

# COMMENTS

## ISRAELI-PALESTINIAN WATER LITERATURE'S MISPLACED DEPENDENCE UPON CUSTOMARY INTERNATIONAL LAW

BY

IAN J. SILVERBRAND\*

*The literature treats customary international water law and restricted territorial sovereignty as the best constructs with which to analyze the allocation of shared Israeli-Palestinian water resources. This treatment is in spite of the regional treaty water law that embraces various other principles of international water law. Even though the Israelis and Palestinians have refrained from adopting and implementing customary international water law and restricted territorial sovereignty, the literature continues to advocate for its use in spite of the constructs' obscurities and questionable legal applicability. Instead of continuing the literature's embrace of customary international water law and restricted territorial sovereignty, this Comment identifies the flaws in the literature and calls for future work to adopt other legal approaches to the distribution's legal resolution.*

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## I. INTRODUCTION

During Biblical times, the Jordan Valley<sup>1</sup> was compared to a divine garden replete with flourishing trees and wildlife;<sup>2</sup> in more recent years, however, the Jordan Valley has been described as a desolate wasteland.<sup>3</sup> Despite this decline, the Jordan Valley is still widely perceived as an oasis.<sup>4</sup>

<sup>1</sup> "Jordan Valley" describes the land that borders the Jordan River basin. The "Jordan River basin" consists of four principal tributaries (the Hasbani of Lebanon, the Dan of Israel, the Baniyas of Syria, and the Yarmouk, which originates in Syria and forms the boundary between Jordan and Syria and later between Jordan and Israel before flowing into the Lower Jordan) which contribute to one stem consisting of the Upper and Lower Jordan. The Upper Jordan flows into Lake Tiberias, which flows into the Lower Jordan, which discharges into the Dead Sea. Miriam R. Lowi, *Rivers of Conflict, Rivers of Peace*, 49 J. INT'L AFF. 124, 127-38 (1995); see Selig A. Taubenblatt, *Jordan River Basin Water: A Challenge in the 1990s*, in THE POLITICS OF SCARCITY: WATER IN THE MIDDLE EAST 41, 42-43 (Joyce R. Starr & Daniel C. Stoll eds., 1988) (providing a detailed explanation of the physical and geographic characteristics of the Jordan River basin).

<sup>2</sup> Rashi, one of the most renowned commentators on the Torah, explained that the Jordan Valley was a land of water streams and growing trees and plants. Likewise, the Ralbag describes the biblical Jordan Valley as a flourishing and fertile land. See CHAMISHAH CHUMSHEI TORAH 'IM PERUSH RASHI VE-'IM BE'UR RABENU LEVI BEN GERSHOM (RALBAG) 194-201 (*Hotzaat Maalyot sh'al Yad Yeshivat "Berchat Moshe"* ed., 1993) (translation by author) (providing the text and rabbinic commentaries related to Genesis 13:10 and adjacent passages).

<sup>3</sup> See, e.g., HERMAN MELVILLE, JOURNAL OF A VISIT TO EUROPE AND THE LEVANT, OCTOBER 11, 1856-MAY 6, 1857, at 154 (Howard C. Horsford ed., 1955) ("No country will more quickly dissipate romantic expectations than Palestine . . . [T]he disappointment is heart sickening. . . . Is the desolation of the land the result of the fatal embrace of the Deity? Hapless are the favorites of Heaven."); MARK TWAIN, THE INNOCENTS ABROAD 597 (Shelley Fisher Fishkin ed., Oxford University Press 1996) (1869) (describing a trip from the Dead Sea to Mars Saba) ("The sun so pelted us that the tears ran down our cheeks once or twice. The ghostly, treeless, grassless, breathless canons smothered us as if we had been in an oven.")

<sup>4</sup> Mark Twain ironically well represents this hypothetical observer. He wrote:

When I was a boy I somehow got the impression that the river Jordan was four thousand miles long and thirty-five miles wide. . . . It is not any wider than Broadway in New York. There is the Sea of Galilee and this Dead Sea—neither of them twenty miles long or thirteen wide.

In a desert-like environment such as the Middle East,<sup>5</sup> the Jordan River basin is presumed to provide much opportunity for agricultural and economic development and for personal use. However, like most oases, the basin has not lived up to its perceived promise. More than a decade ago, the Jordan River basin naturally discharged 1.1 billion cubic meters of water annually.<sup>6</sup> This is a meager volume relative to the demand for water. Sadly, today the situation is even more dismal as the Jordan River's natural discharge continues to decline as a consequence of both human intervention and natural diminishment.<sup>7</sup> Likewise, the nearby West Bank Aquifer,<sup>8</sup> which has a sustainable natural yield of approximately 300 million cubic meters (MCM) of water annually, is being overpumped by approximately twenty-five percent annually,<sup>9</sup> and its natural yield will decline as a result.

Even with this nonefficient overconsumption of water resources,<sup>10</sup> the annual per capita water consumption in the region is shockingly low

And yet when I was in Sunday School I thought they were sixty thousand miles in diameter.

TWAIN, *supra* note 3, at 596–97. See also DANIEL HILLEL, *RIVERS OF EDEN: THE STRUGGLE FOR WATER AND THE QUEST FOR PEACE IN THE MIDDLE EAST* 156 (1994) (“Those familiar with [the Jordan River] only in legend and song may imagine it to be a mighty river as broad and long as America’s ‘Ol’ Man River.’ In actual fact, the Jordan would scarcely qualify as a rivulet to a tributary of the Mississippi.”).

<sup>5</sup> MARTIN SHERMAN, *THE POLITICS OF WATER IN THE MIDDLE EAST: AN ISRAELI PERSPECTIVE ON THE HYDRO-POLITICAL ASPECTS OF THE CONFLICT* 3 (1999) (“Throughout most of the region annual rainfall ranges from roughly 250 mm to 1000 mm with much of the extensive desert regions receiving virtually none at all. Furthermore, not only is regional rainfall scarce, but it is highly erratic as well.”). See also Joseph W. Dellapenna, *Rivers as Legal Structures: The Examples of the Jordan and the Nile*, 36 NAT. RESOURCES J. 217, 222 (1996) (noting that Israel experiences droughts); Taubenblatt, *supra* note 1, at 43 (“From north to south in the Jordan Valley, rainfall diminishes rapidly and the climate becomes subtropical.”).

<sup>6</sup> See HILLEL, *supra* note 4, at 174 (“The maximum potential annual supply of water from all sources . . . is estimated at 1,100 million cubic meters.”). See also *Water in the Middle East: As Thick as Blood*, *ECONOMIST*, Dec. 23, 1995, at 53–54 [hereinafter *Water in the Middle East*] (noting that the total flow of the Jordan River is one percent of the Nile River).

<sup>7</sup> See Orly Halpern, *River of No Return?*, *JERUSALEM POST*, Mar. 31 2005, at 13 (noting that at publication, the Jordan River discharged “less than 100 million cubic meters, of which some 20% is untreated sewage”).

<sup>8</sup> An aquifer is a water resource that lies under the ground and is naturally replenished by rainfall. Andrew R. Malone, *Water Now: The Impact of Israel’s Security Fence on Palestinian Water Rights and Agriculture in the West Bank*, 36 CASE W. RES. J. INT’L L. 639, 645 (2004). The West Bank Aquifer, also known as the Mountain Aquifer, is composed of three aquifers underneath the West Bank which were developed by various rock formations dating back to the Lower Cretaceous era. See APPLIED RESEARCH INSTITUTE-JERUSALEM, *THE WATER CONFLICTS IN THE MIDDLE EAST FROM A PALESTINIAN PERSPECTIVE* 4 (1996) [hereinafter *THE WATER CONFLICTS IN THE MIDDLE EAST*]; see also STEPHEN C. MCCAFFREY, *THE LAW OF INTERNATIONAL WATERCOURSES: NON-NAVIGATIONAL USES* 276 (2001). The West Bank Aquifer originates in the West Bank and eventually percolates into Israel-proper after crossing the Green Line. Hilal Elver, *Palestinian/Israeli Water Conflict and Implementation of International Water Law Principles*, 28 HASTINGS INT’L & COMP. L. REV. 421, 424 (2005).

<sup>9</sup> See HILLEL, *supra* note 4, at 206 (noting that the West Bank Aquifer’s “total annual pumpage averages 375 million cubic meters”).

<sup>10</sup> But see Pamela LeRoy, *Troubled Waters: Population and Water Scarcity*, 6 COLO. J. INT’L ENVTL. L. & POL’Y 299, 311 (1995) (disputing claims of Israeli non-efficient use of water resources, stating that “Israel probably uses water more efficiently than any other country”).

compared to other countries' water consumption.<sup>11</sup> For example, Israel only affords 350 cubic meters of water per year per capita,<sup>12</sup> and the Palestinian territories are afforded less than 250 cubic meters of water per year per capita.<sup>13</sup> By comparison, "First World" countries like the United States, Canada, and Japan are typically afforded in excess of 1,000 cubic meters of water per year per capita.<sup>14</sup> These figures suggest that, given the region's significant dependence upon these resources<sup>15</sup> and the inevitable increases in population, the potential for a catastrophic humanitarian disaster, beyond the violence that has marred the region for centuries, is severe.<sup>16</sup>

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<sup>11</sup> See Dellapenna, *supra* note 5, at 219 ("The Middle East is now the most water short region in the world, that is, people in the Middle East have available less water *per capita* than any other large region on the planet.").

<sup>12</sup> See HILLEL, *supra* note 4, at 34.

<sup>13</sup> See *Water in the Middle East*, *supra* note 6, at 54 (stating that "Israel's 5 1/2m people consume three or four times as much water per head as the 2m Palestinians," and also noting that Palestinian territories receive no water from the Jordan River directly but are "instead served by Israel's carrier and, more important, the groundwater in the region's aquifers, tapped by wells," in part because by the time the Jordan River reaches Jericho, the crossing point between Jordan, Israel, and the West Bank, it becomes "a murky, salty little stream"); Halpern, *supra* note 7, at 13 ("According to agreements, the Palestinians are supposed to receive from Israel 250 cubic meters of water from the basin. But in actuality they receive far less.").

<sup>14</sup> HILLEL, *supra* note 4, at 34. See also H. I. Shuval, *Are the Conflicts Between Israel and Her Neighbors Over the Waters of the Jordan River Basin an Obstacle to Peace? Israel-Syria as a Case Study*, 123 WATER, AIR, AND SOIL POLLUTION 605, 608 (2000) ("It has been suggested by various researchers as well as by the World Bank that for a country to be considered as having sufficient water for all purposes it would be desirable to have at its disposal at least 1000 cubic meters/person/year (CM/P/Yr.).") (internal citations omitted).

<sup>15</sup> See Ewan W. Anderson, *Water: The Next Strategic Resource*, in THE POLITICS OF SCARCITY: WATER IN THE MIDDLE EAST 1, 7 (Joyce R. Starr & Daniel C. Stoll eds., 1988) ("The upper Jordan itself accounts for approximately 40 percent of Israel's water budget. . . . [the Jordan River basin] provides approximately 60 percent of the water for Israel and 75 percent of that for Jordan."); Karen Hudes, *Shared Water Resources in the Jordan River Basin*, 1 GONZ. J. INT'L L. (1997-98), available at <http://www.gonzagajil.org/content/view/75/26/> (stating that the West Bank aquifer is the source of 35% of Israel's total annual water consumption and the source of 90% of West Bank Palestinian's total annual water consumption).

<sup>16</sup> In fact, the War of 1967 was largely affected by, *inter alia*, Syria's attempt to divert waters from the Jordan River at the expense of Israel's National Water Carrier. See EYAL BENVENISTI, SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCES USE 18 (2002) ("It is widely perceived that the June 1967 war in the Middle East erupted as a direct consequence of heated border skirmishes along the Israeli-Syrian border following Syrian attempts to divert the headwaters of the Jordan River."). That water remains a cause of conflict in the present day is a common argument among hydrologists. See, e.g., Malin Falkenmark, *Fresh Waters as a Factor in Strategic Policy and Action*, in GLOBAL RESOURCES AND INTERNATIONAL CONFLICT: ENVIRONMENTAL FACTORS IN STRATEGIC POLICY AND ACTION 85, 89 (Arthur H. Westing ed., 1986) (claiming that the water conflict "is also a major aspect of the Palestinian question and of the struggle over the future of the West Bank" (quoting John K. Cooley, *The War Over Water*, 54 FOREIGN POL'Y 3, 3-26, (1984))); Timothy L. Fort & Cindy A. Schipani, *Ecology and Violence: The Environmental Dimensions of War*, 29 COLUM. J. ENVTL. L. 243, 259 (2004) ("Water stress is a hovering reality in all of the conflicts between Israel and its Arab neighbors."); SHERMAN, *supra* note 5, at 58 ("[W]ater is indeed an inflammatory issue in the Israeli-Arab conflict."). In fact, even during the Second *Intifada*, it has been reported in the press that one of the underlying sources of tensions and conflict between Israel and the Palestinian territories relates to distribution of water. See, e.g., Halpern, *supra* note 7, at 13 (noting that meetings between Israeli, Palestinian, and Jordanian officials about the use of the Jordan River

Indeed, humanitarian disaster has already begun. Due in part to the increasing demand for water resources caused by a rapidly increasing population,<sup>17</sup> the region's riparians have consumed the available water resources at a rate beyond the natural replenishment rate.<sup>18</sup> Environmental studies have consequently shown that the quantity and the quality of the region's water resources have dramatically declined in recent years.<sup>19</sup> Likewise, this overconsumption has already adversely affected the ecology of the watershed,<sup>20</sup> and has indirectly affected the strength of the Israeli and Palestinian economies.<sup>21</sup> Even worse, however, overconsumption has not

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have been difficult to arrange during the second Intifada); Center for Economic and Social Rights, *The Right to Water in Palestine: A Background*, <http://cesr.org/node/451> (last visited July 15, 2007) ("Since 2000, after the onset of the Second Intifada in September, the Israeli army has intensified the destruction of water [sic] infrastructure and confiscation of water sources in the West Bank and Gaza.").

<sup>17</sup> A 1996 study estimated that the Palestinian population between 2000 and 2010 would increase by 38%, whereas the Israeli population during the same time period would increase by 11%. See *THE WATER CONFLICTS IN THE MIDDLE EAST*, *supra* note 8, at 9–10 (also projecting a 66% increase in Palestinian demand for water during the same period).

<sup>18</sup> See, e.g., MARQ DE VILLIERS, *WATER: THE FATE OF OUR MOST PRECIOUS RESOURCE* 189 (2000) (noting that by the mid-1990s, Israel was drawing down its aquifers at beyond replenishment rates by about 15% per year).

<sup>19</sup> See Juliette Niehuss, *Access to Water: The Legal Implications of the Israeli-Palestinian Water Crisis*, 5 *SUSTAINABLE DEV. L. & POL'Y* 13, 13 (2005) (noting that "overuse of water has steadily decreased water supplies by approximately 1.6 mcm annually" and explaining that "restrictions have forced Palestinians to use unclean water for their daily uses").

<sup>20</sup> Rudolf Orthofer, Clive Lipchin, Jad Isaac, Ra'ed Daoud & Julie Trottier, *The "Dead Sea" Project: Is a More Sustainable Water Management in the Dead Sea Basin Possible?* 4 (MEDAQUA Conference in Amman, Jun. 14–15, 2004), available at [http://www.fao.org/ag/wfe2005/casedb\\_en.asp](http://www.fao.org/ag/wfe2005/casedb_en.asp) (follow "The 'Dead Sea' Project" hyperlink under "Theme 3") (discussing ecological damage caused by the current water regimes and noting that "[t]he most visible and most disturbing degradation is the decline of the Dead Sea level and volume").

<sup>21</sup> Astutely, Chaim Weizmann, Israel's first President, generally discussed the correlation between water resources and the region's economic status long before the present water crisis. He once wrote, "[t]he whole economic future of Palestine is dependent upon its water supply for irrigation and for electric power . . ." JAD ISAAC & LEONARDO HOSH, *ROOTS OF THE WATER CONFLICT IN THE MIDDLE EAST* 8 (submitted to the Applied Research Institute-Jerusalem, *The Middle East Water Crisis: Creative Perspectives and Solutions*, May 7–9, 1992) (citing *Jewish Observer*, 22), available at [http://www.arij.org/images/pub/publications\\_1997/roots\\_of\\_the\\_water\\_conflict/Roots\\_of\\_the\\_Water\\_Conflict\\_in\\_the\\_Middle\\_East.pdf](http://www.arij.org/images/pub/publications_1997/roots_of_the_water_conflict/Roots_of_the_Water_Conflict_in_the_Middle_East.pdf). And indeed it has. Because both Israel and the Palestinian territories have had significant shortages of water, many businesses have been loathe to develop in the region, particularly in the Palestinian territories, out of concern for the unpredictable supply of water resources. See Niehuss, *supra* note 19, at 13 ("Palestinian businesses are affected by these policies on a regularly occurring basis, are forced to rotate water access, and are unable to attract high-tech or manufacturing industries because of this unpredictability."). Likewise, there has been concern that highly-skilled Jewish Israelis, agitated by the water shortage and its effects upon the Israeli standard of living, could leave the country thereby causing a dramatic brain drain and shortage of highly-skilled labor. See SHERMAN, *supra* note 5, at 4 stating:

However, it is clearly unfeasible to sustain such a population over time without providing an appropriate standing of living which would be roughly comparable with that which an individual of corresponding ability could attain elsewhere. This is becoming particularly true in an era in which the force of secular ideologies (on which the Zionist movement drew heavily in Israel's initial years) is waning, and in which population mobility is extremely high (especially in the case of individuals endowed with

sufficiently met the region's water needs. Israel still faces an annual shortage of 475 MCM of water and the Palestinian territories face an annual deficit of 35 MCM.<sup>22</sup>

According to many water law theorists, these calamitous results could be avoided by applying customary international law's embrace of restricted territorial sovereignty to the Israeli-Palestinian allocation of water.<sup>23</sup> However, most of these theorists disregard that customary international water law is very abstract and does not provide a conclusive determination of how to resolve the situation. Likewise, these authors have failed to consider that application of the articulations of customary international water law upon which they focus to the Israeli-Palestinian problem would be inappropriate for a variety of reasons. Consequently, the literature, while well intentioned, will likely have limited application and contribution to the ultimate resolution of the Israeli-Palestinian water distribution problem.

This Comment considers the shortcomings of customary international law's application to the problem of Israeli-Palestinian water resource management. In Part II, this Comment explores the relevant customary international water law and regional treaty water law. In doing so, this section introduces and explains Professor F.J. Berber's hydrological constructs and demonstrate how the recent regional treaty water law has drawn upon them. In Part III, this Comment demonstrates that the reliance upon customary international water law is largely misplaced and unhelpful. Part IV concludes by explaining how international water law can be harnessed more effectively to the benefit of the resolution of this problem. By identifying these alternative solutions, it is the author's hope that future literature will depart from the current trend of suggesting that customary international water law's principles be applied to the problem.

## II. RELEVANT SOURCES OF INTERNATIONAL WATER LAW

### *A. Principles of International Water Law*

When settling conflicts over competing uses of water, riparians can rely upon a wide range of theoretical authority.<sup>24</sup> Professor F.J. Berber synthesized this authority and articulated that there are "four alternative principles which govern the use of waters flowing through more than one

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skills that are in great demand).

*Id.*

<sup>22</sup> See David Rudge, *Water Crisis Worse than Expected*, JERUSALEM POST, Apr. 11, 2001, at 5 (claiming that the shortage is approximately 475 MCM/Yr.); Niva Telerant, *Riparian Rights Under International Law: A Study of the Israeli-Jordanian Peace Treaty*, 18 LOY. L.A. INT'L & COMP. L. REV. 175, 180 (1995) (noting that the West Bank is consuming water at 100% of potential usage while Gaza is consuming water at a deficit of 35 MCM/Yr.).

<sup>23</sup> See *infra* Part III.

<sup>24</sup> "Riparian" refers to one who is related to or located on "riparian land," which is defined as "[l]and that borders on a public watercourse . . ." BLACK'S LAW DICTIONARY 893-94 (8th ed. 2004).

state.”<sup>25</sup> These principles are absolute territorial sovereignty, absolute territorial integrity, community of property in water, and restricted territorial sovereignty.<sup>26</sup> Each of these constructs has been drawn upon, to varying degrees, during the historical negotiations related to usage of the Jordan River watershed resources.<sup>27</sup>

Absolute territorial sovereignty is based upon the belief that a riparian should be able to freely dispose of waters flowing through its territory and that no riparian has a right to demand the continued free flow from other riparians.<sup>28</sup> A prime example of the theory’s application can be found in the conflict between the United States and Mexico’s usage of the Rio Grande.<sup>29</sup> As a result of the use of Rio Grande waters by farmers and ranchers in Colorado and New Mexico, Mexican communities near Ciudad Juarez were deprived of the use of quantities of Rio Grande water to which they had historical access for hundreds of years before farmers and ranchers arrived in New Mexico.<sup>30</sup> A legal dispute resulted, and it was referred to United States Attorney General Judson Harmon, who, in 1895, issued an opinion that has become known as the Harmon Doctrine.<sup>31</sup> In it, Harmon wrote:

The fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its own territory. . . .

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. . . . The immediate as well as the possible consequences of the right asserted by Mexico show that its recognition is entirely inconsistent with the sovereignty of the United States over its national domain.<sup>32</sup>

Although the United States eventually abandoned the Harmon Doctrine and resolved the Rio Grande dispute by an agreement to apportion the waters of the Rio Grande equitably,<sup>33</sup> absolute territorial sovereignty—the driving principle behind the Harmon Doctrine—has since been argued by numerous other countries in water disputes with varying degrees of

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<sup>25</sup> F.J. BERBER, RIVERS IN INTERNATIONAL LAW 12 (R.K. Batstone trans., The London Institute of World Affairs ed. 1959) (drawing upon the works of, *inter alia*, Max Huber).

<sup>26</sup> See *id.* at 13–40 (discussing how these four principles operate).

<sup>27</sup> See generally *infra* Part II.C.

<sup>28</sup> BERBER, *supra* note 25, at 13.

<sup>29</sup> MCCAFFREY, *supra* note 8, at 114–15.

<sup>30</sup> *Id.* at 114.

<sup>31</sup> *Id.* at 114–15; Judson Harmon, *Treaty of Guadalupe Hidalgo—International Law*, 21 U.S. OP. ATT’Y. GEN. 274 (1895) [hereinafter Harmon Doctrine].

<sup>32</sup> Harmon Doctrine, *supra* note 31, at 281–82 (internal quotations omitted) (quoting *Schooner Exch. v. McFaddon*, 7 Cranch 116, 136 (1812)).

<sup>33</sup> See Convention between the United States and Mexico providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, U.S.-Mex., May 21, 1906, 34 Stat. 2953 (adopting a cooperative approach to the distribution of Rio Grande waters).

success.<sup>34</sup> Those disputes support the supposition that because absolute territorial sovereignty tends to typically favor the highest upstream riparian, the theory is typically advanced by upper riparians.<sup>35</sup>

Conversely, absolute territorial integrity suggests that “a state has the right to demand the continuation of the natural flow of waters coming from other countries, but [a state] may not for its part restrict the natural flow of waters flowing through its territory into other countries.”<sup>36</sup> According to this construct, every riparian must allow its watershed to follow its natural course.<sup>37</sup> This forces a state, when exercising control over its portion of an international basin, to consider the effects of this usage on its co-riparians.<sup>38</sup> Consequently, this construct most widely appeals to the lowest riparian who is in possession of where the river ends and empties into another body.<sup>39</sup>

By contrast, community of property in water suggests that water “rights are either vested in the collective body of riparians or are divided proportionally.”<sup>40</sup> Subsequently, no riparian can “dispose of the waters without the positive co-operation of the others.”<sup>41</sup> Because this principle requires significant collaboration, it is best applied to a situation where there is “a fully developed legal community”<sup>42</sup> and where the riparians have amicable diplomatic relations. For example, community of property in water was invoked by then-United States Secretary of State Thomas Jefferson to President George Washington in 1792 with respect to navigation of the then Spanish-controlled lower Mississippi River.<sup>43</sup>

Lastly, restricted territorial sovereignty prohibits detrimental increases in usage and prohibits detrimental alterations to the nature of the body’s flow.<sup>44</sup> Thus, restricted territorial sovereignty suggests “all states riparian to an international waterway stand on a par with each other insofar as their

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<sup>34</sup> See generally MCCAFFREY, *supra* note 8, at 116–23 (identifying numerous conflicts where one party has advanced absolute territorial sovereignty as a basis to support its position, including: India during its negotiations with Pakistan prior to the Indus Waters Treaty of 1960 and the Agreement on Sharing of the Ganges Waters of 1977, Austria during its negotiations with Yugoslavia related to the Drava River, Chile during its negotiations with Bolivia related to Rio Mauri in the 1920s, and Ethiopia during negotiations related to the Nile River).

<sup>35</sup> BERBER, *supra* note 25, at 13.

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* at 20 (quoting Max Huber); MCCAFFREY, *supra* note 8, at 128.

<sup>38</sup> Daniel J. Epstein, *Making the Desert Bloom: Competing for Scarce Water Resources in the Jordan River Basin*, 10 TEMP. INT’L & COMP. L.J. 395, 402–03 (1996).

<sup>39</sup> BERBER, *supra* note 25, at 13–14. See also MCCAFFREY, *supra* note 8, at 129–33. (invoked by the United States during disputes related to air pollution with Canada during the 1940s, by Egypt in disputes related to Nile, by Pakistan in disputes with India related to usage of the Indus River, by Spain against France during litigation related to the Lake Lanoux Arbitration, and by Bolivia with respect to conflicts pertaining to Rio Mauri and Rio Lauca).

<sup>40</sup> BERBER, *supra* note 25, at 13.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 14.

<sup>43</sup> MCCAFFREY, *supra* note 8, at 153.

<sup>44</sup> See BERBER, *supra* note 25, at 33–34 (noting that Hans Thalmann states that European law permits the diversion of water only to the extent that it does not harm neighboring territories and that injury due to the increase of water usage is the responsibility of the author of the increase).

right to utilization of the water is concerned.”<sup>45</sup> “Standing on a par,” synonymous with the more commonly used phrase “equitable utilization,” is not meant to “imply that each riparian has an equal claim to the basin waters; rather it is interpreted to mean that each riparian’s needs are to be considered on an equal basis in relation to the needs of the other states sharing the basin.”<sup>46</sup> This flexible articulation demonstrates that formal expressions of law that invoke this theoretical construct “will undoubtedly contain lacunae, obscurities and inaccuracies.”<sup>47</sup> Nevertheless, restricted territorial sovereignty is “probably the prevailing theory of international watercourse rights and obligations today.”<sup>48</sup>

### *B. Customary International Water Law*

Modern international law has considered the environment and water in numerous sources. Although not expressly discussed in the United Nations Charter,<sup>49</sup> the United Nations Declaration of Human Rights, an oft-cited source of customary international law,<sup>50</sup> proclaims “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.”<sup>51</sup> Many have commented that within the Declaration is an implicit recognition of the human right to water.<sup>52</sup> The international community eventually recognized a human right to water explicitly.<sup>53</sup> Recently, for example, the United Nations Economic and Social Council stated that “[t]he human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.”<sup>54</sup> Tangentially, the internationally recognized right to participate in

<sup>45</sup> Jerome Lipper, *Equitable Utilization*, in *THE LAW OF INTERNATIONAL DRAINAGE BASINS* 15, 44–45 (A. H. Garretson, R. D. Hayton & C. J. Olmstead eds., 1967).

<sup>46</sup> Epstein, *supra* note 38, at 403.

<sup>47</sup> BERBER, *supra* note 25, at 14.

<sup>48</sup> McCaffrey, *supra* note 8, at 137; *see also* Michelle R. Sergent, Comment, *Comparison of the Helsinki Rules to the 1994 U.N. Draft Articles: Will the Progression of International Watercourse Law be Dammed?*, 8 *VILL. ENVTL. L.J.* 435, 445 (1997) (“‘Restricted sovereignty’ is a generally accepted norm of customary international law.”).

<sup>49</sup> *See* Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031 (nowhere discussing “water”).

<sup>50</sup> John Scanlon, Angela Cassar & Noémi Nemes, *Water as a Human Right?* 3 (IUCN Environmental Law Programme, Working Paper No. 51, 2004), *available at* <http://www.iucn.org/themes/law/pdfdocuments/EPLP51EN.pdf>

<sup>51</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at 75, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948).

<sup>52</sup> *See* Scanlon et al., *supra* note 50, at 4.

<sup>53</sup> The right to water had been recognized in more limited contexts. For example, the Geneva Convention provides that “[s]ufficient drinking water shall be applied to prisoners of war.” Geneva Convention Relative to the Treatment of Prisoners of War art. 26, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>54</sup> U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc., and Cultural Rights, *General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social, and Cultural Rights)*, ¶ 1, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

public affairs has been interpreted to create a right for individuals to be allowed to partake in local environmental decisions including those pertaining to water.<sup>55</sup>

Although these aforementioned rights are likely binding international law,<sup>56</sup> the human rights to water and to participation in environmental decisions do not impose any substantive responsibilities upon individual countries.<sup>57</sup> Instead, one must consider other documents to define the scope of the right. The academic literature almost entirely depends upon codified customary international water law to define the range of these rights in regions lacking binding water treaties.

### 1. *The Helsinki Rules (1966)*

The International Law Association (ILA), a law-related nongovernmental organization,<sup>58</sup> drafted the Helsinki Rules, “the first comprehensive expression of equitable utilization and international river (drainage) basin principles.”<sup>59</sup> The Rules are the conglomeration of resolutions made at ILA-sponsored conferences in Dubrovnik in 1956, New York in 1958, and Salzburg in 1961.<sup>60</sup>

The Helsinki Rules, which aim to provide “[t]he general rules of international law . . . applicable to the use of the waters of an international drainage basin,”<sup>61</sup> are strong articulations in favor of

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<sup>55</sup> See, e.g., U.N. Int'l Covenant on Civil & Political Rights, Human Rights Comm., *General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights: General Comment No. 25 (57)*, ¶¶ 2, 5, 6, 7, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Aug. 27, 1996), (describing the basic elements of a right to participate in public affairs); U.N. Conference on Env't & Dev., June 3–14, 1992, *Rio Declaration on Environment and Development*, annex 1, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) (explaining that “[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level”); U.N. Dept. of Econ. and Soc. Affairs, Div. for Sustainable Dev., *Promoting Education, Public Awareness and Training*, Agenda 21, ¶ 36.10(b), U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) (proposing that countries “should encourage public participation in discussions of environmental policies and assessments”).

<sup>56</sup> See Statute of the International Court of Justice, art. 38, para. 1, June 26, 1945, 59 Stat. 1055 (identifying the bases of enforceable international law as “expressly recognized,” “international conventions,” “international custom,” “general principles of law recognized by civilized nations,” and “judicial decisions and the teachings of the . . . publicists of the various nations”).

<sup>57</sup> See Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT'L ENVTL. L. REV. 1, 1 (1992) (“Surprisingly little attention has been given, however, to the question of whether there is a right to water, and, if so, what the contours of such a right might be.”).

<sup>58</sup> HILAL ELVER, PEACEFUL USES OF INTERNATIONAL RIVERS: THE EUPHRATES AND TIGRIS RIVERS DISPUTE 163 (2002).

<sup>59</sup> *Id.* at 165.

<sup>60</sup> *Id.* at 163–64.

<sup>61</sup> See Int'l L. Ass'n, Comm. on the Uses of the Waters of Int'l Rivers, *The Helsinki Rules on the Uses of the Waters of International Rivers* (Aug. 20, 1966) [hereinafter *Helsinki Rules*] (defining an “international drainage basin” as “a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus”).

equitable utilization.<sup>62</sup> In relevant part, the Helsinki Rules state that “[e]ach basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.”<sup>63</sup> Thereafter, the Rules enumerate a nonexclusive list of factors for determining what constitutes “a reasonable and equitable share.”<sup>64</sup> Article V of the Rules notes that “[t]he weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors.”<sup>65</sup> These addendums eviscerate any bright-line applicability of the Helsinki Rules and force each basin State to argue over what weight each factor should be given.<sup>66</sup> Thus, the Rules do little more than provide structure for future riparian negotiations,<sup>67</sup> and appear to suffer from Berber’s historical concern regarding articulations of restricted territorial sovereignty—“lacunae, obscurities and inaccuracies.”<sup>68</sup>

There are some other crucial provisions of the Helsinki Rules. For example, Article VIII grants “existing reasonable use[s]” a preference over

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<sup>62</sup> See Epstein, *supra* note 38, at 404 (“The Helsinki Rules and the ILC Rules both draw heavily from the theory of equitable utilization.”).

<sup>63</sup> *Helsinki Rules*, *supra* note 61, art. IV.

<sup>64</sup> *Id.* art. V stating:

Relevant factors which are to be considered include, but are not limited to:

1. The geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;
2. The hydrology of the basin, including in particular the contribution of water by each basin State;
3. The climate affecting the basin;
4. The past utilization of the waters of the basin, including in particular existing utilization;
5. The economic and social needs of each basin State;
6. The population dependent on the waters of the basin in each basin State;
7. The comparative costs of alternative means of satisfying the economic and social needs of each basin State;
8. The availability of other resources;
9. The avoidance of unnecessary waste in the utilization of waters of the basin;
10. The practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and
11. The degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.

*Id.*

<sup>65</sup> *Id.* arts. III, V.

<sup>66</sup> See generally Sharif S. Elmusa, *Prior Use and Significant Harm: Focusing International Water Law on Development*, 7 ARAB WORLD GEOGRAPHER 228, 231 (2004) (criticizing the articulation of international water law because “individual factors are too broadly stated and their relative weight is unknown; the language of the text is sometimes vague and the provisions contradictory; and the factors are listed as discrete entities, as if they were unrelated”).

<sup>67</sup> Although the author is critical of the shortcomings of the Helsinki Rules, the structure that the Rules provide is very useful in framing the scope of negotiations and defining the range of relevant issues. Accord J. BRUHÁCS, *THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES* 170 (M. Zehery trans., 1993) (noting that “the term reasonable and equitable share means more a method of approach to discussions than a rule on which to decide the said disputes . . . . Accordingly, the actual realization of a reasonable and equitable share has essentially been left to international treaties or conventions.”) (emphasis in original).

<sup>68</sup> BERBER, *supra* note 25, at 14.

other uses.<sup>69</sup> This provision, which resembles prior appropriations doctrine, has numerous practical benefits. As opposed to forcing riparians to change their existing bodies of law, the priority for existing uses prevents radical changes and allows riparians to rely upon the status quo, so long as it is reasonable, thereby promoting stability and increasing efficiency.<sup>70</sup> Consequently, a preference for reasonable existing uses “allows States the opportunity to invest in reasonable, long-term planning.”<sup>71</sup>

## 2. *The Convention on the Law of the Non-Navigational Uses of International Watercourses (1997)*

Aware of the Helsinki Rules' shortcomings,<sup>72</sup> the United Nations soon took its own steps to codify international water law. The International Law Commission (ILC), the United Nations' Legal Committee's chief advisory body,<sup>73</sup> drafted articles in 1991 and 1994 to define the scope of international water law.<sup>74</sup> After the ILC adopted the Draft Articles, the United Nations General Assembly's Legal Committee was authorized as a working group to negotiate the text of what would become the Convention on the Law of the Non-Navigational Uses of International Watercourses (the Convention).<sup>75</sup>

Much like the Helsinki Rules and the ILC Draft Articles, the Convention drew heavily upon equitable utilization.<sup>76</sup> However, its embrace of restricted territorial sovereignty was more tempered than that of the Helsinki Rules.<sup>77</sup> For example, in its identification of factors to consider in determining what constituted an equitable utilization, the Convention slightly deviates from

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<sup>69</sup> *Helsinki Rules*, *supra* note 61, art. VIII (“An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use.”).

<sup>70</sup> Sergent, *supra* note 48, at 471.

<sup>71</sup> *Id.*

<sup>72</sup> *See id.* at 475–77 (suggesting that the power of the United Nations could ameliorate those problems and “provide a stronger foundation for international support than the Helsinki Rules”).

<sup>73</sup> Jonathan M. Wenig, *Water and Peace: The Past, the Present, and the Future of the Jordan River Watercourse: An International Law Analysis*, 27 N.Y.U. J. INT'L L. & POL. 331, 346 (1995).

<sup>74</sup> With respect to the scope of international water law, the Convention on the Law of the Non-Navigational Uses of International Watercourses (the Convention) is to apply to international watercourses, or those systems “of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus,” parts of which are located in multiple states. U.N. Convention on the Law of Non-Navigational Uses of International Watercourses, G.A. Res. 51/229, U.N. GAOR, 51st Sess., 99th plen. mtg., U.N. Doc. A/RES/51/229, art. 2 (May 21, 1997) [hereinafter G.A. Res. 51/229]. *See also* ELVER, *supra* note 58, at 168.

<sup>75</sup> *See* G.A. Res. 51/229, *supra* note 74 at pmb. (“The General Assembly . . . [e]xpresses its deep appreciation to the International Law Commission for its valuable work on the law of the non-navigational uses of international watercourses”); ELVER, *supra* note 58, at 182; Sergent, *supra* note 48, at 451–52.

<sup>76</sup> *See* Epstein, *supra* note 38, at 404.

<sup>77</sup> *See* Sergent, *supra* note 48, at 456 (discussing the 1994 U.N. Draft Articles, upon which the Convention was heavily drawn, and noting that “[t]he 1994 U.N. Draft Articles also adopt the principle of equitable utilization but lean towards the ‘community of property’ concept”).

the Helsinki Rules' articulation.<sup>78</sup> Specifically, the Convention added consideration of "[t]he effects of the use or uses of the watercourses in one watercourse State on other watercourse States" and omitted consideration of past utilization.<sup>79</sup> Such changes, and others discussed herein, reflect a more limiting approach to restricted territorial sovereignty. Moreover, by including within the Convention consideration of "optimal utilization,"<sup>80</sup> the ILC also drew upon the theory of community of property in water.<sup>81</sup> Community of property, while not usually discussed within international water law, can improve the condition of any watercourse, including perhaps the Jordan River,<sup>82</sup> by forcing riparians "to achieve the optimal use of the watercourse as if no State boundaries existed."<sup>83</sup> This optimal use could be determined through the implementation of greater joint, technical analyses of the condition of disputed watersheds.

Despite these modified provisions, the international community did not receive the Convention well. On May 21, 1997, when the General Assembly opened the Convention for signature, the vote was 103 in favor, 27 abstentions, and 3 against.<sup>84</sup> Israel abstained from voting on the Convention, citing in part that it would have preferred a more explicit balance between the principle of no harm and the principle of reasonable and equitable utilization.<sup>85</sup> Although they were unable to vote for it due to their observer status,<sup>86</sup> the Palestinians also had reason for reservation with the Convention. Particularly, there was concern that the Convention's consideration of the "economic and social needs" of riparians in determining reasonable and equitable utilizations,<sup>87</sup> without consideration of the relative

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<sup>78</sup> Compare Helsinki Rules, *supra* note 61, art. V with G.A. Res. 51/229, *supra* note 74, art. 6 (showing that some of the factors common to both documents are: geography of the basin, hydrology of the basin, climate of the basin, economic and social needs of the riparians, the population dependent upon the waters, the availability of alternative sources of water, and developmental potential of the water resources).

<sup>79</sup> *Id.* art. VI. *But see id.* art. VI (1)(g) (referring to existing uses).

<sup>80</sup> *Id.* art. VIII.

<sup>81</sup> Sergent, *supra* note 48, at 457 (noting that "[o]ptimal utilization . . . is the essential element of the 'community of property' concept").

<sup>82</sup> See Joseph W. Dellapenna, *Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty vs. Community of Property*, 26 CASE W. RES. J. INT'L L. 27, 56 (1994) (arguing for application of community of property concepts into international water law because "[w]ater can thus become the key to building peace within a region, if the interested states are prepared to exploit this possibility actively and effectively, rather than to allow themselves to drift into mutually destructive competition").

<sup>83</sup> Sergent, *supra* note 48, at 457.

<sup>84</sup> ELVER, *supra* note 58, at 183. See also Press Release, General Assembly, General Assembly Adopts Convention on Law of Non-Navigational Uses of International Watercourses, U.N. Doc. GA/9248 (May 21, 1997) [hereinafter General Assembly Press Release] (providing that "[t]he Assembly . . . adopt[ed], by 103 votes in favour to 3 against (Turkey, China, Burundi) with 27 abstentions," a resolution on the non-navigational uses of international watercourses).

<sup>85</sup> General Assembly Press Release, *supra* note 84 (providing that Leeora Kidron, delegate from Israel, was concerned that "[n]either principle should be subservient to the other" and that "[t]he balance between them should be based on the specific case").

<sup>86</sup> G.A. Res. 3237, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 4 (Nov. 22, 1974).

<sup>87</sup> G.A. Res. 51/229, *supra* note 74, art. 6(1)(b) (providing that the equitable utilization of an

level of development of each riparian,<sup>88</sup> unfairly favored Israel.<sup>89</sup> By contrast, Jordan, Syria, and Lebanon were three of the only nine countries that ratified the Convention as of February 15, 2001.<sup>90</sup>

### *C. Regional Treaty Water Law*

An analysis of the recently agreed-upon treaties and joint declarations is necessary because these agreements reflect how the parties have applied the principles of international water law to their own situations and the extent to which they have drawn upon customary international water law.

#### *1. The Declaration of Principles*

After years of secret discussions between Palestinian Liberation Organization (PLO) and Israeli delegates,<sup>91</sup> the Palestinians and Israelis eventually reached their first formal agreement, the Declaration of Principles, in September 1993.<sup>92</sup> Underlying the agreement was the parties' acknowledgment that "it [wa]s time to put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process."<sup>93</sup> Through the Declaration, the parties, perhaps surprisingly,<sup>94</sup> formally recognized one another, thereby eliminating one of the largest hurdles to the solution of the Middle East conflict and to the solution of distribution of water between Israel proper and the Palestinian territories.<sup>95</sup>

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international watercourse involves consideration of "[t]he social and economic needs of the watercourse States concerned").

<sup>88</sup> See Elmusa, *supra* note 66, at 232 (lamenting that the "Convention fails to mention as a factor the relative level of development").

<sup>89</sup> See ELVER, *supra* note 58, at 137 noting:

Moreover, the reference to the social and economic needs of states is often a very unjust factor if the riparian countries' levels are not at equal levels of development, such as is the case [sic] water sharing disputes between Israel and the Palestinian Authority. Does Israel deserve more per capita and overall water use rights than the Palestinians because they are economically wealthier than Palestine?

*Id.* (internal citations omitted).

<sup>90</sup> *Id.* at 183–84.

<sup>91</sup> See generally WILLIAM B. QUANDT, PEACE PROCESS: AMERICAN DIPLOMACY AND THE ARAB-ISRAELI CONFLICT SINCE 1967 (3d ed. 2005) (detailing the history of the Israeli-Palestinian peace process and American involvement).

<sup>92</sup> Justus R. Weiner, *Co-Existence Without Conflict: The Implementation of Legal Structures for Israeli-Palestinian Cooperation Pursuant to the Interim Peace Agreements*, 26 BROOK. J. INT'L L. 591, 600 (2000).

<sup>93</sup> Declaration of Principles on Interim Self-Government Arrangements, Isr.-Palestinian Liberation Org., pmbL, Sept. 13, 1993, 32 I.L.M. 1525 [hereinafter Principles].

<sup>94</sup> See, e.g., MUNTHER J. HADDADIN, DIPLOMACY ON THE JORDAN: INTERNATIONAL CONFLICT AND NEGOTIATED RESOLUTION 349 (2002) ("Israel and the PLO exchanged formal recognition, and Mr. Arafat, heretofore viewed as the head of a terrorist organization, became Mr. Chairman!").

<sup>95</sup> Principles, *supra* note 93, pmbL.

The Declaration of Principles included some terms related to water allocation. It announced that the elected Palestinian council would establish a Palestinian Water Administration Authority (PWA).<sup>96</sup> Upon its establishment, PWA was charged with administering all Palestinian water issues.<sup>97</sup> PWA has since been working to develop a legal framework for promulgating development legislation and monitoring water resources.<sup>98</sup> However, PWA has been slow to reach the level of sophistication of Israeli water law and “Palestinian [w]ater [l]aws may need ‘jump-starting’ to offer [a] parallel framework.”<sup>99</sup> Perhaps underlying the unsophisticated nature of the Palestinian framework is the belief among many Palestinians that PWA is a superfluous, formalistic, and bureaucratic body, since the “PWA cannot achieve it [sic] goals and provide the direction required without sovereign control over its water resources . . . [and] cannot administer, manage, and control what it does not have [sovereign control].”<sup>100</sup> Despite the depth of its regulations and laws, PWA has accomplished significant achievements, including the drafting of Palestinian Law No. 3 of 2002, which declares that the Palestinian water resources are public property to be owned by the Palestinian people.<sup>101</sup> Additionally, Israel and the PLO agreed to cooperate by jointly establishing a water development program that would “specify the mode of cooperation in the management of water resources in the West Bank and Gaza Strip, and w[ould] 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.”<sup>102</sup>

Despite all of this progress, the Declaration of Principles was only meant to be a first step toward peace. The Declaration of Principles did not end the Israeli-Palestinian conflict, in part because a more thorough and detailed agreement would have complicated what was only meant to be the foundation

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<sup>96</sup> *Id.* art. VII, § 4.

<sup>97</sup> Yasser Arafat, President of the Palestinian National Authority, Law No. 2 for 1996 Concerning the Establishment of the Palestinian Water Authority (Jan. 18, 1996), *available at* <http://www.emwis-ps.org/documentation.htm> (articulating the aims of the PWA).

<sup>98</sup> See Ihab Barghothi, Advisor, Palestinian Water Authority Presentation to the U.S. House Committee on International Relations at Hearing on Water Scarcity in the Middle East 16–18 (May 5, 2004), *available at* <http://hirc.house.gov/archives/108/bar050504.pdf> (explaining that the aim of PWA is “to secure an environmentally sound and sustainable development of water resources through efficient and equitable water management”).

<sup>99</sup> Alon Tal, Dir. of Research, The Arava Inst. for Env'tl. Studies, Israel's Water Legislation: Implications for Cooperative Management Strategies, Israeli-Palestinian International Academic Conference on Water for Life in Antalya, Turkey 32 (October 10–14, 2004), *available at* <http://www.ipcri.org/watconf/tal.pdf>.

<sup>100</sup> Hiba Hussein, The Palestinian Water Authority: Legal Developments and Challenges, Israeli-Palestinian International Academic Conference on Water for Life in Antalya, Turkey 18 (October 10–14, 2004), *available at* <http://www.ipcri.org/watconf/husseini.pdf>.

<sup>101</sup> See Richard Laster, Dan Livney & Darrin Holender, *The Sound of One Hand Clapping: Limitations to Integrated Water Management in the Dead Sea Basin*, 22 PACE ENVTL. L. REV. 123, 138–39 (2005) (“The Water Law of 2002 of the Palestine National Authority, like its Israeli counterpart, declares all water resources to public property and grants every person the right to water.”).

<sup>102</sup> Principles, *supra* note 93, annex III, § 1.

of a longer-lasting peace process.<sup>103</sup> Therefore, the Declaration of Principles dictated that future negotiations needed to take place in order to develop an Interim Agreement<sup>104</sup> that would settle some of the more contentious details of the peace negotiations.

From a theoretical perspective, the Declaration of Principles included provisions that evoke restricted territorial sovereignty and absolute territorial integrity. By including the phrase “equitable utilization of joint water resources,”<sup>105</sup> the Declaration of Principles endorses a version of restricted territorial sovereignty. However, this endorsement of restricted territorial sovereignty is tempered by provisions which state that PWA would cooperate with Israel in future development and present use of the watershed—a veiled recognition of absolute territorial integrity. Absolute territorial integrity was advocated for by the Palestinians,<sup>106</sup> who clearly benefited from the construct’s application given their lower-riparian position.<sup>107</sup> By contrast, Israel’s adoption of the Declaration of Principles evidences a disregard for its previously held claim for absolute territorial sovereignty.<sup>108</sup> The most logical explanation for this change is Israel’s strong desire to end hostilities with the Palestinians, even at the expense of its treasured water rights.<sup>109</sup>

## 2. Jordan-Israel Peace Treaty

With the improved relations between Israel and the Palestinian territories, in 1994 Israel and Jordan reached a comprehensive peace agreement.<sup>110</sup> Within the agreement, Article VI attempts to “achiev[e] a comprehensive and lasting settlement of all the water problems between” Israel and Jordan.<sup>111</sup> Among the relevant stipulations, the Treaty dictates that Israel be allowed to use the Jordan River as it had been at the time of the

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<sup>103</sup> Weiner, *supra* note 92, at 601.

<sup>104</sup> Principles, *supra* note 93, art. VII.

<sup>105</sup> *Id.* annex III, § 1.

<sup>106</sup> See Dellapenna, *supra* note 5, at 236 (“The Palestinians, recognizing their relatively weak position vis-à-vis the Israelis, have opted for a claim to the equitable utilization of both the waters of the Jordan River and their shared aquifers.”).

<sup>107</sup> See *id.* at 235–36 (noting that after Jordan lost control of the West Bank in 1967, all of the riparians adopted new hydrological principles due to the change in their riparian positions).

<sup>108</sup> See *id.* at 236 (noting that after 1967, “[p]redictably, and more consistently, [Israel] then put forth a claim to absolute territorial sovereignty”).

<sup>109</sup> Telerant, *supra* note 22, at 199 & n.221.

<sup>110</sup> See Raed Mounir Fathallah, *Water Disputes in the Middle East: An International Law Analysis of the Israel-Jordan Peace Accord*, 12 J. LAND USE & ENVTL. L. 119, 126 (1996) (“The Treaty consists of thirty articles of agreement that concern international boundaries, security, economic relations, refugees, and, of course, water.”); see also HADDADIN, *supra* note 94, at 331–410 (detailing the background and process leading up to the creation of the Treaty and also explaining the contents of the Treaty). But see ABDUL SALAM MAJALI, JAWAD A. ANARI & MUNTHER J. HADDADIN, PEACEMAKING: THE INSIDE STORY OF THE 1994 JORDANIAN-ISRAELI TREATY 93–95, 223–27, 245–59, 265–71 (2006) (describing in detail the Jordanian perspective during negotiations on water-related issues and identifying some issues, including the settlement of disputes, to which Israel and Jordan could not reach a resolution).

<sup>111</sup> Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Isr.-Jordan, art. 6, Oct. 26, 1994, 34 I.L.M. 43.

Treaty's ratification.<sup>112</sup> Likewise, Israel was allotted twenty-five MCM of water annually from the Yarmuk River,<sup>113</sup> subject to a proviso that permits Israel to pump an additional twenty MCM of water from the Yarmuk during the winter in exchange for twenty MCM of water annually to go to Jordan from the Jordan River during the summer.<sup>114</sup> Conversely, Israel agreed to transfer twenty MCM of water each summer from the Jordan River to Jordan.<sup>115</sup> More significantly, the Treaty permitted Jordan to use from the Jordan River "an annual quantity equivalent to that of Israel, provided however, that Jordan's use will not harm the quantity or quality of the above Israeli uses."<sup>116</sup>

By noting that Jordan's use of Jordan River waters should not harm Israel and elsewhere noting that Jordan and Israel would "jointly undertake to ensure that the management and development of their water resources do not, in any way, harm the water resources of the other Party,"<sup>117</sup> the Treaty invokes a version of restricted territorial sovereignty,<sup>118</sup> tempered by forbidding "appreciable harm."<sup>119</sup> While Jordan was likely pleased that the allocation of water, which it had historically seen as illegal, had been redistributed more favorably,<sup>120</sup> some have speculated that Israel's acceptance of reallocation was not an acceptance of restricted territorial authority.<sup>121</sup> Instead, Israel allegedly consented to the invocation of restricted territorial sovereignty "as a cheaper and socially preferable solution to a continuation of hostilities."<sup>122</sup>

### 3. The Interim Agreement

In compliance with the Declaration of Principles,<sup>123</sup> Israeli and Palestinian delegations met in 1995 to further develop plans to establish a Palestinian Interim Self-Government Authority that could actively participate in the creation of a permanent settlement of the Israeli-Palestinian conflict.<sup>124</sup> The result of these meetings was the creation of the Interim Agreement.<sup>125</sup> Particular to water allocation, the Interim Agreement explicates that "Israel recognizes the Palestinian water rights in the West

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<sup>112</sup> *Id.* annex II, art. I, § 2(c).

<sup>113</sup> *Id.* annex II, art. I, § 1(a)-(b) (specifying 12 MCM in summer and 13 MCM in winter).

<sup>114</sup> *Id.* annex II, art. I, § 1(b).

<sup>115</sup> *Id.* annex II, art. I, § 2(a).

<sup>116</sup> *Id.* annex II, art. I, § 2(c).

<sup>117</sup> *Id.* art. VI, § 2.

<sup>118</sup> Telerant, *supra* note 22, at 199.

<sup>119</sup> *Id.* at 201.

<sup>120</sup> *Id.* at 199.

<sup>121</sup> *See, e.g., id.*

<sup>122</sup> *Id.* (also arguing in note 221 that this logic explained Israel's behavior in negotiations with the Palestinians).

<sup>123</sup> Principles, *supra* note 93, art. VII.

<sup>124</sup> The Interim Agreement on the West Bank and the Gaza Strip, Isr.-Palestinian Liberation Org., pmbL., Sept. 28, 1995, 36 I.L.M. 551 [hereinafter Interim Agreement].

<sup>125</sup> *Id.* at 551.

Bank.”<sup>126</sup> However, the recognition of Palestinian water rights was somewhat limited. The Interim Agreement estimates the future water needs of the West Bank Palestinians to be between seventy and eighty MCM per year.<sup>127</sup> This figure breaks down to between 27.6 and 31.6 cubic meters per year per capita annually,<sup>128</sup> far below current usage,<sup>129</sup> and well below internationally agreed upon standards.<sup>130</sup> While Israel would understandably agree to such a low future allocation to the West Bank in order to increase its uses of water resources,<sup>131</sup> the logic of the Palestinian Authority to agree to such an abysmally low allocation is unclear. The Interim Agreement noted though that the allocations would be finalized after being “negotiated in the permanent status negotiations and settled in the Permanent Status Agreement relating to the various water resources.”<sup>132</sup> Perhaps then, the Palestinians hoped to renegotiate these figures.

Additionally, the Interim Agreement stated that a Joint Water Committee would be formed to implement the terms of the Interim Agreement.<sup>133</sup> Particularly, the Joint Water Committee, which would be represented by an equal number of Israeli and Palestinian representatives,<sup>134</sup> would “deal with all water and sewage related issues in the West Bank.”<sup>135</sup> Since its establishment, the Joint Water Committee has played a surprisingly vital role in the management of the region’s water resources. Even though permanent status negotiations have been put on hold since the al-Aqsa Intifada broke out,<sup>136</sup> the Joint Water Committee has continued to meet and function although “nearly all the other Oslo mechanisms have ground to a halt due to the ongoing al-Quds [al-Aqsa] intifada that began in 2000.”<sup>137</sup> This cooperation inspires hope that the parties and academics alike will recognize the importance of the water situation and continue to work to reach a workable solution to the attendant problems.

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<sup>126</sup> *Id.* annex III, art. IV, app. 1, art. 40 (1).

<sup>127</sup> *Id.* annex III, art. IV, app. 1, art. 40 (6).

<sup>128</sup> Central Intelligence Agency, The World Factbook: West Bank, <https://www.cia.gov/library/publications/the-world-factbook/geos/we.html> (last visited July 15, 2007) (showing the West Bank population at 2,535,927).

<sup>129</sup> *See supra* Part I.

<sup>130</sup> *See supra* note 14 and accompanying text.

<sup>131</sup> *But see* SHERMAN, *supra* note 5, at 100 (noting that the Interim Agreement “has been criticized in the harshest terms by [Joyce] Starr [a columnist for Israeli newspaper Yed’iot Aharonot], who warns that ‘by the explicit recognition of Palestinian water rights Israel has opened . . . a Pandora’s box and created the most dangerous precedent in her history’”).

<sup>132</sup> Interim Agreement, *supra* note 124, annex III, art. IV, app. 1, art. 40 (1).

<sup>133</sup> *Id.* annex III, art. IV, app. 1, art. 40 (11).

<sup>134</sup> *Id.* annex III, art. IV, app. 1, art. 40 (13).

<sup>135</sup> *See id.* annex III, art. IV, app. 1, art. 40 (12) (delineating a number of the functions of the Joint Water Commission including coordinated water resource management, protecting the water resources and related systems, exchanging information relating water and sewage laws and regulations, resolving water related disputes, and arranging for water supply).

<sup>136</sup> *See generally* BBC News, Al-Aqsa Timeline, [http://news.bbc.co.uk/2/hi/middle\\_east/3677206.stm](http://news.bbc.co.uk/2/hi/middle_east/3677206.stm) (last visited July 15, 2007) (noting that the *al-Aqsa Intifada*, or the second *Intifada*, broke out in September 2000).

<sup>137</sup> Elizabeth Burleson, *Middle Eastern and North African Hydropolitics: From Eddies of Indecision to Emerging International Law*, 18 GEO. INT’L ENVTL. L. REV. 385, 395–96 (2006).

### III. RELIANCE UPON CUSTOMARY INTERNATIONAL WATER LAW AND RESTRICTED TERRITORIAL SOVEREIGNTY

#### A. The Literature's Focus

It is indisputable that the academic literature has focused upon customary international water law as the most useful tool to resolve the Israeli-Palestinian water situation.<sup>138</sup> Because restricted territorial

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<sup>138</sup> See, e.g., Samer Alatout, *Water Balances in Palestine: Numbers and Political Culture in the Middle East*, in WATER BALANCES IN THE EASTERN MEDITERRANEAN 59, 79 (David B. Brooks & Ozay Mehmet eds., 2000) (“What is important, however, is to simultaneously ground any possible resolution to the problem on the international legal principles of equity and historic right.”); *Water in the Middle East*, *supra* note 6, at 54 (“The concept of ‘equitable apportionment,’ at the heart of such international water law as exists, is not properly observed.”); KAREN ASSAF, NADER AL KHATIB, ELISHA KALLY & HILLEL SHUVAL, A PROPOSAL FOR THE DEVELOPMENT OF A REGIONAL WATER MASTER PLAN 158 (1993) (“Whether or not international law is actually binding at this time, the community of nations will undoubtedly expect that Israel and her neighbors negotiate a settlement . . . in the spirit of the principles of ‘equitable apportionment’ under international law”); Eyal Benvenisti & Haim Gvirtzman, *Harnessing International Law to Determine Israeli-Palestinian Water Rights: The Mountain Aquifer*, 33 NAT. RESOURCES J. 543 (1993); Burleson, *supra* note 137, at 423 (“This article has applied the multifactor balancing test of the Draft Convention on the Law of Transboundary Aquifers to the Israeli-Palestinian conflict and analyzed Middle Eastern . . . hydrogeopolitics in light of emerging international law.”); Fadia Daibes, *A Progressive Multidisciplinary Approach for Resolving the Palestinian-Israeli Conflict over the Shared Transboundary Groundwater: What Lessons Learned from International Law?*, 8 U. DENV. WATER L. REV. 93 (2004); Jeffrey D. Dillman, *Water Rights in the Occupied Territories*, 19 J. PALESTINIAN STUD. 46, 64 (1989) (concluding that “[w]ithout a comprehensive settlement of the Palestinian-Israeli conflict, based on Palestinian self-determination, it is unlikely that Israel’s policies will be brought into accord with international law”); Henk Donkers, *Fresh Water as a Source of International Conflicts: The Water Conflicts between Israel, Jordan and the Palestinians*, in THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES 135, 151 (Edward H.P. Brans, Esther J. de Haan, André Nollkaemper & Jan Rinzema eds., 1997) (“A more equitable allocation of shared water resources could be based on principles of international water law.”); Sharif S. Elmusa, *Dividing the Common Palestinian-Israeli Waters: An International Water Law Approach*, 22 J. PALESTINIAN STUD. 57, 57–58 (1993) (“I wish to explore how redistribution can be worked out on the basis of ‘factors’ stipulated in the doctrine of ‘equitable apportionment’ of international water law.”); Epstein, *supra* note 38, at 407 (“The principles developed in the Helsinki and ILC Rules are important pillars on which to build future agreements.”); Elver, *supra* note 58; Wenig, *supra* note 73, at 334; Harold D. Frederiksen, *Water: Israeli Strategy, Implications for Peace and the Viability of Palestine*, 10 MIDDLE EAST POL’Y 69, 92 (2004) (recommending “[a]n early equitable allocation of the water resources of historical Palestine”); ISAAC & HOSH, *supra* note 21, at 7–8, available at [http://www.arij.org/images/pub/publications%201997/roots\\_of\\_the\\_water\\_conflict/Roots%20of%20the%20Water%20Conflict%20in%20the%20Middle%20East.pdf](http://www.arij.org/images/pub/publications%201997/roots_of_the_water_conflict/Roots%20of%20the%20Water%20Conflict%20in%20the%20Middle%20East.pdf) (“Riparian states have failed to abide by the general principles of international water law, and have thus, contributed greatly to the difficulty of solving today’s water crisis. . . . If the general principles of international water law were adhered to, it is likely that many of the past water related conflicts would have not taken place.”); NURIT KLIOT, WATER RESOURCES AND CONFLICT IN THE MIDDLE EAST 248–49 (1993) (criticizing academic proposals that “do not take into consideration all the relevant Helsinki and ILC Rules and their scope is narrow. . . . Without such arrangements any agreement will be founded on shaky grounds and may eventually collapse.”); Malone, *supra* note 8, at 651 (“Cross-border theories of international water law are also instructive on the question of West Bank water rights.”); Ziad A. Mimi & Bassam I. Sawalhi, *A Decision Tool for Allocating the Waters of the Jordan River Basin between all Riparian Parties*, 17 WATER RES. MGMT. 447, 448 (2003) (“The

sovereignty pervades customary international water law, the literature, at minimum implicitly, also relies upon restricted territorial sovereignty.<sup>139</sup> Similarly, many of the region's drafted water plans and accepted treaties adopt articulations that draw upon restricted territorial sovereignty.<sup>140</sup> Thus, an analysis of the problem using the dominant theoretical heuristic admittedly bears an undeniable logic.

As an example of this analytical perspective, Gamal Abouali, who would later serve as a legal advisor to the PLO during Israeli-Palestinian negotiations including the Camp David Summit of July 2000,<sup>141</sup> wrote extensively in his award-winning article, *Natural Resources Under Occupation: The Status of Palestinian Water Under International Law*, on the importance of customary international water law with respect to the Israeli-Palestinian water situation.<sup>142</sup> After analyzing the status of the shared aquifers under the Convention,<sup>143</sup> Abouali eventually notes that Israel has "maintained its lopsided use of shared water resources, which is inequitable under evolving norms of international transboundary water law."<sup>144</sup> Thereafter, he concludes that "participants in the current process of negotiations should heed these [customary international water law] prescriptions, at least in their own self-interest, if not out of an intrinsic respect for the value and force of legal norms."<sup>145</sup> While Abouali's writing is persuasive, it is not unique. Abouali is part of a very long line of scholars who subscribe to the same flawed logic—customary international water law and restricted territorial sovereignty are the best, if not the only, constructs with which to resolve the Israeli-Palestinian water conflict.

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challenge, however, will be to negotiate a fair and reasonable assignment of entitlements based on existing international water law."); Niehuss, *supra* note 19, at 13 (analyzing Palestinian water rights within the framework of international water law, but recognizing the barriers of such an application); Kevin Scanlan, *The International Law Commission's First Ten Draft Articles on the Law of the Non-Navigational Uses of International Watercourses: Do They Adequately Address All the Major Issues of Water Usage in the Middle East?*, 19 *FORDHAM INT'L L.J.* 2180, 2222 (1996) ("The Draft Articles provide Middle Eastern states with a workable and effective framework upon which to rely for guidance in drafting their own watercourse agreements."); U.N. Comm. on the Exercise of the Inalienable Rights of the Palestinian People, Div. for Palestinian Rights, *Water Resources of the Occupied Palestinian Territory*, U.N. Doc. A/AC.183/9-10 (June 1, 1992) (suggesting that article IV of the Helsinki Rules on the Uses of the Waters of International Rivers should provide guidance to Israel in allocating resources to the Palestinian territories); Aaron Wolf, *Water for Peace in the Jordan River Watershed*, 33 *NAT. RESOURCES J.* 797, 813-19 (1993) (suggesting that Palestinians and Israelis jointly develop their water resources, in part, by negotiating an equitable division of existing resources).

<sup>139</sup> MCCAFFREY, *supra* note 8, at 137 ("[Restricted territorial sovereignty] is probably the prevailing theory of international watercourse rights and obligations today. . . . [T]he sovereignty of a state over its territory is said to be 'limited' by the obligation not to use that territory in such a way as to cause significant harm to other states."); *see also supra* Part II.B.

<sup>140</sup> *See supra* Part II.C.

<sup>141</sup> Cleary Gottlieb Steen & Hamilton LLP, Our Lawyers, Gamal M. Abouali, <http://www.cgsh.com/english/lawyers/bio.aspx?id=6578> (last visited July 15, 2007).

<sup>142</sup> Gamal Abouali, *Natural Resources Under Occupation: The Status of Palestinian Water Under International Law*, 10 *PACE INT'L L. REV.* 411 (1998).

<sup>143</sup> *Id.* at 547-59.

<sup>144</sup> *Id.* at 573.

<sup>145</sup> *Id.* at 574.

*B. Customary International Water Law Does Not Apply to the Israeli-Palestinian Water Problem*

The legal applicability of customary international water law is uncertain, yet there is very little in the literature that admits this shortcoming. Nonetheless, the shortcoming is crucial, as Israel oftentimes cites the customary international water law's inapplicability as justification for some of its present water policies.<sup>146</sup> In so arguing, Israel notes that the scope of conventional international water law sources neither reaches the West Bank Aquifer nor affects the Palestinian territories.<sup>147</sup>

Conventional international water law likely does not apply to transboundary aquifers like the West Bank Aquifer. Although Abouali suggests that the Convention applies because one can consider "an aquifer as an underground terminus of waters from precipitation and seasonal rivers or wadis,"<sup>148</sup> he ignores the hydrological reality of the Aquifer. Besides flowing into three divergent termini,<sup>149</sup> the Aquifer "has no physical relationship with any surface body of water, and is, in fact, unrelated to any other identifiable water resource."<sup>150</sup> Because the Convention only applies to aquifers if they are part of a "system of surface waters and groundwaters constituting . . . a unitary whole and normally flowing into a common terminus,"<sup>151</sup> and because the Aquifer fails to meet these criteria, the West Bank Aquifer does not appear to be within the scope of the Convention.<sup>152</sup> Thus, customary international law is not bindingly applicable to a significant element of the broader dilemma.

Moreover, international law is generally meant to affect the relations between nations.<sup>153</sup> Accordingly, the Helsinki Rules apply to "the use of the waters of an international drainage basin,"<sup>154</sup> and an "international drainage basin" relates only to specific "geographical area[s] extending over two or more States."<sup>155</sup> Likewise, the Convention speaks exclusively in terms of

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<sup>146</sup> See, e.g., Frederiksen, *supra* note 138, at 75 ("[In 1999], the Israeli Water Commission issued a statement on the rights of the Palestinians to the region's water. 'The principles of the international law do not apply to the Palestinian case because they have no state.'") (internal citations omitted).

<sup>147</sup> *Id.*

<sup>148</sup> Abouali, *supra* note 142, at 540.

<sup>149</sup> Burleson, *supra* note 137, at 389 (concluding that the Aquifer's characteristics are not within the scope of the Convention).

<sup>150</sup> Yoram Eckstein & Gabriel E. Eckstein, *Groundwater Resources and International Law in the Middle East Peace Process*, 28 WATER INT'L 154, 159 (2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=758637](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=758637) (follow "Social Science Research Network" hyperlink).

<sup>151</sup> See G.A. Res. 51/229, *supra* note 74, art. 2(a).

<sup>152</sup> But see Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT'L L. 384, 414 (1996) ("[I]nternational water law should focus on all freshwater resources traversing political boundaries that can give rise to externality problems. There is no sense in excluding confined groundwater resources from its purview.").

<sup>153</sup> BLACK'S LAW DICTIONARY 835 (8th ed. 2004).

<sup>154</sup> *Helsinki Rules*, *supra* note 61, art. I.

<sup>155</sup> *Id.* art. II.

“international watercourses,”<sup>156</sup> which it defines as “a watercourse, parts of which are situated in different States.”<sup>157</sup> However, until there are Final Status negotiations between Israel and the Palestinians, the Palestinians will lack formal recognition as a nation.<sup>158</sup> Thus, Israel can argue that customary international water law should not apply to present Israeli-Palestinian allocations of the Jordan River or of the West Bank Aquifer.<sup>159</sup>

Although Israel has adopted this textual approach,<sup>160</sup> the literature that discusses this perspective is sparse.<sup>161</sup> Instead, the literature, nearly uniformly, disregards it and concludes that customary international water law should be applied.<sup>162</sup> However, at least one source that identifies this shortcoming noted that customary international water law normatively should and positively does apply because the international community, including Israel, has been preparing for a future Palestinian state.<sup>163</sup> Therefore, some believe that Israel’s “non-State argument is merely a delay tactic, and a virtual non-issue.”<sup>164</sup>

Delay tactic or not, Israel’s admitted application of customary international water law to the Palestinian territories would be politically problematic. The underlying assumption that the international community has been preparing for a Palestinian state is somewhat flawed. While the establishment of an independent Palestinian state would ideally contribute to a resolution of the region’s instability, and while the assumption was quite valid throughout the Oslo Negotiations, in light of the years-long al-Aqsa Intifida, the establishment of a Palestinian state is not immediately

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<sup>156</sup> G.A. Res. 51/229, *supra* note 74, art. 1.

<sup>157</sup> *Id.* art. 2(b).

<sup>158</sup> See Principles, *supra* note 93, art. V (calling for permanent status negotiations in the future to cover remaining issues).

<sup>159</sup> Niehuss, *supra* note 19, at 16.

<sup>160</sup> See Frederiksen, *supra* note 138, at 71 (“[In 1999], the Israeli Water Commission issued a statement on the rights of the Palestinians to the region’s waters. ‘The principles of the international law do not apply to the Palestinian case because they have no state.’” (internal citation omitted)).

<sup>161</sup> *But see* HEATHER L. BEACH ET AL., TRANSBOUNDARY FRESHWATER DISPUTE RESOLUTION: THEORY, PRACTICE, AND ANNOTATED REFERENCES 10–11 (2000) (“Furthermore, international law only concerns itself with the rights and responsibilities of nations. Some political entities who might claim water rights, therefore, would not be represented, such as the Palestinians along the Jordan river . . . .”); Malone, *supra* note 8, at 650 (“Whether or not Palestine becomes a State also affects the legality of . . . the allocation of water. The Palestinians of the West Bank will have the right to use the water of the West Bank without restrictions only if they achieve the creation of a Palestinian State recognized by Israel.”); Niehuss, *supra* note 19, at 15 stating:

Israel has always qualified Palestine’s claim of water rights by arguing that the Palestinian Territories do not yet constitute an independent and sovereign “state” for the purposes of binding or customary international law. Israel further argues that since Palestine is not, and never has been, a sovereign state, international human rights and customary law provisions do not apply, and therefore Palestine does not have independent riparian rights.

*Id.* (internal citation omitted).

<sup>162</sup> See *supra* note 138 and accompanying text.

<sup>163</sup> Niehuss, *supra* note 19, at 15.

<sup>164</sup> *Id.*

foreseeable. Consequently, if Israel were to presently apply customary international water law to the Palestinian territories, it would be, in effect, rewarding the Palestinian territories despite the Intifada. Such an action would not coincide with Israel's retributive behavior throughout the conflict,<sup>165</sup> nor would it be a politically prudent. If an Israeli government were to presently adopt customary international water law, it would likely be exposing itself to political turmoil.<sup>166</sup> When Israel first recognized a Palestinian right to water, the Israeli press was highly critical of the move, going as far as to "warn[] that 'by the explicit recognition of Palestinian water rights Israel has opened . . . a Pandora's box and created the most dangerous precedent in her history.'"<sup>167</sup> Those words were written during the less-contentious time following the Interim Agreement's drafting.<sup>168</sup> If the Israeli government were to further recognize Palestinian water rights in the midst of the Intifada, the Israeli public would likely respond with a ferocity that could destabilize the Israeli government.

Moreover, neither the Helsinki Rules nor the Convention are binding customary international law.<sup>169</sup> For customary international law to be treated as binding upon all nations, it must be general practice of the international community.<sup>170</sup> Here, that is far from the case, with only nine countries ratifying the Convention worldwide.<sup>171</sup> Academia and the Palestinians could argue in response that since all of the Jordan River riparians, except for Israel, ratified the Convention, the Convention reflects the binding norms within the region;<sup>172</sup> however, limited enforceability of customary international law is uncommon, and, regardless, Israel would likely disregard any such claims.

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<sup>165</sup> See Steven R. David, *Fatal Choices: Israel's Policy of Targeted Killing* 18 (The Begin-Sadat Center for Strategic Studies at Bar-Ilan University, Mideast Security and Policy Studies No. 51, 2002) (prepared for the BESA Center Conference on Democracy and Limited War, June 4-6, 2002, revised July 2002), available at <http://www.biu.ac.il/Besa/david.pdf> ("Retribution is an even more powerful justification for the Israeli policy of targeted killing. Retribution, in its purest sense, has no utilitarian component.").

<sup>166</sup> See generally Fred J. Khouri, *The Jordan River Controversy*, 27 REV. OF POL. 32, 33 (1965) ("Every issue, whether it involved the refugees, armistice agreements, or the Jordan River, has been dominated by insurmountable emotional and political factors.").

<sup>167</sup> SHERMAN, *supra* note 5, at 100.

<sup>168</sup> *Id.* (quoting Joyce R. Starr in the Israeli newspaper *Yedi'ot Aharonot*, Sept. 18, 1995).

<sup>169</sup> INT'L UNION FOR CONSERVATION OF NATURE AND NATURAL RES., *FLOW: THE ESSENTIALS OF ENVIRONMENTAL FLOWS* 74-75, & 116 n.90 (Megan Dyson, Ger Bergkamp & John Scanlon eds., 2003), available at <http://iucn.org/themes/wani/pub/FLOW.pdf>. The Convention has not yet entered into force, and the Helsinki Rules have 33 contracting parties. *Id.*

<sup>170</sup> See *supra* note 56 and accompanying text.

<sup>171</sup> See *supra* Part II.B.2.

<sup>172</sup> *But see* Abouali, *supra* note 142, at 573 (minimizing the importance of international water law as a tool with which to resolve the issue of water allocation: "The absence of a binding implementation mechanism for the bodies of international law here under consideration, suggests that law cannot be the entire answer").

*C. Pleas to Apply Restricted Territorial Sovereignty Ignore the Principle's Vagueness and the Parties' Preference for Other Principles*

One of the biggest faults with the current trend in analysis is that there is no resource that provides a unanimously accepted application of equitable utilization to the Israeli-Palestinian context.<sup>173</sup> Consequently, because restricted territorial sovereignty is such an amorphous construct,<sup>174</sup> the different parties interpret it to mean different things. For example, while Israel believes that equitable utilization should consider the parties' relative demand for water based upon economic and industrial development,<sup>175</sup> "[t]he Palestinians would interpret the equitable division of the waters as reflecting the relative shares of the communities in the catchment basin, an approach that would award them the bulk of the waters."<sup>176</sup> These diametric perspectives have added confusion and obscurity to the dilemma, just as Berber predicted.<sup>177</sup>

Accordingly, pleas for the application of restricted territorial sovereignty ignore that an acceptance of customary international water law does not, in and of itself, provide explicit determination of how to solve the Israeli-Palestinian water quandary. In fact, most of the literature lacks an explicit determination of how to allocate the region's water resources using the restricted territorial sovereignty heuristic.<sup>178</sup> Although some studies have concluded that customary international water law demands greater Palestinian access to shared water resources,<sup>179</sup> most studies have gone no further than arguing how specific factors of equitable utilization would be

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<sup>173</sup> See Burleson, *supra* note 137, at 386 ("The groundwater shared by Israelis and Palestinians is not sufficiently covered by international water law, leaving open the issue of reasonable and equitable water use as it relates to the Middle Eastern and North African peace process."); Christina M. Carroll, *Past and Future Legal Framework of the Nile River Basin*, 12 GEO. INT'L ENVTL. L. REV. 269, 291 (1999) ("The Convention obligates parties to cooperate for various purposes, but it does not provide any guidance on how countries should do so."); Mimi & Sawalhi, *supra* note 138, at 451 ("The international water law by itself is nonbinding and lacks enforcement mechanisms.").

<sup>174</sup> See BERBER, *supra* note 25, at 1 (noting that restricted territorial sovereignty's meaning can be obscure and confusing).

<sup>175</sup> See Aaron T. Wolf, *Water Matters*, 28 J. PALESTINIAN STUD. 94, 95 (1999) (reviewing SHARIF S. ELMUSA, *WATER CONFLICT: ECONOMICS, POLITICS, LAW AND THE PALESTINIAN-ISRAELI WATER RESOURCES* (1997)) (commending Elmusa for distinguishing between "use" and "demand" and for conceptualizing Palestinian "latent water demand" as a tool to compare "Palestinian water use not only with Israeli use, but more appropriately with the populations of surrounding countries with similar GNP's and lifestyles").

<sup>176</sup> Dellapenna, *supra* note 5, at 236.

<sup>177</sup> See BERBER, *supra* note 25, at 14 (explaining the shortcomings of each of the four principles).

<sup>178</sup> See, e.g., Epstein, *supra* note 38, at 416 (concluding only that "[t]he ILC Rules and the Helsinki Rules offer principles that should provide the basis for future regional and national policies"); Telerant, *supra* note 22, at 204 (lamenting that the Israeli Jordan Peace Treaty provides for rigid allocations as opposed to a flexible articulation like those in customary international water law).

<sup>179</sup> See, e.g., Niehuss, *supra* note 19, at 17 (concluding that customary international law "support[s] Palestine's access to sources such as the Jordan River").

argued by the parties.<sup>180</sup> The omissions of a definitive determination reflect that academia, not surprisingly,<sup>181</sup> is not aware of how to apply customary international water law, even though its application became more structured under the Convention.<sup>182</sup>

Even beyond the difficulty in applying customary international water law, it seems as though restricted territorial sovereignty alone is not the hydrological principle of choice. While all of the regional treaty water law includes terms that reflect an appreciation for restricted territorial sovereignty, they also include provisions that reflect each of the other principles of international water law.<sup>183</sup> Because the riparians themselves have willingly applied other principles of international water law, and because restricted territorial sovereignty was likely only accepted by Israel in order to expedite a larger regional agreement, it seems foolhardy to analyze the situation exclusively under restricted territorial sovereignty.

#### IV. CONCLUSION

Hopefully, the Jordan Valley will flourish again when the parties draft a conclusive agreement relating to the region's water distribution. Unfortunately, that is unlikely to take place until the Final Status negotiations produce a complete resolution to the Israeli-Palestinian conflict.<sup>184</sup> Although the ultimate resolution of the Israeli-Palestinian water distribution is not in the foreseeable future, academia should be focusing upon developing specific and reasonable solutions to the distribution problem instead of making general, normative statements.

As has been discussed, the regional treaty water law does not fully embrace the norms of customary international water law. Instead, the regional treaty water law reflects acceptance of community of property in water and of absolute territorial integrity. Because restricted territorial sovereignty and the precepts of customary international water law have not been the source of resolution of related water disputes thus far, there is little reason to suspect that a full-fledged acceptance of them will take place in the final resolution of the Israeli-Palestinian water distributions. By

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<sup>180</sup> See, e.g., Wenig, *supra* note 73, at 357–62 (applying elements of equitable utilization to the Jordan River riparians).

<sup>181</sup> BERBER, *supra* note 25, at 14.

<sup>182</sup> See *supra* Part II.B.2.

<sup>183</sup> See *supra* Part II.C.

<sup>184</sup> Water is, inarguably, a critical issue of the larger Middle East conflict. LeRoy, *supra* note 10, at 302. The continued conflict, as an expression of conflicting perspectives relating to nationalist aspirations, has made every issue, including those related to water distribution, “dominated by insurmountable emotional and political factors.” Khouri, *supra* note 166, at 33. Consequently, not until an agreement relating to the parties’ ultimate aspirations is made can water issues be resolved. See Abouali, *supra* note 142, at 573 (“The current political settlement, despite all of its imperfections, must be the method, which determines the permanent status of Palestinian and Israeli water rights.”); Lowi, *supra* note 1, at 144 (claiming that “[h]istory shows that a political settlement of the Arab-Israeli conflict is the essential first step [before resolving the water issue]”).

imposing restricted territorial sovereignty and customary international water law upon Israel and its riparians, academia is ignoring the realities of the region and limiting the utility of their recommendations. Therefore, it is the author's hope that this article marks the beginning of a trend in the literature that recognizes the shortcomings of customary international law, but looks to it to inform the creation of an encompassing solution that invokes regionally-accepted principles of international water law.

While international water law is a useful mechanism that academia can refer to and elaborate upon when drafting recommendations for implementation, regrettably, the literature has focused nearly entirely upon customary international water law. The author believes that academia has done a disservice by failing to consider other areas of international water law. Particularly, comparative international water law has been regrettably absent from literature,<sup>185</sup> even though it could assist in the resolution of the Israeli-Palestinian water problem. Likewise, analyses involving all of Berber's principles, not just restricted territorial sovereignty, could provide significant contributions to the eventual resolution of the problem.

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<sup>185</sup> This comparative method would be an interesting method of injecting new ideas into the body of international water law. In fact, this approach has been taken in some studies. See, e.g., Karen A. Baim, *Come Hell or High Water: A Water Regime for the Jordan River Basin*, 75 WASH. U. L. Q. 919, 940 (1997) (noting that "the procedures developed and used by Canada and the United States may be instructive for management of the Jordan River Basin"); Burleson, *supra* note 137, at 417-23 (comparatively analyzing French and Swiss utilization of the Genevese Aquifer; Algerian, Libyan, and Tunisian joint cooperation with respect to the Northwestern Sahara Aquifer System; and Chadian, Egyptian, Libyan, and Sudanese consumption of the Nubian Sandstone Aquifer System with the Israeli and Palestinian usage of the Coastal and Mountain Aquifers); Malone, *supra* note 8, at 665-66 (suggesting comparative solutions including the application of Australia's market approach and South Africa's free access approach); Martin A. Rowland, *The Evolution of Two Water Resource Management Systems: Case Studies of Tampa Bay and the Middle East*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 411, 413 (2000) ("A comparative analysis illustrates the parallels and differences between the two cases... with recommendations for how the Tampa Bay approach to water resource management could be used to resolve water issues in the Middle East"); Annalisa Jabaily, *Water Rites: A Comparative Study of the Dispossession of American Indians and Palestinians from Natural Resources*, 16 GEO. INT'L ENVTL. L. REV. 225, 245 (2004) (comparing the humanitarian plight of the Palestinians and Native Americans, but, in so doing, taking a politically-charged, historic perspective without regard to the varying legal frameworks, and without making reasonable recommendations beyond the unoriginal suggestion that "[b]oth groups must fight even to be recognized" because "the fantasy of American Indian and Palestinian non-existence cannot forever withstand the clamor that increases with thirst").