NIS 2,362 (US\$572) and NIS 1,886 (US\$457) in monthly expenditures respectively for 2007 (using the average NIS/US\$ exchange rate of 4.1). See UNRWA, *Prolonged Crisis in the Occupied Palestinian Territory: Socio-Economic Developments in 2007*, July 2008, Gaza: UNRWA, p 51.

774 Ibid. Previously, the World Bank had put this figure at 47 per cent with 16 per cent of the Palestinian population in subsistence poverty. See World Bank, 2004, pp 30 and 32 (where poverty is defined as less than US\$2.3 per person per day and subsistence poverty as less than US\$1.6 per person per day. See pp 31–32).

775 Ibid, pp 13–14.

776 For a detailed analysis of the economic crisis and consequent poverty see UNDP, 2010; UNRWA, July 2008; World Bank, 2004, pp 1–3 and 39–41; and UNRWA, 2006, pp 14 and 27–28.

777 See Jane Flanagan in Nablus, 'Hamas sanctions squeeze the life out of West Bank', *The Telegraph*, 7 May 2006; Chris McGreal in Jerusalem, 'UN calls for massive rise in Palestinian aid', *Guardian*, 1 June 2006; David Gow in Brussels and Chris McGreal in Jerusalem, 'EU Plans to Go It Alone with Aid for Palestinians', *Guardian*, 8 May 2006; Donald Macintyre in Gaza, 'Emergency Aid May Be Too Little, Too Late for Palestinians Trying to Survive a Crisis', *The Independent*, 11 May 2006.

to a situation where many of the interviewees were unable to pay for mains water if connected and unable to purchase adequate amounts of water from other sources. Thus, economic accessibility to sufficient safe water is threatened, if not impossible. The Center for Economic and Social Rights concludes, 'Palestinians' economic accessibility to water is being diminished both from a general increase in poverty and unemployment, as well as a rise in the price of both piped and tanker water. Since the start of the second Intifada, poverty among Palestinians has trebled to 60 per cent, unemployment has risen to half the population, and the price of tanker water, on which so many rely, has risen by an average of 82 per cent. Even in communities with piped water, high rates of inability to pay water bills (up to 100 per cent) have been recorded. The poverty, unemployment, and inflation of water prices are a direct result of Israeli policies of occupation, closure, and discrimination between Israelis and Palestinians'.⁷⁷⁸

The source of the water has a bearing on the cost – tanker water was the most expensive, due to the difficulties in transporting it.⁷⁷⁹ Many interviewees talked of the rise in the cost of tanker water due to the dangers faced by drivers in transporting it and the physical difficulty in accessing roads to Palestinian communities.⁷⁸⁰ Furthermore, the cost of tanker water limited the amount of water people consumed, as they could only purchase minimal amounts. Interviewee 23 states that he pays 20 NIS per m³ for tanker water, which is not affordable for the family and limits the amount of water purchased and used. It also causes problems for the family: 'It is a financial burden and I have fought with my children several times in order to make them use water wisely. This [water] problem makes me, and the rest of my family, nervous (stressed) all the time'.⁷⁸¹ Additionally, even piped water has become increasingly difficult to afford. The PHG reports that 'In the cases of communities that are provided with water through a network, the high percentage of families in almost all of these surveyed communities that cannot afford to pay their water bills has, in many cases, reached 100 per cent'.⁷⁸²

Notably, in the case of Hebron municipality, a scheme had been introduced to try and make the piped water more accessible for those with limited economic

778 Center for Economic and Social Rights and PHG, May 2003, p 5 (poverty is defined in this instance as personal average daily consumption of less than US\$2, based on the definition in the World Bank report, *Two Years of Intifada, Closures and Palestinian Economic Crisis: An Assessment*, 5 March 2003, Washington DC: World Bank, p 3.

779 Oxfam reports that the price of tanker water has risen sharply due to the use of alternative difficult routes, which increase transportation time and therefore costs. In 11 localities interviewed, the local authorities reported an average increase of 82 per cent in the price of tanker water. See Oxfam International, 'Forgotten Villages: Struggling to Survive under Closure in the West Bank', International Briefing Paper 28, Oxfam International, September 2002, p 26.

780 See previous examples cited.

781 See Interviewee 25 for a similar testimony (they also pay 20 NIS/m³ for tanker water which they find is not affordable and limits use of water): 'The family is nervous all the time because of the lack of water and worry that we have to use it wisely. In addition, getting the needed quantity of water is something which is not safe or easy to do and this causes a real problem to us'.

782 PHG, 'Background, Unemployment', at www.phg.org/campaigns (accessed 4 May 2007). Further information concerning pricing for water in the West Bank, see Palestinian Independent Commission for Citizens Rights, *Concerning Price Discrepancy for Water in the Palestinian National Authority Areas*, Special Report Series (20), March 2003, Ramallah: PICCR.

means. Two families reported being eligible and party to a subsidised water supply that had been introduced for residents of the Old City of Hebron, apparently to encourage citizens to stay in that part of the city.⁷⁸³

Finally, interviewees reported discrimination in relation to both physical and economic access to water. Notable was the claim by several families that water was distributed inequitably on the part of the local Palestinian municipality or service provider. Claims that wealthy and influential members of the Palestinian communities received priority in water allocation, as well as greater amount of water, were made by interviewees; for example Interviewee 1 noted that more water is supplied to influential Palestinians, such as the area where the town mayor and other dignitaries live (Wadi Attufah).⁷⁸⁴ Furthermore, as noted above, many interviewees said that whilst they do not have access to sufficient water, Israeli settlers within the West Bank had sufficient water and mains access with constant supply all year round.⁷⁸⁵

In sum, Israel is in violation of all the core obligations concerning both the physical and economic dimensions of access to water. Furthermore, the dangers presented to the physical security of the interviewees through the collection of water are considerable and threaten human life in cases. As such, the actions of the IDF and Israeli settlers present a breach of international humanitarian law, in addition to a violation of the human right to water.

Violations of core obligations – water quality

Concerning specific violations of the right to water, the final key substantive element to be discussed is that of water quality. The core obligations concerning water quality provide that water must be ‘sufficient and safe for personal and domestic uses to prevent disease’.⁷⁸⁶ The related core obligation ‘To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation’⁷⁸⁷ is also relevant. As noted previously, both in terms of sufficiency and access, water supply to the Palestinian people interviewed is inadequate. These factors alone mean increased health risks for these families. However, this risk is increased further by the fact that much of the water available to them is of poor quality and in some cases contaminated. Of the 45 interviews carried out, 25 reported a problem with the quality of the water they received.⁷⁸⁸ In terms of human settlements, the rural areas were most affected followed by the camps and then urban areas. This correlates with the source of the water, with

783 Interviewees 1 and 2.

784 See examples cited previously.

785 See examples cited previously.

786 GC 15, para 37(a).

787 Ibid, para 37(i).

788 It should be noted that no scientific data was gathered to clarify whether the water was contaminated in these particular cases. However, evidence of poor quality water supply has been gathered more widely. E.g. see PHG, 2006, pp 39–41; World Bank, April 2009, pp 23–25; and Amnesty International, 2009, pp 60–61.

urban areas having the most network connections and therefore less reliance on other sources.

The problems reported ranged from water that is dirty in appearance to water contaminated with sewage and water with 'moving creatures' in it. Also, the source of the water had a bearing on the quality of the water. Tanker water was the most cited as polluted or dirty as often the tankers were not clean before the water was collected. Roof tanks and cisterns were also problematic as they often were open to the air and ground and as such collected residues and dirt as well as pollutants contained within the rainwater or groundwater. Cases of pollution of water from these sources have been reported when supplies for water purification and tank cleaning could not be delivered due to closures.⁷⁸⁹ This scenario is also evident in the case studies. For example, Interviewee 10 believed that the quality of their water is poor and said it was not clean to sight or acceptable in taste, colour or smell. They believe it to be contaminated because, 'When you look at it, it does not look clear. I sometimes see larva and moving things in the water, especially the water from cisterns. Water used from the cisterns is not treated or chlorinated and we expect it to be contaminated from the roof and the atmosphere'.

The water supplied via the mains was the cleanest although again this depended on how often the supply was cut off, as it often sat sedentary in rusting pipes causing discolouration and a metallic taste: 'Rust is always seen and found in the water coming from the old pipes'.⁷⁹⁰ In some cases interviewees were unsure whether their water supply was actually contaminated but felt it was because it looked dirty or smelt and tasted bad. Others were convinced it was contaminated and state that they had suffered health problems due to this.⁷⁹¹

Interviewee 15 relies on rainwater collected in a cistern for 60 per cent of their water and purchases tanker water for 30 per cent of their supply. The final 10 per cent is from the network. He believes the water is contaminated:

It is contaminated because of the existence of small worms and dirt in it, especially when we get it from cistern. The collected rainfall is not always clean, we don't use any chlorine methods and the water networks are rusty and unclean because of long cuts in water supply. Also, because of the unavailability of a wastewater network in the city of Dura and the dependence on cesspits there is an increased risk of contamination from wastewater.

It has been documented that water is commonly open to contamination from sewage, open waste water and other pollutants due to the poor water network infrastructure, lack of maintenance causing water pipes and sanitation systems to be in a state of poor repair and/or deliberate damage and destruction of pipelines and water tanks by the Israeli forces' actions: 'Israeli occupation and closure have

789 E.g. in the case of the village of Mughrayeh, rainwater cisterns and wells were not cleaned or chlorinated because supplies could not be delivered from Ramallah. See Oxfam, 2002, p 27.

790 Interviewee 10.

791 See examples cited previously.

compromised the quality of water available to Palestinians. Israeli military incursions have destroyed critical water treatment infrastructure. Closure has delayed or prevented repair to aging or damaged water and sanitation systems as well as the proper disposal of sewage and solid waste, leading to contamination of water sources'.⁷⁹² Furthermore, there has been a lack of development and funding of existing wastewater treatment infrastructure and delay in approval of plans for improvements and new construction projects of modernised sewage treatment plants, further exacerbating the decline in water quality.⁷⁹³ In addition, cases of deliberate contamination including deliberate contamination by IDF soldiers⁷⁹⁴ and dumping of industrial waste and settlement sewage into Palestinian water sources have been documented.⁷⁹⁵

Overall, 'The destruction of drinking water sources and infrastructure, as well as the decline in incomes, has forced Palestinians to turn to water sources of lesser quality to fulfil their domestic needs'.⁷⁹⁶ For example, interviewee 19 states that although he knows the quality of the water available is poor, 'It is the only available water and despite everything we use it . . . We are not sure what the quality of it is, as it is not tested', but they believe it to be contaminated: 'The water normally has a colour (red tinge or white cloudy), the network is old and rusty, cisterns are usually not clean, since the water collected is rainwater and on the ground and could be polluted. No chlorination is used to disinfect the water'.

On the whole, based on evidence from this study and more widely, water supplied to the West Bank Palestinian communities is not 'sufficient and safe for personal and domestic use'⁷⁹⁷ and access to adequate sanitation⁷⁹⁸ is not enjoyed by many. Moreover, Israeli policies have led to the deterioration of water quality and to the contamination of water whether deliberate or as a result of occupation policies restricting freedom of movement. In conclusion, the evidence points to a violation on the part of Israel, of the obligation to ensure safe quality of water is available for everyone to enjoy. Furthermore, measures to control and treat disease once present have not been taken and in fact, Palestinians' access to health care has also declined in the current Intifada.

Violations of the right to health due to lack of safe and accessible water

The lack of mains network and the existence of only intermittent mains water supply result in a reliance on unsafe water sources. The information gathered from

792 Center for Economic and Social Rights and PHG, May 2003, pp 5, and 32.

793 B'Tselem, *Foul Play: Neglect of Wastewater Treatment in the West Bank*, June 2009, Jerusalem: B'Tselem – The Israeli Information Centre for Human Rights in the Occupied Territories, pp 17–21.

794 E.g. see B'Tselem, July 2001, p 9.

795 B'Tselem, 2009, pp 5–17; UNDP, 2010, p 92; Amnesty International, 2009, p 63; PHG, 2004, p 65; and UNEP, 2003, pp 76–87.

796 Center for Economic and Social Rights and PHG, May 2003, p 5.

797 GC 15, para 37(a).

798 Ibid, para 37(i).

this project indicates that those without mains supply of water are most at risk of health problems, as they have increased exposure to unclean water sources and dirty collection points, resulting in a higher risk of contamination. Moreover, they are more likely to suffer from water shortage leading to poor hygiene practices. As such, lack of physical and economic access is a major contributing factor in health problems related to water supply. Furthermore, the poor quality of much of the water consumed and used by the interviewees and by Palestinians throughout the West Bank has far-reaching consequences for the health of the Palestinians in these communities. Bartram notes that it is a combination of lack of access to water and use of unsafe quality water that causes the most health problems, rather than the limited supply of water.⁷⁹⁹ Moreover, the policy of closures results in the stagnation of waste and with little means to dispose of sewage and other health hazards, environmental risks of contamination of water are high. Because of these factors, related violations of the right to health are prevalent.⁸⁰⁰

Problems suffered are a result of several factors: consumption of contaminated or poor-quality water, poor personal and environmental hygiene due to lack of access to water and insufficient water and inadequate sanitation. The consequences include, *inter alia*, intestinal and worm-related illnesses, skin disease, infectious diseases and pneumonia.⁸⁰¹ Interviewees in this study reported a range of health problems as a result of water-related factors, particularly skin diseases and stomach complaints. Significantly, those especially affected by health problems were the young and women. Children are particularly vulnerable and in several of my case studies the families reported that their children suffered with skin diseases, asthma and stomach infections causing diarrhoea and vomiting. For example, Interviewee 11 believes his water is contaminated, as it smells bad and although the turbidity is clear it has moving things (creatures) in it. The children suffer from diarrhoea and stomach bugs due to the contaminated water and lack of hygiene due to water shortage: 'The children are sick all the time and I have to take them for treatment. Although their illness is not serious, this is another economical and psychological burden'. He adds that his ten-year-old daughter is particularly vulnerable and suffers from stomach pains all the time. 'Treatment at a doctor's or health centre can cost between 10 and 15 US\$'.

Interviewee 19 states:

One of my children, who is 4 years old, has asthma and he is still suffering from it [due to poor hygiene]. The children have diarrhoea and stomach problems most of the time. The shortage of water availability is affecting the

799 Bartram and Howard, 2003, pp 23 and 27–28.

800 For evidence of wider violations of the right to health related to water within the OPTs, see WHO, *Health Conditions in the Occupied Palestinian Territory, Including East Jerusalem, and in the Occupied Syrian Golan*, Report by the Secretariat, 13 May 2008, A61/18 Rev.1; UNDP, 2010, p 43; PHG, 2006, pp 39–42; Center for Economic and Social Rights and PHG, May 2003, pp 27–28; and Oxfam, 2002, pp 27–28.

801 See UNICEF, *Progress for Children: A Report Card on Water and Sanitation*, No. 5, September 2006, New York, NY: UNICEF, p 4.

hygiene situation in our house and we are not able to clean properly and continuously . . . In particular, our children and babies are suffering from the shortage in water quantities. Sometimes, but not always, we boil the water for babies as a preventative measure.

Many interviewees reported their children suffering from upset stomach, vomiting, diarrhoea and amoebic dysentery due to poor water quality.⁸⁰² Furthermore, lack of water was reported as responsible for exacerbating existing allergies such as asthma and skin problems.⁸⁰³ In certain cases, the vulnerability of babies and children caused the families to take measures to try and prevent illness. The baby girl in the family is particularly vulnerable due to the water problems, 'Some times I have to buy bottled water for her or boil the needed water'.⁸⁰⁴ Although, interviewees testified that low income often meant they could not afford chlorine tablets or other water treatment measures:

[The] quality of the water is poor – dirty to sight and it tastes and smells bad. Rainwater from the cistern is contaminated due to the dusty air and unclean roof cistern. Also the tanker water is not clean at times as the tankers themselves are unclean. We don't use chlorine tablets or any water treatment measures because of difficult financial conditions – low income.⁸⁰⁵

More severe health problems were also reported.⁸⁰⁶ Significantly in several cases from camp communities, interviewees reported their children suffering from amoebic infection which in serious cases they suspected had caused brain abscesses or similar. They believe this is caused by the contamination of the mains water supply from the open waste water in the camp. Interviewee 31 states that his children suffer from stomach bugs, diarrhoea and vomiting and stomach cramps. In addition, 'One of my children was affected with a serious disease in the head and the doctor assured us that it was related to the water (when the doctor examined the water he confirmed that the water was polluted). My child stayed in the hospital for ten days'. Likewise Interviewee 32 reported that one of her children had 'a serious disease in the head and had to stay in the hospital for two weeks (It causes a very bad fever) . . . Several people in the neighbourhood were infected with the same disease in the head and everybody thinks it is related to the water'.⁸⁰⁷ Her family also suffer from stomach bugs and cramps, diarrhoea and amoeba.

802 See, *inter alia*, Interviewees 4, 5, 10 and 25.

803 See, *inter alia*, Interviewees 4 and 5.

804 Interviewee 10.

805 Interviewee 5. Similarly, Interviewee 25 states, 'Cisterns are not cleaned properly, and therefore, when we reach the bottom of the cistern we get water of dirty colour that tastes bad. No treatment or disinfection of the water takes place . . . Children are sick most of the time because of the unclean water. They always have stomach problems and throw up, but thank god they do not have any serious diseases'.

806 E.g. kidney failure was noted as a common illness within the community due to use of polluted water from cisterns, e.g. in Interview 9 where the interviewee is a pharmacist. Also, interviewee 28 reports kidney stones, and interviewee 37 reports kidney problems.

807 No further details were available to confirm the cause.

Notably, both these families lived in Al'Aroub refugee camp, which has been documented within the WaSH report as liable to contamination of water due to open sewage channels.⁸⁰⁸ The contamination of water for consumption with wastewater is also documented in other camps, for example Al Duheisha camp, Bethlehem: 'Sometimes it [water] has been polluted when it has been mixed with wastewater that flows in the camp'. The interviewees say they usually notice a change in the taste and colour of the water when this happens. They suffer from stomach bugs causing, cramps, diarrhoea and vomiting and note that their children are particularly vulnerable and often ill.⁸⁰⁹

Rural interviewees also reported amoebic infection. For example, in Interview 26 the interviewee states that all the children have amoebic infection, as does the male head of the family. They are taking treatment for it, but the children and baby are particularly vulnerable, 'We are forced to boil the water or buy bottled water to avoid illness'. Even in urban areas, children were susceptible to illness from poor hygiene and contamination. Interviewee 15: 'My children always suffer from the existence of germs, diarrhoea and stomach upset due to contamination. I have to take at least one of them to doctor each month. This leads to further deterioration of my economic situation'.

These testimonies illustrate the necessity for special measures to protect the right to water of vulnerable groups. Additionally, the importance of adequate sanitation as imperative to the realisation of the right to clean and sufficient water is evident. The connection between safe quality water and adequate sanitation is inextricable and both therefore are imperative for the realisation of the right to water and elements of the right to health. Although sanitation was not specifically discussed during the interviews, as illustrated by the above testimonies, many interviewees did report problems with sanitation and waste disposal affecting their water supply. This only serves to reinforce the link between adequate, safe and accessible water and the provision of adequate sanitation. It is also worth noting that many of those interviewed lived in housing conditions and communities that were not adequate materially and were overcrowded. The consequences of these conditions are further hygiene problems and higher risk of disease.⁸¹⁰ Changes in hygiene practices were noted in response to water shortage and inaccessibility: Interviewee 11 had taken the flush off his toilet to save water and B'Tselem reports that in the summer some (Palestinian) residents are only able to take one or two showers a week, which they take using a bucket, and that some residents improvise toilets outside, usually just a hole, to save water.⁸¹¹ Subsequently, these changes in hygiene practices due to lack of water availability, have led to violations of the right to health.⁸¹²

808 PHG, data on Al'Aroub community, 2003/2004 database: maps, tables and queries, Al Aroub community, community ID: 502530, at www.phg.org/campaign (accessed 4 May 2007).

809 Interviewee 38. Also Interviewee 39.

810 E.g. Palestinian children living in overcrowded conditions suffer a higher rate of parasitic infections due to contamination of the environment. See Giacaman, R, *Life and Health in Three Palestinian Villages*, London: Icatha Press, 1988, p 131.

811 B'Tselem, July 2001, p 7.

812 Center for Economic and Social Rights and PHG, May 2003, p 27.

Supporting evidence for these findings can be found in larger scale studies including Oxfam's 'Forgotten Villages'⁸¹³ and the WaSH project of the PHG.⁸¹⁴ Oxfam reported that four out of ten households they interviewed reported an increase in the incidence of diarrhoea, due to the use of unclean water from irrigation channels and every last drop of water from cisterns. This meant scraping the bottom of cisterns where pathogens accumulate.⁸¹⁵ The PHG reported that the prevalence of water-related diseases in Palestinian communities it surveyed was at least 41 per cent (and many cases remain unreported due to the difficulties in gaining medical treatment).⁸¹⁶

In conclusion, 'The decline in the amount of water and the quality of water used by Palestinians has also led to violations of the right to health as poverty and the destruction and deterioration of infrastructure has forced communities to turn toward water sources of lesser quality'.⁸¹⁷ Therefore, Israel is in breach of its obligations not only under the right to water but also under the related right to health as contained in ICESCR, Article 12.

Violations of the principle of non-discrimination

In addition to the specific violations of the substantive content of the right to water, there is evidence of violations of the core obligation of non-discrimination in relation to the right of access to safe and sufficient water and in the distribution of water services. The General Comment provides that the right to water is enjoyed without discrimination and:

proscribes any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water.⁸¹⁸

It is clear that on a general basis among the interviewees, access to water is limited because of who they are. As evident from the discussion above, as members of a population under occupation they are discriminated against in relation to access to water, service-level provision of water by the Israeli state and water company Mekorot and in terms of the quality of water available. Specifically, interviewees talked of discrimination between themselves and Israeli settlers and discrimination between the Palestinians living in the OPTs and the population of Israel itself.

813 Oxfam, 2002.

814 PHG, 2004; PHG 2005; and PHG 2006.

815 Oxfam, 2002, p 27.

816 In some cases the figure was even higher, e.g. in Rantis in Ramallah Governorate the percentage of the population infected with water-related diseases was 64 per cent. See PHG, 2004, pp 64–6.

817 Center for Economic and Social Rights and PHG, May 2003, p 5.

818 GC 15, para 13. See also paras 14, 37(b) and 37(c).

This discrimination has been noted more widely:

[The] Israeli policies . . . apply to Palestinians but not to Jewish settlers living in the OPT, and therefore constitute blatant discrimination in terms of the right to water. The deliberate confiscation of resources from the Palestinian inhabitants of the OPT for use by Israeli Jewish citizens inside Israel and illegal Jewish settlers in the OPT, the differential prices that these populations pay for water, and the blatant non-recognition of the water needs of the Palestinians in the OPT (such as lack of water planning or investment in infrastructure) all provide further evidence of Israel's discriminatory policies.⁸¹⁹

Furthermore, the GC 15 provides that the state must 'ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups'.⁸²⁰ Israel is in breach of this provision. Concerning such vulnerable groups, the General Comment notes that, 'States have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities'.⁸²¹ Moreover, states 'should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees'.⁸²²

As noted previously, the negative health effects of the Israeli water policies and actions are greatest among the Palestinian interviewees' children. Overall, 17 of the interviewees stated that their children suffered health problems because of lack of water or limited access to water or through consumption of contaminated water. Palestinian children have been reported to suffer from diseases caused by contaminated water and poor sanitation, the major killers being gastroenteritis, summer diarrhoea, respiratory diseases and malnutrition.⁸²³ Furthermore, malnutrition in Palestinian children has been linked to a lack of access to piped water.⁸²⁴

Another vulnerable group disproportionately affected by the water problems outlined are women. Although this was not reflected within the interviews carried out in this study, this may have been because the majority of the interviews were carried out with the male head of the households. Certain aspects were reported,

819 Center for Economic and Social Rights and PHG, May 2003, p 23.

820 GC 15, para 37(b).

821 Ibid, para 15.

822 Ibid, para 16.

823 Union of Palestinian Medical Relief Committees, quoted in Young, E, 'A Feminist Politics of Health Care: The Case of Palestinian Women under Israeli Occupation, 1979–82', in Mayer, T (ed), *Women and the Israeli Occupation: The Politics of Change*, 1994, London: Routledge, pp 179–98, at p 81.

824 A study at Birzeit University found a 41 per cent rate of malnutrition in three Palestinian villages studied and the lack of piped water was a major cause. 'Children from households with no running water had the highest rate of malnutrition'. Moreover, internal toilets made the matter worse due to the lack of water to sustain their working order and maintain sanitary conditions. See Giacaman, 1988, pp 125–26.

such as the responsibility women and female children had for collection of water; for example, the family in Interview 19 got 5 per cent of their water from rainwater gathered in a communal ground cistern. The women and girls of the community collect the water from the cistern on foot. It usually takes them about two hours to collect the water. Sometimes they use animals to transport water to the community. 'As you know, we are Bedouins and live by raising livestock that consume a lot of water, which we have to bring from other places. During summer time, women have to walk more than 3 kilometres to get the needed water [from the communal cisterns]'. Similarly, Interviewees 18 and 20 stated that the women and girls are responsible for collecting water from communal cisterns and from a local spring, on foot (taking a minimum of 30 minutes).

However, in one case male members of the family collected the water: in this case, the family are dependent upon rainwater collected in communal cisterns for 70 per cent of their supply and tanker water for 30 per cent. They travel 2km within the boundaries of their own community to communal cisterns and 6km to Al Samou' community and 12km to Yatta community to the filling point for tankers.⁸²⁵ It may be that water was always collected by tractor or tanker (driven by the men) or it could be due to the dangers faced in collecting the water, that the men undertook this job.⁸²⁶ It would seem however, that this case is an exception though and that the responsibility for collection of water usually falls to the women of the family.

This disproportionate burden women bear in collection of water and the associated problem of children being deprived of schooling due to water collection are noted in the GC 15.⁸²⁷ Furthermore, Giacaman's study of Palestinian women in the West Bank offers supporting evidence illustrating the role of Palestinian women in collecting water. For example, it details the case of a young woman whose husband is in prison and who is suffering hardship as her family own no arable land and she cannot afford sufficient food or water. Her mother-in-law takes charge of the family life due to the indigenous kinship structure and sends the woman to collect water for four to five hours a day. Her daughter accompanies her to help and thus she starts to miss school. This results in physical (carrying water long distances) and emotional stress for both the woman and child.⁸²⁸

Moreover, under the effects of the occupation and denial of access to resources and health care,⁸²⁹ women carry the responsibility for teaching children how to

825 Interviewee 22.

826 As in this case (Interview 22) the interviewee reported threats to physical security: sometimes the only available access to wells is through secondary dirt roads. These roads are often closed by settlers, who prevent the Palestinians from passing through to collect the required water. 'Israeli soldiers at checkpoints stopped us for more than an hour whilst we were trying to get water to our house. This was in 2003. The soldiers were pointing their guns at us all the time we were stopped'.

827 GC 15, para 16(a) and (b).

828 See Giacaman, 1988, pp 80–81.

829 See Cervenak, C, 'Promoting Inequality: Gender-Based Discrimination in UNRWA's Approach to Palestinian Refugee Status', (1994) 16(2) *Human Rights Quarterly* 300–61. Also, Charlesworth, H, 'International Human Rights Law: Prospects and Problems for Palestinian Women', in Bowen, 1997, pp 79–91, at 89.

manage limited water and for caring for children disproportionately affected by water-related disease, under unsanitary conditions.⁸³⁰ The particular impact of water shortage on Palestinian women in the OPTs has been studied. For example, in a 'Discussion Paper on the Integration of Gender into Oxfam GB Jerusalem's Water Programme', Oxfam noted that:

In most homes women are the water managers and are thus responsible for obtaining water, cleaning it when necessary and making decisions about water use. Women are therefore bearing the increased cost of tankered water, which requires them to engage in income generating activities for the first time or sell off jewellery and possessions. Many women are forced to borrow money and are incurring increasing debts. Women also must bear the increased time needed to provide water for the household as they travel longer distances to access water from springs and spend more time filtering and boiling the spring water which is of a lower quality. Finally, women are making the decisions on how to use increasingly limited water supplies. In some areas this has resulted in bathing children less. Often women's small scale production activities suffer – they may have to sell land and livestock to purchase water, or have to sell off livestock when they can no longer afford to give them water to drink.⁸³¹

Furthermore, women are economising on essential food and water, in an effort to make money go further, thus exacerbating existing poverty and worsening the health of women and children in particular.⁸³² This illustrates clearly the knock-on effects and interrelated problems that Palestinian women living under occupation face when their right to water is violated.

Violations of the right to water under international humanitarian law

It is important to note that due to the existence of the occupation, the violations of the right to water documented can also be viewed in many cases as breaches of applicable international humanitarian law, as discussed in Chapter 4. The correlation between the provisions under international humanitarian law and the provisions under international human rights law, concerning the right to water are noted by the CESCR in GC 15, which states that 'during armed conflicts, emergency situations and natural disasters, the right to water embraces those obligations

830 For a discussion of Palestinian women and water, see Young, in Mayer, 1994, pp 179–98; Giacaman, 1988; Chinkin, C, 'The Potential and Pitfalls of the Right to Self-Determination for Women', in Bowen, 1997, pp 93–117; and Kuttub, E and Bargouti, R, *The Impact of Armed Conflict on Palestinian Women*, Study prepared for the UN Development Fund for Women and the UN Development Programme/Programme of Assistance to the Palestinian People, April 2002.

831 Oxfam, quoted in Center for Economic and Social Rights and PHG, May 2003, p 28. Also, Oxfam, 2002, pp 11–13.

832 Oxfam, 2002, pp 11–13.

by which States parties are bound under international humanitarian law . . . ensuring that civilians, . . . have access to adequate water'.⁸³³

Violations of water availability and accessibility are correlative to a breach of Article 55 to ensure adequate food supplies to the occupied population. Furthermore, under the said article the occupying power (Israel) is limited to utilising the resources of the occupied area for military necessity and then only if the needs of the occupied population have been taken into account. Clearly, the drilling of wells in the OPT to supply water to the Israeli settlements and the inequitable supply of mains water to these settlements, at the expense of water supply to the Palestinian communities, contravene international humanitarian law.

In particular, deliberate attacks upon both those trying to access water and upon the water infrastructure are in breach of Additional Protocol, Article 54(2) which prohibits attacks on, destruction or removal of, or rendering useless, drinking water installations and supplies for any motive.⁸³⁴ Evidently, this provision has been breached regularly, as interviewees have reported damage to and destruction of water tankers, cisterns, wells and pipelines. Furthermore the security policies of closure and curfew have further prevented water access and prevented free passage of relief and aid including water. This is in contravention of Geneva Convention IV, Articles 23, 59, 60, 61 and 62.

Israel justifies its policies of occupation including expropriation of land, closures and military attacks as necessary for maintaining security.⁸³⁵ However, in his visit to the OPTs in August 2002, the UN Special Rapporteur to the OPTs reported:

It is necessary to ask whether the measures resorted to by Israel, particularly curfews and closures, always serve a security need. Often they appear so disproportionate, so remote from the interests of security, that one is led to ask whether they are not in part designed to punish, humiliate and subjugate the Palestinian people. Israel's legitimate security needs must be balanced against the legitimate humanitarian needs of the Palestinian people . . . it appears that there is no such balance. Human rights have been sacrificed to security.⁸³⁶

Finally, the principle of non-discrimination is enshrined in humanitarian law as well as international human rights law. Geneva Convention IV, Article 27 prohibits discrimination between the civilian population and citizens of the occupying power, particularly on the grounds of 'race, religion or political opinion'. It is clear both from the evidence of the interviews and more widely documented data that Israel continues to discriminate on the basis of national identity, religion and ethnicity in terms of the provision of and access to water services.

833 GC 15, para 22. Original footnote omitted.

834 See also Geneva Convention IV, Art 53.

835 Center for Economic and Social Rights and PHG, May 2003, p 5.

836 *Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967*, A/57/366/Add.1, 16 September 2002, para 4.

Concluding remarks

The aim of this case study was to examine ongoing and unique water problems faced by Palestinians living in the OPTs. Moreover, I wanted to establish whether these problems constituted violations of the right to water and what the nature of such violations might be. The methodology employed involved using a violations approach to analysis of the findings alongside a framework of core obligations as laid out in the GC 15. The usefulness of this design proved successful and data gathered from interviews is informative and in-depth but allows for comparison due to the semi-structured questions used.

Subsequently, having analysed and presented the interview material gathered in the field, it is evident that violations of all substantive elements of the right to water have taken place amongst the interviewees in this study. The testimonies gathered illustrate problems in terms of realisation of the substantive elements of the right to water as well as raising issues of discrimination and highlighting vulnerable groups, who most often bear the brunt of the violations, in particular Palestinian women and children. There is also evidence of related rights being under threat including most prominently the right to health.

As previously noted, to establish that Israel is responsible for these violations of the Palestinians' right to water, Israel's state policy and practice must be shown to be in breach of its obligations concerning the right to water under the ICESCR, particularly its core obligations, which cannot be derogated from at any time. The evidence presented from the case study testimonies clearly demonstrates that this is the case.

Table 6.2 summarises the nature of the violations documented, in relation to the relevant core obligations. If we look at the table, it is evident that Israel has not complied with its core obligations in these individual cases, in relation to availability, accessibility and quality of water, water strategy and management or in relation to those concerning the wider principles of non-discrimination and help for vulnerable groups.

In terms of the distribution of the violations reported, they take place across all the types of communities involved in the research. Most families are subject to violations of one or more elements of the right to water but it is evident that sufficiency of supply remains a particular problem for all communities – rural, camps and urban. These findings illustrate that violations of the right to water are not confined to underdeveloped rural areas or the overcrowded living conditions of camps but are widespread encompassing all types of geographical settlement.

Even in family homes with mains connections, the limited water supply they receive results in detrimental effects. Although the effects of limited supply are felt most deeply during the summer months, this is because needs are necessarily greater at this time and there is little by way of additional water sources such as rainwater or spring water to rely on.

Discrimination in distribution of water between Palestinians and Israeli settlers was frequently reported. In addition, discrimination was noted between Palestinians and Israelis in Israel itself. Notably, interviewees also complained of discrimination within Palestinian communities, citing that Palestinians in wealthier areas received

Table 6.2 Violations of core obligations of the right to water

<i>Key element</i>	<i>Core obligation</i>	<i>How violated / breached (case study evidence)</i>
Availability	To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease.	Availability threatened at all times. Supply sufficient for most Interviewees' personal consumption but not for maintaining adequate health and hygiene.
Physical accessibility	To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets; to avoid prohibitive waiting times; and that are at a reasonable distance from the household. To ensure personal security is not threatened when having to physically access water. To ensure equitable distribution of all available water facilities and services.	Interviewees often do not have safe physical access to water due to closures and curfews and incursions; lack of mains network and intermittent mains supply; access limited to unsafe communal sources. Water is not distributed equitably between Palestinian communities and Israeli communities.
Economic accessibility	To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalised groups.	Many interviewees rely on expensive tanker water, especially during the summer.
Quality	To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease. To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation.	Interviewees rely on communal sources of untreated water: rainwater, dirty water from tanks, springs, communal filling points, wells and open cisterns. During incursions and closures waste cannot be removed. There is inadequate sanitation due to lack of water.
Non-discrimination and vulnerable groups	To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalised groups.	Israeli settlers are favoured over Palestinian communities. No special measures for Palestinian children in schools. Women and children suffer the most as home makers and water collectors.
Water strategy and management	To adopt and implement a national water strategy and plan of action addressing the whole population. The process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups.	No existing plan or strategy that includes the OPTs, as Israel administers the OPTs and Israel separately. Therefore they do not account for the Palestinians in their water plans, even though Israel control all water sources.

more water. There was a strong feeling amongst the interviewees that discrimination was at the core of their water problems and not scarcity of water itself.

The interviewees that reported the most widespread violations of the right were those families living in rural villages, due to lack of mains access and the subsequent associated problems, such as reliance on poor quality sources causing danger to health. However, many families across all three types of communities reported health problems, again due to reliance on non-mains water, either through consumption of contaminated water from tankers and cisterns or through poor hygiene due to limited water. These problems are compounded by inadequate sanitation provision including contamination of water by open cesspits and sewers. This is especially a problem within the refugee camps.

In addition, it is evident that in some circumstances, the problems encountered and reported in these interviews constitute breaches of international humanitarian law as well as violations of the right to water under international human rights law. This is especially true of those violations reported as a result of actions by the IDF, Israeli settlers and as a result of occupation policies, such as closures, curfews and incursions. The significance of the fact that both systems of law can be used as a basis for establishing violations are further discussed in the concluding chapter. However, it is important to note that this body of law bears particular importance to the Palestinians interviewed in terms of establishing breaches, as the application of humanitarian law is unequivocal.

Significantly, the study found that many interviewees held the view that their right to water could not be realised without self-determination over both water resources and land. The interviewees felt strongly about this issue and as such it is clear that wider political solutions to the overall conflict need to be found in order that the full scope of the right is implemented. Meanwhile, a rights-based approach can assist in the enjoyment of the minimum core elements of the right thus alleviating some of the most serious problems. Although realisation of the core content of the right to water cannot be seen as a long-term solution to the Israeli violations of the Palestinians' right to water, it is a way to ensure immediate and fundamental measures are implemented to alleviate suffering and prevent further violations in the interim period, in the absence of a political solution and end to the occupation.

Finally, one unexpected and significant finding from the interviews was the widely held view that realisation of the right to water was not possible for the Palestinians in the West Bank, without ownership and control of both the water resources and the land. Consequently, many of the interviewees felt that until the occupation ends and the Palestinians have control over their borders and territory, their human rights cannot be fulfilled. Clearly, self-determination is important to the people interviewed and their lack of self-determination is seen as an obstacle to the realisation of all their human rights. Furthermore, it clearly illustrates the link between the right to water and the right to self-determination over land and natural resources.⁸³⁷ Moreover, it begs the question of whether the Palestinian right

837 For further reading on occupation and permanent sovereignty over natural resources, see Scobbie, in Bowen, 1997. Also see UN General Assembly Resolution A/RES/60/183, Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory,

to water can be realised without self-determination.⁸³⁸ However, that is not to say that measures cannot be taken to improve their situation immediately, rather that the full scope and content of the right to water cannot be a reality without equitable division of shared water resources, full control and management of the water resources and therefore, freedom from occupation. In fact, conversely, the lack of self-determination over resources highlights the need to take optimum action to ensure that at a very minimum the core of the right to water is implemented without delay.

In sum, Israel has failed to implement the minimum standard of the right to water 'which is within its powers to meet'.⁸³⁹ Therefore, a case could be brought against Israel for violations of the Palestinians' right to water, both as individual cases and/or as a collective group or community.⁸⁴⁰ However, the question remains as to where remedy can be sought.

To conclude, enjoyment of the right to water by Palestinians in the West Bank is severely limited and violations of the right are evident, as this case study has clearly illustrated. What remains to be established is whether this lack of enjoyment and violations are as a consequence of the particular context or whether there are wider implications for the realisation of the right to water in other contexts. The concluding chapter addresses these questions.

including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources, 31 January 2006; UN Economic and Social Council, Resolution 2005/51, Economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and the Arab population in the occupied Syrian Golan, E/2005/SR.40, 27 July 2005.

838 The question of what form self-determination should take is outside the scope of this book and obviously open to debate. For further reading on self-determination, see Summers, J, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, 2007, London: Martinus Nijhoff; Summers, J, 'The Right to Self-Determination and Nationalism in International Law', (2005) 12(4) *International Journal on Minority and Group Rights* 325–54; and on self-determination in the OPTs, see Bowen, 1997.

839 Maastricht Guidelines 1997, para 15(i).

840 A case could be established on a group or communal basis, as in the precedent set in HC 3586/01, *The Regional Council for the Unrecognised Villages in the Naqab and others v The Minister of National Infrastructure and others*. Despite this case being brought under Israeli law, it offers supporting evidence of Israel's discrimination regarding a right to water and guidance on how to go about building a case, although mechanisms of international human rights and humanitarian law would be the only applicable provisions.

7 Where do we go from here?

Conclusions and recommendations for developing the right to water

Conclusions and recommendations concerning the right to water in the OPTs (West Bank)

Within the case study, violations of all core elements of the right to water have been established. Discrimination is central to these violations and vulnerable groups are particularly affected. Threats to the enjoyment of related rights are also evident, in particular the lack of enjoyment of the right to health. The pertinent question remains, why have these violations taken place? Is it as a result of weak legal provisions concerning the right, or as a direct consequence of occupation measures?

In conclusion, I would argue that it is as a result of both of these things. In theory, a case could be brought against Israel for violations of the Palestinians' right to water, either as individual cases or as a collective group/community. However, provisions regarding the right are weak at domestic level. As part of the bilateral Oslo Accords there is a possible basis for claiming a right to water. However, implementation of this provision has been limited. Moreover, remedies at international level are also lacking. Further, due to the occupation the implementation of international provisions is very difficult. The right exists in theory but there is lack of enjoyment in practice: as several interviewees said, the right seems to exist only on paper.⁸⁴¹

Practical measures / recommendations

The primary concern then is what can be done to remedy the current situation with regards to the right to water and in the absence of a political solution to the conflict. There are several practical steps which can be taken to improve conditions. Concrete measures must be taken immediately, by the government of Israel, to implement the core elements of the right to water. In relation to availability, Israel must ensure continuous supply of sufficient water to Palestinian communities connected to the water network, including supply to municipalities for local management. It must stop discrimination in supply and sufficiency of water received between Palestinians and settlers and take action against any settlers who tamper with existing water

841 Interviewees 5, 22, 25 and 36.

sources. Settlers should also be prevented from threatening or attacking Palestinians trying to access water, thus allowing them safe access.

In relation to safe physical accessibility, Israeli forces must cease all attacks on water infrastructure including stopping demolitions of buildings which result in damage to the water infrastructure (wells, pumps, pipelines, roof-tanks and cisterns). Any attempt to injure or kill Palestinians collecting water must cease. Freedom of movement and immediate access must be given to those supplying water tankers and to those trying to carry out repairs to the water infrastructure. Concerning economic accessibility, water must be affordable to all Palestinians. Therefore, there must be an end to the Israeli government policy of closures. This will enable freedom of movement for people and goods, therefore aiding economic development, giving access to employment and services and lowering costs whilst increasing economic assets.

Action is also required on the part of the PA. As the recognised government of the Palestinian people, it has a moral obligation to do whatever is within its means to realise the right to water for its people. When the PA has control of local water services it must ensure equitable distribution, as far as is possible, of whatever water is available. Further, there must be an end to any corruption in the provision of equitable access.

Concerning water quality, Israel must ensure that deliberate contamination of Palestinian water supplies, both by settlers and Israeli forces and by industrial dumping of waste is stopped. Israel must also ensure adequate water supply, as shortage of water can produce poor hygiene and subsequent potential for contamination of water. Furthermore, provision of adequate piped water supply would put an end to reliance on poor-quality sources. Also, maintenance and repairs of the water infrastructure must be allowed to take place to reduce the risk of contamination. Further, waste disposal must not interfere with water supplies. Therefore, adequate sanitation provision is essential to prevent contamination of water and possible disease.

In addition to these immediate practical measures to be taken by the government of Israel, there is a responsibility on the part of other states parties to the ICESCR and to the Geneva Conventions and Additional Protocols, to address the continuing denial of Israel to comply with its obligations to realise the enjoyment of the right to water under these treaties. As a part of its international obligations under ICESCR, Article 2, other state parties are obliged to assist Israel in realising this right. Furthermore, Israel must be pressurised to comply with its immediate core obligations and must be held accountable for its actions or omissions under international human rights law, by using established mechanisms and procedures for remedy.⁸⁴² In addition, under Common Article 1 of the Geneva Conventions and Additional Protocols, the international community has an obligation to ensure that Israel complies with its obligations under the treaty. The parallel application of humanitarian law is crucial in ensuring that there is accountability for breaches of the right to water as a direct result of military actions/omissions.

Under international human rights law, treaty monitoring bodies must continue to pressurise Israel to comply with its monitoring obligations and include infor-

842 Such as the periodic report mechanism of the ICESCR.

mation in its state periodic reports concerning all areas under its jurisdiction and effective control. As noted previously, the CESCR has strongly condemned Israel's refusal to report on the economic, social and cultural rights in the occupied territories. However, it is imperative that all treaty monitoring bodies take a vigorous approach concerning Israel's compliance with its reporting obligations.

Moreover, the reports and work of other UN bodies⁸⁴³ continue to be vital in maintaining a picture of the human rights situation in the OPTs. The work of local and international NGOs is also imperative in assisting individuals and groups in seeking remedy for violations of the right to water through whatever means are possible. Advocates are essential to document and report violations, as well as offering advice and assistance to those who are victims of violations of the right to water.

Long-term measures are also needed by the PA to ensure there is a viable legal basis for the right to water and other human rights within future domestic law. Codification of the right to water is necessary at domestic level if the right to water is to be implemented effectively.

As previously stated, the Palestinian Basic Law 2003 and the Palestinian Water Law offer possibilities for development and amendment. This would enable adoption of provisions for a human right to water. However, to ensure optimum human rights protection, extensive human rights legislation needs to be adopted, encompassing the substantive protections provided for in the international covenants. With this in mind, assistance and advice should continue to be offered to the PA on how to develop and strengthen its legal system, to increase human rights protection in the OPTs and with a view to independence and sovereignty.

Furthermore, in the interim period, the limited but useful provision pertaining to water rights under Interim Agreement, Article 40 should also be considered (as well as Article 40 in its entirety). It may be that this clause supports and enables possible renegotiation of the water provisions of Article 40, for inclusion in the final status agreement or for new or amended domestic provisions under a sovereign government. New negotiations may also offer an opportunity for the Palestinians to codify the human right to water within a bilateral agreement with Israel to be subsequently enshrined within domestic law.

The Palestinians would also benefit from the development of a regional human rights system. Other states within the Middle East region, with appropriate international assistance, could work to strengthen provisions and remedies under a regional human rights mechanism such as the Arab Charter on Human Rights 2004.⁸⁴⁴

In the long term, the key event necessary for the realisation of the full scope of the right to water in the OPTs is an end to the occupation by Israel and self-determination over water resources and land for the Palestinian people. Ending the occupation is the first step to enabling optimum realisation of all human

843 Such as, the General Assembly, other UN human rights bodies and Special Rapporteurs, UNRWA, UNEP and UNDP.

844 See Ch 1 regarding this treaty.

rights.⁸⁴⁵ Only then can the PA begin to build an infrastructure and foster a social and legal environment which positively embraces international human rights standards.

Right to water in the context of conflict

It is clear from the examination of provisions under international humanitarian law that there are rules protecting a right to water under humanitarian law, in particular within the Geneva Conventions and their Additional Protocols. These provisions relate either to specific groups of people, for example prisoners of war, or provide for a basic level of protection afforded to civilians generally. These latter provisions are limited to essential aspects of the right required for survival. The content of the provisions is therefore necessarily limited; however, these provisions are essential as they provide protection for the core elements of the right to water. In addition, many provisions can be applied as customary rules of international law and as such their application is unequivocal and cannot be derogated from. Furthermore, it has been established that this is especially important in relation to the specific context of the Israeli–Palestinian conflict, as Israel denies its responsibility for the application of international human rights standards to the OPTs.

More generally in relation to the right to water in times of conflict, there is a need to continue to develop ideas and undertake further research investigating the parallel application of human rights law and international humanitarian law in conflict situations of all kinds.⁸⁴⁶ In particular, there is a need for detailed examination of the law as it applies to occupation, especially human rights law.⁸⁴⁷ There is very little information available concerning economic and social rights enjoyment under occupation and case material is limited to the occupation of Kuwait by Iraq⁸⁴⁸ and the Israeli–Palestinian case. What is evident both from this research and from that of Kalin in regard to Kuwait is ‘the great importance of [economic and] social rights in times of occupation as frequent and deliberate violations of these rights constitutes part of the oppression of the local population’.⁸⁴⁹ Furthermore, this research has illustrated that the application of international humanitarian law is not enough to

845 For an interesting discussion on human rights post-occupation, see Alnajjar, G, ‘Human Rights in a Crisis Situation: The Case of Kuwait after Occupation’, (2001) 23(1) *Human Rights Quarterly* 188–209.

846 Most recently see the UN study by UN Special Rapporteurs following the war in Lebanon in 2006, which deals with the relationship between these two areas of law in the context of, *inter alia*, economic and social rights during conflict: Kalin *et al*, 2 October 2006. Also on the need to move beyond the acceptance of the application of human rights in times of armed conflict and focus on the challenges in the parallel application of human rights law and humanitarian law, see Lubell, 2005.

847 In relation to international humanitarian law and occupation, see Benvenisti, 2004.

848 See Kalin, W, *Human Rights in Times of Occupation: The Case of Kuwait*, 1994, Law Books in Europe. Also regarding economic and social rights during conflict see Kalin *et al*, 2006.

849 Kalin, 1994, p 17. For details of violations of economic and social rights in occupied Kuwait, see Report on the situation of human rights in Kuwait under Iraqi occupation, prepared by Mr Walter Kalin, Special Rapporteur of the Commission on Human Rights, in accordance with Commission Resolution 1991/67, 16 January 1992, E/CN.4/1992/26, paras 185–235, pp 49–58.

ensure protection of the right to water and related economic and social rights under occupation and that the more comprehensive provision for the human right to water contained within international human rights law is required in order to guarantee legal protection of the right.

Conversely, despite the fact that provisions for a right to water under international humanitarian law are limited in their scope, this does not detract from their importance in the protection of basic water for survival of civilians during occupation. Hence, the key to realisation of the right to water during occupation is the parallel application of both sets of provisions under these doctrines, those under international human rights law and those under international humanitarian law. As Kalin notes, 'the case of occupied Kuwait, has evidenced that a cumulative application of human rights and humanitarian law is both feasible and meaningful'.⁸⁵⁰ This system will provide the optimum protection of the right, through reinforcing provisions under humanitarian law through human rights law and vice versa, as well as allowing for interpretation of one set of laws in light of the other.⁸⁵¹ In addition, to ensure continuing integrated application of these two areas of law, adoption of hard law combining provisions from both doctrines would be beneficial. For example, this 'convergence' approach has already been recognised in the Turku Declaration or Declaration of Minimum Humanitarian Standards.⁸⁵²

This parallel application of both doctrines of law is also important as establishing violations of the right to water under international humanitarian law is restricted to those that constitute grave breaches, which are necessarily those of an extremely serious nature, such as those resulting from deliberate extensive destruction of property and attacks on civilian objects.⁸⁵³ States can be held responsible for violations of a lesser nature and individuals can be punished for committing these breaches on a state's behalf by the domestic courts of the state or other states parties' national courts. However, in terms of remedy under international humanitarian law, there is no mechanism by which individual redress can be sought. Remedy for breaches of international humanitarian law is in the form of state versus state compensation or through specially established compensation commissions.⁸⁵⁴ This

850 Kalin, 1994, p 27; Kalin *et al*, 2006, para 16; and Lubell, 2005, pp 737–38 and 752.

851 Kalin, 1994, p 27.

852 Adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, in Turku/Åbo, Finland, 30 November–2 December 1990. This approach was called for in light of the perceived deficiencies with the two fields of law to protect individuals adequately and resulted in the drafting of new norms including provisions prohibiting deliberate deprivation of access to food, drinking water and medicine, as well as requiring that displaced populations have adequate conditions of shelter, hygiene, health safety and nutrition. However, in regard to the right to water it encompasses only brief provisions relating to drinking water. For further information regarding the provisions and approach of the Turku Declaration, see Rosas and Sandvik-Nylund, in Eide *et al*, 2001; Provost, R, *International Human Rights and Humanitarian Law*, 2002, Cambridge: Cambridge University Press; Meron, T, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument', (1983) 77 *American Journal of International Law* 589–606; Meron, T, *Human Rights in Internal Strife: Their International Protection*, 1987, Cambridge: Cambridge University Press, p 28; and UN Secretary General, *SG Report on Minimum Humanitarian Standards*, E/CN.4/1998/97.

853 See Geneva Convention IV, Arts 146 and 147; Additional Protocol I, Arts 11 and 85.

854 See Geneva Convention IV, Art 148.

process is lengthy and would do little to alleviate the immediate suffering of those whose right to water had been violated. Neither would it strengthen the protection of their rights in the longer term. Hence the redress offered under humanitarian law is more suited to settlement when the ongoing occupation has ceased, perhaps as part of a peace deal or 'war reparations'.⁸⁵⁵ Consequently, for the interviewees in this study it holds little hope for remedy of the situation in relation to their right to water during continuing occupation. Therefore, the importance of the application of provisions under human rights law cannot be overstated as it also offers the potential for individual redress for violations of the right, whilst an occupation continues.

Wider conclusions and recommendations

Overall, the use of a rights-based approach to the water problems of the Palestinians acts as a new and empowering instrument for resolving these difficulties. Furthermore, application of a human rights framework adds a new perspective to this aspect of the conflict. However, what are the lessons for the wider application of the right to water in other contexts? This question is an issue which requires more research and merits further study. There are, however, several insights which can be gained from this research. Firstly, as noted, there is continuing ambiguity of the legal codification of the right at international level. Secondly, there exist weaknesses in substantive provision most especially, in relation to sanitation. Thirdly, there is the issue of obligations of non-state actors and extra-territorial application of states' obligations. Finally, there is the significant problem of lack of effective remedy and lack of access to redress for violations of the right to water. The first two issues relate to the right to water specifically, however, the final two points are applicable not just to the right to water but are problematic for economic and social rights generally.

Legal codification

In regard to the issue of legal codification, international human rights bodies have concluded that a right to water already constitutes an integral part of recognised human rights provisions. However, despite the existence of a human right to water, as this book has made clear, the nature of the provisions concerning the right are in the main implicit and at worst ambiguous. As a consequence of the lack of explicit codification regarding the right to water within the ICESCR (and limited provision within the CRC and CEDAW), the status of the right in international human rights law is uncertain and amounts to a gap in human rights provisions. Furthermore, this lack of clarity regarding the right is compounded by its relationship with other

855 E.g. see the duty of Iraq to compensate victims of human rights violations from the occupation of Kuwait, through the UN Compensation Fund and Commission, under Security Council Resolution 687, 3 April 1991. See also Resolution 674, 29 October 1990, stressing Iraq's liability.

economic and social rights, of which it has been seen as both a constitutive and derivative element, for example, the right to health or as an implicit element of the more general right to an adequate standard of living.

As a result of the analysis of legal sources for the right, it is evident that GC 15 has enhanced and furthered the legal standing of the right to water and contains comprehensive provisions detailing the normative content of the right, thus providing a workable framework for implementation of the right and states' compliance with their obligations. However, despite the developments made due to GC 15, clarification is still required as to whether the human right to water is an independent right or derived from other human rights.⁸⁵⁶

The need for explicit legally binding codification at international level remains. This has led to an argument for new provisions at international level to explicitly codify the right in the form of a new 'Water Treaty'. This treaty would encompass several approaches – the human right to water, water rights under humanitarian law, water as a development goal and water as provided for under international environmental law.⁸⁵⁷ Although it would be unusual for an entire treaty to be dedicated to codifying one particular (economic and social) right, the CAT has demonstrated that this approach can be utilised successfully. Furthermore, water is the subject of several international treaties, all with varying approaches and focusses to water, thus a new water treaty would complement these existing provisions. Moreover, by incorporating the various approaches that have developed over time, it would be comprehensive, covering water from many angles to provide optimum protection and provision.

Sanitation

Furthermore, there is a need to address the existing gap in substantive provisions concerning adequate sanitation. Adequate sanitation is an essential prerequisite without which the right to water cannot be fully realised. This point is recognised in the recent report of the independent expert on the issue of human rights obligations related to safe drinking water and sanitation, who notes the lack of attention given to sanitation within GC 15, both generally and in regard to obligations.⁸⁵⁸ However, the focus of GC 15 was intended to be on the right to water. Notwithstanding this point, further work is required to determine and clarify the legal status,

856 HRC, *Report of the United Nations High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation under International Human Rights Instruments*, A/HRC/6/3, 16 August 2007, para 68.

857 See Green Cross International, the International Secretariat for Water and the Maghreb-Machrek Alliance for Water, 'Fundamental Principles for a Framework Convention on the Right to Water', May 2005, at www.watertreaty.org/convention.php (accessed 11 November 2006); Friends of the Right to Water, *Key Principles for an International Treaty on the Right to Water, Draft Work in Progress for Consultation and Revision*, 14 April 2005, Friends of the Right to Water (including COHRE, FIAN and Brot für die Welt).

858 HRC, *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Safe Drinking Water and Sanitation, Summary*, A/HRC/10/6, 25 February 2009, paras 33 and 27.

substantive content and obligations concerning sanitation.⁸⁵⁹ One development could be the drafting of a separate thematic general comment by the CESCR.

Obligations of non-state actors

Concerning obligations, a particular strength of GC 15 is in the provisions for states parties' obligations. The analysis of these provisions has illustrated that states parties' obligations concerning the right to water are comprehensive, incorporating the accepted tripartite typology of obligations and providing clear guidance for state parties. The provisions successfully incorporate extensive obligations regarding domestic implementation. In addition, a further strength of the General Comment is the inclusion of recent developments in the understanding of the breadth of state obligations as duties to be bound by, not just when acting within national borders but in their actions extra-territorially. Conversely, the lack of detailed obligations concerning non-state actors and the right to water demands attention. Although it is illustrative of the wider debate and lack of clarity concerning the extent and nature of obligations of non-state actors correlative to all economic and social rights, it is especially important due to the extensive involvement of non-state actors, such as those in the water services sector (private actors involved in service and delivery) and also global actors whose business activities affect the right to water.

Remedies and redress

The significant problems of lack of remedy and access to remedy is a crucial issue to be addressed in relation to the right to water and more broadly in relation to economic and social rights. In the first instance, existing mechanisms for legal remedy can be developed. Within international law the definition of what constitutes remedy is more flexible and broad than in domestic law and refers to mechanisms other than courts. If there is a procedure and end result then it can be viewed as a remedy. For example, state reporting and concluding observations under a treaty monitoring body can be seen as a remedy. Therefore, at international level, treaty monitoring bodies, in particular the CESCR, but also other treaty monitoring bodies, should continue monitoring enjoyment of the right to water through the state parties' periodic reporting mechanism and acceptance of NGO parallel reports. Further, they should continue to ensure that the right to water is included in reports in a comprehensive manner and that concerns regarding the right to water are expressly noted in their concluding observations.⁸⁶⁰

859 See HRC, *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Safe Drinking Water and Sanitation, 1st Annual Report to HRC focussing on sanitation*, A/HRC/12/24, 1 July 2009.

860 The CESCR has noted numerous concerns regarding the right to water since the adoption of GC 15. Recent examples include CESCR, *Concluding Observations Bosnia Herzegovina*, E/C.12/BIH/CO/1, 24 January 2006; CESCR, *Concluding Observations Libyan Arab Jamahiriya*, E/C.12/LYB/CO/2, 25 January 2006; CESCR, *Concluding Observations Canada*, E/C.12/CAN/CO/4 and 5, 22 May 2006; CESCR, *Concluding Observations Morocco*, E/C.12/MAR/CO/3, 4

In addition the indicators and benchmarks system used by the CESCR should continue as a means to measure progressive realisation of the wider scope of the right to water. Further research concerning the development of indicators to measure implementation of the right to water has shown that more extensive use of qualitative data which assesses national laws, policy environment and institutions can be especially useful as a basis for human rights indicators.⁸⁶¹

Similarly, the Special Rapporteur on the right to health has noted the usefulness of a human rights-based approach to indicators; that is, using existing indicators for a particular right but disaggregating the data to show any discrimination and supplementing this data with other indicators essential to human rights, for example, those which monitor participation and accountability.⁸⁶² Both these approaches illustrate that by expanding the focus of indicators and moving away from a narrow concern with statistical data, detailed and more useful information can be obtained, resulting in a clearer picture of the enjoyment of the right in a particular context.

Secondly, under Special Procedures there should be continued pressure from Thematic and Country Rapporteurs by means of research comprising reports, country visits and promotion of the right to water internationally. In 2006, there was a call to expand current measures under special procedures to include the creation of a mandate for a UN Special Rapporteur on the Right to Water.⁸⁶³ This call ultimately resulted in the appointment of an 'Independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation' in September 2008.⁸⁶⁴ To date, the Special Rapporteur has taken a thematic approach to the mandate initially focussing on sanitation as a priority and supporting the development and legal recognition of sanitation as an independent human right.⁸⁶⁵ Further, she is initiating consultations on private sector participation in provision of water and sanitation services and on good practices related to access to safe drinking water and sanitation, as well as undertaking country visits

September 2006; CESCR, *Concluding Observations Tajikistan*, E/C.12/TJK/CO/1, 24 November 2006; CESCR, *Concluding Observations FYR Macedonia*, E/C.12/MKD/CO/1, 24 November 2006; CESCR, *Concluding Observations Hungary*, E/C.12/HUN/CO/3, 16 January 2008; CESCR, *Concluding Observations Nepal*, E/C.12/NPL/CO/2, 16 January 2008; CESCR, *Concluding Observations Costa Rica*, E/C.12/CRI/CO/4, 4 January 2008; CESCR, *Concluding Observations Ukraine*, E/C.12/UKR/CO/5, 4 January 2008; CESCR, *Concluding Observations India*, E/C.12/IND/CO/5, May 2008; CESCR, *Concluding Observations Angola*, E/C.12/AGO/CO/3, 1 December 2008; CESCR, *Concluding Observations Kenya*, E/C.12/KEN/CO/1, 1 December 2008; CESCR, *Concluding Observations Australia*, E/C.12/AUS/CO/4, 12 June 2009; CESCR, *Concluding Observations Republic of Korea*, E/C.12/KOR/CO/3, 17 December 2009; CESCR, *Concluding Observations Madagascar*, E/C.12/MDG/CO/2, 20 November 2009; CESCR, *Concluding Observations Congo*, E/C.12/COD/CO/4, 20 November 2009.

861 See Roaf *et al.*, 2005.

862 Hunt, 3 March 2006, paras 22–61, pp 7–15.

863 An international group of NGOs at the World Water Forum in Mexico 2006 called for a formal declaration/resolution by the HRC and the appointment of a Special Rapporteur on the right to water.

864 Ms Catarina de Albuquerque was appointed as Independent Expert and began her three-year mandate in November 2008.

865 A/HRC/12/24, 1 July 2009, paras 58, 59 and 81(a).

to Egypt, Bangladesh, Costa Rica and Slovenia. Overall, the appointment under Special Procedures of an independent expert on water and sanitation has already had a positive impact on the development of the right to water and sanitation, and one hopes that the continuing mandate will be helpful in further progressing the legal standing of the right and clarifying obligations.

Other initiatives could be taken which increase the possibilities for protection of the right to water, for example, through expansion of those bodies eligible to become parties to new treaties with relevant provisions (extending obligations to non-state entities). For example, the recently adopted UN Convention and Optional Protocol on the Rights of Persons with Disabilities 2006⁸⁶⁶ (which provides for a right to water under Article 28, Adequate Standard of Living) is open for ratification by 'regional integration organisations' under Articles 43 and 44.⁸⁶⁷ Despite the non-state parties being limited in this instance to regional integration organisations, the treaty may set precedence for ratification of other new treaties by non-state actors of organisational type, such as the Organisation of Arab States or by an international administration as in Hong Kong or Kosovo, or even perhaps an elected body such as the PA. This would then allow the parties to be bound by the provisions and obligations regarding the right and allow them access to the monitoring and complaints mechanisms. Notably, if the PA were to become a party to the ICESCR it may have negative consequences for the enjoyment of rights, as Israel could argue that the ratification by the PA would relieve Israel of any obligations under the Covenant regarding the OPTs even if it remained the occupying force with overall effective control. Therefore, in the case of the OPTs it may be more beneficial for the PA to submit a parallel report to the CESC, similar to those of NGOs.

Precedent for the acceptance of reports for consideration by human rights treaty monitoring bodies from non-state bodies has already been set by the CCPR; for example, the HRC considered a report by the UN interim administration in Kosovo, UNMIK⁸⁶⁸ and also by the Special Administrative Region of the Peoples Republic of China on Hong Kong.⁸⁶⁹ Therefore, in practice, the CESC could consider a report on the OPTs by the PA, even if in theory it is not a party to the Covenant.⁸⁷⁰ Again, this would enable non-state parties' access to remedy for violations of the right to water.⁸⁷¹

866 UNGA A/61/611, 13 December 2006. Entry into force 3 May 2008: 144 signatures and 85 ratifications, as of April 2010.

867 E.g. the EU signed the treaty on 30 March 2007. The EU was also involved in drafting the convention as a member of the committee established for the task (General Assembly Resolution 56/168, 19 December 2001).

868 UNMIK was established under Security Council Resolution 1244, 1999. See UNMIK Report, CCPR/C/UNK/1 13 March 2006; and CCPR, *Concluding Observations*, CCPR/C/UNK/CO/1, 14 August 2006.

869 See report, CCPR/C/HKG/2005/2, 3 March 2005; and CCPR, *Concluding Observations*, CCPR/C/HKG/CO/2, 21 April 2006.

870 The UNMIK administration had authority by means of Security Council resolution. This may be one way in which authority could be given to a body to report under the CESC, e.g. in case of a Palestinian administration to report.

871 This would also allow them to submit a complaint to the committee under the new optional protocol even if not a legal party to the covenant.

In terms of new developments at the international level for increasing the status and protections for the right to water and other ESCRs, the Optional Protocol to the ICESCR is significant. Unanimously adopted by the General Assembly on 10 December 2008, the Optional Protocol establishes a complaints procedure under the Covenant, providing the Committee with the competence to receive and consider communications.⁸⁷² This protocol when operational will enable individual/collective complaints, inter-state complaints and includes an inquiry procedure for gross and/or systematic violations.⁸⁷³ Thus it should strengthen procedure for redress of violations of economic and social rights under the Covenant including violations of the right to water.

There are several limitations with this mechanism, however. The Optional Protocol explicitly restricts the making of individual complaints to those within a state's jurisdiction. However, this does not eliminate the possibility of extra-territorial complaints under either the inter-state complaint or, particularly, the inquiry procedures. Furthermore, it may also be possible for individuals to make a complaint if they can demonstrate the effective jurisdiction of a state party extends beyond its national borders.⁸⁷⁴ For example, the CESCR could consider a complaint under the individual communications procedure of the Optional Protocol from a collective group of victims under the OPTs, if Israel ratifies the Protocol.

Significantly, ratification of the protocol is, as the title suggests, optional. Furthermore, the inquiry and inter-state procedures are restricted in that they require additional consent by states parties (opt-in procedures).⁸⁷⁵ As Riedel noted during the preparatory working group discussions, there is a need to balance the objective of universal ratification and the integrity of the Covenant.⁸⁷⁶ Despite the optional nature of the Protocol, it is hoped that states parties to the Covenant will view ratification as mutually beneficial. Since opening for signature on 24 September 2009 the Optional Protocol has received 32 states parties' signatures.⁸⁷⁷ At present, the success of the Optional Protocol as a quasi-judicial remedy is unknown. How the procedures will operate and the approach of the CESCR in

872 A/RES/63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 10 December 2008. Adopted by the HRC in Resolution 8/2 of 18 June 2008.

873 See A/RES/63/117, Arts 2, 10 and 11. For further details regarding the background drafting of the optional protocol, see Commission on Human Rights, *Report of the Open-ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Third session*, E/CN.4/2006/47, 14 March 2006; Commission on Human Rights, *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its First session*, E/CN.4/2004/44, 15 March 2004; Arambulo, 1999.

874 See Courtis, C and Sepúlveda, M, 'Are Extra-territorial Obligations Reviewable under the Optional Protocol to the ICESCR?', (2009) 27(1) *Nordic Journal of Human Rights* 54–63.

875 For an analysis of the new Optional Protocol see (2009) 27(1) *Nordic Journal of Human Rights*, Special Issue on the Optional Protocol to the ICESCR.

876 Commission on Human Rights, *Report of the Open-ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Third Session*, 2006, para 40.

877 Correct as of 27 April 2010. Note the Optional Protocol enters into force three months after the deposit of the tenth instrument of ratification.

dealing with complaints will become clearer once the Protocol enters into force and the Committee begins to receive communications.

National implementation – constitutional provision and case law

Moving away from measures to be taken at international level, a key method to improve the realisation of the right to water is implementation at domestic level.⁸⁷⁸ It is evident from the case study undertaken that despite provisions for the right to water under international human rights law, these provisions are difficult to enforce without supporting domestic legislation. By enshrining the right to water within national law, people gain access to remedies under a judicial system and states are held accountable for their actions or omissions.

A number of states have already provided for an explicit right to water under their constitutional law⁸⁷⁹ and several have subsequently enshrined these obligations under national legislation.⁸⁸⁰ For example, South Africa has explicitly and comprehensively enshrined the right to water within Article 27(1)(b) of its constitution and has enacted legislation under constitutional provision Article 27(2) to enforce these provisions in the South Africa Water Services Act 108 (1997) and Act 19 (1998) and the South Africa National Water Act 36 (1998).

This codification of the right to water under constitutional and national laws has led to developing jurisprudence of the right within national courts. For example, in South Africa, several cases have been heard before various domestic courts concerning economic access to water, unlawful disconnections of water supply and provision of free basic water supply.

878 See GC 15, para 26: 'The obligation to fulfil requires States parties to adopt the necessary measures directed towards the full realization of the right to water. The obligation includes, *inter alia*, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation'.

879 As of 2009, eight states have constitutions that explicitly recognise the right to water, namely: Bolivia, 2009, Arts 16 and 20; Democratic Republic of Congo, 2006, Art 48; Ecuador, 2008, Arts 12, 66, 314 and 411; Kenya, 2005 (draft) Arts, 65 and 66; Nicaragua 1987, 2005, Arts 89 and 105; South Africa, 1996, 2003, Art 27; Uganda, 1995, 2005, Preamble XIII, XIV, XXI; Uruguay 1967, 2004, Art 47. In addition, 28 states have constitutions which provide explicit state duties in relation to water and sanitation services: Argentina 1994, Section 42; Armenia 1995, 2005, Art 31.1; Bangladesh 1972, 2004, Art 15; Belgium 1994, Art 23, Draft amendment 2004, Art 23; Colombia 1991, 2005, Arts 49, 334, 365, 366, 367 and 368; Dominican Republic 2002, Art 8; Eritrea 1997, Art 8; Ethiopia 1994, Arts 90 and 92; Gambia 1996, 2001, Art 216; Ghana 1992, Art 35; Guatemala 1985, 1993, Arts 96, 99 and 127; Guyana 1980, 2003, Arts 36 and 40; Indonesia 1945, 2002, Arts 28c, 33 and 34; Iran 1979, Arts 43 and 45; Laos 1991, Art 17; Lithuania 1992, 2004, Art 54; Malawi 1992, 1998, Art 30; Mozambique 2005, Art 92; Nepal 1990, Art 11, and 2007, Arts 14 and 33 (interim constitution); Nigeria 1999, Art 20; Pakistan 1973, 2003, Art 38; Panama 1972, 2004, Arts 43, 110, 118, 258 and 259; Portugal 1997, Art 81; Senegal 2001, 2007, Preamble; Swaziland 2005, Art 210; Ukraine 1996, 2004, Arts 13, 48 and 50; Venezuela 1999, Arts 82, 83, 127, 156, 178, 184 and 304; and Zambia 1991, 1996, Art 112.

880 As of 2009, 55 states have given explicit recognition and legal entitlements to the right to water in their national domestic legislation. An additional 34 states have adopted domestic legislation which deals with one or more aspects of the right including, allocation, availability, affordability, quality, discrimination and provisions for vulnerable groups, physical accessibility, participation and access to information, remedies for violations and monitoring and international cooperation.

In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*, the applicant (a resident) on behalf of all the residents sought interim relief following disconnection from the water supply to their block of flats by the local council. The court case relied on the provisions in the Constitution but also referred to the Water Services Act in relation to the state's obligation to give notice of any impending disconnection and the requirement to provide redress mechanisms and opportunities for representations (Water Services Act 108, Section 4(3)). The court ruled that prior to disconnection none of these fair and equitable procedures had been followed and accordingly the council had violated its obligation to respect the residents' right of access to water through unlawfully depriving them of their existing water supply. The council was ordered to restore the water supply to the Bon Vista Mansions.⁸⁸¹

In *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and Others*, a resident representing a voluntary association of residents from the Lebohang Township brought a case against the local council, local council leaders and the Minister of Health alleging that the disconnection of the water supply would cause irreparable harm to the applicants if the supply was not reconnected.⁸⁸² On balance, the court ruled that 'any pecuniary losses that the respondent might suffer cannot outweigh human need (and possibly even human suffering) which will probably occur due to lack of fresh water'.⁸⁸³ Interim relief was granted and water supply was reinstated with immediate effect.

Whilst the outcome of these cases is positive, more recently the South African Constitutional Court has taken a more conservative approach to the interpretation of the Constitutional provisions for the right to water.

In *Lindiwe Mazibuko and others v City of Johannesburg and others*, the Constitutional Court of South Africa decided against the applicants' claim that the city of Johannesburg was violating their right to water under Section 27 of the Constitution, by not supplying sufficient water under the City's Free Basic Water Policy and by installing pre-paid water meters which charged consumers for use of water in excess of the free basic water allowance and cut-off supply once the basic supply limit was exhausted.⁸⁸⁴ The applicants, residents of Phiri, a poor community in Soweto argued that the decision to limit the amount of free water

881 *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*, High Court of South Africa (Witwatersrand Local Division), Case No: 01/12312, 2001. See COHRE, *Legal Resources for the Right to Water: International and National Standards*, Sources Series No 8, 2003, Geneva: COHRE, pp 121–24; Kok, A and Langford, M, 'The Right to Water', in Brand, D and Heyns, C (eds), *Socio-Economic Rights in South Africa*, 2005, Pretoria: Pretoria University Law Press, pp 191–208, at 203; WaterAid, 'The Right to Water, Legal Redress, Enforcing the Right to Water: South Africa', at www.righttowater.org.uk (accessed 1 June 2010).

882 *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and others*, Transvaal Provincial Division, Case No 28521/2001, 17 May 2002. For a discussion of this case, see COHRE, 2003, pp 117–26; and Kok and Langford, 2005, at p 203.

883 *Highveldridge*, 17 May 2002, para 33.

884 *Lindiwe Mazibuko and others v City of Johannesburg and others*, Case CCT 39/09, (2009) ZACC 28, 8 October 2009. Final judgment available at Centre for Applied Legal Studies, University of Witwatersrand, Johannesburg, 'Phiri Water Rights, Basic Services', at <http://web.wits.ac.za/NR/rdonlyres/CEA91684-DF24-40B1-BE5A-25CB66DC289E/0/CCT3909MazibukoandothersvCityofJohannesburgandothersFINAL.pdf> (accessed 1 June 2010).

to 6,000 litres per household per month is insufficient because it is calculated on the basis of 20 litres per person with an average of eight people per household. However, the average number of people in a Phiri household is 16.⁸⁸⁵ In addition, the applicants argued that the installation of pre-paid water meters which automatically cut off the water supply once the 6,000 litre limit has been reached is unlawful. The applicants asked that the court order Johannesburg Water to provide everyone in Phiri with a free basic water supply of 50 l/c/d (litres per person per day).⁸⁸⁶ The court rejected these arguments stating that the cut off in water supply was a temporary suspension rather than a discontinuation or disconnection and that the amount of water specified in the Free Basic Water Policy was reasonable, ruling that the City was in compliance with its obligation to progressively realise the right.⁸⁸⁷ The conservative approach taken by the court was decided on the basis of the reasonableness doctrine rather than on determining a minimum core content of the right and core obligations. It is a disappointing and retrogressive step in terms of implementing the right to water. Moreover, it reflects the increasingly cautious approach adopted by the court in the context of socio-economic cases⁸⁸⁸ and highlights the possible variations in interpretation of ESCRs across domestic courts.

Several cases have also been heard using constitutional and national sources in South America, for example, in Argentina and Brazil although neither state constitution contains an explicit provision for the right to water.⁸⁸⁹ In *Quevedo Miguel Angel y otros c/Aguas Cordobesas S.A.Amparo Cordoba City*, the Civil and Commercial First Instance Court of Argentina ruled that disconnection of the water supply to a group of low-income families due to non-payment was illegal as it violated both provincial law regulations to provide 50 litres of water per day regardless of payment and that it violated Section 42 of the Argentinean Constitution concerning consumer rights to health and safety. Furthermore, the court held that the minimum supply of 50 litres was insufficient to meet the health and hygiene requirements of the families and ordered the company to provide a minimum of 200 litres per household.⁸⁹⁰

885 The applicants claimed that the amount supplied was insufficient and that the policy was in conflict with the Water Services Act 19 (1998), Government Gazette 22355, 8 June 2001, Government Notice R509, Regulation 3, which provides for a right to a limited a minimum quantity of free potable water of 25 litres per person per month and that no consumer is without a supply for more than seven full days in any year.

886 The case was heard in the first instance between 3 and 5 December 2007 in the Johannesburg High Court. Case number: 06/13865.

887 For further details and access to all case documents, see Centre for Applied Legal Studies, University of Witwatersrand, Johannesburg, Basic Services, at http://web.wits.ac.za/Academic/CLM/Law/CALS/Basic_Services/ (accessed 1 June 2010). See also Dugard, J., 'Pro-poor Critique of Prepayment Water Meters in SA: The Phiri Story', (2007) 2 *Critical Health Perspectives* 1–3 (People's Health Movement South Africa).

888 See ESCR-Net, Case Law, *Lindiwe Mazibuko and others v City of Johannesburg and others*, at www.escr-net.org/caselaw/ (accessed 1 June 2010).

889 On the right to water in Argentina, see Picolotti, JM, Gilli, L, Juliá, M and Mendyvil, A, *The Right to Water in Argentina*, 5 November 2003, Rights and Humanity/Centre for Human Rights and the Environment.

890 *Quevedo Miguel Angel y otros c/Aguas Cordobesas S.A.Amparo Cordoba City*, Juez Sustituta de Primera Instancia y 51 Nominacion en lo Civil y Comercial de la Ciudad de Cordoba (the Civil and

In *Defensoría de Menores N° 3 v Poder Ejecutivo Municipal*, the Children's Public Defender of the Province of Neuquén filed a case on behalf of children living in the Valentina Norte rural colony whose drinking water supply was contaminated with hydrocarbons. The Superior Justice Court upheld a previous decision of the Court of Appeal requiring the government to provide 100 litres of drinkable water per day to each individual in the colony, as well as providing the means to store the water safely until decontamination of the water supply had been implemented. The case relied upon the Constitution but also based its arguments on the provisions for a right to water as part of the right to health under the CRC.⁸⁹¹

In the Argentinean case *Menores Comunidad Paynemil s/ acción de amparo*, the Court of Appeals decided that the pollution of an indigenous peoples community's water supply by an oil company constituted a violation of the people's right to health and a safe environment. The court found that the government had not fulfilled its obligation to protect the health of the population under the Constitution.⁸⁹²

Another case regarding disconnection of water services has been heard under the national law of Brazil. In this particular case, the vulnerability of the petitioners was central to the outcome of the case. One of the residents of the household was sick and the court held that this situation was the primary concern in deciding whether disconnection of their water supply was illegal or not. Under Brazilian Consumers' Defence Code, Article 42, exposure of the user to humiliating decisions is forbidden. Therefore, under this national regulation, the decision was found in favour of the residents: the water supply was reinstated and compensation awarded.⁸⁹³

Cases have also been heard based upon constitutional provision for related human rights. In *Government of the Republic of South Africa and others v Grootboom and others*, the provision of adequate safe and sufficient water was considered as an element of the right to housing.⁸⁹⁴ Significantly, cases concerning the right to water

Commercial First Instance Court of Argentina), 8 April 2002. See COHRE, 'Leading Cases on Economic, Social and Cultural Rights: Summaries', Working Paper No 4, ESC Rights Litigation Programme, 2006, Geneva: COHRE, p 27.

891 *Valentina Norte Colony, Defensoría de Menores N° 3 c/ Poder Ejecutivo Municipal s/ acción de amparo*, Expte 46-99, Acuerdo 5 del Tribunal Superior de Justicia, Neuquén, Argentina, 2 March 1999. See COHRE, 2006, pp 27-28 and COHRE, 2003, p 113.

892 *Menores Comunidad Paynemil s/ acción de amparo*, Expte 311-CA-1997, Sala II, Cámara de Apelaciones en lo Civil, Neuquén, Argentina, 19 May 1997. See COHRE, 2003, pp 111-14; and Picolotti, R, 'The Right to Safe Drinking Water as a Human Right', (2005) 2(1) *Housing and ESC Law Rights Quarterly*, COHRE 1-5, for details of other Argentinean cases.

893 Bill of Review 0208625-3, Special Jurisdiction Appellate Court, Paraná, Brazil, August 2002. See COHRE, 2006, pp 29-30; and COHRE, 2003, p 115.

894 *Republic of South Africa v Grootboom* (Case No CCT 11/00 2000 (11) BCLR 1169, Constitutional Court of South Africa, 4 October 2000). The court upheld a previous ruling in the High Court (*Grootboom and others v Oostenberg Municipality and others*, Case No 6826/99, High Court of South Africa, Judgment 17 December 1999, Judge Davis, pp 24-5), that the government had an obligation to provide the respondents with shelter consisting in the bare minimum of 'tents, portable latrines and a regular supply of water (albeit transported)'. For an analysis of the jurisprudence in this case, see Fitzpatrick, J and Slye, R, 'Republic of South Africa v. Grootboom. Case No.CCT 11/00.2000 (11) BCLR 1169 and Minister of Health v. Treatment Action Campaign. Case No.CCT 8/02', (2003) 97(3) *AJIL* 669-80; Kok and Langford, in Brand and Heyns 2005, pp 191-208; Bilchitz, 2007, pp 139-52.

have also been brought under provision for the right to life, as contained in Article 21 of the Indian Constitution.⁸⁹⁵ In *Subhash Kumar v State of Bihar*, the court ruled that the right to life must include the 'right of enjoyment of pollution free water'.⁸⁹⁶ In *Municipal Council Ratlam v Vardhichand and others*, the Supreme Court held that sufficient clean and safe water supply is essential for preserving public health.⁸⁹⁷

Regional human rights systems have also heard cases. In the case of *World Organisation Against Torture (OMCT) and others v Zaïre*, at the African Commission, the petitioners claimed, *inter alia*, that the government had failed to provide basic services including safe drinking water. The African Commission found that the government of Zaïre had indeed failed to provide basic services necessary for a minimum standard of health and as such had violated the right to health including a right to safe drinking water as provided for under Article 16 of the African Peoples Charter.⁸⁹⁸

Generally, the development of jurisprudence concerning the right to water and other related economic and social rights is in its infancy but it is evolving and is a welcome move forward for remedy in the field. The selected cases discussed illustrate the various approaches taken by different regional and domestic courts in interpreting state obligations correlative to these rights. Significantly, in the majority of the cases listed there has been a positive outcome. This illustrates the importance of strong domestic legislation in finding remedy for violations. However, it is also evident that progressive interpretation of legal obligations in regard to economic and social rights is required by the courts to improve enjoyment of the right to water and other related rights in practice.

Moreover, for people to have access to legislation and procedures under domestic law, there must be a functioning and effective justice system. Therefore, it is imperative that at an international level, development organisations, NGOs and state agencies should assist in the reform of those domestic legal systems that are lacking (for example, that of the PA as under occupation) so that mechanisms are put in place to implement effective remedies and monitoring of all human rights, including the right to water. In addition, education programmes and availability of information (on rights and how to seek remedies) are essential if people are to be empowered to use these procedures at both international and domestic levels.

Another useful development would be the establishment of a database of legal

895 In India, the courts have considered many aspects of economic and social rights as within their jurisdiction. Regarding the broad interpretation of the right to life under Indian jurisprudence, see Muralidhar, S, 'Judicial Enforcement of Economic and Social Rights: The Indian Scenario', in Coomans, F (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, 2006, Antwerp/Oxford: Intersentia, pp 237–67. For summary of various cases, see COHRE, 2003, pp 115–17; and FIAN/Brot für die Welt, 2006, pp 10–11.

896 *Subhash Kumar v State of Bihar*, AIR 1991 SC420, Supreme Court of India.

897 *Municipal Council Ratlam v Vardhichand and others*, AIR 1980 SC 1622, Supreme Court of India. Summary at COHRE, 2003, p 115.

898 See *OMCT and others v Zaïre*, Communications 25/89, 47/90, 56/91 and 100/93; see also *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication 155/96, both before the African Commission on Human Rights. Summary at COHRE, 2003, pp 108–10.

cases relating to the right to water and other ESCRs, which would act as a central mechanism for building up a picture of jurisprudence concerning the right, as this remains disparate and in its early stages.⁸⁹⁹ Work on such a project has already begun with the creation of the ESCR-NET case law database which collates jurisprudence, cases and other decisions related to ESCRs.⁹⁰⁰

Final comments

To conclude, the evolution of thinking about water problems has resulted in various approaches to tackling issues of water shortage and lack of access to clean and sufficient water. From international water law to development and environmental perspectives, all of these ideas – whether embodied in hard law or soft law – have assisted in the promotion of the idea that water should be available for all human beings at a level to sustain life and ensure human dignity. The particular benefit of the human rights approach to water and sanitation is its capacity for empowering individuals and communities, particularly for the most vulnerable in society, as the demand for fulfilment of their water needs are transformed into legal entitlements. Furthermore, the legal framework of human rights provides for monitoring of the enjoyment of the right and state compliance with its obligations, as well as providing a mechanism for establishing and providing remedy for violations. As such, the recent focus upon a human right to water is an important and significant development.

However, although much has already been achieved in the codification and standards produced concerning the human right to water, this study has clearly determined that the current provisions for the right to water are insufficient. Action is required to promote the legal standing of the right as an independent right and ensure the most comprehensive provisions are codified within the law. In addition, much can be done to improve the current situation by implementing advances in remedy for economic and social rights as a whole. There is a need for further research, both by academics and by those in practice; however, there are tangible measures that can be taken now to ensure accessible, safe and sufficient water for all.

899 This idea was tabled in relation to all economic and social rights by Michael Windfuhr (*Brot für die Welt*) at the International Human Rights Obligations Network Launch Day, Lancaster University, UK, 18 January 2006.

900 See ESCR-Net, Case law Database, at www.escr-net.org/caselaw/ (accessed 1 June 2010).

Appendix 1

Water use in the West Bank and the human right to water

Interview schedule for individuals

General information

Please tick the applicable:

I live in a

Camp

Rural village

Urban area (Large town / city)

I live in the area of: (Please state name of camp, village or town and area)

(NB. Type of dwelling and time taken for interview was also noted following conversation with the researcher)

Please state the number of people in your household:

Adult – male:

Adult – female:

Child – male:

Child – female:

Baby – male:

Baby – female:

Elderly – male:

Elderly – female:

Relevant additional information:

Part I – Everyday water use

Availability

1. Do you have sufficient water for personal use?
(Personal hygiene, sanitation)

2. Do you have sufficient water for domestic use?
(Food preparation, household hygiene)
3. a) Do you have sufficient water for drinking?
b) If not, does this cause you and / or your family health problems? Dehydration, thirst etc. If your answer is yes, explain any problems you do suffer with.
4. How much water do you use daily? (Please specify in litres and state how many people this has to be shared between). Alternatively state amount of water in litres per person.
5. a) Does your water supply vary according to the time of year / seasons?
b) If so, when and how?
6. Do you worry about sustainability of water sources for your children and future generations?

Quality

1. Is the water that you get clean [to sight]?
2. Is the water you get acceptable in colour, taste and smell for personal use?
3. a) Is the water you get free from contamination?
b) If not, do you know how it is contaminated and at what point it becomes contaminated?

Accessibility

1. Is the same water equally accessible to everyone where you live?
2. Is the water you get within safe physical reach?
3. Is your water from: (Please tick all those applicable)
A mains tap in your home
A communal tap where you live
A tap outside of your village / camp / town
Groundwater from a spring, stream, river, lake – specify which and how far away and whether seasonal
Groundwater from a well – specify where and distance away and whether seasonal
Rainwater collected in a roof-tank
Tanker water (purchased)
Bottled water (purchased)
Other – please specify

If you use a combination of sources please list to what extent you are reliant on each source.

4. How far do you have to go to access water? Please state in kilometres and how long it takes to get there.
5. Who collects the water for your family? (Please tick all those applicable)
 - Women
 - Female children
 - Male children
 - Men
6. How do you collect your water if you have to travel to get it? On foot, by cart, by car?
7. Is your access to water ever denied by: (Please tick all those applicable and state how often it happens). If you can give any examples with dates please do.
 - Checkpoints
 - Roadblocks
 - Incursions and high intensity fighting
 - Curfew
7. a) Is your personal safety ever endangered due to collecting water?
 - b) If yes, how and why?
8. a) If you have mains water supply in your home, are you ever disconnected from the mains water supply?
 - b) If yes, how often and do you know why?
9. a) Do you have to pay for water?
 - b) If so, how much? (per litre)
10. Is this affordable to you?
11. Does this price limit the amount of water you can purchase and use?
12. a) Do you feel that lack of water or limited access to water or contaminated water causes you and your family any problems?
 - b) If so, what are these problems and how do you think they might be remedied?
13. Do you or your family, suffer from any health problems due to lack of water or poor quality water?
14. Is anyone in your family particularly vulnerable due to water problems? For example babies, older people?

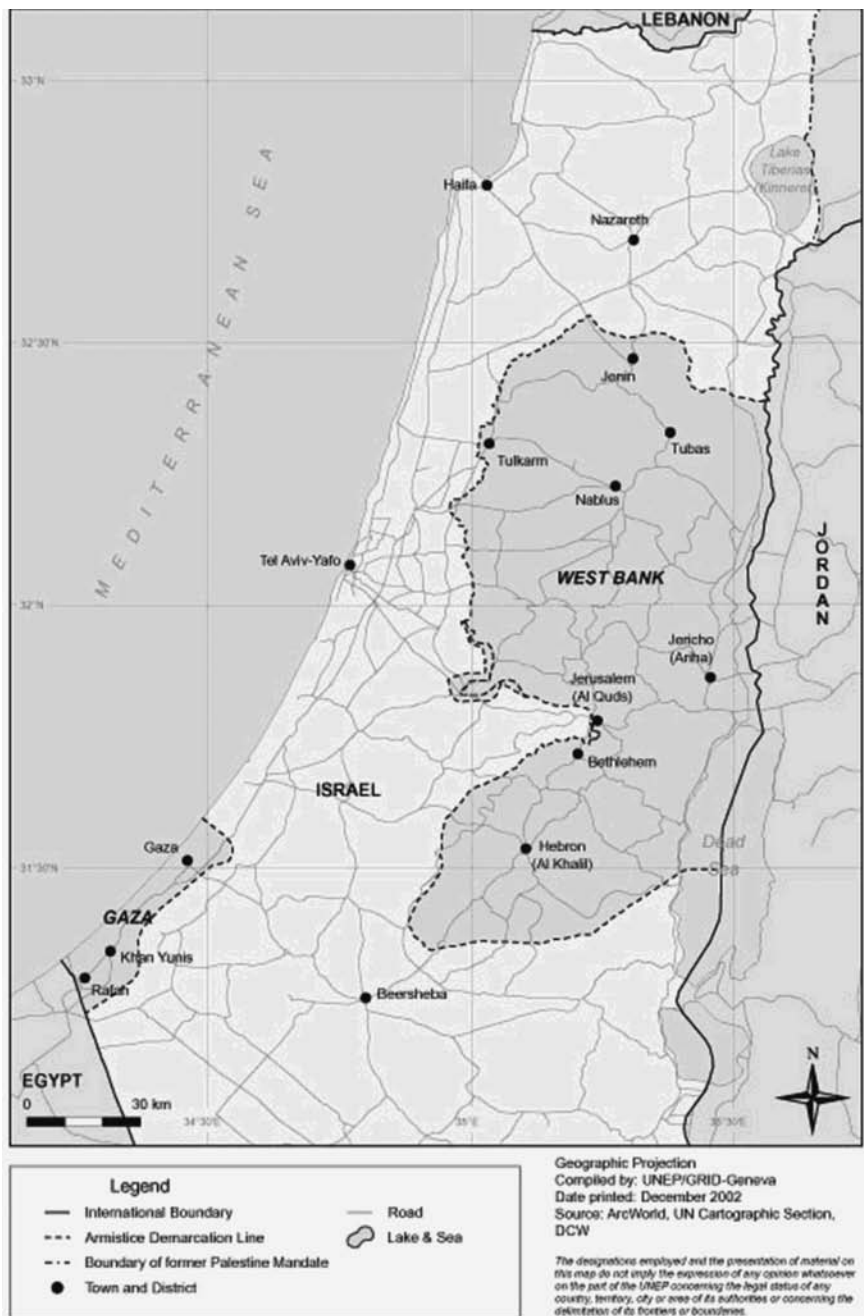
15. Please tell me any particular experiences, views and stories regarding water that you would like to share.

Part II – A human right to water

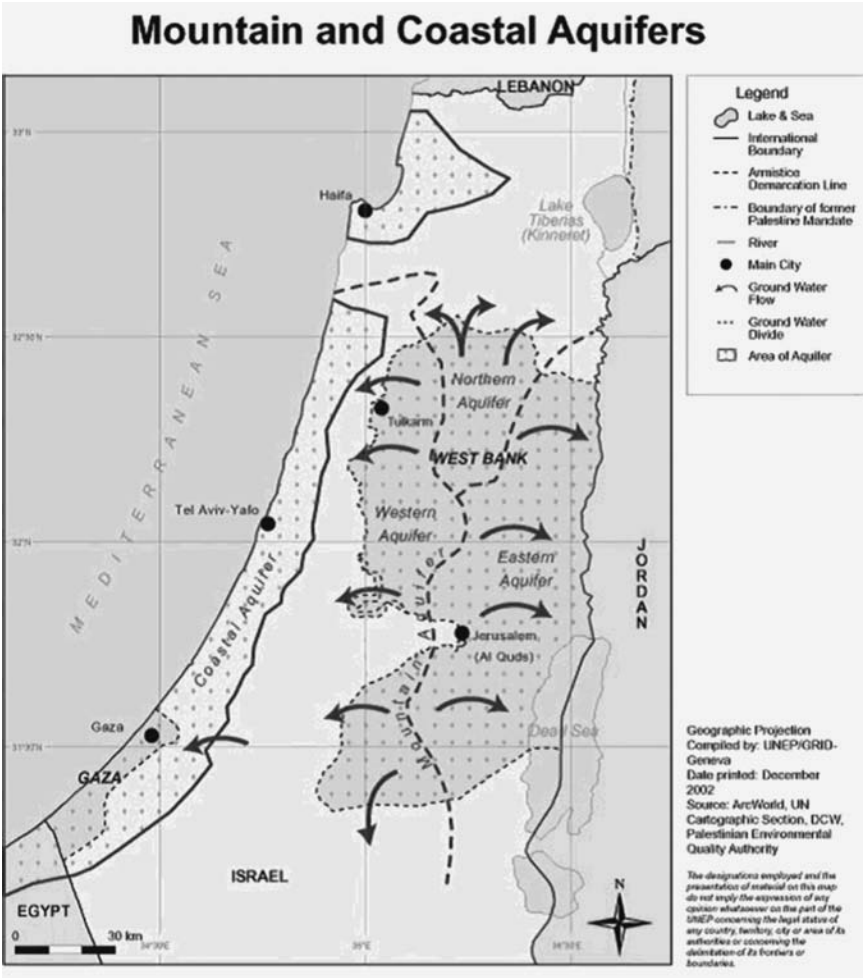
1. a) Do you think there is discrimination concerning water in the West Bank?
b) If yes, please state how and why?
2. Have you heard of human rights?
3. Did you know that there is a human right within international law to safe and sufficient water?
4. What do you understand by this?
5. Do you think that human rights law can help to realise your water needs?
6. Do you think it would it make a difference if the human right to water was a part of national law as well as international law?
7. a) Do you think your right to water is being threatened or violated?
b) If so how?

Many thanks for your time and effort

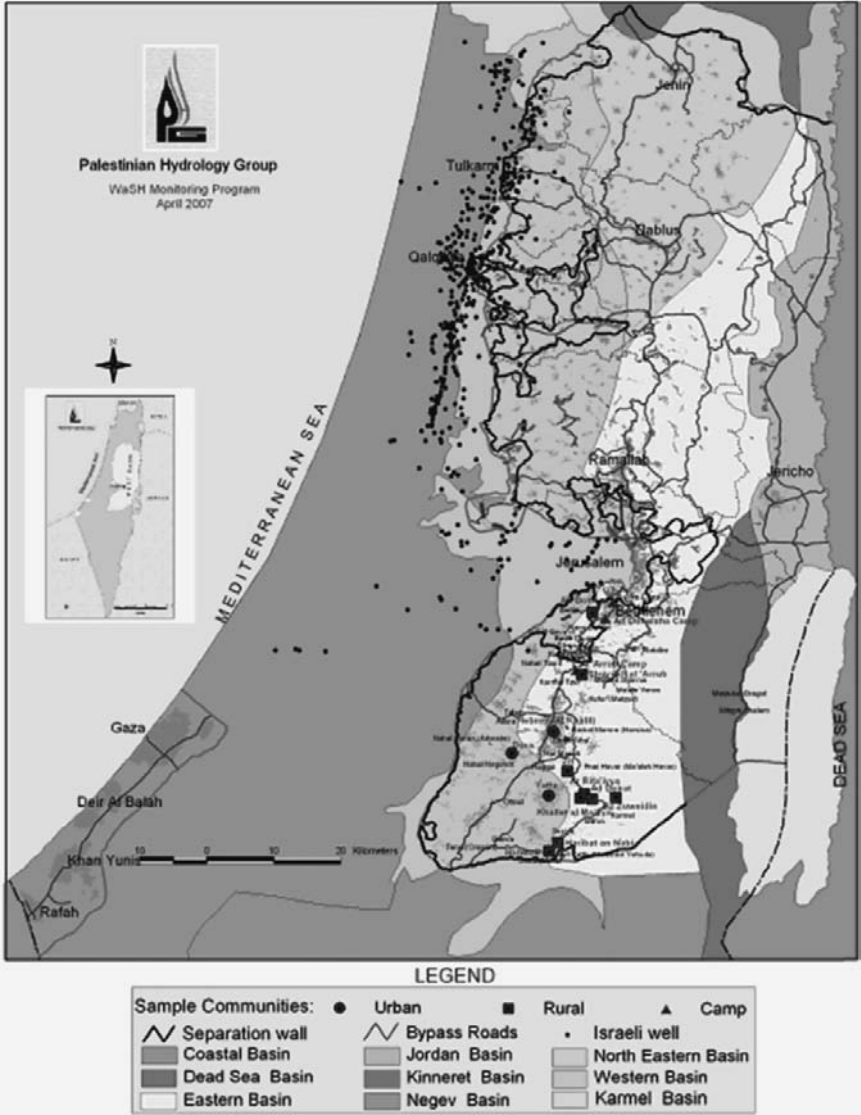
Appendix 2



Map A West Bank and Gaza (reproduced from UNEP, see details above)



Map B Mountain and coastal aquifers (reproduced from UNEP, see details above)



Map C Sample communities (adapted from PHG map)

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